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INTERRING THE IMMIGRATION RULE OF LENITY

Patrick J. Glen
United States Department of Justice

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Patrick J. Glen*

INTERRING THE IMMIGRATION RULE OF LENITY

ABSTRACT

The immigration rule of lenity has haunted immigration jurisprudence since its initial iteration in 1947. But as with any spectral entity, its existence is more ephemeral than real. The rule was meant to be a tiebreaker of sorts: a canon that where a provision of the immigration laws was ambiguous, the courts should impose the more lenient construction. It has never, however, been the dispositive basis for a holding of the Supreme Court. Rather, to the extent it has been referenced, it has been trotted out only as a rhetorical device to sanction a decision reached on other grounds. Even this rhetorical role has been called into question with the advent of Chevron *deference. The* raison d'être *of the rule was to provide the basis of decision when the court was confronted with two equally plausible interpretations of a statutory provision.* Chevron *now fills that gap, and there seems no room left for the immigration rule of lenity in modern administrative law. Rather than continue to allow this outmoded rule of decision to stalk argumentation in immigration cases, the Supreme Court should simply euthanize and inter the rule at the earliest opportunity.*

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* Adjunct Professor, Georgetown University Law Center; Senior Litigation Counsel, Office of Immigration Litigation, Civil Division, United States Department of Justice. The views and opinions expressed in this Article are the author's own and do not necessarily represent the views of the Department of Justice or any component thereof.

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I. INTRODUCTION

Reviewing briefs filed before the Supreme Court in immigration cases over the past decade, one could be forgiven for believing that the so-called "immigration rule of lenity" is a vibrant and integral component of the Court's approach to statutory interpretation. It has been raised to argue, *inter alia*, that a second controlled-substance possession conviction may be a "drug trafficking crime" under the Immigration and Nationality Act (INA) only where the prosecutor has sought and obtained a recidivist enhancement;[1] that tax crimes are categorically excluded from the INA's provision relating to criminal offenses involving fraud or deceit;[2] that a state statute must contain a jurisdictional element in order for the offense to correspond to a federal analog;[3] that whatever else "sexual abuse of a minor" may mean, it does

1. *See* Brief for Petitioner at 38–40, Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (No. 09-60); *see also* 8 U.S.C. § 1101(a)(43)(B) (2018) ("The term 'aggravated felony' means . . . illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)."); 18 U.S.C. § 924(c)(2) (2018) ("[T]he term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.").
2. *See* Brief for the Petitioners at 41–47, Kawashima v. Holder, 565 U.S. 478 (2012) (No. 10-577); *see also* 8 U.S.C. § 1101(a)(43)(M) ("The term 'aggravated felony' means . . . an offense that—(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.").
3. *See* Brief for Petitioner at 44–47, Torres v. Lynch, 136 S. Ct. 1619 (2016) (No. 14-1096); *see also* 8 U.S.C. § 1101(a)(43)(E)(i) ("The term 'aggravated felony' means . . . an offense described in [section 844(i) of title 18] . . . ."); 18 U.S.C. § 844(i) (2018) (providing, *inter alia*, that "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building,

not include statutory rape offenses in states where the age of consent is sixteen or seventeen;[4] and that a charging document that omits the "time and place" of the alien's initial removal hearing should not trigger the cessation of continuous physical presence for purposes of establishing eligibility for cancellation of removal.[5]

The rule, first enunciated in the late 1940s, is framed as a tiebreaking rule of strict construction: when a provision of the INA can be read in two plausible ways, a reviewing court is bound to adopt the less restrictive or harsh reading of the statute.[6] In other words, in cases of doubt, that doubt should be resolved in line with the interpretation that would entail the least adverse consequences for the alien facing deportation or seeking relief from removal.[7] The problem is, however, that although frequently invoked by the immigration bar and often paid lip service to by the Supreme Court itself, the rule has *never* done significant work in interpreting the immigration laws. It has invariably been a tool of absolute last resort, brought to the table of decision only once an interpretation has been settled upon and invoked, i.e., only as a final justification in support of a construction al-

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vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both").

4. *See* Brief for the Petitioner at 35–45, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017) (No. 16-54); *see also* 8 U.S.C. § 1101(a)(43)(A) ("The term 'aggravated felony' means—murder, rape, or sexual abuse of a minor.").

5. *See* Brief for Petitioner at 44–48, Pereira v. Sessions, 138 S. Ct. 2105 (2018) (No. 17-459); *see also* 8 U.S.C. § 1229(a)(1) (2018) ("In removal proceedings under section 1229a of this title, written notice (in this section referred to as a 'notice to appear') shall be given in person to the alien . . . specifying" certain information, including "[t]he time and place at which the proceedings will be held."); 8 U.S.C. § 1229b(a)(2) (2018) (requiring seven years of continuous residence for an alien previously admitted for lawful permanent residency to establish eligibility for cancellation of removal); 8 U.S.C. § 1229b(b)(1)(A) (requiring ten years of continuous physical presence in the United States for a nonpermanent resident alien); 8 U.S.C. § 1229b(d)(1) ("[A]ny period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear under section 1229(a) of this title . . . ."); *see generally* Patrick J. Glen & Alanna R. Kennedy, *The Strange and Unexpected Afterlife of* Pereira v. Sessions, 34 GEO. IMMIGR. L.J. 1, 24–28 (2019).

6. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[S]ince 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."); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (characterizing the rule as a "principle of construing any lingering ambiguities in deportation statutes in favor of the alien").

7. *See, e.g.*, *Fong Haw Tan*, 333 U.S. at 10 ("We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile." (citing Delgadillo v. Carmichael, 332 U.S. 388 (1947))); *see also* INS v. Errico, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien.").

ready sufficiently supported by traditional tools of interpretation. Even assuming the rule *has* done work in the past, its irrelevance in a post-*Chevron* world is clear: if there are two plausible interpretations of a statutory provision, the agency's interpretation must control so long as reasonable and permissible, and regardless of whether another interpretation is in some sense "better" or preferred by the reviewing court.

This Article seeks to fill the role of Antony: "I come to bury" the immigration rule of lenity, "not to praise" it.[8] The Supreme Court should, at the earliest opportunity, inter the rule as the anachronism it is. As already stated, it is questionable as to whether the rule has ever played anything but a rhetorical role in the decisions of the Supreme Court. But whatever its historical legacy may be, it has no further service to pay in the deference-oriented world of the modern administrative state. The *Chevron* framework establishes the appropriate tiebreaking mechanism for interpretations of ambiguous statutory provisions, and the immigration rule of lenity has no work to do within that framework and no relevance outside it.

This Article proceeds in three Parts. The first Part traces the formative years of the rule, its initial genesis and the Supreme Court's subsequent refinements. This Part demonstrates the shaky foundations of the rule in cases where there was no serious debate over the scope of the proper interpretation of the statute. In other words, the rule is developed not only in cases where it plays no role in the decision but also in cases where the parties and the Court itself were more or less on the same page regarding how the statute should be interpreted. This shaky foundation is not solidified by the Court's subsequent "refinements" of the rule, and in any event, the rule continued to play only an adjunct role to decisions through the late 1950s. The second Part advances the timeline to 1964, with the first section addressing the two most significant post-1958, pre-*Chevron* decisions presenting the issue. Although a closer call, these cases too provide little indication of a meaty role for lenity. The second section heralds the advent of *Chevron* and its application in immigration cases, with the third section then proceeding to the Supreme Court's post-*Chevron* lenity decisions. Finally, the third Part addresses the question of what role lenity could play in contemporary administrative law. This Part begins by reviewing the rule of strict construction of penal statutes, i.e., the criminal or traditional "rule of lenity." This review provides a baseline of sorts for how lenity may operate in the immigration context, but it is also tempered by the strictures of *Chevron*. Thus, this Part proceeds to assess the question of how or why lenity could operate within the *Chevron* framework. It concludes that whether at step

8. WILLIAM SHAKESPEARE, JULIUS CAESAR act 3, sc. 2.

one or step two, lenity is out of place, while also rejecting a proposed "outside-*Chevron*" role for lenity. In the end, however, this Part concludes that the death of lenity should be of little moment; the concerns that animated lenity are more or less safeguarded by the *Chevron* framework. Under *Chevron*, as under lenity, there is no risk that aliens will be subject to arbitrary, capricious, or irrational interpretations of the immigration laws.

II. GENESIS AND REFINEMENT: THE RULE OF STRICT CONSTRUCTION, 1947–1958

This Part traces the origins of the immigration rule of lenity from the late 1940s to the late 1950s, essentially the "foundational" period for the rule. In some ways, this temporal scope is arbitrary; structurally, this Part could also fold in the two cases from the 1960s discussed *infra* and frame the discussion as effectively two periods divided by the advent of *Chevron* deference in 1984. The instant framing makes sense for two reasons. First, the foundational period is, on the whole, concerned with statutory provisions that predate the enactment of the Immigration and Nationality Act in 1952. It thus makes sense to treat this class of cases separately from the cases that implicate the rule and began to arise in the 1960s. The unifying characteristic of Part III of this Article, therefore, is the law to be applied, and a similar point could be made about this Part. Second, the rule was "accepted" to a larger degree by 1964. This Part is not concerned with application of an accepted rule, but with tracing the origins of that rule—why and how it arose and was given shape by the early decisions applying it. Accordingly, the framing in Parts II and III does have much to recommend it, even if it could be presented in a different grouping.

Section A of this Part presents the origins of the immigration rule of lenity in the doctrine of strict construction announced by the Supreme Court in *Delgadillo v. Carmichael* and *Fong Haw Tan v. Phelan*. But as that section notes, from the very beginning the rule was on shaky footing—it was an adjunct to normal tools of statutory construction that played little role in either decision; the interpretations adopted by the Court in both cases were not meaningfully contested by the parties, making resort to the rule unnecessary; the statement of the rule was in tension with its related rule of strict construction of penal statutes; and the entire development of the rule can be laid at the feet of Justice Douglas, whose creation of the rule was more rhetorical than substantive, deriving from a contestable view of the nature of deportation proceedings. Section B carries the historical review from 1950 through 1958, in a trio of decisions—one rejecting application of the rule, and two raising the rule in the course of rendering a statutory interpretation that ultimately favored the alien. As this section concludes, however, the same pre-1950 flaws are present in these

cases. Most importantly, the rule continued to play no apparent role in the decision of these cases. To the extent the rule was noted by majorities in two of the cases, traditional tools of statutory construction had proven sufficient to resolve the case even prior to invoking lenity. The foundational period thus introduces a strain that unifies cases as disparate as 1947's *Delgadillo* and 2001's *INS v. St. Cyr*: the immigration rule of lenity is a rhetorical device, not a substantive rule of decision.

A. Genesis: *Delgadillo* and *Fong Haw Tan*

Delgadillo was a Mexican citizen who lawfully entered the United States in 1923 and resided here through June 1942.[9] That same month, he shipped out from Los Angeles on a merchant ship for an intercoastal voyage to New York City via the Panama Canal.[10] Unfortunately, the ship was torpedoed sometime after exiting the Panama Canal, and Delgadillo was rescued and taken to Cuba.[11] After one week of recuperation at the United States consulate in Cuba, he returned to the United States through Miami, Florida, where he resumed his service as a merchant seaman.[12] This idyll was upended in March 1944, however, when Delgadillo was convicted of second-degree robbery in California and sentenced to one year to life imprisonment.[13] On the basis of that conviction, he was charged with deportability as an "alien who is hereafter sentenced to imprisonment for a term of one year or more because of a conviction in this country of a crime involving moral turpitude, committed within five years after entry of the alien to the United States."[14]

The immigration officer, affirmed by the Board of Immigration Appeals, sustained the charge of removability, concluding that Delgadillo's arrival in Miami in June 1942 "constituted an 'entry'" into the United States.[15] A district court granted a writ of habeas corpus, but the Ninth Circuit reversed, upholding the agency determination.[16] The Ninth Circuit noted language in prior Supreme Court opinions that characterized the term "entry" as broad and relating to any coming or going of an alien into the United States. The Supreme Court

9. *Delgadillo*, 332 U.S. at 389.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 389–90.
14. *Id.* at 390; *see* 8 U.S.C. § 155(a) (1940) (current version at 8 U.S.C. § 1227(a) (2018)); Immigration Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889. This section of the Immigration Act was later renumbered as § 19(a), which is how it will be referred to herein. *See* Alien Registration Act, Pub. L. No. 76-670, § 20, 54 Stat. 670, 671 (1940).
15. *See* Del Guercio v. Delgadillo, 159 F.2d 130, 132 (9th Cir. 1947), *rev'd* 332 U.S. 388 (1947).
16. *Id.* at 131–32.

had stated, for instance, that "[t]he word 'entry' by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the act there must be an arrival from some foreign port or place."[17] Broader still, that Court had opined that "the word 'entry' . . . includes *any coming* of an alien from a foreign country into the United States whether such coming be the first or any subsequent one."[18] Applying these precedents, the court of appeals found the question of the voluntariness of landing on foreign soil, thus necessitating an entry into the United States, "immaterial in considering whether his return to this country constitutes an 'entry' within the Immigration Act."[19] The Ninth Circuit noted that it had already rejected that argument in a similar case presenting a shipwreck, a rescue entailing time spent in a foreign country, and a return to the United States, holding that such a return constituted an "entry" for immigration purposes.[20] The court also emphasized that it was not the wreck and entry itself that subjected Delgadillo to immigration consequences but his subsequent conviction for a criminal offense: "The Government is not asking that appellee be deported because the exigencies of war forced him to land in Cuba. Appellee is being deported because, within five years after his entry, he was convicted of robbery."[21]

The Supreme Court reversed.[22] Although it recognized that the cases relied on by the Ninth Circuit did ostensibly lend support to the court of appeals' holding, it also distinguished those cases as presenting circumstances "where the alien plainly expected or planned to enter a foreign port or place."[23] Delgadillo, in contrast, "was catapulted into the ocean, rescued, and taken to Cuba. He had no part in selecting the foreign port as his destination. His itinerary was forced on him by wholly fortuitous circumstances."[24] Deeming his return to the United States an "entry" within the meaning of the immigration laws would give that term a "capricious application."[25] The Court noted approvingly the then-recent decision of Judge Learned Hand in *Di Pasquale v. Karnuth*.[26] In that case, an alien had boarded a train in Buffalo bound for Detroit, that unbeknownst to him passed through

17. United States *ex rel.* Claussen v. Day, 279 U.S. 398, 401 (1929).
18. United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 425 (1933) (emphasis added).
19. *Delgadillo*, 159 F.2d at 132.
20. *See* Taguchi v. Carr, 62 F.2d 307, 308 (9th Cir. 1932) ("[W]e are compelled to hold that, notwithstanding the misfortune which befell appellant, he was coming from a foreign country and therefore was subject to the immigration laws the same as though he had never resided in the United States.").
21. *Delgadillo*, 159 F.2d at 133.
22. Delgadillo v. Carmichael, 332 U.S. 388, 388 (1947).
23. *Id.* at 390.
24. *Id.*
25. *Id.* at 390–91.
26. *Id.* at 391; *see* Di Pasquale v. Karnuth, 158 F.2d 878 (2d Cir. 1947).

Canada.[27] Because of the route through Canada, immigration authorities deemed the alien's disembarkation in Detroit an "entry" and subsequently charged him with removability based on criminal convictions entered both before and after this "entry."[28] Before the Second Circuit, argument turned entirely on whether the alien's return was an "entry": if so, he was clearly deportable, but if not, he was clearly *not* amendable to deportation.[29] Judge Hand concluded that the alien did not make an entry when the train returned to the United States, relying on the inability of the alien to effect any change in that route or to voluntarily assent to departure from the United States.[30] In Judge Hand's view:

> Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards.[31]

The Supreme Court concurred in this notion in rejecting the court of appeals' view that Delgadillo had effected an "entry" in 1942, opining that "[d]eportation can be the equivalent of banishment or exile."[32] And so the rule of strict construction was given its first iteration:

> We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme.[33]

The Supreme Court returned to the issue one year later in a case presenting a variation on the "crime involving moral turpitude" ground for deportation.[34] Along with a single conviction for a crime involving moral turpitude committed within five years of entry, the 1917 Act also provided for the deportation of "any alien who, after May 1, 1917, . . . is sentenced more than once to [a term of one year or more] of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry."[35] Fong Haw Tan, a Chinese national and citizen, was convicted of two murders in a two-count indictment, and sentenced in one judgment to

27. *Di Pasquale*, 158 F.2d at 878.
28. *Id.*
29. *Id.*
30. *Id.* at 878–79.
31. *Id.* at 879.
32. Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) (citing Bridges v. Wixon, 326 U.S. 135, 147 (1945)).
33. *Id.*
34. Fong Haw Tan v. Phelan, 333 U.S. 6 (1948).
35. 8 U.S.C. § 155(a) (1940) (current version at 8 U.S.C. § 1227(a) (2018)); *see* Immigration Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889.

a period of life imprisonment.[36] He was subsequently paroled for purposes of being taken into custody by the immigration service and was then charged with deportability under § 19(a) based on his convictions.[37] Fong Haw Tan sought habeas relief, arguing that "he [was] sentenced but once, and hence, having resided here more than five years before the crimes were committed, he is not subject to deportation."[38] The district court denied issuance of the writ, as did the Ninth Circuit,[39] which relied on its extant precedent:

> The purpose of Congress [in enacting the crime involving moral turpitude provision] undoubtedly was to provide for the deportation of a man who committed more than one offense involving moral turpitude for which he had been convicted and upon which conviction and sentence has been imposed; whether the sentence run concurrently or consecutively is entirely immaterial from the standpoint of the purpose of the law.[40]

In essence, two offenses qualify under the statute, regardless of how the sentence is itself imposed, so long as the alien has been convicted of both offenses.[41]

Interpretation of this clause of § 19(a) implicated a multi-pronged conflict amongst the courts of appeals. Along with the Ninth Circuit, the First Circuit had concluded that conviction for any two crimes brings the alien within the purview of § 19(a), regardless of whether the acts are in one criminal scheme and regardless of how the sentence is imposed.[42] The Second Circuit had held that two convictions qualify under the statute when the sentences imposed run consecutively, but not when the sentences run concurrently.[43] The Fourth Circuit had held that the two crimes for which the alien is convicted must arise out of distinct criminal transactions, but if that condition is met, it is not relevant how the sentences are imposed, i.e., concur-

36. *Fong Haw Tan*, 333 U.S. at 8.

37. *Id.*; *see* 8 U.S.C. § 155(a) (providing that an alien covered by this provision "shall, upon the warrant of the Attorney General, be taken into custody and deported") (current version at 8 U.S.C. § 1227(a)).

38. Fong Haw Tan v. Phelan, 162 F.2d 663, 664 (9th Cir. 1947), *rev'd*, 333 U.S. 6 (1948).

39. *Id.* at 663.

40. Nishimoto v. Nagle, 44 F.2d 304, 306 (9th Cir. 1930).

41. *Fong Haw Tan*, 162 F.2d at 665 ("[T]here is no harsh injustice involved that justifies a judicial search for a limitation of the plainly expressed scope of the statute. Within five years of entry, one base act of the alien ends his permissive stay; after five years two base acts ends it.").

42. *See* Clark v. Orabona, 59 F.2d 187, 189 (1st Cir. 1932) (finding the alien deportable where acts arose out of the same criminal scheme, two indictments were entered, and two sentences imposed); *Nishimoto*, 44 F.2d at 305–06 (similar).

43. *See* United States *ex rel.* Mignozzi v. Day, 51 F.2d 1019, 1021 (2d Cir. 1931) (holding concurrent sentences do not meet the requirement, even if entered for distinct offenses); Johnson v. United States *ex rel.* Pepe, 28 F.2d 810, 811–12 (2d Cir. 1928) (holding a single indictment for multiple offenses where sentences are imposed consecutively qualifies).

rently or consecutively.[44] Finally, the Fifth Circuit concluded that the convictions must be based on distinct criminal incidents subject to distinct sentencing, i.e., the statute contemplated multiple sentencings for multiple crimes occurring at different points in time.[45]

The Supreme Court ultimately adopted the Fifth Circuit's view.[46] Relying largely on legislative history, which seemed to support the view that Congress was concerned with recidivist offenders, the Court held that § 19(a) "authorize[s] deportation only where an alien having committed a crime involving moral turpitude and having been convicted and sentenced, once again commits a crime of that nature and is convicted and sentenced for it."[47] Having resolved the issue based on the language of the statute and legislative history and intent, the Court nonetheless went on to opine, "We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile."[48] Developing the principle as announced in *Delgadillo*, the Court concluded, "[S]ince 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."[49]

So was the immigration rule of lenity begotten. Contemporary cases, as well as advocates, return especially to *Fong Haw Tan* to ground invocation of the rule. But these cases provide at best a shaky foundation for a robust command that ambiguities in deportation statutes *must* be resolved in favor of the alien. In this regard, at least four points bear mentioning.

First, in these cases, as with a fair reading of *every* decision in which the rule has been invoked, application of lenity was not necessary. In *Delgadillo*, the Supreme Court properly noted that it had not

44. *See* Tassari v. Schmucker, 53 F.2d 570, 573 (4th Cir. 1931) ("In our opinion the correct principle to be deduced from these decisions is that where the crimes are separate and distinct and there is a separate sentence for each offense it must be held within the meaning of the act that the alien has been 'sentenced more than once' even though the separate sentences are made to run concurrently and not consecutively.").

45. *See* Wallis v. Tecchio, 65 F.2d 250, 252 (5th Cir. 1933) ("The alien is sentenced once when, after a conviction or plea of guilty, he is called before the bar and receives judgment, whether for one or several crimes, with one or several terms of imprisonment. He is sentenced more than once when that happens again."); *see also* Opolich v. Fluckey, 47 F.2d 950, 950 (N.D. Ga. 1930) ("[I]n my opinion Congress had in mind what are commonly called 'repeaters,' that is to say, persons who commit a crime and are sentenced, and then commit another and are sentenced again.").

46. Fong Haw Tan v. Phelan, 333 U.S. 6, 9 (1948).

47. *Id.* at 9–10.

48. *Id.* at 10 (citing Delgadillo v. Carmichael, 332 U.S. 388 (1947)).

49. *Id.*

previously addressed the voluntariness of departure in assessing whether an alien made a subsequent "entry" into the United States.[50] Although its cases could be read to support a broad construction of the term "entry," the Court ultimately determined that the better interpretation of that language would account for the nature of the alien's departure from the United States.[51] This common-sense interpretation was imposed *prior* to resort to any strict-construction canon.[52] In *Fong Haw Tan*, the issue was resolved by construing the statutory language in conjunction with the legislative history, which indicates that Congress sought to target repeat criminal offenders who engaged in multiple, distinct criminal transactions.[53] Only after resolving the question in favor of this interpretation, and by using traditional tools of statutory construction, did the Court then opine that any doubts, if still held, should be resolved in favor of that interpretation in light of the rule of strict construction.[54] But upon application of the traditional interpretive tools, there were no remaining doubts.[55]

Second, a corollary to the first point: in both cases the Government either agreed with the interpretation adopted by the Supreme Court or declined to defend the harsher interpretation adopted by the court of appeals. In *Delgadillo*, the Government, consistent also with the Supreme Court, recognized that a strict and literal application of the text of the statute could support the Ninth Circuit's decision.[56] But it declined to press that interpretation: "Upon reconsideration . . . we are inclined to suggest that the Congress may not have intended that an 'entry' for the purposes of the immigration laws should be predicated upon a genuinely involuntary departure from the United States, i.e., an involuntary going to a foreign port or place."[57] In the Government's view, the Supreme Court's prior decisions did not foreclose this interpretation; it was consistent with the general principle that consequences should not be attached to involuntary acts, and the agency had itself, in other circumstances, concluded that where the alien had no control over the departure there was no subsequent entry upon return.[58] For instance, when an alien service member was deployed abroad with the armed forces, he was not deemed to effect an "entry" when he returned, since the departure was not within his control.[59] The Government submitted:

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50. *Delgadillo*, 332 U.S. at 390.
51. *Id.* at 390–91.
52. *Id.*
53. *Fong Haw Tan*, 333 U.S. at 9–10.
54. *Id.*
55. *Id.*
56. Brief for the Respondent at 7–8, *Delgadillo*, 332 U.S. 388 (No. 63).
57. *Id.* at 20.
58. *Id.* at 20, 23.
59. *Id.* at 23.

> It seems to us that this ruling is clearly sound in recognizing that such departure and return of an alien serviceman is a matter completely beyond his control. In principle, we are unable to distinguish an involuntary landing in a foreign country resulting from a torpedoing or shipwreck from the situation of the alien in the armed forces.[60]

Likewise, in *Fong Haw Tan*, the government declined to defend the Ninth Circuit's interpretation of the statute and instead argued that the Fourth Circuit's construction was the preferred view.[61] Contrary to the Ninth Circuit, the Fourth Circuit's interpretation required that the crimes arise from distinct criminal transactions, although sentencing could occur in a single proceeding and be imposed either concurrently or consecutively.[62] The Supreme Court did not adopt this view in whole, but the interpretation it did adopt was similar: the decision adopted the Fifth Circuit's view, which required not only that the offenses had to arise from distinct criminal transactions but also that the sentencings had to be separate, i.e., the alien had to be brought twice before the court for purposes of sentencing.[63] Thus, in *Delgadillo* there was no adversarial posture regarding the interpretation of "entry" ultimately adopted by the Court; the alien and Government agreed on a voluntariness requirement and that interpretation was itself in accord with agency views. And in *Fong Haw Tan*, there was little adversarial posture; the views of the parties and Court ultimately aligned to a high degree—nobody defended the broad interpretation adopted by the Ninth Circuit, and although the Court's interpretation was narrower than that proffered by the Government, Fong Haw Tan would not have been deportable under either.[64]

Third, although appearing in two unanimous decisions of the Supreme Court, the immigration rule of lenity seems less a court-driven jurisprudential development than a Justice Douglas rhetorical crusade. Justice Douglas wrote the opinion for the Court in both *Delgadillo* and *Fong Haw Tan*, and the initial precedential "hook" for his opinion in *Delgadillo* was his own prior opinion in *Bridges v. Wixon*.[65]

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60. *Id.*
61. Brief for the Respondent at 28–29, Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) (No. 370).
62. *See supra* note 44.
63. *Fong Haw Tan*, 333 U.S. at 8–9. *Compare* Tassari v. Schmucker, 53 F.2d 570, 573 (4th Cir. 1931) ("In our opinion the correct principle to be deduced from these decisions is that where the crimes are separate and distinct and there is a separate sentence for each offense it must be held within the meaning of the act that the alien has been 'sentenced more than once' even though the separate sentences are made to run concurrently and not consecutively."), *with* Wallis v. Tecchio, 65 F.2d 250, 252 (5th Cir. 1933) ("The alien is sentenced once when, after a conviction or plea of guilty, he is called before the bar and receives judgment, whether for one or several crimes, with one or several terms of imprisonment. He is sentenced more than once when that happens again.").
64. *See* Brief for the Respondent, *supra* note 61, at 30–33.
65. *Delgadillo*, 332 U.S. at 391.

In that case, Justice Douglas wrote that "[t]hough 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."[66] This characterization of deportation was and is, at the least, contestable. Both before and after *Bridges* and the subsequent development of the immigration rule of lenity, Supreme Court decisions have declined to characterize deportation as punishment, a penalty, exile, or banishment.[67] To the extent Justice Douglas disagreed and wrote competing language into controlling opinions of the Supreme Court, those specific views, never relevant to the actual disposition of the case in which they were raised, should be taken with a grain of salt.

Finally, the Court's framing of the rule of strict construction for immigration purposes was contrary to contemporary statements of the rule of strict construction. In fact, the case recorded immediately after *Fong Haw Tan* in the Supreme Court reports, *United States v. Brown*, specifically rejected the contention that the rule of strict construction requires the narrowest possible reading of statutory language.[68] The issue in *Brown* arose under the Federal Escape Act, which defined escape from "any penal or correctional institution" as a federal criminal offense in qualifying circumstances, and included the following:

> The sentence imposed hereunder shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody *at the time of such escape or attempt to escape*. If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, *any sentence*

66. Bridges v. Wixon, 326 U.S. 135, 154 (1945).

67. *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 526 (2009) (Scalia, J., concurring) ("This Court has long understood that an 'order of deportation is not a punishment for crime.'" (quoting Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893))); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment." (citing Carlson v. Landon, 342 U.S. 524, 537 (1952))); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons who it does not want."); Wong Wing v. United States, 163 U.S. 228, 236 (1896) ("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.").

68. United States v. Brown, 333 U.S. 18 (1948).

> *under which such person is held at the time of such escape or attempt to escape.*[69]

Brown was serving the first of three sentences that had been imposed, to run consecutively, when he escaped and was subsequently convicted under the Escape Act.[70] The question in the case was when the sentence for the escape began to run—Was it at the end of the first one-year sentence, that he was serving at the time of escape, or at the end of the five-year aggregate term to which he had been sentenced?[71] The Supreme Court held that the sentence under the Escape Act did not begin to run until the completion of the total terms of imprisonment the defendant was serving at the time of the escape and, in doing so, rejected the argument that the rule of strict construction required it to adopt a more lenient interpretation.[72] "The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require a magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language."[73] Moreover, the rule does not "demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers."[74] It is difficult, if not impossible, to square this understanding of the rule of strict construction with Justice Douglas's view as expressed in *Fong Haw Tan*. The major difference between *Brown* and *Fong Haw Tan* is more prosaic: Justice Douglas was in dissent in *Brown* and unable to import his whims into the dicta of the Court's opinion.[75]

B. Refinement and Application, 1950–1958

Between 1950 and 1958, the immigration rule of lenity was referenced on at least three occasions, with varying results for the alien. In *United States ex rel. Eichenlaub v. Shaughnessy*, the Supreme Court was called upon to decide whether an alien could be deported after being denaturalized, based on convictions incurred while he was a citizen.[76] Eichenlaub was naturalized in 1936, but in 1941 he was convicted of violating the Espionage Act of 1917 and sentenced to

69. 18 U.S.C. § 753h (1940) (emphasis added) (current version at 18 U.S.C. § 751 (2018)).
70. *Brown*, 333 U.S. at 19–20.
71. *Id.*
72. *Id.* at 22–25.
73. *Id.* at 25–26.
74. *Id.* at 26 (quoting United States v. Gaskin, 320 U.S. 527, 530 (1944)) (citing United States v. Raynor, 302 U.S. 540, 552 (1938); United States v. Giles, 300 U.S. 41, 48 (1937); Gooch v. United States, 297 U.S. 124 (1936); United States v. Corbett, 215 U.S. 233 (1909)).
75. *Id.* at 27.
76. United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950).

eighteen months' imprisonment.[77] In 1944, he was denaturalized "by consent" based on alleged fraud in the procurement of his naturalization.[78] Following denaturalization, deportation proceedings were instituted, where he was charged with deportability based on his criminal conviction.[79] The relevant provision provided for the deportability of "[a]ll aliens who since August 1, 1914, have been or may hereafter be convicted of any violation or conspiracy to violate any of the following sections, the judgment on such conviction having become final, namely:" the Espionage Act of 1917.[80]

On a 4–3 vote, with Justices Douglas and Clark not participating, the Supreme Court upheld application of this provision to Eichenlaub, rejecting the argument that he could not be deported based on a conviction entered while he was a naturalized citizen.[81] According to the majority, the language of the statute requires that:

> [A]ll persons to be deported under this Act shall be "aliens." [It] do[es] not limit its scope to aliens who never have been naturalized. [It] do[es] not exempt those who have secured certificates of naturalization, but then have lost them by court order on the ground of fraud in their procurement. [It] do[es] not suggest that such persons are not as clearly "aliens" as they were before their fraudulent naturalization.[82]

The majority saw the case as simple—Eichenlaub was an alien who was convicted of an offense in the deportation statute and was thus deportable. For this reason, "there [wa]s no occasion to restrict [the] language [of the statute] so as to narrow its plain meaning."[83] The majority recognized the substantial issue presented by the case as "whether the Act requires that the relators not only must have been 'aliens' at the times when they were ordered deported, but . . . also have had that status at the times when they were convicted of designated offenses against the national security."[84] But the statute did not require by its plain terms alienage at the time of conviction; instead, it was triggered when two conditions precedent were met, a conviction for a relevant offense and alienage.[85] "When both conditions are met and, after hearing, the Attorney General finds them to be undesirable residents of the United States, the Act is satisfied."[86] The majority finally buttressed this plain language interpretation by reference to legislative intent: the intent of Congress had been to deport undesirable aliens convicted of crimes against national security, and there

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77. *Id.* at 523.
78. *Id.* at 523–24.
79. *Id.* at 524.
80. 8 U.S.C. § 157(1) (1940) (current version at 8 U.S.C. § 1227(a) (2018)).
81. *Eichenlaub*, 338 U.S. at 523, 533.
82. *Id.* at 528.
83. *Id.* at 529.
84. *Id.*
85. *Id.* at 530.
86. *Id.*

was no indication that Congress would have wanted to distinguish between naturalized citizens and aliens when deciding whether to deport an alien following his denaturalization.[87]

Justice Frankfurter dissented, however, joined by Justices Black and Jackson.[88] In Justice Frankfurter's view, the immigration rule of lenity should have provided the rule of decision: "I deem it my duty not to squeeze [the language of the statute] so as to yield every possible hardship of which its words are susceptible."[89] The dissent would have held that the statute "should be read to apply only to one who was an alien when convicted and should not be made to apply to persons in the position of these petitioners," i.e., it should not apply to denaturalized citizens whose convictions were entered while citizens.[90] This interpretation of the statute was plausible and reasonable, and so for Justice Frankfurter, the question came down to the consequences the competing interpretations entailed.[91] "Where, as here, a statute permits either of two constructions without violence to language, the construction which leads to hardship should be rejected in favor of the permissible construction consonant with humane considerations."[92]

In *Barber v. Gonzales*, decided four years later, the Court returned to the question of how the term "entry" should be applied.[93] Gonzales was "born a national of the United States in" pre-independence Philippines.[94] He entered the United States in 1930, prior to independence, and had not departed since.[95] In 1941, "he was convicted . . . of assault with a deadly weapon and was sentenced to imprisonment for one year," and in 1950, "he was convicted . . . of second degree burglary" and given an indeterminate sentence with a two-year minimum.[96] Based on these convictions, Gonzales was charged with deportability as an alien convicted of more than one crime involving moral turpitude after entry, for which a sentence of one year or more had been imposed.[97] Gonzales filed a petition for a writ of habeas corpus, arguing that he had not made an "entry" to the United States within the meaning of § 19(a) since he had not come from a foreign territory or

87. *See id.* at 530–32.
88. *Id.* at 533 (Frankfurter, J., dissenting).
89. *Id.*
90. *Id.* at 534.
91. *Id.* ("Since such construction is not unreasonable, due regard for consequences demands that the statute be so read.").
92. *Id.*
93. Barber v. Gonzales, 347 U.S. 637 (1954).
94. *Id.* at 638.
95. *Id.*
96. *Id.*
97. *Id.*; *see* 8 U.S.C. § 155(a) (1946), *amended by* 8 U.S.C. § 1251(a) (1952) (current version at 8 U.S.C. § 1227(a) (2018)).

port.[98] The district court denied the writ, but the Ninth Circuit reversed and ordered Gonzales's release from detention.[99]

The Supreme Court granted review to consider "whether [Gonzales]—who was born a national of the United States in the Philippine Islands, who came to the continental United States as a national prior to the Philippine Independence Act of 1934 . . . may now be deported under § 19(a) of the Immigration Act of 1917."[100] The Government largely based its argument on the Philippine Independence Act of 1934, which provided that "[f]or the purposes of the Immigration Act of 1917, . . . this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens."[101] According to the Government, although Gonzales was a national upon his entry to the United States, the independence of the Philippines and the conditions under which that independence was granted, negated that status.[102] Since he was not a citizen of the United States, he should be considered an alien, and thus subject to removal based on his convictions.[103]

The Supreme Court rejected this argument, finding that it was premised on a fundamental misapprehension relating to whether Gonzales had *ever* made an "entry" within the meaning of § 19(a).[104] Although in common parlance Gonzales made an entry into the United States when he arrived in 1930, "some terms acquire a special technical meaning by a process of judicial construction," and the majority found "entry" to be one of those words.[105] Examining its precedent, the Court read entry as requiring "*an arrival from some foreign port or place*."[106] In 1930, when Gonzales entered the United States, "he was *not* arriving 'from some foreign port or place.' On the contrary, he was a United States national moving from one of our insular possessions to the mainland."[107] The Court's holding was premised on its view of the "well-settled meaning of 'entry,'"[108] but it also referenced

98. *Barber*, 347 U.S. at 638.
99. *Id.*
100. *Id.* at 638–39.
101. Philippine Independence Act, Pub. L. No. 73-127, § 8(a)(1), 48 Stat. 456, 462 (1934).
102. *Barber*, 347 U.S. at 639–40.
103. *Id.* at 640 ("[B]y virtue of this provision [of the 1934 Act] the respondent was assimilated to the status of an alien for purposes of 'immigration, exclusion, or expulsion'; and that, having been twice convicted thereafter of crimes involving moral turpitude, he is deportable under § 19(a) of the Immigration Act of 1917.").
104. *Id.*
105. *Id.* at 641.
106. *Id.* (quoting United States *ex rel.* Claussen v. Day, 279 U.S. 398, 401 (1929)).
107. *Id.* at 638, 642 (emphasis added).
108. *Id.* at 642.

the rule of strict construction.[109] This reference, however, only serves to clarify the textual and precedential basis for the Court's decision: "In the absence of explicit language showing a contrary congressional intent, we must give technical words in deportation statutes their usual technical meaning."[110] In other words, Congress was free to alter the meaning of "entry" that had developed through judicial decisions, but until it did so, the Court would continue to apply its traditional interpretation of the term.

Justice Minton dissented, joined by Justices Reed and Burton.[111] The disagreement centered on what exactly the "well-settled" meaning of "entry" was.[112] The dissent maintained that "entry" should be given its "ordinary meaning,"[113] and that nothing in the legislative history or the Court's own precedent "reveals [anything] sufficient to indicate that Congress did not intend the word 'entry' in section 19 should have its ordinary meaning."[114] The dissent found the invocation of lenity especially inapt:

> I know of no good reason why we should by strained construction of an Act compel the United States to cling onto alien criminals. It is not the public policy of this country to construe its statutes strictly in favor of alien criminals whose convictions have already been established of record.[115]

The Court returned to the definition of "entry" in *Bonetti v. Rogers*, capping this foundational period in the rule's history.[116] Under the Internal Security Act of 1950, any "alien who had been a member of the Communist Party of the United States after entry into the United States" was deportable.[117] Bonetti first entered the United States in 1923, became a dues-paying member of the Communist Party in 1932, but left the party in 1936.[118] In 1937, he abandoned his residence in the United States to fight in the Spanish Civil War but was readmitted in October 1938 as a quota immigrant.[119] He was not at that time a member of the Communist Party, nor had he joined the Party after entry.[120] Nonetheless, in 1951, after passage of the Internal Security Act of 1950, deportation proceedings were instituted based on his ear-

109. *Id.* at 642–43 (citing Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947)).
110. *Id.* at 643.
111. *Id.*
112. *Id.* at 643–44 (Minton, J., dissenting).
113. *Id.* at 643.
114. *Id.* at 644 (quoting United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 425 (1933)).
115. *Id.* at 643; *see id.* at 644 ("Because of the Court's strict construction of this statute, which has the effect of putting a liberal construction on the statute in favor of the alien criminal, which I believe to be contrary to the public policy of this country, I dissent.").
116. Bonetti v. Rogers, 356 U.S. 691 (1958).
117. *Id.* at 693.
118. *Id.* at 692.
119. *Id.*
120. *Id.* at 693.

lier membership, he was found deportable, and both the district court and court of appeals affirmed that determination.[121]

The Supreme Court reversed.[122] The Court agreed that the 1950 Act was meant to target aliens who were Communist Party members at the time of their admission, or those who became members at any point after their admission.[123] The disagreement centered on what entry counted for purposes of applying the provision: Bonetti argued that it was the 1938 entry that was relevant for assessing his deportability;[124] the government argued that any entry may qualify, and that for purposes of assessing his deportability, it was fair to use the 1923 entry as the relevant entry.[125] The majority deemed the 1938 entry the relevant entry in this "novel factual situation,"[126] so concluding because it was the status granted in October 1938 that the government sought to annul via deportation.[127] Since Bonetti was not at that time a member of the Communist Party, and had not joined at any time since, he was not deportable.[128] Although the language of the 1950 Act was "quite ambiguous in [its] application to the question here presented, we believe that our interpretation of [it] is the only fair and reasonable construction that [its] cloudy provisions will permit under the rare and novel facts of this case."[129] And, of course, the Court recognized that it could not "assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used."[130]

Justice Clark, joined by Justices Frankfurter and Harlan, dissented, and would have held against the alien based on the plain text of the statute.[131] The legislative intent behind the 1950 Act was to broadly encompass any alien who was a member of the Communist Party at the time of or after *any* entry to the United States.[132] In contrast with the words used by Congress, the dissent viewed the majority as impermissibly reading the term "last" into the statute to qualify "entry."[133] But according to the dissent, the Court had already rejected the argument that Congress had a particular entry, of multiple entries, in mind; in *Volpe*, for instance, the Court had rejected the argument that it was only the initial entry that mattered for purposes of

121. *Id.*
122. *Id.* at 700.
123. *Id.* at 694–95.
124. *Id.* at 695.
125. *Id.*
126. *Id.* at 696.
127. *Id.* at 696–97.
128. *Id.* at 697.
129. *Id.* at 699.
130. *Id.* (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).
131. *Id.* at 700, 702 (Clark, J., dissenting).
132. *Id.* at 700–02.
133. *Id.* at 702.

assessing application of the deportability provisions, not a subsequent entry.[134] The dissent noted:

> Petitioner here makes the converse argument that the word "entering" should be modified to read "last entering." I would not so amend the statute in disregard of the long and uniform judicial, legislative, and administrative history whereby "entry" has acquired a definitive, technical gloss, to wit, its ordinary meaning and nothing more or less.[135]

The rule's invocation between 1950 and 1958 established some level of staying power for the principle; *Delgadillo* and *Fong Haw Tan* were not to be solitary precedents in this regard.[136] Yet many of the same flaws that make the earlier cases weak precedents are equally present in the later cases. Again, the rule was not relevant to the disposition of any case between 1950 and 1958; in *Eichenlaub*, the Court resolved the case against the alien based on the plain language of the statute, and in *Barber*, the Court based its holding on the specialized meaning of "entry." *Bonetti* is ostensibly a closer call, but the better interpretation of the statute is that arrived at by the majority; Bonetti was admitted to the United States in 1938, and it was the status gained at that time that the government sought to annul through deportation. It is true that he had been admitted earlier, but that status was surrendered upon departure in 1937. Given that fact there was no compelling argument as to why the prior entry should then be the touchstone for deportability in the 1950s. None of these decisions come out differently in a world where the immigration rule of lenity does not exist.

These cases also highlight the subjective grounds for the rule's invocation. Applying the rule is contingent on finding ambiguity in statutory language, and clarity (or lack thereof) is not necessarily an objective trait but is rather in the eye of the beholder. Justice Frankfurter dissented in *Eichenlaub* and advocated for what would have been the most robust application of lenity in any of these initial five cases,[137] but he joined a dissent in *Bonetti*, finding that the plain language foreclosed the alien's interpretation of the statute.[138] Justice Burton wrote the decision in *Eichenlaub*,[139] deciding the case on plain language grounds, but joined the majority in *Bonetti*, which invoked (in some fashion) the rule of lenity.[140] Justice Clark penned the dissent in *Bonetti*, finding recourse to lenity unnecessary given the plain

134. *Id.* at 703 (citing United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 425 (1933)).
135. *Id.*
136. *Cf.* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000) ("[T]he conventional [nondelegation] doctrine has had one good year, and 211 bad ones (and counting).").
137. United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521, 533–37 (1950) (Frankfurter, J., dissenting).
138. *Bonetti*, 356 U.S. at 700–03 (Clark, J., dissenting).
139. *Eichenlaub*, 338 U.S. at 522.
140. *Bonetti*, 356 U.S. at 692–700.

language of the statute,[141] while joining the majority in *Barber*, which invoked the rule.[142] The competing circumstances in which any one Justice may be inclined to invoke lenity simply reinforce the obvious: different judges may have different views of what the plain language requires. But that fact also points away from lenity filling an important role. The Supreme Court is able to resolve these cases on de novo review of the statutory language, and differences of opinion may be accommodated within the broad ambit of "traditional statutory interpretation." There is simply not a level of serious ambiguity in these cases that would trigger a need to resort to a tiebreaking rule of absolute last resort.

III. THE IMMIGRATION RULE OF LENITY IN THE SUPREME COURT, 1964–PRESENT

This Part picks up with the first cases utilizing the rule in conjunction with the Immigration and Nationality Act and carries the story forward into the present. The temporal scope of this Part is, however, bifurcated by a different development—the Supreme Court's seminal decision in *Chevron*. The decision in that case, and the extension of administrative deference to immigration cases, essentially renders the immigration rule of lenity irrelevant as a legal matter. Section A considers the two cases raising the rule decided in the 1960s and comes to a familiar conclusion: the rule had little or no effect on the decision rendered. Section B presents *Chevron* and its subsequent extension to immigration proceedings, while section C considers how the rule has been raised and considered in immigration cases post-*Chevron*. Although not a numerous data set, the rule's references in the Court's post-*Chevron* cases fit the prevailing pattern. The rule is raised as an afterthought or rhetorical device to clinch an interpretation otherwise rendered through consideration of traditional tools of statutory construction. Beyond that point, there is also no support in these cases for the proposition that lenity would trump deference. To the contrary, the Court has assumed that where there is genuine ambiguity in a statutory provision, i.e., Congress has provided a gap to be filled, it is the agency's prerogative to fill that gap in any reasonable and permissible manner.

A. Pre-*Chevron* Applications: *Costello* and *Errico*

The rule was "applied" twice more in the 1960s before lying dormant for the better part of two decades, at least as an explicit princi-

141. *Id.* at 700–03 (Clark, J., dissenting).
142. Barber v. Gonzales, 347 U.S. 637, 638–43 (1954).

ple relied upon by the Court.[143] In 1964, the Court revisited the question of whether an alien who is denaturalized could then be deported based on criminal convictions entered while he was a citizen.[144] With the advent of the Immigration and Nationality Act of 1952, the prior crime-involving-moral-turpitude provision had been revised. Under the 1952 Act:

> Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who— . . . (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial . . . .[145]

The Court determined that *Eichenlaub* was not controlling, given both differences in the relevant statutory language and the expressed intent of Congress.[146] Although both language and history supported the decision in *Eichenlaub*, "[n]either the language nor the history of § 241(a)(4) lends itself so easily to a similar construction."[147] On some level, there were at least two plausible interpretations of the statutory language:

> The petitioner's construction—that the language permits deportation only of a person who was an alien at the time of his convictions, and the Court of Appeals' construction—that the language permits deportation of a person now an alien who at any time after entry has been convicted of two crimes, regardless of his status at the time of the convictions—are both possible readings of the statute . . . .[148]

With neither language nor history proving definitive, the Court looked to statutory structure and context. "Although no legislative history illumines our problem, considerable light is forthcoming from another provision of the statute itself."[149] Section 241(b)(2) provided that "if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty

143. It was also raised a third time, in dissent, in *Reid v. INS*, 420 U.S. 619 (1975), a case that rejected a broad interpretation of the Court's decision in *INS v. Errico*, 385 U.S. 214 (1966). There, Justice Brennan opined that "[e]ven if statutory language is unclear any doubt should be resolved in favor of the alien since 'deportation is a drastic measure and at times the equivalent of banishment or exile.' Today the Court strains to construe statutory language *against* the alien." *Reid*, 420 U.S. at 633–34 (Brennan, J., dissenting) (citations omitted). Justice Brennan was joined in dissent by Justice Marshall, who, ironically, had presented argument for the government in *Errico*, contending that the waiver provision should be interpreted narrowly. *Id.* at 631; *see Errico*, 385 U.S. at 214, 217.
144. Costello v. INS, 376 U.S. 120 (1964).
145. 8 U.S.C. § 1251(a)(4) (1952) (current version at 8 U.S.C. § 1227(a) (2018)).
146. *See Costello*, 376 U.S. at 123–24.
147. *Id.* at 124.
148. *Id.*
149. *Id.* at 126.

days thereafter, a recommendation . . . that such alien not be deported," the deportation would not take place.[150] The Supreme Court found that this provision would be inoperable for aliens who were convicted of crimes when naturalized citizens: "A naturalized citizen would not 'at the time of first imposing judgment or passing sentence,' or presumably 'within thirty days thereafter,' be an 'alien' who could seek to invoke the protections of this section of the law."[151] This factor tipped the scales for the majority, which was hesitant to adopt a construction of § 241(a)(4) that "would, with respect to an entire class of aliens, completely nullify a procedure so intrinsic a part of the legislative scheme."[152]

Having resolved the case on its own interpretation of the statute, with special emphasis on structure and context, the majority proceeded to pay homage to the immigration rule of lenity: even if resort to structure in the form of § 241(b)(2) was not *determinative*, the Court would "nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner."[153] Concluding that convictions entered against an alien while he was a citizen could count for purposes of deportability "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."[154]

The dissent, in contrast, would have found the statutory language sufficient to resolve the case against the alien, buttressed by relevant legislative intent and the reasonableness of seeking deportation of criminal aliens regardless of when the conviction was entered—during the period of naturalization or after denaturalization.[155] In Justice White's words, "I have no quarrel with the doctrine that where the Court is unable to discern the intent of Congress, ambiguities should be resolved in favor of the deportee, but here there is a clear expression of congressional purpose. I would carry it out."[156]

In 1966, the Court had to confront an opaquely worded provision pertaining to relief from deportation.[157] The INA, as amended, provided:

> The provisions . . . relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens

150. Immigration and Nationality Act, Pub. L. No. 82-414, § 241(b)(2), 66 Stat. 163, 208 (1952); *see* 8 U.S.C. § 1251(b)(2) (1952) (repealed 1990).
151. *Costello*, 376 U.S. at 127.
152. *Id.* at 127–28.
153. *Id.* at 128.
154. *Id.*
155. *Id.* at 134, 147–48 (White, J., dissenting).
156. *Id.* at 148.
157. *See* INS v. Errico, 385 U.S. 214 (1966).

> who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.[158]

The dispute in *INS v. Errico* centered on the "otherwise admissible" language: Did that section apply to an alien with the necessary familial relationship, who entered or was admitted based on fraud or misrepresentation, but was inadmissible at the time of entry because of national origin quota restrictions in place prior to the 1965 Act?[159] The Government, with then-Solicitor General Thurgood Marshall presenting argument before the Court, contended that "to be otherwise admissible at the time of entry the alien must show that he would have been admitted even if he had not lied, and that the aliens in these cases would not have been admitted because of the quota restrictions."[160] On the other side of the argument, the alien contended that the Government's construction was too narrow, since any material fraud or misrepresentation in connection with entry likely covered up a fact that made the alien *inadmissible*; in other words, were the alien otherwise admissible within the meaning of the Government's argument there would not be any reason to engage in conduct that would implicate a need for the waiver.[161]

To resolve the question, the Court examined the history of provisions pertaining to discretionary relief for fraud or misrepresentations connected to entry and admission.[162] That history indicated that for aliens with qualifying family relationships, establishing that they were "otherwise admissible" did not include establishing that they would have been admissible under the quota restrictions, i.e., an alien would be entitled to relief for fraud connected with evading the quota restrictions *so long as* the alien possessed a qualifying family relationship.[163] The intent of the earlier provisions "not to require that aliens who are close relatives of United States citizens have complied with quota restrictions to escape deportation for their fraud is clear from its language, and there is nothing in the legislative history to suggest that Congress had in mind a contrary result" under either the earlier

158. Act to Amend the Immigration and Nationality Act, Pub. L. No. 87-301, § 16, 75 Stat. 650, 655 (1961); *see* 8 U.S.C. § 1251(f) (Supp. III 1961) (repealed 1990).
159. *Errico*, 385 U.S. 214; *see, e.g.*, Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 313 (1956) ("In 1924, Congress imposed quantitative restrictions on the entry of aliens and established a national origins quota system in which place of birth played a decisive role in the allocation of visas. Deportation was ordered for those who thereafter entered without a valid visa.").
160. *Errico*, 385 U.S. at 217.
161. *Id.* at 217–18.
162. *Id.* at 218–23.
163. *Id.* at 222–23.

Acts or when essentially restating those provisions in enacting § 241(f).[164] The Court found this interpretation "further reinforced when the section is regarded in the context of the 1957 Act. The fundamental purpose of this legislation was to unite families," and that purpose was best served by adopting the broader interpretation of the provision's scope.[165] Having again resolved the question presented on more or less traditional grounds, the Court proceeded to application of the immigration rule of lenity colored by the humanitarian concerns already noted: "We conclude that to give meaning to the statute in the light of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens, the conflict between the circuits must be resolved in favor of the aliens."[166] In other words, "[e]ven if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."[167]

Nothing distinguishes the application of the rule in these cases from the similarly rhetorical recitations of that rule in the cases between 1947 and 1958. The rule itself is largely an afterthought trotted out only to buttress application of traditional tools of statutory construction. In *Costello*, the statutory structure was determinative; the inclusion of § 241(b)(2) provided support for the contention that to be a deportable offense, the offense had to be committed when the individual was an alien. Otherwise, a major procedural protection put into place by the 1952 Act would have been rendered a dead letter for those convicted of offenses while a citizen. Likewise, in *Errico*, the history and statutory language was determinative; history illuminated the meaning of "otherwise admissible" in the relief context, and established the irrelevance of the quota restrictions for judging the "admissibility" of aliens for purposes of the waiver.[168] Legislative intent, too, was important, and in *Errico* supported a liberal construction of the statutory scheme. Lenity fits comfortably with the Court's approach in *Errico*, but that is less because of application of the rule itself than the fact that here, unlike the earlier cases, the Court was actually addressing a statutory provision intended to provide a humanitarian benefit to aliens.

164. *Id.* at 223.

165. *Id.* at 224.

166. *Id.* at 225.

167. *Id.*

168. *But see Recent Developments: Immigration: The Criterion of "Otherwise Admissible" as a Basis for Relief from Deportation Because of Fraud or Misrepresentation*, 66 COLUM. L. REV. 188, 195–97 (1966) (criticizing the Court's review of statutory history and opining that the Court misread the limited intent Congress evinced in enacting Section 241(f) as a protection, mainly, for Mexican aliens who were not subject to the quota restrictions).

B. *Chevron* Deference and Immigration Law

The concept of judicial deference to the determinations of administrative agencies within their areas of competence predates 1984. In 1904, for instance, and with citation to cases as early as 1840, the Supreme Court held:

> [W]here Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong.[169]

In 1961, the Court opined:

> This admonition has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.[170]

Where the agency's choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[171]

The Supreme Court's decision in 1984 in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, molded this historical practice and gave form to the decisional framework that should govern a court's review of agency action.[172] Under the Clean Air Act Amendments of 1977,[173] "[s]tates that had not achieved [specified] national air quality standards" were required to "establish a permit program regulating 'new or modified major stationary sources' of air pollution."[174] The Environmental Protection Agency in turn promulgated a regulation that allowed "nonattainment" states "to adopt a plantwide definition of the term 'stationary source.'"[175] "Under [that] definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant."[176] The United States Court of Appeals for the District of Columbia Circuit set aside the regulations, holding that the "bubble-

169. Bates & Guild Co. v. Payne, 194 U.S. 106, 108–09 (1904); *see id.* at 109 (citing, *inter alia*, Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840)).
170. United States v. Shimer, 367 U.S. 374, 382 (1961).
171. *Id.* at 383.
172. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).
173. Pub. L. No. 95-95, 91 Stat. 685 (1977).
174. *Chevron*, 467 U.S. at 840.
175. *Id.*
176. *Id.*

based" definition of stationary source was "inappropriate" given the ends of the 1977 Amendments—"to '*improve* [ ] air quality.'"[177]

The Supreme Court reversed, holding that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition."[178] In so holding, the Court laid out what would become known as the *Chevron* framework, a two-step process for determining the permissibility of an agency interpretation of a statute it is charged with administering. The first step "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."[179] The second step follows "if . . . the court determines Congress has not directly addressed the precise question at issue."[180] In such circumstances:

> [T]he 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.[181]

The Court rooted this iteration of the rule in the reality of the modern administrative state: "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."[182] Delegations may be express, in which case the agency's rule or decision must be "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."[183] Or they may be implied, in which case "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[184] In *Chevron* itself, the Supreme Court concluded that the Clean Air Act Amendments did not foreclose the regulation adopted by the EPA, and that its "definition of the term 'source' [was] a permissible construc-

177. *See* NRDC v. Gorsuch, 685 F.2d 718, 726 (D.C. Cir. 1982) (quoting ASARCO, Inc. v. EPA, 578 F.2d 319, 327 (D.C. Cir. 1978)).

178. *Chevron*, 467 U.S. at 842.

179. *Id.* at 842–43.

180. *Id.* at 843.

181. *Id.*

182. Morton v. Ruiz, 415 U.S. 199, 231 (1974).

183. *Chevron*, 467 U.S. at 843–44 (citing United States v. Morton, 467 U.S. 822, 834 (1984); Schweiker v. Gray Panthers, 453 U.S. 34, 44 (1981); Batterton v. Francis, 432 U.S. 416, 424–26 (1977); Am. Tel. & Tel. Co. v. United States, 299 U.S. 232, 235–37 (1936)).

184. *Id.* at 844.

tion of the statute which seeks to accommodate progress in reducing air pollution with economic growth."[185]

Chevron has special relevance in the immigration context, where Executive Branch authority and discretion have long been recognized not only as integral components of the statutory scheme but as background principles implicated because of the very nature of immigration law. Deference to the political branches is rooted in the plenary power, succinctly summarized by Justice Frankfurter in 1952:

> The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification, 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 the Congress and wholly outside the power of this Court to control.[186]

Thus, even before *Chevron*, the Supreme Court had noted that "it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[187] Furthermore, "[o]ur cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"[188] In other words, "the power over aliens is of a political character and therefore subject only to narrow judicial review."[189]

As a statutory matter, the Immigration and Nationality Act provides that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."[190] The statute is otherwise replete with express delegations of decisional authority to the Attorney General, many of which decisions are in his or her sole discretion.[191] The applicability of *Chevron* to immigration decisions

185. *Id.* at 866.
186. Harisiades v. Shaughnessy, 342 U.S. 580, 596–97 (1952) (Frankfurter, J., concurring).
187. Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)) (citing Kleindienst v. Mandel, 408 U.S. 753, 766 (1972)).
188. *Id.* (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)) (citing *Harisiades*, 342 U.S. 580; Lem Moon Sing v. United States, 158 U.S. 538 (1895); Fong Yue Ting v. United States, 149 U.S. 698 (1893); The Chinese Exclusion Case, 130 U.S. 581 (1889)).
189. Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) (citing *Fong Yue Ting*, 149 U.S. at 713).
190. 8 U.S.C. § 1103(a)(1) (2018).
191. *See, e.g.*, 8 U.S.C. § 1103(g)(2) (2018) ("The Attorney General shall establish such regulations, prescribe such forms of bond, reports, entries, and other papers, issue such instructions, review such administrative determinations in immigration proceedings, delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out this section."); 8 U.S.C.

has thus been accepted by the Supreme Court since the very first cases arose presenting the question.[192]

"It is [thus] clear that principles of *Chevron* deference are applicable to this statutory scheme."[193] If anything, the typical deference extended to agencies under *Chevron* was characterized as "heightened" in the arena of immigration law. The Supreme Court has "recognized 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.'"[194] In *Aguirre-Aguirre*, for instance, the Supreme Court rejected a Ninth Circuit decision that had been inadequately deferential to the agency's determination of what constituted a "serious non-political crime" for purposes of denying a claim to withholding of removal.[195] But as the Court noted:

> A decision by the Attorney General to deem certain violent offenses committed in another country as political in nature, and to allow the perpetrators to remain in the United States, may affect our relations with that country or its neighbors. The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions.[196]

C. Post-*Chevron* Applications: An Outmoded Rule

Whatever role the rule could be said to have played in the Supreme Court's pre-*Chevron* cases, it has not been, fairly construed, even a

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§ 1158(b)(1)(A) (2018) (including "the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures" he has established); 8 U.S.C. § 1229b(a)–(b) (2018) (proscribing discretionary relief in the form of cancellation of removal, which "may" be granted by the Attorney General); 8 U.S.C. § 1255(a) (2018) (providing that the Attorney General "may" adjust status of certain aliens within the United States); *see also* Patrick J. Glen, Matter of L-A-C-: *A Pragmatic Approach to the Burden of Proof and Corroborating Evidence in Asylum Proceedings*, 35 GEO. IMMIGR. L.J. (forthcoming 2021) (noting numerous express and implied delegations to the Attorney General in the asylum statute); Patrick Glen, *The Removability of Non-Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings*, 30 BERKELEY J. INT'L L. 1, 13–20 (2012) (noting various additional waivers and forms of relief available in the exercise of the Attorney General's discretion).

192. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987) ("There is obviously some ambiguity in a term like 'well-founded fear' which can only be given concrete meaning through a process of case-by-case adjudication. In that process of filling "'any gap left, implicitly or explicitly, by Congress,'" the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program." (quoting Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984))).

193. INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999).

194. *Id.* at 425 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)).

195. *Id.* at 425–26.

196. *Id.* at 425.

rule of last resort in post-*Chevron* cases. The Court has resolved many cases on its own reading of the text using traditional tools of statutory construction (but not the rule of lenity), as this section establishes, and the Court has otherwise deferred to reasonable agency interpretations of ambiguous statutory provisions, as a subsequent section shows.[197]

The two main post-*Chevron* cases are *INS v. Cardoza-Fonseca*[198] and *INS v. St. Cyr*.[199] In *Cardoza-Fonseca*, the Court had to resolve which standard governs whether an applicant has established eligibility for asylum under the INA.[200] The INA establishes two forms of relief and protection for aliens who fear persecution in their country of nationality. First, withholding of deportation (now called withholding of removal) is a mandatory form of protection triggered where the alien establishes that his "life or freedom *would be* threatened in" the country of removal based on a statutorily protected ground, i.e., "race, religion, nationality, membership in a particular social group, or political opinion."[201] Second, asylum is a discretionary form of relief available to applicants who can establish past "persecution or a *well-founded fear* of persecution on account of" a statutorily protected ground.[202] In an earlier case, the Supreme Court had already held that to establish eligibility for withholding of deportation, the alien had to demonstrate that "it is more likely than not that [he] would be subject to persecution" in the country of removal.[203] In reaching that holding, the Court had rejected the applicant's contention that the "would be threatened" language of the withholding provision should be governed by the looser "well-founded fear" standard that had developed under various statutory iterations pertaining to refugee admissions.[204]

Cardoza-Fonseca presented the converse argument—should the "more likely than not" standard developed for withholding cases govern the "well-founded fear" inquiry?[205] The Government argued, in essence, "that the only way an applicant can demonstrate a 'well-founded fear of persecution' is to prove a 'clear probability of persecution.'"[206] The Court rejected this argument for two main reasons.

197. *See infra* subsection IV.B.2.
198. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).
199. INS v. St. Cyr, 533 U.S. 289 (2001).
200. *Cardoza-Fonseca*, 480 U.S. 421.
201. 8 U.S.C. § 1253(h) (1982) (emphasis added) (current version at 8 U.S.C. § 1231(b) (2018)).
202. 8 U.S.C. § 1101(a)(42)(A) (1982) (emphasis added) (current version at 8 U.S.C. § 1101(a)(42)(A) (2018)); 8 U.S.C. § 1158(a) (1982) (current version at 8 U.S.C. § 1158(b) (2018)).
203. INS v. Stevic, 467 U.S. 407, 429–30 (1984).
204. *See id.* at 428–30.
205. *Cardoza-Fonseca*, 480 U.S. 421.
206. *Id.* at 430.

First, as a textual matter, "the language Congress used to describe the two standards conveys very different meanings."[207] The "would be threatened" language in the withholding provision pointed to an objective inquiry, whereas the asylum statute contemplated some level of inquiry into the subjective mental state of the alien by requiring that any fear be "well-founded."[208] And in common understanding, a fear could be "well-founded" even "when there is less than a 50% chance of the occurrence taking place."[209] Second, "[t]he message conveyed by the plain language of the Act is confirmed by an examination of its history."[210] Most importantly, in this regard, was the intent of the drafters of the 1980 Refugee Act to "bring United States refugee law into conformance with" its international obligations under the 1951 Refugee Convention and the 1967 Protocol.[211] The consistent interpretation and application of the Convention's own definition of "refugee" indicated that an applicant may qualify where the evidence establishes something significantly less than a "clear probability" of persecution.[212] And differential treatment of the two standards was especially warranted based on the structure of international law, which was mirrored in the domestic Act: asylum corresponds to the discretionary relief contemplated by the Convention, whereas withholding of deportation corresponds to the mandatory non-*refoulement* obligation, applicable where an applicant establishes a *greater* risk of harm if removed.[213]

Resort to these traditional tools of statutory construction was sufficient to reject the Government's argument that the two statutes should be interpreted to provide for identical inquiries:

> Our analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that to show a "well-founded fear of persecution," an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country.[214]

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207. *Id.*

208. *Id.* at 430–31.

209. *Id.* at 431.

210. *Id.* at 432–33.

211. *See id.* at 436–41.

212. *Id.* at 438–40.

213. *Id.* at 440–41; *id.* at 441 ("Article 34 provides for a precatory, or discretionary, benefit for the entire class of persons who qualify as 'refugees,' whereas Article 33.1 provides an entitlement for the subcategory that 'would be threatened' with persecution upon their return. This precise distinction between the broad class of refugees and the subcategory entitled to § 243(h) relief is plainly revealed in the 1980 Act." (citing INS v. Stevic, 467 U.S. 407, 428 (1984))).

214. *Id.* at 449.

These "ordinary canons of statutory construction" were "compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[215]

In contrast with the relatively easy disposition of *Cardoza-Fonseca*, *INS v. St. Cyr* presented two thorny questions related to the massive statutory reforms enacted in 1996 by the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA):[216] whether habeas jurisdiction had been repealed, and whether the repeal of relief available under former § 212(c) was retroactive as applied to aliens who pled guilty to a qualifying offense prior to enactment.[217] On the procedural question of whether district courts retained jurisdiction to consider questions of law in cases where the INA otherwise foreclosed jurisdiction via a petition for review, the Supreme Court answered in the affirmative:

> [T]he absence of [an alternative forum in which to raise the purported legal question], coupled with the lack of a clear, unambiguous, and express statement of congressional intent to preclude judicial consideration on habeas of such an important question of law, strongly counsels against adopting a construction that would raise serious constitutional questions.[218]

Having resolved the threshold jurisdictional issue, the Court proceeded to the merits question: whether the amendments to the relief provisions made in 1996 foreclosed an alien's ability to seek a certain form of discretionary relief from removal when the conviction was entered prior to the effective date of IIRIRA.[219] In 1996, St. Cyr had pled guilty to selling a controlled substance under Connecticut state law, by which he became removable and "eligible for a discretionary waiver of that deportation under" former § 212(c) of the INA.[220] He was placed into removal proceedings *after* the effective date of IIRIRA, and the agency declined to consider him for relief under § 212(c) based on the statutory repeal of that section.[221] In analyzing the merits question, the Supreme Court began on solid and accepted ground: "A stat-

215. *Id.* (citing INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).
216. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.
217. INS v. St. Cyr, 533 U.S. 289 (2001).
218. *Id.* at 314 (citing Felker v. Turpin, 518 U.S. 651, 660–61 (1996)); *see generally* David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996-2005)*, 51 N.Y.L. SCH. L. REV. 75 (2006–2007) (reviewing the habeas question in historical context with a view to post-*St. Cyr* legislative developments).
219. *St. Cyr*, 533 U.S. at 314.
220. *Id.* at 293, 314–15; *see* Patrick Glen, Judulang v. Holder *and the Future of 212(c) Relief*, 27 GEO. IMMIGR. L.J. 1, 6–15 (2012) (providing a historical overview of § 212(c) relief through the Supreme Court's decision in *St. Cyr*).
221. *St. Cyr*, 533 U.S. at 293.

ute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result."[222] This was a high standard, and the "cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation."[223] Although the Government made various arguments relating to the language of IIRIRA and its legislative history, the Court declined to find that this high standard was met.[224] Rather, it noted:

> The 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," forecloses the conclusion that . . . "Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[225]

On its face, *St. Cyr* seems to present a closer call regarding the application of the immigration rule of lenity. The Court explicitly references it as "buttress[ing]" the other relevant canon of construction, the presumption against retroactivity.[226] But even here the rule is doing nothing despite the rhetorical turn in the Court's opinion, and its subsequent reference in another retroactivity case five years later makes that point clear.[227] At issue in *Fernandez-Vargas v. Gonzales* was a different IIRIRA amendment, that to the INA's reinstatement provision.[228] That amendment provided:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.[229]

Fernandez-Vargas was ordered removed sometime in the 1970s but illegally reentered in 1982 and remained in the United States continuously since that date.[230] He subsequently married a United States citizen and sought to adjust his status, but this application triggered an investigation that uncovered the prior order of removal, which the government then reinstated and used to remove him.[231] On petition for review, Fernandez-Vargas argued that pre-1996 law governed his

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222. *Id.* at 316; *see id.* at 315–16 ("[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result." (quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988))).
223. *Id.* at 316–17 (quoting Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)).
224. *Id.* at 317–20.
225. *Id.* at 320 (citations omitted).
226. *Id.*
227. Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).
228. *Id.*
229. 8 U.S.C. § 1231(a)(5) (2000) (current version at 8 U.S.C. § 1231(a)(5) (2018)).
230. *Fernandez-Vargas*, 548 U.S. at 35.
231. *See id.* at 35–36.

claims, since he had illegally reentered long before 1996; under that law, unlike IIRIRA's reinstatement provision, he remained eligible for adjustment of status.[232] The Tenth Circuit rejected this claim, holding that § 241(a)(5) barred any further relief, and that its application to him did not have "an impermissible retroactive effect."[233]

Before the Supreme Court, Fernandez-Vargas argued:

> Congress intended that INA § 241(a)(5) would not apply to illegal reentrants like him who returned to this country before the provision's effective date; and in any event, that application of the provision to such illegal reentrants would have an impermissibly retroactive effect, to be avoided by applying the presumption against it.[234]

The Supreme Court began by noting its three-step sequential analysis for retroactivity cases.[235] First, the question is "'whether Congress has expressly prescribed the statute's proper reach,' and in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying 'our normal rules of construction.'"[236] Second, "[i]f that effort fails, we ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis] of conduct arising before [its] enactment.'"[237] Finally, "[i]f the answer [to that second question] is yes," the Court "then appl[ies] the presumption against retroactivity by construing the statute as inapplicable to the event or act in question owing to the 'absen[ce of] a clear indication from Congress that it intended such a result.'"[238]

It was within this framework that Fernandez-Vargas sought to raise the immigration rule of lenity. He contended that the rule should be applied at step one of the retroactivity analysis: "Since the new law is bereft of . . . clarity [regarding whether it applied to pre-enactment activity]," Fernandez-Vargas argued that "we should apply the 'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'"[239] The effect of doing that would be to "impose '[t]he presumption against retroactive application of ambiguous statutory provisions,'" limiting the scope of § 241(a)(5)'s application to post-enactment reentries only.[240] Applying the immigration rule of lenity in this manner, at step one of the retroactivity analysis,

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232. *Id.* at 36.
233. Fernandez-Vargas v. Ashcroft, 394 F.3d 881, 886, 890–91 (10th Cir. 2005).
234. *Fernandez-Vargas*, 548 U.S. at 38.
235. *Id.* at 37.
236. *Id.* (citations omitted).
237. *Id.* (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 278 (1994)) (citing Lindh v. Murphy, 521 U.S. 320, 326 (1997)).
238. *Id.* at 37–38 (quoting INS v. St. Cyr, 533 U.S. 289, 316 (2001)) (citing Martin v. Hadix, 527 U.S. 343, 352 (1999)).
239. *Id.* at 40 (quoting *St. Cyr*, 533 U.S. at 320).
240. *Id.* (quoting *St. Cyr*, 533 U.S. at 320).

would render unnecessary the remaining two steps.[241] Yet as the Court noted, "[i]t is not until a statute is shown to have no firm provision about temporal reach but to produce a retroactive effect when straightforwardly applied that the presumption [against retroactivity] has its work to do."[242]

Declining to apply the rule in the manner advocated by Fernandez-Vargas, the Court concluded that "[c]ommon principles of statutory interpretation fail to unsettle the apparent application of § 241(a)(5) to any reentrant present in the country, whatever the date of return."[243] This aspect was ultimately more or less beside the point, however, as the Court held that, as applied to Fernandez-Vargas, there was no retroactive effect.[244] It was his "choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out."[245]

The Court's distillation of the retroactivity analysis in *Fernandez-Vargas* puts to rest any claim that the rule of lenity played a role in the Court's earlier decision in *St. Cyr*. The rule cannot come into play at the threshold to resolve any ambiguity in whether Congress has clearly dictated the temporal application of a statute. But if the Court gets to step three, the presumption against retroactive application would itself take precedence and resolve the case in accord with how the immigration rule of lenity would have resolved the case. In other words, it is not possible that the rule had a freestanding application in *St. Cyr*; the statute remained "ambiguous" in a relevant sense after the first two steps of the retroactivity analysis, but that ambiguity was resolved within the analysis itself by presuming only prospective effect for the repeal of § 212(c) relief.[246]

The last significant invocation of the rule was in *Kawashima v. Holder*.[247] The Kawashimas, husband and wife, pled guilty respec-

241. *Id.*
242. *Id.* (citing *Landgraf*, 511 U.S. at 280).
243. *Id.* at 41–42.
244. *Id.* at 42–43.
245. *Id.* at 44.
246. INS v. St. Cyr, 533 U.S. 289 (2001).
247. Kawashima v. Holder, 565 U.S. 478 (2012). The rule was also cited in *Dada v. Mukasey*, where the issue presented related to the interplay between the motion to reopen mechanism and the discretionary relief of voluntary departure, which allows an alien to depart the United States without accruing the legal disabilities associated with "removal." 554 U.S. 1 (2008). A failure to depart after having been granted voluntary departure also entailed adverse legal consequences, but departure while a motion to reopen was pending effected a withdrawal of that motion. *Id.* at 15. The Court explained:

> Without some means, consistent with the Act, to reconcile the two commands—one directing voluntary departure and the other directing ter-

tively to violations of willfully making and subscribing a false tax return,[248] and aiding and assisting in the preparation of a false tax return.[249] They were subsequently found removable as aliens convicted of an aggravated felony offense, as defined by § 1101(a)(43)(M): "[A]n offense that either '(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or (ii) is described in section 7201 of title 26 (relating to tax evasion) in which revenue loss to the Government exceeds $10,000.'"[250] Before the Supreme Court, the Kawashimas argued that § 7206 offenses "do not involve 'fraud or deceit,'" and that in any event *all* tax offenses are excluded by implication from subsection (i).[251]

The Supreme Court quickly rejected the first argument. "The language of Clause (i) is clear. Anyone who is convicted of an offense that 'involves fraud or deceit in which the loss to the victim or victims exceeds $10,000' has committed an aggravated felony and is subject to deportation . . . ."[252] Convictions under § 7206 met that definition, as "[t]he elements of willfully making and subscribing a false corporate tax return . . . and of aiding and assisting in the preparation of a false tax return . . . establish that those crimes are deportable offenses because they necessarily entail deceit."[253] The second argument was an argument by implication—that the express reference to tax evasion in subsection (ii) was exhaustive of tax offenses, and that such offenses

> mination of the motion to reopen if an alien departs the United States—an alien who seeks reopening has two poor choices: The alien can remain in the United States to ensure the motion to reopen remains pending, while incurring statutory penalties for overstaying the voluntary departure date; or the alien can avoid penalties by prompt departure but abandon the motion to reopen.

Id. at 5. Given the statutory language relating to motions to reopen, and the important procedural safeguard the reopening mechanism served, the Court found "[i]t is necessary . . . to read the Act to preserve the alien's right to pursue reopening while respecting the Government's interest in the *quid pro quo* of the voluntary departure arrangement." *Id.* at 19. This conclusion was rooted in "the plain text of the statute" and the need to avoid the absurd result of foreclosing reopening for a favored class of aliens, those eligible for and granted voluntary departure. *Id.* at 18–19 (citing Costello v. INS, 376 U.S. 120, 127–28 (1964)). For this final point, the rule of strict construction warranted a "see also" citation at the end of a long string cite. *Id.* at 19 (citing *St. Cyr*, 533 U.S. at 320 ("[R]ecognizing 'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'"); Stone v. INS, 514 U.S. 386, 399 (1995)). The rule did not play any role in the Court's adoption of its interpretation of the statute. *Id.* at 4–23.

248. *Kawashima*, 565 U.S. at 480; *see* 26 U.S.C. § 7206(1) (2012) (current version at 26 U.S.C. § 7206(1) (2018)).
249. *Kawashima*, 565 U.S. at 480; *see* 26 U.S.C. § 7206(2) (2012) (current version at 26 U.S.C. § 7206(2) (2018)).
250. *See Kawashima*, 565 U.S. at 481.
251. *Id.* at 482.
252. *Id.* at 484.
253. *Id.* at 484–85.

were therefore outside the scope of subsection (i).[254] The Court determined that there was nothing in the plain language of the statute to support the exclusion of tax offenses from the broad scope of the language used by subsection (i)—an offense that "involves fraud or deceit."[255] And the possibility that a court would conclude that tax evasion under 26 U.S.C. § 7201 would *not* qualify as a "fraud or deceit" crime under subparagraph (i) was a sufficient justification for the disparate treatment between that offense (given its own subsection) and other tax-based offenses (which could fall under subsection (i)).[256] The Kawashimas also argued "that subparagraph (M)'s treatment of tax crimes other than tax evasion is ambiguous, and that we should therefore construe the statute in their favor."[257] The Court rejected that invitation: "We think the application of the present statute clear enough that resort to the rule of lenity is not warranted."[258]

This post-*Chevron* review of the rule's application concludes in a familiar way, by noting that there is no indication whatsoever in these opinions that the rule was relevant to the decision. In *Cardoza-Fonseca*, the Court explicitly noted it could and was resolving the case on other grounds without the need to resort to the rule of strict construction. *St. Cyr* does raise the rule in a context where it seems like it is relying on it at least in part, but the presumption against retroactive application did the heavy lifting and left the rule of lenity with no work to do. Application of the rule is rejected as unnecessary in both *Fernandez-Vargas*, which clarifies the inappropriateness of applying the rule *within* the retroactivity analysis, and *Kawashima*.

There is also no support in these cases for an argument that lenity would displace *Chevron* or even have a role to play within the *Chevron* framework. In *Cardoza-Fonseca*, the Court construed the question of whether the withholding and asylum standards were identical as "a pure question of statutory construction for the courts to decide."[259] It accepted the applicability of deference to immigration decisions generally, but concluded that deference was not appropriate since resolution of the case did not call for any of the gap filling to which *Chevron* would apply.[260] *Chevron* was also found to be irrelevant in *St. Cyr*. As the Court noted, "[b]ecause 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

254. *Id.* at 485.
255. *Id.* at 486.
256. *Id.*
257. *Id.* at 489.
258. *Id.*
259. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 (1987).
260. *Id.* at 448 ("[O]ur task today is much narrower, and is well within the province of the Judiciary.").

such a statute for an agency to resolve."[261] The rule was additionally noted in *Dada v. Mukasey*, but there the indication is that *Chevron* would have work to do in cases of ambiguity and that the rule of lenity would not serve as the tiebreaker. Even as the Court adopted a de novo interpretation of the motion to reopen and voluntary departure provisions as *requiring* a mechanism to permit withdrawal of the voluntary departure request, it opined that the agency would have authority to render a different interpretation and disagree with how the Court had resolved the case.[262]

IV. CONTEXTUALIZING THE ROLE OF LENITY IN IMMIGRATION CASES

This Part moves from doctrinal overview to normative questions: How or why would lenity have a role to play in interpreting the Immigration and Nationality Act in circumstances where the application of administrative deference is otherwise required? Section A begins by shifting focus to the rule of lenity in criminal cases. How and why that rule has been applied, and its inherent limitations, are relevant to assessing whether a similar rule could play the same role in the context of immigration cases. Section B returns to the immigration rule of lenity and the fundamental question: Even assuming some historical relevance for the rule, does it retain vitality in a world governed by *Chevron*? The answer is no—its application is foreclosed by the nature of the step one inquiry and incompatible with the step two inquiry, while it is unclear that there remains space outside the *Chevron* framework where the rule could find a home.

The final two sections address remaining questions. Section C confronts the question of whether lenity should displace deference in a certain class of immigration cases, addressing provisions directly concerned with deportation, while allowing deference to apply to the remaining class of cases, e.g., interpretation of relief provisions. This typological distinction makes little sense, however, because of the interconnected nature of the immigration laws. It also makes little sense under *Chevron*'s framework, as the removability provisions are as much a matter of agency expertise as any other facet of the immigration laws. The better rule is that which concludes section B: *Chevron* governs review in immigration cases to the exclusion of lenity. Finally, section D argues that the death of lenity will be of little moment, and considering its general and uniform irrelevance to the decisions in

261. INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001) (citation omitted).
262. Dada v. Mukasey, 554 U.S. 1, 20 (2008) ("Although a statute or regulation might be adopted to resolve the dilemma in a different manner, as matters now stand the appropriate way to reconcile the voluntary departure and motion to reopen provisions is to allow an alien to withdraw the request for voluntary departure before expiration of the departure period.").

which it has thus far been raised, it would seem difficult to seriously contest that position. The *Chevron* framework ensures that aliens will not be subject to arbitrary or capricious interpretations of the immigration laws, as such cases will be resolved either under the clear intent of Congress or a *reasonable* and *permissible* construction of the statutory language by the agency. And, in hindsight, this framework would have largely rendered the development of the rule of lenity unnecessary. In other words, if lenity has done work in the past, it can safely cede that role to *Chevron* now.

A. Strict Construction in Criminal Cases

The rule of strict construction of penal statutes, or the criminal rule of lenity, is "[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment."[263] The rule originated "in the legislative blood lust of eighteenth-century England. Faced with a vast and irrational proliferation of capital offenses, judges invented strict construction to stem the march to the gallows."[264] In 1883, Sir Peter Maxwell wrote:

> The rule which requires that penal and some other statutes shall be construed strictly was more rigorously applied in former times, when the number of capital offences was very large; when it was still punishable with death to cut down a cherry-tree in an orchard, or to be seen for a month in the company of gipsies [sic] . . . .[265]

The rule survived the retrenchment of capital punishment and was absorbed as a general rule of statutory construction to be applied in specific circumstances. As early as 1820, Chief Justice Marshall paid homage to the rule, writing:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[266]

But criticism of the rule is nearly as old as the rule itself, and many states acted to implement legislation that would disallow strict

263. *Rule of Lenity*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see* DAVID MELLINKOFF, DICTIONARY OF AMERICAN LEGAL USAGE 577 (1992) (describing the rule of lenity and stating that "generally, ambiguity in a criminal statute should be resolved in favor of the defendant, e.g., a less harsh penalty").

264. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198 (1985).

265. SIR PETER BENSON MAXWELL, ON THE INTERPRETATION OF STATUTES 462 (W. Wyatt-Paine ed., Sweet & Maxwell, Ltd. & The Carswell Co. 6th ed. 1920) (1883).

266. United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

construction of their penal codes.[267] In more contemporary times, the rule has seemingly fallen out of favor as a dispositive rule of decision.[268] Talk of the rule's prior glory colors the contemporary debate, but assertions of its historical robustness seem misplaced or at least based on spotty evidence.[269] For instance, although Chief Justice Marshall described the long-standing nature of the rule, his description of its application is not one of particular strength or vitality:

> It is said, that notwithstanding [the rule of strict construction], the intention of the law maker must govern in the construction of penal, as well as other statutes. This is true. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.[270]

And for every example of the court "find[ing] ambiguity and adopt[ing] a narrow construction even when it seemed illogical[ ], contrary to the literal language of the statute[ ], or likely to frustrate the congressional purpose,"[271] there are multiple examples of the Court noting the inherent limitations of the rule and declining to adopt a narrower

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267. *See* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 752–56 (1935); *id.* at 753 n.25 ("The distinction between a favourable and unfavourable construction of laws is abolished. All penal laws whatever are to be construed according to the plain import of their words, taken in their usual sense, in connexion with the context, and with reference to the matter of which they treat . . . . Courts are expressly prohibited from punishing any acts or omissions which are not forbidden by the plain import of the words of the law, under the pretence that they are within its spirit." (quoting EDWARD LIVINGSTON, SYSTEM OF PENAL LAW PREPARED FOR THE STATE OF LOUISIANA 12 (Philadelphia, John I. Kay & Co. 1872))); *id.* ("The rule of the common law that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." (quoting DAVID D. FIELD, WILLIAM C. NOYES & ALEXANDER W. BRADFORD, DRAFT OF A PENAL CODE FOR THE STATE OF NEW YORK 5 (Albany, Weed, Parsons & Co. 1864))).

268. *See, e.g.*, Jeffries, *supra* note 264, at 200 ("[S]trict construction may no longer retain widespread allegiance in the courts . . . ."); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885–86 (2004) ("[T]he rule [of lenity] has lately fallen out of favor with both courts and commentators. . . . [I]t appears occasionally as a supplemental justification for interpretations favored on other grounds . . . .").

269. *See, e.g.*, Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2421–23 (2006) (describing a more robust rule of lenity that courts were quicker to apply in the face of statutory language that could bear multiple reasonable interpretations, but providing only three examples between 1820 and the 1970s of cases that could be allegedly explained by a resort to lenity).

270. *Wiltberger*, 18 U.S. (5 Wheat.) at 95–96.

271. Note, *supra* note 269, at 2423.

construction of the statute even where that narrower construction could be deemed plausible.[272]

The rule has never, then, been absolute or applied in a vacuum; "whenever invoked it comes attended with qualifications and other rules no less important."[273] As the Court opined in *Hartwell*:

> The rule of strict construction is not violated by permitting the words of the statute to have their *full* meaning, or the *more extended* of two meanings, as the wider popular instead of the more narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent.[274]

The overarching focus of the courts in applying the rule of lenity, in both the past and modern times, has thus been the intent of the legis-

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272. *See, e.g.*, United States v. Brown, 333 U.S. 18, 25–26 (1948) (rejecting narrower construction, as "[t]he canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language"); United States v. Gaskin, 320 U.S. 527, 530 (1944) (same, and noting that the principle of strict construction "does not require distortion or nullification of the evident meaning and purpose of the legislation" (citing United States v. Raynor, 302 U.S. 540, 552 (1938); United States v. Giles, 300 U.S. 41, 48 (1937); Gooch v. United States, 297 U.S. 124, 128 (1936))); *Raynor*, 302 U.S. at 552 ("No rule of construction . . . requires that a penal statute be strained and distorted in order to exclude conduct clearly intended to be within its scope—nor does any rule require that the act be given the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." (citing *Giles*, 300 U.S. 41)); *Giles*, 300 U.S. at 48 ("The rule, often announced, that criminal statutes must be strictly construed does not require that the words of an enactment be given their narrowest meaning or that the lawmaker's evident intent be disregarded." (citing United States v. Corbett, 215 U.S. 233, 242 (1909))); *Gooch*, 297 U.S. at 128 ("Congress intended to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that the captor might secure some benefit to himself. And this is adequately expressed by the words of the enactment. . . . [W]hile penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view." (citing United States v. Mescall, 215 U.S. 26, 31–32 (1909); United States v. Bitty, 208 U.S. 393, 402 (1908); Johnson v. S. Pac. Co., 196 U.S. 1, 17–18 (1904); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 395 (1868))); *Corbett*, 215 U.S. at 242 ("But the argument is that, however cogent may be the considerations [supporting conviction], they are here inapplicable, because the statute is a criminal one, requiring to be strictly construed. The principle is elementary, but the application here sought to be made is a mistaken one. The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute, in disregard of their context, and in frustration of the obvious legislative intent." (citing *Hartwell*, 73 U.S. (6 Wall.) at 385)).

273. *Hartwell*, 73 U.S. (6 Wall.) at 395.

274. *Id.* at 396 (emphasis added) (citing United States v. Morris, 39 U.S. (14 Pet.) 464, 475 (1840); *Wiltberger*, 18 U.S. (5 Wheat.) at 96; United States v. Winn, 28 F. Cas. 733 (D. Mass. 1838) (No. 16,740)).

lature.[275] Nonetheless, as the focus on that intent has grown in contemporary times, the importance of the rule has receded:

> [I]t has lost much of its force and importance in recent times, and it is now recognised that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning, and to promote its object.[276]

Under modern iterations of the rule, it "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended."[277] It is not sufficient to find the statute less than clear or that a narrower construction is *possible*.[278] Before the Court will consider resort to lenity, it must bring

275. *E.g.*, *Mescall*, 215 U.S. at 32 (the defendant's "act comes within the letter of the statute as well as within its purpose; and the intent of Congress in the legislation is the ultimate matter to be determined"); *Johnson*, 196 U.S. at 16–18 (rejecting narrower construction adopted by the court of appeals as contrary to normal usage of the statutory language and incompatible with legislative intent); *accord Bitty*, 208 U.S. at 401–03 (similar); *Winn*, 28 F. Cas. at 734 ("[W]here the words are general, and include various classes of persons, I know of no authority, which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute, which has various known significations, I know of no rule, that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me, that the proper course in all these cases, is to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature."); *see also* United States v. Lacher, 134 U.S. 624, 628 (1890) ("[T]hough penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature." (citing *Morris*, 39 U.S. (14 Pet.) at 464; Am. Fur Co. v. United States, 27 U.S. (2 Pet.) 358, 367 (1829); *Wiltberger*, 18 U.S. (5 Wheat.) at 76)); *Morris*, 39 U.S. (14 Pet.) at 475 ("In expounding a penal statute the Court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled, that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction." (citing *Wiltberger*, 18 U.S. (5 Wheat.) at 95)); *Am. Fur Co.*, 27 U.S. (2 Pet.) at 367 ("This construction of the acts of congress which have been referred to, is, in the judgment of this Court, well warranted by the words of those acts; as well as by the obvious policy which dictated them. . . . Even penal laws, which, it is said, should be strictly construed, ought not to be construed so strictly as to defeat the obvious intention of the legislature.").

276. MAXWELL, *supra* note 265, at 462–63.

277. United States v. Castleman, 572 U.S. 157, 172–73 (2014) (quoting Barber v. Thomas, 560 U.S. 474, 488 (2010)).

278. *See, e.g.*, Abramski v. United States, 573 U.S. 169, 188 n.10 (2014) ("The dissent would apply the rule of lenity here because the statute's text, taken alone, permits a narrower construction, but we have repeatedly emphasized that is not the appropriate test." (citing Muscarello v. United States, 524 U.S. 125, 138 (1998); Smith v. United States, 508 U.S. 223, 239 (1993))).

all traditional interpretive tools to bear on the relevant statutory phrase in order to try and ascertain its meaning.[279] The rule of lenity "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."[280] And, as a tool ultimately tied to legislative intent, the rule is not "a directive to this Court to invent distinctions neither reflective of the policy behind congressional enactments nor intimated by the words used to implement the legislative goal."[281]

Deference-related issues are not generally present in the interpretation of pure criminal statutes. "A court owes no deference to the prosecution's interpretation of a criminal law," since "[c]riminal statutes 'are for the courts, not for the Government, to construe.'"[282] To the extent the question has arisen, it has done so in the context of an "executive agency's interpretation of a law that contemplates both criminal and administrative enforcement."[283] Whether arising under the securities, environmental, or labor law statutes, to name a few, the courts of appeals have uniformly determined that deference is warranted in such circumstances, and thus that the criminal rule of lenity's role is further cabined; ambiguity in such circumstances may be resolved by a permissible agency interpretation, leaving lenity with little or no role to play in such cases.[284]

The Supreme Court has not definitively resolved the question; it has not foreclosed resort to deference prior to lenity nor endorsed lenity to the exclusion of deference. But its decisions seem to indicate some role still for deference to play even in the context of the so-called "dual-use statutes."[285] Confronting the EPA's regulatory definition of the term "take" under the Endangered Species Act, for instance, the Court noted that "[t]he latitude the ESA gives the Secretary in enforc-

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279. *See id.* ("Although the text creates some ambiguity, the context, structure, history, and purpose resolve it."); *Barber*, 560 U.S. at 488 ("Having so considered the statute, we do not believe that there remains a 'grievous ambiguity or uncertainty' in the statutory provision before us. Nor need we now simply 'guess' what the statute means.").

280. Maracich v. Spears, 570 U.S. 48, 76 (2013) (quoting Callanan v. United States, 364 U.S. 587, 596 (1961)).

281. United States v. Healy, 376 U.S. 75, 82 (1964).

282. Whitman v. United States, 574 U.S. 1003, 1003–04 (2014) (Scalia, J., respecting the denial of cert.) (mem.) (quoting *Abramski*, 573 U.S. 169).

283. *Id.* at 1004.

284. *See* United States v. Royer, 549 F.3d 886, 899 (2d Cir. 2008); United States v. Flores, 404 F.3d 320, 326–27 (5th Cir. 2005); NLRB v. Okla. Fixture Co., 332 F.3d 1284, 1286–87 (10th Cir. 2003); *In re* Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000); United States v. Kanchanalak, 192 F.3d 1037, 1047, 1047 n.17 (D.C. Cir. 1999); NRA v. Brady, 914 F.2d 475, 479 n.3 (4th Cir. 1990).

285. *See generally* Patrick J. Glen & Kate E. Stillman, Chevron *Deference or the Rule of Lenity? Dual-Use Statutes and Judge Sutton's Lonely Lament*, 77 OHIO ST. L.J. FURTHERMORE 129 (2016) (making this argument in the context of the INA).

ing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation."[286] In reaching its decision, the Court rejected resort to lenity simply because the ESA also provided for criminal penalties: "We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."[287] The opinion in *Babbitt* may be weak support for a more general rule as to how lenity interacts with deference. The decision "expressly limits itself to 'facial challenges,' the sorts of claims that raise arguments—say that the regulation exceeded the agency's authority and thus was unenforceable in all of its applications—that have no connection to the rule of lenity."[288] And Justice Scalia previously described this language as a "drive-by ruling . . . deserv[ing] little weight."[289] But the general principle is borne out in other cases. In *United States v. O'Hagan*, for instance, the Court applied deference canons to a legislative rule implemented by the Securities and Exchange Commission and concluded that the Commission's assessment of that rule, and whether it "is reasonably designed to prevent fraudulent acts," must be accorded "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."[290] And the Court subsequently applied *Skidmore* deference to the Secretary of Labor's "views about the meaning of . . . enforcement language" within the agency's expertise,[291] rejecting resort to the rule of lenity *after* resolving the case on deference grounds. In fact, the Court's statement that "after engaging in traditional methods of statutory interpretation, we cannot find that the statute remains sufficiently ambiguous to warrant application of the rule of lenity here,"[292] supports the argument that *Chevron* is such a tool to be applied *prior* to resort to lenity.

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286. Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 703–04 (1995).
287. *Id.* at 704 n.18.
288. Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1030 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd sub nom.* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).
289. Whitman v. United States, 574 U.S. 1003, 1005 (2014) (Scalia, J., respecting the denial of cert.) (mem.).
290. United States v. O'Hagan, 521 U.S. 642, 673 (1997) (quoting Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984)).
291. Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 14–15 (2011) (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)); *see id.* at 15–16 ("These agency views are reasonable. They are consistent with the Act. The length of time the agencies have held them suggests that they reflect careful consideration, not '*post hoc* rationalizatio[n].'" (alteration in original) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983))).
292. *Id.* at 16.

B. How or Why Would Lenity Fit Within the Deference Framework?

The historical overview of both the immigration rule of lenity and its much older relative, the criminal rule of lenity, is important to understanding how or why lenity should fit within the deference framework announced by the Supreme Court in *Chevron*. This section turns to that focal question and proceeds in three subsections. First, is lenity relevant at the first step of *Chevron*? Second, if not, does it come into play at step two? And finally, if the answer is again no, does there nonetheless exist a class of cases *outside* the scope of *Chevron* to which the rule of lenity may have relevance? The answer to the first two questions is a resounding "no." The answer to the third is similarly a "no," with a potentially narrow qualification.

1. Step One?

The purpose of *Chevron*'s step one is to ascertain whether Congress has clearly spoken on the precise question at issue, and if it has, "that is the end of the matter": that plain meaning must control.[293] Lenity, on the other hand, operates in a world where there is some doubt or ambiguity regarding the statutory language and legislative intent. It makes no sense to reference lenity in the context of trying to find the plain meaning of a statutory provision, and the function of applying lenity at step one would more often than not frustrate the intent behind that inquiry. As David Rubenstein has argued, "one cannot fairly say that the rule of lenity sheds light on Congress's actual intent as to any 'precise question.' Instead, lenity is a transmutable concept that affords the most favorable interpretation to the alien in any given case, whatever that may be."[294]

The immigration rule of lenity's poor fit at step one of the *Chevron* framework tracks the similar irrelevance of the criminal rule of lenity at the threshold of interpreting penal statutes. The inquiry then is whether, taking the language together with traditional tools of statutory construction and giving the words their fair meaning, a more or less plain meaning can be distilled.[295] If application of those tools of construction distill such a meaning, that interpretation controls even if it is harsh and even if a more lenient construction of the statute *could* be contemplated.[296] In other words, the criminal rule does not operate at the threshold as a directive to adopt the most lenient interpretation possible, and the legislative intent always must be the

293. *See Chevron*, 467 U.S. at 842–43.
294. David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN. L. REV. 479, 507 (2007).
295. *See supra* notes 272, 277–79 and accompanying text.
296. *See supra* note 272.

guide.[297] Where that intent can be gleaned, either from the language of the statute itself or from other relevant sources, the inquiry is at an end.

This view of the immigration rule of lenity—as not operating at step one to mitigate the otherwise harsh consequences, or limited scope of relief, contemplated by Congress in enacting a provision—finds additional support in Supreme Court precedent, as Rubenstein explains.[298] In *Phinpathya v. INS*, the Ninth Circuit held that an alien could establish eligibility for suspension of deportation, which required seven years of "continuous physical presence" in the United States, despite her three month absence from the country during the relevant statutory period.[299] The court of appeals concluded that this departure was not "meaningfully interruptive" of her presence, since she always intended to return, and thus could not serve to foreclose eligibility for relief.[300] The Supreme Court reversed, finding the term "continuous" plain and the Ninth Circuit's contrary reading foreclosed by this plain meaning.[301] In reaching this holding, the Court rejected the alien's argument that, despite the plain language, the statute should be construed more generously in line "with the equitable and ameliorative nature of the suspension remedy."[302] The Court concluded that a liberal interpretation would conflict with the result Congress itself intended in enacting the statute,[303] and that if Congress wanted a less harsh relief provision, it was "up to [it] to temper the laws' rigidity if it so desires."[304] Until that time, the plain meaning of the existing statute controlled, and that plain meaning foreclosed the alien's argument.[305] In another case involving suspension of deporta-

297. *See supra* note 275; *see also* Maracich v. Spears, 570 U.S. 48, 76 (2013) ("In this framework, there is no work for the rule of lenity to do."); United States v. Healy, 376 U.S. 75, 82 (1964) (noting the rule of strict construction "is hardly a directive to this Court to invent distinctions neither reflective of the policy behind congressional enactments nor intimated by the words used to implement the legislative goal").
298. Rubenstein, *supra* note 294, at 508–10.
299. *See* Phinpathya v. INS, 673 F.2d 1013, 1017–18 (9th Cir. 1981), *rev'd* 464 U.S. 183 (1984).
300. *Id.*
301. *Phinpathya*, 464 U.S. at 189–92.
302. *Id.* at 192.
303. *See id.* at 194 (noting that "[h]ere . . . we have every reason to believe that Congress considered the harsh consequences of its actions. . . . We would have to ignore the clear congressional mandate and the plain meaning of the statute" to accept the alien's argument); *id.* at 195 ("It is . . . clear that Congress intended strict threshold criteria to be met before the Attorney General could exercise his discretion to suspend deportation proceedings. . . . Respondent's suggestion that we construe the Act to broaden the Attorney General's discretion is fundamentally inconsistent with this intent.").
304. *Id.* at 196.
305. *Id.*

tion, which in addition to physical presence required a qualifying family relationship with a United States citizen spouse, parent, or child, the Third Circuit had reversed an agency decision and remanded for it to consider whether the alien's relationship with her United States citizen nieces was the functional equivalent of the parent–child relationship.[306] The Supreme Court found the Third Circuit's attempt to inject a more liberal operation into the statutory scheme inappropriate: "[E]ven if Hector'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, precluded this functional approach to defining the term 'child.'"[307]

The immigration rule of lenity is not front and center in these cases but lurks behind the façade of what the Court is actually doing. As Rubenstein writes, "[w]hile 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."[308]

Beyond the incoherence of applying a rule tied to ambiguity at the level of trying to ascertain the plain meaning of a statute, there are both jurisprudential and structural concerns that would also argue against its use at this stage. First, lenity could be applied at step one only if it had attained a sufficient status to be classed with the "clear statement rules" that the Supreme Court has applied at step one.[309] But the immigration rule of lenity does not have such an exalted pedigree; it is a recently introduced rule of construction that is at best a tiebreaker in narrow circumstances, not a rule "deeply rooted in our jurisprudence, and embod[ying] a legal doctrine centuries older than our Republic."[310] Moreover, the Supreme Court itself has not treated the rule as in a class with the other "clear statement" canons. It relied on traditional canons in *Cardoza-Fonseca* while noting that resort to those canons was sufficient without reference to lenity, indicating that lenity did not occupy comparable ground in the interpretive analysis.[311] Likewise, *Fernandez-Vargas* rejected resort to lenity as incompatible with the structure the Court had already established to assess retroactivity and impermissible retroactive effect.[312] And in any event, the rule of lenity would be an ill fit with the other clear state-

306. INS v. Hector, 479 U.S. 85, 87–88 (1986).
307. *Id.* at 90 (citing *Phinpathya*, 464 U.S. at 194).
308. Rubenstein, *supra* note 294, at 510.
309. *Id.* at 505.
310. INS v. St. Cyr, 533 U.S. 289, 316 (2001) (quoting Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring)); *see also* Rubenstein, *supra* note 294, at 506 (contrasting "the immigration rule of lenity" with the "presumption against retroactivity").
311. INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).
312. Fernandez-Vargas v. Gonzales, 548 U.S. 30, 40–42 (2006).

ment rules, which tend to serve the purpose, at least ostensibly, of elucidating congressional intent or at least the legal backdrop against which Congress is assumed to be legislating.[313] The immigration rule of lenity does no such thing; it is irrelevant to ascertaining the intent of Congress and serves only to resolve ambiguity once that intent cannot be found from the language or other accepted tools of statutory construction.

Second, applying lenity at step one would entail unacceptable structural consequences for the deference framework. If lenity applied at step one to resolve the meaning of the statute, there would never be a reason to proceed to step two in an immigration case. Rather, once any ambiguity was found, the rule would immediately apply to resolve that ambiguity in favor of the alien, leaving no room or reason for the court to then assess the reasonableness or permissibility of the agency's own interpretation. Applied at step one, the immigration rule of lenity would eviscerate the *Chevron* framework for all immigration cases.

2. *Step Two?*

Step two of *Chevron*, concerned as it is with resolving ambiguity, provides on first blush a more comfortable fit for the immigration rule of lenity. Is it possible that lenity is applicable at step two, and if so, how is it to be applied? Reviewing the case law and literature, Rubenstein posited at least two ways in which lenity could be applied at step two: as a rule that the agency would be required to apply itself in interpreting ambiguous statutory provisions, or, on petition for review before the courts of appeals, as a "litmus test for reasonableness."[314] There are, however, at least two problems with applying the rule in this fashion. Neither application fits with the statement of deference and limited review required at *Chevron* step two, and neither fits actual Supreme Court practice in immigration cases presenting step two issues.

First, the Court has made clear in numerous cases that the question at step two is not whether the agency had adopted the interpretation a court deems "best" or the interpretation that the court itself

313. *See, e.g.*, 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 . . . ." (citing Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 670 (1986))); *see also* King v. St. Vincent's Hosp., 502 U.S. 215, 220 n.9 (1991) (stating that the Court "will presume congressional understanding of . . . interpretive principles" (citing *McNary*, 498 U.S. at 496)). *See generally* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 159–63 (2010) (describing these background assumptions in greater detail).

314. Rubenstein, *supra* note 294, at 510–17.

would prefer.[315] Rather, the question is whether the interpretation adopted by the agency is a permissible and reasonable construction of the statute in light of all relevant considerations.[316] Adopting lenity at step two would eliminate the agency discretion inherent in the delegations by Congress by dictating the interpretation that *must* follow once any ambiguity or gap is found. This contradicts decades, if not centuries, of Supreme Court precedent that establishes that an agency is not required to select a specific interpretation against a competing plausible interpretation of the statute; it must only select an interpretation that is reasonable.[317] Using lenity as a "litmus test" before the courts of appeals ostensibly provides more discretion, if the point is that lenity will be a relevant factor when reviewing the agency determination but not alone determinative of the reasonableness of that interpretation. But even in this context, it is not clear why, if two interpretations are equally plausible, and equally permissible and reasonable, lenity should place a thumb on the scale of one rather than the other. For the agency as well as the reviewing courts, the question should be only whether the interpretation adopted is reasonable. If it is, that ends the inquiry at step two. There should not be a further inquiry into whether, even if the agency's interpretation is reasonable, a more lenient interpretation was possible and thus possibly required. Whether as a consideration for the agency or the reviewing court, applying the rule at step two would eviscerate the *Chevron* framework in a similar way as its application at step one. There would never be any room for agency interpretation, as once ambiguity was found, any doubts regarding the proper construction would be resolved in favor of the more lenient interpretation.

Second, application of lenity at step two is, at best, in tension with Supreme Court practice, and, at worst, contrary to that practice. The Supreme Court has consistently deferred to agency interpretations of the INA at step two without regard to whether a more lenient or permissive interpretation of the statute was possible. In *Aguirre-Aguirre*, the Court reversed a Ninth Circuit decision for failure to give appropriate deference to the agency's construction of the serious nonpolitical crime bar to withholding of deportation.[318] According to the Supreme Court, the court of appeals had, in concluding that the Board had to "supplement" its interpretation of the statute "by examining additional factors," "failed to accord the required level of deference to

315. *See, e.g.*, Holder v. Martinez Gutierrez, 566 U.S. 583, 591 (2012) (stating that the Board's "position prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best" (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999); Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843–44, 843 n.11 (1984))).
316. *See id.*
317. *See supra* notes 169–71 and accompanying text.
318. *Aguirre-Aguirre*, 526 U.S. at 425–32.

the interpretation of the serious nonpolitical crime exception adopted by the Attorney General and BIA."[319] In *Holder v. Martinez Gutierrez*, the Supreme Court upheld the Board's interpretation of the cancellation of removal statute as not requiring that a parent's continuous physical presence be imputed to a minor child for purposes of establishing statutory eligibility for relief.[320] In doing so, it rejected a contrary Ninth Circuit decision that had concluded such imputation was required, at least in part because of the "canon of construction that resolves ambiguities in favor of the alien."[321] The Ninth Circuit opined that in rejecting the Board's contrary interpretation and "allowing imputation, we merely implement the countervailing and coequal congressional policy of recognizing that presence in the United States of an extended length gives rise to such strong ties to the United States that removal would result in undue hardship."[322] Contrary to the court of appeals, however, the Supreme Court found the Board's interpretation reasonable and permissible, and thus the end of the matter for interpretive purposes.[323] Finally, in *Scialabba v. de Osorio*, the Court upheld a strict agency interpretation of the retention and automatic conversion provisions enacted into the family-based visa preference system in order to safeguard "child" beneficiaries who turned twenty-one after the visa application was filed but before the visa became "available."[324] In so holding, the Court rejected the alien's argument that "the BIA acted unreasonably in choosing the more restrictive reading" of the statute.[325] The plurality noted that the Board's interpretation was recommended by "administrative simplicity," and that the agency had "offered a cogent argument, reflecting statutory purposes, for distinguishing between aged-out beneficiaries" in different preference categories.[326] In the view of Justice Kagan, *de Osorio* was "the kind of case *Chevron* was built for. Whatever Congress might have meant . . . it failed to speak clearly. Confronted with a self-contradictory, ambiguous provision in a complex statutory scheme, the Board chose a textually reasonable con-

319. *Id.* at 424.

320. *Martinez Gutierrez*, 566 U.S. 583.

321. Cuevas-Gaspar v. Gonzales, 430 F.3d 1013, 1029 (9th Cir. 2005) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); Hernandez v. Ashcroft, 345 F.3d 824, 840 (9th Cir. 2003)).

322. *Id.*

323. *Martinez Gutierrez*, 566 U.S. at 598 ("Because the Board's rejection of imputation under § 1229b(a) is 'based on a permissible construction of the statute,' we reverse the Ninth Circuit's judgments . . . ." (citing Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984))).

324. Scialabba v. de Osorio, 573 U.S. 41 (2014).

325. *Id.* at 73.

326. *Id.* at 73–74 (citing Xiuyi Wang, 25 I. & N. Dec. 28, 38 (BIA June 16, 2009)).

struction consonant with its view of the purposes and policies underlying immigration law."[327]

Beyond merits cases, the rule is also inconsistent with Supreme Court practice in cases where that Court has remanded to the Board for it to exercise its interpretive authority. For instance, in *Gonzales v. Thomas*, the Court summarily reversed a Ninth Circuit decision and remanded proceedings to the agency for it to consider "in the first instance" the alien's late-raised claim that her family "constitute[d] a 'particular social group'" for purposes of asylum eligibility.[328] Subsequently, in *Negusie v. Holder*, the Court remanded for the agency to determine in the first instance whether there is a coercion or voluntariness exception to application of the persecutor bar to asylum and withholding-of-removal eligibility.[329] Both of these cases apply a version of the "ordinary remand rule," the principle that "[g]enerally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."[330] In *Negusie*, the Court explicitly supported its remand decision with reference to the deference applicable to agency interpretations of statutes they are charged with administering: the "remand rule exists, in part, because 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps . . . involves difficult policy choices that agencies are better equipped to make than courts.'"[331] If lenity applied at step two, however, there would not be any meaningful reason to remand. The appropriate interpretation, i.e., the most lenient, could and should be imposed and applied by the Court in the first instance.

3. *Relevance "Outside"* Chevron*?*

Lenity is not compatible with *Chevron* deference. But does that mean it has no place in the interpretation of immigration law? Ruben-

327. *Id.* at 75.
328. Gonzales v. Thomas, 547 U.S. 183, 185 (2006) (per curiam).
329. Negusie v. Holder, 555 U.S. 511, 523–24 (2009).
330. INS v. Ventura, 537 U.S. 12, 16, 18 (2002) (per curiam); *see* Patrick J. Glen, *"To Remand, or Not to Remand":* Ventura*'s Ordinary Remand Rule and the Evolving Jurisprudence of Futility*, 10 RICH. J. GLOBAL L. & BUS. 1, 4–19 (2010) (providing historical development of the rule, with special emphasis on its application in immigration cases).
331. *Negusie*, 555 U.S. at 554 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005)); *id.* at 524 ("The agency's interpretation of the statutory meaning of 'persecution' may be explained by a more comprehensive definition, one designed to elaborate on the term in anticipation of a wide range of potential conduct; and that expanded definition in turn may be influenced by how practical, or impractical, the standard would be in terms of its application to specific cases. These matters may have relevance in determining whether its statutory interpretation is a permissible one.").

stein thought not: "While the rule of lenity has no place within *Chevron*'s two-step framework, a role for lenity exists beyond *Chevron*—after the court determinates that: (1) the statute is ambiguous; and (2) the agency's interpretation is unreasonable."[332] For Rubenstein, such a role is consistent with *Chevron*, since it comes into play only if the agency's interpretation is not reasonable or permissible, and with the concept of lenity itself, which is meant to come into play "only as a doctrine of 'last resort.'"[333] Rubenstein's choice of case to illustrate his theory was, however, unfortunate—the Ninth Circuit's decision in *Cuevas-Gaspar*, which the Supreme Court subsequently and unanimously reversed, holding that the Board's contrary interpretation was entitled to deference as a permissible construction of the statute.[334]

This point aside, two others bear mentioning. First, it is not clear that lenity has a role to play *even if* the court finds that the agency's interpretation is unreasonable. If the statute is ambiguous and there is no plain meaning to apply, the agency has the authority to interpret the provision. If it has done so in an unreasonable manner, that error should be flagged for the agency by the reviewing court and proceedings remanded so the agency can consider the issue anew apprised of its prior error.[335] In other words, the traditional "ordinary remand rule" discussed above undercuts the notion that the immigration rule of lenity has work to do if the agency's interpretation is unreasonable. Rather than apply lenity, the case should return to the agency for it to correct its errors and reach a permissible construction of the statute.

Second, even assuming lenity could fill this role, it is not clear that the court's decision would be anything but a place-holder interpretation that the agency would not be bound to adopt itself. If the court of appeals applies lenity after concluding that the agency's interpretation is not reasonable, then it is applying its own construction to an ambiguous statutory phrase. The Supreme Court has held, however, that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency

332. Rubenstein, *supra* note 294, at 517.
333. *Id.* at 518–19.
334. *See supra* notes 321–24 and accompanying text.
335. *Negusie*, 555 U.S. at 523–24; *see* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) ("When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency.").

discretion."[336] Thus, even were the court to adopt a more lenient construction in the circumstances contemplated by Rubenstein, nothing binds the agency to that construction in a subsequent case. Rather, it is free to render its own interpretation of the relevant provision subject to the normal strictures of *Chevron*, that its interpretation be reasonable and permissible.

The "beyond *Chevron*" rubric contemplated by Rubenstein thus inevitably comes back to *Chevron*. The court of appeals, concluding that the agency interpretation of an ambiguous statutory provision is unreasonable, should either remand for a new interpretation or render a decision applying lenity *but* subject to agency "reversal" under *Brand X*. In either case, the question will again boil down to the permissibility of the new interpretation under *Chevron*.

Although Rubenstein's specific conception may not work, there could be a narrower beyond-*Chevron* space where lenity might yet come into play. Under the criminal rule of lenity, the rule is triggered only in cases of "grievous ambiguity," where even after considering all relevant tools of statutory construction the court is left only to "guess as to what Congress intended."[337] Perhaps lenity may be relevant in such cases where ambiguity admits of no truly reasonable harmonization upon consideration of all relevant canons of construction and policy options. As Chief Justice Roberts noted in his concurrence in *de Osorio*, "[d]irect conflict is not ambiguity, and the resolution of such a conflict is not statutory construction but legislative choice. *Chevron* is not a license for an agency to repair a statute that does not make sense."[338] This would be a small selection of cases, attributable to near-absolute incoherent draftsmanship on the part of Congress. And it would also be subjective as to what qualified as a sufficiently direct conflict to move the case outside the scope of *Chevron*. Returning to *de Osorio*, Justice Kagan's opinion for the plurality deferred to a statute it described as "Janus-faced," each of the relevant provision's two clauses pointing in a separate direction.[339] "Read either most naturally, and the other appears to mean not what it says. That internal tension makes possible alternative reasonable constructions, bringing into correspondence in one way or another the section's different parts."[340] In the plurality's view, "when that is so, *Chevron* dictates

336. *Brand X*, 545 U.S. at 982; *see id.* at 982–83 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.").

337. United States v. Castleman, 572 U.S. 157, 172–73 (2014) (quoting Barber v. Thomas, 560 U.S. 474, 488 (2010)).

338. Scialabba v. de Osorio, 573 U.S. 41, 76 (2014) (Roberts, C.J., concurring in the judgment).

339. *Id.* at 57 (plurality opinion).

340. *Id.*

that a court defer to the agency's choice—here, to the Board's expert judgment about which interpretation fits best with, and makes most sense of, the statutory scheme."[341]

Nonetheless, leaving aside the question of what level of conflict pushes a case outside the purview of *Chevron*, it is possible to conceive the immigration rule of lenity as having some role to play in deciding that class of case. But in such circumstances, there is no conflict with deference principles anyway. A conflict sufficiently grievous to trigger the rule of lenity presupposes a case where a reasonable interpretation of the statute is not possible, and so no displacement of agency discretion is occasioned by applying lenity. Even without a conflict between lenity and deference, a court would be free to adopt an interpretation it thought most fair to the language used and the intent evinced by Congress, without necessarily adopting the narrowest construction of the statute.[342] And it bears mentioning that if the statutory provision in *de Osorio* did not present such a case, even as it engendered four separate opinions each resolving the case on different grounds, it seems unlikely that there would be many, if any, circumstances where the rule of lenity would be used for resolving cases.[343]

C. Typological Distinctions and Lenity

If *Chevron* deference should generally displace lenity as an interpretive tool, is there nonetheless room to argue that this presumption should be reversed for certain classes of cases? For instance, could deportation provisions be dealt with differently than other immigration provisions, such that lenity may be a relevant consideration in the former category but not the latter? Versions of this argument have been raised. In *Torres*, the alien argued that the immigration rule of lenity "does not apply in all immigration cases; it applies only where deportation would be a consequence. In other immigration matters, the BIA is entitled to deference when it reasonably interprets ambiguities in the INA."[344] This argument seeks to take a middle ground, recognizing the applicability of *Chevron* to immigration cases (thus avoiding the absurdity of arguing against Supreme Court practice), while nonetheless contending that deference is not warranted where the immediate consequence of the provision being interpreted is removal from the United States. Cabining lenity in this fashion may have intuitive appeal, but it is nonetheless problematic for at least two reasons.

First, the foundation of deference to the agency's interpretation of the immigration laws is Congress's express provision that the Attor-

341. *Id.*
342. *See supra* notes 272, 275.
343. *de Osorio*, 573 U.S. 41.
344. Brief for Petitioner, *supra* note 3, at 46.

ney General's ruling on "all questions of law shall be controlling."[345] There is no basis for parsing the plain text of this provision and concluding that it is controlling for most determinations under the immigration laws but not controlling as to certain other determinations. This is especially true where the inadmissibility and deportation grounds are at the very heart of the INA and the system established by that statute. Carving them out of the class of interpretations that would be entitled to deference on review makes little structural sense. Disentangling deportation and inadmissibility grounds from other provisions would also be close to impossible, considering that many of the grounds of removability double as eligibility criteria.[346] If lenity dictated one interpretation for purposes of deportation and another for

345. 8 U.S.C. § 1103(a)(1) (2018); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25 (1999) (noting the importance of this provision for purposes of determining whether deference is warranted).

346. Taking only the cancellation of removal provisions, 8 U.S.C. § 1229b, there are no less than nine subsections where eligibility for relief turns in some way on admissibility or deportability under sections 1182 and 1227. *See, e.g.*, 8 U.S.C. § 1229b(a)(3) (2018) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien— . . . (3) has not been convicted of any aggravated felony."); 8 U.S.C. § 1229b(b)(1)(C) ("The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien— . . . (C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title . . . ."); 8 U.S.C. § 1229b(b)(2)(A)(iv) ("The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien demonstrates that— . . . (iv) the alien is not inadmissible under paragraph (2) or (3) of section 1182(a) of this title, is not deportable under paragraphs (1)(G) or (2) through (4) of section 1227(a) of this title, . . . and has not been convicted of an aggravated felony."); 8 U.S.C. § 1229b(c) ("The provisions of subsections (a) and (b)(1) shall not apply to any of the following aliens: . . . (4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title."); 8 U.S.C. § 1229b(d)(1)(B) ("For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title . . . ."); *see also* 8 U.S.C. § 1101(f) (2018) ("No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was— . . . (3) a member of one or more of the classes of persons, whether inadmissible or not, described in paragraphs (2)(D), (6)(E), and (10)(A) of section 1182(a) of this title; or subparagraphs (A) and (B) of section 1182(a)(2) of this title and subparagraph (C) thereof of such section . . . (8) one who at any time has been convicted of an aggravated felony (as defined in subsection [1101](a)(43)); or (9) one who at any time has engaged in conduct described in section 1182(a)(3)(E) of this title (relating to assistance in Nazi persecution, participation in genocide, or commission of acts of torture or extrajudicial killings) or 1182(a)(2)(G) of this title (relating to severe violations of religious freedom)."); 8 U.S.C. § 1229b(b)(1)(B) (requiring "good moral character" for non-

purposes of relief, there would be statutory anarchy, which is to say nothing about the impermissibility of bipartite interpretations of single terms or provisions of a statute.[347] But if the default then became "lenity controls," deference over large swaths of the INA would be eliminated, including over many or most relief provisions; the cabined version of lenity could quickly result in the wholesale importation of the concept. Finally, there is a conceptual disconnect between the cabined version of lenity and reality—in removal and relief cases, the same stakes are at issue. Interpretation of the removal provision may more immediately affect (in the sense of directly controlling) the alien's removability, but interpretation and application of the INA's relief and protection provisions has the same consequence. Denial of relief or protection from removal entails removal. In other words, the distinction between deportation as such, and the relief and protection provisions of the INA, is less significant than first meets the eye.

Second, Supreme Court practice does not support the distinction. Although the rule is phrased in terms of strict construction of deportation statutes,[348] the use of the term "deportation" seems more like a shorthand for "immigration." Before *Chevron*, lenity was mentioned in cases presenting both issues of deportability and relief, and there was no difference in how the rule was stated or applied.[349] After *Chevron*, too, it has been mentioned in both classes of cases with no distinction as to its applicability, i.e., that it would be applicable in the deportation context but not in the relief context.[350] If there is in fact an immigration rule of lenity with substantive content, it would seemingly

permanent resident cancellation of removal); 8 U.S.C. § 1229b(b)(2)(A)(iii) (same, for special-rule cancellation of removal).

347. *See, e.g.*, Clark v. Suarez Martinez, 543 U.S. 371, 378 (2005) ("To give these same words [in the same statute] a different meaning for each category would be to invent a statute rather than interpret one. . . . [The statute may be reasonably interpreted in at least two ways, but] [i]t cannot . . . be interpreted [in both ways] at the same time."); *cf.* Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) ("Although here we deal with § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." (citing United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 517–18 (1992) (plurality opinion))).

348. *See, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (describing the rule as "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (citing INS v. Errico, 385 U.S. 214, 225 (1966); Costello v. INS, 376 U.S. 120, 128 (1964); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948))).

349. *Compare Costello*, 376 U.S. 120 (relating to deportability of the alien), *and Fong Haw Tan*, 333 U.S. 6 (same), *with Errico*, 385 U.S. 214 (relating to eligibility for a waiver of deportability).

350. *Compare* Kawashima v. Holder, 565 U.S. 478 (2012) (deportability), *with* Scialabba v. de Osorio, 573 U.S. 41 (2014) (visa eligibility), *and* Holder v. Martinez Gutierrez, 566 U.S. 583 (2012) (cancellation of removal).

apply to the immigration laws writ large—the INA as a whole—and not only to specific portions thereof. There is no warrant for a more specific targeting of subparts of the INA for lenity while otherwise employing deference principles. Lenity and deference present all-or-nothing propositions, and it is lenity that should come out the loser in that contest.

D. The Unnecessity of Lenity

The Supreme Court, given the appropriate case, should "bury"[351] the immigration rule of lenity, rather than allow it to continue to "stalk" the Court's immigration jurisprudence.[352] The rule has always been irrelevant to the decisions the Court issued, but its rationale was on some level supported by a semblance of conceptual sense: in cases of statutory ambiguity where the Court needed a tiebreaker, the rule of lenity provided additional cover for adopting one interpretation of the immigration laws rather than another. The criminal rule of lenity survives in some form today because it *continues* to serve that same purpose in the context of a court's interpretation of penal statutes. In contrast, the immigration rule of lenity is an anachronism whose conceptual underpinnings were demolished with *Chevron*'s advent.[353] The role previously served by the rule, at least rhetorically, has now been delegated to the Attorney General acting through his delegates.

Will the rule's funeral mark a change in the Supreme Court's immigration jurisprudence? Of course not; there is no colorable argument that cases will be decided any differently than they have been in the nearly four decades since *Chevron* was decided. In no decision decided in that timeframe did the rule provide even a relevant component of the Court's decision in an immigration case, let alone the actual dispositive basis for decision. And that reality charts the longer history of the rule, where it was never dispositive and at best a light thumb on the scales for an interpretation around which a majority had otherwise coalesced. As an unnecessary rule of decision in the last four decades, it is highly unlikely to have any effect in future cases.

This is especially true where the purposes of lenity can be adequately realized within the *Chevron* framework. The immigration rule

351. SHAKESPEARE, *supra* note 8.

352. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, [the] *Lemon* [test] stalks our Establishment Clause jurisprudence once again, frightening the little children . . . .").

353. *Cf.* Whitman v. United States, 574 U.S. 1003, 1004 (2014) (Scalia, J., respecting the denial of cert.) (mem.) ("Undoubtedly Congress may make it a crime to violate a regulation, but it is quite a different matter for Congress to give agencies—let alone for us to *presume* that Congress gave agencies—power to resolve ambiguities in criminal legislation." (citations omitted)).

of lenity was premised in part on the harshness of deportation,[354] but even accepting that framing, the harshness was not itself the *raison d'être* of the rule. Lenity was not required at the threshold to allow an alien to avoid deportation simply because the statute could contemplate a lenient interpretation, just as the criminal rule of lenity is not applied at the beginning as a tool for mitigating application of the penal laws.[355] The immigration rule of lenity, like the similar criminal rule, was meant to ensure that the courts did not stray into territory that was the province of the legislative branch.[356] It would not contemplate deportation in circumstances where it was not clear that Congress would have intended, with the statutory provision it enacted, that result.[357] *Chevron* changes the scope of the territory the courts should be respecting; once it may have been solely the prerogative of Congress acting through legislation to establish discrete and specific criteria to govern all immigration questions, but that is no longer true today and has not been for decades. Immigration law is a collaborative work between the legislative and executive branches, with the judiciary playing referee. The framing of the immigration rule of lenity as trying to protect against arbitrary determinations regarding deportation can still serve as a guide on judicial review, but deference does alter the scope of a court's authority to consider that factor. This concern, however, can be adequately considered within the existing *Chevron* framework.

At step one of *Chevron*, courts can simply take a harder look at the statutory language in conjunction with other relevant tools of statutory construction to distill a plain meaning of the statute. As Justice Kennedy bemoaned in *Pereira*, "some Courts of Appeals [have] engaged in cursory analysis of the questions whether, applying the ordinary tools of statutory construction, Congress' intent could be discerned."[358] Eschewing such "reflexive deference" would propel the courts into a deeper review of relevant materials, thus minimizing the need to defer to agency interpretations while ensuring that most cases

354. *See, e.g.*, Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile . . . . We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized.").

355. *See* Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[S]ince 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."); *see also* Maracich v. Spears, 570 U.S. 48, 75–76 (2013) (finding "there is no work for the rule of lenity to do" in interpreting the Driver's Privacy Protection Act of 1994).

356. *See supra* note 275 (regarding the criminal rule of lenity).

357. *See Fong Haw Tan*, 333 U.S. at 10; *Delgadillo*, 332 U.S. at 391.

358. Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (citing Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843, n.9 (1984)).

are resolved on "plain meaning" grounds, i.e., grounds that arguably better track the legislative intent (or at least legislative text). The Court's decision in *Pereira* itself cannot be explained on other grounds; as Justice Alito accurately noted in his solo dissent, the majority's decision effectively imposed a better reading on the statute in derogation of basic principles of deference.[359] The decision in *Esquivel-Quintana v. Sessions* is also on par; the Court effectively concluded that the term "sexual abuse of a minor" is clear enough regarding certain applications, i.e., in not encompassing statutory rape offenses in states where the age of majority is sixteen or seventeen, but potentially still ambiguous on other applications, including statutes with the *same* age of consent but that also include elements evincing a power dynamic between the victim and abuser.[360] As the Court explicitly noted in that case, resolving the question on that basis allowed it to avoid any question of how deference or lenity should apply.[361]

Consideration of *Pereira* and *Esquivel-Quintana* should not give one too rosy a view as to how a harder look may benefit aliens. The interpretations adopted in both cases did ultimately benefit the alien seeking to avoid removal, but it is just as likely that the plain meaning of the statute will foreclose relief or support deportation. That is the result the Court came to in both *Torres* and *Kawashima*, upholding interpretations of the INA's aggravated felony provision that entailed the deportation of the petitioners in those cases.[362] It is also the conclusion the Court reached more recently in *Barton v. Barr*, upholding a strict interpretation of the cancellation-of-removal provision's stop-time rule,[363] as well as the earlier cases, *Phinpathya* and *Hector*.[364] To be sure, then, a harder look is not a benefit to one party or the other. But neither the alien nor the government have any claim to a

359. *Id.* at 2121 (Alito, J., dissenting) ("Here, a straightforward application of *Chevron* requires us to accept the Government's construction of the provision at issue. But the Court rejects the Government's interpretation in favor of one that it regards as the best reading of the statute. I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.").

360. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017) ("Absent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as sexual abuse of a minor under the INA, regardless of the age differential between the two participants. We leave for another day whether the generic offense requires a particular age differential between the victim and the perpetrator, and whether the generic offense encompasses sexual intercourse involving victims over the age of 16 that is abusive because of the nature of the relationship between the participants.").

361. *Id.* ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case because the statute, read in context, unambiguously forecloses the Board's interpretation.").

362. *See* Torres v. Lynch, 136 S. Ct. 1619 (2016); Kawashima v. Holder, 565 U.S. 478 (2012).

363. *See* Barton v. Barr, 140 S. Ct. 1442 (2020).

364. *See supra* notes 298–307 and accompanying text.

more lenient (or stricter) interpretation that would be in derogation of the plain meaning of the statute, established by resort to traditional tools of statutory construction.[365] The only point is that under *Chevron*'s existing framework, and undertaking the more searching review of plain meaning advocated by Justice Kennedy, the "purpose" of lenity would be served, as the alien would only be deportable or ineligible for relief on the ground that Congress intended that exact result.

Step two of *Chevron* ultimately provides a similar safeguard, rejecting interpretations that are arbitrary, capricious, or unreasonable. If the agency has rendered such an interpretation, then the proper course is for the reviewing court to vacate the decision and remand. The Supreme Court took this tack in *Judulang v. Holder*, overturning agency precedent for assessing a deportable alien's eligibility for relief under former § 212(c) of the INA.[366] There, the Court concluded that "[b]y hinging a deportable alien's eligibility for discretionary relief on the chance correspondence between statutory categories—a matter irrelevant to the alien's fitness to reside in this country—the BIA has failed to exercise its discretion in a reasoned manner."[367] And in *Mellouli v. Lynch*, the Court rejected deference, holding that the Board's interpretation of the relevant removability provision made "scant sense."[368] As already noted, the Court made a similar move in *Negusie*, holding that the Board had improperly deemed itself bound by Supreme Court precedent in construing the persecutor bar, finding that the Board had not interpreted the statute for that reason, and remanding for further proceedings.[369]

Again, reasonableness will ensure that aliens are not removed or denied relief on spurious grounds. And in retrospect, this would have been sufficient to forestall any rhetorical resort to lenity in the foundational cases. In *Degladillo*, for instance, it would have been easy to construe an agency interpretation of "entry" as encompassing an involuntary shipwreck and temporary stay in the country of rescue as arbitrary and capricious. Whatever other interpretive discretion the agency could have in construing that term, that would not be a reasonable reading entitled to deference. Likewise, in *Fong Haw Tan*, an interpretation of the twice-sentenced language as encompassing only a single indictment and sentencing would not have passed muster under *Chevron*. There may still have been some leeway for the agency to interpret the term *contrary* to the Court's holding in *Fong Haw Tan*—for instance, in accord with the Fourth Circuit's holding that the statute required distinct criminal occurrences and separate sentences for

365. *See, e.g.*, Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842–43 (1984).
366. Judulang v. Holder, 565 U.S. 42 (2011).
367. *Id.* at 53.
368. Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015).
369. Negusie v. Holder, 555 U.S. 511, 522–24 (2009).

each, but not necessarily a second sentencing hearing. But that would not have changed the Court's rejection of the Ninth Circuit's decision. In the end, the reasonableness requirement of *Chevron* tempers the limits of agency discretion in construing the immigration laws, permitting only those interpretations that are reasonable. This is an adequate safeguard against the harshness of deportation.

V. CONCLUSION

The immigration rule of lenity should be interred as a vestige of a bygone era, irrelevant to contemporary judicial review of immigration law. Rooted in shaky jurisprudential grounds and always a bridesmaid, never a bride, insofar as resolving cases has been concerned, any relevance for the rule disappeared in 1984 with *Chevron*. Rather than continue to countenance the rule's ghoulish existence, stalking argumentation before the Supreme Court, the Court should simply put to rest what seems firmly established on a clear-eyed review of the rule's history: the rule is a myth, a rhetorical device turned to in order to support interpretations otherwise firmly rooted in application of traditional tools of statutory construction. Instead of the *paeans* that advocates have grown used to periodically paying, the rule deserves only an elegy.