TAMING IMMIGRATION TRAUMA

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This Article documents the United States' century-long efforts to humanize our borders. In the end, law has been insufficient to tame immigration law's enforcement. How the United States enforces borders, however, can and should be more humane. Two important principles should guide this process. First, the United States should recognize that borders' impacts are as severe as other forms of punishment, especially when the means to enforce the immigration power have become indistinguishable from criminal enforcement. Second, human trauma should guide immigration policy toward meaningful inclusion. After significant reckoning over the travesty of shutting our borders, the United States has embraced certain experiences of trauma as grounds for welcoming immigrants or has shown mercy to permit immigrants to stay when family and communal bonds in the United States are strong. Yet, the discretionary nature of these central efforts to humanize borders has not translated to sustaining gains. Borders are still open and shut at the whims of xenophobia and nationalistic tendencies to blame the "other" during difficult socio-political and economic crises. Moreover, the lack of basic due process protections in immigration law and punitive enforcement practices functions as a significant barrier that substantially undermines the very efforts to expand immigration's inclusion.

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INTRODUCTION

In recent years, the cruelty of U.S. borders has been on full display. On April 6, 2018, for example, the Trump administration announced a "zero tolerance" policy.[1] Under the policy, the U.S. government pressed criminal charges against all adult migrants attempting to enter the United States anywhere other than at an official port of entry.[2] The policy

[1] *Q&A: Trump Administration's "Zero-Tolerance" Immigration Policy*, HUM. RTS. WATCH (Aug. 16, 2018, 8:00 AM), https://www.hrw.org/news/2018/08/16/qa-trump-administrations-zero-tolerance-immigration-policy [https://perma.cc/7HRZ-UPGA].

[2] *Id.*

resulted in widespread family separation.[3] A review conducted by the Biden administration in June 2021 found that from July 2017 through January 2021, 5,636 family separations occurred, 3,913 of which were directly related to the "zero tolerance" policy.[4] The review also revealed that while 1,800 families had since been unified, it had no records of family unification for the remaining 2,100 families; as well, 400 children had been sent back to their country of origin.[5] Mental health experts have documented the enormous trauma children especially have been forced to endure under these practices, with ill effects likely to last well into adulthood.[6] Although the government rescinded the "zero tolerance" policy following public outcry, family separations continue on a less widespread basis.[7] The cruelty of U.S. borders in recent years is not unprecedented. Examples of dark periods of U.S. immigration law include racist bans against Asians;[8] the Cold War's cruel expulsion of a wide net of long-time permanent residents treated as communists;[9] interdiction practices mostly waged against Haitian asylum seekers;[10] the arbitrary denial of asylum protections to Central Americans escaping U.S. funded wars in the 1980s;[11] the harsh treatment of Muslims post-

3 *Id.*

4 Myah Ward, *At Least 3,900 Children Separated from Families Under Trump 'Zero Tolerance' Policy, Task Force Finds*, POLITICO (June 8, 2021, 6:00 AM), https://www.politico.com/news/2021/06/08/trump-zero-tolerance-policy-child-separations-492099 [https://perma.cc/BU67-XGBW].

5 *Id.*

6 *See* Cristina Muñiz de la Peña, Lisa Pineda & Brenda Punsky, *Working with Parents and Children Separated at the Border: Examining the Impact of the Zero Tolerance Policy and Beyond*, 12 J. CHILD & ADOLESCENT TRAUMA 153 (2019); Carmen Monico, Karen Rotabi, Yvonne Vissing & Justin Lee, *Forced Child-Family Separations in the Southwestern US Border Under the "Zero-Tolerance" Policy: The Adverse Impact on Well-Being of Migrant Children (Part 2)*, 4 J. HUM. RTS. & SOC. WORK 180 (2019).

7 Jack Herrera, *Biden Brings Back Family Separation—This Time in Mexico*, POLITICO MAG., (Mar. 20, 2021, 1:33 PM), https://www.politico.com/news/magazine/2021/03/20/border-family-separation-mexico-biden-477309 [https://perma.cc/L282-4UQE].

8 *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

9 *See, e.g.*, Raquel E. Aldana & Thomas O'Donnell, *A Look Back at the Warren Court's Due Process Revolution Through the Lens of Immigrants*, 51 U. PAC. L. REV. 633 (2020); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 SAINT MARY'S L.J. 833 (1997).

10 *See, e.g.*, Hiroshi Motomura, *Haitian Asylum Seekers: Interdiction and Immigrants' Rights*, 26 CORNELL INT'L L.J. 695 (1993).

11 *See* Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585 (2019); Bill Ong Hing, *Mistreating Central American Refugees: Repeating History in Response to Humanitarian Challenges*, 17 HASTINGS RACE & POVERTY L.J. 359 (2020).

9/11;[12] and more recently, the shutting down of the border to asylum seekers through policies like the Migrant Protection Protocols and Title 42.[13]

This Article considers the ways in which the United States has sought to limit the trauma wielded by borders and immigration law enforcement. The focus is solely on the actions of the federal government, including Congress, executive agencies, and the U.S. Supreme Court.[14] In recent decades, local governments have played an increasingly significant role in the regulation of immigrants, acting both to improve or worsen the treatment of immigrants.[15] However, the core of immigration law enforcement—the exclusion at the border or expulsion of migrants from the United States—still remains today as a largely federal project. In this arena, the taming of immigration trauma has been a slow process that, if traced, would resemble a complex roller coaster with sharp highs and lows as well as swift reversals.[16] Much of the explanation for this rests in federal immigration law's plenary power doctrine, whose combination of limited judicial review and placement of vast powers in the hands of the political branches has rendered progress to humanize borders volatile.[17] In general, these gains have been influenced by important constitutionally-grounded judicial doctrines embedded in the plenary power and largely rests in the Fifth Amendment's substantive and

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12 *See* Dalia Hashad, *Stolen Freedoms: Arabs, Muslims, and South Asians in the Wake of Post 9/11 Backlash*, 81 DENV. U. L. REV. 735 (2004); Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 119 (2012).

13 *See* Sarah Sherman-Stokes, *Public Health and the Power to Exclude: Immigrant Expulsions at the Border*, 36 GEO. IMMIGR. L.J. 261, 262–63 (2021); *see also infra* notes 493–505 and accompanying text.

14 This Article does not generally examine lower federal immigration court decisions except to discuss cases, including splits in precedent, that have ultimately been resolved by the Court. While there have been efforts by lower federal courts to ameliorate immigrant trauma, U.S. Supreme Court oversight under the framework of plenary power has made these gains, with few exceptions, short-lived. *See, e.g.*, Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 119 (2018).

15 KEVIN R. JOHNSON, RAQUEL ALDANA, BILL ONG HING, LETICIA M. SAUCEDO & ENID TRUCIOS-HAYNES, *Immigration Federalism*, *in* UNDERSTANDING IMMIGRATION LAW 135–218 (3d ed. 2019).

16 *See, e.g.*, Jim Rosenfeld, *Deportation Proceedings and Due Process of Law*, 26 COLUM. HUM. RTS. L. REV. 713 (1995); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Peter H. Shuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

17 *See generally* Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002); Kevin R. Johnson, *It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, etc.)*, 13 CHAP. L. REV. 583 (2010).

procedural due process rights.[18] Mostly these doctrines have influenced the interpretation of immigration statutes in favor of immigration petitioners or inspired immigration reforms that have created important forms of relief—albeit discretionary—against deportation, increased due process for certain immigrants, or imposed limits over certain detention practices.

Taming trauma wielded by borders is not unlike the taming of war. The entire project may appear folly given the inevitability of human suffering in immigration enforcement. Exclusion and deportation can separate families,[19] return persons to nations where their lives or liberties are threatened,[20] or expel them from home to places they have never known.[21] These considerations alone provide compelling reasons to abolish borders.[22] This paper, however, presupposes the persistence of borders, at least in the foreseeable future. And for as long as borders remain, how the United States enforces them can and should be more humane. Two important principles should guide this process. First, the United States should recognize that borders' impacts are as severe as other forms of punishment, especially when the means to enforce the immigration power have become indistinguishable from criminal enforcement. To prevent entry or effectuate deportation, the United States often arrests and incarcerates foreign nationals in great numbers

18 In a few cases, U.S. citizens or lawful permanent residents have also asserted rights of association or to religion to challenge practices that exclude certain immigrants on grounds they believe affect their fundamental rights. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753 (1972) (opining on a group of U.S. citizens' challenge to the exclusion of a communist scholar based on First Amendment grounds); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (opining on plaintiffs'—including U.S. citizen and lawful permanent residents sponsoring immigrant and nonimmigrant visas—challenge to the so-called Muslim Ban based on the Establishment Clause). These cases yield similar results to those grounded in the Fifth Amendment and are relevant to the constitutional limits imposed on the immigration plenary power. However, this Article focuses largely on harm framed as an interest in liberty as part of substantive or procedural due process.

19 *See, e.g.*, Stephen Lee, *Family Separation as Slow Death*, 119 COLUM. L. REV. 2319 (2019).

20 *See, e.g.*, Sarah Stillman, *When Deportation Is a Death Sentence*, NEW YORKER (Jan. 8, 2018), https://www.newyorker.com/magazine/2018/01/15/when-deportation-is-a-death-sentence [https://perma.cc/R4X5-T8BS].

21 *See* Miriam Jordan, *Deported Veterans Long to Return from Exile. Some Will Get the Chance.*, N.Y. TIMES (July 26, 2021), https://www.nytimes.com/2021/07/26/us/deported-immigrants-us-veterans.html (last visited Nov. 6, 2022).

22 A growing movement of scholars and activists has called for the abolition of borders. *See, e.g.*, HARSHA WALIA, BORDER & RULE: GLOBAL MIGRATION, CAPITALISM, AND THE RISE OF RACIST NATIONALISM 213 (2021) (arguing that abolishing borders will result in an end to "[a]nti-migrant xenophobia, immigration enforcement, detention centers, migration controls, and border securitization").

and for lengthy periods.[23] The privatization of some aspects of immigration enforcement, namely detention, has also thrust this project into the darker side of profit-making.[24] This should translate to greater due process and mechanisms of accountability than we currently recognize over immigration law. Second, human trauma should guide immigration policy toward meaningful inclusion. Over time, and only after significant reckoning over the travesty of shutting our borders to human suffering, the United States has opened borders to embrace certain experiences of trauma as grounds for welcoming immigrants and has shown mercy to permit immigrants to stay when family and communal bonds in the United States are strong.[25] Yet, the discretionary nature of these central efforts to humanize borders has not translated to sustaining gains. Borders are still open and shut at the whims of xenophobia and nationalistic tendencies to blame the "other" during difficult sociopolitical and economic crises.[26] Moreover, the lack of basic due process protections in immigration law and punitive enforcement practices function as significant barriers that undermine substantially the very efforts to expand immigration's inclusion.

Part I of this Article documents the progression and ebbs and flows of efforts to humanize borders and immigration enforcement through the imposition of constitutional limits on the plenary power doctrine. Section I.A focuses on the Fifth Amendment and traces how notions of liberty in the context of immigration have yielded limited but important substantive and procedural rights for immigrants. Section I.B focuses on how the framing of immigration law's enforcement as punishment—when this has occurred—has at times tamed the trauma of immigration enforcement by alleviating some of its harshness. Part II of this Article turns to the national political responses by Congress and the immigration agencies that have both embraced liberty concepts to constrain the immigration power and pushed back to assert their power when they have deemed it necessary or desirable.

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23 *See Immigration Detention in the United States by Agency*, AM. IMMIGR. COUNCIL (Jan. 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf [https://perma.cc/W7BQ-XPUU].

24 *See generally* Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1 (2017); Alyssa Ray, *The Business of Immigration: Tracking Prison Privatization's Influence on Immigration Policy*, 33 GEO. IMMIGR. L.J. 115 (2018).

25 *See* Raquel E. Aldana, Patrick Marius Koga, Thomas O'Donnell, Alea Skwara & Caroline Perris, *Trauma as Inclusion?*, 89 TENN. L. REV. (forthcoming 2022).

26 *See generally* Akram & Johnson, *supra* note 17; Johnson, *supra* note 17.

I. THE EBBS AND FLOWS OF PLENARY POWER

A. *The Fifth Amendment's Reach over the Immigration Plenary Power*

At the turn of the nineteenth century, during a time of virulent racist, anti-Chinese sentiment in the United States,[27] the U.S. Supreme Court, with few exceptions, validated highly suspect federal laws targeting long-term lawful Chinese residents of the United States, including some who claimed U.S. citizenship. A seminal case, *Chae Chan Ping v. United States*, decided in 1889, involved a Chinese laborer who had legally immigrated to the United States in 1875 but left temporarily to visit China after obtaining a certificate allowing him to depart and return lawfully in 1887—twelve years after his arrival to the United States.[28] While on his return voyage in 1888, Congress passed a law that discontinued the certificate program and prohibited the return of persons like Chae Chan Ping, who consequently was detained and excluded from entry upon his return.[29] Then, in 1896, in *Fong Yue Ting v. United States*, three Chinese nationals who lived lawfully in the United States for fourteen, sixteen, and nineteen years, respectively, and who remained inside the United States, challenged their deportations because they could not or would not produce "at least one credible white witness" who could vouch for their residence in the country.[30] At the time, it was unsettled whether Congress had the power to exclude or deport the Chinese and, if it did, whether constitutional limits would apply to this power. The U.S. Constitution did not expressly enumerate an immigration power, and a long history of state regulation of immigration and immigrants preceded the holdings.[31] Yet, strong political forces and racist attitudes propelled the Court to issue sweeping decisions that not only permitted Congress to regulate in the area of immigration but also to declare this power, both as to exclusion and deportation, to be absolute and not limited by the Bill of Rights.[32] Shockingly, in 1905, in *United States v. Ju Toy*, the Court would extend this plenary power even to those claiming to have been born in the United States upon return from China who were denied their citizenship

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27 *See, e.g.*, Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Powe*r, *in* IMMIGRATION STORIES 7 (David A. Martin & Peter H. Schuck eds., 2005).

28 Chae Chan Ping v. United States, 130 U.S. 581 (1889).

29 *Id.* at 582.

30 Fong Yue Ting v. United States, 149 U.S. 698, 727 (1893).

31 *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993).

32 *See generally* Chin, *supra* note 27.

in cursory immigration administrative proceedings and without a hearing.[33]

Fong Yue Ting, in particular, provoked strongly worded dissents. While generally unsympathetic to the plight of the Chinese petitioners, the dissenters worried about the tyrannical implications of an unlimited deportation power that could be applied to white persons of European descent in the future.[34] This fear led three dissenting justices to equate deportation to punishment:

> Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.[35]
>
> The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offense. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, his family, and his business, and taken before the judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business.[36]
>
> But the act before us is not an act to abrogate or repeal treaties or laws in respect of Chinese laborers entitled to remain in the United States, or to expel them from the country, and no such intent can be imputed to congress. As to them, registration for the purpose of identification is required, and the deportation denounced for failure to do so is by way of punishment to coerce compliance with that requisition. No euphuism can disguise the character of the act in this regard. It directs the performance of a judicial function in a particular way, and inflicts

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33 United States v. Ju Toy, 198 U.S. 253 (1905).

34 Justice Field writes in his dissent:

> Is it possible that congress can, at its pleasure, in disregard of the guaranties of the constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized?

Fong Yue Ting, 149 U.S. at 750 (Field, J., dissenting). Justice Brewer was more brazen in expressing his racism: "It is true this statute is directed only against the obnoxious Chinese, but, if the power exists, who shall say it will not be exercised to-morrow against other classes and other people?" *Id.* at 743 (Brewer, J., dissenting).

35 *Id.* at 740 (Brewer, J., dissenting). Similarly, in *Ju Toy*, Justice Brewer equated the banishment of citizens to "punishment of the severest kind." *Ju Toy*, 198 U.S. at 269 (Brewer, J., dissenting).

36 *Fong Yue Ting*, 149 U.S. at 759 (Field, J., dissenting).

> punishment without a judicial trial. It is, in effect, a legislative sentence of banishment, and, as such, absolutely void.[37]

More than a century later, these strong pronouncements equating deportation to punishment have not become the law of the land.[38] Essentially, this means that the plethora of constitutional rights, which over time has attempted to tame criminal law's trauma, does not apply in the area of immigration.[39] However, subsequent cases discussed below have cited the Fifth Amendment Due Process Clause to legitimize the concerns that deportation deprives persons subjected to it of liberty and, at times, even life. Over time, these cases also included the families of those deported as possessing separate standing to assert their own trauma resulting from exclusion and deportation. Moreover, in the context of immigration detention or in areas where immigrants occupy spaces that intersect the criminal punitive space, liberty concerns have at times tamed the cruelty of immigration enforcement.

A decade after the Court decided *Fong Yue Ting*, a mere four days after entry into the United States, this time by a Japanese woman, the Court reversed course on the absolute nature of the immigration plenary power, albeit meekly. In 1903, an immigration officer allowed Kaoru Yamataya to enter the United States, only to have the agency order her deported days later on the basis that she should have been found inadmissible at the time of entry as a pauper and likely to become a public charge.[40] Yamataya challenged the legislation for violating her due process rights under the Fifth Amendment for lack of notice and an opportunity to be heard.[41] In the end, Yamataya lost her case, but the Court's language was different. This time it lacked the categorical assertions in *Fong Yue Ting* that the immigration deportation power was absolute. While lacking clarity or force, *Yamataya* left open the possibility

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37 *Id.* at 762–63 (Fuller, C.J., dissenting).

38 *See generally* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

39 These include prohibitions against cruel and unusual punishment and excessive bail as well as ex post facto or double jeopardy restrictions. *See, e.g.*, Aldana & O'Donnell, *supra* note 9; Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007). Also, due process safeguards intended to ensure that deprivations of liberty or even life do not occur without due process or safeguards against law enforcement abuses do not apply at all or equivalently in the immigration enforcement context. *See, e.g.*, Kari Hong, Gideon*: Public Law Safeguard, Not a Criminal Procedure Right*, 51 U. PAC. L. REV. 741 (2020); Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010); Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008).

40 Yamataya v. Fisher, 189 U.S. 86 (1903).

41 *Id.*

that constitutional due process did apply to persons who have effectuated an entry into U.S. territory:

> But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends . . . .[42]

At the turn of the nineteenth century, the Due Process Clause lacked teeth to alter the outcome of Yamataya's deportation; but the opinion yielded an important first crack in the plenary power doctrine.[43] As discussed below, numerous subsequent federal immigration cases, including dozens decided by the U.S. Supreme Court, cited *Yamataya* for the basic proposition that certain minimum due process guarantees apply in deportation cases. As well, the idea that deportation cases implicate the immigrant's or their family members' substantive right to liberty also took hold and either influenced the way statutes were interpreted or imposed some limited review over especially harsh deportation statutes applied to long-term lawful permanent residents (LPRs). These cases hardly ever changed outcomes, but their strongly worded principles ultimately influenced legislative reforms that have sometimes humanized immigrants and recognized their trauma.

1. The Right to Stay and Family

One reason deportation was said to be different from exclusion was rooted in the idea that, over time, lawful (and even those here without authorization) permanent residents gain vested rights to stay in the United States with their families. A different framing is the recognition that deportation, especially for long-term residents, but also the exclusion of foreign nationals with significant ties to the United States, involves significant forms of trauma. In general, LPRs have relied on their liberty stakes either to seek favorable statutory interpretations to avoid deportation[44] or outright reversal of statutory deportation powers. With

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42 *Id.* at 100–01.

43 *See, e.g.*, Motomura, *supra* note 16.

44 This strategy in immigration law of seeking narrow construction of ambiguous deportation statutes in favor of deportees based on constitutional concerns has been explored in several writings. *See, e.g.*, Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom*

few exceptions, these cases have not fared well for immigrants. Despite the compelling nature of their trauma—namely separation from family, community, and home—arguing for a constitutional right against deportation or to family unity has not been successful. However, the Court's conflicts over its denial, as expressed in concurrences and dissents, have influenced legislative grants of discretionary remedies that recognize immigrants' stakes in family unity and sometimes based on their own harm. These are taken up in Section II.B.

Not unlike the important constitutional challenges to anti-Asian immigration enforcement, the cruelty of immigration law's enforcement during the Second World War led to an important series of attempts to limit the immigration plenary power.[45] The backdrop of national security in the Cold War cases, however, deeply influenced the tone and outcomes of the cases before the Court despite important constitutional gains for criminal defendants during the same period.[46] In 1945, the Court quite unusually overturned the deportation of Harry Bridges, an LPR of twenty-five years accused of "affiliation" with the Communist Party, due to his labor union activities to support the rights of longshoremen.[47] The Court yielded both a majority and a concurring opinion, with three Justices dissenting.[48] The majority did not cite *Yamataya* but applied heavy scrutiny to the meaning of the term "affiliation" in the statute and to the agency's due process irregularities prescribed in their regulations.[49] Justice Murphy's concurrence went even further, discussing *Yamataya* to support the proposition that "resident aliens have constitutional rights . . . that Congress may not ignore . . . in the exercise of its 'plenary' power."[50]

This pronouncement in *Bridges*, however, would not last long. Seven years later, three LPRs facing deportation based on their past or present communist activities could not alter their fate despite their decades-long residency in the United States, each with significant ties to family, property, and community.[51] Harisiades, the most committed communist, had come to the United States at age thirteen, lived in the country for

Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545 (1990); Alina Das, *Administrative Constitutionalism in Immigration Law*, 98 B.U. L. REV. 485 (2018); Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363 (2007).

45 Aldana & O'Donnell, *supra* note 9, at 638–45 (documenting the treatment of immigrants during WWII).

46 *Id.* at 645–53.

47 *See* Bridges v. Wixon, 326 U.S. 135 (1945).

48 Justice Jackson did not take part in the case and the result was 5–3. *Id.*

49 *Id.* at 142–54.

50 *Id.* at 161 (Murphy, J., concurring).

51 Harisiades v. Shaughnessy, 342 U.S. 580 (1952).

thirty-six years, and had a wife and two U.S. citizen children.[52] Mascitti, who had severed relations with the communist party for over twenty years, had come to the United States at age sixteen and had one U.S. citizen child and an LPR wife after living thirty-two years in the United States.[53] Finally, Coleman, the longest resident of thirty-eight years in the United States, had come at age thirteen in 1914 and had a spouse and three U.S. citizen children.[54] Like Mascitti, Coleman had disavowed her sporadic membership in the Communist Party fourteen years earlier, but the Alien Registration Act, 1940, which rendered them deportable based on their "communism,"[55] applied to them regardless of whether their affiliation or sympathies had long ceased to exist. The majority, with only two Justices dissenting, was aware that the deportations in this case "bristle[d] with severities";[56] and yet, it cited *Yamataya*, alongside other cases, only to assert that "[t]he Government's power to terminate its hospitality has been asserted and sustained . . . since the question first arose."[57] In *Harisiades*, the Court relied once more on foreign relations, inherent powers, and war powers to declare the immigration deportation power as "largely immune from judicial inquiry or interference" to reject the "vested right" in liberty claimed by the petitioners and uphold their deportation.[58] The dissenters in this case, Justices Black and Douglas, could not have been more emphatic in their disapproval of this outcome:

> An alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned. He can live and work here and raise a family, secure in the personal guarantees every resident has and safe from discriminations that might be leveled against him because he was born abroad. Those guarantees of liberty and livelihood are the essence of the freedom which this country from the beginning has offered the people of all lands. If those rights, great as they are, have constitutional protection, I think the more important one—the right to remain here—has a like dignity.[59]

Without a liberty right to stay, long-term LPRs facing deportation were left with little recourse to challenge the immigration power. Galvan, a Mexican national who came to the United States at age seven and lived as an LPR for thirty-six years, was married to a U.S. citizen for twenty

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52 *Id.* at 581–82.

53 *Id.* at 582.

54 *Id.* at 583.

55 Alien Registration Act, 1940, § 23, Pub. L. No. 76-670, 54 Stat. 670 (codified as amended at 8 U.S.C. § 137) (repealed 1952).

56 *Harisiades*, 342 U.S. at 587.

57 *Id.*

58 *Id.* at 584, 588–89, 596.

59 *Id.* at 599 (Douglas, J., dissenting).

years, and had four U.S. citizen-born children and a U.S. citizen-born stepson who served the United States as a paratrooper.[60] Rather than insist on a constitutional right, as in *Bridges*, Galvan, who faced deportation based on his alleged ties to communism, placed his hope instead in the Court's willingness to interpret the deportation statute in his favor, arguing that to be a "member" in the Communist Party requires full consciousness of the Party's advocacy of violence.[61] Nearly a decade after *Bridges*, however, the Court was not so willing. The Court did not resort to constitutional concerns to examine statutory meaning; instead, it provided evidence from the legislative history that Congress did not intend to exempt "innocent" members.[62] In fact, when the Court turned to the constitutional challenges to the Internal Security Act of 1950 (ISA)[63] based on First Amendment and ex post facto grounds, the Court was unwilling to conduct even limited constitutional review of congressional action. Indeed, the language of plenary power in *Galvan* is broad and appears to erase even the careful distinction between exclusion and deportation.[64] Here, too, Justices Black and Douglas dissented to lament how little substantive due process is accorded to long-term LPRs, in such high stakes situations, who must endure ex post facto laws and deportation for membership in a Communist Party they have since terminated without proof that they even knew of its violent purpose.[65]

Three years later, in 1957, coinciding with McCarthyism's decline,[66] the Court in *Rowoldt v. Perfetto*[67] appeared to have a change of heart, at least in terms of more favorable statutory interpretation holdings. The Court even cited *Galvan* for what appears to be a contradictory holding—that the ISA's legislative history imposed a consciousness requirement that required the agency to show with substantial evidence, "[b]earing in

60 Galvan v. Press, 347 U.S. 522, 532 (1954) (Black, J., dissenting).

61 *Id.* at 525 (majority opinion).

62 *Id.* at 526.

63 Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987.

64 But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.

Galvan, 347 U.S. at 531 (citations omitted) (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

65 *Id.* at 533–34 (Black, J., dissenting).

66 Robert M. Lichtman, *McCarthyism and the Court: The Need for "An Uncommon Portion of Fortitude in the Judges"*, 39 J. SUP. CT. HIST. 107 (2014).

67 Rowoldt v. Perfetto, 355 U.S. 115 (1957).

mind the solidity of proof" required in deportation cases, that the deportee knew they were joining a political organization when they joined the Communist Party.[68] Like Galvan, Charles Rowoldt had lived in the United States for over four decades, and his membership in the Communist Party had been brief (about a year), a decade prior to his deportation proceedings and certainly prior to the ISA that made him deportable.[69] *Rowoldt*'s stricter membership standard, while not explicitly recognizing a substantive due process right, resulted in at least some favorable outcomes for LPRs targeted for deportation based on communistic associations.[70]

Despite these important statutory interpretation gains for immigrants, later wars would mean new harsh immigration laws and practices. And without clear constitutional limits, courts would once again simply ignore the plight of immigrants. This was most certainly true post-9/11 when even gains of constitutional rights outside of immigration law—such as the right to family and marriage—could not undo or limit immigration law's plenary power.[71] In 2015, for example, the Court heard a petition directly from a U.S. citizen to recognize her liberty interest in uniting with her husband from Afghanistan to build a life together in the United States.[72] Fauzia Din came to the United States as a refugee fifteen years prior to her case reaching the Court and naturalized as a U.S. citizen in 2007.[73] In 2006, she married Kanishka Berashk, a resident of Afghanistan and a former civil servant of the Taliban regime.[74] This is all the Court and we learned about Berashk because when Din tried to sponsor him as an immediate relative, the U.S. Consulate office in Afghanistan deemed Berashk inadmissible as someone who "engaged in

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68 *Id.* at 120.

69 *Id.* at 116–19.

70 *See, e.g.*, Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963) (overturning a deportation order based on insubstantial evidence of communistic associations). *But see* Niukkanen v. McAlexander, 362 U.S. 390, 391 (1960) (affirming deportation when the Court did not find that the lower court's finding of perjured testimony was "clearly erroneous").

71 *See generally* Kerry Abrams, *The Rights of Marriage:* Obergefell*,* Din*, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501 (2018).

72 Kerry v. Din, 576 U.S. 86 (2015). The backdrop of absolute plenary power in exclusion cases must have weighed heavily on Din when raising her claim. During the Cold War, Knauff, also married to a U.S. citizen, was similarly excluded from joining her husband in the United States based on secret evidence. In that case, however, Knauff, and not her U.S.-citizen spouse, filed the claim. Moreover, she framed it as a procedural due process claim, rather than a substantive liberty claim. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). The Court, however, was categorical in its affirmation of plenary power: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Id.* at 544.

73 *Din*, 576 U.S. at 89.

74 *Id.* at 88.

terrorist activities" without providing any further information.[75] There were several problems with this stance. Neither Din nor Berashk had notice of this outcome, much less the opportunity to respond to the allegations.[76] Moreover, charges against Berashk cited a lengthy and complex statutory provision[77] without citing one of its dozens of subclauses, which further obfuscated the reasons for his permanent exclusion from the United States.[78] In a highly divided plurality opinion, however, the Court sided with the government. Justice Scalia, joined only by Chief Justice Roberts and Justice Thomas, issued the most sweeping decision that entirely denied Din's asserted liberty interest as including her right to live with her spouse in the United States.[79] To do this, the Court adopted a significantly narrow view of liberty, relying on originalism to include only actual physical restraint.[80] In his concurrence, Justice Kennedy, joined by Justice Alito, chose not to take up the liberty question, deciding the case instead by applying the deferential "facially legitimate and bona fide" standard first developed in *Kleindienst v. Mandel*.[81] Din had hoped her family-based liberty interests would carry even more weight, and at least four dissenting Justices agreed. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, however, reframed Din's interest as involving procedural rather than substantive rights.[82] As such, the test became not whether Din's interest in living with her husband in the United States required heightened scrutiny, but whether the due process accorded was sufficient to recognize her interest, an interest Justice Breyer situated as both implied in the Constitution and statutorily conferred.[83] To Justice Breyer, who declared that national security "does not suspend the Constitution," the procedural safeguards should have included notice of the advance actions, an opportunity to

75 *Id.* at 101.

76 *See id.* at 111 (Breyer, J., dissenting).

77 *Id.* at 113–20 (discussing the Immigration and Nationality Act § 212, Pub. L. No. 82-414, 66 Stat. 182 (1952) (codified at 8 U.S.C. § 1182(a)(3)(B)(iv))).

78 *Id.*

79 *Id.* at 94–97 (majority opinion).

80 *Id.* at 91–93.

81 *Id.* at 103–06 (Kennedy, J., concurring) (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)). *Mandel* was the first case decided by the U.S. Supreme Court that strategically framed an exclusion case as involving the interests of U.S. citizens in order to sidestep the absolute power of plenary. *Mandel*, which involved a First Amendment challenge by U.S.-citizen plaintiffs to the exclusion of a scholar for his communistic views, did not entirely erase plenary power, but it did create limited review in recognition of citizens' rights to freedom of association. *Mandel*, 408 U.S. at 754.

82 *Din*, 576 U.S. at 107–10 (Breyer, J., dissenting). Much earlier, Hiroshi Motomura noted this odd trend by the courts to reframe substantive rights as procedural in the area of constitutional immigration law. Motomura, *supra* note 16.

83 *Din*, 576 U.S. at 107–10 (Breyer, J., dissenting).

present evidence before a neutral decision maker, and a reasoned decision grounded in more precise charges under the immigration statute.[84] The Court's greater comfort with procedural limitations on the plenary power, which has been present not only in dissents but also in the majority, is taken up below.

2. Fairness as Compassion

A different way to consider the effect of constitutional doctrine on taming immigration trauma is the extent to which it recognizes immigrant rights to procedural due process. Foremost, procedural due process means an opportunity for the immigrant's story—including their trauma—to matter enough to be heard and, hopefully, be seen. This visibility of immigrant trauma, in turn, is a necessary precursor to the possibility of changing society's minds and hearts to recognize and embrace immigrants' trauma and perhaps influence policy. Second, procedural due process is concerned with fairness; and insofar as trauma is now sometimes relevant to inclusion,[85] due processes become paramount to embed the adjudication of trauma with fairness. In turn, the principle of fairness has the potential to embed the immigration process with greater compassion toward immigrant trauma.

a. Not Without Notice or a Hearing

In general, the Court has been more willing to admonish immigration agencies over procedural unfairness than to second guess immigration policy choices, at least to safeguard minimum due process rights of immigrants present inside U.S. territory. Still, the Court's willingness to do so has also experienced ebbs and flows. During the Cold War, for example, when the noncitizen facing deportation was a long-term LPR inside U.S. territory, the Court relied on other distinctions, such as war versus peace, to further contract *Yamataya*'s procedural due process reach. As illustrated in the cases below, decisions often turned on LPR nationality to signal the distinction in the treatment of perceived enemy aliens. Consider *Ludecke v. Watkins*, decided in 1948, a case which yielded two strong dissents.[86] Ludecke was a long-term LPR, but he was also German, one of the principal nations the United States fought during WWII. Thus, he was deported under the Alien Enemy Act of 1798, which authorized the President whenever there was a declared war to remove

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84 *Id.* at 110–15.

85 *See* Aldana, Koga, O'Donnell, Skwara & Perris, *supra* note 25.

86 Ludecke v. Watkins, 335 U.S. 160, 173–84 (1948) (Black, J., dissenting); *id.* at 184–87 (Douglas, J., dissenting).

foreign nationals the immigration agencies deemed dangerous without the possibility of judicial review.[87] Indeed, Ludecke was one of 530 so-called "alien enemies" similarly deported.[88] The majority, which ignored *Yamataya*, upheld the legality of Congress's Act and its application to Ludecke under broad assertions of war powers.[89] In contrast, *Yamataya* was cited in both dissents to assert that procedural due process should have protected Ludecke against his arbitrary deportation. Justice Black's dissent questioned the application of Congress's absolute war powers in the absence of a formally declared war given that WWII officially ended in 1945.[90] Justice Douglas went further by questioning the legality of any act of Congress during peacetime that would remove the basic due process protections of fair notice and a hearing in deportation cases.[91] In so doing, the dissenters once more affirmed the trauma inherent in deportation and, thus, the constitutional liberty interests implicated in such acts:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.[92]

In contrast to *Ludecke*, two years later, the Court affirmed the basic due process requirements articulated in *Yamataya* when it invalidated the deportation of a Chinese national, Wong Yang Sung, who had overstayed his visa and was still present in irregular status in the United States.[93] Sung was deported in proceedings during which a single immigration officer, who acted as both an investigator and adjudicator, decided his fate in a summary proceeding that did not accord him fair notice or a hearing.[94] The Court relied on the then newly enacted

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87 *Id.* at 162–63 (majority opinion).

88 *Id.* at 162 n.2.

89 *Id.* at 172 ("Such great war powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined.").

90 *Id.* at 175–77 (Black, J., dissenting).

91 *Id.* at 185–86 (Douglas, J., dissenting).

92 *Id.* at 186 (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945)).

93 Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), *superseded by statute*, Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952), *as recognized in* Ardestani v. Immigr. & Naturalization Serv., 502 U.S. 129 (1991).

94 *Id.* at 45.

Administrative Procedure Act (APA) to invalidate the hearing for its failure to conform to the APA's requirements.[95]

The next two Cold War immigration cases to reach the Supreme Court a few years later involved the question of whether LPRs who exited U.S. territory temporarily lost their rights to procedural due process. The fact that the Court was revisiting the plight of the returning LPR was itself progress given the invisibility of the issue in the case of Chae Chan Ping, who was treated as excludable without a second thought in the seminal case establishing the federal plenary immigration power.[96] In fact, for over the six decades that followed, the Court ignored the liberty interests and, therefore, the trauma of excluding returning LPRs by the unconstrained ways it interpreted the word "entry" in immigration laws. An example of the harsh results of this oversight was in the case of *United States ex rel. Volpe v. Smith*, which involved the deportation of Volpe, an LPR who came to the United States in 1906 at age sixteen.[97] In 1925, he pled guilty to a counterfeit offense—a crime involving moral turpitude (CMT) under immigration law.[98] However, Volpe, who had been an LPR for almost two decades by then, was not deportable because the CMT was not committed within five years of his original "entry."[99] His fate took a dark turn, however, when he traveled briefly to Cuba and was detained and charged under the very same provision since the crime had occurred within five years of this new "entry."[100] The Court, however, completely ignored Volpe's liberty interest when it upheld the government's claim that his brief departure to Cuba should seal his fate.[101]

Volpe provoked strong dissension in the lower courts and rulings that tried to avoid similar fates for other returning LPRs.[102] The Court's blindness to the plight of returning LPRs also began to change when it decided *Kwong Hai Chew v. Colding* in 1953.[103] With some déjà vu

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95 *Id.* at 48–50. This part of the holding treating deportation proceedings as "adversary adjudications" under the APA was ultimately overturned by the Court four decades later. *Ardestani*, 502 U.S. at 139.

96 Chae Chan Ping v. United States, 130 U.S. 581 (1889). Chae Chan Ping came to the United States in 1875 and resided here until June 2, 1887, when he returned for a visit to China after first obtaining a reentry certificate. On September 7, 1888, he boarded a vessel bound for San Francisco. By the time he arrived around October 7, his reentry certificate had been declared void by the passage of the Scott Act. *See* Chin, *supra* note 27, at 11.

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

98 *Id.* at 423.

99 *Id.* at 426.

100 *Id.* at 423.

101 *Id.* at 426.

102 *See, e.g.*, Rosenberg v. Fleuti, 374 U.S. 449, 453–55 (1963) (discussing lower courts' resistance to *Volpe*).

103 Kwong Hai Chew v. Colding, 344 U.S. 590 (1953).

parallels to the life of Chae Chan Ping, Kwong Hai Chew was also a Chinese national and an LPR who obtained a permit to exit the United States temporarily.[104] Here, the parallels end. Kwong Hai Chew entered the United States in 1945, two years after the repeal of the Chinese exclusion law, and avoided deportation based on his marriage to a U.S.-born citizen.[105] Unlike Chae Chan Ping, Kwong Hai Chew was eligible and applied for naturalization to become a U.S. citizen.[106] During World War II, when China was a key U.S. ally, Kwong Hai Chew served as a U.S. Merchant Marine; in fact, his permission to exit the United States was to work for the U.S. Coast Guard as a seaman on a merchant vessel.[107] When an immigration agent denied him entry without a hearing under the same law whose constitutionality the Court upheld three years earlier to exclude Knauff, the German wife of a U.S. citizen,[108] the Court moved quickly to distinguish the cases since Kwong Hai Chew involved a "resident alien" in contrast to an "alien entrant."[109] The Court, in a unanimous decision, went on to affirm that "[i]t is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law."[110] More importantly, the Court declared that it did not consider that "the constitutional status which [the] petitioner indisputably enjoyed prior to his voyage [w]as terminated by that voyage."[111]

In contrast to *Kwong Hai Chew*, the petitioner in the second Cold War–returning LPR case did not fare well. Decided the same year, Mezei

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104 *Id.* at 592–93. In 1947, the Court had decided another returning LPR case in favor of the immigrant, but under fairly unique circumstances. Delgadillo, an LPR of over two decades, left the United States in 1942 to serve on a U.S. merchant ship, which was torpedoed. Delgadillo was rescued and first taken to Cuba for recovery before being returned to the United States. Two years later, he was convicted of second-degree robbery and placed in deportation proceedings for having committed a CMT within five years after entry. The Court considered that his being taken to Cuba to recover rather than to the United States could not be used against him to signify an entry when his so-called exit had been entirely involuntary. Delgadillo v. Carmichael, 332 U.S. 388 (1947).

105 Chinese Exclusion Acts were repealed by the Magnuson Act of 1943, which allowed 105 Chinese immigrants to enter per year. Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600. *See generally* David W. Dunlap, *135 Years Ago, Another Travel Ban Was in the News*, N.Y. TIMES (Mar. 17, 2017), https://www.nytimes.com/2017/03/17/insider/chinese-exclusion-act-travel-ban.html (last visited Nov. 8, 2022).

106 *Kwong Hai Chew*, 344 U.S. at 593.

107 *Id.* at 594.

108 United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542–47 (1950).

109 *Kwong Hai Chew*, 344 U.S. at 596.

110 *Id.*

111 *Id.* at 600.

was returning from a country behind the Iron Curtain,[112] and the case involved a stateless person, who, while also a twenty-five-year LPR of the United States, did not bring to the table the same character qualities that appeared to have evoked so much empathy by the Court in *Kwong Hai Chew*. Because Mezei was being detained at Ellis Island and excluded on national security grounds based on secret evidence and without a hearing, it is impossible to ascertain exactly what the Court knew about his life. But what happened to him after his departure from the United States likely raised significant questions about his character: Mezei sailed to Romania apparently to visit his dying mother but was denied entry for reasons unknown. Stuck for nineteen months in Hungary, unable to secure an exit permit, he was ultimately successful in securing a visa in Budapest to return to the United States but was detained and excluded upon arrival in New York and labeled a national security threat. Then, dozens of countries in Latin America turned down his request for entry, leaving him stuck at Ellis Island indefinitely.[113] These are basically the facts the Court knew when it chose to contrast the ruling in *Kwong Hai Chew* as follows:

> But respondent's history here drastically differs from that disclosed in Chew's case. Unlike Chew who with full security clearance and documentation pursued his vocation for four months aboard an American ship, respondent, apparently without authorization or reentry papers, simply left the United States and remained behind the Iron Curtain for 19 months.[114]

Ironically, the Court in *Mezei* cited *Yamataya* to go out of its way in dicta to contrast this harsh result for Mezei[115] to what would likely be the fate for any other foreign nationals already inside U.S. territory—this time, even for those who entered without permission: "It is true that aliens who have once passed through our gates, even illegally, may be

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112 The Court's citation of the district court's description of Shaughnessy's background itself reveals the Court's discomfort with the petitioner: "Respondent's present dilemma springs from these circumstances: Though, as the District Court observed, '(t)here is a certain vagueness about (his) history', respondent seemingly was born in Gibraltar of Hungarian or Rumanian [sic] parents and lived in the United States from 1923 to 1948." Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 208 (1953) (first and second alterations in original) (quoting United States *ex rel.* Mezei v. Shaughnessy, 101 F. Supp. 66, 67 (S.D.N.Y. 1951)).

113 *Id.*

114 *Id.* at 214 (footnote omitted).

115 *Id.* at 212. Eventually, Mezei's story would be revealed based on subsequent hearings the government granted him based on political pressure. Mezei never regained his LPR status and was ultimately paroled. For a very interesting recounting of Mezei's story, see Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995).

expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[116]

Mezei provoked two strong dissents from four of the Justices. Justices Black and Douglas worried that *Mezei*'s holding would lead to tyrannical governments no different than Hitler's Germany.[117] Justices Jackson and Frankfurter instead unmasked the Court's attempts to blame Mezei for his fate and returned to him his humanity by recognizing his stakes in liberty and his trauma:

> What is our case? In contemplation of law, I agree, it is that of an alien who asks admission to the country. Concretely, however, it is that of a lawful and law-abiding inhabitant of our country for a quarter of a century, long ago admitted for permanent residence, who seeks to return home. . . . For nearly two years he was held in custody of the immigration authorities of the United States at Ellis Island, and if the Government has its way he seems likely to be detained indefinitely, perhaps for life, for a cause known only to the Attorney General.[118]

Then, in 1952, a year prior to the decisions in *Kwong Hai Chew* and *Mezei*, but years after their deportations were final, Congress enacted a definition of "entry,"[119] which, in part, attempted to ameliorate the harshness imposed by *Volpe*.[120] The first time the Court examined the meaning of the statute, however, was not until 1963 when the Court considered whether Fleuti, an LPR of four years, should be considered as making an "entry" into the United States upon his return from an uneventful visit of a couple of hours to Ensenada, Mexico.[121] The answer

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116 *Mezei*, 345 U.S. at 212 (citing Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903)).

117 *Id.* at 217–18 (Black, J., dissenting).

118 *Id.* at 219–20 (Jackson, J., dissenting) (footnote omitted).

119 The 1952 Act defined "entry" as:

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

Immigration and Nationality Act § 101(a)(13), Pub. L. No. 82-414, 66 Stat. 167 (1952) (codified at 8 U.S.C. § 1101).

120 Rosenberg v. Fleuti, 374 U.S. 449, 453–58 (1963).

121 *Id.* at 450–52. The issue of how Congress's definition of "entry" affected LPRs came up but was not fully considered in *Bonetti v. Rogers*, a case involving two separate lawful entries as an LPR, which raised the question over the meaning of the term "at the time of entering the United States" in the amended provision of the ISA, which made membership in a communist organization a deportable offense. 356 U.S. 691 (1958). Because Frank Bonetti's second lawful entry as an LPR occurred years after his membership in the Communist Party, and because he was allowed "entry"

was extremely important to Fleuti since the government was charging him as excludable as a "psychopathic personality" for being gay, a ground of exclusion that was not available at the time of his entry in 1952.[122] The irrationality that a two-hour venture out of the United States would so impact Fleuti was not lost on the Court:

> Certainly when an alien like Fleuti who has entered the country lawfully and has acquired a residence here steps across a border and, in effect, steps right back, subjecting him to exclusion for a condition, for which he could not have been deported had he remained in the country seems to be placing him at the mercy of the "sport of chance" and . . . "meaningless and irrational hazards" . . . .[123]

Yet, the Court did not directly rely on substantive due process, or even the doctrine of constitutional avoidance, to reach its result, perhaps because the challenge involved a policy choice over a procedural question—e.g., what effectuates an "entry" into the United States. Instead, a divided Court focused on the returning-LPR exception in the Immigration and Nationality Act of 1952 (INA) available to the Attorney General to construe it broadly in order to avoid irrational results and acknowledge certain basic rights that LPRs who leave the United States retain as recognized in *Kwong Hai Chew*.[124]

Finally, in 1982, the Court considered the fate of a Salvadoran woman, an LPR of five years married to a U.S. citizen with minor U.S.-citizen children, who was caught at the border attempting to smuggle six Mexican and Salvadoran nationals into the country days after her departure.[125] In contrast to *Fleuti*, Maria Plasencia directly challenged the lack of due process imposed on a returning LPR and, perhaps because of this, the Court more explicitly rendered a constitutional holding. The most significant aspect of the case is that the Court, even while agreeing with the government that the question of whether Plasencia effectuated an "entry" could be resolved by the government in an exclusion proceeding, adopted for the first time *Mathews v. Eldridge*[126] as the standard to assess whether exclusion proceedings, at least as applied to returning LPRs, met the "essential standard of fairness under the Due

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with full knowledge of this fact, the Court decided the case not by focusing directly on whether a one-day visit to Tijuana constituted a new entry, but rather by narrowing the meaning of entry as used in the deportation provision as referring only to the last date in which Bonetti became an LPR. *Id.* at 698.

122 *Fleuti*, 374 U.S. at 453.

123 *Id.* at 460 (quoting Di Pasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947)).

124 *Id.*

125 Landon v. Plasencia, 459 U.S. 21 (1982).

126 *Id.* at 34; *see* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

Process Clause."[127] *Mathews* necessarily required balancing the government's interest in border control against both the immigrant's interest at stake and the risk of erroneous deprivation through the procedures used.[128] As the Court explained, this would mean that the sufficiency of due process would vary with the particular circumstances and would need to consider how the weighty interest of an LPR seeking reentry would weigh against the government's interest in border control.[129] Then, while characterizing the government interest also as "weighty," the Court elaborated that Plasencia's interests included a right "to stay and live and work in this land of freedom" and a "right to rejoin her immediate family."[130] Another significant aspect of this case is that the Court did not strip Plasencia of her constitutional rights, despite her illegal conduct. Indeed, the Court ignored this fact while citing numerous precedents to reassert that "once an alien gains admission . . . and begins to develop the ties that go with permanent residence his constitutional status changes accordingly. . . . [A] continuously present resident alien is entitled to a fair hearing when threatened with deportation."[131]

b. The Contours of Fairness: Who Decides?

The Court's several rulings affirming that territoriality and stakes trigger procedural due process did not definitively resolve how much due process is constitutionally required in immigration proceedings. This lack of clarity, and Congress's desire to define the precise terms of this process, have led to Court rulings that largely defer to Congress. The Court's trepidation to decide immigration due process on constitutional grounds has given Congress the upper hand since courts have provided no definite guidance on what is minimally required for fairness in a deportation hearing. And yet, it would be too simplistic to ignore the influence that judicial due process pronouncements in the context of deportations likely have had on how Congress legislates. In general, Congress has legislated to recognize greater due process guarantees in

127 *Plasencia*, 459 U.S. at 35.

128 *Id.* at 34 (citing *Mathews*, 424 U.S. at 334–35).

129 *Id.*

130 *Id.* (quoting Bridges v. Wixon, 326 U.S. 135, 153–54 (1945)) (first citing Moore v. City of East Cleveland, 431 U.S. 494, 499, 503–04 (1977); and then citing Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

131 *Id.* at 32–33 (first citing Johnson v. Eisentrager, 339 U.S. 763, 770 (1950); then citing United States *ex rel.* Tisi v. Tod, 264 U.S. 131, 133–34 (1924); then citing Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912); then citing Kwong Hai Chew v. Colding, 344 U.S. 590, 598 n.8 (1953); then citing United States *ex rel.* Vajtauer v. Comm'r of Immigr., 273 U.S. 103, 106 (1927); then citing Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903); then citing Wong Yang Sung v. McGrath, 339 U.S. 33, 49–50 (1950); and then citing *Bridges*, 326 U.S. at 153–54).

deportation proceedings in contrast to those that involve exclusion.[132] This, again, largely reflects the recognition of the border's trauma on immigrants who have made the United States home.

Since *Yamataya*, the Court's vast deference to Congress's due process contours set the stage for the early cases that challenged immigration statutes based on due process. Even in *United States v. Ju Toy*, a case which involved Ju Toy's claim to citizenship at a port of entry, the Court validated essentially the same procedures given to Yamataya (a single brief hearing with an immigration officer and without adequate notice) as adequate due process, explicitly rejecting the need for a judicial trial to review a person's claim to citizenship.[133] Other earlier cases involved the deportation of Chinese women based on allegations of prostitution. In 1911, a Chinese woman, an LPR and widow of a U.S. citizen, lost on jurisdictional grounds her due process challenge to the deportation statute for its failure to provide a hearing of a judicial character or to compel or sanction witnesses for their failure to show up.[134] The following year, the U.S.-citizen spouse of a Chinese woman similarly accused of prostitution challenged the same statute on due process grounds.[135] This time, the challenge focused on the same concerns over the statute's omissions to regulate witnesses but also, inter alia, on the government's reliance on the hearsay evidence of a confidential informant and violations of the right to be represented by counsel at all stages of the proceedings.[136] The Court once more declined to find that the statute violated due process, establishing a standard that required the petitioner to show that the rules were "so arbitrary" or "manifestly unfair" as to intend to rob the noncitizen of a fair hearing.[137]

The Court also deferred when Congress, in direct contradiction to the Court, legislated to limit the application of the APA in the area of immigration. In addition to expanding judicial review,[138] the APA

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132 Since 1996, however, Congress has legislated too narrowly regarding who receives these greater due process protections by, for example, drawing distinctions between legal and illegal entry through terminology such as "admission," as has the Executive by redrawing the border in ways that expand exclusion. These new trends are taken up in Section II.A.

133 United States v. Ju Toy, 198 U.S. 253, 263 (1905). Congress has also legislated to ameliorate the holding in *Ju Toy*. While not requiring a full judicial hearing, denials of citizenship claims asserted as occurring outside of the United States are subject to habeas corpus review. 8 U.S.C. § 1503.

134 Yeung How v. North, 223 U.S. 705 (1911). For a discussion of the facts and legal challenge in the case, see *Low Wah Suey*, 225 U.S. at 468–69.

135 *Low Wah Suey*, 225 U.S. at 460.

136 Specifically, his wife was not advised of her right to retain counsel, and when she was, she was still questioned without the presence of her lawyer against her will. *Id.* at 469–72.

137 *Id.* at 468, 472; *see also* United States *ex rel.* Tisi v. Tod, 264 U.S. 131 (1924).

138 See *infra* notes 165–262 and accompanying text for a discussion of the APA, judicial review, and deportation.

prescribed a number of fairness guarantees to administrative hearings that could only be undone through clear legislative mandate.[139] Four years after the APA's adoption in 1946, the Court in *Wong Yang Sung v. McGrath* confirmed the APA's application to deportation hearings.[140] This prompted Congress to move quickly to reverse the Court as part of the Supplemental Appropriation Act of 1951, which included a provision declaring that Sections 5, 7, and 8 of the APA did not apply to exclusion or deportation hearings.[141] Then, in 1952, Congress enacted the INA, which, inter alia, prescribed new procedures governing deportation proceedings and further declared that "[t]he procedure (herein prescribed) shall be the sole and exclusive procedure for determining the deportability of an alien."[142] To be sure, the INA included many due process guarantees, including some not stipulated in the APA.[143] Yet, the INA did not guarantee all of the due process protections contemplated by the APA. This led to litigation. In 1955, the Court decided a case involving an LPR of forty-four years, Carlos Marcello, who had a U.S.-citizen wife and four U.S.-citizen children.[144] Marcello was ordered deported based on a decades-old conviction from 1938 for which he was sentenced to one year in prison for violating the Marihuana Tax Act, a crime that did not become grounds for deportation until 1952.[145] His challenge, based on the APA, was very concrete: he focused on the lack of independence of administrative officers deciding his case whose boss was the Attorney General who, in turn, had made public statements labeling Marcello and 152 other deportees as "undesirable."[146] The Court, however, did not agree, essentially siding with the government's claim that the INA simply superseded the APA without giving due consideration to whether, if so, the new process passed constitutional muster.[147] As well, the two

139 *See, e.g.*, Robin J. Arzt, David H. Coffman & Pamela L. Wood, *Advancing the Judicial Independence and Efficiency of the Administrative Judiciary: A Report to the President-Elect of the United States*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 93 (2009).

140 Wong Yang Sung v. McGrath, 339 U.S. 33, 46 (1950).

141 *See* Marcello v. Bonds, 349 U.S. 302, 306 (1955).

142 *Id.* at 307–09 (quoting Immigration and Nationality Act § 242(b), Pub. L. No. 82-414, 66 Stat. 208 (1952) (codified at 8 U.S.C. § 1252)).

143 For example, the 1952 INA prescribed a reasonable opportunity to be present at the deportation hearing; reasonable notice of the hearing and nature of the charges; an opportunity to present evidence and cross-examine; some safeguards to protect the mentally incompetent; the privilege to be represented by counsel; and the guarantee that deportation decisions be substantiated by reasonable, substantial, and probative evidence. *Id.* at 307–08.

144 *Id.* at 315 (Black, J., dissenting).

145 The 1952 INA made convictions for this and other drug crimes at any time grounds for deportation and made the Act applicable retroactively. *Id.* at 303 (majority opinion).

146 *Id.* at 304.

147 *Id.* at 308–11.

dissenters on this point[148] hinted but did not decide that Congress's decision to eradicate the application of Section 5 of the APA to deportation might raise a constitutional question, choosing instead to hold that the INA actually restored Section 5.[149]

Another clear example of the Court's deference to congressional policy choices over the contours of due process for immigrants occurred when the Court decided *Landon v. Plasencia*, a case involving the application of exclusion proceedings to a returning LPR.[150] While the Court strongly affirmed Plasencia's constitutional procedural due process rights, it distinguished between "determining whether the procedures meet the essential standard of fairness under the Due Process Clause" from "imposing procedures that merely displace congressional choices of policy."[151] The case itself is emblematic of the elaborate tango that this judicial constitutional review with congressional policy deference seems to require of Congress. Congress makes the initial move on the tango dance floor, but this move must anticipate the Court's mood to ensure a synchronous dance. Congress made such a move when it enacted the INA, the law that dictated procedures in *Plasencia* and drew important procedural and substantive distinctions between exclusion and deportation proceedings discussed in the case; among these: deportation hearings required a seven-day notice of the charges but exclusion hearings did not; deportation orders could be appealed to a Court of Appeal but exclusion orders were subject only to habeas corpus; only deportable noncitizens were eligible to apply for suspension of deportation, depart voluntarily, and choose the country of deportation.[152] Plasencia's concrete due process concerns pertained to (1) inadequate notice (she received less than eleven hours' notice before her hearing); (2) a claim that it should be the government who must bear the burden of proof to establish her deportability (it was not clear in the proceedings who bore the burden of proof); and (3) the fact that she did not meaningfully waive her right to counsel because she did not understand the consequences of that choice.[153] This is where an otherwise unanimous Court parted ways. The majority was more comfortable remanding the case to the court of appeals to allow the parties to decide whether

148 The case yielded two separate dissents, with the second, by Justice Douglas, focused solely on ex post facto challenges. *See id.* at 319–21 (Douglas, J., dissenting). For a discussion of such challenges, see *infra* notes 151–259 and accompanying text.

149 *Marcello*, 349 U.S. at 316 (Black, J., dissenting).

150 Landon v. Plasencia, 459 U.S. 21 (1982).

151 *Id.* at 35.

152 *Id.* at 25–27.

153 *Id.* at 35–36.

Plasencia was accorded due process.[154] Justice Marshall's tango move would have been more corrective. He was unconvinced that Plasencia received fair notice both in terms of adequate time and adequate content or that she understood what she was waiving when she did not seek counsel.[155]

Another issue related to fairness in immigration proceedings that is especially relevant to cases in which trauma can be the basis for inclusion (e.g., humanitarian visas) relates to who should bear the burden of proof in immigration proceedings. In general, when the Court recognizes a constitutional liberty interest, it has expressed a preference for the government and not the immigrant to bear the burden of proof. This has been true in cases involving the detention and deportation of LPRs. In *Zadvydas v. Davis*, for example, a case that examined the legality of post-removal indefinite detention, the Court did not view as sufficient administrative proceedings to contest the detention that imposed on immigrants the burden of proving they are not dangerous.[156] The Court, however, has rejected claims that the government must bear the burden of proving either eligibility or bars to eligibility that either grants a person lawful entry into the United States or suspends a deportation. In *Kimm v. Rosenberg*,[157] an LPR of over two decades from Korea was ordered deported on grounds unrelated to national security, yet he was subsequently denied suspension of deportation for his refusal to answer a question about his communist associations.[158] Diamond Kimm, who had otherwise established his eligibility for suspension, admittedly a discretionary remedy, unsuccessfully argued that his mere silence did not satisfy the government's burden of establishing that he was nonetheless barred based on the deportability ground proscribing communism associations.[159] The Court disagreed, finding that the statute[160] placed the

154 *Id.* at 37.

155 *Id.* at 38–39 (Marshall, J., concurring in part and dissenting in part). The Ninth Circuit remanded the case to the district court, but there is no written opinion of the district court's ruling. Plasencia v. Dist. Dir., Immigr. & Naturalization Serv., 719 F.2d 1425 (9th Cir. 1983). "The government subsequently declined further prosecution of Plasencia on remand—presumably due to the likelihood that pro-immigrant due process law would arise from further litigation of the case." Johan Fatemi, *A Constitutional Case for Appointed Counsel in Immigration Proceedings: Revisiting* Franco-Gonzalez, 90 ST. JOHN'S L. REV. 915, 928 (2016) (citing THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 560 (7th ed. 2012)).

156 Zadvydas v. Davis, 533 U.S. 678, 692 (2001).

157 Kimm v. Rosenberg, 363 U.S. 405 (1960).

158 *Id.* at 413 (Brennan, J., dissenting).

159 *Id.* at 406 (majority opinion).

160 Act of Oct. 16, 1918, ch. 186, Pub. L. No. 65-221, 40 Stat. 1012 (repealed 1952).

burden on the applicant without considering whether such interpretation in any way violated due process.[161]

A related issue on proof is what the standard of proof should be in cases involving immigrants' liberty interests. The question is especially relevant in deportation proceedings insofar as the Court has understood such proceedings as involving severe consequences comparable to criminal punishment.[162] In contrast to criminal cases, however, the Court has never imposed a standard of proof in deportation cases that even comes close to beyond a reasonable doubt. In a very early deportation case, the Court imposed a deferential standard that rejected even the substantial evidence test sought from the appellant facing deportation.[163] Instead, the Court held that "it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced and that it committed no error so flagrant as to convince a court of the essential unfairness of the trial."[164]

c. Judicial Check on the Immigration Power

How much liberty interest courts recognize on behalf of immigrants facing trauma from exclusion or deportation correlates to the types of judicial review they are willing to impose as a check on the exercise of this power. This has been the subject of significant back and forth between Congress and the courts, especially after the APA established guidelines for judicial review of administrative action.[165] In general, Congress has retained the upper hand by increasingly enacting judicial-stripping provisions in immigration statutes such that robust judicial review is the exception rather than the norm as to most immigration matters. The effect has been that immigrants, especially those who are not inside U.S. territory, cannot tell their stories or must do so in cursory, secret, or hidden proceedings that render invisible or erase their trauma.

Prior to 1952, the sole means of challenging immigration laws and practices had been through habeas corpus.[166] A large reason for this was that early immigration legislation, such as the Immigration Act of 1891[167] and the Immigration Act of 1917[168] prescribed that administrative

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161 *Id.*

162 *See infra* Section I.B.1.

163 United States *ex rel.* Vajtauer v. Comm'r of Immigr., 273 U.S. 103 (1927).

164 *Id.* at 106 (citing United States *ex rel.* Tisi v. Tod, 264 U.S. 131, 133 (1924)).

165 Note, *The Right to Judicial Review of Deportation Orders Under the Administrative Procedure Act*, 62 YALE L.J. 1000 (1953).

166 *See* Patel v. U.S. Att'y Gen., 971 F.3d 1258, 1269–72 (11th Cir. 2020) (providing a detailed history of judicial review in immigration proceedings).

167 *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020) (discussing the Immigration Act of 1891).

168 Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

exclusion or deportation orders were "final."[169] Courts largely interpreted these statutes as precluding all forms of judicial review over such orders except habeas corpus review, often without giving serious consideration to the statute's constitutionality.[170] In many cases, whether involving legal challenges to exclusion or deportation, the U.S. Supreme Court simply applied habeas corpus review with no analysis as to why.[171] In other cases, the Court relied on the canon of constitutional avoidance to interpret the relevant statutes as not precluding habeas corpus review, considering such interpretation suspect under the Due Process and Suspension Clauses.[172]

Immediately following its adoption, the APA was used to challenge the legality of the Immigration Act of 1917's judicial review restrictions, aside from habeas corpus, on the ground that it failed to satisfy the APA's limited exceptions to judicial review of agency decisions as a matter of right. Combined, Sections 10 and 12 of the APA created a presumption for judicial review of administrative decisions except when Congress clearly legislated to preclude judicial review or when the agency action involved the exercise of discretion as a matter of law.[173] In one of the first cases, *McGrath v. Kristensen*, the Court did not consider it necessary to rely on Section 10 of the APA to hold that the 1917 Act did not preclude an examination of questions of law in the immigration context.[174] The case, however, was not a challenge to the deportation per se; rather, petitioner sought declaratory judgment on whether the agency had correctly interpreted a bar to naturalization on which it relied to deny petitioner's request for suspending his deportation.[175] A few years later, however, the Court took up the issue directly in a case that contested a deportation's legality. Like so many other deportations of the Cold War, this case involved the deportation of a foreign national under the ISA, which made membership in a communist party per se a ground for

169 *See Patel*, 971 F.3d at 1269 (discussing the Immigration Act of 1917).

170 *Id.*

171 *See, e.g.*, Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); Fiallo v. Bell, 430 U.S. 787 (1977).

172 *See, e.g.*, Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 299–300 (2001), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, *as recognized in* Nasrallah v. Barr, 140 S. Ct. 1683 (2020); Zadvydas v. Davis, 533 U.S. 678, 699 (2001).

173 Administrative Procedure Act § 10, Pub. L. 79-324, 60 Stat. 243 (1946) (codified as amended at 5 U.S.C. §§ 701–706). On the other hand, whereas the Court originally read into Section 10 of the APA, an independent grant of subject-matter jurisdiction in the federal courts in a case involving denationalization, this understanding of the APA was ultimately overruled by the Court. *See* Rusk v. Cort, 369 U.S. 367 (1962), *abrogated by* Califano v. Sanders, 430 U.S. 99 (1977).

174 McGrath v. Kristensen, 340 U.S. 162 (1950).

175 Specifically, Kristensen, who was a visa overstayer, alleged that the agency was wrong in concluding that he was "residing" in the United States for purposes of the bar to naturalization under the Selective Training and Service Act of 1940. *Id.* at 166, 174.

deportation.[176] Rather than challenge the constitutionality of the Act through habeas corpus, Heikkila filed a direct appeal that both sought to challenge the deportation law's constitutionality while granting him injunctive and declaratory relief from his deportation.[177] *Heikkila v. Barber* focused on whether, given the APA's preference for judicial review, the 1917 Act was sufficiently clear to satisfy the statutory exception to this type of judicial review under the APA. The Court ultimately recognized the "statute preclude[ed] judicial review" under the legislative exception in Section 10.[178] *Heikkila*, moreover, raised the question that the affirmance of the Act's judicial review restrictions would violate due process. To do so, *Heikkila* relied on precedent, including *Kristensen*, granting declaratory or injunctive relief in cases involving the denial of naturalization or erroneous determinations of citizenship eligibility.[179] In contrast to those cases, the Court declined to find a due process violation in *Heikkila* by stating that deportation did not implicate the same harms or, perhaps, rights as denials of citizenship.[180]

Despite *Heikkila*, the Court was initially less willing to read immigration statutes adopted post-APA as limiting judicial review, aside from habeas corpus. In 1955, the Court reviewed the availability of injunctive relief against deportation orders, this time under the INA.[181] Surprisingly, especially since the INA retained the exact same language as the 1917 Act characterizing deportation orders as "final," the Court did not find *Heikkila* controlling.[182] Instead, the Court considered the word "final" ambiguous in that it could connote a finality to the administrative process but not of judicial review.[183] Moreover, the Court was bothered by the government's position that, unless deportees were detained, habeas corpus too was unavailable.[184] *Heikkila* and *Shaughnessy v. Pedreiro* are hard to reconcile except insofar as the Court seems to view the APA as exacting greater precision from Congress when it legislates to end judicial review. The Court adopted a similarly strict statutory language requirement in an exclusion case a year later, although that case involved

176 Heikkila v. Barber, 345 U.S. 229 (1953).

177 *Id.* at 230.

178 *Id.* at 235–36. The Court did not, however, contemplate whether deportation also implicated a discretionary agency action, the other APA exception to judicial review.

179 *Id.* at 236 (first citing Perkins v. Elg, 307 U.S. 325 (1939) (declaratory and injunctive relief); and then citing *Kristensen*, 340 U.S. 162 (declaratory relief)).

180 *Id.*

181 Shaughnessy v. Pedreiro, 349 U.S. 48 (1955).

182 *Id.* at 50.

183 *Id.* at 51.

184 *Id.*

a claim to citizenship. In *Brownell v. Tom We Shung*,[185] Tom We Shung unsuccessfully claimed U.S. citizenship as the biological son of a U.S. citizen who served during WWII but was excluded in a process he claimed lacked substantiation and violated his due process.[186] The Court was unwilling to recognize a legislative exception to judicial review seeking declaratory judgment by imposing a strict construction of a different provision of the 1952 Act in order to preserve the APA's presumption in favor of broader judicial review.[187]

The trend to apply strict statutory interpretation construction to judicial-stripping provisions post-APA pushed Congress to include explicit judicial-stripping provisions over immigration enforcement decisions in subsequent legislation. For example, in 1961, Congress moved to create a single, separate statutory form of judicial review of deportation orders that eliminated review by the district courts and replaced it with direct review by the courts of appeals based on the administrative record.[188] Congress then adopted the more sweeping judicial-stripping provisions over immigration adjudication in 1996 as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[189] The IIRIRA is hardly a model for clarity in just how far Congress intended to shield immigration decisions from judicial review beyond habeas, or even on whether it applied to ongoing cases when enacted.[190] Perhaps because of this, the Court has still imposed similar presumptions of judicial review to the IIRIRA as in *Shung*.[191] The Court has been more willing, without even mentioning the APA's presumption for judicial review, to read the muddled provisions of the IIRIRA as foreclosing judicial review of pre-final orders of deportation even in cases that began prior to the IIRIRA's enactment.[192] The Court,

185 Brownell v. Tom We Shung, 352 U.S. 180 (1956).

186 *Id.* at 181–82.

187 In *Tom We Shung*, the INA provided that citizenship claimants who held a "certificate of identity" could only test the validity of their exclusion through habeas corpus. The government argued that this provision was controlling on Shung. Yet the Court disagreed by declaring the statute technically inapplicable to Shung, who did not hold such a certificate. *Id.* at 182–85.

188 *See* Agosto v. Immigr. & Naturalization Serv., 436 U.S. 748, 752–53 (1978) (discussing the Immigration and Nationality Act Amendments of 1961 § 106, Pub. L. No. 87-301, 75 Stat. 651 (codified at 8 U.S.C. § 1105a)).

189 8 U.S.C. § 1252(a)(2)(B); *see also* Nken v. Holder, 556 U.S. 418, 423–25 (2009) (discussing some of the IIRIRA's judicial-stripping provisions); Lee Gelernt, *The 1996 Immigration Legislation and the Assault on the Courts*, 67 BROOK. L. REV. 455 (2001); Lucas Guttentag, *Immigrants' Rights in the Courts and Congress: Constitutional Protections and the Rule of Law After 9/11*, 25 WASH. U. J.L. & POL'Y 11 (2007).

190 *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) (highlighting the judicial struggles to make sense of the IIRIRA's judicial-stripping provisions just in this case).

191 *See supra* notes 185–87 and accompanying text.

192 *Reno*, 525 U.S. at 482–88.

however, has been unwilling to read statutes as foreclosing all judicial review of deportation orders, at least insofar as final orders of deportation are still reviewable by the courts of appeals.[193] Moreover, despite Congress's attempts to limit stays of removal while deportation orders are on appeal,[194] the Court preserved the more flexible federal court standard for issuing stays in order to preserve the integrity of judicial proceedings in immigration cases.[195] To do so, the Court did not emphasize immigrants' liberty interests or stakes to defend themselves against deportation.[196] Instead, the Court focused on the role of stays, which, unlike injunctions, are extraordinary judicial remedies to safeguard against injury, function to preserve the ability of the court to act responsibly and deliberately in its decision making.[197] Quite recently, however, the Court read an immigration statute[198] to bar class action lawsuits seeking to enjoin the indefinite detention practices (over six months) of immigrants with reinstated orders of removal—some who

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193 *Id.* at 482.

194 The IIRIRA lifted the ban on judicial review of deportation cases when the noncitizen had already been removed from the country, but it also changed the presumption of an automatic stay of removal that applied to immigration deportation orders on appeal. Instead, federal courts now must order such stays. *Nken*, 556 U.S. at 424–25.

195 *Id.* at 426–27. To order stays, the federal courts adopted a four-factor test:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 425–26 (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). The government, however, argued for the application of the stricter test for issuing injunctions under the IIRIRA, namely when "the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law." *Id.* at 426 (quoting 8 U.S.C. § 1252(f)(2)).

196 The petitioner in this case applied for asylum and Convention Against Torture withholding upon his arrival to the United States on a transit visa but was denied based on lack of credibility. *Id.* at 422.

197 *Id.* at 427–30. Despite *Nken*, not all lower courts grant stays to immigration deportation pending appeal, even in compelling cases. The Fifth Circuit's denial of such a stay to a Haitian man afflicted with mental illness, and who was initially granted withholding of deportation by an immigration judge until the BIA reversed, provoked a strong dissent from Justice Sotomayor when the Court declined to hear the case. *See* Francois v. Wilkinson, 141 S. Ct. 652 (2021) (Sotomayor, J., dissenting).

198 The INA sets forth a precise limitation on the lower federal courts' jurisdiction to enter injunctive relief in cases involving specified sections of the INA. The provision states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [§§ 1221–32], as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1).

sought relief based on fears of persecution or torture.[199] Justice Sotomayor, joined by Justice Kagan and, in part, by Justice Breyer, challenged the conservative Justices'[200] plain reading of the contested provision.[201] Importantly, Justice Sotomayor criticized an (imperfect) textualist approach to statutory interpretation that completely ignored the presumption in favor of equitable jurisdiction in statutes that are ambiguous in their judicial-stripping provisions.[202] She cautioned that the ramifications of the Court's (erroneous) ruling risk depriving many vulnerable immigrants of any meaningful opportunity to protect their rights, viewing it as both unfair and inefficient to require them to challenge individually what are clearly systemic failures of the immigration system.[203]

In terms of the second APA exemption to the judicial review presumption—i.e., decisions that involve an agency's discretionary functions—the Court, in general, has been permissive, even encouraging, of Congress's judicial-review stripping provisions or those that otherwise substantially limit judicial review. One recent example of this is the 2021 *Garland v. Dai* decision involving the review of credibility determinations in asylum cases.[204] This case juxtaposed the "highly deferential" INA provision making administrative findings conclusive unless a reasonable adjudicator would be compelled to conclude the contrary[205] with the more precise INA provision establishing a rebuttal presumption of credibility in favor of the applicant on appeal when agencies failed to make an "'explici[t]' 'adverse credibility determination.'"[206] This latter provision, which the Court labeled a "wrinkle,"[207] led the Ninth Circuit to adopt a presumption of credibility in asylum cases in which the agency had not made an explicit finding of credibility.[208] The Court, however, resolved the so-called statutory wrinkle by determining that an "appeal" referred only to the Board of Immigration Appeals (BIA) review of the

199 Garland v. Aleman Gonzalez, 142 S. Ct. 2057 (2022).

200 Justice Alito wrote the majority opinion, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barrett. *Id.*

201 The Justices quarreled, for example, over the meaning of "operation" and whether the term referred to all implementation of the statute, whether lawful or not, or whether it could only refer to lawful agency action. *Id.* at 2070 (Sotomayor, J., concurring in part and dissenting in part).

202 *Id.* at 2071–72.

203 *Id.* at 2076–77.

204 Garland v. Dai, 141 S. Ct. 1669 (2021).

205 *Id.* at 1677 (citing 8 U.S.C. § 1252(b)(4)(B)).

206 *Id.* (alteration in original) (first quoting §§ 1158(b)(1)(B)(iii); then quoting 1231(b)(3)(C); and then quoting 1229a(c)(4)(C)).

207 *Id.*

208 *Id.* at 1674.

immigration judge's decision, and not to what it considered "collateral judicial review" of executive agencies.[209]

The Court's willingness to cede oversight of immigration discretionary decisions, however, has not always meant agency deference to threshold decisions about which immigration functions involve discretionary functions. For example, in *Kucana v. Holder* in 2010, the Court clarified that the IIRIRA's judicial-stripping provisions on immigration discretionary functions applied only to those made discretionary by statute and not solely through regulation.[210] To do so, the Court based its decision not only on their reading of statutory language,[211] but also on the presumption in favor of interpreting statutes as preserving judicial review of administrative actions.[212] *Kucana* involved judicial review of denials of motions to reopen, which the Court held did not involve discretionary functions.[213] Then, in the Deferred Action for Childhood Arrival (DACA) 2020 Supreme Court case, the government attempted to challenge the Court's jurisdiction by both characterizing DACA as an exercise of a discretionary government function and thus an exception to the APA's presumption in favor of judicial review[214] and by citing legislative exceptions.[215] The Court, however, rejected both claims, stating that "[t]o 'honor the [APA's] presumption of [judicial] review, we have read the exception . . . quite narrowly.'"[216] Then, in terms of discretionary decisions, the Court confined the presumption to the "rare 'administrative decision[s] traditionally left to agency discretion'"—namely, the "agency's decision *not* to institute enforcement proceedings."[217] The Court did not consider DACA to fall into this category because the program "did not merely 'refus[e] to institute proceedings'"; it also "directed [the U.S. Citizenship and Immigration Services] to 'establish a clear and efficient process'" for adjudicating

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209 *Id.* at 1678.

210 Kucana v. Holder, 558 U.S. 233 (2010). *Kucana* involved an appeal from the denial of a motion to reopen an asylum case based on new evidence. *Id.*

211 The IIRIRA provision stripping judicial review of administrative actions used the phrase "specified under this subchapter," which the Court interpreted as narrowing the provision solely to immigration determinations made discretionary by statute. *Id.* at 237 (quoting 8 U.S.C. § 1252(a)(2)(B)(ii)).

212 *Id.*

213 *Id.* at 233. The Court has since expanded the availability of judicial review in denials of motions to reopen even when the denial was based on untimely filing. Mata v. Lynch, 576 U.S. 143 (2015).

214 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1906 (2020).

215 *Id.* at 1907.

216 *Id.* at 1905 (quoting Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018)).

217 *Id.* (alteration in original) (emphasis added) (quoting Lincoln v. Vigil, 508 U.S. 182, 191 (1993)) (citing Heckler v. Chaney, 470 U.S. 821, 831–32 (1985)).

individual claims for the conferral of affirmative immigration relief.[218] In terms of the legislative exceptions, the government first relied on § 1252(b)(9) of the INA, which bars review of claims arising from the removal of immigrants.[219] However, the Court did not view DACA's rescission as involving removal decisions. The government also relied on § 1252(g), which bars judicial review in cases "'arising from' decisions 'to commence proceedings, adjudicate cases, or execute removal orders.'"[220] The Court, however, rejected a broad interpretation of this provision as a general jurisdictional limitation over judicial review of immigration decisions.[221]

Finally, despite a lengthy history of habeas corpus review to challenge all immigration decisions raising questions of law,[222] the Court has also considered whether Congress has or could strip the courts of habeas corpus jurisdiction, at least as to immigration decisions that did not involve challenges to detention practices. In 2001, in *Immigration and Naturalization Service v. St. Cyr*, the government claimed that provisions in both the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) (§ 401(e)) and IIRIRA (§ 1252(a)(1), (a)(2)(C), and (b)(9)) eliminated even habeas review such that Enrico St. Cyr, a decade-long LPR convicted of selling a controlled substance, could no longer raise questions of law to challenge his disqualification from suspension of deportation based on revisions restricting relief enacted after his criminal conviction.[223] The Court in *St. Cyr* disagreed. The opinion, however, as much as it grounded itself in the avoidance of constitutional concern that such an interpretation would violate the Suspension Clause,[224] did not entirely preclude the possibility that Congress could move to eliminate habeas review from most, if not all, immigration decisions. Instead, the Court relied on both the strong presumption in favor of judicial review

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218 *Id.* at 1906 (alteration in original) (citations omitted) (first quoting *Chaney*, 470 U.S. at 832; and then quoting Memorandum from Janet Napolitano, Sec'y, Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigr. Servs., and John Morton, Dir., U.S. Immigr. & Customs Enf't 2 (June 15, 2012), https://www.aila.org/infonet/dhs-deferred-action-process-certain-young-people [https://perma.cc/G4VY-F5G2]). Perhaps ironically, this characterization of DACA, while giving the Court jurisdiction over the APA claims, would likely be its demise if it is ever considered on the merits based on a statutory and separation of powers claim.

219 *Id.* at 1907.

220 *Id.* (quoting 8 U.S.C. § 1252(g)).

221 *Id.*

222 *See generally* Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 308–10 (2001), *superseded by statute*, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, *as recognized in* Nasrallah v. Barr, 140 S. Ct. 1683 (2020) (discussing an extensive history of immigration cases outside the context of detention where habeas review was granted to review questions of law).

223 *Id.* at 293.

224 *Id.* at 300–02; *see* U.S. CONST. art. I, § 9, cl. 2.

over administrative action and its longstanding rule of requiring a clear statement of congressional intent to repeal habeas jurisdiction to hold that neither the AEDPA nor the IIRIRA precluded St. Cyr from challenging the retroactive application of the stricter cancellation of the removal provision in his case.[225] In 2005, when enacting the Real ID Act, Congress expressly abrogated at least this aspect of the holding insofar as it clarified that any issue arising from final orders of deportation could no longer be raised in a habeas proceeding.[226] Importantly, however, this did not mean that the absence of habeas meant the absence of judicial review entirely, at least as to final orders in deportation. Moreover, factual review, at least in a few matters, could still be preserved and conducted in the courts of appeal, of course, based solely in the administrative record. In 2020, for example, the Court clarified in *Nasrallah v. Barr* that while Nidal Nasrallah, a long-term LPR, could only raise a challenge to his denial of a Convention Against Torture (CAT) relief, his CAT claim did not merge into the final order of deportation, which meant he could raise questions of fact and law but only in the courts of appeal and no longer as part of habeas.[227]

Because in all of the prior cases some judicial review was preserved, none had to squarely address whether Congress could choose to foreclose all judicial review entirely, including habeas, without violating the U.S. Constitution. This very issue was taken up instead in *Department of Homeland Security v. Thuraissigiam*, this time in a case involving an asylum seeker from Sri Lanka who filed a habeas petition challenging the standard of credible fear applied to him to deny him entry as part of an expedited removal proceeding.[228] With the IIRIRA's adoption in 1996, Congress subjected certain "arriving aliens"—namely those attempting to enter without authorization or with fraudulent documents[229]—to a summary process allowing a single immigration officer to exclude them or deny them entry.[230] Under the IIRIRA, asylum seekers could overcome expedited removal but only by proving credible fear, a decision that an asylum officer makes and, if denied, is reviewed by an immigration judge.[231] This denial is what Vijayakumar Thuraissigiam challenged in a habeas petition while awaiting the execution of his removal in detention. The problem for Thuraissigiam was that in the IIRIRA, Congress severely restricted the availability of even habeas review to certain immigration

225 *Id.* at 298.

226 *Nasrallah*, 140 S. Ct. at 1690.

227 *Id.* at 1690–91.

228 Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020).

229 8 C.F.R. § 1.2 (2011); 8 C.F.R. § 1001.1(q) (2022).

230 *Thuraissigiam*, 140 S. Ct. at 1964–65.

231 8 U.S.C. § 1225(b)(1)(A)(i).

decisions involving "arriving aliens." According to the IIRIRA, in "arriving aliens" cases, habeas review was restricted to three types of matters: whether the petitioner is an "alien"; whether petitioner was ordered removed; and whether the petitioner has already been granted entry as a lawful resident, refugee, or asylee.[232] Thus, Thuraissigiam had to directly challenge the constitutionality of the statute's habeas corpus stripping provisions in cases without any other avenue for judicial review. Justice Alito, writing for the majority, was unsympathetic to Thuraissigiam's claim. In terms of the Suspension Clause, a plural majority insisted on a very narrow interpretation of habeas corpus review, only as it existed, they claimed, in 1789—i.e., to include only cases in which detained persons challenged the legality of their detention.[233] In making this claim, Justice Alito had to contend with a century of immigration cases in which the Court had consistently heard habeas challenges to the legality of exclusion or deportation practices. The way he did so was to insist that all of these cases had been decided based on statutory interpretation and were not grounded in constitutional mandate.[234]

Justice Sotomayor, joined by Justice Kagan, disagreed vehemently with this dismissal of precedent, arguing instead that constitutional principles always guide the Court's rulings.[235] The dissenters questioned the majority's undue reliance on pre-1789 habeas case law, when immigration law was itself a novelty and asylum law was nearly two centuries away from existing.[236] As well, the dissenters disagreed that Thuraissigiam, who had been captured twenty-five yards inside the U.S. border, was not protected by the Due Process Clause, which the Court had consistently applied over centuries—including in *Yamataya*—to any "person," including immigrants inside U.S. territory, irrespective of their immigration status or the circumstances of their entry.[237] In other words, the dissenters focused on a strong territoriality principle, while the majority seemed eager to replace the territoriality principle entirely in favor of a requirement that would only protect immigrants inside U.S. territory after lawful entry or admission.[238] And whereas Justices Breyer

232 *Id.* at 1966 (discussing § 1252(e)(2)).

233 *Id.* at 1969. Justice Thomas also wrote a concurrence making a similar point. *Id.* at 1984 (Thomas, J., concurring). Indeed, in *Jennings v. Rodriguez*, Justice Alito, writing for the majority, had no problem recognizing habeas corpus jurisdiction in a case challenging mandatory detention practices during the removal period despite the fact that the statute contemplated judicial review only after a final order of removal had been given. 138 S. Ct. 830, 839–40 (2018).

234 *Thuraissigiam*, 140 S. Ct. at 1977–81.

235 *Id.* at 1993 (Sotomayor, J., dissenting).

236 *Id.* at 1997–98.

237 *Id.* at 2012. *See generally* Yamataya v. Fisher, 189 U.S. 86 (1903).

238 *Thuraissigiam*, 140 S. Ct. at 1982.

and Ginsburg ultimately concurred in the judgment, as applied to Thuraissigiam's circumstances, they expressed concern that the majority went further than the facts and worried about the implications of this ruling on LPRs with significant stakes or even on those arriving who claimed citizenship.[239] These are indeed the questions the Court left wide open, which could mean that Congress has been given carte blanche to decide whether to exclude all immigrants in irregular status in the United States from the territoriality and stakes constitutional principles that had developed over centuries.[240] Of course, for asylum seekers at the borders, *Thuraisiggiam* already means that their trauma does not matter enough to make it more visible through judicial hearings. Moreover, as policy practices move us more and more to the externalization of borders for asylum seekers, including through programs like the so-called "Remain in Mexico," begun under President Trump and retained and expanded under President Biden,[241] *Thuraissigiam* means that asylum seekers' trauma is simply removed from our courts.

d. Notice and Comment and Other APA Procedural Requirements

A different type of check courts have been willing to impose on immigration agencies is requiring agencies to follow formal notice and comment or other APA procedural requirements when adopting or rescinding agency actions. Agencies retain vast policy discretion over immigration actions so long as they do not conflict with immigration statutes' overt actions.[242] But the additional processes agencies are forced to take up, while not guaranteeing shifting outcomes in favor of immigrants, do encourage immigration agencies to be more transparent and to justify their actions. These additional processes provide an opportunity for the public to visualize immigrant trauma and, as such, require agencies to justify it.[243]

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239 *Id.* at 1988–90 (Breyer, J., concurring).

240 Already, the IIRIRA authorizes that expedited removal can apply to persons who violated the immigration laws when they entered the United States and who cannot establish a two-year presence in the United States. 8 U.S.C. § 1225(b)(1)(A)(iii)(II). Until the Trump administration, however, immigration agencies had chosen not to apply this provision fully, although they pushed the border more inside U.S. territory in ways that had been upheld by lower courts. This is further discussed in Section II.A.

241 Nicole Narea, *Biden's Bewildering Decision to Expand a Trump-Era Immigration Policy*, VOX (Dec. 4, 2021, 8:30 AM), https://www.vox.com/policy-and-politics/2021/12/4/22815657/biden-remain-in-mexico-mpp-border-migrant?fr=operanews [https://perma.cc/Y8FJ-2CV6].

242 Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 80–82 (2017).

243 As Professor Jill Family explains, Congress never fully integrated immigration law into administrative law. As a result, the administrative law gains in immigration, including through the

One important example of this type of APA immigration challenge occurred in *Jean v. Nelson*, in which a class of Haitian asylum seekers challenged their mandatory detention pursuant to a shift in practices not based on a statute or regulation.[244] This change was a radical departure from what had been the practice of paroling asylum seekers for at least thirty years since the adoption of the U.S. Refugee Act in 1980.[245] Moreover, the fact that the change was in response to an increase in largely Haitian asylum seekers raised significant concerns among immigration advocates over the racial animus that motivated the decision.[246] As a direct result of the litigation, the then-INS moved quickly to issue formal regulations that adopted facially neutral policies mandating detention of all arriving asylum seekers.[247] The new rule would ultimately lead the Court to consider the APA challenge moot.[248] It did not, however, foreclose the constitutional challenge to the practice of no-bail detention of Haitian asylum seekers insofar as a neutral rule did not preclude its disparate treatment in application.[249] The Court's unwillingness to rule on the constitutional issue left as many as 400 Haitians who formed part of the class and remained in detention without oversight on whether the policy was implemented without invidious racial discrimination against them.[250] It also did not challenge the mandatory detention practices of asylum seekers, an issue the Court would take up later.[251] However, it yielded a race-neutral formal rule that forced the agency to confront and respond publicly to the discriminatory treatment of asylum seekers arriving in Florida's South Shore.

Another important example involved the APA challenge to the Department of Homeland Security's (DHS) decision in 2017 to rescind DACA.[252] In 2012, DHS issued a memorandum announcing the creation of DACA.[253] Then in 2017, responding to the advice of then-Attorney

APA, have been limited. In a recent article, Professor Family concludes, in fact, that administrative law has failed immigrants, especially in the regulation of the deportation power. In that piece, she proposes important reforms to ameliorate this problem beyond the scope of this Article. Jill E. Family, *Regulated Immigrants: An Administrative Law Failure*, 65 HOW. L.J. (forthcoming 2022).

244 Jean v. Nelson, 472 U.S. 846 (1985).

245 *Id.* at 849.

246 Deborah Sontag, *Haitian Migrants Settle In, Looking Back*, N.Y. TIMES (June 3, 1994), https://www.nytimes.com/1994/06/03/nyregion/haitian-migrants-settle-in-looking-back.html (last visited Nov. 8, 2022).

247 *Nelson*, 472 U.S. at 852.

248 *Id.* at 846–47.

249 *Id.* at 859 (Marshall, J., dissenting).

250 *Id.* at 850–51 (majority opinion).

251 For a discussion of *Jennings v. Rodriguez*, see *infra* notes 434–46 and accompanying text.

252 Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020).

253 *Id.* at 1901.

General Jeff Sessions, then-DHS Acting Secretary Elaine C. Duke rescinded DACA in a letter addressed to the Attorney General.[254] Duke's sole reason for ending DACA was Sessions's legal opinion that DACA suffered from the same illegality that led the Fifth Circuit to strike down another parallel program, Deferred Action for Parents of Americans (DAPA).[255] When Secretary Kirstjen M. Nielsen took over DHS as its permanent Secretary, she chose to confirm Duke's rescission of DACA nine months later, elaborating on the reasons for the initial rescission rather than taking new administrative action.[256] In a challenge that reached the Supreme Court, the issue became not whether DHS could rescind DACA, but the procedures it must follow to do so under the APA. Specifically, outside of formal rulemaking, the APA sets forth procedures for federal agencies to be accountable to the public by requiring "reasoned decisionmaking" and directing agencies to "set aside" decisions that are "arbitrary" or "capricious."[257] Chief Justice Roberts, writing for the majority, imposed a demanding review of agency procedures,[258] one that

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254 *Id.*

255 *Id.* at 1910.

256 Nielsen articulated three reasons why DACA's rescission was sound:

> First, she reiterated that, "as the Attorney General concluded, the DACA policy was contrary to law." Second, she added that, regardless, the agency had "serious doubts about [DACA's] legality" and, for law enforcement reasons, wanted to avoid "legally questionable" policies. Third, she identified multiple policy reasons for rescinding DACA, including (1) the belief that any class-based immigration relief should come from Congress, not through executive non-enforcement; (2) DHS's preference for exercising prosecutorial discretion on "a truly individualized, case-by-case basis"; and (3) the importance of "project[ing] a message" that immigration laws would be enforced against all classes and categories of aliens. In her final paragraph, Secretary Nielsen acknowledged the "asserted reliance interests" in DACA's continuation but concluded that they did not "outweigh the questionable legality of the DACA policy and the other reasons" for the rescission discussed in her memorandum.

Id. at 1904 (alterations in original) (citations omitted) (quoting Memorandum from Kirstjen M. Nielsen, Sec'y, Homeland Sec. 2–3 (June 22, 2018), https://www.dhs.gov/sites/default/files/publications/18_0622_S1_Memorandum_DACA.pdf [https://perma.cc/X4CW-3B4T]).

257 *Id.* at 1905 (first quoting Michigan v. EPA, 576 U.S. 743, 750 (2015); and then quoting 5 U.S.C. § 706(2)(A)).

258 *Id.* at 1912–13. First, the Court considered only Duke's reasoning for ending DACA rather than weighing Nielsen's additional rationale, reasoning that a foundational principle of administrative law is that judicial review of agency action must be limited to the grounds the agency invoked when it took action. Second, the Court faulted Duke for inadequately distinguishing whether DACA's illegality rested in its forbearance of the deportation power (i.e., prosecutorial discretion) or in its conferral of benefits (i.e., work authorization). Third, the Court found Duke's rescission lacking for its failure to take up important policy choices that belonged to DHS, namely when and whether to exercise prosecutorial discretion in the exercise of the immigration enforcement function. *Id.* at 1907–08.

Justice Kavanaugh sees as an "idle and useless formality" in his dissent.[259] By the time Duke rescinded DACA, more than 700,000 youth had the status.[260] Petitioners and amici grounded the arbitrary and capricious action on the enormous harms DACA's rescissions would cause on the youth who relied on the program to make critical life decisions, such as having a family or investing in school.[261] For the Court, the agency's arbitrariness and capriciousness was found in not considering these factors when it ended the program. As the Court explained, when an agency changes course, it must be cognizant that longstanding policies may have engendered serious reliance interests that must be considered.[262]

3. Equality as Liberty

A different framework for recognizing liberty stakes in immigration has been to challenge either discriminatory immigration laws or disparate immigration enforcement practices on equal protection grounds. In general, courts have been reluctant to validate such challenges, but they have struggled to dismiss these outright in cases where the discrimination involves "high stakes," both in terms of the nature of the interest and the egregiousness of the discrimination.

Among the easiest cases to dismiss on equal protection grounds have been those that involve the denial of immigration visas to foreign nationals outside U.S. territory, even when such denials have implicated discriminatory treatment against sponsoring U.S. citizens or LPRs living in the United States. In *Fiallo v. Bell*, appellants, consisting of U.S. citizens

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259 *Id.* at 1909 (quoting NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766 n.6 (1969)); *see also id.* at 1932–36 (Kavanaugh, J., concurring in part and dissenting in part).

260 *Id.* at 1901 (majority opinion).

261 *Id.* at 1914. Petitioners and amici also argued that DACA's rescission was motivated by racial animus in violation of the Fifth Amendment. The Court, however, rejected this claim and found that the disparate impact of DACA's rescission on certain Latinos was rooted in the overrepresentation of Latinos among the unauthorized population and not on racial animus. *Id.* at 1915.

262 *Id.* at 1913. In three separate dissents, four Justices expressed strong dissatisfaction with the majority's holding. Justice Thomas, joined by Justices Alito and Gorsuch, spent considerable time discussing DACA's illegality and could not imagine how a new administration could not end it the same way it started: with a memorandum. *Id.* at 1918 (Thomas, J., concurring in part and dissenting in part). Justice Alito wrote separately to point out that the Court lacked jurisdiction to review the agency's exercise of prosecutorial discretion. *Id.* at 1932 (Alito, J., concurring in part and dissenting in part). Finally, Justice Kavanaugh took a more measured approach to value APA oversight over agency decisions but disagreed that Secretary Nielsen's memorandum stating the policy reasons for the rescission should have been dismissed. *Id.* at 1934 (Kavanaugh, J., concurring in part and dissenting in part).

and LPRs, asserted both sex and "illegitimate status" discrimination against immigration laws that imposed additional burdens on fathers, but not mothers, to sponsor a family visa either on behalf of offspring who had been born to illegitimate fathers or on behalf of fathers who had birthed illegitimate children.[263] Appellants argued, in contrast to other immigration cases involving exclusion, that their interests were high because, as U.S. citizens and LPRs in the United States, not their excluded family members' but their own statutory right to family reunification, which was once conferred by Congress, should not discriminate against them on suspect grounds such as sex.[264] The Court did not entirely dismiss these liberty interests but applied the largely deferential "facially legitimate and bona fide" standard to uphold the law.[265] Indeed, this standard, in contrast to the rational basis test with teeth that has applied to same-sex discrimination cases, has nearly always tipped the balance of scale in favor of the government over the interests of immigrants.[266]

Another type of immigration discrimination case the Court has been willing to dismiss outright involves claims of selective immigration enforcement based on alleged suspect grounds. In *Reno v. American-Arab Anti-Discrimination Committee*, two LPRs and six others who had overstayed their student visas alleged that the government targeted them for deportation in violation of the First Amendment based on their membership in the Popular Front for the Liberation of Palestine, a group the government characterized as an international terrorist and communist organization.[267] The Court, however, disagreed. Justice Scalia, joined by four other Justices, declared that "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation," without adequate explanation as to whether the two LPRs were differently situated in the case.[268] Rather, the Court proceeded to explain how "[e]ven in criminal [cases], a selective prosecution claim is a *rara avis*" to explain why this case lacked merit.[269] Even so, the Court did not rule out the possibility of a "rare case in which the alleged basis of discrimination is so outrageous" that the preference for judicial restraint in second-guessing prosecutorial decisions could be overcome.[270] What that "outrageous" case would be is hard to speculate,

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263 Fiallo v. Bell, 430 U.S. 787, 791 (1977).

264 *Id.* at 794.

265 *Id.* at 794–95 (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

266 *See* Jenny-Brooke Condon, *Equal Protection Exceptionalism*, 69 RUTGERS U. L. REV. 563 (2017).

267 Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 473–74 (1999).

268 *Id.* at 488.

269 *Id.* at 489.

270 *Id.* at 491.

except we glean from Justice Ginsburg's concurrence, joined by Justice Breyer, that, while adopting a different standard from "outrageous" to challenge selective deportation claims, the standard would still remain quite high in favor of deference. In her opinion, Justice Ginsburg rejected the idea that selective immigration enforcement should be exempt from equal protection scrutiny, labeling deportation, in particular, as "a grave sanction."[271] She also relied on criminal law precedent to find that selective deportation could proceed against the immigration agencies if they are found to act in "bad faith, lawlessly, or in patent violation of constitutional rights."[272] However, Justice Ginsburg did not find that respondents in this case demonstrated a strong likelihood of success and a "chilling effect on [their] speech" or that agency conduct was "flagrantly improper" to warrant immediate judicial intervention.[273]

The more complex cases for the Court to resolve on equal protection grounds have been those related to the acquisition or involuntary loss of citizenship. The U.S. Constitution confers only two types of citizenship rights in the Fourteenth Amendment—by birth and through naturalization.[274] All other forms of citizenship, including *jus sanguinis*—the type that children born to U.S. citizens abroad acquire at birth—are statutorily conferred.[275] Moreover, the Constitution confers on Congress the power to establish a "uniform Rule of Naturalization."[276] In general, this means that Congress has vast discretion to establish the requirements for naturalization and to decide whether to confer any additional types of citizenship not contemplated in the U.S. Constitution.[277] The issue, however, is whether it can do so by creating distinctions that turn on suspect or quasi-suspect classifications, such as gender. As discussed below, in such cases, the Court initially issued plurality opinions or deeply divided cases over disagreements that ranged from who has standing to raise the discrimination claim to what standard and how much scrutiny should apply. When it finally reached a greater consensus on these issues, concerns over the Court's ability to rewrite statutes to undo the discrimination have hampered the impact these cases could have to repair the harms to citizens and their offspring.

In 1998, Lorelyn Penero Miller challenged her denial of *jus sanguinis* citizenship based on the requirement that her U.S.-citizen father should have legitimated her prior to her turning eighteen, a requirement that did

271 *Id.* at 497 (Ginsburg, J., concurring in part).

272 *Id.* at 494.

273 *Id.* at 498.

274 *See generally* JOHNSON, ALDANA, HING, SAUCEDO & TRUCIOS-HAYNES, *supra* note 15, at 621.

275 *Id.*

276 *Id.* at 643 (quoting U.S. CONST. art. I, § 8, cl. 4.).

277 *Id.*

not apply to out-of-wedlock mothers.[278] Her father, Charlie Miller, a former U.S. Air Force personnel who served in the Philippines, did not join the lawsuit; however, when Lorelyn was twenty-two, he gave her his last name and entered a voluntary paternity decree on her behalf in a Texas court to confer her citizenship dating back to her birth.[279] However, the immigration agencies rejected the claim by concluding that only the legitimation process and no other means, including a DNA paternity test, could have satisfied the statutory requirements.[280] The majority opinion, authored by Justice Stevens and joined only by Chief Justice Rehnquist, without explicitly taking up how the Equal Protection Clause protected Lorelyn, applied a heightened scrutiny to § 316 of the INA to hold that the distinction responded to important government interests and was well tailored to serve those interests.[281] The Court reasoned that because women and men are differently situated when a child is born out of wedlock, insofar as public records automatically register the mother, but not the father, as the biological parent, the law served the important purpose of simplifying and facilitating the determination of the biological relationship by imposing the additional requirement on the father and not the mother.[282] Moreover, the Court considered it perfectly appropriate—that is, adequately tailored—to impose a formal act of legitimation as a means to lessen the possibility of fraud.[283] Furthermore, the Court acknowledged other important government interests served by the law—namely that of encouraging healthy relationships between citizen parents and their children and fostering ties with the United States—were not diminished simply because the law could not guarantee these outcomes in all cases.[284] In contrast, Justice Ginsburg's dissent, joined by Justices Souter and Breyer, traced the history of insidious discrimination against women in the history of *jus sanguinis* statutes to express deep skepticism over the stated purposes of the law, which still rested on stereotypical roles of men and women as parents.[285] In her concurrence, Justice O'Connor, joined by Justice Kennedy, instead preferred to question Lorelyn's standing to assert an equal protection claim when the discrimination was directed at her father and hinted that, at a minimum, Lorelyn's diminished stakes—as someone who had never lived in the United States until age twenty-one—should have warranted

278 Miller v. Albright, 523 U.S. 420, 424 (1998).

279 *Id.* at 425.

280 *Id.* at 426, 437–38.

281 *Id.* at 440.

282 *Id.* at 436.

283 *Id.* at 440.

284 *Id.* at 439–40.

285 *Id.* at 460–71 (Ginsburg, J., dissenting).

at most a rational basis review.[286] However, a few years later, Justice O'Connor's discomfort over the weakened "heightened scrutiny" deference in gender-based discrimination claims that was emerging in the immigration context would become apparent.

Three years after *Miller v. Albright*, the Court agreed to decide *Nguyen v. Immigration and Naturalization Service*.[287] Tuan Nguyen, like Miller, was born out of wedlock, this time in Vietnam, to a Vietnamese mother and a U.S.-citizen father who did not legitimate him prior to age eighteen.[288] That is where the similarities end. In contrast to Miller, Nguyen had been raised by his U.S.-citizen father, Joseph Boulais, and did not have a relationship with his biological mother.[289] Nguyen, in contrast to Miller, moved to the United States with his father when he was only six and had been raised in the United States as an LPR.[290] At age twenty-two, Nguyen pled guilty to two counts of sexual assault of a minor and was ordered deportable.[291] This time, both Nguyen and his father challenged the exact same provision as in *Miller*, asserting their independent standing: Boulais as a U.S.-citizen father and Nguyen as a long-term LPR, since he was a child.[292] Thus, in contrast to *Miller*, the stakes for both the father and Nguyen were undeniable. The question, thus, became whether these liberty stakes would yield a different alignment and treatment of the equal protection question raised in *Miller*. In the end, while *Nguyen*'s outcome was exactly the same as *Miller*'s—in both cases, the discriminatory law was upheld, and both Miller and Nguyen were deported—there were some subtle gains. One gain is that two more Justices (Justices Kennedy and O'Connor), now for a total of seven, regardless of their actual alignment in the case, shifted from *Miller* to recognize standing, and thus, the liberty interests of both Nguyen and his father, to raise the equal protection claim. The main point of departure, then, became not whether but how to read and apply nonimmigration precedent on gender-based heightened scrutiny to the immigration context, at least in the context of *jus sanguinis* citizenship. In *Nguyen*, Justice Kennedy largely repeated the analysis and rationale in *Miller* to uphold the discriminatory statute under a heightened review.[293] In contrast, Justice O'Connor unusually broke with her conservative colleagues to join the three liberal dissenting Justices to pen an equally

286 *Id.* at 451–52 (O'Connor, J., concurring).

287 Tuan Anh Nguyen v. Immigr. & Naturalization Serv., 533 U.S. 53 (2001).

288 *Id.* at 53.

289 *Id.* at 57, 89.

290 *Id.*

291 *Id.*

292 *Id.*

293 *Id.* at 71–73.

strong objection to the Court's watering down of the heightened scrutiny standard that has applied to sex discrimination cases.[294] Importantly, Justice O'Connor, believing that context matters to sex discrimination claims, recounted once more the history of sex discrimination in laws governing the transmission of citizenship that Justice Ginsburg highlighted in *Miller* to affirm the harms caused by such laws: the confirmation of parenting stereotypes that burden both men and women and contributions to the growing stateless problem.[295]

Justice O'Connor retired from the Court four years after *Nguyen* and eleven years prior to the issue of gender discrimination in the conferral of *jus sanguinis* citizenship returning to the Court.[296] This time, however, her strong dissent in *Nguyen* found majoritarian voice at the hands of Justice Ginsburg when the Court finally struck down an immigration statute squarely based on equal protection grounds in the case of *Sessions v. Morales-Santana* in 2017.[297] Not unlike Nguyen, Luis Ramón Morales-Santana faced deportation based on criminal convictions after he had lived most of his life (since age thirteen) in the United States.[298] Like Nguyen, but for the discrimination against his father in the immigration laws, Morales-Santana would have been born a citizen. Unlike Nguyen, however, the discrimination involved the continuous physical presence requirement imposed on parents to confer citizenship to children born abroad when one parent was not a U.S. citizen. The requirement that applied generally was five years, except that the statute created a favorable exemption in the case of unwed mothers who only had to establish a one-year continuous physical residence requirement.[299] Unfortunately, Morales-Santana's father was twenty days shy of satisfying the five-year requirement.[300] It was the fact that this case involved the physical residence requirement and not a paternity-acknowledgement requirement that allowed the Court to distinguish this case from the *Miller* and *Nguyen* precedents.[301] Justice Ginsburg, joined by five of her colleagues, then applied the type of substantive review Justice O'Connor encouraged in the dissent in *Nguyen*.[302] The Court, however, rejected Morales-Santana's proposed remedy, that his father satisfy only the one-

294 *Id.* at 78–79 (O'Connor, J., dissenting in part).

295 *Id.* at 91–94.

296 Letter from Sandra Day O'Connor, Assoc. J., U.S. Sup. Ct., to George W. Bush, President of the United States of America (Jul. 1, 2005), https://www.supremecourt.gov/publicinfo/press/oconnor070105.pdf [https://perma.cc/A8HE-6K2E].

297 Sessions v. Morales-Santana, 137 S. Ct. 1678, 1700–01 (2017).

298 *Id.* at 1688.

299 *Id.* at 1687.

300 *Id.* at 1683.

301 *Id.* at 1694.

302 *Id.* at 1690.

year requirement that applied to unwed mothers, instead deferring to Congress to revise the statute and to the immigration agencies to apply them in a gender-neutral manner in the interim.[303] Indeed, the Court did not foreclose the possibility that the agency could simply move to impose the higher five-year requirement also on mothers and as such, deny Morales-Santana's citizenship claim. By doing so, the Court disentangled equality from liberty and ignored Morales-Santana's substantial stakes in this country.

4. Citizenship as Liberty

The courts have treated cases that involve liberty interest in citizenship as distinct from other types of immigration trauma; indeed, so much so that these, at least in theory, fall beyond the jurisdiction of the plenary power.[304] At the height of anti-Chinese sentiment, when harsh immigration laws also affected U.S. citizens of Chinese descent, the Court declared that "[j]urisdiction in the executive to order deportation exists only if the person arrested is an alien."[305] The Court explained: "To deport one who so claims to be a citizen obviously deprives him of liberty . . . . It may result also in loss of both property and life, or of all that makes life worth living."[306] Two important constitutional distinctions flow from citizenship claims cases: (1) that constitutional or even congressional conferral of citizenship, once legitimately acquired, represents a liberty interest deserving of traditional, non-plenary power heightened constitutional protection; and (2) that distinctions in treatment, including as to denationalization, as between the different types of U.S. citizens—by birth, derivative, or through naturalization—are unconstitutional except for the mere exception in Article II, Section 1 that only the "natural born" are eligible to be president.[307]

Citizenship liberty protections have applied whenever someone who claims U.S. citizenship faces exclusion or deportation. Yet, even here, the doctrine of territoriality is relevant to the question of just how much constitutional protection applies. In general, liberty citizenship claims (assuming these can be proven) are at their strongest when the citizen finds himself subject to deportation from inside U.S. territory over

303 *Id.* at 1698–1700.

304 *See* Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965 (2013) (documenting the fraught treatment of citizens caught up in immigration enforcement).

305 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

306 *Id.*

307 U.S. CONST. art. II, § 1.

exclusion at the border. Conversely, liberty interests are at their lowest when a citizenship claim is made from outside U.S. territory. In contrast to immigration exclusion cases, congressional power to exclude citizens is not absolute. In 1908, in *Chin Yow v. United States*, the Court granted habeas review rights to a person of Chinese descent, who claimed to be a U.S.-born citizen but was denied entry at a San Francisco port, to consider due process allegations: namely, no meaningful opportunity to produce and present evidence of citizenship.[308] The Court agreed. Nevertheless, the issue in *Chin Yow* remained narrow and considered only whether the agency misinterpreted the statute's alleged proscription against obtaining such evidence.[309] As such, it left open the question of what might occur if Congress applied equivalent summary removal proceedings as it currently does to noncitizens facing exclusion to those claiming citizenship at the border. Of course, cases like this make it extremely risky for U.S.-born Chinese citizens to travel abroad for fear of being denied entry upon return. In 1915, for example, Kwock Jan Fat, an eighteen-year-old, obtained three white witnesses and testimony from his family to have himself declared a U.S. citizen prior to departing to China on a temporary visit.[310] Having been declared a citizen, Kwock Jan Fat left but still was not safe. During his absence, an anonymous witness claimed that Kwock Jan Fat was not who he said he was and that he was born in China instead.[311] Based on this information, the immigration agencies denied Kwock Jan Fat admission during his return, ultimately reversing course to deny his citizenship on the basis of testimony from the confidential informant whose identity was not disclosed.[312] On a writ of habeas, the Court conceded it could not reverse the immigration agency's factual conclusion on the question of citizenship unless it was "manifestly unfair."[313] Despite the Court's recognition of congressional deference to the agencies, the Court conducted a thorough review of the administrative record to reverse the agency's determination, finding it arbitrary that the agency ignored obvious signs of the confidential informant's unreliability while ignoring the testimony of two white witnesses of "notable" character.[314] The "manifestly unfair" standard applied, however, would still uphold agency exclusion of persons claiming citizenship, even in proceedings that might have raised due

308 Chin Yow v. United States, 208 U.S. 8, 10–13 (1908).

309 *Id.* at 11.

310 Kwock Jan Fat v. White, 253 U.S. 454, 455 (1920).

311 *Id.* at 456.

312 *Id.*

313 *Id.* at 457 (quoting Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912)).

314 *Id.* at 460–65.

process concerns in other contexts.[315] In view of these cases, Congress has statutorily demarcated a process for addressing denials to citizenship claims, at or outside the border, that only contemplates habeas review but not a judicial hearing.[316]

In contrast to citizenship claims arising in exclusion cases, in *Ng Fung Ho v. White*, the Court relied on the Fifth Amendment to hold that deportation of persons claiming citizenship could not occur except in a judicial trial despite the authorization of executive-only deportation proceedings against "aliens."[317] The case involved substantiated claims of derivative citizenship by two persons—born in China to a native-born U.S. citizen—who faced deportation months after entering as citizens, facts that seemed to matter to the Court in its holding.[318] The Court reaffirmed this constitutional requirement of de novo judicial review in subsequent deportation cases involving claims to citizenship, at least when "substantial evidence" of the citizenship claim had been presented.[319] This precedent led Congress in 1961 to carve out an exception to preserve judicial de novo review in immigration deportation cases involving claims to citizenship when it otherwise routed all judicial review of final orders of deportation to the courts of appeal.[320] Interestingly, when it did so, Congress also lowered the threshold from "substantial evidence" to "genuine issue of material fact" to allow for de novo judicial review in the district courts for those claiming citizenship, an interpretation recognized by the Court in *Agosto v. Immigration and Naturalization Service*, decided in 1978.[321]

Citizenship liberty interests have also applied when citizens face the loss of citizenship legitimately acquired. The precondition that citizenship be legitimately acquired has meant that applicants (1) must satisfy the requirements for citizenship established by Congress (such as for naturalization), although questions of law on eligibility are still subject to judicial review; and (2) to do so without illegal procurement, willful misrepresentation, or the concealment of a material fact.[322] Once conferred, however, the Court has imposed strict burdens on denaturalization or denationalization based on agency error in the

315 *See, e.g.*, Ng Fung Ho v. White, 259 U.S. 276 (1922); *In re* Wong Toy, 278 F. 562 (D. Mass. 1922); Doo Fook v. United States, 272 F. 860 (9th Cir. 1921).

316 8 U.S.C. § 1503.

317 *Ng Fung Ho*, 259 U.S. at 284–85.

318 *Id.* at 282.

319 *Id.* at 283; Agosto v. Immigr. & Naturalization Serv., 436 U.S. 748, 752–53 (1978).

320 *Agosto*, 436 U.S. at 752–53; *see also* Immigration and Nationality Act Amendments of 1961 § 106(a)(6), Pub. L. No. 87-301, 75 Stat. 652 (codified as amended at 8 U.S.C. § 1101).

321 *Agosto*, 436 U.S. at 754.

322 *See* JOHNSON, ALDANA, HING, SAUCEDO & TRUCIOS-HAYNES, *supra* note 15.

conferral of citizenship or on the imposition of additional requirements or disqualifiers for citizenship not in force at the time of conferral. This was the case in *Schneiderman v. United States* when the Court prevented the denaturalization of petitioner twelve years after his citizenship was conferred based on the claim that it had been illegally procured because petitioner had been a member of communist organizations five years prior to his naturalization.[323] The problem with the government's claim was that when Schneiderman became a citizen, membership in communistic organizations did not disqualify him from naturalization.[324] Moreover, the Court refused to find that such beliefs, given the U.S. Constitution's commitment to free speech, would mean he falsely claimed to be attached to the principles of the U.S. Constitution.[325] Instead, considering that denaturalization "[i]n its consequences . . . is more serious than a taking of one's property, or the imposition of a fine or other penalty,"[326] the Court imposed a "clear, unequivocal, and convincing" standard to take back such a right, especially in cases where the citizen met his obligations of citizenship at the time of conferral and committed to acts of lawlessness post-conferral.[327] Similarly, a few years later in *Klapprott v. United States*, the Court revoked a denaturalization proceeding waged against petitioner nine years after he acquired it on similar allegations, namely that his membership in certain German organizations must mean that he lied regarding his attachment to the U.S. Constitution at the time of his oath.[328] Klapprott's denaturalization occurred in a default judgment entered by a district court without a hearing or any evidence presented, while Klapprott was in detention and without access to lawyers.[329] The Court, characterizing denaturalization as an "extraordinarily severe penalty," declined to read the statutes and federal rules of procedure as authorizing that denaturalization could occur in a default judgment.[330] These strict requirements to claims of illegitimate acquisition of citizenship have even applied when revocation is sought based on intentional lies or concealments either at the time of admission or as part of the naturalization petition.[331] Since then, the Court has affirmed the revocation of citizenship only in egregious cases

323 Schneiderman v. United States, 320 U.S. 118, 119–22 (1943).

324 *Id.* at 132.

325 *See id.* at 145–46, 160.

326 *Id.* at 122.

327 *Id.* at 125.

328 Klapprott v. United States, 335 U.S. 601, 602–03 (1949).

329 *Id.* at 605.

330 *Id.* at 612–13.

331 *See, e.g.*, Kungys v. United States, 485 U.S. 759 (1988); Fedorenko v. United States, 449 U.S. 490 (1981); Costello v. United States, 365 U.S. 265 (1961).

of fraud that would have been material to the outcome. It has also adopted a strict materiality test that requires the government to show with "clear, unequivocal, and convincing" evidence that the misrepresentation or concealment "was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision."[332]

Of course, not unlike other rights, the right to citizenship is not absolute and Congress may prescribe grounds for expatriation based on serious conduct. Despite this, the Court has declared the withdrawal of citizenship a "drastic measure" and a "calamity" resulting not only in the loss of rights but also community.[333] As such, the types of constitutional restrictions courts have imposed on the expatriation power is stricter substantive due process and equal protection protections than have applied in the immigration context.[334] Even here, however, Congress retains some discretion. In *Schneider v. Rusk*, for example, the Court struck down as unconstitutional an immigration provision that denaturalized non-native-born citizens simply for living abroad continuously for longer than three years.[335] To the Court, the provision raised equality concerns—since the native born could live abroad their entire lives without losing their citizenship—as well as substantive liberty interests for expanding too broadly the grounds that stripped citizenship.[336] As to the latter, while some Justices even contemplated a strict prohibition against involuntary expatriation, the majority view has been to strictly narrow rather than proscribe the ability of Congress to regulate the loss of citizenship. Foremost, the Court has required the government to establish specific intent on the part of the citizen to voluntarily relinquish his status.[337] It has, however, over the strong objections of several Justices, permitted this burden to be established simply by a preponderance of the evidence, while also allowing a rebuttable presumption of voluntariness as to the act of expatriation as separate from a showing of intent.[338] Grounds that have been disallowed based on these evidentiary standards include denationalization as a punitive response to evading military service,[339] deserting the armed

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332 *Kungys*, 485 U.S. at 771–72.

333 Schneider v. Rusk, 377 U.S. 163, 168 (1964); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 161 (1963).

334 *See supra* Section I.A.3.

335 *Schneider*, 377 U.S. 163.

336 *Id.* at 168–69.

337 Vance v. Terrazas, 444 U.S. 252 (1980).

338 *Id.* at 268.

339 *Mendoza-Martinez*, 372 U.S. at 184–86.

forces in time of war,[340] voting in foreign elections,[341] or serving in the armed forces of a foreign state when it is mandated by law.[342] However, the Court has sanctioned denationalization when U.S. citizens voluntarily take oaths to become citizens of other nations in oaths that expressly revoke U.S. citizenship and swear allegiance to other sovereigns.[343]

B. *Deportation as Punishment*

A different way courts have at times constrained the immigration power is to recognize the trauma inherent in its enforcement; that is, to equate deportation to punishment.[344] Equating immigration enforcement's inherent trauma as punishment is critical to immigrant trauma more broadly in several ways. Importantly, the result could yield greater due process for immigrants including the right to counsel and standards and burdens of proof on the government—rather than the citizen—to exclude or deport the immigrant. Moreover, the trauma of immigration's blunt enforcement also imposes on immigrants new trauma on top of existing trauma. This only exacerbates the conditions that retraumatize immigrants, especially those who ironically may have relief based on their trauma. Finally, detention conditions significantly hinder immigrants' ability to seek relief from removal based on trauma by denying them meaningful access to lawyers or health care advocates and by fomenting terrible conditions in which to attempt to engage in trauma-informed advocacy and treatment.[345]

There are several facets to the framing of deportation as punishment. The first is to consider expulsion itself as equivalent or worse even to the deprivation of liberty implicated in incarceration as a consequence of criminal misconduct. Attempts to frame the deportation power in this

340 Trop v. Dulles, 356 U.S. 86 (1958).

341 Afroyim v. Rusk, 387 U.S. 253 (1967).

342 Nishikawa v. Dulles, 356 U.S. 129 (1958).

343 *See* Savorgnan v. United States, 338 U.S. 491 (1950).

344 For articles exploring the framing of deportation as punishment, see, for example, Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261 (2013); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771 (2000).

345 *See, e.g.*, Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359 (2016).

way have been tried repeatedly but have failed.[346] In 1955, for example, Justice Douglas had to issue yet another powerful dissent seeking the protections of ex post facto for an LPR of forty-four years deported based on a minor drug crime committed decades earlier, declaring that "[d]eportation may be as severe a punishment as loss of livelihood."[347] A decade later, the Court took a middle ground when it rejected both the petitioner's "beyond a reasonable doubt" and the government's "preponderance of the evidence" standards to bear the burden of proof in deportation cases in favor of a "clear, unequivocal, and convincing evidence" test.[348] Here again, the Court declared that "[t]o be sure, a deportation proceeding is not a criminal prosecution"[349] and, moreover, seemed willing to declare the burden of proof standard only in the absence of a legislative standard.[350] And yet, the principle itself—that expulsion is inherently liberty-depriving and trauma-inducing—has resurfaced as an important taming instrument of the immigration power in areas that converge the immigration and criminal law powers.[351] In this Article, I call this the middle space—crimmigration[352]—a space in which immigrants face criminal sanctions with immigration consequences or vice versa.[353] A second framing of deportation as punishment focuses not on deportation itself as the deprivation of liberty but, instead, on the means to exercise the immigration power through immigration detention practices. This has also yielded a mix of cases that sometimes also recognize the trauma of immigration's enforcement.

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346 *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Li Sing v. United States, 180 U.S. 486 (1901); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149 (1923); Harisiades v. Shaughnessy, 342 U.S. 580, 593–95; Immigr. & Naturalization Serv. v. Lopez-Mendoza, 468 U.S. 1032 (1984).

347 Marcello v. Bonds, 349 U.S. 302, 320 (1955) (Douglas, J., dissenting).

348 Woodby v. Immigr. & Naturalization Serv., 385 U.S. 276, 277 (1966).

349 *Id.* at 285.

350 *Id.* at 284.

351 In fact, in *Woodby*, the Court went on to say that it could not close its eyes to deportations' "drastic deprivations" that are "often greater than [those] inflicted by denaturalization, which does not, immediately at least, result in expulsion from our shores." *Id.* at 285–86.

352 The coining of the term "crimmigration" is attributed to Juliet Stumpf who first used the term in her seminal 2006 article. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

353 I have excluded from this analysis the space in which immigration violations are treated as criminal acts. This trend occurred early in the history of U.S. immigration law but has exploded since the 1980s. *See* JOHNSON, ALDANA, HING, SAUCEDO & TRUCIOS-HAYNES, *supra* note 15, at 561–74. In contrast to deportation, in general, when immigration violations are crimes, courts have largely applied similar constitutional protections that apply to criminal defendants. Despite this, recent practices in the differentiated adjudication of federal immigration crimes with truncated due process protections are raising important constitutional questions. *See, e.g.*, Doug Keller, *Re-Thinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 128–29 (2012); Joanna Jacobbi Lydgate, Comment, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481 (2010).

1. The Middle Space: Crimmigration

When LPRs face deportation from the United States based on crimes or are criminally charged based on immigration violations, the Court has been more willing to apply the more protective due process norms that apply to criminal defendants. An example of this is when the Court has applied certain statutory construction doctrines that have applied only in the criminal context to immigration statutes that make certain crimes grounds for deportation and also, importantly, bars to humanitarian grounds of immigration relief.[354] These doctrines, which include the principle of lenity and void for vagueness, apply the bedrock principle of fair notice as essential to due process when liberty stakes are especially high.[355] In contrast, *Chevron* deference[356]—the doctrine that agency interpretation over ambiguous statutes should be affirmed—has often governed the outcome in other areas of immigration law including asylum and other admission cases.[357] The void for vagueness doctrine, for example, has helped narrow the types of crimes to be considered removable offenses or bars to asylum or other types of discretionary relief. In 1951, the Court considered whether "crime involving moral turpitude" is sufficiently definite in the immigration statutes. While holding that it is, the Court rejected the government's contention that the void for vagueness doctrine should apply solely in the criminal context in view of

354 I excluded from the analysis the application of the categorical or the modified categorical statutory interpretation approaches to immigration statutes that lead to removal based on crime because these doctrines have been largely based on judicial administrative efficiency concerns and not so much on liberty concerns for the noncitizen. While it is true that the application of these doctrines has favored immigrants, a favorable outcome for immigrants is not the underlying principle of the rule, nor are due process concerns necessarily driving the outcome. *See* Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1790 (2020); *Immigration and Nationality Act—Aggravated Felony*—Luna Torres v. Lynch, 130 HARV. L. REV. 477, 486 (2016); Tanika Vigil, *An Unjust Burden: The Tenth Circuit's Misapplication of the Categorical Approach in* Lucio-Rayos v. Sessions, 96 DENV. L. REV. 369, 386 (2019).

355 *See* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515 (2003).

356 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

357 *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 516–17 (2009) (involving the interpretation of the persecutor bar in asylum and noting that "[j]udicial deference in the immigration context is of special importance, for executive officials 'exercise especially sensitive political functions that implicate questions of foreign relations'" (quoting Immigr. & Naturalization Serv. v. Abudu, 485 U.S. 94, 110 (1988))); *see also* Scialabba v. Cuellar de Osorio, 573 U.S. 41 (2014) (applying *Chevron* deference to the priority date retention approach to family immigration backlogs even when doing so would cause many families to start over after waiting in line for several years); Holder v. Martinez Gutierrez, 566 U.S. 583 (2012) (holding that the BIA reasonably construed the statute addressing eligibility for cancellation of removal, by requiring each alien to satisfy on his own, without imputing a parent's years of LPR status or years of continuous residence).

the "grave nature of deportation."[358] Then, in 2018, the same principle was used to challenge and, this time, successfully strike down for vagueness a section of the immigration laws that made "crime[s] of violence" as defined by federal statute a deportable aggravated felony offense.[359] In its holding, a plurality majority reiterated the view that "deportation is 'a particularly severe penalty,' which may be of greater concern to a convicted alien than 'any potential jail sentence.'"[360] In his concurrence, Justice Gorsuch agreed that civil penalties can at times be more severe than those in criminal statutes and that, moreover, Congress's wide discretion in immigration law still could not justify vague laws.[361] The case involved an LPR of over two decades with two convictions of first-degree burglary in California, who, if the convictions were labeled as aggravated felonies, would face deportation from the United States for life.[362]

In turn, the principle of lenity has favored an interpretation of crime-based immigration statutes, even where more than one interpretation is reasonable, in order to avoid the harsh consequences of deportation or denials of humanitarian forms of relief for immigrants.[363] In 1948, for example, the Court resolved a circuit split regarding the meaning of the phrase "sentenced more than once," as used in the CMT deportation provision, in favor of the immigrant to exclude its application in a case involving a conviction on two counts of murder arising from a single criminal trial.[364] To do so, the Court stated:

358 Jordan v. De George, 341 U.S. 223, 229, 231 (1951).

359 Sessions v. Dimaya, 138 S. Ct. 1204, 1210–13 (2018) (quoting 18 U.S.C. § 16).

360 *Id.* at 1213 (quoting Lee v. United States, 137 S. Ct. 1958, 1968 (2017)).

361 *Id.* at 1229 (Gorsuch, J., concurring in part).

362 *Id.* at 1207 (majority opinion).

363 The principle of lenity has also applied at times beyond crime-based immigration statutes when an interpretation of an immigration provision can help an immigrant avoid deportation. *See, e.g.*, Immigr. & Naturalization Serv. v. Errico, 385 U.S. 214 (1966) (resolving ambiguity in favor of immigrants in a provision waiving deportation based on misrepresentation to preserve family unity). In contrast, the Court did not resolve ambiguity in favor of the immigrant when the ambiguity of whether a state crime constituted a CMT arose, rather than in a deportation case, in the context of cancellation of removal, a process in which the noncitizen bears the burden of proving he should not be barred from relief based on crime. *See* Pereida v. Wilkinson, 141 S. Ct. 754 (2021).

364 Fong Haw Tan v. Phelan, 333 U.S. 6, 8 (1948).

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment of [sic] exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.[365]

In 1964, the Court reversed the lower court's affirmation of the agency's reasonable interpretation of a provision that made deportable any person who "at any time after entry is convicted of two crimes involving moral turpitude" when applied to a person who was a naturalized citizen at the time of conviction but was later denaturalized because he had acquired his naturalization by willful misrepresentation.[366] Frank Costello, who had been born in Italy, was brought to the United States as an LPR at age four and naturalized in 1925, after residing in the United States for nearly thirty years.[367] Almost three decades later, in 1954, while still a citizen, Costello was convicted on two separate offenses of income tax evasion.[368] Five years later, however, the government denaturalized him because he lied about his involvement in a bootlegging operation at the time of his naturalization—a revocation affirmed by the Court two years before this matter came before it.[369] In 1961, the Immigration and Naturalization Service (INS) commenced deportation proceedings against Costello at age seventy, based on convictions that were nearly a decade old, after he had lived in the United States for sixty-six years either as an LPR or a citizen.[370] The Court pushed back against a broad interpretation of "at any time after entry" to preclude its application against someone whose convictions occurred while he was a citizen, regardless of how that citizenship had been acquired.[371] In its reasoning, the Court explained that its reading of the statute was "constrained by accepted principles of statutory construction . . . to resolve that doubt in favor of the petitioner," especially given that "deportation is a drastic measure[,] . . . the equivalent of banishment or exile . . . . [, and] a penalty."[372]

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365 *Id.* at 10 (citation omitted).

366 Costello v. Immigr. & Naturalization Serv., 376 U.S. 120, 121 (1964) (quoting Immigration and Nationality Act § 241(a)(4), Pub. L. No. 82-414, 66 Stat. 204 (1952) (codified at 8 U.S.C. § 1231)).

367 *Id.*

368 *Id.*

369 Costello v. United States, 365 U.S. 265 (1961).

370 *Costello*, 376 U.S. at 121–22.

371 *See id.* at 125–28.

372 *Id.* at 128 (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

These statutory interpretation gains favorable to immigrants, while grounded in liberty concerns, do not, of course, guarantee a favorable outcome for immigrants.[373] For example, in 1951, the Court rejected a vagueness challenge to the "crime involving moral turpitude," finding that the term, which had been in existence for sixty years in the immigration laws and also appeared in other contexts, did not lack definiteness.[374] More recently, in a unanimous opinion, Justice Sotomayor declined to apply the vagueness principle to the statutory requirements to raise a collateral attack on a reentry conviction, finding that the statute was clear.[375] Judicial philosophies that underlie statutory interpretation approaches, such as a strong preference for separation of powers, could lead a more conservative-leaning court, moreover, to find plain meaning in terms of provisions in the immigration statutes, no matter how harsh the outcome, whose reasonable meaning finds disagreement among the dissenting Justices. This appears to be the approach that the current U.S. Supreme Court, at least its majority, is likely to take in immigration cases given its strong preference for textualism in the interpretation of statutes.[376] And whereas textualism itself cannot escape concerns over judicial activism,[377] with few exceptions,[378] a textualist approach in the area of immigration, given its tendency toward harshness, is unlikely to favor immigrants absent the exercise of lenity or the application of a constitutional lens to the reading of statutes.[379] This new textualist harsh reality is already poking its head in the more recent cases involving challenges to mandatory and prolonged immigration detention discussed in the next Section.

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373 *See, e.g.*, Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491 (2019).

374 Jordan v. De George, 341 U.S. 223, 229–30 (1951).

375 United States v. Palomar-Santiago, 141 S. Ct. 1615 (2021).

376 *See, e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020); Richard B. Ancowitz, *Impertinent Questions: The Unusual Case of* Gorsuch v. Alito *and the Supreme Court's Textualist Approach to Judging*, N.Y. ST. BAR J., Nov. 2020, at 30.

377 *See, e.g.*, James Andrew Wynn, *When Judges and Justices Throw Out Tools: Judicial Activism in* Rucho v. Common Cause, 96 N.Y.U. L. REV. 607 (2021).

378 One such exception occurred in 2021 when the U.S. Supreme Court decided *Niz-Chavez v. Garland*, 141 S. Ct. 1474 (2021). Justice Gorsuch's strict plain-meaning reading of the notice requirement for a deportation hearing would have triggered the stop-time rule and precluded the Guatemalan native from seeking certain types of relief against removal had it been correctly issued. The problem was, according to Justice Gorsuch, that the "a" word that qualified "notice to appear" in the statute must mean that all the information that is statutorily required in the statute to be given to the immigrant facing removal must occur in a single document and cannot be cured through subsequent notices, which Agusto Niz-Chavez had received. *Id.* at 1482. Interestingly, Justice Gorsuch was joined in his opinion by Justices Thomas, Breyer, Sotomayor, Kagan, and Barrett, while Justice Kavanaugh's dissent was joined by Chief Justice Roberts and Justice Alito. This unusual lineup ironically coincides with how unusual it will be for immigrants to benefit from a strict textualist reading of the INA.

379 *See, e.g.*, Motomura, *supra* note 44.

Another example of this middle space has involved the ability of immigrants to raise due process challenges to underlying deportation orders when these become elements of the criminal offense. Such is the case in the felonious crime of illegal reentry that applies to noncitizens who make an entry without authorization into the United States after being excluded or deported.[380] In *United States v. Mendoza-Lopez*, the Court considered whether noncitizens charged with illegal reentry could raise a collateral attack based on procedural irregularities to the underlying deportation, now an element of the crime.[381] While the Court conceded that the immigration criminal statute contained no such avenue for a collateral attack, the Court nonetheless cited a series of other nonimmigration criminal precedent decisions to hold that "where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding."[382] This was true, the Court concluded, in administrative proceedings where meaningful judicial review is already substantially curtailed.[383] While the outcome dismissed the criminal charges, it did not automatically "cure" the deportation harm. Nevertheless, by affirming the lower court's finding that the deportation proceeding had not guaranteed respondent's ability to knowingly and intelligently waive the opportunity to apply for suspension of deportation or to appeal, it also very likely opened those remedies for them in immigration proceedings.[384]

A final example of this middle space is the Court's willingness to recognize an ineffective assistance of counsel claim when immigrants, while in criminal proceedings, enter a plea and subsequently face deportation as a result. In 2010, in *Padilla v. Kentucky*, a Honduran man who had been an LPR for over forty years had served in the U.S. armed forces during the Vietnam war prior to his plea for transporting large amounts of marijuana after his lawyer wrongly told him he did not have to worry about immigration consequences. The Court declined to treat deportation as a collateral consequence and allowed an ineffective assistance of counsel postconviction claim.[385] To do so, the Court reasoned:

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380 8 U.S.C. § 1326.

381 United States v. Mendoza-Lopez, 481 U.S. 828, 834 (1987).

382 *Id.* at 837–38.

383 *Id.* at 839.

384 *Id.* at 830–32.

385 Padilla v. Kentucky, 559 U.S. 356, 359 (2010).

> We have long recognized that deportation is a particularly severe "penalty," but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.[386]

Padilla has been limited somewhat by the Court's subsequent decision not to apply it retroactively[387] and by its application usually only in cases involving clearly erroneous immigration advice about the immigration consequences of a plea.[388] Nevertheless, *Padilla* has allowed many immigrants to fight their deportation in postconviction proceedings and influenced the development of protective practices at the local level to avoid triggering deportation based on criminal convictions.[389]

2. Immigration Detention and Liberty

Many immigrants face exclusion or deportation while in detention, at times prolonged or indefinite, and always harsh. Throughout history, immigrants subjected to such detention practices have argued for a greater constitutional scrutiny to tame this aspect of the immigration power. At times, the Court has created legal fictions to deny that immigration detention implicates a liberty interest at all, either by blaming immigrants for "hindering" their deportation or characterizing the detention as administrative rather than punitive. And even when the Court has recognized strong liberty interests, the constitutional scrutiny under the substantive Due Process Clause over immigration detention has remained weak. As detailed below, at most, courts have applied the constitutional avoidance doctrine to interpret immigration statutes in ways that tame the worst types of detention—i.e., prolonged, mandatory, or indefinite. What they have failed to do is establish clear precedent that

386 *Id.* at 365–66 (citations omitted) (first quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893); and then quoting United States v. Russell, 686 F.2d 35, 38 (D.C. Cir. 1982)).

387 Chaidez v. United States, 568 U.S. 342 (2013).

388 *See* Nicholas D. Thornton, *The Failing Promise of* Padilla*: How* Padilla v. Kentucky *Should Have Changed the Game in North Dakota, but Did Not*, 87 N.D. L. REV. 85, 125–27 (2011).

389 *See, e.g.*, Christopher N. Lasch, *Redress in State Postconviction Proceedings for Ineffective Crimmigration Counsel*, 63 DEPAUL L. REV. 959 (2014).

these types of detention violate the U.S. Constitution. This failure has led to two things: (1) permitting Congress to revise statutes in ways that leave little doubt that they intend detention to be mandatory (i.e., without bail) and for as long as necessary; and (2) subsequent rulings that refuse to apply the constitutional avoidance doctrine to old or new detention statutes whose interpretation had not been settled by the Court.

The Cold War era was particularly harsh on immigrants, and one of its manifestations was the expansion of the immigration detention practices. For example, in 1950, Congress enacted the ISA,[390] also known as the Subversive Activities Control Act, which, inter alia, expanded immigration agencies' discretion to hold immigrants believed to be communists without bail while awaiting determination of their deportability. As it turned out, the detention could be prolonged and, in fact, indefinite given other nations' refusal to accept the return of immigrants deported on secret evidence as national security threats.[391] This outcome led four Justices to render strong dissents in *Carlson v. Landon*, a case that involved detention without bail for years—one of them for over four years—of four long-term LPRs—one of thirty-nine years—accused of being communists.[392] For the majority, the agencies' exercise of discretion to deny bail did not violate the Fifth Amendment's substantive due process nor the Eighth Amendment's proscription against excessive bail since Congress has delegated this authority to the Attorney General.[393] Leading up to its holding, the Court included broad language affirming Congress's power to expel, especially in times of upheaval in world politics or the domestic economy.[394] But the Court, while explicitly rejecting that deportation is punishment and affirming that detention is necessarily a part of deportation procedure, did cite *Yamataya* for the proposition that the immigration power is subject to judicial review under the "paramount law of the Constitution."[395] Thus, it mattered to the majority that Congress had not given "untrammeled discretion" to the agency to deny bail since judicial review was preserved, at least to undo clear abuses of power.[396] To the dissenters, the balance

390 Internal Security Act of 1950, Pub. L. No. 81-831, 64 Stat. 987.

391 *See* Carlson v. Landon, 342 U.S. 524, 549 (1952) (Black, J., dissenting).

392 In his dissent, Justice Black made it a point to produce facts ignored by the majority: that one of the petitioners, Carlson, had already been detained for over four years and that a second petitioner, Zydoc, had been an LPR of thirty-nine years. *Id.*

393 *Id.* at 533–46 (majority opinion).

394 *Id.* at 534.

395 *Id.* at 537 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893)) (first citing Ekiu v. United States, 142 U.S. 651, 659 (1892); then citing Yamataya v. Fisher, 189 U.S. 86, 97 (1903); then citing Zakonaite v. Wolf, 226 U.S. 272 (1912); and then citing Wong Wing v. United States, 163 U.S. 228, 231 (1896)).

396 *Id.* at 540–43.

struck by the majority was still inadequate. Justice Frank, in particular, distinguished the immigration plenary power to deport from the power to detain when detention had not been shown necessary to execute the removal: "Consequently prior cases holding that Congress has power to deport aliens provide no support at all for today's holding that Congress has power to authorize bureau agents to put 'dangerous' people in jail without privilege of bail."[397]

The so-called "criminal alien" has also been a group that Congress has subjected to mandatory detention.[398] Congress has amended the immigration laws several times to expand the field of crimmigration—i.e., the growth of immigration violations treated as crimes and the creation of criminal grounds that lead to deportation, especially since the 1980s.[399] Then, in 1988, Congress limited the immigration agencies' discretion over detention determinations with respect to noncitizens convicted of the expanding category of "aggravated felonies,"[400] ultimately mandating detention also to most immigrants facing removal based on criminal grounds.[401] This provided the courts with an opportunity to reconsider whether *Carlson v. Landon*'s wartime denial of bail to immigration detainees should also apply in peacetime. When the issue first arose, four out of five courts of appeals considering the issue agreed that mandatory detention of LPRs facing deportation based on criminal grounds violated substantive due process.[402] In 1996, Congress significantly expanded the group of persons subject to mandatory detention during their removal proceedings.[403] Under this law, any immigrant who challenged their deportation or removal would linger in

397 *Id.* at 551–52 (Black, J., dissenting).

398 For a discussion of mandatory immigration detention, see Darlene C. Goring, *Freedom from Detention: The Constitutionality of Mandatory Detention for Criminal Aliens Seeking to Challenge Grounds for Removal*, 69 ARK. L. REV. 911 (2017); Joren Lyons, *Mandatory Detention During Removal Proceedings: Challenging the Applicability of* Demore v. Kim *to Vietnamese and Laotian Detainees*, 12 ASIAN L.J. 231 (2005).

399 JOHNSON, ALDANA, HING, SAUCEDO & TRUCIOS-HAYNES, *supra* note 15, at 559–60.

400 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; *see also* Demore v. Kim, 538 U.S. 510, 521 (2003).

401 *See* Goring, *supra* note 398; Veronica Ascarrunz, Note, *The Due Process Implications of Mandatory Immigration Detention: Mandatory Detention of Criminal and Suspected Terrorist Aliens*, 13 GEO. MASON U. C.R.L.J. 79, 82–87 (2003).

402 The four circuits were the Third, Fourth, Ninth, and Tenth Circuits. *See Demore*, 538 U.S. at 515–16 (first citing Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001); then citing Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002); and then citing Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002)). Only the Seventh Circuit rejected a constitutional challenge. *Id.* at 1254 (citing Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999)).

403 *See* Zadvydas v. Davis, 533 U.S. 678, 698 (2001) (discussing AEDPA's mandatory detention provision and the IIRIRA's removal and post-removal provisions).

detention, potentially for years.[404] Yet, in 2003, when the Court considered this very set of facts in *Demore v. Kim*,[405] it reversed the Ninth Circuit. To do so, the Court cited Congress's broad powers over immigration, asserting that "Congress regularly makes rules that would be unacceptable if applied to citizens."[406] The Court also largely validated Congress's stated rationale for the mandatory detention of the "criminal alien" while diminishing the liberty stakes involved, largely by choosing to average the days in detention of all immigrants in removal over the individualized circumstances of petitioner and others similarly situated.[407] In contrast, Justice Souter, joined by Justices Stevens and Ginsburg, highlighted Hyung Joon Kim's story in their dissent. Hyung Joon Kim had arrived in the United States at age six and had been an LPR since age eight; he had a U.S.-citizen mother and two lawful resident brothers.[408] These facts, the dissenters concluded, would make it impossible for Hyung Joon Kim to "establish firm ties with any place besides the United States."[409] Moreover, the dissenters acknowledged that Hyung Joon Kim had already been in immigration detention for six months and would likely be in detention for years in his battle against his deportation.[410] They felt he had a constitutional right to fight for his deportation while not in detention.[411]

The next immigration detention challenge that immigrants convicted of crimes raised was to their indefinite detention post-removal. In 1996, Congress added a post-removal period provision as part of the IIRIRA, which authorized the further detention of certain immigrants it had failed to remove during the ninety-day removal period; namely, those who are inadmissible, those who were deported based on certain criminal or national security grounds, or those found to be a general risk to the community.[412] The problem with this provision is that it potentially authorized indefinite detention for those whose removability was impossible. This was not merely a hypothetical. In the decades after the IIRIRA, thousands of immigrants within these categories became "lifers"

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404 Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. CAL. L. REV. 1, 32 (2018).

405 *Demore*, 538 U.S. at 528–31.

406 *Id.* at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

407 *Id.* at 567–68 (Souter, J., concurring in part and dissenting in part). Since *Demore*, the Court has reaffirmed the legality of mandatory detention provisions applied to the "criminal alien" even in cases of noncitizens released from criminal detention for years before they are put in removal. *See* Nielsen v. Preap, 139 S. Ct. 954 (2019).

408 *Demore*, 538 U.S. at 545 (Souter, J., concurring in part and dissenting in part).

409 *Id.*

410 *Id.* at 558, 567–68.

411 *Id.* at 577 (Breyer, J., concurring in part and dissenting in part).

412 Zadvydas v. Davis, 533 U.S. 678, 682 (discussing 8 U.S.C. § 1231(a)(6)).

because no country would take them back.[413] In 2001, in *Zadvydas v. Davis*, the Court considered the consolidated challenge of two potential "lifers" who had challenged their indefinite detention through a writ.[414] The first was Kestutis Zadvydas, a stateless person who had arrived in the United States in 1948 at the age of eight and had been here as an LPR for over fifty years.[415] Zadvydas had a long criminal history involving drug crimes, attempted robbery, attempted burglary, and theft and had been ordered deported in 1994, after serving his last sixteen-year prison sentence.[416] But because he had been born to Lithuanian parents in a displaced German camp, neither Lithuania nor Germany would recognize his citizenship nor agree to take him back, nor would the Dominican Republic, his wife's birth country.[417] Out of options, and after spending about seven years in post-removal detention, he asked the Supreme Court to reconsider the Fifth Circuit's denial of his constitutional claim.[418] Kim Ho Ma was born in Cambodia and came to the United States at age seven in 1985.[419] When he was seventeen, he was convicted of manslaughter in a gang-related shooting and sentenced to thirty-eight months, of which he served two years before being placed in immigration detention.[420] He was ordered removed as an aggravated felon and lingered in post-removal detention for a year when Cambodia refused to take him back before the Ninth Circuit released him under supervision, considering his prolonged detention unconstitutional.[421] The Court agreed with the Ninth Circuit that indefinite detention raised serious constitutional concerns but decided the case by applying the doctrine of constitutional avoidance and choosing to read a limitation into the statute.[422] Specifically, the Court considered that "may detain" in the statute provided the immigration agencies with some discretion, though not unlimited.[423] Then, citing a desire to facilitate agency compliance and honor agency expertise, the Court delegated the ruling's implementation to the immigration agencies with the following standard: After six months, once an immigrant has proven that there are no good reasons to believe there is a significant likelihood of removal in the

413 *See Analysis of Immigration Detention Policies*, ACLU, https://www.aclu.org/other/analysis-immigration-detention-policies [https://perma.cc/TYG9-GCAA].

414 *Zadvydas*, 533 U.S. at 682.

415 *Id.* at 684.

416 *Id.*

417 *Id.*

418 *Id.*

419 *Id.* at 685.

420 *Id.*

421 *Id.* at 685–86.

422 *Id.* at 689.

423 *Id.* at 697.

reasonably foreseeable future, the government can rebut the showing. If it cannot, then supervised release is warranted.[424]

The *Zadvydas* majority expressly noted the constitutional distinction in the application of the Due Process Clause as between immigrants who have effectuated an entry into U.S. territory and those who have not.[425] Indeed, the Court distinguished this case from Mezei's, who had also been stuck at Ellis Island in indefinite detention, by focusing on the entry's constitutional significance.[426] Yet, the very exact post-removal statute also applied to immigrants situated exactly as Mezei, a point not lost in Justice Kennedy's dissent that predicted that the holding, when based on statutory construction, inevitably also applied to immigrants seeking admission at the U.S. border.[427] Ultimately, Justice Kennedy was right. Four years later in 2015, the Court considered the application of *Zadvydas* to two non-LPR Cuban nationals who were paroled but never admitted due to extensive criminal histories of convictions in the United States after arrival.[428] Both Sergio Martinez and Daniel Benitez arrived in the United States in the 1980s as part of the Mariel boatlift and, after being deported based on their criminal convictions, were detained in post-removal immigration detention for five and ten years, respectively, by the time their cases reached the Court.[429] This time, Justice Scalia, who dissented in *Zadvydas*, wrote for the majority to hold purely on precedential statutory interpretation grounds that since this case involved the exact statutory provision as in *Zadvydas*, even when applied to "arriving aliens" and not prior long-term LPRs, *Zadvydas*'s reading of the statute controlled.[430] Moreover, Justice Scalia went out of his way to undermine any constitutional importance of what motivated the outcome in *Zadvydas* by maintaining that the doctrine of constitutional avoidance relied on in *Zadvydas* did not announce a constitutional principle, but rather simply a presumption that Congress intended a statutory reading that could raise any constitutional

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424 *Id.* at 700–01.

425 *Id.* at 693–94.

426 *Id.*

427 *Id.* at 715–17 (Kennedy, J., dissenting). In fact, Justice Kennedy expressed concern over the ruling's effect on immigrants flooding the U.S. border, expecting a post-removal release under the *Zadvydas* terms.

428 Clark v. Martinez, 543 U.S. 371 (2005). The Court detailed in a lengthy paragraph the extensive list of criminal convictions in several states over several years that plagued the records of these two Cuban nationals, including crimes of theft, assault, burglary, firearm violations, and sexual crimes. *Id.* at 374–75.

429 Martinez, who remained in detention, had been ordered removed in 2000, while Benitez was released on parole to his family in 2003 after being ordered deported in 1993. *Id.* at 374–76.

430 *Id.* at 377–78.

issue.[431] In this, Justice Scalia unusually departed from Justice Thomas and Chief Justice Rehnquist, who were more comfortable with a reading of the statute that would recognize greater limitations on Congress's ability to detain prior long-term LPRs indefinitely versus those never admitted.[432] Perhaps intentionally, since it was unlikely that the ruling would actually compel Martinez's release as noted by Justice O'Connor,[433] the holding in *Clark v. Martinez* appears to solidify congressional authority to prescribe the terms and length of immigration detention, as long as it does so clearly.

Despite their constitutional ambiguity, *Zadvydas* and *Martinez* opened the door for many other immigrants facing prolonged detention to come back to the Court and reconsider the legality of their detention. This included a reconsideration of whether *Demore*'s sanction of no-bail detention during removal proceedings would still apply if it exceeded six months. The challenge reached the U.S. Supreme Court in 2018 in the case of *Jennings v. Rodriguez* and involved a class of three different groups of immigrants subjected to mandatory detention for longer than six months.[434] The first group involved asylum seekers who had passed the credible fear screening.[435] The second group involved those arriving at the border who were otherwise claiming to be admissible.[436] The final category involved immigrants, including LPRs being removed based on certain criminal convictions.[437] This is the category in which Alejandro Rodriguez, the representative of the class, belonged. Rodriguez had been an LPR since 1987 (nearly three decades) when he was put in removal proceedings in 2014 after serving time for drug and theft vehicle

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431 *Id.* at 381–82.

432 *Id.* at 390–92 (Thomas, J., dissenting).

433 *Id.* at 387 (O'Connor, J., concurring) (explaining that the government could continue to detain any foreign national in post-removal for whom it had reasonable grounds to believe that they had engaged in certain terrorist or other dangerous activities).

434 Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

435 *Id.* at 860 (Breyer, J., dissenting).

436 The statutory detention provision applying to the class of noncitizens seeking admission at the border is 8 U.S.C. § 1225(b)(2)(A), which reads that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." *Id.* at 874 (quoting 8 U.S.C. § 1225(b)(2)(A)).

437 The relevant statutory provision, § 1226(c), says in paragraph (1) that the "Attorney General shall take into custody any alien who . . . is deportable [or inadmissible] by reason of having committed [certain crimes] when the alien is released," presumably (or ordinarily) after having served his sentence. It then goes on to say, in paragraph (2), that the "Attorney General may release [that] alien . . . only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness [or to certain related others]."

Id. at 872–73 (alterations in original) (quoting 8 U.S.C. § 1226(c)).

offenses.[438] Because he was appealing his deportation order, he had been in immigration detention for over three years by the time his case reached the Court.[439] Unfortunately for him and the thousand others in his class, Justice Alito, writing for the majority, refused to apply the constitutional avoidance doctrine to read a similar six-month mark bail hearing requirement into the various statutes.[440] Describing the canon's application as generous in *Zadvydas*, the Court refused to see ambiguity in statutes where Congress had used the words "shall detain" over "may detain" as had been the case in the post-removal detention statute.[441] Justice Breyer, joined by Justices Ginsburg and Sotomayor,[442] wrote a lengthy dissent recognizing the substantial constitutional problems of prolonged detention under the Fifth and Eighth Amendments.[443] To do so, Justice Breyer, contradicting his own analysis in *Zadvydas*, rejected the legal fiction created in *Mezei* to hold that even immigrants detained while seeking admission at the border should be considered to be inside U.S. territory for constitutional purposes, distinguishing *Mezei* primarily on national security grounds.[444] And yet, once again, Justice Breyer, who penned the *Zadvydas* majority, chose not to apply the constitutional scrutiny directly to the statutes, instead painstakingly parsing out the various provisions to argue their statutory ambiguity and, thus, the application of the constitutional avoidance doctrine.[445] To be fair, the textual arguments this time became improbable[446] and begged the question as to why the Court, even in dissents, is so reluctant to finally decide the constitutional questions in these cases. This is, in fact, what Justice Kennedy had encouraged the Court to do in *Zadvydas*. In his dissent, he expressed frustration over what he considered was the misapplication of the constitutional avoidance doctrine to an ambiguous statute but did not discard that immigrants in detention, even ones who were detained while seeking admission, have a constitutional right to challenge detention practices that are arbitrary or capricious.[447] To Justice Kennedy, *Zadvydas* did not present such an arbitrary and capricious case; the problem is that the Court's reluctance to consider when the

438 *Id.* at 838 (majority opinion).

439 *Id.* at 833.

440 *Id.* at 842.

441 *Id.* at 843–44.

442 Justice Kagan took no part in the decision. *Id.* at 835.

443 *Id.* at 861–70 (Breyer, J., dissenting).

444 *Id.* at 867–68.

445 *Id.* at 870–80.

446 *Id.* at 870–72. For example, the dissenters argued that "shall be detained" did not preclude a reading that could include being released on bail under supervision. *Id.* at 875.

447 Zadvydas v. Davis, 533 U.S. 678, 718–22 (2001) (Kennedy, J., dissenting).

Constitution is violated in immigration detention cases has left tremendous voids on what, if any, limitations apply. Indeed, in *Zadvydas*, Justice Breyer even said, "[d]espite [the] constitutional problem, if 'Congress has made its intent' in the statute 'clear, "we must give effect to that intent."'"[448]

One of the most recent cases challenging immigration detention was decided in June 2021 and was also penned by Justice Alito; it did not go well for the immigrants involved. This time, the Court considered whether persons with reinstated prior orders of removal were eligible for bond while they pursued their withholding of deportation claims.[449] Two separate detention provisions could have applied in the case—8 U.S.C. § 1226, which governed detention "pending a decision on whether the alien is to be removed," and 8 U.S.C. § 1231, which governed detention for aliens "ordered removed"—but only one, § 1226, prescribed a right to a bond hearing.[450] In this case, respondents—about whom we are given no facts except as to their immigration procedural history—had both been ordered removed and were also in removal proceedings while they adjudicated their withholding claims; as such, either provision could have applied. Interestingly, the conservative Justices, all six,[451] and the liberal Justices, the remaining three, split on their reading of the provisions—the conservative majority applied § 1231 and therefore did not grant a bond hearing, and the liberals landed on § 1226, and, thus, granted a bond hearing.[452] And yet, ironically, all the Justices provided analyses that were purely about statutory construction devoid of any principles that might have guided the Court. These principles could have included *Chevron* deference for the conservatives—or, more importantly for our purposes—the doctrine of constitutional avoidance, which would have recognized more explicitly the presence of a liberty interest.[453] Indeed, while Justice Breyer, writing for the dissent, noted that withholding of deportation decisions often takes longer than a year and some well over two years,[454] we hear nothing more about the liberty implications of this ruling on the lives of people facing the prospect of torture or life sentences while having to pursue their defense against removal while in detention.

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448 *Id.* at 696 (majority opinion) (quoting Miller v. French, 530 U.S. 327, 336 (2000)).

449 Johnson v. Guzman Chavez, 141 S. Ct. 2271 (2021).

450 *Id.* at 2280 (quoting 8 U.S.C. §§ 1226, 1231).

451 *Id.* at 2277. Justice Thomas, joined by Justice Gorsuch, issued a concurrence that agreed with the holding and its reasoning, except they would have denied jurisdiction to hear the claim. *Id.* at 2292 (Thomas, J., concurring).

452 *Id.* at 2297–98 (Breyer, J., dissenting).

453 *See generally* Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275 (2016).

454 *Guzman Chavez*, 141 S. Ct. at 2294–95 (Breyer, J., dissenting).

Then, in 2022, immigrants attempted once more to challenge their prolonged and mandatory detention, this time by arguing that mandatory detention beyond six months without a bail hearing violated both the INA and the U.S. Constitution.[455] This argument was consistent with limitations the Third and Ninth Circuits had imposed post-*Zadvydas* on prolonged mandatory detention during or post the removal period.[456] Earlier, we discussed the Court's rejection, also in 2022, of immigrants' ability to bring this type of challenge in a class action lawsuit.[457] Suing only for himself, Antonio Arteaga-Martinez, a Mexican national who was pursuing a CAT claim while in post-removal detention, relied on Third Circuit precedent[458] to argue he had a right to a bail hearing once he endured six months of immigration detention. Writing for the majority, Justice Sotomayor joined with all of her colleagues to hold that neither the INA nor the U.S. Constitution required a bail hearing, with Justice Breyer as the sole dissenter, and only in part.[459] The Court adopted the *Jennings* textualist approach to read the relevant statute[460] as clearly authorizing indefinite detention—"[t]his text, which does not address or 'even hin[t]' at the requirements [of bail]"—and thus precluding the application of the canon of constitutional avoidance.[461] Bound by what appears to be strong commitment to precedent,[462] this position was nonetheless a dramatic shift in convictions for Justice Sotomayor who had vehemently argued in *Jennings* that the U.S. Constitution did indeed impose limits on indefinite detention.[463] Justice Breyer, recognizing that this case involved the identical statutory provision implicated in

455 Johnson v. Arteaga-Martinez, 142 S. Ct. 1827 (2022).

456 In *Zadvydas*, the Court interpreted the relevant INA statute as imposing a reasonable temporal limit of six months for post-removal–period detentions. The Court determined that indefinite detention would raise serious constitutional questions. *See* Zadvydas v. Davis, 533 U.S. 678, 680 (2001); *Arteaga-Martinez*, 142 S. Ct. at 1828; Anthony R. Enriquez, Note, *Structural Due Process in Immigration Detention*, 21 CUNY L. REV. 35 (2017); Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363 (2014).

457 *See supra* notes 199–203 and accompanying text (discussing *Garland v. Aleman Gonzalez*).

458 *Arteaga-Martinez*, 142 S. Ct. at 1830–31 (citing Guerrero-Sanchez v. Warden York Cnty. Prison, 905 F.3d 208, 224–25 (3d Cir. 2018)).

459 *Id.* at 1830; *see also id.* at 1837–38 (Breyer, J., concurring in part and dissenting in part).

460 In this case, the relevant statute, § 1231(a)(6), provides, in relevant part, that certain noncitizens who have been ordered removed "may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision." 8 U.S.C. § 1231(a)(6).

461 *Arteaga-Martinez*, 142 S. Ct. at 1833 (first alteration in original) (quoting Jennings v. Rodriguez, 138 S. Ct. 830, 843 (2018)).

462 *Id.* at 1834 ("But the detailed procedural requirements imposed by the Court of Appeals below reach substantially beyond the limitation on detention authority recognized in *Zadvydas*. *Zadvydas* does not require, and *Jennings* does not permit, the Third Circuit's application of the canon of constitutional avoidance.").

463 Jennings v. Rodriguez, 138 S. Ct. 830, 859–69 (2018) (Breyer, J., dissenting).

Zadvydas, dissented to state that *Zadvydas* was controlling in finding that prolonged mandatory detention raised a "serious constitutional problem."[464] Sadly, Justice Breyer, now retired, stood alone now on this point, and it seems like the Court has swayed more in favor of textualism that largely abandons a commitment to liberty interests.

Finally, a separate line of immigration detention cases has involved the detention of minors. Especially since the 1980s, the immigration detention of minors has been treated distinctly from adult immigration detention in ways that are generally more protective.[465] These changes evolved as a result of legal challenges that led to regulatory reforms that led to legislative reforms.[466] Perhaps ironically, these progressive improvements led the Court, as early as 1993, to label the immigration detention of minors as "legal custody" rather than "detention," and, thus, outside the realm of constitutional scrutiny under substantive due process.[467] At this time, Congress did not distinguish between the detention of children and adults and provided vast discretion to immigration agencies in terms of who was subject to detention during the removal period.[468] However, in response to litigation, the then-INS instituted regulations in 1988 that, in general, released children to parents, close relatives, or legal guardians and also improved conditions of detention.[469] The challenge in the case involved minors ineligible to be released because only persons not related to the child were willing to take up temporary custody but not legal guardianship.[470] As recognized by the dissent, these children could remain in detention for as long as a year and were placed in juvenile detention facilities required by litigation to guarantee certain basic conditions and services.[471] To the majority, in an opinion authored by Justice Scalia, these terms of detention did not

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464 *Arteaga-Martinez*, 142 S. Ct. at 1837 (Breyer, J., concurring in part and dissenting in part).

465 *See generally* Sarah Collins, *Kids in Cages and the Regulations That Protect Them*, 97 DENV. L. REV. F. 230 (2019).

466 *See generally* Matt Sussis, *The History of the* Flores *Settlement: How a 1997 Agreement Cracked Open Our Detention Laws*, CTR. FOR IMMIGR. STUD. (Feb. 2019), https://cis.org/sites/default/files/2019-02/sussis-flores-history.pdf [https://perma.cc/CL3D-ASDN].

467 Reno v. Flores, 507 U.S. 292, 298 (1993).

468 At the time,

> Section 242(a) of the Immigration and Nationality Act provide[d] that any "alien taken into custody may, in the discretion of the Attorney General and pending [a] final determination of deportability, (A) be continued in custody; or (B) be released under bond . . . containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole."

Id. at 333 (Stevens, J., dissenting) (second alteration in original) (quoting 8 U.S.C. § 1252(a)(1)).

469 *Id.* at 297–98 (majority opinion) (discussing 8 C.F.R. § 242.24 (1992)).

470 *Id.* at 302–03.

471 *Id.* at 297–98; *see also id.* at 323–24 (Stevens, J., dissenting).

involve physical restraint and, moreover, affected juveniles who are always in a state of custody even when not in an institutional custodial setting.[472] In a concurrence, Justices O'Connor and Souter disagreed with this framing, concluding that children have a constitutionally protected interest in freedom but feeling satisfied that the INS regulation satisfied the substantive due process requirements.[473] Justices Stevens and Blackmun would have imposed greater constitutional scrutiny, imposing a "best interest of the child" standard to ensure that liberty protections for children were maximized.[474]

II. FEDERAL POLITICAL RESPONSES TO IMMIGRATION TRAUMA[475]

This Part explores some of the political gains and pushbacks to judicial attempts to tame the trauma wielded by immigration enforcement. Some of these responses were covered as part of the discussion of immigration constitutional cases, such as how Congress curtailed judicial review in immigration cases when the Court sought to expand its oversight,[476] or how Congress expanded its immigration detention power when the Court sought to limit it.[477] This Part further focuses on the ways Congress and the executive have shifted borders in ways that affect the Court's territorial demarcation of rights offshore or to conceal immigrant trauma, not just at U.S. borders, but potentially inside U.S. territory. Simultaneously, Congress and the executive have created additional relief against deportation, whether individual or collective, for certain immigrants in recognition of the trauma they or their families would endure from their removal. Largely, given the lack of clear fundamental rights that limit the plenary power, courts have

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472 *Id.* at 302–03 (majority opinion).

473 *Id.* at 315 (O'Connor, J., concurring).

474 *Id.* at 320–21 (Stevens, J., dissenting).

475 Part II focuses only on national political responses insofar as federal immigration enforcement remains largely thought of as certainly not an exclusively federal power. As many other scholars have documented, however, the explosion of immigration federalism, in addition to the voluntary devolution of federal immigration powers by Congress and the executive, has meant that localities, too, respond politically to both tame or augment the trauma wielded by immigration laws' enforcement. *See, e.g.*, *supra* notes 210–21 (discussing local immigration enforcement and sanctuary).

476 *See supra* Section I.A.2.

477 *See supra* Section I.B.2. Periodically, a few presidents, including President Biden, saddled with the cost and burdens of immigration detention, have promoted alternatives to detention practices. *See* Stef W. Kight, *Scoop: Biden to Stop Holding Undocumented Families in Detention Centers*, AXIOS (Dec. 16, 2021), https://www.axios.com/2021/12/16/biden-ends-migrant-family-detention-border-immigration [https://perma.cc/VX94-VEW4]. These policies, however, do not undo the existing harsh mandatory detention practices in the immigrations statutes.

deferred to Congress's policy choices, even when they have contradicted the narrow rights-based reasoning the courts have provided for narrowing the interpretation of prior statutes. At times, moreover, courts have limited these political responses, although guided by separation of power concerns that do not always align with the rights-based foundations that may have prompted the political response.

A. *Shifting Borders*

In 1996, Congress reclaimed the border and decided which immigrants could be heard (and seen). Instead of accepting the Court's significance of entry as the demarcator of (some) constitutional rights to due process, Congress both introduced the concept of admission and began a project of redrawing the border. The IIRIRA defined admission as a "lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[478] Thus, under the IIRIRA, the world for immigrants in terms of substantive and procedural rights was no longer simply divided in terms of those facing "exclusion" from outside the United States versus those facing deportation from within the United States. Instead, the IIRIRA imposed a relevance standard of how immigrants effectuated the entry and, in general, reduced both procedural and substantive rights for those who entered without authorization.

As discussed in the sections that follow, in general, the IIRIRA shifted borders to reframe "constitutionally relevant" presence by creating five distinct categories of immigrants facing immigration enforcement: (1) those who were "arriving aliens" and were seeking admission at a border point prior to effectuating an entry; (2) those who effectuated an entry without inspection (EWI) and either sought admission or faced removal from within the United States; (3) those previously admitted as nonimmigrants who sought a new admission or faced removal from within the United States; (4) those previously admitted as LPRs who traveled abroad and found themselves physically outside U.S. territory; and (5) LPRs facing deportation from within the United States. It was in the second and fourth categories, in particular, that Congress made the most constitutionally relevant changes, but all of them were altered in important ways. Since 1996, as detailed below, mostly through executive actions, this project of shifting borders for certain immigrants has continued. As borders have shifted, compassion

478 8 U.S.C. § 1101(a)(13)(A).

and fairness have shrunk, and immigrant trauma for those affected has been rendered legally invisible.

1. "Arriving Aliens"

Congress introduced the concept "arriving alien" into the IIRIRA, although it was not an entirely new construct in immigration law.[479] In many ways, an "arriving alien" as used in the IIRIRA was equivalent to a non-U.S. citizen facing exclusion in the ways the Court conceived of the term when constructing the doctrine of territoriality.[480] For the Court, exclusion cases not only included anyone seeking initial "entry" into the United States from outside U.S. territory, but also persons detained or paroled in what became known as the "entry fiction" cases in immigration law and sometimes even returning LPRs seeking reentry.[481] In general, however, "entry" into U.S. territory—whether or not authorized—altered the constitutional standing of non-U.S. citizens in ways that guaranteed them greater substantive and due process protections. In important ways, however, Congress, through the "arriving alien" framework, also altered the concept of "excludable aliens" to construct a legislative framework that generally affirmed but also expanded the Court's treatment of them beyond constitutional protections. Interestingly, the IIRIRA used but did not define the term "arriving alien." Instead, the Code of Federal Regulations (CFR) defined the term as:

> an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means.[482]

The CFR further clarified that a non-U.S. citizen who is paroled is considered an "arriving alien," except if paroled before April 1, 1997, or if granted advance parole while in the United States prior to departure from and return to the United States.[483]

What the IIRIRA did do is create special rules governing "arriving aliens" that generally deny most of them nearly all procedural and

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479 *See* Gerald Seipp, *Law of "Entry" and "Admission": Simple Words, Complex Concepts*, IMMIGR. BRIEFINGS, Nov. 2005.

480 *See generally* Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017 (2007).

481 *See, e.g.*, Colton Spencer Bane, Note, *Procedural Due Process in Removal Proceedings: History, Overview, and Recent Developments*, FED. LAW., May/June 2020, at 30, 32.

482 8 C.F.R. § 1.2 (2011).

483 *Id.*

substantive due process that would otherwise apply to those not considered "arriving aliens." In essence, "arriving aliens" possess the fewest procedural and substantive safeguards of any immigrant since they face high standards and burdens of proof;[484] expedited removal when they arrive lacking real documents or possessing fraudulent documents;[485] mandatory detention;[486] and, now, no access even to habeas review to challenge their denial of a credible asylum claim.[487] For most treated as "arriving aliens," even the most progressive Justices would concede their precedential rulings have excluded them from protections.[488] Constitutional concerns do arise, however, especially as to certain "arriving aliens" whose liberty interests in territoriality have been recognized by the Court. As will be explained more fully in the Sections below, based on other IIRIRA provisions, many or all of these liberty-restricting special rules have applied to certain returning LPRs and to certain non-U.S. citizens who effectuated a successful EWI in ways that blatantly defied the territorial borders defined by the Court.[489]

The IIRIRA, moreover, authorizes immigration agencies to extend expedited removal to all non-U.S. citizens present in the United States—meaning they effectuated an entry—but who were not admitted or paroled and who cannot prove they have been physically present in the United States continuously for at least two years.[490] While recognizing that prolonged presence of non-U.S. citizens in the United States builds stakes that should translate to a recognition of liberty interests, this provision rejects that territorial presence per se, however brief, should trigger constitutional interests. Early analysis of the IIRIRA quickly noted

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484 *See* Seipp, *supra* note 479.

485 *Id.*; *see also* Amy Wingfield, Note, *The Opulent or the Oppressed? Expedited Removal as a Violation of the American Ideal*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 767 (2010).

486 Wingfield, *supra* note 485, at 798, 800; *see also* Elizabeth Knowles, *Detained Without Due Process: When Does It End?*, 96 U. DET. MERCY L. REV. 77 (2018).

487 *See generally* Diana G. Li, Note, *Due Process in Removal Proceedings After* Thuraissigiam, 74 STAN. L. REV. 793 (2022). For a discussion of *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959 (2020), see *supra* notes 228–41 and accompanying text.

488 An example of this was in *Thuraissigiam*, in which even Justices Ginsburg and Breyer sided with the majority to deny habeas review to an asylum seeker denied credible fear. Only Justices Kagan and Sotomayor pushed back on Thuraissigiam's treatment as an "arriving alien," since he had been caught within twenty-five yards after crossing the border without inspection. *See supra* note 237 and accompanying text.

489 As already explored in the analysis of the Court's cases, the Court often repeated that the territoriality constitutional framework of immigration law did not hinge on whether persons entered U.S. territory with or without authorization. *See supra* note 116 and accompanying text.

490 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

the unconstitutionality of this path,[491] and for years the immigration agencies ignored this authority. This, however, changed when President George W. Bush issued regulations in 2004 that expanded the class of EWIs subject to expedited removal to those apprehended within 100 miles of the border who could not establish fourteen days of continuous physical presence in the United States.[492] This regulation essentially redrew the border, not at the border, but somewhere else inside U.S. territory in a way that ignored Supreme Court precedent but was consistent with, and in fact narrower than, legislative authority. In fact, the IIRIRA provisions led some lower federal courts to implicitly or explicitly validate President Bush's redrawing of the border[493] and the Supreme Court to do so as well in 2020 when it decided *Thuraissigiam*.[494] Then, in 2017, through executive order, President Trump brought to life the IIRIRA's fullest erasure of territoriality principles for persons who effectuated an EWI who could not prove the two-year continuous physical presence framework.[495] The COVID-19 pandemic interrupted the Order's implementation, and President Biden reversed the Order.[496]

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491 *See, e.g.*, David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820 (1998).

492 Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877-01 (Aug. 11, 2004); *see also* Fatma E. Marouf, *Extraterritorial Rights in Border Enforcement*, 77 WASH. & LEE L. REV. 751, 770 (2020).

493 In certain cases, federal courts cited immigration agencies' authority to apply expedited removal to persons caught near the border. *See, e.g.*, St. Charles v. Barr, 514 F. Supp. 3d 570 (W.D.N.Y. 2021). In other cases, federal courts conceded the application of expedited removal proceedings to certain asylum applicants but limited its extension to mandatory detention since the regulation was silent on this point. *See, e.g.*, Dorval v. Barr, 414 F. Supp. 3d 386 (W.D.N.Y 2019) (involving a Haitian asylum seeker who passed his credible fear). Other cases, however, have allowed the extension of mandatory detention provisions to asylum seekers subject to the 2004 Bush regulation who were treated as "arriving aliens" even after making an entry. *See, e.g.*, Rodriguez-Figueroa v. Barr, 442 F. Supp. 3d 549 (W.D.N.Y. 2020); Singh v. Barr, No. 19-CV-01096, 2020 WL 1064848 (W.D.N.Y. Mar. 2, 2020).

494 The majority in *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1964 n.2 (2020), cites the 2004 regulation as applying to Thuraissigiam since he had been caught within twenty-five yards of the border.

495 Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017); *see also* Daniel Kanstroom, *Expedited Removal and Due Process: "A Testing Crucible of Basic Principle" in the Time of Trump*, 75 WASH. & LEE L. REV. 1323 (2018).

496 *See* Hamed Aleaziz, *The Biden Administration Has Suspended a Trump-Era Policy That Put Immigrants at Risk of Being Deported Without Due Process*, BUZZFEED NEWS (Oct. 14, 2021, 10:26 PM), https://www.buzzfeednews.com/article/hamedaleaziz/expedited-removal-trump-immigrant-policy-suspended [https://perma.cc/5P39-YBP7].

As a result, the constitutionality of IIRIRA's most ambitious reclaiming of constitutional power has not yet been tested in federal courts.[497]

These political disruptions of the Court's early attempts to locate constitutional relevance at the U.S. border of all persons irrespective of immigration status have recently solidified with recent policies, such as the Migrant Protection Protocol (MPP), or "Remain in Mexico," and the application of Title 42 COVID-19–related border restrictions at the U.S.-Mexico border.[498] Title 42 restrictions, which the Trump administration implemented in March 2020 as a response to the COVID-19 pandemic, could be set apart as an exceptional emergency public health measure rather than exclusively an immigration policy.[499] The validity of Title 42 as an emergency public health measure, however, has always been in doubt,[500] especially given the lifting of all other emergency public health measures, including travel restrictions for all other foreigners.[501] The MPP program, in contrast, predated the COVID-19 pandemic and was never intended as anything other than a transformation of how the United States treats asylum seekers arriving at the U.S.-Mexico border.[502] Combined, these programs have essentially shut down the U.S.-Mexico border to nearly all asylum seekers and allowed federal immigration

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497 Nevertheless, the *Thuraissigiam* Court matter of factly mentions the IIRIRA's two-year continuous physical presence requirement without a hint that the Court could view it as constitutionally problematic. *Thuraissigiam*, 140 S. Ct. at 1964–65.

498 Title 42 is a public health and welfare statute enacted in 1944 that gave the U.S. Surgeon General the authority—later transferred to the Centers for Disease Control and Prevention—to determine whether communicable diseases in foreign countries pose a serious danger of spreading in the United States, either by people or property entering the country. Until the COVID-19 pandemic, this obscure law had rarely been used. *See* Deepa Shivaram, *What to Know About Title 42, the Trump-Era Policy Now Central to the Border Debate*, NPR (Apr. 24, 2022, 5:00 AM), https://www.npr.org/2022/04/24/1094070784/title-42-policy-meaning [https://perma.cc/JJA2-UUBN].

499 *See* Andrea Castillo & Karen Garcia, *Title 42 Explained: The Obscure Public Health Policy at the Center of a U.S. Border Fight*, L.A. TIMES (Oct. 25, 2021, 5:28 AM), https://www.latimes.com/politics/story/2021-10-25/what-is-title-42-how-does-it-impact-us-border-immigration [https://perma.cc/FJ5V-BXJ5].

500 *See, e.g.*, Dylan Corbett, *Title 42 Is Not a Public Health Measure—Biden Needs to Rescind It*, HILL (Aug. 6, 2021, 9:30 AM), https://thehill.com/opinion/immigration/566654-title-42-is-not-a-public-health-measure-biden-needs-to-rescind-it [https://perma.cc/T2HU-H6LJ].

501 *See* Bailey Schulz, Michael Collins & Morgan Hines, *US Drops COVID Testing Requirement for International Flyers*, USA TODAY (June 13, 2022, 7:44 AM), https://www.usatoday.com/story/travel/news/2022/06/10/travel-covid-test-requirement-us/6657199001 [https://perma.cc/WD82-BXU5].

502 *See* BEN HARRINGTON & HILLEL R. SMITH, CONG. RSCH. SERV., LSB10251, "MIGRANT PROTECTION PROTOCOLS": LEGAL ISSUES RELATED TO DHS'S PLAN TO REQUIRE ARRIVING ASYLUM SEEKERS TO WAIT IN MEXICO (2019).

agencies to expel nearly two million migrants[503] and to return tens of thousands of other asylum seekers to Mexico, forcing them to process their asylum cases where they face significant danger.[504] The litigation battles that have ensued seeking to end or to continue these programs largely center around political power struggles among a few states and federal agencies to control the border but also reveal that, regardless of who wins the political battle, the losers will be the vulnerable migrants given how much absolute power sovereign states and the federal agencies claim over the border.[505] In June 2022, in a split decision that also divided the conservative Justices, the Court finally settled this political battle, at least as it relates to MPP, and declared federal immigration agencies the winner.[506] The opinion, however, solely reversed the lower court's conclusion that the immigration statutes compelled the Biden administration, rather than made it permissive, to implement MPP.[507] Indeed, in so holding, the Court actually appears to have validated the immigration agencies' statutory authority to return all asylum seekers, regardless of nationality, to either Mexico or Canada for their asylum

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503 John Gramlich, *Key Facts About Title 42, the Pandemic Policy That Has Reshaped Immigration Enforcement at U.S.-Mexico Border*, PEW RSCH. CTR. (Apr. 27, 2022), https://www.pewresearch.org/fact-tank/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border [https://perma.cc/E5G7-LM83].

504 *See, e.g.*, AM. IMMIGR. COUNCIL, THE "MIGRANT PROTECTION PROTOCOLS" (2022); '*Remain in Mexico': Overview and Resources*, HUM. RTS. WATCH (Feb. 7, 2022, 9:00 AM), https://www.hrw.org/news/2022/02/07/remain-mexico-overview-and-resources [https://perma.cc/25WV-VCSQ].

505 *See, e.g.*, Madeleine Carlisle, *The Battle over 'Remain in Mexico' Shows How U.S. Immigration Policy Has Reached 'Peak Confusion'*, TIME (Apr. 25, 2022, 7:00 AM), https://time.com/6169724/remain-in-mexico-battle-supreme-court [https://perma.cc/S67A-RSCQ].

506 Biden v. Texas, 142 S. Ct. 2528 (2022). Chief Justice Roberts delivered the opinion of the Court, in which Justices Breyer, Sotomayor, Kagan, and Kavanagh joined. Justice Alito wrote a dissent, in which Justices Thomas and Gorsuch joined. Justice Barrett also wrote a dissent, in which Justices Thomas, Alito, and Gorsuch joined as to all but the first sentence.

507 The two INA provisions pertinent to the case are 8 U.S.C. § 1225(b)(2)(A), (C). § 1225(b)(2)(C) provides that:

> In the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.

§ 1225(b)(2)(C). § 1225(b)(2)(A) states that if "an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." § 1225(b)(2)(A). Texas and Missouri, supported by the lower courts and the dissenting Justices, suggested that the government's violation of the mandatory detention provision made the otherwise permissive provision, regarding where asylum seekers could be processed, mandatory rather than permissive. *Biden*, 142 S. Ct. at 2550 (Alito, J., dissenting).

processing.[508] This is a point that immigrants' rights activists fiercely contested in other litigation challenging MPP that focused instead on how these laws violated the statutory and international law rights of asylum seekers.[509] For now, these early rights-based challenges seem to have vanished into thin air, a point that is not lost with the Biden administration, which is still weighing its options on whether to end or retain MPP.[510]

2. EWIs

With regard to EWIs, the IIRIRA changes were especially radical. The most radical shift relates to their permissive treatment as "arriving aliens" as explored above.[511] But other changes even to those not treated as "arriving aliens" are also noteworthy. Importantly, and perhaps responding to constitutional precedent, the IIRIRA retained minimum procedural due process safeguards identified by the Court and applied them equally to all non-U.S. citizens facing removal from within the United States, including EWIs. These procedural safeguards include the right to notice and a hearing by a neutral factfinder; advisal of rights; adequate translation; the privilege of effective representation; the right to examine evidence that the government is using against them, as well as to present their own evidence; the right to have a complete record of testimony and evidence from their removal proceedings; and some level of judicial review.[512] Immigration detention provisions, which were also a part of the AEDPA, demarcated lines of distinction to impose mandatory detention, not based on EWI status but rather on crime.[513] However, the IIRIRA bifurcated the substantive grounds for removal

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508 *Biden*, 142 S. Ct. at 2541 ("Section 1225(b)(2)(C) plainly confers a *discretionary* authority to return aliens to Mexico during the pendency of their immigration proceedings."). A more narrow and plausible interpretation would only have allowed nationals of the contiguous territory to be returned to their own countries of nationality.

509 *See, e.g.*, Aaron Reichlin-Melnick, *Risky "Remain in Mexico" Policy Faces Legal Challenges*, IMMIGR. IMPACT (Feb. 21, 2019), https://immigrationimpact.com/2019/02/21/remain-in-mexico-policy-legal-challenges [https://perma.cc/MXK6-9JYG].

510 *See* Kate Morrissey, *Supreme Court Rules 'Remain in Mexico' Can End. Asylum Seekers in Tijuana Waiting*, L.A. TIMES (July 1, 2022, 7:48 AM), https://www.latimes.com/politics/story/2022-07-01/supreme-court-remain-in-mexico-tijuana [https://perma.cc/L6JC-NDER] (reporting that a government lawyer said during an MPP hearing that the program will continue, at least for now, since the Court's ruling said ending it was possible but not required).

511 EWIs and nonimmigrants convicted of certain crimes are, like "arriving aliens," also subjected to expedited removal. *See supra* Section II.A.1.

512 *See* Bane, *supra* note 481, at 34–35.

513 *See, e.g.*, Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 INTERPRETER RELEASES 209 (1997).

between EWIs and previously admitted persons facing removal from within the United States[514] and, moreover, shifted the burden of proof to EWIs, once alienage is established, to prove their non-removability.[515] In addition, the IIRIRA introduced significant procedural barriers to legalization based on immigration violations, including sanctions for EWI and unlawful stays.[516] Finally, the IIRIRA narrowed the availability of discretionary remedies to bars from admission or from removal that, in general, are unavailable to EWIs or impose much higher burdens.[517]

None of these changes, moreover, are likely to raise any constitutional concerns since the courts will view most as involving policy over procedural choices or discretionary measures. A recent Supreme Court case illustrates this well. In 2021, in *Sanchez v. Mayorkas*, Justice Kagan, writing for a unanimous Court, affirmed the government's denial of Jose Sanchez's eligibility to adjust his status to that of an LPR based on a petition filed by his U.S.-citizen wife.[518] Sanchez, a Salvadorean citizen, had lived in the United States for longer than two decades, since 1997, when he effectuated an entry without inspection and subsequently obtained, in 2001, temporary protected status (TPS), a protection given to certain Salvadoreans based on earthquakes and other conditions that made it unsafe for them to return.[519] Despite Sanchez's significant stakes in the United States, the Court applied what it called a "straightforward application" of the adjustment of status provision (considered discretionary) and held that TPS, while granting Sanchez nonimmigrant status, could not constitute a lawful admission since, post-1996, its definition required a "lawful entry" into the United States.[520] Yet, prior lower courts, including the Ninth and Sixth Circuits, had found the opposite—that the INA unambiguously treated TPS as an admission.[521] Thus, at a minimum, the Court could have treated the INA as ambiguous on this point and, in recognition of Sanchez and about 3,000 other TPS

514 *See, e.g.*, Linton Joaquin, *The 1996 Immigration Act: Grounds of Inadmissibility and Deportability and Available Waivers*, 73 INTERPRETER RELEASES 1641, 1642–43 (1996).

515 *See, e.g.*, Maureen O'Sullivan, *The Cancellation of Deportation and Exclusion Jurisprudence: What Can We Expect from Removal Proceedings?*, 1997–98 IMMIGRATION & NATIONALITY LAW HANDBOOK 259, *as reprinted in* SD61 AM. L. INST.-AM. BAR ASS'N 253, 256–57 (1999).

516 *See, e.g.*, Anne J. Greer, *The Path to Adjustment: Jurisdiction over Selected Applications to Adjust Status*, IMMIGR. BRIEFINGS, Apr. 2010.

517 *See infra* notes 558–78 and accompanying text.

518 Sanchez v. Mayorkas, 141 S. Ct. 1809 (2021).

519 *Id.* at 1812.

520 *Id.* at 1813.

521 Cody M. Gecht, Note, *Lawful Permanent Residency: A Potential Solution for Temporary Protected Status Holders in the Eastern District of New York*, 36 TOURO L. REV. 471, 491, 495 (2020).

holders' significant stakes, might have turned to statutory interpretation principles in favor of the immigrant.[522]

3. Nonimmigrants

The IIRIRA appeared to place certain nonimmigrants—those previously admitted to the United States on a temporary basis—somewhere between EWIs and LPRs in terms of procedural and substantive treatment. Generally, the differences, which are more favorable toward nonimmigrants than EWIs but less so as compared to LPRs, appear to respond to the congressional desire to shift constitutional relevance away from "entry" without authorization toward "admission" or entry after inspection and authorization. In this regard, Congress largely exempts nonimmigrants from "arriving alien" treatment[523] and otherwise treats them more comparably to LPRs in removal proceedings, not just in terms of due process, but also in terms of standards and burdens of proof and the substantive grounds for deportation.[524] One significant exception has been the IIRIRA's provision on the use of expedited removal proceedings to deport both EWIs and certain nonimmigrants convicted of crimes deemed "aggravated felon[ies]."[525] So far, attempts to challenge this practice in the lower federal courts have not succeeded.[526] In general, moreover, nonimmigrants do enjoy certain advantages in exceptions to bars from seeking new admission despite immigration violations;[527] however, they are otherwise similarly situated

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522 *See supra* notes 355–89 and accompanying text (discussing reliance on pro-immigrant statutory interpretation principles in deportation cases).

523 An exception is when the immigration agencies establish that the immigration visa is fraudulent or was procured by fraud. *See generally The Expedited Removal Study: Report on the First Three Years of Implementation of Expedited Removal*, 15 NOTRE DAME J.L., ETHICS & PUB. POL'Y 1 (2001).

524 *See* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 95–97 (2001).

525 8 U.S.C. § 1228(b)(1).

526 *See, e.g.*, Valdiviez-Hernandez v. Holder, 739 F.3d 184 (5th Cir. 2013) (convicting EWIs of aggravated felony subject to expedited removal); Graham v. Mukasey, 519 F.3d 546 (6th Cir. 2008); United States v. Calderon-Segura, 512 F.3d 1104 (9th Cir. 2008) (holding that no equal protection violation for expedited removal provision applied to nonimmigrants); Ogundipe v. Dep't of Homeland Sec., 295 F. Supp. 2d 513 (E.D. Pa. 2003) (finding no due process violation when expedited removal proceedings against a nonimmigrant denied his ability to file adjustment of status).

527 The most used and important exception is the ability of visa overstayers who are immediate relatives of a U.S. citizen to adjust their status without leaving the United States. In contrast, EWIs who are immediate relatives must leave the United States to seek an admission, and when they do, they trigger additional bars (usually ten years) for their unlawful stay in the United States, a penalty

to EWIs in their ability to seek relief from removal.[528] None of these provisions appear to raise constitutional concerns insofar as distinctions in treatment also reveal rational policy (a bias in favor of persons who arrive to the United States with authorization) over procedural choices or discretionary measures.

4. Returning LPRs

The IIRIRA enacted some, but certainly not all, of the ways in which the Court restricted the treatment of returning LPRs as seeking "entry" based on substantial liberty concerns. Now, with the operative word being "admission," the IIRIRA created six exceptions to the general presumption that LPRs who travel abroad are not seeking a new "admission."[529] Of these, the only ones that most closely track the Court's precedent are the first two, which either focus on a voluntary relinquishment of LPR status or a presumption against such an abandonment unless the person has been absent for longer than six months.[530] Neither of these conditions, however, are necessary for LPRs to be treated as "arriving aliens" when any of the other four exceptions are present.[531] The third exception seems to track the Court's requirement for "innocent" purpose travel, at least as articulated in *Fleuti*,[532] yet its language of any "illegal activity," which is not even confined to criminal acts, could be and has been construed quite broadly and in ways that defy the intent in *Fleuti*.[533] Similarly, the fifth exception focuses on the

that does not apply to visa overstayers who adjust their status. *See* Kristi Lundstrom, Note, *The Unintended Effects of the Three- and Ten-Year Unlawful Presence Bars*, 76 L. & CONTEMP. PROBS. 389, 391–92 (2013).

528 *See infra* notes 567–69 and accompanying text (discussing cancellation of removal requirements).

529 The six exceptions were as follows: (1) "has abandoned or relinquished [permanent resident] status"; (2) "has been absent from the United States for a continuous period [of more than] 180 days"; (3) "has engaged in illegal activity after having departed the United States"; (4) has left the United States while under removal or extradition proceedings; (5) "has committed an offense identified in [INA § 212(a)(2) (criminal grounds of inadmissibility)]," unless the person was granted § 212(h) relief or § 240A(a) cancellation of removal to forgive the offense; or (6) is attempting to enter or has entered without inspection. 8 U.S.C. § 1101(a)(13)(C); *see also* MARIA BALDINI-POTERMIN, IMMIGRATION TRIAL HANDBOOK § 4:6 (2022).

530 *See generally infra* notes 102–31 and accompanying text (discussing the Supreme Court returning LPR cases).

531 8 U.S.C. § 1101(a)(13)(c) creates the six conditions in the "or" such that any of the six conditions alone can trigger an LPR being treated as seeking admissions. *See infra* note 529.

532 *See supra* notes 120–24 and accompanying text (discussing *Rosenberg v. Fleuti*).

533 Kate Aschenbrenner, *Beyond "Because I Said So": Reconciling Civil Retroactivity Analysis in Immigration Cases with a Protective Lenity Principle*, 32 REV. LITIG. 147, 169–73 (2013). Similarly,

commission of broad categories of criminal grounds for inadmissibility, which, in contrast to most criminal grounds for deportation, do not require a conviction. Notably, this latter provision does not appear to have a temporal restriction and appears to focus on the commission of the relevant crimes prior to the travel abroad or even afterward.[534] Given this, the provision could treat returning LPRs as "arriving aliens" for the commission of a crime that predated the IIRIRA, even if they otherwise satisfied the *Fleuti* terms of now seeking an "entry"—a brief and innocent visit abroad. This is exactly what happened to Panagis Vartelas, an LPR since 1989, who, in 1994, two years prior to the IIRIRA, pled guilty to a felony of conspiring to make a counterfeit security, a crime for which he served four months.[535] In 2003, after one of Vartelas's many travels to Greece to visit family, an immigration officer classified him as "seeking admission" based on his 1994 conviction, even though his travel to Greece had been entirely innocent.[536] Vartelas, who was excluded from returning to the United States, waged a challenge to his exclusion by arguing that since his conviction occurred prior to the IIRIRA's passage, he should still be governed by *Fleuti* and not be treated as seeking an "entry."[537] The U.S. Supreme Court agreed: "[g]uided by the deeply rooted presumption against retroactive legislation, [the Court held] that § 1101(a)(13)(C)(v) [did] not apply to Vartelas' conviction."[538] In so holding, the Court reiterated that for Vartelas, with deep ties in the United States, his banishment would represent a severe sanction.[539] But the case was not a reframing of immigration law's enforcement as punishment nor a reversal of the non-application of the ex post facto proscription; rather, the ruling remains a statutory construction rule used as a tool to tame trauma under certain circumstances. Perhaps more importantly, however, the Court left clear that *Fleuti*, a rule that seemed grounded in a recognition of Fleuti's constitutional liberty interest, could not survive the IIRIRA. Prospectively, Section 101(a)(13)(C) of the INA overruled *Fleuti*, which means that LPRs who have committed certain

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the fourth and sixth exceptions allow returning LPRs to be treated as "arriving aliens" for civil violations, namely leaving while under removal or extradition proceedings or attempting to enter without inspection.

534 *See* Patrick Glen, Judulang v. Holder *and the Future of 212(c) Relief*, 27 GEO. IMMIGR. L.J. 1, 3–5 (2012); Allen C. Ladd, *Protecting Your Non-Citizen Client from Immigration Consequences of Criminal Activity*, S.C. LAW., May 2004, at 38, 41.

535 Vartelas v. Holder, 566 U.S. 257, 260 (2012).

536 *Id.*

537 *Id.* at 259.

538 *Id.* at 261.

539 *Id.* at 267.

crimes post-1996 travel outside the United States at their own risk of being banished upon return.[540]

5. LPRs

LPRs inside the United States have enjoyed the most liberty gains in the Court's constitutional jurisprudence but, even here, these protections remained limited. The IIRIRA, and also the AEDPA, for the most part, respected these boundaries[541] except as to LPRs convicted of certain crimes, who are considered national security risks or who have already been ordered removed. Substantively, these and other laws adopted in response to the September 11 attacks on the United States substantially expanded who was treated as a serious criminal alien or a grave national security threat.[542] As already discussed, however, the courts are likely to view these changes as largely immune from constitutional scrutiny since they involve policy choices about who is subject to removal from the United States. For these subgroups of LPRs facing removal, however, there were also notable procedural changes and detention practices that could raise constitutional concerns. While the IIRIRA spared LPRs from expedited removal when convicted of aggravated felonies, those labeled terrorists or national security threats could be subjected to special removal proceedings that permitted secret evidence and secret courts.[543] Interestingly, these provisions were never implemented due to their procedural flaws and perhaps because other less scrutinized immigration venues were already available.[544] Finally, as already discussed, some of the

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540 *See* Michelle Slayton, Comment, Interim Decision No. 3333*: The Brief, Casual, and Innocent Conundrum*, 33 NEW ENG. L. REV. 1029 (1999).

541 For example, almost all LPRs face removal in immigration proceedings that provide the same basic due process guarantees that apply to EWIs. *See supra* notes 514–17 and accompanying text. In contrast to EWIs, however, LPRs, like nonimmigrants, also preserve *Woodby*'s burden of proof requirements on the government to prove deportability. *See* Joseph J. Migas, Note, *Admissibility of Hearsay in Administrative Deportation Hearings: A Due Process Call for Reform*, 11 GEO. IMMIGR. L.J. 601, 605 (1997) ("While the order to show cause would appear on its face to require the alien to establish his lawful presence in the United States, the burden of proof is actually on the government to show by clear, convincing, and unequivocal evidence that the alien is deportable.").

542 *See, e.g.*, Arthur L. Rizer, III, *The Ever-Changing Bogeyman: How Fear Has Driven Immigration Law and Policy*, 77 LA. L. REV. 243 (2016); Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CALIF. L. REV. 1173 (2004).

543 *See, e.g.*, Rizer, *supra* note 542; Michael Scaperlanda, *Are We That Far Gone?: Due Process and Secret Deportation Proceedings*, 7 STAN. L. & POL'Y REV. 23 (1996); Lawrence E. Harkenrider, *Due Process or "Summary" Justice?: The Alien Terrorist Removal Provisions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 4 TULSA J. COMPAR. & INT'L L. 143 (1996).

544 *See* Aram A. Gavoor & Timothy M. Belsan, *The Forgotten FISA Court: Exploring the Inactivity of the ATRC*, 81 OHIO ST. L.J. 139 (2020).

IIRIRA provisions pertaining to mandatory detention have already been subjected to constitutional challenge, at best with mixed results.[545]

B. *Embracing Stakes*

Congress has also embraced what the Court has oft-labeled "stakes"—the ties that immigrants build overtime by living in the United States or by establishing significant ties with U.S. citizens or LPRs, such as family, property, and community—as a ground for relief against deportation. At its most generous, relief is given to large groups of immigrants in legislation known as amnesty; that is, laws that confer legalization to immigrants who have broken immigration laws to enter or remain in a country. In the United States, immigration amnesty has been rare. Congress adopted Title II of the Immigration Reform and Control Act of 1986 (IRCA), the only major piece of immigration amnesty legislation that allowed undocumented immigrants to regularize their status despite entering without inspection or violating the terms of their visas.[546] IRCA constituted a major statutory response to the vast tide of irregular immigration that had accumulated in the United States and produced a shadow population of persons who lived in constant fear of deportation, were vulnerable to exploitation, and yet played a useful and constructive role in the U.S. economy.[547] Under IRCA, nearly 2.7 million persons secured legalization and, with it, demonstrable intergenerational socioeconomic gains.[548] Since, there have been smaller amnesties, such as the adoption in 1994 of Section 245(i) of the INA—a provision that permitted immigrants with family or employer immigrant sponsors who were ineligible to adjust their immigration status based on EWIs or unlawful stays to pay a penalty and be allowed to legalize without leaving the United States—and its several extensions.[549] However, despite

545 *See infra* Section I.B.2.

546 Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. To be eligible under IRCA, immigrants needed to have resided continuously in the United States in an unlawful status since January 1, 1982; be present in the United States continuously since November 6, 1986; and be otherwise admissible.

547 Reno v. Cath. Soc. Servs., Inc., 509 U.S. 43, 78 (1993) (Stevens, J., dissenting).

548 *See, e.g.*, Emily Badger, *What Happened to the Millions of Immigrants Granted Legal Status Under Ronald Reagan*, WASH. POST (Nov. 26, 2014, 10:06 AM), https://www.washingtonpost.com/news/wonk/wp/2014/11/26/what-happened-to-the-millions-of-immigrants-granted-legal-status-under-ronald-reagan [https://perma.cc/V6LA-5QT8].

549 CONG. RSCH. SERV., RL31373, IMMIGRATION: ADJUSTMENT TO PERMANENT RESIDENT STATUS UNDER SECTION 245(I) (2003).

repeated efforts to repeat some version of the 1986 amnesty, it has proved impossible, especially as anti-immigration sentiment has hardened.[550]

Instead of amnesty-type legislation, the executive has increasingly resorted to the use of prosecutorial discretion to grant limited forms of relief to certain immigrants facing removal who are not considered priorities and who raise significant equities against removal.[551] Notably, in 2012, DHS issued DACA,[552] a program which, since its inception, has permitted over 800,000 youths to receive reprieve from removal and receive work authorization from the federal government and additional benefits from certain states, such as access to driver's licenses or state college tuition.[553] Not unlike the 1986 amnesty law, studies also show significant economic and social gains, not only for recipients and their families, but entire communities.[554] In addition, recent administrations, like that of President Obama and, most recently, President Biden, have adopted policies to prioritize—usually based on criminal history—and deprioritize—based on equity factors that consider the immigrant's liberty interests in the United States, including family—who is subject to deportation.[555] But both the discretionary nature of these measures, as well as the lack of legislative backing, have rendered these measures vulnerable both to political shifts and to legal challenges based on separation of powers or federalism concerns.[556] The effect of these

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550 *See, e.g.*, Elaine Kamarck, *Can Biden Pass Immigration Reform? History Says It Will Be Tough*, BROOKINGS (June 22, 2021), https://www.brookings.edu/blog/fixgov/2021/06/22/can-biden-pass-immigration-reform-history-says-it-will-be-tough [https://perma.cc/C5DT-A2M8].

551 *See, e.g.*, SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015).

552 Memorandum from Janet Napolitano, *supra* note 218.

553 *See, e.g.*, *How Many DACA Recipients Are There in the United States?*, USAFACTS (Sept. 23, 2020, 3:51 PM), https://usafacts.org/articles/how-many-daca-recipients-are-there-united-states [https://perma.cc/Q7SP-9DVF].

554 *See, e.g.*, Richard C. Jones, *Has DACA Promoted Work Over Schooling and Professional Advancement for Qualifying Mexican Dreamers?*, 102 SOC. SCI. Q. 3007 (2021); Nicole Prchal Svajlenka & Trinh Q. Truong, *The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition*, CTR. FOR AM. PROGRESS (Nov. 24, 2021), https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition [https://perma.cc/6ZPG-RZYE].

555 *See* Camilo Montoya-Galvez, *ICE Issues Policy to Protect Parental Rights of Immigrant Detainees*, CBS NEWS (July 14, 2022, 1:01 PM), https://www.cbsnews.com/news/immigration-ice-parental-rights-detainees [https://perma.cc/E5P2-RTHD]. *See generally* WADHIA, *supra* note 551; Muzaffar Chishti & Randy Capps, *Biden Immigration Enforcement Priorities Emphasize a Multi-Dimensional View of Migrants*, MIGRATION POL'Y INST. (Oct. 28, 2021), https://www.migrationpolicy.org/article/biden-immigration-enforcement-priorities [https://perma.cc/FZ82-H8DQ].

556 *See, e.g.*, Nuria Diaz Muñoz & Maria Ramirez Uribe, *Courts Are Still Debating the Legality of DACA*, POLITIFACT (June 29, 2022), https://www.politifact.com/article/2022/jun/29/courts-are-

measures, so far, has been to force the Obama and Biden administrations, for example, to end DACA, at least for new applicants, or to suspect favorable exercises of prosecutorial discretion until the legality of these programs makes its way through the courts.[557] Ultimately, it will be the Supreme Court that will settle these issues, and it is likely to do so largely on structural constitutional grounds—whether the executive has the power to exercise this type of prosecutorial discretion—without consideration of the significant stakes involved for the recipients of these measures.

Another form of relief from deportation for immigrants has been based on relief from removal for individual immigrants facing deportation. This type of relief has existed for almost as long as the federal regulation of borders in the United States. At the inception of federal immigration law during the late nineteenth century, immigrants could only be deported for conduct occurring within a narrow window of time after entry in recognition of their built ties over time.[558] While these temporal restrictions were ultimately lifted in the 1917 immigration laws, Congress nevertheless allowed judges to reprieve deportations based on humanitarian grounds.[559] It was in 1940, through the adoption of the Smith Act,[560] that Congress first legislated the remedy then known as suspension of deportation, which allowed certain deportable immigrants an opportunity to seek relief based on economic hardship to qualifying family (certain U.S. citizens or LPRs) who would be left behind.[561] Since, Congress has legislated several times to tighten the requirements for this type of relief.[562] These changes included, for example, longer times of physical presence or residence in the United States, requirements of good

still-debating-legality-daca [https://perma.cc/86J9-YRXA]; Jess Hanson, *What Is Going On with DACA in the Courts?*, NAT'L IMMIGR. L. CTR. (June 29, 2022), https://www.nilc.org/2022/06/29/what-is-going-on-with-daca-in-the-courts-torch [https://perma.cc/M8W9-E9V7]; Jared Culver, *Florida Judge Rejects Biden Legal Theory That He Has Unfettered Discretion and Immunity from Legal Challenge*, NUMBERSUSA (May 9, 2022, 3:57 PM), https://www.numbersusa.com/blog/florida-judge-rejects-biden-legal-theory-he-has-unfettered-discretion-and-immunity-legal [https://perma.cc/H4D8-PMMK].

557 *See, e.g.*, Priscilla Alvarez, Tierney Sneed & Rachel Janfaza, *Federal Judge Blocks New DACA Applications and Says Program Is Illegal*, CNN POL. (July 17, 2021, 2:44 PM), https://www.cnn.com/2021/07/16/politics/daca-ruling-hanen/index.html [https://perma.cc/A3MN-EEXL].

558 *See, e.g.*, Jill E. Family, *The Future Relief of Immigration Law*, 9 DREXEL L. REV. 393, 395 (2017).

559 *Id.* at 396.

560 The Alien Registration Act, 1940, popularly known as the Smith Act of 1940, is a United States federal statute that was enacted on June 28, 1940. Pub. L. No. 76-670, 54 Stat. 670 (codified as amended at 18 U.S.C. § 2385) (repealed 1952).

561 Family, *supra* note 558, at 396.

562 *Id.* at 397 (discussing changes in 1952 and 1962).

moral character, and a much higher threshold of hardship.[563] The last set of legislative changes to this relief also occurred in 1996, the same year Congress shifted the border. Congress restructured the relief into three distinct categories of what it now calls cancellation of removal, which applied different standards to LPRs; victims of domestic violence; and non-LPRs, including EWIs. In general, the relief was narrowed substantially to disqualify many based on criminal convictions or the commission of crimes while retaining the higher threshold of exceptional and extremely unusual hardship, except for those eligible as long-term LPRs or victims of domestic violence.[564] The extreme difficulty of proving the hardship, even for those who are not otherwise disqualified, has excluded from relief most families whose significant trauma is not deemed sufficient.[565] It has also required strenuous evidentiary requirements and burdens of proof on the noncitizen who must also resort to their own money to hire experts to assess their potential harm.[566] In 2022, for example, the Court rejected the application of favorable statutory interpretation for an immigrant in the crimmigration context—namely, that ambiguity should favor the immigrant—to a crime-related bar: "crime involving moral turpitude" in a non-LPR cancellation of removal case.[567] To do so, the Court reiterated that cancellation of removal, a type of relief against deportation, remains discretionary; as such, the burden is solely on the immigrant to establish that they are not barred from the relief.[568] Finally, the relief was also capped at only 10,000 individuals per year for non-LPRs, which has not only produced significant backlogs but has also encouraged more denials.[569]

A significant limitation of legislative or executive grants of relief from removal to immigrants is that these are treated by both the political branches and the courts as purely discretionary remedies. As such, their denial or rescission are subject to limited judicial oversight even when

563 *Id.*

564 For a more detailed description of the cancellation of removal requirements, see *id.* at 398–403.

565 *See, e.g.*, Bill Ong Hing & Lizzie Bird, *Curtailing the Deportation of Undocumented Parents in the Best Interest of the Child*, 35 GEO. IMMIGR. L.J. 113 (2020); Gina L. Signorelli, Note, *Immigration Waivers and the Psychological Effects on Family Members Throughout Their Loved One's Legalization Process*, 46 S.U. L. REV. 195 (2019).

566 Hing & Bird, *supra* note 565; Signorelli, *supra* note 565.

567 Pereida v. Wilkinson, 141 S. Ct. 754, 758 (2021).

568 *Id.* at 762–63.

569 *See, e.g.*, Margaret H. Taylor, *What Happened to Non-LPR Cancellation? Rationalizing Immigration Enforcement by Restoring Durable Relief from Removal*, 30 J.L. & POL. 527 (2015).

significant irregularities in implementation arise.[570] IRCA, for example, came under quite a bit of scrutiny for its arbitrary implementation to challenge the agencies' interpretation of its substantive requirements.[571] The Court's willingness to exercise oversight in such cases, however, was not always consistent.[572] As well, the discretionary nature of these remedies has also meant even fewer judicial constraints on due process, such as imposing the burden of establishing eligibility on the petitioner or adopting suspect evidentiary norms. In 1956, for example, the Court dismissed a challenge—raised by an LPR of over three decades who was ordered deported based on his communist associations—to the agency's reliance on confidential information to deny his suspension claim, even when he otherwise satisfied the statutory requirements for the relief.[573] In its reasoning, the Court emphasized the discretionary nature of the relief and the agency's broad discretion to decide what information is considered and how to consider it.[574] Then in 1984, the Court imposed a strict literal reading of the "continuous physical presence" requirement to the suspension of deportation provision to preclude a student visa overstayer from relief based on a three month trip abroad.[575] To do so, the Court rejected the relevance of *Fleuti*, not only because the cases involved different statutes, but also because, in contrast to *Fleuti*, the petitioner had already been ordered deported after living unlawfully in the country.[576] Moreover, the Court has declined to impose similar strict statutory construction burdens that have applied in the context of crime-based bars to discretionary remedies given that, in contrast to deportation cases involving LPRs, it is the immigrant's burden to establish both that they

570 One narrow exception to this has been APA challenges to DACA's rescission. *See supra* Section I.A.2.d. Also, judicial oversight over discretionary remedies has applied to separation of powers violations, such as when, for example, Congress chose to retain legislative veto power over suspension of deportation grants approved by the agency. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

571 *See* Maria L. Ontiveros, *Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers*, 1 U. CHI. LEGAL F. 103, 126 (2009).

572 *Compare* McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479 (1991) (granting injunctive relief over amnesty denials based on due process challenges), *with* Reno v. Cath. Soc. Servs., Inc., 509 U.S. 43 (1993) (denying injunctive relief to a class of immigrants who had yet applied for amnesty who challenged the agency's interpretation of IRCA's requirements).

573 Jay v. Boyd, 351 U.S. 345 (1956).

574 *Id.* at 350–52.

575 Immigr. & Naturalization Serv. v. Phinpathya, 464 U.S. 183 (1984).

576 *Id.* at 192–94. Ironically, the petitioner's husband, who had not traveled abroad, was successful in his suspension of the deportation provision. Each had been living in the United States for over a decade. *Id.* at 185–86.

qualify and are not disqualified from the discretionary remedies.[577] It is still possible, however, to challenge immigration policies as to the application of discretionary relief under the APA's narrow "arbitrary [or] capricious" standard, at least in cases in which judicial review has been preserved. For example, in *Judulang v. Holder*, the Court "flunked" the BIA for adopting distinctions it considered irrelevant for distinguishing between lawful residents who could seek suspension of deportation under the pre-1996 provision based on whether they had ever traveled outside the United States.[578]

CONCLUSION

The status quo of restrictive borders and tough border enforcement is not working.[579] Despite efforts by nations to erect physical walls,[580] shift borders through bilateral immigration enforcement agreements[581] or interdiction practices,[582] or restrict legal migration,[583] migration flows, especially forced migration, are on the rise.[584] This is hardly surprising: climate change,[585] persistent civil wars,[586] generalized violence,[587] and

577 Pereida v. Wilkinson, 141 S. Ct. 754, 758 (2021). Pereida provoked a strong dissent given that he had lived in the United States for twenty-five years and raised three children, including one U.S. citizen. *Id.* at 767–68 (Breyer, J., dissenting).

578 Judulang v. Holder, 565 U.S. 42, 52–53 (2011) (quoting 5 U.S.C. § 706(2)(A)).

579 *See* Thomas Gammeltoft-Hansen & Nikolas F. Tan, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, 5 J. MIGRATION & HUM. SEC. 28, 30–40 (2017).

580 Reece Jones, *Borders and Walls: Do Barriers Deter Unauthorized Migration?*, MIGRATION POL'Y INST. (Oct. 5, 2016), https://www.migrationpolicy.org/article/borders-and-walls-do-barriers-deter-unauthorized-migration [https://perma.cc/8JEA-EW8H].

581 See generally Anita Sinha, *Transnational Migration Deterrence*, 63 B.C. L. REV. 1295 (2022).

582 *See, e.g.*, AZADEH DASTYARI, UNITED STATES MIGRANT INTERDICTION AND THE DETENTION OF REFUGEES IN GUANTÁNAMO BAY 5 (2015).

583 Stuart Anderson, *Trump Cuts Legal Immigrants by Half and He's Not Done Yet*, FORBES (July 21, 2020, 1:03 AM), https://www.forbes.com/sites/stuartanderson/2020/07/21/trump-cuts-legal-immigrants-by-half-and-hes-not-done-yet/?sh=1360a1dd6168 [https://perma.cc/86Z6-WPFV].

584 *See, e.g.*, *Figures at a Glance*, UNHCR (June 16, 2022), https://www.unhcr.org/figures-at-a-glance.html [https://perma.cc/VAF6-DXHH].

585 Alex de Sherbinin, *Climate Impacts as Drivers of Migration*, MIGRATION POL'Y INST., (Oct. 23, 2020), https://www.migrationpolicy.org/article/climate-impacts-drivers-migration#:~:text=Each%20has%20a%20more%20or,likely%20to%20drive%20permanent%20migration [https://perma.cc/5YP8-KSLW].

586 *See, e.g.*, Mike Giglio, *The Syrian Sisters Who Refuse to Give Up on America*, ATLANTIC (Mar. 15, 2020), https://www.theatlantic.com/politics/archive/2020/03/syria-turkey-usa-refugee-crisis-trump-biden-sanders/607984 [https://perma.cc/C6MD-YG99].

587 *See, e.g.*, MEDECINS SANS FRONTIERES, FORCED TO FLEE CENTRAL AMERICA'S NORTHERN TRIANGLE: A NEGLECTED HUMANITARIAN CRISIS (2017), http://urbanspaces.msf.org/wp-content/uploads/2019/03/forced-to-flee-central-americas-northern-triangle_-a-neglected-humanitarian-crisis.pdf [https://perma.cc/WM63-W3TN].

extreme forms of poverty[588] render these barriers permeable to the waves of people whose desperation at home thrusts them often into even greater peril. Data shows a rise in migrants falling prey to human trafficking;[589] deaths at sea;[590] and murder, rape, or kidnappings by drug lords,[591] all for the remote hope that if they reach their destination, life will be better for them and their families. One haunting story details the cruel death by suffocation of fifty-three migrants, including children, left abandoned by their human smugglers in an overheated trailer in San Antonio, Texas on June 27, 2022.[592] In 2021 alone, 650 migrants died while trying to reach the United States through the U.S.-Mexico border, making it the deadliest year on record for the border.[593] Yet, a cruel myth fuels the status quo: that deterrence through suffering, whether at the hands of private actors, or worse, at the hands of immigration enforcers, will somehow stop people from migrating.[594] In the case of irregular migration, at least, this myth is just not panning out, as it ignores that forced migration is a type of risk-reduction strategy: "as difficult as it might be, forced migration takes place once staying at home has become the worst choice."[595]

This Article has documented century-long efforts by the United States to humanize our border. In the end, law has been insufficient in taming immigration law's enforcement. A looming reason for this is the persistence of the plenary power doctrine in immigration law. At a minimum, this doctrine must end. At this time, this prospect appears elusive. The trend of the current U.S. Supreme Court's immigration rulings to rely on strict textualism is eroding even the few limits imposed

588 *See, e.g.*, Charles T. Call, *The Imperative to Address the Root Causes of Migration from Central America*, BROOKINGS (Jan. 29, 2021), https://www.brookings.edu/blog/order-from-chaos/2021/01/29/the-imperative-to-address-the-root-causes-of-migration-from-central-america [https://perma.cc/A6WY-4T88].

589 *See, e.g.*, Anastasia Moloney, *Venezuelan Child Migrants, Women Fall Prey to Human Traffickers in Peru*, REUTERS (Mar. 12, 2019, 7:55 PM), https://www.reuters.com/article/us-peru-humantrafficking/venezuelan-child-migra%20%20nts-women-fall-prey-to-human-traffickers-in-peru-idUSKBN1QT355 [https://perma.cc/PRV7-Y842].

590 *See, e.g.*, C.J. Chivers, *Risking Everything to Come to America on the Open Ocean*, N.Y. TIMES MAG. (Feb. 7, 2021), https://www.nytimes.com/2021/02/03/magazine/customs-border-protection-migrants-pacific-ocean.html (last visited Nov. 8, 2022).

591 *See, e.g.*, Ed Vulliamy, *Kidnappers Prey with 'Total Impunity' on Migrants Waiting for Hearings in Mexico*, GUARDIAN (Feb. 18, 2020, 3:00 PM), https://www.theguardian.com/us-news/2020/feb/18/mexico-kidnappers-migrants-trump-immigration [https://perma.cc/4X3H-NWPN].

592 Paola Rosa-Aquino, *53 Migrants Died After Being Inside a Trailer During a Heat Wave. Crossing into the US May Get Deadlier as Climate Change Makes Extreme Heat More Common.*, BUS. INSIDER (June 29, 2022, 4:00 PM), https://www.businessinsider.com/rising-temperatures-make-it-deadlier-to-cross-us-mexico-border-2022-6 [https://perma.cc/QN4W-4SRR].

593 *Id.*

594 *See* Gammeltoft-Hansen & Tan, *supra* note 579, at 43–45.

595 *Migration and Risks Introduction*, *in* MIGRATION IN WEST AND NORTH AFRICA AND ACROSS THE MEDITERRANEAN: TRENDS, RISKS, DEVELOPMENT AND GOVERNANCE 133, 133 (2020).

on the doctrine by past precedent. But historically, the end of the plenary power doctrine has seemed more real,[596] and the future may write a different story. The constitutionalization of the immigration power alone, however, will not guarantee greater humanity toward immigrants. A sobering reminder of this is the criminal justice system. Over five decades of the procedural due process revolution in favor of criminal defendants have most certainly not ended the cruelty of prisons.[597] However, the premise of this Article is that gains in immigration law—such as the right to counsel, the right to a hearing and to judicial review, the right to bail, and ex post facto protections, to name a few—bring with them the potential to improve the terrible plight of immigrants who are punished, mistreated, and discarded without regard to their humanity and human rights.

596 *See, e.g.*, Mac LeBuhn, Note, *The Normalization of Immigration Law*, 15 NW. J. HUM. RTS. 91 (2017); Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 26–28 (2015); Bianca Figueroa-Santana, Note, *Divided We Stand: Constitutionalizing Executive Immigration Reform Through Subfederal Regulation*, 115 COLUM. L. REV. 2219 (2015); Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002); Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000).

597 *See* Neil L. Sobol, Griffin v. Illinois*: Justice Independent of Wealth?*, 49 STETSON L. REV. 399 (2020); Cara H. Drinan, *Conversations on the Warren Court's Impact on Criminal Justice:* In Re Gault *at 50*, 49 STETSON L. REV. 433 (2020); Jonathan K. Stubbs, *The Ripple Effects of* Gideon*: Recognizing the Human Right to Legal Counsel in Civil Adversarial Proceedings*, 49 STETSON L. REV. 457 (2020).