Immigration — Review of Administrative Action — Agency Adjudication — Jurisdictional Bar — Patel v. Garland

Can limits on judicial review exist within a "regime of law and . . . constitutional government?"[1] Just ask noncitizens, millions of whom[2] are deportable at the stroke of a bureaucrat's pen.[3] Indeed, under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[4] (IIRIRA), executive branch employees act as judge, jury, and appellate tribunal, all outside the judicial branch. Last Term, in *Patel v. Garland*,[5] the Supreme Court held that one such provision of IIRIRA — barring review of "any judgment" of an immigration official "regarding the granting" of discretionary relief[6] — forecloses judicial review of even the threshold determination of whether a noncitizen is eligible to receive such relief.[7] Although *Patel* held that IIRIRA precludes judicial review of merely factual questions, it need not and should not be read to preclude review of fact-related judgments that are so egregiously mistaken as to violate the Due Process Clause.

In 1992, Pankajkumar Patel, along with his wife, Jyotsnaben, and their two sons, Nikhil and Nishantkumar, entered the United States without documentation or inspection and settled in Georgia.[8] Fifteen years on, in 2007, Patel applied for a green card under 8 U.S.C. § 1255,[9] which confers discretionary authority upon the Attorney General to forive an unlawful entry and grant permanent residency to eligible noncitizens.[10] The application process has two steps: At the first step, a noncitizen must demonstrate his eligibility for relief.[11] At the second,

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[1] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1363 (1953).

[2] *See* BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015–JANUARY 2018, at 3 tbl.1 (2021) (estimating that there were more than eleven million undocumented immigrants in the United States in 2018, five million of whom had arrived more than twenty years prior).

[3] *See generally* Jennifer Lee Koh, Feature, *Executive Defiance and the Deportation State*, 130 YALE L.J. 948, 958 (2021) (summarizing the various jurisdiction-stripping provisions that limit judicial review of executive immigration proceedings).

[4] Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of the U.S. Code).

[5] 142 S. Ct. 1614 (2022).

[6] 8 U.S.C. § 1252(a)(2)(B)(i).

[7] *Patel*, 142 S. Ct. at 1627.

[8] Brief for Petitioners at 12 & n.3, *Patel* (No. 20-979). Patel and his family are citizens of India. *See* Oral Decision of the Immigration Judge, *In re* Patel (U.S. Immigr. Ct. May 9, 2013), *reprinted in* Appendix at 111a–12a, *Patel* (No. 20-979).

[9] Brief for Petitioners, *supra* note 8, at 12. Because Patel's employer filed a labor certification on his behalf, and because Patel was present in the United States on December 21, 2000, he met the baseline criteria specified in § 1255(i)(2). *Id.* His wife and children were included as derivative applicants. *Id.*

[10] 8 U.S.C. § 1255(i)(2).

[11] *See id.* § 1229a(c)(4)(A)(i).

the Attorney General, or his designee, must determine whether to grant relief.[12]

A year later, with his application under review within the Department of Homeland Security, Patel set off on a more quotidian task — renewing his driver's license.[13] His immigration status posed no obstacle under state law, given his pending application for permanent residence.[14] Nonetheless, the form asked: "Are you a U.S. Citizen?"[15] Patel checked: "Yes."[16]

That one checkbox spawned fourteen years of litigation. At first, the Department of Homeland Security, citing the checkbox, denied Patel's application.[17] It claimed that Patel was now ineligible for permanent residency under 8 U.S.C. § 1182, which bars relief for any noncitizen who has "falsely represented[] himself . . . to be a citizen of the United States for any purpose or benefit under . . . any . . . State law,"[18] with the "*subjective intent*" of obtaining a purpose or benefit.[19]

Soon thereafter, Patel — now in removal proceedings, along with his wife and children — renewed his request for discretionary relief.[20] In 2013, Immigration Judge Wilson denied his request and ordered his deportation.[21] In the judge's view, Patel's sworn testimony — that this was just an innocent mistake — was "simply not plausible."[22] As he

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[12] *See id.* § 1229a(c)(4)(A)(ii).

[13] Brief for Petitioners, *supra* note 8, at 12.

[14] *See* GA. COMP. R. & REGS. 375-3-1.02(7) (2022) (providing that a "pending application for lawful permanent residence" is sufficient to demonstrate an applicant's "lawful status" for purposes of applying for a driver's license).

[15] Brief for Petitioners, *supra* note 8, at 13.

[16] *Id.*

[17] *Id.*; *see also* 8 C.F.R. § 245.2(a)(1) (granting jurisdiction over such applications to an agency within the Department of Homeland Security).

[18] 8 U.S.C. § 1182(a)(6)(C)(ii)(I). Adjacent provisions exclude "drug abuser[s]" and "addict[s]," *id.* § 1182(a)(1)(A)(iv), current and former members of any "Communist" party, "domestic or foreign," *id.* § 1182(a)(3)(D)(i), and "[p]racticing polygamists," *id.* § 1182(a)(10)(A), among others. As the Second Circuit once noted, these provisions are like "a magic mirror, reflecting the fears and concerns of past Congresses." Lennon v. INS, 527 F.2d 187, 189 (2d Cir. 1975).

[19] *In re* Richmond, 26 I. & N. Dec. 779, 784 (B.I.A. 2016) (emphasis added). In addition, the Board of Immigration Appeals has interpreted this provision to include a "materiality element," such that the misrepresentation must "actually affect . . . the purpose or benefit sought." *Id.* at 787.

[20] Oral Decision of the Immigration Judge, *supra* note 1, at 112a; *see also* 8 C.F.R. § 1245.2(a)(5)(ii) ("[T]he applicant . . . retains the right to renew his . . . application in [removal] proceedings . . . ."). Because Patel was now threatened with deportation, his renewed claim fell within the "exclusive jurisdiction" of the immigration judge assigned to his case. *See id.* § 1245.2(a)(1)(i).

[21] Oral Decision of the Immigration Judge, *supra* note 1, at 118a. Immigration judges (formerly known as "special inquiry officers") are employees of the Department of Justice. Unlike their Article III counterparts — who are appointed by the President with the "Advice and Consent of the Senate," U.S. CONST. art. II, § 2, cl. 2, and are entitled to "hold their Offices during good Behaviour" and "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office," *id.* art. III, § 1 — immigration judges are appointed and supervised by the Attorney General and are entitled to neither life tenure nor a fixed salary, *see* 8 U.S.C. § 1101(b)(4).

[22] Oral Decision of the Immigration Judge, *supra* note 1, at 115a.

saw it, to obtain a driver's license, Patel had no choice but to lie, and that lie rendered him ineligible for discretionary relief.[23] Upon review for clear error, a divided panel of the Board of Immigration Appeals affirmed in 2017.[24] Board Member Wendtland dissented, noting that, contrary to Immigration Judge Wilson's interpretation, the pertinent state law required only "lawful presence" to renew a driver's license, a criterion Patel satisfied with his pending application.[25]

In 2019, a unanimous panel of the Eleventh Circuit[26] — followed by the full court, splitting 9–5[27] — denied Patel's petition for review on jurisdictional grounds. Writing for the en banc majority, Judge Tjoflat[28] offered a "straightforward reading" of 8 U.S.C. § 1252, which bars review of "any judgment regarding the granting of relief" under the provision on which Patel's claim rested but preserves federal jurisdiction over legal and constitutional questions.[29] "[W]hat Congress giveth," he explained, "it can also taketh away."[30] Because "judgment" is a "broad term" — "encompassing both the process of forming an opinion as well the pronouncement of the result" — it cannot be interpreted to eliminate jurisdiction over only discretionary *decisions*.[31] In dissent, Judge Martin[32] disagreed. In her view, § 1252 lent itself to precisely that interpretation — after all, the word "judgment" naturally "refers to exercises of *judgment*," not "findings of fact."[33] To hold otherwise would ratify an "extraordinary delegation of authority" to immigration officials.[34]

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[23] *Id.* at 116a.

[24] Decision of the Board of Immigration Appeals, *In re* Patel (B.I.A. Jan. 17, 2017) (per curiam), *reprinted in* Appendix, *supra* note 20, 106a–08a. The decisions of *first-instance* immigration judges in removal proceedings are appealable as of right to *appellate* immigration judges — specifically, the twenty-three members of the Board of Immigration Appeals, the decisions of whom are reviewable by the Attorney General. *See* 8 C.F.R. § 1003.1(a)(1), (b)(3), (h)(1)(i).

[25] Decision of the Board of Immigration Appeals, *supra* note 24, at 109a–10a (Wendtland, Board Member, dissenting).

[26] Patel v. U.S. Att'y Gen. (*Patel I*), 917 F.3d 1319, 1332 (11th Cir. 2019). The panel rejected Patel's other challenge — that any misrepresentation here had no effect on his license renewal and thus did not satisfy § 1182's materiality requirement — on the basis that the statute, properly read, does not require materiality at all. *Id.* at 1328–32.

[27] Patel v. U.S. Att'y Gen. (*Patel II*), 971 F.3d 1258, 1284 (11th Cir. 2020) (en banc). The en banc court limited its review to the jurisdictional question, leaving "undisturbed" the panel's holding that materiality forms no part of the § 1182 analysis. *Id.* (citing *Patel I*, 917 F.3d at 1322).

[28] Judge Tjoflat was joined by Chief Judge William Pryor and Judges Ed Carnes, Marcus, Newsom, Branch, Grant, Luck, and Lagoa.

[29] *Patel II*, 971 F.3d at 1271–72 (quoting 8 U.S.C. § 1252(a)(2)(B)(i)).

[30] *Id.* at 1272.

[31] *Id.* at 1281.

[32] Judge Martin was joined by Judges Wilson, Jordan, Rosenbaum, and Jill Pryor.

[33] *Patel II*, 971 F.3d at 1289 (Martin, J., dissenting) (emphasis added). That reading was particularly plausible, in Judge Martin's view, given the "foundational canons of statutory construction" that presume the availability of judicial review and counsel in favor of construing ambiguities in favor of noncitizens. *Id.* at 1284; *see also id.* at 1286–87 (reviewing said canons).

[34] *Id.* at 1285 (quoting Kucana v. Holder, 558 U.S. 233, 252 (2010)).

The Supreme Court affirmed.[35] Writing for the Court, Justice Barrett[36] held that the federal courts' "limited role" in the "comprehensive[]" scheme governing the exclusion of noncitizens does not extend to review of "factual findings that underlie a denial of relief."[37] She noted that the "eligibility" inquiry is just that — a threshold determination that need not result in a "favorable exercise of discretion" or, indeed, any change in a noncitizen's legal status at all.[38] In this sense, "relief from removal is 'always a matter of grace.'"[39]

With this framework in mind, Justice Barrett turned to the question at the heart of the case: "[T]he scope of the word 'judgment.'"[40] Three competing views were on offer. The Solicitor General argued that a "'judgment' refers exclusively to a decision that requires the use of discretion," like the determination of whether a noncitizen's removal would result in "exceptional and extremely unusual hardship."[41] Although Patel agreed that a "'judgment' implies an exercise of discretion," he argued that the *rest* of the phrase — a "judgment *regarding the grant*[] *of relief*" — narrows the jurisdictional bar to exclude only the *final* decision of whether to grant relief.[42] And an amicus, appointed by the Court to defend the decision below, argued that a judgment is simply "any authoritative decision," which includes any factual findings.[43]

Justice Barrett concluded that the amicus's interpretation was the only one that fit the statute's "text and context."[44] To limit its reach, she explained, would ignore not only the "expansive" language of the clause but also Congress's decision, in the wake of *Immigration & Naturalization Service v. St. Cyr*,[45] to retain judicial review over legal and constitutional questions, rather than lift the bar on judicial review altogether.[46]

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[35] *Patel*, 142 S. Ct. at 1627. Although Patel petitioned for certiorari on both questions addressed by the Eleventh Circuit — that is, whether § 1252 bars federal court jurisdiction over threshold determinations of eligibility for discretionary relief and whether § 1182 applies to immaterial misrepresentations — the Court limited its grant of certiorari to the jurisdictional question. *See* Patel v. Garland, 141 S. Ct. 2850 (2021) (mem.).

[36] Justice Barrett was joined by Chief Justice Roberts and Justices Thomas, Alito, and Kavanaugh.

[37] *Patel*, 142 S. Ct. at 1618.

[38] *Id.* at 1619.

[39] *Id.* (internal quotation marks omitted) (quoting INS v. St. Cyr, 533 U.S. 289, 308 (2001)).

[40] *Id.* at 1621.

[41] *Id.* at 1622.

[42] *Id.* (emphasis added).

[43] *Id.* at 1621 (citing, inter alia, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1223 (1993)).

[44] *Id.* at 1622.

[45] 533 U.S. 289 (2001).

[46] *Patel*, 142 S. Ct. at 1622–23 (citing 8 U.S.C. § 1252(a)(2)(D)).

Justice Gorsuch dissented.[47] Like Justice Barrett, he started with the two-step process required by requests for adjustment: first, eligibility, and second, discretion.[48] But unlike Justice Barrett, he saw this process as core to the "exception" carved out in § 1252.[49] To Justice Gorsuch, as to Patel, "regarding the granting of relief" has a "well-understood meaning" — that is, "to 'supply redress or benefit.'"[50] As such, when a judgment is "issue[d] . . . only at step one, it never reaches the question whether to grant relief or supply some redress or benefit."[51] It cannot be, then, that the plain text of § 1252 bars all judicial review.

To Justice Gorsuch, the Court committed two arch textualist sins in its analysis of § 1252. First, it created surplusage. The Court's expansive interpretation of "judgment," he explained, renders a core phrase — "regarding the granting of relief" — wholly unnecessary.[52] And second, it failed to acknowledge the statutory context. In enacting § 1252, he observed, Congress borrowed language "long used" by the Court to describe only "second-step discretionary determinations."[53] By ignoring these "contextual clues," he lamented, the Court blessed a system in which the "federal bureaucracy can make an obvious factual error . . . and nothing can be done about it."[54]

Two provisions loom large in *Patel*. One bars review of "any judgment regarding the granting of relief."[55] Another preserves jurisdiction over "constitutional claims" and "questions of law."[56] What the *Patel* Court read the former to preclude may be less important than what future courts interpret the latter to preserve. At most, the Court's opinion can be read to foreclose all judicial review whatsoever, even of meritorious claims, at least insofar as those claims are predicated on disputed facts. At a minimum, however, it can be read to foreclose only review of such facts as of right — and thus to leave open factual review in the context of procedural due process claims. Both precedent and prudence counsel for the narrow reading.

If *Patel* is read for all it might be worth, federal courts may not adjudicate any claim that turns on a contested factual finding — no matter how tendentious or absurd that factual finding may be. Justice Barrett, after all, brooked no compromise. If § 1252 is to bar review of "any judgment" that disposes of a claim, she held, "any judgment" must mean "any judgment" — "not just discretionary judgments."[57] On this view,

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47 Justice Gorsuch was joined by Justices Breyer, Sotomayor, and Kagan.

48 *Patel*, 142 S. Ct. at 1630–31 (Gorsuch, J., dissenting).

49 *Id.* at 1631.

50 *Id.* (quoting United States v. Denedo, 556 U.S. 904, 909 (2009)).

51 *Id.*

52 *Id.* at 1631–32.

53 *Id.* at 1633–34.

54 *Id.* at 1627.

55 8 U.S.C. § 1252(a)(2)(B)(i).

56 *Id.* § 1252(a)(2)(D).

57 *Patel*, 142 S. Ct. at 1622.

then, the federal courts lack jurisdiction to review any "fact[] found as part of [a] discretionary-relief proceeding[]."[58] But what of the federal courts' jurisdiction over "constitutional claims" and "questions of law"? That, presumably, includes only three inquiries: What rule governs?[59] Is that rule constitutional?[60] And how should that rule be applied to agreed-upon facts in a particular case?[61]

On this reading, valid claims of constitutional and legal right could be evaded altogether. Consider a hypothetical. Imagine, say, that an immigration judge (*J*) were to predicate a factual finding against an applicant (*A*) solely on the basis of discriminatory animus. Indeed, imagine that *J* were to deem *A* ineligible for discretionary relief under the statute at issue here — discrediting *A*'s evidence that he, like Pankajkumar Patel, made an innocent mistake — on the basis that *A*'s fringe religious views are despicable and proof of his insincerity.[62] To "single[] out" a religion "for discriminatory treatment" violates the First Amendment's Free Exercise Clause.[63] May no court hear *A*'s claim, on the basis that *J*'s credibility finding was, ultimately, a factual one?[64] Consider a variation on these facts. Imagine that *J* were to find *A* ineligible for discretionary relief because *A*, in *J*'s considered view, assassinated President Abraham Lincoln[65] — an incoherent finding based, needless to say, on pure fantasy. Under the Fifth Amendment's Due Process Clause, an

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[58] *Id.* at 1627.

[59] *See, e.g.*, Iliev v. Holder, 613 F.3d 1019, 1025 (10th Cir. 2010) (Gorsuch, J.) (reviewing whether the Board of Immigration Appeals applied the correct legal standard).

[60] *See, e.g.*, Shuti v. Lynch, 828 F.3d 440, 443 (6th Cir. 2016) (reviewing whether a deportation order violated the Constitution under the void-for-vagueness doctrine).

[61] *See* Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062, 1067 (2020) (holding that the federal courts possess jurisdiction to evaluate mixed questions of law and fact); *cf.* Kenneth Culp Davis, *Scope of Review of Federal Administrative Action*, 50 COLUM. L. REV. 559, 564 (1950) (arguing that there is no stable distinction between questions of "fact" and those of "law," given that "[e]very determination which refines the meaning of a legal concept" — such as whether a given person's actions qualify as negligence — "is to that extent analytically a determination of law").

[62] *Cf.* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1729 (2018) (explaining that a member of the Colorado Civil Rights Commission "disparage[d]" a man's religious views by describing them as "despicable" and "insincere").

[63] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993); *see also Masterpiece Cakeshop*, 138 S. Ct. at 1731 (applying this principle).

[64] It is no answer to say that a new proceeding untainted by *J*'s animus may not lead to a visa (or even a favorable credibility determination) for *A*. It is, after all, the *process* of fair and impartial review of his claim that *A* is entitled to — not any particular *outcome*. *Cf.* Tumey v. Ohio, 273 U.S. 510, 535 (1927) (holding that "[n]o matter what the evidence [is] against" a particular defendant, "he ha[s] the right to have an impartial judge" adjudicate his claim).

[65] *Cf.* 8 U.S.C. § 1182(a)(3)(B) (deeming inadmissible any person who "engaged in a terrorist activity," *id.* § 1182(a)(3)(B)(i)(I), such as "[a]n assassination," *id.* § 1182(a)(3)(B)(iii)(IV)).

administrative finding must be supported by "some evidence,"[66] even in a deportation proceeding.[67] May no court hear *A*'s claim?[68]

These stylized examples are, of course, hyperbolic.[69] But while the facts are farfetched, the idea that deportable noncitizens possess no enforceable constitutional rights is not. Indeed, as a doctrinal matter, the foreclosure of relief in such instances has been a hallmark of the Court's approach to immigration law. Two decisions, both from the Term before last, are of particular note. First, in *Department of Homeland Security v. Thuraissigiam*,[70] the Court reaffirmed the principle that "an arriving alien" at a "port of entry," even one on "U.S. soil," is considered "on the threshold" and *outside* the United States for constitutional purposes[71] — and then expanded that threshold to include a noncitizen who was apprehended *inside* the United States, twenty-five yards from the border.[72] And second, in *Agency for International Development v. Alliance for Open Society International, Inc.*,[73] the Court deemed it "long settled" that "foreign citizens outside U.S. territory" possess no constitutional rights.[74] Together, these decisions stand for the proposition that the border is, at least for noncitizens, a Constitution-free zone. Jurisdiction is of little use to those without substantive rights to assert; it should perhaps come as no surprise, then, that the scope of judicial review has shrunk as noncitizens' rights have evaporated.[75]

But the noncitizen's lot is not hopeless — at least, not yet. Just as Justice Barrett's opinion is susceptible to a broad reading, it is susceptible to a narrow reading, too, in which it closes only one avenue of review.

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66 United States *ex rel.* Vajtauer v. Comm'r of Immigr., 273 U.S. 103, 106 (1927); *see also* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 637–41 (1988) (discussing the "some evidence" requirement in the context of deportation proceedings).

67 *See, e.g.*, Reno v. Flores, 507 U.S. 292, 306 (1993) (citing Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903)). Note, however, that while noncitizens who are present in the United States ("even illegally") are entitled to due process, noncitizens "on the threshold of initial entry" — awaiting processing "on Ellis Island," for instance — are not. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212–13 (1953).

68 Justice Gorsuch hinted at this issue in a footnote in his dissent. *See Patel*, 142 S. Ct. at 1635 n.3 (Gorsuch, J., dissenting) (questioning the majority's characterization of Patel's claim as presenting "only a factual question").

69 That is not to downplay the "[r]epeated egregious failures" of the immigration courts. Kadia v. Gonzales, 501 F.3d 817, 821 (7th Cir. 2007) (Posner, J.); *see also* Quinteros v. Att'y Gen. of U.S., 945 F.3d 772, 789, 794 (3d Cir. 2019) (McKee, J., concurring, joined by Roth & Ambro, JJ.) (criticizing the Board of Immigration Appeals for frequently failing to act as a "neutral and fair tribunal," *id.* at 789, in adjudicating "claims of life-changing significance, often involving consequences of life and death," *id.* at 794).

70 140 S. Ct. 1959 (2020).

71 *Id.* at 1982–83.

72 *Id.* at 1964 (citing Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892)).

73 140 S. Ct. 2082 (2020).

74 *Id.* at 2086.

75 *Cf.* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 639–44 (2006) (explaining how "merits considerations" influence "justiciability determinations," *id.* at 642).

After all, the Court decided a claim characterized as *only a factual challenge*.[76] It had no occasion, then, to determine the federal courts' jurisdiction over challenges characterized otherwise. It noted that Congress preserved review for "legal and constitutional questions" and left it at that.[77] It is not clear, then, that the Court's conclusion (no review of factual findings) must follow from different premises (a constitutional claim predicated on disputed facts). If Patel had pleaded a procedural due process claim, what result?

Both precedent and prudence counsel for some form of review. Start with the Court's precedents. Since *Yick Wo v. Hopkins*[78] in 1886, the Court has recognized that the guarantee of due process is "universal in [its] application, to all persons within the territorial jurisdiction, without regard to differences of . . . nationality."[79] And since *Yamataya v. Fisher*[80] in 1903, that guarantee against "arbitrary power" has applied in deportation proceedings, protecting those noncitizens who have entered the United States, regardless of the legality of their initial entry.[81] Time and again, the Court has reaffirmed and applied these basic principles.[82] And one "minimum requirement" of procedural due process is that "some evidence" support a factual finding.[83]

That the relief sought is discretionary is of no matter.[84] Of course, due process attaches only to a "legitimate claim of entitlement," not to a "unilateral expectation."[85] But the issue is not so simple. Just as a criminal defendant "may have no right to object to a particular result of the sentencing process" but has "a legitimate interest in the character of the procedure which leads to the imposition of [a] sentence," a deportable

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[76] *See Patel*, 142 S. Ct. at 1619 (describing Patel's claim as whether the immigration judge's "factual findings" were "clearly erroneous"); *see also* Petition for a Writ of Certiorari at i, *Patel* (No. 20-979) (presenting the question of whether § 1252 permits judicial review of certain "threshold eligibility findings" of fact).

[77] *Patel*, 142 S. Ct. at 1623.

[78] 118 U.S. 356 (1886).

[79] *Id.* at 369; *see also* Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (explaining that the Fifth Amendment does not "acknowledge[] any distinction between citizens and resident aliens").

[80] 189 U.S. 86 (1903).

[81] *Id.* at 101 (holding that no "executive officer" may "arbitrarily" deport "an alien who has entered the country, and has become subject . . . to its jurisdiction, and a part of its population").

[82] *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (explaining that "once an alien enters the country," regardless of the legality of their entry, their "legal circumstance changes" under the Due Process Clause and describing the underlying "distinction" — between a noncitizen "who has effected an entry" and a noncitizen who has not — as one that "runs throughout immigration law"). Indeed, the *Thuraissigiam* Court predicated its rejection of a due process challenge on this "century-old rule." Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020).

[83] *E.g.*, Superintendent v. Hill, 472 U.S. 445, 454 (1985) (quoting Wolff v. McDonnell, 418 U.S. 539, 595 (1974)).

[84] The courts of appeals are split on this issue. *Compare, e.g.*, United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) (holding that noncitizens possess due process rights in immigration proceedings for discretionary relief), *with, e.g.*, Hamdan v. Gonzales, 425 F.3d 1051, 1060–61 (7th Cir. 2005) (holding that noncitizens possess no such rights).

[85] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

noncitizen may have no right to object to the second-step denial of relief but retain an interest in the determination of his first-step eligibility for discretion.[86] Indeed, *St. Cyr* held as much in the habeas context, acknowledging noncitizens' "right to challenge the Executive's failure to exercise the discretion authorized by law."[87] Here, then, as in parole revocation, sentencing, and appeals as of right, even if the Constitution does not *require* a certain procedure, if the state *chooses* to provide it, it must comport with due process in doing so.[88]

As a prudential matter, only the narrow reading promotes official adherence to law.[89] Consider the Court's approach to federal law claims predicated on issues of state law. To ensure a meritorious claim of federal right is not evaded by state law chicanery, a "nonfederal ground" for decision must have "fair or substantial support."[90] Without such review, facts could be freely "manipulated" to foreclose valid claims and federal law "nullified."[91] So, too, in the immigration domain. Indeed, in *Guerrero-Lasprilla v. Barr*,[92] a 7–2 decision handed down in the same Term as *Thuraissigiam*, the Court rejected as "extreme" an interpretation of § 1252 that would have allowed executive officials to dodge judicial review merely by "recit[ing]" the applicable legal standard, even if

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[86] Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality opinion); *see also* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 633–40 (2006) (arguing along these lines).

[87] INS v. St. Cyr, 533 U.S. 289, 308 (2001) (citing United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 267 (1954)); *see also id.* at 341 (Scalia, J., dissenting) (emphasis omitted) (describing the majority's approach as finding a "right to judicial compulsion of the exercise of Executive discretion"). In this sense, a "legitimate claim of entitlement" is created by "placing substantive limitations on official discretion" — here, fact-specific eligibility criteria. Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460, 462 (1989) (quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)).

[88] *See* Morrissey v. Brewer, 408 U.S. 471, 483–84 (1972) (parole revocation); Townsend v. Burke, 334 U.S. 736, 741 (1948) (sentencing); Evitts v. Lucey, 469 U.S. 387, 393 (1985) (appeals as of right). This disposes, too, of the argument that no due process entitlement can attach to discretionary relief from removal because of its status as a "public right." *Cf.* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (noting that Congress may entrust "the final determination" of "facts" relating to admissibility "to an executive officer"). Indeed, many of the Court's foremost procedural due process cases have arisen out of paradigmatic public-rights claims. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542–44 (1985) (public employment); Bell v. Burson, 402 U.S. 535, 535–39 (1971) (driver's licenses); Goldberg v. Kelly, 397 U.S. 254, 260–64 (1970) (welfare benefits).

[89] *Cf.* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 38 (1997) (describing one synthesis of the "rule of law" as "an interpretive process guided by publicly accessible norms and characterized by reason-giving").

[90] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 455 (1958) (quoting Ward v. Bd. of Cnty. Comm'rs, 253 U.S. 17, 22 (1920)).

[91] Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1051–52 (1977) (citing, for example, Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813), and describing the Court's "ancillary jurisdiction" over such antecedent questions as "essential" to the supremacy of federal law).

[92] 140 S. Ct. 1062 (2020).

their application of that standard was done "in a manner directly contrary to well-established law."[93] Here, as in *Guerrero-Lasprilla*, the threat of reversal for unsupportable factual findings — even if seldom realized — guards against both irrational[94] and illicit[95] decisionmaking. *Patel* should not be read to bless the carte blanche delegation that *Guerrero-Lasprilla* scorned.

Patel closes one door to judicial review. But it may leave another open. Such jurisdiction was core to what Professor Henry M. Hart, Jr., deemed the courts' "responsibility" to ensure "that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion."[96] Of course, as Hart acknowledged, it may well be that Congress can deport any alien, for any reason.[97] But if the people must "turn square corners" in dealing with the government — even in an errant checkbox on a driver's license renewal form — surely, "when so much is at stake," the government must "turn square corners in dealing with the people," too.[98] Noncitizens included.

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[93] *Id.* at 1073; *cf.* Kucana v. Holder, 558 U.S. 233, 252–53 (2010) (explaining that the IIRIRA "did not delegate to the Executive [the] authority" to "pare[] back judicial review").

[94] *See* Morgan v. United States, 298 U.S. 468, 481–82 (1936) (explaining that a "hearing," for purposes of procedural due process, requires that "the officer who makes the determinations must consider and appraise the evidence which justifies them"). If there is no evidence for a finding, then, by definition, the decisionmaker must not have considered and appraised the administrative record. *Cf.* Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1100 (1998) (acknowledging the importance of the "some evidence" requirement to protect each "alien's interest in accurate adjudication").

[95] *Cf.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (justifying strict scrutiny for racial classifications as "smok[ing] out" improper intent). The "some evidence" test acts in a similar fashion. After all, as Justice Hughes explained, it only has bite in instances where the evidence is of such an "indisputable character" that the decision itself "argues the denial of [a] fair hearing and consideration." Tang Tun v. Edsell, 223 U.S. 673, 681 (1912). One purpose of the inquiry, then, is to expose the true nature of facially neutral decisions that rest on an impermissible basis, such as nonrecord evidence or subjective hostility. *Cf.* Dickinson v. United States, 346 U.S. 389, 396–97 (1953) (finding no basis in fact for a local draft board's refusal of a ministerial exemption to a Jehovah's Witness and thus attributing the decision to mere "suspicion and speculation," *id.* at 397).

[96] Hart, *supra* note 1, at 1390.

[97] *See id.* at 1389–96; *see also* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (describing Congress's plenary power "to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions").

[98] Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1909 (2020) (quoting St. Regis Paper Co. v. United States, 368 U.S. 208, 229 (1961) (Black, J., dissenting)); *cf.* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1632 (1992) (arguing that the Court has recognized procedural due process checks on immigration proceedings "to fill the vacuum in substantive constitutional rights that the plenary power doctrine has created").