Stanford Law Review

Volume 74 April 2022

NOTE

Due Process in Removal Proceedings After *Thuraissigiam*

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Abstract. It is well established that Congress wields plenary power over the admission of noncitizens at the border. But when the government removes noncitizens who have already entered the country, including those who did so without lawful admission, the boundaries of its power are less clear. The Supreme Court confronted this issue in *Department of Homeland Security v. Thuraissigiam*. There, the Court rejected an asylum seeker's attempt to challenge his removal proceedings under both the Suspension Clause and the Due Process Clause. While scholars have focused on the Suspension Clause holding, this Note focuses on the Due Process portion of the opinion, which held that Thuraissigiam had no procedural due process rights because he had made it only twenty-five yards inside the border. Beyond that core holding, the opinion also implied two additional principles: first, that whether a noncitizen facing removal can claim procedural due process rights may depend on the existence of "established connections" with the United States, and second, that those due process rights are contingent on lawful admission.

This Note argues that lower courts should limit *Thuraissigiam*'s holding to its facts and avoid giving legal force to those two principles, which were arguably dicta. Courts should not read *Thuraissigiam* as an invitation to subject noncitizens' constitutional rights to nebulous ties-based tests or to pin those rights to the ever-changing statutes and regulations that govern admission. Instead, courts should affirm the longstanding principle that all noncitizens who have successfully entered the United States enjoy procedural due process rights in their removal proceedings, regardless of whether they obtained lawful admission. In addition to preserving the fundamental constitutional rights of noncitizens already within our borders, this position reconciles *Thuraissigiam* with Supreme Court precedent, which has generally recognized that those noncitizens are entitled to procedural due process rights with respect to their removal.

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Introduction

In *Department of Homeland Security v. Thuraissigiam*, the Supreme Court considered the case of a Tamil asylum seeker, Vijayakumar Thuraissigiam, who fled political violence in Sri Lanka.[1] After Thuraissigiam had worked for a Tamil candidate for Sri Lankan Parliament, men who identified themselves as government intelligence officers went to his farm and called for him by name.[2] As the district court described, Thuraissigiam was "pushed into a van where he was bound, beaten, and interrogated about his political activities" by the government officers, and he then "endured additional torture before he woke up in a hospital where he spent several days recovering."[3] He ultimately fled the country, making his way through Latin America before eventually seeking asylum at the U.S.–Mexico border.[4] When Thuraissigiam brought his case to court, he bore scars from his beatings and "still suffer[ed] from numbness in his left arm."[5]

Thuraissigiam was a target of what an amicus brief called the "notorious pattern of 'white van abductions' perpetrated by the Sri Lankan government": the common phenomenon of plainclothes Sri Lankan government officials kidnapping individuals in unmarked white vans and subsequently torturing and interrogating them.[6] Nevertheless, the U.S. government denied Thuraissigiam's application for asylum and ordered him expelled by means of expedited removal, an accelerated process that is applied to certain categories of noncitizens.[7] Thuraissigiam then filed a habeas petition contesting his removal order, arguing that it violated statutory and regulatory requirements

1. *See* 140 S. Ct. 1959, 1967-68 (2020).
2. Thuraissigiam v. U.S. Dep't of Homeland Sec., 287 F. Supp. 3d 1077, 1078 (S.D. Cal. 2018), *rev'd*, 917 F.3d 1097 (9th Cir. 2019), *rev'd*, 140 S. Ct. 1959.
3. *Id.*
4. *Id.* at 1078-79.
5. *Id.* at 1078.
6. Brief of Professors of Sri Lankan Politics as Amici Curiae in Support of Respondent at 7-8, *Thuraissigiam*, 140 S. Ct. 1959 (No. 19-161), 2020 WL 402612; *see also Sri Lanka's Sinister White Van Abductions*, BBC (Mar. 14, 2012), https://perma.cc/PW2J-VB76 (describing thirty-two unexplained abductions in a five-month period, many of which involved white vans).
7. *Thuraissigiam*, 140 S. Ct. at 1967-68; *see also* HILLEL R. SMITH, CONG. RSCH. SERV., R45314, EXPEDITED REMOVAL OF ALIENS: LEGAL FRAMEWORK 1-2, 13 (rev. 2019), https://perma.cc/KBE5-QCD3 (describing the legal framework of expedited removal, as codified in 8 U.S.C. § 1225(b)(1)(A), also known as section 235(b)(1) of the Immigration and Nationality Act, which enables the removal of certain noncitizens without further hearings or review); *infra* notes 24-27 and accompanying text (discussing the expedited removal framework).

as well as his constitutional due process rights.[8] In the ensuing litigation, Thuraissigiam also argued that 8 U.S.C. § 1252(e)(2), a statute that limits judicial review of expedited removal orders, would violate the Suspension Clause if interpreted to deny him review of his removal order.[9]

The Supreme Court ultimately rejected Thuraissigiam's claims, holding that the relevant statute, as applied to Thuraissigiam, violated neither the Suspension Clause nor the Due Process Clause.[10] Justice Alito's majority opinion first addressed the inapplicability of the Suspension Clause to Thuraissigiam's situation in a portion of the opinion[11] that has plenty of critics and commentators.[12] This Note, however, focuses on the consequences of and questions raised by the Court's second holding: that Thuraissigiam, despite being on U.S. soil, had no procedural due process rights with regard to his entry and removal.[13] In reaching that holding, the majority opinion made two statements. First, it stated that "aliens who have *established connections* in this country have due process rights in deportation proceedings."[14] Second, it stated that aliens who both try to "enter the country illegally" and are "detained

8. Joint Appendix at 31-32, *Thuraissigiam*, 140 S. Ct. 1959 (No. 19-161), 2019 U.S. S. Ct. Briefs LEXIS 8056, at *33-36 (Petition for Writ of Habeas Corpus).

9. *See Thuraissigiam*, 140 S. Ct. at 1968. Section 306(a)(2) of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRIRA) limits judicial review of expedited removal orders to three types of claims: those considering "whether the petitioner is an alien, . . . whether the petitioner was ordered removed[, and] . . . whether the petitioner can prove by a preponderance of the evidence" that they had already been admitted as a lawful permanent resident, a refugee, or an asylee. Pub. L. No. 104-208, § 306(a), 110 Stat. 3009-546, 3009-610 (codified as amended at 8 U.S.C. § 1252(e)(2)); *see also Thuraissigiam*, 140 S. Ct. at 1966-67 (describing the statutory provision and IIRIRA's broader objectives).

10. *Thuraissigiam*, 140 S. Ct. at 1963-64.

11. *Id.* at 1968-81.

12. *See, e.g.*, Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v. Thuraissigiam, JUST SEC. (Aug. 25, 2020), https://perma.cc/88AE-Q7JT (arguing that *Thuraissigiam* "rewrote and marginalized prior precedent on habeas corpus"); *The Supreme Court, 2019 Term—Leading Cases: Article I—Suspension Clause—Expedited Removal Challenges*—Department of Homeland Security v. Thuraissigiam, 134 HARV. L. REV. 410, 417-18 (2020) (explaining that the Court's opinion "prove[s] difficult to reconcile with the Court's originalist approach" and will "drive[] methodological confusion for future judges and litigants"); Lee Kovarsky, *Habeas Privilege Origination and* DHS v. Thuraissigiam, 121 COLUM. L. REV. 23, 24-25 (describing *Thuraissigiam* as an example of the Court's "head-spinning decisional behavior" regarding the Suspension Clause); Amanda L. Tyler, *Thuraissigiam and the Future of the Suspension Clause*, LAWFARE (July 2, 2020, 12:31 PM), https://perma.cc/5G9N-TV6G (exploring the opinion's ramifications and explaining that it "generally signals a more limited vision of the Suspension Clause").

13. *See Thuraissigiam*, 140 S. Ct. at 1982-83.

14. *Id.* at 1963-64 (emphasis added).

shortly after unlawful entry" have "only those rights regarding admission that Congress has provided by statute."[15]

It is now up to lower courts to interpret *Thuraissigiam*. The Court's opinion treated Thuraissigiam's due process claims only cursorily and, in doing so, raised more questions than it answered. This Note aims to help navigate the resulting doctrinal confusion by exploring the different possible readings of the opinion and arguing that the decision should be limited to its narrow facts. Courts should not embrace a reading of *Thuraissigiam* that gives life to the opinion's two fleeting suggestions that a noncitizen's due process rights can be tied to either "established connections" or legal admission. Beyond being wholly unnecessary to the decision, such a broad reading of the opinion is atextual, contradicts decades of precedent, and implicates the rights of many noncitizens and immigrants beyond just asylum seekers like Thuraissigiam.

Instead, this Note argues, lower courts should affirm what I call a territorial conception of due process: one in which successful entry into the territory of the United States, authorized or unauthorized, confers the threshold ability to bring procedural due process challenges. Of course, noncitizens may lose their due process challenges on the merits if they cannot prove a violation of their rights—but the issue *Thuraissigiam* raised is whether noncitizens can bring constitutional challenges at all, or whether they are subject to the government's removal processes with no mechanism to vindicate their substantive rights. Conferring procedural due process rights upon all who have entered the United States is the position that is most consistent with the text, history, and purpose of the Fifth Amendment,[16] as well as with precedent.[17] This position also avoids the significant administrability issues posed by other readings of the opinion.[18] Lower courts should interpret the due process holding in *Thuraissigiam* narrowly to preserve the territorial conception of due process as much as is practicable within the current doctrine. Whatever flaws a territorial conception of due process may have, it is vastly preferable to other directions that courts might take after *Thuraissigiam* that would make the due process inquiry even more incoherent and hostile to noncitizens.

Part I of this Note describes the due process holding in *Thuraissigiam* and situates it in the broader setting of over a century of Supreme Court precedent, which has frequently assumed that territorial presence is sufficient to confer procedural due process rights. In doing so, it illustrates long-standing principles that lower courts should adhere to when deciding how broadly to

15. *See id.* at 1982-83.

16. *See infra* Parts III.A, IV.A.

17. *See infra* Part I.B.1.

18. *See infra* Part III.B.

interpret *Thuraissigiam*'s holding. Part II then advances three plausible readings of the opinion, canvassing recent cases and briefs to help illustrate the various ways courts can interpret the ambiguities in the opinion. The rest of this Note then explains why courts should adopt the first of these readings and narrowly limit *Thuraissigiam* to its facts. Specifically, Part III argues that courts should not read *Thuraissigiam* to mean that only noncitizens who can demonstrate "established connections" to the United States deserve procedural due process rights, which is the second possible reading of the opinion. Instead, courts should reaffirm the longstanding principle, described in Part I, that an immigrant's entry into the United States, defined as territorial presence and freedom from restraint, is sufficient to confer procedural due process rights. Finally, Part IV explains why *Thuraissigiam* should not be read to mean that noncitizens cannot claim procedural due process rights unless they have been formally and legally admitted. That is the third possible reading of the opinion, and it is similarly flawed due to its unjustified conflation of statutory and constitutional inquiries.

Despite his harrowing account of persecution, Thuraissigiam was not the most compelling litigant. He had no apparent ties with the United States, was apprehended shortly after crossing the border, and struggled to articulate his case to immigration officials.[19] But as with all cases that wind their way up to the Supreme Court, his case—and its legacy—will affect countless individuals, including Deferred Action for Childhood Arrivals (DACA) recipients, other asylum seekers, and even legal permanent residents and U.S. citizens.[20] Due to the lack of judicial scrutiny of procedures like the one Thuraissigiam endured, the government has coerced noncitizens (and even citizens) into signing away their legal rights, denied them translation services and opportunities to find counsel, and even shackled and detained them without food.[21] Without procedural due process rights, immigrants who have lived in the United States for a long period of time but were never legally admitted could be abruptly removed with little to no procedural fairness or transparency. Given how high the stakes are, courts must dissect the limits placed on judicial review by *Thuraissigiam* and grapple with the decision's potentially dangerous consequences.

19. *See Thuraissigiam*, 140 S. Ct. at 1967-68; *id.* at 1991-92 (Breyer, J., concurring in the judgment) (describing the procedural claims asserted by Thuraissigiam as concerning "more technical" errors, such as communication and translation issues, rather than more structural errors, such as the wholesale denial of a credible fear interview or a layer of review).

20. *See infra* Part IV.B.

21. *See infra* notes 261-83 and accompanying text.

I. *Thuraissigiam* as a Departure from Precedent

Depending on how the opinion is interpreted, *Thuraissigiam* may be read as calling into question decades of precedent. This Part places *Thuraissigiam* within the broader historical context of Supreme Court precedent concerning noncitizens' due process rights. In doing so, it aims to illustrate long-standing principles that should inform how lower courts interpret *Thuraissigiam* moving forward. Although *Thuraissigiam* is good law, this Note argues that earlier cases can provide lower courts with helpful principles for limiting the opinion's reach while still remaining faithful to its holding.

A. The Due Process Holding in *Thuraissigiam*

Vijayakumar Thuraissigiam, a Sri Lankan national of Tamil ethnicity, came to the United States to escape ethnic and political persecution.[22] Although he entered the country, he was stopped twenty-five yards inside the southern border and then detained for expedited removal,[23] an accelerated removal process for noncitizens who are inadmissible because they either lack relevant documentation for entry or have attempted to enter through fraud or misrepresentation.[24] Under expedited removal, an immigration officer can determine that a noncitizen should be removed and enter an order of removal that becomes final upon supervisory review and cannot be appealed.[25] In practice, then, most noncitizens subject to expedited removal never see an immigration judge or a courtroom and are at the mercy of an individual Border Patrol agent.[26]

Certain noncitizens, however, can obtain additional review by an asylum officer if they indicate an intention to apply for asylum or claim a credible fear of persecution if they return to their home country.[27] Thuraissigiam obtained this review because he claimed that he feared returning to Sri Lanka, as a group

22. *Thuraissigiam*, 140 S. Ct. at 1967-68.

23. *Id.* at 1967.

24. SMITH, *supra* note 7, at 15 (explaining some of the regulations that govern expedited removal).

25. *Id.* at 15-16.

26. Jennifer M. Chacón, *Stranger Still: Thuraissigiam and the Shrinking Constitution*, AM. CONST. SOC'Y (Feb. 3, 2021), https://perma.cc/XL3H-3FWJ.

27. SMITH, *supra* note 7, at 17. If the asylum officer finds that the noncitizen has a credible fear of persecution or torture, then the noncitizen is placed in formal removal proceedings, which provide greater procedural protections than expedited removal. *Id.* at 17-19. If the asylum officer does not find that the noncitizen has a credible fear, the officer will provide the noncitizen with a written decision, and the noncitizen can seek review before an immigration judge; if the noncitizen does not seek review, the officer will enter a removal order. *Id.* at 19.

of government agents there had kidnapped and beaten him due to his political activities.[28] An asylum officer credited Thuraissigiam's factual account of the assault but still rejected his legal claim of persecution,[29] concluding that Thuraissigiam was not beaten due to a protected ground of race, religion, nationality, political opinion, or membership in a political social group.[30] An immigration judge then affirmed that determination in a "check-box decision," and Thuraissigiam was ordered removed.[31]

Thuraissigiam then filed a habeas petition, arguing that his removal process violated statutory and regulatory due process requirements. Specifically, he argued that the government misunderstood and misapplied the statute's standard of a "significant possibility" of meeting the criteria for asylum, given that he experienced a textbook case of a white van abduction.[32] Thuraissigiam also argued that the asylum officer violated regulatory requirements, including the requirement that officers elicit every piece of relevant information, given the officer's failure to ask obvious questions and the lack of adequate translation.[33] For example, at Thuraissigiam's asylum interview, the following exchange occurred:

28. Thuraissigiam v. U.S. Dep't of Homeland Sec., 287 F. Supp. 3d 1077, 1078 (S.D. Cal. 2018), *rev'd*, 917 F.3d 1097 (9th Cir. 2019), *rev'd*, 140 S. Ct. 1959.

29. *Thuraissigiam*, 140 S. Ct. at 1968.

30. Joint Appendix, *supra* note 8, at 83, 2019 U.S. S. Ct. Briefs LEXIS 8056, at *69 (Question and Answers from Asylum Officer to Thuraissigiam (Mar. 9, 2017)) (showing that the asylum officer checked a box indicating that "[a]pplicant's testimony was credible" because it was found to be "consistent, detailed, and plausible"); *id.* at 87, 2019 U.S. S. Ct. Briefs LEXIS 8056, at *71-72 (recording that the asylum officer wrote that there was "[n]o [n]exus" between Thuraissigiam's fear of persecution and a protected characteristic that would merit asylum).

31. *Thuraissigiam*, 917 F.3d at 1101. In calling the immigration judge's action a "check-box decision," the Ninth Circuit was referring to the form of the immigration judge's order affirming the asylum officer's decision: The judge had "simply checked a box on a form stating that the immigration officer's decision was 'Affirmed.'" *Id.* at 1118. Specifically, the form included three sets of checkboxes for the judge to fill in: (1) whether testimony "was" or "was not" taken; (2) whether the Applicant "has" or "has not" established a significant possibility of persecution; and (3) whether the asylum officer's decision should be "[a]ffirmed" or "[v]acated." Joint Appendix, *supra* note 8, at 97, 2019 U.S. S. Ct. Briefs LEXIS 8056, at *80-81 (Order of the Immigration Judge).

32. Brief for Respondent at 6-7, *Thuraissigiam*, 140 S. Ct. 1959 (No. 19-161), 2020 WL 353476; *supra* note 6 and accompanying text (describing the "white van" phenomenon). When Justice Alito questioned at oral argument whether the facts of Thuraissigiam's case truly constituted persecution, one commentator called it a "cringeworthy moment," given the volume of evidence cataloguing the well-known phenomenon. Mark Joseph Stern (@mjs_DC), TWITTER (Mar. 2, 2020, 1:05 PM), https://perma.cc/286D-9Q78.

33. *See* Brief for Respondent, *supra* note 32, at 7-8.

> ASYLUM OFFICER. Do you have any question about the purpose of today's interview?
>
> THURAISSIGIAM. Yes[.]
>
> ASYLUM OFFICER. What is your question?
>
> THURAISSIGIAM. Yes, I understand.[34]

The district court dismissed Thuraissigiam's petition, accepting the government's argument that the court lacked jurisdiction over his claims under 8 U.S.C. § 1252(e)(2).[35] That statute limits habeas review of expedited removal orders to determinations of whether the petitioner "is an alien," "was ordered removed," or was already admitted as a legal permanent resident, refugee, or asylee—none of which described Thuraissigiam's claims.[36] The district court also rejected Thuraissigiam's argument about the Suspension Clause, a constitutional clause that enables detainees to contest their custody through a writ of habeas corpus.[37] Specifically, it rejected his argument that 8 U.S.C. § 1252(e)(2) would violate the Suspension Clause if it were construed to preclude review of his claims.[38] On appeal, the Ninth Circuit reversed. While it agreed with the district court that 8 U.S.C. § 1252(e)(2) did not authorize habeas review of Thuraissigiam's claims, it held that as a result, the statute violated the Suspension Clause as applied to Thuraissigiam.[39]

The government appealed the Ninth Circuit's decision, and the question before the Supreme Court was whether 8 U.S.C. § 1252(e)(2) was unconstitutional as applied to Thuraissigiam.[40] The Court analyzed and rejected Thuraissigiam's challenge to the statute under the Suspension Clause.[41] It also held that the statute, as applied to Thuraissigiam, did not violate the Due Process Clause of the Fifth Amendment, which guarantees that

34. Joint Appendix, *supra* note 8, at 64, 2019 U.S. S. Ct. Briefs LEXIS 8056, at *55 (Question and Answers from Asylum Officer to Thuraissigiam (Mar. 9, 2017)) (transcribing Thuraissigiam's asylum interview).

35. Thuraissigiam v. U.S. Dep't of Homeland Sec., 287 F. Supp. 3d 1077, 1080-82 (S.D. Cal. 2018) ("In sum, the Court . . . concludes that it does not have subject matter jurisdiction to hear Petitioner's claims challenging his removal order."), *rev'd*, 917 F.3d 1097, *rev'd*, 140 S. Ct. 1959 (2020).

36. *Id.* at 1080 (quoting 8 U.S.C. § 1252(e)(2)).

37. *See* U.S. CONST. art. I, § 9, cl. 2.

38. *Thuraissigiam*, 287 F. Supp. 3d at 1082.

39. *Thuraissigiam*, 917 F.3d at 1104 ("[W]e conclude that § 1252(e) does not authorize habeas review of Thuraissigiam's petition."); *id.* at 1119 ("Therefore, we hold that § 1252(e)(2) violates the Suspension Clause as applied to Thuraissigiam . . . .").

40. *See Thuraissigiam*, 140 S. Ct. at 1963-64, 1966.

41. *Id.* at 1971 (explaining that because Thuraissigiam was not seeking "simple release" but rather the opportunity to remain in the United States, the relief he sought fell outside the scope of habeas corpus, meaning that no violation of the Suspension Clause occurred).

no person will "be deprived of life, liberty, or property, without due process of law."[42] This Note focuses on the due process holding of the opinion, in which the Court held that Thuraissigiam, as an immigrant seeking entry to the United States, could not challenge any aspect of his removal proceedings because he categorically had no procedural due process rights with respect to his entry.[43]

In denying Thuraissigiam those constitutional rights, the majority opinion made two moves that are the subject of this Note. First, it explained that "aliens who have *established connections* in this country have due process rights in deportation proceedings."[44] Although the Court did not explicitly declare that only individuals with established connections have due process rights, it also did not clarify to whom, precisely, the statement applied. The Court did indicate, however, that being twenty-five yards inside the border did not constitute sufficient connections to confer due process rights.[45]

Second, the opinion explained that asylum seekers like Thuraissigiam "cannot claim any greater rights under the Due Process Clause" than those Congress grants with respect to their entry into the country.[46] In doing so, the Court assimilated Thuraissigiam's status to that of a person "on the threshold" of entry, since he was "detained shortly after unlawful entry."[47] Pursuant to its sovereign power to determine who can enter the country, then, Congress had free rein to determine by statute the procedures to which Thuraissigiam was entitled, and under no circumstances could Thuraissigiam contest the constitutionality of those procedures.[48] Thuraissigiam's recent entry thus enabled the Court to avoid more directly confronting the question of how to treat immigrants with more significant ties to or time spent in the country.

Beyond mentioning these two principles—"established connections" and Congress's plenary power to set the terms of admission—the Court did little to explain its theory of who deserves procedural due process rights. That ambiguity sets up an opportunity for courts to determine how broadly *Thuraissigiam*'s holding should apply. Because *Thuraissigiam* did not overrule

42. *Id.* at 1983; U.S. CONST. amend. V.

43. *See Thuraissigiam*, 140 S. Ct. at 1982-83 (explaining that Thuraissigiam deserved "nothing more" than "those rights regarding admission that Congress has provided by statute").

44. *Id.* at 1963-64 (emphasis added).

45. *See id.* at 1982 (explaining that Congress's plenary power—"the power to set the procedures" for admitting immigrants—would be rendered "meaningless" if that power became "inoperative as soon as an arriving alien set foot on U.S. soil").

46. *See id.* at 1964.

47. *Id.* at 1982-83 (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953)).

48. *See id.*

any prior precedent, past cases provide helpful guidance to lower courts on how to interpret the opinion moving forward.

B. The Historical Role of Territorial Presence in Conferring Due Process Rights

1. Supreme Court precedent

Prior to *Thuraissigiam*, the Supreme Court consistently suggested that individuals within U.S. borders are entitled to Fifth Amendment procedural due process rights with regard to their entry and their right to remain in the country, while those outside the country generally are not.[49] In the immigration context, the Court often did not carefully distinguish between the concepts of entry (physical presence in the United States) and admission (formal permission to enter the country at a port of entry like an airport), largely because there was no need: Plaintiffs were often either noncitizens who had both physically entered and been formally admitted, or were arriving noncitizens who had neither physically entered nor been formally admitted, obviating the need for such a distinction.[50] This is unsurprising, given that the concept of "illegal immigration" did not really take root at the federal level until the late nineteenth century. The first national immigration act was enacted in 1875 and was followed by the Chinese Exclusion era from 1882 to 1892, at which point immigration control was driven in part by racism and xenophobia.[51] Still, although the Court has never squarely held as such, it gave multiple indications throughout the twentieth century that all those who had entered the United States were entitled to due process in proceedings to determine their right to remain, even if they had entered unlawfully.[52]

49. Neuman, *supra* note 12 (explaining that in the twentieth century, the Supreme Court had "generally recognized" that "noncitizens who were discovered at large *inside* U.S. territory" had a "due process right to a hearing on their right to remain," even after a "fairly recent crossing of the border"). For additional discussion of Supreme Court precedent prior to *Thuraissigiam*, see Daniel Kanstroom, Essay, *Deportation in the Shadows of Due Process: The Dangerous Implications of* DHS v. Thuraissigiam, 50 SW. L. REV. 342, 343-44 (2021).

50. *See infra* notes 54-70 and accompanying text.

51. Louis Henkin, Essay, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 855-56 (1987) (describing immigration to the United States as being "free and encouraged" until 1875, when xenophobia and economic depression led to more restrictive immigration laws); *see* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 22-31 (1996) (explaining that although states had varying restrictions on immigration that they tried to seriously enforce, federal restrictions on immigration largely started in the late 1800s).

52. *See* David A. Martin, Comment, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 689 (2000) (explaining that the Court has not "squarely

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Multiple courts of appeals have also adhered to this principle for decades, granting noncitizens procedural due process rights even if they were apprehended on the very same day as their unlawful entry.[53] How much process these noncitizens were due might have varied. But the bottom line was that they enjoyed the constitutional right of procedural due process in their removal proceedings.

This reading of Supreme Court precedent suggests that *Thuraissigiam* is an understandably close case. Having made it only twenty-five yards inside the border before being apprehended, it is arguable whether Thuraissigiam truly made an "entry" into the territory of the United States. However, the majority opinion treats the case as black and white, without squarely addressing the due process rights of those who may have made it miles inside the border, or been present for weeks or months, before being apprehended. Given this ambiguity, *Thuraissigiam*'s holding should be limited to its narrow facts regarding someone who barely made it inside the border, as reading it any other way would contradict long-standing Supreme Court precedent.

As early as 1886, the Supreme Court explained in in *Yick Wo v. Hopkins* that the Fourteenth Amendment's use of the term "persons" applies to "all persons within the *territorial jurisdiction*, without regard to any differences of race, of color, or of nationality."[54] In *Yick Wo*, the Court struck down a San Francisco ordinance that required certain laundry businesses to obtain a permit, as the city was implementing the ordinance in a discriminatory manner against Chinese laundry owners.[55] In its unanimous opinion, the Court explained that the Fourteenth Amendment should be read to be "universal in [its] application" and to "involv[e] the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court."[56] Although *Yick Wo* addressed immigrants' rights under the Equal Protection Clause of the Fourteenth Amendment, the Court soon thereafter quoted that same language about the Fourteenth Amendment's universal application in *Wong Wing v. United States*, a case about immigrants' Fifth Amendment due process protections.[57] There, the Court held that

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ruled" on the procedural due process claims of those who have entered without inspection).

53. *See* Brief for Respondent, *supra* note 32, at 38 n.16 (collecting cases in which the D.C. Circuit, the Second Circuit, the Fifth Circuit, and the Ninth Circuit followed this approach).

54. 118 U.S. 356, 369 (1886) (emphasis added).

55. *Id.* at 368, 374.

56. *Id.* at 369; *see also* NEUMAN, *supra* note 51, at 61-62 (calling this concept "not controversial").

57. 163 U.S. 228, 238 (1896). The immigrants in *Yick Wo* and *Wong Wing* were arguably unlike Thuraissigiam, as those cases were about immigrants who were already legally

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because the Fifth Amendment's due process protections—which mirror that of the Fourteenth Amendment—applied to "all persons within the territory of the United States," a penalty of imprisonment and hard labor without a proper conviction violated an immigrant's Fifth Amendment procedural due process rights.[58]

Seven years later, the Court held in *Yamataya v. Fisher* that a recent entrant was entitled to procedural due process in her deportation proceedings, even though she was technically inadmissible and should have been excluded.[59] The Court concluded that someone "who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here" must have an "opportunity to be heard upon the questions involving his right to be and remain in the United States."[60] Again, the Court adopted a strongly territory-based view of due process: Because Yamataya had "entered the country" and become "subject in all respects to its jurisdiction," she deserved constitutional due process rights.[61] In holding that Yamataya deserved procedural due process, however, the Court declined to decide whether a noncitizen who "has entered the country clandestinely, and who has been here for too brief a period" would also deserve procedural due process rights.[62] Still, the facts of Yamataya's own case are instructive. She arrived in Seattle from Japan on July 11, 1901 and was arrested four days later when authorities determined that she was likely to become a public charge (rendering her inadmissible); just ten days after her arrest, she attended the

residing in the United States, as opposed to those seeking entry at the border. Still, those cases are relevant because of the Court's discussion of the reach of the Due Process Clause.

58. *See id.*

59. Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 87, 100-01 (1903).

60. *Id.* at 101.

61. *Id.* Yamataya still lost her case because the Court decided that even if she did not understand the "nature and import of the questions propounded to her," she was ultimately still given an opportunity to be heard. *Id.* at 101-02. Despite its hollow view of due process, the case is influential because of the Court's recognition of Yamataya's due process right. The substance of that right has grown with time. *See* Lucas Guttentag, *The President and Immigration Law: The Danger and Promise of Presidential Power*, JUST SEC. (Oct. 19, 2020), https://perma.cc/2BAM-WRTQ (describing the "process afforded [to Yamataya]" as "close to meaningless," but observing that the due process doctrine "became more protective" in later decades).

62. *Yamataya*, 189 U.S. at 100; *see also* Neuman, *supra* note 12 (explaining that this dictum has provided support for the "revisionist theory" that noncitizens discovered inside U.S. territory do not have procedural due process rights regarding their ability to remain in the country, even though this theory is contrary to most twentieth-century case law).

hearing that resulted in her deportation, which she immediately appealed.[63] Thus, the Court signaled that the roughly two weeks Yamataya had spent in the United States was sufficient to make her "part of [the country's] population" and give her procedural due process rights with regard to her admission.[64]

Further into the twentieth century, as the hysteria of McCarthyism gripped the country, the Court began to more explicitly recognize the category of unauthorized noncitizens and give additional guidance about who was entitled to due process.[65] In *United States ex rel. Knauff v. Shaughnessy*, the Supreme Court upheld an order to exclude the wife of an American citizen that was based on "a finding by the Attorney General," without the benefit of a hearing, "that her admission would be prejudicial" to the country's interests.[66] In *Knauff*, the Court embraced the now well-known principle that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[67] Shortly afterwards, in *Shaughnessy v. United States ex rel. Mezei*, the Court confronted the case of a plaintiff who was excluded from the United States and faced indefinite detention because the government could not successfully remove him.[68] Although he had been a legal permanent resident for twenty-five years and allegedly left the country only to visit his dying mother, the Court rejected his claim, explaining that the "power to expel or exclude aliens" was a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[69]

In rejecting Mezei's claim, however, the Court admitted that legal entry was not necessary to confer procedural due process rights: "It is true 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."[70] That language explicitly acknowledged the existence of noncitizens whose presence in the country was unauthorized. On one reading,

63. *See* Torrie Hester, *"Protection, Not Punishment": Legislative and Judicial Formation of U.S. Deportation Policy, 1882-1904*, J. AM. ETHNIC HIST., Fall 2010, at 11, 23 (describing the timing of Yamataya's entry into the United States and the procedures that followed).

64. *Yamataya*, 189 U.S. at 101.

65. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 554-58 (1990) (placing *United States ex rel. Knauff v. Shaughnessy* and *Shaughnessy v. United States ex rel. Mezei* in the context of the Court's general affirmation of the plenary power doctrine); *see also infra* text accompanying notes 66-70.

66. 338 U.S. 537, 539-40, 547 (1950).

67. *Id.* at 544.

68. 345 U.S. 206, 208-09, 215-16 (1953) ("In short, respondent sat on Ellis Island because this country shut him out and others were unwilling to take him in.").

69. *See id.* at 208, 210.

70. *Id.* at 212 (emphasis added).

the Court's statement applied only to those who had been formally but erroneously admitted: those who were ineligible to enter in the first place and should have been excluded. The Court's citation of *Yamataya*—a case that mirrors those facts—is consistent with that narrow reading. But another possible, and arguably more natural, reading of the phrase "passed through our gates" indicates that the Court was referring to all noncitizens who were unlawfully in the country, regardless of formal admission. Under that interpretation, "pass[ing] through our gates" denotes a physical entry, meaning all noncitizens within the territory of the United States deserve constitutional procedural due process rights regardless of their admission status.

The Court's statements in later cases provide some clues about how to resolve the ambiguity of the language in *Mezei*. In *Mathews v. Diaz*, although it upheld a limitation on Medicare eligibility based on citizenship and residency requirements, the Court explained that for the "millions of aliens within the jurisdiction of the United States," the "Fifth Amendment . . . protects every one of these persons."[71] Indeed, "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[72] Even though *Mathews v. Diaz* addressed the constitutionality of substantive classifications based on citizenship status, its language about the reach of the Fifth Amendment's procedural due process protections is still instructive. The Court noted that Congress is not required to treat "the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, *nor the illegal entrant*" the same as other noncitizens.[73] The explicit acknowledgement of illegal entrants as a category of noncitizens provides further evidence that the Court's statements about the Fifth Amendment's scope were made with the awareness of the phenomenon of unauthorized immigration. Ultimately, the Court's statements in cases like *Knauff* and *Mezei* continued to suggest that although those outside the U.S. border would be largely unsuccessful in bringing procedural due process claims, those inside the country might succeed with such claims.[74]

At the turn of the twenty-first century, the Court affirmed the role of territoriality in determining constitutional due process rights. In *Zadvydas v. Davis*, a case about the legality of prolonged detention, the Court explained that "once an alien enters the country, the legal circumstance changes, for the Due

71. 426 U.S. 67, 69-70, 77, 87 (1976).

72. *Id.* at 77.

73. *Id.* at 80 (emphasis added).

74. Motomura, *supra* note 65, at 558, 560 (describing the noncitizen's location as one of the "two basic lines of inquiry in the early plenary power decisions" that were subsequently reinforced by *Knauff*, *Mezei*, and a third case, *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952)).

Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[75] In contrasting the case with *Mezei*, the opinion in *Zadvydas* explained that there was a "basic territorial distinction" that was "critical": Mezei was stopped at a port of entry and had not yet entered.[76] The Court also noted that the "distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."[77] Thus, the Court reaffirmed the border–interior distinction in the context of procedural due process rights.[78] Indeed, as recently as 2004, the government itself represented to the Supreme Court that entry into the territory confers procedural due process rights. In *Clark v. Martinez*, a case about the detention of inadmissible noncitizens, the following exchange occurred during oral argument:

> JUSTICE BREYER. A person who runs in illegally, a person who crosses the border illegally, say, from Mexico is entitled to these rights when you catch him.
>
> GOVERNMENT COUNSEL. He's entitled to procedural due process rights.[79]

Thus, until *Thuraissigiam*, it seemed that courts and even the government largely assumed that those who had successfully crossed the border were entitled to procedural due process rights.

2. Statutory background

One theme throughout the cases above is the potential distinction between physical entry and formal legal admission. In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), making a noncitizen's statutory rights turn on whether they had been formally

75. 533 U.S. 678, 682, 693 (2001).

76. *Id.* at 694.

77. *Id.* at 693; *see also* Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 407 (2002) (arguing that *Zadvydas* "conflates three distinct sorts of territorial distinctions" of "admission/non-admission," "entry/non-entry," and "presence/non-presence").

78. *See* T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 373-75 (2002) (observing that even though noncitizens who have entered without inspection have not been formally admitted to the United States, Justice Breyer, writing for the majority in *Zadvydas*, "appears to believe [they are] entitled to protection under the due process clause").

79. *See* Brief for Respondent, *supra* note 32, at 38-39 (quoting Transcript of Oral Argument at 25, Clark v. Martinez, 543 U.S. 371 (2005) (Nos. 03-878 & 03-7434), 2004 WL 2396844); Brief of Amici Curiae Immigration Scholars in Support of Respondent at 17, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020) (No. 19-161) (quoting Transcript of Oral Argument, *supra*, at 25).

admitted, rather than their physical location.[80] Prior to 1996, those seeking entry at the border were subject to exclusion proceedings if denied entry, whereas those facing removal from within the country were put into deportation proceedings, which had heightened procedural protections.[81] IIRIRA shifted the relevant inquiry from the noncitizen's territorial location to their formal admission status.[82] As a result, any immigrant who has "not been admitted" is treated as "an applicant for admission," even if they are physically within the border.[83] This shift to focusing on formal admission as the relevant inquiry also matters for determining what substantive law applies to noncitizens facing removal. Previously, those who had entered the country without inspection were subject to grounds of deportability, but under IIRIRA, they are now subject to the generally broader grounds of inadmissibility because they are still considered to be seeking admission.[84]

Yet while IIRIRA pins statutory procedural protections to formal admission, its impact on the *constitutional* rights of those who are already in the country remains unclear. As explained above, the Supreme Court's cases have long suggested that those within the territory of the United States possess constitutional procedural due process rights with respect to their right to remain in the country, regardless of whether their presence is authorized. Yet IIRIRA blurs the line by setting it at one point: formal admission. The closest the Court has come to considering someone who has physically entered, but not been legally admitted, was in *Yamataya*. There, the immigrant's admission was technically erroneous, but the present-day version of the Immigration and Nationality Act (INA) would still treat Yamataya as having been formally admitted, as she presented herself for inspection at a port of entry.[85]

This tension between the statutory line drawn in IIRIRA and the constitutional line drawn in the Supreme Court's precedents thus set up the core due process question in *Thuraissigiam*: What process is due to someone

80. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of the U.S. Code); *see* 8 U.S.C. § 1225(a)(1) (treating all noncitizens who have not been admitted as "applicant[s] for admission").

81. *See* Daniel Kanstroom, *Expedited Removal and Due Process: "A Testing Crucible of Basic Principle" in the Time of Trump*, 75 WASH. & LEE L. REV. 1323, 1331-32 (2018).

82. *Id.* at 1332.

83. 8 U.S.C. § 1225(a)(1).

84. IMMIGRANT LEGAL RES. CTR., INADMISSIBILITY & DEPORTABILITY § 1.4 (2019), https://perma.cc/ED2P-72YC; *see* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10464, SUPREME COURT RULES THAT LAWFUL PERMANENT RESIDENTS MAY BE TREATED AS "INADMISSIBLE" UNDER CANCELLATION OF REMOVAL STATUTE 1-2 (2020), https://perma.cc/Y5SE-CHHD (describing "the criminal grounds of inadmissibility" as "generally broader" than those of deportability, while noting that not all offenses that trigger deportability necessarily trigger inadmissibility).

85. *See supra* notes 59-64 and accompanying text.

who has physically entered, but not been admitted?[86] While *Thuraissigiam* began to answer that question, it only did so for a specific subset of immigrants in that gray area: those who entered recently and were immediately apprehended.[87]

C. Exceptions and Supplements to the Territorial Model

Although the Court has consistently granted procedural due process protections to those within the territory of the United States, it has also articulated three arguably inconsistent doctrines: the entry fiction, the parole doctrine, and ties-based models. This Note does not challenge those doctrines. None of them, however, should be seen as displacing the territorial model described in Part I.B. Instead, they are either exceptions (the entry fiction and parole doctrines) or supplements (the ties-based model) to the territorial model, and as a result, they should not influence the understanding of the precedent pre-dating *Thuraissigiam*.

First, the entry fiction maintains that all noncitizens seeking admission at ports of entry do not have procedural due process rights with respect to their entry, despite technically being on United States soil.[88] In *Mezei*, the Court explained that while the government could keep arriving noncitizens "aboard the vessel pending determination of their admissibility," the "resulting hardships to the alien and inconvenience to the carrier" led to their "temporary removal from ship to shore" during the process of determining their suitability for entry.[89] Thus, although Mezei was technically on U.S. territory because of his "temporary haven on Ellis Island," he had no procedural due process rights because he was "treated as if stopped at the border," where the government has power to exclude altogether.[90] Second, the parole doctrine does something similar for those who are temporarily permitted to enter the United States (for example, for humanitarian reasons) while their applications for admission are still pending—meaning that they also do not have procedural due process

86. *See* Martin, *supra* note 52, at 689-90 ("The Supreme Court has never squarely ruled on the procedural due process claims of [entrants without inspection]. . . .").

87. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020) (stating that the holding applies to those who are "detained after arriving at a port of entry"—specifically, those "in respondent's position").

88. *See* Kaplan v. Tod, 267 U.S. 228, 229-30 (1925) (explaining that someone who was ordered deported, but whose deportation was delayed by the start of World War I, was "still in theory of law at the boundary line and had gained no foothold in the United States"); Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 89-96 (1989) (describing the entry fiction).

89. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953).

90. *See id.* at 207, 215.

rights.[91] Both doctrines are fictions because they treat noncitizens as being outside the United States, even though they are technically on United States soil.

This Note does not contest those doctrines, partly because they are firmly entrenched in the Court's precedents,[92] and partly because they have already been the subject of heavy criticism.[93] But more importantly, the entry fiction and parole doctrine are narrow exceptions that do not undermine the general rule that entry into the territory of the United States confers procedural due process rights.

Behind these two fictions is the idea that arriving noncitizens and parolees do not yet have legal status beyond what Congress provides, even if they are physically present in U.S. territory. In *Mezei*, the Court described the noncitizen's situation as "temporary harborage," suggesting that the entry fiction does not apply to someone who has successfully made it into the United States and whose presence is not "temporary."[94] The Court's description of the entry fiction as a matter of "legislative grace" implies that it applies only to those whom the government has authorized to land and disembark.[95] Thus, if someone presents themselves at the border—like Mezei—they are subject to the entry fiction; if they manage to enter the United States, they are not. The same logic applies to parole, where a noncitizen is admitted on the condition that they are still fictitiously treated as if at the border.[96] These doctrines were created to allow noncitizens to temporarily enter the country while the government was still determining their immigration status, and such practical exceptions should not be seen as eroding the general role of territoriality in determining due process rights.[97]

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91. *See* Bosniak, *supra* note 77, at 411 (describing the parole doctrine in the immigration context); Leng May Ma v. Barber, 357 U.S. 185, 190 (1958) (explaining that a grant of parole "was never intended to affect an alien's status" and does not "place[]" one "legally within the United States" (internal quotation marks omitted)).

92. *See supra* Part I.B.1.

93. *See* Wani, *supra* note 88, at 90-92, 90 n.209, 91 n.217, 92 n.218 (recognizing the entry fiction as "perhaps the most heavily criticized immigration law fiction" due to criticisms from multiple scholars including Henry Hart, Jr., Louis Henkin, David Martin, Peter Schuck, Laurence Tribe, and others, and noting that it has been "described as scandalous, shocking, morally outrageous, deplorable, an embarrassment and an anomaly").

94. *See* 345 U.S. at 215.

95. *See id.*

96. *See supra* note 91 and accompanying text.

97. Brief of Amici Curiae Immigration Scholars in Support of Respondent, *supra* note 79, at 8-10 (discussing the entry fiction's rationale as illustrated by *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Kaplan v. Tod*, 267 U.S. 228 (1925); and *United States v. Ju Toy*, 198 U.S. 253 (1905)).

Additionally, the Court has occasionally suggested a ties-based model of constitutional rights for noncitizens. In *Mathews v. Diaz*, the Court explained that although all persons are protected by the Due Process Clause, "Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence."[98] This ties-based conception of rights is, in some sense, a natural approach: While perhaps all people enjoy certain fundamental liberties, the government is allowed to bestow a higher level of benefits upon those who have invested more in society. Still, a ties-based approach to determining the *content* of constitutional protections is entirely compatible with a territorial conception of due process rights: Entry into the territory grants all people a baseline of procedural due process protection, while additional ties can grant residents more robust substantive rights.

The only case in which a noncitizen's procedural due process rights have been separated from territorial presence is *Landon v. Plasencia*, where the Court found that a legal permanent resident could claim procedural due process rights despite not being within U.S. borders.[99] In *Plasencia*, a legal permanent resident took a brief trip to Mexico and attempted to bring six noncitizens back to the United States with her in her car.[100] Despite Plasencia's location at the border—outside the United States—the Court did not treat her as a newly arriving noncitizen, explaining that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[101] It then concluded that because Plasencia had left the country for "only a few days," she was still entitled to procedural due process, just like any other permanent resident inside the country.[102] Rather than contradicting the territorial model of due process, however, *Plasencia* simply confers an additional path to claim procedural due process rights when one is outside the United States. In granting Plasencia procedural due process rights, the Court was not denouncing the importance of territoriality in determining one's constitutional rights, but was simply likening her status to that of someone in the United States given her short departure and ties to the country.[103]

98. 426 U.S. 67, 78, 80 (1976).

99. 459 U.S. 21, 23, 32 (1982) ("We agree with Plasencia that under the circumstances of this case, she can invoke the Due Process Clause on returning to this country . . . .").

100. *Id.* at 23.

101. *Id.* at 23, 32.

102. *Id.* at 32-34.

103. Similarly, in *Kwong Hai Chew v. Colding*, the Court interpreted a regulation that allows exclusion without a hearing as being inapplicable to a legal permanent resident returning from a trip abroad. 344 U.S. 590, 591-92 (1953). In doing so, the Court used both statutory and constitutional reasoning to "assimilate petitioner's status to that of

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II. Interpreting the Rule from *Thuraissigiam*

As Part I explained, the opinion in *Thuraissigiam* seems to question the relevance of entry in conferring procedural due process rights, which is a concept that the Supreme Court has long assumed. After all, Thuraissigiam had made it inside the border and was in a different position than someone presenting themselves for entry. But at its core, the due process holding in *Thuraissigiam* may not be so surprising if one accepts that Thuraissigiam was functionally no different than someone who had just arrived in the United States, subject to the country's sovereign right to control its borders and the entry fiction described above. Thus, how novel *Thuraissigiam* is, and how concerning it is, depends on how broadly courts read its holding. Although it is clear that Thuraissigiam lost, how to define the case's "holding" is debatable.[104]

To that end, the majority opinion does not offer much guidance, as the brevity of its discussion about due process leaves open some critical questions. By drawing on the proceedings below, the briefing at the Supreme Court, and the opinion itself, this Part advances three plausible readings of the opinion, from narrowest to broadest. Subsequently, Parts III and IV will explain why courts should adopt the first reading.

A. Due Process in the Proceedings Below and the Supreme Court's Opinion

Separate from its content, the most striking aspect of the Due Process Clause holding in *Thuraissigiam* is the fact that the Court even decided to issue it. Justice Sotomayor's dissent and even Justice Breyer's concurrence noted that the majority should not have reached the question, with Justice Sotomayor characterizing the majority as "stretch[ing] to reach the issue"[105] and Justice Breyer explaining that he would "avoid . . . com[ing] to conclusions about the Due Process Clause, a distinct constitutional provision that is not directly at issue here."[106] The Suspension Clause holding provided sufficient grounds on which to reject Thuraissigiam's claim, arguably rendering the Due Process Clause discussion dicta.[107] But the majority opinion explicitly rejected the

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an alien continuously residing and physically present in the United States." *Id.* at 596, 599-600.

104. *See* Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551, 1556-65 (2020) (describing different approaches to defining the "holding" of a case).

105. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 2011 (2020) (Sotomayor, J., dissenting).

106. *Id.* at 1989 (Breyer, J., concurring in the judgment).

107. Additionally, the Suspension Clause portion of the opinion concluded that the Court lacked jurisdiction over Thuraissigiam's claims because they fell outside the scope of

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dissent's suggestions that it should not have reached the due process issue, inevitably leading to the conclusion that the majority intended that portion of the opinion to be part of the holding.[108] Although the gratuitous nature of the Due Process Clause holding does not, at face value, tell us how to interpret the opinion, it counsels against reading the opinion broadly, as it should not have issued in the first place.

When appealing the Ninth Circuit's decision, the government's own brief framed the "question presented" as "whether, as applied to respondent, section 1252(e)(2) is unconstitutional *under the Suspension Clause*."[109] The government's two main argumentative headings in its opening brief on the merits were that the "*Suspension Clause* does not guarantee judicial review of respondent's claims relating to his efforts to be admitted to the United States," and that "[e]ven if the *Suspension Clause* guarantees some limited protections, the statutory framework for expedited removal satisfies any such requirements."[110]

The majority opinion asserted that it was proper to decide the due process issue because it was "an independent ground for the decision below."[111] But that characterization is dubious, if not misleading. The government likely chose to focus its briefing on the Suspension Clause because the Ninth Circuit's decision, contrary to the Supreme Court's characterization, did not squarely address due process. Instead, the Ninth Circuit's holding focused on the Suspension Clause, and the court even spent two paragraphs explaining why "rights protected by the Suspension Clause are *not identical* to those under the

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the writ, *id.* at 1971 (majority opinion), which should have been another reason for the Court to refrain from ruling on the merits of Thuraissigiam's right to due process.

108. *See id.* at 1982.

109. Brief for the United States at i, *Thuraissigiam*, 140 S. Ct. 1959 (No. 19-161), 2019 WL 6727092 (emphasis added). As a leading treatise on Supreme Court practice explains, the petitioner appealing a decision to the Court "bears the prime responsibility for framing the questions to be considered and possibly resolved by the Court." STEPHEN M. SHAPIRO, KENNETH S. GELLER, TIMOTHY S. BISHOP, EDWARD A. HARTNETT & DAN HIMMELFARB, SUPREME COURT PRACTICE ch. 6.25, at 90 (11th ed. 2019).

110. Brief for the United States, *supra* note 109, at iii (emphasis added). While both the government's and Thuraissigiam's briefs addressed Thuraissigiam's rights under the Due Process Clause, they appeared to do so only to determine the scope of habeas review. *See id.* at 20-27 (discussing Thuraissigiam's constitutional rights in the context of whether the Suspension Clause "guarantee[s] judicial review of respondent's claims relating to his efforts to be admitted to the United States" (capitalization altered)); Brief for Respondent, *supra* note 32, at 33-45 (arguing that the Suspension Clause "does not hinge" on the Due Process Clause, but that in the alternative, Thuraissigiam was entitled to procedural due process rights).

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

Fifth Amendment's guarantee of due process."[112] As Justice Sotomayor pointed out, the Ninth Circuit mentioned due process in removal proceedings "only in a footnote and as an aside" in its opinion.[113] Beyond being only three sentences long, that footnote was unnecessary to the Ninth Circuit's holding, which was squarely about the Suspension Clause.[114]

The due process portion of the opinion is also notable because of its brevity. The Suspension Clause discussion spans twenty-three pages of the slip opinion, whereas the due process portion occupies barely three pages.[115] Despite its length, however, the due process portion of the opinion is no less significant, as it makes sweeping statements about the applicability of the Due Process Clause to noncitizens. Judges and scholars have debated what process is due to unauthorized entrants for over a century, but *Thuraissigiam* disposed of that issue with little analysis.[116] Perhaps the due process holding is so brief precisely because even the government framed the issue as being primarily about the Suspension Clause and not about due process.

The unfortunate reality is that the Supreme Court did decide the due process question, and lower courts now must parse the opinion. Although an analysis of the Suspension Clause portion of the opinion is outside the scope of this Note, that holding makes it even more important for lower courts to interpret the due process holding as narrowly as possible. In rejecting Thuraissigiam's attempt to bring a challenge under the Suspension Clause, the Court removed one of the key avenues that arriving noncitizens have traditionally relied on to challenge the government's enforcement actions.[117] While some commentators have called the relationship between the Due

112. Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1111-12 (9th Cir. 2019) (emphasis added), *rev'd*, 140 S. Ct. 1959. The Ninth Circuit cited *Boumediene v. Bush*, 553 U.S. 723, 785 (2008), as an example of the Supreme Court itself recognizing the "distinction between the Fifth Amendment's due process rights and the Suspension Clause." *Id.* at 1112; *see also infra* notes 118-21 and accompanying text (discussing the relationship between the two clauses).

113. *Thuraissigiam*, 140 S. Ct. at 2011 (Sotomayor, J., dissenting).

114. Although Thuraissigiam's briefing addressed the applicability of the Due Process Clause, that was an argument in the alternative. *See* Brief for Respondent, *supra* note 32, at 38-45. In any event, the government still chose to focus on the Suspension Clause in its reply brief. *See* Reply Brief for the Petitioners at i, *Thuraissigiam*, 140 S. Ct. 1959 (No. 19-161), 2020 WL 833097.

115. *See* Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161, slip op. at 11-33, 34-36 (U.S. June 25, 2020).

116. *See supra* Part I.B.1 (discussing over a century's worth of cases and commentary about the constitutional procedural due process rights of noncitizens).

117. For example, in *Mezei*, the Court held that the petitioner had no procedural due process rights but still exercised habeas review. *See* Brief for Respondent, *supra* note 32, at 35-36 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 211-13 (1953)).

Process Clause and the Suspension Clause "completely unsettled,"[118] what is clear is that they are two distinct constitutional provisions.[119] In *Boumediene v. Bush*, the Court pulled the two concepts apart and established that the Suspension Clause has force independent of the Due Process Clause as a check on executive detention at Guantanamo Bay.[120] There, the Court did not discuss Guantanamo detainees' due process rights, but instead focused on the independent role of the Suspension Clause as a check on executive detention.[121] Additionally, in scenarios where resident noncitizens are removed but struggle to claim habeas relief because they are not in government custody, the Due Process Clause represents one of the only ways in which they can challenge any errors that occurred during their removal process.[122] Thus, *Thuraissigiam*'s undermining of noncitizens' habeas challenges makes it even more critical to understand the influence of the opinion on the separate realm of due process challenges.

118. Martin H. Redish & Colleen McNamara, *Habeas Corpus, Due Process and the Suspension Clause: A Study in the Foundations of American Constitutionalism*, 96 VA. L. REV. 1361, 1364-65 (2010) (summarizing different scholars' articulations of the relationship between the two clauses).

119. *See* Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 50-52 (2012) (explaining that while *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), focused on the Due Process Clause to determine what process was due to citizens challenging their detention, *Boumediene v. Bush*, 553 U.S. 723 (2008), demonstrated a new direction in which the Suspension Clause independently supplied authority to review the legality of detention).

120. *See id.* at 52 (citing *Boumediene*, 553 U.S. at 785); Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After* Boumediene *and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 747-48 (2012) (describing how after *Boumediene*, the "basic connection" between the Due Process and Suspension Clauses "has been severed").

121. *Boumediene*, 553 U.S. at 784-85 (explaining that even if a tribunal "satisf[ied] due process standards, it would not end [the Court's] inquiry" because the Suspension Clause "remains applicable and the writ relevant . . . even where" a process is "conducted in full accordance with the protections of the Bill of Rights"). The *Boumediene* opinion adopted this decoupling of the two clauses even over the express dissent and criticism of Chief Justice Roberts, who argued that the substance of habeas should consider "what rights . . . [it] is supposed to protect." *See* Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L.J. 405, 439 (2020) (quoting *Boumediene*, 553 U.S. at 813 (Roberts, C.J., dissenting)).

122. *See* Tyler, *supra* note 12 (citing Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2573 (1998)) (explaining that an individual who is removed without a court hearing may have valid claims to challenge their removal process but may not be able to access habeas relief due to the lack of ongoing government custody).

B. Three Possible Readings of the Opinion

Broadly, there are three possible readings of the majority opinion in *Thuraissigiam*. This Note advocates for the first reading—that the opinion should be limited to the facts of *Thuraissigiam*—as it is most true to the Fifth Amendment's text, precedent, and purpose while still remaining faithful to *Thuraissigiam*'s holding. In contrast, the second and third readings—which give broader meaning to the opinion's language about established connections and lawful admission—represent progressively larger departures from precedent and raise a host of independent problems, which Parts III and IV will explore.

1. Limited as applied to the facts of *Thuraissigiam*

The narrowest reading of *Thuraissigiam*, and the one this Note advocates, is to limit the holding to the facts of the case: a recent entrant stopped immediately after crossing and within twenty-five yards of the border. This echoes the reading that Justice Sotomayor suggested in her dissent, as she recognized that the Court's opinion "cabins its holding to individuals who are 'in respondent's position.'"[123] Interpreted in this way, the due process holding may not be so startling, as the explanation for it would be that Thuraissigiam's status, for constitutional purposes, was assimilated to that of an arriving noncitizen like Mezei or Knauff. This is one of the moves that the majority opinion makes when it compares Thuraissigiam to "an alien detained after arriving at a port of entry."[124] This view is understandably compelling, as it seems unfair to reward Thuraissigiam with heightened due process protections simply because he made it just inside the border—an approach that might create perverse incentives to immigrate unlawfully.

At first glance, this construction of the opinion departs from the precedent described in Part I.B.1. After all, Thuraissigiam did make it twenty-five yards inside the border, distinguishing him from an arriving entrant. But under a conception of "entry" previously developed and adopted by immigration courts, Thuraissigiam may not have effected an entry into the country at all. Under this view, he was justifiably treated as an arriving noncitizen and not entitled to procedural due process rights, meaning the *Thuraissigiam* opinion was actually consistent with precedent from immigration courts.

Before the enactment of IIRIRA,[125] when immigration laws still distinguished between deportation and exclusion proceedings, the INA defined

123. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 2013 (2020) (Sotomayor, J., dissenting) (quoting *id.* at 1983 (majority opinion)).

124. *Id.* at 1983 (majority opinion).

125. *See supra* text accompanying notes 81-83 (describing how before the passage of IIRIRA, the government placed noncitizens into either deportation or exclusion proceedings depending on whether they had effected an entry into U.S. territory).

an "entry" as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession."[126] In determining whether a noncitizen had made an "entry," the Board of Immigration Appeals construed "entry" to mean: (1) "a crossing into the territorial limits of the United States"; (2) either "inspection and admission by an immigration officer," or "actual and intentional evasion of inspection at the nearest inspection point"; and (3) "freedom from restraint."[127] Although IIRIRA consolidated deportation and exclusion proceedings and changed the relevant statutory line from "entry" to "admission,"[128] those statutory changes did not erase the precedent defining what "entry" meant in the context of immigration law.[129] Indeed, Congress likely did not mean to change the accepted meaning of the word "entry" when it enacted IIRIRA, as it then defined "admission" as "lawful *entry*"—suggesting that it was drawing on the accepted meaning of the word "entry" in defining "admission."[130]

Under the long-standing interpretation of the term, then, even Thuraissigiam arguably did not effect an "entry." The government apprehended him immediately after he crossed the border, which suggests that he did not establish the third prong of the definition described above: freedom from official restraint. Reading the due process holding in *Thuraissigiam* as

126. *In re* Pierre, 14 I. & N. Dec. 467, 468 (B.I.A. 1973) (quoting INA, ch. 477, § 101(a)(13), 66 Stat. 163, 167 (1952) (current version at 8 U.S.C. § 1101(a)(13)(A))).

127. *Id.* (providing the definition of "entry" based on a "survey of the many cases which have treated this subject over the years"); David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 835 & n.117 (1998) (citing *In re* G—, 20 I. & N. Dec. 764, 768 (B.I.A. 1993)) (describing the pre-IIRIRA technical and legal concept of entry).

128. *See supra* notes 81-83 and accompanying text. The section of the INA that defined "entry" has now been replaced by the definition of "admission" and "admitted." *See* 8 U.S.C. § 1101(a)(13)(A) (defining "admission" and "admitted" as the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer").

129. For example, even though *Zadvydas v. Davis* was decided five years after IIRIRA was enacted, the opinion still explained that "[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." 533 U.S. 678, 693 (2001); *see also* Joanna R. Mareth, Comment, *New Word, Same Problems: Entry, Arrival, and the One-Year Deadline for Asylum Seekers*, 82 WASH. L. REV. 149, 157 (2007) (explaining that although IIRIRA changed some immigration terminology, the "basic premise" that those who have successfully effected an "entry" as defined by legal precedent deserve "certain constitutional rights . . . remains the same").

130. Sarah K. Barr, *The Meaning of "Admission" and "Admitted" in the Immigration and Nationality Act*, IMMIGR. L. ADVISOR (U.S. Dep't of Just./Exec. Off. for Immigr. Rev., D.C.), Oct. 2009, at 1, 2-3, https://perma.cc/6SV8-L5GB (emphasis added) (citing *In re* Rosas-Ramirez, 22 I. & N. Dec. 616, 625 (B.I.A. 1999) (Rosenberg, Board Member, concurring and dissenting)).

applying only to noncitizens who have not effected an entry is thus a way to reconcile *Thuraissigiam* with the precedent described in Part I.B.1 above, as this precedent was decided against the backdrop of immigration courts' definition of the word "entry." Thus, the original rule from the cases described in Part I.B.1 was that any noncitizen who "entered" U.S. borders (and was free from restraint) could claim procedural due process rights. Because Thuraissigiam was never free from restraint, the Supreme Court's denial of his procedural due process rights was consistent with such a rule.

One recent district court decision illustrates this proposed approach to interpreting *Thuraissigiam*. In *United States v. Guzman-Hernandez*, the Eastern District of Washington considered the case of an undocumented noncitizen who was discovered in Nogales, Arizona, approximately three-quarters of a mile from the border.[131] Among other clear errors, the officers who apprehended Guzman-Hernandez never explained to him that he was being placed in removal proceedings, and they did not allow him to review statements that they asked him to sign.[132] In holding that Guzman-Hernandez's Fifth Amendment due process rights had been violated, the court rejected the government's argument that *Thuraissigiam* controlled his case because Guzman-Hernandez was, like Thuraissigiam, apprehended close to the border:

> Thuraissigiam was found 25 yards from the border. Guzman-Hernandez was detained three-quarters of a mile from the border. The Supreme Court did not intend to allow for the parade of horribles that stems from expanding the zone of constitutional inapplicability beyond the 25 yards in *Thuraissigiam*. . . . If the Supreme Court had intended to overturn more than a century of precedent, it would have said so. It did not.[133]

Thus, the district court read the twenty-five-yard line in *Thuraissigiam* to be the outer boundary of the Supreme Court's decision. Although there is no magical reason why that line should control, the district court simply decided to take the Court's opinion in *Thuraissigiam* at face value and interpret it narrowly given the "century of precedent" (as described in Part I.B.1) that any other interpretation would abrogate.

131. 487 F. Supp. 3d 985, 988 (E.D. Wash. 2020).

132. *Id.* at 992.

133. *Id.* at 989-91. "[C]entury of precedent" referred to the Supreme Court's cases indicating that "non-citizens found in the United States have constitutional rights," including many of the citations in Part I.B.1 above, such as *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Mathews v. Diaz*, 426 U.S. 67 (1976); and *Zadvydas v. Davis*, 533 U.S. 678 (2001). *See Guzman-Hernandez*, 487 F. Supp. 3d at 990-91.

2. "Established connections" as a way to overcome lack of admission

Although the majority opinion articulates two principles (established connections and lawful admission), it is unclear whether they are conjunctive or disjunctive, and the two concepts are discussed in separate parts of the opinion.[134] Thus, one potential reading is that either of the two—established connections or lawful admission—would be sufficient to grant a noncitizen procedural due process rights. Holding that lawful admission is sufficient to establish procedural due process rights does not seem surprising, as much of the case law seems to assume this. In *Yamataya*, for example, the Court found that even someone who was admitted only a few days prior pursuant to an erroneous decision was still entitled to procedural due process rights.[135]

The more interesting question concerns the role of "established connections" in determining who receives procedural due process. "Established connections" have traditionally not been a requirement for noncitizens to claim procedural due process. Again, *Yamataya* provides a helpful example, as the noncitizen in that case was apprehended a few days after her entry to the United States and thus had few ties to the country beyond her mere admission.[136] It is implausible that the majority was saying that *all* noncitizens only have procedural due process rights if they have established connections, as that would impose a new requirement that has never been recognized before in this context. Indeed, by focusing the due process portion of the opinion so heavily on lawful admission,[137] the opinion implicitly acknowledges that such admission alone would give noncitizens a right to claim procedural due process.

Perhaps the majority instead meant that in the *absence* of lawful admission, established connections might be sufficient to confer procedural due process on a noncitizen. The government itself seemed to advocate for this position in its briefing at the Supreme Court. It argued that an unlawful entrant like Thuraissigiam "is properly classified as an alien seeking initial admission, at least unless he has been here long enough to develop *sufficiently meaningful ties* to the country."[138] Based on that articulation, the government's position seems

134. The reference to "established connections" comes at the beginning of the opinion where the Court summarizes the due process holding, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963-64 (2020), whereas the reference to lawful admission comes at the end of the opinion, in the portion about the Due Process Clause, *id.* at 1982-83.

135. *See supra* notes 59-64 and accompanying text.

136. *See supra* notes 59-64 and accompanying text.

137. *See Thuraissigiam*, 140 S. Ct. at 1982 (describing Congress's plenary power to determine the process of formal immigration admissions).

138. Brief for the United States, *supra* note 109, at 23 (emphasis added).

to have been that even unlawful entrants can claim procedural due process rights, but only if they can show "meaningful ties" to the country.

Indeed, two district courts seem to have read *Thuraissigiam* this way. One district court held that the due process holding in *Thuraissigiam* did not apply to a petitioner who had entered without authorization but had been in the country "over 10 years and has a family here."[139] Based on those facts, the court concluded that the petitioner "[o]bviously . . . has established connections in the United States," distinguishing *Thuraissigiam*.[140] In another case, a district court held that a noncitizen who had been denied an immigrant visa could still bring a Fifth Amendment claim contesting that denial.[141] There, the court explained that because the noncitizen had lived in the country for ten years, he had "established connections" with the country and therefore *Thuraissigiam*'s holding did not apply.[142] Citing *Thuraissigiam*, the court explained that it was distinguishing between "non-citizens seeking *initial* entry and those in deportation proceedings who have established connections in the United States."[143]

This second potential reading of the opinion would require courts to parse what counts as "established connections." The two district courts cited above likely had an easy time answering this question because the noncitizens' ten years of residence in both cases plainly constituted "established connections."[144]

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139. Sergio S.E. v. Rodriguez, No. 20-cv-06751, 2020 WL 5494682, at *1, *5 (D.N.J. Sept. 11, 2020).

140. *Id.*

141. Muñoz v. U.S. Dep't of State, 526 F. Supp. 3d 709, 724 & n.18 (C.D. Cal. 2021).

142. *Id.* at 724 n.18. This case is also distinct from Thuraissigiam's, as the alleged due process violation occurred when the government denied the plaintiff's immigrant visa while he was abroad instead of in the country. *See id.* at 713-14 (explaining that the suit arose when the government denied the plaintiff's visa application after his interview at the U.S. Consulate in El Salvador). Still, the district court's focus on the extent of the plaintiff's connections to the United States to distinguish *Thuraissigiam* shows how noncitizens might use "established connections" to overcome the lack of formal admission when claiming Fifth Amendment procedural due process rights. *See id.* at 724 & n.18.

143. *Id.* at 724 n.18 (citing Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963-64 (2020)). Although the court ultimately concluded that the plaintiffs did not show that the "challenged statute is unconstitutionally vague" under the Fifth Amendment, it is relevant that the court found their claim cognizable in the first place. *See id.* at 725 (citation omitted).

144. It is worth noting that one alternative reading of the phrase "aliens who have established connections" would construe "established" as the past tense of a verb rather than as an adjective. *Compare Establish*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the verb "establish" as "[t]o settle, make, or fix firmly; to enact permanently" and "[t]o make or form; to bring about or into existence"), *with Established*, BLACK'S LAW DICTIONARY (11th ed. 2019) (classifying "established" as an adjective and providing definitions such as "[h]aving been brought about or into existence," "[h]aving existed for a long period;

footnote continued on next page

Yet future cases will not always be so clear. Part III will explain why lower courts should reject this reading of the opinion in light of the difficulties courts have already had interpreting similar phrases in other areas of constitutional doctrine that pin noncitizens' rights to their level of ties with the country.

3. Admission as a prerequisite for procedural due process rights

The most troubling reading of *Thuraissigiam* is that lawful admission is a prerequisite for procedural due process rights, regardless of whether someone has "established connections." This reading would focus more on the Court's explanation that unless and until someone has been admitted, they have not "effected an entry."[145] The majority opinion pushes back against the idea that due process is conferred "as soon as an arriving alien set[s] foot on U.S. soil," citing the entry fiction.[146] Under this view, then, one could argue that a noncitizen would never be entitled to procedural due process without being formally admitted, even if they had "established connections." The Court's repeated invocation of the plenary power doctrine, including the famous line from *Knauff*—"[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"[147]—suggests that it may be equating the statutory and constitutional lines: Noncitizens who have not "effected an entry" deserve no constitutional rights.

This view is particularly concerning because of how broadly it sweeps. About half of the roughly 11 million undocumented immigrants already in the country have overstayed their visas, meaning that they did originally obtain lawful admission and can claim procedural due process rights, even under a maximalist account of the reach of the *Thuraissigiam* opinion.[148] But for the over five million remaining undocumented immigrants already in the

already in long-term use," and "[p]roven; demonstrated beyond doubt"). In other words, perhaps Justice Alito meant that aliens who have done something to "establish" a connection with the United States—attend school, hold a job, or rent an apartment, for example—deserve procedural due process rights. This reading of "establish" as a verb is more generous to noncitizens and might suggest that unlawful entrants deserve procedural due process rights upon establishing some connection with the United States—a potentially low bar. But because this interpretation falls under the first proposed reading of the opinion as described in Part II.B.1 above, as it would not expand the holding of *Thuraissigiam* beyond its facts, the rest of this Note will assume that Justice Alito meant "established" as an adjective.

145. *Thuraissigiam*, 140 S. Ct. at 1982 (quoting Zadvydas v. Davis, 533 U.S. 678, 693 (2001)).

146. *Id.*

147. *Id.* (quoting United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

148. *See* Miriam Jordan, *The Overlooked Undocumented Immigrants: From India, China, Brazil*, N.Y. TIMES (updated Jan. 27, 2021), https://perma.cc/XT2W-4K8U (reporting that an estimated 46% of the roughly "10.7 million undocumented immigrants in the United States" are people who have overstayed their visas).

country, this third, broad reading of *Thuraissigiam* would strip away the ability to bring procedural due process challenges with regard to their removal. Justice Sotomayor's dissent specifically calls out this possibility, as she explained that the majority opinion might allow 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."[149] Given the lack of any limiting principle provided by the majority opinion, it is unclear how far the holding of *Thuraissigiam* reaches. Could it reach a noncitizen who unlawfully made it a mile past the border? Thirty miles? Who had been here for a week? Thirty years?

Under this view, *Thuraissigiam* would tie a constitutional question (who deserves procedural due process rights) to a statutory question (who is lawfully admitted under Congress's criteria). It seems arbitrary and doctrinally incorrect, however, to conclude that a constitutional question can be wholly determined by ever-changing statutory law.[150] Yet in focusing its due process analysis on Congress's plenary power to exclude, the Court may have laid the groundwork for future declarations that only those who have been lawfully admitted can claim any procedural due process rights at all.

This position is not hypothetical, as some have already suffered as a result of courts accepting this position. In *United States v. Gonzales-Lopez*, for example, a district court cited *Thuraissigiam* in holding that an immigrant who was found in the United States had no constitutional procedural due process rights, even though he had lived in the United States for "most of his life" and first

149. *Thuraissigiam*, 140 S. Ct. at 2013 (Sotomayor, J., dissenting); *see also* Vivian Yee, Kenan Davis & Jugal K. Patel, *Here's the Reality About Illegal Immigrants in the United States*, N.Y. TIMES (Mar. 6, 2017), https://perma.cc/B6ZF-5BH5 (to locate, select "View the live page") (reporting that about 60% of the undocumented population has been in the country for at least a decade).

150. There are admittedly areas of law where statutory provisions can influence a constitutional question. For example, one's reasonable expectation of privacy under the Fourth Amendment can be defined in part by the presence or absence of statutory protections. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516-19 (2007) (describing the "positive law model" of the Fourth Amendment, where courts descriptively look at existing laws, such as statutes and regulations, to determine whether an action violated one's reasonable expectation of privacy); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825-26 (2016) (advocating for such a model and describing it as an approach that "has been kicking around in Fourth Amendment case law for some time"). But what is objectionable about the third possible reading of *Thuraissigiam* is the wholesale equation of statutory and constitutional inquiries, which goes further than an acknowledgment that one can influence the other.

came to the United States as a four-year-old with his mother and sister.[151] In *Guerrier v. Garland*, even though the Ninth Circuit found that a plaintiff had a "colorable constitutional claim" that his constitutional due process rights were violated during the expedited removal process, it concluded that *Thuraissigiam* "abrogated" any "exception to the statutory limits on our jurisdiction," collapsing the constitutional and the statutory inquiries.[152] Echoing this conflation of the two inquiries, the government argued in another case that because *Thuraissigiam* held that arriving noncitizens do not enjoy constitutional procedural due process protections at the border, they do not necessarily have a claim if statutory procedures are violated.[153] Such an argument represents an expansion of the holding in *Thuraissigiam*, as the decision there did not address entitlements to statutory and regulatory procedural requirements. In rejecting the government's broad position, the court also noted that the illegal reentry context was distinct from *Thuraissigiam*, and it accordingly refused to adopt the government's invitation to "extend *Thuraissigiam*'s holding . . . to the [8 U.S.C.] § 1326 [illegal reentry] context."[154]

The government has eagerly attempted to expand *Thuraissigiam* to other new contexts, such as detention. In *Padilla v. Immigration and Customs Enforcement*, the plaintiff class included noncitizens who entered unlawfully, were placed into expedited removal, demonstrated a credible fear of persecution, and then were placed in prolonged detention pending their asylum determinations.[155] That class challenged their prolonged detention, arguing that the practice violated the Due Process Clause.[156] The Ninth Circuit affirmed a preliminary injunction ordering the government to provide bond hearings to determine whether continued detention was justified.[157] In petitioning the Ninth Circuit's decision to the Supreme Court, the government cited *Thuraissigiam* to argue that the detention was lawful because the Due Process Clause definitionally did not apply to noncitizens who had not been

151. *See* United States v. Gonzales-Lopez, No. 18-cr-00213, 2020 WL 5210923, at *1-2, *5 (N.D. Cal. Sept. 1, 2020). In *Gonzales-Lopez*, the court held that *Thuraissigiam* meant that the defendant, despite successfully making an unlawful entry, was to be treated as an arriving noncitizen and thus deserved "procedural due process" only to the extent that it was required by applicable statutes and regulations. *Id.* at *5.

152. *See* Guerrier v. Garland, 18 F.4th 304, 310-11 (9th Cir. 2021).

153. United States v. Ochoa-Quinones, 489 F. Supp. 3d 1184, 1187-88 (E.D. Wash. 2020).

154. *Id.* at 1186-88.

155. *See* 953 F.3d 1134, 1139-40 (9th Cir. 2020), *vacated*, 141 S. Ct. 1041 (2021) (mem.).

156. *Id.* at 1139-40.

157. *Id.* at 1140-42, 1152 (upholding the grant of preliminary injunctive relief requiring bond hearings but remanding the questions of the particular process due and the scope of injunctive relief).

legally admitted.[158] Notably, the government did not limit its argument to just arriving noncitizens; instead, it argued that *Thuraissigiam* would apply to *all* those noncitizens "encountered within 100 air miles of the border and within 14 days of having unlawfully entered the United States."[159] That group represents a much broader set of noncitizens than asylum seekers like Thuraissigiam. The government's position is particularly concerning, given that expedited removal can now be applied to *anyone* in the country who has been present for less than two years without being lawfully admitted.[160]

As a result of the government's litigation efforts, the Supreme Court granted certiorari in *Padilla* in January 2021. Without an opinion, the Court vacated the judgment and remanded the case to the Ninth Circuit "for further consideration in light of *Department of Homeland Security v. Thuraissigiam*."[161] One potential explanation for this ruling is that *Thuraissigiam* clarified that the portion of the class members in *Padilla* who are arriving noncitizens or recently arrived noncitizens (like Thuraissigiam) do not have constitutional procedural due process rights, requiring the vacatur and remand that occurred.[162] That interpretation is not as concerning, since those noncitizens are admittedly subject to the entry fiction.[163] But the vacatur and remand might also indicate the possibility that *Thuraissigiam* will be read to deny procedural due process rights to all noncitizens who have not been legally admitted, especially since some of those in the *Padilla* class were apprehended further into the interior of the United States. That reading would tie a noncitizen's constitutional procedural due process rights entirely to the presence of formal admission, and Part IV will explain why lower courts should reject this reading.

158. *See* Petition for a Writ of Certiorari at 13-14, *Padilla*, 141 S. Ct. 1041 (No. 20-234), 2020 WL 5092673.

159. *See id.* at 14. The government drew the line at 100 air miles and fourteen days because that was the extent of expedited removal when the class of noncitizens was certified. *See infra* notes 238-44 and accompanying text (explaining the genesis and expansion of expedited removal).

160. *See infra* notes 238-44 and accompanying text.

161. *Padilla*, 141 S. Ct. at 1041-42.

162. *See* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10343, IS MANDATORY DETENTION OF UNLAWFUL ENTRANTS SEEKING ASYLUM CONSTITUTIONAL? 4 (rev. 2021), https://perma.cc/J2WB-U26Y.

163. *See supra* notes 88-91 and accompanying text (describing the entry fiction and its reach).

III. Due Process Rights as a Function of "Entry" Instead of "Established Connections"

The ambiguity in the Court's opinion leaves significant room for future courts to take varying directions when interpreting *Thuraissigiam*. This Part argues that in the wake of *Thuraissigiam*, courts should affirm a territorial conception of due process, defined as one in which physical entry is the touchstone for determining whether someone has procedural due process rights. Under that interpretation, neither "established connections" nor lawful admission would be a prerequisite for procedural due process rights. Instead, courts should ask whether a noncitizen had entered the United States. If so, the noncitizen could bring procedural due process challenges to their removal procedures. Immigration courts' understanding of the meaning of "entry" provides a useful model for this constitutional inquiry: As explained earlier, that definition of "entry" requires (1) physical presence; (2) inspection or intentional evasion of inspection; and (3) freedom from official restraint.[164]

Under this interpretation of who is entitled to procedural due process rights, Thuraissigiam might not have been considered as having effected an entry under prior precedent because he failed the third prong, freedom from restraint. The holding in *Thuraissigiam*, then, is actually consistent with this interpretation of "entry." Still, while not inconsistent with *Thuraissigiam*, this Note's proposal requires adopting a narrow reading that limits the majority opinion to the facts of the case. Part III.A explains why the understanding that territorial presence confers procedural due process rights—the first possible reading of the opinion described above in Part II.B, and the one this Note advocates—is most faithful to the Fifth Amendment's text and precedent. Part III.B highlights the shortcomings of the majority opinion's potential alternative suggestion to use a ties-based theory centered on "established connections"—the second possible reading of *Thuraissigiam* described in Part II.B—by analogizing to *United States v. Verdugo-Urquidez*.[165] In *Verdugo-Urquidez*, the Court suggested that noncitizens inside the United States enjoy Fourth Amendment protections only if they have "substantial connections" to

164. *See supra* note 127 and accompanying text. Additionally, as described in notes 88-93 and the accompanying text above, doctrines like the entry fiction and parole may initially seem contrary to this position. But this proposed definition of "entry" requires freedom from restraint. This is consistent with the entry fiction, which only addresses noncitizens who are at a port of entry. And to the extent that there is any tension with existing doctrines, my goal is not to contest them, but rather to cabin *Thuraissigiam*'s holding in light of those well-settled doctrines.

165. 494 U.S. 259 (1990).

the country.[166] The haphazard way in which lower courts have interpreted this phrase furnishes a helpful harbinger of the harms that could arise from adopting a similar standard of "established connections" in the Fifth Amendment context.

A. Entry as a Grant of Procedural Due Process Rights: Text and Precedent

The Fifth Amendment guarantees that "[n]o *person*" shall "be deprived of life, liberty, or property, without due process of law."[167] As explained in Part I, the term "person" has often been given an expansive understanding, even in the immigration context. It is useful to draw a contrast with certain other amendments, such as the First, Second, and Fourth, that use the narrower term of "the people," rather than "person."[168] Although many courts and commentators disagree over whether the meaning of "the people" is consistent across the amendments,[169] they generally agree that "the people" denotes a narrower subset of all "persons."[170]

While Part III.B explains the lessons we can learn from those debates, one key point is that the term "the people" in the Fourth Amendment is distinct from the term "person" in the Fifth Amendment. The Supreme Court made exactly this point in its 1990 case *United States v. Verdugo-Urquidez*, where it held that a citizen and resident of Mexico could not claim Fourth Amendment

166. *Id.* at 271 ("[A]liens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.").

167. U.S. CONST. amend. V (emphasis added).

168. *See* U.S. CONST. amends. I, II, IV; Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 355-58 (2010) (describing the uses of "the People" in the Constitution).

169. *Compare* United States v. Portillo-Munoz, 643 F.3d 437, 440-41 (5th Cir. 2011) (refusing to interpret "the people" consistently across the Second and Fourth Amendments given their varying purposes), *and* Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078, 1089, 1093 (2013) (noting that because of the "three amendments' textual differences, it is not obviously correct to conclude that their shared phrase, 'the people,' has a single meaning"), *with* United States v. Meza-Rodriguez, 798 F.3d 664, 669-70 (7th Cir. 2015) (concluding that "the people" has a consistent meaning across the First, Second, and Fourth Amendments, in part because of "the advantage of treating identical phrasing in the same way and respecting the fact that the first ten amendments were adopted as a package").

170. *See, e.g.*, *Portillo-Munoz*, 643 F.3d at 441-42 (finding that the phrase "the people" in the Second Amendment is narrower than all persons because it excludes "aliens illegally in the United States"); *Meza-Rodriguez*, 798 F.3d at 670 (adopting the Supreme Court's definition of "the people" as a subset of "persons who are part of a national community" or have "sufficient connection[s]" to the country (quoting *Verdugo-Urquidez*, 494 U.S. at 265)). The Supreme Court first articulated this idea of "the people" being a subset of all persons in *Verdugo-Urquidez*. *See infra* text accompanying note 171-174.

protection for searches of his property in Mexico.[171] In rejecting Verdugo-Urquidez's claim that his Fourth Amendment rights were violated, the Court explained that it was "significant to note that [the Fourth Amendment] operates in a different manner than the Fifth Amendment."[172] The text of the Fourth Amendment, "by contrast with the Fifth and Sixth Amendments, extends its reach only to 'the people.'"[173]

In drawing that contrast, *Verdugo-Urquidez* characterized the term "person" as a "relatively universal term."[174] Thus, reading *Thuraissigiam* to suggest that only noncitizens with "established connections" or who have been lawfully admitted can claim procedural due process rights is at odds with the Court's prior acknowledgement that in covering all "persons," the Fifth Amendment applies broadly. Multiple federal appellate courts have since echoed this analysis. One court interpreted *Verdugo-Urquidez* as "teach[ing] that 'People' is a word . . . of narrower content than 'persons,'"[175] while another found that because "the Fifth Amendment's text does not limit the category of individuals entitled to [its] protection," "[e]xcludable aliens are not non-persons" and thus deserve Fifth Amendment rights.[176]

Thuraissigiam did not purport to address all Fifth Amendment due process rights of noncitizens, but only those procedural due process rights specifically "regarding admission."[177] Thus, the majority would likely concede that even unauthorized noncitizens retain basic constitutional due process protections against torture or imprisonment by the government.[178] However, the decision to create this subcategory of Fifth Amendment procedural due process rights—those regarding admission and the right to remain in the country—is a judicial creation with no obvious grounding in the Constitution.[179] Given that origin,

171. 494 U.S. at 274-75.

172. *Id.* at 264.

173. *Id.* at 264-65.

174. *Id.* at 265-66, 269. For a discussion of the "long and troubled history" of who counts as a "person" under American law, such as in the context of segregation in the United States, see Anne Anlin Cheng, *Ornament and Law*, *in* NEW DIRECTIONS IN LAW AND LITERATURE 229, 239-40 (Elizabeth S. Anker & Bernadette Meyler eds., 2017).

175. United States v. Huitron-Guizar, 678 F.3d 1164, 1168 (10th Cir. 2012).

176. *See* Hernandez v. United States, 757 F.3d 249, 268 (5th Cir. 2014) (second alteration in original) (quoting Lynch v. Cannatella, 810 F.2d 1363, 1374-75 (5th Cir. 1987)).

177. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020).

178. *See* Zadvydas v. Davis, 533 U.S. 678, 704 (2001) (Scalia, J., dissenting) ("I am sure [aliens] cannot be tortured, as well . . . .").

179. Although the power to exclude noncitizens has long been characterized as core to sovereignty, *see Thuraissigiam*, 140 S. Ct. at 1982-83, no provision of the Constitution clearly grants this plenary power. It has instead been implied from both enumerated powers (the Commerce Clause, the Naturalization Clause, the War Power Clause, and the Migration and Importation Clause) and unenumerated powers. T. ALEXANDER

footnote continued on next page

then, prior Supreme Court precedent should be the most informative source in understanding the scope of that subcategory of rights. As described in much more detail in Part I.A above, both the Supreme Court and the government itself have long seemed to understand physical entry to confer procedural due process rights on noncitizens. The Court's statements in cases like *Mezei* that those who have "passed through our gates, even illegally"[180] deserve procedural due process indicate that there is no such additional requirement of established connections or lawful admission to merit those rights.[181] *Thuraissigiam*'s due process holding is hard to reconcile with that precedent unless the decision is read as being narrowly limited to its facts.

B. *Thuraissigiam*'s Reference to "Established Connections"

The majority's suggestion that a noncitizen who has "established connections" can claim procedural due process protections might conversely imply that undocumented noncitizens *without* established connections cannot claim those protections. This stance would be contrary to this Note's proposed approach. Thankfully, the opinion does not explicitly claim that *only* noncitizens with "established connections" can assert due process rights, although that is one plausible reading of his opinion.[182] That is a reading courts should reject. Although a ties-based approach that only confers due process rights on those who have developed connections with the United States may seem appealing, it would lead to a dangerous situation where courts make ad hoc justifications about who deserves basic constitutional rights. Dividing "deserving" from "undeserving" noncitizens could be a pretext for oppressing those who are most vulnerable and most in need of protections.[183] Additionally, *Thuraissigiam* gave little to no guidance about how to define "established connections," even though what is at stake here is the fundamental right to bring a due process challenge against removal from one's country of residence. That fundamental right should not turn on nebulous ties-based tests.

ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON, JULIET P. STUMPF & PRATHEEPAN GULASEKARAM, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 28-32 (9th ed. 2021).

180. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); *see also supra* text accompanying note 70.

181. *See supra* Part I.B.1.

182. *See supra* Part II.B.2.

183. *See* Grace Yukich, *Constructing the Model Immigrant: Movement Strategy and Immigrant Deservingness in the New Sanctuary Movement*, 60 SOC. PROBS. 302, 315-17 (2013) (warning that making such a distinction in the activism context can erode the public image of those who "arguably need[] pro-immigrant actors to reframe their public images even more urgently").

Analogizing to *Verdugo-Urquidez* and to lower courts' interpretations of that opinion provides useful insights about why courts should avoid adopting a concept of "established connections" in their analysis. In *Verdugo-Urquidez*, the Court coined a similar phrase—"substantial connections"—in articulating who could claim Fourth Amendment rights.[184] Lower courts' interpretations of this phrase provide a blueprint for how *Thuraissigiam*'s "established connections" dicta might be construed in lower-court jurisprudence. As explained earlier, the five-Justice majority in *Verdugo-Urquidez* rejected a Mexican national's claim that his Fourth Amendment rights had been violated by a search of his property in Mexico.[185] The opinion suggested that only noncitizens who had "sufficient" or "substantial connections" with the country merited constitutional protections.[186] In explaining that the Fourth Amendment only applies to "the people" (rather than "person[s]"), the majority explained that "the people" only includes those "who are part of a national community or who have otherwise developed *sufficient connection* with this country to be considered part of that community."[187]

Thus, lower courts' struggles to interpret the "sufficient" or "substantial connections" language in *Verdugo-Urquidez* can show us what *Thuraissigiam*'s reference to "established connections" might mean in the future. Of course, *Verdugo-Urquidez* was about the Fourth Amendment and not the Fifth Amendment. But given the similarity between the "sufficient" or "substantial connections" language in *Verdugo-Urquidez* and the "established connections" language in *Thuraissigiam*, and the similar inquiries they ask lower courts to make, there are lessons to be learned.

1. Lower courts' interpretations of *Verdugo-Urquidez*'s "substantial connections" test

As Justice Brennan noted in his dissent in *Verudgo-Urquidez*, the Court's opinion "le[ft] the precise contours of its 'sufficient connection' test unclear" and gave little guidance about "the underlying principles upon which any interpretation of that test must rest."[188] With three decades of hindsight, the legacy of *Verdugo-Urquidez* is uninspiring. Lower courts have struggled to apply nebulous ties-based tests with any consistency—with some even eschewing a case-by-case approach altogether in favor of categorical rules that bar undocumented noncitizens' claims in a way that arguably exceeds and even contradicts *Verdugo-Urquidez*'s dicta.

184. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 270-71 (1990).

185. *See id.* at 261, 274-75.

186. *Id.* at 265, 271.

187. *Id.* at 265-66 (emphasis added).

188. *Id.* at 282, 286 (Brennan, J., dissenting).

A decade ago, immigration scholar D. Carolina Núñez found that lower courts have applied the "substantial" or "sufficient" connections tests in *Verdugo-Urquidez* highly inconsistently.[189] Some courts have found prior legal entrances to be sufficient to establish "substantial" connections. For example, in *Martinez-Aguero v. Gonzalez*, the Fifth Circuit found that someone who had visited the United States multiple times with a valid border-crossing pass demonstrated sufficient connections to merit Fourth Amendment protection.[190] One district court even found that an entry based on a fraudulently obtained tourist visa established sufficient connections for Fourth Amendment protection.[191] In contrast, other courts have declined to find prior legal entrances to be sufficient. For example, another district court concluded that multiple legal visits to family members still did not qualify as "substantial connections."[192] Given the stakes—the ability to claim key constitutional protections—this contradictory and ad hoc case-by-case analysis is concerning.

Even more concerning than the inconsistent case-by-case applications are the courts that have cited *Verdugo-Urquidez* to hold that entire categories of noncitizens can *never* develop "substantial" enough ties to claim Fourth Amendment protections, precisely due to their unlawful or criminal status. As Núñez explains, at least three courts have reached these categorical conclusions.[193] One district court determined that criminal noncitizens could never be part of "the people" in the context of the Fourth Amendment because their status means they cannot be "lawfully employed," are not "entitled to federal or state public benefits," and "can be restricted from voting or running

189. *See* D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 90-91 (2011). Núñez summarized the three approaches of lower courts after *Verdugo-Urquidez* as: (1) finding the case irrelevant to the Fourth Amendment rights of immigrants within the country; (2) requiring case-by-case determinations; or (3) functioning as a categorical bar on Fourth Amendment rights for certain classes of undocumented immigrants. *See id.* at 101-02.

190. 459 F.3d 618, 625 (5th Cir. 2006).

191. Núñez, *supra* note 189, at 106 (citing United States v. Tehrani, 826 F. Supp. 789, 796-97 (D. Vt. 1993)); *Tehrani*, 826 F. Supp. at 793 n.1 (explaining that "[s]uch connections are thus distinguishable from those in *Verdugo-Urquidez* and constitute the type of connections which would vest in aliens the protections afforded by the Fourth Amendment").

192. *See* Núñez, *supra* note 189, at 107-08 (citing Am. Immigr. Laws. Ass'n v. Reno, 18 F. Supp. 2d 38, 59-60, 60 n.17 (D.D.C. 1998)). There, the court applied the *Verdugo-Urquidez* standard even though the issue was whether the plaintiffs possessed Fifth Amendment due process rights. Still, the court reasoned that "there is no indication that either [plaintiff] has developed 'substantial connections' with the United States." *Am. Immigr. Laws. Ass'n*, 18 F. Supp. 2d at 45, 59-60.

193. *See* Núñez, *supra* note 189, at 108-11 (citing United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254 (D. Utah 2003), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004); United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259 (D. Kan. 2008); and United States v. Ullah, No. 04-cr-00030, 2005 WL 629487 (W.D.N.Y. Mar. 17, 2005)).

for office," precluding the establishment of sufficient ties to the country.[194] It is particularly troubling that the court defined "substantial connections" as those that require or presume lawful status, given the circular nature of that inquiry. For example, the court relied in part on the fact that Esparza-Mendoza could not be "lawfully employed,"[195] even though many might consider employment itself—lawful or unlawful—to count as a type of connection to the country. In another case, a court found that all noncitizens who are not legally present are "dangerous or irresponsible" because they have "already violated a law of this country."[196] Another court similarly concluded that even ties to friends and family members in the United States were not sufficient under the "substantial connections" test because of the existence of an illegal entry.[197] Under that interpretation, no noncitizen—even one who had lived in the United States for decades—could claim constitutional rights under a "substantial" or "established connections" test.

Those courts' approaches are startling because they go much farther than the Court's opinion in *Verdugo-Urquidez*, on which they purported to rely. There, the Supreme Court explicitly said it was not deciding whether "illegal aliens *in* the United States" could "be entitled to Fourth Amendment protections," because their situation was different from Verdugo-Urquidez's, who "had no voluntary connection with this country."[198] Yet some of the lower-court cases mentioned above involved noncitizens who were voluntarily in the country, meaning that although *Verdugo-Urquidez* did not clearly apply, those courts applied the dicta from that decision.[199] That subtle expansion of the Court's holding ultimately shows how lower courts have expanded the concept of "sufficient connections" beyond the scope of what was originally envisioned in *Verdugo-Urquidez*.

Finally, in a development that postdates Nuñez's work, courts have begun applying the "substantial connections" test from *Verdugo-Urquidez* in the Second Amendment context because that amendment also contains the phrase "the people" in its text—which was the genesis for the "substantial connections"

194. *See id.* at 109-10 (quoting *Esparza-Mendoza*, 265 F. Supp. 2d at 1269-70).

195. *Esparza-Mendoza*, 265 F. Supp. 2d at 1269-71.

196. Núñez, *supra* note 189, at 110-11 (quoting *Gutierrez-Casada*, 553 F. Supp. 2d at 1267). Although the court in *Gutierrez-Casada* ultimately said that it did not "find *Verudgo-Urquidez* controlling," it did explain that its rationale was persuasive. *Gutierrez-Casada*, 553 F. Supp. 2d at 1265.

197. Núñez, *supra* note 189, at 111 (citing *Ullah*, 2005 WL 629487, at *30).

198. United States v. Verdugo-Urquidez, 494 U.S. 259, 272-73 (1990) (emphasis added).

199. *See, e.g.*, *Gutierrez-Casada*, 553 F. Supp. 2d at 1260, 1265 (discussing a "defendant [who] was found in Shawnee County, Kansas"); *Ullah*, 2005 WL 629487, at *1 (charging an immigrant "with unlawful reentry into the United States").

test in *Verdugo-Urquidez*.[200] In the 2008 decision *District of Columbia v. Heller*, the Court quoted *Verdugo-Urquidez* to explain that the phrase "the people" in the Constitution "unambiguously refers to all members of the political community."[201]

Lower courts have split on whether the Second Amendment's reference to "the people," in light of the Court's decisions in *Verdugo-Urquidez* and *Heller*, includes undocumented noncitizens.[202] The Seventh Circuit found that an undocumented immigrant could claim Second Amendment rights because he had "extensive ties with this country," such as residence for more than twenty years, attendance at public schools, close relationships, and work history.[203] In doing so, it rejected the government's argument that unauthorized noncitizens could never be considered part of "the people."[204]

In contrast, other courts of appeals have accepted that very argument when denying undocumented noncitizens Second Amendment rights. For example, in *United States v. Portillo-Munoz*, the Fifth Circuit cited *Verdugo-Urquidez* in holding that those "who entered and remained in the United States illegally" are not part of "the people" for the purpose of the Second Amendment.[205] The Eighth Circuit followed suit later that year.[206] And just like in the Fourth Amendment context, the Fifth and Eighth Circuits reached those holdings by troublingly concluding that undocumented noncitizens can never be part of "the people." Those decisions and the existence of a circuit split in the Second Amendment context only confirm the ambiguous nature of ties-

200. *See* Pratheepan Gulasekaram, *"The People" of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U. L. REV. 1521, 1522-39 (2010) (discussing the meaning of "the people" in the context of the Second Amendment, as well as some of the issues underlying how to interpret the Second Amendment in light of discussions regarding "the people" in *Verdugo-Urquidez* and *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

201. 554 U.S. at 579-81.

202. Other scholarship has documented the circuit split on this issue. *See, e.g.*, Justin Hay, *The Second Amendment, Undocumented Immigrants, and the Shifting Definition of "People": How the Federal Gun Control Act of 1968 Prevents Undocumented Immigrants from Exercising Second Amendment Rights*, 87 U. CIN. L. REV. 571, 573, 576-81 (2018); Justine Farris, Note, *The Right of Non-citizens to Bear Arms: Understanding "The People" of the Second Amendment*, 50 IND. L. REV. 943, 950-56 (2017); Maria Stracqualursi, Note, *Undocumented Immigrants Caught in the Crossfire: Resolving the Circuit Split on "The People" and the Applicable Level of Scrutiny for Second Amendment Challenges*, 57 B.C. L. REV. 1447, 1464 & n.96 (2016). My goal is not to repeat this material at length, but to explain its relevance in assessing the wisdom of importing a similar requirement into the Fifth Amendment context.

203. United States v. Meza-Rodriguez, 798 F.3d 664, 666, 670-71 (7th Cir. 2015).

204. *See id.* at 671-72.

205. *See* United States v. Portillo-Munoz, 643 F.3d 437, 440-42 (5th Cir. 2011).

206. United States v. Flores, 663 F.3d 1022, 1022-23 (8th Cir. 2011) (per curiam) (adopting the Fifth Circuit's holding in *Portillo-Munoz*).

based tests. There, the same two phenomena in the Fourth Amendment context—inconsistency in ad hoc decisions and sweeping categorical per se rules—are also cropping up as a result of confusion about how to parse a noncitizen's connections to the country.

2. Implications for lower courts interpreting *Thuraissigiam*

The post–*Verdugo-Urquidez* confusion shows that lower courts have interpreted the "sufficient" and "substantial connections" language in *Verdugo-Urquidez*—a case about the Fourth Amendment rights of a Mexican national, on Mexican soil, with no ties to the United States—to take away other constitutional protections from broader categories of noncitizens who *do* have ties to the country. That evolution warns us about the pernicious effects the "established connections" language in *Thuraissigiam* might have in due time. While *Thuraissigiam* is ostensibly only about asylum seekers like Thuraissigiam, sweeping language can easily take on a life of its own in the lower courts. In particular, the courts that have categorically found that undocumented noncitizens can *never* be part of "the people" under *Verdugo-Urquidez* show the potential for dicta to expand and encompass far more fact patterns than the one originally addressed by the Supreme Court.

The aftermath of *Verdugo-Urquidez* is particularly notable because the "sufficient" and "substantial connections" language arguably commanded only a plurality, making its outsized role in future cases even more striking. Many scholars have noted that although five Justices technically signed the majority opinion, Justice Kennedy, in a separate concurrence, explicitly disagreed with the majority's "weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections."[207] In doing so, he rejected the very analysis that justified the majority's focus on "sufficient" or "substantial connections." In contrast, *Thuraissigiam*'s language of "established connections" *was* part of the majority opinion, although it arguably was just dicta at the beginning of the opinion.[208] If anything, we should be even more

207. United States v. Verdugo-Urquidez, 494 U.S. 259, 276 (1990) (Kennedy, J., concurring); *see also* NEUMAN, *supra* note 51, at 107 (explaining that "Justice Kennedy purported to concur in the majority opinion but formulated his reasons quite differently"); Karen Nelson Moore, Madison Lecture, *Aliens and the Constitution*, 88 N.Y.U. L. REV. 801, 836-37 (2013) (describing Justice Kennedy's concurrence as "expressly reject[ing] the Chief Justice's interpretation of the meaning of 'the people' under the Fourth Amendment"); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 1015 (2009) (describing the "reasoning in [Justice Kennedy's] concurrence" as "not consistent with [Chief Justice] Rehnquist's"); Núñez, *supra* note 189, at 102 ("Only four of nine Justices appear to have agreed with [Chief] Justice Rehnquist's 'substantial connections' language.").

208. The language of "established connections" appears in the majority's announcement of the holding at the beginning of the opinion, rather than in the actual portion of the opinion
footnote continued on next page

worried about what lower courts will do with the phrase "established connections," given the clearer mandate for that position than for the language in *Verdugo-Urquidez*.

Instead of a nebulous standard based on ties or "established connections," a bright-line rule that grants procedural due process rights to all noncitizens who have entered the country would be much easier to administer. Thus, courts should adopt the first proposed reading of the opinion by limiting *Thuraissigiam* to its facts and continuing to accept entry as the threshold for procedural due process rights. Where the stakes are so high—the ability to claim a constitutional right—it is hard to justify the level of inconsistency described above. Of course, any standard that grants discretion may result in inconsistent decisions. But such inconsistency is unacceptable given the grave potential outcomes here, such as being unable to bring any constitutional challenge to government action. The many advantages of choosing bright-line rules over flexible standards are already well-documented in the legal literature, including greater clarity, fairness to litigants, and predictability.[209]

Beyond their usual advantages, bright-line rules are preferable to amorphous standards in the context of procedural due process rights for an additional reason. Here, even if all those who entered the territory of the United States enjoyed Fifth Amendment procedural due process rights, courts and judges would still retain significant discretion in conducting removal proceedings. Proponents of more open-ended standards often argue that standards are preferable to rules because they allow for flexibility to account for different fact patterns.[210] In the immigration context, a noncitizen's case rarely ends with a finding that they are entitled to due process. Even if an undocumented noncitizen can claim the protection of the Fifth Amendment, the government action remains subject to balancing under *Mathews v. Eldridge*, and the government can still prevail if it can show why the procedure's benefits outweigh its risks.[211] Under *Mathews*, courts consider and balance three factors in determining whether the provided procedure complies with the Fifth Amendment's due process requirements: (1) the individual's interest at stake; (2) the risk of "erroneous deprivation" based on existing procedures and

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that goes into the procedural due process analysis. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963-64 (2020).

209. *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57-69 (1992) (defining rules and standards and discussing the advantages and disadvantages of both); Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-79 (1989) (making the case for rules).

210. *See* Sullivan, *supra* note 209, at 66-69.

211. *See* Joseph Landau, *Due Process and the Non-citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 881-82, 889-911 (2015) (discussing the "due process revolution" of *Mathews* and its applicability in the immigration context).

the "probative value" of further "procedural safeguards"; and (3) the government's competing interest.[212] In the immigration context, *Mathews* balancing enables courts to conduct individualized inquiries in an area of law where courts often default to announcing categorical rules denying rights, especially when national security interests are at stake.[213] Such balancing thus provides an appropriate framework both for the noncitizen and the government to advance fact-specific arguments and for the court to exercise its discretion in determining whether a violation of due process has occurred.[214] What is at issue here, however, is a *threshold* question of whether a noncitizen can claim procedural due process rights to challenge government action in the first place.

The Court's unwillingness to extend constitutional rights to all those within its borders contrasts with its willingness to use the border as a definitive line for *denying* constitutional rights. In 2020, the Supreme Court declared in *Agency for International Development v. Alliance for Open Society International, Inc.* that "it is long settled" that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution."[215] That same Term, the Court also issued a 5–4 decision in *Hernández v. Mesa*, where it declined to recognize an alleged violation of Fourth and Fifth Amendment rights.[216] In that case, a Border Patrol agent standing on U.S. soil shot and killed Hernández, a 15-year-old Mexican national standing on Mexican soil.[217] There, Hernández's location was critical to the Court's holding that Hernández's parents could not claim a remedy for his injury: No party to the

212. Mathews v. Eldridge, 424 U.S. 319, 323, 334-35 (1976).

213. *See* Landau, *supra* note 211, at 881-82, 894-910 (explaining how *Mathews* balancing has produced stronger constitutional protections for noncitizens when compared to conventional categorical approaches).

214. *See* Tyler, *supra* note 12 (calling the modern due process doctrine "better equipped to take into account how different factors might alter the balance in determining" what due process rights the government must give noncitizens before removing them). For an example of the Supreme Court itself doing this weighing in the immigration context, see Landon v. Plasencia, 459 U.S. 21, 34-37 (1982) (discussing *Mathews* balancing in the context of the litigant's case and ultimately remanding to the court of appeals "to assess the sufficiency" of the process afforded).

215. 140 S. Ct. 2082, 2086 (2020); *see The Supreme Court, 2019 Term—Leading Cases: Constitutional Law—First Amendment—Freedom of Speech—Extraterritoriality*—Agency for International Development v. Alliance for Open Society International, Inc., 134 HARV. L. REV. 490, 490 (2020) (arguing that such a declaration "ignored the important role that ties to the United States have played in determining the scope of noncitizens' constitutional rights" and that "[a]ccordingly, [the case] should not be read to foreclose all extraterritorial constitutional protections for noncitizens with substantial ties to the United States").

216. 140 S. Ct. 735, 739-40 (2020).

217. *Id.*

litigation contested that Hernández's parents would have had a cognizable claim "had the bullet hit Hernández while he was running up or down the United States side of the embankment."[218] Thus, as Justice Ginsburg explained in dissent, the Court denied Hernández's parents' ability to seek relief only because of the "fortuity that the bullet happened to strike Hernández on the Mexican side of the embankment," meaning his rights "turn[ed] upon a happenstance subsequent to the conduct—a bullet landing in one half of a culvert, not the other."[219]

The first time the case came before the Court in 2017, the government urged the Court to apply a bright-line rule and find the Fourth Amendment inapplicable to Hernández because he was outside U.S. territory. It argued that a presumption against granting rights to those abroad had administrability benefits and was better than an "indeterminate approach," which would result in an "open-ended judicial inquiry" based on "the totality of the circumstances."[220] Instead of that open-ended inquiry, then, the government argued that there was a better way to draw the line: the border. Specifically, it explained that "[P]etitioners' approach to extraterritoriality around the border 'devolves into a line drawing game' without principled lines—and that game *'is entirely unnecessary because there is a border between the United States and Mexico.'*"[221] Thus, the government made precisely the point this Note is making here. Just as in Hernández's case, there is no need for lower courts to guess what constitutes "established connections" in the immigration context when the border provides a much more workable and plausible line.[222]

The majority opinion in *Thuraissigiam* understandably pointed out that conferring procedural due process rights upon all those who have entered, whether legally or illegally, may seem counterintuitive. Such a rule would create a "perverse incentive to enter at an unlawful rather than a lawful location," as an undocumented noncitizen would receive more procedural due

218. *See id.* at 756 (Ginsburg, J., dissenting).

219. *See id.*

220. *See* Brief for the United States at 42-45, Hernández v. Mesa, 137 S. Ct. 2003 (2017) (No. 15-118), 2017 WL 104588, at *42-45. Although the government argued in *Hernández* that the Court should follow the approach in *Verdugo-Urquidez*, it was not advocating for the "substantial connections" test; instead, it was citing *Verdugo-Urquidez* for the proposition that Fourth Amendment rights do not apply extraterritorially. *See id.* at 37 n.16, 2017 WL 104588, at *37 n.16.

221. *Id.* at 47, 2017 WL 104588, at *46 (emphasis added) (quoting Hernández v. United States, 757 F.3d 249, 281 (5th Cir. 2014) (DeMoss, J., concurring in part and dissenting in part), *aff'd en banc*, 785 F.3d 117 (5th Cir. 2015), *vacated*, 137 S. Ct. 2003).

222. As discussed in Part I.C above, this Note does not contest the Supreme Court's approval of a ties-based test in cases like *Landon v. Plasencia*. Instead, it argues that *Plasencia*'s approach merely represents an additional, but not necessary, way for a noncitizen to gain constitutional rights. *See supra* notes 99-103 and accompanying text.

process rights than someone who presents at the border for entry.[223] But as one scholar notes, "perverse incentives run both ways."[224] A rule that would insulate the executive from any judicial review of decisions involving undocumented noncitizens would undermine the checks and incentives to comply with governing statutes and procedures, as the government would not be held accountable for violating individual rights.[225]

Additionally, although no line is perfect, a ties-based test would suffer from the many difficulties of measuring a noncitizen's connections that were discussed earlier in this Part. Even if it may seem unfair to grant greater rights to undocumented noncitizens than to those who have not entered, that type of reasoning fails to account for the compelling humanitarian reasons behind people's choices to cross the border without authorization. And despite the *Thuraissigiam* majority's reasonable and practical concern that granting procedural due process rights to all those within the territory of the United States would further encourage unauthorized border crossings, it is unlikely that people's decisions to migrate are driven by minute calculations about the level of procedural due process protections that they might get after entering.[226]

IV. Distinguishing Statutory and Constitutional Procedural Due Process Inquiries

In addition to suggesting that "established connections" might influence one's procedural due process rights, the majority opinion also suggested that lawful admission might be a prerequisite for those rights. If the Court simply meant that those at the *threshold of entry* do not have procedural due process rights with respect to entry, then *Thuraissigiam* does not represent a large departure from prior precedent because that is simply an affirmation of the well-established entry fiction.[227] But if it meant that lawful admission is a prerequisite for *everyone* to claim procedural due process rights with respect to entry, including those who have effected an entry, that would represent a concerning development. This Part explains the problems with that interpretation by using recent experience with the expedited removal process to argue that courts should not conflate the statutory and constitutional due

223. *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982-83 (2020).

224. *See* Kanstroom, *supra* note 81, at 1341-42.

225. *See infra* Part IV.A (discussing the procedural shortcomings of expedited removal).

226. *See, e.g.*, Kirk Semple, *Asylum Seekers Say U.S. Is Returning Them to the Dangers They Fled*, N.Y. TIMES (updated June 27, 2020), https://perma.cc/2JFR-NJE6 (describing the reasons that asylum seekers flee their home countries, including death threats and violence against them and their families).

227. *See supra* notes 88-91 and accompanying text.

process inquiries. It then illustrates the costs of equating those two inquiries by describing the types of due process challenges that would no longer be cognizable under a broad reading of *Thuraissigiam*. Lower courts can resist this conflation while staying true to *Thuraissigiam*'s holding by accepting the decision's application to those who have barely made it inside the border, like Thuraissigiam, but interpreting it not to apply to those who have been within the country for a longer period.

A. *Thuraissigiam*'s Emphasis on Statutory Admission

The broadest and most troubling reading of *Thuraissigiam* would be that noncitizens can claim Fifth Amendment procedural due process rights only if they have been formally admitted to the country. Even "established connections" would be insufficient to confer those rights absent legal admission. As explained earlier, the opinion's repeated references to Congress's plenary power to exclude noncitizens could be read to suggest this view.[228] This reading, however, is even more troubling than the ties-based theory discussed above in Part III. Tying an individual's constitutional rights to the whims of congressional or executive policy undermines the very purpose of having constitutional rights: to act as a check and a safeguard for individual liberties.

If those who have never been formally admitted cannot claim procedural due process rights, millions of undocumented noncitizens have no recourse against government actions to remove them because they were never formally admitted.[229] More broadly, the inability of individuals to enforce their rights removes a key mechanism for ensuring that the government adheres to the law—including guarantees that the government itself has voluntarily promised to provide entrants through statutory provisions. The consistent expansion of expedited removal—the process through which Thuraissigiam was removed—provides a particularly useful example. Expedited removal is an accelerated form of removal with minimal procedural protections that applies to arriving noncitizens who lack proper documentation for entry.[230] First established in 1996, the process confers significantly fewer procedural protections than previously enjoyed, enabling faster removal proceedings.[231]

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228. *See supra* Part II.B.3.

229. *See* T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 241-42 (1983) (explaining that the Court has also rejected a "positivist approach to due process").

230. *See* SMITH, *supra* note 7, at 1-3 (describing the legal framework of expedited removal).

231. *See* Margulies, *supra* note 121, at 413-17 (describing the expansion of expedited removal and the limitations it places on judicial review).

According to its proponents, expedited removal dispenses with "frivolous" asylum claims more efficiently and deters future illegal entry by improving enforcement.[232] But its advantages of speed and ease explain its disadvantages, as well: Under expedited removal, a low-level immigration officer can remove a noncitizen with virtually no judicial review. There is no right to counsel, no right to a formal administrative hearing, and no right to administrative appeal and judicial review.[233] Thus, noncitizens often cannot make even basic legal claims, such as claims that an immigration officer improperly placed them in expedited removal, failed to disclose key facts, or used unlawful procedures and policies.[234] There are limited exceptions to expedited removal, but as the D.C. Circuit recently acknowledged, the protections given to those who qualify "[are] scarcely more involved."[235] Ultimately, the only challenges that a noncitizen subject to an expedited removal order can bring are a habeas petition limited to (1) whether they are actually an "alien" (as opposed to a citizen, for example); (2) whether they were ordered removed; and (3) whether they "can prove by a preponderance of the evidence" that they are a lawful permanent resident, have been admitted as a refugee, or have been granted asylum.[236] Separately, litigants can also bring a constitutional challenge to the expedited removal statute or to its implementing regulations in the U.S. District Court for the District of Columbia within sixty days after the implementation of the challenged section or regulation.[237]

The government initially applied expedited removal only to arriving noncitizens who sought admission at a port of entry, likely in part because of

232. *See* Kanstroom, *supra* note 81, at 1345-46 (quoting ALISON SISKIN & RUTH ELLEN WASEM, CONG. RSCH. SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 16 (2005), https://perma.cc/AHU2-NUU7). For what Kanstroom, *supra* note 81, at 1346, describes as the "the most sustained and sophisticated defense of the program," see generally Martin, *supra* note 52.

233. SMITH, *supra* note 7, at 8 (capitalization altered); *see also* HILLEL R. SMITH, CONG. RSCH. SERV., LSB10336, THE DEPARTMENT OF HOMELAND SECURITY'S NATIONWIDE EXPANSION OF EXPEDITED REMOVAL 2 (rev. 2020), https://perma.cc/CA6U-KK69.

234. *See* 8 U.S.C. § 1252(e)(5) (limiting the scope of judicial review to "whether such an order in fact was issued and whether it relates to the petitioner").

235. *See* Make the Road N.Y. v. Wolf, 962 F.3d 612, 619 (D.C. Cir. 2020) (describing the expedited removal process "for individuals who assert an intention to apply for asylum or a fear of persecution").

236. 8 U.S.C. § 1252(e)(2).

237. *Id.* § 1252(e)(3) (describing "[c]hallenges on [the] validity of the system"). Such challenges are narrow, as they must be against a written procedure or policy and be made within sixty days of its promulgation, rather than from the date the challenged procedure or policy was applied to a particular noncitizen. *Id.*; *see* SMITH, *supra* note 7, at 35 (citing Am. Immigr. Laws. Ass'n v. Reno, 18 F. Supp. 2d 38, 44-47 (D.D.C. 1998)) (explaining that the sixty-day requirement runs from the date of the "implementation of the challenged . . . provision" and not from the date of its specific application).

the severity of the consequences and the limited procedural protections available. In 2004, the government expanded expedited removal to noncitizens who were apprehended within 100 miles of a land border and who had arrived within the last fourteen days, and it piloted that expansion in select portions of the southwestern border.[238] In 2006, the government further expanded expedited removal to apply to within 100 miles of any land or sea border, adding the U.S.–Canada border and the U.S. coasts.[239] In 2017, "President Trump issued an executive order directing the [Department of Homeland Security] Secretary to apply"[240] the expedited removal regime "in his sole and unreviewable discretion."[241] Subsequently, in 2019, the Department of Homeland Security finally expanded expedited removal to its unprecedented statutory limit: to all noncitizens encountered anywhere in the United States who cannot show that they were both lawfully admitted and continuously present in the United States for two years.[242] Thus, under the most recent expansion, even immigrants who have lived in the United States with clean criminal records for up to two years can be removed from the country with little to no review through expedited removal.

This continued expansion of expedited removal raises the question of how far Congress can go in curtailing procedural protections for immigrants who have not lawfully entered. After all, expedited removal is a creature of statute.[243] Although Congress decided to cabin eligibility for expedited removal to those who cannot show two years of continuous presence in the country, Congress easily could have made a different choice (and still could) by applying expedited removal to even more immigrants, such as those who have not been continuously present for four, six, or ten years.[244]

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238. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,877 (Aug. 11, 2004); *see* Ebba Gebisa, Comment, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 573.

239. *See* Gebisa, *supra* note 238, at 573; SMITH, *supra* note 7, at 52.

240. SMITH, *supra* note 7, at 41.

241. *Id.* at 41 n.311 (quoting Exec. Order No. 13,767, 3 C.F.R. 263 (2018)).

242. *See id.* at 41-42.

243. For a discussion of the relationship between statutory interpretation and constitutional law in the immigration context, see Motomura, *supra* note 65, at 549. Motomura describes the inevitable tension in immigration law due to the clash between the unforgiving plenary power doctrine in the immigration context and "phantom norms" that are related to the rights of individuals in other "mainstream" areas of public law. *See id.* at 564-65.

244. *See* Aleinikoff, *supra* note 229, at 241-42 (explaining that Congress has "broad power to decide who may enter and who must leave"). Aleinikoff explains, however, that despite Congress's plenary power, courts must still "independently assess" the constitutionality of "the procedures Congress adopts to carry out those decisions." *Id.*

To read *Thuraissigiam* to mean that lack of formal admission automatically denies someone procedural due process rights means that procedures like expedited removal would be largely insulated from judicial review. By its very definition, expedited removal applies only to those who have not been formally admitted, a determination that is controlled by statute and administrative action.[245] President Trump's expansion of expedited removal was immediately challenged in court on both statutory and constitutional grounds, with one set of plaintiffs claiming that the policy violated the Due Process Clause. Those plaintiffs argued that the expansion violated the due process rights of those "who are apprehended in the interior of the United States (far from the border), and who have lived continuously in this country for extended periods of time."[246] But neither the district court nor the D.C. Circuit reached the constitutional question, as they resolved the case on statutory grounds.[247]

Under a reading of *Thuraissigiam* that denies procedural due process rights to all those who have not been formally admitted, though, such constitutional challenges would never be cognizable. Such an outcome is a concerning possibility, especially given the 11 million undocumented immigrants already in the United States.[248] While some of those undocumented immigrants were initially lawfully admitted (via a nonimmigrant visa, for example), meaning they would be safe even from a broad reading of *Thuraissigiam*, one source estimates that 58% of undocumented immigrants were not formally admitted.[249] If *Thuraissigiam* were interpreted to require formal admission for procedural due process rights, all those people would be stripped of the ability to bring constitutional challenges to proceedings related to their entry or removal, no matter what types of ties they had developed in the country.

Beyond being smart policy, declining to give Congress plenary power over the procedural due process rights of those who have effected an entry would be more consistent with the purpose of the Fifth Amendment. Although the Due Process Clause generated little discussion during the drafting and ratification

245. SMITH, *supra* note 7, at 1-2.

246. *See* Make the Road N.Y. v. McAleenan, 405 F. Supp. 3d 1, 10 n.2 (D.D.C. 2019), *rev'd sub nom.* Make the Road N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020).

247. *See id.* at 25 n.12; *Wolf*, 962 F.3d at 621 n.2 (explaining that the court did not address the pending constitutional claims because the issue was not briefed on appeal).

248. *See supra* note 148 and accompanying text.

249. *See* Robert Warren & Donald Kerwin, *The 2,000 Mile Wall in Search of a Purpose: Since 2007 Visa Overstays Have Outnumbered Undocumented Border Crossers by a Half Million*, 5 J. ON MIGRATION & HUM. SEC. 124, 125 (2017).

of the Bill of Rights,[250] what we do know about the Due Process Clause's origins and purposes further reinforces the importance of keeping the constitutional and statutory inquiries distinct. The Due Process Clause was meant to serve as a check on nonjudicial bodies playing a judicial role in the deprivation of life, liberty, or property. That understanding counsels against complete congressional control over constitutional line drawing, which is what a focus on statutory admission would do in the immigration context. The Due Process Clause was derived from Chapter 29 of the Magna Carta, which provided that "[n]o free man shall be arrested or imprisoned, or disseised or outlawed or exiled or in any way victimized . . . except by the lawful judgment of his peers or by the law of the land."[251] Sir Edward Coke then codified "law of the land"—*lex terrae*—as "due process of law."[252] By its plain terms, *lex terrae* seems to tie due process rights to territory or physical presence. But that term was "remarkably difficult to explain," and Paul Halliday explains that its definition was "so elusive" because it was unclear how to define both "law" and "land."[253] It was unclear whether the "law" encompassed "common law, statute, local customs," and/or equity, and whether the "land" reached far enough to include Ireland or American "plantations."[254] Thus, the phrase "law of the land" does not provide much guidance here.

A broader understanding of the purposes of the Due Process Clause, however, supports the idea that wholesale congressional control over removal—like an extreme expansion of expedited removal—is inconsistent with the clause's values. While there is a robust debate about the original understanding of the Due Process Clause,[255] multiple accounts argue that it

250. Christopher Wolfe, *The Original Meaning of the Due Process Clause*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 213, 220 (Eugene W. Hickok, Jr. ed., 1991).

251. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 596-97 (2009) (quoting Magna Carta, 9 Hen. 3 c. 29 (1225), *reprinted in* RALPH V. TURNER, MAGNA CARTA: THROUGH THE AGES app. at 231 (Routledge 2014) (2003)); Wolfe, *supra* note 250, at 220; *see also* LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 247-48 (1999).

252. *See* Gedicks, *supra* note 251, at 597; Wolfe, *supra* note 250, at 220; *see also* LEVY, *supra* note 251, at 247-48.

253. PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 137, 141 (2010). Although Halliday's work addresses the Suspension Clause, his analysis of the phrase "law of the land" is applicable here as well, given that the Due Process Clause was derived from the same language. *See supra* note 251 and accompanying text.

254. HALLIDAY, *supra* note 253, at 137.

255. *See* Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1675-77 (2012) (describing one group of scholars as believing due process entailed "nothing more than judicial procedure" and the other as believing due process enabled the striking down of legislative acts contrary to norms of "reasonableness, justice, or fairness").

was intended to preserve the separation of powers. Thus, the clause was not a freestanding justification to strike down legislation (i.e., today's substantive due process doctrine), but rather a check against legislation that tried to exercise quintessentially judicial powers. For example, some scholars argue that at the time of its adoption, the Fifth Amendment was understood to bar legislative acts that "exercised judicial power."[256] According to proponents of this theory, figures like Madison, Hamilton, and Jefferson believed that the clause required judicial review of statutes that empowered another branch to deprive someone of rights "without adequate procedural guarantees."[257] Similarly, other scholars argue that a legislative act was not part of the "law of the land" if it either deprived people of procedural rights that were "traceable to the common law" or tried to exercise quintessentially judicial powers.[258]

This view of due process might be interpreted to support the idea that *Thuraissigiam* should not be read as empowering Congress to enact statutes that allow the executive to remove someone without minimum procedural protections—which is arguably what statutes like expedited removal do. Admittedly, undocumented noncitizens may not be due the same amount of process as a legal entrant because of their different status. But if the originalist account of the Due Process Clause is at least partially about separation of powers—a concept that does not rely on the specific identity of the person acted upon—it follows that we should be skeptical of a reading of *Thuraissigiam* that allows the legislature to exercise theoretically uncontrolled judicial power through statutes that virtually eliminate judicial review.[259] Additionally, the fact that the expedited removal statute explicitly provides a mechanism to bring certain constitutional challenges to the statute, even if only in very limited circumstances, further demonstrates that Congress itself likely did not contemplate a full abrogation of judicial review.[260]

B. The Types of Rights and Challenges at Stake

Returning to an entry-based conception of procedural due process rights would enable noncitizens to require the government to guarantee a minimum standard of fairness in expedited removal proceedings. Noncitizens could thus bring challenges to the many demonstrated problems with removal proceedings, such as the lack of translation services, failure of asylum and

256. *Id.* at 1677.

257. *Id.* at 1679.

258. Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1627 (2019) (emphasis omitted).

259. *See also* NEUMAN, *supra* note 51, at 119-25 (explaining why the constitutional rights of noncitizens should serve at least some function in constraining immigration policy).

260. *See supra* note 237 and accompanying text.

immigration officers to provide required information, and prolonged detention that inhibits the ability to obtain counsel.[261] Ultimately, what is at stake is the rule of law and a mechanism to require the government to comply with minimum procedural guarantees.

Lower courts' decisions prior to *Thuraissigiam* help illustrate the types of challenges that could no longer be heard if *Thuraissigiam* were read to deny procedural due process to those who have not been lawfully admitted. For example, in *United States v. Raya-Vaca*, the Ninth Circuit found that a noncitizen who had entered without authorization a day before being found by officials could challenge his expedited removal proceedings under the Due Process Clause due to basic errors.[262] First, the immigration officer did not even tell Raya-Vaca that he could be removed from the country as a result of the proceedings—perhaps the most quintessential example of lack of notice.[263] Second, the government had Raya-Vaca sign papers without letting him read or review them, which violated even the agency's own rules.[264] Finally, the papers themselves had basic typographical errors that obscured their meaning.[265] The government did not even try to argue that the immigration officer followed the proper procedure (likely because there was no colorable argument), leading the court to find that the government's total "failure to contest Raya-Vaca's allegations" supported the finding of a due process violation.[266]

Similarly, in *United States v. Rojas-Fuerte*, the government violated the due process rights of a noncitizen who was found "several miles north" of the southern border and subject to expedited removal.[267] Because Rojas-Fuerte had entered the United States and "was not denied entry," the court observed that he was "entitled to the protections of due process."[268] The Border Patrol agent who put him through the expedited removal process failed to obtain his signature on a form that was the "only document that informs an alien of the reason for his or her inadmissibility."[269] Without such a signature, the court

261. *See* KATHRYN SHEPHERD & ROYCE BERNSTEIN MURRAY, AM. IMMIGR. COUNCIL, THE PERILS OF EXPEDITED REMOVAL: HOW FAST-TRACK DEPORTATIONS JEOPARDIZE ASYLUM SEEKERS 1-3, 20-21, 26 (2017), https://perma.cc/E96C-EM86 (listing some challenges that detainees face during the expedited removal process).

262. 771 F.3d 1195, 1199, 1203-04 (9th Cir. 2014).

263. *Id.* at 1205.

264. *Id.*

265. *Id.*

266. *Id.*

267. No. 18-cr-00347, 2019 WL 1757523, at *1-3 (D. Or. Apr. 19, 2019).

268. *Id.* at *3.

269. *Id.* at *2, *4.

found, there was no guarantee that Rojas-Fuerte was adequately advised of the charges against him, meaning that his due process rights were violated.[270]

A broad reading of *Thuraissigiam* that pins constitutional rights to statutory lines would abrogate cases like *Raya-Vaca* and *Rojas-Fuerte*, as the plaintiffs in those cases had not been formally admitted. But courts have the option to limit *Thuraissigiam* to its facts. If they adopted the position advanced by this Note, they could preserve challenges like the one brought by Raya-Vaca while distinguishing *Thuraissigiam*, as Raya-Vaca had entered and was arguably free from restraint, even if for just a short period of time.[271]

It is hard to understand the full panoply of due process violations that can accompany expedited removal, in part because so many people are summarily removed before they can seek counsel or notify people about any errors.[272] Immigration and Naturalization Service officers often make mistakes due to their heavy workload, as they have very limited time to consider each individual's case.[273] Additionally, problems of racism and bias are at their peak in expedited removal determinations that require quick decisionmaking with limited supervision.[274] Many have already criticized expedited removal at length, and this Note does not aim to repeat those myriad concerns. The important point here is that *Thuraissigiam* could be—but should not, and need not, be—read as precluding constitutional challenges to that procedure.

Perhaps most troubling, the inability of those targeted by expedited removal to mount constitutional challenges would also result in *lawful* immigrants and even U.S. citizens being erroneously ensnared and subjected to expedited removal. While expedited removal technically targets only those who have been in the United States for less than two years, it is difficult to cabin the process given the lack of procedural protections.[275] Expedited removal has also given rise to racial profiling and stops that are arguably intrinsically harmful, even if they do not ultimately lead to one's removal. In just one year under the Trump Administration, over 27,000 citizens were

270. *Id.* at *4-5.

271. *See Raya-Vaca*, 771 F.3d at 1199 (noting that Raya-Vaca was apprehended the day after he entered the United States).

272. *See* Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 232-33 (1999); *see also* Kanstroom, *supra* note 81, at 1349 (explaining that abuses by Customs and Border Protection officials are difficult to uncover "because the victims of such misconduct are often quickly deported under expedited removal").

273. Laplante, *supra* note 272, at 234.

274. *See id.* at 236-38.

275. *See* Neuman, *supra* note 12 (explaining that American citizens have been erroneously subjected to expedited removal because the "weakness of the procedure and the lack of accountability" mean that the process can be applied broadly).

questioned about their legal status by Immigration and Customs Enforcement—"five times more than the last year of the Obama administration"—increasing the risk that lawful permanent residents or even citizens will be erroneously deported through expedited removal, and at the very least, subjecting people to demeaning encounters.[276]

This concern is not mere speculation, as individuals who have lived in the country for more than a decade as well as U.S. citizens have been erroneously deported through expedited removal.[277] In one harrowing example, a U.S. citizen of Jamaican descent was handcuffed by immigration officials when she arrived at John F. Kennedy Airport and was subjected to expedited removal because officials thought she was using a fraudulent passport.[278] Despite having her valid passport and even her birth certificate, officials detained her overnight, shackled her, refused to give her food, and did not let her use the restroom.[279] She was then deported despite having every right to reenter the country.[280] In another example, a U.S. citizen of Mexican descent was subject to expedited removal upon his arrival at Chicago O'Hare Airport.[281] He was deported, and by the time he was able to correct the situation, he had already lost his job and suffered emotional distress.[282] As the Supreme Court has recognized in the adjacent Fourth Amendment context, insufficient procedures designed for noncitizens pose particular problems because they might "diminish the . . . rights of citizens who may be mistaken for aliens."[283] Thus, unfair processes that escape judicial scrutiny can affect far more people than just recent entrants. While lawful noncitizens and citizens can certainly bring legal challenges to vindicate their rights, even if they are successful, they will have already experienced tangible harm.

Conferring procedural due process rights upon all those who have entered the territory of the United States is a valid response to the harms we have seen from the growing expedited removal regime. While there may be concerns about the increased cost and burden on courts from a greater number of due process claims, the position this Note takes—tying due process rights to successful entry—was arguably the status quo until *Thuraissigiam*, and thus is

276. Beth Werlin, Opinion, *The Human Cost of Fast-Track Deportation*, N.Y. TIMES (July 25, 2019), https://perma.cc/TM9C-AJN5.

277. *See* Vanessa Romo, *Trump Administration Moves to Speed Up Deportations with Expedited Removal Expansion*, NPR (July 22, 2019, 5:20 PM ET), https://perma.cc/4BG7-GDPJ.

278. *See* Gebisa, *supra* note 238, at 565.

279. *Id.*

280. *Id.*

281. Laplante, *supra* note 272, at 213.

282. *Id.*

283. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 883-84 (1975).

not an entirely new approach.[284] Such a position would not confer new procedural due process rights on the millions of noncitizens who arrive at, but do not get past, U.S. borders. Regardless of the wisdom of the entry fiction, that doctrine is separate and will still persist.[285]

Even if granting procedural due protections based on entry did cause additional cases to reach the courts, it would not necessarily result in protracted litigation. In many instances, a court may be able to conduct a *Mathews v. Eldridge* balancing test and swiftly determine that no violation of due process has occurred. Under *Mathews* balancing, some noncitizens who have recently arrived and do not have ties to the country will have little chance of prevailing due to a lack of strong interests. Courts may therefore find that such noncitizens nominally have procedural due process rights, but that these rights have not been violated.[286] Granting procedural due process rights, then, is no panacea for noncitizens, who still must demonstrate weighty interests. Indeed, even if the Court had found Thuraissigiam to have constitutional procedural due process rights, his lack of ties to the country likely would have counted heavily against him in *Mathews* balancing, despite his compelling claim for asylum.

The purpose of this Note is not to give a detailed description of the *Mathews* inquiry in the immigration context, but rather to argue that such an inquiry is flexible enough to accommodate any national security or efficiency concerns implicated by granting judicial review. Other scholars, such as David Martin and Peter Margulies, have given in-depth analyses of how the three prongs of *Mathews* balancing (the individual's interest, the risk of error, and the state's interest) might play out with respect to admissions and removals, demonstrating the flexibility of such a test in this context.[287]

If anything, the fact that Thuraissigiam might still have lost even if the Court had granted him procedural due process rights illustrates precisely the strength of the proposed approach, as it shows that procedural due process can accommodate a range of situations. In contrast to Thuraissigiam, immigrants who have lived in the United States without authorization for a long time might benefit greatly from being able to claim procedural due process rights. After all, the Supreme Court itself recognized that "deportation may result in

284. *See supra* Part I.B.1.

285. *See supra* notes 88-91 and accompanying text (discussing the entry fiction).

286. *See supra* notes 210-14 and accompanying text.

287. *See* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 216-34 (1983) (describing the *Mathews* balancing test as applied to different categories of noncitizens); Margulies, *supra* note 121, at 440-49 (describing the types of factors that courts would consider in the admission and expedited removal contexts).

the loss 'of all that makes life worth living'"—certainly a weighty interest.[288] As Henry Hart, Jr., explained in critiquing cases like *Knauff*, "What process is due always depends upon the circumstances, and the Due Process Clause is always flexible enough to take the circumstances into account."[289]

Conclusion

The Supreme Court should not have reached the due process question in *Thuraissigiam* in the first place.[290] Still, given that it did, lower courts now have an opportunity to interpret the opinion, and early signs demonstrate multiple possible directions.[291] The government has wasted no time in arguing for as broad an interpretation as possible, even citing the due process portion of *Thuraissigiam* to argue that undocumented citizens cannot qualify as "inhabitants" for the census—an entirely different context.[292] That citation is just a taste of the many ways the government could interpret the sweeping language in *Thuraissigiam* to dehumanize and further take rights away from immigrants.

Lower courts should take a longer-term view of the relevant precedent and limit *Thuraissigiam* to its narrow facts. As this Note argues, there is room for courts to stay faithful to the case's holding by characterizing it in the way the majority opinion did—as being about an alien who had not yet entered—but declining to extend the case to immigrants who have been in this country for longer than Thuraissigiam. The key to that approach is an affirmation of the arguably long-standing principle that all noncitizens who have entered U.S. territory deserve procedural due process rights, regardless of their legal status. This is the reading that is most consistent with the Fifth Amendment's text, precedent, and history.[293] In adopting this reading, courts can avoid giving life to two ideas in the majority opinion that have significant potential to erode noncitizens' rights: (1) that only those with "established connections" can claim due process rights; and (2) that lawful admission is a prerequisite to claim such protections. If those ideas take root, *Thuraissigiam* could represent an affront not only to asylum seekers' rights, but also to the rights of

288. Bridges v. Wixon, 326 U.S. 135, 147 (1945) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

289. Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1391-93 (1953).

290. *See supra* Part II.A.

291. *See supra* Part II.B.

292. *See* Brief for the Appellants at 3, 36-37, Trump v. New York, 141 S. Ct. 530 (2020) (No. 20-366), 2020 WL 6487939. The Court dodged the merits in this case by ruling on standing instead. *See Trump*, 141 S. Ct. at 536-37.

293. *See supra* Part III.A (text and precedent); *supra* Part IV.A (history).

undocumented noncitizens who have lived in the United States for years, legal permanent residents, and U.S. citizens.[294]

Being forcibly removed from the country one calls home represents a severe use of the government's coercive power. At a minimum, the government should have to provide those facing removal with the opportunity to challenge gross mistakes and unfair proceedings. Of course, even if an immigrant can bring a challenge, the government may still ultimately prevail on the merits of the case. But that is no reason to deprive noncitizens of basic procedural rights. As immigration enforcement becomes increasingly tied to criminal enforcement, the need for these procedural protections in removal proceedings becomes even more critical.[295] Courts have already severely abrogated noncitizens' other fundamental constitutional rights, such as those guaranteed by the Fourth Amendment, effectively treating them as a subclass and inviting racial profiling.[296] Courts should not go down that same path in the Fifth Amendment procedural due process context.

294. *See supra* Part IV.B.

295. *See* Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1573-79 (2010) (describing the increase in the overlap between the criminal and immigration legal systems due to an increase in "migration-related criminal offenses," the severity of "collateral immigration consequences" of convictions, and the level of punishment for immigration offenses).

296. *See id.* at 1603-11.