

DEPORTATION IN THE SHADOWS OF DUE PROCESS: THE DANGEROUS IMPLICATIONS OF *DHS V. THURAISSIGIAM*

Daniel Kanstroom*

The deportation of many thousands of “people who were previously integral members of U.S. society” and who have long “been part of the social fabric of the United States” is—as Beth Caldwell notes—a human rights tragedy of immense proportions that should not be forgotten.¹ However, an ever-expanding array of fast-track, unreviewable, discretionary immigration enforcement mechanisms raise equally compelling—if distinct—concerns. Even as we attend to how “deportation is particularly cruel for people who grew up in the United States,”² we must not acquiesce in the relegation of recent entrants—or, indeed, recent *re-entrants*—to a rightless realm of unreviewable arbitrary enforcement. This is especially true for those fleeing from persecution and other severe harms and for unaccompanied minors.³

The Supreme Court’s approval of such mechanisms in *Department of Homeland Security v. Thuraissigiam*⁴ may affect due process, habeas corpus, and the necessity of judicial review of agency action dangerously and corrosively.⁵ Justice Alito, writing for a 5-4 majority, concluded that neither

* Professor of Law, Thomas F. Carney Distinguished Scholar, Faculty Director, Rappaport Center for Law and Public Policy, and Co-Director, Center for Human Rights and International Justice, Boston College.

1. BETH C. CALDWELL, *DEPORTED AMERICANS: LIFE AFTER DEPORTATION TO MEXICO* 1-2 (2019).

2. *Id.* at 189.

3. *See, e.g.*, *Osorio-Martinez v. Att’y Gen.*, 893 F.3d 153, 176-78 (3d Cir. 2018) (discussing how special immigrant juvenile (SIJ) status reflects alien children’s significant ties to this country and Congress’s determination that such aliens should be accorded important statutory and procedural protections, SIJ designees are entitled to invoke the Suspension Clause and petition the federal courts for a writ of habeas corpus).

4. 140 S. Ct. 1959 (2020).

5. Along with a few other scholars included in the issue, the author signed an amicus brief in support of the Respondent advancing a similar argument. *See* Brief of Amici Curiae Immigr. Scholars in Support of Respondent 1-2 & app. at 2a-3a, *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (No. 19-161), 2020 WL 402610, at *1-2 & app. *2a-3a.

the Suspension Clause⁶ nor the Due Process Clause mandate habeas corpus (or any other) judicial review of a summary government denial of an asylum claim brought by a noncitizen on U.S. soil. As Justice Sotomayor poignantly noted in her dissent, the Court held “that the Constitution’s due process protections do not extend to noncitizens . . . , who challenge the procedures used to determine whether they may seek shelter in this country or whether they may be cast to an unknown fate.”⁷ This precludes any means to ensure the “integrity” of an expedited removal order and “upends settled constitutional law.”⁸ Moreover, it “paves the way toward transforming already summary expedited removal proceedings into arbitrary administrative adjudications.”⁹ As bleak as this is, Justice Sotomayor may actually have understated the dangers of *Thuraissigiam* as its ramifications for the future of habeas corpus are also worrisome.¹⁰

To see why this is so, let us first review certain basics of U.S. exclusion and deportation law, which are still largely governed by a relatively few—and quite venerable—doctrinal decisions of the U.S. Supreme Court. All scholars and practitioners in the field can easily recite the cases and their basic constitutional holdings quickly and colloquially. The so-called “Chinese Exclusion Case”¹¹ located the government’s power to exclude as an “incident of sovereignty” and defined it as essentially immune from meaningful constitutional scrutiny.¹² *Fong Yue Ting v. United States* then accepted this power internally, holding that the power to deport is “as absolute and unqualified, as the right to prohibit and prevent . . . entrance into

6. The Suspension Clause provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” U.S. CONST. art. I, § 9, cl. 2.

7. *Thuraissigiam*, 140 S. Ct. at 1993 (Sotomayor, J., dissenting).

8. *Id.*

9. *Id.*

10. See, e.g., Amanda L. Tyler, *Thuraissigiam and the Future of the Suspension Clause*, LAWFARE (July 2, 2020, 12:31 PM), <https://www.lawfareblog.com/thuraissigiam-and-future-suspension-clause> (citing to *Boumediene v. Bush*, 553 U.S. 723 (2008)) (explaining that *Thuraissigiam* “calls into question several aspects of the Supreme Court’s earlier decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), and more generally signals a more limited vision of the Suspension Clause than *Boumediene* embraced.”). Also of great concern is Justice Kavanaugh’s cavalier and overbroad assertion in *United States Agency for International Development v. Alliance for Open Society International, Inc.*, 140 S. Ct. 2082, 2086 (2020), that “foreign citizens outside U. S. territory do not possess rights under the U. S. Constitution.” Space constraints compel me to defer discussion of this problem.

11. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581, 589 (1889). As Louis Henkin once noted, its “very name is an embarrassment.” *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 29 (1985).

12. *Chinese Exclusion Case*, 130 U.S. at 609.

[this] country."¹³ As to process, the Court in *Ekiu v. United States* held that the fact-based decision of an inspector of immigration that "an alien immigrant" shall not be permitted to land was "final and conclusive."¹⁴

Such bright line constitutional rules were deeply unstable and had to be qualified, at least *within* the United States. Three dissenters in *Fong Yue Ting* had noted this,¹⁵ including Stephen J. Field who had authored the opinion in the *Chinese Exclusion Case*.¹⁶ A major problem was how to reconcile the internal application of absolutist, anti-constitutional "plenary power" doctrine with emerging norms of equal protection and due process represented by cases, such as *Yick Wo v. Hopkins*.¹⁷ One sees the contradictions and the doctrinal tectonic fault lines in *Yamataya v. Fisher*, where Justice Harlan intoned:

[T]his Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.¹⁸

One of the most important such "principles is that no person shall be deprived of . . . liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends."¹⁹ Simply put, *some* procedural due process norms apply to those facing deportation. They are constitutionally protected against "such arbitrary power."²⁰ However, in a caveat for the ages, Justice Harlan left the door open as to "whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed."²¹

13. 149 U.S. 698, 707 (1893).

14. 142 U.S. 651, 663 (1892).

15. See 149 U.S. at 733 (Brewer, J., dissenting); *id.* at 745-46 (Field, J., dissenting); *id.* at 761-62 (Fuller, C.J., dissenting).

16. 130 U.S. at 581.

17. See, e.g., 118 U.S. 356, 373-74 (1886).

18. 189 U.S. 86, 100 (1903).

19. *Id.* at 101.

20. *Id.*

21. *Id.* at 100. Contemporaneously with the Court's infamous "separate but equal" decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court in *Wong v. United States* held on a more substantive constitutional front that the Fifth and Sixth Amendments forbade the imprisonment at hard labor without a jury trial for non-citizens convicted of illegal entry to or presence in the United States. 163 U.S. 228, 241-42 (1896). This bright-line distinction between deportation and punishment drawn by the *Wong* Court masked some quite complex problems beyond the scope of

For more than a century, then, immigration law has continued to grapple with these major constitutional dilemmas (among others):

1. Who is left unprotected by due process norms?
2. What do such norms require?
3. What is the constitutional required role of federal courts in overseeing these norms?

The brevity of this essay precludes analysis of the multifarious situations in which these questions have previously arisen, but we now face a massive fast-track, often arbitrary and dangerous enforcement system that exists in what Beth Caldwell evocatively calls the “shadow of due process.”²²

The Supreme Court had a historic opportunity to shine some light into this shadowy realm. However, the Court substantially missed the mark in *Thuraissigiam*. Although the case does not directly apply to “deported Americans,” its oversights and undertones are extremely troubling for those of us who have long been concerned about the increasing deformatization of deportation proceedings and the concomitant deprecation of constitutional and human rights norms for the noncitizens among us.²³

The issue in *Thuraissigiam* was essentially whether an asylum seeker placed in “expedited removal” proceedings soon after entering the United States could obtain judicial review of an allegedly arbitrary denial of his claim.²⁴ As noted above, U.S. courts have long held that noncitizens on U.S. soil are entitled to due process protections.²⁵ However, the process due to a

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

22. CALDWELL, *supra* note 1, at 17-47; see also Daniel Kanstroom, *Expedited Removal and Due Process: A “Testing Crucible of Basic Principle” in the Time of Trump*, 75 WASH. & LEE L. REV. 1323 (2018); [hereinafter Kanstroom, *Expedited Removal and Due Process*]; Vanessa M. Garza, Comment, *Unheard and Deported: The Unconstitutional Denial of Habeas Corpus in Expedited Removal*, 56 HOUS. L. REV. 881 (2019).

23. See DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012); see also Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 542, 579-82 (2011); ACLU, *AMERICAN EXILE: RAPID DEPORTATIONS THAT BYPASS THE COURTROOM* 10-30 (2014); Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 3 (2014); Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119, 124 (2017); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 193 (2017).

24. 140 S. Ct. 1959, 1963-65 (2020).

25. Although *Shaughnessy v. United States ex rel. Mezei* held that “aliens who have once passed through our gates, even illegally,” possess certain constitutional rights, while “an alien on the threshold of initial entry stands on a different footing,” presence at a port of entry on U.S. soil does not constitute entry into the country. 345 U.S. 206, 212-13 (1953) (“[H]arborage at Ellis Island is not an entry into the United States.”). For due process purposes, a noncitizen at a port of entry “is treated as if stopped at the border.” *Id.* at 215; see also *Leng May Ma v. Barber*, 357 U.S. 185,

“clandestine entrant,” apprehended on American soil, near the border, soon after entry, has not been definitively resolved.²⁶

This constitutional uncertainty has facilitated various informal, fast-track removal mechanisms for many years.²⁷ Such systems raise obvious concerns for those fleeing persecution or severe harm. An influx of people fleeing Cuba and Haiti in the 1980s led to legislative proposals for “summary exclusion,” which sought to “stymie unauthorized migration by restricting the hearing, review, and appeal process for aliens arriving without proper documents.”²⁸ “Summary exclusion” was later instantiated as “expedited removal of arriving aliens” in 1996.²⁹ This new system was first applied only at the border. But it is now also used against some “clandestine entrants.”³⁰ It allows government agents to remove people quickly and, in many cases, completely outside of immigration courts and federal courts.³¹ It drastically restricts process protections, imposes mandatory detention, and essentially eliminates hearing, appeal, and judicial review processes for noncitizens without proper documents. Those “expeditiously removed” are barred from returning for five years.³²

Some habeas review of an expedited removal order is statutorily permitted; but it is extremely limited.³³ Essentially, the statute *deems* certain noncitizens on U.S. soil to be “unadmitted” or, technically, “inadmissible.”³⁴ The 1996 statutes, however, replaced the territorial conceptual dividing line

188 (1958) (noting entry fiction applies to a noncitizen who is “paroled” into the country pending determination of admissibility).

26. *Shaughnessy*, 345 U.S. at 215-16.

27. See generally Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (2004); see also Marc R. Rosenblum, *Shifts in the US Immigration Enforcement System*, 1501 PEREGRINE, 2015, at 2 (“In the twenty-five years before 1996, just 3 percent of all people expelled from the United States were formally removed . . . versus 97 percent who were informally returned.”).

28. See Alison Siskin & Ruth Ellen Wasem, Cong. Rsch. Serv., RL33109, *Immigration Policy on Expedited Removal of Aliens 3* (2005).

29. *Id.*; see also Philip G. Schrag, *A Well-Founded Fear: The Congressional Battle to Save Political Asylum in America* (2000); Mark Hetfield et al., U.S. Comm’n on Int’l Religious Freedom, *Report on Asylum Seekers in Expedited Removal Volume I: Findings & Recommendations 1-2* (2005).

30. See SISKIN & WASEM, *supra* note 28, at 2-3.

31. *See id.* at 1-2.

32. *Id.* at 2; see also *id.* at 4-6 (describing the basics of removal).

33. See MARGARET MIKYUNG LEE, CONG. RSCH. SERV., R43226, *AN OVERVIEW OF JUDICIAL REVIEW OF IMMIGRATION MATTERS 5* (2013).

34. *See id.* at 2, 5. “An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.” 8 U.S.C. § 1182(a)(6)(A)(i).

between exclusion and deportation with the concept of “admission.”³⁵ Those who have been lawfully admitted (i.e., with visas) generally retain formal procedural protections.³⁶ Others, however, may be treated like those denied admission at a port of entry, i.e., summarily. Expedited removal thus has clear constitutional implications. *Where* one stood at the time of arrest has long been constitutionally significant (with some technical exceptions for those at ports of entry).³⁷ Due process norms have protected those who had “passed through our gates, even illegally.”³⁸

Over time, the group subjected to expedited removal has expanded.³⁹ The Trump Administration energetically sought to expand it still further. In July 2019, DHS sought to apply expedited removal,⁴⁰ in its “sole and unreviewable discretion” to noncitizens encountered *anywhere* in the United States—even more than 100 air miles from the border—who have been continuously present for less than two years.”⁴¹ This was temporarily enjoined.⁴² However, such an expansion may ultimately well be permitted.⁴³

35. See generally David A. Martin, Two Cheers for Expedited Removal in the New Immigration Laws, 40 VA. J. INT'L L. 673, 689 (2000).

36. *Id.* at 679-80.

37. See SISKEN & WASEM, *supra* note 28, at 2-3.

38. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

39. See, e.g., Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,924 (Nov. 13, 2002) (expanding expedited removal to noncitizens caught within the United States who had arrived by sea but who had not been physically and continuously present in the country for two years prior to apprehension). In August 2004, expedited removal was further expanded to include noncitizens encountered by an immigration officer within 100 air miles of the U.S. southwest land border, who cannot establish “to the satisfaction of an immigration officer that they have been physically present in the United States continuously for the preceding 14-day period.” SISKEN & WASEM, *supra* note 28, at 2-3. In January 2006, it was further expanded along all U.S. borders and applied to “illegal alien families” apprehended in areas along the nation’s southern, northern, and coastal borders. *Id.* at 6-7.

40. Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019); Memorandum from John Kelly, Sec’y U.S. Dep’t Homeland Sec., to Kevin McAleenan, Acting Comm’r U.S. Customs & Border Prot. et al., 7 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_SImplementing-the-Presidents-Border-Security-Immigration-Enforcement-ImprovementPolicies.pdf (directing DHS to issue “a new Notice Designating Aliens Subject to Expedited Removal”).

41. Designating Aliens for Expedited Removal, *supra* note 40, at 35,412-13.

42. See *Make the Rd. N.Y. v. McAleenan*, 405 F. Supp. 3d 1, 25 n.12 (D.D.C. 2019), *rev’d sub nom.* *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

43. See, e.g., *Make the Rd. N.Y.*, 962 F.3d at 618 (“[B]ecause Congress committed the judgment whether to expand expedited removal to the Secretary’s ‘sole and unreviewable discretion,’ the Secretary’s decision is not subject to review under the APA’s standards for agency decisionmaking. Nor is it subject to the APA’s notice-and-comment rulemaking requirements.” (citation omitted)).

This could subject many hundreds of thousands of people—and in some sense all of us—to expedited removal.

Courts have noted risks and dangers of this system, while bemoaning their self-assessed lack of capacity to do anything about it. As one Court of Appeals noted in 2010, “To say that this procedure is fraught with risk of arbitrary, mistaken, or discriminatory behavior . . . is not, however, to say that courts are free to disregard jurisdictional limitations.”⁴⁴ I have elsewhere explored whether expedited removal is inherently impossible to oversee sufficiently to avoid predictable rights infringements? And whether “by its very nature” it poses “a serious, perhaps unacceptable, risk of dangerous accretions of government agency power?”⁴⁵ This essay considers how the *Thuraissigiam* decision not only fails to grapple with these concerns, but it may also preclude meaningful consideration of them by any court.⁴⁶

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The earliest justifications for summary or expedited removal were, as noted, its efficacy as a border control regime, primarily as to those with “frivolous” asylum claims.⁴⁷ Proponents also argued that it focuses on those with low “stakes.”⁴⁸ Although the system has faced severe criticism virtually from the moment it was first conceived,⁴⁹ most challenges to the system have failed in court. However, the requirements of habeas corpus review and the Suspension Clause were unresolved.⁵⁰

The Third Circuit considered claims brought by twenty-eight families, who sought review of their expedited removal orders based on asylum officers’ “negative credible fear determinations.”⁵¹ They asserted that if the expedited removal statute were not construed to provide for habeas review of such claims, the Suspension Clause would be violated.⁵² The court held

44. *Khan v. Holder*, 608 F.3d 325, 329 (7th Cir. 2010).

45. Kanstroom, *Expedited Removal and Due Process*, *supra* note 22, at 1345.

46. *Cf.* Stephen Manning & Kari Hong, *Getting It Righted: Access to Counsel in Rapid Removals*, 101 MARQ. L. REV. 673, 679 (2018) (arguing that “providing meaningful access to counsel throughout the expedited removal regime—at each of the critical fact-finding and adjudication moments—improves accuracy without substantially impacting speed.”).

47. *See* SISKEN & WASEM, *supra* note 28, at 3, 16 (“Proponents . . . contend that aliens use frivolous appeals to postpone deportation.”); *Martin*, *supra* note 35, at 675 (“[T]o lay the groundwork for more severe sanctions if they do not take the law enforcement hint.”).

48. *See* *Martin*, *supra* note 35, at 701 (relating the location of entry to the low stakes of removal).

49. *See* Kanstroom, *Expedited Removal and Due Process*, *supra* note 22, at 1346 n.124.

50. *See id.* at 1352.

51. *Castro v. U.S. Dep’t of Homeland Sec.*, 835 F.3d 422, 428 (3d Cir. 2016).

52. *Id.* at 444.

that because petitioners were “seeking initial admission to the United States,” they had no right to habeas review under the Suspension Clause even though they had physically entered the United States before being arrested.⁵³ Thus, the court relied upon the *statutory* designation of noncitizens as “seeking admission,” not their actual presence on U.S. soil.⁵⁴ Petitioners “failed” at the first step of the court’s analysis “because the Supreme Court has unequivocally concluded that ‘an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.’”⁵⁵ The Third Circuit panel also thought it important that “[p]etitioners were each apprehended within hours of surreptitiously entering the United States.”⁵⁶ The panel opined that, “we think it appropriate to treat them as ‘alien[s] seeking initial admission to the United States.’”⁵⁷ This was obviously a rather abrupt and summary resolution of a major doctrinal dilemma. Such reasoning would imply that, for noncitizens, “much of the United States is now a Constitution-free zone.”⁵⁸

The Supreme Court denied certiorari in *Castro*.⁵⁹ But another case involved Vijayakumar Thuraissigiam, a Tamil asylum-seeker who had fled Sri Lanka and claimed that he had been abducted and tortured. He was apprehended shortly after crossing the U.S. border and was given an expedited removal order “after the government determined that he did not have a credible fear of persecution.”⁶⁰ How had the government decided this? He had been referred for a “credible fear interview,” but an asylum officer, after a brief interview, determined that he had not established a “credible fear of persecution.”⁶¹ A supervisor approved, and an immigration judge affirmed the finding in a quick, “check-box” decision.⁶² Thuraissigiam, in short, never had a hearing.

He challenged this action through a habeas corpus petition. In a remarkably chilling passage, the district court judge accepted his claims as true:

In 2014, [Thuraissigiam] was approached by men on his farm who identified themselves as government intelligence officers and called [him]

53. *Id.* at 445-46.

54. *See id.* at 424-25.

55. *Id.* at 445.

56. *Id.*

57. *Id.*

58. Kanstroom, *Expedited Removal and Due Process*, *supra* note 22, at 1353.

59. 137 S. Ct. 1581 (2017).

60. *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 287 F. Supp. 3d 1077, 1078-79 (S.D. Cal. 2018), *rev’d*, 917 F.3d 1097 (9th Cir. 2019), *rev’d*, 140 S. Ct. 1959 (2020).

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

62. *Thuraissigiam*, 917 F.3d at 1101.

by his name. [He] was then pushed into a van where he was bound, beaten, and interrogated about his political activities [Thuraissigiam] then endured additional torture before he woke up in a hospital where he spent several days recovering [He] went into hiding in Sri Lanka and India, and then in 2016 he fled the country.⁶³

The court concluded, however, that even with such facts, “strict restraints on [the court’s] jurisdictional reach to review expedited removal orders does not violate the Suspension Clause.”⁶⁴ Thuraissigiam’s habeas petition was thus dismissed and his motion for an emergency stay of removal was denied.⁶⁵

On appeal, Thuraissigiam’s essential argument was that “noncitizens have *always* been able to test the legality of their removal through habeas.”⁶⁶ If the district court were to be affirmed, he argued, it would be the first time that either the Ninth Circuit or the Supreme Court “permitted a noncitizen who entered the country to be removed without judicial scrutiny of the legality of the removal.”⁶⁷

The Ninth Circuit agreed.⁶⁸ However, in a remarkable 7-2 decision, the Supreme Court has now held that Thuraissigiam has no constitutional right to habeas corpus review.⁶⁹ The majority opinion by Justice Alito, joined by four others, held that the statutory limitations on habeas review do not violate the Suspension Clause.⁷⁰ As importantly, and seemingly gratuitously, Alito opined that the case presents no problem under the Due Process Clause of the Fifth Amendment.⁷¹

Essentially, Alito concluded that because Thuraissigiam had requested more than mere release from detention (the “historical core of the habeas writ”) and because he was a noncitizen seeking “initial admission,” he had no Constitutional due process rights beyond what might be granted by statute.⁷² Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg,

63. *Thuraissigiam*, 287 F. Supp. 3d at 1078.

64. *Id.* at 1082.

65. *Id.* at 1083-84 (declaring final orders).

66. Opening Brief of Appellant at 17, *Thuraissigiam v. U.S. Dep’t of Homeland Sec.*, 917 F.3d 1097 (9th Cir. 2019) (No. 18-55313).

67. *Id.*

68. See *Thuraissigiam*, 917 F.3d at 1119 (“Therefore, we hold that § 1252(e)(2) violates the Suspension Clause as applied to Thuraissigiam, although we do not profess to decide in this opinion what right or rights Thuraissigiam may vindicate via use of the writ.”).

69. *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1964 (2020).

70. See *id.*

71. *Id.* at 1964.

72. *Id.* at 1963-64, 2009.

concurring on narrower grounds.⁷³ Justice Sonia Sotomayor, joined by Justice Elena Kagan, strongly dissented.⁷⁴

Alito viewed Thuraissigiam’s petition as a claim for “the right to enter or remain in a country or to obtain administrative review potentially leading to that result.”⁷⁵ He also concluded that the writ of habeas corpus had to be construed as it existed in 1789. On this view, it does not and “has never encompassed respondent’s claims” because writ was used only to secure release from detention.⁷⁶ Thus, habeas could not include Thuraissigiam’s claims to vacate his expedited removal order and to be permitted to apply for asylum with more procedural protections. There are more things wrong with the majority’s reasoning than can be fully explored in a brief essay. But it clearly seems to contradict the fairly recent precedents of *INS v. St. Cyr* and *Boumediene v. Bush*.⁷⁷

St. Cyr had also involved a habeas petition, filed by a lawful permanent resident, who faced deportation after pleading guilty to a criminal charge.⁷⁸ At the time of his criminal conduct and of his plea, he would have been eligible for a discretionary “Section 212(c)” waiver of deportation.⁷⁹ His removal proceedings, however, began after the statutory repeal of Section 212(c), retroactively.⁸⁰ The Attorney General thus asserted that *St. Cyr* was no longer eligible to apply for a waiver and, in effect, had no defense to deportation.⁸¹

The Supreme Court ruled, first, that statutes had not eliminated jurisdiction to review *St. Cyr*’s habeas petition.⁸² The Suspension Clause meant that “some ‘judicial intervention in deportation cases’ is unquestionably ‘required by the Constitution.’”⁸³ As I noted in 2002, the

73. See *id.* at 1988 (Breyer, J., concurring) (“I agree that enforcing [statutory review] limits in this particular case does not violate the Suspension Clause’s constitutional command.”).

74. See *id.* at 1993 (Sotomayor, J., dissenting).

75. *Id.* at 1969 (majority opinion). The conflation of “enter” and “remain” is striking, as these claims have historically been treated quite distinctly. See *id.* at 1969.

76. *Id.* at 1963 n.12. Justice Clarence Thomas, also concurring, wrote that the “founding generation viewed the privilege of the writ of habeas corpus as a freedom from arbitrary detention.” *Id.* at 1985.

77. See 533 U.S. 289 (2001); 553 U.S. 723 (2008).

78. *St. Cyr*, 533 U.S. at 292-93; see also Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002) [hereinafter Kanstroom, *St. Cyr or Insincere*].

79. See *St. Cyr*, 533 U.S. at 293.

80. *Id.* at 293.

81. See *id.*

82. *Id.* at 314.

83. *Id.* at 300 (quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953)).

implications of the *St. Cyr* decision were profoundly important.⁸⁴ The Court had affirmed, first, that “*habeas corpus* remains available to challenge executive detention of citizens and aliens alike;” and second, that “complete preclusion of judicial review of questions of law relating to non-citizens facing deportation would present, at the very least, a ‘serious constitutional question.’”⁸⁵

However, I was quite concerned at the time, and I am even more concerned now that the *St. Cyr* Court had not articulated a clear constitutional holding.⁸⁶ Rather, the Court, following the precedent it set in *Calcano-Martinez v. INS*, relied upon constitutional avoidance interpretation: that constitutional “concerns can best be alleviated by construing the jurisdiction-stripping provisions of that statute not to preclude aliens such as petitioners from pursuing habeas relief pursuant to § 2241.”⁸⁷

In *Thuraissigiam*, Justice Alito held that *St. Cyr* “does nothing” because it merely reaffirmed conclusions drawn from 1789-era habeas cases: that the writ “provided a vehicle to challenge all manner of detention by government officials” and that “the writ could be invoked by aliens already in the country who were held in custody pending deportation.”⁸⁸ This is a parsimonious and patently incorrect reading of *St. Cyr*. As Justice Sotomayor correctly noted, both *St. Cyr* and *Boumediene* indicate that perfect consistency with pre-1789 cases is neither possible nor required.⁸⁹ The *St. Cyr* court had “simply asked, at a far more general level, whether habeas jurisdiction was historically ‘invoked on behalf of noncitizens . . . in the immigration context’ to ‘challenge Executive . . . detention in civil cases.’”⁹⁰ Indeed, the *Boumediene* Court had noted that a “[d]iligent search by all parties reveal[ed] no certain conclusions’ about the relevant scope of the common-law writ in 1789.”⁹¹

Alito’s narrow interpretation of *Somerset v. Stewart*⁹² is also noteworthy. As Lord Mansfield had issued a habeas writ that prevented the removal of a slave to Jamaica,⁹³ the analogy to *Thuraissigiam* is clear. Alito, however,

84. See Kanstroom, *St. Cyr or Insincere*, *supra* note 78.

85. *Id.* at 413.

86. *See id.*

87. 533 U.S. 348, 351 (2001).

88. 140 S. Ct. 1959, 1981 (2020).

89. *Id.* at 1998-99 (Sotomayor, J., dissenting).

90. *Id.* at 1998 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302, 305 (2001)).

91. *Id.* (alterations in original) (quoting *Boumediene v. Bush*, 553 U.S. 723, 746 (2008)). Justice Alito cavalierly dismissed the relevancy of *Boumediene* because it “[wa]s not about immigration at all.” *Id.* at 1981 (majority opinion).

92. (1772) 98 Eng. Rep. 499 (K.B.).

93. *Id.* at 510.

argued that the petitioner had been allowed to stay in England not “due not to the [habeas] writ issued . . . but to English law regarding entitlement to reside in the country,” which differed significantly from contemporary immigration statutes.⁹⁴ To say the least, this casual reading overlooks the broad implications of Lord Mansfield’s decision in light of prior rulings and powerful politico-legal controversies of the time.⁹⁵ Without being too “presentist” about it, we ought to consider that Alito is essentially holding that had positive English law *not* permitted the slave to stay, then it would have been appropriate, indeed perhaps required, for Lord Mansfield to acquiesce in a forced return to brutal slavery. Whatever one might say about an eighteenth-century analysis of that type, surely it is not acceptable in a constitutional system with basic due process and other human rights protections.

It is true, however, that, unlike Thuraissigiam, St. Cyr had entered and established lawful permanent residence in the United States.⁹⁶ As we have seen per *Yamataya*,⁹⁷ this could make a significant difference for due process purposes. The government argued its merits brief that Thuraissigiam was properly classified as “an alien seeking initial admission” because he was a clandestine entrant with no real ties to the United States and was quickly apprehended twenty-five yards from the U.S.-Mexico border.⁹⁸ In what may turn out to be an especially portentous and pernicious aspect of the majority opinion, Justice Alito wrote that individuals—even on U.S. soil—who seek initial admission to the United States do not have due process rights beyond what the statute confers.⁹⁹ This seems to ignore numerous precedents and much dicta.

Alito also analogized Thuraissigiam’s claim to that rejected by the Court in 2008 in *Munafv. Geren*.¹⁰⁰ That case involved two American citizens who were accused of committing crimes in Iraq.¹⁰¹ They had filed *habeas* petitions to block their transfer from U.S. custody to the custody of the Central Criminal Court of Iraq.¹⁰² The court denied habeas relief because, according to Alito, the *Munaf* petitioners had essentially wanted the United

94. *Thuraissigiam*, 140 S. Ct. at 1973.

95. See CHRISTER PETLEY, *WHITE FURY: A JAMAICAN SLAVEHOLDER AND THE AGE OF REVOLUTION* 150 (2018).

96. *INS v. St. Cyr*, 533 U.S. 289, 293 (2001).

97. See 189 U.S. 86, 98 (1903).

98. Brief for the United States at 17, *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (No. 19-161), 2019 WL 6727092, at *17.

99. See *Thuraissigiam*, 140 S. Ct. at 1980-81.

100. 553 U.S. 674 (2008).

101. *Id.* at 681, 683.

102. *Id.* at 682.

States to protect them from criminal prosecution in Iraq.¹⁰³ However, as Justice Souter had noted in concurrence in *Munaf* (joined by Justices Breyer and Ginsburg, both of whom also concurred in *Thuraissigiam*¹⁰⁴), the *Munaf* Court had reserved judgment on an “extreme case in which the Executive has determined that a detainee [in US custody] is likely to be tortured but decides to transfer him anyway.”¹⁰⁵ Souter added that he “would extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it.”¹⁰⁶ Moreover, Souter noted (correctly in my view) that, “if the political branches did favor transfer it would be in order to ask whether substantive due process bars the Government from consigning its own people to torture.”¹⁰⁷ As the Court had long held, “where federally protected rights [are threatened], it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”¹⁰⁸

The *Thuraissigiam* dissenters—Sotomayor and Kagan—strenuously disagreed with Alito’s view of the relief sought by *Thuraissigiam*’s *habeas* petition.¹⁰⁹ Justice Sotomayor highlighted how, “[a]t bottom, respondent alleged that he was unlawfully denied admission under governing asylum statutes and regulations.”¹¹⁰ She noted that *Thuraissigiam* *did*, in fact, ask “to be freed from wrongful executive custody.”¹¹¹ He had already spent two years in immigration detention and would be detained again were his expedited removal order to be executed.¹¹² The fact that such release might *also* require admission into the United States or additional asylum procedures did not mean it was outside the scope of the habeas writ’s historical purpose. Moreover, she argued that even the 1789-era cases show that the habeas writ had long included claims such as those brought by *Thuraissigiam*.¹¹³ The writ “did not free [the] slave so much as it protected him from deportation.”¹¹⁴

103. *Thuraissigiam*, 140 S. Ct. at 1970-71.

104. *Id.* at 1988 (Breyer, J., concurring).

105. *Munaf*, 533 U.S. at 706 (Souter, J., Ginsburg, J., and Breyer, J., concurring).

106. *Id.*

107. *Id.*

108. *Bell v. Hood*, 327 U.S. 678, 684 (1946).

109. *Thuraissigiam*, 140 S. Ct. at 1994-95 (Sotomayor, J., dissenting).

110. *Id.* at 1994.

111. *Id.* at 1996.

112. Brief for Respondent at 30, *Dep’t of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (No. 19-161), 2020 WL 3534476, at *30.

113. *See, e.g., Somerset v. Stewart*, (1772) 98 Eng. Rep. 499, 503 (K.B.).

114. *Thuraissigiam*, 140 S. Ct. at 1999, 2003 (Sotomayor, J., dissenting) (alteration in original) (quoting PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 175 (2010)) (arguing that *Munaf* was inapplicable because it had involved the rights of sovereign nations, interfering with military operations, and the requested use of habeas to avoid extradition.)

The majority and dissent differed on many other important interpretive points that are beyond the scope of this essay, including the correct understanding of cases from the so-called the “finality era” (from 1891 to 1952 when statutes generally precluded judicial review of immigration enforcement) in which courts grappled with how to determine when review was *constitutionally* required.¹¹⁵ Most fundamental to this disagreement was *Ekiu*, in which a Japanese woman was detained because an immigration inspector found that she was likely to become a “public charge.”¹¹⁶ She filed a habeas petition, arguing that if the statute had in fact granted exclusive, unreviewable authority to the inspector to decide her right to enter then it would be unconstitutional.¹¹⁷ The *Ekiu* Court held that the inspector’s decision was “final and conclusive,” and that this was constitutional.¹¹⁸

In *Thuraissigiam*, Alito highlighted that the *Ekiu* Court “did not hold that the Suspension Clause imposed any limitations on the authority of Congress to restrict the issuance of writs of habeas corpus in immigration matters.”¹¹⁹ The dissenters, however, noted that *Ekiu* and other finality-era decisions had *construed* the immigration statute to allow judicial review of legal challenges.¹²⁰ The reason was that review of legal questions was “constitutionally compelled.”¹²¹ Sotomayor thus wrote that *Ekiu* explicitly stated that “[a]n alien immigrant . . . prevented from landing [in the United States] by any [executive] officer . . . and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus *to ascertain whether the restraint is lawful*.”¹²² Sotomayor also cited the 1953 case of *Heikkila v. Barber*, in which the Court had construed the then-operative 1917 statute as “preclud[ing] judicial intervention in deportation cases *except insofar as it was required by the Constitution*.”¹²³ Alito had viewed *Heikkila* as irrelevant because it was not a habeas case.¹²⁴ This, however, seems to ignore the Court’s recitation of the well-accepted idea that the Constitution *must* require “some ‘judicial intervention,’” at least for extreme or egregious cases.¹²⁵ If habeas—as required by the Suspension Clause—is not the mechanism of last

115. *Id.* at 2004-06 (majority opinion).

116. *Ekiu v. United States*, 142 U.S. 651, 662 (1892).

117. *Id.* at 661.

118. *Id.* at 663.

119. *Thuraissigiam*, 140 S. Ct. at 1977.

120. *Id.* at 2005 (Sotomayor, J., dissenting).

121. *Id.*

122. *Id.* (alterations in original) (emphasis added) (quoting *Ekiu*, 142 U.S. at 660).

123. *Id.* at 2007-08 (emphasis added) (quoting *Heikkila v. Barber*, 345 U.S. 229, 234-35 (1953)).

124. *Id.* at 1980 (majority opinion).

125. *Id.* at 1981 (quoting *INS v. St. Cyr.*, 533 U.S. 289, 300 (2001)).

resort, then what would be? Alito wrote that the fundamental principle that the political branches have plenary authority over the admission or exclusion of immigrants “would be meaningless if it became inoperative as soon as an arriving alien set foot on U. S. soil.”¹²⁶ To this one might respond that constitutional rights would be meaningless if the government may define people by statute to be outside of the United States even when they are physically present.

Alito analogized clandestine entries to ports of entry where noncitizens generally cannot invoke due process rights.¹²⁷ Thuraissigiam, he opined, stood “on the threshold of initial entry.”¹²⁸ However, as Sotomayor noted, the so-called “entry fiction” is rightly a limited one: even though an airport is strictly speaking on United States soil, a port of entry is different from being unrestricted on U.S. soil.¹²⁹ Thuraissigiam was past any port of entry and “was actually within the territorial limits of the United States.”¹³⁰ He thus had due process rights as must we all while on U.S. soil. Where Alito’s logic would stop is “hard to say.”¹³¹ If “[t]aken to its extreme . . . [it] would permit Congress to constitutionally eliminate all procedural protections for any noncitizen the Government deems unlawfully admitted and summarily deport them.”¹³²

This is hardly a trivial concern. Indeed, one is not heartened by Justice Alito’s rather callous and snarky observation that although “respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka.”¹³³ If read broadly, *Thuraissigiam*, then, could leave noncitizens in expedited removal to the tender mercies of government agents who, we have seen time and again, routinely ignore statutory and regulatory requirements.¹³⁴

When seen in this light, the concurrence of Justices Breyer and Ginsburg appears as a valiant, if perhaps tragic, attempt to limit the implications of Alito’s reasoning.¹³⁵ Breyer unfortunately agreed that the Suspension Clause

126. *Id.* at 1982.

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

128. *Id.* at 1963-64. *But see* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 213 (1953) in which the Supreme Court permitted the use of a habeas writ to challenge exclusion.

129. *Thuraissigiam*, 140 S. Ct. at 2012 (Sotomayor, J., dissenting).

130. *Id.*

131. *Id.* at 2013.

132. *Id.*

133. *Id.* at 1970 (majority opinion); *see also Ex parte D’Olivera*, 7 F. Cas. 853, 854 (C.C.D. Mass. 1813) (No. 3,967) (releasing sailor to a ship).

134. *See* Kanstroom, *Expedited Removal and Due Process*, *supra* note 22, at 1341.

135. One is reminded of the constitutional avoidance reasoning of Breyer’s majority opinion in *Zadvydas v. Davis*, 533 U.S. 678, 696-97 (2001).

was not implicated as to *Thuraissigiam*, noting “that the constitutional floor set by the Suspension Clause here cannot be high.”¹³⁶ The availability of habeas relief, he continued, “need not be as extensive” as it might be for people with stays of longer duration in the United States.¹³⁷ He wondered, “What review might the Suspension Clause assure, say, a person apprehended years after she crossed our borders clandestinely and started a life in this country?”¹³⁸ As we have seen, this is not inconsistent with Justice Harlan’s caveat in *Yamataya*,¹³⁹ though it does seem contradicted by later precedents that relied more on presence itself than on ties.¹⁴⁰ Also, it is not entirely clear how Breyer means to distinguish the basic *availability* of habeas review from its “scope.”¹⁴¹ His major point, though, is that habeas corpus is an “adaptable remedy,” and the “precise application and scope” of the review it guarantees may change “depending upon the circumstances.”¹⁴² This is a position—about the *nature* of due process in various settings—that many have advocated over the years.

It is more difficult to understand Breyer’s assertion that “Congress may, consistent with the Suspension Clause, make unreviewable” *Thuraissigiam*’s claims because they are essentially questions of “fact” rather than questions of law or the application of law to fact.¹⁴³ As Sotomayor correctly notes, this is an odd position in that even such conclusions of fact “should not have foreclose[d]” *Thuraissigiam*’s “ability to bring them [before a court] in the first place.”¹⁴⁴ Breyer’s model raises the question of *who* determines whether a claim is one of fact or law and at what stage in proceedings does that take place?

In sum, the potential implications of *Thuraissigiam* are extremely significant: for millions of noncitizens among us and for our understanding of the essential protections of habeas corpus and judicial review against arbitrary or discriminatory government action. Ultimately, we are now left to wonder how noncitizens can “ensure the integrity of an expedited removal order . . . [that] is not subject to any meaningful judicial oversight as to its

136. *Thuraissigiam*, 140 S. Ct. at 1990 (Breyer J., concurring).

137. *Id.*

138. *Id.* at 1989.

139. See *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903).

140. See, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976); see also *Thuraissigiam*, 140 S. Ct. at 2012 (Sotomayor, J., dissenting) (“[T]he Court has since determined that presence in the country is the touchstone for at least some level of due process protections.”).

141. *Thuraissigiam*, 140 S. Ct. at 1989 (Breyer J., concurring).

142. *Id.* at 1989 (quoting *Boumediene v. Bush*, 553 U.S. 723, 779 (2008)).

143. *Id.* at 1990 (Breyer J., Concurring).

144. *Id.* at 1996 (Sotomayor, J., dissenting).

substance.”¹⁴⁵ The line between those with rights and the rightless seems to be moving ever further inward and ever further towards those with even longer stays than *Thuraissigiam* had in the United States.¹⁴⁶ This is a dangerous, worrisome trend.¹⁴⁷ As Henry M. Hart noted many years ago, “courts [have] a *responsibility* to see that statutory authority was not transgressed, that a reasonable procedure was used . . . [and] that human beings were not unreasonably subjected, even by direction of Congress, to an uncontrolled official discretion.”¹⁴⁸ We must remain attentive to how expedited removal will inevitably cause serious errors and dangerous deprivations of rights.¹⁴⁹ Especially in light of its Trumpian expansion, it invites—indeed it tends to incentivize—transgressions of statutory authority and uncontrolled discretion by government agents. Such shortcuts by law enforcement have a dangerous metastatic tendency. As Justice Sotomayor noted in a related context, this is “lawlessness . . . basically saying that we’re not a country of law, that we’re a country of arbitrariness.”¹⁵⁰ Even Justice Stephen J. Field, author of the infamous *Chinese Exclusion Case*, once wrote that “[t]he contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain.”¹⁵¹

145. *Id.* at 1993.

146. *See, e.g.*, *Make the Rd. N.Y. v. Wolf*, 962 F.3d 612 (D.C. Cir. 2020).

147. One should note, however, a rather puzzling and oblique footnote to the majority opinion that might seem to offer hope against the worst imaginable abuses:

Whatever may be said about the concurrence’s hypotheticals, it is possible to imagine all sorts of abuses not even remotely related to unauthorized executive detention that could be imposed on people in this country if the Constitution allowed Congress to deprive the courts of any jurisdiction to entertain claims regarding such abuses. If that were to happen, it would no doubt be argued that constitutional provisions other than the Suspension Clause guaranteed judicial review. We have no occasion to consider such arguments here.

Thuraissigiam, 140 S. Ct. at 1975 n.21.

148. *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1390 (1953) (emphasis added).

149. *See* Kanström, *Expedited Removal and Due Process*, *supra* note 22 at 1341; *see also* 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, 409 (2020) (arguing before the Court’s *Thuraissigiam* decision in favor of “review that ensures independence, absence of arbitrary decision-making, and fundamental fairness, but is more deferential than the error-correction approach.”).

150. Transcript of Oral Argument at 8, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018) (No. 15-1204), 2017 WL 4517127, at *8.

151. *Wong v. United States*, 163 U.S. 228, 242-43 (1896).