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I. INTRODUCTION

As a unit of United States jurisprudence, immigration law has rarely played well with others. A leading scholar long ago described immigration law as “a neglected stepchild ... cut off from the usual rules of judicial review and from much of our constitutional culture.” ¹ Unfortunately, this description remains valid. Immigration law, by definition, primarily affects persons who are not citizens of the United States. Even the applicability of those constitutional protections usually guaranteed for U.S. citizens becomes an unanswered question for immigrants, one that continues to plague scholars and the courts. ²

One of the most significant disparities between immigration law and other judicial realms is the degree to which the judiciary defers to the political branches on immigration-related matters. The Supreme Court explained the unique deference paid to immigration agencies in a 1988 deportation case:

[A]lthough all adjudications by administrative agencies are to some degree judicial and to some degree political ... INS officials must exercise especially sensitive political functions ... and therefore the reasons for giving deference to agency decisions ... in other administrative contexts apply with even greater force in the INS context. ³

Standards of review in administrative law are complicated questions in and of themselves; when one takes into account the special treatment that courts often afford immigration agencies as well as the nebulous nature of immigration law, the result can be chaotic.

Recent procedural changes continue to add new wrinkles to this complex area of law. To “reduce delays in the administrative review process, eliminate the existing backlog of cases, and focus more attention and resources on those cases presenting significant issues for resolution,” ⁴ the Board of Immigration Appeals (BIA) (the highest administrative body for interpreting and applying immigration laws) instituted a new streamlining initiative in 2002. Under the new initiative, a single Board member may review decisions, and the Board may summarily dismiss appeals without decision. ⁵ In spite of, or perhaps because of, these measures, appeals of BIA decisions continue to skyrocket. In 1999, the U.S. courts of appeals reviewed a total of 1,731 cases appealing decisions by the Immigration and Naturalization Service (INS). ⁶ In 2004, the courts reviewed 10,812 cases, an increase of 624 percent. ⁷ Faced with such a Herculean task, would the circuits defer more to immigration agencies, in line with the overall streamlining trend? Or would the circuits reverse more cases due to procedural insufficiencies?
This paper discusses how lower courts have applied current administrative law deference standards to immigration decisions and attempts to distill a workable pattern of judicial deference in immigration law. The first section discusses current judicial deference standards in administrative law, specifically *659 the flexibility that the *United States v. Mead Corp.* opinion gave courts to award *Chevron* deference *9 to agency actions. The second section discusses three main ways various circuits have interpreted *Mead* and analyzes whether those interpretations correctly represent the *Mead* holding. This section particularly focuses on Second and Ninth Circuit opinions that, for the first time, refuse to grant *Chevron* deference to certain formally adjudicated BIA decisions because the decisions fail to meet the standard of judicial deference established by *Mead*. The final section proposes that circuits, unhappy with the amount of due process the BIA currently affords petitioners, use *Mead* to carry out particular judicial objectives that would not otherwise be possible given the high deference standard in immigration law.

**II. JUDICIAL DEFERENCE IN ADMINISTRATIVE LAW**

**A. Judicial Deference Before United States v. Mead**

Scholars typically recognize three administrative law decisions as seminal in setting the standards by which courts defer to agencies when applying the law to the facts. *10 Commonly referred to as the *Skidmore, Chevron, and Mead* standards, each case represents a significant and intentional effort by the Supreme Court to draw the line between agency deference and judicial review. *11 Although cases such as *National Labor Relations Board v. Hearst* *12 and *Universal Camera Corp. v. National Labor Relations Board* *13 established *660 the “substantial evidence” standard of judicial review for agencies’ pure-fact and mixed-fact-and-law determinations, *Skidmore v. Swift & Co.* *14 was the Court’s first foray into setting a standard of deference for agency determinations in situations where it is unclear whether Congress intended to grant the agency the power to determine the issue at hand. *15 In that case, the Supreme Court reversed the trial court’s denial of employees’ overtime benefits under the *Fair Labor Standards Act.* *16 Since there was no principle of law that decided the issue, the Court remanded the case so that the trial court could consider the opinion of the Department of Labor’s Wage and Hour Division Administrator. *17 In an oft-quoted passage, Justice Jackson pronounced the *Skidmore* deference standard for agency interpretations: “[t]he weight of [the administrator’s] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to *persuade*, if lacking power to *control.*” *18*

The *Skidmore* standard, through which the courts freely assigned weight to agency determinations as part of a larger balancing test, prevailed for forty years. But as regulatory agencies mushroomed after World War II, the Supreme Court “struggle[d] to reconcile the growth of agencies with the Constitution” *19 without bogging down agencies and the courts in countless appeals. *20 In 1984, the Court attempted to clarify deference standards by replacing the *Skidmore* balancing test with the supposedly simpler two-step test that it established in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.* *21 Justice Stevens articulated the test for the majority:**

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect *661 to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute. *22*
Widely viewed as the most important administrative law decision of its time, 23 *Chevron* read ambiguities in the law to signify Congress’ implicit intent to delegate interpretive powers to the agency. 24 This in turn significantly enlarged the agency’s self-determination and interpretative powers. 25 More importantly, it arguably shifted the balance of power between the political and judicial branches. 26 In *Chevron*'s wake, agencies no longer had to wonder how a court would balance its own determinations with the other considerations noted by Justice Jackson in *Skidmore*. Rather, an agency could confidently decide all matters reasonably within its authority unless expressly prohibited from doing so by Congressional statute.

The *Chevron* standard reached every aspect of legislative jurisprudence. Within the immigration context, the standard’s application more often than not resulted in defeats for alien petitioners. 27 In the years since the Court first promulgated *Chevron*, scholars have accused its treatment of immigration matters of being “‘mechanical,’” “exclud[ing] an exploration of statutory purpose,” and “submerg[ing] the purpose or ‘spirit’ of documents in favor of a faulty, literalist approach.” 28 Under *Chevron*, the courts have generally favored immigration agencies over aliens. 29

*662  B. United States v. Mead*

*United States v. Mead* arguably set a new standard of judicial deference, not because it replaced *Chevron*, but because it imposed a threshold barrier to awarding agencies *Chevron* deference. 30 Rather than automatically deferring to the agency when statutory ambiguities exist, agencies implementing a particular statutory provision may now qualify for *Chevron* deference only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [where] the agency interpretation claiming deference was promulgated in the exercise of that authority.” 31 Justice Souter’s opinion identifies notice-and-comment rulemaking and formal adjudication as two procedures that typically deserve *Chevron* deference. 32 Noting that *Chevron* deference is not limited to these two particular types of procedures, 33 the opinion goes on to state:

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force. 34

Some scholars argue that *Mead* “reverses [the] global presumption” of deference that the Court established in *Chevron*. 35 Statutory ambiguity no longer implies congressional delegation (and consequently judicial deference). Rather, unless the reviewing court specifically finds that Congress intended to delegate interpretive authority to the agency, it may freely withhold *Chevron* deference. 36

Equally important is the Court's decision to revive *Skidmore*. The Court remanded *Mead for Skidmore* balancing because there was “no indication that Congress intended [a tariff classification by the U.S. Customs Service] to carry the force of law.” 37 The tariff classification in *Mead* was the result of a ruling letter that did not carry the force of law. 38 The Court further held that even if ruling letters from the Customs Service have precedential value in later agency action, that value alone “does not add up to *Chevron* entitlement ... [I]nterpretive rules [for example] may sometimes function as precedents *663 ... [but] they enjoy no *Chevron* status as a class.” 39 Rather, the Court bestowed upon the Customs ruling the same weight as the type of
“specialized experience” usually given to expert witnesses. The Court then ordered the lower court, upon remand, to afford the ruling “a respect proportional to its ‘power to persuade.’” 40

Mead reinstated power to the judiciary branch that it had lost after Chevron. 41 However, the results of this return of power have been mixed. Though Mead attempted to “tailor deference to variety,” 42 the Court's intent to offer flexibility to lower courts has actually “produced a great deal of confusion and error.” 43 One criticism is that Mead “overvalues the decisional benefits of standards and undervalues the decisional benefits of rules.” 44 Rather than guiding lower courts with a clear-cut rule to apply in future deference questions, this line of critique describes Mead as having simply announced a number of factors for the courts to examine in reaching their own conclusions. As a result, discrepancies continue to occur among the lower courts as they reach different conclusions while ostensibly applying the same Mead standard. Another criticism is that circuit courts' definitions of “force of law” vary widely and thus limit the determinacy value that one would hope to derive from Mead. 45 Finally, some fear that Mead leads to a dramatic increase of non-deferential judgments that completely ignore the agency's views. 46

In the few years since the Supreme Court decided Mead, it seems that at least where immigration law is concerned, circuit decisions exist to support each of these criticisms. Mirroring the confusion in other realms of administrative law, the circuits that have applied Mead have done so in a few *664 arguably incompatible ways. The following section discusses the three primary approaches by which circuit courts tackle Mead's application in the immigration context.

III. RECENT APPLICATIONS OF UNITED STATES V. MEAD IN IMMIGRATION LAW

Despite the big splash Mead made in administrative law, the circuit courts have cited the case only eleven times in their reviews of BIA decisions. 47 Moreover, the First, Fourth, and Sixth Circuits have never mentioned Mead when reviewing BIA determinations. There could be a number of explanations for this, of course, that are totally unrelated to the courts' application of Mead principles. However, between 2004 and 2005, circuit courts cited Chevron 152 times while reviewing BIA decisions. 48 Regardless of whether the courts in those cases decided to grant Chevron deference to the agency, Mead should have required the court to first decide whether Congress intended the challenged BIA action to carry the force of law before it could apply or discard Chevron deference. The task then is to find out how the courts have applied Mead in reviewing BIA actions, if at all.

The circuit courts of appeals have generally applied Mead in three or arguably four different ways. Four circuits have never cited Mead in an immigration decision. 49 Three other circuits faithfully apply Mead in its traditional interpretation, giving deference whenever the agency engages in formal adjudication and denying deference where the agency acts outside of its congressionally promulgated authority. 50 Since all BIA decisions are formal adjudications, this means that these courts generally will defer to the BIA's conclusions unless the issue under review is outside the scope of the agency's statutory authority. 51 In stark contrast, the Ninth Circuit has taken full advantage of Mead to take away a significant portion of the agency's interpretative powers, choosing often to reverse rather than remand or defer to the agency where ambiguities exist. Finally, the Second Circuit, in what I believe to be the most thorough and thoughtful application of Mead, has arguably carved out a new rule of judicial deference where it appears that the BIA has failed to afford alien petitioners the “fairness and deliberation” 52 that they deserve.

*665 A. The Standard Bearer--Traditional Application by the Third, Fifth, and Seventh Circuits

For the most part, Mead has not affected the way a majority of the circuits grant Chevron deference to immigration agencies. Most circuits continue to be extremely deferential to the immigration agency. In granting deference they often choose to cite not the deference standards articulated in Chevron or Mead but rather important immigration cases where the Supreme Court
stressed the political nature of immigration law and the need generally to defer to INS decisions. Other than the Second and Ninth Circuits, only four other circuits have ever cited Mead while reviewing an immigration case, generating only six opinions total. Of the six cases, only three discussed Mead with any meaning at all, and only one decided to withhold deference based in part on a Mead analysis.

The Fifth Circuit's decision in *Omagah v. Ashcroft* appears to be the most pithy and straightforward, if somewhat inaccurate, application of the Mead principles. The petitioner sought review of an Attorney General's order refusing to grant a discretionary suspension of deportation. The immigration judge (IJ) held that the petitioner “lacked good moral character,” and the BIA upheld the judge's decision on appeal. Upon review, the Fifth Circuit stated in a footnote simply that it would give the BIA's interpretation Chevron deference “[b]ecause the BIA interpreted the INA [Immigration and Nationality Act] through formal adjudication.” In a parenthetical that followed the footnote, the opinion summed up Mead as “explaining that Chevron deference is due when an agency acts according to legally delegated authority inherent in formal adjudication.” In so doing, the Fifth Circuit seems to make the inferential leap that all formal adjudications qualify for Chevron deference. The Mead opinion indicates that this is in fact not so. Mead never explicitly bestows upon all formal agency adjudications an automatic exemption toward Chevron deference. Rather, it describes formal adjudications as “a very good indicator of delegation meriting Chevron treatment,” and deems it “fair to assume generally” that formal adjudicatory procedures carry with them the effect of law contemplated by Congress. Taken as a whole, Mead seems to place far more value on the existence of “fairness and deliberation” than whether the proceeding was a formal adjudication.

As the only Third Circuit case to discuss Mead, *Cai Luan Chen v. Ashcroft* does a better job of articulating and applying the Mead standard. The petitioner in *Chen* sought asylum based on the forced abortion of his fiancé by Chinese officials. The IJ granted asylum, analogizing the petitioner to the married petitioners in *Matter of C-Y-Z-*, who were afforded asylum based on forced sterilization. The BIA reversed on appeal, noting that *Matter of C-Y-Z-* did not apply to the petitioner's case and that the petitioner's experience did not rise to the level of past persecution called for by the statute. On appeal to the circuit court, Judge Alito's opinion carefully laid out the threshold questions posed by Mead and explained the Chevron two-step test. Citing Mead, the opinion states, “Chevron applies when ‘it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.’” Then, noting that the petitioner had not challenged the ambiguity of the organic statute, Judge Alito wrote: “[h]ere, there is no dispute that ‘the BIA should be accorded Chevron deference for its interpretations of the immigration laws.’” Judge Alito's conclusion, though lacking in explanation, appears to be correct. The BIA here engaged in formal adjudication to interpret a section of its organic statute regarding asylum eligibility, acted within its promulgated authority in reversing the IJ's opinion, and in doing so gave factually-based reasons that seem to indicate its deliberation of the petitioner's circumstances.

Finally, in the only decision of its kind, the Seventh Circuit in *Flores v. Ashcroft* withheld Chevron deference because it found that the agency failed to act within the authority delegated to it by Congress. The petitioner in *Flores* challenged a BIA decision that ordered him deported because he committed a “crime of domestic violence” under 18 U.S.C. § 16. At issue was how the petitioner's crime, as defined under Indiana state law, should be classified for purposes of the INA's removal provisions. The government argued that the BIA's decision to remove the petitioner deserved Chevron deference, but the court properly cited Mead to deny such deference. The Seventh Circuit noted: *Chevron deference depends on delegation [citing Mead], and § 16(a) does not delegate any power to the immigration bureaucracy ... or to the Board of Immigration Appeals. Section 16 is a criminal statute, and...*
just as courts do not defer to the Attorney General or United States Attorney when § 16 must be interpreted in a criminal prosecution, so there is no reason for deference when the same statute must be construed in a removal proceeding. Any delegation of interpretive authority runs to the Judicial Branch rather than the Executive Branch. 72

This analysis also seems to conform to the traditional understanding of Mead. The BIA’s decision in Flores failed the Mead standard because the agency overstepped its promulgated authority in interpreting a criminal statute that was unrelated to the immigration agency’s organic powers. After denying deference to the BIA, the circuit court nonetheless considered the persuasive force of the agency’s interpretation pursuant to the Skidmore balancing test, but concluded that the agency’s position was unpersuasive and remanded to the Board for further action. 73

In transcribing the traditional understanding of Mead to the immigration context, each of the above three opinions act as standard bearers of Mead analysis in immigration law. Each stands for the proposition that where formal adjudications such as BIA decisions are concerned, these circuit courts will almost always give Chevron deference to the agency unless the agency acts outside the scope of its authority. This proposition to a large degree captures fairly the spirit of the original Mead opinion. After all, Justice Souter made it clear that the Court will look very favorably upon notice-and-comment rulemaking and formal adjudications when contemplating Chevron deference. 74 Indeed, citing Mead, the Fifth Circuit goes so far as to declare all BIA formal adjudications regarding the INA automatically worthy of Chevron deference. 75 Were this to be the case, Mead would greatly simplify the judiciary’s task when reviewing BIA decisions. Besides weeding out misapplications of the agency’s authority in cases like Flores, courts would simply defer to most, if not all, of the BIA’s determinations as long as they concern the agency’s interpretation of the INA. Though several circuits have adopted this straightforward and highly deferential approach, a recent Second Circuit opinion adds new dimensions to this analysis.

B. The Innovator--A New Approach to Agency Deference in the Second Circuit

The Mead opinion contains more nuances than the decisions discussed in the above section seem to articulate. Mead rejected an agency ruling letter as not carrying with it the effect of law because the Court wanted to ensure agencies made decisions that were procedurally adequate and within their constitutionally delegated authorities. 76 What kind of agency action could allay these concerns more than actions such as the BIA’s formal adjudications of its organic statute, which call for a complete record and administrative review, among other procedural safeguards? Yet Justice Souter refrained from endorsing all formal adjudications with the guarantee of Chevron deference. Did he foresee circumstances in which formal adjudications would nonetheless fail to provide petitioners with the “fairness and deliberation” that Mead requires? If so, did he write Mead in such a way to offer petitioners a mode of protection against an otherwise over-deferential court? The Second Circuit has recently interpreted Mead as affording just such a safeguard.

The three petitioners in Shi Liang Lin v. U.S. Dep’t of Justice--Shi Liang Lin, Xian Zou, and Zhen Hua Dong--were either boyfriends or fiancés of women who had suffered from China’s forced sterilization or abortion policy. 77 Each petitioner claimed refugee status by virtue of his relationship with the female victim. 78 Each relied on the BIA’s decision in Matter of C-Y-Z., 79 in which the BIA held that “forced sterilization or abortion of one spouse is an act of persecution against the other spouse and that, as a result, the spouses of those directly victimized by coercive family planning policies are per se as eligible for asylum as those directly victimized themselves.” 80 As the court in Lin pointed out, however, the BIA “did not explain the basis for this conclusion” 81 or supplement its analysis in subsequent opinions.
The IJ denied each petitioner's claim on different but related grounds. The IJ examining Shi Liang Lin found that it would not be “appropriate to expand ... Matter of C-Y-Z- to include unmarried couples” because, given Congress' 1,000 person-per-year cap on the number of persons eligible for asylum based on forced sterilization or abortion, allowing non-spouses to apply for asylum could jeopardize the ability of those individuals more directly harmed by China's family planning policies to avoid persecution. The IJ examining Xian Zou held there was “absolutely no way that Section 101(a)(42) of the Immigration and Nationality Act and supporting case law apply [to Zou].” That decision, in the Second Circuit's view, failed to provide “any meaningful analysis.” Finally, the IJ examining Zhen Hua Dong found that the BIA had not extended its ruling in Matter of C-Y-Z- to fiancés of victims of forced sterilization, and therefore, Dong was not eligible for asylum. The circuit court noted that in each case, “a single Board member affirmed, without opinion, the results of the IJ's decision below.”

The Second Circuit properly framed the issue as “whether an IJ's construction of the INA is entitled to review under the deferential standards set forth in Chevron ... where, as here, an IJ has engaged in statutory construction and the BIA has summarily affirmed.” Rephrasing the issue within the Mead standard, the Second Circuit set out to determine first whether Congress delegated authority to the agency (here, the Attorney General) generally to make rules carrying the force of law, and second, whether the agency interpretation (here, the IJ's statutory construction and the BIA's summary affirmance) was promulgated in the exercise of that authority. The court answered yes to the first question but no to the second.

In finding that Congress delegated authority to the agency, the court wrote that “[h]ere, it is beyond cavil that Congress has, as a general matter, delegated the authority to make immigration rules carrying the force of law; the INA, after all, unambiguously vests such power in the Attorney General, among others.” However, the court declined to find that “an IJ's summarily affirmed construction of the INA is ‘promulgated in the exercise of’ the Attorney General's authority.” The court did so by relying on two lines of reasoning that both relate to its interpretation of “rule” as articulated in Mead. First, the court found that though the Attorney General has the authority to make rules carrying the force of law, there was no evidence that he or she “ever intended to--let alone did in fact--delegate similar rulemaking authority to the IJs, themselves.” In making this finding, the court referred to agency practice within the Executive Office for Immigration Review, which “strongly suggests” that the IJs “lack the juridical power to issue decisions that are in any way binding on future parties, on one another, or on the BIA.” Without the power to issue binding decisions, the court argued, the IJs could not in themselves “possess the requisite ability to issue, on behalf of the Attorney General, a ‘rule’ carrying the force of law--because one of the hallmarks of a legal ‘rule’ is that it will, in fact, apply equally in all cases of a similar kind.” To emphasize its point regarding the potentially unpredictable results of IJ decisions, the court argued that if it accorded Chevron deference to non-binding IJ statutory interpretations, it could find itself “having to uphold as reasonable on Tuesday one construction that is completely antithetical to another construction [it] had affirmed as reasonable the Monday before.”

Though the court's argument has merit, hasn't the BIA reviewed the lower IJ's decision in each petitioner's case, and having effectively certified each decision, thus bestowed upon it authority greater than that inherent in the position of the IJ? The court answered this question in the negative as well, and in doing so dealt a major blow to the streamlining model and interpretive powers championed by the BIA. As the second reason for denying the IJs' construction of the INA, the court found that “a summarily affirmed IJ decision also cannot be construed as a ‘rule’ promulgated by the BIA on behalf of the Attorney General.” Moreover, though the BIA may deem the IJ's decision as a “final agency determination,” this status “does not transform the IJ's legal construction into a BIA rule carrying the force of law” because the BIA's own streamlining regulations state that while the BIA approves of the result reached by the IJ, “it does not necessarily imply approval of all of the reasoning of that decision.”
Applying *Mead* analysis to the issue at hand, the court in *Lin* refused to extend *Chevron* deference to the BIA's summary affirmances of the IJ's opinions because it found that the affirmances were not rules that exercised the authority delegated to the Attorney General by Congress. In its view, “[t]here is ... no reason to believe that an IJ's summarily affirmed decision contains the sort of authoritative and considered statutory construction that *Chevron* deference was designed to honor.”

Having denied *Chevron* deference, the court then applied *Skidmore* to the IJ's decisions. The court found the IJ decisions did not “possess any persuasive power” and remanded the cases to the BIA for a definitive agency view of whether boyfriends and fiancés are eligible for asylum. In a final nod to administrative law precedents, the court quoted *SEC v. Chenery Corp.* to support its remand and stated that, short of remanding the case to the BIA for further clarification, it could not “‘be compelled to guess at the theory underlying [a particular] agency’s action; nor ... chisel that which must be precise from what the agency has left vague and indecisive.’”

Importantly, without *Mead*, the outcome in *Lin* may have been very different. Applying the *Chevron* standard to the question at hand, the issue would have been “whether the agency's answer is based on a permissible construction of the statute.” In other words, were the IJs’ interpretations of the asylum statute to preclude boyfriends and fiancés from relief a permissible construction of the statute? Since the text of INA § 101(a)(42) does not specifically mention boyfriends, fiancés, or even husbands of women forced to undergo abortion, the IJs’ interpretations may well have been permissible under the *Chevron* test and therefore worthy of judicial deference. Without *Mead*, a court would have little choice but to uphold the BIA’s affirmances.

Thus, in a rare blow to the usually formidable stature of agency decisions reached through formal adjudication, the Second Circuit used *Mead* to withhold *Chevron* deference to an agency even where the agency had offered the petitioner a formal hearing and review upon appeal. To those who read the *Mead* decision as a court-endorsed rubber stamp on formal adjudication and rulemaking, the Second Circuit's holding may come as a surprise.

This survey on how the circuits apply *Mead* in immigration cases ends with the Ninth Circuit, which has quite a renegade history of interpreting immigration issues not first addressed by the BIA. It appears that where *Mead* analysis is concerned, the circuit does not deviate from its reputation. Like *Lin*, *Padash v. INS* involved a circuit court's rejection of the IJ's interpretation (affirmed by the BIA) of a provision of the INA. Instead of properly applying the *Mead* threshold questions, the court in *Padash* did not possess any persuasive power and remanded the cases to the BIA for a definitive agency view of whether boyfriends and fiancés are eligible for asylum. In a final nod to administrative law precedents, the court quoted *SEC v. Chenery Corp.* to support its remand and stated that, short of remanding the case to the BIA for further clarification, it could not “‘be compelled to guess at the theory underlying [a particular] agency’s action; nor ... chisel that which must be precise from what the agency has left vague and indecisive.’”

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In other words, the enactment of agency procedures alone is not dispositive in deciding whether the agency will receive *Chevron* deference. In that respect, *Lin* presents the flip side to Justice Souter's words in that here, although the BIA followed its formal procedures, it failed to demonstrate through its summary affirmation the “fairness and deliberation” that *Mead* requires courts to locate before granting deference. Thus, it appears that at least in the Second Circuit, the BIA cannot expect deference without first administering meaningful review.

### C. The Outlier -- The Ninth Circuit's Misappropriation of Interpretive Powers in *Ali Padash v. INS* and *Thomas v. Gonzales*

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however, the Ninth Circuit used Mead only for its revitalization of the Skidmore standard so that it could reach its own conclusion without deferring to the agency.

Ali Padash petitioned for review of a BIA denial of his application for asylum and withholding of deportation, as well as a denial of adjustment of status. While he conceded to overstaying his temporary visa and being deportable, Padash requested asylum because he feared persecution in India and Iran. The IJ found Padash failed to establish past persecution or a well-founded fear of future persecution and denied his claim. While Padash appealed this decision, a permanent resident visa that Padash's uncle filed on his behalf in 1984 became available. Padash moved to expedite and reopen the deportation proceedings, arguing that he was entitled to adjust his status. The BIA granted Padash's motion in April of 1996 and remanded the case for the IJ to determine the new adjustment of status issue. At the second hearing, the IJ found that Padash's status could not be adjusted because he turned twenty-one on May 21, 1996 and no longer met the definition of “child” under INA § 101(b). On February of 2002, the BIA affirmed all of the IJ’s decisions, including the determination that Padash was not eligible to adjust his status because he no longer met the definition of “child.” Notably, the BIA did not summarily affirm the IJ’s decisions but rather explained each of its conclusions in detail, referring to specific facts in Padash’s history where necessary to reinforce its decision.

Upon review by the Ninth Circuit, the court separated the asylum and withholding of deportation issue from the adjustment of status issue, affirming the first and reversing the second. In reviewing the asylum and deportation issue, the court applied the “substantial evidence” standard to the IJ’s findings of fact and confirmed that the evidence did not compel a finding in favor of the petitioner. The adjustment of status issue, however, hinged upon the interpretation of a 2002 statute that provides “age-out” protection for individuals who were children when they first applied for permanent residence. Specifically, the outcome depended on whether “final determination” as used in the Child Status Protection Act of 2002 means “final determination of the matter [by a court] or final determination by the agency involved.” By affirming the IJ's decision, the BIA interpreted “final determination” as meaning the final determination by the agency involved. Not only did the court decline to defer to the agency interpretation on the second question, it wrestled the power of interpretation away from the agency.

The Ninth Circuit was certainly not oblivious to the history of Skidmore, Chevron, and Mead. In fact, it cited all three in its discussion of the standards of review. On its face the issue before the court was relatively simple. Applying Mead, the court should first ask whether Congress delegated authority to the agency to make rules carrying the force of law. The answer, as the Second Circuit in Lin discussed, is clearly yes. Second, was the BIA’s interpretation of “final determination” promulgated in the exercise of that authority? The answer here appears to be affirmative as well. Unlike Lin, the BIA did not summarily affirm the IJ’s decision but rather reviewed it as part of the standard appeals process. Thus, Padash does not present an issue where the circuit court must decide whether Congress delegated authority to the agency to make rules carrying the force of law. Rather, the BIA’s affirmation was the conclusion of a formal adjudication that followed the agency's standard procedures. Assuming the agency determination satisfied the Mead threshold questions, the court should have then applied the first step of the Chevron inquiry to determine whether Congress’s intent was ambiguous. Unless Congress clearly intended “final determination” to mean determination by the courts, the Ninth Circuit should have deferred to the agency's interpretation.

In actuality, it appears that the Ninth Circuit in Padash ignored Mead, misapplied Chevron, and capitalized on Skidmore to reach its result. The court began by noting that the INS “did not present any arguments or supporting authority that would suggest that the agency itself had thoroughly considered the issue and taken a ‘reasoned and consistent’ view of the Act or that [its] position was anything more than a ‘convenient litigating position.’” Rather than remanding to the agency for clarification (the course
of action taken by the Second Circuit in *Lin*, the Ninth Circuit conducted “independent research”\(^{129}\) and discovered an internal agency memorandum that defined “final determination” as “agency approval or denial.”\(^{130}\) The court then found this agency interpretation to be “entirely unpersuasive” because “the INS's construction is not supported by any analysis or reason and therefore lacks any indicia of the type of considered decisionmaking that [the Court] find[s] worthy of deference,” and that “the agency's construction is contrary to the policy and purposes of the Act and to the intent of *675 Congress.*”\(^{131}\) Finally, having completely dismissed the agency's position, the court defined “final determinations” itself, arguing that “deference is not required” because the court could “ascertain congressional intent by employing ‘traditional tools of statutory construction.’”\(^{132}\)

The Ninth Circuit’s denial of deference based on an internal agency memo that was neither relied upon nor produced by one of the parties could not be further from a proper application of existing judicial deference standards. First, the definition of “final determination” was arguably ambiguous, since as the court noted the INS had yet to take a stand on the issue. As such, the court should have remanded for clarification. Alternatively, the court could have given deference to the BIA's affirmance if it equated the affirmance with an agency interpretation that carried with it the effect of law.\(^{133}\) Finally, if the court wanted to withhold deference, it should have explained why an internal agency memorandum did not encompass the authority delegated by Congress to make it worthy of *Chevron* deference. In fact, the court chose none of the above approaches and jumped directly into a *Skidmore* balancing test that led it to conclude the agency memorandum was unpersuasive.\(^{134}\) Thus, in a cavalier fashion typical of the Ninth Circuit, the court overruled the agency's position in not one but two forms and chose to interpret the statute in the way that it believed to be best.

It would be easy to argue that *Padash* resulted from a renegade Ninth Circuit panel. However, a decision in 2005 reinforced the Ninth Circuit's approach to judicial deference. In *Thomas v. Gonzales*,\(^ {135}\) the Ninth Circuit met en banc to resolve an intra-circuit conflict on whether a family constitutes a “particular social group” for purposes of qualifying for asylum.\(^ {136}\) The petitioners were all members of a South African family that received violent threats due to their kinship ties to a locally well-known racist foreman.\(^ {137}\) The issue involved the BIA's denial\(^ {138}\) of Thomas's request for asylum and withholding of removal because the IJ determined that Thomas failed to sufficiently prove she and her family suffered persecution based on any of the five statutory grounds listed in the immigration statute.\(^ {139}\) Up until this point, there was an intra-circuit split regarding whether families qualified as a “particular social group” for asylum purposes.\(^ {140}\) The circuit met to finalize the interpretation of the statute in question.

Rather than arguing for deference to its interpretation of a “particular social group,” the government contended that the issue was unexhausted at the agency level because the IJ's opinion only analyzed the petitioners' claim in relation to the “race” and “political opinion” grounds of the asylum statute.\(^ {141}\) The court flatly rejected this contention and held that despite its claim, the BIA had actually faced the issue at the administrative level, even if it had failed to fully analyze the ground at issue, because the BIA had the petitioners' record on appeal and “had a full opportunity to review the record ... before summarily affirming the IJ's decision.”\(^ {142}\)

Having settled the jurisdictional question, the court then interpreted INA § 101(a)(42)(A) by discussing previous BIA decisions that set out the “particular social group” test.\(^ {143}\) The en banc opinion then discussed other circuits' determinations that a family may constitute a social group.\(^ {144}\) The court concluded that “a family may constitute a social group for the purposes of the refugee statutes,”\(^ {145}\) noting that “[o]ur holding defers to both the BIA's stated interpretation of the statutory phrase ‘particular social group,’ and the BIA's precedent.”\(^ {146}\)
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Yet was this any kind of deference at all? How could the court rule against the government and at the same time state that it was deferring to the government's interpretation? Four judges dissented in part from the majority opinion to raise this question of deference. Judge Rymer, writing for the dissent, noted that “the issue whether a nuclear family, without more, is a ‘particular social group’ has never been vetted by the Board of Immigration Appeals.” Though the majority claimed to defer to the BIA’s interpretation, no such interpretation actually exists. While the BIA defined “social group” in past opinions as “a group of persons all of whom share a common, immutable characteristic ... such as sex, color, or kinship ties,” the Board has never interpreted the language to apply directly to a nuclear family like the Thomases. Yet the Ninth Circuit chose to interpret for itself the language’s application, and it did so with the conscious intention of establishing a uniform doctrine within the circuit.

Only the dissenting opinion seemed to have taken the issue of deference seriously. Even if the issue was exhausted at the administrative level, the dissent argued, the court nevertheless should not have ventured beyond the interpretation that the BIA provided and should have remanded for further clarification, rather than decide for itself. Judge Rymer argued, “We have no business deciding such a question without the BIA’s having first addressed it because we owe deference to the BIA’s interpretation and application of the immigration laws.” Specifically, the court owed “Chevron deference to the BIA’s interpretation of the immigration laws” and should “remand a case to an agency for decision of a matter that statutes place primarily in agency hands. This principle has obvious importance in the immigration context.”

IV. THE LANDSCAPE OF IMMIGRATION LAW AFTER UNITED STATES V. MEAD

Despite the voluminous scholarship predicting the impact that Mead would have upon the interplay between agencies and the courts, it appears that it has had a minimal effect on immigration law. There are many potential explanations for why the circuit courts have not produced more opinions that discuss how Mead affects their decisions whether to defer to the immigration agency. Given the formal adjudicatory nature of all BIA decisions, perhaps some courts do not believe Mead enacts any additional barriers to granting Chevron deference in most appeals of BIA decisions. Others may place more emphasis on the importance of deferring to the agency on immigration questions than whether such deferral is permissible from an administrative law standpoint. Or maybe some courts simply do not understand how Mead applies to immigration law.

Mead notwithstanding, most circuits continue to afford Chevron deference to the BIA without discussion of whether the BIA’s decisions are promulgated within its congressional authority to make rules carrying the force of law. Even where courts find that the BIA's decision does not provide an adequate basis for meaningful review, they sometimes nonetheless defer to the IJ’s interpretation rather than remand or reverse as long as the IJ’s interpretation was “reasonable.” Yet if under Mead the IJ does not have the authority to promulgate rules, how could the court defer to its interpretation of a statute, especially when it recognizes that it has “not yet addressed the question?” Were courts to properly apply Mead in such instances, the agency may not necessarily receive Chevron deference.

All is not lost, though, where Mead and immigration collide, as at least one circuit seems to understand how Mead may affect judicial review of the current immigration system. The Second Circuit’s decision in Lin allowed the court tactfully to reject sloppy agency procedures without treading upon the agency’s authority to interpret the INA, an authority that the Supreme Court has strongly endorsed in cases like INS v. Aguirre-Aguirre and INS v. Ventura. Without going so far as to find the procedures unconstitutional or to differ substantively from the agency’s position, Mead allowed the Second Circuit to neither affirm nor reject a substantive ruling by the agency. Rather, the court pointed out legitimately inadequate procedural lapses,
remanded to the agency for evaluation of the substantive issues, and ensured that the petitioner received the “fairness and deliberation” that he or she deserved.

In modern U.S. jurisprudence, it is difficult to imagine an agency that enjoys more deference, at least in theory, than the agencies charged with administering immigration law. In fact, whenever the courts review an immigration question, it is well understood that the ultra-political nature of immigration issues require courts generally to grant greater deference and accord less scrutiny than they would afford other agencies. Nowhere has this heightened sensitivity to immigration issues been articulated more plainly than in the Supreme Court, where a clear line of cases consistently calls for deference to the immigration agency’s interpretation of its own substantive statutes. Yet the deference standards and tests set by the Court in other areas of administrative law, namely *Chevron* and *Mead*, inevitably intertwine with immigration jurisprudence to create a complex set of deference standards whose applications may vary depending on individual circuits' interpretation of their meaning.

As this paper has discussed, many circuit courts continue to accord *Chevron* deference to BIA decisions without any meaningful discussion of how *Mead* affects their analysis. Moreover, the formal adjudicatory nature of BIA decisions often shields them from remand or reversal even where the court does consider *Mead*. However, a more discerning approach to applying *Mead* in immigration reviews may sometimes force the BIA to either act meaningfully and within its congressionally delegated authority or risk losing *Chevron* deference. Justice Scalia may well have been right when he predicted in his dissenting opinion in *Mead* that “[w]e will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, for years to come.” In the meantime, as courts continue to distill standards of judicial deference in immigration law, it seems that the significance of *Mead* is truly in the eye of the beholder.

Footnotes

a1 J.D. candidate, Cornell Law School, 2007; B.A., Yale University, 2003; Note Editor, Volume 92, Cornell Law Review. I thank Professor Stephen Yale-Loehr for his generous and helpful input throughout. I also very much appreciate the Georgetown Immigration Law Journal's great work on my Note. Finally, I thank my parents and Michael Graham for their years of gracious support.


4 Fact Sheet, Department of Justice, Board of Immigration Appeals: Final Rule (Aug. 23, 2002) available at www.usdoj.gov (last visited Oct. 30, 2005). The new rule also includes a provision replacing the BIA's previous “de novo” standard of review for examining immigration judges' factual findings with the more deferential “clearly erroneous” standard. See id. Supporting its decision, the Department of Justice cited a retired Board Member's testimony before the House Judiciary Committee, in which the member testified that the “overwhelming percentage of immigration judge decisions ... [are] legally and factually correct.” Id.


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Each of the three standards warrants thorough discussion in this section. Although usually only the most recent standard would have legal significance, Mead revives Skidmore and calls for lower courts to apply each standard according to circumstance.

322 U.S. 111 (1944). Here, the Supreme Court decided how much deference the Court would give to an agency's judgment in interpreting and applying its organic statutes. Where the agency's determination falls within its statutorily authorized scope, a court is to accept its determination if it has warrant in the record and a reasonable basis in law. See id. Though a casual reading of the case may lead one to conclude that the court readily defers to agency determinations, Justice Rutledge's opinion actually takes care to remind the reader of the judiciary's greater powers of statutory interpretation: “[u]ndoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute.” Id. at 130-31. This suggests that whether the court ultimately defers to the agency's determination may have as much to do with the language of the organic statute as with judicial deference standards generally.

340 U.S. 474 (1951). In this case the Supreme Court laid out for the lower courts the standard by which to review issues of fact in formal agency adjudications. The court must assess whether the agency's decision is supported by substantial evidence upon the record considered as a whole. The court should set aside the agency's decision only when the record clearly precludes the decision from being justified. See id.

323 U.S. 134 (1944).

See id. at 136-40 (discussing the weight owed the agency when preexisting statutes and court decisions are silent regarding the validity of the agency determination).

Id. at 139-40.

Id. at 136-37.

Id. at 140 (emphasis added).


See 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) (“[Chevron] can be seen as a device for managing the courts of appeals that can reduce (although not eliminate) the Supreme Court's need to police their decisions for accuracy.”).


Id. at 842-43.
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23 See, e.g., Mark Seidenfeld, A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes, 73 TEX. L. REV. 83, 84 (1994) (“The Chevron ‘two-step’ has revolutionized judicial review of agency statutory interpretation.”); Cass R. Sunstein, Law and Administration After Chevron, 90 COLUM. L. REV. 2071, 2075 (1990) ( “[Chevron] has established itself as one of the very few defining cases in the last twenty years of American public law.”).

24 See Adrian Vermeule, Mead in the Trenches, 71 GEO. WASH. L. REV. 347 (2003) (“[T]he key innovation of Chevron is to create a global interpretive presumption: ambiguities are, without more, taken to signify implicit delegations of interpretive authority to the administrative agency.”); Womack, supra note 10, at 297 (“[T]he Supreme Court in Chevron based deference on the fiction that Congress has delegated to the agency the authority to speak in absence of language to the contrary.”).

25 See Womack, supra note 10, at 297 (“The ability of an agency to speak absent an express intent of Congress gives the agency wide discretion due to the low likelihood that Congress will ever speak with unambiguous intent on a particular issue being litigated before a court.”); Thomas W. Merrill, Judicial Deference to Executive Precedent, 101 YALE L.J. 969, 977 (1992) (“Chevron transformed a regime that allowed courts to give agencies deference along a sliding scale into a regime with an on/off switch.”).

26 See Sunstein, supra note 23, at 2075 (“Chevron has altered the distribution of national powers among courts, Congress, and administrative agencies.”); Womack, supra note 10, at 298 (suggesting that Chevron necessarily creates an institutional hierarchy in which agencies’ power to interpret and make decisions exceed that of the judiciary).

27 See Michael G. Heyman, Immigration Law in the Supreme Court: The Flagging Spirit of the Law, 28 J. LEGIS. 113, 113 (2002) (explaining that the scarcity of wins for aliens seeking protection in court is due to the Court’s interpretation of relevant regulations, statutes, and documents).

28 Id. at 113-14.

29 See id. at 116 (“Despite the disconnect between Chevron and the reality of administrative immigration decision-making, and the absence of any real locus of decision-making within the entire immigration system, the Court has deferred to those decisions least favorable to aliens.”). See also id. at 116-24 (providing three examples of recent Supreme Court decisions involving immigration law in which the Court deferred to agency interpretations on dubious Chevron grounds).


31 Id. at 226-27.

32 See id. at 230.

33 See id. at 231.

34 Id. at 229-30. This passage seems to suggest that even after Mead, a court will generally defer to formal agency adjudications that afford the plaintiff access to a complete record and multi-step review. As the next section discusses, some circuits have adopted this reading, while others treat the BIA’s recent streamlining procedure as an exception to this rule. See infra Section III.

35 See Vermeule, supra note 24, at 348.

36 See Mead, 533 U.S. at 226-27.

37 Id. at 221.

38 Id. at 231-32.

39 Id. at 232. One year before Mead, the Court held that agency interpretations contained in an opinion letter do not warrant Chevron deference. See Christensen v. Harris County, 529 U.S. 576 (2000).

40 Id. at 235 (quoting Skidmore, 323 U.S. at 140).
Chevron was widely criticized as being incompatible with the nature of separation of powers. See Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 488 (1989) (“[T]hat Congress may give agencies primary responsibility ... for defining [the limits of their organic statutes where ambiguities exist] ... is fundamentally incongruous with the constitutional course by which the Court came to reconcile agencies and separation of powers.”).

Mead, 533 U.S. at 236.

Vermeule, supra note 24, at 355.

Id. at 356. See also Thomas W. Merrill, The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards, 54 ADMIN. L. REV. 807, 833 (2002) (“[Mead] treats ‘force of law’ as (at most) a standard to be applied by looking to a variety of factors. The Court’s decision to treat ‘force of law’ as a standard rather than a rule is regrettable.”).

See Womack, supra note 10, at 317-18; David J. Barron & Elena Kagan, Chevron’s Nondelegation Doctrine, 2001 SUP. CT. REV., 201, 204 (2001) (“Given the difficulty of determining actual congressional intent, some version of constructive–or ... fictional–intent must operate in judicial efforts to delineate the scope of Chevron.”).


I came about this number by doing a LexisNexis search of all courts of appeals decisions that cite Mead and contain the words “immigration” and “BIA.” In contrast, the circuit courts have cited Mead in non-immigration contexts 346 times. To put these disproportional numbers into perspective, one must realize that 15 percent of the circuit courts’ caseload consisted of immigration appeals by 2003, and the number of BIA appeals have continued to rise since then. See Stanley Mailman & Stephen Yale-Loehr, Immigration Appeals Overwhelm Federal Courts, N.Y.L.J. Dec. 27, 2004, at 3.

I derived this number from searching in LexisNexis for all court of appeals decisions that cite Chevron and contain the words “immigration” and “BIA.”

These circuits are the First, Fourth, Sixth, and Eighth Circuits. I include the Eighth Circuit in this category because Eusebio does not cite Mead for its deference standard but rather for its articulation of the general standard of review. See infra note 54.

See infra Section A.

See infra note 56 and accompanying text.

Mead, 533 U.S. at 230.

For example, the deference standard articulated in INS v. Aguirre-Aguirre, 526 U.S. 415 (1999), has been cited by the circuit courts reviewing BIA decisions ninety times since Mead was promulgated. The standard articulated in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), has been cited twenty-three times. I reached these numbers by searching in LexisNexis for circuit court decisions since 2001 that review BIA decisions and cite these Supreme Court cases’ headnotes that refer to deference standards.

See Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003). The other two cases are Eusebio v. Ashcroft, 361 F.3d 1088 (8th Cir. 2004), where the court cited Mead only to articulate the standard of review (“We review the BIA's legal determinations de novo ... giving due deference to the administrative agency's interpretation of the statute.” Mead, 533 U.S. at 227-28), and Gill v. Ashcroft, 335 F.3d 574 (7th Cir. 2003), where the court cited Mead but decided that it need not reach the deference question (“It is unnecessary for us to determine how far Chevron ... applies to the Board's adjudicatory (as opposed to rulemaking) decisions after Mead ... the agency is still entitled to a significant measure of discretion.”).

288 F.3d 254 (5th Cir. 2002).
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56 See id. at 257. It does not appear that this was a summary affirmance. While the court's opinion does not mention how the BIA reviewed the Immigration Judge's decision, the decision was reached in April of 2002, which was before the BIA's streamlining initiatives had truly taken place. The significance of BIA summary affirmances are discussed in greater detail infra in Section B.

57 Id. at 259 n.3.

58 Id.

59 Mead, 533 U.S. at 229.

60 Id. at 230 (emphasis added).

61 381 F.3d 221 (3d Cir. 2004).

62 See id. at 223; infra note 79 and accompanying text.

63 See Chen, 381 F.3d at 223.

64 See id. at 223-24. As the latest addition to the Supreme Court, Judge Alito's views on deference take on added significance. For a survey of Judge Alito's stance on deference generally, see Adam Liptak, Alito's Dissents Show Deference to Lower Courts, N. Y. TIMES, Nov. 3, 2005, at A2 (“One theme that runs through Judge Alito's dissents is deference to the views of the people and the agencies closest to the facts and thus, in his view, best situated to make decisions.”).

65 Chen, 381 F.3d at 223-24 (quoting Mead, 533 U.S. at 226-27).

66 Id. at 224.

67 350 F.3d 666 (7th Cir. 2003).

68 See id.

69 See id. at 668.

70 See id. at 671-72.

71 See id. at 671.

72 Id.

73 See id.

74 See supra notes 31, 36 and accompanying text.

75 See Omagah, 288 F.3d at 257.

76 See Mead, 533 U.S. at 218.

77 416 F.3d 184, 188-89 (2d Cir. 2005).

78 See id.


80 Shi Liang Lin, 416 F.3d. at 188 (quoting Matter of C-Y-Z-, 21 I. & N. Dec. 915 (BIA 1997)).

81 Id. (quoting Cai Luan Chen v. Ashcroft, 381 F.3d 221, 225 (3d Cir. 2004)).
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82 See id. at 188-89.
83 Id. at 188 (quoting IJ decision).
84 See id.
85 Id. at 188 (quoting IJ decision).
86 Id.
87 See id. at 189.
88 Id. (emphasis in original).
89 Id. (emphasis in original).
90 See Mead, 533 U.S. 218.
91 Lin, 416 F.3d at 189.
92 See id. (quoting Mead, 533 U.S. at 226-27).
93 Id. at 190.
94 Id.
95 Id.
96 Id.
97 Id. (emphasis in original).
98 Id.
99 Id. (citing 8 C.F.R. § 1003.1(e)(4)).
100 See id. at 190-92.
101 Id. at 191.
102 See id. at 191. See also Mead, 533 U.S. at 235 (remanding to lower court for application of Skidmore deference where the Court refused to bestow Chevron deference to an agency determination).
103 Lin, 416 F.3d at 191-92.
104 Id. at 192 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947)). The Supreme Court asserted in Chenery that a court reviewing an agency decision will only consider the validity of the grounds that the agency proffers the court for its decision. Should those grounds fail, the court will not supply more reasonable grounds on the agency's behalf but rather strike down the agency's decision as a whole. See Chenery, 332 U.S. 194.
105 Chevron, 467 U.S. at 843.
For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well
founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.


Id. at 230.

See INS v. Ventura, 537 U.S. 12 (2002) (reversing the Ninth Circuit's denial of remand to the BIA where the Ninth Circuit decided an asylum issue that the BIA had not first addressed and holding that where statutes place the decision of a matter in agency hands, the court of appeals should apply the ordinary remand rule); INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) (holding that the Ninth Circuit failed to properly defer to the BIA's interpretation of the serious non-political crime exception and that Chevron deference should be accorded so long as the agency's actions are based on a permissible construction of the statute); INS v. Wang, 450 U.S. 139 (1981) (finding that the Ninth Circuit had encroached upon the Attorney General's authority by substituting its own interpretation of “extreme hardship” for that of the Board's).

358 F.3d 1161 (9th Cir. 2003).

See id. at 1163.

See id.

See id. at 1164.

Padash was the derivative beneficiary of a visa that his uncle had filed for Padash's father. See id.

See id.

See id.


Padash, 358 F.3d at 1165.

See id.

See id.

See id. at 1165-67.

See id. at 1167.

Pub. L. No. 107-208, 116 Stat. 930 (codified at 8 U.S.C. § 1151). The relevant subsection stated that the Act would apply to an alien beneficiary of “a petition for classification under section 204 of the Immigration and Nationality Act (8 U.S.C. 1154) approved before such date but only if a final determination has not been made on the beneficiary's application for an immigrant visa or adjustment of status to lawful permanent residence pursuant to such approved petition” (emphasis added).

Padash, 358 F.3d at 1168.

See id. at 1167-74.

See id. at 1168-69.

See Mead, 533 U.S. at 226-27.

Padash, 358 F.3d at 1168.

Id.
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130 See id. (discussing Memorandum for Regional Directors, Immigration Services Division, Office of International Affairs (Feb. 14, 2003)).

131 Id. at 1168.

132 Id.

133 See Mead, 533 U.S. 218.

134 See Padash, 358 F.3d at 1168.

135 409 F.3d 1177 (9th Cir. 2005) (en banc).

136 The particular provision of INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) reads:

The term “refugee” means: (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

137 Thomas, 409 F.3d at 1180-81.

138 The BIA's decision was made through yet another affirmation without opinion of the IJ's determination.

139 See Thomas, 409 F.3d at 1181-82.

140 See id. at 1188.

141 See id. at 1182-83.

142 Id. at 1184.


144 See Thomas, 409 F.3d at 1186.

145 Id. at 1187.

146 Id.

147 Id. at 1189-90 (Rymer, J., dissenting).

148 Matter of Acosta, 19 I. & N. Dec. at 233. Though family ties and kinship ties are arguably synonymous in common usage, the issue was the BIA's traditional interpretation of “kinship ties” as applying to broad tribal links rather than nuclear family relationships, and whether nuclear families such as the Thomases could reasonably fall within the “kinship ties” category. Cf. Matter of Fauziya Kasinga, 21 I. & N. Dec. 357, 365 (BIA 1996) (defining petitioner's social group as “young women who are members of the Tchamba-Kunstuntu Tribe of northern Togo who have not had [female genital mutilation]”).

149 See Thomas, 409 F.3d at 1191 (Rymer, J., dissenting).

150 Id. at 1190 (Rymer, J., dissenting).

151 Id. at 1192 (Rymer, J., dissenting).

152 Id. (Rymer, J., dissenting) (quoting INS v. Ventura, 537 U.S. 12, 16-17 (2002)).

153 See, e.g., Onwuegbuzie v. Ashcroft, 80 F. App'x 904 (5th Cir. 2003).
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154 See, e.g., Onwuegbuzie v. Ashcroft, 80 F. App'x 904 (5th Cir. 2003) (“Although ..., the standard of review [for questions of law] is de novo, we must give deference to the BIA in making its determination ... Therefore, we should ask ‘whether the agency’s answer is based on a permissible construction of the statute’ and if so, we must defer to the agency's interpretation.”).

155 See Cruz-Funez v. Gonzales, 406 F.3d 1187, 1191 (10th Cir. 2005) (“Given [the Board's failure to provide a basis of review], we may remand for clarification or for the Board to follow its own procedures, or we may consider the IJ's report, as did the Sixth Circuit in Gjyzi, to determine whether the IJ has provided an adequate basis for meaningful review.”). See also Albathani v. INS, 318 F.3d 365 (1st Cir. 2003) (criticizing one-line summary affirmances for making it impossible for courts to tell whether BIA members are in fact engaging in the requisite review, but nonetheless affirming the BIA's decision).

156 Cruz-Funez, 406 F.3d at 1191.


159 See supra text accompanying notes 1-3. Though the issue is beyond the scope of this paper, the possibility exists for an interesting comparison to the application of Chevron deference in the military context. See Jonathan Masur, A Hard Look or a Blind Eye: Administrative Law and Military Deference, 56 HASTINGS L. J. 441 (2005).


161 Mead, 533 U.S. at 239 (Scalia, J., dissenting).

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