January 2002

St. Cyr or Insincere: The Strange Quality of Supreme Court Victory

Daniel Kanstroom

Boston College Law School, kanstroo@bc.edu

Follow this and additional works at: https://lawdigitalcommons.bc.edu/lsfp

Part of the Administrative Law Commons, Human Rights Law Commons, and the International Law Commons

Recommended Citation

ST. CYR OR INSINCERE: THE STRANGE QUALITY OF SUPREME COURT VICTORY

DANIEL KANSTROOM*

I. INTRODUCTION

A. The Cases

Though immigration law, like everything else, is now tragically stamped by the terrible events of September 11, 2001, the legal effects of great victories won by immigrants’ rights advocates in the cases of INS v. St. Cyr and INS v. Calcano-Martinez are still worthy of attention. Indeed, if there were a Nobel Prize for against-the-odds litigation, there could be little doubt that it should go to those who labored so long and hard to get the Court — finally — to affirm a few propositions that many had thought fundamental:

• The “Great Writ” of habeas corpus remains available to challenge executive detention of citizens and aliens alike;
• The complete preclusion of judicial review of questions of law relating to non-citizens facing deportation would present, at the very least, a “serious constitutional question”;
• Deportation laws — indeed, even discretionary “relief from deportation” laws — cannot be applied retroactively absent meticulous clarity on the point by the legislature; and, more specifically,
• The retroactive elimination of Section 212(c) relief from deportation for people who entered into plea agreements before the law was changed attaches a cognizable disability to past transactions or considerations, and it would be contrary to considerations of “fair

* Associate Professor of Clinical Law, Boston College Law School; Director, Boston College Immigration and Asylum Project. I am grateful to Sylvia Wang, Mary Holper, and Debra Bouffard for research assistance. I am also grateful to Dean John Garvey for his support and note with particular appreciation the support of a grant from the Dr. Thomas F. Carney Gift Fund. I have also greatly appreciated the constructively critical commentary of Kent Greenfield and participants at the Georgetown Immigration Law Journal Symposium on the Supreme Court and Immigration Law, November 16-17, 2001, at the Georgetown University Law Center.
1. For this Symposium, I have been asked to discuss INS v. St. Cyr, 121 S. Ct. 2271 (2001), and INS v. Calcano-Martinez, 121 S. Ct. 2268 (2001). The opinion in Zadvydas v. Davis, 121 S. Ct. 2491 (2001), is at least as significant a victory for immigrants’ rights.
2. With apologies to anyone I may have overlooked, my short list of nominees might include Lucas Guttentag and the entire ACLU Immigrants Rights Project, David Cole, Nancy Morawetz, Gerald Neuman, Manuel Vargas, and Michael Wishnie.

413
notice, reasonable reliance, and settled expectations” to prevent such people from applying for relief.

The factual settings of the cases — both of which arose from the Second Circuit — are simple enough, though the legal issues they raise are intricate. Among the major changes brought to U.S. immigration law by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”) were extensive limitations on judicial review of a variety of immigration matters and the repeal of a form of discretionary relief from deportation known as Section 212(c) of the Immigration and Nationality Act (“INA”).

Enrico St. Cyr, a lawful permanent resident in the United States since 1986, had pleaded guilty in 1996 to a criminal charge that made him deportable. At the time of his criminal conduct and of his plea he would have been eligible for a Section 212(c) waiver of deportation. His removal proceedings, however, began after the effective dates of AEDPA and IIRIRA. As a result, the Attorney General asserted that St. Cyr was no longer eligible to apply for a waiver and, in effect, had no defense to deportation. St. Cyr, along with others, brought a habeas corpus petition in district court. The court accepted jurisdiction and held that the 1996 restrictions did not apply to removal proceedings brought against a non-citizen, such as St. Cyr, who had pleaded guilty to a deportable crime before their enactment. The Second Circuit affirmed.

The issues before the Supreme Court were both jurisdic-
tional (whether habeas review remained available) and substantive (the problem of retroactivity). As noted above, St. Cyr won on both counts.

Calcano-Martinez 14 involved three lawful permanent residents 15 with similar histories to St. Cyr, each of whom had filed both a petition for review in the Second Circuit 16 and a habeas corpus petition in the district court pursuant to 28 U.S.C. § 2241 in order to challenge the Board of Immigration Appeals’ (“BIA”) determination that, as a matter of law, they were ineligible to apply for Section 212(c) relief. The Second Circuit Court of Appeals dismissed their petitions for lack of jurisdiction but held that they could pursue their constitutional and statutory claims in a district court habeas action. 17

The Supreme Court granted certiorari in both cases to determine “whether aliens in the petitioners’ position may seek relief in the Court of Appeals (pursuant to 8 U.S.C. § 1252(a)(1)); in the district court (pursuant to 28 U.S.C. § 2241); or not at all.” 18 It ultimately determined that, notwithstanding some partial concessions by the government as to reviewability of certain issues in the circuit courts, 19 the plain language of Section 1252(a)(2)(C) “fairly explicitly strips the courts of appeals of jurisdiction to hear [the petitioners’] claims on petitions for direct review.” 20 As in St. Cyr, however, the Court concluded that “leaving aliens without a forum for adjudicating claims such as those raised in this case would raise serious constitutional questions.” 21 It then held that “these concerns can best be alleviated by construing the jurisdiction-stripping provisions of that statute not to preclude aliens such as petitioners from pursuing habeas relief pursuant to § 2241.” 22

For those of us who have labored in the immigration law vineyards for years, before IIRIRA, before AEDPA, before aggravated felonies, and, for some of our more venerable colleagues, perhaps even before Section 212(c) was applied to deportation cases, 23 the unusual and dramatic character of the Court’s decisions this term is obvious. This is primarily so because of the

---

19. Id. at 2269 n.2 (“Throughout this litigation, the government has conceded that the courts of appeals have the power to hear petitions challenging the factual determinations thought to trigger the jurisdiction-stripping provision (such as whether an individual is an alien and whether he or she has been convicted of an ‘aggravated felony’ within the meaning of the statute)). See Brief for Respondent at 22-23. In addition, the government has also conceded that the courts of appeals retain jurisdiction to review ‘substantial constitutional challenges’ raised by aliens who come within the strictures of § 1252(a)(2)(C). See id. at 23-24. As the petitions in this case do not raise any of these types of issues, we need not address this point further.”).
20. Id. at 2270.
21. Id. at 2269.
22. Id. (emphasis added).
23. See discussion infra Part II.
relatively unusual outcomes (the individuals won, the government lost). At least as important for the long-term, however, is the nature of the Court’s reasoning, virtually all of which is contained in St. Cyr.

B. The Court’s Approach to Review

St. Cyr is a noteworthy immigration law opinion in part because of its approach to judicial review. Virtually nowhere does anything about the government’s extraordinary power to control immigration law appear. Not once does the so-called plenary power doctrine rear its hoary head. This is not because the doctrine wasn’t invoked. Indeed, the records of both the St. Cyr and Calcano-Martinez cases are littered with such suggestions. Judge Walker’s dissent in the Second Circuit decision, for instance, begins by asserting that “[t]here is no doubt that it is within Congress’s power to redefine what will subject an alien to removal . . . and that Congress may effect such changes to require removal of an alien who would not have been subject to removal before the changes became effective.” Moreover, Judge Walker pointedly disputes the majority’s “hint” that retroactive removal of Section 212(c) relief would raise a “profound constitutional question.”

According to Judge Walker, “Congress’s plenary power to define the conditions of aliens’ residence in this country gives Congress the authority to remove 212(c) relief, as advocated by the INS.” Similarly, in its Brief in Calcano-Martinez, the INS prominently cited a century old case for the assertion — debatable then and highly questionable, to say the least, now — that “the power to exclude or expel aliens belonged to the political department of the Government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien’s right to enter this country, or remain in it, depended, was due process of law.”

25. Courts have sometimes historically distinguished judicial review from habeas review in immigration cases. This Article will not do so, however, except where necessary to maintain clarity.
26. The majority, in a footnote cite to a law review article, conversely notes that “the Court . . . has tended to create the strongest clear statement rules to confine Congress’s power in areas in which the Congress has the constitutional power to do virtually anything.” INS v. St. Cyr, 121 S. Ct. 2271, 2279 n.10 (2001).
28. Id. at 416 n.7.
29. Id. at 422 n.1 (Walker, J., dissenting).
30. Brief for Respondent at 43, Calcano-Martinez v. INS, 121 S. Ct. 2268 (2001) (No. 00-1011) (citing The Japanese Immigrant Case, 189 U.S. 86, 100 (1903)) (emphasis added). This case embodied a linkage between the powers of exclusion and deportation, which the Court has largely rejected since. Indeed, it was one of the first cases to begin to establish the outlines of that distinction. The Court made quite clear that immigration officers in deportation cases involving individual liberty interests may not disregard fundamental due process principles. The government’s citation to it as support for the proposition that it would comport with due process now to eliminate all judicial review of administrative fact-finding is problematic to say the least. Courts, for nearly a century, have viewed due process in deportation cases to include at least some judicial review of factual
Nevertheless, Justice Stevens simply asserts, early on in the *St. Cyr* opinion, that “[f]or the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.”\(^3\) Just a garden variety rule of law issue, it seems, though a highly contentious one, which, as Professor David Cole has noted, has been as “studiously avoided by the courts” as it has been “assiduously studied by law professors.”\(^32\)

But the *St. Cyr* Court does more to warm the hearts of immigrant-rights advocates than to reaffirm the basic countermajoritarian authority of the federal judiciary. Justice Stevens more specifically states that the writ of *habeas corpus*, “[a]t its historical core”\(^33\) is strongest in relation to review of executive detention,\(^34\) that it was available to “nonenemy aliens,”\(^35\) and that it was not limited by the invocation of the civil-criminal distinction.\(^36\) Fans (such as this writer) of Hart’s “*Dialogue*”\(^37\) will also note with some satisfaction its prominent appearance in the *St. Cyr* opinion.\(^38\) This is especially gratifying in light of the fact, highlighted recently by Professor Gerald Neuman, that the latest edition of the Hart and Wechsler casebook omitted the portions of the *Dialogue* on the power of Congress over the jurisdiction of the federal courts that addressed immigration cases, just when those issues were being adjudicated by federal courts.\(^39\)

The Court also states that the writ “in cases involving executive detention” was *not* limited only to claims of constitutional error, noting that it was used determinations. See e.g., Vajtauer v. Comm’r of Immigration, 273 U.S. 103, 106 (1927). See generally Gerald L. Neuman, *The Constitutional Requirement of “Some Evidence,”* 25 SAN DIEGO L. REV. 631, 631-35 (1988). See also Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law,* 71 TUL. L. REV. 704, 731-34, 759-66 [hereinafter Kanstroom, *Surrounding the Hole in the Doughnut*]. As with other aspects of due process analysis, the question is a rather fluid, evolving one.

31. *St. Cyr*, 121 S. Ct. at 2278 (citations omitted).
33. Substantial credit for this analysis should go to the Amicus Brief filed by legal historians, authored by Michael Wishnie, among others. See Brief of Amici Curiae Legal Historians at 2-3, INS v. St. Cyr, 121 S. Ct. 2271 (2001) (No. 00-767).
34. *St. Cyr*, 121 S. Ct. at 2280.
35. *Id.*
36. *Id.*
38. See *St. Cyr*, 121 S. Ct. at 2282. The *Dialogue* has, to date, been cited 212 times by Justices of the Court. Prior to *St. Cyr*, it appeared most recently in a footnote to Justice Souter’s concurrence (joined by Justices Stevens and Breyer) in Felker v. Turpin, 518 U.S. 651, 667 n.2 (1996). Its last appearance in a majority opinion was in Bowen v. Michigan Acad. of Family Physicians, 467 U.S. 667, 681 (1986) (holding that Congress intended to insulate from judicial review only those matters that it specifically left to be determined in a “fair hearing” but did not intend to preclude judicial review of challenges to the validity of Medicare regulations).
to command the discharge of seamen who had a statutory exemption from impressment into the British navy, to emancipate slaves, and to obtain the freedom of apprentices and asylum inmates. Later in the opinion, the Court also asserts that habeas courts "regularly answered questions of law that arose in the context of discretionary relief." If this were not enough to make one's day, along the way the Court also emphasizes "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."

All of this will undoubtedly have profound implications for future attempts by Department of Justice lawyers to defeat challenges to deportation laws on jurisdictional grounds as well as for potential future attempts by Congress to limit federal court jurisdiction in any arena. Indeed, at one point, the Court goes so far as to cite Heikkila v. Barber for the proposition that, because of the existence of the Suspension Clause, "some judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'"

The specific holding of St. Cyr, though more qualified, is still powerful: "the Suspension Clause questions that would be presented by the INS' reading of the immigration statutes before us are difficult and significant," and, therefore, the Court would require a "clear and unambiguous statement of constitutional intent" before finally resolving them. This is strong stuff, if slightly oblique, and not much weakened by the highly technical analysis of AEDPA § 401(e) and three IIRIRA provisions, 8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(c), and 1252(b)(9), which this Article will not re-visit in detail.

C. The Court's Approach to Retroactivity

The Court's analysis of the retroactivity question on the merits was similar. Again, the fact that the case arose in the historically unique realm of immigration law seems relatively unimportant. The opinion simply notes that

40. St. Cyr, 121 S. Ct. at 2280. Were I presenting this Article to the litigation Nobel Prize committee I would note that the citations in support of this analysis were taken, virtually completely, from the historians' brief. See Brief of Amici Curiae Legal Historians at 2-3, INS v. St. Cyr, 121 S. Ct. 2271 (2001) (No. 00-767). However, in what may have been an act of editorial courtesy to the INS, the Court did not repeat the historians' note that the writ had also been applied against the British "Sewer Commission." See id.
41. St. Cyr, 121 S. Ct. at 2283.
42. Id. at 2290 (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987), an opinion also authored by Justice Stevens).
43. 345 U.S. 229 (1953).
44. Article I, § 9, cl. 2, of the U.S. Constitution provides, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In light of the history of the "matter of grace" formula for discretion discussed in Part III, infra, and its relationship to the constitutional right/privilege distinction, it is interesting to note that the Suspension Clause uses the term "privilege."
45. St. Cyr, 121 S. Ct. at 2279 (citing Heikkila, 345 U.S. at 235).
46. Id. at 2281-82.
47. See discussion infra Part III.
"[r]etroactive statutes raise special concerns."

"Interesting," the immigration law teacher thinks, "may we tell that to Mr. Mahler, Mr. Galvan, or Mr. Harisiades or their descendants wherever they may be?" More to the point, may we tell it to the hundreds, if not thousands, of non-citizens who have recently found themselves in removal proceedings based upon criminal dispositions that were not grounds for deportation when entered? But I digress.

According to the latest word from the Court, in the post-Landgraf world, as a matter at least of statutory interpretation if not ex post facto clause or due process analysis, the Court is deeply concerned that the "Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." Moreover, the Court specifically applies to non-citizens the Landgraf dicta that legislatures "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." As I will discuss more fully below, this is a proposition that, if taken seriously, could lead to some profound changes in the way deportation cases are adjudicated.

Though the Court demurs as to the ultimate constitutional validity of all retroactive deportation laws, its requirement of an "unambiguous direction" from Congress is said to be "a demanding one." In the future, it appears that

---

48. St. Cyr, 121 S. Ct. at 2287.
49. In Mahler v. Eby, 264 U.S. 32 (1924), the Court upheld the deportation of Mahler, who had been convicted of violating draft laws at a time when such conviction was not a ground for deportation.
51. In Harisiades v. Shaughnessy, 342 U.S. 580 (1952), the Court upheld the retroactive use of a deportation law to deport Harisiades and a number of other people.
52. Cf. Kessler v. Strecker, 307 U.S. 22 (1939) (holding that alien could not be deported for being a member of the Communist Party after he entered the United States because he was not a member at the time of his arrest).
53. In a peculiarly harsh move, many of the criminal removal grounds in IIRIRA were made retroactive by Congress, including, most broadly, the definition of "aggravated felony," which is said to apply, "regardless of whether the conviction was entered before, on, or after the date of enactment." Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321(b), 110 Stat. 3009 (amending INA § 101(a)(43)).
54. Landgraf v. USI Film Products, 511 U.S. 244 (1994), mandated the approach that courts must now take in determining the temporal effect of new statutes. In brief, courts must review legislation to determine whether there are any textual constitutional bars to retroactivity. They must determine whether the statute itself indicates a retroactive congressional design. They are then instructed to consider the nature of the retroactive operation and to apply a default rule against retroactive application. See discussion infra Part III.
55. See generally Mojica v. Reno, 970 F. Supp. 130 (E.D.N.Y. 1997) (declining to accede to AEDPA retroactive removal of Section 212(c) relief as a matter of statutory interpretation).
58. See discussion infra Part III.
59. St. Cyr, 121 S. Ct. at 2288.
a retroactive deportation law will require statutory language that is "so clear that it could sustain only one interpretation."\textsuperscript{60} If the history of late twentieth-century literary and hermeneutics theory has any continuing validity, this could be a virtually impossible test to pass. If, on the other hand, the recent history of immigration litigation is a guide, sufficient clarity will be found more often than one might think.\textsuperscript{61}

It should also be noted that the Court explicitly \textit{rejected} the Government's invitation to rule that deportation laws can never have retroactive effect because deportation is inherently prospective.\textsuperscript{62} The Court was similarly unimpressed by the contention that because deportation is "not punishment" for past crimes, the elimination of discretionary relief cannot be considered a serious legal problem.\textsuperscript{63}

All to the good, no doubt. And yet, as an old Amazing Rhythm Aces song once asked, "Why can't I be satisfied?"\textsuperscript{64} After all, Mr. St. Cyr is free,\textsuperscript{65} the doors to the district courts are again open for \textit{habeas corpus} petitions, the Suspension Clause is revitalized, retroactivity is disfavored, the rights of non-citizens have been vindicated, and immigration law has been more or less mainstreamed.

Maybe it's me. Teaching immigration law is not normally thought of as a pursuit laden with hidden or illicit pleasures. Yet upon first reading the Supreme Court's opinions in \textit{INS v. St. Cyr}, \textit{INS v. Calcano-Martinez}, and

\begin{footnotesize}
\begin{enumerate}
\item Id. (citing Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997)).
\item See, e.g., Meng Li v. Eddy, 259 F.3d 1132 (9th Cir. 2001) (holding that, in an admission case with respect to review of expedited removal orders, the statute "could not have been much clearer in its intent to restrict \textit{habeas review}" and that no due process right exists in such a setting); Ismailov v. Reno, No. 00-3239, 2001 U.S. App. LEXIS 19335, at *9-11 (11th Cir. 2001) (holding that 8 U.S.C. § 1158(a)(3) clearly indicates congressional intent to preclude judicial review of decisions made pursuant to 8 U.S.C. § 1158(a)(2), notwithstanding any other provision in the statute and so "[a]ccordingly, we conclude that we have no jurisdiction to address Ismailov's claim that the Board erred by determining that he did not demonstrate extraordinary circumstances related to his untimely application for asylum").
\item For a critique of this argument, see Kanstroom, \textit{Deportation and Punishment, supra} note 57. See also Mojica v. Reno, 970 F. Supp. 130, 174 (E.D.N.Y. 1997) ("The government's argument can be reduced to a syllogism: The \textit{Landgraf} presumption only applies when there is retroactivity; deportation for past convictions (or perhaps for any past conduct) is never retroactive; therefore the \textit{Landgraf} presumption is irrelevant to the reading of the AEDPA's scope. Whether deportation statutes can be removed from \textit{Landgraf} analysis through this syllogism requires review of \textit{Landgraf} and the constitutional and statutory interpretation doctrine in which it is rooted. \textit{Landgraf} reaffirmed some 200 years of precedent that recognizes that retroactive laws are presumptively unjust.") (citations omitted). See generally Note, Mojica v. Reno: \textit{Upholding District Courts' Statutory Power Under the Immigration Laws of 1996}, 7 J.L. & Pol'y 169, 197 (1998).
\item The Amazing Rhythm Aces, \textit{Why Can't I Be Satisfied}, on \textit{STACKED DECK} (WB Music Corp. 1975). Anyone who is unfamiliar with the Amazing Rhythm Aces has a deeper problem than can be solved by reading a law review article. Moreover, as a recent LEXIS search of the ALLREV database disclosed not a single reference to this great band in the entire history of LEXIS reprinting of law review articles, I believe the problem is systemic. If he reads this footnote, I hope that Hiroshi Motomura understands what I am getting at here.
\end{enumerate}
\end{footnotesize}
Zadvydas v. Davis, I could not help think at first that I might be deprived of an odd, guilty, sort of jurisprudential Schadenfreude\textsuperscript{66} that had long pervaded my psyche and motivated my teaching and scholarship. Could it be that the apparently definitive erosion of some of the worst implications of the plenary power doctrine might make the subject less fun to teach? Will we no longer be able to cite with approval bons mots like, "In an example of legislative draftsmanship that would cross the eyes of a Talmudic scholar, Section 306(c)(1) now reads . . ."\textsuperscript{67} or " . . . morsels of comprehension must be pried from mollusks of jargon."\textsuperscript{68} Will we have to abandon our staple metaphors of neglected step-children and the like?\textsuperscript{69} Five years ago, I wrote that 1996 might well become known as the year in which the rule of immigration law (such as it was) died.\textsuperscript{70} Reports of its death now appear to have been exaggerated and, of course, I and my clients are glad of it. But the teacher and scholar within me, and I suspect within some who read this Article, may fear that our "little realm" is about to become substantially more boring. Well, fear not. Large loose ends remain. Here are four:\textsuperscript{71}

1. The enduring "messiness" of Section 212(c): " . . . the combined effect of 212(c) and the interpretation in Francis and its aftermath, is to create an untidy patchwork, even, one might say, a mess."\textsuperscript{72}

2. Discretion as "grace": "Eligibility that was 'governed by specific statutory standards' provided a right to a ruling on an applicant's eligibility, even though the actual granting of relief was not a matter

\textsuperscript{66} Schadenfreude is a German psychological term that means pleasure taken in the misery of others. It may be understood generally as the opposite of empathy. Of course, I have never taken any pleasure in the real miseries caused to my clients by immigration law. I confess that I have, however, enjoyed describing the bizarre nature of our law to many students, community groups, etc. over the years.


\textsuperscript{68} Kwon v. INS, 646 F.2d 909, 919 (5th Cir. 1981).


\textsuperscript{70} Kanstroom, \textit{Surrounding the Hole in the Doughnut}, supra note 30, at 704.

\textsuperscript{71} Though considerations of space and time preclude me from doing so here, one ought also to take seriously some other loose-ends:

1) Whether \textit{St. Cyr} applies to persons convicted after trial rather than plea. (The answer will largely depend on the importance of the "quid-pro-quo" factor to retroactivity.)


3) The wrath of Justice Scalia and the problem of district court floodgates: "The Court today finds ambiguity in the utterly clear language of a statute that forbids the district court (and all other courts) to entertain the claims of aliens such as respondent St. Cyr, who have been found deportable by reason of their criminal acts . . . it brings forth a version of the statute that affords criminal aliens more opportunities for delay-inducing judicial review than are afforded to non-criminal aliens, or even than were afforded to criminal aliens prior to this legislation concededly designed to expedite their removal."\textsuperscript{INS v. St. Cyr, 121 S. Ct. 2271, 2293-94 (2001).}

\textsuperscript{72} Campos v. INS, 961 F.2d 309, 315 (1st Cir. 1992). The author was co-counsel of record.
of right under any circumstances, but rather is in all cases a matter of grace.”

3. The civil/criminal line: “And our mere statement that deportation is not punishment for past crimes does not mean that we cannot consider an alien’s reasonable reliance on the continued availability of discretionary relief from deportation when deciding whether the elimination of such relief has a retroactive effect.”

4. The acceptance of retroactivity of deportation laws: “Moreover, our decision today is fully consistent with a recognition of Congress’ power to act retrospectively. We simply assert, as we have consistently done in the past, that in legislating retroactively, Congress must make its intention plain.”

Part II of this Article begins the attempt to tie these loose-ends together from the knotty perspective of two specific Section 212(c) issues that are likely to arise in the wake of *St. Cyr* and *Calcano-Martinez*: the so-called “comparable grounds” issue as it might apply to various types of aggravated felons and the debate over the nature of the exercise of discretion in Section 212(c) and similar cases. Part II situates these problems more generally within the lingering problem of the meaning of discretion in immigration law, a subject about which many were concerned before the 1996 deluge. Though the issue of how courts should review immigration law discretion was not directly at issue in *St. Cyr* and was artfully finessed by counsel, the Court, and amici, the opinion implicitly leaves us with a rather binary and formal view of the rule of law/discretion dichotomy. If accepted by lower courts, as it already has been by some, this model could close the courthouse doors — on habeas petitions or otherwise — to a wide range of significant issues of a type that have historically been reviewed by courts. Even if such questions are reviewable on habeas — and I will argue that they are — the law/discretion dichotomy is unduly formalistic and is historically and theoretically unsound.

The *St. Cyr* Court’s use of an ancient phrase implies an important aspect of this dichotomy that warrants particularly close analysis: the ultimate exercise of discretion is said to be “a matter of grace.” Consideration of the historical evolution of this phrase calls its invocation in this context into question. Both theoretical consistency and justice may be better served by a more subtle and nuanced jurisprudential model of administrative practice and more predictable judicial oversight.

The most important substantive question resolved by *St. Cyr* is the validity of the retroactive elimination of a form of relief from deportation. Part III

---

74. *Id.* at 2292.
75. *Id.* at 2293 n.55.
76. See discussion *infra* Part III.
77. *St. Cyr*, 121 S. Ct. at 2283.
examines this question of retroactivity in light of the apparent revitalization in *St. Cyr* of another problematic bright line dichotomy: the civil/criminal distinction. The opinion accepts this dichotomy in a complex way. The Court seems to maintain the distinction even as it adopts reasoning that may render it less meaningful than it historically has been to retroactivity analysis. Put another way, the opinion imports a "phantom"\(^7\) criminal retroactivity norm into the nominally civil deportation realm. The norm embodies a humane, if murky, approach to legislative retroactivity that is clearly redolent of classic interpretations by the Court of the *ex post facto* clauses.\(^7\) One might, and I do, applaud the result of this approach for Mr. St Cyr. But the Court's somewhat disingenuous reasoning may lead to the acceptance by lower courts of retroactivity in other deportation statutes. That is an outcome that portends greater hardship and injustice than did the elimination of Section 212(c).

In both of these settings this Article considers how the Court could have reached the same result through a more comprehensive and consistent reasoning process that would better address the linkage among the problems of deportation-law discretion, retroactivity, and judicial review. It ultimately proposes, over-ambitiously but with the hope of provoking imaginative discussion, a model of deportation law that might render many of these problems more easily and more justly soluble.

II. DISCRETION, GRACE, AND THE RULE OF LAW: THE SECTION 212(c) MESS REVIVED

A. Discretion: The Hidden Problem in *St. Cyr*

The basic problem of how to define and review discretion in immigration law is an old one. Five years ago, however, it became clear that it would not be addressed seriously by the judiciary until the threshold AEDPA and IIRIRA matters of judicial-review preclusion and retroactivity were resolved. And here we are. I am reminded of the fascinating recent film, *Memento*, in which a man who apparently has no short-term memory re-awakens every five minutes or so to face the same mystery with only the most fragmentary sense that he has even thought about it before, let alone learned anything.

Before 1996, as now, U.S. immigration law in practice could be described as a "fabric of discretion and judicial deference,"\(^8\) though it has proven

---


79. U.S. CONST. art. I, § 9, cl. 3 ("No... *ex post facto* Law shall be passed."); art. I, § 10, cl. 1 ("No State shall... pass any... *ex post facto* Law...").

immune to any consistent definition of the former concept. Though it was clearly not Justice Stevens' intention to do so, the St. Cyr opinion may compel us to gather our notes from the past and to return to a problem that, though subtle, is integral to any meaningful long-term immigration law-reform project.

Two provisions of the 1996 law are especially relevant here. 8 U.S.C. § 1252(a)(2)(B) provides:

(B) Denials of discretionary relief. Notwithstanding any other provision of law, no court shall have jurisdiction to review —

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245 [8 U.S.C.S. §§ 1182(h), 1182(i), 1229b, 1229c, or 1255], or

(ii) any other decision or action of the Attorney General the authority for which is specified under this title [8 U.S.C.S. §§ 1151 et seq.] to be in the discretion of the Attorney General, other than the granting of relief under section 208(a) [8 U.S.C.S. § 1158(a)].

And 8 U.S.C. § 1252(g) states:

(g) Exclusive jurisdiction. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Both of these laws — the first explicitly, the second implicitly — link judicial review preclusion to discretion. But discretion itself is nowhere defined. Some might suggest that this is because, like obscenity, perhaps, judges know discretion when they see it. History is to the contrary, however, as the judicial understanding of discretion has been quite complicated.

The first of these provisions has already been tested somewhat in the context of adjustment of status applications, where, in a few cases prior to St.

81. Id. 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 decisions of the Attorney General; and factual determinations by immigration judges as well as a wide variety of other legal decisions. Though these forms of discretion are very different, courts and commentators have not developed a taxonomy to capture those differences.


84. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

85. See discussion infra Part II.C.
Cyr, it was held to preclude habeas review.86 (These cases, however, did not involve the explicit definitional problem because adjustment of status (per INA § 245) is specifically listed in the statute.) The second, too, has generally been held to preclude review in cases to which it applies, though such cases likewise do not necessarily require a judicial definition of discretion.87 Still, the question remains whether Congress can preclude review of all discretionary decisions in deportation cases. I think not. But to explain why such preclusion is constitutionally offensive, the apparently bright line between law and discretion must be deconstructed.

There are good reasons why the preclusion of judicial review of discretion has not topped the reform or litigation agenda. As Professor Nancy Morawetz has pointed out, the first cases to come before the courts involving the new laws were those in which persons who had committed crimes prior to the enactment of the new laws faced new deportation consequences.88 The specific problem of retroactive application “provided an important doctrinal hook for challenging the severity of the laws as they applied to this group.” Morawetz correctly noted that these challenges risked “distorting the debate about the new laws.”90 The deepest problem with these laws is not their retroactivity or even their preclusion of judicial review. It is their brutal inhumanity, their disproportionality, their lack of consideration of the cruelty of deporting persons who may have grown up in the United States, who have all their family here as U.S. citizens or permanent legal residents, and who may well know no other country. This harshness is all the more difficult to accept as deportation law and practice have focused on an increasingly minor array of offenses.91 The alternative proposed by Professor Morawetz (and many others, including myself) has been that the system should reflect a fair evaluation of each case.92 This can be an appealing approach due to its implicit humanity and its evocation of a well-developed (if messy and contested) body of administrative law and practice. It is, however, clearly a discretionary model and thus in need of an accompanying theory of judicial

87. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 485 (1999) (holding that section should be read narrowly and applies only to three types of discretionary decisions by the Attorney General — specifically, to commence proceedings, to adjudicate cases, or to execute removal orders).
89. Id. at 1937. As the Supreme Court stated in Landgraf, “Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations.” Landgraf v. USI Film Products, 511 U.S. 244, 272 (1994).
91. See generally Kanstroom, Deportation, Social Control, and Punishment, supra note 63; Kanstroom, Deportation and Punishment, supra note 57.
The following scenario illustrates the problem. Imagine that when Mr. St. Cyr goes back before the Immigration Judge, she decides to deny his case not because he is barred from applying, but because the judge decides that, on balance, the "equities" are not in his favor. The Immigration Judge writes a decision, moderately specific, in which she weighs various factors and also opines that as a "criminal alien," Mr. St. Cyr did not seem to have much of a life here and he would probably be better off in Haiti.\footnote{If this decision is upheld by the BIA, will it be reviewable? Apparently not, owing to 8 U.S.C. § 1252(a)(2)(B) and (C), which bar review of criminal and "discretionary" cases.} It is a criminal case and, more specifically, there will be little doubt that the Immigration Judge and the Board have exercised discretion.

The question of habeas review in such a case was not directly presented in \textit{St. Cyr}, but the structure of the opinion is not especially promising for those who might seek review of such a Board denial. Section II of the majority opinion, for example, begins by asserting that Mr. St. Cyr's application raises "a pure question of law."\footnote{Put another way, it involved no specific dispute over any facts alleged to prove him deportable. Nor did it involve the so-called ultimate exercise of discretion as he had not even been permitted to apply for the Section 212(c) waiver.} Nevertheless, the Court goes to the trouble of stating that Mr. St. Cyr did not "contend that he would have any right to have an unfavorable exercise of the Attorney General's discretion reviewed in a judicial forum."\footnote{Such a concession could be understood as a prudent, tactical move by St. Cyr's counsel. After all, the INS, in its opening brief in \textit{St. Cyr}, had strenuously sought to frame the entire Suspension Clause issue as one of discretion: "This Court has never ruled that the Great Writ requires a judicial forum for an alien to present the claim that he has the 'right' to be considered for an exercise of a power that Congress has placed in the discretion of the Attorney General to dispense with the deportation of an alien."\footnote{Department of Justice lawyers must have thought this a strong argument because virtually the same argument was made in the government's \textit{Calcano-Martinez} brief.} As the Court recited, the INS had also argued by analogy that "the writ [historically] would not issue where 'an official had statutory authorization to __________

\footnote{Some commentators had suggested, prior to \textit{St. Cyr}, that discretion has been and ought to continue to be reviewable on habeas. See Cole, \textit{Jurisdiction and Liberty}, supra note 32; Jonathan L. Hafetz, \textit{The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts}, 107 \textit{Yale L.J.} 2509 (1998).}

\footnote{I realize that this is an extreme example, but it makes the point and I have seen worse in reality.}


\footnote{INS v. St. Cyr, 121 S. Ct. 2271, 2278 (2001).}

\footnote{\textit{Id}.}

\footnote{Brief for the Petitioner at 27, INS v. St. Cyr, 121 S. Ct. 2271 (2001) (No. 00-767).}

\footnote{Brief for the Respondent at 32, INS v. Calcano-Martinez, 121 S. Ct. 2268 (2001) (No. 00-1011).}
detain the individual but . . . the official was not properly exercising his discretionary power to determine whether the individual should be released.' 100

In pursuit of an answer to the question whether the Suspension Clause issue was a serious one, the Court was primarily concerned with early habeas cases that had reviewed executive detention for anything other than constitutional error. This is a difficult inquiry for many reasons, not the least of which is the citation to British cases, which, of course, could not refer to a written constitution. But it is considerably easier if one confines the inquiry to "pure questions of law," even if they arise in broadly discretionary contexts. The Court notes, for example, that in Ex parte Boggin, the court had required a response from the Admiralty in a case involving the impressment of a master of a coal vessel, despite the argument that exemptions for "seafaring persons of this description" were given only as a matter of "grace and favour," not "of right." 101

The Court’s first stab at a resolution of this problem is, to say the least, subtle:

In Heikkila v. Barber, the Court observed that the then-existing statutory immigration scheme "had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution," 345 U.S. at 234-235 (emphasis added) — and that scheme . . . did allow for review on habeas of questions of law concerning an alien’s eligibility for discretionary relief. 102

Two pages later, the Court again states that "[h]abeas courts also regularly answered questions of law that arose in the context of discretionary relief." 103 But here’s the rub: "courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand." 104 The Court finally hangs its robes on this hook: eligibility to discretionary relief that is governed by "specific statutory standards" provides a "right" to a ruling even though the actual relief itself was not "a matter of right under any circumstances, but rather is in all cases a

100. St. Cyr, 121 S. Ct. at 2281 (citing Brief for Respondent at 33).
101. Id. at 2280 n.23 (citing Hollingshead’s Case, 91 Eng. Rep. 307 (K.B. 1702) (granting relief on the grounds that the language of the warrant of commitment — authorizing detention until "otherwise discharged by due course of law" — exceeded the authority granted under the statute to commit "till [the bankrupt] submit himself to be examined by the commissioners"); see also Brief for Legal Historians as Amici Curiae at 8-10, 18-28, INS v. St. Cyr, 121 S. Ct. 2271 (2001) (No. 00-767). See generally Hafetz, supra note 93.
102. St. Cyr, 121 S. Ct. at 2281.
103. Id. at 2283 (citing United States ex rel. Accardi v. Shaughnessy, 349 U.S. 280 (1955), and United States ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957)).
104. Id. at 2283 (citing Gerald L. Neuman, Jurisdiction and the Rule of Law After the 1996 Immigration Act, 113 HARV. L. REV. 1963 (2000) (describing the "strong tradition in habeas corpus law . . . that subjects the legally erroneous failure to exercise discretion, unlike a substantively unwise exercise of discretion, to inquiry on the writ").
matter of grace." Thus, the Court notes that even though the actual suspension of deportation authorized by 1917 law was "a matter of grace," a deportable alien had a right to challenge the Executive's failure to exercise discretion authorized by law. And so it shall be now. But what does this mean?

Essentially it means that the threshold characterization of an issue as either a "pure question of law" or "a matter of grace" (also known as discretion) will now be dispositive as to judicial review. In my hypothetical example, then, it seems likely that Mr. St. Cyr would not get into court unless he could somehow reframe the denial as a question of law.

B. Four Past and Future Problems with Section 212(c) and Discretion

When I found myself in time of trouble
I relied on 212(c),
Thought there was a waiver,
212(c)

1. Introduction

Few legal subjects are as complicated as the history of the so-called Section 212(c) waiver. Looking back, as one must now do in order to look forward, one sees a strange mix of inartful legislative drafting, retroactive patching of an unwieldy (now superceded) statutory scheme that differentiated exclusion from deportation cases, episodic administrative and judicial attempts to achieve a modicum of humanitarian consistency (justified by unique invocations of constitutional principles), and, finally, administrative and legislative reactions to the foregoing that resulted in complicated limitations on eligibility. The history of the Section 212(c) waiver can perhaps be best understood as an extended — if baroque — conversation about administrative discretion and the rights of people facing deportation among the INS, the Congress, and the judiciary. It is just the sort of conversation that AEDPA and IIRIRA sought to silence and that the St. Cyr opinion seems to have resurrected.

To appreciate how that conversation may now continue, however, a more specific (but very brief) history will be useful. This history reveals at least

105. Id. at 2283 (citing Jay v. Boyd, 351 U.S. 345, 353-54 (1956)).
106. Id.
107. By L. Rosenberg, to the tune of Lennon and McCartney's "Let It Be."
108. Put more generally, one can see three distinct patterns: the transformation of pure discretion into interpretive discretion; the incorporation of a judicially defined constitutional norm into agency discretionary decisions, and the development of agency rules or standards that appeared to some judges to be insufficiently discretionary. See Kanstroom, Surrounding the Hole in the Doughnut, supra note 30, at 781-801.
109. To be honest about it, there have been times when the conversation seemed more of a profane shouting match. But at least there was some kind of talking going on.
four distinct problems raised by the lack of a consistent definition of the elusive idea of administrative discretion in immigration law.

The first problem involves what might be termed "interpretive discretion" or agency statutory interpretation. One Section 212(c) exemplar of this — familiar to some immigration law specialists — is the so-called "comparable grounds" issue, which is discussed below. As a particularly vigorous form of agency statutory interpretation, BIA interpretive discretion might simply be governed by *Chevron* and its progeny. But partly because of inherent problems in the *Chevron* model itself, partly because of the unusual complexity of the issues raised by Section 212(c), partly because of the background norm of extreme judicial deference in immigration cases, and partly because of the tendency of the idea of discretion to be expanded in such cases, the rule of Section 212(c) law was well-described by at least one court as a "mess." Still, it is likely that interpretive discretion as to issues like "comparable grounds" will be reviewed on habeas by most district courts post-*St. Cyr*, for reasons that require only brief explanation: they "feel" like questions of law.

The second problem has to do with the venerable administrative law distinctions among questions of law, fact, and discretion. Immigration law in general and Section 212(c) (and all other discretionary relief provisions) in particular place high reliance upon administrative resolution of mixed law and fact questions such as remorse, rehabilitation, and intent. Historically, what has been at issue in such cases generally has been the standard of judicial review. Now, however, the intersection between the 1996 laws and the *St. Cyr* opinion could mean that some factual or mixed law/fact questions could be considered "discretionary," which could, in turn, preclude review entirely. This is unlikely, however. Indeed, even the *St. Cyr* dissent saw a clear distinction between review of factual and discretionary questions. If

---

111. Another such issue is that of the accrual of seven years of lawful domicile for Section 212(c) eligibility. *See, e.g.*, *In re Lok*, 18 I. & N. Dec. 101, 105 (B.I.A. 1981), *aff'd*, 681 F.2d 107 (2d Cir. 1982) (domicile accrues through final order); *Wall v. INS*, 722 F.2d 1442 (9th Cir. 1984) (through judicial review).
115. Justice Scalia thus seemed to see a workably bright line when he stated that "the whole concept of 'discretion' was not well developed at common law" and followed this by asserting (incorrectly, I believe) that "even the executive's evaluation of the facts — a duty that was a good deal more than discretionary — was not subject to review on habeas." *St. Cyr*, 121 S. Ct. at 2302 (citing *Hafetz*, *supra* note 93). It is interesting that Justice Scalia cites in his dissent a law review note that advocates the opposite proposition. Still, Justice Scalia asserts that "[a]n exhaustive search of cases antedating the Suspension Clause discloses few instances in which courts even discussed the concept of executive discretion; and on the rare occasions when they did, they simply confirmed what seems obvious from the paucity of such discussions — namely, that courts understood executive discretion as lying entirely beyond the judicial ken." *Id.* (citation omitted). The problem here, however, is that the term discretion means very different things in different settings. *See infra* Part II.B.5 (discussing the "matter of grace" formula).
past practice is a guide, the pressure by government lawyers to include various factual issues into the arguably unreviewable discretion category will be strong. Courts may then wish to consider whether there are better theoretical ways to address this than formalistic distinctions between factual and discretionery decisions.

The third problem involves the subtle distinction between a challenge to the actual exercise of discretion versus a challenge to the alleged failure to exercise discretion. Derived from the Warren Court’s opinion in United States ex rel. Accardi v. Shaughnessy the Zen-like paradox may become a crucial component of many claims to judicial review in the future. It was cited specifically by Justice Stevens in St. Cyr. But though I can appreciate its pragmatic utility, I remain skeptical as to whether it really makes sense, especially as a way to divide reviewable from unreviewable agency actions.

Finally, we must reach the most fundamental immigration law discretion problem: its ultimate exercise. Known sometimes by the inspiring but anachronistic and misleading phrase, “matter of grace,” this decisive moment in Section 212(c) (and many other immigration decisions) will now likely be argued to be immune from any judicial review at all. For advocates of immigrants’ rights, as for believers in a rich theory of the rule of law, acquiescence to this could be dangerous. It is no accident that this phrase was last given serious content by the Supreme Court in a Cold War case involving the deportation of an alleged former communist by retroactive law and on the basis of “confidential information.” Due to the tragic events of September 11, 2001, it now appears likely that we are heading into an era of strenuous assertions of government power that are likely to be accompanied by exhortations towards extreme judicial deference. It is especially important at such times, however, to maintain a level-headed and theoretically sound approach and to resist easy categorical mechanisms like the “matter of grace” trope.

C. The “Comparable Ground” Problem

From 1917 to 1996 (when the basic idea of exclusion was legislatively changed), Congress provided so-called “relief” from exclusion, in the discretion of the Attorney General, to certain resident non-citizens who, upon returning to the United States after a short trip abroad, were found excludable

117. St. Cyr, 121 S. Ct. at 2283.
119. 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. Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 878.
because of criminal conviction. Immigration specialists are used to it but others may note the odd structural choice here: rule-based grounds of exclusion combined with standardless grants of “discretionary” waiver powers to an enforcement agency.

The disjuncture between exclusion relief and a lack of similar deportation relief led to various legal and equitable concerns raised in two 1940 decisions by the BIA and the Attorney General called Matter of L-. The cases involved a legal permanent resident convicted of a “crime involving moral turpitude,” which, as it happened, did not make him deportable. It did, however, make him “excludable” were he to leave the United States and seek to return. He left the United States, but upon his return, he was not found excludable (apparently because the inspector did not ask him any questions). Unfortunately, however, his re-entry into the United States rendered him deportable as one who had been “excludable” at the time of his last entry. More unfortunately, it seemed to leave him without the defense he would have had at the border (Section 212(c)). Thus, “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” led to, “I cannot conclude that Congress intended the immigration laws to operate in so capricious and whimsical a fashion. . . . [Respondent] should be permitted to make the same appeal to discretion that he could have made if denied admission in 1939.”

Law or discretion? A close call. But because the decision inured to the benefit of the non-citizen and was therefore not challenged in court, not much turned on an answer to this jurisprudential question. In any case, despite this other finagling, when Congress rewrote U.S. immigration law in 1952, the Section 212(c) exclusion waiver was left where it had been: as an exclusion waiver. And no similar deportation waiver for crime was added for lawful

120. 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. Id.
121. A similar system had applied to other deportable aliens in the form of what became known as Suspension of Deportation. This relief, however, was not designed to protect lawful permanent residents with criminal convictions, as it required a finding of “good moral character,” which would be precluded by many types of criminal conduct. Thus, most lawful permanent resident aliens who were subject to deportation based on criminal conviction had no statutory discretionary relief options.
123. Id. 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. Pursuant to the Supreme Court’s Volpe decision, this provision of the statute was 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. Id.
124. Id. at 4-5.
125. Id. at 5-6. For a fuller discussion of the various other ways in which the BIA expanded Section 212(c), see Kanstroom, Surrounding the Hole in the Doughnut, supra note 30, at 782-83.
126. The waiver was further extended by the BIA beyond the scope of the statute’s plain language. However, it still generally tied it to an actual departure and reentry. An alien had to leave the country and return to be eligible for this type of discretionary relief from deportation.
permanent residents.\textsuperscript{127}

In 1976, however, the Second Circuit Court of Appeals in \textit{INS v. Francis}\textsuperscript{128} dramatically expanded the reach of the Section 212(c) waiver on equal protection grounds to include those who had not left the United States,\textsuperscript{128} although limits were maintained, ostensibly based on the statutory text. Despite the potential breadth of the \textit{Francis} equal protection analysis, the BIA and the courts generally continued to limit the applicability of the waiver to deportation offenses which had a so-called "comparable ground" under the exclusion section of the Immigration and Nationality Act.\textsuperscript{129} This meant, for example, that a person convicted of armed robbery might be eligible (because armed robbery was a crime of moral turpitude with a comparable exclusion ground) while one convicted of simple, unlicensed possession of a handgun was not eligible. This seemed odd to many observers, but so it went.

Certain of these complex problems created by the comparable grounds rule were almost administratively resolved in a series of cases involving a legal permanent resident alien named Hernandez-Casillas, who had been found ineligible for Section 212(c) relief. The BIA initially decided to extend the availability of Section 212(c) to all grounds of deportability except the sections that relate to subversives and war criminals.\textsuperscript{130} The BIA majority based this action on the considerations that by this time in its interpretive evolution, Section 212(c) bore little resemblance to the statute as written and that giving a broader application to the waiver would have the benefit of alleviating potential hardships in light of the fundamental fairness/equal protection reasoning of the court in \textit{Francis}.\textsuperscript{131} The next year, however, the Attorney General overturned the BIA and reinstated the comparable-grounds rule. This left direct due process/equal protection challenges and exceedingly complex statutory interpretation arguments as the last line of defense for many long-term lawful permanent residents. The judicial response was mixed. But a frequent refrain, as noted above, was that of the First Circuit: the "combined effect of 212(c) and the interpretation in \textit{Francis} and its

\textsuperscript{127} Suspension of deportation was still available for some cases, however.

\textsuperscript{128} 532 F.2d 268 (2d Cir. 1976). The \textit{Francis} court held that 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 were otherwise in exactly the same situation had no such relief available violated equal protection in that the law subjected aliens to disparate treatment on "criteria wholly unrelated to any legitimate governmental interest." \textit{Id.} at 273.

\textsuperscript{129} \textit{See e.g.}, Matter of Granados, 16 I. & N. Dec. 726 (B.I.A. 1979) (finding legal permanent resident convicted of possessing a sawed-off shotgun deportable and denying application for 212(c) relief from deportation because there was no comparable exclusion ground); Matter of Wadud, 19 I. & N. Dec. 182 (B.I.A. 1984) (holding LPR charged with deportability for aiding and abetting another alien in obtaining a fraudulent visa ineligible even if crime was one of moral turpitude because "we decline to expand the scope of section 212(c) ... where the ground of deportability charged is not also a ground of inadmissibility").


\textsuperscript{131} \textit{Id.}
aftermath, is to create an untidy patchwork, even, one might say, a mess.\textsuperscript{132} Still, that court, like most others, declined "to tinker further."\textsuperscript{133}

For those who like a bright-line law/discretion dichotomy, all of this likely appears to be a "pure question of law."\textsuperscript{134} Thus, under \textit{St. Cyr}, some courts may again be confronted by a host of such "comparable ground" issues in revived Section 212(c) cases\textsuperscript{135} and might simply invoke \textit{Chevron} or other traditional canons of deference and decline "to tinker."\textsuperscript{136} Others, like the \textit{Francis} court may envision the judicial role more expansively. It is also now possible that administrators who wish to deny a Section 212(c) case (or any other discretionary relief case) will conclude that judicial review can be completely avoided by couching a denial in discretionary terms.\textsuperscript{137} The issue for reviewing courts will then require a constitutional line to be drawn between pure questions of law (reviewable on \textit{habeas}) and those of discretion.\textsuperscript{138}

D. \textit{Fact and Law}

Let us return for a moment to the hypothetical discretionary denial of Mr. St. Cyr's case that I posed above. What if his lawyers were to concede that a denial on discretionary grounds is unreviewable but were to argue that the immigration judge's decision (and that of the BIA) was not one of discretion but was really factual: what is his life like here? What would it be like in Haiti?\textsuperscript{139} They would not be the first to do so. The history of Section 212(c) and other immigration law discretion cases is replete with similar categorizations.

In \textit{Devenuto v. Curran},\textsuperscript{140} a 1924 \textit{habeas} case cited in the \textit{St. Cyr} opinion,\textsuperscript{141} for example, one question was whether the non-citizen had been denied entry into the United States because he was illiterate. The court was skeptical:

---

\textsuperscript{132} Campos v. INS, 961 F.2d 309, 315 (1st Cir. 1992).
\textsuperscript{133} Id. The author was co-counsel of record and (unsuccessfully) urged the court to "tinker" much further.
\textsuperscript{134} Another unresolved question is that of "lawful domicile." Prior to 1996, courts were split on the question of whether a person convicted of a crime or placed in deportation proceedings following conviction prior to accruing the necessary seven years of lawful residence lost eligibility to apply for Section 212(c) relief.
\textsuperscript{135} The availability of cancellation of removal might mitigate this problem in some cases but will not do so for aggravated felony cases involving lawful permanent residents.
\textsuperscript{136} Other courts, however, could be moved by the plight of those facing deportation. These judges might invoke \textit{INS v. Cardoza-Fonseca}, 480 U.S. 421, 449 (1987), or even equal protection.
\textsuperscript{137} Of course, it is not self-evident that administrative actors always want to avoid judicial review. Indeed, one can imagine various scenarios in which an immigration judge or the BIA might desire a certain result but feel institutionally unable to achieve it. In such cases, issues would more likely be framed as "pure questions of law."
\textsuperscript{138} See Part III, \textit{infra}, for one example of how this has been done in the past.
\textsuperscript{139} They might also cast it as a legal question: is the quality of his life a legitimate factor at all?
\textsuperscript{140} United States \textit{ex rel.} Devenuto v. Curran, 299 F. 206 (2d Cir. 1924).
\textsuperscript{141} \textit{INS v. St. Cyr}, 121 S. Ct. 2271, 2283 n.30 (2001).
There is nothing in this record which discloses to the court what test, if any, this alien was subjected to. It does not appear that the words were those in "ordinary use," and that the slip used contained "nor less than thirty nor more than forty words." The immigration officials must understand that, where an alien is excluded on the ground that he cannot read, the courts are entitled to know exactly what test was used. All that we know from this record as to this alien's ability or inability to read is found in the following excerpt from his testimony:

"Q. Were you asked by the steamship agents whether you were able to read?
A. No. I told them I could read a little.
Q. Did any one warn you that you would not be permitted to land, owing to the fact that you are unable to read, and owing to the fact that the quota for Italy had been filled?
A. No."

The statement in the record is: "Excluded; excess quota, unable to read." This cannot be accepted by the court as proof that the alien was given the kind of test which the act of Congress required to be used in such cases.142

As difficult as it may be to say whether this was a legal, factual, or discretionary determination it now appears that reviewability itself on habeas could turn on the answer.

E. Exercise and the Lack of Exercise: The Accardi Line Revisited

Here is a paradox: The more an agency like the INS or the BIA seeks to structure its exercise of discretion, to render it transparent, and to proceed in a rule-like fashion, the more it seems to invite judicial oversight of its choice and application of factors. For example, in an apparent attempt to regularize the ultimate discretionary calculus in Section 212(c) cases, the BIA had listed factors and standards to be considered.143 Judicial oversight of BIA decisions of this type (i.e., those that applied the standards) was notably erratic, showing in some cases extreme deference144 and in others rather close scrutiny.145

Allegations of BIA inconsistency raised thorny problems for reviewing courts.146 In 1993, for example, the Sixth Circuit Court of Appeals examined

142. Devenuto, 299 F. at 213.
144. See generally Kanstroom, Surrounding the Hole in the Doughnut, supra note 30, at 793-97.
145. See e.g., Diaz-Resendez v. INS, 960 F.2d 493, 496-98 (5th Cir. 1992) (finding that the Board had failed to consider all of the relevant factors when determining whether Diaz-Resendez' equities rose to the level of "unusual or outstanding").
146. Id. (stating 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, 19 I. & N. Dec. 628 (B.I.A. 1988)).
the Board’s policy toward certain types of applicants for Section 212(c) relief, found that the Board seemed to have consistently failed to exercise its discretion favorably, and suggested that this pattern might itself constitute an abuse of discretion. 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 Board hears only a small percentage of cases heard by immigration judges (and it is possible that “stronger” cases in which relief was granted would not have been appealed by INS), the court was concerned that the Board’s practice left the impression that it had a policy of not granting Section 212(c) waivers in virtually any cases involving conviction of a serious drug offense. The court said, “Such a policy . . . appears to be an unauthorized assumption by the INS of a position properly to be made by the Congress.” Indeed, the court asserted, “The BIA’s failure to exercise its discretion may well be an abuse of discretion.” Nevertheless, the Court upheld the Board’s decision.

The reasoning of the Sixth Circuit echoed the Supreme Court’s holding in Accardi v. Shaughnessy that discretion, in the sense of nuanced, individualized, balancing action, must be exercised, if such power is granted to an agency. Accardi involved a habeas corpus claim by a non-citizen who asserted that right before the BIA ruled on his claim for discretionary relief from deportation. The Attorney General had issued a list with his name on it of “unsavory characters” whom the Attorney General wanted deported. Accardi claimed the list had been circulated among INS employees and members of the Board and that this circulation made fair consideration of his case impossible. The court reversed and held that if the allegations were true, it showed that the Board’s discretion had been compromised.

The Accardi opinion contains two important features. First, the fact that regulations had required discretion to be exercised by the Board was critical. The Court held that the “decisive fact in this case” was that the
Board was required to exercise its own judgment when considering appeals.\textsuperscript{154} In itself, this was an important but hardly earth-shattering holding: regulations mean something and the content of that something can be deduced by courts (in \textit{habeas} cases) from what the regulations say.

Much more interesting at the time and for present purposes, however, was the Court's apparent idea that there is a meaningful distinction between review on \textit{habeas} of the exercise of discretion itself (highly disfavored to the point of unavailability) and review of whether discretion had in fact been exercised (possible):

\begin{quote}
It is important to emphasize that we are not here reviewing and reversing the manner in which discretion was exercised \ldots Rather, we object to the Board's alleged failure to exercise its own discretion, contrary to existing valid regulations.\textsuperscript{155}
\end{quote}

Though not often a major part of recent litigation, this distinction has again become potentially important because of the bifurcation in \textit{St. Cyr} between questions of law (reviewable) and those of discretion (not reviewable). It is foreseeable that litigants will rely heavily on \textit{Accardi} to challenge alleged failures of the INS or the BIA to exercise discretion while asserting that they are not challenging the exercise of discretion itself. Does this approach make any sense?

The \textit{Accardi} dissenters, led by Justice Jackson, clearly thought not, beginning their rebuttal with the charge that "the [majority's] doctrine seems proof of the adage that hard cases make bad law."\textsuperscript{156} The dissenters then made two legal arguments. First, they asserted that the nature of the power and discretion vested in the Attorney General is analogous to the power of pardon or commutation of a sentence, "which we trust no one thinks is subject to judicial control."\textsuperscript{157} The second argument was that Accardi had no legal right "by virtue of constitution, statute or common law to have a lawful order of deportation suspended" and "\textit{habeas corpus} is to enforce legal rights, not to transfer to the courts control of executive discretion."\textsuperscript{158} For the dissenters, the distinction between law and discretion was fundamentally linked to the role of constitutional courts:

\begin{quote}
by law as is appropriate and necessary for the disposition of the case \ldots \). Because of these regulations, the facts that the Board's authority was secondary to that of the Attorney General and that the Attorney General had review power over Board decisions were not dispositive. \textit{Id.}
\end{quote}

\textsuperscript{154} \textit{Accardi}, 347 U.S. at 267.
\textsuperscript{155} \textit{Id.} at 268. It should be noted that the segment of the quotation I have replaced with ellipsis seems to indicate that the Court thought it could review the exercise of discretion itself on \textit{habeas}: "If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief." \textit{Id.} This, however, would be an incorrect inference as the Court never asserted such authority on \textit{habeas} and, in fact, decisive indications to the contrary pervade this and other opinions.
\textsuperscript{156} \textit{Id.} at 269.
\textsuperscript{157} See Part II, \textit{infra}, for discussion of whether "no one" still thinks this.
\textsuperscript{158} \textit{Accardi}, 347 U.S. at 269.
Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review. But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function...  

In sum, the dissent saw no meaningful distinction between an allegation of failure to exercise discretion and one that discretion has been improperly exercised. Moreover, it viewed the law/discretion distinction as (at least) analogous to that which has sometimes been called in the due process context the difference between a right and a privilege.

The majority and the dissent, however, shared certain theoretical premises. They both seemed to accept the propositions first that there is a definable difference between law and discretion in the context of relief from deportation and, second, that discretion as such was unreviewable on habeas. The majority thus faced a powerful theoretical impediment to its obvious desire to maintain some vestige of judicial control over an allegedly deficient administrative process. If it questioned the law/discretion line entirely, then the floodgates might open on habeas to second-guess all sorts of discretionary denials. When seen in this light, the exercise/non-exercise distinction appears to have been something of a pragmatic compromise position.

As the dissents indicate, the controversial implications of the Accardi doctrine were immediately clear as it was the first time that the Court had directly considered the meaning of immigration law discretion in the context of habeas corpus judicial review. That controversy remains strong. Justice Scalia in his St. Cyr dissent, for example, asserts that

In sum, there is no authority whatever for the proposition that, at the time the Suspension Clause was ratified — or, for that matter, even for a century and a half thereafter — habeas corpus relief was available to compel the Executive's allegedly wrongful refusal to exercise discretion. The striking proof of that proposition is that when, in 1954, the Warren Court held that the Attorney General's alleged refusal to exercise his discretion under the Immigration Act of 1917 could be reviewed on habeas, see United States ex rel. Accardi v. Shaughnessy, supra, it did so without citation of any supporting authority...
Until *St. Cyr*, the issue had been largely avoided by the Supreme Court. Though cited fairly regularly in practice manuals, some law review articles, and some lower court opinions, *Accardi* has been cited by Supreme Court majority opinions only ten times in nearly fifty years. One obvious reason for this was that the major change that occurred to immigration law judicial review statutes in 1961 lessened greatly the importance of the distinction. Nonetheless, even in the few cases in which *Accardi* was cited by the Court prior to *St. Cyr*, it had virtually never been for the proposition that there is a meaningful distinction between challenges to the alleged failure to exercise discretion *per se* and the specific exercise of discretion. Rather, the case is more frequently cited for the milder propositions that the Attorney General cannot control the Board and that the government is bound by its own regulations.

*Accardi* may be best seen as a compromise in light of two contemporary Supreme Court cases that pointed in opposite directions as to the review of immigration discretion on habeas. In *Jay v. Boyd*, which cited *Accardi* for the “failure to exercise versus unreviewable exercise” line, the 5-4 majority emphasized the unavailability of judicial review of the ultimate discretionary calculus:

> It does not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised. Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. *Accardi v. Shaughnessy*, 347 U.S. 260, a

---

164. See e.g., IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 58, 553 (3d ed. 1992).


166. See e.g., Goncalves v. Reno, 144 F.3d 110 (1st Cir. 1998).


168. One might also question the real significance of the *Accardi* exception to the alleged unreviewability of discretion. Consider what happened, for example, when *Accardi*’s case itself returned to the Court in 1955: *Accardi* lost decisively and the Court went to some lengths to limit the possible implications of its prior holding. *Shaughnessy v. United States ex rel. Accardi*, 349 U.S. 280 (1955). It thus may be the case that the doctrine works to put pressure on the BIA by affirming at least a possibility of judicial review. But the likelihood of an actual decision being overturned on this ground is very small.

169. See *Schilling v. Rogers*, 363 U.S. 666, 676-77 (1960) (“This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that he has acted beyond the scope of his powers, where the availability of judicial review would be attended by quite different considerations than those controlling here.”); *Service v. Dulles*, 354 U.S. 363 (1957) (“Regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature.”).


171. See e.g., *Vitarelli v. Seaton*, 359 U.S. 535, 539-40 (1959) (“[H]aving chosen to proceed against petitioner on security grounds, the Secretary here ... was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulations he could have discharged petitioner summarily.”); see also *United States v. Nixon*, 418 U.S. 683, 692 (1974).


grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it "comes as an act of grace." 174

Another case from the same era seems to embody a very different view, however. At the very least, Hintopoulos v. Shaughnessy 175 indicated that the door to the courthouse should not be completely closed simply because a decision was part of the discretion delegated to the Attorney General. The case, like Jay v. Boyd, involved a BIA discretionary denial of an application for suspension of deportation. The contention on appeal (by habeas petition) was simply that the Board had abused its discretion. 176 The district court had applied a deferential standard of review. 177 The Supreme Court confirmed that the review authority of courts extended over the standards applied by the Board to determine eligibility: "It is clear from the record that the Board applied the correct legal standards in deciding whether petitioners met the statutory prerequisites for suspension of deportation." 178 Though suspension was again said to be "a matter of discretion and of administrative grace," the opinion continued, "Nor can we say that it was abuse of discretion to withhold relief in this case." 179 Although the issue is not discussed in the opinion, Hintopoulos is noteworthy in that Justice Harlan seemed to apply a

174. 351 U.S. at 354. Upon reading statements like this, one cannot help wonder whether the apparent "release-valve" of the Accardi exception lessened pressure on courts to consider the consequences of declining to review such discretionary decisions. On the other hand, it is clear that Accardi seemed to leave some play in the joints for courts to work with in exceptional cases. 175. 353 U.S. 72 (1957). 176. See United States ex rel. Hintopoulos v. Shaughnessy, 133 F. Supp. 433, 434 (S.D.N.Y. 1955). 177. But it definitely was reviewed:

It is well established that the Courts may not review the exercise of such discretion by the Attorney General, and that they may interfere only where there has been a clear abuse of discretion or a clear failure to exercise discretion . . . the Court can do no more than to require that the discretion be properly exercised. Id. (citations omitted). The Second Circuit affirmed. United States ex rel. Hintopoulos v. Shaughnessy, 233 F.2d 705 (2d Cir. 1956). Its formulation of the applicable standard of review was even more deferential. But again, it was review:

[N]either the 1940 Act nor the 1952 Act provide any indication of the factors which shall control the formulation of the discretion granted: under each . . . the Board has untrammeled discretion to grant or withhold a suspension. Only if the discretion is shown to have been formulated on arbitrary or illegal consideration may the courts interfere. Id. at 708. The court also opines that if the broad grant of discretionary authority were found to be invalid, the victory would be Pyrrhic because "the appellants and all other hardship cases would stand confronted with rigid deportation provisions as were their predecessors before the law was liberalized." Id. at 708-09. Citing an earlier Second Circuit case, United States ex rel. Kaloudis v. Shaughnessy, 180 F.2d 489, 491 (2d Cir. 1950), the court drew an explicit analogy between discretionary relief from deportation and the power of a judge to suspend execution of a sentence or of the President to pardon a convict: "It is a matter of grace, over which courts have no review, unless . . . it appears that the denial has been actuated by consideration that Congress could not have intended to make relevant." Id. at 709.

178. Hintopoulos, 353 U.S. at 77. 179. Id.
purportedly deferential but otherwise relatively straightforward "abuse of
discretion" and "arbitrary and capricious" test on habeas review of the BIA's
denial of suspension of deportation. The opinion states, "The reasons
relied on by the Hearing Officer and the Board — mainly the fact that
petitioners had established no roots or ties in this country — were neither
capricious nor arbitrary."

More recent judicial analyses of immigration law discretion indicate more
concern with BIA standardization than with the non-exercise/exercise line
per se, though the issues are theoretically similar. Courts rarely asserted
that a BIA discretionary decision was completely unreviewable. But
standardization invited scrutiny both of the particular standards that were
chosen and of the bona fides of their application — claims of the type that
might generally be considered under an "arbitrary and capricious" rubric. As
enforcement policies hardened and as Congress sent increasingly strong
signals against granting relief, some courts, most prominently the Ninth
Circuit Court of Appeals, began to scrutinize BIA denials of relief rather
closely. Indeed, through the early 1990s, the Ninth Circuit increasingly
engaged in a kind of "hard look" review for the exercise of discretion in
Section 212(c) cases. In Yepes-Prado v. INS, for example, the court forcefully
(and presciently) stated,

Congress could have decided to deny discretionary relief to all persons
convicted of serious drug offenses, but it explicitly chose not to do
so. . . . The Attorney General should consider these applications on a
case by case basis.

By 1995, the problem of judicial review of relief from deportation
discretion seemed poised to come to a head in INS v. Elramly in which the
BIA's development of a standard for drug cases was challenged as insuffi-
ciently tailored. The Court, however, remanded the case, and the issue
remains unresolved.

180. Id. at 78.
181. Id. at 77. More specifically, the Court suggested that consideration of various outside factors
by the Board would not necessarily be improper: "Surely it is not unreasonable for him to take
cognizance of present-day conditions and congressional attitudes, any more than it would be arbitrary
for a judge, in sentencing a criminal, to refuse to suspend sentence because contemporary opinion, as
exemplified in recent statutes, has increased in rigour as to the offense involved." Id.
182. As noted above, following the revision of the judicial review scheme in 1961 and up to
1996, the primary importance of categorizing BIA action as discretionary was the scope of review,
183. But see infra Part V.
184. 10 F.3d 1363, 1371 (9th Cir. 1993). The Board was thus required to indicate "how it weighed
the factors involved" and "how it arrived at its conclusion." Id.
185. 49 F.3d 535 (9th Cir. 1995) (considering as equivalent crimes the handing off of one hundred
dollars worth of hashish and large-scale drug-trafficking). The author was counsel of record for amici
curiae law professors in Elramly before the Supreme Court.
The *Hintopoulus* Court's implicit acceptance of authority to review discretionary decisions under *habeas* in 1957 does not, of course, necessarily compel the conclusion that such review cannot constitutionally be precluded today. To reach that ultimate point one must consider more specifically the relationship between discretion and the fundamental importance of *habeas corpus* in our legal system. Questions abound. Can review itself constitutionally turn on the law/discretion line? If *Accardi* has, as it appears, been revitalized by *St. Cyr*, what sorts of claims may be brought? Are *Elramly*-type challenges to BIA standardization available on *habeas* per *Accardi*? Professor Gerald Neuman, echoing *Accardi* more than *Hintopoulous*, suggests that a statute or regulation may confer a "right" to consideration for discretionary relief, in which case "[a]n arbitrary refusal even to consider exercising discretion, or a legally erroneous finding of ineligibility, would deprive the alien of that limited right, and could render a resulting removal order unlawful."\(^{186}\)

The first part of this formulation — that the refusal to exercise discretion must be reviewable on *habeas* — certainly seems unproblematic if the refusal is obvious. If the agency simply were to say *no mas* and to deny consideration of apparently eligible cases, one can certainly envision a successful *habeas* challenge per *Accardi*. Similarly, if the alleged ground were a clearly illegal one, say race, then the fundamental responsibility of constitutional courts appears to warrant *habeas* review.\(^{187}\) Finally, as was alleged to be the case in *Accardi*, the intrusion of unauthorized outside influence, though perhaps better analyzed as a form of corruption than of discretionary practice, ought not to evade review (though on the merits *Hintopoulous* seemed to set a high bar to what sort of intrusion would actually be impermissible).

But the meaning of the term discretion itself becomes most problematic when one considers how Professor Neuman, before *St. Cyr*, saw what the future might hold, "scrutiny ... would not, however, include the intrusive substantive evaluations that courts have performed under the APA abuse of discretion standard."\(^{188}\) This seems right to me as a prediction of what some

---


188. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, supra note 162, at 1057. Professor Neuman accepts a fairly broad scope of *habeas* review:

Ultimately, it would appear to be an issue of statutory interpretation — and therefore an issue for judicial determination — whether a statutory provision for discretionary relief confers a right to consideration, and whether the validity of a removal order is contingent on the alien's having received such consideration. Not all forms of discretionary relief are alike, and the necessary role of a habeas court will depend on the particular configuration. If the statute does make consideration for discretionary relief a precondition for entry of a removal order, then the legality of the denial of relief should be open to scrutiny on habeas corpus. That scrutiny
courts will say. But how bright a line is that? And how well does that line comport with the underlying reasons to maintain habeas review? Implicit values of regularity, consistency, transparency, and separation of powers (not to mention justice) undoubtedly inspired Justice Harlan to assume in Hintopoulos, without even carefully analyzing the point, that the standard of review of the ultimate exercise of discretion ought to be either abuse of discretion or arbitrary and capricious. Much in St. Cyr and elsewhere indicates that those values remain strong. Most importantly, the values pressure courts to blur the ostensibly bright lines that divide unreviewable “matters of grace” from review standards such as “arbitrary and capricious” and “abuse of discretion.” To be sure, what one ends up with in cases like Hintopoulos is not so formally clear as the Accardi line; it is perhaps more a mood than a bright line. But the more one considers real cases, the more one sees that it is a very important mood to preserve.\textsuperscript{189}

All of this impels me to note that, as I have argued more fully elsewhere, the history of judicial review of Section 212(c) and other forms of discretionary relief, which now may assume constitutional dimensions following St. Cyr, illustrates the value of a richer, more complex theory of the rule of law and discretion in immigration law.\textsuperscript{190} The history of the BIA’s application of Section 212(c) to particular cases, for example, demonstrates how express discretionary grants of administrative power tend over time to develop more rule-like structures in order to maintain legitimacy. This tendency inevitably invites greater judicial oversight, which, in turn, invites complex discretion-avoidance formulae like the Accardi exercise/non-exercise distinction.

Messy though this all may have been, it had conversational attributes that were of great value to the INS and the BIA as well as to the people affected by these cases. But the conversations of the past may be silenced in the current era because the INS and the BIA will exercise discretion in relief from

\footnotesize{\textsuperscript{189} Also, the more deferential the discretionary test, the more one might expect to see Francis-type decisions as review of threshold “questions of law” becoming increasingly crucial. See e.g., Dillingham v. INS, No. 97-71038, 2001 U.S. App. LEXIS 20423 (9th Cir. Sept. 14, 2001) (allowing review of denial of eligibility for discretionary relief and holding that alien’s right to equal protection is violated if, in the course of removal proceedings, the INS refuses to recognize the effects of a British expungement statute on a simple drug possession offense that would have qualified for federal first offender treatment had it occurred in the United States). That is to say, trends towards the unreviewability of the exercise of discretion will put more pressure to review anterior questions under norms of equal protection and the like. Advocates will also undoubtedly continue to stretch the Accardi formulation to fit specific cases, so an apparent exercise of discretion will be argued to be ephemeral or a jurisprudential sham.}

\footnotesize{\textsuperscript{190} See generally Kanstroom, Surrounding the Hole in the Doughnut, supra note 30.}
deportation cases and because it may well be argued that St. Cyr implicitly holds such action immune from review.\textsuperscript{191} This could be a profoundly painful and unjust outcome for many non-citizens and their families and for our legal system as a whole.

The recent case of \textit{Byrdak v. INS}\textsuperscript{192} provides an example of how this can happen. \textit{Byrdak} involved the specific preclusion of review for certain implicitly discretionary decisions: 8 U.S.C. § 1252(g).\textsuperscript{193} Following pre-St. Cyr precedent,\textsuperscript{194} the court held that because the alien resident was challenging a discretionary decision by the BIA, i.e., the denial of a motion to reconsider and for stay of removal while he challenged his conviction in state court, the court lacked jurisdiction to consider a \textit{habeas} petition.\textsuperscript{195} The St. Cyr opinion may well be read by lower courts to preclude \textit{habeas} (and therefore all) judicial review of the final discretionary calculus, which is the point at which various considerations are balanced and applied. Everything then may turn on what is considered the \textit{really} discretionary part of a decision. Discretion will be a dustbin of a jurisprudential category: the place where, as triples were said to do in the glove of Joe Dimaggio, complicated legal questions go to die.

Courts may increasingly assert, in one phrasing or another, that there are large areas of our legal system in which there is simply “no law to apply,”\textsuperscript{196}

\[\text{\footnotesize{\textsuperscript{191}} See also Zadvydas v. Davis, 121 S. Ct. 2491, 2497 (2001) (“The aliens here, however, do not seek review of the Attorney General’s exercise of discretion; rather, they challenge the extent of the Attorney General’s authority under the post-removal-period detention statute. And the extent of that authority is not a matter of discretion.”).}\]
\[\text{\footnotesize{\textsuperscript{192}} No. 00-C-6182, 2001 U.S. Dist. LEXIS 10055 (N.D. Ill. July 13, 2001).}\]
\[\text{\footnotesize{\textsuperscript{193}} Section 1252(g) states:}\]
\[\text{\footnotesize{Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.}}\]
\[\text{\footnotesize{8 U.S.C. § 1252(g) (2000).}}\]
\[\text{\footnotesize{\textsuperscript{194}} See Fedorca v. Perryman, 197 F.3d 236, 239 (7th Cir. 1999) (holding that Section 1252(g) deprived it of jurisdiction over a Section 2241 petition requesting review of the BIA’s decision to deny petitioner’s request for a stay of deportation).}\]
\[\text{\footnotesize{\textsuperscript{195}} Byrdak, 2001 U.S. Dist. LEXIS 10055, at *12.}\]
\[\text{\footnotesize{\textsuperscript{196}} The history of judicial interpretation of APA § 701(a)(2), 5 U.S.C. § 701(a)(2) (1994), which limits judicial review of agency action if “agency action is committed to agency discretion by law” is a likely source for prediction of future discretionary immigration litigation. Under the APA, courts have, in general, been very reluctant to hold agency action unreviewable under Section 701(a)(2) as “committed to agency discretion.” Since its 1967 opinion in Abbott Lab. v. Gardner, 387 U.S. 136 (1967), the Supreme Court has generally presumed reviewability in cases governed by the APA. The Court later more colorfully asserted in Overton Park that judicial review would only be precluded where “statutes are drawn in such broad terms that in a given case there is no law to apply.” Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971). Of course, the INA does not necessarily embody the basic presumption of judicial review” of the APA. Still, the Section 701(a)(2) cases are shot through with the same sort of normative underpinnings that the St. Cyr majority applied to \textit{habeas} review of deportation cases. For a time in the mid-1980s it appeared that a strongly preclusive reading of Section 701(a)(2) might be invigorated by two rather different Supreme Court decisions. In Heckler v. Chaney, the FDA had refused to initiate an enforcement action against a state for the use of an injectable drug for capital punishment although the drug was not approved for that use. 470 U.S. 821, 830-32 (1985). The Court found that the FDA’s decision not to enforce certain provisions of the}}\]
despite a well-developed and, one hopes, still widely-shared feeling that “there is no place for unreviewable discretion in a system such as ours.”

This background norm has been less consistently applied in immigration law than in other administrative law arenas. For example, long before AEDPA and IIRIRA, Judge Easterbrook had suggested, albeit in an exceptionally confusing opinion, that a denial of discretionary relief in the context of a motion to re-open was not subject to judicial review.

In the sort of language that seemed designed to enflame more than to convince, Judge Easterbrook wrote, “The Board did not take mercy on Achacoso-Sanchez, but it has the discretion to be cold-blooded.” Statements such as this actually help to clarify the fundamental debate. How much, if any, unreviewable discretion should our constitutional system tolerate in deportation cases? Judge Easterbrook’s confidence in the Department of Justice vies with the view once advocated by Judge Friendly, who expressly rejected the argument that, at the very least, discretion under either the APA or the INA could “not [be] subject to the restraint of the obligation of a reasoned decision.” This more encompassing view of the rule of law still courses like well-oxygenated blood through even the most discretionary capillaries of our legal system.

FDCA was not subject to judicial review because “if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for ‘abuse of discretion.’” In Webster v. Doe, the Court rejected a statute-based challenge to the decision of the Director of the CIA to terminate a homosexual employee because it was “committed to agency discretion by law” and there was said to be no law to apply. 486 U.S. 592 (1988). These cases presented very different administrative law and policy issues from those raised by deportation relief cases. And, in any event, the intervening years have not witnessed a revitalization of Section 701(a)(2) by the Court. But see Lincoln v. Vigil, 508 U.S. 182, 192-95 (1993) (holding allocation of funds from lump-sum committed to agency discretion).

197. Bernard Schwartz, Administrative Law Cases During 1985, 38 ADMIN. L. REV. 392, 410 (1986). Moreover, as Professor Ronald Levin has noted, the “no law to apply” formula so ignores the considerations that undoubtedly influence decisions about unreviewability that lower courts “have tortured and evaded the formula in as many ways as they can construe.” Ronald M. Levin, Understanding Unreviewability in Administrative Law, 74 MINN. L. REV. 689, 690 (1990).

198. Achacoso-Sanchez v. INS, 779 F.2d 1260, 1265 (7th Cir. 1985).

199. Id. (citations omitted). More specifically the judge opined that “[a]buse” of discretion cannot be understood without reference to the purpose and scope of the discretion being exercised. The discretion of immigration officials is exceptionally broad. The Board’s discretion is broad in part because it administers the immigration laws, and “over no conceivable subject is the legislative power of Congress more complete” than with respect to immigration.

Id.

200. Wong Wing Hang v. INS, 360 F.2d 715, 718 (2d Cir. 1966) (citations omitted).

201. It is, for example, interesting to note that former INS Commissioner Meissner, in a memorandum that authorized and encouraged the exercise of prosecutorial discretion, generated a fairly specific list of standards and factors to be applied. Though part of the purpose of such agency action may well be to discourage judicial review, it hardly equates to a mysterious, contentless, unquantifiable or even unreviewable “matter of grace.” The list, the structure, and the relative transparency all inspire confidence. But if the agency were to diverge from such practice and, for example, rely again on secret lists of “unsavory characters,” it is hard to accept such arbitrary actions with such stakes as completely immune from all judicial scrutiny.
The congressional delegation of discretionary authority in Section 212(c) and other discretionary relief-from-deportation statutes is exceedingly broad; one might even say contentless. But this does not necessarily mean that it can simply be dismissed as a “matter of grace” or that its insulation from judicial review does not raise serious questions under the Suspension Clause. Surely our legal system can do better in cases in which long-term legal residents may be separated forever from their families than simply to say, “no one is entitled to mercy, and there are no standards by which judges may patrol its exercise.”

F. Amazing Grace

If nothing else, *St. Cyr* and its progeny ought to inspire reconsideration of the potentially misleading “matter of grace” formulation. Even a cursory review of the history of the phrase demonstrates its malleability and its anachronistic quality in a well-developed, modern legal system. Indeed, despite its rhetorical power, it has almost never been fully synonymous with “arbitrary” or equivalent to “completely outside of the prevailing norms of our legal system.” Like the general ideas of discretion and privilege, the functional meaning of “grace” varies greatly according to time and context.

---

202. The long interpretive history of such laws, however, may provide fodder for arguments that Congress acted against fairly specific background understandings of the sorts of factors to be considered.

203. For one thing, unlike in *Webster*, there is no obvious national security issue at stake in most such cases. Also, the decisions of the BIA in such cases are explicitly (and appropriately) based on a balancing of specific factors, which, as noted above, seem to invite at least some kind of review.

204. *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1265 (7th Cir. 1985).

205. In addition to the areas discussed in this Part, the “matter of grace” formulation also has appeared with some regularity:

In claims by Native American Indians: *See e.g.*, Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) (lands granted by executive order did not recognize title or ownership of the Indians to any part of the land; therefore, compensation was only granted as a matter of grace and not as a matter of obligation); *see also* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). In *Tee-Hit-Ton Indians*, an Alaskan Indian tribe claimed that their property was taken without compensation in violation of the Fifth Amendment when the federal government sold Alaskan timber. The Supreme Court held that the Indians did not have a right to unrestricted possession because no federal statute gave them such a right. The Court reasoned that the Indians had no compensable interest because their right to use the land was given at the government’s will. They did not hold title to the land; rather, they were permitted by whites to occupy portions of the land. This right of occupancy could be terminated at any time that the sovereign desired without compensation. The Court treated the Indians as a wronged group who could be compensated only by the “compassion” of the American people: “Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability.” *Id.* at 281.

In tax and notice cases: *New York ex rel. Metro. St. Ry. Co. v. New York State Bd. of Tax Comm’r*, 199 U.S. 1 (1905) (allowing a reduction because of the “nature of the tax” is a *matter of grace*, granted by the legislature because like a tax exemption, a tax reduction is given in some cases, but it is not an entitlement protected by the Constitution); *see also* Security Trust & Safety Vault Co. v. Lexington, 203 U.S. 323 (1906) (assessment for back taxes was made as a special assessment and was entered into the assessor’s books after a new statute became effective; the new statute did not provide for notice of the special assessment; therefore, notice
The phrase has basic historical links to sovereign immunity. Its earliest reported invocation by the U.S. Supreme Court was the eighteenth century opinion in *Chisholm v. Georgia*. The plaintiff in *Chisholm*, who was not a resident of Georgia, had brought a suit “in assumpsit” against the State of Georgia, the attorney general of which had claimed sovereign immunity. The Court ruled against state sovereign immunity from suits by citizens of other states.

Justice Iredell interpreted the common law of England as to remedies available against the Crown. According to Blackstone, until the time of Edward I, the King could be sued in all actions as a common person. After that time, those who sought to pursue a legal action against the King could only do so by petition to the King for leave to file suit against him:

If any person has, in point of property, a just demand upon the King, he must petition him in his Court of Chancery, where his Chancellor will administrator right, as a matter of grace, though not upon compulsion.

The King in such cases was not obligated to “administer a right.” Rather, it was said to be the King’s choice that was bestowed upon the petitioner “as a matter of grace.” A petitioner could in no way force the King to observe a contract, but had to persuade him to do so. Thus, on first blush, “grace” seems to imply a certain necessary acceptance of arbitrariness and lack of judicial review.

But there is considerably more to the rule of law than its formal structures. For example, the Court notes, with some approval, Puffendorf’s assertion that “no wife [sic] prince will ever refuse to stand to a lawful contract.” Indeed, it appeared that the usual procedure was for the King to endorse a petition, “soit droit fait la partie” (let right be done to the party), upon which a commission would look into the truth of the claim. Although both the

---

was given “as a matter of grace” and not as a matter of right); Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915) (a formal levy was made upon a parcel of Coe’s property without notice to him; the court held that such taking without notice deprived the stockholder of due process of law and the right to a hearing under the Fifth and Fourteenth amendment due process protections can not be substituted by a hearing that is granted as a matter of discretion or favor). In land grants: See United States v. City of Santa Fe, 165 U.S. 675, 700-02 (1897). In government payments: See District of Columbia v. Eslin, 183 U.S. 62, 65 (1901).

206. Students of immigration law history may be struck by the sovereignty origins of a phrase that has assumed more importance recently in a context where the government’s power has been held inherent in sovereignty. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

207. *2 U.S. 419* (1793).


209. *1 William Blackstone, Commentaries *203 (quoted in Chisholm v. Georgia, 2 U.S. 419, 450 (1793) (emphasis added)).

210. Id.
procedure and the substance of such actions were affected by the invocation of "grace," it was a more bounded concept than it might appear. To be sure, if the action proceeded at all it did so upon "natural equity and not municipal law." Though this was formally outside the rule of law, there were powerful background norms to "let right be done" that argued against the idea that "grace" could legitimately equal arbitrariness.

Later uses of the phrase support the notion that calling government action "a matter of grace" did not necessarily mean it was outside of the norms of the legal system or even immune from judicial review. Indeed, the better view in a constitutional system after *Marbury v. Madison* would seem to be that the ultimate repository of "grace," in the sense of finality, is the Supreme Court.\(^{211}\)

Some cases have tended to equate "grace" with "privilege" — a counter-principle to a "right"\(^{212}\) but not so absolute a notion perhaps as might be

\(^{211}\) The Court itself has intimated this in *State of Rhode Island and Providence Plantations v. Commonwealth of Massachusetts*, 37 U.S. 657 (1838). In this case, which involved a dispute over the boundary between Rhode Island and Massachusetts, the Court applied the "matter of grace" metaphor to its own authority. The states, via the Constitution, were held to have transferred the sovereign rights to decide boundaries to the Court:

The states, in their highest sovereign capacity, in the convention of the people thereof; on whom, by the revolution, the prerogative of the crown, and the transcendent power of parliament devolved, in a plentitude unimpaired by any act, and controllable by no authority, adopted the U.S. Constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more states. By the Constitution, it was ordained that this judicial power, in cases where a state was a party, should be exercised by the United States Supreme Court as one of original jurisdiction. The states waived their exemption from judicial power, as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal.

\(^{212}\) Indeed, the "matter of grace" phrase has been used in contexts that demonstrate how what was once "grace" can, over time, even become a "right." In *James v. Cambell*, 104 U.S. 356 (1881), for example, the complainant had brought a suit for patent infringement. The Court noted that the granting of a patent in England, which was once "a matter of grace," had evolved into "a matter of right" in the United States by virtue of the codification of patent rights in the Constitution. See also *United States v. River Rouge Improv. Co.*, 269 U.S. 411 (1926). Appellate review, in the context of due process, also has such an evolutionary history. In *Luckenback Steamship Co. v. United States*, 272 U.S. 533 (1926), several of the claimant's barges and tugs were taken into possession by the United States. The claimant sued the government. The Court held that there was no right to bring these suits against the United States except when Congress had consented. The right arising from the consent was therefore subject to such restrictions as Congress had imposed: "An appellate review is not essential to due process of law, but is a matter of grace." *Id.* at 536. Similarly, in the context of criminal appeals in *Cobbledick v. United States*, 309 U.S. 323 (1940), the Court noted the importance of finality as a condition of review in the criminal process and then stated that, "since the right of judgment from more than one court is a matter of grace and not a necessary ingredient of justice," the
implied by the earlier equation with the King’s sovereign power. Moreover, it is interesting to note that the term usually appears as a negative — not used to deny a claim but as a counterpoint in support of granting one. In *Ex parte Garland,* for example, the Court upheld the right of an attorney to maintain his license even though he declined to take a loyalty oath (which he was unable to take because of his past participation in the Confederate government). The Court noted that

[A]n Attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a [*matter of grace*] and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

Both the malleability of the “matter of grace” idea and its complex relationship to the right/privilege distinction for purposes of due process are illustrated by cases involving probation and parole.

---

213. One possible path for the migration of the phrase from sovereignty into the aliens’ rights context is demonstrated by the case of *Sullivan v. Kidd,* 254 U.S. 433 (1921), which involved a dispute over land that was inherited by a resident and citizen of Canada, who was also a British subject. Here the underlying link to sovereignty was relatively clear. Under British interpretation of a relevant treaty, the woman, as a British subject, was entitled to succession. The American interpretation, however, was that she was not entitled to inherit because notice of adherence for the Dominion of Canada was not given. The Court held the United States did not need to accord the right to inherit under the treaty because Canada interpreted the treaty to afford aliens such a right. The Court stated that each sovereign nation may contract as it desired, granting any rights to other citizens as “a matter of grace” and not as “a matter of right.” *Id.* at 440.

214. The phrase frequently retained its early associations with general notions of discretion and equity, though these do not necessarily imply complete immunity from judicial review. In *Ownbey v. Morgan,* 256 U.S. 94 (1920), the plaintiff filed a suit and attached the defendant’s land in Delaware, where the plaintiff lived. The defendant sought to compel the state of Delaware to relax its established legal procedure, but the court refused. He appealed to compel the common law courts to exercise their extraordinary jurisdiction, distinguishable from their ordinary or formal jurisdiction. The Court held that the Due Process Clause of the Fourteenth Amendment did not require the state to depart from its usual measures and relieve him from his hardship. “But where the proceedings have been regular, it is exercised as a matter of grace or discretion, not as of right, and is characterized by the imposition of terms on the party to whom concession is made.” *Id.* at 438. The key here, I believe, is the requirement of “regularity.”

215. 71 U.S. 333 (1866).

216. *Id.* at 379.

217. This discussion is limited to the liberty interest in the right or expectation of parole and the ensuing due process considerations recognized by the Supreme Court. The Supreme Court has addressed the concept of liberty interests within the context of many other prison-related activities. See e.g., Kentucky Dep’t of Corr. v. Thompson, 490 U.S. 454 (1989) (finding prisoners had no liberty interest to receive outside visitors); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981) (determining that Board of Pardons was not required to provide prisoners with written statement explaining reasons for not shortening sentence where state statute did not impose limits on the...
referred to parole and probation as matters of grace, but even then they did not equate the categorization with complete immunity from review. For example, in *Burns v. United States*,\(^{218}\) the petitioner’s probation had been revoked in a proceeding that was challenged, in part, as having involved conditions of which he had not been informed.\(^{219}\) The Court invoked the right/privilege distinction: “The evident purpose [of a list of conditions] is to give appropriate admonition to the probationer, not to change his position from the possession of a privilege to the enjoyment of a right.”\(^{220}\) Following this, however, the Court held that there should be some sort of review process under the rubric of an abuse of discretion test. The exercise of judicial discretion\(^{221}\) could not be arbitrary.\(^{222}\) This approach was equally applicable to “grace” in this context. As the Court put it, “While probation is a matter of grace, the probationer is entitled to fair treatment, and is not to be made the victim of whim or caprice.”\(^{223}\) *Escoe v. Zerbst* was similar.\(^{224}\) Petitioner was granted probation, which was then revoked pursuant to a federal statute that allowed for the revocation of his parole by a court. Instead of being brought before a court, he was “taken to a prison beyond the territorial limits of that court and kept there in confinement without the opportunity for a hearing.”\(^{225}\) The Supreme Court held, “For this denial of a legal privilege the commitment may not stand.”\(^{226}\) The Court declined to base its holding directly on the Constitution, noting that probation “comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose.”\(^{227}\) As the statute mandated a hearing before a court, it was also held to require “an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper.”\(^{228}\) By the 1970s the final transformation from grace/privilege to right in the parole and probation context was complete. In *Morrissey v. Brewer*, the Court determined that “some orderly process, however informal,” was required in parole

---

218. 287 U.S. 216 (1932).
219. The petitioner argued that he was entitled to previous notice of the specific charges and to a judicial-type hearing.
220. *Burns*, 287 U.S. at 222.
221. One might distinguish the specific applicability of this line of cases on the ground that judicial discretion may be differently viewed from administrative discretion.
222. *Burns*, 287 U.S. at 222.
223. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*; see also *Berman v. United States*, 302 U.S. 211 (1937) (holding that probation, “an act of grace,” did not affect the finality of judgment).
revocation because of the parolee's liberty interest. According to the Court, "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." Then, in *Gagnon v. Scarpelli*, the Court determined that no difference between the revocation of probation and the revocation of parole existed regarding due process. Significantly, for present purposes, the Court stated,

> It is clear at least after *Morrissey v. Brewer*, that a probationer can no longer be denied due process, in reliance on the dictum in *Escoe v. Zerbst*, that probation is an "act of grace."

The Court reiterated that the required preliminary and final revocation hearings were intended to serve the interest both of the parolee or probationer and the State. The Court's reasoning is as applicable to removal cases as to probation and parole:

Both the probationer and parolee and the State have interests in the accurate finding of fact and the informed use of discretion — the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

The use of the "matter of grace" phrase that is perhaps most analogous to its modern invocation in deportation cases is in the Court's review of the pardon power in criminal cases. As early as the 1833 case of *United States v. Wilson*, the Court said, "a pardon is an act of grace," implying a lack of

---

229. 408 U.S. 471, 482 (1972).
230. On the liberty interest of parolees, the Court wrote,

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State property subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in prison.

*Id.*

231. 411 U.S. 778, 782 (1973). The Court held "that a probationer, like a parolee, is entitled to a preliminary and final revocation hearing, under the conditions specified in *Morrissey v. Brewer*," even though probation revocation, like parole revocation, is not part of a criminal prosecution. *Id.*

232. *Id.* at 782 n.4 (citations omitted).
233. *Id.* at 786.
234. *Id.* at 785.
235. 32 U.S. 150 (1833). The complete quotation is worth reading:

A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law
judicial oversight. In more modern cases, however, the view that pardons are unreviewable acts of grace has been considered more fully. The traditional view is illustrated by *Solesbee v. Balkcom*, in which a defendant asked the governor of Georgia to postpone his execution on the grounds that he had become insane while awaiting trial.\(^{236}\) The governor denied the claim without hearing or permitting judicial review of the findings in accordance with a state statute. The Supreme Court held that a person legally convicted and sentenced to death had no statutory or constitutional right to have his sanity reviewed before execution. "It viewed the Georgia statutory procedure for determination of this question as motivated solely by a sense of 'public propriety and decency — an act of grace' which could be 'bestowed or withheld by the State at will.' "\(^{237}\) It was therefore found not subject to even minimal due process requirements of notice and hearing.\(^{238}\) The reasoning of the Court is instructive. Stating that the power to reprieve comes from the same source as the power to pardon, which is derived from English law, the Court noted that this power traditionally rested in a governor or the President, although some has been delegated to agencies, such as pardon or parole boards. Yet, this power of executive clemency was said to be seldom subject to review by the courts.\(^{239}\) This logic is essentially the same as that of the Court in *Jay v. Boyd*, when suspension of deportation was called a "matter of grace" as opposed to "a matter of right."\(^{240}\)

There are glimmers of transformation in the law of pardons, however. The implicit meaning of grace in the context of executive clemency was at issue in *Herera v. Collins*.\(^{241}\) An inmate convicted of capital murder argued that he

\(\text{id. at 160-61.}\)

\(\text{236. } 339 \text{ U.S. 9 (1950).}\)

\(\text{237. } \text{id. at 11.}\)

\(\text{238. } \text{id.}\)

\(\text{239. Justice Frankfurter dissented. Id. at 14. He argued that the constitutional protections afforded the person awaiting execution are no different from those that pertain during trial. Id. As he could not have been executed then if found insane, he cannot be executed now for the same reason. The exercise of this constitutional protection, therefore, cannot be left to the discretion of the governor of Georgia. Id. at 25-26.}\)

\(\text{240. As noted above, this formula may derive from Justice Jackson's Accardi dissent in which he had argued that the role of the Court is to determine legal rights, not to review executive "acts of grace." The phrase, however, appeared in other contexts during this period. See e.g., Simmons v. United States, 348 U.S. 397 (1955) (holding the provision of a summary of an FBI report to be a right, not a "matter of grace").}\)

\(\text{241. } 506 \text{ U.S. 390 (1993).}\)
was eligible for habeas corpus relief based on the fact that he had discovered new evidence and was no longer guilty. The Court held that such evidence was not grounds for a habeas corpus petition absent any independent constitutional violations.\textsuperscript{242} But the case also involved an interesting dispute about the role in our system of executive clemency, said to be a form of "grace." The majority offered a view of the general history of clemency, which encompassed pardons, commutations, remissions of fines, and reprieves,\textsuperscript{243} and opined that clemency "is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."\textsuperscript{244} Justice Blackmun, in dissent, disputed the majority's acceptance of the sufficiency of clemency to protect rights: "Whatever procedures a State might adopt to hear actual-innocence claims, one thing is certain: The possibility of executive clemency is not sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments."\textsuperscript{245} Though he agreed that "a pardon is an act of grace," he asserted that "the vindication of rights guaranteed by the Constitution has never been made to turn on the unreviewable discretion of an executive official or administrative tribunal."\textsuperscript{246} Put most forcefully, "If the exercise of a legal right turns on 'an act of grace,' then we no longer live under a government of laws."\textsuperscript{247}

The most relevant case for present purposes, however, may be Ohio Adult Parole Authority v. Woodard, in which five justices concluded that the strong version of the "matter of grace" idea is not appropriate in capital clemency cases.\textsuperscript{248} Indeed, Justices O'Connor, Souter, Ginsburg, Breyer, and Stevens stated that procedural due process principles govern a clemency hearing even though the clemency decision was entrusted to executive discretion.\textsuperscript{249} Chief

\textsuperscript{242} Id. (Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ.).

\textsuperscript{243} Id. It traced the use of clemency back to England, where such power was one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court in equity in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.

\textsuperscript{244} "Clemency," the Court said, "provided the principal avenue of relief for individuals convicted of criminal offenses — most of which were capital — because there was no right of appeal until 1907." Id. (citing 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 122 (1948)).

\textsuperscript{245} Id. at 439 (Stevens and Souter, JJ., joining).

\textsuperscript{246} Id. (citing Ford v. Wainwright, 477 U.S. 399, 416 (1986), which had explicitly rejected the argument that executive clemency was adequate to vindicate the Eighth Amendment right not to be executed if one is insane).

\textsuperscript{247} Herera, 506 U.S. at 440.

\textsuperscript{248} 523 U.S. 272 (1997). Connecticut Board of Pardons v. Dumschat had held that the Due Process Clause did not apply in non-capital clemency proceedings because there was no constitutionally protected interest in such proceedings. The reasoning was that an inmate's "liberty" ended with a valid conviction and any interest the inmate might have in clemency was "simply a unilateral hope." 452 U.S. 458, 464-65 (1981). Dumschat, however, did deal with capital clemency proceedings.

\textsuperscript{249} Id. The case involved an Ohio law that gave the governor the power to grant clemency, required the state's parole authority to conduct a clemency hearing within forty-five days of the execution, and allowed the inmate to request an interview with parole authority members before the
Justice Rehnquist, in a portion of the opinion joined by Justices Scalia, Kennedy, and Thomas, had argued that there is no cognizable due process interest in capital clemency proceedings because “[t]he process Respondent seeks would be inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace.” Although it was conceded that Mr. Woodard retained “a residual life interest” not to be summarily executed by prison guards, this, it was said, did not lead to a due process right of any import. This was a fairly standard invocation of the “matter of grace” formulation in the due process context. But Justices O’Connor, Souter, Ginsburg, and Breyer, concurring in part and dissenting in part, stated at the outset that, “a prisoner under death sentence remains a living person and consequently has an interest in his life.” Further, these Justices disputed the notion that “because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards.”

At least in the context of capital cases, some minimal procedural protections apply to clemency proceedings, i.e., if a state official “flipped a coin to determine whether to grant clemency” or if the State “arbitrarily denied a prisoner any access to its clemency process.” Justice Stevens, also concurring in part and dissenting in part, was even more specific:

[T]he Chief Justice takes a different view — essentially concluding that a clemency proceeding could never violate the Due Process Clause. Thus, under such reasoning, even procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence would be constitutionally acceptable . . . I respectfully disagree with that conclusion.

hearing, but did not allow for counsel at the hearing. An inmate claimed that the process violated his Fifth and Fourteenth Amendment rights against self-incrimination. The Justices divided significantly on a number of issues.

250. 523 U.S. 272, 280 (1997); see also Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (holding that the Governor has complete discretion to make a final decision on clemency and the Authority’s recommendation is purely advisory; this process indicates that the State has not created a protected interest).

251. These Justices rejected arguments, based on Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, that mandatory procedures in the Ohio scheme created a liberty interest, and on Evitts v. Lucey that because clemency was arguably an integral part of Ohio’s system for adjudicating guilt or innocence it had to comport with due process: “Here, the executive’s clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural protections the Respondent urges.” Id. at 285. See generally Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1 (1979) (the expectancy of release on parole created by the mandatory language of the Nebraska statute was entitled to some measure of constitutional protection; however, due process did not require a formal parole hearing and a statement of the evidence relied upon by the parole board); Evitts v. Lucey, 469 U.S. 387 (1985) (there is a constitutional right of effective assistance of counsel on a first appeal as an “integral part” of the adjudicatory system).

252. Woodard, 523 U.S. at 286.

253. Id.

254. Id. at 289.

255. Id. at 290.
Woodard thus demonstrates a few noteworthy things:

- The formulation of executive action as an unreviewable "matter of grace" for due process purposes is the end point of an implicit analysis that inevitably must evaluate the importance of the interest of the individual;
- Judges are quite capable of piercing this formulation when sufficiently motivated to do so, e.g., in a death penalty case where as Justice Stevens put it, "it is abundantly clear that respondent possesses a life interest protected by the Due Process Clause";\(^{256}\) and
- The idea of Due Process is sufficiently malleable and flexible to apply even to clemency proceedings.\(^ {257}\)

As an alternative and, I think, superior approach to the formalistic, unreviewable "matter of grace" formula, review of even discretionary deportation matters could be viewed (and, on habeas, undoubtedly reviewed) in this light:

Even if a State has no constitutional obligation to grant criminal defendants a right to appeal, when it does establish appellate courts, the procedures employed by those courts must satisfy the Due Process Clause . . . Likewise, even if a State has no duty to authorize parole or probation, if it does exercise its discretion to grant conditional liberty to convicted felons, any decision to deprive a parolee or a probationer of such conditional liberty must accord that person due process.\(^ {258}\)

As to the applicability of such reasoning in the context of deportation, one might also recall the dissents in Jay v. Boyd. Chief Justice Warren stated that the strong "matter of grace" formulation sacrificed "to form too much of the American spirit of fair play in both our judicial and administrative processes."\(^ {259}\) He noted that "relief from deportation" discretion was not created by Congress as a "carte blanche" but in the "interest of humanity."\(^ {260}\) When such discretion is exercised to deny relief, it should therefore be analyzed more closely than when it grants relief.\(^ {261}\) Abstract symmetry may suffer, but justice may thrive.

III. The Civil-Criminal Line and the Problem of Retroactivity

Let us return to basics. Enrico St. Cyr ended up before the Supreme Court because he had been convicted of a crime, was found to be subject to

\(^{256}\) Id. at 292.

\(^{257}\) Id. ("Even if due process is required in clemency proceedings, only the most basic elements of fair procedure are required.").

\(^{258}\) Id. (citations omitted).


\(^{260}\) Id.

\(^{261}\) Id.
deportation because of that conviction, and was retroactively deprived of a discretionary option that might have allowed him to continue to live in the United States as he had legally done since 1986. Had his case been a criminal one instead of deportation and had the discretionary issue been a choice between time in prison and probation (in other words, had only his liberty and not his continued residence in the United States been at risk), the retroactive removal of the possibility of probation by the legislature would have been prohibited by the *Ex Post Facto* Clause.\footnote{262} The operative date would have been that of the commission of the underlying crime. There would be no problem of whether the "conduct" at issue for purposes of deciding whether the law had retroactive effect was the crime or the plea.\footnote{263}

Nor would the discretionary nature of probation or of the judicial choice between probation and prison be a major impediment to finding such a law unconstitutional. Indeed, the decision of the Court in *Lindsey v. Washington*—that the retroactive change of a state statute that removed the possibility of (discretionary) parole violated the *Ex Post Facto* Clause—would seem to control.\footnote{264}

The Court’s majority opinion in *St. Cyr*, however, avoids consideration of the possibility that deportation of the type faced by St. Cyr—that of a long-term lawful permanent resident based on a post-entry criminal conviction—could be punishment for purposes of the *Ex Post Facto* Clause. This is accomplished, first, by reaffirmation of the venerable formalism that deportation is “civil” and “not punishment for past crimes.”\footnote{265}

What follows, however, is much more interesting. The Court uses a combination of a search for clear expression of congressional intent and the


\footnote{263} In any case, reliance does not only apply to the plea context. As the court noted in *Mojica*,

Even if retroactivity is measured from conviction rather than from commission of the crime it is suspect. Once the individual is accused of a crime and has to make choices during criminal proceedings, he or she begins actual reliance on expectations of the law. In criminal proceedings the accused faces a number of choices. The defendant may (1) plead guilty as charged (or, in some jurisdictions, *nolo contendere*); (2) plead guilty to a lesser offense in exchange for dropping of a more serious charge; or (3) contest the charge and go to trial. If convicted the defendant may choose to appeal or waive appeal. In particular a defendant who plea bargains must choose among various possible dispositions, weighing various possible sentencing outcomes and other consequences. Those consequences include whether the plea will lead to deportation.

*Mojica v. Reno*, 970 F. Supp. 130, 143-44 (E.D.N.Y. 1997); *see supra* Part I.C.

\footnote{264} 301 U.S. 397, 401-02 (1937) (holding state statute that provided that a sentence shall be fixed by court at a maximum term with possible earlier release through parole and that amended statute authorizing maximum and minimum sentences as violating *Ex Post Facto* Clause because it provided a technical increase in punishment because accused were denied possibility of sentence of less than the maximum without parole); *see also* Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663 (1974) (stating that statute taking away parole eligibility for offenses subject to parole according to the law at the time they were committed could be found to be constitutionally impermissible as an *ex post facto* law).

\footnote{265} INS v. St. Cyr, 121 S. Ct. 2271, 2292 (2001).
The oblique invocation of sub-constitutional normative reasoning. The result was obviously good for Mr. St. Cyr and for other potential Section 212(c) applicants. But it may well turn out to be substantially less than half a loaf for those who face deportation in the future.

The first gripe I have with the Court's reasoning is obvious. Others have long argued in favor of the proposition that at least some types of deportation ought to be considered punishment for Ex Post Facto Clause purposes. Strong historical and functional arguments sustaining this view may be traced back as far as Calder v. Bull. It has also been persuasively suggested that substantive due process principles should apply. These arguments will not be repeated at length here. It is clear that, for the time being, that horse is dead and further beating of it serves no purpose.

Still, it is interesting to note that there was more supporting the suggestion that a functional constitutional approach was superior than considerations of justice. There were also considerations of logic, consistency, and transparency. What has struck me upon reading St. Cyr in this light is how civil retroactivity theory, itself already complex to the point of Talmudic scholar eye-crossing, becomes even more so because of the Court's persistence in maintaining the civil-criminal line. Had the Court considered the nature of the deportation proceedings even a bit more functionally, had it been willing to grasp even a bit more directly with the questions of justice and fairness underlying the challenges to AEDPA and IIRIRA retroactivity, it might well have achieved a more durable and comprehensive outcome.

Consideration of certain analytical peculiarities in the St. Cyr opinion supports this contention. The first and most basic peculiarity in St. Cyr is the oddly formalist connection made between the Court's prior unwillingness to grant a remand for a jury trial to a plaintiff in a sexual harassment case.
(Landgraff)\textsuperscript{273} and the retroactive removal of a discretionary defense to deportation by the government against an individual. Are these things really similar enough to apply the retroactivity logic of one to the other without comment?\textsuperscript{274}

Ever since the Court definitively separated the strands of criminal\textsuperscript{275} and civil retroactivity analysis in \textit{Calder v. Bull},\textsuperscript{276} a succession of Justices have struggled mightily, but unsuccessfully, to develop a comprehensive theory of civil retroactivity. One reason for this is the breadth of the civil category itself. Another, even more fundamental, reason is that the basic antipathy that any rule of law system has towards retroactivity can never be absolute. All judicial decisions, for example, are in one form or another retroactive. Legislation may upset settled expectations but be sufficiently ameliorative in other respects to overcome the aversion to retroactivity. Indeed, the one consistent element repeatedly stated by the Court in civil cases, that "a court will and ought to struggle hard against a construction which will, by retrospective operation, affect the rights of parties,"\textsuperscript{277} was overcome by other considerations in the first case in which it was enunciated. Since then, civil retroactivity jurisprudence has twisted and turned under the weight of various formalisms and formulations. These have included balancing the general anti-retroactivity urge with various methods of interpreting ambiguous statutory language (most recently, a strong affirmation of the principle that "where the congressional intent is clear, it governs");\textsuperscript{278} avoidance of constructions said to be "unreasonable or unjust";\textsuperscript{279} considerations of "vested rights";\textsuperscript{280} and attempts to develop special exceptions for procedural

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{273} Landgraf v. USI Film Prod., 511 U.S. 244 (1994).
\item \textsuperscript{274} See generally id. ("Landgraf did not persuasively reconcile the Court's retroactivity jurisprudence and its purported framework is incomplete.").
\item \textsuperscript{275} Or, more precisely, punitive.
\item \textsuperscript{276} 3 U.S. (3 Dall.) 386 (1798).
\item \textsuperscript{277} United States v. Schooner Peggy, 5 U.S. 103, 110 (1801). For a time the Court explicitly rejected the contention, derived from Schooner Peggy, that "a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." See Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974) (allowing petitioners reasonable attorney fees for services rendered prior to the enactment of statute because the propriety of the award was pending resolution on appeal when the statute became law and because no manifest injustice would result from such a retroactive application); see also Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969) (using constitutional analysis and principle that appellate court must apply law in effect at time it renders decision to overcome retroactivity objection by housing authority to HUD notice requirements for evictions).
\item \textsuperscript{278} See Kaiser Aluminum and Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) (interpreting federal interest statute, which was amended while appeal was pending, on its "clear meaning" and determining that it contained no language that it was to have retroactive application); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (holding that a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms); see also United States v. Heth, 7 U.S. 399 (1806) (disallowing retroactive reduction in commissions received by customs collectors).
\item \textsuperscript{279} Heth, 7 U.S. at 411.
\item \textsuperscript{280} Id. at 414.
\end{itemize}
\end{footnotesize}
The most important recent case in this line was Landgraf, which involved the expansion of relief for workplace sexual harassment contained in the Civil Rights Act of 1991. Plaintiff Barbara Landgraf's case was on appeal when the statute was passed, and she sought a remand so she could proceed under the new law. In denying her claim, the Court found that the legislation was not clear and then enunciated a "default" non-retroactivity rule. Following the rough "first step" pattern of the Chevron case he had penned a decade earlier, Justice Stevens (also the author of St. Cyr) recognized that, in the retroactivity context, the absence of clear statutory language meant that the Court had to resolve an apparent tension between two seemingly contradictory canons for interpreting such temporally unclear statutes: the Bradley rule that a court must apply the law in effect at the time it renders its decision, and the principle that statutory retroactivity is not favored.

What follows is a melange of general anti-retroactivity principles, based generally, if not definitively, on the idea that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." The model of a retroactivity default rule, like the deference rule of Chevron, has apparent virtues of clarity, consistency, and predictability. Justice Stevens undoubtedly thought that if legislatures know what the Court's default rule will be, they can either craft clearer laws or anticipate the judicial consequences. Moreover, if one is inclined to trust the judicial ability to determine clarity at step one (as to which, of course, much has been written), then anti-retroactivity resonates well as a default rule for most cases. The method is not without its problems, however. Anti-retroactivity principles, as noted above, conflict in some cases with other powerful norms, such as fairness. Some of the stated Landgraf principles are not self-evidently applicable to the case itself, including, for


282. This is said to have been because statutes "speak to the power of the court rather than to the rights or obligations of the parties." Landgraf, 511 U.S. at 274 (quoting Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 100 (1992)) (Thomas, J., concurring). But see Lindh v. Murphy, 521 U.S. 320 (1997) (holding AEDPA amendments to habeas corpus statute not to apply retroactively); Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939 (1997) (holding amendment to jurisdictional provision not to apply retroactively).

283. The Court cites with approval Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395 (1950), which identified the apparent conflict between the canon that "[a] statute imposing a new penalty or forfeiture, or a new liability or disability, or creating a new right of action will not be construed as having a retroactive effect" and the countervailing rule that "remedial statutes are to be liberally construed and if a retroactive interpretation will promote the ends of justice, they should receive such construction." Id. at 402 (citations omitted).


286. Landgraf, 511 U.S. at 265 (citing Dash v. Van Kleeck, 7 Johns. *477, *503 (N.Y. 1811)) ("It is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect.") (Kent, C.J.); Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 MINN. L. REV. 775 (1936).
example, the consideration that, "elementary considerations of fairness dictating that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," which does not apply without some straining to sexual harassment. The general anti-retroactivity position thus impedes close consideration of the particular types of "vested rights" or "new obligations, duties or disabilities imposed." This may matter less for deportation cases than for future civil cases that will cite St. Cyr (which, it may be argued by some, protected the interests of a law-breaker) as evidence of an especially strong anti-retroactivity presumption by the Court.

A related issue that is more important for deportation cases is the Court's apparent blurring of the civil-criminal line for some purposes as it is maintained for others. Following Landgraf, civil retroactivity analysis seems to have trended towards reasoning that is redolent of the criminal ex post facto realm. St. Cyr is the first significant example of this at the Supreme Court level. Indeed, it is noteworthy (though not unprecedented) that the Court cites both a civil case — Hughes Aircraft Co. v. United States ex rel Schumer — and a criminal case — Lindsey v. Washington — one after the other without comment in support of the general proposition that "the fact that § 212(c) relief is discretionary does not affect the propriety of our conclusion." According to the Court, there is a "clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." But we must still determine what the consequences of that difference are. To do this persuasively, a court should balance the anti-retroactivity interests of the individual against the needs of the government to overcome the general aversion to retroactive lawmaking. That

287. Landgraf, 511 U.S. at 269-72. However, as Justice Blackmun noted in dissent, "The well-established presumption against retroactive legislation, which serves to protect settled expectations, is grounded in a respect for vested rights." Id. at 296 (citing Smead, The Rule Against Retroactive Legislation, supra note 286, at 784 (retroactivity doctrine developed as an "inhibition against a construction which . . . would violate vested rights")). This presumption need not be applied to remedial legislation, such as Section 102, that does not proscribe any conduct that was previously legal. As Justice Blackmun later pointed out, "At no time within the last generation has an employer had a vested right to engage in or to permit sexual harassment; 'there is no such thing as a vested right to do wrong.' " Landgraf, 511 U.S. at 297.

288. As the court noted in Mojica, "Although Landgraf is a case about statutory interpretation, it expressly refers to the Supreme Court's constitutional jurisprudence to inform its discussion of the statutory presumption against retroactivity and unfair retroactive effects." Mojica v. Reno, 970 F. Supp. 130, 141 (E.D.N.Y. 1997).

289. It is interesting to consider how the bright civil/criminal line is problematic as a guide to retroactivity analysis. There are situations in the criminal context where a retroactive law might make good sense and others in the civil context where it would not. After all, retroactivity is proscribed in the Constitution in many more places than simply the ex post facto clauses. See generally Harold J. Krent, The Puzzling Boundary Between Civil and Criminal Lawmaking, 84 Geo. L.J. 2143 (1996).

290. 520 U.S. 939, 949 (1997) (stating that an increased likelihood of facing a qui tam action constitutes an impermissible retroactive effect for the defendant).

291. 301 U.S. 397 (1937).


293. Id.
is what is done — explicitly\textsuperscript{294} or implicitly — in many of the civil retroactivity cases anyway, despite dicta such as "the potential unfairness of civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."\textsuperscript{295}

The "clear statement" method that the Court adopted in the jurisdictional portion of \textit{St. Cyr} to avoid direct confrontation with constitutional questions undoubtedly has pragmatic advantages as a way to obtain a Court majority, to avoid unnecessary confrontations with Congress, to enhance the legitimacy of the Court, etc. The sub-constitutional, \textit{Chevron}-like variant of this sort of reasoning adopted in the retroactivity section has similar virtues, as noted above. As the \textit{Landgraf} Court put it, "Requiring clear intent assures that the Congress itself has considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."\textsuperscript{296} Whatever value this restraint principle may have in other settings, however, it seems especially strange when we consider it as applied to \textit{St. Cyr} and other deportation cases. Can a retroactive change from possible to certain deportation truly be thought only to require a clear statement by Congress to be constitutionally permissible? It is true that such clarity is rarely found.\textsuperscript{297} Still, this approach renders much of the most powerful normative underpinnings of \textit{Landgraf} and other retroactivity cases bitterly irrelevant. Let us assume, for example, that the Court is truly concerned — as a matter of principle — about "[t]he legislature's unmatched powers . . . to sweep away settled expectations suddenly."\textsuperscript{298} Let us further assume that the Court purposefully highlights a most salient issue about the legislature, that "[i]ts responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."\textsuperscript{299} Can it be seriously maintained that a constitutional court really addresses such problems by requiring the legislature \textit{to be clear about it}? Indeed, a legislature that is truly aiming at an unpopular group may be, if anything, \textit{more} likely to be meticulously clear than one which retroactively deprives a more empowered group (such as the \textit{Landgraf} defendants) of something arguably of value. If \textit{St. Cyr} is seen as an \textit{explicit} rejection of the

\footnotesize
\begin{itemize}
  \item \textsuperscript{294} See \textit{e.g.}, Morawetz, \textit{Rethinking Retroactive Deportation Laws, supra} note 270, at 132 (discussing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)).
  \item \textsuperscript{295} \textit{Landgraf}, 511 U.S. at 267.
  \item \textsuperscript{296} \textit{Id.} at 272-73.
  \item \textsuperscript{297} See \textit{e.g.}, Graham & Foster v. Goodcell, 282 U.S. 409, 416-20 (1931) (holding that a statutory provision "was manifestly intended to operate retroactively according to its terms"); Automobile Club of Mich. v. Commissioner, 353 U.S. 180 (1957) (finding a clear statement authorizing the Commissioner of Internal Revenue to correct tax rulings and regulations). \textit{But see} United States v. Zacks, 375 U.S. 59, 65-67 (1963) (declining to give retroactive effect to a new substantive tax provision by reopening claims otherwise barred by statute of limitations); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (finding a clear statement of congressional abrogation of Eleventh Amendment immunity where the federal statute explicitly contemplated "the State" as defendant).
  \item \textsuperscript{298} \textit{Landgraf}, 511 U.S. at 266.
  \item \textsuperscript{299} \textit{Id.}
\end{itemize}
argument that either the *Ex Post Facto* clause or substantive due process provide constitutional restraint on the power of Congress to craft retroactive deportation laws, then other exceedingly harsh aspects of AEDPA and IIRIRA will lie, like discretion does for Justice Scalia, "beyond the judicial ken." Much of the logic of *Landgraf*, if applied to these situations, however, seems to cry out for substantially more than a clear indication of legislative intent. A more functional view of some forms of deportation as punishment seems to provide a more solid — and no more complicated — analytic framework. It was, as I have stated at the outset, a good thing that some of *Landgraf*'s chickens came home to roost in *St. Cyr*. But perhaps it is time to renovate the coop.

The link between countermajoritarian concerns and the remedy of a requirement of a clear statement of legislative intent may make sense in the context in which it was forged in *Landgraf*, a civil suit for money damages. But it works much less impressively in the arena of deportation laws where legislative majorities have targeted non-citizen political dissidents in the past quite clearly and quite specifically and indeed may well do so again. Thus, however much one may applaud the outcome in *St. Cyr*, the (formalistically civil) *Landgraf* line of reasoning with its clear statement approach may ultimately prove to be something of a Trojan Horse.

On the other hand, the *St. Cyr* opinion could be read more affirmatively and expansively. The Court's apparent recognition of the similarities between the constitutional protections in criminal cases and deportation subtly bridges the civil and criminal categories. Even were the Court to continue explicitly to "reject the argument that deportation is punishment for past behavior and that deportation proceedings are therefore subject to the 'various protections that apply in the context of a criminal trial,'" the logic of *Landgraf* offers a model for a constitutional middle-way. As to retroactive deportation laws the Court could continue to import the norms of *ex post facto* analysis more fully and directly, without necessarily resolving the entire civil/criminal issue. It would, however, eventually have to move from the *Landgraf* method to due process in order to do so convincingly. This was essentially the approach taken in one of the early post-1996 AEDPA retroactivity cases: *Mojica*. Judge Weinstein first noted in that case that "[t]he Constitution is infused with the common-law aversion to retroactivity." Due process was
then argued to be a strong constitutional requirement for retroactive deportation laws: "Like any aspect of legislation, retroactive characteristics must meet the basic due process requirement of being 'supported by a legitimate legislative purpose furthered by a rational means.'"\textsuperscript{306} In the current environment, even that requirement would be a big step forward.\textsuperscript{307}

Some theoretical support for a more nuanced, less binary, due process-based approach to retroactivity by the Supreme Court might also be found in a recent case that dealt with judicial retroactivity. In Rogers v. Tennessee, the application of penal legislation. Article I, § 10, cl. 1 prohibits States from passing another type of retroactive legislation, laws 'impairing the Obligation of Contracts.' The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.' The prohibitions on 'Bills of Attainder' in Art. §§ 9-10 prohibit legislation from singling out disfavored persons and meeting out summary punishment for past conduct . . . The Due Process Clause also protects the interest in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a state's prospective application under the Clause 'may not suffice' to warrant its retroactive application."\textsuperscript{306} (citations omitted).

306. \textit{Id.} at 169-70. The court concluded that in this case:

Congress had offered no purpose for retroactivity itself. Indeed, the statute, read as a whole, was not generally retroactive. Even in the most deferential areas of rational basis review, such an absence of purpose is a significant factor that can lead a court to strike down a government program as lacking a rational basis. Cases where the Supreme Court has upheld retroactive statutes against due process challenges were distinguished as having involved clear, rational and (implicitly) just policy choices by the Congress. First, they involved challenges to statutes where congressional policy on retroactive application is unambiguous. For example, \textit{Usery v. Turner Elkhorn}, concerned an attack on a congressional program for allocating the costs of Black Lung injuries sustained by workers on the job. Congress had to balance the issue of retroactivity with the problem of developing an equitable plan that avoided unfair burdens on current producers and recognized that past employers had benefited from the activity that was the cause of the harms Congress sought to ameliorate. \textit{See also United States v. Sperry} (upholding method for allocating costs of Iran-United States Claims Tribunal as preventing windfalls and equitably distributing costs). In other cases, it was noted that the Court had found retroactivity "was necessary to address the problem of actors modifying their behavior for inappropriate economic gain during the pendency of legislation." \textit{See e.g., Pension Benefit Guaranty Corp. v. R.A. Gray & Co.} (retroactivity of provisions on withdrawal from pension plans designed to check against employers withdrawing from plans during the lengthy legislative process). In other cases, retroactivity was designed to correct inequities that resulted from unexpected judicial interpretations of prior law or were targeted to correct an unexpected loophole created by prior law.

\textit{Id.} (citations omitted). AEDPA, however, was seen to be different:

First, as applied prospectively, the AEDPA serves to provide notice of the severe and certain deportation consequences that will flow from commission of any of the crimes enumerated in section 440(d). It may therefore be seen as making clear the very high standards to which immigrants will be held. It may well have a deterrent effect. By contrast, when applied retroactively to crimes that were treated leniently in the criminal justice system, the statute works only to upset and frustrate expectations. Retroactive application would create a situation in which people who have lived in the community, have established themselves as valuable members of society, and who are needed to support their families, are summarily deported without regard to the present and future interests of their families or the community at large . . . Moreover, under the AEDPA's vast expansion of the relevant crimes leading to automatic deportation, these consequences would be visited on people who committed crimes that may have been treated leniently in the criminal justice system.

\textit{Id.} at 170-71 (citations omitted).

307. \textit{See generally Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, supra note 270.}
Court upheld retroactive judicial abolition of the common law "year and a day" rule against a due process challenge. As there was no question that had such a rule been retroactively abolished by the legislature it would have violated the *Ex Post Facto* Clause, the issue in the case was the extent to which the strictures of that specific prohibition would be incorporated into the judicial realm via due process analysis. The majority declined a complete incorporation rule, suggesting that it would circumvent the plain language of the constitutional provision and that it would overlook important differences between legislating and common-law decisionmaking. Therefore, the Court held that due process limits on retroactive judicial action — whether statutory interpretation or common-law decisions — would be confined to those that are "unexpected and indefensible by reference to the law that had been previously expressed." In effect, the majority crafts a sort of inverted clear statement rule: retroactive lawmaking (or law-finding) by judges will be allowed unless the decision is clearly a decisive break with the past. What might be most intriguing and useful in *Rogers*, though buried somewhat, is Justice Breyer's invocation of Cardozo's idea that the legitimacy of retroactivity should be determined "not by metaphysical conceptions of the nature of judge-made law . . . but by considerations of convenience, of utility, and of the deepest sentiments of justice."

IV. CONCLUSION

One would be hard pressed to find three more challenging legal subjects than the outer limits of congressional power to restrict judicial review, discretion, and retroactivity. For that reason, if for no other, it seems appropriate in conclusion to commend the *St. Cyr* litigants and the Court for accomplishing a humane specific result while reaffirming some of the better principles in our legal system. To paraphrase Sir Walter Scott, though, "what a tangled web we weave when first we practice to relieve." Relief from removal remains available to some, but the *St. Cyr* web is tangled indeed. Can we imagine a thread to tie these strands together? Of course we can. It is called due process, the repository of most constitutional norms in our legal system. As David Cole has noted, the attempt to divest the courts of authority raises powerful due process concerns, especially when it involves executive detention of individuals, whether citizens or not. These concerns are consonant with those addressed in *St. Cyr* under the Suspension Clause. But the value in naming them becomes clear when we realize that due process also

308. 121 S. Ct. 1693 (2001).

309. *Id.* at 1700.

310. *See also* Costello v. INS, 376 U.S. 120, 131 (1964) ("In this area of law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities.").

311. The original: "O, what a tangled web we weave when first we practice to deceive." *Sir Walter Scott*, *Marmion*, canto 6, stanza 17 (1808).
provides a framework for better theoretical consistency and just outcomes in the case of purportedly unreviewable discretion, too. Again, this is particularly true for "relief" discretion, granted in the "interest of humanity." Finally, even if the Court is not yet willing to reconsider the problems caused by a formalistic civil-criminal line, due process analysis provides a path out of the civil retroactivity forest by returning our attention to the trees on which we should gaze: the real interests at stake for real people considered in the light of justice and fairness.