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NOTE

Chevron Meets the Categorical Approach

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Abstract. The Immigration and Nationality Act (INA) predicates various civil and criminal consequences on a noncitizen's prior conviction for an "aggravated felony." In determining whether a noncitizen's prior conviction counts as one for an aggravated felony, courts and the relevant immigration agencies employ what is known as the categorical approach. That approach collides with *Chevron* deference when a federal court of appeals is asked to review a Board of Immigration Appeals (BIA) interpretation of the INA's aggravated felony definition. Because it is an agency charged with administering the INA, the BIA would appear to be a prime candidate for *Chevron* deference. And indeed, most federal courts of appeals do defer to the BIA in these situations. But not all of them do. What is perhaps more striking is that the Supreme Court never has. Rather, in the face of repeated government pleas for deference, the Court has consistently declined to address the issue. There thus exists confusion both vertically and horizontally among the federal courts as to how this tension between *Chevron* deference and the categorical approach should be resolved.

This Note suggests that the Supreme Court has been correct to implicitly reject the *Chevron* framework in the aggravated felony context. And in the absence of any clear explanation from the Court, this Note proposes one of its own: The very nature and methodology of the categorical approach render the BIA categorically ineligible for *Chevron* deference when it is interpreting the generic crimes listed in the aggravated felony definition.

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Introduction

This Note explores the clash of two interpretive titans: *Chevron* deference and the categorical approach. The familiar doctrine of *Chevron* deference directs courts to defer to reasonable agency interpretations of the statutes those agencies are charged with administering.[1] The categorical approach, meanwhile, is used to answer the question whether a prior conviction qualifies as one for a generic crime listed in a given statute[2]—for instance, whether a Virginia conviction for "grand larceny"[3] counts as "a theft offense" within the meaning of the Immigration and Nationality Act (INA).[4] That approach bars courts from looking to the actual facts surrounding the prior conviction and permits them to consider only the statute defining the crime of conviction.[5] Only if all the elements of that statute fit entirely within the definition of the generic offense does the prior conviction qualify.[6]

These two methodologies clash when a federal court of appeals is asked to review Board of Immigration Appeals (BIA) decisions that use the categorical approach in defining an "aggravated felony" listed in the INA.[7] The INA uses the term "aggravated felony" as the basis for various civil and criminal penalties.[8] The term is defined as a list of more than fifty crimes or categories of crimes.[9] The BIA may encounter the aggravated felony definition in a number of situations. A noncitizen may challenge a removal decision premised on a conviction for an aggravated felony.[10] Or she may challenge a denial of

1. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984).

2. *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013).

3. VA. CODE ANN. § 18.2-95 (2017).

4. 8 U.S.C. § 1101(a)(43)(G) (2016); *see* Omargharib v. Holder, 775 F.3d 192, 194 (4th Cir. 2014) (using the categorical approach to answer this very question); *see also* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of the U.S. Code).

5. *See Moncrieffe*, 133 S. Ct. at 1684; Kawashima v. Holder, 565 U.S. 478, 483 (2012).

6. *See Moncrieffe*, 133 S. Ct. at 1684 ("[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense '"necessarily" involved . . . facts equating to [the] generic [federal offense].'" (second, third, and fourth alterations in original) (quoting Shepard v. United States, 544 U.S. 13, 24 (2005) (plurality opinion))); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007).

7. *See* 8 U.S.C. § 1101(a)(43) (defining the term "aggravated felony").

8. *See infra* notes 184-94 and accompanying text.

9. *See* 8 U.S.C. § 1101(a)(43); *infra* text accompanying notes 179-83.

10. *See* 8 C.F.R. § 1003.1(b)(3) (2017) (providing for the BIA to hear appeals from decisions of immigration judges (IJs) in removal proceedings); *see also* 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable.").

asylum premised on such a conviction.[11] Regardless of context, the BIA is required to employ the categorical approach when it interprets the aggravated felony definition.[12] On appeal, the BIA—charged with administering the INA[13]—would appear to be the textbook candidate for *Chevron* deference.[14] Indeed, the Supreme Court has explicitly instructed that *Chevron* applies when the BIA interprets our immigration laws.[15] The Court has even gone so far as to say that deference is "especially appropriate" when it comes to immigration law.[16] Denying the BIA deference in the aggravated felony context would appear to defy these instructions.[17]

Yet that is precisely what the Supreme Court is doing. The Court has not once granted *Chevron* deference to a BIA interpretation of the INA's aggravated felony definition.[18] In fact, it has never squarely engaged with the question

11. *See* 8 C.F.R. § 1003.1(b)(9) (providing for BIA review of IJs' decisions in asylum proceedings); *see also* 8 U.S.C. § 1158(b)(2)(A)(ii) (barring asylum relief for those who, "having been convicted . . . of a particularly serious crime, constitute[] a danger to the community of the United States"); *id.* § 1158(b)(2)(B)(i) (providing that a conviction for an aggravated felony constitutes a conviction for "a particularly serious crime").

12. *See infra* note 121 and accompanying text. Under certain circumstances, the categorical approach requires additional steps beyond defining the generic crime. The "modified categorical approach," for instance, kicks in when the statute of conviction contains multiple possible grounds for conviction. *See* Descamps v. United States, 133 S. Ct. 2276, 2281 (2013). And a circumstance-specific approach is used when the language of the federal statute refers to specific conduct as opposed to elements. *See* Nijhawan v. Holder, 557 U.S. 29, 40 (2009) (applying the circumstance-specific approach to 8 U.S.C. § 1101(a)(43)(M)(i)'s monetary threshold). But the complications those steps introduce are beyond the scope of this Note. What is important is that regardless which step terminates the categorical approach, the starting point is defining the generic crime.

13. *See* 8 U.S.C. § 1103(a)(1) (charging the Attorney General with determining questions of law under the INA); 8 C.F.R. § 1003.1(a)(1) (delegating the Attorney General's authority to the BIA).

14. *See* Michael Kagan, Chevron*'s Immigration Exception, Revisited*, YALE J. ON REG. NOTICE & COMMENT (June 10, 2016), https://perma.cc/GCG7-P8GV ("If I had been a student confronted with [a scenario in which the BIA had interpreted an ambiguous provision of the INA] on an Administrative Law exam, I would have said that the tests in *Chevron*'s Step 0 and Step 1 were met, and the decisive question should be whether the BIA's interpretation is reasonable.").

15. *See* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203 (2014) (plurality opinion) ("Principles of *Chevron* deference apply when the BIA interprets the immigration laws."); INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) ("It is clear that principles of *Chevron* deference are applicable to this statutory scheme.").

16. *Aguirre-Aguirre*, 526 U.S. at 425.

17. *See* Drakes v. Zimski, 240 F.3d 246, 250 (3d Cir. 2001) ("Failing to accord deference to the BIA's interpretation of [8 U.S.C.] § 1101, as bereft of explanation as it was, would appear to run counter to the Supreme Court's mandate in *Aguirre-Aguirre*.").

18. In *Esquivel-Quintana v. Sessions*, the Court held that *Chevron* did not apply because the statute "unambiguously foreclose[d]" the BIA's interpretation. *See* 137 S. Ct. 1562, 1572 (2017). In earlier cases, the Court accepted or rejected BIA interpretations by analyzing

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whether principles of *Chevron* deference even apply in the aggravated felony context in the first place. Time and again, the government has asked the Court to defer to the BIA's explications of the provision. And time and again, the Court has declined with virtually no explanation.[19]

The exact opposite is true in the lower federal courts. Those courts overwhelmingly grant *Chevron* deference to the BIA's reasonable interpretations of the aggravated felony definition, just as they would with any other INA provision.[20] Despite the clear trend in the Supreme Court's treatment of aggravated felony cases, these lower courts nonetheless believe their approach is "mandated" by the Court's more general immigration precedent.[21] They view themselves and their choice to defer as faithful to the Court's broad "determin[ation] that the special deference rules of *Chevron* apply to BIA interpretations" of the INA writ large.[22]

Some lower courts, however, disagree. The Third and Seventh Circuits, along with Judge Katzmann of the Second Circuit, have begun to question whether the *Chevron* framework even applies in the aggravated felony context.[23] These courts acknowledge that there may be something special about the aggravated felony definition as compared to the INA's other provisions. In particular, they highlight "the issue of what deference to accord an agency's interpretation of the statute it is charged with administering when that interpretation is itself based on the agency's construction of federal criminal statutes."[24]

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the INA itself without discussing *Chevron* deference. *See* Torres v. Lynch, 136 S. Ct. 1619, 1624-34 (2016); Moncrieffe v. Holder, 133 S. Ct. 1678, 1693 (2013); Kawashima v. Holder, 565 U.S. 478, 482-90 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563, 571, 573-76, 582 (2010); Nijhawan v. Holder, 557 U.S. 29, 33-43 (2009); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 188-94 (2007); Lopez v. Gonzales, 549 U.S. 47, 51-60 (2006); Leocal v. Ashcroft, 543 U.S. 1, 3-13 (2004).

19. *See infra* notes 228-33 and accompanying text.

20. *See infra* Part II.C.

21. *See, e.g.*, Gertsenshteyn v. U.S. Dep't of Justice, 544 F.3d 137, 142-43 (2d Cir. 2008); *see also* Emile v. INS, 244 F.3d 183, 185 (1st Cir. 2001) ("[U]nder governing Supreme Court precedent, the INS' reading of the phrase is entitled to deference . . . .").

22. *See* Soliman v. Gonzales, 419 F.3d 276, 281 (4th Cir. 2005) (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999)).

23. *See, e.g.*, Denis v. Attorney Gen. of the U.S., 633 F.3d 201, 209 (3d Cir. 2011) (declining to apply *Chevron* deference to the BIA's interpretation of the INA's aggravated felony definition); Zivkovic v. Holder, 724 F.3d 894, 897, 900 (7th Cir. 2013) (similar); Higgins v. Holder, 677 F.3d 97, 107-09 (2d Cir. 2012) (Katzmann, J., concurring) (arguing that *Chevron* deference applies to the BIA's interpretations of the INA's aggravated felony definition itself but not to the BIA's interpretations of federal criminal statutes incorporated in that definition).

24. *See Higgins*, 677 F.3d at 104 (per curiam).

The time is therefore ripe for definitive guidance on the matter. Should *Chevron* interact with the categorical approach in a way that diminishes *Chevron*'s potency, the Court ought to clarify as much. Conversely, the Court should clarify whether it is merely silently determining that the BIA's interpretations fall short at a particular step of the *Chevron* analysis. Without such guidance, the odds of eventual harmony appear slim.

Nor has this tension between *Chevron* deference and the categorical approach in the aggravated felony context been squarely addressed in immigration scholarship.[25] While there has been robust debate about the relationship between *Chevron* deference and other interpretive canons—most notably, the rule of lenity and the so-called "immigration rule of lenity"[26]—that

25. *See, e.g.*, Paul Chaffin, Note, *Expertise and Immigration Administration: When Does* Chevron *Apply to BIA Interpretations of the INA?*, 69 N.Y.U. ANN. SURV. AM. L. 503, 575-79, 576 n.357 (2013) (arguing against *Chevron* deference in the aggravated felony context without mentioning the categorical approach except in a footnote acknowledging its existence); Michael Dorfman-Gonzalez, Note, Chevron*'s Flexible Agency Expertise Model: Applying the* Chevron *Doctrine to the BIA's Interpretation of the INA's Criminal Law-Based Aggravated Felony Provision*, 82 FORDHAM L. REV. 973, 1008-14 (2013) (arguing for *Chevron* deference in the aggravated felony context without mentioning the categorical approach). Rebecca Sharpless recently began "to develop a general jurisprudence of *Chevron* and deportation for a crime, arguing for an expansive principle of nondeference in cases involving ambiguity in the scope of crime-based removal statutes." Rebecca Sharpless, *Zone of Nondeference:* Chevron *and Deportation for a Crime*, 9 DREXEL L. REV. 323, 330 (2017). Her argument draws on "[t]he animating principles of *Chevron* as well as the rationales behind both the ban on deference to criminal prosecutors and the criminal and immigration rules of lenity." *Id.* This Note addresses similar topics but focuses specifically on the aggravated felony definition in an effort to both explain and justify its unique treatment before the Supreme Court.

26. For a discussion of the tension between *Chevron* and the rule of lenity, see, for example, Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 197 (2015) ("[T]he scope of the rule [of lenity] in the context of *Chevron* has been subject to considerable scholarly debate."); Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1, 25-69 (1996); and Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2276-77 (2003) ("A number of writers have noticed this problem, but there is no consensus in the literature about how to deal with it.").

Some have described an "immigration rule of lenity" in the immigration context. *See, e.g.*, Cazun v. Attorney Gen. U.S., 856 F.3d 249, 256 n.14 (3d Cir. 2017); 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, 491-94 (2007); Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 519-22 (2003). That canon instructs courts to "construe any lingering ambiguities in deportation statutes in favor of the alien." *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987). For a discussion of the tension between *Chevron* and that canon, see, for example, Rubenstein, *supra*, at 504-19 (arguing that the canon should come into play only after *Chevron* Step Two); Slocum, *supra*, at 574-82 (arguing that the canon should come into play at *Chevron* Step Two "as one factor in determining whether the agency's interpretation is reasonable"); David A. Luigs, Note, *The Single-Scheme Exception to Criminal Deportations and the Case*

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debate has largely ignored the possibility that the categorical approach's interpretive methodology itself renders the *Chevron* framework inappropriate.[27]

This Note proposes that the Supreme Court's apparent approach—that is, placing the aggravated felony definition beyond *Chevron*'s domain—is the proper one. And given the Court's reticence on the matter, this Note proposes an explanation: The very nature of the categorical approach renders the BIA's interpretations of the aggravated felony definition categorically ineligible for *Chevron* deference. The categorical approach is all about crimes. Its first step entails defining a crime, and its second step entails comparing that crime to another crime. As one would imagine, this process calls for special reliance on and familiarity with criminal law itself. But the BIA possesses no expertise when it comes to criminal law. To the contrary, it is the courts that are charged with interpreting and administering criminal laws. And the categorical approach's prescribed methodology leaves little to no room for the BIA to exercise discretion. The extensive entanglement of the aggravated felony definition with federal criminal law casts serious doubt on the proposition that Congress meant *Chevron* to apply in this context.

It bears mentioning that the INA also contains other crime-based provisions.[28] And while this Note may have some bearing on the interpretation of

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for Chevron*'s Step Two*, 93 MICH. L. REV. 1105, 1130 (1995); and Matthew F. Soares, Note, *Agencies and Aliens: A Modified Approach to* Chevron *Deference in Immigration Cases*, 99 CORNELL L. REV. 925, 946-50 (2014).

27. *See* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1680 n.45 (2011) [hereinafter Das, *Immigration Penalties of Criminal Convictions*] ("Categorical analysis is an area of immigration law that is ripe for exploration."); Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 294 n.237 (2012) ("[A] deeper exploration of the relationship between the *Chevron* doctrine and the categorical approach is ripe for further scholarly analysis . . . ."); *see also* Das, *supra* note 26, at 176 & n.179, 190 (arguing that *Chevron* deference is inappropriate for the BIA's interpretation of the INA's detention provisions and noting that "[t]here may be reasons to question the applicability of *Chevron* deference to the BIA's interpretations of other provisions of the INA"); Shruti Rana, Chevron *Without the Courts?: The Supreme Court's Recent* Chevron *Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 320 (2012) (noting that in the immigration context, "the Court appears to be experimenting with *Chevron* in ways that have largely gone unrecognized").

28. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(ii) (2016) (barring asylum relief for noncitizens who, "having been convicted . . . of a particularly serious crime, constitute[] a danger to the community of the United States"); *id.* § 1158(b)(2)(A)(iii) (barring asylum relief where "there are serious reasons for believing that the [noncitizen] has committed a serious nonpolitical crime outside the United States"); *id.* § 1227(a)(2)(A)(i) (rendering deportable noncitizens who have been convicted both of a "crime involving moral turpitude" within a certain period after admission and of a crime with a possible sentence of one year or longer); *id.* § 1227(a)(2)(A)(iv) (rendering deportable noncitizens who are

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those provisions, its conclusion does not necessarily apply wholesale. The criminal terminology employed in the INA's other crime-based provisions is not intertwined with federal criminal law the way the term "aggravated felony" is.[29] And a number of those other crime-based provisions may raise special concerns not implicated by the aggravated felony definition.[30] This Note therefore suggests that there is something special about the aggravated felony provision; there is a reason the Supreme Court has never deferred to the BIA's interpretations of that provision but has deferred to the BIA's interpretations of other crime-based provisions.[31]

This Note proceeds in three Parts. Part I provides a brief primer on *Chevron* deference and the categorical approach. Part II then turns to the area in which these interpretive titans most prominently clash: aggravated felony cases. As Part II illustrates, the Supreme Court and the lower courts have taken vastly different approaches to reconciling *Chevron* with the categorical approach. Part III explains why the Supreme Court's approach is the correct one. Specifically, it argues that because the aggravated felony definition must be interpreted according to the dictates of the categorical approach, the *Chevron* framework does not apply.

I. Doctrinal Background

The aggravated felony definition sits at the center of an interpretive Venn diagram. The first circle comprises those instances in which *Chevron* deference could apply—when a court is tasked with reviewing an agency's interpretation of the statute it is charged with administering. The second circle encompasses those instances in which the interpretation of a particular statute calls for use of the categorical approach. This Part traces these two overlapping circles, briefly describing the mechanics, underlying rationales, and fields of applicability of these two interpretive doctrines.

"convicted of a violation of [18 U.S.C. § 758] (relating to high speed flight from an immigration checkpoint)"); *id.* § 1227(a)(2)(E)(i) (rendering deportable noncitizens who are "convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment").

29. *See infra* Part III.B.3.

30. *See infra* notes 252-55, 257, 306-11 and accompanying text.

31. *See* Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015) (mentioning that *Chevron* did not apply to the BIA's interpretation of 8 U.S.C. § 1227(a)(2)(B)(i) because that interpretation made "scant sense"); INS v. Aguirre-Aguirre, 526 U.S. 415, 423-25, 433 (1999) (deferring to the BIA's interpretation of the phrase "serious nonpolitical crime" in 8 U.S.C. § 1253(h)(2)(C)).

A. *Chevron* Deference

Congress regularly entrusts agencies with administering the statutes it passes.[32] The Environmental Protection Agency, for instance, is entrusted with administering the Clean Air Act.[33] The BIA has similarly been charged with administering the INA.[34] When Congress doles out duties in this way, it understands that the discharge of those duties necessarily involves interpreting the terms of the statute being administered. It is thus by congressional design that ambiguities in those terms will "be resolved, first and foremost, by the agency."[35] To remain faithful to this design, courts typically defer to those interpretations so long as they are reasonable.[36] That practice has come to be known as *Chevron* deference.

Mechanics: *Chevron* deference entails two steps. At Step One, the court asks "whether Congress has directly spoken to the precise question at issue."[37] If it has, the court "must give effect to the unambiguously expressed intent of Congress."[38] But if it has not, the court proceeds to Step Two: assessing "whether the agency's answer is based on a permissible construction of the statute."[39] If so, the court defers to the agency's interpretation.[40]

Before jumping into the *Chevron* framework, a court must ask whether "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority."[41] If not,

32. *See, e.g.*, 8 U.S.C. § 1103(a)(1) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . ."); 42 U.S.C. § 7601(a)(1) (2016) ("The Administrator [of the Environmental Protection Agency] is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter."); 47 U.S.C. § 201(b) (2016) ("The [Federal Communications] Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.").

33. *See* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2435, 2439 (2014); *see also* Clean Air Act, Pub. L. No. 84-159, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401-7671q).

34. *See infra* text accompanying notes 199-205.

35. *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740-41 (1996).

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

37. *Id.* at 842.

38. *Id.* at 842-43.

39. *Id.* at 843.

40. *Id.* at 842-43.

41. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); *see also* Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2101 (1990) ("*Chevron*'s principle of deference . . . is an attempted reconstruction of congressional instructions . . . .").

then the framework is inapplicable. This inquiry has come to be known as *Chevron* Step Zero.[42] It is aimed at divining "Congress's (implied) instructions in the particular statutory scheme."[43]

Several indicia may bear on this question. One good indicator is "an agency's power to engage in adjudication or notice-and-comment rulemaking."[44] Others might include "the interstitial nature" of the issue; the agency's "related expertise"; "the importance of the question" to the statute's administration; "the complexity" of the statutory scheme; "the careful consideration the [a]gency has given the question over a long period of time";[45] the "subject matter of the relevant provision—for instance, its distance from the agency's ordinary statutory duties or its falling within the scope of another agency's authority"; and the provision's "text, its context, the structure of the statutory scheme, . . . canons of textual construction," and its "[s]tatutory purposes."[46]

Underlying rationale: The precise rationales underlying the Supreme Court's opinion in *Chevron* remain a matter of some debate, but three primary explanations have risen to the fore. Because a great deal of ink has already been spilled parsing these rationales, this Note outlines them only briefly.

The rationale that has thus far proven most influential is congressional intent.[47] As the Supreme Court put it in *Chevron*, "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[48] Congress means for agencies—not courts—to fill in the details of the

42. *See* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001); Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining "*Chevron* Step Zero" as "the initial inquiry into whether the *Chevron* framework applies at all").

43. Sunstein, *supra* note 42, at 217-18 (emphasis omitted); *see also Mead*, 533 U.S. at 226-27; *cf.* City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013) (noting that "*Chevron* is rooted in a background presumption of congressional intent" and addressing the question whether *Chevron* applies to agency interpretations of statutory provisions defining the agency's jurisdiction).

44. *See Mead*, 533 U.S. at 227.

45. *See* Barnhart v. Walton, 535 U.S. 212, 222 (2002).

46. *See City of Arlington*, 133 S. Ct. at 1875-76 (Breyer, J., concurring in part and concurring in the judgment).

47. *See* Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1284 (2008) ("Arguably the leading rationale for *Chevron* deference is the presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration."); Das, *supra* note 26, at 168 ("Most scholars now agree that *Chevron* deference, while shaped by notions of political accountability and agency expertise, depends primarily on an express or implied delegation rationale."); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456 (1989) (arguing that the Court deferred in *Chevron* "in order to respect the legislature's decision to entrust regulatory responsibility to agencies"); Sunstein, *supra* note 42, at 198 ("[T]his reading of *Chevron* has prevailed.").

48. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

statutory schemes it enacts.[49] The Step Zero inquiry that precedes any application of *Chevron* is animated by this very line of reasoning.[50]

A second possible rationale for *Chevron* deference is the relative expertise of courts and agencies.[51] This rationale posits that "those with great expertise and charged with responsibility for administering the provision would be in a better position to do so."[52] Expertise, of course, comes in many flavors.[53] Agencies may possess technical or scientific expertise,[54] expertise in the complex statutory regime at issue,[55] or expertise in the sensitive political considerations involved.[56]

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49. *See id.* at 843-44.

50. *See City of Arlington*, 133 S. Ct. at 1868; Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-rules and Meta-standards*, 54 ADMIN. L. REV. 807, 812 (2002) ("*Mead* eliminates any doubt that *Chevron* deference is grounded in congressional intent.").

51. *See* Negusie v. Holder, 555 U.S. 511, 530 (2009) (Stevens, J., concurring in part and dissenting in part) ("The *Chevron* framework thus accounts for the different institutional competencies of agencies and courts: Courts are expert at statutory construction, while agencies are expert at statutory implementation."); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-*Chevron *Era*, 32 B.C. L. REV. 757, 774-75 (1991); Criddle, *supra* note 47, at 1286; Das, *supra* note 26, at 168; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2374 (2001) (explaining that courts have invoked the expertise rationale "to delimit the scope of the *Chevron* doctrine"); Sapna Kumar, *Expert Court, Expert Agency*, 44 U.C. DAVIS L. REV. 1547, 1549 (2011) ("*Chevron* is based, in part, on the idea that agencies have superior expertise and institutional advantages over courts.").

52. *Cf. Chevron*, 467 U.S. at 865 (suggesting that relative expertise might be one reason Congress leaves gaps in statutes).

53. For a detailed taxonomy of various kinds of agency expertise, see Chaffin, *supra* note 25, at 531-47 (distinguishing among technical expertise, specialization, expertise in statutory interpretation, and political accountability).

54. *See* Kristin E. Hickman, *The Need for* Mead*: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1599 (2006) ("In some complex regulatory areas, making policy choices requires an evaluation of scientific, engineering, or other technical data . . . ."); Chaffin, *supra* note 25, at 531-35.

55. *See* Criddle, *supra* note 47, at 1286-87 ("Because [statutes under agency administration] are often highly complex, courts rely on agencies' expertise to anticipate the effects of the courts' interpretations on the regulatory scheme as a whole."); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 574 (1985) ("[I]nterpretive expertise might be based on any one of three possible grounds: (1) access to greater knowledge or evidence of statutory meaning; (2) an interpretive process better suited to yielding correct solutions; or (3) motivation by a set of preferences more conducive to accurate identification of statutory meaning."); Kumar, *supra* note 51, at 1549 ("In general, agencies have detailed knowledge of their organic statutes . . . ."). *But see* Note, *Justifying the* Chevron *Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2045 (2010) (arguing that this sort of expertise cannot justify the *Chevron* doctrine).

56. *See* Greenberg, *supra* note 26, at 9 ("[*Chevron*] portrays administrators potentially as experts in more than a narrow, technical sense; they also have the potential to balance conflicting policy goals contained in Congress's handiwork."); Sunstein, *supra* note 41,

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A third and related justification for *Chevron* deference is the relationship between political accountability and the separation of powers.[57] Agencies reside within the executive branch, which—unlike the courts—is accountable to the electorate.[58] And because of this accountability, "it is entirely appropriate for this political branch of the Government to make such policy choices."[59] Though powerful initially, the strength of this rationale has somewhat subsided.[60]

Applicability: Questions of *Chevron* deference arise in virtually all areas of the law. The doctrine has been applied to agency interpretations in areas including environmental laws,[61] labor laws,[62] social security and welfare laws,[63] patent laws,[64] communications laws,[65] taxation laws,[66] transportation

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at 2088 ("*Chevron* reflects a salutary understanding that these judgments of policy and principle should be made by administrators rather than judges.").

57. *See* Das, *supra* note 26, at 168 (noting the view that "courts should not tread on an agency's policy choices" because agencies are "more politically accountable than the courts"); Farina, *supra* note 47, at 456 (arguing that *Chevron* deference is meant "to ensure that the policy choices inherent in interpreting regulatory statutes are made by persons answerable to the political branches rather than by unelected judges"); Kagan, *supra* note 51, at 2372-80 (suggesting that political accountability is "*Chevron*'s primary rationale"); Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 218-19 (2013) (arguing that *Chevron* deference is "substantially driven by assumptions about political accountability"); Sunstein, *supra* note 42, at 197 (suggesting that *Chevron* deference may be "based on a healthy recognition that in the face of ambiguity, agency decisions must rest on judgments of value" that "should be made by politicial rather than judicial institutions").

58. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

59. *See id.*

60. *See* Kagan, *supra* note 51, at 2373 ("As first conceived, the *Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President . . . . Since that time, however, this rationale has receded . . . ."); *see also* Merrill, *supra* note 50, at 812 ("[*Mead*] should put to end the speculation that *Chevron* rests on something other than congressional intent . . . .").

61. *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2448 (2014); EPA v. EME Homer City Generation, L.P., 134 S. Ct. 1584, 1603 (2014); Nat'l Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 666 (2007); Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc., 470 U.S. 116, 129 (1985); *Chevron*, 467 U.S. at 839-40.

62. *See, e.g.*, NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112, 123 (1987); Cornelius v. Nutt, 472 U.S. 648, 650, 659 (1985).

63. *See, e.g.*, Barnhart v. Walton, 535 U.S. 212, 217-18 (2002); Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 695-96 (1991); Conn. Dep't of Income Maint. v. Heckler, 471 U.S. 524, 530-32 (1985).

64. *See, e.g.*, Cuozzo Speed Techs., LLC v. Lee, 136 S. Ct. 2131, 2144 (2016).

65. *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1867-68 (2013); Glob. Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc., 550 U.S. 45, 47-48 (2007); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

66. *See, e.g.*, Mayo Found. for Med. Educ. & Research v. United States, 562 U.S. 44, 55 (2011).

laws,[67] banking laws,[68] health laws,[69] and education laws.[70] And most relevant here, courts generally apply the *Chevron* framework to the BIA's binding interpretations of the INA.[71]

Chevron deference is unavailable, however, for agency interpretations of criminal laws.[72] This restriction is rooted in the constitutional separation of powers. The executive branch is charged with enforcing our criminal laws through prosecutions.[73] Courts hear criminal cases and determine how the law at issue is to be applied to the facts at hand. It is therefore the courts, not agencies, that are charged with administering those criminal laws.[74] Were it otherwise, those who bear the power to prosecute would also bear the power to define the contours of the very crimes they are prosecuting. Such an arrangement would both "violate established traditions and threaten liberty itself."[75]

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67. *See, e.g.*, Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45-46 (2002).

68. *See, e.g.*, Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 739 (1996).

69. *See, e.g.*, Rust v. Sullivan, 500 U.S. 173, 184-87 (1991).

70. *See, e.g.*, Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 89 (2007).

71. *See supra* note 15 and accompanying text.

72. *See* Sharpless, *supra* note 25, at 334 ("[O]ne established rule is that courts never defer to the Attorney General's interpretation of ambiguous criminal law statutes in individual criminal prosecutions."); *see also* United States v. Apel, 134 S. Ct. 1144, 1151 (2014) ("[W]e have never held that the Government's reading of a criminal statute is entitled to any deference."); Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

    Congress sometimes explicitly makes it a crime to violate agency regulations. *See* United States v. Grimaud, 220 U.S. 506, 514, 522-23 (1911) (holding that Congress may criminalize violations of regulations issued by the Secretary of Agriculture); WAYNE R. LAFAVE, CRIMINAL LAW § 2.6, at 130 (5th ed. 2010) ("[T]he administrative crime is becoming more and more important."); Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2426 (2006) (arguing that Congress can delegate the power to define crimes). But it is "quite a different matter" to assume that Congress delegated the power to define crimes when a statute is silent on the matter. *See* Whitman v. United States, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting the denial of certiorari); *see also* Richard E. Myers II, Essay, *Complex Times Don't Call for Complex Crimes*, 89 N.C. L. REV. 1849, 1858 (2011) (contrasting explicit delegations of regulatory power with implicit delegations in the criminal context).

73. *See* United States v. Nixon, 418 U.S. 683, 694 (1974) ("Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government.").

74. *See* Abramski v. United States, 134 S. Ct. 2259, 2274 (2014) ("The critical point is that criminal laws are for courts, not for the Government, to construe."); Francis v. Reno, 269 F.3d 162, 168 (3d Cir. 2001) (noting that 18 U.S.C. § 16 "is not transformed into an immigration law merely because it is incorporated into the INA").

75. Sunstein, *supra* note 42, at 210; *see also* THE FEDERALIST NO. 47, at 298 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and

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B. The Categorical Approach

Under federal law, civil or criminal liability is sometimes premised on a prior conviction—whether federal or state—for a certain type of crime. The Armed Career Criminal Act (ACCA) of 1984,[76] for instance, mandates a minimum sentence of fifteen years for anyone convicted of certain firearms offenses who "has three previous convictions . . . for a violent felony or a serious drug offense."[77] In determining whether this mandatory minimum applies, the question necessarily arises whether any of a defendant's past convictions qualifies as either a "violent felony" or a "serious drug offense."

Mechanics: The categorical approach is the interpretive methodology that applies when determining whether a particular offense fits within the definition of a generic crime. Faced with such a question, courts must employ the categorical approach's two-step methodology.[78] The first step is defining the federal generic crime.[79] The second step is comparing the elements of that generic crime to those of the prior offense.[80] In making this comparison, the "facts underlying the case" are irrelevant.[81] The prior offense is defined entirely by the state or federal statute of conviction.[82] If the conduct criminalized falls entirely within the generic definition, then the prior offense qualifies as the generic crime at issue.[83] But if the statute of conviction criminalizes any

judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

76. Pub. L. No. 98-473, ch. 18, 98 Stat. 1837, 2185 (codified as amended at 18 U.S.C. § 924(e) (2016), *invalidated in part by* Johnson v. United States, 135 S. Ct. 2551 (2015)).

77. 18 U.S.C. § 924(e)(1). Other federal mandatory minimum laws take similar approaches. *See, e.g.*, *id.* § 2252(b)(1) ("[I]f such person has a prior conviction . . . under [certain federal laws or] the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years."); *id.* § 2252(b)(2) (similarly tying the length of sentence to, among other things, prior convictions).

78. *See Johnson*, 135 S. Ct. at 2557 ("[T]he Armed Career Criminal Act requires courts to use a framework known as the categorical approach . . . ."); Kawashima v. Holder, 565 U.S. 478, 482-83 (2012) (explaining that in defining "aggravated felony" in the INA, the Court "employ[s] a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime"). The inquiry becomes a bit more complicated under certain circumstances beyond the realm of this Note. *See supra* note 12.

79. *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013); Taylor v. United States, 495 U.S. 575, 599-600, 602 (1990).

80. *See Moncrieffe*, 133 S. Ct. at 1684.

81. *See id.*

82. *See id.*

83. *See id.*; *Taylor*, 495 U.S. at 598-99.

conduct the generic federal definition would not, then the prior offense does not qualify.[84]

Consider as an example a simplified version of the Supreme Court's seminal categorical approach case: *Taylor v. United States*.[85] Then as now, the ACCA's fifteen-year mandatory minimum applied to anyone convicted of being a felon in possession of a firearm who had three prior convictions for specified offenses, including "burglary."[86] Taylor was found guilty of being a felon in possession of a firearm and had four prior convictions.[87] Two of those convictions were for burglary under Missouri law, which covered "breaking and entering 'any booth or tent, or any boat or vessel, or railroad car.'"[88] The question before the court was whether those burglary convictions counted as generic burglary for purposes of the ACCA's mandatory minimum.[89]

At the first step of the categorical approach, the Supreme Court determined that the generic definition of "burglary" has "the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[90] At the second step, the Court determined that Missouri's definition of burglary was overbroad because it covered entry into places the generic definition does not—namely, railroad cars.[91] Because Taylor's crime of conviction was categorically not a match with the generic definition, the Court held that the lower court had erred by sentencing Taylor to the mandatory minimum.[92]

Underlying rationale: The purposes of and justifications for the categorical approach are somewhat clearer than those for *Chevron* deference.

First, the categorical approach "promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact."[93] Such an approach is especially attractive when the underlying crime was committed years ago and the evidence has become stale or witnesses have since forgotten the events.[94] It avoids the situation

84. *See* Descamps v. United States, 133 S. Ct. 2276, 2292 (2013).

85. 495 U.S. 575.

86. *See id.* at 578 (quoting 18 U.S.C. § 924(e), *invalidated in part by* Johnson v. United States, 135 S. Ct. 2551 (2015)); *see also* 18 U.S.C. § 922(g) (2016) (prohibiting anyone convicted of a felony from "possess[ing] in or affecting commerce, any firearm or ammunition"); *id.* § 924(e) (current version of the ACCA).

87. *Taylor*, 495 U.S. at 578.

88. *See id.* at 578, 599 (quoting MO. REV. STAT. § 560.070 (repealed)).

89. *See id.* at 578-80.

90. *Id.* at 599.

91. *See id.* at 599, 602.

92. *See id.* at 602.

93. Moncrieffe v. Holder, 133 S. Ct. 1678, 1690 (2013).

94. *See id.*

where two people, "each 'convicted of' the same offense, might obtain different . . . determinations depending on what evidence remains available or how it is perceived by an individual . . . judge."[95] The categorical approach also sidesteps the problem that would arise when the charging papers do not specify the theory of the crime as it was presented to the jury at trial or to the defendant when he pleaded guilty.[96]

Second, the categorical approach gives effect to congressional intent. When Congress lists generic crimes as the bases for civil or criminal liability, it means to capture a certain class of convicted people regardless of the particular labels their convictions may carry.[97] And when Congress uses terms like "convictions" and "elements," it reveals a choice that the fact of the conviction itself—as opposed to the circumstances surrounding the conviction—is what matters.[98] The categorical approach is designed to address these legislative design choices. The Court's logic in *Taylor* with respect to the ACCA is instructive. While "[t]here was considerable debate" in Congress about what predicate offenses ought to be covered by the ACCA, "no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case."[99] Rather, Congress included generic crimes in the statute to ensure that particular classes of repeat offenders would be covered.[100] It is therefore "implausible" that Congress intended the definition of any of those generic crimes to "depend on the definition adopted by the State of conviction."[101]

Third, the categorical approach is designed to promote fairness and predictability in high-stakes contexts. The categorical approach is used to establish a uniform definition of a generic crime "independent of the labels employed by the various States' criminal codes."[102] This approach avoids the unfairness of hinging civil or criminal liability on the particular criminal

95. *Id.*

96. *See Taylor*, 495 U.S. at 601-02; *cf.* Kelly Holt, Comment, *Congressional Guidance on the Scope of Magistrate Judges' Duties*, 84 U. CHI. L. REV. 909, 924-26 (2017) (summarizing the plea process and the role of facts therein).

97. *See Taylor*, 495 U.S. at 589 (noting that Congress's use of a generic definition of burglary "prevent[s] offenders from invoking the arcane technicalities of the common-law definition of burglary . . . and protect[s] offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction"); *cf.* Nijhawan v. Holder, 557 U.S. 29, 34-35 (2009) ("[The] ACCA's language read naturally uses the word 'felony' to refer to a generic crime as *generally* committed.").

98. *See* Descamps v. United States, 133 S. Ct. 2276, 2287 (2013); Shepard v. United States, 544 U.S. 13, 19 (2005).

99. *Taylor*, 495 U.S. at 601.

100. *See id.*

101. *See id.* at 590.

102. *See id.* at 592.

labels states may choose to use.[103] It also provides to those facing convictions notice of the consequences those convictions might carry. In the immigration context, it allows noncitizens "to anticipate the immigration consequences of guilty pleas in criminal court" and therefore to avoid "the risk of immigration sanctions."[104] Likewise, in the criminal context, the categorical approach enables defendants in all states to anticipate the future sentencing implications of their current pleas and convictions. This rationale has recently come under fire, as a rising chorus of courts and commentators has decried the categorical approach as unfair and unpredictable.[105]

Finally, the categorical approach avoids potential Sixth Amendment concerns in the criminal sphere. The Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury."[106] Generic crimes are regularly used to trigger heightened sentences.[107] Were a sentencing court to look beyond the fact of a prior conviction and consider the facts surrounding that conviction in increasing a defendant's statutory

103. *See id.* at 589.

104. Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015) (quoting Koh, *supra* note 27, at 307).

105. *See, e.g.*, Mathis v. United States, 136 S. Ct. 2243, 2258 (2016) (Kennedy, J., concurring) ("[T]oday's decision is a stark illustration of the arbitrary and inequitable results produced by applying an elements based approach to this sentencing scheme."); *id.* at 2259 (Breyer, J., dissenting) ("I fear that the majority's [application of the categorical approach] will unnecessarily complicate federal sentencing law, often preventing courts from properly applying the sentencing statute that Congress enacted."); Johnson v. United States, 559 U.S. 133, 151-52 (2010) (Alito, J., dissenting) (worrying about the categorical approach's "untoward consequences"); United States v. Davis, 875 F.3d 592, 595 (11th Cir. 2017) ("Curiouser and curiouser it has all become, as the holding we must enter in this case shows. Still we are required to follow the rabbit."); United States v. Chapman, 866 F.3d 129, 136 (3d Cir. 2017) (Jordan, J., concurring) (explaining that the categorical approach has a "consistently troubling feature: its requirement that judges ignore the real world"); United States v. Perez-Silvan, 861 F.3d 935, 944 (9th Cir. 2017) (Owens, J., concurring) (referring to "sentencing adventures more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls" (citing RAIDERS OF THE LOST ARK (Paramount Pictures 1981))); United States v. Faust, 853 F.3d 39, 61 (1st Cir. 2017) (Lynch, J., concurring) ("My concern is that use of these tests can lead courts to reach counterintuitive results, and ones which are not what Congress intended."); United States v. Doctor, 842 F.3d 306, 312-13 (4th Cir. 2016) (Wilkinson, J., concurring) ("[The categorical] approach has pushed criminal sentencing to the very last place that sentencing ought to be, that is at an untenable remove from facts on the ground."), *cert. denied*, 137 S. Ct. 1831 (2017); Tijani v. Holder, 628 F.3d 1071, 1075 (9th Cir. 2010) (calling the categorical approach "[c]ounterfactual and counterintuitive").

106. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

107. *See, e.g.*, 8 U.S.C. § 1326(a), (b)(2) (2016) (making a prior conviction for an "aggravated felony" the basis for raising the statutory maximum from two to twenty years); 18 U.S.C. § 924(e) (2016) (listing generic crimes as the basis for a fifteen-year mandatory minimum), *invalidated in part by* Johnson v. United States, 135 S. Ct. 2551 (2015).

maximum on the ground of a conviction of a particular generic crime, it would risk violating the Sixth Amendment's jury trial guarantee.[108]

Applicability: The categorical approach—like *Chevron*—applies in a host of contexts, but it is most often employed in sentencing and immigration cases.[109] The categorical approach rose to prominence in the area of criminal sentencing.[110] The sentencing laws and guidelines often base the length of an offender's sentence in part on the nature and number of her past convictions.[111] The ACCA, for example, predicates a fifteen-year statutory minimum in part on whether the defendant has prior convictions for "burglary, arson, or

108. *See* Descamps v. United States, 133 S. Ct. 2276, 2287 (2013) (noting that the categorical approach "avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries"); Shepard v. United States, 544 U.S. 13, 25-26 (2005) (plurality opinion) (explaining this rationale in more detail); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .").

109. *See* Rendon v. Holder, 782 F.3d 466, 471 (9th Cir. 2015) (Graber, J., dissenting from the denial of rehearing en banc) ("The modified categorical approach arises frequently in both immigration and criminal cases—categories that comprise a substantial majority of our docket."); Rojas v. Attorney Gen. of the U.S., 728 F.3d 203, 214 (3d Cir. 2013) (en banc) ("It is well-established that the categorical approach is a method often used to ascertain whether a prior conviction 'fits' the definition of a generic federal predicate offense for purposes of certain immigration or sentencing consequences.").

The categorical approach's methodology has also arisen with respect to generic crimes listed in the context of the International Travel Act, *see* Perrin v. United States, 444 U.S. 37, 45-49 (1979); United States v. Nardello, 393 U.S. 286, 295-96 (1969); *see also* International Travel Act of 1961, Pub. L. No. 87-63, 75 Stat. 129 (codified as amended at 22 U.S.C. §§ 2121-2124 (2016)), and the Hobbs Act, *see* Scheidler v. Nat'l Org. for Women, 537 U.S. 393, 409-11 (2003); *see also* Hobbs Act, Pub. L. No. 80-772, § 1951, 62 Stat. 683, 793-94 (1948) (codified as amended at 18 U.S.C. § 1951).

110. *See Mathis*, 136 S. Ct. at 2248 (majority opinion); United States v. Castleman, 134 S. Ct. 1405, 1413 (2014); Chambers v. United States, 555 U.S. 122, 125 (2009), *abrogated by Johnson*, 135 S. Ct. 2551; Begay v. United States, 553 U.S. 137, 141 (2008), *abrogated by Johnson*, 135 S. Ct. 2551; *Shepard*, 544 U.S. at 19-20 (majority opinion); Taylor v. United States, 495 U.S. 575, 600 (1990).

111. *See, e.g.*, 18 U.S.C. § 924(e)(1) (mandating a fifteen-year statutory minimum for anyone who "has three previous convictions . . . for a violent felony or a serious drug offense, or both"); *id.* § 2252(b)(1) ("[I]f [a person who commits specified offenses] has a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years."); *id.* § 2252(b)(2) (similarly tying the length of sentence to, among other things, the nature of prior state convictions); U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(2)(E) (U.S. SENTENCING COMM'N 2016) (basing sentencing enhancements in part on whether offenders have "convictions for misdemeanors that are crimes of violence or drug trafficking offenses").

extortion."[112] And the sentencing guidelines base certain enhancements on prior convictions for, among other offenses, "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, [or] extortion."[113] Courts have recently held that the categorical approach also applies to the Sex Offender Registration and Notification Act,[114] which tethers a sex offender's registration requirements to the type of crime he has committed.[115]

Courts have also long applied the categorical approach in interpreting U.S. immigration laws.[116] The INA premises deportability in part on prior criminal convictions for, among other generic crimes, "a crime involving moral turpitude," "an aggravated felony," a "controlled substance" offense, "[c]ertain firearm offenses," "trafficking," "[d]omestic violence, stalking, and child abuse."[117] Similar generic crimes serve as the basis for criminal liability,[118] enhanced sentences,[119] and ineligibility for certain forms of relief from removal and inadmissibility.[120] Both courts and the agencies charged with

112. *See* 18 U.S.C. § 924(e)(1), (2)(B).

113. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 & cmt. n.2.

114. Pub. L. No. 109-248, tit. I, 120 Stat. 587, 590-611 (codified as amended in scattered sections of the U.S. Code).

115. *See* 42 U.S.C. § 16911 (2016) (to be recodified at 34 U.S.C. § 20911); *see also* United States v. Berry, 814 F.3d 192, 196 (4th Cir. 2016); United States v. Morales, 801 F.3d 1, 5 (1st Cir. 2015); United States v. White, 782 F.3d 1118, 1135 (10th Cir. 2015); United States v. Cabrera-Gutierrez, 756 F.3d 1125, 1127, 1135 (9th Cir. 2014); United States v. Taylor, 644 F.3d 573, 576 (7th Cir. 2011).

116. *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 (2013) ("This categorical approach has a long pedigree in our Nation's immigration law."); Das, *Immigration Penalties of Criminal Convictions*, *supra* note 27, at 1676 ("Nearly a century of precedent has turned categorical analysis into well-settled law in the immigration context.").

There is some scholarly debate over whether the categorical approach used in the criminal context is identical to that used in the immigration context. *See, e.g.*, Das, *Immigration Penalties of Criminal Convictions*, *supra* note 27, at 1677 (acknowledging "key differences between the criminal sentencing context in *Taylor* and the immigration context"); Koh, *supra* note 27, at 299-311 (advocating greater attention to the reasons courts began employing categorical analysis in the immigration context); Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1035 (2008) ("[T]he methodologies for evaluating prior crimes must be the same in criminal sentencing and immigration cases . . . .").

117. *See* 8 U.S.C. § 1227(a)(2) (2016); *see also* Nijhawan v. Holder, 557 U.S. 29, 37 (2009) ("The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes.").

118. *See* 8 U.S.C. § 1327.

119. *See id.* § 1326(b)(2).

120. *See id.* §§ 1182(h), 1229b; *see also id.* § 1252(a)(2)(B) (prohibiting judicial review of executive branch judgments regarding relief under § 1182(h) or § 1229b).

administering our immigration laws—namely, the BIA and Immigration Judges (IJs) tasked with determining whether noncitizens are removable or entitled to certain relief—are required to use the categorical approach to determine whether a prior offense counts as one for any of these generic crimes.[121]

1. Some confusion at step one of the categorical approach

Most of the Supreme Court's attention when it comes to the categorical approach has so far been paid to the second step: comparing the crime of conviction with the generic crime. The Supreme Court has addressed which version of the statute of conviction should be considered,[122] what to do when that statute contains multiple grounds for conviction,[123] whether a state statute of conviction must contain an interstate commerce element to be a categorical match with a federal generic crime,[124] and when extraneous documents and facts may be considered.[125]

The categorical approach's first step—deriving the generic federal definition—has received relatively little attention. There thus remains some uncertainty as to how exactly it should be performed.

In some instances, it is easy. Congress might provide a ready-made definition in the statute itself or cross-reference another federal statute.[126] One

121. *See, e.g.*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567-68 (2017) ("[T]o determine whether an alien's conviction qualifies as an aggravated felony under [8 U.S.C. § 1101(a)(43)], we 'employ a categorical approach by looking to the statute . . . of conviction, rather than to the specific facts underlying the crime.'" (last alteration in original) (quoting Kawashima v. Holder, 565 U.S. 478, 483 (2012))); United States v. Garcia-Santana, 774 F.3d 528, 543 (9th Cir. 2014) (holding impermissible a BIA interpretation that "entirely ignores the *one* methodology properly applicable in this context—namely, the mode of analysis derived from *Taylor* and its progeny"); Jean-Louis v. Attorney Gen. of the U.S., 582 F.3d 462, 472-73 (3d Cir. 2009) (declaring the BIA's failure to apply the categorical approach to a criminal ground for removal an "impermissible reading of the statute"); Ibarra, 26 I. & N. Dec. 809, 810 (B.I.A. 2016) (explaining that the BIA "must apply the categorical approach"); Guevara Alfaro, 25 I. & N. Dec. 417, 421 (B.I.A. 2011) ("[A] categorical approach must be employed . . . .").

122. *See* McNeill v. United States, 563 U.S. 816, 821 (2011).

123. *See* Mathis v. United States, 136 S. Ct. 2243, 2253 (2016); Descamps v. United States, 133 S. Ct. 2276, 2281-82 (2013).

124. *See* Torres v. Lynch, 136 S. Ct. 1619, 1623 (2016).

125. *See* Nijhawan v. Holder, 557 U.S. 29, 34 (2009); Shepard v. United States, 544 U.S. 13, 16 (2005).

126. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(B) (2016) (listing "illicit trafficking in a controlled substance (as defined in [21 U.S.C. § 802])"); *id.* § 1101(a)(43)(F) (listing "a crime of violence (as defined in [18 U.S.C. § 16], but not including a purely political offense)"). Some federal courts of appeals have held § 1101(a)(43)(F) to be unconstitutionally vague in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). *See, e.g.*, Golicov v. Lynch, 837 F.3d 1065, 1067 (10th Cir. 2016).

example of this is the INA's definition of the aggravated felony "illicit trafficking in firearms or destructive devices," which is "defined in [18 U.S.C. § 921]."[127] Similarly, the ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that . . . has as an element the use, attempted use, or threatened use of physical force against the person of another."[128]

Other times, however, the federal law simply lists a generic crime with no definition.[129] Most notable among such generic crimes in the INA are "burglary" and "sexual abuse of a minor."[130] Where a statute simply lists a generic crime without a cross-reference or clear definition, the Supreme Court has instructed that the generic federal definition is to be derived from "the generic sense in which the term is now used in the criminal codes of most States."[131] Thus in *Taylor*, the Court consulted a leading criminal treatise—including its survey of state criminal laws—and the Model Penal Code to divine the generic federal definition of "burglary."[132]

The Court has employed this same approach in subsequent cases. In *Scheidler v. National Organization for Women, Inc.*, the Court settled on a generic federal definition of "extortion" that accorded with the views of "the Model Penal Code and a majority of States."[133] In *Gonzales v. Duenas-Alvarez*, the Court keyed its generic federal definition of "theft offense" to the way "criminal law [was then] uniformly treat[ing]" the issue at hand.[134] And most recently in *Esquivel-Quintana v. Sessions*, the Court adopted a generic federal definition of "sexual abuse of a minor" that accorded with the "structure of the INA, a related federal statute, and evidence from state criminal codes."[135]

Among the federal courts of appeals, there is some disagreement as to whether this is always the proper approach. Those courts have developed three

127. 8 U.S.C. § 1101(a)(43)(C).

128. 18 U.S.C. § 924(e)(2)(B) (2016), *invalidated in other part by Johnson*, 135 S. Ct. 2551.

129. A substantial number of the INA's aggravated felony provisions fall into this bucket. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(A) ("murder, rape, or sexual abuse of a minor"); *id.* § 1101(a)(43)(G) ("a theft offense (including receipt of stolen property) or burglary offense"); *id.* § 1101(a)(43)(S) ("obstruction of justice, perjury or subornation of perjury, or bribery of a witness").

130. *See id.* § 1101(a)(43)(A), (G); *cf.* 18 U.S.C. § 924(e)(2)(B)(ii) (including "burglary" in the ACCA's definition of "violent felony").

131. *See* Taylor v. United States, 495 U.S. 575, 598 (1990); *see also* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 190 (2007).

132. *See* 495 U.S. at 598 & n.8, 599.

133. *See* 537 U.S. 393, 410 (2003).

134. *See* 549 U.S. at 185, 190.

135. *See* 137 S. Ct. 1562, 1570 (2017). As a member of Stanford's Supreme Court Litigation Clinic, I assisted in the petitioner's briefing in this case.

methods for divining generic federal definitions when the statute does not provide one.

One group of circuits uses a multijurisdictional approach, deriving generic federal definitions by looking to state and federal criminal laws, the Model Penal Code, and other leading criminal law authorities.[136] These circuits point to the Supreme Court's consistent practice dating back to *Taylor* of defining generic crimes in this manner.[137]

A second group of circuits defines generic crimes using a plain language approach.[138] That is, these circuits determine a crime's "'generic, contemporary meaning' from its common usage as stated in legal and other well-accepted dictionaries."[139] These circuits believe that "*Taylor* and its progeny do not specify whether [courts] must use a particular method" in defining a generic crime.[140]

A third group of circuits takes a hybrid approach. These circuits use multijurisdictional surveys when defining generic common law crimes but take a plain language approach when defining generic nontraditional

136. *See* United States v. Marrero, 677 F.3d 155, 165-66 (3d Cir. 2012); *cf.* United States v. De Jesus Ventura, 565 F.3d 870, 873, 876-77 (D.C. Cir. 2009) (adopting this approach in the sentencing context). The Supreme Court vacated *Marrero* and remanded for further consideration in light of *Descamps v. United States*, 133 S. Ct. 2276 (2013). Marrero v. United States, 133 S. Ct. 2732, 2732 (2013) (mem.); *see also id.* at 2732-33 (Alito, J., dissenting) (suggesting that the remand was prompted by a modified categorical approach issue).

137. *See Marrero*, 677 F.3d at 165; *De Jesus Ventura*, 565 F.3d at 876.

138. *See* United States v. Rodriguez, 711 F.3d 541, 552 (5th Cir. 2013) (en banc), *abrogated in other part by Esquivel-Quintana*, 137 S. Ct. 1562; United States v. Romero-Hernandez, 505 F.3d 1082, 1087-88 (10th Cir. 2007); United States v. Londono-Quintero, 289 F.3d 147, 153-54 (1st Cir. 2002); United States v. Martinez-Carillo, 250 F.3d 1101, 1104-05 (7th Cir. 2001); United States v. Graham, 982 F.2d 315, 316 (8th Cir. 1992) (per curiam).

139. *Rodriguez*, 711 F.3d at 544 (quoting Taylor v. United States, 495 U.S. 575, 598 (1990)). To define the generic crime "sexual abuse of a minor," the Fifth Circuit turned to *The Oxford English Dictionary* and other leading dictionaries, all of which defined "minor" as someone under the age of majority. *See id.* at 559-60 (citing *Minor*, 9 OXFORD ENGLISH DICTIONARY (2d ed. 1989); *Minor*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003); *Minor*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (2002); and *Minor*, BLACK'S LAW DICTIONARY (9th ed. 2009)). Because the age of majority is usually defined as eighteen, the generic crime covered conduct against minors up to age eighteen. *See id.* at 560 (citing *Age of Majority*, BLACK'S LAW DICTIONARY (9th ed. 2009)). The Supreme Court has since rejected that definition of the generic crime. *See Esquivel-Quintana*, 137 S. Ct. at 1567, 1569 (relying in part on dictionary definitions of "age of consent" to conclude that the INA's generic crime "sexual abuse of a minor" does not include "consensual sexual intercourse between a 21-year-old and a 17-year-old").

140. *See Rodriguez*, 711 F.3d at 550.

crimes.[141] Common law crimes in this context are those crimes that have roots in the common law but are today embodied in criminal statutes.[142] They include crimes like murder, suicide, manslaughter, burglary, arson, robbery, rape, assault, battery, false imprisonment, and perjury.[143] They do not include nontraditional crimes like sexual abuse of a minor[144] and statutory rape,[145] which are creatures of contemporary legislation. The courts that have adopted this hybrid approach reason that the *Taylor* line of cases used the multijurisdictional approach because those cases dealt with common law crimes[146] but that practical difficulties call for another approach when it comes to nontraditional offenses. Specifically, they worry that such offenses "could encompass multiple, divergent offenses in any given state," making it "'difficult, if not impossible,' to sift through the multitudes of qualifying state offenses and identify a consensus set of the minimum elements necessary to define the category."[147]

These three approaches differ not only in design but also in the outcomes they produce. Take as an example the generic crime "sexual abuse of a minor."[148] Using a multijurisdictional approach, the Fourth Circuit determined that the generic crime requires that the victim be younger than sixteen because "a large majority of jurisdictions sets the age at which an individual is legally capable of consenting to sexual relationships at sixteen."[149] A plain language

141. *See* United States v. Alfaro, 835 F.3d 470, 474-75 (4th Cir. 2016); United States v. Ramirez-Garcia, 646 F.3d 778, 782-83 (11th Cir. 2011); United States v. Lopez-Solis, 447 F.3d 1201, 1206-07 (9th Cir. 2006). *But see* United States v. Rangel-Castaneda, 709 F.3d 373, 377-78 (4th Cir. 2013) (using a multijurisdictional approach to define "sexual abuse of a minor"); *see also* text accompanying note 155 (explaining that sexual abuse of a minor was not a crime at common law).

142. *See generally* LAFAVE, *supra* note 72, § 2.1(c), at 80 (discussing the history of common law crimes in the United States and their eventual codification).

143. *See id.* § 2.1(b), at 79; Jennifer Lee Koh, *Rethinking Removability*, 65 FLA. L. REV. 1803, 1831 (2013) ("[T]he grounds of inadmissibility or deportability . . . referenc[e] common law crimes such as 'theft,' 'burglary,' and others." (footnotes omitted) (quoting 8 U.S.C. § 1101(a)(43)(G))).

144. *See Ramirez-Garcia*, 646 F.3d at 783.

145. *See* United States v. Gomez-Mendez, 486 F.3d 599, 602 n.4 (9th Cir. 2007).

146. *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185 (2007) (theft offense); Taylor v. United States, 495 U.S. 575, 598 (1990) (burglary); Perrin v. United States, 444 U.S. 37, 38 (1979) (bribery); United States v. Nardello, 393 U.S. 286, 287 (1969) (extortion).

147. *See* United States v. Alfaro, 835 F.3d 470, 474 (4th Cir. 2016) (quoting United States v. Rodriguez, 711 F.3d 541, 556 (5th Cir. 2013) (en banc), *abrogated in other part by* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017)).

148. The generic crime "sexual abuse of a minor" arises in the context of both sentencing, *see* U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.2 (U.S. SENTENCING COMM'N 2016), and immigration, *see* 8 U.S.C. § 1101(a)(43)(A).

149. *See* United States v. Rangel-Castaneda, 709 F.3d 373, 380 (4th Cir. 2013). The same reasoning led the Fourth Circuit to conclude that the age of consent for purposes of the generic crime "statutory rape" is sixteen. *See id.* at 377-78.

approach, meanwhile, led the Fifth Circuit to conclude that the generic crime requires that the victim be younger than eighteen because "legal and other well-accepted dictionaries" define "minor" as a person under the age of eighteen.[150] Employing a hybrid approach, the Ninth Circuit also turned to the term's plain language in light of the nontraditional nature of "sexual abuse of a minor."[151] It focused on the plain meaning of "abuse" in holding that the generic crime encompasses only those crimes against eighteen-year-old victims that are "harmful emotionally and physically."[152]

The Supreme Court recently offered a bit of guidance in *Esquivel-Quintana* that is relevant to this disagreement. Specifically, it instructed that a "multijurisdictional analysis" is not strictly "required by the categorical approach" but is "useful insofar as it helps shed light on the 'common understanding and meaning' of the federal provision being interpreted."[153] Because state and federal criminal codes aided the Court's interpretation in *Esquivel-Quintana* "by offering useful context," the Court keyed its generic definition of "sexual abuse of a minor" to such sources.[154]

Time will tell precisely how *Esquivel-Quintana* will affect the courts of appeals' various interpretive methods, but a few things are already clear. First, the Supreme Court in *Esquivel-Quintana* dispelled any reliance on a distinction between common law and nontraditional crimes. It is accepted that "sexual abuse of a minor" was not recognized as a crime at common law,[155] yet the Court in *Esquivel-Quintana* keyed its generic definition of that term to state and federal criminal codes.[156] Second, criminal codes and treatises need not be relied on to the exclusion of dictionaries and vice versa. The Court consulted both types of sources in *Esquivel-Quintana*, and both supported the Court's

150. *See Rodriguez*, 711 F.3d at 559-60 (interpreting both "sexual abuse of a minor" and "statutory rape"); *see also supra* note 139. A few judges disagreed with the majority's use of the plain language approach, though not all of them disagreed with the majority's definitions. *See Rodriguez*, 711 F.3d at 563, 567-68 (Owen, J., concurring) (rejecting the majority's exclusive reliance on dictionaries); *id.* at 569, 572-73 (Graves, J., concurring in part and concurring in the judgment) (arguing that "statutory rape" is a common law offense and rejecting the majority's plain meaning approach as to that crime); *id.* at 575 (Dennis, J., dissenting) (rejecting the majority's approach and conclusions).

151. *See* United States v. Lopez-Solis, 447 F.3d 1201, 1206-07 (9th Cir. 2006).

152. *See id.*

153. Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1571 n.3 (2017) (quoting Brief for the Respondent at 23, *Esquivel-Quintana*, 137 S. Ct. 1562 (No. 16-54), 2017 WL 345128).

154. *See id.*

155. *See Rodriguez*, 711 F.3d at 558 (majority opinion); United States v. Ramirez-Garcia, 646 F.3d 778, 783 (11th Cir. 2011); *Lopez-Solis*, 447 F.3d at 1207.

156. *See* 137 S. Ct. at 1571-72.

conclusion.[157] Finally, as explained in more detail in the next Subpart, criminal law remains an important part of the categorical approach's first step.

2. The preeminence of criminal law

Regardless whether one takes a strictly multijurisdictional approach or a plain language approach, criminal law—including both state and federal criminal codes and other leading authorities on criminal law—provides the most natural and accurate guidepost for defining generic crimes. The criminal law landscape will always "shed light on" a generic crime's "common understanding and meaning."[158]

At the most basic level, Congress intended that criminal law play a prominent role in defining generic crimes. The Supreme Court's reasoning in *Taylor* is again illustrative. Interpreting a generic crime listed in the ACCA, the Court observed that Congress had long taken a "general approach of using uniform categorical definitions to identify predicate offenses."[159] Such an approach worked to ensure that the provision at issue would "be triggered by crimes having certain specified elements, not by crimes that happened to be labeled 'robbery' or 'burglary' by the laws of the State of conviction."[160] The Court then rejected the notion that those specified elements should be defined according to the common law because the contemporary understanding Congress was operating under in passing the ACCA had "diverged a long way" from the common law.[161] To capture this understanding, the Court instructed that generic crimes be defined according to "the generic sense in which the term[s are] now used in the criminal codes of most States."[162]

So too with the INA's aggravated felony definition. Congress's intent in enacting and expanding the aggravated felony definition was to ensure that certain classes of criminal noncitizens are kept out of the United States.[163] That

157. *See id.* at 1568-72 (relying on both state and federal criminal codes and dictionaries in defining "sexual abuse of a minor").

158. *Id.* at 1571 n.3 (quoting Brief for the Respondent, *supra* note 153, at 23). Indeed, the Supreme Court has always "look[ed] to state criminal codes for additional evidence about the generic meaning of" a given crime in its categorical approach cases. *See id.* at 1571.

159. *See* Taylor v. United States, 495 U.S. 575, 590-91 (1990).

160. *Id.* at 588-89.

161. *See id.* at 593-96.

162. *See id.* at 598.

163. *See* Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration Law's New Aggravated Felons,* 12 GEO. IMMIGR. L.J. 589, 593 (1998) ("Comments by legislators evinced a clear determination to rid the country of this new class of criminal alien."); Lea McDermid, Comment, *Deportation Is Different: Noncitizens and Ineffective Assistance of Counsel,* 89 CALIF. L. REV. 741, 778 (2001) ("[Congress has] dramatically expanded the

footnote continued on next page

definition, along with its subsequent expansions, was meant to help "solv[e] a major problem faced by Federal and State criminal justice systems—the problem of how to expeditiously remove from our streets those aliens who are convicted of murder, or trafficking in drugs and weapons."[164] Criminals acquire their status by virtue of the crimes they commit. Those crimes are in turn defined in state and federal criminal codes. Criminal laws themselves, then, set the bounds of the convictions the INA might implicate. It therefore makes perfect sense to use them to determine whom Congress intended the aggravated felony definition to cover. Indeed, the First Circuit—previously a proponent of the plain language approach—has already changed its tune since *Esquivel-Quintana* and defined the generic crime "theft offense" according to the Model Penal Code and state criminal codes.[165]

Dictionaries might provide some help in this inquiry, but it is criminal law itself that defines the scope of the convictions the aggravated felony provision was meant to encompass. Dictionary definitions are at best rough approximations of contemporary understandings of criminal law.[166] Relying on them rather than consulting the primary sources begins to resemble a game of interpretive telephone. Furthermore, statutory terms ought to be construed according to their context.[167] In the case of the aggravated felony definition, the relevant context is a discussion of particular types of crimes. Relying on general dictionaries—designed to capture the meanings of words as they appear

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criminal grounds for removal by broadening the definition of 'aggravated felony' and 'conviction.'").

164. *See* 136 CONG. REC. 35,621 (1990) (statement of Sen. Graham).

165. *See* De Lima v. Sessions, 867 F.3d 260, 266 (1st Cir. 2017) (rooting the generic definition in the fact that at the time Congress used the term, "the Model Penal Code had for several years provided for criminal liability for theft of services, and over half the states had criminalized theft of services").

166. *See* United States v. Rodriguez, 711 F.3d 541, 567 (5th Cir. 2013) (en banc) (Owen, J., concurring) ("Presumably the authors arrive at a definition by surveying the way in which terms are actually used in their relevant legal contexts, a task that this court is able to undertake itself."), *abrogated in other part by* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

167. *See* Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) ("[W]e construe language in its context and in light of the terms surrounding it."); King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."), *superseded in other part by statute*, Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (codified as amended at scattered sections of the U.S. Code); *cf.* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 291 (1998) ("[G]eneral dictionaries exclude legal sources and thus will exclude any special legal meanings of common words."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 418-19 (1989) ("To say that courts should rely on the words or on their ordinary meaning—the plain meaning approach—is unhelpful when statutory words have more than one dictionary definition, or when the context produces interpretive doubt.").

in all contexts—ignores the decidedly criminal nature of this inquiry and the specialized definitions many of the terms used in generic crimes have.[168]

Tethering the definitions of generic crimes to criminal law also yields practical benefits. It promotes uniformity and predictability in the application of federal laws, thereby giving critical notice to those with predicate convictions who may be affected in dramatic ways.[169] Determining how the weight of criminal authority defines a given crime is a purely legal question. It relies on objective touchstones that are readily available to anyone asked to perform the inquiry.[170] Regardless which judge or member of the BIA consults the criminal codes and leading criminal law authorities, the conclusion ought to be the same. The same is not always true with respect to dictionary definitions, which are by design more abstract and multitudinous.[171]

According criminal law a leading role in the definition of federal generic crimes also respects federalism and comity. In many categorical approach cases, the prior offenses are state convictions.[172] There thus arises a tension between the need for a uniform federal definition and the need to respect the fact that "our federal system allows the various states to define offenses as they see

168. *See, e.g.*, Jean-Louis v. Attorney Gen. of the U.S., 582 F.3d 462, 477 (3d Cir. 2009) ("[C]rime involving moral turpitude is a term of art, predating even the immigration statute itself. As such, its division into a noun and subordinate clause, as the Attorney General seeks to do, distorts its intended meaning." (citations omitted)); Espinoza-Gonzalez, 22 I. & N. Dec. 889, 893 (B.I.A. 1999) ("Congress did not adopt a generic descriptive phrase such as 'obstructing justice' or 'obstruct justice,' but chose instead a term of art utilized in the United States Code to designate a specific list of crimes.").

169. Of course, outcomes would be even more predictable if courts simply relied on a given state's criminal law labels. But as explained above, such an approach would lead to nonuniformity and unfairness. *See supra* notes 102-05 and accompanying text. There is a tradeoff, and the practice of divining contemporary understandings in criminal law is meant to strike the proper balance.

170. Not only are state laws themselves available, but also ready-made multijurisdictional surveys abound. *See, e.g.*, *Esquivel-Quintana*, 137 S. Ct. app. at 1573-76 (cataloging the states' statutory rape laws); Gonzales v. Duenas-Alvarez, 549 U.S. 183 app. at 195-98 (2007) (cataloging the states' aiding and abbetting laws). *See generally, e.g.*, NATIONAL SURVEY OF STATE LAWS (Richard A. Leiter ed., 7th ed. 2015) (compiling current state laws on dozens of legal topics); Children's Bureau, U.S. Dep't of Health & Human Servs., Definitions of Child Abuse and Neglect: State Statutes (2016), https://perma.cc/T89M-H8EQ (compiling current state laws related to child abuse and neglect).

171. *See* Aprill, *supra* note 167, at 310 ("Legal definitions, like general definitions, must opt for breadth and abstraction."); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1446 (1994) ("Individual judges must make subjective decisions about which dictionary and which definition to use.").

172. *See* Laura Jean Eichten, Comment, *A Felony, I Presume?: 21 U.S.C. § 841(b)'s Mitigating Provision and the Categorical Approach in Immigration Proceedings*, 79 U. CHI. L. REV. 1093, 1094 (2012) ("[M]ost criminal defendants in this country . . . were convicted of state law offenses.").

fit."[173] Keying a generic definition—uniform though it may be—to the consensus of state criminal codes strikes a balance between respecting the states' definitions of crimes and honoring Congress's desire for a single, uniform federal definition.

II. Tension in the Aggravated Felony Context

Chevron deference and the categorical approach butt heads in aggravated felony cases—those in which the BIA or a court is called upon to determine whether a given conviction qualifies as one for an aggravated felony under the INA. The BIA, an agency charged with administering the INA, is ostensibly entitled to *Chevron* deference in its reasonable interpretations of the aggravated felony definition. But the BIA's interpretations of that provision must also accord with the dictates of the categorical approach.

As this Part explains, there is substantial confusion as to how these two doctrines interact in this context. Not only have the vast majority of lower federal courts adopted an approach contrary to the Supreme Court's, but there is also a fair amount of disagreement among the lower courts themselves as to precisely how aggravated felony cases are to be handled.

A. Teasing Out the Tension

The INA is the United States's federal immigration law. It governs, among other things, who is eligible to enter the country,[174] who must be removed from the country,[175] who may receive a visa,[176] who may be given asylum,[177] and who may become a U.S. citizen.[178] Peppered throughout these provisions and the rest of the INA are uses of the term "aggravated felony." This term is defined in 8 U.S.C. § 1101(a)(43) to encompass more than fifty crimes or categories of crimes "whether in violation of Federal or State law."[179] Such offenses include, among others, "murder, rape, or sexual abuse of a minor";[180] "a

173. United States v. Rangel-Castaneda, 709 F.3d 373, 379 (4th Cir. 2013); *see also* United States v. Faust, 853 F.3d 39, 65 (1st Cir. 2017) (Barron, J., concurring) ("[A] state may have chosen to group together both violent and non-violent conduct under a particular label precisely because it did not want the criminal proceedings to focus on whether the conduct in which the defendant engaged was violent or not.").

174. *See* 8 U.S.C. § 1182 (2016).

175. *See id.* § 1227.

176. *See id.* § 1153.

177. *See id.* § 1158.

178. *See id.* §§ 1421-1451.

179. *See id.* § 1101(a)(43).

180. *Id.* § 1101(a)(43)(A).

crime of violence (as defined in [18 U.S.C. § 16], but not including a purely political offense)";[181] "a theft offense . . . or burglary offense";[182] and "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered."[183]

As the Supreme Court has put it, immigrants convicted of an "aggravated felony" face "the harshest deportation consequences."[184] Most notably, any noncitizen convicted of an aggravated felony is deportable,[185] and the Attorney General must pursue expedited removal proceedings.[186] While those proceedings are pending, the noncitizen must be taken into custody and detained.[187] Indeed, she may be detained beyond the customary ninety-day "removal period."[188] The noncitizen is further barred from seeking judicial review of any order that issues from her expedited removal proceedings.[189] And the Attorney General is barred from canceling her removal, permitting voluntary departure, granting asylum, or issuing certain waivers of inadmissibility.[190] Once removed, a noncitizen who has committed an aggravated felony may never come back to the United States.[191]

The term also carries harsh criminal consequences.[192] Any noncitizen convicted of reentry "whose removal was subsequent to a conviction for commission of an aggravated felony" may be subject to a fine or up to twenty years in prison.[193] Anyone who "knowingly aids or assists" any noncitizen who

181. *Id.* § 1101(a)(43)(F).

182. *Id.* § 1101(a)(43)(G).

183. *Id.* § 1101(a)(43)(R).

184. Carachuri-Rosendo v. Holder, 560 U.S. 563, 566 (2010).

185. *See* 8 U.S.C. § 1227(a)(2)(A)(iii).

186. *See id.* § 1228(a)(3)(A). An aggravated felony conviction also lifts certain restrictions on what immigration officials may consider in making the deportability determination. *See id.* § 1367(a)(1).

187. *See id.* §§ 1226(c)(1), 1231(a)(2).

188. *See id.* § 1231(a)(6); *see also id.* § 1231(a)(1)(A) (establishing the ninety-day removal period).

189. *See id.* § 1252(a)(2)(C).

190. *See id.* §§ 1158(b)(2)(A)-(B), 1182(h), 1229b(a), 1229c(a)(1), (b)(1). Under certain circumstances, aggravated felons are also ineligible for withholding of removal. *See id.* § 1231(b)(3)(B).

191. *See id.* § 1182(a)(9)(A).

192. Because the term is used in both the civil and criminal contexts, a tension arises between *Chevron* and lenity when the INA provision at issue is ambiguous. *See supra* note 26.

193. *See* 8 U.S.C. § 1326(b)(2). Without a prior conviction for an aggravated felony or another enhancement, the maximum penalty for reentry is a fine and two years in prison. *See id.* § 1326(a).

"has been convicted of an aggravated felony" in entering the United States illegally may also be subject to a fine or up to ten years in prison.[194]

To determine whether a conviction is one for an "aggravated felony," courts and the BIA use the categorical approach described above.[195] The categorical approach serves "to promote efficiency, fairness, and predictability in the administration of immigration law."[196] IJs' and the BIA's dockets are dramatically strained as it is,[197] and the categorical approach saves them the significant time it would take to relitigate the facts underlying prior convictions.[198]

The INA also establishes the command structure of the agencies that administer the immigration laws. It charges the Secretary of Homeland Security "with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens."[199] Pursuant to this grant of authority, the BIA was created.[200] The BIA is the appellate body of the Executive Office for Immigration Reform.[201] It exists within the Department of Justice and consists of seventeen members who serve "as the Attorney General's delegates in the cases that come before them."[202] The BIA reviews "those administrative adjudications under the [INA] that the Attorney General may by regulation assign to it . . . in a manner that is timely, impartial, and consistent with the [INA] and regulations."[203] This includes the decisions of IJs and other immigration officials.[204] In reviewing such decisions, the BIA is to "provide clear and uniform guidance to the [Immigration and Naturalization] Service, the immigration judges, and the general public on the proper interpretation and administration of the [INA] and its implementing regulations."[205]

194. *See id.* § 1327.

195. *See supra* notes 116-21 and accompanying text.

196. *See* Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015).

197. *See* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 564 (2011) ("In fiscal year 2009, approximately 230 immigration judges completed 290,233 proceedings."); Rana, *supra* note 27, at 324.

198. *See* Michel v. INS, 206 F.3d 253, 264 (2d Cir. 2000); Koh, *supra* note 27, at 295.

199. 8 U.S.C. § 1103(a)(1).

200. *See* 8 C.F.R. § 1003.1(a)(1) (2017).

201. *See id.*

202. *Id.*

203. *Id.* § 1003.1(d).

204. *Id.* § 1003.1(b).

205. *Id.* § 1003.1(d).

Only a small fraction of the BIA's decisions are eligible for *Chevron* deference. To be clear, this is still a large number of cases,[206] and those cases have long-lasting and far-reaching effects.[207] But courts will generally defer only to BIA opinions that are deemed precedential and therefore binding.[208] The majority of the BIA's cases are heard by single members sitting alone[209] and thus result in unpublished, nonprecedential opinions.[210] Under certain circumstances, a three-member panel of the BIA will hear a case.[211] The decisions of such three-member panels are nonprecedential unless "designated to serve as precedents" by a "majority vote of the permanent Board members."[212] The same is true for the BIA's en banc opinions.[213]

A decision from the BIA marks the end of an administrative immigration proceeding. If that decision is unfavorable, the noncitizen may choose to appeal it to the local federal court of appeals.[214] The INA, however, severely circumscribes the courts of appeals' jurisdiction in such cases. Relevant here, "[N]o court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense."[215] But the courts of appeals do have the power to review "constitutional claims or questions of law" in criminally based deportation cases.[216] Aggravated felony cases—as challenges to the BIA's interpretation of the INA—fall squarely in that realm.

206. *See* Sharpless, *supra* note 25, at 344 (observing that "the BIA issued 319 precedential decisions" over the past ten years).

207. Precedential BIA opinions are binding and "serve as precedents in all proceedings involving the same issue or issues." *See* 8 C.F.R. § 1003.1(g).

208. *See, e.g.*, Amos v. Lynch, 790 F.3d 512, 518 (4th Cir. 2015); Hernandez-Cruz v. Holder, 651 F.3d 1094, 1106 (9th Cir. 2011); Arobelidze v. Holder, 653 F.3d 513, 520 (7th Cir. 2011); Quinchia v. U.S. Attorney Gen., 552 F.3d 1255, 1258 (11th Cir. 2008). Some courts will also accord *Chevron* deference to nonprecedential decisions, but only to the extent those decisions rely on precedential decisions. *See* Efagene v. Holder, 642 F.3d 918, 920 (10th Cir. 2011); Marmolejo-Campos v. Holder, 558 F.3d 903, 911 (9th Cir. 2009) (en banc).

209. *See* BD. OF IMMIGRATION APPEALS, PRACTICE MANUAL 4 (2017), https://perma.cc/UUC9-DR6B; *cf.* 8 C.F.R. § 1003.1(e) ("Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition.").

210. *See* 8 C.F.R. § 1003.1(g) (providing that only decisions issued by a panel or by the BIA en banc may be designated as precedential).

211. *See id.* § 1003.1(e)(6).

212. *Id.* § 1003.1(g).

213. *See id.* § 1003.1(a)(5), (g).

214. *See* 8 U.S.C. § 1252 (2016); 28 U.S.C. §§ 2242-2243 (2016).

215. 8 U.S.C. § 1252(a)(2)(C).

216. *See id.* § 1252(a)(2)(D).

And therein lies the rub: As an agency interpreting the law Congress has charged it with administering, the BIA would typically be entitled to deference to its binding interpretations of ambiguous INA provisions so long as those interpretations are reasonable.[217] But the task of defining generic crimes does not rely on the BIA's immigration expertise and leaves little to no room for the BIA to make a judgment call. It also calls on a field of law—criminal law—the administration of which is specially entrusted to the judicial branch and agency interpretations of which do not typically enjoy *Chevron* deference.[218] Therefore, the task of defining generic crimes in aggravated felony cases appears to fall somewhere between *Chevron*'s extremes.[219]

B. The Supreme Court's Treatment of the Tension

The Supreme Court and the lower courts, however, do treat these cases as if they existed at opposite ends of the *Chevron* spectrum. As noted above, the Supreme Court has made clear that the BIA is generally entitled to *Chevron* deference in interpreting ambiguous INA provisions.[220] Indeed, it has indicated that deference "is especially appropriate in the immigration context" in light of the INA's complexity and the BIA's exercise of "especially sensitive political functions that implicate questions of foreign relations."[221] The Court's reasoning is rooted in the statutory scheme outlined above. In creating the BIA, the Attorney General gave that body a portion of the "discretion and authority conferred upon [her] by law" to exercise "in the course of 'considering and determining cases before it.'"[222]

For these reasons, the Supreme Court typically defers to the BIA's binding interpretations of the INA. Most notably, the Court has consistently deferred to the BIA's interpretations of the INA's asylum provisions.[223] So too has it

217. *See supra* note 15 and accompanying text.

218. *See supra* notes 72-75 and accompanying text.

219. *See* Drakes v. Zimski, 240 F.3d 246, 250-51 (3d Cir. 2001) (noting that aggravated felony cases "appear[] to fall somewhere between *Aguirre-Aguirre* and *Sandoval*" because "the BIA [did] not, at least explicitly, call upon any particular expertise" (citing INS v. Aguirre-Aguirre, 526 U.S. 415 (1999); and Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999)).

220. *See supra* note 15 and accompanying text.

221. *See Aguirre-Aguirre*, 526 U.S. at 425 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)); *see also* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203 (2014) (plurality opinion).

222. *Aguirre-Aguirre*, 526 U.S. at 425 (quoting 8 C.F.R. § 3.1(d)(1) (1998) (current version at 8 C.F.R. § 1003.1 (2017))). Although the corresponding INA provision has changed since the Supreme Court decided *Aguirre-Aguirre*, *see* 8 U.S.C. § 1103(a)(1), the members of the BIA still "act as the Attorney General's delegates in the cases that come before them," *see* 8 C.F.R. § 1003.1(a)(1) (2017).

223. *See* Negusie v. Holder, 555 U.S. 511, 513-14, 523-25 (2009) (remanding for the BIA to exercise its *Chevron* discretion in the context of the persecutor bar to asylum and withholding of removal); *Aguirre-Aguirre*, 526 U.S. at 425 (holding in the asylum

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applied the *Chevron* framework to a BIA interpretation of the immigrant visa provisions.[224] And it has also engaged in *Chevron* analysis in the context of relief from removal. The Court has grappled with *Chevron* when faced with BIA determinations of retroactivity,[225] residency requirements,[226] and certain conduct-based bars to asylum and withholding of removal.[227]

But the BIA has never received *Chevron* deference—indeed, the Supreme Court has never so much as invoked *Chevron*—in the context of defining the term "aggravated felony."[228] This is so despite the government's repeated pleas for deference. In *Torres v. Lynch*, for instance, the Court was called on to answer the question whether a state law may constitute an aggravated felony if it lacks the jurisdictional element contained in the cross-referenced federal law.[229] The government maintained that "[a]ny ambiguity concerning the meaning of the aggravated-felony provisions in the INA should be resolved based on deference under *Chevron*."[230] But no mention of *Chevron*—or any level of deference, for that matter—is to be found in the Court's opinion. Likewise in *Nijhawan v. Holder*, the Court granted certiorari to review a challenge to the BIA's interpretation of the INA's "fraud or deceit" aggravated felony provision.[231] The government argued in the alternative that should the Court "conclude[] that the INA is ambiguous in relevant part, it should defer to the Board's clear

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context that "by failing to follow *Chevron* principles in its review of the BIA, the Court of Appeals erred"); INS v. Cardoza-Fonseca, 480 U.S. 421, 446-49 (1987) (acknowledging the applicability of the *Chevron* framework in the asylum context but declining to defer after using "ordinary canons of statutory construction" to resolve the question at Step One).

224. *See Scialabba*, 134 S. Ct. at 2196, 2203 (plurality opinion) (applying the *Chevron* framework in the context of immigrant visas); *id.* at 2214 (Roberts, C.J., concurring in the judgment) (agreeing that the *Chevron* framework applied).

225. *See* INS v. St. Cyr, 533 U.S. 289, 320 n.45 (2001).

226. *See* Holder v. Martinez Gutierrez, 566 U.S. 583, 591 (2012).

227. *See Negusie*, 555 U.S. at 513-14, 523-25 (remanding for the BIA to "exercise[] its *Chevron* discretion to interpret the statute in question"). For a more substantial delineation of the Court's *Chevron* behavior, see Chaffin, *supra* note 25, at 569-79 (distinguishing among the Court's practices with respect to BIA provisions implicating foreign policy, procedure, and domestic policy).

228. *See supra* note 18 and accompanying text; *see also* Kagan, *supra* note 13; Asher Steinberg, Torres v. Lynch—*A Sub Silentio Holding on* Chevron *Deference to Administrative Interpretations of Criminal Law?*, NARROWEST GROUNDS (June 1, 2016), https://perma.cc/H8CP-ADRC. The Court has twice mentioned *Chevron* in passing in the aggravated felony context, but neither mention came close to an application or invocation of the doctrine. *See infra* Part III.A.

229. *See* Petition for a Writ of Certiorari at i, Torres v. Lynch, 136 S. Ct. 1619 (2016) (No. 14-1096), 2015 WL 1064744.

230. Brief for the Respondent at 14, *Torres*, 136 S. Ct. 1619 (No. 14-1096), 2015 WL 5626637.

231. *See* 557 U.S. 29, 32-33 (2009).

determination."[232] But yet again, the Court's opinion is devoid of any mention of deference. The government similarly asked the Court to defer under *Chevron* in *Esquivel-Quintana* to no avail.[233]

To be fair, the government has not asked for *Chevron* deference in every aggravated felony case the Court has heard.[234] And not every aggravated felony case has involved a precedential BIA decision.[235] But the Court has consistently skirted the *Chevron* issue, often without mention, even when it has been raised and briefed by the parties. And nonprecedential BIA opinions could still be eligible for a lower level of deference under *Skidmore*, but the Court has also consistently failed to mention that possibility.[236] These trends in the Court's jurisprudence seem to suggest that something special is happening with the aggravated felony definition.

C. Lower Courts' Treatment of the Tension

The Supreme Court has observed that in the immigration context, "the lower courts uniformly have applied the approach [the] Court set forth in *Taylor*" in determining whether a listed offense encompasses a given conviction.[237] While this observation is undoubtedly true,[238] the Court has not

232. *See* Brief for the Respondent at 45, *Nijhawan*, 557 U.S. 29 (No. 08-495), 2009 WL 815242.

233. *Compare* Brief for the Respondent, *supra* note 153, at 36 ("Because the Board, on behalf of the Attorney General, has adopted a reasonable construction of Section 1101(a)(43)(A), deference to that interpretation is required."), *with* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017) ("We have no need to resolve whether the rule of lenity or *Chevron* receives priority in this case . . . .").

The government also unsuccessfully asked the Court to honor *Chevron* principles in *Kawashima v. Holder*, 565 U.S. 478 (2012). Because that case involved a nonprecedential BIA decision, the government requested that the Court remand to the BIA so that it could issue a binding interpretation. *See* Brief for the Respondent at 43 & n.19, *Kawashima*, 565 U.S. 478 (No. 10-577), 2011 WL 4590846 [hereinafter *Kawashima* Respondent's Brief]. But the Court's opinion did not mention *Chevron* deference.

234. Such a request was conspicuously absent from the government's briefs in *Moncrieffe v. Holder*, *see* Brief for the Respondent, Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (No. 11-702), 2012 WL 3803440; Brief for the Respondent in Opposition, *Moncrieffe*, 133 S. Ct. 1678 (No. 11-702), 2012 WL 826580, and *Carachuri-Rosendo v. Holder*, *see* Brief for the Respondent, Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (No. 09-60), 2010 WL 723015; Brief for the Respondent, *Carachuri-Rosendo*, 560 U.S. 563 (No. 09-60), 2009 WL 3844444.

235. *See Kawashima*, 565 U.S. at 481-82; *Kawashima* Respondent's Brief, *supra* note 233, at 43 & n.19; *see also* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 188-89 (2007).

236. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Kagan, *supra* note 13.

237. *Duenas-Alvarez*, 549 U.S. at 185-86.

238. *See, e.g.*, Fajardo v. U.S. Attorney Gen., 659 F.3d 1303, 1305 (11th Cir. 2011); Efagene v. Holder, 642 F.3d 918, 921 (10th Cir. 2011); Gertsenshteyn v. U.S. Dep't of Justice, 544 F.3d 137, 143 (2d Cir. 2008).

mentioned a quirk in the lower courts' jurisprudence. Unlike the Supreme Court itself, the lower courts tasked with interpreting the aggravated felony definition for the most part add *Chevron* into the mix. And many of them are struggling to sort out the interaction between that doctrine and the categorical approach.[239]

The majority deferential approach: Lower courts generally defer to the BIA at the first step of the categorical approach but not at the second. That is, they defer to the BIA's reasonable interpretations of the aggravated felony definition but review de novo the purely legal question whether a particular prior conviction qualifies as one for an aggravated felony.[240]

These courts defer to the BIA's generic federal definitions "[b]ecause § 1101(a)(43) is part of the INA."[241] The Supreme Court's clear instruction that "*Chevron* deference applies in general to the legislative framework erected by the INA," then, ought to apply.[242] And these courts draw no distinction between the aggravated felony definition and the INA's many other provisions when it comes to this instruction. Indeed, these courts regularly rely on cases outside the aggravated felony context to support their use of the *Chevron* framework in aggravated felony cases.[243]

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239. *See, e.g.*, Higgins v. Holder, 677 F.3d 97, 104 (2d Cir. 2012) (per curiam) ("This circuit split . . . poses the issue of what deference to accord an agency's interpretation of the statute it is charged with administering when that interpretation is itself based on the agency's construction of federal criminal statutes."); Denis v. Attorney Gen. of the U.S., 633 F.3d 201, 207 (3d Cir. 2011) ("The general question of the deference we owe to an agency's—and specifically to the BIA's—statutory construction of the relevant provision is a matter of some confusion."); *see also* Dorfman-Gonzalez, *supra* note 25, at 997-1007 (detailing a circuit split on *Chevron*'s applicability to the BIA's interpretation of the aggravated felony definition).

240. *See* Hernandez v. Holder, 760 F.3d 855, 858-59 (8th Cir. 2014); Garcia-Mendoza v. Holder, 753 F.3d 1165, 1168 (10th Cir. 2014); Lecky v. Holder, 723 F.3d 1, 4-5 (1st Cir. 2013); Ramos v. U.S. Attorney Gen., 709 F.3d 1066, 1069 & n.2 (11th Cir. 2013); Restrepo v. Attorney Gen. of the U.S., 617 F.3d 787, 790, 792 (3d Cir. 2010); Gaiskov v. Holder, 567 F.3d 832, 835 (7th Cir. 2009); Renteria-Morales v. Mukasey, 551 F.3d 1076, 1081 (9th Cir. 2008); Martinez v. Mukasey, 519 F.3d 532, 538 (5th Cir. 2008); Soliman v. Gonzales, 419 F.3d 276, 281 (4th Cir. 2005); Patel v. Ashcroft, 401 F.3d 400, 407 (6th Cir. 2005); Kuhali v. Reno, 266 F.3d 93, 102 (2d Cir. 2001). *But see* Burke v. Mukasey, 509 F.3d 695, 696 (5th Cir. 2007) (per curiam) (reviewing "the scope of the definition of aggravated felony" de novo and without any discernible deference to the BIA's interpretation).

241. *E.g.*, *Renteria-Morales*, 551 F.3d at 1081.

242. *Restrepo*, 617 F.3d at 792; *see* INS v. Aguirre-Aguirre, 526 U.S. 415, 424 (1999) ("It is clear that principles of *Chevron* deference are applicable to this statutory scheme."); *see also Renteria-Morales*, 551 F.3d at 1081; Coronado-Durazo v. INS, 123 F.3d 1322, 1324 (9th Cir. 1997) ("The Board's interpretation and application of the immigration laws are entitled to deference.").

243. *See, e.g.*, Espinal-Andrades v. Holder, 777 F.3d 163, 166 (4th Cir. 2015) (relying on *Martinez v. Holder*, 740 F.3d 902, 909 (4th Cir. 2014), which deemed *Chevron* generally

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At the categorical approach's second step, however, these courts do not defer to the BIA's determination whether a particular prior conviction fits within the generic federal definition. That analysis, as these courts recognize, involves the interpretation of state or federal criminal laws.[244] Specifically, it involves the interpretation of the criminal law that serves as the basis for the prior conviction.[245] And because the BIA has not been charged with the administration of criminal laws, courts "do not defer to the BIA's interpretations of state law or provisions of the federal criminal code."[246] Such interpretations are "beyond the scope of the BIA's delegated power or accumulated expertise."[247] De novo review shows "proper regard for the BIA's administrative role—interpretation of federal immigration laws."[248]

The minority skeptical approach: Not all courts have taken such a blanket approach. Specifically, the Third and Seventh Circuits have declined to apply the *Chevron* framework in aggravated felony cases.[249] Judge Katzmann of the Second Circuit has likewise proposed limits on *Chevron*'s applicability to the INA.[250]

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applicable in the Convention Against Torture context); Velasco-Giron v. Holder, 773 F.3d 774, 776 (7th Cir. 2014) (relying on *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion), which deemed *Chevron* applicable in the visa context, and *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999), which deemed *Chevron* applicable in the asylum context); Oouch v. U.S. Dep't of Homeland Sec., 633 F.3d 119, 121 (2d Cir. 2011) (relying on *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 178 (2d Cir. 2006), which deemed *Chevron* applicable in the asylum, Convention Against Torture, and withholding of removal contexts); *see also* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. 100-20, 1465 U.N.T.S. 85.

244. *See, e.g.*, *Renteria-Morales*, 551 F.3d at 1081.

245. *See, e.g.*, *Ramos*, 709 F.3d at 1069 & n.2; *Renteria-Morales*, 551 F.3d at 1081.

246. *See Renteria-Morales*, 551 F.3d at 1081; *see also* Kuhali v. Reno, 266 F.3d 93, 102 (2d Cir. 2001).

247. Omagah v. Ashcroft, 288 F.3d 254, 258 (5th Cir. 2002); *accord* Soliman v. Gonzales, 419 F.3d 276, 281 (4th Cir. 2005) (explaining that the second step of the categorical approach "involves an issue of our appellate jurisdiction and an interpretation of [state] criminal law, neither of which lies within the BIA's authority or expertise").

248. *See* Smalley v. Ashcroft, 354 F.3d 332, 335-36 (5th Cir. 2003).

249. *See* Zivkovic v. Holder, 724 F.3d 894, 897-98 (7th Cir. 2013); Denis v. Attorney Gen. of the U.S., 633 F.3d 201, 209 n.11 (3d Cir. 2011); Yong Wong Park v. Attorney Gen. of the U.S., 472 F.3d 66, 71 (3d Cir. 2006); Francis v. Reno, 269 F.3d 162, 168 (3d Cir. 2001).

Note that both circuits have sometimes granted *Chevron* deference to the BIA's interpretations of the aggravated felony definition. *See* Velasco-Giron v. Holder, 773 F.3d 774, 776 (7th Cir. 2014); Restrepo v. Attorney Gen. of the U.S., 617 F.3d 787, 792 (3d Cir. 2010); Valansi v. Ashcroft, 278 F.3d 203, 208 (3d Cir. 2002). But the Third Circuit has also reaffirmed that it "do[es] not defer to the BIA's interpretation of [8 U.S.C. § 1101(a)(43)(S), which covers obstruction offenses,] in making this determination." Flores v. Attorney Gen. U.S., 856 F.3d 280, 287 n.23 (3d Cir. 2017).

250. *See* Higgins v. Holder, 677 F.3d 97, 107-09 (2d Cir. 2012) (Katzmann, J., concurring).

The Third Circuit in *Yong Wong Park v. Attorney General of the United States* declined to apply the *Chevron* framework to the INA provision listing "an offense relating to . . . counterfeiting" as an aggrevated felony.[251] It did so for two primary reasons. First, the court observed that the concerns driving the Supreme Court's provision of *Chevron* deference in *INS v. Aguirre-Aguirre* were "largely absent."[252] The aggravated felony provision at issue in *Yong Wong Park*, unlike the asylum provision at issue in *Aguirre-Aguirre*, did not require the BIA to "exercise especially sensitive political functions that implicate questions of foreign relations" or involve any potential "diplomatic repercussions."[253] Second, the Third Circuit explained that "the Attorney General has no particular expertise in defining a term under federal law, yet it is 'what federal courts do all the time.'"[254] The court therefore concluded that "neither the Attorney General nor the BIA" is eligible for *Chevron* deference in interpreting the aggravated felony definition.[255]

Four years later in *Denis v. Attorney General of the United States*, the Third Circuit again declined to apply the *Chevron* framework to the aggravated felony definition—this time the "relating to obstruction of justice" provision—for similar reasons.[256] First, it noted that the phrase "relating to obstruction of justice" did not "pertain[] to the Executive Branch's exercise of 'especially sensitive political functions that implicate questions of foreign relations.'"[257] Second, the Third Circuit believed the phrase "relating to obstruction of justice" to be "capable of definition."[258] The court noted that "Title 18 of the U.S. Code contains a listing of crimes entitled 'obstruction of justice,'" allowing for easy determination of "the types of conduct Congress intended the phrase

251. *See* 472 F.3d at 71 (alteration in original) (quoting 8 U.S.C. § 1101(a)(43)(R)).

252. *See id.* at 70-71 (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 424-25 (1999)); *see also* Patel v. Ashcroft, 294 F.3d 465, 467-68 (3d Cir. 2002) (noting that the considerations motivating *Chevron* deference in *Aguirre-Aguirre* "are absent here" (citing *Aguirre-Aguirre*, 526 U.S. at 424-25)), *superseded in other part by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302-23 (codified as amended in scattered sections of 8 and 18 U.S.C.), *as recognized in* Kamara v. Attorney Gen. of the U.S., 420 F.3d 202 (3d Cir. 2005).

253. *See Aguirre-Aguirre*, 526 U.S. at 425 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)). *Compare id.* (identifying these concerns), *with Yong Wong Park*, 472 F.3d at 71 (noting that the *Aguirre-Aguirre* Court's concerns were "largely absent").

254. *Yong Wong Park*, 472 F.3d at 71 (quoting Drakes v. Zimski, 240 F.3d 246, 251 (3d Cir. 2001)).

255. *See id.*

256. *See* 633 F.3d 201, 209 & n.11 (3d Cir. 2011); *see also* 8 U.S.C. § 1101(a)(43)(S) (2016) (listing as an aggravated felony "an offense relating to obstruction of justice").

257. *See Denis*, 633 F.3d at 209 n.11 (first quoting 8 U.S.C. § 1101(a)(43)(S); then quoting *Aguirre-Aguirre*, 526 U.S. at 425).

258. *See id.* at 209.

to encompass" in the INA.[259] And whereas "construction of the criminal provisions in Title 18 'is a task outside the BIA's special competence,'" the Third Circuit felt itself "well-equipped to interpret and apply the statutory language of Title 18 on [its] own."[260] So that is precisely what it did.[261]

The Third Circuit is not alone in its opposition to *Chevron* deference in aggravated felony cases. The Seventh Circuit recently held that it need not give *Chevron* deference to the BIA's determination of "what counts as a 'crime of violence' for purposes of [8 U.S.C. § 1101(a)(43)(F)]."[262] The reasons it offered, however, were somewhat different from those driving the Third Circuit's decision. First, the Seventh Circuit noted that "some questions of law do not depend on agency expertise for their resolution."[263] Indeed, "the great majority" of criminal cases involving the meaning of "crime of violence" "are entirely unrelated to immigration law."[264] Second, pointing to the crime of violence provision's cross-reference to 18 U.S.C. § 16, the Seventh Circuit found no "hint that Congress intended the Board to craft a particularized definition of this general statute for use exclusively in immigration proceedings."[265] It therefore held that the BIA did not "exercise[] any delegated power to interpret the governing statute—18 U.S.C. § 16—and thus *Chevron* deference [did] not apply to that aspect of" the BIA's reasoning.[266]

Judge Katzmann of the Second Circuit also suggested in his concurrence in *Higgins v. Holder* that the lower courts should rethink their practice of

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259. *Id.*

260. *See id.* at 209 & n.11 (quoting Tran v. Gonzales, 414 F.3d 464, 467 (3d Cir. 2005)). Echoes of this reasoning have appeared in other cases in which the Third Circuit denied *Chevron* deference to the BIA's interpretations of the aggravated felony "crime of violence (as defined in [18 U.S.C. § 16], but not including a purely political offense)." *See* 8 U.S.C. § 1101(a)(43)(F); Singh v. Gonzales, 432 F.3d 533, 538 (3d Cir. 2006) ("The BIA's interpretation of 18 U.S.C. § 16 is not entitled to deference by this Court: as a federal criminal provision outside the INA, it lies beyond the BIA's area of special expertise."); Oyebanji v. Gonzales, 418 F.3d 260, 262 (3d Cir. 2005) ("Because the BIA is not charged with administering 18 U.S.C. § 16 and has no special expertise regarding the interpretation of that criminal statute, we do not defer to the BIA's interpretation of that provision."); Francis v. Reno, 269 F.3d 162, 168 (3d Cir. 2001) ("The BIA is not charged with administering 18 U.S.C. § 16, and that statute is not transformed into an immigration law merely because it is incorporated into the INA by § 1101(a)(43)(F)."). The logic of those cases, however, is more limited given the courts' reliance on the particular cross-reference incorporated by the "crime of violence" provision.

261. *See Denis*, 633 F.3d at 209 & n.11.

262. *See* Zivkovic v. Holder, 724 F.3d 894, 897-98 (7th Cir. 2013).

263. *Id.* at 897.

264. *Id.*

265. *Id.*

266. *Id.* at 897-98. This is the same reasoning the Third Circuit adopted when interpreting the same provision in *Francis v. Reno*. *See* 269 F.3d 162, 168 (3d Cir. 2001).

deferring to the BIA's interpretations of the aggravated felony definition.[267] The majority in that case aptly noted that the tension between *Chevron* deference and the established method of interpreting the aggravated felony definition "poses the issue of what deference to accord an agency's interpretation of the statute it is charged with administering when that interpretation is itself based on the agency's construction of federal criminal statutes."[268] But the majority declined to weigh in on the matter because the conviction at issue qualified as an aggravated felony regardless whether the court adopted the BIA's more restrictive definition.[269]

Judge Katzmann took things one step further. In his concurrence, he cast doubt upon *Chevron*'s applicability in the first place, proposing that courts defer to the BIA's construction of the INA only "to the extent that it is within the domain of the agency's special expertise in immigration law, as long as it is reasonable."[270] With respect to the aggravated felony "relating to obstruction of justice," Judge Katzmann noted that "[i]t is well established that 'analysis of a federal criminal statute . . . [is] beyond the BIA's administrative responsibility and expertise.'"[271] And because the BIA interpreted the federal criminal law in reaching its generic federal definition, the Second Circuit should have "review[ed] *de novo* the BIA's conclusion."[272]

* * *

In a nutshell, the disagreement among the federal courts on the relationship between *Chevron* deference and the categorical approach in the aggravated felony context exists both vertically and horizontally. Vertically speaking, the

267. *See* 677 F.3d 97, 107-09 (2d Cir. 2012) (Katzmann, J., concurring).

268. *See id.* at 104 (per curiam).

269. *See id.*

270. *See id.* at 108-09 (Katzmann, J., concurring). Paul Chaffin and Michael Dorfman-Gonzalez also advocate expertise-based approaches to *Chevron* in immigration cases but reach different conclusions with respect to the aggravated felony definition. Chaffin proposes that "courts reviewing BIA interpretations should consider, as part of the *Chevron* step zero threshold inquiry, whether the BIA exercised its expertise in interpreting the statute." Chaffin, *supra* note 25, at 519. With respect to the aggravated felony definition, he concludes that courts "should step up and perform a judicial interpretation that provides judicial reasoning" rather than defer to the BIA. *Id.* at 579. Dorfman-Gonzalez, meanwhile, proposes "a flexible agency expertise model that allows a court to consider an agency's accumulated expertise outside its traditional field" and concludes that "the BIA has gained sufficient experience outside its traditional field of expertise to warrant an application of *Chevron*'s two-step approach" to its interpretations of the aggravated felony definition. *See* Dorfman-Gonzalez, *supra* note 25, at 1009, 1013.

271. *Higgins*, 677 F.3d at 108 (Katzmann, J., concurring) (second and third alterations in original) (quoting Mugalli v. Ashcroft, 258 F.3d 52, 56 (2d Cir. 2001)).

272. *See id.*

Supreme Court has yet to engage in *Chevron* analysis in the aggravated felony context, but lower courts generally do so as a matter of course. Horizontally speaking, a few courts of appeals have deviated from the general practice of their sister circuits and tended toward an approach that more closely mimics the Supreme Court's.

This confusion among the federal courts is a cause for concern. The inconsistent application of *Chevron* across the circuits has led to a patchwork of definitions of the various aggravated felonies across the country.[273] Such a jumble makes it difficult for noncitizens to anticipate the consequences of their prior convictions and results in nonuniform application of the INA to similarly situated noncitizens. The courts' varying approaches to *Chevron* deference in the aggravated felony context also raise serious separation of powers concerns. Regardless whether Congress intended that the BIA receive deference in this context, some courts are not honoring Congress's intern—either by grabbing interpretive power that rightfully belongs to the BIA or by allowing the BIA to exercise power that rightfully rests with the courts and legislature.

III. The Categorical Foreclosure of *Chevron*

This Part offers a more robust explanation of and justification for the Supreme Court's jurisprudence in aggravated felony cases. Finding little guidance in the rare nuggets the Court has offered on the matter, it proposes that the BIA's interpretations of the aggravated felony definition are categorically ineligible for *Chevron* deference because of the nature of the categorical approach Congress intended to govern the interpretation of that provision. It suggests that such an approach not only would bring harmony to the administration of critically important provisions of the INA across various circuits and levels of appeal but also would remain faithful to Congress's intent and design.

A. The Supreme Court's Approach

The Supreme Court has said precious little in defense of its own seemingly contradictory practice.[274] The closest it has come to addressing the *Chevron*

273. *See* Chaffin, *supra* note 25, at 506-07. *Compare, e.g.*, Renteria-Morales v. Mukasey, 551 F.3d 1076, 1081 (9th Cir. 2008) (granting deference to the BIA's interpretation of the "relating to obstruction of justice" provision), *with* Denis v. Attorney Gen. of the U.S., 633 F.3d 201, 207-09, 211 (3d Cir. 2011) (declining to defer to and rejecting the BIA's interpretation of the same provision).

274. *See* Sharpless, *supra* note 25, at 351 ("In these cases, it is often unclear whether the Court regarded *Chevron* as irrelevant (a step zero decision) or regarded *Chevron* relevant but the statutory meaning clear (a step one decision)."). Indeed, this question could be
footnote continued on next page

question in the aggravated felony context is mentioning it in passing in *Esquivel-Quintana v. Sessions*.[275] In that case, the Court explained that it had "no need to resolve" the issue of *Chevron*'s applicability "because the statute, read in context, unambiguously forecloses the Board's interpretation."[276] But these few words offer little in the way of instruction. Rather, they appear to be "a formalistic means to a preordained end."[277] For whatever unspoken reason, there seems to be something different about deportation—and about the aggravated felony definition in particular.[278]

B. A Proposed Explanation

This Note proposes that what is really motivating the Court's jurisprudence—and what should be motivating all courts' jurisprudence—in aggravated felony cases is a determination that the BIA's interpretations of the aggravated felony definition are categorically ineligible for *Chevron* deference. The principles of *Chevron* deference only apply to an agency's interpretations of a statute if Congress has authorized that particular agency "to determine the particular matter at issue in the particular manner adopted."[279] Courts therefore must first ask whether "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law."[280] Among the factors that bear on this inquiry are expertise, complexity, the statute's text and context, and the law's overall structure.[281]

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framed as a *Chevron* Step One issue: The categorical approach could be used as an ordinary tool of statutory construction to eliminate any ambiguity in the aggravated felony definition. But because the Court has not admitted that it is even playing in the *Chevron* ballpark, this is unlikely. *See* Steinberg, *supra* note 228.

275. *See* 137 S. Ct. 1562, 1572 (2017). The Court also mentioned it in passing in another case dealing with a non-aggravated felony criminal ground for removal. *See* Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015) (punting the *Chevron* issue because the BIA's interpretation made "scant sense").

276. *Esquivel-Quintana*, 137 S. Ct. at 1572.

277. Patrick Glen, *Response to Walker on* Chevron *Deference and* Mellouli v. Lynch, YALE J. ON REG. NOTICE & COMMENT (June 10, 2015), https://perma.cc/N87D-FSFU.

278. *See id.* ("Where deportation is concerned, then, the Supreme Court's conception of room for deference to the agency's interpretation of the removability provisions is more circumscribed than it otherwise would be . . . ."); Michael Kagan, *Does* Chevron *Have An Immigration Exception?*, YALE J. ON REG. NOTICE & COMMENT (May 19, 2016), https://perma.cc/56L3-X46A ("Now with the decision in [*Torres v. Lynch*, 136 S. Ct. 1619 (2016),] . . . we have a mounting body of evidence that the Court does not in fact defer to the BIA on interpretation of criminal grounds of removal.").

279. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013); *see supra* notes 41-43 and accompanying text.

280. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

281. S*ee supra* text accompanying notes 44-46.

When it comes to the BIA's interpretations of the aggravated felony definition, the answer to this threshold question is no. Congress did not delegate to the BIA the authority to define aggravated felonies.[282] It is certainly true that the BIA has the authority to issue binding decisions through adjudication[283] and that immigration is an important field of law.[284] But such authority and importance are not dispositive. Rather, the BIA's lack of relative expertise in criminal law, the aggravated felony definition's text and context, and the overall structure of federal law indicate that any attempt at *Chevron* in this field should fail as a preliminary matter.

1. Expertise and complexity

Judges and scholars have rightly homed in on the BIA's lack of expertise as a signpost of Congress's intent on this issue.[285] First and foremost, the definition of "aggravated felony" is not a question that requires technical or

282. Justice Gorsuch recently suggested as much during the second oral argument in *Sessions v. Dimaya*. *See* Transcript of Oral Argument at 60, Sessions v. Dimaya, No. 15-1498 (U.S. Oct. 2, 2017), 2017 WL 4517130, at *61 (explaining that the INA's criminal grounds for removal are not "an example where Congress has delegated authority to the executive to" define crimes).

283. *See Mead*, 533 U.S. at 226-27; *see also* 8 U.S.C. § 1103(a)(1) (2016) (providing that the Attorney General's "determination and ruling . . . with respect to all questions of law [under the immigration laws] shall be controlling"); 8 C.F.R. § 1003.1(d)(1) (2017) ("[T]he [BIA], through precedent decisions, shall provide clear and uniform guidance to the [Immigration and Naturalization] Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.").

284. *See supra* notes 184-94 and accompanying text. The importance of the aggravated felony definition is reflected in the growing portion of the Supreme Court's docket that is devoted to immigration law. *See* Rana, *supra* note 27, at 345. Many of these cases are aggravated felony cases. Justice Sotomayor noted in her opinion for the Court in *Moncrieffe v. Holder* that the case was "the third time in seven years that [the Supreme Court had] considered whether the Government has properly characterized a low-level drug offense as 'illicit trafficking in a controlled substance,' and thus an 'aggravated felony.'" 133 S. Ct. 1678, 1693 (2013). Since just 2004, the Supreme Court has heard no fewer than nine aggravated felony cases on the merits. *See* cases cited *supra* note 18. And another was argued in October 2017. *See* Transcript of Oral Argument, *supra* note 282.

285. *See, e.g.*, Zivkovic v. Holder, 724 F.3d 894, 897 (7th Cir. 2013); Higgins v. Holder, 677 F.3d 97, 108 (2d Cir. 2012) (Katzmann, J., concurring); Yong Wong Park v. Attorney Gen. of the U.S., 472 F.3d 66, 71 (3d Cir. 2006); Alyssa Bell & Julie Dona, *Torturous Intent*: Refoulement *of Haitian Nationals and U.S. Obligations Under the Convention Against Torture*, 35 N.Y.U. REV. L. & SOC. CHANGE 707, 741 (2011); Rana, *supra* note 27, at 331; Sharpless, *supra* note 25, at 344; Slocum, *supra* note 26, at 532; Chaffin, *supra* note 25, at 578-79. *But see* Dorfman-Gonzalez, *supra* note 25, at 1013 ("[T]he BIA has gained sufficient experience outside its traditional field of expertise to warrant an application of *Chevron*'s two-step approach . . . .").

scientific expertise.[286] It is a legal determination that boils down to what a particular crime entails. Such an analysis naturally relies on familiarity with criminal law and "the criminal codes of most States."[287] Because the interpretation of the aggravated felony definition depends in such large part on interpretation of state and federal criminal codes, deference to the BIA is inappropriate. As the Third Circuit has put it, "the interpretation and exposition of criminal law is a task outside the BIA's sphere of special competence" and well within that of the courts, which interpret criminal laws on a near-daily basis.[288] Indeed, it is the courts that have a relative edge when it comes to the categorical approach and defining generic crimes. Whereas the BIA is charged with administering the immigration laws, the courts are the designated expositors of criminal law.[289] It is precisely for such reasons that agencies are typically not eligible for deference in their interpretations of criminal laws.[290]

This logic applies most clearly with respect to those aggravated felonies that are defined by cross-references to federal criminal statutes. Indeed, the Seventh Circuit in *Zivkovic* and the Third Circuit in *Denis* both relied in part on a cross-reference to Title 18 of the *United States Code* in justifying their decisions to deny *Chevron* deference.[291] And a number of the aggravated felony cases in which the Supreme Court skirted the *Chevron* issue involved aggravated felony provisions with cross-references.[292]

But the same logic extends beyond those generic crimes with cross-references. A cross-reference serves only to state explicitly what the categorical approach's application mandates implicitly: that a generic crime be defined according to its contemporary understanding in criminal law. The lack of a cross-reference does not make applying the categorical approach any less mandatory. Courts and the BIA must still divine "the generic sense in which

286. *See Zivkovic*, 724 F.3d at 897 ("[S]ome questions of law do not depend on agency expertise for their resolution."); Hickman, *supra* note 54, at 1599; Chaffin, *supra* note 25, at 535 ("[I]mmigration is a subject matter that does not inherently implicate *technical* expertise.").

287. Taylor v. United States, 495 U.S. 575, 598 (1990).

288. *See* Singh v. Ashcroft, 383 F.3d 144, 151 (3d Cir. 2004).

289. *See supra* note 74 and accompanying text.

290. *See supra* notes 72-75 and accompanying text.

291. *See Zivkovic*, 724 F.3d at 897; Denis v. Attorney Gen. of the U.S., 633 F.3d 201, 209 (3d Cir. 2011).

292. *See* Torres v. Lynch, 136 S. Ct. 1619, 1623-24 (2016) (involving 8 U.S.C. § 1101(a)(43)(E)(i)); Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013) (involving 8 U.S.C. § 1101(a)(43)(B)); Carachuri-Rosendo v. Holder, 560 U.S. 563, 574 (2010) (involving 8 U.S.C. § 1101(a)(43)(B)); Lopez v. Gonzales, 549 U.S. 47, 50 (2006) (involving 8 U.S.C. § 1101(a)(43)(B)); Leocal v. Ashcroft, 543 U.S. 1, 4 (2004) (involving 8 U.S.C. § 1101(a)(43)(F)).

the term is now used in the criminal codes of most States,"[293] largely by reference to those codes themselves and other leading criminal law authorities.[294] Such an approach entails interpreting criminal law just as much as consulting a cross-referenced provision of Title 18 does.

Judge Katzmann's reasoning in *Higgins v. Holder* is illustrative.[295] In that case, the BIA turned to the chapter of Title 18 entitled "Obstruction of Justice" to help it define an identically named generic crime listed in the aggravated felony definition.[296] That generic crime is not defined by any cross-reference.[297] Yet it remained the case that faithful application of the categorical approach required the BIA to engage in "analysis of a federal criminal statute," a task "beyond the BIA's administrative responsibility and expertise."[298] Other courts of appeals have reasoned similarly in declining to apply the *Chevron* framework to aggravated felony provisions without cross-references.[299] And the Supreme Court, too, has refrained from raising the *Chevron* issue in cases involving aggravated felonies that lack cross-references, such as "theft offense,"[300] "crimes 'involv[ing] fraud or deceit,'"[301] and "sexual abuse of a minor."[302]

293. Taylor v. United States, 495 U.S. 575, 598 (1990).

294. *See* Sharpless, *supra* note 25, at 325 ("The reality that interpretations of crime-based removal statutes often involve criminal law further complicates this legal landscape."); *supra* Part I.B.

295. 677 F.3d 97, 107-09 (2d Cir. 2012) (Katzmann, J., concurring).

296. *See id.* at 101 (per curiam); *see also* 8 U.S.C. § 1101(a)(43)(S) (2016) (listing as an aggravated felony "an offense relating to obstruction of justice").

297. *See* 8 U.S.C. § 1101(a)(43)(S).

298. *See Higgins*, 677 F.3d at 108 (Katzmann, J., concurring) (quoting Mugalli v. Ashcroft, 258 F.3d 52, 56 (2d Cir. 2001)).

299. *See* Drakes v. Zimski, 240 F.3d 246, 251 (3d Cir. 2001) ("[N]ot only did the BIA not, at least explicitly, call upon any particular expertise in reaching that determination, but defining under federal law a term such as 'forgery' is what federal courts do all the time."); *cf.* Ki Se Lee v. Ashcroft, 368 F.3d 218, 224 n.10 (3d Cir. 2004) (posing but not answering the "question of whether [the court] should defer to the Board's interpretation . . . where the meaning of the statutory provision depends, in part, on an understanding of the Internal Revenue Code, a subject on which the Board has no expertise").

300. *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 185 (2007) (emphasis omitted) (quoting 8 U.S.C. § 1101(a)(43)(G)).

301. *See* Kawashima v. Holder, 565 U.S. 478, 480 (2012) (alteration in original) (quoting 8 U.S.C. § 1101(a)(43)(M)(i)).

302. *See* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1567 (2017) (quoting 8 U.S.C. § 1101(a)(43)(A)). Another case involving a generic aggravated felony without a cross-reference focused on a circumstance attached to the crime. *See* Nijhawan v. Holder, 557 U.S. 29, 32 (2009) (interpreting 8 U.S.C. § 1101(a)(43)(M)(i)).

Second, the INA is admittedly a poorly designed maze of a statute.[303] But the BIA is not likely to be significantly more familiar with it than courts are. And the task of defining generic crimes—and fully appreciating their place within the INA as a whole—is not markedly more complex than other interpretive tasks courts perform on a day-to-day basis.[304] The INA is a far cry from complex statutory schemes like Social Security.[305]

Finally, the aggravated felony definition does not implicate the BIA's political expertise. The BIA is a sort of administrative hybrid. It is neither wholly adjudicator nor wholly policysetter.[306] Rather, it is an "appellate body charged with the review of . . . administrative adjudications under the [INA]."[307] Its job "is to decide cases on principle, not to formulate foreign policy in the guise of deciding cases."[308] In aggravated felony cases, the BIA is called upon not to determine who should and should not be deported as a policy matter but rather to divine Congress's intent with respect to that question. While this determination may bear on foreign policy to some extent, it does not "pertain[] to the Executive Branch's exercise of 'especially sensitive political functions that implicate questions of foreign relations'"[309] the same way other provisions might.[310] It does not involve the exposition of foreign laws, interpretation of treaties, or assessment of international political conditions.[311]

303. *See* Scialabba v. Cuellar de Osorio, 134 S. Ct. 2191, 2203 (2014) (plurality opinion) ("Those hardy readers who have made it this far will surely agree with the 'complexity' point.").

304. *See* Kagan, *supra* note 13 ("Immigration law is complicated, but it is law.").

305. *See* Transcript of Oral Argument at 40-41, *Esquivel-Quintana*, 137 S. Ct. 1562 (No. 16-54), 2017 WL 749022 (Breyer, J.) ("There are many agencies—Social Security—that have statutes that are incredibly detailed and have to do rather directly with how this program is being administered. . . . But you've just listed things that we seem to be able to know just as well as they.").

306. *See* Michael G. Heyman, *Immigration Law in the Supreme Court: The Flagging Spirit of the Law*, 28 J. LEGIS. 113, 122 (2002) ("The Board merely operates as an administrative tribunal."); Chaffin, *supra* note 25, at 545 ("Tasked with these competing mandates of independence and subordination, the BIA is not well positioned to function as either a policymaker worthy of judicial deference or an impartial adjudicator of questions of law.").

307. 8 C.F.R. § 1001.3(d)(1) (2017).

308. Heyman, *supra* note 306, at 142.

309. Denis v. Attorney Gen. of the U.S., 633 F.3d 201, 209 n.11 (3d Cir. 2011) (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)).

310. *See* Heyman, *supra* note 306, at 122 ("Though its decisions may obliquely have some effect on relationships with other countries, the Board enjoys no more authority to forge foreign policy than the Civil Service Commission.").

311. *See* Chaffin, *supra* note 25, at 575-79.

2. Text and context

But expertise is just one piece of the puzzle. When it comes to the aggravated felony definition, two aspects of that provision's text indicate that Congress intended the categorical approach's two-step methodology to apply. First, the aggravated felony definition is composed largely of generic crimes—that is, "crime[s] as generally committed."[312] It lists, for instance, "murder," a "burglary offense," and "an offense described in [18 U.S.C. § 1962] (relating to racketeer influenced corrupt organizations)."[313] The Supreme Court has indicated that "the categorical approach applies" when a statute refers to "generic crim[es]" like these.[314]

Congress's use of the term "conviction" also provides a "relevant statutory hook."[315] As the Supreme Court has explained, "[T]he language imposing the categorical approach" speaks in "terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes."[316] This is precisely the sort of language that appears in the INA with respect to the aggravated felony definition: "[T]he term applies regardless of [when] the *conviction* was entered . . . ."[317] "Any alien who is *convicted* of an aggravated felony at any time after admission is deportable."[318] And any noncitizen convicted of reentry "whose removal was subsequent to a *conviction* for commission of an aggravated felony . . . shall be fined under such title, imprisoned not more than 20 years, or both."[319] Thus, for more than a century, courts interpreting generic crimes in the federal immigration laws have concluded that Congress "intended" the categorical approach to govern that task.[320]

312. Nijhawan v. Holder, 557 U.S. 29, 34 (2009) (emphasis omitted); *see also id.* at 37 ("The 'aggravated felony' statute lists several of its 'offenses' in language that must refer to generic crimes."); *supra* text accompanying notes 179-83.

313. 8 U.S.C. § 1101(a)(43)(A), (G), (J) (2016).

314. Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 (2013) (quoting *Nijhawan*, 557 U.S. at 37); *see supra* note 97 and accompanying text.

315. *See* Carachuri-Rosendo v. Holder, 560 U.S. 563, 580 (2010); *see also* Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015) ("Because Congress predicated deportation 'on convictions, not conduct,' the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior." (quoting Das, *Immigration Penalties of Criminal Convictions*, *supra* note 27, at 1701)); *supra* text accompanying note 98.

316. Shepard v. United States, 544 U.S. 13, 19 (2005) (second alteration in original). As the Supreme Court has noted, "If Congress had wanted to increase a sentence based on the facts of a prior offense, it presumably would have said so; other statutes, in other contexts, speak in just that way." Descamps v. United States, 133 S. Ct. 2276, 2287 (2013).

317. 8 U.S.C. § 1101(a)(43) (emphasis added).

318. *Id.* § 1227(a)(2)(A)(iii) (emphasis added).

319. *Id.* § 1326(b) (emphasis added); *see also id.* §§ 1228(a)(3)(A), 1229b(a), 1327.

320. *See Mellouli*, 135 S. Ct. at 1986.

This guidance accords with the classic interpretive principle that Congress writes statutes against the backdrop of existing law.[321] The categorical approach has long been the designated mode of answering the question whether a particular offense qualifies as a listed generic crime.[322] Thus, one can presume that when Congress in the INA premised various civil and criminal penalties on convictions for any number of generic crimes, it knew the categorical approach would apply and intended that to be the case.

Regardless whether Congress was actually aware of the contours of the categorical approach,[323] that approach is tailor-made and has long been invoked to resolve the interpretive question the aggravated felony definition raises. The aggravated felony definition requires courts and the BIA to determine whether a particular conviction is one for any of the listed crimes. In designing the INA in this way, Congress meant to identify particular classes of criminal noncitizens who would be subject to the harshest deportation consequences.[324] It was concerned not with the details of the criminal acts those noncitizens had committed but rather with the types of crimes those acts served as the basis for. Courts have historically employed the categorical approach in answering this question precisely because it gives effect to that intent.[325] It determines at the first step the nature of the crime Congress had in mind and at the second step whether that crime encompasses a given conviction.

It therefore follows that Congress did not mean for the BIA to receive *Chevron* deference to its interpretations of the aggravated felony definition. The categorical approach is "the *one* methodology properly applicable" in the aggravated felony context.[326] That methodology is designed to reach a single, uniform result by reference to objective criminal law authorities.[327] It operates on the assumption that Congress understood the generic crimes it included in

321. *See* 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 . . . ."); Cannon v. Univ. of Chi., 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law . . . ."); Lorillard v. Pons, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

322. *See supra* notes 15, 116 and accompanying text.

323. *See generally* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 924-64 (2013) (surveying legislative drafters and finding that they were more familiar with some interpretive principles than with others).

324. *See supra* notes 163-65 and accompanying text.

325. *See supra* notes 112-16 and accompanying text.

326. *See* United States v. Garcia-Santana, 774 F.3d 528, 543 (9th Cir. 2014).

327. *See supra* Part I.B.2.

the INA to bear their contemporary meanings and not the meanings a particular state might ascribe to the terms. Just as the categorical approach limits states' discretion in using criminal labels to trigger sentencing or immigration consequences, so too does it limit the BIA's discretion in setting the boundaries of generic crimes. Because the outcome is preordained in this way, there is no discretion for the BIA to exercise—no "gap for the agency to fill"[328] for *Chevron* purposes.

3. Structure

Furthermore, the aggravated felony definition's place in the overall structure of federal law counsels against *Chevron*'s applicability. As noted above, the aggravated felony definition triggers both civil and criminal consequences within the INA framework.[329] A federal court of appeals that defines a given aggravated felony in the immigration context by deferring to the BIA's interpretation would therefore presumably be binding courts in its jurisdiction to that interpretation in future criminal cases. Statutes must, after all, be interpreted consistently across different contexts.[330] And Congress's very aim in enacting the aggravated felony definition was to keep designated groups of criminal aliens out of the United States.[331] It would seem an odd result that the same noncitizen might qualify as an aggravated felon for purposes of deportation but not when being criminally prosecuted for illegal reentry. Equally odd is the notion that the BIA would be able to bind courts deciding criminal cases to its own interpretations of the INA.[332] Yet that is precisely the result *Chevron* deference to BIA interpretations of the aggravated felony definition would produce.

This problematic outcome is compounded when one looks beyond the INA to other criminal laws. The sentencing guideline that corresponds to the INA's crime of transporting unlawful immigrants, for instance, incorporates by

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

329. *See supra* notes 184-94 and accompanying text.

330. *See* United States v. Santos, 553 U.S. 507, 522 (2008) (plurality opinion) ("[T]he meaning of words in a statute cannot change with the statute's application."), *superseded in other part by statute*, Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified as amended in scattered sections of 18 and 31 U.S.C.); Clark v. Martinez, 543 U.S. 371, 380 (2005) (rejecting the notion that "the *same* detention provision" can have "a different meaning when [different] aliens are involved"); Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (explaining that when a statute has "both criminal and noncriminal applications," courts "must interpret the statute consistently").

331. *See supra* notes 163-65 and accompanying text.

332. *See supra* notes 72-75 and accompanying text.

reference the INA's aggravated felony definition.[333] This presents the same lose-lose situation as the INA's own criminal provisions: Either the statute is to be given different meanings in different contexts or the BIA wields the power to issue interpretations that govern in cases beyond its purview.

The federal criminal statutes incorporated by cross-reference into the INA's aggravated felony definition raise yet another concern. If the federal courts defer to the BIA's interpretations of, for instance, "crime of violence" under Title 18 in issuing their own precedential opinions, such interpretations could set precedent that bears not only on future interpretations of that criminal provision itself but also on any number of unrelated statutes that incorporate that provision by cross-reference or contain similar wording.[334] It seems safe to assume that Congress did not intend the BIA to leave its fingerprints on such laws.[335]

In short, the aggravated felony provision is intertwined with federal criminal law to an extent that casts serious doubt on the proposition that Congress meant *Chevron* to apply.

C. A Better Path Forward

The categorical foreclosure of *Chevron* deference in the aggravated felony context might at first blush appear to be cause for concern. As explained above, *Chevron* deference is meant to promote uniformity in the law and resolve lingering statutory ambiguities. Ruling out *Chevron* in the aggravated felony context, then, might appear to do away with these benefits. But that is not the case. The categorical approach is also designed to promote uniformity and resolve ambiguities in the interpretation of generic crimes. And that approach provides a better path forward that is not only in line with Congress's intent but also desirable as a practical matter.

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333. *See* U.S. SENTENCING GUIDELINES MANUAL § 2L1.1 cmt. n.1 (U.S. SENTENCING COMM'N 2016).

334. *See* 18 U.S.C. § 16 (2016) (defining "crime of violence"); *see also, e.g.*, 2 U.S.C. § 1961 (2016) (incorporating 18 U.S.C. § 16 by cross-reference in defining the Capitol Police's "authority to make arrests within the District of Columbia"); 42 U.S.C. § 3717 & app. at 5254 (2016) (to be recodified at 34 U.S.C. §§ 30502-30503) (incorporating 18 U.S.C. § 16 by cross-reference in establishing the Attorney General's authority to provide support for state and local criminal investigations); *id.* § 14503(a), (f)(1) (incorporating 18 U.S.C. § 16 by cross-reference in defining the scope of protection from liability provided to volunteers for nonprofits and government entities).

335. *See* Zivkovic v. Holder, 724 F.3d 894, 897-98 (7th Cir. 2013) ("No one thinks that the Board of Immigration Appeals has the authority to set the boundaries of the term 'crime of violence' . . . ."); Francis v. Reno, 269 F.3d 162, 168 (3d Cir. 2001) (noting that 18 U.S.C. § 16 "is not transformed into an immigration law merely because it is incorporated into the INA").

First, uniformity in the law is undoubtedly a benefit of *Chevron* deference.[336] Unlike courts, agencies "can be expected to reach single readings of the statutes for which they are responsible and to enforce those readings within their own framework."[337] And the value in uniform application of the law is not to be understated.[338] But in the aggravated felony context, the categorical approach is itself designed to promote uniformity in the law by nationalizing the definition of a generic crime.[339] And because the definitions of generic crimes are keyed to objective criminal authorities, the inquiry ought to yield the same answer no matter which court performs the analysis.[340] The very nature of the categorical approach, then, should lead to uniform interpretation of the aggravated felony definition across jurisdictions.

That there is currently a multiplicity of categorical methodologies is a product not of the categorical approach itself but rather of the lack of guidance courts have received with respect to its operation. The categorical approach by its very terms requires "some uniform definition independent of the labels employed by the various States' criminal codes" for a generic federal crime.[341] But given the dearth of Supreme Court guidance on how generic definitions are to be divined, lower courts have struggled with the analysis.[342] Thus, the current existence of variations on the categorical approach's first step does not

336. *See* John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 622 (2005) ("When a circuit court relies on an exception to *Chevron* deference to reject an agency interpretation, the practical effect is to create a patchwork immigration law with different results depending upon controlling circuit authority."); Chaffin, *supra* note 25, at 511 ("One argument in favor of categorical deference to the BIA is that lockstep deference enables the BIA to produce a fully uniform national immigration law . . . ."). Note that this patchwork is more likely if some courts of appeals defer to the BIA and some do not. *See* Chaffin, *supra* note 25, at 512. *But cf.* Joshua C. Macey, Note, *Playing Nicely: How Judges Can Improve Dodd-Frank and Foster Interagency Collaboration*, 126 YALE L.J. 806, 851-57 (2017) (discussing the role judicial review can play in achieving administrative harmony).

337. Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1121 (1987).

338. *See* Butros v. U.S. INS, 990 F.2d 1142, 1149 (9th Cir. 1993) (Trott, J., dissenting) (noting that uniformity "is essential in promoting the goal of treating all people the same, regardless of the federal circuit in which they live"); Greenberg, *supra* note 26, at 25 (arguing that uniformity "promotes fundamental fairness for affected individuals and regulated parties"); Merrill & Hickman, *supra* note 42, at 861 ("A . . . reason for preferring agency interpretation . . . is that this may be the only practical way today to achieve uniformity in federal law.").

339. *See supra* text accompanying notes 102-03.

340. *See supra* Part I.B.

341. Taylor v. United States, 495 U.S. 575, 592 (1990).

342. *See supra* Part I.B.1.

justify invoking *Chevron* for uniformity's sake. Rather, it underscores the need for the Court to step in and clarify the contours of the categorical approach.

Second, lower courts have feared that the categorical approach itself might produce ambiguity. Especially in the context of nontraditional offenses, the possibility exists that there might be no clear consensus among state and federal criminal codes as to a generic crime's definition.[343] Such a lack of consensus could exist for different reasons. Jurisdictions could split by a narrow margin on a generic crime's meaning. Or there could be such variation in the state and federal criminal codes that no clusters of definitions emerge.

Though certainly possible, concern for such a state of affairs may well be overblown. Nonuniformity is unlikely to be an issue with respect to common law and *malum in se* offenses—offenses deeply rooted in society's understandings of criminal culpability.[344] And such crimes make up the bulk of the listed aggravated felonies.[345] Indeed, the Supreme Court has yet to encounter an absence of consensus in its own categorical approach case law, even in those cases involving nontraditional crimes.[346] But should such a problem present itself in the future, courts would do well to bear in mind that multijurisdictional surveys need not be consulted to the exclusion of all other sources.[347] The ultimate aim of the inquiry is to divine the contours of the crime Congress had in mind in writing the INA.[348] And while the consideration of criminal law is a critical part of this inquiry, courts can and have consulted other authorities to bolster or confirm their analysis.[349]

Conclusion

For decades, the Supreme Court and the lower federal courts have taken inconsistent approaches to resolving the tension between *Chevron* deference and the categorical approach in aggravated felony cases. The Supreme Court has consistently ignored the possibility of *Chevron* deference, whereas the

343. *See supra* notes 136-47 and accompanying text.

344. *See* William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2228 n.801 (2002) (characterizing *malum in se* offenses as those that are "intrinsically wrong"); *supra* note 146 and accompanying text.

345. *See* 8 U.S.C. § 1101(a)(43) (2016). Only some of the generic crimes in the aggravated felony provision would even arguably fall outside this category. *See, e.g.*, *id.* § 1101(a)(43)(C) ("illicit trafficking in firearms or destructive devices"); *id.* § 1101(a)(43)(J) ("relating to gambling offenses"); *see also* United States v. Sandoval-Barajas, 206 F.3d 853, 855 (9th Cir. 2000) (providing an overview of the listed generic crimes).

346. *See supra* text accompanying notes 131-35.

347. *See supra* note 157 and accompanying text.

348. *See supra* notes 97-101 and accompanying text.

349. *See supra* note 157 and accompanying text.

lower courts generally apply the *Chevron* framework to the aggravated felony definition as they would to any other INA provision. The odds of these courts reaching a state of harmony appear slim. Lest the law continue to develop in this flatly inconsistent manner, a unifying rationale is sorely needed.

This Note posits that what is really driving the Supreme Court's jurisprudence—and what should be driving the practice of all courts in aggravated felony cases—is a determination that the nature of the categorical approach renders the BIA's interpretations of the aggravated felony definition ineligible for *Chevron* deference. The text and structure of the INA dictate that the categorical approach be used to resolve the question how a generic crime ought to be defined. Because this approach turns in large part on the exposition of criminal authorities outside the BIA's expertise or administration, the *Chevron* framework has no place in the analysis. The time is therefore ripe for courts to reclaim their interpretive role with respect to the INA's aggravated felony definition and ensure that our immigration laws—especially those that dole out the harshest consequences—are administered in a manner that is fair, consistent, and true to their design.