A Tale of Two Opinions: The Meaning of Statutes and the Nature of Judicial Decision-making in the Administrative Context

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After a long period of relative neglect, the subject of statutory interpretation once again enjoys favor in the courts of academic discourse.¹

The rise of the administrative state ignited an ongoing debate on the role of the judiciary in interpreting statutes. Professor Vaughns examines the majority and dissenting opinions in Abourezk v. Reagan, interpreting a politically-charged statutory provision in a decision from the Circuit Court of Appeals for the District of Columbia, often characterized as one of the more ideologically polarized courts in the country. Although both opinions follow the methodological decision-making mandated by the Supreme Court's landmark case of Chevron U.S.A. v. Natural Resources Defense Council, employing traditional tools of statutory construction, they nonetheless reach sharply contrary, result-oriented outcomes. Meanwhile modern commentators have advanced more sophisticated statutory interpretive theories to update outmoded statutes and to encourage more judicial candor. Abourezk thus provides an excellent vehicle for showing how other interpretive methods play out in the context of a complex case. Abourezk also illustrates how even the seemingly easy to apply agency deference required by Chevron can be judicially

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manipulated to satisfy individual agendas. Finally, Abourezk reveals the heavy social costs that may result from a lack of judicial candor.

I. INTRODUCTION

The American legal system has moved rapidly from a system of case law to one dominated by statutes applied by agencies to control all aspects of our lives. Because many statutory delegations to agencies occur at a high level of generality, judges possess a good degree of maneuverability in deciding how to apply the law. In order to cabin judicial discretion and achieve congressional mandates, both candor and sophisticated statutory analysis must be used in decision-making. In this article I examine one case in which both qualities are lacking. Through a detailed analysis of the case, I hope to shed some light on a highly controversial substantive area and to provide an example of how to analyze difficult problems of interpretation in the administrative context. In the process, I hope to encourage students of statutory interpretation to set aside discussions of abstract linguistics and easy examples and urge them to consider difficult real world problems. Finally, I consider the role judicial candor plays in statutory interpretation.


4. See, e.g., Church of the Holy Trinity v. United States, 143 U.S. 457 (1892). The Court in that case refused to follow the language of the statute, declaring that "a thing may be within the letter of the statute and yet not within the . . . intention of its makers." Id. at 459. Also, "[s]tatutes are not exercises in private language. They should be read, like a contractual offer, to find their reasonable import." Easterbrook, supra note 3, at 60. The instant case provides such an example with the "mere presence or entry" versus "activities" dichotomy discussed infra.

5. The stock examples are "vehicles in the park" and "letting blood in the streets of Bologna." See Frederick Schauer, Formalism, 97 YALE L.J. 509, 540, 543 (1988).
The case selected for this examination involves the interpretation of a statutory provision in the Immigration and Nationality Act of 1952, as amended ("INA"), involving the exclusion of aliens from entry into the United States. Although the provision at issue has subsequently been amended to eliminate the specific interpretive question the court addressed, the recent amendment itself raises intriguing questions for the various theories of statutory interpretation that currently dominate the field. Specifically, would any of the modern statutory approaches advanced by legal scholars have remedied the concerns that were eventually resolved through the legislative process? In other words, which of the theories, if any, that focus on statutory interpretation as evolutionary, would have best served the cause of the legislative resolution ultimately fashioned by Congress? And what of judicial candor? Would it have informed the legislative process as well?

II. THE SUBJECT OF THE INTERPRETIVE INQUIRY

This article thus critically examines the jurisprudence of two judges in a single case—Abourezk v. Reagan; one judge strains to avoid applying the rule of law while the other strains to apply it. Judge Ginsburg for the majority temporarily avoided the aliens' outright exclusion by remanding the case for irrelevant information, while Judge Bork, in dissent, affirmed their exclusion by selective reliance on legislative history.
Abourezk was selected because of the controversy it highlights and because it fits the paradigm case described by Professor Diver: a case "where a legislature entrusted the administration of a statute to an agency, subject to judicial review." With the delegation of authority to executive agencies to enforce and implement the statute that Congress has charged them to administer, those agencies have the first opportunity to pass on the interpretive issue which is later presented to a court.

Thus the "Age of Statutes" has "significantly altered the ground rules" of statutory interpretation. Judges now must share their interpretive functions with officials in the executive branch of government, which is not a natural task for some. This is particularly true in certain areas of the law such as immigration law. Long considered "a maverick . . . in our public law," immigration is an area of law in which the role of the judiciary is considered rather circumspect. In fact, "no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system."

These statements exemplify the tension inherent in the judicial process when judges confront issues in immigration law. The discord arises because the power of the sovereign over immigration is plenary, a power so great that it permits Congress to "regularly mak[ ] rules that would be unacceptable if applied to citizens." Moreover, the Supreme Court has
repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission (and conversely the exclusion) of aliens.\textsuperscript{20}

Supreme Court precedent "[has] long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."\textsuperscript{21} Well-established case law requires judges to defer to agency determinations and statutes in this area.\textsuperscript{22} The formal role of the judiciary, therefore, is quite limited. But a limited judicial role, of course, can lead to an "unjust" result in individual cases, a perception that often places temptation before the judiciary.\textsuperscript{23}

That temptation often leads judges astray, causing them to stretch the correct result while maintaining the formal requirements of our legal system. These rulings can be made to appear, at least on their face, consistent with established precedent. Examined more closely, however, the ruling can be seen as a subterfuge for not deciding the case as precedent would dictate. Judges who write such opinions have, in effect, substituted their own judgment for that of the agency, Congress, or higher courts.\textsuperscript{24} Such action, of course, flies squarely in the face of Supreme Court mandates as well as established notions of acceptable judicial behavior.

\textit{Abourezk} involves a statutory provision that relates to the government's denial of nonimmigrant (temporary visitors) visas based on ideological and national interests (i.e., political)

\begin{thebibliography}{10}
\bibitem{Legomsky} See supra note 2.
\bibitem{Shaughnessy v. Mezei} 345 U.S. 206, 210 (1953).
\bibitem{INS v. Jong Ha Wang} 450 U.S. 139, 145 (1981); see also, e.g., \textit{Fiallo v. Bell}, 430 U.S. 787, 792 (1977) (power "largely immune" from judicial review).
\bibitem{But see} id. at 793 n.5 (accepting a "limited" judicial responsibility to review even those congressional decisions concerning the exclusion of aliens).
\bibitem{generally Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 112-23 (1992) (explaining the choice between jurists favoring rules (a more restrictive approach) and jurists favoring standards (a more flexible approach) as differing on the basis of their conceptions of the judicial role). "But particular choices between rules and standards take place in specific political contexts, and, in those contexts, take account of the substance they will govern." Id. at 123.
\bibitem{See} e.g., \textit{Jong Ha Wang}, 450 U.S. at 144 (stating that courts may not overturn an agency construction of a discretionary standard "simply because [they] may prefer another interpretation of the statute").
\end{thebibliography}
grounds of exclusion,25 the latter ground being a matter that implicates "the conduct of foreign relations" that is "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."26 The case also involves the application of the analytical framework that the Supreme Court articulated in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.27 for the interpretation of administrative statutes that mandates agency deference in appropriate cases.

The Department of State (DOS), the executive branch agency accorded documentation responsibilities under the INA for such authority as the issuance of travel visas,28 gave the statute an unnatural construction29 that was not contemplated by the Congress that drafted it.30 The DOS interpretation also ran counter to modern social concerns evinced in international treaties and related statutes.31 The statute was subsequently amended to ameliorate the earlier

28. Ordinarily, the DOS's responsibilities lie in the field of foreign relations. Nevertheless, it is one of five major federal agencies involved in the immigration process. 8 U.S.C. § 1104 (1988). Although it has a secondary role in administering the immigration laws, compare 8 U.S.C. § 1103(a) with id. §§ 1104(a) and 1201, the DOS plays a primary role in visa issuance because visa applications are usually handled by consulate officials abroad. A foreign national intending to visit this country must, therefore, file a visa application at a United States consulate or embassy in his or her homeland before traveling to this country.

For a more complete description of the DOS's role in the issuance of immigration visas, see generally T. ALEXANDER ALINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 115-17 (2d ed. 1991).
29. The construction of the provision in question was unnatural because a literal definition of "activities" is far more restrictive than the connotations of terms like "mere presence" or "entry" proffered by the government.
31. See, e.g., Mitchell C. Tilner, Ideological Exclusion of Aliens: The Evolution of a Policy, 2 GEO. IMMIGR. L.J. 1 (1987) (tracing the history of the ideological and national interest exclusion provisions enacted in 1952 to the legislative and social currents set in motion as early as the colonial period); Deborah L. Zimic, Note, National Security Visa Denials: Delimiting the Exercise of Executive Exclusion Authority Under the Immigration and Nationality Act, 28 VA. J. INT'L L. 711 (1986) (examining the proposed reform measures designed to conform the national security exclusion grounds to address current political and social reality concerns); see also infra notes 217-29 and accompanying text.
interpretation. Admittedly, under several traditional and modern methods of statutory interpretation, the agency decision was not entirely justified. On the other hand, the statutory language in question is very broad and sweeping in scope, and the DOS acted in an area of broad executive discretion pursuant to a statute designed to protect national interests. Further, the agency’s interpretation was linguistically possible and not clearly precluded by the statutory provision’s legislative history or the subsequent legislative history of a related provision. Finally, the DOS is generally concerned with matters having foreign policy implications.

A. Abourezk v. Reagan: Facts and Background

Abourezk v. Reagan involved the denial of visas to four foreign nationals. Each foreign national had applied for a visa at an American consulate or embassy abroad. The consular officers originally denied the visas on ideological grounds to which a possible statutory waiver would have applied. But because all of the applications involved possible denials for foreign policy reasons under the national interest (or national security) ground of exclusion for which no waiver was possible, they were forwarded to DOS officials in Washington, D.C. for review in accordance with standing operational instructions.


34. With exceptions not relevant here, no alien may enter the United States without first having applied for and obtained an immigrant or nonimmigrant visa. See 8 U.S.C. §§ 1181(a), 1182(a)(26) (Supp. V 1993).

35. A discretionary waiver of excludability based on the ideological ground (subsection 28) could have been conferred by the Attorney General, but no such waiver was available for exclusion under the national interest ground (subsection 27). 8 U.S.C. § 1182(d)(3) (1982).

Originally, three of the four denials were based on former INA § 212(a)(28);\textsuperscript{37} ultimately, however, all four were based on former INA § 212(a)(27).\textsuperscript{38} Subsection 28, generally referred to as the "ideological" ground, was more specific in scope, and barred admission to aliens who advocated, or were members of organizations that advocated, anarchistic, communist, or totalitarian ideology, or otherwise advocated the overthrow of the United States government.\textsuperscript{39} Subsection 27, generally labelled the "national interests" ground, broadly barred entry to any alien who sought "to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest or endanger the welfare, safety or security of the United States."\textsuperscript{40}

In each case, DOS officials in Washington recommended the denial of the visas on the ground that admission would be prejudicial to U.S. foreign policy interests. Specifically, DOS concluded that the foreign nationals' visits to the United States were not as private citizens of their respective countries but as official representatives of their countries' governments as part of official efforts to disrupt American foreign policy, with the exception of Nino Pasti whom the government considered to be an emissary of an instrumentality for the former Soviet govern-


\textsuperscript{39} See 8 U.S.C. § 1182(a)(28) (1982). Aliens who published, or belonged to organizations that published, materials advocating viewpoints espoused by such groups were also barred. Id.

\textsuperscript{40} 8 U.S.C. § 1182(a)(27) (1982).
ment. Eventually, DOS officials informed the consular officers that the entry and the proposed activities of the aliens would prejudice the conduct of United States foreign affairs, and instructed that the visas be denied pursuant to subsection 27 for which no possible waiver existed. The visa applicants were informed of the denials accordingly, and lawsuits soon followed.

The plaintiffs were a diverse group of individuals and organizations, including several members of Congress, who had originally invited the foreign nationals—individuals with direct or indirect ties to communist governments—to come to the United States as speakers. The plaintiffs brought suit in their own right challenging the visa denials on grounds that the DOS had improperly denied visas through an erroneous application of the statute and that the American plaintiffs' first amendment right to engage in dialogue with these foreign nationals had been violated. Among other arguments, plaintiffs contended that the activities they proposed to engage in posed no danger to the public interest or the safety, security, or welfare of the United States and that the statute itself did not permit exclusion on the grounds that entry alone was prejudicial to those interests.

The district court granted the government's request for summary judgment. The plaintiffs then appealed to the

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43. The INA does not of itself endow plaintiffs with a right of action, but the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1982), which complements statutes controlling agency behavior, does. Specifically, § 702 affords a right of review to "[a] person suffering a legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702 (1972). Although the government had argued in the district court that the plaintiffs lacked the requisite standing to challenge the visa denials, the court concluded that "[u]nquestionably, [plaintiffs were] 'aggrieved' by the State Department's resort to section 1182(a)(27) [for which no waiver of excludability was possible] to keep out people they have invited to engage in open discourse with them within the United States . . . ." Abourezk v. Reagan, 785 F.2d 1043, 1050-51 (D.C. Cir. 1986), aff'd per curiam, 484 U.S. 1 (1987). Accordingly, they were, as the district court observed, at least arguably within the zone regulated by the statute. Id. Not surprisingly, the Court of Appeals affirmed this conclusion. Id.
44. Although the district court had decided the first amendment issue on the basis of Kleindienst v. Mandel, 408 U.S. 753 (1972), the Court of Appeals considered this case as presenting special circumstances and that the court should proceed in a manner that avoided a constitutional confrontation. See Abourezk, 785 F.2d at 1049.
Court of Appeals for the District of Columbia Circuit, which reversed the judgment and remanded the case for further proceedings. From that ruling, the Supreme Court granted certiorari. Due to an evenly divided court, the Supreme Court affirmed the result reached in the Court of Appeals.46

The statutory issues raised in the Court of Appeals addressed the meaning of former section 212(a)(27) of the INA. The Court of Appeals considered whether section 212(a)(27) permitted exclusion only when the alien sought entry into the United States to engage in activities that the government determined would be prejudicial to the national interest as the plaintiffs had argued, or simply because the alien's mere presence here would be prejudicial to the national interest, as the government contended.47 In the district court, Judge Greene had concluded that in the particular context of this case, the distinction between an alien's activities and his or her mere presence in the United States is one without a difference, citing to the 1979 incident involving the seizure of American hostages in the U.S. embassy in Tehran following the entry of the Shah of Iran into the United States.48 Of significant note, the legislative history accompanying the recently enacted, newly-crafted "foreign policy" exclusion provision also cites to this particular incident.

B. The Mandate of Chevron

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.49 controls the judicial review process in cases such as Abourezk involving an agency's interpretation of a statute. The

specific visa denials were within the DOS's statutory and constitutional authority), rev'd 785 F.2d 1043 (D.C. Cir. 1986) (on statutory grounds only and remanded concluding that material issues of fact remained to be resolved in the district court), aff'd per curiam, 484 U.S. 1 (1987).

47. Abourezk, 785 F.2d at 1053.
48. Abourezk, 592 F. Supp. at 884-85. Judge Harold H. Greene, in reaching his conclusion, observed that the best proof of the government's position here was the case of the former Shah of Iran whose mere entry into the United States provoked the 1979 American Hostages incident in Tehran. As Judge Greene further observed: Given these most serious consequences for the United States resulting from the Shah's admission, "[i]t is thus not surprising that the Executive, in construing subsection (27), has not made the distinction plaintiffs ask the Court to draw." Id. at 884.
Court in *Chevron* assembled an analytical framework—albeit a rickety one—for assessing the validity of an administrative agency's construction of the statute that the agency is charged with administering.\(^{50}\) The Court established a two-step approach to analyze the interpretive issue presented to a reviewing court. First, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."\(^{51}\) But if a court determines that Congress has not directly addressed the precise question at issue, it may not substitute its own construction of the statute, as would be the case in the absence of an administrative interpretation.\(^{52}\) "Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."\(^{53}\) In other words, the principle of deference to reasonable administrative interpretations applies where congressional intent is not clearly expressed on the precise question at issue.\(^{54}\) Such is the case here. And "clear evidence of interpretive intent . . . is a rarity."\(^{55}\)

The judges in *Abourezk* ostensibly followed the guidance offered by the criteria set forth in *Chevron*. Although *Chevron* favors deference,\(^ {56}\) it does not eliminate statutory interpretation; it merely disguises it.\(^ {57}\) Terms like "unambiguous mandate" and "permissible interpretation" are elastic enough to permit a judge to build what she will out of the language.

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51. *Chevron*, 467 U.S. at 842-43.
52. *Id.* at 843.
53. *Id.* (emphasis added).
54. Diver, *supra* note 1, at 570.
55. *Id.*
56. See, e.g., Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2594 (1992) (stating that *Chevron* announced a "fundamental principle of our law, one requiring judicial deference to a reasonable statutory interpretation by an administering agency"). *But cf.* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (demonstrating that the deference principle does not necessarily apply in every case involving an agency construction of a broad or ambiguously expressed statutory provision).
57. As one legal commentator has suggested, "Chevron's limitation of the federal courts' interpretive authority is properly understood as a self-imposed restriction, born of prudence, rather than a constitutional or statutory imperative." Maureen B. Callahan, Must Federal Courts Defer to Agency Interpretations of Statutes?: A New Doctrinal Basis for Chevron U.S.A. v. Natural Resources Defense Council, 1991 Wis. L. Rev. 1275, 1275.
Chevron itself, in other words, does not provide—except in the easiest of cases—the judge with workable guidance.

Nevertheless, the first task for the judge is to interpret the statute to determine whether there has been an unambiguous mandate. If not, the judge is to apply to the agency's construction of the statutory provision in question some standards of interpretation to determine whether the agency decision was a permissible, to wit, "reasonable" interpretation. Chevron counsels judges to employ the traditional tools of statutory interpretation in resolving the first prong of the mandate.58 These tools involve the text, the context including legislative history, subsequent events and policy grounds. Each of these elements tends to carry with it a theory that depends on that element alone, and each such theory is inadequate to the extent it ignores the other considerations. This is particularly so in the application of the "plain meaning" rule.

C. The Text of Subsection 27 and the "Plain Meaning" Rule

The statutory language supports the view that exclusion cannot be based on the effect of entry alone, since it refers to "engaging" in "activities" and no reference to mere physical presence appears in the text. Further, as the majority in Abourezk pointed out, other subsections of the statute specifically designate whether the exclusion is based on status or on activities. This reinforces a reading of the language which permits exclusion under subsection 27 only for "activities." Judge Ginsburg then stated, "[t]he language of the statute, as the Dissent acknowledges, supports the plaintiffs' interpretation on this issue."59 Former Judge Bork in dissent admitted, "[h]ad we before us nothing but the language of the statute, without any legislative history, I might be inclined to adopt the construction proposed by the plaintiffs."60

The plain meaning rule thus restricts a court to the literal meaning of the words of the statute.61 Extrinsic evidence can

58. See, e.g., NLRB v. United Food & Comm'1 Workers Union, 484 U.S. 112, 123 (1987) (observing that the first prong of the Chevron test, i.e., determining congressional intent, is purely a legal question to be guided by "traditional tools of statutory construction").
60. Id. at 1066.
61. The plain meaning rule has been around for some time now. As the debate surrounding the various approaches to statutory interpretation heats up in the wake of Chevron, it has been labelled one of the elements in a new interpretive
be considered only if the statutory language is unclear or ambiguous. Application of the plain meaning rule would dictate the adoption of the plaintiffs' construction of the statutory terms. Presumably, if that were the end of the inquiry, the agency's construction would be patently "unreasonable" and thus fail. But none of the opinions rendered in the case—district or appellate—rested their conclusions on the express statutory language. In other words, none of the judges relied upon a literal interpretation or plain meaning of the statutory language.

Once prominent in decisional law, the plain meaning rule has long been out of favor among academics.62 The Supreme Court apparently abandoned it as well years ago, but, astonishingly, resurrected it quite recently,63 particularly in the context of immigration law.64 The usual rationale for the plain meaning approach is that, as Justice Scalia has said, "[j]udges interpret laws rather than reconstruct legislators' intentions."65 Several reasons exist for not "reconstructing" those "intentions": First, the plain meaning—that is, the interpretation given by a reasonable person reading only the statute—is more accessible and the statute is more likely to be read consistently (in other words, without the clutter of the legislative history).66 Second, a plain meaning approach is also said to approach called "textualism." Mashaw, supra note 3, at 829 (citing William N. Eskridge, Jr., The New Textualism, 37 UCLA L. REV. 621 (1990)); see also, Nicholas S. Zeppos, Justice Scalia's Textualism: The "New" New Legal Process, 12 CARDOZO L. REV. 1597, 1597-98 (1991) (noting Prof. Eskridge's characterizing Justice Scalia's approach as the "new textualism").


63. See United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). Justice Scalia has been a leader in the renascence of the plain meaning rule. See, e.g., I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J. concurring) ("[I]f the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity."). Judge Easterbrook also endorses the plain meaning rule. See Easterbrook, supra note 3, at 65.

64. See, e.g., INS v. Phinpathya, 464 U.S. 183 (1984) (adopting a literal interpretation of the term "continuous physical presence" which was even contrary to the government's construction of the statutory provision).


66. See, e.g., Easterbrook, supra note 3, at 66.
"discipline" the legislature, to penalize it when the intent has not been made evident in the statutory language. Finally, a more sophisticated argument suggests that because most legislation results from the desire of individual legislators to be re-elected rather than from a desire to serve the public good, a limiting form of construction—such as plain meaning—is an effective form of damage control.67

The standard critique of the plain meaning rule is that it is simplistic in its approach to language, for it assumes that language can be understood outside of context.68 Another objection is that it strongly inhibits the ability of the legislature to pass a statute which can be adapted to changing or unanticipated circumstances—hence its appeal to non-activist judges.69 Finally, a plain meaning advocate is at a loss when the language is found not plain. There is no accompanying systematic method of looking at legislative history. This is not mere quibbling; in the absence of a principled approach to an interpretive question, the search through extrinsic evidence becomes merely ad hoc.

In Abourezk, the government argued that the language was susceptible to an interpretation which would make "entry" sufficient grounds for exclusion. Judge Bork agreed: "[I]t is not at all clear—from the language alone—whether presence within this country can itself be deemed an 'activity.'"70 Individuals in this country are always engaging in some activity, even if it is just sleeping. If an alien's presence is prejudicial to the national interest or security, her activity is prejudicial because she must be present to engage in it. Although this is a possible interpretation, it is a strained one. A reasonable person would not ordinarily think that an alien who seeks to enter the United States to go skiing at Aspen was seeking to enter the country "to engage in activities which would be prejudicial to the

67. See, e.g., T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 MICH. L. REV. 20, 27-28 (1988). This last reason highlights what may be the real reason for renewed judicial interest in plain meaning. It serves admirably the purpose of conservative judges who wish to restrict the range of liberal legislation. Cf. Note, Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court, 95 HARV. L. REV. 892 (1982). It is no surprise, therefore, that jurists like Scalia and Easterbrook have become zealous advocates of the rule. Abourezk, however, demonstrates the potential of plain meaning to cut the other way—limiting the scope of restrictive laws as well.
68. See, e.g., REYNOLDS, supra note 62, at 192-93.
69. REYNOLDS, supra note 62, at 211.
public interest or endanger the welfare, safety or security of the United States." Nevertheless, no word can be understood out of its context. Read without regard to context, the statutory language seems to deal only with concern for activities and not with presence. If, however, the language is approached with the expectation that it authorizes exclusion where entry would be prejudicial, the words will bear that meaning. Thus, the existence of ambiguity depends upon some concern beyond the words on the page.

Justice Scalia, in Cardoza-Fonseca, made abundantly clear that legislative history was never relevant in the administrative context. If there is ambiguity, the agency's view wins. This case illustrates the problem of determining ambiguity. All words have meaning dependant on context. In the absence of any other context, the reader may assume a context inferred from the language and conclude that the meaning is plain. If that context is shown to be inaccurate, the meaning may no longer be plain. Discovery of ambiguity requires some attention to the surrounding circumstances. Hence, even a plain meaning court should turn to legislative history to put the language in context. But the plain meaning court rejects such guidance. Advocates of the plain meaning rule do not get to the legislative history until they find that the statute on its face is ambiguous.

III. THE CONTEXT OF SUBSECTION 27: LEGISLATIVE HISTORY AND ORIGINAL INTENT—THE DECEPTION OF THE DISSERT

The legislative history of former INA § 212(a)(27) is rich and instructive for those who believe that it is relevant to problems of statutory interpretation. Anyone, in other words, who is interested in the questions of legislative intent or

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71. 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring) ("Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent.").

72. See, e.g., Schanck, supra note 62, at 847 ("Justice Scalia has excoriated legislative histories suggesting that they be held inadmissible.") In fact, Justice Scalia is considered to be the "high priest" of the new textualism, exalting statutory text over other extrinsic sources of statutory meaning. Mashaw, supra note 3, at 835.

73. See, e.g., James M. Landis, A Note on Statutory Interpretation, 43 HAV. L. REV. 886, 887-88 (1930) (noting that the language of the statute, legislative history, and statutory purpose often provides rich and compelling evidence of congressional intent).
purpose will find much ore to mine in this material. The question for those persons is what they do with what they find.\textsuperscript{74}

A. Legislative History

Section 212(a)(27) enacted in 1952, traces its lineage to laws passed in 1950, 1948, and 1941. This trail leads the student through fascinating chapters in United States history when the threat of fascist and communist subversion seemed especially vivid to Congress. Section 212(a)(27) along with section 212(a)(28)—the original ground of exclusion in this case—embody Congress’s attempt to deal with this problem.

Ever since their adoption, controversy has surrounded these exclusion grounds. Although used less frequently than they were immediately after their passage, they remained immune to reform efforts\textsuperscript{75} and a part of the law only until fairly recently.\textsuperscript{76} These grounds reflect a period in American history characterized by anticommmunist hysteria, one which led to the passage of “xenophobic legislation.”\textsuperscript{77}

The antecedents of section 212(a)(27) date to the early part of this century.\textsuperscript{78} The provision relating to anarchists was adopted by Congress in 1903 in the wake of President McKinley’s assassination, and supplemented by the Anarchist Act of 1918, which was applied broadly to cover communists as well as other political “undesirables.”\textsuperscript{79} Sanctions against

\textsuperscript{74} While quoting Judge Leventhal’s observation about the use of legislative materials, Judge Wald of the District of Columbia Circuit Court of Appeals noted that the use of legislative history is similar to “looking over a crowd and picking out your friends.” Patricia M. Wald, \textit{Some Observations on the Use of Legislative History in the 1981 Supreme Court Term}, 68 \textit{Iowa L. Rev.} 195, 214 (1982). This is no less true about the decision-making process in \textit{Abourezk}.

\textsuperscript{75} See ALEINIKOFF & MARTIN, IMMIGRATION PROCESS AND POLICY 183 (1st ed. 1985) (noting that “[e]ven the Select Commission on Immigration and Refugee Policy, which carried out an otherwise comprehensive study of immigration laws from 1978 through 1981, ducked the thorny political controversies that might be involved in recasting the grounds of exclusion”).


\textsuperscript{78} See generally Committee on the Judiciary, United States House of Representatives, \textit{Grounds for Exclusion of Aliens Under The Immigration And Nationality Act}, Serial No. 7 at 5-27 (1988).

aliens who had engaged in activities considered subversive were enhanced by the Smith Act of 1940. 80

In 1941, six months before Pearl Harbor, Congress passed another act which barred issuance of visas to aliens who sought entry to engage in activities deemed an endangerment to the public safety of this country. 81 The 1941 Act was not part of the Immigration Act. However, the concept of excluding aliens who were expected to endanger the public safety found its way into the Act of May 25, 1948. 82 The 1948 enactment was passed at the beginning of the post-war "Red Scare." Finally, in 1950, Congress enacted the Internal Security Act—originally sponsored by the House Un-American Activities Committee—which contained, in almost identical language, the exclusionary bars carried over into sections 212(a)(27) and (28) which Congress adopted in 1952 during the Cold War years as part of the thirty-three grounds for exclusion of the McCarran-Walter Act. 83

A closer look at the individual enactments highlights the sloppy use of the provision's legislative history by both the majority and dissent in Abourezk. Much of the difficulty arises from legislators' use of sweeping language in a casual manner to describe technical language. If an alien intends to engage in activities dangerous to the national safety, her presence in this country is dangerous to the national safety. A law which excludes her because of the likelihood that she will engage in such activities, therefore, may be described as a law that keeps out persons whose presence is dangerous to the national safety, even though it does not exclude all persons who present such a danger.

For example, the law passed in 1941 uses the term "activities" to describe the exclusionary bar to admission—a clear antecedent to the present ground. 84 The Senate Report stated

80. Alien Registration Act of June 28, 1940, 54 Stat. 670 is commonly referred to as the Smith Act.
84. In pertinent part, it reads:

That whenever any American diplomatic or consular officer knows or has reason to believe that any alien seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States, he shall refuse to issue to such alien any immigration visa, passport visa, transit certificate, or other document entitling
in its purpose paragraph, however, that the bill was to keep out "certain aliens, otherwise admissible, whose presence in the United States would be dangerous to the public safety."85 Further, a letter from the Attorney General and one from the Acting Secretary of State to the Chairman of the Senate Committee on Immigration also referred briefly to the fact that the bill would prohibit the "entry" or the "admission" of certain aliens into the United States.86

Judge Bork's dissent in Abourezk quoted these references and noted that the Committee Chairman, on the Senate floor, also referred to the bill as denying visas to those whose "presence" would be "inimical to the public interest."87 Bork concluded from this that Congress understood the term "activities" to encompass entry and presence.88 Judge Ginsburg, who cited no legislative history on this point, merely stated that the majority did not find the legislative history of the 1941 Act to be as clear as the dissent found it.89

To add to the confusion over the meaning of these terms, the letter to the Senate Committee Chairman on Immigration from the Attorney General also described the bill in another way, namely, that a visa shall be denied when an "alien wishes to enter the United States for the purpose of engaging in activities which would endanger the public safety."90 This passage, admittedly, quotes the key language of the bill. However, it redirects our attention to "activities" as the condition precedent for an alien to be denied admission into the United States.

Whether Bork's references to the bill's content should be taken, as Ginsburg stated, "as drafted more meticulously and as reflecting congressional will more accurately than the statutory text itself,"91 is a central issue throughout Bork's analysis. The scope of the bill is so short and so easily grasped by a quick reading that accurate statements about its content would have to repeat word for word the language of the bill. This sug-

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such alien to present himself for admission into the United States.


86. Id. at 1-2.
88. Id. at 1066.
89. Id. at 1054-55 n.11.
90. S. REP. NO. 386, 77th Cong., 1st Sess. 1, 2 (1941).
91. Abourezk, 785 F.2d at 1054 n.11.
gests that the references Bork cited may have been casual comments. Thus, Bork's analysis of the legislative history is, at best, overstated.\textsuperscript{92}

More persuasive that the Senate committee chairman's comments were casual references is the evidence of his errors in describing the bill. Although the bill concerned activities that endanger the "public safety," the chairman said it concerned the endangerment of "public interest." It seems unlikely that those two terms are synonymous because one is a good deal more narrow in scope than the other. If the chairman erred about the very nature of the bill, additional errors are all too possible. Bork's analysis, therefore, loses some ground here.

The 1948 amendment tracked the language of the 1941 Act, and also involved the Attorney General in decisions to admit or exclude aliens. The amendment provided that "aliens who the Attorney General knows or has reason to believe seek to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States" shall be excluded.\textsuperscript{93} The significance of the amendment to the \textit{Abourezk} case is not easily overstated because this provision eventually emerged as 8 U.S.C. \textsection{}1182(a)(27). Obviously, the legislative history of the 1948 Amendment should have been considered in \textit{Abourezk}, yet both judges ignored it in their opinions.

The Senate and House reports, which duplicate one another, provide interesting insight. Each states that Congress amended "the immigration laws to deny admission to the United States of persons who may be coming here for the purpose of engaging in activities which will endanger the public safety . . . ." Each then refers to a letter from the Assistant Attorney General that "so completely described [the bill] . . . that further discussion is unnecessary." The letter also refers to the term "activities."\textsuperscript{96}

\textsuperscript{92.} Also, as discussed more fully below, selective reliance on legislative history materials could masquerade for judicial candor or a lack thereof.


\textsuperscript{94.} \textit{H.R. Rep. No. 1286, 80th Cong., 2d Sess. 1 (1948).}

\textsuperscript{95.} \textit{Id. at 1-2.}

\textsuperscript{96.} In pertinent part the letter reads:

\textit{Under existing law (22 U.S.C. \textsection{}228), whenever an American diplomat or consular officer knows or has reason to believe that an alien seeks to enter the United States for the purpose of engaging in activities that will}
All of these sources support the view that Congress intended the amendment to exclude aliens on the basis of *contemplated activity* in the United States, *but not for prejudicial entry* as Judge Bork would have it. The Attorney General's letter is most instructive on this point for it states that the bill is designed to correct the problem of concealment of purpose which could lead to a lawful admission. The intent to engage in activities can be concealed, but when an alien requests a visa, there is no concealment, nor can there be, of an intent to enter the United States.

The purpose of the Internal Security Act of 1950—according to the Senate report—was to strengthen existing law regarding the exclusion and deportation of subversive aliens.97 The House Un-American Activities Committee, which originally sponsored the bill, however, was primarily concerned with the "enemy within," i.e., communist activities in the United States.98 It was the Senate, however, that undertook a revision of the Immigration Act and redrafted the language that became section 212(a)(27).99 The final draft of the Internal Security Act blended the concerns of both Houses of Congress.

Although the House report concerning the original bill, which was later amended, suggests that the House was focused on the acts of subversives and not the mere entry of certain individuals,100 the apparent focus on activities *per se* must be

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endanger the public safety, he must refuse to issue to such alien an immigration visa or any other document entitling the alien to present himself for admission into the country. However, if the alien succeeds in *concealing such purpose* from the diplomatic or consular officer and obtains a visa or other travel document, he cannot legally be denied admission on the ground of his [sic] purpose after he reaches the United States.

The bill under consideration would correct this . . . .

*Id.* at 2 (emphasis added).

100. The House Report states:

*We contend that, under our constitutional system, ideas must be combatted with ideas and not with legislation. If communism in the United States operated in the open, without foreign direction, and without attempting to set up a dictatorship subservient to a foreign power, legislation directed against it would neither be justified nor necessary.*

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considered in another light. The original House bill was not
directed at aliens but at United States citizens who may have
been attempting to subvert the government. Thus, the House
report does not shed much light on congressional thinking
regarding the admission of aliens, except to suggest that activi-
ties, not mere presence, was on the collective mind of the
House.

The Senate, which sponsored the revision of the Immigra-
tion Act, reworked and added language to the 1948 amendment
to exclude from admission “[a]liens who seek to enter the Unit-
ed States whether solely, principally, or incidentally, to engage
in activities which would be prejudicial to the public interest,
or would endanger the welfare or safety of the United
States.”

Three changes in the 1948 amendment resulted
from this new language: (1) elimination of the reference to the
Attorney General (this was inserted in another subsection); (2)
clarification that any intent to engage in certain acts, no mat-
ter how slight, is sufficient grounds to exclude; and (3) broaden-
ing of the list of forbidden conduct to include those activities
which are prejudicial to the public interest or which endanger
public safety.

Commenting on the changes, the Senate report, which
noted that the subsection was a mix of new and existing law,
reintroduced ambiguity when it stated that “under existing
law, among the excludable aliens are certain aliens who seek to
enter the United States whose entry would be prejudicial to the
public interest or would endanger the safety of the United
States.”

The Report also stated that the class of excludable
aliens was broadened “to include those aliens who seek to enter
the United States to engage in activities which would endanger
the welfare of the United States.”

Both Ginsburg and Bork quote this passage as illustrating
that Congress viewed the law as prohibiting prejudicial en-

There is irrefutable evidence to support the premise that the Communist
organization is now and has been, since its inception, engaged in the
training of espionage specialists who are taught to infiltrate and destroy
our Government from within.

3888, 3891.
102. Id. at 5.
103. Id.
try.\textsuperscript{104} The problem with this passage, however, is that its author misstated the law. Existing law, as shown above, did not exclude when entry would be prejudicial but only when entry endangered public safety. Having made this error, the author goes on to misinform the reader that the new provision merely adds an exclusion for activities prejudicial to the public interest.

Given that the passage is misleading and incorrect on these two points, its credibility as evidence of congressional intent must be reconsidered; if the author is wrong in describing these provisions, why should he be assumed correct on another point of law mentioned in the same passage?\textsuperscript{105} Moreover, the author's reference to "existing law" was a direct reference to the 1948 amendment and, as seen earlier, the legislative record strongly suggests that Congress in 1948 intended exclusion to be based only on activities, and not on prejudicial entry.

Other passages in the record, not mentioned in Abourezk, support this interpretation. In discussing the history of the immigration statutes, the Senate report in several different places paraphrases the 1948 amendment and the 1941 law as excluding aliens who seek admission "for the purpose of engaging in activities."\textsuperscript{106} The terms "presence" or "entry," used in the manner Bork suggests are never mentioned. The period in which these measures were enacted also lend credence to the notion that the prime concern was with an alien's activities while in this country.

The Walter-McCarran Act incorporated the above provisions of the Internal Security Act into what became the now former section 212(a)(27) of the INA. There were only two changes to that subsection: (1) reinsertion of the express reference to the powers of the Attorney General, along with consular officers, to exclude aliens when they have knowledge of certain facts; and (2) addition of activities that endanger "security" to the list of activities for which exclusion is possible. The subsection required exclusion of aliens "the consular officer or

\textsuperscript{104} Abourezk v. Reagan, 785 F.2d 1043, 1054 n.9, 1064-65 (D.C. Cir. 1986).

\textsuperscript{105} Of course, there is always the hypothesis that the author deliberately misstated the content of existing law. Two objections can be made to that point: first, what end would be served by a deliberate misstatement? Second, statutory construction would indeed be an endless quagmire if the good faith of relevant statements were open to question.

the Attorney General knows or has reason to believe seek to engage in activities that would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.\textsuperscript{107} Unfortunately, references to this subsection in the legislative record are almost nonexistent.

The most substantive comment is found in a discussion about the law as it relates to the examination of aliens before an immigration officer. The Senate Report notes, in passing, that such an examination may give rise to exclusion under section 212(a)(27) for "an alien whose entry would endanger the public safety or security."\textsuperscript{108} Bork notes this passage as another example that prejudicial entry was encompassed by subsection 27.\textsuperscript{109} Since the author's focus is on another section of the bill, this is not persuasive evidence of such intent.

The majority's search of the legislative history is anything but exhaustive. While a few passages quoted in the opinion do support a view that the legislative history is ambiguous with regard to the interpretation of subsection 27, many other passages could have been cited by the majority which would tip the balance in favor of the plaintiffs' interpretation that prejudicial entry was not a sufficient ground to exclude aliens.

Judge Bork's research is far more thorough; nonetheless, one must conclude that he was either not very careful in his research or very selective in what he used. If the latter is an accurate characterization then Bork has engaged in the tactics of an advocate and not the role of a judge resolving the issue in accordance with established rules.

Judge Bork's determination is, essentially, premised on a series of brief, casual references—almost asides—that occasionally break through the surface of the legislative record. Substantive comments such as that found in the record of the 1948 amendment are entirely ignored; yet that record is certainly relevant to most theories of the proper interpretation of the statute. Moreover, the references selected by Judge Bork contain misstatements or errors which lessen their reliability as evidence of legislative intent.

\textsuperscript{108} S. REP. NO. 1137, 82 Cong., 2d Sess. 27 (1952).
\textsuperscript{109} Abourezk, 785 F.2d at 1068.
B. Original Intent

The orthodox approach to statutory interpretation treats statutes as static texts. Legislative intent is the criterion that is most often cited when interpreting the meaning of statutes. According to Professor Eskridge, this “intentionalist” approach asks how the legislature originally intended the interpretive question to be answered, or would have intended the question to be answered had it thought about the issue when it passed the statute.

This “originalist” approach assumes that the legislature fixes the meaning of a statute to all possible applications the day it was enacted. The implicit claim is that a legislator interpreting the statute at the time of enactment would render the same interpretation as a judge interpreting the same statute fifty years later. This implication seems counterintuitive. Indeed, the legal realists argued this point earlier in the century. All statutes contain gaps and ambiguities. They exist because the legislature has failed to anticipate them or has used broad and sweeping language, hence, no clear intent is discernable.

The method of statutory interpretation courts most often invoke is to discover legislative or “original” intent. Of course the intention of the legislature—a multi-member body of politicians—is not easily discoverable, especially when a complicated statute is involved. Thus, it is difficult to conclude, as did Judge Bork, that the legislative history clearly supported the government’s interpretive view. The record shows a conscious concern to exclude aliens who might do something within the United States that was harmful, but seemingly no consideration was given to the application of this provision to persons whose entry alone might be harmful. Judge Ginsburg for the majority gave Judge Bork’s version of legislative history entirely too much credit when she cited the Senate Reports as being in favor of allowing exclusion for prejudicial entry, but she was correct when she noted, “[o]ne searches all the legisla-

110. For general explanation of the intentionalist approach, see William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479 (1987).
111. Id. at 1480 n.3.
112. Aleinikoff, supra note 67, at 22.
113. REYNOLDS, supra note 62, at 184-85.
115. Id. at 870.
tive history in vain for an illustration homing in on the question at issue." In short, there is a clear original intent concerning exclusion for activities and none concerning exclusion for presence. Faced with such a gap, the original intent theorist has no basis for determining what the drafters would have done. Since the language points away from application based on entry and the legislature did not consider its application to entrance which causes harm, the original intent theorist should not find the statute applicable.

C. The Legal Process School

To a legal process follower, as already noted above, the legislative history is rich in material. A "modified intentionalist" or legal process approach uses original purpose rather than original intent, as the focus for interpretation. Legal process followers seek the interpretation that best furthers the purpose the original legislature had in mind when it enacted the statute. The legal process theorist thus searches for the context more intensely than the original intent theorist. The purpose is derived by analysis of the problem which the statute was designed to address and the interests which bound its solution. The difficulty with this theory lies in identifying the "purpose" of the statute. According to Professor Cass Sunstein, that purpose is not discovered but created. Recognition of the difficulty in ascertaining the original intent or purpose has animated the debate on statutory interpretation and prompted scholarly challenges to the usual approach which focuses a resolution of interpretive issues on traditional theories of statutory interpretation.

117. See H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1150-57 (tentative ed. 1958). The Hart and Sacks approach, also referred to as the "legal process" approach, follows the traditional search for legislative history through the text, legislative history and purpose. Zeppos, supra note 14, at 353-54.
119. See Eskridge, supra note 110, at 1480.
As for the interpretive issue presented in *Abourezk*, subsection 27 was obviously designed to cope with the specific problem of aliens who were likely to engage in activities in the United States that would be prejudicial to the public interest or dangerous to public welfare and safety. While that purpose might be generalized to the level of protecting the national interests of the United States, such a generalized purpose permits almost anything since it lies behind most immigration statutes. A more specific purpose might be found in protection of the nation from dangerous activities within its borders, a limited purpose that would deny the agency's interpretation in this case. And ascertaining the 1952 legislature's original intent would be futile because it seems more likely than not that the precise statutory interpretation issue raised here was not considered at the time of the INA's enactment.122 Thus, imagination and creativity may be necessary in the judicial process of determining the specific statutory interpretation issue.

**D. Originalism: Of Economists and Sailors**

One of the early scholarly participants in this interpretive discourse, Judge Richard A. Posner,123 has urged greater study of statutory interpretation.124 Judge Posner's approach to statutory construction, which is closely aligned to the legal process school, is best described as one of "imaginative reconstruction."125 According to Judge Posner, the judge should try to think her way, as best she can, into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.126 It is easy to scoff at this

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122. As observed by Judge Frank H. Easterbrook, "[o]riginal intent controls, if only we can find it." *Easterbrook*, supra note 3, at 60 (footnote omitted).


125. Although his suggested approach closely resembles that of legal process adherents, Judge Posner distinguishes his method by challenging the legal process view that statutory purpose can guide the court's interpretive determination. *Posner, Statutory Interpretation*, supra note 124, at 819-20.

126. "The true law, the governing rule, is not down on paper; it is in the
approach. Judges after all, lack the requisite imagination for
the most part and what they will do in practice is assume that
the legislators were people just like themselves; the interpret-
ive process then will consist of judges voting for their own per-
sonal preferences and ascribing them to the statute's drafters.
But Judge Posner insists that if one assumes a judge who will
try, with the aid of a reasonable intelligence, to put herself in
the place of the enacting legislators, then she will do better if
she follows the suggested approach than if she tries to apply
the canons of statutory interpretation.

If Judge Posner's approach had been followed in Abourezk,
the conclusion would have been that at the time of enactment,
the legislators would have wanted the agency's interpretation
to be applied. After all, the Congress that enacted these exclu-
sion provisions in 1952 had every intention to keep out aliens
for decidedly political reasons, an intention that President
Truman considered objectionable enough for him to veto the
bill when it was first submitted to him for signature. The
override of that veto by two-thirds majorities in both houses of
Congress certainly evidenced congressional intent with respect
to these provisions, and the weakly-worded McGovern Amend-
ment, discussed more fully below, does little to mitigate the ef-
fect of the original congressional action.

An imaginative reconstruction of the statute essentially re-
quires a court to say that a frightened and timid legislature
would have wanted to pervert the language of their own stat-
ute to reach any situation that might be thought undesir-
able—a sort of delegation by fear that seems the antithesis of
statutory interpretation. One might equally well imagine the
initial legislator saying that the problem of "prejudicial entry"
must be dealt with through another statute since it was a con-

minds of the legislators." Easterbrook, supra note 3, at 60-61.
127. 98 CONG. REC. 8082, 8084 (1952) (veto message of Pres. Truman, June
25, 1952).
128. As reported by the Committee on Immigration and Nationality Law of the
Association of the Bar of the City of New York in 1985:

As President Truman warned, "[s]eldom has a bill exhibited the dis-
trust evidenced here for citizens and aliens alike." [footnote omitted.] On
their face, then, the ideological exclusion provisions conflict with the tradi-
tional values of the United States. In practice, the law is an unabashedly
cynical betrayal of those proclaimed beliefs.

Committee on Immigration and Nationality Law of the Association of the Bar of
the City of New York, Visa Denials on Ideological Grounds: An Update, 8 SETON
HALL LEGIS. J. 249, 253 (1985) [hereinafter Visa Denials].
cern she had never previously considered. Indeed, a less timid legislature in 1990 did exactly that, to wit, enacted an entirely new provision to address the problem.\textsuperscript{129}

Judge Posner's "imaginative reconstruction" approach is in sharp contrast to the one advanced by Professor Alexander Aleinikoff which also utilizes originalist sources.\textsuperscript{130} While Judge Posner looks to the past much like an archeologist, Professor Aleinikoff offers a prescription for the present-minded. The approach sketched out by Professor Aleinikoff is known as the "nautical" approach to statutory interpretation: "A statute is an ongoing process in which both the shipbuilder and the subsequent navigator play a role. The dimensions and structure of the craft determine where it is capable of going, but the current course is set by the crew on board."\textsuperscript{131} Such an approach thus takes into account current values. This approach urges judges to apply the traditional tools of originalist theorists in a "present-minded way."\textsuperscript{132}

The nature of judicial process would seem to support a more "present-minded" approach to solving interpretive problems. Perhaps unconsciously, judges already engage in updating statutes while professing to follow traditional approaches. As Professor Nicholas Zeppos has observed: "Try as they might, judges cannot completely place themselves outside the context in which [the process of] statutory interpretation occurs."\textsuperscript{133} Even Judge Posner in recent years has become more skeptical about a judge's ability to place herself in a mindset associated with the past.\textsuperscript{134} But it is unlikely that he would adopt an approach to statutory interpretation that expands the process past the outer perimeter of traditional judicial conduct and

\begin{itemize}
  \item \textsuperscript{129} See infra notes 217-29 and accompanying text.
  \item \textsuperscript{130} See Zeppos, supra note 14, at 356 n.18 (noting that Judge Posner's suggested approach has been "challenged as both unworkable and unresponsive to democratic values").
  \item \textsuperscript{131} Aleinikoff, supra note 67, at 20. The nautical approach is in keeping with the more modern, evolutive approaches advanced by others, but examines it from a different perspective. Zeppos, supra note 14, at 358. According to Professor Zeppos, the nautical approach—although it challenges the legitimacy of the originalist approach to statutory interpretation—may, nonetheless, "be consistent with the originalist framework that continues to dominate judicial opinions." Id. at 358 n.26.
  \item \textsuperscript{132} Zeppos, supra note 14, at 411.
  \item \textsuperscript{133} Id. at 411.
  \item \textsuperscript{134} Richard A. Posner, The Jurisprudence of Skepticism, 86 Mich. L. Rev. 827, 849-51 (1988) (conceding that imaginative reconstruction of legislative intent of a past legislature may fail because of the present-minded context in which the interpreter undertakes the interpretive task).
\end{itemize}
engages, in effect, in judicial legislation. Such, arguably, is the potential end result of an evolutionary or more dynamic approach to deciding interpretive questions in the administrative context.

IV. EVOLUTIVE THEORIES OF STATUTORY INTERPRETATION: SUBSEQUENT DEVELOPMENTS—THE IRRELEVANCE OF THE MAJORITY

If the legislative history is so insufficient as to preclude a determination of ambiguity, another avenue of pursuit of the meaning of a statute would be to interpret it dynamically, as several legal commentators have suggested. For some scholars, doubts about the proper construction of a statute are resolved not just by looking at language, history, and context; later developments should also play a role. Thus, in contrast to an archeological approach, dynamic theorists ask how a particular statute can be read to meet the needs of present-day society.

This approach is appealing because it is realistic in the present-minded sense. "Gaps and ambiguities exist in all statutes, typically concerning matters as to which there was little legislative deliberation." Such is the situation in Abourezk. For dynamic theorists, "the quest is not properly for the sense originally intended by the statute, [or] for the sense sought originally to be put into it, but rather for the sense which can be quarried out of it in the light of the new situation." Thus, the interpretive approach under these circumstances should be one in which an interpreter asks not "what the legislation means abstractly, or even on the basis of legislative history, but also what it ought to mean in terms of the needs and goals of our present-day society."


136. But note that such theories also raise the problem of legislative supremacy. See, e.g., Maltz, supra note 118, at 12 (noting that the approaches of those advocating a dynamic interpretation are inconsistent with the theory of legislative supremacy).

137. Eskridge, supra 110, at 1480.

138. See id. at 1480 n.5 (quoting Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed, 3 Vand. L. Rev. 395, 400 (1950) (emphasis deleted)).

139. Id. at n.6 (quoting Phelps, Factors Influencing Judges in Interpreting Stat-
When such a determination is made in light of the "societal, political, and legal context," the agency's interpretation appears to be inconsistent with the present-day political climate which has witnessed the ushering in of a new world (political) order. In Abourezk, however, the agency determination seemed consistent with certain subsequent events on the one hand; but contrary to the societal and political context of subsequent amendments to the statute on the other hand. Specifically, the ever-expanding grounds of exclusion were narrowed, somewhat, in 1977 in response to an international agreement designed to foster greater freedom between signatory states and to promote greater flow of information across borders.

A. Helsinki Accords and McGovern Amendment

Seeking to secure human rights throughout the world, the United States signed the Helsinki Accords in 1975. While the United States saw the Accords as a method to pressure the then Soviet Union's policy with respect to emigration, the Accords also reflected on the United States' own immigration policy. The signatories pledged themselves to facilitate and foster greater international freedom of movement and exchange of ideas.

The principle underlying both the first amendment and the Helsinki Accords is the concept of an open "marketplace of ideas." Under the first amendment, United States citizens are guaranteed the right to receive and exchange ideas with whomever they wish. The Basket III provisions of the Accords extend this principle to the international arena by facilitating the free exchange of ideas and persons across national borders. The Accords, as an international declaration, seek to accomplish universal freedom of expression, a goal which is of particular significance to the international community of writers.


utes, 3 VAND. L. REV. 456, 469 (1950)).
140. See infra notes 217-20 and accompanying text on the discussion about the Shah of Iran and the Tehran Hostage incident and the newly-crafted "foreign policy" exclusion ground passed in the 1990 amendment to the INA; see also H.R. CONF. REP. NO. 955, 101st Cong., 2d Sess. 130 (1990) (citing the Shah of Iran's mere presence in the United States as the trigger for the Iran hostage crisis).
141. See infra notes 142-150 and accompanying text on the Helsinki Accords and the McGovern Amendment.
The ideological exclusion provisions of the Immigration and Nationality Act, former subsections 27, 28, and 29, inhibited the free flow of ideas and persons across national boundaries. One of the issues in *Abourezk* was whether subsection 27 should have been interpreted narrowly to avoid exclusions in light of the Helsinki Accords. The denial of entry in the *Abourezk* case directly conflicted with the tenor of the Helsinki Accords.143

The Helsinki Accords were not the only indication of a liberalizing environment for international movement. In 1977, former subsection 28—the most controversial of the three ideological and national interests exclusion provisions144—underwent legislative modification of questionable significance, when Congress enacted the McGovern Amendment.145 This amendment sought to assure United States compliance with the Helsinki Final Act with regard to free movement across international borders, and to encourage other signatories to comply with the terms of the Final Act.146 Subsection 28 was the only one of the three formerly ideological and national interests grounds for exclusion for which a waiver of admissibility was available. Under the amendment, within thirty days of a visa denial because of affiliation with a proscribed organization, the Secretary of State “should” recommend to the Attorney General that a waiver be granted if the alien was “otherwise admissible to the United States.”147 This latter point is emphasized in a second sentence in the statutory provision: “Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is inadmissible for reasons other than membership in or affiliation with a proscribed organization.”148 Neither sub-

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143. Id. at 305.
144. The third ground of exclusion was INA § 212(a)(29).
146. Miranda, supra note 77, at 310. But see id. at 310 n.55 (reserving the right to restrict travel on a reciprocal basis).
147. “Should” carries the connotation that the action ought to be executed as distinguished from the mandatory “shall.” In other words, “should” falls in between “may” which connotes a discretionary determination and “shall.”
section 27 nor subsection 29 were affected by the McGovern Amendment.

Since the Accords were an executive agreement rather than a formal treaty, they did not displace these statutory provisions. Specifically, the McGovern Amendment did not apply to subsection 27, the subject of the interpretive issue in Abourezk. The McGovern Amendment applied only to visa applicants who were "otherwise admissible to the United States." On any theory of original intent, the Helsinki Accords and the McGovern Amendment were not relevant as a practical matter.

Nevertheless, these subsequent developments in the law changed the environment in which subsection 27, originally enacted in the Cold War days of 1952, was applied. The subsequent concern for opening borders to views of persons with other affiliations and ideologies made anachronistic an interpretation of subsection 27 that derived from cold war fears and excluded persons for their associations rather than their specific activities. However, the government argued in Abourezk that the reason for exclusion was based on the visa applicants' specific governmental associations, not on blanket organizational communist ideology. If that is a correct reading of the government's position, then its adoption would not have necessarily been counter to the concern that ideas be free-flowing across international borders. But the unique characteristic of these denials, limited to governmental associations and not strictly based on ideology, made it difficult to find other instances in the record to support a consistent approach.

150. 785 F.2d at 1069 (Bork, J., dissenting). As discussed more fully below, the visa applicants in Abourezk were specifically denied entry because of their governmental connections and not their membership in a proscribed organization.

151. Moreover, as Professor Aleinikoff notes, the required deference to the agency's statutory interpretation is a shortcoming of the dynamic interpretive approach. Aleinikoff, supra note 67, at 45-46.

152. In the consolidated actions, the first applicant was Tomas Borge, the Interior Minister of Nicaragua. In his situation, the Nicaraguan government had applied to the U.S. embassy in Managua for his nonimmigrant visa. As for the circumstances surrounding the denial of a nonimmigrant visa to Nino Pasti, the U.S. government had argued that he was a member of an instrumentality of the Soviet government. In the case of Olga Finlay and Leonor Rodriguez Lezcano, their visa applications had been conveyed by diplomatic note from the Cuban government. Abourezk, 785 F.2d at 1048-49.
B. Congressional Acquiescence and Past Administrative Practice

On appeal in *Abourezk* Judge Ginsburg found the agency’s interpretation wanting because the government had failed to establish a pattern of administrative practice to support a finding that Congress had acquiesced in the administrative interpretation. Ginsburg concluded, therefore, that the district court had erred in failing to develop an adequate record prior to reaching its determination. The remand was ordered to permit further discovery on this issue. As earlier noted, such an exercise would prove futile.

Judge Ginsburg concluded that Congress was apprised at least once that the DOS actually had applied its asserted interpretation of subsection 27. According to Ginsburg, evidence of congressional acquiescence (or lack thereof) in an administrative construction of the statutory language during the thirty-four years since the Act had been passed could be important, concluding that information about such acquiescence, or absence of it, would rank as a significant indicator of the legislature’s will. That view is highly questionable at best. Nonetheless, the majority determined that the evidence of record was meager and did not demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence.

153. *Abourezk*, 785 F.2d at 1064.
154. *Id.* at 1055.
155. See *Zemel v. Rusk*, 381 U.S. 1, 8-12 (1965) (showing the Court’s willingness to recognize congressional acquiescence to executive discretion, giving credence to the Court’s interpretation of subsection 27). The majority in *Abourezk* found that the two cases cited by the parties interpreting subsection 27 provided no support for the DOS’s interpretation as evidence of congressional acquiescence in a longstanding judicial construction. *Abourezk*, 785 F.2d at 1055 n.12 (citing *El-Werfalli v. Smith*, 547 F. Supp. 152 (S.D.N.Y. 1982) and *Allende v. Schultz*, 605 F. Supp. 1220 (D. Mass. 1985)). In *El-Werfalli*, the court held that a Libyan student seeking to enter the United States in order to study airplane maintenance was properly excluded under subsection 27. The majority in *Abourezk* concluded that although “such study does not rise to the level of subversive activity, it clearly constitutes an ‘activity’ exceeding mere presence.” *Id.* In *Allende*, the majority found that the court there did not reach this precise issue because it held the government’s reasons for exclusion inadequate on other grounds. *Id.*
156. See generally *REYNOLDS*, supra note 62, at 250-54.
157. See *Kent v. Dulles*, 357 U.S. 116, 128 (1958) (refusing to impute to congress approval of the DOS’s decisions where the decisions were “scattered rulings . . . not consistently of one pattern”).
In remanding, Judge Ginsburg failed to follow faithfully the guidelines of *Chevron*; rather, she apparently engaged in a form of judicial subterfuge with the hope that on remand “justice” would be done. But to the extent that the issue could be considered close, *Chevron* commands that the court defer to a reasonable administrative interpretation. In criticizing the remand—finding it unnecessary—Judge Bork concluded that the majority’s decision deprived the Executive “of much of the flexibility and nuance that are essential in the conduct of foreign relations,” and began “a process of judicial incursion into the United States’ conduct of its foreign affairs.”

In remanding the case to the district court for a fuller “airing of the activity/mere entry” question, the majority concluded that the legislative history was inconclusive. Thus further evidence of legislative acquiescence was needed before it could assess the validity of the agency’s interpretation. In reaching this conclusion the majority assumed that more evidence was indeed available. Visa denials, which may have a substantial impact on aliens seeking admission to the United States, receive only limited internal administrative oversight and almost no judicial consideration. What the evidence did show was that there were very few visa denials in this area. It was not likely, therefore, that anything of real consequence would be accomplished on remand. Thus, the remand appeared to be futile on its face. Even the majority alluded to this when it stated that “the examples cited by the State Department, in conjunction with the inconclusive legislative history, however, do cast some doubt on the plaintiffs’ interpretation.” Moreover, the Court of Appeals gave no guidance to the district court concerning what to do if no further evidence was pertinent.

Judge Ginsburg proclaimed that the purpose of the remand was to assure congressional acquiescence in the agency’s inter-

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158. *Abourezk*, 785 F.2d at 1064.
159. *Id.* at 1074.
160. *Id.* at 1076.
162. *Abourezk*, 785 F.2d at 1067 n.2. Further, “government records relating to visa requests are required by law to be kept confidential.” *Id.* at 1067-68 (citing 8 U.S.C. 1202(f) (1982)).
163. *Abourezk*, 785 F.2d at 1056; see also *id.* at 1067-68 (Bork, J., dissenting).
pretation. But both she and the *Chevron* Court have failed to realize that even if the practice is proved, it is no guarantee of congressional intent. The intent of the legislature is that which was intended by the Congress that enacted the legislation in question, not the subsequent bodies that may have acquiesced in a certain interpretation put forth by the agency.

One reason to look at consistent interpretations of agencies or courts is the likelihood that they build up expectations. This is one of the concerns underlying stare decisis, and may be strong enough to override an otherwise better interpretation. But in this case there was no reliance on past decisions. Even if the agency had engaged in previous exclusions, the alien denied a visa and the citizens who invited her have in no way relied upon the agency's position. The only form of reliance that might have been posited was that the agency relied on the statute in not seeking a new basis from the legislature to authorize its behavior. If the agency interpretation had been reversed, it would have merely required the agency to make a request for legislative action at a time later than it should have made. A better rationale for discovery of past practice would have been that the court must assure itself that the agency's interpretation is of some weight because it has been interpreted that way consistently over a series of administrations. However, that relates to the due deference criteria and not a determination of congressional intent.

Although consideration of the agency's interpretation is part of the *Chevron* formula, the issue of due deference may be at the crux of the problem in adjudication of statutory construction issues. As Judge Posner recently wrote, "the canon that the interpretation of a statute by the administrative agency that enforces it is entitled to great weight by the courts" rests on "an unrealistic view of the political process." According to Judge Posner, "[t]here is no reason to expect administrative agency members, appointed and confirmed long after the enactment of the legislation they are enforcing, to display a special fidelity to the original intent of the legislation rather than to the current policies of the Administration and the Congress." Judge Posner recommends that a current agency interpretation not be given any particular weight unless the

165. Id. at 810-11.
166. Id.
interpretation has persisted through several changes of Administration. Thus, one can conclude that Judge Posner views an agency’s interpretation as suspect unless it has withstood the test of time, which appears to be the case here.

I surmise that Judge Ginsburg viewed the agency’s interpretation in Abourezk as suspect as well—as indeed it was. This is particularly true here because in at least one of the cases, the consular officer abroad had originally denied the visa under subsection 28, a waivable basis for exclusion under the McGovern Amendment. When the advisory opinion was issued by the DOS, the consular official was informed that subsection 27 should be the basis for denial because foreign policy considerations were implicated. Under subsection 27, no such waivable basis for exclusion is available. And so the plot thickens.

After former President Reagan took office in 1981, the Administration began using subsections 27, 28, and 29 of section 212(a) of the INA on a much wider scale. Administration officials routinely cited “foreign policy reasons,” and occasionally stated that they did not want to provide “a propaganda platform” in the United States for the excluded individuals. Then Secretary of State, George Schultz, remarked on the Borg visa denial: “As a general proposition I think we have to favor freedom of speech, but it can get abused by people who do not wish us well, and I think we have to take some reasonable precautions about that.” This statement definitely indicates an intent to impede the free flow of ideas across international borders.

Although certain policies of a particular Administration may be suspect, the Reagan administration was not the only

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167. Id. at 811. But in Abourezk, the government had submitted evidence demonstrating that its interpretation had been applied consistently, albeit infrequently, by subsequent administrations. Abourezk v. Reagan, 592 F. Supp. 880, 885 n.14 (D.D.C. 1984) (citing examples of several different administrations excluding aliens for foreign policy reasons).


170. ALEINIKOFF & MARTIN, supra note 75, at 204.

administration that has denied entry to foreign nationals for dubious political reasons. Also, notwithstanding particular administration policies, agencies may, nonetheless, know more than the courts about the legislation they implement. This is an appropriate rationale for giving an agency's interpretation reasonable deference, as now mandated by *Chevron*. "[T]o the extent [agencies] support their interpretation with reasons at least plausibly based on superior knowledge the courts should give that interpretation weight." Although the particular evidence available in this case is sparse on prior practice, what was offered by the government's affidavits would seem to support a consistent interpretation.

Admittedly, the statutory issues in *Abourezk* are complex. Essentially, the term "activities" is clear enough as to its literal meaning; and the legislative history, as stated earlier, is inconclusive at best or indeed may even suggest an "activities" based exclusion mind-set. Only because the agency has interpreted the term to include "entry or mere presence" does the pertinent issue of statutory construction even arise in this case. The language in subsection 27 is broad and sweeping in scope. Further this was not the first time that the agency had given such a construction to the term. Moreover, there are no guarantees that a judge is a more competent "surveyor[] of [the] legal topography" than the agency to which Congress has charged the implementation of its statutes.

The example which the Government gave most readily to justify this interpretation at the time involved the Shah of Iran and the resulting take-over of the American embassy and the hostage crisis in 1979. Of course this event took place


174. Id.


176. The term "activities" is defined primarily as "1. the state or quality of being active; the state of acting; action; doing." *The Random House Dictionary of the English Language* 15 (unabridged ed. 1981).


178. Zeppos, supra note 14, at 381.

many years after enactment of the legislation in question and subsection 27 did not serve as a basis for exclusion of the Shah because he was eventually admitted. For the adherents of the school of dynamic statutory interpretation, this information has its appeal. As noted below, this very example figured prominently in the most recent amendments to the INA designed to re-craft a “foreign policy” exclusion ground. Nonetheless, the critical issue here is whether the agency's interpretation of the statutory provision can take precedence over the plain or literal meaning of the statutory language and the apparent leaning of the legislative history towards the plaintiffs' position. The answer to the foregoing question should have been, perhaps surprisingly, in the affirmative.

In refusing to resolve the “activity/mere entry” question on the record before it (favorable to the government) and remanding the case to the district court for further proceedings (consistent with its decision), the divided Court of Appeals failed to comply with the Chevron mandate, to wit, to defer to a reasonable agency construction of the statutory provision in question. This should have been the court's focus on appeal but it was not. Under the circumstances and in most situations, the search for congressional intent can be exhaustive, frustrating, illusive and entirely capable of result-oriented judicial outcomes. So, if other agendas were at work here, because the majority is not entirely candid about its decision, what did the remand accomplish for the parties and the courts? The overwhelming evidence connected to the remand of this case suggests that little was in fact accomplished other than the needless consumption of limited judicial resources in an effort to avoid the inevitable exclusions.

As noted above, a divided Court of Appeals vacated the district court's judgment in Abourezk and remanded it for further proceedings consistent with its opinion. The case proceeded before the district court under the terms of the Court of Appeals' remand. The district court stated that the consolidated cases were remanded to it to decide two issues. The first issue related to the “activity/mere entry” dichotomy and the

180. See infra notes 217-29 and accompanying text concerning the legislative history accompanying the 1990 amendments of INA § 212(a).
second related to the relationship between subsection 27 and subsection 28, particularly the relationship of the McGovern Amendment to the latter provision. All parties had agreed at the outset that the "public interest[,] . . . welfare, safety, or security" language is sufficiently broad to include foreign policy concerns.\textsuperscript{183} So another obstacle to agency deference was constructed.

Subsequent to the remand, the district court afforded the government an opportunity to present additional evidence of congressional acquiescence as mandated by the Court of Appeals. The district court concluded that the government had failed in its task. Although the government had presented some new evidence of an administrative practice, acquiesced in by Congress, to support its interpretation of subsection 27, the district court found that the additional evidence was "only imperceptibly more weighty than it was when the cases were before the Court in 1984."\textsuperscript{184} Furthermore, the district court read the appellate court's majority opinion as a mandate to enter judgment for plaintiffs unless the government could satisfy this inquiry. As such, the district court found against the government on the first issue.

As to the second issue concerning the relationship between subsection 27 and subsection 28 of the INA and the McGovern Amendment which modified the latter but not the former, the focus of the district court's inquiry was on whether the visa denials in these consolidated cases were based on a threat to the public interest, etc., "independent of the fact of membership in or affiliation with the . . . [proscribed] organization" set forth in subsection 28. Because the appellate court had concluded that the government could not satisfy this inquiry by the mere assertion that the reason for exclusion was in addition to and not independent of the fact of membership in such an organization, the district court likewise found against the government on the second issue.\textsuperscript{185}

Although the McGovern Amendment did not alter the provisions of subsection 27 in any manner, this additional requirement created by the judiciary virtually guaranteed an adverse decision for the government on remand. Notwithstanding the fact that exclusion grounds are separate and independent

\textsuperscript{183} Id. at *4 n.7.
\textsuperscript{184} Id. at *14-*15.
\textsuperscript{185} Id. at *16.
grounds of exclusion and that an alien may be subject to exclusion on more than one ground, the judiciary's determination on this issue required their connection. On the parties' cross-motions for summary judgment, the district court then granted the plaintiffs' motion and denied the government's motion. The court specifically noted that the plaintiffs (nearly five years after the original filing) were still anxious to have the four aliens—who were equally anxious (apparently)—come to the United States to fulfill their speaking engagements. Therefore, the court ordered that appropriate entry visas be issued to the four aliens. The court, however, lacked the requisite statutory authority to order such action. Not surprisingly, the case went up on appeal once again.

On the second round of review (now a year later), a different appellate panel found that only one of the consolidated cases that comprised the original Abourezk v. Reagan case (now called City of New York v. Baker) presented a live controversy. In that remaining case, the appellate court held that the district court, in ordering the issuance of the visa, had exceeded its authority. As a result, the case was remanded to the district court once again for further proceedings not inconsistent with the appellate court's opinion.

Although the second time around the appellate court did not, in effect, overrule the earlier panel's decision in this case, subsequent and intervening events rendered much of the earlier case moot. The significance of the much-heralded majority's decision in the original Abourezk case was severely undermined. These subsequent events also underscored the clear political nature of the agency decisions rendered in these cases. As discussed more fully below, Congress intervened as well.

The events following the district court's decision on remand included, among other political acts, the passage of the "Moynihan-Frank Amendment," which Congress enacted subsequent to the challenged visa denials. The Amendment established a general prohibition against the exclusion of aliens because of beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be

186. Id. at *22 n.29.
protected under the U.S. Constitution.\textsuperscript{189} While the government took an appeal on the merits in \textit{Abourezk v. Reagan},\textsuperscript{190} the first of the three consolidated cases, it appealed only the scope of the district court's order in the remaining two cases\textsuperscript{191} because it had concluded that the Amendment prohibited exclusion of these aliens on the bases initially asserted under subsection 28. Another subsequent event formally disposed of the \textit{Abourezk} case.

\section*{C. Presidential Proclamations}

On October 22, 1988, President Reagan issued a presidential proclamation which specifically prohibited "officers and employees of the Government of Nicaragua" from entering the United States as temporary visitors.\textsuperscript{192} Accordingly, the parties agreed that this proclamation constituted "an independent intervening cause for future exclusions of Tomas Borge, the Interior Minister of Nicaragua," who was the subject of the visa denial in the original \textit{Abourezk v. Reagan}.\textsuperscript{193} Thereafter, the appellate court dismissed the appeal in \textit{Abourezk v. Reagan} and instructed the district court to vacate its judgment and dismiss that case on mootness grounds.\textsuperscript{194}

Three years earlier, President Reagan had issued a presidential proclamation which, presumably, should have disposed of the second case involving the Cuban foreign nationals.\textsuperscript{195} Section 1 of the Proclamation states:

\begin{quote}
Entry of the following classes of Cuban nationals as nonimmigrants is hereby suspended: (a) officers or employees of the Government of Cuba or the Communist Party of Cuba holding diplomatic or official passports; and (b) individuals who, notwithstanding the type of passport that they hold, are
\end{quote}

\begin{thebibliography}{99}

\bibitem{189} Id.
\bibitem{190} Civil Action No. 83-3739.
\bibitem{193} City of New York v. Baker, 878 F.2d 507, 509 (D.C. Cir. 1989) (citing \textit{County of Los Angeles v. Davis}, 440 U.S. 625, 631 (1979) for the proposition that a "case becomes moot if neither party has [a] legally cognizable interest in [the] final determination of factual and legal questions").
\bibitem{194} Id. (citing \textit{United States v. Munsingwear, Inc.}, 340 U.S. 36, 39 (1950)).
\bibitem{195} Proclamation No. 5377, 50 Fed. Reg. 41,329 (1985), entitled "Suspension of Entry as Non-Immigrants by Officers or Employees of the Government of Cuba or the Communist Party of Cuba," was signed by President Reagan on October 4, 1985.
\end{thebibliography}
considered by the Secretary of State or his designee to be officers or employees of the Government of Cuba or the Communist Party of Cuba.\textsuperscript{196}

In the Court of Appeals' earlier opinion in this case, the majority noted that "[i]f this Proclamation covers Finlay and Lezcano, the President's directive might constitute an independent intervening cause for future exclusions, and thus render the City of New York case moot" in constitutional terms.\textsuperscript{197} But like the issue of administrative practice and congressional acquiescence, the appellate court the first time around found the record on the mootness issue inadequate as well. Similarly, the impact of this issue was left to be resolved on remand to the district court.\textsuperscript{198} On remand, however, the district court did not consider the mootness issue.\textsuperscript{199}

Over appellees' technical objections, the Court of Appeals, in agreement with the government this time around, determined that the controversy over Lezcano's visa denial under subsection 27 was no longer viable and therefore dismissed the case as moot.\textsuperscript{200} The court, on the other hand, rejected the government's contention that the "Moynihan-Frank Amendment" had, at least, rendered the Cronin case "prudentially moot." The basis for this rejection was the conclusion that this Amendment did not address the "activity/entry" distinction originally raised in Abourezk v. Reagan.\textsuperscript{201} And because the government had not renounced its earlier position on this issue, it remained possible for the Secretary of State to deny a future visa application filed by Nino Pasti, the former member of the Italian Senate who had been denied originally on the basis of his membership in the World Peace Council which, according to the DOS, was an instrumentality of the former Soviet government. Thus, the court declined to dismiss the case but did hold eventually that the district court had exceeded its authority when it ordered the issuance of a visa to Pasti. On appeal, the court vacated that portion of the district court's order and re-

\textsuperscript{196} Id.
\textsuperscript{197} Abourezk v. Reagan, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986).
\textsuperscript{198} Id.
\textsuperscript{200} Id. The court had already acknowledged that since Finlay had died in the interim, only Lezcano's right to a visa remained at issue in this case. Id. at 509.
\textsuperscript{201} Id. at 511.
manded (again) for further proceedings not inconsistent with the court's opinion.202

Given the new world (political) order, it is doubtful that there are presently, or will be in the foreseeable future, much call for speakers at nuclear rally protests. Further, with the fall of communism in Eastern Europe and the dismantling of the Soviet Union, concern regarding membership in former Soviet instrumentalities has no doubt declined appreciably. Thus, in the future Nino Pasti should have no difficulty visiting this country. Again, this observation underscores the largely political nature of the government's actions in this case, leaving for the two political branches of government, Congress and the Executive Branch, to strike an appropriate balance ("deal") policy-wise.

D. The Relevance of Subsequent Amendments to the Critique on the Judicial Process

Subsequent to the original appellate decision in Abourezk, Congress took a number of steps to liberalize visa denial policies based on political beliefs. First, Congress passed temporary provisions to ease the restrictions on free speech activities.203 These first steps at reform, however, only partially ameliorated the harsh exclusion provisions of an "anachronistic immigration statute."204 They were piecemeal legislative tinkering that never fully addressed the issues raised by litigation. Finally, it took a thorough overhaul of the INA to bring about the much needed changes in these provisions nearly nine years after the final report of the Select Commission on Immigration and Refugee Policy which had recommended substantial immigration reform proposals. Interestingly, the Select Commission, which otherwise advanced reform proposals for a comprehensive overhaul of the INA, "ducked the thorny political controversies that might be involved in recasting the grounds of exclusion."205 This observation further underscores the political nature of the debate and why courts should not try to tackle these "thorny

202. Id. at 512.
205. ALEINKOFF & MARTIN, supra note 75, at 183.
political controversies." Of course, that does not mean they should remain silent. For example, in *Lennon v. INS*,\(^{206}\) the court commented that the exclusion provisions listed in the INA constitute "a magic mirror, reflecting the fears and concerns of past Congresses."\(^{207}\) More recently, Judge Sterling Johnson in the Second Circuit lamented that his hands, in effect, were tied due to congressional inaction and excoriated the Executive Branch for the harshness of its (unconscionable) policy on Haitian refugees.\(^{208}\)

After addressing illegal immigration in 1986, Congress used the occasion of a comprehensive revision to the INA, namely the Immigration Act of 1990,\(^{209}\) to totally revamp the security-related exclusion grounds. If statutory interpretation has as its goal an attempt to reflect the current societal and political context, the changes made during that legislative session reveal an agency acting out of step with the times. But first, in 1987, Congress passed the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, which suspended until March 1, 1989, sections of the INA that had prohibited admission into the United States because of beliefs or associations, or the anticipated content of statements made by a noncitizen while in the United States.\(^{210}\) Unlike the McGovern Amendment which extended only to foreign nationals entering on temporary visits, this Authorization Act extended to those seeking to immigrate on a permanent basis.

In the Act of October 1, 1988,\(^{211}\) which extended section 901 of the Foreign Relations Authorization Act for two years, Congress restricted its application to nonimmigrants only. The

\(^{206}\) 527 F.2d 187 (2d Cir. 1975).
\(^{207}\) Id. at 189.

\((a)\) IN GENERAL.—Notwithstanding any other provision of law, no alien may be denied a visa or excluded from admission into the United States, subject to restrictions or conditions on entry into the United States, or subject to deportation because of any past, current, or expected beliefs, statements, or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States.

temporary change did not apply to denials of visas or admission based on foreign policy considerations or national security as long as those exclusions were not based on beliefs or activities protected by the Constitution.212 This aspect of the legislative initiative is similar to the Abourezk majority's insistence that there be no overlap between exclusion grounds. But unlike the legislative measure, the judicial requirement lacked legislative authority. Still it fits a dynamic approach to statutory interpretation.

In early 1990, Congress made this restricted section 901 permanent.213 The new legislation, in effect, permanently prohibited the government from barring foreign nationals from entering the country on a temporary basis because of their political beliefs. In signing the bill, then President Bush stated that he was not bound by several provisions in the measure that limited his authority to conduct foreign relations.214 In fact, a news item at the time reported that a senior official had told the Washington Post that "the administration [was] considering suing Congress to test the constitutionality of some provisions."215

Later that year, Congress passed the Immigration Act of 1990 which both broadened and narrowed the political and national security exclusion grounds.216 House conferees, in deciding on the appropriate amendments to these particular grounds, established a single provision authorizing the executive branch to exclude foreign nationals for foreign policy reasons in certain limited circumstances. Elements of the former subsections 27 and 29 were incorporated into new subsections 3(A) and 3(B) of section 212(a). In so doing, the conferees stated as follows:

Under current law there is some ambiguity as to the authority of the Executive Branch to exclude aliens on foreign policy grounds (this ambiguity is a result of the overlapping nature of the basic grounds for exclusion as set out in Section 212(a) of the Immigration and Nationality Act (INA), Section 901 of the Foreign Relations Authorization Act, Fiscal Years 1988

212. Miranda, supra note 77, at 302.
215. Id.
and 1989, as amended, and the "McGovern Amendment"). The foreign policy provision in this title would establish a single clear standard for foreign policy exclusions (which is designated as 212(a)(3)(C) of the INA). The conferees believe that granting an alien admission to the United States is not a sign of approval or agreement and the conferees therefore expect that, with the enactment of this provision, aliens will be excluded not merely because of the potential signal that might be sent because of their admission, but when there would be a clear negative foreign policy impact associated with their admission.217

Thus, the legislative history of this newly crafted provision indicates that the executive branch is authorized to exclude aliens for foreign policy reasons in certain circumstances. These "certain circumstances" are described as those based on the reasonable belief held by the Secretary of State that an alien's entry or proposed activities within the United States would have potentially adverse foreign policy consequences.218 This aspect of the new measure's legislative history emphasizes the lack of distinction between the dichotomy that was previously litigated. There are, however, two pertinently detailed exceptions covering officials (or electoral candidates for government office) of foreign governments and all other aliens when their exclusion implicates past, current or expected beliefs, statements or associations which would be lawful in the United States.219

218. Id. at 129.
219. Id. As to the first exception involving foreign government officials or those candidates seeking election to a foreign government office, the legislative history specifically contemplates that such foreign nationals would not be excludable under the foreign policy provision "solely because of any past, current or expected beliefs, statements or associations which would be lawful in the United States." Id. To further underscore the importance of this exception, the Conference Report states:

The word "solely" is used in this provision to indicate that, in cases involving government officials, the committee intends that exclusions not be based merely on, for example, the possible content of an alien's speech in this country, but that there be some clear foreign policy impact beyond the mere fact of the speech or its content, that would permit exclusion.

Id.

As to the second exception concerning all other aliens, the government is required to demonstrate a compelling United States foreign policy interest, attested to by the personal opinion of the Secretary of State and certified to the relevant Congressional oversight committees, if first amendment activities are implicated.

Recall that this was essentially the district court's view in the first round of litigation involving Abourezk v. Reagan. But that court had concluded, after an in
Admittedly, the subsequent amendments are relevant to this critique because they support the fact that congressional update of the anachronistic exclusion provisions—the subject of much litigation—was hotly debated and well overdue. However, the legislative history, as found in the Conference Report discussed above, underscores the strictly political nature of this inquiry. More important, the political contours of the inquiry and the need for compromise between the political branches highlights the rationale for allowing such updating, putting aside the issue of legitimacy of evolutive theories of interpretation and legislative supremacy, to occur in the political forum with the advice, counsel and input of the administration agencies and the executive branch along with interested individuals (i.e., lobbyists).

For example, the legislative history refers to the American hostage incident involving the Shah of Iran for not making the “activity/entry” distinction as part of the policy rationale. Although it used this as an example of a compelling U.S. foreign policy interest, it adds to the weight of evidence indicating the reasonableness of the agency’s position on the interpretive issue in this case.

As noted above, elements of the former subsections 27 and 29 appear in newly-crafted subsections under section 212(a). There is, however, “a rough relationship” between former subsection 28 and the new subsection 3(D) of section 212(a), which covers immigrant members of totalitarian parties. For nonimmigrants, the new amendments contain no exclusion ground analogous to former section 212(a)(28). For immi-

camera inspection which the majority in the appellate case had criticized, that the confidential information had satisfactorily indicated that this was more than just the possible content of the speeches. As stated then, “an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded under subsection (27) solely on account of the content of his proposed message.” Abourezk v. Reagan, 592 F. Supp. 880, 887 (D.D.C. 1984).

220. For a fuller discussion describing these new provisions, see LEGOMSKY, supra note 216, at 342.

221. As Professor Legomsky notes:

Given the limits that section 901 of the Foreign Relations Authorization Act had already placed on old subsection 28, however, the omission of an analogous nonimmigrant exclusion ground is probably not a significant change. Virtually all the activities mentioned in subsection 28—advocacy, publication, party membership, etc.—would be protected under the Brandenburg test unless they were calculated to incite, and likely to incite, imminent lawless action. In that latter event, the alien would generally be excludable under new subsection 3(A)(ii) in any event.
grants, however, the exclusion grounds have been narrowed.\textsuperscript{222} Visa applicants seeking permanent admission may still be denied on the basis of their political memberships.\textsuperscript{223}

Finally, the new legislation repealed both section 901 of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, as amended, and the McGovern Amendment and removed membership in or affiliation with the communist party as a ground for exclusion of nonimmigrants.\textsuperscript{224} With this later act, prior practice under the McGovern Amendment requiring nonimmigrants who were otherwise excludable under former subsection 28 to go through an "automatic" waiver process was necessarily discontinued.\textsuperscript{225}

Section 212(a)(3)(C), the newly-crafted provision, carving out a single provision for foreign policy exclusions, was designed to alleviate legitimate concerns that former subsection 27 was being used to exclude aliens on the basis of their beliefs, statements, or associations. This new foreign policy provision also sets forth, ostensibly, a clear standard for such exclusions and the circumstances under which they would be appropriate. This is the likely end result of a "negotiated" compromise between the legislative and executive branches of government.

It is doubtful that if the courts had taken a dynamic approach to statutory interpretation, a similar outcome as the one reached through legislative compromise could have been achieved. This issue was admittedly "an especially sensitive issue for Congress's consideration."\textsuperscript{226} So, with the benefit of hindsight, one could conclude that courts engaging in the process of interpreting statutes should not be adjudged by the temper of the times. Instead, consistent with the doctrine of legislative supremacy, courts should await appropriate modernization of statutes in the political arena even though the wait

\textsuperscript{222} LEGOMSKY, supra note 216, at 342 (cross reference omitted).

\textsuperscript{223} Id.

\textsuperscript{224} New INA subsection 3(D)(i) includes some of the aliens previously covered by former subsection 28. Specifically, new subsection 3(D)(i) covers associations but not advocacy, publication, etc. It covers only associations with "the Communist or any other totalitarian party" and not associations with other groups once regarded as subversive under the old law. See INA § 212(a)(28)(D)(ii) (1982).


\textsuperscript{226} ALEINIKOFF & MARTIN, supra note 28, at 327.
may be a long one. But, more importantly, it is very doubtful that this relatively recent statutory change could have been accomplished prior to the concomitant change in the political world order. As noted by commentators in the field, "[t]he 1990 Act completes the work with regard to ideological exclusion, providing generous waivers of excludability for former Communist party members and permitting only limited exclusion based on foreign policy considerations for other aliens whose political ideas or affiliations are a matter of concern." This compromise no doubt reflects not only the new world order but a growing belief or acceptance that there may no longer be a clear divide between what is foreign and what is domestic policy.

Meanwhile, deference to the agency interpretation, if reasonable under the circumstances, should be the paramount guiding principle in cases such as this one. Such was not the case here, however. Instead, the Court of Appeals embarked upon an odyssey of interpretive subterfuge in an effort to avoid the need to address the real considerations that should have guided its decision. Admittedly, the Supreme Court application of the *Chevron* doctrine over the years has been somewhat inconsistent and has failed to provide the lower courts with clear guidance as to when a court should defer to an agency's construction of the statute. But in this particular area of the law, little guidance is needed when it comes to the concept of agency deference.

As discussed more fully below, the circumstances of the *Abourezk* case presented such considerations. Specifically the policy considerations attendant to immigration cases make deference practical. Moreover, as the district court in *Abourezk* had already observed, "in foreign affairs matters and those involving the admission of aliens, the political branches have the widest possible latitude in these respects."

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227. FRAGOMEN & BELL, supra note 204.
229. Johnson, supra note 32, at 422.
V. KEY POLICY CONSIDERATIONS

Applying traditional methods of statutory interpretation in viewing the language and legislative history of the statute, the agency’s interpretation is admittedly not a very plausible one. But at this juncture of the process, reliance on traditional tools is not paramount because (a) they do not provide a satisfactory answer to the question posed and (b) there are several complicating factors involved in this case that should have prompted the court to give more weight to the agency’s position even though it thought another view more enlightened. Additionally, given the serious foreign policy ramifications following the Shah of Iran’s admission to the United States in the late 1970s, such an interpretation has a common sense appeal to it. Moreover, a focus on the reasonableness of the agency’s viewpoint is all that Chevron requires. And, presumably, such a focus would have conserved limited judicial resources. Such an approach or, more appropriately, focus on the court’s part in the original appellate decision would have brought about finality to the saga of this case much earlier. And as the Court has indicated previously in Fiallo v. Bell, the matter should more appropriately be taken up with Congress. More importantly, such consideration would have been in keeping with the mandate of Chevron.

In Abourezk Judge Ginsburg had elected, most likely, to follow the approach several appellate courts have adopted by giving Chevron a “weak” reading. To approve an adminis-

231. This is apparently what the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York had in mind when it issued its 1985 report on visa denials based on ideological grounds:

In 1984 Congress had again an opportunity to effect major revisions in this country’s immigration laws. But it would have left unscathed and largely unexamined the disturbing legacy of the McCarthy era that permits the denial of visas to the United States on ideological grounds. The controversy stirred by such denials may explain but does not excuse a failure to address the issue. In the hopes of encouraging the Legislature to confront the controversy when it next examines these laws, we recommend the repeal of sections 212(a)(27)-(29) of the Immigration and Nationality Act, and their replacement with language that reflects this country’s values.

Visa Denials, supra note 128, at 249-50 (footnotes omitted).

232. See, e.g., Richard J. Pierce, Jr., Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions, 41 VAND. L. REV. 301, 302 (1988). In adopting such a reading of Chevron, the court resolves the ambiguities in the statute itself rather than applying the deference principle. Id.; see also, John F. Belcaster, The D.C. Circuit’s Use of the Chevron Test: Constructing a Positive
trative construction a court "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." All that a court need do is determine whether the agency's interpretation is reasonable under the circumstances once the court has concluded, after the application of the traditional tools of statutory interpretation, that the language is either silent on the particular interpretive issue or ambiguous.

More important, as Professor Diver has argued, "courts should presumptively defer to agency interpretations of statutes in situations where Congress has endowed the agency with significant policy-making responsibility." For those commentators who argue against "a blanket rule of deference to agency constructions whenever an agency charged with implementing a statute interprets it," there are appropriate factors for employing the Chevron mandate here. As Professor Diver has remarked: "Since interpretation is inherently a form of policymaking, courts should presumptively defer to an agency's interpretation of a statute under which the agency exercises significant policymaking responsibility." Such is the case here. The DOS is such an agency with significant authority in the issuance of visas under the immigration statutory scheme.

A. The Foreign Affairs Power

The principle of deference to the agency's interpretation applies with special force when a statute involves a delegation to the Executive of authority to make and implement decisions


233. Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 n.11 (1984); see also Udall v. Tallman, 380 U.S. 1, 16 (1965) ("We need not find that [the agency's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.") (quoting Unemployment Comm'n v. Aragon, 329 U.S. 143, 153 (1946)); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.").

234. Diver, supra note 1, at 552.

235. Callahan, supra note 57, at 1292.

236. Diver, supra note 1, at 593.
relating to the conduct of foreign affairs. Not surprisingly, Judge Bork paid particular attention to this aspect of the Abourezk case in his dissent. The Supreme Court has described the exclusion of aliens as "a fundamental act of sovereignty," stating that "the right [to exclude] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." Therefore, in its delegations of power in the area of foreign relations, Congress "must of necessity paint with a brush broader than that it customarily wields in domestic areas," and "[p]ractically every volume of the United States Statutes contains one or more acts . . . of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." The INA is one such statute.

As for the discussion about subsection 27 and whether it authorizes the exclusion of aliens whose entry or presence in the United States raises foreign policy concerns notwithstanding the plain language of the statute that seemingly restricts activities only, the district court noted that the distinction between an alien's activities and his presence in the United States is one without a difference. Any person admitted must engage in some activity in the United States, and entry alone can have dramatic effects on American foreign policy.

237. Judge Bork states in his dissent:

Plaintiffs have chosen an especially inhospitable legal environment in which to attempt the resuscitation of the non-delegation doctrine, for it is in the context of foreign affairs that the Supreme Court has repeatedly upheld the legitimacy of broad and discretionary Executive power. "[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature," statutes conferring authority upon the President to conduct foreign affairs have necessarily been less detailed and specific than statutes concerned with domestic affairs.

239. Zemel, 381 U.S. at 17.
242. See, e.g., id. at 884-85 (discussing the impact of the admission of the
The district court observed that it would be a non sequitur to conclude that Congress meant to bar only those aliens who would engage in prejudicial activities, but admit those whose very entry would be prejudicial to the public interest.

Further, Subsection 29 argues against drawing such a distinction between entry and activities. Specifically, Congress limited this particular exclusionary provision to conduct occurring "after entry." Thus, such a distinction would render subsections 27 and 29 largely duplicative. Such a result would offend the well-settled rule of construction that all parts of a statute, if at all possible, are to be given effect. Moreover, immigration grounds for exclusion are not necessarily mutually exclusive.

Finally, the extreme deference accorded the executive branch in this particular area of the law is another factor pointing to the reasonableness of the agency's interpretation of the statute. This is particularly appropriate because, as Professor Sunstein once remarked, "[s]tatutory construction is not a search for direct decision of precise questions... Congress often doesn't foresee how its laws will be applied or what the particular circumstances will be." Here, such a distinction is unnecessary because the question of whether to limit exclusion to activities or mere presence is a pure question of policy, given the nature of the sovereign's power in the area of admissions as discussed more fully below.

B. The Plenary Power Doctrine

The context provided by the general field in which the legislation operates is another powerful interpretive tool. Here,
Congress enacted legislation in an area where the federal government has plenary power. As a result, federal courts are generally reluctant to scrutinize government action too closely in the area of immigration law when it involves those who seek admission to this country. Furthermore, aliens found excludable on ideological grounds are not entitled to any constitutional guarantees. The doctrine, frequently applied by the courts, has been universally criticized by legal commentators as a means "to shield the executive branch's immigration decisions from meaningful judicial review." But note that the Court in Fiallo v. Bell did reserve a role for the judiciary should the political branches of government ever transgress the constitutional boundaries of their discretion in determining the nation's foreign policy goals and the means to achieve them. Congress and the executive branch of government have been particularly vigilant in avoiding such a constitutional controversy. The recent amendments to the INA's grounds of exclusion are such examples.

For those not indoctrinated with this notion of plenary power, the realization that an area of the law exists over which courts have little to adjudicate may seem anachronistic. In one of the early cases addressing the plenary power doctrine, Justice Field wrote in The Chinese Exclusion Case that "[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution." According to Field the exclusion of these foreigners from our midst was "a proposition which we do not think open to controversy." The thrust of his concern is that "if [an independent nation] could not exclude aliens, it would be to that extent..."

246. See, e.g., Michael Scaperlanda, Polishing the Tarnished Golden Door, 1993 Wis. L. Rev. 965 ("The plenary power doctrine provides the backbone for our constitutional tradition affecting aliens, placing nearly unfettered authority with the political branches of the federal government.").

247. See id. at 967 n.7 ("The plenary power doctrine is a judicial creation by which the Court severely limits its role in resolving immigration issues, while exalting the role played by Congress and the executive branch.").


249. Johnson, supra note 32, at 443.

250. Id. at 603.

251. Id. at 609.

252. Id. at 608.
subject to the control of another power.Ë’ Three years later in *Nishimura Ekiu v. United States*,” the Court described the doctrine in terms of “an accepted maxim of international law.”

These oft-cited passages referring to the inherent power of the sovereign to exclude aliens leave open a number of questions about the nature of the source of the federal power to enact and to regulate immigration laws. Both confusion and concern exist as to the constitutional source of this power, our republic being a union whose government exercises only those powers which are enumerated in the Constitution—and such implied powers as are necessary and proper. It is generally accepted that the power to regulate the flow of aliens over our borders is inherent in the concept of sovereignty. Thus, by virtue of the inherent authority of the executive in foreign affairs matters, coupled with the plenary power doctrine, judicial review in this particular area of immigration law is usually a somewhat restrictive activity, a limitation that undoubtedly causes much consternation amongst activist judges.

The majority in *Abourezk*, consistent with this reasoning, concluded that Congress intended foreign policy concerns to rank among the national interests whose protection would justify exclusion of an alien under subsection 27. According to the majority, “the broad language of subsection 27 evince[d] no intent to restrict the kinds of governmental concerns that would qualify; the subsection speaks of ‘public interest[,] . . . welfare, safety, or security’ and places no limitation on these encompassing terms.” In Judge Ginsburg’s opinion, “[o]nly an isolationist view patently inconsistent with the reality of our late twentieth century world could account for a belief that the ‘public interest’ and the ‘national welfare’ did not depend, in

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253. *Id.* at 604.
254. 142 U.S. 651 (1892).
255. *Id.*
256. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 22 (1972) (noting that “the difficulty of locating a constitutional source for the foreign affairs power probably produced the unique theory expressed that the foreign affairs powers derive not from the Constitution at all, but rather are inherent in the notion of a sovereign nation”).
257. *Abourezk v. Reagan*, 785 F.2d 1043, 1043, 1053 (D.C. Cir. 1986), aff’d *per curiam*, 484 U.S. 1 (1987). Up to this point, the majority was in agreement with the district court’s analysis.
258. *Id.*
part, on the effective execution of our foreign policy.\textsuperscript{259} Further, Judge Ginsburg exhorted the court not to adopt such "a counterintuitive interpretation of expansive statutory language." Judge Ginsburg also noted that the plaintiffs had not identified anything in the legislative history or administrative practice to suggest that Congress intended to exclude foreign policy concerns from consideration under subsection (27).\textsuperscript{260} In light of this discourse, the majority need not have embarked upon the next analytical inquiry under the \textit{Chevron} test.

In discussing the foregoing principles at the outset, Judge Bork assigned them great weight because of their conclusive effect on the outcome of this case. According to Bork, the majority opinion failed to give the requisite weight to them.\textsuperscript{261} Similarly, I view such a discussion as critical to a well-reasoned opinion in an immigration case, given the nature of the inherent authority of the government in this area of the law. Adjudicating these cases out of their historical context may cause a court to lose sight of the correct task at hand and possibly give way to the temptation to substitute its own judgment.

When coupled with the inherent power of the sovereign to exclude aliens,\textsuperscript{262} which is so "intricately interwoven" with the conduct of foreign policy,\textsuperscript{263} a contrary conclusion requires clear authority to overcome the plenary nature of the government's power. Otherwise, such an intrusion on the Executive would be unwarranted. And because this authority does not stem alone from the "legislative power but is inherent in the executive power to control the foreign affairs of the nation,"\textsuperscript{264} courts should, therefore, hesitate before making such an intrusion which, in effect, limits or embarrasses such powers.\textsuperscript{265}

However, by recognizing the need to give deference to the government because of the nature of its authority in this area, I do not intend, by any means, to imply that I accept the government's approach as a matter of policy. As practitioners noted in their call for legislative reform of these ideological

\begin{footnotes}
\item 259. \textit{Id.} at 1053.
\item 260. \textit{Id.}
\item 261. \textit{Id.} at 1064.
\end{footnotes}
grounds of exclusion "to remove that shadow of hypocrisy and to affirm the principles underlying our Bill or Rights":

While our intellectual and political life is damaged, these exclusion provisions also mar our moral image, here and abroad. They cannot be reconciled with our role as signatory to an international agreement intended to encourage the free exchange of ideas and movement of citizens, or with our condemnation of injustices in other countries.266

Note also that these practitioners "lobbied" Congress, not the courts, to repeal the controversial ideological grounds of exclusion.267 And in a more philosophical vain, a single practitioner representing an individual in a deportation case involving one of these ideological grounds noted the following:

There is a fundamental tension between the desire to be free individuals and the desire to be part of a community that defines itself through affirming particular substantive values. That tension is encapsulated in the First Amendment, which suggests that our nation's primary substantive value is government neutrality in the sphere of substantive values. But too much freedom threatens our sense of community. The McCarran-Walter Act thus sets the boundaries for our freedom. But at what price? It affirms our faith in democracy by casting out people who believe in other systems of government. It affirms our faith in pluralism by barring from our borders anyone who is perceived as advocating totalitarianism. It privileges narrow nationalist self-definition over the uninhibited exchange of ideas, which is itself one of our most important freedoms. It promotes "freedom" by denying the fundamental humanity of another human being. The question that the McCarran-Walter Act raises is whether a country can ever call itself pluralist or humanist when it expels and excludes persons like [Margaret] Randall because they hold dissenting points of view.268

Given an academic's role, notwithstanding our own political views, it is not inappropriate for us to criticize the judicial process. I view judges' roles, however, quite differently. In that role, other considerations come into play and, therefore, re-

266. Visa Denials, supra note 128, at 264.
267. Id. at 249-50.
strain their conduct. This is not to suggest that judges cannot express their criticism of a particular policy in their opinions. This is part of the process of engaging in judicial candor. Ultimately such candor can inform the legislative process.

VI. A WORD ON JUDICIAL CANDOR AND INTERPRETIVE SUBTERFUGE

Abourezk raises starkly the issue of judicial candor. Neither opinion can be read without a strong suspicion that other agendas were animating the writers' hands while couched in originalist rhetoric. Both opinions announce allegiance to the guiding principles of *Chevron* then take off in entirely different directions of analysis. To the extent that there are overlapping areas of accord, they are explained away. This is not necessarily surprising because, as some commentators have observed, appellate courts tend to give *Chevron* either a strong or weak reading which allows them to, in effect, dictate the outcome of a particular case while maintaining the appearance of legitimacy.

As stated earlier, immigration is an area of the law in which the judiciary's role is perceived as quite limited. According to commentators, it is an area in which constitutional enlightenment has not taken a substantial hold. As such, the temptation to do "justice" and uphold the traditional constitutional values of this society is very great.

But in today's legal climate, rare is the occasion that a jurist must succumb to this temptation. In his article on judicial candor, Professor Shapiro observes that in modern society we aspire to be just. Although questions of morality may profoundly affect the dynamic nature of the decision-making process in certain cases, "the judge's allegiance to both law and

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270. See, e.g., Pierce, supra note 232, at 307, 310-12 (Such activity is tantamount to "judicial resolution of [a policy issue] through a process disguised as statutory interpretation.").


273. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 750 (1987) (noting that in today's legal climate, we are not faced with the kind of social dilemmas that plagued our society in earlier years); see id. at 749 n.86.
candor must be considered in determining his moral duty.274 For Professor Shapiro, judges have an absolute moral duty to candor in rendering their opinions. Candor is thus a part of the judiciary functioning responsibly.275 So when faced with a temptation to do justice in a particular case, a judge cannot escape her predicament "by concluding that the legal right itself is a function of whatever morality requires."276 According to Professor Shapiro, "a judge's fidelity to law can be fairly measured only if judges believe what they say in their opinions and orders."277 In other words, judges should be more forthcoming about the real reasons for their decisions if they are not consistent with the applicable rules or standards.278 Thus, simple disagreement with the governing rule or standard should not be enough to trigger judicial activism to correct perceived injustices.

In the area of statutory interpretation, judges who follow a "weak" reading of Chevron may engage in judicial updating through a process of interpretive subterfuge.279 For some commentators, they assert that judges engage in judicial updating of statutes while "shrouding their decisions in the rhetoric of originalist interpretation."280 But perhaps as Professor Zeppos has observed, it is not so easy to be critical of this type of judicial conduct.281

274. Id. at 749-50.
276. Shapiro, supra note 273, at 750.
277. Id.
278. But see Donald C. Langevoort, Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation, 85 MICH. L. REV. 672, 733 (1987) (opining that "a request for such candor probably asks too much of the judicial system"). See also Scott Altman, Beyond Candor, 89 MICH. L. REV. 296, 297 (1990) (observing that "[c]andid opinions do not offer reasons judges know do not persuade them").
279. Zeppos, supra note 14, at 358-59 (noting that "complaints about the lack of candor also have a long tradition in the common law").
280. Id. at 395.
281. Professor Zeppos states:
   It is also possible that judges reach a result consistent with their personal preferences but convince themselves that they have done no more than read the originalist evidence. Thus, if we asked these judges to be candid and to tell us their "real" reasons, they would look genuinely puzzled and point to their written opinions. Having persuaded themselves that they did not make policy, they would be incapable of candidly unmasking their originalist opinion.
The lack of candor, self-deception or, simply, a lack of self-awareness, in the Abourezk case comes as no surprise. But the fact that such lack of candor is commonplace should not prevent academics from engaging in a critical discourse about such judicial conduct, particularly in the area of statutory interpretation with its attendant concerns about legitimacy, in view of legislative supremacy. Such a critique is necessary to prevent the abuse of judicial power. The problem of candor in judging is much more complex, however, than the discussion permits and thus beyond the scope of this article. Although such conduct may be an unconscious form of judicial updating as some commentators have observed, it remains, nonetheless, a form of self-deception.

A. Judicial Activism

One suspects that Judge Ginsburg simply disagreed with the government’s position but felt constrained in rejecting it outright, thus the ordered remand. Given the fact that the activities in which the foreign nationals planned to engage included, among others, the delivery of speeches—activities that surely implicate the First Amendment—it is hard not to be suspicious of the Administration's motives in denying the visa requests. I suspect that the government was concerned that these particular aliens would be speaking to American groups and propounding a viewpoint considered embarrassing to the United States or in some manner contrary to the best interests of United States foreign policy. Because of the

Id. at 409. Professor Zeppos opines ultimately that perhaps the problem isn’t “so much a lack of candor . . . but [rather] a lack of self-awareness in judging.” Id. at 411.

282. Id. at 402.

283. Shapiro, supra note 273, at 736-37. Legal realists used to refer to this kind of judicial conduct as “judicial deception.” See JEROME FRANK, LAW AND THE MODERN MIND 40-41, 248-51 (1930).

284. Zeppos, supra note 14, at 408.

285. Id. at 410-11 (referring to Professor’s Aleinikoff’s nautical approach utilizing originalist interpretive tools as judges unconsciously adopting judicial updating of statutes by reading them in a “present-minded” fashion).


287. Rick Atkinson, Congressmen, Others Denounce Denial of Visas to Critics of
overlap between foreign policy considerations and first amendment guarantees, suspicion would naturally attach to any denial under subsection 27 rather than under subsection 28.\textsuperscript{288} But these grounds of exclusion were not mutually exclusive. If a foreign visitor is excludable on one ground, she may also be excluded on any of the other grounds in the Act. So even though subsection 28, a waivable exclusion ground, was applicable in the \textit{Abourezk} case, the alien could, nonetheless, have been excluded under subsection 27.

A plausible explanation for the government’s reluctance to identify the reasons for denial on the basis of “activities”—as being prejudicial to the national interest—is sensitivity to the First Amendment concerns that would naturally arise.\textsuperscript{289} Kindly put, such an interpretation does reflect the government’s sensitivity to charges that it is attempting to suppress free exchange of ideas or deprive these speakers of a United States audience. While one may deplore such conduct, it is well within the government’s authority to so legislate. Thus the government elected, arguably, to advance the interpretation that entry and mere presence was a sufficient basis for denial on foreign policy grounds in this case specifically to avoid raising a constitutional, or more specifically, a disfavored policy issue. Although it is accepted doctrine that the government has the substantive power to deny entry on grounds that implicate first amendment guarantees, the district court judge would have found, nonetheless, such a reason for denial of the visas objectionable.\textsuperscript{290}


\textsuperscript{288} See H.R. CONF. REP. NO. 955, 101st Cong., 2d Sess. 128 (1990). Therefore, the agency’s practice may seem suspect. Legally speaking, however, it was not unlawful or contrary to statutory authority to do so.

\textsuperscript{289} 5 IMMIGRATION LAW REPORT 63 (1986). According to the author of the article in the Immigration Law Report, “[t]his Administration’s sensitivity to the issue ... is symptomatic of the real problems underlying both § 212(a)(27) and (a)(28).” \textit{Id}. The author also opined that proposals then pending in Congress would have amended these former grounds for exclusion to assure their application only in cases in which the national security is involved, “a standard much more in keeping with American political values and foreign policy principles, insofar as those principles seek to encourage democratic traditions and institutions abroad.” \textit{Id}. As discussed above, this is apparently what Congress has done.

\textsuperscript{290} \textit{Abourezk v. Reagan}, 592 F. Supp. 880, 886-87 (D.D.C. 1984) (“For although the government may deny entry to aliens altogether, or for any number of specific reasons, it may not, consistent with the First Amendment, deny entry solely on account of the content of speech.”). As a precautionary note, the district court later remarked:
Another reason which the government has steadfastly held to is the distinction drawn between visa denials based on organizational associations and those relating to governmental associations. In Abourezk all visa applicants had governmental contacts, according to DOS officials. As such, the denials under these circumstances are entirely plausible despite the literal language which seems to cast a much narrower net of exclusion.

Therefore, the Court of Appeals should have upheld the lower court's finding on this issue unless the appellate court found the finding clearly erroneous. Of course, one recognizes the difficulty inherent in making this determination without evidence in the record—and none exists on this point for purposes of review—in light of the in camera proceedings in the district court. Nonetheless, the Court of Appeals should have addressed the issue of resolving such disputes by way of in camera proceedings instead of going off on its own frolic and detour.

As a practical matter, judges are no different than anyone else. Thus, application of governing legal doctrine is not the only influence on judicial decision-making. When faced with two or more legitimate dispositions in deciding a particular case, they are likely to choose the one that is most consistent with their political views or philosophies on the interpretation and application of the law or policy. One commentator has aptly described these factors as external.

To find the conclusory statement that the entry of a particular individual would be contrary to United States foreign policy objectives to be a "facially legitimate" reason would be to surrender to the Executive total discretion even in cases such as these where it is claimed—and the claim is not implausible—that entry is being denied solely on account of the content of the alien's proposed speech.

Id. at 888.

291. Although the majority seemed highly critical of the district court's handling of this matter in camera, under the circumstances it seemed to be the best approach. It served a supervisory function as well. As the district court remarked:

Moreover, judicial scrutiny of the specific reasons for denials of entry will have the beneficial effect of preventing both a mushrooming of exclusions based on the provision here at issue and content-based denials.

Id. at 888 (footnotes omitted).

292. According to Professor Stephen Legomsky, one can apply to the immigration cases "the increasingly well accepted view that various factors not typically acknowledged in courts' opinions contribute heavily to the results." STEPHEN LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 225 (1987). Among the "external" factors that influence judicial decision-
That freedom, though broad, is not limitless.\textsuperscript{293} The flexibility inherent in the judicial process is constrained by the now familiar "steadying factors" that Karl Llewellyn assembled as a response to what he perceived as the excesses of legal realism. The \textit{Chevron} mandate requires agency deference in appropriate cases. When such a case presents itself, the judge's focus is on determining whether the agency's construction is a reasonable one. Like the earlier articulated "steadying factors," consideration of reasonableness is another approach that functions as a constraint on judicial decisionmaking. But "probably the most significant of those constraints is the professional office occupied by the judge."\textsuperscript{294}

Thus, in examining an opinion of a judge in an immigration case, one must factor into the discussion the limitations inherent in the law.\textsuperscript{295} Indeed, most commentators writing in this area believe, whether so stated or not, that judges should be more activist-oriented given the constraints already inherent in the law.\textsuperscript{296} Then add to these constraints the notion that as a matter of principle courts should defer to an agency interpretation, it is not surprising that judges influenced by ideological forces will strain to find a way around such a principle.\textsuperscript{297}

making in the immigration sphere are:

- the personal backgrounds and political attitudes of the judges; the judges' own perceptions of their roles in the legal system; and the political forces—"political" here being used in its broadest sense to encompass social and economic forces as well—prevailing in society at the time cases are decided.

\textit{Ibid.}

\textsuperscript{293} Id. at 224.

\textsuperscript{294} Id. (citing \textsc{Karl Llewellyn, The Common Law Tradition—Deciding Appeals} 45-46 (1960)).

\textsuperscript{295} See, \textit{e.g.}, \textsc{Charles Fried, Order and Law: Arguing the Reagan Revolution—A Firsthand Account} 212 n.10 (1991) ("Bent upon relieving the harshness of deportation orders, appellate judges have consistently distorted the immigration laws.").

\textsuperscript{296} See, \textit{e.g.}, Johnson, \textit{supra} note 32, at 455 ("The law is well-known for the considerable discretion delegated to the Attorney General over many immigration decisions, discretion that is equalled in few administrative schemes.").

\textsuperscript{297} \textit{See generally Robert H. Bork, The Tempting of America: The Political Seduction of the Law} 52-129 (1980) (discussing such ideological factors). \textit{But cf.} P. Irons, \textit{Making Law: The Case for Judicial Activism}, 24 \textsc{Valparaiso U. L. Rev.} 35, 37 (1989) (remarking that "we need the weapon of judicial activism in order to protect members of "discrete and insular" minorities from the tyranny of the majority"); Johnson, \textit{supra} note 32, at 419 ("Because the INS has demonstrated an anti-immigrant, pro-enforcement bias, and because the executive branch has tremendous leeway in the foreign policy realm, deference is ill-advised in the immigration context.").
The most likely explanation for any individual decision, therefore, is the specific legal doctrine articulated in the opinion. At the outset, a court's refusal to interfere with Congress on the issue of immigration results from the impact of the plenary power decisions.298 These decisions were accompanied by reasoned opinions. Then add to the mix a decision controlled by a statute, a limiting factor in judicial decision-making because the legislature is the superior law-making body in this situation.299 And judges, for the most part, adhere to the doctrine of legislative supremacy in deciding such cases.300 A further limiting factor is judicial deference to an agency's interpretation of a statute which Congress has delegated to it to implement and administer. Such deference is lacking in the majority's opinion.

B. Agency Deference

Judge Bork's approach to deciding this case was consistent with judicial deference to an agency interpretation that was, arguably as previously discussed, reasonable under the circumstances.301 But the emphasis on the legislative history as supporting this interpretation is misplaced. As discussed earlier, the evidence in the legislative history "tugged in both directions." Nonetheless, the result was consistent with the Chevron mandate because the central question was the reasonableness of the agency's construction. Given that the legislative history did not preclude such an interpretation, that should have been the end of the discussion on that point.

The Supreme Court has always said (e.g., Fiallo v. Bell) that it is for Congress and not the courts to decide this nation's immigration policy. If we are afraid to hear what others have to say then it's a sad commentary on our society. But we as a

298. Peter Schuck states:

For almost a century, the Supreme Court has treated immigration law as sui generis. It has bestowed upon Congress the untrammeled authority to make decisions concerning the admission and expulsion of aliens. So great has been the power of the word "immigration" that its mere mention has been enough to propel the Court into a cataleptic trance.

Schuck, supra note 2, at 6-7.

299. REYNOLDS, supra note 62, at 184.


301. See Pierce, supra note 232, at 308.
people, through the electorate, not the judiciary, make such choices. And because agencies are likely to be more accountable to the electorate (as expressed by who is elected as President) than the courts, agencies should have the dominant role in matters of policy. Moreover, Congress is the most appropriate arena for this discussion given all the political participants, i.e., congresspeople, staffers, lobbyists, and agency officials. Also, the efforts of the judiciary in such cases as Abourezk and Allende cannot substitute for congressional attention to this issue, and in fact are likely to create more problems than they solve as they strain for interpretations of the immigration statute that may have unintended consequences.

In general, when the legislature has chosen to work through an administrative agency to realize its purposes, and therefore, presumptively, to confer on it some policy-making function, deference to the agency's construction of the statute should normally be permitted to function unless the judge is convinced that the purpose of the statute is contradicted. In this case, there appears to be no significant evidence of such a contradiction.

Professor Kenneth Davis argues that courts are the experts "on many types of issues, including constitutional law, common law, ethics, overall philosophy of law and government, procedural fairness, judge-made law developed through statutory interpretation, most analysis of legislative history, and problems transcending the field of the particular agency." As for ascertaining a statute's meaning, according to Professor Diver, "[t]he conventional wisdom . . . favors agencies." Moreover, agencies are more knowledgeable about the circumstances surrounding a statute's enactment. Therefore, in appropriate circumstances, judges should be restrained in their decisionmaking to avoid policymaking under the guise of interpreting statutes.

In the administrative state, agencies should have the dominant role in policymaking when the choice is between agencies

302. Id. at 307.
303. See Posner, Statutory Interpretation, supra note 124, at 811.
304. 5 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE 393 (2d ed. 1984).
305. Diver, supra note 1, at 583.
306. Id. at 575.
307. Of note is the fact that Kenneth Davis had once predicted that "considerable deviation from the doctrine . . . is likely" because Chevron's allocation of interpretive authority is "unnatural." Callahan, supra note 57, at 1295 n.102.
and courts. Thus the central question of statutory interpretation posed here is whether agencies or courts should have greater authority over the process of interpreting statutes.\textsuperscript{308} And because statutory interpretation is not "a search for direct decision of precise questions [given that] Congress often doesn't foresee how its laws will be applied or what the particular circumstances will be,"\textsuperscript{309} the courts should defer in appropriate cases to the agency's construction of a matter involving policy.

Instead the \textit{Abourezk} majority employed unduly restrictive approaches and other subterfuges in deciding this case, the first one being that this was a special circumstances case requiring the court to avoid a constitutional confrontation.\textsuperscript{310} Since the Supreme Court had already decided the issue adversely to plaintiffs in an earlier case, no such confrontation existed. Thus, shrouding the case in terms of statutory interpretation was merely a mechanism for side-stepping an issue that had an easy answer.

Although the statutory issues in \textit{Abourezk} were fairly complex, the constitutional ones were not. Supreme Court precedent in this area is quite clear and consistent.\textsuperscript{311} Thus the majority in this case had to decide against the government on the statutory issues. In doing so, the court focused on the statute's legislative history. This approach afforded more flexibility in terms of the result in this case.\textsuperscript{312} Also, the majority's reference to the sweeping authority of the presidential proclamation as an added safety feature was equally disingenuous given the result-oriented nature of the decision.\textsuperscript{313} Furthermore, such a reference merely served to highlight the underlying political nature of the decision in question which should have pointed in the direction of allowing a "permissible" agency interpretation. And as discussed earlier, the government found it necessary to resort to this authority to deal with

\textsuperscript{308} Diver, \textit{supra} note 1, at 550-51.
\textsuperscript{309} Zeppos, \textit{supra} note 14, at 397 n.258 (citing Professor Sunstein's judicial panel comments).
\textsuperscript{310} \textit{Abourezk} v. Reagan, 785 F.2d 1043, 1052 (D.C. Cir. 1986).
\textsuperscript{311} \textit{See} Kleindienst v. Mandel, 408 U.S. 753 (1972); \textit{see also} \textit{Abourezk} v. Reagan, 592 F. Supp. 880, 881 (D.D.C. 1984) (referring to the constitutional issue in this case as "relatively straightforward").
\textsuperscript{312} \textit{See}, e.g., Larry Evans et al., \textit{Congressional Procedure and Statutory Interpretation}, 45 ADMIN. L. REV. 239, 239 n.4 (1993).
\textsuperscript{313} \textit{Abourezk}, 785 F.2d at 1049 n.2.
the particular individuals in the consolidated cases. Much of what transpired in this case subsequently was unnecessary. The problem remains and will unfortunately continue because the required deference to agencies causes courts to surrender too much control to agencies, particularly when reviewing decisions of those agencies popularly viewed as suspect.

VII. CONCLUSION

Many theories of statutory interpretation are the subject of academic discourse in today's legal climate. But are any of them satisfactory for application in the administrative context? How well do the traditional tools really work in a case such as Abourezk? If you apply the plain meaning rule as would a textualist, the agency's interpretation falters. If you take a look at the legislative history as would a student of the legal process school, the issue of intent is inconclusive if not illusory. However, taking everything into account as a modified intentionalist would, one could conclude that the agency's interpretation was permissible. This is particularly appropriate here because it is such a highly deferential area of the law notwithstanding its detractors' criticism. Further, this is a matter that goes to the very heart of how this nation defines itself, which is accomplished through the processes employed by the legislative and the executive branches of government. More importantly, this is all that the Chevron mandate requires under these particular circumstances; namely, for the courts to ascertain the reasonableness of the agency's construction, not whether they would prefer something different, more enlightened or better.

There is no question that a comprehensive revision of the national and security interests exclusion provisions was long overdue. Born of an era long since past, and made even more arcane with the recent fall of communism and the subsequent political re-alignments worldwide, it nonetheless remained for the political branches of government to strike the appropriate agreement on the contours of the newly enacted provision replacing subsection 27 and the surrounding political exclusion grounds. Although severely limited in its scope, Congress still accorded the executive branch explicit authority to exclude aliens on the basis of foreign policy considerations. No doubt this is exactly what the courts were attempting to do. It is unlikely that any serious reform in this highly politicized area could have been achieved short of a new world order. Nevertheless judicial intervention is not the answer.
As a matter of policy, the agency's construction in *Abourezk* was not unreasonable nor was it plainly inconsistent with other INA statutory provisions. Under *Chevron*, it was therefore a permissible construction that should have been given due deference. It was not given such deference because the majority apparently seized the moment to, in effect, update the anachronistic provisions of this cold-war era statute or, at the very least, frustrate the modern-day agency's actions in barring the admission of undesirable foreign officials on foreign policy grounds that probably did not run afoul of first amendment implications.

All of this is by no means to suggest that the courts do not play a role in the administrative context. The determination of whether an agency's construction is "permissible" or "reasonable," albeit a constraining factor in the judicial process, is not intended as an abdication of the judicial role in such matters. In the administrative state, courts play a primary and necessary role of supervision when judges scrutinize agency decisions and interpretations of statutes. As the nation's moral conscience, there is always a need for judicial scrutiny of agency conduct, but given that certain doctrines, judicially-created no less, limit the role of the judiciary in certain areas of the law, legal reformists should look to more appropriate venues for their reform efforts. But alas, such is the nature of judicial decision-making that promotes the judicial route as the more appropriate avenue for achieving justice.

314. See 1 KENNETH C. DAVIS AND RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 7 (3d ed. 1994) (opining that "reviewing courts may have little choice but to tolerate less accuracy and greater discretion in the agency decisionmaking process" given the limited judicial resources and expanding administrative workloads).