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Taking Fairness and Retroactivity From Immigration Law: Casenote on *Fernandez-Vargas v. Gonzales*

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CASENOTE

Taking Fairness and Retroactivity From Immigration Law: Casenote on *Fernandez-Vargas v. Gonzales*

Gregory R. Hawran*

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I. INTRODUCTION

Humberto Fernandez-Vargas is a citizen of Mexico who has illegally entered into the United States several times.¹ He was

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1. *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 883 (10th Cir. 2005).

deported back to Mexico on numerous occasions.² Finally, starting in 1982, he was able to remain undetected in Utah, where he started a trucking business.³ Mr. Fernandez-Vargas fathered an American child in 1989 and in 2001 married the child's mother, a U.S. citizen.⁴ Following his marriage, Mr. Fernandez-Vargas applied for an adjustment of his legal status to one of a legal permanent resident.⁵ But instead of adjusting of his status, the U.S. Government, acting pursuant to section 305(a)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)⁶ enacted in 1996, reinstated his 1981 deportation order⁷ and removed Mr. Fernandez-Vargas to Mexico.⁸

On June 22, 2006, the United States Supreme Court upheld the deportation, stating that IIRIRA was not impermissibly retroactive as it did not affect any right nor impose any burden on Mr. Fernandez-Vargas.⁹ Arguably, the Supreme Court felt the pressures surrounding national immigration policy and misapplied common principles of statutory interpretation. The Court incorrectly concluded that IIRIRA did not affect rights or impose burdens on illegal aliens. This decision has an enormous impact on many American families, many of which will be broken apart and separated due to the Supreme Court's interpretation of the IIRIRA.

This casenote addresses and scrutinizes the statutory interpretation applied by the majority of the Supreme Court. It argues

2. *See id.*

3. Fernandez-Vargas v. Gonzales, 126 S. Ct. 2422, 2427 (2006).

4. *See id.*

5. *See id.* Mr. Fernandez-Vargas's wife filed a relative-visa petition on behalf of her husband pursuant to 8 U.S.C. §§ 1154(a)-(b) (2000), which allowed him to file an application to adjust his status to that of a lawful permanent resident under 8 U.S.C. § 1255(i) (2000). *See id.*

6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 305(a)(5), 110 Stat. 3009-546, 599 (1996) (codified as amended at 8 U.S.C. § 1231 (2002)).

7. Under IIRIRA, deportation proceedings are now called removal proceedings. *See* 8 U.S.C. § 1229a(e)(2).

8. *See Fernandez-Vargas*, 126 S. Ct. at 2427. At the time of the application filing, the Immigration and Naturalization Service fined Mr. Fernandez-Vargas \$1,000 for entering the United States without inspection but, nonetheless, accepted his application for adjustment. *See* Brief of Petitioner at 17, *Fernandez-Vargas*, 126 S. Ct. 2422 (2006) (No. 04-1376). On November 1, 2003, Mr. Fernandez-Vargas appeared at the Bureau of Citizenship and Immigration Service (BCIS) for a routine interview regarding his petition. *See id.* at 18. He was arrested by the Bureau of Immigration and Customs Enforcement (ICE) officials and subsequently, on September 9, 2004, deported to Juarez, Mexico. *See id.*

9. *See Fernandez-Vargas*, 126 S. Ct. at 2427. In an 8-1 decision, Justice Stevens was the lone dissenter. *See id.* at 2434 (Stevens, J., dissenting).

that the history of immigration and deportation statutes, combined with the nature of the consequences that flow from IIRIRA indicates that Congress did not intend to apply the statute retroactively. It also criticizes Supreme Court's analysis of the substantial rights and liabilities that the retroactive applicability of IIRIRA creates. The note concludes by addressing the doctrine of legal fiction, which the Supreme Court relied on in labeling deportation as a civil rather than a criminal proceeding.

The statute at issue, 8 U.S.C. § 1231(a)(5), as enacted by IIRIRA, does not explicitly state if it should apply to all illegal reentrants that entered the United States before its enactment. It provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.¹⁰

II. PERSPECTIVE

A. *The History of the Immigration Naturalization Act*

In 1952, Congress enacted the Immigration and Nationality Act (INA), which the newly enacted IIRIRA replaced in 1996. The INA provided:

Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether *before or after* the date of enactment of this Act [June 27, 1952], on any ground described in any of the paragraphs enumerated in subsection (e) [of this section], the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry.¹¹

The 1952 version of the statute differed from the present stat-

10. 8 U.S.C. § 1231(a)(5) (2000).

11. Immigration and Nationality Act, Pub. L. No. 414, § 242(f), 66 Stat. 163, 212 (1952) (codified as amended at 8 U.S.C. § 1252(f) (1996)), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(a)(2), 110 Stat. 3009, 548 (1996) (emphasis added).

ute mainly due to the inclusion of the “before or after” phrase. Unlike the IIRIRA provision, which applies to every individual, the older version applied to a specific narrow group of aliens.¹² The 1952 version also allowed for certain discretionary adjustment of status if the alien met certain conditions.¹³

Overall, the 1952 statute explicitly stated retroactive applicability, despite having reached into a much narrower group of individuals. The main goals of the 1952 statute were to reunify families, to protect the domestic labor force, and to promote the immigration of people with sought-after skills.¹⁴ Although Congress amended the 1952 statute many times since its enactment, the alien’s ability to adjust his or her status has remained constant.¹⁵

B. The Formation of IIRIRA in Congress

Congress enacted IIRIRA in 1996, acting pursuant to general public sentiment that immigration should be reduced.¹⁶ Many members of Congress had emphasized anti-immigrant rhetoric during their election campaigns.¹⁷ In addition, some Americans blamed illegal immigrants for taking jobs from American workers and reducing overall wages for Americans.¹⁸

Although Congress clearly desired to enact laws that would curb and discourage illegal immigration, it must have been aware that retroactive applicability of any such laws would have a large scale effect. The current version of IIRIRA section 241(a)(5) originated in the House of Representatives and mirrors the enacted version, as it did not include the “before or after” clause that was present in the 1952 version.¹⁹ The Senate version of the statute, however, included the “before or after” clause, which illustrated that it believed the statute should be retroactively

12. See Brief of Petitioner at 3-4, *Fernandez-Vargas*, 126 S. Ct. 2422 (2006) (No. 04-1376). The narrow group of aliens that the statute applied to included persons who had been deported for commission of an aggravated felony. See *id.*

13. See *id.*

14. See Jeffrey A. Bekiares, *In Country, on Parole, Out of Luck-Regulating Away Alien Eligibility for Adjustment of Status Contrary to Congressional Intent and Sound Immigration Policy*, 58 FLA. L. REV. 713, 718 (2006).

15. See *id.*

16. See Alexander Tsesis, *Toward a Just Immigration Policy: Putting Ethics into Immigration Law*, 45 WAYNE L. REV. 105, 106 (1999).

17. See *id.*

18. See *id.* at 107.

19. See H.R. REP. NO. 104-469(I), at 26 (1996).

applied.²⁰ In order to eliminate the discrepancies, the “before or after” clause that the Senate proposed was removed from enacted IIRIRA section 241(a)(5).

*C. The Interpretation of Section 241(a)(5) of IIRIRA
by Various Circuits*

Prior to the Supreme Court’s decision, circuit courts of appeal struggled with the interpretation of the scope of section 241(a)(5). Two circuits have held that section 241(a)(5) did not apply to all aliens who reentered the United States prior to the statute’s effective date. In *Bejjani v. INS*,²¹ a Lebanese national and lawful permanent resident of the United States pled guilty to a charge of possession with intent to distribute 650 grams of heroin.²² Faced with a deportation proceeding, Mr. Bejjani voluntarily left the United States.²³ He returned to the United States using an invalid Alien Registration Card, thus illegally and fraudulently reentering the country.²⁴ The Immigration and Naturalization Service (INS) attempted to reinstate the order of deportation issued in 1992, pursuant to section 241(a)(5) of the IIRIRA.²⁵ The Sixth Circuit held that the INS could not reinstate Bejjani’s 1992 deportation order because section 241(a)(5) could only be applied to reentries that occurred after IIRIRA’s effective date.²⁶

The Ninth Circuit reached a similar conclusion in *Castro-Cortez v. INS*.²⁷ Faced with deportation, an illegal alien voluntarily left the country and subsequently illegally reentered the United States.²⁸ He married an American citizen and fathered two children, both of whom were born in the United States.²⁹ The court concluded that Congress clearly intended that the statute should not be applied retroactively to aliens whose reentry occurred prior

20. See S. REP. NO. 104-249, at 118 (1996), 1996 WL 180026. Unlike the House version, which applied to broad number of aliens, the scope of the Senate version was similar to the 1952 version as it applied to limited number of aliens. See *id.*

21. *Bejjani v. INS*, 271 F.3d 670, 672 (6th Cir. 2001).

22. See *id.* at 672.

23. See *id.*

24. See *id.*

25. See *id.*

26. See *id.* at 689.

27. See *Castro-Cortez v. INS*, 239 F.3d 1037, 1041 (9th Cir. 2001). *Castro-Cortez* was a consolidated case of five petitioners, all in similar situation, faced with reinstatement of a former deportation order under newly enacted IIRIRA, despite reentering the United States prior to its enactment. See *id.* at 1040-1043.

28. See *id.* at 1041.

29. *Id.*

to its enactment.³⁰

In *Alvarez-Portillo v. Ashcroft*,³¹ the Eighth Circuit concluded that under the law prior to IIRIRA, aliens had a reasonable expectation that they could apply for a discretionary adjustment of status, or wait and preserve that defense during a deportation proceeding.³² Alvarez-Portillo was deported from the United States in 1993, but decided to illegally reenter the country only twelve days later.³³ He married an American citizen in 1996, but did not apply for an adjustment of status until 2001.³⁴ Refusing to recognize Congress's express intent that section 241(a)(5) should be applied only proactively,³⁵ the court concluded that because Portillo's marriage occurred prior to the effective date of IIRIRA, he had a reasonable expectation to rely on prior law, which allowed him discretionary adjustment of status.³⁶

Three circuits, however, have refused to apply IIRIRA retroactively against those aliens who applied for an adjustment of status before the effective date of the statute.³⁷ These circuits concluded that applying IIRIRA retroactively would attach new legal consequences to aliens' pending applications, thus giving IIRIRA an impermissible retroactive effect.³⁸

D. The History of the Supreme Court's Interpretation of Retroactive Statutes

The Supreme Court has faced the issue of statutory retroactive applicability on numerous occasions. The jurisprudential tradition against retroactive legislation dates back to the early days of the Supreme Court. As early as 1829, Justice Marshall stated that the presumption against retroactivity is a principle that has always been held sacred in the United States.³⁹ Laws which regu-

30. See *id.* at 1051.

31. *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858 (8th Cir. 2002).

32. See *id.* at 867.

33. *Id.* at 861.

34. *Id.*

35. See *id.* at 864.

36. See *id.* at 866- 867. The Eighth Circuit relied on *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939 (1997), where the Supreme Court concluded that a statute that eliminated certain defenses would have an impermissible retroactive effect if applied in a situation where the alleged tort occurred before the enactment of the statute.

37. See *Arevalo v. Ashcroft*, 344 F.3d 1 (1st Cir. 2003); *Faiz-Mohammad v. Ashcroft*, 395 F.3d 799 (7th Cir. 2005); *Sarmiento Cisneros v. U.S. Attorney Gen.*, 381 F.3d 1277 (11th Cir. 2004).

38. See *Arevalo*, 344 F.3d at 16.

39. *Reynolds v. McArthur*, 27 U.S. (2 Pet.) 417, 434 (1829).

late human action should look forward, not backwards.⁴⁰ Accordingly, statutes should never be construed retrospectively unless the language of the act renders such construction indispensable.⁴¹

In *United States v. St. Louis, San Francisco & Texas Railway Co.*,⁴² the Supreme Court rejected retroactive applicability of a three-year statute of limitations amendment to causes of action that were pending at the time of the enactment of the amendment.⁴³ The Supreme Court strongly emphasized the general presumption against retroactive interpretation of statutes.⁴⁴ Retroactive application, therefore, could only be permitted when congressional intent was clearly manifested by explicit language or by necessary implication.⁴⁵ After considering the plain language and the history of the amendment, the Court concluded that the new statute of limitations could not have been applied retroactively.⁴⁶

In *Landgraf v. USI Film Products*,⁴⁷ the Supreme Court was called upon to resolve the question of whether the Civil Rights Act of 1991, which created a right to recover compensatory and punitive damages for certain violations of Title VII of the 1964 Civil Rights Act, could be applied to events that occur prior to the statute's enactment.⁴⁸ The plaintiff in *Landgraf* commenced a suit, prior to the enactment of the 1991 amendments, against her employer for alleged sexual discrimination violations.⁴⁹ After the plaintiff failed to prevail at trial, and during the appeal process, the 1991 amendment was enacted.⁵⁰ The plaintiff petitioned the court to remand her case and re-try it according to the newly enacted provisions.⁵¹

The Supreme Court applied a two-part test to analyze the retroactive applicability of the 1991 Civil Rights Act.⁵² The first part involved determining whether Congress expressly prescribed the

40. *Id.*

41. *Id.*

42. *United States v. St. Louis, S.F. & Tex. Ry. Co.*, 270 U.S. 1 (1926).

43. *See id.* at 4.

44. *See id.* at 3.

45. *See id.*

46. *See id.*

47. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

48. *See id.* at 247. The 1991 amendment also allowed any party to request a trial by jury when these damages were sought. *Id.*

49. *See id.* at 248.

50. *See id.* at 249.

51. *Id.*

52. *See id.* at 280.

statute's reach.⁵³ If Congress had done so, the inquiry would end and the intent of Congress would be applied.⁵⁴ If, however, the statute contained no such clear mandate, the court had to determine whether the new statute would have retroactive effect.⁵⁵ If retroactive effect existed, the presumption against retroactivity required the court to give the newly enacted statute only a prospective effect.⁵⁶

Under the first part of the test, the Supreme Court held that Congress had not clearly expressed its intent as to the retroactive reach of the 1991 Civil Rights Act.⁵⁷ Under the second part of the test, the Court reasoned that applying the 1991 amendments to pending cases would increase a defendant's liability for past conduct, which in turn would have a retroactive effect against the defendant.⁵⁸

Three years later, in *Lindh v. Murphy*,⁵⁹ the Supreme Court applied the *Landgraf* test to a newly enacted habeas corpus statute. The new habeas provision changed the standards of proof and persuasion in a way more favorable to the state.⁶⁰ The Court concluded that the new provision affected the petitioner's substantive entitlement for the relief.⁶¹ Under the first part of the *Landgraf* test, the Supreme Court compared other provisions of the newly enacted statute and found that Congress clearly intended only proactive application.⁶² Other provisions of the statute clearly stated that they were applicable to pending cases, while the provision in question did not.⁶³ Such disparity in selected language strongly suggested to the Court that Congress intended different treatment of various provisions it had enacted.⁶⁴ The

53. *See id.*

54. *See id.*

55. *See id.* Retroactive effect exists when the newly enacted statute would impair rights a party possessed when he acted, increased a party's liability for past conduct, or impose new duties with respect to transactions already committed. *See id.*

56. *See id.*

57. *See id.* at 286.

58. *See id.* at 283.

59. *Lindh v. Murphy*, 521 U.S. 320 (1997).

60. *Id.* at 327.

61. *See id.* at 327. The Court distinguished between procedural and substantive laws, stating that purely procedural laws do not present problems of retroactivity. *See id.* However, when the statute goes beyond mere procedure to affect substantive entitlement to relief, it has effects of a substantive law and it presents similar problems regarding retroactive effect. *See id.*

62. *See id.* at 329.

63. *See id.*

64. *See id.* at 330. The Court further stated that "different treatments of the two chapters thus illustrates the familiar rule that negative implications raised by

decision in *Lindh* is an example where, under the first part of the *Landgraf* test, courts are required to look at the legislative history when analyzing Congress's intent as to the retroactive reach of the statute.

In *Hughes Aircraft Co. v. United States*,⁶⁵ decided shortly before *Lindh*, the Supreme Court faced the question regarding retroactive applicability of the 1986 amendments to the False Claims Act.⁶⁶ *Hughes Aircraft* concerned a company's incorrect accounting audits associated with a federal contract that occurred in 1984.⁶⁷ The 1986 amendment allowed private individuals to bring claims on behalf of the government against people who knowingly submitted fraudulent claims to the government.⁶⁸

Under the first part of the *Landgraf* test, the Court found congressional intent unclear regarding whether the 1986 amendments should apply retroactively or only proactively.⁶⁹ Under the second part of the *Landgraf* test, the Court inquired whether the amendment had retroactive effect, which would trigger the judicial presumption against it.⁷⁰ The Court concluded that the 1986 statute possessed retroactive effect because it deprived the defendant of certain defenses that existed under the statute that was in effect when the alleged wrongdoing occurred.⁷¹ Justices of the Supreme Court emphasized, as timeless and universal, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place.⁷²

E. The History of the Supreme Court's Interpretation of Immigration Statutes

The presumption against retroactivity has also been applied

disparate provisions are strongest when the portions of statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Id.* In other words, the trail of language selection during statute's formulation in Congress can be a strong indicator of the intended reach of the statute.

65. *Hughes Aircraft Co. v. U.S.*, 520 U.S. 939 (1997).

66. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 3730(b), 100 Stat. 3153, 3154 (1986).

67. *Hughes Aircraft*, 520 U.S. at 942-943.

68. *See id.* at 941.

69. *See id.* at 946.

70. *Id.* at 947.

71. *See id.* at 951-952.

72. *See id.* at 946 (citing *Landgraf*, 511 U.S. at 26); *see also* *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.").

to immigration statutes. In 1884, the Supreme Court concluded in *Chew Heong v. United States*⁷³ that section 4 of the Chinese Restriction Act (CRA) did not apply to Chinese citizens who entered the United States prior to the statute's enactment.⁷⁴ Section 4 of the CRA required all Chinese laborers present in the United States to obtain a certificate of a right of reentry in order to be allowed back into the United States.⁷⁵ The petitioner in *Chew Heong* was a Chinese national who, after being lawfully present in the United States, left for Hawaii in 1881 without obtaining the requisite certificate of a right of reentry.⁷⁶ He attempted to reenter the United States in 1884, but was detained at the port of entry due to his failure to produce the said certificate.⁷⁷ The Supreme Court concluded that the petitioner relied on the treaty that regulated travel of Chinese nationals that was in effect at the time of his departure in 1880.⁷⁸ The Court stated that courts uniformly refuse to give statutes a retrospective operation, where rights previously vested are injuriously affected, unless the courts are compelled to do so by a clear and positive language of the statute that such is the intent of the legislature.⁷⁹

In 1939, in *Kessler v. Strecker*,⁸⁰ the Supreme Court once again applied the presumption against retroactivity when interpreting another immigration statute. In *Kessler*, the Naturalization Bureau denied an alien's application for naturalization and the Department of Labor initiated deportation proceedings due to his past membership in a communist party.⁸¹ The Government argued that section 1 of the Act of October 16, 1918 allowed for deportation of any immigrant alien who was found in the past to be a member of a communist party.⁸² The Supreme Court disagreed, stating that the statute only applied to current members of the communist party.⁸³ The Court added that the statute, absent a clear and definite expression that Congress intended for an alien to be deported if he was ever a member of a communist

73. *Chew Heong v. U.S.*, 112 U.S. 536 (1884).

74. *See id.* at 554-559.

75. *See id.* at 539. The CRA was enacted in 1882 and further amended in 1884. *Id.* at 538.

76. *Id.*

77. *Id.* at 538-539.

78. *See id.* at 559-560.

79. *See id.*

80. *Kessler v. Strecker*, 307 U.S. 22 (1939).

81. *See id.* at 23-25.

82. *See id.* at 26-27.

83. *See id.* at 30.

party in the past, could not be applied retroactively.⁸⁴ Similarly as in *Chew Heong*, the Court applied the presumption against retroactive statutory interpretation in the area of immigration law, deportation, and aliens' rights.

In *Fong Haw Tan v. Phelan*,⁸⁵ the Supreme Court was called upon to interpret the reach of another deportation statute. The statute in question mandated a deportation of an alien who was sentenced more than once for an imprisonment term of one year or more.⁸⁶ The petitioner in *Fong Haw Tan* was convicted of the murder of two separate individuals and was sentenced to life imprisonment for each murder.⁸⁷ He was later paroled and released from prison, after which the Immigration Service initiated deportation proceedings under the aforementioned statute.⁸⁸ Challenging the deportation, Fong Haw Tan argued that the deportation statute did not apply to his case because he was sentenced only once for the several crimes he committed.⁸⁹ The Court construed the statute narrowly in favor of the alien and reversed the deportation proceedings.⁹⁰ Speaking for the majority of the Court, Justice Douglas described deportation as a drastic measure equivalent to banishment or exile.⁹¹ He further depicted deportation as a penalty that an alien receives for his misconduct in this country.⁹² This harshness that deportation brought about required the Court to interpret the statute narrowly in favor of the alien.⁹³

The Court reaffirmed the commitment to interpretation of deportation statutes in favor of the alien in *Costello v. Immigra-*

84. *See id.*

85. *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948).

86. *Id.* at 8. Section 19(a) of the Immigration Act of February 5, 1917 stated that "any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry. . . shall, upon the warrant of the Attorney General, be taken into custody and deported." *Id.* at 7 n.1.

87. *Id.* at 8.

88. *Id.*

89. *See id.* at 8-9.

90. *Id.* at 10.

91. *Id.*

92. *Id.*

93. *See id.* ("[S]ince 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.").

tion and Naturalization Service.⁹⁴ Section 241(a)(4) of the Immigration and Nationality Act of 1952⁹⁵ provided for the deportation of any alien who at any time after entry was convicted of two crimes involving moral turpitude.⁹⁶ The petitioner was a naturalized citizen who was convicted of two separate crimes, both of which occurred after he was already naturalized.⁹⁷ Once again, the Supreme Court reversed the deportation proceedings and narrowly interpreted the statutory language to exclude the petitioner from the category of aliens deportable under the statute.⁹⁸ The Court held that the statute only applied to crimes that were committed before the alien was naturalized, which excluded the petitioner from the targeted group.⁹⁹ The Court stated that even if it is logical to interpret the statute in a way that would include the petitioner in a group targeted for deportation, such an interpretation is not proper due to the harsh consequences that deportation imposes upon aliens.¹⁰⁰

The Court further expanded the doctrine of statutory interpretation in a way favorable to the alien in *Immigration and Naturalization Service v. Errico*.¹⁰¹ The question before the Court was the applicability of section 241(f) of the INA to aliens who entered the United States by misrepresentations in order to evade quota restrictions.¹⁰² Section 241(f) stated:

The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.¹⁰³

94. *Costello v. INS*, 376 U.S. 120 (1964).

95. Immigration and Nationality Act, Pub. L. No. 414, § 241(a)(4), 66 Stat. 163, 204 (1952).

96. See *Costello*, 376 U.S. at 121.

97. *Id.* at 121-122.

98. See *id.* at 122, 128.

99. See *id.*

100. *Id.* at 128.

101. See *INS v. Errico*, 385 U.S. 214 (1966).

102. *Id.* at 215.

103. Immigration and Nationality Act, Pub. L. 87-301, sec. 16, § 241(f), 75 Stat. 650, 655-56 (1961) (codified as amended at 8 U.S.C. 1251, sec. 16, § 241(f)) (current version at 8 U.S.C.S. § 1227 (1996)).

Specifically, the issue was whether aliens who misrepresented their occupation in order to evade quota restriction were considered as "otherwise admissible" aliens under the statute.¹⁰⁴

Despite a strong dissent from three Supreme Court Justices who argued that a solution of statutory interpretation in favor of the alien would create a reward for fraud,¹⁰⁵ the majority of the Court sided with the petitioners.¹⁰⁶ While interpreting the statutory vagueness in favor of the alien, the Warren Court considered the social implications that an opposite interpretation would bring.¹⁰⁷ Given the severity of the consequences that a different interpretation would bring about, the Court relied on the *Fong Haw Tan* doctrine and concluded that only a clear and unambiguous statement from Congress can bring out such serious and broad results.¹⁰⁸

Finally in 2001, the Supreme Court faced the issue of retroactive effect of the IIRIRA in *Immigration and Naturalization Service v. St. Cyr*.¹⁰⁹ Section 304(b) of IIRIRA¹¹⁰ eliminated the right to a discretionary petition for waiver of deportation proceedings, available under section 212(c) of the Immigration and Naturalization Act.¹¹¹ The petitioner in *St. Cyr* was admitted to the United States as a lawful permanent resident in 1986.¹¹² Ten years later, he pled guilty in a state court to a charge of selling a controlled substance, a conviction that made him deportable.¹¹³ Because the deportation proceedings did not start until April 1997 after

104. *Errico*, 385 U.S. at 216-217.

105. *Id.* at 230 (Stewart, J., dissenting).

106. *Id.* at 225.

107. *See id.* at 224-225.

108. *See id.* at 225.

109. *See generally* INS v. St. Cyr., 533 U.S. 289 (2001).

110. Illegal Immigration Reform & Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 597 (1996) (codified as amended at 8 U.S.C. §1252a(b)(4)).

111. Immigration and Nationality Act, Pub. L. 414, § 212(c), 66 Stat. 163, 187 (1952). Section 212(c) has been interpreted by the Board of Immigration Appeals to authorize any permanent resident alien with a lawful un-relinquished domicile of seven consecutive years to apply for a discretionary waiver from deportation. *St. Cyr*, 533 U.S. at 295 (2001). If relief was granted the deportation proceeding was terminated and the alien remained as a permanent resident. *Id.* The extension of section 212(c) relief to the deportation context had great practical importance because deportable offenses have historically been defined broadly. *Id.* Thus, the class of aliens whose continued residence in the United States depended on their eligibility for section 212(c) relief was extremely large. *Id.* at 295-296. Additionally, a substantial number of applications for section 212(c) relief have been granted. *Id.* at 296.

112. *Id.* at 293.

113. *Id.*

IIRIRA took effect, the question before the Court was whether the provision of IIRIRA, which eliminated the right to apply for discretionary relief from deportation, applied retroactively to defendants who were convicted of a crime prior to IIRIRA's enactment.¹¹⁴

The Supreme Court concluded that under the second part of the *Landgraf* test, IIRIRA's elimination of any possibility of section 212(c) relief for people who entered into plea agreements with the expectation that they would be eligible for such relief, clearly attached new disability with respect to transactions or considerations already past.¹¹⁵ Absent any indication that Congress intended for the statute to have such retroactive effect, the Court stated that section 304(b) of IIRIRA could repeal the availability of section 212(c) relief only to aliens who pled guilty after IIRIRA's enactment.¹¹⁶

III. ANALYSIS

A. *The Supreme Court's Failure to Interpret Congressional Intent*

The Supreme Court majority in *Fernandez-Vargas* concluded that under the common principles of statutory interpretation, section 241(a)(5) of IIRIRA is not clear as to the scope of its application.¹¹⁷ Under the first step of the *Landgraf* test, the Court only addressed the absence of the "before or after" clause in the newly enacted statute.¹¹⁸ The Court refused to look into the legislative history of IIRIRA in Congress, including Congress's rejection of the express retroactive language from section 241(a)(5).

The Court's refusal to address the history of section 241(a)(5) was a clear departure from its prior history of analyzing legislative intent.¹¹⁹ Previously, the Court stated that few principles of statutory construction are more compelling than the proposition that Congress does not intend to enact statutory language that it had earlier discarded in favor of other language.¹²⁰ Removal of language from the draft rule is a signal that Congress did not intend the effect of the rejected language.¹²¹ Nonetheless, despite

114. *Id.*

115. *Id.* at 321.

116. *See id.* at 325.

117. *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2430 (2006).

118. *See id.* at 2428-2430.

119. *See supra* notes 19-20 and accompanying text.

120. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

121. *Lonchar v. Thomas*, 517 U.S. 314, 324-28 (1996). There, the Court analyzed

this precedent, the Court refused to look at Congress's express rejection of the "before or after" clause from the initial draft. Given the present controversy surrounding immigration issues, the Court's approach in deciding this case was not surprising. By failing to find Congress's clear proactive intent, the Supreme Court decided to play it safe. Had the Supreme Court found congressional intent, the public may have seen the Court as attempting to curtail immigration reforms.

B. The Supreme Court's Refusal to Find Section 241(a)(5) as Having Impermissible Retroactive Effect

Upon failing the first part of the *Landgraf* test, the Court proceeded to the second part of the test to determine if the statute had a disfavored retroactive effect.¹²² Courts disfavor retroactivity when it impairs the rights a party possessed when they acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed.¹²³ After concluding that section 241(a)(5) did not penalize an alien for the act of the reentry into the United States, but rather for his or her continuous presence, the Court found the statute had no disfavored retroactive effect and upheld the statute's retroactive application.¹²⁴

The Court's reasoning under the second part of the *Landgraf* test is inconsistent with its prior holdings in immigration cases. Specifically, the Court has consistently recognized the harsh consequences that are associated with deportation and the effect that it has on people that are subjected to it.¹²⁵ Absent clear congressional intent, the Court has constantly refused to give a deportation statute retroactive effect. The Court's distinction that section 241(a)(5) is designed to punish an alien's continuous presence in the country rather than the initial act of reentry is not convincing

the intent of Congress as to the scope of prejudice requirement under the newly enacted habeas statute. *Id.* It concluded that "Congress, when considering a draft of the Rule . . . directly focused upon the prejudice requirement and *rejected*, by removing from the draft Rule, a provision that would have eased the burden of the prejudice requirement by presuming prejudice after a delay of five years." *See id.* at 327.

122. *See Fernandez-Vargas*, 126 S. Ct. at 2430-31.

123. *Id.* at 2427-28 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)).

124. *See id.*

125. *See generally Costello v. INS*, 376 U.S. 120 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1949).

because the Court overlooks the consequences associated with deportation.

When an alien decides to enter the United States illegally, he or she arguably does so after carefully considering the pros and cons associated with such illegal behavior. The possibility of an adjustment of status through marriage to an American citizen is one of the factors that likely plays into this analysis. The possibility of such an adjustment, however, is usually not available to the alien immediately upon arrival; it requires time and physical presence in the United States, as the alien must establish him or herself both financially and socially. Few, if any, illegal immigrants enter this country with the financial and social skills necessary to find a potential spouse. From this perspective, it is difficult to see the distinction between the act of entry and the act of continuous presence in the United States, as this continuous presence is a prerequisite to the possibility of an adjustment of status through marriage.

Retroactivity is most problematic when it upsets a stable equilibrium.¹²⁶ The longer a rule is in effect, and the more time people have had to build their lives around that rule, the more disruptive it will be if the government is permitted to reach back and alter it.¹²⁷ This is the type of retroactive effect that section 241(a)(5) has on aliens who illegally reentered prior to IIRIRA's enactment. Prior to IIRIRA, an alien who resided in the United States appeared to have the possibility of an adjustment of status through marriage to an American citizen. So it is difficult to accept the Court's reasoning that section 241(a)(5) has no retroactive effect when one looks at a person like Mr. Fernandez-Vargas. He lived and built his life in the United States for nearly fifteen years under a law that allowed an adjustment of status through marriage. The possibility of an adjustment of status encouraged his continuous illegal presence in the United States, and thus application of section 241(a)(5) retroactively impaired the rights that he possessed when the illegal act was carried out.¹²⁸

Another concern that retroactive legislation poses, which the

126. See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 137 (1998) (citing Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1105-06 (1997)).

127. See Morawetz, *supra* note 126, at 137.

128. Even if one accepts the Court's distinction that section 241(a)(5) punishes the present illegal act of actual presence in the United States, an alien's reliance on pre-IIRIRA's possibility of an adjustment of status gives section 241(a)(5) impermissible retroactive effect.

Court in *Fernandez-Vargas* never addressed, is the potential for such legislation to target unpopular groups or individuals for abuse.¹²⁹ Limitations on retroactive legislation curb such arbitrary and potentially vindictive legislation.¹³⁰ The immigrant population has a long history of existing as a disfavored group, and politicians use them as a convenient scapegoat for many of America's problems.¹³¹ The Court failed to recognize the limited or almost non-existent representation of immigrant groups' interests in Congress. While legislation is usually drafted after careful debate and consideration of all possible negative effects, construction of immigration laws tend to be conducted without such close scrutiny.¹³²

It appears that the central problem and flaw in the Court's reasoning under the *Landgraf* test is the test itself. The *Landgraf* test acknowledges that a statute may operate retroactively in one of two ways: due to legislative intent for its retroactive application expressly stated in the statutory language, or due to the statute's effect or impact when it is applied in certain situations.¹³³ In either instance, a court should not accord the statute retroactive effect absent clear congressional intent favoring such results.¹³⁴ However, it appears that the impact of a statute's retroactive effect can be subject to differing interpretations.¹³⁵ Any change in the law has retroactive effect in the sense that it disturbs existing legal relationships and expectations.¹³⁶ It appears that almost all legislation is unable to escape some level of retroactive analysis.¹³⁷

Despite *Landgraf's* instruction that a statute will not have retroactive application absent an indication of clear congressional intent, this safeguard dissipates if a court declines to define a statute as having a retrospective effect in the first instance.¹³⁸ The Supreme Court's jurisprudence has considered several factors in analyzing the retroactivity of civil legislation.¹³⁹ Failing to acknowledge the full panoply of these considerations resulted in

129. See Tsesis, *supra* note 16, at 106-07.

130. See Morawetz, *supra* note 126, at 137.

131. See *id.*

132. See *id.* at 141-47.

133. See Debra Lyn Bassett, *In the Wake of Schooner Peggy: Deconstructing Legislative Retroactivity Analysis*, 69 U. CIN. L. REV. 453, 503 (2001).

134. *Id.*

135. *Id.* at 504.

136. *Id.*

137. *Id.*

138. *Id.* at 505.

139. *Id.*

the Court's inability to convincingly reconcile its retroactivity decisions in *Landgraf*.¹⁴⁰ This appears to be the case in *Fernandez-Vargas* as well, where the result reached under the *Landgraf* test is totally inconsistent with its prior decisions regarding deportation statutes.

Determination of retroactive effect is just one of the two ambiguities in retroactivity jurisprudence.¹⁴¹ Properly applied, fairness is a critical limiting factor in retroactivity.¹⁴² When the Supreme Court's retroactivity jurisprudence is reviewed in its entirety, it becomes clear that the Court generally has considered three factors in determining whether to give civil legislation retroactive effect.¹⁴³

The first factor is a traditional statutory interpretation issue, where the Court examines the legislation's plain meaning for congressional intent.¹⁴⁴ The second factor involves an inquiry regarding whether the statute is subject to constitutional constraints found in the Contracts, Takings, and Due Process Clauses.¹⁴⁵ Finally, the third factor is composed of the principles of fairness, encompassing a wide range of consideration, including equity, justice, and reliance.¹⁴⁶

Applying these three factors, there are six potential scenarios involving retroactivity: (1) the statute expressly indicates its retroactive intent and there are no constitutional or fairness constraints to implementing the statute retroactively, which results in retroactive application; (2) the statute expressly indicates its retroactive intent, but that intent cannot be implemented due to constitutional or fairness constraints, which results in only prospective application; (3) the statute has an identifiable retroactive effect, the statute indicates a clear intent favoring that result, and there are no constitutional or fairness constraints to implementing the statute retroactively, which results in retroactive application; (4) the statute has an identifiable retroactive effect, the statute indicates a clear intent favoring that result, but that intent cannot be implemented due to constitutional or fairness

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 506.

144. *See id.* (citing *United States v. Heth*, 7 U.S. 399, 413 (1806) (requiring a "clear, strong, and imperative" expression of intent by the legislature to give the statute retroactive application)).

145. *See Bassett, supra* note 133, at 506-07.

146. *See id.* at 507.

constraints, which results in only prospective application; (5) the statute has an identifiable retroactive effect but the statute does not indicate a clear intent favoring that result, which according to *Landgraf* results in only prospective application; (6) the statute has an identifiable retroactive effect, but the court declines to recognize that effect, which results in de facto retroactive application.¹⁴⁷

Landgraf's analysis is incomplete with regard to constitutional and fairness concerns.¹⁴⁸ The *Landgraf* decision properly noted the constitutional restraints upon retroactive legislation but it sent mixed messages with respect to considerations of fairness.¹⁴⁹ Fairness is the concept that gives rules legitimacy.¹⁵⁰ Our country was founded on a system where the judiciary serves as a check on the legislative and executive branches. Deferring to congressional desire to impose a new rule retroactively, without scrutinizing whether the new rule violates principles of fairness, is expedient, but it is a process by which courts abdicate their constitutional responsibilities.¹⁵¹

The fairness inquiry should include analysis of the possibility of disproportionate burden, disproportionate impact, discrimination, arbitrariness, and unreasonableness.¹⁵² Fairness should equate with equity and justice.¹⁵³ Looking at the facts in *Fernandez-Vargas*, it is clear that section 241(a)(5) fails the fairness aspect of the retroactivity test. As Justice Stevens points out in his dissent, the government has changed the rules mid-game.¹⁵⁴ At the time of Mr. Fernandez-Vargas's entry, and for the next 15 years, the enacted laws motivated him to remain in the United States continuously, to build a business, and to start a family.¹⁵⁵ However, the Court's interpretation of section 241(a)(5) appears to render all these activities irrelevant in the eyes of the law.¹⁵⁶ The burden that the retroactive application of section 241(a)(5) imposes on aliens clearly violates the fairness aspect of the retroactivity inquiry.

147. *Id.*

148. *Id.* at 508.

149. *Id.*

150. *Id.* at 513.

151. *Id.*

152. *Id.* at 515.

153. *Id.*

154. See *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2436 (2006) (Stevens, J., dissenting).

155. See *id.*

156. See *id.*

C. *The Supreme Court's Holding Has Devastating Effects on American Families*

Preservation of the family has historically been a priority of the American culture.¹⁵⁷ The Supreme Court has often recognized the importance of the family institution to society.¹⁵⁸ In past cases, when faced with a housing ordinance that forbade more than one grandchild from living in one home, the Court rejected the law and stated that the Constitution protected the sanctity of the family, an institution that is deeply rooted in the America's history and tradition.¹⁵⁹ On another occasion, the Court pointed out that the history and culture of Western civilization reflected a strong tradition of parental concern for the nurture and upbringing of their children.¹⁶⁰ The primary role of the parents in the upbringing of their children appeared to be established beyond debate as an enduring American tradition.¹⁶¹

Throughout its history, the Supreme Court has also emphasized the importance of marriage in American society. In the celebrated decision of *Loving v. Virginia*, which declared state laws barring interracial marriages unconstitutional, the Court stated that freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.¹⁶² Yet in *Fernandez-Vargas*, the Court appears to ignore this fundamental personal right of marriage. The Court's ignorance of this aspect and retroactive application of IIRIRA deprives Fernandez-Vargas's wife, who is an American citizen, of this very fundamental right.¹⁶³

American citizens are the most protected members of our society and their constitutional rights deserve the utmost protection.¹⁶⁴ Congress should not be allowed unlimited deference when

157. See Tsesis, *supra* note 16, at 154.

158. See *id.*

159. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977) ("It is though the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

160. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

161. *Id.*

162. See *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

163. *Fernandez-Vargas v. Gonzales*, 126 S. Ct. 2422, 2427 (2006).

164. See Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power versus Aliens' Rights*, 41 VILL. L. REV. 725, 778-779 (1996) (citing T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 20-21 (1990); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 208 (1983)).

citizens' rights are at stake.¹⁶⁵ Historically, the Government has been held to strict scrutiny when the law infringed on citizens' fundamental rights.¹⁶⁶ Nevertheless, although the Supreme Court has recognized the importance of marriage in immigration cases, it has refused to give serious consideration to an American citizen's fundamental right to marry and to marital privacy when a non-citizen is involved.¹⁶⁷ Justice Marshall has criticized the Court's approach in dealing with immigration marriage cases by pointing out that when Congress grants a fundamental right to all but an invidiously selected class of citizens, it is clear that such discrimination would be intolerable in any other context but immigration.¹⁶⁸

Immigration laws that limit and interfere with fundamental rights of family unity should be reevaluated and repealed.¹⁶⁹ Although people experience many joys, all of them are not qualitatively the same.¹⁷⁰ One of the greatest qualitative pleasures is that which accompanies being with family members.¹⁷¹ They are a source of strength, wisdom, comfort, joy, and support.¹⁷² Communion with family develops interpersonal skills that translate into an ability to communicate with people outside the family unit.¹⁷³ Strong families that respect the rights of others are models of relationships that make it easier to communicate and compromise with our fellow countrymen.¹⁷⁴ Mutual respect by fellow countrymen increases social welfare, happiness, and tranquility.¹⁷⁵ Many immigration laws, such as section 241(a)(5), have the opposite effect, creating less familial and social harmony.¹⁷⁶

The majority of the Court in *Fernandez-Vargas* failed to recognize the large presence of immigrants in American families. Nine percent of all American families with children are composed

165. Kelly, *supra* note 164, at 778.

166. *See id.* at 779-80 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204-205 (1995) (holding that the federal government is held to the same standard of strict scrutiny as state and local governments when racial classifications are involved)).

167. *See* Kelly, *supra* note 164, at 776.

168. *Id.* at 778 (quoting *Fiallo v. Bell*, 430 U.S. 787, 816 (1977) (Marshall, J., dissenting)).

169. Tsesis, *supra* note 16, at 159-60.

170. *Id.* at 159.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *See id.*

of families where at least one parent is an immigrant.¹⁷⁷ This includes immigrants that have either legal or illegal status, as well as those immigrants that adjusted their status through marriage to an American citizen.¹⁷⁸ Seventy percent of New York's undocumented immigrant-headed households with children contain native-born citizen children.¹⁷⁹ This empirical data shows that decisions dealing with the scope and reach of immigration laws, such as *Fernandez-Vargas*, have broad spillover effects on American families and American citizens.¹⁸⁰

At the time when there is a large debate about preserving family values and marriage, such as legally defining marriage as between a man and a woman,¹⁸¹ the public seems to ignore how immigration laws such as IIRIRA pose a real threat to American families. Mr. Fernandez-Vargas has been separated from his wife and child, both American citizens.¹⁸² His wife, a homemaker with few job skills, and son, an asthmatic, were dependent on him for financial support.¹⁸³ The Supreme Court did not address the negative impact that the Court's interpretation of section 241(a)(5) has on American families by dividing married couples and separating children from their parents. This and other immigration laws create the possibility of placing families in the difficult position of being separated from one parent and having to raise children on a single-parent income.¹⁸⁴

177. Michael E. Fix & Wendy Zimmermann, *All Under One Roof: Mixed-Status Families in an Era of Reform*, URBAN INST. (Oct. 6, 1999), <http://www.urban.org/uploadedpdf/409100.pdf>.

178. *Id.*

179. *Id.*

180. *See id.*

181. *See generally* Richard G. Wilkins, Welcome to Defend Marriage!, <http://defendmarriage.org/defendmarriage/index.cfm> (last visited Feb. 12, 2007) (explaining the "threat to marriage and the family posed by the aggressive effort to legalize same sex marriage Strong families have always been the essential foundation of every successful society. And for millennia, traditional marriage, defined as a union of a man and a woman, has been essential to the creation and protection of strong families. Legalizing same sex marriage would change forever the role that marriage plays in our society, undermining it and the family.").

182. Brief of Petitioner, *supra* note 12, at 40.

183. *Id.*

184. Bekiares, *supra* note 14, at 739 (discussing the negative impact of 8 C.F.R. § 245.1(c)(8) (2006) on American families, which prohibits an arriving alien in removal proceedings from adjusting his status).

D. The Supreme Court's Faulty Reliance on Old Legal Fiction in Treating Deportation as a Civil Proceeding

Perhaps the biggest flaw in the Supreme Court's reasoning is its adherence to the old tradition that deportation proceedings are not a criminal process or punitive.¹⁸⁵ Constitutional deportation doctrine that developed in the late nineteenth century was primarily a form of extended border control.¹⁸⁶ Despite its often harsh practical effects, these deportation laws generally fit well within traditional civil and regulatory models.¹⁸⁷ Over the years, however, the Supreme Court has treated deportation proceedings as a civil proceeding through the use of this legal fiction.¹⁸⁸

Legal fiction is a doctrine that embraces an array of modes of communication ranging from figures of speech and metaphors, to distortions or lies.¹⁸⁹ It is the falsity itself that makes a statement or concept fictional.¹⁹⁰ The most familiar uses of legal fiction were either dictated by the limitations of language in expressing an idea, or by the need to escape the strictures and formalism of the common law.¹⁹¹ Legal fiction can be used to escape the duty of reasoned analysis, to perpetuate mythologies upon which the law operates, to mask the true intent and purpose of the communicator, to avoid moral responsibility for decision, or to pursue an

185. Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1914 (2000).

186. *Id.* at 1908.

187. *Id.*

188. See Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 100-101 (1989) (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (exclusionary rule afforded under the Fourth Amendment is not available because deportation is a civil rather than criminal proceeding)).

189. *Id.* at 54-55. As Professor Wani suggests, metaphors, by definition, are not false because they presume likeness or similarity and are generally only a tool for enhancing the effectiveness of communication. See *id.* at 54-55 n.16. But they can also be used to mislead or distort images. See *id.* For example, when someone says "E is an elephant," one suggests a likeness between E and an elephant and assumes that the recipient of that statement is familiar with elephants. *Id.* If that is true, the reference to an elephant will immediately color the recipient's perception and she will begin to conjure up elephant characteristics in thinking about E. *Id.* This reference may, however, be an exaggeration because E may only have three elephant characteristics. *Id.* The reference can also be a lie because E may, after all, not have any elephant characteristics. *Id.*

190. *Id.* at 55.

191. *Id.* at 58.

agenda that is inconsistent with the mainstream of thought.¹⁹²

In reviewing prior Supreme Court decisions, it appears that deportation has been treated as a civil and not a criminal process, because: (1) its purpose is not to punish but merely to determine eligibility to remain in the United States; (2) the procedure is held before an immigration judge whose sole power is to order deportation; and (3) the immigration judge does not have the authority to punish or adjudicate guilt related to unlawful entry.¹⁹³ The civil-criminal distinction spelled out by the Court is a classic example of legal fiction.¹⁹⁴ The distinction is fictional.¹⁹⁵ It is the type of formalism that has long been discarded in constitutional jurisprudence because it does not aid constructive decision-making.¹⁹⁶

There is nothing inherent in the nature of a proceeding or obligation that classifies it as either civil or criminal.¹⁹⁷ Deportation procedures are legislatively mandated, not due to anything inherent in the character of a deportation hearing, but as a product of unrelated legislative bargaining.¹⁹⁸ Nothing in the legislative history suggests that Congress took into account the civil or criminal character or consequence of deportation in designating the requisite procedures.¹⁹⁹ It appears that the Court declares deportation as a civil procedure because the Congress decided to label it as civil.²⁰⁰

It is difficult to comprehend the Court's blindness and refusal to recognize deportation as a punishment or as a criminal proceeding. This can only be possible if one ignores the reality of involuntary removal from home, family and property.²⁰¹ Deportation almost always deprives an alien of his liberty when he is apprehended and detained.²⁰² There is also a stigma associated with deportation because it suggests wrongdoing and illegal conduct.²⁰³ Moreover, deportation is based on past conduct, and like traditional criminal punishment, it is partly designed to send a message to society, particularly aliens, about the utility of compliance

192. *Id.* at 58-59.

193. *Id.* at 103 n.282 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1044-45 (1984)).

194. *Id.* at 103.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 103-04.

201. *Id.* at 104.

202. *Id.*

203. *Id.*

with the immigration laws.²⁰⁴

The legal fiction of labeling deportation proceedings as civil and not criminal is probably the main reason behind the illogical and socially destructive holding in *Fernandez-Vargas*. Classifying deportation proceedings as criminal would bar the government from retroactive application.²⁰⁵ Where other fictions shift and reform to accommodate changing views, century old fictions still rule immigration law²⁰⁶ and, as exemplified in *Fernández-Vargas*, bring about unjust results.

IV. CONCLUSION

The Supreme Court's decision in *Fernandez-Vargas v. Gonzales* came at the height of the immigration debate and the nation's dissatisfaction with current immigration policy. In order to avoid the public's scrutiny, the Court turned its head and relied on a legal fiction to achieve a result that would satisfy the majority of the public. In some ways, this decision is reminiscent of other infamous Supreme Court rulings where the majority of the Court ruled contrary to justice and equality in order to satisfy public sentiment.

The impact of this decision on American families is devastating. The democratic process will hopefully mitigate the absence of rationality on the part of the judiciary. Seeing the negative impact that section 241(a)(5) will have on American families and public will hopefully force Congress to either amend or repeal the statute. *Fernandez-Vargas* is another example of the government's attempt to treat immigrants in this country as a class possessing little constitutional protections. Being a voiceless political class in American society, immigrants will continue to be the victims of irrational decisions and policies from all three branches of our government. In the absence of such a rational voice, the possibility of creating a sound immigration policy in the United States remains slim.

204. *Id.* at 105.

205. See Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2146-2147 (1996) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).

206. Wani, *supra* note 188, at 53.