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MADISON LECTURE

ALIENS AND THE CONSTITUTION

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Beginning with this nation's founding and continuing today, courts and political leaders have grappled with difficult questions as to the proper treatment of aliens—those individuals either living here or interacting with the government, but not bearing the title of "U.S. citizen." In the annual James Madison Lecture, Judge Karen Nelson Moore explores the protections afforded to aliens by our Constitution, tracing those protections and their limitations across the many disparate legal contexts in which questions regarding aliens' constitutional rights arise. Although the extent to which aliens possess constitutional rights varies with the closeness of their ties to this country, she explains that this single variable cannot account for the many nuances and tensions in federal jurisprudence relating to aliens' constitutional rights. Closeness, after all, can be measured across multiple dimensions: immigration status, physical proximity to the United States (or to its borders), lawfulness of presence, and allegiance to the country.

Judge Moore first tackles the complicated meaning of alienage, discussing its conceptual definition separately with respect to the text of the Constitution, immigration law, and national security. She then considers the extent to which the Equal Protection Clause of the Fourteenth Amendment limits the government's ability to draw distinctions between different classes of aliens. Possible differential treatment among classes of aliens presents complex constitutional questions that remain unresolved, particularly as those questions relate to the treatment of aliens unlawfully present in this country. The rights of this group are the most in flux: These aliens' unauthorized presence in the country, combined with their close ties to the political community, makes them difficult to fit into existing legal categories.

 An earlier version of this text was delivered as the James Madison Lecture of the New York University School of Law on October 16, 2012. I am particularly grateful for the outstanding assistance of three of my law clerks: Christina Prusak, N.Y.U. '10, Sarah Tallman, and Will Thomas. I am honored to have been selected as a Madison Lecturer by Professor Norman Dorsen and Dean Ricky Revesz and express my deep appreciation to them for this opportunity.

The criminal procedure rights of aliens under the Fourth, Fifth, and Sixth Amendments are also considered, followed by a discussion of aliens' due process rights with respect to civil litigation, immigration proceedings, and alien-enemy detention. Judge Moore highlights those areas at the outer reaches of current doctrine—the extraterritorial application of constitutional protections and the extent of executive power to combat terrorism. She articulates themes present in constitutional jurisprudence as it relates to aliens, providing a broad-lens view of this vast and complicated area of law.

INTRODUCTION

What rights are afforded to aliens by the founding document for a nation of immigrants? One tends to focus on the Constitution's relevance to the citizens for whom it was primarily drafted to govern and protect,[1] but also important is the extent to which the Constitution affords its protections to aliens. Courts and political leaders alike must grapple with difficult questions as to the proper treatment of millions of individuals either living here or interacting with the government, but not bearing the title of "U.S. citizen." The process of formulating answers to these difficult questions requires an articulation and refinement of shared conceptions of "civil liberty," "national purpose," and identity as a nation.[2] As these are focal points of this lecture series, there is no more perfect forum and, frankly, no more timely occasion for exploration of this important topic.[3]

Today's discussion is motivated by three overarching questions: What rights do aliens have under the Constitution? When and in what ways does it offend the Constitution to afford aliens different treatment than citizens? Are all aliens entitled to an identical set of constitutional rights? By exploring these questions, this Article makes two broad points.

First, as James Madison's writings on the Bill of Rights appear to have anticipated, aliens have rights under the Constitution. This is, in itself, remarkable and an important defining feature of our national identity: That this is a country that has long recognized such rights, and does so to this day, is something to be celebrated.

Second, those rights afforded to aliens are not without limitation. Rather, the extent to which aliens possess constitutional rights varies

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[1] *See* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9, 13 (1990) ("Because we generally view the Constitution as establishing our national community, it seems reasonable to understand the document as primarily concerned with the members of the national community, that is, citizens.").

[2] *See* Harold H. Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 88 (1985) ("The way a government—any government—treats its alien inhabitants, be they permanent residents, nonimmigrants, or undocumented aliens, has moral, political, and constitutional dimensions.").

[3] *James Madison Lectures*, N.Y. UNIV. SCH. OF LAW, http://www.law.nyu.edu/academics/fellowships/haysprogram/LitigationandLectures/JamesMadisonLectures/index.htm (last visited Apr. 16, 2013) ("The Madison Lectures . . . are designed to enhance the appreciation of civil liberty and strengthen the sense of national purpose.").

with the closeness of their ties to this country.[4] Yet this simple statement connecting the scope of an alien's constitutional rights to his or her ties to the United States masks endless complications. Closeness, after all, can be measured across multiple dimensions: immigration status, physical proximity to the United States (or to its borders), lawfulness of presence, and allegiance to the country. Moreover, judicial consideration of these dimensions occurs in wholly distinct legal contexts—be it a criminal prosecution, an immigration hearing, or a habeas proceeding—which further complicates the inquiry. Thus, there are instances in which rulings in one area of law may be in tension with, or may even contradict, rulings in another area.

Nowhere are different concepts of closeness on more prominent display than in the treatment of aliens who are present in the United States without authorization. Many so-called "unauthorized aliens" are, despite their unauthorized status, like citizens insofar as they have lived in the United States for years, have extensive ties to local communities, and are parents of U.S. citizens.[5] The tension between this extensive community integration and the original unlawful entry evokes strong emotions and divided viewpoints.[6] Should those who have remained in the country for years and have developed substantial ties to the community be afforded robust constitutional rights, despite their unauthorized presence? Or should this underlying unlawfulness limit them to only minimal constitutional protections? Meanwhile, as part of the War on Terror, courts continue to grapple with the rights due to alien detainees held abroad and at Guantanamo Bay. At the forefront of both immigration and national security, then, sit concerns about whether constitutional guarantees extend beyond the nation's territorial borders, and the way the Constitution treats

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[4] As the Supreme Court once put the point: "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society." Johnson v. Eisentrager, 339 U.S. 763, 770 (1950); *see also* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly.").

[5] Throughout history and case law, several terms have been used to identify this class of individuals: illegal aliens, undocumented aliens, unlawful aliens, unlawfully present aliens, and unauthorized aliens. Following the recent practice of the Supreme Court, *see* Arizona v. United States, 132 S. Ct. 2492 (2012), this Article uses the term "unauthorized alien."

[6] *See* Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 111–13 (2011) (analyzing competing visions of a "nation-of-laws" and a "nation-of-immigrants").

these noncitizens has increasing relevance to the operation of government at every level—federal, state, and local.[7]

Not all classes of aliens are afforded identical constitutional rights. Further, different legal considerations and analyses apply to each specific right. Thus, this Article addresses several constitutional rights separately. Part I provides a brief taxonomy of the ways in which aliens are distinguished from citizens and the ways in which different classes of aliens are distinguished from each other. It addresses the concept of alienage separately with respect to the text of the Constitution, immigration, and national security, because each complicates one's understanding of alienage; it then considers the ways that the Equal Protection Clause of the Fourteenth Amendment constrains the categories that the government may permissibly draw. Part II considers aliens' constitutional criminal procedure rights, touching on both the rights attendant to the criminal process under the Fifth and Sixth Amendments as well as the right to be free from unauthorized governmental intrusion under the Fourth Amendment. Part III discusses aliens' due process rights with respect to civil litigation, exclusion and removal through immigration proceedings, and legal claims of alien enemies detained by the U.S. government. Finally, this Article concludes by providing some unifying observations and suggestions for further exploration of this important topic.

I
Concepts of Alienage

In order to consider what rights the Constitution affords aliens, one first needs to understand how aliens are distinguished from citizens and how different classes of aliens are distinguished from each other. The purpose of this Part is to establish some working knowledge of alienage as it is understood across three settings: the text of the Constitution, immigration, and national security. This Article then addresses what limits the Fourteenth Amendment's Equal Protection Clause places on these line-drawing efforts. After addressing which class of individuals the term "alien" picks out, this Article turns in Parts II and III to the particular rights afforded.

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[7] *Cf.* Tamra M. Boyd, *Keeping the Constitution's Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 Stan. L. Rev. 319 (2001) (emphasizing the importance of making alienage jurisprudence consistent across legal contexts, for example, federal immigration law and domestic state law, given the increasing population of resident aliens in American society).

A. A Taxonomy of Aliens in Three Contexts

Determining the extent of an alien's constitutional rights presupposes some concept of alienage. The first source to consider in exploring such a concept is, as always, the Constitution itself. The Constitution acknowledges the existence of aliens twice: The Naturalization Clause of Article I anticipates that there will be foreign citizens (namely, those who wish to enter and/or join the United States), and Article III, Section 2 specifically mentions suits between "a State, or the Citizens thereof, and foreign States, Citizens or Subjects" as a basis for federal subject-matter jurisdiction.[8] Further, the Constitution provides additional insight into alienage through the manner by which it identifies different classes of individuals. The Constitution variously refers to the following categories of individuals: a "natural born Citizen";[9] a "Citizen" or "Citizens";[10] "the people" or "the People";[11] a "Person" or "Persons";[12] and specific individuals, such as "the Owner"[13] and "the accused."[14] References to citizens appear overwhelmingly in eligibility requirements for political office,[15] and in the various guarantees of voting rights.[16] By contrast,

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[8] U.S. CONST. art. I, § 8, cl. 4; U.S. CONST. art. III, § 2, cl. 1. Article III, Section 2 has been limited by the Eleventh Amendment, which protects states from being sued directly by their own citizens, citizens of another state, or citizens of a foreign state. The Eleventh Amendment does nothing to disturb federal courts' jurisdiction over suits between American citizens and foreign citizens or subjects.

[9] U.S. CONST. art. II, § 1, cl. 5.

[10] The original Constitution refers to citizens eleven times. U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3; U.S. CONST. art. IV, § 2, cl. 1. Chief Justice Rehnquist has argued that this quantity alone is a remarkable fact "in a political document noted for its brevity." Sugarman v. Dougall, 413 U.S. 634, 651 (1973) (Rehnquist, C.J., dissenting). The Eleventh, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments also refer to "citizens" or "Citizens," with the last four all specifying the "[t]he right of citizens."

[11] The specific expression "right of the people" appears in the First, Second, and Fourth Amendments. Additional references to "the People" appear in the Preamble and Article I, Section 2, clause 1. The Ninth, Tenth, and Seventeenth Amendments refer to "the people."

[12] "Person" and "Persons" appear throughout the Constitution; there are twenty-two references in the original document, plus another four to "persons" or "person" in the Bill of Rights, and twenty-three in the subsequent Amendments.

[13] U.S. CONST. amend. III.

[14] U.S. CONST. amend. VI.

[15] A notable exception here is the Privileges and Immunities Clause, which states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

[16] The fact that the right to vote is now constitutionalized in terms of citizenship is interesting given the history of aliens' voting rights. In a break from British common-law traditions, aliens were often afforded the privilege of voting by the various states prior to the Civil War. *See generally* Virginia Harper-Ho, Note, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQ. 271, 275 (2000) (noting that the right to political participation was tied to property ownership as well as

the Bill of Rights makes no mention of citizens; instead, it focuses on persons (and specific categories of persons) and the people. Some have suggested that this silence in the Bill of Rights speaks volumes about the proper understanding of aliens' rights under the Constitution.[17] The argument maintains that conscious avoidance of the word "citizen" conveys the drafters' intention that the rights defined in the Bill of Rights extend beyond those with citizen status.[18]

This account of how the Constitution extends its protections beyond its citizens seems consistent with James Madison's understanding. Madison reasoned:

> [I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws, than they are parties to the Constitution; yet it will not be disputed, that as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage.[19]

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race and residence, affording many aliens the opportunity to participate in elections). However, today the right to vote is understood as a defining feature of citizenship in light of the Nineteenth and Twenty-Sixth Amendments. *See* Aleinikoff, *supra* note 1, at 12–13 ("Indeed, most Americans would probably recognize the possession of political rights as the most significant difference between aliens and citizens."); *id.* at 22 ("If citizenship plays any coherent role in our constitutional scheme, it is to designate the holders of certain political rights.").

[17] *See, e.g.*, *id.* at 22 ("When read in this manner, the Constitution reflects quite a different theory of membership. Rather than seeing citizens as the general case and aliens as the special case (the outsider), we can understand the document as being primarily about 'persons'—a category that includes aliens and citizens as subsets."); *see also* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 368 (2003) ("Because the Constitution expressly limits to citizens only the rights to vote and to run for federal elective office, equality between non-nationals and citizens would appear to be the constitutional rule."). *But see* J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 485 (2007) (rejecting this inference and arguing that "[v]iewed as a whole, the Constitution is not a globalist document").

[18] Unsurprisingly, there is historical evidence that in fact there was disagreement among the various political factions regarding what rights, if any, aliens should be entitled to under the Constitution. *See* Cole, *supra* note 17, at 371 n.18 ("The debate that accompanied the enactment and ultimate demise of the Alien and Sedition Acts suggests that there was in fact substantial disagreement about the status of foreign nationals' rights in the early years of the republic, at least in a time of crisis."). For discussion of this disagreement, see GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 52–63 (1996).

[19] Cole, *supra* note 17, at 371 (quoting 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (Taylor & Maury eds., 2d ed. 1836)). Professor Cole has suggested that Madison's view was informed by an understanding of "the Bill of Rights . . . not as a set of optional contractual provisions enforceable because they were agreed upon by a group of states and extending only to the contracting parties, but as inalienable natural rights that found their provenance in God." *Id.* at 372. For further discussion of Madison's conception of

Further, the idea that "persons" and "the people" identify a broader class of individuals than citizens—a class that would necessarily encompass aliens—is borne out in the Supreme Court's interpretation of "the people" in *United States v. Verdugo-Urquidez*.[20] The Court's decision in *Verdugo-Urquidez* concerned an alien's access to Fourth Amendment protections, and is discussed at length *infra* Part II.B.2. For now, it is enough to note that in this context, a plurality led by Chief Justice Rehnquist declared that the expression "'the people' seems to have been a term of art employed in select parts of the Constitution" that extends certain rights to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[21] By contrast, that same plurality suggested that "person" is a "relatively universal term" that applies more broadly.[22] Extending this reading, one might conclude that the Constitution grants citizens a broad array of rights; that specific rights under the First, Second, and Fourth Amendments apply to some class of people that includes, but is not limited to, citizens; and that the Fifth, Sixth, and Fourteenth Amendments apply to an even broader class. This Article will show that this formulation holds true at a superficial level, though there remains ample room for nuance.

There is more to say, however, in the taxonomy of alienage. These categories are briefly introduced here, because they are discussed in more detail throughout the Parts that follow. Congress has created specific categories of aliens in immigration, where it is concerned with those aliens who are seeking or have sought entry to,

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"constitutional equality," see Cass R. Sunstein, *Madison and Constitutional Equality*, 9 HARV. J.L. & PUB. POL'Y 11 (1986).

[20] 494 U.S. 259 (1990); *see also* District of Columbia v. Heller, 554 U.S. 570, 579–81 (2008) (discussing the wide scope of those included in the term "the people," in contrast to other terms mentioned in the Constitution, such as the militia and citizens, which capture a narrower class of individuals). Professor Neuman has argued in favor of this reciprocity-based notion of aliens' constitutional rights and dubbed it the "municipal law" model of aliens' constitutional rights. *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 913 (1991). He explains, however, that "[t]his linkage of obligations and rights does not necessarily guarantee the full package of constitutional rights[;] . . . [The] municipal law approaches recognize that certain rights may have been reserved to particular categories of persons or places." *Id.* at 919.

[21] *Verdugo-Urquidez*, 494 U.S. at 265; *see also* United States v. Huitron-Guizar, 678 F.3d 1164, 1168 (10th Cir. 2012) ("*Verdugo-Urquidez* teaches that 'People' is a word of broader content than 'citizens,' and of narrower content than 'persons.'").

[22] *Verdugo-Urquidez*, 494 U.S. at 269 (arguing that aliens cannot have broader Fourth Amendment rights than they do Fifth Amendment rights, because "[i]f such [a limitation] is true of the Fifth Amendment, which speaks in the relatively universal term of 'person,' it would seem even more true with respect to the Fourth Amendment, which applies only to 'the people.'").

residence in, and/or citizenship of the United States (as opposed to aliens who do not visit the United States and have no intention of entering). The Immigration and Nationality Act (INA) classifies aliens as either immigrants or nonimmigrants.[23] Immigrant aliens are those lawfully admitted aliens who have permission to remain permanently in the United States and, eventually, to seek citizenship.[24] In modern parlance, these aliens are often referred to as "lawful permanent residents" or "green card holders."[25] Nonimmigrant aliens are those who have permission to be present temporarily in the United States, usually for a specified purpose, and include, for example, those who hold temporary visas to study or to work in the United States.[26] The INA initially distinguished aliens who have already entered U.S. territory from those attempting to enter but have not yet successfully done so; this distinction is still relevant today. In addition, Congress has distinguished admissible aliens from inadmissible ones since 1996.[27] Increasingly in the national discourse, there is discussion regarding aliens deemed inadmissible by virtue of their unauthorized entry into the United States.

Distinct from the immigration setting is the national-security setting. This country has a tradition of differentiating alien enemies from alien friends;[28] Madison himself appeared to have recognized the importance of such a distinction.[29] Of course, the term "enemy" does not cleanly divide citizens from aliens—citizens can be enemies too. Nevertheless, alien enemies appear to be subject to their own limited jurisprudence. Thus, in 1798 Congress passed the Alien Enemy Act, which allows for the apprehension, restraint, and removal of alien enemies at the order of the President, and which remains in force

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[23] 8 U.S.C. § 1101(15) (2006); MICHAEL A. SCAPERLANDA, IMMIGRATION LAW: A PRIMER 39 (2009).

[24] David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 93–94 (2002). Immigrants are, however, still vulnerable to deportation or removal—most frequently in connection with the commission of crimes—making their status nevertheless distinct from that of citizens, for whom banishment is no longer an accepted punishment. *Id.*

[25] *Id.* at 93.

[26] SCAPERLANDA, *supra* note 23, at 39–40.

[27] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48, and 50 U.S.C.).

[28] *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) ("[O]ur law does not abolish inherent distinctions . . . between citizens and aliens, nor between aliens of friendly and of enemy allegiance, nor between resident enemy aliens who have submitted themselves to our laws and nonresident enemy aliens who at all times have remained with, and adhered to, enemy governments.").

[29] *See* NEUMAN, *supra* note 18, at 58–59.

today.[30] The rights of alien enemies are especially salient today in the context of detainees captured during the War on Terror.

In summary, alienage can be considered on at least three levels. There is the constitutional setting, which makes scant mention of aliens but implies some protection for them in the way it distinguishes citizens, persons, and the people. There is the immigration setting, which further classifies aliens according to their eligibility to remain, the legality of their entry, and their location. And there is the national-security setting, which provides an overlay to the immigration and constitutional settings and which may impact the extent to which an alien's rights are more limited than those of a citizen.

B. Equal Protection and Alienage

The Constitution does more than identify categories of individuals. The Fourteenth Amendment restricts the government's ability to create and discriminate against categories of individuals. Accordingly, rounding out this taxonomy of alienage requires consideration of how the Equal Protection Clause constrains distinctions drawn along alienage lines. Discussion of equal protection also provides a natural segue into the discussion of what other constitutional rights are afforded to aliens, as it is the first right that was clearly and widely recognized on behalf of aliens.[31]

1. Distinctions Between Citizens and Aliens

The Fourteenth Amendment provided a key foundation for aliens' constitutional rights by establishing that no state shall "deny to *any person* within its jurisdiction the equal protection of the laws."[32] In the germinal case of *Yick Wo v. Hopkins*, the Supreme Court

[30] An Act Respecting Alien Enemies (Alien Enemy Act), ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24 (2006)). For a fuller discussion of the Alien Enemy Act, see *infra* notes 299–300 and accompanying text.

[31] Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 ARIZ. ST. L.J. 1135, 1157 (1996); *see also* Neuman, *supra* note 20, at 940 ("[N]o case before the Civil War gave the Court occasion to hold that aliens were possessors of constitutional rights" in large part because "the Bill of Rights applied only to the federal government, while the regulation of aliens was carried out largely by the states.").

[32] U.S. CONST. amend. XIV, § 1 (emphasis added). Aleinikoff suggests that the use of "person" rather than "citizen" is "most dramatic" in the Fourteenth Amendment insofar as that Amendment "begins with a definition of citizenship," and then frames the right to equal protection in terms of "person" rather than "citizen." Aleinikoff, *supra* note 1, at 21. Indeed, the first clause of Section 1 of the Fourteenth Amendment constitutionalized the principle of birthright citizenship, thereby overturning the Supreme Court's determination in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), that freed slaves were not citizens. For scholarship discussing birthright citizenship in the United States, particularly as it was inherited from British common-law roots, see Jonathan C. Drimmer, *The Nephews of*

recognized that this reference to "any person" included aliens as well as citizens.[33] *Yick Wo* involved a challenge to a state ordinance regulating the operation of laundry facilities that was enforced only against Chinese immigrants.[34] In striking down the statute, the Court concluded that though the statute was "fair on its face," it was "applied and administered by public authority with an evil eye and an unequal hand" against Chinese immigrants.[35] As a result, the Court concluded, the state ordinance violated the Equal Protection Clause of the Fourteenth Amendment.[36]

Decades later, the Supreme Court would return to *Yick Wo* and apply strict scrutiny to state-imposed distinctions based on alienage.[37] Justice Blackmun,[38] writing for a majority in *Graham v. Richardson*, explained that the application of strict scrutiny was warranted because aliens are "a prime example of a 'discrete and insular minority.'"[39] In the aftermath of *Graham*, the Court struck down under strict scrutiny several state restrictions on aliens' employment opportunities: membership in the Connecticut bar,[40] employment with the New York civil

Uncle Sam: The History, Evolution, and Application of Birthright Citizenship in the United States, 9 GEO. IMMIGR. L.J. 667, 667–99 (1995).

[33] 118 U.S. 356 (1886).

[34] *Id.* at 368–69.

[35] *Id.* at 373–74.

[36] *Id.* at 369–70.

[37] *See* Graham v. Richardson, 403 U.S. 365, 372 (1971). Prior to the emergence of strict scrutiny jurisprudence, the Court had applied a "special public interest doctrine" to delineate when it was acceptable for states to impose differences based on alienage. However, this doctrine was eroded in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), and ultimately it was replaced by the strict scrutiny regime in *Graham*. *See also* Cabell v. Chavez-Salido, 454 U.S. 432, 437–38 (1982) (describing the erosion of both the public-private distinction and the "special public interest" doctrine).

[38] Justice Blackmun authored many of the alienage equal protection opinions of this era. For a detailed account, see generally Koh, *supra* note 2. Koh argues that Justice Blackmun consistently voted in recognition of robust equal protection rights for aliens, but that "the coalition of Justices that . . . voted with him . . . gradually eroded" over time. *Id.* at 52.

[39] *Graham*, 403 U.S. at 372 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938)). Koh suggests that *Graham* is remarkable insofar as the equal protection argument was not the focus of the alien appellees' arguments; the appellees had focused instead on preemption as the grounds for striking down the law. Koh, *supra* note 2, at 58–60. Indeed, the Court did in some respects address preemption-related concerns, and commentators have stated that, ironically, this provided a hook for future decisions affording more leniency to alienage distinctions imposed by the federal government. Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1106 (1994).

[40] *In re* Griffiths, 413 U.S. 717, 722 (1973) ("Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is important that a State bear a heavy burden when it deprives them of employment opportunities.").

service,[41] participation in the engineering profession,[42] and service as a notary public.[43] The Court even struck down a New York statute that barred resident aliens not intending to become U.S. citizens from qualifying for state financial aid for higher education.[44]

However, this strict scrutiny review of distinctions based on alienage did not always apply.[45] The Supreme Court carved out a "public function" exception to the application of strict scrutiny.[46] The Court established that, provided there is a rational basis for doing so, states may exclude aliens from participating in political or governmental functions—specifically, important public functions that go to the heart of community governance—when significant public interests are at stake.[47] In applying this public function exception, the Court

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[41] Sugarman v. Dougall, 413 U.S. 634 (1973) (striking down under strict scrutiny a New York civil service law requiring that permanent positions of the competitive state civil service be held by citizens).

[42] Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 602–06 (1976) (applying strict scrutiny to strike down a Puerto Rico statute requiring an applicant for registration as a licensed engineer to be a U.S. citizen).

[43] Bernal v. Fainter, 467 U.S. 216 (1984) (striking down under strict scrutiny a Texas statute requiring notaries to be U.S. citizens).

[44] Nyquist v. Mauclet, 432 U.S. 1, 12 (1977) ("Resident aliens are obligated to pay their full share of the taxes that support the assistance programs. There thus is no real unfairness in allowing resident aliens an equal right to participate in programs to which they contribute on an equal basis.").

[45] Indeed, as early as 1927, the Supreme Court upheld under rational basis review a Cincinnati ordinance that limited the issuance of pool hall licenses to citizens. Clarke v. Deckebach, 274 U.S. 392, 397 (1927). The Court explained: "Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification." *Id.* at 396 (internal citations omitted). Similar language appears in the Court's later equal protection decisions. *See, e.g.*, Foley v. Connelie, 435 U.S. 291, 295 (1978) ("It would be inappropriate, however, to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny,' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.'" (quoting *Nyquist*, 432 U.S. at 14 (Burger, C.J., dissenting))).

[46] *See* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 736–37 (1996) (discussing the "public function" exception to strict scrutiny as rooted "in an exclusionary theory of the political community" as opposed to the Court's prior "special public interest doctrine[, which] had its foundations in economic protectionism by the state").

[47] *See Bernal*, 467 U.S. at 220 ("[T]he 'political function' exception . . . applies to laws that exclude aliens from positions intimately related to the process of democratic self-government."); *see also* Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) ("The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition."); *Foley*, 435 U.S. at 297 ("The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens."). Scaperlanda challenges the logic of this strain of jurisprudence, arguing that "[i]f the Court seriously considers aliens as members of a discrete and insular minority who are entitled to

has upheld under rational basis review state statutes limiting alien employment in a state police force,[48] as peace officers,[49] and as public school teachers.[50]

Some scholars further suggest that, in addition to the public function exception, the Supreme Court practically applies lesser scrutiny to federally imposed alienage distinctions.[51] The argument maintains that because the federal government has "plenary power"[52] over immigration regulation, its decisions to create distinctions based on alienage are afforded more deference.[53] State statutes, on the other

greater judicial protection, the level of judicial scrutiny should not be dependent on the nature and strength of the government's interest." Scaperlanda, *supra* note 46, at 738.

[48] *Foley*, 435 U.S. at 297 (upholding a New York statute limiting police force to citizens because "the police function is essentially a description of one of the basic functions of government").

[49] *Cabell*, 454 U.S. at 447 ("[F]rom the perspective of the larger community, the probation officer may symbolize the political community's control over, and thus responsibility for, those who have been found to have violated the norms of social order.").

[50] Ambach v. Norwick, 441 U.S. 68, 75–76 (1979) ("Public education, like the police function, fulfills a most fundamental obligation of government to its constituency." (internal quotation marks omitted)).

[51] *See, e.g.*, Hiroshi Motomura, *The Rights of Others: Legal Claims and Immigration Outside the Law*, 59 DUKE L.J. 1723, 1733 (2010) ("Together, *Graham* and *Diaz* establish that equal protection doctrine limits both federal and subfederal governments, but the federal government has greater power than the states to classify by immigration and citizenship status.").

[52] For a discussion of the Court's plenary power jurisprudence, establishing broad federal capacity to regulate immigration, see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1984); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

[53] *See* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 628 (2008) ("[W]hereas state distinctions between citizens and noncitizens are subject to strict scrutiny, such distinctions drawn by the federal government are subject to only rational basis review."); *see also* Martin, *supra* note 24, at 87 ("The Court also retreated from any suggestion, which might have been derivable from *Graham*, that the federal government would also have to provide compelling justification for differential treatment of aliens, even in realms, such as the design of welfare programs, where states were thus constrained."). *But see* Hampton v. Mow Sun Wong, 426 U.S. 88, 101 (1976) ("We do not agree, however, with the petitioners' primary submission that the federal power over aliens is so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."). Some suggest that this principle is more nuanced, turning on whether the imposed distinction is related to immigration regulation or some other federal interest more generally. *See* Scaperlanda, *supra* note 46, at 733; *see also* Martin, *supra* note 24, at 87–88 ("But the Court still manifested skepticism of the federal government's use of alienage distinctions if they could not be sufficiently tied to the regulation of immigration or naturalization."). *But see* Anna C. Tavis, Note, *Healthcare for All: Ensuring States Comply with the Equal Protection Rights of Legal Immigrants*, 51 B.C. L. REV. 1627, 1648 (2010) (explaining that challenges to restrictions on aliens' access to federal benefits under the 1996 Personal Responsibility and Work Opportunity Reconciliation Act generally were unsuccessful in limiting the federal government's power over purely economic—as opposed to immigration-specific—regulation).

hand, are more vulnerable to invalidation because there is no overriding federal interest to justify the imposed differences.[54] Such an analysis is used to explain the Court's decision in *Mathews v. Diaz*,[55] which "rejected a challenge to a federal statute that denied eligibility for Medicare supplemental insurance programs to aliens who were permanent residents and had been in the United States for less than five years."[56] Justice Stevens concluded for a unanimous majority that "Congress . . . has no constitutional duty to provide *all aliens* with the welfare benefits provided to citizens" and that "it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence."[57] Several commentators have suggested that the Court would have struck down as unconstitutional similar legislation if it had been enacted by a state.[58]

While there is support for this federal-exception theory in practice, it remains unclear whether the Supreme Court has explicitly adopted this doctrine as a part of its constitutional jurisprudence.[59]

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[54] *See, e.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420–21 (1948) (striking down a California statute that prohibited aliens who were ineligible for citizenship from obtaining licenses to fish off the California coast); Truax v. Raich, 239 U.S. 33, 41–43 (1915) (holding that a provision of the Arizona Constitution limiting the alien workforce to no more than twenty percent violated the Equal Protection Clause); *see also Hampton*, 426 U.S. at 100–01 (observing that national interests might justify a federal restriction on aliens that would not be upheld if imposed by a state). A body of literature also discusses the vulnerability of alien-aimed state statutes to invalidation on preemption grounds. *See, e.g.*, Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179 (1994); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994); Rodríguez, *supra* note 53, at 621–22.

[55] 426 U.S. 67 (1976).

[56] Maltz, *supra* note 31, at 1167.

[57] *Diaz*, 426 U.S. at 82–83.

[58] *See, e.g.*, Bosniak, *supra* note 39, at 1105 ("Since the federal government is constitutionally conferred with the power to regulate matters of immigration and naturalization, . . . courts must yield to its decisions regarding the treatment of aliens. States . . . enjoy no such constitutional power; when states discriminate against aliens, therefore, courts must apply equal protection analysis full force."); Motomura, *supra* note 51, at 1738 ("But even for lawful permanent residents, an alienage-based equal protection challenge to a properly adopted federal requirement of citizenship was impossible to win, according to *Diaz*."). Professor Bosniak argues further:

> *Graham* is fundamentally an equality case: It emphasizes aliens' personhood, . . . and (implicitly) their functional identity with citizens in virtually all areas of state life. On this basis, *Graham* imposes a substantial burden of justification on states that choose to discriminate against them. *Mathews*, in contrast, bypasses the issue of aliens' equal personhood entirely and focuses instead on the nation's interest in regulating national community membership.

Bosniak, *supra* note 39, at 1109.

[59] *Compare Diaz*, 426 U.S. 67 (rejecting an equal protection challenge to conditioning of federal benefits to resident aliens on the duration of their presence in the United States), *with Hampton*, 426 U.S. at 101–03 (holding a regulation barring resident aliens from the competitive Civil Service to be unconstitutional). One can also question whether

Nevertheless, the Equal Protection Clause affords aliens some protections. Those protections, however, are not unlimited, and courts in some instances allow distinctions to be made between aliens and citizens, especially where those distinctions relate to employment sectors that substantially affect the political community.

2. Distinctions Among Classes of Aliens

It is well settled that, in the immigration context, Congress may draw distinctions among aliens, and needs only a rational basis for doing so.[60] The jurisprudence becomes even more complex and the surrounding debate more contentious when considering which distinctions made among different classes of aliens are constitutionally permissible. The remainder of this Part focuses on two sets of distinct classes: nonimmigrant aliens and unauthorized aliens.

a. Nonimmigrant Aliens

The Supreme Court's jurisprudence on the rights of nonimmigrant aliens is unsettled. A 1923 opinion by the Court in *Terrace v. Thompson* appears to have endorsed distinctions among categories of lawfully present aliens based on their likelihood of becoming permanent inhabitants of the United States,[61] though it predates the Court's strict scrutiny alienage jurisprudence. More recent equal protection cases referred to "resident aliens" in describing equal protection rights, and often involved immigrant aliens with lawful permanent resident status.[62] This leaves open the following question: Are the equal

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the trend is connected to the robust preemption jurisprudence in the state-alienage legislation arena, which often provides grounds for striking down state statutes without reaching the constitutional equal protection issues. *See, e.g.*, Toll v. Moreno, 458 U.S. 1 (1982) (striking down a state statute denying "in-state" tuition and fees to resident aliens on Supremacy Clause grounds). For another theory that may explain the additional deference given to the federal government on equal protection challenges, see Richard A. Primus, Bolling *Alone*, 104 COLUM. L. REV. 975 (2004) (arguing that, despite the Fourteenth Amendment's reverse incorporation against the federal government, courts have been reticent to find equal protection violations).

[60] *See, e.g.*, Poveda v. U.S. Att'y Gen., 692 F.3d 1168, 1177 (11th Cir. 2012) ("Congress has plenary power to pass legislation concerning the admission and exclusion of aliens, and federal classifications that distinguish among groups of aliens are subject only to rational basis review." (internal quotation marks omitted)); Bracamontes v. Holder, 675 F.3d 380, 388 n.5 (4th Cir. 2012) (collecting cases).

[61] Terrace v. Thompson, 263 U.S. 197, 218–22 (1923) (upholding a provision of the Washington State Constitution that forbade aliens who have not or cannot declare their intention to naturalize from owning real property). In particular, the Supreme Court noted that "[t]he rights, privileges and duties of aliens differ widely from those of citizens; and those of alien declarants differ substantially from those of nondeclarants." *Id.* at 218.

[62] *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1 (1977); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971); *see also Moreno*, 458 U.S. at 44 (Rehnquist, C.J., dissenting) ("In each case in which the Court

protection rights of aliens limited to only immigrant aliens? In the absence of a definitive answer by the Supreme Court, various lower court opinions demonstrate that arguments can be made in both directions as to the intended breadth of the Court's alien equal protection rulings.

Both the Fifth and the Sixth Circuits have held in split-panel decisions that the Supreme Court's strict scrutiny jurisprudence does not apply to nonimmigrant aliens.[63] The majorities in both circuits reasoned that nonimmigrant aliens lack the citizen-like features that warrant immigrant aliens' treatment as a "suspect class"[64]—that is, nonimmigrant aliens are not "'virtual citizens' who are 'legally entrenched in society' but who lack the ability to participate in the political process."[65] Consequently, both courts concluded that distinctions based on nonimmigrant status need only withstand rational basis review.[66] Under that more lenient standard, both circuits upheld the state statutes in question: In the case of the Fifth Circuit, a statute preventing nonimmigrant aliens from sitting for the bar exam,[67] and in the case of the Sixth Circuit, a statute preventing nonimmigrant aliens from obtaining drivers' licenses.[68]

Each majority opinion provoked a dissent.[69] The dissents argued that the Supreme Court's failure to limit its strict scrutiny holding to aliens with lawful permanent resident status meant that the Court's

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has tested state alienage classifications under the Equal Protection Clause, the question has been the extent to which the States could permissibly distinguish between citizens and permanent resident aliens.").

[63] League of United Latin American Citizens (LULAC) v. Bredesen, 500 F.3d 523 (6th Cir. 2007) (2-1 decision); LeClerc v. Webb, 419 F.3d 405 (5th Cir. 2005) (2-1 decision).

[64] *LULAC*, 500 F.3d at 533 ("Temporary resident aliens . . . are admitted to the United States only for the duration of their authorized status, are not permitted to serve in the U.S. military, are subject to strict employment restrictions, incur differential tax treatment, and may be denied federal welfare benefits."); *LeClerc*, 419 F.3d at 417 ("[N]onimmigrant aliens—who ordinarily stipulate before entry to this country that they have no intention of abandoning their native citizenship, and who enter with no enforceable claim to establishing permanent residence or ties here—need not be accorded the extraordinary protection of strict scrutiny by virtue of their alien status alone.").

[65] *LULAC*, 500 F.3d at 533 (quoting *LeClerc*, 419 F.3d at 417). In addition, the Fifth Circuit stated that nonimmigrant aliens were too diverse to constitute a "discrete" or "insular" class. *LeClerc*, 419 F.3d at 417.

[66] *Id.* at 420.

[67] *Id.* at 422 (concluding that the limitation "is rationally related to the state's interest in assuring continuity and accountability in legal representation").

[68] *LULAC*, 500 F.3d at 533 (holding that it is reasonable for a state to issue only driving certificates to nonimmigrant aliens "so as to avoid the appearance that the State of Tennessee is vouching for [the nonimmigrant alien's] identity").

[69] After the Fifth Circuit issued its decision, a petition for rehearing en banc was denied, with two judges filing dissents from denial of the petition. LeClerc v. Webb, 444 F.3d 428 (5th Cir. 2006).

statements of law extended equally to nonimmigrant aliens.[70] Judge Stewart, dissenting in the Fifth Circuit case, criticized the majority's assertions that nonimmigrant aliens lack the defining features to warrant treatment as a suspect class.[71] Judge Stewart concluded that the majority's reasoning was flawed because it is "aliens' inability to vote, and thus their impotence in the political process, and the long history of invidious discrimination against them" that justifies their treatment as a "suspect class"—not their "ability to serve in the Armed Forces or pay taxes."[72] Judge Gilman, dissenting in the Sixth Circuit case, argued that it was inappropriate for a federal court of appeals to carve out exceptions to established constitutional rights when the Supreme Court has declined to do so itself.[73]

In July 2012, a unanimous decision from the Second Circuit in *Dandamudi v. Tisch* sided with these dissents and held that a New York statute limiting applications for pharmacists' licenses to U.S. citizens and lawful permanent residents violated the equal protection rights of nonimmigrant aliens granted temporary visas to work in the United States.[74] The Second Circuit's opinion focused considerable attention on whether nonimmigrant aliens were part of a "discrete and insular minority" deserving of strict scrutiny. Ultimately, the Second Circuit declined to follow the Fifth and Sixth Circuit majorities for three reasons: (1) The similarities between aliens and citizens

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[70] *LULAC*, 500 F.3d at 543–44 (Gilman, J., dissenting) ("But contrary to the majority's shying-away rationale, the Supreme Court *has* spoken regarding the individuals at issue here, having proclaimed unequivocally in *Graham* that 'classes based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.'" (quoting Graham v. Richardson, 403 U.S. 365, 372 (1971))); *LeClerc*, 419 F.3d at 426 (Stewart, J., dissenting) ("I disagree with the majority's reservations [about applying the Supreme Court's strict scrutiny jurisprudence] because the Supreme Court's statement that 'alienage is a suspect class' by definition includes nonimmigrant aliens as part of that class."); *id.* at 427–28 ("The Court has not distinguished between immigrant aliens or nonimmigrant[ ] aliens when discussing the alienage suspect class even though the Court has had before it cases which involved extensive review of the Immigration and [Nationality] Act and its various classifications for admitted aliens . . . .").

[71] *LeClerc*, 419 F.3d at 428.

[72] *Id.* at 428–29. Judge Stewart also pointed out that "[n]onimmigrant aliens do pay taxes, support the economy and contribute in other ways to our society" just as immigrant aliens do. *Id.* at 428.

[73] *LULAC*, 500 F.3d at 542–44 (Gilman, J., dissenting).

[74] 686 F.3d 66 (2d Cir. 2012). Previously, two district courts in the Second Circuit had reached this same conclusion. *See* Adusumelli v. Steiner, 740 F. Supp. 2d 582 (S.D.N.Y. 2010); Kirk v. N.Y. State Dep't of Educ., 562 F. Supp. 2d 405 (W.D.N.Y. 2008); *see also* Finch v. Commonwealth Health Ins. Connector Auth., 959 N.E.2d 970, 974 (Mass. 2012) (striking down state provision limiting state healthcare benefits for nonimmigrant aliens on state equal protection grounds). The Second Circuit noted that, although the case ultimately was more easily disposed of on preemption grounds, it was forced to reach the equal protection question in this instance. *See Tisch*, 686 F.3d at 81.

articulated in *Graham* "refuted the State's argument that it did have a compelling reason for its law"; (2) the primary reason for affording aliens strict scrutiny is their lack of political clout—a feature shared by immigrant and nonimmigrant aliens alike; and, (3) in the case before it, the "nonimmigrant aliens are sufficiently similar to citizens that discrimination against them in the context presented here must be strictly scrutinized."[75] Interestingly, the Second Circuit also observed that despite the nonimmigrant aliens' temporary admission to the United States, many of them were likely to remain for long periods of time and even to seek permanent residence or citizenship, leaving "little or no distinction between [lawful permanent residents] and the lawfully admitted nonimmigrant plaintiffs here."[76] The Second Circuit decision creates a circuit split on whether distinctions may be based on nonimmigrant alien status, though recently the Supreme Court declined to take up the issue.[77]

b. Unauthorized Aliens

With respect to unauthorized aliens, the Supreme Court has provided clearer direction as to the scope of the Equal Protection Clause. In 1982, in the formative case of *Plyler v. Doe*,[78] the Supreme Court considered whether a Texas statute excluding unauthorized alien children from access to public education violated equal protection rights. While the Supreme Court affirmed that aliens unlawfully present in the United States are still "persons" entitled to equal protection under the Fourteenth Amendment, the Court also held that they are not members of a suspect class nor are they entitled to the benefits of strict scrutiny.[79]

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[75] *Id.* at 75.

[76] *Id.* at 78.

[77] The Court recently denied a petition for certiorari on the issue of what level of scrutiny is applicable to nonimmigrant aliens. *See* Van Staden v. St. Martin, 133 S. Ct. 110 (2012) (denying petition for certiorari); Van Staden v. St. Martin, 664 F.3d 56 (5th Cir. 2011) (applying *LeClerc* to uphold a state statute requiring a person to be a citizen or permanent resident in order to be granted a nursing license under rational basis review). The Court previously has been presented with this issue, but it avoided reaching the issue by deciding the case on Supremacy Clause grounds. *See* Toll v. Moreno, 458 U.S. 1 (1982) (holding that a state's denial of "in-state status" for university tuition and fees to nonimmigrant aliens violated the Supremacy Clause). Chief Justice Rehnquist was a vocal advocate of the position that nonimmigrant aliens are not a suspect class entitled to strict scrutiny. *Id.* at 44–45 (Rehnquist, C.J., dissenting) ("As a group, then, nonimmigrant aliens are sufficiently different from citizens in relevant respects that distinctions between them and citizens or immigrant aliens should not call for heightened scrutiny.").

[78] 457 U.S. 202 (1982).

[79] *Id.* at 216–18; *see also* Rodríguez, *supra* note 53, at 573 n.14 ("Pursuant to the Supreme Court's alienage jurisprudence, state laws that distinguish between citizens and noncitizens are subject to strict scrutiny. . . . Regardless, equal protection scrutiny is

Regarding the entitlement of aliens unlawfully entering the United States to some constitutional rights, Justice Brennan wrote the following for the majority:

> That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish.[80]

Justice Brennan's statement of this basic principle of reciprocity harks back to the views of Madison discussed previously: When an alien is subject to the duties and obligations of the laws of the United States by virtue of his or her presence, that alien is also entitled to the benefits of the laws' protections.[81] However, as Justice Brennan went on to explain, those rights are not without limitation, and how an alien acquired his or her presence is relevant in determining those limits.[82] Consequently, Justice Brennan concluded that "[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"[83]

Despite recognizing that undocumented aliens were not a suspect class, the Court in *Plyler* nevertheless struck down the state statute in question. In doing so, it applied a form of intermediate scrutiny, emphasizing the importance of access to education while simultaneously affirming its prior decision that education is not a fundamental right.[84] Commentators have noted that, as a result, *Plyler*'s holding is

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relaxed when state laws deal with unauthorized immigrants. The Court has only once found distinctions involving unauthorized immigrants unconstitutional." (internal citation omitted)).

[80] *Plyler*, 457 U.S. at 215.

[81] *See* Cole, *supra* note 17, at 371.

[82] *Plyler*, 457 U.S. at 220 ("Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolute immutable characteristic since it is the product of conscious, indeed unlawful, action.").

[83] *Id.* at 223.

[84] *Compare id.* at 221 ("In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."), *with id.* at 223 ("Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."). *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–39 (1973) (finding no fundamental right to education).

quite narrow and fact-specific.[85] Nevertheless, the Eleventh Circuit recently upheld a preliminary injunction against an Alabama statute requiring students to submit a birth certificate or notification of their "actual citizenship or immigration status" before enrolling in a public school.[86] In doing so, the Eleventh Circuit followed closely the approach displayed in *Plyler*: The opinion avoided declaring unauthorized aliens a suspect class, focused on the importance of the educational rights affected, and subjected the state's conduct to a form of intermediate scrutiny.[87]

Since *Plyler*, the debate over what distinctions concerning the legality of an alien's presence may be permissibly drawn has increased in prominence as states enact housing ordinances and employment statutes that penalize landlords and employers who provide housing or jobs to individuals they know to be present without authorization in the United States.[88] This in turn has spurred litigation in opposition.[89]

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[85] *See* Motomura, *supra* note 51, at 1731–32 (explaining that "*Plyler*'s holding has been confined to the context in which it arose," and that its rationale was so heavily steeped in "the involvement of children and education that no court has ever used it to overturn a statute disadvantaging unauthorized migrants outside the context of K–12 public education" (internal citations omitted)). The Court has, however, rejected other types of distinctions between aliens in the education context. In *Toll v. Moreno*, the Court held under the Supremacy Clause "that Maryland could not deny *nonimmigrant* aliens in-state status when charging university fees and tuition." Koh, *supra* note 2, at 81 (discussing *Toll v. Moreno*, 458 U.S. 1 (1982)). Similarly, in *Nyquist v. Mauclet*, the Court held unconstitutional a New York statute that prohibited "certain *resident* aliens" from receiving financial aid for higher education. 432 U.S. 1, 2 (1977).

[86] Hispanic Interest Coal. of Ala. v. Governor of Ala., 691 F.3d 1236, 1240–41 (11th Cir. 2012). The statute in question is Alabama H.B. 56, which curtailed the activities of unauthorized aliens. Other sections of H.B. 56 were preliminarily enjoined on preemption grounds. *See* United States v. Alabama, 691 F.3d 1269, 1280 (11th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3421 (U.S. Apr. 29, 2013) (No. 12-884).

[87] *See, e.g.*, *Hispanic Interest Coal.*, 691 F.3d at 1247 ("Compared to the tuition requirement struck down in *Plyler*, [Alabama's statute] imposes similar obstacles to the ability of an undocumented child to obtain an education—it mandates disclosure of the child's unlawful status as a prerequisite to enrollment in public school.").

[88] *See* Laura A. Hernández, *Anchor Babies: Something Less Than Equal Under the Equal Protection Clause*, 19 S. CAL. REV. L. & SOC. JUST. 331 (2010) (discussing the constitutionality of ordinances aimed at blocking unauthorized aliens' access to housing); Rodríguez, *supra* note 53, at 591–93 (describing various state measures implemented or pursued by legislatures); John Ryan Syllaios, Note, *The Future of Discriminatory Local Ordinances Aimed at Regulating Illegal Immigration*, 16 WASH. & LEE J. CIV. RTS. & SOC. JUST. 639 (2010); Julia Preston, *Justices' Arizona Ruling on Illegal Immigration May Embolden States*, N.Y. TIMES, May 27, 2011, at A14, *available at* http://www.nytimes.com/2011/05/28/us/politics/28immigration.html; Cristina Rodríguez et al., *Testing the Limits: A Framework for Assessing the Legality of State and Local Immigration Measures*, MIGRATION POL'Y INST. (2007), *available at* http://www.migrationpolicy.org/pubs/NCIIP_Assessing%20the%20Legality%20of%20state%20and%20Local%20immigration%20Measures121307.pdf. Professor Rodríguez points out, however, that not all state actions have been aimed at stemming the tide of immigration or encouraging "self-deportation" of those unlawfully present; many local efforts also have aimed at facilitating the successful

Yet many of these challenges rely on federal preemption arguments rather than equal protection ones.[90] While some of these preemption challenges have been met with success,[91] two recent Supreme Court decisions have left unsettled the future of preemption challenges to state regulation of unauthorized aliens. In *Chamber of Commerce of the United States v. Whiting*, the Court upheld an Arizona statute imposing sanctions on those employing unauthorized aliens.[92] The majority in *Whiting* held that although the federal Immigration Reform and Control Act (IRCA) "restricts the ability of States to

integration of new arrivals into communities by providing support and resources. Rodríguez, *supra* note 53, at 582–90, 596–609.

[89] *See, e.g.*, City of Hazleton v. Lozano, 131 S. Ct. 2958 (2011), *vacating* 620 F.3d 170 (3d Cir. 2010) (remanding for further consideration in light of *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968 (2011)); *Alabama*, 691 F.3d 1269 (concluding that the United States would likely prevail on preemption challenges to the majority of provisions at issue from Alabama's H.B. 56); Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1047 (S.D. Cal. 2006) (granting temporary restraining order against defendant's implementation of a new city ordinance imposing penalties on landlords providing housing to unauthorized aliens); *see also* Ashleigh Bausch Varley & Mary C. Snow, *Don't You Dare Live Here: The Constitutionality of the Anti-Immigrant Employment and Housing Ordinances at Issue in* Keller v. City of Fremont, 45 CREIGHTON L. REV. 503, 518–20 (2012) (discussing federal litigation surrounding an employment and housing ordinance enacted in Fremont, Nebraska).

[90] *See, e.g.*, Equal Access Educ. v. Merten, 305 F. Supp. 2d 585 (E.D. Va. 2004) (challenging the Attorney General's statement that no undocumented aliens are to be permitted in higher education institutions); Motomura, *supra* note 51, at 1735–36 (noting that attorneys for unauthorized aliens frequently decide as a matter of trial strategy not even to advance equal protection arguments because "[a]s long as the touchstone in prevailing constitutional doctrine is intent rather than effect, race or ethnic discrimination is an unpromising way to argue that subfederal laws violate equal protection by targeting unauthorized migrants"); Sofía D. Martos, Note, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099 (2010) (discussing obstacles to equal protection challenges to local immigration laws under the current legal regime). In so doing, litigants focus on the structure set out by the Supreme Court in *De Canas v. Bica*, 424 U.S. 351 (1976). Motomura, *supra* note 51, at 1736.

[91] *See, e.g.*, *Alabama*, 691 F.3d 1269 (enjoining enforcement of several provisions of an Alabama law in light of likelihood of success on preemption challenges); Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1269 (11th Cir. 2012) (enjoining enforcement of a provision of Georgia's H.B. 87 in light of the likelihood of success on preemption claims); Chamber of Commerce of U.S. v. Edmondson, 594 F.3d 742, 750 (10th Cir. 2010) (concluding that various chambers of commerce had a likelihood of success on the merits of their preemption challenges to an Oklahoma employment-eligibility statute); Villas at Parkside Partners v. City of Farmers Branch, 496 F. Supp. 2d 757, 760 (N.D. Tex. 2007) (granting preliminary injunction on preemption grounds); *Garrett*, 465 F. Supp. 2d 1043, 1047 (granting temporary restraining order against a city ordinance imposing penalties on landlords providing housing to unauthorized immigrants citing potential preemption and due process grounds); *see generally* Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011) (arguing against constitutionality of "mirror-image theory" of state enforcement of federal immigration law).

[92] 131 S. Ct. 1968, 1973 (2011).

combat employment of unauthorized workers," the Arizona law at issue fell within an exception to IRCA's preemption provision for state laws concerning licensing, and thus it was not preempted.[93] In *Arizona v. United States*, the Court upheld some and struck down other portions of Arizona's controversial Support Our Law Enforcement and Safe Neighborhoods Act on preemption grounds.[94] The Court struck down provisions of the Arizona law that criminalized the failure to comply with federal alien registration requirements and that made it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona.[95] The Court also struck down as preempted the portion of the statute authorizing local law enforcement to arrest without a warrant those who law enforcement agents have probable cause to believe have committed an offense subjecting them to removal from the United States.[96] In contrast, the Court left in place the provision that "provides that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government."[97] It remains to be seen whether further developments will rely on preemption, or whether *Plyler*'s equal protection analysis will extend beyond the context of education.[98]

C. Summarizing Thoughts

In sum, the Court's equal protection jurisprudence instructs that aliens are persons under the Fourteenth Amendment. However, their rights are not without limitation, and in some contexts—regulation of public functions and potentially regulation by the federal government—courts will apply deferential levels of scrutiny to distinctions drawn on alienage grounds. Moreover, the Court has, in theory,

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[93] *Id.* at 1975, 1987.

[94] 132 S. Ct. 2492, 2510 (2012). Lower courts have since applied *Arizona* to constrain elements of state immigration-aimed legislation on federal preemption grounds. *See, e.g.*, *Hispanic Interest Coal.*, 691 F.3d 1236; *Alabama*, 691 F.3d 1269; United States v. South Carolina, Nos. 2:11-2958, 2:11-2779, 2012 WL 5897321 (D.S.C. Nov. 15, 2012) (on remand from the Fourth Circuit, applying and discussing *Arizona* in modifying a preliminary injunction that enjoined portions of a parallel South Carolina statute).

[95] *Arizona*, 132 S. Ct. at 2501–05.

[96] *Id.* at 2505–07.

[97] *Id.* at 2498.

[98] Professor Motomura has suggested that "[s]o far, history has shown *Plyler* to be a high-water mark, and not a decision that prompted a new era in equal protection for unauthorized migrants generally." Motomura, *supra* note 51, at 1734. At the same time, he suggests that invalidation of these state statutes on preemption grounds serves ultimately to strengthen the equal protection rights lurking in the backdrop. *See id.* at 1742–45 (arguing that preemption challenges serve as a surrogate for equal protection claims and successful preemption challenges thereby strengthen the sense that rights are owed to unauthorized aliens).

permitted disparate treatment of nonimmigrants and unauthorized aliens as against other aliens, though the equal protection jurisprudence surrounding these classes remains unsettled. With this baseline, this Article now considers aliens' constitutional rights with respect to criminal process.

II
The Criminal Process Constitutional Rights

It is clear from Madison's writings that he thought constitutional criminal procedure protections for aliens were of paramount importance.[99] Madison argued that the principle of reciprocity—that so far as aliens are subject to obligations under U.S. law, they should also be entitled to the law's benefits—applied most clearly to the core criminal process rights, such as the right to trial by jury.[100] In essence, Madison believed that when aliens are subject to criminal proceedings in the United States, they should be entitled to the constitutional protections afforded to citizens.[101]

Madison's views were prescient, as today it is well established that aliens subject to criminal prosecution in the United States are entitled to the same constitutional protections as citizens.[102] However, there exist clear limitations, and some unanswered questions, as to the scope of these rights when applied to aliens outside the United States' territorial boundaries and to certain classes of aliens. This Part explores these nuances through the Fifth and Sixth Amendment trial rights.

Before doing so, however, it must be emphasized that because immigration proceedings are considered to be civil rather than criminal in nature, the constitutional criminal procedure rights that will be discussed are inapplicable to such proceedings.[103] While this does not

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[99] *See* Neuman, *supra* note 18, at 58–59 (exploring Madison's approach toward alien rights). As previously discussed, Madison was an early champion of rights for aliens under the Constitution. *See* Cole, *supra* note 17, at 371 (quoting 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 556 (Taylor & Maury eds., 2d ed. 1836)).

[100] *See* Neuman, *supra* note 18, at 58–60.

[101] *See id.*; Cole, *supra* note 17, at 371.

[102] *See* Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 Geo. L.J. 851, 873–74 (2003) ("Provisions in the Bill of Rights that have been interpreted as 'trial rights' protect all defendants, regardless of alienage, during their trials in the United States."); Scaperlanda, *supra* note 46, at 741 ("From plenary power's beginnings, the Court has consistently held that noncitizens are entitled to domestic criminal trial rights before being criminally sanctioned.").

[103] *See* Wong Wing v. United States, 163 U.S. 228, 236 (1896) ("The order of deportation is not a punishment for crime." (internal citations omitted)); Scaperlanda, *supra* note 23,

mean that the Constitution is irrelevant to the actions of immigration officials in removal proceedings, "the scope of applicable rights and the remedies for violations of constitutional rights is much different in the civil immigration context than in the criminal context."[104] Thus aliens are much more vulnerable to denial of constitutional protections than the present discussion—limited to the criminal context—will capture.[105] For example, under the Court's holding in *INS v. Lopez-Mendoza*, evidence seized in violation of the Fourth Amendment may still be introduced against aliens in removal proceedings,[106] and, while aliens have a statutory right to retain counsel to aid them in immigration proceedings, aliens have no guaranteed constitutional right to counsel in those proceedings.[107] A more complete discussion of aliens' constitutional rights in the context of immigration proceedings will follow the discussion of criminal procedure rights.

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at 31 ("[T]he Supreme Court has consistently concluded that neither deportation nor exclusion constitute[s] punishment.").

[104] Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1604 (2010).

[105] *See id.* at 1619 ("The gap between the rights and remedies available in criminal proceedings and those available in civil removal cases raises the genuine possibility that immigrants whose constitutional rights are violated will be served to ICE on a silver platter for removal.").

[106] 468 U.S. 1032, 1050 (1984). Nevertheless, this rule of law need not necessarily be characterized as an alien-citizen distinction. Indeed, the general rule is that the Fourth Amendment is inapplicable in civil proceedings for aliens and citizens alike. Consequently, one way to view the nonapplication of the exclusionary rule in the removal-proceeding context is as being on par with the treatment usually afforded to citizens. Some courts of appeals have held that *Lopez-Mendoza* allows an exception despite this general rule, namely that the exclusionary rule may apply in removal proceedings if the alien has been subject to an "egregious" violation of the Fourth Amendment. *E.g.*, Oliva-Ramos v. Att'y Gen., 694 F.3d 259, 275–79 (3d Cir. 2012).

[107] Professor Chacón summarizes the differences:

> Fourth Amendment protections . . . are narrower in the immigration enforcement context than in the criminal context. The Fifth Amendment protections against self-incrimination do not apply in civil proceedings, and federal regulations only call for officers to offer a portion of the basic requirement of the *Miranda* decision when conducting criminal arrests, with no comparable requirement for civil arrests. Limitations on extremely coercive interrogations apply in civil proceedings by virtue of the operation of the Due Process Clause, but these violations are much more difficult to establish than violations of the right against self-incrimination under *Miranda*. There is no constitutional right to counsel at the government's expense in civil removal proceedings, although noncitizens do have a statutory right to supply counsel at their own expense.

Chacón, *supra* note 104, at 1604–05 (footnotes omitted). *But see* Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1317–25 (2011) (arguing that courts attempt to import criminal rights into the civil immigration context specifically by importing via legal fictions "the right to effective assistance of counsel, the rule of lenity, the void for vagueness doctrine and the application of the exclusionary rule").

A. Fifth and Sixth Amendments

1. Aliens' Fifth and Sixth Amendment Rights

Approximately ten years after the Supreme Court held that aliens are entitled to equal protection under the Fourteenth Amendment, the Court held that aliens are entitled to Fifth and Sixth Amendment rights.[108] *Wong Wing v. United States* involved a constitutional challenge to Section 4 of the Geary Act, which required aliens who were "not lawfully entitled to be or remain in the United States" to "be imprisoned at hard labor for a period not exceeding one year . . . ."[109] The Supreme Court concluded that such imprisonment violated the Fifth and Sixth Amendments, which, the Court reasoned from *Yick Wo*, applied to "all persons within the territory of the United States . . . even aliens."[110] In doing so, the Court affirmed Congress's plenary power to exclude, deport, and detain aliens, but reasoned that, because subjecting persons to hard labor is more akin to criminal punishment than immigration regulation, Congress was constrained by the Constitution's criminal process protections.[111] As a result, the Supreme Court held that hard labor could be imposed only in accordance with the proper criminal process prescribed by the Constitution.[112]

Today, an alien's right to the full panoply of constitutional criminal-trial protections is essentially beyond dispute, despite the fact that the Supreme Court has not explicitly held that aliens are entitled to each of the specific underlying rights, such as the right to a speedy trial.[113] Indeed, just a few Terms ago in *Padilla v. Kentucky*, the Supreme Court even recognized that aliens' Sixth Amendment right

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108 *Wong Wing*, 163 U.S. 228.

109 *Id.* at 233.

110 *Id.* at 238.

111 *See id.* at 236–38; Bosniak, *supra* note 39, at 1096 ("[T]he Court concluded that what was at stake in this case was not immigration regulation, but criminal punishment, and therefore that invocation of the government's plenary power in the immigration sphere was off the mark." (internal citation omitted)).

112 *Wong Wing*, 163 U.S. at 237 ("But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.").

113 Ingrid V. Eagly, *Prosecuting Immigration*, 104 Nw. U. L. Rev. 1281, 1286 (2010) ("[N]oncitizen defendants occupy the same playing field as other defendants in the federal criminal system."); Godsey, *supra* note 102, at 874 ("When an alien defendant is on trial in a federal courtroom in the United States, no one would dispute the fact that he is afforded the right to an attorney, the right to call witnesses in his defense and all of the other constitutional rights that are synonymous in this country with the right to a fair trial."). The Supreme Court has recognized that resident aliens are entitled to the Fifth Amendment's protections against self-incrimination. *See, e.g.*, United States v. Balsys, 524 U.S. 666, 671 (1998); *see also* Sean K. Lloyd, *Fifth Amendment Rights of a Resident Alien After* Balsys, 6

to effective assistance of counsel includes the right to be informed of the immigration-related consequences of entering a guilty plea.[114]

2. *Limitations on Aliens' Fifth and Sixth Amendment Rights*

Nevertheless, consistent with an underlying theme of this Article, the fact that aliens' Fifth and Sixth Amendment rights are well established does not mean that they are without limitation. Questions as to how far, in the territorial sense, and to which classes of aliens those rights extend vex courts as U.S. criminal investigations become increasingly global in scope.[115] Exploration of these nuances begins with a Supreme Court decision implicating both the territorial reach and class-of-aliens issues.

In *Johnson v. Eisentrager*, the Supreme Court considered a habeas petition by German aliens caught assisting Japan in the continued war after Germany's surrender in World War II.[116] The German aliens challenged their trial by military commission in China claiming that their "conviction and imprisonment violate[d] . . . the Fifth Amendment."[117] The Supreme Court held that these aliens were not "persons" under the Fifth Amendment because they had never set foot on U.S. soil and were "alien enemies."[118] The Court explained

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TULSA J. COMP. & INT'L L. 163 (1999) (discussing the scope of the Court's holding in *Balsys*).

[114] 130 S. Ct. 1473, 1482–83 (2010) ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."); *see also* Scott C. Gyllenborg, *Effective Assistance of Counsel to an Alien Criminal Defendant Under the Sixth Amendment After* Padilla v. Kentucky, 79 UMKC L. REV. 925 (2011). The Supreme Court emphasized that "changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction" such that "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla*, 130 S. Ct. at 1480 (footnote omitted). As a result, the Court concluded that "accurate legal advice for noncitizens accused of crimes has never been more important." *Id.* In February 2013, the Supreme Court held that the rule announced in *Padilla* does not apply retroactively. Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013).

[115] Godsey, *supra* note 102, at 851; *see* Bryan William Horn, *The Extraterritorial Application of the Fifth Amendment Protection Against Coerced Self-Incrimination*, 2 DUKE J. COMP. & INT'L L. 367, 367 (1992) ("As the United States government expands its law enforcement activities to combat drug trafficking, terrorism, and other international crimes, the extent to which the Bill of Rights applies extraterritorially becomes a crucial issue to aliens accused of violating United States criminal laws."); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* United States v. Verdugo-Urquidez*?*, 56 MO. L. REV. 213, 213 (1991) ("With increasing frequency, federal law enforcement activities have transcended national boundaries.").

[116] 339 U.S. 763, 766 (1950).

[117] *Id.* at 767 (outlining the claims of petitioners, including violations of other constitutional and Geneva Convention provisions).

[118] *Id.* at 784. Alien enemies are nationals of a country with which the United States is at war. *Id.* at 769 n.2 ("In the primary meaning of the words, an alien friend is the subject of a

that aliens are "accorded a generous and ascending scale of rights as [they] increase[ ] [their] identity with our society" and that the scale is intimately connected to the "alien's presence within [the United States'] territorial jurisdiction."[119] The Court further asserted that the "disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage"[120] and that although aliens, in many respects, are treated like citizens, times of "war . . . expose[ ] the relative vulnerability of the alien's status."[121]

Thus, *Eisentrager* identified two distinct grounds for not extending the Constitution's protections to the aliens in question: (1) The aliens were apprehended abroad; and (2) The aliens were engaged in wartime activities against the United States. The dual rationale makes the exact import and significance of *Eisentrager*'s holding somewhat cryptic.[122] Part III.C takes up *Eisentrager*'s legacy relating to the constitutional protections afforded to enemies of the United States. This Subpart, however, discusses the import of the first rationale—that extraterritoriality limits the reach of constitutional protections. *Eisentrager*'s focus on the fact that the German aliens were apprehended abroad raises the question of whether aliens outside of the United States are simply not entitled to Fifth and Sixth Amendment rights.

Before deciding *Eisentrager*, the Supreme Court held in *In re Ross* that U.S. citizens prosecuted outside of the United States were not entitled to the Constitution's criminal procedure protections.[123] The Supreme Court held that the Constitution's protections "apply only to citizens and others within the United States, or [those] who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."[124] Thus, one could have reasoned that the Supreme Court's *Eisentrager* decision was a

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foreign state at peace with the United States; an alien enemy is the subject of a foreign state at war with the United States." (citations omitted)); *see* An Act Respecting Alien Enemies (Alien Enemy Act), ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24).

119 *Eisentrager*, 339 U.S. at 770–71.

120 *Id.* at 772.

121 *Id.* at 771.

122 Kent, *supra* note 17, at 474 (noting the dispute among commentators about the exact holding in *Eisentrager* and the debate about "whether the result . . . turned on the fact that the petitioners were admitted agents of an enemy power during a formally declared war, that they were confined as part of a military operation, or that they were noncitizens with no preexisting connection to the United States who were confined abroad" (footnote omitted)).

123 140 U.S. 453, 454, 464 (1891).

124 *Id.* at 464.

straightforward application of a previously established principle: The Constitution's reach is limited to the territorial boundaries of the United States.[125]

However, jurisprudence after both *Eisentrager* and *In re Ross* renders such an interpretation strained. In *Reid v. Covert*, the Court considered the Constitution's applicability to U.S. citizens accused of committing murder at military bases abroad and subsequently tried by courts-martial.[126] In concluding that the U.S. citizens "could not constitutionally be tried by military authorities," Justice Black, writing for a plurality, "reject[ed] the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights."[127] Instead, Justice Black reasoned that "[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land."[128] The plurality concluded accordingly "that the Constitution in its entirety applied to the trials" of the citizens,[129] and although the Court did not explicitly state that it was overruling *In re Ross*, the plurality suggested that the opinion "should be left as a relic from a different era."[130]

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125 The Supreme Court did not, however, explicitly mention *In re Ross* in *Eisentrager*. This might reflect the fact that *In re Ross* was decided prior to the Supreme Court's recognition that aliens were persons under the Fifth and Sixth Amendments. The Supreme Court in *Eisentrager* did cite some of the *Insular Cases*, in which the Court had decided the Constitution's application in newly acquired territories. For example, the *Eisentrager* Court cited *Downes v. Bidwell*, 182 U.S. 244 (1901), in which it "held that the provision of the Constitution establishing that 'all duties, imposts, and excises shall be uniform throughout the United States' does not apply to Puerto Rico, which the Court determined was not part of the United States for the purposes of that provision." José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1685 (2009) (quoting U.S. CONST. art. I, § 8); *see also* Neuman, *supra* note 20, at 915 ("In the notorious *Insular Cases*, the Supreme Court held that the Constitution does not even 'follow the flag,' that is, the United States may acquire sovereignty of 'unincorporated' possessions where it will be bound only by those provisions of the Constitution that the Court deems 'fundamental;' these cases have never been expressly overruled." (footnote omitted)). *But see* Elizabeth Sepper, Note, *The Ties That Bind: How the Constitution Limits the CIA's Actions in the War on Terror*, 81 N.Y.U. L. REV. 1805, 1814 (2006) ("While the Court decided [the *Insular Cases*] primarily on the basis of the nature of U.S. control over the territory . . . it consistently held that certain 'fundamental rights' apply regardless of where and against whom the government acts."). Professor Burnett argues that the *Insular Cases*' territorially restrictive view of the Constitution has been overstated. *See* Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After* Boumediene, 109 COLUM. L. REV. 973, 982–94 (2009).

126 354 U.S. 1, 3 (1957).

127 *Id.* at 5–6.

128 *Id.* at 6.

129 *Id.* at 18.

130 *Id.* at 12.

Some have read *Reid* as being strictly limited to U.S. citizens and having no bearing on the constitutional rights of aliens abroad.[131] Indeed, this is the reading that Justice Scalia endorsed in his dissent to the 2008 *Boumediene* decision, where the majority held that Guantanamo detainees had the constitutional right to challenge their detention as enemy combatants through a writ of habeas corpus.[132] However, particularly after *Boumediene*'s rejection of formalistic analysis of the Constitution's extraterritorial application—discussed at length *infra* Part III.C—*Reid*'s recognition of the extraterritorial application of the Fifth and Sixth Amendments to citizens arguably suggests the possibility of similar treatment for aliens that the United States reaches out to punish criminally.[133] Moreover, extending *Reid* to aliens need not disturb the Court's ruling in *Eisentrager* because that decision can still stand on the independent ground that it was the convergence of extraterritorial presence and "enemy alien" status that exempted the Fifth and Sixth Amendments' application in that particular instance.[134]

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131 *E.g.*, Godsey, *supra* note 102, at 870.

132 *See* Boumediene v. Bush, 553 U.S. 723, 841–42 (2008) (Scalia, J., dissenting) ("There is simply no support for the Court's assertion that constitutional rights extend to aliens held outside the U.S. sovereign territory, . . . and *Eisentrager* could not be clearer that the privilege of habeas corpus does not extend to aliens abroad."); *see also* Kent, *supra* note 17 (arguing against extraterritorial constitutional rights for aliens); Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT'L L. 307 (2011) (critiquing *Boumediene*'s functional approach to the Constitution's extraterritorial application and arguing that the approach should be centered around the application of fundamental norms derived from international law).

133 *See* NEUMAN, *supra* note 18, at 5 ("Since *Reid v. Covert*, . . . the disputable question is whether a particular constitutional limitation on the government's authority to act should be regarded as including within its prohibitions unusual categories of places or persons."); Sepper, *supra* note 125, at 1817 n.64 ("Some thought that *Reid* reversed *Johnson v. Eisentrager* . . . [but] others thought that *Eisentrager* was limited to its very particular historical context and facts."). The majority in *Boumediene* concluded that *Eisentrager* did not endorse a rigid, formalistic view of extraterritoriality, but rather employed a "functional approach" in which "practical considerations" are "integral" to the decision. *Boumediene*, 553 U.S. at 762–64. Writing for the majority, Justice Kennedy also reasoned that the Court's prior decisions "undermine[d] the . . . argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends." *Id.* at 755; *see also* Gerald L. Neuman, *The Extraterritorial Constitution After* Boumediene v. Bush, 82 S. CAL. L. REV. 259, 261, 271 (2009) ("The [*Boumediene*] Court rejects formalistic reliance on single factors, such as nationality or location, as a basis for wholesale denial of rights, and essentially maintains that functionalism has long been its standard methodology for deciding such questions.").

134 *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 984 (2002) (suggesting that the Court "was careful to note in *Eisentrager* that the power to treat enemy aliens is 'an incident of war and not . . . an incident of alienage'" (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950))). *But see* Godsey, *supra* note 102, at 869 (stating that *Verdugo-Urquidez* suggests that *Eisentrager* should not be narrowly interpreted as limited to its wartime context and to enemy combatant aliens because "[t]he Court in *Verdugo-Urquidez* completely

Lower courts have grappled with issues of the Fifth and Sixth Amendments' extraterritorial application to aliens and thus have considered the significance of *Reid* and *Eisentrager* when read together. However, the jurisprudence remains far from well defined and many important questions regarding the Constitution's territorial reach remain undecided.[135] To explore the progress that has been made, this Subpart discusses two specific constitutional criminal procedure rights: (1) the Fifth Amendment right against self-incrimination; and (2) the Sixth Amendment right to a speedy trial.

a. Fifth Amendment Right Against Self-Incrimination

As law enforcement becomes increasingly international, it is frequently the case that individuals tried in U.S. courts are interrogated by U.S. law enforcement officials overseas.[136] It is widely accepted that *Reid* establishes that U.S. citizens interrogated abroad are entitled to the Fifth Amendment's protections.[137] This leaves open the question whether aliens are due similar treatment—a question that the Supreme Court has not yet answered.[138]

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ignored the wartime setting of *Eisentrager* as a ground for distinguishing that case and expressed the holding of *Eisentrager* broadly as having emphatically 'rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States'" (internal citation omitted)).

[135] *See, e.g.*, Neuman, *supra* note 133, at 286 n.138 (suggesting that it remains unsettled whether the right to a jury trial applies extraterritorially).

[136] Professor Mark Godsey notes the complications that can arise from this phenomenon:

> This heightened activity of American law enforcement officials abroad will compel American courts to confront two closely related questions of constitutional significance. Does the Fifth Amendment's privilege against self-incrimination apply to non-American citizens who confess to American authorities abroad and who are later tried in the United States? And if the Fifth Amendment does apply, does an FBI agent conducting an investigation abroad have to provide *Miranda* warnings to a non-American citizen before interrogating him?

Mark A. Godsey, Miranda*'s Final Frontier—The International Arena: A Critical Analysis of* United States v. Bin Laden*, and a Proposal for a New* Miranda *Exception Abroad*, 51 DUKE L.J. 1703, 1706–07 (2002) (footnotes omitted).

[137] Godsey, *supra* note 102, at 852–53 ("The Supreme Court has also held that [Fifth and Sixth Amendment] protections apply to American citizens who are interrogated by U.S. law enforcement officials outside of the United States."). Lower courts have concluded that this includes the obligation to provide *Miranda* warnings to U.S. citizens interrogated by U.S. officials abroad. *See* United States v. Covington, 783 F.2d 1052, 1056 (9th Cir. 1986); Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 RUTGERS L. REV. 647, 677 (2008).

[138] *See* United States v. Hasan, 747 F. Supp. 2d 642, 657 (E.D. Va. 2010) ("[A]lthough the Supreme Court has not yet ruled definitively on this specific issue, . . . in past cases, the Government has not contested that Fifth and Sixth Amendment protections apply even to the custodial interrogation of a foreign national outside of the United States by U.S. agents

At least one federal court of appeals, the Second Circuit, has concluded that aliens interrogated abroad *are* entitled to the Fifth Amendment's protections, specifically the right against self-incrimination, in domestic criminal trials.[139] It reached this result by reasoning that "a violation of the Fifth Amendment's right against self-incrimination occurs only when a compelled statement is offered at trial against the defendant."[140] The Second Circuit derived this principle from language in the Supreme Court's decision in *United States v. Verdugo-Urquidez*,[141] contrasting the timing of a Fifth Amendment self-incrimination violation with that of a Fourth Amendment violation, which "is 'fully accomplished' at the place and time of the alleged intrusion . . . ."[142] Thus, the Second Circuit avoided the complicated extraterritoriality question by framing the issue as the domestic application of the Fifth Amendment's self-incrimination provision to a noncitizen.[143] Other courts have adopted the Second Circuit's reasoning.[144]

The Second Circuit's decision is undoubtedly circumspect in avoiding the difficult constitutional question as to the territorial reach of the Fifth Amendment.[145] However, it raises questions as to whether

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engaged in a criminal investigation." (internal quotation marks and alterations in original omitted)), *aff'd sub nom.* United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

139 *In re* Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177, 201 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2765 and 129 S. Ct. 2778 (2009).

140 *Id.* at 199.

141 494 U.S. 259 (1990).

142 *Terrorist Bombings*, 552 F.3d at 199 (quoting *Verdugo-Urquidez*, 494 U.S. at 264).

143 *Id.* at 199–201; *see also* Godsey, *supra* note 136, at 1727–28 ("If a non-American who confessed abroad is later tried in the United States, the question is not whether the privilege against self-incrimination applies abroad, but whether non-Americans located *within the boundaries of the United States*, for the purpose of attending their criminal trial, are protected by the privilege.").

144 *See, e.g.*, United States v. Clarke, 611 F. Supp. 2d 12, 28–29 (D.D.C. 2009) ("It is by now well-established that the Fifth Amendment privilege against self-incrimination protects nonresident aliens facing a criminal trial in the United States even where the questioning by United States authorities takes place abroad."); United States v. Straker, 596 F. Supp. 2d 80, 90 (D.D.C. 2009) (using this identical langauge). Prior to the Second Circuit's decision, the Southern District of New York had reached a similar conclusion. *See* United States v. Bin Laden, 132 F. Supp. 2d 168, 181–82 (S.D.N.Y. 2001) ("[A]ny violation of the privilege against self-incrimination occurs, not at the moment law enforcement officials coerce statements through custodial interrogation, but when a defendant's involuntary statements are actually used against him at an American criminal proceeding."); *see also* Condon, *supra* note 137, at 668 ("The requirements of *Miranda* and the due process 'voluntariness' requirement do not constrain law enforcement agents gathering intelligence abroad so long as the government does not seek to use those statements at a criminal trial."); Fred Medick, *Exporting* Miranda*: Protecting the Right Against Self-Incrimination When U.S. Officers Perform Custodial Interrogations Abroad*, 44 HARV. C.R.-C.L. L. REV. 173, 195 (2009) (arguing for greater protection).

145 The Second Circuit's opinion also, of course, leaves unanswered the scope of the Fifth Amendment's protections for aliens, interrogated by U.S. officials abroad, who are

the principle equally extends to an alien's statements, made during an interrogation by foreign officials, that are offered for admission before a domestic court.[146] The general rule thus far has been that the Fifth Amendment does not constrain foreign officials' actions, unless it can be demonstrated that U.S. officials were so intimately involved as to be implicated under a "joint venture" theory.[147] However, complications arise when foreign officials are alleged to have used torture or other unlawful means to extract the confessions sought to be admitted. Many presume that evidence obtained by foreign officials abroad via torture is inadmissible in U.S. courts[148] because the Due Process Clause limits the admission into evidence of any confession

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subsequently tried abroad, rather than brought to the United States for criminal prosecution. At least the Fourth Circuit has suggested that, in that instance, the Fifth Amendment's self-incrimination clause would not operate as a bar. *See* United States v. (Under Seal), 794 F.2d 920, 925–26 (4th Cir. 1986) ("From this history, we conclude that the Fifth Amendment privilege applies only where the sovereign compelling the testimony and the sovereign using the testimony are both restrained by the Fifth Amendment from compelling self-incrimination."), *cert. denied*, 479 U.S. 924 (1986). *But see* Moses v. Allard, 779 F. Supp. 857, 882 (E.D. Mich. 1991) (declining to adopt the Fourth Circuit's reasoning).

146 *See* Condon, *supra* note 137, at 662 ("[A] U.S. stationhouse . . . is no longer the paradigmatic setting of modern custodial interrogation in the context of the war on terror [as] U.S. counterterrorism agents regularly partner—for the purpose of detention and interrogation—with foreign governments . . . .").

147 *See id.* at 680–84. However, Professor Condon notes that the joint-venture exception is quite limited:

> Courts have interpreted the 'joint venture' doctrine narrowly, requiring a high level of involvement—'active' or 'substantial' participation—by U.S. law enforcement personnel in the specific interrogation or investigative act at issue. . . . In light of that narrow focus, courts rarely find that cooperation between U.S. law enforcement and foreign governments rises to the level of a joint venture or agency relationship."

Id. at 681; *see also, e.g.*, United States v. Maturo, 982 F.2d 57, 60–62 (2d Cir. 1992) (stating that information obtained from wiretaps initiated solely by the Turkish National Police, despite cooperation in the form of information and equipment provided by U.S. law enforcement agents, was not excludable as evidence under a number of tests for U.S.-foreign cooperation, including "joint venture"); Pfeifer v. U.S. Bureau of Prisons, 615 F.2d 873, 877 (9th Cir. 1980) (stating that the fact that "an American DEA agent who had a pistol visible under his jacket was present in the room where Pfeifer was interrogated by Mexican officials" is insufficient to establish "substantial participation by a federal agent in the activities of Mexican officials" (internal quotations omitted)), *cert. denied*, 447 U.S. 908 (1980); United States v. Heller, 625 F.2d 594, 599–600 (5th Cir. 1980) (concluding that the fact that "but for a tip from an American official appellant probably would not have been arrested" was insufficient to demonstrate that the foreign official was acting as an agent for United States law enforcement). *But see* United States v. Emery, 591 F.2d 1266, 1268 (9th Cir. 1978) (concluding that there was a joint venture between U.S. and Mexican law enforcement officials where U.S. agents "alerted the Mexican police of the possible activity, coordinated the surveillance at the Guaymas airport, supplied the pilot for the plane and gave the signal that instigated the arrest").

148 *See* Condon, *supra* note 137, at 652 ("[S]cholars and government officials alike have universally assumed the strength of constitutional protections to prevent the admission of evidence obtained by torture in U.S. criminal trials."); *id.* at 657 ("[I]n the United States

that is not truly "voluntary."[149] The Supreme Court, however, has not yet addressed the issue, and lower courts have avoided deciding the question by concluding that there was insufficient evidence to sustain the allegations of torture.[150]

b. Sixth Amendment Right to a Speedy Trial

Another byproduct of increasingly international criminal investigations is the reality that often defendants remain abroad for a substantial amount of time before they are brought to the United States for trial. This has prompted various lower courts to consider whether and when the Sixth Amendment right to a speedy trial attaches to an alien indicted in the United States, but remaining abroad.[151] At least one federal court has concluded that the right to a speedy trial does not attach before the alien-defendant enters the United States.[152] The Seventh Circuit, on the other hand, has seemed to assume, without

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the prohibition on evidence obtained by torture—even torture extracted by foreigners—is rarely revisited by the courts.").

[149] *Id.* at 671–72; *see, e.g.*, Al-Hajj v. Obama, 800 F. Supp. 2d 19, 27 (D.D.C. 2011) (holding that some of petitioner's statements must be suppressed because taint of prior coercion outside of U.S. custody had not yet dissipated, but that other statements were admissible); United States v. Karake, 443 F. Supp. 2d 8, 86 (D.D.C. 2006) (concluding that defendant's statements to Rwandan officials were the product of coercion, and therefore "involuntary and inadmissible"). After *Colorado v. Connelly*, 479 U.S. 157 (1986), most cases indicate "that courts may view the Supreme Court's permission to admit involuntary statements as limited to circumstances in which an individual is compelled to speak because of factors that cannot be attributed to any abuse of official authority—whether that of U.S. actors or foreign officials." Condon, *supra* note 137, at 675.

[150] *See, e.g.*, Al-Qurashi v. Obama, 733 F. Supp. 2d 69, 94 (D.D.C. 2010) (concluding that "[b]ased on the totality of the circumstances" the government "sustained [its] burden to show that these incriminating statements were made voluntarily and are therefore admissible"); United States v. Abu Ali, 395 F. Supp. 2d 338, 374–79 (E.D. Va. 2005) (concluding that the government satisfied its burden of proving by a "preponderance of the evidence" that confession was voluntary but that question of torture would still be submitted to the jury for a factual determination), *aff'd in relevant part*, 528 F.3d 210, 231–34 (4th Cir. 2008); *In re* Extradition of Atta, 706 F. Supp. 1032, 1052 (E.D.N.Y. 1989) (concluding that evidence indicated that statements were voluntary and correct despite allegations of torture); *see also Abu Ali*, 395 F. Supp. 2d at 379 (stating, despite finding that there was insufficient evidence of torture to hold that a defendant's statements were involuntary, that "the Court would like to make a very clear statement that torture of any kind is legally and morally unacceptable, and that the judicial system of the United States will not permit the taint of torture in its judiciary proceedings").

[151] *See generally* Robert Iraola, *Due Process, the Sixth Amendment, and International Extradition*, 90 NEB. L. REV. 752 (2012) (discussing the application of the Fifth and Sixth Amendments in the context of international extradition).

[152] *See* United States v. Koch, No. 03-144, 2011 WL 284485, at *3 (W.D. Pa. Jan. 25, 2011) (unpublished opinion) ("[A] foreign national[,] presently residing outside the United States, has no Sixth Amendment right to a speedy trial or to other constitutional protections."). *But see* United States v. Leaver, 358 F. Supp. 2d 255, 268 (S.D.N.Y. 2004) (concluding that the speedy-trial right attaches at the time the indictment is filed); United States v. McDonald, 172 F. Supp. 2d 941, 949–51 (W.D. Mich. 2001) (concluding that a

explicitly deciding, that the Sixth Amendment's speedy-trial guarantee extends to an alien outside the United States, although it ultimately held that the right was not violated.[153] Other courts, such as the D.C. Circuit, have explicitly avoided answering the inquiry, by assuming *arguendo* that the right attached upon indictment, but deciding in favor of the government even with the assumption.[154]

Despite the many unanswered questions as to the finer points of constitutional jurisprudence in this area, these two discrete topics crystallize the multifaceted nature of the analytical framework. In addition to raising questions about the Fifth and Sixth Amendments' territorial reach, issues of the application of these constitutional rights abroad have required courts to define the timing of the rights' attachment. These principles arguably have import for the scope of citizens' constitutional rights as well.

B. Fourth Amendment Rights

1. Aliens' Fourth Amendment Rights

Given the prior discussion of aliens' Fifth and Sixth Amendment rights, it is perhaps not surprising that, generally speaking, aliens, just as citizens, are entitled to the Fourth Amendment's protections and to the exclusion, in domestic criminal proceedings, of evidence obtained in violation of the Fourth Amendment.[155] The Supreme Court

fifteen-year delay in securing extradition violated defendant's speedy-trial rights because delay was due to government's negligence).

[153] United States v. Wanigasinghe, 545 F.3d 595, 597–99 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 1599 (2009) (citing *Boumediene* to caution that it may not be easily assumed that the Constitution does not apply outside of the United States); *see also* United States v. Hijazi, 845 F. Supp. 2d 874, 894 (C.D. Ill. 2011) ("In sum, the Court does not find that Hijazi has suffered enough prejudice to overcome the fact that the delay is of his own making."). Prior to this decision, the Seventh Circuit had suggested that this was the right result. *See In re* Hijazi, 589 F.3d 401, 410 (7th Cir. 2009) ("Although we express no view about the arguments Hijazi has presented based on the Sixth Amendment's guarantee of a speedy trial, . . . the principles underlying that guarantee point strongly in the direction of Hijazi's right to the ruling he has requested on his motions to dismiss.").

[154] United States v. Tchibassa, 452 F.3d 918, 921 n.1, 927 (D.C. Cir. 2006) ("[W]e assume *arguendo* that Tchibassa was entitled to a speedy trial under the Sixth Amendment . . . . We therefore need not decide the question . . . whether the Sixth Amendment speedy trial right attaches to a foreign national—charged with a crime committed outside United States territory—while he remains outside our borders."); *see also* United States v. Diacolios, 837 F.2d 79, 84 (2d Cir. 1988) ("Because the government's failure to obtain defendant's extradition was the result of reliance upon United States policy not to seek extradition outside the extradition treaty with Greece, we conclude that the government has satisfied its burden of demonstrating due diligence in seeking defendant's return for trial without unnecessary delay.").

[155] *See* SCAPERLANDA, *supra* note 23, at 216 ("Until *Verdugo-Urquidez*, courts have uniformly assumed that the domestic application of the [F]ourth [A]mendment protected aliens in the same fashion as citizens.").

implicitly endorsed this proposition in 1973 in *Almeida-Sanchez v. United States*, where the Court held that the warrantless search and seizure of a Mexican citizen legally present in the United States violated the Fourth Amendment.[156] In fact, the *Almeida-Sanchez* Court did not even consider the impact of alienage on the analysis; instead, Justice Stewart, writing for the plurality, focused on whether the search was properly encompassed within the administrative border-search exception.[157]

However, this generalization of the law requires further elaboration and refinement. As is true with aliens' Fifth and Sixth Amendment rights, aliens' Fourth Amendment rights are subject to limitation.

2. *Limitations on Aliens' Fourth Amendment Rights*

Two primary situations have demonstrated limitations on aliens' Fourth Amendment rights: searches and seizures occurring outside of the United States, and searches and seizures of aliens who lack substantial connection to the United States. Their source is the same 1990 Supreme Court decision: *United States v. Verdugo-Urquidez*.[158] Accordingly, the opinion is worth examining before considering each of these important topics.

Verdugo-Urquidez involved the criminal prosecution of a Mexican citizen allegedly involved in the murder of a U.S. DEA agent. Verdugo-Urquidez was apprehended by Mexican law enforcement officers and turned over to U.S. marshals, who then brought him to the United States to stand trial. After Verdugo-Urquidez was apprehended and transported to the United States, DEA agents searched his residence in Mexico and seized evidence of narcotics trafficking; Verdugo-Urquidez sought to suppress the evidence on the grounds that the search and seizure violated the Fourth Amendment.[159]

Chief Justice Rehnquist wrote a plurality opinion for the Court, in which he set out a dual rationale for concluding that Verdugo-Urquidez could not avail himself of the protections of the Fourth Amendment. First, Chief Justice Rehnquist emphasized the fact that

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156 413 U.S. 266 (1973).

157 *Id.* at 272–74. While the Court recognized "the power of the Federal Government to exclude aliens from the country" and to "effectuate[ ]" this power by border searches, the Court concluded this search "at least 20 miles north of the Mexican border, was of a wholly different sort." *Id.* at 272–73 (footnote omitted). Justice Powell's concurrence also did not consider alienage to be a defining feature in the case. *See id.* at 275–85 (Powell, J., concurring).

158 494 U.S. 259 (1990).

159 *Id.* at 262–63.

the search had occurred in Mexico. Because there was "no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters," Chief Justice Rehnquist concluded that "the Fourth Amendment has no application" to a search of a Mexican citizen's property in Mexico by U.S. agents.[160] The Chief Justice cited *Eisentrager* to support this principle of the Constitution's territorially limited reach, and distinguished *Reid* on the grounds that it involved citizens. Second, Chief Justice Rehnquist addressed Verdugo-Urquidez's presence in the United States at the time of the search. The Chief Justice explained that the reference to "the people" in the Fourth Amendment was distinct from the reference to "person" in the Fifth Amendment, and that the former "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[161] Chief Justice Rehnquist concluded that "aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country."[162] Because his being brought involuntarily into the country immediately before the search did not constitute a sufficient connection, Verdugo-Urquidez was not one of the "people" protected by the Fourth Amendment.

Four Justices participated in the plurality opinion. In addition, Justice Kennedy stated in a concurrence that he joined these four Justices, and that his concurrence did not disagree in any fundamental respect. However, his reasoning suggested otherwise.[163] Justice Kennedy expressly rejected the Chief Justice's interpretation of the meaning of "the people" under the Fourth Amendment, and suggested that the fact that the search occurred in Mexico, rather than in the United States, was the deciding factor.[164] Thus, five Justices

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160 *Id.* at 267, 275.

161 *Id.* at 265–66. The plurality opinion alternately refers to "sufficient connection[s]," *id.* at 265, "substantial connections," *id.* at 271, and "previous significant voluntary connection[s]." *Id.* The plurality also refers to aliens "accept[ing] some societal obligations" in the context of assessing whether voluntary connections exist. *Id.* at 272–73. Lower courts have referred to sufficient, substantial, and significant connections interchangeably, and nothing in *Verdugo-Urquidez* itself appears to suggest that these expressions pick out different standards.

162 *Id.* at 271.

163 *Id.* at 275–78 (Kennedy, J., concurring); *see also* Burnett, *supra* note 125, at 1015 ("Although Kennedy joined Chief Justice William Rehnquist's opinion for the Court, the reasoning in his concurrence was not consistent with Rehnquist's, which set forth what has come to be known as the 'substantial connection' test.").

164 *See* SCAPERLANDA, *supra* note 23, at 224 (stating that although Justice Kennedy stated that "his views did not 'depart in fundamental respects from the opinion of the

agreed that when a search occurs outside the United States, an alien is not entitled to Fourth Amendment protections. Four Justices accepted the view that aliens must be within the United States and have "substantial connections" in order to qualify for Fourth Amendment protections, while Justice Kennedy offered mixed support for the substantial connections prong of this two-part test. A concurrence in the judgment and two dissents further muddied the water about the scope of *Verdugo-Urquidez*'s holding.[165] It is not surprising, then, that lower courts have understood *Verdugo-Urquidez* to stand for a diverse array of propositions.[166] In particular, *Verdugo-Urquidez* has spurred disagreement over the territorial reach of the Fourth Amendment, and over whether certain classes of aliens are afforded greater Fourth Amendment protection than others.

Court' . . . [his] opinion suggests a far greater schism with the 'plurality' than his words suggest"); *see also* NEUMAN, *supra* note 18, at 105 ("Kennedy's concurring opinion diverged so greatly from Rehnquist's analysis and conclusions that Rehnquist seemed really to be speaking for a plurality of four."). Various courts have assumed that the opinion's "substantial connections" language is controlling precedent. *See, e.g.*, United States v. Tehrani, 826 F. Supp. 789, 793 n.1 (D. Vt. 1993) (stating that defendant's voluntary presence in the United States was sufficient to entitle him to the Fourth Amendment's protection); Riechmann v. State, 581 So. 2d 133, 138 (Fla. 1991) ("Riechmann's claim is not controlled by *Verdugo-Urquidez* because Riechmann did have a voluntary attachment to the United States and thus had greater entitlement to [F]ourth [A]mendment protection, having assumed the benefits and burdens of American law when he chose to come to this country."), *cert. denied*, 506 U.S. 952 (1992).

165 Justice Stevens concurred in the judgment and stated that because "aliens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights, including the Fourth Amendment," Verdugo-Urquidez was entitled to the Fourth Amendment's protections. 494 U.S. at 279 (Stevens, J., concurring in the judgment). However, Justice Stevens also concluded that the search was "not 'unreasonable'" and that the Warrant Clause does not "app[ly] to searches of noncitizens' homes in foreign jurisdictions." *Id.* Justices Brennan and Marshall dissented, concluding that substantial connections were not necessary for protection under the Fourth Amendment; that, in any event, Verdugo-Urquidez's presence in the United States satisfied such a requirement; and that the Fourth Amendment applied to American actions taken abroad. *Id.* at 279–97 (Brennan, J., dissenting). Justice Blackmun's dissent argued that Verdugo-Urquidez was entitled to Fourth Amendment protections because he was in the United States when the search occurred, but advocated for a more narrow interpretation of the Fourth Amendment's extraterritorial scope. *Id.* at 297 (Blackmun, J., dissenting).

166 *See* D. Carolina Núñez, *Inside the Border, Outside the Law: Undocumented Immigrants and the Fourth Amendment*, 85 S. CAL. L. REV. 85, 101–12 (2011) (discussing lower court opinions applying *Verdugo-Urquidez*). Judge Cabranes suggests that the differing views between the Justices in the majority and those in the dissent track two different underlying theories of the Constitution: the compact theory, which "regard[s] the Constitution as a framework for establishing domestic order," and the organic theory, which views compliance with constitutional provisions as a requirement for legitimate state action. *See* Cabranes, *supra* note 125, at 1665, 1667, 1669–70.

a. The Fourth Amendment Outside the United States

Five Justices agreed in *Verdugo-Urquidez* that aliens' Fourth Amendment rights, whatever they may be, do not extend beyond the borders of the United States. This holding has been restated by several courts,[167] though it remains an open question whether the same rule applies to lawful permanent residents.[168] That said, the total denial of Fourth Amendment rights to aliens abroad must be understood in light of the fact that citizens likely also have limited Fourth Amendment rights while abroad. Although the Supreme Court has not expressly resolved this question, Justice Brennan, in his dissent in *Verdugo-Urquidez*, asserted that it was clearly established that U.S. citizens are entitled to the Fourth Amendment's protections for searches and seizures conducted by U.S. officials abroad.[169] However, all but Justices Brennan and Marshall stated at various points in their

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167 *See, e.g.*, *In re* Terrorist Bombings of U.S. Embassies in E. Afr. (*Terrorist Bombings*), 552 F.3d 157, 168 (2d Cir. 2008) (characterizing the Supreme Court holding as: "[T]he Fourth Amendment affords no protection to aliens searched by U.S. officials outside of our borders"), *cert. denied*, 130 S. Ct. 1050 (2010); United States v. Bravo, 489 F.3d 1, 9 (1st Cir. 2007) ("The Supreme Court's holding in *Verdugo-Urquidez* is clear that the actions of the United States directed against aliens in foreign territory or in international waters are not constrained by the Fourth Amendment."), *cert. denied*, 552 U.S. 939 (2007); United States v. Davis, 905 F.2d 245, 251 (9th Cir. 1990) ("Although *Verdugo-Urquidez* only held that the [F]ourth [A]mendment does not apply to searches and seizures of nonresident aliens in foreign countries, the analysis and language adopted by the Court creates no exception for searches of nonresident aliens on the high seas."); United States v. Larrahondo, 885 F. Supp. 2d 209, 221 (D.D.C. 2012) (stating that *Verdugo-Urquidez* forecloses an alien's claim to Fourth Amendment protection when abroad except, possibly, where the method of gathering evidence "shocks the conscience"); United States v. Defreitas, 701 F. Supp. 2d 297, 304 (E.D.N.Y. 2010) ("Kadir is not a U.S. citizen, and has no voluntary connections to the United States. It is well settled that the Fourth Amendment is inapplicable to persons so situated, who are searched outside of the country."); Kindhearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857, 873–74 (N.D. Ohio 2009). Extraterritoriality questions are presented more directly in the Fourth Amendment context in light of the fact that "a violation of the Fourth Amendment is seen as occurring at the moment the unlawful search and seizure takes place—not, as with the [Fifth Amendment] privilege [against self-incrimination], at trial when the evidence seized is introduced." Godsey, *supra* note 102, at 879.

168 *See* United States v. Omar, No. 09-242, 2012 WL 2277821, at *3–4 (D. Minn. June 18, 2012) (declining to reach the question "whether a lawful permanent resident, subject to a search and seizure on foreign soil, is entitled to the protections of the Fourth Amendment," but noting that it is an open issue in the Eighth Circuit). *But see* United States v. Fantin, 130 F. Supp. 2d 385, 391 (W.D.N.Y. 2000) (concluding that a foreign defendant not present in the United States during the alleged unlawful search lacked sufficient connections to assert Fourth Amendment rights).

169 *Verdugo-Urquidez*, 494 U.S. at 283 n.7 (Brennan, J., dissenting) ("Certainly nothing in the Court's opinion questions the validity of the rule, accepted by every Court of Appeals to have considered the question, that the Fourth Amendment applies to searches conducted by the United States Government against United States citizens abroad." (internal citations omitted)). Some courts have held, however, that U.S. citizens are not so protected when the searches are conducted by "foreign [law enforcement] authorities in

respective opinions that the Warrant Clause would not apply—to anyone, alien or citizen alike—overseas, and at least one circuit court has adopted this position.[170] Several courts have concluded that the Warrant Clause does not apply abroad, but that searches and seizures against citizens performed by U.S. agents abroad must still satisfy the Fourth Amendment's reasonableness inquiry.[171]

b. The Fourth Amendment and Substantial Connections

This leads to the second prong of the *Verdugo-Urquidez* plurality holding: An alien must have "substantial connections" to the United States to be entitled to the Fourth Amendment's protections.[172] As part of his plurality opinion, Chief Justice Rehnquist called into question what most had assumed since *INS v. Lopez-Mendoza*: Entitlement to Fourth Amendment rights does not turn on the legality of aliens' presence in the United States.[173] In dicta of his own, Chief Justice Rehnquist stated that *Lopez-Mendoza*'s assumption that unauthorized aliens in the United States were entitled to Fourth Amendment protections was nothing more than dicta, suggesting that the Supreme Court might decide differently were it directly presented with the question.[174] Not surprisingly, this has spurred debate as to when aliens present in the United States are entitled to the Fourth Amendment's protections.

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their own countries . . . ." *See, e.g.*, United States v. Peterson, 812 F.2d 486, 490 (9th Cir. 1987).

170 *Terrorist Bombings*, 552 F.3d at 169 ("[I]n *Verdugo-Urquidez*, seven [J]ustices of the Supreme Court endorsed the view that U.S. courts are not empowered to issue warrants for foreign searches."); *see also* United States v. Stokes, 710 F. Supp. 2d 689, 700 (N.D. Ill. 2009) (adopting the Second Circuit's reasoning).

171 *See, e.g.*, *Terrorist Bombings*, 552 F.3d at 167 ("[W]e hold that the Fourth Amendment's warrant requirement does not govern searches conducted abroad by U.S. agents; such searches of U.S. citizens need only satisfy the Fourth Amendment's requirement of reasonableness."); United States v. Juda, 46 F.3d 961, 968 (9th Cir. 1995) ("We agree . . . that the Fourth Amendment's reasonableness standard applies to United States officials conducting a search affecting a United States citizen in a foreign country."); United States v. Flath, No. 11-CR-69, 2011 WL 6296759, at *8 (E.D. Wis. Nov. 18, 2011) (concluding that even if the Fourth Amendment was implicated via the "joint venture" theory, the search satisfied the Fourth Amendment's reasonableness requirement and the "Warrant Clause does not apply to overseas searches"), *adopted*, 845 F. Supp. 2d 951 (E.D. Wis. 2012); *Stokes*, 710 F. Supp. 2d at 697–700 (concluding that while the Fourth Amendment was implicated in the search of a home of a U.S. citizen living abroad, the search was not subject to the Warrant Clause).

172 494 U.S. at 271 (observing that the alien lacked a "significant voluntary connection").

173 *Id.* at 272–73 (discussing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984)).

174 *Id.* at 272 ("Our statements in *Lopez-Mendoza* are therefore not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us.").

First and foremost, whether aliens located within U.S. territory must satisfy the substantial connections test, or whether something less is sufficient, remains unresolved.[175] Nevertheless, it appears that most district courts looking to *Verdugo-Urquidez* have applied the substantial connections test—and not merely the territorial prong embraced by Justice Kennedy's concurrence—to determine whether an alien may claim Fourth Amendment protections.[176]

This raises the further question of what connections to the United States are sufficient. Several courts appear to handle the question on a case-by-case inquiry.[177] However, a few have attempted categorical

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[175] The Fifth Circuit declined to decide between the two tests because it found, in *Martinez-Aguero v. Gonzalez*, that its defendant could satisfy both. 459 F.3d 618, 624–25 (5th Cir. 2006), *cert. denied*, 549 U.S. 1096 (2006); *see also* United States v. Barona, 56 F.3d 1087, 1094 (9th Cir. 1995) (noting that it "could hold, therefore, that [the defendants] have failed to demonstrate that, at the time of the extraterritorial search, they were 'People of the United States' entitled to receive the 'full panoply of rights guaranteed by our Constitution'" but declining to reach the question "because even if they were entitled to invoke the Fourth Amendment, their effort would be unsuccessful" (quoting *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1236 (9th Cir. 1988))). The D.C. Circuit has intimated that the substantial connections test applies. Rasul v. Myers, 563 F.3d 527, 531 (D.C. Cir. 2009) (stating, in discussing *Verdugo-Urquidez*, that "[t]hose cases [involving aliens with substantial connections] could not help an alien who, like Verdugo-Urquidez and plaintiffs in this case, had at no relevant time been in the country and had 'no previous significant voluntary connection with the United States.'"), *cert. denied*, 130 S. Ct. 1013 (2009). Professor Neuman suggests that the Supreme Court's holding in *Boumediene* "provides a long overdue repudiation of Rehnquist's opinion in *Verdugo-Urquidez*" that the application of the Constitution rises and falls with "previous significant voluntary connection with the United States." Neuman, *supra* note 133, at 272 (internal quotation marks omitted).

[176] *See, e.g.*, United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1264–65 (D. Kan. 2008); Veiga v. World Meteorological Org., 568 F. Supp. 2d 367, 374 (S.D.N.Y. 2008), *aff'd on other grounds*, 368 F. App'x 189 (2d Cir. 2010); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1261 (D. Utah 2003) (expressing unwillingness to second-guess Justice Kennedy's statement that he joined the opinion of the Court), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004); Daly v. Harris, 209 F.R.D. 180, 189 n.4 (D. Haw. 2002); United States v. Fantin, 130 F. Supp. 2d 385, 390 (W.D.N.Y. 2000); United States v. Tehrani, 826 F. Supp. 789, 794 n.1 (D. Vt. 1993), *aff'd*, 49 F.3d 54 (2d Cir. 1995). However, at least one federal court found that there is no substantial connections requirement for aliens inside the territorial United States. *See* United States v. Guitterez, 983 F. Supp. 905, 915 (N.D. Cal. 1998) ("[T]he question that remains unanswered by *Verdugo-Urquidez* and *Barona* is whether an illegal alien *must* demonstrate a 'connection' with this country as a prerequisite to asserting the shelter of the Fourth Amendment. . . . [T]he [c]ourt concludes that, at this juncture, no such obligation exists."), *rev'd on other grounds*, 203 F.3d 833 (9th Cir. 1999). Another court dismissed as dicta the entire discussion of domestic aliens' Fourth Amendment rights in *Verdugo-Urquidez*. *See* United States v. Iribe, 806 F. Supp. 917, 919 (D. Colo. 1992), *rev'd in part on other grounds, aff'd in part*, 11 F.3d 1553 (10th Cir. 1993).

[177] *See, e.g.*, United States v. Huitron-Guizar, 678 F.3d 1164, 1167–68 (10th Cir. 2012) (understanding *Verdugo-Urquidez* to demonstrate that "[t]he Court seemed unwilling to say that illegal aliens, who reside here voluntarily and who accept some social obligations, have *no* rights the government is bound to respect when, say, they protest a raid or detention" (citation omitted)); *Martinez-Aguero*, 459 F.3d at 625 (concluding that a Mexican citizen's voluntary, repeated interactions with the immigration system—the defendant had

pronouncements regarding entire classes of aliens. The Ninth Circuit, for example, has stated that *Verdugo-Urquidez* requires "treating resident aliens the same as resident citizens for purposes of constitutional analysis."[178] At the other extreme, two district courts have held, on the basis of *Verdugo-Urquidez*, that "previously deported alien felons" are categorically prohibited from any Fourth Amendment protection.[179] One of these opinions has not yet been followed by other courts, while the other was affirmed on other grounds that avoided the categorical analysis.[180]

In recent years, various states have enacted legislation aimed at increasing law enforcement power to ferret out and detain those suspected of being present without authorization in the United States, thereby posing Fourth Amendment issues.[181] As with the potential equal protection claims previously discussed,[182] most of this state legislation has been challenged on preemption grounds. An example is the case heard during the Supreme Court's previous Term, *Arizona v. United States*,[183] in which the Supreme Court considered Arizona's Support Our Law Enforcement and Safe Neighborhoods Act. Under section 2(B) of the Arizona statute, law enforcement officers are instructed "to make a reasonable attempt to determine the immigration status of any person they stop, detain, or arrest on some other legitimate basis if reasonable suspicion exists that the person is an alien and is unlawfully present in the United States."[184] Although the case was decided solely on preemption grounds, the Court nevertheless mentioned the possibility of constitutional concerns were the

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been detained for using a recently expired border-crossing card, which federal officials had nevertheless encouraged her to continue using—"constitute her voluntary acceptance of societal obligations, rising to the level of 'substantial connections'"). *See generally* Núñez, *supra* note 166, at 105–08 ("[C]ourts have struggled to find a consistent method for analyzing a claimant's connection with the United States.").

178 United States v. Juda, 46 F.3d 961, 967 (9th Cir. 1995).

179 *Esparza-Mendoza*, 265 F. Supp. 2d at 1271 ("In reaching this conclusion, the court has made a categorical determination about previously deported aliens. In other words, an individual previously deported alien felon is not free to argue that, in his particular case, he possesses a sufficient connection to this country to receive Fourth Amendment coverage . . . ."); *see also* United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1272 (D. Kan. 2008). As Professor Núñez points out, the same judge deciding *Esparza-Mendoza* declined to apply his own analysis to a later case involving an unauthorized alien who was not a previously deported alien felon. *See* Núñez, *supra* note 166, at 110 n.125 (discussing *United States v. Atienzo*, No. 2:04-CR-00534, 2005 WL 3334758 (D. Utah Dec. 7, 2005)).

180 *See* United States v. Esparza-Mendoza, 386 F.3d 953, 960 (10th Cir. 2004) (holding that the encounter in question did not constitute a search).

181 *See supra* notes 86–88 and accompanying text.

182 *See supra* notes 89–98 and accompanying text.

183 132 S. Ct. 2492 (2012).

184 *Id.* at 2507 (internal quotation marks and alterations omitted).

statute to authorize detaining individuals "solely to verify their immigration status" and left open the possibility of "other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."[185] Future Fourth Amendment challenges to the Arizona law are likely to occur. As courts hear new challenges to new state immigration legislation, they may be faced with questions about how the substantial connections test of *Verdugo-Urquidez* should be applied to unauthorized aliens in the United States.

3. The Effect of the Fourth Amendment on the Second Amendment

Although not a matter of criminal procedure, it is worth addressing briefly how the jurisprudence surrounding *Verdugo-Urquidez* and its progeny is being extended to assess whether and to what extent aliens have rights under the Second Amendment. This has occurred because *Verdugo-Urquidez*, in interpreting the Fourth Amendment's reference to "the people," expressly states that the same term of art appears in the Second Amendment. When, in *District of Columbia v. Heller*, the Supreme Court first recognized an individual right to bear arms for the purposes of self-defense, the majority recited Chief Justice Rehnquist's analysis of "the people," and applied the same interpretation to the Second Amendment.[186]

Given the individual right established by *Heller*, courts have subsequently faced the question of whether the right extends to aliens. This question has arisen thus far predominantly in the context of 18 U.S.C. § 922(g)(5), which makes it a crime "for any person . . . who, being an alien, is illegally or unlawfully in the United States . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition."[187] All courts have upheld the statute as constitutional, though there are notable

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185 *Id.* at 2509–10; *see also id.* at 2516 (Scalia, J., dissenting) ("[A]ny investigatory detention, including one under § 2(B), may become an unreasonable seizure if it lasts too long. But that has nothing to do with this case, in which the Government claims that § 2(B) is pre-empted by federal immigration law, not that anyone's Fourth Amendment rights have been violated." (internal citations omitted)).

186 554 U.S. 570, 579–81 (2008) (interpreting the meaning of "the people" in the Second Amendment). *Heller*'s recognition of an individual right to bear arms for the purpose of self-defense has been extended to the states via the Fourteenth Amendment. *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010).

187 18 U.S.C. § 922(g)(5). The Sixth Circuit had previously considered the effect that *Verdugo-Urquidez* had on the application of the Second Amendment to aliens. United States v. Bournes, 339 F.3d 396, 397–98 (6th Cir. 2003), *cert. denied*, 540 U.S. 1113 (2004). However, the precedential value of this opinion is in doubt after *Heller*. *See id.* at 397 (holding that dicta in *Verdugo-Urquidez* cannot disrupt the fact that "there can be no serious claim to any express constitutional right of an individual to possess a firearm") (citations omitted).

differences in the reasoning between the Fifth and Eighth Circuits, the Tenth Circuit, and the Fourth Circuit.[188]

In *United States v. Portillo-Munoz*, the Fifth Circuit upheld § 922(g)(5) against a Second Amendment challenge.[189] Portillo, a Mexican citizen who entered the United States without authorization and had been working as a ranch hand for eighteen months, was convicted of possessing a firearm. The Fifth Circuit concluded that Portillo had no Second Amendment rights, and so his conviction under § 922(g)(5) could not be unconstitutional. The Fifth Circuit noted the interpretation of "the people" in both *Verdugo-Urquidez*'s plurality and in *Heller*, but nevertheless did "not find that the use of 'the people' in both the Second and the Fourth Amendment mandates a holding that the two amendments cover exactly the same groups of people."[190] Because the former deals with an affirmative right that could have been intended to cover a narrower class of individuals than would be covered by a protective right, the Fifth Circuit concluded that the combined constitutional analyses of *Verdugo-Urquidez* and *Heller* did not require holding that § 922(g)(5) was unconstitutional.[191]

The Tenth Circuit, faced with similar charges brought against a Mexican national living without authorization in the United States since the age of two, declined to adopt the Fifth Circuit's distinction between the Fourth and Second Amendments.[192] Nevertheless, because *Heller* modifies slightly the constitutional analysis in *Verdugo-Urquidez*—*Heller* interprets "the people" to be concerned with "the *political* community," whereas *Verdugo-Urquidez* refers to "the *national* community"—and because *Heller* had no occasion to consider aliens' Second Amendment rights, the Tenth Circuit declined to recognize "a rule that the right to bear arms is categorically inapplicable to noncitizens."[193] Instead, it upheld § 922(g)(5) on narrower grounds, holding that, even assuming that unauthorized aliens had

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188 The Eighth Circuit, in a four-sentence opinion, incorporated the reasoning and holding of the Fifth Circuit. United States v. Flores, 663 F.3d 1022, 1022 (8th Cir. 2011) (per curiam) ("Agreeing with the Fifth Circuit that the protections of the Second Amendment do not extend to aliens illegally present in this country, we affirm." (citing United States v. Portillo-Munoz, 643 F.3d 437 (5th Cir. 2011) (internal citations omitted))), *cert. denied*, 133 S. Ct. 28 (2012).

189 643 F.3d 437 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 1969 (2012).

190 *Id.* at 440.

191 Judge Dennis, who partially dissented from the majority's opinion, argued that *Heller* itself expressly disclaims this characterization of the Second Amendment as an affirmative, rather than a protective, right. *Id.* at 444 (Dennis, J., concurring in part and dissenting in part).

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

193 *Id.* at 1168 (emphasis added).

Second Amendment rights, the law survived the intermediate scrutiny analysis used to evaluate other subsections of § 922(g).[194] As a result, it avoided the underlying constitutional question.

Most recently, the Fourth Circuit concluded, in dismissing a challenge to the constitutionality of § 922(g)(5), "that the Second Amendment right to bear arms does not extend to illegal aliens."[195] In doing so, it shared the Tenth Circuit's hesitation to exclude illegal aliens from the Second Amendment on the basis of *Verdugo-Urquidez*'s and *Heller*'s overlapping textual analyses of "the people."[196] Nevertheless, the Fourth Circuit relied for its conclusion on a separate discussion in *Heller*—one that "reached the Second Amendment's connection to law-abiding citizens through a historical analysis, independent of its discussion about who constitutes 'the people.'"[197] Determining that unauthorized aliens, who entered the country in violation of federal law, would not historically have been considered law-abiding citizens, the Fourth Circuit determined that this class of aliens thereby fell outside the scope of the Second Amendment's protection.[198] Beyond these four circuits, several district courts—albeit all in unpublished opinions—have upheld § 922(g)(5) against Second Amendment challenges brought by unauthorized aliens.[199]

Although Second Amendment challenges brought by unauthorized aliens against § 922(g)(5) have thus far been unsuccessful, courts will continue to confront questions regarding the impact of *Heller*'s recognition of an individual right to bear arms under the Second Amendment. The jurisprudence surrounding whether and to what extent Second Amendment rights extend to aliens will thus continue to evolve and take shape in the coming years. To that point, one federal district court in Massachusetts has recently recognized a Second Amendment right for lawful permanent residents.[200] In doing so, the court relied on *Verdugo-Urquidez* both to interpret the scope of the Second Amendment's reference to "the people" in light of *Heller* and

194 *Id.* at 1169–70.

195 United States v. Carpio-Leon, 701 F.3d 974, 982 (4th Cir. 2012).

196 *Id.* at 978.

197 *Id.* at 979.

198 *Id.* at 981.

199 United States v. Flores-Higuera, No. 1:11-CR-182-TCB, 2011 WL 3329286, at *2–3 (N.D. Ga. July 6, 2011), *adopted*, 2011 WL 3329147 (Aug. 1, 2011); United States v. Lewis, No. 10-007, 2010 WL 3370754, at *2–3 (N.D. Ga. May 26, 2010), *adopted*, 2010 WL 3370719 (Aug. 23, 2010); United States v. Yanez-Vasquez, No. 09-40056-01, 2010 WL 411112, at *2–5 (D. Kan. Jan. 28, 2010); United States v. Boffil-Rivera, No. 08-20437-CR, 2008 WL 8853354, at *4–8 (S.D. Fla. Aug. 12, 2008).

200 Fletcher v. Hass, 851 F. Supp. 2d 287 (D. Mass. 2012).

to determine whether the plaintiffs were able to satisfy the substantial connections test.[201] As a result, the court ruled unconstitutional a state statute that prohibited all aliens from possessing firearms, though only insofar as that statute applies to lawful permanent residents.[202] It remains to be seen whether the Second Amendment will follow the Fourth, Fifth, and Sixth Amendments to include limited constitutional rights for aliens based on considerations of status, location, and allegiance.

III
Due Process Rights

Part II addressed aliens' constitutional rights within the criminal procedure context. This final Part introduces three particular settings where due process rights are at issue. Part III.A acknowledges the use of the Fifth Amendment as a sword and as a shield by civil litigants, and considers whether aliens receive different treatment from citizens. Parts III.B and III.C examine contexts that predominantly or exclusively concern aliens: the detention and removal of aliens, and the process afforded to alien enemies in the War on Terror. As will become clear, the law of when and how due process protections apply is not uniform across contexts. Rather, because questions of extraterritorial application of constitutional protections, the government's power at the nation's borders, and the power of the Executive in wartime are also at stake, the application of due process standards to aliens by courts has been variable and nuanced in federal jurisprudence.

A. Aliens' Fifth Amendment Rights in Civil Litigation

Aliens, like citizens, bring civil challenges to remedy perceived constitutional violations. As one would suspect from the discussion thus far, courts have recognized specific limitations on an alien's ability to bring such claims. This is especially true in the Fifth Amendment context, where aliens have sued for due process violations and, relatedly, for unconstitutional takings.

The Ninth Circuit, in addressing an alien's due process rights while abroad, recently adopted a modified version of *Verdugo-Urquidez*'s substantial connections test.[203] Ibrahim was a Malaysian

[201] *Id.* at 294–99, 301.

[202] *Id.* at 301–02 ("This case does not require me to decide whether Second Amendment protection applies to *all* lawfully admitted aliens.").

[203] *See* Ibrahim v. Dep't of Homeland Sec., 669 F.3d 983, 996 (9th Cir. 2012) (stating that in *Verdugo-Urquidez*, "the inquiry is whether the alien has voluntarily established a

citizen pursuing a Ph.D. at Stanford who had been denied reentry to the United States after attending a conference abroad because her name appeared on the government's no-fly list. The Ninth Circuit sought to determine whether, because of her travels, Ibrahim lost the ability to enforce "the [Fifth Amendment] right she otherwise had because she left the United States."[204] It relied on *Verdugo-Urquidez*, as well as *Boumediene*, for the conclusion that the constitutional rights of aliens abroad should be assessed according to a flexible, functional calculation.[205] It then held that Ibrahim could invoke due process protections because the connections she developed over five years studying in the United States were substantial, and because her travels abroad—attending a conference to present the research she was conducting domestically—evinced her intent "to further, not to sever, her connections to the United States."[206]

The Federal Circuit similarly relied on *Verdugo-Urquidez* in considering whether a citizen of Uzbekistan could seek compensation under the Takings Clause after U.S. embassy workers in Uzbekistan allegedly ordered and oversaw the destruction of her cafeteria.[207] It too considered whether an alien abroad had sufficient connections to maintain suit under the Fifth Amendment. Without much discussion, the Federal Circuit then held that the lower court properly applied *Verdugo-Urquidez*'s substantial connections test to deny the plaintiff's claims, despite the fact that the Fourth Amendment was not at issue.

Notwithstanding the observation in many other settings that aliens abroad have no or limited access to the Fifth Amendment, there is one situation in which it appears that aliens are reliably protected by the Fifth Amendment. The Supreme Court has grounded its "minimum contacts" analysis of personal jurisdiction on the Due Process Clause, and there is no serious question that any alien abroad may raise this defense.[208] The D.C. Circuit recently faced this tension

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[significant] connection with the United States," but disregarding the territorial prong of the test).

204 *Id.* at 995.

205 *Id.* at 997 ("The law that we are bound to follow is . . . the 'functional approach' of *Boumediene* and the 'significant voluntary connection' test of *Verdugo-Urquidez*."). Ibrahim also raised a First Amendment claim, which the Ninth Circuit evaluated simultaneously with her Fifth Amendment claim. *Id.*

206 *Id.*

207 Atamirzayeva v. United States, 524 F.3d 1320 (Fed. Cir. 2008); *see also* Rosner v. United States, 231 F. Supp. 2d 1202, 1213–14 (S.D. Fla. 2002) (refusing to apply the Fifth Amendment extraterritorially in light of *Verdugo-Urquidez*).

208 As Professors Haugen and Parrish have independently pointed out, the denial of Fifth Amendment protection to aliens abroad in other contexts is jarring given this well-established rule of civil procedure that protects aliens and citizens alike from being unduly haled into court. *See* Gary A. Haugen, *Personal Jurisdiction and Due Process Rights for*

created by an aggressive denial of constitutional protections to aliens abroad on the one hand and the Supreme Court's civil procedure jurisprudence on the other.[209] The D.C. Circuit reviewed a district court's refusal to enforce an arbitration award against a state-owned Liberian company for lack of personal jurisdiction. Pointing to, among other cases, *Verdugo-Urquidez* for its discussion of constitutional rights of aliens abroad, the district court remarked that

> [i]t is not clear why foreign defendants . . . should be able to avoid the jurisdiction of United States courts by invoking the Due Process Clause when it is established in other contexts that nonresident aliens without connections to the United States typically do not have rights under the United States Constitution.[210]

While the D.C. Circuit speculated as to how to reconcile the doctrinal tension pointed out by the district court, it ultimately declined to resolve the problem, because the alien defendant-appellant had waived any due process argument.[211]

As shown especially in the following two Subparts, the extension of due process rights to aliens abroad in the civil procedure context stands in contrast with the treatment of the Fifth Amendment in immigration and national-security settings, where courts have extended fewer protections to aliens, especially those outside U.S. borders. Yet at the same time, a rigid focus on doctrinal tensions may obscure the fact that this outcome is broadly consistent with a view of aliens' rights increasing alongside their connection to the United

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Alien Defendants, 11 B.U. INT'L L.J. 109, 115–17 (1993); Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 37 (2006) ("[T]he Court's current due process formulations in the jurisdictional context are incoherent with its approach to U.S. constitutionalism in other contexts."). Haugen explores the tension between the Court's holding in *Verdugo-Urquidez*, that constitutional rights are available extraterritorially only when an alien defendant meets the substantial connections test, and its jurisprudence in personal jurisdiction cases, where alien defendants located outside the U.S. are protected under the Due Process Clause from being haled into a federal court unless they have minimum contacts with the United States. Haugen, *supra*, at 115–17. It would seem that, under *Verdugo-Urquidez*, only alien defendants who meet the substantial connections test would be permitted to assert a Due Process Clause defense relating to a lack of personal jurisdiction. Haugen argues that this makes little sense, because it is alien defendants lacking any connections with the United States "who need the 'minimum contacts' test the most," because it is so unreasonable to subject them to U.S. jurisdiction; however, it is precisely these defendants "who, under *Verdugo-Urquidez*, cannot claim this constitutional protection." *Id.* at 116.

209 *See* GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805 (D.C. Cir. 2012).

210 GSS Grp. Ltd. v. Nat'l Port Auth., 774 F. Supp. 2d 134, 139 (D.D.C. 2011), *aff'd*, 680 F.3d 805 (D.C. Cir. 2012).

211 *GSS Grp. Ltd.*, 680 F.3d at 816. The D.C. Circuit suggested that defendants appearing in court, even on a limited basis, establish presence enough to afford due process protection to nonresident aliens; and, alternatively, courts exercising jurisdiction inflict damage domestically on alien defendants sufficient to vest due process rights. *Id.*

States. Where contacts are less than minimum, the courts will not exercise jurisdiction over an individual. However, once minimum contacts are established, the courts have broad authority to exercise jurisdiction over that individual. As contacts become more substantial, that individual's ability to assert constitutional rights grows, until he or she finally resembles an ordinary citizen. Although the formal treatment of the Fifth Amendment due process right may seem contradictory, the outcome may be in line with this Article's broader discussion of aliens and the Constitution.

B. Aliens and Immigration

Now comes discussion of aliens' due process rights in the context of immigration processes. In exploring this topic, the framework is necessarily different because the circumstances are unique to aliens: exclusion, removal, and detention related to immigration processes. It has long been understood that forcible exclusion of citizens from the United States is cruel and unusual punishment prohibited by the Eighth Amendment.[212] However, the government's power to exclude and deport aliens has remained largely unlimited,[213] in light of the government's plenary power in the immigration sphere.[214] Because the government's power is at its zenith in this realm, understanding

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[212] *See* Martin, *supra* note 24, at 92–93 ("[S]ince the 1940s, the Supreme Court has steadily enhanced the protections that citizens enjoy against involuntary loss of membership, to the point that it now may be lost only when a citizen specifically intends to relinquish it." (footnotes omitted)); Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 478 (2005) (noting that the Supreme Court has held that "expatriation without renunciation constitutes cruel and unusual punishment in violation of the Eighth Amendment, because it results in statelessness").

[213] *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987) ("The Court has left only immigration and deportation outside the reach of fundamental constitutional protections."). For a historical overview of the development of deportation in U.S. history, see generally DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).

[214] The plenary power doctrine is informed by social-contract theory and "founded on strong notions of national sovereignty and clear separation between citizens who can claim protections under the U.S. Constitution and noncitizens who cannot." HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 36 (2006). Professor Aleinikoff describes the doctrine as follows:

> Congress acts essentially free from any constitutional limits when it defines the categories of aliens entitled to enter, designates categories of excludable aliens, establishes admission and detention procedures at the border, mandates the deportation of aliens residing in the country, denies resident aliens benefits and federal employment, permits the interdiction on the high seas of aliens seeking to come to the United States, and defines classes of aliens ineligible for U.S. citizenship.

the ways that aliens' due process rights nevertheless operate as constraints provides deeper insight into the general scope of aliens' constitutional rights and the extent to which they differ from the rights of citizens.

1. Exclusion and Removal

Immigration law in the United States historically involved "two types of proceedings in which aliens [could] be denied the hospitality of the United States: deportation hearings and exclusion hearings."[215] Deportation hearings applied to aliens already within U.S. borders, whereas exclusion hearings dealt with aliens at the border seeking entry.[216] Congress abandoned this territoriality-centered framework of exclusion-versus-deportation when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).[217] Now immigration law focuses on the admissibility of an alien, and the two types of hearings have been consolidated into a single "removal proceeding." Nevertheless, the constitutional jurisprudence surrounding the due process rights of aliens in immigration proceedings developed around this background framework. Accordingly, this Article explores the development of aliens' due process rights in immigration proceedings through the lens of the old exclusion and removal distinctions.

To address aliens' constitutional rights in the context of exclusion and removal requires reemphasizing the guiding principle previously discussed: Because exclusion and removal are considered civil rather than criminal matters, the Constitution's criminal procedure

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Aleinikoff, *supra* note 1, at 10–11 (footnotes omitted). *See also* Bosniak, *supra* note 39, at 1060 ("Broadly speaking, the plenary power doctrine allows the government to subordinate the interests of aliens to the perceived interests of the nation; as a result, Congress and the executive branch may make rules vis-a-vis aliens that would be unacceptable if applied to citizens." (internal quotation marks and alterations omitted)); Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 346–49 (2008) (succinctly reviewing the doctrine's historical evolution). *But see* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1016 (2002) (describing how the plenary power doctrine "has been limited in recent years").

215 Vartelas v. Holder, 132 S. Ct. 1479, 1484 (2012) (quoting Landon v. Plasencia, 459 U.S. 21, 25 (1982)).

216 *Id.* at 1484.

217 Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 20, 22, 28, 32, 42, 48, and 50 U.S.C.); *see also Vartelas*, 132 S. Ct. at 1484 (citing 8 U.S.C. §§ 1229, 1229a). The new statute created a single, uniform proceeding called removal. *See* 8 U.S.C. § 1229a. Instead of using the terms "entry" and "exclusion," the key term of art governing alien rights is "admission." *See* Lin Guo Xi v. INS, 298 F.3d 832, 838 (9th Cir. 2002).

protections are largely inapplicable.[218] Thus, in seeking to constrain government action in these proceedings, aliens have been primarily limited to due process claims.[219]

a. Aliens' Due Process Rights in Immigration Proceedings

The Supreme Court's early jurisprudence treated exclusion and removal proceedings as conceptual equals and concluded that aliens were not entitled to due process protections with respect to either.[220] In so doing, the Supreme Court recognized the essentially unlimited power of the federal government to regulate immigration through exclusion and expulsion, including retroactively and on the grounds of race.[221] The Court even went so far as to hold that those claiming to be lawful citizens as a defense to removal or exclusion were not entitled to due process protections.[222]

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[218] SCAPERLANDA, *supra* note 23, at 33; *see also* Markowitz, *supra* note 107, at 1302 (noting that in the context of deportation proceedings "immigrants have no right to appointed counsel[,] . . . no protection against retroactive changes in the law[,] . . . no right to have their proceedings in any particular venue[,] . . . and immigrants can be deported for the most minor offenses, such as turnstile jumping or shoplifting candy").

[219] Scaperlanda, *supra* note 46, at 762 ("The Court has . . . applied the amorphous concepts of procedural due process found in the Fifth Amendment to protect noncitizens in immigration proceedings."). *But see* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1650 (1992) (noting that the fact that deportation is conceptualized as "civil" rather than "criminal" in nature has made the Supreme Court "reluctan[t] to give real content to procedural due process" protections).

[220] *See* Motomura, *supra* note 52, at 550–54.

[221] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 727–28 (1893) (rejecting a constitutional challenge on procedural due process grounds to a rule requiring Chinese aliens to produce a White witness to vouch for their lawful presence in the United States); Ekiu v. United States, 142 U.S. 651, 662 (1892) (denying habeas relief to a Japanese alien who was denied entry because she was deemed likely to become a public charge); The Chinese Exclusion Case (Chae Chan Ping v. United States), 130 U.S. 581, 606–07 (1889) (upholding the exclusion of a Chinese immigrant returning to the United States in light of racial restrictions enacted during his time abroad); *see also* Lem Moon Sing v. United States, 158 U.S. 538, 549 (1895) (same); Cole, *supra* note 214, at 1015–16 ("These decisions inaugurated the so-called 'plenary power' doctrine, which provides that the immigration power is in large measure immune from constitutional restraint.").

[222] *See* United States v. Ju Toy, 198 U.S. 253, 262 (1905); *see also* Maltz, *supra* note 31, at 1152–53 (analyzing the opinions in *Ju Toy*). The Court's decisions in these matters are remarkable insofar as they are roughly contemporaneous with the recognition of aliens' right to equal protection under the Fourteenth Amendment and criminal procedure constitutional rights under the Fifth and Sixth Amendments in the late nineteenth century. *See supra* Part I.B.1 (discussing the extension of Fourteenth Amendment rights to aliens in *Yick Wo v. Hopkins*, 118 U.S. 356 (1876)); *supra* Part II.A.1 (discussing the extension of Fifth and Sixth Amendment rights to aliens in *Wong Wing v. United States*, 163 U.S. 228 (1896)); *see also* Motomura, *supra* note 219, at 1626 ("The stunted growth of constitutional immigration law contrasts sharply with the flowering of constitutional protections for aliens in areas other than immigration law.").

Over time due process jurisprudence has developed to recognize constitutional limits on government action in the immigration realm.[223] Specifically, the Supreme Court fashioned divergent constitutional regimes for removal and for exclusion, using physical presence as the key distinguishing factor: The Court reasoned that aliens already physically present in the United States have a greater stake in their continued presence and thus have the right to challenge the basis for their removal. In 1903 in *Yamataya v. Fisher*—also known as the *Japanese Immigrant Case*—the Supreme Court concluded that Yamataya, a Japanese alien challenging her deportation on the grounds that she would likely become a public charge, had a right to be heard.[224] The Court held that an alien who has entered the United States, even if "alleged to be illegally here," cannot be detained and removed without the "opportunity to be heard upon the questions involving his [sic] right to be and remain in the United States."[225] Although the Court ultimately concluded that Yamataya had been afforded all the process due under the circumstances,[226] the decision for the first time acknowledged the potential validity of due process claims in the removal context.[227]

In *Yamataya*'s aftermath, the Supreme Court limited the newly recognized due process right,[228] and treated removal proceedings as immune from constitutional challenge unless proven to be "manifestly unfair."[229] However, as the harsh remedy of removal became an

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223 *See* Motomura, *supra* note 219, at 1637, 1645; *see also* SCAPERLANDA, *supra* note 23, at 34–35 (noting Supreme Court precedents recognizing that the Due Process Clause applies to removal proceedings of aliens located in the United States).

224 189 U.S. 86, 99–100 (1903).

225 *Id.* at 101.

226 *See id.* at 101–02 (stating that Yamataya had been given sufficient opportunity to be heard and that her specific objections should have been raised before and appealed to the official in charge of the proceedings).

227 Motomura, *supra* note 219, at 1637–38; *see also* Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 LAW & HIST. REV. 69, 91 (2003) (noting that federal courts at the time summarily affirmed immigration proceedings notwithstanding due process challenges). The Supreme Court's prior jurisprudence had "suggested that no constitutional objection by an alien outside the United States would be successful." Motomura, *supra* note 52, at 554.

228 Motomura, *supra* note 219, at 1638 ("For fifty years after *Yamataya*, Court decisions recited a procedural due process requirement while refusing to apply it to overturn government decisions."). Professor Motomura suggests that "[t]he Court's readiness to recognize procedural due process as a formal exception to the plenary power doctrine stood in tension with its unwillingness to give the procedural due process requirement any real content." *Id.* at 1646.

229 Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912); *see also* Motomura, *supra* note 219, at 1640 ("The only case that upheld a procedural due process challenge was *Kwock Jan Fat v. White*, [253 U.S. 454 (1920),] which invalidated an administrative order excluding a returning resident of Chinese descent because the immigration report . . .

increasingly frequent immigration-regulation tool,[230] the Supreme Court imposed more exacting constitutional limitations on the nature of its attendant proceedings.[231] The Court even strove to interpret deportation statutes in aliens' favor in light of its attention to underlying constitutional concerns.[232]

b. Limitations on Aliens' Due Process Rights in Immigration Proceedings

Notwithstanding the inroads made by *Yamataya* and its progeny, aliens' constitutional due process rights in the context of immigration proceedings remain quite circumscribed. Two key factors limit the scope of aliens' due process rights.

[excluded] evidence that several white witnesses clearly recog[n]ized the petitioner on his return to the United States.").

[230] Initially, the utility of deportation was limited by strict statutes of limitations. *See* Ngai, *supra* note 227, at 74 ("Between 1892 and 1907 the Immigration Service deported only a few hundred aliens a year . . . ."). However, after World War I, the first wave of anti-Communist sentiment moved through the country, prompting legislation that encouraged the arrest and deportation of "immigrant anarchists and communists." *Id.* at 74. These efforts "culminat[ed] in the Palmer Raids," during which "authorities arrested 10,000 alleged anarchists and ultimately deported some five hundred. *Id.* Much of this enforcement activity was done "under the guidance of the Justice Department's 'alien radical' division, headed by a young J. Edgar Hoover." Cole, *supra* note 134, at 995. The Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924), eliminated the statute of limitations for deportation, prompting "a dramatic increase in the number of deportations." Ngai, *supra* note 227, at 76.

[231] *See, e.g.*, Wong Yang Sung v. McGrath, 339 U.S. 33, 46, 49–51 (1950) (noting the serious consequences of deportation and the problem of submitting "a voteless class of litigants who not only lack the influence of citizens, but who are strangers to the laws and customs in which they find themselves" to deportation without the proper procedures); Bridges v. Wixon, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."); Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922) (stating that because deportation "may result . . . in loss of both property and life; or of all that makes life worth living . . . the Fifth Amendment affords protection in its guarantee of due process of law").

[232] *See, e.g.*, Woodby v. INS, 385 U.S. 276, 285–86 (1966) (holding, in interpreting an ambiguous statute, that the government had the burden to show deportability by "clear, unequivocal, and convincing evidence," rather than by a "preponderance of the evidence" in light of the serious consequences of deportation proceedings); *Wong Yang Sung*, 339 U.S. at 49–51 (affirming the application of the Administrative Procedure Act (APA) to deportation hearings and suggesting that if the APA did not govern deportation hearings, those hearings would be constitutionally infirm because the Constitution not only requires that aliens be given a hearing prior to deportation, but that the hearing be "a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality"); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.").

First, despite recognizing that aliens are entitled to due process in removal proceedings, the Supreme Court has consistently regarded the Executive's power as virtually unlimited with respect to the substantive bases upon which removal may be effectuated.[233] For example, in the 1952 case *Harisiades v. Shaughnessy*, the Supreme Court upheld the deportation of a "legally resident alien because of membership in the Communist Party," rejecting both a Fifth Amendment due process claim and a First Amendment freedom of association claim.[234] While the Court used Congress's plenary power to justify its conclusion on the due process claim,[235] it relied on the fact that the Court considered Communist membership akin to incitement of violent overthrowing of the government to justify the substantive basis for the deportation.[236]

Second, the Supreme Court has held that exclusion at the border is free from due process constraints.[237] The differential treatment stems from the concept that entry into the United States is a privilege, not a right, and therefore, before aliens cross the threshold of the U.S. border, they are completely lacking in entitlement to presence within the United States. It is pursuant to this logic that, in *United States*

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[233] *See* Aleinikoff, *supra* note 1, at 11 ("[B]ecause deportation is held not to constitute 'punishment,' substantive grounds of deportation may not be challenged as cruel and unusual punishment, ex post facto laws, or bills of attainder."). This fact is further underscored by federal legislation limiting the role of courts in reviewing the government's deportation decisions. *See* KANSTROOM, *supra* note 213, at 229–30 (discussing the Antiterrorism and Effective Death Penalty Act (AEDPA), the IIRIRA, and the 2005 REAL ID Act).

[234] 342 U.S. 580, 581 (1952). The Court also concluded that the outcome was no different in light of the fact that the resident alien in question had abandoned his Communist allegiance by the time that allegiance became a ground for deportation. *Id.* at 593–94; *accord* Motomura, *supra* note 52, at 558–59.

[235] *Harisiades*, 342 U.S. at 587–88 ("That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state."). Professor Cole has observed that this First Amendment holding is notable insofar as the Court "upheld the challenged immigration law under the then-prevailing First Amendment standard for citizens." Cole, *supra* note 17, at 385.

[236] *Harisiades*, 342 U.S. at 592. Just a few years later in *Galvan v. Press* the Court reached a similar conclusion with respect to a Mexican national, even though that individual claimed he had been duped into joining the Communist party. 347 U.S. 522, 523, 528–29 (1954).

[237] Professor Motomura captures this distinction:

> Taken together, *Knauff*, *Mezei*, and *Harisiades* confirmed the modern importance of the two basic lines of inquiry in the early plenary power decisions: the alien's location and the type of constitutional challenge. Specifically, aliens 'outside' the United States would continue to find it very difficult to raise any constitutional challenge to immigration decisions. Those 'inside' the United States could have some success with procedural claims but would be likely to have none with substantive claims.

Motomura, *supra* note 52, at 560.

ex rel. Knauff v. Shaughnessy,[238] the Supreme Court upheld the exclusion of a German alien without a hearing and based on confidential information; the Court stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[239] Indeed, in recent decisions, some lower courts have gone so far as to say that inadmissible aliens have no constitutional grounding upon which to challenge events—such as extraordinary rendition or allegations of torture—surrounding their exclusion.[240]

The exclusion exception to due process protection is itself subject to an exception for lawful permanent residents returning to the United States from abroad.[241] While the Supreme Court repeatedly hinted that lawful permanent residents may be on distinct constitutional footing from other aliens,[242] it first embraced heightened constitutional protections for resident aliens seeking reentry in 1982 in

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238 338 U.S. 537 (1950).

239 *Id.* at 544; Motomura, *supra* note 52, at 555–56; *see also* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155 (1993) (upholding a government policy of intercepting aliens on the high seas attempting to reach the United States to seek political asylum, albeit on statutory interpretation grounds); Won Kidane, *The Alienage Spectrum Disorder: The Bill of Rights from Chinese Exclusion to Guantanamo*, 20 BERKELEY LA RAZA L.J. 89, 104–06 (2010) (discussing *Sale*, 509 U.S. 155). Professor Cole suggests that the holding of this case is perhaps "overstated" when it comes to calling for distinct constitutional protections for aliens living within or outside U.S. borders. Cole, *supra* note 134, at 982. He suggests that the decision "may simply reflect the proposition—equally applicable to citizens—that where a statute does not create an entitlement, no 'liberty' or 'property' interest is implicated, and therefore due process does not attach." *Id.*

240 *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009); *see also* Charles Ellison, *Extending Due Process Protections to Unadmitted Aliens Within the U.S. Through the Functional Approach of* Boumediene, 3 CRIT 1, 13–16 (2010) (discussing the legal resolution of *Arar v. Ashcroft*).

241 Lawful permanent residents arguably also are provided heightened protection against removal from the United States as "[t]he only significant basis for the deportation of resident aliens today is their knowing commitment of a criminal act, and deportation ensues only upon conviction." Martin, *supra* note 24, at 115.

242 The first hint came in *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600 (1953), when the Court utilized legal gymnastics to ensure that a lawful permanent resident's denial of reentry to the United States was analyzed under the deportation framework, where due process rights attach, as opposed to under the exclusion framework. To reach this result, the Court relied on the fiction that an alien's trip abroad did not terminate his presence for immigration purposes, and distinguished *Knauff* as a case concerning "an alien entrant," rather than, as here, a "resident alien's right to be heard." *Id.* at 596. In *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963), the Court held that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." Professor Motomura suggests that this interpretive move may have been used to avoid addressing the constitutionality of the basis for the exclusion. Motomura, *supra* note 52, at 576–78. The INS had sought to exclude Fleuti on the basis of his homosexuality being a "psychopathic personality"—a basis that was not an established ground for exclusion in 1952 when he initially entered the United States. *Fleuti*, 374 U.S. at 451–52.

Landon v. Plasencia, when it considered the exclusion of a lawful permanent resident caught smuggling unauthorized immigrants into the United States.[243] Justice O'Connor, writing for the majority, held that under the relevant immigration statute, exclusion proceedings were proper but that some due process protections were required, expressly declining to "decide the contours of the process that is due or whether the process accorded Plasencia was insufficient."[244] In support of this conclusion, Justice O'Connor explained 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."[245]

Although these constitutional decisions—and their focus on entry and physical presence—remain guiding law,[246] the enactment of IIRIRA shifted the statutory classifications applied to aliens to one centered on an alien's admissibility. The prior distinction between excludable or deportable aliens, as determined by whether they had entered the United States, no longer forms the basis of immigration law. Admittedly, "in most cases, 'admission' and 'entry,' viewed as sorting mechanisms, divide people similarly."[247] But IIRIRA's new classifications alter the status of a particular class of aliens—unauthorized aliens, those who have arrived in the country without inspection, have "entered" under the old scheme, but have not been "admitted" under the new scheme.[248] By making "admission," rather than physical presence, the dividing line between the two categories of proceedings, IIRIRA essentially placed those entering without authorization and those denied entry at the border on equal footing, as compared with the old regime that gave preferential treatment to aliens who had entered the United States without authorization or inspection over those who properly submitted to border inspection.[249] As new due process claims are brought by aliens in relation to immigration proceedings, courts must determine how to apply the constitutional norms developed for the exclusion-versus-removal backdrop to

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243 459 U.S. 21 (1982).

244 *Id.* at 28–29, 32.

245 *Id.* at 32.

246 *See, e.g.*, Borrero v. Aljets, 325 F.3d 1003, 1007 (5th Cir. 2003) (citing approvingly *Landon* and *Knauff* in a post-IIRIRA case); Lin Guo Xi v. INS, 298 F.3d 832, 837 (9th Cir. 2002) (noting the "basic territorial distinction" at play in immigration law (internal quotation marks omitted)).

247 Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR. L.J. 407, 409 (2002). *But see, e.g.*, United States v. Lopez-Vasquez, 227 F.3d 476, 479 n.2 (5th Cir. 2000) (using the pre-IIRIRA term "excludable" interchangeably with the IIRIRA term "inadmissible").

248 *See* Bosniak, *supra* note 247, at 409.

249 Thus, inadmissible aliens are now divided into two categories: (1) arriving aliens deemed excludable and (2) aliens entering without inspection. Martin, *supra* note 24, at 65.

IIRIRA's classifications, and the ramifications for aliens' due process rights are still unfolding.[250]

2. *Detention*

Consider now the detention that often occurs ancillary to immigration proceedings.[251] Detention in the immigration context is described as "preventive detention" insofar as it does not result from a criminal conviction, which is the standard justification for government absolutely restricting an individual's liberty.[252] The constitutional limits on the government's power to "lock[ ] up a human being"[253] continue to be tested today, as courts grapple with legislation that increases the scope of the government's detention power.[254] The standards applied when detaining aliens thus continue to evolve.

When the government attempts to remove aliens, it often seeks in the interim to maintain those aliens in its custody, and a number of separate statutory bases provide it with the authority to do so.[255] As a result, detention can occur while immigration proceedings are

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[250] *See* Bosniak, *supra* note 247, at 409; Ellison, *supra* note 240, at 36 ("Hence, in regard to both undocumented aliens and aliens denied entry, the entry fiction depends at least in part on the assumption that aliens outside the border of the U.S. are entitled to no constitutional protections."); Allison Wexler, Note, *The Murky Depths of the Entry Fiction Doctrine: The Plight of Inadmissible Aliens Post-*Zadvydas, 25 CARDOZO L. REV. 2029, 2061 n.238 (2004) (discussing various sources that question how due process rights will unfold). At least some courts have continued to adhere to the view that unlawfully present aliens are entitled to due process. *See* Rusu v. INS, 296 F.3d 316, 321 n.8 (4th Cir. 2002) ("Nevertheless, it is well established that even one whose presence in this country is unlawful, involuntary, or transitory is entitled to the constitutional protection of the Fifth Amendment's Due Process Clause." (internal quotation marks omitted)).

[251] *See* Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44–46 (2010) (detailing the ever-increasing number of immigration-related detentions in the United States each year).

[252] *See* Cole, *supra* note 214, at 1004 ("[P]reventive detention is a narrowly carved exception to the general due process rule that persons may not be deprived of their liberty absent a criminal conviction."). Traditionally, preventive detention is held to be permissible only in cases "where an individual (1) is either in criminal or immigration proceedings and has been shown to be a danger to the community or a flight risk; (2) is dangerous because of a harm-threatening mental illness that impairs his ability to control his dangerousness; or (3) is an enemy alien during a declared war." *Id.* at 1010 (footnotes omitted) (internal quotation marks omitted).

[253] *Id.* at 1008.

[254] *See* Whitney Chelgren, Note, *Preventive Detention Distorted: Why It Is Unconstitutional to Detain Immigrants Without Procedural Protections*, 44 LOY. L.A. L. REV. 1477, 1482–83 (2011) (stating that AEDPA and the IIRIRA "expanded the categories of immigrants that are subject to mandatory detention" leading to a significant increase in the number of aliens detained by the United States annually).

[255] Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 609 (2010) ("At least three statutes authorize the detention of immigrants: 8 U.S.C. § 1225(b) for inadmissible 'arriving aliens,' 8 U.S.C. § 1226 for immigrants in the United States who are placed in removal proceedings, and 8 U.S.C.

ongoing,[256] as well as after such a determination has been made while the United States works to transfer aliens to another country.[257] In some instances, detention of an alien is statutorily mandated, both before and after the issuance of a final order of removal.[258] Because immigration proceedings can be lengthy and transfer arrangements difficult to secure, questions have arisen regarding how long and in what circumstances these detentions comport with due process.[259]

Initially, the Constitution was understood to permit prolonged (even seemingly indefinite) detentions in the aid of immigration enforcement. In *Shaughnessy v. United States ex rel. Mezei*, the Supreme Court upheld the prolonged detention—without a hearing and on the basis of secret evidence—of an alien who had previously

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§ 1231(a) for immigrants who have been ordered removed and who are awaiting deportation.").

256 Under 8 U.S.C. § 1226(a), "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States," and under 8 U.S.C. § 1225, arriving but potentially inadmissible aliens may be detained pending determination of their statuses. The United States sometimes employs the practice of paroling potentially inadmissible aliens within its borders pending determination of their statuses. Martin, *supra* note 24, at 57. Under this practice, "[a] person paroled into the United States is deemed not to have 'entered,' but merely to have been permitted physical presence in the United States while his or her right to enter is being adjudicated." Thomas Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 375 (2002); *see also* Heeren, *supra* note 255, at 609 n.53 (discussing parole practices).

257 8 U.S.C. § 1231 governs detention following the issuance of a final order of removal. Pursuant to § 1231(a)(6), an alien "may be detained beyond the removal period" if deemed "to be a risk to the community or unlikely to comply with the order of removal."

258 Aliens deemed inadmissible or deportable on the basis of having been convicted of one of a specified set of crimes are subject to mandatory detention pending final determination of their removability under 8 U.S.C. § 1226(c). The Supreme Court has described the statutory framework as follows:

> [T]he immigration laws provide two separate lists of substantive grounds, principally involving criminal offenses, for these two actions. One list specifies what kinds of crime render an alien excludable (or in the term the statute now uses, 'inadmissible'), while another—sometimes overlapping and sometimes divergent—list specifies what kinds of crime render an alien deportable from the country . . . .

Judulang v. Holder, 132 S. Ct. 476, 479 (2011) (internal citations omitted). Pursuant to 8 U.S.C. § 1231(a), an alien is subject to mandatory detention during the ninety-day "removal period" following the issuance of a final order of removal.

259 *See* Aleinikoff, *supra* note 256, at 365 (explaining that if the INS "is unable to remove a non-citizen because his or her state of origin is unwilling to permit return or because he or she has no state to which to return, the detention of the non-citizen may become indefinite"); *see also* Kimere Jane Kimball, Note, *A Right to Be Heard: Non-citizens' Due Process Right to In-Person Hearings to Justify Their Detentions Pursuant to Removal*, 5 STAN. J. C.R. & C.L. 159, 161 (2009) ("Many non-citizens choose to give up their meritorious claims rather than risk years in prison for exercising their right to challenge their removal.").

resided in the United States from 1923 to 1948.[260] When Mezei arrived at Ellis Island after nineteen months abroad, the United States denied him entry and, because no other country would accept him, maintained Mezei in custody on the island.[261] When Mezei challenged the constitutionality of his confinement through a petition for a writ of habeas corpus, the Supreme Court upheld his exclusion concluding that, by virtue of his departure, he was subject to the rules of "exclusion," and therefore not entitled to the due process protections available to deportable aliens.[262] The Court used the same exclusion analogy to assert that Mezei's presence at Ellis Island, while providing him standing to request habeas relief insofar as he was being detained by the United States, did not provide him with any statutory or constitutional right preventing his indefinite detention.[263]

Since *Mezei*, the Supreme Court has decided two important cases concerning the Executive's power to detain and remove: one in the context of detention following a final order of removal and one in the context of mandatory detention pending a decision on removability. While the signals emanating from the two decisions are mixed, they call into question *Mezei*'s continuing vitality.

In *Zadvydas v. Davis*, the Supreme Court suggested that indefinite detention following a final order of removal, at least with respect to aliens present in the United States, is constitutionally impermissible.[264] In *Zadvydas*, the Court confronted the question whether aliens present in the United States, but deemed removable, may be detained indefinitely pending their actual departure from the United States.[265] Concluding that indefinite detention implicated "serious constitutional concerns" under the Fifth Amendment, the Supreme Court read into the relevant statute a requirement that the length of the detention after the ninety-day removal period be reasonable and set out six months as the "presumptively reasonable period of detention."[266] Justice Breyer's majority opinion was cautious, however,

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260 345 U.S. 206, 208 (1953).

261 *Id.* at 208–09.

262 *Id.* at 213.

263 *Id.* at 215–16. After four years of detention, "Mezei was paroled into the United States under a special clemency measure . . . ." Motomura, *supra* note 52, at 558.

264 533 U.S. 678 (2001).

265 *Id.* at 683 (citing 8 U.S.C. §§ 1226(a), (c), 1231(a)); *see also* Martin, *supra* note 24, at 50 ("The issues the Court confronted in *Zadvydas* arose from a change in the governing law in 1996, one of many restrictive provisions adopted that year in the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).").

266 *Zadvydas*, 533 U.S. at 682, 701; *see also* Cole, *supra* note 214, at 1018 ("While the decision thus technically rests on statutory grounds, its strained statutory interpretation is plainly driven by constitutional concerns.").

recognizing that "[a]liens who have not yet gained admission to this country would present a very different question."[267] Nonetheless, the majority in *Zadvydas* stated that "once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[268]

Perhaps not surprisingly, in *Zadvydas*'s wake, a circuit split emerged regarding whether the Supreme Court's holding was equally applicable to inadmissible aliens.[269] The Sixth Circuit concluded en banc that the constitutional due process concerns that animated the Supreme Court in *Zadvydas* were no less salient with respect to inadmissible aliens facing indefinite detention because Cuba would not allow them to return.[270] The en banc decision in *Rosales-Garcia* distinguished *Mezei* on the grounds that there were "no special circumstances involving national security" in the case before the Sixth Circuit and suggested that subsequent Supreme Court decisions called into question "the [Supreme] Court's implicit conclusion in *Mezei* . . . that the indefinite detention of excludable aliens does [not] raise constitutional concerns."[271] Other circuits disagreed with this reasoning,

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267 *Zadvydas*, 533 U.S. at 682, 693–95; *see also* Martin, *supra* note 24, at 102 (concluding that *Zadvydas* "could be understood as saying that roots or connections established in that fashion, on the basis of such an invitation, simply count for more when calculating the constitutional limits on future treatment—even if the initially favorable legal status, for valid reasons, has been terminated").

268 *Zadvydas*, 533 U.S. at 693.

269 *Compare* Benitez v. Wallis, 337 F.3d 1289 (11th Cir. 2003) (concluding that inadmissible aliens have no constitutional right against indefinite detention), Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003) (same), *and* Rios v. INS, 324 F.3d 296 (5th Cir. 2003) (same), *with* Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003) (en banc) (applying reasonableness limitation to detention of inadmissible aliens in light of constitutional concerns), *and* Lin Guo Xi v. INS, 298 F.3d 832 (9th Cir. 2002) (same).

270 I must confess to having authored the majority opinion, which stated in relevant part:

> If the Due Process Clause of the Fifth Amendment applies to Rosales and Carballo, as we believe that it must, we do not see how we could conclude that the indefinite and potentially permanent detention of Rosales and Carballo raises any less serious constitutional concerns than the indefinite and potentially permanent detention of the aliens in *Zadvydas*. . . . [W]e find it not only unpalatable but also untenable to conclude that under the Due Process Clause of the Fifth Amendment persons living in the United States—whether by our choice or not—could be subjected to a life sentence in prison simply because their country of origin will not have them back.

Rosales-Garcia, 322 F.3d at 412–13.

271 322 F.3d at 414 (citing, inter alia, *Zadvydas*, 533 U.S. at 696, and United States v. Salerno, 481 U.S. 739 (1987)). *But see* Aleinikoff, *supra* note 256, at 374 (stating that *Zadvydas* did not expressly overturn *Mezei* and that "[t]here is some merit to Justice Scalia's charge that '*Mezei* . . . stands unexplained and undistinguished by the Court's opinion'"); Martin, *supra* note 24, at 71 (stating that Justice Breyer distinguished *Mezei* on territoriality grounds).

however, and concluded that Justice Breyer's statement indicated the Court's view that the due process concerns identified in *Zadvydas* were not implicated for inadmissible aliens.[272]

Two years later, the Supreme Court addressed the circuit split in *Clark v. Martinez*, although it chose to do so on statutory rather than constitutional grounds.[273] In a relatively brief opinion, Justice Scalia, writing for the seven-to-two majority, concluded that two Cuban nationals, temporarily paroled into the United States but later deemed inadmissible in light of criminal convictions, could not be detained indefinitely after the termination of the ninety-day removal period.[274] For the *Martinez* majority, the conclusion was compelled by *Zadvydas*: The Court could not interpret the statute's language to mean one thing as applied to lawfully admitted but removable aliens, and something else as applied to inadmissible aliens.[275] Justice Scalia made clear, however, that the Court's holding was not a constitutional one and even suggested that were Congress so inclined, it could alter the language of the statute to impose different terms of detention for inadmissible aliens.[276] As a result, after *Zadvydas* and *Martinez*, an open question remains whether a different statute authorizing indefinite detention of inadmissible aliens might be constitutional and whether *Mezei* survives at all.[277]

The Supreme Court evidenced less constitutional concern regarding mandatory detention prior to a final order of removability.

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[272] For a discussion of cases concluding that inadmissible aliens have no constitutional right against detention, see *supra* note 269 and accompanying text.

[273] 543 U.S. 371, 373–78 (2005).

[274] *Id.* at 378. Justice O'Connor joined the majority opinion, but also wrote a brief concurrence. Justice Thomas and Chief Justice Rehnquist dissented.

[275] *Id.* at 378 ("To give these same words a different meaning for each category [of aliens] would be to invent a statute rather than interpret one.").

[276] *See id.* at 380 ("The Government, joined by the dissent, argues that the statutory purpose and the constitutional concerns that influenced our statutory construction in *Zadvydas* are not present for aliens . . . who have not been admitted to the United States. Be that as it may, it cannot justify giving the *same* detention provision a different meaning when such aliens are involved."); *id.* at 386 ("[F]or this Court to sanction indefinite detention in the face of *Zadvydas* would establish within our jurisprudence, beyond the power of Congress to remedy, the dangerous principle that judges can give the same statutory text different meanings in different cases." (footnote omitted)).

[277] So far, at least, the D.C. Circuit has held that *Mezei* remains good law and that therefore *Zadvydas* and *Clark* should give a court no pause in deciding that an alien who has not yet entered the United States may be indefinitely detained, although ultimately this holding was vacated. *See* Kiyemba v. Obama, 555 F.3d 1022, 1027–28 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010); *see also* Bertrand v. Holder, No. CV-10-0604-PHX-GMS (JRI), 2011 WL 4356375, at *5 (D. Ariz. Aug. 16, 2011) ("Here, Petitioner is in the shoes of Mezei, not Zadvydas. And thus he may be detained indefinitely without violating due process."), *adopted*, 2011 WL 4356369 (D. Ariz. Sept. 19, 2011).

In *Demore v. Kim*, the Supreme Court upheld the constitutionality of 8 U.S.C. § 1226(c), which mandates that aliens eligible for removal based on specific criminal convictions be detained pending their removal proceedings.[278] Chief Justice Rehnquist, writing for a five-to-four majority, held "that Congress, justifiably concerned that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large numbers, may require that persons such as respondent be detained for the brief period necessary for their removal proceedings."[279] While the Court noted that "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings," the Court simultaneously asserted that "this Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process."[280] In justifying its holding, the Court reaffirmed that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[281] The Court distinguished *Zadvydas* on the grounds that in that case "the period of detention . . . was indefinite" because "removal was no longer practically attainable."[282] Justices O'Connor, Scalia, and Thomas joined Chief Justice Rehnquist in this decision on the merits, but dissented based on an argument that the federal court lacked habeas jurisdiction to make this merits determination under 8 U.S.C. § 1226(e). Justice Kennedy concurred and thereby provided the vital fifth vote. Critical to Justice Kennedy, however, was the availability of an "individualized" determination. So long as there were some "individualized procedures to ensure there is at least some merit to the [INS's] charge and, therefore, sufficient justification to detain a lawful permanent resident alien pending a more formal hearing," as there were here, then the detention was permissible.[283] Justice Kennedy also wrote that "if the continued detention

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[278] 538 U.S. 510, 513 (2003). Many of the circuits that considered the question before the Supreme Court's decision reached the opposite result. *See* Cole, *supra* note 214, at 1020, 1022 & n.85 (citing Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002); Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002); Kim v. Ziglar, 276 F.3d 523 (9th Cir. 2002); Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001)).

[279] *Kim*, 538 U.S. at 513.

[280] *Id.* at 523 (internal quotation marks omitted).

[281] *Id.* at 521–22 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

[282] *Id.* at 527–28 (internal quotation marks omitted).

[283] *Id.* at 531–33 (Kennedy, J., concurring). Justices Souter, Stevens, Ginsburg, and Breyer dissented and concluded that, while the Court had habeas jurisdiction to consider the merits of the due process challenge, the detention was unconstitutional. Justice Souter, whose opinion Justices Stevens and Ginsburg joined, emphasized the greater rights afforded to lawful permanent residents and the Court's holding in *Zadvydas* in concluding that an individualized determination as to the justification for the detention was necessary

became unreasonable or unjustified," then "a lawful permanent resident alien . . . could be entitled to an individualized determination as to his risk of flight and dangerousness."[284] Yet Justice Kennedy joined Chief Justice Rehnquist's opinion in full. The *Kim* decision is remarkable insofar as it is the first time that the Supreme Court has upheld categorical preventive detention outside of a wartime context.[285]

The Supreme Court's decisions in *Zadvydas* and *Kim* have arguably sent mixed signals.[286] Perhaps in light of this uncertainty, federal courts of appeals have faced numerous issues in deciding due process challenges to immigration detention practices.[287] A recent example is the Third Circuit's decision in 2011 in *Diop v. ICE/Homeland Security*.[288] There, the Third Circuit read into 8 U.S.C. § 1226(c)—the same provision considered by the Supreme Court in *Kim*—a requirement that after detention exceeds a "reasonable amount of time" allotted, "authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community."[289] In so doing, the Third Circuit relied heavily on Justice Kennedy's concurrence in *Kim*, which focused on the need to "provide individualized procedures through which an alien might contest the basis of his detention" if, for example, an alien claimed not to be in the category subject to mandatory detention.[290] The Third Circuit then

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before an alien, not yet deemed removable, could be detained in this manner. *Id.* at 543–76 (Souter, J., dissenting). Justice Breyer dissented on the grounds that in a case such as the one at bar, where an alien has not conceded deportability, there must be an individualized determination as to the justification for detention. *Id.* at 576–79 (Breyer, J., dissenting).

284 *Id.* at 532 (Kennedy, J., concurring).

285 Cole, *supra* note 17, at 386 ("The decision marks the first time outside of a war setting that the Court has upheld preventive detention of *anyone* without an individualized assessment of the necessity of such detention.").

286 *See* Kimball, *supra* note 259, at 162 ("Since *Kim*, lower courts have struggled to reconcile these cases and determine the requisite procedural protections for individuals in this context."). Aleinikoff has argued that "*Zadvydas* will probably come to look a lot like *Plyler v. Doe*: a case that stands for fundamental justice more than constitutional logic—one that is unlikely to be overturned but also unlikely to chart a major change in constitutional law." Aleinikoff, *supra* note 256, at 367.

287 *See* Kimball, *supra* note 259, at 172–76.

288 656 F.3d 221 (3d Cir. 2011).

289 *Id.* at 231; *accord* Leslie v. Att'y Gen., 678 F.3d 265, 271 (3d Cir. 2012); Case Comment, *Due Process—Immigration Detention—Third Circuit Holds that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Authorizes Immigration Detention Only for a 'Reasonable Period of Time'*—Diop v. ICE/Homeland Security, *656 F.3d 221 (3d Cir. 2011)*, Case Comment, 125 HARV. L. REV. 1522 (2012).

290 *Diop*, 656 F.3d at 232; *see also* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 717 (2009) (discussing Justice Kennedy's concurrence).

distinguished *Kim* on the grounds that the Supreme Court had relied on the fact "that detention under § 1226(c) lasts roughly a month and a half in the vast majority of cases . . . and about five months in the minority of cases in which an alien chooses to appeal."[291] In the case before the Third Circuit, the alien had been detained 1072 days—just shy of three years—and this led the court to conclude that this much more lengthy "detention, without any post-*Joseph* hearing inquiry into whether it was necessary to accomplish the purposes of § 1226(c), was unreasonable."[292] The Sixth Circuit reached a similar result based on the eighteen-month detention of a Vietnamese national who could not be removed to Vietnam even if deemed removable.[293] Other circuits also have focused on requiring individualized determinations as to whether continued detention is justified when detention continues beyond the relatively brief period of time identified in *Kim*, both before and after a final order of removal is procured.[294]

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[291] *Diop*, 656 F.3d at 233 (internal quotation marks omitted).

[292] *Id.* at 234. A "*Joseph* hearing" is a hearing "immediately provided to a detainee who claims that he is not covered by § 1226(c)." *Kim*, 538 U.S. at 514 n.3. "At the hearing, the detainee may avoid mandatory detention by demonstrating that he is not an alien, was not convicted of the predicate crime, or that the INS is otherwise substantially unlikely to establish that he is in fact subject to a mandatory detention." *Id.* (citing 8 C.F.R. § 3.19(h)(2)(ii) (2002); *In re* Joseph, 22 I. & N. Dec. 799 (B.I.A. 1999)).

[293] The Sixth Circuit distinguished *Kim* in much the same way as in *Diop*:

> If *Rosales-Garcia* stands for the proposition that *any* alien facing the process of deportation is entitled to a specific hearing within six months absent special justification, the decision is inconsistent with *Kim*, which specifically authorized such detention in the circumstances there. To the extent that *Kim* would appear to authorize indefinite detention for persons in pre-removal proceedings, it could compel a conclusion contrary to *Rosales-Garcia* in this case. However, the Court's discussion in *Kim* is undergirded by reasoning relying on the fact that Kim, and persons like him, will normally have their proceedings completed within . . . a short period of time and will actually be deported, or will be released. That is not the case here. Because of the differences between Ly's case and these opinions, we hold that neither of them affirmatively compels a different decision here.

Ly v. Hansen, 351 F.3d 263, 271 (6th Cir. 2003). The Sixth Circuit in *Ly* declined to adopt a bright-line period of presumptive reasonableness, concluding that fact-specific analysis was more appropriate in the pre-removal context. *See id.*

[294] *See, e.g.*, Diouf v. Napolitano, 634 F.3d 1081, 1086 (9th Cir. 2011) (stating that because "prolonged detention under § 1231(a)(6), without adequate procedural protections, would raise 'serious constitutional concerns' . . . we apply the canon of constitutional avoidance and construe § 1231(a)(6) as requiring an individualized bond hearing, before an immigration judge, for aliens facing prolonged detention under that provision" (quoting Casas-Castrillon v. Dep't of Homeland Sec., 535 F.3d 942, 950 (9th Cir. 2008))); *Casas-Castrillon*, 535 F.3d at 951 ("Because the prolonged detention of an alien without individualized determination of his dangerousness or flight risk would be 'constitutionally doubtful,' we hold that § 1226(a) must be construed as *requiring* the Attorney General to provide the alien with such a hearing." (quoting Tijani v. Willis, 430 F.3d 1241, 1242 (9th Cir. 2005))). The Ninth Circuit has even extended the reasoning of *Zadvydas* to hold that another section of the INA cannot be held to authorize indefinite detention where removal

Further clarification of the constitutional bounds of detention in the immigration context may depend on Congress's eagerness to explore limits left undefined in *Kim*. In addition, *Zadvydas* left open cases of "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[295] This is not insignificant. Since September 11, 2001, Congress has authorized the detention of aliens and citizens alike in aid of pursuing those responsible for the attacks. In the USA PATRIOT Act, Congress included a provision allowing for continued and seemingly indefinite detention of an alien whose release "will threaten the national security of the United States or the safety of the community or any person."[296] Justice Scalia mentioned this provision in *Clark v. Martinez* without questioning its constitutionality.[297] There has been limited opportunity since for courts to consider further its constitutionality.

C. Alien Enemies and Challenges to Detention in the War on Terror

Part III shifts now from the detention of immigrants to the detention of alien enemies, with particular attention paid to the developing understanding of constitutional rights over the past eleven years. The concept that certain classes of aliens, and in particular those aliens properly classified as "enemies" of the United States, are due different treatment under the Constitution dates back to the writings of

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is not foreseeable. *See* Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006). *But see* Mwangi v. Terry, 465 F. App'x 784, 787 (10th Cir. 2012) (concluding that "[a]lthough a precise end-date" for removal proceedings cannot be ascertained because "there is no indication that Mr. Mwangi is unremovable, whether it be for lack of a repatriation agreement or because his designated country will not accept him," his detention pursuant to § 1226(a) is constitutional); Hussain v. Mukasey, 510 F.3d 739, 743 (7th Cir. 2007) (concluding delay in filing habeas challenge to detention rendered due process challenge moot as completion of administrative proceedings was now imminent); *see also* Kimball, *supra* note 259, at 175 n.120 (listing district court cases applying inconsistent standards for granting hearing to review continued detention in the Ninth Circuit).

295 Zadvydas v. Davis, 533 U.S. 678, 696 (2001); *see also* Aleinikoff, *supra* note 256, at 378 (noting that Justice Breyer suggests no legal basis that would justify different treatment in such circumstances).

296 USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 350-51 (codified at 8 U.S.C. § 1226a(a)(6) (2000 ed., Supp. II)). Specifically, the statute authorizes detention "for seven days without any charges, and after being charged, [they] can apparently be held indefinitely in some circumstances, even if they prevail in their removal proceedings by obtaining 'relief from removal.'" Cole, *supra* note 290, at 702. "The United States does not have a statute authorizing preventive detention of suspected terrorists without charge." *Id.* at 693.

297 543 U.S. 371, 386 n.8 (2005).

James Madison.[298] In discussing the Alien Enemy Act, Madison wrote that "[w]ith respect to alien enemies, no doubt has been intimated as to the Federal authority over them . . . With respect to aliens who are not enemies . . . the power assumed by the Act of Congress is denied to be constitutional."[299] Despite the controversy surrounding and the ultimate repeal of the contemporaneous Alien and Sedition Acts, the Supreme Court has upheld the Alien Enemy Act, and it remains the law today.[300]

With this history, it is not surprising that the Supreme Court found the alien-enemy classification material to its constitutional analysis in *Eisentrager*. Recall that *Eisentrager* rested on two independent grounds: the extraterritorial analysis—which was discussed in Part II.A.2—and the enemy status of the German aliens involved. At the time *Eisentrager* was decided, however, it was not clear that the "enemy" distinction was alien-specific. In a case decided before *Eisentrager*, the Supreme Court held that trial by military tribunal of both aliens and citizens detained in the United States was constitutionally permissible when the individuals were charged with being

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298 KANSTROOM, *supra* note 213, at 57–58; *see also* Kent, *supra* note 17, at 527 ("The concepts of 'alien friend' and 'alien enemy' were drawn from the common law and the law of nations . . . [where] the rights of aliens diminished substantially when their home state engaged in hostilities with their state of current residence—when they became alien enemies.").

299 KANSTROOM, *supra* note 213, at 57–58 (internal quotation marks omitted); *see also* Neuman, *supra* note 20 at 936 ("Madison viewed as fundamental the distinction between alien enemies and alien friends. As to alien enemies, the Constitution's grant of the war power gave Congress the usual authority under the law of nations." (footnotes omitted)). The Alien Enemy Act authorizes the President to order the deportation of all aliens who are nationals of a country with which the United States is at war and to effect the deportation "without any individualized showing of disloyalty, criminal conduct, or even suspicion." Cole, *supra* note 134, at 959.

300 Congress passed four acts in the summer of 1798 that collectively are known as the Alien and Sedition Acts. Act of July 14, 1798 (Sedition Act), ch. 74, 1 Stat. 596 (1798); An Act Respecting Alien Enemies (Alien Enemy Act), ch. 66, 1 Stat. 577 (1798) (codified as amended at 50 U.S.C. §§ 21–24 (2006)); An Act Concerning Aliens (Aliens Act), ch. 58, 1 Stat. 570 (1798); Act of June 18, 1798 (Naturalization Act), ch. 54, 1 Stat. 566 (1798). The Aliens Act and Sedition Act were met with widespread criticism, and neither was renewed upon its scheduled expiration two years later. By contrast, the Alien Enemy Act had no automatic expiration provision, and it remains in force today. The Alien Enemy Act permits the President, in the event of a declared war or invasion, to make a public proclamation, at which time "all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, *shall be liable to be apprehended, restrained, secured, and removed as alien enemies*." 50 U.S.C. § 21 (emphasis added). "[T]he Alien Enemy Act has been enforced during declared wars, and was upheld by the Supreme Court in 1948, even when applied to detain aliens after hostilities had ceased." Cole, *supra* note 134, at 990 (citations omitted) (referencing Ludecke v. Watkins, 335 U.S. 160, 171–72 (1948)).

"unlawful enemy belligerents" and violating the laws of war.[301] The Supreme Court reasoned in *Ex parte Quirin* that it would be inconsistent to conclude that aliens and citizens who violate the laws of war should be treated differently than military members committing the same offenses.[302] This holding arguably supports the view that the parties' enemy status, rather than their alien status, drove the Supreme Court's decision in *Eisentrager*.[303]

The War on Terror has required courts to define more succinctly how designation as an enemy impacts the panoply of constitutional rights afforded to an individual—citizen and alien alike. In the wake of September 11, Congress passed the Authorization for Use of Military Force (AUMF), which authorized the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.[304]

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[301] *Ex parte* Quirin, 317 U.S. 1, 35–37, 45 (1942). The opinion defined "unlawful enemy belligerents" as "those who during time of war pass surreptitiously from enemy territory into [the United States], discarding their uniforms upon entry, for the commission of hostile acts involving the destruction of life or property." *Id.* at 35, 47. In so doing, the Supreme Court distinguished its prior holding in *Ex parte Milligan* on the grounds that, in this instance, the citizen in question had violated the laws of war. *Id.* at 45–46. *Ex parte Milligan* involved a citizen of Indiana who was alleged to have conspired against the United States during the Civil War. 71 U.S. 2 (1866); *see also* Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-citizen*, 38 U.C. DAVIS L. REV. 79, 89–91 (2004). The Supreme Court was presented with the question whether Milligan was entitled to be tried by a jury in state court or whether he could be tried by a military commission. *Ex parte Milligan*, 71 U.S. at 13. The Court held that, although the suspension of habeas corpus was lawful, subjecting Milligan to a military commission was unconstitutional when civilian courts were still in operation. *Id.* at 122. The Court asserted holding otherwise would work a violation of "[o]ne of the plainest constitutional provisions." *Id.*

[302] *Ex parte Quirin*, 317 U.S. at 44.

[303] Stumpf suggests that in *Ex parte Quirin*, by "eras[ing] the distinction between citizen and non-citizen enemy belligerents[, t]he Court drew a parallel between aliens and 'citizen enemies'" and thereby "allowed norms created for non-citizens and pseudo-citizens to apply to U.S. citizens." Stumpf, *supra* note 301, at 109, 112; *see also* Cabranes, *supra* note 125, at 1700 ("The war power loomed large in the analysis of the *Eisentrager* Court. The Court explained that the backdrop of war altered drastically an alien's claim to constitutional protections against the exercise of government power."); Godsey, *supra* note 136, at 1731 (arguing that "*Eisentrager* was intended to be limited to its wartime facts" and that "[t]he Supreme Court's primary concern in extending the civil liberties contained in the Bill of Rights to wartime enemies seemed to be the potentially crippling effect it would have on the ability of the United States to conduct warfare.").

[304] Boumediene v. Bush, 553 U.S. 723, 733 (2008) (quoting § 2(a), 115 Stat. 224) (internal quotation marks omitted).

Pursuant to this authority, President Bush issued an order authorizing the detention of those aiding al-Qaeda by membership or support,[305] and began detaining those suspected of complicity with al-Qaeda as "enemy combatants."[306]

The Supreme Court first considered the legality of these detentions in *Hamdi v. Rumsfeld*.[307] A plurality, authored by Justice O'Connor, determined that the AUMF authorized the President "to detain citizens who qualify as 'enemy combatants.'"[308] Sparring with Justice Scalia's dissent, the plurality asserted that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant," citing *Ex parte Quirin* in support and reasoning as follows:

> A citizen, no less than an alien, can be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.[309]

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[305] *See* Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834; *see also* Faiza W. Sayed, Note, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1844–45 (2011) (describing the Bush order as the backdrop of subsequent detention challenges).

[306] Cole, *supra* note 290, at 705 ("[T]he Bush administration cited the AUMF and its own executive power as authority to detain anyone it declared an 'enemy combatant'—whether captured at home or abroad."). In March 2009, the Obama Administration abandoned the term "enemy combatant." Press Release, Dep't of Justice, Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees (Mar. 13, 2009), *available at* http://www.justice.gov/opa/pr/2009/March/09-ag-232.html. It also announced that it would interpret the AUMF in light of the laws of war and as applicable to "persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners." Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. Mar. 13, 2009) (No. 05-763), ECF No. 175. *But see Hamlily*, 616 F. Supp. 2d at 75–77 (determining that the "substantially support[s]" standard exceeds authority under the AUMF). Following *Hamlily*'s decision, Congress passed materially identical language. National Defense Authorization Act of 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (Dec. 31, 2011) (applying the AUMF to any "person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces"). This past September, a federal district court disagreed that Congress had merely clarified the AUMF; further, the court permanently enjoined implementation of the standard as unconstitutionally overbroad. Hedges v. Obama, 890 F. Supp. 2d 424, 439–45, 472 (S.D.N.Y. 2012), *stayed pending appeal*, 2012 WL 4075626 (2d Cir. Sept. 17, 2012).

[307] 542 U.S. 507, 509 (2004).

[308] *Id.* at 516–17. Chief Justice Rehnquist and Justices Kennedy and Breyer joined the plurality opinion.

[309] *Id.* at 519 (internal citations and quotation marks omitted). The decision somewhat avoided Hamdi's objection to his indefinite detention in light of the ambiguous definition of the ongoing conflict, and concluded that his detention was authorized in the narrow

The plurality then addressed "what process is constitutionally due to a citizen who disputes" classification as an enemy combatant.[310] The plurality concluded that the *Mathews v. Eldridge* balancing test should apply and that in these circumstances due process requires "notice of the factual basis for [the] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," as well as access to counsel.[311] The plurality left open the question of accommodations that could be made to the nature of the proceedings—for example, through the introduction of hearsay evidence, the imposition of a rebuttable presumption that the enemy-combatant designation is proper, or trial before a military tribunal.[312]

Justices Souter and Ginsburg concurred in part and dissented in part. While giving the plurality the votes for a judgment vacating and remanding to permit Hamdi to have a meaningful opportunity to challenge his classification as an enemy combatant, they disagreed that the AUMF clearly authorized the Executive to classify and detain Hamdi in this manner, and concluded that the Non-Detention Act entitled Hamdi to be released.[313] Justice Scalia wrote a dissent joined by Justice Stevens.[314] Relying on a historical analysis of the constitutional treatment afforded to citizens, Justice Scalia concluded that a U.S. citizen could be detained in this manner only through formal suspension of the writ of habeas corpus or through the initiation of criminal

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confines of the definition of "enemy combatant" by the terms of the AUMF. *Id.* at 520–24; *see also* Stumpf, *supra* note 301, at 121 ("*Hamdi* represents the first time that a court has explicitly applied the plenary power doctrine to U.S. citizens detained in the United States under the suspicion that they are unlawful enemy combatants.").

310 *Hamdi*, 542 U.S. at 524.

311 *Id*. at 531, 533, 539 (applying *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

312 *Id.* at 533–35, 538; *see also* Cole, *supra* note 290, at 732 ("The Court's decision in *Hamdi*, however, hardly resolved the issue. Disputes continue to rage over both the proper substantive scope of 'enemy combatant' detention, and over the procedures that alleged combatants are due.").

313 *Hamdi*, 542 U.S. at 541, 545–51 (Souter, J., concurring) (discussing 18 U.S.C. § 4001(a) (2000)). In support of their position, the Justices mentioned the USA PATRIOT Act, which "authorized the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings" and stated that "[i]t is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado." *Id.* at 551. Nevertheless, their opinion left open the possibility that "the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people," noting that no such exigency was present. *Id.* at 552.

314 Justice Thomas dissented separately on the ground that the "detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision." *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting); *see also* Stumpf, *supra* note 301, at 128 (observing that Justice Thomas deferred "to the executive's determination that Hamdi was an enemy combatant, regardless of his citizenship").

proceedings against the detainee.[315] As a result, Justice Scalia concluded that the government had two options: either to try Hamdi for treason or to release him.[316] Justice Scalia limited the reach of this conclusion, however, by stating that "[w]here the citizen is captured outside and held outside the United States, the constitutional requirements may be different."[317]

The various *Hamdi* opinions demonstrate that the Justices disagreed as to the significance of Hamdi's U.S. citizenship to the outcome of the analysis. Thus, *Hamdi* left unsettled whether similar process was due to aliens and whether detention abroad would impact the analysis. After avoiding the constitutional issue in *Rasul v. Bush*,[318] the Supreme Court finally delved into these issues by considering challenges raised by enemy-combatant aliens held at the U.S. Naval Station at Guantanamo Bay, Cuba.

In 2008, in *Boumediene v. Bush*, the Court held that Article I, Section 9, Clause 2 of the Constitution, known as the Suspension Clause, "has full effect at Guantanamo Bay," thereby requiring Congress to act in accordance with the Suspension Clause if it wished to deny the privilege of habeas corpus to the aliens designated as enemy combatants.[319] The Court concluded that foreign nationals detained at Guantanamo have a constitutional right to challenge the factual basis for their detention and that the Detainee Treatment Act provisions were an inadequate substitute for the writ of habeas corpus; thus, § 7 of the Military Commissions Act, which stripped the federal courts of habeas jurisdiction over alien detainees of the United States that have been identified as enemy combatants, "operates as an unconstitutional suspension of the writ."[320] Justice Kennedy, writing for the majority, emphasized the importance of the writ of habeas corpus to "the Constitution's separation-of-powers structure," which "protects persons [including foreign nationals] as well as citizens."[321] He distinguished *Eisentrager* by noting that there the Court was

315 *Hamdi*, 542 U.S. at 573 (Scalia, J., dissenting).

316 Justice Scalia chastised Justice O'Connor for drawing comparisons to the historical permissible treatment of "enemy *aliens*" in reaching a contrary result. *Id.* at 559.

317 *Id.* at 577. Eventually, in exchange for his release, Hamdi renounced his U.S. citizenship. Stumpf, *supra* note 301, at 134–35.

318 542 U.S. 466, 470 (2004). *Rasul* "present[ed] the narrow . . . question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad" and held at Guantanamo. *Id.* The Court was presented with the availability of statutory, as opposed to constitutional, habeas relief. *Id.* at 475. Justice Stevens, writing for the majority, concluded that statutory habeas was available. *Id.* at 476–79.

319 553 U.S. 723, 771 (2008).

320 *Id.* at 733.

321 *Id.* at 743.

considering an alien detained on soil over which the United States exercised neither *de jure* nor *de facto* control, whereas in *Boumediene* it was an "uncontested fact that the United States, by virtue of its complete jurisdiction and control over the [Guantanamo Bay] base, maintains *de facto* sovereignty" over it.[322] Justice Kennedy also reasoned that the Court's prior decisions "undermine[d]" any "argument that, at least as applied to noncitizens, the Constitution necessarily stops where *de jure* sovereignty ends."[323]

Justice Kennedy drew from past Supreme Court jurisprudence three factors significant to determining whether the Suspension Clause applied to protect the aliens detained abroad: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[324] Applying those three factors, the Court concluded that "[t]he situation in *Eisentrager* was far different."[325] The detainees at Guantanamo had only limited opportunity to contest their designation as enemy combatants; they were held on a naval base under the plenary control of the United States; and adjudication of habeas petitions did not present practical obstacles. Hence, the Court concluded that the Suspension Clause applied to the detainees held at Guantanamo and that Congress could not strip federal courts of the power to grant habeas without providing an adequate substitute, which was lacking in the Detainee Treatment Act of 2005.

The majority in *Boumediene* did not identify the scope of Guantanamo detainees' due process rights or the requirements for review under habeas corpus or an adequate substitute. The Court did discuss, however, a number of flaws in the Detainee Treatment Act's framework that, at least when combined, prevented a detainee from exercising a meaningful opportunity to show he was held unlawfully and merited release. These flaws included restrictions on the ability of detainees to present their cases to the Combatant Status Review Tribunals (CSRTs) that decided whether to designate the detainees as enemy combatants, restrictions which presented a "considerable risk

322 *Id.* at 755, 762–64.

323 *Id.* at 755; *see also* Neuman, *supra* note 133, at 263 ("Kennedy found the historical evidence inconclusive both regarding precisely where and to whom the writ was available, and regarding the real reasons why the writ was sometimes available to detainees outside the King's territories, and sometimes unavailable to detainees within the King's territories.").

324 *Boumediene*, 553 U.S. at 766.

325 *Id.* at 769.

of error in the tribunal's findings of fact."[326] Although the Court did not resolve whether these limitations in the CSRT process themselves violated due process, it concluded that:

> [T]he court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings . . . [including] some authority to assess the sufficiency of the Government's evidence[,] . . . authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding[,] . . . adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.[327]

Of the five Justices in the majority, three emphasized in a separate concurrence that some detainees had been incarcerated for six years and that the Court's decision was foreshadowed by its decision in *Rasul* four years earlier.[328] Chief Justice Roberts and Justice Scalia both wrote dissents, which Justices Thomas and Alito joined. Chief Justice Roberts emphasized that the procedural protections provided to the Guantanamo detainees were in his view "generous" and adequate to respect whatever rights those detainees possessed,[329] and he accused the majority of insisting on greater constitutional protections for these aliens than those afforded to citizens detained as enemy combatants.[330] Justice Scalia argued that "[t]here is simply no support for the Court's assertion that constitutional rights extend to aliens held outside U.S. sovereign territory and *Eisentrager* could not be clearer that the privilege of habeas corpus does not extend to aliens abroad."[331] He argued that the majority's opinion was "the first time in our Nation's history[ ] [that] the Court confer[red] a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war."[332]

After *Boumediene*, numerous questions remain concerning the constitutional protections afforded to alien detainees. Yet the Supreme Court has essentially left resolution of these issues for the

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326 *Id.* at 785. These restrictions included the lack of the assistance of counsel, limited means to find or present evidence, and absence of limits on admission of hearsay evidence at the CSRT level.

327 *Id.* at 786–87.

328 *Id.* at 798–801 (Souter, J., concurring, joined by Ginsburg and Breyer, JJ.).

329 *Id.* at 801 (Roberts, C.J., dissenting).

330 *Id.* at 804, 808; *see also* Kidane, *supra* note 239, at 103–04 ("Roberts'[s] objection is absolutely accurate that *Boumediene* would give better due process rights to enemy aliens detained in Guantanamo than ordinary aliens fighting deportation from the United States.").

331 *Boumediene*, 553 U.S. at 841–42 (Scalia, J., dissenting) (citation omitted).

332 *Id.* at 826–27.

lower courts, notably for the U.S. Court of Appeals for the D.C. Circuit, where the current statutory framework channels most appeals. A brief review of some of the most significant constitutional issues involving alien detainees includes the following.

First, *Boumediene* leaves unsettled whether the Suspension Clause applies to a detention in circumstances where the United States does not exercise the same degree of *de facto* control that it does at Guantanamo. The D.C. Circuit held in *Al Maqaleh v. Gates* that the Suspension Clause does not extend protections to detainees at the U.S. Bagram Air Base in Afghanistan, and therefore held that it lacked jurisdiction to consider the habeas petitions of noncitizens challenging their detention there.[333] The *Al Maqaleh* court applied the three-factor test from *Boumediene*, and concluded that Bagram was in a theater of war where the United States lacked *de jure* or *de facto* sovereignty, and most importantly, where the practical obstacles of active hostilities precluded the detainees from asserting the protection of the Suspension Clause. In the D.C. Circuit's view, Bagram was a stronger case than *Eisentrager* for denial of federal-court habeas jurisdiction. The court did, however, reserve deciding the question that would be posed should the United States intentionally transfer aliens to active war zones to avoid the reach of habeas protection.

Second, the Supreme Court's *Boumediene* opinion leaves to the lower courts the fashioning of the process necessary to effectuate detainees' habeas protections.[334] The D.C. Circuit has concluded that "[t]he Suspension Clause protects only the fundamental character of habeas proceedings," rather than providing "all the accoutrements of habeas for domestic criminal defendants."[335] Thus, for aliens seized abroad and brought to Guantanamo, the D.C. Circuit has held in *Al-Bihani v. Obama* that a preponderance of the evidence standard for showing the basis for a detainee's imprisonment was not unconstitutional[336] and that hearsay was admissible.[337] Moreover, the D.C.

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[333] Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010); *see also* Kal Raustiala, *Suspension Clause—Extraterritorial Reach of Habeas Corpus—Jurisdiction to Review Military Detention of Noncitizens Held at Bagram Air Base, Afghanistan*, 104 AM. J. INT'L L. 647 (2010). For discussion of the nature and conditions of detention and status review at Bagram, see generally Marc D. Falkoff & Robert Knowles, *Bagram,* Boumediene*, and Limited Government*, 59 DEPAUL L. REV. 851 (2010).

[334] *Boumediene*, 553 U.S. at 795–96 ("We make no attempt to anticipate all of the evidentiary and access-to-counsel issues that will arise during the course of the detainees' habeas corpus proceedings. . . . These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.").

[335] Al-Bihani v. Obama, 590 F.3d 866, 876 (D.C. Cir. 2010).

[336] *Id.* at 878. The D.C. Circuit continues to leave open the possibility that some lower standard of proof would be constitutional. *See, e.g.*, Almerfedi v. Obama, 654 F.3d 1, 5 n.4 (D.C. Cir. 2011) ("Our cases have stated that the preponderance of the evidence standard

Circuit requires that evidence in a detainee habeas case be evaluated holistically. In assessing whether the government has met its burden of proof, the D.C. Circuit has repeatedly insisted that a district court "considering a Guantanamo detainee's habeas petition must view the evidence collectively rather than in isolation."[338] Finally, the D.C. Circuit has announced that all official government records must be afforded a presumption of regularity (though not a presumption of truth).[339] This means that, when presented with an official government document, a district court must presume that "the government official accurately identified the source and accurately summarized his statement."[340] The amount of proof a detainee must put forward to rebut this presumption remains unclear; the court in *Latif* applied a preponderance standard, but held open the possibility that a higher threshold would be constitutional.[341]

Third, *Boumediene* was decided on Suspension Clause grounds, and so does not address whether the Constitution's other provisions—and due process in particular—provide protection to these detainees.[342] This issue as well has fallen largely to the D.C. Circuit to resolve. While several opinions have intimated that alien detainees

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is constitutionally sufficient and have left open whether a lower standard might be adequate to satisfy the Constitution's requirements for wartime detention."), *cert. denied*, 132 S. Ct. 2739 (2012); Uthman v. Obama, 637 F.3d 400, 403 n.3 (D.C. Cir. 2011) (same), *cert. denied*, 132 S. Ct. 2739 (2012); *Al-Bihani*, 590 F.3d at 878 n.4 (same).

337 *Al-Bihani*, 590 F.3d at 878–81; *see also* Barhoumi v. Obama, 609 F.3d 416, 431 (D.C. Cir. 2010) ("The question in this case . . . is not a binary one—admissibility vs. inadmissibility—but rather concerns the degree of reliability exhibited . . . .").

338 Latif v. Obama, 677 F.3d 1175, 1193 (D.C. Cir. 2011) (quoting Salahi v. Obama, 625 F.3d 745, 753 (D.C. Cir. 2010)), *cert. denied*, 132 S. Ct. 2741 (2012); *accord* Al-Adahi v. Obama, 613 F.3d 1102, 1105–06 (D.C. Cir. 2010) (reversing a grant of habeas to a Yemeni national for failing to apply "conditional probability analysis," and telling the district court that it must not "require[ ] each piece of the government's evidence to bear weight without regard to all (or indeed any) other evidence in the case" (internal quotation marks omitted)).

339 *Latif*, 677 F.3d at 1185.

340 *Id.* at 1180. Concluding that the justification for this rule derives from horizontal separation of powers—and not, as a lengthy dissent suggests, from the reliability of the process used to create the records—the D.C. Circuit extended this presumption categorically to all "official government document[s]." *Id.* at 1181–82. The presumption thus covers "interrogation reports prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes." *Id.* at 1179.

341 *Id.* at 1185 n.5.

342 Boumediene v. Bush, 553 U.S. 723, 801 (2008) (Roberts, C.J., dissenting) (noting that the majority concludes "without bothering to say what due process rights the detainees possess"); *see* 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, 726 (2012) ("Because there exists a number of significant ways . . . in which the possible applicability of the [Due Process] Clause to Guantanamo detainees affects ongoing litigation, the Due Process

lack any constitutional rights beyond the Suspension Clause, it appears that no such rule has been conclusively adopted. The D.C. Circuit addressed alien detainees' non-habeas constitutional rights when it announced in *Kiyemba I* that the "[d]ecisions of the Supreme Court and of this court . . . hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States."[343] However, the Supreme Court vacated *Kiyemba I*'s decision on the grounds that the underlying facts had changed.[344] *Kiyemba III*—a per curiam opinion decided in response to the vacatur of *Kiyemba I*—held that the factual predicate motivating the Supreme Court's decision did not bear on the original reasoning in *Kiyemba I*.[345] The per curiam opinion then reinstated *Kiyemba I*'s opinion "as modified here to take account of new developments" without revisiting detainees' constitutional due process rights.[346]

Since *Kiyemba III*, the D.C. Circuit has yet to resolve directly whether its initial pronouncement in *Kiyemba I*—that alien detainees had no constitutional rights—remains good law. In *Al-Madhwani v. Obama*, the D.C. Circuit restated the language of *Kiyemba I*, but ultimately concluded that any discussion of due process was not essential to its holding, and thus said that "[w]e need not address the underlying legal basis for Madhwani's objection."[347] And in the context of *Bivens* claims brought on behalf of alien detainees, a few opinions

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Clause appears to be the part of the Constitution whose potential to accompany the Suspension Clause to Guantanamo will confront the Supreme Court soonest.").

343 Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated*, 130 S. Ct. 1235 (2010) (per curiam), *reinstated as amended*, 605 F.3d 1046 (D.C. Cir. 2010). The D.C. Circuit had concluded before the Supreme Court's *Boumediene* decision that aliens had no constitutional rights, Rasul v. Myers (*Rasul I*), 512 F.3d 644, 663 (D.C. Cir. 2007) ("We recently held that Guantanamo detainees lack constitutional rights" (citing Boumediene v. Bush, 476 F.3d 981, 984 (D.C. Cir. 2007))), but this holding was vacated by the Supreme Court. Rasul v. Myers, 555 U.S. 1083 (2008).

344 Kiyemba v. Obama, 130 S. Ct. 1235 (2010) ("By now . . . each of the detainees at issue in this case has received at least one offer of resettlement in another country.").

345 Kiyemba v. Obama (*Kiyemba III*), 605 F.3d 1046, 1047 (D.C. Cir. 2010) (per curiam) ("Our original decision [in *Kiyemba I*] was made in the light of resettlement offers to all petitioners."), *cert. denied*, 131 S. Ct. 1631 (2011).

346 *Kiyemba III*, 605 F.3d at 1047.

347 Al-Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) (upholding a denial of habeas to a Yemeni national), *cert. denied*, 132 S. Ct. 2739 (2012). The *Al-Madhwani* court officially credits its view of alien detainees' due process rights to *Kiyemba II*, which itself had cited *Kiyemba I*. However, the *Al-Madhwani* court neglected to mention that it cited only a concurring opinion in *Kiyemba II*. Moreover, *Kiyemba II* was decided before the Supreme Court vacated *Kiyemba I*; the same precedential concerns regarding *Kiyemba I* likely apply equally to this statement in *Kiyemba II*.

have hinted that alien detainees have no constitutional rights.[348] However, although several alien detainees have sought to use *Bivens* actions as a way to discover what, if any, constitutional due process rights they possess, the D.C. Circuit has resolved these cases without reaching the merits of the underlying constitutional inquiry. Twice the D.C. Circuit has dismissed *Bivens* actions on the alternative grounds that, if an alien detainee's constitutional right exists, it was either not clearly established at the time of the violation or could not give rise to a private remedy in light of the special factors stemming from national security concerns.[349] And recently in *Al-Zahrani v. Rodriguez*, the D.C. Circuit dismissed on jurisdictional grounds a *Bivens* action brought by the parents of alien detainees who died at Guantanamo.[350] There the court relied on section 7 of the Military Commissions Act (MCA), which was arguably struck down in *Boumediene*. After "presum[ing] that the Supreme Court used a scalpel and not a bludgeon in dissecting § 7 of the MCA," the D.C. Circuit upheld language in section 7 as it pertains to "the continuing applicability of the bar to our jurisdiction over 'treatment cases.'"[351] It remains to be seen whether the Supreme Court will address the continued vitality of this subsection of section 7 of the Military Commissions Act, or whether the Supreme Court will step in to decide whether alien detainees have constitutional rights beyond those afforded by the Suspension Clause.

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348 Ali v. Rumsfeld, 649 F.3d 762, 772 (D.C. Cir. 2011) ("[W]e have nonetheless held that the Suspension Clause does not apply to Bagram detainees. [Petitioners] offer no reason—and we see none ourselves—why the plaintiffs' Fifth and Eighth Amendment claims would be any stronger than the Suspension Clause claims of the Bagram detainees."); Rasul v. Myers (*Rasul II*), 563 F.3d 527, 529 (D.C. Cir. 2009) ("The Court stressed [in *Boumediene*] that its decision 'does not address the *content of the law* that governs petitioners' detention.' With those words, the Court in *Boumediene* disclaimed any intention to disturb existing law governing the extraterritorial reach of any constitutional provisions, other than the Suspension Clause." (citation omitted) (quoting *Boumediene*, 553 U.S. at 798)).

349 *Ali*, 649 F.3d at 772–74; *Rasul II*, 563 F.3d at 529–30, 532 n.5; *see also* Celikgogus v. Rumsfeld, Nos. 06-1996, 08-1677, 2013 WL 378448, at *6 (D.D.C. Feb. 1, 2013) ("[P]laintiffs' constitutional claims fail because they are legally indistinguishable from those addressed in *Rasul II*."). Likewise, the Second Circuit denied a foreign citizen's *Bivens* action on the basis of special factors without reaching the question of whether his rendition from the United States to Syria violated constitutional due process rights. Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009). *But see* Hamad v. Gates, No. C10-591 MJP, 2012 WL 1253167 (W.D. Wash. Apr. 13, 2012) (rejecting the D.C. Circuit's suggestion in *Rasul II* that *Boumediene* only affected aliens' Suspension Clause rights and refusing to grant the Secretary of Defense qualified immunity, but nevertheless denying an alien's *Bivens* action for failing to state a claim against the Secretary regarding unlawful detention at Guantanamo).

350 Al-Zahrani v. Rodriguez, 669 F.3d 315 (D.C. Cir. 2012).

351 *Id.* at 319.

Conclusion

It is worth taking stock of what has been surveyed and what remains for further exploration. It is clear from each of the areas of constitutional law explored above that aliens do enjoy rights under the Constitution.[352] Indeed, this fact is deeply ingrained in this country's constitutional history as evidenced by the early, landmark cases of *Yick Wo* and *Wong Wing*. Even in the realm of immigration regulation, where federal power is at its zenith, the constraints of due process still temper government action, particularly as the government seeks to remove those once lawfully present in the United States and to detain aliens indefinitely and without individualized justification. That aliens are protected by the nation's core foundational and governing document says much about Americans' identity as a nation—deeply cherished rights "inhere in the dignity of the human being,"[353] and do not attach only to those with the label of citizen. Madison himself recognized that the fundamental principles in the Constitution are about respect for all persons, whether or not they are citizens.[354] That such rights were recognized early in the nation's constitutional history—and are still recognized today—merits celebration.

Of course, as prior Parts of this Article have demonstrated, aliens' constitutional rights are not without limitation. The difficult questions, and the ones that remain unresolved, pertain to when such differential treatment between citizens and aliens is proper. And where the constitutional doctrine is most complex and simultaneously most unsettled is in the realm of differential treatment among classes of aliens. The complexity inheres further when questions of differing classes of aliens intersect with questions of the Constitution's extraterritorial application and executive power. That the settings in which aliens' constitutional rights are litigated often involve the presidential war powers and the powers of the executive and legislative branches at the nation's borders—complicated areas of legal doctrine themselves—impacts how courts think about the application of

352 *See* Cole, *supra* note 17, at 381 ("In short, contrary to widely held assumptions, the Constitution extends fundamental protections of due process, political freedoms, and equal protection to all persons subject to our laws, without regard to citizenship. These rights . . . are especially necessary for people, like non-nationals, who have no voice in the political process."); *see also* Lobel, *supra* note 132, at 315 ("Throughout American history, however, those practical concerns have competed with the recognition that, even if the entire Constitution did not apply to aliens in certain situations, there must be some fundamental constitutional principles that restrain governmental conduct.").

353 *See* Cole, *supra* note 17, at 381.

354 As Madison recognized, "[i]f aliens had no rights under the Constitution, they might not only be banished, but even capitally punished, without a jury or other incidents to a fair trial." Neuman, *supra* note 20, at 935–36 (internal quotation marks omitted).

constitutional protections to noncitizens. It is thus no surprise that the examination of the application of each constitutional right to aliens shows tensions and even contradictions.

That said, as Madison articulated so long ago, there seems to be a deeply ingrained sense that the increasing closeness of an alien's ties with the United States should afford greater entitlement to the Constitution's protections. For this reason, courts do not question a lawful permanent resident's right to equal protection and due process as well as the Fourth Amendment's guarantees, even upon return to the United States after time spent abroad. Courts have, however, evidenced greater pause in extending the full panoply of rights to nonimmigrant aliens, and thus, although also entitled to equal protection, this class of aliens can invoke only less stringent scrutiny. In addition, the government may exclude this class of aliens from entry to the United States with guarantee of little else than that they will not be subject to indefinite detention.

The harmony of the sliding-scale system breaks down, however, when considering those aliens physically present in the United States, but unlawfully so, as this group presents the contradiction of sometimes having deeply rooted communal ties to the United States despite their unauthorized status. Thus, it is not surprising that the constitutional rights of this group remain in the greatest state of flux.

The Executive's actions in the context of the War on Terror only further complicate the analysis: How far outside of the territorial bounds of the United States does the Constitution extend and what are the implications of an "alien enemy" label to the robustness of the Constitution's reach and protections? As with unauthorized aliens, this is another area of the law in which unsettled constitutional jurisprudence intersects with important questions about the identity of this nation. This Article only begins to scratch the surface of important constitutional questions. The extent to which constitutional norms apply to aliens is a deeply complicated question that intersects with important and contested realms of executive and legislative power. With each new case challenging government action towards aliens, courts will continue to confront difficult questions about how far, and in what contexts, fundamental constitutional guarantees extend. Hopefully, this Article has highlighted a few themes and nuances that will serve useful in further exploration of these important topics by scholars and courts alike.