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Judical Line-Drawing and the Court's Failure to Protect Immigrants

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JUDICIAL LINE-DRAWING AND THE COURT'S FAILURE TO PROTECT IMMIGRANTS

Zoe Graham[*]

> *"Resisting violence and abuse by the state is especially difficult when those in power exercise their ability to legally define an institution such as immigration detention in ways that shield it from legal challenge."*
>
> *– Carl Lindskoog*[1]

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[1] CARL LINDSKOOG, DETAIN AND PUNISH: HAITIAN REFUGEES AND THE RISE OF THE WORLD'S LARGEST IMMIGRATION DETENTION SYSTEM 5 (2018).

I. INTRODUCTION

Nativism, xenophobia, and "law and order" politics have worked in tandem to systematically deny undocumented immigrants—particularly immigrants of color—their constitutional rights to due process before being subjected to detention and removal. The Supreme Court has perpetuated this inequality by creating an exception to constitutional protections known as "entry fiction." The Court has repeatedly used entry fiction as a mechanism to strip itself of jurisdiction to review immigration decisions and give complete judicial deference where it should not. Since its judicially created inception, the entry fiction doctrine has been weaponized against undocumented immigrants and refugees by all three branches of the United States government. The Court has failed to uphold the Constitution by categorically treating undocumented immigrants as less-than and turning a blind eye to the abrogation of basic constitutional protections.

This article analyzes the use of entry jurisprudence and discusses the future of entry fiction and immigration exceptionalism in light of the Court's recent opinion, *Department of Homeland Security v. Thuraissigiam*.[2]

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

II. BACKGROUND

The following section gives a broad overview of relevant immigration law and explains the basic premise of entry fiction and how it applies to certain groups of immigrants.

It is not entirely clear what the Founding Fathers would have thought about the immigration system as we now know it. Many of the Founding Fathers were immigrants themselves; both George Washington and Thomas Jefferson wrote that they thought of the United States as *a place for refugees*.[3] However, it is important to note that their idea of a "refugee" may have differed drastically from our contemporary understandings.[4] In fact, it is unlikely that many of today's refugees would have been entitled to basic civil rights under the original Constitution at all.[5]

Less than two decades after the ratification of the Fourteenth Amendment, the Supreme Court issued an expansive interpretation and declared that *all persons* within the territorial jurisdiction of the United States, including undocumented immigrants, were entitled

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[3] *See* Stuart Anderson, *Immigration, Nationalism and America's Founders*, FORBES (Aug. 1, 2019), https://www.forbes.com/sites/stuartanderson/2019/08/01/immigration-nationalism-and-americas-founders/?sh=48868e4236c1; Letter from George Washington to Francis Adrian Van Der Kemp (May 28, 1788), *in Founders Online*, NAT'L HIST. PUB. & REC. COMM'N, https://founders.archives.gov/documents/Washington/04-06-02-0266 [https://perma.cc/RJ86-3Z4M]; Letter from Thomas Jefferson to George Flower (Sept. 12, 1817), *in Founders Online*, NAT'L HIST. PUB. & REC. COMM'N, https://founders.archives.gov/documents/Jefferson/03-12-02-0012 [https://perma.cc/M6K8-JXLL].

[4] Anderson, *supra* note 3 (Jefferson referred to people "fleeing the misrule of *Europe*" as "refugees") (emphasis added).

[5] *See* Paul Finkelman, *"Let it be Placed Among the Abominations!": The Bill of Rights and the Fugitive Slave Laws*, NAT'L PARK SERV., https://www.nps.gov/articles/000/the-bill-of-rights-and-the-fugitive-slave-laws.htm (last visited Nov. 21, 2021); Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/.

to due process and equal protections of the law.[6] Continuing with such inclusive interpretations, the Court subsequently extended the protections of the Fifth and Sixth Amendments to *all persons* within the territory of the United States.[7] However, these protections were never fully realized and continued to erode in the mid-1950s with the introduction of entry fiction.

There are two ways for an immigrant to become "undocumented" in the United States. The first is unauthorized border crossing, which is what comes to mind for a majority of laypeople when they think about "illegal" immigration. Contrary to public belief, the majority of newly undocumented immigrants over the past decade were not "illegal" border crossers.[8] Instead, the most common way for immigrants to become undocumented has been by overstaying their visas or failing to follow through with extensions or other administrative paperwork.[9] For each year of the past four years, it is estimated that between 600,000 and 800,000 lawfully admitted visa holders overstayed the terms of their visas and become undocumented.[10] Understanding how immigrants become

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[6] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that the Fourteenth Amendment has broad application and must be extended to protect *all persons* within the borders of the country) (emphasis added).

[7] Wing Wong v. United States, 163 U.S. 228, 238 (1896).

[8] *See* Robert Warren, *U.S. Undocumented Population Continued to Fall from 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year*, CTR. FOR MIGRATION ST. (Jan. 16, 2019), https://cmsny.org/publications/essay-2017-undocumented-and-overstays/ [https://perma.cc/PA8R-EWTQ].

[9] *Id.*

[10] U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2019 ENTRY/EXIT OVERSTAY REPORT 13 (2020), https://www.dhs.gov/sites/default/files/publications/20_0513_fy19-entry-and-exit-overstay-report.pdf [https://perma.cc/MCN7-R9FD]; U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2018 ENTRY/EXIT OVERSTAY REPORT 13 (2019), https://www.dhs.gov/sites/default/files/publications/19_0417_fy18-entry-and-exit-overstay-report.pdf [https://perma.cc/5MDB-9P92]; U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2017 ENTRY/EXIT OVERSTAY REPORT 12 (2018), https://www.dhs.gov/sites/default/files/publications/18_1009_S1_Entry-Exit-Overstay_Report.pdf [https://perma.cc/A2TV-WSDF]; U.S. DEP'T OF HOMELAND SEC., FISCAL YEAR 2016 ENTRY/EXIT OVERSTAY REPORT 13 (2017), https://www.dhs.gov/sites/default/files/publications/Entry%20and%20Exit%20

undocumented is essential for understanding Supreme Court jurisprudence and the entry fiction doctrine. For the sake of clarity, I will refer to the sub-category of undocumented immigrants who enter via unauthorized border crossing as "unentered immigrants."

Prior to the creation of entry fiction, it was understood that physical entry and legal entry were one in the same.[11] Once an immigrant had physically entered the country, whether by visa or by border crossing, the immigrant was considered to have "entered" the country in the legal sense and was therefore entitled to protections under the Fourteenth Amendment.[12] The Supreme Court altered this understanding by separating physical entry from legal entry.[13] Legal entry began to require lawful admission at a port of entry.[14] In 1996, Congress officially codified the entry fiction doctrine through the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[15]

Overstay%20Report%2C%20Fiscal%20Year%202016.pdf [https://perma.cc/EWV2-7GDM]. Between 90,000 and 150,000 of the individuals who overstayed entered the United States on the Visa Waiver Program ("VWP"). The VWP allows travelers from thirty nine countries to enter the United States for business and travel purposes without having to apply for visas. The countries represented in this program are exclusively considered the "global north" (e.g., European countries, Australia, New Zealand, Japan, Singapore, South Korea, and Taiwan). These individuals can effectuate an "entry" simply by passing through U.S. Customs. *See* U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFF., VISA WAIVER PROGRAM, https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html [https://perma.cc/WWY3-KXD3] (last visited April 10, 2021).

[11] In earlier versions of the Code, the legal definition of an "entry" into the United States required: "(1) a crossing into the territorial limits of the United States, i.e., physical presence; (2)(a) inspection and admission by an immigration officer, OR (b) actual and intentional evasion of inspection at the nearest inspection point." *See* 8 U.S.C. 1101(a)(13)(1988).

[12] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); *Wong*, 163 U.S. at 238.

[13] *See* Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206 (1953). *See also* Leng May Ma v. Barber, 357 U.S. 185, 188-89 (1958).

[14] *Id.*

[15] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 302, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C. and 18 U.S.C.).

This new legal fiction essentially split undocumented immigrants into two categories based on their method of entry.[16] Undocumented immigrants who overstay their visas are still entitled to protection under the Fourteenth Amendment because they have physically *and* legally entered the country. But undocumented immigrants who enter via unauthorized border crossing are now stripped of these protections and considered the legal equivalent of someone stopped and turned away at the border, despite being within the country. This legal fiction disproportionately strips constitutional protections from poor immigrants of color who do not have the resources to obtain legal entry documents and are not entitled to the Visa Waiver Program because they are from the "global south."[17]

III. ENTRY FICTION'S BEGINNINGS: THE JUDICIARY

The beginning of the Cold War marked a turning point in United States immigration law. The Supreme Court handed down two decisions in the early 1950s that officially adopted the entry fiction exception to due process protections.[18] These two cases set the tone for future curtailment of immigrant rights.

The first of these cases involved a woman named Ellen Knauff—a German-born immigrant seeking American citizenship.

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[16] *Id.*

[17] It is important to note that immigrants who resort to unauthorized border crossing are disproportionately poor immigrants of color. A number of factors contribute to this disparity, such as inaccessibility to resources required for visa applications, lack of legal assistance, and the United States creating visa programs that explicitly benefit the "global north." (I dislike the terms "global north" and "global south," but I use them for brevity and clarity. As of 2021, the "global north" is most of Europe, Canada, the United States, Australia, New Zealand, Japan, Singapore, South Korea, and Taiwan. The "global south" consists of the remaining "developing" areas, including Africa, the Middle East, Latin America, the Caribbean, and Pacific Islands.) *See North and South, The (Global)*, ENCYCLOPEDIA, https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/north-and-south-global [https://perma.cc/G4XJ-2KMF] (last visited May 21, 2021). *See also supra*, notes 8–10.

[18] *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); *Mezei*, 345 U.S. at 210.

In 1948, Knauff petitioned the United States for naturalization and was temporarily detained at Ellis Island.[19] The attorney general denied Knauff's naturalization petition the same day and permanently excluded her from the United States without a hearing.[20] The authority for the executive branch to deny her petition without due process came from the Act of June 21, 1941, which authorized the President to impose additional restrictions and prohibitions on immigration during a national emergency.[21] Under this power, the President issued Proclamation 2523, which granted the Secretary of State and the Attorney General authority to prohibit any alien from entering the United States if entry would be prejudicial to the interests of the United States.[22]

Knauff filed a petition for a writ of habeas corpus, challenging the 1941 Act as an unconstitutional delegation of legislative power.[23] The Court rejected this argument and tied its own hands, stating that when Congress passes legislation concerning the *admissibility* of aliens, it also implements an inherent executive power which allows the executive branch to decide alien admissibility with *final and conclusive* authority.[24] When analyzing whether this violated Knauff's due process rights, the Court stated that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[25] This means that unentered immigrants are not entitled to any constitutional protections besides what Congress designates to them.

Three years after *Knauff*, the Court issued another opinion directly addressing immigrant rights.[26] In *Shaughnessy v. United States ex rel. Mezei*, the Court continued to set the groundwork for the entry fiction doctrine by holding that "aliens on the threshold of initial entry stand[] on a different footing: 'Whatever the procedure

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[19] *Knauff*, 338 U.S. at 539.
[20] *Id.* at 539–40.
[21] *Id.* at 540.
[22] *Id.* at 540–41.
[23] *Id.* at 542.
[24] *Id.* at 542–43.
[25] *Id.* at 543–44.
[26] *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 207 (1953).

authorized by Congress is, it is due process as far as an alien denied entry is concerned.' "[27]

The Court paints these issues as black and white, but Mezei's situation was certainly not. Mezei was not an alien on his maiden voyage to America who could justifiably be turned away at the border.[28] Mezei was *returning* to America after living here for over twenty-five years.[29] It is troubling how the Court oversimplified this case through its unwillingness to give any credence to the fact that Mezei had previously been legally admitted to the United States and had spent twenty-five years building a life here.

Even more troubling, Mezei's situation was unique because the United States had nowhere to deport him.[30] He was unable to secure entry into any other country, so this ruling ultimately meant that he could be indefinitely detained and had no constitutional right to challenge it.[31]

Throughout both of these cases, the Court expresses a disinterest in intervening on behalf of immigrants. The Court effectively tied its own hands by attempting to strip itself of the power to review immigration decisions and granting Congress and the Executive complete discretion to decide who should and should not be protected by the Constitution. In both cases, the Court stated that the power to expel or exclude aliens is "a fundamental sovereign attribute exercised by Government's political departments *largely immune* from judicial control."[32]

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[27] *Id.* at 213. *See also* Leng May Ma v. Barber, 357 U.S. 185, 188–89 (1958).

[28] *See* Mezei, 345 U.S. at 208.

[29] *See id.*

[30] *Id.* at 209.

[31] *Id.* at 209–10.

[32] *Id.* at 210 (United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 539 (1950)) (emphasis added).

IV. ENTRY FICTION'S EXPANSION: THE EXECUTIVE

Shortly after the Court declared the validity of the entry fiction exception, the United States began to see large influxes of migrants fleeing oppressive regimes in the Caribbean and Central America.[33] Unlike the European and Euro-Cuban refugees of previous decades, these new waves of immigrants were predominantly poor people of color.[34] The growing concerns surrounding race coupled with xenophobia and political pressure from local communities pushed the United States government to adopt punitive and discriminatory immigrant detention and parole policies which were largely informed by the idea of entry fiction.

In response to the masses of immigrants arriving on South Florida shores, Immigration and Naturalization Services ("INS")[35] implemented policies to detain all incoming refugees and expedite their expulsion from the country.[36] A number of class action lawsuits bubbled up through the Florida district courts challenging the constitutionality of these policies and procedures.[37] Haitian and Cuban activists brought attention to the dismal conditions of the

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[33] *See* Lindskoog, *supra* note 1, at 34 ("Approximately 15,000 Haitian asylum seekers joined the more than 100,000 Cubans who arrived in the spring and summer of 1980, placing the United States in the unprecedented position of being a country of mass first asylum and presenting the Carter administration with a refugee crisis for which it was unprepared").

[34] *Id.* at 39.

[35] INS was an executive agency within the U.S. Department of Justice that oversaw immigration law, enforcement, and border patrol. After the creation of the Department of Homeland Security in 2002, INS' functions were divided between three new entities – U.S. Citizenship and Immigration Services (USCIS), U.S. Immigration and Customs Enforcement (ICE), and U.S. Customs and Border Protection (CBP). *See Our History*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (last visited May 3, 2021), https://www.uscis.gov/about-us/our-history [https://perma.cc/F85E-PG2N].

[36] *See* Lindskoog, *supra* note 1, at 27. Some of these policies included a blanket denial of Haitian asylum petitions and increasing the number of expulsion hearings per day to speed up the removal process.

[37] *See* Haitian Refugee Ctr. v. Civiletti, 503 F. Supp. 442 (S.D. Fla. 1980) (confirming that INS's policies constituted discrimination against Haitian refugees); Fernandez-Roque, et al., v. Smith, et al., 600 F. Supp. 1500 (1985).

overcrowded jails and makeshift refugee detention centers which forced the Carter Administration to come up with a solution.[38]

As a result, INS began paroling Cubans and Haitians into the country via the Attorney General's Parole Authority with the explicit disclaimer that they were to be considered "entrants," not refugees, despite the fact that many of them had credible persecution fears.[39] The designation as "entrants" allowed INS officials to use entry fiction to maintain that those paroled had not yet legally "entered" the United States.[40] This meant that INS could eventually *exclude* the parolees as opposed to *deport* them, effectively stripping them of their due process rights to challenge future detention and removal.[41]

[38] *See* Lindskoog, *supra* note 1, at 44–45.

[39] At the time, the Attorney General had the authority to parole immigrants into the country in cases of humanitarian crisis or emergency. *See* Immigration and Nationality Act of 1952, Pub. L. No. 414-477, § 204, 66 Stat. 181, 188 (1952). *See also* Lindskoog, *supra* note 1, at 19, 48, 111 (describing how many of the Haitian "entrants" who were subsequently deported were immediately subjected to prison, torture, or execution in Haiti).

[40] *See Mezei*, 345 U.S. at 214 ("the Attorney General may lawfully exclude [an entrant] without a hearing"). *See also* Lindskoog, *supra* note 1, at 40 (citing Jana K. Lipman, "*The Fish Trusts the Water, and It Is in the Water That It Is Cooked": The Caribbean Origins of the Krome Detention Center*, 115 RADICAL HIST. REV. 123 (2013)).

[41] *Id. See also* Immigration and Nationality Act of 1952, *supra* note 38, at §§ 237, 242.

V. ENTRY FICTION'S CODIFICATION: THE LEGISLATIVE

In addition to the influxes of new immigrants, the latter half of the twentieth century was also characterized by civil and political unrest. Hundreds of race riots broke out in urban cities across the United States, including the then most destructive Watts riots in Los Angeles and Martin Luther King Jr. assassination riots that took place in over 100 cities.[42] Throughout this period, Americans all over the country were consumed by news of the violence, disorder, and destruction unfolding in urban centers.[43] Politicians stoked this fear in rural and suburban white communities, and soon "law and order" and "tough on crime" campaigns garnered wide support from both major political parties.[44]

Immigration law got swept up in this crackdown on crime, in effect bringing about the criminalization of immigration law and producing what some legal scholars have dubbed "the

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[42] *See* Thomas J. Sugrue, *2020 is not 1968: To Understand Today's Protests, You Must Look Further Back*, NATIONAL GEOGRAPHIC (June 11, 2020), https://www.nationalgeographic.com/history/article/2020-not-1968 [https://perma.cc/N6JW-JVX2]; Erin Blakemore, *Why People Rioted After Martin Luther King, Jr.'s Assassination*, THE HISTORY CHANNEL (last updated Jan. 26, 2021), https://www.history.com/news/mlk-assassination-riots-occupation [https://perma.cc/TXY3-7HLD]; Los Angeles Times Staff, *How the L.A. Times Covered the 1965 Watts Riots*, LOS ANGELES TIMES, https://documents.latimes.com/1965-watts-riots/ [https://perma.cc/22AU-LBXA] (last visited May 1, 2021). The Watts and Martin Luther King Jr. Assassination riots have been surpassed as the most "destructive" by the 1992 Rodney King riots and 2020 George Floyd riots. *See* Noah Manskar, *Riots Following George Floyd's Death May Cost Insurance Companies up to $2B*, THE NY POST (Sept. 16, 2020), https://nypost.com/2020/09/16/riots-following-george-floyds-death-could-cost-up-to-2b/ [https://perma.cc/25NM-GUH7].

[43] *See* Los Angeles Times Staff, *How the L.A. Times Covered the 1965 Watts Riots*, LOS ANGELES TIMES, https://documents.latimes.com/1965-watts-riots/ [https://perma.cc/M6C8-GSM4] (last visited May 1, 2021)*; see also* Lindskoog, *supra* note 1, at 55 ("the national media closely covered the violence, property destruction, and disorder of the previous decade's urban rebellions. For many present or watching on television, the scenes looked eerily like a war zone").

[44] *See* Lindskoog, *supra* note 1, at 132.

crimmigration crisis."[45] One of the policies passed during this period was the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[46] The purpose of the IIRIRA was to codify the punitive policies of the prior decade which were used to act as deterrents for future migration and to streamline the removal of unentered immigrants.[47] Some of the most notable components of the IIRIRA included: increasing border security, restricting benefits previously available to undocumented immigrants, streamlining deportation proceedings by limiting the appeals process, creating penalties for unauthorized entry, and expanding the definition of aggravated felonies and applying them retroactively to disqualify lawful permanent residents from maintaining their status.[48]

Additionally, the IIRIRA narrowed the legal definition of admission to include only a lawful entry (i.e., with a visa) after being inspected or authorized by an immigration officer and codified the entry fiction exception by creating two distinct categories of

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[45] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 376 (2006) (discussing how the intersection of nativism and the ostensible anti-crime movement helped push immigration towards criminal law).

[46] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 302, 110 Stat. 3009-546 (1996) (codified in sections of 8 U.S.C. and 18 U.S.C.); *see also* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 220 (Princeton University Press, Feb. 16, 2016) ("support for tougher immigration policies had been whipped up by charges that immigrants are a major source of crime and that border violence is out of control. These twin tendencies produced both the strikingly punitive turn in immigration policy and the continuing rise of the carceral state").

[47] While advocating for tough immigration policy before a Congressional subcommittee, Associate Attorney General Rudy Giuliani testified that the implementation of punitive mandatory detention and interdiction programs resulted in the Haitian immigration rate dropping to "just about zero" from 1,500-1,600 per month. *See Detention of Aliens in Bureau of Prison Facilities: Hearing Before the Subcomm. on Courts, C.L., and the Admin. of Just. of the Comm. on the Judiciary*, 97th Cong. 18 (1982) (statement of United States Assoc. Att'y Gen. Rudolph Giuliani).

[48] Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 302, 110 Stat. 3009-546 (1996) (codified in sections of 8 U.S.C. and 18 U.S.C.).

immigrants, each with their own removal procedure.[49] The first category is lawful permanent residents or other immigrants lawfully admitted into the United States. This group can be *deported* after receiving due process of law and a deportation hearing.[50] The second category of immigrants are those traditionally subject to the entry fiction doctrine which includes any "alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival . . . [)]."[51] This group can be *excluded* or *removed* via an expedited removal process which can be ordered *and* effectuated by an immigration officer without further hearing or review.[52] This expedited removal process often takes place entirely outside of immigration courts and has been deformalized over the last few decades to allow for more efficient expulsions without any judicial oversight.[53]

The law concerning inadmissible aliens and applicants for admission continues to be excessively punitive. For example, if an inadmissible immigrant claims asylum and substantiates a credible fear of persecution, that asylum seeker is subject to *mandatory detention* pending a final determination, which can take years.[54] Mandatory detention acts as a deterrent and results in many immigrants voluntarily self-deporting themselves to escape the miserable conditions of prolonged and uncertain immigrant detention.[55] In addition to mandating detention and curtailing due

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[49] 8 C.F.R. § 235 (2012)*; see also Applying for Admission into United States*, U.S. CUSTOMS AND BORDER PROTECTION, https://www.cbp.gov/travel/international-visitors/applying-admission-united-states [https://perma.cc/7XD2-CJPY] (last visited April 20, 2021).

[50] *See* 8 U.S.C. § 1226(a) (2020); 8 C.F.R. § 1236.1(d)(1) (2020).

[51] *See* 8 U.S.C. § 1225(a)(1) (2020).

[52] 8 U.S.C. § 1225(c) (2020) (emphasis added). Immigrants can indicate an intention to apply for asylum or a fear of persecution before their ordered removal.

[53] *See* Allison Siskin & Ruth Ellen Wasem, Cong. Rsch. Serv., RL33109, *Immigration Policy on Expedited Removal of Aliens* (The Library of Congress, 2005).

[54] 8. U.S.C. § 1225(b)(1)(B)(ii-iii) (2020).

[55] In 2018 alone, nearly 30,000 immigrants applied for self-deportation, opting to leave the country rather than being stuck in prolonged detention while fighting a lengthy legal battle with very little hope of success. *See* Christie

process protections for unentered immigrants, the IIRIRA also sought to preclude any form of judicial review of executive actions.

Under section 1252(e), Congress severely limited the Court's jurisdiction to review executive decisions on unentered immigrants.[56] Judicial review of any determination in habeas corpus proceedings shall be limited to determinations of:

> (A) whether the petitioner is an alien,
> (B) whether the petitioner was ordered removed under such section, and
> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum . . . .[57]

The Court is *not* allowed to review whether the alien is *actually inadmissible* or entitled to any relief from removal.[58] In conjunction with the Court's general predisposition to defer to the legislature and overall reluctance to review executive decisions, these jurisdiction stripping statutes have caused immigration law to severely lag behind all other areas of law. This immigration exceptionalism has resulted in the abrogation of fundamental constitutional rights, and this troubling trend does not seem to be slowing down anytime soon.

Thompson & Andrew R. Calderon, *More Immigrants are Giving up Court Fights and Leaving the U.S.*, THE MARSHALL PROJECT (May 8, 2019), https://www.themarshallproject.org/2019/05/08/more-detained-immigrants-are-giving-up-court-fights-and-leaving-the-u-s [https://perma.cc/S3R8-85XY].

[56] 8 U.S.C. § 1252(e)(2) (2020).

[57] *Id.* (quotations omitted).

[58] *Id.* at § 1252(e)(5) (2020).

VI. THE TWENTY-FIRST CENTURY AND BEYOND

The Court has issued several important immigration decisions in the last two decades. However, every time there is a slight push towards increasing unentered immigrants' rights, it seems that the Court digs in its heels and entrenches itself deeper into entry fiction and unjustified deference.

A. Zadvydas v. Davis

In 2001, the Court reaffirmed that admitted aliens were entitled to constitutional protections but did not intend to address the detention of unentered aliens, stating that "aliens who have not yet gained initial admission to this country would present a very different question."[59] Despite not rendering a ruling on unentered aliens, the Court continued to validate the entry fiction exception. However, the Court's use of case law to justify entry fiction, which is riddled with inconsistency, only added to the confusion of who is entitled to due process protections.

The Court stated, "[t]he distinction between an alien who has *effected* an entry into the United States and one who has never entered runs throughout immigration law."[60] However, the Court goes on to state that "aliens who have once passed through our gates, *even illegally*, may be expelled *only* after proceedings conforming to traditional standards of fairness encompassed in due process of law."[61] These two statements directly contradict each other. Under the first, an unentered immigrant would *not* be entitled to due process protections; but under the second, they would. The Court fails to reconcile these contradictions and concludes with the broad statement that due process protections *may vary* depending upon

[59] Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

[60] *Id.* at 693 (emphasis added) (first citing Kaplan v. Tod, 267 U.S. 228, 230 (1925) (despite nine years' presence in the United States, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States"); then citing Leng May Ma v. Barber, 357 U.S. 185, 188-190 (1958) (alien "paroled" into the United States pending admissibility had not effected an "entry").

[61] *Id.* (emphasis added) (quoting Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212 (1953)).

status and circumstance, despite citing cases directly above that disagree with that notion.[62]

Another problematic holding in *Zadvydas* is the Court's misplaced presumption that the immigration detention system is "nonpunitive," based solely on the fact that the proceedings are labeled "civil."[63] Government detention violates the Due Process Clause unless it is used in a criminal proceeding where the defendant was entitled to adequate procedural protections *or* in "certain special and narrow nonpunitive circumstances where a special justification outweighs the individuals constitutionally protected interest."[64] The Court skipped the analysis of whether immigration proceedings are "narrow and nonpunitive," concluding that because they are "civil," they are presumably nonpunitive in purpose and effect.[65]

This conclusion is misguided and ignores the historical context and current state of immigration detention. The United States has openly used punitive immigration policies to deter others from migrating.[66] Yet, in *Kansas v. Hendricks*, a case cited in *Zadvydas*, the Court acknowledged that deterrence is one of two primary objectives of criminal *punishment*.[67] Further, immigrants

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[62] *Id.* at 694 (emphasis added) (first citing Wong Wing v. United States, 163 U.S. 228, 238 (1896); then citing Landon v. Plasencia, 459 U.S. 21, 32-34 (1982); then citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)).

[63] See *id.* at 690.

[64] *Id.* (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

[65] *Id.*

[66] *See* Lindskoog, *supra* note 1, at 143–44. *See also* JULIE A. DOWLING & JONATHAN XAVIER INDA, GOVERNING IMMIGRATION THROUGH CRIME 75 (Stanford Social Sciences, Mar. 27, 2013) ("in formally shifting toward this more punitive response to unauthorized migration, the Department of Homeland Security's premise was that routing immigrants through the federal criminal justice system and into prison, rather than simply removing them, serves to increase deterrence").

[67] *See* Kansas v. Hendricks, 521 U.S. 346, 347 (1997). *See also id.* at 373 (Kennedy, J., concurring) (emphasis added) ("We should bear in mind that while incapacitation is a goal common to both criminal and civil systems of confinement, retribution and *general deterrence are reserved for the criminal system alone*.").

have historically been held in the same county jails and prisons that are used to *punish* convicted criminals.[68]

Since the 1980s, the number of private immigration detention centers has boomed.[69] These detention centers are built and administered by the same companies who build private prisons for criminal incarceration.[70] Firsthand accounts of these facilities show that the two are markedly similar.[71] Immigrants are often handcuffed and shackled, forced to wear jumpsuits, deprived of the ability to freely move around the facility, subjected to solitary confinement, required to stand at attention for "count," and unable to access personal belongings or basic necessities.[72] Taking all these factors into account, it remains unclear how the Court can so easily distinguish immigration detention from punitive criminal detention. This practical inability to review what other branches are doing

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[68] *See* Lindskoog, *supra* note 1, at 28 (explaining how Haitian and Cuban immigrants, including an eight-year-old girl, were kept in West Palm Beach County Jail while awaiting removal).

[69] President Reagan offered the first private immigration detention facility contract to Corrections Corporation of America (CCA) in 1983. *See id.* at 82. As of 2019, there are 215 immigration detention facilities, and 81% of people held in immigration detention are held in facilities operated by private companies. *Immigration Detention 101*, DET. WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 [https://perma.cc/TM6T-KNXR] (last visited May 3, 2021).

[70] *See* Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POLICY INSTITUTE (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention [https://perma.cc/XD9U-RYEH].

[71] *See* Stacy Brustin, Opinion, *I Toured an Immigration Detention Center. The Prison-Like Atmosphere was Mind-Numbing*, USA TODAY (May 16, 2019), https://www.usatoday.com/story/opinion/voices/2019/05/16/ice-immigration-detention-center-like-prison-otero-column/1190633001/ [https://perma.cc/H8S6-GB89]; Breanna Cary, *Living Conditions in U.S. Immigration Detention Centers*, NOLO, https://www.nolo.com/legal-encyclopedia/living-conditions-immigration-detention-centers.html [https://perma.cc/7H9U-JFQK] (last visited May 1, 2021); Judy Woodruff, Warren Binford & William Brangham, *A Firsthand Report of 'Inhumane Conditions' at a Migrant Children's Detention Facility*, PBS (June 21, 2019), https://www.pbs.org/newshour/show/a-firsthand-report-of-inhumane-conditions-at-a-migrant-childrens-detention-facility [https://perma.cc/M6BQ-JMM8].

[72] *See* Breanna Cary, *supra* note 71.

perpetuates the systemic inequalities faced by unentered immigrants.

Although *Zadvydas* is troubling in many ways, it did push back on both the Court's history of unwillingness to review immigration cases and the IIRIRA statutes that attempt to strip the Court of jurisdiction.[73] The Court overcame provisions that forbid judicial review by stating that relevant case law suggests the Constitution may preclude granting "an administrative body the unreviewable authority to make determinations implicating fundamental rights."[74] Justice Breyer did not limit this review authority to statutorily granted rights, but instead wrote that there is a serious constitutional problem when a statute permits an indefinite "*deprivation of human liberty*," suggesting this could potentially be extended to unentered immigrants.[75]

All in all, the Court's decision in *Zadvydas* advanced protections for certain categories of undocumented immigrants by limiting how long the government can detain them pending removal orders to six months. However, this holding excluded unentered immigrants and resulted in a circuit split over whether this decision ought to be expanded.[76]

B. DHS v. Thuraissigiam

The most recent Supreme Court decision on this issue, *Department of Homeland Security v. Thuraissigiam*, sent unentered immigrants' rights spiraling backwards and left many with a sense of hopelessness for what is to come with the new makeup of the Court. The Court's right-wing justices (Roberts, Gorsuch, Kavanaugh, Thomas, and Alito) joined the majority with Justice

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[73] *See* Zadvydas v. Davis, 533 U.S. 678, 692 (2001).

[74] *Id.* (quoting *Superintendent, Mass. Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 450 (1985)).

[75] *Id.*

[76] *Compare* Xi v. United States Immigr. and Naturalization Serv., 298 F.3d 832 (9th Cir. 2002) (extending *Zadvydas*'s six-month time limit to unentered immigrants), *with* United States v. Rodriguez, 342 F.3d 296 (3rd Cir. 2003); Hoyte-Mesa v. Ashcroft, 272 F.3d 989 (7th Cir. 2001); Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003) (all refusing to extend the six-month limit to unentered aliens).

Alito delivering the opinion of the Court.[77] Justice Breyer, joined by Justice Ginsburg, filed a concurring opinion, while Justice Sotomayor, joined by Justice Kagan, dissented.[78]

This case involved Vijayakumar Thuraissigiam, a Sri Lankan national who was apprehended 25 yards after crossing the southern border.[79] Thuraissigiam was subsequently detained and designated for expedited removal.[80] At the time of his arrest, Thuraissigiam stated he had once been abducted and beaten and was unsure whether the Sri Lankan authorities would protect him in the future, but he did not fear persecution based on a characteristic that justifies an asylum claim.[81] The asylum officer determined Thuraissigiam lacked a "credible" fear as required by the asylum statute, and Thuraissigiam filed a habeas petition claiming the asylum officer did not follow the correct determination procedure.[82]

The majority ultimately held that Thuraissigiam was not entitled to due process protections because he was an unentered immigrant seeking "initial admission," and that the Court was unable to review the merits of Thuraissigiam's asylum claim due to the IIRIRA jurisdiction stripping statute.[83] Alito dealt a huge blow to unentered immigrants when he reaffirmed that Congress has the right to admit or exclude aliens, and then went further to say that "this rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil."[84] Alito compared unentered immigrants to aliens arriving at an international airport on the "threshold of initial entry."[85]

However, Thuraissigiam was *not* on the threshold of initial entry. He was beyond the border and was not at a port of entry. He had set foot on *free* U.S. soil, not at a checkpoint, not at a security fence, but on unregulated U.S. soil. However, Justice Alito dismissed his physical presence with ease, setting a potentially

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[77] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1962 (2020).

[78] *Id.*

[79] *Id.* at 1967.

[80] *Id.*

[81] *Id.* at 1967–68.

[82] *Id.* at 1968.

[83] *Id.* at 1982 (citing *Mezei*, 345 U.S. at 215).

[84] *Id.* at 1982.

[85] *Id.* at 1982 (quoting *Mezei*, 345 U.S. at 212).

dangerous precedent that presence on U.S. soil (potentially anywhere) does not matter for unentered immigrants. How far will the majority's logic expand? Is every unentered immigrant now on the "threshold of entry" until they have been in the country for two years?[86] While only a small portion of the overall opinion, this paragraph has devastating potential for unentered immigrants. This holding gives new energy to the entry fiction exception which has the potential to reach far beyond the twenty-five yards from the border where Thuraissigiam was apprehended.

Despite the implications of this opinion, Justice Sotomayor seems to be one of the only justices who truly comprehends the effects of the Court's immigration jurisprudence. Sotomayor has issued several scathing immigration dissents over the years, and this one is par for the course. Sotomayor shreds the majority, charging that the holding renders executive branch decisions to be "functionally unreviewable through the writ of habeas corpus, no matter whether the denial is arbitrary or irrational or contrary to governing law."[87] After all, if the Supreme Court—America's Temple of Justice—cannot review decisions or safeguard certain individuals' rights, then who can? Who can initiate a "check" on the other two branches of government in this system of so-called checks and balances? If Congress can abrogate constitutional rights by defining people as being "outside" of the country despite the fact that their physical bodies are within the borders, then what is the purpose of having these rights at all?[88]

Sotomayor characterizes entry fiction as "judicially fashioned line-drawing [that] is not administrable" and lacks any basis in the Constitution.[89] The entire premise of assuming that those who have not entered the country legally should have the same due process as those who have not entered the country at all is

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[86] Immigrants who can prove they have been in the United States for two consecutive years are not subject to expedited-removal proceedings under 8 U.S.C. § 1225(b)(1)(A)(iii).

[87] *Thuraissigiam*, 140 S. Ct. at 1994 (Sotomayor, J., dissenting).

[88] *See* Daniel Kanstroom, *Deportation in the Shadows of Due Process: The Dangerous Implications of DHS v. Thuraissigiam*, 50 SW. L. REV. 342, 356 (2021).

[89] *Thuraissigiam*, 140 S. Ct. at 2013 (Sotomayor, J., dissenting).

unsupported.[90] Sotomayor recognizes the broader implications of drawing the line for due process at legal admission rather than physical entry, denouncing the Court's tethering of constitutional protections to a noncitizen's legal status.[91] What is to stop Congress from redefining "entry" again and depriving more immigrants of their rights to due process?[92]

> Fundamentally, it is out of step with how this Court has conceived the scope of the Due Process Clause for over a century: Congressional policy in the immigration context does not dictate the scope of the Constitution.
> ***
> Taken to its extreme, a rule conditioning due process rights on lawful entry would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them no matter how many decades they have lived here, how settled and integrated they are in their communities, or how many members of their family are U.S. citizens or residents.[93]

VII. CONCLUSIONS

The future implications of *Thuraissigiam* cannot yet be fully understood. What is clear, however, is that this ruling sets the Court on a dangerous trajectory back towards entry fiction and the blanket denial of constitutional protections for unentered immigrants. The majority in this opinion skews the history of the entry fiction exception in a way that leaves it wide open for future expansion. With a 6-3 supermajority, including three Trump appointees, the prospects of meaningful jurisprudence in the area of undocumented immigrants' rights looks bleak—at best.

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[90] *Id.* at 2012.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 2013 (quotations omitted).