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Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law

Daniel Kanstroom*

Among the many problems facing U.S. immigration law is a crisis of discretion and judicial deference. Through two recently passed laws, the United States Congress and the President have seriously limited judicial review of discretionary immigration decisions of the Board of Immigration Appeals. This Article focuses on this preclusion of judicial review of discretionary agency decisions. The Article begins with an examination of discretion from a theoretical perspective, and goes on to examine areas of immigration law in which discretion was traditionally most important. That examination is followed by a discussion of immigration-law scholarship and critique. The Article concludes that what is needed in U.S. immigration law is greater restraint, and calls on the Judiciary to provide more oversight regarding discretionary agency decisions.

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I. INTRODUCTION

If judicial review of administrative orders depriving noncitizens of the opportunity to live in the United States is an essential part of the rule of law, then 1996 may well become known as the year in which the rule of immigration law died. Cresting a wave of anti-immigrant sentiment, a Republican Congress and a Democratic administration have passed the most fundamental statutory restructuring of immigration law in two hundred years. Among the central features of this legislation is a severe limitation of judicial review. Two separate laws, the Antiterrorism and Effective Death Penalty Act of 19961

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1. Pub. L. No. 104-132, 110 Stat. 1214 (1996). Section 440(a) of the AEDPA amended section 106(a) of the Immigration and Nationality (McCarran-Walter) Act (INA), 8 U.S.C. § 1105a, to provide that “[a]ny final order of deportation against an alien who is deportable by reason of having committed” one of a number of listed criminal offenses “shall not be subject to review by any court.” Id. § 440(a), 110 Stat. at 1276-77.
(AEDPA); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996\(^2\) (IIRIRA), combine to stifle the emerging dialogue between the judiciary and the Immigration and Naturalization Service\(^3\) (INS) and to create a largely unregulated administrative environment. Challenges to the AEDPA and the IIRIRA, based upon the Due Process Clause and the separation of powers principles of Article III, section 1 of the Constitution, will have to be resolved by the judiciary unless the legislative and executive branches retreat from the constitutional brink. This Article, however, focuses on one particular feature of the new immigration laws—their preclusion of judicial review of many so-called discretionary agency decisions.\(^4\) It

\(^2\) Pub. L. No. 104-208, 110 Stat. 3009 (1996). The IIRIRA replaces what were formerly known as “exclusion” and “deportation” procedures with a new entity called “removal.” Section 306 of the IIRIRA then provides that judicial review of a final order of removal shall, in general, be “governed only by chapter 158 of title 28 of the United States Code” with certain procedural modifications. *Id.* § 306(a). Section 302 of the IIRIRA amended section 235 of the Immigration and Nationality Act, 8 U.S.C. § 1225, to create a new expedited system of inspection of “aliens arriving in the United States and certain other aliens who have not been admitted or paroled.” *Id.* § 302(b). This category could include aliens who are in the United States but who were not granted “lawful entry . . . into the United States after inspection and authorization by an immigration officer.” *Id.* § 301(a) (amending Immigration and Nationality Act § 101(a)(13), 8 U.S.C. § 1101(a)(13)). Unless such a person is an asylum-seeker or can show to the satisfaction of an immigration officer that she has been physically present in the United States for two years immediately prior to the date of determination of inadmissibility, then “the officer shall order the alien removed from the United States without further hearing or review.” *Id.* § 302(b) (emphasis added). IIRIRA section 306 provides that “no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1).” *Id.* § 306(a). The only exception is that judicial review may be available in habeas corpus proceedings. But this review is limited to determining “whether the petitioner is an alien,” “whether the petitioner was ordered removed,” and “whether the petitioner can prove by a preponderance of the evidence” she is a legal permanent resident, was admitted as a refugee, or was granted asylum, “and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 235(b)(1)(C) [which authorizes the Attorney General to provide by regulation for administrative review of such claims].” *Id.* § 306(e). Judicial review of determinations under section 235(b) is, however, available in the United States Court for the District of Columbia, but is limited to determining constitutional challenges to the statute or implementing regulations, and whether regulations, policy directives, guidelines, or procedures are “consistent with applicable provisions of this title or . . . otherwise in violation of law.” *Id.*


\(^4\) IIRIRA section 306(a)(2) amended section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252 to provide that no court shall have jurisdiction to review—
begins with the assumption that this part of the regime of the AEDPA and the IIRIRA is so unfair, and so divorced from our best traditions of constitutional democracy, that it will not last long. It is of course impossible to predict whether change will result from judicial or legislative action. A recent opinion of the Supreme Court indicates that legislative reform may be more likely than judicial. But the complete preclusion of a judicial role in decisions of this magnitude, affecting in many cases legal permanent residents and their U.S. citizen families, will come to be seen, the Article (perhaps optimistically) assumes, as the transitory excess of government actors who, as Henry Hart once put it, "knew not Joseph."

Prior to this year, much immigration-law scholarship examined the ways in which immigration law has become a unique enclave, largely isolated from other areas of public law. A common general

(i) any judgment regarding the granting of relief under section 212(h), 212(i) [discretionary waivers of grounds of inadmissibility], 240A [discretionary "cancellation of removal"], 240B [voluntary departure], or 245 [adjustment of status], or
(ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [asylum].

The IIRIRA also provides that no court shall have the power to review any final order of removal against an alien that is based on most criminal offenses. Id.

5. See INS v. Yueh-Shaio Yang, 117 S. Ct. 350, 352 (1996) (stating that the Immigration and Nationality Act of 1994 "establishes certain prerequisites to eligibility for a waiver of deportation, [but] it imposes no limitations on the factors that the ... INS ... may consider in determining who, among the class of eligible aliens, should be granted relief").

6. Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1389-91 (1953) (referring to Supreme Court justices who did not believe that "courts had a responsibility to see that statutory authority was not transgressed, that a reasonable procedure was used ... and ... that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion").


approach of this scholarship was to consider the uniqueness of
immigration law from the perspective of "mainstream" constitutional
protections and, sometimes, from that of other deep social, political,
or cultural values. The conclusion, phrased in a wide variety of ways,
has been that immigration law is a "neglected stepchild," a "maverick," "a constitutional oddity," and so on. As one writer once put it, "[p]robably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."

Primary responsibility for this state of affairs was generally laid at
the doorstep of the so-called "plenary power doctrine," pursuant to
which courts exhibit extraordinary constitutional deference to
Congress and the Executive in immigration matters. The solution
which was often proposed is a constitutional reintegration of
immigration with other fields of law, with the expectation that this
would result in closer judicial scrutiny and a better system of law.

This Article, though strongly sympathetic to much that
undergirds this scholarly tradition, reconsiders two of its most basic
assumptions: (1) that the primary cause of immigration law's
problems is the plenary power doctrine and (2) that the modification of
that doctrine would necessarily result in meaningful reform. The
mildly heretical nature of this inquiry requires some preliminary
justification. My first point is a rather simple one. There are
surprisingly few instances in contemporary, real-life immigration
practice in which the plenary power doctrine, as such, has a dispositive

10. THOMAS ALONSO ARLENIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS
AND POLICY at xvii (1985).
12. Legomsky, supra note 7, at 255.
13. See generally Charles D. Weisselberg, The Exclusion and Detention of Aliens:
(discussing the dissonance between contemporary principles of substantive due process and
the plenary power doctrine).
15. See Motomura, Plenary Power, supra note 8, at 261-69; Motomura, The
Curious Evolution, supra note 8, at 1626; Weisselberg, supra note 13, at 939.
bite. This is not to say that those cases are not poignant and important. Indeed, in many ways they are the most egregious examples of a basic problem with U.S. immigration law. Occasionally, in cases like *Fiallo* v. *Bell*, an unsuccessful challenge to a provision of the Immigration and Nationality Act that discriminated against certain illegitimate children and their fathers, the doctrine may have very broad effects. However, apart from such (rather rare) constitutional challenges, and certain cases involving the detention of excludable aliens, where it is often conclusive, the plenary power doctrine can be better understood as part of a shifting constellation of interpretive and rhetorical devices which have developed in the field.


19. The doctrine itself is not simple and is comprised of subparts which can be distinguished. It may be seen to include principles of federal supremacy over the states, allocations of authority between the executive and legislative branches, and judicial deference to Congress and the Executive. See Weisselberg, *supra* note 13, at 939; see also Thomas Alexander Aleinikoff & David A. Martin, *Immigration: Process and Policy* 1-39 (2d ed. 1991) (discussing the development of and bases for the plenary power doctrine); Stephen H. Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 180-222 (1987); Schuck, *supra* note 11, at 14-18. This complexity may partially account for the occasional judicial tendency to invoke the plenary power doctrine even in cases which do not seem to require this sort of trump card. See, e.g., *Sale* v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210, 212, 215 (1953). It may also account for the differential application of the doctrine in cases involving the exclusion of aliens versus deportation cases, and for differences in the way the doctrine applies to “substantive” and “procedural” constitutional claims. (I place the term substantive in quotation marks to emphasize that it is a highly ambiguous, though often-used word. Generally, when used in this context, it seems primarily to refer to equal protection and First Amendment review as opposed to procedural due process.) See Motomura, *The Curious Evolution, supra* note 8, at 1628-29.

20. Another formalist doctrine—the so-called “civil-criminal distinction”—appears in immigration law with at least equal regularity and force. The effects of this doctrine range from denying aliens the right to jury trials in deportation cases, to denying them the right to appointed counsel, to insulating immigration law from the Ex Post Facto Clause, and more. See *Galvan* v. *Press*, 347 U.S. 522, 530-31 (1954) (holding that the Ex Post Facto Clause does not apply to deportation cases); *Carlson* v. *Landon*, 342 U.S. 524 (1952). See generally Schuck, *supra* note 11, at 24-27. As early as 1893 the Supreme Court determined that an order of deportation “is not a punishment for crime.” *Fong Yue Ting* v. United States, 149 U.S. 698, 730 (1893). Later, in a more piquant formulation, Justice Holmes
This constellation has been defined as much by the ascent of the extremely amorphous concept of discretion as by the lack of a "substantive" constitutional parameter. In one sense discretion is a kind of shadow concept, a contentless gap-filler which lacks significant affirmative meaning. Viewed in another way, however, it offers a fresh perspective from which U.S. immigration law might be understood. Indeed, U.S. immigration law in practice may be best described as a fabric of discretion and judicial deference. Many provisions of statutory immigration law are expressly called discretionary. Other aspects of immigration law as practiced are

asserted that deportation is not punishment, "it is simply a refusal by the Government to harbor persons whom it does not want." Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

21. One might also focus on judicial deference as a concept apart from the plenary power doctrine, though it is somewhat harder. After all, deference seems to be just another way for a court to say, "we decline to undertake a close review of this decision." Weisselberg, supra note 13, at 1011-19. Further, deference means something very different in the constitutional context than in its usage for the review of administrative decisions more generally. As discussed more fully below, decisions of administrators are reviewed under the Administrative Procedure Act (APA), Pub. L. No. 79-404, § 10, 60 Stat. 237, 243-44 (1946) (codified as amended in scattered sections of 5 U.S.C.). The APA distinguishes levels of judicial review among findings of fact ("substantial evidence"), 5 U.S.C. § 706(2)(E) (1994); questions of law (independent determination authorized), id. § 706(2)(A)-(D); and discretionary decisions ("arbitrary, capricious, [or] an abuse of discretion"), id. § 706(2)(A). See infra Part III.A.4. for a fuller discussion of these standards. If I am correct that "substantive" constitutional doctrine, even if more fully incorporated into immigration law, might not have either predictable or salutary effects, then we might have reason to see deference as an idea with weight of its own. Judicial decisions can certainly be read this way. In one of the first decisions to recognize that noncitizens within the United States have at least some procedural due process protections, the Supreme Court also reaffirmed the power of Congress to confer "finality" upon the fact-finding power of the executive immigration officers of the time. See Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892). Three years later, when a Chinese noncitizen sought to challenge certain exclusion laws as violative of due process, those claims were rejected with the holding that supervision of immigration was not within the province of the judiciary. See Lem Moon Sing v. United States, 158 U.S. 538, 547-549 (1895). More recently, even in cases in which the argument seems exceptionally strained, the Court has sometimes sought to justify deference by linking immigration decisions to foreign policy concerns. See Fiallo, 430 U.S. at 796; Mathews v. Diaz, 426 U.S. 67, 81-82 (1976). This sort of reasoning is related to, but different from, the pure "no-rights" rhetoric of Chinese Exclusion or Dred Scott. It may correctly be seen as ultimately derived from the plenary power idea—a practical manifestation and consequence of that doctrine. But there has also been an evolution of the idea of deference itself—part of the dialogue, sometimes constitutional sometimes subconstitutional, about the relationship between courts and agencies in immigration law. This evolution is worth considering in its own light because the concept of deference is as deep as that of plenary power, and will likely survive even if the discredited doctrine of Chinese Exclusion does not. See generally Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853 (1987) (noting that the doctrine of Chinese Exclusion is a relic from a different era of constitutional law).

22. See infra Part III.B.
considered by courts to be discretionary, but there is no consensus about what this means. Indeed, although some systematic attention has recently been paid by immigration-law scholars to certain strands of this fabric, the historic confusion runs deep. Especially in light of the AEDPA and IIRIRA, what is needed, and what this Article seeks to begin to develop, is a "unified field theory" of immigration-law discretion.

A good starting point for such a theory is the often-asked question of what discretion generally means in the legal system of the United States. A common answer to this question seeks to distinguish discretion from rules. This dichotomy, however, is problematic in two ways. First, as many writers have demonstrated, the term "rule" is itself highly ambiguous. It requires its own "standard for standards," and can refer to many different types of legal phenomena, such as presumptions, factors, standards, guidelines,

23. See infra Part IV. A LEXIS search of the "IMMIG/COURTS" database using the key word "discretion!", for example, yielded 7,050 case entries. This search was undertaken on May 17, 1995. This is, of course, hardly empirical proof of the assertion that discretion is the centerpiece of immigration legal practice. Still, in light of the many forms of so-called "discretionary relief" as contested issues in real cases, the frequent invocation of the term in various contexts supports a deeper inquiry into its meaning and history. See infra Part IV. However, although it also appears explicitly some 584 times in the three major statutes governing immigration law, no statutory definition of the term has been enacted and little regulatory limitation has been attempted. See 42 U.S.C. Titles 8, 29, 42 (1994). Further, many statutory provisions use terms such as "may" to achieve a discretionary result. See infra Part IV.B.1.


27. See, e.g., 1 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 6 (2d ed. 1979); see also Peter L. Strauss, The Rulemaking Continuum, 41 DUKE L.J. 1463, 1466-68 (1992) (discussing various activities identified as "rulemaking").
principles, and so on. Since the definition of discretion in this model is derived residually from that of rules, this ambiguity hinders a precise definition of the latter term. Discretion, as Ronald Dworkin once famously put it, "like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."  

A more functional or pragmatic definition of discretion simply views it as the "'power to make a choice between alternative courses of action.'' This approach does not solve the theoretical ("doughnut") problem, although it may have the virtue of directing attention from abstraction to practice. The implication of either definition is that while there may be a "correct" answer to a rule-like question of law or fact, there is probably no such thing as a uniquely correct discretionary decision. There may, however, be clearly incorrect applications of discretion such as those which are unauthorized or arbitrary. The most basic problems of discretion are thus how to define and restrain its abuse without destroying its non-rule-like character, while maintaining its legitimacy within the legal community.

However difficult it has been in other fields to understand discretion, immigration law has proven remarkably resistant to any consistent understanding of the concept. This Article will suggest that this difficulty has largely been due to inconsistent usages of the term by administrative adjudicators and the judiciary. For example, the word "discretion" has been used to describe administrative adjudication of applications for so-called "discretionary" forms of relief from deportation; whether a motion to reopen proceedings has established a prima facie case for relief; whether new evidence in support of such a motion is material, was not available, and could not have been presented at a former hearing; so-called policy-based

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28. See generally Sunstein, supra note 25, at 956-67 (discussing a spectrum of legal tools, including rules, presumptions, factors, standards, guidelines, and principles).


31. See infra Part III.A.1.


33. See Abudu, 485 U.S. at 104-05; see also 8 C.F.R. § 3.2 (1996).
decisions of the Attorney General; \(^{34}\) and factual determinations by immigration judges, as well as a wide variety of other legal decisions. Though it is apparent that these forms of discretion are very different, courts and commentators have not developed a taxonomy to capture those differences. The need for such a taxonomy has never been greater, however, as the IIRIRA has adopted the discretionary designation as the code word for the preclusion of judicial review. Even before 1996, discretionary applications for relief from deportation were adjudicated so stringently that one U.S. court of appeals went so far as to assert that the Board of Immigration Appeals may have had an "unauthorized policy" of denying relief to drug offenders without actually exercising discretion at all.\(^ {35}\) The Board has vehemently denied that this is true,\(^ {36}\) but under some theories of discretion, such a policy might actually be permissible.

Pressures such as these have recently compelled judges and legal scholars to grapple with the definitional problem of immigration-law discretion. In his concurrence and dissent in the case of \textit{INS v. Doherty}, for example, Justice Scalia (joined by Justices Stevens and Souter) was deeply troubled by the confusion over different types of discretion, and sought to distinguish what he termed "merits-deciding" discretion from other forms.\(^ {37}\) A related issue was presented to the Court in \textit{INS v. Elramly},\(^ {38}\) which raised the difficult question of whether the asserted \textit{failure} of the Board of Immigration Appeals to exercise discretion in a case-by-case adjudicatory manner may be overturned by a reviewing court.\(^ {39}\)

Justices Scalia, Stevens, and Souter took an important first step in \textit{Doherty} by highlighting the need to parse the concept of discretion more finely than the Court has done in the past. This Article seeks to follow that lead and to suggest that an even deeper understanding of discretion would greatly improve U.S. immigration law. Different meanings of the term in statutes, regulations, and case law can be distinguished, and anachronistic usages can be discarded. This new taxonomy may help us to understand and to systematize apparently


\(^{35}\) De Gonzalez v. INS, 996 F.2d 804, 810-11 (6th Cir. 1993).


\(^{37}\) 502 U.S. at 329-34 (Scalia, J., concurring in part and dissenting in part).


\(^{39}\) See \textit{infra} Part IV.B.3. The author was counsel of record for amici curiae in \textit{Elramly}. 

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disparate lines of cases, to improve judicial review, and to
organize proposals for change.

I do not wish to contest the emerging optimistic scholarly
consensus that U.S. immigration law is at a constitutional
crossroads as the plenary power doctrine erodes.40 It is not so
much the fact but the significance of this change that might be
questioned. For one thing, as others have noted,41 the current
tendency of the federal courts is to resolve many difficult issues
by statutory rather than constitutional interpretation.42 Even
"transformations"43 in constitutional macrostructure could leave
immigration law unchanged in important ways,44 and more
constitutional "mainstreaming" will not transform the
fundamentally discretionary quality of immigration law.
Immigration practice is now, and will likely remain, much more
discretionary, more ad hoc, and much less judicially regulated45

40. See Legomsky, supra note 7, at 297-99, 303-05; Motomura, The Curious
Evolution, supra note 8, at 1631; Schuck, supra note 11, at 34, 54.
41. See William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993
42. Some scholars, in fact, have begun to criticize the increasing tendency of courts
not to treat immigration cases as unique. In a recent article, for example, Kevin Johnson
criticized a Supreme Court decision in which it appeared that "a deportation order should
receive no more scrutiny by a reviewing court than a rate-setting decision." Kevin R.
Johnson, Responding to the "Litigation Explosion": The Plain Meaning of Executive
points out that in three immigration cases decided in 1991 the Court used a "plain meaning"
approach to side with the INS. Id. at 418. "Yet, remarkably, when the plain meaning of the
text tended to support the immigrant's position, the Court considered a wealth of extra­
textual evidence, much of it of doubtful trustworthiness, to vindicate the INS position." Id.
at 419.
43. See Schuck, supra note 11, at 54, 75.
44. Indeed, a degree of constitutional incorporation has long been the norm in many
areas of immigration legal practice. Apart from "exclusion" cases which involve the legal
fiction that the person has not "entered" the United States, our courts, for the most part, have
formally extended at least modified constitutional protections to noncitizens. See Daniel
Kanstroom, Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get into
obviously does not guarantee any particular result. In fact, immigration law also contains
examples of judicial ability to skirt the plenary power doctrine. See, e.g., INS v. Chadha,
462 U.S. 919, 939 (1983) (holding a "legislative veto" unconstitutional); Francis v. INS,
532 F.2d 268 (2d Cir. 1976) (holding that Immigration and Nationality Act, as applied,
violated equal protection).
45. See Schuck, supra note 11, at 3; see also LAURENCE H. TRIBE, AMERICAN
CONSTITUTIONAL LAW 355-61 (2d ed. 1988) (discussing extent of judicial deference to
Congress on immigration matters); Henry M. Hart, Jr., The Power of Congress to Limit
Jurisdiction of the Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362, 1387­
96 (1953) (discussing the Court's refusal to scrutinize exclusion cases for due process since
Congress has not expressly authorized judicial review in such circumstances); Developments
than many other legal areas where the stakes are not nearly so high.46

The critical focus on meta-constitutional diagnoses of the problems of U.S. immigration law sometimes overlooks this subconstitutional reality. Too exclusive a focus on constitutional doctrine can lead to an essentialist tendency to assume that incorporation of immigration law within prevailing “mainstream” constitutional doctrine would lead to more predictable results which would be more favorable to noncitizens. Although most careful writers in the field have been aware of this problem,47 the importance of the subconstitutional concept of discretion has sometimes been overlooked. Indeed, apart from the structuralist argument that immigration law should be “mainstreamed”48 in order “to provide a

46. Part of the difficulty may be the absence of any specific constitutional provision which defines the governmental power to control immigration. The need to fill this gap through judicial intervention has resulted in a system which is very technical and subtle, full of constitutional insulation, legal fictions, anachronisms, and procedural blind alleys which make it difficult to describe why “[t]he currents that have transfigured constitutional jurisprudence, administrative law, civil rights, and judicial ideology ... have largely passed immigration law by.” Schuck, supra note 11, at 3.

47. See, e.g., Motomura, Plenary Power, supra note 8, at 600-13. The Equal Protection doctrine, for example, has hardly fully protected aliens from a wide variety of discriminatory practices even outside of the “plenary power” immigration context, especially when those practices were undertaken by the federal government. See, e.g., Oyama v. California, 332 U.S. 633 (1948) (disallowing ownership of property); Heim v. McCall, 239 U.S. 175 (1915) (barring aliens from certain public works projects); Mow Sun Wong v. Campbell, 626 F.2d 739 (9th Cir. 1980) (barring aliens from certain public employment). See generally Schuck, supra note 11, at 12 (noting the limited protection enjoyed by aliens under cases upholding their constitutional rights). But see Plyler v. Doe, 457 U.S. 202, 227-30 (1982) (holding that state denial of public education to undocumented alien children violates equal protection). Further, as some writers have noted, the prevailing due process calculus defined by Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), incorporates flexibility both in its assessment of the interest at stake and the process due to an alien. See Mathews v. Diaz, 426 U.S. 67, 78-84 (1976); Fleming v. Nestor, 363 U.S. 603, 610-12 (1960); see also Kanstroom, supra note 44, at 89-90 (discussing the balancing of factors required by Eldridge). See generally Weisselberg, supra note 13, at 1020-34 (discussing interests at stake and process due in exclusion-and-deportation cases).

48. I use the term “mainstream” in this context very cautiously. It appears in much of the literature, but so far as I know has never been defined. See, e.g., Motomura, Plenary Power, supra note 8, at 549. I believe that this lack of definition is reflective of the essentialism which I describe above. Put simply, I do not think there is any such thing as “mainstream public law” against which immigration law can be tested. Rather, there are ever-shifting categories of public law with varying degrees of internal cohesion depending upon what questions are being asked.
coherent theoretical and practical framework," advocates of noncitizens' rights might well reconsider whether "constitutional mainstreaming" is the most important part of a law reform effort. To put it more precisely, it is extremely important to link "constitutional mainstreaming" to a better understanding and critique of discretionary practice.

This Article therefore proposes a different way of looking at U.S. immigration law—a bit less from the (constitutional) top-down and a bit more from the level of practice-up. This analysis, of course, does not ignore the often criticized line of Supreme Court "plenary power" cases beginning with the notorious Chinese Exclusion Case, and continuing through such Cold War low points as United States ex rel. Knauff v. Shaughnessy, which permitted exclusion from the United States without a hearing while reciting the icy dictum that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." 49

49. Motomura, Plenary Power, supra note 8, at 550.
52. Id. at 544. It must also include the civil/criminal distinction as derived from Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893), and reaffirmed in Cold War cases like Harisiades v. Shaughnessy, 342 U.S. 580, 594-96 (1952) (allowing retroactive application of deportation law against lawful permanent residents). These cases, with their invocation of plenary congressional and executive power, the civil/criminal dichotomy, and their creative abdication of judicial scrutiny, have indeed contributed to the shameful uniqueness of immigration law in practice. See Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 177, 179 (1993) (denying rights against repatriation under either U.S. or international law to Haitian refugees who are interdicted on the high seas by the U.S. Coast Guard); Jean v. Nelson, 472 U.S. 846, 857 (1985) (declining to decide whether Haitians seeking admission to the United States have any constitutional rights). One can surely see why scholars have attacked these cases so vigorously and why some have gone so far as to draw a connection between them and the Dred Scott-type reasoning which has now been largely discredited in other legal arenas. See Scott v. Sandford, 60 U.S. 393 (1857). By "Dred Scott-type reasoning," I mean that sort of formalism which begins by "reifying" citizenship and then by denying rights to noncitizens. Once such a rigid dichotomy is established, it almost inevitably leads to conclusions such as that contained in the next part of Justice Taney's decision which held that citizenship was so precious that it was not constitutionally required to be given to persons of African descent. See id. at 403-27. It is interesting to note, however, that it was also in Scott that Justice Taney wrote:

[The federal government] does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution.

Id. at 401; see also LEGOMSKY, supra note 19, at 187.
Many noncitizens in the United States, however, have been subjected to highly discretionary, highly unpredictable, but completely constitutional government action.\textsuperscript{53} Constitutional doctrine clearly plays an important role in this system, as do "epiphenomenal" reflections of "more fundamental social and ideological structures,"\textsuperscript{54} judges' personal backgrounds, and "role perceptions."\textsuperscript{55} A closer examination of the way in which discretion is central to this system of law may further enhance our understanding.

Part II of this Article begins to examine discretion from a theoretical perspective. The purpose of this examination is to demonstrate the exceptional fluidity of the concept of discretion and how that fluidity makes discretion, as currently understood, a dangerous engine for a system as important as immigration law. Also in Part II, analytical categories are proposed to guide discussion of how administrative action might be better understood and reviewed in this field. Two broad jurisprudential models are developed—the \textit{residual thesis} and the \textit{contingency thesis}—which seek to situate different approaches to discretion within larger jurisprudential traditions.

Part III of the Article examines some of the areas of pre-1996 immigration law in which discretion had become most important. This examination begins with a review of the way in which discretion is defined and controlled under "mainstream" administrative law.\textsuperscript{56} It continues with a proposal to think of immigration-law discretion as having two major variants—\textit{interpretive discretion}, a process which is not uncommon in other areas of U.S. administrative law, and \textit{delegated discretion}, which is somewhat more unique to immigration

\textsuperscript{53} Even the recognition of procedural due process rights in deportation hearings, \textit{Yamataya v. Fisher (The Japanese Immigrant Case)}, 189 U.S. 86, 100-02 (1903), or certain equal protection rights in family visa proceedings have only partially solved the problems of excessive discretion in practice. \textit{See Kanstroom, supra note 44}, at 87; \textit{cf. Smith v. INS, 684 F. Supp. 1113, 1116-17 (D. Mass. 1988)} (rejecting a challenge to the Immigration Marriage Fraud Amendments (IMFA) based on equal protection).

\textsuperscript{54} Schuck, \textit{supra} note 11, at 2; \textit{see also Legomsky, supra note 7}, at 286-96.

\textsuperscript{55} \textit{See LEGOMSKY, supra note 19}, at 223-53.

\textsuperscript{56} It should perhaps be noted for the sake of nonspecialists that the establishment of a field of administrative law is a relatively recent (mid- to late-twentieth century) and still somewhat debated phenomenon. Indeed, one leading casebook begins with the statement that ""Administrative Law' means different things to different people," WALTER GELLHORN \textit{ET AL., ADMINISTRATIVE LAW} 1 (8th ed. 1987). More recently, Michael Heyman has asserted in this context that "it is simply silly to talk about an administrative law." Heyman, \textit{supra} note 24, at 870.

For the broad purposes of this Article, I will simply include in the field all scholars who have defined themselves to be within its ambit.
law. These categories include practices which are currently called discretionary and some which are not. This reconceptualization is defended in Part III on theoretical as well as practical grounds. The proposed categories, it is argued, help us to understand how our highly discretionary system arose. They also help to determine the breadth of permissible or legitimate discretion, and the coherency of the doctrine as it is actually applied.

In Part IV, this reconceptualization is used to show the confused understanding of discretion within our current system of immigration law and how we might improve it. After a short history of critique in the field, three examples—suspension of deportation, motions to reopen, and so-called “section 212(c) relief”—are developed to show how different forms of discretion have been confused by agency adjudicators and reviewing courts. The Article ultimately concludes that, beyond its need for constitutional mainstreaming, U.S. immigration law, like Mick Jagger’s Lucifer, is, to put the matter simply, “in need of some restraint.” The most important steps in this direction must be taken by Congress. Part of this restraint however, could (and should) also come from more effective and coherent judicial oversight. In addition, other regulatory suggestions are offered, based in part on proposals last made some twenty years ago, but largely ignored since then, to help to accomplish this goal.

II. TOWARD A THEORETICAL FRAMEWORK: THE RESIDUE AND CONTINGENCY MODELS

I do not question the Court’s premise that the decision whether to permit reopening of an immigration proceeding is discretionary. Even discretion, however, has its legal limits.

Immigration law, if perhaps unique in the extent to which it is discretionary, is not unique in its lack of a definition of discretion. The concept of discretion is an exceptionally difficult one for all but the most positivist theorists of the nature of law. In almost all of its

57. THE ROLLING STONES, Sympathy for the Devil, on BEGGAR’S BANQUET (Decca Records 1968).
59. Legal positivism, for the purposes of this Article, may be defined generally as a system of thought which accepts the following basic propositions: (1) the concept of law is essentially one of a special set of rules which govern the exercise of public power; (2) the set of such rules is complete as to “the law” but is supplemented by the exercise of “discretion”; and (3) all legal obligations, rights, powers, privileges, and immunities must flow from a
varied incarnations it appears as an interstitial idea at best, a gap-filler between more easily defined concepts like rules, "plain language," or, for some, deductive and analytic reasoning. When attention does focus on discretion, it is generally only to highlight its lack of meaning.

Despite this theoretical emptiness, discretion has been long accepted as a necessary concept in Anglo-American law. The standard definitions of discretion, however, are often painfully circular. Black's Law Dictionary, for example, begins its definition with two related but equally opaque Latin maxims: "Discretio est discernere per legem quid sit justum" ("Discretion is to know through law what is just"), and "Discretio est scire per legem quid sit justum" ("Discretion consists in knowing what is just in law"). Other, English-language definitions are hardly more illuminating. Consider the following, which also appears in Black's: "In criminal law and the law of torts, it means the capacity to distinguish between what is right and wrong, lawful or unlawful, wise or foolish . . . ." These sorts of definitions place discretion at the juncture between legal practice and some sort of extra-legal realm of justice. Here, discretion is, to return to Ronald Dworkin's metaphor, perhaps not so much the hole in the doughnut as the coffee into which the doughnut is dipped. A more specific, often-

valid legal rule. See Ronald M. Dworkin, The Model of Rules, 35 U. Chi. L. Rev. 14, 14 (1967); see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977) (discussing the central tenets of legal positivism). H.L.A. Hart once defined legal positivism to mean: "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so." H.L.A. HART, THE CONCEPT OF LAW 181-82 (1961). This separation of law and morality, while logically derivative from the above definition, is not required by it. For the purposes of this Article, in any event, it is not necessary to revisit the debate over the separation of law from morality.

The most "rigid" positivists might hold, following Austin, that law is a system of rules and that all nonrule-based practice is discretionary and therefore outside the rule of law. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 124 (Noonday Press 1954) (1832). Discretion in such a system seems relatively easy to define, but, as Hart, Dworkin, and others have shown, it is not.

60. See, e.g., HART, supra note 59, at 138-44; Diver, supra note 24, at 66 (advocating a utilitarian model for rules precision involving standards of "transparency," 'accessibility,' and 'congruence.'"); Dworkin, supra note 29, at 52-60.

61. See infra Part III.A.3.


63. See, e.g., Roscoe Pound, Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case, 35 N.Y.U. L. Rev. 925, 926 (1960) ("Discretion . . . is an idea of morals, belonging to the twilight zone between law and morals.").

64. BLACK'S LAW DICTIONARY 466 (6th ed. 1990).

65. Id.

66. Id.
quoted, definition of “judicial and legal discretion,” however, is similar to Dworkin’s view of discretion as a bounded subset of rule-based law:

[D]iscretion bounded by the rules and principles of law, and not arbitrary, capricious, or unrestrained. It is not the indulgence of a judicial whim, but the exercise of judicial judgment, based on facts and guided by law, or the equitable decision of what is just and proper under the circumstances.67

Taken together these definitions demonstrate that, whether it is a doughnut hole or coffee, the concept of discretion can only be understood by reference to a meta-theory of law. It is therefore helpful, when discussing discretion, to specify as much as possible one’s basic legal theoretical backdrop. At the risk of oversimplifying, then, I will propose two broad models which, although far from comprehensive, help to frame a more nuanced discussion of discretion in our practice.

A. The Residual Thesis

The traditional, and still dominant, approach of Anglo-American jurisprudence treats discretion as a concept somewhat analogous to our notion of equity. When exercised “properly,” discretion, on this view, means the *residue* of rule-based legal practice; that which cannot be accounted for under the “core” system of law which is primarily seen as one of definable rules which seek to govern abstractly and in advance of a particular dispute.68 To be sure, discretion is still a part of “the Rule of Law” in general,69 but it is distinguishable from rule-based “law.” For purposes of this Article, this broad definitional system will be termed the *residual thesis*. Wide variations exist within this model. There is, for example, an obvious inverse relationship between the narrowness of one’s idea of a rule and the breadth of one’s idea of discretion. Thus, Roscoe Pound, operating from a relatively narrow rule concept (“a precept attaching a precisely defined fixed consequence to a definite detailed fact or state of facts”) saw the

67. *Id.* at 466-67; *see also* Manekas v. Allied Discount Co., 166 N.Y.S.2d 366, 369 (Sup. Ct. 1957).
69. *Cf.* Sunstein, *supra* note 25, at 956-57 (distinguishing the tradition of “clear, abstract rules laid down in advance” from “lawmaking at the point of application” and arguing against an “extravagantly rule bound conception of the rule of law” (emphasis omitted)).
residual category of discretion to include legal fictions and interpretation. Still, there was no question for Pound that discretion was part of the “Rule of Law.”

Kenneth Culp Davis, perhaps the leading, and certainly one of the most prolific, writers on administrative discretion, tended to define discretion functionally: “A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.” This position may best be understood as derived from the residual thesis. This becomes apparent if one asks how far such a choice may legitimately go. Hart and Sacks, for example, had earlier defined discretion as “the power to choose between two or more courses of action each of which is thought of as permissible.” Legitimacy, in the Hart and Sacks process-based model of bounded institutional competencies, depended on the extent to which such discretion, at least when exercised within the adjudicative realm, involved “reasoned elaboration.” Advocates of the residual thesis must decide how discretion, “properly exercised,” is part of the Rule of Law, a decision which obviously requires an

70. Pound, supra note 63, at 927.
71. See id. The residual thesis encompasses two definitions of the term “law”—first as that (rule-based) practice which is distinguished from discretion, then as the name for the entire intellectual enterprise. Put another way, the law/discretion dichotomy sits within the law/morality or law/politics dichotomy. As the coffee metaphor demonstrates, discretion may also appear in the outer circle as a complement or alternative category to (the Rule of) Law. One consequence of this double usage has been a tendency to obscure the difference between linguistic or analytical questions such as, “what is discretion?” and normative ones like, “what is legitimate?” The concept of legitimacy itself recapitulates this problem, however. On the most general level legitimacy might simply be defined as that quality which renders the legal discipline meaningful. More specifically, some writers assert that it is ultimately “moral” discourse which confers legitimacy upon law and therefore permits law to influence human conduct. See Schuck, supra note 11, at 76. Others, recognizing the ambiguity within the category of the “moral,” accept law as a more bounded enterprise and regard “the rhetorical and legerdemain of the law as an achievement . . . rather than as the matter of scandal.” STANLEY FISH, THERE’S NO SUCH THING AS FREE SPEECH AND IT’S A GOOD THING, TOO 21-22 (1994) (emphasis added).
73. Hart & Sacks, supra note 30, at 162 (emphasis added).
74. Legislators, conversely, could legitimately be permitted “unbuttoned discretion.”
75. This concept of discretion was thus based more on process values than that of either Pound or Davis. Indeed, one could argue that Hart and Sacks pressed against the boundaries of the residual thesis since legal actors always have the power they described. The concept of “reasoned elaboration,” however, was clearly designed to maintain a workable definition of “the Rule of Law,” not to deconstruct it.
underlying theory (such as "reasoned elaboration") of the Rule of Law itself. 76

Those who tend to see the Rule of Law in more "rule-like" terms are naturally more wary of discretion than those who see a more fluid legal order. 77 As Roscoe Pound put it, "[i]n order to assure the stability which is demanded for the legal order, careful limitation of the cases in which discretion may be resorted to is clearly indicated." 78 The development of such a theory of limitation, however, may challenge the residual thesis itself. When, for example, Pound sought to place discretion at the "point of contact between law and morals," 79 he raised the question of how to define those categories. The rejection of a strict, rule-based theory of law, and Pound’s acceptance of Hans Kelsen’s general view that discretion may be a part of the Rule of Law did not solve the dilemma of legitimacy. 80 For, put simply, if discretion may be part of the Rule of Law, it also may not be.

B. Legal Positivism and the Problem of Discretion

One of the clearest analyses of discretion within the residual thesis paradigm was undertaken by H.L.A. Hart. In the context of a discussion of the indeterminacy of language and the difference between legislation and precedent, Hart recognized that

[i]f the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. . . . This would be a world fit for "mechanical" jurisprudence.

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76. Some practical system (such as judicial review) must then be developed to determine whether discretion has, in fact, been properly exercised in a particular case.
78. Pound, supra note 63, at 927.
79. Id. at 929.
80. Consider Pound’s four categories of law, which seem to embody this dilemma at each level, in the definition of terms like "strict rule," authoritative, and "bad motives": (1) cases governed by a strict rule; (2) "cases . . . to be decided by reasoning from authoritative principles as starting points, using an authoritative technique guided by authoritative ideals"; (3) "cases calling for judicial discretion, i.e., discretion guided by analogy of principles of law as starting points for reasoned determination"; and (4) "cases left to the personal discretion of judge or official or person authorized to act, without any organized grounds of or guides to decision," with only the limitation to act "honestly in good faith without reckless indifference or from bad motives." Id. at 929-30.
Plainly this world is not our world... In contrast to the more rigid Legal Positivism of John Austin, Hart saw that no system of rules, no matter how complex, comprehensive, or subtle, can anticipate or control all future applications. Yet, as Hart also saw, different legal systems have tended to ignore this problem or to acknowledge it only obliquely. Those whom we might call formalists or conceptualists tend to be less concerned with this problem of rule precision and application. Conversely, the centerpiece of (rule-skeptical) Legal Realism was the continual critique of a form of what Felix Cohen had called "transcendental nonsense" that failed to account for the real-world effects of indiscriminate, formalist rule application.

Hart, seeking a middle path between classical formalism and the most extreme forms of rule skepticism, describes the dominant (residual thesis) understanding of discretion in Anglo-American law. This approach begins with the observation that, "all systems, in different ways, compromise between two social needs: the need for certain rules... and the need to leave open, for later settlement by an informed, official choice, issues which can only be properly appreciated and settled when they arise in a concrete case." This acceptance of a dichotomy in our law between fixed rules and more open mandates is clearly now the mainstream U.S. model. We comfortably accept the idea that certain areas of law may be recognized from the start by the legislature as necessitating varied application. Therefore, "the legislature sets up very general standards..."

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81. Hart, supra note 59, at 125.
82. See Austin, supra note 59, at 1. "A law... may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him." Id. at 10.
84. See id. at 126.
86. I recognize that this is a controversial and probably unverifiable proposition. I can only defend it by advising those who disagree to re-read The Concept of Law which seems to me to define a mainstream position at least in its basic jurisprudential posture. The separation of law and morals is, I think, a more controversial position but not as important for the purposes of this Article. I would also suggest, although this argument will not be fully developed here, that Ronald Dworkin's "integrity" model and even his Hercules metaphor amount to refinements of, but not really attacks on, Hart's positivism. Indeed, the central task of Hercules is to bring discretion within a defensible legal reasoning model. See Ronald Dworkin, Hard Cases, 88 Harv. L. Rev. 1057, 1082-1109 (1975).
87. Hart, supra note 59, at 127.
and then delegates to an administrative, rule-making body . . . the task of fashioning rules. 88

Apart from possible questions of political legitimacy raised by this model, however, 89 the model leads to a systemic problem. Even if a vague legislative mandate such as a "fair rate" or a "safe system" is still a "rule," we need another concept to describe how the subsidiary administrative body should apply that rule. It is only at this point in Hart's analysis that the word "discretion" appears (indeed, for the very first time) in *The Concept of Law*: "In these cases it is clear that the rule-making authority must exercise a discretion . . . ." 90 Discretion, therefore, for a (moderately) rule-skeptical positivist 91 like H.L.A. Hart, is inextricably woven into the fabric of Anglo-American jurisprudence, both in the realm of administrative law and in the common law itself.

The debate, on this view, should not be over whether discretion is central to our law—it is—but over how central it is. As Hart puts it:

In every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents. None the less these activities . . . must not disguise the fact that both the framework within which they take place and their chief end-product is one of general rules. 92

Since modern legal positivists like Hart 93 start from the proposition that law in general is a set of definable rules, their main theoretical problem is to explain how the "exercise of discretion" either amounts to a type of rule or may be defended in some other way as legitimate. 94

88. *Id.* at 127-28.
89. See infra Part III.A.2.
90. HART, *supra* note 59, at 128.
91. Hart, of course, expressly set himself against the strong form of rule-skepticism when he suggested that all talk of rules is a myth and that law consisted only of the ad hoc decision of judges. See *id.* at 133. Whether this was an accurate assessment of the Legal Realists is surely debatable. Nevertheless, it is clear that he saw his central task as the revitalization and development of a more sophisticated rule-based concept of law.
92. *Id.* at 132-33.
93. See Dworkin, *supra* note 59, at 17-22 (discussing different strands of positivism under this analysis).
94. One important point to bear in mind is that, to maintain systemic coherency, the discretionary decision of a judge must, prospectively at least, also become part of the law and thus a new "general rule." If a highly similar case arises, there should now be a rule to govern it. Hart, unlike Austin, recognized primary rules, which create rights or obligations, and secondary rules, which govern the formation, revision, or abolition of the primary rules. However, Hart also recognized that certain cases inevitably require the exercise of a
Hart used the analogy of a game to illustrate his answer to this problem. A competitive game may be played without an official scorer, in which case each player makes an honest assessment of progress by reference to a mutually accepted rule. The institution of a scorer, by virtue of what Hart termed a “secondary rule,” adds another element which renders the scorer’s decisions unchallengeable. This, for Hart, does not mean that unbridled discretion has now become incorporated into the rule of the game. The score is not simply, “what the scorer says it is.” Rather, “the scoring rule remains what it was before and it is the scorer’s duty to apply it as best he can.” The alternative game, where the score is what the scorer says it is, Hart derisively calls the game of “scorer’s discretion.” That (rule-skeptical) game may be distinguished from a “normal” game because we recognize that the scoring rule, though it has an “area of open texture,” has a “core of settled meaning.” This core is critically important to the residual thesis because “[i]t is this which the scorer is not free to depart from, and which, so far as it goes, constitutes the standard of correct and incorrect scoring....”

Ronald Dworkin’s system of “principles, policies, and other sorts of standards,” though primarily a critique of Hart’s “rule-based” system, includes a somewhat different look at the concept of discretion. Dworkin defined a “weak” form of discretion as existing whenever an official is empowered to apply a not-absolutely-precise rule to a set of facts. Another weak sense of discretion, also

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95. See Hart, supra note 59, at 138-39.
96. See id.
97. Id. at 139.
98. Id.; see also Sunstein, supra note 25, at 960-68 (distinguishing “untrammeled discretion” from rules, rules with excuses, presumptions, factors, standards, guidelines, principles, and analogies).
99. Hart, supra note 59, at 139.
100. Id. at 140.
101. Id. (emphasis added); see also H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 606-15 (1958) (describing the excessive concern in law schools with “problems of the penumbra” at the expense of the “core of central meaning which rules have”).
102. Dworkin, supra note 59, at 17-18, 22.
103. See id. at 32-33.
identified by Dworkin, is more procedural. It connotes the delegation of authority to make a decision. An analogy for this use of the term would be decisions of a baseball umpire as to whether a pitch is a ball or a strike, or whether a runner is “safe” or “out.” The strongest sense of the term discretion approximates the concept of arbitrariness. It rarely appears as anything other than a *reductio ad absurdem* in our law, such as Hart’s game of “scorer’s discretion.” It does, however, seem to appear sometimes in practice in immigration law, a point to which I shall return.104

C. *The Difficulties of the Residual Thesis in Practice*

It is difficult for adherents to the *residual thesis* to accept a broad idea of discretion in practice.105 The work of Kenneth Culp Davis illustrates this difficulty well. His 1969 book, *Discretionary Justice*, begins with a recital of an engraving on the Department of Justice building in Washington, D.C.: “Where law ends tyranny begins.”106 Soon thereafter, however, Davis states his basic thesis as, “[w]here law ends, discretion begins.”107 Could these two aphorisms mean that, for Davis, discretion is not the same as law? It sometimes appears so, as the exercise of discretion is distinguished explicitly from the “application of law”: “An officer who decides what to do or not to do often (1) finds facts, (2) applies law, and (3) decides what is desirable in the circumstances after the facts and the law are known. The third of these three functions is customarily called ‘the exercise of discretion’ . . . .”108 In other places, however, discretion is said to include “making a judgment about doubtful law”109 and “the judgment that goes into finding facts from conflicting evidence and into interpreting unclear law.”110 These formulations, unlike the first, seem

104. Ultimately, it is difficult to determine how much more weight Dworkin gives to the definition of a practice as discretionary than does Hart. Indeed, Dworkin’s theory of “law as integrity” can be seen as an attempt to transcend the entire problem of rules versus discretion by developing a unified field theory for all legal practice. In this sense, one might place Dworkin outside of the *residual thesis*. This transcendence, however, takes place at a level of abstraction and generality which compels the question of whether it guides practice in any meaningful way, particularly where the term “discretion” is still pervasive.

105. James Landis, for example, once wrote, “I return thus to the issue of ‘law’ as being the dividing line of judicial review—as bounding the province of that ‘supremacy of law’ that is still our boast.” JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 152 (1938).

106. DAVIS, *supra* note 72, at 3.

107. *Id.*

108. *Id.* at 4.

109. *Id.*

110. *Id.* at 4-5.
to place Davis within the residual thesis model of a (lowercase) law/discretion dichotomy within a larger Rule of Law model. What we are left with, however, from Davis, as from most modern discussions of administrative discretion, is a somewhat vague, two-tiered system. Finding facts, interpreting, and “applying the law” are part of the Rule of Law, though they seem somewhat “discretionary.” Deciding in a still less bounded way what is “desirable under the circumstances” is certainly discretion, which is probably part of the Rule of Law, but may not be.

Those who seek to maintain a coherent model for a Rule of Law downplay the significance of this tension. They acknowledge that the ultimate meaning of a rule is often the product of an unanticipated political or moral ex post judgment. Nevertheless, they argue that it is a marginal problem.

More recent discussions of discretion, perhaps inspired by Dworkin, sometimes rely upon a law/policy dichotomy. This dichotomy, however, may obscure more than it clarifies as the line between law and policy is hard to draw. Consider, for example, the following discussion from the latest revision of Davis’s Administrative Law Treatise:

Many questions concerning the meaning to be given statutes cannot be characterized as issues of law. If Congress has resolved a policy dispute in the process of enacting a statute, an agency or court can, and must, adopt Congress’ resolution. . . . Congress cannot, and does not, resolve all policy disputes when it enacts a statute, however. . . . Congress leaves many policy issues open. . . . [S]ome institution must resolve that dispute. [T]hat institution . . . is not engaged in statutory interpretation. It is engaged in statutory construct. It is not resolving an issue of “law.” Rather, it is resolving an issue of policy.

In a celebrated 1986 law review article, then-Judge Stephen Breyer criticized the judicial tendency to defer to agency judgments about “matters of law” while conducting more in-depth review of “matters of policy.” Apart from denominating an agency’s interpretation of its governing statute as one of “law,” however,

111. See Sunstein, supra note 25, at 989.
112. See id. at 990.
113. 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 3.3, at 112 (3d ed. 1994).
115. Id. at 364.
Breyer did not dwell upon or seek to define the nature of the line between law and policy.\textsuperscript{116} As an adherent to the \textit{residual thesis}, however, Breyer implicitly placed the law/policy dichotomy under the rubric of the Rule of Law. Whether we term the process at issue to be legal construction, interpretation, or even policymaking,\textsuperscript{117} the \textit{residual thesis} tends to place most administrative practices under the Rule of Law,\textsuperscript{118} although the focus on discretion as a concept highlights a problem with this placement.\textsuperscript{119} Nevertheless, the \textit{residual thesis}, with its optimistic belief that Rule of Law legal reasoning can be distinguished from pure discretion and policy analysis still expresses the most common current understanding of our legal system.\textsuperscript{120}

\textsuperscript{116} Indeed, in a footnote, Breyer concedes that “sometimes the wisdom of agency policy becomes relevant to the interpretation of the agency’s authorizing statute” in which case it should be treated as a matter of law. \textit{Id.} at 382 n.64.

\textsuperscript{117} As Christopher Edley has noted, “the continuing dilemma for administrative law has been that the effort to impose Rule of Law constraints on agencies must contend with the critique that judicial review simply replaces the objectionable discretion of the administrator with the objectionable discretion of the judge.” CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 7 (1990).

\textsuperscript{118} See, e.g., Judicial Review of Administrative Action in a Conservative Era, 39 ADMIN. L. REV. 353, 366-71 (1987) (panel discussion) (speech of Cass R. Sunstein criticizing \textit{Chevron} review based on duty of courts to decide the law); \textit{see also} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

\textsuperscript{119} Judge Henry Friendly once offered what might be termed a strongly functional or Realist version of discretion:

When we are discussing the allocation of power between trial and appellate courts, I find it more useful to say that the trial judge has discretion in those cases where his ruling will not be reversed simply because an appellate court disagrees. If this be circular, make the most of it!


\textsuperscript{120} This understanding of discretion can help to situate discussions of the subject such as that undertaken by Professor Maurice Rosenberg, who focused on the allocation of trial versus appellate authority: “Even if constitutional, unreviewable discretion offends a deep sense of fairness in our view of the administration of justice. We are committed to the practice of affording a two-tiered or three-tiered court system, so that a losing litigant may obtain at least one chance for review . . . .” Maurice Rosenberg, \textit{Judicial Discretion of the Trial Court, Viewed from Above}, 22 SYRACUSE L. REV. 635, 641-42 (1971). Indeed, one reason for supporting an appellate system at all, which clearly is based on the \textit{residual thesis}, is that it promotes consistency—the cornerstone of the Rule of Law. As Benjamin Cardozo once put it, “[i]t will not do to decide the same question one way between one set of litigants and the opposite way between another.” BENJAMIN N. CARDozo, THE NATURE OF THE JUDICIAL PROCESS 33 (1921). The purpose of appeals courts, on this view, is to maximize the number of issues that can be reduced to “rules” while minimizing the residual discretion of trial courts. Of course, such a system, as Cardozo’s own experience with the elusive concepts of causation and duty showed, is not necessarily either apolitical or neutral. It does, however, offer at least the appearance of a more rule-based enterprise. As a practical matter, though, this is just the beginning of the problem. Once we accept the principle of
D. The Contingency Thesis

The fluidity of the definition of the Rule of Law which is central to the residual thesis leads directly to another model which I will term the contingency thesis.\textsuperscript{121} This idea, more critique than doctrine, which in other fields might be termed “anti-foundationalism,” and in jurisprudence is sometimes called “anti-formalism,”\textsuperscript{122} starts with a rejection of the idea that “the law is an order, and therefore all legal problems must be set and solved as order problems . . . free of all ethical-political value judgments.”\textsuperscript{123}

The strongest version of the contingency thesis might be pejoratively called Vulgar Realism.\textsuperscript{124} This would be the view that purported legal reasoning is really a mask for substantive policy (political or economic or, perhaps, completely arbitrary) decisions. The implication for a theory of discretion of this model would be that, in essence, everything is discretionary in the strongest sense. Although such views occasionally were expressed in the early writings of some Legal Realists\textsuperscript{125} most supporters of the contingency thesis today express a much more subtle view.\textsuperscript{126} Essentially, the argument is that appellate review we must still define its limits. This, again, involves drawing some sort of line between rules and discretion. It is here that a concept of deference to certain types of decisions emerges. As Judge Friendly once put it,

\begin{quote}
[too perfectionist an attitude with respect to many sorts of claims of trial error involves the prospect of an infinite regress. There thus is a gray penumbra just beyond the boundaries of the harmless error doctrine where the discretion rule may serve the purpose, at least in civil cases, of avoiding useless reversals where there is no real prospect [of] a different result.
\end{quote}

Friendly, \textit{supra} note 119, at 762.

\textsuperscript{121} As Elizabeth Mensch once put it, “The most corrosive message of legal history is the message of contingency.” Elizabeth Mensch, The History of Mainstream Legal Thought, in THE POLITICS OF LAW 13, 13 (David Kairys ed., 2d ed. 1990).


\textsuperscript{123} FISH, \textit{supra} note 71, at 143 (quoting HANS KELEN, PURE THEORY OF LAW 192 (Max Knight trans., 1967)).

\textsuperscript{124} See EDLEY, \textit{supra} note 117, at 10.

\textsuperscript{125} It is not easy to define Legal Realism. As Morton Horwitz has noted, it was: “neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood than a clear body of tenets, more a set of sometimes contradictory tendencies than a rigorous set of methodologies or propositions about legal theory.” MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 169 (1992). Nevertheless, certain common elements can be defined. First, Realism tended to reject attempts to create a sharp distinction between law and politics. Similarly, realists often attacked the idea that legal reasoning was “neutral, natural, or apolitical.” \textit{id.} at 170.

Legal Realists also were generally less court-centered in their outlook than some of their Progressive predecessors, working more typically toward legislative and administrative solutions to social problems. \textit{See id.} On the philosophical level, Legal Realists tended to be skeptical, both cognitively and morally. \textit{See id.; see also LAURA KALMAN, LEGAL REALISM
legal reasoning is not a formal mechanism for determining outcomes in a neutral fashion but is rather a ramshackle ad hoc affair whose ill-fitting joints are soldered together by suspect rhetorical gestures, leaps of illogic, and special pleadings tricked up as general rules, all in the service of a decidedly partisan agenda that wants to wrap itself in the mantle and majesty of The Law.\textsuperscript{127}

This argument does not suggest, however, that legal doctrine is a sham or that the whole enterprise is necessarily to be discarded. This “irrationalist” view is not the mainstream of the contingency thesis. In the realm of administrative law, for example, legal doctrine is now said to, “play[] an important role if it plausibly captures in general terms those qualities of an agency choice or decision making process that tend to persuade a lay reviewer that the result is sound.”\textsuperscript{128} Such doctrine must, therefore, “either accurately describe the reviewer’s intuition or powerfully shape it.”\textsuperscript{129} Doctrine, in other words, may be in some ways a mask, but that characteristic does not necessarily make the whole enterprise a farce.

Whatever the virtues of such a critique-based meta-theory, however, and there clearly are some,\textsuperscript{130} it tends to lead to an abandonment of the search for the meaning of discretion as a distinct concept. One reason for this is that the absence of a bright law/discretion line renders definition less important. If, for example, one argues that there is no important difference between a concept like Hart and Sacks’s “reasoned elaboration” (or Dworkin’s “integrity”) and “pure discretion,”\textsuperscript{131} then there is little left to say about the way in which judges might justify their practice as either review of “law” or

\begin{itemize}
\item \textsuperscript{126} “Critical Legal Studies” thus may be largely defined by its critique of the claims of “legal orthodoxy” to be able to offer determinate, nondiscretionary, neutral, and apolitical answers to legal questions. \textit{See}, e.g., \textsc{Roberto Mangabeira Unger}, \textsc{The Critical Legal Studies Movement} 1-14 (2d ed. 1986).
\item \textsuperscript{127} \textsc{Fish}, \textit{supra} note 71, at 21.
\item \textsuperscript{128} \textit{Id}.
\item \textsuperscript{129} \textsc{Edley}, \textit{supra} note 117, at 11.
\item \textsuperscript{130} The contingency thesis is unquestionably important as a critique of Hart’s and Dworkin’s belief in a definable legal method, based either on rules or “policies and principles.” It calls into question the basic premise that legal doctrine presents a “more determinate rationality” than the “less determinate rationality of ideological contests.” \textit{See} \textsc{Unger}, \textit{supra} note 126, at 2. In the context of administrative law, for example, the insights of Legal Realism and Critical Legal Studies have been essential to the development of a more sophisticated understanding of the ultimately political nature of legal doctrine.
\item \textsuperscript{131} \textit{See}, e.g., \textsc{Mensch}, \textit{supra} note 121, at 25.
\end{itemize}
“discretion.” And there is certainly little reason to attempt to improve practice in those terms. When applied to actual practice, the contingency thesis therefore sometimes tends to lead us away from the actual processes of (purportedly) legal decisionmaking and into a much more abstract realm of discourse. Indeed, in its more sophisticated incarnations, the contingency thesis almost inevitably leads to concepts like Christopher Edley’s “sound governance,” which is said to be both “inchoate and aspirational” and, as importantly, “ill served . . . by our . . . traditional assumptions regarding discretion and institutional roles.” The contingency thesis would thus seem to be an unpromising framework for an article such as this that seeks primarily to further an antidiscretion project that itself might be seen as anachronistic or based on a simplistic view of current legal practice.

Immigration law differs in important respects from many other areas of administrative law, however. Too Olympian, transcendent, or even policy-based a perspective in this arena can put many individuals at grave risk. A sort of theoretical triage, in which abstract intellectual purity may have to be sacrificed in the service of more immediate law reform is therefore justified. For this reason, the residual thesis is a necessary framework, even if ultimately illusory, for analysis of practice in the field. As long as discretion appears specifically in our law and practice, we will have to try to understand its meaning. Nevertheless, both because it is the substantive underpinning of much rule skepticism, and because in so many areas of our law it is so clearly right, the contingency thesis must always, even if more like Banquo’s ghost than a guest of honor, sit at the table whenever discretion is being discussed.

133. See id. at 215-17.
135. See, for example, the discussion of judicial deference to agency rules in Part III.A.2.
136. Though one’s general concept of discretion must in some way be linked to one’s belief in a system of rules which it supplements, it also must be parsed into more refined subcategories. First of all, we should distinguish jurisprudential discussions of discretion as it relates to meta-theories of law, such as those of Hart and Dworkin, from the somewhat more prosaic questions of the allocation of power among Congress, agencies, and the judiciary, or between trial and appellate bodies. In general, adherents of the residual thesis seek to carve out “core” areas of what might be called discretionary practice for treatment as “interpretation of law,” “application of law,” or “rule of law.” Critique, derived from the contingency thesis, then focuses on the inherent indeterminacy of these categories. This critique, in turn, leads to judicial review formulae, such as that of the Chevron case, which
III. DISCRETION IN THE FIELD: ADMINISTRATIVE AND IMMIGRATION LAW

"Discretion is only to be respected when it is conscious of the traditions which surround it and of the limits which an informed conscience sets to its exercise."137

A. Problems of Judicial Review

Because judicial review has come to be seen in American jurisprudence as the most important mechanism for maintaining the residual thesis version of the Rule of Law, discussions of discretion, particularly administrative discretion, are often wrapped within debates about the scope of judicial review. As Professor Jaffe once noted, "[t]he availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid."138 One recurring issue in this realm, which is part of this Article’s proposed new taxonomy for immigration cases, is the distinction among so-called questions of law, fact, and policy.

1. Law, Fact, and Policy

The principle that, by virtue of the Act of August 18, 1894, the courts cannot pass on questions of fact, but are nevertheless empowered to pass upon questions of law, is easily stated. But it is not always easy to distinguish a question of fact from a question of law.139

The dichotomy between questions of "fact" and those of "law" appears often in discussions of discretion. Despite its venerability and durability, however, this distinction is much more slippery than it might first appear. Fact-finding, for example, might involve hearing evidence, deciding what is relevant or probative, weighing different

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139. CLEMENT L. BOUVÉ, A TREATISE ON THE LAWS GOVERNING THE EXCLUSION AND EXPULSION OF ALIENS IN THE UNITED STATES 530 (1912).
aspects of evidence, deciding what evidence is accurate or believable, and drawing certain factual conclusions.\textsuperscript{140} It is apparent that most, if not all, of these activities themselves depend to some degree on prior "legal" (or policy or philosophical) decisions.\textsuperscript{141} Which facts should be focused on? What is at issue? Moreover, when we begin to factor in processes such as the drawing of inferences and the application of law to fact, the difficulty is compounded.\textsuperscript{142} Indeed, commentators have long recognized that "the difference [between fact and law] is one of degree ... a spectrum with finding of fact shading imperceptibly into conclusion of law."\textsuperscript{143} Nevertheless, the standard approach of U.S. courts for many years has been to distinguish formally between these two categories for purposes of judicial review. Courts are instructed to review "questions of fact" under the "substantial evidence" test,\textsuperscript{144} which reviews the whole record.\textsuperscript{145} This model has

\begin{footnotesize}
\textsuperscript{140} The search for process-based answers, such as those of Hart and Sacks, as noted above, is one way to attempt to avoid the fact/law dichotomy. Rather than viewing the question in a formalist or essentialist way (what is "fact"; what is "law"?), this approach seeks to focus on which body has decisional responsibility and why. It has proven almost irresistible, however, for judges to return to categories such as "pure questions of law." This is not only because these categories have utility in many cases, but also because they live in our legal history from \textit{Marbury v. Madison} through the Administrative Procedure Act. This understandable yearning for linguistic clarity is particularly difficult to achieve with the category of discretion, however.

\textsuperscript{141} Beyond the problem of reviewing relatively straightforward questions of fact, more mixed law/fact inquiries cause even greater difficulty. The multitarian analysis required in such cases is extremely complicated. As it seems impossible to develop an objective method by which to maintain the anterior distinction between "law" and "fact," some have proposed changing the inquiry from whether a question is one of "fact" or "law" to one of process—how much of the resolution of the issue is to be determined by the judge and how much by the agency. See Roy A. Schotland, \textit{Scope of Review of Administrative Action—Remarks before the D.C. Circuit Judicial Conference, March 18, 1974}, 34 Fed. B.J. 54, 58 (1975), reprinted in GELLHORN ET AL., supra note 56, at 380; see also Hart & Sacks, supra note 30, at 369-83 (discussing the relationship between law and fact). The definitional problem, however, remains if any particular decision is to have precedential value. In a different context, for example, Henry Monaghan has suggested delineating "law declaration," which yields general propositions about statutes and other regulations; "fact identification," which is case specific ("what happened here"); and "law application," which is like law declaration but more situation-specific. Henry P. Monaghan, \textit{Constitutional Fact Review}, 85 Colum. L. Rev. 229, 235-36 (1985).

\textsuperscript{142} See generally Ronald M. Levin, \textit{Identifying Questions of Law in Administrative Law}, 74 Geo. L.J. 1 (1985) (suggesting a model for how courts separate questions of law from questions of discretion).

\textsuperscript{143} JAFFE, supra note 138, at 546-47.


\textsuperscript{145} See Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951). See generally Louis L. Jaffe, \textit{Judicial Review: "Substantial Evidence on the Whole Record,"} 64 Harv. L. Rev. 1233, 1236-56 (1951) (discussing the Court's adoption of the "whole record" as the object of the "substantial evidence test").
\end{footnotesize}
been maintained despite the Supreme Court's candid realist admission that "new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment." The continuing efforts of courts to specify the precise level of deference appropriate to administrative "law" and "fact" cases has created less a finished painting than a palette of generally accepted colors from which judges may choose. However this inability to distinguish questions of fact from those of law is most problematic when it is not recognized or discussed. For it is in those cases where it may stand as an illusory rationale for a particular level of judicial review which is actually based upon other factors. As we shall see, this particular type of formalism is very common in immigration cases.

Similarly, the distinction between law and policy is increasingly used by the Supreme Court to define the appropriate level of judicial scrutiny of a particular agency action. Recently, for example, in *Pauley v. BethEnergy Mines, Inc.*, the Court stated quite explicitly that it will defer to an agency's "policy" decisions even in the context of so apparently legal a question as whether one agency's decisions are

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147. In *Gray v. Powell*, 314 U.S. 402, 413 (1941), the Supreme Court held that certain administrative decisions should be affirmed if they have a "rational basis":

> Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. . . .
> It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.

*Id.* at 412; see also Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 473-76 (1950). The difficulty of crafting a general rule was illustrated by another Supreme Court case decided the same year as *Gray v. Powell*. In *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which arose under the Fair Labor Standards Act, Justice Jackson phrased the scope of review formula quite differently:

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a 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.

*Id.* at 140.


“more restrictive than” another’s. 150 Partly because, as noted above, it is no easy matter to define the line between law and policy, and partly because of the nature of the residual thesis’s need for a Rule of Law, one can confidently predict that this distinction will always assume more of the character of a canon of construction than a bright-line test. 151

2. Deference

It is easy to understand the problem of the scope of judicial review in a very general, functional way. One can envision a spectrum of standards, from the IIIRIRA’s complete preclusion of review to de novo review, with a vast gray area in between containing a variety of phrases and formulae. Case law in this middle area is sufficiently hard to categorize so that one’s position on the matter may be as much one of theoretical temperament or political opinion as particularized deduction in a given case. 152 This skeptical view is supported by the fact that for many years there simply was no single “unifying theory” developed by the Supreme Court to control when (and how much) courts should defer to agency decisions. 153 It is further supported by the fact that so much seems to be at stake in such cases—theories of tripartite government, efficient administration of increasingly complex systems, and predictability, for example. Such weighty background concerns also explain why it seemed so difficult for so long to unify the field. Indeed, notwithstanding Supreme Court protestations to the contrary, a true unifying theory for all administrative law cases may simply be impossible to achieve. Nevertheless, the much-discussed recent trend 154 has been toward such a theory of deference to agency decisionmakers.

In contrast to past practice, which presumed judicial oversight but debated the standard, courts now tend to show substantially more than

150. Id. at 696-97.
151. See generally Breyer, supra note 114, at 394 (arguing that courts should defer more to agency policy decisions than to legal ones).
152. See, e.g., GELLHORN ET AL., supra note 56, at 350 (distinguishing among the “realist,” “reductionist,” “formalist,” and “pragmatic” schools of thought).
154. This trend may be more real at the lower court level than at the Supreme Court level. See Peter H. Schuck & E. Donald Elliott, To the Chevron Station: An Empirical Study of Federal Administrative Law, 1990 DUKE L.J. 984, 1020-43 (analyzing the effect of Chevron on lower federal courts); cf. Merrill, supra note 153, at 980-85 (noting the Supreme Court’s failure to follow Chevron principles consistently).
what Colin Diver once called "courteous regard" for agency decisions,\footnote{See Colin S. Diver, Statutory Interpretation in the Administrative State, 133 U. PA. L. REV. 549, 565 (1985) (referring to Skidmore v. Swift & Co., 323 U.S. 134 (1944)).} even where they are apparently "purely legal." Where once the judicial approach was well-described as "pragmatic and contextual,"\footnote{See Merrill, supra note 153, at 971.} it now purports to be rather formulaic and binary. Following Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,\footnote{467 U.S. 837 (1984).} judges are instructed to undertake a two-step approach to review agencies' statutory interpretation.\footnote{The interpretive approach required by Chevron is as follows: 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 . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute. Id. at 842-43 (footnotes omitted).} First, if the intent of Congress is "clear, that is the end of the matter."\footnote{Id. at 842.} But if the court decides that Congress has not directly decided the question, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute."\footnote{Id. at 843 (emphasis added).} Thus, the current Supreme Court's idea of deference changes the judicial analysis from whether the agency construction is correct to whether it is "permissible" or, perhaps, "reasonable."\footnote{See Diver, supra note 155, at 562.}

As many commentators have noted, the clarity of the Chevron doctrine may be more apparent than real.\footnote{See generally Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 467-88 (1989) (arguing that Chevron's promise of "judicial usurpation" is "fundamentally" incongruous with the Court's constitutional course (reconciliation of agencies and separation of powers)).} For one thing, a very small percentage of legitimately controversial statutory interpretation cases can be resolved by a "plain language" approach. And although even the staunchest defenders of Chevron-type review readily concede
that congressional intent is largely fictitious,\textsuperscript{163} the scope of judicial review in the balance of hard cases now apparently depends upon the clarity with which that fictitious intent can be determined.\textsuperscript{164}

Perhaps the most fundamental change wrought by \textit{Chevron}, however, was the apparent presumption that congressional delegation of \textit{any} authority to an agency includes a specific delegation of interpretive authority to which courts should defer. In the preceding century of experience with administrative law, courts handled this question quite differently. A distinction was drawn between two types of agency rules—"legislative rules" and "interpretive rules."\textsuperscript{165} The former required a specific delegation of congressional authority, the latter did not. The amount of deference which a court is instructed to pay to an agency decision should, on this view, depend upon an initial determination by the court of the \textit{exact nature} of the congressional delegation to the agency.\textsuperscript{166} \textit{Chevron}, however, relieves courts of the responsibility for inquiry into the nature of the delegation. The former "legislative rule" model is presumed.\textsuperscript{167} Thus, even if a party challenging agency action can make it past \textit{Chevron}'s "step one" by showing that the intent of Congress was \textit{not} clear, \textit{Chevron} mandates that courts presume a clear delegation of congressional interpretive authority.\textsuperscript{168} Given the deep implications of this presumption, it is hardly surprising that it has, to say the least, not been consistently applied. In the immigration-law context the most famous example of this inconsistency is the majority decision in \textit{INS v. Cardoza-}

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\item \textsuperscript{163} See, e.g., Antonin Scalia, \textit{Judicial Deference to Administrative Interpretations of Law}, 1989 DUKE L.J. 511, 517 ("[T]he quest for 'genuine' legislative intent is probably a wild-goose chase anyway.")
\item \textsuperscript{164} For the most recent example of the Court's difficulty in applying the \textit{Chevron} doctrine, see \textit{Babitt v. Sweet Home Chapter of Communities for a Great Oregon}, 115 S. Ct. 2407, 2415-16 (1995).
\item \textsuperscript{165} See generally \textsc{Jaffe}, supra note 138, at 564-65 (discussing the scope of judicial review for legislative rules and de facto rules); \textsc{Landis}, supra note 105, at 146-52 (comparing the incidence of judicial review of administrative lawmaking by regulation and by adjudication); Merrill, supra note 153, at 973.
\item \textsuperscript{167} See Kevin W. Saunders, \textit{Interpretive Rules with Legislative Effect: An Analysis and a Proposal for Public Participation}, 1986 DUKE L.J. 346, 357 (arguing that \textit{Chevron} seems to eliminate the legislative/interpretive rule distinction).
\item \textsuperscript{168} See Scalia, supra note 163, at 516-17.
\end{itemize}
Fonseca, in which the same Justice Stevens who wrote Chevron determined that whether the asylum standard was the same as that for withholding of deportation was "a pure question of statutory construction" in which deference to the agency was not required. It remains an open question whether Cardoza-Fonseca was an aberration or an indication of deep uncertainty in the Court over the strength of Chevron. It is, in any case, highly ironic that the case which most tested Chevron arose in the area of administrative law known for deference far beyond even that which Chevron proposed. Cardoza-Fonseca may thus indicate not merely the inconsistency of the post-Chevron Court but the concomitant demise of the plenary power doctrine as well.

The apparently simple first step of the Chevron method also masks deeper complexity. Since so much turns on the decision made at step one under the binary Chevron system, the Court has struggled over how to approach a statutory text. The ascendance of a "textualist" method by the Court should, according to its proponents, result in more cases being resolved by courts at step one. Others have argued, more persuasively in my view, that genuine textualism will answer the precise question at issue in so few cases that its proponents tend to abandon the quest for specific congressional answers, dramatically expanding the judicial interpretive role, albeit in a disingenuous way.

Moreover, the relationship between Chevron's steps is often difficult to understand. A judge's desire to rely upon "plain" statutory language does not necessarily lead to a belief in Chevron deference in cases where the statutory text does not seem to be controlling. Indeed,

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169. 480 U.S. 421 (1987); see also Adams Fruit Co. v. Barrett, 494 U.S. 638, 649-50 (1990) (holding that a statement by the Secretary of Labor about the scope of private judicial remedies was not subject to deference because it was outside the authority delegated to the agency by Congress).


171. See Merrill, supra note 153, at 985-88; see also NLRB v. United Food & Commercial Workers Union Local 23, 484 U.S. 112, 133-34 (1987) (Scalia, J., concurring) (asserting that Cardoza-Fonseca was not being followed by the Court).


173. See, e.g., Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribs. Cos., 498 U.S. 211, 223-24 (1991) (inquiring as to whether statute was ambiguous or unclear); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 290-93 (1988) (inquiring as to whether statute has "plain meaning").

174. See Scalia, supra note 163, at 521.

175. See Merrill, supra note 153, at 991.
one might expect the opposite to be the case. Justice Scalia, however, has argued that, "there is a fairly close correlation between the degree to which a person is ... a ‘strict constructionist’ of statutes, and the degree to which that person favors Chevron and is willing to give it broad scope."176 Strict constructionists tend to believe in what has been termed “archeological” statutory interpretation.177 They hold that the meaning of a statute is more or less set in stone on the date of enactment and the interpreter’s job is simply to recapture that meaning as much as possible.178 An alternative view, however, might be termed “nautical.”179 A statute is seen as an “on-going process (a voyage) in which both the [legislative] shipbuilder and subsequent navigators [agencies and courts] play a role.”180 Step one of Chevron appears archeological because it requires judicial deference to the statutory language or the intent of the legislature. But the second step of Chevron, with its deference to agency interpretation, appears to be of the nautical type. Rather than instructing courts to attempt to recapture even unclear intent as well as possible, Chevron simply allows the agency to navigate. It thus might seem odd that Justice Scalia would link it to the most archeological form of statutory interpretation.181 Indeed, once a “strict constructionist” decides that neither the text nor legislative intent controls, then one’s position on deference to an agency would seem to have nothing to do with either archeology or shipbuilding. As there is no longer a real archeological option, the debate is over the relative interpretive powers of agencies and the judiciary.

If self-styled strict-constructionist Chevron supporters like Justice Scalia are not motivated either by a nautical or an archeological

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176. Scalia, supra note 163, at 521.
178. See id.
179. Id.
180. Id.
181. One underlying jurisprudential reason for this might be a belief that the “clarity/ambiguity” dichotomy parallels that of “rule/discretion.” Judicial application of a “clear” statute is thus, by definition, not discretionary. This justification for Chevron, that Congress generally intends broad delegation to agencies and a more limited role for courts, is therefore most defensible if one believes that judges can really determine (through the exercise of legal reasoning) when the intent of Congress is clear. This first tier determination is analogous to Hart’s attempt to subsume apparently discretionary decisions into the broader rules category. It is formally consistent but on closer inspection seems primarily a form of linguistic category shifting. This is less of a problem, however, in areas of immigration law where Congress has been fairly specific in its delegation of interpretive authority to the Attorney General. See infra Part III.B.1.
interpretive method, how do we account for their support for *Chevron*’s second step? One possible explanation is that they believe that most agency action, including interpretations of statutory law, are more questions of “policy” than of “law.” Apart from the obvious definitional problems raised by this dichotomy, it creates yet another dilemma. Strict constructionists define themselves that way because they tend to dislike the flexibility which *nautilcal* judges bring to interpretation. Why then would *nautilcal* agencies be preferable? The standard answer, of course, is rooted in a particular view of democratic theory. Because judges “have no constituency” and agencies are at least subject to the general oversight of the president, it is more legitimate to defer to agency interpretations than for the judiciary to review matters de novo. This argument has been extensively supported and critiqued elsewhere and there is no need to revisit the entire debate here. It is important, though, to consider how *Chevron*’s presumption of deference, perhaps even more than the complex, nuanced practice which preceded it, highlights the need for a deep theory of legitimacy.

3. Legitimacy

A good deal of this looseness in judicial review can be accounted for by the fashionableness in legal circles of one word: discretion. Although this doctrine in its beginnings was healthy, designed to prevent unnecessary judicial interference with social policies adopted by the Congress, it has long since exceeded proper boundaries.

If, as we continue to teach law students, it is the province of the U.S. judiciary to say “what the law is,” how can judges constitutionally cede that power to agencies? Leaving aside the inherent tension of the law/policy dichotomy, *Chevron* deference strains our notions of separation of powers. Though *Chevron* is

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187. See generally Cass R. Sunstein, *Constitutionalism after the New Deal,* 101 HARV. L. REV. 421 (1987) (arguing that many of the failures of regulatory administration can be blamed on an inadequate system of checks and balances).
sometimes touted as a "counter-Marbury,"[188] the basic idea that there is a legitimate realm of largely nonreviewable executive discretion may be traced back at least to Marbury v. Madison itself.[189] To determine the extent of this realm, one must consider larger questions about the legitimacy of administrative law in general.[190]

At least three paradigmatic solutions to this problem have been offered. The first was what Richard Stewart once called the "transmission-belt" model.[191] This account views the relation between elected officials and administrators as analogous to (and derived from) that between voters and elected officials. As legitimacy is conferred by the voters upon their officials, it is transmitted to the agencies who, by proxy, carry out the will of the electorate.[192] Though this strand continues to appear in Supreme Court decisions,[193] it is something of an understatement to say that it may leave modem observers, "vaguely dissatisfied."[194] Amid the incredible complexity and deep bureaucracy of the modern administrative state, the search for a true "transmission belt" seems both practically and theoretically doomed. A second, if less politically satisfying, model for administrative legitimacy might be that of expertise. This model has the virtue of recognizing the need for more sophisticated treatment of many public issues than any legislative body could hope to develop. Indeed, this was one of the most powerful arguments offered in support of the modern expansion of administrative agencies in the first place.[195] Reliance upon expertise for legitimation raises a number of problems, however. How is performance to be evaluated? Powerful arguments have long been made that some agencies are charged with controlling processes which are too complex to be even conceptualized, let alone managed.[196] Similarly, it is somewhat implausible that many people are persuaded that agency action is legitimate simply because the agency purports to

188. See Merrill, supra note 153, at 969.
192. See id. at 1675 & n.20.
possess expert knowledge. When the FDA is lax in its regulation of hormones in milk, does anybody really concede the legitimacy of that decision based upon some abstract idea that the agency must know best?

The various strands of legitimacy theory described above are important for obvious political reasons. They also serve to justify patterns of judicial intervention in the administrative process. A common, if greatly oversimplified, way to link theories of legitimacy to judicial review has been to posit a bipolar model of administrative practice. On one end is legislative-type activity, on the other judicial-

197. Jerry Mashaw has also noted the "unfortunate anti-egalitarian connotations" of administrative expertise as a legitimating doctrine. Mashaw, supra note 194, at 21. Put more succinctly, faith in expertise cannot come close to counteracting the lack of political consensus about public policy choices, increasing technical complexity, and the general alienation from political processes which besets the modern American administrative state. Nevertheless, this model continues to retain power for the judiciary although its invocation often seems highly selective and contingent.

198. As with so much of recent U.S. law, a legitimating model for administrative law based on process values has also emerged. This focus on participatory values has been best exemplified by the so-called due process revolution which began with Goldberg v. Kelly, 397 U.S. 254 (1970). An initial difficulty for this theory involves the nature of the process in which participation is sought. Participation in an adversarial hearing does not have the resonance of participation in administrative governance and policymaking. Further, there is no obvious support for the assumption that participatory governance will work better on the (relatively) micro-administrative level than it does on the macro-legislative level, nostalgic yearnings for New England town meetings notwithstanding. It could, moreover, impede whatever "transmission" there might still be from the legislature and interfere with any application of expertise at all. Also, it is inevitably expensive and, as a freestanding model, provides no substantive guidelines as to how to determine the public good or for weighing competing interests. See Mashaw, supra note 194, at 23. Finally, it is clearly inapplicable to adversarial immigration-law practice such as deportation hearings.

199. In cases involving rulemaking, the transmission-belt theory may support deferential judicial review of the permissible bounds of administrative action within legislative mandates. See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410-17 (1971). The old nondelegation jurisprudence of the Schechter and Panama Refining cases may be seen as rejections of transmission-belt theory, at least as a matter of formal doctrine, if not politics. See Schechter Poultry Corp. v. United States, 295 U.S. 495, 537-42 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 421-30 (1935); see also Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (noting that construing a statute as an open-ended grant of agency authority could make the statute unconstitutional under Schechter and Panama Refining). As a more progressive, New Deal spirit took hold, however, both the transmission-belt and the expertise theories were used to justify a regime of ever-increasing judicial deference to administrative authority. See generally 1 Davis, supra note 27, § 3:5 (discussing judicial acceptance of delegations of congressional authority even in the absence of standards or "intelligible principles"). The ascension of process-based theories in the 1946 APA was, in many respects, a response to this trend. Of course, it is also true that disagreements with the substantive outcome of administrative action are often reformulated as disagreements over process. See Mashaw, supra note 194, at 26-27.
type decisionmaking. The scope of judicial review may depend upon where on this continuum particular agency action falls.\textsuperscript{200}

Whatever its ultimate theoretical utility,\textsuperscript{201} the bipolar model of administrative action\textsuperscript{202} has dominated discussions of how to constrain administrative discretion for more than half a century.\textsuperscript{203} The rule-making process of the APA,\textsuperscript{204} according to the bipolar model, is the primary way in which excessive discretion regarding so-called "legislative facts" should be constrained. Such requirements as public notice and a statement of reasons for adoption of a rule might operate to check at least some of the most egregious forms of excessive discretion.\textsuperscript{205}

Some recent scholarship grounded in the contingency thesis has focused on defects in the bipolar model and current legitimacy theory.\textsuperscript{206} Christopher Edley, for example, suggests a "trichotomy of

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  \item \textsuperscript{200} Once the general constitutional legitimacy of administrative law became more or less settled during the New Deal era, the passage of the Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.), concretized this model for academics, policymakers, and the judiciary. See generally Ronald A. Cass, Models of Administrative Action, 72 VA. L. REV. 363, 364 (1986) (noting the general acceptance, by the end of the New Deal era, of the constitutional legitimacy of administrative action).
  
  \item \textsuperscript{201} Cass and others seem to me clearly correct to point out the defects of this model, including the fundamental point that "[a] linear array of administrative functions . . . fails to capture the complexity of administrative life." Cass, supra note 200, at 366.
  
  \item \textsuperscript{202} One incarnation of this model was Kenneth Culp Davis's distinction between "legislative facts," the determination of which should not require trial-type procedures, and "administrative facts," which should. See, e.g., Davis & Pierce, supra note 113, § 7.03, at 293-97; Kenneth Culp Davis, An Approach to Problems of Evidence in the Administrative Process, 55 HARV. L. REV. 364, 402-16 (1942).
  
  \item \textsuperscript{203} Cass, following Walter Gelhorn and Kenneth Culp Davis, also cites two Supreme Court decisions from the early 1900s, Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915), and Londoner v. Denver, 210 U.S. 373 (1908), which seem to contain seeds of the bipolar model, or at least, as Cass concedes, "a general, inarticulate notion that some administrative actions require procedures that are used by courts but not legislatures." Cass, supra note 200, at 368.
  
  \item \textsuperscript{204} APA § 2(c), 5 U.S.C. § 551(4) (1994).
  
  \item \textsuperscript{205} Adjudicative proceedings under the APA are more thoroughly regulated and include explicit recognition of and guidance for judicial review. Here, standards such as "reliable, probative, and substantial evidence" and "abuse of discretion" aspire to a more judicially bounded system. See id. § 7, 5 U.S.C. § 556(d).
  
  \item \textsuperscript{206} One difficulty with the bipolar model is its simplistic adoption of the fact/value (or fact/policy) distinction. See Glen O. Robinson, The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform, 118 U. PA. L. REV. 485, 521 (1970); see also Cass, supra note 200, at 384-85 (discussing academic criticisms of the bipolar model's notion that fact or policy is uncontaminated by assumptions, opinions, and biases). This distinction seems untenable both as an abstract proposition and as a description of any real-world decisions. More ambitious critiques of the model focus on the way in which it fails to account for other important values within our
paradigmatic decisionmaking methods. This schematic includes "adjudicatory fairness, science, and politics." Adjudicatory fairness embraces not just courts but "reasoned elaboration, neutrality of the decisionmaker, well-elaborated notions of hearing and confrontation, and consistency." Science involves "rationality, objectivity, deductive reasoning, and specialized knowledge." Politics is simply "interest accommodation or balancing." Even this more subtle framework, however, has conceptual difficulties which, according to Edley, cause administrative law to "fail at its antidiscretion project."

Although this "trichotomy" functions as a "diagnostic test" to explain why doctrine has evolved in the generally unsatisfying and confusing way it has, Edley argues that the reliance on its three paradigms actually obfuscates "clear decisional principles." Edley's solution to this problem is to "confess" the ultimately political nature of administrative decisionmaking and to develop guidelines for

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208. Id.

209. Id. at 568.

210. Id.

211. Id. at 569.

212. Although it is probably fair to describe the dominant strand of academic analysis of administrative law over the last half century as an "anti-discretion project," this label has been resisted by Kenneth Culp Davis. Indeed, Davis's book, Discretionary Justice, begins with the proposition that "the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness." Davis, supra note 72, at 3. Everything, in Davis's view, depends upon determining "the optimum point on the rule-to-discretion scale." Id. at 15.

213. The first conceptual failure is duality. Each paradigm contains positive and negative attributes which may be selectively emphasized by judges. Adjudicative fairness, for example, may be praised as neutral or consistent or criticized as expensive or conservative, for example. A second conceptual problem is that of boundaries. In practice, these paradigms are always commingled in ways which render them inseparable without "artificial and distorted conceptual violence." Edley, supra note 207, at 570. Thus, "when we observe agency actions or statements, our description is nothing but a choice among paradigms, which in turn amounts to a choice about scope of review or judicial deference." Id. at 571. Put in more familiar Critical Legal Scholarship terminology, "[b]ecause any given problem can be placed under the rubric of more than one paradigm, the selection of a particular paradigm as controlling reflects a subjective judgment call." Id. at 574.
administrative action that are grounded not in the trichotomy, or even in separation of powers ethos, but in political, social, and economic theory.214 This approach necessarily involves the abandonment of the general “antidiscretion project” and its replacement with a “dialogue” (or a trialogue?) among courts, agencies, and Congress over the “norms of sound governance.”215 The hard task, then, is to figure out exactly how such a model would work in practice.

William Eskridge and Philip Frickey have recently proposed a name for the three-sided relationship among courts, agencies, and Congress which offers such a practical focus.216 Noting that the Supreme Court now contains a majority of justices who are alumni of Hart and Sacks’s course on “The Legal Process”217 and arguing that “legal process theorizing about public law has enjoyed a renaissance,”218 Eskridge and Frickey draw upon positive political theories to develop a model of administrative law as an “equilibrium.”219 In this equilibrium, which is said to be “a state of balance among competing forces or institutions,”220 each branch of government “seeks to promote its [own] vision of the public interest”221 while both cooperating and competing with the other branches.222 There is, of course, a strongly Realist, or

214. Another sort of critique which grapples most directly with the discretion problem is that which addresses the very concept of a “reasoned decision.” Even jury trials, after all, while protecting values of dignity and fairness, do not solve the discretion dilemma. Indeed, strong supporters of the jury system often seem to applaud the discretionary powers of jurors to, for example, nullify unpopular or unfair laws. Thus, proponents of “reason” as the dominant administrative value do not always see adjudicative processes as necessarily being the best means to that end. See Barry B. Boyer, Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 MICH. L. REV. 111, 137-46 (1972); Cass, supra note 200, at 389-90. Other critiques of the bipolar model focus on the values of fairness and dignity. Proponents of dignitary theories generally tend to see trial-type processes as the ideal guarantee of fairness and dignity, though they recognize that the costs of adopting such procedures for all actions are too high. Discretion in this model is dealt with in the way it is in all judicial fora—decisions must be based on evidence, must be reasoned to a least some formal standard, and are subject to review by courts. See, e.g., Mashaw, supra note 194, at 153-54, 162-82; Colin S. Diver, Policymaking Paradigms in Administrative Law, 95 HARV. L. REV. 393, 424-25 (1981); Diver, supra note 24, at 98-101 (stressing the importance of how much information is available to administrators).

216. See Eskridge & Frickey, supra note 41, at 28.
217. Id. at 27.
218. Id. at 28.
219. Id.
220. Id.
221. Id.
222. See id. at 28-29.
contingency thesis, aspect to this view. Indeed, the position begins with a rejection of the idea that “law is a closed system of objectively discoverable rules.” The main goal of Eskridge and Frickey’s argument is to show how the Court has recently acted either to upset or maintain “stable equilibrium.” Their model however, with its emphasis on institutional “rationality” and “interdependence,” also helps us to understand how the concept of discretion is often the fault line of inter-institutional power struggles. The model has a rather distressing implication for immigration law, however. In discussing Justice Stone’s footnote four in United States v. Carolene Products Co., and its theoretical progeny such as John Hart Ely’s Democracy and Distrust, Eskridge and Frickey conclude that:

Even were the Court inclined to be counter-hegemonic, the complex system of implicit bargains the Court has made with the coordinate branches of national government narrow the Court’s doctrinal options, preventing the Court from challenging the positions of the other branches. . . . [G]roups truly marginalized by the political process may not have the resources or the energy to adjudicate successfully through the Supreme Court level.

4. Judicial Review under the APA

Thus, although it is not logically or even empirically true that all informal agency actions are exercises of discretion, courts will typically label informal actions discretionary because the standard by which the actions are reviewed uses that label.

Under the APA, discretion appears in complicated conjunction with standards for judicial review. Discretion is not defined, however, and the concept can devolve into a conclusory label derived from an anterior decision by a court about the desired scope of review.

223. Id. at 29.
224. Id. at 32.
225. Id. at 33.
226. 304 U.S. 144, 152 n.4 (1938).
228. Eskridge & Frickey, supra note 41, at 53.
of a particular decision. Two different provisions of the APA use the term discretion. Section 701(a)(2) limits judicial review of agency action if “agency action is committed to agency discretion by law.” Section 706(2)(A) mandates that a reviewing court “hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” The first of these sections relies upon a designation by “law” of a particular practice as committed to agency discretion. The definitional problem is thus sometimes shifted from the courts to the legislature. The second section, however, permits a reviewing court to determine not only what an abuse of discretion might be, but also what sorts of agency decisions are discretionary.

Courts are generally reluctant to hold agency action unreviewable under section 701(a)(2) as “committed to agency discretion.” Since 1967 the Supreme Court has adopted a presumption of reviewability which it derived from the structure of the APA: “[T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review . . . [O]nly upon a showing of ‘clear and convincing evidence’ of a contrary legislative intent should courts restrict access to judicial review.” In Citizens to Preserve Overton Park, Inc. v. Volpe, the Court further elaborated on its reading of APA section 701(a)(2) by concluding that judicial review would only be precluded where “statutes are drawn in such broad terms that in a given case there is no law to apply.”

Since Overton Park, some federal courts of appeals have occasionally found statutes to commit certain decisions solely to agency discretion. In general, however, the residual thesis

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231. See id. at 1489.
233. Id. § 706(2)(A).
234. This is not invariably true, however, as courts often apply an abuse-of-discretion standard even to agency action which has not been specifically labeled as discretionary by the legislature. See infra Part IV.
237. Overton Park, 401 U.S. at 410 (quoting S. REP. No. 79-752, at 26 (1945)).
238. See, e.g., Sierra Club v. Yeutter, 911 F.2d 1405, 1414 (10th Cir. 1990) (holding that U.S. Forest Service decision to use or to not use federal reserved water rights is “committed to agency discretion by law” except where agency conduct cannot be reconciled with general mandate of governing statute).
reluctance to consider legal practice discretionary in the strongest sense is evident in this line of cases. In *Webster v. Doe*, however, the Court held that a statute-based challenge to the decision of the Director of the CIA to terminate a homosexual employee was unreviewable because it was "committed to agency discretion by law" and there was no law to apply. Chief Justice Rehnquist, writing for the majority, noted, beyond the national security concerns raised by the case, the explicit way in which the statute was worded ("in his discretion" and "whenever he shall deem such termination . . . advisable"), and the breadth of the statutory standard (whether termination was "advisable"). This reasoning, which first appeared in Justice Rehnquist's opinion in *Heckler v. Chaney*, has been severely criticized both by legal scholars and other members of the Court. Bernard Schwartz, for example, has referred to it as "administrative law heresy" because "there is no place for unreviewable discretion in a system such as ours." Subsequent statements by the Court, however, have indicated that *Webster* should probably be read narrowly, though its exact contours remain unclear.

The *Elramly* case—if it returns to the Court—is likely to test the reviewability presumption. The idea of nonreviewability in immigration law has recently begun to percolate through the federal judiciary. In a particularly chilling decision, one judge, following *Heckler* and *Webster*, has gone so far as to hold that there is no law to be applied in relief-from-deportation cases. As in *Webster*, the

240. Id. at 600.
241. Id. at 594, 600 (quoting National Security Act of 1947, § 102(c), 50 U.S.C. § 403(c) (1994)).
242. 470 U.S. 821, 837-38 (1985) (holding that FDA refusal to take enforcement action relating to drugs used for lethal injection is not subject to judicial review).
243. See Heyman, supra note 24, at 873.
244. Bernard Schwartz, Administrative Law Cases during 1985, 38 ADMIN. L. REV. 392, 310 (1986); see also Kenneth Culp Davis, "No Law to Apply," 25 SAN DIEGO L. REV. 1, 2, 10 (1988) (noting that the Court always has a standard of reasonableness to apply); Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 734-35 (1990) (suggesting that review of questions such as whether agency misunderstood facts, departed from precedent, or acted unconscionably, among others, is virtually always possible).
246. See the opinion of Judge Easterbrook in *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265 (7th Cir. 1985), holding that denial of discretionary relief is not subject to judicial review. See also *Perales v. Casillas*, 903 F.2d 1043, 1048, 1050-51 (5th Cir. 1990)
congressional delegation in section 212(c) (at issue in *Elramly*) is exceedingly broad; indeed it is entirely contentless. Unlike in *Webster*, however, there is no obvious national security issue at stake and the decision of the Board of Immigration Appeals (BIA) as to whether to grant relief from deportation was explicitly based on a balancing of factors. Moreover, it could be important to *Elramly* that the Court has continually reaffirmed that a colorable constitutional claim, perhaps of procedural due process, is not barred by *Webster*. A decision in *Elramly* will, however, be of merely historical interest if the judiciary upholds the IIRIRA discretion provisions under section 701(a)(2). To be sure, the IIRIRA does seem to embody "clear and convincing" evidence of congressional intent to preclude review. But that is not necessarily the end of the matter.

Recently, for example, in another signal of support for the general concept of judicial review, the Court has distinguished specific challenges to agency action (which may be barred by Congress) from systematic or constitutional allegations. This distinction has held even in immigration cases where one might have expected it to be trumped by the plenary power doctrine. In *McNary v. Haitian Refugee Center, Inc.*, a seven-member majority of the Court held inapplicable a statutory provision of the Immigration Reform and Control Act of 1986 which prohibited judicial review of a determination with respect to an application for legalization. Because the plaintiffs had alleged systematic violations of both constitutional and statutory law, the Court declined to apply the statutory preclusion of review.

(holding denial of voluntary departure and work authorization prior to deportation hearing unreviewable); Dina v. Attorney General of the United States, 793 F.2d 473, 476 (2d Cir. 1986) (holding that USIA waiver recommendation is committed to agency discretion).

247. *Franklin*, 505 U.S. at 801. The claim in *Elramly* may be one of due process or equal protection.

248. Indeed, this recent history supports the proposition that the plenary power doctrine is less dispositive than it sometimes appears.


The APA standard of "arbitrary, capricious [or] an abuse of discretion" has proven much more complex for courts than "committed to agency discretion by law." One of the most frequently cited judicial decisions to grapple with this problem is that of Judge Henry Friendly in an immigration case—Wong Wing Hang v. INS. The case was an appeal from a denial of relief from deportation under Section 244 (Suspension of Deportation). The denial was based on a number of "discretionary" factors including the allegation that Mr. Wong had deliberately concealed information about the whereabouts of his wife and children from INS, and had "permitted" his wife to enter the United States with fraudulent documents.

Judge Friendly first considered the apparent conflict between APA section 701(a)(2) and section 706. As an apparent adherent of the Hart and Sacks version of the residual thesis, he rejected the argument that discretion under the APA or the INA could "not [be] subject to the restraint of the obligation of reasoned decision." He then sought to define more precisely what this sort of review could mean.

Two possible standards were contrasted. The first is analogous to a "clearly erroneous" standard: "[W]hen judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." The second model is even more limited: "discretion is held to be abused only when the action 'is arbitrary, fanciful or unreasonable, which is another way of saying that

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253. 360 F.2d 715 (2d Cir. 1966).
254. See Immigration and Nationality Act § 244, 8 U.S.C. § 1254 (1994); see also Wong Wing Hang, 360 F.2d at 716.
255. See Wong Wing Hang, 360 F.2d at 717.
256. Id.
257. 5 U.S.C. § 701(a)(2) (1994) (providing for no judicial review where "agency action is committed to agency discretion by law").
258. Id. § 706(2)(A) (authorizing reversal of decisions which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); Wong Wing Hang, 360 F.2d at 718.
259. Wong Wing Hang, 360 F.2d at 718 (quoting Hart and Sacks, supra note 30, at 172, 175-77).
260. It should be noted that Judge Friendly rejected the argument that unreviewability was mandated by Jay v. Boyd, 351 U.S. 345 (1956), by citing United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957), in which the Supreme Court affirmed an agency denial of section 244 relief as neither arbitrary nor an abuse of discretion.
261. Wong Wing Hang, 360 F.2d at 718 (quoting In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954)).
discretion is abused only where no reasonable man would take the view' under discussion.”

Judge Friendly was of the opinion that narrower review was more appropriate when agency (as opposed to judicial) action was being reviewed, particularly where the relevant statute expressly empowered discretionary decisions. As a result, he offered the following formula: “[T]he denial of suspension to an eligible alien would be an abuse of discretion if it were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as an invidious discrimination against a particular race . . . .”

The *Wong Wing Hang* formula, though highly deferential, represents about as close a standard of review of immigration cases as any court has been willing to offer. Indeed, the Supreme Court has, at least in certain types of cases, supported a much more deferential posture. Judge Friendly, however, though troubled by the lack of standards, encouraged a better “equilibrium” between the judiciary and the Attorney General:

In the absence of standards in the statute itself, proper administration would be advanced and reviewing courts would be assisted if the Attorney General or his delegate, without attempting to be exhaustive in an area inherently insusceptible of such treatment, were to outline certain bases deemed to warrant the affirmative exercise of discretion and other grounds generally militating against it.

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262. *Id.* (quoting Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942)).
263. *Id.* at 718-19.
264. *Id.* at 719. The “inexplicable departure” and “impermissible basis” standards seem clear enough and indeed have been meaningfully (though generally restrictively) invoked by courts. *See infra* Part IV. It is more difficult to understand the “without rational explanation” test. It is hard to imagine a “discretionary” decision of record which would be rendered without a “rational explanation” of some sort. Unless the reviewing court is prepared to weigh this rationality in some fashion, the “rational explanation” standard is almost meaningless.
265. *See infra* Part IV.B.
266. It is worth noting that Judge Friendly, in his 1982 article, also concluded that the scope of review should be a function of the type of discretion at issue:

When I began working on this lecture, I thought these wildly different definitions of abuse of discretion could not be defended and that we ought to pick one—very likely something like Judge Magruder’s—and apply it across the board. Study has led me to conclude that the differences are not only defensible but essential.

267. *Wong Wing Hang*, 360 F.2d at 718.
Although it is has not been comprehensively done, the Attorney General has, through both formal rulemaking and adjudication, attempted to answer Judge Friendly's call for greater specificity. But this very action by the Executive has sometimes had the apparent effect of confusing the judiciary about how to review different types of discretionary decisions. To see how this has come about we will need more refined definitions of discretionary action in immigration law.

B. Models of Immigration-Law Discretion

1. Delegated Discretion

The power to reopen a case and grant an adjustment of status is a power to dispense mercy. No one is entitled to mercy, and there are no standards by which judges may patrol its exercise.\footnote{268. Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985) (Easterbrook, J.).}

Although administrative discretion permeates many aspects of contemporary U.S. law, its impact in immigration law is exceptional. Some twenty years ago, Maurice Roberts, former chairman of the Board of Immigration Appeals, poignantly explained why special attention must be paid to immigration decisions:

In terms of human misery, the potential impact of our immigration laws can hardly be overstated. With minor exceptions, the immigration laws operate directly and exclusively upon human beings, flesh and blood, men, women and children, whose hopes for future happiness in a realistic sense frequently depend on their ability to enter, or remain in, this land of freedom and opportunity.\footnote{269. Roberts, supra note 24, at 144.}

Discretion has been woven into the fabric of this system in a number of different ways, sometimes explicitly, sometimes more subtly. The most obvious appearance of discretion is in so-called "relief" provisions of immigration law. Because of the individual stakes involved and the severe hardship which could be caused by exclusion or deportation, Congress, over the years, has enacted an array of measures designed to waive inadmissibility or deportability.\footnote{270. Part of the need for such measures derives from the absence of statutes of limitations as to exclusion or deportation for criminal conduct, fraud, and other grounds.} Many forms of relief from deportation such as suspension of deportation,\footnote{271. See Immigration and Nationality Act § 244, 8 U.S.C. § 1254(a) (1994).} voluntary
departure, registry, adjustment of status, asylum and various "waivers" have been defined as discretionary in the governing statute. The new so-called “Cancellation of Removal” provisions of the IIRIRA follow this pattern. All of these measures not only expressly include specific eligibility requirements, which require analysis and interpretation, but depend also upon a favorable decision “in the discretion” of either the State Department or the Justice Department. This type of discretion is explicitly included by Congress in the relief legislation itself, resulting in a system which was pointedly described by Kenneth Davis some years ago: “The underlying scheme of the Act is to avoid conferring legal rights on aliens.”

This form of discretion, which is prescribed expressly by statute and which appears as the end point of a complex, multilayered administrative decision, could be termed delegated discretion. It might be arguably the most amenable to extreme judicial deference as “committed to agency discretion by law.” Courts, however, as discussed above, are often reluctant to go this far and tend to review even delegated discretion under an “abuse” or “arbitrary and capricious” standard. The actual scope of such review, however, is exceptionally deferential.

272. See id.
274. See id. § 245, 8 U.S.C. § 1255.
276. See Immigration and Nationality Act § 212, 8 U.S.C. § 1182(g)-(h).
277. Judicial review of a discretionary denial of such relief will require at least a showing that the administrative decision was “arbitrary, capricious, and an abuse of discretion” under the APA. In light of the extra deference given the agency in immigration practice, it is also fair to say that “one who contests a discretionary determination is battling against heavy odds.” 3 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 81.09[2][c], at 81-152 (rev. ed. 1993).
279. See infra Part III.B.2.
280. 2 DAVIS, supra note 27, § 8:10, at 200.
281. When considering the propriety of delegated discretion it is perhaps as important to focus on the delegation as the discretion. If we address this problem from the top down, our first question should focus on the textual constitutional source of governmental authority to control immigration at all. However, as many judges and academics have noted, there is none. See, e.g., The Chinese Exclusion Case, 130 U.S. 581, 609 (1889). This textual gap has been filled by a variety of metaphysical solutions ranging from the foreign affairs power to being “inherent in sovereignty.” Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892); see also United States v. Curtiss-WrightExport Corp., 299 U.S. 304, 316-18 (1936) (holding that foreign affairs power is extra-constitutional, derived from independence).
A well-known example of delegated discretion is the statutory provision which, until removed by the IIRIRA, authorized the Attorney General to waive deportation for aliens who have resided a minimum of seven years in the United States. The statute began as follows: "[T]he Attorney General may, in his discretion, suspend deportation ...." The careful reader may be struck by the discretionary overkill implicit in this formulation. Generally, one would think that either the use of the word "may" or the phrase "in his discretion" would suffice to make the point. There is, in fact, a rather fascinating history to this provision which is worth briefly recounting, as it illustrates some important general features of discretion in U.S. immigration law.

There was no statutory basis to suspend the deportation of an otherwise deportable alien until 1940. This, of course, did not mean that no relief was possible. Indeed, a rather extensive, but virtually secret and unregulated system of administrative discretion flourished.

Vague sources of power have been accompanied by vague conceptions of its limitations. This has been especially true as to the delegation of immigration authority from the Congress to executive agencies. Thus, the INA charges the Attorney General with "the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens." Immigration and Nationality Act § 103(a), 8 U.S.C. § 1103(a). Indeed, this grant is accompanied by a provision the precise meaning of which has never been determined: "determination and ruling by the Attorney General with respect to all matters of law shall be controlling." Id. In practice, of course, the Attorney General rarely makes personal decisions in immigration cases, but this is a second-order delegation problem which only heightens the importance of the first: Can Congress legitimately grant such broad power to make law to the Attorney General?

One way to approach this question is to ask whether this power belongs solely to Congress in the first place. Early immigration decisions of the Supreme Court seemed to assume so. In the Chinese Exclusion Case, for example, Justice Field focused on the power of "the government of the United States, through its legislative department." 130 U.S. at 606. Pursuant to section 103 of the INA, however, the judicial inquiry has shifted to the extent of congressional delegation to the executive branch. In Narenji v. Civiletti, 617 F.2d 745, 747 (D.C. Cir. 1979), for example, the court held that distinctions among aliens based on nationality could be made by the Executive, even without explicit congressional action, due to the breadth of the mandate of section 103. So long as such distinctions are not "wholly irrational" they will be sustained. Recently, there has been some renewed interest in the fundamental delegation problem of immigration law. See generally Andrés Snaider, The Politics and Tension in Delegating Plenary Power: The Need to Revive Nondelegation Principles in the Field of Immigration, 6 GEO. IMMIGR. L.J. 107 (1992).

sub silentio.\textsuperscript{285} The Alien Registration Act of 1940 brought this process into the open and permitted the Attorney General (the statute said "may") to suspend deportation of an alien who showed "good moral character" for the preceding five years, and whose citizen or permanent-resident spouse, parent, or minor child would suffer "serious economic detriment" as a result of the deportation.\textsuperscript{286} In 1948, Congress expanded eligibility for relief to include aliens with seven years residence in the United States, even if they lacked family ties here.\textsuperscript{287} The generally liberal construction of these provisions was criticized in the debates\textsuperscript{288} leading to the passage of the 1952 McCarran-Walter Act.\textsuperscript{289} As a result, this form of relief was severely restricted. An alien now had to show "exceptional and extremely unusual hardship."\textsuperscript{290} In addition, the superfluous phrase, "in [the Attorney General's] discretion" was added.\textsuperscript{291} The apparent aim of this surplusage was to authorize highly discretionary action that would be largely immune from judicial scrutiny. Presumably, given the tenor of the times, Congress anticipated that the Attorney General would exercise discretion more stringently than judges had.

Judicial practice has tended to follow this lead. U.S. immigration law, as noted above, is notorious for its general lack of judicial review of legislative categories,\textsuperscript{292} executive action,\textsuperscript{293} and administrative practice.\textsuperscript{294} The case law on delegated discretion, however, represents the pinnacle of judicial deference. Consider the case of Jay v. Boyd.\textsuperscript{295}


\textsuperscript{288} See, e.g., S. REP. No. 82-1137, at 25 (1952); S. REP. No. 81-1515, at 600-01 (1950).

\textsuperscript{289} Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a), 66 Stat. 163, 214-16 (1952) (codified as amended at 8 U.S.C. § 1254(a) (1994)).

\textsuperscript{290} Id.

\textsuperscript{291} Id.

\textsuperscript{292} See, e.g., Fiallo v. Bell 430 U.S. 787, 792, 798 (1977).


\textsuperscript{294} See, e.g., De Los Santos v. INS, 690 F.2d 56, 59-60 (2d Cir. 1982). This subject has sometimes been recognized as a problem by writers in the field. See, e.g., Sofaer, supra note 24, at 1294. When viewed from the perspective suggested by this Article, however, the picture that emerges is somewhat different from that which has been suggested before.

\textsuperscript{295} 351 U.S. 345 (1956).
Cecil Reginald Jay entered the United States in 1914. His only absence from the United States had occurred during World War I when he served in the armed forces of Canada. He was a member of the U.S. Communist Party from 1935 to 1940, a period during which that party was widely recognized in this country as a bona fide political organization, fielding candidates in many state elections. Although membership in the Communist Party was not completely clarified as a ground of deportation until ten years after Jay's membership had ceased, he, like many others, was held subject to deportation retroactively.

Jay was over sixty years of age at the time he applied for suspension of deportation. He had, as noted, been out of the Communist Party for more than ten years, and had no criminal record. The special inquiry officer who heard his case found that he was a person of good moral character and acknowledged Jay's testimony that "if he were deported . . . he would be separated from relatives and friends, and . . . he would find it almost impossible to maintain himself because of lack of funds." His application for suspension, however, was denied on the basis of certain "confidential information."

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296. See id. at 364 (Black, J., dissenting).
297. See id. (Black, J., dissenting).
298. See id. at 362-63 (Black, J., dissenting).
299. The 1952 McCarran-Walter Act provided that an otherwise deportable alien could have his deportation "suspended . . . in the discretion" of the Attorney General if the alien could prove that during the preceding 10 years he was a person "of good moral character" and that deportation would result in "exceptional and extremely unusual hardship." Immigration and Nationality Act, Pub. L. No. 82-414, § 244(a)(4), 66 Stat. 163, 214-16 (codified at 8 U.S.C. § 1254 (a)(5)(c) (1994)).
301. See Jay, 351 U.S. at 364.
302. See id. at 349 n.4.
303. Id.
304. Id. at 350. The exact nature of this information was subject to some dispute. Jay, upon information and belief, argued in his petition for a writ of habeas corpus that the "confidential information" was simply the fact that his name had appeared on a list circulated by the American Committee for the Protection of the Foreign Born, an organization which had been designated ex parte by the Attorney General as subversive. See id. at 350 n.6. The government denied this, in general, but the exact nature of the information was not disclosed. See id. The use of such confidential information had been authorized by regulations promulgated by the Attorney General "if in the opinion of the
The Supreme Court, in an opinion authored by Justice Reed, took what seems in retrospect a curious approach to the case. Rather than considering the propriety of secret proceedings, under the statute or the Due Process Clause, the Court focused on the discretionary nature of the relief sought. Congress had not, according to the Court, provided statutory standards for determining who, among the pool of qualified applicants, should actually receive “the ultimate relief.” That determination was left to the “sound discretion of the Attorney General.” And this discretion was now to be viewed very broadly. The statute did “not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised.” The “unfettered discretion” of the Attorney General in suspension cases was deemed most analogous to the parole power over convicted criminals. Not only would the Court import no substantive standards into this realm, but there would not even be found a right to a hearing or full disclosure of the considerations entering into a decision. Relief was said to be, “in all cases a matter of grace.”

There were four dissenters in Jay v. Boyd. Although the identity of one of them, Felix Frankfurter—who had written the

officer or the Board making the determination the disclosure of such information would be prejudicial to the public interest, safety, or security.” 8 C.F.R. § 244.3 (1952).

305. See Jay, 351 U.S. at 351-56. Owing to the prevailing view in the 1950s of the parameters of the Due Process Clause, Jay apparently did not argue that this use of secret procedures would itself be unconstitutional. See Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212, 215 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); cf. Kwok Jan Fat v. White, 253 U.S. 454, 464 (1920) (noting that agency power in immigration cases should be administered “not arbitrarily and secretly, but fairly and openly”). He did, however, argue that to deny him a right to a full hearing would be inconsistent with the “tradition and principles of free government.” Jay, 351 U.S. at 357. Though conceding that this was “[o]n its face ... an attractive argument,” the Court declared itself bound by the “plain meaning” of the statute, “however severe the consequences.” Id.


307. Id.

308. Indeed, in a footnote, the Court noted that the 1940 precursor to the 1952 suspension law had provided only that “the Attorney General may ... suspend deportation.” Id. at 353 n.15 (citation omitted in original). The Immigration and Nationality Act of 1952 had added the words “in his discretion’ after the words ‘the Attorney General may.”’ Id. (citation omitted in original).

309. Id. at 354.

310. Id. at 354-55.

311. See id. at 355.

312. Id. at 354 (emphasis added).

313. They were Chief Justice Warren and Justices Black, Frankfurter, and Douglas. See id. at 361-76.
Court’s opinion in *Galvan v. Press*[^314] and concurred in *Harisiades v. Shaughnessy*[^315]—might have come as something of a surprise, the nature of their arguments was perhaps less surprising. Chief Justice Warren, for example, could not “in conscience” agree with the majority opinion because it sacrificed “to form too much of the American spirit of fair play in both our judicial and administrative processes.”[^316] He saw the discretion of the suspension remedy as having been given by Congress not as a carte blanche but in the “interest of humanity.”[^317] Discretion which denies relief should, on this view, be analyzed differently from that which grants relief. Justice Black pointedly noted that this was “a strange case in a country dedicated by its founders to the maintenance of liberty under law.”[^318] Two points seem to have animated his dissent. First, the breadth of the Attorney General’s construction of “confidential information” was troubling[^319]. Black went so far as to interpret the Court’s holding as allowing “exile on the basis of anonymous gossip.”[^320] But Black also focused on the fact that, after all, it is not really the Attorney General who exercises “unfettered discretion,” but lower level officials of the INS and the Board of Immigration Appeals[^321]. Justice Frankfurter’s dissent also raised this problem of delegation or “redelegation” of discretion[^322]. According to Frankfurter, the question of “conscience” is a personal one:

If the Attorney General’s conscience is satisfied to act on considerations that he does not desire to expose to the light of day or to impart to an alien whose liberty may be at stake, thereby involving the fate of an innocent family, Congress leaves him free to do so. But

[^314]: 347 U.S. 522 (1954). Justice Frankfurter noted, “much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion ... belonging to Congress in regulating the entry and deportation of aliens... [B]ut the slate is not clean.” *Id.* at 530-31.

[^315]: 342 U.S. 580, 596-98 (1952) (Frankfurter, J., concurring).


[^317]: *Id.* (Warren, C.J., dissenting).

[^318]: *Id.* at 362 (Black, J., dissenting).

[^319]: *Id.* at 365 (Black, J., dissenting).

[^320]: *Id.* (Black, J., dissenting).

[^321]: *Id.* at 366 (Black, J., dissenting). Black also challenged the majority’s probation analogy by noting that probation only arises after conviction for a crime, whereas “[v]iewed realistically this suspension procedure is an integral part of the process of deciding who shall be deported.” *Id.* at 367.

[^322]: *Id.* at 372 (Frankfurter, J., dissenting).
Congress has not seen fit to invest his subordinates with such arbitrary authority over the lives of men.\textsuperscript{323}

On its most obvious reading, the issue in \textit{Jay v. Boyd} was perhaps not really discretion but the propriety of secret hearings. The special inquiry officer, after all, had found Jay eligible, even under the discretionary grounds, save the confidential, political ones.\textsuperscript{324} But the majority's emphasis on the discretionary nature of the relief and on the magnitude of the congressional delegation of authority to the subordinates of the Attorney General was important. Indeed, although the congressional and judicial willingness to accept secret procedures in immigration cases had, until recently, waned since the McCarthyite depths of the Cold War, the understanding of \textit{delegated discretion} in immigration law has remained fairly constant: an applicant may meet the statutory requirements (which in practice means having been granted passage through a maze of different standards) but may still be denied if there are insufficient "equities" to merit relief in the opinion of the Attorney General.\textsuperscript{325} The "burden" to overcome this discretionary hurdle remains on the applicant.\textsuperscript{326} This ultimate discretionary decision, as noted, is not generally seen as completely unreviewable, but the cases present little guidance. Indeed, much of the immigration case law on "abuse of [delegated] discretion" calls to mind Maurice Rosenberg's \textit{bon mot} that, "[t]he phrase 'abuse of discretion' does not communicate meaning. It is a form of ill-tempered appellate grunting..."\textsuperscript{327}

The highly deferential posture toward delegated discretion has also spilled over into cases reviewing other forms of discretion. The leading immigration-law treatise\textsuperscript{328} begins its treatment of the subject of discretion by highlighting this definitional problem: "[S]ome discretionary actions may have two phases. First, there is a determination whether the applicant satisfies preliminary standards of eligibility prescribed by the statute... it is not uncommon to assume eligibility and to deny relief in the exercise of discretion."\textsuperscript{329} This preliminary eligibility determination itself, however, can (and should)
be parsed further. In an understatement, the treatise notes that, "the attitude of the courts has not always been consistent . . . . The most that can be said is that concepts of review are somewhat different and the courts are more reluctant to intervene when discretionary action is involved."\textsuperscript{330} Consistency, if not more appropriate intervention, would be more achievable if discretion were named and understood more precisely. This is now more important than ever as the IIRIRA ties its preclusion of judicial review to the undefined term, "discretion."

2. Interpretive Discretion

The history of U.S. immigration law demonstrates the great subconstitutional fluidity in this field as well as the interplay among agency, legislative, and judicial action. More than simply a case study of what Eskridge and Frickey have termed "equilibrium," however, this history also demonstrates a pervasive judicial confusion. Some of this confusion derives from the unusual complexity of the statutory scheme itself.\textsuperscript{331} U.S. immigration law is primarily controlled by a statute\textsuperscript{332} which exceeds 400 pages in length and contains a welter of terms such as "crimes of moral turpitude" which often strike the nonspecialist (and many specialists as well) as at least quaint and archaic, if not opaque. Many statutory terms have been subjected to a decades-long process of judicial and agency interpretation (through both rulemaking and adjudication), which renders "plain meaning" analysis perilous. As one court noted in an often-quoted passage, "we are in the never-never land of the Immigration and Nationality Act, where plain words do not always mean what they say."\textsuperscript{333} Similarly, even terms such as "well-founded fear of persecution" that have been more or less concretized are continually reinterpreted by the Board of Immigration Appeals (BIA)\textsuperscript{334} and by decisionmakers in the field.

\textsuperscript{330} Id.
\textsuperscript{331} See id. at 145.
\textsuperscript{333} Yuen Sang Low v. Attorney Gen., 479 F.2d 820, 821 (9th Cir. 1973).
\textsuperscript{334} The BIA is subordinate to the Attorney General, who retains authority to overrule its decisions. See 8 C.F.R. § 3.1(h) (1996). As Justice Jackson noted, this Board is neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office, he names its members, and they are responsible only to him. It operates under his supervision and direction, and its every decision is subject to his unlimited review and revision. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 269-70 (1954) (Jackson, J., dissenting).
The interpretive history of statutory immigration law is distinctive. One intriguing aspect of this process has been what Hiroshi Motomura has aptly called "The Curious Evolution" of immigration law.335 This evolution has taken place in at least two ways. Judges, who, for a variety of reasons, are reluctant to apply "mainstream constitutional norms" to immigration cases, sometimes will use nominal processes of statutory interpretation to achieve the same end.336 Moreover, in some areas of immigration law, procedural due process has become an interpretive surrogate for more substantive constitutional review.337

The terminology I propose for this review is derived from a qualified, rather pragmatic version of the contingency thesis. It presumes no hard distinction between the categories of law and discretion. It does not, however, classify all legal practice as policy or politics. What it seeks is a better categorization of different types of practice in the service of traditional Rule of Law goals such as precision, clarity, consistency, comprehensibility, and predictability.338 The immigration-law process of agency interpretation, reconceptualization, and application should be termed interpretive discretion.339 This general term refers to the power which is exercised by INS decisionmakers, including adjudication by immigration judges, the BIA and other agency appellate institutions, and (in rare cases) by the Attorney General (all of which will be called agency interpretive discretion).340

335. Motomura, The Curious Evolution, supra note 8, at 1625.
336. See Motomura, Plenary Power, supra note 8, at 564-75.
337. See Motomura, The Curious Evolution, supra note 8, at 1627.
338. See generally Diver, supra note 24, at 66 (defining the concept of rule "precision" by reference to the elements of "transparency," "accessibility," and "congruence").
339. Defining this interpretive process as discretionary may strike some readers as unusually overbroad if not a form of vulgar realism. It also has a functional risk: that of confusing standards of judicial review between this process and that of delegated discretion. But it has important benefits, too. First, and most importantly, courts and commentators have, as noted above, tended to define agency interpretation as discretionary. Further, as a matter of theory, categorizing agency interpretation as discretionary highlights the exceptional breadth of interpretive history in immigration law. Particularly on the administrative level, it emphasizes the extensive decisional authority which has been granted to the agency in this field. Finally, if this terminology partly demystifies the evolutionary progress of doctrine it may help to explain the unique interplay among statutory terms, agency interpretation, and judicial review in immigration law.
340. To be consistent, this Article will also occasionally refer to the power which is exercised by Article III judges interpreting immigration statutes as judicial interpretive discretion.
One of the central goals of this Article is to describe how the judiciary has confused different forms of immigration law discretion and how agency interpretive discretion has influenced judicial interpretive discretion.\textsuperscript{341} To do this it is useful to distinguish further three forms of interpretive discretion: general interpretive discretion, which is quintessentially, but far from exclusively, a judicial process, and factual interpretive discretion and procedural interpretive discretion, both of which are almost exclusively agency functions.

\textbf{a. General Interpretive Discretion}

General interpretive discretion is the process which develops specific meaning for unique immigration-law terms such as "moral turpitude\textsuperscript{342} and "good moral character."\textsuperscript{343} Though essentially a variant of statutory interpretation,\textsuperscript{344} the category name of general interpretive discretion highlights the fact that, since Chevron, the INS and the BIA have substantially more interpretive leeway than many agencies have had in the past.\textsuperscript{345} Further, classification of this method as a form of discretion rather than statutory interpretation recognizes that current policy considerations, rather than a concern with the original intent of the legislature or other interpretive methods, are likely to control most immigration agency action.\textsuperscript{346}

\textbf{b. Procedural Interpretive Discretion}

Procedural interpretive discretion is the process by which the INS, immigration judges, and the BIA control practice in the immigration-law system. It involves such elements as rules of

\textsuperscript{341} In some areas of law, such as the section 212(c) waiver, agency interpretive discretion has also influenced Congress. See infra Part IV.B.3.c.


\textsuperscript{344} This process has been perhaps best described by Guido Calabresi as "no more and no less than the critical task of deciding when a retentionist or a revisionist bias is appropriately applied to an existing statutory or common law rule." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 164 (1982).

\textsuperscript{345} See generally Aleinikoff, supra note 177, at 42-43. ("Contrary to popular belief, most statutory interpretation does not occur in the courts. Agencies are the captains of the ship of state, and they are constantly giving meaning to statutes as they write regulations, bring enforcement actions, adjudicate claims, or issue interpretive guidelines.").

\textsuperscript{346} See Diver, supra note 155, at 599 (recommending deference to agencies which have significant policymaking authority under the relevant statute).
practice, changes of venue, and continuances.\textsuperscript{347} The standard of 
review for such decisions is generally seen to be "abuse of 
discretion,"\textsuperscript{348} and the field is replete with a variety of highly 
discretionary formulae. Changes of venue, for example, are governed 
by regulations which simply state: "The Immigration Judge, for good 
cause, may change venue only upon motion by one of the parties 
\ldots."\textsuperscript{349} Over the years, some standards have been imposed by 
the BIA and courts. Thus, "good cause" is to be determined by balancing 
such factors as administrative convenience; the alien's residence; the 
location of witnesses, evidence, and counsel; expeditious treatment of 
the case; and costs, among others.\textsuperscript{350} Beyond requiring some 
balancing, however, courts are very reluctant to overturn cases because 
of improper changes of venue. In a recent case, for example, a 
Chinese asylum-seeker was transferred from Raybrook, New York to 
Oakdale, Louisiana without any prior notice to his counsel who 
thereafter could only participate by telephone from his office in 
Buffalo.\textsuperscript{351} The Second Circuit Court of Appeals found that venue had 
been improperly changed because the asylum-seeker was not given 
otice of the change or an opportunity to contest it until after it had 
been completed.\textsuperscript{352} As the court noted, "[i]t is hardly adequate to 
provide a party with an opportunity to make an after-the-fact objection, 
especially since such an objection then must be made in the very venue 
to which the party objects."\textsuperscript{353} Nevertheless, no relief was granted.\textsuperscript{354} 
The court held that this regulation "does not affect fundamental rights 
derived from the Constitution or a federal statute,"\textsuperscript{355} and that the

\textsuperscript{347} Continuances in deportation hearings are governed by 8 C.F.R. § 242.13 (1996) (stating that they may be granted for "good cause"). As the Ninth Circuit Court of Appeals once noted, "'a myopic insistence upon expeditiousness in the face of a justifiable request for delay' can render the alien's statutory rights merely 'an empty formality.'" Baires v. INS, 856 F.2d 89, 91 (9th Cir. 1988) (quoting Ungar v. Sarafite, 376 U.S. 575, 589 (1964)).

\textsuperscript{348} Kin Sang Chow v. INS, 12 F.3d 34, 39 (5th Cir. 1993).

\textsuperscript{349} 8 C.F.R. § 3.20(b) (1995).

\textsuperscript{350} See Lovell v. INS, 1995 U.S. App. LEXIS 8876 (Apr. 17, 1995); see also Baires, 856 F.2d at 92 (discussing factors to be weighed in considering change-of-venue request); In re Rahman, 20 I. & N. Dec. 480 (B.I.A. 1992) (denying change of venue where government would suffer prejudice); In re Velasquez, 19 I. & N. Dec. 377, 382-83 (B.I.A. 1986) (discussing alien's opposition to change-of-venue motion filed by his attorney).

\textsuperscript{351} See Kong Min Jian v. INS, 28 F.3d 256, 257-58 (2d Cir. 1994).

\textsuperscript{352} See id. at 258-59.

\textsuperscript{353} Id. at 259.

\textsuperscript{354} See id.

\textsuperscript{355} Id. (quoting Waldron v. INS, 17 F.3d 511, 518 (2d Cir. 1993)); cf. Montilla v. INS, 926 F.2d 162, 166-69 (2d Cir. 1991) (requiring no showing of prejudice where INS violated regulation relating to right to counsel). In United States v. Calderon-Medina, 591
applicant failed to show he was prejudiced by the change of venue. This doctrine of prejudice, though not expressly justified as a form of deference to agency procedural interpretive discretion, can also be understood in that way.

The most significant recent appearance of procedural interpretive discretion has been in the realm of so-called motions to reopen, which are considered in greater detail below. As in other areas of practice, a perception of a "strong public interest in bringing litigation to a close" has resulted in very deferential judicial review of agency refusal to reopen cases.

c. Factual Interpretive Discretion

One traditional way to analyze agency action, as discussed above, is to distinguish between questions of fact and those of law. The former, which most often involve what were once called by Kenneth Davis "adjudicative facts," "usually answer the questions of who did what, where, when, how, why, with what motive or intent." Factual
interpretive discretion thus involves both the adjudicative fact determination process and a more complex, hybrid inquiry. When an adjudicator determines whether a marriage (which might lead to permanent residence) is bona fide, for example, that determination will often rest upon rather soft standards of factual inquiry. It is not simply a matter of deciding who did what or when or why. Rather, it is a mix of “legal” categorization and definition with factual inquiry—a more fluid process, the exact methods of which are extremely difficult to define and to monitor specifically.\textsuperscript{364} While the outer bounds of this sort of discretion are, at least in some types of immigration cases, policed by constitutional requirements of due process and equal protection,\textsuperscript{365} there is a vast gray area which eludes either rules or hard standards. The APA, as noted above, prescribes a “substantial evidence” test for factual review.\textsuperscript{366} The INA, however, has its own requirement that “the Attorney General’s findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.”\textsuperscript{367} In \textit{Woodby v. INS},\textsuperscript{368} the Supreme Court interpreted this language as applying only abstractly to the scope of judicial review.\textsuperscript{369} The Court imposed a higher standard—“clear, unequivocal, and convincing evidence”—to govern the actual level of proof required to sustain a finding of deportability.\textsuperscript{370}

The law of asylum offers a good example of factual interpretive discretion.\textsuperscript{371} As David Martin has written, “[t]he asylum determination rests on uniquely elusive grounds. It will usually turn on facts which are strikingly inaccessible ... by U.S. courts and

\textsuperscript{364} See, e.g., O’Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 507-08 (1951) (holding that question of whether drowning arose out of and in the course of employment to be one of fact).

\textsuperscript{365} See, e.g., Bark v. INS, 511 F.2d 1200, 1201-02 (9th Cir. 1975) (“Aliens cannot be required to have more conventional or more successful marriages than citizens.”).


\textsuperscript{367} Id. § 106, 8 U.S.C. § 1105(a)(4).

\textsuperscript{368} 385 U.S. 276 (1966).

\textsuperscript{369} See id. at 284.


Agencies... Asylum determinations therefore often revolve critically around a determination of the applicant’s credibility.\textsuperscript{372}

This elusiveness of fact, both of the \textit{adjudicative} and \textit{legislative} variety, is only part of the discretionary problem. There is another area of elusiveness which is the point at which legal definition meets fact. In the asylum process the tail end of this discretion is what Martin called “an informed prediction (not truly a finding) about the degree and type of danger the particular applicant is likely to face upon return.”\textsuperscript{373} Since this last step is the critical one in the asylum process, our inability to define how it should be reasoned is troubling. As Martin noted, the best we seem to be able to do is to recognize that “[s]uccess consists ... in achieving sufficient acceptance of the process, including respect for the judgment and fairness of the decisionmakers, so that final grants and denials are regarded as authoritative.”\textsuperscript{374}

Such acceptance and respect have not been easy to achieve in the high stakes and highly politicized asylum realm. A recent study of the asylum process of the INS, for example, highlighted the complex fact-based nature of asylum determinations.\textsuperscript{375} The study also noted shortcomings in the factual questioning undertaken by asylum adjudicators, including adversarial and confusing questions, personal challenges to clients’ credibility, lack of familiarity with the case, and overly general questions.\textsuperscript{376} Part of the difficulty was undoubtedly related to training and other constraints. But it would be a mistake to underestimate the problems caused not only by the difficulty of factual inquiry as such, but by the more abstract difficulty in \textit{defining} the nature of that inquiry. By better distinguishing the components of \textit{factual interpretive discretion}, we might enable judges to participate in this process in a more consistent, productive way.

These three forms of \textit{interpretive discretion}: \textit{general, procedural,} and \textit{factual}, form much of the distinctive pattern of U.S. immigration law. It is an important pattern to recognize in a nation which, despite recurrent periods of anti-immigrant backlash, still views immigration

\footnotesize{
\textsuperscript{374} Id. at 1285.
\textsuperscript{376} See id. at 84-85.
}
as a core societal value. Legal proceedings with the highest possible stakes for the participants, literally sometimes life and death, are taking place in a uniquely discretionary legal environment. The problems with the system vary somewhat with the type of discretion at issue. Insufficient use of rulemaking, for example, often means that interpretive discretion is exercised ad hoc, retroactively, and many times in unpublished proceedings. Understood only by few cognoscenti, issues involving interpretive discretion have often tended not to be taken sufficiently seriously either by administrative law generalists, or, more importantly, by Article III judges.

The exercise of factual interpretive discretion is, in many ways, the most problematic. Immigration law, in practice, is exceptionally discretionary both in the way in which factual conclusions are drawn and in its approach to mixed law/fact issues. One reason for this is the vagueness of certain of the legal standards which dominate immigration practice. This legal confusion causes factual confusion as fact finders are often legitimately uncertain about what information is relevant. Another important factor is the unusually high reliance in U.S. immigration law upon subtle matters of intention as questions of fact. For example, adjustment-of-status proceedings may turn upon questions of the alien’s state of mind at entry. Was she a “bona fide” nonimmigrant when she crossed the border or did she already intend to live permanently in the United States? Questions such as these require a highly nuanced sort of judgment, especially in hard cases where there is no concrete evidence one way or the other. A fact finder often must draw conclusions about intent from behavior. Finally, again, in all parts of the factual realm, we must also consider the training of adjudicators, the resources available to them, and the possibility for meaningful review of factual decisions.

378. Indeed, some of the seminal cases involving the exercise of interpretive discretion are acknowledged, even by those who might agree with their outcomes, to be analytical embarrassments. See the discussion of Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963) (construing “innocent, casual, and brief” departure from the United States by lawful permanent resident not to be “meaningfully interruptive” of residence and therefore not to result in “reentry”), in Alexander Aleinikoff & David Martin, Immigration Process and Policy 460 (2d ed. 1991).
379. Adjustment of status is the process by which an alien changes either from undocumented or nonimmigrant status to permanent residence. See Immigration and Nationality Act § 245, 8 U.S.C. § 1255 (1994).
IV. CONFUSION IN THE FIELD

A. A Brief History of Critique and Response

Critique of the lack of precise bounds of INS discretion, as well as the often incomprehensible manner in which it is exercised, has dogged the INS for many years. Critiques, however, like many reviewing courts, have not generally distinguished interpretive from delegated discretion. For example, in a 1953 letter to Senator Arthur Watkins, President Eisenhower criticized the insufficient precision of the new "exceptional and extremely unusual hardship" standard for Suspension of Deportation contained in the McCarran-Walter Act of 1952, while asserting that "the law should more clearly state the standards upon which this discretionary relief may be granted by the Attorney General." This lack of distinction between what I have suggested are two very different forms of discretion—the interpretive standards and the ultimate grant of relief—can blunt the force of critique because the justifications for discretionary action differ depending upon whether discretion is interpretive or delegated.

One of the most thorough attempts to analyze immigration-law discretion was based on a study conducted for the Administrative Conference of the United States by Abraham D. Sofaer. Beginning with the very general point that "[a]version to broad discretionary power has long been part of the American lawyer’s intellectual baggage," Sofaer set out to examine the exercise of discretion in the "informal agency process" of the so-called "change of status adjudication."

In 1972, change-of-status adjudications, by which an alien seeks to attain permanent residence without the necessity of traveling abroad to a U.S. consulate, were exceedingly informal. The statutory prerequisites were simply that an alien be "admissible" to enter the

380. See, e.g., Sofaer, supra note 24, at 1295, 1299-1304.
382. 99 CONG. REC. 4321, 4322 (1953) (emphasis added).
383. See Sofaer, supra note 24, at 1294.
384. Id. at 1293.
385. Sofaer defined "informal" to mean an "agency disposition without "the conventionalized reception of evidence and testimony," cross-examination, a record and an appeal." Id. at 1293 n.2 (quoting WALTER GELLHORN & CLARK BYSE, ADMINISTRATIVE LAW 639 (4th ed. 1960)).
386. Id. at 1294. Although Sofaer adopted Kenneth Culp Davis's very broad definition of discretion, he also expressly maintained the residual thesis belief that there is an "optimum" combination of discretion and "law." Id. at 1297 (citing KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 4 (paper ed. 1971)).
United States, and that he or she be eligible for "immediate" issuance of a visa. The statute, however, also provided that the Attorney General "may ... in his discretion" grant this relief to eligible aliens. Thus, the change-of-status adjudication raised issues of what I have termed both *interpretive discretion* and *delegated discretion*.

Sofaer, without expressly distinguishing any particular categories, but apparently thinking of *delegated discretion*, criticized the Immigration Service’s exercise of discretion:

The Examiner’s initial determination to grant or deny an eligible alien’s application on the basis of "discretion" is virtually ungoverned by standards.... [A]djudicators are given little guidance ... and virtually no limits exist on their authority to decide any individual application one way or the other.... In addition, aspects of the processes of administrative review and enforcement are highly discretionary.

After considering the results of a companion empirical study, Sofaer offered the following diagnoses:

1. "relatively undefined grounds of decision more frequently cause inconsistent results than well-defined grounds";
2. "[E]xaminers applied different standards in exercising discretion on the merits"; and there were "striking" differences in the denial rates among different INS Districts;
3. the INS’s "view of discretion has changed periodically" and official INS “policy on the meaning of discretion permits inconsistent results"; and
4. "extensive and successful political intervention on the merits strongly correlates with the presence of discretionary power."

Clearly, this was a devastating critique of discretionary agency practice which called for dramatic solutions. Sofaer, however,
recognized a humanitarian paradox. Even if courts could insist on more specific standards, he noted, it is highly likely that such standards would be more, rather than less, restrictive.\textsuperscript{397} Indeed, the then-current discretionary law had resulted from the efforts of aliens' rights advocates to loosen the rigidity of the prior law.\textsuperscript{398}

The idea of somewhat more specific rules, however, seemed promising. As Sofaer noted, "[t]he bases for exercising discretion adversely and the factors to weigh in doing so could readily be set forth. Certain especially important factors could also be identified...."\textsuperscript{399} This sort of specificity had, in fact, been expressly recommended by the Administrative Conference in 1971.\textsuperscript{400} The official response of the INS bears repeating: "Exercise of discretion inherently requires flexibility in assessing diverse factual patterns. Decisions must necessarily be made on a case by case basis utilizing criteria set forth in published precedents. Formulations of standards for exercise of discretion is self-defeating since standards would impair flexibility."\textsuperscript{401} Apart from the obvious point that this response in no way explains why criteria could not be developed through rulemaking which might retain some "flexibility," it should also be noted how the INS also blurred different categories of discretion. While it is clearly true that factual interpretive discretion requires case-by-case flexibility, this is much less true for general interpretive discretion.\textsuperscript{402}

\textsuperscript{396} It is important to note, however, that Sofaer found that inconsistency did not necessarily cause "injustice" in the sense of wrongly denied applications. Indeed, the study determined that, "ultimately, almost every applicant obtains section 245 relief." \textit{Id.} at 1303.

\textsuperscript{397} See \textit{id.} at 1307.

\textsuperscript{398} Moreover, any attempt by courts to require INS to engage in more specific rule making would also encounter difficult definitional and legitimation problems. \textit{See id.} at 1309-14.

\textsuperscript{399} \textit{Id.} at 1312.

\textsuperscript{400} \textit{See id.} at 1313 n.110 (quoting Recommendation 27: Procedures of the Immigration and Naturalization Service in Respect to Change-of-Status Applications (adopted Dec. 6, 1971)).

\textsuperscript{401} \textit{Id.} at 1313 (quoting Views and Comments of the Immigration and Naturalization Service with Respect to Recommendation 27 of the Administrative Conference 1 (1972)).

\textsuperscript{402} It is true, of course, that standards can be developed by adjudication as well as by rulemaking. In 1972 this was a less attractive solution than it might be today because of a paucity of BIA decisions, the fact that most of those cases that were published were denials, and the refusal of the BIA, at that time, to publish dissents. \textit{See id.} at 1316. For these reasons, the Administrative Conference had recommended that more decisions of INS adjudicators be published and made available to the public, especially those which involved novel or difficult legal questions. \textit{See id.} at 1317. Over the years, these recommendations have been received more warmly and with greater effect than those pertaining to rulemaking.
INS continued to resist the model of greater precision throughout the 1970s. In the attempt to fashion a "standard for standards," Colin Diver again focused in 1983 on the defects of the INS’s criteria for granting permanent resident status to nonimmigrant aliens. The first problem he noted, ten years after Sofaer’s article was published, was the continuing lack of any serious effort by the Attorney General to clarify the discretionary mandate of the statute for the subordinate officers who would apply it. There were, to be sure, published regulations which purported to guide practice. These regulations, however, provided no extra-statutory criteria for the exercise of discretion. The INS Operating Instructions, internal guides to agency adjudicators, merely stated a general policy that cases should not generally be denied if "substantial equities exist." Decisions of the Board of Immigration Appeals, taken as a body of authority, amounted to "a list of undefined and unweighted 'adverse factors' and 'equities.'" Diver noted the occasional tendency of (usually dissenting) judges to bemoan the fact that the INS’s exercise of discretion was "an utterly unguided and unpredictable undertaking."

Diver did praise some within the INS who, through proposed rules in 1979, attempted to establish more meaningful standards for adjustment-of-status proceedings and other discretionary administrative decisions. The proposed rules were ambitiously entitled, "Factors to be Considered in the Exercise of Administrative Discretion." Their goals were greater openness, precision, and uniformity: "We desire these criteria to be available to all Service personnel and to all members of the public, attorneys and

403. See Diver, supra note 24, at 66 (defining the concept of rule “precision” by reference to the elements of “transparency,” “accessibility,” and “congruence”).
404. See id. at 93.
405. See id.
406. See id.
407. Id.
408. Id. (including a preconceived intent to seek permanent residence at the time of entry, misrepresentations made in the application, criminal conduct, and illegal employment, among others).
409. Id. (including bona fide marriage and “candor”).
410. Id. at 94 (quoting the dissent of Judge Freedman in Ameeriar v. INS, 438 F.2d 1028, 1042 (1971)).
412. See Diver, supra note 24, at 94.
413. 44 Fed. Reg. at 36,187.
representatives, applicants and petitioners who come before the Service."\textsuperscript{414} This attempt was ended in the first days of the Reagan administration, however, with the following laconic jurisprudential observation:

\begin{quote}
[I]t is impossible to foresee and enumerate all the favorable or adverse factors which may be relevant and should be considered in the exercise of administrative discretion. Listing some factors, even with the caveat that such list is not all inclusive, poses a danger that use of guidelines may become so rigid as to amount to an abuse of discretion.\textsuperscript{415}
\end{quote}

As Diver pointedly noted, "[a]t least the Service is consistent: its explanations are no more transparent than its rules."\textsuperscript{416}

Since Diver wrote, there have been more attempts at precision through adjudication\textsuperscript{417} and certainly a general improvement in the availability of INS Operating Instructions and similar practice guides. The current regulations, however, still contain virtually no attempt to structure or define the exercise of \textit{delegated discretion} for adjustment of status. The same remains true for other discretionary remedies such as "Voluntary Departure"\textsuperscript{418} and "Suspension of Deportation."\textsuperscript{419} Moreover, there has been increasing confusion in the courts over the proper scope of review of different types of pre-IIRIRA discretion.

\section*{B. The BIA and the Courts}

\subsection*{1. Suspension of Deportation: \textit{Delegated Versus Interpretive Discretion}}

Through the adjudicative process of the Board of Immigration Appeals, some standards have been developed for the exercise of discretion in cases involving applications for relief from deportation. It is often difficult to tell, however, whether such standards apply to \textit{interpretive discretion}, \textit{delegated discretion}, or both. In \textit{Matter of Anderson}, a leading decision on Suspension of Deportation,\textsuperscript{420} for example, the Board (as Judge Friendly had suggested it do in \textit{Wong

\textsuperscript{414} id.
\textsuperscript{416} Diver, supra note 24, at 94.
\textsuperscript{418} Immigration and Nationality Act § 244, 8 U.S.C. § 1254(e) (1994).
\textsuperscript{419} Id. § 244(a), 8 U.S.C. § 1254(a)(1).
Wing Hang) attempted to specify a list of criteria to be considered on the issue of "extreme hardship."421 The list includes the applicant's age, family ties in the United States and abroad, length of residency, health, conditions in the applicant's home country, financial considerations, the availability of other forms of immigration relief from deportation, and contributions the applicant has made to the community.422 These factors could be seen as an exercise of delegated discretion, in which case neither their promulgation nor their application would be subject to more than the most minimal judicial review. But they can also (more correctly) be seen as interpretive discretion as to the meaning of a statutory term. Viewed this way, they should be reviewed by courts much more closely. Because the Supreme Court has never made clear what form of discretion is at issue in such cases, however, its decisions in this area are extremely unpredictable and offer little guidance to lower courts or agency decisionmakers.

In INS v. Jong Ha Wang,423 for example, which involved the meaning to be given the term "extreme hardship," the Court offered a classic statement of the doctrine of moderate judicial deference to agency interpretive discretion:

[T]he Court of Appeals improvidently encroached on the authority which the Act confers on the Attorney General and his delegates.... These words ["extreme hardship"] are not self-explanatory, and reasonable men could easily differ as to their construction. But the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute.424

In the terminology of this Article, the Court did not view Jong Ha Wang as a delegated discretion case such as Jay v. Boyd had been. Rather, it seemed to view the BIA's application of the statutory term largely as it would similar action by any agency. The reason for this choice seems simply to have been the decision by the agency not to rely on its delegated discretionary authority.

421. Id. at 597-98.
422. See id. at 597. The Board in Anderson referred to H.R. REP. NO. 94-506, at 17 (1975), which, though it did not pass, influenced the Board's decision. See 16 I. & N. Dec. at 597 & n.1.
424. Id. at 144.
The Suspension of Deportation landscape has been further cluttered by the Court’s occasional reliance upon the concept of plain language. Less than three years after Jong Ha Wang, in INS v. Phinpathya, Justice O’Connor wrote a majority opinion which decided the meaning of the so-called “continuous presence” requirement of section 244(a)(1), the Suspension of Deportation statute. Rather than simply relying on deference to the interpretive discretion of the BIA, deference which would have been possible because the BIA had read the provision in a way that was similar to that ultimately adopted by the Court, Justice O’Connor found that the “plain meaning” of the statute controlled. One could perhaps resolve this inconsistency by concluding that the phrase “continuous presence” has some sort of inherently clear content which is lacking in “extreme hardship,” though this conclusion seems highly problematic to me. However, it is still difficult to reconcile the reasoning of Wang with that of Phinpathya, even though the results were the same in two senses: the Supreme Court overruled a court of appeals decision that had favored the alien and upheld the decision of the BIA. Wang was expressly about deference to agency interpretive discretion while Phinpathya contained the following statement:

Respondent further suggests that . . . the Court of Appeals’ [decision is] consistent with the ameliorative purpose of, and the discretion of the Attorney General to grant, the suspension remedy. Respondent’s suggestion is without merit.

. . . .

It is . . . clear that Congress intended strict threshold criteria to be met before the Attorney General could exercise his discretion to suspend deportation proceedings. Congress drafted § 244(a)(1)’s provisions specifically to restrict the opportunity for discretionary administrative action.

Reading Jay v. Boyd, Wang, and Phinpathya together, then, demonstrates how an anterior decision about method can obscure doctrinal clarity. More specifically, it demonstrates the extreme unpredictability which is caused by judicial failure to differentiate

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426. Id. at 189-92.
427. Id. at 195 (emphasis added) (citation omitted).
between forms of discretion. Immigration judges, the BIA, and reviewing courts are free to choose one of three decisional bases: plain language, interpretive, or delegated discretion. Based upon these three Supreme Court cases, no one of these bases seems preferred, making it difficult to predict which approach a reviewing court will adopt. This does not mean, however, that the result in Phinpathya would have been different had the Court reasoned as it did in Wang or vice versa. But, at least to the extent that Supreme Court decisions guide lower courts not only by their holdings but by their method, the Court’s methodological waffling is far from useful.429

2. Motions to Reopen: General Versus Procedural Interpretive Discretion

No issue has tested the fault lines of discretionary immigration practice more than judicial review of motions to reopen.430 It is at this jagged junction between the claims of procedural due process rights and assertions of dilatory, unethical tactics that the idea of discretion, however misunderstood, has proven most resilient. Further refinement of our understanding of discretion provides a new way to look at a series of Supreme Court decisions in this contentious arena.

Prior to 1988, there were two different approaches taken by the Supreme Court to review motions to reopen in cases involving applications for discretionary relief. The first, as illustrated by Jong Ha Wang,431 affirmed the agency’s authority to develop the meaning of statutory standards such as “extreme hardship.”432 In the context of a

429. Ultimately, though, the suspension cases may indicate the ambiguity of the concept of delegated discretion. What is it that is actually granted by Congress when it adds the words “may” or “in the discretion of”? In light of the flexibility of interpretive discretion as it relates to standards like “extreme hardship,” and the current ascendance of extreme judicial deference to agency interpretive discretion, delegated discretion seems an often unnecessary and confusing idea. Nevertheless, unless Congress removes it from the statutes governing immigration law, it is important for courts and commentators to try at least to distinguish the form of discretion that is at issue in a given case. My opinion is that the approach to agency action taken by the Phinpathya Court is the better one, though I disagree strongly with the content of its plain-language reasoning. That is, the judiciary should play a role in giving meaning to terms like “extreme hardship” and “continuous presence.” The extreme deference apparently intended by Congress should be confined to the review of a delegated discretionary decision which follows interpretation of such terms.


431. 450 U.S. 139, 143-44 (1981); see infra Part IV.B.

432. See Jong Ha Wang, 450 U.S. at 143-44.
motion to reopen, this interpretive discretionary authority was deemed even more worthy of deference:

The Attorney General and his delegates have the authority to construe "extreme hardship" narrowly should they deem it wise to do so. . . . Moreover, the Government has a legitimate interest in creating official procedures for handling motions to reopen deportation proceedings so as readily to identify those cases raising new and meritorious considerations.433

The second approach was to blend together different types of discretion to achieve a generalized standard of extreme judicial deference. This method was illustrated by INS v. Rios-Pineda,434 which also involved a BIA refusal to grant a motion to reopen to apply for Suspension of Deportation. The issue which seems most to have engaged the attention of the Court was relatively straightforward: whether the BIA could deny a motion to reopen solely because the applicants for Suspension of Deportation had accrued the required seven years of residence in the United States, in part because of continued appeals.435 The Court's opinion, though clearly animated by a substantive disdain for the litigation tactics of the applicants, is extraordinarily hard to understand without a more refined theory of discretion than that offered by the Court. Consider the following excerpts:

[1] [G]ranting a motion to reopen is a discretionary matter with BIA. . . . Thus, even assuming that respondents' motion to reopen made out a prima facie case of eligibility for suspension of deportation, the Attorney General had discretion to deny the motion . . . .436
[2] [I]f the Attorney General decides that relief should be denied as a matter of discretion, he need not consider whether the threshold statutory eligibility requirements are met.437
[3] The BIA noted that respondents' issues on appeals were without merit and held that the 7-year requirement satisfied in this manner should not be recognized. . . . [I]t did not exceed its discretion in doing so.438
[4] The purpose of an appeal . . . is not to permit an indefinite stalling of physical departure in the hope of eventually satisfying legal prerequisites. . . . The Attorney General can, in exercising his

433. Id. at 145.
435. See id. at 449-50.
436. Id. at 449 (citation omitted).
437. Id.
438. Id. at 450.
discretion, legitimately avoid creating a further incentive for stalling by refusing to reopen suspension proceedings for those who became eligible for such suspension only because of the passage of time while their meritless appeals dragged on.\footnote{439}

[5] Administering the 7-year requirement in this manner is within the authority of the Attorney General. The Act commits the definition of the standards in the Act to the Attorney General and his delegate in the first instance.\footnote{440}

[6] We are sure that the Attorney General did not abuse his discretion in denying reopening based on respondents' flagrant violation of the federal law in entering the United States, as well as ... willful failure to depart voluntarily after his request to do so was honored by the INS.\footnote{441} It is untenable to suggest that the Attorney General has no discretion to consider their individual conduct and distinguish ... on the basis of the flagrancy and nature of their violations.

[7] In this government of separated powers, it is not for the judiciary to usurp Congress' grant of authority to the Attorney General by applying what approximates \textit{de novo} appellate review.\footnote{442}

The Rios-Pineda Court clearly went beyond the \textit{general interpretive discretion} of Jong Ha Wang. But the seven excerpts above, although all revolving around a central discretionary point, express somewhat different views of the proper role of a reviewing court. Point [1], for example, merely asserts that the issue is "discretionary"—an assertion which, we have seen, means very little in itself. Point [2] focuses on what this Article has termed the \textit{delegated discretion} idea, a concept which, by itself, would have been sufficient to sustain the BIA's denial in this case. The Court, however, apparently bridled at the thought of subsuming all BIA action, procedural, interpretive, and dispositive, under this very broad concept. Points [3], [4], and [5] thus seem to bring \textit{procedural interpretive discretion} into the mix, thereby raising the question whether this has the effect of limiting the force of point [2]. Alternatively, one could view these points as sanctioning deference to the BIA's \textit{general interpretative discretion} regarding the seven-year requirement.\footnote{443} Points [6] and [7] may best be seen as rhetorical icing.

\begin{footnotes}
\item[439.] \textit{Id.}
\item[440.] \textit{Id.} at 451.
\item[441.] \textit{Id.}
\item[442.] \textit{Id.} at 452.
\item[443.] Of course, it is extremely difficult to reconcile this approach with that taken by the Court in Phinpathya. If "continuous presence" is plain language why isn't "seven years"? 
\end{footnotes}
on the cake. If point [2] means what it seems to—that motions to reopen in delegated discretion cases are themselves subject to delegated discretion—then point [6] hardly seems necessary. Indeed, points [3] through [6] seem unnecessary. Moreover, it is difficult to understand exactly what “separation of powers” in point [7] has to do with any of this, since motions to reopen were created by regulation, not by Congress. A sound theory of tripartite government could surely just as well support close judicial scrutiny of this sort of agency action as the deference for which it is cited. All of this may support a contingency thesis view that the disagreement between the courts of appeals, the Board, and the Supreme Court is substantive and political more than procedural. It is plausible that the tail of Supreme Court disdain for immigration lawyers’ “dilatory tactics” wagged the dog of deference and discretion theory in Rios-Pineda. But the ambiguity at the core of this joinder among delegated, general, and procedural interpretive discretion was a significant problem. Revealed in a series of conflicting circuit court decisions, it came to a head in the 1988 Supreme Court decision of INS v. Abudu.

Dr. Abudu was a citizen of Ghana who first entered the United States as a student in 1965. In 1981 he was placed in deportation proceedings due to a criminal conviction. In 1982 he was found deportable by an immigration judge, and his application for adjustment of status was denied. This decision was affirmed by the BIA in 1984. While the case was on appeal before the Court of Appeals for the Ninth Circuit, Dr. Abudu moved to reopen his case to apply for asylum. The BIA denied the motion to reopen on two grounds, one apparently solely procedural, the other generally interpretive. The procedural ground was that Dr. Abudu had not “reasonably explained his failure to assert the [asylum] claim prior to completion of the deportation hearing.” The interpretive ground was that he had not established “prima facie eligibility for [the] relief [sought].” The court of appeals reversed the BIA’s denial of the motion to reopen,

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444. See Rights of Aliens, supra note 45, at 1398.
446. See id. at 96.
447. See id.
448. See id.
449. See id.
450. See id. at 97.
451. See id. at 97-100.
452. Id. (quoting application to petition for certiorari at 15a).
453. Id. at 98 (quoting application to petition for certiorari at 15a).
holding that the BIA was required to "draw reasonable inferences from the facts in favor of the petitioner."\textsuperscript{454}

The holding of \textit{Abudu}, at first glance, might appear to be little more than a reaffirmation of \textit{Jong Ha Wang} and \textit{Rios-Pineda}. The Court identified "three independent grounds on which the BIA may deny a motion to reopen."\textsuperscript{455} First, the BIA may decide the movant has not established prima facie eligibility for the relief sought.\textsuperscript{456} Second, the BIA may hold that the movant has not introduced "previously unavailable, material evidence"\textsuperscript{457} or, in an asylum case, that he or she has not "reasonably explained his failure to apply for asylum."\textsuperscript{458} Finally, in cases "in which the ultimate grant of relief is discretionary . . . the BIA may leap ahead, as it were . . . and simply determine that even if [the first two requirements] were met, the movant would not be entitled to the discretionary grant of relief."\textsuperscript{459} This was not the first time that the Court had authorized the "leap ahead" procedure. In 1976, it had held that an immigration judge could deny an application for adjustment of status in the exercise of discretion without deciding whether the applicant would be statutorily eligible for that relief.\textsuperscript{460} \textit{Abudu}, however, was the first sustained treatment of the question by the Court. And, although there is certainly a logic to its structure, its inattention to different types of discretion renders the decision deeply unsatisfying.

What was really at issue in \textit{Abudu} was the distinction between review of \textit{interpretive} and \textit{delegated discretion}. Unfortunately, the Court, perhaps lacking a language to capture this distinction, never did so. One way to appreciate the need for more precise language is to note the lengths to which Dr. Abudu’s attorneys went to try to distinguish his asylum claim from prior suspension-of-deportation cases:

In motions to reopen to apply for suspension of deportation, the discretion to grant or deny reopening is stacked upon discretion to grant the underlying relief which in turn is stacked upon the discretion

\textsuperscript{454} Abudu v. INS, 802 F.2d 1096, 1101 (9th Cir. 1986), \textit{rev’d}, 485 U.S. 94 (1988).
\textsuperscript{455} Abudu, 485 U.S. at 104.
\textsuperscript{456} See \textit{id}.
\textsuperscript{457} \textit{id}. at 104-05 (citing 8 C.F.R. § 3.2 (1987)).
\textsuperscript{458} \textit{id}. at 105 (citing 8 C.F.R. § 208.11).
\textsuperscript{459} \textit{id}.
to define the threshold eligibility. This bundle of discretion puts the Attorney General at the height of his discretionary powers.461

Unlike in those cases, it was argued that in asylum cases, “the Attorney General has no discretion to define statutory eligibility for the relief sought.”462 But here, confusion over the meaning of discretion became apparent, as it was argued that the BIA also has no “discretion” to deny withholding of deportation463 if certain facts are found. Thus, what this Article has termed interpretive (defining statutory eligibility for asylum) and delegated (relief-granting) discretion were conflated.

Dr. Abudu’s attorneys obviously believed that the key to victory was to avoid the idea of discretion as much as possible: “The BIA denial was not made on discretionary grounds rather, it was for failure to state a prima facie case.”464 Conversely, the strategy of the government was to frame the case as much as possible in terms of procedural and delegated discretion. Thus, the Brief for the Government argued that: “Since the reopening procedure is provided solely as a matter of administrative grace, common sense would dictate that the BIA should have broad discretion in deciding when to reopen a case.”465 The careful reader of this Article will note that the government, too, has conflated different ideas of discretion. The “matter of grace” type of delegated discretion from Jay v. Boyd is mixed with procedural interpretive discretion.

The key to understanding Abudu as precedent may be found in a footnote. In footnote ten, the Court addresses the jurisprudential struggle which had been taking place between different ideas of discretion: “Respondent attempts to distinguish Jong Ha Wang, Phinpathya, and Rios-Pineda, by arguing that the key standard for determining eligibility for suspension of deportation ... [extreme hardship] is itself established at the discretion of the BIA, whereas the standard for determining eligibility for asylum is determined by statute.”466 This argument, which was rejected by the Court, might have been strengthened by a more refined taxonomy of discretion.

462. Id.
464. Respondent’s Opposition, supra note 461.
The Court in *Abudu*, however, was apparently uninterested in it as it was presented, as there was another way to resolve the case: that of procedural interpretive discretion. Thus, the specific holding of *Abudu* turns out to be a rather pedestrian one—"the BIA did not abuse its discretion when it held that respondent had not reasonably explained his failure to apply for asylum prior to the completion of the initial deportation proceeding." The case is therefore noteworthy mostly as a missed opportunity and a confused treatment of discretion.

Another recent Supreme Court opinion which dealt with this subject finally expressed some concern about the definition of discretion. In *INS v. Doherty*, the Attorney General had denied a motion to reopen on the grounds that Doherty had not presented new evidence to warrant reopening and that he had waived claims for asylum and withholding of deportation by withdrawing them in an earlier hearing. The majority opinion, written by Chief Justice Rehnquist, gives Doherty’s arguments short shrift and strongly supports the discretionary power of the BIA to deny reopening. Justice Scalia, however, was sufficiently troubled by the Court’s reasoning to dissent in part. Justice Scalia’s dissent focused partially on the meaning of “reopening” and partially on the meaning of discretion. As to reopening, he saw that reopening in the immigration system could be analogized to the reopening of a final judgment by a court. In that sense it would be “a rarely accorded matter of grace.” But reopening could also be seen as similar to a so-called “remand for further proceedings” when issues “acquire legal relevance or practical importance only by virtue of the decision on appeal.” It is interesting, for purposes of this Article, that Justice Scalia recognized discretion as the key concept for a reviewing court: "Permission to ‘reopen’ in this [remand] sense cannot be denied with the breadth of discretion that the Court today suggests." This insight led Justice Scalia to note how the Court had also misread certain "‘broad discretion’ statements in cases such as *INS v. Rios-Pineda*.”

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467. *Id.* at 111.
469. *See id.* at 324.
470. *See id.* at 324-29.
471. *See id.* at 329-45 (Scalia, J., dissenting).
472. *See id.* at 330 (Scalia, J., dissenting).
473. *Id.*
474. *Id.* at 331 (Scalia, J., dissenting).
475. *Id.*
476. *Id.*
His point was that there is a substantial difference between a motion to reopen to apply for delegated, discretionary relief, like asylum, and a motion to reopen to apply for mandatory relief like withholding of deportation. Abudu, on this view, authorizes the “leap ahead” basis for denial only in cases where what Justice Scalia termed a “merits-deciding” discretion is derived from the fact that the ultimate relief sought is itself discretionary.477 Needless to say, this view is completely consonant with that taken throughout this Article.

3. Section 212(c): The Transformation of Discretion

a. A Brief History

One of the most fascinating stories about the evolution of discretion in immigration law is unfortunately also one of the most complex. The history of the so-called section 212(c) waiver is worth close attention, however, because it reveals three distinct patterns: the transformation of discretion into interpretive discretion; the incorporation of a judicially defined constitutional norm into agency discretionary decisions, and the development of agency rules or standards which appear to some judges to be insufficiently discretionary. The history of the section 212(c) waiver can thus be best understood as an extended conversation among the agency, Congress, and the judiciary about discretion. It is the sort of conversation that the IIRIRA attempts to silence.

Since 1917,478 Congress has provided relief from exclusion, at the discretion of the Attorney General, to aliens who, upon returning to the United States after a short trip abroad, were found excludable due to criminal conviction.479 Aliens who were subject to deportation from within the country, however, were not granted similar relief by Congress. This situation led to various legal and equitable concerns which the Attorney General first considered in 1940 in Matter of L-.480

477. Id. at 333 (Scalia, J., dissenting).
478. The Seventh Proviso to section 3 of the Immigration Act of 1917 was the precursor to current section 212(c) of the Immigration and Nationality Act. See Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 878.
479. The provision provided that, in the discretion of the Attorney General, an alien would be permitted to reenter the United States if exclusion were to result in peculiar or unusual hardship. See id.
480. 1 I. & N. Dec. 1 (B.I.A. 1940), aff’d, 1 I. & N. Dec. 3 (Att’y Gen. 1940). Matter of L- was the first published administrative decision under the immigration-and-nationality laws. See Lory D. Rosenberg & Denyse Sabagh, A Practitioner’s Guide to INA sec. 212(c), in IMMIGRATION BRIEFINGS I, 2 (1993). Matter of L- also has the dubious distinction of being the first case in which the Attorney General, in a moment of perhaps confused but
A legal permanent resident from Yugoslavia had been convicted of a "crime involving moral turpitude" (larceny). This conviction did not prevent him from gaining legal residency, nor did it make him deportable. However, after the conviction, he took a short trip to Yugoslavia. Upon his return to the United States, he was not found excludable (apparently because the inspector did not ask him any questions). His good fortune was short-lived, however. Due to the rule of United States ex rel. Volpe v. Smith, his reentry rendered him deportable as one who had been "excludable" at the time of his last entry. The Attorney General in Matter of L- reacted strongly to the harshness of Volpe: "The Volpe doctrine manifestly makes foreign travel hazardous for certain classes of domiciled aliens. Not what the alien has done but the fact that he has taken a trip becomes the operative fact that renders him excludable or deportable." After examining the alien's various limited options under the current immigration law for returning to his home in Michigan, the Attorney General found them all to be inequitable, and held:

I cannot conclude that Congress intended the immigration laws to operate in so capricious and whimsical a fashion.... No policy of Congress could possibly be served by such irrational result.... [Respondent] should be permitted to make the same appeal to discretion that he could have made if denied admission in 1939, or that well-intentioned benevolence, expanded the scope of section 3 of the Seventh Proviso well beyond the plain meaning of the statute.

482. See id.
483. See id.
484. See id.
485. 289 U.S. 422 (1933); see infra Addendum.
486. Matter of L-, 1 I. & N. Dec. at 4-5. Under then section 19 of the Immigration Act of 1917, an alien within the United States was subject to deportation if convicted of a crime of moral turpitude prior to entry to the United States. See id. at 4. While it would appear that this would apply only to those aliens who had been convicted in their own countries prior to first entering the United States, the Volpe doctrine had held that:

this provision of the statute is applicable even though the crime in question was committed in the United States and did not of itself constitute a ground of deportation, and even though the subsequent entry into the United States was a return from a temporary visit abroad to an unrelinquished domicile in this country.

487. Id. at 4-5.
488. For example, if deported, he would have to wait at least one year outside the country before he could reapply for admission. See id. at 5.
he could make in some future application for admission if he now left the country.489

In the language proposed by this Article, the Attorney General used delegated discretionary authority to engage in interpretive discretion. This pattern, which was not clearly identified, has continued for many years and has influenced Congress and the judiciary.

After its codification in 1952, the section 212(c) exclusion waiver was extended through BIA interpretive discretion to certain deportable legal permanent-resident aliens.490 While the BIA expanded the waiver far beyond the scope of the statute's plain language, however, it still tied it to an actual departure and reentry. Thus, an alien who had not left the country since his deportable conviction was ineligible even to apply for discretionary relief under section 212(c).491 In 1976, however, the scope of section 212(c) was dramatically expanded by

489. Id. at 5-6. The BIA later issued other decisions in which a rather broad exercise of interpretive discretion was applied to aliens who would otherwise have faced deportation due to apparent illogical glitches in the immigration laws. For example, an alien who wished to adjust status had at that time to depart the country and return as an immigrant. In order that the alien not be excluded upon reentry, the INS and BIA permitted a pre-examination hearing in which the alien received permission to depart voluntarily, as well as an early section 3 waiver under the Seventh Proviso on the ground of exclusion which would arise upon subsequent application for readmission into the United States. See Rosenberg & Sabagh, supra note 480, at 2.

490. The BIA, for example, held that permanent-resident aliens who left the United States and upon return faced exclusion (due to prior criminal conviction), could be granted a retroactive ("nunc pro tunc") waiver under section 212(c). Matter of S-, 6 I. & N. Dec. 392, 396 (B.I.A. 1954), aff'd, 6 I. & N. Dec. 397 (Att'y Gen. 1955).

491. For example, in Matter of Arias-Urbe, 13 I. & N. Dec. 696, 699-700 (B.I.A. 1971), aff'd, Arias-Urbe v. INS, 466 F.2d 1198 (9th Cir. 1972) (per curiam), the BIA held that section 212(c) relief was not available to a deportable petitioner who was applying for an advance exclusionary waiver so that after deportation he could return and reenter the United States. However, Arias-Urbe, a native of Mexico who was found deportable for a narcotics conviction, had not departed the United States since his conviction. Also, he was not combining his application for section 212(c) waiver with an adjustment-of-status application under section 245. The BIA thus denied his pre-examination section 212(c) waiver, stating:

The requirement that an alien must have "temporarily proceeded abroad voluntarily and not under an order of deportation" makes it clear that Congress curtailed our authority for the advance exercise of section 212(c) relief in a deportation proceeding. Where a section 212(c) application is not coupled with an application for adjustment of status under section 245 of the Act, we have no basis for avoiding the statutory requirement that an alien lawfully admitted for permanent residence must be returning to resume a lawful domicile of seven consecutive years following a temporary, voluntary departure not under an order of deportation.

Id. at 700.
the Second Circuit Court of Appeals in INS v. Francis\(^{492}\) to include many deportable aliens, regardless of whether they had ever left the country.\(^{493}\) Francis directly addressed the fact that aliens who left the country and faced exclusion upon return could use the section 212(c) waiver, while aliens who did not leave, but otherwise were in exactly the same situation, had no such relief available. After tracing the evolution of the section 212(c) waiver from strictly an exclusion waiver to its uses in certain deportation situations such as that described above,\(^{494}\) the Francis court held that this reading of the statute violated equal protection in that the law subjected aliens to disparate treatment on "criteria wholly unrelated to any legitimate governmental interest."\(^{495}\) Put another way, the judiciary recognized that the Equal Protection Clause sets limits on the way in which the BIA could exercise interpretive discretion. As a result, section 212(c) litigation exploded. The initial confusion between interpretive and delegated discretion remained, however, as the Board and the courts struggled to determine their proper role.

\subsection*{b. Interpretive Discretion Following Francis}

In the years following Francis there have been a number of attempts to define the limits of the section 212(c) waiver in deportation

\footnote{492. Francis v. INS, 532 F.2d 268 (2d Cir. 1976).}
\footnote{493. See id. at 273.}
\footnote{494. See supra notes 480-491 and accompanying text.}
\footnote{495. Francis, 532 F.2d at 273. The court reasoned that:}

Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner. We do not dispute the power of the Congress to create different standards of admission and deportation for different groups of aliens. However, once those choices are made, individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest.

\textit{Id.} (footnote omitted). In \textit{Matter of Silva}, 16 I. & N. Dec. 26, 29-30 (B.I.A. 1976), the BIA reversed \textit{Matter of Arias-Uribe} and followed Francis. Subsequently the Francis rule was adopted nationwide except in cases arising in the Ninth Circuit. \textit{See, e.g., Tapia-Acuna v. INS}, 620 F.2d 311 (9th Cir. 1980),\textit{vacated}, 449 U.S. 945 (1980) (denying section 212(c) relief in deportation proceedings); \textit{see also} Bowe v. INS, 597 F.2d 1158 (9th Cir. 1979) (holding section 212(c) waiver unavailable to aliens facing deportation); Nicholas v. INS, 590 F.2d 802, 808 (9th Cir. 1979) (holding that deportable alien was not eligible for section 212(c) relief because he had not left the country subsequent to his conviction). The Ninth Circuit joined the Francis line, however, after the Supreme Court vacated the decision in \textit{Tapia-Acuna} and remanded the case for "further consideration in light of the Solicitor General's assertion to the Supreme Court that the Government no longer opposed a rule making aliens who are deportable" eligible for relief under section 212(c). \textit{Tapia-Acura v. INS}, 640 F.2d 223, 224 (9th Cir. 1981).
proceedings. The formula that was finally settled upon by the Board and accepted by the courts was to limit the applicability of the waiver to deportation offenses which had a so-called “comparable ground” under the exclusion provisions. This interpretation was defended as being consistent with the original rationale for expanding the scope of section 212(c)—that the deportable alien deserved the relief because, if he had left the country, he would have been eligible for the waiver.

For purposes of this Article, what is most interesting about this history is the breadth of interpretive discretion exercised by the BIA. What amounts to an administrative equal protection analysis was often obscured from meaningful judicial oversight because it was couched in the language of discretion.

The first attempts to define the scope of the section 212(c) waiver followed the generous spirit of the early Seventh Proviso/section 212(c) cases and Francis. In Matter of Salmon, an alien applied for section 212(c) relief from deportation for a conviction involving a crime of moral turpitude (robbery in the third degree). The BIA held:

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499. See, for example, Matter of Hom, 16 I. & N. Dec. 112, 112 (B.I.A. 1977), in which a legal permanent resident who had been found deportable after his conviction for narcotics had applied for adjustment of status under section 245. The immigration judge had denied relief and found the alien deportable. See id. at 112-13. The BIA held that the petitioner was not eligible for an adjustment of status, but nevertheless, on its own initiative, granted eligibility for relief, stating:

Under Board decisions rendered prior to Silva, the respondent in the present case who has not departed the United States since his narcotics conviction, could only have made his application for a section 212(c) waiver in connection with an application for adjustment of status. However, following the reasoning in Silva, a section 212(c) waiver may now be granted in deportation proceedings regardless of whether the alien made an entry when eligible for the relief or whether the alien may adjust his status to that of a lawful permanent resident under section 245. Consequently . . . adjustment of status is not relevant. Upon a showing of eligibility for section 212(c) relief, deportation proceedings may be reopened in order that the respondent be given an opportunity to apply for the benefits of section 212(c).

Id. at 113-14 (internal cross references omitted).


501. See id. at 735.
Although the language in section 212(a)(9) concerning excludability on the basis of conviction for a crime involving moral turpitude is not exactly the same as the language of section 241(a)(4) of the Act concerning deportability for a conviction of a crime involving moral turpitude, we find that drawing such a distinction would run counter to the rationale of Francis . . . .

The difficulties with the comparable-grounds rule are demonstrated by Matter of Granados503 and Matter of Wadud.504 In Granados, a legal permanent resident was convicted of possessing a sawed-off shotgun and was subsequently found deportable.505 His application for relief from deportation under section 212(c) was denied because there was no comparable exclusion ground for possession of a sawed-off shotgun.506 Granados creatively argued that because the mere fact of his deportation would make him immediately excludable upon any attempt at reentry, his conviction effectively constituted a ground of excludability.507 The Board disagreed, finding that under Granados’s reasoning, section 212(c) relief would be available for all grounds of deportability including even the “subversive” grounds, which were specifically precluded from section 212(c) relief in the statute.508

In Matter of Wadud, a man charged with deportability for aiding and abetting another alien in obtaining a fraudulent visa seized on language in Granados which indicated that, had Granados’s crime been one of moral turpitude, he might have qualified for section 212(c) relief.509 The BIA, however, held that: “[W]e need not determine whether the respondent’s conviction was one involving moral turpitude because we decline to expand the scope of section 212(c) relief beyond the grounds listed under that section.” 502

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502. Id. at 736 (footnote omitted).
506. See id. at 728-29. The BIA also held that, as shotgun possession was not a crime involving moral turpitude, Granados would not be able to gain relief by analogical reference to that section of § 212(a) either. See id. at 728.
507. See id.
508. Id. at 728-29. The Board stated that “nothing in the plain language or the legislative history of section 212(c) justif[ied] extending . . . relief [from deportation] beyond the grounds listed under that section.” Id. This would of course be hard to find since section 212(c) was an exclusion statute and not a deportation statute.
relief in cases where the ground of deportability charged is not also a
ground of inadmissibility.\textsuperscript{510}

Cases involving entry without inspection and illegal possession
of a firearm have been especially difficult to reconcile with the
comparable grounds rule. Two circuit court decisions, \textit{Marti-Xiques v. INS}\textsuperscript{511} and \textit{Cabasug v. INS},\textsuperscript{512} illustrate this difficulty well. In \textit{Marti-Xiques} a man was found deportable for smuggling aliens illegally into
the country and for illegal entry without inspection.\textsuperscript{513} He was denied
section 212(c) relief from deportation by the BIA because, while the
smuggling charge had a comparable ground of exclusion, the entry­
without-inspection charge did not.\textsuperscript{514} The INS contended that the latter
ground of exclusion could not be waived.

The Eleventh Circuit Court of Appeals held otherwise.\textsuperscript{515} The
court reasoned that the interpretation taken by the INS clashed with the
purpose of the section 212(c) waiver which aims to “relieve aliens of
the potential hardships flowing from literal application of exclusion
provisions that permit an alien to be excluded for reasons less
substantial than those necessary to support deportation.”\textsuperscript{516} The court
found that Congress had “unquestionably” considered entering without
inspection a lesser offense than smuggling illegal aliens, because the
criminal sentences were much harsher for smuggling than for illegal
entry.\textsuperscript{517} Under this reasoning, the court examined the underlying
offensive conduct to determine whether a waiver was available and
overruled the BIA decision, holding that section 212(c) permitted

\textsuperscript{510} Id. The Board reasoned that if it were to hold otherwise, an “anomalous
situation” would result in some deportation cases because most of the crimes listed in the
section affecting \textit{Wadud} were not crimes of moral turpitude:

To afford section 212(c) relief only to those aliens whose crime under section
241(a)(5) involved moral turpitude would be to reward those guilty of a more
egregious offense for their greater culpability. We are unable to conclude that
Congress intended such an inequitable consequence to ensue from the
implementation of section 212(c).

\textit{Id.} The Board did not address the inequity apparent in the fact that, while section 212(c)
relief is denied to aliens guilty of visa fraud, it is sometimes granted to murderers. \textit{See}

\textsuperscript{511} 713 F.2d 1511 (11th Cir. 1983), \textit{vacated on grant of reh’g}, 724 F.2d 1463 (11th
Cir.), \textit{decided on other grounds}, 741 F.2d 350 (11th Cir. 1984).

\textsuperscript{512} 847 F.2d 1321 (9th Cir. 1988).

\textsuperscript{513} \textit{Marti-Xiques}, 713 F.2d at 1513.

\textsuperscript{514} \textit{See id.} at 1515.

\textsuperscript{515} \textit{See id.} at 1515-16.

\textsuperscript{516} \textit{Id.} at 1515.

\textsuperscript{517} The court stated that the “anomaly” was further heightened by the fact that the
two charges arose from the same offense. \textit{See id.} at 1516.
discretionary relief as to both of Marti-Xiques's grounds for exclusion.\textsuperscript{518}

In \textit{Cabasug v. INS},\textsuperscript{519} however, the Ninth Circuit Court of Appeals addressed the potential constitutional problem of denying section 212(c) relief to aliens convicted of illegal firearms possession, which, like entry without inspection, does not have a specific comparable ground of exclusion.\textsuperscript{520} The court held that, unlike the situation addressed in \textit{Francis}, there was no equal protection or due process violation in denying section 212(c) relief to aliens convicted of illegal firearms possession.\textsuperscript{521}

\textsuperscript{518} \textit{See id.} at 1515-16. The holding, however, was limited: We do not hold that [section] 212(c) permits discretionary relief as to all grounds of deportability. Nor do we hold that an appellant may claim the benefit of [section] 212(c) as to a given ground of deportation merely by pointing to a more serious ground of exclusion with which he is not charged but that is enumerated in [section] 212(c). All we hold is that where an appellant is deportable under two grounds arising out of the same incident, [section] 212(c) permits waiver of an unenumerated ground if a more serious ground is an enumerated ground for waiver.

\textsuperscript{519} \textit{See id.} at 1516.

\textsuperscript{520} \textit{See id.}

\textsuperscript{521} \textit{See id.} at 1326-27. The court interpreted \textit{Francis} narrowly by focusing, not on the \textit{Francis} concern with fairness and equal protection, but on the specific narcotics aspect of the \textit{Francis} decision. \textit{See id.} at 1325. The court pointed out that, whereas there was a ground of exclusion for narcotics offenders, "there exists no class of persons alike in carrying sawed-off shotguns or machine guns, and deportable or not depending on the irrelevant circumstance of whether at some previous time they took a temporary trip out of the country." \textit{Id.} at 1326. Cabasug took the position that the INS had created an arbitrary distinction by refusing to extend section 212(c) relief to all categories of deportation except those explicitly excluded from section 212(c). \textit{See id.} The court would have none of it: "This is merely a rhetorical device to avoid an explicit challenge to the statute. ... We are not about to overturn an Act of Congress under the pretense that we are merely correcting an administrative aberration." \textit{Id.} Cabasug also argued that "Congress could not have meant to treat the firearms offense more seriously than crimes of moral turpitude such as murder or rape" that have comparable grounds of exclusion. \textit{Id.} The court disagreed, citing different contexts in which Congress had given special treatment to firearms offenses and stating that the legislative history showed that Congress gave special attention to deporting "racketeers," who were known to carry machine guns and sawed-off shotguns. \textit{Id.} at 1327. The court stated:

There is no anomaly in Congress depriving the INS of discretion in somewhat analogous circumstances to those in which it had deprived the judiciary of discretion in the criminal context. Congress may fashion a sanction without discretionary mitigating features in order to deter a kind of conduct about which it is especially concerned.

\textit{Id.} Thus, the court reasoned that Congress may have decided to withhold discretion ... in exclusion cases because it found a public policy advantage in deporting the entire class of aliens convicted
The problems of entry without inspection and illegal firearms possession under the comparable grounds rule were finally administratively resolved in a series of cases involving a legal permanent-resident alien, Hernandez-Casillas, who had entered the United States without inspection and was held to be ineligible for section 212(c) relief. The BIA, in a powerful demonstration of interpretive discretion, reversed the immigration judge's denial:

This limitation can result in the total unavailability of relief from deportation for longtime resident aliens who, like the present respondent, may not have committed offenses nearly as serious as those of other aliens who are eligible for the section 212(c) waiver. In order to remedy this anomalous situation, we have today decided to extend the availability of section 212(c) to all grounds of deportability except [the] sections ... which relate to subversives and war criminals.

The BIA reasoned that the waiver should be expanded because section 212(c) bore such little resemblance to the statute as written (it had essentially been "judicially rewritten" and over the years become a vehicle for "full deportation relief") and because giving a broader application to the waiver would have the benefit of alleviating potential hardships to certain deserving aliens under the same type of fundamental fairness/equal protection arguments made in Francis.

of the sawed-off shotgun and machine gun offenses which it did not perceive for some members of the classes of aliens committing certain other offenses.

Id. The court held: "Congress has 'almost plenary' power in this area, and 'the decisions of Congress are subject only to limited judicial review.' The treatment for deportation purposes of these firearms offenses is a rational means to achieve the legitimate purpose of deterring possession of the forbidden weapons by aliens." Id. (citations omitted) (quoting Adams v. Howerton, 673 F.2d 1036, 1091 (9th Cir. 1982)).


523. Id. at 265.

524. Id. at 266 (Appleman, B.M., concurring) (quoting Matter of Silva, 16 I. & N. Dec. 26, 31 (B.I.A. 1976)).

525. See id. The BIA also reasoned that the statutory-construction and congressional-intent arguments in Granados and Cabasing were unpersuasive:

As to the language and legislative history of section 212(c), we simply find that, given the unusual history of section 212(c), and the long distance already travelled from the "plain language" of that statute, it makes little sense now to adhere to strict rules of statutory construction.

... "It strikes us as inconsistent for INS, on the one hand, to attribute no significance to Sec. 212(c)'s failure to mention deportation proceedings but, on the other hand, to argue that section 212(c)'s silence regarding grounds of deportation evinces an intent to preclude relief with respect to grounds of deportation that are not one of the enumerated grounds of exclusion. INS cannot
The concurrence and the dissent in Hernandez-Casillas I can be read as a debate over the proper extent of interpretive discretion. The opposing sides are clearly delineated. The majority opinion and concurrence were concerned with consistency, fairness, and the "generous spirit" of the waiver. The dissent, however, was concerned with strict statutory construction and deference to the powers of Congress. Dissenting Board Members Vacca and Morris argued that, however admirable the majority's concerns with fairness and the generous spirit of the statute, their decision to further expand the waiver resulted in a "cavalier construction of the statute" and a "blatant disregard for the intent of Congress."

have it both ways. If Sec. 212(c)'s failure to mention deportation proceedings generally has no significance, then its omission of any reference to grounds of deportation likewise has no significance."

Id. at 267-68 (quoting Marti-Xiques v. INS, 713 F.2d 1511, 1516 n.5 (11th Cir. 1983), vacated on grant of reh'g, 724 F.2d 1463 (11th Cir.), decided on other grounds, 741 F.2d 350 (11th Cir. 1984)).

526. Board Member Heilman, in his concurrence, states:

Anyone who invokes principles of statutory construction and legislative history in a discussion of section 212(c) at this point cannot present any logical and coherent argument for partial adoption of the waiver to deportation proceedings.

...The dissent suffers from the handicap that meets any legal analysis that attempts to limit the coverage of a statutory provision once its most elementary and basic substance has been abandoned. Here, we have the overriding fact that the waiver was meant to waive grounds of exclusion, not deportation. Second, we have the indisputable fact that this limitation has been abandoned by judicial and administrative choice.... Since Congress clearly never intended to provide this waiver to anyone other than an applicant for admission, it could hardly be said to have any intent whatsoever in regard to persons in deportation proceedings.

I would readily concede that very little that has been done in regard to section 212(c) in the past 13 years may be justified by reference to statutory construction or legislative intent and would even concede that we are dealing with an administratively and judicially concocted creature. As this is so, it seems to me it is necessary for this concoction to pass some elementary tests of rationality and fairness.

Id. at 270-73 (Heilman, B.M., concurring).

527. Id. at 274 (Vacca, B.M., & Morris, B.M., dissenting). After an examination of legislative and decisional history, the dissent concluded:

[T]he majority consistently has ignored the guideposts of statutory construction. It consistently confuses how the statute reads with how the statute ought to read. In effect, the majority has rewritten section 212(c) in this case in order to satisfy its own sense of fairness, thereby throwing reasonable and judicially accepted standards of statutory construction to the winds.
The dissenters ultimately prevailed when, at the request of the INS, the Attorney General issued an opinion overturning the BIA decision and upholding the comparable-grounds rule. The Attorney General found that the BIA’s “bold assertion” that there was no reason not to make section 212(c) applicable to all grounds of deportability was:

simply ... not enough to justify the Board’s decision to wrench away even further from the statutory text. Absent some supervening affirmative justification based upon a requirement of the Constitution or other applicable law, neither the Board nor I may depart—or, in this instance, extend an earlier departure—from the terms of the statute we are bound to enforce.

The Attorney General held that because there was no comparable ground of exclusion, and thus no different treatment for people within the same class (aliens guilty of entry without inspection or firearms possession), there could not be a violation of equal protection or due process. On this issue, then, the pattern of extensive interpretive

Throughout this decision, I have attempted to show the inherent weaknesses in the rationale of the majority. Above all, it should be quite clear that there is virtually no authoritative support for the majority’s approach. The majority has boldly invaded the province of the Congress and for that there is no excuse.

Id. at 276, 280.

528. See Matter of Hernandez-Casillas, 20 I. & N. Dec. 280, 286-93 (Att’y Gen. 1991) [Hernandez-Casillas II]. The INS also had requested that the Attorney General overturn Silva and return section 212(c) to a strict-exclusion waiver, but the Attorney General declined, stating that he did not need to delve into that issue in order to resolve the comparable-grounds issue. See id. at 286-88.

529. Id. at 289.

530. Upon remand, the BIA dismissed the appeal per the Attorney General’s orders. The Fifth Circuit Court of Appeals concurred, finding that there were no “absurd or unfair results that justified disturbing the Board’s literal reading of the statute.” Hernandez-Casillas v. INS, 983 F.2d 231, 231 (5th Cir. 1993). In 1990, while the Attorney General was considering the comparable-grounds issue in Hernandez-Casillas II, Congress passed an amendment to section 212(c) to preclude its availability to aggravated felons who have served more than five years in jail. See Immigration Act of 1990, Pub. L. No. 101-649, §§ 511, 601(d), 104 Stat. 4978, 5052, 5075 (codified as amended at 8 U.S.C. § 1182(c) (1994)); see also DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 11.4(c)(2), at 28 (1996). Also, the deportation statute for illegal possession of sawed-off shotguns and machine guns had been expanded in 1988 under the ADAA to include any illegal-weapons convictions. These amendments have proven to be particularly harsh in light of the comparable-grounds rule. See, e.g., Lopez-Amaro v. INS, 25 F.3d 986 (11th Cir. 1994) (involving conviction for first-degree murder with a pistol), cert. denied, 115 S. Ct. 1093 (1995); Campos v. INS, 961 F.2d 309 (1st Cir. 1992) (involving conviction for carrying unlicensed pistol); In re Esposito, Int. Dec. 3243, 1995 BIA LEXIS 5 (B.I.A. Mar. 30, 1995) (involving convictions for possession of drugs and sawed-off shotgun); Matter of Montenegro, 20 I. & N. Dec. 603 (B.I.A. 1992) (involving convictions for
discretion essentially concluded. As one reviewing court has put it, the “combined effect of § 212(c) and the interpretation in Francis and involuntary manslaughter and assault with a firearm); Matter of Rodriguez-Cortes, 20 I. & N. Dec. 587 (B.I.A. 1992) (involving convictions for five counts of second-degree attempted murder where codefendant used firearm); Matter of Meza, 20 I. & N. Dec. 257, 258 (B.I.A. 1991) (involving aggravated felony and narcotics conviction).

Following Hernandez-Casillas II and the amendments to the statute, a legal permanent resident who was found deportable due to a conviction for an aggravated felony with a sentence of less than five years was denied relief from deportation under section 212(c) because there was no specific ground of exclusion for aliens convicted of an aggravated felony. See Meza, 20 I. & N. Dec. at 258. The BIA held that the statutory language, which makes aliens who have served over 5 years for an aggravated felony ineligible for section 212(c) waivers, implied that Congress meant aliens who served less than five years to be eligible. See id. The BIA stated it was evident from the legislative history of the 1990 Act that the limitation of relief was imposed by Congress with the understanding that section 212(c) relief was to be available to some aliens, notwithstanding the conviction for an aggravated felony. See id. The BIA reasoned that a section 212(c) waiver was not necessarily unavailable for aggravated felons merely because the exclusion statute did not specifically include the words “convicted of an aggravated felony.” Id. at 259. The Board then found that the specific felony of which Meza was convicted, possession of a controlled substance, was encompassed within section 212(a), and held: “We find that as the respondent’s conviction for a drug-related aggravated felony clearly could also form the basis for excludability under section 212(a)(23), he is not precluded from establishing eligibility for section 212(c) relief based on his conviction for an aggravated felony.” Id. Board Member Heilman, in his concurrence, took the majority position one step further:

It appears to me that this amendment renders irrelevant the holdings of such cases as Matter of Wadud and Matter of Granados as far as aggravated felonies are concerned. Even if all of the Board and judicial interpretations which have extended section 212(c) relief to deportation grounds with “counterparts” in exclusion are swept away, section 212(c) relief will still be available to aggravated felons in deportation proceedings under the 1990 amendment to section 212(c) of the Act. By this amendment, Congress has now given a statutory basis for an application for section 212(c) relief in deportation proceedings, where previously this relief had only been available through administrative and judicial interpretation.

Id. at 261 (Heilman, B.M., concurring) (citations omitted).

This approach has not worked for aliens convicted of firearms offenses, however. For example, in Montenegro, 20 I. & N. Dec. 603, 603-04 (B.I.A. 1992), an alien was found ineligible for section 212(c) relief because he had been convicted of voluntary manslaughter and assault with a firearm. The immigration judge denied his section 212(c) eligibility because there was no comparable ground of exclusion for the firearms offense. See id. at 604. The alien appealed, arguing by analogy to Meza, that his conviction for assault with a firearm would make him excludable under section 212(a)(2)(A)(i)(I) for having been convicted of a crime involving moral turpitude, which would be a comparable ground of exclusion. See id. at 605-06. The BIA dismissed the appeal, upholding Wadud and reiterating that a specific ground of deportation cannot be subsumed under a more general category for deportation. See id. The BIA also qualified Heilman’s concurrence in Meza, 20 I. & N. Dec. at 260-61, limiting it to mean merely that, regardless of the availability of section 212(c) relief to any other deportation charge under Wadud and Granados, the specific language of amended section 212(c) provided a statutory basis of eligibility only for certain aggravated felons in deportation hearings. See Montenegro, 20 I. & N. Dec. at 605-06.
its aftermath, is to create an untidy patchwork, even, one might say, a mess." Nevertheless, despite the equal protection underpinnings to the prior history of interpretive discretion, the court, like most others, declined "to tinker further."

c. The "Serious Crime" and "Unusual and Outstanding Equities" Standards

Beyond its extensive use of interpretive discretion to determine eligibility to apply for section 212(c) relief, the BIA has also sought to develop relatively concrete factors and standards to be considered in the exercise of delegated discretion. Judicial review of BIA decisions of this type vacillates between extreme deference and an emerging tendency to force the Board to greater rule-like consistency. To determine if relief is warranted, the Board will "balance" social and humane factors against adverse factors that indicate the applicant's undesirability as a permanent resident. For cases in which there are substantial negative factors, the Board also now requires a heightened showing of positive factors, termed "unusual or outstanding equities," for relief to be granted. This heightened showing of unusual or outstanding equities is automatically required when a legal permanent resident has been convicted of a serious drug offense, especially drug trafficking. This requirement, ostensibly an exercise of delegated discretion, has an interesting history. Its central irony is that what

531. Campos v. INS, 961 F.2d 309, 315 (1st Cir. 1992). The author was co-counsel of record in Campos.
532. Id. at 317.
534. In Marin, the Board outlined the factors to be considered in determining whether section 212(c) relief is warranted. See id. Positive factors include: 1) family ties in the United States; 2) residence of long duration in the United States, especially when residence began at a young age; 3) evidence of hardship to the applicant and his family if deportation occurs; 4) service in the armed forces; 5) a history of employment; 6) the existence of property or business ties; 7) evidence of value and service to the community; 8) proof of genuine rehabilitation if a criminal record exists; and 9) other evidence attesting to a respondent's good character, such as affidavits from family, friends, and responsible representatives of the community. See id. Negative factors include: 1) the nature and underlying circumstances of the exclusion or deportation ground at issue; 2) the presence of additional significant violations of the immigration laws; 3) the existence of a criminal record and, if so, its nature, recency, and seriousness; and 4) the presence of other evidence indicative of an applicant's bad character or undesirability as a permanent resident. See id. at 584.
535. See id. at 586.
536. See id. at 586 n.4.
started as a strong form of discretion has grown to a virtual preclusion of discretion by the Board.

The standard was developed in Matter of Marin, in which the Board held that as negative factors grew more serious, it would become incumbent upon the applicant to introduce additional offsetting favorable evidence, which in some cases may have to involve "unusual or outstanding equities." The Board justified the creation of this new standard by asserting that the Immigration and Nationality Act provided clear distinctions in the treatment of aliens convicted of drug offenses and those convicted of other crimes, and that "this disparate statutory treatment and the disfavor with which we view [drug] offenses" authorized such a heightened showing for drug offenders.

Following Marin, the Board sought to clarify the "unusual or outstanding equities" standard for drug offenders. The Board's current position is that a showing of "unusual or outstanding equities . . . may be mandated because of a single serious crime [as in Marin], or because of a succession of criminal acts which together establish a pattern of serious criminal misconduct." Even a showing of unusual or outstanding equities, however, does not automatically entitle an applicant to section 212(c) relief. Rather, the Board has asserted that

537. The immigration judge had denied section 212(c) relief to a legal permanent resident convicted of criminal sale of cocaine, reasoning that the nature of Marin's criminal offense and subsequent confinement meant that, absent a showing of "unusual or outstanding equities," relief should not be granted. Id. at 582-83. The immigration judge determined that Marin's conviction as a drug offender had not been sufficiently offset by his few favorable factors and therefore discretionary section 212(c) relief was not warranted. See id. On appeal, Marin argued that the immigration judge's exercise of discretion in demanding a showing of "unusual and outstanding equities" was not founded upon standards promulgated through regulations or adjudication, nor did it follow precedent. Marin argued that the decision thus "violated any standard for fair play as well as due process." Id. at 583.

538. Id. at 585. In a footnote, the Board used the immigration judge's concept of unusual and outstanding equities to create a new standard for the drug offender seeking discretionary section 212(c) relief: "[W]e require a showing of unusual or outstanding countervailing equities by applicants for discretionary relief who have been convicted of serious drug offenses, particularly those involving the trafficking or sale of drugs." Id. at 586 n.4.

539. Id.


541. Edwards, 20 I. & N. Dec. at 195-96; see Buscemi, 19 I. & N. Dec. at 633-35. It is the nature of the underlying crime, and not the ground of deportability, which determines the "degree of equities" necessary to overcome the crime. Id.
relief can still be denied in its "discretion." It is unclear what this extremely residual form of discretion could actually mean in practice, however.

542. For example, in Edwards, the Board found that even though Edwards demonstrated "unusual or outstanding equities," when those equities were weighed against the adverse factors of his criminal record, including his drug offense and his inability to prove rehabilitation, relief was not warranted. 20 I. & N. Dec. at 197-99. The Board reasoned that Edwards's 10-year pattern of crime, as well as his controlled-substance distribution offenses (which had each independently required a demonstration of unusual or outstanding equities) were so serious that his unusual or outstanding equities were still not adequate to overcome his criminal history. See id. at 198-99; see also Chavez-Arreaga v. INS, 952 F.2d 952, 953-54 (7th Cir. 1991) (holding that Board's finding of outstanding equities was nevertheless outweighed by the seriousness of the crime); In re Rodriguez-Reyes, A344022839 (B.I.A. Mar. 5, 1992) (unpublished decision on file with author) (involving 61-year-old woman convicted of illegally importing cocaine into the United States, with no criminal convictions and no history of drug use, who was denied section 212(c) relief despite her outstanding equities, including 17 years of lawful permanent residency in the United States, good employment history, a U.S. citizen son and five grandchildren, and community and church service).

543. The "unusual and outstanding equities" standard has sparked disagreement among the members of the Board. See Roberts, 20 I. & N. Dec. at 303-05 (Heilman, B.M., concurring in part and dissenting in part); Edwards 20 I. & N. Dec. at 199-202 (Morris, B.M., concurring; Heilman, B.M., concurring in part and dissenting in part). Board Member Morris's concurrence in Edwards concerns the difficulties in defining the terms "unusual" and "outstanding," and suggests abolishing the "unusual and outstanding" requirement altogether. 20 I. & N. Dec. at 199-201 (Morris, B.M., concurring). Morris contended that there is no need for the term "unusual" because "[i]t is the weight of the equity that is significant, not the frequency with which it may occur." Id. at 199. He also expressed concern with how the term outstanding should be defined. See id. at 200. He asserted that an outstanding length of time cannot be pinpointed, because the quality of that time must count as well as the length. See id. Additionally, he noted that "there is no formula for determining the number and type of United States citizen and lawful permanent resident relatives who may constitute an outstanding equity." Id. Thus he would evaluate all equities, assigning weight or importance to each one separately and then to all of them cumulatively and balancing them against the adverse factors, which should also be evaluated cumulatively. See id. He stated: "In sum, I believe that it is the Board's purpose to provide guidance in the exercise of discretion in these areas but that it is not the Board's intention to provide a formula that should be rigidly followed." Id. at 201.

Board Member Heilman, in his concurrence/dissent in Roberts focused on the factor of rehabilitation under the "unusual or outstanding equities" standard. 201 I. & N. Dec. at 303-05. Heilman also criticized the Board's characterizing any drug sale, no matter how small, as trafficking, and thus as an aggravated felony. See id. at 303. He suggested that because of the absurdity of imposing the titles of "aggravated felon" and "drug trafficker" on even small-time street dealers, making them equivalent to major drug dealers, rapists, and murderers, the Board should interpret the terms "traffic" and "trafficker" narrowly to mean more than a single sale of a small amount of drugs. See id. at 303-04. Heilman stated that he "would not treat rehabilitation as a requirement, but rather as an equity" where, if it exists, it would be considered a positive factor to be balanced against the negative factors. Id. at 305. The greater the evidence of rehabilitation, the greater the equity, and if rehabilitation cannot be established, then the alien has simply failed to establish one equity, and this failure will not be held against him as an adverse factor. See id.
It has been argued that the "unusual and outstanding equities" standard was itself unauthorized, and that had Congress desired a different standard for serious drug offenders it could have created one. Courts, however, have not been easily persuaded. The Ninth Circuit Court of Appeals in the pre-Elramly decision of Ayala-Chavez v. INS, for example, affirmed the Board's practice. The court held that its review was confined to deciding whether the standard is based on a "permissible" reading of the statute. Noting that courts have broadly interpreted the discretionary authority of the Attorney General to grant or deny relief from deportation, the court stated that inherent in this discretion is the Attorney General's authority to establish general standards that govern its exercise so long as these standards are rationally related to the statutory scheme. The court then found that because the immigration laws clearly reflect a strong congressional policy against the lenient treatment of drug offenders, the "unusual and outstanding equity" standard was rationally related to the statutory scheme. This approach, it would seem, implicitly viewed the creation of the standard as a permissible part of the Board's delegated discretion because the statute is completely silent on the issue.

While courts have generally upheld the Board's authority to create the "unusual and outstanding equities" standard, the application

Furthermore, Heilman suggested that if the lack of rehabilitation did swing the balance against the respondent, it would be because the criminal record was so substantial that one or two equities alone would not suffice. See id.

While the Board has made clear that rehabilitation is not a requirement but merely one important factor of many, rehabilitation has for all purposes been made into a requirement and is given treatment as a negative factor, as well as a positive one. For example, in Roberts the Board specifically mentioned rehabilitation as a favorable factor but then stated that Roberts's difficulty in establishing rehabilitation due to his constant incarceration did not preclude "considering the lack of rehabilitation as an adverse factor." 20 I. & N. Dec. at 302 (emphasis added). The Board also places substantial importance on a showing of rehabilitation for incarcerated aliens, even though they cannot establish standard rehabilitation factors such as passage of time with no criminal record, steady employment, or counseling. See id. at 299.

544. See Rosenberg & Sabagh, supra note 480.
545. See Ayala-Chavez v. INS, 944 F.2d 638, 641 (9th Cir. 1991).
546. See id.
547. See id.
548. See id.; see also Nunez-Pena v. INS, 956 F.2d 223, 225-26 (10th Cir. 1992) (holding that, where an alien has engaged in serious criminal conduct, a higher standard of outstanding equities is allowed despite the fact that it was established through adjudication rather than through the procedural channels under the APA); Blackwood v. INS, 803 F.2d 1165, 1167-68 (11th Cir. 1986) (stating that Congress has forcefully expressed a national policy against persons who possess controlled substances by enacting laws to exclude them from the United States if they are aliens).
of that standard has also been severely criticized. The Fifth Circuit Court of Appeals, in *Diaz-Resendez v. INS*, vacated and remanded the Board’s denial of section 212(c) relief because the court found that the Board had abused its discretion. The court found that the Board had failed to consider all of the relevant factors when determining whether Diaz-Resendez’s equities rose to the level of unusual or outstanding. Asserting that the Board must do more than merely refer to relevant factors in passing, the court held that in considering Diaz-Resendez’s assertions of hardship (the imminent break-up of his marriage if he were deported, the fact that his child would be left fatherless, and the severe economic hardship that the family would suffer), the Board did not actually “meaningfully address” these assertions.

As importantly, the court also held that the Board’s inconsistent treatment of similar cases constituted an abuse of discretion. The court found that the Board acted arbitrarily when it decided that Diaz-Resendez failed to demonstrate unusual or outstanding equities, when it had reached a contrary conclusion on much weaker facts in another decision, *Matter of Buscemi*.

549. But see *Flores-Ramo v. INS*, No. 90-70639, 1992 U.S. App. LEXIS 6370 (9th Cir. Apr. 3, 1992), in which the court gave a brief synopsis of the factors found by the immigration judge and BIA and cursorily dismissed the entire matter: “Although the BIA found that the equities in Flores-Ramos’ case were ‘substantial,’ they were insufficient to ground relief . . . . We find no abuse of discretion. Affirmed.” *Id.* at *4* (citation omitted).

550. 960 F.2d 493, 496-98 (5th Cir. 1992).

551. See *id.* at 497-98; see also *Tipu v. INS*, 20 F.3d 580, 584-87 (3d Cir. 1994) (following the approach of *Diaz-Resendez*).

552. *Diaz-Resendez*, 960 F.2d at 497-98. Moreover, the court found that in failing to address such factors as Diaz-Resendez’s lack of criminal history, successful completion of his three-year probation, and a recommendation letter from his probation officer, the treatment the Board accorded the rehabilitation equity fell below the warranted threshold. See *id.* The court surmised that the Board had found Diaz-Resendez’s rehabilitation unsatisfactory merely because he did not state in exact words that he was remorseful. See *id.* at 497. Apparently the Board did not consider Diaz-Resendez’s testimony that he would not do it again to be a statement of remorse. See *id.* at 498.

553. See *id.* at 496-97.

554. See *id.* at 497 (citing *Matter of Buscemi*, 19 I. & N. Dec. 628 (B.I.A. 1988)). Diaz-Resendez, convicted of possession of marijuana with intent to distribute, presented a sympathetic and compelling case: a legal permanent-resident for 37 years; six U.S. citizen or legal permanent resident children, three of whom were dependent and one of whom had suffered brain damage; a sick U.S. citizen wife; steady employment history; a supportive letter from his probation officer, as well as numerous other recommendation letters; and no prior criminal record other than a D.W.I. charge. See *id.* at 494-95, 497. In contrast, the applicant’s equities in *Buscemi* (finding entry into the United States at a young age and 17 years of legal permanent-residency status; the close relationship and emotional dependence of his financially self-sufficient mother and sisters; and steady employment), although arguably less compelling, were considered by the Board to be outstanding equities. See *Buscemi*, 19 I. & N. Dec. at 629, 635. The court found that the Board offered no
The Sixth Circuit Court of Appeals, in Gonzalez v. INS, also recently examined the Board’s policy toward applicants for section 212(c) relief who are guilty of drug offenses. The court found that the Board has consistently failed to exercise its discretion favorably, and suggested that this pattern may constitute an abuse of discretion. Gonzalez, who was being deported for a drug conviction, had contended that the Board’s denial of discretionary relief constituted a “‘de facto ruling that immigrants convicted of a single, though admittedly, serious drug crime, will never warrant a favorable grant of discretionary relief even though Congress has expressed a contrary intent.’” The Sixth Circuit, after conducting an in-depth review of the evidence and the immigration judge’s and Board’s reasoning, found that Gonzalez’s assertion “[had] some merit.”

The court asked the INS to provide all decisions in which the Board exercised discretion in favor of an alien convicted of a drug offense. Although more than 3,000 decisions had been published, the INS was only able to provide the court with one decision in which relief was granted to a drug offender. While the court recognized that the Board hears only a small percentage of cases heard by immigration judges, it stated that this did not diminish the fact that, in cases which do eventually reach the Board, the Board’s practice left the impression that it had a policy of not granting a section 212(c) waiver in cases where an alien has been convicted of a serious drug offense. The court stated: “Such a policy ... appears to be an unauthorized assumption by the INS of a position properly to be made by the Congress.” The court asserted that the purpose of giving discretionary power to administrative agencies is to individualize the explanation for the disparate treatment of the two factually similar cases, and held that the Board “‘acts arbitrarily when it disregards its own precedents and policies without giving a reasonable explanation for doing so.’” Díaz-Resendez, 960 F.2d at 497 (quoting Israel v. INS, 785 F.2d 738, 740 (9th Cir. 1986)).

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555. 996 F.2d 804 (6th Cir. 1993).
556. See id. at 811.
557. Id. at 810 (quoting Brief of the Petitioner).
558. Id.
559. See id.
560. In Matter of Morrobel, A30924038 (B.I.A. Mar. 10, 1993) (unpublished decision on file with the author), section 212(c) relief was given to an alien convicted of one attempted sale of cocaine valued at $20.00—hardly a serious drug offense.
561. See Gonzalez, 996 F.2d at 810.
562. See id.
563. Id.
application of law, and to make it flexible and adaptable to circumstances:

Without it, the law is apt to be criticized as harsh, unfeeling and unjust.

In deportation cases, the Attorney General or her designees . . . are entrusted with the authority to exercise discretion in order to ameliorate the harsh results that deportation wrecks on aliens and their families by allowing, in certain circumstances, a waiver of deportation. The BIA's failure to exercise its discretion may well be an abuse of discretion.\(^6\)

Despite this strong statement, however, the court declined to find an abuse of discretion in the Board's determination that Gonzalez had not established sufficient unusual and outstanding equities.\(^5\)

The Ninth Circuit, in response to the Board's use of the serious-crime category, has recently begun to develop a form of what might be termed "hard look" review.\(^6\) Following Ayala-Chavez, in Yepes-Prado v. INS,\(^5\) the court sent a pointed signal to the Board:

Congress could have decided to deny discretionary relief to all persons convicted of serious drug offenses, but it explicitly chose not to do

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564. Id. at 811 (citing DAVID M. WALKER, THE OXFORD COMPANION TO LAW 363 (1980)) (emphasis added) (footnotes omitted).

565. In support of this position, the court cites Vinci v. Consolidated Rail Corp., 927 F.2d 287, 288 (6th Cir. 1991) (holding that "[t]he failure to exercise discretion can also constitute an abuse of discretion") and United States ex rel. Berman v. Curran, 13 F.2d 96, 98 (3d Cir. 1926) (holding that exclusion of aliens "‘under sixteen years of age unaccompanied by or not coming to [a parent]’ was, in view of their full qualification for admission,” an abuse of discretion because of a failure to exercise discretion). The Board has categorically denied that it has had a de facto policy of denying relief under section 212(c) to all aliens convicted of a serious drug offense, asserting that, in light of the disfavor Congress has shown to drug offenders, an alien convicted of a serious drug offense will face a difficult task in establishing that he or she merits discretionary relief. See Matter of Burbano, 20 I. & N. Dec. 872, 876-79 (B.I.A. 1994). The Board has also asserted that the single favorable case presented to the court was merely intended to "provide a contemporaneous example of the type of decision requested by the court and to refute the allegation that the Board would ‘never’ grant discretionary relief to an alien convicted of a serious drug crime." Id. at 877. The Board stated that the decision was submitted “solely for illustrative purposes” and it was never its intention to represent that case as the only favorable decision for serious drug offenders. Id.

566. See generally Motor Vehicle Mfr. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-44, 57 (1983) (applying requirement of reasoned analysis to agency’s decision to rescind rule). Though the imposition of procedural requirements in agency cases which involve special expertise has been criticized, such judicial review is both more appropriate and necessary in section 212(c) cases. The justifications for such a judicial posture include the high stakes for the individual permanent residents; the lack of any complex, expertise-based agency decisions as were undertaken in State Farm; and the confused state of the Board’s practice in this area.

567. 10 F.3d 1363 (9th Cir. 1993).
so... [T]he Attorney General should consider these applications on a case by case basis...

... [I]t is the agency’s responsibility to decide the proper weight to give the various factors involved in 212(c) petitions.... What it may not do is categorically deny 212(c) relief to drug offenders who have served less than five years incarceration. 568

In order to scrutinize Board decisions properly, the Ninth Circuit has required more than simply a listing of factors. The Board “must indicate ‘how it weighed the factors involved’ and ‘how it arrived at its conclusion.’” 569 The Elramly decision—that the serious-crime category cannot simply equate delivery of one-hundred dollars worth of hashish to sale of fifty-thousand dollars worth of cocaine—follows this pattern.

The history of section 212(c) litigation, though complex almost to the point of opacity, illustrates the importance of adding a fuller theory of discretion to our understanding of the selective “constitutionalization” of aspects of immigration law. Absent such a link, it is exceedingly difficult to reconcile the constitutional rationale of the Francis court with subsequent assertions of judicial deference to the Attorney General’s decision in Hernandez-Casillas II. When it is understood, however, that the Francis decision stood on the shoulders of a long history of administrative interpretive discretion, it is at least easier to understand, if not defend, the reluctance of judges “to tinker further,” despite the explicit constitutional questions presented.

The history of the Board’s application of section 212(c) to particular cases is also better understood with a more nuanced theory of discretion. Indeed, by viewing this history together with that of suspension of deportation and motions to reopen, one can see the way in which the tendency of the residual thesis to develop more rule-like mechanisms can conflict with expressly discretionary grants of administrative power. The difference among these three areas is mechanical. The tension, however, is the same. Motions to reopen have been the easiest arena for judicial deference because they are governed by regulations—a method of ossification with which the judiciary is quite familiar and comfortable. Suspension of deportation, however, has become governed by an adjudicated list of factors—a predictable formula for continuing confusion because of inadequate

568. Id. at 1371.
569. Id. at 1370 (quoting Dragon v. INS, 748 F.2d 1304, 1307 (9th Cir. 1984)).
understanding of the relationship between interpretive and delegated discretion. The extreme example of this confusion is the Board's development of the bright-line standard of "serious crime" and "unusual and outstanding equities." At this point, the agency begins to risk illegitimacy by its apparent abandonment of discretion. Courts then struggle to determine how to reconcile deference with the need to ensure that discretion, once granted by Congress, is actually exercised. The distinction between interpretive and delegated discretion is especially useful here. When a category or standard is developed as a matter of interpretive discretion, it may be justified on grounds of predictability and consistency as well as fidelity to the intent of Congress (and by implication the will of the electorate). A reviewing court in such a case is presented with a straightforward problem of statutory interpretation. When, however, the standard is designed to restrict the agency's delegated discretion, it is more worrisome, as it may indicate an arbitrary refusal on the part of the agency to do the hard case-by-case job intended by the legislature. The reviewing court must then grapple with the more complex question of the exact nature of the congressional delegation of authority.

V. CONCLUSION

Among its many other problems, U.S. immigration law faces a crisis of discretion and judicial deference. This crisis has been primarily caused by excessive and inconsistent use of adjudicatory rulemaking by the Board of Immigration Appeals and by judicial reluctance to review Board actions carefully. Ironically, however, just as the judiciary has begun to recognize the need for a more coherent and comprehensive theory of review of discretionary immigration cases, Congress and the president have sought to silence the judicial voice on discretion entirely. The Supreme Court should nevertheless clarify its position on three issues of great importance for immigration and, more generally, administrative law.

The first of these is the full reach of APA section 701(a)(2), which precludes judicial review of agency action that is "committed to agency discretion by law." Elramly could one day conceivably be decided by the Court on this issue, although the Solicitor General has not pressed this argument to date. Were the Court to adopt Judge Easterbrook's APA approach, however, either in Elramly or to the IIRIRA, it would create both a conceptual and, possibly, a humanitarian disaster. The basic conceptual problem would be the
apparent rejection of a position well-stated by Louis Jaffe more than thirty years ago: "[T]here are very few discretions, however broad, substantially affecting the person or property of an individual which cannot at some point come under judicial surveillance."

Even Justice Rehnquist seemed to accept Jaffe's point in *Heckler v. Chaney*, when he pointed out that an agency's refusal to act does not involve an exercise of "coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." Although the Court's later decision in *Webster* seemed implicitly to abandon some of the core-rights distinction, one can surely differentiate termination of public employment from deportation. Indeed, the Court seemed to justify just such a reading of *Webster* in *Lincoln v. Vigil* when it listed "certain categories" of decisions that are "committed to agency discretion" but focused on the impossibility of defining a meaningful judicial standard and described its precedents in rather fact-specific terms. Deportation cases, conversely, beyond the substantial human stakes, present questions which are far less obviously policy-based than the *Lincoln* question of how to spend a lump-sum appropriation and far less resistant to meaningful standards than whether to initiate an enforcement action. A narrow reading of APA section 701(a)(2) is especially important in light of *Chevron*. The constitutional legitimacy of the administrative state under the residual thesis rests upon a balance between unreviewable agency discretion and the judicially enforced Rule of Law. Each absolute preclusion of review accepted by the Court increases the pressure to read *Chevron* less preclusively. For proponents of a weak reading of *Chevron* this is perhaps no dilemma as they also tend to be uncomfortable with *Heckler* and its progeny. Supporters of a strong *Chevron* deference principle, however, must recognize that a further extension of APA section 701(a)(2) to deportation cases risks the illegitimate appearance of wholesale judicial abdication which, in turn, puts increased pressure on *Chevron* deference.

570. JAFFE, supra note 138, at 375.
574. Id. at 191-92. ("[D]ecision[s] not to institute enforcement proceedings ... refusal[s] to grant reconsideration of an action because of material error ... decision[s] ... to terminate an employee in the interests of national security.").
The second opportunity presented to the Court by the IIRIRA and cases like *Elramly* is to clarify whether courts may impose any meaningful subconstitutional requirements on immigration agency decisions. Here, the proposed distinction between delegated and interpretive discretion could prove useful. Because section 212(c) was itself a discretionary form of relief, unlike withholding of deportation as considered by Justice Scalia in *Doherty*, it is especially difficult under current doctrine to generate a subconstitutional theory to justify the Ninth Circuit's *Elramly* decision. If, however, the Board's development of section 212(c) categories is understood as interpretive discretion, then the Court could, under its more nuanced, post-Chevron decisions, review those categories fairly closely. Since the Board itself has held that its categories are, in a sense, prior to the ultimate exercise of delegated discretion, a view of the "serious crime" category as interpretive seems correct.

Moreover, despite the current Court's general distaste for "hard look" review, *Elramly* presents an excellent opportunity to rethink an important aspect of that doctrinal history—the extent to which judicial imposition of quasi-procedural requirements should derive from the nature of the agency action at issue. Much of the debate over the *State Farm* decision has centered on the Court's reliance on the paradigm of expertise versus that of politics. 575 Most deportation cases, however, present no such paradigmatic dilemma. The appropriate model, whether constitutionally grounded in due process or subconstitutional, should be one of fairness. 576 However difficult it may be in close cases to define the line between law and policy, the agency decisions in individual deportation cases fall on the law side of that divide. The standard arguments against "hard look" review thus should not apply in this realm. As Stephen Breyer once wrote,

If one believes that the more important the legal decision, the greater the need for a check outside the agency, increased judicial scrutiny automatically seems appropriate. Courts are fully capable of rigorous review of agency determinations of law, for it is the law that they are expert in, and it is in interpreting law that their legitimacy is greatest. 577


576. The only exception to this principle might occur in cases that expressly involve grounds of deportation based expressly on national-security concerns. Even in such cases, a due-process-based balancing would be necessary.

577. Breyer, supra note 114, at 394.
Third, and most broadly, the Elramly problem obliges the Court and the legal community to rethink discretion and deference in immigration law. Although administrative-law scholarship is replete with formulae by which discretion may be cabined in general, the best practice and theory derives from a highly specific understanding of the particular field at issue.

Some years ago, Herbert Simon proposed a model of the "administrative man" who is inherently averse to maximum rule specificity; who proceeds instead by "testing marginal deviations from the status quo against a slowly shifting threshold of acceptable performance." This, I suggest, is an accurate portrayal of the evolution of discretionary immigration-law practice. Whatever the virtues of this optimistic evolutionary theory may be in other areas of administrative law, however, they are far outweighed by its defects in immigration law. The consequences of such "muddling through" for many noncitizens are simply too grave for us to tolerate anything less than the best legal system we can imagine. To that end, I conclude with the following suggestions, which I recognize without embarrassment are virtually the mirror image of the IIRIRA model:

1. **Delegated discretion**, as defined in this Article, should be legislatively removed from U.S. immigration law as much as possible. Relief from deportation should be available if specific standards are met, such as a specified period of residence, extreme hardship, and good moral character, among others. A statute of limitations ought to apply to deportation for crime, for example. The best model for this system would be that of pre-AEDPA and IIRIRA withholding of deportation. There is, of course, a danger to this suggestion. History's lesson is that rule precision in immigration law almost invariably involves very restrictive, harsh rules, the substance of which can be very troubling to those who support a fairly expansive view of noncitizens' rights. As we have seen, delegated discretion in immigration law arose in large measure as a response to an oppressive, excessively rule-bound system. When seeking to control discretion, we must always recall that a system of invariable, highly specific rules,

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578. See, e.g., Shapiro, supra note 229, at 1500 n.63 (describing a "rather standard repertoire of possible constraints on administrative discretion").

579. See Herbert A. Simon, Administrative Behavior 39 (3d ed. 1976). The quoted passage is from Diver, supra note 24, at 98; see also Diver, supra note 214, at 399-400 (discussing the incrementalism model of policymaking).


581. See supra Part III.B.1.
even if possible, could cause unfair or unjust results in particular cases. But if the basic forms of relief were not materially changed, this danger would be minimized. Standards such as extreme hardship, would, in a post-delegated discretionary environment be subject to administrative interpretive discretion which, in turn, should continue to be subject to "mainstream" judicial review. Such judicial review, however, could be based upon a clearer set of review principles which jettison the confusing array of discretion formulations that litter today's legal environment. If delegated discretion is to remain in the system, it should be placed more in the judicial than the administrative realm. The restoration of the JRAD (Judicial Recommendation Against Deportation) would be a good model. Such a system, in addition to being more predictable, more consistent, more "transparent," and more fair, would also facilitate a more productive "trialogue" among Congress, immigration agencies, and the federal judiciary.

2. Assuming, as I do, that the above suggestion does not immediately transform the legislative agenda, there is productive action which can take place elsewhere. The INS must itself promulgate regulations to govern the exercise of both interpretive and delegated discretion. As importantly, these regulations should define which form of discretion is being exercised. More administrative rulemaking seems an especially promising way to proceed in this field.

Such rules, clearly permissible under existing statutes if properly drafted, would have enormous benefits of clarity, predictability, and economy. Indeed, as noted above, prior attempts have been made to

582. I have chosen the verb "should" because, as noted, the AEDPA and IIRIRA purport to eliminate much judicial review from immigration law.

583. More specifically, the INS might reconsider Kenneth Davis's proposal that administrators develop rules which respond to hypothetical cases, without necessarily generalizing further. See Davis, supra note 72, at 59-64, 102-03. The advantages of such a system are that it would be more specific and that administrators would feel less hesitant in adopting such rules because it would not be necessary to foresee too wide a range of unanticipated consequences.

584. Davis would reverse the order of suggested law reform that I have proposed: "Earlier and more diligent use of agencies' rule-making power is a far more promising means of confining excessive discretionary power than urging legislative bodies to enact more meaningful standards." See id. at 56. More specific legislation seemed unpromising to Davis because: (1) legislative bodies lack both the capacity and the inclination to draft more specific laws, (2) the idea of requiring standards will not reach the great bulk of extant discretionary power, and (3) administrative rulemaking offers better hope of developing not only meaningful standards but better rules. See id. at 217.
draft such rules. In 1979, the INS proposed rules entitled "Factors to Be Considered in the Exercise of Administrative Discretion."585 The rules, as their proponents put it, "are intended to insure that all applications and petitions to this Service receive consideration under appropriate discretionary criteria and are adjudicated in a fair and uniform manner."586 The rules contained guidelines for general interpretive discretion ("emergent reasons" for parole),587 procedural interpretive discretion (bond riders and waiver of fees),588 and delegated discretion (adjustment of status and waivers).589 Though never adopted,590 they warrant serious reconsideration now.

3. No matter what legislative or regulatory changes are made, a more refined taxonomy of discretion, viewed as part of a repertoire of interpretive methods, will help students of the law to understand (and judges to avoid) confusing or inconsistent usages. The scope of judicial review in immigration-law cases can then be understood on a continuum ranging from the most deferential review of delegated discretion to the closest scrutiny of general interpretive discretion as in Cardoza-Fonseca. Because this latter class of cases presents the most "law-like," and least "policy-like" sorts of interpretive questions, a less deferential scope of judicial review is both theoretically sound and consistent with the direction of the Court's post-Chevron decisions. It provides the best hope for the continuation of the role of the judiciary and for the resurrection of immigration law.

586. Id. at 36,187.
587. Id.
588. See id. at 36,188.
589. See id. at 36,190.
ADDENDUM

THE ENTRY DOCTRINE: PLENARY POWER OR GENERAL INTERPRETIVE DISCRETION?

As discussed above, the most common current critique of United States immigration law focuses on the plenary power doctrine. This critique, I have suggested, would be strengthened by a more nuanced understanding of discretion. This Addendum will use the example of the so-called entry doctrine to show how judicial and, to a lesser extent, agency interpretive discretion has affected the constitutional plenary power doctrine.

The concept of a border, and therefore of “entry,” as a relevant category of thought is unavoidable in a world of sovereign nation-states. The hard task for U.S. courts has been to decide what role this concept should play in immigration law. An early immigration case, Lem Moon Sing v. United States, illustrates the way in which entry, through its incorporation by Congress into statutes and its interpretation by agencies and the Supreme Court, gradually became determinative of procedural constitutional rights. Lem Moon Sing, a merchant who had previously legally resided in San Francisco, sought reentry into the United States but was denied by the Collector of Customs pursuant to authority delegated by the Secretary of Commerce and Labor. This decision, according to the governing

591. The general matter of entry was clearly an important, if perhaps under-analyzed, component of the decision in the Chinese Exclusion Case when Justice Field repeatedly wrote of the unlimited governmental “power of exclusion of foreigners.” 130 U.S. 581, 609 (1889). The idea of a person standing at a border surely seemed unproblematic. The questions whether returning residents were different from first-time entrants or what “exclusion” actually means when a person seeks admission from a ship in San Francisco Bay were not considered sufficiently important to warrant much if any consideration. And indeed, a subsequent major Supreme Court case dealing with the rights of immigrants, Fong Yue Ting v. United States, 149 U.S. 698 (1893), seemed to render such questions irrelevant by holding that: “[t]he right of a nation to expel or deport foreigners... rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.” Id. at 707. Once the Court, in 1903, began to recognize procedural due process rights in deportation proceedings, see The Japanese Immigrant Case, 189 U.S. 86, 100-02 (1903), however, more began to turn on whether a person had legally entered the United States.

592. One of the central concepts of the IIRIRA is its replacement of the concept of entry with the concept of admission.

593. 158 U.S. 538 (1895).

594. See id. at 540.
statute, was to be conclusive.\textsuperscript{595} In a petition for habeas corpus, however, certain facts were alleged which would have given Lem Moon Sing a clear right to reenter the country.\textsuperscript{596} Lem Moon Sing's attorneys accepted, as they had to, the holding of \textit{Nishimura Ekiu v. United States}\textsuperscript{597} that, as to first-time entrants, factual decisions of executive or administrative officers would not be reviewed by courts. But they sought to interpret the entry bar as inapplicable, "if the alien is entitled, of right, by some law or treaty, to enter this country."\textsuperscript{598} The Supreme Court held that such review was still not permissible\textsuperscript{599} and reaffirmed the finality of the decision of the executive officer.\textsuperscript{600} While ostensibly concerning many different aspects of immigration-law doctrine ("plenary power," deference, and so on), \textit{Lem Moon Sing} also established the idea of "entry" as the fulcrum of all such analysis.\textsuperscript{601}

The crux of the decision was not the constitutional status of alienage. The Court, in fact, made clear that: "[w]hile he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States."\textsuperscript{602} But once he voluntarily left the country, this protection ended and he, as an alien, "[could not] reenter [sic] the United States in violation of the will of the government as expressed in enactments of the law-making power."\textsuperscript{603}

\textsuperscript{595} See Act of Aug. 18, 1894, ch. 301, § 1, 28 Stat. 372, 390 (originally codified at 5 U.S.C. § 342(j) and now eliminated). The Act stated that: "In every case where an alien is excluded from admission into the United States ... the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." \textit{Id.}

\textsuperscript{596} See \textit{Lem Moon Sing}, 158 U.S. at 540-41.

\textsuperscript{597} 142 U.S. 651, 660 (1892).

\textsuperscript{598} \textit{Lem Moon Sing}, 158 U.S. at 546.

\textsuperscript{599} See \textit{id.} at 549.

\textsuperscript{600} See \textit{id.}

\textsuperscript{601} See \textit{id.} at 547-48. The Court stated:

The power of Congress to exclude aliens altogether ... or to prescribe the terms and conditions upon which they may come to this country ... is settled....

Is a statute passed in execution of that power any less applicable to an alien, who has acquired a commercial domicil within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reenter [sic] it? We think not.

\textit{Id.} at 547.

\textsuperscript{602} \textit{Id.}

\textsuperscript{603} \textit{Id.} at 548.
The power of the linkage between entry and administrative finality was illustrated even more starkly by *United States v. Ju Toy*. The petitioner in *Ju Toy* had been denied entry by immigration inspectors. In a petition to the U.S. District Court for the Northern District of California in San Francisco, he alleged that he was actually a native-born U.S. citizen who had merely taken a temporary trip to China. The district court found this to be true and ordered him released from custody. When the case came to the Supreme Court, however, the majority opinion, written by Oliver Wendell Holmes, Jr., defined the problem as one of the scope of judicial review: "The broad question is presented whether or not the decision of the Secretary of Commerce and Labor is conclusive." Although prior cases such as *Lem Moon Sing* had answered this question in the affirmative as to aliens seeking entry, "their [asserted] rights were only treaty or statutory rights, and therefore were subject to the implied qualification imposed by the later statute, which made the decision of the collector with regard to them final." Here, however, what was asserted was a due process right grounded in U.S. citizenship itself. Thus, the case presented an implicit battle for supremacy between two concepts—the rights of citizens and the entry doctrine. Put another way, the struggle was between the plenary power doctrine and judicial interpretive discretion. The key for Holmes's majority was apparently the place from which a right was asserted more than the nature of that right: "The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate." For this reason, even were the Court to assume that *Ju Toy* had Fifth Amendment rights in this setting, those rights were not violated by a statutory regime of finality for the decisions of executive officers.

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604. 198 U.S. 253 (1905).
605. Id. at 261.
606. Id. at 262.
607. Id. at 263.
608. Entry and admission probably seemed to Holmes and other members of the *Ju Toy* majority to be rather clear, location-based concepts. The moderate legal fiction which caused *Ju Toy* to be "regarded as if he had been stopped at the limit of our jurisdiction" soon began to assume increased importance, however. A poignant example of this was the case of *Kaplan v. Tod*, 267 U.S. 228 (1925). A 13-year-old child was brought to the United States from Russia by her mother in 1914. See id. at 229. Her father already lived in this country, and the family sought to reunite. See id. The child, however, was found to be "feebleminded" by an immigration inspector and was denied entry. Id. The beginning of the First World War prevented her return to Russia, and she was allowed into the United States under the auspices of the Hebrew Sheltering and Immigrant Aid Society. See id.
The implicit tension between a formalist, bright-line entry doctrine and one based more on considerations of "stake" as well as place came to a head in United States ex rel. Volpe v. Smith. Volpe had entered the United States in 1906 at the age of sixteen. In 1925 he was convicted of a "crime involving moral turpitude." He was not subject to deportation for this crime because the Immigration Act at that time contained a five-year statute of limitations for deportation on such grounds. In 1928, however, Volpe left the United States for a short trip to Cuba from which he returned without incident. In 1930, he was arrested and charged with being unlawfully in the United States because "he has been convicted of . . . a . . . crime . . . involving moral turpitude . . . prior to his entry into the United States." The Supreme Court unanimously and with little analysis held that "entry" within the meaning of the deportation statute meant "any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." The reasoning was simple and straightforward: (1) The power of Congress to prescribe terms of entry is "no longer open to serious question"; (2) the

609. 289 U.S. 422 (1933).
610. See id. at 425.
611. Id.
614. Id. at 425.
615. Id.
"second coming" of an alien is an entry within "the usual acceptance of that word"; and (3) there was no indication in the text of the Immigration Act of 1917 "that Congress did not intend the word 'entry' in § 19 should have its ordinary meaning."

Two aspects of the Volpe decision have been highlighted by commentators. The first is that it makes "mincemeat of the statutory structure" because it "transforms a deportation ground intended to cover aliens excludable for acts committed prior to establishing residence in the United States into a ground that penalizes post-entry conduct." The second critique of Volpe tends to focus on the "acknowledged falsity and outrageousness" of this "reentry doctrine" and the way in which it affects procedural due process protections.

If the reentry doctrine is linked exclusively to the plenary power idea, however, one can underestimate the importance of the interpretive discretion process which preceded Volpe. To see this, we have to dig a little deeper into the decisional history.

The Volpe Court cited Lewis v. Frick and United States ex rel. Claussen v. Day in support of its "usual acceptance" argument. Lewis held that the fact that an alien had been domiciled in the United States for six years prior to his reentry did not exempt him from exclusion provisions of the 1907 Immigration Act. Claussen held that a short trip to a foreign port by a noncitizen sailor resulted in an "entry" upon his return, subjecting him anew to a ground for deportation based upon a criminal conviction "within five years after entry." Neither Frick nor Claussen, however, contain any significant judicial reasoning, an observation which may lend support to the notion that the Court, relying on the plenary power doctrine, abdicated

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616. So far as I am aware, no theological humor was intended by the Court's odd, gerund-laden language.

617. Id. (citing Lewis v. Frick, 233 U.S. 291 (1914); United States ex rel. Claussen v. Day, 279 U.S. 398 (1929)).

618. Id.

619. ALENIKOFF & MARTIN, supra note 10, at 452.


621. 233 U.S. 291 (1914).

622. 279 U.S. 398 (1929).

623. 233 U.S. at 297.

its responsibility to think through this issue. But the most important prior case, and the most fully reasoned in the sense of interpretive discretion, was omitted from the Volpe opinion and has not often been considered by later commentators.

That case was Lapina v. Williams.625 Lapina had entered the United States at the age of twelve accompanied by a man who had promised to marry her.626 For reasons which are not included in the Supreme Court opinion, this child was compelled to practice prostitution and to support her companion with the proceeds of that work for the next four years.627 About a decade later, she returned to Russia to visit her mother.628 Upon reentry to the United States, after a short stay in Russia, she apparently falsely claimed to be the spouse of a United States citizen in order to facilitate her landing.629 Soon thereafter she was arrested in a "house of prostitution" in Phoenix and held for deportation on the ground that she had last entered the United States for the purpose of prostitution.630 The issue before the Supreme Court was whether the provisions of the 1907 Immigration Act631 regarding admission and deportation applied to an alien who had long resided in this country and then made a temporary visit abroad.632

Lapina, unlike Volpe, Frick, and Claussen, contains a rather serious and "mainstream" form of statutory interpretive discretion.

625. 232 U.S. 78 (1914).
626. See id. at 82-83.
627. See id.
628. See id. at 83.
629. See id.
630. Id.
631. Pub. L. No. 59-96, ch. 1134, 34 Stat. 898. "That the following classes of aliens shall be excluded from admission into the United States: ... prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose ...." Id. § 2, 34 Stat. at 898-99.
632. See Lapina, 232 U.S. at 84.
One may disagree, as I do, with the Court's ultimate conclusion, but the opinion cannot reasonably be analogized to a "neglected stepchild." The Court's first point is that the 1907 Act was derived from earlier Immigration Acts. Under the Immigration Act of 1891 courts had drawn a distinction between two classes of entrants: "alien immigrants" to whom certain grounds of exclusion and deportation would apply and "aliens previously resident" to whom those grounds did not apply. Similar results were obtained in some courts regarding the Immigration Act of 1903, but a split in the circuit courts developed over whether Congress, in the 1903 Act, intended exclusion grounds to apply to aliens already domiciled in the United States. After the usual talismanic invocation of the plenary power doctrine, the Court nevertheless interpreted the statutory language. The choice, as the Court saw it, was between a "liberal" interpretation, as authorized by Church of the Holy Trinity v. United States, and a more "textual" approach. Choosing the latter, the Court concluded that Congress had deliberately eliminated the word "immigrant" from the 1903 and 1907 Acts and thereby intended exclusion grounds to apply to all aliens.

Leaving aside for the moment the question whether greater constitutional scrutiny may have been warranted in the pre-1952 entry-and-reentry cases, it thus appears that the early development of the entry doctrine was not only a product of deference or judicial

633. ALENIKOFF & MARTIN, supra note 10, at xvii.
634. See Lapina, 232 U.S. at 84-85.
636. See Moffitt v. United States, 128 F. 375, 379-81 (9th Cir. 1904); In re Ota, 96 F. 487, 488 (N.D. Cal. 1899); In re Maiola, 67 F. 114, 114-15 (S.D.N.Y. 1895); In re Martorelli, 63 F. 437, 437 (S.D.N.Y. 1894); In re Panzara, 51 F. 275, 276 (E.D.N.Y. 1892).
638. Compare Taylor v. United States, 152 F. 1, 4-5 (2d Cir. 1907) (applying the 1903 Act to aliens previously domiciled in the United States), with United States v. Nakashima, 160 F. 842, 845 (9th Cir. 1908) (holding that phraseology of the 1903 Act is insufficient to show an intent that it should apply to alien residents), and Rodgers v. United States ex rel. Buchsbaum, 152 F. 346, 355-56 (1907) (holding exclusion grounds do not apply to alien previously domiciled in United States).
639. 143 U.S. 457, 459 (1892) (authorizing statutory interpretation by the "spirit" rather than the letter of the law).
641. See id. at 89-91.
abdication, but also one of interpretive discretion with especially deep, one might say structural, consequences.642

In 1952, Congress essentially adopted the Volpe reading of “entry” and incorporated it into the Immigration and Nationality Act.643 The term “entry” was defined in the statute as:

[...]

Many important provisions of pre-IIRIRA U.S. immigration law were tied to a determination of whether an alien had “entered” the United States. One who had not entered, for example, was subject to numerous grounds of exclusion, whereas one who had entered was not.645 Similarly, there were important procedural646 differences between exclusion and deportation proceedings.647 It is not clear at

642. The interpretive discretion history of the entry doctrine did not end with Volpe. In Di Pasquale v. Karnuth, 158 F.2d 878, 878-79 (2d Cir. 1947), the Second Circuit Court of Appeals ruled that a long-term resident alien traveling from one U.S. city to another did not effect an “entry” after his train crossed the Canadian border while he was sleeping. In Delgadoillo v. Carmichael, 332 U.S. 388, 390-91 (1947), the Supreme Court held that a permanent resident alien who had been ordered to Cuba under military authority did not make an “entry” upon his return.


644. Id.

645. See id. § 212(a), 8 U.S.C. 1181(a).


647. As the definition of entry is now rooted in the Immigration and Nationality Act itself it might seem to be a poor example of any form of interpretive discretion. It is important to recall, however, the way in which this definition was developed through a dialogue between the judiciary and Congress. That this process did not have an inevitable end result is well-illustrated by the little-known dissent of Judge Alschuler to the opinion of the Seventh Circuit Court of Appeals in Volpe. See United States ex rel. Volpe v. Smith, 62 F.2d 808, 812 (7th Cir.) (Alschuler, J., dissenting), aff’d, 289 U.S. 422 (1933). Judge Alschuler argued that there was not “the remotest relation” between the facts of Lewis, Clausen and Volpe, where “not only was the conviction long after the original entry, but was not such in respect to its penalty as would in any event have been sufficient ground for deportation.” Id. at 814. Highlighting the discretionary nature of the interpretive process, Judge Alschuler concluded: “Nothing is better settled than that statutes should receive a sensible construction’.... In my judgment the statutes do not require and should not receive the construction ... which this court adopts.” Id. at 816 (quoting Lau Ow Bew v. United States, 144 U.S. 47, 59 (1892)).
this time whether the IIRIRA has really eliminated the importance of entry, however. Indeed, although its importance has been lessened, important procedural, substantive, and even criminal consequences flow from entry.

Similarly, the 1952 statutory definition may have sought to end the process of interpretive discretion, but failed to do so. For one thing, the judiciary continued to grapple with the problem of the returning resident. In Kwong Hai Chew v. Colding,648 for example, the Court held that certain exclusion regulations did not apply to a returning resident seaman who had undertaken a five-month voyage on a United States merchant ship.649 One way to look at this case law is to see it as a "phantom norm" review—expressly subconstitutional but suggesting "that the Court favored a constitutional norm of procedural due process" for such entrants.650 Indeed, the Court itself later approved of this reading.651 It is also true, however, that this sort of interpretive discretion had occurred, as we have seen, in the Supreme Court many times before.652 Moreover, value-laden interpretation is not only understandable as constitutional reasoning. Grounding a decision in a constitutional norm does have the effect of enhancing its importance and of linking it to a broader body of discourse. But, as the Court's 1982 decision in Landon v. Plasencia653 demonstrates, an expressly constitutional decision does not necessarily end or even substantially cabin interpretive discretion.

The Plasencia Court, in fact, declined to explain how its holding that a returning resident alien could "invoke the Due Process Clause" could be reconciled with Mezei's ruling that a lawfully admitted permanent resident alien who had been gone for twenty

649. See id. at 598-99.
650. See Motomura, Plenary Power, supra note 8, at 570. See generally Siegfried Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases, 68 YALE L.J. 1578, 1593-94 (1959) (noting that the procedural due process issue was left open in early Supreme Court cases); Siegfried Hesse, The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel, 69 YALE L.J. 262, 290-97 (1959) (proposing the acceptance of inherent constitutional limits on the power to expel).
651. See Landon v. Plasencia, 459 U.S. 21, 33 (1982) ("Although the holding [of Chew] was one of regulatory interpretation, the rationale was one of constitutional law.").
months could not do so.\textsuperscript{654} Nor was the Court willing to accept Justice Marshall's challenge to define with any degree of specificity the content of the protections which were required by the Due Process Clause.\textsuperscript{655} Thus, although it is surely refreshing to read a Supreme Court opinion which does not brutally deny all constitutional protections to alien entrants, it would be a mistake to place too much weight on this sort of "transformation." Indeed, one of the ironies of decisions like \textit{Plasencia} is that, by raising the constitutional stakes, they may actually open the door to even more subconstitutional \textit{interpretive discretion} over questions such as when an entry occurs or whether a resident intended to abandon such status.\textsuperscript{656}

As more hinges on the characterization of an action as an "entry," more pressure develops for a highly particularized definition of that term. The Supreme Court reaffirmed in 1958 that a simple physical-presence test for entry could not suffice.\textsuperscript{657} Many immigration inspection locations, are, after all, located within the territory of the United States. This continuing acceptance of a legal fiction, however, was not uncontroversial. Justice Douglas, for example, wrote in dissent: "How an alien can be paroled 'into the United States' and yet not be 'within the United States' remains a mystery."\textsuperscript{658}

The most well-known subsequent Supreme Court decision was \textit{Rosenberg v. Fleuti},\textsuperscript{659} in which the Court held that an "innocent, casual, and brief"\textsuperscript{660} departure from the U.S. by a lawful permanent resident will not result in a reentry unless it is found that the resident had an intent to depart which is "meaningfully interruptive of the alien's permanent residence."\textsuperscript{661} The statutory interpretation in \textit{Fleuti}
was very elaborate, filled with implicit-value discourse. The opinion can therefore easily be criticized as at least disingenuous. But does the Court's very broad reading of the statute render the opinion illegitimate as outside of the residual thesis ideal of the Rule of Law or "an embarrassment"? The implicit basis for such a conclusion may involve an underestimation of the interpretive discretion process which brought the Court to the Fleuti problem in the first place. Another basis for this reading of Fleuti sees it as a "milestone in the transition from phantom to real of a norm recognizing a returning resident alien's stake." As the above discussion of Plasencia demonstrates, however, it is not necessarily correct that procedural due process is any more "real" than the norms that guided the Court's interpretive discretion in Fleuti.

The "mystery" of the entry-doctrine fiction, noted by Justice Douglas in Leng May Ma, has continued to be explored by a series of decisions of the Board of Immigration Appeals. The BIA has thus become a full participant in the recent interpretive discretion history of the entry doctrine. In 1973, the BIA sought to capture the meaning of "entry" with a four-part test. Thus, in Matter of Pierre, the Board decided that "entry" involves: 1) physical presence, 2) inspection and admission by an INS officer, or 3) actual and intentional evasion of inspection at the nearest inspection point, plus 4) freedom from...
restraint. This model, however, has still failed to resolve all potential problems in this area, and the process of *interpretive discretion* continues to define U.S. immigration law as it has for more than a century. Now, however, due to increasing assertiveness by the BIA, and judicial deference, the process takes place more on the agency level than on the judicial level. Agency adjudicators now continue not merely to flesh out a vague term, but to define substantially the structure of the immigration system itself. When courts review such decisions, however, deference impedes assessment of the structural significance of the agency's interpretation.

that the Due Process Clause applies to deportation proceedings. In the early twentieth century the Court seemed to assume that this would be true for exclusion proceedings as well. See *Kwock Jan Fat v. White*, 253 U.S. 454, 457-58 (1920) (exclusion decision subject to review under due process standard). During the 1950s, however, the Court developed a doctrine of virtually complete deference in exclusion cases, holding that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).


672. See, e.g., *In re Phelisna*, 551 F. Supp. 960, 963-64 (E.D.N.Y. 1982) (stating that government has burden of proving that alien did not intend to evade inspection); Matter of Ching and Chen, 19 I. & N. Dec. 203, 205 (B.I.A. 1984) (stating that escape from airport after denial of entry was an entry).
