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## Irreconcilable Similarities: The Inconsistent Analysis of 212(c) and 212(h) Waivers

Kate Aschenbrenner Rodriguez

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## IRRECONCILABLE SIMILARITIES: THE INCONSISTENT ANALYSIS OF 212(C) AND 212(H) WAIVERS

KATE ASCHENBRENNER RODRIGUEZ\*

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### *Introduction*

Issues in immigration law often exist at the complex and confusing intersection of the plenary power doctrine, constitutional law, administrative law, and immigration law itself. Courts and legal scholars have long struggled with difficult legal and theoretical problems in each of these individual areas alone. It is not surprising then that, when combined, these problems may become intractable. And when the case in which they are confronted involves the permanent removal of a noncitizen from the United States, perhaps a long-term lawful permanent resident (LPR) whose

entire life and family are here, the consequences to their resolution are magnified to the extreme.<sup>1</sup>

One area that highlights what occurs when these areas of law overlap in a single case involves waivers of inadmissibility under the former section 212(c) of the Immigration and Nationality Act (INA) and under the current INA section 212(h).<sup>2</sup> Both of these waivers are frequently used to waive criminal convictions for long-term LPRs so that such LPRs do not lose their status and may remain legally in the United States. By the language alone of these waivers, they apply only to noncitizens seeking admission into the United States or otherwise subject to the grounds of inadmissibility. Both 212(c) and 212(h) waivers, however, have been the subject of extensive litigation seeking to extend their reach to allow them to waive grounds of deportability. The result of the intersection of constitutional, administrative, and immigration law in this litigation appears to be, to put it simply, a mess. The decisions are inconsistent, sometimes incoherent, and often irrational in terms of both outcome and doctrine.

With respect to outcome, the courts have reached essentially the opposite result in 212(c) and 212(h) cases: 212(c) is available to most noncitizens seeking to waive charges of deportability while 212(h) is not. With respect to doctrine, despite immigration exceptionalism's insistence that Congress' power over immigration is plenary and that the executive branch is particularly deserving of deference in the immigration context, the courts have applied general principles of administrative and constitutional law to congressional and agency positions. Three major legal frameworks have been involved in these decisions: (1) judicial deference to an agency's interpretation of a statute it is charged with administering under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*;<sup>3</sup> (2) arbitrary and capricious review of an agency's action under section 706(2)(A) of the Administrative Procedure Act (APA);<sup>4</sup> and (3) the guarantee of equal protection of the law under the due process clause of the Fifth Amendment to the Constitution. Not only have the courts considering these questions differed on how to interpret and

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1. See, e.g., *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (“[D]eportation is a drastic measure . . . .”); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (stating that deportation may result in not only loss of liberty but also “loss of both property and life; or of all that makes life worth living”).

2. The Immigration and Nationality Act, commonly referred to as the “INA,” begins at 8 U.S.C. § 1101.

3. 467 U.S. 837, 844-45 (1984).

4. 5 U.S.C. § 706(2)(A) (2012).

apply particular portions of the legal standards, but they have also varied widely as to which of these particular legal standards they discuss and even whether they invoke any at all.

Despite these radical discrepancies in outcome and legal framework, however, the 212(c) and 212(h) decisions can deepen our understanding of immigration exceptionalism, immigration law today, and immigration law's intersection with administrative and constitutional law. The application of ordinary administrative and constitutional law principles in these cases demonstrates a clear continuing erosion of immigration exceptionalism and the plenary power doctrine. Furthermore, there are significant parallels in the courts' analyses regardless of which of the three legal frameworks is employed. Assessing whether an agency's legal interpretation is reasonable under step two of the *Chevron* analysis looks a great deal like analyzing whether an agency's action is arbitrary and capricious under section 706(2)(A) of the APA, which in turn looks a great deal like considering whether there is a rational basis for a particular action under minimal scrutiny equal protection review.

The courts themselves have only recently and rarely begun to note these parallels and have never analyzed their significance. This failure is one facet of a larger issue: the courts in the 212(c) and 212(h) cases have primarily engaged in only a surface application of the constitutional and administrative law principles discussed. I argue that this failure illustrates the continuing effects of plenary power and immigration law exceptionalism. Deeper attempts to explore what these doctrines mean, address the many remaining questions regarding their application in the immigration law context, and consider how the individual doctrines interconnect will be the next step in the erosion of immigration exceptionalism. Like the weakening of the plenary power doctrine thus far, however, progress is likely to be slow, incremental, and non-linear.

Part I of this article will introduce the doctrinal frameworks: the plenary power doctrine and the theory of immigration exceptionalism, *Chevron* deference, arbitrary and capricious review, and equal protection rational basis analysis. Part II will detail the development of the problem in the case law regarding the expansion of 212(c) and 212(h) waivers to grounds of deportability. Part III then contains the heart of the argument. I will argue that the differences in outcome and application of doctrine between the 212(c) and 212(h) cases and even among each case type are irreconcilable. Despite these irreconcilable differences, however, there are substantial parallels in the factors the courts are actually considering in these cases. As courts begin to acknowledge and explore these parallels and engage in a

deeper analysis of the administrative and constitutional principles being employed, the validity and hold of a theory of immigration exceptionalism will continue to decline.

### *I. Doctrinal Frameworks*

Immigration law is in many respects “special”: it is complicated, intricate, and highly technical under the best of circumstances.<sup>5</sup> Immigration law has also been understood to differ markedly from other areas of the law, in particular with respect to questions of judicial review and constitutionality.<sup>6</sup> Ordinary legal principles are not expected to apply in the same way they might in other contexts, and outcomes that would be unusual in other settings are not uncommon. This understanding is sometimes described as a theory of “immigration exceptionalism.”<sup>7</sup> At its core, immigration exceptionalism stems from the development of the plenary power doctrine in a series of Supreme Court decisions from the late 1800s.<sup>8</sup> The plenary power doctrine means in effect that Congress has absolute and unqualified power, immune from the threat of judicial review, over choices regarding which noncitizens to admit into and deport from the United States.<sup>9</sup> Courts allow constitutional violations against noncitizens in

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5. See, e.g., *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (“Those hardy readers who have made it this far will surely agree with the ‘complexity’ point.”); cf. Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 925 (1995) (“For more than a hundred years, the Supreme Court of the United States has been telling us that immigration law is just plain different.” (footnotes omitted)); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1301 (2011) (“What emerges from this discussion is the realization that deportation does not fit neatly into the civil or criminal box, but rather that it lives in the netherworld in between.”).

6. See, e.g., Kevin Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 58 (2015) (“Immigration law is most well-known among law professors for its marked departure from mainstream U.S. constitutional law.”); Legomsky, *supra* note 5, at 925-26; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-60 (1990).

7. See, e.g., Johnson, *supra* note 6, at 59; Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307, 307 (2000); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999).

8. See *Fong Yue Ting v. United States*, 149 U.S. 698, 706-15 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 609 (1889).

9. See, e.g., Johnson, *supra* note 6, at 58-59.

the immigration context that would be impermissible in other areas of law.<sup>10</sup>

Immigration exceptionalism also extends beyond the plenary power doctrine. Hiroshi Motomura, for example, has defined it as “the view that immigration and alienage law should be exempt from the usual limits on government decisionmaking . . . .”<sup>11</sup> Immigration and alienage law includes all immigration or status-related matters affecting noncitizens in the United States, not just laws relating to the entry and expulsion of noncitizens.<sup>12</sup> The plenary power doctrine focuses primarily on the relationship between the courts and Congress—that is, between the judicial and the legislative branches of government. Immigration exceptionalism is also concerned with relationships between the courts and the immigration executive agencies (the judicial and the executive branches), between Congress and the immigration executive agencies (the legislative and executive branches), and between federal law and state law.<sup>13</sup>

Immigration exceptionalism and the individual constitutional rights of noncitizens have long existed in awkward tension with each other. Another particularly significant aspect of immigration law exceptionalism today is its intersection with doctrines of deference in administrative law.<sup>14</sup> A strong application of the theory of immigration exceptionalism would suggest that these constitutional and administrative “usual limits on government decisionmaking” should have no role in immigration cases.<sup>15</sup>

Noncitizens and commentators alike have long criticized the plenary power doctrine and debated the exact degree of deference to congressional

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10. See, e.g., *id.*; cf. *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (“In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.”).

11. Motomura, *supra* note 7, at 1363.

12. See, e.g., *id.* at 1361. Commentators have even argued for further expansion of the subject matter covered by a theory of immigration exceptionalism. See, e.g., Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1969 (2013) (arguing for a “broader understanding of immigration exceptionalism” that focuses on the system’s procedural aspects and takes into consideration its implications for both noncitizens and citizens).

13. Cf. Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1672-76 (2007) (focusing on the distribution of authority between Congress and the executive agencies and the judiciary’s role in influencing that distribution).

14. Cf. *id.* at 1671 (discussing the intersection of the plenary power doctrine and administrative law doctrines of deference).

15. Motomura, *supra* note 7, at 1363.

judgment it requires.<sup>16</sup> Although the demise of the plenary power doctrine has been incorrectly predicted for decades,<sup>17</sup> the doctrine certainly is less robust today than initially understood or intended.<sup>18</sup> In recent years, as courts have increasingly begun to apply ordinary principles of law in an ordinary manner in immigration cases, scholars have not only recognized the erosion of the plenary power doctrine but also questioned the continued viability of a theory of immigration exceptionalism.<sup>19</sup> This trend is apparent in the extensive case law in the context of 212(c) and 212(h) waivers.

Three “ordinary” principles of law have played a particular role in these cases. Under the umbrella of administrative law, courts have invoked both *Chevron* deference and arbitrary and capricious review under the APA. In the constitutional law arena, courts have engaged in equal protection review. This section will briefly introduce all three principles. Each of these doctrines alone are, of course, complex and the subject of countless cases and voluminous scholarship. This section is not intended to be a comprehensive survey, but rather a simple introduction to the facets of the

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16. See, e.g., Legomsky, *supra* note 5, at 925-26; Motomura, *supra* note 7, at 1363-64; Motomura, *supra* note 6, at 550-62; Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 339 (2002).

17. See, e.g., 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, 287 (2000); Johnson, *supra* note 6, at 59-60; Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 27-29 (2015) (“A sober observer would point out that immigration law scholars have been predicting the imminent demise of the plenary power doctrine for at least three decades.”); Legomsky, *supra* note 5, at 936-37; Spiro, *supra* note 16, at 339-40.

18. See, e.g., STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 220-22 (6th ed. 2015); Johnson, *supra* note 6, at 59-60, 60 n.7; Legomsky, *supra* note 5, at 930-37; Motomura, *supra* note 7, at 1372-73; Motomura, *supra* note 6, at 607-13; Rosenbloom, *supra* note 12, at 1983, 1983 n.129 (“A number of scholars have chronicled the emergence of cracks in the plenary power doctrine over the decades.”); Spiro, *supra* note 16, at 341-45; cf. Chin, *supra* note 17, at 258 (“At the time they were decided, many of the terrible immigration cases could have come out the same way even if they involved the rights of citizens under domestic constitutional law. It is not that any of the cases were correctly decided, rather, it is that they could have been decided the same way without resort to any claim that they were beyond the Constitution.”).

19. See, e.g., Johnson, *supra* note 6, at 58-66; Kagan, *supra* note 17, at 21-23; cf. T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 34 (1990) (calling for an end to immigration exceptionalism more than fifteen years ago). *But cf.* Motomura, *supra* note 7, at 1393 (“The question of immigration exceptionalism is considerably more nuanced. Immigration can be exceptional for some purposes and not for others.”).

principles and open questions that figure prominently in the case law on 212(c) and 212(h) discussed in Part II below.

#### A. Administrative Law

##### 1. Chevron Deference

The Supreme Court in *Chevron* held that courts must defer to a reasonable agency interpretation of the statute that agency is charged to administer.<sup>20</sup> Prior to the Court's decision in *Chevron*, judicial deference to agency interpretations had been approached on a more ad hoc basis, with multiple contradictory approaches existing in the case law.<sup>21</sup> While at the time the decision was issued *Chevron* was not viewed as a watershed,<sup>22</sup> it quickly became a profoundly significant decision in administrative law.<sup>23</sup>

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20. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

21. *See, e.g.*, Cox, *supra* note 13, at 1682 (“In fact, that was part of the point of *Chevron*—to create a general, trans-substantive doctrine of administrative deference to replace the more ad hoc approach to deference that had previously characterized administrative law jurisprudence.”); Gary Lawson & Stephen Kam, *Making Law Out of Nothing At All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 6-9 (2013) (“We do not believe any single principle can either account for all pre-*Chevron* Supreme Court decisions or—more to the point for this study—describe the views of all pre-*Chevron* lower courts about the law prescribed by pre-*Chevron* Supreme Court decisions, but we do think that such decisions and views converge on the key inquiry, implicit in Judge Friendly's description in *Pittston Stevedoring*: whether the legal question decided by the agency and under judicial review is a *pure question of legal interpretation* or a *mixed question of law application to a particular set of facts*.”).

22. *See, e.g.*, Lawson & Kam, *supra* note 21, at 29-33 (“[W]hen *Chevron* was briefed and argued in the Supreme Court, no one thought it was a case involving any serious, general question about the standard of review for questions of law.”); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 975-76 (1992); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512 (“It should not be thought that the *Chevron* doctrine—except in the clarity and the seemingly categorical nature of its expression—is entirely new law.”).

23. *See, e.g.*, Lawson & Kam, *supra* note 21, at 2 (“*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, for which the doctrine is named, has become the most cited case in federal administrative law, and indeed in any legal field, and the scholarship on *Chevron* could fill a small library.” (footnotes omitted)); Scalia, *supra* note 22, at 512 (“*Chevron* has proven a highly important decision—perhaps the most important in the field of administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC*. In the first three and a half years after its announcement—up to the beginning of 1988—*Chevron* was cited by lower federal courts over 600 times.” (footnote omitted)).

The federal courts typically apply *Chevron* deference as a two-step test.<sup>24</sup> At step one, courts must determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>25</sup> If, on the other hand, “the statute is silent or ambiguous with respect to the specific issue,” the courts move on to step two, where “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”<sup>26</sup> Within three years, the Supreme Court applied *Chevron* in an immigration case.<sup>27</sup> The Court in *INS v. Cardoza-Fonseca* held that Congress had spoken clearly in defining refugees as those who have a “well-founded fear of persecution” and that deference to the agency’s interpretation of that language was therefore unwarranted.<sup>28</sup>

The application of *Chevron* has not been nearly as straightforward as this simple two-step test might suggest, however. Substantial questions left unanswered by the Supreme Court’s decision in *Chevron* remain at all stages of the *Chevron* inquiry.<sup>29</sup> Each of these questions has arisen at times in the immigration context. First, when, or to what type of agency interpretations, does *Chevron* apply in the first instance? Scholars often call this the “*Chevron* step zero” inquiry.<sup>30</sup> Second, how clearly must Congress have spoken in the statute at issue? Asked otherwise, how should courts determine Congress’ intent? What role do canons of statutory construction play?<sup>31</sup> Finally, when is an agency’s interpretation reasonable or permissible? How deeply should the courts scrutinize agency action and

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24. See, e.g., Lawson & Kam, *supra* note 21, at 59-60; Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes*, 73 TEX. L. REV. 83, 83-84, 83 n.4 (1994). Even this basic structure, however, is a matter of some debate. See, e.g., Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 LOY. U. CHI. L.J. 141, 144, 144 n.10 (2012); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 597-99 (2009).

25. *Chevron*, 467 U.S. at 842-43.

26. *Id.* at 843.

27. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987).

28. *Id.* at 427-28, 446-50.

29. See, e.g., Lawson & Kam, *supra* note 21, at 2-3.

30. See, e.g., Mary Holper, *The New Moral Turpitude Test: Failing Chevron Step Zero*, 76 BROOK. L. REV. 1241, 1242 (2011); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 191 (2006).

31. See, e.g., Brian G. Slocum, *The Immigration Rule of Lenity and Chevron Deference*, 17 GEO. IMMIGR. L.J. 515, 517 (2003) (“One important issue left unresolved by the Court is the role of canons of construction in the review of agency interpretations.”).

conclusions at this stage of the inquiry?<sup>32</sup> Underlying all of these unresolved issues is the question of what exactly deference means in the first place, and therefore, what courts should be doing in applying the *Chevron* two-step test.<sup>33</sup>

## 2. *Arbitrary and Capricious Review*

Section 706(2)(A) of the APA provides that a reviewing court must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .”<sup>34</sup> Review under this section of the APA is commonly referred to as “arbitrary and capricious review.”<sup>35</sup> How courts should approach arbitrary and capricious review has evolved over time<sup>36</sup> and even today differs depending on the type of agency action being reviewed.<sup>37</sup> Prior to the 1960s and 1970s, arbitrary and capricious review strongly resembled the highly deferential rational basis test then used in constitutional due process analysis.<sup>38</sup> Thereafter, courts began to engage in more searching review under the same umbrella standard.<sup>39</sup> The Supreme Court officially rejected any comparison with rational basis review in favor

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32. Cf. Cox, *supra* note 13, at 1679, 1679 n.25 (taking the position on the opinions of Posner and other judges strongly criticizing decisions of the Board of Immigration Appeals “that one cannot fit this apparent lack of deference into standard administrative law doctrines”).

33. See, e.g., William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1093 (2008); Lawson & Kam, *supra* note 21, at 9-10 (“[T]he word ‘deference’ is used in many different senses, and its usage is not always consistent even within individual opinions. . . . Deference can mean anything from complete entrustment of decisionmaking authority to another—essentially the absence of review—to a simple acknowledgment that someone else has an opinion on the subject.” (footnote omitted)).

34. 5 U.S.C. § 706(2)(A) (2012).

35. Cf. Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C.L. REV. 721, 727 (2014) (“Arbitrary and capricious review is rooted in the Administrative Procedure Act.”).

36. See, e.g., *id.* at 727-33; Heath A. Brooks, *Case Comment: American Trucking Associations v. EPA: The D.C. Circuit’s Missed Opportunity to Unambiguously Discard the Hard Look Doctrine*, 27 HARV. ENVTL. L. REV. 259, 268-69 (2003).

37. See, e.g., Virelli, *supra* note 35, at 724.

38. See, e.g., *id.* at 727; Brooks, *supra* note 36, at 268-69.

39. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-417 (1971), is commonly cited as the impetus for this development. See also, e.g., Virelli, *supra* note 35, at 727-733; Brooks, *supra* note 36, at 268-69.

of a less deferential standard in 1983 in *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*<sup>40</sup>

Today, arbitrary and capricious review is also known as the “hard look doctrine.”<sup>41</sup> As applied today, the doctrine requires courts to ensure that agencies have engaged in reasoned decision-making by looking at both procedural and substantive factors such as whether the agency considered all relevant factors, “the existence and quality of the administrative record supporting the agency’s decision, the presence and persuasiveness of the agency’s explanation for that decision, and the ‘rational connection’ between the agency’s explanation and its ultimate policy position.”<sup>42</sup> Typically, courts use arbitrary and capricious review to review an agency’s policy determinations. However, the line between a legal interpretation that would trigger *Chevron* deference and a policy determination that would trigger arbitrary and capricious review is, at best, fuzzy and, at worst, non-existent.<sup>43</sup>

#### *B. Constitutional Law: Equal Protection*

The due process clause of the Fifth Amendment to the United States Constitution prohibits the federal government from depriving any person within its jurisdiction the equal protection of the laws. This means essentially that the federal government must treat similarly situated people

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40. 463 U.S. 29, 42-43, 43 n.9 (1983) (“The Department of Transportation suggests that the arbitrary-and-capricious standard requires no more than the minimum rationality a statute must bear in order to withstand analysis under the Due Process Clause. We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.”). *But cf.* Brooks, *supra* note 36, at 268-69, 269 n.99 (“Although courts continue to use phrases like ‘rational basis’ and ‘reasoned decision-making’ when performing arbitrary and capricious review, the actual test being applied is not nearly as deferential as the constitutional rational basis test.” (citations omitted)).

41. *See, e.g.*, Lawson & Kam, *supra* note 21, at 12-13 (“As the law has developed over the past half-century, agency policy decisions—or at least policy decisions of threshold consequence—are reviewed under the so-called ‘hard look doctrine,’ which requires agencies to articulate the reasons behind their actions and requires courts to ensure agencies have seriously considered both the problems before them and their relevant factors.”).

42. Virelli, *supra* note 35, at 727-29 (footnotes omitted).

43. *See, e.g.*, Lawson & Kam, *supra* note 21, at 13 (“Unfortunately, the line between agency policymaking and agency law-finding is anything but sharp, especially in a world from which the nondelegation doctrine has been largely expunged.”); *cf.* Claire R. Kelly, *The Brand X Liberation: Doing Away with Chevron’s Second Step as Well as Other Doctrines of Deference*, 44 U.C. DAVIS L. REV. 151, 177-83 (2010).

alike.<sup>44</sup> Purposeful distinctions among similarly situated individuals will be reviewed according to one of the three levels of scrutiny, strict, intermediate, or rational basis, depending on the protected class to which the individuals belong. Under strict scrutiny, a distinction must be narrowly tailored to serve a compelling government interest.<sup>45</sup> Under rational basis review—also known as minimal scrutiny—a distinction need only be rationally related to a legitimate government interest.<sup>46</sup>

For a number of reasons, distinctions involving noncitizens have been notoriously difficult to classify. First, distinctions based on citizenship likely also involve at least one other factor, such as sex, race, or nationality. Second, the applicable standard of scrutiny depends on who is conducting the discrimination. State classifications that discriminate on the basis of alienage are subject to strict scrutiny because noncitizens have been held to be a “suspect class” deserving of heightened judicial protection.<sup>47</sup> Federal classifications related to alienage, however, receive only rational basis review as a result of the plenary power doctrine and immigration exceptionalism discussed in Section I.A.<sup>48</sup>

## *II. Development of the Problem: 212(c) and 212(h) Waivers*

Section 212(c) and 212(h) waivers have a seemingly simple function: to “forgive” violations of the immigration laws so that a noncitizen can get or retain legal status in the United States. Despite this apparent simplicity, legal eligibility for the two waivers has been the subject of extensive litigation. One particularly important question has been the expansion of the two waivers to grounds of deportability as well as inadmissibility. Section II.A will lay the groundwork for a discussion of the application of “ordinary” administrative and constitutional principles in this body of case law. It will introduce the place of these two waivers within the overall structure of immigration law as well as the basic legal requirements for each waiver. The remaining Sections, II.B through II.D, will trace the history of the expansion of 212(c) and 212(h), paying particular attention to the courts’ invocation and application of *Chevron* deference, arbitrary and capricious review, and rational basis equal protection review.

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44. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

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

46. *See Cleburne*, 473 U.S. at 446; *Romer v. Evans*, 517 U.S. 620, 631 (1996).

47. *See Graham v. Richardson*, 403 U.S. 365, 372 (1971).

48. *See Mathews v. Diaz*, 426 U.S. 67, 82-83 (1976).

*A. Introduction to 212(c) and 212(h) Waivers*

The current procedural structure of immigration law in the United States is largely a product of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>49</sup> Under this current system, noncitizens may have difficulty obtaining or keeping legal status because of problems with inadmissibility under section 212 of the INA or with deportability under INA section 237. The deportability provisions of INA section 237(a) apply to noncitizens who have already been legally inspected and admitted into the United States.<sup>50</sup> The inadmissibility provisions of INA section 212(a) apply under certain specified circumstances: LPRs seeking admission who have particular types of criminal convictions or meet other narrowly defined exceptions; all other noncitizens seeking admission into the United States; noncitizens inside the United States who were paroled in, entered as crewmen, or entered without inspection; and noncitizens inside the United States who are applying for adjustment of status or other immigration benefits that specify admissibility as an element of the relief sought.<sup>51</sup> Questions of inadmissibility and deportability are typically decided in a single set of proceedings, called removal proceedings.<sup>52</sup>

The structure of immigration law prior to 1996 had one particularly significant parallel to the post-IIRIRA system: the concepts of excludability and deportability, which mirror the current inadmissibility and deportability sections of the INA.<sup>53</sup> Noncitizens seeking entry or admission into the United States have consistently been treated differently than those who are already here.<sup>54</sup> Before 1996, however, excludability and deportability were

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49. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (making substantial changes to both the substance and procedure of U.S. immigration law).

50. INA § 237(a), 8 U.S.C. § 1227(a) (2012) (applying to “[a]ny alien . . . in and admitted to the United States”); INA § 101(a)(13)(a), 8 U.S.C. § 1101(a)(13)(a) (2012) (defining “admitted” as “the lawful entry of the alien into the United States after inspection and authorization by an immigration officer”).

51. INA § 212(a), 8 U.S.C. § 1182(a) (2012) (rendering noncitizens within the specified grounds of inadmissibility “ineligible to receive visas and ineligible to be admitted to the United States”); INA § 101(a)(13), 8 U.S.C. § 1101(a) (2012).

52. See INA § 240(a), 8 U.S.C. § 1229a(a) (2012).

53. See *Judulang v. Holder*, 565 U.S. 42, 45-46 (2011).

54. See *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581 (1889); see also, e.g., Rosenbloom, *supra* note 12, 1983-84; Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 936-38, 948 (1995).

decided in two separate types of proceedings, and those who were subject to each type were defined differently than is the case today.<sup>55</sup> Both before and after 1996, the grounds of excludability/inadmissibility and deportability have changed and expanded over time.<sup>56</sup>

Section 212 of the INA—both before and after IIRIRA’s 1996 revisions—also contains waivers in addition to specifying grounds of inadmissibility. These waivers allow certain grounds of inadmissibility to be “forgiven” under specified circumstances so that noncitizen applicants may enter the United States or obtain a legal status that they would be otherwise eligible for but for the ground of inadmissibility being waived. Among these waivers are those under the former INA section 212(c) and the current INA section 212(h). Sections 212(c) and 212(h) are both frequently used to waive criminal convictions for long-term LPRs so that such LPRs do not lose their status and may remain legally in the United States. Section 212(c) may be used to waive most types of criminal convictions,<sup>57</sup> while the scope of 212(h) is more limited. Section 212(h) covers only inadmissibility resulting from crimes involving moral turpitude, multiple criminal convictions, prostitution and commercialized vice, and possession of less than thirty grams of marijuana.<sup>58</sup>

### 1. INA Section 212(c)

Congress enacted section 212(c) of the INA in 1952 to replace a similar waiver known as the Seventh Proviso to section 3 of the Immigration Act of 1917.<sup>59</sup> In order to qualify for relief under section 212(c), a noncitizen must be lawfully admitted for permanent residence and have maintained a lawful domicile in the United States for the seven years immediately preceding the

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55. See *Judulang*, 565 U.S. at 45-46.

56. See *Blake v. Carbone*, 489 F.3d 88, 94-96 (2nd Cir. 2007); see also 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.04 (Matthew Bender, rev. ed. 2016).

57. INA § 212(c), 8 U.S.C. § 1182(c) (amended 1996); 6 GORDON ET AL., *supra* note 56, § 74.04(1)(a).

58. INA § 212(h), 8 U.S.C. § 1182(h) (2012) (“The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana . . . .”); see also INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2012).

59. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (1952) (originally passed as the McCarran-Walter Bill of 1952); Pub. L. No. 64-301, ch. 29, 39 Stat. 874, 878 (1917); 6 GORDON ET AL., *supra* note 56, § 74.04(1)(a).

application for relief.<sup>60</sup> Certain grounds of inadmissibility related to national security and international child abduction will make a noncitizen ineligible.<sup>61</sup>

After demonstrating basic eligibility, the noncitizen must demonstrate that the positive discretionary factors present in his or her individual case outweigh the negative in order to show that he or she merits relief in an exercise of the immigration judge's discretion.<sup>62</sup> Positive factors that an immigration judge should consider include

family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in the country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character.<sup>63</sup>

Potentially adverse factors, on the other hand, are

the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country.<sup>64</sup>

The adjudicator must explicitly weigh these factors in his or her decision granting or denying relief.<sup>65</sup>

Section 212(c) remained a part of the INA from its enactment in 1952 until IIRIRA repealed it, effective April 1, 1997.<sup>66</sup> Despite the fact that 212(c) is not part of the current statute, the question of eligibility for waivers under the former section 212(c) remains far from a moot point. The

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60. INA § 212(c), 8 U.S.C. § 1182(c) (amended 1996); 8 C.F.R. § 1212.3(f) (2016).

61. INA § 212(c), 8 U.S.C. § 1182(c) (amended 1996); 8 C.F.R. § 1212.3(f)(3) (2016).

62. *Matter of Marin*, 16 I. & N. Dec. 581, 582-83, 584 (BIA 1978).

63. *Id.* at 584-85.

64. *Id.* at 584.

65. *Id.* at 585.

66. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (1996) (replacing 212(c) by cancellation of removal under INA section 240A(a)).

Supreme Court held in *INS v. St. Cyr* that applying the repeal of 212(c) to criminal issues that pre-dated IIRIRA could have an impermissibly retroactive effect.<sup>67</sup> That is, 212(c) waivers must remain available to certain noncitizens who would have been eligible for them at the time of the criminal issues that rendered them removable.<sup>68</sup> The exact meaning and application of the holding in *St. Cyr* was challenged repeatedly before the Board of Immigration Appeals (“the Board” or “BIA”) and the circuit courts of appeals, but the totality of this history is not relevant here.<sup>69</sup> To summarize, the current result of this litigation is that 212(c) can be used today to waive all convictions occurring prior to April 1, 1997, if the noncitizen meets the requirements of 212(c) as amended at the time of the plea or conviction.<sup>70</sup>

## 2. INA Section 212(h)

Section 212(h) of the INA was first created in 1957.<sup>71</sup> The current version of the waiver was not enacted until 1996, as part of the same statute that repealed the former INA 212(c).<sup>72</sup> There are three different categories of noncitizens who qualify for relief under the current version of section 212(h): (1) noncitizens whose criminal convictions occurred more than fifteen years before their application for admission, are rehabilitated, and

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67. 533 U.S. 289, 314-326 (2001).

68. *Id.* at 326.

69. See Patrick Glen, *Judulang v. Holder and the Future of 212(c) Relief*, 27 GEO. IMMIGR. L.J. 1, 6-15 (2013), for more discussion of this history.

70. See 8 C.F.R. § 1212.3(f)(4) (2016) (stating 212(c) waives all aggravated felony convictions prior to November 29, 1990, but conviction for an aggravated felony or aggravated felonies between November 29, 1990, and April 24, 1996, will bar relief if the noncitizen served an aggregate term of imprisonment of five years or more for those convictions); 8 C.F.R. § 1212.3(h) (2016) (explaining the impact of amendments made to 212(c) in 1996); *St. Cyr*, 533 U.S. at 297 (explaining the impact of amendments made to 212(c) in 1990 and 1996); *Matter of Abdelghany*, 26 I. & N. Dec. 254, 268-69 (BIA 2014) (clarifying that 212(c) is available to noncitizens convicted after trial as well as through plea agreement). For an illustration of the complexity of determining whether a noncitizen qualified for 212(c) at the time of her conviction, see Maria Baldini-Potermin, *CHART: Eligibility for a 212(c) Waiver After Judulang and St. Cyr*, NAT'L IMMIGR. PROJECT, [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/cd\\_pa\\_Chart\\_on\\_212c\\_After\\_Judulang.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/cd_pa_Chart_on_212c_After_Judulang.pdf) (last visited Jan. 20, 2017).

71. Act of Sept. 11, 1957, Pub. L. No. 85-316, § 5, 71 Stat. 639, 640 (codified at INA § 212(h), 8 U.S.C. § 1182(h) (2012)).

72. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 348, 110 Stat. 3009-546, 3009-639 (1996); see 5 GORDON ET AL., *supra* note 56, § 63.03(11)(f)(i).

pose no danger to the national welfare, safety, and security of the United States; (2) noncitizens who can demonstrate extreme hardship to a spouse, parent, son or daughter that is an LPR or a United States citizen; or (3) self-petitioners under the Violence Against Women Act.<sup>73</sup> A noncitizen admitted to the United States as a lawful permanent resident is barred from relief under all three categories if he or she has a conviction for an aggravated felony or has not lawfully resided in the United States for seven years prior to the initiation of removal proceedings.<sup>74</sup>

Like 212(c), a 212(h) waiver is ultimately discretionary.<sup>75</sup> The adjudicator must balance the same positive and adverse factors previously discussed to decide whether an eligible noncitizen merits an exercise of relief in the court's discretion.<sup>76</sup> For applicants under the second subsection discussed above who must demonstrate extreme hardship to a qualifying relative, there is a substantial similarity in the factors to be considered for hardship and for discretion, and in practice these two distinct portions of the required analysis are often collapsed together.<sup>77</sup>

### 3. Expansion

These basics of statutory eligibility are only the beginning of the story for both 212(c) and 212(h).<sup>78</sup> By the language alone of these waivers, they apply only to noncitizens seeking admission into the United States or otherwise subject to the grounds of inadmissibility as set forth in Section II.A. Both 212(c) and 212(h) waivers, however, have been the subject of extensive litigation seeking to extend their reach. One focus of these challenges has been to extend the applicability of the waivers to the criminal grounds of deportability in addition to those of inadmissibility.

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73. INA § 212(h)(1), 8 U.S.C. § 1182(h)(1) (2012).

74. INA § 212(h)(2), 8 U.S.C. § 1182(h)(2) (2012).

75. *Matter of Mendez-Morales*, 21 I. & N. Dec. 296, 299-300 (BIA 1996).

76. *Id.* at 299-300 (citing *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978)).

77. *See Matter of Cervantes-Gonzalez*, 22 I. & N. Dec. 560, 565-66 (BIA 1999); 5 GORDON ET AL., *supra* note 56, § 63.12(2)(a)(iii)(B), (iv); Gerald P. Seipp, *Waivers of Inadmissibility—From Basic Principles to Advanced Practice Considerations* (Part 2), 03-09 IMMIGR. BRIEFINGS 1, at text accompanying note 27 (West 2003).

78. Today neither 212(c) nor 212(h) can be understood without reference to the wide-ranging and sometimes conflicting case law that has interpreted and expanded the statutory provisions. Section 212(c), in particular, has been described as “one of the most complex and frequently litigated areas of immigration law.” 6 GORDON ET AL., *supra* note 56, § 74.04(2)(a). This article does not (and could not) encompass the entirety of that judicial history, but instead focuses on the particular aspect of it identified in this paragraph: the availability of the waivers when a noncitizen is charged as deportable rather than inadmissible.

The results of this litigation can be summarized, in a somewhat oversimplified sense, as follows: 212(c) can be used as a stand-alone waiver to waive both inadmissibility and deportability while 212(h) as a stand-alone waiver will waive only grounds of inadmissibility. To demonstrate how the courts could have reached such radically divergent outcomes in seemingly substantially similar situations, the remaining sections in this part will trace the development of the case law in each of the two different areas. Sections II.B and II.C will focus on 212(c); Section II.B will cover the initial application of 212(c) to the context of deportability; and Section II.C will answer the question of which grounds of deportability 212(c) can waive. Section II.D will address the significantly shorter history of the failed expansion of 212(h). Throughout, I will focus in particular on the invocation of ordinary administrative and constitutional law doctrines and on the rationale used by the various courts within these frameworks to reach such different conclusions.

*B. Expansion of 212(c) Waivers to Deportability: The Basics*

Questions of the applicability of and eligibility for relief under 212(c) were actively contested and litigated over the forty-plus years that the section was part of the INA.<sup>79</sup> The uncertainties and legal challenges have only multiplied during the fifteen-plus years since its repeal.<sup>80</sup> As covered here in Section II.B, the basic issue of the expanded applicability of 212(c) to charges of deportability was effectively resolved long before the repeal of the subsection.<sup>81</sup> As will be discussed in Section II.C, however, related questions continue to be litigated even today. Most recently and significantly, these cases have been related to the Supreme Court's consideration in *Judulang v. Holder* of the standard for determining exactly which offenses or grounds of deportability may be waived for noncitizens charged as deportable.<sup>82</sup>

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79. See *Judulang v. Holder*, 565 U.S. 42, 45-47 (2011); Glen, *supra* note 69, at 7-12; 7 GORDON ET AL., *supra* note 56, § 74.04(2).

80. For example, the issue of whether noncitizens convicted after a jury trial instead of by plea remain eligible for 212(c) waivers remained unresolved until the Supreme Court issued their opinion in *Vartelas v. Holder*, 566 U.S. 257 (2012). See also *Matter of Abdelghany*, 26 I. & N. Dec. 254, 268-69 (BIA 2014). The question of which criminal convictions are waivable continued to be litigated up through the Supreme Court's decision in *Judulang*, 565 U.S. 42. 6 GORDON ET AL., *supra* note 56, § 74.04(2)(f), (4).

81. See generally *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976).

82. 565 U.S. 42.

### 1. *Slow Growth*

The BIA recognized the expanded applicability of the former INA section 212(c) gradually through a series of incremental decisions.<sup>83</sup> First, the Board recognized the ability of noncitizens charged as deportable to apply for a 212(c) waiver of inadmissibility *nunc pro tunc*.<sup>84</sup> This holding did not benefit all noncitizens in deportation proceedings but only a subgroup: noncitizens who took a temporary and voluntary trip abroad after the criminal conviction that rendered them inadmissible and deportable and who qualified for a 212(c) waiver at the time of their reentry into the United States from that trip.<sup>85</sup> *Nunc pro tunc* means literally “now for then.”<sup>86</sup> These noncitizens were granted a 212(c) waiver of inadmissibility back to the time of their reentry, as though they had been apprehended and placed in exclusion proceedings at that time instead of being placed in deportation proceedings later.

The Board’s decisions relied primarily on the fact that the Seventh Proviso, the previously discussed predecessor to 212(c), had been available under these circumstances.<sup>87</sup> Since Congress was well aware of this fact and did not act to change it while intentionally modifying other aspects of 212(c), the Board held that Congress must have intended for 212(c) to remain available *nunc pro tunc* in deportation proceedings.<sup>88</sup> The Board’s discussion in the 212(c) cases did not go beyond this. The decisions do not reference any equal protection concerns or discuss equal protection explicitly in any way. The Attorney General’s earlier Seventh Proviso case that was cited in the 212(c) cases—while not overtly raising equal protection or administrative law—did examine factors that would likely arise in an equal protection analysis and use language sounding similar to arbitrary and capricious review.<sup>89</sup> The Attorney General recognized that “[n]ot what the alien has done but the fact that he has taken a trip becomes the operative fact that renders him excludable or deportable,” although he

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83. *See Francis*, 532 F.2d at 270-71; 6 GORDON ET AL., *supra* note 56, § 74.04(1)(a).

84. *Matter of F-*, 6 I. & N. Dec. 537, 537-34 (BIA 1955); *Matter of M-*, 5 I. & N. Dec. 598, 599-600 (BIA 1954); *Matter of S-*, 6 I. & N. Dec. 392, 393-97 (BIA 1954); *cf. Matter of G-A-*, 7 I. & N. Dec. 274 (BIA 1956).

85. *F-*, 6 I. & N. Dec. at 538-39; *M-*, 5 I. & N. Dec. at 599-600; *S-*, 6 I. & N. Dec. at 393-97.

86. *Nunc pro tunc*, BALLENTINE’S LAW DICTIONARY (Lexis Nexis, ed. 2010).

87. *S-*, 6 I. & N. Dec. at 393-96.

88. *Id.*

89. *See Matter of L-*, 1 I. & N. Dec. 1, 5-6 (A.G. 1940).

did not explicitly label this fact problematic.<sup>90</sup> He discussed the fact that not allowing nunc pro tunc waivers of inadmissibility would mean that the respondent was placed in a worse position by having been (erroneously) readmitted without issue and determined,

I cannot conclude that Congress intended the immigration laws to operate in so capricious and whimsical a fashion. Granted that respondent's departure in 1939 exposed him on return to the peril of a fresh judgment as to whether he should be permitted to reside in the United States, such judgment ought not to depend upon the technical form of the proceedings. No policy of Congress could possibly be served by such irrational result.<sup>91</sup>

While not referencing the equal protection or constitutional framework, this mirrors an exercise of rational basis review.

Another Seventh Proviso case, holding that noncitizens may apply for and receive an advance grant of the 212(c) waiver prior to departure, went a step further.<sup>92</sup> The Board noted that "a contrary view would result in consequences both capricious and absurd" and held that a chance trip abroad could not be allowed to determine an alien's substantive eligibility for relief and ability to remain in the United States.<sup>93</sup> It is highly likely, given the explicit reliance on the Seventh Proviso cases, that these same concerns were underlying the Board's decisions in the 212(c) nunc pro tunc cases, even though the Board did not explicitly discuss them there.

Next, the Board extended the holding in the nunc pro tunc cases to allow some noncitizens in deportation proceedings who had not departed the United States subsequent to the criminal issue that made them inadmissible to apply for a 212(c) waiver. So long as the noncitizen filed the waiver application in conjunction with an application for adjustment of status, the Board found the waiver would be available to those who qualify.<sup>94</sup> Here again the Board was focused on not treating differently groups of noncitizens who were, for all relevant intents and purposes, substantially similarly situated.

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90. *Id.* at 5.

91. *Id.*

92. Matter of A-, 2 I. & N. Dec. 459, 461-63 (BIA 1946).

93. *Id.* at 461.

94. Matter of Smith, 11 I. & N. Dec. 325, 327 (BIA 1965).

These decisions appeared to culminate with the Board's decision in a 1971 case, *Matter of Arias-Uribe*.<sup>95</sup> Here, the Board halted the expansion of the applicability of 212(c) waivers in deportation proceedings, holding that they were available only in the two scenarios previously discussed: nunc pro tunc to a post-conviction trip abroad or in conjunction with an application to adjust status.<sup>96</sup> Arias-Uribe had not departed the United States after his conviction for possession of heroin and did not qualify for adjustment of status, but he argued that Congress had tacitly approved an administrative practice of allowing noncitizens like himself to nevertheless use a 212(c) waiver to waive grounds of deportability.<sup>97</sup>

The Board rejected this argument, relying almost exclusively on the language of the statute itself to reach its conclusion.<sup>98</sup> Specifically, the Board focused on the change in language from the Seventh Proviso, which required that the noncitizen be "returning after a temporary absence," to the language in section 212(c), which required that the noncitizen have "temporarily proceeded abroad voluntarily and not under an order of deportation."<sup>99</sup> The Board then held that this shift in language indicated Congress' intention to curb the advance use of 212(c) waivers in deportation proceedings by requiring (in most cases) an actual departure and return to the country.<sup>100</sup> The Board did not discuss the implication of the distinction this holding drew between noncitizens who happened to travel outside the United States and those who did not, or reference equal protection or factors relevant to an equal protection analysis in any way. The Court of Appeals for the Ninth Circuit affirmed the Board's holding in a brief decision without substantial discussion, stating simply that allowing the use of 212(c) to waive grounds of deportability violated the clear language of the statute.<sup>101</sup>

## 2. Francis, Silva, and Onward

*Matter of Arias-Uribe* proved, however, to be only a temporary pause. The expansion of the availability of 212(c) to waive grounds of deportability was restarted by a case decided by the Second Circuit Court of

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95. 13 I. & N. Dec. 696 (BIA 1971), *aff'd* Arias-Uribe v. INS, 466 F.2d 1198 (9th Cir. 1972).

96. *Id.* at 697-99.

97. *Id.* at 697.

98. *Id.* at 699-700.

99. *Id.* at 699-700, 699 n.2; *see also* Francis v. INS, 532 F.2d 268, 271 (2d Cir. 1976).

100. *Arias-Uribe*, 13 I. & N. Dec. at 699-700; *see also* Francis, 532 F.2d at 271.

101. *Arias-Uribe v. INS*, 466 F.2d 1198, 1199-1200 (9th Cir. 1972).

Appeals, *Francis v. INS*.<sup>102</sup> In *Francis*, the Second Circuit agreed that the Board's interpretation in *Arias-Uribe* was consistent with the statutory language of section 212(c).<sup>103</sup> Francis argued, however, and the Second Circuit agreed, that this interpretation deprived him of the equal protection of the laws as guaranteed by the Fifth Amendment to the United States Constitution.<sup>104</sup>

The Second Circuit began by affirming that, despite Congress' and the Executive's plenary power over immigration, the government must abide by the Fifth Amendment's due process protections in the area of immigration, and that the guarantee of equal protection of the laws applies to noncitizens in deportation proceedings.<sup>105</sup> The court applied the minimal scrutiny test, which it explained required that "distinctions between different classes of persons must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."<sup>106</sup> Ultimately, the court held that the government had offered no rational basis to treat lawful permanent residents who had never temporarily departed the country after a criminal conviction less favorably than those who had. No reason was offered to explain why travel should be a crucial factor, but even if it were, logic and fairness could not support the Board's interpretation prohibiting a noncitizen "whose ties with this country are so strong that he has never departed after his initial entry" from even applying for 212(c) relief while allowing applications from "an individual who may leave and return from time to time."<sup>107</sup> The court concluded by stating, "Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner."<sup>108</sup>

Deference was not addressed in *Francis*. *Francis*<sup>109</sup> was decided nearly a decade prior to the Supreme Court's decisions in *Chevron*<sup>110</sup> and *Cardoza-*

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102. 532 F.2d 268.

103. *Id.* at 271-72.

104. *Id.* at 272-73.

105. *Id.* at 272 (first citing *Galvan v. Press*, 347 U.S. 522 (1954); then citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); and then citing *Noel v. Chapman*, 508 F.2d 1023 (2nd Cir. 1975)).

106. *Id.* (quoting *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

107. *Id.* at 273.

108. *Id.*

109. 532 F.2d 268.

110. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

*Fonseca*.<sup>111</sup> The Second Circuit in deciding *Francis*, therefore, did not go through a step-by-step analysis to determine whether Congress had spoken clearly and, if not, if the agency's interpretation was reasonable. In fact, beyond agreeing that the Board's interpretation in *Arias-Uribe* was consistent with the statutory language, the court in *Francis* did not raise deferring to the Board's position in *Arias-Uribe* at all, in word or in action.<sup>112</sup>

The Board subsequently adopted the Second Circuit's position in *Matter of Silva*.<sup>113</sup> After tracing the history of the expansion of 212(c) relief and its own prior inconsistent decision in *Arias-Uribe*, the Board wholeheartedly adopted the Second Circuit's holding and rationale from *Francis* without offering any additional reasoning or analysis of its own.<sup>114</sup> Since *Silva*, the basic premise that noncitizens charged with deportability may be eligible for 212(c) waivers has been widely applied and essentially uncontested throughout the United States.<sup>115</sup> Questions of precisely how this expanded applicability would be determined and applied in individual cases moving forward, however, remained unresolved.

### C. Expansion of 212(c) Waivers to Deportability: Which Grounds?

One significant and controversial question that remained following *Francis* and *Silva* was what it meant for lawful permanent residents to be "similarly situated" and therefore prima facie eligible for relief under 212(c). That is, since the grounds of inadmissibility and deportability are not identical,<sup>116</sup> exactly what grounds of deportability or what criminal convictions may be waived under 212(c)?<sup>117</sup> This question arose primarily

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111. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

112. *See Francis*, 532 F.2d at 271-73.

113. 16 I. & N. Dec. 26 (BIA 1976).

114. *Id.* at 29-30 ("In light of the constitutional requirements of due process and equal protection of the law, it is our position that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and nondeparting permanent resident aliens. We further conclude that permanent resident aliens similarly situated shall be treated equally with respect to their applications for discretionary relief under section 212(c) of the Act.").

115. *See, e.g., De Gonzalez v. INS*, 996 F.2d 804, 806 (6th Cir. 1993); *Butros v. INS*, 990 F.2d 1142, 1143 (9th Cir. 1993); *Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir. 1993); *Casalena v. INS*, 984 F.2d 105, 106 n.3 (4th Cir. 1993); *Ghassan v. INS*, 972 F.2d 631, 633 n.2 (5th Cir. 1992) (en banc); *Campos v. INS*, 961 F.2d 309, 313 (1st Cir. 1992); *Vissian v. INS*, 548 F.2d 325, 328 n.3 (10th Cir. 1977).

116. *See, e.g., Judulang v. Holder*, 565 U.S. 42, 45-46 (2011).

117. *See, e.g., Sara Fawk*, Note, *Immigration Law - Eligibility for Section 212(c) Relief from Deportation: Is It the Ground or the Offense, the Dancer or the Dance?*, 32 W. NEW ENG. L. REV. 417 (2010); Michael M. Waits, Note, "In Like Circumstances but for

in three different groups of cases. The first group involved charges of being present in the United States after entering without inspection<sup>118</sup>—that is, a charge of deportability that could not logically be a ground of inadmissibility. The second group involved noncitizens convicted of firearm-related offenses.<sup>119</sup> The third group consisted of noncitizens convicted of aggravated felonies.<sup>120</sup> Unlike the charges of deportability in the first group, Congress could have chosen to make firearm offenses and aggravated felonies grounds of excludability. Instead, Congress made them grounds of deportability but not inadmissibility. Some convictions that constitute aggravated felonies would also trigger one of the criminal grounds of inadmissibility, while most convictions that are firearm offenses would not.

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*Irrelevant and Fortuitous Factors”: The Availability of Section 212(c) Relief to Deportable Legal Permanent Residents*, 51 ARIZ. L. REV. 465 (2009).

118. See INA § 241(a)(1)(C)(ii), 8 U.S.C. § 1251(a)(1)(C)(ii) (amended and transferred 1996) (making being present in the United States after having entered without inspection a ground of deportability). Today entry without inspection is a ground of inadmissibility, not a ground of deportability. See INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A) (2012). This is a result of IIRIRA’s shift from a focus on physical entry to a requirement of lawful inspection and admission as the dividing line between exclusion/inadmissibility and deportability. See INA § 101(a)(13)(A), 8 U.S.C. § 1101 (a)(13)(A)(2012); Kate Aschenbrenner, *Beyond “Because I Said So”: Reconciling Civil Retroactivity Analysis in Immigration Cases with a Protective Lenity Principle*, 32 REV. LITIG. 147, 169-70 (2013).

119. See INA § 237(a)(2)(c), 8 U.S.C. § 1227(a)(2)(c) (2012) (making certain firearm offenses a ground of deportability).

120. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (defining aggravated felonies). There is no definitive answer as to what caused this marked shift in the grounds of deportability for which noncitizens sought relief under the former 212(c), but at least part of the answer likely stems from changes made to immigration law by IIRIRA in 1996. Aggravated felonies became a ground of deportability in 1988, but at that time there were very few of them. See *INS v. St. Cyr*, 533 U.S. 289, 295-96 n.4 (2001). In 1996, IIRIRA radically expanded the definition of aggravated felonies and specifically stated that the expansion was retroactive. See *id.* This meant that post-1996 someone could be deportable as an aggravated felon for a criminal conviction that occurred prior to 1996, making it more likely for the question of the expanded applicability of 212(c) to charges of deportability for these convictions to arise. Furthermore, IIRIRA also created a new remedy for LPRs with criminal convictions: cancellation of removal, which barred those with aggravated felony convictions but was a more attractive option for relief from removal for those charged with other grounds of removability. See INA § 240A(a), 8 U.S.C. § 1229b(a) (2012). After *St. Cyr* clarified the continued availability of 212(c) relief in 2001, then, increasing numbers of noncitizens with what now constituted aggravated felony convictions were potentially in need of 212(c) relief while decreasing numbers of noncitizens with other types of convictions needed to rely on 212(c).

Section II.C.1 below will discuss how the BIA and the circuit courts of appeals answered the question of what it means for an LPR charged as deportable to be similarly situated prior to the repeal of section 212(c) in 1996. These cases fall within group one, those charged with entry without inspection, and group two, those charged with firearms offenses. Section II.C.2 will consider how the question was answered after 2001, when the Supreme Court held that denying 212(c) relief for criminal convictions occurring prior to its repeal could be impermissibly retroactive.<sup>121</sup> These cases fall within group three, noncitizens charged as deportable for aggravated felony convictions. The Supreme Court finally weighed in on this question in 2011 in *Judulang v. Holder*. Section II.C.3 will address the *Judulang* case and its aftermath and application.

*1. Pre-Repeal*

*a) The Board*

Following its decision in *Silva* extending eligibility for 212(c) relief to LPRs charged as deportable, the Board quickly confronted the question of what it meant for such an LPR to be similarly situated. The Board held in a number of cases that “if a ground of deportation is also a ground of inadmissibility,” the ground of deportation is waivable under 212(c).<sup>122</sup> This standard became known as the comparable-grounds analysis.<sup>123</sup> However, what this term meant in application—and therefore what exactly 212(c) could waive for a noncitizen charged as deportable—was not so quickly resolved. For example, must the grounds of deportation and inadmissibility have identical language or can they differ slightly? How much? Or what if there is no similar ground of inadmissibility with corresponding language, but the conduct or conviction charged would trigger another ground of inadmissibility? *Matter of Hernandez-Casillas*,<sup>124</sup> decided by the Attorney General in 1991, appears to be considered by the circuit courts of appeals as the agency’s authoritative position on this issue.<sup>125</sup>

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121. *See St. Cyr*, 533 U.S. at 314-26.

122. *Matter of Salmon*, 16 I. & N. Dec. 734, 737 (BIA 1978); *see also, e.g., Matter of Wadud*, 19 I. & N. Dec. 182, 184 (BIA 1984); *Matter of Granados*, 16 I. & N. Dec. 726, 728 (BIA 1979).

123. *See, e.g., Blake v. Carbone*, 489 F.3d 88, 95 (2d Cir. 2007).

124. 20 I. & N. Dec. 262 (BIA 1990, A.G. 1991) *aff’d*, 983 F.2d 231 (5th Cir. 1993) (unpublished table decision).

125. *See, e.g., De La Rosa v. U.S. Att’y Gen.*, 579 F.3d 1327, 1332, 1336 (11th Cir. 2009); *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 685 (7th Cir. 2008); *Abebe v. Gonzales*

Joel Hernandez-Casillas was an LPR. He was apprehended and charged as deportable for entering without inspection following his entry into the United States by wading across the Rio Grande while assisting a group of undocumented individuals to enter for a fee.<sup>126</sup> He attempted to apply for relief under INA 212(c) even though he was placed in deportation, not exclusion, proceedings, but the immigration judge denied his application.<sup>127</sup> The immigration judge held that 212(c) was unavailable to noncitizens charged as deportable for entering without inspection.<sup>128</sup>

The Board first decided *Matter of Hernandez-Casillas* in 1990.<sup>129</sup> The Board reversed the immigration judge, holding that “the same fundamental fairness/equal protection arguments made in *Francis v. INS* can and should be invoked to make section 212(c) relief available to aliens deportable under any ground of deportability.”<sup>130</sup> The Board relied heavily on the fact that the current application of 212(c) had already departed significantly from the original statutory language and intentions and that traditional tools of statutory interpretation were of little utility.<sup>131</sup> In that light, it found that its approach was the cleanest and simplest logical alternative and would have “the benefit of alleviating potential hardships to sometimes deserving aliens.”<sup>132</sup> The Board backed away from its previous cases requiring a “comparable ground” of excludability and essentially interpreted the “similarly situated” language from *Francis* and *Silva* in its broadest possible sense.<sup>133</sup>

Had the Board’s decision stood, it likely would have substantially ended litigation on this particular question. In 1991, however, the Attorney

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(*Abebe I*), 493 F.3d 1092, 1107 (9th Cir. 2007); *Blake v. Carbone*, 489 F.3d 88, 103 (2d Cir. 2007); *Vue v. Gonzales*, 496 F.3d 858, 862 (8th Cir. 2007); *Dalombo Fontes v. Gonzales*, 483 F.3d 115, 121 (1st Cir. 2007); *Vo v. Gonzales*, 482 F.3d 363, 368-70 (5th Cir. 2007); *Farquharson v. U.S. Att’y Gen.*, 246 F.3d 1317, 1323-24 (11th Cir. 2001); *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1457, 1459-60 (11th Cir. 1994); *Leal-Rodriguez v. INS*, 990 F.2d 939, 949 (7th Cir. 1993).

126. *Hernandez-Casillas*, 20 I. & N. Dec. at 263.

127. *Id.* at 263-64.

128. *Id.* at 264.

129. *Id.* at 262.

130. *Id.* at 266 (citation omitted) (excluding only grounds of deportability “where there is a comparable ground of exclusion which has been specifically excepted from section 212(c),” relating to “subversives and war criminals”).

131. *Id.* at 265 (“In deciding to change our approach to section 212(c) waivers, we have considered that section 212(c) as currently applied bears little resemblance to the statute as written.”).

132. *Id.* at 268-69.

133. *See id.*

General certified the case to himself and reversed the Board.<sup>134</sup> The Attorney General was very critical of the Board's "unjustified expansion of discretionary relief under section 212(c)."<sup>135</sup> He declined to reconsider the Board's decision in *Silva*, but seemed to encourage the Board to do so in a future case.<sup>136</sup> He found no equal protection violation<sup>137</sup> and no other reason to depart further from the statutory text of 212(c) and therefore held that Hernandez-Casillas was ineligible for relief under 212(c).<sup>138</sup>

The Attorney General's decision returned to the principle that 212(c) was unavailable to noncitizens in deportation proceedings charged with a ground of deportability for which there was no comparable or analogous ground of inadmissibility.<sup>139</sup> The fact that the Board had previously reached a similar, although narrower, conclusion in a case within the second group, involving a firearm offense, further supported this principle. In *Matter of Granados*, the Board held that the respondent was ineligible for relief under 212(c) because his firearms offense did not come within the grounds of excludability waivable by 212(c): "Conviction for possession of a concealed sawed-off shotgun is not a specified section 212(a) ground of excludability, nor a crime involving moral turpitude that would render the respondent excludable under section 212(a)(9) of the Act."<sup>140</sup> The terms "analogous" and "comparable," however, were never clearly defined and

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134. *Id.* at 280-81. The Attorney General has the power to certify Board decisions to him or herself for decision. 8 C.F.R. § 1003.1(h)(1)(i) (2016). The Attorney General's decision will then become the final agency determination in the case and binding precedent in future cases. 8 C.F.R. § 1003.1(g) (2016).

135. *Hernandez-Casillas*, 20 I. & N. Dec. at 289.

136. *Id.* at 286; *see also, e.g.,* *Bedoya-Valencia v. INS*, 6 F.3d 891, 896 (2nd Cir. 1993).

137. *Hernandez-Casillas*, 20 I. & N. Dec. at 287-89 ("Under no plausible understanding of equal protection principles must discretionary relief be made available in deportation cases where the ground for deportation could not be waived if asserted in an exclusion case—or, as here, could not be asserted at all in an exclusion case.").

138. *Id.* at 293. The Court of Appeals for the Fifth Circuit affirmed the Attorney General's decision without opinion. *Hernandez-Casillas v. INS*, 983 F.2d 231 (5th Cir. 1993).

139. *See, e.g.,* *De La Rosa v. U.S. Att'y Gen.*, 579 F.3d 1327, 1332, 1336 (11th Cir. 2009); *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 685 (7th Cir. 2008); *Vue v. Gonzales*, 496 F.3d 858, 862 (8th Cir. 2007); *Abebe I*, 493 F.3d 1092, 1107 (9th Cir. 2007); *Dalombo Fontes v. Gonzales*, 483 F.3d 115, 121 (1st Cir. 2007); *Vo v. Gonzales*, 482 F.3d 363, 368-70 (5th Cir. 2007); *Farquharson v. U.S. Att'y Gen.*, 246 F.3d 1317, 1323-24 (11th Cir. 2001); *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1457, 1459-60 (11th Cir. 1994); *Leal-Rodriguez v. INS*, 990 F.2d 939, 949-50 (7th Cir. 1993); *Matter of Brieva*, 23 I. & N. Dec. 766, 771 (BIA 2005); *Matter of Blake*, 23 I. & N. Dec. 722, 724 (BIA 2005).

140. 16 I. & N. Dec. 726, 728 (BIA 1979).

the BIA and federal courts continued to issue decisions debating their meaning and reaching different conclusions.

*b) The Circuit Courts*

The circuit courts of appeals also grappled with the same question of what grounds of deportability could be waived by 212(c). These cases were initially concentrated in the first two groups: charges of deportability for entering without inspection and for firearm offenses. While cases involving entry without inspection might seem to present a more straightforward question, as entry without inspection under the version of the statute then in effect could not logically be a ground of deportability, in practice this did not prove to be the case. The courts hearing these cases took a variety of approaches and reached results different in several respects from the Attorney General's holding in *Hernandez-Casillas*. The firearm offense cases, on the other hand, primarily reached the same conclusion as the BIA in *Granados*, albeit by several varying routes.

*(1) Group One: Entry Without Inspection*

The circuits split in major cases addressing entry without inspection. The Court of Appeals for the Seventh Circuit in *Leal-Rodriguez v. INS* sided with the Attorney General in *Hernandez-Casillas*, finding that 212(c) could not waive deportability for entry without inspection.<sup>141</sup> The Court of Appeals for the Second Circuit in *Bedoya-Valencia v. INS* held the opposite, finding that, for the sake of "coherence and consistency," 212(c) relief must be available to noncitizens charged as deportable for entering without inspection.<sup>142</sup> The Court of Appeals for the Eleventh Circuit, perhaps most interestingly, found 212(c) available to waive entry without inspection in some cases but not in others.<sup>143</sup> In *Marti-Xiques v. INS*, the Eleventh Circuit found that entry without inspection could be waived by section 212(c) where the noncitizen was also charged with some other, more serious, ground of deportability arising out of the same incident that

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141. 990 F.2d 939, 950 (7th Cir. 1993).

142. 6 F.3d 891, 897 (2nd Cir. 1993).

143. Compare *Marti-Xiques v. INS*, 713 F.2d 1511 (11th Cir. 1983), *vacated on rehearing* 724 F.2d 1463 (11th Cir. 1984), *decided on other grounds*, 741 F.2d 350 (11th Cir. 1984) with *Farquharson v. U.S. Att'y Gen.*, 246 F.3d 1317 (11th Cir. 2001). Despite the fact that *Farquharson* was decided after the repeal of 212(c) in 1996, it deals with an order to show cause issued by INS in 1986 and therefore pre-1996 procedures and law govern the case on the questions relevant here. See *Farquharson*, 246 F.3d at 1319, 1320 n.3.

did have a comparable ground in the grounds of inadmissibility.<sup>144</sup> In *Farquharson v. United States Attorney General*, without so much as even citing to *Marti-Xiques*, the Eleventh Circuit held that 212(c) was not available to waive entry without inspection even where the respondent was also charged with deportability for a controlled substance violation, an arguably more serious ground of deportability, arising out of the same incident.<sup>145</sup>

In addition to reaching these different substantive results, the courts took varying routes to get there, particularly with respect to their invocation of *Chevron* deference and reliance on equal protection arguments. The Seventh Circuit in *Leal-Rodriguez* cited to *Chevron* and discussed *Chevron* deference at some length before reaching the same result as the BIA.<sup>146</sup> Most of the discussion regarding *Chevron*, however, took place in the context of another issue in *Leal-Rodriguez*: whether Leal-Rodriguez's actions in fact constituted an entry and therefore made him removable as charged for entering without inspection.<sup>147</sup> When it reached its discussion of whether or not 212(c) was available to waive a charge of entering without inspection, the court simply referred back to its earlier discussion and stated, "we must defer to the Attorney General's interpretation if it is reasonable."<sup>148</sup> The court cited to both the Supreme Court's decision in

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144. 713 F.2d 1511 (11th Cir. 1983), *vacated on rehearing*, 724 F.2d 1463 (11th Cir. 1984), *decided on other grounds*, 741 F.2d 350 (11th Cir. 1984). On rehearing, the Eleventh Circuit found that Marti-Xiques had not met one of the requirements, seven years of lawful domicile, to obtain relief under 212(c). *Marti-Xiques*, 741 F.2d at 355.

145. 246 F.3d at 1325. The court in *Farquharson* may have felt itself not bound by the prior panel's decision in *Marti-Xiques* because that panel decision was vacated and decided on other grounds. Given the similarity in circumstances, however, it is somewhat surprising that the *Farquharson* court did not at least briefly acknowledge *Marti-Xiques*, even if it did not go so far as to explain or justify why it was reaching a different result. This is particularly true where the BIA and at least two other circuit courts of appeals discussed and seemingly took very seriously the Eleventh Circuit's initial panel decision in *Marti-Xiques*. See *Rodriguez v. INS*, 9 F.3d 408, 412-13 (5th Cir. 1993); *Cabasug v. INS*, 847 F.2d 1321, 1326-27 (9th Cir. 1988), *abrogated by Abebe v. Mukasey (Abebe II)*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 267-69 (BIA 1990, A.G. 1991) *aff'd sub nom. Hernandez-Casillas v. INS*, 983 F.2d 231 (5th Cir. 1993) (unpublished table decision). In fact, the Eleventh Circuit itself discussed the original panel decision in *Marti-Xiques* in a firearm offense case, discussed below. See *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1458 (11th Cir. 1994).

146. *Leal-Rodriguez v. INS*, 990 F.2d 939, 944-46, 950-52 (7th Cir. 1993).

147. *Id.* at 944-46.

148. *Id.* at 950.

*Chevron*<sup>149</sup> and another Seventh Circuit decision<sup>150</sup> following this statement.<sup>151</sup>

Leal-Rodriguez argued that the Attorney General's decision in *Hernandez-Casillas* was unreasonable for three different reasons: that the language of 212(c) itself supports the extension of its relief to all deportable aliens, that the 1990 amendments to the INA support this interpretation and demonstrate that Congress intended it, and that the position announced in *Hernandez-Casillas* violated his right to equal protection under the due process clause of the Fifth Amendment to the United States Constitution.<sup>152</sup> After considering and dismissing each of these three arguments, the Seventh Circuit found the agency's position as announced in *Hernandez-Casillas* reasonable and upheld it, dismissing Leal-Rodriguez's appeal.<sup>153</sup>

A problem with this analysis is that it completely skips two questions: whether *Chevron* applies in the first instance and whether Congress spoke clearly on the issue in question. The prior Seventh Circuit decision cited<sup>154</sup> and the decision it cites<sup>155</sup> both repeat this same error, considering only whether the agency's position on two separate, unrelated legal questions was reasonable. Although the court in *Leal-Rodriguez* identified these two questions in its discussion of the legal standard, it ignored them in application.<sup>156</sup> The Seventh Circuit may have assumed that, given the somewhat tortured history of administrative and judicial modification it had detailed, it was clear that Congress had not spoken clearly.<sup>157</sup> It did not, however, state, much less explain, this presumption or its decision to apply *Chevron* in the first instance.

Unlike the Seventh Circuit, the Second Circuit in *Bedoya-Valencia* did not cite to or discuss *Chevron*, but did make an oblique reference to deference in its preliminary statement of the standard of review. After asserting that its review of questions of law was plenary, it qualified its declaration by adding, "In conducting that review, however, deference must

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149. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

150. *Zalega v. INS*, 916 F.2d 1257, 1259 (7th Cir. 1990) (applying *Chevron* to the BIA's interpretation of the INA in an asylum claim).

151. *Leal-Rodriguez*, 990 F.2d at 950.

152. *Id.*

153. *Id.* at 950-52 ("We therefore leave the Attorney General's decision intact and hold that section 212(c) relief is not available to Leal.").

154. *Zalega*, 916 F.2d at 1259.

155. *Variamparambil v. INS*, 831 F.2d 1362, 1366 (7th Cir. 1987) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984)).

156. *Leal-Rodriguez*, 990 F.2d at 950-52.

157. *Id.* at 948-50.

be accorded to the views of the Attorney General, who is charged with the administration of the INA and whose rulings with respect to questions of immigration law are controlling within the executive branch.”<sup>158</sup> In support of this statement on deference, the Second Circuit cited two cases: the Seventh Circuit’s *Leal-Rodriguez* case and its application of *Chevron* just discussed, and a pre-*Chevron* Second Circuit case applying a standard that differs, at least slightly, from the *Chevron* two-step test.<sup>159</sup>

Despite discussing the Attorney General’s decision in *Hernandez-Casillas* at length, the Second Circuit did not explicitly raise deference in its decision—perhaps because it did not in fact defer to that decision.<sup>160</sup> It did, however, state, “The ruling that we make today poses no challenge to the legislative and executive branches, or to the Attorney General’s special role within the executive branch with respect to legal interpretation of the immigration statutes.”<sup>161</sup> The Second Circuit relied heavily on the fact that the application of 212(c) had been judicially modified so far from the original text that it did not make sense to ask what the statutory language meant or what Congress intended.<sup>162</sup> The court noted that what it was really interpreting was its own prior constitutional decision in *Francis*, not a statute over which the Attorney General had “conceded expertise.”<sup>163</sup> The Second Circuit may then have been holding, although they did not explicitly state, that *Chevron* was inapplicable by its own terms because this was not an instance of an agency interpreting a statute that it was charged to administer.

The Eleventh Circuit decided *Marti-Xiques*<sup>164</sup> prior to the BIA’s decision in *Hernandez-Casillas* and prior to the Supreme Court’s decision in *Chevron*, so there was no directly on-point BIA decision to defer to and deference was not at issue. In *Farquharson*, the Eleventh Circuit, like the Second Circuit in *Bedoya-Valencia*, referenced deference exclusively in its

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158. *Bedoya-Valencia v. INS*, 6 F.3d 891, 893 (2nd Cir. 1993).

159. *Id.* at 893-94 (citing 8 U.S.C. § 1103(a) (1988); *Leal-Rodriguez*, 990 F.2d at 950; *De los Santos v. INS*, 690 F.2d 56, 59 (2nd Cir. 1982)). Title 8 U.S.C. § 1103(a) simply sets out the authority of the Attorney General. *De los Santos* describes the standard as follows: “[I]f INS’s interpretation is reasonable, in that it is consistent with the statutory language, legislative history, and purpose of the statute, we will not invalidate it.” 690 F.2d at 59.

160. *Bedoya-Valencia*, 6 F.3d at 895-96 (stating, regarding the Board’s decision in *Hernandez-Casillas*, “We view the matter differently.”).

161. *Id.* at 898.

162. *Id.* at 897-98.

163. *Id.* at 898.

164. 713 F.2d 1511 (11th Cir. 1983), *vacated on rehearing*, 724 F.2d 1463 (11th Cir. 1984), *decided on other grounds*, 741 F.2d 350 (11th Cir. 1984).

preliminary statement of its standard of review. It stated: “In our review of the BIA’s decision, we review the BIA’s statutory interpretation *de novo*, but we defer to the BIA’s interpretation if it is reasonable.”<sup>165</sup> In support of this statement, it cited only to another Eleventh Circuit case.<sup>166</sup> That case in turn cited to a third Eleventh Circuit case without significant discussion of the standard.<sup>167</sup> The third case finally cites to, discusses, and applies the *Chevron* test.<sup>168</sup>

The statement quoted above from *Farquharson* is not a complete statement of the *Chevron* test, as it omitted the step-one analysis of whether Congress has spoken clearly. However, it may simply be reciting stock language rather than affirmatively misstating the standard. The third case that finally cited *Chevron*, as discussed in the preceding paragraph, recited this same stock phrase before correctly and completely expanding and discussing the *Chevron* two-step test.<sup>169</sup> On the other hand, the Eleventh Circuit in *Farquharson* may have been repeating the Seventh Circuit’s errors in *Leal-Rodriguez* by proceeding from a presumption that *Chevron* does apply and step one has already been decided in the negative or completely avoiding these preliminary questions.

Although the Eleventh Circuit discussed the Board’s decision in *Hernandez-Casillas*,<sup>170</sup> noted the significant similarities with *Farquharson*’s situation,<sup>171</sup> and ultimately decided the case in accordance with the agency’s position,<sup>172</sup> it did not apply anything resembling the *Chevron* two-step test or even mention deference again in its analysis. The court focused on answering the question whether denying noncitizens like *Farquharson*, charged as deportable for entering without inspection, the opportunity to apply for relief under 212(c) violated equal protection.<sup>173</sup> It did note that it found convincing the Attorney General’s analysis on this issue.<sup>174</sup>

All three of the circuits in the cases considering entry without inspection at least referenced equal protection, but none found an equal protection violation. The Second Circuit in *Bedoya-Valencia* discussed equal

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165. *Farquharson v. U.S. Att’y Gen.*, 246 F.3d 1317, 1320 (11th Cir. 2001).

166. *Id.* (citing *Asencio v. INS*, 37 F.3d 614, 616 (11th Cir. 1994)).

167. *Asencio*, 37 F.3d at 616 (citing *Perlera-Escobar v. Exec. Office for Immigration*, 894 F.2d 1292, 1296 (11th Cir. 1990)).

168. *Perlera-Escobar*, 894 F.2d at 1296-97.

169. *See id.* at 1296.

170. *Farquharson*, 246 F.3d at 1323-24.

171. *Id.* at 1324-25.

172. *Id.* at 1325-26.

173. *Id.* at 1325.

174. *Id.*

protection only in the context of describing its prior decision in *Francis* and the Attorney General's decision in *Hernandez-Casillas*, despite the fact that the BIA decision it was reviewing had discussed equal protection and found no violation.<sup>175</sup> The Eleventh Circuit in *Marti-Xiques* referenced equal protection only once, in stating the Second Circuit's holding in *Francis*.<sup>176</sup> Neither the Second Circuit in *Bedoya-Valencia* nor the Eleventh Circuit in *Marti-Xiques* explained why they were not addressing equal protection.

Only the Seventh Circuit in *Leal-Rodriguez*<sup>177</sup> and the Eleventh Circuit in *Farquharson*<sup>178</sup> discussed equal protection arguments in more depth. *Leal-Rodriguez* argued that his right to equal protection under the law was violated when other noncitizens with much more serious criminal convictions could apply for relief under the former section 212(c) while he could not.<sup>179</sup> In *Leal-Rodriguez*, the court explained the standard for determining equal protection violations as looking to whether there was a "facially legitimate and bona fide reason" for the enactment of the immigration provision at issue.<sup>180</sup> After stating this standard and explaining *Leal-Rodriguez*'s arguments, however, the court did not even attempt to apply it or refute respondent's argument of an equal protection violation. Instead, the Seventh Circuit focused on its desire not to further judicially expand 212(c) beyond what was required by the rationale in *Francis* and *Silva* and held that the reasons to interfere with congressional intent were not sufficiently strong under the circumstances at issue.<sup>181</sup> The court referenced the plenary power doctrine, although not by name, and expressed concern with meddling in Congress' power to regulate immigration.<sup>182</sup>

The Eleventh Circuit in *Farquharson* expressed the standard somewhat differently, evoking the minimal scrutiny test and stating, "A statutory

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175. *Bedoya-Valencia v. INS*, 6 F.3d 891, 893, 895, 896-97 (2nd Cir. 1993).

176. *Marti-Xiques v. INS*, 713 F.2d 1511, 1515 (11th Cir. 1983), *vacated on rehearing*, 724 F.2d 1463 (11th Cir. 1984), *decided on other grounds*, 741 F.2d 350 (11th Cir. 1984).

177. *Leal-Rodriguez v. INS*, 990 F.2d 939, 951-52 (7th Cir. 1993).

178. 246 F.3d at 1324.

179. *Leal-Rodriguez*, 990 F.2d at 951.

180. *Id.* (quoting *Fiallo v. Bell*, 430 U.S. 787, 794 (1977)). The court relied on the Supreme Court's decisions in *Fiallo*, 430 U.S. at 794, and *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972), for this standard. *Leal-Rodriguez*, 990 F.2d at 951.

181. *Leal-Rodriguez*, 990 F.2d at 952 ("To hold that the same form of discretionary relief must be available to aliens deportable for different, but arguably comparable, violations is to interfere again, on an even weaker rationale, with Congress's scheme for regulating aliens.").

182. *Id.* at 951-52.

distinction such as that challenged by Farquharson . . . will survive an equal protection challenge if the classification drawn by the statute is rationally related to a legitimate state interest.”<sup>183</sup> Although not articulated identically, this standard should, in practice, mean essentially the same thing as the standard asserted by the Seventh Circuit in *Leal-Rodriguez*.<sup>184</sup> In application, however, the Eleventh Circuit diverged from the Seventh. Like the Seventh Circuit, the Eleventh Circuit was concerned with further judicially stretching the meaning of the plain language of 212(c). Unlike the Seventh Circuit, however, the Eleventh Circuit looked for and found a “rational” reason for distinguishing noncitizens deportable for entry without inspection: “It is reasonable that the government would decline to offer a waiver to aliens deportable for entry without inspection, since illegal entry violations directly and fundamentally undermine the enforcement efforts of the INS.”<sup>185</sup>

(2) *Group Two: Firearm Offenses*

Unlike the cases involving entry without inspection, there was no circuit split with respect to cases in the second group, those involving charges of deportability based on firearm offenses. The circuit courts that considered the question held that the firearms-related grounds of deportability had no comparable ground of inadmissibility and that 212(c) was therefore not available to waive them. The significant cases in this second group include *Cabasug v. INS*<sup>186</sup> and *Komarenko v. INS*<sup>187</sup> in the Ninth Circuit, *Campos v. INS*<sup>188</sup> in the First Circuit, *Chow v. INS*<sup>189</sup> and *Rodriguez v. INS*<sup>190</sup> in the Fifth Circuit, *Rodriguez-Padron v. INS*<sup>191</sup> in the Eleventh Circuit, and *Gjonaj v. INS*<sup>192</sup> in the Sixth Circuit. Despite reaching the same result, the courts took significantly different paths to get there, including with respect

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183. *Farquharson*, 246 F.3d at 1324 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)).

184. *See, e.g., Campos v. INS*, 961 F.2d 309, 316 (1st Cir. 1992) (connecting the two standards and explaining the “facially legitimate and *bona fide* reason” language as the specific application of the minimal scrutiny test to an immigration law provision).

185. *Farquharson*, 246 F.3d at 1325.

186. 847 F.2d 1321 (9th Cir. 1988), *abrogated by Abebe II*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam).

187. 35 F.3d 432 (9th Cir. 1994), *overruled by Abebe II*, 554 F.3d 1203.

188. 961 F.2d 309 (1st Cir. 1992).

189. 12 F.3d 34 (5th Cir. 1993).

190. 9 F.3d 408 (5th Cir. 1993).

191. 13 F.3d 1455 (11th Cir. 1994).

192. 47 F.3d 824 (6th Cir. 1995).

to their invocation of *Chevron* deference and reliance on equal protection arguments.

Only the Fifth Circuit in *Chow* and the Eleventh Circuit in *Rodriguez-Padron* specifically discussed *Chevron* deference. In *Chow*, as in the Seventh Circuit's *Leal-Rodriguez* decision discussed earlier,<sup>193</sup> part of the discussion regarding *Chevron* took place in the context of another argument—whether *Chow* was in fact deportable as charged for a firearms offense.<sup>194</sup> There the Fifth Circuit clearly recognized that whether the law was ambiguous or unequivocal and whether the agency interpretation was reasonable were both part of the *Chevron* analysis.<sup>195</sup> When the court in *Chow* reached the availability of 212(c), however, they stated only, citing *Chevron* and *Cardoza-Fonseca*, “[B]ecause Congress has delegated the administration of the statutory scheme to the INS, its interpretation is entitled to strong deference.”<sup>196</sup> It therefore addressed whether or not *Chevron* applied, but ignored the question of whether or not the law was unambiguous and addressed only implicitly whether the agency's interpretation was reasonable.<sup>197</sup> In support of its holding that 212(c) was unavailable for firearm offenses, it offered only favorable reference to its own memorandum opinion summarily affirming the Attorney General's decision in *Hernandez-Casillas* and to the First Circuit's decision in *Campos*, tacitly supporting the position that the agency's interpretation in the case below was reasonable.<sup>198</sup>

A second published Fifth Circuit case, *Rodriguez v. INS*, considering the availability of 212(c) for a charge of deportability for a firearms offense was decided just one month later and with one of the same judges on the panel.<sup>199</sup> Oddly enough, the court in *Rodriguez* neither considered *Chevron* deference nor cited to its earlier decision in *Chow*.<sup>200</sup>

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193. *Leal-Rodriguez v. INS*, 990 F.2d 939, 944-46 (7th Cir. 1993).

194. *Chow v. INS*, 12 F.3d 34, 37 (5th Cir. 1993).

195. *Id.*

196. *Id.* at 38 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)).

197. *Id.*

198. *Id.* (citing *Hernandez-Casillas v. INS*, 983 F.2d 231 (5th Cir. 1993) (unpublished table decision); *Campos v. INS*, 961 F.2d 309 (1st Cir. 1992)).

199. 9 F.3d 408 (5th Cir. 1993). Judge Garwood sat on the panel in both cases and wrote the court's decision in *Rodriguez*. *Id.*; *Chow*, 12 F.3d 34.

200. *Rodriguez* relies on equal protection as the basis for its decision, 9 F.3d at 414, while *Chow* does not consider an equal protection argument. The Court in *Rodriguez* does state that its “review of immigration decisions is extremely limited.” *Id.* at 410 (citing *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

The Eleventh Circuit in *Rodriguez-Padron* addressed *Chevron* deference only briefly and only in the last paragraph of its opinion before the conclusion—essentially as an afterthought.<sup>201</sup> The court held, relying only on *Chevron*: “Finally, and significantly, we note that the Attorney General’s reasonable interpretation of the statutory scheme is entitled to deference.”<sup>202</sup> Skipping *Chevron* step one, the court then went on to find, without discussion, that the agency’s interpretation in *Hernandez-Casillas* was reasonable and did not misinterpret the statute.<sup>203</sup>

The First Circuit in *Campos* did not mention the *Chevron* test or deference by name, but it did suggest a standard of review that amounted functionally to some level of deference to the agency: “While this court is not, of course, bound by the Attorney General’s opinion, we should disregard it only if misconstrues the law or the Constitution.”<sup>204</sup> The court provided no citation for this statement.<sup>205</sup> Although the BIA’s decision in *Granados*<sup>206</sup> was more arguably on point, the court here was apparently referring to the Attorney General’s decision in *Hernandez-Casillas*<sup>207</sup> when it spoke of the Attorney General’s opinion.<sup>208</sup> Despite stating throughout its decision that it was interpreting provisions of the INA—the statute the relevant agency was charged with administering—it did not discuss why it was not applying the *Chevron* two-step test.<sup>209</sup> The court in *Campos* ultimately found that the Attorney General’s decision in *Hernandez-Casillas* did not misinterpret 212(c) or other amendments to the immigration laws and, as discussed below, did not violate equal protection.<sup>210</sup> Like many of the courts deciding these cases, the First Circuit strongly resisted what it described as further judicial “tinkering” with a statute already stretched beyond its literal meaning.<sup>211</sup>

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201. *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1460-61 (11th Cir. 1994).

202. *Id.* at 1460 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

203. *Id.* at 1460-61.

204. *Campos v. INS*, 961 F.2d 309, 314 (1st Cir. 1992).

205. *See id.*

206. *Matter of Granado*, 16 I. & N. Dec. 726 (BIA 1979), *abrogated by* *Matter of Wadud*, 19 I. & N. Dec. 182 (BIA 1984).

207. 20 I. & N. Dec. 262 (BIA 1990, A.G. 1991), *aff’d*, 983 F.2d 231 (5th Cir. 1993) (unpublished table decision).

208. *Campos*, 961 F.2d at 314.

209. *See id.*

210. *Id.* at 313-17.

211. *Id.* at 315, 317.

The Ninth Circuit in *Cabasug*<sup>212</sup> and *Komarenko*,<sup>213</sup> the Fifth Circuit in *Rodriguez*,<sup>214</sup> and the Sixth Circuit in *Gjonaj*<sup>215</sup> did not cite to *Chevron* or even so much as allude to deference to the agency's interpretation of the statute in the 212(c) context. In fact, the Ninth Circuit in *Cabasug* made a contrary assertion, focused on Congress' power to regulate immigration, alleging that the court decides "in accord with deference to the legislature."<sup>216</sup> The Ninth Circuit's omission of any mention of *Chevron* in *Komarenko* in the 212(c) context is particularly curious because it cites and applies *Chevron* in another context, the agency's interpretation of whether *Komarenko* should be barred from asylum for commission of a particularly serious crime.<sup>217</sup> Of course, as in the entry without inspection cases, these courts could be simply proceeding from a presumption that *Chevron* does not apply, but they do not so state or explain why they think *Chevron* is inapplicable.

Only *Rodriguez-Padron* in the Eleventh Circuit addressed both *Chevron* deference and equal protection,<sup>218</sup> although as discussed above, the First Circuit in *Campos* functionally deferred to the agency and based its decision on equal protection.<sup>219</sup> The Ninth Circuit in *Cabasug* and *Komarenko* and the Fifth Circuit in *Rodriguez* raised only equal protection.<sup>220</sup> The Ninth, First, Fifth, and Eleventh Circuits do not differ from each other or the previously discussed entry without inspection cases as to the proper legal standard for the equal protection claims, at least in so far as the legal standard was discussed or is clear in the cases. The courts do depart in their applications of this standard, however, before coming back together to reach the same outcome.

The Ninth Circuit in *Cabasug* did not discuss the legal standard for assessing an equal protection violation. In application, the court focused on the same distinction at stake in *Francis* and *Silva* and ultimately held that there was no group being treated differently because there was no

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212. *Cabasug v. INS*, 847 F.2d 1321 (9th Cir. 1988), *abrogated by Abebe II*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam).

213. *Komarenko v. INS*, 35 F.3d 432 (9th Cir. 1994), *overruled by Abebe II*, 554 F.3d 1203.

214. *Rodriguez v. INS*, 9 F.3d 408 (5th Cir. 1993).

215. *Gjonaj v. INS*, 47 F.3d 824 (6th Cir. 1995).

216. 847 F.2d at 1326.

217. *Komarenko*, 35 F.3d at 435-36.

218. *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1458-59, 1460 (11th Cir. 1994).

219. *See Campos v. INS*, 961 F.2d 309, 313-17 (1st Cir. 1992).

220. *Rodriguez v. INS*, 9 F.3d 408, 413-14 (5th Cir. 1993); *Komarenko*, 35 F.3d at 435; *Cabasug*, 847 F.2d at 1325-26.

“substantially identical” language in the grounds of exclusion: “By contrast with narcotics and marijuana cases, there exists no class of persons alike in carrying sawed-off shotguns or machine guns, and deportable or not depending on the irrelevant circumstance of whether at some previous time they took a temporary trip out of the country.”<sup>221</sup> The court also considered whether Congress could treat specific criminal offenses differently without violating equal protection and concluded not only that Congress could but had expressed a particular concern with firearms offenses in a number of different contexts.<sup>222</sup>

Six years later, the Ninth Circuit in *Komarenko* used a different analysis to reach the same result.<sup>223</sup> The court in *Komarenko* began with the holding reached in previous cases, allegedly including *Cabasug*, that “when the basis upon which the INS seeks deportation is identical to a statutory ground for exclusion for which discretionary relief would be available, the equal protection component of the fifth amendment due process guarantee requires that discretionary relief be accorded in the deportation context as well.”<sup>224</sup> It then considered whether firearms offenses were sufficiently “identical” to the ground of exclusion for crimes of moral turpitude to give rise to an equal protection violation and concluded that they were not.<sup>225</sup> The Ninth Circuit rejected an offense-specific approach that would have looked at whether the conviction that rendered the noncitizen deportable would also render him or her excludable.<sup>226</sup>

Unlike the two Ninth Circuit cases, the First Circuit in *Campos* did discuss at length the applicability and standard for equal protection violations under the Fifth Amendment: “Under well-established principles, a challenged statute that does not employ a suspect classification or impinge upon fundamental rights must be upheld if it is rationally related to a legitimate governmental purpose.”<sup>227</sup> In the immigration context, a statute is rationally related if “it is based upon a ‘facially legitimate and bona fide reason.’”<sup>228</sup> The court in *Campos* ultimately held that it was not irrational for Congress “to treat different crimes differently.”<sup>229</sup> Significantly, the

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221. *Cabasug*, 847 F.2d at 1325, 1326.

222. *Id.* at 1326-27.

223. *See* 35 F.3d 432.

224. *Id.* at 434 (quoting *Gutierrez v. INS*, 745 F.2d 548, 550 (9th Cir. 1984)).

225. *Id.* at 434-35.

226. *Id.* at 435.

227. 961 F.2d 309, 315-16 (1st Cir. 1992) (citing *Whiting v. Town of Westerly*, 942 F.2d 18, 23 (1st Cir. 1991)).

228. *Id.* at 316 (quoting *Fiallo v. Bell*, 430 U.S. 787, 794 (1977)).

229. *Id.*

court appeared to focus primarily on the Attorney General's decision in *Hernandez-Casillas*, which it described as "administratively dispositive," to a lesser extent, on the Board's decision in *Campos* below, and not at all on the Board's decision in *Granados* or similar cases.<sup>230</sup> This explains, at least in part, its more general focus on different types of crimes, like the Ninth Circuit in *Cabasug*, rather than specifically on firearms offenses, like the Ninth Circuit in *Komarenko*.

The Fifth Circuit in *Rodriguez v. INS* purported to address an even broader contention, whether failing to allow *all* deportees to apply for a 212(c) waiver violated equal protection.<sup>231</sup> The court set out the same legal standard for equal protection violations as laid out by the First Circuit in *Campos*.<sup>232</sup> Ultimately the court answered the question with reference back to firearms, holding that facially valid reasons for treating firearms offenses differently—a particular concern with this type of offender—existed.<sup>233</sup> The court recognized that the distinctions were "confusing and arbitrary," but nevertheless found them constitutional.<sup>234</sup> By answering the question in this way, the court avoided the larger question it initially articulated.

The Eleventh Circuit in *Rodriguez-Padron* approached the equal protection question similarly to the courts in *Cabasug*, *Campos*, and *Rodriguez*. The court in *Rodriguez-Padron* identified the same legal standard and again held that it was rational for Congress to treat different crimes, and in particular firearms offenses, differently.<sup>235</sup>

The Sixth Circuit in *Gjonaj v. INS*<sup>236</sup> discussed neither *Chevron* deference nor equal protection. Its consideration of the availability of 212(c) to waive a firearms ground of deportability was only a few sentences long.<sup>237</sup> It simply cited to a number of the previously discussed opinions in support of its conclusion that the availability of 212(c) to waive grounds of deportability required a comparable ground of inadmissibility and firearms

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230. *Id.* at 314.

231. 9 F.3d 408, 413 (5th Cir. 1993). *Rodriguez* may have been attempting to distinguish his case by framing the question in this way. As earlier discussed, a previous Fifth Circuit case, *Chow*, did not discuss equal protection at all. *See Chow v. INS*, 12 F.3d 34 (5th Cir. 1993).

232. *Rodriguez*, 9 F.3d at 414. The *Rodriguez* court cites both *Campos* and *Cabasug*. *Id.*

233. *Id.* at 414.

234. *Id.*

235. 13 F.3d 1455, 1458-59 (11th Cir. 1994).

236. 47 F.3d 824 (6th Cir. 1995).

237. *See id.* at 827.

offenses did not have one.<sup>238</sup> The court then “decline[d] to change this well-established rule.”<sup>239</sup>

(3) *Pre-Repeal: Preliminary Conclusions*

While some of the pre-repeal decisions on the contours of the expanded application of 212(c) referenced Congress’ power to regulate immigration and cited to plenary power cases, the cases also applied ordinary administrative and constitutional law principles. None questioned whether these ordinary principles were applicable in the immigration realm, even in this somewhat unusual context of the judicial expansion of statutory relief that might have brought such questions into the foreground.

As detailed in Section II.C.2.b, however, the courts varied significantly as to *which* administrative and constitutional law doctrines were invoked and the level of detail at which they were discussed. *Chevron* or other forms of deference to the agency’s decisions in particular received little analysis and portions of the doctrine were frequently omitted from the opinion with no discussion. These variations and omissions make patterns somewhat difficult to discern in the early case law. However, several overarching comments can be made.

First, although the majority of the circuit courts in both the group one entry without inspection and the group two firearms offenses cases ultimately agreed with the agency that 212(c) relief was not available, the courts did not apply a very high level of deference in reaching these conclusions. Even among those decisions that referenced deference and purported to be applying it, courts undertook their own detailed analyses of the question independently of the agency’s analysis and the factors that the agency had considered.

Second, there were not careful distinctions made between the various doctrines and steps of the doctrines; the courts’ analyses frequently combined supposedly disparate principles. In particular, the equal protection analysis was often collapsed into the *Chevron* step-two reasonableness inquiry. That is, courts appeared to consider whether the agency’s interpretation of the applicability of 212(c) was unreasonable

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238. *Id.* (citing *Rodriguez-Padron*, 13 F.3d at 1459-61; *Rodriguez*, 9 F.3d at 412-13; *Leal-Rodriguez v. INS*, 990 F.2d 939, 948-51 (7th Cir. 1993); *Campos v. INS*, 961 F.2d 309, 311-14 (1st Cir. 1992); *Cabasug v. INS*, 847 F.2d 1321, 1326-27 (9th Cir. 1988), *abrogated by Abebe II*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam); *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262 (BIA 1990, A.G. 1991), *aff’d sub nom. Hernandez-Casillas v. INS*, 983 F.2d 231 (5th Cir. 1993) (unpublished table decision)).

239. *Id.*

*because* it violated equal protection. Courts also merged the question of Congress' intent and the meaning of the statutory language (step one of the *Chevron* analysis) with step two, whether the agency's interpretation of that language was reasonable. A number of courts also noted, however, how far the application of 212(c) had departed from the statutory language. This factor may have driven the collapse of the *Chevron* analysis into a single step in this context.

No definitive ultimate conclusion or agreed upon application of the various doctrines was reached in the pre-repeal 212(c) cases. At the same time as the Board and circuit courts were struggling with the expanded applicability of 212(c), Congress was gradually restricting 212(c)'s availability.<sup>240</sup> Congress repealed the waiver as part of the IIRIRA<sup>241</sup> in 1996—before the questions of which grounds of deportability or criminal offenses could be waived by section 212(c), or what standard should be applied in making that determination, could be answered definitively.

## 2. Post-St. Cyr – Group Three: Aggravated Felonies

While the questions of the contours of the expanded application of 212(c) faded somewhat into the background for a period of time following the repeal of 212(c), they resurged after the Supreme Court's decision in *St. Cyr*.<sup>242</sup> The Supreme Court in *St. Cyr* ruled that the repeal of the waiver had an impermissible retroactive effect, and that the waiver must remain available to at least some noncitizens who were previously eligible.<sup>243</sup> The Department of Homeland Security promulgated a final regulation meant to implement *St. Cyr* in 2004.<sup>244</sup> Among other provisions, the final rule provided that 212(c) was unavailable where "[t]he alien is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act."<sup>245</sup> Cases in the third group, involving charges of deportability based on aggravated felonies, predominated in this post-regulation resurgence.

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240. See, e.g., *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 687 (7th Cir. 2008); *Matter of Abdelghany*, 26 I. & N. Dec. 254, 256-57 (BIA 2014).

241. Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546.

242. 533 U.S. 289 (2001).

243. *Id.* at 314-26.

244. *Blake v. Carbone*, 489 F.3d 88, 97 (2d Cir. 2007); see 8 C.F.R. § 1212.3(f)(5) (2005).

245. 8 C.F.R. § 1212.3(f)(5) (2005). This provision was not in the proposed rule, but was added pursuant to a commenter's suggestion. *Blake v. Carbone*, 489 F.3d at 97 (citing Section 212(c) Relief for Aliens With Certain Criminal Convictions Before April 1, 1997, 69

Relatively quickly after the regulations were issued in 2004, the BIA held that the regulation's term "statutory counterpart" and case law's "comparable ground" or "corresponding ground" all meant that similar language must have been used to describe substantially equivalent categories of offenses.<sup>246</sup> Most circuits to consider the question agreed with the Board's narrow interpretation, with the result that most noncitizens in group three with aggravated felony convictions would not be eligible for 212(c) relief. The Second Circuit disagreed, holding that a ground of deportability had a statutory counterpart if the offense that made the noncitizen deportable would also make him or her inadmissible.<sup>247</sup> The Second Circuit's position would have meant that a significantly larger group of noncitizens in group three could qualify for a 212(c) waiver. Just as in the pre-repeal cases, ordinary principles of administrative and constitutional law were almost unquestioningly invoked, but the circuit courts varied widely as to how they interpreted and applied the doctrines of *Chevron* deference and equal protection. Even more significantly, the Supreme Court weighed in on this question, and introduced the use of the APA's arbitrary and capricious review for the first time in this context without significant discussion of why it chose to make this shift.<sup>248</sup>

a) *The Board* – *Matter of Blake* and *Matter of Brieva-Perez*

In 2005, the BIA applied and clarified this rule in two published cases decided just months apart: *Matter of Blake*<sup>249</sup> and *Matter of Brieva-Perez*.<sup>250</sup> The noncitizen respondents in both *Blake* and *Brieva-Perez* were charged as deportable based on convictions for aggravated felonies—sexual abuse of a minor in *Blake*<sup>251</sup> and a crime of violence in *Brieva-Perez*.<sup>252</sup> The Board began by holding that the "statutory counterpart" phrase from the regulations had the same meaning as and could be employed

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Fed. Reg. 57, 826, 57,831-32 (Sept. 28, 2004) (codified at 8 C.F.R. pts. 1003, 1212, and 1240)).

246. *Matter of Blake*, 23 I. & N. Dec. 722, 727 (BIA 2005), *vacated and remanded sub nom.* *Blake v. Carbone*, 489 F.3d 88; *Matter of Brieva-Perez*, 23 I. & N. Dec. 766, 772 (BIA 2005), *aff'd sub. nom.* *Brieva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007).

247. *Blake v. Carbone*, 489 F.3d at 104.

248. *See Judulang v. Holder*, 565 U.S. 42 (2011).

249. 23 I. & N. Dec. 722 (BIA 2005).

250. 23 I. & N. Dec. 766 (BIA 2005).

251. 23 I. & N. Dec. at 722-23.

252. 23 I. & N. Dec. at 767.

interchangeably with the previously used phrases “comparable ground” or “corresponding ground” from its case law.<sup>253</sup>

Conviction of an aggravated felony is a ground of deportability under INA section 237(a)(2)(A)(iii), but is not included by name within the grounds of inadmissibility. Aggravated felonies are defined within the INA and include at least twenty-one different categories of offenses.<sup>254</sup> The Board held that whether a conviction for an aggravated felony had a statutory counterpart within the grounds of inadmissibility must be determined by looking at the specific aggravated felony charged.<sup>255</sup> That is, the question was whether sexual abuse of a minor and crimes of violence had inadmissibility statutory counterparts.<sup>256</sup>

The Board considered the argument that Blake’s and Brieva-Perez’s aggravated felonies had comparable grounds of inadmissibility because nearly all sexual abuse of a minor and crime of violence offenses would also render a noncitizen inadmissible as a crime involving moral turpitude.<sup>257</sup> Ultimately, however, it held against this position. The Board announced a narrow, limiting rule for making this determination: “[W]hether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses.”<sup>258</sup> “Considerable overlap” between two different categories, like that Blake and Brieva-Perez argued existed between aggravated felony crimes of violence or sexual abuse of a minor and crimes involving moral turpitude, was found to be insufficient.<sup>259</sup>

The Board in both cases parsed precedent and the recently enacted Department of Justice regulation in a relatively formalistic manner to reach its conclusions without going into the background of how and why the statutory counterpart rule was initially adopted or justifying its narrow reading of the regulation. The Board’s rule meant that a noncitizen’s

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253. *Blake*, 23 I. & N. Dec. at 727.

254. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012). The actual number of individual aggravated felonies is higher as each category may contain more than one aggravated felony. For example, the Board in *Blake* determined that INA 101(a)(43)(A) contained three separate aggravated felony offenses. 23 I. & N. Dec. at 727.

255. *Blake*, 23 I. & N. Dec. at 728; *Brieva-Perez*, 23 I. & N. Dec. at 772.

256. *Blake*, 23 I. & N. Dec. at 727; *Brieva-Perez*, 23 I. & N. Dec. at 772.

257. *Blake*, 23 I. & N. Dec. at 723; *Brieva-Perez*, 23 I. & N. Dec. at 771-73.

258. *Blake*, 23 I. & N. Dec. at 728; *Brieva-Perez*, 23 I. & N. Dec. at 771.

259. *Blake*, 23 I. & N. Dec. at 728; *Brieva-Perez*, 23 I. & N. Dec. at 771 (“In *Blake*, we found the mere overlap between ‘sexual abuse of a minor’ and some crimes involving moral turpitude insufficient to demonstrate that the provisions were statutory counterparts.”).

eligibility for relief under the former section 212(c) could turn on the charging decision made by an officer of the Department of Homeland Security.<sup>260</sup> Virtually identically situated respondents, then, could end up being treated very differently. The Board did not discuss the rationale underlying such a rule or any reasoning behind imposing it. It did not acknowledge, much less discuss, any equal protection implications of their holding.

b) *The Fifth Circuit – Brieva-Perez v. Gonzales*

The Board's decision in *Brieva-Perez* was appealed to the Court of Appeals for the Fifth Circuit and affirmed in *Brieva-Perez v. Gonzales*.<sup>261</sup> The Fifth Circuit filed its decision on the same date as two other companion cases: *Avilez-Granados v. Gonzales*, involving charges of deportability for the aggravated felony sexual abuse of a minor,<sup>262</sup> and *Vo v. Gonzales*, involving charges of deportability for two aggravated felonies, a crime of violence and a theft or burglary offense.<sup>263</sup> All three cases were heard and decided by the same three-judge panel.<sup>264</sup> *Brieva-Perez* did not directly challenge the Board's interpretation of "statutory counterpart" in his case,<sup>265</sup> although he did argue unsuccessfully that denying him the opportunity to apply for 212(c) relief was a violation of equal protection.<sup>266</sup> The Fifth Circuit held, without much explanation, that he failed to demonstrate he was being treated differently than other similarly situated noncitizens.<sup>267</sup> *Avilez-Granados* was a relatively brief decision with little analysis beyond citation to the Board's decision in *Blake*.<sup>268</sup> The Fifth Circuit's rationale for adopting the Board's rule requiring textual similarity between the charged ground of deportability and a ground of inadmissibility

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260. See, e.g., *Brieva-Perez*, 23 I. & N. Dec. at 772 n.4 (rejecting *Brieva-Perez*'s argument that his conviction should be considered a theft offense for purposes of the statutory counterpart analysis because he was charged with a crime of violence).

261. 482 F.3d 356 (5th Cir. 2007).

262. 481 F.3d 869 (5th Cir. 2007).

263. 482 F.3d 363 (5th Cir. 2007).

264. Chief Judge Edith H. Jones wrote all three decisions; Judges Jacque L. Wiener and Rhessa H. Barksdale also served on the panel. *Brieva-Perez*, 482 F.3d at 356; *Avilez-Granados*, 481 F.3d at 869; *Vo*, 482 F.3d at 363.

265. *Brieva-Perez*, 482 F.3d at 359 n.2.

266. *Id.* at 361-62.

267. *Id.*

268. *Avilez-Granados*, 481 F.3d at 871-72.

to constitute a statutory counterpart was contained primarily in the third companion case, *Vo*.<sup>269</sup>

*Vo* involved a respondent charged as deportable for two aggravated felonies, a crime of violence and a theft or burglary offense, both based on his Texas conviction for unauthorized use of a motor vehicle.<sup>270</sup> After going through the history of 212(c) relief and its expansion, the court held that *Vo*'s unauthorized use of a motor vehicle conviction did not have a statutory counterpart in the grounds of exclusion and therefore could not be waived by section 212(c).<sup>271</sup> While this phrasing is somewhat odd in its reference to the criminal offense rather than the ground(s) of deportability charged, the court discussed *Blake* and *Brieva-Perez* in an overwhelmingly positive manor, so it does not appear that the Fifth Circuit was trying to alter the standard or analysis as laid out by the Board there. It is more likely that the Fifth Circuit simply did not understand what it was doing in referring to *Vo*'s conviction rather than his charges of deportability.

The Fifth Circuit considered multiple arguments raised by *Vo* against endorsing the *Blake/Brieva-Perez* standard in his case.<sup>272</sup> Most significantly, for purposes of this article, the court considered whether the agency's interpretation in *Blake* and *Brieva-Perez* was unreasonable as an unjustified departure from past agency precedent<sup>273</sup> and whether application of this rule to noncitizens in *Vo*'s circumstances would violate constitutional equal protection rights.<sup>274</sup> The court held first that the rule announced by the Board in *Blake* was not new but longstanding: "*Vo* has not demonstrated a substantial shift in agency practice sufficient to render the BIA's interpretation of its own regulation irrational or arbitrary and capricious."<sup>275</sup> Although the court used language identical to section 706(2)(A) of the APA, it did not cite to the APA or any other source in

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269. *Brieva-Perez*, 482 F.3d at 366-72. All three decisions also cite to a prior Fifth Circuit case, *De La Paz Sanchez v. Gonzales*, 473 F.3d 133, 135 (5th Cir. 2006), that reached the same conclusion without explanation in reliance on the Board's decision in *Matter of Brieva-Perez*. *Brieva-Perez*, 482 F.3d at 362; *Avilez-Granados*, 481 F.3d at 872; *Vo*, 482 F.3d at 369, 372.

270. 482 F.3d at 365.

271. *Id.* at 366-69.

272. *Id.* at 368-72.

273. *Id.* at 369-70.

274. *Id.* at 371-72. In addition to these two arguments, the court also rejected *Vo*'s claims that the Board's holding violated *St. Cyr*, that the regulation and the Board's interpretation of it in *Blake* and *Brieva-Perez* were *ultra vires* the statute, and that the Board's interpretation of the regulation rendered it internally inconsistent. *Id.* at 370-71.

275. *Id.* at 370.

support of this standard.<sup>276</sup> On the question of equal protection, the Fifth Circuit held that, even if excludable and deportable noncitizens could be considered similarly situated, encouraging deportable aliens to leave the country was a rational reason to distinguish between them by making 212(c) available to waive exclusion but not deportation.<sup>277</sup>

Despite the fact that the Fifth Circuit clearly followed the Board's position in all three cases—*Brieva-Perez*, *Avilez-Granados*, and *Vo*—the Fifth Circuit's discussion and application of the legal standard regarding deference to an agency's interpretation of a statute is particularly unclear and confusing. First, none of the three cases cite to *Chevron* or invoke, even without name, the *Chevron* two-step test. The court in *Vo* does briefly cite to the Supreme Court's decision in *Cardoza-Fonseca* when explaining *Vo*'s argument that the Board's interpretation does not deserve deference because it impermissibly departs from past agency precedent, but that citation comes without discussion of the standard.<sup>278</sup> On the other side of the coin, *Vo* alludes to congressional power and the plenary power doctrine: "Additionally, in the immigration context, there is a particular need for courts to defer to congressional choices."<sup>279</sup>

Second, despite being decided by the very same three-judge panel and concerning the same basic legal issue, the discussion of deference is different. *Avilez-Granados* and *Vo* contain the same stock sentence regarding deference: "We review the BIA's conclusions of law *de novo*, according deference to the BIA's interpretations of ambiguous provisions of the INA."<sup>280</sup> In support of that sentence, the court cites to the same Fifth Circuit case: *Carbajal-Gonzales v. INS*.<sup>281</sup> *Brieva-Perez v. Gonzales* contains essentially the same stock sentence with only minor, irrelevant differences,<sup>282</sup> but, surprisingly, cites to another Fifth Circuit case altogether in support of the standard: *Hernandez-Castillo v. Moore*.<sup>283</sup>

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276. See 5 U.S.C. § 706(a)(2) (2012).

277. *Vo*, 482 F.3d at 371-72.

278. *Id.* at 369.

279. *Id.* at 372.

280. *Avilez-Granados v. Gonzales*, 481 F.3d 869, 871 (5th Cir. 2007); *Vo*, 482 F.3d at 366.

281. 78 F.3d 194, 197 (5th Cir. 1996).

282. 482 F.3d 356, 359 (5th Cir. 2007) ("Questions of law are reviewed *de novo*, according deference to the BIA's interpretations of ambiguous provisions of the INA.").

283. *Hernandez-Castillo v. Moore*, 436 F.3d 516, 519 (5th Cir. 2006).

*Carbajal-Gonzales* contains a very similar stock sentence at the end of its recitation of the standard of review.<sup>284</sup> In support of this sentence, it does refer to the Supreme Court's decision in *Chevron* by name.<sup>285</sup> The *Chevron* test, or any kind of deference to an agency legal interpretation, however, plays no more role in the court's decision, probably because the court was concerned with whether Carbajal-Gonzales's conduct met a particular legal standard (the grounds of deportability for entry without inspection and alien smuggling) rather than the Board's interpretation of any legal standard.<sup>286</sup>

*Hernandez-Castillo* also contains a similar stock sentence, but one that differs in at least one important word.<sup>287</sup> Rather than referring simply to a conclusion of law, the court in *Hernandez-Castillo* refers specifically to the interpretation of an immigration *regulation*.<sup>288</sup> In support, the court cites not to *Chevron*, but to another Fifth Circuit decision, *Lopez-Gomez v. Ashcroft*.<sup>289</sup> In *Lopez-Gomez*, the court was really concerned with interpreting a regulation rather than some other source of law.<sup>290</sup> In *Hernandez-Castillo*, on the other hand, the court was discussing the application of the repeal of 212(c); while there is the regulation enacted to implement the Supreme Court's decision in *St. Cyr*, that regulation does not appear to have been discussed or at issue in *Hernandez-Castillo*.<sup>291</sup> *Hernandez-Castillo*, then, probably cites *Lopez-Gomez* inappropriately; the actual standard in *Lopez-Gomez* for review of agency interpretation of its own regulations is inapplicable to the situation under consideration.<sup>292</sup>

The court in *Hernandez-Castillo* goes on to make a statement specifically about its own application of this standard of review in a case involving section 212(c): "In this case, no deference is owed to the IJ's

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284. 78 F.3d at 197 ("This court reviews conclusions of law *de novo* (although with the usual deference to the Board's interpretations of ambiguous provisions of the Act . . .").

285. *Id.* (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)).

286. *See id.* at 197-201.

287. 436 F.3d at 519 ("We review the BIA's conclusions of law *de novo*, although we defer to the BIA's interpretation of immigration regulations if that interpretation is reasonable.").

288. *Id.*

289. *Id.* (citing *Lopez-Gomez v. Ashcroft*, 263 F.3d 442, 444 (5th Cir. 2001)).

290. 263 F.3d at 444.

291. 436 F.3d 516.

292. While the standard for judicial deference to an agency's interpretation of its own rule is somewhat muddled, agency interpretation of a *regulation* is probably due less deference (is less controlling) than agency interpretation of a *statute*. *See, e.g., Skidmore v. Swift*, 323 U.S. 134, 140 (1944); WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW § 12.05[B] (6th ed. 2012).

conclusion of law regarding the availability of § 212(c) relief because that conclusion was based on principles of retroactivity rather than the content of the immigration regulations.”<sup>293</sup> Likely because of this seemingly helpful statement, and probably unaware of the mis-citation in *Hernandez-Castillo*, the Fifth Circuit in *Brieva-Perez v. Gonzales* compounds the mistake by citing *Hernandez-Castillo*. Again, the same regulation implementing *St. Cyr* was potentially at issue in *Brieva-Perez*, but there was no clear indication that the court was focused on that regulation when discussing deference. Even if the *Brieva-Perez* court was focused on interpreting the regulation, it failed to explain why the interpretation of the regulation was significant there but the interpretation of the statute was the focus in the virtually identical situations in its companion cases *Vo* and *Avilez-Granados*. Although it would indicate sloppy draftsmanship, the court in *Brieva-Perez* may also have assumed that “regulation” was being used in its general sense of a legal standard rather than in its specific sense of a rule promulgated according to the APA’s requirements for notice and comment rulemaking.

This may seem like overly finicky parsing of only tangentially relevant language, and to a certain extent it is. I do not want to make too much of the precise nature of the apparent mistakes made by the court, as that is not what is important here. Rather, I want to highlight that such an error could be made in one case in this context, where the same three-judge panel also released decisions on the same legal issue in two other cases on the same day where they did not make the same error. Furthermore, I want to emphasize the subject matter of the mistake: the application of, and standard for, deference to the agency’s interpretation of a provision of immigration law. This issue paints in particularly stark relief the substantial confusion among the circuit courts regarding just how to apply the ordinary principles of administrative law to actions of the immigration agencies, at least in the context of 212(c) relief.

Most of the circuit courts to consider a similar question agreed with the Board in *Blake* and *Brieva-Perez*, and therefore agreed with the Fifth Circuit in *Brieva-Perez*, *Avilez-Granados*, and *Vo*. The general consensus was that (1) grounds of deportability could be waived by 212(c) only where Congress had employed similar language to describe a substantially equivalent category of excludable offenses and (2) most aggravated felonies did not have a sufficiently similar statutory counterpart in the grounds of

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293. 436 F.3d at 519.

inadmissibility.<sup>294</sup> At least the First,<sup>295</sup> Third,<sup>296</sup> Seventh,<sup>297</sup> Eighth,<sup>298</sup> and Eleventh<sup>299</sup> Circuits all took this position.

Most of these courts at least briefly considered and dismissed an equal protection argument on the grounds that deportable noncitizens were not similarly situated to excludable noncitizens where there was no corresponding ground of inadmissibility.<sup>300</sup> Because these courts held that equal protection concerns were not triggered, they had no opportunity to consider whether there was some rational basis for the differing treatment of noncitizens with less serious criminal convictions or the distinctions between noncitizens charged as deportable or excludable.

Only three of the courts, the Third Circuit in *Caroleo v. Gonzales*, the Eighth Circuit in *Vue v. Gonzales*, and the Eleventh Circuit in *De la Rosa*, explicitly considered deference to the agency's interpretation of the INA under *Chevron*.<sup>301</sup> The Eighth Circuit in *Vue* announced that it gives "substantial deference" to the Board's statutory interpretations and lists the *Chevron* two-step test.<sup>302</sup> It did not, however, appear to apply this standard

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294. One notable exception is the aggravated felony illicit trafficking in a controlled substance under INA § 101(a)(43)(B), 8 U.S.C. § 1101 (a)(43)(B) (2012). The Board of Immigration Appeals held that this aggravated felony did have a comparable ground of inadmissibility, violation of any law relating to a controlled substance under then INA § 212(a)(23). Matter of Meza, 20 I. & N. Dec. 257, 258-59 (BIA 1991); see also Matter of Blake, 23 I. & N. Dec. 722, 729 (BIA 2005), *vacated and remanded sub. nom.* Blake v. Carbone, 489 F.3d 88 (2d Cir. 2011).

295. *Fontes v. Gonzales*, 483 F.3d 115 (1st Cir. 2007) (aggravated felony, crime of violence); *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. 2006) (same), *abrogated by* *Judulang v. Holder*, 565 U.S. 42 (2011).

296. *Caroleo v. Gonzales*, 476 F.3d 158 (3rd Cir. 2007) (aggravated felony, crime of violence, and theft or burglary offense), *abrogated by* *Judulang*, 565 U.S. 42.

297. *Zamora-Mallari v. Mukasey*, 514 F.3d 679 (7th Cir. 2008) (aggravated felony, sexual abuse of a minor); *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007) (same).

298. *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007) (aggravated felony, crime of violence); *Soriano v. Gonzales*, 489 F.3d 909 (8th Cir. 2006) (same).

299. *De la Rosa v. U.S. Att'y Gen.*, 579 F.3d 1327 (11th Cir. 2009) (aggravated felony, sexual abuse of a minor); *Rubio v. U.S. Att'y Gen.*, 182 Fed. App'x 925 (11th Cir. 2006) (aggravated felony, theft or burglary offense).

300. See *De la Rosa*, 579 F.3d at 1337-39; *Zamora-Mallari*, 514 F.3d at 692-93; *Fontes*, 483 F.3d at 120-23; *Valere*, 473 F.3d at 762; *Vue*, 496 F.3d at 861-62; *Kim*, 468 F.3d at 62-63. The Third Circuit in *Caroleo* discussed equal protection only in its discussion of other cases. 476 F.3d at 163, 165.

301. *De la Rosa*, 579 F.3d at 1332; *Caroleo*, 476 F.3d at 163, 165; *Vue*, 496 F.3d at 859.

302. *Vue*, 496 F.3d at 859 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Jamieson v. Gonzales*, 424 F.3d 765, 767 (8th Cir. 2005); *Habtemicael v. Ashcroft*, 370 F.3d 774, 779 (8th Cir. 2004)) ("This court reviews the BIA's

in its analysis, despite the fact that it adopted the Board's statutory counterpart analysis for the application of 212(c) to waive grounds of deportability.<sup>303</sup> The Eleventh Circuit did likewise.<sup>304</sup>

The Third Circuit in *Caroleo* first undertook its own discussion of cases in other circuit courts.<sup>305</sup> The court then stated, without discussion of the standard, that the Board's interpretations of the INA were entitled to deference and cited to *Chevron* as well as another Third Circuit case.<sup>306</sup> The Third Circuit recognized

the *seeming illogic* of a scheme under which the crime of attempted murder may constitute a crime involving moral turpitude rendering the alien removable, while the same alien, if charged with being removable under INA section 237's aggravated felony "crime of violence" ground, is ineligible for § 212(c) relief because a "crime of violence" is not a statutory counterpart of a "crime involving moral turpitude."<sup>307</sup>

However, it still did not discuss whether the Board's decision was unreasonable under step two of the *Chevron* standard and ultimately adopted the Board's interpretation.

c) *The Second Circuit* – Blake v. Carbone

The Second Circuit took the position contrary to the Fifth Circuit and other circuits previously discussed. The Board's decision in *Blake* ultimately had the opposite outcome on appeal of the Board's decision in *Brieva-Perez*. *Blake* was appealed to the Second Circuit.<sup>308</sup> Although the Board in *Blake* had asserted that its approach was consistent with Second Circuit precedent,<sup>309</sup> the Second Circuit reversed and remanded in a

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determinations on questions of law de novo, but gives substantial deference to its statutory interpretations.”).

303. *See id.* at 859-62. Interestingly, the court goes back to an earlier BIA case, *Matter of Wadud*, 19 I. & N. Dec. 182, 184 (BIA 1984), rather than citing to the Board's more recent decisions in *Blake* or *Brieva-Perez* as the source for this analysis. *Vue*, 496 F.3d at 860.

304. *See De la Rosa*, 579 F.3d at 1335-37.

305. 476 F.3d at 163-67.

306. *Id.* at 166 (citing *Chevron*, 467 U.S. at 844; *Francois v. Gonzales*, 448 F.3d 645, 648 (3d Cir. 2006)).

307. *Id.* at 166 (emphasis added).

308. *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007).

309. *Matter of Blake*, 23 I. & N. Dec. 722, 728-29 (BIA 2005) (citing *Drax v. Reno*, 338 F.3d 98 (2d Cir. 2003); *Cato v. INS*, 84 F.3d 597, 600 (2d Cir. 1996)), *vacated and remanded sub nom.* *Blake v. Carbone*, 489 F.3d 88.

published decision.<sup>310</sup> The Second Circuit relied on the same equal protection principle it had enunciated in *Francis v. INS* to hold that the Board's rule violated equal protection by treating similarly situated noncitizens differently.<sup>311</sup> The court held that the focus should be on the offense itself rather than on the ground of deportability.<sup>312</sup> That is, a noncitizen will be eligible for a waiver under the former section 212(c) if the offense that he or she is seeking to waive would also render him or her inadmissible.<sup>313</sup>

The Second Circuit in *Blake* considered but rejected the government's argument that they should defer to the Board's interpretation of eligibility for a 212(c) waiver.<sup>314</sup> The court seems to have primarily based its analysis on step one of the *Chevron* analysis, holding that there was no ambiguity in the language of the 212(c) statute itself, and that therefore the court and the agency must defer to the "unambiguously expressed intent of Congress."<sup>315</sup> There is also language in the court's decision, however, that suggests that the Second Circuit viewed the situation as falling outside of the *Chevron* framework entirely.<sup>316</sup> Any difficulty in apply section 212(c), the court noted, arose not from the statute but from the BIA's "gloss" on the Second Circuit's prior decision in *Francis*.<sup>317</sup> *Francis* had interpreted 212(c) to avoid a constitutional infirmity—the violation of equal protection—that would have otherwise existed.<sup>318</sup>

None of the other circuits officially adopted or indicated approval of the Second Circuit's position in *Blake*. At least two of the circuits did, however, remand with instructions to consider the Second Circuit's position.<sup>319</sup> The Seventh Circuit, in a published decision regarding ineffective assistance of counsel, stated that, on remand, the Board "may wish to reconsider its prejudice ruling in light of the Second Circuit's

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310. *Blake*, 489 F.3d at 105.

311. *Id.* at 91.

312. *Id.* at 104.

313. *Id.*

314. *Id.* at 100 ("We find no reason to defer to the BIA's interpretation of the statutory counterpart rule . . .").

315. *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

316. *Id.* ("We . . . conclude that the BIA's comparable grounds analysis fails to comport with *Francis*.").

317. *Id.*

318. *Id.* (citing *Bedoya-Valencia v. INS*, 6 F.3d 891, 898 (2d Cir. 1993)).

319. *See, e.g., Zamora-Mallari v. Mukasey*, 514 F.3d 679, 688 n.3 (7th Cir. 2008).

decision in *Blake v. Carbone*.<sup>320</sup> The Eleventh Circuit, in an unpublished decision, remanded to the Board to directly reconsider the respondent's eligibility for 212(c) where the Board relied on its previous decision in *Blake* to find him ineligible.<sup>321</sup>

d) *The Ninth Circuit – Abebe v. Mukasey*

Despite the multiplicity of outcomes, standards, and frameworks in the cases previously discussed, the rule adopted by the Second Circuit in *Francis* and the Board in *Silva* remained the underlying bedrock. Individual courts, likely frustrated with the resulting complexity of the law, did criticize these decisions.<sup>322</sup> By and large, however, courts did not consider overruling or departing from their holding that it would violate equal protection to deny similarly situated noncitizens charged as deportable the opportunity to apply for relief under section 212(c). The Second Circuit's decision in *Blake*, holding that 212(c) must be available for all offenses that would also render an alien excludable, followed directly from *Francis*.<sup>323</sup> Even the Fifth Circuit in the *Breiva-Perez* trio of cases, in addition to other courts refusing to expand *Francis* beyond grounds of deportability having textually similar excludability counterparts, did not seriously question the underlying holding in *Francis* and *Silva*.<sup>324</sup> The Ninth Circuit was initially part of this group, affirmatively adopting the rule of *Francis* and *Silva* in a 1981 case, *Tapia-Acuna v. INS*,<sup>325</sup> but thereafter resisting further expansion

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320. *Gutierrez-Almazan v. Gonzales*, 491 F.3d 341, 344 n.1 (7th Cir. 2007). The Board had previously held that Gutierrez-Almazan could not demonstrate prejudice because he was ineligible for 212(c) relief. *Id.* (“Gutierrez-Almazan also challenges the BIA's holding that he could not show prejudice from Trigo's ineffective assistance because he was ineligible for a § 212(c) waiver.”).

321. *Palomino-Abad v. U.S. Att’y Gen.*, 229 Fed. App'x. 891, 892 (11th Cir. 2007) (“Without expressing any opinion about the issues raised in Palomino's petition for review or Palomino's eligibility for § 212(c) relief, we GRANT the petition, VACATE the order denying reconsideration, and REMAND this case to the BIA for the purpose of allowing the BIA to consider Palomino's motion to reconsider in light of *Blake v. Carbone*.”).

322. *See, e.g., Blake*, 489 F.3d at 105. (“While hindsight might pin much of this confusion on *Francis*, we are bound to finish what our predecessors started.”); *Kim v. Gonzales*, 468 F.3d 58, 63 (1st Cir. 2006), *abrogated by Judulang v. Holder*, 565 U.S. 42 (2011).

323. *See Blake*, 489 F.3d at 101-05.

324. *Breiva-Perez v. Gonzales*, 482 F.3d 356 (5th Cir. 2007); *Avilez-Granados v. Gonzales*, 481 F.3d 869 (5th Cir. 2007); *Vo v. Gonzales*, 482 F.3d 363 (5th Cir. 2007).

325. 640 F.2d 223, 225 (9th Cir. 1981), *overruled by Abebe II*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam).

of the availability of 212(c).<sup>326</sup> After initially mirroring the approach of the Board and the Fifth Circuit, however, the Ninth Circuit ultimately took a third approach in a case called *Abebe v. Mukasey (Abebe II)*, an aggressively litigated case resulting in multiple different decisions.<sup>327</sup>

The Ninth Circuit first decided *Abebe v. Gonzales (Abebe I)* in 2007.<sup>328</sup> Abebe was charged as deportable for an aggravated felony conviction, specifically sexual abuse of a minor, based on his California conviction for lewd and lascivious conduct upon a child.<sup>329</sup> The Ninth Circuit held that the Board correctly determined that Abebe was not eligible for a waiver under section 212(c) because this aggravated felony did not have a comparable ground of inadmissibility.<sup>330</sup> The Ninth Circuit engaged in a relatively straightforward application of the *Chevron* two-step test to the Board's interpretation of 212(c) as announced in its decisions in *Blake* and *Brieva-Perez*.<sup>331</sup> While it is certainly possible to disagree substantively with not only the outcome but also with multiple aspects of the legal holdings of this decision, the court's opinion here is a model of clarity in comparison to many of the decisions previously discussed. It is at a minimum apparent what test the Ninth Circuit was applying, what it was holding at each step of the analysis, and why it so held.

The Ninth Circuit initially held in *Abebe I* that, at step one of the *Chevron* test, Congress had not spoken clearly; 212(c) itself was subject to multiple interpretations.<sup>332</sup> This portion of the holding was made without significant discussion or application of a legal standard, but was presumably based in large part on the court's extensive discussion of the history of the 212(c) provision earlier in its decision.<sup>333</sup> The court then went on to consider step two of the *Chevron* analysis—that is, to determine whether the agency's interpretation was reasonable. The court considered first the consistency of the Board's interpretation with the statute, regulations, and prior agency practice; and second constitutional concerns

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326. See *Komarenko v. INS*, 35 F.3d 432, 435 (9th Cir. 1994), *overruled by Abebe II*, 554 F.3d 1203; *Cabasug v. INS*, 847 F.2d 1321, 1326 (9th Cir. 1988), *abrogated by Abebe II*, 554 F.3d 1203.

327. 554 F.3d 1203.

328. 493 F.3d 1092 (9th Cir. 2007).

329. *Id.* at 1094-95.

330. *Id.* at 1094.

331. *Id.* at 1100-01 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)).

332. *Id.* at 1101.

333. *Id.* at 1096-1101.

raised by the Board's position.<sup>334</sup> On the equal protection question, the court relied on its prior decision in *Komarenko* to hold that there was no violation.<sup>335</sup> Because Abebe was not "facing deportation on a basis which 'is identical to a statutory ground for exclusion for which discretionary relief would be available,'" there were not actually two similarly situated groups being treated differently.<sup>336</sup> The court again specifically refused to extend its holding in *Tapia-Acuna* beyond the limited situation of grounds of deportability with textually similar excludability counterparts.<sup>337</sup>

This Ninth Circuit decision in *Abebe I*, however, did not survive. After a somewhat tortured procedural history, an en banc panel of the Ninth Circuit issued the court's final substantive decision in the *Abebe II* litigation on January 5, 2009.<sup>338</sup> Despite strong opposition from both the concurrence<sup>339</sup> and the dissent,<sup>340</sup> the panel in *Abebe II* overruled the Ninth Circuit's previous decision in *Tapia-Acuna* and withdrew from the court's adoption of the standard in *Francis* and *Silva*.<sup>341</sup> The court held that refusing to allow noncitizens charged as deportable to avail themselves of the 212(c) waiver of inadmissibility did not violate equal protection because there was a rational basis for Congress to distinguish between noncitizens charged as inadmissible and those charged as deportable: "Congress could have limited section 212(c) relief to aliens seeking to enter the country from abroad in order 'to create[] an incentive for deportable aliens to leave the country.'"<sup>342</sup> The court therefore concluded that a waiver under section 212(c) was not available to Abebe to waive his deportability as an aggravated felon.<sup>343</sup> Unlike in its previous decision in *Abebe I*, the Ninth Circuit here did not

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334. *Id.* at 1101-05.

335. *Id.* at 1104-05.

336. *Id.* at 1104 (quoting *Komarenko v. INS*, 35 F.3d 432, 434 (9th Cir. 1994), *overruled by Abebe II*, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam)); *see also id.* at 1105 ("Had [Abebe] left the United States and returned after his conviction, he could not have been excluded on a 'sexual abuse of a minor' theory because no such ground of inadmissibility exists.").

337. *Id.* at 1104-05.

338. 554 F.3d 1203.

339. *Id.* at 1208-13 (Clifton, J., concurring).

340. *Id.* at 1213-19 (Thomas, J., dissenting).

341. *Id.* at 1207 (majority opinion).

342. *Id.* at 1206 (alteration in original) (quoting *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 309 (5th Cir. 2009)).

343. *Id.* at 1207.

refer to *Chevron* or any other kind of deference to an agency determination.<sup>344</sup>

Abebe's request for en banc panel rehearing or full court rehearing en banc was denied over a vehement dissent on August 18, 2009.<sup>345</sup> Abebe filed a petition for writ of certiorari with the Supreme Court, but his petition was denied on May 17, 2010.<sup>346</sup> Amidst the multiple decisions in the *Abebe* litigation, however, another case involving the same legal question worked its way up to the Ninth Circuit and would eventually be heard by the Supreme Court in *Judulang v. Holder*.<sup>347</sup>

### 3. *The Supreme Court – Judulang v. Holder*

*Judulang* was placed in removal proceedings on a charge that a conviction for voluntary manslaughter was an aggravated felony crime of violence and therefore rendered him removable from the United States.<sup>348</sup> The BIA found him ineligible for relief under the former section 212(c) because, it held, aggravated felony crimes of violence do not have a substantially similar statutory counterpart in the grounds of exclusion.<sup>349</sup> The Ninth Circuit agreed in an unpublished and brief decision, relying on its initial decision in *Abebe I* as controlling.<sup>350</sup> Only two short paragraphs of the opinion were devoted to this holding, with no new analysis or explanation.<sup>351</sup> In addition to *Abebe I*, the court cited only to the Board's decision in *Brieva-Perez* and the Third Circuit's opinion in *Caroleo*.<sup>352</sup>

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344. The dissenting opinion does cite to *Chevron* and point out related implications of the court's decisions, but does not otherwise discuss or apply *Chevron* deference. *Id.* at 1217 (Thomas, J., dissenting) ("By holding that the statutory language of section 212(c) is clear and that *Francis* and *Tapia-Acuna* did not 'accord[] sufficient deference' to Congress, the majority has implicitly questioned DHS's authority to enact the above regulation. Under the majority rule, the regulation that has been applied in thousands of cases cannot survive." (alteration in original) (citation omitted)).

345. *Abebe v. Holder (Abebe III)*, 577 F.3d 1113 (9th Cir. 2009) (mem.).

346. *Abebe v. Holder*, 560 U.S. 903 (2010) (mem.).

347. 565 U.S. 42 (2011).

348. *Id.* at 51-52.

349. *Judulang v. Gonzales*, 249 Fed. App'x 499, 502 (9th Cir. 2007), *rev'd and remanded*, *Judulang*, 565 U.S. 42.

350. *Id.* (citing *Abebe I*, 493 F.3d 1092 (9th Cir. 2007)). The Ninth Circuit's subsequent decisions in the *Abebe* litigation occurred after this decision in *Judulang*. See *Abebe III*, 577 F.3d 1113.

351. *Judulang*, 249 Fed. App'x at 502.

352. *Id.*

The Supreme Court granted certiorari in *Judulang* on April 18, 2011, to resolve a circuit split.<sup>353</sup> Oral arguments were held on October 12, 2011, and the Supreme Court issued its decision on December 12, 2011.<sup>354</sup> The Court rejected the *Chevron* and equal protection frameworks that the Ninth Circuit had relied on below to find *Judulang* ineligible for section 212(c) relief and that are the two common threads running through the jurisprudence on the expansion of 212(c).<sup>355</sup> Instead, the Court chose to analyze the case through the lens of the APA.<sup>356</sup>

Section 706(2)(A) of the APA provides that a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>357</sup> The Supreme Court explained that, in order to comply with this section of the statute, an agency—when setting policy—must provide a reasoned explanation, based on “non-arbitrary, ‘relevant factors,’” for its choices.<sup>358</sup> In the immigration context, this means “that the BIA’s approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system.”<sup>359</sup> The Supreme Court held that the BIA’s approach failed this test: “Rather than considering factors that might be thought germane to the deportation decision, that policy hinges § 212(c) eligibility on an irrelevant comparison between statutory provisions.”<sup>360</sup> The Court used highly critical language to highlight at length what it viewed as the extreme and multilayered arbitrariness of the BIA’s holding.<sup>361</sup> It described the

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353. *Judulang*, 565 U.S. at 52 n.6 (“Compare *Blake v. Carbone*, 489 F.3d 88, 103 (C.A.2 2007) (rejecting the BIA’s approach and holding instead that ‘[i]f the offense that renders [an alien] deportable would render a similarly situated [alien] excludable, the deportable [alien] is eligible for a waiver of deportation’), with *Koussan v. Holder*, 556 F.3d 403, 412-14 (C.A.6 2009) (upholding the comparable-grounds policy); *Caroleo v. Gonzales*, 476 F.3d 158, 162-63, 168 (C.A.3 2007) (same); *Kim v. Gonzales*, 468 F.3d 58, 62-63 (C.A.1 2006) (same).”).

354. 565 U.S. 42.

355. The Court did not reach the equal protection argument, finding it unnecessary given its holding that the Board’s position was arbitrary and capricious. *Id.* at 54 n.8. As discussed below, the Court considered and rejected the *Chevron* framework. *Id.* at 52 n.7.

356. *Id.* at 52-53.

357. 5 U.S.C. § 706(2)(A) (2012).

358. *Judulang*, 565 U.S. at 55 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

359. *Id.*

360. *Id.*

361. *See id.* at 55-59.

comparable-grounds rule as turning deportation decisions into a “sport of chance.”<sup>362</sup>

The government argued before the Supreme Court that the Board’s position was not arbitrary and capricious for three separate reasons: (1) it was more consistent with the statutory language, (2) the Board’s approach had been consistent and longstanding, and (3) the comparable-grounds rule saved the government time and money.<sup>363</sup> The Court rejected each of these arguments in turn.<sup>364</sup>

Judulang in his initial brief argued his case under the APA arbitrary and capricious framework.<sup>365</sup> He did not explain why this approach was more appropriate than the *Chevron* deference relied on by the Ninth Circuit below, but did state in a footnote that both the analysis and the result would be the same under *Chevron*: “Whether understood under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), or under the second step of *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984), the standard is the same: whether the BIA’s policy is ‘arbitrary or capricious in substance.’”<sup>366</sup> The Attorney General, on the other hand, argued the case under *Chevron* deference<sup>367</sup> without addressing the use of the arbitrary and capricious framework, other than to assert that Judulang conceded the applicability of *Chevron*.<sup>368</sup> None of the amicus briefs addressed this choice between administrative law frameworks. This is somewhat remarkable given the significant shift this represented; none of the prior major cases on the expansion of 212(c) to deportability had invoked the APA arbitrary and capricious standard.

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362. *Id.* at 58-59 (quoting Judge Learned Hand in *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2nd Cir. 1947)).

363. *Id.* at 59-64.

364. *Id.*

365. Brief for Petitioner at 31-55, *Judulang*, 565 U.S. 42 (No. 10-694). Judulang’s petition for certiorari proceeded in the same manner, arguing that the BIA’s interpretation was arbitrary and capricious in violation of the APA without discussing why this framework should be substituted for the *Chevron* deference employed by the Ninth Circuit below. Petition for Writ of Certiorari at 17, 26, *Judulang*, 565 U.S. 42 (No. 10-694).

366. Brief for Petitioner, *supra* note 365, at 44 n.16 (citing *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011)).

367. Brief for Respondent at 18-30, *Judulang*, 565 U.S. 42 (No. 10-694). Specifically, the Attorney General argued that the statutory language of 212(c) is ambiguous at *Chevron* step one and the Board’s reasonable interpretation of that language was entitled to deference at *Chevron* step two. *Id.* at 18-20.

368. *Id.* at 19.

The Supreme Court addressed the choice of framework only in a footnote. Before electing to proceed under the framework of the APA, the Supreme Court specifically considered *Chevron* but found *Chevron* deference inapplicable to the situation at hand.<sup>369</sup> The Court explained that in order for *Chevron* deference to be triggered, the agency must be interpreting a statute it has been charged with administering.<sup>370</sup> The Board's comparable-grounds rule could not be a statutory interpretation, in significant part because 212(c) does not even mention grounds of deportation.<sup>371</sup>

The Supreme Court makes a point of saying, however, that it would undergo the same analysis and reach the same conclusion at step two of the *Chevron* analysis if it had elected to proceed in that direction: "Were we to do so, our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance.'"<sup>372</sup> The Court thereby implies, although it does not state, that it would find Congress had not spoken clearly in the statute itself at *Chevron* step one; that it would not use the statutory interpretation principle of constitutional avoidance to interpret the statute at *Chevron* step one; and that it would not need to rely on constitutional avoidance arguments to reject the agency's comparable-grounds rule as unreasonable at *Chevron* step two.<sup>373</sup>

Both Judulang and the Attorney General (as well as an amicus brief) addressed equal protection arguments at some substantial length.<sup>374</sup> Judulang framed his equal protection argument as part of the arbitrary and capricious analysis,<sup>375</sup> while the Attorney General addressed equal protection as part of its *Chevron* step-two analysis.<sup>376</sup> The Supreme Court, however, also relegated its treatment of equal protection to a footnote and appeared to treat equal protection as a stand-alone question.<sup>377</sup> The Court indicated that it did not appear as though similarly situated noncitizens were

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369. *Judulang*, 565 U.S. 42 at 52 n.7.

370. *Id.*

371. *Id.*

372. *Id.* (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53 (2011)).

373. *See id.*

374. Brief for Petitioner, *supra* note 365, at 51-53; Brief for Respondent, *supra* note 367, at 49-54; Brief for Amici Curiae 39 Immigration Law Professors In Support Of Petitioner at 6-19, *Judulang*, 565 U.S. 42 (No. 10-694).

375. Brief for Petitioner, *supra* note 365, at 51-53.

376. Brief for Respondent, *supra* note 367, at 49-54.

377. *Judulang*, 565 U.S. at 54 n.8.

being treated differently, but declined to reach the equal protection argument given its holding that the BIA's comparable-grounds analysis was arbitrary and capricious.<sup>378</sup>

Notably, the Supreme Court did not tell the BIA what test it should adopt; it simply stated that the test the BIA had chosen was arbitrary and capricious.<sup>379</sup> The question of which alternative test to select and apply was left to the Board to decide in a subsequent case.<sup>380</sup> The Board made this selection in a February 2014 decision in a case called *Matter of Abdelghany*, a case that was pending at the time the Supreme Court decided *Judulang* in 2011.<sup>381</sup> The Board in *Abdelghany* engaged in lengthy discussion of the history of congressional limitations in 212(c) relief, the Supreme Court precedents *Judulang* and *St. Cyr*, and the strengths and weaknesses of the various available alternatives to the comparable-grounds test. Ultimately, the Board adopted the same test it had endorsed in its *Hernandez-Casillas* opinion twenty-some years earlier.<sup>382</sup> That is, "otherwise qualified applicants may apply for section 212(c) relief in removal proceedings to waive any ground of deportability, unless the applicant is subject to the grounds of inadmissibility" specifically excluded by section 212(c).<sup>383</sup> The Board then went on to consider and resolve other contested aspects of eligibility for relief under the former section 212(c) in an extremely comprehensive decision for the stated purpose of adopting a "uniform nationwide rule."<sup>384</sup> Despite this lofty goal, however, unanswered questions remain in the 212(c) context.<sup>385</sup>

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378. *Id.*

379. *Id.* at 57-58, 64 ("Again, we do not say today that the BIA must give all deportable aliens meeting § 212(c)'s requirements the chance to apply for a waiver. The point is instead that the BIA cannot make that opportunity turn on the meaningless matching of statutory grounds." (citation omitted)).

380. *Id.* at 64; *Matter of Abdelghany*, 26 I. & N. Dec. 254, 259 (BIA 2014) ("After *St. Cyr* and *Judulang*, the basic question remains: which deportable lawful permanent residents may apply for section 212(c) relief?").

381. *Abdelghany*, 26 I. & N. Dec. at 265-66.

382. *Id.*; *Matter of Hernandez-Casillas*, 20 I. & N. Dec. 262, 262-66 (BIA 1990, A.G. 1991) *aff'd sub nom.* *Hernandez-Casillas v. INS*, 983 F.2d 231 (5th Cir. 1993) (unpublished table decision).

383. *Abdelghany*, 26 I. & N. Dec. at 266.

384. *Id.* at 266-72.

385. *See, e.g., United States v. Gill*, 748 F.3d 491, 503 (2d Cir. 2014) (citing *Abdelghany* in support of holding 212(c) relief available for a conviction obtained after trial).

#### 4. *Post-Repeal: Preliminary Conclusions*

As in the pre-repeal decisions on the contours of the expanded application of 212(c), some of the post-repeal decisions referenced Congress' power to regulate immigration and cited to plenary power cases.<sup>386</sup> All of the significant circuit court cases, however, also applied ordinary administrative and constitutional law principles. Not only did no court seriously question whether these ordinary principles were applicable in the immigration realm, *Chevron* deference, arbitrary and capricious review, and equal protection became more deeply entrenched in this context. As a result, court decisions applying these principles began to more extensively explain and explore them.

Just as in the pre-repeal cases, the courts in the post-repeal decisions continued to vary as to *which* administrative and constitutional law doctrines were invoked. In addition, even when invoking the same principles, in the post-repeal cases differences in how each individual doctrine was interpreted and applied began to be discernable. Patterns remain extraordinarily difficult to identify, but there are several points of note.

First, the courts again did not apply a very high level of deference to the agency. Even in those decisions that ultimately agreed with the agency's position, the courts did not spend a great deal of time identifying or discussing the doctrine of deference they were applying. They primarily undertook their own detailed analyses of the question independently of the agency's analysis and the factors that the agency considered. Administrative law doctrines of deference were also used by the courts to overturn agency positions, most notably by the Supreme Court in *Judulang*.<sup>387</sup>

Second, as some more detailed discussions of the administrative and constitutional law principles occurred in the case law, the radical differences between circuits—and even within a single circuit—in interpreting and applying those doctrines became even more apparent. For example, when should APA arbitrary and capricious review be triggered instead of *Chevron* deference? Should equal protection and other constitutional questions be subsumed within step two of *Chevron* or the

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386. See, e.g., *Abebe II*, 554 F.3d 1203, 1206 (9th Cir. 2009) (“Congress has particularly broad and sweeping powers when it comes to immigration, and is therefore entitled to an additional measure of deference when it legislates as to admission, exclusion, removal, naturalization or other matters pertaining to aliens.”).

387. *Judulang v. Holder*, 565 U.S. 42, 54 (2011).

arbitrary and capricious analysis? Or should equal protection be treated as a stand-alone question? Does the substantive logic of an agency interpretation have a role in arbitrary and capricious review or only in *Chevron*'s reasonableness inquiry? Just how deferential should courts be when assessing the arbitrariness, capriciousness, or reasonableness of an agency position?

#### *D. Expansion of 212(h) Waivers to Deportability*

Despite the apparent surface similarities between waivers under the former section 212(c) and waivers under 212(h), litigation to expand the applicability of 212(h) to waive charges of deportability has taken a very different path. It began more slowly, picking up speed only in recent years, and has not produced nearly the same volume of cases as the 212(c) litigation.<sup>388</sup> Perhaps more importantly, these challenges in the 212(h) context have reached very different results. Section 212(h), when used alone to waive a charge of deportability, unconnected to a prior entry or an application to adjust status, is called a stand-alone 212(h) waiver.<sup>389</sup> While *Francis* and *Silva* held unequivocally that a failure to allow stand-alone 212(c) waivers would be unconstitutional, arguments to expand the applicability of 212(h) to this pure stand-alone context have been almost exclusively unsuccessful.

This subpart traces these challenges. Section D.1 covers the initial expansion of the availability of 212(h) to waive deportability under some circumstances. Section D.2 describes the circuit court cases that halted that expansion. Then Section D.3 addresses the BIA's decision that went further to contract the availability of 212(h) for LPRs charged as deportable and its aftermath in the circuit courts. The discussion in all three of these sections focuses not only on the outcomes of the cases but also on the invocation of Congress' plenary power over immigration and the use of the three legal

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388. There is no definitive explanation for why 212(h) has historically spawned less litigation, but several factors may contribute. Section 212(h) is a narrower form of relief than 212(c)—it both waives fewer convictions and is more difficult to obtain in many circumstances because of the extreme hardship element that does not exist for 212(c). Prior to the repeal of 212(c) in 1996, 212(c) was almost always available and preferable when 212(h) was an option. After 212(c) was repealed, however, there are increasing circumstances in which 212(h) will be available and 212(c) (and perhaps even Cancellation of Removal) are not. As the importance of 212(h) has grown, questions about 212(h) are increasingly frequently litigated.

389. See, e.g., *Matter of Rivas*, 26 I. & N. Dec. 130 (BIA 2013), *cert. denied*, 135 S. Ct. 1414 (2015); Michael Vastine, *The Status of Standalone INA § 212(h) Waivers: Can Rivas Withstand Constitutional Scrutiny?*, 2013 EMERGING ISSUES 7039 (Lexis) (July 19, 2013).

frameworks discussed above in the 212(c) context: *Chevron* deference, equal protection, and arbitrary and capricious review under the APA. Finally, Section D.4 draws some preliminary conclusions from the application of these general constitutional and administrative law frameworks in the 212(h) expansion context. Despite the greater uniformity in doctrine and outcome for 212(h) as compared to 212(c), the case law raises equal, if not greater, questions.

### 1. Initial Expansion

The distinction between 212(c) and 212(h) has not always existed; there was a point in time at which it appeared that the expanded application of these two separate waivers would proceed along parallel tracks. The BIA held in multiple cases that 212(h) waivers were available in deportation proceedings *nunc pro tunc* when the facts that are the basis for deportability made the noncitizen inadmissible at the time of his or her last entry.<sup>390</sup> The Board even discussed and analogized to a 212(c) *nunc pro tunc* case, *Matter of Tanori*, in this context.<sup>391</sup> The Board further held that noncitizens in deportation proceedings were eligible for 212(h) waivers in conjunction with applications to adjust status.<sup>392</sup> None of these decisions discussed equal protection or, of course, deference.

In the 1995 *Yeung v. INS* case, which involved a request for a stand-alone 212(h) waiver, the Court of Appeals for the Eleventh Circuit took the same step further as the Second Circuit in *Francis* had in the 212(c) context.<sup>393</sup> *Yeung* was an LPR deportable as a noncitizen convicted of a crime involving moral turpitude within five years after entry because of his

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390. See, e.g., *Matter of Sanchez*, 17 I. & N. Dec. 218, 222-23 (BIA 1980), *overruled by* *Matter of Rivas*, 261 I. & N. Dec. 130, 134 (BIA 2013); *Matter of Bernabella*, 13 I. & N. Dec. 42, 43 (BIA 1968); *Matter of Mascorro-Perales*, 12 I. & N. Dec. 228, 229 (BIA 1967); *Matter of Millard*, 11 I. & N. Dec. 175, 177 (BIA 1965); *Matter of P-*, 7 I. & N. Dec. 713, 713 (BIA 1958).

391. See *Sanchez*, 17 I. & N. Dec. at 223 (citing *Matter of Tanori*, 15 I. & N. Dec. 566 (BIA 1976)).

392. See, e.g., *Matter of Parodi*, 17 I. & N. Dec. 608, 611-12 (BIA 1980); *Bernabella*, 13 I. & N. Dec. at 43-44.

393. 76 F.3d 337, 340 (11th Cir. 1995), *modified* 72 F.3d 843 (11th Cir. 1996). It does not appear that there were any earlier published precedential Board of Immigration Appeals decisions ruling one way or the other on the availability of stand-alone 212(h) waivers in deportation proceedings outside of the *nunc pro tunc* and adjustment of status contexts. See *Yeung v. INS*, 72 F.3d 843, 843 (11th Cir. 1996), *modifying* 76 F.3d 337 (1995) (remanding with directions to the Board to reconsider its precedents only in *Sanchez*, *Parodi*, and *Yeung* itself); see also *Vastine*, *supra* note 389.

conviction for attempted manslaughter.<sup>394</sup> He needed a stand-alone 212(h) waiver because he could not file for adjustment of status, and he had not left the United States and returned after his conviction, so he could not benefit from the nunc pro tunc waiver allowed under prior case law.<sup>395</sup>

The very same equal protection question was raised, then, as was in the 212(c) cases: can the law distinguish between LPRs who travel outside the United States and those who do not? The court held that it could not. It applied minimal scrutiny under the rational basis standard of review, and found that this distinction between groups “can only be characterized as arbitrary” and “is without ‘a fair and substantial relation to the object of the legislation.’”<sup>396</sup> The Eleventh Circuit explicitly found the Second Circuit’s decision in *Francis*, holding the same in the 212(c) context, to be analogous.<sup>397</sup>

The court did not discuss or apply any kind of deference to the agency’s contrary interpretation of the applicability of 212(h) in its initial decision. However, on a petition for rehearing, the Eleventh Circuit added a paragraph remanding to the BIA with instructions to reconsider its prior interpretation of 212(h) in *Sanchez*, *Parodi*, and *Yeung*, “consistent with the competing statutory, constitutional, and policy interests at stake.”<sup>398</sup> In support of this remand with instructions, the Eleventh Circuit cited to *Chevron*.<sup>399</sup> By the time the Board issued its decision on remand, however, Congress had passed IIRIRA, which made 212(h) unavailable to LPRs who, like *Yeung*, had been convicted of an aggravated felony.<sup>400</sup> Because *Yeung* would no longer be eligible for a 212(h) waiver in any event, the Board specifically declined to rule on the scope of availability of 212(h) to waive charges of deportability.<sup>401</sup>

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394. *Yeung*, 76 F.3d at 337.

395. *Id.* at 338; *see also, e.g., Sanchez*, 17 I. & N. Dec. at 223.

396. *Yeung*, 76 F.3d at 340 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

397. *Id.*

398. *Yeung v. INS*, 72 F.3d 843, 843 (11th Cir. 1996).

399. *Id.*

400. *Matter of Yeung*, 21 I. & N. Dec. 610, 611-12 (BIA 1996).

401. *Id.* at 612. The Board does not appear to have reconsidered its interpretation of 212(h) and its position in *Sanchez* in another case prior to *Matter of Rivas*. *See Poveda v. U.S. Att’y General*, 692 F.3d 1168, 1181 (11th Cir. 2012) (Martin, J., dissenting); *Matter of Rivas*, 26 I. & N. Dec. 130, 131-34 (BIA 2013).

## 2. Halting the Expansion

After the Eleventh Circuit's decision in *Yeung*, 212(c) and 212(h) did not continue in the same expansive direction. Unlike after *Francis*, when the Board acted quickly to affirmatively adopt the Second Circuit's holding regarding 212(c) and therefore apply it uniformly throughout the country, the Board did not so act in the 212(h) context. Furthermore, no circuit courts have agreed with the Eleventh Circuit in *Yeung*, and several have affirmatively disagreed.<sup>402</sup>

The Board did, however, initially continue to acknowledge the availability of 212(h) for deportable LPRs to waive grounds of inadmissibility nunc pro tunc to a prior entry and in conjunction with an application to adjust status.<sup>403</sup> The Board and the circuit courts cited to *Sanchez* even after Congress constricted the availability of 212(h) for LPRs as part of IIRIRA in 1996.<sup>404</sup>

### a) The Seventh, Fifth, and Third Circuits

The Seventh Circuit in *Klementanovsky v. Gonzales*<sup>405</sup> and the Fifth Circuit in *Cabral v. Holder*<sup>406</sup> declined to expand the Board's holdings in *Sanchez* and *Parodi* to allow stand-alone 212(h) waivers. Both courts held that denying deportable noncitizens the ability to apply for a 212(h) waiver did not violate equal protection because there were multiple potential rational reasons for distinguishing "between those criminal aliens who seek *to be admitted* to the United States, and those criminal aliens who are *being deported* from the United States."<sup>407</sup> The Third Circuit in an unpublished decision, *Montano v. United States Attorney General*, agreed.<sup>408</sup> Possible reasons offered by the three courts included the following:

Congress might have wanted to ensure that dangerous people, including those convicted of crimes of moral turpitude, remain outside the United States while their applications for

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402. See KATHERINE BRADY, IMMIGRANT LEGAL RESOURCE CTRS., UPDATE ON INA § 212(H) DEFENSE STRATEGIES 19 (2011), [http://www.ilrc.org/files/documents/update\\_on\\_ina\\_212\\_1.pdf](http://www.ilrc.org/files/documents/update_on_ina_212_1.pdf).

403. See, e.g., *Matter of Loaisiga*, No. A28 644 366, 2008 WL 1924655 (BIA Apr. 8, 2008); see also *Vastine*, *supra* note 389.

404. See, e.g., *Margulis v. Holder*, 725 F.3d 785, 787-89 (7th Cir. 2013); *Matter of Abosi*, 24 I. & N. Dec. 204, 206 (BIA 2007).

405. 501 F.3d 788 (7th Cir. 2007).

406. 632 F.3d 886 (5th Cir. 2011).

407. *Klementanovsky*, 501 F.3d at 792; see also *Cabral*, 632 F.3d at 893.

408. 350 Fed. App'x 643 (3rd Cir. 2009).

discretionary relief are being considered. Congress might have wanted aliens seeking such waivers to do so from outside the United States in order to discourage them from attempting to “fly under the radar” of the immigration authorities in the event that the discretionary waiver is ultimately denied. Congress might have rationalized that an alien who self-deports and returns through proper admission procedures provides immigration authorities a second bite at the apple to intercept and consider otherwise unlawful aliens. Congress might have rationalized that granting a waiver to those who self-deport and seek readmission at the borders provides an incentive for such aliens to voluntarily depart at their own expense.<sup>409</sup>

Commentators also suggested that the Ninth Circuit, were it to take up this issue, would decide in accordance with these three circuits given its decision in *Abebe* withdrawing from the *Francis* equal protection rationale even in the 212(c) context.<sup>410</sup>

The Third, Fifth, and Seventh Circuits in these three cases focused exclusively on equal protection. They did not discuss deference to the agency interpretation of 212(h)—*Chevron* or otherwise—or any requirements imposed by the APA. The Fifth Circuit in *Cabral* attempted to distinguish the 212(c) context and the Second Circuit’s decision in *Francis*.<sup>411</sup> Despite the factual situations and prior legal histories being virtually identical, the Fifth Circuit attempted to describe the groups being distinguished between differently than the Second Circuit had done in *Francis*. The Fifth Circuit described the court in *Francis* as pointing out that the distinction at issue was between deportable LPRs who had traveled outside the United States and those who had not.<sup>412</sup> Factually, this was also the case in *Cabral*, but the court there chose to describe the two groups as those who were being deported and those who were being excluded.<sup>413</sup> This

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409. *Klementanovsky*, 501 F.3d at 792-93; see also *Cabral*, 632 F.3d at 892-93; *Montano*, 350 Fed. App’x at 647.

410. See Brady, *supra* note 402, at 19.

411. *Cabral*, 632 F.3d at 893-94. *Cabral* appears to have relied on the Second Circuit’s decision in *Francis* rather than the more applicable Board decision in *Silva*. *Id.* at 893. The Seventh Circuit in *Klementanovsky* discussed a prior Seventh Circuit case drawing this same distinction. 501 F.3d at 793-94 (citing *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)).

412. *Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976).

413. *Cabral*, 632 F.3d at 893-94.

allowed the Fifth Circuit to analyze differently the possible rational bases for Congress' decision to draw this distinction.

*b) The Eleventh Circuit*

For many years, it appeared that the Eleventh Circuit would stand by its decision in *Yeung* and continue to interpret 212(h) as allowing at least some noncitizens to waive their charges of deportability.<sup>414</sup> Today, however, even the Eleventh Circuit has retreated from *Yeung*. In a 2012 case called *Poveda v. United States Attorney General*, the Eleventh Circuit agreed with the Third, Fifth, and Seventh Circuit Courts of Appeals that there was no equal protection violation as there was a rational basis to distinguish between excludable noncitizens' and deportable noncitizens' respective eligibility for relief under section 212(h).<sup>415</sup> The court in *Poveda* cited to *Klementanovsky* and *Cabral* and offered the same possible reasonable explanations for this distinction.<sup>416</sup>

The court in *Poveda* also went beyond the pure equal protection framework of the cases previously discussed to attempt to address a number of other issues. First, *Poveda* stated that the court was not overruling its previous decision in *Yeung*, but instead attempted to distinguish the current circumstances from those when *Yeung* was decided.<sup>417</sup> The court explained that the Board had previously held that 212(h), like 212(c), was available nunc pro tunc to noncitizens who departed the United States after a criminal conviction that rendered them inadmissible but had not actually been charged with inadmissibility on reentry.<sup>418</sup> According to the court, the distinction that concerned the courts in *Yeung* and *Francis* was between those noncitizens charged as deportable who were allowed to request waivers nunc pro tunc to their prior entries and those who had not departed

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414. See *Lanier v. U.S. Att'y Gen.*, 631 F.3d 1363, 1364 n.1 (2011). Lanier was a lawful permanent resident charged as deportable in removal proceedings as the result of an aggravated felony conviction. *Id.* at 1365. The legal question at issue in the case was whether the aggravated felony bar to 212(h) applied to those who adjusted status to lawful permanent residence, but the Eleventh Circuit cited *Yeung* in a footnote in support of the statement that 212(h) was available to noncitizens in removal proceedings. *Id.* at 1364 n.1 (citing *Yeung v. INS*, 76 F.3d 337, 340 (11th Cir. 1995)). As Lanier was charged as deportable, this statement also must have meant available to waive essentially all grounds of deportability or the question of the applicability of the aggravated felony bar would have been moot. See also *Vastine*, *supra* note 389.

415. 692 F.3d 1168, 1176-78 (11th Cir. 2012).

416. *Id.*

417. *Id.* at 1174.

418. *Id.*

the United States and therefore would not be eligible for waivers. The court held, however—citing only to the Seventh Circuit decision in *Klementanovsky* and without an on-point citation to Board precedent—that the Board had retreated from this position in the 212(h) context and no longer believed that 212(h) was available nunc pro tunc.<sup>419</sup>

The court also attempted to distinguish the circumstances at issue in *Yeung* from those in *Poveda* by focusing on the shift in IIRIRA from a focus on physical entry into the United States to a focus on lawful inspection and admission.<sup>420</sup> Under IIRIRA's new definition of those seeking admission, LPRs with criminal convictions who traveled outside the country would be deemed to be seeking admission and subject to the grounds of inadmissibility.<sup>421</sup> Although the court's decision on this point is not entirely clear, it appeared to be saying that continuing to allow nunc pro tunc or stand-alone 212(h) waivers would be inconsistent with these extensive changes made by Congress.<sup>422</sup> Finally, the court briefly tried to distinguish 212(h) from the earlier 212(c) cases and the holdings in *Francis* and *Silva* by quoting from an earlier Eleventh Circuit case defining the two groups at issue as being deportable non-citizens and inadmissible non-citizens rather than two different groups of deportable non-citizens.<sup>423</sup> Ultimately, the court held that there was not the same two groups as in the 212(c) cases being treated differently and therefore there was no longer an equal protection violation.<sup>424</sup> The court was essentially drawing the same fine line that the Fifth Circuit in *Cabral* had also somewhat unsuccessfully used to try to distinguish the 212(h) context.

Second, unlike the other circuits in the 212(h) context, the court in *Poveda* discussed and applied *Chevron* deference.<sup>425</sup> The court held at *Chevron* step one that Congress had not spoken clearly.<sup>426</sup> It therefore went

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419. *Id.* at 1174, 1176. The dissent disagreed on this point in particular, arguing that the Board had not abandoned *Sanchez* and had in fact applied it in *Poveda*'s own case. *Id.* at 1182-85 (Martin, J., dissenting).

420. *Id.* at 1174-76 (majority opinion).

421. *Id.*

422. *Id.*

423. *Id.* at 1178 (quoting *Chuang v. U.S. Att'y Gen.*, 382 F.3d 1299, 1304 (11th Cir. 2004)). The Eleventh Circuit both in *Poveda* and *Chuang* appears to be operating from the misunderstanding that noncitizens charged as excludable or inadmissible will remain outside the United States while their exclusion or removal proceedings are conducted. *See id.*; *Chuang*, 382 F.3d at 1304; *cf. Vastine, supra* note 389.

424. *Poveda*, 692 F.3d at 1174.

425. *Id.* at 1176-78.

426. *Id.* at 1176.

on to consider at *Chevron* step two whether the agency had acted reasonably in its interpretation that 212(h) was not available as a stand-alone waiver of deportability: “Because section 212(h) is silent about whether an alien within our borders may obtain a hardship waiver without concurrently applying for an adjustment of status, we must consider whether the new interpretation of section 212(h) by the Board is reasonable.”<sup>427</sup> In two different places in its decision, in discussing the *Chevron* reasonableness inquiry, the Court emphasized the particular level of deference due to the executive branch in the immigration context.<sup>428</sup>

The court concluded that the Board’s interpretation was in fact reasonable.<sup>429</sup> Despite its emphasis on deference to the agency’s interpretation, much of the discussion on reasonableness focused not on the Board’s opinions but on the other circuits’ decisions in *Klementanovsky* and *Cabral*.<sup>430</sup> *Klementanovsky*’s and *Cabral*’s equal protection analyses were collapsed into the *Poveda* court’s reasonableness inquiry. It appears as though the Eleventh Circuit in *Poveda* was saying that, if there was a rational basis to distinguish between inadmissible and deportable noncitizens for purposes of eligibility for 212(h), then the Board’s interpretation prohibiting stand-alone 212(h) to waive grounds of deportability was reasonable.

*Poveda* did not stand for long as the Eleventh Circuit’s only opinion on stand-alone 212(h); less than one year later another panel of the Eleventh Circuit issued a second decision addressing essentially the same issue in *Lawal v. United States Attorney General*.<sup>431</sup> Like *Poveda*, *Lawal* was an LPR charged as deportable in removal proceedings as the result of criminal convictions.<sup>432</sup> Following his criminal convictions, *Lawal* had taken a trip outside the United States and was lawfully readmitted some years prior to being placed in removal proceedings.<sup>433</sup> He argued that, under *Sanchez*,

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427. *Id.* Again, the Eleventh Circuit was not able to cite to a Board decision where the Board had announced this new interpretation. *Id.*; see also *Vastine*, *supra* note 389.

428. *Poveda*, 692 F.3d at 1172 (“[J]udicial deference to the Executive Branch is especially appropriate in the immigration context.”) (quoting *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999)); *Id.* at 1176 (“The degree of deference is especially great in the field of immigration.”) (quoting *Chen v. U.S. Att’y Gen.*, 565 F.3d 805, 809 (11th Cir. 2009)).

429. *Id.* at 1176.

430. See *id.* at 1176-78.

431. 710 F.3d 1288 (11th Cir. 2013); see also *Vastine*, *supra* note 389 (“Apparently realizing that *Poveda* was problematic on many counts, the Eleventh Circuit published [*Lawal*] mere months after [*Poveda*].” (footnote omitted)).

432. *Lawal*, 710 F.3d at 1289.

433. *Id.*

because he would have been inadmissible as the result of his criminal convictions at the time he was readmitted, he qualified for a nunc pro tunc 212(h) waiver to waive his grounds of deportability.<sup>434</sup> Ultimately, the Eleventh Circuit remanded Lawal's case for the Board to reconsider in light of the Eleventh Circuit's decision in *Poveda* and the Supreme Court's decision in *Judulang*.<sup>435</sup>

Although the court in *Lawal* did not so much as mention deference, *Chevron*, or the APA, it discussed the BIA's decision in *Sanchez* and subsequent cases in detail.<sup>436</sup> The court then found that the Eleventh Circuit's decisions in *Yeung* and *Poveda* called the BIA's interpretation of 212(h) in *Sanchez* into doubt.<sup>437</sup> Rather than attempting to unravel that conundrum on its own, the Eleventh Circuit remanded Lawal's case to the Board for it to address this question on its own in the first instance, in effect indicating deference to the Board's interpretation.<sup>438</sup> Although the panel of the Eleventh Circuit in *Lawal* never explicitly called into question the earlier panel's decision in *Poveda*, this acknowledgement of the ambiguity of the Board's current position was a significant retreat from the *Poveda* panel's certainty regarding the Board's interpretation of 212(h) and its reasonableness.<sup>439</sup>

With the possible/partial exception of the Eleventh Circuit, all circuits to consider the issue in the 212(h) context ultimately reached the exact opposite conclusion as in the 212(c) context. These courts held that LPRs with certain criminal convictions who depart the United States and are seeking readmission may apply for and receive waivers of inadmissibility under INA section 212(h). However, an identical LPR who has never left the country is prohibited from even seeking such a waiver unless it is in conjunction with an application for adjustment of status.

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434. *Id.* at 1289-91.

435. *Id.* at 1293-94.

436. *Id.* at 1289-91.

437. *Id.* at 1291-92.

438. *Id.* at 1293-94. Unlike the panel in *Poveda*, the panel in *Lawal* did not discuss or rely on the Seventh and Fifth Circuits' decisions in *Klementanovsky* and *Cabral*. *Id.* The Board does not appear to have issued any published decision on remand in *Lawal*. Shortly after *Lawal* was remanded, the Board published its decision in *Matter of Rivas*, 26 I. & N. Dec. 130 (BIA 2013). See also Vastine, *supra* note 389.

439. See, e.g., Vastine, *supra* note 389 (“[*Lawal*] clearly indicated that the circuit lacked the necessary clarity of agency position to rule on the constitutionality and legality of that position. thus [sic] effectively overruled the precedential value of [*Poveda*] by acknowledging the need for determination from the BIA.”).

### 3. *Contraction*

Not only was the expansion of the availability of 212(h) to waive charges of deportability halted, but the BIA affirmatively contracted that availability. In *Matter of Rivas*, the BIA held that INA section 212(h) “does not provide for an alien in removal proceedings to obtain a ‘stand alone’ waiver without an application for adjustment of status” and “a nunc pro tunc waiver should not be available to avoid the requirement that an adjustment application must be concurrently filed with the waiver request.”<sup>440</sup> The Board’s decision was based almost exclusively on an interpretation of the language of the statute, particularly the 1996 revisions, and congressional intent.<sup>441</sup> It held that Congress’ revisions to the INA and 212(h) in 1990 and 1996 had abrogated its prior decision in *Sanchez*.<sup>442</sup> The Board did not discuss deference, except insofar as to say the circuit courts had found its approach limiting the availability of 212(h) reasonable, or otherwise mention the APA.<sup>443</sup> It did not discuss equal protection except to note that the use of nunc pro tunc waivers could create equal protection issues, as they had in the 212(c) context.<sup>444</sup>

*Rivas* was appealed to the Eleventh Circuit, which sustained the Board’s position for the reasons given by the Board and by the Eleventh Circuit in its earlier decision in *Poveda*.<sup>445</sup> The Eleventh Circuit held again that the statutory language of the waiver was ambiguous and that the Board’s interpretation, now clearly articulated in its decision in *Rivas*, that 212(h) was not available as a stand-alone waiver of grounds of deportability was reasonable.<sup>446</sup> The Eleventh Circuit first went through clear and relatively detailed explanations of the standards for *Chevron* deference and equal

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440. 26 I. & N. Dec. at 132-33.

441. *Id.* at 131, 133-34. It is worth noting that the Board does use some odd and potentially inconsistent language to discuss and possibly discredit its previous decision in *Matter of Sanchez* in an attempt, it would appear, to justify its position. *Id.* at 131. The Court stated: “Because the respondent [in *Sanchez*] was not eligible for adjustment of status, the Immigration Judge granted the waiver nunc pro tunc. The respondent’s situation is different from that of the alien in *Sanchez* because he does not have a pending application for adjustment of status.” *Id.* Either these two sentences are inconsistent, or they are irrational and mean that a noncitizen could escape the issue simply by filing an unfounded application to adjust status.

442. *Id.* at 134 (“Our precedent issued prior to the 1990 and 1996 amendments to section 212(h), including *Matter of Sanchez*, is therefore no longer valid.”)

443. *Id.* at 132.

444. *Id.* at 133-34.

445. *Rivas v. U.S. Att’y Gen.*, 765 F.3d 1324, 1329-30 (11th Cir. 2014).

446. *Id.* at 1328.

protection review in the immigration context.<sup>447</sup> While the court does not specifically invoke Congress' plenary power, it does seem to emphasize its own limited role in the immigration context in deference to greater legislative and executive power.<sup>448</sup> The court also mentioned but did not explain its disagreement with Rivas' argument that the Board's new interpretation of 212(h) "invites arbitrary and capricious agency action," presumably a reference to the APA.<sup>449</sup>

The court's analysis did not precisely track the standards it set out, but appears, like *Poveda*, to focus primarily on the reasonableness inquiry.<sup>450</sup> It placed great importance on the fact that the Board's interpretation was consistent with the statutory language.<sup>451</sup> In addition, just as in *Poveda*, the rational basis analysis appears to have become one factor (and not necessarily the most important factor) in determining the reasonableness of the agency's interpretation.<sup>452</sup> Throughout the decision, the court heavily cited to and relied on its prior decision in *Poveda*, the Seventh Circuit's decision in *Klementanovsky*, and the Fifth Circuit's decision in *Cabral*.<sup>453</sup>

No circuit court appears to have seriously questioned the Board's position in *Rivas*. Unsurprisingly, the Eleventh Circuit (in several unpublished opinions) has cited primarily to its own decisions in *Poveda* and *Rivas* to support reaching the same conclusion: no stand-alone 212(h) for LPRs charged as deportable without an application to adjust status.<sup>454</sup> The Third<sup>455</sup> and Fifth<sup>456</sup> Circuits have done the same without further analysis. In an earlier published decision, the Third Circuit may have left some minimal room for a challenge to the Board's interpretation in *Rivas*.<sup>457</sup> The court noted in a footnote, without citing to the Board's decision in *Rivas*, that it was not necessary to reach the availability of

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447. *Id.*

448. *See id.*

449. *Id.* at 1329.

450. *See id.* at 1328-30.

451. *Id.* at 1329.

452. *See id.* at 1330.

453. *Id.* at 1328-30.

454. *See, e.g.,* *Villava v. U.S. Att'y Gen.*, 591 Fed. App'x 732, 733, 735-36 (11th Cir. 2014); *Alas v. U.S. Att'y Gen.*, 589 Fed. App'x 420, 422-23 (11th Cir. 2014).

455. *See, e.g.,* *Cameron v. Att'y Gen. U.S.*, 641 Fed. App'x 139, 142 (3rd Cir. 2016); *Johnson v. Att'y Gen. U.S.*, 632 Fed. App'x 728, 730-31 (3rd Cir. 2015).

456. *See, e.g.,* *McMaster v. Holder*, 587 Fed. App'x 826, 829 (5th Cir. 2014); *Zhong Qin Yang v. Holder*, 570 Fed. App'x 381, 385 (5th Cir. 2014). Both decisions also cite to *Cabral v. Holder*, 632 F.3d 886, 891-92 (5th Cir. 2011).

457. *See Chavez-Alvarez v. Att'y Gen. U.S.*, 783 F.3d 478, 483 n.8 (3rd Cir. 2015).

stand-alone 212(h) waivers, and it was therefore declining “to address this question in a precedential opinion at this time.”<sup>458</sup>

The Sixth Circuit briefly discussed the Board’s interpretation and held in a single sentence in an unpublished decision: “Grounded in the statutory text and legitimate equal protection concerns, the BIA’s interpretation of the INA is plainly reasonable and entitled to deference.”<sup>459</sup> The Seventh Circuit, in a case argued before the Board’s decision in *Rivas* was published but issued after, left some room to challenge the Board’s new interpretation abrogating its position in *Sanchez*: “As the overruling was based on a statutory interpretation, there may be room for argument to a reviewing court that the *Rivas* decision is erroneous.”<sup>460</sup> Relatively quickly, however, the Seventh Circuit upheld the Board’s decision in *Rivas* without discussion of its merits.<sup>461</sup>

Only the Ninth Circuit analyzed the Board’s decision in *Rivas* in any level of detail in the case of *Mtoched v. Lynch*.<sup>462</sup> The court first laid out the Board’s interpretation as articulated in a DOJ regulation, 8 C.F.R. § 1245.1(f), and in its decision in *Rivas* that a noncitizen in the United States may apply for a 212(h) waiver only in conjunction with an application to adjust status.<sup>463</sup> Then the court articulated the standard for *Chevron* deference.<sup>464</sup> It held that 212(h) was part of a statutory scheme that the Attorney General was expressly charged to administer.<sup>465</sup> Although it did not specifically so state, it apparently found that 212(h) was ambiguous at *Chevron* step one, as the majority of its discussion was focused on the

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458. *Id.*

459. *Sellers v. Lynch*, 630 Fed. App’x 464, 471 (6th Cir. 2015) (citing *Palma-Martinez v. Lynch*, 785 F.3d 1147, 1149-50 (7th Cir. 2015); *Rivas v. U.S. Att’y Gen.*, 765 F.3d 1324, 1329-30 (11th Cir. 2014)); *see also* *Fayzullina v. Holder*, 777 F.3d 807, 816 (6th Cir. 2015) (“In any event, the *nunc pro tunc* waiver concept that was acknowledged for different purposes in those cases has since been definitively repudiated by the BIA.”).

460. *Margulis v. Holder*, 725 F.3d 785, 789 (7th Cir. 2013).

461. *Palma-Martinez*, 785 F.3d at 1149-50. The Seventh Circuit also cited to and relied heavily on its own decision in *Klementanovsky v. Gonzales*, 501 F.3d 788 (7th Cir. 2007). *Id.* at 1149.

462. 786 F.3d 1210, 1217-18 (9th Cir. 2015); *see also* *Garcia v. Lynch*, 786 F.3d 789, 793 n.5 (9th Cir. 2015) (citing the Board’s decision in *Rivas* favorably without further discussion); *Ramirez v. Holder*, 556 Fed. App’x 613, 614 (9th Cir. 2014) (citing the Board’s decision in *Rivas* favorably without further discussion).

463. *Mtoched*, 786 F.3d at 1217. The Court also noted that this interpretation had been upheld by the Eleventh Circuit in *Rivas*, the Fifth Circuit in *Cabral*, and the Seventh Circuit in *Klementanovsky*. *Id.* at 1217-18.

464. *Id.* at 1218.

465. *Id.*

reasonableness of the agency interpretation at *Chevron* step two.<sup>466</sup> The court relied heavily on the fact that the Board's interpretation was consistent across both the regulation and its decision in *Rivas* and with the statutory language.<sup>467</sup> Although the court was focused on *Chevron* and did not discuss the APA, it emphasized (without much discussion) *Chevron's* statement that an agency's interpretation was reasonable if not arbitrary or capricious.<sup>468</sup> The Ninth Circuit's decision contained no discussion of equal protection or of any similarities or dissimilarities with 212(c) waivers.

This agreement, at least on outcome, and apparent lack of controversy over virtually ending 212(h)'s availability to waive grounds of deportability is somewhat surprising given the opposite outcome in the 212(c) cases and the apparent conflict of the courts' decisions with the Supreme Court's language in *Judulang*. Some commentators predicted after the *Rivas* decision that it would not stand,<sup>469</sup> but given the length of time that has now passed and the lack of serious court attention to challenges, that outcome now seems less likely. Just as in the 212(c) context, however, unanswered questions about other aspects of 212(h) triggering possible application of constitutional and administrative law doctrines remain.<sup>470</sup>

#### 4. 212(h): Preliminary Conclusions

Several of the circuit court cases on the applicability of 212(h) to grounds of deportability specifically referenced Congress' plenary power in the immigration context.<sup>471</sup> Many of these references were in the context of

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466. *See id.*

467. *Id.*

468. *Id.*

469. *See, e.g.,* Vastine, *supra* note 389 ("It is difficult, if not impossible, to rationalize the BIA's conclusion without instinctively concluding that the distinction in treatment based on travel is even less intellectually sound than the § 212(c) scheme pilloried by the Supreme Court in *Judulang*, particularly since the roots of *Judulang* are in an unfavorable critique of § 212(c) cases that explicitly discriminated against applicants on the basis of foreign travel. It is overstatement to declare *Judulang* a 'sword of Damocles' hanging over the BIA's § 212(h) holding, but *Judulang* is evidence that the BIA's logic in determining eligibility for § 212(h) will be subject to significant (and likely caustic) scrutiny.").

470. *See generally* Julianne Lee, Note, *Tortured Language: Lawful Permanent Residents and the 212(h) Waiver*, 84 *FORDHAM L. REV.* 1201 (2015) (discussing the BIA and circuit court split on the applicability of the aggravated felony bar in 212(h) to lawful permanent residents who adjusted their status in the United States as opposed to entering as lawful permanent residents).

471. *See, e.g.,* *Yeung v. INS*, 76 F.3d 337, 339 (11th Cir. 1995); *Cabral v. Holder*, 632 F.3d 886, 892 (5th Cir. 2011); *Poveda v. U.S. Att'y Gen.*, 692 F.3d 1168, 1177 (11th Cir. 2012).

justifying the application of only minimal scrutiny to equal protection violations.<sup>472</sup> The BIA in *Matter of Yeung* also referred to Congress' "almost unfettered power to decide which aliens may come to and remain in this country."<sup>473</sup> Rather than truly being an expression of the limited powers of the courts in the immigration context, these references appear to be more of a justification for the approach the court was taking in that particular case. The Board's invocation of Congress' power was particularly self-serving, as it was trying to justify departing from its own precedent in *Sanchez* through relying on revisions made by Congress to the INA in IIRIRA.

Just as in the 212(c) context, the circuit courts did not hesitate to invoke general principles of constitutional and administrative law in the 212(h) context. Virtually all of the decisions turned on either equal protection rational basis review or *Chevron* deference to the agency's interpretation of 212(h). Only the Eleventh Circuit in *Lawal* even alluded to the possible applicability of the APA's arbitrary and capricious review, although *Judulang* in the 212(c) context was decided by the Supreme Court using that framework prior to many of the later 212(h) decisions.<sup>474</sup> While the application of these doctrines was, if anything, even more entrenched in the 212(h) than the 212(c) cases, the 212(h) cases did not result in the same in-depth discussions of the doctrines.

The 212(h) cases were considerably more uniform than the 212(c) cases as to which administrative and constitutional law doctrines were invoked. The earlier 212(h) cases turned primarily on the courts' equal protection rational basis review,<sup>475</sup> while *Poveda* and the other later cases incorporated more reliance on *Chevron* deference. Given the less extensive discussion of the doctrines in the 212(h) cases, fewer differences in how each individual doctrine was interpreted and applied were discernable. In fact, the cases converged on each other to a somewhat remarkable degree; cross citation

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472. See, e.g., *Yeung*, 76 F.3d at 339; see also *Cabral*, 632 F.3d at 892; *Poveda*, 692 F.3d at 1177.

473. *Matter of Yeung*, 21 I. & N. Dec. 610, 612 (BIA 1996).

474. *Lawal v. U.S. Att'y Gen.*, 710 F.3d 1288, 1294 (11th Cir. 2013) ("The Supreme Court, however, has recently struck down the BIA's comparable grounds rule as arbitrary and capricious. Accordingly, on remand, the BIA is also to reconsider *Lawal's* case in light of the Supreme Court's holding in *Judulang*." (citation omitted)). The Board of Immigration Appeals in *Rivas* also cited to *Judulang*, but without any reference to the APA or arbitrary and capricious review. *Matter of Rivas*, 26 I. & N. Dec. 130, 133 (BIA 2013).

475. *Yeung* is the only one of the earlier cases to so much as mention deference, and then only in a brief paragraph in a revised decision. See *Yeung*, 76 F.3d at 341.

was common across circuits to the point that the courts' reasoning became circular in some instances.<sup>476</sup>

Several patterns are notable. First, prior to the Board's decision in *Rivas*, the courts did not apply a very high level of deference to the agency. Even within a framework of deference, the courts undertook their own detailed analyses of the question independently of the agency's analysis and the factors that the agency had considered. This is even more remarkable than in the 212(c) context, given the fact that virtually all of the courts in the 212(h) context agreed with the Board's interpretation.

Second, even absent the radical differences between and within circuits in interpreting and applying administrative and constitutional law principles, extremely significant gaps in the discussion are nevertheless (further) revealed in the 212(h) context. Despite the overall convergence on which principles should be applied under which circumstances, the courts completely fail to discuss their rationale for *why* those choices are being made, leaving many difficult questions unanswered. For example, why did the early circuit court decisions employ only rational basis review even when an agency interpretation of the provision at issue existed? What constitutes an agency interpretation that would trigger *Chevron* deference? Is APA arbitrary and capricious review rather than *Chevron* deference ever appropriate in the 212(h) context? When and why?

In addition, there are significant holes in the discussion of the substantive standards themselves and what they mean. As in the 212(c) context, many courts that considered both equal protection and *Chevron* deference in the 212(h) context collapsed the constitutional question into *Chevron's* step-two reasonableness inquiry. What is the proper place for equal protection and other constitutional questions? Just how deferential should courts be when assessing the arbitrariness, capriciousness, or reasonableness of an agency position? Little guidance is offered in selecting and applying the appropriate framework(s) for future decision-makers facing the same or different circumstances.

### *III. Explanations and Implications*

It should be abundantly clear from the above discussion in Part II just what a tangled mess the case law is with respect to the expansion of 212(c) and 212(h) waivers to grounds of deportability. Despite dealing with a relatively narrow, closely related subset of immigration law questions—an already very specialized area—we face multi-layered, seeming inexplicable

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476. See also, e.g., Vastine, *supra* note 389.

inconsistencies in outcomes, choice of legal framework, and analysis within a chosen framework. Section III.A argues that these decisions cannot be reconciled at the level of outcome, doctrine, or theory.

Despite being irreconcilable, the decisions do illustrate something important about immigration law and its intersection with administrative and constitutional law. There are significant parallels in the courts' analyses regardless of which of the three legal frameworks—*Chevron* deference, APA arbitrary and capricious review, and equal protection rational basis analysis—is employed. The factors that courts consider and the weight that they give to those factors are substantially similar whether the court is determining if the agency's action is reasonable at *Chevron* step two, if the agency's action is arbitrary and capricious under the APA, or if a statutory distinction is rationally related to a legitimate government interest. Section III.B.1 highlights these parallels from the discussion of the case law in Part II.

Section III.B.2 discusses the significance of these parallels to our understanding of immigration law and its relationship to administrative and constitutional law today. They reveal the uneasy relationships that originated in the theory of immigration exceptionalism and have always existed among the courts, the executive branch, and Congress in the immigration context. The theory of immigration exceptionalism has clearly eroded, as evidenced in the courts' consistent and unquestioning application of these constitutional and administrative law principles. At the same time, remnants of the theory still appear to be creating a certain tension in the courts' decisions regarding the expansion of 212(c) and 212(h). Although administrative and constitutional doctrines are being applied, the explanation of what these doctrines mean and how they apply in the immigration law context has been stunted. Detailed development of these questions will be an important next step if the theory of immigration exceptionalism is to continue to erode.

#### *A. Irreconcilable Differences*

The currently applicable rules on the expansion of 212(c) and 212(h) to waive deportability for LPRs can be summarized at the most basic level of generality. As detailed in Part II, the agency and courts have reached essentially opposite conclusions in the two contexts. The former section 212(c) is available to waive all grounds of deportability except those corresponding to a ground of inadmissibility specifically excluded in the

statutory language.<sup>477</sup> Section 212(h), on the other hand, may never be used as a stand-alone waiver of deportability, including nunc pro tunc; it may only be used to overcome deportability in conjunction with an application to adjust status.<sup>478</sup> Section III.A.1 argues that these different outcomes are not reconcilable; 212(c) and 212(h) cannot be meaningfully distinguished with respect to their applicability to deportation.

Part II also illustrated clearly that the 212(c) and 212(h) cases differ not only in outcome but also in their choice of legal framework and analysis within a chosen framework. Section III.A.2 will argue that the use of doctrine or theory cannot help to reconcile these legal frameworks and analyses in the 212(c) and 212(h) cases.

### *1. Sections 212(c) and 212(h) Are Not Distinguishable*

While the Board in *Sanchez*<sup>479</sup> and the Eleventh Circuit in *Yeung*<sup>480</sup> specifically analogized to 212(c) in cases dealing with 212(h), the later agency and court opinions all agreed that 212(h) and 212(c) were somehow different. Many decisions in the 212(h) expansion cases ignored the obvious similarities with 212(c) and simply reached the opposite conclusion without even attempting to distinguish 212(h) from 212(c).<sup>481</sup> Those courts that did try to differentiate 212(h) relied primarily on an argument related to the equal protection analysis: courts attempted to define the similarly situated groups differently for 212(h).<sup>482</sup> When examined more closely, this argument cannot stand. Despite these courts' efforts, there is no way to meaningfully distinguish between the applicability of 212(c) and 212(h) waivers to grounds of deportability.

The 212(h) opinions described the court in *Francis* as being concerned with the distinction being made between two different groups of deportable LPRs: those who had traveled outside the United States and those who had

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477. See *Matter of Abdelghany*, 26 I. & N. Dec. 254, 265-66 (BIA 2014).

478. See *Rivas*, 26 I. & N. Dec. at 132-33.

479. *Matter of Sanchez*, 17 I. & N. Dec. 218, 223 (BIA 1980) (citing *Matter of Tanori*, 15 I. & N. Dec. 566 (BIA 1976)).

480. *Yeung*, 76 F.3d at 340-41.

481. See generally *Rivas v. U.S. Att'y Gen.*, 765 F.3d 1324 (11th Cir. 2014); *Montano v. U.S. Att'y Gen.*, 350 Fed. App'x 643 (3rd Cir. 2009); *Rivas*, 26 I. & N. Dec. 130.

482. See generally *Poveda v. U.S. Att'y Gen.*, 692 F.3d 1168, 1177 (11th Cir. 2012) (quoting *Chuang v. U.S. Att'y Gen.*, 382 F.3d 1299, 1303-04 (11th Cir. 2004) and *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)); *Cabral v. Holder*, 632 F.3d 886, 893-94 (5th Cir. 2011); *Klementanovsky v. Gonzales*, 501 F.3d 788, 793-94 (7th Cir. 2007) (citing *LaGuerre*, 164 F.3d at 1041).

not.<sup>483</sup> The courts in the 212(h) cases, on the other hand, chose to describe the two groups as those who were being deported and those who were being excluded.<sup>484</sup> Although this may be a technically accurate description of what the Second Circuit in *Francis* said, it is a false distinction because it misses an important point.

The court in *Francis* and the Board in *Silva* were actually concerned with the very same two groups as the courts in the 212(h) cases: LPRs with criminal convictions who had traveled outside the country and LPRs with criminal convictions who had not. In *Francis* and the other pre-1996 cases, LPRs in the first group who had traveled outside the country could still be charged as deportable on their return.<sup>485</sup> In the post-1996 212(h) cases, these very same LPRs would be charged as inadmissible because of changes made by IIRIRA to the definition of who is seeking admission.<sup>486</sup> To repeat, the members of the first group are identical in the 212(c) and 212(h) contexts. For purposes of equal protection, whether a group is in fact similarly situated, or whether Congress had a rational basis for singling that group out for disparate treatment, cannot turn solely on how that group is described.<sup>487</sup>

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483. *Francis v. INS*, 532 F.2d 268, 272-73 (2d Cir. 1976); *see, e.g., Poveda*, 692 F.3d at 1177; *Cabral*, 632 F.3d at 893-94; *Klementanovsky*, 501 F.3d at 793-94.

484. *See, e.g., Poveda*, 692 F.3d at 1177 (quoting *Chuang v. U.S. Att'y Gen.*, 382 F.3d 1299, 1303-04 (11th Cir. 2004) and *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)); *Cabral*, 632 F.3d at 893-94; *Klementanovsky*, 501 F.3d at 793-94 (citing *LaGuerre*, 164 F.3d at 1041).

485. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (amended 1996); *Rosenberg v. Fleuti*, 374 U.S. 449, 452, (1963); *see also Poveda v. U.S. Att'y Gen.*, 692 F.3d 1168, 1175 (11th Cir. 2012). Entry without inspection was also a ground of deportability pre-1996 but is now a ground of inadmissibility. *Compare* INA § 241(a)(1)(C)(ii), 8 U.S.C. § 1251(a)(1)(C)(ii) (amended and transferred 1996) (making being present in the United States after having entered without inspection a ground of deportability) *with* INA § 212(a)(6)(A), 8 U.S.C. § 1182 (a)(6)(A) (2012) (making being present in the U.S. after having entered without inspection a ground of inadmissibility).

486. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2012); *Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA)*, Pub. L. No. 104-208, § 301(a)(13)(C)(v), 110 Stat. 3009 (1996); *see also Lawal v. U.S. Att'y Gen.*, 710 F.3d 1288, 1291-92 (11th Cir. 2013); *Aschenbrenner, supra* note 118, at 169-70.

487. Furthermore, it is somewhat difficult to argue that Congress had a rational basis for delineating the division between the grounds of inadmissibility and the grounds of deportability in the first instance. There is illogicality in the grounds of deportability and inadmissibility themselves. Why are aggravated felonies, or firearms offenses, or crimes of domestic violence grounds of deportability but not grounds of inadmissibility? *See* INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2012); INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012); INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C) (2012); INA §

This distinction between the 212(h) and 212(c) context seems almost pretextual, as though the courts wanted to reach a different conclusion in the 212(h) context and were looking for a justification to do so. Because 212(c) is now available only retroactively to waive convictions occurring prior to IIRIRA, 212(c) cases are likely to eventually taper off over time. Section 212(h), however, remains available to waive current and future convictions. The courts may have been trying to avoid the plethora of litigation and complexities that have characterized 212(c) in an ongoing context like 212(h).

Courts and commentators may also argue that 212(c) is a special, peculiar context, and should not be used to draw deductions applicable to other immigration law issues, such as 212(h). Section 212(c) cases necessarily involve the intersection of not only immigration law but also complex questions of retroactivity, equal protection, and administrative law. It is highly tempting to dismiss this area of law as an aberration, a highly technical wrinkle driven by the overlap of several areas of long-past, and possibly mistaken, precedent in the already complex morass of immigration law. Indeed, once the 212(c) cases are removed from the analysis in Part II above, the 212(h) cases viewed alone appear at first blush much more consistent and less problematic. Considering, given the repeal of 212(c), 212(c) claims will eventually no longer arise, what would be the harm in simply writing off this area for purposes of future analysis? Under this theory, the inconsistencies are in fact irreconcilable, but it does not matter because the 212(c) context is aberrational.

Many of the courts hearing these cases would seem likely to agree with this diagnosis. The First Circuit described “the combined effect of § 212(c) and the interpretation in *Francis* and its aftermath” as “an untidy patchwork, even, one might say, a mess.”<sup>488</sup> The Second Circuit highlighted

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237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E) (2012). Arguments can and have been made in support of this of course, including the fact that those charged as deportable have violated a trust or opportunity and may have caused harm inside the United States. Considered at the most basic level, however, how can this be rational? If a criminal offense is considered to be “bad” enough to deport someone, how can it not be “bad” enough to warrant keeping someone out of the country in the first place? The movement of individuals from one category to another, such as those who entered without inspection could also support an argument against rationality. Compare INA § 241(a)(1)(C)(ii), 8 U.S.C. § 1251(a)(1)(C)(ii) (amended and transferred 1996) (making being present in the U.S. after having entered without inspection a ground of deportability) with INA § 212(a)(6)(A), 8 U.S.C. § 1186(a)(6)(A) (2012) (making being present in the U.S. after having entered without inspection a ground of inadmissibility).

488. *Campos v. INS*, 961 F.2d 309, 315 (1st Cir. 1992).

the inherent complexities by beginning their opinion in *Blake* with the following sentence: “At issue is a judicial amendment to an unconstitutional statute now repealed.”<sup>489</sup> Even the Supreme Court expressed similar sentiments during oral argument in *Judulang*. Justice Breyer described it as an “arcane area of the law,”<sup>490</sup> and Justice Ginsburg described the cases as “a very confusing set of decisions.”<sup>491</sup> Justice Alito described a particular circumstance caused by the 212(c) cases as “bizarre.”<sup>492</sup> Justice Kennedy asked at one point if the Court had to “just say we’re in this wilderness and we can’t get out?”<sup>493</sup>

Despite its admitted complexity, and these strong sentiments from the courts, 212(c) cannot be so easily dismissed as an aberration. Section 212(c) and the case law interpreting it are not such a departure from the more typical context that they cannot be used to make general deductions and predictions. This is most clear by looking at the stark similarity of the issues discussed in the 212(h) context above. It is also illustrated by the fact that the Supreme Court has heard multiple cases in the 212(c) context;<sup>494</sup> this would have been unlikely to occur had the Court not understood these questions as having broader implications and applicability.<sup>495</sup> In fact, the Supreme Court has substantively cited its 212(c) cases in other contexts.<sup>496</sup> Furthermore, the complexity of the questions presented can be a benefit, as it highlights potential issues with the doctrine as seen in the discussion of the case law above.

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489. *Blake v. Carbone*, 489 F.3d 88, 90 (2nd Cir. 2007).

490. Transcript of Oral Argument at 26, *Judulang v. Holder*, 565 U.S. 42 (2011).

491. *Id.* at 15.

492. *Id.* at 17.

493. *Id.* at 18.

494. See generally *INS v. St. Cyr*, 533 U.S. 289 (2001); *Judulang*, 565 U.S. 42.

495. See SUP. CT. R. 10(a)-(c) (providing reasons that the Supreme Court may consider in determining whether to grant certiorari); Margaret Meriweather Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 391 (2004) (analyzing “the gatekeeping choices that the Justices make as they set the direction in which the Court will proceed”).

496. See, e.g., *Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2015 (2012) (citing *Judulang v. Holder*, 565 U.S. at 45-49); *Vartelas v. Holder*, 132 S. Ct. 1479, 1484-85 (2012) (citing *Judulang*, 565 U.S. at 45-48); *Kawashima v. Holder*, 132 S. Ct. 1166, 1176 (2012) (citing *St. Cyr*, 533 U.S. 289, 320 (2011)); *Padilla v. Kentucky*, 559 U.S. 356, 363 (2010) (citing *St. Cyr*, 533 U.S. at 296); *Dada v. Mukasey*, 554 U.S. 1, 19 (2008) (citing *St. Cyr*, 533 U.S. at 320); *Fernandez-Vargas v. Gonzalez*, 548 U.S. 30, 43 (2006) (citing *St. Cyr*, 533 U.S. at 289).

## 2. *Doctrine and Theory Cannot Help to Reconcile 212(c) and 212(h)*

If the 212(c) and 212(h) expansion cases cannot be reconciled on their face, then the next question is whether some doctrine or theory can be applied to reconcile them now or for the future. This section considers whether immigration exceptionalism, *Chevron* deference, or ABA arbitrary and capricious review may provide an explanation for—or better yet a way out of—the current morass. I ultimately conclude that these doctrines and theory also do not help to reconcile the 212(c) and 212(h) cases, although some may help point to a way forward.

### a) *Immigration Exceptionalism?*

First, the utility of a theory of immigration exceptionalism in this context is easily rejected. It may explain differences in doctrine and application between immigration law and other areas of the law, but as previously discussed, commentators are now questioning whether or not even these differences really continue to exist.<sup>497</sup> In any event, a theory that immigration law differs from other specialty areas of law certainly does not, or should not be allowed to, explain discrepancies and confusion *within* immigration law. Furthermore, even if one accepts the premise that *Congress* has plenary power over immigration, it cannot explain why *courts* should have essentially unrestrained discretion to act in the immigration context, as sometimes seems to have occurred in the 212(c) and 212(h) cases.

### b) *Chevron as Explanation or Savior?*

A second possibility is that looking closely at the role of *Chevron* can explain what is going on in these cases. At first blush, this is an appealing theory. The initial cases regarding the expansion of 212(c) to the deportability context, *Francis* and *Silva*, were decided prior to the Supreme Court's decision in *Chevron*, while the cases regarding the expansion of 212(h) to waive deportability were decided after.<sup>498</sup> Although deference to agency action was not nonexistent prior to *Chevron*, it was not nearly as

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497. See generally LEGOMSKY & RODRIGUEZ, *supra* note 18, at 220-22; Aleinikoff, *supra* note 19, at 34; Johnson, *supra* note 6; Kagan, *supra* note 17; Legomsky, *supra* note 5, at 930-37; Motomura, *supra* note 7, at 1372-73; Motomura, *supra* note 6, at 574-600; Rosenbloom, *supra* note 12, at 1983 n.129 (“A number of scholars have chronicled the emergence of cracks in the plenary power doctrine over the decades.”); Spiro, *supra* note 16, at 341-45.

498. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976); *Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976).

clearly articulated or established as it became in *Chevron*'s aftermath.<sup>499</sup> Perhaps the application of *Chevron* deference in the 212(h) cases and not the 212(c) cases could somehow explain the opposite outcomes reached in those two sets of decisions. This explanation could, in theory, be related to the circuit courts' greater freedom and authority to decide constitutional issues; to the respective likelihoods of the courts and the agency to reach decisions favorable to the noncitizen respondent; or to some other factor related to or arising out of the exercise of *Chevron* deference.

Despite its potential appeal, this theory ultimately proves untrue as a factual matter. First, *Chevron* was only invoked in three of the pre-*Rivas* 212(h) cases.<sup>500</sup> In the others, there was no indication that the Court was deferring to the agency's decision.<sup>501</sup> Therefore, it is unlikely that *Chevron* could be the explanation for the different outcomes reached. Second, the cases considering which grounds of deportability could be waived by 212(c) leading up to *Judulang* demonstrate that the application of *Chevron* is not nearly so straightforward. Even when invoked, *Chevron* can be interpreted and applied in a variety of ways and therefore does not necessarily result in a particular or consistent outcome. Furthermore, the pre-*Judulang* 212(c) decisions demonstrated a fair amount of discrepancy and seeming randomness with respect to when the courts invoked *Chevron* in the first instance, thereby giving the invocation of *Chevron* little predictive or explanatory power.

Even if *Chevron* cannot explain the existing incoherence, perhaps clarifying the application of *Chevron* can fix the inconsistency moving forward. Multiple possible *Chevron* critiques and fixes have been proposed in various contexts. One fix focuses on the role of constitutional avoidance in the *Chevron* two-step test. Commentators have long suggested that constitutional avoidance is a canon of statutory interpretation that should be applied to interpret the statute at *Chevron* step one.<sup>502</sup> This follows logically

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499. See, e.g., Cox, *supra* note 13, at 1681; Lawson & Kam, *supra* note 21, at 6-9.

500. See *Rivas v. U.S. Att'y Gen.*, 765 F.3d 1324, 1328 (11th Cir. 2014); *Poveda v. U.S. Att'y Gen.*, 692 F.3d 1168, 1176-78 (11th Cir. 2012); *Yeung v. INS*, 72 F.3d 843, 843 (11th Cir. 1996); cf. *Lawal v. U.S. Att'y Gen.*, 710 F.3d 1288 (11th Cir. 2013) (not mentioning deference or *Chevron*, but remanding for the Board to clarify their interpretation of 212(h)).

501. *Cabral v. Holder*, 632 F.3d 886, 893 (5th Cir. 2011); *Montano v. U.S. Att'y Gen.*, 350 Fed. App'x 643 (3rd Cir. 2009); *Klementanovsky v. Gonzales*, 501 F.3d 788, 792 (7th Cir. 2007).

502. See, e.g., Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 66 (2008) ("A majority, including the Supreme Court, argues that courts should continue to interpret legislation independently when normative canons would apply, even when Congress has charged a particular agency

both from the nature of step one (to determine what the statute says and whether it is unambiguous)<sup>503</sup> and from the fact that administrative agencies like the BIA have only limited jurisdiction over constitutional issues.<sup>504</sup> If an agency cannot ultimately decide and has no expertise in constitutional issues, perhaps it does not make sense to defer to that agency's interpretation of a statute with constitutional implications. Focusing the identification and resolution of constitutional issues at step one would avoid having to ask this difficult question at step two.

Alternatively, courts could clarify that the analysis of whether a particular interpretation triggers constitutional issues should block the application of *Chevron* deference altogether<sup>505</sup> or should happen during *Chevron*'s step two reasonableness inquiry.<sup>506</sup> A position that questionable constitutional issues should take adjudication outside the scope of *Chevron*

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with the statute's administration."); *cf. Cox, supra* note 13, at 1672-79 (arguing that judicial skepticism of agency decisions may reflect the position that certain types of decisions, such as statutes raising potential constitutional issues, are better left to Congress than to administrative agencies). *But see Stephenson & Vermeule, supra* note 24, at 607-09 ("The relationship between *Chevron* and these other interpretive tools raises a host of difficult and important issues, yet judges and scholars are sometimes distracted by the question whether this or that interpretive tool ought to come into play at Step One or Step Two, instead of focusing on the real questions.").

503. *See Chevron*, 467 U.S. at 842-43.

504. *Matter of Fitzpatrick*, 26 I. & N. Dec. 559, 562 (BIA 2015) ("[W]e have no authority to rule on the constitutionality of the laws enacted by Congress."); *Matter of Fuentes-Campos*, 21 I. & N. Dec. 905, 912 (BIA 1997) ("It is well settled that we lack jurisdiction to rule on the constitutionality of the Act and the regulations we administer."); *Matter of C-*, 20 I. & N. Dec. 529, 532 (BIA 1992) ("[I]t is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations.").

505. *See, e.g., Alina Das, Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 191-96 (2015); Slocum, *supra* note 31, at 546 ("One clear statement canon that seems to clearly displace *Chevron* deference is the constitutional question avoidance canon, which directs that 'if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of a statute is "fairly possible," . . . [reviewing courts] are obligated to construe the statute to avoid such problems.'" (alterations in original)); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000) (describing the canon of constitutional avoidance as trumping *Chevron* on the theory that Congress, not the agency, must choose to raise constitutionally sensitive questions).

506. *See, e.g., Bamberger, supra* note 502, at 68 (arguing that normative canons such as constitutional avoidance should be applied in a contextual inquiry as part of the reasonableness assessment at *Chevron* step two); Slocum, *supra* note 31, at 573-82 (arguing that the immigration rule of lenity, another canon of statutory construction, should be employed as part of *Chevron* step two).

deference would place constitutional considerations even more squarely within the control of the courts and Congress. Placing the inquiry at *Chevron* step two, on the other hand, would give the agency some voice on constitutional questions. Under this approach, if an agency's legal interpretation is unconstitutional, or perhaps even merely presents constitutional issues, the courts would find that agency position unreasonable. This is in fact what many of the courts appear to have done in the 212(c) and 212(h) contexts, but without explicitly so stating or explaining why they chose to address constitutional issues at step two rather than step one. For purposes of this discussion, exactly where the constitutional consideration—here, equal protection—comes into play is less important than clarity on what is occurring and why. Explicit articulation and consideration in the case law of the role of equal protection in or outside of *Chevron* deference, even if there is disagreement among courts, should eventually lead to greater uniformity and predictability.

A second solution focuses on *Chevron* step zero: determining whether *Chevron* is triggered in the first instance.<sup>507</sup> This inquiry can involve multiple questions, including whether the agency is interpreting a statute it is charged with administering, whether the agency position takes a form that merits deference from the courts, and whether *Chevron* or some other standard of deference is most appropriate.<sup>508</sup> Clarifying the standard for determining when *Chevron* does or does not apply would do much to avoid the distortion of the standard and the confusion that has resulted in the 212(c) and 212(h) contexts.

Clarifying the application of *Chevron* in all respects as a means of reconciling inconsistencies in the 212(c) and 212(h) contexts, and even in other aspects of immigration law, has significant merit for all the reasons discussed above. Alone, however, it could not resolve the inconsistencies and incoherence surrounding 212(c) and 212(h) and their expansion to waive grounds of deportability. The 212(h) cases turn in significant part on the fact that the courts found no equal protection concerns, holding in most cases that there were multiple rational reasons for treating noncitizens seeking admission differently than noncitizens facing deportation. Even the most perfect and complete *Chevron* fix, then, could not rationalize the opposite outcomes in 212(c) and 212(h) cases. *Chevron*, equal protection, and other administrative procedures are profoundly interconnected, at least

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507. See generally Holper, *supra* note 30; Sunstein, *supra* note 30.

508. See, e.g., Jack M. Beerman, *Chevron at the Roberts Court: Still Failing After All These Years*, 83 *FORDHAM L. REV.* 731, 741-50 (2014); Eskridge & Baer, *supra* note 33, at 1098-120.

in this immigration context. I argue in Section III.B below that these interconnections must be fully considered both for the 212(c) and 212(h) problem and for the future of immigration law more generally.

c) *Judulang as Savior?*

If *Chevron* cannot reconcile the 212(c) and 212(h) mess, perhaps arbitrary and capricious review under the APA can. Some commentators have presented the Supreme Court's opinion in *Judulang* as not only a recognition of the problem but also a wakeup call for the agency.<sup>509</sup> This theory is also very appealing. The Court used strong language in *Judulang* to criticize the arbitrariness of the Board's interpretation of 212(c) in *Blake* and *Brieva*.<sup>510</sup> The decision has been seen as a warning to the agency that it must provide reasoned, rational explanations for its legal interpretations or the federal courts will overturn them under the APA.<sup>511</sup>

There is some indication that the Board has received this message. The Board's opinion in *Matter of Abdelghany*, announcing its new interpretation for when 212(c) will be available to waive charges of deportability after the old rule was abrogated in *Judulang*, is twenty pages long.<sup>512</sup> The Board explained at length the various possible alternative rules it considered and why it rejected them.<sup>513</sup> The Board then clearly stated what the rule will be moving forward.<sup>514</sup> The Board went even further, however, and attempted to clarify its position on other remaining questions regarding eligibility for 212(c) relief in an effort to provide a comprehensive and definitive resolution.<sup>515</sup> But in other contexts—for example the Board's recent opinion in *Matter of Rivas* taking away the ability for noncitizens charged as deportable to be granted stand-alone 212(h) relief nunc pro tunc to a prior entry—the same lack of clarity and rationality still creep in.<sup>516</sup>

Even if the agency perfectly heeds *Judulang's* call for clarity and rationality, however, it will not be sufficient to solve the problems

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509. See, e.g., Glen, *supra* note 69, at 2; Kevin Johnson, *Opinion Analysis: Judulang v. Holder*, SCOTUSBLOG (Dec. 13, 2011, 10:40 AM), <http://www.scotusblog.com/2011/12/opinion-analysis-judulang-v-holder/>.

510. *Judulang v. Holder*, 565 U.S. 42, 53-63 (2011).

511. See, e.g., Glen, *supra* note 69, at 2; Jeffrey D. Stein, *Delineating Discretion: How Judulang Limits Executive Immigration Policymaking Authority and Opens Channels for Future Challenges*, 27 GEO. IMMIGR. L.J. 35, 37 (2012).

512. *Matter of Abdelgheny*, 26 I. & N. Dec. 254 (BIA 2014).

513. *Id.* at 261-65.

514. *Id.* at 265-66.

515. *Id.* at 266-72.

516. *Matter of Rivas*, 26 I. & N. Dec. 130 (BIA 2013).

identified above. As should be obvious from the circuit court decisions discussed here, the courts of appeals are easily as much, if not more of, an issue than the agency itself. It is the decisions of the courts of appeals that have contributed most significantly to the inconsistencies, errors, and inexplicability of the 212(c)/212(h) context. Furthermore, as discussed above in relation to *Chevron*, arbitrary and capricious review, *Chevron* deference, and equal protection are all profoundly interconnected in these cases. Any comprehensive solution must also consider these relationships.

### *B. Summary and Significance of the Parallels*

The fact that the 212(c) and 212(h) decisions cannot be explained or reconciled at the level of outcome, doctrine, or theory leads to some important insights regarding immigration exceptionalism, immigration law today, and immigration law's intersection with administrative and constitutional law. The application of ordinary administrative and constitutional law principles—specifically *Chevron* deference, arbitrary and capricious review, and equal protection rational basis analysis—by the courts deciding the 212(c) and 212(h) cases demonstrates a clear, continuing erosion of the plenary power doctrine. Analyzing the application of these principles further, there are significant parallels in the courts' analyses regardless of which of the three legal frameworks are employed. Assessing whether an agency's legal interpretation is reasonable under step two of the *Chevron* analysis looks a great deal like analyzing whether an agency's action is arbitrary and capricious under section 706(2)(A) of the APA, which in turn looks a great deal like considering whether there is a rational basis for a particular action under minimal scrutiny equal protection review. Section III.B.1 explores the historical roots of these parallels and draws attention to their occurrence in the case law from Part II.

Courts have only extremely rarely noted these parallels and have never analyzed their significance. This failure is one facet of a larger issue: the courts in the 212(c) and 212(h) cases have primarily engaged in only a surface application of the constitutional and administrative law principles discussed. Section III.B.2 argues that the fact that these courts have not engaged in a deeper analysis of the intersection of these principles or attempted to answer the remaining questions regarding these doctrines highlighted throughout this article is a remnant of plenary power and immigration law exceptionalism. Deeper attempts to explain what these doctrines mean, when and how they apply in the immigration law context, and how they interconnect will be the next step in the erosion of immigration exceptionalism.

### 1. Summary of the Parallels

Considering the immigration, constitutional, and administrative law tracks simultaneously shows us that there are significant parallels among the analyses under each of the three separate frameworks discussed here. The factors that the courts consider and the weight that they give to those factors are substantially similar whether the court is determining if the agency's action is reasonable at *Chevron* step two, if the agency's action is arbitrary and capricious under the APA, or if a statutory distinction is rationally related to a legitimate government interest in an equal protection analysis. These parallels are not just a recent development, but have roots in the origin and history of each doctrine.

First, the *Chevron* reasonableness inquiry shares significant overlap with the APA's arbitrary and capricious review.<sup>517</sup> In fact, the Supreme Court in *Judulang* explicitly acknowledged the analogy between *Chevron* reasonableness and arbitrary and capricious review.<sup>518</sup> The Supreme Court's decision in *Judulang* is the first, and surprisingly the only, major decision in the 212(c) and 212(h) context to explicitly apply arbitrary and capricious review under the APA. In a footnote declining the government's urging to decide the case under *Chevron* deference, the Court found that, even if they had done so, "our analysis would be the same, because under *Chevron* step two, we ask whether an agency interpretation is arbitrary or capricious in substance."<sup>519</sup> At the same time, the Court in *Judulang* expanded the factors courts consider under arbitrary and capricious review in immigration cases.<sup>520</sup> Rather than focusing primarily on the process by which the agency reached its policy interpretation, the courts now look at the substantive merits of that policy.<sup>521</sup> The end result is that arbitrary and capricious review looks even more like the *Chevron* reasonableness inquiry.

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517. An important unresolved question is how a court should determine when to apply *Chevron* deference versus when to apply arbitrary and capricious review. *See, e.g.*, Beerman, *supra* note 508, at 741 ("A major problem with the *Chevron* doctrine, going back to the immediate aftermath of the *Chevron* decision itself, has been the lack of a discernible boundary between cases that should be resolved using *Chevron* deference and cases that should be resolved under some other doctrine, such as the less deferential *Skidmore* deference, non-deferential statutory construction, or arbitrary or capricious review under the Administrative Procedure Act § 706(2)(A).").

518. *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011).

519. *Id.* (citing *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 52 (2011)) (internal quotations omitted).

520. *Cf. Stein, supra* note 511, at 48-52.

521. *Id.*

This correspondence did not originate in *Judulang* but has deep historical roots. The Supreme Court in *Chevron* used both terms appearing in the APA—arbitrary and capricious—to help define when an agency’s action was reasonable: “Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.”<sup>522</sup>

This overlap in language can be traced throughout the 212(c) and 212(h) cases. The Court in *Judulang* uses the term “reasonable” in evaluating the agency’s interpretation.<sup>523</sup> Other decisions, both 212(c) and 212(h), employ the arbitrary and capricious language as part of their *Chevron* analysis. For example, the Fifth Circuit in *Vo*, in assessing the reasonableness of the agency’s 212(c) comparable-grounds interpretation, concluded: “Accordingly, *Vo* has not demonstrated a substantial shift in agency practice sufficient to render the BIA’s interpretation of its own regulation irrational or arbitrary and capricious.”<sup>524</sup> The Ninth Circuit in *Mtoched* also uses the arbitrary and capricious language in describing and applying the *Chevron* reasonableness analysis to the agency’s 212(h) interpretation.<sup>525</sup>

Even more significant than the overlap in language is the correspondence in the factors that the courts actually consider when engaging in the *Chevron* reasonableness analysis and arbitrary and capricious review. In *Judulang*’s arbitrary and capricious review, the Court focused on its conclusion

that the BIA’s approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system. A method for disfavoring deportable aliens that bears no relation to these matters—that neither focuses on nor relates to an alien’s fitness to remain in the country—is arbitrary and capricious.<sup>526</sup>

The Supreme Court was also troubled that the Board’s comparable-grounds approach meant that whether or not a noncitizen was eligible for 212(c) relief would turn on “the fortuitous chance” of an individual officer’s charging decision.<sup>527</sup> Finally, the Court also considered the consistency of

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522. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

523. *Judulang*, 565 U.S. at 55 (“The problem with the comparable-grounds policy is that it does not impose such a *reasonable* limitation.” (emphasis added)).

524. *Vo v. Gonzales*, 482 F.3d 363, 370 (5th Cir. 2007)

525. *Mtoched v. Lynch*, 786 F.3d 1210, 1218 (9th Cir. 2015).

526. *Judulang*, 565 U.S. at 55.

527. *Id.* at 58.

the Board's interpretation with the statutory language, consistency of the Board's position across time, and cost and efficiency considerations offered by the Board.<sup>528</sup> These very same factors were at play in those 212(c) and 212(h) cases where the courts engaged in *Chevron's* step-two reasonableness inquiry and offered substantive discussion of the agency's position<sup>529</sup> beyond citation to prior decisions.<sup>530</sup>

Second, both administrative law doctrines demonstrate remarkable similarity with equal protection rational basis review. Courts in immigration cases, dating back to at least the Second Circuit's 1975 *Francis* decision, have consistently used similar formulations of the minimal scrutiny, or rational basis, standard: "Under the minimal scrutiny test, . . . distinctions between different classes of 'persons must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"<sup>531</sup> This formulation uses both the term "reasonable" from *Chevron* and the term "arbitrary" from arbitrary and capricious review.

As previously discussed, historically arbitrary and capricious review and rational basis analysis have been understood to have substantial similarities. While the Supreme Court officially rejected any comparison between arbitrary and capricious review and the highly deferential rational basis test then used in constitutional due process analysis in 1983,<sup>532</sup> this formulation and the correspondence between the two different tests nevertheless seems

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528. *Id.* at 59-64.

529. *See, e.g., Mtoched*, 786 F.3d 1210, 1218 (9th Cir. 2015) (considering consistency with the statute, the regulation, and Board precedent); *Rivas v. U.S. Att'y Gen.*, 765 F.3d 1324, 1329 (11th Cir. 2014) (considering consistency with the statutory language); *Abebe I*, 493 F.3d 1092, 1101-05 (9th Cir. 2007) (considering consistency with the statute, regulations, and past agency practice); *Vo*, 482 F.3d 363, 369-72 (5th Cir. 2007) (considering consistency with past agency precedent); *Leal-Rodriguez v. INS*, 990 F.2d 939, 950-52 (7th Cir. 1993) (considering consistency with the statutory language); *cf. Poveda v. U.S. Att'y Gen.*, 692 F.3d 1168, 1176-78 (11th Cir. 2012) (focusing on the equal protection question within the reasonableness inquiry).

530. For cases falling into the latter category, where the courts did not actually analyze the reasonableness of the agency position, see, for example, *De La Rosa v. U.S. Att'y Gen.*, 579 F.3d 1327 (11th Cir. 2009); *Caroleo v. Gonzales*, 476 F.3d 158, 166 (3rd Cir. 2007); *Vue v. Gonzales*, 496 F.3d 858 (8th Cir. 2007); *Rodriguez-Padron v. INS*, 13 F.3d 1455, 1460-61 (11th Cir. 1994); and *Chow v. INS*, 12 F.3d 34, 38 (5th Cir. 1993).

531. *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976) (quoting *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

532. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 n.9 (1983).

to have stuck in the immigration context.<sup>533</sup> Furthermore, as previously highlighted, courts appear to not only have considered reasonableness as part of the rational basis test but to have collapsed that analysis into *Chevron* step two.<sup>534</sup> The extremely close linkages among all three of these legal frameworks are thus readily apparent.

## 2. Significance of the Parallels

The vast majority of the courts deciding 212(c) and 212(h) cases have apparently not noticed and have not commented on these parallels. The Supreme Court in *Judulang* was the first major decision to begin to make this connection, and it did so in only a very limited manner.<sup>535</sup> The Court's brief discussion was contained in a footnote.<sup>536</sup> It was concerned only with the relationship between step two of *Chevron* deference and arbitrary and capricious review; it did not address equal protection. It recognized the pattern by noting that its analysis of whether the Board's interpretation was reasonable under *Chevron* would be the same as its analysis that the Board's interpretation was arbitrary and capricious. It did not, however, consider the significance or implications of this conclusion. The Court stated briefly that it found arbitrary and capricious review to be the appropriate legal framework because the Board was not interpreting a statute, but did not fully explore the question of choice of legal framework. It thus left a number of questions unanswered.

The limitations of the Supreme Court's opinion in *Judulang* and the failure of courts generally to note these parallels is one facet of a larger issue: the courts in the 212(c) and 212(h) cases have primarily engaged in only a surface application of the constitutional and administrative law principles discussed. As previously discussed, these decisions result in numerous outstanding issues. For example, the majority of the courts made no attempt to explain why they were selecting a particular legal framework

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533. See, e.g., *Yeung v. INS*, 76 F.3d 337, 340 (11th Cir. 1995); *Komarenko v. INS*, 35 F.3d 432, 434 (9th Cir. 1994); cf. *Rivas v. U.S. Att'y Gen.*, 765 F.3d 1324, 1330 (11th Cir. 2014); *Poveda*, 692 F.3d at 1176-78; *De La Rosa*, 579 F.3d at 1337-39; *Abebe II*, 554 F.3d 1203, 1207 (9th Cir. 2009) (en banc) (per curiam); *Abebe I*, 493 F.3d 1092, 1104-1105 (9th Cir. 2007); *Caroleo*, 476 F.3d at 163, 165. But cf. Brooks, *supra* note 36, at 268-69 n.99 ("Although courts continue to use phrases like 'rational basis' and 'reasoned decision-making' when performing arbitrary and capricious review, the actual test being applied is not nearly as deferential as the constitutional rational basis test." (citations omitted)).

534. See, e.g., *Rivas*, 765 F.3d at 1330; *Poveda*, 692 F.3d at 1176-78; *Abebe I*, 493 F.3d at 1104-05; *Vo*, 482 F.3d at 369-70, 371-72; *Leal-Rodriguez*, 990 F.2d at 950.

535. *Judulang v. Holder*, 565 U.S. 42, 52 n.7 (2011).

536. *Id.*

or combination of frameworks. They did not address how or why *Chevron* deference, arbitrary and capricious review, and equal protection rational basis analysis fit together. They left open many questions specific to each individual doctrine.

The theory of immigration exceptionalism has clearly eroded, as evidenced in the courts' consistent and unquestioning application of constitutional and administrative law principles. At the same time, remnants of the theory still appear to be creating a certain tension in the courts' decisions regarding the expansion of 212(c) and 212(h). This tension reveals the uneasy relationships that originated in the theory of immigration exceptionalism and have always existed among the courts, the executive branch, and Congress in the immigration context. The fact that these courts have not engaged in a deeper analysis of the intersection of these principles or attempted to answer the remaining questions regarding these doctrines highlighted throughout this article is a remnant of plenary power and immigration law exceptionalism. While administrative and constitutional doctrines are being applied, the explanation of what these doctrines mean and how they apply in the immigration law context has been stunted by this historical tension.

Deeper attempts to explain what these doctrines mean, when and how they apply in the immigration law context, and how they interconnect will be the next step in the erosion of immigration exceptionalism. The Supreme Court took a significant step in this direction in its opinion in *Judulang*. The courts, however, appear to have moved backward again in much of their recent 212(h) jurisprudence. Like the initial cracks in the plenary power doctrine, this progress is likely to be slow, non-linear, and to proceed on its own timetable.

### *Conclusion*

The courts' decisions on the expansion of 212(c) and 212(h) waivers to the grounds of deportability are irreconcilable in both outcome and doctrine. It is unjustifiably inconsistent to allow 212(c) waivers to waive virtually all grounds of deportability, but to allow 212(h) to waive virtually none. Furthermore, the courts' choices of legal framework in these cases among *Chevron* deference, arbitrary and capricious review, and equal protection are incoherent. Even within a single doctrine, there is no uniformity in interpretation and application. By looking at the factors that the courts have considered in these cases, however, it is possible to identify significant parallels. What the courts are actually doing in assessing whether the agency's interpretation is reasonable at step two of *Chevron*

looks very much like what they are doing in assessing whether an agency's position is arbitrary and capricious under the APA, which in turn looks very much like what they are doing in assessing whether there is a rational basis for a distinction under equal protection review.

The fact that the courts are regularly applying these ordinary principles of administrative and constitutional law in the immigration context at all illustrates a continuing erosion of the plenary power doctrine and the theory of immigration exceptionalism. However, immigration exceptionalism has nevertheless had a lasting impact on the cases. The courts' failure to identify and analyze the parallels noted above and to engage in a deep analysis of the constitutional and administrative law principles being applied generally is a remnant of plenary power and immigration exceptionalism. This is likely to be the next facet of immigration exceptionalism to crumble, bringing immigration law ever so slowly closer to mainstream legal doctrine. So doing may help the courts focus on the underlying purpose for their analysis and avoid getting caught up in the minutiae and technicalities of the doctrine. This much-needed paradigm shift will build consistency and coherence and will reduce legal errors in immigration jurisprudence.