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## The Exclusion of HIV-Positive Immigrants Under the Nicaraguan Adjustment and Central American Relief Act and the Haitian Refugee Immigration Fairness Act, Statutory interpretation, Communicable disease, Public health, Legislative intent

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## NOTE

# The Exclusion of HIV-Positive Immigrants Under the Nicaraguan Adjustment and Central American Relief Act and the Haitian Refugee Immigration Fairness Act

*Shayna S. Cook\**

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### INTRODUCTION

The United States has turned away immigrants infected with the human immunodeficiency virus (“HIV”) under the public health exclusion of the Immigration and Nationality Act (“INA”)<sup>1</sup> since the mid-1980’s.<sup>2</sup> Since Congress codified the HIV exclusion in 1993,<sup>3</sup> any

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1. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525 (1994 & Supp. 1999). The public health exclusion, found in 8 U.S.C. § 1182(a)(1)(A), states that immigrants who have a “communicable disease of public health significance” are inadmissible. It is one of several grounds of inadmissibility found in the INA. Prior to 1993, the Secretary of Health and Human Services had the discretion to decide which communicable diseases should render aliens inadmissible.

2. As discussed in Part II.A *infra*, the Public Health Service added acquired immune deficiency syndrome (“AIDS”) to the list of dangerous contagious diseases excludable under

alien applying for an immigrant or nonimmigrant visa, adjustment of status to lawful permanent resident, or refugee status must first have a blood test for HIV.<sup>4</sup> The HIV exclusion is not absolute, however. Each HIV-positive alien can apply for one of two waivers of the HIV exclusion that are available in the INA. When an alien applies for immigrant or permanent resident status, he must disclose his HIV status on the application and, if he is HIV-positive, may simultaneously apply for a waiver of the exclusion. The first waiver, available to general immigrants under the INA, requires the immigrant to have an immediate family member in the United States who is a citizen or lawful permanent resident.<sup>5</sup> The idea behind this requirement is that family members will help to care, financially and otherwise, for HIV-positive relatives, thus relieving the financial burden on the government. The second waiver, available for "special" immigrants such as refugees, gives the Attorney General discretion to waive the exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest."<sup>6</sup> In other words, this humanitarian waiver is re-

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the INA in 1987. See Peter A. Barta, Note, *Lambskin Borders: An Argument for the Abolition of the United States Exclusion of HIV-Positive Immigrants*, 12 GEO. IMMIGR. L.J. 323, 327 (1998) (describing the adoption of the AIDS exclusion).

3. Pub. L. No. 103-43, 107 Stat. 122, 210 (1993). As a result of the 1993 Amendment, the INA declares inadmissible any alien "who is determined (in accordance with regulations proscribed by the Secretary of Health and Human Services) to have a communicable disease of public health significance, which shall include infection with the etiologic agent for acquired immune deficiency syndrome." 8 U.S.C. § 1182 (a)(1)(A)(i) (1994).

4. See 42 C.F.R. § 34.3(b) (1999) (discussing the requirements for serologic HIV testing of immigrants).

5. See 8 U.S.C. § 1182(g) (1994 & Supp. IV 1999):

The Attorney General may waive the application of —

(1) subsection (a)(1)(A)(i) in the case of any alien who —

(A) is the spouse or the unmarried son or daughter, or the minor unmarried lawfully adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or of an alien who has been issued an immigrant visa, or

(B) has a son or daughter who is a United States citizen, or an alien lawfully admitted for permanent residence, or an alien who has been issued an immigrant visa . . . .

6. 8 U.S.C. § 1157(c)(3) (1994). This section, which permits HIV waivers for certain refugees and asylees, reads:

[T]he Attorney General may waive [the public health exclusion] with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Any such waiver by the Attorney General shall be in writing and shall be granted only on an individual basis following an investigation.

Although the waiver articulated above is found in the refugee provision of the INA, it is reiterated in other sections of the INA that deal with special immigrants, such as the Chinese Student Protection Act. Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969. Because this waiver is available "to assure family unity," it implicitly encompasses applicants who would qualify for the familial relationship waiver. Thus, even though an applicant cannot apply for both waivers, this waiver is broader, including applicants who would qualify under either waiver. See Rebecca Kidder, Note, *Administrative Discretion Gone Awry: The Reintroduction of the Public Charge Exclusion for HIV-Positive Refugees and Asylees*, 106 YALE L.J. 389, 400-03 (1996) (discussing the different waivers of the HIV exclusion available under various provisions of the INA).

served for groups of immigrants whom Congress allows into the United States for humanitarian reasons. Which of the two waivers an immigrant can apply for depends on what type of immigration status he is seeking, because different waivers are available for aliens applying under various sections of the INA. When a new immigration law is enacted, Congress or the Immigration and Naturalization Service (“INS”) must decide which waiver should be available to HIV-positive immigrants applying under the new provision.<sup>7</sup>

The INS recently had an opportunity to decide which of these two waivers should apply to newly enacted legislation. Congress passed the Nicaraguan Adjustment and Central American Relief Act of 1997 (“NACARA”)<sup>8</sup> and the Haitian Refugee Immigration Fairness Act of 1998 (“HRIFA”),<sup>9</sup> which allow Haitian, Cuban, and Nicaraguan immigrants and illegal aliens who have been in the United States since December 1995 to adjust their status to that of lawful permanent resident.<sup>10</sup> The humanitarian purpose of these laws, as this Note discusses, was to recognize and respond to the unique situations of these individuals who fled particularly horrific political conditions in their home countries by allowing them to reside permanently in the United States.<sup>11</sup> NACARA and HRIFA (hereinafter “the Acts”) constitute

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7. The INA includes all immigration laws. When a new immigration law is enacted, it enters the U.S. Code as an amendment of the INA, codified in 8 U.S.C. When Congress is silent on which waiver should apply to a new provision, the INS must decide which waiver is appropriate through rulemaking procedures.

8. District of Columbia Appropriations Act, Pub. L. No. 105-100, Title II (Nicaraguan Adjustment and Central American Relief Act), 111 Stat. 2160, 2193 (1997) (amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997)). While NACARA appears in the 1999 Supplement to the United States Code as an amendment to 8 U.S.C. § 1255, this Note uses the public law citation.

9. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Title IX (Haitian Refugee Immigration Fairness Act of 1998), 112 Stat. 2681, 2681-538 (1998). While HRIFA appears in the 1999 Supplement to the United States Code as an amendment to 8 U.S.C. § 1255, this Note uses the public law citation.

10. Although both NACARA and HRIFA included a filing deadline of April 1, 2000, members of both the House and Senate introduced bills to extend the deadline, since the INS's final regulations in response to the Acts did not come out until March 24, 2000. *See* 146 CONG. REC. S617-19 (daily ed. Feb. 10, 2000) (introduction of S. 2058 by Sen. Graham); 146 CONG. REC. E64 (daily ed. Feb. 2, 2000) (statement of Rep. Meek). The Senate Judiciary Committee approved the legislation to extend the deadline on April 13, 2000. *See* Michael Posner, *Cubans, Haitians, Nicaraguans May Get New Residency Status Deadline*, THE NATIONAL JOURNAL, COMMITTEE MARKUPS AND VOTES THURSDAY, APR. 13, 2000 (describing the Senate Judiciary Committee markup of S. 2058). Since the 107th Congress began in January 2001, a bill extending the deadline of HRIFA and NACARA has already been reintroduced in the House and referred to the House Judiciary Committee. Central American and Haitian Adjustment Act of 1999, H.R. 348, 107th Cong. (2001).

11. *See* DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1998, S. PRT. 106-23, at 657-68 (Haiti) (1999) (discussing ongoing human rights abuses in Haiti); DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997, 105 CONG., at 481-94, 591-601 (Cuba and Nicaragua) (1998) (discussing ongoing human rights abuses in Cuba and Nicaragua); *see also* IRWIN P. STOTZKY, SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY (1997); Matias F. Travieso-Diaz, *Immigra-*

exceptions to the general adjustment of status provision under the INA, in that they grant permanent resident status to applicants even if they are inadmissible for many reasons, including illegal entry and potential financial burden on the government.<sup>12</sup> Applicants under the Acts are still subject to some of the inadmissibility provisions that are barriers to adjustment of status, including the HIV exclusion.

In regulations adopted pursuant to the Acts, the Immigration and Naturalization Service requires HIV-positive applicants under the Acts to apply for the waiver of the HIV exclusion that is dependent on the applicant's immediate family relationship with a United States citizen or permanent resident.<sup>13</sup> The INS regulations with respect to waivers of the HIV exclusion do not allow HRIFA and NACARA applicants to apply for the waiver for humanitarian reasons available to other HIV-positive refugees and special immigrants.<sup>14</sup> Seemingly, it would be easier for HIV-positive applicants to assert humanitarian reasons for the INS not to deport them in their waiver applications than to prove the requisite family relationship because HRIFA and NACARA constitute Congress's recognition that the United States should not send these applicants who have been living in the United States since 1995 back to Haiti, Cuba, and Nicaragua. Thus, the INS effectively chose the waiver with more difficult requirements for HIV-positive applicants to meet.

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*tion Challenges and Opportunities in a Post-Transition Cuba*, 16 BERKELEY J. INT'L L. 234 (1998).

12. The Acts allow for adjustment of status for an alien who "is otherwise admissible to the United States for permanent residence, except that, in determining such admissibility, the grounds for inadmissibility specified in paragraphs (4) [public charge], (5) [labor certification], (6)(A) [aliens previously deported], (7)(A) [documentation requirements], and 9(B) [guardians accompanied excluded persons] of section 212(a) [of the INA] shall not apply." § 902 (a)(1)(B), 112 Stat. at 2681-538 (HRIFA). The same language is included in NACARA. § 202 (a)(1)(B), 111 Stat. at 2193.

13. 8 C.F.R. § 245.13 (c) (2000) (NACARA); 8 C.F.R. § 245.15(e)(2) (2000) (HRIFA). These regulations refer HIV-positive applicants seeking waivers of excludability to a section of the C.F.R. that requires applicants subject to the public health exclusion to have a qualifying familial relationship with a United States citizen or permanent resident. *See* 8 C.F.R. § 212.7(4)(b)(1) (2000) (authorizing a waiver under § 212(g) of the INA, which requires a family relationship). *See also* Adjustment of Status for Certain Nationals of Haiti, 65 Fed. Reg. 15,835 (Mar. 24, 2000) (introducing the Final Rule for both NACARA and HRIFA, eight days before the statutory filing deadline).

14. In its discussion of its final rule for HRIFA, the INS addressed comments it received relating to which waiver should be available for HIV-positive applicants under HRIFA. The INS rejected the possibility of allowing the humanitarian waiver for HIV-positive applicants, concluding that this waiver only applied to the adjustment of status of refugees under 8 U.S.C. § 1159, and that the INS did not have the statutory authority to adopt the humanitarian waiver here. *See* Adjustment of Status for Certain Nationals of Haiti, 65 Fed. Reg. at 15,837. As this Note argues, the INS misconstrued the legislative intent behind the Acts and their position within the INA as a whole. The INS did, however, open the possibility that HIV-positive Haitians who were paroled into the United States for the purpose of receiving medical treatment could be given a discretionary waiver. *See* 8 C.F.R. § 245.15(e)(2) (2000). It is unclear how this discretion would help Haitians without qualifying family members, however, since the familial relationship is mandatory to obtaining such a waiver.

This Note considers the appropriateness of the INS's HIV waiver regulations under HRIFA and NACARA. Courts generally afford administrative agency interpretations of statutes great deference under the *Chevron* doctrine, unless the agency regulation is contrary to legislative intent.<sup>15</sup> *Chevron* requires courts to review administrative actions under a two-pronged analysis to determine whether the agency's regulation is an abuse of its congressionally delegated discretion.<sup>16</sup> Under the first prong, a reviewing court determines if Congress clearly addressed the precise question; if it did, and the agency regulation does not match Congress's clear intent, the agency abused its administrative authority.<sup>17</sup> If Congress's intent is not clear, the court turns to the second prong of *Chevron*, under which it must defer to the agency's construction of the statute as long as that construction is permissible.<sup>18</sup>

Subsequent courts have clarified what "clear" intent under the first prong entails, determining that legislative intent need not be clear on the textual surface and that courts may look beyond the text of the law to determine whether Congress's intent was clear.<sup>19</sup> The Supreme Court has adopted a holistic approach to statutory construction, which requires courts to look beneath the surface of the statute to divine legislative intent.<sup>20</sup> The Fourth Circuit in *Brown & Williamson To-*

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15. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

16. See *id.* at 842-43.

17. See *id.* ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If 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.") (citation omitted). In a footnote following the previous quotation, the Court clarified that intent should be determined through the traditional tools of statutory construction:

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

*Id.* at 843 n.9 (internal citations omitted).

18. See *id.* at 843 ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. 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.") (citations omitted).

19. See, e.g., Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2091 (1990) ("The Court's own decisions, however, suggest that the mere fact of a plausible alternative is insufficient to trigger the *Chevron* rule."). But see Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 520 (arguing that a statute should be regarded as ambiguous when "two or more reasonable, though not necessarily equally valid, interpretations exist").

20. See *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 475 (1997) (demonstrating through its reasoning that courts should consider "the history of evolving congressional regulation in the area"); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (reasoning

*bacco Corporation v. FDA* synthesized the Court's "holistic approach" to statutory construction as involving four considerations: 1) the plain language of the statute; 2) the overall statutory scheme; 3) legislative history; and 4) a consideration of other relevant statutes.<sup>21</sup>

If, after conducting this multi-faceted analysis under the first prong of *Chevron*, a statute is still ambiguous with respect to a specific issue, courts move on to the second *Chevron* inquiry: whether the agency's regulation is based on a permissible construction of the statute.<sup>22</sup> Ambiguity arises only after a reviewing court has looked for Congress's specific intent using all of the traditional tools of statutory construction: plain language, context and structure of the statute, and legislative history.<sup>23</sup> Although courts generally give agencies more discretion if the statute is ambiguous,<sup>24</sup> the regulation must still be reasonable "in

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that "Act[s] of Congress should not be read as a series of unrelated and isolated provisions"); *United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (instructing courts to "look to the provisions of the whole law, and to its object and policy" (citing *United States v. Boisdore's Heirs*, 8 How. 113, 122 (1849))); *Dole v. United Steelworkers*, 494 U.S. 26, 35 (1990) ("On a pure question of statutory construction . . . [o]ur starting point is the language of the statute,' . . . but 'in expounding a statute we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' ") (citations omitted); *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988) (characterizing statutory interpretation as a "holistic endeavor": "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . ."); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (utilizing the "ordinary canons of statutory construction," including the statutory language, its congruence with the international treaty, and the legislative history).

21. *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 162-63 (4th Cir. 1998), *aff'd*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

22. See *supra* note 18.

23. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect, and the regulations at issue must be fully consistent with it.") (citation omitted); *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1448 (D.C. Cir. 1988) ("[W]e are not persuaded that Congress's intent is clear within the meaning of *Chevron*. That is to say, our employment of the traditional tools of statutory interpretation has left us in doubt as to what Congress had in mind on the precise issue at hand.").

24. See *Cont'l*, 843 F.2d at 1453-54:

[I]t is elementary in administrative law that, at least where Congress's intent is unknown, an agency's interpretation (if reasonable) is entitled to deference from the Article III branch. This notion is premised on the very nature of our system of government, with its time-tested separation of governmental powers. . . . To depart from the culture of deference (again, as always, where Congress's specific intent on the question at hand is unclear) is to do violence to basic structural principles relied upon by Congress and the President in creating the agency in the first instance and endowing it with powers to interpret, administer and enforce that portion of the law of the land.

See also Sunstein, *supra* note 19, at 2105 ("On the question of reasonableness, it seems clear that the agency must be given considerable latitude. But this is not to say that the agency may do whatever it wishes.").

light of the language, legislative history, and policies of the statute.”<sup>25</sup> The reasonableness inquiry includes an examination of the agency’s textual analysis of the statute, including its analysis of legislative history, and a determination of the compatibility of the agency’s interpretation to the congressional purposes behind the statute.<sup>26</sup> If the regulation is contrary to Congress’s policy goals in enacting the statute, a court will find that it is not a reasonable interpretation of the law and thus an abuse of administrative discretion.<sup>27</sup> In performing this analysis, courts must consider Congress’s goals in light of the legislative history of the statute, including compromises between competing goals.<sup>28</sup>

This Note utilizes this holistic approach to statutory construction to argue that the INS regulations regarding the HIV exclusion under the Acts are contrary to clear congressional intent and thus an abuse of administrative discretion. This Note further argues that even if the intent of Congress is not clear and the Acts are ambiguous as to waivers of the HIV exclusion, the INS’s regulations for HIV-positive applicants are unreasonable in light of Congress’s humanitarian purposes in enacting HRIFA and NACARA. Part I examines the plain language of the Acts, concluding that because Congress did not explicitly address the HIV exclusion in the Acts, it is necessary to look elsewhere to determine legislative intent concerning this issue. Part II discusses Congress’s intent behind the Acts and the HIV exclusion itself, concluding that the most important reason behind the HIV exclusion — cost — is not relevant under HRIFA and NACARA. Moreover, because Congress intended to create an unprecedented immigration remedy in response to political unrest in these countries, the administrative regulations under the Acts should reflect the congressional goal of giving the applicants — even the HIV-positive ones — special treatment. This discussion of legislative intent is relevant both to show Congress’s clear intent under *Chevron* prong one and to evaluate the

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25. *Republican Nat’l Comm. v. Fed. Election Comm’n*, 76 F.3d 400, 406 (D.C. Cir. 1996) (quoting *Natural Res. Def. Council v. United States EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987)). See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 392 (1999) (vacating an FCC rule because of the agency’s unreasonable interpretation of the statute).

26. See *Cont’l*, 843 F.2d at 1449 (“In our view, reasonableness in this context is to be determined by reference both to the agency’s textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that interpretation with the Congressional purposes informing the measure.”).

27. See *id.* at 1452 (“‘Reasonableness’ in this context means, we are persuaded, the compatibility of the agency’s interpretation with the policy goals (as carefully identified in the manner previously described) or objectives of Congress.”).

28. See *id.* at 1451 (“[P]recision of goal identification must be the order of the day. . . . [T]he goal (or more precisely, the competing and conflicting goals) must be identified with care and respect for the compromise-laden legislative process.”); see also *Republican Nat’l Comm.*, 76 F.3d at 406 (“Examining again the statute and its legislative history, we find no basis for questioning the reasonableness of [the regulation at issue]. As we have already concluded, nothing in the statute or its legislative history limits the Commission to requiring a single request, or precludes the Commission from requiring a follow-up.”).

INS's reasonableness under prong two. Part III considers the INS regulations in light of other relevant immigration statutes and Congress's overall statutory scheme for immigration law. A consideration of relevant statutes is useful in evaluating the regulations under both prongs of *Chevron*. Part III argues that because the INS treats HIV-positive applicants differently under HRIFA and NACARA than under other immigration laws based on similar legislative purposes, the INS violated Congress's intent to give HRIFA and NACARA applicants the same protection as applicants under analogous laws. This Note concludes that the INS should voluntarily change the waiver requirements in its regulations; courts should find the waiver regulation to be an abuse of administrative discretion and vacate the rule; or Congress should amend the law to specify that the humanitarian waiver is available for HIV-positive applicants.<sup>29</sup>

### I. THE PLAIN LANGUAGE OF NACARA AND HRIFA

The first step in statutory interpretation is to look at the plain language of the statute.<sup>30</sup> Because the Acts do not mention the HIV exclusion or waiver explicitly, the plain language of the Acts does not conclusively demonstrate Congress's clear intent with respect to HIV-positive applicants. As mentioned above, the Acts allow Haitian, Nicaraguan, and Cuban nationals who have been continuously present in the United States since December 1995 and are otherwise admissible to adjust their status to permanent resident.<sup>31</sup> Applicants are not

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29. Although both NACARA and HRIFA include a clause that limits the judicial review of a decision by the Attorney General as to whether or not the status of any alien should be adjusted under the Acts, the Supreme Court has distinguished between judicial review of an administrative action on a particular case and judicial review of an administrative regulation under an act of Congress generally. *See Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667 (1986). In terms of the legislative reform solution, it is worth noting that the Central American and Haitian Parity Act of 1999, which was introduced in the Senate, included technical amendments to NACARA and HRIFA. Among the amendments was a provision that would grant the Attorney General discretion to waive the public health exclusion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. *See* 145 CONG. REC. S10944-45 (daily ed. Sept. 15, 1999) (statement of Sen. Durbin concerning the bill, S. 1592). The last legislative action on this bill was in September 1999, when it was referred to the Senate Committee on the Judiciary. The Central American and Haitian Adjustment Act of 1999, which was reintroduced in the House in January 2001, would likewise amend the HIV waiver under NACARA and HRIFA. Central American and Haitian Adjustment Act of 1999, H.R. 348, 107th Cong. (2001).

30. *See Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."); *see also* NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION 81-83 (5th ed. 1992).

31. *See supra* notes 8-10 and accompanying text.

required to have been paroled<sup>32</sup> or admitted into the United States, which means they need not have entered the country legally. The key phrase in the Acts relevant to the HIV exclusion is that applicants must be “otherwise admissible,” which indicates that the grounds for inadmissibility of immigrants under the INA (including the HIV exclusion) apply to HRIFA and NACARA applicants.<sup>33</sup> The Acts explicitly waive some of the inadmissibility grounds, including the likelihood of becoming a public charge, failure to obtain a labor certification, entering the country illegally, and violating documentary requirements for entry.<sup>34</sup> The Acts do not waive the HIV exclusion, however, and do not specify which waiver should be available for HIV-positive applicants; in fact, the Acts do not mention HIV or the public health exclusion at all.

Another interpretation of the Acts might conclude that the plain language is quite clear: Congress explicitly waived other inadmissibility grounds in the Acts, indicating that the legislators considered each

32. Parole is an executive power used in part to accommodate large numbers of refugees temporarily. Since the adoption of the Refugee Act of 1980, the Attorney General has used parole to allow large groups of “refugees” into the United States who do not meet the technical refugee definition under the Act but should be allowed to stay temporarily for “urgent humanitarian reasons or significant public benefit.” 8 U.S.C. § 1182(d)(5)(A) (Supp. V 1999). Many HRIFA and NACARA applicants were paroled into the United States, although it is not a requirement in the Acts. Because parole is only effective for a certain amount of time, when it expires, the parolee can be returned automatically unless the Attorney General extends the deadline. *See* 8 C.F.R. § 212.5(d) (2000).

33. The Acts allow for adjustment of status for an alien who “is otherwise admissible to the United States for permanent residence, except that, in determining such admissibility, the grounds for inadmissibility specified in paragraphs (4) [public charge exclusion], (5) [labor certification requirement], (6)(A) [aliens previously deported], (7)(A) [documentation requirements], and 9(B) [guardians accompanying excluded persons] of section 212(a) [of the INA] shall not apply.” Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Title IX (Haitian Refugee Immigration Fairness Act of 1998), Div. A, § 101(h), (a)(1)(A), 112 Stat. 2681, 2681-583 (1998); Nicaraguan Adjustment and Central American Relief Act, District of Columbia Appropriations Act, Pub. L. No. 105-100, Title II (Nicaraguan Adjustment and Central American Relief Act), tit. III, 111 Stat. 2160, 2193 (1997) (amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997)).

34. *See* statutory references *supra* note 33; *see also INS Sets Application Procedures for Nicaraguans and Cubans Under NACARA*, 75 INTERPRETER RELEASES 724, 725 (1998). The INS explicitly undermines the public charge waiver in its informal instructions to HIV-positive HRIFA applicants on its website, by attempting to add a public charge requirement to HIV-positive applicants seeking waivers of the HIV exclusion. The INS website, under “Questions and Answers about HRIFA,” includes the following information about HIV-positive HRIFA applicants:

Individuals must apply for a waiver under Section 212(g) of the INA. To be eligible an alien must have a qualifying family relationship and also demonstrate that:

- Their illness will not pose a danger to the public health of the United States;
- The possibility of the spread of infection is minimal; and
- Their illness will not result in any cost being incurred by any government agency without prior consent of the agency.

Questions and Answers, at <<http://www.ins.gov/graphics/publicaffairs/questsans/HRIFAQA.htm>> (last visited Sept. 10, 2000).

of the inadmissibility grounds in deciding which ones to waive, and thereby made a conscious decision not to waive the HIV exclusion. This maxim of statutory interpretation, *expressio unius est exclusio alterius*,<sup>35</sup> dictates that where the legislature enumerates items that are excluded from the law, the items not listed should be assumed not to be excluded.<sup>36</sup> While the *expressio unius* maxim makes logical sense, it must be used with caution. Because the maxim looks only to the text and organization of the statute to determine legislative intent, it should not be relied upon if other tools of statutory interpretation, such as looking to the legislative history and purposes behind the statute, indicate that Congress's intent was otherwise.<sup>37</sup> Here, Congress's explicit waivers of other grounds of inadmissibility shed light on its priorities. Notably, the Acts waive the exclusion of immigrants who could someday become a "public charge" (i.e., a financial burden on the government), demonstrating that Congress was willing to ignore the financial risk of allowing potentially costly immigrants into the country — the major impetus behind Congress's adoption of the HIV exclusion in 1993.<sup>38</sup> Additionally, the complete waiver of the public charge inadmissibility undermines the need for the familial relationship waiver of the HIV exclusion. The requirement of an immediate family member in the United States is financially motivated, rooted in Congress's effort to ensure that there is someone other than the government to take care of HIV-positive immigrants medically and financially. The humanitarian waiver seems more appropriate, given Congress's humanitarian — rather than fiscal — priorities evidenced on the face of the Acts and, as discussed in Section II.B, in the legislative history. Thus, a brief look below the surface of the Acts indicates that the *expressio unius* argument is not dispositive of Congress's intent in this situation.

Moreover, the *expressio unius* argument is only powerful as a response to an argument for waiving the HIV exclusion entirely; if Congress intended the Acts to eliminate the exclusion, it would have done so explicitly when it waived other provisions. The issue in this Note, however, is not whether Congress intended to eliminate the HIV exclusion entirely, but which waiver of the HIV exclusion should be available to HRIFA and NACARA applicants. In the Acts, Con-

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35. Defined as: "the expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 581 (6th ed. 1990).

36. See SINGER, *supra* note 30, at 216-17.

37. See *id.* at 234 ("[I]n the usual circumstances the application of the maxim is subordinated to the basic rule of statutory construction that the intent of the statute prevails over the letter."); see also *Burns v. United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.").

38. See *infra* Section II.B.

gress is silent on the issue of which waiver of the HIV exclusion should be available. One might infer that this silence indicates that Congress intended the waiver requiring a family relationship, which is found in the general inadmissibility section of the INA and applied to all general immigrants as a default. But legislative silence is not a dispositive indicator of legislative intent.<sup>39</sup> The text of the Acts, in terms of the permanent immigration relief they provide to a large number of refugees, does not support the INS requirement that HIV-positive applicants must have an immediate family member who is a United States citizen or permanent resident. Instead, the plain language of the Acts sheds light on Congress's broader purpose of providing widespread humanitarian relief, and the INS should have recognized this purpose and chosen the waiver for humanitarian reasons.

The arguments above indicate that the plain language of NACARA and HRIFA can be interpreted both ways on the issue of which waiver should be available for HIV-positive applicants. But the holistic approach to discerning Congress's clear intent under the first prong of *Chevron* does not end with plain language or the absence thereof.<sup>40</sup> Because the statutory language is ambiguous, further examination of the legislative history of the Acts and the HIV exclusion and the structure of the Immigration and Nationality Act is necessary to discern Congress's clear intent under the first prong of the *Chevron* analysis.<sup>41</sup>

## II. UNDERSTANDING THE LEGISLATIVE HISTORY OF NACARA AND HRIFA IN LIGHT OF THE LEGISLATIVE HISTORY OF THE HIV EXCLUSION

A consideration of the legislative history behind NACARA and HRIFA in light of the legislative history behind the codification of the

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39. See, e.g., *Nat'l. Rifle Assoc. of Am. v. Reno*, 216 F.3d 122, 129 (D.C. Cir. 2000) ("Heeding the Supreme Court's recent warning, '[w]e do not rely on Congress's failure to act' as dispositive evidence of congressional intent.") (citation omitted); *Brown v. Secretary of Health & Human Servs.*, 46 F.3d 102, 108 (1st Cir. 1995) ("[N]onaction by Congress is ordinarily a dubious guide. . . ." (citing *Brown v. Gardner*, 513 U.S. 115, 121 (1983))).

40. See *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 162 (4th Cir. 1998), *aff'd*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

41. Courts should refrain from looking at the broad purposes of legislation when the plain language of a specific provision of a law is unambiguous. See *Trustees of the Chicago Truck Drivers (Independent) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 830 (7th Cir. 1996). When the plain language is ambiguous, however, courts should look to the legislative history of the law. See *Central States, Southeast and Southwest Areas Pension Fund v. Robinson Cartage Co.*, 55 F.3d 1318, 1323 (7th Cir. 1995). Importantly, the ambiguity of the statutory language does not automatically indicate that Congress's *intent* was not clear in terms of the *Chevron* analysis. In other words, ambiguous language does not push the analysis from *Chevron* prong one to *Chevron* prong two; rather, courts look beyond the statutory language to determine if Congress's intent was clear. See also Sunstein, *supra* note 19.

HIV exclusion of immigrants reveals that Congress viewed the financial reasons underlying the HIV exclusion as subordinate to its policy reasons for NACARA and HRIFA. Section II.A discusses Congress's policy reasons for enacting the HIV exclusion, demonstrating that the legislative history highlights the primary policy priority as a financial one. Section II.B discusses the legislative history of the Acts, which indicates that Congress intended the Acts to provide humanitarian relief for immigrants who fled horrific conditions and should not be forced to return home. Additionally, the Acts reflect Congress's decision to further the United States' international foreign policy priorities in Nicaragua, Cuba, and Haiti and to provide immigration relief regardless of the cost. This Part concludes that, given Congress's intent to grant widespread immigration exceptions to Nicaraguans, Cubans, and Haitians for both diplomatic and humanitarian reasons, the INS's strict waiver policy for HIV-positive HRIFA and NACARA applicants (which focuses on avoiding costs) undermines congressional intent. The INS should have recognized this humanitarian legislative intent and chosen the more appropriate waiver of the HIV exclusion available under the INA — the waiver based on humanitarian reasons.

#### A. Congress's Policy Reasons Behind the HIV Exclusion

To determine whether the INS's regulations concerning HIV-positive applicants under HRIFA and NACARA are consistent with congressional intent, it is necessary to consider the legislative intent behind Congress's creation of the HIV exclusion in immigration law generally. As the Supreme Court has directed, one level of holistic statutory construction under *Chevron* is a consideration of relevant statutes.<sup>42</sup> The HIV exclusion, which is part of the INA, is relevant because every new immigration statute that requires applicants under it to be admissible, including HRIFA and NACARA, subjects applicants to the HIV exclusion. This section examines the legislative intent behind the HIV exclusion, concluding that the primary reasons Congress originally passed it in 1993 — financial and political concerns, not public health concerns — are not important under HRIFA and NACARA, because these Acts demote monetary concerns to secondary status. This section then discusses Congress's intention to treat refugees differently than other immigrants with respect to the HIV ex-

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42. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (noting that acts of Congress "should not be read as a series of unrelated and isolated provisions"); *United Sav. Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) (statutory interpretation is a "holistic endeavor" that includes an examination of the statute's full text, its structure, and the subject matter); *United States v. Stewart*, 311 U.S. 60, 64 (1940) ("[A]ll acts *in pari materia* are to be taken together, as if they were one law" (quoting *United States v. Freeman*, 3 How. 556, 564 (1845))); *Brown & Williamson*, 153 F.3d at 162.

clusion, concluding that, by analogy, HRIFA and NACARA applicants should be treated differently as well.

Although the United States has excluded aliens with communicable diseases since the beginning of modern immigration law, the justification behind the exclusion has evolved from public health concerns to monetary and political concerns. The history of the public health exclusion goes back to the Immigration and Nationality Act of 1952, which declared immigrants who were infected with "any dangerous contagious disease" inadmissible.<sup>43</sup> It was the responsibility of the Public Health Service ("PHS") (within the Department of Health and Human Services ("HHS")) to determine which diseases should be included on this list. In 1987, the PHS added AIDS to the list.<sup>44</sup> In response, the Senate unanimously passed an amendment requiring the PHS to substitute HIV for AIDS on the list. This quick congressional response, at a time when Senators knew very little about this relatively new and mysterious virus, was a sign that the HIV exclusion was to be a politically charged issue, born out of fears of the American electorate, rather than a reasoned scientific response to a health risk.<sup>45</sup> Congress diminished the impact of this amendment when it passed the Immigration Act of 1990,<sup>46</sup> which replaced "dangerous contagious disease" with "communicable disease of public health significance" and granted authority to the Secretary of HHS to determine which diseases fit this definition.<sup>47</sup>

The permanent codification of the HIV exclusion was the result of a long political battle.<sup>48</sup> As scientists learned more about HIV, HHS realized that the virus was communicable only through certain behaviors, not by casual contact like tuberculosis (the type of disease the public health exclusion was designed to prevent), and in 1991, Secretary of HHS, Dr. Louis Sullivan, proposed that HIV be removed from

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43. Immigration and Nationality Act, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182 (1952).

44. Barta, *supra* note 2, at 326.

45. See Elizabeth Mary McCormick, Note, *HIV-Infected Haitian Refugees: An Argument Against Exclusion*, 7 GEO. IMMIGR. L.J. 149, 157 (1993) ("The decision to act in this area may well have resulted from the belief that the rapid spread of this 'new' disease in the United States, coupled with fear and ignorance of the public about how it was spread, called for drastic measures."). Senator Helms led the charge for this amendment. See *id.*

46. Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified in scattered sections of 8 U.S.C.).

47. 8 U.S.C. § 1182(a)(1)(A)(i) (1994).

48. In the debates over the codification of the HIV exclusion, Senator Simpson postulated that the reason Congress wanted to take away the HHS Secretary's authority to determine which diseases were of public health significance was because HIV "has become now a political football . . . I have a feeling that that is exactly what this is, under the pressure of a political campaign and a political response and a political payoff." 139 CONG. REC. 2,870 (1993) (remarks of Sen. Simpson).

the list.<sup>49</sup> This proposal received a negative response from many conservatives in Congress and members of the general public.<sup>50</sup> President Clinton took part in the debate as well, expressing his intention to eliminate the HIV exclusion shortly after taking office.<sup>51</sup> Republicans in Congress responded by initiating an amendment to the National Institutes of Health Revitalization Act of 1993 that provided that HIV would permanently constitute a “communicable disease of public health significance” under the public health exclusion.<sup>52</sup>

The primary concern reflected in the congressional debates over this amendment was the enormous cost of treating HIV-positive immigrants.<sup>53</sup> Editorials on the subject also focused on the financial burden on taxpayers.<sup>54</sup> One of the strongest arguments against the fiscal rationale behind the amendment was that the HIV exclusion was not necessary to prevent the costs to taxpayers because the INA already contained an exclusion of immigrants who were likely to become public charges.<sup>55</sup> The amendment’s supporters rejected this response, perhaps because the issue had become so highly politicized.

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49. Sullivan’s reasoning for the proposed removal of HIV from the list of communicable diseases was:

The risk of (or protection from) HIV infection comes not from the nationality of the infected person, but from the specific behaviors that are practiced. Again, a careful consideration of the epidemiological principles and current medical knowledge leads us to believe that allowing HIV infected aliens into this country will not impose a significant additional risk of HIV infection to the United States population, where prevalence of HIV infection is already widespread. Our best defense against further spread of HIV infection, whether from a U.S. citizen or alien, is an educated public.

McCormick, *supra* note 45, at 160 (quoting Medical Examination of Aliens, 56 Fed. Reg. 2485 (1991)).

50. House Republicans sent a letter to Sullivan, signed by fifty-seven representatives, urging him to reconsider the proposed rule. Additionally, the HHS received more than 40,000 letters opposing the proposed rule, many from conservative religious groups. In response to this backlash, the Justice Department tabled the proposal. Barta, *supra* note 2, at 329-30.

51. Philip J. Hilts, *Clinton to Lift Ban on H.I.V.-Infected Visitors*, N.Y. TIMES, Feb. 9, 1993, at A17. See also Barta, *supra* note 2, at 335.

52. Pub. L. No. 103-43, 107 Stat. 210 (1993). The amendment was proposed by Republican Senator Don Nickles.

53. See 139 CONG. REC. 2,850 (1993) (remarks of Sen. Kassebaum) (“[M]y concern lies in the area of potential financial costs to an already beleaguered American health system. . . . [A] single AIDS case is currently estimated to cost about \$102,000 over the lifetime of the patient.”). Senator Phil Gramm clarified that the issue was one of fiscal responsibility, not one of compassion: “First, compassion is what you do with your money, not what you do with the taxpayers’ money; and second, compassion ought to begin at home.” 139 CONG. REC. 2,861 (1993) (remarks of Sen. Gramm).

54. One prominent example came from Republican Senator Don Nickles of Oklahoma: “HIV persons will be flocking to the United States to have taxpayers pick up their health care expenses.” *What Insanity Could Persuade the United States of America to Admit to Its Shores Immigrants Testing Positive to HIV, the AIDS Virus?*, DAILY OKLAHOMAN, Feb. 14, 1993, at 10, available at 1993 WL 7973345.

55. See National Institutes of Health Revitalization Act of 1993, 139 CONG. REC. 3,016 (1993) (statement of Sen. Hatfield):

The supporters of the HIV exclusion were also concerned with protecting the health of American citizens, although these concerns seem somewhat secondary to financial concerns.<sup>56</sup> Moreover, these appeals to public health concerns were undermined by the medical experts' opinion that HIV does not fit the definition of a "communicable disease of public health significance" under the 1990 Immigration Act, because it is not spread through casual contact and does not put people in public settings at risk.<sup>57</sup> Ultimately, the opposition to the amendment from some Democrats, health care providers, the scientific community, and AIDS advocacy groups was not enough to ensure its defeat, and the amendment was adopted.<sup>58</sup>

The primacy of the legislators' financial concern in passing the HIV exclusion is evident in the waiver of the HIV exclusion available for general immigrants under the INA. This waiver admits HIV-positive immigrants who have a close family relative who is a United States citizen or permanent resident.<sup>59</sup> The familial connection has nothing to do with the public health risks posed by the HIV-positive applicant, but it is relevant to the likelihood that the applicant will not become a public charge if he has relatives to help finance his medical bills. The focus on financial concerns in the general waiver gives rise to

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I voted to oppose the Nickles amendment [which codified the HIV exclusion] today because I felt it attempted to make a medical decision for economic reasons. I do not believe Congress is the proper authority for making medically and scientifically based decisions of this nature. The current public charge exclusions more appropriately address the economic concerns and provide immigration officials with the basis for excluding those they believe will become public charges due to their medical conditions. If Congress is truly concerned with the economic costs associated with new immigrants, I feel it would be more appropriate to take a closer look at the public charge exclusions, rather than making medical decisions for political reasons.

139 CONG. REC. 2,855 (1993) (statement of the National Commission on Acquired Immune Deficiency Syndrome, Washington, DC) ("Public charge provisions of the Immigration and Nationality Act require all applicants for immigrant and non-immigrant visas to demonstrate that they are not likely to become public charges. Anyone who does not do so is denied a visa and precluded from either visiting or immigrating to the United States.").

56. As Senator Simpson noted, "[HIV] is certainly a contagious disease whose only prognosis as far as we know — and it is a terrible tragedy — is death, and [it] already affects 1.5 million Americans." But he then went on to characterize the "public significance" of HIV in terms of medical care expenses: "[A] disease, which has such high medical costs, has to be of public health significance unless one would argue that health care costs are not of public health significance." This focus on the high cost of treating HIV indicates that, in Senator Simpson's opinion, the public health significance of HIV was bound up with its economic significance. 139 CONG. REC. 2,870 (remarks of Sen. Simpson).

57. These medical experts, from organizations including the Centers for Disease Control and Health and Human Services, concluded that HIV is "not spread by casual contact, through the air, or from food, water or other objects, nor will an infected person in a common public setting place another individual inadvertently or unwillingly at risk." 139 CONG. REC. 2,854 (1993) (news release from the U.S. Department of Health and Human Services, Jan. 25, 1991).

58. The final vote tally was 76 to 23. 139 CONG. REC. 3,016 (1993).

59. 8 U.S.C. § 1182(g) (2000).

an inference about which waiver Congress intended for HIV-positive applicants under NACARA and HRIFA. In these Acts, Congress explicitly waived the public charge exclusion, sending a message that applicants should be admitted under these special statutes regardless of the possibility of their becoming a public charge.<sup>60</sup> Congress must have known that applicants were likely to fall under the public charge exclusion given the economic and political conditions from which they fled.<sup>61</sup> The waiver of the public charge exclusion demonstrates that Congress believed that the purpose of the Acts overshadowed its fiscal concerns. Thus, taking the inference one step further, Congress implicitly prioritized the humanitarian and foreign policy purposes of NACARA and HRIFA over the primarily fiscal purpose of the HIV exclusion.<sup>62</sup> Although Congress probably did not intend to waive the exclusion entirely, the INS should have looked to the legislative purpose behind the HIV exclusion and the public charge waiver within HRIFA and NACARA to inform its choice between HIV waivers. Because the INS did not consider the purpose of the HIV exclusion, which is relevant under both prongs of *Chevron*, its regulations are contrary to legislative intent and thus an abuse of discretion.

Another relevant factor in the legislative history of the 1993 amendment codifying the HIV exclusion is Congress's intent to treat HIV-positive refugees differently than other HIV-positive immigrants.<sup>63</sup> In the debates over the amendment, the Senate discussed the

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60. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Title IX (Haitian Refugee Immigration Fairness Act of 1998), 112 Stat. 2681, 2681-583 (1998); Nicaraguan Adjustment and Central American Relief Act, District of Columbia Appropriations Act, Pub. L. No. 105-100, Title II (Nicaraguan Adjustment and Central American Relief Act), tit. III, 111 Stat. 2160, 2193 (1997) (amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997)).

61. See, e.g., Haitian Refugee Immigration Fairness Act, Hearing before the Subcomm. on Immigration of the Comm. on the Judiciary, 105th Cong. 10 (1997) (letter to Sen. Abraham from Alfonso Oviedo-Reyes, Attorney, Nicaraguan Fraternity) ("As you are aware, Haiti has a fragile economy and it is recovering from the devastating effects of a civil struggle that required the U.S. to send troops to Haiti in order to bring stability and guarantee the rights of the Haitian citizens."); see also DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1998, S. PRT. 106-23, at 658 (1999) (Haiti) ("Haiti is an extremely poor country, with a per capita annual income of about \$500. . . . About two-thirds of the population work in subsistence agriculture, earn less than the average income, and live in extreme poverty. A small, traditional elite controls much of the country's wealth."); DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1997, 105 CONG., at 591 (Nicaragua) (1998) ("Nicaragua is an extremely poor country. . . . The unemployment rate was officially estimated at 14 percent, with underemployment reaching 35 percent."); U.S. DEP'T OF STATE, 1997 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1997, 105 CONG., at 481 (Cuba) (1998) ("[T]he economy remained depressed due to the inefficiencies of the centrally controlled economic system.").

62. See *infra* Section II.B.

63. Under the international refugee definition in the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 6261, 189 U.N.T.S. 150, 152, a refugee is an individual who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the

situation of HIV-positive refugees as distinct from other immigrants. Statements by several Senators signify a recognition that the HIV exclusion is not absolute, but must yield to other, greater concerns such as the plight of refugees.<sup>64</sup> Comments from members of Congress indicate that Congress did not intend to include refugees and other special immigrants within the blanket HIV exclusion, but intended for the waiver for humanitarian purposes under the Refugee Act of 1980 to remain intact.<sup>65</sup> The ideas in these statements can be extended by analogy to HRIFA and NACARA, because as Sections II.B and III.B discuss, Congress enacted the Acts in order to grant quasi-refugee remedies to Haitian, Nicaraguan, and Cuban immigrants who, like refugees, fled inhumane conditions.

### B. *Legislative Intent Behind NACARA and HRIFA*

Under *Chevron*, courts look to the legislative history of statutes to determine whether the history clarifies Congress's intent under the "holistic" method of statutory construction of *Chevron* prong one<sup>66</sup> and, if Congress's intent is not clear, to ascertain Congress's purposes to decide whether the agency's regulation was unreasonable under

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country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. . . ." The United States signed on to the treaty, adopting the definition, in the 1967 Protocol Relating to the Status of Refugees. *See* Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 6225, 606 U.N.T.S. 267, 268. The treaty requires special treatment of individuals who meet the refugee definition.

64. Senator Simpson pointed out that refugees were not subject to the HIV exclusion: "This amendment does not affect refugees who are admitted under another provision which allows waivers of medical exclusion." 139 CONG. REC. 2,871 (1993) (remarks of Sen. Simpson). This statement is not completely true, because the Refugee Act specifies that refugees and asylees are still subject to the HIV exclusion, although they can apply for a waiver based on humanitarian purposes and the public interest. *See infra* Section III.B.

Interestingly, this debate took place at a time when over 200 HIV-positive Haitians who had fled their country were being detained in a quarantined camp in Guantanamo Bay. Several Senators expressed concern about these people being allowed to come to the United States. But as Senator Simpson pointed out, these Haitians did not meet the definition of refugee anyway, because many of them fled for primarily economic reasons. Additionally, the detainees can be distinguished from HRIFA applicants because they were outside the United States and these debates took place before HRIFA was enacted. The comments are interesting, however, because they reveal a commonly held belief that a substantial percentage of Haitians are HIV-positive. *See* 139 CONG. REC. 2,860 (1993) (remarks of Sen. Nickles) ("I have heard reports that in Haiti alone, the HIV population may range as much as 11 percent, and that is a tragedy.").

65. Senator Bob Dole, discussing the waiver authority of the Attorney General, affirmed that "[n]o one has argued that this waiver authority should be altered." 139 CONG. REC. 2,866 (remarks of Sen. Dole). *See supra* note 64 (remarks of Sen. Simpson concerning the HIV waiver for refugees).

66. *See Chevron U.S.A., Inc. v. Natural Res., Inc.*, 467 U.S. 837, 851-53 (1984) (looking to the legislative history of the Clean Air Act to see if Congress's intent was clear on the issue); *see also* Scalia, *supra* note 19, at 515 ("[I]t seems to me that the 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences.").

*Chevron* prong two.<sup>67</sup> Explicit discussion of the waiver of the HIV exclusion in the legislative history is not necessary to ascertain Congress's clear intent under *Chevron* prong one. Even if this failure to discuss the precise issue renders the legislative history unclear under the first prong of *Chevron*, the legislative history sheds light on Congress's purposes to the extent necessary to determine that the INS's interpretation of that intent in its regulations was unreasonable under *Chevron* prong two.

Congress intended NACARA and HRIFA to provide permanent immigration relief to Haitians, Nicaraguans, and Cubans fleeing horrific situations in their home countries. This section discusses the legislative history of the Acts, which demonstrates Congress's humanitarian purpose. The legislative history of the Acts is relatively scant, as NACARA was never referred to or discussed in a committee, and both Acts were eventually passed within large appropriations bills. But there are enough sources of legislative history to understand Congress's purposes and policy reasons for enacting NACARA and HRIFA, including a Senate Explanatory Memorandum, floor testimony from the House and Senate debates of NACARA, and a Senate immigration subcommittee hearing on HRIFA.<sup>68</sup> Like the Acts themselves, none of the legislative history touches on the HIV exclusion issue or the available waivers of the exclusion from which the INS might choose. Nonetheless, the INS had a duty to recognize the humanitarian purpose demonstrated in the legislative history, and it should have chosen the less restrictive humanitarian waiver of the HIV exclusion. The humanitarian waiver, which takes into consideration humanitarian reasons to refrain from sending the HIV-positive applicant back to his home country, is more appropriate, given that the Acts were based on an understanding that there are, in fact, humanitarian reasons to allow these refugees to stay in the United States permanently. This section concludes that under both prongs of *Chevron*, the INS had a duty to recognize Congress's humanitarian intent in adopting the Acts and to choose the waiver of the HIV exclusion that would better further Congress's goals.

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67. See *Cont'l Airlines v. Dep't of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988) ("In our view, reasonableness in this context is to be determined by reference both to the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that interpretation with the Congressional purposes informing the measure.").

68. Both of these documents are appropriate for ascertaining congressional intent. Although Committee Reports are generally considered the most authoritative source of legislative intent, committee hearings are considered useful, particularly for insight into Congress's purpose. Likewise, statements in floor debate, particularly when made by the bill's sponsor, are indicative of legislative intent. See William N. Eskridge, Jr. & Philip P. Frickey, *CASES AND MATERIALS ON LEGISLATION* 709-10, 717-19 (2d ed. 1995); see also *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972) (construing the statute by relying almost entirely on statements at Senate hearings by Senator John Kennedy, the bill's sponsor, and his advisor).

Because NACARA was enacted approximately ten months prior to HRIFA and HRIFA's language was modeled on NACARA, it is appropriate to look first to the legislative history of NACARA. The purposes of the bill, as reported in the Explanatory Memorandum reprinted in the Congressional Record, were as follows:

The purpose of this Act is to ensure that nationals of certain specified countries who fled civil wars and other upheavals in their home countries and sought refuge in the United States, as well as designated family members, are accorded a fair and equitable opportunity to demonstrate that, under the legal standards established by this Act, they should be permitted to remain, and pursue permanent resident status, in the United States. In recognition of the hardship that those eligible for relief suffered in fleeing their homelands and the delays and uncertainty that they have experienced in pursuing legal status in the United States, the Congress directs the Department of Justice and the Immigration and Naturalization Service to adjudicate applications for relief under this Act expeditiously and humanely.<sup>69</sup>

This statement of purpose indicates that NACARA was a humanitarian measure, intended to give immigrants who fled inhumane situations permanent immigration relief in the United States. The House floor debates on NACARA support this purpose as well.<sup>70</sup> Additionally, Congress specifically directed the INS to adjudicate NACARA applications "humanely."<sup>71</sup> The humanitarian waiver of the HIV exclusion would have effectuated this mandate, because the waiver requires the Attorney General to determine whether there are humanitarian reasons for the INS not to send the applicant back to his home country. Congress's statement of purpose recognizes the existence of such humanitarian reasons, and the INS should have followed Congress's guidance.

A secondary purpose behind NACARA was administrative convenience. The statement above mentioned the delays that NACARA applicants had faced in the processing of their asylum cases, and this concern was reiterated at other points of the legislative history as well.<sup>72</sup> The concern is a legitimate one; asylum cases require an exten-

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69. EXPLANATORY MEMORANDUM REGARDING TITLE II OF THE D.C. APPROPRIATIONS PORTION OF THE OMNIBUS APPROPRIATIONS BILL SUBMITTED BY MESSRS. MACK, GRAHAM, ABRAHAM, KENNEDY, AND DURBIN, reprinted in 143 CONG. REC. S12266 (daily ed. Nov. 9, 1997) [hereinafter EXPLANATORY MEMORANDUM].

70. See District of Columbia Appropriations Act, 143 CONG. REC. H10,678 (daily ed. Nov. 12, 1997) (statement of Rep. Davis) ("The inclusion of this legislation in the D.C. appropriation bill will bring a measure of justice to thousands who have fled oppression in their native land to seek the freedom and opportunity offered in this Nation.").

71. See EXPLANATORY MEMORANDUM, *supra* note 69, at S12266.

72. See, e.g., EXPLANATORY MEMORANDUM, *supra* note 69, at S12267 ("[A]pplication of the foregoing approach would greatly reduce the need for protracted analysis of the more subjective aspects of the suspension [of deportation] standard, thereby reducing the adminis-

sive individualized assessment, which is expensive and leaves applicants without status as they wait for a resolution.<sup>73</sup> But it is notable that Congress's solution to the administrative problem was to allow all Nicaraguans and Cubans who had been in the United States since 1995 to become permanent residents, regardless of their potential cost to society or the likelihood of success in their asylum claims. The solution Congress chose to the administrative problem indicates that it was more concerned about providing a quick, permanent resolution and removing barriers to immigration relief than saving money.

The Senate Immigration Subcommittee hearing on HRIFA indicates that Congress was motivated by similar humanitarian concerns when it passed HRIFA almost a year later. As when enacting NACARA, Congress was concerned, especially in light of the harsh deportation requirements enacted in 1996 in the Illegal Immigrant Reform and Immigrant Responsibility Act ("IIRIRA"), that Haitians who resided in the United States with temporary status might be deported. Senator Spencer Abraham, Chairman of the Senate Immigration Subcommittee, elaborated on these concerns in his opening remarks:

In recent years, many people came to the United States under a legal or quasi-legal status, fleeing tyrannical regimes that were either enemies of the United States or allies whose domestic abuses were countenanced because of the country's strategic significance in the struggles for world freedom that were going on at the time. I noted during the [NACARA] debates that retroactive application of the new standards would likely force some of these people to leave, despite the roots they have laid down, and the fact that the conditions they were returning to remained dangerous.<sup>74</sup>

Senator Abraham's remarks indicate that Congress was motivated by an unwillingness to send Haitians back to the dangerous situations they fled in Haiti. As with NACARA, the HIV waiver available to applicants who could demonstrate that there were humanitarian reasons not to send them home would be more appropriate to fulfill Congress's purpose.

Congress had another purpose in enacting HRIFA that was not present in NACARA: ensuring that Haitian immigrants were treated

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trative burden on the Immigration and Naturalization Service and minimizing further delays in according relief to these individuals.").

73. See, e.g., *Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 19 (1997) (statement of Rep. Díaz-Balart) ("[T]hese refugees filed asylum petitions, oftentimes during lengthy processing times, for Immigration to evaluate their claims. . . . It is estimated that approximately 4,000 of these asylum claims are still pending.").

74. *Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration, of the Senate Comm. on the Judiciary*, 105th Cong. 2-3 (1997) (statement of Sen. Abraham).

fairly by U.S. immigration laws. Members of Congress were acutely aware of the historic disparate treatment of Haitian refugees in comparison to other similar groups, most prominently Cubans.<sup>75</sup> In light of the passage of NACARA, members of the Congressional Black Caucus convinced other members of Congress and President Clinton that U.S. immigration law should treat similarly situated refugees the same.<sup>76</sup> The legislative history of HRIFA indicates that Congress was in fact motivated in part by the lack of consistent treatment of refugees.<sup>77</sup> This secondary motive is relevant to the HIV waiver question because it indicates that Congress chose to provide widespread immigration relief to Haitians through HRIFA, which it had consistently failed to do previously, so the more lenient HIV waiver is appropriate to fulfill Congress's intent.

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75. In 1994, Representative Carrie Meek proposed a Haitian Refugee Fairness Act that would have provided Temporary Protected Status to Haitians, thereby relieving the "unfairness, inequity and the perception of racial prejudice" that characterized U.S. policy toward Haitian refugees and asylees. *U.S. Policy Toward Haiti: Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 103rd Cong. 7 (1994) (testimony of Rep. Meek). Representative Corrinne Brown agreed: "For too long, Haitian refugees have been treated differently from other refugees, particularly Cuban refugees." *Haitian Asylum-Seekers: Hearing Before the Subcomm. on International Law, Immigration and Refugees of the House Comm. on the Judiciary*, 103rd Cong. 68 (1994) (statement of Rep. Brown). Although this bill was not passed, it was a precursor to the Haitian Refugee Immigration Fairness Act of 1998, which was founded upon the principle of providing the same humanitarian relief to similarly situated refugees.

76. When Congress enacted NACARA in 1997, President Clinton — under pressure from the Congressional Black Caucus and other groups — finally recognized this prejudice by ordering a policy of Deferred Enforced Departure, which protected Haitians from deportation until legislation comparable to NACARA could be passed. *See Clinton Orders Deferred Enforced Departure for Haitians*, 75 INTERPRETER RELEASES 2 (1998) ("Like Central Americans, Haitians for many years were forced to seek the protection of the United States because of oppression, human rights abuses and civil strife at home. . . . [w]hile we have been encouraged by Haiti's progress following the restoration of democratic government in 1994, the situation there remains fragile.") (quoting President Clinton). *See, e.g., Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 3 (1997) (statement of Sen. Abraham) ("U.S. immigration law, in my judgment, should not turn on arbitrary distinctions between members of different nationalities."); *see also* Annette C. Escobar, Note and Comment, *Aggravating the Immigration Paradox: The Nicaraguan Adjustment and Central American Relief Act's Effect on U.S. Immigration Policy*, 11 ST. THOMAS L. REV. 445, 473-74 (1999) (discussing Congress's acknowledgment that NACARA inherently discriminated against Haitians).

77. As stated by Senator Kennedy:

[Haitians] endured repression and suffered persecution at the hands of successive governments. Haitians supporting democracy have faced torture, extra-judicial killings, imprisonment, and other forms of persecution. . . . The call for democracy is being heard around the world, and America's voice has always been the loudest. How can we advocate democracy on the one hand, and then deny protection to those who heed our call and are forced to flee their homeland as a result?

144 CONG. REC. S13003 (daily ed. Nov. 12, 1998) (statement of Sen. Kennedy). *See Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 14-15 (1997) (statement of Rep. Conyers) (discussing the inequity to Haitian refugees in NACARA and in the history of U.S. immigration law's treatment of Haitian refugees in general); *id.* at 38-40 (statement of Miraan Sa, Amnesty International) (discussing the ongoing human rights abuses in Haiti).

The historical context of the United States' immigration policies toward and relationships with Nicaragua, Haiti, and Cuba indicates that Congress also had foreign policy reasons for enacting NACARA and HRIFA.<sup>78</sup> In addition to the legislative purposes discussed above, NACARA and HRIFA represent congressional decisions to provide special relief above and beyond what is normally available through United States immigration policy — a recurring theme in diplomatic relations with these countries. Congress singled out Haitians, Cubans, and Nicaraguans for preferential immigration treatment to compensate for the United States' involvement in — and in some cases, responsibility for — the political situations in these countries.<sup>79</sup>

NACARA is a continuation of the United States' scheme of special immigration protection for Cubans over the past several decades and a reiteration of American disapproval of Communism. The United States has used immigration policy as a political tool to fight Communism in Cuba since the Cuban Revolution of 1959 caused a mass emigration to the United States.<sup>80</sup> Because it viewed the Communist regime under Fidel Castro as inherently abhorrent and oppressive, the United States was (and is) reluctant to return anyone to such conditions.<sup>81</sup> Coupled with this anti-Communist motive is a humani-

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78. As Senator Kennedy pointed out, "President Clinton and Secretary Albright have repeatedly stated that it is America's long-standing foreign policy to ensure the continuing stability and viability of emerging, yet still fragile, democracies in Central America and Haiti." 145 CONG. REC. S10,946 (daily ed. Sept. 15, 1999) (remarks of Sen. Kennedy) (discussing not the Acts at issue in this Note but the proposed Central American and Haitian Parity Act, which would amend the Acts discussed here).

79. See *Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 2-3 (1997) (statement of Sen. Abraham) ("In recent years, many people came to the United States under a legal or quasi-legal status, fleeing tyrannical regimes that were either enemies of the United States or allies whose domestic abuses were countenanced because of the country's strategic significance in the struggles for world freedom that were going on at the time."). Indeed, as Michael Walzer observed, a government feels the most obligation to assist refugees in two situations: when it has helped to turn the individuals into refugees by direct involvement in the unrest that has uprooted them, and when the individuals are persecuted precisely because they are ideologically and/or ethnically similar to its own citizens. MICHAEL WALZER, *SPHERES OF JUSTICE* 49 (1983).

80. Travieso-Diaz, *supra* note 11, at 251 ("U.S. policy toward Cuba in the last forty years has been motivated exclusively by the interest of the United States in fighting Communism and replacing the current Cuban government with a democratic regime.").

81. See *The Clinton Administration's Reversal of United States Immigration Policy Toward Cuba*, *Hearing Before the Subcomm. on the Western Hemisphere of the House Comm. on International Relations*, 104th Cong. 1 (1995) (comments of Chairman Dan Burton):

For over 30 years, the United States has had a policy of accepting people who are fleeing Communist oppression from the island of Cuba. The oppressive policies of the Castro regime are known around the world. Not only has Fidel Castro supported violent revolution around our hemisphere, but he also has assisted in revolutionary organizations in Africa, the Middle East, and elsewhere.

The recent international custody battle over 6-year old Elian Gonzalez, who fled Cuba and was rescued in the high seas and brought to America in late 1999, highlighted the fact that

tarian concern about human rights conditions in Cuba.<sup>82</sup> Congress codified this sentiment in the Cuban Refugee Adjustment Act of 1966, which allowed Cubans who were paroled into the United States to adjust their status to lawful permanent resident after two years, without having to surmount the barriers of proving their eligibility for asylum.<sup>83</sup> In fact, the Senate explained that NACARA was modeled after the Cuban Adjustment Act.<sup>84</sup> Cuban refugees continue to receive special immigration treatment in contrast to other refugees, most notably Haitians.<sup>85</sup>

The United States' immigration remedies for Nicaraguan refugees, including NACARA, grew out of a sense of obligation resulting from American involvement in the civil war between the Contras and the Sandanistas in the 1980s, which drained the Nicaraguan economy and compelled citizens to seek refuge.<sup>86</sup> Congress responded with various

U.S.-Cuba immigration policy is really about the eternal political disagreement between communism and democracy. See Joseph Contreras, *The War Over Elian*, NEWSWEEK, Jan. 17, 2000, at 22-25.

82. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 105 CONG., at 481 (Cuba) (1997) ("The [Cuban] Government's human rights record remained poor. It continued systematically to violate fundamental civil and political rights of its citizens.").

83. Cuban Refugees, Adjustment of Status, Pub. L. No. 89-732, 80 Stat. 1161 (1966). See Travieso-Diaz, *supra* note 11, at 239 n.20 ("Congress in effect decided that because Castro was Communist, in general no Cubans should be deported."). The administration adhered to this open door policy even during the infamous Mariel boatlifts of 1980, when approximately 125,000 Cubans fled subsequent to Castro's removal of the exit restrictions at the Mariel port. See *id.* at 242. In April 1996, the Senate voted to keep the Cuban Refugee Adjustment Act intact until Cuba has a democratic government, at which point it will be repealed. See *id.* at 250. Haitians have pointed to this open-ended law as evidence of U.S. immigration policy's differential treatment of Haitians and Cubans. See Cheryl Little, *Intergroup Coalitions and Immigration Policies: The Haitian Experience in Florida*, 53 U. MIAMI L. REV. 717, 733 (1999) ("The Cuban Refugee Adjustment Act . . . accounts in large measure for the stark difference in treatment between the two groups. But what makes this law so remarkable is that it is open-ended, has no cut-off date, and has not been repealed.").

84. See EXPLANATORY MEMORANDUM REGARDING TITLE II OF THE D.C. APPROPRIATIONS PORTION OF THE OMNIBUS APPROPRIATIONS BILL SUBMITTED BY MESSRS. MACK, GRAHAM, ABRAHAM, KENNEDY, AND DURBIN, reprinted in 143 CONG. REC. S12266 (daily ed. Nov. 9, 1997).

85. See, e.g., *The Clinton Administration's Reversal of United States Immigration Policy toward Cuba*, Hearing Before the Subcomm. on the Western Hemisphere of the House Comm. on International Relations, 104th Cong. 2 (1995) (comments of Chairman Dan Burton). Contrasting Cuban refugees to economic refugees, the Chairman stated:

Now we are confusing people who are fleeing oppression from Castro's Cuba with people who are coming here for economic reasons. . . . The people who are coming here for economic reasons from Mexico and elsewhere are not coming because they are fleeing oppression, but rather they are coming here to make a living and we have a terrible problem with that. However, those who are fleeing for their lives, those who are fleeing to bring their families to safety out of the horrible conditions that exist in Cuba because of the Communist terror down there, those who do not want to be thrown into Castro's dungeons, have a right to be free.

86. Approximately 126,000 Nicaraguans applied for asylum in the United States between 1981 and 1991: "What happened when these various people came to our country was

special immigration measures, but because none of them provided the permanent immigration relief that NACARA provided, Nicaraguans were left in an in-between status — neither permanent residents nor illegal aliens.<sup>87</sup> When Congress passed IIRIRA in 1996 and the INS began to apply its deportation provisions retroactively, Nicaraguans under these programs were in danger of deportation.<sup>88</sup> Congress solved this quandary by enacting NACARA, which provided the permanent solution necessary to avoid deporting these Nicaraguans and thus maintain consistency in its policy of providing humanitarian relief to Nicaraguan refugees.<sup>89</sup> Congress intended NACARA to provide

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somewhat different than what happened to others who have come here. . . . Indeed, the actions with regard to the Nicaraguans in particular suggests that the American Government was actively promoting the notion that those Nicaraguans, fearful of the outcome of these uprisings, come to America.” 143 CONG. REC. S10,199 (daily ed. Sept. 30, 1997) (statement of Sen. Abraham).

87. These legislative responses began with the Nicaraguan Review Program from 1985 to 1995, which temporarily protected Nicaraguan asylum applicants from deportation while their asylum cases were under review and allowed rejected asylum-seekers to reapply for asylum instead of being deported. This reapplication provision essentially allowed Nicaraguan asylum-seekers an extra level of review. See PRESIDENT’S MESSAGE TO CONGRESS TRANSMITTING A LEGISLATIVE PROPOSAL TO PROVIDE RELIEF TO CERTAIN ALIENS WHO WOULD OTHERWISE BE SUBJECT TO REMOVAL FROM THE UNITED STATES, H.R. DOC. NO. 105-111, at 1-2; see also 143 CONG. REC. S10,199 (daily ed. Sept. 30, 1997); Linda Kelly, *Defying Membership: The Evolving Role of Immigration Jurisprudence*, 67 U. CIN. L. REV. 185, 224 (1998). When the program expired in 1995, the INS encouraged Nicaraguans to apply for suspension of deportation, which was available to aliens who had lived continuously in the United States for seven years. See *id.* at 225.

88. IIRIRA replaced suspension of deportation with the more restrictive cancellation of removal. Cancellation generally requires the applicant to demonstrate: 1) ten years of physical presence in the United States; 2) good moral character during that time; 3) no convictions of certain crimes, including crimes “involving moral turpitude”; and 4) “exceptional and extremely unusual” hardship not to the applicant, but to a U.S. citizen or permanent resident spouse, parent, or child of the applicant. 8 U.S.C. § 1229b(b)(1) (Supp. V 1999). This retroactive application of IIRIRA and the problems it caused for Nicaraguans was the subject of a class-action suit in a Florida district court. See *Tefel v. Reno*, 972 F. Supp. 623, 650 (S.D. Fla. 1997) (granting preliminary injunction that prevented the INS from deporting any of the class members or dismissing their applications for suspension of deportation). This preliminary injunction was vacated and the case remanded by the Eleventh Circuit Court of Appeals in response to the enactment of NACARA, which rendered many of the class members’ claims moot by allowing Nicaraguans to bypass the suspension of deportation process and apply for adjustment to permanent resident status. See *Tefel*, 180 F.3d at 1293-94; see also Kelly, *supra* note 87, at 226-27 (discussing the impact of the *Tefel* case on legislators’ decisions regarding NACARA).

89. Members of the Senate discussed the impact of IIRIRA on Nicaraguans in their consideration of NACARA. See 143 CONG. REC. S10,196-202 (daily ed. Sept. 30, 1997). Senator Abraham summarized the need for consistency in the United States’ policy toward Nicaragua:

[I]n the 1980’s, this country actively encouraged people fearing persecution, fearing death squads, fearing disruptions of their communities to come to America. Then we took extraordinary measures to make it feasible for them to stay here, even those who had been denied asylum through the official asylum-seeking procedures . . . .

143 CONG. REC. S10,199-200 (daily ed. Sept. 30, 1997). Senator Mack reiterated Senator Abraham’s consistency concerns:

widespread relief to refugees fleeing a political situation in which the United States was directly involved.

United States involvement in Haiti in the past decade has primarily focused on promoting democracy, but this focus has not been as acute as the obsession with defeating Communism in Cuba.<sup>90</sup> When a military coup cut short the democratically-elected regime of Jean-Bertrand Aristide in September 1991, Haitian citizens fled the violence and poverty that ensued.<sup>91</sup> Congress's solution — interception of Haitians at sea and return to Haiti — although congruent with the United States' historical treatment of Haitians, differed markedly from its policy toward Cuban refugees.<sup>92</sup> In May 1994, President Clinton temporarily suspended this direct return policy and instituted a policy of transporting intercepted refugees to a safe haven on Guatanamo Bay for processing of their asylum claims.<sup>93</sup> But this policy

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[I]n essence, we went to bat for [the Central American refugees] in the 1980's to protect democracy and to move them toward freedom and capitalism, and today [they] are still struggling in that battle. To send several hundred thousand individuals back into an environment . . . where the unemployment rate is 60 percent, would destabilize those countries, which would be just the opposite of the effort that we made in the 1980's.

143 CONG. REC. S10,201 (daily ed. Sept. 30, 1997) (statement of Sen. Mack).

Senator Abraham emphasized this concern again during the hearings on HRIFA:

Unfortunately, various sections of [IRIRA] . . . have had some perverse impacts on a variety of different fronts that have been, as a consequence, issues to be addressed by those of us in the 105th Congress. The combination of the changes to the suspension of deportation procedures and the cap of 4,000 per year on those who could be suspended and adjusted, was together a very devastating set of procedures with regard to people who had been in various processes seeking to have their status adjusted here in the United States.

*Haitian Refugee Immigration Fairness Act: Hearing Before the Senate Subcomm. on Immigration of the Comm. on the Judiciary*, 105th Cong. 2 (1997) (statement of Sen. Abraham).

90. See Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 710-14 (1993) (distinguishing U.S. treatment of Cuban and Haitian asylum-seekers based on the political bent of their home countries). As Lennox notes, the United States is more likely to grant asylum to people fleeing Communist regimes: "Even today, 90 percent of asylees hail from communist countries." *Id.* at 711 (citation omitted).

91. Congress considered this election "the most free and fair elections in [Haitian] history." *U.S. Policy Toward Haiti: Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 103rd Cong. 1 (1994) (statement of Chairman Christopher Dodd). See Elizabeth Kay Harris, *Economic Refugees: Unprotected in the United States by Virtue of an Inaccurate Label*, 9 AM. U. J. INT'L L. & POL'Y 269, 279 (1993). As Harris discusses, Haitian civilians were subject to unemployment, starvation, and constant fear of attack, as "economic conditions become inseparable from political conditions." *Id.* at 282.

92. From 1981 to 1991, U.S. policy toward Haitian refugees consisted of using the Coast Guard to prevent them from reaching the United States. See Lennox, *supra* note 90, at 703-04. After the 1991 coup, the administration introduced a parole process, whereby Haitians were intercepted at sea and interviewed at Guatanamo Bay. Those who met the threshold "credible fear" standard for asylum claims were temporary paroled into the United States to apply for asylum. See 143 CONG. REC. E2,382 (daily ed. Nov. 13, 1997) (extension of remarks of Rep. Conyers).

93. See Susan Martin, Andy Schoenholtz, and Deborah Waller Meyers, *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L. J. 543,

was short-lived: after U.S. troops returned Aristide to power in October of 1994, the U.S. government sent the Haitians in Guantanamo Bay refugee camps back to their homeland, even though members of the military continued to make Haiti unsafe for Aristide supporters.<sup>94</sup> As discussed above, HRIFA represents Congress's acknowledgment that U.S. immigration policy for Haitians was inconsistent with the policy for Cubans, given that Congress had similar foreign policy concerns about both neighboring countries.

This discussion of the United States' involvement and interest in Cuba, Nicaragua, and Haiti supports the evidence of legislative intent found in the legislative history of the Acts. The United States has a long history of involvement in the political regimes of these countries, and feels a sense of obligation to its political allies who fled these abusive regimes. Congress, recognizing the inhumane circumstances HRIFA and NACARA applicants fled and the unstable political conditions in their home countries, intended the Acts to provide a comprehensive, humanitarian immigration solution. In addition, widespread relief negated the need to evaluate each applicant's asylum claim individually. When these concerns are compared to the financial justification behind the HIV exclusion discussed in Section II.A, it seems that the humanitarian HIV waiver is more consistent with Congress's intent than the waiver based on familial ties to the United States. Because the INS did not heed Congress's purposes when choosing the proper HIV waiver under the Acts, its waiver regulations are both contrary to legislative intent under *Chevron* prong one and unreasonable under *Chevron* prong two, and thus an abuse of administrative discretion.

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554 (1998); STOTZKY, *supra* note 11, at 37 (discussing Clinton's move as a response to political pressure from the Congressional Black Caucus and human rights groups). Many of these people were paroled into the United States after immigration officials determined that they had a credible asylum claim. HRIFA granted these parolees permanent residence status, based on a recognition that their asylum claims might not be successful and, even if they were, might not provide a permanent remedy. See *Haitian Refugee Immigration Fairness Act: Hearing before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 19 (1997) (statement of Rep. Díaz-Balart) (stating that of the approximately 11,000 Haitians who were paroled through Guantanamo Bay between 1991 and 1993, 4,000 of their asylum claims are still pending).

94. See Martin et al, *supra* note 93, at 555; STOTZKY, *supra* note 11, at 39-41; see also *U.S. Policy Toward Haiti: Hearing Before the Subcomm. on Western Hemisphere and Peace Corps Affairs of the Senate Comm. on Foreign Relations*, 103rd Cong. 63 (1994) (testimony of Holly Burkhalter, Advocacy Director, Human Rights Watch). Ms. Burkhalter discussed the state of human rights in Haiti in 1994: "Haitians remain in the relentless grip of the military and armed thugs, who murder, attack, and harass suspected Aristide supporters with impunity." And although many Haitians sought relief through the U.S. refugee program, "the sea has proved safer for them than the U.S. Embassy's refugee program." *Id.*

### III. COMPARING THE INS REGULATIONS UNDER NACARA AND HRIFA TO OTHER IMMIGRATION LAWS

A comparison of NACARA and HRIFA to other immigration laws demonstrates that Congress intended the Acts to provide permanent immigration relief analogous to that available under the Refugee Act and other special immigration laws contained within the INA. Special immigrants under these laws can apply for an HIV waiver for humanitarian reasons, unlike general immigrants, who must apply for the waiver based on family relationships. The INS chose the latter HIV waiver in its regulations for NACARA and HRIFA, even though both waivers were available in the INA and Congress considered NACARA and HRIFA applicants to be more like special immigrants than general immigrants. Thus, the INS's HIV waiver is inconsistent with the structure of the INA as a whole and thereby contrary to legislative intent.

Looking to other immigration provisions within the INA is a legitimate method to determine legislative intent under the holistic approach to statutory construction. As the Supreme Court advised in *Gustafson v. Alloyd Co.*, in determining legislative intent, congressional acts "should not be read as a series of unrelated and isolated provisions."<sup>95</sup> Other relevant statutes should be considered along with them *in pari materia*.<sup>96</sup> The Supreme Court recently employed this method in *FDA v. Brown & Williamson Tobacco Corp.*,<sup>97</sup> in which it invalidated the Food and Drug Administration's ("FDA") tobacco regulations. To ascertain legislative intent, the Court looked beyond the plain language of the Food, Drug, and Cosmetic Act ("FDCA"), which granted the FDA authority to regulate drugs and devices, to other congressional statutes regulating the use of tobacco. The Court considered statutes enacted both prior to and subsequent to the enactment of the FDCA.<sup>98</sup> Other immigration laws are relevant to NACARA and HRIFA under this analysis, because all of the laws are included within the INA and newly enacted laws are codified as

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95. 513 U.S. 561, 570 (1995).

96. Statutes that are "*in pari materia*" are "those relating to the same person or thing or having a common purpose." BLACK'S LAW DICTIONARY 791 (6th ed. 1990).

97. 529 U.S. 120 (2000).

98. *Id.* at 142-58. Justice O'Connor, writing for the majority, summarized the Court's holding:

In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.

*Id.* at 1297.

amendments of the INA.<sup>99</sup> Even if these relevant statutes do not indicate Congress's clear intent concerning the HIV waiver under *Chevron* prong one, looking to other statutes is a valid method of discerning the reasonableness of the INS's waiver policy under *Chevron* prong two.

This Part utilizes the above method to determine the legislative intent of NACARA and HRIFA by comparing the provisions and requirements of the Acts with other immigration provisions. Section III.A contrasts the statutory requirements for adjustment of status to permanent resident under the Acts to the general requirements for immigrants who wish to adjust their status, concluding that, by deleting many of the adjustment requirements for applicants under the Acts, Congress intended to make it easier for these Haitians, Nicaraguans, and Cubans to adjust their status to permanent resident. Section III.B compares the statutory and regulatory provisions for adjustment under the Acts with the provisions for refugee and asylum status, arguing that the INS's restrictive regulations for HIV-positive HRIFA and NACARA applicants contradict Congress's attempt to allow these Haitians, Nicaraguans, and Cubans to bypass the barriers to qualifying for asylum. Section III.C analogizes the Acts to similar ad hoc legislation for immigrants from certain countries, concluding that because these laws are similar in purpose to NACARA and HRIFA, the INS should have looked to them to determine which waiver should be available for HIV-positive HRIFA and NACARA applicants. This Part concludes that, because Congress intended HRIFA and NACARA to provide permanent, widespread immigration relief that is more like refugee law and other special immigration measures than relief available to general immigrants, the INS should have imitated the HIV waiver available under special immigration laws rather than the one available under general immigration law.

#### A. *Adjustment of Status for Immigrants Generally*

A comparison of the requirements and barriers to adjustment of status from immigrant to permanent resident in the INA with those in HRIFA and NACARA demonstrates that Congress intended to allow applicants under the Acts to bypass many of the barriers to obtaining a "green card" that most immigrants face. General immigrants applying for permanent residence status must demonstrate that they have been inspected and admitted or paroled into the United States and must fit into one of the narrowly defined categories of eligibility defined by the statute, of which all except immediate family relationships

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99. For instance, HRIFA and NACARA were codified as amendments to the adjustment of status provision of the INA. 8 U.S.C. § 1255 note (Supp. V 1999).

are subject to annual numerical limitations.<sup>100</sup> In contrast, NACARA and HRIFA applicants can adjust their status without demonstrating that they were inspected, admitted, or paroled, which would be difficult for most of the applicants to prove; they must show only that they have resided in the United States since December 1995.<sup>101</sup> In addition, NACARA and HRIFA are not subject to numerical quotas.

More importantly, immigrants seeking adjustment of status under the general INA provision must be “eligible to receive an immigrant visa,” which means that applicants are subject to all of the grounds for inadmissibility.<sup>102</sup> In contrast, HRIFA and NACARA automatically waive many of these grounds, including the exclusion of aliens who are likely to become a public charge, aliens who have been working in the United States without authorization or wish to do so in the future, undocumented aliens, and aliens who are unlawfully in the United States.<sup>103</sup> The fact that Congress waived the public charge exclusion for HRIFA and NACARA applicants indicates a recognition that most of the Haitian, Nicaraguan, and Cuban applicants were poor, having fled their poverty-stricken home countries without any of their belongings, and would either have to work or obtain public assistance at least

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100. See 8 U.S.C. § 1255(a) (1994); MARGARET H. MCCORMICK, *The Immigration System, reprinted in IMMIGRATION LAW: BASICS AND MORE* 5-9 (2000) (discussing the annual numerical limitations and four categories of eligibility for permanent residence: family relationship, employment relationship or circumstance, lottery based on diversity of country origin, and eligibility for special immigrant status (such as refugee status)). Although these requirements may sound simple, they exclude many immigrants who would be included under HRIFA and NACARA. For example, aliens who enter the United States illegally — without being inspected and admitted or paroled — are ineligible. Adjustment of Status to that of Person Admitted for Permanent Residence, 8 C.F.R. § 245.1(b)(3) (1999).

101. District of Columbia Appropriations Act, Pub. L. No. 105-100, Title II (Nicaraguan Adjustment and Central American Relief Act) § 202(b)(2), 111 Stat. 2160, 2194 (1997); Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Title IX (Haitian Refugee Immigration Fairness Act of 1998), § 902(b)(1), 112 Stat. 2681, 2681-538 (1998).

102. 8 C.F.R. § 245.1(a) (1999). These grounds for exclusion include the HIV exclusion and are found in 8 U.S.C. § 1182 (1994).

103. See *supra* note 12. Indeed, HRIFA and NACARA waive all exclusions except public health exclusions, exclusions on criminal grounds, security exclusions (e.g., terrorists and Nazis), the exclusion of draft evaders, exclusions for fraudulence and smuggling, and the exclusion against previously removed aliens. This distinction is significant, because the grounds for inadmissibility that Congress waived generally render many immigrants ineligible for green cards. Consider, for instance, the employment exclusion: if an immigrant wishes to work in the United States, the Secretary of Labor must have determined that there are not enough available workers at the time and place where the immigrant wishes to work and that the immigrant's employment will not affect the wages or conditions of similarly employed workers — a difficult burden of proof for most immigrants. 8 U.S.C. § 1182(a)(5)(A) (1994). The only other option for immigrants is not to work, which would mean that they would probably soon become welfare recipients, a.k.a. “public charges” (unless they had independent sources of wealth), and would thus be excludable under the public charge exclusion.

temporarily.<sup>104</sup> By waiving these important grounds for exclusion that apply to most aliens seeking to adjust their status, Congress exempted Haitians, Nicaraguans, and Cubans from the grounds of exclusion that were probably most likely to prevent their adjustment of status. The INS's regulations for HIV-positive applicants undermine Congress's efforts to make it easier for HRIFA and NACARA applicants to obtain permanent residency than for general immigrants, because applicants must obtain the same HIV waiver as general "green card" seekers.<sup>105</sup>

### B. *A Substitute for Asylum*

As discussed in Section II.B, Congress viewed Haitians, Nicaraguans, and Cubans who had fled to the United States as refugees, and intended the Acts to provide humanitarian relief similar to that available for refugees — essentially, a substitute for asylum status. The legislative history behind the Acts indicates that Congress was motivated by the "refugee-like situations" from which these Haitians, Nicaraguans, and Cubans fled.<sup>106</sup> Recognizing that many HRIFA and NACARA applicants would not qualify for asylum status for technical legal reasons, even though they deserved the same relief as refugees, Congress eliminated the barriers the applicants would face in qualifying for asylum status. For instance, NACARA and HRIFA applicants are not required to prove that they would qualify for asylum, nor are they required even to have applied for asylum since they arrived in the United States.<sup>107</sup> Additionally, Congress intended to avoid the long,

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104. *See supra* Section II.B (discussing Congress's intent to provide humanitarian immigration relief to NACARA and HRIFA applicants who fled refugee-like situations).

105. *Compare* 8 C.F.R. § 245.13(c) (1999), *and* 8 C.F.R. § 245.15(e)(2) (1999), *with* 8 U.S.C. § 1182(g) (1994).

106. *Haitian Refugee Immigration Fairness Act, Hearing Before the Subcomm. on Immigration, Senate Comm. on the Judiciary*, 105th Cong. 35 (1998) (statement of Grover Joseph Rees, former General Counsel of the INS) ("They came at a time when their country was being ruled by a particularly brutal regime. In the words of President Clinton . . . 'They are chopping people's faces off down there.'"). Speaking to this point, Senator Abraham stated:

[W]ith respect to Nicaraguans, . . . in the 1980's, this country actively encouraged people fearing persecution, fearing death squads, fearing disruptions of their communities to come to America. Then we took extraordinary measures to make it feasible for them to stay here, even those who had been denied asylum through the official asylum-seeking procedures.

143 CONG. REC. S10,199 (daily ed. Sept. 30, 1997) (statement of Sen. Abraham).

107. Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, Title IX (Haitian Refugee Immigration Fairness Act of 1998), 112 Stat. 2681, 2681-538 (1998) (extending HRIFA eligibility to all Haitians who have been in the United States continuously since December 31, 1995, whether or not they applied for asylum); District of Columbia Appropriations Act, Pub. L. No. 105-100, Title II (Nicaraguan Adjustment and Central American Relief Act), 111 Stat. 2160, 2194 (1997) (amended by Pub. L. No. 105-139, 111 Stat. 2644 (1997)) (listing application for asylum as just one possible way for NACARA applicants to prove that they have been continuously present in the United States since December 1, 1995).

expensive process of individualized assessment of each asylum application by the INS.<sup>108</sup> Congress thereby bypassed the long waiting period asylum applicants face due to the backlog of asylum cases, so that applicants gain immediate status and rights, which affects their right to work and receive public assistance benefits.<sup>109</sup>

Congress enacted the Acts partly because there was no guarantee that Nicaraguan, Cuban, and Haitian refugees who fled to the United States would qualify for asylum status under the Refugee Act of 1980.<sup>110</sup> The Refugee Act, which incorporates the international definition of "refugee" from the 1951 Convention Relating to the Status of Refugees, requires asylum-seekers to show that there is a reasonable possibility that they will be subject to serious human rights violations on account of their race, religion, nationality, political opinion, or membership in a particular social group if returned to their home country.<sup>111</sup>

Several elements of the refugee definition would be difficult for many NACARA and HRIFA applicants to meet. One problem for applicants would be showing that they faced a risk of "persecution" as defined by asylum caselaw. Persecution is generally understood as a serious human rights violation, most notably a threat to life or freedom.<sup>112</sup> Economic harm alone is usually not considered persecution, and refugees who flee to escape economic deprivations or to improve their living standards or chances for employment are typically denied asylum.<sup>113</sup> Many NACARA and HRIFA applicants, particularly

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108. See, e.g., *Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 35 (1997) (statement of Grover Joseph Rees, former General Counsel of the INS) ("[The HRIFA applicants'] asylum cases have taken years to adjudicate. They have built families here. Some have been here 6 years.").

109. See, e.g., *Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 35 (1997) (statement of Rep. Diaz-Balart) ("[T]hese refugees filed asylum petitions, oftentimes during lengthy processing times, for Immigration to evaluate their claims. . . . It is estimated that approximately 4,000 of these asylum claims are still pending."). The backlog of asylum cases reached over 400,000 in the 1990's. See Martin et al., *supra* note 93, at 552.

110. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.). Like NACARA and HRIFA, the Refugee Act appears in the U.S. Code as amendments to the INA.

111. See *supra* note 63 (discussing the definition of "refugee"). See generally JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 6-11 (1991). The Senate Judiciary Committee's Report accompanying the Refugee Act of 1980 demonstrates Congress's intent to update the statutory definition of "refugee" to comport with the United States' international treaty obligations. See H.R. REP. NO. 96-608, at 1 (1979).

112. See generally HATHAWAY, *supra* note 111, at 112-116 (characterizing "persecution" as a serious violation of human rights).

113. See, e.g., *Minwalla v. INS*, 706 F.2d 831, 835 (8th Cir. 1983) ("Mere economic detriment is not sufficient."). See also DEBORAH E. ANKER, *LAW OF ASYLUM IN THE UNITED STATES* 233-35 (3rd ed. 1999).

Haitians, would have difficulty showing that the risk they faced was beyond mere economic harm.<sup>114</sup> A second problem for most Haitians, Cubans, and Nicaraguans would be proving that they faced a risk of persecution “on account of” one of the five reasons listed in the Convention.<sup>115</sup> The Supreme Court has interpreted this language to require an asylum applicant to provide direct or circumstantial evidence that his persecutors were motivated to persecute him because of his race, religion, nationality, political opinion, or membership in a particular social group.<sup>116</sup> Thus, asylum applicants must make some showing of their persecutors’ intent to harm them, beyond a threat of indiscriminate harm to the entire population.<sup>117</sup> This persecutory intent requirement would be difficult for many NACARA and HRIFA applicants, whose fears were based on generalized poverty and violence.<sup>118</sup> Through the Acts, Congress allowed applicants to bypass these asylum requirements and provided a substitute for the difficult asylum process.<sup>119</sup>

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114. See Harris, *supra* note 91, at 278-83 (1993) (discussing the difficulty Haitians have qualifying for asylum under U.S. refugee law).

115. 8 U.S.C. § 1101(a)(42)(A) (1994) (incorporating the definition of “refugee” from the 1951 Convention Relating to the Status of Refugees to require refugee applicants to demonstrate “a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion”).

116. See *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

117. See, e.g., *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (concluding that the facts “do not indicate that the Kanjobal Indians have been recruited *because* of their race, political opinion, or any other protected ground. What they indicate, tragically, is that wherever the guerillas clash with the Guatemalan Army, civilians are forcibly recruited by both sides to serve in the conflict.”); *Singh v. INS*, 134 F.3d 962, 970 (9th Cir. 1998) (“Petitioner still must demonstrate that the persecution she suffered was ‘appreciably different’ from the hardships suffered by Indo-Fijians in general.”); *Vides-Vides v. INS*, 783 F.2d 1463, 1469 (9th Cir. 1986) (concluding that the applicant’s fear of harm must be “appreciably different from the dangers faced by the alien’s fellow citizens”).

118. For a poignant example of an asylum applicant who feared the denial of her application, see *Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 28 (1997) (statement of Louciana Miclisse) (discussing the experiences that induced her to flee Haiti, namely the military’s murder of her father, and expressing her fear that she may not qualify for asylum under U.S. law: “I understand that even though my parents were killed, my application for asylum may be denied.”).

119. See *Haitian Refugee Immigration Fairness Act: Hearing Before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 35 (1997) (statement of Grover Joseph Rees, former General Counsel of the INS):

The most important refugee protection law arguably, however, is not any of the specific refugee laws, laws that have the word ‘refugee’ in their title. Rather, it is the Attorney General’s power to parole people into the country; that is to allow for their provisional entry, even though no law specifically provides for their admission. . . . The refugee admission process is a complicated one. It can take months, or even years, and the problem is we can’t always plan for the existence of refugees. The only people who can plan for whether people are going to be persecuted are the persecutors themselves. . . . The parole power is often better suited to that kind of quick reaction than the formal refugee admission process.

Like NACARA and HRIFA, the Refugee Act was humanitarian in purpose, based on the United States' duty of "non-refoulement," which prevents countries who are parties to the Refugee Convention from sending refugees back to countries where they face persecution.<sup>120</sup> Unlike the Acts, Congress specified in the Refugee Act that the waiver based on humanitarian purposes should be available to HIV-positive refugees.<sup>121</sup> Because the plain language of the Acts did not indicate which waiver of the HIV exclusion was available to applicants, the INS had a choice in its regulations between the waiver available for refugees and the waiver available for general immigrants. In keeping with Congress's intent to grant NACARA and HRIFA applicants quasi-refugee relief, the INS should have copied the waiver articulated in the Refugee Act, as opposed to the waiver in the general immigrant provisions of the INA.

Because the INS did not compare the purposes of the Acts to the purposes of the Refugee Act, it did not follow the holistic approach to determining Congress's intent that the Supreme Court has recommended. The INS's final rule and response to comments on HRIFA indicates that it considered imitating the humanitarian waiver in the Refugee Act, at least for HRIFA applicants, but rejected the idea.<sup>122</sup> The agency read the humanitarian waiver available under the refugee provision of the INA as applicable only to that section, not to aliens applying for adjustment of status under other sections of the INA.<sup>123</sup> In doing so, the INS stratified the various adjustment of status provisions in the INA and failed to utilize other sections of the INA for guidance as to legislative intent behind NACARA and HRIFA. Thus, the INS took a formalistic approach to interpreting the INA, instead of delving into the substantive policy reasons behind the INA's various immigration provisions.<sup>124</sup> In filling the gap Congress left in NACARA and

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Mr. Rees then went on to discuss the need for a more permanent solution to the parole power, which NACARA and HRIFA provide.

120. See HATHAWAY, *supra* note 111, at 14 (defining "non-refoulement" as "the duty to avoid the return of a refugee to a country where she faces a genuine risk of serious harm").

121. See 8 U.S.C. § 1157(c)(3) (1994) (allowing refugees to apply to the Attorney General for a discretionary waiver "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest").

122. See Adjustment of Status for Certain Nationals of Haiti, 65 Fed. Reg. 15,835, 15,837 (Mar. 24, 2000).

123. See *id.*:

When read in its entirety, it is clear that the waiver provision contained in [the refugee provision] of the Act applies only to aliens who are adjusting status under that section, not to aliens who are adjusting status under other provision of law, including HRIFA. The Department does not have the statutory authority to make this change. Accordingly, this suggestion cannot be adopted.

124. Professor Cass Sunstein supports granting greater latitude to administrative agencies to look beyond the formal text of a statute to implement Congress's policy choices: "As against modern formalists, we might urge that administrative agencies should be authorized

HRIFA, the agency had a duty to compare the humanitarian purpose of NACARA and HRIFA to other immigration provisions motivated by similar reasons (such as the Refugee Act) and give HIV-positive applicants the opportunity to apply for the humanitarian waiver.

### C. *The HIV Exclusion Under Other Special Immigration Measures*

Congress intended the Acts to provide a permanent immigration status similar to past ad hoc statutes that transformed temporary, emergency immigration relief for groups of refugees fleeing particular countries into permanent resident status. These laws, like NACARA and HRIFA, represent Congress's decision that the United States should not send these refugees back to their home countries for humanitarian reasons. As Senator Abraham stated in the subcommittee hearing on HRIFA, the Acts were modeled after these ad hoc measures.<sup>125</sup> Because the Acts have a similar purpose and provide similar relief to these special measures, the INS should have looked to the HIV waiver available under them when crafting its regulations for HIV-positive HRIFA and NACARA applicants.

Senator Abraham mentioned two recent examples of such ad hoc immigration measures. The Chinese Student Protection Act of 1992 allowed Chinese students who had been involved in the Tiananmen Square massacre and had subsequently been granted Deferred Enforced Departure ("DED") status to adjust their status to permanent resident.<sup>126</sup> Congress was motivated by both humanitarian and foreign policy reasons, as in its consideration of NACARA and HRIFA.<sup>127</sup>

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to reject the 'text' in situations where common law judges would not be so authorized, at least when there is no evidence of a considered legislative judgment against the agency's interpretation." Cass R. Sunstein, *Must Formalism be Defended Empirically?*, 66 U. CHI. L. REV. 636, 660 (1999).

125. See *Haitian Refugee Immigration Fairness Act: Hearing before the Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 105th Cong. 3 (1997) (remarks of Sen. Abraham, chairman of the subcommittee):

Under U.S. law, one traditional way in which relatively large numbers of individuals paroled into the country have gained permanent residence has been for Congress to pass a special law that permits this to happen. . . . The relief accorded to asylum applicants and others from Cuba and Nicaragua in this year's Central American relief bill is in that tradition as well. . . . In the aftermath of the Tiananmen Square crackdown, Congress passed a law granting lawful permanent residence to many of the Chinese nationals who were here in the United States at that time. . . . In 1996, the Illegal Immigration Reform and Immigrant Responsibility Act permitted Polish and Hungarian refugees admitted under the Attorney General's parole authority to apply for and gain permanent residence. U.S. immigration law, in my judgment, should not turn on arbitrary distinctions between members of different nationalities.

126. Chinese Student Protection Act of 1992, Pub. L. No. 102-404, 106 Stat. 1969. See also THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, AND HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1164 (4th ed. 1998); Martin et al., *supra* note 93, at 578.

127. See John D. Griffin, Comment, *The Chinese Student Protection Act and "Enhanced Consideration" for PRC Nationals: Legitimizing Foreign Policy while Averting False Positives in Asylum Law*, 66 U. COLO. L. REV. 1105, 1117-19 (1995) (citing congressional testi-

Unlike HRIFA and NACARA, the Act enabled HIV-positive students to apply for the same humanitarian waiver of inadmissibility available for refugees.<sup>128</sup> Another recent immigration remedy that is almost identical to NACARA and HRIFA was passed as part of IIRIRA, and provides adjustment of status to permanent residence for certain Polish and Hungarian nationals who were paroled into the United States between 1989 and 1991 and were denied refugee status.<sup>129</sup> Congress intended this provision to amend a “bureaucratic error” that prevented these people who had been paroled into the country for humanitarian reasons years earlier from adjusting their status to permanent resident.<sup>130</sup> This law also contained the humanitarian waiver of the HIV exclusion.

One might argue that because Congress explicitly indicated which waiver should be available for HIV-positive applicants in both of the above statutes, it would have done so in HRIFA and NACARA if it had intended for a less stringent waiver to be available. But as was discussed above, Congress did not mention waivers of inadmissibility at all in HRIFA and NACARA, but merely indicated which grounds of inadmissibility were completely waived. Because the plain language of the Act did not answer the waiver question, the INS was left with the responsibility of determining which waiver Congress intended. Since the above statutes are similar to HRIFA and NACARA in terms of the type of relief they provide and Congress’s reasons for enacting them, *Chevron* requires the INS to look to the HIV waivers under these statutes rather than the general adjustment of status provision of the INA. To be consistent with congressional intent, the INS should have allowed HIV-positive applicants under HRIFA and NACARA to apply for the more accessible waiver of the HIV exclusion.

This Part argued that the INS, in requiring HIV-positive HRIFA and NACARA applicants to apply for a waiver based on a family relationship to a United States citizen or permanent resident, contradicted Congress’s intent. By analogizing the type of relief granted and the

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mony that the “deeper purpose” of the legislation was the promotion of democracy and capitalism and the condemnation of communism). Griffin emphasizes the discriminatory effect of Congress’s favorable treatment of Chinese students compared to its negative response to Haitians fleeing the military coup of 1991. *Id.* at 1120, 1158-60.

128. Chinese Student Protection Act of 1992, Pub. L. No. 102-404 § 2(a)(3)(B), 106 Stat. 1969 (specifying the availability of a waiver to the public health exclusion based on humanitarian reasons, family unity, or public interest).

129. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, 3009-709.

130. See 142 CONG. REC. H11,081 (daily ed. Sept. 25, 1996) (Statement of Rep. Hyde) (speaking in support of the Conference Report on IIRIRA):

This omnibus legislation includes a number of miscellaneous provisions that are responsive to a range of problems. . . . We also recognize the equities of certain nationals of Poland and Hungary who were paroled into the United States years ago — and thus entered our country legally — by affording them an opportunity to adjust to permanent resident status.

purposes of the Acts to other immigration provisions, the INS should have recognized that Congress intended HRIFA and NACARA to be more like refugee status and other special immigration statutes rather than adjustment of status for general immigrants. To carry out legislative intent, the INS should have copied the waiver in these special immigration provisions, based on humanitarian purposes, rather than the waiver for general immigrants.

#### CONCLUSION

Congress enacted the Nicaraguan Adjustment and Central American Relief Act of 1997 and the Haitian Refugee Immigration Fairness Act of 1998 to provide permanent immigration remedies to refugees fleeing inhumane situations in countries toward which the United States has long demonstrated a foreign policy commitment. The HIV exclusion of immigrants was enacted primarily for financial reasons, while Congress's purpose behind HRIFA and NACARA was primarily humanitarian. The INS, charged with developing regulations to further congressional mandates, should have recognized that Congress intended these Acts to be similar to the Refugee Act and other special immigration measures, and allowed HIV-positive applicants to obtain a waiver based on humanitarian purposes. Because the INS did not follow Congress's clear intent or, in the alternative, did not interpret Congress's purposes reasonably, the waiver regulation should be vacated by courts or voluntarily changed by the INS. Alternatively, Congress should pass an amendment to the Acts that specifies that the humanitarian waiver is available for HIV-positive applicants. These reforms are necessary to fulfill Congress's goal of providing widespread immigration relief to refugees from Haiti, Cuba, and Nicaragua.