

# Judicial Review of Discretionary Immigration Decisionmaking

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*The Immigration and Nationality Act vests enormous discretion in the Attorney General and her subordinates, a discretion exercised frequently at all levels of the immigration system. Despite this, though, judicial review of these decisions has followed a very uneven, troubled course. This Article will explore the reasons for this, focusing first on the Administrative Procedure Act and the elusive meaning of discretion itself. It will demonstrate the "disintegration" of administrative law and the failure of its general precepts to accommodate immigration issues. Next, it will trace the development of faulty doctrine through case law, resulting in a terribly stunted judicial review. Finally it will reveal the necessity for developing a more particularized approach to judicial review to afford aliens effective access to our legal system.*

## INTRODUCTION

Aliens are outsiders in this country. This seeming truism is so in both a figurative and decidedly literal sense. Not only are they separate from our national community,<sup>1</sup> but they are likewise frequently outsiders to our legal system. This is especially so in deportation. Though the deportation process embodies many of the protections one expects from a mature legal system,<sup>2</sup> relief from deportation is

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1. See, e.g., T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237 (1983); see also Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

2. See generally 8 U.S.C. §§ 1101-1525 (1988) (Immigration and Nationality Act

often circumscribed dramatically by the presence of a virtually ubiquitous discretion reposed in the Attorney General. And, though she rarely exercises this discretionary power directly, her subordinates do so constantly.

In and of itself, perhaps this seems unexceptional. Discretion is no stranger to administrative law. However, because of the convergence of several dominant themes, discretion has been used as a catchword that justifies potentially arbitrary immigration decisionmaking. Worse yet, judicial review has often been impotent to check this process. Through an insidious synergism of doctrines, discretion has often become a mantle insulating immigration decisions from meaningful review.

The first theme contributing to this dilemma is that of plenary power. This notion is captured by the chilling declaration by the Supreme Court that: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."<sup>3</sup> Though the *Knauff* case dealt with the exclusion of a resident alien, it aptly expresses the mood that immigration legislation is largely immune from constitutional review. And, though plenary power has eroded somewhat recently,<sup>4</sup> it retains considerable resilience.<sup>5</sup> Perhaps this resilience owes to the notion that "the nation's immigration laws represent the exercise by the 'owners' of the national property of their collective right to use the property as they please."<sup>6</sup> By that view, aliens who have overstayed their welcome can complain little, for they then become uninvited guests, even trespassers. Though the plenary power doctrine technically applies only to constitutional attacks on immigration legislation, its judicial adoption reflects a mood decidedly unfavorable to aliens. This mood is intensified by a second, related factor which has stultified judicial review. An alien seeking

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(INA) and amendments).

3. United States *ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950).

4. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 34 (1982). The Supreme Court moved away from the mechanical concept that aliens are perpetually subject to exclusion and thus possess no extra-statutory remedies, and employed an explicit *Matthews v. Eldridge*, 424 U.S. 319 (1976), analysis in determining the process due a returning permanent resident alien in exclusion proceedings. *Id.*

5. For a critique of the plenary power theory, see, e.g., Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389-96 (1953); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 51-53 (1989); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

6. Legomsky, *supra* note 5, at 269. Professor Legomsky offered this as one possible justification for the notion of plenary power. *Id.* However, he went on to note that the question should not be one of the proper source of congressional power over immigration, but of its proper exercise. *Id.*

the favorable exercise of discretion is usually someone subject to deportation.<sup>7</sup> Thus, having violated our immigration laws, she then turns to the system seeking discretionary relief. She appeals to our compassion, seeking to remain in this country. Yet such a claim seems incompatible with an entitlement. That is, if the initial decisionmaker *need not* afford relief, it's hard to understand how the alien can have any claim of right to that relief which must be recognized by an appellate court.<sup>8</sup> Though this seems to resurrect the somewhat dated rights-privilege dichotomy,<sup>9</sup> it need not. Whether it does depends on what we mean by discretion. It's easy to see, then, how discretionary decisionmaking, especially regarding aliens, would seem like an unlikely candidate for rigorous judicial review.

The final force leading to the stunted judicial review of immigration decisions is the general development of the law of the unreviewability of administrative action. Within one year in the 1980s, the Supreme Court authored two critical decisions affecting judicial review of administrative action. First, in *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*,<sup>10</sup> a unanimous Court held that if a statute is silent or ambiguous, a court should defer to an agency's permissible construction of that statute and not engage in its own construction.<sup>11</sup> Though *Chevron* has not been interpreted

7. That is, the discretion previously referred to exists in statutes which potentially provide discretionary relief from deportation. See 8 U.S.C. §§ 1182(c), 1254(a) (1983 & Supp. V 1993).

However, a nonimmigrant who has not violated her immigration status may apply affirmatively for asylum, yet have it discretionarily denied. The statute provides that she "[m]ay be granted asylum in the discretion of the Attorney General." 8 U.S.C. 1158(a) (1988).

8. *Board of Pardons v. Allen*, 482 U.S. 369, 373-81 (1987). The Court discussed the relationship between the discretionary nature of parole decisions and whether the prisoner had a cognizable liberty interest. *Id.* Though the majority perceived no incompatibility between official discretion and a liberty interest, the dissenters decidedly disagreed. *Id.* at 383 (O'Connor, J., dissenting). By their view, "an entitlement is created by statute only if 'particularized standards or criteria' constrain the relevant decisionmakers." *Id.* at 382-83 (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981)).

9. See, e.g., William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (discussing the rights and privileges dichotomy).

10. 467 U.S. 837 (1984).

11. *Id.* at 843-44.

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Id.* (footnote omitted).

uniformly, it is widely regarded as a case insulating the executive from judicial scrutiny.<sup>12</sup> But *Chevron* does not stand alone.

Within a year after *Chevron*, the Court attempted to reconcile two seemingly conflicting provisions of the Administrative Procedure Act.<sup>13</sup> While the Act permits a reviewing court to set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”<sup>14</sup> it also insulates from review any matters “committed to agency discretion.”<sup>15</sup> In *Heckler v. Chaney*,<sup>16</sup> the Court concluded that when a court has “no meaningful standard against which to judge the agency’s exercise of discretion . . . the statute (‘law’) can be taken to have ‘committed’ the decisionmaking to the agency’s judgment absolutely.”<sup>17</sup> Thus, there is simply no law to apply and judicial review would be futile.

Taken together, these cases can virtually eliminate meaningful judicial review. Many statutes, including a host of immigration statutes, simply provide no manageable standards for the exercise of discretion. Their interpretation would seem to be confined to the agencies in the first instance, and even then, in the absence of internal standards for interpretation, it is hard to see how they can avoid a fateful brush with *Heckler*.<sup>18</sup> Untethered to any controlling standards, the notion of discretion reposes virtually uncheckable power in decisionmakers. Judicial review would seem futile, if not impossible.

But that need not be. In this Article, I will show how judicial review is virtually indispensable to the successful operation of the administrative state. The Administrative Procedure Act set certain bounds for the exercise of judicial review. It reflects a recognition that some matters must be decided by agencies, unhampered by judicial second-guessing. And that makes sense. Agencies, as creatures of statute, often forge those policies that cannot practicably be embodied in their legislative charters. This is part of what they do and should do.

However, that position can lead to absurd excesses. Presumably,

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12. Indeed, heralding *Chevron* as an important and needed decision, Justice Scalia commented: “*Chevron*, however, if it is to be believed, replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.” He further stated that “[b]road delegation to the Executive is the hallmark of the modern administrative state . . . .” Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 516.

13. 5 U.S.C. §§ 702, 706 (1988).

14. *Id.* § 706(2)(A).

15. *Id.* § 701(a)(2).

16. 470 U.S. 821 (1985).

17. *Id.* at 830.

18. It should be pointed out that *Heckler*, by its own terms, only included “agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise.” *Id.* at 838.

as part of the executive branch, agencies are politically accountable. But that is surely more fiction than reality. Thus, I will show that the view that agencies should be deferred to because of their political legitimacy is naive and unrealistic.<sup>19</sup> Moreover, the model of judicial review spawned by this thinking is likewise misguided. Courts need not be viewed as antagonists of the agencies, frequently seeking to smuggle in their notions of justice in the face of agency decisionmaking. Rather, the relationship must be reconceptualized to reflect the need for dialogue between the two branches, a dialogue that can lead to the orderly and coherent development of the law. This notion will be developed in the first part of this Article.

In the second part of this Article, I will explore the concept of discretion itself to demonstrate the variety of notions encompassed in that seemingly simple word. The incantation of the word "discretion" is a conversation stopper. It would seem to mean that someone has exercised a power unconstrained by legal rules. In that vein, it would lead to the notion that review of discretion is doomed for the following reason: one cannot determine if discretion is abused if no determinate standards exist for its use. By that view, review would seem to be impossible.<sup>20</sup> Here, I will rely on various threads of jurisprudential literature to explore the concept of discretion and expose the various meanings attributed to that word. Thus, since little agreement exists on its meaning beyond the barest superficialities, it is striking that the literature of all three branches of government treats it as a unitary, coherent concept.

In the third part, I will examine how this "discretion talk" has resulted in confusion in a variety of areas of immigration law. Specifically, I will focus on several lines of cases to demonstrate the origins and spread of some profoundly misguided doctrine. This doctrine reflects the common features of a retreat from meaningful judicial review and the resulting willingness to leave the development of immigration standards to the administrative system. But these judicial developments represent an unacceptable insensitivity to the human dimension of these cases.

Finally, then, I will show the necessity for courts to adopt a more

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19. Indeed, immigration decisionmaking does not result from the operation of a cohesive, unitary body, but is both ideologically and even geographically diffused. This assuredly belies the notion that the law, at the agency level, speaks with one voice.

20. That assumes, of course, that no standards have been articulated. If they have, the situation changes. However, my point is that the very concept of discretion often embodies the view that it isn't rule-based, and leads to reactive decisionmaking that is neither demonstrably correct or incorrect. It is simply "discretionary."

pragmatic approach to review, tailoring the degree of scrutiny to the particular demands of different kinds of cases. This approach results from the practical necessities of recognizing the various forms that discretion takes and the profoundly human aspect of immigration cases. Though this approach probably reflects what some courts are doing, that should be removed from the shadows and more openly and clearly elaborated.

## I. UNREVIEWABILITY LAW

“Administrative law is inseparable from constitutional and political theory.”<sup>21</sup> Though unquestionably true, this seeming axiom has led numerous commentators in as many directions. Yet, perhaps this welter of reactions reflects a failure to grasp the role of agencies in the administrative state.

Agencies are the product of the legislation creating them. This legislation, unquestionably wide-ranging, operates in a vast variety of areas. And, agencies engage in numerous functions, of which rulemaking and adjudication are only the most obvious examples. In these functions agencies must frequently interpret their governing statutes in their efforts to act in harmony with this law. Yet, these statutes are frequently open textured,<sup>22</sup> often providing only sketchy guidelines for the agencies to follow. Thus, agencies must frequently proceed based on a kind of best guess of whether their actions will be consonant with their statutes.

Commentators have not reacted happily to this absence of discernible standards. Professor Pierce has created a typology of four kinds of statutory standards for agency action: meaningful standards, traditional empty standards, lists of unranked decisional goals, and contradictory standards.<sup>23</sup> Obviously, only the first category comports with a conventional concept of law. The others leave the agencies with enormous power to engage in the creation of law. This fact has led many, including Pierce, to the conclusion that Congress is not doing its job properly. It has delegated lawmaking quite obviously to the executive branch. But it is unclear how the legal system should react to that notion.

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21. Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 *TEX. L. REV.* 469, 470 (1985).

22. I borrow this term from H.L.A. HART, *THE CONCEPT OF LAW* (1961). Hart believed that all rules possess a “fringe of vagueness or ‘open texture’ . . .” *Id.* at 120. From this he concluded that “there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.” *Id.* at 132.

23. See Pierce, *supra* note 21, at 473-78.

### A. Delegation and Separation of Powers

For a brief time, the Supreme Court enforced the delegation doctrine.<sup>24</sup> By that view, any statute delegating an unguided authority to an agency was unconstitutional. This view flowed from the general maxim that: "[T]he general rule of law is, that a delegated authority cannot be delegated."<sup>25</sup> Thus, since Congress draws its power from the Constitution, it cannot, constitutionally, redelegate its legislative power. However, the delegation doctrine has remained inert since 1935.

Yet doubts obviously remained about the wisdom, even the legality, of reposing substantial lawmaking power in agencies.<sup>26</sup> And it's here that legal commentary has been most divided. By some views, agency lawmaking would seem to be a practical necessity. It would seem to fill in that necessarily open texture of statutory law. Viewed in that manner, not only must agencies exercise this function, but that exercise must be honored because of the separation of governmental powers. That is, since agencies are part of the executive branch, they are politically accountable. They are, then, by this view, likely candidates for lawmaking. Thus, this argument is practically grounded in necessity and agency competence, but also has decidedly political theoretical justifications.

Proponents of this view see deference to agencies as a matter of constitutional duty, though others have grounded deference in vague notions such as agency expertise or the like.<sup>27</sup> Explaining the demise of the nondelegation doctrine, Professor Douglas Kmiec stated that

24. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

25. *Shankland v. Washington*, 30 U.S. (5 Pet.) 389, 395 (1831).

26. Indeed, perhaps the seminal work criticizing the legislative bent of creating vast amounts of discretionary decisionmaking is Professor Kenneth C. Davis' *Discretionary Justice: A Preliminary Inquiry* (1969). Professor Davis states:

But the legislative bodies, sensing the need for administrative discretion on one problem after another, have gone on delegating, as even the most conservative legislatures have felt compelled to do. The result is perhaps the most significant twentieth-century change in the fundamentals of the legal system has been the tremendous growth of discretionary power. . . . [I]n this country we have developed a habit of allowing discretionary power to grow which far exceeds what is necessary and which is much less controlled than it should be. What we need to do is to work on the third reason, not to minimize discretion or to maximize its control, but to eliminate unnecessary discretion and to find the optimum degree of control.

*Id.* at 20.

27. Indeed, Justice Scalia posits constitutional duty as the theoretical basis for deference to agency decisions. See Scalia, *supra* note 12, at 514, 516.

“it is analytically inconsistent and contrary to the assignment of political responsibility within our constitutional structure for the judiciary to tolerate liberal delegations of authority to executive agencies and, then, selectively undermine or displace that authority when it is exercised.”<sup>28</sup>

Animating this view are two closely related notions. First, deference flows from the simple fact that courts refuse to enforce the nondelegation doctrine. Thus, since delegation is constitutionally tolerated, it is odd and unacceptable to second-guess the results of this delegation: the actions taken by agencies. But that view assumes its conclusion — namely, that agencies should be deferred to simply because Congress has not legislated with requisite specificity. It virtually tells the courts not to interfere unless they are willing to revive nondelegation. That would seem to allow little breathing room for judicial review, and constitutes its own analytical anomaly. Courts now are being denied their essential review function simply because Congress has done poorly.

But opponents of substantial judicial review are emboldened by a second factor. They insist that judicial deference is required by majoritarianism.<sup>29</sup> Distilled to its essence, this view reflects the position that since agencies are, formally and functionally, part of the executive branch of government, they are more politically responsive than judges. In some fashion, at some time, their decisions are subject to political inspection, and thus must comport with the public will. This stands in marked contrast to the role of federal judges, who enjoy lifetime appointments and do not operate in the hurly burly of the political process. This provides a principled justification for reposing decisive lawmaking authority in agencies.

However, critics of broad deference likewise seek to protect the separation of powers, but feel that virtually unreviewed agency decisionmaking violates it. These arguments are more obviously rooted in notions of constitutional regularity. That is, since *Marbury*,<sup>30</sup> judicial review has been a legal commonplace. Article III of the Constitution<sup>31</sup> calls for an independent judiciary and the majoritarian arguments advanced by advocates of broad deference have an odd ring.

Even setting aside the likelihood that political accountability of

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28. Douglas W. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269, 269-70 (1988).

29. See generally Pierce, *supra* note 21. See, e.g., Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 98 (1985).

30. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). “It is emphatically the province and duty of the judicial department to say what the law is.” *Id.* at 177.

31. U.S. CONST. art. III.



agencies is more illusion than reality,<sup>32</sup> opponents of judicial review face what would seem to be advancing a logically untenable position. Judicial review is always non-majoritarian in some sense. Thus, their arguments strike at review itself, a clearly indefensible position.<sup>33</sup> Some deference will always be required by review courts. However, advocates of broad deference would tilt the scales massively in favor of the agencies, thus divesting the courts of an essential function.

This debate has no winner, then. Clearly judges are not politically accountable. Just as clearly, judicial review represents some form of interference with the operation of the executive branch. But given the constitutional requirement of an independent judiciary, courts obviously must play a role in checking the potential errors and excesses of the other branches of government. The only real questions, then, concern the areas in which courts should play a particularly active role in performing this assigned function.<sup>34</sup>

Thus, narrowing the debate to these remaining real questions, commentators have noted some oddities about judicial review of administrative actions. Justice Stephen Breyer, a longtime student of

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32. That is, the path from the decisionmaking bureaucrat to the politically accountable member of the executive is so tortuous and attenuated that it is hard to see how accountability exists in any realistic sense.

33. Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 814 (1991). He states:

It is peculiar to use majoritarian concerns to defeat judicial review. If we accept this argument's premise, then judicial review, which is necessarily non-majoritarian, will always be defeated. At some point, however, one must confront the fact that, although majoritarian concerns influenced the Constitution, the structure of government involves a balance of majoritarian and non-majoritarian practices and institutions, including the establishment of an independent judiciary.

*Id.* (footnote omitted).

34. Several commentators have acknowledged the non-majoritarian nature of review, but have resisted the view that courts should abdicate their constitutional responsibility. Thus, they correctly note that the question becomes one not of whether or not deference should be afforded, but rather one of its degree. See, e.g., Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 865. Professor Linda Hirshman has reached a similar conclusion, writing that:

Neither a free-floating ad hoc procedural solution nor a prescription for interfering where Congress has clearly authorized agency action, judicial review of agency action for conformity to law, as interpreted by the courts in the exercise of their constitutional and statutory function of reading statutes, plays an important role in keeping the system in the balance it requires.

Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 676 (1988) (footnote omitted).

administrative law, perceived a particularly strange anomaly.<sup>36</sup> Although we would think that courts would have greater competence to review issues of law than policy, he concluded that unreviewability law has taken the opposite turn. Thus, he wrote:

The law 1) requires courts to defer to agency judgments about *matters of law*, but 2) it also suggests that courts conduct independent, "in-depth" reviews of agency judgments about *matters of policy*. Is this not the exact opposite of a rational system? Would one not expect courts to conduct a stricter review of matters of law, where courts are more expert, but more lenient review of matters of policy, where agencies are more expert?<sup>37</sup>

Justice Breyer is right. Moreover, his observations reveal a fundamental, though often unnoticed, fact about administrative law. Because of the enormous variety of administrative agencies and because of the extraordinary diversity of their subject areas and kinds of institutional actions, it is simply silly to talk about an administrative law. And, if that is true, it is fanciful to believe that the Supreme Court can create any single standard to guide review courts.

Professor Elliott captures this nicely in speaking of the "dis-integration" of administrative law.<sup>37</sup> Although it is comforting to think of an administrative law (though resisting the notion of its unitary quality can lead to untidiness), common reality principles dictate the recognition of the diffuseness of administrative law. Although the various areas of administrative law share many characteristics, it is more apt and more useful to candidly recognize that the overarching concept of a unitary administrative law appeals more to sentiment than reality. Instead, as Elliott suggests, "the center of gravity has shifted away from the broad, overarching generalizations of the administrative law of the 1960's toward more particularistic statutory and policy objectives."<sup>38</sup>

If Elliott is right, as I believe he is, the task is to encourage a relationship between the judiciary and the agencies that facilitates the mature development of the law. Much of unreviewability law and literature reflects an essential fear of a reckless, policy-mongering judiciary. It does not admit of the possibility that courts and agencies can work together to develop the law. Thus, unreviewability theorists implicitly posit an antagonistic model of the relationship between these branches of government. But this notion must be resisted in favor of recognition that courts and agencies can join in a dialogue through which the law can grow to address effectively the

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35. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986).

36. *Id.* at 397.

37. E. Donald Elliott, Jr., *The Dis-Integration of Administrative Law: A Comment on Shapiro*, 92 YALE L.J. 1523 (1983).

38. *Id.* at 1532 (footnote omitted).

rich diversity of issues presented.

### B. *Chevron and Heckler*

Thus far, I have been talking about one aspect of unreviewability, the notion that courts often should defer to agencies in their interpretations of law, a view springing from the Court's unanimous decision in *Chevron*. In that case, the Court considered the issue of "whether [the] EPA's decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based on a reasonable construction of the statutory term 'stationary source.'"<sup>39</sup> That term was part of the Clean Air Act Amendments of 1977.<sup>40</sup> The District of Columbia Circuit Court of Appeals had set aside the regulations calling for this single bubble rule, noting that both the legislation and its history were inexact on this issue.<sup>41</sup>

The Supreme Court reversed, noting that the circuit court's basic error was its adoption of a static definition of the statutory term.<sup>42</sup> Instead, the Court held that if Congress has been silent or ambiguous about the meaning of a statutory term, courts should yield to a permissible agency construction.<sup>43</sup> The Court did this on the express ground that Congress' failure to elucidate a term constituted a delegation to the agency to interpret the law.<sup>44</sup> Thus, by that view, the agency construction should only be set aside if it is "arbitrary, capricious, or manifestly contrary to the statute."<sup>45</sup>

Debate about *Chevron* has been extensive, even wearisome, so I will not rehash these issues. However, one fact is clear: a unanimous Court reposed the primary task of interpretation in the agencies, a view that would seem to founder on the assignment of roles to these coordinate branches of government. But that may fail to recognize the complexity of the issues addressed by agencies and thus may

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39. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 840 (1984).

40. Pub. L. 95-95, 91 Stat. 685 (pertinent amendment codified as amended at 42 U.S.C. § 7502(b)(6) (1988)).

41. *National Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718 (D.C. Cir. 1982).

42. *Chevron*, 467 U.S. at 842.

43. *Id.* at 843.

44. *Id.* at 843-44.

45. *Id.* at 844.

misconstrue the reach of *Chevron*. As Professor Pierce noted, Congress often provides agencies with inadequate standards for the performance of their work.<sup>46</sup> This work includes a wide variety of tasks. Thus, it may make a great deal of sense to defer to agencies on some issues, yet not on others.

If *Chevron* reflects the Court's views on the comparative competence of courts and agencies to decide technical, dynamic issues, then it offers sensible guidance. Indeed, even Professor Sunstein noted the virtue in giving agencies the opportunity to administer their own laws in response to changing facts and needs.<sup>47</sup> However, Sunstein and others have recognized the continued need for courts to play an instrumental role in the interpretation of statutes, and recognize that *Chevron* is but one guide in this interpretive venture.<sup>48</sup> If that is so, then *Chevron* need not deprive courts of their jurisdiction, but can fit comfortably within accepted notions of the allocation of resources within our government.

If, then, *Chevron*, in and of itself, does not necessarily chill judicial review, this aspect of unreviewability law may be unobjectionable. Surely *Chevron* has been misapplied, but that can be corrected. If the courts can continue to engage in meaningful judicial review without impugning *Chevron*, then constitutional regularity can be restored.

However, unreviewability law contains a second thread, potentially as hostile to judicial review as *Chevron*. The "no law to apply" view of *Heckler*,<sup>49</sup> taken together with *Chevron*, poses an enormous threat to constitutional regularity. The *Heckler* court attempted to resolve two seemingly irreconcilable provisions of the Administrative Procedure Act, one allowing review for abuse of discretion,<sup>50</sup> the other barring review of matters that are "committed to agency discretion by law."<sup>51</sup> It did that in the context of the FDA's refusal to take enforcement actions with respect to drugs used for lethal injections to carry out the death penalty.<sup>52</sup>

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46. Pierce, *supra* note 21, at 473-78.

47. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2088-89 (1990). Professor Sunstein states:

In these circumstances, a grant of interpretive authority to administrators, allowing them to take changed circumstances into consideration, seems to be a valuable if partial corrective. The result is to confer a power of adaptation on institutions that combine the judicial virtue of continuing attention to individual contexts and new settings with the legislative virtue of a fair degree of electoral accountability.

*Id.* (footnote omitted).

48. *Id.* at 2105; see also Maureen B. Callahan, *Judicial Review of Agency Legal Determinations in Asylum Cases*, 28 WILLAMETTE L. REV. 773, 784 (1992).

49. *Heckler v. Chaney*, 470 U.S. 821 (1985).

50. 5 U.S.C. § 706 (1988).

51. *Id.* § 701(a)(2).

52. *Heckler*, 470 U.S. at 823.

The Court, refusing to second-guess the FDA, simply upheld its decision not to act in this area. In doing so, it noted that, though review is generally favored,<sup>53</sup> for a narrow range of cases “‘statutes are drawn in such broad terms that in a given case there is no law to apply.’”<sup>54</sup> Thus, the Court confined this case to the situation in which an agency had refused to initiate enforcement action under a statute that provided no guiding standards for the exercise of discretion.

Viewed narrowly, *Heckler* is certainly benign. However, it has not uniformly been read that way. Indeed, one commentator coined the term “futility theory” to capture one mood of judicial review.<sup>55</sup> As Professor Levin explains:

[A]n action should be deemed “committed to agency discretion” if judicial review would be infeasible and therefore futile. The futility theory is superficially plausible to the extent one equates abuse of discretion review with an inquiry into whether the agency used legally relevant factors in exercising its discretion. If there are no legally relevant factors, the argument goes, a court obviously cannot conduct this inquiry.<sup>56</sup>

Although Levin argues that substantive review is always possible, and does not depend on the governing statutes,<sup>57</sup> others disagree. Thus, Levin suggests that “pure” abuse of discretion review is available and is, indeed, “an integral part of contemporary administrative law and practice . . . .”<sup>58</sup> By his view then, courts are not hampered by empty statutes, but can inquire into such matters as whether an agency misunderstood the facts, departed from precedent, or made an unconscionable value judgment.<sup>59</sup> Although others agree with Levin,<sup>60</sup> the contrary view has a seductive appeal which has drawn many to it. And here, the confluence of *Chevron* and *Heckler* is clear.

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53. *Id.* at 829-30.

54. *Id.* at 830 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

55. Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 707 (1990).

56. *Id.* at 707-08 (footnotes omitted).

57. *Id.*

58. *Id.* at 708.

59. *Id.*

60. See, e.g., Kenneth C. Davis, *No Law to Apply*, 25 SAN DIEGO L. REV. 1, 10 (1988) (“A reviewing court *always* has the meaningful standard of reasonableness, that is, the court’s own judicial judgment about reasonableness.”); Sharon Werner, Note, *The Impact of Heckler v. Chaney on Judicial Review of Agency Decisions*, 86 COLUM. L. REV. 1247, 1266 (1986) (“An agency’s discretion, however, is never unlimited. Judicially manageable standards always exist where the plaintiff alleges that the agency’s action contravenes some universally accepted constraint on agency discretion.”).

*Chevron* easily can be seen as reflecting a mood regarding the proper relationship between the courts and the administrative state. By one view, it exhorts courts to adopt an exceedingly deferential posture regarding agency action. Courts following that view would find additional support for deference in *Heckler*. That is, once you assume an abstemious position, that view is readily reinforced by a decision which, at least by one reading, tells you not to disturb an agency decision unless the decision violated articulated statutory guidelines. Thus, in the absence of such guidelines, Levin's "futility theory" might govern. And, immigration law is rife with statutes providing seeming carte blanche for the exercise of discretion.

Judge Easterbrook's opinion in *Achacoso-Sanchez v. INS*<sup>61</sup> reflects this judicial attitude in virtually pristine form. There, the court was confronted by an exceedingly litigious alien who had "jumped the queue . . . and [had] resisted all invitations to rejoin the queue abroad."<sup>62</sup> His task was to review the denial of various forms of discretionary relief to her.

In doing so, he first invoked the plenary power doctrine, noting that "'over no conceivable subject is the legislative power of Congress more complete' than with respect to immigration."<sup>63</sup> Next, he found that she could assert no right, since neither the statutes nor the regulations embodied any objective criteria for application. Thus, he found no asserted liberty or property interest.<sup>64</sup>

But Judge Easterbrook went beyond this and his comments demonstrably reveal the "futility theory." His language is particularly helpful:

The absence of substantive rules means more than just the absence of "liberty or property." It means the absence of standards for judges to use. The judicial process is a system of rational application of rules to facts. When there are no rules or standards there is neither legal right nor legal wrong. . . .

In the language of administrative law, the grant of discretionary relief under the immigration laws is a question on which there is "no law to apply," and when there is no law to apply judicial review is exceedingly constricted. When there is no governing legal rule, it is fatuous to speak of "error" in the disposition of a given case. Judges, specialists in the applications of standards of decision to facts, and in the rooting out of error, have little to contribute.<sup>65</sup>

Thus, the circle is now closed. This view of judicial review reflects the conflation of various threads of doctrine. Put bluntly, though, it reveals an indisposition to afford meaningful judicial review in the

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61. 779 F.2d 1260 (7th Cir. 1985).

62. *Id.* at 1263.

63. *Id.* at 1264 (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

64. *Id.*

65. *Id.* at 1264-65 (citations omitted).

absence of articulated statutory or regulatory standards. Since no such standards exist in immigration law, were Easterbrook's view to hold sway, judicial review would effectively be closed to all immigration cases in which aliens seek discretionary relief.

But one facet of Judge Easterbrook's opinion requires closer inspection. He used the word "right" in several instances, but with different meanings. First, he asserted that the alien could not claim a right to the relief sought. Here, he was speaking about cognizable legal rights. However, as the opinion progressed, he spoke from the point of view of the appellate judge, noting that without standards, that judge could not assess the correctness of the action taken below; she could not tell whether the agency acted correctly or in error. This being so, the judge could do little but uphold that view and only reverse in the presence of egregious action.<sup>66</sup> Easterbrook indissolubly linked these related notions of right, thus closing the door on real judicial review. In the absence of a claim of right delineated by standards, any claim of error was effectively futile. Discretion dictated that.

Unfortunately, throughout much "discretion talk," commentators refer to discretion as if it were determinate, bearing a single meaning. That is hardly so. Rather, many have argued persistently that discretion is hydra-headed, possessing a multitude of meanings. If that is so, then review of discretionary decisionmaking need not take one cast, but can and should differ markedly from one kind of case to another. However, though unreviewability law does not bar review of discretionary decisions, some would foreclose review because of the nature of discretion itself. It remains to be seen whether that makes sense.

## II. DISCRETION TALK

Discretion talk takes on a particularly annoying cast. Often, the original decisions are made with little explanation, leaving appellate

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66. Judge Easterbrook said that the "Board [of Immigration Appeals (BIA)] 'abuses its discretion' when it acts for a forbidden reason or for a reason that a court *can* determine is erroneous." *Id.* at 1265. Thus, he adopted the view adopted by some other circuits that: "The denial [of a motion to reopen] will be upheld unless it "was made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis such as invidious discrimination against a particular race or group."'" *Id.* (quoting *Williams v. INS*, 773 F.2d 8, 9 (1st Cir. 1985) which quoted *Balani v. INS*, 669 F.2d 1157, 1161 (6th Cir. 1982)) (alteration in *Williams*). Obviously, this provides an exceedingly narrow ambit for judicial review.

tribunals to guess at their basis in deciding whether an abuse of discretion has taken place. Then, after reciting the appropriate standard of review,<sup>67</sup> the court passes on the discretionary decision. Yet throughout this dialogue, something is obviously missing. The speakers often seem to be talking past one another, though that fact goes unnoted. The charade plays itself out with the audience startled at the ratio of subtext to explicit discussion. Sometimes, though, someone breaks this cycle.

In a recent case,<sup>68</sup> Judge Richard Posner expressed himself with unusual candor and force. Reviewing the Board of Immigration Appeals' (Board) affirmance of a discretionary denial by an immigration judge, Judge Posner used the terms "astonishingly," "irresponsible," and "incoherently" to characterize the quality of reasoning under review.<sup>69</sup> Particularly perturbed by the government's statement that the Board has no fixed standard of review, thus varying its standard from case to case, he replied, "[t]hat won't do."<sup>70</sup>

Indeed, Posner seemed particularly irked by the government's easy explanation of this inconsistency. It is here that he used the word "incoherently" to describe the argument of the government's lawyer.<sup>71</sup> He recoiled at the intellectual flaccidity of the view that if the Board agreed with the immigration judge it used the abuse of discretion standard, but, if it disagreed, it engaged in *de novo* review. To Judge Posner, that simply meant that in posing the very question of whether the Board agreed with the judge, it was engaging in *de novo* review. For him, this totally muddied the notion of review, leading him to conclude that it was "high time that the Board of Immigration Appeals examined its relationship to the immigration judges."<sup>72</sup>

Perhaps we can conclude that Posner is simply naive, unaware, or simply unacceptant of sloppy thinking, especially in this area. However, it may be that he is particularly unwilling to participate in the new game of judicial review, a venture in which language and review functions are distorted. He was troubled that "the Board seems not to have made up its mind . . . whether the immigration judge is a sufficiently responsible officer to justify the Board's in effect delegating the making of the necessary discretionary judgment to him."<sup>73</sup> Posner's comments, indeed the entire scenario of this little case, may reflect more than the intolerance of a former academic of intellectual

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67. As shall be noted in the text, the standard of review may differ as to different aspects of the discretionary decision.

68. *Ortiz-Salas v. INS*, 992 F.2d 105 (7th Cir. 1993).

69. *Id.* at 107-08.

70. *Id.* at 107.

71. *Id.* at 108.

72. *Id.*

73. *Id.* at 108.



sloppiness; this case may, in microcosm, reflect some deep ambiguities about discretion itself.

Maurice Rosenberg has noted at least two separate meanings to the term "discretion."<sup>74</sup> He identifies these as "primary" and "secondary" types of discretion.<sup>75</sup> By Rosenberg's account, primary discretion is decisionmaking discretion, freeing the decisionmaker from the constraints of rules.<sup>76</sup> This form has strong jurisprudential implications, raising some difficult questions about the relationship between rules and discretion.

Secondary discretion "has to do with hierarchical relations."<sup>77</sup> It is an institutional concept, serving a review-restraining function. Thus, this form of discretion substantially insulates the antecedent decision from scrutiny and thus reversal. Yet, though Rosenberg's typology has been criticized,<sup>78</sup> couldn't his view account for the Board's inconsistency on its standard of review? Although Posner inveighed against its inconsistency, perhaps the Board simply engages in de novo review when it envisages discretion in this primary sense, yet uses the abuse of discretion standard when it conceives of discretion in the secondary sense.

Naturally, it is irrelevant whether this is an accurate description of the Board's conduct, though it could be. But it is important to recognize that discretion is an unmanageable legal concept precisely because it has been used in such diverse ways. Thus, to ignore these divergent uses, indeed different exercises of discretion, misses the point that discretion is a vastly overburdened legal concept. A veritable legal chameleon, it serves double, triple duty, and more. As Wittgenstein observed, it is nonsense to think a variety of things are the same just because you use a single word to refer them.<sup>79</sup> Continuing in that vein, though discretionary acts bear "family resemblances,"<sup>80</sup> their differences cannot be ignored. These differences must be recognized for judicial review to have some semblance of coherence and efficacy.

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74. See Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971).

75. *Id.* at 637.

76. *Id.*

77. *Id.*

78. See, e.g., Charles M. Yablon, *Justifying the Judge's Hunch: An Essay on Discretion*, 41 HASTINGS L.J. 231, 250 (1990).

79. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 67 (G.E.M. Anscombe trans., 3d ed. 1958).

80. *Id.* at 67.

### A. *The Two Problems with Discretion: Definition and Context*

For judicial review to operate competently, courts must recognize two distinct problems with the concept of discretion. First, substantial disagreement exists over the core meaning of the term. Before analysis can proceed sensibly, we must agree, however provisionally, on a meaning of discretion that effectively accounts for the use of the term.

A second problem looms, though. Even assuming we agree on what it means to exercise discretion, we must acknowledge the fact that discretionary acts take place in a variety of settings. Thus, even if we agree on what discretion means, we have to recognize that the kind of scrutiny afforded discretionary acts may well vary with the circumstances of its exercise. For example, rulemaking is different from adjudication, and thus it might make sense to defer more broadly to discretionary rulemaking than to its adjudicatory counterpart. Indeed, this may explain much of *Chevron*. There, the Court concluded quite tellingly that “the EPA’s use of [the bubble] concept here is a reasonable policy choice for the agency to make.”<sup>81</sup>

The Court’s reference to policy is helpful. Because of Congress’ lack of prescience, the Court afforded the agency substantial leeway in its elucidation of the controlling statute. Yet it did that in the context of rulemaking, an area in which the EPA was filling statutory gaps to fulfill its mission. Rulemaking serves the function of charting policy; it acts prospectively, thus allowing agencies to serve their functions effectively.

But surely we recoil somewhat, at least, at the thought of agencies deciding cases without reference to rules. The notion of purely discretionary decisionmaking in actual cases may trouble many. If it does, it is because we suspect that the decisionmaker is acting unconstrained, and thus may, or at least can, act differently from case to case. It is here that we confront the first problem of discretion. If we envision discretion as somehow being the antithesis of rules, it also may seem like the antithesis of law. And, unless the discretion is guided by standards, the possibility of inconsistent and arbitrary decisionmaking is always present.

*Chevron* dealt with the forging of policy, a choice of goals for the EPA. Yet, as Dworkin has pointed out, legislatures choose policy and we expect cases to be decided based on principles and rules.<sup>82</sup> Thus, though it might seem desirable to depart from an established rule in adjudication, our legal system accepts that departure in a very narrow range of cases. We expect judges to apply the law in

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81. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 845 (1984).

82. Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059-60 (1975).

deciding the cases before them.

### 1. *Definitional Problems*

Now we confront the first problem of discretion. As Dworkin said elsewhere, "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."<sup>83</sup> It only makes sense to talk of discretion in the context of a decision in which the actor has some leeway for choice. Thus, whether we adopt Dworkin's "weak" or "strong" sense of the term, discretion involves a choice in which the decisionmaker is not bound to arrive at a certain result.<sup>84</sup>

But, though Dworkin warns us not to equate discretion with license,<sup>85</sup> such confusion is virtually unavoidable and most certainly occurs frequently. In fact, hasn't Professor Rosenberg done just that in defining secondary discretion as a review-constraining concept? Perhaps so, but even if he has not, discretion easily can be perceived in that fashion. If no guidelines are placed on the decisionmaker, then discretion and license appear identical. Similarly, if the decision cannot be overturned, even if erroneous, then its very finality makes the decisionmaker omnipotent, unanswerable to any review entity.

Disagreement about the core meaning of discretion has certain unfortunate consequences, then. If courts conceive of discretion as somehow being outside a system of rules, then they can do little to curb its abuse; indeed, the very concept of "abuse" may seem incoherent. Thus, at the outset, courts are plagued by an essential definitional imprecision. That being so, it is little wonder that the abuse of discretion standard, like "jurisdiction," is "a verbal coat of . . . many colors."<sup>86</sup> Unsure of their proper institutional role, courts will vary greatly in their exercise of this challenging review function.

Compounding the ambiguity of discretion is the role of standards

83. Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 32 (1967).

84. *Id.* at 32-33. Dworkin describes discretion in the weak sense in two ways. First, it means that standards exist that cannot be applied mechanically, and judgment is required to make the decision. *Id.* This may be captioned "discretion as judgment." *Id.* The second form of discretion in the weak sense involves decisions in which the official is the final authority, "discretion as finality," if you will. *Id.* He uses the example of the second base umpire whose decision on whether the ball or runner arrived first is not subject to reversal. *Id.* He then contrasts discretion in the strong sense as meaning that "on some issue he is simply not bound by standards set by the authority in question." *Id.* at 33.

85. *Id.*

86. *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting).

for both the discretionary decisionmaker and those reviewing her actions. That is, over time, the Board has enumerated factors that should be considered in guiding the use of discretion in some areas. These factors provide the standards to be used by immigration judges.<sup>87</sup> Accordingly, some courts are especially vigilant about detecting departures from these standards.

The Ninth Circuit Court of Appeals has been especially active here. In a recent decision,<sup>88</sup> that court reviewed the denial of discretionary relief from deportation to an alien who was convicted for a drug violation and sentenced to a period of confinement. Initially, the court was troubled by the Board's confusion over its own standard of review for discretionary denials. Thus, quoting approvingly from Judge Posner's comments from *Ortiz-Salas*,<sup>89</sup> it concluded that the "BIA has no fixed situs for the basic discretionary determination and thus no fixed standard for reviewing decisions by [immigration judges] on 212(c) applications."<sup>90</sup> Because the Board had not exercised de novo review, the court decided that it must review the immigration judge's exercise of discretion.

In reviewing that exercise, the court noted that discretion is abused if the agency "fails to state its reasons and show proper consideration of all factors when weighing equities and denying relief" or includes an "improper factor in reaching a discretionary decision."<sup>91</sup> In this case, the court found that "the [immigration judge] abused his discretion egregiously."<sup>92</sup> Yet, though this standard seems sensible, it raises a strange anomaly. Presumably, the Board had no obligation to create standards in this area. Yet, having done so, the system was now subject to scrutiny for departure from those standards.

This further confuses the notion of rules and discretion. It is odd indeed that, had the Board not established standards for meting out relief in this area, presumably the exercise would have escaped reversal. Yet, having done something it did not have to do, it exposed the judge to reversal. Thus, though it is understandable and utterly sensible for the court to require the agency to play by its own rules, it is still odd that no obligation existed in the first instance to create those rules.

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87. See *In re Silva*, 16 I. & N. Dec. 26 (BIA 1976); *In re Edwards*, No. A18-274-740, Int. Dec. 3134 (BIA 1990). Moreover, the Board has stated that these standards are, by necessity, general. However, it requires the immigration judge to furnish an enunciation of relevant factors when making the decision. That affords the Board with a basis for its decision. *In re Marin*, 16 I. & N. Dec. 581, 585 (BIA 1978).

88. *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir. 1993).

89. *Ortiz-Salas v. INS*, 992 F.2d 105 (7th Cir. 1993).

90. *Yepes-Prado*, 10 F.3d at 1367.

91. *Id.* at 1366.

92. *Id.* at 1370.

This anomaly reflects the convergence of various threads of review-denying thought, threads captured perfectly by Judge Easterbrook in *Achacoso-Sanchez*.<sup>93</sup> As noted above, Judge Easterbrook invoked a variety of doctrines in noting the exceptionally narrow scope of judicial review of discretionary action. However, much of that rests on the rules-discretion dichotomy and his view that, unless positive law supports a claim for relief, no claim of right exists and, thus, no judge can impose one from on high.

Judge Easterbrook's language is particularly useful. He noted that "[w]hen Congress does not lay down rules, its power devolves on the executive branch, which then may consider factors of its own choosing."<sup>94</sup> Further, he rooted any claim of entitlement to the existence of objective criteria created by statute or regulation.<sup>95</sup> By his view, when there are no rules to apply, there is simply "no law to apply" and the judge's role is "exceedingly constricted."<sup>96</sup> True, the Ninth Circuit applied the Board's own standards in reversing it, but those standards never had to exist. The Board could have gone along *ad infinitum* without such standards. Thus, to premise legal relief on the existence of standards, the creation of which is discretionary itself, distorts completely even primitive notions of justice and thwarts effective review. And this all flows from discretion's uncertain legal status.

Properly seen, then, Judge Easterbrook's opinion is about unreviewability law only derivatively. Primarily, the problems turned on the jurisprudential dilemmas surrounding discretion. It is only because of those problems that reviewability became an issue. In fact, Judge Easterbrook's rules-discretion dichotomy dovetails with the somewhat dated rights-privilege dichotomy, thus bringing to mind Dworkin's critique of positivist thought on discretion. Dworkin wrote:

The positivists' doctrine of discretion (in the strong sense) required this view of legal obligation, because if a judge has discretion there can be no legal right or obligation — no entitlement — that he must enforce. Once we abandon that doctrine, however, and treat principles as law, we raise the possibility that a legal obligation might be imposed by a constellation of principles as well as by an established rule.<sup>97</sup>

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93. *Achacoso-Sanchez v. INS*, 779 F.2d 1260 (7th Cir. 1985). See *supra* note 61 and accompanying text.

94. *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1264 (7th Cir. 1985) (emphasis added).

95. *Id.*

96. *Id.* at 1265 (quoting *Heckler v. Chaney*, 470 U.S. 821 (1985)).

97. Dworkin, *supra* note 83, at 45.

At the outset, then, confusion over the core meaning of discretion has led commentators in a variety of directions, depending on their jurisprudential inclinations. However, the focus on discretion and standards by those such as Judge Reinhardt in *Yepes-Prado*<sup>98</sup> reveals the second problem with discretion. Even assuming agreement can be reached on a core meaning, it is still foolish to think discretion remains constant among a variety of situations and actors. Judge Reinhardt assumed that standards should constrain the exercise of discretion, that their existence created bounds for discretion, thus making its exercise amenable to judicial review. This, in turn, assumed a paradigm in which a decisionmaker is making factual findings about an individual, thereby reaching a judgment about the availability of discretionary relief. However, that reflects but one view of discretionary justice, though a common one.<sup>99</sup>

It is not that Judge Reinhardt is wrong. On the contrary, he did an exemplary job in that case. Rather, we must recognize that discretion is not a unitary concept. Accordingly, though the Ninth Circuit handled *Yepes-Prado* well, we must not be lulled into thinking that the problems of discretion can be solved simply by requiring immigration judges and the Board to apply standards consistently, even though they are standards of their own making. That view accedes to a simplistic notion of discretionary conduct.

Considering the various forms of discretionary conduct, Charles Koch observed that “[t]he average person seems to use the term *discretion* to mean decisionmaking authority that cannot be reversed by a higher authority.”<sup>100</sup> Yet he made this observation while discussing “unbridled discretion,” one of two forms of unreviewable discretion by his thinking.<sup>101</sup> He then went on to say that “there is very little

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98. *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir. 1993).

99. In fact, in their review of Davis' famous work, Baldwin and Hawkins criticize Davis for being too limited in his view of discretionary behavior. They say that:

Davis's thesis, it should be clear now, is cast in a rationalist paradigm and rests on a narrow view of discretionary behaviour — as simple, unproblematic, and mechanistic. The broader view, derived from a naturalist paradigm, which pays attention to the complexity of the decision-making process, shows that there may be less to the idea of structuring than meets the eye.

Robert Baldwin & Keith Hawkins, *Discretionary Justice: Davis Reconsidered*, 1984 PUB. L. 570, 586. Davis' work is discussed *supra* note 26.

100. Charles H. Koch, Jr., *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469, 495 (1986).

101. *Id.* By Koch's thinking, discretion is divisible into five types. Discretion may be individualizing, executing, or policymaking. These forms are subject to judicial review. The final types of discretion are unbridled and numinous. These cannot be reviewed. *See id.* at 494-95.

Naturally, Koch is not alone in identifying different forms of discretion. In a recent chapter, Carl Schneider identified quite a variety of forms of discretion, making balanced arguments for and against discretion as opposed to rules. Indeed, he captioned his most exotic version of discretion “khadi-discretion,” a kind of discretion that relied entirely on the consummate wisdom of the decisionmaker. *See* Carl E. Schneider, *Discretion and*

good about unbridled discretion” and “the law should incorporate a very strong preference against its proliferation, and, indeed, should move away from inferring such discretion where it is not clearly established by statute or the Constitution.”<sup>102</sup> Strikingly, the very view of discretion that should be resisted most strenuously seems to hold sway, at least in common parlance.

But the differences between the EPA’s actions in *Chevron* and an immigration judge’s decision in adjudication should be clear. In one, an agency is forging policy, filling in some gaps in the law in a manner presumably consonant with the governing statute. Here, in rulemaking, we easily can accept a notion of judicial deference that affords a presumption of correctness to the agency decision.<sup>103</sup>

Adjudication is entirely different. Though the judge is exercising discretionary power, her conduct is more narrowly circumscribed by traditional norms of judicial conduct. We simply expect her to follow the law.<sup>104</sup> That is where discretion becomes problematic. To a point, she is guided by statutes, regulations, and precedent. Beyond that lies discretion. Here, Professor Koch’s comments are essential. He exhorts us to resist the notion of unbridled discretion. It seems like anathema to legal process as we commonly understand it. Yet, in this twilight zone of judicial conduct, in this area of discretionary decisionmaking, judges seem least reviewable. We must ask just why that is.

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*Rules: A Lawyer’s View*, in *THE USES OF DISCRETION* 47, 61-63 (Keith Hawkins ed. 1992).

102. Koch, *supra* note 100, at 502.

103. Naturally, this view represents a greatly simplified view of *Chevron* law. As one commentator has stated:

A narrower reading of *Chevron* would require that the circumstances determine the amount of judicial deference to agency views on interpretive questions. . . . Such a reading would permit the courts to take a more sophisticated approach when reviewing agency decisions. It would recognize that the term “deference” refers not to one simple notion, but rather encompasses a range of methods by which courts may take account of other decisionmakers’ views.

Callahan, *supra* note 48, at 784. Accordingly, if we should shade deference in *Chevron* settings, it follows that we should defer much more guardedly when an agency is acting in an apparently much more rule-oriented fashion.

104. In an interesting foray into this debate, Professor George Christie established an important difference between legislative choice and judicial choice. He said that “judicial choices, no matter how difficult, must be made on the basis of a circumscribed set of criteria, whereas legislative choice may be based on a much more extended range of criteria.” George C. Christie, *An Essay on Discretion*, 1986 *DUKE L.J.* 747, 753.

## 2. Contextual Problems

Discussions of discretion naturally gravitate toward the hard calls, calls that must be made swiftly and, hopefully, accurately. Sports calls seem to provide useful examples. Thus it is that Professor Rosenberg discussed a wrong call made during a football game in 1961, a call that, though wrong, was not reversed.<sup>105</sup> Similarly, Dworkin exemplified one weak sense of discretion by referring to calls made by second-base umpires.<sup>106</sup> Again, they may be wrong, but they're final.<sup>107</sup> Hopefully, these authors aren't indulging themselves, but are drawing useful analogues from an accessible frame of reference. And, they reveal two distinct notions of discretion: (1) discretion as closeness and judgment, and (2) discretion as finality.<sup>108</sup>

Discretion as finality seems to borrow little from the core meaning of discretion. It would not seem that we are dealing so much with a decision that represents the reflective wisdom of the decisionmaker as one that must be made swiftly and decisively. As Professor Yablon noted, "Discretionary decisions of this kind are justified not because they are correct, but because they are close enough, and making a finer determination is either not possible or not worth the time and effort."<sup>109</sup> Here, sports examples abound. The National Football League used a form of instant replay for several years to review some types of calls made by officials. However, under a barrage of criticism, it abandoned it.<sup>110</sup> That review was time-consuming, disruptive of play, frequently redundant, and often inconclusive. Thus, it was abandoned because our tolerance for error permitted that. It simply was not worth the trouble, despite its potential to correct error.

Though the legal system tolerates this form of discretionary conduct,<sup>111</sup> we need not passively accept that. Adoption of this use of discretion reveals fundamental values about speed and resource conservation, values that may be outweighed by the need for reflective and reviewable judgments. Thus, the need for closure may be easily overridden by other institutional norms. We should not easily accept a form of discretion which simultaneously posits the existence of a right answer, yet denies it controlling importance. At least we should

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105. Rosenberg, *supra* note 74, at 639-40.

106. Dworkin, *supra* note 83, at 32-33.

107. Recall the statement made by Justice Robert Jackson that "[w]e are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

108. Professor Yablon discusses these under the heading of discretion as skill and discretion as expediency. Yablon, *supra* note 78, at 261, 268.

109. *Id.* at 269-70.

110. It was abandoned as of the 1992 season because 11 of 28 owners voted against it in an owners' meeting.

111. Yablon, *supra* note 78, at 268-69.



not do that unreflectively. Perhaps good enough simply isn't.

Yet, even if we repose a decisive value in finality, even if we can tolerate the possibility of error, it is nonsense to treat all discretionary decisions this way. Though it may make sense to defer to the decision of an immigration judge, leaving that finding undisturbed, it is quite another to defer *for the same reason* to a decision of the Board or the Attorney General. The time constraints and resource allocation problems are simply different as we ascend the institutional hierarchy. Indeed, the bases for decisionmaking change as the decisional arena changes. Thus, expediency cannot be the sole basis for the carte blanche deference paid to discretionary decisions.

Writing about discretionary decisionmaking, Judge Henry Friendly recognized certain real benefits to deference.<sup>112</sup> However, he predicated extensive deference on the courts' "first-hand observation or direct contact with the litigation."<sup>113</sup> It is the closeness of the judge at the trial level that commands our respect and, frequently, deference. That is so because of her unique access to demeanor evidence and other evidence that loses its vibrancy when placed under the microscope of appellate review. We may characterize this as discretion as closeness.<sup>114</sup> Oddly, as Professor Yablon notes, this justification for discretion reverses "the normal assumptions of institutional competence."<sup>115</sup> Presumably, trial courts exercise a skill which cannot and should not be second-guessed in the arid atmosphere of an appellate court.

Yet, having said that, it is obvious that this justification for extreme deference to decisionmakers has two important qualifications. First, from its nature, it applies uniquely to decisions made at the trial level in which fact-intensive inquiry is crucial. Thus, it does not transfer at all to decisions made by an appellate tribunal such as the Board or those made by the Attorney General. Though it may be that we should defer to these bodies for some reason, it surely is not based on their closeness to the cases or skill in exercising judgment on close factual calls.

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112. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 755-56 (1982).

113. *Id.* at 783 (quoting *United States v. Criden*, 648 F.2d 814, 817-18 (3d Cir. 1981)).

114. Professor Yablon took a similar tack in discussing discretion as skill. He asserted that "some forms of judicial decisionmaking, which I call 'discretion as skill,' involve the exercise of a practice that is neither reducible nor justifiable in terms of a rule." Yablon, *supra* note 78, at 262.

115. *Id.* at 267.

Second, even conceding that such deference is appropriate, that may only be so once certain factual predicates are satisfied. It may be that we should defer if and only if the decision is the product of a reasoned inquiry informed by cognizable standards. If it is not, the reason for deference dissolves. Thus, talk of discretion as skill or discretion as closeness only makes sense if the decisional process involves the use of some set of accepted norms. If it does not, then we are likely back in the morass of Professor Koch's unbridled discretion.<sup>116</sup>

Professor Schneider made this point, writing that the "decision-makers' discretion is constrained by their socialization and training."<sup>117</sup> From his view, lawyers and judges limit the range of acceptable arguments because of their shared substantive, procedural, and ethical norms.<sup>118</sup> But is this true?

Here, a return to *Yepes-Prado* is instructive.<sup>119</sup> Rigoberto Yepes-Prado became a permanent resident in this country in 1974. Ten years later, he was arrested in California for possession of heroin with intent to distribute it. He was tried and convicted under state law in 1986, and sentenced to one year in the county jail and two years of probation. Based on that conviction, the Immigration and Naturalization Service sought Yepes-Prado's deportation linked to his violation of a law relating to controlled substances.<sup>120</sup>

Yepes-Prado sought a discretionary waiver of deportation under section 212(c) of the Immigration and Nationality Act.<sup>121</sup> Although the immigration judge found equities in his favor, he denied the relief. As noted previously, the Board affirmed under the abuse of discretion standard.<sup>122</sup>

In reversing, the Ninth Circuit excoriated the immigration judge for his reliance on irrelevant factors in denying relief. The judge questioned Yepes-Prado at length about his "anti-social behavior by fathering another child . . . out of wedlock" and also placed significance in his failure to marry the mother of his children.<sup>123</sup> Accordingly, the unanimous panel stated that:

In sum, by considering the irrelevant factors of the legal status of Yepes-Prado's relationship with Saavedra and her refusal to marry him, as well as the "illegitimacy" of Yepes-Prado's children, the [immigration judge] based his decision on unreasonable and improper factors rather than on legitimate

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116. See *supra* notes 100-02 and accompanying text.

117. Schneider, *supra* note 101, at 81.

118. *Id.* at 81-82.

119. *Yepes-Prado v. INS*, 10 F.3d 1363 (9th Cir. 1993).

120. *Id.* at 1365.

121. 8 U.S.C. § 1182(c) (1988).

122. *Achacoso-Sanchez v. INS*, 779 F.2d 1260, 1264 (7th Cir. 1985). Although, as Judge Posner noted, the BIA has been inconsistent here; it frequently engages in *de novo* review after such denials.

123. *Yepes-Prado*, 10 F.3d at 1367-68. (omission in original).

concerns about the administration of the immigration laws. In short, the [immigration judge] abused his discretion egregiously.<sup>124</sup>

Obviously, the socialization of this panel was different from that of the immigration judge, thus exposing difficulties with Professor Schneider's assumptions. The circuit court derived its norms from perceived congressional policy on illegitimacy and rights to privacy in sexual relations. By contrast, the immigration judge apparently saw Yepes-Prado as a sexually irresponsible lout who flouted received standards of morality. Yet, though the circuit court corrected the error, its very occurrence is significant. Though Schneider's views may make sense in some contexts, they appear entirely fanciful when applied to immigration decisions.

Immigration decisionmaking reflects the same ambivalence and conflict as does the national debate on immigration policy. As Peter Schuck has written:

The ideological poles of the current debate are easy to categorize. At one end are libertarians and free market purists. They favor not just expansion but essentially open borders . . . .

At the restrictionist end is a melange of groups animated by anxieties about migrants' effects on the environment, labor market competition, population growth, and public services.<sup>125</sup>

It is hardly surprising, then, that we cannot find a body of shared social values among decisionmakers here. Quite understandably, they fall prey to the same forces as others in the national debate and, given the absence of real standards for decisionmaking, inconsistency is a virtual certainty.

In fact, the very notion of "agency" decisionmaking sounds absurd in this context. Though the unreviewability debate often turned on attitudes about the democratic legitimacy of administrative agencies, the immigration system represents a sprawling, diverse, and multi-tiered bureaucracy, thus making any argument about democratic legitimacy foolish.<sup>126</sup> As Maurice Roberts said of discretionary immigration decisionmaking, "[T]he fact remains that it is exercised by

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124. *Id.* at 1370 (citation omitted).

125. Peter H. Schuck, *The Great Immigration Debate*, AM. PROSPECT, Fall 1990, at 100, 101.

126. Although it is tempting to refer to the entire system as the INS, we must recognize divisions within the Department of Justice. Thus, INS falls within the department, but immigration judges are employed by the Executive Office of Immigration Review. And, the BIA has no statutory basis, but is the product of the Attorney General. Beyond that, the Attorney General herself has decisional authority over immigration decisions.

impressionable and fallible human beings at all levels of the administrative hierarchy. . . . [For] in practice decision making has been delegated to and is exercised by a host of lesser officials."<sup>127</sup> Little wonder, then, that decisions vary with the attitude and personal philosophies of the decisionmaker, with the hard-nosed types showing greater conservatism than their more permissive counterparts.<sup>128</sup>

The notion of discretion has, then, been distorted and tortured, effectively eviscerating any core of effective meaning. It is now obvious that the exercise of discretion cannot be dissociated from its decisional context. Decisionmakers are simply performing different functions in different contexts, and to treat this melange of activity as a piece wreaks havoc on legal doctrine. Thus, it is senseless to adopt a single standard of judicial review for such a diverse array of decisions.

Yet, many of these problems of review flow from the fact that discretionary decisionmaking does at least seem to stand apart from its rule-based counterpart. Unguided by fairly fixed standards, decisionmakers would seem to be at liberty to mete out justice on an individual, though unprincipled, basis. And, the resulting legal chaos is somehow acceptable because we are dealing with aliens, frequently aliens who have demonstrably outworn their welcome.

In the remaining parts, I will examine the contribution made by courts (chiefly the Supreme Court) to the area of judicial review, noting the clear message sent to lower courts to afford extreme deference to agency decisions. Thereafter, I will consider just how this should change. I will detail how judicial review must be fine-tuned to cope with the potentially terrible legal problems suffered by aliens facing expulsion.

### III. RECALIBRATING REVIEW

#### A. Wang and Hernandez-Cordero

In *INS v. Jong Ha Wang*,<sup>129</sup> the Supreme Court made its first major foray into discretionary immigration decisionmaking. In that case, the Court faced a situation in which the Ninth Circuit had overturned a Board decision denying the Wangs' motion to reopen deportation proceedings to seek suspension of deportation.<sup>130</sup>

The Wangs came to this country as nonimmigrant treaty traders

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127. Maurice A. Roberts, *The Exercise of Administrative Discretion Under the Immigration Laws*, 13 SAN DIEGO L. REV. 144, 147 (1975). No casual onlooker on immigration matters, Mr. Roberts has edited Interpreter Releases for decades and is a former Chair of the Board of Immigration Appeals.

128. *Id.* at 148.

129. 450 U.S. 139 (1981).

130. *Jong Ha Wang v. INS*, 622 F.2d 1341 (9th Cir. 1980) (en banc).

from Korea<sup>131</sup> and remained for a substantial period, although their visas had long since run. Thus, having been present in this country more than seven years, they sought suspension of deportation based on allegations of the hardship that their deportation would occasion.<sup>132</sup> Essentially, their hardship claim was based on the fact that they had two American-born children who would suffer educationally if deported, and the fact that they would suffer economically because of a precipitous liquidation of their business assets.<sup>133</sup>

The Board found these claims unexceptional. Reasoning that they were well-educated and had significant financial resources, the Board concluded that their children would suffer no unusual hardship upon returning to Korea.<sup>134</sup> Similarly, the Board found that mere economic detriment did not constitute extreme hardship.<sup>135</sup> The Ninth Circuit reversed.<sup>136</sup> Essentially, it reasoned that the Wangs had made a *prima facie* showing of hardship, thus entitling them to an evidentiary hearing on these claims.

Thus, in the Supreme Court, the case came down to the propriety of the Ninth Circuit in affording the Wangs the opportunity to present their claims fully in a hearing. Their claim below was not for relief itself, but for the opportunity to pursue the claim on the merits. This the Court denied them.<sup>137</sup>

In its denial, the Court created layers of discretion that few applicants can pierce. First, it noted that motions to reopen were once discretionary, but now had a regulatory basis.<sup>138</sup> Yet, having said that, the Court noted that “[t]he present regulation is framed negatively; it directs the Board not to reopen unless certain showings are made. It does not affirmatively require the Board to reopen the proceedings under any particular condition.”<sup>139</sup>

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131. In immigration parlance, a nonimmigrant is someone who has come to the United States for temporary purposes. This contrasts with an immigrant, the person who bears the so-called green card.

132. Suspension is available to an alien who, though deportable, has been physically present in the United States continuously for seven years, is of good moral character, and can prove that deportation would “in the opinion of the Attorney General, result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.” 8 U.S.C. § 1254(a)(2) (1988).

133. *Wang*, 450 U.S. at 141-42.

134. *Id.* at 142.

135. *Id.* at 142-43.

136. *Jong Ha Wang v. INS*, 622 F.2d 1341 (9th Cir. 1980) (en banc).

137. *Wang*, 450 U.S. at 143-45.

138. *Id.* at 143 n.5.

139. *Id.*

Now that's odd. Though the regulation says that such motions "will not be granted unless" the alien produces material and previously unavailable evidence,<sup>140</sup> that does not create either a negative or positive bias in the regulation; it simply states the necessary conditions that a motion to reopen must meet.<sup>141</sup> However, apparently anxious to resurrect the previous discretionary nature of this relief, the Court sought support from the dissenting opinion below, an opinion decidedly jaundiced in its appraisal of alien movants.<sup>142</sup> There, Judge Wallace revealed a mood most inhospitable to aliens in deportation. He stated:

If INS discretion is to mean anything, it must be that the INS has some latitude in deciding when to reopen a case. The INS should have the right to be restrictive. *Granting such motions too freely will permit endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case.*<sup>143</sup>

Thus, in *Wang*, a case denied plenary consideration, the Court concluded that reopening a case was discretionary. By that, it presumably meant that reopening could be denied if the alien seemed particularly litigious or was otherwise seeking to leap to the front of the immigration queue. And again, absent any coherent concept of discretion, the Court's message appears clear: if reopening itself is denied, courts should not intervene. This message was conveyed through a footnote in *Wang*.<sup>144</sup>

As a procedural matter, then, the Court attempted to insulate denials of motions to reopen from review. However, the opinion went further. The Court rebuked the Ninth Circuit for reversing the Board's substantive findings.<sup>145</sup> By the Court's view, the concept of "extreme hardship," as a statutory term, should receive definitive

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140. 8 C.F.R. § 242.22 (1994).

141. Speaking to this issue in a recent case, Judge (now Justice) Breyer stated: We recognize that the regulation is phrased in negative terms, which means that it does not explicitly grant any right to anyone ever to ask to reopen a proceeding. Nonetheless, consider the words

nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted . . . unless the relief is sought on the basis of circumstances which have arisen subsequent to the hearing.

Coupled with the Board's explicit authority to reopen any case, what could those words mean but that the alien *does* have a right to move for reopening to ask for "discretionary relief . . . on the basis of circumstances which have arisen subsequent to the rehearing"?

*Goncalves v. INS*, 6 F.3d 830, 833 (1st Cir. 1993) (quoting 8 C.F.R. § 3.2 (1993)) (omissions in original) (citations omitted).

142. *Wang*, 450 U.S. at 143 n.5. The Court quoted the dissenting view of Judge Wallace from *Villena v. INS*, 622 F.2d 1352 (9th Cir. 1980) (en banc). That case was heard by the circuit court en banc along with *Wang*.

143. *Villena*, 622 F.2d at 1362 (emphasis added).

144. *Wang*, 450 U.S. at 143 n.5.

145. *Id.* at 143-45.

construction from the Board. It said of these words that "the Act commits their definition in the first instance to the Attorney General and his delegates, and their construction and application of this standard should not be overturned by a reviewing court simply because it may prefer another interpretation of the statute."<sup>146</sup>

Now the Court has compounded administrative discretion. In extending it to the substantive application of a statutory standard, the Court has doubly insulated the Board. That is, even if we may quibble with the procedural denial (though no standards are provided), we then confront the discretionary denial on the merits. Yet, though it makes some sense to allow the Board to develop a usable standard for "extreme hardship," that is not the Court's real message.

Early in the opinion, the Court chided the Wangs for failing to provide the Board with anything but conclusory allegations of hardship unsupported by affidavits.<sup>147</sup> The Board then proceeded to decide that economic and educational hardship did not meet the statutory standard.<sup>148</sup> Yet this must be wrong on two counts. First, the Board cannot mean that in any categorical legal sense. At some point, economic loss coupled with cultural and educational hardship to U.S. citizen children simply must constitute "extreme hardship."<sup>149</sup>

But second, and more importantly, the Court and the Board are impaled on an inescapable contradiction. Unless they subscribe to the view just refuted, they find themselves in the position of deciding that the scant evidence presented is sufficient to deny the motion. Somehow the conclusory statements of the movants are sufficient to decide that they would not suffer "extreme hardship." You can't

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146. *Id.* at 144. Although this quote has strong *Chevron* overtones, *Wang* predated that case.

147. *Id.* at 143.

148. *Id.*

149. Indeed, in the wake of *Wang* many courts questioned the categorical nature of that view, often concluding that economic detriment cannot be a per se bar to a hardship claim. *See, e.g.,* *Santana-Figueroa v. INS*, 644 F.2d 1354 (9th Cir. 1981). The court in this case found that the total inability to get work could result in conditions that could certainly create hardship. By its view, "These bleak prospects cannot rationally be said to fall short of extreme hardship in all cases simply because they are traceable to 'economic' causes." *Id.* at 1357. Despite this and like cases, at least one source reasoned that substantive review is precluded by *Wang* and that "effective judicial control of agency discretion to deny relief from deportation may be a short-lived phenomenon." Comment, *Developments in the Law — Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1398 (1983). However, despite this prognostication, it is clear that courts still manage to distinguish *Wang* as they see fit. *See generally* *Carrete-Michel v. INS*, 749 F.2d 490, 492 (9th Cir. 1984) (distinguishing between mere economic hardship and the complete inability to get work).

have it both ways. Surely you can fault the Wangs for submitting unsupported claims, but you can't simultaneously conclude that the underlying basis for their claim is inadequate. There is no evidence to support that. Yet, since they are aliens seeking relief from deportation, apparently that will do.

In sum, the Court has foreclosed the opportunity for aliens to prove claims at an evidentiary hearing. It is absolutely correct in asserting that the words "extreme hardship" are not self-explanatory,<sup>150</sup> but by that very reasoning a hearing is required to explore all facets of such claims. The questions are finally not legal, but instead subtle, fact-driven inquiries about the potential lot of those expelled from this country. These questions simply cannot be answered on an arid record by the Board, yet that is precisely what the Court has approved. And, it has done this through its erection of a hydra-headed discretion that doubly insulates Board decisions.

*Wang* sent a clear signal to lower courts to defer to administrative determinations about hardship and, at all costs, to resist the urge to engage in substantive review. This view was elevated to dizzying heights by the Fifth Circuit's decision in *Hernandez-Cordero v. INS*.<sup>151</sup> There, the court confronted a couple who had been here illegally for twelve years<sup>152</sup> and had four children, three of whom were citizens of the United States. The couple's application for suspension of deportation was rejected by the immigration judge, and that result was affirmed by the Board.<sup>153</sup> In affirming those results, the circuit court created yet another layer of discretion and characterized that discretion as "unfettered."<sup>154</sup>

The centerpiece for this decision was the Supreme Court's decision in *Jay v. Boyd*.<sup>155</sup> There, the Court approved the Attorney General's use of undisclosed, confidential material to deny an application for suspension. Thus, although the Court did characterize the Attorney General's ultimate discretion as "unfettered,"<sup>156</sup> it did so based on a barren record in a case that represented an embarrassment from the Cold War era. The embarrassment in *Hernandez-Cordero* is the use to which the Fifth Circuit put that relic.

First, the Fifth Circuit concluded that, though extreme hardship is an eligibility requirement for relief, it represents a discretionary call

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150. *Wang*, 450 U.S. at 144.

151. 819 F.2d 558 (5th Cir. 1987).

152. Mr. Hernandez had entered without inspection, and Mrs. Hernandez had overstayed her visitor's visa. *Id.* at 559.

153. *Id.* at 559-60.

154. *Id.* at 562. Remember, of course, Professor Koch's admonition against the creation of unbridled discretion. See *supra* notes 100-02 and accompanying text. Yet, it is evident here that, rather than resisting this notion, the court embraced it with alacrity.

155. 351 U.S. 345 (1956).

156. *Id.* at 354.



made by the Attorney General and is thus reviewed under the abuse of discretion standard.<sup>157</sup> This conclusion was based on the language "in the opinion of the Attorney General," found in the suspension statute.<sup>158</sup> It thus concluded that language that candidly conceded the subjective nature of the decision should therefore be read to mean that the decision also was discretionary. And, though discretion-bashing may seem wearisome by now, presumably the court used that term to mean that the decision was final *because* it was discretionary.<sup>159</sup> Yet, although it erred in transforming an explicitly legal decision into a discretionary one, it is easy to see how *Wang* led to this.<sup>160</sup>

Yet, having labeled this decision as discretionary, the court had not necessarily committed to an unspeakably deferential standard of review. The abuse of discretion standard is adequately broad to provide for review, both procedural and substantive. Sadly, it is there that the court used *Boyd* most illicitly and it is there that the "New-speak" of discretion is most appalling.

If we conceive of the exercise of discretion as some kind of intellectual exercise unguided by rules, then we must accept it as a part of law's open texture; we must see it as an area in which rules, as strict inhibitors, cannot hold sway. We commit, then, to the wisdom of these decisionmakers, trusting in their ability to act well. But in *Boyd* we simply have no idea why the Attorney General denied the application. Since the facts were undisclosed, we cannot examine the decision at all. Five members of that Court simply accepted the argument that national security prevented the disclosure of those facts. Having labeled the action discretionary, it followed that no real review was available.

However, an immigration judge who decides a hardship case is

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157. *Hernandez-Cordero*, 819 F.2d at 562.

158. 8 U.S.C. § 1254 (1988).

159. Yet, it is unclear just what the court meant by discretion. It could have simply meant, as suggested, that review is virtually nonexistent because a subjective decision has been made. That could reflect Professor Rosenberg's notion of secondary discretion, review-denying discretion. See *supra* notes 74-77 and accompanying text. However, it could just as easily have meant that since the immigration judge was closest to the case and exercised some skill in reaching her decision, no legal standards exist that can effectively repudiate that decision.

160. In fact, the dissent conceded that the language used "undoubtedly delegated discretion to the Attorney General to determine in the first instance what is extreme hardship." *Hernandez-Cordero*, 819 F.2d at 565. It is unfortunate, then, to see the confusion wrought by this term, confusion not even confined to immigration law, but to administrative law generally. The appendix to this opinion lists 169 statutes framed in terms of the "opinion of" the decisionmaker. *Id.* at 570-74.

performing an entirely different function than that of the Attorney General in *Boyd*. It is an entirely different sort of decisional process. Despite this, the Fifth Circuit saw *Boyd* as precedential. It likened the two decisions, noting that the Court defined the Attorney General's ultimate authority to suspend deportation as "unfettered" and it saw "no reason why the Attorney General's discretion to determine extreme hardship should not be equally unfettered."<sup>161</sup> This is classic "Newspeak." The reasoning consists of simply refusing to think, "seeing no reason why" one thing called discretionary was not like another so labeled. It reached this conclusion because "[b]y creating a two-tiered system of discretion, Congress intended the threshold criteria to 'restrict the opportunity for discretionary' relief, not expand it."<sup>162</sup>

Not surprisingly, this court discerned a congressional policy hostile to suspension applicants. Similarly, it sharply limited substantive review, doubting that much, "if any" substantive review remains after *Wang*.<sup>163</sup> And, as for procedural review, the court concluded that the standard was whether the Board did "utterly fail" to consider the factors pertinent to the hardship claim.<sup>164</sup> Little wonder, then, that the court affirmed the Board.

*Hernandez-Cordero* represents part of the new mythology of immigration decisionmaking. Although there is no single situs for decisionmaking, though immigration judges have no congeries of reasoning from which to draw, many review courts treat these cases as a piece. If only in metaphor, they speak of the Attorney General's decision as though she were really making these decisions and building a useful repository of expertise. They shy away from the fact that, as the *Hernandez-Cordero* dissent notes, these decisions are "made in the depths of the bureaucracy."<sup>165</sup>

Viewed in that manner, it is hard to see just why courts should defer to agency decisionmaking. Though immigration judges deal with these matters on a daily basis, there is no reason to believe they know anything more about hardship than anyone else. Surely, given Maurice Roberts' comments, there is every reason to suspect that the decisions are driven more by predilections and ideology than by any developed body of expertise.

Similarly, it's sheer fancy to think that immigration judges are politically accountable. Nevertheless, piously citing *Chevron*, many courts treat them as if they were. In *Hernandez-Patino v. INS*,<sup>166</sup>

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161. *Id.* at 562.

162. *Id.* (citation omitted).

163. *Id.* (quoting from *Ramos v. INS*, 695 F.2d 181, 185 (5th Cir. 1983)).

164. *Id.* at 563.

165. *Id.* at 567 (Rubin, J., dissenting).

166. 831 F.2d 750 (7th Cir. 1987).

the Seventh Circuit said that "in refusing to define 'extreme' hardship fully, [Congress] avoided the substantive policy decision and has deferred to agency expertise."<sup>167</sup> Realistically, in the words of Professor Pierce, Congress simply created an empty standard.<sup>168</sup> Yet that court treated congressional silence as consent for immigration judges to make policy choices about the construction of the term "extreme hardship." Surely *Chevron* need not support that.<sup>169</sup>

Relief from deportation must not be available for all aliens who have avoided expulsion for the statutory period. However, its very presence in the Immigration and Nationality Act indicates a theme of forgiveness which must apply to some cases.<sup>170</sup> Clearly then, a balance must be struck between enforcement concerns and humanitarian relief. Yet, disturbingly, the scales are increasingly tipped in favor of enforcement by the bureaucracy. Thus, as the *Hernandez-Cordero* dissenters point out, "Review is meaningless if it is circumscribed by a standard that assures but one result."<sup>171</sup> The adoption of that standard represents an abdication of the responsibility to maintain an independent judiciary.

### B. *Abudu: From Hardship to Persecution*

The suspension cases dealt with claims of potential hardship wrought by deportation. In *INS v. Abudu*,<sup>172</sup> the claim was different.

167. *Id.* at 753.

168. See *supra* note 23 and accompanying text.

169. The court cited *Chevron*:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

*Hernandez-Patino*, 831 F.2d at 753 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984)). It should be noted that *Chevron* dealt with EPA rulemaking in the face of statutory ambiguity. Here, however, we are dealing with immigration judges engaging in adjudication. Policy should play no role here at all; to allow it is to encourage mere license.

170. See *supra* note 7.

171. *Hernandez-Cordero v. INS*, 819 F.2d 558, 565 (5th Cir. 1987). Indeed, as one major casebook says: "Rather, the authority of a court to remand a case may ensure that a dialogue occurs between the agency and the court—a conversation that considers both law enforcement and humanitarian concerns. Is not such a dialogic process silenced by *Wang*?" T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 626 (2d ed. 1991).

172. 485 U.S. 94 (1988).

There, Assibi Abudu sought reopening of his deportation case to apply for asylum and withholding of deportation.<sup>173</sup> He sought to prove that he had a well-founded fear of persecution were he returned to his native Ghana.

Abudu had not applied for asylum below, but claimed that events occurring after his deportation proceeding produced his fears. Specifically, he claimed that he was visited by a high-ranking official in the repressive Rawlings regime who tried to lure him back to Ghana. According to Abudu, he feared persecution because of his close association with Lt. Col. Joshua Hamidu, declared the number one enemy of the current government, and because his brother, consigned to hiding, was similarly opposed to Rawlings.<sup>174</sup> Thus, Abudu claimed he would be persecuted if he were returned to Ghana until he revealed the whereabouts of these two exiled enemies of the government.

The Board denied Abudu's motion, concluding that it neither made a prima facie case for the relief sought, nor revealed previously unavailable information that could not have been presented at the deportation hearing.<sup>175</sup> Discounting the significance of the surprise visit to Abudu, the Board concluded that the "visitor was admittedly a long-time friend of the respondent's who in fact may have been paying a purely social visit."<sup>176</sup>

Affirming the Board's decision, the Court wrote its most sweeping opinion to date on discretionary denials in immigration cases, an opinion that revealed an extreme distaste for motions to reopen. First, the Court elevated from footnote to text the view it took in *Wang*. Accordingly, the Board may deny the motion if the ultimate relief sought is discretionary, "even if the alien has surmounted the requisite thresholds of prima facie case and new evidence/reasonable explanation."<sup>177</sup> The standard of review for this denial is abuse of discretion.

Similarly, the Court concluded that a denial based on a failure to produce previously available evidence is likewise governed by the abuse of discretion standard. This provided the basis for the affirmance here. Thus, the Court did not reach the issue of whether the application for withholding, a mandatory form of relief, could be discretionarily denied in the reopening context. Rather, it established the abuse standard based on the "disfavor" in which reopening motions are held. It explained that "[t]here is a strong public interest in

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173. *Id.* at 97.

174. *Abudu v. INS*, 802 F.2d 1096, 1098-99 (9th Cir. 1986), *rev'd*, 485 U.S. 94 (1988).

175. *Abudu*, 485 U.S. at 97.

176. *Id.* at 98.

177. *Id.* at 106.

bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases."<sup>178</sup> Endorsing the values of expediting proceedings and conserving judicial resources, the Court plainly disapproved these motions.<sup>179</sup> Thus, the Court had "no hesitation in concluding that the BIA did not abuse its discretion."<sup>180</sup>

As has been seen, though, an abuse of discretion standard may be sufficiently generous to accommodate meaningful judicial review. Even so, the Court gave a forbidding gloss to that standard. Explaining why the Board should be deferred to, the Court said that "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations, and therefore the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts *apply with even greater force in the INS context.*"<sup>181</sup> The message to the judiciary is clear.

Remarkably, Justice Stevens relied on *Hampton v. Mow Sun Wong*,<sup>182</sup> an opinion of his, in that passage, citing it for the view that, since the power over aliens is political, it is subject to very limited judicial review.<sup>183</sup> However, the passage cited simply reiterated the plenary power doctrine, asserting the substantial power of Congress to establish immigration policy.<sup>184</sup> It provided no support for a court to venture off into foreign affairs in the course of deciding a case before it.

On the contrary, in *Hampton*, Justice Stevens concluded that the

178. *Id.* at 107.

179. Maurice Inman, former INS General Counsel, expressed similar sentiments in a memorandum he wrote to Regional Counsels in 1984. He said that "[w]ithout question, motions to reopen are the most abused dilatory tactics. Frequently, they are 'motions to buy time.'" He went on to express the service position of opposition to such motions before immigration judges and the Board unless service attorneys are certain of the bona fides of the aliens' claims. *INS Issues Instructions on Student Employment Forms*, 62 INTERPRETER RELEASES 507 (1985).

180. *Abudu*, 485 U.S. at 111.

181. *Id.* at 110 (emphasis added) (footnote omitted).

182. 426 U.S. 88 (1976).

183. *Abudu*, 485 U.S. at 110.

184. In the footnote to which Justice Stevens cites, he quoted from an earlier case that elaborated the plenary power doctrine. However, there, Justice Gray explicitly acknowledged that the immigration power is "to be regulated by treaty or by act of Congress." *Hampton*, 426 U.S. at 102 n.21 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893)). Simply labeling the power political in character says nothing about just which branch of government is authorized to create policy. Surely, however, no authority supports a court or other tribunal exercising that function.

Civil Service Commission lacked the democratic legitimacy to establish a rule requiring citizenship for the holding of federal jobs.<sup>185</sup> Stating that “the Commission performs a limited and specific function,”<sup>186</sup> he denied it the authority to venture into areas of immigration policymaking.<sup>187</sup> *Hampton* constricted plenary power. It did not expand it.<sup>188</sup>

Yet here, he has conferred exceptional policy making power upon the Board, something it plainly does not possess. The Board is an administrative tribunal created by the Attorney General to decide immigration appeals. It cannot legitimately decide political issues in handling those appeals. Yet, by so anointing it, the Court has given it a power and finality it should not enjoy. Plenary power has been functionally expanded by *Abudu*.<sup>189</sup> Worse yet, this has happened in the context of an asylum claim.

Just one year prior to *Abudu*, the Court decided the seminal case of *INS v. Cardoza-Fonseca*.<sup>190</sup> There, in another opinion authored by Justice Stevens, the Court took the view that the evidentiary burden on the asylum seeker was less than that on the withholding applicant. It did that despite the contrary positions taken by the immigration judge and the Board. It did that despite *Chevron*.<sup>191</sup>

Justice Stevens felt impelled to protect the potential victim of persecution. He wrote:

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185. *Id.* at 115-17. Apparently, Justice Stevens initially stood alone in proposing this due process of law making model for deciding this case. The other members of the majority would have struck down the civil service regulation on traditional equal protection grounds. Obviously, he persuaded the others to follow him, perhaps because this was one of his first opinions. See BOB WOODWARD & STEVEN ARMSTRONG, *THE BROTHERS* 402 (1979).

186. *Hampton*, 426 U.S. at 114.

187. *Id.* “It is the business of the Civil Service Commission to adopt and enforce regulations which will best promote the efficiency of the federal civil service. That agency has no responsibility for foreign affairs, for treaty negotiations, for establishing immigration quotes or conditions of entry, or for naturalization policies.” *Id.*

188. Resisting the government’s arguments, Stevens did not agree “that the federal power over aliens is *so plenary* that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens.” *Id.* at 101 (emphasis added).

189. Though plenary power, as explained earlier, defines the roles of Congress and the judiciary on immigration policy, Justice Stevens enlarged that notion here. Here, in *Abudu*, he has conferred enormous power on a tribunal within the administrative system while simultaneously limiting the power of Article III courts to review these decisions. This clearly stifles an independent judiciary as we understand it.

190. 480 U.S. 421 (1987).

191. The Court was, after all, construing the section of the Immigration and Nationality Act defining refugee. See 8 U.S.C. § 1101(a)(42) (1988). However, irked by what he regarded as a cavalier discussion of *Chevron*, Justice Scalia said: “But this approach [to *Chevron*] would make deference a doctrine of desperation, authorizing courts to defer only if they would otherwise be unable to construe the enactment at issue. This is not an interpretation but an evisceration of *Chevron*.” *Cardoza-Fonseca*, 480 U.S. at 454 (Scalia, J., concurring).

Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country. In enacting the Refugee Act of 1980 Congress sought to "give the United States sufficient flexibility to respond to situations involving political or religious dissidents and detainees throughout the world."<sup>192</sup>

But all that distinguished these two cases was their posture on appeal; *Abudu* came through the vehicle of a motion to reopen, *Cardoza-Fonseca* did not. However, since both faced deportation to countries in which they might have been persecuted, it is impossible to reconcile the vastly different moods of these opinions.

Each party feared persecution if deported. This exceeds "extreme hardship." Moreover, at the core, proof of a well-founded fear is highly subjective and particularized. As David Martin wrote: "As asylum processing demonstrates, establishing with reasonable confidence that an applicant fears persecution and that the fear is well-founded requires careful interviewing, steps to verify the events claimed as the basis of the fear, and ultimately a difficult assessment of the applicant's credibility."<sup>193</sup> Yet it is absolutely impossible to make these determinations on as barren a record as *Abudu* presented. The significance of the surprise visit and the sincerity of his response are simply undiscernible without a hearing. Despite that, the *Abudu* court vaulted closure above these requirements.

Courts responded to *Abudu* swiftly, often endorsing the value it placed on finality. *Abudu* left open the question of the standard of review on a denial based on the apparent failure to prove a prima facie case.<sup>194</sup> Some courts misread *Abudu*, citing it for matters it never decided.<sup>195</sup> Others, taking its lead, extended its mood of intolerance toward reopening. *M.A. v. INS*<sup>196</sup> presents a vivid example of this.

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192. *Cardoza-Fonseca*, 480 U.S. at 449.

193. David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L LEGAL STUD. 91, 113.

194. "The standard of review of such a denial is not before us today, as we have explained." *INS v. Abudu*, 485 U.S. 94, 104 (1988).

195. See, e.g., *Johnson v. INS*, 962 F.2d 574, 577 (7th Cir. 1992). The court stated bluntly that: "Abuse of discretion is the proper standard of review when a denial of a motion to reopen is based on failure to either establish the prima facie case or introduce previously unavailable, material evidence." *Id.* Strikingly, it cited *Abudu* for this proposition. *Id.*

196. 899 F.2d 304 (4th Cir. 1990).

In that case, M.A., a citizen of El Salvador, filed a motion to reopen to pursue an asylum claim the day before his scheduled deportation.<sup>197</sup> The immigration judge denied the motion and the Board affirmed. A panel of the Fourth Circuit reversed,<sup>198</sup> and the court granted rehearing. Reversing the panel, the Fourth Circuit repeatedly noted that M.A. sought reopening of “completed” proceedings, thus posing a threat to finality.<sup>199</sup>

*M.A.* is significant both for what it held and for its reasoning and tone. Showing an evident distaste for eleventh-hour appeals, the court held that the standard of review for such denials is abuse of discretion. In elaborating on that standard, it made clear that the test in reopening is “more difficult to satisfy than statutory eligibility.”<sup>200</sup> By its thinking, since the Board can deny a motion that establishes a *prima facie* case, there is “nothing incongruous” about applying a “more demanding” standard in reopening.<sup>201</sup>

Effectively denying federal courts review power over these determinations, the court enlarged *Abudu* remarkably. Recognizing that an asylum claim necessarily accuses a foreign state of engaging in persecution, it noted that such policy debates should be conducted in the political branches of government. It concluded that “federal courts lack the expertise, and, more importantly, the constitutional authority, to assume such a role.”<sup>202</sup> This plainly reverses the roles of the Board and the Article III courts.

This last observation left Judge Winter and the other dissenting judges livid. To Winter, “[i]t is precisely the politicization of the asylum process that troubles me, and suggests that heightened deference to the Board is unwarranted.”<sup>203</sup> Resisting the mumbo jumbo of the majority, he saw his task as the straightforward one of parsing the evidence to assess the legitimacy of the alien’s fear of persecution.<sup>204</sup> In that, the Board has no advantage over a court.<sup>205</sup>

In marked contrast to the majority, Judge Winter saw no reason to afford the Board “extraordinary respect”<sup>206</sup> based on any theory

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197. *Id.* at 306. M.A. claimed to have left El Salvador to avoid aiding its vicious military. Thus, his claim went, he sought asylum in the United States because of his conscientious objection to those atrocities and his consequent fear that he would be persecuted in El Salvador. *Id.*

198. *M.A. v. INS*, 858 F.2d 210 (4th Cir. 1988).

199. *M.A.*, 899 F.2d at 309-10.

200. *Id.* at 310.

201. *Id.*

202. *Id.* at 313.

203. *Id.* at 319 (Winter, J., dissenting).

204. *Id.* at 324.

205. Judge Winter cited Professor Legomsky, stating that “the BIA will have no advantage over a court in assessing the legitimacy of [this] fear.” *Id.* at 324 (quoting Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1213 (1989)) (alteration in original).

206. *Id.* at 309.



of comparative competence. For him, as for Justice Breyer in an earlier case, the review judge has "the typical role of a reviewing court considering a typical decision of an administrative agency."<sup>207</sup> Affording extreme deference vests the Board with an unreasonably unique expertise in fact-finding and an entirely unwarranted policy-making power. And all of this flows from the improper view of agency discretion and judicial review of its exercise.

### C. INS v. Doherty

The case of Joseph Patrick Doherty<sup>208</sup> presents one of the oddest, most byzantine sagas in recent legal history.<sup>209</sup> Doherty, a former member of the Provisional Irish Republican Army, was tried in Belfast for the killing of a British soldier on May 2, 1980, but escaped before the court returned a verdict. He was convicted in absentia and sentenced to life imprisonment.<sup>210</sup>

Doherty fled Ireland, eventually making his way to New York City, where he avoided detention another sixteen months. He was arrested, and the INS promptly sought deportation. Doherty applied for asylum, but immigration proceedings were suspended to process an extradition proceeding requested by the United Kingdom. Extradition was denied by Judge John E. Sprizo, who found that Doherty's acts presented the "political offense exception [to extradition] in its most classic form."<sup>211</sup>

The suspended deportation proceeding resumed in September, 1986. Doherty conceded deportability and proceeded under a provision of the INA to designate his country of deportation as the Republic of Ireland. He waived any claim to asylum or withholding of deportation.<sup>212</sup> The immigration judge and the Board assented to Doherty's choice, but the INS opposed it. Claiming it "would be

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207. *Ananeh-Firempong v. INS*, 766 F.2d 621, 623 (1st Cir. 1985). Judge (now Justice) Breyer further stated:

In doing so, we must keep in mind the fact that here no broad policy judgments are at issue. Rather, the Attorney General has made a simple judgment about facts; and we review that judgment with awareness both of the Attorney General's comparative expertise and of the limits of reasonableness that he cannot transgress.

*Id.* at 626.

208. *INS v. Doherty*, 112 S. Ct. 719 (1992).

209. For an exceptionally detailed account of this, see James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 *FORDHAM L. REV.* 317 (1992).

210. *Doherty*, 112 S. Ct. at 722.

211. *In re Doherty*, 599 F. Supp. 270, 276 (S.D.N.Y. 1984).

212. *Doherty v. INS*, 908 F.2d 1108, 1111 (2d Cir. 1990).

prejudicial to United States' interests" to deport Doherty to Ireland, Attorney General Edwin Meese reversed the Board.<sup>213</sup> He ordered him deported to the United Kingdom.

Prior to that decision by Mr. Meese, Doherty had sought reopening of his deportation case to seek asylum and withholding. His change of heart was occasioned by a change in extradition law that effectively would result in his return to the United Kingdom were he deported to Ireland. Although the Board granted that motion, the case was certified to the then-Attorney General Richard Thornburgh for his review.<sup>214</sup>

Once again, an Attorney General, now Mr. Thornburgh, reversed the Board. Citing foreign policy concerns, he believed U.S. national interests required Doherty's return to the United Kingdom, thus justifying a negative exercise of his discretion.<sup>215</sup> Moreover, from his view, Doherty was ineligible for withholding because of his commission of a "serious nonpolitical crime outside of the United States."<sup>216</sup> The Second Circuit Court of Appeals reversed, finding that there was no discretion to deny a hearing for mandatory relief (withholding), and that it was impermissible to consider the foreign policy implications of an asylum claim.<sup>217</sup>

The case was a *cause celebre* when it reached the Supreme Court. Doherty had been incarcerated for more than eight years during these legal proceedings and his case drew enormous attention.<sup>218</sup> The case produced an extremely fragmented Court,<sup>219</sup> thus apparently carrying little precedential weight. However, in tone and in some content, the case is ominous.

Superficially, the Court addressed only the narrow question of

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213. *Id.* at 1112. Although 8 C.F.R. § 3.1(h) (1994) authorizes Attorney General review, such review takes place very rarely.

214. The Board found that Doherty had satisfied the two standards for reopening: the requirement to prove a *prima facie* case for the relief sought and show previously unavailable evidence. Specifically, it found that the change in the Irish extradition law and the Attorney General's decision demonstrated changed circumstances from those existing during the initial hearing. *Doherty*, 908 F.2d at 1112-13.

215. *Id.* at 1111-21. Mr. Thornburgh stated emphatically that "it is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment. . . . [Deporting Doherty] would unquestionably advance this important policy." *Id.* at 1121 (citation omitted) (omission in original).

216. *Id.* at 1116 (citing 8 U.S.C. § 1253(h)(2)(c) (1988)).

217. *Id.* at 1117-18.

218. In fact, 132 members of Congress filed an *amici* brief with the Court. The membership was diverse, including, for example, Orin Hatch (R-Utah). Brief for Amici Curiae Members of the United States Senate and Members of the United States House of Representatives in Support of Respondent, *INS v. Doherty*, 112 S. Ct. 719 (1992) (No. 90-925).

219. Only Part I of the opinion drew a majority, in which Justices White, Blackmun, O'Connor, and Kennedy joined Chief Justice Rehnquist.

whether the Attorney General abused his discretion in denying Doherty's motion to reopen.<sup>220</sup> Thus, although the Second Circuit found that Attorney General Thornburgh had impermissibly relied on foreign policy concerns in denying Doherty's motion, the Court reversed it based on Thornburgh's more technical findings.<sup>221</sup>

However, in reversing the Second Circuit, it greatly fortified the notion of unbridled discretion. First, discussing the discretion of the Attorney General, it characterized it as "broad discretion."<sup>222</sup> Thus, having already recited the now-familiar litany about the undesirability of motions to reopen,<sup>223</sup> it effectively concluded that the Attorney General's denials should virtually command affirmance.

Second, it based this extreme deference on the authoritative status of the Attorney General. In choosing the Attorney General over the Board, the opinion stated that "the BIA is simply a statutory creature of the Attorney General, to which he has delegated much of his authority under the applicable statutes. He is the final administrative authority in construing the regulations, and in deciding questions under them."<sup>224</sup>

But this is not a case in agency law in which we must acknowledge that the agent acts at the principal's behest. Rather, we have the extraordinary spectacle here of the Attorney General having overturned the finding of a panel that deals with such cases on a daily basis. Thus, the Board would seem to have the upper hand over the Attorney General as a matter of comparative competence. Nevertheless, despite the Court's statements about expertise in *Wang*, deference to him could have been founded on little else than the inclination to affirm a denial. A persistent line of subtext, discretion as

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220. *Doherty*, 112 S. Ct. at 725.

221. *Id.* at 723. Mr. Thornburgh found that Doherty had not presented new evidence warranting reopening and had waived his claims to asylum and withholding. Thus, the Court did not address his conclusion that Doherty had committed serious nonpolitical crimes that made him statutorily ineligible for humanitarian relief. *Id.* However, the political maneuvering in this case is clear. For a closer examination of the conduct of the Attorney General, see Joan Fitzpatrick & Robert Pauw, *Foreign Policy, Asylum and Discretion*, 28 WILLAMETTE L. REV. 751 (1992).

222. *Doherty*, 112 S. Ct. at 726. "We hold, for the reasons stated in the opinion of the Attorney General, that it was well within his *broad discretion* in considering motions to reopen to decide that the material adduced by respondent could have been foreseen or anticipated at the time of the earlier proceeding." *Id.* (footnote omitted) (emphasis added).

223. *Id.* at 724.

224. *Id.* at 726 (citation omitted).

denial, now emerged quite evidently.<sup>225</sup> And, this view, quite ironically, prevents the establishment of a body of reasoning that speaks to the future.

Finally, the Court examined the Attorney General's basis for denying the motion, concluding that it was supported by the evidence. Accordingly, it concluded that "[t]he mere fact that he disagrees with a conclusion of the BIA in construing or applying a regulation cannot support a conclusion that he abused his discretion."<sup>226</sup>

But the Court affirmed his decision to deny Doherty an opportunity to prove asylum or entitlement to withholding. In reaching that conclusion, it stated that the abuse of discretion standard applies "regardless of the underlying basis of the alien's request [for relief]." <sup>227</sup> And it is here that its dislike for reopening is most malign. It is here that its "docket-clearing mindset"<sup>228</sup> is most troubling.

The broad discretion afforded the Attorney General applied to all denials of motions to reopen, regardless of the relief sought. Thus, the Court presumably treated this case the same as one in which the alien sought relief based on some claim of lesser urgency. However, as Justice Scalia pointed out in his separate opinion, this ignores the "imperative language" of the withholding provision.<sup>229</sup>

Withholding of deportation embodies an essential notion of humanitarian law: a refugee shall not be returned to a state of danger. Discretion doesn't exist here; in both domestic and international law, *nonrefoulement* is mandatory.<sup>230</sup> In enacting the Refugee Act of 1980,<sup>231</sup> we adopted this notion of *nonfoulement* from international

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225. Though it is conceivable that the Court was sounding the note that decisions should be made by parties most accountable, there is no indication that it did so, nor is there any reason to believe that the Attorney General is truly accountable for her immigration decisions.

226. *Doherty*, 112 S. Ct. at 727.

227. *Id.* at 725 (quoting *INS v. Abudu*, 485 U.S. 94, 99 n.3 (1988)) (alteration in original). There, the Court said that "the focus throughout the proceedings has been on the asylum application, and our discussion will maintain the same focus. This focus should not obscure the fact that our holding today applies to BIA reopening decisions regarding both asylum and withholding of deportation requests." *Abudu*, 485 U.S. at 99 n.3. Thus the Court changed its focus from the first sentence to the second on a matter not properly before it.

228. Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. Rev. 413, 477 (1993). Professor Johnson was co-counsel on the amici brief submitted on behalf of the congressional members to the Supreme Court in *Doherty*.

229. *Doherty*, 112 S. Ct. at 729 (Scalia, J., concurring in part and dissenting in part).

230. The term *nonrefoulement* derives from the French word *refouler*, which means return. See *Dictionnaire Larousse* 631 (1981) (Francais, Anglais).

231. Pub. L. No. 96-212, 94 Stat. 102 (amending Immigration and Nationality Act, §§ 101(a)(42), 207-209, 243(h), 411-414) (codified as amended at 8 U.S.C. §§ 1101(a)(42), 1151-1153, 1157-1159, 1181-1182, 1243(h), 1521-1525 (1982)).

law.<sup>232</sup> As a consequence of the Court's decision, though, the Attorney General could deny an applicant the very opportunity to prove her status as a refugee.<sup>233</sup> Again, presumably because of concerns about resource allocation and docket-clearing, a hearing may be denied so long as the Attorney General provides any remotely credible basis for that denial. And, again, as with *Abudu*, this was done in the subtle, fact-driven context of refugee law.

At that point, Justices Scalia, Stevens, and Souter split with the plurality opinion. Acknowledging that "[e]ven discretion . . . has its legal limits,"<sup>234</sup> they sought to narrow the discretionary power to deny a hearing where the claim was for withholding. Chafing at likening a motion to reopen to reopening a final judgment, they analogized it to "remand for further proceedings."<sup>235</sup> Thus, they recognized that in many cases an applicant must be given the opportunity to prove factual matters that "'cannot be adequately resolved in the absence of an evidentiary record.'"<sup>236</sup> And, the need for a hearing is pointedly obvious when an alien seeks to prove refugee status.

But even Justice Scalia admitted that discretion still existed to deny the reopening itself, regardless of the procedural merits of the alien's claim. Though he concluded that the Attorney General had abused his discretion on the procedural calls, he admitted that he could *still* have denied the motion qua motion.<sup>237</sup> However, though conceding that, he said that it wasn't "as discretionary . . . as the term 'reopening' might suggest."<sup>238</sup>

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232. *Nonrefoulement* is embodied in article 33 of the United Nations Convention Relating to the Status of Refugees, done July 28, 1951, 189 U.N.T.S. 137, 176. Under it, "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." *Id.*

233. The withholding applicant must essentially prove that she is a refugee. Thus, even though the Court created a higher burden of proof for one seeking withholding in *INS v. Stevic*, 467 U.S. 407 (1984), that does not change the kinds of evidence that must be produced in both cases.

For criticisms of the *Stevic* decision, see Michael G. Heyman, *Redefining Refugee: A Proposal for Relief for the Victims of Civil Strife*, 24 SAN DIEGO L. REV. 449, 483 n.144 (1987); ALEINIKOFF & MARTIN, *supra* note 171, at 758.

234. *INS v. Doherty*, 112 S. Ct. 719, 728 (1992).

235. *Id.*

236. *Id.* at 736 (quoting *Doherty v. INS*, 908 F.2d 1108, 1117 (2d Cir. 1990)).

237. Remember the statements in *Wang* and *Abudu* that some latitude must exist to deny a motion even if it has surmounted the procedural hurdles of proving a prima facie case and adducing previously unavailable evidence.

238. *Doherty*, 112 S. Ct. at 734. However, though it makes good sense to nuance

Despite Justice Scalia's protestations,<sup>239</sup> *Doherty* solidified the Court's position that the Attorney General has enormous and virtually unreviewable discretion in deciding immigration cases. Though the case could be confined to its narrow facts, and indeed only extended to the personal acts of the Attorney General, *Doherty* more likely emphatically reaffirmed the powerlessness of aliens to receive meaningful review of discretionary decisions. And, it explicitly expanded the ambit of those decisions to include denials of mandatory humanitarian relief. The prospects for aliens would seem quite bleak after *Doherty*.

#### IV. RECOMMENDATIONS AND CONCLUSION

In *Doherty* our legal system ultimately failed us badly. *Doherty* prevailed in virtually every tribunal except the Supreme Court and the Attorney General's Office. He avoided extradition in district court and succeeded before the Board and Second Circuit. But the Supreme Court's opinion is forbidding; it sought to silence effective discussion of discretionary decisionmaking without advancing its development one iota. And, in doing that, it again approved the ill-considered expansion of discretion to the motions themselves and to mandatory humanitarian relief.

However, room remains for an independent judiciary to review both procedural and substantive claims. Ironically, because of the very distortions wrought to the term "discretion," lower courts may still be able to act independently of the administrative bureaucracy.<sup>240</sup> Indeed, to maintain an effective legal system, they must do so.

In virtually all judicial discussions of discretion a critical fact went unnoticed: review is most extensive where standards exist, yet most obviously limited where they do not. In the words of one commentator, this represents an "inverted analysis."<sup>241</sup> Litigants are better

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the scope of review for discretionary decisions, talking about something not being "as discretionary" as something else tries coherence. Quite likely, it simply demonstrates the intellectual morass created by the word discretion.

239. And, they have their limits, too. The Court was unanimous in affirming the Attorney General on the asylum claim. There, Justice Scalia concluded that "*Doherty* is a sufficiently unsavory character not to be granted asylum in this country." *Id.* at 730. That is hardly an intellectually satisfying approach to abuse of discretion review.

240. That is, since discretion has been divested of almost all meaning, courts can engage in abuse of discretion review without denigrating its exercise. By this point, discretion only means some sort of exercise of judgment not cabined by rules. But since the Administrative Procedure Act provides for review for abuse of discretion, courts are not nearly as stifled as we might expect.

241. Tim Searchinger, Note, *The Procedural Due Process Approach to Administrative Discretion: The Courts' Inverted Analysis*, 95 YALE L.J. 1017 (1986).

protected when agencies must apply standards when exercising discretion and review courts have some bases for determining the legitimacy of their exercise. However, where the naked word "discretion" appears, the decisionmaker below and the review court would seem to be at a loss.

Since Congress has not produced meaningful standards, the duty falls on review courts to fill that vacuum. Thus, "[i]nstead of viewing unlimited discretion as a reason to limit judicial review, courts should treat the breadth of discretion as a 'process' variable which they can influence and for which they can order compensating procedural checks."<sup>242</sup> This seems especially true when we are dealing with a politically powerless group such as aliens. Our legal history is replete with examples of the governmental mistreatment of aliens,<sup>243</sup> and we have had limited impetus for the protection of those who are concededly subject to deportation.

Discussion of the inhibitions of *Chevron* and *Heckler* is not only wearisome then, it misses the mark. The matters under discussion involve questions of law and fact that courts are uniquely equipped to handle. We are not dealing with administrative policymaking, but with adjudication. Thus, the most persuasive answer to those who deny courts the authority to decide these cases is that they are already doing it. And in so doing, they are doing precisely what is required of an independent judiciary.<sup>244</sup>

Review standards for discretionary decisionmaking must recognize differences in the exercise of discretion. Though I previously noted that the case law has confused discretion with the simple exercise of judgment,<sup>245</sup> absent any overruling, we are stuck with that law.

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242. *Id.* at 1018.

243. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889), the Chinese Exclusion Case, and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), are simply among the more egregious examples. There, both Congress and the Supreme Court demonstrated an almost reprehensible disdain for Chinese residents of the United States.

244. See Hirshman, *supra* note 34, at 675-76. Similarly, Judge Joseph Weis said that "[a]rguments advocating judicial deference to agency statutory interpretations are simply not supportable in the absence of actual, not theoretical, agency expertise or specific delegations of power. An argument for deference deserves careful consideration only when those factors are present." Joseph F. Weis, Jr., *A Judicial Perspective on Deference to Administrative Agencies: Some Grenades from the Trenches*, 2 ADMIN. L.J. 301, 304 (1988).

245. That is, the *Hernandez-Cordero* court and others translate the language about the Attorney General's "opinion" into discretion. That has no basis, for Congress was simply noting that a finding of hardship is subjective. Its choice of language conveys that naturally. So too, though, for a multitude of findings. Thus, these courts confuse a simple judgment call with a discretionary finding.

However, courts still may play a major role in developing this area of immigration law. In doing so, they must deal differently with findings of an immigration judge and affirmances of the Board flowing from an evidentiary hearing, and with motions to reopen.

When an immigration judge (or the Board) decides a discretionary matter after a hearing, her decision is subject to two forms of review, procedural and substantive. Courts are still quite willing to review such findings for procedural regularity, as they should. Thus, in *Turri v. INS*,<sup>246</sup> the court reversed the denial of suspension to the alien. It found that, although the Board recited a "laundry list of potentially relevant factors,"<sup>247</sup> it failed to adequately consider the evidence presented by Turri. Presumably, this reversal can lead to a more careful consideration by the Board on remand.<sup>248</sup> Requiring closer scrutiny can only advance the development and application of the law.

Courts should not be limited, though, to review for procedural defects. As *Wang* and its progeny demonstrate, the Board has no corner on wisdom, and substantive review also can lead to the progress of the law. Thus, though that case seemed to take the view that economic detriment cannot amount to extreme hardship, later cases have shown how, at some point, it must.<sup>249</sup> Similarly, courts have developed the substantive law of hardship in other areas, thus advancing the development of the law.

In engaging in this dialogue with the immigration judges and the Board, review courts can further the law. Thus, though some courts may simply substitute their judgment for that of the Board, positing that as a certainty represents a cynical view of judicial review that, taken to its extreme, rejects the very legitimacy of an independent judiciary. Through this cooperative effort of the Board and courts, this area of law can mature effectively.

Courts must be particularly vigilant, however, in their review of discretionary denials of motions to reopen. There, quite frequently,

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246. 997 F.2d 1306 (10th Cir. 1993).

247. *Id.* at 1310.

248. We see the fruits of such a remand in *Akinyemi v. INS*, 969 F.2d 285 (7th Cir. 1992). There, the court reversed the Board's denial of an application for discretionary relief from deportation. Though the Board concluded that it did not have to address the issue of Akinyemi's rehabilitation, the court disagreed, requiring the Board to address that issue specifically. On remand, in an undesignated opinion dated May 18, 1983, the Board found outstanding equities in the case and substantial efforts toward rehabilitation. *BIA Finds Rehabilitation, Grants § 212(c) Relief on Second Go Round*, 70 INTERPRETER RELEASES 1059 (1993). Thus, though the Board admonished Akinyemi that its "reserve of compassion had been exhausted," it nevertheless afforded him the relief sought. *Id.*

249. *Santana-Figueroa v. INS*, 644 F.2d 1354 (9th Cir. 1981), and other cases demonstrate the vacuity of such blanket statements about the content of concepts such as extreme hardship. Certainly, total economic destitution can wreak such havoc on a family that anyone can recognize it as extreme hardship.



the Board plainly has no record on which to act, yet acts nonetheless. It is here that discretion is most insidious, for here it is least guided by rules or standards. Here, its actions least represent the exercise of expertise. Indeed, it is hard to imagine discussion within the Board being anything other than a shouting match between those who favor denial and those who don't.

Courts must be particularly active here, for often the stakes are greatest, yet the process most wanting. For that reason, courts should be guided by the thinking of *Matthews v. Eldridge*.<sup>250</sup> Though, technically, due process is not involved, the *Matthews* analysis provides a perfect paradigm for review courts. *Matthews* tells us to evaluate the adequacy of the process by considering the private interest, the risk of erroneous deprivation of that interest, and the governmental interest, including the fiscal and administrative burdens that a substitute form of procedure would entail.<sup>251</sup>

When the Board's denial is based on procedural irregularity such as the failure to prove a prima facie case, a review court is perfectly suited to review that denial. Moreover, as with *Abudu* and *Doherty*, where the alien seeks a hearing for humanitarian relief, courts must be particularly careful in determining whether the Board showed proper concern for the claim. The interest can be most grave, the risk of error profound, and the government's interest largely one in avoiding delay and costly hearings. Yet, antipathy toward some excessively litigious aliens should not result in wholesale denials of the precious right to be heard.

The most offensive denials, though, are those in which the Board either simply denies relief which is itself discretionary, or denies the motion itself despite the bona fides of the alien's claim. In each case, some ineffable value judgment has propelled the Board, yet no workable standard exists for assessing its legitimacy. Here, then, the Board proceeds most dangerously, and here the courts should defer least. No plausible reason supports deference, and its actions should command little respect.

Above all, review courts must not act reflexively.<sup>252</sup> They must perform their traditional role impartially, with neither a positive nor

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250. 424 U.S. 319 (1976).

251. *Id.* at 335.

252. For example, within one month, Judge Politz, in similar circumstances, cited *Chevron* to dispose of one case, yet cited *Overton Park* in another in which he reversed the Board. See *Fonseca-Leite v. INS*, 961 F.2d 60 (5th Cir. 1992); *Diaz-Resendez v. INS*, 960 F.2d 493 (5th Cir. 1992). That won't do. Neutral principles must apply alike to the unsavory and appealing case.

negative bias toward the Board or immigration judge. If all decisionmakers act in this fashion, and if all engage in the cooperative task of advancing the law, favoring neither the values of enforcement nor those of the necessitous alien, they have performed their duty in a manner that speaks effectively to the future. We can ask no more.