Immigration and Nationality Act — Mandatory Detention — Chevron *Deference* — Nielsen v. Preap

Immigration law is, and long has been, an anomaly within the American legal landscape.[1] Arguably no other public law domain is "so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."[2] In 1996, Congress enacted 8 U.S.C. § 1226(c), which mandates the detention of immigrants who have committed certain crimes "when [they are] released" from criminal custody.[3] Last Term, in *Nielsen v. Preap*,[4] the Court held that the phrase "when . . . released" from § 1226(c) mandates the detention of qualifying immigrants years after their release from criminal custody. In doing so, the Court continued its commitment to "immigration exceptionalism"[5] — or, more specifically, immigration detention exceptionalism. In *Preap*, the Court once again exempted its review of an immigration detention matter from generally applicable legal norms, but declined an opportunity to clarify its rationale for doing so.

Section 1226 contains "two provisions governing the arrest, detention, and release of aliens . . . believed to be subject to removal."[6] One of these provisions — § 1226(a) — grants the government the authority to arrest an alien "pending a decision on whether the alien is to be removed."[7] Subsection 1226(a) also affords the government discretion in determining whether to release such aliens on bond "[e]xcept as provided in subsection (c)."[8] The second provision — § 1226(c) — contains two paragraphs. The first paragraph mandates the detention of aliens with certain characteristics — for instance, convictions for certain predicate offenses — "when the alien[s are] released" from criminal custody.[9] Subsection 1226(c)'s second paragraph generally prohibits the government from releasing aliens "described in paragraph (1)."[10]

In 2006, Mony Preap was released from criminal custody after serving time for two drug convictions, both of which were predicate offenses

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[1] *See generally* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 593–614 (2017).

[2] Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984).

[3] 8 U.S.C. § 1226(c) (2012).

[4] 139 S. Ct. 954 (2019).

[5] *See* Rubenstein & Gulasekaram, *supra* note 1, at 585.

[6] *Preap*, 139 S. Ct. at 959.

[7] 8 U.S.C. § 1226(a).

[8] *Id.* If the government decides to detain the alien, a federal regulation entitles the alien to challenge his detention in a bond hearing. *See* 8 C.F.R. § 236.1(d)(1) (2019).

[9] 8 U.S.C. § 1226(c)(1).

[10] *Id.* § 1226(c)(2).

under § 1226(c)(1).[11] Immigration authorities did not detain him upon release.[12] Years later, Preap was arrested for a different crime — one that did not qualify him for mandatory detention under 8 U.S.C. § 1226(c) — and upon release was transferred to an immigration detention facility, where the government held him without a bond hearing.[13] Preap and two co-plaintiffs filed a class action complaint for habeas relief in the Northern District of California, alleging that they were not subject to mandatory detention under § 1226(c) because they were not detained immediately upon their release from criminal custody.[14] The district court granted the plaintiffs' motion to certify and entered a preliminary injunction against the government.[15] In a similar suit filed in the Western District of Washington, plaintiffs filed a class action complaint challenging their detention without bond hearings.[16] There, the district court certified a class comprising "aliens who were subjected to mandatory detention under 8 U.S.C. § 1226(c) even though they were not detained immediately upon their release from criminal custody."[17] The Washington district court also held that § 1226 mandates detention only for aliens detained "immediately" after their release from criminal custody.[18]

The Ninth Circuit affirmed both district court rulings.[19] Writing for a unanimous panel in affirming the Northern District of California, Judge Nguyen[20] concluded that § 1226's subsections (a) and (c) established two different sources of release authority, each with a separate set of predicates and instructions for detention and release.[21] The court also held that subjecting aliens arrested years after their release from criminal custody to mandatory detention "fail[ed] to do justice to the statute's structure" because it decoupled § 1226(c)(1)'s arrest directive from § 1226(c)(2)'s general prohibition on release.[22]

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[11] *Preap*, 139 S. Ct. at 961.

[12] *Id.*

[13] *See id.*

[14] *See id.*

[15] Preap v. Johnson, 303 F.R.D. 566, 587 (N.D. Cal. 2014). The certified class encompassed "[i]ndividuals in the state of California who are or will be subjected to mandatory detention under 8 U.S.C. section 1226(c) and who were not or will not have been taken into custody by the Government immediately upon their release from criminal custody for a Section 1226(c)(1) offense." *Id.* at 584.

[16] *Preap*, 139 S. Ct. at 961.

[17] Khoury v. Asher, 667 F. App'x 966, 967 (9th Cir. 2016).

[18] *See* Khoury v. Asher, 3 F. Supp. 3d 877, 887–88 (W.D. Wash. 2014).

[19] The panel affirmed the California district court in *Preap v. Johnson*, 831 F.3d 1193 (9th Cir. 2016), and summarily affirmed the other case in *Khoury v. Asher*, 667 F. App'x 966.

[20] Judge Nguyen was joined by Judges Kleinfeld and Friedland.

[21] *See Preap*, 831 F.3d at 1201.

[22] *Id.* at 1202.

The Supreme Court reversed.[23] Justice Alito delivered the lead opinion, writing for the Court on the key statutory interpretation issue and for a three-Justice plurality on several jurisdictional questions and an alternative holding. Leading the fractured Court, Justice Alito emphasized the plain meaning, structure, and grammar of the statutory text.

Writing for a three-Justice plurality, Justice Alito[24] first considered four jurisdictional issues. First, the plurality concluded that 8 U.S.C. § 1226(e)[25] did not preclude review of the plaintiffs' claims,[26] pointing to Justice Alito's plurality opinion in *Jennings v. Rodriguez*,[27] which maintained that the statute permits review of "the extent of the Government's detention authority under the 'statutory framework' as a whole."[28] Second, the plurality determined that 8 U.S.C. § 1252(b)(9)[29] did not present a jurisdictional bar.[30] Third, the plurality concluded that it "need not decide" whether the district court in the Northern District of California exceeded its statutory authority by certifying a class of aliens that included some aliens who had not yet faced mandatory detention.[31] Last, the plurality asserted that the plaintiffs' claims were not moot.[32] The plurality thus concluded that the Court had jurisdiction to consider the plaintiffs' merits claims.

Then, writing for the Court, Justice Alito[33] turned to the text of § 1226. Paragraph 1226(c)(1) mandates the detention of "any alien" who meets the criteria specified by subparagraphs (A)–(D) "*when* the alien is released."[34] Paragraph 1226(c)(2) generally forbids the "release [of] an alien *described* in paragraph (1)."[35] To determine whether the plaintiffs were "alien[s] described in paragraph (1)," the majority divided paragraph (1) into four parts: "a verb ('shall take'), an adverbial clause ('when . . . released'), a noun ('alien'), and a series of adjectival clauses ('who . . . is inadmissible,' 'who . . . is deportable,' etc.)."[36] Using these

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[23] *Preap*, 139 S. Ct. at 959.

[24] Justice Alito was joined by Chief Justice Roberts and Justice Kavanaugh in this part (Part II) of the opinion.

[25] Subsection 1226(e) exempts the "[government's] discretionary judgment regarding the application of [§ 1226]" from judicial review. 8 U.S.C. § 1226(e) (2012).

[26] *See Preap*, 139 S. Ct. at 961–62 (opinion of Alito, J.).

[27] 138 S. Ct. 830 (2018).

[28] *Preap*, 139 S. Ct. at 962 (opinion of Alito, J.) (quoting *Jennings*, 138 S. Ct. at 841).

[29] Subsection 1252(b)(9) provides that questions "arising from any action taken or proceeding brought to remove an alien from the United States" may be judicially reviewed only upon "a final order." 8 U.S.C. § 1252(b)(9).

[30] *Preap*, 139 S. Ct. at 962 (opinion of Alito, J.); *see also Jennings*, 138 S. Ct. at 841.

[31] *Preap*, 139 S. Ct. at 962 (opinion of Alito, J.).

[32] *See id.* at 962–63.

[33] Justice Alito was joined by Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh in this section of the opinion (Parts III-A and III-B-1).

[34] 8 U.S.C. § 1226(c)(1) (emphasis added).

[35] *Id.* § 1226(c)(2) (emphasis added).

[36] *Preap*, 139 S. Ct. at 964 (quoting 8 U.S.C. § 1226(c)(1)).

classifications, the majority held that because an adverb, by definition, may not modify a noun, § 1226(c)(1)'s adverbial clause ("when . . . released") cannot modify — and therefore cannot "describe" — which aliens the government must immediately arrest.[37]

Nonetheless, the majority contended that its conclusion "[was] not dependent on a rule of grammar."[38] Pointing to the dictionary definition of "describe," the majority maintained that the adverbial clause could "play[] no role in identifying for the [government] which aliens [it] must immediately arrest" because, if the clause did play such a role, it would produce an incoherence — it would make the arrest of aliens upon release both the ultimate duty of the government and a criterion for determining when the duty obtains.[39]

Next, the Court rejected the Ninth Circuit's conclusion that § 1226(a) and § 1226(c) "establish[] separate sources of arrest and release authority."[40] Instead, the Court read subsection (c) as a limit on the discretion conferred by subsection (a).[41] Two inferences, said the majority, supported such a reading. First, subsection (a)'s general authorization explicitly excepts decisions "as provided in subsection (c),"[42] and there would be "no need" for such language if subsection (c) were a separate source of authority altogether.[43] Second, the majority noted that subsection (c)(2) does not contain phrases like "'under authority created by' (c)(1)"[44] — rather, subsection (c)(2) merely refers to aliens "described in" subsection (c)(1).[45]

Writing again for a plurality, Justice Alito[46] proposed an alternative holding. He asserted that even if the Ninth Circuit were correct that subsections (a) and (c) establish separate founts of authority to arrest and that subsection (c) requires immediate arrest, the plaintiffs would still be subject to mandatory detention under § 1226(c)(1).[47] The plurality noted that the Court "ha[s] held time and again" that "an official's crucial duties are better carried out late than never."[48] Unless a statute "specif[ies] a consequence for noncompliance with statutory timing provisions," wrote the plurality, courts should not preclude later action,[49]

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[37] *Id.*
[38] *Id.* at 964–65.
[39] *Id.* at 965 (emphasis omitted).
[40] *Id.* at 966.
[41] *Id.*
[42] *Id.* (quoting 8 U.S.C. § 1226(a) (2012)).
[43] *Id.*
[44] *Id.*
[45] *Id.* (quoting 8 U.S.C. § 1226(c)(2)).
[46] Here, in Part III-B-2 of the opinion, Justice Alito was again joined by Chief Justice Roberts and Justice Kavanaugh.
[47] *See Preap*, 139 S. Ct. at 967 (opinion of Alito, J.).
[48] *Id.* (citing Sylvain v. Attorney Gen., 714 F.3d 150, 158 (3d Cir. 2013)).
[49] *Id.* (quoting Barnhart v. Peabody Coal Co., 537 U.S. 149, 159 (2003)).

especially where the "deadline will often be missed for reasons beyond the Federal Government's control."[50]

Last, the Court[51] addressed several counterarguments. The majority first asserted that its reading did not violate the canon against surplusage, arguing that the "when . . . released" clause served two purposes: first, it forbade the government from "cut[ting] short an alien's state prison sentence in order to usher him more easily right into immigration detention,"[52] and second, it "exhort[ed] the [government] to act quickly."[53] Next, the majority maintained that a contrary reading would lead to "bizarre result[s]," including being "gentler on terrorists than . . . on garden-variety offenders."[54] Finally, the majority held that the constitutional avoidance canon did not apply because the statute was not ambiguous, but preserved the possibility of considering as-applied challenges to the statute.[55]

Justice Kavanaugh concurred, emphasizing the "narrowness" of the Court's holding.[56] On his account, the "sole question" before the Court was "whether . . . the Executive Branch's mandatory duty to detain a particular noncitizen when the noncitizen is released from criminal custody remains mandatory if the Executive Branch fails to *immediately* detain the noncitizen."[57]

Justice Thomas[58] concurred in part. He asserted that there were at least three bars to the Court's review. First, because "'[d]etention is necessarily a part of [the] deportation procedure' that culminates in the removal of the alien," § 1252(b)(9) barred judicial review.[59] Second, he maintained that § 1226(e) barred review because the statutory text contains no exception for challenges to the statutory framework as a whole.[60] Third, Justice Thomas argued that § 1252(f)(1) barred the class certified by the Northern District of California.[61] Last, he suggested that the plaintiffs' claims might be moot.[62]

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[50] *Id.* at 968. Citing data, the plurality also noted that "state and local officials sometimes rebuff the Government's request that they give notice when a criminal alien will be released." *Id.*

[51] In this section of the opinion (Part IV), Justice Alito wrote for a majority including Chief Justice Roberts and Justices Thomas, Gorsuch, and Kavanaugh.

[52] *Preap*, 139 S. Ct. at 969.

[53] *Id.*

[54] *Id.* at 970.

[55] *See id.* at 971–72.

[56] *Id.* at 972 (Kavanaugh, J., concurring).

[57] *Id.* at 973.

[58] Justice Thomas was joined by Justice Gorsuch.

[59] *Preap*, 139 S. Ct. at 974 (Thomas, J., concurring in part and concurring in the judgment) (alterations in original) (quoting Carlson v. Landon, 342 U.S. 524, 538 (1952)).

[60] *Id.* at 975.

[61] *Id.*

[62] *See id.* at 975–76.

Justice Breyer[63] dissented. He contended that aliens not detained a reasonable time after release must be afforded a bond hearing.[64] Taking issue with the majority's equation of the verb "describe" with "modify," Justice Breyer contended that "describe" has a broader meaning than "modify" in most contexts.[65] Moreover, Justice Breyer emphasized three structural points: first, paragraph (c)(2)'s reference to all of paragraph (1), rather than just the adjectival clauses; second, the parallel structure of subsections (a) and (c); and third, the enactment of a "transition statute" after the law including § 1226 was passed.[66] He further argued that constitutional avoidance should apply, that the statute did indicate a consequence — a bond hearing — for noncompliance with § 1226(c)(1)'s deadline, and that the government should be allowed a presumptive six months after release to detain under subsection (c).[67]

Immigration law has long been considered "a constitutional oddity."[68] The immigration detention context, in particular, has become a proverbial black hole of due process norms. In *Preap*, the Court exempted its review of an immigration detention matter from another, central legal norm: deference to agency interpretations of statutes. In opting not to apply the *Chevron*[69] doctrine to the agency's interpretation of an immigration detention statute, the majority instead deferred to the executive branch by means of a different tool — the "better late than never" rationale. By doing so, the Court ironically accomplished what *Chevron* also aims to achieve: judicial respect for agency policy decisions. The substitution of the "better late than never" reasoning for *Chevron* fits a larger pattern within the Court's immigration detention cases — in fact, in each of the last two Terms, the Court has silently excluded *Chevron* from an immigration detention case. Yet, given a chance to clarify the Court's rationale for omitting *Chevron* from immigration detention matters, the *Preap* majority declined the opportunity.

Scholars have called immigration law "exceptional,"[70] "a maverick," and "a wild card."[71] Indeed, the Court's holdings in immigration cases have often rested on logic that excepts the immigration context from general constitutional norms.[72] The Court has explicitly acknowledged

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[63] Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

[64] *See Preap*, 139 S. Ct. at 977 (Breyer, J., dissenting).

[65] *See id.* at 979.

[66] *See id.* at 980–81.

[67] *See id.* at 982–84.

[68] Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255.

[69] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[70] Rubenstein & Gulasekaram, *supra* note 1, at 584.

[71] Schuck, *supra* note 2, at 1.

[72] *See* Rubenstein & Gulasekaram, *supra* note 1, at 584–88; *see also, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) ("Unlike the typical suit involving religious displays or school prayer, plaintiffs seek to invalidate a national security directive regulating the entry of aliens abroad."); Fiallo v.

as much, noting that its immigration jurisprudence is stock full of "rules that would be unacceptable if applied to citizens."[73] As one example, the Court has held that border searches constitute an exception to the Fourth Amendment's general warrant requirement.[74] At most, a border search requires a showing of individualized suspicion.[75]

As *Preap* reaffirmed, the Court's due process jurisprudence also deems immigration detention exceptional. Mandatory detention for immigrants constitutes an exception to the general requirement that confinement be supported by an individualized showing of flight risk or dangerousness.[76] Although the Court has indicated that indefinite immigration detention may be unconstitutional,[77] it has time and again underscored the principle that mandatory detention pending a removal proceeding generally does not violate due process. Decisions in each of the Court's last two Terms — *Jennings* and *Preap* — further endorsed this principle. In *Jennings*, the Court rejected a constitutional-avoidance reading of § 1226(c) that would have required a bond hearing after six months of detention.[78] Again and again, the *Jennings* and *Preap* majorities cited favorably *Demore v. Kim*,[79] in which the Court held mandatory detention pending a removal proceeding constitutional.[80] As Justice Kavanaugh noted in his *Preap* concurrence, the constitutionality of mandatory immigration detention is now "undisputed."[81]

The *Preap* Court's treatment — or nontreatment — of the executive branch's interpretive authority was similarly exceptional — even compared to other immigration law cases. In immigration cases, the Court typically ensures proper respect for executive-branch policymaking through a posture of deference.[82] And given that the *Preap* Court was considering a question of statutory interpretation that the Board of

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Bell, 430 U.S. 787, 806–07 (1977) (Marshall, J., dissenting) (observing the majority's exceptional treatment of the immigration context relative to equal protection norms).

73 Demore v. Kim, 538 U.S. 510, 521 (2003) (quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976)).

74 *See* United States v. Ramsey, 431 U.S. 606, 616–19 (1977).

75 *See* Note, *The Border Search Muddle*, 132 HARV. L. REV. 2278, 2280–81 (2019); *see also* Recent Case, United States v. Touset, *890 F.3d 1227 (11th Cir. 2018)*, 132 HARV. L. REV. 1112, 1116 (2019).

76 *See Demore*, 538 U.S. at 521–31.

77 Zadvydas v. Davis, 533 U.S. 678, 699 (2001).

78 Jennings v. Rodriguez, 138 S. Ct. 830, 846 (2018).

79 538 U.S. 510.

80 *Id.* at 531; *see also* Peter Margulies, *Supreme Court Reinforces Mandatory Detention of Immigrants*, LAWFARE (Mar. 20, 2019, 1:12 PM), https://www.lawfareblog.com/supreme-court-reinforces-mandatory-detention-immigrants [https://perma.cc/94GX-WAQP] ("[T]he substance and tone of [Justice Alito's] opinion suggested that future constitutional challenges to mandatory immigration detention would face formidable obstacles.").

81 *Preap*, 139 S. Ct. at 973 (Kavanaugh, J., concurring). *But see id.* at 982 (Breyer, J., dissenting).

82 *See* Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 517–21 (2019).

Immigration Appeals (BIA) had authoritatively resolved,[83] *Chevron* deference would seem relevant to the Court's analysis. This is perhaps why both parties briefed the *Chevron* issue,[84] the lower courts analyzed the issue under the *Chevron* framework,[85] and other courts of appeals to consider the question reckoned with *Chevron*.[86] Yet one of the few things that garnered the agreement of all nine Justices of the *Preap* Court was the apparent (but silent) conclusion that *Chevron* did not apply to the case — nowhere in any of the Court's four opinions was *Chevron* mentioned.

Instead, the *Preap* majority protected executive power by means of a different tool. All members of the majority seemed to endorse an application of a "better late than never" rationale, even if only a plurality did so explicitly. Justices Thomas and Gorsuch did not join in the plurality's specific quotation of *United States v. Montalvo-Murillo*,[87] the case in which the rationale was first born.[88] But they nonetheless joined the part of the Court's opinion that repudiated application of the canon against surplusage to the "when . . . released" clause.[89] According to the majority, that clause is not mere surplusage for two reasons: first, because it forbids the government from cutting short a state prison sentence, and second, because it "exhort[s] the [government] to act quickly."[90] The first reason alone is insufficient to defeat application of the canon against surplusage because if Congress wished only to prevent the government's interfering with a criminal sentence, the more natural choice of adverb would be "after," not "when." And if a merely exhortative provision is not surplusage, there is, in effect, no legally enforceable deterrent to the government's failure to meet its statutory duty. Thus, although subtly, a majority of the *Preap* Court paid homage to the "better late than never" rule.

The *Preap* Court's application of the "better late than never" reasoning gave effect to *Chevron*'s rationale of leaving important policy questions to "the agency charged with the administration of the statute in

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[83] Rojas, 23 I. & N. Dec. 117, 124–25 (B.I.A. 2001) (en banc).

[84] *See* Brief for the Petitioners at 39–41, *Preap*, 139 S. Ct. 954 (No. 16-1363); Brief for Respondents at 43–46, *Preap*, 139 S. Ct. 954 (2019) (No. 16-1363); Reply Brief for the Petitioners at 19–21, *Preap*, 139 S. Ct. 954 (No. 16-1363).

[85] *See* Preap v. Johnson, 831 F.3d 1193, 1200, 1203 n.14 (9th Cir. 2016); Preap v. Johnson, 303 F.R.D. 566, 575, 580–82 (N.D. Cal. 2014); Khoury v. Asher, 3 F. Supp. 3d 877, 883 (W.D. Wash. 2014).

[86] *See* Lora v. Shanahan, 804 F.3d 601, 610–13 (2d Cir. 2015); Olmos v. Holder, 780 F.3d 1313, 1317–24 (10th Cir. 2015); Sylvain v. Attorney Gen., 714 F.3d 150, 156–57 (3d Cir. 2013); Hosh v. Lucero, 680 F.3d 375, 378–81 (4th Cir. 2012).

[87] 495 U.S. 711 (1990).

[88] *See id.* at 718–19.

[89] *See supra* p. 396 and note 51.

[90] *Preap*, 139 S. Ct. at 969.

light of everyday realities."[91] The "better late than never" rationale, of course, is narrower than the *Chevron* framework insofar as it only concerns statutes that impose deadlines.[92] Nonetheless, the rationale protects executive power in similar ways. Like *Chevron*, the rationale is motivated by a belief in the executive branch's superior position in allocative decisionmaking — the idea that "strict enforcement of statutory deadlines can exacerbate agency resource constraints to the point of threatening an agency's ability to carry out its substantive duties."[93] Likewise, if the executive branch truly has the power to "complete" a statutory scheme,[94] that power would be seriously frustrated by enforceable deadlines that could not be met for reasons outside the executive branch's control. This intuition likely actuated Justice Alito's allusion to "state and local officials . . . rebuff[ing] the Government's request that they give notice when a criminal alien will be released."[95] Such reasoning jibes with the Court's tradition of reluctance in reviewing agency decisions not to enforce.[96]

Again, the *Preap* Court's puzzling substitution of the "better late than never" rationale for *Chevron* fits a broader pattern within the Court's immigration detention jurisprudence. The omission of *Chevron* is typical of the Court in recent immigration detention cases: *Chevron* is ignored (or at least not faithfully applied), review is nominally de novo, and the government often wins.[97] As Professor Michael Kagan observes, this pattern tends to present itself only in immigration cases related to detention or deportation — in other immigration cases, the Court usually applies *Chevron*.[98] Yet, because what the Court says about *Chevron*'s applicability and what the Court does in practice are two different things, lower courts routinely assume that *Chevron* applies in immigration detention cases.[99] This dissonance is as unique as it is mysterious. In each of the past two Terms, the Court considered a case

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91 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

92 Also, because the Court applied the "better late than never" rationale in its de novo interpretation of the statute, the government may not in the future deviate from the Court's interpretation in light of different enforcement priorities. This inflexibility also distinguishes the rationale from *Chevron*, which would allow the agency more discretion if the Court deemed the government interpretation "reasonable" at *Chevron* Step Two. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005).

93 Kirti Datla, Note, *The Tailoring Rule: Mending the Conflict Between Plain Text and Agency Resource Constraints*, 86 N.Y.U. L. REV. 1989, 2020 (2011).

94 *See* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006).

95 *Preap*, 139 S. Ct. at 968 (opinion of Alito, J.).

96 *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831 (1985).

97 *See* Kagan, *supra* note 82, at 529.

98 *Id.* at 495.

99 *See* Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 163–66 (2015).

in which it could have plausibly dispelled any uncertainty. In each case, it declined to do so.[100]

Moreover, it seems clear that the Court's omission of *Chevron* is not a result of *Chevron*'s silent application to cases the Court considers — rather, the Court is purposely ignoring and declining to apply *Chevron*. At face value, several recent immigration detention decisions like *Jennings* and *Preap* could plausibly be read as "Step One" decisions — in other words, as decisions that applied *Chevron* but determined that there was no ambiguity.[101] But this argument is unpersuasive upon further scrutiny. The Court clearly knows how to mention *Chevron* where it plainly seems to apply, even where it is not determinative. In *Esquivel-Quintana v. Sessions*,[102] a deportation case, the Court concluded that it "ha[d] no need" to apply *Chevron* because the statute was unambiguous.[103] But the Court's refusal to apply *Chevron* in immigration detention (and deportation) cases cannot be explained exclusively through determinations that the statute in question was unambiguous. For instance, in *Mellouli v. Lynch*,[104] another deportation case, the Court held that a Board of Immigration Appeals interpretation did not merit *Chevron* deference because it "ma[de] scant sense"[105] — entirely glossing over Step One. After *Preap*, both the Court's habit of omitting *Chevron* from its review of immigration detention matters and the puzzles surrounding that omission remain.

Every day, more than 30,000 people in the United States await their removal hearings in "prison-like" immigration detention facilities.[106] The legal basis of their detention is a constitutional outlier. In *Preap*, the Court reaffirmed a jurisprudence that increasingly defies the prevailing norms of due process and judicial deference to agency interpretations. While immigration law's norm-defying character is well established, *Preap* confirms that immigration detention is perhaps the most exceptional area of one of American law's most exceptional domains. But immigration detention exceptionalism comes with its mysteries — mysteries that will be solved only, if ever, in future Terms.

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100 *See* Kagan, *supra* note 82, at 535; *see also supra* p. 400.

101 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("If the intent of Congress is clear, that is the end of the matter." *Id.* at 842.).

102 137 S. Ct. 1562 (2017).

103 *Id.* at 1572.

104 135 S. Ct. 1980 (2015).

105 *Id.* at 1989.

106 Preap v. Johnson, 831 F.3d 1193, 1195 (9th Cir. 2016).