ARTICLE

PUTTING THE IMMIGRATION RULE OF LENITY IN ITS PROPER PLACE: A TOOL OF LAST RESORT AFTER *CHEVRON*

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INTRODUCTION

Immigration policy towards aliens[1] is inextricable from considerations of national security, foreign relations, and the economy.[2] These interests sometimes align, but not always. It is Congress that decides, in the first instance, how to harmonize the nation's foreign and domestic policies in crafting immigration law.[3] Where Congress has intentionally (or unintentionally) left gaps in that law, it has authorized the Attorney General to fill them.[4]

The Supreme Court has historically deferred to the political branches' policy decisions in immigration matters.[5] However, in part to offset the politically disadvantaged position of aliens, the Court fashioned a rule requiring courts to interpret ambiguous immigration statutes leniently in favor of aliens.[6] The intent of this immigration rule of lenity is to provide

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1. The Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(3) (2000) (defining "alien" as "any person not a citizen or national of the United States").

2. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (stating "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government"); H.R. REP. NO. 104-469(I), at 106 (1996) (discussing the interrelationship of alien interests with broader national considerations); *see also* Ana Cristina Torres, *Preface*, 9 GEO. PUB. POL'Y REV. 1, 1 (2004) (discussing how "[a] wide range of economic, humanitarian, ethical and security issues shape the arguments supporting the current immigration debate").

3. *See infra* Part I.A; *see also* H.R. REP. NO. 104-469(I), at 108 (explaining that "Congress has the task to set legal immigration policy that serves the national interest").

4. *See* 8 U.S.C. § 1103(a)(1) (providing that in connection with the administration and enforcement of the INA, the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling"). The Attorney General, in turn, has delegated interpretational authority to the Board of Immigration Appeals (BIA). *See* 8 C.F.R. § 1003.1 (2006) (creating the BIA and providing that Board members shall "act as the Attorney General's delegates in cases that come before them"). For purposes of this Article, no distinction is drawn between the interpretations of the Attorney General and the BIA as his delegate.

5. *See infra* Part I.A.

6. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 568 (1990) (citing the immigration rule of lenity as a tool developed by the Supreme Court "to offset the disadvantaged position of aliens in constitutional immigration law"); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 522 (2003) ("The Court's use of lenity may . . . stem from its recognition that noncitizens

aliens a modicum of protection against the harsh consequences of deportation,[7] by giving them the benefit of the doubt where Congress has been less than clear in its legislative enactments.[8]

While the rule of lenity calls for "favorable" statutory interpretations of ambiguous immigration statutes, the Supreme Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council* more broadly demands that courts defer to "reasonable" agency interpretations.[9] Specifically, under *Chevron*'s familiar two-step statutory analysis, a reviewing court must first determine, through use of "traditional tools of statutory construction,"[10] whether Congress has directly spoken to the precise question at issue. If it has, that is the end of the matter. But if the statute is silent or ambiguous on the issue, the court must proceed under *Chevron*'s second step to determine whether the agency's interpretation is reasonable. If the interpretation is reasonable, the court may not substitute its own judgment for that of the agency.[11]

The *Chevron* doctrine rests on the presumption that when Congress leaves statutory gaps or ambiguity, it intends to vest primary interpretational authority in the agencies that are best equipped to make difficult policy choices in the laws they administer.[12] However, a conflict exists between *Chevron* and the rule of lenity in immigration cases where the Attorney General's statutory interpretation inures to the alien's detriment, but where the interpretation is otherwise reasonable in light of competing governmental interests.[13] The Supreme Court has yet to reconcile this tension in the law, and the decisions from the circuit courts are disparate.[14]

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typically have no political voice or access to political power and its desire to counteract possible prejudice against them and ensure that the political process treats them fairly."). For similar rules of lenity that apply to criminal statutes, see Bell v. United States, 349 U.S. 81, 83 (1955), and for statutes that implicate the relevant rights of Native Americans, see Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (citations omitted) (interpreting a similar rule of lenity that applies to cases involving Native Americans).

7. *See* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (noting that "[t]o deport [an alien] . . . may result . . . in loss of both property and life; or of all that makes life worth living") (citation omitted).

8. *See infra* Part II.

9. 467 U.S. 837, 843-44 (1984).

10. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, ch. 7 (3d ed. 2002) (providing a general discussion of the different types and uses of canons.) Canons of statutory construction are principles used by courts to glean Congress's intent and to promote uniform decision making in construing statutes. *See id.*

11. *Chevron*, 467 U.S. at 842-43.

12. *See infra* Part III.

13. *See infra* Part IV.

14. *See, e.g.*, Ali v. Ashcroft, 395 F.3d 722, 728-29 (7th Cir. 2005) (ignoring the rule of lenity); Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1028-29 (9th Cir. 2005) (applying the rule of lenity after determining that the Attorney General's interpretation of an ambiguous statute was not reasonable); Okeke v. Gonzales, 407 F.3d 585, 593-97 (3d Cir. 2005)

Some commentators have suggested that the rule of lenity should be considered at *Chevron*'s first step, on the theory that the rule is a traditional tool of statutory construction by which judges may glean Congress's intent.[15] Other commentators have pressed for the rule's application at *Chevron*'s second step in determining whether the Attorney General's interpretation is reasonable.[16] Both of these suggested approaches are fundamentally flawed. Models that attempt to reconcile lenity within *Chevron*'s framework unduly limit—or worse, trump—a congressional delegation of authority to the Attorney General.[17] In doing so, these models distort the relative strengths and purposes of both the lenity and *Chevron* doctrines.

This Article argues that the rule of lenity should be used as a tool to resolve lingering statutory ambiguities only after *Chevron*'s second step, that is, only if the reviewing court deems the Attorney General's interpretation unreasonable. This approach is preferable because it affords the Attorney General an unencumbered first bite at balancing the competing policies undergirding the immigration law when the statute at issue is ambiguous. This approach also best comports with the judicial deference that judges traditionally afford to the political branches in immigration matters.[18] To say that the rule of lenity has no place in *Chevron*'s two-step framework is neither an abdication of the rule itself nor the venerable policy interests it aims to advance. It simply puts those

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(applying the rule of lenity at *Chevron*'s second step in determining whether the Attorney General's interpretation was reasonable); Padash v. INS, 358 F.3d 1161, 1173 (9th Cir. 2004) (applying the rule of lenity at *Chevron*'s first step in determining Congress's intent); *see also infra* notes 130-41 and accompanying text.

15. *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 (2004) ("To the extent that the rule of lenity . . . is applicable at step one of the *Chevron* analysis, it would tend to serve as a tie breaker resolving any otherwise irresolvable ambiguities in favor of a construction contrary to that reached by the [BIA]."); David A. Luigs, Note, *The Single-Scheme Exception to Criminal Deportations and the Case for* Chevron*'s Step Two*, 93 MICH. L. REV. 1105, 1131 n.110 (1995) (arguing that the rule of lenity should be considered at *Chevron*'s first step); *see also In re* Small, 23 I. & N. Dec. 448, 454 (Bd. of Immigration Appeals 2002) (Rosenberg, dissenting) (arguing that the rule of lenity "applies even to interpretations of the plain language of the statute under the first prong of the test prescribed in *Chevron*").

16. *See, e.g.*, Slocum, *supra* note 6, at 576-82 (arguing that the immigration rule of lenity should be applied at step two in varying degrees, depending on the nature of the statute at issue); Jeffrey A. Bekiares, Note, *In Country, On Parole, Out of Luck—Regulating Away Alien Eligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy*, 58 FLA. L. REV. 713, 725 (2006) (stating that courts in a step two analysis may apply the immigration rule of lenity to determine if the agency action was unreasonable, but recognizing that "[s]uch an analysis . . . would not be without . . . controversy").

17. *See infra* Part V.

18. *See infra* Part V; *see also* Guendelsberger, *supra* note 15, at 618 (asserting that "[e]ven before *Chevron*, the Court had required a deferential reasonable person standard for review of [agency interpretation] of the immigration law").

policy considerations in their proper place, in relation to the institutional policies that *Chevron* advances in the immigration context.

Part I of this Article begins with a discussion of the political branches' plenary authority over immigration law and concludes with a general discussion of the civil nature of immigration proceedings. Part II discusses the genesis and application of the immigration rule of lenity. Part III provides a summary of *Chevron*, its practical benefits to the administrative state, and the source of its deferential dictate. Part IV highlights the conflict between the immigration rule of lenity and *Chevron*, and outlines how the courts have side-stepped or dealt with the conflict. Finally, Part V explains why the rule of lenity has no place in *Chevron*'s two-step framework, and resolves the conflict in favor of applying the rule of lenity only where the court deems the Attorney General's interpretation unreasonable.

I. IMMIGRATION LAW IN CONTEXT

A. The Political Branches' Plenary Authority Over Immigration

"[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" alienage and immigration.[19] The source of this authority is amorphous. It is sometimes said to derive directly from the Naturalization Clause in the Constitution[20] and other times from more general principles of sovereignty, international law, and national security.[21]

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19. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 340 (1909) (further describing Congress's power over the "right to bring aliens into the United States" as "absolute").

20. *See* U.S. CONST. art. I, § 8, cl. 4 ("Congress shall have the Power . . . [t]o establish an uniform Rule of Naturalization."); *see also* INS v. Chadha, 462 U.S. 919, 940 (1983) (stating that "[t]he plenary authority of Congress over aliens under [the Naturalization Clause] is not open to question"); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (asserting that the immigration power "is vested in the national government, to which the constitution has committed the entire control of international relations"); Ping v. United States, 130 U.S. 581, 609 (1889) (describing the power over immigration as "delegated by the Constitution"). *But cf.* Jean v. Nelson, 711 F.2d 1455, 1465 (11th Cir. 1983) *aff'd*, 472 U.S. 846 (1985) (noting that "the Constitution fails to delegate specifically the power over immigration").

21. *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 534 (1952) ("So long . . . as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders.") (footnote omitted); Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only . . . upon such conditions as it may see fit to prescribe."); *Ping*, 130 U.S. at 604 ("Any restriction upon [the power to exclude aliens], deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.") (quoting Schooner Exch. v. M'Fadden, 11 U.S. (7 Cranch) 116, 136 (1812));

Whatever its source,[22] congressional authority to prescribe substantive immigration law is only as secure as the Judiciary will allow.[23] Under the banner of the "plenary doctrine," however, history has proven the Supreme Court to be a pillar of deference, standing uncharacteristically idle even in the face of legislation that "would be unacceptable if applied to citizens."[24]

The plenary doctrine is an institutional recognition that, as between the Judiciary and Congress, it is Congress's role to set immigration law and policy.[25] As the Supreme Court explained, "nothing in the structure of our [g]overnment or the text of our Constitution would warrant judicial review by standards which would require us to equate our political judgment with that of Congress."[26] That "the formulation of [admission and expulsion]

Jean, 727 F.2d at 964 ("For centuries, it has been an accepted maxim of international law that the power to control the admission of foreigners is an inherent attribute of national sovereignty."); *see also* Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340 (2002) (arguing that "[t]he inherent international element of immigration decisionmaking perhaps best explains the origins of the plenary power doctrine").

22. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CAL. L. REV. 373, 378-90 (2004) (analyzing in detail the origins, purpose and scope of congressional plenary power).

23. With regards to Congress's plenary authority, a distinction has been drawn between substantive immigration law, over which Congress has the last and only say, and the non-substantive application of such laws, which is subject to important constitutional guarantees. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (acknowledging the government's plenary power to expel immigrants, but explaining that "Congress must choose a 'constitutionally permissible means of implementing'" its immigration power) (quoting *Chadha*, 462 U.S. at 941); *Chadha*, 462 U.S. at 940-41 (striking down legislative veto and noting that "[t]he plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power"); Detroit Free Press v. Ashcroft, 303 F.3d 681, 686-87 (6th Cir. 2003) ("Although acknowledging the political branches' plenary power over all substantive immigration laws and non-substantive immigration laws that do not implicate constitutional rights, the Supreme Court has repeatedly allowed for meaningful judicial review of non-substantive immigration laws where constitutional rights are involved.").

24. *See* Demore v. Kim, 538 U.S. 510, 521 (2003) (explaining that in the exercise of its broad power over immigration, "Congress regularly makes rules that would be unacceptable if applied to citizens" (quoting Mathews v. Diaz, 426 U.S. 67, 79-80 (1976))); *see also* Dia v. Ashcroft, 353 F.3d 228, 243 (3d Cir. 2003) ("What is 'fair' within the context of immigration proceedings . . . need not always measure up to the requirements of fairness in other contexts, especially because aliens only have those statutory rights granted by Congress.") (internal marks and citations omitted); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (arguing that "no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system" as immigration has been); Motomura, *supra* note 6, at 547 (explaining that the plenary "doctrine has dominated immigration law since the Court adopted it almost one hundred years ago in rejecting constitutional objections to Congress' first immigration statutes").

25. *See* Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v. Albright, 1998 SUP. CT. REV. 1, 32-40 (characterizing the plenary power doctrine as a matter of "institutional deference").

26. Harisiades v. Shaughnessy, 342 U.S. 580, 590 (1952).

policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."[27]

While the law entrusts Congress with the creation of our country's immigration law in the first instance, Congress has delegated the bulk of the enforcement and administration of that law to department heads within the executive branch.[28] To the extent that such delegation has yielded administrative rules enforced by the Attorney General, the plenary doctrine has generally been recognized to attach with equal (or near equal) force and effect.[29]

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27. Galvin v. Press, 347 U.S. 522, 531 (1954).

28. Prior to 1940, the administration and enforcement of the immigration laws were assigned to the Department of Commerce and Labor. *See Dia*, 353 F.3d at 234 (discussing Congress's delegation of power to regulate immigration). In 1940, these immigration responsibilities were transferred to the Department of Justice, headed by the Attorney General, and were largely re-delegated to the Immigration and Naturalization Service (INS), which was an agency within that department. *See* Alien Registration Act of 1940, ch. 439, 54 Stat. 670, 675 (1940) (delegating congressional authority over immigration policy); *see also In re* L, 1 I. & N. Dec. 1 n.1 (Bd. of Immigration Appeals 1940). In 1983, the Attorney General established a quasi-judicial agency within the Department of Justice, called the Executive Office for Immigration Review (EOIR), to operate independently of the INS. Under EOIR's umbrella are currently more than fifty Immigration Courts and the Board of Immigration Appeals, or BIA, which is a single administrative appellate body that decides appeals from decisions of Immigration Judges. *See* 48 Fed. Reg. 8037, 8038-40 (Feb. 25, 1983) (establishing the BIA); U.S. Department of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, http://www.usdoj.gov/eoir/ocijinfo.htm (discussing the Immigration Court system) (last visited July 8, 2007). Following the September 11, 2001 terrorist attacks, Congress enacted the Homeland Security Act of 2002, which abolished the INS and transferred its administration and enforcement functions to the newly erected Department of Homeland Security (DHS). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 402-03, 116 Stat. 2135, 2177-78 (2002) (establishing DHS to replace the INS in carrying out immigration enforcement). The DHS Secretary is now charged with "[c]arrying out the immigration enforcement functions vested by statute in, or performed by, the Commissioner of Immigration and Naturalization (or any officer, employee, or component of the Immigration and Naturalization Service)." Pub. L. No. 107-296, § 402(3), 116 Stat. 2135, 2178 (2002); *see also* INA § 103(a), 8 U.S.C. § 1103(a) (2000). Despite the transfer of this authority, EOIR was left untouched within the Department of Justice, and the Attorney General retained the final authority on matters of law. *See* INA § 103(a), 8 U.S.C. § 1103(a) (discussing the balance of power over immigration policy).

29. *See* Alvarado v. Gonzales, 449 F.3d 915, 923 (9th Cir. 2006) ("Congress delegated plenary authority to the Attorney General to enforce the INA." (citing 8 U.S.C. § 1103(a) (2000))); Hall v. INS, 253 F. Supp. 2d 244, 248 (D.R.I. 2003) ("The plenary authority of Congress may be delegated in part to the Executive branch." (citing U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950))); Cox, *supra* note 22, at 381 (recognizing that "[a]lthough it may be possible to interpret plenary power doctrine as operating differently in the context of congressional and executive action, courts typically treat the two contexts indistinguishably") (citation omitted); Schuck, *supra* note 24, at 15 (observing that "the Court has not hesitated to extend this 'special judicial deference to congressional policy choices in the immigration context, to administrative officials as well as to Congress"); Spiro, *supra* note 21, at 339 ("Since the advent of federal regulation of immigration in the late nineteenth century, the courts have persistently abjured any significant role in policing political branch conduct in the area.") (citation omitted). *But cf.* Motomura, *supra* note 6, at 580-83 (suggesting that plenary power doctrine may be understood as operating differently

As the Supreme Court has explained, "[a]ppropriate deference must be accorded" to "the [immigration] agency primarily charged by Congress to implement the public policy underlying these laws."[30] That is largely because "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[31] These matters, the Court explained, "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."[32]

Several commentators have criticized the plenary doctrine and have called for its end.[33] The margins of the plenary doctrine may have narrowed in recent years, at least in cases where non-substantive immigration law appears to impinge constitutional norms.[34] The Supreme Court's decision in *Zadvydas v. Davis* provides one such example.[35] In *Zadvydas*, the Court declined to apply the plenary doctrine when construing a non-substantive immigration statute that contained no express time limit for executive detention of certain classes of aliens pending their removal.[36]

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in the context of congressional and executive action, but recognizing that the doctrine supports broad Congressional and executive control over immigration decisions).

30. INS v. Miranda, 459 U.S. 14, 19 (1982).

31. *Harisiades*, 342 U.S. at 588-89.

32. *Id.*; *accord* Reno v. Flores, 507 U.S. 292, 305 (1993) (emphasizing "the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); Sad v. INS, 246 F.3d 811, 814 (6th Cir. 2001) (stating that "immigration matters [are] particularly appropriate for judicial deference because executive 'officials exercise especially sensitive political functions that implicate questions of foreign relations'" (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999))).

33. *See, e.g.*, GERALD E. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); Gabriel J. Chin, *Is there a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange But Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000); Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Motomura, *supra* note 6, at 580-93; Spiro, *supra* note 21 (opining that the Supreme Court has indicated abandonment of plenary power). *But see* Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 384 (2002) (describing the continued vitality of the plenary doctrine in modern immigration law); Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to* Is there a Plenary Power Doctrine?, 14 GEO. IMMIGR. L.J. 289 (2000) (countering Professor Chin's plenary doctrine analysis).

34. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (citing INS v. Chadha, 462 U.S. 919, 941-42 (1983)) (stating that the plenary power doctrine is "subject to important constitutional limitations").

35. *See id.*

36. *Id.* at 688-89. The detention statute at issue in *Zadvydas* provides in pertinent part: "An alien ordered removed who is inadmissible . . . , removable or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the [general ninety-day] removal period . . . ." INA § 241(a)(6), 8 U.S.C. §1231(a)(6) (2000). The Court, in rejecting any application of the

The Court found that the Attorney General's interpretation, which could have resulted in indefinite executive detention of aliens, raised a "serious constitutional problem."[37] In order to side-step this constitutional issue, the Court read into the statute an implicit "reasonable time" limitation.[38]

While *Zadvydas* illustrates the limits of the plenary doctrine when serious constitutional issues arise, the Court has shown no signs of retreating from its deferential posture when reviewing immigration laws that do not implicate constitutional norms.[39] In the non-constitutional context—which is the only context in which the *Chevron* versus lenity issue arises[40]—the plenary doctrine continues to apply with full force and effect.[41]

B. Immigration Proceedings Are Civil in Nature

Aliens have "ambiguous status" in this country.[42] In several respects they stand on equal footing with citizens, but in other respects they do not enjoy "legal parity."[43] In unwavering terms, the Supreme Court explained some time ago that for an alien "to protract ambiguous status within the country is not his [or her] right but is a matter of permission and

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plenary doctrine, explained that "Executive and Legislative Branch decisionmaking . . . is subject to constitutional limits." *Zadvydas*, 533 U.S. at 679.

37. *Zadvydas*, 533 U.S. at 690 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem.").

38. *Id.* at 689 ("In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention."). *See id.* at 701-02 (holding further that the application of the "reasonable time" limitation is subject to federal court review, and that if removal of the alien was foreseeable, a six-month detention to accomplish that purpose would be presumptively reasonable); *id.* at 701 (declaring that after six months, and if the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing in order to warrant further detention).

39. *See* Demore v. Kim, 538 U.S. 510, 531 (2003) (using plenary doctrine reasoning in upholding immigration statute); INS v. Aguirre-Aguirre, 526 U.S. 415, 423-26 (1999) (using plenary doctrine reasoning in demanding deference to the BIA's statutory interpretation); Detroit Free Press v. Ashcroft, 303 F.3d 681, 693 (6th Cir. 2003) ("Undoubtedly, . . . where a constitutional right is not implicated, the political branches retain unfettered discretion to determine both substantive and non-substantive immigration policy and laws."); *see also* Aleinikoff, *supra* note 33, at 384 (arguing that "the Court has not jettisoned the plenary power doctrine with its decision in *Zadvydas*").

40. As explained in Parts III and IV, no conflict exists between the rule of lenity and *Chevron* when constitutional problems arise because *Chevron* is displaced in this context, leaving the rule of lenity unchallenged.

41. *See* Aleinikoff, *supra* note 33, at 384 (explaining how the plenary power doctrine remains viable).

42. Harisiades v. Shaughnessy, 342 U.S. 580, 586-87 (1952).

43. *Id.*

tolerance."[44] Harsh words, but the message holds true today: Aliens are guests here, and if they abuse or overstay this country's hospitality,[45] they may be asked—and then forced—to leave.[46]

Despite the often significant consequences for the alien wrought by deportation,[47] deportation is not a "punishment."[48] Indeed, since the question first arose, the Supreme Court has repeatedly explained:

> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend.[49]

Categorizing deportation as something other than punishment goes beyond semantics; it impacts the rights of aliens facing removal.[50] Most notably, because immigration proceedings are civil in nature, many

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44. *Id.*

45. *See* Fiallo v. Bell, 430 U.S. 787, 796 (1977) (explaining that "the conditions of entry for every alien, . . . the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of Congress and wholly outside the power of this Court to control" (quoting *Harisiades*, 342 U.S. at 596-97 (Frankfurter, J., concurring))); Peters v. Ashcroft, 383 F.3d 302, 307 (5th Cir. 2004) ("Congress has clearly spoken against aliens who abuse the hospitality of the United States by committing drug-related crimes." (quoting Coronado-Durazo v. INS, 123 F.3d 1322, 1326 (9th Cir. 1997))).

46. Illegal aliens generally fall into one of the following classes: (1) those that are detained at a port of entry or paroled into the country; (2) those that entered the country without authorization or inspection by an immigration official; or (3) those that entered the country legally, but are no longer entitled to remain, either because their time to do so has expired, or because they have committed acts (usually criminal acts) which render them deportable. *See generally* INA §§ 212(a), 237, 8 U.S.C. §§ 1182(a), 1227 (2000) (providing grounds of inadmissibility and grounds of deportation).

47. *See* Woodby v. INS, 385 U.S. 276, 285 (1966) ("This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification.").

48. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (describing how the Court did not consider deportation to be a form of punishment).

49. *Id.*; *see* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (stating that deportation is not "a punishment; it is simply a refusal by the Government to harbor persons whom it does not want"); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) (stating that the purpose of enforcing the immigration law is not to "punish past transgressions but rather to put an end to a continuing violation of the immigration laws").

50. *Cf.* Schuck, *supra* note 24, at 25. Professor Schuck noted:

> This distinction [between punishment or not] possesses little logical power: at least concerning aliens who have established a foothold in American society, it is a legal fiction with nothing, other than considerations of cost and perhaps administrative convenience, to recommend it. Nevertheless, it has proved to possess the staying power that [Justice] Holmes knew to be far more important in law than logic.

Id.

constitutional protections afforded in criminal proceedings are not triggered in the immigration context.[51] For example, aliens have no Sixth Amendment right to an attorney;[52] are not immune from retroactive application of statutes under the Constitution's Ex Post Facto Clause;[53] and cannot benefit from the criminal evidentiary exclusion rule.[54]

Moreover, the criminal rule of lenity does not apply to immigration proceedings. The criminal rule of lenity is a well-entrenched substantive canon of construction,[55] under which lingering ambiguities in criminal

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51. *See Lopez-Mendoza*, 468 U.S. at 1038 ("Consistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing.").

52. *See* Uspango v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002) (holding that "there is no Sixth Amendment right to counsel in deportation hearings"); Romero v. INS, 399 F.3d 109, 112 (2d Cir. 2005). While aliens have no Sixth Amendment right to counsel, Congress has afforded aliens a statutory right to counsel at an alien's own expense. *See* INA § 292, 8 U.S.C. § 1362 (2000); *see also* 8 C.F.R. § 1240.10(a)(1) (2006). In light of this statutory entitlement, courts have generally held that if an alien receives ineffective assistance of counsel, it could upset the fundamental fairness of the hearing in a way that violates the alien's Fifth Amendment right to due process. *See, e.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993) ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); Batanic v. INS, 12 F.3d 662, 667 (7th Cir. 1993) (explaining that the statutory right to counsel is "an integral part of the procedural due process to which the alien is entitled"); *see also* United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) (announcing that "to prevail on a claim of ineffective assistance of counsel, [an alien] 'must show that his counsel's performance was so ineffective as to have impinged upon the fundamental fairness of the hearing in violation of the [F]ifth [A]mendment [D]ue [P]rocess [C]lause'") (quoting Saleh v. U.S. Dep't of Justice, 962 F.2d 234, 241 (2d Cir. 1992)).

53. U.S. CONST. art. I, § 10, cl. 1 ("No state shall . . . pass any . . . *ex post facto* law."). The ex post facto clause prohibits the government from applying laws that "'retroactively alter the definition of crimes or increase the punishment for criminal acts.'" Cal. Dep't of Corrs. v. Morales, 514 U.S. 499, 504 (1995) (quoting Collins v. Youngblood, 497 U.S. 37, 41 (1990)). Since the question first arose, the Supreme Court has held that the ex post facto clause does not apply to immigration proceedings on the ground that such proceedings are civil rather than criminal in nature. *See Bugajewitz*, 228 U.S. at 591; Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952); Galvin v. Press, 347 U.S. 522, 531 (1954). *But cf.* Scheidemann v. INS, 83 F.3d 1517, 1526-27 (3d Cir. 1996) (Sarokin, J., concurring) (imploring the Supreme Court to revisit its precedent on this issue).

54. *See Lopez-Mendoza*, 468 U.S. at 1040-50 (declining to apply the criminal exclusionary rule in immigration proceedings). In *Lopez-Mendoza*, the Supreme Court held that two aliens were deportable as charged, even if—as the aliens had claimed—their arrests by INS officials were unlawful. *Id.* The Court explained:

> Applying the exclusionary rule in [immigration] proceedings that are intended not to punish past transgressions but to prevent their continuance or renewal would require the courts to close their eyes to ongoing violations of the law. This Court has never before accepted costs of this character in applying the exclusionary rule . . . . His release would clearly frustrate the express public policy against an alien's unregistered presence in this country. Even the objective of deterring Fourth Amendment violations should not require such a result. The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.

Id. at 1046-47.

55. "Substantive" or "normative" canons are those that reflect policy judgments or normative values that when applied generally dictate a particular outcome. *See* ESKRIDGE,

statutes must be construed in favor of criminal defendants.[56] The rule—which presumes that Congress does not intend to impose criminal liability beyond that which the statute explicitly provides[57]—advances the constitutional protections of fair notice, non-retroactivity of criminal statutes, and separation of powers.[58] The criminal rule of lenity is generally

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supra note 10, at 634 (positing that substantive canons are "essentially presumptions about statutory meaning based upon substantive principles or policies drawn from the common law, other statutes, or the Constitution"); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596 (1992) (noting that substantive canons "represent value choices by the Court").

56. *See, e.g.*, United States v. Bass, 404 U.S. 336, 348 (1971) (stating that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant"); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court 1993 Term-Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 104 (1994) (describing the rule of lenity as the "rule against applying punitive sanctions if there is ambiguity as to underlying criminal liability or criminal penalty"). For a general discussion of the criminal rule of lenity, see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345; Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004).

57. *See* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 (1952).

> [W]hen [a] choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Id.; Bell v. United States, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."); *see also* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 8 (2006) ("The rule of lenity can be also formulated as a presumption about congressional intent: a court will presume that Congress intended the narrower interpretation unless it clearly specifies otherwise.").

58. In *United States v. Bass*, Justice Marshall explained:

> [T]wo policies . . . have long been part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should. Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

404 U.S. at 347-48 (internal quotations and citations omitted); *accord* United States v. Lanier, 520 U.S. 259, 266 (1997) (discussing the three manifestations associated with the fair warning requirement: the vagueness doctrine, the rule of lenity, and due process); *see also* Dunn v. United States, 442 U.S. 100, 112 (1979) (stating that lenity "is rooted in fundamental principles of due process which mandate that no individual be forced to speculate . . . whether his conduct is prohibited"); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 332 (2000) ("The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes. While it is not itself a constitutional mandate, it is rooted in a constitutional principle . . . .").

regarded as a "clear statement rule." This demands a favorable statutory interpretation for a criminal defendant unless Congress has clearly and unambiguously stated otherwise.[59]

II. THE IMMIGRATION RULE OF LENITY

A similar rule of lenity exists in the immigration context. However, because the rule is not constitutionally inspired and competes with a long tradition of judicial deference to the political branches of government, the rule of lenity applies with less muscle in immigration cases.[60]

The genesis of the immigration rule of lenity traces to the Supreme Court's decision in *Fong Haw Tan v. Phelan*.[61] The issue in *Phelan* was whether an alien, convicted of two separate counts of murder in the same criminal proceeding, was deportable under the immigration law as an alien "sentenced more than once" for a crime of moral turpitude.[62] The Court held that the alien's convictions did not fall within the ambit of the deportation statute.[63] Relying on excerpts from the relevant legislative history, the Court held that Congress designed the statute to target repeat offenders—aliens who commit a crime after an earlier conviction—not aliens convicted of two counts in the same trial.[64] According to the Court, any doubt about the statute's scope should be construed in the alien's favor "because deportation is a drastic measure and at times the equivalent of banishment or exile."[65] The Court further 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.[66]

Thus, the Court intended the immigration rule of lenity to provide aliens some protection against the harsh consequences of deportation by providing them the benefit of the doubt when their immigration status turns

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59. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 413-14 (1991) (describing the rule of lenity as a "clear statement rule"); Eskridge & Frickey, *supra* note 55, at 595 n.4 (describing "clear statement rules" as those that "require a 'clear statement' on the face of the statute to rebut a policy presumption the Court has created").

60. *See supra* Part I.A; *see also infra* notes 80-84 and accompanying text.

61. 333 U.S. 6, 9-10 (1948) (holding that in deportation cases, courts should apply the narrowest reading of a statute to protect the freedom of aliens).

62. *See id.* at 7-8 (interpreting § 19(a) of the Immigration Act of 1917, to determine the meaning of the statutory phrase "who is sentenced more than once").

63. *See id.* at 9-10 (reversing the decision of the lower courts).

64. *See id.* (quoting Congressman Sabath, Congressman Burnett, and the Senate Committee Report).

65. *Id.* at 10.

66. *Id.*

on the interpretation of ambiguous statutes.[67] Indeed, in such cases, the rule of lenity requires the "narrowest" of meanings that may reasonably be extracted from the statutory language at issue.[68]

Since the *Phelan* decision, the Supreme Court has repeatedly paid homage to the principle that courts should construe ambiguous immigration statutes favorably for aliens.[69] The circuit courts, for their part, have followed suit.[70] In practice, however, the rule of lenity is seldom, if ever, dispositive on its own. Rather, the rule often serves as a court's alternative

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67. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (stating that "[d]eportation is always a harsh measure"); Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) ("[D]eportation is a drastic sanction, one which can destroy lives and disrupt families . . . ."); Barber v. Gonzales, 347 U.S. 637, 642 (1954) ("Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile' . . . ." (quoting *Phelan*, 333 U.S. at 10)); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."). Although the rule of lenity, as originally fashioned, was intended to apply to statutory provisions that render aliens deportable, see *Phelan*, 333 U.S. at 9-10, it has since been applied to a wide variety of immigration provisions, including those that provide discretionary relief from deportation. *See, e.g.*, Rosario v. INS, 962 F.2d 220, 225 (2d Cir. 1992) (applying the rule of lenity to interpret a statute governing the suspension of deportation); Lok v. INS, 548 F.2d 37, 39 (2d Cir. 1977) (stating that recognition of the immigration rule of lenity was "especially pertinent" in a case involving relief from deportation); *see also* David A. Martin, *Major Issues in Immigration Law*, 1987 WL 123658, at *9 n.73 (F.J.C.) (noting that courts sometimes apply the rule of lenity in "questionable settings," such as to benefit an alien who had been in the country for only a few days).

68. *See Phelan*, 333 U.S. at 10 (explaining that the courts should err on the side of the alien because deportation is a severe penalty for specific types of misconduct); *see also* Jobson v. Ashcroft, 326 F.3d 367, 376 (2d Cir. 2003) (stating that the immigration rule of lenity requires the narrowest meaning that may be adopted); 6 CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 71.01[4][b], 71-16 (MB rev. ed. 2006) (clarifying that under rule of lenity deportation provisions "must be limited to the narrowest compass reasonably extracted from their language").

69. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 320 (2001) (analyzing the rule of lenity alongside the general "presumption against retroactive application of ambiguous statutory provisions" to determine that Congress had not fully considered the costs and benefits of applying a statute to pre-enactment convictions); *Cardoza-Fonseca*, 480 U.S. at 449 (noting the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); INS v. Errico, 385 U.S. 214, 225 (1966) (weighing the humanitarian values of keeping families together with the statutory language at issue to determine that the statute should be read in favor of the alien); Costello v. INS, 376 U.S. 120, 128-29 (1964) (determining that under the § 241(a)(4) of the INA, an alien who committed crimes while a naturalized citizen could not be deported after being denaturalized); Bonetti v. Rogers, 356 U.S. 691, 699 (1958) (describing the principle as the "rule of lenity").

70. *See, e.g.*, Okeke v. Gonzales, 407 F.3d 585, 596-97 (3d Cir. 2005); Padash v. INS, 358 F.3d 1161, 1173 (9th Cir. 2004); De Osorio v. INS, 10 F.3d 1034, 1043 (4th Cir. 1993); *Rosario*, 962 F.2d at 225 (all applying rule of lenity in reaching a favorable statutory interpretation for the alien); *see also* Castellano-Chacon v. INS, 341 F.3d 533, 543 (6th Cir. 2003) (acknowledging the presumption of favoring an alien when a statutory clause is ambiguous, but concluding that the clause in question was not ambiguous); *infra* notes 130-41 and accompanying text.

rationale after it has determined the outcome.[71] And in cases where the rule of lenity actually plays a role in the disposition of a case, lenity is generally considered as merely one factor among others.[72]

Like the criminal rule of lenity, its immigration counterpart is a doctrine of last resort that comes into operation only after other interpretive aids fail to yield sufficient insight into Congress's intent.[73] Thus, before invoking the rule of lenity to construe either criminal or immigration statutes, courts will first look to the statute's language and structure, its legislative history, and its motivating policies.[74] Unlike the criminal rule of lenity, however,

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71. *See, e.g.*, *Errico*, 385 U.S. at 225 ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); *Costello*, 376 U.S. at 128 (stating that even if the statutory interpretation issue before the Court was in doubt, it "would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the [alien]"); Ki Se Lee v. Ashcroft, 368 F.3d 218, 224-25 (3d Cir. 2004) ("In the end, after considering various tools of statutory construction, we believe that Congress' intent is clear . . . . To the extent that any ambiguity lingers, we note that there is a longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.") (internal marks and citation omitted); Francis v. Reno, 269 F.3d 162, 168-71 (3d Cir. 2001) (determining that classification of crimes should be determined by state law with respect to the Immigration and Nationality Act as a means of reducing redundancy and noting that this approach is consistent with the rule of lenity); *see also Cardoza-Fonseca*, 480 U.S. at 449 ("We find these ordinary canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.").

72. *See, e.g.*, *St. Cyr*, 533 U.S. at 320 (indicating that "[t]he presumption against retroactive application of ambiguous statutory provisions, buttressed by the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," foreclosed the retroactive application of the statute at issue) (internal quotation marks omitted); *Phelan*, 333 U.S. at 7, 9-10 (finding a "trace" of congressional purpose in the statute's legislative history before declaring that it would resolve the doubt in the alien's favor); *Okeke*, 407 F.3d at 596 ("A final reason [the BIA's] interpretation of [the statute at issue] is impermissible is that, because of the serious consequences of deportation, rules of statutory interpretation relating to immigration statutes require that ambiguities be construed in the favor of the alien."); *Padash*, 358 F.3d at 1172-73 (relying on rule of lenity in conjunction with several factors, including legislative history and other canons of construction); *see also* Slocum, *supra* note 6, at 572 n.358 ("[I]n many of the decisions which cite to the immigration rule of lenity, the canon is not used in a dispositive manner, but, rather, as further and perhaps superfluous justification for rejecting the government's interpretation."); *cf.* Jeffries, *supra* note 56, at 198-99 (stating that the criminal rule of lenity "survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation").

73. *Compare* Callanan v. United States, 364 U.S. 587, 596 (1961) ("The [criminal] rule [of lenity] comes into operation at the end of the process of construing what Congress has expressed . . . ."), *with* Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3d Cir. 2002) (acknowledging that immigration rule of lenity "may be applied as a canon of last resort").

74. *Compare* Lara-Ruiz v. INS, 241 F.3d 934, 942 (7th Cir. 2001) (declaring that the immigration rule of lenity "applies only when 'a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute'" (quoting Moskal v. United States, 498 U.S. 103, 108 (1990))) (internal quotations and citation omitted), *with* Reno v. Koray, 515 U.S. 50, 65 (1995) ("The [criminal] rule of lenity applies only if, 'after seizing everything from which aid can be derived,' . . . we can make 'no more than a guess as to what Congress intended.'" (quoting Smith v. United States, 508 U.S. 223, 239 (1993) (internal quotations and citation omitted) and Ladner v. United States, 358 U.S. 169, 178 (1958))).

the immigration rule is not rooted in constitutional protections.[75] Rather, it is "best viewed as a judicial creation that is based on important concerns and public values, but not on constitutional rights."[76] This distinction is important because it impacts whether, and to what extent, the immigration rule of lenity can displace, or be displaced by, other judicially created doctrines, including—as pertinent here—the *Chevron* doctrine.[77]

III. THE *CHEVRON* DOCTRINE

A. Chevron*'s Two-Step Framework*

Chevron is a landmark decision that, more than twenty years later, continues to "dominate[] modern administrative law."[78] In *Chevron*, the Supreme Court articulated a two-step framework for "review[ing] an agency's construction of the statute which it administers."[79] The Court stated:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[80]

The Court continued:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress . . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[81]

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75. *See supra* notes 54-58 and accompanying text (discussing the constitutional protections advanced by the criminal rule of lenity).

76. Slocum, *supra* note 6, at 528.

77. For a general discussion of how the criminal rule of lenity may operate within *Chevron*'s framework, see Greenfield, *supra* note 57, at 51-61.

78. Sunstein, *supra* note 58, at 329.

79. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

80. *Id.*

81. *Id.* at 843-44 (internal marks and citation omitted).

Thus, *Chevron* demands that "unless Congress has decided the 'precise question at issue,' agencies are authorized to interpret ambiguous terms as they see fit, so long as the interpretation is reasonable."[82] Prior to *Chevron*, courts were generally obliged to defer to agency interpretations only when Congress *expressly* delegated authority to the agency "to define a statutory term or prescribe a method of executing a statutory provision."[83] As Professors Merrill and Hickman explained:

> *Chevron* expanded the sphere of mandatory deference through one simple shift in doctrine: It posited that courts have a duty to defer to reasonable agency interpretations not only when Congress expressly delegates interpretative authority to an agency, but also when Congress is silent or leaves ambiguity in a statute that an agency is charged with administering.[84]

Chevron's gap-filling framework left many gaps of its own. For example, *Chevron* noted that a court may use "traditional" canons of statutory interpretation to discern whether Congress has directly spoken to the precise question at issue.[85] But canons come in many flavors,[86] and whether a particular canon is traditional can be a matter of much debate.[87] While the use of canons in step one should be limited to determining whether Congress has unambiguously expressed its intent,[88] the "wide range of potentially applicable rules of statutory construction afford the courts considerable leeway in determining whether a plain meaning may be uncovered in any particular provision."[89] Thus, "[t]he outcome using the 'traditional tools of statutory construction' . . . depends largely on who gets

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82. Sunstein, *supra* note 58, at 329.

83. Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 833 (2001) (quoting Rowan Cos., Inc. v. United States, 452 U.S. 247, 253 (1981)) [hereinafter Chevron*'s Domain*]; *see* Herweg v. Ray, 455 U.S. 265, 274-75 (1982) (discussing a statutory clause that expressly delegated authority to the Secretary of Health and Human Services); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981) (declaring that when Congress delegates authority explicitly to an agency, any interpretation of the statute by the agency is entitled to "legislative effect"); *see also* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972-75 (1992) (describing the pre-*Chevron* practice of courts) [hereinafter *Judicial Deference to Executive Precedent*].

84. Chevron*'s Domain*, *supra* note 83, at 833. *But cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (stating that the *Chevron* doctrine should not be considered "entirely new law" as "courts have been content to accept 'reasonable' executive interpretations of law for some time").

85. *See Chevron*, 467 U.S. at 843 n.9.

86. *See* ESKRIDGE, *supra* note 10, at 669-816 (discussing the types and uses of common canons).

87. *See* Slocum, *supra* note 6, at 540 ("While most would agree that at least some canons of statutory construction are 'traditional tools of statutory construction,' the question of which canons are applicable and how they should be incorporated into the *Chevron* framework, if at all, is a subject of much debate and confusion.") (citation omitted).

88. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 446-48 (1987) (explaining that it is up to the courts to determine the intent of Congress).

89. Guendelsberger, *supra* note 15, at 623.

to choose the tools."[90] Whatever canons apply, however, their aim must be to shed light on Congress's actual—or at least presumed—intent.[91] After all, that is the ultimate thrust of the step one analysis.[92]

The *Chevron* decision provides even less guidance on whether and how courts should use canons of construction in step two. The general approach of the courts seems to rely on many of the same interpretive aids used in step one, with perhaps the addition of others, to determine whether an agency's interpretation is reasonable.[93] As in step one, the use of canons in step two provides courts with considerable discretion as to which interpretive aids to employ. The difference is that unlike the use of canons in step one to discern whether Congress has directly spoken to the issue, the use of canons in step two is with an eye towards measuring the reasonableness of the agency's interpretation.[94]

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90. Mark Burge, Note, *Regulatory Reform and the* Chevron *Doctrine: Can Congress Force Better Decisionmaking by Courts and Agencies?*, 75 TEX. L. REV. 1085, 1096 (1997).

91. *See* ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 23 (1997) (describing canons as "judicially crafted maxims for determining the meaning of statutes"); Andrew S. Gold, *Absurd Results, Scrivener's Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 83 (2006) (describing certain canons as "presumptions which courts apply based upon their perceived correlation to legislative intent"); Robert M. Zinman, *Precision in Statutory Drafting: The* Qualitech *Quagmire and the Sad History of § 365(h) of the Bankruptcy Code*, 38 J. MARSHALL L. REV. 97, 157 (2004) ("Canons are designed to carry out a presumed intent of the legislature."); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) ("[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation . . . ."). Indeed, even the "plain language" canon of construction, which looks to the plain words of the statute, reflects only a presumption that "a legislature says in a statute what it means and means in a statute what it says." *Germain*, 503 U.S. at 253-54.

92. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

93. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 260 (1991) (Scalia, J., concurring) ("[D]eference is not abdication, and it requires [the Court] to accept only those interpretations that are reasonable in light of the principles of construction courts normally employ."); Albuquerque Indian Rights v. Lujan, 930 F.2d 49, 59 (D.C. Cir. 1991) (explaining that the use of canons in step one "is limited to an attempt to determine whether or not Congress has unambiguously expressed its intent. . . . Any further resort to the canons of construction in our review of administrative decisions would normally be limited to determining whether or not the agency interpretation is 'rational and consistent with the statute'") (citation omitted); *see also Judicial Deference to Executive Precedent*, *supra* note 83, at 977 ("[B]y 'reasonable,' the Court [in *Chevron*] seemed to mean reasonable in light of the text, history, and interpretive conventions that govern the interpretation of a statute by a court . . . .").

94. *See, e.g.*, Bell Atl. Tel. Cos. v. FCC, 131 F.3d 1044, 1049 (D.C. Cir. 1997).

> We note that step two of *Chevron* requires us to evaluate the same data that we also evaluate under *Chevron* step one, but using different criteria. Under step one we consider text, history, and purpose to determine whether these convey a plain meaning that *requires* a certain interpretation; under step two we consider text, history, and purpose to determine whether these *permit* the interpretation chosen by the agency.

Id.

B. Chevron*'s Practical Benefits*

The *Chevron* doctrine promotes our country's tripartite system of governance while effectuating the primary benefits of the administrative state.[95] For at least three reasons, "[f]illing [statutory] gaps . . . involves difficult policy choices that agencies are better equipped to make than courts."[96] First, agencies generally have better information and more expertise than Congress or the Judiciary, and are in the best position to choose among conflicting policies.[97]

Second, agencies have flexibility in creating and modifying policies.[98] Unlike courts, which are constrained by the principle of stare decisis, agencies have much more flexibility to change their rules and policies.[99] Indeed, the administrative rule at issue in *Chevron* was a departure from a pre-existing rule.[100] Moreover, while Congress is constrained by the slow grind of bicameral lawmaking, agencies can respond to changing information and conditions relatively quickly by enacting regulations or through case-by-case adjudications.[101]

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95. *See* Greenfield, *supra* note 57, at 20 (discussing justifications for *Chevron* deference).

96. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (citing *Chevron*, 467 U.S. at 865-66).

97. *See Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail.").

98. *See* Greenfield, *supra* note 57, at 20 ("Agencies can respond relatively quickly to a dynamic environment, adjusting regulations and interpretations to meet changing conditions and new information."); Laurence H. Silberman, Chevron—*The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990) ("*Chevron*'s importance is its recognition that . . . agencies . . . maintain a comparative institutional advantage over the judiciary in interpreting ambiguous legislation that the agencies are charged with applying.").

99. *See Brand X*, 545 U.S. at 981 ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework. Unexplained inconsistency is, at most, a reason for holding an interpretation to be an arbitrary and capricious change from agency practice under the Administrative Procedure Act."). *But cf.* INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (citing Watt v. Alaska, 451 U.S. 259, 273 (1981) and Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976)). For a discussion of the Court's seemingly conflicting positions on the issue of whether, and to what extent, deference may be afforded to an agency interpretation that is inconsistent with an agency's previously held view, see Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995 (2005).

100. *See Chevron*, 467 U.S. at 857-58 (discussing a recent reversal in agency policy).

101. *See* Greenfield, *supra* note 57, at 20 ("Agencies can respond relatively quickly to a dynamic environment, adjusting regulations and interpretations to meet changing conditions and new information."); *see also* Rust v. Sullivan, 500 U.S. 173, 186-87 (1991) ("An agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt its rules and policies to the demands of changing circumstances.") (internal marks and citations omitted); United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 78 (1957) (noting that it was proper for INS to consider "present-day conditions and congressional attitudes" in exercising discretion).

Third, unlike the courts, agency heads are politically accountable through the Executive.[102] Presumably, that accountability would tend to favor rules and policies that are consistent with the public's needs and desires.[103] As the Court explained in *Chevron*, "resolving the struggle between competing views of the public interest are not judicial [concerns]: 'Our Constitution vests such responsibilities in the political branches.'"[104]

C. The Source of Chevron*'s Deferential Dictate*

While institutional competence, flexibility, and accountability provide "good practical reason[s]" for deferring to an agency's views, they are, in the words of Justice Scalia, "hardly a valid theoretical justification for doing so."[105] Indeed, from its inception, legal commentators have suggested at least three candidate sources for *Chevron*'s authority: "(1) the Constitution, in the form of the doctrine of separation of powers; (2) the courts, in the form of a common-law norm of self-governance; and (3) the Congress, in the form of a presumption about congressional intent."[106] This debate is relevant insofar as it bears on *Chevron*'s flexibility or resistance in the face of competing doctrines. If *Chevron* deference is

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102. *See* Greenfield, *supra* note 57, at 20 (explaining that policy decisions are usually a crucial part of judicial interpretation but should not be used to defeat an agency interpretation because the courts lack political accountability); Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 506 (1985) (citing *Chevron* for the recognition "that policy choices should be made by the most politically accountable branch of government, and that the judiciary is the least politically accountable branch").

103. As the Fourth Circuit explained:

> [*Chevron*] insures that agencies—which are more politically accountable than federal courts—have final say on matters of policy not resolved by Congress. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Rehab. Ass'n of Va., Inc. v. Kozlowski, 42 F.3d 1444, 1471 (4th Cir. 1994) (citation omitted).

104. *Chevron*, 467 U.S. at 866 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195 (1978)).

105. Scalia, *supra* note 84, at 514. Justice Scalia has been regarded as "*Chevron*'s leading judicial champion." *See* Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2132 (2002); *see also* Greenfield, *supra* note 57, at 5-6 (describing Justice Scalia as the "Supreme Court's most energetic proponent of a broad reading of *Chevron*").

106. Chevron*'s Domain*, *supra* note 83, at 836; *cf.* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212-13 ("The *Chevron* doctrine began its life shrouded in uncertainty about its origin. *Chevron* barely bothered to justify its rule of deference, and the few brief passages on this matter pointed in disparate directions."); Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 173 (2002) ("*Chevron* is in the throes of a prolonged, difficult, and confused adolescence.").

constitutionally mandated, it would tend to be immutable. By contrast, if *Chevron* deference is merely a gesture of judicial self-governance, it would tend to be most flexible.

As it turns out, *Chevron* falls somewhere in the middle. The prevailing scholastic view, and the one most supported by Supreme Court precedent,[107] is that *Chevron* deference rests on a theory of congressional intent.[108] Thus, as the Court has explained, *Chevron* rests on a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather then the courts) to possess whatever degree of discretion the ambiguity allows."[109] And, as the Court later stated, "*Chevron* deference is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."[110]

There are at least two byproducts of the congressional-intent model of *Chevron* deference. The first is that courts must determine whether Congress's intent to delegate is present in any given case.[111] In *United States v. Mead Corp.*, the Court articulated two prerequisites to find such intent: first, it must appear that "Congress delegated authority to the agency generally to make rules carrying the force of law"; second, the agency's interpretation must have been "promulgated in the exercise of that

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107. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005) (describing the holding in *Chevron* by stating that ambiguities in a statute that an agency is supposed to administer are congressional delegations of authority); United States v. Mead Corp., 533 U.S. 218, 229-32 (2001) (explaining that *Chevron* deference is not warranted where there is no evidence that Congress intended to delegate particular interpretive authority to an agency); United States v. Haggar Apparel Co., 526 U.S. 380, 392-93 (1999) (explaining that Congress delegates authority to agencies because it cannot anticipate all circumstances to which a statute may apply); Smiley v. Citibank, 517 U.S. 735, 740-41 (1996) (clarifying that when Congress leaves ambiguity in a statute, it does so with the intent that the agency resolve such issues in the future).

108. *See* Chevron*'s Domain*, *supra* note 83, at 836 ("*Chevron* should be regarded as a legislatively mandated deference doctrine."); Barron & Kagan, *supra* note 106, at 212 ("*Mead* represents the apotheosis of a developing trend in *Chevron* cases: the treatment of *Chevron* as a congressional choice, rather than either a constitutional mandate or a judicial doctrine."); Scalia, *supra* note 84, at 516 ("The extent to which courts should defer to agency interpretations of law is ultimately a function of Congress's intent on the subject . . . .") (internal quotations and citations omitted).

109. *Smiley*, 517 U.S. at 740-41.

110. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 123 (2000).

111. *See Mead Corp.*, 533 U.S. at 226-27 (offering different ways to determine whether Congress intended to delegate authority to an agency); *see also* Chevron*'s Domain*, *supra* note 83, at 872 ("[I]f *Chevron* rests on a presumption about congressional intent, then *Chevron* should apply only where Congress would want *Chevron* to apply."); Greenfield, *supra* note 57, at 25 (arguing that *Mead* clarifies that the "presumption [of] delegation is inferred not simply from the presence of ambiguity, but only when additional factors, such as rule-making authority, are present"); *see also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 267 (2002) (explaining that *Chevron* deference is required only where Congress would have wanted it).

authority."[112] Generally, where the first condition is met, the second will be presumed if the rule at issue was promulgated either under the Administrative Procedure Act's notice-and-comment procedure or otherwise through formal administrative adjudication.[113]

The second byproduct of the congressional-intent model, and more central to the analysis here, is that *Chevron* deference is not as immutable as it might otherwise be if it were constitutionally required. Indeed, the Supreme Court has bypassed *Chevron* deference on a few occasions.[114] For example, in *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, the Court held that although the statute at issue was ambiguous, the governing agency's construction of the provision was not entitled to deference because serious constitutional problems would arise if the agency's interpretation were accepted.[115] Essentially, the Court used the constitutional avoidance canon "to oust the *Chevron* framework altogether."[116]

Similarly, in *EEOC v. Arabian American Oil Co.*, the Court declined to defer to the relevant agency's "plausible" interpretation of an ambiguous statute where the agency's interpretation called for extraterritorial

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112. 533 U.S. at 226-27.

113. As the *Mead* Court explained:

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. Thus, the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.

533 U.S. at 230 (citation omitted); *see also* Barron & Kagan, *supra* note 106, at 227-28 (describing "notice-and-comment rulemaking [and] formal adjudication" as "safe harbors" in which the "agency will know that its reasonable resolution of statutory ambiguity will govern"). Whether and under what circumstances the Court should afford *Chevron* deference outside of the formal rulemaking and adjudication safe-harbors is a matter of much debate, and is beyond the scope of this Article. For a discussion of the issue, see generally, Chevron*'s Domain*, *supra* note 83, and Barron & Kagan, *supra* note 106. In cases where *Chevron* does not apply, agency decisions may be entitled to deference to the extent that such decisions possess "those factors which give [the agency's interpretation] power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *accord Mead Corp.*, 533 U.S. at 235-36 (explaining that when a regulatory scheme is complex and the specialized experience of the agency may be beneficial, an agency may make a *Skidmore* claim if *Chevron* is inapplicable); Lin v. U.S. Dep't of Justice, 416 F.3d 184, 191 (2d Cir. 2005) (holding that decisions by Immigration Judges are not entitled to *Chevron* deference but may be entitled to *Skidmore* deference).

114. *See, e.g.*, EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (rejecting the EEOC's claim for deference in its decision that Title VII should apply abroad); DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568-69 (1988) (refusing to grant deference to the NLRB because its interpretation raised constitutional concerns).

115. *See DeBartolo*, 485 U.S. at 577 ("Even if [the agency's] construction of the [statute at issue] were thought to be a permissible one . . . we must independently inquire whether there is another interpretation, not raising these serious constitutional concerns, that may fairly be ascribed to [the statute].").

116. Scalia, *supra* note 84, at 988.

jurisdiction.[117] The Court assumed that Congress had legislated against the backdrop of the presumption against extraterritoriality, and thus declined to extend a statute beyond the United States absent a clear statement of Congress's intent to do so.[118]

IV. THE CONFLICT BETWEEN *CHEVRON* AND THE IMMIGRATION RULE OF LENITY

In immigration cases where *Chevron* applies, a conflict exists between *Chevron* deference and the rule of lenity.[119] On the one hand, *Chevron* demands that courts defer to reasonable agency interpretations of ambiguous statutes. On the other hand, the rule of lenity requires courts to construe ambiguous immigration statutes favorably for aliens.[120] Thus, in immigration cases involving statutory interpretation that reach federal court,[121] the agency almost always argues that a statutory construction inuring to the alien's detriment is nevertheless reasonable, whereas the alien advances a more favorable interpretation.[122]

In light of the Supreme Court's apparent willingness to consider certain substantive canons within the *Chevron* framework,[123] the following two related issues arise: (1) is the rule of lenity one such canon and if so, (2) where in the *Chevron* framework does it fit? The Supreme Court has yet to decide either issue.

In *INS v. Cardoza-Fonseca*, the Court mentioned the immigration rule of lenity for the first time since *Chevron*, but did not rely on the rule and failed to explain where in the statutory analysis it would have fit, if necessary.[124] Specifically, in *Cardoza-Fonseca*, the Court interpreted the

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117. *See* 499 U.S. at 253 ("If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.").

118. *See id.* at 248 ("We assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.") (internal quotations and citations omitted).

119. *See* Slocum, *supra* note 6, at 539 ("In deportation proceedings reaching federal court . . . the potential for conflict between a strong version of *Chevron* deference and the immigration rule of lenity is vast.").

120. *See* Ali v. Reno, 22 F.3d 442, 446 (2d Cir. 1994) (stating that a court must construe "[l]ingering ambiguities in a statute" favorably for the alien, but still must accord *Chevron* deference to an agency's reasonable statutory interpretation).

121. While aliens have a statutory right to petition the courts of appeals to review final orders of removal under the terms and conditions of INA § 242, 8 U.S.C. § 1252 (2000), the Government does not have the right to a federal appeal. Thus, if the case is in federal court, it means that the alien received some unfavorable agency decision.

122. *See* Slocum, *supra* note 6, at 539 ("If the court should find the relevant statute ambiguous, the agency invariably argues that its (broad) interpretation should be granted *Chevron* deference, and the noncitizen argues (if her attorney thinks of it) that the immigration rule of lenity should be invoked and the statute narrowly construed.").

123. *See supra* notes 85-92 and accompanying text.

124. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

Immigration and Nationality Act's (INA) definition of a refugee for asylum purposes,[125] and held that to qualify as a refugee an alien must demonstrate only a "well-founded fear of persecution," not that persecution in the alien's home country is "more likely than not."[126] The Court expressly decided the issue at *Chevron*'s step one, based on an "analysis of the plain language of the [INA], its symmetry with the United Nations Protocol, and its legislative history."[127] The Court found these "ordinary canons" of statutory construction compelling, "even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[128] Thus, while the Court in *Cardoza-Fonseca* made clear that the rule of lenity persists in some form in post-*Chevron* jurisprudence, the Court was not required to review, and thus did not reach, the issue of how the rule is to be reconciled with *Chevron* in cases where the statute or its interpretation is unfavorable to aliens.

The Court arguably shed additional light on the issue in *INS v. Aguirre-Aguirre*, where it held that the Board of Immigration Appeals (BIA)—as the Attorney General's delegate—is entitled to *Chevron* deference even where the BIA's interpretation of an ambiguous statute at issue is unfavorable to the alien.[129] The Court, however, did not expressly refer to the rule of lenity, and thus did not expressly resolve the issue of how it should be reconciled with the principle of *Chevron* deference.

Absent definitive guidance from the Supreme Court, the circuit courts' treatment of the issue has, understandably, been quite varied.[130] Indeed, just about every conceivable approach has been employed or suggested by the circuit courts, which can be summarized as follows: (1) applying

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125. *Id.* at 425 (interpreting the INA's definition of "refugee"). Under the INA, "[t]he term 'refugee' means . . . any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ." INA § 101(a)(42), 8 U.S.C. § 1101(a)(42).

126. *Cardoza-Fonseca*, 480 U.S. at 449.

127. *Id.* at 446-47 ("Employing traditional tools of statutory construction, we have concluded that Congress did not intend the two standards to be identical.") (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).

128. *Cardoza-Fonseca*, 480 U.S. at 449 (citing, for the principle of lenity, INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); and Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)). Justice Powell, in his dissenting opinion in *Cardoza-Fonseca*, found the statutory language "far more ambiguous than the Court," and argued that the Court should have deferred to the Attorney General's reasonable interpretation, without explaining how the rule of lenity would have factored into that analysis. *Cardoza-Fonseca*, 480 U.S. at 459-63 (Powell, J., dissenting).

129. 526 U.S. 415, 423-26 (1999); *see also infra* notes 225-36 and accompanying text (discussing *Aguirre-Aguirre* in detail).

130. *See* Slocum, *supra* note 6, at 553-55.

Chevron and ignoring the rule of lenity;[131] (2) applying the rule of lenity and ignoring *Chevron*;[132] (3) recognizing both doctrines and not deferring to the agency's interpretation because the statute was clear on its face;[133] (4) recognizing both doctrines and rejecting the principle of lenity because the statute was clear on its face;[134] (5) applying the rule of lenity where *Chevron* was found not to apply;[135] (6) considering the rule of lenity at *Chevron*'s first step in determining whether Congress's intent was clear;[136] (7) considering the rule of lenity at *Chevron*'s second step in determining whether the agency's interpretation was reasonable;[137] (8) applying *Chevron* deference and finding that the rule of lenity did not apply at step

131. *See, e.g.*, Ali v. Ashcroft, 395 F.3d 722, 728-29 (7th Cir. 2005); Acosta v. Ashcroft, 341 F.3d 218, 225 (3d Cir. 2003); Sad v. INS, 246 F.3d 811, 818-19 (6th Cir. 2001); Shaar v. INS, 141 F.3d 953, 957-58 (9th Cir. 1998); Perlera-Escobar v. Executive Office for Immigration, 894 F.2d 1292, 1296-98 (11th Cir. 1990); Kim v. Meese, 810 F.2d 1494, 1496-97 (9th Cir. 1987) (applying *Chevron* and implicitly rejecting Judge Norris's dissenting opinion calling for application of the rule of lenity).

132. *See, e.g.*, Vlaicu v. INS, 998 F.2d 758, 760 (9th Cir. 1993); *see also* Solorzano-Patlan v. INS, 207 F.3d 869, 874 n.9 (7th Cir. 2000) (applying the criminal rule of lenity in construing whether the alien was convicted of an aggravated felony for removal purposes).

133. *See, e.g.*, Khalayleh v. INS, 287 F.3d 978, 980 (10th Cir. 2002); Marincas v. Lewis, 92 F.3d 195, 200 n.6 (3d Cir. 1996).

134. *See, e.g.*, Boatswain v. Gonzales, 414 F.3d 413, 417-18 (2d Cir. 2005); Castellano-Chacon v. INS, 341 F.3d 533, 543 (6th Cir. 2003); Cedano-Viera v. Ashcroft, 324 F.3d 1062, 1066 (9th Cir. 2003); Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3d Cir. 2002); Lara-Ruiz v. INS, 241 F.3d 934, 942 (7th Cir. 2001); United States v. Zavala-Sustaita, 214 F.3d 601, 607 n.11 (5th Cir. 2000).

135. *See, e.g.*, Chrzanoski v. Ashcroft, 327 F.3d 188, 191, 197 (2d Cir. 2003); Ojeda-Terrazas v. Ashcroft, 290 F.3d 292, 300 n.53 (5th Cir. 2002) (finding that *Chevron* deference is not applicable in determining the retroactive effect of immigration statutes and stating that the rule of lenity supported its decision); Francis v. Reno, 269 F.3d 162, 168-71 (3d Cir. 2001) (finding that the court did not owe *Chevron* deference to the agency's interpretation of a criminal statute that was incorporated into the immigration statute, and then using the immigration rule of lenity to buttress the court's interpretation in favor of the alien); Velasquez-Gabriel v. Crocetti, 263 F.3d 102, 106 (4th Cir. 2001).

136. *See, e.g.*, Padash v. INS, 358 F.3d 1161, 1173-74 (9th Cir. 2004) (using the rule of lenity to support the court's interpretation of a statute under *Chevron*'s step one); *see also infra* Part V.A.

137. *See, e.g.*, Okeke v. Gonzales, 407 F.3d 585, 593-97 (3d Cir. 2005) ("A final reason [the BIA's] interpretation of [the statute at issue] is impermissible is that, because of the serious consequences of deportation, rules of statutory interpretation relating to immigration statutes require that ambiguities be construed in the favor of the alien."); De Osorio v. INS, 10 F.3d 1034, 1043 (4th Cir. 1993) (explaining that while the rule of lenity should be considered at step two, the rule is not dispositive, and did not overcome the otherwise reasonable agency interpretation of the statute at issue); Rosario v. INS, 962 F.2d 220, 225 (2d Cir. 1992) ("Our conclusion that the INS's interpretation is unreasonable is supported by the principle that in light of the harshness of deportation, ambiguous deportation provisions should be construed in favor of the alien.") (citations omitted); *see also infra* Part V.B.

two because the agency's interpretation was otherwise reasonable;[138] and (9) employing the rule of lenity after determining that the agency's construction was unreasonable.[139]

Of these, ignoring one doctrine or the other obviously cannot be the answer—especially if the doctrine being ignored is *Chevron*.[140] Moreover, this Article is not concerned with cases where *Chevron* does not apply; for example, where the interpretation is of a non-immigration statute or raises serious constitutional questions. That is because where *Chevron* does not apply, there simply is no conflict.[141]

Thus, what follows is an analysis of the only three potentially viable options for reconciling *Chevron* and the rule of lenity: (1) lenity as a consideration at step one; (2) lenity as a consideration at step two; and (3) lenity as a consideration, if at all, only after determining that the statute is ambiguous and that deference is not warranted because the agency's interpretation is unreasonable.

V. PUTTING THE IMMIGRATION RULE OF LENITY IN ITS PROPER PLACE

Commentators who have considered the issue have suggested that the courts should apply the immigration rule of lenity as a factor in *Chevron*'s step one[142] or step two.[143] But neither approach is correct. Rather, lenity should be applied only at the very end of the process—after the court determines both that the statute is ambiguous under step one and that the agency's interpretation is unreasonable under step two. Any other approach distorts the relative strengths and purposes of the competing doctrines at issue.

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138. *See* Ruiz-Almanzar v. Ridge, 485 F.3d 193, 198-99 (2d Cir. 2007) (holding that "even were the statute ambiguous, we would defer to the BIA's permissible construction of it" and not apply the rule of lenity); Amador-Palomares v. Ashcroft, 382 F.3d 864, 868 (8th Cir. 2004); Mizrahi v. Gonzales, No. 05-0010-ag, 2007 U.S. App. LEXIS 15303, at *56-57 (2d Cir. June 27, 2007) (citing *Ruiz-Almanzar*, 485 F.3d at 198) ("The rule of lenity is a doctrine of last resort, and it cannot overcome a reasonable BIA interpretation entitled to Chevron deference."); *see also infra* Part V.C.

139. *See* Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1028-29 (9th Cir. 2005); *see also infra* Part V.C.

140. *See* INS v. Aguirre-Aguirre, 526 U.S. 416, 424 (1999) (reversing the Ninth Circuit, and explaining that "[b]ecause the [circuit court] confronted questions implicating an agency's construction of the statute which it administers, the court should have applied the principles of deference described in *Chevron* . . . ") (internal marks and citations omitted).

141. Slocum, *supra* note 6, at 539 ("In cases where *Chevron* deference is not applicable there is no conflict with the immigration rule of lenity, and courts are free to apply lenity where applicable without fear that doing so will conflict with deference to agency interpretations.").

142. *See* Guendelsberger, *supra* note 15.

143. *See* Slocum, *supra* note 6.

A. Not at Step One

As noted above, the step one inquiry is directed at discerning whether Congress has "directly spoken to the precise question at issue," because if it has, "that is the end of the matter."[144] *Chevron*'s invitation to the courts to consider "traditional tools of statutory construction" in determining whether Congress has directly spoken[145] provides an opening to argue that the immigration rule of lenity applies at step one. This approach is possible, the theory goes, "because substantive canons in general can be viewed as background conventions Congress considers when legislating and, thus, they could be employed at [s]tep-[o]ne as guides to legislative intent."[146] Indeed, Justice Scalia has expressed the view that traditional tools include not only textual canons[147] and some extrinsic source canons (such as dictionaries and legislative history),[148] "but also, quite specifically, the consideration of policy consequences."[149]

To date, only a select class of substantive canons that have attained the status of "clear statement rules" have permeated *Chevron*'s first step.[150] Indeed, that was the case in *INS v. St. Cyr*, where the Supreme Court declined the Immigration and Naturalization Service's (INS) invitation to afford *Chevron* deference to the BIA's interpretation of an immigration provision as having retroactive effect.[151] The Court explained:

> We only defer . . . to agency interpretations of statutes that, applying the normal "tools of statutory construction," are ambiguous. Because a statute that is ambiguous with respect to retroactive application is

144. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

145. *Id.* at 843 n.9.

146. Slocum, *supra* note 6, at 574-75; *see* Greenfield, *supra* note 57, at 48 ("Canons of construction that allow inferences about congressional intent serve the court's purpose at Step One, and hence their use is consistent with the *Chevron* framework."); *see also* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."); King v. St. Vincent's Hosp., 502 U.S. 215, 221 n.9 (1991) (stating that the Court "will presume congressional understanding of . . . interpretive principles").

147. Textual canons are those that "set forth inferences that are usually drawn from the drafter's choice of words, their grammatical placement in sentences, and their relationship to other parts of the 'whole' statute." ESKRIDGE, *supra* note 10, at 634.

148. Extrinsic source canons are a variety of devices extrinsic to the statutory text that act as aids in attributing meaning to it. *Id.*

149. Scalia, *supra* note 84, at 515; *see also* Eskridge & Frickey, *supra* note 56 (discussing substantive canons).

150. Other clear statement rules, such as the constitutional avoidance canon and presumption against extraterritoriality, have been found to trump *Chevron* deference altogether. *See supra* notes 114-18 and accompanying text.

151. INS v. St. Cyr, 533 U.S. 289, 320 & n.45 (2001).

> construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.[152]

The Court further explained that the presumption against retroactivity is one "deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[153]

In stark contrast, the immigration rule of lenity enjoys no such status.[154] Rather, it was introduced to immigration jurisprudence sixty years ago,[155] and has since generally been regarded as a mere "tie-breaker canon"[156]—a thumb on the scale when there is nothing left to choose from.[157] To apply such a weak policy presumption at step one would defeat the purpose of the *Chevron* doctrine (not to mention the plenary doctrine), which demands that policy gaps left by Congress be filled in the first instance by the administering agency, not the courts.

Although not in the context of a *Chevron* analysis, the Supreme Court in *Fernandez-Vargas v. Gonzales* all but dispelled of any notion that the immigration rule of lenity is a traditional tool of construction.[158] The issue in *Fernandez-Vargas* was whether a statute enacted in 1996 could be applied retroactively to an alien who had illegally re-entered the country in 1982.[159] In resolving the issue against the alien, the Court applied its familiar *Landgraf* retroactivity analysis.[160] Under the first step of that analysis, the Court determines whether Congress intended the statute to apply retroactively by looking to the statute's express language and to

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152. *Id.*

153. *Id.* at 316 (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)); *accord* Landgraf v. USI Film Prods., 511 U.S. 244, 265-66 (1994).

154. *See* Cedano-Viera v. Ashcroft, 324 F.3d 1062, 1066 (9th Cir. 2003) (distinguishing *St. Cyr*, 533 U.S. at 289, and explaining that the rule of lenity, unlike the presumption against retroactivity, is not a clear statement rule).

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

156. *See* Guendelsberger, *supra* note 15, at 623 ("To the extent that the rule of lenity . . . is applicable at step one of *Chevron* analysis, it would tend to serve as a tie breaker resolving any otherwise irresolvable ambiguities in favor of a construction contrary to that reached by the [BIA]."); Slocum, *supra* note 6, at 574 (classifying the immigration rule of lenity as a tie-breaker canon).

157. *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 341 (2000) (explaining that in general tie-breaker canons are triggered only if the court is left in doubt about the meaning of the statute after the more common sources of construction—such as text, legislative history, and statutory purpose—are exhausted); *cf.* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 582 (1989) (noting, with respect to the criminal rule of lenity, that the "judicial thumb" on the scale "depends on how much the thumb weighs").

158. 126 S. Ct. 2422, 2428-30 (2006).

159. *Id.* at 2425-27.

160. *Id.* at 2427-28 (citing Landgraf v. USI Film Prods., 511 U.S. 244 (1994)).

"normal rules of construction."[161] This inquiry is akin to *Chevron*'s first step, where courts must determine whether Congress has directly spoken to the issue with the aid of "traditional tools" of construction.[162] Instructively, the Court in *Fernandez-Vargas* rejected the alien's suggestion that the Court apply the rule of lenity to glean Congress's intent concerning the temporal reach of the statute at issue.[163] Just as the Court declined to treat the rule of lenity as a "normal rule of construction" for *Landgraf*'s retroactivity analysis, the Court should not consider the rule to be a "traditional tool" of construction for *Chevron* purposes.

Canonical classifications aside, the fundamental shortcoming of employing lenity at step one is that it would tend to frustrate—rather than promote—Congress's intent because one cannot fairly say that the rule of lenity sheds light on Congress's actual intent as to any "precise question."[164] Instead, lenity is a transmutable concept that affords the most favorable interpretation to the alien in any given case, whatever that may be.[165] In this way—and unlike the presumptions against retroactive and extraterritorial statutes[166]—the rule of lenity does not inform Congress, at the time of legislative enactment, as to the particular result if the statute is later deemed ambiguous.

Congress could have enacted a statute demanding that ambiguous immigration provisions be interpreted liberally in favor of aliens. But it did not. Instead, Congress expressly delegated interpretational and rulemaking authority to the Attorney General.[167] Applying the rule of lenity at step one

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161. *Id.* at 2428 (quoting Lindh v. Murphy, 521 U.S. 320, 326 (1997)). If the Court is unable to glean Congress's clear intent, then the Court proceeds under the *Landgraf* analysis to determine whether applying the statute to the person objecting would impair or affect substantive rights, liabilities, or duties on the basis of conduct arising before the statutes enactment. *See id.* (citing *Landgraf*, 511 U.S. at 278). If the answer is yes, then the Court applies a presumption against retroactivity by construing the statute as inapplicable to the event or act in question. *Id.* (citing INS v. St. Cyr, 533 U.S. 289, 316 (2001)).

162. *See supra* Part III.A.

163. *Fernandez-Vargas*, 126 S. Ct. at 2428-29.

164. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (explaining that the first query is whether Congress has "directly spoken to the precise question at issue").

165. *See supra* Part II.

166. *See* INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve."); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("[U]nless there is the affirmative intention of the Congress clearly expressed, we must presume it is primarily concerned with domestic conditions.") (citations omitted).

167. *See* INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2000); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (holding that *Chevron* deference was owed to the BIA, as the Attorney General's delegate, because Congress had conferred the Attorney General with authority to determine questions of law arising under the INA); Lin v. U.S. Dep't of Justice, 416 F.3d 184, 189 (2d Cir. 2005) ("[I]t is beyond cavil that Congress has, as a general matter, delegated the authority to make immigration rules carrying the force of law; the INA, after all, unambiguously vests such power in the Attorney General, among others.").

would eviscerate Congress's intent to delegate this authority in every case where a statutory ambiguity arises.[168] As a practical matter, it would handcuff Congress by requiring it to legislate with absolute specificity[169] in an area of the law where the agency is far better suited to fill in the details.

Further, there is an inherent conflict in applying the immigration rule of lenity at *Chevron*'s first step. If a statutory ambiguity does not exist, the step one inquiry ceases.[170] By its own terms, however, the rule of lenity comes into operation only *after* an ambiguity is found to exist.[171] Thus, the step one inquiry and the rule of lenity are mutually exclusive: the latter comes into play only where the former is already complete. To use the rule of lenity to first beget an ambiguity, and then to cure it, would elevate the rule well beyond its intended purpose as a tie-breaker canon.[172] Certainly, the Supreme Court has offered no support for employing the rule of lenity in this way.[173]

In the pre-*Chevron* case of *Phinpathya v. INS*,[174] for example, the Supreme Court made it abundantly clear that notions of lenity could not displace Congress's otherwise clear intent. The Court was called upon to review the Ninth Circuit's interpretation of a statute under former INA § 244(a)(1), which required an alien to demonstrate seven years of "continuous physical presence" as a condition for suspension of deportation.[175] Specifically, the issue was whether the alien's three-month

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168. *See* Slocum, *supra* note 6, at 542 ("[I]f the immigration rule of lenity is a 'traditional tool of statutory construction' in the sense meant by the Court in *Chevron*, reviewing courts would never defer to the agency's interpretation because the issue would be resolved at Step One."); *cf.* INS v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) (warning that use of certain canons would be "an evisceration of *Chevron*").

169. *See* Slocum, *supra* note 6, at 568 ("Congress sometimes legislates with deliberate ambiguity and often lacks sufficient time to make language clear . . . . If courts require Congress to legislate with clarity in order to overcome substantive canons, Congress may not be able to pass a statute at all.").

170. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

171. *See supra* notes 71-77 and accompanying text.

172. *Cf.* Slocum, *supra* note 6, at 572 (arguing that the rule of lenity should be employed at step two, although recognizing that "[t]he immigration rule of lenity . . . has only been used by courts as a tie-breaker canon and has never required the level of clarity associated with clear statement rules").

173. As the Supreme Court has explained in the criminal context: "[T]he rule of lenity applies only when an ambiguity is present; 'it is not used to beget one . . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers.'" Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 262 (1994) (citing United States v. Turkette, 452 U.S. 576, 587-88 (1981)).

174. 464 U.S. 183 (1984).

175. *Id.* at 185-86. Former INA § 244(a)(1) authorized the Attorney General, at his discretion, to suspend the deportation of an otherwise deportable alien who "has been physically present in the United States for a continuous period of not less than seven years [and] is a person of good moral character . . . whose deportation would result in extreme hardship to the alien or his spouse, parent, or child." 8 U.S.C. § 1254(a)(1) (1982), *repealed by* Pub. L. No. 104-208, Div. C, Title III, § 308(b)(7), 110 Stat. 3009-615 (1996).

departure to Thailand disrupted her otherwise seven-year continuous presence in the United States.[176] The Ninth Circuit held that because the alien had "intended at all times to return to the United States," her absence was not meaningfully interruptive, and that she could thus satisfy the seven-year requirement.[177]

The Supreme Court reversed. It explained that the Ninth Circuit's generous interpretation was belied by the plain language of the statute, which required seven years of "*continuous* physical presence" in the United States.[178] Instructively, the Supreme Court also expressly rejected the alien's claim that, in light of the ameliorative purposes of the suspension of deportation remedy, the Court should have adopted the more "generous" and "liberal" construction espoused by the Ninth Circuit.[179] Such a construction, the Court explained, was "impermissible in our tripartite scheme of government. Congress designs the immigration laws, and it is up to Congress to temper the laws' rigidity if it so desires."[180]

Similarly, in the post-*Chevron* case of *INS v. Hector*,[181] the Supreme Court was called upon to determine whether under former INA § 244(a)(1)[182] the "extreme hardship" to an alien's nieces was sufficient to qualify the alien for suspension of deportation.[183] The statute at issue expressly provided relief only where the hardship was to a "spouse, parent, or child."[184] During the administrative proceedings, the BIA held, as a matter of law, that a niece is not a "child" for purposes of the statute, and thus, the alien was ineligible for the relief she sought.[185] The Third Circuit, however, determined that the BIA had erred "in not giving sufficient consideration to whether [the alien's] relationship with her nieces was the functional equivalent of a parent-child relationship."[186] The Supreme Court reversed, citing *Phinpathya*, and explained: "even if [the alien's] relationship with her nieces closely resembles a parent-child relationship, we are constrained to hold that Congress, through the plain language of the statute [and as corroborated by the legislative history], precluded this functional approach to defining the term 'child.'"[187]

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176. *Phinpathya*, 464 U.S. at 185-86.
177. *Id.* at 187.
178. *Id.* at 189-91 (emphasis added).
179. *Id.* at 193-96.
180. *Id.* at 196.
181. 479 U.S. 85 (1986) (per curiam).
182. *Id.* at 86.
183. *Id.*
184. *See* 8 U.S.C. § 1254(a)(1) (1982) (repealed 1996); *see also Phinpathya*, 464 U.S. at 185-86.
185. *Hector*, 479 U.S. at 86-87.
186. *Id.* at 87.
187. *Id.* at 90 & n.6.

While the Supreme Court in *Phinpathya* and *Hector* did not expressly refer to the immigration rule of lenity, the Court did reject any notion that lenity has a role in statutory interpretation where the terms of the statute are clear. There is nothing in *Chevron* that eclipses this general principle, as borne out by the majority of circuit courts that have directly addressed the issue.[188] The rule of lenity simply has no place at step one.

B. Not at Step Two

Whereas *Chevron*'s step one inquiry aims to determine whether Congress has directly spoken to the issue, the step two inquiry turns on whether the agency's statutory construction is reasonable.[189] As the Supreme Court explained in *Chevron*, a "reasonable" agency interpretation is not necessarily the "reading the court would have reached if the question initially had arisen in a judicial proceeding," or "the only one [the agency] permissibly could have adopted."[190] In this way, reasonableness is a spectrum on which there are no "right" answers, only wrong ones that lie beyond it.[191]

Scholars have suggested two different approaches for using the immigration rule of lenity at step two of *Chevron*.[192] The first approach would require the Attorney General and his delegates to employ the rule of lenity when construing ambiguous immigration provisions.[193] The agency's failure to consider the rule of lenity under this approach would render the agency's interpretation unreasonable for *Chevron* purposes.[194] Under the second approach the court would review the agency's ultimate interpretation for reasonableness, and regardless of whether the agency

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188. *See* Castellano-Chacon v. INS, 341 F.3d 533, 543 (6th Cir. 2003); Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3d Cir. 2002); Lara-Ruiz v. INS, 241 F.3d 934, 942 (7th Cir. 2001); United States v. Zavala-Sustaita, 214 F.3d 601, 608 n.11 (5th Cir. 2000) (all declining the opportunity to apply the rule of lenity to the interpretation of an unambiguous INA provision). *But see* Padash v. INS, 358 F.3d 1161, 1173 (9th Cir. 2004) (using the rule of lenity to buttress courts' interpretation of statute under *Chevron*'s step one).

189. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984).

190. *Id.* at 843 n.11.

191. *See* Barnhart v. Walton, 535 U.S. 212, 226 (2002) (Scalia, J., dissenting) (stating that there is not "only one 'correct' interpretation of a statutory text" but rather "a range of permissible interpretations"); *see also* Daniel Kanstroom, S*urrounding the Hole in The Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 735 (1997) (observing that under *Chevron* deference, the courts' inquiry is not whether the agency's interpretation is correct, but rather whether the interpretation is reasonable).

192. *See* Slocum, *supra* note 6, at 576.

193. *See id.*; *cf.* Alex Tallchief Skibine, *The* Chevron *Doctrine in Federal Indian Law and the Agencies' Duty to Interpret Legislation in Favor of Indians: Did the EPA Reconcile the Two in Interpreting the "Tribes as States" Section of the Clean Water Act?*, 11 ST. THOMAS L. REV. 15, 28-29 (1998) (arguing that an agency must consider the canon favoring liberal interpretation of statutes as applied to Native Americans, and that a reviewing court should consider under step two whether the agency has applied this canon).

194. *See* Slocum, *supra* note 6, at 576.

applied the rule of lenity, the court would do so.[195] Both of these approaches are inappropriate because they impose undue constraint on the agency and are squarely at odds with *Chevron*'s deferential policy.

1. Courts Should Not Require Agencies to Construe Immigration Statutes Liberally

The first approach is flawed because, while the agency is certainly *free* to consider the rule of lenity in its role as a statutory gap filler (and indeed has done so on many occasions),[196] courts should not *require* the agency to apply the rule as a prerequisite for deference.[197] Immigration law represents an intricate web of policy considerations, ranging from those designed to protect the rights of aliens to those that preclude or strip away such rights. Applying the rule of lenity at step two would upset this delicate balance.[198]

Specifically, if the courts required the agency to apply lenity in every case where a statutory gap or ambiguity arose, it would unduly marginalize competing national interests—such as national security and foreign policy. A model that favors alien interests above all others could not be what Congress intended in delegating interpretational authority to the Attorney General.[199] Indeed, it would be an abdication of the Attorney General's delegated duty to blindly side with the alien in the face of competing public considerations.

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195. *See id.*

196. *See In re* Farias-Mendoza, 21 I. & N. Dec. 269, 273-75 (Bd. of Immigration Appeals 1996) (considering rule of lenity to favorably construe former INA § 241(a)(1)(E)(iii), 8 U.S.C. § 1251(a)(1)(E)(iii) (1994), relating to a waiver of deportability); *In re* Hou, 20 I. & N. Dec. 513, 520 (Bd. of Immigration Appeals 1992) (holding that an attempted firearms offense did not support a charge of deportability under former INA § 241(a)(2)(C), 8 U.S.C. § 1251(a)(2)(C) (1988), and citing to the immigration rule of lenity); *In re* Tiwari, 19 I. & N. Dec. 875, 881 (Bd. of Immigration Appeals 1989) ("Considering that there is apparently no legislative history to support the [INS's] position regarding the respondent's deportability, we note that any lingering ambiguities regarding the construction of the Act are to be resolved in the alien's favor."); *In re* G—, 9 I. & N. Dec. 159, 164 (Bd. of Immigration Appeals 1960); *In re* H—, 7 I. & N. Dec. 616, 617 (Bd. of Immigration Appeals 1957); *see also In re* Crammond, 23 I. & N. Dec. 9, 30 (Bd. of Immigration Appeals 2001) (noting that the BIA has "recognized and applied [the rule of lenity] with approval in over 30 precedent decisions issued since 1949") (Rosenberg, concurring).

197. *Cf.* Bernard W. Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J.L. & POL. 105, 132-33 (1997) (arguing that agencies should decide whether to invoke non-clear statement substantive canons).

198. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (requiring the "narrowest of several possible meanings"); *see also supra* notes 61-68 and accompanying text.

199. *See* INA § 103(a)(1), 8 U.S.C. § 1103(a)(1) (2000).

2. The Courts Should Not Limit the Spectrum of Reasonableness in the Immigration Context

Nor would it be appropriate, under the second proposed approach, for the courts to use the rule of lenity as a litmus test for reasonableness. Professor Slocum, who is a proponent of this approach, largely bases his argument on the notion that some substantive canons of construction are appropriate for determining reasonableness, and that sound policy justifications exist for including the rule of lenity in that class.[200] However, even if one accepts the general proposition that substantive canons are an appropriate consideration in *Chevron*'s second step—and several commentators do not[201]—the immigration rule of lenity does not fit the mold of those that should be considered. Indeed, Professor Slocum himself recognizes that the rule would have to be "reconfigured" from a tie-breaker canon into a non-dispositive balancing factor in order to fit within *Chevron*'s framework.[202]

That was the apparent approach taken by the Second Circuit in *Rosario v. INS*,[203] and by the Fourth Circuit in *De Osorio v. INS*.[204] In *Rosario*, the Second Circuit found the BIA's interpretation of the term "domicile" in former INA § 212(c)[205] to be unreasonable, and supported its holding, in part, on "the principle that . . . ambiguous deportation provisions should be construed in favor of the alien."[206]

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200. Slocum, *supra* note 6, at 559-82.

201. *See Judicial Deference to Executive Precedent*, *supra* note 83, at 988 ("[I]f an agency interpretation is consistent with the language and purpose of a statute, it is hard to see how it could be condemned as unreasonable simply because a judicial canon would suggest a contrary result."); Chevron*'s Domain*, *supra* note 83, at 873 ("All norms and canons grounded in common law must give way to the *Chevron* doctrine."); Bradford C. Mank, *Textualism's Selective Canons of Statutory Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY. L.J. 527, 576-90 (1997-1998) (arguing that *Chevron* deference should prevail over various substantive canons); *see also* Mich. Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285, 1292 (D.C. Cir. 1989) (holding that *Chevron* deference trumps substantive canons, and thus declining to consider the canon requiring narrow constructions of antitrust law exceptions).

202. Slocum, *supra* note 6, at 543.

203. 962 F.2d 220 (2d Cir. 1992). *But cf.* Ruiz-Almanzar v. Ridge, 485 F.3d 193 (2d Cir. 2007) (declining to apply the rule of lenity at *Chevron*'s step two where the agency's interpretation was deemed reasonable, and not discussing or distinguishing its prior ruling in *Rosario*). For a discussion of the Second Circuit's treatment of the *Chevron*-lenity conflict in *Ruiz-Almanzar*, see *infra* note 237 and accompanying text.

204. 10 F.3d 1034 (4th Cir. 1993).

205. 8 U.S.C. § 1182(c), *repealed by* Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597 (1996)).

206. *Rosario*, 962 F.2d at 224-25 (finding the BIA's interpretation unreasonable because the BIA's construction of the term "domicile" was "inconsistent with its traditional common law meaning," and because the agency's interpretation "result[ed] in adding to the domicile requirement a residency requirement, which is not included in the language of the [INA]").

In *De Osorio*, the Fourth Circuit considered the rule of lenity in interpreting a different provision in former INA § 212(c), but nevertheless held that the BIA's interpretation was reasonable.[207] The court explained that the BIA's interpretation was permissible because, as opposed to the alien's interpretation, the BIA's interpretation was "most consistent with [congressional] intent."[208] The court further noted that while "lenity to the alien is an important principle in interpreting immigration statutes," the court did "not believe" lenity to have "the dispositive effect that the [aliens sought] to give it."[209]

De Osorio illustrates how courts may use the rule of lenity as a non-dispositive factor at step two, without necessarily trumping *Chevron* deference altogether. While this flexibility is certainly preferable to using the rule of lenity dispositively, even this measured approach goes too far. This is because a court's use of the rule of lenity as a balancing factor in step two effectively narrows the broad spectrum of reasonableness that *Chevron* affords.[210] Whatever merit there might be in limiting the concept of reasonableness in other administrative contexts,[211] it is absent in immigration matters, where the Judiciary has traditionally afforded heightened deference to the political branches.[212]

Such deference was exemplified in *INS v. Jong Ha Wang*, where the Supreme Court held—in unwavering terms—that the Attorney General was entitled to construe an immigration statute narrowly, if he so wished.[213] While *Wang* pre-dated *Chevron*, it may be regarded as a step two case, and indeed, was cited in *Chevron* as an example of implied delegation to which deference was due. [214]

In *Wang*, the agency deported the aliens (husband and wife) for having overstayed their visas.[215] While here illegally, they filed a motion with the BIA to reopen their deportation proceedings for the purpose of applying for

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207. *De Osorio*, 10 F.3d at 1036, 1043 (interpreting INA § 212(c), 8 U.S.C. § 1282(c) (1988)).
208. *Id.* at 1043.
209. *Id.*
210. *Cf.* Mich. Citizens for an Indep. Press v. Thornburgh, 68 F.2d 1285, 1292 (D.C. Cir. 1989) ("*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable agency interpretations of ambiguous statutes.") (emphasis omitted); *see also supra* notes 189-91 and accompanying text.
211. *Cf.* Greenfield, *supra* note 57, at 47 (arguing in favor of applying the criminal rule of lenity at step two, and noting that doing so would "narrow[] the range of 'reasonable' or 'permissible' interpretations that fall within the scope of the agency's delegated authority").
212. *See supra* Part I.A; *see also* Motomura, *supra* note 6, at 604 (recognizing that the immigration rule of lenity invites undue intrusion into the agency's decision-making).
213. INS v. Wang, 450 U.S. 139, 144 (1981).
214. *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 n.13 (1984) (citing *Wang*, 450 U.S. at 144).
215. *Wang*, 450 U.S. at 141.

suspension of deportation under former INA § 244.[216] The BIA denied the motion on the ground that the aliens failed to demonstrate a prima facie case that their deportation would result in "extreme hardship" to either them or their children so as to warrant the discretionary relief they sought.[217] In this regard, the BIA explained that "a mere showing of economic detriment is not sufficient to establish extreme hardship under the [INA]."[218] The BIA further held that "the alleged loss of educational opportunities to the young children of relatively affluent, educated Korean parents did not constitute extreme hardship within the meaning of [the statute]."[219] The Ninth Circuit, sitting en banc, remanded the case to the BIA, in part on the ground that the "statute should [have been] liberally construed to effectuate its ameliorative purpose."[220]

The Supreme Court reversed because "fundamentally, the [Ninth Circuit] improvidently encroached on the authority which the [INA] confers on the Attorney General and his delegates."[221] In this regard, the Court explained:

> The crucial question in this case is what constitutes "extreme hardship." These words are not self-explanatory, and reasonable men could easily differ as to their construction. But the [INA] commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.[222]

The Court continued: "The Attorney General and his delegates have the authority to construe 'extreme hardship' narrowly should they deem it wise to do so. Such a narrow interpretation is consistent with the 'extreme hardship' language, which itself indicates the exceptional nature of the suspension remedy."[223]

While there is no express mention of the rule of lenity in *Wang*, the Supreme Court made clear that the Judiciary owed appropriate deference to the agency's statutory interpretation, notwithstanding its harsh effect on the alien. Nothing in the nature of the *Chevron* doctrine upsets this analysis. Indeed, the Supreme Court has explained that *Chevron* deference, as buttressed by the plenary power doctrine, is "especially appropriate in the immigration context."[224]

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216. *Id.* at 142; *see also supra* note 175 (discussing eligibility requirements for suspension of deportation).
217. *Wang*, 450 U.S. at 142-43.
218. *Id.* at 142.
219. *Id.* at 142-43.
220. *Id.* at 143.
221. *Id.* at 144.
222. *Id.*
223. *Id.* at 145.
224. INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999); *see also supra* Part I.A.

Specifically, in *INS v. Aguirre-Aguirre*,[225] the Supreme Court confronted the issue of whether *Chevron* deference applies to the legal interpretations adopted by the BIA through formal adjudication.[226] The BIA had held that the respondent, a native and citizen of Guatemala, was not entitled to withholding of deportation because he had committed a "serious nonpolitical crime" prior to his arrival in the United States.[227] The BIA considered the crime to be non-political because the criminal nature of the alien's acts outweighed the political nature of his acts.[228] The Ninth Circuit held that the BIA should have "supplement[ed] this weighing test by examining additional factors" and remanded the case to the BIA for that purpose.[229]

However, the Supreme Court reversed the Ninth Circuit on the ground that it had failed to accord the required level of deference to the interpretation espoused by the BIA.[230] Specifically, the Court explained that because the Ninth Circuit decision involved questions that implicated an agency's construction of the statute it administers, the Ninth Circuit should have applied *Chevron*'s two-step inquiry.[231] The Court pointed out that the INA charged the Attorney General with its administration and enforcement, and that the Attorney General had in turn delegated power to the BIA.[232] Based on that allocation of authority, the Court explained, the BIA should be accorded *Chevron* deference because the BIA gives ambiguous statutory terms concrete meaning through case-by-case adjudication.[233] Resonant of the plenary doctrine, the Court also emphasized that "judicial deference to the Executive Branch is *especially* appropriate in the immigration context, where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'"[234]

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225. *Id.* at 415.
226. *Id.* at 418-19, 424-25.
227. *Id.* at 418, 421-22 (explaining that the BIA began its analysis by examining the respondent's involvement in various political protests in Guatemala and that those protests resulted in destruction of property and assaults on civilians).
228. *Id.* at 421-23 (repeating respondent's description of the political protests and the BIA's conclusion that the respondent had engaged in a "serious nonpolitical crime" under INA § 243, 8 U.S.C. § 1253(h)(2)(C)).
229. *Id.* at 423-24.
230. *Id.* at 424-25.
231. *Id.* at 424.
232. *Id.* at 425 ("The Attorney General, while retaining ultimate authority, has vested the BIA with power to exercise the 'discretion and authority conferred upon the Attorney General by law' in the course of 'considering and determining cases before it.'") (citing 8 C.F.R. § 3.1(d)(1) (1998)).
233. *Id.* (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 448-49 (1987)).
234. *Id.* (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)) (emphasis added); *see also supra* Part I.A (discussing the political branches' plenary authority over immigration matters).

Thus, as the Supreme Court has made clear, any notion of constricting agency discretion in the immigration context not only upsets *Chevron*, but also defies the traditional deference afforded under the plenary power doctrine.[235] That is not to suggest that the plenary doctrine itself displaces the rule of lenity; nor could it, as the two co-existed prior to *Chevron*. However, the plenary doctrine demands the maximum degree of deference that *Chevron* affords. To limit that deference in the immigration context would upset volumes of immigration jurisprudence and the fundamental principles on which that tradition was built.[236]

Consistent with this approach, the Second and Eighth Circuits have both expressly declined to apply the rule of lenity at step two in cases where the agency's interpretation was reasonable. Specifically, the Second Circuit in *Ruiz-Almanzar v. Ridge*—in deferring to the BIA's reasonable interpretation—explained:

> The rule of lenity . . . is one of last resort, to be used only after the traditional means of interpreting authoritative texts have failed to dispel any ambiguities. It cannot be the case, as Ruiz-Almanzar suggests, that the doctrine of lenity must be applied whenever there is an ambiguity in an immigration statute because, if that were true, it would supplant the application of *Chevron* in the immigration context . . . . We apply the rule of lenity only when none of the other canons of statutory construction is capable of resolving the statute's meaning and the BIA has not offered a reasonable interpretation of the statute. That is not the case here and thus we need not construe the statute in favor of Ruiz-Almanzar under the rule of lenity.[237]

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235. *See Aguirre-Aguirre*, 526 U.S. at 425 (indicating that the judiciary is not in the best position to "shoulder primary responsibility" from any repercussions that flow from a decision on whether a perpetrator should remain in the United States); *see also* INS v. Abudu, 485 U.S. 94, 110 (1988) ("INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context."); Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 278 (4th Cir. 2004) (stating that in giving deference to the Attorney General's regulation, it was "mindful of the fact that 'the power to expel or include aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control'" (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977))).

236. *See supra* Part I.A.

237. 485 F.3d 193, 198-99 (2d Cir. 2007) (internal marks and citations omitted) (deferring to the BIA's interpretation of § 440 of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214, 1277). As noted above, the Second Circuit's treatment of the *Chevron*-lenity conflict in *Ruiz-Almanzar* appears to be in tension with its decision fifteen years earlier in *Rosario v. INS*, 962 F.2d 220 (2d Cir. 1992). In *Rosario*, the court appears to have considered lenity as a factor at step two in deeming the BIA's interpretation of a different immigration provision unreasonable. *Rosario*, 962 F.2d at 224-25. The Second Circuit in *Ruiz-Almanzar* did not cite to or otherwise distinguish *Rosario*. In *Mizrahi v. Gonzales*, the Second Circuit affirmed its ruling in *Ruiz-Almanzar* that the rule of lenity had no application at *Chevron* step two, but again, did not mention or discuss *Rosario*. *See* No. 05-0010-ag, 2007 U.S. App. LEXIS 15303 (2d Cir. June 27, 2007).

In similar fashion, the Eight Circuit in *Almador-Polameres* held:

> [T]he [BIA's] interpretation of the INA is entitled to deference, and we cannot say its interpretation was unreasonable . . . . And while Mr. Amador-Palomares urges us to invoke the rule of lenity, he ignores that the rule is applied only where there still exists an ambiguity after the reviewing court applies traditional methods of statutory construction. It does not supplant *Chevron* deference merely because a seemingly harsh outcome may result from the [BIA's] interpretation. [238]

As these courts properly held, the rule of lenity has no place in *Chevron*'s second step.

C. A Role For Lenity After Chevron

While the rule of lenity has no place within *Chevron*'s two-step framework, a role for lenity exists beyond *Chevron*—after the court determines that: (1) the statute is ambiguous; and (2) the agency's interpretation is unreasonable. The Ninth Circuit's decision in *Cuevas-Gaspar v. Gonzales*[239] illustrates this approach. The issue before the court in *Cuevas-Gaspar* was whether an alien's presence in the United States as a minor residing with his lawfully admitted mother should count towards the seven-year residency requirement for cancellation of removal eligibility.[240] The alien had been admitted to the United States as a lawful permanent resident in 1997, although his mother had attained that status in 1990.[241] The alien was placed in removal proceedings in 2003—less than seven years after he had acquired lawful permanent status—and the Immigration Judge ordered him removable based on his conviction for a crime of moral turpitude.[242] Specifically, the Immigration Judge pretermitted the alien's application for cancellation of removal on the ground that he had not acquired the requisite seven years of continuous

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If and when the Second Circuit attempts to reconcile these decisions, *Rosario* likely will yield, as the holding in that case arguably did not depend on the rule of lenity, which was but one of several factors that "supported" the court's conclusion that the BIA's interpretation of the statute was unreasonable. Moreover, *Rosario*—unlike *Ruiz-Almanzar*—did not directly address the conflict between *Chevron* deference and lenity.

238. 382 F.3d 864, 868 (8th Cir. 2004) (internal marks and citations omitted). *Amador-Polamares* involved an alien who entered the country illegally without inspection and was later convicted for possession of marijuana and solicitation of a prostitute. In the course of the alien's removal proceedings, the Immigration Judge denied his application for suspension of deportation on the ground that his solicitation offense rendered him lacking, per se, in good moral character, and thus ineligible for the relief he sought. On appeal to the BIA, the alien contended that his single conviction for solicitation did not render him per se lacking in good moral character under the relevant statutory provisions. The BIA affirmed without a separate opinion, and the Eighth Circuit affirmed the BIA. *See generally id.*

239. 430 F.3d 1013 (9th Cir. 2005).

240. *Id.* at 1021.

241. *Id.*

242. *Id.* at 1016-17.

residence in the United States prior to being placed into proceedings.[243] The alien argued on appeal to the BIA that he had satisfied the seven-year continuous resident requirement because his presence in the United States as a minor residing with his lawfully admitted mother should have counted towards the period. The BIA rejected the claim.[244]

In reviewing the BIA's decision, the Ninth Circuit applied *Chevron*'s two-step framework.[245] First, it found that the relevant statute was "silent as to whether a parent's status may be imputed to the parent's emancipated minor child for purposes of satisfying" the seven-year continuous residence requirement.[246] The court then proceeded, under *Chevron* step two, to determine whether the BIA's interpretation was reasonable.[247] After considering the "context of the statute as a whole," the court determined that the "BIA's interpretation [was] unreasonable," and thus the court owed the BIA no deference.[248] The court then proceeded to justify its own interpretation—that a parent's lawful permanent status could be imputed to minor children—as being consistent with the legislative purpose and intent of the cancellation of removal statutory scheme and the rule of lenity.[249]

Employing the rule of lenity as a consideration *after* determining that the court owes no *Chevron* deference—as the court did in *Cuevas-Gaspar v. Gonzales*—is the proper approach because it best effectuates Congress's intent that the Attorney General and his delegates (not the courts) resolve statutory ambiguities in the first instance.[250] Courts are then free to consider the rule of lenity in construing the statute in favor of aliens if, and only if, the agency's interpretation is unreasonable.

This approach is not only most consistent with the principles underlying the *Chevron* and plenary doctrines, but is also most consistent with the rule of lenity, which courts traditionally employ only as a doctrine of "last

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243. *Id.* Under the so-called "stop-time rule" enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(d), 110 Stat. 3009-587 (1996), the accrual of continuous residence required for cancellation of removal ends when deportation proceedings commence, or when the alien commits certain offenses. *See* INA § 240A(d), 8 U.S.C. § 1229b(d).

244. *Cuevas-Gaspar*, 430 F.3d at 1017.

245. *Id.* at 1022-26.

246. *Id.* at 1022.

247. *Id.* at 1024-26.

248. *Id.* at 1026.

249. *Id.* at 1028-29 ("Finally, we note that our interpretation adheres to the general canon of construction that resolves ambiguities in favor of the alien.") (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

250. *Cf.* Krzalic v. Republic Title Co., 314 F.3d 875, 877-78 (7th Cir. 2002) (Posner, J.) (explaining that *Chevron* "hands over (with certain qualifications) interpretive responsibility to the officials responsible for making policy judgments, when the ordinary interpretive tools used by courts, such as textual interpretation, do not work well").

resort."[251] To say that the immigration rule of lenity has no place within *Chevron* is neither an abdication of the rule itself nor of the venerable policy interests it aims to promote. It simply puts those policy considerations in their proper place in relation to more compelling policy interests advanced by the *Chevron* and plenary doctrines.

CONCLUSION

This Article reconciles the conflict between the rule of lenity and *Chevron* in cases where the Attorney General's interpretation of ambiguous immigration statutes inures to an alien's detriment. While the rule of lenity calls for favorable statutory interpretations of ambiguous immigration statutes, *Chevron* more broadly demands that courts defer to reasonable agency interpretations. Approaches that seek to reconcile the conflict by incorporating the rule of lenity within *Chevron*'s two-step framework do violence to the competing doctrines at issue. The better approach is for courts to employ the rule of lenity as a tool of last resort only after the court first finds that the statute is ambiguous and that the agency's interpretation is unreasonable. This approach comports most with the principles underlying both the *Chevron* and plenary doctrines. It is also most consistent with the rule of lenity itself, which is meant to be applied as a thumb on the scale only when there is nothing left from which to choose.

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251. Ruiz-Almanzar v. Ridge, 485 F.3d 193, 198 (2d Cir. 2007); *see also* Valansi v. Ashcroft, 278 F.3d 203, 214 n.9 (3d Cir. 2002); *supra* notes 60-71 and accompanying text.