IMMIGRATION LAW—ELIGIBILITY FOR SECTION 212(c) RELIEF FROM DEPORTATION: IS IT THE GROUND OR THE OFFENSE, THE DANCER OR THE DANCE?

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IMMIGRATION LAW—ELIGIBILITY FOR SECTION 212(c) RELIEF FROM DEPORTATION: IS IT THE GROUND OR THE OFFENSE, THE DANCER OR THE DANCE?\cite{1}

INTRODUCTION

Deportation is the removal of a lawful permanent resident, a legal noncitizen residing in the United States, from the country.\cite{2} The corollary to this immigration procedure is the act of exclusion,\cite{3} where a noncitizen is not allowed entry into the United States.\cite{4} Currently, two sections of the Immigration and Nationality Act of 1952 govern the deportability and excludability of noncitizens.\cite{5}

\begin{enumerate}
\item In his poem, *Among School Children*, William Butler Yeats asks, “How can we know the dancer from the dance?” W.B. YEATS, SELECTED POETRY 153 (Timothy Webb ed., 1991). His question articulates the dilemma when watching a performance: whether the audience is watching the dancer—the obvious visual entertainment—or, rather, something below the surface—the dance or the artistic creation. The poet illustrates just how difficult it is to separate the two. Yeats’s question about creator versus creation parallels the issue in the current circuit split over eligibility for section 212(c) relief from deportation. In determining whether a lawful permanent resident is eligible for section 212(c) relief, most federal circuits focus on the dancer—the language or text of the deportation grounds—while one circuit emphasizes the dance, the underlying facts of the offense charged. In this legal dichotomy, it is the dancer that should win our attention.
\item Congress enacted the term “removal” to refer to both “deportation” and “exclusion.” Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-546, -587 to -597; see 8 U.S.C. § 1229a(e)(2) (2006). For purposes of this Note, both “deportation” and “exclusion” will be used.
\item Congress replaced the term “excludable” with “inadmissible” through the enactment of section 304(a)(3) of IIRIRA. See Immigration and Nationality Act of 1952 (INA) § 235, 8 U.S.C. § 1225. However, to maintain clarity in this Note, only the term “exclusion” will be used.
\item “Immigration law features two parallel statutory schemes for regulating the movements of non-citizens. One involves exclusion, or the process of excluding people who seek to enter the United States, while the other involves deportation, or the process of expelling people who are already present in the country.” Leal-Rodriguez v. INS, 990 F.2d 939, 942 (7th Cir. 1993).
\item See INA § 237(a) (formerly § 241), 8 U.S.C. § 1227 (listing the grounds for deportation); INA § 212(a), 8 U.S.C. § 1182(a) (listing the grounds for exclusion). The Immigration and Nationality Act refers to legal noncitizens as “aliens.” INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (defining alien as “any person not a citizen or national of the United States”). While the term “noncitizen” is a broader category than immigrant—it is not exactly accurate since the immigrant is a citizen of some country—it is preferred in this Note because of the derogatory nature of the word “alien.” See Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1361 & n.1 (1999).
\end{enumerate}
Congress, however, has provided for discretionary relief from deportation or exclusion for lawful permanent residents (LPRs) in certain circumstances. In particular, from 1952 through 1996, under the Immigration and Nationality Act of 1952 (INA), exclusion could be waived pursuant to section 212(c). Specifically, section 212(c) allowed the Attorney General discretion to waive exclusion for “[a]liens 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.” Despite appearing clear on its face as pertaining to only those in exclusion proceedings, starting as early as 1940, courts applied section 212(c) not only to those LPRs as specified in the statute but also to those LPRs who, but for some mistake of procedure, were placed in deportation proceedings when they should have been dealt with in exclusion proceedings. Courts found it critical that the LPR in deportation proceedings had actually departed the country and returned.

6. A lawful permanent resident (LPR) is a noncitizen who has “been lawfully accorded the privilege of residing permanently in the United States as an immigrant.” INA § 101(a)(20), 8 U.S.C. § 1101(a)(20). The United States Citizenship and Immigration Services (USCIS) defines an LPR as “[a]ny person not a citizen of the United States who is residing in the U.S. under legally recognized and lawfully recorded permanent residence as an immigrant. Also known as ‘Permanent Resident Alien,’ ‘Resident Alien Permit Holder,’ and ‘Green Card Holder.’” USCIS, http://www.uscis.gov/portal/site/uscis (click on “Resources,” then click on “Glossary” in the left-hand column and click on the letter “L”). LPR status can be family sponsored, employment sponsored, or granted to refugees and asylees. 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 1.03[2][e] (rev. ed. 2007). LPRs are afforded the constitutional protection of procedural due process upon admission into the United States. Id. § 1.02[3][b]. Nonresident noncitizens, those who are lawfully present on a temporary basis such as students or temporary workers, are not the subject of this Note. See id. § 1.03[2][c][iii] (explaining temporary immigrant visas). Neither are “undocumented” or “illegal” immigrants who have entered the country without permission or overstayed a temporary visa. Id.

7. Between 1952 and 1996 deportation could be waived pursuant to section 244(a)(1). INA § 244(a)(1), 8 U.S.C. § 1254(a)(1) (1994) (repealed 1996). Section 244 granted relief for anyone who had been physically present in the United States for a continuous period of at least seven years, who proved that during all of such period he was and remained a person of good moral character, and who was a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship. Id. Current forms of discretionary relief include cancellation of removal, INA § 240A, 8 U.S.C. § 1229b (2006); asylum, INA § 208, 8 U.S.C. § 1158; non-refoulement, INA § 241b(3), 8 U.S.C. § 1231(b)(3); and voluntary departure, INA § 240B, 8 U.S.C. § 1229c.


9. Id.

10. See infra Part II.A.
After years of granting relief in this manner, the Second Circuit, in Francis v. INS, held, based on equal protection grounds, that section 212(c) relief was available to those deportees similarly situated to excludees but who had not departed from and returned to the United States.\(^{11}\) The Board of Immigration Appeals (BIA) subsequently held, in accordance with Francis, that deportable LPRs who were similarly situated to excludable LPRs must be treated equally with respect to their applications for section 212(c) relief.\(^{12}\)

About twenty years later, during the 1990s, Congress began to reshape the focus of immigration law.\(^{13}\) Among the changes, the legislature both narrowed the class of noncitizens to whom section 212(c) relief applied and broadened the grounds for which noncitizens could be deported.\(^{14}\) Then, in 1996, Congress repealed section 212(c), replacing it with section 240A(a).\(^{15}\) After some

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14. See Immigration Act of 1990 (IMMART), Pub. L. No. 101-649, § 511(a), 104 Stat. 4978, 5052 (amending section 212(c) so that any LPR convicted of an aggravated felony who had served a term of imprisonment of at least five years was not eligible for relief); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277 (barring LPRs with aggravated felony convictions, drug convictions, certain weapons convictions, among others, from applying for section 212(c) relief and removing the five-year time served qualification); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, -597 (repealing section 212(c) relief altogether); IIRIRA § 321, 8 U.S.C. § 1101(a)(43) (redefining and broadening the term “aggravated felony” to include many new offenses, some of which are misdemeanors and low-level felonies).
uncertainty whether the repeal of section 212(c) applied retroactively, the Supreme Court held that section 212(c) relief was not repealed for certain LPRs in deportation proceedings in progress before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).\textsuperscript{16}

This Note focuses on how the courts determine whether LPRs, particularly those subject to deportation under the more recently defined aggravated felony ground, are eligible for section 212(c) relief. With the advent of the equal protection holdings mentioned earlier, this threshold question of eligibility has become a pivotal part in the path to section 212(c) relief from deportation.

However, in applying this equal protection framework for eligibility, a circuit split has arisen. The split revolves around what it means for an LPR in deportation proceedings to be similarly situated to an LPR in exclusion proceedings, particularly when deportable for an aggravated felony. Two approaches have emerged when asking whether a deportee is similarly situated to an excludee.\textsuperscript{17} These approaches are similar in nature but differ in the detail.

The majority of courts of appeals follow the comparable-grounds approach, which finds support in federal regulation, administrative and federal case law, and statutory interpretation.\textsuperscript{18} Under this approach, courts compare the petitioner’s ground for deportation in section 237(a) (former section 241) to the grounds for exclusion listed under section 212(a). If the deportation ground has a

\textsuperscript{n.6} (2d Cir. 2007). Currently, subsections (a) and (b) of 240A, collectively titled “cancellation of removal,” allow for the Attorney General to exercise discretion in granting relief to LPRs in deportation and exclusion proceedings so long as certain requirements are satisfied.\textsuperscript{id}. Congress has expressly denied any discretion to cancel the removal of an aggravated felon.\textsuperscript{id}

\textsuperscript{16.} INS v. St. Cyr, 533 U.S. 289, 315-20 (2001); \textit{see infra} Part II.C.

\textsuperscript{17.} The author readily acknowledges the development of a three-way split among the circuits. \textit{See} Abebe v. Mukasey, 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam). Upon reevaluating its precedent, the Ninth Circuit has taken a different route altogether by rejecting \textit{Francis} and eliminating the statutory-counterpart test.\textsuperscript{id} at 1207. Consequently, the Ninth Circuit’s third option is to not offer section 212(c) relief to deportable LPRs who have not left the country. Because this rationale is so distinct from the issues discussed in this Note, the Abebe decision will be addressed minimally. \textit{See infra} Part III.B.3.

\textsuperscript{18.} \textit{See infra} Parts III.A.1, III.B.1. In 2004, 8 C.F.R. \textsection 1212.3(f)(5) codified the nomenclature of the comparable-grounds approach as the statutory-counterpart test. 8 C.F.R. \textsection 1212.3(f)(5) (2009). Though it is now properly known as the statutory-counterpart test, for purposes of this Note, the terms “comparable grounds” and “statutory counterpart” will be used interchangeably.
“counterpart” in the exclusion provision, then the grounds are comparable and the petitioner is eligible for relief.¹⁹

But in 2007, in Blake v. Carbone, the Second Circuit employed its own offense-specific approach to determine eligibility, focusing on the underlying offense of an LPR’s deportation charge to answer whether the LPR was similarly situated to an excludee.²⁰ The court premised its approach on its previous decision, Francis v. INS, described above. To satisfy the equal protection concerns of Francis, the court remanded to determine whether the petitioners’ certain aggravated felonies could form the basis of the crime involving moral turpitude (CIMT) ground for exclusion.²¹

Upon review of both approaches, it is apparent that the Second Circuit impermissibly expanded the reach of Francis, creating the unnecessary step of evaluating a petitioner’s underlying offense. Though compelling, the Second Circuit’s reliance on Francis is flawed. In evaluating these flaws it becomes clear that the majority approach is best and, in fact, the concern for equal protection is unfounded.

In contrast, the comparable-grounds approach continues to satisfactorily address the question of section 212(c) eligibility. This majority approach serves as an effective, consistent, and fair way to determine section 212(c) eligibility. This Note contends that, absent congressional action, the majority of courts of appeals follow the proper approach in determining whether an LPR is eligible for section 212(c) relief from deportation. The comparable-grounds approach, codified at 8 C.F.R. § 1212.3(f)(5) as the statutory-counterpart rule, is preferred because it comports with legislative intent and administrative policy. Moreover, it promotes uniformity and avoids adding further confusion to the section 212(c) eligibility analysis.

Part I of this Note provides a short overview of removal. Part II discusses the history of the section 212(c) waiver. Part III examines the circuit split and briefly addresses a recent Ninth Circuit decision, which departs from both approaches at issue in this Note.

¹⁹. See, e.g., In re Blake, 23 I. & N. Dec. 722, 726 (B.I.A. 2005) (“[W]hether the deportation ground under which the [LPR] has been adjudged deportable has a statutory counterpart among the exclusion grounds waivable by section 212(c).” (quoting In re Jimenez-Santillano, 21 I. & N. Dec. 567, 574 (B.I.A. 1996)) (internal quotation marks omitted)), vacated sub nom. Blake v. Carbone, 489 F.3d 88.
²⁰. 489 F.3d 88, 103.
²¹. Id. at 104. The court described its decision as merely “confined to the equal protection principle articulated in Francis.” Id.
Lastly, Part IV puts forth the argument that the comparable-grounds approach properly applies the constitutional guarantee of equal protection per *Francis*, promotes the policies of uniformity and efficiency, and upholds long-standing administrative and judicial precedent, therefore making it the correct approach for determining section 212(c) eligibility.

I. REMOVAL

A. Congressional Plenary Power

Although the United States Constitution does not explicitly grant Congress authority over immigration, it does grant Congress broad powers in the immigration context. The main sources of federal power over immigration include the Naturalization Clause, the Migration or Importation Clause, and the War Powers Clause. Congress is also vested with the power to control immigration via the intrinsic right of a sovereign to control its borders. It is well understood that Congress holds the exclusive authority to design immigration policy.

Indeed, the Supreme Court stated that Congress’s authority to prescribe grounds for expelling resident aliens is “plenary” and stated that a resident’s stay in this country is one of “permission and tolerance.” Thus, the congressional right to deport noncitizens “is as absolute and unqualified as the right to prohibit and prevent

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22. U.S. CONST. art. I, § 8, cl. 4 (vesting in Congress the power “[t]o establish an uniform rule of naturalization”).
23. Id. § 9, cl. 1 (pertaining to limits on “[t]he migration and importation of such persons as any of the States now existing shall think proper to admit”).
24. Id. § 8, cl. 11 (granting Congress the power to declare war).
25. See Mahler v. Eby, 264 U.S. 32, 39 (1924) (“The right to expel aliens is a sovereign power, necessary to the safety of the country, and only limited by treaty obligations in respect thereto entered into with other governments.”); Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (“The right to exclude or to expel all aliens [is] . . . an inherent and inalienable right of every sovereign and independent nation . . . .”); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604-07 (1889) (stating that Congress has absolute power to exclude legal aliens when required by public interest to protect the country’s security and autonomy); see also 1 GORDON ET AL., supra note 6, § 1.03[4][a].
26. Galvan v. Press, 347 U.S. 522, 531 (1954) (stating that Congress’s control over immigration policies “has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government”).
27. Harisiades v. Shaughnessy, 342 U.S. 580, 586-87 (1952); see Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Scales v. United States, 367 U.S. 203, 222 (1961); see also McJunkin v. INS, 579 F.2d 533, 536 (9th Cir. 1978) (“Congress possesses plenary power over immigration and may impose conditions upon the privilege of remaining in this country which could not be imposed upon citizens.” (citation omitted)).
their entrance.” By 1893, the Supreme Court made clear that, from a policy perspective, deportation was justified “simply because [the LPR’s] presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken.”

B. Short History of Removal

The Alien and Sedition Acts of 1798 provided for the deportation of noncitizens, giving the President the power to deport (1) resident aliens who maintained citizenship of a country at war with the United States (enemy aliens), (2) any alien whom the President considered a threat to the peace and safety of the country, and (3) any alien in prison. Besides the Alien and Sedition Acts,

28. Fong Yue Ting, 149 U.S. at 713-14; see Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953) (stating that the power to exclude or deport aliens is “largely immune from judicial control”); The Chinese Exclusion Case, 130 U.S. at 607-09 (explaining the sovereign power of the government to exclude people from the United States).

29. Fong Yue Ting, 149 U.S. at 709. Some scholars argue that deportation is in fact punishment for lawful permanent residents akin to that of the penal system. See Peter L. Markowitz, Straddling the Criminal-Civil Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings, 43 HARV. C.R.-C.L. L. REV. 289 (2008); Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 AM. U. L. REV. 367 (2006); Michelle Rae Pinzon, Note, Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century, 16 N.Y. INT’L L. REV. 29 (2003); see also Peter H. Schuck, The Transformation of Immigration Law, 84 COLUM. L. REV. 1, 24-27 (1984). Though not discussed in this Note, it is helpful to understand the opposing arguments in this debate. The civil and administrative argument states that because the “deportee is not being indicted, tried, and sentenced for [a] crime . . . expulsion is simply a protective measure to rid the United States of aliens deemed undesirable, and that in any event the deportee is merely being sent back to his country of origin and allegiance.” 6 GORDON ET AL., supra note 6, § 71.01[4][a]–[c]. The criminal argument contends that so long as the deportee is not a recent arrival to the country, then the no-punishment argument lacks standing because the alien has likely established roots in the United States for many years. Id.; see, e.g., Bridges v. Wixon, 326 U.S. 135, 147 (1945) (“[D]eportation may deprive the non-citizen ‘of all that makes life worth living.’” (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922))); Scheidemann v. INS, 83 F.3d 1517, 1527 (3d Cir. 1996) (Sarokin, J., concurring) (“The legal fiction that deportation following a criminal conviction is not punishment is difficult to reconcile with reality, especially in the context of [longtime LPRs].”). Nevertheless, under current law deportation is considered civil and administrative, not criminal. See 6 GORDON ET AL., supra note 6, § 71.01[4][a].


32. Id.; see Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801); Act of June 18, 1798, ch. 54, 1 Stat. 566 (repealed 1802).
the nation’s first one hundred years consisted of unrestricted immigration.33 The country’s need for labor as a developing nation was its main purpose behind this open-door policy.34 Eventually, in 1875, Congress did invoke its power over immigration by passing its first restrictive statute barring the admission of convicts and prostitutes.35

In 1882, Congress enacted laws aimed at immigrants from China. The Chinese Exclusion Acts restricted immigration of Chinese laborers for ten years and the admittance of Chinese residents to citizenship.36 In 1891, Congress added, in conjunction with its exclusion laws, a deportation statute limited to “any alien who shall come into the United States in violation of law.”37 Then in 1907, Congress passed a deportation statute with respect to a noncitizen’s conduct after she had made a lawful entry into the United States.38 In 1917, Congress revised and passed a new set of immigration laws and in the 1920s created further restrictions.39 The laws remained the same until the enactment of the INA in 1952.40

C. Grounds for Removal

The INA specifies the grounds under which an LPR may be excluded or deported.41 If a noncitizen is seeking entry to the United States and falls under a provision of section 212(a), then the noncitizen is “ineligible to be admitted to the United States.”42

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33. 1 GORDON ET AL., supra note 6, § 2.02[1].  
34. Id.  
38. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900 (making deportable any noncitizen who was a prostitute “at any time within three years after she shall have entered the United States”).  
41. INA § 212(a), 8 U.S.C. § 1182(a) (grounds for exclusion); INA § 237(a), 8 U.S.C. § 1227(a) (grounds for deportation). While the grounds for exclusion and deportation are enumerated separately, because Congress recently adopted the term “removal” to describe both exclusion and deportation, both sets of grounds are now generally referred to as “grounds for removal.” See supra note 2. For purposes of this Note, these grounds will be referred to separately.  
42. See INA § 212(a), 8 U.S.C. § 1182(a). Currently there are forty-six grounds for exclusion. Id. The following three categories include these grounds: (1) Health and Related Grounds, (2) Criminal and Related Grounds (most relevant to this Note), and (3) Security and Related Grounds. INA § 212(a)(1)-(3), 8 U.S.C. § 1182(a)(1)-(3).
However, after an initial lawful admission, if an LPR residing in the United States commits an act provided for in section 237(a), then the LPR is subject to deportation. Some of the exclusionary and deportation categories overlap; however, certain acts amount only to grounds for deportation, while others only exclusion.

II. HISTORY OF SECTION 212(C) RELIEF

A. The Precursor to Section 212(c) Relief: 1917

The first form of discretionary relief is found in the seventh proviso of section 3 of the Immigration Act of 1917. Section 3 of the Act focused on the exclusion of noncitizens only. However, the seventh proviso allowed the Secretary of Labor to admit certain noncitizens in exclusion proceedings to the United States. These noncitizens were those returning to their permanent U.S. residence of at least seven consecutive years after a temporary trip abroad.

In 1940, in *In re L—*, upon certification from the BIA, the Attorney General first expanded the applicability of the seventh proviso to deportation proceedings. In weighing the equitable concerns for Mr. L—, a noncitizen from Yugoslavia, the Attorney

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43. See INA § 237(a), 8 U.S.C. § 1227(a). Congress has enumerated thirty-three grounds for deportation, which are distributed among six categories: (1) Inadmissible at Time of Entry or of Adjustment of Status or Violates Status, (2) Failure to Register and Falsification of Documents, (3) Security and Related Grounds, (4) Public Charge Grounds, (5) Unlawful Voting, and (6) Criminal Offenses. INA § 237(a)(1)-(6), 8 U.S.C. § 1227(a)(1)-(6).

44. While the grounds in each provision may be similar, they are not identical. Both contain criminal and noncriminal bases for removal, but the consequences of a criminal offense may be more serious in both the deportation proceedings itself and beyond. See 6 GORDON ET AL., supra note 6, § 71.01[4][c].


46. Id.


48. Immigration Act of 1917 § 3 (“[A]liens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor, and under such conditions as he may prescribe . . . .”).

49. Id.

General used his discretion nunc pro tunc and granted relief. Mr. L— was convicted of a CIMT (larceny), which, under the law at that time, made him excludable but not deportable. He later temporarily traveled abroad to visit family; upon return, immigration officers overlooked Mr. L—’s excludability and admitted him into the country. A few months later, Mr. L— was placed in deportation proceedings because of his earlier CIMT conviction. Under this scheme, Mr. L— technically did not have discretionary relief available to him because the seventh proviso only applied to those in exclusionary proceedings. However, the Attorney General determined that relief should be available to Mr. L— because it would have been available to him had he been properly put in exclusionary proceedings when he returned to the United States. The Attorney General recognized that to deny Mr. L— relief from deportation would have been to deny him solely on a technicality, and “[n]o policy of Congress could possibly be served by such irrational result.” Critical to his analysis, the Attorney General held that sections 3 and 19 (the grounds for exclusion and deportation, respectively) “must be read together.” In essence, he compared both grounds and found that because of their similarity, a “corrective exercise” of authority under the seventh proviso was proper.
By granting what “amount[ed] to little more than a correction of a record of entry,” the Attorney General made the landmark decision to provide relief from deportation via the seventh proviso.61

B. Section 212(c): 1952–1976

In 1952, Congress compiled all the immigration laws from 1798 through the 1920s into the Immigration and Nationality Act of 1952.62 With the enactment of the INA, what was once the seventh proviso became section 212(c).63 Like its predecessor, section 212(c) only governed exclusionary proceedings.64 Yet the BIA continued with its pre-1952 practice of extending relief to the deportation context in certain circumstances.65

In 1956, in In re G—A—, the BIA first granted section 212(c) relief to a Mexican LPR who pled guilty to an excludable offense, departed temporarily, returned to the United States, and was then placed in deportation proceedings.66 Based on In re L—, the BIA allowed the LPR to apply for section 212(c) relief nunc pro tunc.67 The BIA found the LPR eligible, reasoning that because the LPR would have been eligible for section 212(c) relief had he been properly placed in exclusionary proceedings upon reentry, he should be eligible for such relief in later deportation proceedings regardless of the statute’s plain language.68 For about the next twenty years the

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64. INA § 212(c), 8 U.S.C. §1182(c) (1994) (repealed 1996) (providing that relief is available to those LPRs “not under an order of deportation”).
67. Id. at 276. Interestingly, despite a seeming requirement for travel abroad, in In re Smith, section 212(c) relief was extended to deportation proceedings for an LPR requesting adjustment of status. 11 I. & N. Dec. 325, 327 (1965). The court reasoned that there was “no valid reason for denying him the benefits of section 212(c) on the technical ground that he is not returning to the United States after a voluntary departure.” Id.
68. See In re G—A—, 7 I. & N. Dec. at 276; see also Blake v. Carbone, 489 F.3d 88, 94 (2d Cir. 2007) (“According to the BIA, a [section] 212(c) waiver should be available to lawful permanent residents who commit an excludable offense in the United
availability of section 212(c) discretionary relief was limited to those LPRs, like Mr. L— and Mr. G—A—, who had actually departed, returned to the country, and then faced deportation. For example, in In re Arias-Uribe, the BIA held that the nunc pro tunc discretion afforded in In re L— did not apply because the LPR had never left the country and therefore would never have been subject to exclusionary proceedings. The situation of an error in the record of entry discussed in In re L— had not occurred. While acknowledging that the scope of section 212(c) had already been extended beyond its plain meaning, the BIA did not want to go further and grant relief to an LPR who had not physically left the United States. To support this conclusion, the BIA referenced a change in language from the seventh proviso to section 212(c) that illustrated Congress’s intent to require an actual departure and return to the United States.

In 1976, however, the Second Circuit effectively eliminated this physical-departure limitation on section 212(c) eligibility. In Francis v. INS, the court expanded the reach of section 212(c) to certain noncitizens who had not traveled outside the United States. Francis permanently resided in the United States for ten years but was found deportable after being convicted of a drug charge. He sought section 212(c) relief, the BIA denied his application, and he appealed to the Second Circuit. Francis argued that section 212(c), as applied by the BIA, created two identical classes of aliens, except that, in one class, members departed and returned to the United States after commission of the offense, have not been put in exclusion proceedings upon return, but later end up in deportation proceedings.

69. See, e.g., In re Arias-Uribie, 13 I. & N. Dec. 696, 698 (B.I.A. 1971), aff’d sub nom. Arias-Uribie v. INS, 466 F.2d 1198 (9th Cir. 1972) (per curiam).
70. Id. at 697-98.
71. Id. at 698.
72. Id. at 700. The language changed from requiring the LPR to have “return[ed] after a temporary absence” to requiring the LPR to have “temporarily proceed[ed] abroad voluntarily and not under an order of deportation.” Id. at 699 & n.2.
73. Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976).
74. See id.
75. Id. at 269.
76. Id. at 270.
77. Id. at 272.
protection of the laws.\textsuperscript{78} The Second Circuit agreed, concluding that the distinction was not rationally related to any legitimate purpose of the statute.\textsuperscript{79}

The court further stated that the statute, as applied, violated the equal protection component of the Fifth Amendment by limiting discretion to those who temporarily traveled abroad and not considering those similarly situated but who had not left the country.\textsuperscript{80} “Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.”\textsuperscript{81} Rather than strike the statute, the Second Circuit further extended the reach of section 212(c) by making relief from deportation “available to deportable [LPRs] who differ[ ] from excludable [LPRs] only in terms of a recent departure from the country.”\textsuperscript{82}

A few months later, in \textit{In re Silva}, the BIA adopted the \textit{Francis} holding.\textsuperscript{83} As a result, section 212(c) relief became available to those in deportation proceedings who had never traveled outside

\textsuperscript{78.} \textit{Id.}

\textsuperscript{79.} \textit{Id.} at 272-73. The Second Circuit applied the “minimal scrutiny test” requiring that “distinctions between different classes of persons ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” \textit{Id.} at 272 (quoting Stanton v. Stanton, 421 U.S. 7, 14 (1975)). Note that “all individuals in the United States—citizens and aliens alike—are protected by the Due Process Clause of the Constitution. . . . However, [f]ederal authority in the areas of immigration and naturalization is plenary. Accordingly, federal classifications based on alienage are subject to relaxed scrutiny.” Garberding v. INS, 30 F.3d 1187, 1190 (9th Cir. 1994) (alteration in original) (citations and internal quotation marks omitted).

\textsuperscript{80.} \textit{See Francis}, 532 F.2d at 272 n.5, 272-73. The court reasoned that “an alien whose ties with this country are so strong that he has never departed after his initial entry should receive at least as much consideration as an individual who may leave and return from time to time.” \textit{Id.; see also} Elwin Griffith, \textit{The Road Between the Section 212(c) Waiver and Cancellation of Removal Under Section 240A of the Immigration and Nationality Act—The Impact of the 1996 Reform Legislation}, 12 Geo. IMMIGR. L.J. 65, 94 n.211 (1997) (explaining that there is no specific Equal Protection Clause in the Fifth Amendment, but it does forbid discrimination that violates due process, thereby creating the connection between the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment).

\textsuperscript{81.} \textit{Francis}, 532 F.2d at 273. The court further stated, “We do not dispute the power of the Congress to create different standards of admission and deportation for different groups of aliens. However, . . . individuals within a particular group may not be subjected to disparate treatment on criteria wholly unrelated to any legitimate governmental interest.” \textit{Id.} (footnote omitted).

\textsuperscript{82.} \textit{See Blake v. Carbone, 489 F.3d 88, 95 (2d Cir. 2007).}

the United States. Immigration courts were thus tasked with considering the merits of petitions for relief from deportees similarly situated to excludees.

With the equal protection framework in place, it became difficult to determine whether a deportable LPR was similarly situated to an excludable LPR. As a result, courts found it necessary to evaluate the grounds for deportation and exclusion; the analysis required a determination that they be comparable and that the ground of deportation could be found in the grounds for exclusion. The BIA settled on the comparable-grounds approach to guide immigration judges in their equal protection determination. By comparing the petitioner’s ground of deportation to the enumerated grounds of exclusion, the BIA was better able to discern which petitioners met the equal protection mandate set out in Francis and Silva.

Towards the end of this time period, Congress established the aggravated felony ground of deportation, which at that point included only murder, drug trafficking, and weapons trafficking. The number of aggravated felony grounds increased during the rush of legislation in the 1990s. Importantly, as the number and types increased, the grounds of exclusion did not. Thus, for determining

84. Id. (“In light of the constitutional requirements of due process and equal protection of the law, it is our position that no distinction shall be made between permanent resident aliens who temporarily proceed abroad and non-departing permanent resident aliens.”).

85. See id.

86. Blake, 489 F.3d at 95.


88. Blake, 489 F.3d at 95; see Abebe v. Gonzales, 493 F.3d 1092, 1099 (9th Cir. 2007), reh’g en banc sub nom. Abebe v. Mukasey, 554 F.3d 1203 (9th Cir. 2009) (per curiam) (“[T]he BIA has resisted further departures from the statutory text and consistently held that relief is available only for aliens facing deportation on a ground with some tight connection to a ground of excludability that could have been waived under § 212(c) had the alien traveled abroad.”).

89. See infra Part III.A for a more detailed look at how the comparable-grounds test evolved and changed in light of the aggravated felony ground of deportation.

90. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (codified as amended at 8 U.S.C. § 1101(a)(43) (2006)); see Abebe, 493 F.3d at 1099-1100 n.10 (“The ‘aggravated felony’ deportation ground was created by the Anti-Drug Abuse Act of 1988 (‘ADAA’) and was defined narrowly to include murder, drug trafficking, and weapons trafficking. Since that time, the number of offenses classified as aggravated felonies has exploded.” (citations omitted)).

91. See infra notes 96, 101, and accompanying text.
section 212(c) eligibility, a discrepancy was created that the courts had to reconcile in their analyses.  

C. **Section 212(c): 1990–2004**

The 1990s ushered in a new era of immigration law. A large policy shift occurred in an attempt to rid the country of criminal noncitizens and threats of terrorism. As part of that shift, Congress enacted various amendments limiting the reach of section 212(c) and ultimately repealing it in total. First, in 1990, the Immigration Act of 1990 (IMMCA) removed eligibility for section 212(c) relief for any noncitizen convicted of an aggravated felony who served five years or more in prison. Next, in 1996, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) eliminated eligibility for section 212(c) relief for any LPR rendered deportable because of an aggravated felony conviction regardless of length of the sentence. AEDPA also expanded the definition of aggravated felony to include many more criminal offenses, which further narrowed eligibility for 212(c) relief.

Several months later, Congress passed IIRIRA, which included an amendment that ended section 212(c) relief for proceedings commenced on or after April 1, 1997. Another amendment enacted the new form of discretionary relief titled “cancellation of removal,” which has a much narrower framework for eligibility than

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92. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (defining aggravated felonies). In Blake v. Carbone, the petitioners made multiple arguments including the argument that “their aggravated felony ground of deportation has a counterpart in the ground of exclusion for crimes of moral turpitude because all aggravated felonies are crimes of mortal turpitude, or, in the alternative, their individual aggravated felonies could form the basis of a ground of exclusion.” Blake, 489 F.3d at 100. The Second Circuit agreed with their alternative argument. Id. at 104. For informational purposes, the present removal provision states that “[a]ny alien who is convicted of an aggravated felony at any time after admission is” removable. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii). Conviction is defined at INA § 101(a)(48), 8 U.S.C. § 1101(a)(48)(A).

93. See supra note 13.

94. Blake, 489 F.3d at 96.


96. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277. Drug convictions, multiple CIMTs, certain weapon charges, and national security violations were also included in this broader list of offenses. Id.

97. 6 GORDON ET AL., supra note 6, § 74.04(i)(b).

did section 212(c).\textsuperscript{99} For example, LPRs convicted of an aggravated felony are ineligible for cancellation of removal.\textsuperscript{100} And, like AEDPA, IIRIRA redefined “aggravated felony” by adding more offenses to the list.\textsuperscript{101} Moreover, Congress made this new definition retroactive so that it applied to crimes committed both before and after the effective date of IIRIRA.\textsuperscript{102}

IIRIRA, however, was unclear regarding the retroactive effect of the repeal of section 212(c).\textsuperscript{103} Accordingly, the BIA and federal courts had room for interpretation.\textsuperscript{104} In 1997, in \textit{In re Soriano}, the

\begin{itemize}
\item \textsuperscript{100} INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3).
\item \textsuperscript{101} INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (as amended by IIRIRA § 321(a)).
\item \textsuperscript{102} IIRIRA § 321(b).
\item \textsuperscript{103} See IIRIRA § 321(c) (providing that its amendments did not apply to deportation proceedings in progress prior to the date of enactment).
\end{itemize}
Attorney General held that the repeal of section 212(c) operated retroactively.105 Several courts of appeals followed suit, while others did not.106 Eventually the issue came to the Supreme Court.

In 2001, the Supreme Court addressed this question of retroactive effect in its watershed decision INS v. St. Cyr.107 The Court held that the IIRIRA amendments did not retroactively eliminate 212(c) relief and thus overturned In re Soriano.108 Relief would remain available to those “whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for [section] 212(c) relief at the time of their plea under the law then in effect.”109 The Court suggested that IIRIRA had an unlawful retroactive effect on the due process rights of an LPR who relied on the availability of the section 212(c) waiver by pleading guilty to aggravated felonies.110 Moreover, the basic notion of fairness required that petitioners have notice of what the law is so their decisions could be made accordingly.111 And in deciding whether Congress meant for a statute to apply retroactively, the language must clearly state its intention so there can be only one meaning.112

Three years later, in response to St. Cyr, the Department of Homeland Security promulgated a rule to codify the Supreme Court’s holding.113 The rule provided for the availability of section 212(c) waivers to LPRs with a criminal conviction entered before

106. Compare Requena-Rodriquez v. Pasquarell, 190 F.3d 299, 306-08 (5th Cir. 1999) (finding that repeal of section 212(c) operated retroactively), and De Sousa v. Reno, 190 F.3d 175, 186-87 (3d Cir. 1999) (same), with Henderson v. INS, 157 F.3d 106, 130 (2d Cir. 1998) (finding that repeal of section 212(c) did not operate retroactively), and Goncalves v. Reno, 144 F.3d 110, 133-34 (1st Cir. 1998) (same).
108. St. Cyr, 533 U.S. at 326.
109. Id. Though not directly at issue in the Court’s opinion, the holding garnered the same result with respect to AEDPA. See, e.g., Attwood v. Ashcroft, 260 F.3d 1, 3 (1st Cir. 2001).
111. Id. at 316.
112. Id. at 317.
April 1, 1997. After the notice and comment period, the final rule also included a codification of the comparable-grounds approach. Specifically, the final rule provided that section 212(c) relief is not available when an LPR “is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.” Part III.A.2 discusses the statutory-counterpart rule further.

III. Determining Eligibility for Section 212(c) Relief

A. Evolution of the Comparable-Grounds Approach

The exact time when the BIA first employed the comparable-grounds approach is debatable. This Part focuses on three primary cases that formed the basis of the comparable-grounds approach in light of Francis. In re Wadud, In re Hernandez-Casillas, and In re Meza each held that eligibility for section 212(c) relief applies only to those petitioners found deportable with a compara-
The ground of exclusion. These cases foreshadowed the eventual codification of the comparable-grounds approach as the statutory-counterpart rule.

1. BIA Comparable-Grounds Jurisprudence

As stated earlier, in In re Silva, the BIA acknowledged that the Constitution demands that similarly situated noncitizens be treated equally in certain situations. That same year, however, the BIA made it clear that Francis only expanded the class of noncitizens to which section 212(c) applied; Francis did not expand the statutory grounds itself. Thus, Francis served as an important recognition and rectification of inequality but not as a change in statutory scheme. Therefore, section 212(c) relief was unnecessary when a petitioner’s ground for deportation had no comparable ground for exclusion.

In In re Wadud, the petitioner argued that his ground for deportation, a conviction for visa fraud, was comparable to the CIMT ground for exclusion. Specifically, Wadud argued that because visa fraud involved moral turpitude and a CIMT is a ground for inadmissibility, he was thus eligible for section 212(c) relief. The BIA concluded the opposite but acknowledged that its dictum in In re Granados may have misled the petitioner to make his CIMT argument. The court clarified, “[W]e need not determine whether the respondent’s conviction was one involving moral turpitude because we decline to expand the scope of section 212(c) relief in cases.


119. See supra notes 83-85 and accompanying text.


121. See In re Blake, 23 I. & N. Dec. 722, 724 (B.I.A. 2005), vacated sub nom. Blake v. Carbone, 489 F.3d 88 (2d Cir. 2007); In re Granados, 16 I. & N. Dec. at 728-29; see also Griffith, supra note 80, at 94-95 (“[I]t could be that Francis did not really provide a new remedy, but merely imposed a requirement of equal treatment for aliens in similar situations.”); Daniel Kanstroom, Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law, 71 Tul. L. Rev. 703, 786 (1997).

122. In re Granados, 16 I. & N. Dec. at 728-29; see Griffith, supra note 80, at 95.

123. In re Wadud, 19 I. & N. Dec. at 185. The petitioner relied on language in Granados indicating that had Granados’s crime been one of moral turpitude, he might have qualified for section 212(c) relief. Id.

124. Id.
where the ground of deportability charged is not also a ground of [exclusion].”125

Perhaps most significant in solidifying the comparable-grounds approach was the decision the Attorney General handed down in In re Hernandez-Casillas.126 One year prior, in In re Silva, the BIA had in fact reversed its comparable-grounds approach, making section 212(c) eligibility available to all deportable LPRs except those specifically precluded from relief by the statute.127 The Attorney General in In re Hernandez-Casillas declined to address In re Silva directly but nonetheless under the constitutional limitations set out in Francis and In re Silva he concluded that the BIA “erred in holding that relief under section 212(c) may be afforded for grounds for deportation that are not grounds for exclusion made waivable by the terms of section 212(c).”128

The Attorney General’s basis for his disapproval was two-fold. First, the Attorney General concluded that the BIA incorrectly asserted that In re Silva and In re Hernandez-Casillas were equally removed from section 212(c) as written. Rather, its further expansion of section 212(c) in In re Hernandez-Casillas had no resemblance to the text and would “take immigration practice even further from the statutory text.”129 In contrast, In re Silva still had some connection to the text as it “permit[ed] waivers of only those grounds for deportation that Congress expressly made waivable in the related context of exclusion.”130

Second, the Attorney General found that the scope of the equal protection guarantee should reach only those who have com-

125. Id.; see also Griffith, supra note 80, at 96 (“If the BIA had supported relief for [noncitizens] convicted of offenses involving moral turpitude, it would have rewarded deportable aliens whose more serious offenses could be tied to exclusion under section 212(a)(9), while denying relief to other aliens convicted of lesser crimes involving moral turpitude.”).


127. Id. at 266 (B.I.A.).

128. Id. at 286-87 (Att’y Gen.). The Attorney General further stated that when a “particular ground for deportation has no counterpart among the grounds for exclusion,” section 212(c) discretionary relief is unavailable. Id. at 288 (emphasis added).

129. Id. at 287.

130. Id. The Attorney General also concluded that such an extension of section 212(c) relief to deportation cases would override the proof required when granting relief under section 244(a)(1) of the INA. For example, the extension would make most Congress’s requirements such as “good moral character” and “extreme hardship” for granting discretionary relief from deportation. Id.
parable grounds for deportation and exclusion.\textsuperscript{131} He explained that \textit{Francis} and \textit{In re Silva} require “at most, that an alien subject to deportation must have the same opportunity to seek discretionary relief as an alien who has temporarily left this country and, upon reentry, been subject to exclusion.”\textsuperscript{132} The Attorney General found the BIA’s “bald assertion” that there was “no reason not to make [section 212(c)] applicable to all grounds of deportability” as insufficient to support its decision to “wrench away even further from the statutory text.”\textsuperscript{133} The Attorney General’s opinion left no question that the comparable-grounds approach was necessary to determine eligibility for section 212(c) relief.\textsuperscript{134}

Two months later, the BIA first addressed a case involving an aggravated felony ground for deportation.\textsuperscript{135} Recall that in 1988 Congress first added the aggravated felony ground for deportation and from that point on, the grounds have become more elaborate, developing into a class unto itself.\textsuperscript{136} In \textit{In re Meza}, the BIA applied the comparable-grounds test to an LPR deportable for an aggravated felony conviction.\textsuperscript{137} Despite no reference to “aggravated felonies” in the various grounds for exclusion, the BIA concluded that “a waiver under section 212(c) is not \textit{unavailable} to an alien convicted of an aggravated felony simply because there is no ground of exclusion which recites the words, ‘convicted of an aggravated felony,’ as in section 241(a)(4)(B) of the [INA].”\textsuperscript{138} Instead,
the BIA chose to look to the provision of the INA that defined the aggravated felony to determine whether a comparable ground for excludability existed.\textsuperscript{139}

The BIA found comparable grounds in sections 101(a)(43)(B) and 212(a)(23) of the INA.\textsuperscript{140} In the former, an LPR is deportable for the aggravated felony of any “illicit trafficking in a controlled substance . . . including a drug trafficking crime.”\textsuperscript{141} In the latter, a noncitizen is excluded from the country for “a violation of (or a conspiracy or attempt to violate) any law . . . relating to a controlled substance.”\textsuperscript{142} However, the BIA qualified that this finding “[was] limited to the question of eligibility for section 212(c) relief in the case of a conviction for a drug-trafficking aggravated felony and [was] based on the specific amendment to section 212(c) regarding aggravated felonies.”\textsuperscript{143} The BIA emphasized that its decision did not alter the comparable-grounds framework limiting section 212(c) eligibility.\textsuperscript{144}

\textsuperscript{139} In re Meza, 20 I. & N. Dec. at 259 (looking to the “specific category of aggravated felony at issue”). Courts have stated that deportation grounds and exclusion grounds must be “analogous,” “substantially identical,” “comparable,” or “equivalent.” See Cabasug v. INS, 847 F.2d 1321, 1326 (9th Cir. 1988); In re Montenegro 20 I. & N. Dec. 603, 606 (B.I.A. 1992); In re Hernandez-Casillas, 20 I. & N. Dec. at 265-66 (B.I.A.); In re Wadud 19 I. & N. Dec. 182, 185-86 (B.I.A. 1984). There is no counterpart if one of the grounds has a “vastly greater scope” than the other, even if the broader ground may include the narrower ground. In re Jimenez-Santillano, 21 I. & N. Dec. 567, 573-74 (B.I.A. 1996), aff’d, 120 F.3d 270, No. 96-9552, 1997 WL 447315 (10th Cir. July 28, 1997) (unpublished table decision).


\textsuperscript{141} INA § 101(a)(43), 8 U.S.C. § 1101(a)(43)(B).


\textsuperscript{143} In re Meza, 20 I. & N. Dec. at 259; see also In re Montenegro, 20 I. & N. Dec. 603, 605 (B.I.A. 1992) (“Some aggravated felons are eligible for a section 212(c) waiver in deportation proceedings even though there is no single comparable ground of exclusion based on conviction of an aggravated felony.”).

\textsuperscript{144} In re Meza, 20 I. & N. Dec. at 259; see In re Montenegro, 20 I. & N. Dec. at 605 (finding LPR deportable based on conviction for assault with a firearm and distinguishing In re Meza as a singular matter); In re Esposito, 21 I. & N. Dec. 1, 21 (B.I.A. 1995) (“Meza . . . is limited to the question of eligibility for section 212(c) relief in the case of a conviction for drug-trafficking aggravated felony and is based on the specific amendment to section 212(c) regarding aggravated felonies.”); In re Blake, 23 I. & N. Dec. 722, 725 (B.I.A. 2005), vacated sub nom. Blake v. Carbone, 489 F.3d 88 (2d Cir. 2007).
2. DHS Promulgates the Statutory-Counterpart Test

_In re Meza_ and its progeny evidenced that the comparable-grounds analysis was a competent measure for determining eligibility for an LPR deportable on an aggravated felony conviction. From _In re Hernandez-Casillas_ forward, the BIA maintained the Attorney General’s comparable-grounds approach, and in 2004 the Department of Homeland Security published its federal regulation codifying the approach with the phrase “statutory counterpart.”

Two years earlier, the Department of Justice published proposed amendments that influenced the drafting of the rule. One specific proposed amendment stated that in order to qualify for discretionary relief under 212(c), “[a]n applicant must, at a minimum, meet the following criteria . . . [that he or she] is deportable or removable on a ground that has a corresponding ground of exclusion or inadmissibility.” Also, the supplementary information to the final rule explained that during the prescribed comment period, the DHS received one request for clarification regarding aggravated felons. The comment suggested that any noncitizen found deportable as an aggravated felon should be ineligible for section 212(c) relief “if there is no comparable ground of inadmissibility for the specific category of aggravated felony charged.” The DHS agreed with the commenter’s suggestion and codified the comparable-grounds approach formally as the statutory-counterpart test.

145. 8 C.F.R. § 1212.3(f)(5) (2009). Under the regulation a petitioner is ineligible for relief where he or she “is deportable under former section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.” (emphasis added).

146. _Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997_, 67 Fed. Reg. 52,627 (proposed Aug. 13, 2002).

147. _Id._ at 52,628-29; _see Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997_, 69 Fed. Reg. 57,826, 57,832 (Sept. 28, 2004) (codified at 8 C.F.R. pts. 1003, 1212, and 1240) (“[A]n alien who is deportable or removable on a ground that does not have a corresponding ground of exclusion or inadmissibility is ineligible for section 212(c) relief.”).

148. _See Section 212(c) Relief for Aliens with Certain Criminal Convictions Before April 1, 1997_, 69 Fed. Reg. at 57,831.

149. _Id._. The commenter explained that “[f]or example, the rule should not apply to [those who are deportable] under specific types or categories of aggravated felonies such as Murder, Rape, or Sexual Abuse of a Minor.” (internal quotation marks omitted); _see Blake_, 489 F.3d at 97 (discussing the comment).

150. 8 C.F.R. § 1212.3(f)(5).
3. Statutory-Counterpart Jurisprudence

In 2005, the BIA for the first time applied the new statutory-counterpart test in In re Blake.151 The BIA determined that petitioner, Leroy Blake, deportable under the aggravated felony ground of deportation for sexual abuse of a minor, was not eligible for section 212(c) relief.152 The BIA acknowledged that the only possible statutory counterpart in Blake’s case was the inadmissibility provision for a CIMT and further stated that statutory counterparts “need not be a perfect match” to qualify for eligibility.153 Accordingly, the BIA stressed, “Congress [must have] employed similar language to describe substantially equivalent categories of offenses.”154 The BIA reasoned that the CIMT ground for exclusion addressed a “much broader category of offenses” than the aggravated felony provision for sexual abuse of a minor155 and rejected Blake’s argument that the CIMT ground for exclusion was comparable to his aggravated felony charge.156

That same year, the BIA decided In re Brieva-Perez, which further clarified the statutory-counterpart analysis.157 There, the BIA denied section 212(c) relief to the petitioner, who was deportable on an aggravated felony of a crime of violence—the unauthorized use of a motor vehicle.158 The BIA held that the crime of violence ground for deportation lacked a statutory counterpart in the CIMT

152. Id. at 723. Blake was charged under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227 (a)(2)(A)(iii), as an alien convicted of sexual abuse of a minor, which is an aggravated felony under INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A). Id. The immigration judge concluded that the types of offenses described in section 101(a)(43)(A) of the Act had a comparable ground of exclusion in that nearly all such offenses involve moral turpitude. Id. The immigration judge granted Blake a section 212(c) waiver and terminated deportation proceedings. Id. The DHS appealed to the BIA, which reversed the lower judge’s holding. Id.
153. Id. at 729.
154. Id. at 728.
155. Id. The BIA distinguished its decision in In re Meza and further explained that “although there may be considerable overlap between offenses categorized as sexual abuse of a minor and those considered crimes of moral turpitude, these two categories of offenses are not statutory counterparts.” Id. at 728. Furthermore, the grounds lacked sufficiently similar language. Id.
156. Id. at 727.
158. Id. at 767, 773.
ground for exclusion.159 Due to the “distinctly different terminology used to describe the two categories of offenses and the significant variance in the types of offenses covered by [the] two provisions,” the BIA denied eligibility.160

B. The Circuit Split

1. Comparable-Grounds Approach: The First, Third, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits

The courts of appeals have jurisdiction to review constitutional claims or questions of law raised upon a petition for review from a final decision of the BIA.161 And the question of whether a petitioner is eligible for section 212(c) relief is one “of law, unlike the discretionary and unreviewable decision of whether such a waiver ultimately should be granted.”162 In addressing the question of section 212(c) eligibility, the majority of courts of appeals follow the comparable-grounds approach.163 These courts have rejected a more fact-based approach often urged by petitioners, whereby the court would have to look at the underlying offense of the deportation charge to determine whether a comparable ground existed.164 For example, the Tenth Circuit rejected the argument that obtaining fraudulent documents for illegal noncitizens present in the United States and the exclusionary ground for fraudulently procuring a visa or other documentation for entry into the United States were statu-

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159. Id. at 773 (“Although there need not be perfect symmetry in order to find that a ground of removal has a statutory counterpart in section 212(a), there must be a closer match than that exhibited by [an] incidental overlap . . . .”).

160. Id.

161. See INA § 242(a), 8 U.S.C. § 1252(a)(2)(D) (2006); see also Blake v. Carbene, 489 F.3d 88, 98 n.7 (2d Cir. 2007).

162. Blake, 489 F.3d at 98 n.7.

163. See, e.g., Thap v. Mukasey, 544 F.3d 674 (6th Cir. 2008); Gonzalez-Mesias v. Mukasey, 529 F.3d 62 (1st Cir. 2008); Zamora-Mallari v. Mukasey, 514 F.3d 679 (7th Cir. 2008); Vue v. Gonzales, 496 F.3d 858 (8th Cir. 2007); Dalombo Fontes v. Gonzales, 483 F.3d 115 (1st Cir. 2007); Dung Tri Vo v. Gonzales, 482 F.3d 363 (5th Cir. 2007); Brieva-Perez v. Gonzales, 482 F.3d 356 (5th Cir. 2007); Avilez-Granados v. Gonzales, 481 F.3d 869 (5th Cir. 2007); Caroleo v. Gonzalez, 476 F.3d 158 (3d Cir. 2007); Valere v. Gonzales, 473 F.3d 757 (7th Cir. 2007); Kim v. Gonzales, 468 F.3d 58 (1st Cir. 2006); Soriano v. Gonzales, 489 F.3d 909 (8th Cir. 2006) (per curiam); Rubio v. U.S. Attorney Gen., 182 F. App’x 925 (11th Cir. 2006) (per curiam); Jimenez-Santillano v. INS, 120 F.3d 270, No. 96-9532, 1997 WL 447315 (10th Cir. July 28, 1997) (unpublished table decision). Contra Abebe v. Mukasey, 554 F.3d 1203 (9th Cir. 2009) (per curiam); Webster v. Mukasey, 259 F. App’x 375 (2d Cir. 2008); Blake, 489 F.3d at 104.

164. See, e.g., Dung Tri Vo, 482 F.3d at 372; Avilez-Granados, 481 F.3d at 872; Caroleo, 476 F.3d at 164; Kim, 468 F.3d at 62.
tory counterparts. Moreover, the Third Circuit concluded that “the underlying crime for which [the petitioner] was convicted plays no role in determining eligibility for a [section] 212(c) waiver.”

The Fifth Circuit reemphasized that the extension of section 212(c) relief to those with comparable grounds of deportability and exclusion is a limited category, merely an addition to the certain group Congress chose years ago. If it is not limited, then almost any LPR could make the argument that his or her deportation charge is so serious that it constitutes the broad exclusionary provision of a CIMT. The consistent analyses in the various courts of appeals show a wide acceptance of the comparable-grounds approach. Moreover, the courts are now simply adhering to federal regulation. The focus in the analysis remains the same: a comparison of the grounds for deportation and exclusion as written by Congress.

2. Offense-Specific Approach: The Second Circuit

In Blake v. Carbone, the Second Circuit employed its own approach to determine whether a lawful permanent resident charged with an aggravated felony ground for deportation is eligible for section 212(c) relief. To support its reasoning, the court referred back to the thirty-year-old case Francis v. INS. Based on the equal protection holding of Francis, the Second Circuit Court of Appeals became the sole appellate court to form its comparison of the deportation and exclusion provisions not on the language of the grounds but instead on the offense committed by the petitioner.

In 2007, the court heard the consolidated claims of four petitioners: Leroy Blake, Ho Yoon Chong, Errol Foster, and Aundre Singh. Each petitioner argued that the BIA incorrectly denied him eligibility for section 212(c) relief. In 1992, Blake pled guilty

165. Jimenez-Santillano, 1997 WL 447315, at *2; see also, e.g., Leal-Rodriguez v. INS, 990 F.2d 939 (7th Cir. 1993); Campos v. INS, 961 F.2d 309 (1st Cir. 1992).
167. Dung Tri Vo, 482 F.3d at 372.
168. See Dalombo Fontes, 483 F.3d at 123 (“Given the possible breadth of the moral turpitude concept, almost anyone could argue that although found deportable for a serious unwaviable crime, waiver authority should be interpolated because the crime was also one of moral turpitude.”) (citation and internal quotation marks omitted).
169. Blake v. Carbone, 489 F.3d 88 (2d Cir. 2007).
170. Id. at 102.
171. Id. at 103 (“Rather than adopt this overly broad approach, petitioners’ eligibility for a [section] 212(c) waiver must turn on their particular criminal offenses.”).
172. Id. at 101.
173. Id. at 100.
to first-degree sexual abuse of a minor. At some point between 1993 and 1994, Ho Yoon Chong pled guilty to racketeering charges. In 1990, Foster pled guilty to first-degree manslaughter. And in 1986, Singh pled guilty to second-degree murder. Deportation proceedings were initiated against each petitioner on the basis that each committed an aggravated felony after admission to the United States. The aggravated felony provision of the INA was applied retroactively to the petitioners pursuant to IIRIRA.

The four petitioners challenged the BIA’s conclusion that they were ineligible for a section 212(c) waiver, arguing that a statutory counterpart existed in the exclusionary ground of a CIMT because either “all aggravated felonies are crimes of moral turpitude, or, in the alternative, their individual aggravated felonies could form the basis of a ground for exclusion.” The Second Circuit agreed with the petitioners’ alternative argument that an aggravated felony ground for deportation could have a counterpart ground of exclusion. Moreover, the court found “no reason to defer to the BIA’s interpretation of the statutory counterpart rule [concluding] that the BIA’s comparable grounds analysis fail[ed] to comport with Francis.”

For its analysis, the Second Circuit first had to determine whether deference should be afforded to the BIA’s interpretation of the statutory-counterpart rule. The standard to determine the applicable level of deference is set out in *Chevron U.S.A., Inc. v.*

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174. Id. at 91.
175. Id. at 92.
176. Id.
177. See id. at 93.
179. See INA § 101, 8 U.S.C. § 1101(a)(43) (“[T]he term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.”).
180. Blake, 489 F.3d at 100. Petitioners also argued that the statutory-counterpart rule had an impermissible retroactive effect. Id. at 98. That is, but for the federal regulation, they would have been eligible for the waiver when they pled guilty. Id. They also argued that the rule was contrary to congressional intent because Congress intended section 212(c) waivers to apply to all deportees with aggravated felony convictions. Id. at 99. The Second Circuit dismissed the first argument, holding that the rule did not have an impermissible retroactive effect because it did “nothing more than crystallize the agency’s preexisting body of law.” Id. at 98. Next, the court rejected the second argument, holding that evidence of such intent was too weak considering the promulgation of the new rule. Id. at 99.
181. Id. at 104.
182. Id. at 100.
183. Id. at 99-100.
Natural Resources Defense Council, Inc. The two-part Chevron framework requires courts to first look at the language of the statute and determine whether it is clear or ambiguous. If the statutory language is clear, then the matter is over and “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” If the statutory language is ambiguous, then the court moves on to step two, where it considers whether the agency’s interpretation is a reasonable one.

The Second Circuit determined that the Chevron doctrine was not applicable; therefore, it was not required to follow the BIA’s comparable-grounds approach. The court found that the government could not point to any ambiguity in section 212(c). Thus, the government could not “stand on firm Chevron ground.” Because section 212(c) plainly stated that the Attorney General could not grant waivers to LPRs who were “under an order of deportation,” there was no statutory ambiguity in its terms. Consequently, the court found that “[a]ny difficulty in determining [section] 212(c)’s applicability to deportees arises not from the statutory language but from the BIA’s gloss on Francis.”

With the deference question resolved, the court was free to consider whether the petitioners’ particular offenses had counterpart grounds of exclusion that would, under Francis, trigger section

184. Id. at 100 (”Chevron’s familiar rubric requires a court to defer to an agency’s interpretation of a statute it is charged with enforcing should the court conclude the agency has provided a reasonable interpretation of an ambiguous statute.”); see Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

185. Chevron, 467 U.S. at 842-43. The BIA is able to interpret and enforce the language of the INA through the authority of the Attorney General, the head of the Department of Justice. Blake, 489 F.3d at 100. The BIA may “fill statutory gaps with reasonable interpretations.” Id. (citing INA § 103, 8 U.S.C. § 1103(a) (2006)).

186. Chevron, 467 U.S. at 842-43.

187. Id. at 843.

188. Blake, 489 F.3d at 100.

189. Id.

190. Id.

191. Id. (quoting 8 U.S.C. § 1182(c) (1994) (repealed 1996)).

192. Id. The Second Circuit continued, “The statutory counterpart rule . . . is a creature of constitutional avoidance, arising from ‘the ramifications of a prior constitutional decision of this court, rather than the original statute concerning whose interpretation the Attorney General has conceded expertise.’” Id. (quoting Bedoya-Valencia v. INS, 6 F.3d 891, 898 (2d Cir. 1993)). “However, in Bedoya-Valencia, [the court] found appropriate a modest extension of Francis’s mandate in cases where the ground of deportation could have no conceivable analogue in exclusion proceedings,” and justified its holding “in terms of coherence and clarity, not equal protection.” Id. at 96 (emphasis added) (citations and internal quotation marks omitted).
212(c) relief. Consequently, the court held that the “petitioners’ eligibility for a [section] 212(c) waiver must turn on their particular criminal offenses.” In other words, the court chose to shift the focus of the statutory-counterpart analysis from a comparison of statutory grounds to a comparison of offenses.

This offense-specific approach echoed the Second Circuit’s decision in Francis in that the rationale for the approach was based on equal protection principles. Compelled to follow its own precedent, the Second Circuit concluded, “if petitioners’ underlying aggravated felony offenses could form the basis of a ground of exclusion, they will be eligible for a [section] 212(c) waiver.” Each petitioner’s case was then remanded to determine whether his aggravated-felony offense could also form a basis of exclusion as a CIMT. The court deemed its holding consistent with Francis, with the Attorney General’s discretionary power as confined by the grounds of exclusion in section 212(a), and with BIA precedent.

3. Repudiation of Francis and Section 212(c) Relief: The Ninth Circuit

In its historic decision, Abebe v. Mukasey, the Ninth Circuit reversed its long-standing adoption of both the equal protection holding of Francis and the BIA’s comparable-grounds approach. Previously, petitioner Abebe was found ineligible for section 212(c) relief by both the immigration judge and the BIA. On its initial review, the Ninth Circuit’s three-judge panel affirmed and held that

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193. Id. at 100. The court, however, noted that the petitioners’ statutory-counterpart argument was a failed syllogism: an aggravated felony requires an act of moral turpitude; we committed aggravated felonies; therefore, our aggravated felonies are acts of moral turpitude. Id. at 102. The court explained that not all aggravated felonies constitute crimes involving moral turpitude and vice versa. Id. at 102-03.

194. Id. at 103. The Second Circuit rejected the government’s contention that the provisions should be the sole source of comparison and found such a focus on similar language “strange” and difficult to measure. See id. at 102 & n.10.

195. See id. at 103-04.

196. Id. at 104 (emphasis added). The court stressed that “[w]hile hindsight might pin much of this confusion on Francis, we are bound to finish what our predecessors started.” Id. at 105.

197. Id.

198. See id. at 104.

199. Abebe v. Mukasey (Abebe II), 554 F.3d 1203 (9th Cir. 2009) (en banc) (per curiam). The Ninth Circuit first adopted Francis in Tapia-Acuna v. INS, 640 F.2d 223 (9th Cir. 1981), overruled by Abebe II, 554 F.3d 1203, and the BIA’s comparable-grounds test in Komarenko v. INS, 35 F.3d 432 (9th Cir. 1994), abrogated by Abebe II, 554 F.3d 1203.

200. Abebe II, 554 F.3d at 1204-05.
Abebe’s aggravated felony ground for deportation (sexual abuse of a minor) was not substantially identical to the CIMT ground of exclusion based on the comparable-grounds test it had adopted over a decade earlier.201

The Ninth Circuit’s recent en banc opinion repudiated Francis and overruled Tapia-Acuna v. INS, stating “that there’s no rational basis for providing section 212(c) relief from [exclusion], but not deportation.”202 Instead, it employed a standard of “bare rationality” and offered a legitimate reason for the different treatment of deportees who are similarly situated to excludees but for a temporary departure from the country.203 In doing so, the Ninth Circuit dismissed the need for any equal protection analysis and the eligibility approaches discussed above.204 Thus, it rejected Francis, In re Silva, and the comparable-grounds test entirely.205

In reaching this conclusion, the Abebe court explained as follows:

Congress could have limited section 212(c) relief to aliens seeking to enter the country from abroad in order to “create[ ] an incentive for deportable aliens to leave the country.” A deportable alien who wishes to obtain section 212(c) relief will know that he can’t obtain such relief so long as he remains in the United States; if he departs the United States, however, he could become eligible for such relief. By encouraging such self-deportation, the government could save resources it would otherwise devote to arresting and deporting these aliens. Saving scarce resources that would otherwise be paid for by taxpayers is certainly a legitimate congressional objective.206

Moreover, the court reasoned that because the section 212(c) waiver, by its plain language, only provided relief from exclusion, Abebe was initially never eligible for section 212(c) relief, and, thus, the issue of an equal protection violation was moot.207 After reevaluating the “complex legislative scheme” regarding section 212(c) waivers, the Ninth Circuit was able to avoid the debate be-

201. Abebe v. Gonzales (Abebe I), 493 F.3d 1092, 1105-06 (9th Cir. 2007), reh’g en banc sub nom. Abebe v. Mukasey, 554 F.3d 1203.
202. Abebe II, 554 F.3d at 1207. The court additionally rejected Kormarenko as “a dead letter.” Id.
203. Id. at 1206 (asking “whether [it could] conceive of a rational reason Congress may have had in adopting [section 212(c) waivers]”).
204. Id. at 1207.
205. See id.
206. Id. at 1206 (alteration in original) (citations omitted).
207. Id. at 1207.
tween the comparable-grounds and offense-specific approach. Rather, the Ninth Circuit provides the simple result that deportable LPRs in its jurisdiction who have not left the country are not eligible for section 212(c) relief.

IV. Analysis

Absent congressional action, the appropriate approach to determine whether a petitioner is eligible for section 212(c) relief remains the comparable-grounds approach, now codified in the statutory-counterpart rule. Congressional intent and administrative policy make it clear that the comparable-grounds approach is preferred. To disregard these principles of law is to disregard the proper channels in determining the law.

Moreover, the rationale employed in Blake v. Carbone, specifically the court’s reliance on the equal protection holding of Francis v. INS, is faulty. The facts from which the issue arose in Francis are not analogous to the facts in Blake, nor does the scope of Francis reach the issue in Blake. Further, Francis rests on shaky ground as a valid immigration decision because equal protection rights are rarely afforded to noncitizens.

Additionally, the Second Circuit’s offense-specific approach needlessly creates more confusion related to section 212(c) relief of deportation. By allowing petitioners to argue that their aggravated felony crimes of deportation could form the basis of CIMT, a variety of problems arise. Immigration courts will be bogged down with case-by-case, fact-specific analyses. The courts of appeals will have to deal with the results. The jurisprudence will be confused because of a lack of consistency surrounding CIMTs.

Conversely, the comparable-grounds approach provides uniformity across the federal circuits. It maintains consistency among cases because of its clear framework. Lastly, as the mere codification of established case law, the application of the comparable-grounds approach is already clear, thereby avoiding additional confusion.

A. Congressional and Administrative Policy Considerations

Before addressing the flaws of the Second Circuit’s reliance on Francis, certain policy considerations that arise with the offense-
specific approach must be addressed. First, by opening the door to allow more LPRs section 212(c) relief, this approach contradicts legislative intent. Second, the court’s failure to give proper deference to the BIA under *Chevron* undermines the validity of its offense-specific approach.

1. Rejection of Congressional Intent

As discussed earlier in this Note, in the 1990s, Congress enacted new immigration laws, amended current statutes, and repealed certain sections of the INA, including section 212(c). With respect to section 212(c), the progression followed from limiting eligibility available to certain aggravated felons to eliminating section 212(c) relief altogether. In other words, more LPRs were going to be deported. Thus, it can be inferred from these changes that Congress intended for the increase in deportation of LPRs and especially those convicted of aggravated felonies as defined by the INA. Furthermore, Congress had multiple opportunities to add certain aggravated felonies to the list of exclusionary grounds, thereby creating a statutory counterpart for certain deportation grounds, but it has never done so.

In *Blake v. Carbone*, the Second Circuit remanded each petitioner’s case to the BIA to determine whether his deportable offense could form the basis of a CIMT. If so, the petitioner was then eligible for section 212(c) relief. The Second Circuit had to have been aware that this analysis paved the way for more LPRs deportable on aggravated felony grounds to remain in the country. Therefore, the eventual consequence of its approach was a decrease in deportations. By extending the possibility of section 212(c) eligibility to the four petitioners in *Blake*, the Second Circuit directly contradicted congressional intent.

Interestingly, the Second Circuit had previously addressed the issue of congressional intent in *Cato v. INS*. There, the Second Circuit concluded that the petitioner’s argument that Congress intended section 212(c) to be a broad, forgiving provision cognizant

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210. See supra notes 93-106 and accompanying text.
211. See supra notes 94-98 and accompanying text.
212. Blake v. Carbone, 489 F.3d 88, 105 (2d Cir. 2007).
213. Id.

214. The court did assert that it “neither made a [section] 212(c) waiver available to all deportees with an aggravated felony conviction, nor put deportees in a better position than excluders.” Id. at 104.
215. Cato v. INS, 84 F.3d 597, 600 (2d Cir. 1996).
of humanitarian concerns “[flew] in the teeth of the statute itself, which unequivocally provides relief only for excludees, and, then, only for certain specified grounds of exclusion . . . [and] flout[ed] the legislative history, which indicates that Congress intended that [section] 212(c) relief be granted sparingly.” The Second Circuit then pointed out that it had rejected a similar argument in Francis v. INS, stating that if Congress had wanted to grant generous relief, then the result in Francis would have been far broader than its narrow holding pertaining to analogous grounds of exclusion. The court’s statements in Cato make its complete disregard of congressional intent in Blake curious. On the one hand, it had already acknowledged that Congress did not intend to grant broad relief, which would allow more criminal LPRs to remain in the country. Yet, some years after, when applying its own offense-specific approach, the court chose to ignore precedent and instead contradicted congressional intent.

The Second Circuit’s rejection of congressional intent in Blake not only created a way to counter the increase in the number of deportations, but it also created an obstacle to judicial efficiency. When the possibility of relief increases, so do the number of petitioners seeking relief. Because under the offense-specific approach it is possible for an aggravated felony offense to form the basis of a CIMT and all LPRs convicted of aggravated felony must be deported, it follows that most LPRs will try to obtain eligibility for relief. Thus, if courts were to adhere to the offense-specific approach, there would be an influx of petitioners. Frankly, it would be a mistake for a deportable LPR not to argue that the facts of his

216. Id. (emphasis added); see H.R. REP. No. 82-1365, at 51 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1705 (“[A]ny discretionary authority to waive the grounds for exclusion should be carefully restricted to those cases where extenuating circumstances clearly require such action and . . . the discretionary authority should be surrounded with strict limitations.”).

217. Cato, 84 F.3d at 600 (“[I]f Congress wished to provide sweeping and generous relief to all deportees with substantial ties to the country, we would have recognized this gesture in Francis, and would not have narrowed our holding to deportees who can show an analogous ground of exclusion in [section] 212(a).”); see also Leal-Rodriguez v. INS, 990 F.2d 939, 949-50 (7th Cir. 1993) (“To extend relief to other classes of deportable aliens would only further disrupt Congress’s scheme for awarding discretionary relief, which deliberately set the eligibility bar higher in cases of deportation than those involving exclusion.”).

218. Perhaps St. Cyr opened the door for courts to interpret Congress’s intent more flexibly. See INS v. St. Cyr, 533 U.S. 289, 315-16 (2001). By holding AEDPA and IIRIRA unlawfully retroactive, the Supreme Court’s clarification allowed the judicial branch to reinterpret legislative intent rather than have Congress restate the statute. Id.
crime, regardless of the ground of deportation charged, could amount to a CIMT.

However, such an influx would hamper an already overloaded administrative immigration system. Moreover, the case-by-case factual analysis required in the offense-specific approach would make for lengthier court proceedings and cause an increase in the number of petitions for review in the federal courts of appeals. In turn, petitioners would be held in detention for longer durations in direct relation to longer case postures. Ultimately, administrative and judicial resources would be increasingly overextended.

2. Failure to Properly Defer to the BIA

It is general policy that courts should defer to congressional authority. In turn, courts should also defer to the agencies that Congress creates to handle certain areas of the law. As an extension of the Department of Justice and through the powers delegated by the Attorney General, the BIA enforces and interprets immigration law. Therefore, courts of appeals must afford the BIA proper deference, particularly when it comes to its interpretation of statutes and regulations. However, the Blake court made it a point to avoid such deference. In doing so, the Second Circuit incorrectly ignored the general administrative policy stated above and, more specifically, the Chevron doctrine. Further, when the Second Circuit refused to defer to the BIA’s interpretation of section 212(c), which allowed the court to implement its offense-specific approach, the court again made a conclusion contrary to one it had made previously in Cato v. INS. Upon closer look, the Second Circuit dismissed the government’s Chevron argument with an unsettling analysis that contradicted its own statements in Cato and failed to properly follow the well-understood two-step Chevron process.

In Cato, the Second Circuit explained that its reasoning in a related case was motivated in part “by the lack of legislative gui-

219. See supra note 185 and accompanying text.

220. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); see, e.g., Evangelista v. Ashcroft, 359 F.3d 145, 150 (2d Cir. 2004) (“We review the BIA’s interpretation of ambiguous provisions of the INA . . . with substantial deference . . . .”); Okoroa v. INS, 715 F.2d 380, 382 (8th Cir. 1983) (“This court . . . must give deference to an agency’s interpretation of a statute that it is charged with administering.”).

221. See Cato, 84 F.3d at 599 (employing the comparable-grounds approach).
dance” in section 212(c). The court was referring to a situation where a ground for exclusion could never exist, but, nonetheless, it plainly indicated that section 212(c) was unclear. Yet, in Blake, the Second Circuit concluded that the language of section 212(c) was clear, that is, the government was unable to point to any ambiguity in the statute. According to the court, because the statute clearly stated that the Attorney General could not provide discretionary relief to LPRs under an order of deportation, it had a clear meaning. This is, however, an incorrect application of the first prong of Chevron. Although the statute is read to pertain only to excludees, the reality is the statute has been applied in both contexts of exclusion and deportation since at least the 1950s. Moreover, the Second Circuit had taken issue with the lack of guidance in section 212(c) regarding deportees whose charge of deportation will never have a ground of exclusion. Thus, the statute is not clear because it does not address its application in multiple contexts. Nevertheless, the court was able to avoid applying Chevron deference and instead could employ its own approach.

If the Second Circuit had found section 212(c) to be ambiguous, it would have likely run into a problem with the second prong, foreclosing the opportunity to employ its offense-specific approach. In Cato, the Second Circuit stated that an LPR in deportation proceedings is similarly situated to an LPR in exclusion proceedings “when the ground for the deportee’s removal . . . is the same as the ground for the excludee’s denial of admission; thus, a § 212(c) waiver becomes available in a deportation proceeding if the reason for deportability is ‘substantially equivalent’ to a ground of exclusion listed in § 212(a).”

222. Id. at 600 (emphasis added). The court added that “the Francis rule itself—which was judicially (not legislatively) crafted—gave rise to the ‘interstitial issue’ [the court] faced.” Id. (quoting Bedoya-Valencia v. INS, 6 F.3d 891, 897 (2d Cir. 1993)). Thus, the court shifted the source of its analytical problem from just section 212(c) to also include its own judicially created Francis rule. However, this finessing of the issue did not conceal the court’s acknowledgment that there is ambiguity—or lack of guidance—in section 212(c). In fact, the court stated that “the Francis rule would promote ‘coherence and consistency’ in the statutory scheme.” Id.

223. Id.

224. Blake v. Carbone, 489 F.3d 88, 100 (2d Cir. 2007).

225. Id.

226. Cato, 84 F.3d at 599 (emphasis added); see also Drax v. Reno, 338 F.3d 98, 107 (2d Cir. 2003). Additionally, the Second Circuit held that a petitioner is eligible for section 212(c) relief when the ground for deportation is one to which no ground for exclusion could even exist. See Cato, 84 F.3d at 599-600; see also Drax, 338 F.3d at 107-08; Bedoya-Valencia, 6 F.3d at 897.
ble-grounds analysis that the BIA employed in *In re Blake*. There, the BIA held that the test to determine eligibility is “whether Congress has employed similar language to describe substantially equivalent categories of offenses.”227

Although the Second Circuit decided *Blake v. Carbone* subsequent to *Cato*, the precedential value of *Cato* makes its rationale worth comparing to the reasoning used in *In re Blake*. Specifically, the similarity between these two holdings brings into question the validity of the *Blake* court’s conclusion as to the reasonableness (or second) prong of the *Chevron* analysis. Accordingly, the Second Circuit’s conclusion that *Chevron* deference did not apply in *Blake* becomes transparent considering the court had previously used a comparable-grounds test similar to one used by the BIA. Based on precedent, the Second Circuit would have had to find the BIA’s test reasonable if it reached the second prong of the *Chevron* analysis.228 *Chevron* only requires deference so long as the interpretation is a reasonable one. Because the comparable-grounds test was indisputably a reasonable one—the Second Circuit had applied the comparable-grounds rationale in at least two of its earlier decisions229—then the Second Circuit would have had to defer to the BIA’s comparable-grounds approach in *Blake*. Therefore, the Second Circuit’s history of using the comparable-grounds approach undermines its quick dismissal of *Chevron* in *Blake*.

B. *Reliance on Francis v. INS*

In 2007, when the Second Circuit premised its holding in *Blake v. Carbone* on the equal protection rationale of its 1976 decision, *Francis v. INS*, the court extended the thirty-year-old holding far beyond its reach. The court’s reliance on *Francis* is faulty for three reasons: (1) the cases are not factually analogous; (2) the scope of *Francis* is limited by the facts of each case; and (3) the equal protection rights afforded LPRs may be less than required by *Francis*.


228. *See Cato*, 84 F.3d at 600 (stating a deportee is not eligible for relief when “[t]he deportee’s ground of deportation may be one that could conceivably have an analogous ground of exclusion under [section] 212(a) but, unhappily, Congress has not chosen to include that ground in [section] 212(a)”).

229. *See, e.g., id.; Bedoya-Valencia*, 6 F.3d at 894.
1. Factual Comparison

In *Francis*, the Second Circuit remedied a particular factual situation where the ground of deportation charged was exactly the same as a ground of exclusion so that the only difference between the deportee and excludee was a departure from the United States. Specifically, Francis was deportable under section 241(a)(11), which stated in relevant part that “[a]ny alien in the United States . . . shall . . . be deported who . . . at any time has been convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . narcotic drugs or marihuana.” He pled guilty and was subsequently convicted of criminal possession of dangerous drugs (marijuana). The comparable exclusionary provision stated in relevant part that “[a]ny alien who has been convicted of a violation of . . . any law or regulation relating to the illicit possession of . . . narcotic drugs or marihuana” is deportable. This left the excludee who had departed the United States eligible for relief and the deportee who had not, ineligible. As a result, *Francis* “expanded the class of aliens to whom [section] 212(c) relief is available but did not broaden the statutory grounds on which it may be applied.”

In *Francis*, the language of the grounds for deportation and exclusion were not only comparable, they were exactly the same. However, in *Blake*, none of the aggravated felony grounds for each petitioner’s deportation charge was an exact match to the CIMT ground of exclusion. Thus, to rely on *Francis* as an analogous situation is faulty. The facts of these cases are not analogous; they are different situations involving distinctly different statutory provisions: *Francis* illustrates how deportation and exclusion grounds can act as two sides of the same coin satisfying the equal protection test it mandated, while *Blake* fails to show how any of the four different grounds for deportation could work in the same manner with the CIMT ground of exclusion. This distinction makes the Second Circuit’s basis for relying on *Francis* somewhat attenuated. The court’s basis becomes further attenuated when looking at the scope of the *Francis* holding.

231. *See Francis*, 532 F.2d at 269 (citing the deportation statute in force at the time).
232. *Id.*
233. *Id.* at 270 n.2 (citing the exclusionary statute in force at the time).
234. *Id.* at 272-73.
235. Dung Tri Vo *v.* Gonzales, 482 F.3d 363, 367 (5th Cir. 2007).
2. Scope of Francis

When the Second Circuit concluded that the petitioners’ claims in Blake turned on the guarantee of equal protection, it highlighted what it perceived as the “touchstone in Francis.”\textsuperscript{236} The court honed in on the “‘irrelevant and fortuitous’ circumstance of traveling abroad recently.”\textsuperscript{237} Indeed, the trip abroad is what made the petitioner in deportation proceedings different from the petitioner in exclusionary proceedings. But, to be sure, it was the same grounds for deportation and exclusion that made them similarly situated, and to be similarly situated is what is necessary to even consider an equal protection claim.

Equal treatment is understood to be “fully accords” when resident noncitizens in deportation proceedings can seek relief on the basis of the same grounds as those noncitizens seeking to re-enter the country.\textsuperscript{238} Indeed, “more [is] not required by equal protection principles. . . . [T]o go further would flatly contravene the statutory language limiting the Attorney General’s waiver power to the grounds specifically referred to in [section] 212(a).”\textsuperscript{239} The equal protection component of Francis is only invoked once the comparable-grounds approach is satisfied. Otherwise, there will not be two classes of similarly situated people having different results. The comparable-grounds approach establishes whether there is reason for an equal protection concern at all.\textsuperscript{240}

The Second Circuit broadens the scope of Francis by refusing to adhere to the limitations of the comparable-grounds approach.\textsuperscript{241} In going beyond a comparison of statutory text, the court oversteps the equal protection concern it had set out to protect in 1976. Other courts of appeals, unlike the Second Circuit, consider Congress’s act of leaving the particular language of 212(c) “substantially

\textsuperscript{236} Blake v. Carbone, 489 F.3d 88, 102 (2d Cir. 2007).
\textsuperscript{237} Id. (quoting Francis, 532 F.2d at 273); see also id. (“In short, eligibility for relief in Francis turned on whether the lawful permanent resident’s offense could trigger [section] 212(c) were he in exclusion proceedings, not how his offense was categorized as a ground of deportation.”) (emphasis added).
\textsuperscript{238} Campos v. INS, 961 F.2d 309, 313 (1st Cir. 1992).
\textsuperscript{239} Id. at 313-14.
\textsuperscript{240} See, e.g., Valere v. Gonzales, 473 F.3d 757, 762 (7th Cir. 2007) (“[A] ‘statutory counterpart’ . . . is what makes a removable, nondeparting alien similar to an inadmissible alien in the first place.”); Campos, 961 F.2d at 316 (“Campos is being treated no differently from any other alien convicted of a crime that is a ground for deportation but has no corresponding ground for exclusion.”).
\textsuperscript{241} Blake v. Carbone, 489 F.3d 88, 100 (2d Cir. 2007).
unchanged” as an expression of the “continued desire to limit [section] 212(c) relief to the listed grounds of exclusion.”

The Second Circuit views Francis as sanctioning its analysis beyond the language of the statutes or, rather, beneath the surface of the statutory grounds, to the offenses committed in order to find comparable grounds, whereas the majority of Circuits narrowly construe the language of the statutes to find comparable grounds. As the Seventh Circuit explained, to go beyond the narrow view and “hold that the same form of discretionary relief must be available to aliens deportable for different, but arguably comparable, violations is to interfere again, on an even weaker rationale, with Congress’s scheme for regulating aliens.” Further, to allow for such a distant relationship between the grounds is a failure to act in accordance with the boundaries set out in Francis.

3. Equal Protection as Applied to LPRs

Irrespective of the impact of Francis, the decision itself does not carry as much weight as the Second Circuit purports. The question remains whether LPRs are afforded the type of equal protection rights granted to the petitioners in Blake. Francis proceeds under the tenet “that the constitutional promise of equal protection of the laws applies to aliens as well as citizens.” But the court did acknowledge that “the right of a permanent resident alien to remain in this country has never been held to be the type of ‘fundamental right’ which would subject classifications touching on it to strict judicial scrutiny.” Though the court then countered with the statement that the Supreme Court has found deportation to be equivalent to exile, the analogy is not enough to change the treatment of deportation from administrative to criminal. Factors like the plenary power doctrine, the process of administrative law, and the interests sought to be protected in relief from deportation cases all play a role in forming a lesser scrutinized version of equal pro-

242. See, e.g., Campos, 961 F.2d at 315.
243. Leal-Rodriguez v. INS, 990 F.2d 939, 952 (7th Cir. 1993).
244. Francis v. INS, 532 F.2d 268, 272 (2d Cir. 1976) (citing Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886)); see Plyer v. Doe, 457 U.S. 202, 210 (1982) (“Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”); Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953) (stating that deportation can only occur after completion of immigration proceedings that satisfy due process standards).
245. Francis, 532 F.2d at 272.
246. Id.
tection rights. This larger question of how much equal protection is guaranteed to LPRs leaves many section 212(c) cases, including Blake v. Carbone, up for debate.

C. Offense-Specific Approach Creates Further Confusion

Many petitioners, like those in Blake, make the argument that, although they are subject to deportation for a specific aggravated-felony conviction with no facially comparable exclusion provision, they are eligible for 212(c) relief because the crime committed amounts to a CIMT ground for exclusion.\footnote{Blake v. Carbone, 489 F.3d 88, 100 (2d Cir. 2007) (noting petitioners' argument that all aggravated felony grounds of deportation are categorically CIMTs, or in the alternative, that each aggravated felony could form the basis of a CIMT ground of exclusion); see Zamora-Mallari, 514 F.3d at 692; Kim v. Gonzales, 468 F.3d 58, 62 (1st Cir. 2006).} In Blake, the Second Circuit held that each petitioner was eligible for relief if, on remand, the lower court found that the “particular aggravated felony offense \textit{could} form the basis of exclusion under [section] 212(a) as a crime of moral turpitude.”\footnote{Blake, 489 F.3d at 104 (emphasis added).} Two major points of confusion result from this holding: how the aggravated felony offense should be compared to the definition of a CIMT\footnote{One author suggests that the statutory-counterpart rule gives the DHS too much power and that the holding in Blake v. Carbone, which allows for some speculation, mitigates this disparity. See Barr, supra note 117, at 755-56. However, this suggestion fails to consider the practical ramifications of allowing petitioners to argue that counterparts exist in CIMT and crimes of violence.} and whether the approach already taken by some courts of appeals in removing LPRs based on CIMTs is appropriate.

The term “moral turpitude” first appeared in immigration laws in the late nineteenth century, where exclusion was directed toward “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.”\footnote{Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.} From then on the CIMT language has been part of immigration laws and subject to much controversy.\footnote{See, e.g., S. REP. NO. 82-1137, at 9-10, 21-22 (1952); H.R. REP. NO. 82-1365, at 13, 15, 48, 50, 60, 131, 132, 176 (1952); S. REP. NO. 64-352, at 1 (1916). See generally Derrick Moore, Note, “Crimes Involving Moral Turpitude”: Why the Void-for-Vagueness Argument Is Still Available and Meritorious, 41 CORNELL INT’L L.J. 813 (2008); Jay}
“moral turpitude” in the INA. Mei v. Ashcroft defined moral turpitude “as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.”

Another popular definition includes “conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between person or to society in general.”

These are not, however, the only possible definitions. Some argue that the term itself is redundant and therefore lacks clarity. And, as one court stated, “[t]he phrase ‘moral turpitude’ is one of the most ambiguous in the long list of ambiguous legal phrases, and the cases are far from consistent.” Additionally, with respect to relief from deportation, courts have held that the determination of “whether a crime involves . . . moral turpitude depends upon the inherent nature of the offense, as defined in the relevant statute, rather than the circumstances surrounding [the petitioner’s] particular conduct.”

Presently, immigration law excludes noncitizens who have been convicted of a CIMT or who admit to having committed a CIMT or acts that constitute the essential elements of such a

Wilson, Comment, The Definitional Problems with “Moral Turpitude,” 16 J. LEGAL PROF. 261 (1991) (examining the problems that arise when one tries to distinguish crimes that involve moral turpitude from crimes that do not in the context of the legal profession).


254. See, e.g., Hamdan v. INS, 98 F.3d 183, 186 (5th Cir. 1996); Medina v. United States, 259 F.3d 220, 227 (4th Cir. 2001).

255. See, e.g., Guerrero de Nodahl v. INS, 407 F.2d 1405, 1406 (9th Cir. 1969) (affirming that an act of moral turpitude is one that is “intrinsically wrong”); United States ex rel. Berlandi v. Reimer, 30 F. Supp. 767, 768 (S.D.N.Y 1939) (stating that moral turpitude is an “indefinite term” but includes “[e]verything done contrary to justice, honesty, or good morals” (citation and internal quotations marks omitted)), aff’d, 113 F.2d 429 (2d Cir. 1940); United States v. Carrollo, 30 F. Supp. 3, 6 (W.D. Mo. 1939) (defining an act of moral turpitude as one that “grievously offends the moral code of mankind and would do so even in the absence of a prohibitive statute”).

256. Jordan v. De George, 341 U.S. 223, 232-45 (1951) (Jackson, J., dissenting). In his dissent, Justice Jackson questioned how well courts could define what type of conduct is a CIMT without an “intelligible definition of deportable conduct.” Id. at 245. The Jordan majority, however, held that the term was not unconstitutionally vague. Id. at 232 (majority opinion).


crime. In *Gill v. INS*, the Second Circuit afforded *Chevron* deference to the BIA’s construction of the “undefined” phrase “moral turpitude.” There, the court reviewed the BIA’s interpretation of federal and state criminal statutes with respect to the BIA’s conclusion that recklessness, in combination with serious resulting bodily injury and use of a deadly weapon, amounted to a CIMT. The court reviewed the BIA’s decision for the purposes of removal, not section 212(c) relief. The court stated, “In assessing whether a crime of conviction is a CIMT, the BIA takes the ‘categorical approach,’ focusing on ‘the intrinsic nature of the offense.’” The court went on to state that the proper focus is on intent, the “mental state reflected in a given offense.” Upon a short description of BIA precedent where crimes committed knowingly or intentionally were found to be CIMTs, the court affirmed the BIA’s determination that “attempted reckless assault” under New York law contained the elements of a CIMT.

*Gill* illustrates the complicated analysis required to determine whether an offense is a CIMT. Moreover, in *Blake*, the Second Circuit stated that a CIMT determination relative to an aggravated felony “is one well within the BIA’s expertise” and cited *Gill*. Given the extensive line of reasoning used in *Gill* and the number of aggravated felony grounds of deportation as well as the impot of federal and state law, CIMT analysis does not appear to be quick and manageable. Plus, when one considers the undefined term of moral turpitude, the numerous definitions from which a court could choose, and the evolving morals of the public, a CIMT determination cannot be objective. In fact, such a determination will be ripe for appeal based on inconsistency, arbitrariness, and subjectivity. Section 212(c) jurisprudence does not need another layer of complication, which, as evidenced above, is a likely result when applying the offense-specific approach.

260. Gill v. INS, 420 F.3d 82, 89 (2d Cir. 2005). The court went so far as to say that “the BIA has expertise applying and construing immigration law.” Id.
261. Id.
262. Id.
263. Id. (quoting Dalton v. Ashcroft, 257 F.3d 200, 204 (2d Cir. 2001)).
264. Id.
265. Id. at 89-90.
266. Blake v. Carbone, 489 F.3d 88, 104 (2d Cir. 2007).
267. This hypothetical framework that the offense could form the basis of a CIMT invites subjective interpretation. Since it is not definitive, it is possible that many offenses would fall under the framework. It is a vague and broad test that is far from the narrow statutory interpretation of the comparable-grounds approach.
Ironically, the Second Circuit is wary of such arbitrary analysis. It strongly opposed judicial arbitrariness in its critique of the BIA’s rationale in *In re Blake.* Specifically, the court had concerns with the BIA’s standard that an “incidental overlap” between grounds does not reach the level of a statutory counterpart. The Second Circuit stated that such a standard “invites arbitrary decision making” because there is no certainty as to what amount of overlap is enough. In a CIMT analysis, this same type of vagueness and arbitrary decision making will occur. Thus, the offense-specific approach will create problems that the Second Circuit has sought to avoid. Because this standard is based on moral, rather than legal, standards, and moral standards change over time and vary in different locations, it is not possible for the CIMT analysis, per the offense-specific approach, to be consistent as applied.

D. *Comparable Grounds Provides Uniformity and Congruency*

The comparable-grounds approach is preferred for two main reasons. One, it promotes uniformity through both its wide acceptance in the federal and immigration courts and its significant precedential value. Two, given the unique equal protection framework of the section 212(c) eligibility determination, the comparison between grounds makes sense analytically.

1. Benefits of Uniformity

The federal courts favor uniformity and consistency to support the structure and function of the court system. “Not only is uniform interpretation of federal law assumed to be desirable as a matter of policy, some judges and scholars claim that the Constitution requires federal courts to standardize the meaning of federal law for the nation.” Though *Blake v. Carbone* is not binding on the other federal circuits, it nonetheless defeats uniformity in the federal court system and in immigration law, which in turn creates inconsistent results, uncertainty among petitioners, and the impetus

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268. *Blake*, 489 F.3d at 102 n.10.
269. *Id.* at 102 & n.10.
270. *Id.* at 102 n.10.
272. See Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1569 (2008). Though this article questions the weight given to uniformity, it nonetheless establishes that uniformity is currently a desirable goal. *Id.* at 1574.
273. *Id.* at 1569.
to forum shop.\textsuperscript{274} By keeping the equal protection analysis the same within each federal circuit, legal uncertainty is thwarted while consistency in the law is promoted. Without a common method to determine whether the deportee is similarly situated to an excludee, there is no way to ensure consistent results. Even though there is no explicit requirement for uniformity in immigration law, policy reasons suggest it is preferable.

Furthermore, one of the constitutional bases for the federal government’s power to regulate immigration requires uniformity in the related area of naturalization.\textsuperscript{275} It can be argued that this should extend to other areas of immigration law. In fact, some courts have stated that uniform immigration law is of “paramount” importance since immigration is exclusively a federal responsibility.\textsuperscript{276} Similarly, courts have reasoned that uniformity is important in the nationwide application of immigration law.\textsuperscript{277} Because the vast majority of courts of appeals follow the BIA’s comparable-grounds approach,\textsuperscript{278} in the interest of uniformity alone, this approach is the preferable choice. Simply, the Second Circuit’s decision to create its own test impedes the goals of uniformity stated earlier.

Additionally, the comparable-grounds approach stems from over thirty years of BIA precedent, including an affirmative opinion by the Attorney General.\textsuperscript{279} It has been upheld by the majority of courts of appeals and is now codified in federal regulation. Though the approach may have initially been an attempt to synthesize “problematic legislation” with “judicial-stitchery,” its long-standing presence in immigration jurisprudence is undeniable.\textsuperscript{280} In answer-

\textsuperscript{274.} See generally Iris Bennett, Note, The Unconstitutionality of Nonuniform Immigration Consequences of “Aggravated Felony” Convictions, 74 N.Y.U. L. Rev. 1696, 1700 (1999) (discussing how immigration case law has extended the uniformity requirement found in the Naturalization Clause to other aspects of immigration law and thus should be extended to the aggravated felony provision).

\textsuperscript{275.} U.S. Const. art. I, § 8, cl. 4.

\textsuperscript{276.} See, e.g., Ferreira v. Ashcroft, 382 F.3d 1045, 1050 (9th Cir. 2004) (“[I]mmigration laws should be applied uniformly across the country.” (quoting Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 913 (9th Cir. 2004) (internal quotation marks omitted))).

\textsuperscript{277.} See, e.g., Drakes v. Zimski, 240 F.3d 246, 248 (3d Cir. 2001).

\textsuperscript{278.} See supra note 163.


\textsuperscript{280.} Blake v. Carbone, 489 F.3d 88, 105 (2d Cir. 2007).
ing which of the two approaches is preferred, decades of precedent cannot be ignored.

2. Textual Focus of the Comparable-Grounds Approach

The comparable-grounds approach also provides a logical framework for courts to follow. The analysis of the language in both the exclusionary and deportation provisions is critical since a “textual link between [a deportation and an exclusion provision] indicate[s] that Congress had the same class of offenses in mind when it enacted the two provisions that must be compared.” 281 A “common-sense understanding” of the crimes involved in each provision does not provide this type of insight. 282

To be similarly situated there must be an evident textual link to satisfy the equal protection concerns of Francis and Silva. 283 The comparable-grounds approach itself is uncomplicated so long as the longstanding case law is understood. The inclination to complicate the question of “whether Congress has employed similar language to describe substantially equivalent categories of offenses” is understandable, particularly when the deportation ground is an aggravated felony. 284 However, to do so is to cause a problem where one need not be.

Rather, the focus on similar language in the comparable-grounds approach is a rational standard. 285 While the Second Circuit found that “[t]he BIA’s emphasis on similar language is

281. Avilez-Granados v. Gonzales, 481 F.3d 869, 872 (5th Cir. 2007).
282. See id.
283. See Valere v. Gonzales, 473 F.3d 757, 762 (7th Cir. 2007). The Seventh Circuit explained,

[T]he requirement of a comparable ground of exclusion in [section] 212(a)—a “statutory counterpart”—is what makes a removable, nondeparting alien similarly situated to an inadmissible alien in the first place. If the removable alien’s crime of conviction is not substantially equivalent to a ground of inadmissibility under [section] 212(a), then the removable alien is not similarly situated for purposes of claiming an equal protection right to apply for [section] 212(c) relief.

Id.

285. Cf. Barr, supra note 117, at 757-60 (arguing that the comparable-grounds approach creates arbitrary distinctions at various stages of a petitioner’s eligibility claim). For additional insight on the comparable-grounds versus offense-specific approach debate, see Michael M. Waits, Note, “In Like Circumstances, but for Irrelevant and Fortuitous Factors”: The Availability of Section 212(c) Relief to Deportable Legal Permanent Residents, 51 ARIZ. L. REV. 465 (2009).
strange,"286 this concern only arises in rare situations involving a potential overlap like in Jimenez-Santillano v. INS, where an exclusionary provision is written broadly and seemingly encompasses a ground of deportation.287 But, to automatically assume there is a counterpart is incorrect. The comparable-grounds approach properly guides courts in finding the necessary textual link between the statutes. This approach ensures that the intent existed for the two grounds to be compared, instead of a judicial reclassification of offenses based on factual similarities.

CONCLUSION

Because a circuit split does exist, there is room for either the legislative or judicial branch to decide the issue. Generally, the Supreme Court resolves such matters. However, here, congressional action is the appropriate option. Plenary power authorizes Congress’s control over immigration matters. As the legislative body that speaks for the people of the United States, Congress translates society’s views into law. If courts “tinker” with the current system for 212(c) eligibility, they are sparring with congressional intent and potentially overstepping judicial bounds.288 For these reasons it is that body, not the Supreme Court, that must change immigration statutes to better serve both citizen and noncitizen residents of the United States.

Currently, the United States’s policy toward immigration is one of heightened protection for its citizens. Until the country can resolve its own conflicting views toward immigration, the laws will stay the same. The courts then must uphold the statutes and the

286. Blake, 489 F.3d at 102.
287. See Jimenez-Santillano v. INS, 120 F.3d 270, No. 96-9532, 1997 WL 447315, at *1-3 (10th Cir. July 28, 1997) (unpublished table decision). The Tenth Circuit affirmed the BIA’s finding of no statutory counterpart. Id. at *2.
288. Campos v. INS, 961 F.2d 309, 317 (1st Cir. 1992). Additionally, “judicial redrafting would serve only to pull the statute further from its moorings in the legislative will.” Zamora-Mallari v. Mukasey, 514 F.3d 679, 692 (7th Cir. 2008) (quoting Farquharson v. U.S. Attorney Gen., 246 F.3d 1317, 1325 (11th Cir. 2001)) (internal quotation marks omitted). Courts are in agreement that “a statute of this detailed nature is best left to the ministrations of the Congress.” Leal-Rodriguez v. INS, 990 F.2d 939, 952 (7th Cir. 1993) (quoting Campos, 961 F.2d at 316-17) (internal quotation marks omitted); cf. Barr, supra note 117, at 755 (stating that both rationales of reliance and fear are not “valid because Congress never contemplated this issue” of section 212(c) relief for deportation).

policies that underlie them. If the people decide that change is necessary, it must come from Congress, not the bench.\textsuperscript{289}

Despite the convoluted history of section 212(c), one approach for determining eligibility has remained at the forefront of all section 212(c) relief matters. To choose otherwise is to choose more confusion. The majority of courts of appeals uphold the statutory-counterpart approach, which is testimony to its effectiveness.

Though some might argue that the rule is form over substance, form is indeed one of its strong points.\textsuperscript{290} By applying the same standard across the country, noncitizens in deportation hearings know that they are receiving the same universal treatment. The Second Circuit’s offense-specific approach will only add more confusion to the story of section 212(c). Moreover, the Second Circuit’s reliance on the equal protection rights afforded in \textit{Francis} is faulty, allowing for an inappropriate focus on the facts of the petitioner’s offense.

With the likelihood of many CIMT claims under this approach, the courts will be bogged down with highly arbitrary, subjective analysis. The need for a more accurate approach that analyzes consistent statutory language versus inconsistent factual matters will quickly materialize. Furthermore, the offense-specific approach creates a loophole for those who have committed a more serious crime to be eligible for relief while those with less severe infractions will be barred. The vagueness of the CIMT ground of exclusion (and the crime-of-violence ground of deportation) provides more room for argument for those who have committed serious crimes than those with a lesser degree of seriousness. Given all of these concerns, the comparable-grounds approach is the correct analysis in determining eligibility for section 212(c) relief.

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\textsuperscript{289} See Campos, 961 F.2d at 316 (“[T]he conditions of entry for every alien, . . . the right to terminate hospitality to aliens, the grounds on which such determination shall be based, have been recognized as matters solely for the responsibility of Congress and wholly outside the power of this Court to control.” (alterations in original) (quoting Fiallo v. Bell, 430 U.S. 787, 796 (1977)) (internal quotation marks omitted)).

\textsuperscript{290} See Barr, supra note 117, at 760.

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