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Beyond "Because I Said So": Reconciling Civil Retroactivity Analysis in Immigration Cases with a Protective Lenity Principle

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I. INTRODUCTION

Jayson Charles entered the United States for the first time as a legal permanent resident from Trinidad and Tobago in 1975.[1] In 1981, he pled guilty to a charge of grand larceny under then New York Statute § 155.30(1), was convicted, and was sentenced to five years of probation. This is Mr. Charles's only criminal conviction. Prior to 1996, Mr. Charles's conviction for grand larceny posed no real risk at all to his immigration status. He was not deportable; his crime did not constitute an aggravated felony at the time[2] and, although it was likely a crime involving moral turpitude, the criminal conduct occurred more than 5 years after his admission into the

1. Mr. Charles' facts are a fictionalized composite of multiple real immigrants, and his experience is representative, but he is not an actual person.

2. *See, e.g.*, Immigration and Nationality Act ("INA") § 101(a)(43), 8 U.S.C. § 1101(a)(43) (1994) ("The term 'aggravated felony' means murder, any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in § 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in § 921 of such title, any offense described in § 1956 of title 18, United States Code (relating to laundering of monetary instruments), or any crime of violence (as defined in § 16 of title 18, United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act."); INA § 241(a)(2)(A)(iii), 8 U.S.C. § 1251(a)(2)(A)(iii) (1994) (providing that any alien convicted of an aggravated felony at any time after entry is deportable).

United States.[3] So long as any trips he took outside of the United States were "brief, casual, and innocent," he was also not excludable on his return.[4] While he would have been excludable based on his conviction for a crime involving moral turpitude had he been "seeking admission" into the United States in the first instance, he was deemed not subject to the grounds of exclusion because he was returning as a legal permanent resident.[5]

For almost thirty years after his criminal conviction (almost thirty-five after his arrival as a legal permanent resident), Mr. Charles built his life in the United States. He had four United States citizen children, established a long-term relationship with the United States citizen mother of the youngest two children, and worked hard to support his family. The immigration laws changed in 1996,[6] deeming legal permanent residents who had committed crimes involving moral turpitude to be "seeking admission" no matter how brief and innocent their departure from the United States,[7] but Mr. Charles's life did not. Mr. Charles continued to live and work and care for his family in the United States, and even took two short trips to see his elderly and ailing mother in Trinidad and Tobago without incident.

It was not until Mr. Charles took a two day cruise to the Bahamas with his family in November 2009 that the 1996 law, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), had any effect on him. Upon his return to the United States, he was stopped, sent to deferred inspection, and ultimately issued a Notice to Appear placing him in removal proceedings as an arriving alien who was inadmissible because of a conviction for a crime involving moral turpitude. Although Mr. Charles would not

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3. *See, e.g.*, INA § 241(a)(2)(A)(i), 8 U.S.C. § 1251(a)(2)(A)(i) (1994) (stating that certain noncitizens who have been convicted of a crime of moral turpitude within five years of their date of entry are deportable).

4. Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963).

5. *Id. See also, e.g.*, INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1994) (stating that lawful permanent residents "shall not be regarded as making an entry into the United States" upon their return from foreign trips except under specific circumstances); INA § 212, 8 U.S.C. § 1182 (1994) (listing grounds of exclusion).

6. *See* Illegal Immigration Reform and Immigration Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, Div. C, 110 Stat. 3009 (1996) (making substantial changes to both the substance and procedure of U.S. immigration law).

7. IIRIRA § 301(a)(13)(C)(v); INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2006).

have been subject to deportation or exclusion at the time of his plea agreement and conviction in 1982, or for more than a decade thereafter, the government was now alleging that he was removable based on the changes in the law that occurred in 1996. The Department of Homeland Security argued that, pursuant to amendments made by IIRIRA to § 101(a)(13) of the Immigration and Nationality Act ("INA"),[8] Mr. Charles, despite his legal status as a permanent resident, was now "seeking admission" because of his grand larceny conviction, a crime involving moral turpitude. Moreover, because of this crime involving moral turpitude, he was inadmissible and therefore removable from the United States.

From Mr. Charles's standpoint, or indeed in the view of many non-legally trained observers, this seems unfair—how could a new law change the consequences of something that has already happened and cannot be changed? From a legal perspective, however, the question of whether the relevant change to the immigration laws made by IIRIRA can be applied retroactively to conduct occurring prior to the effective date of that Act in 1996 is a more complex one.

The federal courts, including the Supreme Court, have repeatedly struggled with the question of retroactivity in civil cases generally[9] and in the immigration context specifically.[10] Today, more than fifteen years after IIRIRA took effect, questions regarding

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8. *See* IIRIRA § 301(a)(13)(C)(v); INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2006).

9. *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677, 678 (2004) (holding that Congress intended for the Foreign Sovereign Immunities Act to apply to all cases regardless of when the underlying conduct occurred); Martin v. Hadix, 527 U.S. 343 (1999) (finding that provisions of the Prison Litigation Reform Act limiting attorneys' fees could not be applied to work that predated the Act); Hughes Aircraft Co. v. United States, *ex rel.* Schumer, 520 U.S. 939 (1997) (holding that an amendment to the False Claims Act did not apply retroactively to conduct occurring before its effective date); Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (holding that provisions of the Civil Rights Act of 1991 providing for a trial by jury to determine compensatory and punitive damages could not be applied to harrassment that predated the Act).

10. *See, e.g.*, Fernandez-Vargas v. Gonzales, 548 U.S. 30, 33–34 (2006) (holding that IIRIRA's amendments to INA § 241(a)(5), governing the reinstatement of removal orders for those who reenter the United States illegally, may be applied to all noncitizens present in the United States regardless of the date of reentry); Immigration and Naturalization Serv. v. St. Cyr, 533 U.S. 289, 317 (2001) (holding that the repeal of INA § 212(c) cannot be applied to noncitizens who pled guilty to criminal charges prior to the repeal).

its retroactive application remain unresolved and subject to different answers depending on the court considering them. The exact question presented in Mr. Charles's case, whether the amended § 101(a)(13) of the INA can be applied retroactively to legal permanent residents who pled guilty to the criminal offense triggering its applicability prior to IIRIRA, has caused a split among the federal circuit courts.[11] The Supreme Court granted certiorari in one of these cases, *Vartelas v. Holder*, to resolve that split during the October 2011 Term.[12]

In *Vartelas*, the Supreme Court considered the following question: whether the current version of seeking admission in INA § 101(a)(13) can be retroactively applied to individuals who engaged in conduct that, at the time, would not have had immigration consequences but today renders them removable.[13] This Article will utilize that question as a case study for the application of the civil

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11. *Compare* Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004), *and* Camins v. Gonzales, 500 F.3d 872 (9th Cir. 2007), *with* Vartelas v. Holder, 620 F.3d 108 (2d Cir. 2010), *rev'd*, 132 S. Ct. 1479 (2012) (*Olatunji* and *Camins* held that retroactive application of amended § 101(a)(13) of the INA was impermissible; the Second Circuit, in *Vartelas*, held it permissible to apply the section retroactively).

12. 132 S. Ct. 70 (2011).

13. *Vartelas* framed the question before the Supreme Court as: "Is [INA § 101(a)(13)(C)(v)], which has been interpreted as depriving certain lawful permanent residents of their right to take brief trips abroad without being denied reentry, impermissibly retroactive as applied to lawful permanent residents who pleaded guilty before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)?" Brief for Petitioner at i, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211). The Attorney General, while focusing on the commission of the crime rather than the guilty plea, does not contest the focus on the retroactive application of IIRIRA's definition of admission. It is worth noting, however, that this is not the only way of presenting the issue at stake. Others have argued that the plain language of the current version of INA § 101(a)(13)(C) in combination with the constitutional underpinnings of Supreme Court cases interpreting the definition of entry in the pre-IIRIRA version of INA 101(a)(13) suggest that that jurisprudence should also be applied to the new definition of admission. *See, e.g.*, *In re* Collado-Munoz, 21 I. & N. Dec. 1061, 1067–78 (BIA 1998) (Rosenberg, J., dissenting); Brief for American Immigration Lawyers Association as Amicus Curiae Supporting Petitioner at 5, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211). *See also infra* Part IV(A) (further discussing *Collado-Munoz*, 21 I. & N. Dec. 1061). Such an interpretation would largely, if not entirely, obviate the need to consider the question of retroactivity. This Article expresses no opinion on possible alternative formulations of the question presented in *Vartelas*, but takes the issue as raised for purposes of considering questions of retroactivity in the immigration context.

retroactivity analysis in immigration cases. Part II will briefly introduce the concept of retroactivity as it has previously been applied in civil, and particularly in immigration, cases. Part III will address the structural and substantive changes made by the Illegal Immigration Reform and Immigrant Responsibility Act that led to this situation. Part IV will examine how other courts, including the Board of Immigration Appeals and various circuit courts of appeal, have addressed the question. Finally, in Part V, the Article will, using the Supreme Court's consideration of this issue in *Vartelas v. Holder*, propose a solution to the current incoherence of the civil retroactivity doctrine and application in immigration cases. This Article will argue that the courts' analysis of the question presented in *Vartelas* and in all questions of retroactivity in immigration cases should be informed by a principle that construes all ambiguity in favor of the noncitizen.

II. RETROACTIVITY

A. Theory

The term "retroactive" is defined as "extending in scope or effect to matters that have occurred in the past."[14] Deciding whether or not a law can be applied retroactively is essentially the decision of which law to apply: the law in effect at the time in the past when some relevant conduct occurred or the law in effect at some defined future date.[15]

The concept of retroactivity today proceeds from a presumption that laws should operate prospectively. Courts have gone so far as to make statements such as: "Where, as here, Congress has not clearly spoken as to a statute's temporal application, we begin with a 'presumption against retroactive legislation' that is 'deeply rooted in our nation's jurisprudence.'"[16] This explanation is often treated as an assumption, or a concept that flows from the

14. BLACK'S LAW DICTIONARY 1432 (9th ed. 2009).

15. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994) ("[T]he controlling question is whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992.").

16. *Olatunji*, 387 F.3d at 389 (quoting *Landgraf*, 511 U.S. at 265).

"natural" order of our legal system; because, however, from a practical perspective most laws have at least some retroactive effect, it is more accurately described as a presumption, or a principle that we have adopted as true because of our beliefs and values regarding our legal system.

Retroactivity, as a principle of our legal system, is the idea that the negative consequences of applying a new law to conduct already completed are potentially both dangerous and significant; thus, such an application should occur only in certain limited and extraordinary circumstances. Otherwise stated, retroactivity should be the exception rather than the rule. The norm of anti-retroactivity also helps to protect against legislative overreaching; it is a check against Congress's otherwise unconstrained power that could be used to further personal interests or punish unpopular groups or individuals.[17]

This presumption against retroactivity has been explained as having its roots in the Constitution.[18] Several constitutional provisions bar specific types of retroactive laws: the Ex Post Facto Clause prohibits retroactive criminal legislation,[19] the prohibition on bills of attainder bars legislation declaring an individual or group guilty of a past crime without the benefit of a trial,[20] and the Contracts Clause restricts states from passing laws that retroactively impair rights under a contract.[21] These provisions are all clearly limited in scope and do not explicitly prohibit retroactive application of statutes.[22] They have, however, been described as supporting the general presumption against retroactivity that underpins the Supreme Court's jurisprudence on the retroactivity of civil statutes. Other sections of the Constitution—in particular the Takings Clause[23] and the Due Process Clause[24]—likewise lend support to the general

17. *See, e.g.*, *Landgraf*, 511 U.S. at 266–67.

18. *Landgraf*, 511 U.S. at 266.

19. U.S. CONST. art. I, § 9, cl. 3 (barring the federal government from passing ex post facto laws); U.S. CONST. art. I, § 10, cl. 1 (barring the state governments from passing any ex post facto laws).

20. U.S. CONST. art. I, §§ 9–10.

21. U.S. CONST. art. I, § 10, cl. 1.

22. *Id.*

23. U.S. CONST. amend. V.

24. *Id.* *See also* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17 (1976) ("The retrospective aspects of legislation, as well as the prospective aspects, must

presumption against laws that add new consequences to past actions or otherwise disrupt settled expectations.

The Ex Post Facto Clause, one of these constitutional underpinnings, has been held to apply only to criminal laws, barring retroactive criminal legislation, but not to civil laws.[25] There is, however, a significant overlap between civil and criminal retroactivity analysis. Principles applied in the civil retroactivity analysis are drawn heavily from ex post facto jurisprudence.[26]

Despite the seeming simplicity of retroactivity, it has been the subject of much litigation and many Supreme Court cases. As a practical matter, it is difficult for Congress to pass any legislation without having some effect on past events or conduct. Due to the many competing factors and influences on them, as well as the actual complexity and uncertainty of the retroactivity analysis, Congress often passes laws without fully considering their potential retroactive effect.

B. Civil Retroactivity in General

The seminal case regarding retroactivity in the civil context is *Landgraf v. USI Film Products.*[27] Barbara Landgraf sued her employer USI Film Products claiming she was sexually harassed while at work.[28] At the time the harassment occurred, Ms. Landgraf

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meet the test of due process, and the justifications for the latter may not suffice for the former.").

25. U.S. CONST. art. I, § 9, cl. 3; Collins v. Youngblood, 497 U.S. 37, 41 (1990); Calder v. Bull, 3 U.S. 386, 390–91, 394 (1798).

26. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 324 (2001) ("As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law."); Hughes Aircraft Co. v. United States, *ex rel.* Schumer, 520 U.S. 939, 948 (1997) (citing criminal cases in holding that a civil statute could not be applied retroactively); Landgraf v. USI Film Prods., 511 U.S. 244, 266–67 n.20, 269 n.23, 275 n.28, 282 n.35, 285 n.37 (1994) (discussing the appearances in the Constitution of an antiretroactivity principle, including in the Ex Post Facto Clause, and citing several ex post facto cases in support of its civil retroactivity analysis); Brief for Petitioner at 22–23, Vartelas v. Holder, No. 10-1211 (Nov. 15, 2011).

27. 511 U.S. 244 (1994).

28. *Landgraf*, 511 U.S. at 247–48. The Court in *Landgraf* assumed that the facts as found by the lower courts were true for purposes of its analysis; this Article will therefore do the same. 511 U.S. at 250 ("Accordingly, for purposes of our decision, we assume that the District Court and the Court of Appeals properly

was eligible only for equitable relief as determined at a bench trial.[29] By the time her appeal was heard in the Court of Appeals, under amendments to the Civil Rights Act of 1991, an individual in Ms. Landgraf's same circumstances would have been eligible for a jury trial to determine compensatory and punitive damages.[30] The Court found that these amendments could not be applied retroactively to Ms. Landgraf because Congress had not clearly stated an intention for them to apply retroactively and to apply them to the past conduct in Ms. Landgraf's case would impose additional burdens on past conduct, thereby impacting the rights and planning of private parties.[31]

The United States Supreme Court used *Landgraf* to articulate a two-step test for determining whether a federal civil statute applies retroactively.[32] At step one of what has now come to be known as the *Landgraf* analysis, a court considering a question of retroactive application in a civil case must first "determine whether Congress has expressly prescribed the statute's proper reach."[33] This step stems directly from the presumption against retroactive legislation and the problems inherent in it. As the Court in *Landgraf* stated, "a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[34]

If the statute does not have an express command, courts must proceed to the second step of the *Landgraf* analysis.[35] At this second step, "the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed."[36] In other words, the court must determine "whether the new provision attaches new legal consequences to events completed

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applied the law in effect at the time of the discriminatory conduct and that the relevant findings of fact were correct.").

29. *Id.* at 247–49.
30. *Id.*
31. *Id.* at 280–86.
32. *Id.* at 280.
33. *Landgraf*, 511 U.S. at 280.
34. *Id.* at 268, 272–73.
35. *Id.* at 280.
36. *Id.*

before its enactment."[37] This test has deep roots in American legal history, stemming from Justice Story's formulation from a case decided in the early 1800s.[38] The *Landgraf* Court recognized that this test will not always result in a clear, determinate outcome and offered additional guidance for adjudicators engaging in this second step of the retroactivity analysis.[39] Among other driving principles, it suggested that the analysis should be informed by "familiar considerations of fair notice, reasonable reliance, and settled expectations."[40]

Subsequent Supreme Court cases expanded on this basic definition, each offering its own formulations and guidance within the same basic premise.[41] Of particular importance, the Court in *INS v. St. Cyr* clarified that each element of Justice Story's formula was alone sufficient to prohibit a statute's retroactive application.[42] That is, a statute that "takes away or impairs vested rights acquired under existing laws," or "creates a new obligation," or "imposes a new duty," or "attaches a new disability, in respect to transactions or considerations already past," cannot be applied retroactively.[43] It is not necessary to demonstrate that all four conditions exist for legislation to be deemed retroactive.[44]

There is also at least one alternate interpretation of the second step of the *Landgraf* analysis, originating in Justice Scalia's

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37. *Id.* at 270–71.

38. Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.) (No. 13,156) ("[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.").

39. *See Landgraf*, 511 U.S. at 270.

40. *Id. See also id.* at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

41. *See, e.g.*, Hughes Aircraft Co. v. United States, *ex rel.* Shumer, 520 U.S. 939, 947 (1997) ("[T]he Court has used various formulations to describe the 'functional conceptio[n] of legislative retroactivity,' and made no suggestion that Justice Story's formulation was the exclusive definition of presumptively impermissible retroactive legislation.") (quoting *Landgraf*, 511 U.S. at 269)).

42. INS v. St. Cyr, 533 U.S. 289, 321 n.46 (2001).

43. Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.) (No. 13,156).

44. *See* Fernandez-Vargas v. Gonzales, 548 U.S. 30, 44 n.10 (2006); *St. Cyr*, 533 U.S. at 321 n.46; Brief for Petitioner at 5–6, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

concurring opinion in *Landgraf*,[45] that has played a prominent role in the Supreme Court's (as well as the lower federal courts') jurisprudence on civil retroactivity. Justice Scalia suggests that, by incorporating Justice Story's formulation of the civil retroactivity analysis, the Court is focused on the wrong criteria.[46] Instead of being concerned with whether the new law affects "vested rights," or is a substantive or procedural amendment, Justice Scalia would direct the Court to determine the relevant activity that the rule is intended to regulate.[47] If that activity was completed prior to the effective date of the new law, the new law cannot be applied retroactively to it absent clear direction to do so from Congress.[48] This test has been incorporated, both explicitly[49] and implicitly,[50] in other cases raising a question of the retroactivity of a civil statute.

C. In the Immigration Context

There is a long history of the application of civil retroactivity analysis in immigration cases.[51] Parties will occasionally argue that

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45. *Landgraf*, 511 U.S. at 290–94 (Scalia, J., concurring).

46. *Id.* at 291.

47. *Id. See also* Martin v. Hadix, 527 U.S. 343, 363 (1999) ("The critical issue . . . is not whether the rule affects 'vested rights' . . . but rather what is the relevant activity that the rule regulates.").

48. *See, e.g.*, *Fernandez-Vargas*, 548 U.S. at 41 ("The point here is not that these provisions alone would support an inference of intent to apply the reinstatement provision retroactively . . . for we require a clear statement [from Congress] for that."); *St. Cyr*, 533 U.S. at 316 ("A statute may not be applied retroactively, however, absent a clear indication from Congress that it intended such a result."); *Martin*, 527 U.S. at 354 ("This language falls short of demonstrating a 'clear congressional intent' favoring retroactive application . . . in other words, of the 'unambiguous directive' or 'express command' that the statute is to be applied retroactively." (quoting *Landgraf*, 511 U.S. at 263, 280)); *Landgraf*, 511 U.S. at 291 ("Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered.") (Scalia, J., concurring).

49. *See, e.g.*, Republic of Austria v. Altmann, 541 U.S. 677, 698 n.17 (2004) ("Our approach to retroactivity in this case thus parallels that advocated by Justice Scalia in his concurrence in *Landgraf*."). *See also* Transcript of Oral Argument at 8, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

50. *See, e.g.*, *Fernandez-Vargas*, 548 U.S. at 46 ("What Fernandez-Vargas complains of is the application of new law to continuously illegal action within his control both before and after the new law took effect.").

51. *Cf. Landgraf*, 511 U.S. at 271 (discussing a case in the immigration context in support of the premise that the presumption against retroactive

the plenary power doctrine should bar the ability of the courts to find that immigration legislation cannot be applied retroactively, but this argument has historically been rejected.[52] Functionally speaking, this is a logical conclusion. Application of the *Landgraf* analysis does not limit Congress's immigration powers in any significant respect; it simply demands that Congress make a clear and unambiguous statement when it wishes for its legislation to apply to conduct completed before the law's enactment.[53] Retroactivity questions raised in immigration cases, then, have been treated substantively no differently than retroactivity questions raised in any other civil context.

As early as the late 1800s, the Supreme Court in *Chew Heong v. United States* considered whether to permit retroactive application of the "Chinese Restriction Act" of 1882.[54] The Court held that the provision at issue, which required Chinese citizens seeking to reenter the United States to have a certificate prepared prior to their departure from this country, could not be applied retroactively to bar the reentry of a Chinese man who had departed from the United States before the Chinese Restriction Act took effect.[55] Since that time, retroactivity-based challenges have been raised at a number of junctures involving significant transformations in the United States immigration laws.

Changes in immigration law, perhaps even more so than in many other areas of the law, are strongly motivated by political pressures and expediencies.[56] The modifications made to the laws in this area can be drastic, too frequent, and sometimes abrupt, resulting in a complicated system that does not always operate smoothly or fit together well. In a field of law where individual interests are so

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legislation is not limited to cases involving "new provisions affecting contractual or property rights").

52. *Cf. St. Cyr*, 533 U.S. at 324 (rejecting INS's argument that application of a law of deportation can never have a retroactive effect). *See also* Reply Brief for Petitioner at 5–6, 9, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211) (arguing that Congress's plenary power over entry and deportation does not justify retroactivity).

53. *Landgraf*, 511 U.S. at 291.

54. Chew Heong v. United States, 112 U.S. 536 (1884).

55. *Id* at 559–60. *See also Landgraf*, 511 U.S. at 271–72 (discussing the case facts and holding of *Chew Heong*).

56. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 3–4 (1998) (discussing the use of race in immigration law).

important and the consequences can be as life-defining as immigration, such changes raise significant retroactivity concerns. After any significant immigration-related act of Congress, retroactivity challenges to that Act will occur. The modern Supreme Court has confronted such challenges in the wake of the amendments to U.S. immigration laws made in 1996 and 1997 by the Antiterrorism and Effective Death Penalty Act ("AEDPA") and IIRIRA.[57]

1. INA § 212(c) Relief—*INS v. St. Cyr* and the Aftermath

One change made by IIRIRA was to repeal section 212(c) of the INA, a section which had previously provided relief from exclusion or deportation for certain long term legal permanent residents with criminal convictions.[58] Many challenged the retroactive application of this repeal, including a Haitian citizen, Enrico St. Cyr, whose case was eventually heard by the Supreme Court.[59] Mr. St. Cyr had entered the United States as a legal permanent resident in 1986.[60] He pled guilty to a controlled substance violation of Connecticut law in March 1996, prior to AEDPA and IIRIRA, but was not placed into removal proceedings until April 10, 1997, after both statutes, including the repeal of the former section 212(c), took effect.[61]

Mr. St. Cyr argued that because he would have been eligible for relief under INA § 212(c) at the time of his guilty plea, the repeal of § 212(c) could not be retroactively applied to him.[62] After an extended examination of its jurisdiction, the Supreme Court applied

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57. *See infra* Part II.C (discussing how the Court addressed AEDPA and IIRIRA).

58. INA § 212(c) (1994) ("Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)).").

59. INS v. St. Cyr, 533 U.S. 289 (2001).

60. *Id.* at 293.

61. *Id.* at 292.

62. *Id.* at 315.

the *Landgraf* analysis to the circumstances of Mr. St. Cyr's case.[63] At step one of that analysis, the Court found that Congress had not clearly expressed an intent for the repeal of § 212(c) to apply retroactively.[64] Because the repeal of § 212(c) attached "a new disability" to past conduct, a guilty plea, and noncitizens would have relied on the availability of this relief in their decision to take such a plea, the Court further held that the repeal could not survive step two of the *Landgraf* analysis.[65] The Court therefore concluded that the opportunity to request relief under the former § 212(c) must remain available to noncitizens who, like Mr. St. Cyr, were trying to waive criminal convictions that resulted from guilty pleas entered into before AEDPA and IIRIRA took effect and would have been eligible for such relief at the time of their plea.[66] *St. Cyr* was a tremendously important decision in the immigration context, but it also left many unanswered questions.

The role of reliance in the retroactivity analysis has long been an issue in immigration cases, but that issue came into specific focus and prominence after the Supreme Court's decision in *St. Cyr*.[67] Some courts have recognized explicitly that the part to be played by reliance has not yet been decided by the Supreme Court.[68] Reliance has been variously described as a necessary[69] or a sufficient[70] or an irrelevant[71] factor in finding that a statute should not be applied retroactively at the second step of the *Landgraf* analysis. Even among courts that agree that reliance is a required element, there is

63. *Id.*

64. *Id.* at 316–20.

65. *Id.* at 321–24.

66. *Id.* at 326.

67. Reliance is also a contested issue in civil retroactivity analysis outside the immigration context. *See, e.g.*, Olatunji v. Ashcroft, 387 F.3d 383, 390–91 (4th Cir. 2004) (discussing applicability of reliance in the retroactivity inquiry in cases concerning the Civil Rights Act of 1991, the False Claims Act, and others).

68. *See, e.g.*, *id.* at 389 ("Whether, under the *Landgraf* framework, an aggrieved party must demonstrate some form of reliance on a prior statute in order to establish that a later-enacted statute is impermissibly retroactive has not been resolved by the Supreme Court.").

69. *See, e.g.*, Ponnapula v. Ashcroft, 373 F.3d 480, 494 (3d Cir. 2004) (framing the retroactivity question as "what aliens–if any–who went to trial and were convicted did so in reasonable reliance on the availability of § 212(c) relief").

70. *See, e.g.*, Hernandez de Anderson v. Gonzales, 497 F.3d 927, 938, 940–941 (9th Cir. 2007).

71. *See, e.g.*, *Olatunji*, 387 F.3d at 394.

not a consensus on what kind of reliance that means. Some courts have required that the reliance be objectively reasonable,[72] while others have required the individual noncitizen to demonstrate subjective reliance.[73] The Supreme Court suggested in a footnote in an immigration case decided earlier in the same term as *Vartelas* that it might consider the minimum standard to be objectively reasonable reliance, but the issue remained far from definitively resolved prior to the Court's decision in *Vartelas*.[74]

In the wake of *St. Cyr*, this question of reliance was raised in cases exploring the limits of the Supreme Court's decision in that case. Many of these cases dealt with noncitizens who had been convicted after trial rather than pursuant to a plea of guilty like St. Cyr.[75] Perhaps not surprisingly, a great deal of inconsistency and incoherence arose among the decisions of the various courts. One good example of this muddle arises in the case law of the Fourth Circuit. In 2002, the Fourth Circuit in *Chambers v. Reno* held that the repeal of the former INA § 212(c) *could* be retroactively applied to a noncitizen convicted at trial because the noncitizen did not demonstrate reliance interests in the old law comparable to those at issue in *St. Cyr*.[76] The *Chambers* decision does recognize that reliance might not be a required element pursuant to the Supreme

72. *See, e.g.*, Martinez v. INS, 523 F.3d 365, 385 (2d Cir. 2008).

73. *See, e.g.*, Carranza-De Salinas v. Gonzales, 477 F.3d 200, 205 (5th Cir. 2007) ("[T]his circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective reliance . . . .").

74. *See* Judulang v. Holder, 132 S. Ct. 476, 489 n.12 (2011) ("[W]e likewise reject Judulang's argument that Blake and Brieva-Perez were impermissibly retroactive. To succeed on that theory, Judulang would have to show, at a minimum, that in entering his guilty plea, he had reasonably relied on a legal rule from which Blake and Brieva-Perez departed." (citing Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994))).

75. *See generally* Anjum Gupta, *Detrimental Reliance on Detrimental Reliance: The Courts' Conflicting Standards for the Retroactive Application of New Laws to Past Acts*, RUTGERS L. REV. COMMENTARIES, Dec. 27, 2011 at 3–6 (discussing the circuit split over the interpretation of *St. Cyr*; explaining one view that reads the case as requiring a showing of reliance, but does not view a guilty plea as an exclusive way to show reliance; and explaining the other view that reads the case as not requiring a showing of reliance, but that reliance can be a consideration in determining whether retroactive application for a new law attaches new legal consequences to past acts).

76. Chambers v. Reno, 307 F.3d 284, 293 (4th Cir. 2002).

Court's civil retroactivity case law,[77] but ultimately finds in a relatively conclusory fashion that this point is not outcome determinative for Mr. Chambers.[78] In 2007, the Fourth Circuit published another case addressing essentially the same question.[79] This decision, *Mbea v. Gonzales*, echoes the court in *Chambers* without specifically discussing the role of reliance in the retroactivity analysis.[80] *Mbea*, like *Chambers*, holds that another noncitizen who elected to go to trial prior to IIRIRA does not have a claim that the repeal of § 212(c) should not be retroactively applied to him.[81]

Mbea might appear to be a straightforward application of prior precedent were it not for an intervening decision of the Fourth Circuit. In the interim between *Chambers* and *Mbea*, the Fourth Circuit decided *Olatunji v. Ashcroft*, a case concerning the retroactive application of the definition of admission at the heart of this Article.[82] In *Olatunji*, the court held clearly and explicitly "that the consideration of reliance is irrelevant to statutory retroactivity analysis."[83] The panel in *Mbea* does not discuss or even cite to the circuit's prior decision in *Olatunji*, much less attempt to distinguish or reconcile the cases.[84] Within even a single circuit, then, and in a relatively narrow context, retroactivity and reliance are disputed concepts.

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77. *Id.* at 292–93 ("In view of these observations by the Court about retroactivity, we have acknowledged that an alien's failure to demonstrate reliance on pre-IIRIRA law might not foreclose a claim that the post-IIRIRA version of the INA operates retroactively.").

78. *Id.* at 293.

79. Mbea v. Gonzales, 482 F.3d 276 (4th Cir. 2007).

80. *Id.* at 280–82.

81. *Id.*

82. Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004).

83. *Id.* at 393. *See also id.* at 389 ("A careful review of both the basis for the judicially-imposed presumption against retroactivity and the Supreme Court's retroactivity jurisprudence shows that the fact that IIRIRA has attached new legal consequences to Olatunji's guilty plea is, alone, sufficient to sustain his claim, and that no form of reliance is necessary."). For additional discussion of the Fourth Circuit's decision in *Olatunji*, see *infra* Part IV.B.1 and text accompanying notes 151–170.

84. *Mbea*, 482 F.3d at 276. It does not appear that either en banc reconsideration or certiorari were sought in *Mbea*. The Court in *Olatunji* did attempt to deal with *Chambers*, focusing on the panel's statement there that reliance might not be a necessary element of a civil retroactivity analysis. *Olatunji*, 387 F.3d at 391–93.

The decisions in other circuits only add to this confusion.[85] Circuits other than the Fourth Circuit also experience intra-circuit conflicts and inconsistencies on the issue.[86] Some circuits agree that actual individualized reliance is necessary, but disagree about what conduct is necessary to demonstrate that reliance.[87] Other circuits set the bar lower, finding objectively reasonable reliance to be sufficient.[88] Still others hold that reliance is not required at all and is

85. *See* Gupta, *supra* note 75, at 3–6 (discussing the widely variant recent circuit court decisions regarding the legality of retroactive immigration laws).

86. *Compare* Ponnapula v. Ashcroft, 373 F.3d 480, 491–93 (3d Cir. 2004) (holding that actual individual reliance is not required but suggesting, at a minimum, that objective reliance is), *with* Atkinson v. Att'y Gen., 479 F.3d 222, 231 (3d Cir. 2007) ("For the above reasons, we conclude that reliance is but one consideration in assessing whether a statute attaches new legal consequences to past events .... Nowhere in the Supreme Court's jurisprudence ... has reliance (or any other guidepost) become the *sine qua non* of the retroactive effects inquiry."). Note, however, that the court in *Atkinson* does not acknowledge this conflict and purports to reconcile its decision with the decision in *Ponnapula*. *Atkinson*, 479 F.3d at 227–28, 231.

87. *See, e.g.*, Nadal-Ginard v. Holder, 558 F.3d 61, 70 n.9 (1st Cir. 2009) (holding that proceeding to a jury trial did not, in itself, constitute sufficient actual reliance and declining to decide what, if any, conduct after trial might constitute such reliance); Esquivel v. Mukasey, 543 F.3d 919, 922 (7th Cir. 2008) (holding that "those who affirmatively abandoned rights or admitted guilt in reliance on § 212(c) relief" could demonstrate actual reliance); Carranza-De Salinas v. Gonzales, 477 F.3d 200, 205 (5th Cir. 2007) (holding that proceeding to trial does not constitute reliance but affirmatively postponing the filing of an application for relief under the former section 212(c) does); Wilson v Gonzales, 471 F.3d 111, 122 (2d Cir. 2006) (requiring petitioners to make an individualized showing of reasonable reliance on § 212(c), rather than requiring them to demonstrate mere knowledge of its availability, to demonstrate reliance based on postponing filing an application for relief).

88. *See, e.g.*, Ferguson v. U.S. Att'y Gen., 563 F.3d 1254, 1271 n.28 (11th Cir. 2009) ("Joining the majority of circuits, we decline to extend *St. Cyr* to aliens who were convicted after a trial because such aliens' decisions to go to trial do not satisfy *St. Cyr's* reliance requirement."); Hernandez de Anderson v. Gonzales, 497 F.3d 927, 940–41 (9th Cir. 2007) (finding the 10th Circuit's reasoning persuasive in holding that objectively reasonable reliance is sufficient to demonstrate retroactivity); Hem v. Maurer, 458 F.3d 1185, 1197 (10th Cir. 2006) ("We now hold for three reasons that objectively reasonable reliance on prior law is sufficient to sustain a retroactivity claim."); Thaqi v. Jenifer, 377 F.3d 500, 504 n.2 (6th Cir. 2004) (noting that "under *St. Cyr*, the petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect").

instead simply one factor to be considered in the totality of the retroactivity analysis.[89]

2. Other Subjects

Retroactivity challenges have also been raised regarding other amendments made by AEDPA and IIRIRA. One of the more prominent is the Supreme Court's decision in *Fernandez-Vargas v. Gonzales*.[90] Mr. Fernandez-Vargas was a citizen of Mexico who had last illegally reentered the United States in 1982, after he was deported for immigration (not criminal) violations.[91] He contended that IIRIRA's amendments to the provisions of the INA dealing with reinstatement could not be applied retroactively to him because he had reentered the United States long before IIRIRA was promulgated and those provisions took effect.[92] The Supreme Court held that, because being present without legal status in the United States was a continuing course of conduct that persisted even after IIRIRA's effective date, there was no retroactivity problem in applying IIRIRA's amended reinstatement provisions to Mr. Fernandez-Vargas.[93]

Like the question of the retroactive application of the repeal of § 212(c), this issue regarding the retroactive application of IIRIRA's provisions related to reinstatement led to substantial disagreement on many levels among the federal circuits.[94] While the Supreme Court's decision addressed the immediate issue of resolving this circuit split as to Mr. Fernandez-Vargas's relatively narrow facts, it did little to nothing to clarify the standard for conducting a civil retroactivity analysis in an immigration case

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89. *See, e.g.*, Lovan v. Holder, 574 F.3d 990, 993–94 (8th Cir. 2009) ("requiring actual reliance in each case runs contrary to the Supreme Court's retroactivity analysis in *Landgraf*. . . .").

90. Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006).

91. *Id.* at 35.

92. *Id.* at 33–35. The amendments expanded the categories of those who could be subjected to reinstatement and reduced the forms of relief that such reinstated noncitizens could request. *Id.*

93. *Id.* at 33 ("We hold the statute applies to those who entered before IIRIRA and does not retroactively affect any right of, or impose any burden on, the continuing violator of the INA now before us.").

94. *See, e.g., id.* at 36 n.5 (discussing the circuit split that led the Court to grant certiorari).

generally. The Supreme Court began its analysis in *Fernandez-Vargas* professedly grounded in the majority opinion of *Landgraf v. USI Film Products*[95] and discussed its earlier decision in *St. Cyr* at length.[96] Its focus in *Fernandez-Vargas*, however, on the activity being regulated is a shift away from the reliance concerns that have preoccupied the courts in the § 212(c) context and in fact more closely resembles the conduct test from Scalia's concurrence in *Landgraf*.[97] The Court does not, however, explicitly address this shift or justify why it believes the factual and legal circumstances at issue merit a different approach.[98] It is, however, interesting that the Court seems to consider Mr. Fernandez-Vargas's past immigration violations to be more serious and detrimental transgressions than at least some of the criminal convictions of legal permanent residents at issue in the § 212(c) context.

This section's review of civil retroactivity questions in immigration cases is intended as an introduction to the case study of the retroactive application of IIRIRA's definition of admission presented in sections III and IV below and the arguments made in the final section of this Article. It is by no means meant to be a comprehensive discussion of this issue.[99] It should be clear, however, from just this brief survey that the standards in this area are truly confusing. Despite the fact that each of these cases purports to rely on the same two step analysis and guiding principles originating from the Supreme Court's decision in *Landgraf*, the results diverge radically. As the sheer number of publically available cases grows, the doctrine of civil retroactivity, at least in the immigration context, has become less and less coherent.

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95. *Id.* at 38.

96. *Id.*

97. Landgraf v. USI Film Prods., 511 U.S. 244, 290–94 (1994) (Scalia, J., concurring). *See also supra* text accompanying notes 45–50 (discussing Scalia's position that the Court should determine the activity that the rule intends to regulate in order to conduct a retroactivity analysis).

98. *Fernandez-Vargas*, 548 U.S. at 45–46.

99. For in-depth analyses of questions of retroactivity in the immigration context, see Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002); Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1743 (2003); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998).

III. ENTRY, THE FLEUTI DOCTRINE, AND SEEKING ADMISSION UNDER INA § 101(a)(13)

A. Entry and the Fleuti Doctrine

Prior to 1996 and IIRIRA, whether or not a noncitizen had made an "entry" into the United States determined what substantive law and procedural protections governed that noncitizen's status and presence in the United States. Initially, entry was a judicially defined concept, at its simplest and most straightforward meaning "any coming of an alien from a foreign country into the United States."[100] In 1952, Congress codified a somewhat more complex definition of entry in the Immigration and Nationality Act of 1952 ("INA"), the basis for our immigration laws today. The then-section 101(a)(13) read:

> The term "entry" means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary . . . .[101]

The Supreme Court in *Rosenberg v. Fleuti* found that Congress's aim in codifying a definition of "entry" had been to ameliorate some of the more harsh judicial interpretations of the term.[102] As a result, it found that the "intent" requirement in INA section 101(a)(13) meant that a legal permanent resident could only be considered to be making a new entry when he or she had intended

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100. United States *ex rel.* Volpe v. Smith, 289 U.S. 422, 425 (1933).

101. INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1952).

102. Rosenberg v. Fleuti, 374 U.S. 449, 457–58 (1963). *But see id.* at 465–66 (Clark, J., dissenting) (stating that the statute had merely codified precedent).

"to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence."[103] Whether or not a trip outside the United States was "meaningfully interruptive" was to be measured by its length, purpose, need for travel documents, and other factors to be developed by the subsequent case law.[104]

Fleuti came to stand for the doctrine that departures from the United States that were "innocent, casual, and brief" did not trigger the consequences of a new entry for legal permanent residents.[105] While the Court in *Fleuti* framed its ruling as flowing directly from Congress's intent and the natural language of the statute, later commenters described the Court's holding as a significant departure from the previous meaning of the term "entry."[106] Nevertheless, the *Fleuti* doctrine became an entrenched and accepted principle of immigration law.[107]

Subsequent cases have added additional factors relevant to the determination of whether a trip abroad was "innocent, casual, and brief." In addition to the length and purpose of the trip[108] and the arrangements it required,[109] courts have considered the frequency of

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103. *Id.* at 462.

104. *Id.*

105. *Id.* at 461; Mendoza v. INS, 16 F.3d 335, 336 (9th Cir. 1993).

106. *See, e.g.*, 6 CHARLES GORDON, STANLEY MAILMAN, & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 71.03(6)(b) (Matthew Bender, rev. ed. 2011).

107. *See, e.g., id.*

108. *See* Jubilado v. United States, 819 F.2d 210, 213–14 (9th Cir. 1987) (holding that a three month departure where the purpose was to tie up affairs and move family to the United States did not meaningfully interrupt permanent resident status); Dabone v. Karn, 763 F.2d 593, 596 (3d Cir. 1985) (holding that a trip of two months to multiple countries for business purposes was not casual and brief); Munoz- Casarez v. INS, 511 F.2d 947, 948 (5th Cir. 1975) (holding that a one month trip to visit ill family in Mexico meaningfully interrupted legal permanent residence); Lozano-Giron v. INS, 506 F.2d 1073, 1078–79 (7th Cir. 1974) (holding that a trip of 27 days with a substantial amount of foreign currency for the purpose of getting married was not brief, casual, and innocent); *In re* Salazar, 17 I. & N. Dec. 167, 168 (BIA 1979) (considering length of time (five months) and activities during departure (visiting family and sightseeing) as factors to conclude departure was meaningfully interruptive of permanent resident status); *In re* Janati-Ataie, 14 I. & N. Dec. 216, 220 (Att'y Gen. 1972) (holding that trips of 30 and 35 days to visit family were brief, casual, and innocent).

109. *See, e.g., In re* Janati-Ataie, 14 I. & N. Dec. 216, 222 (BIA 1972) (holding that since travel documents were required, return was an entry); *In re* Nakoi, 14 I. & N. Dec. 208, 212 (BIA 1972) (holding that a contract for foreign employment made return an entry); *In re* Quintanilla-Quintanilla, 11 I. & N. Dec.

trips made,[110] any associated violations of immigration[111] or criminal laws,[112] and the noncitizen's family, employment, and community ties to the United States as compared to ties to and the situation in the country of proposed deportation.[113] While these analyses are by

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432, 454 (BIA 1965) (holding that a return was not an entry when no special travel documents were required).

110. *See, e.g.*, Kabongo v. INS, 837 F.2d 753, 757 (6th Cir. 1988) (holding that regular trips for school were entries); *In re* Cardenas Pinedo, 10 I. & N. Dec. 341, 343 (BIA 1963) (holding that a single visit for a few hours was not an entry).

111. *See, e.g.*, Leal-Rodriguez v. INS, 990 F.2d 939, 946–47 (7th Cir. 1993) (holding the *Fleuti* doctrine does not apply to entries without inspection); Laredo-Miranda v. INS, 555 F.2d 1242, 1245 n.6 (5th Cir. 1977) (finding that avoiding inspection at a border crossing, where the petitioner also assisted other noncitizens in entering without inspection, was one factor in determining that the petitioner's trip abroad was not innocent); Ferraro v. INS, 535 F.2d 208, 210 (2d Cir. 1976) (remanding to the Board of Immigration Appeals for consideration of the effect of a lawful permanent resident's entry without inspection); Aleman-Fiero v. INS, 481 F.2d 601, 601–02 (5th Cir. 1973) (per curiam) (holding that departure when appeal of a deportation order was pending was not "of the brief, casual and temporary nature described in" *Fleuti*); Bufalino v. INS, 473 F.2d 728, 731 (3d Cir. 1973) (holding that entry based on conscious misrepresentation of United States citizenship was not innocent); *In re* Mundall, 18 I. & N. Dec. 467, 470 (BIA 1983) (holding that *Fleuti* does not apply where noncitizen was never a lawful permanent resident).

112. *See, e.g.*, *Laredo-Miranda*, 555 F.2d at 1246 (holding that re-entry while assisting other noncitizens to enter without inspection is not innocent); Longoria-Castenada v. INS, 548 F.2d 233, 237 (8th Cir. 1977) (holding that the *Fleuti* doctrine did not apply to departure for the purpose of furthering a plan to assist noncitizens to enter the United States illegally); Palatian v. INS, 502 F.2d 1091, 1093 (9th Cir. 1974) (holding that narcotics smuggling while reentering the United States rendered an absence not innocent); Vargas-Banuelos v. INS, 466 F.2d 1371, 1374 (5th Cir. 1972) (holding that agreeing to help other noncitizens enter the United States illegally, where the intent to do so was not formed until after leaving the United States, did not meaningfully interrupt permanent resident status); *In re* Acosta, 14 I. & N. Dec. 666, 669 (BIA 1974) (finding that a trip to Mexico where the respondent was convicted of assault and served a six week jail sentence interrupted permanent resident status); *In re* Wood, 12 I. & N. Dec. 170, 176–77 (BIA 1967) (holding that a departure that resulted in convictions for conspiracy to commit forgery and conspiracy to utter was not brief, casual and innocent); *In re* Alvarez-Verduzco, 11 I. & N. Dec. 625, 627 (BIA 1966) (holding that reentry while smuggling heroin meaningfully interrupted permanent resident status); *In re* Scherbank, 10 I. & N. Dec. 522, 524 (BIA 1964) (holding that departures related to cheating at gambling and related criminal charges meaningfully interrupted the respondent's permanent residence).

113. *See, e.g.*, Lozano-Giron v. INS, 506 F.2d 1073, 1077–78 (7th Cir. 1974) ("[A]nother group of relevant factors would undoubtedly center around the

definition very fact specific,[114] a brief trip outside the United States involving no criminal or otherwise proscribed activities was rarely if ever considered to trigger a new entry.[115] Legal permanent residents, then, even those like Mr. Charles with criminal convictions that might make them excludable were they to be considered to be making a new entry, could safely take such trips in reliance on the fact that they would be protected by the *Fleuti* doctrine.

B. Illegal Immigration Reform and Immigrant Responsibility Act

In 1996, Congress enacted sweeping changes to immigration law generally in the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[116] IIRIRA transformed both the substance and the structure of immigration law and proceedings, creating perhaps the most substantial alterations to this area of the law in U.S. history. It was passed in a context of increasingly anti-immigrant sentiment, and its changes were, for the most part, designed to make it more difficult for noncitizens to obtain and keep legal status in the United States.

1. Seeking Admission Under INA § 101(a)(13)

The current version of INA section 101(a)(13) originated with IIRIRA. The definition of entry that the section had previously contained was deleted and was replaced with a definition of admission: "The terms 'admission' and 'admitted' mean, with

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effect of the uprooting caused by deportation, that is, how long the alien had been a permanent resident of the United States, whether he had a wife and children living with him, whether he owned a business establishment or a home or other real estate in the United States, the nature of the environment to which he would be deported, and his relation to that environment.").

114. *Cf.* 6 GORDON ET AL., *supra* note 106, § 71.03(6)(b) (describing the *Fleuti* factors as "somewhat nebulous criteria").

115. *See, e.g.*, *id.* ("Following the *Fleuti* decision a brief absence by a lawful permanent resident alien usually has not resulted in an entry for deportation purposes." (citing Itzcovitz v. Selective Serv., 447 F.2d 888, 891 n.8 (2d Cir. 1971))); Zimmerman v. Lehmann, 339 F. 2d 943 (7th Cir. 1965); *In re* Quintanilla-Quintanilla, 11 I. & N. Dec. 432 (BIA 1965); *In re* Yoo, 10 I. & N. Dec. 376 (BIA 1963); *In re* Cardenas-Pinedo, 10 I. & N. Dec. 341 (BIA 1963).

116. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[117] Congress was not attempting to redefine the term entry with this amendment to the statute. In fact, "entry" remains a relevant term used in many other parts of the INA and the related federal regulations.[118] Rather, with this amendment, Congress was signaling a shift in focus, from the mere fact of a physical "entry" to a lawful inspection and "admission" by immigration officers.

This shift in focus had the effect of subjecting more noncitizens to charges of inadmissibility rather than charges of deportability and ultimately made more noncitizens removable from the United States. Prior to IIRIRA, individuals who successfully entered without inspection were considered to have made an entry pursuant to the then-version of INA section 101(a)(13) and were thus subjected to deportation charges and procedures.[119] Subsequent to IIRIRA, these individuals have not been "admitted" and are therefore subject to charges of inadmissibility.[120] Furthermore, charges of inadmissibility come with fewer procedural protections than charges of deportability,[121] and the grounds of inadmissibility are generally

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117. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2006).

118. Most obviously, the terms "entry" or "enter" are used twice in the definition of admission itself. INA § 101(a)(13)(A), 8 U.S.C. § 1101(a)(13)(A) (2006) ("lawful *entry*") (emphasis added); INA § 101(a)(13)(C)(vi), 8 U.S.C. § 1101(a)(13)(C)(vi) (2006) ("attempted to *enter*") (emphasis added). *See also, e.g.*, INA § 101(a)(15)(T)(i)(II), 8 U.S.C. § 1101(a)(15)(T)(i)(II) (2006) ("allowed *entry*") (emphasis added); INA § 245(c)(2), 8 U.S.C. § 1255(c)(2) ("*entry* into the United States") (emphasis added); INA § 275, 8 U.S.C. § 1325 ("*enters* or attempts to *enter*") (emphasis added); 1 GORDON ET AL., *supra* note 106, § 9.04 n.8, § 64.01 n.4.

119. *See, e.g.*, Mora v. Mukasey, 550 F.3d 231, 235 (2d Cir. 2008); 1 GORDON ET AL., *supra* note 106, § 1.03(2)(b).

120. *See, e.g.*, INA § 235(a)(1), 8 U.S.C. § 1225 (a)(1); INA § 101 (a)(13), 8 U.S.C. § 1101(a)(13) (defining "admission" as "lawful entry of the alien into the United States after inspection and authorization by an immigration officer"); INA § 212(a), 8 U.S.C. § 1182(a) (listing the various reasons for inadmissibility). *See also* 1 GORDON ET AL., *supra* note 106, § 1.03(2)(b) (discussing the shift in focus from entry to admission).

121. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."). *But see* Kwong Hai Chew v. Colding, 344 U.S. 590, 596–98 (1953) (finding legal permanent residents entitled to greater due process protections even when seeking entry). *See also* 1 GORDON ET AL., *supra* note 106, § 9.05.

broader than the grounds of deportability.[122] Overall, then, the shift furthered Congress's stated purpose in IIRIRA of cracking down on "illegal immigration."

IIRIRA's amendments to INA section 101(a)(13) also included provisions specifically addressing when a legal permanent resident would be considered to be seeking admission.[123] Under the current version of the statute, a returning lawful permanent resident is "seeking admission" only under certain circumstances, when:

> the alien – (i) has abandoned or relinquished that status; (ii) has been absent from the United States for a continuous period in excess of 180 days; (iii) has engaged in illegal activity after having departed the United States; (iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this Act and extradition proceedings; (v) has committed an offense identified in section 212(a)(2), unless since such offense the alien has been granted relief under section 212(h) or 240A(a); or (vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.[124]

Many noncitizens who trigger the application of this definition fall within subsection (v) because they have "committed an offense identified in section 212(a)(2)."[125] Those offenses identified in INA section 212(a)(2) certainly include crimes involving moral turpitude and multiple criminal convictions with aggregate sentences of imprisonment for five years or more.[126] A

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122. *Compare* INA § 212(a), 8 U.S.C. § 1182(a), *with* INA § 237(a), 8 U.S.C. § 1227(a).

123. Illegal Immigration Reform Act of 1996, Pub. L. No. 104-208, § 301(a)(13)(C), 110 Stat. 3009-3546, 3009-3575.

124. INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2006).

125. INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v) (2006).

126. INA § 212(a)(2)(A), (B), 8 U.S.C. § 1182(a)(2)(A), (B) (2006). Offenses "identified in section 212(a)(2)" for purposes of INA §101(a)(13)(C)(v) also likely include trafficking in a controlled substance, engaging in prostitution or

"crime involving moral turpitude" is a term of art in immigration law that, because it is not defined in the statute or regulations, has been left to interpretation through case law. As a result, it has a relatively soft definition, but it is generally understood to mean a crime involving "both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness."[127] From a practical perspective, individuals with criminal convictions are particularly likely to be targeted when attempting reentry into the United States. Because it is common to run identifying information of an individual at the "border" through various databases including some containing information about criminal history, it is both more convenient to catch these individuals when they are presenting themselves for inspection than when they are going about their daily lives within the United States and easier to identify individuals with a prior criminal record than those falling within some of the other subcategories of INA subsection 101(a)(13)(C).

Fleuti and IIRIRA's new definition of which legal permanent residents are seeking admission are not coextensive.[128] In some categories, individuals who likely would have been deemed to be seeking entry under *Fleuti* are protected under IIRIRA. For example, departures of up to 180 days (six months) do not necessitate a new admission pursuant to subsection (ii) of the IIRIRA definition, but a multi-month trip would have likely triggered a new entry under *Fleuti*. In other respects, however, the post-IIRIRA section 101(a)(13) subjects more reentering legal permanent residents to removal proceedings than would have been captured under *Fleuti*.[129] Mr. Charles's case is one example—the Department

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other commercialized vice, violating religious freedom, trafficking in persons, and money laundering. INA § 212(a)(2)(C), (D), (G), (H), (I), 8 U.S.C. § 1182(a)(2)(C), (D), (G), (H), (I) (2006). While these categories are not necessarily offenses in the traditional sense of a violation of the criminal laws, they are wrongdoings included within INA § 212(a)(2) and are therefore likely within the scope of INA § 101(a)(13)(C)(v).

127. *In re* Silva-Treviño, 24 I. & N. Dec. 687, 689 n.1 (AG 2008).

128. *Cf. In re* Collado-Munoz, 21 I. & N. Dec. 1061, 1065 (BIA 1998) ("Congress has now amended the law to expressly preserve some, but not all, of the *Fleuti* doctrine, as that doctrine developed following the Supreme Court's 1963 decision.").

129. This is a further example of the phenomenon discussed above in Part III.B.1 of expanding the number of noncitizens subject to charges of

of Homeland Security alleges that noncitizens like Mr. Charles fall within subsection (v) because they have been convicted of a crime involving moral turpitude, an offense identified in INA § 212(a)(2)(A)(i), but such a crime unconnected to the departure from the United States would not have caused a new entry under *Fleuti*.[130]

IIRIRA did not fundamentally alter the consequences of seeking entry or admission. Any noncitizen seeking admission today is required to demonstrate that he or she is not inadmissible under INA § 212, just as was previously required of a noncitizen seeking entry. Other structural changes made by IIRIRA, however, changed the manner in which this determination is made.

2. Other Structural Changes

The other structural changes made by IIRIRA substantially altered immigration procedures. Prior to IIRIRA, there were two forms of proceedings that could result in a noncitizen's inability to enter or remain in the United States. Decisions about whether a noncitizen could enter the United States were made in exclusion proceedings, while decisions about whether a noncitizen who had already entered could remain legally in the United States were made in deportation proceedings.[131]

IIRIRA combined these two separate sets of substantive and procedural rules into a single form of proceedings, called removal proceedings.[132] A distinction similar to that between exclusion and deportation, however, was still maintained. Noncitizens seeking admission (like those previously seeking entry) must demonstrate that they are not inadmissible under § 212 of the Immigration and Nationality Act; noncitizens who have already been admitted (like

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inadmissibility and therefore the number of removable noncitizens. *See supra* notes 119–122 and accompanying text.

130. INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v) (2006). For more differences between the coverage of *Fleuti* and the new IIRIRA definition, see 5 GORDON ET AL., *supra* note 106, § 64.01 n.5.

131. *See* Landon v. Plasencia, 459 U.S. 21, 25 (1982) ("The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission.").

132. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 392, 110 Stat. 3009, 589 (1996).

those previously who had already entered) must demonstrate that they are not deportable under § 237.[133] Noncitizens found to be either inadmissible or deportable will be "removed."[134]

3. IIRIRA's Effective Date

IIRIRA provided that its effective date would be "the first day of the first month beginning more than 180 days after the date of the enactment," which meant that its changes took effect on April 1, 1997.[135] The effective date section specified that IIRIRA's amendments were not to be applied in deportation or exclusion proceedings pending prior to that date.[136] This effective date, however, applied primarily to the procedural portions of the statute, as a method for transitioning to the new procedures.[137] In fact, several substantive amendments specifically identified different temporal applications.[138]

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133. *Id.* § 304, 110 Stat. 3009, 593; INA § 240(e)(2), 8 U.S.C. § 1229a(e)(2) (2006).

134. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 304, 110 Stat. 3009, 593 (1996); INA § 240, 8 U.S.C. § 1229a (2006).

135. Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 309(a), 110 Stat. 3009, 625 (1996).

136. *Id.*

137. *See* INS v. St. Cyr, 533 U.S. 289, 318 (2001) (citing H.R. CONF. REP. No. 104-828, at 222 (1996)) ("Section 309(c)(1) of the IIRIRA is best read as merely setting out the procedural rules to be applied in removal proceedings pending on the effective date of the statute.").

138. *See, e.g.*, Illegal Immigration Reform and Immigration Responsibility Act, Pub. L. No. 104-208, § 321(b), 110 Stat. 3009 (1996) (stating that the amendment of the definition of "aggravated felony" applies with respect to "conviction[s] . . . entered before, on, or after" the statute's enactment date); § 321(c) ("The amendments made by this section shall apply to actions taken on or after the date of the enactment of this Act, regardless of when the conviction occurred . . . ."); § 322(c) ("The amendments made by subsection (a) shall apply to convictions and sentences entered before, on, or after the date of the enactment of this Act."); § 342(b) (adding that incitement of terrorist activity as a ground for exclusion "shall apply to incitement regardless of when it occurs"); § 344(c) (adding that false claims of U.S. citizenship as ground for removal "shall apply to representations made on or after the date" of enactment); § 347(c) (rendering excludable or deportable any noncitizen who votes unlawfully "before, on, or after the date" of enactment); § 348(b) (providing that automatic denial of discretionary waiver from exclusion "shall be effective on the date of the enactment . . . and shall apply in the case of any alien who is in exclusion or deportation proceedings

IV. RETROACTIVITY AND ADMISSION UNDER INA § 101(a)(13)

Despite the fact that IIRIRA was passed and took effect around fifteen years ago, questions with regard to its proper reach remain. While the effect of IIRIRA on the *Fleuti* doctrine began to be considered relatively quickly after IIRIRA took effect in April 1997, the full contours of this inquiry took some time to develop and be explored. Until the Supreme Court's decision in *Vartelas*, the retroactive application of the "new" definition of admission in § 101(a)(13) of the INA was one of the remaining unresolved issues. In part because subsection (v) of INA 101(a)(13)(C) most clearly involves some past conduct, these claims are raised most frequently by noncitizens like Mr. Charles who are reentering the United States after having been convicted of what are arguably crimes involving moral turpitude.

A. Initial Consideration of INA § 101(a)(13)

Shortly after the new definition of admission created by IIRIRA took effect, the Board of Immigration Appeals ("BIA" or "the Board") in *In re Collado-Munoz* held that the *Fleuti* doctrine did "not survive the enactment of the IIRIRA."[139] Collado-Munoz was a legal permanent resident who attempted to reenter the United States after a two-week visit to the Dominican Republic on April 7, 1997,

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as of such date unless a final administrative order in such proceedings has been entered as of such date"); § 350(b) (adding domestic violence and stalking as grounds for deportation, stating that the amendment "shall apply to convictions, or violations of court orders, occurring after the date" of enactment); § 351(c) (discussing deportation for smuggling and providing that amendments "shall apply to applications for waivers filed before, on, or after the date" of enactment); § 352(b) (adding renouncement of citizenship to avoid taxation as a ground for exclusion, stating that amendments "shall apply to individuals who renounce United States citizenship on or after the date" of enactment); § 380(c) (noting that civil penalties on noncitizens for failure to depart "shall apply to actions occurring on or after" effective date); § 384(d)(2) (adding that penalties for disclosure of information shall apply to "offenses occurring on or after the date" of enactment); § 531(b) (noting that public charge considerations as a ground for exclusion "shall apply to applications submitted on or after such date"); § 604(c) (noting that the new asylum provision "shall apply to applications for asylum filed on or after the first day of the first month beginning more than 180 days after the date" of enactment). *See also St. Cyr*, 533 U.S. at 319–20 (2001).

139. *In re* Collado-Munoz, 21 I. & N. Dec. 1061, 1065 (BIA 1998).

just six days after IIRIRA took effect.[140] The Board held that, regardless of the nature and length of his departure, he was properly found to be seeking a new admission under INA §101(a)(13)(C)(v) because he fell within INA § 212(a)(2) due to a 1974 conviction for sexual abuse of a minor.[141] Collado-Munoz apparently did not raise, and the Board did not explicitly consider, however, the question of the retroactive application of INA § 101(a)(13).[142] The Board's decision was based on its finding that the *Fleuti* exception for "innocent, casual, and brief" departures was not incorporated into the new definition of admission pursuant to the plain language of the statute.[143]

Several circuit courts of appeal—the First, Third, and Fifth—agreed with the BIA that IIRIRA abrogated the *Fleuti* doctrine.[144] For some years, this was as far as the inquiry progressed. The basic premise that IIRIRA abrogated *Fleuti* remained essentially unquestioned.[145] Courts did not adopt Board Member Rosenberg's dissenting opinion in *Collado-Munoz* incorporating the Fleuti doctrine into the new definition of admission.[146] They also did not, however, consider whether their contrary interpretation, that IIRIRA did away with the *Fleuti* doctrine, might make the application of at least some portions of INA § 101(a)(13) impermissibly retroactive when applied to conduct pre-dating IIRIRA. In addition, neither the BIA nor the circuit courts considered whether the *Fleuti* doctrine

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140. *Id.* at 1062–63.

141. *Id.* at 1062, 1066.

142. Even Board Member Rosenberg, in dissent, would have held that IIRIRA did not abrogate the *Fleuti* doctrine, not that the new INA § 101(a)(13) could not be retroactively applied. *Id.* at 1067–78.

143. *Id.* at 1064.

144. *See, e.g.*, DeVega v. Gonzales, 503 F.3d 45, 48 n.4 (1st Cir. 2007) (holding that passage of IIRIRA abrogated the *Fleuti* doctrine); Malagon de Fuentes v. Gonzales, 462 F.3d 498, 501 (5th Cir. 2006) (holding the *Fleuti* doctrine no longer applicable, citing two other circuits); Tineo v. Ashcroft, 350 F.3d 382, 384 (3d Cir. 2003) (holding that the *Fleuti* doctrine was "repealed by implication" with passage of IIRIRA).

145. *Cf.* Brief for American Immigration Lawyers Association as Amicus Curiae Supporting Petitioner at 15, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211) ("Lower courts have incorrectly assumed that [IIRIRA's] amendment supersedes *Fleuti*, without properly grappling with that decision's constitutional underpinnings.").

146. *Collado-Munoz*, 21 I. & N. Dec. at 1067–78. *See, e.g.*, Tineo v. Ashcroft, 350 F.3d 382, 390, 396–97 (3d Cir. 2003) (holding that lower courts should follow the BIA's decision in *Collado-Munoz*).

might continue to apply to those sections of the Immigration and Nationality Act that still used the term "entry."[147] In the meantime, legal permanent residents continued to be charged as inadmissible, detained, and removed from the United States on the basis of criminal convictions occurring prior to IIRIRA.

B. Consideration of the Retroactive Application of INA § 101(a)(13)

The first published case considering the retroactive application of the definition of admission in § 101(a)(13) of the INA did not appear until 2004.[148] Only three Circuit Courts of Appeal have explicitly considered the question. Two—the Fourth and the Ninth—found IIRIRA's definition of admission to be impermissibly retroactive under at least some circumstances.[149] One—the Second—found that it could be applied retroactively under the circumstances presented.[150] The First, Third, and Fifth Circuits, the circuits that held that IIRIRA abrogated the *Fleuti* doctrine, have still not considered whether such a position might, under at least some circumstances, be impermissibly retroactive. The remaining circuits—the Sixth, Seventh, Eighth, Tenth, and Eleventh—have not ruled on the issue in a published decision, although, as discussed below, some of them have acknowledged the question in cases ultimately decided on other bases. This broad divergence in approach, analysis, and result provides yet another example of the incoherence of the civil–retroactivity analysis in immigration cases.

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147. *Compare Collado-Munoz*, 21 I. & N. at 1065 (BIA 1998) (referring to "the no longer existent definition of 'entry' in the Act"), *with supra* note 118 and accompanying text (listing the sections of the Act that, post-IIRIRA, still use the term "enter" or "entry"). Because *Rosenberg v. Fleuti* relied at least in part on the intent language in the definition of entry in the former version of INA § 101(a)(13) as the basis for its "innocent, casual, and brief" exception, this would likely not have changed outcomes, given the number of courts interpreting *Fleuti* narrowly. *See* Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963) (relying on the intent language in the definition of "entry" in the former version of INA § 101(a)(13)).

148. Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004). *Cf.* Camins v. Gonzalez, 500 F.3d 872, 882 (9th Cir. 2007) ("We are aware of only one appellate case, *Olatunji v. Ashcroft*, that has dealt directly with this question." (internal citation omitted)).

149. *Camins*, 500 F.3d 872; *Olatunji*, 387 F.3d 383.

150. Vartelas v. Holder, 620 F.3d 108 (2d Cir. 2010), *rev'd*, 132 S. Ct. 1479 (2012).

1. Circuits Finding that INA § 101(a)(13) Cannot Be Retroactively Applied

Both the Ninth and the Fourth Circuit Courts of Appeal have held that the definition of admission added by § 301(a)(13) of IIRIRA cannot be applied retroactively to an individual who reasonably relied on the concept that he would not be subject to expulsion from the United States on account of his guilty plea.[151] The noncitizen before the Fourth Circuit, Clifford Olatunji, was a Nigerian citizen who had been a legal permanent resident of the United States for more than a decade at the time of the appellate court proceedings.[152] In 1998, when attempting to reenter the United States after a nine-day trip to London, he was stopped and charged as seeking admission and inadmissible due to a 1994 guilty plea and conviction for theft of government property.[153] Rodolfo Camins, the noncitizen before the Ninth Circuit, was a citizen of the Philippines who had been a legal resident of the United States since 1988.[154] In 1996, he pled guilty to and was convicted of sexual battery.[155] He was charged as seeking admission and inadmissible in 2001 upon his return from a three-week trip to the Philippines to see his sick mother.[156]

Both Olatunji and Camins were ordered removed by their respective Immigration Judges and appealed unsuccessfully to the Board of Immigration Appeals.[157] Before their corresponding circuit courts, both argued that the previous version of INA § 101(a)(13) and the *Fleuti* doctrine, rather than the post-IIRIRA definition of admission, should be applied because of their pre-IIRIRA guilty pleas.[158] The Ninth Circuit, as in the previous line of cases following *Collado-Munoz*, first found that IIRIRA abrogated the

151. *Camins*, 500 F.3d at 882; *Olatunji*, 387 F.3d at 398.
152. *Olatunji*, 387 F.3d at 386.
153. *Id.*
154. *Camins*, 500 F.3d at 875.
155. *Id.*
156. *Id.*
157. *Camins*, 500 F.3d at 875–76; *Olatunji*, 387 F.3d at 386. Camins sought relief from removal under the former INA § 212(c). *Camins*, 500 F.3d at 875–76. Olatunji apparently did not seek relief from removal and likely would not have been statutorily eligible for §212(c) relief in any event. *Olatunji*, 387 F.3d at 386.
158. *Camins*, 500 F.3d at 875–76; *Olatunji*, 387 F.3d at 388.

Fleuti doctrine.[159] Unlike the previous decisions, however, the Ninth Circuit did not stop its analysis there, but instead went on to consider the retroactive application of IIRIRA's new definition of admission.[160] The Fourth Circuit began its substantive inquiry with the retroactivity question.[161]

Beginning with step one of the *Landgraf* analysis, both the Fourth and the Ninth Circuits held that there is no evidence of "clear congressional intent" that INA § 101(a)(13) should apply retroactively.[162] The Supreme Court in *St. Cyr* held that IIRIRA's effective date provision was insufficiently clear and unambiguous to assure "that Congress . . . has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[163] Since that time, this step of the analysis for those sections of IIRIRA without their own individual temporal–reach provisions has been essentially uncontested.[164]

The Fourth and Ninth Circuits also reached the same conclusion at the second step of the *Landgraf* analysis—the new definition of admission at INA § 101(a)(13)(C)(v) cannot be applied retroactively to noncitizens who pled guilty and were convicted of the offense triggering the application of the new definition prior to the effective date of IIRIRA.[165] Both Circuits focused on the fact that IIRIRA's new definition of admission attached new legal consequences to a past action, a guilty plea and resulting conviction, by automatically classifying noncitizens with such a conviction as seeking admission and thereby exposing them to a charge of

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159. *Camins*, 500 F.3d at 880.

160. *Id.*

161. *Olatunji*, 387 F.3d at 388.

162. *Camins*, 500 F. 3d at 882; *Olatunji*, 387 F. 3d at 389, 393.

163. INS v. St. Cyr , 533 U.S. 289, 322 (2001) (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 272–73 (1994)). *See also Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

164. *See, e.g.*, *Camins*, 500 F.3d at 882 ("The Fourth Circuit held in *Olatunji*, and the government concedes here, that there is no evidence of 'clear congressional intent' that IIRIRA § 301(a)(13) apply retroactively."); *Olatunji*, 387 F.3d at 389 n.3 ("The Government has conceded that the relevant portions of IIRIRA do not contain 'effective date' or 'temporal reach' provisions and that 'the Court must reach the second step of the Landgraf test.'").

165. *Camins*, 500 F.3d at 885; *Olatunji*, 387 F.3d at 396.

inadmissibility upon return to the United States no matter how innocent, casual, and brief the travel.[166]

The Fourth and the Ninth Circuits do, however, differ in the legal standard that they apply and in how they reach this result. The Fourth Circuit held that "reliance, in any form, is irrelevant to the retroactivity inquiry,"[167] while the Ninth Circuit held that a guilty plea was sufficient evidence of objectively reasonable reliance on the old law.[168] This difference in analysis does have consequences. The Ninth Circuit held in a subsequent unpublished opinion, *Myers v. Holder*, that a noncitizen who was convicted after trial prior to IIRIRA rather than as the result of a guilty plea did not have the same reliance interests and therefore could not demonstrate that the new definition of admission should not be retroactively applied to him.[169] The Fourth Circuit has not considered this question in a published opinion; however, since it explicitly found that reliance was not a necessary factor, it would likely hold the opposite—that the post-IIRIRA version of INA § 101(a)(13) could not be applied to such a noncitizen.[170]

2. Circuits Allowing INA § 101(a)(13) to Be Applied Retroactively

The Second Circuit has disagreed with the Ninth and Fourth Circuits in *Vartelas v. Holder*.[171] Mr. Vartelas is a legal permanent resident whose factual situation closely resembles that of Mr. Olatunji and Mr. Camins. He is a Greek citizen who has been a legal permanent resident since 1989.[172] In 1994, he was convicted under federal law of conspiracy to make or possess a counterfeit security

166. *Camins*, 500 F.3d at 885; *Olatunji*, 387 F. 3d at 396.

167. *Olatunji*, 387 F.3d at 396.

168. *Camins*, 500 F.3d at 884.

169. Myers v. Holder, 409 Fed. App'x. 69, 70 (9th Cir. 2010).

170. *But see* Mbea v. Gonzales, 482 F.3d 276, 278 (4th Cir. 2007) (requiring reliance in the context of noncitizens convicted after a trial prior to the effective date of IIRIRA who alleged that the repeal of INA § 212(c) should not be retroactively applied to them); Chambers v. Reno, 307 F.3d 284, 293 (4th Cir. 2002) (holding that the repeal of INA § 212(c) could be applied to the petitioner who was convicted after trial prior to the repeal).

171. Vartelas v. Holder, 620 F.3d 108, 120 (2d Cir. 2010).

172. *Id.* at 110.

based on his guilty plea.[173] In early 2003, more than a decade after he committed the actions that were the basis for his criminal conviction, he was stopped when trying to reenter the United States after a seven–day trip to Greece to assist his parents with their family business there and was ultimately issued a notice to appear charging him as seeking admission and inadmissible because he had been convicted of a crime involving moral turpitude.[174]

Mr. Vartelas's procedural posture was somewhat unique, which to some degree sets his case apart from those of Mr. Olatunji and Mr. Camins. Mr. Vartelas apparently did not raise the argument regarding the retroactive application of INA § 101(a)(13)(C)(v) to him in his initial proceedings before the Immigration Judge or in his initial appeal before the Board of Immigration Appeals.[175] Instead, the argument was raised for the first time in a motion to reopen before the Board of Immigration Appeals alleging that Mr. Vartelas's initial counsel was ineffective for failing to raise the argument in the first instance.[176] The Board denied the motion, and only the denial of the motion was appealed to the Second Circuit.[177] It is the Second Circuit's denial of this petition for review that was recently considered by the Supreme Court.[178] While it might be expected that these distinct procedural issues would make this an unlikely case to be granted certiorari or would affect the Supreme Court's consideration of the issues presented because of the additional layers of legal analysis they pose, they were not raised as real issues in briefing, during oral argument, or in the Supreme Court's decision.[179]

The Second Circuit did not disagree with the Fourth and Ninth Circuits regarding step one of the *Landgraf* analysis, also

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173. *Id.*

174. *Id.* at 111; Brief of Petitioner at 10, Vartelas v. Holder, 132 S. Ct. 70 (2012) (No. 10-1211).

175. *Vartelas*, 620 F.3d at 111–12.

176. *Id.* at 110, 112–13.

177. *Id.* The Board's denial of Mr. Vartelas' appeal from the Immigration Judge's initial removal order was apparently never the subject of a petition for review to the Second Circuit. *Id.* at 112.

178. Vartelas v. Holder, 132 S. Ct. 1479 (2012).

179. The procedural posture and question of ineffective assistance of counsel were raised on remand to the Second Circuit, where the Court remanded to the Board of Immigration Appeals to answer that question in the first instance in light of the Supreme Court's decision regarding retroactivity. *See* Vartelas v. Holder, 689 F.3d 121, 124 (2d Cir. 2012).

finding that Congress in enacting IIRIRA did not expressly prescribe the temporal reach of INA § 101(a)(13)(C).[180] The Second Circuit did disagree, however, when it reached step two of the *Landgraf* analysis. It held that INA § 101(a)(13)(C)(v) could be applied to Mr. Vartelas even though his criminal conduct and conviction predated IIRIRA.[181] The panel in *Vartelas*, like the Ninth Circuit in *Camins*, found that reliance is a necessary component of the civil retroactivity analysis.[182] The court then focused on the commission of the crime, instead of on the guilty plea or conviction, based on the use of the term "committed" in INA § 101(a)(13)(C) and rejected the notion that a noncitizen could reasonably rely on provisions of the immigration laws when he commits a crime.[183]

Following the Second Circuit's decision denying the petition for review in *Vartelas v. Holder*, Mr. Vartelas filed a pro se petition for a writ of certiorari with the United States Supreme Court.[184] The question presented at this stage was phrased as:

> Should 8 U.S.C. § 1101(a)(13)(C)(v), which removes LPR of his right, under Rosenberg v. Fleuti, 374 U.S. 449 (1963), to make "innocent, casual, and brief" trips abroad without fear that he will be denied reentry, be applied retroactively to a guilty plea taken prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 110 Stat. 3009 (1996)?[185]

Among the reasons raised in support of the argument that the Supreme Court should hear the case was the circuit split discussed above.[186] Mr. Vartelas emphasized that this case took place "in a context—immigration law—where nation-wide uniformity is particularly important."[187] The government, in responding to the petition, did not contest that the circuit split, or the general

180. *Vartelas*, 620 F.3d at 117.
181. *Id.* at 121.
182. *Id.* at 118.
183. *Id.* at 120.
184. Petition for Writ of Certiorari, Vartelas v. Holder, 132 S. Ct. 70 (Sept. 27, 2011) (No. 10-1211), 2011 WL 1321242.
185. *Id.* at *ii.
186. *Id.* at *5–8.
187. *Id.* at *5.

contradictions in approach, analysis, and law, existed; instead, the government argued that review by the Supreme Court would be "premature." [188] In support, the government pointed out that the Second Circuit explicitly addressed the Supreme Court's decision in *Fernandez-Vargas*, which was issued subsequent to the Fourth's decision in *Olatunji* and was not addressed by the Ninth in *Camins*, and that the Fourth and Ninth Circuits had not yet had a chance to respond to the Second Circuit's switch in focus to the commission of the crime from a plea of guilty or conviction.[189]

Despite the government's arguments, the Supreme Court granted certiorari on September 27, 2011;[190] oral argument was held on January 18, 2012.[191] The Court's decision, issued on March 28, 2012, will be discussed in section V below.

3. Other Courts

Prior to the Supreme Court's decision in *Vartelas*, no circuit other than the Second, Fourth, and Ninth had issued a decision whose result turned on the question of whether INA § 101(a)(13)(C) may be retroactively applied to some conduct predating IIRIRA. The Eleventh Circuit, however, recognized this as a valid question in a case ultimately decided on other grounds. In *Richardson v. Reno*, the court described the application of the new definition in § 101(a)(13)(C) to Mr. Richardson, a Haitian citizen who had pled guilty to trafficking in cocaine prior to IIRIRA, but did not consider the constitutional issue of retroactive application to a pre-1996 plea or hold that this application was proper or improper because it found that it did not have habeas jurisdiction.[192] The First, Third, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have not spoken to the question at all. The Board of Immigration Appeals acknowledged that the Supreme Court decision in *Vartelas* could affect its

188. Brief for the Respondent in Opposition at 14, Vartelas v. Holder, 132 S. Ct. 70 (2011) (No. 10-1211).

189. *Id.*

190. Vartelas v. Holder, 132 S. Ct. 70 (Sept. 27, 2011).

191. Transcript of Oral Argument, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

192. Richardson v. Reno, 162 F.3d 1338, 1342–48, 1378–79 (11th Cir. 1998), *vacated*, 526 U.S. 1142 (1999).

decisions, but did not reconsider its position as set out in *Collado-Munoz*.[193]

V. SUPREME COURT CONSIDERATION IN *VARTELAS V. HOLDER*—AN OPPORTUNITY TO RESOLVE THE CONFLICT?

A. Imposing a Guiding Principle—Protect the Noncitizen

It should be clear from the discussion above of circuit court decisions addressing the retroactive application of IIRIRA's new definition of admission at INA § 101(a)(13)(C) and other questions of retroactivity in immigration cases that these cases are incoherent when one attempts to view them as a settled, or even developing, body of law. The divergence occurs not just at the margins, or in particularly difficult cases, but at the heart of the civil retroactivity analysis in immigration cases. Circuits disagree repeatedly not only

193. *In re* Rivens, 25 I. & N. Dec. 623, 625 n.1 (BIA 2011) ("We note that the Supreme Court recently granted certiorari on the question whether the definition of 'admission' in section 101(a)(13)(C) of the Act applies to a returning lawful permanent resident who committed an offense identified in section 212(a) before the effective date of section 101(a)(13)(C). The outcome of that case could potentially affect the respondent's inadmissibility for his 1992 offense of offering a false instrument, but it would not seem to have relevance with respect to his 2000 accessory after the fact offense." (internal citation omitted)). Subsequent to the Supreme Court's decision in *Vartelas*, the BIA presumably must reconsider *Collado-Munoz* insofar as it is inconsistent and apply the law as set forth in *Vartelas*, but it has not yet considered the issue in any depth. *See, e.g.*, *In re* Valenzuela Felix, 26 I. & N. Dec. 53, 59 n. 6 (BIA 2012) ("We observe that the Supreme Court issued *Vartelas v. Holder*, 132 S. Ct. 1479 (2012) subsequent to the Immigration Judge's decision in this case. The Supreme Court applied the 'antiretroactivity principle' there to hold that a returning lawful permanent resident could not be regarded as seeking admission under section 101(a)(13) of the Act where his conviction for an offense under section 212(a)(2) predated the effective date of the IIRIRA. *Id.* at 1487–92. Rather, the Supreme Court required an evaluation of the alien's application for admission under the *Fleuti* doctrine, pursuant to which a lawful permanent resident could make brief, casual, and innocent departures outside the United States without being classified as an alien seeking entry upon return. While the respondent argues that this case would apply to his 1991 conviction for possession of cocaine—an issue we do not decide—he does not claim that it would apply to his 2010 bulk cash smuggling conviction, which obviously postdates the effective date of the IIRIRA."); *In re* Fernandez-Taveras, 25 I. & N. Dec. 834, 836 (BIA 2012).

with each other but also with themselves. This uncertainty is particularly problematic because it is occurring within a doctrine, civil retroactivity, that is itself about protecting settled expectations and within a context, immigration, where the consequences of disrupting those settled expectations can be particularly severe.

The incoherence results from inherent ambiguity in the *Landgraf* analysis. There are many aspects of the presumption and the Supreme Court and lower federal courts subsequent jurisprudence that will always be open to interpretation and even manipulation. It cannot be cured without fundamentally altering the centuries-old analysis itself or by prescribing clear and definite guiding principles. This Article argues that the best solution in the immigration context is to employ a variant of the principle of lenity from the criminal realm. The courts' analysis in *Vartelas* and in all questions of civil retroactivity in immigration cases should be informed by a principle of construing all ambiguity in favor of the noncitizen.[194]

There is much justification for imposing such a strong guiding principle on the civil retroactivity analysis in the immigration context. Although immigration law and proceedings have long been held to be civil and not criminal, there is also agreement that immigration is different. Support in the case law for a canon construing ambiguities in favor of legal permanent residents, and even of other noncitizens, already exists. Such a principle is deeply grounded in the rationale underlying the *Landgraf* analysis. Most importantly, assuming that the principle could be applied truly and faithfully,[195] it would cure the problem of incoherence noted throughout this Article.

194. The existence of such a problem in civil retroactivity outside the immigration context and any potential solutions are beyond the scope of this Article.

195. This is, of course, a significant and somewhat unlikely assumption.

1. Immigration Is Different

a. Immigration Is Civil, not Criminal

Courts have virtually uniformly held that immigration proceedings are civil, and not criminal, in nature.[196] The courts have focused on several factors in their explanations of this position. First, and likely most importantly, the Supreme Court has emphasized that deportation, despite appearances, is not a punishment but is rather merely a vehicle for carrying out the government's immigration laws.[197] Since long before our current immigration laws were in force, the Court has made statements like "deportation [is not] a punishment; it is simply a refusal by the Government to harbor persons whom it does not want."[198] Second, courts have concentrated on the position that immigration proceedings result in a determination of status instead of an adjudication of criminal guilt or innocence.[199]

Because immigration proceedings are not criminal, many of the individual protections afforded to those charged with a crime do not attach to noncitizens seeking an immigration status or defending against removal proceedings.[200] For example, noncitizens have no

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196. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure."); IRA KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 284–85 (12th ed. 2010–2011) (stating that "deportation is a civil, not criminal, proceeding" and providing an annotated collection of the cases and bodies of law that have contributed to the development of this doctrine).

197. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . . The purpose of deportation is not to punish past transgressions, but rather to put an end to a continuing violation of the immigration laws."); Carlson v. Landon, 342 U.S. 524, 537 (1952) ("Deportation is not a criminal proceeding and has never been held to be punishment.").

198. Bugajewitz v. Adams, 228 U.S. 585, 591 (1913).

199. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("The proceeding before a United States judge . . . is simply the ascertainment by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country.").

200. *See, e.g.*, KURZBAN, *supra* note 196, 284–85 (listing the individual protections that courts have held do not apply in removal proceedings because immigration is civil in nature; these individual protections include: the Ex Post

absolute right to counsel at government expense in immigration proceedings.[201] The protection against double jeopardy, or the right not to be tried or punished twice for the same offense, does not apply.[202] Most relevantly for the purposes of this Article, the bar against ex post facto laws does not apply.[203]

Facto Clause, the Bill of Attainder Clause, the Sixth Amendment right to counsel, and the protection against double jeopardy).

201. *Compare* U.S. CONST. amend. VI *with* INA § 292 (demonstrating that the Constitution gives an absolute right to counsel in a criminal proceeding even at the government's expense; whereas, in an immigration proceeding, there is a "privilege" of being represented by counsel at no expense to the government). *See also, e.g.*, Morales-Izquierdo v. Gonzales, 486 F.3d 484, 497 (9th Cir. 2007) (holding that there is no absolute right to effective counsel in immigration proceedings because such proceedings are civil rather than criminal); Stroe v. INS, 256 F.3d 498, 499–500 (7th Cir. 2001) (same); Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988) (same); Mantell v. INS, 798 F.2d 124, 127 (5th Cir. 1986) (same). *But cf. In re* Compean, 24 I. & N. Dec. 710, 714, 716–26 (AG 2009), *vacated* 25 I. & N. Dec. 1 (AG June 3, 2009) (holding that noncitizens in removal proceedings have no Fifth Amendment or Sixth Amendment right to counsel).

202. U.S. CONST. amend. V. *See also, e.g.*, Seale v. INS, 323 F.3d 150, 159 (1st Cir. 2003) ("It is well established that neither the Ex Post Facto Clause nor the Double Jeopardy Clause is applicable to deportation proceedings."); De La Teja v. United States, 321 F.3d 1357, 1364–65 (11th Cir. 2003) (stating that the Double Jeopardy Clause applies only to "essentially criminal proceedings" and deportation is a "purely civil proceeding"); United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994) (holding that the Double Jeopardy Clause has no application to deportation proceedings because they are civil and not criminal in nature); Urbina-Mauricio v. INS, 989 F.2d 1085, 1089 n. 7 (9th Cir. 1993) (confirming that the Ninth Circuit has "repeatedly held . . . that deportation is a civil action" and not subject to double jeopardy claims).

203. U.S. CONST. art. I, § 9, cl. 3. *See also, e.g.*, Collins v. Youngblood, 497 U.S. 37, 41–51 (1990) (discussing the contours of the applicability of the Ex Post Facto Clause); Lehmann v. U.S., 353 U.S. 685, 690–91 (1957) (Black, J., concurring) (encouraging the Court to reconsider the inapplicability of the Ex Post Facto Clause to the laws governing deportability); Marcello v. Bonds, 349 U.S. 302, 314 (1955) (declining to "depart from our recent decisions holding that the prohibition of the *ex post facto* clause does not apply to deportation"); Harisiades v. Shaughnessy, 342 U.S. 580, 593–96 (1952) (noting the longstanding precedent that the ex post facto prohibition does not apply to civil disabilities such as deportation); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 131–32 (2d Cir. 2005) ("[T]he *Ex Post Facto* Clause only applies to penal legislation and deportation proceedings have consistently been characterized as civil in nature."); Csekinek v. INS, 391 F.3d 819, 823–24 (6th Cir. 2004) ("The Supreme Court has thus definitively stated that the Ex Post Facto Clause does not apply to [civil] proceedings"); Perez v. Elwood, 294 F.3d 552, 557 (3d Cir. 2002) (noting that deportation is not punishment for past crimes and thus is not subject to ex post

b. *Despite Being Civil in Nature, Immigration Proceedings Have Particularly Serious Consequences*

While courts have firmly held that immigration proceedings are civil, they have recognized the exceptional nature and consequences of those proceedings. The Supreme Court has, on multiple occasions, acknowledged just how severe and drastic an outcome of deportation may be: "This Court has not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land where he often has no contemporary identification."[204] The Court has gone so far as to label removal from the United States "the equivalent of banishment or exile" and to admit that it is, at least functionally, a penalty for breaking the immigration laws.[205]

The line between civil and criminal in the immigration context has been blurred even further recently with the Supreme Court's decision in *Padilla v. Kentucky*.[206] Historically, deportation was treated as a collateral consequence of a criminal conviction, which meant that defense counsel had no duty to warn their clients of the immigration consequences of the criminal charges they faced or agreed to plead guilty to.[207] The Supreme Court stepped away from the direct versus collateral dichotomy, and instead recognized the practical reality that immigration and criminal proceedings are

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facto protections); Hamama v. INS, 78 F.3d 233, 237 (6th Cir. 1996) ("The case law . . . makes it abundantly clear that ex post facto principles do not apply in deportation proceedings."); Scheidemann v. INS, 83 F.3d 1517, 1520 n.4 (3d Cir. 1996) (rejecting petitioner's claim of a violation of the Ex Post Facto Clause because it does not apply to deportation proceedings); United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994) (confirming that the Ex Post Facto Clause applies only to the retrospective application of criminal laws and not civil deportation proceedings).

204. Woodby v. INS, 385 U.S. 276, 285 (1966). *See also* Fong Haw Tang v. Phelan, 333 U.S. 6, 10 (1948).

205. Fong Haw Tang v. Phelan, 333 U.S. 6, 10 (1948).

206. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

207. *See, e.g.*, Commonwealth v. Padilla, 253 S.W.3d 482, 483–84 (Ky. 2008) ("Collateral consequences are outside the scope of representation required by the 6th Amendment and failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.").

substantially intermeshed and removal from the United States is a critical consequence to noncitizen criminal defendants.[208] The Court held that a criminal attorney's failure to warn his or her noncitizen client of the immigration consequences of a criminal plea constitutes ineffective assistance of counsel and may, if prejudice can be shown, warrant a vacatur of the plea.[209] This practical focus on the functional nature of immigration consequences is instructive; it demonstrates that the Court is willing to recognize the unusual nature of immigration and its consequences.

Immigration proceedings and deportation are in fact different for all of the reasons discussed above. This truth helps to justify treating them differently. In fact, courts frequently reference the "unique nature of deportation" as justification for doing just that.[210] There is, therefore, no reason not to consider treating immigration differently in the context of the civil–retroactivity analysis.

2. A Principle of Lenity

a. Some Guiding Principle Is Necessary

The *Landgraf* analysis alone is not enough to provide real guidance to courts considering issues of civil retroactivity. Even without looking beyond the Court's decision in *Landgraf*, the *Landgraf* analysis itself is at least somewhat internally inconsistent. The Court identifies many negatives to allowing legislation to be applied retroactively, particularly when considering step two of the analysis: the disruption of settled expectations, lack of notice regarding new duties or consequences, and increased or new liability for past conduct, among others.[211] If we take seriously these problems and the assertion of a strong historical presumption against retroactive legislation, should we allow that presumption to be overridden at step one by a simple congressional statement alone?

The Court justifies this position with the explanation that the requirement of a clear statement ensures that Congress will make thoughtful decisions about when the benefits of retroactive

208. *Padilla*, 130 S. Ct. at 1481–82; Chaidez v. United States, No. 11-820, slip op. at 9 (Feb. 20, 2013).

209. *Id.* at 1478.

210. *Id.* at 1481.

211. Landgraf v. USI Film Prods., 511 U.S. 244, 269–70 (1994).

application outweigh the detriments.[212] This rationale, however, may reflect an overly optimistic and unrealistic view of the legislative process. Furthermore it does not address the concerns regarding congressional overreaching against "unpopular groups or individuals" that also ground the presumption against retroactivity. It could be argued that, given the inherent issues with the retroactive application of legislation, courts should always have some kind of check, or ability to hold that a provision cannot be applied retroactively, even where Congress has made a direct and clear statement of its intent for that provision to apply to past events.[213]

Accepting the *Landgraf* analysis as adequate, however, still does not remove all of the issues with incoherence. The Supreme Court in *Landgraf* explicitly recognizes that there will be uncertainty in the application of the two-step process and that retroactivity will necessarily require an individualized, case-by-case analysis.[214] In explaining this issue, the Court states:

> The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.[215]

In fact, this problem is even greater than was recognized by the *Landgraf* Court—disagreement has occurred not just in the hard cases, but in virtually all cases.[216] The "process of judgment" that

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212. *Id.* at 272–73.

213. *Cf.*, *e.g.*, *id.* at 267 n.20 (comparing legislative versus judicial competencies).

214. *Id.* at 269–70.

215. *Id.* at 270. The Court in *Landgraf* goes on to say that "retroactivity is a matter on which judges tend to have sound instinct[s] and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." *Id.* (internal quotations and citations omitted). As discussed above, however, in practice, judges' instincts have proven to differ and these considerations have provided insufficient guidance.

216. *See supra* Part IV.B and accompanying notes 148–192.

courts are supposed to engage in has resulted in different, sometimes radically different, results even given similar facts and law.

Landgraf and subsequent cases emphasize that the retroactivity analysis "demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'"[217] Even this simple statement of the rule, however, demonstrates that the test is a very soft one. Courts must ask and can reasonably come to different answers on multiple questions: Which event is the relevant one? When is an event completed as opposed to ongoing? What sort of legal consequences will be sufficient to trigger a holding that the new provision cannot be applied to the past event? The actual analysis as it is applied has even more opportunity for interpretation and manipulation. Many elements of the analysis can easily be interpreted in multiple directions, depending on the individual judge's values and the outcome he or she wants to reach. Regardless of whether the analytical choices are driven by salutary or concerning motives, the sheer number of possibilities presents problems.

The Supreme Court's decision in *Fernandez-Vargas* provides one clear example of this indeterminacy. *Fernandez-Vargas* held that the relevant event for purposes of the retroactivity analysis was Mr. Fernandez-Vargas's continuing presence without authorization in the United States.[218] The Court just as easily, however, could have selected Mr. Fernandez-Vargas's actual reentry as the pertinent conduct. No clear principle directed its decision in this respect. This selection was, however, likely outcome determinative—the reentry itself occurred well prior to the effective date of IIRIRA, while the continuing presence occurred after that date.

The Second Circuit's decision and the parties' merits briefs before the Supreme Court in *Vartelas v. Holder* offer more examples of just how soft a test the *Landgraf* analysis is.[219] The Second Circuit focused on the commission of the criminal offense that triggers IIRIRA's new definition of admission on reentry as the

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217. Martin v. Hadix, 527 U.S. 343, 357–58 (1999) (quoting *Landgraf*, 511 U.S. at 270).

218. Fernandez-Vargas v. Gonzalez, 548 U.S. 30, 43–44 (2006).

219. Vartelas v. Holder, 620 F.3d 108 (2d Cir. 2010); Brief for Petitioner, Vartelas v. Holder, No. 10-1211 (Nov. 15, 2011); Brief for Respondent, Vartelas v. Holder, No. 10-1211 (Dec. 16, 2011).

relevant past conduct for the retroactivity analysis, unlike the Fourth and Ninth Circuits, which focused on the plea and conviction.[220] Again, the courts had little to no guidance on which event should be selected, and, given the circuit split that resulted, the choice of event likely heavily influenced the ultimate outcome.

The Second Circuit does not explicitly reference Justice Scalia's conduct-focused test in its decision, but the test's impact on the court's analysis is obvious, and both parties specifically address it in their briefs to the Supreme Court.[221] In fact, when applying this test in its brief, the government argues for a potential third triggering event—Mr. Vartelas's trip outside the United States that resulted in his being placed into removal proceedings.[222] Justice Scalia's alternative, or supplemental, test adds an additional layer of uncertainty to the civil–retroactivity analysis, regardless of whether or not that test is explicitly referred to by the courts.

The incoherence and indeterminacy present in the existing immigration-related civil–retroactivity jurisprudence clearly demonstrate the need for an additional guiding principle aimed at reconciling the divergent decisions.

b. A Principle of Lenity for Noncitizens Is Justified Under the Supreme Court's Existing Retroactivity Jurisprudence

The same existing immigration-related civil–retroactivity jurisprudence justifies the selection of a guiding principle aimed at protecting the noncitizens subject to the immigration laws. In addition to the problem of attaching new consequences to past conduct, retroactive statutes raise special concerns for "unpopular groups or individuals." The Supreme Court in *Landgraf* held that these special concerns provide an additional rationale underlying the presumption against retroactivity: "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and

220. *See* Vartelas v. Holder, 620 F.3d 108, 119–20 (2d Cir. 2010); Camins v. Gonzales, 500 F.3d 872, 882–83 (9th Cir. 2007); Olatunji v. Ashcroft, 387 F.3d 383, 398 (4th Cir. 2004).

221. Brief for Petitioner at 32, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211); Brief for Respondent at 37–38, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

222. Brief for Respondent at 36, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211).

without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."[223]

Immigrants are the very definition of such an unpopular group requiring special protection and consideration. Legislation regulating immigration has historically been passed at times of both high levels of immigration and high levels of public sentiment against the current groups of immigrants.[224] These circumstances put exceptionally strong political pressure on Congress to act in a way that exacts retribution on these noncitizens for their status and their perceived wrongs against the United States. Because noncitizens cannot vote, their abilities to protect themselves against this adverse legislation are significantly reduced.[225]

The Supreme Court in *Landgraf* also suggests that it is appropriate to consider the context and subject matter in conducting a retroactivity analysis of a civil statute. In finding that the provisions of the Civil Rights Act of 1991 could not be applied retroactively, it noted that the provisions "share key characteristics of criminal sanctions."[226] Because the immigration and deportation contexts also share significant similarities with criminal sanctions, additional support is provided for the argument that a special rule may be adopted in the immigration context.

The rule of lenity in the criminal context is the doctrine that a court, in interpreting a criminal statute, should construe all ambiguities in favor of the criminal defendant.[227] Its existence and application are intended to protect the rights of those accused of a crime, a concededly vulnerable and disfavored group subject to legal proceedings with serious and far-reaching consequences and

223. Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).

224. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 4–11 (1998) (discussing ways in which Congress's plenary power over immigration has been used to discriminate against immigrant groups "identified as undesirable"); Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEXAS L. REV. 1615, 1626–28 (2000) (noting a "positive . . . correlation between high-volume immigration and public hostility toward immigrants").

225. INS v. St. Cyr, 533 U.S. 289, 315 n.39 (2001).

226. *Landgraf*, 511 U.S. at 281.

227. BLACK'S LAW DICTIONARY 1449 (9th ed. 2009).

therefore in need of particular legal protection.[228] This is remarkably analogous to the situation that the Supreme Court has already acknowledged to exist for noncitizens, particularly those potentially subject to retroactive legislation, and suggests that the adoption of a variant of the rule of lenity in this context is an appropriate response.

c. *The Supreme Court Should Adopt a Canon of Construing Ambiguities in Favor of Noncitizens*

The Supreme Court should adopt a principle similar to the rule of lenity in the context of the retroactivity of immigration legislation. This principle can be most clearly expressed as a canon of construing ambiguities, in the legislation and during the analytical test and process, in favor of the noncitizen. Otherwise stated, this canon would direct courts, at least when conducting a civil–retroactivity analysis in the immigration context, to interpret the statute and to conduct its approach to the *Landgraf* analysis in the light most favorable to the immigrant.

Major immigration treatises already recognize this principle.[229] More importantly, there is also already support in the case law of the federal courts for such a canon. The Supreme Court has noted and relied on a "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."[230] Even the immigration agencies acknowledge that this principle may exist.[231]

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228. *See, e.g.*, United States v. Gibbens, 25 F.3d 28, 35–36 (1st Cir. 1994).

229. *See, e.g.*, 1 GORDON ET AL., *supra* note 106, § 9.05(2) ("And courts—as with the rule of lenity in criminal law—must read ambiguous deportation statutes or regulations in the light most favorable to the alien.").

230. INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987). *See, e.g.*, INS v. Errico, 385 U.S. 214, 225 (1966) ("Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); Costello v. INS, 376 U.S. 120, 128 (1964) (explaining that accepted principles of statutory construction in immigration law require the court to resolve doubt in favor of the noncitizen). *Cf.* United States v. Campos-Serrano, 404 U.S. 293, 297–300 (1971) (applying the principle of strict construction of criminal statutes in an immigration context).

231. *See, e.g.*, *In re* Collado-Munoz, 21 I. & N. Dec. 1061, 1077 (BIA 1998) (Rosenberg, B.M., dissenting) ("If at all ambiguous, deportation statutes must be read to favor the noncitizen."); *In re* N-J-B, 21 I. & N. Dec. 812, 840 (BIA 1997) (Rosenberg, B.M., dissenting) (taking the position that the Board of Immigration

In his merits brief, Mr. Vartelas argued for a weaker version of this canon, construing legal ambiguities within the civil retroactivity analysis of an immigration statute in favor only of legal permanent residents, not all noncitizens.[232] While there is some basis in immigration law generally for distinguishing between the rights and protections afforded to legal permanent residents as opposed to all noncitizens (including those without any legal status in the United States), courts should not import that dichotomy in this context. The existing support in the case law and the commentary do not make this distinction, and the reasons discussed above for providing special protection to noncitizens in this context offer no rational support for one. In fact, differentiating between legal permanent residents and other noncitizens in this canon would likely only increase the inconsistencies within the civil–retroactivity cases in the immigration context and therefore thwart the goal of adopting such a principle in the first place.

B. The Supreme Court's Decision in Vartelas

Applying a canon of construing all ambiguities in the civil–retroactivity analysis in favor of the noncitizen would have had significant implications for the Supreme Court's decision in *Vartelas v. Holder*. At the broadest level, such application would likely result in a decision favorable to Mr. Vartelas. While the Supreme Court did not explicitly rely on such a canon, the Court did reach the same result, holding that the post-IIRIRA definition of when a legal permanent resident will be deemed to be seeking admission in INA § 101(a)(13)(C)(v) cannot be applied retroactively to Mr. Vartelas and that his travel therefore remains governed by the *Fleuti* doctrine.[233]

In reaching its decision, the Supreme Court agreed with the lower courts that had considered the issue in the first step of the

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Appeals has historically resolved ambiguities in statutory construction in favor of the noncitizen).

232. Brief of Petitioner at 52–53, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211). *Cf.* Brief for Respondent at 40–42, Vartelas v. Holder, 132 S. Ct. 1479 (2012) (No. 10-1211) (arguing against the application of even a weakened version of this canon). Because Mr. Vartelas is likely to be treated as a legal permanent resident, there is no reason for him to make a more expansive argument.

233. Vartelas v. Holder, 132 S. Ct. 1479, 1491 (2012).

Landgraf analysis, that "Congress did not expressly prescribe the temporal reach of the IIRIRA provision in question."[234] At the second step of the analysis, the Court went on to find that § 301 of IIRIRA attached a new disability, the inability to travel without risking permanent removal from the United States, to past conduct and therefore cannot be applied to convictions predating the statute.[235] Perhaps most importantly, in reaching this decision, the Court held that reliance, while a factor that may support reading a law as operating prospectively only, is not absolutely required to find that a law cannot have retroactive effect.[236] The strong presumption against retroactive application of new laws in the Court's previous case law was an important motivating factor for this aspect of the Court's decision.[237]

While the Court never explicitly raised any kind of principle of construing ambiguities in favor of legal permanent residents or noncitizens generally, such considerations appear to have influenced the result and may have even been implicitly invoked in the decision itself. The factors supporting such a canon as discussed in section 2.C above were evident in several places throughout the Court's decision.[238] The severity of permanent removal from the United States as a consequence was emphasized as relevant: "[P]ermanent residents situated as Vartelas is now face potential banishment. We have several times recognized the severity of that sanction."[239] The Court specifically acknowledged the inability to travel and the separation from home and family as relevant and serious hardships.[240] The Court on several occasions drew support from or cited to criminal cases, lending support to the position that immigration is different and the boundaries between civil and

234. *Id.* at 1487.

235. *Id.* at 1487–88.

236. *Id.* at 1490–91.

237. *Id.* at 1491 ("'It is a strange presumption,' the Third Circuit commented, 'that arises only on . . . a showing [of] actual reliance.'") (quoting Ponnapula v. Ashcroft, 373 F.3d 480, 491 (3d Cir. 2004)).

238. As earlier discussed in relation to the Briefs, see *supra* note 232 and accompanying text, the Court focused specifically on legal permanent residents and not on noncitizens generally, but this can be easily accounted for by the fact that Vartelas was treated as a legal permanent resident. The factors discussed apply equally to all noncitizens, regardless of whether or not they have legal permanent residence.

239. *Vartelas*, 132 S. Ct. at 1487.

240. *Id.* at 1485, 1487–88.

criminal in the immigration context are becoming increasingly blurred.[241] Unfortunately, however, the Court never explicitly stated the role that these factors played in its decision-making process.

While the Supreme Court's decision in *Vartelas* is a laudable development in clarifying the retroactivity analysis in immigration cases, it does not go far enough to resolve the current muddle of the case law in this area or to prevent such confusion from occurring again in the future. Looking at the details of the civil retroactivity analysis necessary to reach the conclusion that the new version of INA § 101(a)(13)(C)(v) cannot be applied to Mr. Vartelas, there are several important ambiguities likely to trigger application of a principle protecting the noncitizen. First, the canon would direct the Supreme Court to choose Mr. Vartelas's plea of guilty and resulting conviction as the relevant past event as opposed to the commission of that crime or his most recent departure from the United States that resulted in him being placed in removal proceedings. Second, the canon would guide the Court to identify Mr. Vartelas's inability to travel outside the United States without risking detention, removal proceedings, and actual removal as a new, post-IIRIRA disability now imposed as a result of that past event rather than focusing on Mr. Vartelas's decision to depart from the United States post-IIRIRA.

The Court in *Vartelas* did in fact reach exactly these same two conclusions,[242] and future courts considering exactly this issue for someone in precisely Mr. Vartelas's situation will of course be bound by this result. However, the Court provided only limited, and insufficient, rationale for *why* it answered these questions in the way that it did. Without this rationale, its decision does not do as much as it could to guide courts considering other questions of civil retroactivity in the immigration context.[243] Relying only implicitly

241. *See, e.g., id.* at 1487 (citing *Padilla*, 559 U.S. at 44) (using certain prosecutions under the Racketeer Influenced and Corrupt Organizations Act as an example without noting the criminal context).

242. *Id.* at 1490–92.

243. One exception might be the issue of availability of waivers under former INA § 212(c), where disagreement among the courts has focused primarily on the role of reliance at the second step of the *Landgraf* analysis. *See, e.g.*, Khammany v. Holder, No. 06-73333, 2012 U.S. App. LEXIS 16865, at *2–3 (9th Cir. Aug. 13, 2012) (remanding in light of *Vartelas*'s discussion of the role of a reliance inquiry when the antiretroactivity principle is invoked); Patel v. Holder, No. 04-71459, 2012 U.S. App. LEXIS 16863, at *1 (9th Cir. Aug. 13, 2012)

on factors underlying a potential protective canon is not enough to guide future courts; it is too easy for courts to ignore or manipulate these facets of a decision. Explicitly stating that it was relying on a canon of construing any and all ambiguities during a civil retroactivity analysis in favor of the noncitizen would have bound future courts to do the same.

Although it is too soon to fully assess the impact of *Vartelas*,[244] it is already clear that confusion and inconsistency in courts' treatment of questions of civil retroactivity in immigration cases will continue. One indication of this comes from Justice Scalia's dissent (joined by Justices Alito and Thomas) in *Vartelas* itself. First, Justice Scalia chooses to focus on the decision to travel outside the United States rather than some aspect of the crime as the relevant controlling event.[245] While such a choice in future cases concerning the retroactivity of IIRIRA's definition of admission is foreclosed, similar choices in other questions of civil retroactivity are not because of the limited guidance in the Court's opinion.

Second, and perhaps more fundamentally, Justice Scalia treats retroactivity as solely a question of Congress's intent regarding the temporal application of a statute, devoid of any consideration of fairness.[246] In his view, it would appear that the second step of the *Landgraf* analysis is simply a means for divining congressional intent when Congress has not made an explicit statement in the statute itself.[247] This alternative test of civil retroactivity has in at least two other instances been raised in decisions of the Supreme Court and is on occasion invoked by litigants and lower courts.[248] If the Court in *Vartelas* had applied a canon construing ambiguities in favor of the noncitizen, and thereby reinforced the importance of fairness in the civil retroactivity analysis at least in the immigration context, this avenue would have been more firmly foreclosed in

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(same); Garcia-Olivarria v. Holder, No. 07-72631, 2012 U.S. App. LEXIS 9689, at *1 (9th Cir. May 10, 2012) (same).

244. As of September 8, 2012, the Supreme Court's decision in *Vartelas* has only been cited in seven cases where the court was considering a question of civil retroactivity in the immigration context.

245. *Vartelas*, 132 S. Ct. at 1493 (Scalia, J., dissenting).

246. *Id.* at 1492–93, 1495–96.

247. *See id.* at 1495.

248. *See* Martin v. Hadix, 527 U.S. 343, 362–63 (1999) (Scalia, J., concurring in part and concurring in judgment); Landgraf v. USI Film Prods., 511 U.S. 244, 291 (1994) (Scalia, J., concurring in judgment).

future cases. As it stands, Justice Scalia's alternative test may remain available to increase the incoherence of the civil retroactivity doctrine.

A second example comes from a pair of Fifth and Sixth Circuit decisions issued after the Supreme Court's decision in *Vartelas*. These decisions considered the retroactivity of another amendment made by IIRIRA, the addition of the stop-time rule, which governs when the seven years of continuous residence required for cancellation of removal for legal permanent residents will stop accruing.[249] The Fifth Circuit held that *Vartelas* did not require it to reconsider a prior decision holding that the stop-time rule could be applied retroactively because Congress had explicitly so provided.[250] The Sixth Circuit likewise held that *Vartelas* supported its conclusion that the stop-time rule could be applied retroactively, but for a completely different reason—because it did not attach a new disability to past conduct.[251] The fact that the Supreme Court's decision in *Vartelas* can be used to support two such different positions on the retroactive application of the same section of the law is a clear illustration that the Court could have done more to resolve the uncertainty in this area of the law.

As additional time passes, and new cases applying a civil retroactivity analysis in the immigration context make their way through the circuit courts of appeal, it is likely that the need for additional guidance will become only more apparent. A canon directing the courts to construe ambiguities in favor of the noncitizen would provide that lacking direction.

VI. CONCLUSION

The problem of the retroactive application of immigration statutes is not likely to go away. Even today, almost fifteen years after IIRIRA took effect, there remain a number of ongoing

249. INA § 240A(d)(1), 8 U.S.C. § 1229b (2006). A complete consideration of the retroactive application of the stop time rule is beyond the scope of this Article.

250. Sanchez v. Holder, No. 11-60540, 2012 U.S. App. LEXIS 13273, at *2–4 (5th Cir. June 28, 2012) (referring to Heaven v. Gonzales, 473 F.3d 167, 171 (5th Cir. 2006)).

251. Methasani v. Holder, No. 10-3914, 2012 U.S. App. LEXIS 17895, at *7 (6th Cir. Aug. 21, 2012).

retroactivity-based challenges to the legislation and the question of whether particular provisions may be retroactively applied remains seriously unsettled. Furthermore, it is highly likely that there will continue to be new immigration legislation that will continue to raise new retroactivity questions. The passage of new immigration laws that amend the existing Immigration and Nationality Act did not stop with IIRIRA,[252] and even now, comprehensive immigration reform and other potential immigration legislation, such as a federal Dream Act, continue to be discussed. This makes resolving the current inconsistency and uncertainty in the doctrine and application of civil retroactivity in immigration cases an issue of particular importance, if the serious impact of these changes in the law on the lives of individual noncitizens like Mr. Charles and their families did not already do so.

For all of the reasons discussed here, adopting a canon of construing all ambiguities in the civil retroactivity analysis in favor of the noncitizen is the most effective and supported strategy to begin to reconcile the existing incoherence.

252. *See, e.g.*, REAL ID Act of 2005, Pub. L. No. 109-13, § 119 Stat. 302 (2005) (amending various provisions of the INA).