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## There and Back, Now and Then: IIRIRA's Retroactivity and the Normalization of Judicial Review in Immigration Law

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# THERE AND BACK, NOW AND THEN: IIRIRA’S RETROACTIVITY AND THE NORMALIZATION OF JUDICIAL REVIEW IN IMMIGRATION LAW

Austen Ishii\*

*The U.S. Supreme Court has a long tradition of treating immigration law as “exceptional,” deferring to Congress and executive agencies when determining the scope of various immigration laws. The Court’s refusal to subject immigration statutes to the ordinary level of judicial review has left immigrants even more susceptible to the effects of anti-immigrant legislation.*

*When the Court decided *Fernandez-Vargas v. Gonzales* in 2006 it increased the scope of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) by allowing portions of the statute to be applied to immigrants who had reentered the United States prior to its effective date. At first glance *Fernandez-Vargas* might appear to be just another example of the Court’s deference to the anti-immigrant policies of the legislature that created IIRIRA and the agencies that enforce it.*

*However, a closer look at *Fernandez-Vargas* and the Court’s related decisions on IIRIRA’s scope reveals that the Court is using ordinary tools of statutory interpretation to determine the outer bounds of that statute’s reach, reflecting a broader trend of more normalized treatment of immigration law.*

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#### INTRODUCTION

In 1982, Humberto Fernandez-Vargas illegally entered the United States from Mexico.<sup>1</sup> This was not his first time crossing the border; he had been deported in 1970 and again in 1981, but he had no criminal record aside from his immigration violations.<sup>2</sup> After reentering the country a second time in 1982, Fernandez-Vargas stayed in the United States for over twenty years. He started a trucking business, had a son in 1989, and then married the mother of his child, herself a U.S. citizen, in 2001.<sup>3</sup> His wife filed a relative visa petition on his behalf and then an application to adjust his legal status.<sup>4</sup> The couple paid a fine of \$1000 for Fernandez-Vargas's illegal entry, and hoped that their application would be granted so that he could become a lawful permanent resident.<sup>5</sup>

Unfortunately for Fernandez-Vargas, his adjustment application only notified the government of his illegal reentry into the country two decades earlier.<sup>6</sup> In the twenty years that Fernandez-Vargas had been living in the United States, immigration law had changed drastically. In 1996, Congress, reacting to a wave of anti-immigrant sentiment, passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),<sup>7</sup> a bill containing numerous provisions restricting or eliminating numerous forms of immigration relief. Among IIRIRA's provisions was a change in the immigration consequences of illegal reentry. Under IIRIRA, Fernandez-

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1. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006).  
2. Petitioner's Opening Brief at 7, *Fernandez-Vargas*, 548 U.S. 30 (No. 03-9610), 2004 WL 5293897, at \*5 [hereinafter *Fernandez-Vargas* Brief].  
3. *Fernandez-Vargas*, 548 U.S. at 35.  
4. *Id.*  
5. *Fernandez-Vargas* Brief, *supra* note 2, at \*3.  
6. *Fernandez-Vargas*, 548 U.S. at 35.  
7. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8, 18 U.S.C.).

Vargas's deportation order from 1981 would be automatically reinstated without review, meaning that he was ineligible for the marriage-based immigration benefit he had applied for.<sup>8</sup> When Fernandez-Vargas showed up for the interview in connection with his adjustment of status application, he was arrested and taken into custody by the Bureau of Immigration and Customs Enforcement.<sup>9</sup>

Fernandez-Vargas petitioned the Tenth Circuit to review his reinstatement order, challenging it on the grounds that he should not be bound by a change in law that occurred after he had made the choice to reenter the country.<sup>10</sup>

Fernandez-Vargas was not alone in his challenge. Many other aliens found themselves in his exact situation: having been deported at some prior date, they had reentered the country, stayed, and built lives in the United States only to have their status discovered many years later after the laws had changed, automatically reinstating their former deportation orders and denying them the chance for a review that might take account of the lives that they had built since then.

Challenges to IIRIRA's application worked their way up through ten of the U.S. circuit courts.<sup>11</sup> The appellate decisions emerged divided: eight circuits held that IIRIRA's changes could apply to the immigrants who entered before the law went into effect, but two circuits disagreed.<sup>12</sup> And so in 2006, the U.S. Supreme Court took up Fernandez-Vargas's case to settle the issue.<sup>13</sup> In the end, the Court decided that the changes brought about by IIRIRA would apply to Fernandez-Vargas (and other similarly situated immigrants).<sup>14</sup>

*Fernandez-Vargas v. Gonzales*<sup>15</sup> remains among the Court's most important decisions addressing the retroactivity of IIRIRA. In *Fernandez-Vargas*, the Court interpreted IIRIRA to operate retroactively in applying the sections of the law that provide for automatic reinstatement of removal orders of aliens who had been previously deported and then reentered the United States prior to the law's effective date.<sup>16</sup>

However, in the wake of that ruling, the circuit courts have held that the same provision of IIRIRA may *not* be retroactively applied to aliens who reentered the United States but applied for an adjustment of status *prior* to the law going into effect.<sup>17</sup> This results in a somewhat striking outcome: two otherwise identically situated groups of immigrants who entered the country before IIRIRA went into effect are given differing outcomes based solely on whether and when they applied for an adjustment of status.

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8. See 8 U.S.C. § 1231(a)(5) (2012).

9. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 883 (2005).

10. *Id.* at 844.

11. *Fernandez-Vargas*, 548 U.S. at 36 n.5.

12. *Id.*

13. *Id.* at 33.

14. *Id.*

15. 548 U.S. 30 (2006).

16. *Id.* at 38.

17. See *infra* Part IV.D–E.

Why should the retroactivity of a law like IIRIRA turn on so thin a reed as to when the alien applies for a benefit? Should the constitutionality of a statute rise or fall on such random circumstances? Put differently, is there a way of explaining the difference in outcomes seen in the Supreme Court's decision in *Fernandez-Vargas* and the lower courts' rulings? The answer may lie in a subtler set of questions about the scope of judicial review in immigration—a matter that appears to be developing slowly and incrementally.

This Note examines the tradition of deferential review in immigration law, as well as the Court's more recent analysis of cases centered on IIRIRA's provisions limiting judicial review, in an attempt to place *Fernandez-Vargas* and the related circuit decisions on IIRIRA's retroactivity in greater context. It concludes that despite their divergent results, the cases examining IIRIRA's retroactivity are illustrative of a greater trend away from the historical treatment of immigration law as an area reserved for the political branches and toward a more rigorous review of immigration laws using ordinary tools of statutory interpretation.

This Note proceeds in five parts. Part I outlines the history of IIRIRA and details some of the changes it implemented, specifically those dealt with in the *Fernandez-Vargas* line of cases. Next, Part II describes the tradition of deferential review in immigration law and looks at some areas in which immigration-related legislation and administrative rules continue to receive more deferential review than expected. Part III reviews the Court's reactions to IIRIRA and finds that the Court has repeatedly reviewed IIRIRA in an ordinary, nondeferential manner. Part IV turns to the analysis of IIRIRA's retroactivity, examining *Fernandez-Vargas* and the related circuit cases that deal with IIRIRA's temporal scope. Finally, Part V concludes that despite their differing outcomes, the line of cases examining IIRIRA's retroactivity are consistent with a broader trend in which immigration law has shifted from being an exceptional area of law subject to only passing review, to one that courts now subject to more normalized appraisal, using the ordinary tools of statutory interpretation.

## I. IIRIRA: A HARSHER IMMIGRATION REGIME

Understanding *Fernandez-Vargas* and its progeny requires some background on IIRIRA itself. Part I begins by providing a brief review of the events that led to the passage of IIRIRA. It then examines some of the changes that the law implemented, specifically those that were the subject of *Fernandez-Vargas* and the related lower court cases.

In 1952, Congress passed the Immigration and Nationality Act<sup>18</sup> (INA), which covered immigration quotas; entry, exclusion, and deportation proceedings; visa issuance and inspection; and the legal relief available to those facing deportation.<sup>19</sup> Although it has been continually amended for

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18. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8, 18, 22 U.S.C.).

19. RICHARD D. STEEL, STEEL ON IMMIGRATION LAW § 1:2 (2014).

the past sixty years, the statute continues to serve as the basic framework for current U.S. immigration law.<sup>20</sup>

The most significant and expansive changes to the INA occurred in the mid-1990s.<sup>21</sup> In 1994, the Republican Party gained majorities in both the House and Senate, and within two years Congress passed an omnibus bill that drastically altered the existing legal landscape in immigration law.<sup>22</sup> IIRIRA was signed into law in 1996.<sup>23</sup>

The law was prompted by a number of different concerns that are reflected in the changes that it made to the INA. An increase in anti-immigrant sentiment in the early 1990s following the 1993 World Trade Center bombing and the 1996 Oklahoma City bombing precipitated calls for systemic immigration reform (despite the fact that the perpetrators of the Oklahoma City bombing turned out to be U.S. citizens).<sup>24</sup> IIRIRA was also motivated in part by frustration over perceived frivolous litigation filed by immigrants who sought to use applications for judicial review as a tactic to stall for time in otherwise groundless cases.<sup>25</sup> Additionally, the legislative history of the statute indicates that at least some members of Congress believed that judges were improperly overturning agency decisions on technicalities simply because they found an immigrant's story to be compelling.<sup>26</sup>

Animated by these concerns, Congress amended the INA in two significant ways: it (1) substantially cut back on the availability of judicial review of immigration agency rulings and (2) eliminated many forms of

20. *Id.*

21. See Brent Asseff, *Reinstatement of Removal and IIRIRA Retroactivity After Fernandez-Vargas v. Gonzales: Restoring Section 212(c) Discretion and Fairness to Immigration Law*, 46 U. LOUISVILLE L. REV. 157, 158 (2007).

22. See Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349, 349 (2005).

23. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8, 18 U.S.C.). Congress enacted another law in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA), which also had substantial consequences for immigration law but which falls outside the scope of this Note. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

24. Asseff, *supra* note 21, at 158; see also Anthony Distinti, *Gone but Not Forgotten: How Section 212(c) Relief Continues to Divide Courts Presiding over Indictments for Illegal Reentry*, 74 FORDHAM L. REV. 2809, 2821 n.98 (2006) ("There has long been a negative sentiment toward immigrants based on the belief that they are responsible for social problems . . . [such] resentment escalated when it was revealed that illegal aliens were responsible for the bombing of the World Trade Center on February 26, 1993, which killed six people and injured more than 1000 others. After the bombing of Oklahoma City on April 19, 1995, anti-immigration sentiment reached a new peak though it was later revealed that two U.S. citizens were responsible for the attack." (quoting Yen H. Trinh, *The Impact of New Policies Adopted After September 11 on Lawful Permanent Residents Facing Deportation Under the AEDPA and IIRIRA and the Hope of Relief Under the Family Reunification Act*, 33 GA. J. INT'L & COMP. L. 543, 545 (2005)).

25. David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of St. Cyr and Nguyen*, 16 GEO. IMMIGR. L.J. 313, 320-24 (2002).

26. *Id.* at 329 ("[S]ome staff and members of Congress considered that overly sympathetic judges were misusing review in this realm to flyspeck opinions by the Board or the immigration judge, identify minute errors, remand the case, and thereby block the removal of aliens that the administrative authorities had found to be poor candidates for a favorable exercise of discretion, but for whom the judge harbored sympathy.").

relief that had been available to aliens facing exclusion and deportation orders.<sup>27</sup>

Prior to IIRIRA, federal courts had exercised the majority of their power in immigration law through the review of decisions by the administrative immigration agencies such as the Board of Immigration Appeals (BIA).<sup>28</sup> Section 106 of the INA provided for judicial review of final orders of deportation or exclusion issued by the BIA,<sup>29</sup> and an alien's case was automatically stayed pending the completion of that review.<sup>30</sup> Additionally, district courts were able to review a broad range of other non-deportation-related matters, including petitions for visas, protected status, and labor certifications.<sup>31</sup> Courts were also able to review a limited set of immigration orders through habeas review.<sup>32</sup>

However, IIRIRA sharply limited judicial review of discretionary determinations made by the BIA, precluding courts from reviewing decisions on "applications for adjustment of status, voluntary departure, nonimmigrant visa petitions, and waivers of inadmissibility."<sup>33</sup>

This meant that among other things, IIRIRA had the effect of tightening restrictions on aliens because immigration agencies now often had the final word on their cases. Most relevant to the discussion below, IIRIRA also enlarged the class of aliens whose old deportation orders could be automatically reinstated if they were found to have illegally reentered the country, and it limited the possible relief available to immigrants to combat their resurrected removal orders.<sup>34</sup>

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27. *Id.* at 314 ("Congress sought to cut back on judicial review in three different and sometimes overlapping ways: (1) by person, (2) by issue, and (3) by timing—that is, consolidating issues for unified and streamlined review.")

28. Until 2002, the INS was the primary agency in charge of administering and enforcing immigration law. After it was abolished, its functions were transferred to a variety of different agencies, the majority of which are housed under the Department of Homeland Security. STEEL, *supra* note 19, § 1:3. Immigration law is now administered by numerous different agencies that often have concurrent and overlapping powers. *See id.* §§ 2:1–21.

29. NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, IMMIGRATION LAW AND DEFENSE § 10:22, at 1 (2013).

30. *See Arevalo v. Ashcroft*, 344 F.3d 1, 6 (1st Cir. 2003).

31. NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, *supra* note 29, § 10:21 ("The district court can review final agency orders such as the denial of visa petitions, INS' failure to process an adjustment of status application based on selection in the Diversity Visa lottery, registry, waivers, change of nonimmigrant status, denial of extension of temporary stay, denial of an application for temporary protected status, denial of a stay of deportation, denial of labor certifications, DHS' invalidation of an approved labor certification due to alleged fraud, denial of deferred action status, denial of petition for remission or mitigation of vehicle forfeiture, denial of adjustment of status by the district director, revocation of an approved immigrant visa petition, determinations that an employment-based immigrant visa petition is not portable under INA § 204(j) [8 U.S.C.A. § 1154(j)], determinations that a labor certification was not 'approvable when filed' within the meaning of INA § 245(i) [8 U.S.C.A. § 1255(i)], denial of I-730 derivative asylum petitions, revocation of advance parole, and denial of release on parole." (alteration in original)).

32. *See* 28 U.S.C. § 2241 (2012); *see also* *INS v. St. Cyr*, 533 U.S. 289 (2001).

33. NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, *supra* note 29, § 10:21.

34. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 33 (2006).

Under the old law (section 212(c) of the INA), the Immigration and Naturalization Service (INS) could only reinstate the previous deportation or exclusion orders of illegal reentrants who had been deported on specific grounds,<sup>35</sup> and those reentrants were permitted to seek review and discretionary relief with the Attorney General.<sup>36</sup> After IIRIRA, the government could reinstate the order of any illegal reentrant and the opportunity to seek review was eliminated. Section 241(a)(5) of the INA now reads:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.<sup>37</sup>

It came as no surprise that aliens who illegally reentered the United States after IIRIRA had a much harder time staying in the country. However, IIRIRA's changes also had the effect of fundamentally altering the judiciary's role in immigration law. The automatic reinstatement of prior administrative decisions, and the myriad of provisions which restricted judicial review of agency decisions, drastically limited courts' role in immigration law. As far as Congress was concerned, the courts no longer needed to concern themselves with reviewing BIA actions like reinstated removal orders; such forceful and life-altering rulings now would be automatic and final.<sup>38</sup> A year after the law was passed, one commentator

35. See 8 U.S.C. § 1252(e) (1994) (repealed 1996) (noting that aliens who had been deported for person smuggling, on national security grounds or certain criminal violations, for failing to register, or the falsification of documents were eligible for reinstatement).

36. Asseff, *supra* note 21, at 160–61 n.23. In pertinent part, section 212(c) provided: Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to reentry.”

8 U.S.C. § 1252(f) (1994) (repealed 1996); see also *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 862 (8th Cir. 2002) (noting that before IIRIRA, reinstatement of removal was a “little-used” provision, which “did not apply to aliens . . . who were deported for entering the country without inspection”).

37. 8 U.S.C. § 1231(a)(5) (2012). For simplicity, the remainder of this Note will often refer to section 241(a)(5) or section 1231(a)(5) of IIRIRA, though in fact IIRIRA merely amended these sections of the INA.

38. For a pointed critique of the consequences of IIRIRA, see Brooke Hardin, Fernandez-Vargas v. Gonzales: *An Examination of Retroactivity and the Effect of the Illegal Immigration Reform and Immigrant Responsibility Act*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 291, 297–98 (2007) (“IIRIRA rests the power of an alien’s continued tenure in the United States in the hand of just one immigration official. This lone official may and ‘shall order the alien removed from the United States without further hearing or review.’ Not only is the decision given to only one immigration official, these expedited deportation orders are neither administratively nor judicially reviewable. Thus, an alien forcing deportation has no recourse, no matter how grave the consequences may be . . . . Obviously,

wrote: “If judicial review of administrative orders depriving noncitizens of the opportunity to live in the United States is an essential part of the rule of law, then 1996 may well become known as the year in which the rule of immigration law died.”<sup>39</sup>

This illegal reentry provision was one of the many changes wrought by IIRIRA affecting how immigrants’ cases would be processed and adjudicated by the mixture of immigration agencies and the federal courts. While these changes appeared unabashedly severe, their ultimate impact turned out to depend in many ways on how the federal courts—including the Supreme Court—would chose to interpret their scope. Ordinarily, judicial deference likely might be assumed. After all, the Supreme Court has a long history of judicial restraint where “exceptional” areas such as immigration and national security are concerned.<sup>40</sup> The Court very well could have been expected to defer to Congress and the immigration agencies, which sought expansive readings of IIRIRA. But this did not always happen. At times, the courts have interpreted IIRIRA narrowly, preserving judicial review for some small, yet important, classes of immigrants. Before turning to the Court’s interpretive stance toward IIRIRA and its scope, it is thus useful to examine how the Court has traditionally reviewed immigration laws. To that end, Part II examines the Court’s traditional deference to the political branches on immigration issues.

## II. JUDICIAL REVIEW OF IMMIGRATION LAW: A HISTORY OF DEFERENCE

Traditionally, immigration law has been treated by the Court as an exceptional area of law subject to only the most limited review, and commentators have long derided the Court’s passive role in the field.<sup>41</sup> Citing the doctrine of plenary power, the low level of equal protection review afforded to statutes that target aliens, and the tendency of the Court to defer to immigration agencies without first conducting a comprehensive analysis of statutes, critics have argued that the Court’s passivity has led to less protection for immigrants than would otherwise be expected, due to the weakening of doctrines that are leveraged more strongly in other areas of the law.<sup>42</sup>

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though, under IIRIRA, Congress decided that only *very limited* due process is required to fulfill this Constitutional requirement for deportable aliens.” (quoting Immigration and Nationality Act § 241(a)(5), 8 U.S.C. § 1231(a)(5)).

39. Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 704 (1997).

40. See, e.g., Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392–94 (1999); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1981–89 (2013).

41. See generally Kanstroom, *supra* note 39; Shruti Rana, *Chevron Without the Courts?: The Supreme Court’s Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313 (2012).

42. See *infra* Part II.A–C.

### A. Plenary Power

A plain reading of the Constitution finds the congressional power to regulate immigration rooted in Article I, Section 8's authority to "establish a uniform Rule of Naturalization."<sup>43</sup> However, such authority was expanded dramatically in 1889 when the Court decided *Chae Chan Ping v. United States*,<sup>44</sup> holding for the first time that Congress has what is now known as "plenary power" to regulate immigration (though that phrase never appears in the case).<sup>45</sup>

In *Chae Chan Ping*, the Court held that in addition to its constitutional foundation, congressional power to regulate immigration stems from the more fundamental ideas of state sovereignty and a nation's need to protect itself.<sup>46</sup> More importantly, the Court also suggested that when Congress exercises its power over immigration, its decisions should not be subject to judicial review.<sup>47</sup>

Of course, the Court did continue to confront immigration cases, but the effect of the plenary power doctrine has meant that, historically, courts have generally given Congress almost complete deference when reviewing federal statutes.<sup>48</sup>

Starting in the 1970s, the Court began to conduct limited judicial review in some immigration cases; however, courts continued to give Congress broad deference under the plenary power doctrine.<sup>49</sup> In modern cases, while the influence of the plenary power doctrine appears to have lessened, the Court has continually declined to explicitly outline its scope when reviewing statutes.<sup>50</sup> Nevertheless, the Court has been unable to escape the

43. U.S. CONST. art. I, § 8, cl. 4.

44. 130 U.S. 581 (1889).

45. *Id.* at 606 (announcing Congress's broad authority to bar a foreign national's entry when "the public interests require such exclusion").

46. *Id.* at 604 ("Any restriction upon [congressional power to exclude aliens], deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction." (quoting *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (alteration in original))).

47. *Id.* at 606 ("[If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . its determination is conclusive upon the judiciary.").

48. Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1616–17 (2000) ("[W]hen someone challenges the constitutionality of an immigration statute, the courts accord Congress unusually great deference, at or approaching nonreviewability."); *see also, e.g.*, *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting*, 287 U.S. 329, 334 (1932) ("Under the Constitution and laws of the United States, control of the admission of aliens is committed exclusively to Congress . . ."); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over [the admission of aliens].").

49. Jessica Portmess, *Until the Plenary Power Do Us Part: Judicial Scrutiny of the Defense of Marriage Act in Immigration After Flores-Villar*, 61 AM. U. L. REV. 1825, 1834 (2012).

50. *Id.* at 1839; *see also* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000).

doctrine altogether and typically still only applies “diluted constitutional standards to immigration cases.”<sup>51</sup> The powerful precedent of the plenary power doctrine ensures that Congress continues to enjoy substantial deference in the area of immigration in a manner that is not seen in other areas of constitutional law.<sup>52</sup>

### B. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment is one of the most important sources of judicial protection of individual rights that might otherwise be infringed on by the political branches.<sup>53</sup> It is also an area where the Court has explicitly set up a system of different levels of deference to be used depending on the group that is being affected by legislation.<sup>54</sup>

The Equal Protection Clause provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”<sup>55</sup> The same restriction is applied to federal laws through the Due Process Clause of the Fifth Amendment,<sup>56</sup> but, perhaps because the courts have held that the Constitution gives Congress plenary power over immigration, federal immigration legislation is usually only subject to a very deferential level of judicial review even when considered under the equal protection framework.<sup>57</sup>

When reviewing statutes under the equal protection framework, the Court applies three levels of scrutiny that affect how much deference is given to the professed objectives behind the laws. The least deferential is called strict scrutiny and is applied in situations in which the legislation at issue discriminates based on a suspect classification or denies an individual a fundamental right.<sup>58</sup> Only laws that are narrowly tailored to advance a compelling state interest may pass strict scrutiny.<sup>59</sup>

More deferential than strict scrutiny, intermediate scrutiny applies when legislation discriminates against classes that have been identified as quasi-suspect and requires that the law is “substantially related to an important governmental objective.”<sup>60</sup>

The most deferential level of scrutiny is rational basis, which applies to any law that is not subject to the other heightened levels of scrutiny.<sup>61</sup> To

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51. Portmess, *supra* note 49, at 1839.

52. Legomsky, *supra* note 48, at 1631–32.

53. Jason H. Lee, *Unlawful Status As a “Constitutional Irrelevancy”?: The Equal Protection Rights of Illegal Immigrants*, 39 GOLDEN GATE U. L. REV. 1, 28 (2008).

54. Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 822–23 (2013).

55. U.S. CONST. amend. XIV, § 1.

56. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

57. *See* Justin Hess, *Nonimmigrants, Equal Protection, and the Supremacy Clause*, 2010 B.Y.U. L. REV. 2277, 2289–90.

58. 16B C.J.S. *Constitutional Law* § 1116 (2013).

59. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

60. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

61. 16B C.J.S., *supra* note 58, *Constitutional Law* § 1120.

pass muster under rational basis, a law need only be rationally related to a legitimate state interest.<sup>62</sup>

While the frameworks for equal protection review might seem straightforward, their application in the immigration context has been anything but. In the words of one commentator, “At the intersection of immigration and equal protection lies a judicial vortex. This area of law is a twilight zone of sorts, where established constitutional principles do not follow their regular paths.”<sup>63</sup>

Notably, the equal protection framework generally intersects not with immigration law itself (the rules governing the entry, expulsion, and detention of noncitizens) but rather with the related but distinguishable area of constitutional alienage law (alienage-based classifications affecting the rights and obligations of noncitizens). The plenary power doctrine holds far less sway over constitutional alienage law.<sup>64</sup> Nevertheless, the application of the equal protection framework to alienage law is somewhat muddled and often finds immigrants receiving more deferential levels of review in spite of the vulnerabilities that accompany their status.<sup>65</sup>

Early on, the Court held outside the immigration context that the Fourteenth Amendment protects noncitizens as well as citizens from the reach of state laws.<sup>66</sup> However, while the Court has found that laws that classify based on alienage are subject to strict scrutiny under the Equal Protection Clause,<sup>67</sup> the Court has yet to define alienage with sufficient clarity and has generally only applied strict scrutiny where alienage laws are challenged by immigrants who are permanent residents.<sup>68</sup>

The Court has also carved out exceptions to the application of strict scrutiny to alienage laws that discriminate against aliens who are permanent residents. For example, permanent residents may be excluded from holding

62. See *Zobel v. Williams*, 457 U.S. 55, 60 (1982).

63. Hess, *supra* note 57, at 2277.

64. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 *YALE L.J.* 545, 565 (1990).

65. See *id.* at 574 n.155 (“Of the examples . . . of groups—‘discrete and insular minorities’—favored by statutory interpretation, only aliens in immigration law cases stand out as unprotected by analogous judicial concern at the constitutional level.”).

66. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

67. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Alienage is among those factors which are

so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

*Id.*

68. See Hess, *supra* note 57, at 2278; see also *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005) (“Thus far, the Supreme Court has reviewed with strict scrutiny only state laws affecting permanent resident aliens.”).

positions that carry a political function so long as the restrictions meet the deferential rational basis level of scrutiny.<sup>69</sup>

The Court has been similarly inconsistent when it comes to determining what level of scrutiny applies to laws that discriminate against illegal immigrants. In *Plyler v. Doe*,<sup>70</sup> the Court held that illegal aliens are not a suspect class entitled to heightened scrutiny, and yet the Court seemed to apply intermediate scrutiny, striking down a Texas law that denied illegal-immigrant children access to public schools because the law did not further a “substantial goal of the State.”<sup>71</sup> Both the dissent in *Plyler* and the Fifth Circuit noted that while the Court professed to be applying rational basis, they were in fact subjecting the law to closer scrutiny.<sup>72</sup>

Despite *Plyler*'s somewhat confusing outcome, in general the opinion provides language that indicates that states need only justify classifications of illegal aliens by showing that there is some rational relationship between the classification and the interest sought to be protected by the law.<sup>73</sup>

In whole, the equal protection analysis itself provides a more in-depth review of alienage legislation than the plenary power doctrine has for ordinary immigration law.<sup>74</sup> Nevertheless, a review of the cases shows that, in general, statutes that discriminate based on alienage receive a more deferential level of review than those that discriminate against other groups with similar legal vulnerabilities.

The Court reviews state laws that discriminate against illegal aliens under the relatively cursory rational basis review, and in some cases even uses rational basis review for laws that discriminate against immigrants who have become lawful permanent residents.<sup>75</sup> These cases indicate that when it comes to aliens and equal protection, the Court will generally defer to both state and federal legislatures.

The reason for such limited review may be due to the fact that an immigrant's alienage status often belies the complexities of his or her particular legal situation<sup>76</sup> or it may be because alienage law still finds itself

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69. See *Foley v. Connelie*, 435 U.S. 291, 296 (1978) (“[B]ecause this country entrusts many of its most important policy responsibilities to these officers . . . it represents the choice, and right, of the people to be governed by their citizen peers.”); see also *Gregory v. Ashcroft*, 501 U.S. 452, 476–77 (1991); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973).

70. 457 U.S. 202, 223 (1982) (“Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”).

71. *Id.* at 224.

72. Hess, *supra* note 57, at 2284.

73. *Plyler*, 457 U.S. at 219 n.19, 223.

74. *Motomura*, *supra* note 64, at 566 (“[The alienage equal protection cases] took . . . constitutional claims seriously, in contrast to the cavalier treatment of constitutional claims in immigration law.”).

75. *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978).

76. Hess, *supra* note 57, at 2287–88 (“[Individuals] enter the United States for different reasons, under different conditions, and under different obligations. The Supreme Court has refused to use heightened equal protection scrutiny, (anything more than a rational basis), for heterogeneous classes that are ‘large, diverse, and amorphous.’” (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973))).

in the shadow of immigration law and the plenary power law that accompanies it.<sup>77</sup>

### C. Administrative Adjudication

Commentators have also critiqued how the Court reviews administrative decisions in the immigration context. Chief among the concerns raised is the worry that the Court is not applying the famous *Chevron*<sup>78</sup> doctrine with the proper rigor (or alternatively, that the Court is reformulating the doctrine) when reviewing decisions from administrative immigration agencies.

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council*,<sup>79</sup> the Court created a two-step framework for evaluating when to give force to an agency's interpretation of a statute. The first step requires federal courts to determine whether a statute is ambiguous.<sup>80</sup> Where a statute is ambiguous, the court will defer to the agency's construction of the statute so long as it is reasonable, an inquiry that constitutes the second step of the test.<sup>81</sup> "In this manner, *Chevron* gave both the federal courts and agencies a role in interpreting statutes."<sup>82</sup>

Professor Shruti Rana argues that recent immigration jurisprudence reveals that the Court has increasingly declined to perform its traditional interpretive role, preferring to allow agencies to interpret statutes and then merely assessing the agencies' results.<sup>83</sup> Driving this shift is agencies' increasing invocation of the Court's ruling in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*<sup>84</sup> as a way to "bypass judicial constructions contrary to the agency's views" and "avoid statutory interpretations the agency believes [are] unfavorable."<sup>85</sup>

In *Brand X*, the Court held that where a statute is ambiguous, not only must courts defer to reasonable agency interpretations, but agencies may themselves actively disregard judicial constructions of statutes.<sup>86</sup> Furthermore, *Brand X* requires that courts must yield to agencies' interpretations in preference to the courts' own precedents if the statute is ambiguous and the agency's interpretation is reasonable.<sup>87</sup> Taken broadly, *Brand X* makes agencies, and not courts, the final arbiters of the law.<sup>88</sup>

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77. *Id.* at 2279 (arguing that "[b]ecause Congress has plenary power over immigration, courts should approach discriminatory state laws by first evaluating their constitutionality under the Supremacy Clause"); see also Motomura, *supra* note 64, at 574 ("[T]he plenary power doctrine smother[s] the entire field of immigration law . . . completely.").

78. *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

79. See *id.* at 842.

80. See *id.* at 843–44.

81. See *id.*

82. Rana, *supra* note 41, at 315 n.2.

83. *Id.* at 322.

84. 545 U.S. 967 (2005).

85. Rana, *supra* note 41, at 347–48 (citation omitted).

86. *Brand X*, 545 U.S. at 1017.

87. *Id.* at 980–81.

88. Rana, *supra* note 41, at 317 ("[In *Brand X*,] the Court came close to declaring that '[i]t is emphatically the province and duty of the [agency] to say what the law is.'")

Professor Rana examined a number of recent Supreme Court immigration cases and concludes that the use of *Brand X* has reduced the courts' role to that of "error-checking" the reasonableness of agency action rather than actively interpreting statutes, resulting in the collapse of *Chevron's* two-step test into a single step.<sup>89</sup>

She argues that this deference is problematic not only because the Court seems to be ceding an important role traditionally held by the judiciary, but also because it comes at a point when the immigration agencies are overburdened and thus most vulnerable to abusing and misusing the power that is being deferred to them.<sup>90</sup>

Taken together, the plenary power afforded to congressional legislation on immigration, the relatively low level of scrutiny used to review statutes that discriminate against aliens, and the erosion of full *Chevron* review in administrative immigration cases seem to solidify the notion that courts generally have been deferential to the political branches when it comes to immigration.

Given such a pattern, one might expect that the Court would only subject IIRIRA to the most passing and deferential judicial review, resulting in an expansive application of the law. However, a review of the cases in which the Court has addressed the scope of IIRIRA, in particular its decisions on the availability of judicial review under the statute, reveal that the Court has continually used the tools at its disposal to limit IIRIRA's application.<sup>91</sup> Somewhat surprisingly, the IIRIRA cases indicate that the Court is still willing to conduct in-depth analysis of immigration laws in some areas.

### III. THE COURT'S SURPRISING REACTIONS TO IIRIRA

In the last two decades, the Court has had numerous opportunities to interpret the scope of a number of IIRIRA's provisions. Among other things, the Court has: reviewed the validity of the law's restrictions on judicial review of removal determinations,<sup>92</sup> determined whether an offense was an "aggravated felony" for the purposes of the provision,<sup>93</sup> adjudicated

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(modifying the famous quote from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (alteration in original)).

89. *Id.* at 353.

90. *Id.* at 318–19. Professor Rana notes that the BIA is "buckl[ing] under a mammoth caseload, replacing three-judge panels with single judges, commonly issuing one-line summary affirmances of immigration judges' decisions (decisions which are themselves coming from a geographically and politically dispersed group of immigration judges) without either endorsing those judges' rationales or suggesting alternatives, and issuing opinions that federal appellate judges across the political and jurisprudential spectrum have found indefensible," and similarly, that the Executive Office for Immigration Review is "beset with so many severe problems—from overburdened courts and an enormous backlog of cases, to charges of bias, to endemic mistakes, to widely inconsistent decision making—[t]hat the American asylum system has fallen into disrepute is no longer a significantly contested point of debate." *Id.* (citing Eliot Walker, *Asylees in Wonderland: A New Procedural Perspective on America's Asylum System*, 2 NW. J.L. & SOC. POL'Y 1, 2 (2007)).

91. See *infra* Part III.

92. See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 476 (1999).

93. *Leocal v. Ashcroft*, 543 U.S. 1, 3 (2004).

when the government can exercise discretion as to removal destination,<sup>94</sup> determined how an alien may calculate residence to meet the temporal requirements for eligibility for cancellation of removal,<sup>95</sup> examined the limits of IIRIRA's provision for post-removal-period detention,<sup>96</sup> reviewed whether an alien may withdraw from a voluntary departure agreement under the provision,<sup>97</sup> determined whether the law barred judicial review of a denial of an alien's motion to reopen removal proceedings,<sup>98</sup> examined what standard governs stays of removal pending judicial review under the statute,<sup>99</sup> and ruled on whether IIRIRA bars habeas corpus review of discretionary relief from deportation.<sup>100</sup>

IIRIRA contains a number of provisions that explicitly strip federal courts of jurisdiction to review immigration decisions.<sup>101</sup> Inevitably, the Court faced several opportunities to review these provisions, and while the Court did cede some jurisdiction where explicitly required to do so,<sup>102</sup> it took a very nondeferential stand when it refused to read the statute's provisions as stripping it of its jurisdiction over habeas review.<sup>103</sup> In the cases below, the Court found that broader readings of IIRIRA would lead to conflicts with the fundamental powers and protections in the Constitution.

*INS v. St. Cyr*<sup>104</sup> dealt with two primary issues: the retroactivity of IIRIRA, which is discussed in Part IV, and whether IIRIRA's provisions could deprive courts of the jurisdiction to review an alien's habeas petitions. Using ordinary tools of interpretation, the Court retained the right to review aliens' habeas petitions.<sup>105</sup>

Notwithstanding the ordinary requirement to defer under the notion of plenary powers,<sup>106</sup> in *St. Cyr* the Court noted that there is a "strong presumption in favor of judicial review of administrative action" and therefore that repealing habeas jurisdiction requires a "clear statement of

94. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 337 (2005).

95. *See generally Holder v. Martinez Gutierrez*, 132 S. Ct. 2011 (2012).

96. *See Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

97. *See Dada v. Mukasey*, 554 U.S. 1, 4 (2008).

98. *See Kucana v. Holder*, 558 U.S. 233, 236–37 (2010).

99. *See Nken v. Holder*, 556 U.S. 418, 423–25 (2009).

100. *See Calcano-Martinez v. INS*, 533 U.S. 348, 349 (2001); *INS v. St. Cyr*, 533 U.S. 289, 292 (2001).

101. NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, *supra* note 29; *see also supra* notes 26–38 and accompanying text.

102. *Calcano-Martinez*, 533 U.S. at 351; *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 481 (1999) (finding that the Court of Appeals lacked jurisdiction over an action in which resident aliens alleged that they had been targeted for deportation because of their affiliation with a politically unpopular group, in violation of their constitutional rights).

103. Aliens have long been able to petition the courts for writs of habeas corpus in order to challenge the legal basis for immigration decisions. *See Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (holding that Immigration Act of 1891 did not deprive courts of habeas jurisdiction); *United States v. Jung Ah Lung*, 124 U.S. 621, 628 (1888) (holding that Chinese Restriction Acts did not eliminate habeas jurisdiction).

104. 533 U.S. 289 (2001).

105. *Id.* at 311.

106. *See supra* notes 42–51 and accompanying text.

congressional intent.”<sup>107</sup> No such plain statement was found in IIRIRA, despite the fact that one of its provisions was titled “Elimination of Custody Review by Habeas Corpus.”<sup>108</sup>

The Court then used a variety of tools to bolster its ruling. It invoked the canon of construction requiring a clear indication when a statute “invokes the outer limits of Congress’s power,” and the substantive canon of constitutional avoidance which requires the Court to construe statutes to avoid raising constitutional issues where an “alternative interpretation of the statute is ‘fairly possible.’”<sup>109</sup>

The Court also considered the history of the writ of habeas corpus as a “means of reviewing the legality of Executive detention,” as well as a means of reviewing “an alien’s eligibility for discretionary relief” in immigration cases.<sup>110</sup> The Court also noted that habeas corpus proceedings are distinct from, and far narrower than, what is termed judicial review or jurisdiction to review, under the Administrative Procedure Act.<sup>111</sup> As such, although the provisions in IIRIRA limited judicial review, the Court concluded that they could not be read to preclude habeas review in such cases.<sup>112</sup>

Not all of the Justices were happy with the choice of interpretive tools used in *St. Cyr*. In a strong dissent penned by Justice Scalia and joined by Chief Justice Roberts, Justice Thomas, and in part by Justice O’Connor, the majority opinion is criticized for failing to give force to the plain language of the statute and instead “fabricat[ing] . . . [a] ‘magic words’ requirement for the congressional expression” of an intent to limit habeas review.<sup>113</sup>

In *Zadvydas v. Davis*,<sup>114</sup> the Court used the principles laid out in *St. Cyr* to preclude a reading of IIRIRA that would have allowed for the indefinite detention of an alien.<sup>115</sup> In particular, the Court invoked the canon of constitutional avoidance, eschewing a construction that would raise due

107. *St. Cyr*, 533 U.S. at 299 (“Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.” (citing *Ex parte Yerger*, 75 U.S. (1 Wall.) 85, 105 (1869))).

108. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 401(e), 110 Stat. 1268. The Court held that “title alone is not controlling,” and found that the exact text of the section only repealed an earlier statute that amended the judicial review sections of the 1952 version of the INA. *St. Cyr*, 533 U.S. at 308–09.

109. *St. Cyr*, 533 U.S. at 299–300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). The Court found that the habeas provisions in Article I, Section 9, clause 2 of the Constitution require judicial intervention in deportation cases, and, as such, reading IIRIRA to preclude such intervention would raise a serious constitutional issue. *Id.* at 300.

110. *Id.* at 301, 304.

111. *Id.* at 312.

112. *Id.* at 312–13; *see also* *Calcano-Martinez v. INS*, 533 U.S. 348, 351 (2001) (“We agree with petitioners that leaving aliens without a forum for adjudicating claims such as those raised in this case would raise serious constitutional questions. We also agree with petitioners—and the Court of Appeals—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.”).

113. *St. Cyr*, 533 U.S. at 326–27 (Scalia, J., dissenting).

114. 533 U.S. 678 (2001).

115. *Id.* at 689.

process concerns, by reading the statute as containing an implicit “reasonableness” requirement.<sup>116</sup> In doing so, the Court recognized that rather than giving the statute its literal construction, it was instead finding that the statute “suggests” that the Attorney General has less than unlimited discretion.<sup>117</sup>

True to *St. Cyr*, four members of the Court dissented in *Zadvydas* (although a different four), arguing that the majority had chosen to ignore the plain meaning of the statute and instead manufactured “constitutional impediment[s] to the discretion Congress gave to the Attorney General.”<sup>118</sup>

Ultimately, in deciding *St. Cyr* and *Zadvydas*, the Court chose to espouse principles that favored aliens<sup>119</sup> and the Court’s own constitutional powers,<sup>120</sup> rather than deferring to either the congressional intent embodied in an immigration statute that is anti-immigrant and against judicial intervention, or to the Attorney General’s office which sought a broader interpretation of the INA and IIRIRA.<sup>121</sup>

The rationale behind substantive canons, such as the canon of constitutional avoidance, is arguably to credit congressional intent by assuming that Congress never intended to write a law that plainly violates the Constitution, thereby preserving laws by reading them in a way that does not require that they be struck down as unconstitutional.<sup>122</sup> Nevertheless, the dissents in *St. Cyr* and *Zadvydas* suggest that instead the Court is using the canon of constitutional avoidance so as to avoid giving full effect to the plain meaning of IIRIRA and the decisions of the agencies that enforce it. That the dissenting Justices are so concerned by what they deem to be an overreach of the Court’s power<sup>123</sup> suggests that this is one area of immigration law in which the Court is unlikely to be accused of being overly deferential to the political branches.

116. *Id.* at 690–99.

117. *Id.* at 689, 697.

118. *Id.* at 705 (Kennedy, J., dissenting).

119. See Jonathan H. Ross, *A Gate Forever Closed? Retiring Immigration Law’s Post-Departure Bar*, 81 *FORDHAM L. REV.* 1051, 1068 (2012) (“In recent years, three norms have emerged that the Supreme Court has relied on in favor of immigrants: (1) the presumption that administrative actions should be subject to judicial review, even in the immigration context; (2) the use of a ‘clear statement rule’ to prevent congressional silence from being transformed into a nonexistent legislative mandate; and (3) that immigrants should have every opportunity to fight the harsh consequences of removal.”).

120. See Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 *VA. L. REV.* 753, 754 (2013) (conceptualizing habeas review as “a form of Article III power belonging to judges, and not as some sort of right”).

121. *Zadvydas*, 533 U.S. at 688 (majority opinion).

122. See *Clark v. Martinez*, 543 U.S. 371, 382 (2005) (“The canon [of constitutional avoidance] is thus a means of giving effect to congressional intent, not of subverting it.”).

123. *Zadvydas*, 533 U.S. at 705 (Kennedy, J., dissenting) (“In the guise of judicial restraint the Court ought not to intrude upon the other branches.”). For a similar argument, see Justice O’Connor’s partial concurrence in *Demore v. Kim*, 538 U.S. 510, 553 (2003) (O’Connor, J., concurring in part and concurring in judgment) (arguing that the majority incorrectly followed *St. Cyr*’s reasoning to disregard the plain meaning of § 1226(c) of the INA in order to preserve habeas review).

Even when the Court examined questions about IIRIRA's scope that did not involve clear constitutional conflicts allowing it to invoke the canon of constitutional avoidance, the Court still has used other interpretational doctrines to read the immigration statute narrowly.

In *Clark v. Martinez*,<sup>124</sup> the Court revisited its decision in *Zadvydas*, holding that the reasonableness requirement that it had read into the provisions applied to inadmissible aliens in the same manner as it did to aliens who had been admitted to the United States.<sup>125</sup> The Court explained its holding as the product of the simple rule that statutory text could not be construed to have different meanings depending on the characteristics of the aliens it was applied to, despite the fact that the "statutory purpose and constitutional concerns influencing the *Zadvydas* construction are not present for inadmissible aliens."<sup>126</sup> As such, the Court eschewed the government's interpretation of the statute in favor of its own even where there was no need to do so to avoid a constitutional problem.

In *Dada v. Mukasey*,<sup>127</sup> the Court again overruled a decision that would have given force to the immigration agency's interpretation of IIRIRA.<sup>128</sup> *Dada* dealt with two conflicting sections of IIRIRA, "one directing voluntary departure and the other directing termination of the motion to reopen if an alien departs the United States."<sup>129</sup> A ruling by the BIA, affirmed by the Fifth Circuit, held that the result of the two provisions was that "an alien who has been granted voluntary departure but fails to depart in a timely fashion is statutorily barred from applying for and receiving . . . adjustment of status."<sup>130</sup> However, the Court found this result unsatisfactory.<sup>131</sup> Finding that the language of the two provisions was unambiguous, the Court looked instead at the practical effects they created and the purpose behind motions to reopen.<sup>132</sup> The Court held that preserving "the alien's right to pursue reopening while respecting the Government's interest in the *quid pro quo* of the voluntary departure arrangement" required that aliens be allowed to withdraw their requests for voluntary departure before the expiration of the departure period.<sup>133</sup>

The dissent in *Dada* argued that the majority had created a remedy without citing the authority of any statute or regulation, in order to solve a "'necessity' [that] does not exist."<sup>134</sup> Whether or not the case was correctly decided, the critiques of the majority's reasoning and the case's result in overturning the BIA's interpretation both suggest that the case provides

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124. 543 U.S. 371 (2005).

125. *Id.* at 385.

126. *Id.* at 380.

127. 554 U.S. 1 (2008).

128. *Id.* at 6.

129. *Id.* at 5.

130. *Id.* at 7.

131. *See id.* at 18 ("Absent . . . remedial action by this Court, then, the alien who is granted voluntary departure but whose circumstances have changed in a manner cognizable by a motion to reopen is between Scylla and Charybdis . . .").

132. *Id.*

133. *Id.* at 19.

134. *Id.* at 23 (Scalia, J., dissenting).

another example of the Court's choice not to defer to agencies' interpretations of IIRIRA, even when such interpretations would seem to be based on the plain meaning of the statute's provisions.<sup>135</sup>

In *Nken v. Holder*,<sup>136</sup> the Court addressed whether IIRIRA changed appellate courts' ability to stay an alien's removal pending his or her decision.<sup>137</sup> Although the government argued that the courts' stay power should fall under the provisions of IIRIRA that limited injunctive relief, the Court held that a stay differed from an injunction and therefore remained governed by the less restrictive traditional stay factors.<sup>138</sup>

Using textualist arguments, the Court found that if Congress had intended the stay power to be governed by the section restricting injunctive relief, it would have simply used the word "stay," as it did in other sections of IIRIRA.<sup>139</sup> Noting that the power to stay pending judicial review is an inherent power of federal appellate courts, the Court again invoked the plain statement rule: "[W]e are loath to conclude that Congress would, 'without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders under review.'"<sup>140</sup>

Dissenting in *Nken*, Justice Alito argued that the majority inappropriately used semantics to "nullif[y] an important statutory provision."<sup>141</sup> He suggested that the Court did not uphold congressional intent because the section restricting injunctive relief was, like other provisions of IIRIRA, "aimed at protecting the Executive's discretion from the courts. Indeed, 'protecting the Executive's discretion from the courts . . . can fairly be said to be the theme of the legislation.'"<sup>142</sup> Here again, the dissenting opinion from an IIRIRA case suggests that the Court is using statutory tools to craft its own interpretations rather than merely deferring to an agency's interpretation or the general scheme and spirit of the law, as characterized by the dissent.<sup>143</sup>

In *Kucana v. Holder*,<sup>144</sup> the Court again examined the scope of judicial review available under IIRIRA.<sup>145</sup> The Seventh Circuit had held that amendments made to the INA by IIRIRA stripped the courts of the power to review not only those administrative decisions made discretionary by statute, but also those made discretionary by regulations promulgated and adopted by the immigration agencies.<sup>146</sup> The Supreme Court disagreed,

135. *Id.*

136. 556 U.S. 418 (2009).

137. *Id.* at 422.

138. *Id.* at 426.

139. *Id.* at 430–31.

140. *Id.* at 433 (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 11 (1942)).

141. *Nken*, 556 U.S. at 439 (Alito, J., dissenting).

142. *Id.* at 443 (quoting *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999)).

143. *Id.* at 439.

144. 558 U.S. 233 (2010).

145. *Id.* at 244.

146. *Id.* A regulation had been amended a few months before IIRIRA went into force which provided that the BIA (exercising authority delegated by the Attorney General) had discretion over whether or not to grant or deny a motion to reopen. *Id.* at 239.

determining that the relevant section of IIRIRA applied only to agency determinations made discretionary by statute and not by regulation.<sup>147</sup> The Court based its decision on “the longstanding exercise of judicial review of administrative rulings on reopening motions, the text and context of [the relevant section of IIRIRA].”<sup>148</sup> The Court also invoked a number of interpretive doctrines including “the ‘presumption favoring interpretations of statutes [to] . . . allow judicial review of administrative action’”<sup>149</sup> and “[s]eparation-of-powers concerns” which “caution [the Court] against reading legislation, absent clear statement, to place in executive hands authority to remove cases from the Judiciary’s domain.”<sup>150</sup> Accordingly, the decision in *Kucana* provides another example of the Court’s choice to actively use a wide array of tools of statutory interpretation rather than simply defer to the interpretation of an executive agency.

#### IV. THE RETROACTIVITY DECISIONS

Determining the retroactive reach of IIRIRA’s provisions presented the Court with the opportunity to either expand the law’s application or to temper and contract its anti-immigrant outcomes. Like the decisions above, the cases on IIRIRA’s retroactivity all tended towards a more ordinary form of statutory interpretation, rather than blind deference to the political branches. However, before explaining the decisions themselves, it is necessary to provide some background information on retroactivity. Therefore, Part IV begins with a brief background of the judicial apprehensions towards retroactive legislation, and the test the Court created to examine a statute’s retroactive effects. Part IV then examines a series of cases in which the Supreme Court and the circuit courts applied the test for retroactivity to IIRIRA’s provisions.

##### A. *The Dangers of Retroactivity*

American jurisprudence has long disfavored the retroactive application of new laws.<sup>151</sup> This principle has roots in the Ex Post Facto Clause of the Constitution<sup>152</sup> and is motivated by concerns over fair notice,<sup>153</sup> the need to

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147. *Id.* at 237.

148. *Id.*

149. *Id.* (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63–64 (1993)).

150. *Id.*

151. 2 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 41:2, at 376 (7th ed. 2001); *see also* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.”).

152. *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 867 (8th Cir. 2002).

153. *See* 2 SINGER, *supra* note 151, § 41:2 (“There is general consensus that notice or warning of a rule should be given in advance of the actions whose effects will be judged. The hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless presupposes that the law is at least susceptible of being known. But this is not possible for law that has yet to exist.”).

provide stability and predictability,<sup>154</sup> and a desire to protect “legitimate expectations and settled transactions.”<sup>155</sup> Additionally, retroactive statutes raise the specter of the use of legislation as a tool for political oppression.<sup>156</sup> Nevertheless, Congress may enact retrospective legislation within constitutional limits.<sup>157</sup> To ensure that ex post facto legislation is properly limited, statutes are only given retroactive effect when it is unequivocally clear that Congress intended them to have such effect.<sup>158</sup> While requiring a clear mandate of retroactivity creates a strict standard for legislators,<sup>159</sup> it ensures that retrospective legislation is only created deliberately, hopefully after consideration of the potentially unfair consequences of such legislation.<sup>160</sup> These considerations are captured in the leading Supreme Court treatment of the retroactivity of statutes, *Landgraf v. USI Film Products*.<sup>161</sup>

### B. The Landgraf Test

In 1994, the Supreme Court established a two-pronged test for the analysis of retrospective legislation in *Landgraf*.<sup>162</sup> The first prong of the test incorporates the general rule that statutes must contain legislative authorization of retroactivity to be given retrospective effect: “[T]he court’s first task is to determine whether Congress has expressly prescribed the statute’s proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules.”<sup>163</sup> Accordingly, the first prong recognizes that Congress may have legitimate reasons for enacting

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154. *Landgraf*, 511 U.S. at 265–66 (“In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.”).

155. See *U.S. Fid. & Guar. Co. v. McKeithen*, 226 F.3d 412, 418 (5th Cir. 2000) (“Retroactive legislation, as opposed to the prospective kind, can present more severe problems of unfairness because it can upset legitimate expectations and settled transactions.”).

156. *Landgraf*, 511 U.S. at 266 (“The Legislature’s unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsiveness 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.”).

157. *INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

158. *United States v. St. Louis, S.F. & Tex. Ry. Co.*, 270 U.S. 1, 3 (1926) (“That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application.”).

159. *Lindh v. Murphy*, 521 U.S. 320, 328 & n.4 (1997) (“[C]ases where this Court has found truly ‘retroactive’ effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation.”); *Arevalo v. Ashcroft*, 344 F.3d 1, 11 (1st Cir. 2003) (“[A]s a general rule, the benchmark for finding unambiguous temporal scope is quite high.”).

160. *Landgraf*, 511 U.S. at 272–73 (“Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.”).

161. 511 U.S. 244 (1994).

162. *Id.* at 280.

163. *Id.*

retroactive provisions but mitigates the unfairness of retroactivity by requiring Congress to be clear about its intentions.<sup>164</sup>

The second prong of the *Landgraf* test recognizes that statutes may still have damaging retroactive effects even when Congress has not delineated their reach. The second prong therefore prescribes a standard for determining when such effects justify limiting the statute's application.<sup>165</sup>

To craft the standard, the Court pulled language from an opinion written in 1814 by Justice Story, sitting on the circuit court in the District of New Hampshire.<sup>166</sup> Justice Story found that there were two categories of statutes that had retroactive effects: those that "take[] away or impair[] vested rights acquired under existing laws," and those that "create[] a new obligation, impose[] a new duty, or attach[] a new disability, in respect to transactions or considerations already past."<sup>167</sup> While the distinction between these categories is somewhat vague,<sup>168</sup> Justice Story made clear that courts should examine both the change in the law itself, and the relationship between the operation of that change and "a relevant past event."<sup>169</sup>

In adopting Justice Story's categories, the Court noted that any test it imposed was unlikely to provide perfect guidance on when a statute has impermissible retroactive effects.<sup>170</sup> However, the Court felt that "familiar considerations of fair notice, reasonable reliance, and settled expectations," as well as judges' "sound . . . instinct[s]" in the area of retroactivity would provide them with the supplemental guidance they needed to reach a fair result.<sup>171</sup>

### C. *Retroactivity and Immigration in the Supreme Court*

The Supreme Court confronted the retroactivity of IIRIRA for the first time in *INS v. St. Cyr*.<sup>172</sup> The case raised an important question of whether aliens should face post-hoc consequences imposed by IIRIRA for things they had done prior to its enactment.<sup>173</sup>

*St. Cyr* dealt with a significant provision of the INA that removed the opportunity to apply for discretionary relief that, prior to IIRIRA, was generally available to immigrants facing deportation. In the case, Enrico St. Cyr took a plea agreement and pled guilty to selling a controlled substance.<sup>174</sup> Under the laws existing prior to IIRIRA, St. Cyr would have been able to apply for a discretionary waiver of his deportation under

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164. *Id.* at 268.

165. *Id.* at 280.

166. *Id.* at 268.

167. *Id.* at 269.

168. This ambiguity has arguably allowed courts more flexibility in finding that a statute has retroactive effects, thereby circumscribing its scope. *See infra* Part IV.D–E.

169. *Landgraf*, 511 U.S. at 270.

170. *Id.* at 276.

171. *Id.* at 270 (citing *Danforth v. Groton Water Co.*, 59 N.E. 1033, 1034 (Mass. 1901)).

172. 533 U.S. 289 (2001).

173. *Id.* at 293.

174. *Id.*

section 212(c) of the INA.<sup>175</sup> However, IIRIRA amended another section of the INA, 304(b), narrowing the class of individuals eligible for section 212(c) waivers.<sup>176</sup> The newly amended section excluded anyone convicted of any aggravated felony,<sup>177</sup> and if applied to St. Cyr, it would have denied him the opportunity to apply for such relief.

The Court looked to the test established in *Landgraf* and held that, per the first prong, Congress had not commanded with “requisite clarity” that IIRIRA should be applied retroactively.<sup>178</sup> In doing so, the Court emphasized that the standard in *Landgraf*'s first prong is a demanding one and that retroactive effect authorized by statute must “involve[] statutory language that [i]s so clear that it could sustain only one interpretation.”<sup>179</sup>

The Court then rejected arguments that IIRIRA's comprehensiveness, date of enactment, or savings clause indicated Congress's intentions that it be retroactive.<sup>180</sup> The Court also found that Congress had explicitly indicated that other sections of IIRIRA were to apply retroactively, so its failure to do so with regard to section 304(b) rendered the legislature's intent ambiguous at best.<sup>181</sup> Accordingly, it found that Congress had not clearly indicated that the section was to be retroactively applied.<sup>182</sup>

Turning to the second prong of the *Landgraf* test, the Court looked to Justice Story's categories of retroactivity and found that section 304(b) fell under the second category: “IIRIRA's elimination of any possibility of . . . relief for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly ‘attaches a new disability, in respect to transactions or considerations already past.’”<sup>183</sup>

In an effort to follow “*Landgraf*'s common-sense, functional retroactivity analysis,”<sup>184</sup> the Court was diligent in examining the precise nature of the past transaction in question and the expectations of relief that may have accompanied it. The Court emphasized criminal defendants' knowledge and consideration of the “immigration consequences of their convictions” when considering plea deals, citing state laws that require trial judges to explain such consequences when discussing plea deals,<sup>185</sup> statistics on the frequency that immigration relief was granted prior to IIRIRA's

175. *Id.* at 295.

176. *Id.* at 314.

177. *Id.* at 297.

178. *Id.* at 316.

179. *Id.* at 317 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997)).

180. *Id.* at 317.

181. *Id.* at 318–19.

182. *Id.* at 320 (“The presumption against retroactive application of ambiguous statutory provisions, buttressed by ‘the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien,’ forecloses the conclusion that, in enacting § 304(b), ‘Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits.’” (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 272–73 (1994))).

183. *Id.* at 321 (citations omitted) (quoting *Landgraf*, 511 U.S. at 269).

184. *Id.* at 324.

185. *Id.* at 322 n.48.

enactment,<sup>186</sup> as well as individual cases in which defendants negotiated deals in return for immigration relief.<sup>187</sup> In light of these factors the Court was convinced that denying defendants a form of relief that they had effectively bargained for by taking a plea deal equated to the impermissible attachment of a new consequence for a past action.<sup>188</sup> Therefore, the Court determined that section 304(b) was impermissibly retroactive.<sup>189</sup>

The result of the decision was to restrain IIRIRA's scope, despite the government's arguments that the statute should be applied. Although the decision was limited to only one of IIRIRA's provisions, its impact was profound because it preserved an important and oft-used form of relief for those whose actions took place before IIRIRA was enacted. Between 1989 and 1996, 51.5 percent of all applications for 212(c) relief were granted, and over 10,000 immigrants received some kind of waiver grant during that period.<sup>190</sup> While IIRIRA did away with 212(c) relief, *St. Cyr* preserved that avenue for those who had acted before the statute became effective.

*St. Cyr* guided the circuit courts that began to hear challenges to the retroactive application of other provisions of IIRIRA. However, each section of the INA that was changed by IIRIRA still required an independent assessment under *Landgraf*, and while *St. Cyr* provided clues about how to apply the test, it did not dictate a result in other cases on the statute's retroactive reach. When the circuit courts considered the temporal scope of the illegal reentry provision under section 241(a)(5), a split quickly developed as the courts used *Landgraf* to differing results. This split was the subject of the Court's next big IIRIRA decision, *Fernandez-Vargas v. Gonzales*.

In *Fernandez-Vargas*, the Court again looked to the *Landgraf* test, but unlike in *St. Cyr*, the result of the case was to expand the reach of IIRIRA rather than to limit it. Humberto Fernandez-Vargas was a Mexican citizen who had first entered the United States in the 1970s.<sup>191</sup> He was subsequently deported, but he continued to reenter the country illegally on multiple occasions, with his last illegal entry taking place in 1982.<sup>192</sup> Thereafter, Fernandez-Vargas started a business, had a son in 1989, and married his wife in 2001.<sup>193</sup> His wife filed a relative visa petition on his behalf, and he then filed for an adjustment of status in order to become a lawful permanent resident.<sup>194</sup> Unfortunately, his application notified the government that Fernandez-Vargas was in the country illegally, and immigration officials moved to reinstate his prior deportation order from twenty years earlier.<sup>195</sup>

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186. *Id.* at 323.

187. *Id.*

188. *Id.*

189. *Id.*

190. See Asseff, *supra* note 21, at 174.

191. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 35 (2006).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

*Fernandez-Vargas* resolved a split in the circuit courts as to whether Congress had intended section 241(a)(5) to apply to aliens who reentered the country prior to IIRIRA's effective date.<sup>196</sup> Once again, the Court used the *Landgraf* test and, under the first prong, began by determining whether Congress had addressed the provision's reach.<sup>197</sup> However, unlike in *St. Cyr*, the Court emphasized not the need for clear statements of intent, but rather the proposition that "normal rules of construction" may be used in an attempt to "draw a comparably firm conclusion about the temporal reach [of a law]" in the absence of explicit language from Congress.<sup>198</sup>

Despite the absence of any statutory language delineating its temporal reach in relation to IIRIRA's effective date, the Court found that Congress had likely intended that section 241(a)(5) should continue to be retroactively applied.<sup>199</sup>

The Court found *Fernandez-Vargas*'s arguments about the omission of explicit retroactive language unpersuasive, explained that such a reading would lead to an absurd result,<sup>200</sup> and ultimately ruled that "[c]ommon principles of statutory interpretation fail to unsettle the apparent application of § 241(a)(5) to any reentrant present in the country, whatever the date of return."<sup>201</sup> Accordingly, the decision abrogated holdings by those circuits that had held that section 241(a)(5) could *never* be retroactively applied.<sup>202</sup>

The Court then turned to the second prong of the *Landgraf* test to determine whether the section amended by IIRIRA would effectively alter the rights, liabilities, or duties of a party after the fact.<sup>203</sup> The Court focused on the fact that *Fernandez-Vargas* did not apply for any of the discretionary forms of relief available to him prior to the effective date of IIRIRA.<sup>204</sup>

The Court determined that *Fernandez-Vargas*'s lack of action was fatal to his claim that the statute had retroactive effects under either of the traditional categories. First, the right to apply for such discretionary relief was not a "vested right" (the first of Justice Story's categories).<sup>205</sup> *Fernandez-Vargas* claimed that the application of section 241(a)(5) deprived him of potential avenues of relief that would have been previously available to him, such as cancellation of removal, adjustment of status, and voluntary departure.<sup>206</sup> However, because he had not actually applied for

196. *Id.* at 36.

197. *Id.* at 37.

198. *Id.* (quoting *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)).

199. *Id.* at 38.

200. *Id.* at 40 ("[I]t would make no sense to infer that Congress meant to except the broad class of persons who had departed before the time of enactment but who might return illegally at some point in the future.").

201. *Id.* at 41–42.

202. See *Bejjani v. INS*, 271 F.3d 670 (6th Cir. 2001), *abrogated by Fernandez-Vargas*, 548 U.S. 30; *Castro-Cortez v. INS*, 239 F.3d 1037 (9th Cir. 2001), *abrogated by Fernandez-Vargas*, 548 U.S. 30.

203. *Fernandez-Vargas*, 548 U.S. at 44.

204. *Id.* at 44 n.10.

205. *Id.* at 44.

206. *Id.*

such relief, the Court described his perceived losses as “inchoate expectations and unrealized opportunities,” which on their own occupied nothing higher than the “level of hope.”<sup>207</sup>

In *St. Cyr*, the Court had been convinced that the petitioning immigrant had an expectation of relief that was subsequently taken away. However, in that case the Court was able to point to more concrete evidence of both *St. Cyr*’s knowledge of the relief at stake and the action he took in reliance on that expectation of relief.<sup>208</sup> In contrast, the Court found that the relief Fernandez-Vargas sought had always been far less guaranteed and far less expected. Furthermore, Fernandez-Vargas’s opportunity to receive relief was contingent on him taking affirmative steps to realize it, and he had not taken any action comparable to *St. Cyr*’s acceptance of a plea deal.<sup>209</sup> As such, the Court held that the mere potential for relief was not a vested right.<sup>210</sup>

Second, because Fernandez-Vargas had not been deprived of a vested right, the Court looked to whether application of the statute “create[d] a new obligation, impose[d] a new duty, or attache[d] a new disability, in respect to transactions or considerations already past.”<sup>211</sup> Importantly, the Court did not consider Fernandez-Vargas’s reentry into the United States as a past “transaction[] or consideration[]” to which IIRIRA attached new disabilities.<sup>212</sup> Because Fernandez-Vargas had not taken any action (such as applying to adjust his legal status) prior to IIRIRA’s date of enactment, the “transaction[] or consideration[]” to be considered was merely his continued presence in the country.<sup>213</sup>

It is therefore the alien’s choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out.<sup>214</sup>

By considering an alien’s continued presence, and not his or her reentry into the United States, the conduct that triggered the application of IIRIRA’s reinstatement provisions, the Court allowed the provisions to be applied to the entire class of aliens who illegally reentered prior to IIRIRA

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207. *Id.*

208. *INS v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. . . . Given the frequency with which § 212(c) relief was granted in the years leading up to . . . IIRIRA, preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.”).

209. *Fernandez-Vargas*, 548 U.S. at 44 n.10.

210. *Id.* (“These putative claims to relief are not ‘vested rights,’ a term that describes something more substantial than inchoate expectations and unrealized opportunities.”).

211. *Id.* at 37 (citing *Soc’y for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814)).

212. *Id.* at 44.

213. *Id.*

214. *Id.*

but who did not take any action to avail themselves of the discretionary relief available pre-IIRIRA.<sup>215</sup>

However, the Court was silent on whether the statute may be retroactively applied to an alien who illegally reentered prior to the effective date of IIRIRA *and* who had applied for an adjustment of status prior to the effective date of IIRIRA.<sup>216</sup>

Nevertheless, many of the circuit courts had already considered this question several years before *Fernandez-Vargas* was decided, and the circuits seem to have reached a consensus that would temper the expansion of IIRIRA's application seen in the Supreme Court's ruling.<sup>217</sup>

#### D. Cases Involving Pre-IIRIRA Applications for Relief

The First, Seventh, Tenth, and Eleventh Circuits all found that where an alien had reentered the United States, applied for and received a visa, and then applied for an adjustment of status, section 241(a)(5) could not be applied retroactively consistent with constitutional principles.<sup>218</sup> Additionally, the Ninth Circuit found the situation in which an alien applied for asylum prior to the effective date of IIRIRA to be analogous to the other circuits' treatment of adjustment of status cases.<sup>219</sup>

Before reviewing the cases, it is necessary to explain the procedural mechanisms they involve. In particular, the cases below examine situations in which an immigrant has applied for (or failed to apply for) an adjustment of status. Applying for an adjustment of status is a multistep process.<sup>220</sup> Prior to applying for the adjustment of status itself, aliens must first establish a basis for immigration and file a petition for a visa, or—more often—have a petition filed on their behalf by a sponsor.<sup>221</sup> Immigrant petitions can be filed on the basis of the relation to a citizen or lawful permanent resident, through employment, humanitarian programs, as well as for a few other special classes of immigrants.<sup>222</sup> The majority of the cases discussed below involve situations in which an alien's family member or spouse filed an immigrant relative visa petition. If a petition is approved, the alien must then wait for a visa to become available, at which point he or she will then be *prima facie* eligible for an adjustment of status.<sup>223</sup> After

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215. *Id.* at 47.

216. *Id.* at 36 n.5.

217. *See infra* Part IV.D–E.

218. *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007); *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento Cisneros v. U.S. Att'y Gen.*, 381 F.3d 1277 (11th Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003).

219. *Ixcot v. Holder*, 646 F.3d 1202, 1213 (9th Cir. 2011).

220. *Adjustment of Status*, U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS., <http://www.uscis.gov/green-card/green-card-processes-and-procedures/adjustment-status> (last updated Mar. 30, 2011).

221. *Id.*

222. *Id.*

223. *Silva Rosa v. Gonzales*, 490 F.3d 403, 406–07 (5th Cir. 2007).

the alien then applies for adjustment of status, the Attorney General decides whether or not to grant the request.<sup>224</sup>

1. *Arevalo v. Ashcroft*

The First Circuit was the first appellate court to deal with the situation in which an alien who was deported subsequently reentered the country and filed for an adjustment of status prior to the effective date of IIRIRA. The First Circuit reached its decision three years prior to the Supreme Court's ruling in *Fernandez-Vargas*.

In *Arevalo v. Ashcroft*,<sup>225</sup> the petitioner illegally reentered the United States in 1990, after which she successfully received an employment authorization card (known as a green card).<sup>226</sup> In 1996, she applied for an adjustment of status to become a legal permanent resident.<sup>227</sup> Arevalo's adjustment of status application was summarily denied and, pursuant to the changes implemented under IIRIRA, the previous order of deportation was reinstated without the opportunity for a hearing before an immigration judge or the opportunity to apply for discretionary relief.<sup>228</sup>

After applying the first prong of the *Landgraf* test and determining that "Congress failed to specify the temporal reach of the INA's reinstatement provision,"<sup>229</sup> the court examined whether section 241(a)(5) had impermissibly retroactive effects.<sup>230</sup> The court first determined that Arevalo was not challenging the right to a new deportation hearing, which had been available prior to IIRIRA, and held that, at any rate, such a right was subject to retroactive revocation because it was merely procedural—i.e., there is no right in a particular forum or to a particular mode of relief.<sup>231</sup> However, the First Circuit found that Arevalo's overarching right to seek relief at all was a "substantive right."<sup>232</sup>

The court then expressed a number of points in dicta that would prove important in subsequent decisions. First, the court emphasized the importance of Arevalo's action in filing for relief *prior* to IIRIRA's effective date.<sup>233</sup> The court reasoned that because she had filed prior to the Act, retroactively disregarding her application pursuant to IIRIRA's amendments to the INA would be unfair because it (1) "would deprive her both of a right that she once had," and (2) would deprive her of "the

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224. *Id.* at 407.

225. 344 F.3d 1 (1st Cir. 2003).

226. *Id.* at 6.

227. *Id.*

228. *Id.*

229. *Id.* at 13. Because *Arevalo* was pre-*Fernandez-Vargas*, the First Circuit had to consider both prongs of the *Landgraf* test.

230. *Id.*

231. *Id.*

232. *Id.* at 14. In making this determination the court relied on prior case law from the First Circuit as well as, by analogy, the Supreme Court's ruling in *Hughes Aircraft*, "stating that changes in whether a claim may be brought at all affect substantive rights." *Id.* (citing *Hughes Aircraft v. United States*, 520 U.S. 939, 951 (1997)).

233. *Arevalo*, 344 F.3d at 15.

reasonable expectation that she would have the opportunity to convince the Attorney General to grant her relief.”<sup>234</sup>

In other words, the First Circuit found that the alien’s claims fell within the first of Justice Story’s categories of retroactivity involving the cancellation of vested rights,<sup>235</sup> as opposed to the second category (new cancellation of vested rights), which occupied most of the Court’s analysis in *Fernandez-Vargas*.<sup>236</sup>

The *Arevalo* court made clear that it found “[the] right to seek relief [to be] analytically separate and distinct from [the] right to the relief itself.”<sup>237</sup> Accordingly, the court held that it was immaterial that the type of relief that *Arevalo* sought (an adjustment of status) was a discretionary form of relief.<sup>238</sup> Here, the *Arevalo* court drew on the Supreme Court’s decision in *St. Cyr*.<sup>239</sup> Specifically, the *Arevalo* court cited *St. Cyr*’s assertion that “there is a clear difference . . . between facing possible deportation and facing certain deportation.”<sup>240</sup> As such, *Arevalo*’s right to discretionary relief had *vested* upon her application for adjustment of status.<sup>241</sup>

In the years following *Arevalo*, the circuit courts that confronted the same question would largely replicate and cite to the reasoning laid out in *Arevalo* in making their own determinations. They also followed and heavily cited the logic and holding from *St. Cyr*, which remained the only guidepost from the Supreme Court for conducting the *Landgraf* test until *Fernandez-Vargas*. However, their formulations of why IIRIRA’s application was impermissible differ in subtle ways.

## 2. *Sarmiento Cisneros v. U.S. Attorney General*

The Eleventh Circuit was the next circuit to address the retroactivity of section 241(a)(5) in *Sarmiento Cisneros v. U.S. Attorney General*,<sup>242</sup> and following *Arevalo*’s rationale, the court ultimately reached the same conclusion. Jose Angel Sarmiento Cisneros illegally reentered the United States, married a U.S. citizen, received a visa (based on a spousal petition filed by his wife), and applied for and received an adjustment of status prior to the effective date of IIRIRA.<sup>243</sup> The court found that, were the statute to bar the application, it would have an impermissibly retroactive effect as applied to Sarmiento; however, interestingly, the court chose to couch the unfair retroactive effect of the statute not in terms of impairing a vested right (as in *Arevalo*), but rather as the attachment of a “new disability to a completed transaction.”<sup>244</sup>

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234. *Id.*

235. *See supra* notes 166–69 and accompanying text.

236. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44 n.10 (2006).

237. *Arevalo*, 344 F.3d at 15.

238. *Id.*

239. *INS v. St. Cyr*, 533 U.S. 289, 325 (2001).

240. *Arevalo*, 344 F.3d at 15 (quoting *St. Cyr*, 533 U.S. at 325).

241. *Id.*

242. 381 F.3d 1277, 1284–85 (11th Cir. 2004).

243. *Id.* at 1279.

244. *Id.* at 1284.

Like the First Circuit, the Eleventh Circuit drew on the “possible deportation” versus “certain deportation” language from *St. Cyr*,<sup>245</sup> as well as the First Circuit’s statement that “applications for discretionary relief, once made, often become a source of expectation and even reliance.”<sup>246</sup> However, rather than concluding that the reliance and expectations created when an alien applies for adjustment of status vest a substantive right, the court reasoned that the deprivation of that wholly discretionary relief is a new disability that attaches to the past conduct of those applying for it.<sup>247</sup>

In other words, the First Circuit considered the pre-IIRIRA application for adjustment of status to constitute a vested right and applying IIRIRA would impermissibly destroy that right; the Eleventh Circuit considered the pre-IIRIRA application for adjustment of status to constitute a past transaction and applying IIRIRA would impermissibly attach new disabilities to that past transaction.

### 3. *Faiz-Mohammad v. Ashcroft*

Khalid Faiz-Mohammad was another alien who illegally reentered, married a U.S. citizen, and filed a petition for alien relative, as well as an application for adjustment of status, prior to IIRIRA’s effective date. In *Faiz-Mohammad v. Ashcroft*,<sup>248</sup> the Seventh Circuit found the language of both *Arevalo* and *Sarmiento Cisneros* compelling, and further conflated (or integrated, depending on one’s perspective) Justice Story’s two categories as it reasoned that IIRIRA’s application was impermissibly retroactive. The court held that preventing aliens from applying for discretionary relief was a “‘new disability’ that did not exist prior to IIRIRA’s passage” (implicating the second category of retroactivity) and that “[c]onsequently, because § 1231(a)(5) operates to ‘impair rights [Faiz-Mohammad] possessed when he acted,’ namely his ability to apply for discretionary relief, § 1231(a)(5) may not be applied retroactively to Mr. Faiz-Mohammad” (implicating the first category of retroactivity).<sup>249</sup>

### 4. *Valdez-Sanchez v. Gonzales*

The Tenth Circuit was the first to confront the issue post-*Fernandez-Vargas*, and interestingly, the court did not find the Supreme Court’s ruling to be an impediment to ruling in favor of the foreign national. In 2007, the Tenth Circuit decided *Valdez-Sanchez v. Gonzales*,<sup>250</sup> and the opinion in the case summarized *Faiz-Mohammad*, *Arevalo*, and *Sarmiento Cisneros* in the lead up to the court’s decision.<sup>251</sup>

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245. *Id.*

246. *Id.* at 1285 (quoting *Arevalo*, 344 F.3d at 15).

247. *Id.*

248. *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799, 800–01 (7th Cir. 2005).

249. *Id.* at 810 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (alteration in original)).

250. *Valdez-Sanchez v. Gonzales*, 485 F.3d 1084 (10th Cir. 2007).

251. *Id.* at 1089–91.

The Tenth Circuit chose to frame its decision in terms of the second of Justice Story's categories.<sup>252</sup> The court found that IIRIRA eliminated the possibility of relief previously available and, as such, a new disability "attached to a completed transaction because Petitioner had applied for relief prior to IIRIRA's enactment."<sup>253</sup> The Tenth Circuit had little trouble distinguishing the case from *Fernandez-Vargas*, because the petitioner in *Valdez-Sanchez* had applied for and received an adjustment of status prior to IIRIRA's effective date, taking the precise steps that the Supreme Court had noted might have changed the equation in *Fernandez-Vargas*'s case.<sup>254</sup>

### 5. *Ixcot v. Holder*

In *Ixcot v. Holder*,<sup>255</sup> the Ninth Circuit also addressed the situation in which an alien who had been subject to a final deportation order illegally reentered the United States and applied for a form of relief prior to the effective date of IIRIRA.<sup>256</sup> The only difference between *Ixcot* and the cases described above is that the alien applied for asylum rather than adjustment of status.<sup>257</sup>

In assessing *Ixcot*'s claims for retroactivity, the Ninth Circuit started by looking at *Fernandez-Vargas*, emphasizing the Court's focus on the fact that *Fernandez-Vargas* had not applied for any relief prior to IIRIRA's effective date and looking to the Court's dicta about what *Fernandez-Vargas* might have done.<sup>258</sup> Acknowledging that the Supreme Court had left open the question of whether having applied for relief before IIRIRA made its application impermissibly retroactive, the Ninth Circuit then looked to the history of cases in the other circuits.

Relying on *Arevalo*, *Sarmiento-Cisneros*, *Faiz-Mohammed*, and *Valdez-Sanchez*,<sup>259</sup> the court concluded that "the most salient fact . . . is whether an alien filed for relief *before* IIRIRA's effective date and was awaiting the adjudication of that pending application when the government sought to reinstate an order of deportation under IIRIRA's reinstatement provision."<sup>260</sup> The Ninth Circuit held that

[the] difference [between an application for asylum and one for adjustment of status] is immaterial, because the central inquiry under *Landgraf* and *St. Cyr* is not the particular form of relief sought, nor whether that form of relief is discretionary, but whether the application of

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252. *Id.* at 1090–91.

253. *Id.*

254. *Id.* at 1089.

255. 646 F.3d 1202 (9th Cir. 2011).

256. *Id.* at 1203–05.

257. *Id.* at 1204.

258. *Id.* at 1209–10; *see* *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 46 (2006) ("[*Fernandez-Vargas*] could have married the mother of his son and applied for adjustment of status during that period, in which case he would at least have had a claim (about which we express no opinion) that proven reliance on the old law should be honored by applying the presumption against retroactivity.").

259. *Ixcot*, 646 F.3d at 1210–12.

260. *Id.* at 1212.

a new statute “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”<sup>261</sup>

It is difficult to determine whether the Ninth Circuit considered IIRIRA’s application to be impermissible under the first, second, or both of Justice Story’s categories of retroactivity, because the court was never explicit in exactly what it considered to be happening in *Ixcot*’s case.

The court merely stated that “IIRIRA’s new reinstatement provision dramatically expanded the scope of reinstatement while simultaneously barring individuals subject to reinstatement from virtually every form of immigration relief,” and that therefore because *Ixcot* had applied for asylum prior to the statute’s enactment, it could not be retroactively applied to him.<sup>262</sup>

The language seems to suggest that both categories are applicable. Because IIRIRA’s expanded reinstatement provision subjected the asylum seeker to deportation proceedings, which he would not have been subjected to prior to the law’s enactment,<sup>263</sup> the court seemed to indicate that IIRIRA attached a new disability (the second category) to his conduct of applying for asylum. But the other effect of IIRIRA was to “simultaneously bar[] [him] from virtually every form of immigration relief,” which sounds more like being denied a right to discretionary relief that vested when he applied for asylum.<sup>264</sup>

#### *E. Cases Lacking Pre-IIRIRA Applications for Relief*

Although a number of circuits have not ruled on the precise question of whether IIRIRA can be read retroactively in cases of illegal reentry, most circuits have ruled on the retroactivity of IIRIRA in one context or another, and those cases support a growing consensus that conduct short of applying for discretionary relief before the statute’s effective date will not prevent it from being retroactively applied.<sup>265</sup> Nevertheless, because they are not directly on point, they require a more abridged analysis than the cases discussed in the previous section.

Several of the circuits have addressed the situation in which an immigrant had reentered the United States and then married a U.S. citizen or legal resident prior to IIRIRA’s effective date. Both the Second and Fourth Circuits held that IIRIRA could be applied in this situation, reasoning that marriage did not constitute the kind of past conduct to which to legal consequences would attach post-IIRIRA.<sup>266</sup>

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261. *Id.* at 1213 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

262. *Id.*

263. *Id.* at 1210.

264. *Id.* at 1213.

265. *See supra* Part IV.D–E.

266. *Herrera-Molina v. Holder*, 597 F.3d 128, 137 (2d Cir. 2010) (concluding that having married a U.S. citizen without having also applied for an adjustment of status was not enough to constitute “prior, completed conduct” that would prejudice the alien if section 241(a)(5) was applied); *Velasquez-Gabriel v. Crocetti*, 263 F.3d 110 (4th Cir. 2001)

In 2002, the Eighth Circuit initially held that IIRIRA could not be applied in this situation, as the elimination of the ability to apply for relief constituted a new legal consequence to events completed prior to its enactment.<sup>267</sup> However, the decision did not focus on the alien's marriage as the past conduct, and in fact did not clarify which past conduct the new consequence was attaching to. The court merely noted that section 241(a)(5)'s denial of the right to apply for relief constituted the "elimination of a substantive defense," which was per se a new legal consequence.<sup>268</sup> However, when confronted with the same situation four years later, the court held that *Fernandez-Vargas* had overruled the reasoning in *Alvarez-Portillo v. Ashcroft* and therefore found that section 241(a)(5) was not impermissibly retroactive.<sup>269</sup>

In *Silva Rosa v. Gonzales*,<sup>270</sup> the alien had not only illegally reentered the United States and married a permanent resident pre-IIRIRA, but his wife had also filed an immigrant relative visa petition on his behalf.<sup>271</sup> The visa was approved but not yet available to him prior to IIRIRA's effective date.<sup>272</sup> Silva Rosa's visa became available post-IIRIRA, and he was then able to file for an adjustment of status.<sup>273</sup> However, because he was not able to take the last step of applying for an adjustment of status prior to IIRIRA, his claim of impermissible retroactivity failed. The court ruled that the combination of his marriage to a permanent resident and an unapproved immigrant relative visa petition was not enough to constitute a "vested right" or "settled expectation."<sup>274</sup> Noting that other circuits had deemed the application for an adjustment of status as a "completed transaction," the court held that the steps Silva Rosa took fell short of what was required.<sup>275</sup> Accordingly, because *Silva Rosa* came after *Fernandez-Vargas*, the Fifth Circuit was compelled to find that lacking such a completed transaction, "IIRIRA does not impermissibly attach new consequences to . . . an illegal reentry."<sup>276</sup>

In *Lopez-Flores v. Department of Homeland Security*,<sup>277</sup> the Eighth Circuit heard the petition of an alien who had also reentered the United States and applied for a visa prior to IIRIRA.<sup>278</sup> However, Lopez-Flores had applied for an Alien Employment Certification through his sponsoring

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(concluding that failure to apply to adjust resident status before the new law took effect ensured that the statute "attache[d] [no] new legal consequences to events completed before its enactment" (citation omitted)).

267. *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 867 (8th Cir. 2002).

268. *Id.*

269. *Gonzalez v. Chertoff*, 454 F.3d 813, 814–18 & n.4 (8th Cir. 2006).

270. 490 F.3d 403 (5th Cir. 2007).

271. *Id.* at 405.

272. *Id.*

273. *Id.*

274. *Id.* at 406.

275. *Id.* at 408.

276. *Id.* at 409.

277. 387 F.3d 773 (8th Cir. 2004).

278. *Id.* at 775.

employer rather than for an immigrant relative visa petition.<sup>279</sup> Lopez-Flores's application was not approved until after IIRIRA, and in 2002 he applied for adjustment of status, which was subsequently denied.<sup>280</sup> Following the rationale in *Alvarez-Portillo*, the court ruled that section 241(a)(5) was impermissibly retroactive as applied to the alien.<sup>281</sup> Although the Supreme Court did not discuss *Lopez-Flores* in its decision in *Fernandez-Vargas*, the Tenth Circuit had distinguished the case in its opinion in the *Fernandez-Vargas* case, which the Supreme Court affirmed.<sup>282</sup>

How should we reconcile the Court's decision in *Fernandez-Vargas*<sup>283</sup> with the circuit courts' decisions<sup>284</sup> narrowly interpreting the reach of IIRIRA's illegal reentry provision? And putting aside *Fernandez-Vargas*'s contrary holding, how should we understand the Court's increasingly nondeferential stance in immigration?<sup>285</sup> The last part of this Note attempts to reconcile these seemingly contradictory decisions on the retroactivity of section 241(a)(5) and the contours of the Court's more recent rulings in general.

#### V. IIRIRA'S RETROACTIVE ANALYSIS REFLECTS THE NORMALIZATION OF IMMIGRATION LAW

A review of the cases presented above leads to two different observations. The first has to do with the different outcomes seen in *Fernandez-Vargas* and the circuit court decisions. The second, and more important, deals with the kind of analyses employed in the retroactivity cases as a whole, and how they compare to the broader arc of judicial review in immigration cases. Part V takes each of these observations in turn and then concludes by explaining why they matter.

##### A. *Fernandez-Vargas Versus the Circuits*

Upon first glance, the picture that emerges from the courts' treatment of IIRIRA's retroactivity is one in which the circuits have tempered the broader application of the immigration statute as applied in *Fernandez-Vargas*.<sup>286</sup> Under *Fernandez-Vargas*, immigrants who reentered the country prior to IIRIRA are still subjected to its harsher immigration regime, but under the circuit court decisions those who applied for an adjustment of status before the law went into effect remain entitled to the relief provided by the more forgiving system that predated it.

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279. *Id.*

280. *Id.*

281. *Id.*

282. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 890 n.11 (10th Cir. 2005), *aff'd sub nom. Fernandez-Vargas v. Gonzales*, 548 U.S. 30 (2006).

283. *See supra* Part IV.C.

284. *See supra* Part IV.D–E.

285. *See supra* Part II.

286. *See supra* Part IV.D–E.

This result may seem absurd, but it is not necessarily the product of a conflict between the Supreme Court and the circuits. In *Fernandez-Vargas*, the Supreme Court explicitly recognized the existence of many of the circuit cases discussed above and provided no indication that those decisions were wrongly decided.<sup>287</sup> Nor can the cases properly be considered a reaction to *Fernandez-Vargas*, as many of them took place several years before it.<sup>288</sup>

However, the mere fact that *Fernandez-Vargas* left open the question decided by the circuit cases, does not equate to an outright approval of the circuits' decisions in those cases. The Supreme Court could still find that section 241(a)(5) retroactively applies to aliens who applied for an adjustment of status prior to IIRIRA's effective date, and indeed the spirit of the Court's decision in *Fernandez-Vargas* may well support such a holding.

Furthermore, the Court's recognition of the circuits' decisions on that question might indicate that the Court knew that its decision in *Fernandez-Vargas* would be limited by the circuits' interpretations. The Court may have been more willing to expand the reach of IIRIRA because it knew that the expansion would still be limited to situations in which aliens had not taken significant affirmative steps to change their legal status before the statute went into effect.<sup>289</sup>

On the other hand, if the result still seems half-baked, one answer may be just that the Court got it wrong. The Court could have used *Fernandez-Vargas* as an opportunity to interpret the scope of IIRIRA much more narrowly. At either step of the *Landgraf* test, the Court could have found that the statute should not be retroactively applied, and in fact the way in which the Court applied the test seems at odds with the Court's other decision on IIRIRA's retroactivity in *St. Cyr*.

The Court framed the inquiry of determining Congress's intent with regard to the provisions of IIRIRA very differently in *Fernandez-Vargas* than it did in *St. Cyr*. In *St. Cyr*, the Court stressed the demanding nature of the inquiry and the need for clear statutory language.<sup>290</sup> Finding the section to be ambiguous, the *St. Cyr* Court invoked the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien," to support their finding that Congress had not addressed the scope of the statute.<sup>291</sup>

In contrast to *St. Cyr*, in *Fernandez-Vargas*, the Court emphasized the use of ordinary tools of statutory interpretation during the first prong of the *Landgraf* test to determine congressional intent in the absence of a clear

287. *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 36 n.5, 46 (2006).

288. See *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento Cisneros v. U.S. Att'y Gen.*, 381 F.3d 1277 (11th Cir. 2004); *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003).

289. See *supra* Part IV.C.

290. *INS v. St. Cyr*, 533 U.S. 289, 316–17 (2001) (quoting *Lindh v. Murphy*, 521 U.S. 320, 328 & n.4 (1997)).

291. *St. Cyr*, 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)).

statement.<sup>292</sup> Additionally, unlike in *St. Cyr*, the Court did not invoke any rules that would have favored the petitioning alien, and they found the tools of interpretation that he used to be unconvincing.<sup>293</sup> In particular, Fernandez-Vargas had cited the statutory interpretive rule of negative implication, arguing that the removal of language applying the reinstatement provision to immigrants who reentered prior to the statute's effective date was evidence of congressional intent to change the law.<sup>294</sup>

Critics note that as it dismissed Fernandez-Vargas's arguments, the Court did not consider the legislative history of the provision in which Congress had considered and rejected an earlier draft of the statute that would have expressly called for the retroactive application of the provisions in section 241(a)(5).<sup>295</sup> Additionally, the presence of clear statements of retroactive reach elsewhere in IIRIRA and a look at the legislative intent behind the pre-IIRIRA version of the statute also suggest that Fernandez-Vargas's interpretation might have more accurately reflected the law's intended scope.<sup>296</sup>

Commentators also have been critical of the Court's application of the second prong of *Landgraf*.<sup>297</sup> The Court could have found that the situation in *Fernandez-Vargas* was analogous to that in *St. Cyr*; indeed that was the argument made by Fernandez-Vargas.<sup>298</sup> He argued that just as *St. Cyr* might not have taken the plea bargain in the absence of the relief eliminated by IIRIRA, so might he not have reentered and continued to live in the United States if it were not for the availability of discretionary relief that existed pre-IIRIRA.<sup>299</sup>

The Court instead chose to shift the triggering conduct from Fernandez-Vargas's reentry to his presence in the country, allowing the Court to bypass the retroactive effects of the statute by finding that it was the alien's failure to leave the country that subjected him to the new law's stricter consequences.<sup>300</sup> Arguably, this leads to the somewhat absurd result of arguing that an alien can escape the harsh reinstatement of removal to a country by moving there voluntarily.<sup>301</sup>

Ultimately, there are no clear answers about what motivated the Court's decision in *Fernandez-Vargas* or why the circuits have reached the consensus seen in their cases. Undoubtedly the differing results of these cases are in large part attributable to the abstruse standards laid out by the

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292. *Fernandez-Vargas*, 548 U.S. at 37 (quoting *Lindh*, 521 U.S. at 326).

293. *Id.* at 40.

294. *Id.* at 38.

295. See, e.g., Asseff, *supra* note 21, at 166.

296. *Id.* at 167.

297. *Id.* at 168.

298. *Fernandez-Vargas*, 548 U.S. at 40.

299. *Id.* at 39.

300. See Asseff, *supra* note 21, at 21.

301. *Id.* at 170. Fernandez-Vargas sought to avoid having to return to live in Mexico, not merely to avoid the removal process itself. "It is thus disingenuous for the Court to argue that Fernandez-Vargas could have improved his situation and avoided the new legal consequences of the IIRIRA by voluntarily returning to Mexico." *Id.*

*Landgraf* test and Justice Story's language. At least one author argues that the ambiguity seen in the test for retroactivity necessitates the creation of a rule of lenity favoring noncitizens in immigration law.<sup>302</sup>

However, the minutiae of the debate over whether *Fernandez-Vargas* was correctly decided or why the cases create such a trivial trigger for determining IIRIRA's retroactive application tends to obscure a more important observation about how the courts are interpreting immigration law in general.

#### B. IIRIRA's Retroactivity As Ordinary Statutory Interpretation

The existence of the debate over *Fernandez-Vargas* itself shows that when it comes to assessing the retroactivity of section 241(a)(5), both the Supreme Court and the circuit courts reviewed IIRIRA in an active and involved manner. Rather than deferring to the government's interpretation of IIRIRA or providing overbroad readings of the statute in recognition of Congress's plenary power in immigration, all of the courts used common interpretive tools to carefully apply the *Landgraf* test to the immigration statute. Even the somewhat erratic use of Justice Story's categories and the myriad arguments against the result in *Fernandez-Vargas* would seem to indicate that the courts are actively using the interpretive tools available to them, allowing them to find multiple paths to define the outer limits of IIRIRA's application.

In this way the cases on IIRIRA's retroactivity are consistent with the Court's more thorough review of the statute in general, as illustrated by the cases in Part III. The picture that emerges from the Court's treatment of IIRIRA is one that stands in sharp contrast to the worries espoused by commentators who feel that the Court has been overly deferential to other branches in immigration law.<sup>303</sup> Far from being reluctant to fulfill its interpretive role, the Court has continually applied the substantive and interpretive tools it has in order to push back against the political branches when it comes to IIRIRA's harsh changes to immigration law.

One explanation for the more normalized statutory interpretation seen in the retroactivity cases is that it is merely the result of the *Landgraf* test's formal framework for review. When structured tests or doctrines from other areas of law are applied to the immigration context, they might offer the Court greater leverage to examine immigration statutes in a more ordinary and less deferential way. The use of the *Landgraf* test in *Fernandez-Vargas* might then be comparable to the application of the equal protection framework discussed in Part II. Applying the test amounted to a more thorough review of the statute, but ultimately the result of the case was less immigrant-friendly than might be expected.

Nevertheless, the retroactivity cases' consistency with the other nondeferential IIRIRA cases suggests that there is a larger trend toward reviewing immigration law in a more ordinary manner. At least one

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302. *Id.* at 175.

303. *See supra* Part II.

commentator has argued that in the last few years the Court has completely normalized its treatment of not only the IIRIRA cases but all immigration cases. Professor Kevin R. Johnson examines the Court's immigration decisions from 2009 to 2013 and concludes that the Court has "mainstreamed U.S. immigration law and slowly but surely moved away from anything that might be reasonably characterized as 'immigration exceptionalism.'"<sup>304</sup>

Professor Johnson details how the contemporary court has repeatedly rejected agency interpretations through the use of "standard, unremarkable [tools of] statutory interpretation."<sup>305</sup> It may then be that when viewed in the context of the Court's recent decisions, the IIRIRA line of cases are but one example of the judiciary's growing rejection of the long tradition of deference and exceptionalism in reviewing immigration laws.

### C. Why Does It Matter?

While in theory laws are to be interpreted and executed with regard to a single meaning,<sup>306</sup> in practice the three branches of American government rarely agree on the application of the law.<sup>307</sup> The legislators who write and pass a law hope that it conveys their intent regarding its application (to the extent that a single opinion can be evinced from a body of hundreds of legislators).<sup>308</sup> The executive agencies that enforce the laws have their own interpretations of how the laws should be construed in practice, which may reflect the agencies' own interests.<sup>309</sup> The judiciary attempts to play the role of "faithful agent" to the legislature,<sup>310</sup> but nonetheless may be influenced and motivated by its own particular institutional and historical

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304. Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: The Burgeoning Era of Immigration Law Unexceptionalism*, U.C. DAVIS L. REV. (forthcoming 2014) (manuscript at 8) (on file with author).

305. *Id.* at 18.

306. 2 AM. JUR. 2D *Administrative Law* § 492 (2004) ("The judiciary must reject administrative constructions that are contrary to clear congressional intent. The executive branch is not permitted to administer a statute in a manner that is inconsistent with the administrative structure that Congress has enacted in law. Thus, where the intent of Congress is clear, the court, as well as the agency, must give effect to that intent.").

307. See Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 466 (1987) ("Despite its notable commitment to legal process, the government of the United States faces inherent difficulties in achieving unitary, government-wide legal interpretation. The very distribution of power among three coequal branches of government means that each branch may evolve at least some important understandings of the law that differ from those of the other two branches.").

308. See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 915 (2013).

309. See Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203, 209 (2004) ("[C]ourts and commentators alike have recognized the possibility that an agency may adopt a statutory or regulatory interpretation that represents an exercise in agency aggrandizement—that is, an interpretation that advances the agency's own interests *vis-à-vis* the interests of other agencies, other governmental institutions or private parties.").

310. See Gluck & Bressman, *supra* note 308, at 912–14.

perspectives,<sup>311</sup> leaving it to express rulings that may or may not always be consistent with the intent or interpretations of the political branches. Therefore, when reviewing the application of a law, courts are confronted with a confluence of interests, further complicating the already fraught task of interpreting statutes that may be unclear, ambiguous, or overreaching. While courts may choose to ignore (properly or not) the background of interests and influences as they go about their business, they may yet find themselves confronting the basic choice of deferring to the interpretations that have been presented to them, or fashioning their own readings.<sup>312</sup>

How much deference the courts should give to the other branches when reviewing their acts and decisions is one of the most fundamental and endlessly controversial issues in American jurisprudence.<sup>313</sup> How that question is answered has important implications for the balance of power wielded by the different branches, the constitutional roles of each branch in governing, and the protection of individual liberties.<sup>314</sup>

A nondeferential court that strictly polices the actions of the political branches may be seen as activist, unrepresentative, and frustratingly countermajoritarian.<sup>315</sup> However, when a court is too deferential it may be

311. See Or Bassok, *The Supreme Court's New Source of Legitimacy*, 16 U. PA. J. CONST. L. 153, 197–98 (2013) (arguing that the rise of scientific public opinion polling provided the Court with a new source of legitimacy and that subsequently “[t]he Court’s sociological legitimacy became its guiding star”); Richard Lavoie, *Activist or Automaton: The Institutional Need to Reach a Middle Ground in American Jurisprudence*, 68 ALB. L. REV. 611, 618–19 (2005) (asserting that “a middle ground, where the judiciary is allowed some degree of lawmaking authority, but is also subject to constraints on the exercise of this authority, represents the best overall solution from an institutional perspective”).

312. Glen Staszewski, *Statutory Interpretation As Contestatory Democracy*, 55 WM. & MARY L. REV. 221, 231–32 (2013) (“[L]egal realists recognized that the notion of ‘legislative intent’ is often a fiction and that courts necessarily exercise substantial policy-making discretion when they decide cases pursuant to traditional methods of statutory interpretation.”); see also Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1090 (2008) (examining when and why courts defer).

313. See Horwitz, *supra* note 312, at 1069 (“[D]eference has featured in countless discussions in the academic literature of constitutional law and its cousin, administrative law.”); see also, e.g., William N. Eskridge, Jr. & Kevin S. Schwartz, *Chevron and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623 (2006) (examining the debate over *Chevron* and deference to the executive branch when public values are implicated); Michael P. Healy, *Reconciling Chevron, Mead, and the Review of Agency Discretion: Source of Law and the Standards of Judicial Review*, 19 GEO. MASON L. REV. 1, 4 (2011) (delineating the areas of judicial review that “remain unsolved” following *Chevron*); Kevin R. Johnson, *supra* note 304, at 9 (“A common battleground for advocates, and differences of opinion among the Justices, is the deference properly afforded the Board of Immigration Appeals, with the arguments mirroring the general ones surrounding propriety of deference to the work of administrative agencies.”). A recent study of *Chevron* deference cites at least 115 cases that attempt to make sense of when and how courts should defer under that doctrine. Kristine C. Karnezis, *Construction and Application of “Chevron Deference” to Administrative Action by United States Supreme Court*, 3 A.L.R. FED. 2D 25 (2005). A Westlaw KeyCite search conducted April 2, 2014 yielded 9334 law review articles that have cited *Chevron* itself.

314. See generally Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 472 (2013) (discussing the implications of deference in “Legislative, Administrative, and ‘Special’ Contexts”).

315. See Legomsky, *supra* note 48, at 1628 (“[U]nelected, relatively unaccountable federal judges make decisions that can profoundly affect the political life of the nation. The

viewed as failing to fulfill its role in protecting constitutional rights from overreaches by the political branches and neglecting to play a more active part in protecting those groups which are vulnerable due to their lack of representation and political power.<sup>316</sup>

Immigration law often has been considered to be an area in which the courts have been very deferential both to the executive branch (in the form of administrative agencies), to Congress, and even to state legislatures.<sup>317</sup> In some sense this may not be so surprising. Immigration is a field in which Congress and the executive branch have traditionally held plenary power.<sup>318</sup> Residence and citizenship can confer substantial rights and privileges, and therefore, the granting of these statuses should arguably be in the hands of the representative branches.<sup>319</sup> Additionally, the sheer volume of immigrants, and the complexity of structures in place to handle immigration, may make it an area in which courts are ill-equipped to make decisions.<sup>320</sup>

Nevertheless, the dangers of an overly deferential court are keenly felt in the immigration sphere.<sup>321</sup> Immigrants, especially those who have entered the country illegally, are perhaps the group with the least ability to navigate the social and political systems in place to obtain political representation

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broader the impact of those decisions, the more concern there is about leaving the last word to a body or a person not subject to a political check.”).

316. See generally Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2031 (2011) (discussing the lack of protections for individual rights when courts give agencies undue deference).

317. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (“Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”). See generally Anne Y. Lee, *The Unfettered Executive: Is There an Inherent Presidential Power to Exclude Aliens?*, 39 COLUM. J.L. & SOC. PROBS. 223 (2005) (examining theories of executive power in immigration law).

318. See Brian G. Slocum, *Courts vs. the Political Branches: Immigration “Reform” and the Battle for the Future of Immigration Law*, 5 GEO. J.L. & PUB. POL’Y 509, 511 (2007) (“Under the infamous ‘plenary power’ doctrine, created by the Supreme Court in the late nineteenth century, courts have traditionally considered the power of Congress over immigration to be nearly unlimited and the constitutional rights of immigrants to be almost nonexistent.”); see also *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (“Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

319. See *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

320. See Legomsky, *supra* note 48, at 1629 (“When a court reverses a decision of an administrative agency, a body that lacks specialized expertise in the particular field is superseding a body that has such expertise. In immigration law, where technical nuances abound, the value of expertise should not be discounted.”).

321. See Rana, *supra* note 41, at 345. In many ways, the “history of immigration jurisprudence is a history of obsession with judicial deference” and one that continues, and appears to be deepening, today. *Id.* at 343 (quoting Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1671 (2007)).

and secure their rights.<sup>322</sup> Moreover, immigration has always been a highly politically charged matter, and unfortunately, xenophobia has long been a potent force in American politics, especially during times in which jobs and resources are scarce.<sup>323</sup> Therefore, there is arguably a special need for the judiciary, which is, at least in theory, more removed from the political sphere, to play an active role in reviewing the actions of the other branches.<sup>324</sup>

The need for a more vigilant judiciary is heightened by the political branches' contemporary efforts to curb the courts' role in immigration.<sup>325</sup> In 1996, IIRIRA drastically changed the "substance and structure of immigration law and proceedings . . . mak[ing] it [much] more difficult for noncitizens to obtain and keep legal status in the United States."<sup>326</sup> The years since IIRIRA's passage are one of the "longest periods of time that have passed without significant immigration reform since the 1880s."<sup>327</sup> The anti-immigrant nature of IIRIRA and the lack of meaningful reform since its passage, exaggerate the impact of the U.S. Supreme Court's interpretations of the statute's scope. It is perhaps heartening then to see that in interpreting IIRIRA, the courts have shied away from the old trends of deference and used the statutory tools at their disposal to engage in the meaningful review of a law that can have such a profound impact on the lives of so many immigrants.

#### CONCLUSION

Nearly twenty years after its passage, the Court continues to grapple with the scope of IIRIRA. More surprising still is that among the biggest

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322. See Legomsky, *supra* note 48, at 1631 ("[I]mmigrants . . . lack access to the normal political channels on which United States citizens can rely for some measure of protection.").

323. See Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 J. GENDER RACE & JUST. 315, 317–22 (2003) (describing the history of racial exclusion in U.S. immigration policy).

324. See Legomsky, *supra* note 48, at 1631 ("Immigrants must depend on a fair and impartial judiciary because they have no one else on whom they can rely."); see also Rana, *supra* note 41, at 345 ("[P]erhaps more than in other areas of administrative law, the political, human rights, and national security issues at stake in immigration cases often underscore the potentially high stakes involved in the debates over the nature of the judicial role. It is not surprising, then, that deference issues have long been of heightened significance in the immigration context.").

325. Slocum, *supra* note 318, at 510 ("Congress's efforts at reform have been mostly anti-immigrant in nature, including particularly troubling attempts to divest courts of jurisdiction to review many challenges to deportation. In turn, the executive branch's reforms have included attempts to undermine the independence of administrative adjudicators and to expedite the administrative review process by providing for less administrative review.").

326. Kate Aschenbrenner, *Beyond "Because I Said So": Reconciling Civil Retroactivity Analysis in Immigration Cases with a Protective Lenity Principle*, 32 REV. LITIG. 147, 169 (2013).

327. Adriane Meneses, *The Deportation of Lawful Permanent Residents for Old and Minor Crimes: Restoring Judicial Review, Ending Retroactivity, and Recognizing Deportation As Punishment*, 14 SCHOLAR 767, 785 (2012).

questions presented by the law is when it can be applied to immigrants whose actions predate it.

However, the decisions on the retroactivity of IIRIRA speak to more than just the individual actions of those caught up in its provisions; they are part of a broader discussion of the judiciary's role in immigration and the courts' responses to the political branches' attempts to circumscribe the already limited judicial intervention available in immigration cases. This Note adds to that broader understanding by examining one line of cases that show how the modern courts have chafed at their historically deferential role in immigration law and pushed back at the strict legal regimes created by Congress and the broad interpretations of restrictive immigration laws advocated for by immigration agencies. While the normalization of judicial review in immigration law does not always mean that the Court's decisions will be immigrant-friendly, it does at least mean that the laws that affect immigrants will be subjected to the type of searching review that we expect from our judiciary.