
Chevron and Citizenship

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INTRODUCTION

The *Chevron* doctrine, created by the Supreme Court,¹ often requires courts to defer to administrative interpretations of federal statutes.

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¹ Some have argued that this common law doctrine is at odds with the text of the Administrative Procedure Act. *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1211 (2015) (Scalia, J., concurring in the judgment) (“Heedless of the original design of the APA, we have developed an elaborate law of deference to agencies’ interpretations of statutes and regulations.”); Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 976-95 (2017); Patrick J. Smith, *Chevron’s*

Federal courts have granted *Chevron* deference to administrative interpretations of the Immigration and Nationality Act in a range of civil and criminal cases. In one context, though, there is a substantial split: federal courts disagree about whether *Chevron* applies to administrative interpretations of citizenship and nationality laws.

Courts declining to defer normally point to the several statutes providing for de novo judicial trials in most cases where an individual claims to be a U.S. citizen or challenges denial of naturalization. This article proposes that these decisions are correct for two reasons not typically advanced. First, the Supreme Court has held that fundamental questions of policy and economics presumptively are not delegated to agencies. Citizenship and nationality are fundamental policy matters — the Court has stated of the United States that “[i]ts citizenry is the country and the country is its citizenry.”² It is not plausibly imaginable that Congress delegated the question of what our country should be to administrators. Second, a long line of Supreme Court cases, apparently ratified by Congress, apply the immigration rule of lenity to citizenship cases. In addition, administrators have advanced discriminatory interpretations of the law. These factors, taken together, create grave doubt about the *Chevron* doctrine’s application to citizenship claims. Instead, ordinary judicial review should apply.

I. CHEVRON AND CITIZENSHIP DETERMINATIONS

A. *Chevron* and the INA

It is now familiar that under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,³ courts often defer to administrative interpretations of law. As Professor William S. Dodge summarized,

At step one of the *Chevron* analysis, the question is “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” . . . At *Chevron* step two, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the

Conflict with the Administrative Procedure Act, 32 VA. TAX REV. 813, 813-15 (2013).

² *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

³ 467 U.S. 837 (1984).

agency's answer is based on a permissible construction of the statute."⁴

There is also a "*Chevron* Step Zero," that is, a preliminary question about whether *Chevron* applies at all.⁵ As Professor Cass Sunstein explained, *Chevron* will not apply to administrative determinations of major policy questions:

In the "Major Question" trilogy, the Court has raised a separate Step Zero question by suggesting the possibility that deference will be reduced, or even nonexistent, if a fundamental issue is involved, one that goes to the heart of the regulatory scheme at issue. The apparent theory is that Congress should not be taken to have asked agencies to resolve those issues.⁶

The Supreme Court⁷ and other courts⁸ have held that administrative interpretations of the Immigration and Nationality Act ("INA") are subject to the general framework of *Chevron*.⁹

⁴ William S. Dodge, *Chevron Deference and Extraterritorial Regulation*, 95 N.C. L. REV. 911, 920 (2017).

⁵ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 190-91 (2006).

⁶ *Id.* at 193 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 159-61 (2000); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 703-08 (1995); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228-34 (1994)).

⁷ *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws.").

⁸ See, e.g., *Gutierrez v. Mukasey*, 273 F. App'x 596, 597 (9th Cir. 2008) ("We must accord *Chevron* deference to the BIA's statutory interpretations of the Immigration and [Nationality] Act ('INA').") (citations omitted); *Robert v. Ashcroft*, 114 F. App'x 615, 616 (5th Cir. 2004) ("Conclusions of law by the BIA with respect to the construction of the INA and its regulations are afforded *Chevron* deference.") (citations omitted); see also Paul Chaffin, Note, *Expertise and Immigration Administration: When Does Chevron Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503, 506 (2013) ("As a general matter, *Chevron* undoubtedly applies to the BIA's interpretation of the INA.").

⁹ There are also many scholarly articles discussing *Chevron* in the immigration context. See, e.g., Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143 (2015); Shruti Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 315-16 (2012); Rebecca Sharpless, *Zone of Nondeference: Chevron and Deportation for a Crime*, 9 DREXEL L. REV. 323, 330 (2017); Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 518 (2003); Michael Kagan, *Chevron's Liberty Exception*, 104 IOWA L. REV. (forthcoming 2019) (manuscript at 3),

B. *Chevron and Citizenship Claims*

1. Cases Applying *Chevron*

Although *Chevron* generally applies to the INA, there is diversity of opinion on whether it applies to questions of citizenship, nationality, and naturalization. Some courts see those issues as ordinary legal questions. Others hold they are distinct because of the special forms of review provided for them by the INA.

A number of cases hold that the general principle of *Chevron* applies to citizenship and naturalization determinations under the INA.¹⁰ One important example is in the context of the good moral character requirement for naturalization. Immigration authorities have promulgated regulations fleshing out the nature of good moral character, and these regulations have been upheld by the Second,¹¹ Sixth,¹² Seventh,¹³ Ninth,¹⁴ and Eleventh Circuits,¹⁵ and district courts in the Third¹⁶ and Fourth¹⁷ circuits. Courts have also upheld regulations associated with naturalization of veterans,¹⁸ and

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125736.

¹⁰ *Fernandez v. Keisler*, 502 F.3d 337, 348 (4th Cir. 2007) (applying *Chevron* to 8 U.S.C. § 1101(a)(22) which defines “permanent allegiance” to the United States).

¹¹ *Nolan v. Holmes*, 334 F.3d 189, 197-98 (2d Cir. 2003) (applying *Chevron* to uphold 8 C.F.R. § 329.2(d)).

¹² *United States v. Kiang*, 56 F. App’x. 696, 699 (6th Cir. 2003) (upholding 8 C.F.R. § 316.10(c)(1)).

¹³ *United States v. Suarez*, 664 F.3d 655, 660 (7th Cir. 2011); *see also* *United States v. Lekarczyk*, 354 F. Supp. 2d 883, 885 (W.D. Wis. 2005).

¹⁴ *United States v. Dang*, 488 F.3d 1135, 1141 (9th Cir. 2007); *see also* *Khamooshpour v. Holder*, 781 F. Supp. 2d 888, 894 (D. Ariz. 2011); *United States v. Salama*, 891 F. Supp. 2d 1132, 1140 (E.D. Cal. 2012) *amended by* *United States v. Salama*, 890 F. Supp. 2d 1253 (E.D. Cal. 2012); *Jimenez v. Eddy*, 153 F. Supp. 2d 1105, 1107 (D. Alaska 2001).

¹⁵ *United States v. Lionel Jean-Baptiste*, 395 F.3d 1190, 1196 (11th Cir. 2005); *see also* *DeLuca v. Ashcroft*, 203 F. Supp. 2d 1276, 1279 (M.D. Ala. 2002).

¹⁶ *Dolgosheev v. U.S. Citizenship & Immigration Servs.*, No. 07-1019, 2008 WL 2950766, at *14 (W.D. Pa. July 25, 2008).

¹⁷ *Hassan v. Johnson*, 93 F. Supp. 3d 457, 464, 465 (E.D. Va. 2015) (applying *Chevron* to 8 C.F.R. § 360.10); *Etape v. Napolitano*, 664 F. Supp. 2d 498, 507 n.5 (D. Md. 2009).

¹⁸ *Lopez v. Henley*, 416 F.3d 455, 457-58 (5th Cir. 2005) (upholding 8 C.F.R. § 329.2(e) and naturalization regulations associated with 8 U.S.C. § 1440); *Bagheri v. INS*, No. 98-55177, 2000 WL 335712, at *1 (9th Cir. Mar. 30, 2000) (“Bagheri lacks the required certification, because the Navy retracted by letter dated September 24, 1996, the certification he was earlier and erroneously given. Therefore, we conclude that on the record before us, Bagheri is not eligible under § 1440(a).”).

procedural regulations regarding filing and processing of applications.¹⁹

Many decisions defer to administrative determinations of eligibility for citizenship by operation of law, for example, whether a child born overseas is a citizen if one or both parents is a U.S. citizen. Deference in the case of a citizenship claim may be more significant than in the case of a naturalization dispute. In a naturalization case, the individual is claiming a right to a process from an agency. A citizenship claim, by contrast, contends that the Constitution or a statute has already conferred status as a citizen.²⁰ Nevertheless, courts have applied *Chevron* to the definition of “legal separation,”²¹ “marital union,”²² and “lawfully admitted”²³ for purposes of derivative citizenship.²⁴

¹⁹ *Sawan v. Chertoff*, 589 F. Supp. 2d 817, 832-34 (S.D. Tex. 2008).

²⁰ See M. Isabel Medina, *Derivative Citizenship: What's Marriage, Citizenship, Sex, Sexual Orientation, Race, and Class Got to Do with It?*, 28 GEO. IMMIGR. L.J. 391, 392 (2014) (“A third way in which U.S. citizens become citizens is through the parent-child relationship, sometimes referred to as citizenship by descent or derivative citizenship.”).

²¹ *Claver v. U.S. Att’y Gen.*, 245 F. App’x 904, 905-06 (11th Cir. 2007); *Brissett v. Ashcroft*, 363 F.3d 130, 133 (2d Cir. 2004) (applying *Chevron* deference to the BIA’s interpretation of the derivative citizenship rule, 8 U.S.C. § 1432 (repealed)); *Hassan-Abdallah v. Ashcroft*, 54 F. App’x 885, 886 (9th Cir. 2002) (discussing legal separation for naturalization under 8 U.S.C. § 1432(a)(3)).

²² *United States v. Moses*, 94 F.3d 182, 185 (5th Cir. 1996) (“Congress did not define the term ‘living in marital union’ in 8 U.S.C. § 1430. INS has defined the term as ‘[a]n applicant lives in marital union with a citizen spouse if the applicant actually resides with his or her current spouse.’ 8 C.F.R. § 319.1(b)(1).”); *Lang v. Chertoff*, No. C08-0610-RSL, 2008 WL 4542410, at *2 (W.D. Wash. Oct. 9, 2008) (“Because Congress has not defined the phrase ‘lives in marital union,’ deference to the agency interpretation is required in this case pursuant to *Chevron*.”) (citations omitted); *United States v. Mohalla*, 545 F. Supp. 2d 1035, 1041 (C.D. Cal. 2008) (marital union).

²³ *Walker v. Holder*, 589 F.3d 12, 17-21 (1st Cir. 2009) (applying *Chevron* in determining that Walker did not qualify for derivative citizenship under the Child Citizenship Act of 2000, 8 U.S.C. § 1431 because, among other reasons, he was not “lawfully admitted”); *Ampe v. Johnson*, 157 F. Supp. 3d 1, 9-10 (D.D.C. 2016).

²⁴ *Nwozuzu v. Holder*, 726 F.3d 323, 326-27 (2d Cir. 2013) (applying *Chevron* in assessing the BIA’s construction of former INA section 321(a), 8 U.S.C. § 1432(a) (1999), repealed by Child Citizenship Act of 2000, the derivative citizenship statute); *Martinez-Madera v. Holder*, 559 F.3d 937, 942 (9th Cir. 2009) (according *Chevron* deference to the BIA’s interpretation of 8 U.S.C. § 1409, which articulates the requirements of citizenship under 8 U.S.C. § 1401 for children born out of wedlock); see *Friend v. Reno*, 172 F.3d 638, 645 (9th Cir. 1999).

2. Cases Rejecting *Chevron*

Driven in large part by statutes providing for de novo judicial trials of citizenship claims, many cases reject application of *Chevron* to citizenship. 8 U.S.C. § 1252(b), the statute providing for judicial review of deportation orders, is an example where Congress provided for searching review of claims to citizenship, even in the context of deportation. The section vests jurisdiction to review deportation orders in the courts of appeals and provides that “[i]f the petitioner claims to be a national of the United States” and the court finds “no genuine issue of material fact . . . the court shall decide the nationality claim.”²⁵ If there is a fact issue:

[T]he court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of Title 28.²⁶

The “new hearing” in such a case is de novo.²⁷

Citizenship claims can arise in other contexts. 8 U.S.C. § 1503(a) provides:

If any person who is within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may institute an action under the provisions of section 2201 of Title 28

except in deportation cases governed by § 1252.²⁸ Cases brought under this section include challenges to government claims that a citizen was expatriated by voting in a foreign election²⁹ or serving in a

²⁵ 8 U.S.C. § 1252(b)(5)(A) (2018).

²⁶ *Id.* § 1252(b)(5)(B).

²⁷ See *Agosto v. INS*, 436 U.S. 748, 756-57 (1978) (“[I]t is apparent that the Court of Appeals erred when it failed to transfer the case to the District Court for a *de novo* hearing.”); *Iracheta v. Holder*, 730 F.3d 419, 422 (5th Cir. 2013) (“The fact that immigration authorities have previously rejected Saldana’s citizenship claim does not inhibit our review; pursuant to § 1252(b)(5) he is entitled to de novo review of that claim in this court.” (citing *Lopez v. Holder*, 563 F.3d 107, 110 (5th Cir. 2009))).

²⁸ 8 U.S.C. § 1503(a) (2018).

²⁹ *Yamamoto v. Acheson*, 93 F. Supp. 346, 349 (D. Ariz. 1950) (brought under 8 U.S.C § 903 (1946), a prior version of 8 U.S.C § 1503(a) (2018)).

foreign army.³⁰ It also includes challenges to denials of passport applications.³¹ The Supreme Court has held that “[t]he judicial hearing in such an action is a trial de novo.”³²

Similarly, when U.S. Citizenship and Immigration Services (“USCIS”) denies a naturalization application, 8 U.S.C. § 1421(c) provides for review in U.S. District Court; “[s]uch review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.” Not all claimants to U.S. citizenship are entitled to de novo judicial review: habeas corpus review of citizenship claims in exclusion cases, by people at the border who have never lived in the United States, seems to be deferential, at least as to the facts,³³ but Article III courts review legal questions in such cases even on habeas corpus.³⁴

Based on these statutes, many federal courts have held that *Chevron* deference is inapplicable when courts address citizenship claims. For

³⁰ *Lehmann v. Acheson*, 206 F.2d 592, 594 (3d Cir. 1953) (brought under 8 U.S.C. § 903 (1952), a prior version of 8 U.S.C. § 1503(a) (2018)).

³¹ *Fong Nai Sun v. Dulles*, 219 F.2d 269, 270 (9th Cir. 1955) (brought under 8 U.S.C. § 903 (1952), a prior version of 8 U.S.C. § 1503(a) (2018)).

³² *Perez v. Brownell*, 356 U.S. 44, 47 n.2 (1958), *overruled in part by Afroyim v. Rusk*, 387 U.S. 253 (1967); *see also Kessler v. Strecker*, 307 U.S. 22, 34-35 (1939) (“Only in the event an alleged alien asserts his United States citizenship in the hearing before the Department, and supports his claim by substantial evidence, is he entitled to a trial de novo of that issue in the district court.”).

³³ 8 U.S.C. § 1503(c) (2018) (“A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise.”); *see also DeBrown v. Dep’t of Justice*, 18 F.3d 774, 777 (9th Cir. 1994) (“Thus, the district court in this case properly declined to conduct a de novo hearing. Instead, its review was limited to whether the Board’s findings of fact were supported by substantial evidence and whether the Board’s decision was arbitrary, capricious, an abuse of discretion, or contrary to law.”); *United States ex rel. Medeiros v. Watkins*, 166 F.2d 897, 899 (2d Cir. 1948) (“In fact, there is unanimity in the cases that a claim of American citizenship advanced by one applying for admission does not entitle him to a judicial trial of the validity of his claim. Such a person has only the right to a fair hearing by the administrative agency entrusted with the enforcement of the immigration laws.”). Judge Frank’s dissent in *Medeiros*, argued that the key distinction was not between exclusion and deportation, but between those who had never lived here and those who had “residence here at any time in the past.” *Id.* at 902 (Frank, J., dissenting). This was vindicated in *Landon v. Placencia*, 459 U.S. 21, 22 (1982) which held that a returning resident was entitled to due process even at the border.

³⁴ *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“[A]nd courts have no power to interfere, unless there was either denial of a fair hearing, or the finding was not supported by evidence, or there was an application of an erroneous rule of law.”) (citations omitted).

example, *O'Sullivan v. U.S. Citizenship & Immigration Services*³⁵ involved a veteran's claim for naturalization under 8 U.S.C. § 1440. The Seventh Circuit had to decide "what level of deference to accord the CIS's statutory interpretation in this case" and concluded that *Chevron* deference was inappropriate:

[W]e are persuaded that we should review his naturalization claim de novo. Congress specifically calls for de novo review in naturalization cases, while ordering great deference in other immigration contexts. We do not find this to be coincidental. A person who is arguably entitled to be a United States citizen, with all of the privileges citizenship entails, is not rightly at the grace of the Attorney General, as other aliens are often considered to be. Therefore, before denying citizenship and the rights attendant to it, it would stand to reason that the district court should review the Attorney General's decision as if it were reviewing a citizen's claim that the government is unfairly denying him his rights. Section 1421(c) seems to reflect this logic by requiring district courts to make de novo findings of fact and law. We therefore will review O'Sullivan's claim de novo.³⁶

Similarly, the Ninth Circuit has held "[b]ecause 'the INA explicitly places the determination of nationality claims solely in the hands of the courts of appeals and (if there are questions of fact to resolve) the district courts,' we are not required to give *Chevron* deference to the agency's interpretation of the citizenship laws";³⁷ the Second Circuit agrees.³⁸ The Fifth Circuit issued an influential decision to that effect

³⁵ 453 F.3d 809 (7th Cir. 2006).

³⁶ *Id.* at 812; *see also, e.g., Klene v. Napolitano*, 697 F.3d 666, 669 (7th Cir. 2012) ("Section 1421(c) gives the alien a right to an independent ("de novo") judicial decision, a right that can be valuable compared with the kind of review available following an order of removal. A court of appeals reviewing a removal decision under § 1252 makes an independent decision on legal questions (subject to the principles of [*Chevron*]) but on factual issues asks only whether substantial evidence supports the agency's conclusion.") (citation omitted); *Gorenyuk v. U.S. Dep't of Homeland Sec.*, No. 07 C 1190, 2007 WL 3334340, at *3 (N.D. Ill. Nov. 8, 2007) ("Even though Gorenyuk relies on § 1447(b) in his amended petition, the Court will review his amended petition under 8 U.S.C. § 1421(c), which requires a de novo review.").

³⁷ *Minasyan v. Gonzales*, 401 F.3d 1069, 1074 (9th Cir. 2005) (citing *Hughes v. Ashcroft*, 255 F.3d 752, 758 (9th Cir. 2001)); *see also Acevedo v. Lynch*, 798 F.3d 1167, 1169 (9th Cir. 2015); *Perdomo-Padilla v. Ashcroft*, 333 F.3d 964, 967 (9th Cir. 2003).

³⁸ *Jaen v. Sessions*, No. 17-1512, 2018 WL 3826019, at *2 n.2 (2d Cir. Aug. 13, 2018) (noting inconsistency in prior cases, and concluding the "statute's designation

in *Alwan v. Ashcroft*;³⁹ the Tenth⁴⁰ and Eleventh⁴¹ Circuits have cited *Alwan* with approval. District courts in the District of Columbia,⁴² Fourth⁴³ and Sixth⁴⁴ circuits⁴⁵ have also found *Chevron* deference inappropriate in citizenship and naturalization cases.⁴⁶

of courts of appeals as the fora for the adjudication of citizenship claims without any material issues of fact under 8 U.S.C. § 1252(b)(5)(A) renders our review de novo and without deference to the determinations of the administrative adjudicators below”).

³⁹ 388 F.3d 507, 510 (5th Cir. 2004) (declining to apply *Chevron* deference “based on the plain language of the INA, we conclude that Alwan’s nationality claim is a purely legal question that Congress has not consigned to the discretion of the BIA. As such, we review it *de novo*.”).

⁴⁰ *Shepherd v. Holder*, 678 F.3d 1171, 1182 (10th Cir. 2012) (“In short, although alienage is a prerequisite for removal and may certainly be addressed at the administrative level, once the issue of citizenship is put before the courts, ‘the BIA’s decision is no longer relevant.’”) (citations omitted).

⁴¹ *Sebastian-Soler v. U.S. Att’y Gen.*, 409 F.3d 1280, 1283 (11th Cir. 2005) (“We review de novo legal questions arising from claims of nationality.” (citing 8 U.S.C. § 1252(b)(5) (vesting authority to decide nationality claims in courts of appeals))) (citations omitted).

⁴² *Wolde v. Lynch*, 166 F. Supp. 3d 70, 73-74 (D.D.C. 2016).

⁴³ *Abusamhadaneh v. Taylor*, 873 F. Supp. 2d 682, 715 (E.D. Va. 2012); *Moore v. James*, 770 F. Supp. 2d 786, 788 (E.D. Va. 2011) (“Because the standard of review is de novo, deference to the USCIS determination under *Chevron* . . . is not applicable.”); *Mobin v. Taylor*, 598 F. Supp. 2d 777, 780 (E.D. Va. 2009) (“*Chevron* deference — either to the earlier decision of the BIA or the subsequent decision of BCIS — is not warranted in the context of judicial review of the denial of an application for naturalization.”).

⁴⁴ *Omar v. Chertoff*, No. 1:06CV2750, 2010 WL 3036747, at *3 (N.D. Ohio June 22, 2010) (noting *Chevron* is inapplicable) (adopted by *Omar v. Chertoff*, No. 1:06 CV 2750, 2010 WL 3056853 (N.D. Ohio July 30, 2010)); *Hassan v. Dedvukaj*, No. 09-10716, 2010 WL 199931, at *4 (E.D. Mich. Jan. 19, 2010).

⁴⁵ *Cf. Abou-Haidar v. Gonzales*, 437 F.3d 206, 207 (1st Cir. 2006) (Although not citing *Chevron*, petitioner claimed “that the BIA erred in concluding that he was not a ‘national’ of the United States” subject to “de novo” review. (citing *Fierro v. Reno*, 217 F.3d 1, 3 (1st Cir. 2000))).

⁴⁶ Suggesting the complexity of the question, a number of federal courts have reserved the question of whether *Chevron* deference was applicable to particular citizenship or naturalization questions. *See, e.g., Ayton v. Holder*, 686 F.3d 331, 335 (5th Cir. 2012) (“We need not resolve here whether the BIA’s interpretation of INA § 321(a) is entitled to *Chevron* deference because our conclusion in this case would be the same whether we interpret the statute de novo or apply *Chevron* deference.”); *United States v. Connolly*, 552 F.3d 86, 92 (2d Cir. 2008) (“However, we conclude that we need not, and thus do not, here decide whether any deference is owed under *Chevron* and the related case law to the narrow, complex, and arguably archaic definition of ‘father’ proposed by the government in this case.”); *see also Calderon v. Johnson*, No. CV 16-0383, 2017 WL 131575, at *3 (D.N.J. Jan. 13, 2017) (“[C]ircuits are split on whether the courts, in their *de novo* review of naturalization denials under 8 U.S.C. § 1421(c), should give *Chevron* deference to agency interpretations.”).

3. De Novo Review and *Chevron*

In *United States v. Haggard Apparel Co.*,⁴⁷ the Supreme Court held that de novo review and *Chevron* deference are not necessarily incompatible:

De novo proceedings presume a foundation of law. The question here is whether the regulations are part of that controlling law. Deference can be given to the regulations without impairing the authority of the court to make factual determinations, and to apply those determinations to the law, de novo.⁴⁸

The Courts of Appeal have applied this principle in immigration cases: “We review the BIA’s conclusions of law de novo, but give so-called *Chevron* deference to its interpretation of the Immigration and Nationality Act.”⁴⁹ However, this conclusion is more complicated than may first appear.

Haggard Apparel involved applicability of *Chevron* deference to a customs regulation in a suit challenging an import duty in the Court of International Trade.⁵⁰ To an ultimate conclusion, such as the amount of an import duty, or whether Jane Jones is a citizen, it is conceptually possible that de novo review could coexist with deference on subsidiary legal or factual issues. That is, it might be reasonable to describe as “de novo review” a procedure where there was a new trial of the facts, and a fresh determination of most questions of law, except in so much as some legal questions were subject to *Chevron* deference. Perhaps de novo review is also consistent with *Chevron* deference to review of a finding with multiple legal conclusions, such as that “Janes Jones did not meet the legal requirements for naturalization.”

⁴⁷ 526 U.S. 380 (1999).

⁴⁸ *Id.* at 391; see also John Duffy, *On Improving the Legal Process of Claim Interpretation: Administrative Alternatives*, 2 WASH. U. J.L. & POLY 109, 166 n.95 (2000).

⁴⁹ See, e.g., *Ampe v. Johnson*, 157 F. Supp. 3d 1, 9-10 (D.D.C. 2016); *Gonzalez v. U.S. Att’y Gen.*, 820 F.3d 399, 403-04 (11th Cir. 2016); *Lozano-Zuniga v. Lynch*, 832 F.3d 822, 828 (7th Cir. 2016); *Ruiz-Del-Cid v. Holder*, 765 F.3d 635, 639 (6th Cir. 2014); *Ibarra v. Holder*, 736 F.3d 903, 910 (10th Cir. 2013); *Da Silva Neto v. Holder*, 680 F.3d 25, 28 (1st Cir. 2012); *Nelson v. U.S. Att’y Gen.*, 685 F.3d 318, 321 (3d Cir. 2012) (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999)); *Boluk v. Holder*, 642 F.3d 297, 301 (2d Cir. 2011); *Mora v. Keisler*, 254 F. App’x 334 (5th Cir. 2007); *Niang v. Gonzales*, 492 F.3d 505, 515 (4th Cir. 2007); *Senica v. INS*, 16 F.3d 1013, 1015 (9th Cir. 1994).

⁵⁰ *Haggard Apparel*, 526 U.S. at 383.

However, it is difficult to see how a court could simultaneously apply *Chevron* deference and de novo review to a single, individual legal issue. For example, a court might consider whether “a conviction for DUI under California Vehicle Code Section 23152(a) constitutes a crime of moral turpitude.” If it reviews that question deferentially under *Chevron*, then it is not engaging in de novo review. On the other hand, if a court engages in de novo review, it is not engaging in deferential review.

This point is underscored by the many cases in a variety of contexts where the Court has distinguished between de novo and deferential review. For example, in a Sentencing Guidelines case, the Court asked: “[S]hould the appeals court review the trial court’s decision deferentially or *de novo*?”⁵¹ In a FOIA exception case, the Court explained that an amendment was not “intended to eliminate de novo review in favor of agency deference”⁵² In a case involving interpretation of state statutes in federal cases, the Court stated: “When *de novo* review is compelled, no form of appellate deference is acceptable.”⁵³ In a suit against an ERISA administrator, the Court explained: “We do not believe that [a prior case] implies a change in the *standard* of review, say, from deferential to *de novo* review.”⁵⁴ In a Privacy Act case, the Court observed that “further provisions specify such things as the *de novo* nature of the suit (as distinct from any form of deferential review)”⁵⁵ In a state habeas corpus case, the Court stated:

Because the Tennessee courts did not reach the merits of Cone’s *Brady* claim, federal habeas review is not subject to the deferential standard that applies under AEDPA to ‘any claim that was adjudicated on the merits in State court proceedings.’ 28 U.S.C. § 2254(d). Instead, the claim is reviewed de novo.⁵⁶

Many other opinions demonstrate the Court’s consistent treatment of de novo review as a standard of review distinct from deferential review.⁵⁷

⁵¹ *Buford v. United States*, 532 U.S. 59, 60 (2001).

⁵² *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 756 n.9 (1989).

⁵³ *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

⁵⁴ *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008).

⁵⁵ *Doe v. Chao*, 540 U.S. 614, 618-19 (2004).

⁵⁶ *Cone v. Bell*, 556 U.S. 449, 472 (2009) (citations omitted).

⁵⁷ *See, e.g., McLane Co. v. Equal Emp’t Opportunity Comm’n*, 137 S. Ct. 1159, 1166-67 (2017) (“When considering whether a district court’s decision should be

Traditionally, judicial review is more deferential toward factual findings of an agency or lower court than it is toward legal conclusions. Several Supreme Court cases explain: “For purposes of standard of review, decisions by judges are traditionally divided into

subject to searching or deferential appellate review — at least absent ‘explicit statutory command’ — we traditionally look to two factors. First, we ask whether the history of appellate practice yields an answer. Second, at least where neither a clear statutory prescription nor a historical tradition exists, we ask whether, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.” (citations and internal quotations omitted); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (“That Congress’ predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence de novo, or to replace Congress’ factual predictions with our own.”); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) (“In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.”); *see also* *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1989 (2017) (Gorsuch, J., dissenting) (“Putting these directions together, the statutory scheme is plain. Disputes arising under the civil service laws head to the Federal Circuit for deferential review; discrimination cases go to district court for de novo review.”); *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1315 (2015) (Thomas, J., dissenting) (“Congress has deviated from the usual practice of affording deference to the fact findings of an initial tribunal in affording de novo review of the TTAB’s decisions.”); *Lawson v. FMR L.L.C.*, 571 U.S. 429, 477 (2014) (Sotomayor, J., dissenting) (“The statute does not merely permit courts to review the Secretary’s final adjudicatory rulings under the Administrative Procedure Act’s deferential standard. It instead allows a claimant to bring an action in a federal district court, and allows district courts to adjudicate such actions de novo, in any case where the Secretary has not issued a final decision within 180 days.”); *Woodford v. Ngo*, 548 U.S. 81, 113 (2006) (Stevens, J., dissenting) (“It is undisputed that the PLRA does nothing to change the nature of the federal action under § 1983; prisoners who bring such actions after exhausting their administrative remedies are entitled to *de novo* proceedings in the federal district court without any deference (on issues of law or fact) to any ruling in the administrative grievance proceedings.”); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 1015 (2005) (Scalia, J., dissenting) (“This meant that many more issues appropriate for agency determination would reach the courts without benefit of an agency position entitled to *Chevron* deference, requiring the courts to rule on these issues de novo.”); *City of Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 177 (1997) (Ginsburg, J., dissenting) (noting “the distinction between *de novo* and deferential review”); *United States v. Raddatz*, 447 U.S. 667, 699 (1980) (Marshall, J., dissenting) (“And in other cases, the factfinder was not entrusted, as was the District Judge here, with making a *de novo* determination, but was instead permitted to give appropriate deference to the conclusions of the official who conducted the hearing.”).

three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’).⁵⁸

Immigration was one of the first areas of the growth of the administrative state.⁵⁹ Explaining the traditional role of the federal courts in immigration cases, the Supreme Court in *INS v. St. Cyr*,⁶⁰ stated that courts “generally did not review factual determinations made by the Executive.”⁶¹ But, the Court went on to explain that the courts “did review the Executive’s legal determinations In case after case, courts answered questions of law in habeas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws.”⁶²

In *Ng Fung Ho v. White*,⁶³ the Supreme Court observed that deportation of a person claiming to be a United States citizen “obviously deprives him of liberty It may result also in loss of both property and life, or of all that makes life worth living.”⁶⁴ First, the Court noted the “difference in security of judicial over administrative action.”⁶⁵ Then, the Court concluded that, under the Due Process Clause, petitioners were “entitled to a judicial determination of their claims that they are citizens of the United States.”⁶⁶ Layering *Chevron* onto the *Ng Fung Ho* principle as embodied in the INA would invert the normal standard of review, combining *de novo* determination of facts with deferential

⁵⁸ *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see also, e.g.*, *Brown v. Plata*, 563 U.S. 493, 512-13 (2011) (“This Court’s review of the three-judge court’s legal determinations is *de novo*, but factual findings are reviewed for clear error.”) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)); *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (“[D]eterminations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. [However] a reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.”).

⁵⁹ *See* Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 3 (2002).

⁶⁰ 533 U.S. 289 (2001).

⁶¹ *Id.* at 306 (citing *Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

⁶² *Id.* at 306-07 (citing *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915)). *But see* *Gegiow v. Uhl*, 239 U.S. 3, 9 (1915) (“The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact.”).

⁶³ 259 U.S. 276 (1922).

⁶⁴ *Id.* at 284 (citing *Chin Yow v. United States*, 208 U.S. 8, 13 (1908)).

⁶⁵ *Id.* at 285 (comparing *United States v. Woo Jan*, 245 U.S. 552, 556 (1918) and *White v. Chin Fong*, 253 U.S. 90, 93 (1922)).

⁶⁶ *Id.*

determination of law. It would require the simultaneous conclusions that citizenship and naturalization issues were so important factually that the Constitution mandated judicial trial de novo and so unimportant legally that deference to administrative legal conclusions was appropriate.

There certainly is room in the Supreme Court's existing *Chevron* jurisprudence to treat de novo review as an important factor suggesting that *Chevron* does not apply. In *United States v. Mead Corp.*,⁶⁷ the Court held that a tariff determination was not subject to *Chevron* in part because an aggrieved party was entitled to have a fresh determination in a court.⁶⁸ In *Haggar Apparel* itself, the Court considered "historical practices in customs cases"⁶⁹ as part of the analysis of whether *Chevron* applied. The Court concluded that "[t]his history, suffice it to say, is not so uniform and clear as to convince us that judicial deference would thwart congressional intent."⁷⁰ The implication of *Mead* and *Haggar Apparel* is that historical practices are relevant.

II. CITIZENSHIP AS A MAJOR QUESTION

The statutory requirement of trial de novo of citizenship claims supports the conclusion that *Chevron* does not apply, particularly in light of the constitutional backdrop of *Ng Fung Ho v. White*. Several other considerations support this outcome. First, citizenship is a major policy question. Second, the Court has often held that a rule of lenity applies to ambiguous citizenship statutes. Finally, many of the most important citizenship cases involve judicial rejection of administrative decisions.

A. Citizenship and Policy

The Supreme Court has established that great political or social significance of an issue may remove it from the coverage of *Chevron*. In *King v. Burwell*,⁷¹ upholding the Affordable Care Act, the Supreme Court explained: "In extraordinary cases . . . there may be reason to

⁶⁷ 533 U.S. 218 (2001).

⁶⁸ See *id.* at 233-34 n.16.

⁶⁹ *United States v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999).

⁷⁰ *Id.*

⁷¹ 135 S. Ct. 2480 (2015).

hesitate before concluding that Congress has intended such an implicit delegation.”⁷² The Court found that the case presented:

[A] question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly. It is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort. This is not a case for the IRS.⁷³

Is citizenship a case for administrators? The Supreme Court has referred to citizenship as a “priceless treasure.”⁷⁴ It has also noted the importance of following the laws passed by Congress because naturalization grants “political rights as a member of this Nation.”⁷⁵ The Court has explained that “Congress alone has the constitutional authority to prescribe rules for naturalization”⁷⁶ It has held that citizenship for those born abroad is available only as provided by Acts of Congress.⁷⁷ The Supreme Court also noted:

The distinction between citizens and aliens . . . is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance.⁷⁸

⁷² *Id.* at 2488-89 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

⁷³ *Id.* at 2489 (citations omitted).

⁷⁴ *Fedorenko v. United States*, 449 U.S. 490, 507 (1981) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 791 (1950) (Black, J., dissenting)).

⁷⁵ *Id.* at 506 (quoting *United States v. Ginsberg*, 243 U.S. 472, 474 (1917)).

⁷⁶ *Id.*

⁷⁷ *Miller v. Albright*, 523 U.S. 420, 422 (1998) (Scalia, J., concurring).

⁷⁸ *Ambach v. Norwick*, 441 U.S. 68, 75 (1979) (citing *Sugarman v. Dougall*, 413 U.S. 634, 651-52 (1973) (Rehnquist, J., dissenting)); *see also* *Sugarman v. Dougall*, 413 U.S. 634, 652 (Rehnquist, J., dissenting) (“In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important.”).

The Court has recognized that application “of the law governing the grant of citizenship to aliens touches the very well-being of the Nation”⁷⁹ and the “unequivocal legal bond citizenship represents.”⁸⁰

However clear it is that the IRS is not expert on health policy, it is much more so that the departments of State, Justice, and Homeland Security are not experts in what makes a good citizen, or how the polity should be structured and restructured. Yet, each of these departments have roles in the immigration system. It is, to put it mildly, “especially unlikely that Congress would have delegated”⁸¹ the decision about what kinds of people should be Americans to these agencies.⁸²

Cases like *Dred Scott v. Sanford*, which held that African Americans could never be citizens,⁸³ show the political and economic importance of citizenship decisions. Some historians claim that *Dred Scott* contributed to the political crisis that led to war.⁸⁴ Chief Justice Roberts seems to agree, observing that: “*Dred Scott’s* holding was

⁷⁹ Baumgartner v. United States, 322 U.S. 665, 676 (1944); see also OSCAR HANDLIN, *THE UPROOTED* 3 (2d ed. 1951) (“Once I thought to write a history of the immigrants in America. Then I discovered that the immigrants *were* American history.”).

⁸⁰ *Ambach*, 441 U.S. at 75; see also, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432, 442 (1982); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (noting “the precious nature of the constitutionally guaranteed rights of citizenship”).

⁸¹ *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015).

⁸² *Cf.*, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (“In sum, assuming without deciding that the national interests identified by the petitioners would adequately support an explicit determination by Congress or the President to exclude all noncitizens from the federal service, we conclude that those interests cannot provide an acceptable rationalization for such a determination by the Civil Service Commission.”); Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1675 (2007) (“[T]he rule of lenity is helpful in highlighting the possibility that there might be some aspect of immigration cases that implicates the kind of choices courts could want to reserve to Congress. Is there such a feature that might justify invoking the democracy-reinforcing rubric of nondelegation? Perhaps the most plausible candidate would be the claim that immigration decisions are distinctive because they concern the allocation of the primary good of membership within a democracy.”).

⁸³ See *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 426-27 (1857).

⁸⁴ Paul Finkelman, *Scott v. Sandford: The Court’s Most Dreadful Case and How It Changed History*, 82 CHI.-KENT L. REV. 3, 3 (2007) (“Though surely an exaggeration, it has been said that the case caused the Civil War. While other forces caused secession and the War, *Dred Scott* surely played a role in the timing of both.”); Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 98 (2007) (“[I]n the crisis of 1860 *Dred Scott* had in fact become the lynchpin of Southern policy and the focus of Northern protests.”).

overruled on the battlefields of the Civil War.”⁸⁵ In *United States v. Wong Kim Ark*,⁸⁶ the Court overruled the view of immigration administrators and held that a person of Chinese ancestry born in the United States was a citizen, and therefore not subject to deportation. But, earlier in *Elk v. Wilkins*,⁸⁷ the Court held that an Indian born in the United States as an Indian tribe member was not a citizen merely by virtue of the Fourteenth Amendment.⁸⁸

Whether these cases were rightly decided or erroneous, they illustrate that categorical determinations about who are and are not citizens can be of surpassing political and economic importance. It is also clear that the critical thing about the cases was the rule of law at stake rather than the application of the facts. It is likely that no one would remember *Dred Scott* today, for example, if it had turned on a factual finding that the plaintiff was not a U.S. citizen because he was born in Mexico or Canada. It is really the legal determination of the categories of persons who can become citizens, and the conduct or status which is disqualifying, which is politically and economically important.

B. *The Supreme Court on Administrative Discretion in Citizenship Cases*

The Court’s decisions suggest the importance of citizenship and limits on executive discretion. In a case accusing a defendant of making a false statement in the course of a naturalization proceeding, the court held that that statements violated the law only if material, and that the definition of materiality was driven by objective legal requirements for naturalization, which left little discretion to administrators. The Court explained that naturalization “turns on objective legal criteria. Congress has prescribed specific eligibility standards for new citizens” and that:

Government officials are obligated to apply that body of law faithfully — granting naturalization when the applicable criteria are satisfied, and denying it when they are not. And to

⁸⁵ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2617 (2015) (Roberts, C.J., dissenting).

⁸⁶ 169 U.S. 649, 704-05 (1898).

⁸⁷ 112 U.S. 94 (1884).

⁸⁸ *Id.* at 109; see generally Bethany R. Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 *CARDOZO L. REV.* 1185 (2016) (discussing “the unconstitutionality of efforts to limit birthright citizenship and the consistency of *Elk* with the egalitarian ideals of the Fourteenth Amendment”).

ensure right results are reached, a court can reverse such a determination, at an applicant's request, based on its "own findings of fact and conclusions of law." 8 U.S.C. § 1421(c). The entire system, in other words, is set up to provide little or no room for subjective preferences or personal whims.⁸⁹

Consistent with the idea that there is little discretionary role for administrators, the Court performs especially searching judicial review when examining qualifications for citizenship. This may be thought to be an example of the immigration rule of lenity.⁹⁰ The rule of lenity developed in the deportation context because the Court recognized that "deportation is a drastic measure and at times the equivalent of banishment of exile."⁹¹ As unfortunate as it is to deport a noncitizen based on an erroneous understanding of the facts or the law, it would be still worse to deport a citizen.

The Court's cases reflect a particular concern for citizenship. For example, *Baumgartner v. United States*⁹² involved cancellation of a naturalization certificate, based on the government's claim that it had

⁸⁹ *Maslenjak v. United States*, 137 S. Ct. 1918, 1928 (2017) (citations omitted). In another case, the Court explained:

The opportunity to become a citizen of the United States is said to be merely a privilege, and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor.

Tutun v. United States, 270 U.S. 568, 578 (1926) (citations omitted); *see also* *United States v. Schwimmer*, 279 U.S. 644, 649 (1929) ("Every alien claiming citizenship is given the right to submit his petition and evidence in support of it. And, if the requisite facts are established, he is entitled as of right to admission."), *overruled in part on other grounds by* *Girouard v. United States*, 328 U.S. 61 (1946).

⁹⁰ *Cox*, *supra* note 82, at 1675 & n.18 (2007) ("For more than half a century, courts have periodically invoked the rule of lenity in immigration cases." (citing *Bonetti v. Rogers*, 356 U.S. 691, 699 (1958) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.")); *Das*, *supra* note 9, at 197-202; Irene Scharf, *Un-Torturing the Definition of Torture and Employing the Rule of Immigration Lenity*, 66 RUTGERS L. REV. 1, 27-33 (2013); *see also* *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948); *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *Yamataya v. Fisher*, 189 U.S. 86, 99-101 (1903).

⁹¹ *Fong Haw Tan*, 333 U.S. at 10 (citation omitted).

⁹² 322 U.S. 665 (1944).

been illegally obtained. The Court reversed a finding in favor of the government, rejecting facts found by the tribunals below. The Court concluded that the case required more searching review because the “decision here for review cannot escape broadly social judgments — judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.”⁹³ The Court later explained *Baumgartner*’s searching review was based on the conclusion that the findings below “clearly impl[y] the application of standards of law.”⁹⁴

In other citizenship-related cases, the Court held that the importance of the issue removed administrative discretion to interpret ambiguous statutes. In *United States v. Minker*,⁹⁵ the question facing the Court was whether the immigration agency’s statutory authority to subpoena a “witness” included a naturalized citizen who was a target of a denaturalization proceeding, or extended only to a non-party witness. The Court found “the word [witness] is patently ambiguous.”⁹⁶ It therefore rejected the administrative interpretation and ruled in favor of the individual potentially subject to denaturalization. The Court explained that the proceeding:

[M]ay result in “loss of both property and life, or of all that makes life worth living.” In such a situation where there is doubt it must be resolved in the citizen’s favor. Especially must we be sensitive to the citizen’s rights where the proceeding is nonjudicial because of “(t)he difference in security of judicial over administrative action”⁹⁷

The Court concluded that: “[t]hese considerations of policy . . . are important guides in reaching [the] decision here. They give coherence to law and are fairly to be assumed as congressional presuppositions, unless by appropriate explicitness the lawmakers make them inapplicable.”⁹⁸ When there is statutory ambiguity, the Court

⁹³ *Id.* at 671; *see also* *Chaunt v. United States*, 364 U.S. 350, 353-54 (1960).

⁹⁴ *Pullman-Standard v. Swint*, 456 U.S. 273, 286 n.16 (1982) (quoting *Baumgartner v. United States*, 322 U.S. 665, 671 (1944)).

⁹⁵ 350 U.S. 179 (1956).

⁹⁶ *Id.* at 186.

⁹⁷ *Id.* at 187-88 (quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284-85 (1922)).

⁹⁸ *Id.* at 188 (citing *Bell v. United States*, 349 U.S. 81, 83 (1955)); *see also, e.g.*, *Gorbach v. Reno*, 219 F.3d 1087, 1097 (9th Cir. 2000) (citing *Minker* and concluding “if there is doubt whether the statute confers the power on the Attorney General to denaturalize, or leaves it exclusively in the district courts, the doubt must be resolved against the Attorney General”).

determined that Congress intended resolution in favor of the individual, not delegation to the agency.

C. *The Administrators' Dubious Track Record*

One historical antecedent of the de novo hearing in citizenship cases seems to have been judicial reaction to unfair administrators. *Chin Yow v. United States*⁹⁹ involved a claim of U.S. citizenship rejected by immigration officials. The Court, through Justice Holmes, acknowledged that administrative determinations of citizenship claims were constitutionally permissible, but agreed that Chin Yow had sufficiently alleged denial of a fair hearing. However, rather than simply order a new administrative hearing, the Court ordered a judicial trial.¹⁰⁰

In a 1920 case, the Court scolded immigration authorities for failing to provide a fair hearing to Kwock Jan Fat, who claimed to be a citizen:

The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race.¹⁰¹

The Court again ordered a judicial trial rather than a new administrative hearing,¹⁰² concluding that: “[i]t is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.”¹⁰³

The kinds of political pressures and social realities that historically made life hard on immigrants or claimed citizens who were Chinese, Southern and Eastern European,¹⁰⁴ Mormons, or political dissenters

⁹⁹ 208 U.S. 8 (1908).

¹⁰⁰ *Id.* at 13.

¹⁰¹ *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920).

¹⁰² *Id.* at 465.

¹⁰³ *Id.* at 464.

¹⁰⁴ *Cf. Gegiow v. Uhl*, 239 U.S. 3, 8 (1915) (noting petitioners “are part of a group of illiterate laborers, only one of whom, it seems, Gegiow, speaks even the ordinary Russian tongue, and in view of that fact it was suggested in a letter from the acting commissioner to the Commissioner General that their ignorance tended to make them form a clique to the detriment of the community; but that is a trouble incident to the

continue today; in the era of the Muslim Ban, one can hardly contend that immigration is not a hot political topic. Accordingly, there is no reason to think those pressures are less likely to distort legal rulings than they are factual ones.

In several instances, immigration authorities attempted to deprive alleged citizens of that status based on non-statutory principles which, admittedly, were founded in international law. In both cases, courts insisted that Congress must make such choices.

In a series of cases in 1915, the Department of Labor, which then had responsibility for immigration, denied admission to adult children of U.S. citizens of Chinese ancestry seeking to enter the United States. Although the statute on its face made these children citizens at birth,¹⁰⁵ immigration authorities concluded that their citizenship was merely “technical” and excluded them. Judge Dooling of the U.S. District Court for the Northern District of California granted a series of writs of habeas corpus, finding that the applicants were citizens notwithstanding the racial animus of the administrators.¹⁰⁶

The Department of Labor responded by adopting adding Rule 9(f) to the Regulations Governing Admission of Chinese. Rule 9(f) provided that children of U.S. citizens of Chinese ancestry were not themselves citizens and could only enter the United States during their minority as dependent family members of a citizen. The Secretary of Labor requested an opinion from the Attorney General on the validity of the rule, who concluded that it was invalid, because it conflicted with the statute.¹⁰⁷ In addition, the Attorney General opinion stated that a U.S. citizen born overseas need take no steps to retain that status. Citizens born abroad did not need to enter the United States during their minority to enter the United States, as citizens as adults.¹⁰⁸

immigration of foreigners generally which it is for legislators, not for commissioners, to consider, and may be laid on one side”).

¹⁰⁵ 8 U.S.C. § 6 (1934) (repealed 1940) (“Any child hereafter born out of the limits and jurisdiction of the United States whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child.”).

¹⁰⁶ See *Ex parte* Tom Toy Tin, 230 F. 747, 749-50 (N.D. Cal. 1916); *Ex parte* Lee Dung Moo, 230 F. 746, 747 (N.D. Cal. 1916); *Ex parte* Leong Wah Jam, 230 F. 540, 541 (N.D. Cal. 1916); *Ex parte* Wong Foo, 230 F. 534, 535 (N.D. Cal. 1916); *Ex parte* Ng Doo Wong, 230 F. 751, 752 (N.D. Cal. 1915).

¹⁰⁷ Admission of Chinese into United States, 30 Op. Att’y Gen. 529, 529-32 (1916).

¹⁰⁸ *Id.* at 536-37.

There was also a statute which provided:

That all children born outside the limits of the United States who are citizens thereof . . . and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.¹⁰⁹

But the Attorney General explained that this requirement was associated only with the right to receive diplomatic protection, not to retain citizenship.¹¹⁰

Perkins v. Elg,¹¹¹ decided in 1939, involved the Department of Labor's revival of the idea that citizenship was lost if not claimed by residence before majority. This time, the Attorney General agreed. Immigration authorities determined that a woman born in the United States but who moved to Sweden as a child had lost her citizenship. The Court accepted the general idea:

It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties.¹¹²

But the Court denied that Ms. Elg had lost her citizenship even though she did not return until she was over twenty-one:

To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice.¹¹³

The clear implication in *Elg*, albeit in dicta, was that administrators could deem citizens to have lost that status if they lived overseas as

¹⁰⁹ Act of March 2, 1907, ch. 2534, § 6, 34 Stat. 1228, 1229 (1906).

¹¹⁰ Admission of Chinese into United States, *supra* note 107, at 533.

¹¹¹ 307 U.S. 325 (1939).

¹¹² *Id.* at 329.

¹¹³ *Id.* at 334.

children and did not come back “on attaining majority.” But in *Mandoli v. Acheson*,¹¹⁴ when the issue was squarely presented, the Court held that immigration authorities had no power to deprive a citizen of that status:

We find no warrant in the statutes for concluding that petitioner has suffered expatriation. And, since Congress has prescribed a law for this situation, we think the dignity of citizenship which the Constitution confers as a birthright upon every person born within its protection is not to be withdrawn or extinguished by the courts except pursuant to a clear statutory mandate.¹¹⁵

The *Mandoli* court’s insistence on a “clear statutory mandate” before an administrator may act is at odds with the very premise of *Chevron*, which treats ambiguous statutes as grants of authority to administrators to select the policy or interpretation they prefer. Similarly, the Court held in denaturalization cases, “we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen.”¹¹⁶

“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”¹¹⁷ What is now 8 U.S.C. § 1252, providing for de novo review of citizenship claims, became part of the INA in 1961.¹¹⁸ Congress has amended it many times since then.¹¹⁹ Yet,

¹¹⁴ 344 U.S. 133 (1952).

¹¹⁵ *Id.* at 139.

¹¹⁶ *Schneiderman v. United States*, 320 U.S. 118, 122 (1943).

¹¹⁷ *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975)); see also *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *Nat’l Lead Co. v. United States*, 252 U.S. 140, 147 (1920); SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 49.09 (Norman Singer ed., 4th ed. 1984).

¹¹⁸ See *Foti v. INS*, 375 U.S. 217, 219 & n.2 (1963); *Theagene v. Gonzales*, 411 F.3d 1107, 1114-15 (9th Cir. 2005).

¹¹⁹ See, e.g., Act of Sept. 13, 1996, Pub. L. No. 104-208, 110 Stat. 305, 310; Act of Apr. 24, 1996, Pub. L. No. 104-132, 110 Stat. 1275, 1277, 1279; Act of Oct. 25, 1994, Pub. L. No. 103-416, 108 Stat. 4317, 4324; Act of Sept. 13, 1994, Pub. L. No. 103-322, 108 Stat. 1823, 2023; Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1751, 1753, 1757, 1759; Act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 5049, 5066, 5085; Act of Nov. 18, 1988, Pub. L. No. 100-690, 102 Stat. 4470; Act of Oct. 24, 1988, Pub.

Congress has never indicated in statutory text disapproval of the interpretive principles the Court has repeatedly applied.

CONCLUSION

Chevron deference in the citizenship context matters in only one situation: Where the agency has denied citizenship (because if granted there will be no dispute), and a court with a free hand would grant it (because if the court would deny it without *Chevron*, application of *Chevron* is moot).¹²⁰ In this situation, *Chevron* is not a good fit. The very purpose of the de novo hearing in citizenship cases seems to be to give individuals two bites at the apple. If the administrator concludes that the individual is entitled to relief, then they get it, because there is no one to appeal or challenge it. If the individual does not get relief, then Congress has granted them a fresh factual and legal look in court. If administrators cannot be trusted to get individual cases right, how can they be trusted to make faithful policy decisions?

There may be less than meets the eye to the citizenship and naturalization cases where courts defer. It is probable that many of them would have come out the same way without *Chevron* deference. There are also many cases where courts have found specific reasons not to defer. The Sixth and Tenth Circuits have rebuffed attempts to control judicial review by regulation.¹²¹ Courts have also denied deference to single-member decisions by the BIA,¹²² and when the question involved did not implicate agency expertise.¹²³ The Ninth Circuit declined to defer to a State Department opinion on citizenship in part because the applicant was in the United States, and the State Department's primary authority was to determine citizenship of those

L. No. 100-525, 102 Stat. 2620; Act of Nov. 6, 1986, Pub. L. No. 99-603, 100 Stat. 3445; Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 2028; Act of Dec. 29, 1981, Pub. L. No. 97-116, 95 Stat. 1620.

¹²⁰ See *Bullcreek v. Nuclear Regulatory Comm'n*, 359 F.3d 536, 541 (D.C. Cir. 2004) ("The question of whether *Chevron* deference applies . . . is moot here because the result is the same whether the court applies de novo review, deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), or *Chevron* deference." (citations omitted)).

¹²¹ See *Shweika v. Dep't of Homeland Sec.*, 723 F.3d 710, 717 (6th Cir. 2013); *Nagahi v. INS*, 219 F.3d 1166, 1169-71 (10th Cir. 2000).

¹²² *Pantlitz-Wilkinson v. U.S. Att'y Gen.*, 598 F. App'x 129, 130 n.1 (3d Cir. 2015) ("In doing so, we do not defer under [*Chevron*] . . . to the BIA's single-member, non-precedential decision in this case." (citations omitted)).

¹²³ *Gerbier v. Holmes*, 280 F.3d 297, 302 n.2 (3d Cir. 2002) (federal criminal code); *Sutherland v. Reno*, 228 F.3d 171, 174 (2d Cir. 2000) (state and federal criminal codes) (citing *Michel v. INS*, 206 F.3d 253, 262 (2d Cir. 2000)).

outside the country. The court cited a D.C. Circuit decision stating that: “[w]hen a statute is administered by more than one agency, a particular agency’s interpretation is not entitled to *Chevron* deference.”¹²⁴

Perhaps the most common reason for finding *Chevron* inapplicable is that immigration authorities’ interpretation of the statute is wrong. Recently, the Supreme Court rejected an interpretation of a deportation ground “[b]ecause it makes scant sense.”¹²⁵ In another case, the Court concluded that “the statute, read in context, unambiguously forecloses the Board’s interpretation.”¹²⁶ Courts have rejected administrative interpretations of what the “examination” is that starts the clock for an opportunity to file in federal court if a naturalization petition is not resolved within 120 days of the examination,¹²⁷ the meaning of “adopted,”¹²⁸ evidence standards for proof of military service,¹²⁹ whether a “child” must be a blood

¹²⁴ *Scales v. INS*, 232 F.3d 1159, 1165 (9th Cir. 2000) (quoting *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000)). Given that the departments of Homeland Security, Justice, and State are all involved in citizenship determinations in different contexts, this principle would remove those claims from *Chevron*’s domain. *See id.*

¹²⁵ *Mellouli v. Lynch*, 135 S. Ct. 1980, 1982 (2015).

¹²⁶ *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) (“There is obviously some ambiguity in a term like ‘well-founded fear’ which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling ‘any gap left, implicitly or explicitly, by Congress,’ the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program. But our task today is much narrower, and is well within the province of the judiciary. We do not attempt to set forth a detailed description of how the ‘well-founded fear’ test should be applied. Instead, we merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.” (citation omitted)); *see generally* Edward J. Imwinkelried, *Defeating Deference: A Practitioner’s Guide to Overcoming the Chevron Doctrine*, 31 AM. J. TRIAL ADVOC. 69 (2007).

¹²⁷ *Alderrah v. Chertoff*, No. 07-10371, 2008 WL 880511, at *3 n.5 (E.D. Mich. Mar. 31, 2008) (“Contrary to the Defendants’ opinion, the Court concludes that an ‘examination,’ as used in § 1447(b), clearly refers to an applicant interview by the agency. Thus, in the view of the Court, the interpretation of this term by the USCIS is not justified. As such, the Defendants’ interpretation is not entitled to a *Chevron* deference.”); *Ibrahim v. Gonzales*, 633 F. Supp. 2d 737, 742-43 (W.D. Mo. 2007) (citing *Silebi De Donado v. Swacina*, 486 F. Supp. 2d 1360 (S.D. Fla. 2007)).

¹²⁸ *Ojo v. Lynch*, 813 F.3d 533, 541 (4th Cir. 2016) (“The term ‘adopted’ is not ambiguous under *Chevron*’s first step, and the BIA’s interpretations that circumscribe reliance on nunc pro tunc orders are not entitled to deference.”).

¹²⁹ *Almero v. INS*, 18 F.3d 757, 760, 763 (9th Cir. 1994) (rejecting as “at odds with Congress’ expressed intent” an INS interpretation prohibiting Philippines Army members, specifically eligible for the benefits of § 1440 under an amendment to the

relative,¹³⁰ and the required duration of “marital union” for an applicant for naturalization based on marriage to a U.S citizen.¹³¹ Given the seriousness of the issues at stake, it is difficult to imagine that Congress intended to relegate decisions to agencies with a track record like this.

statute, from proving service by records of the government of the Philippines).

¹³⁰ *Scales v. INS*, 232 F.3d 1159, 1166 (9th Cir. 2000) (“There is no requirement of a blood relationship between Petitioner and his citizen father, as there is for an illegitimate child. We therefore hold that Petitioner acquired citizenship at birth under § 1401.”).

¹³¹ *Ali v. Smith*, 39 F. Supp. 2d 1254, 1256 (W.D. Wash. 1999).