CONSERVATIVE PROGRESSIVISM IN IMMIGRANT HABEAS COURT: *WHY* BOUMEDIENE V. BUSH *IS THE BASELINE CONSTITUTIONAL MINIMUM*

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ABSTRACT

This article opens with a presentation of the six baseline holdings of Boumediene v. Bush *as an expression of the basic constitutional minimum required under the Suspension Clause for all habeas cases. Then it describes the Circuit split that gave rise to* DHS v. Thuraissigiam*, which distinguished* Boumediene *according to the Court's Conservative Progressive ideology. In* Thuraissigiam*, this ideology was symbolized by* Landon v. Plasencia *that favored* Mathews v. Eldridge *post-racial balancing tests to real justice.*

Then this article exposes the reasons why Thuraissigiam *should be distinguished in all future cases, as Justice Sotomayor contended, according to its highly individualized, narrow set of circumstances. For as Sotomayor wrote in dissent,* Thuraissigiam *is "nothing short of a self-imposed injury to the Judiciary, to the separation of powers, and to the values embodied in the promise of the Great Writ." As such, its rationale should not be followed or repeated, as it may soon fall into the same kind of disrepute as cases like* Korematsu*,* Plessy*, and* Buck v. Bell*.*

In an unrelated matter USAID v. Alliance for Open Society*, the Court attempted to rewrite the holdings of* Boumediene *as the opposite of what they were sub silentio. The Court should not be allowed to apply* Boumediene *as if it held the opposite of what it actually held. So fundamental is the holding of* Boumediene *to basic liberty in America that if the Court fails to rediscover the baseline holdings of* Boumediene *for whatever reason, it is possible the nation could founder.*

This article concludes that the legal community should resist the recent changes the Court made to immigrant habeas corpus. If the Great Writ can be suspended by the government without a Declaration of War or an actual invasion on U.S. soil, then the U.S. Constitution is overridden. The legitimacy of the nation is at stake and the legal community should not falter in their duty to uphold the U.S. Constitution as a matter of loyalty and integrity regardless of how those in power misbehave or embarrass themselves by misrepresenting Boumediene's *six holdings.*

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I.
INTRODUCTION: *BOUMEDIENE V. BUSH* AS A VINDICATION OF U.S. PRINCIPLE

Fourteen years ago the U.S. Supreme Court doubted Progressivism in *Boumediene v. Bush* and instead held to "freedom's first principles" by expounding the common law of habeas corpus as required under the Suspension Clause.[1] *Boumediene* required that a minimum of habeas corpus must be applied "as it existed in 1789" for anyone, even in cases of non-citizen enemy combatants arrested for war crimes in foreign countries and held in black sites like Guantanamo Bay.[2] Therefore, the Suspension Clause requires that the Court can apply more protection than existed in 1789, the year the federal courts were first established by law, but it must not fall constitutionally short of the founding application of habeas corpus.[3]

Boumediene applied the constitutional minimum of the Writ of Habeas Corpus as it existed in 1789 and created these six holdings: (1) 28 U.S.C. § 2241(e) is completely overruled as a Suspension of the Writ;[4] (2) noncitizen aliens suspected by the Government of committing war crimes have the privilege of the Writ of Habeas Corpus;[5] (3) the Writ does not have a geographic limitation and may be asserted against any custodian the U.S. Courts have jurisdiction over including U.S. military officers that run black sites in foreign countries;[6] (4) prudential bases for

[1] Boumediene v. Bush, 553 U.S. 723, 797 (2008) (an opinion made in "fidelity to freedom's first principles").

[2] *Id.* at 746 ("[T]he analysis may begin with precedents as of 1789, for the Court has said that 'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified.") (quoting INS v. St. Cyr, 533 U.S. 289, 300–01 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 663–64 (1996))), and at 815 (Roberts, C.J., dissenting) ("To what basic process are these detainees due as habeas petitioners? We have said that 'at the absolute minimum,' the Suspension Clause protects the writ 'as it existed in 1789.'") (quoting *St. Cyr*, 533 U.S. at 301 (quoting *Felker*, 518 U.S. at 663–64)), *extending* Rasul v. Bush, 542 U.S. 466, 473 (2004) ("The [present habeas] statute traces its ancestry to the first grant of federal-court jurisdiction: Section 14 of the Judiciary Act of 1789 . . . .").

[3] *Boumediene*, 553 U.S. at 746 ("The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ."); *Felker*, 518 U.S. at 659 ("*Yerger's* holding is best understood in the light of the availability of habeas corpus review at that time. Section 14 of the Judiciary Act of 1789 authorized all federal courts, including this Court, to grant the writ of habeas corpus when prisoners were 'in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same.'") (quoting Judiciary Act of 1789, 1 Stat. 73, 82, § 14) (citing *Ex parte* Yerger, 75 U.S. 85, 102 (1869) (Noting that the Suspension Clause prohibits the abridgement of "the jurisdiction derived from the Constitution and defined in the act of 1789.")).

[4] *Boumediene*, 553 U.S. at 733, 792 ("28 U.S.C. § 2241(e), operates as an unconstitutional suspension of the writ").

[5] *Id.* at 732 ("We hold these petitioners do have the habeas corpus privilege.").

[6] *Id.* at 751 ("The prudential barriers that may have prevented the English courts from issuing the writ to Scotland and Hanover are not relevant here.") (distinguishing Rex v. Cowle [1759] 2 Burr. 834, 854–56 (Eng.)); *id.* at 762–64 (Rejecting the Government's argument that *Eisentrager* established

dismissing the Writ like exhaustion and federalism are not relevant;[7] (5) the Court has the power to issue orders directing the conditional or unqualified release of

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geographic limitations of habeas corpus stating: "We reject [the Government's reading] for three reasons. First, we do not accept that the above-quoted passage from *Eisentrager* [about geography] is the only authoritative language in the opinion and that all the rest is dicta. The Court's further determinations, based on practical considerations, were integral to Part II of its opinion and came before the decision announced its holding. Second, because the United States lacked both *de jure* sovereignty and plenary control over the Landsberg Prison, it is far from clear that the *Eisentrager* Court used the term sovereignty only in the narrow technical sense and not to connote the degree of control the military asserted over the facility. . . . Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid's*) functional approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus." (citations omitted) If geography ever had a limiting effect on habeas corpus, it would not be due to sovereignty issues or issues of ultimate control over the land, but rather due to "objective factors and practical concerns" such as, taking *Milligan's* holding into consideration, if a part of the United States fell to a rebel force that geographic part of the country would not practicably be able to have federal writs served on it, but only, according to *Milligan*, because the insurrectionists shuttered the doors of the Courts with violence, and not because habeas requires that the land be in the present sovereign control of the federal government.); *id.* at 796 (Following the ordinary rule that habeas jurisdiction is asserted over the custodian and not the petitioner in custody: "If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, the government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia.") (citing Rumsfeld v. Padilla, 542 U.S. 426, 435–36 (2004); Braden v. 30th Jud. Cir. Ct. Ky., 410 U.S. 484, 499, n. 15 (1973)), *rule applied in* Thompson v. Barr, 959 F.3d 476, 491 (1st Cir. 2020) ("[W]e construe Thompson's emergency motion for bail as a petition for a writ of habeas corpus and transfer it to the Northern District of Alabama." This Court cited to *Padilla* and applied the corrective of *Padilla* that was made in *Boumediene*. Without *Boumediene's* corrective, *Padilla* might require dismissal for filing in the wrong Court.), *rule extended from* Reid v. Covert, 354 U.S. 1, 40 (1957), *and* Rasul v. Bush, 542 U.S. 466, 472–73 n. 9 (2004) ("[T]he District Court . . . held, in reliance of our opinion in *Johnson v. Eisentrager*, that 'aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus.' . . . We granted certiorari, and now reverse.") (citations omitted), and at 476–79 (Nor did *Eisentrager* set forth, nor did any of the 9/11 cases turn *Eisentrager* into, a balancing test, rather *Eisentrager* set forth six critical facts that must be present for a future case to fall directly under its holding: "Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States [etc.] . . . . Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. The Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review. . . . Because *Braden* overruled the statutory predicate to *Eisentrager's* holding [i.e., *Ahrens*], *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims."), *rule drawn from* 28 U.S.C. §§ 2241(a), (c)(3) (granting the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States"), *rule traces its ancestry from* Judiciary Act of 1789, 1 Stat. 73, 81–82, § 14 (still good law), *and* Act of Feb. 5, 1867, 1 Stat. 385, ch. 28, *according to Braden*, 410 U.S. at 497–98, and at 402 (Rehnquist, J., dissenting) ("Today the Court overrules *Ahrens* . . . ."). *Cf. Eisentrager*, 339 U.S. at 767 ("the petition was dismissed on authority of *Ahrens*"—no longer good law).

[7] *Boumediene*, 553 U.S. at 793–94 ("prudential barriers" that "involved federalism concerns" are "not relevant here," and "the case for requiring temporary abstention or exhaustion of alternative remedies . . . no longer pertain here").

prisoners unlawfully detained;[8] and (6) the Court has power to hear exculpatory evidence not presented in the hearing below.[9]

If these holdings were applied, rather than merely referring to *Boumediene* facially without seeking a deeper understanding of its underlying implications, immigrants may not have been so easily abused during the Trump Administration.[10]

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[8] *Id.* at 787 ("We do hold that when the judicial power to issue habeas corpus properly is invoked the judicial officer must have 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."); *id.* at 779 ("And the habeas court must have the power to order the conditional release of an individual unlawfully detained—though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted. See *Ex parte Bollman*, 4 Cranch 75, 136 (1807) (where imprisonment is unlawful, the court 'can only direct [the prisoner] to be discharged').").

[9] *Boumediene*, 553 U.S. at 786 ("For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy, the court that conducts the habeas proceeding . . . also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding."); *id.* at 787 (The Court "must have adequate authority to make a determination in light of the relevant law and facts," i.e., to conduct a *de novo* review of law and fact.). Proper invocation of habeas corpus extends to potentially any person and is exceedingly easy to accomplish: *Rasul*, 542 U.S. at 474–75 (Noting that everybody "in wartime as well as in times of peace" can invoke habeas relief: "The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, and its insular possessions." On the jurisdictional question of proper invocation, prior to *Thuraissigiam*, even Southern rebels trying to destroy the nation in the cause of slavery, German Nazis attempting to bomb us, and enemy generals of Japan being held in the Philippines were able to properly invoke habeas protections—they, but not Mr. Thuraissigiam, were given hearings.) (citing *Ex parte* Milligan, 71 U.S. 2 (1866); *Ex parte* Quirin, 317 U.S. 1 (1942); *In re* Yamashita, 327 U.S. 1 (1946)); Hamdan v. Rumsfeld, 548 U.S. 557, 603, 612–13, 618–20 (2006) (Applying habeas corpus as properly invoked pursuant to *Quirin* and *Yamashita*, and upon the hearing of habeas corpus disagreeing with *Quirin* and *Yamashita* saying: "Whether or not the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed. . . . The procedures and rules of evidence employed during Yamashita's trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court." Also noting that the Geneva Convention provisions that underlie *Yamashita* were repealed in response to *Yamashita* and then adopted in U.S. federal law stating: "At least partially in response to subsequent criticism of General Yamashita's trial, the UCMJ's codification of the Articles of War after World War II expanded the category of persons subject thereto to include defendants in Yamashita's (and Hamdan's) position . . . . The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.") (citing 10 U.S.C.A. § 836, art. 36); *id.* at 627 (Distinguishing *Eisentrager* on this basis as well: "Whatever else might be said about the *Eisentrager* footnote, it does not control this case."); *Yamashita*, 327 U.S. at 30 (Murphy, J., dissenting) ("Jurisdiction properly has been asserted to inquire 'into the cause of restraint of liberty' of such a person."). *See, e.g., Thompson*, 959 F.3d at 491 (the Court "construe[d] Thompson's emergency motion for bail as a petition for a writ of habeas corpus" and transferred it to the proper Court for reviewing the writ, so petitioner did not even need to know he was filing a writ of habeas corpus to file a writ of habeas corpus).

[10] Eric M. Freedman, *Commentary: Court errs in denying habeas corpus to immigrants*, THE PHILADELPHIA INQUIRER, Sept. 19, 2016, https://www.inquirer.com/philly/opinion/commentary/20160919_Commentary__Court_errs_in_denying_habeas_corpus_to_immigrants.html [https://perma.cc/46FB-V853] (hereinafter Freedman, *Commentary*) (stating that the *Castro* Court erred by failing to interpret *Boumediene* as a requirement that any person "regardless of the unpopularity of the group to which he or she belongs . . . has access to judicial review by an independent court"); *Thompson*, 959 F.3d at 483 (federal courts have only recently begun to review BIA decisions at all, and the tradition of not reviewing BIA from before Trump was based upon a presumption, now

Immigrant children may not have been separated from their mothers; asylum seekers may not have been kept in Mexico.[11] But ever since *Boumediene* was decided federal judges have not applied the full force of all six of *Boumediene's* holdings to immigrant habeas cases, and as a direct result immigration advocates lost their most important cases to date.[12]

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proven false, that BIA actually, carefully reviews the immigration system's rulings *sua sponte*—*Boumediene* could have served as a wakeup call, for the Circuits prior to Trump in immigration law, to get ready for the oncoming abuses of immigrants—better late than never, this Court applied *Boumediene's* corrective on *Padilla* and transferred petitioner's case to the correct Court to be considered as a habeas petition); Ragbir v. Homan, 923 F.3d 53, 66, 73, 77 (2d Cir. 2019) (citing *Boumediene* for support, but not specifically applying any of the six holdings from *Boumediene*, which is the problem), *vacated and cert. granted*, 141 S. Ct. 227 (2020) (mem.) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *DHS v. Thuraissigiam*."). *See also* Jennings v. Rodriguez, 138 S. Ct. 830, 842, 852 (2018) (citing Landon v. Placensia, 459 U.S. 21, 34 (1982)) (if *Boumediene* was correctly applied in this case rather than Constitutional Avoidance, the immigrants would have prevailed); Reyes v. Wolf, No. C20-0377JLR, slip op. at 2 (W.D. Wash. Nov. 20, 2020) (instead of applying *Boumediene*, most federal immigrant habeas cases turn on the application of a number of different versions of due process balancing tests). *Cf.* Tuaua v. United States, 788 F.3d 300, 304 (D.C. Cir. 2015) (When the American Samoans cited to *Boumediene* for their rights, a federal court applied the slavery era rationale from *Dred Scott* to deny their rights instead.) (citing Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1857)).

[11] *See* Memorandum from Kirstjen M. Nielsen, Sec'y, Homeland Sec. to L. Francis Cissna, Dir., Citizen and Immigr. Services; Kevin K. McAleenan, Comm'r, Customs and Border Protection; & Ronald D. Vitiello, Deputy Dir., Immigr. and Customs Enf't (Jan. 25, 2019) (applying 8 U.S.C. § 1225(b)(2)(C)), in policy guidance for the implementation of the Migrant Protection Protocols). Secretary Nielsen's policy was subsequently held unlawful*.* Innovation Law Lab v. Wolf, 951 F.3d 986, 987–89, 991 (9th Cir. 2020) (finding that Secretary Nielsen violated § 1225 by applying a section of the law reserved for "spies, terrorists, alien smugglers, and drug traffickers" to "bona fide asylum seekers" and thereby also violated our treaty commitment codified in § 1231(b) of non-refoulement, that we will not return asylum seekers to countries where their lives are in danger) (citing 8 U.S.C. § 1225(b) & 8 U.S.C. § 1231(b)), *stay granted in* Wolf v. Innovation L. Lab, 140 S. Ct. 1564 (2020) (mem.) (until the Supreme Court decides the case or denies cert., the Migrant Protection Protocols stay in effect). *See also* Ms. L. v. ICE, 310 F. Supp. 3d 1133, 1136 (S.D. Cal. 2018) (ordering the government to end the child separation policy through preliminary injunction), *enforcement granted in part, denied in part in* Ms. L. v. ICE, 415 F. Supp. 3d 980, 997–98 (S.D. Cal. 2020) ("Plaintiffs assert Defendants have returned to systematically separating families at the border. . . . Plaintiffs invite the Court to engage in prospective oversight of Defendant's separation decisions, but that invitation warrants caution. . . . Defendants' application of these factors has generally been consistent with this Court's orders and thus Plaintiffs' motion to enforce the preliminary injunction is otherwise respectfully denied."); Ms. L. v. ICE, 302 F. Supp. 3d 1149, 1154, 1168 (S.D. Cal. 2018) ("For the reasons set out above, the Court grants in part and denies in part Defendants' motion to dismiss. . . . Although Plaintiffs did not request leave to amend in the event any portion of Defendants' motion was granted, the Court grants Plaintiffs leave to file a Second Amended Complaint that cures the pleading deficiencies set out above.").

[12] I am speaking of *Thuraissigiam*, *Castro*, and *Jennings*, which were all lost. Section 14 of the Judiciary Act of 1789 applies directly to federal incarceration matters, and thus immigrant matters, and so immigration attorneys may lean more heavily on its text. *See* Judiciary Act of 1789, 1 Stat. 73, 81–82, § 14 ("*And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. Provided, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United

II.
THE RISE OF CONSERVATIVE PROGRESSIVISM IN IMMIGRATION COURT

Ever since Justice O'Connor graced the bench, it became acceptable for conservative judges to cop Progressivism to support their agendas.[13] As presaged by

States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."). *Compare* Dimitri D. Portnoi, *Resorting to Extraordinary Writs: How the All Writs Act Rises to Fill the Gaps in the Rights of Enemy Combatants*, 83 N.Y.U. L. REV. 293, 296–97 (2008) ("The [All Writs Act] was initially codified in the Judiciary Act of 1789. . . . Section 14, which became known as the 'all-writs' provision, contains what has been described as '[t]he most expansive and open-ended language' in the Judiciary Act."), *with* Castro v. USDHS, 835 F.3d 422, 436–37 (3d Cir. 2016) (acknowledging Petitioners' argument that the "[eugenic]-era cases 'establishe[d] a constitutional floor for judicial review'" rather than the Judiciary Act of 1789, § 14), *extended by* Thuraissigiam v. USDHS, 917 F.3d 1097, 1115–16 (9th Cir. 2019) (Citing the constitutional minimum from *Boumediene* and restating *Castro's* incorrect reading, "Cases throughout the [eugenic] era, from the 1890s to the 1950s, which carry significant weight here, held firm to this constitutional premise."), *rev'd*, DHS v. Thuraissigiam, 140 S. Ct. 1959, 1977 (2020) ("The first of the [eugenic] era cases, *Nishimura Ekiu*, required the Court to address the effect of the 1891 Act's finality provision in a habeas case. *Nishimura Ekiu* is the cornerstone of respondent's argument regarding the [eugenic] era cases, so the opinion in that case demands close attention.") (citations omitted). To characterize *Nishimura Ekiu* as the beginning of an era of jurisprudence is an attempt to whitewash over *The Chinese Exclusion Case*, a.k.a., *Chae Chan Ping*, which was the beginning of the Court's plenary power doctrine era and eugenic era, of which the Court followed suit in *Nishimura Ekiu*. It is also an attempt to hold the eugenic era's jurisprudence blameless of racial bias and discrimination post-1891 and to limit the effects of the post-WWII amendments to immigration law that ostensibly removed eugenic/racial classifications from immigration decisions; these changes to immigration law that were inspired by the movement created by Martin Luther King, Jr. were literally enacted by Congress to distinguish the United States from Nazi Germany because the Nazis actually adopted our eugenic policies in order to persecute the Jews and others during and prior to WWII. *See also id.* at 1990 (Breyer, J., concurring) ("Even accepting respondent's argument that our '[eugenic] era' cases map out a constitutional minimum, his claims, on the facts presented here, differ significantly from those that we reviewed throughout this period.") (citations omitted).

[13] In the past, Progressivism embraced eugenic ideology—an underlying theory of the evolutionary progress of human beings toward the perfect genetic human, i.e., the white man. *See* NANCY J. PAREZO & DON D. FOWLER, ANTHROPOLOGY GOES TO THE FAIR 10, 49, 136, 342 (2007). Eugenics is now debunked by science and revealed as a bare racist policy that inspired Hitler to wipe out the Jews. *See* JAMES Q. WHITMAN, HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 139 (2017) ("America was the leader during the age of the rise of Hitler. That is the truth, and we cannot squirm away from it. It was American immigration, citizenship, and anti-miscegenation law that the Nazis cited over and over again. It was American Jim Crow that was highlighted by the Prussian Memorandum."). Progressivism's embrace of eugenics in the past signifies, at the very least, that the umbrella term Progressive can be used to push forward causes that are later unmasked as totalitarian and grotesque. OCTAVIO PAZ, THE LABYRINTH OF SOLITUDE 57, 231 (Lysander Kemp trans., 1985) (warning us to beware "the philosophy of progress" because it can be used for cover by totalitarians). In very recent times, Progressivism became detached from its past and is now used as a placeholder for increased liberalism or even extreme liberalism, and curiously may no longer include even an underlying, unified theory of progress in the popular mind. *See* Jamelle Bouie, *What Is a Bernie Sanders Progressive?*, SLATE, Feb. 4, 2016, https://slate.com/news-and-politics/2016/02/bernie-sanders-definition-of-progressive-is-a-very-selective-one.html [https://perma.cc/55A3-XFYZ] ("In present usage, *progressive* is largely a synonym for *liberal* that came into use after Ronald Reagan and the wide belief that *liberal* was a dirty word."). O'Connor's ascension to the bench as the first woman justice secured her position as a darling of Progressives, defined as liberals or leftists who then embraced identity politics, because she was a woman. *See* Barbara Miner, *O'Connor Leaves Promising Legacy for Women in the Law*, THE PROGRESSIVE, July 6, 2005, https://progressive.org/op-eds/o-

Landon v. Plasencia, the conservatives of the Court often herald their opinions in the Progressive style as automatically of better quality than those made during any other era.[14] In 2020, the Conservative Progressive dogma given in *Landon*

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connor-leaves-promising-legacy-women-law/. Justice O'Connor, though a conservative, embraced the role of being an alternative sort of Progressive. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 75 (2004) ("But judicial restraint is not, as critics may argue, to be confused with an absence of belief or with opposition to 'progress.'"); *id.* at 235 ("Our flexibility—our ability to borrow ideas from other legal systems—is what will enable us to remain progressive, with systems that can cope with a rapidly shrinking world."). Balancing tests were long considered a Progressive way of expressing a judicial opinion. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 963 (1987) ("Balancing was a progressive, up-beat, 'can-do' judicial attitude."). Justice O'Connor popularized the use of judicial balancing tests that liberal Progressives are comfortable with, among the conservative wing of the Court, which allowed her, and her conservative colleagues when they joined her or followed her, to bypass liberal criticism. *See* Landon v. Plasencia, 459 U.S. 21, 32–34 (1982) (using a Progressive balancing test to reassert the eugenic opinion that immigrants have "no constitutional rights" directly from eugenic cases that arose under the Chinese Exclusion Act, with little to no criticism) (citing Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) and using the *Mathews* balancing test). O'Connor's use of balancing tests pinnacled in the *Hamdi* plurality opinion that she wrote, which was a failed attempt to graft *Mathews* balancing on top of habeas corpus review; this attempt was highly destructive and reminded us that the umbrella term Progressivism can push causes that are later revealed to be anti-Progressive, as demonstrated in Progressivism's eugenic past. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (Opinion of O'Connor, J.) (citing *Mathews*, 424 U.S.). The decision in *Hamdi*, led by Justice O'Connor's plurality opinion, severely embarrassed the Court when its remand to a military tribunal ordering it to apply a *Mathews* balancing test was ignored by the military; instead of applying Justice O'Connor's balancing test, the military stripped Yaser Hamdi of his U.S. Citizenship, deported him, and put him on a no fly list. *See also* Dahlia Lithwick, *Nevermind: Hamdi Wasn't so Bad After All*, SLATE, Sept. 23, 2004, https://slate.com/news-and-politics/2004/09/hamdi-wasn-t-so-bad-after-all.html [https://perma.cc/87PL-UNXL] (hereinafter Lithwick, *Nevermind*) (Lithwick, a self-described liberal Progressive, noticed this divergence when she described her perspective that *Hamdi* should have been a liberal Progressive example by the way it sounded on paper, but because it was ignored by the Government it had a direct part in causing a miscarriage of justice.). The problem of Conservative Progressivism in Immigration Court, as defined in this article, is an oxymoron in terms that serves an underlying conservative agenda, while appearing on its face to be liberal or at least a compromise with liberals. *See, e.g.,* Meaghan Winter, Roe v. Wade *Was Lost in 1992*, SLATE, Mar. 27, 2016, http://www.slate.com/articles/double_x/cover_story/2016/03/how_the_undue_burden_concept_eroded_roe_v_wade.html [https://perma.cc/V53Z-UPL6] (exposing O'Connor's opinion in *Casey* as a loss rather than a compromise). Furthermore, this problem only exists so long as a critical mass of liberal Progressives (i.e., plain Progressives defined as liberals) fail to consider whether the version of Progressivism that Justice O'Connor and her conservative colleagues on the Court represent is merely a cover for pushing conservative agendas, rather than a genuine compromise. *See* Dahlia Lithwick, *Bad Heir Day: How Sandra Day O'Connor Became the Least Powerful Jurist in America*, SLATE, July 9, 2007, https://slate.com/news-and-politics/2007/07/how-sandra-day-o-connor-became-the-least-powerful-jurist-in-america.html [https://perma.cc/7YAX-92BJ] (failing to anticipate how O'Connor's opinions would create theoretical Progressive foundations for cases criticized vehemently by liberal Progressives such as *Shelby County*, *Schuette*, and *Thuraissigiam*, because of an unfounded presumption that O'Connor was situated in the middle of the Court's spectrum of political ideologies, rather than considering whether she may have been a conservative extremist, or at least useful to conservative extremists, playing the long game); Dahlia Lithwick & Mark Joseph Stern, *The Supreme Court Doesn't See Asylum-Seekers as People*, SLATE, June 25, 2020, https://slate.com/news-and-politics/2020/06/supreme-court-asylum-deportations-thuraissigiam.html [https://perma.cc/B6HG-AJ7X] (vehemently decrying *Thuraissigiam*, but not mentioning O'Connor's opinion in *Landon*, which enabled *Thuraissigiam*).

[14] *See Landon*, 459 U.S. at 32–34; *Thuraissigiam*, 140 S. Ct. at 1982 (the only case stating plenary power doctrine that *Thuraissigiam* did not hold superseded by law that was used to justify complete

eventually aided the *Thuraissigiam* Court's ironic regression to a state akin to that of the late 19th Century Court.[15]

The holdings of *Boumediene* refuted the Conservative Progressivism expressed in *Landon v. Plasencia* and it also arguably reversed or precluded the O'Connor plurality in *Hamdi v. Rumsfeld*.[16] Rather than adopt a Progressive balancing test,

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dismissal of habeas corpus in *Thuraissigiam* was *Landon*); Schuette v. BAMN, 572 U.S. 291, 314 (2014); Shelby County v. Holder, 570 U.S. 529, 547 (2013) (Using progress as a reason to overrule vital portions of the Voting Rights Act saying, "Nearly 50 years later, things have changed dramatically."); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720–22, 731 (2007) ("The Ninth Circuit below stated that it 'share[d] in the hope' expressed in *Grutter* that in 25 years racial preferences would no longer be necessary to further the interest identified in that case."); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.") (citations omitted).

[15] *See Thuraissigiam*, 140 S. Ct. at 1973–74 (using progress in "U.S. immigration law or the lack thereof" as the touchpoint of the Court's analysis in order to ignore as irrelevant the fact that there was no immigration law in 1789 to hinder the full application of habeas corpus to all immigrants prior to 1875); *id.* at 1976–81 (citing the progress of immigration law beginning in 1875 that was symbolized by *Nishimura Ekiu* and *Chae Chan Ping* as a valid substitution for the immigration friendly application of habeas corpus for immigrants that began around 1789); *id.* at 1982–83 (finally, the Court exclusively relied upon *Landon v. Placensia's* statement derived from *Nishimura Ekiu* that adopted the eugenic era's substitution of founding pro-immigrant policies for the idea that "'an alien seeking initial admission to the United States . . . has no constitutional rights'" apart from Congressional law; *Thuraissigiam* applied this *Landon* dicta as this new holding, "an alien in respondent's position has only those rights regarding admission that Congress has provided by statute . . . the Due Process Clause provides nothing more") (quoting *Landon*, 459 U.S. at 32). The holding in *Thuraissigiam* is exclusively reliant on *Landon's* Conservative Progressive ideology to revive the old eugenic holdings because the *Thuraissigiam* Court repudiated the eugenic era cases as superseded by law saying, "This interpretation of the '[eugenic] era' cases is badly mistaken. Those decisions were based not on the Suspension Clause but on the habeas statute and the immigration laws then in force." *Id.* at 1976. This left only *Landon's* statement as a valid, modern basis for the principle that immigrants do not have rights under the current law even though *Landon* was not itself a habeas case. *Cf.* Adam Serwer, *The Supreme Court Is Headed Back to the 19th Century*, THE ATLANTIC, Sept. 4, 2018, https://www.theatlantic.com/ideas/archive/2018/09/redemption-court/566963/ [https://perma.cc/F4R3-HYCY] ("Americans have an unfortunate tendency to see U.S. history as an epic, sweeping narrative with a Hollywood-style happy ending. That false promise of the final triumph of the forces of good is one reason why America's struggles with racism remain so persistent, and why Americans seem so surprised when what they see as a distant, shameful history emerges in the present.").

[16] *See Boumediene*, 553 U.S. at 734 (citing Rasul v. Bush, 542 U.S. 466, 473 (2004) (quoting Judiciary Act of 1789, 1 Stat. 73, 82, § 14) (citing Felker v. Turpin, 518 U.S. 651, 659–60 (1996))); *id.* at 796 (citing Braden v. 30th Jud. Cir. Ct. Ky., 410 U.S. 484, 499, n. 15 (1973)); *id.* at 825 (Roberts, C.J., dissenting) (citing Landon v. Plasencia, 459 U.S. 21, 34–35 (1982)); *id.* at 841 (Scalia, J., dissenting) (citing Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (plurality opinion)). *See also Rasul*, 542 U.S. at 474 (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218–19 (1953) (Jackson, J., dissenting)), *abrogating Mezei*, 345 U.S.; *Braden*, 410 U.S. at 497–98, *overruling* Ahrens v. Clark, 335 U.S. 188 (1948); *Landon*, 459 U.S. at 34 ("We need not now decide the scope of *Mezei*; it does not govern this case."). *Cf.* Lithwick, *Nevermind*, *supra* note 13 ("Hamdi's case, decided by the Supreme Court earlier this year, was supposed to represent a high-water mark for American freedoms during wartime. . . . It now stands for precisely the opposite: With a yawn and a shrug, the administration sidestepped the courts and the judicial process once again, abandoning this criminal

Boumediene applied the minimum requirements from the Judiciary Act of 1789 that were long promised in *Ex parte Yerger*, *Felker v. Turpin*, *INS v. St. Cyr*, and *Rasul v. Bush* to overrule any subsequent law that would effectively repeal the Act of 1789.[17] *Boumediene* kept this promise by making it binding precedent to consider granting release to noncitizens suspected of terrorism and other war crimes held in Guantanamo Bay pending a common law trial or other legitimate government action.[18]

However, in 2016 when a habeas challenge for immigrant asylum seekers arose on appeal in the Third Circuit in *Castro v. USDHS*, the Court found that *Boumediene* should control the case, but the Court was misinformed about *Boumediene's* holdings.[19] Thus, the *Castro* Court invented a "two-step inquiry," falsely representing that it came from *Boumediene*, and it denied habeas corpus to immigrant asylum seekers that were captured within 100 miles of the border based on *Landon v. Plasencia's* Progressive statement of plenary power doctrine in dicta.[20]

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prosecution altogether and erasing the episode from our national memory. Hamdi has been stripped of his citizenship and his freedom to travel, and sent packing to his family.").

[17] *Boumediene*, 553 U.S. at 734 (citing Rasul v. Bush, 542 U.S. 466, 473 (2004) (quoting Judiciary Act of 1789, 1 Stat. 73, 82, § 14) (citing *Felker*, 518 U.S. at 659–60)); *id.* at 746 ("[T]he analysis may begin with precedents as of 1789, for the Court has said that 'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified.") (quoting INS v. St. Cyr, 533 U.S. 289, 300–01 (2001) (quoting *Felker*, 518 U.S. at 663–64)).

[18] *Boumediene*, 553 U.S. at 734; Boumediene v. Bush, 579 F. Supp. 2d 191, 198–99 (D.D.C. 2008) ("ORDERED that Respondents are directed to take all necessary and appropriate diplomatic steps to facilitate the release of Petitioners Lakhdar Boumediene, Mohamed Hechla, Hadj Boudella, Mustafa Ait Idir, and Saber Lahmar forthwith."), *rev'd in part by* Bensayah v. Obama, 610 F.3d 718, 727 (D.C. Cir. 2010) (remanding to the district court to reconsider also releasing the sixth petitioner); Bensayah v. Obama, No. 1:04N1166, 2014 WL 395693, at *1 (D.D.C. Feb. 3, 2014) ("On December 5, 2013, Bensayah was transferred from Guantanamo to the custody of the Government of Algeria, effectively mooting his habeas request. . . . ORDERED that petitioner's case is DISMISSED as moot.").

[19] Castro v. USDHS, 835 F.3d 422, 427, 445–46 (3d Cir. 2016) (The Court firmly applied *Boumediene* in a case involving asylum seekers not "present in the country for more than about six hours, and . . . apprehended [no] more than four miles from the border." In such cases, according to *Castro*, "*Boumediene* contemplates a two-step inquiry . . . . The reason Petitioners' Suspension Clause claim falls at step one is because the Supreme Court has unequivocally concluded that 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.'" While the Court misconstrued *Boumediene* to somehow include plenary power doctrine, "Petitioners claim that *St. Cyr* and the finality-era cases firmly establish their right to invoke the Suspension Clause to challenge their removal orders." It appears the immigration attorneys did not assert that *Boumediene* applied to their clients' cases.) (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)).

[20] *Id.* at 425, 437–38, 444, 446 ("'This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.'") (quoting *Landon*, 459 U.S. at 32); *id.* at 450 (Hardiman, C.J., concurring dubitante) ("I write separately to express my doubt that the expression of the plenary power doctrine in *Landon v. Placensia* completely resolves step one of the Suspension Clause analysis under *Boumediene*."). The *Thuraissigiam* Court did not correct or modify *Castro* even though its holding about *Boumediene* directly contradicts it; however, the Court did directly vacate *Ragbir* to follow *Thuraissigiam*, even in removal cases involving lawful permanent residents. Ragbir v. Homan, 923 F.3d 53, 66, 73, 77 (2d Cir. 2019), *judgment vacated and cert. granted*, 141 S. Ct. 227 (2020) (mem.) ("Judgment vacated, and case remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *DHS v. Thuraissigiam*.").

In *Castro* the plenary power doctrine defeated the written word of the Suspension Clause affirmed only 8 years earlier in *Boumediene*.[21]

The *Castro* Court cited extensively to the eugenic era (which it labeled the "finality era" to pull focus away from its racist and misogynist underpinnings now considered illegitimate) and implied that the minimum due process immigrants should expect is found in *Chae Chan Ping* a.k.a. *The Chinese Exclusion Case*.[22] It noted that immigrants accordingly may at the most receive only a *de novo* review of the law, and that the Court must not review the factual determinations of the Executive Office for Immigration Review (EOIR).[23] Thus, the *Castro* Court flouted *Boumediene* (while misrepresenting that it was expounding *Boumediene*) and pushed objectively irrelevant, legally superseded eugenic era case law instead.[24]

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[21] *Castro*, 835 F.3d at 437–38, 444, 446.

[22] *Id.* at 436–37 (acknowledging Petitioners' argument that the "[eugenic]-era cases 'establishe[d] a constitutional floor for judicial review'"); *id.* at 440–41 ("Thus, the Court's earliest plenary power decisions established a rule leaving essentially no room for judicial intervention in immigration matters, a rule that applied equally in exclusion as well as deportation cases.") (citing Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (generally accepted as the foundation stone of plenary power doctrine)).

[23] *Id.* at 436–47 (the Court flowed from the eugenic era to *Boumediene* and back to the eugenic era without skipping a beat, while noting the apparent high water mark from *Heikkila*). *But see* Ng Fung Ho v. White, 259 U.S. 276, 283–84 (1922) ("[T]he proceeding for deportation is judicial in its nature. . . . [O]n appeal to the district court, additional evidence may be introduced, and the trial is *de novo*. . . . The situation bears some resemblance to [military service cases, where] . . . [i]t is well settled that, in such a case, a writ of habeas corpus will issue to determine the status.") (citing Liu Hop Fong v. United States, 209 U.S. 453, 461 (1908) ("In our view, giving the Chinaman an appeal, the law contemplates that he shall be given the right of a hearing *de novo* before the district judge before he is ordered to be deported.")), *extended by* Crowell v. Benson, 285 U.S. 22, 46, 60–61, 65 (1932) (applying the habeas corpus common law given in *Ng Fung Ho* as reason for general judicial review (not habeas review) of all adjudicative orders of administrative agencies where "fundamental rights are in question," even when the statutes do not expressly grant jurisdiction for review); Administrative Procedures Act, 5 U.S.C. § 706 (granting judicial review of administrative agencies, including in matters covered by *Crowell*); INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) (citing *Crowell* and saying "we are obliged to construe the statute to avoid such problems," by implying jurisdiction for habeas review). The Court is presently ignoring the jurisdiction extended in *Crowell*, *St. Cyr*, and the Administrative Procedures Act over agencies that was expressly adopted in the context of the immigrant cases *Ng Fung Ho* and *Liu Hop Fong* to resist deportation. Jennings v. Rodriguez, 138 S. Ct. 830, 842, 858 (2018) (Deciding not to apply habeas common law as outlined in *Crowell* and instead stating, "Respondents do not seek habeas relief, as understood by our precedents. . . . [Their] classwide injunction looks nothing like a typical writ. It is not styled in the form of a conditional or unconditional release order."); DHS v. Thuraissigiam, 140 S. Ct. 1959, 1963 (2020) ("Habeas has traditionally been a means to secure release from unlawful detention, but respondent invokes the writ to achieve an entirely different end . . . .").

[24] *Castro*, 835 F.3d at 444, 446–47 (the Court delved into an extensive discussion of the eugenic era's finality decisions and plenary power decisions, but then abruptly stated that those "are not controlling here" and instead relied explicitly on *Landon's* restatement of plenary power doctrine from 1982, finding the treatment of persons who "were apprehended within hours" of entry to be seemingly significant such that they could be seen as "aliens seeking initial admission"). *But see id.* at 450–51 (Hardiman, C.J., concurring dubitante) ("I write separately to express my doubt that the expression of the plenary power doctrine in *Landon v. Plasencia* completely resolves step one of the Suspension Clause analysis under *Boumediene*.").

The Ninth Circuit attempted to respond in *Thuraissigiam*, by disagreeing with *Castro's* application of plenary power doctrine, but then applied the very eugenic era case law that was prescribed under *Castro's* novel "two-step inquiry."[25] Both *Castro* and *Thuraissigiam* cited to *Boumediene's* requirement that habeas, as it existed in 1789, was the minimum level of habeas review that must be applied.[26] However, both failed to apply the minimum promised in *Felker* and *St. Cyr* that was upheld in *Boumediene*, and instead applied the plenary power doctrine as given in the dicta of *Landon v. Plasencia* under the veneer of a due process balancing test.[27]

The Ninth Circuit, however, expressly cabined its holding to the Suspension Clause and refused to reach analysis of the Due Process Clause.[28] The U.S. Supreme Court, therefore, overstepped its bounds as a Court of last review, when it foreclosed Mr. Thuraissigiam's due process rights before the lower courts issued a decision about them.[29] Then it compared the common law habeas remedy of release with deportation saying, "the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka."[30]

The Court continued: "That would be the equivalent of the habeas relief Justice Story ordered in a case while riding circuit. He issued a writ requiring the release of a foreign sailor who jumped ship in Boston, but he provided for the sailor to be

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[25] Thuraissigiam v. USDHS, 917 F.3d 1097, 1106, 1117 (9th Cir. 2019).

[26] *Id.* at 1114–15 (Citing the constitutional minimum from *Boumediene* and restating *Castro's* misrepresentation that: "Cases throughout the [eugenic] era, from the 1890s to the 1950s, which carry significant weight here, held firm to this constitutional premise."); *Castro*, 835 F.3d at 436–37 (Acknowledging Petitioners' argument that the "[eugenic]-era cases 'establishe[d] a constitutional floor for judicial review,'" and yet paradoxically quoting *St. Cyr* for the constitutional minimum that was required by *Boumediene*: "the foundational principle that, 'at the absolute minimum the Suspension Clause protects the writ 'as it existed in 1789.'").

[27] *Castro*, 835 F.3d at 445–46 ("*Boumediene* contemplates a two-step inquiry . . . . The reason Petitioners' Suspension Clause claim falls at step one is because the Supreme Court has unequivocally concluded that 'an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.'") (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)); *Thuraissigiam*, 917 F.3d, at 1110, 1117 (Distinguishing *Landon*, and yet ironically applying the same eugenic, plenary power ideology that *Castro* cited *Landon* to represent: "At step two, the [eugenics] era again informs our analysis of what the Suspension Clause requires when a removal order is challenged.") (citing *Landon*, 459 U.S. at 32 ("This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."—cited as a factor in a *Mathews* due process balancing test.)). *See also* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (Setting forth the eugenic era version of plenary power that was affirmed throughout that era: "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 254 (2016).

[28] *Thuraissigiam*, 917 F.3d at 1112 ("*Landon*, a due process case, is not relevant to whether Thuraissigiam can invoke the Suspension Clause. For that reason, we decline to follow *Castro's* approach and reject the government's argument that Thuraissigiam's purported lack of due process rights is determinative of whether he can invoke the Suspension Clause.").

[29] *Id.* at 1119 ("we do not profess to decide in this opinion what right or rights Thuraissigiam may vindicate via use of the writ"), *rev'd by* DHS v. Thuraissigiam, 140 S. Ct. 1959, 1962–64, 1969–70, 1983 (2020) (determining that Thuraissigiam lacked due process rights to challenge his detention).

[30] *Thuraissigiam*, 140 S. Ct. at 1970.

released into the custody of the master of his ship."[31] Upon further exploration of *Ex parte D'Olivera*, the 1813 case *Thuraissigiam* cited to suggest that habeas release could be equivalent to deportation, it appears that deportation is not the equivalent of what Justice Story ordered at all.[32] For as *Thuraissigiam* admitted, after considering several cases of the early Republic arising under, by, and through the common law writ as granted in *Somerset's Case* in 1772,

> [I]t may be that the released petitioners were able to remain in the United States as a collateral consequence of release . . . [because t]hese decisions came at a time when an "open door to the immigrant was the . . . federal policy." So release may have had the side effect of enabling these individuals to remain in this country . . . .[33]

D'Olivera was especially exceptional, because the War of 1812 was raging at the time it was decided; a war which was fought to defend the rights of foreign sailors to permanently jump ship into the United States.[34] Furthermore, Justice Story expressly rejected the idea that deportation could be applied as a condition of release

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[31] *Id.* (citing *Ex parte* D'Olivera, 7 F. Cas. 853, 854 (C.C.D. Mass. 1813) (No. 3967)).

[32] *D'Olivera*, 7 F. Cas. at 854 (promising "upon the payment of the costs of this application and the gaoler's fees" to deliver the prisoner to the master of his ship, but also noting that it would actually be illegal if Story actually followed through on this promise—the only thing actually provided for was "that the prisoner be discharged" and if the costs were not paid, and there is no evidence they were, then that is all the Court ordered), *cited for opposite conclusion as the U.S. Supreme Court decision in* Thuraissigiam *in* Rasul v. Bush, 542 U.S. 466, 481 (2004) ("At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, ..."), *in* INS v. St. Cyr, 533 U.S. 289, 301–02 nn. 16–17 (2001) ("In England prior to 1789, in the Colonies, and in this Nation during the formative years of our Government, the writ of habeas corpus was available to nonenemy aliens as well as citizens. It enabled them to challenge Executive and private detention in civil cases as well as criminal."), *and in Thuraissigiam*, 917 F.3d at 1112 ("For example, in *Ex parte D'Olivera*, a federal court in Massachusetts permitted an arrested noncitizen seaman to invoke habeas.").

[33] *Thuraissigiam*, 140 S. Ct. at 1973–73 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588, n. 15 (1952)). *Cf.* United States v. Villato, 2 Dall. 370, 371, 373 (C.C.D. Pa. 1797) ("It is conceded, that if the prisoner is not a naturalized citizen of the United States, he must be discharged. . . . [T]he prisoner is not a citizen of the United States; and . . . consequently . . . The Prisoner must, therefore, be discharged."), *cited in* Flores-Miramontes v. INS, 212 F.3d 1133, 1142 n. 12 (9th Cir. 2000).

[34] *See* James Madison, *Special Message [from the President of the United States to Congress Recommending an Immediate Declaration of War Against Great Britain]*, June 1, 1812, https://www.presidency.ucsb.edu/documents/special-message-887 ("British cruisers have been in the continued practice of violating the American flag on the great highway of nations, and of seizing and carrying off persons sailing under it."). *Cf.* THEODORE ROOSEVELT, THE NAVAL WAR OF 1812, PART I, at 32–33 (1900) ("Great Britain's doctrine was 'once a subject always a subject.' On the other hand, the United States maintained that any foreigner, after five years' residence within her territory, and after having complied with certain forms, became one of her citizens as completely as if he was native born."); THEODORE ROOSEVELT, THE NAVAL WAR OF 1812, PART II, at 21–22 (1900) ("At one of the bow-guns was stationed a young Scotchman, named Bissly, who had one leg shot off close to the groin. Using his handkercief as a tourniquet, he said, turning to his American shipmates: 'I left my own country and adopted the United States, to fight for her. I hope I have this day proved myself worthy of the country of my adoption. I am no longer of any use to you or to her, so good-by!' With these words he leaned on the sill of the port, and threw himself overboard.").

in *United States v. The Amistad*—even at the forceful request of the foreign sovereign Queen of Spain.[35] This was the result of *The Amistad*, because there was no equivalent to deportation in federal law prior to the Page Act, as *Thuraissigiam* expressly stated, and instead the law against illegal extradition was applied.[36]

The Ninth Circuit opened up the door to the U.S. Supreme Court's re-characterization of *D'Olivera* as a tool to justify the future use of habeas release to effect deportations when it presumed that *The Chinese Exclusion Case* and other eugenic era case law applied *Boumediene's* minimum requirement of habeas as it existed in 1789 for immigrants.[37] The ordinary standard of review available under

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[35] United States v. The Amistad, 40 U.S. 518, 596 (1841) ("there does not seem to us to be any ground for doubt, that these negroes ought to be deemed free"—after they were freed into the United States, they had to raise money to pay for their own travel back to Africa).

[36] *Id.* at 553 (citing Holmes v. Jennison, 39 U.S. 540, 569 (1840) (Opinion of Taney, C.J.) (distinguishing New York v. Miln, 36 U.S. 102 (1837))); *Thuraissigiam*, 140 S. Ct. at 1973–74 (noting that the first federal immigration regulation was enacted in 1875, which was the Page Act). *Cf.* JOHN QUINCY ADAMS, ARGUMENT . . . IN THE CASE OF THE UNITED STATES, APPELLANTS, VS. CINQUE, AND OTHERS, AFRICANS, CAPTURED IN THE SCHOONER AMISTAD 83 (1841) (Arguing against the President's night order to deport the Africans of *The Amistad* into Cuba at the command of a foreign Queen: "Lawless and tyrannical; (may it please the Court—Truth, Justice, and the Rights of human kind forbid me to qualify these epithets) Lawless and Tyrannical, as this order was upon its face, the cold blooded cruelty with which it was issued—was altogether congenial to its spirit—I have said that it was issued in the dead of winter—and that the Grampus was of so small a burden as to be utterly unfit for the service upon which she was ordered."); *id.* at 91–96 (Giving the relevant law outlawing the slave trade and justifying his earlier comments that the President's order was lawless and tyrannical: "The decree for abolishing the slave trade was issued in 1817. Why did the Spanish minister limit his request to laws passed after 1818? Why was not the decree of 1817 brought forward? . . . [O]nly the laws since 1818 were communicated, and the Decree of 1817, making the slave trade unlawful and its victims free, was kept back. . . . [Commenting extensively on *The Antelope*, the precedent claimed to support ordering *The Amistad* Africans deported:] Upon this plain and simple statement of facts, can we choose but exclaim, if ever a soul of an American citizen was polluted with the blackest and largest participation in the African slave-trade, when the laws of his country pronounced it piracy, punishable by death, it was that of this same John Smith. He had renounced and violated those rights, by taking a commission from Artigas to plunder the merchants and mariners of nations in friendship with our own; and yet he claimed the protection of that same country which he had abandoned and betrayed. Why was he not indicted upon the act of 15th May, 1820, so recently enacted before the commission of his last and most atrocious crime?") (citing 1820 Piracy Law, 3 Stat. 600, § 5).

[37] *Thuraissigiam*, 917 F.3d at 1106, 1114–15 ("[*Boumediene*] affirmed that although the writ's protections may have expanded since the Constitution's drafting, 'at the absolute minimum,' the Clause protects the writ as it existed in 1789. . . . Cases throughout the [eugenic] era, from the 1890s to the 1950s, which carry significant weight here, held firm to this constitutional premise.") (quoting Boumediene v. Bush, 553 U.S. 723, 746 (2008) and citing Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (citing Chae Chan Ping v. United States, 130 U.S. 581, 604–09 (1889))), *not following* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (Applying Due Process to cases involving immigrants: "These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. . . . The questions we have to consider and decide in these cases, therefore, are to be treated as invoking the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.") (quoting U.S. CONST. amend. XIV), *or* Yamataya v. Fisher [a.k.a. Japanese Immigrant Case], 189 U.S. 86, 100 (1903) ("But this Court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may

habeas corpus, tracing back to ancient sources,[38] is *de novo* review of law and fact.[39] The eugenic era was labeled the "finality era" by the *Castro* Court emphatically *because* that era departed from the ordinary standard of habeas review and gave immigrants only *de novo* review of the law, otherwise denying them any review of the facts.[40]

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disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution.") (citing U.S. CONST. amend. V).

[38] ERIC M. FREEDMAN, MAKING HABEAS WORK 113 (2018) (citing to *Boumediene's* requirement that the Court consider "'the relevant law and facts'" as the embodiment of the ancient habeas practice of a full *de novo* review) (*Boumediene*, 553 U.S. at 787); Eric M. Freedman, *Review: Liberating Habeas Corpus*, 39 REV. AM. HIST. 395, 399 (2011) (hereinafter Freedman, *Review*) (Giving a statement of the ordinary habeas standard applied in the 1600's that would be spoken of in the mid-20th Century using the shorthand term *de novo* review: "'Habeas corpus provided a second glance, allowing the court to hold the alleged facts behind each imprisonment against the relevant law.'") (quoting PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 135 (2010)). *Cf.* Padilla v. Kentucky, 559 U.S. 356, 373–74 (2010) (describing the deportation of immigrants as tantamount to the ancient punishment of banishment, and therefore allowing independent habeas review of underlying proceedings that led to the immigrant's deportation); Eric M. Freedman, *Leo Frank Lives: Untangling the Historical Roots of Meaningful Federal Habeas Corpus Review of State Convictions*, 51 ALA. L. REV. 1467, 1531–32 (2000) (Where prudential grounds were used in the early to mid-Twentieth Century to defer to another court's factfinder it was not an attempt to redefine the Court's ordinary "de novo review" standard, i.e., such courts are not deciding whether "the federal court *could* examine the merits" but rather "whether it *should* do so." They therefore left the ordinary standard intact.).

[39] Crowell v. Benson, 285 U.S. 22, 58, 65 (1932) (Allowing the habeas corpus standard to apply to administrative law judgments, including immigration court: "When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined *de novo* upon habeas corpus. . . . We are of the opinion that the District Court did not err in permitting a trial *de novo* on the issue of employment.") (citing *In re* Grimley, 137 U.S. 147, 154–55 (1890)); Wright v. West, 505 U.S. 277, 299–303 (1992) (O'Connor, J., concurring in judgment) (O'Connor cited to *Moore v. Dempsey* as an exemplar of the *de novo* standard in habeas cases, but added a list of twenty more cases, "which applied a standard of *de novo* review" to Justice Thomas's list and remarked, "There have been many others." Here, O'Connor strongly contended for "the general rule of *de novo* review of constitutional claims on habeas." She continued: "Justice Thomas misdescribes *Jackson*. In *Jackson*, the respondents proposed a deferential standard of review, very much like the one Justice Thomas discusses today, that they thought appropriate for addressing constitutional claims of insufficient evidence. We expressly rejected this proposal. Instead, we adhered to the general rule of *de novo* review of constitutional claims on habeas."); Thompson v. Barr, 959 F.3d 476, 483, 491 (1st Cir. 2020) ("we join the Second, Third, Fifth, Seventh, Eight, and Ninth Circuits in holding that we have limited jurisdiction to review constitutional claims or errors of law that arise in motions to reopen sua sponte . . . we construe Thompson's emergency motion for bail as a petition for a writ of habeas corpus and transfer it to the Northern District of Alabama, the district where Thompson remains confined.") (citing Lopez-Marroquin v. Barr, 955 F.3d 759, 759–60 (9th Cir. 2020) ("we construe Lopez-Marroquin's emergency motion to remand pursuant to the All Writs Act as a petition for a writ of habeas corpus, and we transfer it to the Southern District of California")), *invalidating* Luis v. INS, 196 F.3d 36 (1st Cir. 1999), *applying rule from Boumediene*, 553 U.S. at 796 ("If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served, the Government can move for change of venue to the court that will hear these petitioners' cases, the United States District Court for the District of Columbia."—prescribing transferring the case according to *Braden* rather than dismissal pursuant to *Padilla*).

[40] *Compare* Castro v. USDHS, 835 F.3d 422, 436–37 (3d Cir. 2016) ("During this period . . . the Supreme Court consistently recognized the ability of immigrants to challenge the legality of their exclusion or deportation through habeas corpus.") (citing Heikkila v. Barber, 345 U.S. 229, 233–35 (1953) (noting that *Nishimura Ekiu* "was clear on the power of Congress to entrust the final determination of the facts in such cases to executive officers") (citing Nishimura Ekiu v. United States,

Finality as to determinations of fact made by immigration enforcement officials in the eugenic era was based strictly upon the Chinese Exclusion Act, and other immigration laws, that stripped judicial review of the facts in habeas corpus court that previously existed.[41] Congress's stripping of the judicial power to review facts in immigration matters, which arguably gave birth to all the present debates over whether standards of judicial review may include review of law, fact, or mixed questions of law and fact, was upheld repeatedly in the eugenic era according to the Court's expressions of plenary power doctrine.[42] Throughout the eugenic era, determinations of fact made by immigration enforcement officers were inquisitorial and wholly lacked resemblance to the adversarial process of "'fair play and substantial justice'" that we have come to expect in all forms of adjudication today.[43]

Therefore, we know that the eugenic era applied *less* relief for immigrants than was available in 1789 under the Judiciary Act, because a *de novo* review of law and fact was applied as an unstated norm in all habeas cases prior to the eugenic era's emphasis on finality under eugenic immigration statutes that are now repealed.[44] *De*

142 U.S. 651 (1892))), *with* Moore v. Dempsey, 261 U.S. 86, 92 (1923) (asserting the ordinary requirement of habeas review of *de novo* review saying "it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void"). *Cf.* Freedman, *Review*, *supra* note 38, at 400 (noting that in the English Empire "the ambitious goal of insuring that all imprisonments conformed to law" was "thwarted in many thousands of cases" – "particularly after the 1830s").

[41] *See* Immigration Act of 1891, ch. 551, 26 Stat. 1084, 1085 ("All decisions made by inspection officers . . . shall be final . . . ."), *construed in* Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892) ("[T]he final determination of . . . facts may be in trusted [sic] by congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.").

[42] *See* Chae Chan Ping v. United States, 130 U.S. 581, 602–03, 623, 629 (1889) ("When once it is established that Congress possesses the power to pass an act, our province ends with its construction and its application to cases as they are presented for determination.").

[43] International Shoe v. State of Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). *See* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. SOC. CHANGE 433, 488–89, 496 (1992) (giving a short history of how the present quasi-adversarial proceeding at the Executive Office of Immigration Review grew out from a non-adversarial proceeding that existed prior to 1973, and noting the present day non-adversarial, inquisitorial role of immigration "judges"). *But see* Dr. Bonham's Case [1610] 8 Co. Rep. 114a, 118a (Eng.) (opinion of Lord Coke) (Appearing to preclude Courts like EOIR: "One cannot be Judge and attorney for any of the parties.").

[44] Ng Fung Ho v. White, 259 U.S. 276 (1922) was an exception during the eugenic era, and applied the *de novo* review of law and fact norm from the founding era as was applied under *Ex parte Burford*, 7 U.S. 448, 453 (1806) ("the justices may proceed *de novo*, and take care that their proceedings are regular"). This norm was readopted and applied as the general norm beginning again in Crowell v. Benson, 285 U.S. 22 (1932) as the basis of the entire Administrative Law system that we presently live under. *See Ng Fung Ho*, 259 U.S. at 283–84 ("[T]he proceeding for deportation is judicial in its nature. . . . [O]n appeal to the district court, additional evidence may be introduced, and the trial is *de novo*. . . . The situation bears some resemblance to [military service cases, where] . . . [i]t is well settled that, in such a case, a writ of habeas corpus will issue to determine the status.") (citing Liu Hop Fong v. United States, 209 U.S. 453, 461 (1908) ("In our view, giving the Chinaman an appeal, the law contemplates that he shall be given the right of a hearing *de novo* before the district judge before he is

novo review of law and fact was extended to immigrants numerous times in early U.S. habeas courts, most famously to the German immigrant Eric Bollman, whose case is cited in *Boumediene* for yet another major deficiency in the way immigrants today are treated in habeas court—because Eric Bollman applied for and was granted unqualified release from unjust imprisonment under the Judiciary Act of 1789, which is still good law today.[45] In *Thuraissigiam* this relief was not requested,

ordered to be deported.")), *aff'd in Crowell*, 285 U.S. at 60–61 (1932) (applying the habeas corpus common law given in *Ng Fung Ho* as reason for general judicial review (not habeas review) of all adjudicative orders of administrative agencies where "fundamental rights are in question," even when the statutes do not expressly grant jurisdiction for review), *followed by* Administrative Procedures Act, 5 U.S.C. § 706 (granting judicial review of administrative agencies, including in matters covered by *Crowell*); INS v. St. Cyr, 533 U.S. 289, 299–300 (2001) (citing *Crowell* and saying "we are obligated to construe the statute to avoid such problems," by implying jurisdiction for habeas review). *Compare Nishimura Ekiu*, 142 U.S. at 660 ("[T]he final determination of facts may be in trusted [sic] by congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted."), *with Boumediene*, 553 U.S. at 779 ("where imprisonment is unlawful, the court 'can only direct [the prisoner] to be discharged'") (quoting *Ex parte* Bollman, 8 U.S. 75, 136 (1807)), *Moore*, 261 U.S. at 92 ("it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void"), *and* United States v. Villato, 2 U.S. 370, 371, 378–79 (C.C.D. Pa. 1797) ("the prisoner is not a citizen of the United States; and . . . consequently, he must be released" into the United States). *Cf.* Caignet v. Pettit : Caignett v. Goulbaud, 2 U.S. 234, 235 (1795) (Upholding the natural rights of stateless persons saying: "It is true, that he has not acquired the rights of citizenship here; nor, as it appears, in any other country: but, whatever may be the inconvenience of that situation, he had an undoubted right to dissent from the [French] revolution; and, as a member of the minority, to refuse allegiance to the new government, and withdraw from the territory of France.").

[45] *Bollman*, 8 U.S. at 136 (citing Judiciary Act of 1789, 1 Stat. 73, § 14 (still good law)). *See also Caignet*, 2 U.S. at 234 (allowing stateless persons to invoke the jurisdiction of U.S. Courts). Since Bollman's non-citizen status was irrelevant to the Court's determination in *Bollman* and therefore undiscussed in the case, it is worth including two sources that support the strong unlikelihood that Bollman ever sought or acquired official U.S. Citizenship during his stays in America: Fritz Redlich, *The Business Activities of Eric Bollmann. Part II: The International Promoter*, 17 BULLETIN OF THE BUSINESS HIST. SOC. 103, 112 (1943) (cataloguing Bollman's long career after living in the United States and noting that he died in Jamaica); Paul Sweet, *Erich Bollmann at Vienna in 1815*, 46 AM. HIST. REV. 580, 586 (1941) (After speaking with Bollman at his house in London, John Quincy Adams concluded, "I doubt whether he intends ever to return to the U.S. again."—Adams' intuition was spot on; though Bollman never returned, he was always invited.). The liberality by which Congress and the federal courts extended naturalization to immigrants upon the requirement that they take up a dwelling within the United States underscored the lack of any deportation mechanism in the early Republic, and revealed that habeas corpus release in the founding era also implicitly meant *approval* of immigration status to continue their path toward citizenship. *See, e.g.,* Naturalization Act of 1790, 1 Stat. 103, § 1; Campbell v. Gordon, 10 U.S. 176, 180, 183 (1810) ("The words of the 3d section of the act of 1795 are, 'that the children of person duly naturalized, *dwelling within the United States*, and being under the age of 21 years, *at the time of such naturalization*,' 'shall be considered as citizens of the United States.'") (emphasis in original); Stark v. Chesapeake Ins. Co., 11 U.S. 420, 423 (1813) ("It need not appear by the record of naturalization that all the requisites prescribed by law for the admission of aliens to the rights of citizenship have been complied with."); Spratt v. Spratt, 29 U.S. 393, 407–08 (1830) ("The various acts upon the subject, submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact.").

though it was and is available for immigrants under *Boumediene*, the 1789 Act, and the Suspension Clause.[46]

It is also not hard to find cases that granted unqualified release of immigrants into the United States under the Judiciary Act of 1789, which left immigrants free to naturalize in the United States if they chose.[47] Justice James Wilson emphasized from the bench in *Collet v. Collet*, *Henfield's Case*, in the Constitutional Convention, and in his famous Lectures that the only constitutional limitations on immigration were those that limited a naturalized citizen's ability to serve in Congress and his or her ability to run for President.[48] Otherwise, Wilson convinced his colleagues to "'open a wide door for immigrants'" as a constitutional imperative.[49]

Thuraissigiam decided that James Wilson's constitutional contributions were "beside the point," because what mattered to the Court was "the U.S. immigration law, or lack thereof."[50] While relying upon a perceived lack of progress on

[46] Brief for Respondent at 45, DHS v. Thuraissigiam, 140 S. Ct. 427 (2019) (No. 19-161) (asking only for more "due process" from the Executive Office for Immigration Review). *See supra* notes 4–9 and accompanying text; Judiciary Act of 1789, 1 Stat. 73, § 14; U.S. CONST. art. I, § 9, cl. 2.

[47] The *Thuraissigiam* majority cited to at least five of these cases, including *Somerset's Case*, but discounted them: "In these cases, as in *Somerset*, it may be that the released petitioners were able to remain in the United States as a collateral consequence of release, but if so, that was due not to the writs ordering their release, but to U.S. immigration law or the lack thereof. These decisions came at a time when an 'open door to the immigrant was the . . . federal policy.'" DHS v. Thuraissigiam, 140 S. Ct. 1959, 1973–74 (2020) (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588 (1952)). The Court opined that "release may have had the side effect of enabling these individuals to remain in this country, but that is beside the point." *Id.* at 1974. *But see id.* at 2000 (Sotomayor, J., dissenting) ("Curiously, the Court does not contest that the writs in these cases were used to secure the liberty of foreign sailors, and consequently their right to enter the country. Rather, it remarks that judges at the time 'chafed at having to order even release,' which some saw as inconsistent with principles of comity. But reluctance is not inability. That those judges followed the law's dictates despite their distaste for the result should give today's Court pause."); Rasul v. Bush, 542 U.S. 466, 481 n. 11 (2004) (citing *United States v. Villato*, *Ex parte D'Olivera*, and *Wilson v. Izard* for example); *Boumediene*, 553 U.S. at 756 ("In particular, there was no need to test the limits of the Suspension Clause because, as early as 1789, Congress extended the writ to the Territories . . . [by] reaffirming Art. II of Northwest Ordinance of 1787, which provided that '[t]he inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus.'"). *Cf.* United States v. Villato, 2 U.S. 370, 371, 373 (C.C.D. Pa. 1797), *cited in* Flores-Miramontes v. INS, 212 F.3d 1133, 1142 n. 12 (9th Cir. 2000).

[48] Collet v. Collet, 2 U.S. 294, 296 (C.C.D. Pa. 1792); Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6360) (Opinion of Wilson, J.); 1 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 140–43, 643–44 (Mark David Hall & Kermit L. Hall eds., 2007).

[49] 1 WILSON, *supra* note 48, at 140 (Statement of George Mason).

[50] *Thuraissigiam*, 140 S. Ct. at 1974. *But see* Judiciary Act of 1789, 1 Stat. 73, § 14 ("*And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specifically provided for by statute . . . ."); Portnoi, *supra* note 12, at 298 ("Moreover, the [Judiciary Act of 1789, § 14] may be viewed as a broad statutory delegation of authority by Congress to the courts to fill existing gaps by developing law, in the same way that the grant of admiralty jurisdiction permits the courts to make law. The separation-of-powers concern is further mitigated by the 218 years of 'congressional acquiescence and tacit approval' demonstrated by the lack of a repeal or material revision of the [Judiciary Act of 1789, § 14] over its long history."); 1 WILSON, *supra* note 48, at 369 ("'Emigration is, undoubtedly, one of the natural rights of man.'") (quoting Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (No. 6360) (Opinion of Wilson, J.)).

immigration law in 1789 as a reason to sidestep the pro-immigrant policy of that era,[51] the Court also paradoxically appeared to require immigrant habeas petitioners

[51] *Thuraissigiam*, 140 S. Ct. at 1973 ("At the time [1772, when *Somerset's Case* was decided], England had nothing like modern immigration restrictions." This statement and those surrounding it were technically true, but they did not justify the Court's sidestepping of the laws and policies that spanned from 1789 to 1875. Prior to 1875, immigration was exclusively regulated through the States according to the police powers for health and safety purposes, first held constitutional in *New York v. Miln*, 36 U.S. 102, 152 (1837). States also asserted their police power to declare themselves Free States and havens for run-away slaves. For example, Pennsylvania criminalized slave catching of escaped slaves in their Law of 1826, one of the first Sanctuary Laws in the United States. This law was overruled by the U.S. Supreme Court in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), the first plenary power decision requiring the exclusion of immigrants through an interpretation of federal law. *Prigg*, which may be characterized as the origin of plenary power based federal immigration law, was never acknowledged to be overruled by the Thirteenth Amendment. Regardless of that fact, California's modern Sanctuary Law entitled the *California Values Act* was recently upheld in *United States v. California*, 921 F.3d 865, 865 (2019). All State immigration laws that claimed a power to exclude immigrants generally were eventually overruled as unconstitutional in *Edwards v. California*, 314 U.S. 160 (1941) (overruling *Miln*). Thus, the continued existence of federal immigration laws that began with the Page Act in 1875 that were originally copies of State enacted police power laws may soon be called into question under *NFIB v. Sebelius*, which held that the U.S. Constitution "must be read carefully to avoid creating a general federal authority akin to the police power." 567 U.S. 519, 535–36 (2012). The conservative wing of the Court, which has since only grown stronger, firmly supported this holding. Furthermore, while *Thuraissigiam* noted that the word "deportation" was not in general use in 1816, this did not justify the Court's sidestepping of the English extradition program of that era, which was the primary threat to an immigrant's successful relocation to America in 1816. *See Thuraissigiam*, 140 S. Ct. at 1973. The English position of "the doctrine of indissoluble allegiance" was explored and rejected in *Wong Kim Ark*, which observed that "from the Declaration of Independence to this day, the United States have rejected the doctrine of indissoluble allegiance and mandated the general right of expatriation, to be exercised in subordination to the public interests and subject to regulation." United States v. Wong Kim Ark, 169 U.S. 649, 711 (1898). Notably, the U.S. Government never adopted a similar extradition program. Two notable English cases supporting extradition from all corners of the Empire for purposes of enslavement and impressment were *Alexander Broadfoot's Case* (decided in 1743, and published in book form in 1758) and *Le Louis*, 2 Dodson 238 in 1807 (asserting the English oxymoron of a free trade in human flesh). The American decisions that rejected the general expatriation programs of England and Europe from this period were *Holmes v. Jennison*, 39 U.S. 540, 574 (1840) (Opinion of Taney, C.J.), which blocked State governments from complying with foreign extradition orders by noting that, "[s]ince the expiration of the treaty with Great Britain negotiated in 1793, the general government appears to have adopted the policy of refusing to surrender persons who, having committed offenses in a foreign nation, have taken shelter in this"; and *United States v. The Amistad*, 40 U.S. 518, 545, 553 (1841), which blocked Spain from re-enslaving the Africans of *The Amistad* who had successfully won their freedom by forcefully overthrowing their captors. Furthermore, President Jefferson rejected the English extradition system by expelling all British ships through Proclamation in 1807, an act that eventually led to the War of 1812. *See* Thomas Jefferson, *Proclamation 14—Requiring Removal of British Armed Vessels From United States Ports and Waters*, July 2, 1807, *available at* https://www.presidency.ucsb.edu/documents/proclamation-14-requiring-removal-british-armed-vessels-from-united-states-ports-and. Jefferson's Proclamation was made after the H.M.S. Leopard attacked and boarded the U.S.S. Chesapeake to apprehend four U.S. Navy Officers. All four were extradited against U.S. law. One was hanged for being an immigrant, and the three others (who were black men born in the United States), were taken to England and imprisoned under the English idea that being born in America and claiming U.S. Citizenship did not exempt a person from being impressed as a British subject and punished as a deserter. England did not return the prisoners taken from the Chesapeake until the United States won the War of 1812. *Id.*; THE DECLARATION OF INDEPENDENCE paras. 9, 21, & 28 (U.S. 1776) (Indicting the King of England "[f]or transporting us beyond Seas to be tried for pretended offenses," for impressing Americans into British naval servitude,

to raise cases at or before 1789.[52] As Justice Sotomayor noted in her dissent, Alito's apparent requirement of providing cases before 1789 is an impossibility that might render the promises of the Court in *Boumediene*, *St. Cyr*, and *Felker* not only meaningless, but absurd.[53]

The *Thuraissigiam* Court's strategy was straight forward.[54] It took advantage of the popularity of Progressive views on immigration law in the United States to swap out the law of 1789 as represented by *Boumediene* for immigration norms developed later in our history.[55] The Court knew that it was highly unlikely that liberal Progressives would criticize Justice O'Connor's use of a Progressive balancing test in *Landon v. Placensia* where she restated eugenic era plenary power doctrine as a factor that weighed against deciding in favor of immigrants, so they cited to it as if

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and for limiting immigration into the British American Colonies.). *Cf.* Freedman, *Commentary*, *supra* note 10 ("The Third Circuit's closing of the courtroom doors [in *Castro*] is contrary not only to what the Supreme Court wrote in *Boumediene* in 2008 but also to what it did in *United States v. The Amistad* in 1841.").

[52] *Thuraissigiam*, 140 S. Ct. at 1968, 1974–75 (taking issue with the lack of "pre-1789 habeas case[s]" cited by the dissent, despite the fact that they cannot exist, because the Judiciary Act of 1789 created the first federal courts).

[53] *Id.* at 1997–99 (Sotomayor, J., dissenting).

[54] First, the Court dismissed habeas corpus because of Mr. Thuraissigiam's attorneys' failure to assert the common law remedy of release. *Id.* at 1963. Then, the Court warned that if the common law remedy of release were applied that it might eventually result in a deportation. *Id.* at 1970. *But see id.* at 1974 (The Court contradicting itself stated: "So release may have had the side effect of enabling these individuals to remain in this country, but that is beside the point.").

[55] *Thuraissigiam*, 140 S. Ct. at 1971, 1976–77 (The Court acknowledged that "*Nishimura Ekiu* is the cornerstone of respondent's argument" surrounding habeas, but noted that *Ekiu* came from a different era in immigration law that is now superseded by law and thus need not be followed by the Court. In other words, the Court affirmed that *Ekiu* was perhaps the best case for Respondent to cite for his rights so that it could presumptively deal with all previous laws by simply undercutting *Ekiu*, which was a straw man. Furthermore, the Court adopted the short hand of "core" versus "non-core" habeas claims to eliminate future habeas cases along these lines, without considering what was core habeas practice under the law in 1789 as *Boumediene* had done: "Claims so far outside the 'core' of habeas may not be pursued through habeas." Again, *Boumdiene* should have resulted in preclusion of the Court's core versus non-core shorthand, which was used in *Padilla* and is now superseded by the law *Boumediene* overruled.). *See* Rumsfeld v. Padilla, 542 U.S. 426, 435–36 (2004) ("In accord with the statutory language and *Wales'* immediate custodian rule, longstanding federal-court practice confirms that, in 'core' habeas challenges to present physical confinement, the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official. No exceptions to this rule, either recognized or proposed, apply here.") (citing Wales v. Whitney, 114 U.S. 564, 574 (1885)); *id.* at 461 (Stevens, J., dissenting) ("'[W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements.' With respect to the custody requirement, we have declined to adopt a strict reading of *Wales v. Whitney*, and instead have favored a more functional approach that focuses on the person with the power to produce the body.") (quoting Hensley v. Municipal Court, 411 U.S. 345, 350 n. 8 (1973) (noting that *Wales* "may no longer be deemed controlling")), *superseded by* Military Commissions Act of 2006, 120 Stat. 2600, § 7, *amending* 28 U.S.C. § 2241, *overruled by* Boumediene v. Bush, 553 U.S. 723, 780, 796 (2008) ("Habeas 'is, at its core, an equitable remedy'") (quoting Schlup v. Delo, 513 U.S. 298, 319 (1995)). *Cf.* Ms. L. v. ICE, 302 F. Supp. 3d 1149, 1158 (S.D. Cal. 2018) (The shorthand "core" habeas corpus to undermine habeas corpus continues to flourish despite *Boumediene's* corrective: "Here, Ms. C. is not raising a 'core challenge.'").

immigrants having "no constitutional rights" is the best, i.e., most liberal, possible outcome an immigrant can expect, rather than considering *Boumediene's* "first principles," which includes the strong holding of Justice Wilson of the first U.S. Supreme Court in *Henfield's Case* that "[e]migration is, undoubtedly, one of the natural rights of man."[56] Thus, instead of engaging with the express holdings in *Boumediene* that point to the first principles of the Republic, the Court swapped them out, *sub silentio*, for Progressivism—a political view cherished by many in the United States.[57]

In doing so, the Court revealed a basis for review that is still available for immigrants—a request for traditional habeas release under § 14 of the Judiciary Act of 1789.[58] For *Thuraissigiam* explicitly dismissed habeas corpus review because traditional release was not requested.[59] The Court sought to discourage immigration attorneys from asserting this relief by warning that the application of habeas corpus could result in deportation eventually; but this is no different from applying habeas corpus to criminal prisoners who may be tried for crimes and re-imprisoned after being released by habeas corpus.[60]

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[56] *Compare Thuraissigiam*, 140 S. Ct. at 1982 ("'This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.'") (quoting Landon v. Placensia, 459 U.S. 21, 32 (1982) (a *Mathews* balancing test case, not a habeas case)), *with* Boumediene v. Bush, 553 U.S. 723, 797 (2008) (Applying "freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives."), *and* Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Penn. 1793) (No. 6360) (Opinion of Wilson, J.) ("Emigration is, undoubtedly, one of the natural rights of man." Wilson was one of the signatories of the Declaration of Independence, which named the natural rights of life, liberty, and the pursuit of happiness as the first principles of our Republic. These are among the first principles defended and expounded by *Boumediene*.).

[57] *Thuraissigiam*, 140 S. Ct. at 1973–74 (making the case that the development of immigration law decades after the founding was Progressive, and therefore the law that should be applied as if it were the law of 1789).

[58] *Id.* at 1981 ("*Boumediene*, is not about immigration at all"—distinguishing *Boumediene* based on the fact that it was used to move the Court to actually release petitioners, rather than to merely change their immigration status.); Felker v. Turpin, 518 U.S. 651, 659 (1996) ("Section 14 of the Judiciary Act of 1789 authorized all federal courts, including this Court, to grant the writ of habeas corpus when prisoners were 'in custody, under or by colour of the authority of the United States, or [were] committed for trial before some court of the same.'") (quoting Judiciary Act of 1789, 1 Stat. 73, 81–82, § 14).

[59] *Thuraissigiam*, 140 S. Ct. at 1972 (respondent asked for "further review of his asylum claim" rather than basic release); *id.* at 1996 (Sotomayor, J., dissenting) ("Instead, the Court seems to argue that respondent seeks only a peculiar form of release: admission to the United States or additional asylum procedures that would allow for admission into the United States. Such a request, the Court implies, is more akin to mandamus and injunctive relief. But it is the Court's discretionality requirement that bucks tradition. . . . The Court has also never described 'release' as the sole remedy of the Great Writ."). *But see Boumediene*, 553 U.S. at 779 ("Indeed, common-law habeas corpus was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances.").

[60] *Thuraissigiam*, 140 S. Ct. at 1970 (warning that release could mean deportation); *id.* at 1996 (Sotomayor, J., dissenting) (noting that the Court should have considered the pleadings as including the traditional request for release); *Making a Murderer: Plight of the Accused* (Netflix online release Dec. 18, 2015) (in this documentary watched by millions of Americans, Steven Avery was released

Habeas corpus may be raised to challenge the Government's imprisonment or disappearing of a person without a trial, which is exactly what is happening to immigrants in the United States—they are swept up, *en masse*, and placed in prison without a trial.[61] In the case of a person imprisoned without a trial, the Government may falsely tell a habeas court that '*this is a dangerous murderer who will just be tried and put back in prison if he is released by you*' in an attempt to convince a habeas judge to unduly deny jurisdiction for habeas relief without looking behind the paper.[62] This argument was unpersuasive in *The Amistad*, but was resurrected in *Thuraissigiam* when it cited *D'Olivera* for the idea that immigrants may be re-imprisoned and deported even if they are released through habeas as a reason for judges to unduly deny habeas corpus jurisdiction altogether.[63]

In the face of *Thuraissigiam's* strong warnings that deportations may eventually occur if immigration attorneys seek habeas corpus for their clients, immigration attorneys need to stand by the law.[64] They need to request traditional release under all six of *Boumediene's* holdings to distinguish *Thuraissigiam* and preserve their habeas cases.[65] They should rely on *Boumediene*'s analysis of the laws of 1789 to

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from a wrongful conviction and then recharged with new crimes due to what appears to have been bias against Avery in the local police force; many Americans believed, prior to this documentary, that once you were found innocent and were released that you could go back to your life without being bothered by the police, but Americans know better now).

[61] Rachel Monahan, *An Oregon Law Professor Visited Children at the Border and Told the World of the Horrors*, WILLAMETTE WEEK, July 2, 2019 (there is no trial before arrest, nor a warrant issued by a magistrate judge to justify incarceration of immigrants); Richard Gonzales, *Supreme Court Broadens The Government's Power To Detain Criminal Immigrants*, NPR, Mar. 19, 2019, https://www.npr.org/2019/03/19/704953335/supreme-court-broadens-the-governments-power-to-detain-criminal-immigrants ("Alito wrote that it is 'especially hard to swallow' the notion that 'the alien must be arrested on the day he walks out of jail.'") (quoting Nielsen v. Preap, 139 S. Ct. 954, 969 (2019)).

[62] United States v. The Amistad, 40 U.S. 518, 594 (1841) ("[I]t is argued on behalf of the United States that . . . this Court have no right to look behind these documents; that full faith and credit is to be given them; and that they are to be held as conclusive evidence . . . ."). *See, e.g.,* DAVID MILLER DEWITT, THE JUDICIAL MURDER OF MARY E. SURRATT 247, 255–56 (1894) (noting how the open court rule in *Ex parte Milligan* was created to avoid the success of this argument).

[63] *Amistad*, 40 U.S. at 594 (the argument was rejected in this case); John Washington, *Bad Information: Border Patrol Arrest Reports Are Full of Lies That Can Sabotage Asylum Claims*, THE INTERCEPT, Aug. 11, 2019, https://theintercept.com/2019/08/11/border-patrol-asylum-claim/; *Thuraissigiam*, 140 S. Ct. at 1970 ("the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka").

[64] *See supra* notes 4–9 and accompanying text.

[65] *See Thuraissigiam*, 140 S. Ct. at 1968 (Making immigration attorneys the Court's scapegoat for why immigrant petitions fail: "Respondent requested 'a writ of habeas corpus, an injunction, or a writ of mandamus directing [the Department] to provide [him] a new opportunity to apply for asylum and other applicable forms of relief.' His petition made no mention of release from custody."); *id.* at 1981 (stating that *Boumediene* was distinguished based on respondent's failure to request release, and not because there is any categorical reason why *Boumediene* should not otherwise apply); *id.* at 1990 (Breyer, J., concurring) ("To begin, respondent concedes that Congress may eliminate habeas review of factual questions in cases like this one. He has thus disclaimed the 'right to challenge the historical facts' found by immigration officials during his credible-fear process."); Jennings v. Rodriguez, 138 S. Ct. 830, 841 (2018) ("The parties in this case have not addressed the scope of § 1252(b)(9), and it is not necessary for us to attempt to provide a comprehensive interpretation. . . . [T]hey are not

restore the law to what it actually was for the first several decades of our nation's existence—an open door to immigrants.[66]

While *Thuraissigiam* distinguished *Boumediene* on the law, the 2020 Court began to rewrite *Boumediene sub silentio* in the dicta of unrelated matters.[67] For example, *USAID v. Alliance for Open Society* gave a reading of *Boumediene* that is perfectly opposite of what *Boumediene* actually held.[68] The statements about *Boumediene* in *Alliance* are entirely dicta—while dicta can be harmful to future cases, it is not final and it is not the law.[69]

This is especially so when the Court's dicta is obviously false, and provably absurd.[70] While *Boumediene* struck down arbitrary feudal geographic limitations on the Writ—represented by the English case *Rex v. Cowle*—so that it runs potentially anywhere in the world where people are imprisoned under the color of the authority

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challenging the decision to detain them in the first place . . . and they are not even challenging any part of the process by which their removability will be determined."); *id.* at 859 (Thomas, J., concurring in part) ("Because respondents have not sought a writ of habeas corpus, applying § 1252(b)(9) to bar their suit does not implicate the Suspension Clause."). *See also* USAID v. Alliance for Open Society International, Inc., 140 S. Ct. 2082, 2086, 2101 (2020) ("Plaintiffs do not dispute that fundamental principle. . . . Respondents have conceded that their foreign affiliates lack First Amendment rights of their own while acting abroad.").

[66] *Thuraissigiam*, 140 S. Ct. at 1969–71, 1973–74, 1983 (Replacing the founding protections of immigrants with the Page Act and the Chinese Exclusion Act and applying cases arising under these laws to side step *Boumediene's* habeas as it existed in 1789 minimum requirement. The *Thuraissigiam* Court advertised this side stepping as Progressive and therefore obviously constitutional when the Page Act and the Chinese Exclusion Act were repealed because they were unconstitutional and an embarrassment. Nevertheless, this is how the Court justified its decision to ignore decisions that "came at a time when an 'open door to the immigrant was the . . . federal policy.'") (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588 n. 15 (1952) ("An open door to the immigrant was the early federal policy. It began to close in 1884 when Orientals were excluded.") (citing The Chinese Exclusion Act, 23 Stat. 115)). *Cf.* 1 WILSON, *supra* note 48, at 140 (the origin of Court's observation that the policy of the founding generation was to "open a wide door for immigrants" likely came from this passage transcribed from the Constitutional Convention, that was inspired by founder James Wilson's advocacy) (Statement of George Mason).

[67] *Thuraissigiam*, 140 S. Ct. at 1974–75, 1981 ("*Boumediene*, is not about immigration at all.").

[68] USAID v. Alliance for Open Society International, Inc., 140 S. Ct. 2082, 2086–87 (2020) (citing *Boumediene* for the principle that "foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution" as a reason to deny corporate free speech claims arising in foreign countries; *Boumediene*, however, firmly held non-U.S. citizens have due process rights to challenge their commitment potentially anywhere in the world—i.e., Guantanamo and other government black sites are not "U.S. territories"; Cuba still claims sovereignty over that prison, and repeatedly expresses its opposition to U.S. presence there) (citing Boumediene v. Bush, 553 U.S. 723, 770–71 (2008)).

[69] *Id. See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 548 (2013).

[70] *Kirtsaeng*, 568 U.S. at 548 ("We cannot, however, give the *Quality King* statement the legal weight for which Wiley argues. The language 'lawfully made under this title' was not at issue in *Quality King*; the point before us now was not then fully argued; we did not canvas the considerations we have here set forth; we there said nothing to suggest that the example assumes a 'first sale'; and we there hedged our statement with the word 'presumably.' Most importantly, the statement is pure dictum. It is dictum contained in a rebuttal to a counterargument. And it is unnecessary dictum even in that respect. Is the Court having once written dicta calling a tomato a vegetable bound to deny that it is a fruit forever after? To the contrary, we are not necessarily bound by dicta should more complete argument demonstrate that the dicta is not correct.").

of the United States,[71] the *Alliance* Court restated the feudal law from *Cowle*, misrepresenting the precedent as if it were an undisputed law affirmed by *Boumediene*, writing,

> *First*, it is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution. Plaintiffs do not dispute that fundamental principle.[72]

Justice Breyer's dissent confirmed that the Court's novel reinterpretation of *Boumediene* to create this so called fundamental principle "is not the law."[73] Breyer opined that, "The exhaustive review of our precedents that we conducted in *Boumediene v. Bush*, pointed to the opposite conclusion."[74] Then he repeated forcefully, "we rejected the position that the majority propounds today."[75] The Court rejected it, not only in *Boumediene* generally, but also specifically in a previous decision rendered in 2013 in the same case.[76]

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[71] *Boumediene*, 553 U.S. at 751–52. The *Boumediene* Court refused to follow the rule of *Rex v. Cowle* [1759] 2 Burr. 834, 855–57 (Eng.), which was explicitly extended in *Campbell v. Hall* [1774] 1 Cowp. 206, 208 (Eng.) (Denying the rights of most British Colonists around the world on a geographic basis including the Americans: "An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives."). *Campbell* was scandalously reaffirmed by the House of Lords in *R. v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte Bancoult* [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.), the same year the U.S. Supreme Court decided *Boumediene*. *See* 20 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS 270–73, 289 (1816) (Mr. Alleyne before the King's Bench in the case of *Campbell v. Hall* based his argument on "one great leading constitutional principle" that he argued "quadrate[d] with the opinion of the Court, delivered in the case of king and *Cowle*" that "[t]he crown by its prerogative may execute any plan whereby the laws of the country may be promulgated or enforced, communicated or secured to the subjects of the empire." Lord Mansfield, who also decided *Cowle* years earlier and sat as judge in *Campbell*, agreed to this interpretation quite candidly speaking from the bench: "'It is absurd, that in the colonies they should carry all the laws of England with them . . . .'").

[72] *Compare Alliance*, 140 S. Ct. at 2086–87, *with id.* at 2100 (Breyer, J., dissenting). *Cf.* FREEDMAN, *supra* note 38, at 81, n. 15 ("Lower courts in habeas cases sometimes have not asked the jailer to justify the detention but rather placed the burden on the litigant and asked as a condition of entry to the courtroom what right he or she seeks to vindicate. That is the wrong question. It is wrong because it conflates a merits determination with a jurisdictional one and—more importantly and less technically—it is wrong because every person is entitled to be at liberty until the government shows some reason to the contrary. That is the default setting hardwired into the system.") (citing and refuting Castro v. USDHS, 835 F.3d 422, 445–47 (3d Cir. 2016)).

[73] *Alliance*, 140 S. Ct. at 2100 (Breyer, J., dissenting) ("The exhaustive review of our precedents that we conducted in *Boumediene* pointed to the opposite conclusion. In *Boumediene*, we rejected the Government's argument that our decision in *Eisentrager*, 'adopted a formalistic' test 'for determining the reach' of constitutional protection to foreign citizens on foreign soil. This is to say, we rejected the position that the majority propounds today.").

[74] *Id.*

[75] *Id.*

[76] *Compare id.* at 2089 (all but stating that it is a fundamental principle of the nation that the U.S. Government can violate the First Amendment abroad), *with* USAID v. Alliance for Open Society International, Inc. (*Alliance II*), 570 U.S. 205, 220–21 (2013) (Applying First Amendment principles to international situations saying: "But the Policy Requirement goes beyond preventing recipients from using private funds in a way that would undermine the federal program. It requires them to pledge allegiance to the Government's policy of eradicating prostitution. As to that, we cannot improve upon

The *Alliance* Court did not consider overruling *Boumediene*, nor could it.[77] However, the Court severely confounded the holdings of *Boumediene* in such a way that it may make it easier for future Courts to overrule or rewrite *Boumediene sub silentio* in future cases.[78] Examples that show *Alliance's* "fundamental principle" is not a fundamental principle are easily found, and cut strongly against its holding.[79]

Most alarmingly, the *Alliance* Court ignored the fact that in 2008, the same year *Boumediene* was decided to extend habeas writs to U.S. custodians running a black site in Cuba, a foreign country, the House of Lords disagreed with *Boumediene* in *Ex parte Bancoult* and reaffirmed England's 1774 holding in *Campbell v. Hall*; the King's Bench in *Campbell* extended the geographic rule in *Cowle* to exclude colonists no matter what color or creed throughout the British Empire from enjoying what were known as the Rights of the Englishman and thus it became one of the causes of the Revolutionary War.[80] Founder James Wilson distinguished the American Experiment from that of England on this issue when he wrote,

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what Justice Jackson wrote for the Court 70 years ago: 'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.'") (quoting W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

[77] *Alliance*, 140 S. Ct. at 2086.

[78] *Id.* at 2086; *id.* at 2100–01 (Breyer, J., dissenting) ("We have never purported to give a single 'bedrock' answer to these or myriad other extraterritoriality questions that might arise in the future. To purport to do so today, in a case where the question is not presented and where the matter is not briefed, is in my view a serious mistake."). The creation of dicta by a judge in any case infers the intent of that judge such that if that dicta were to be directly put at issue in a future case, that the dicta would become a holding. To show that this was the intent of the Court, especially the intent of the author of the majority in *Alliance* Justice Kavanaugh, let us remove to a comparably less controversial topic: First-sale doctrine in copyright law. In *Quality King* Justice Ginsburg penned an eloquent theory for deciding international first-sale doctrine issues, but it was entirely in dicta. Her hope was that her dicta would be adopted by the Court in a future case where the facts directly put her dicta at issue. This did not happen, and one can clearly see the disappointment of expectations that were created by Ginsburg's dicta in the briefs of the parties in *Kirtsaeng*, and you can see Ginsburg stoutly defending the dicta in her dissent revealing that its eventual adoption as law was indeed her intent. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 577 (2013) (Ginsburg, J., dissenting) (firmly defending the dicta she formerly penned: "*Quality King* 'significantly eroded' the national-exhaustion principle that, in my view, § 602(a)(1) embraces").

[79] In the Judiciary Act of 1789, nearby the original habeas law in the All Writs Act, is the Alien Tort Statute, which is also still a good law that secures the rights of aliens outside of the United States to be adjudicated inside the United States as a matter of course. Judiciary Act of 1789, 1 Stat. 73, § 9, codified at 28 U.S.C. § 1350 (granting non-U.S. citizens a right to sue U.S. citizens or non-U.S. citizens or entities in U.S. Court acting as an international tribunal). *See* Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134, 144 (2014) (holding that NML Capital, a Cayman Islands Corporation, has the right tell the Republic of Argentina what it must do with the backing of the equitable power of the U.S. Courts); Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004) (recognizing the Republic of Austria's right to defend its ownership of Nazi stolen artworks in federal court). *See also* RadioLab, *Enemy of Mankind*, Oct. 24, 2017, https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/enemy-of-mankind (covering recent ATS cases); Martin Guzman & Joseph E. Stiglitz, *How Hedge Funds Held Argentina for Ransom*, N.Y. TIMES, Apr. 1, 2016.

[80] R. v. Secretary of State for Foreign and Commonwealth Affairs, *Ex parte* Bancoult [2008] UKHL 61, ¶¶ 32, 36, 81–84, 87, 125, 146–49 (Eng.) (affirming Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.)). Lord Mansfield's decision in *Campbell*, which decided that the American Colonists

Britain seems determined to merit and to perpetuate, in political as well as geographical accuracy, the description, by which it was marked many centuries ago—

—*divisos* toto orbe Britannos.

What a very different spirit animates and pervades her American sons! Indeed it is proper that it should do so. The insulated policy of the British nation would ill befit the expansive genius of our institutions, as the hills, the ponds, and the rivulets, which are scattered over their island, would adequately represent the mountains, and rivers, and lakes of the United States. "In the new world"—I speak now from one of the finest writers of Britain—"in the new world nature seems to have carried on her operations with a bolder hand, and to have distinguished the features of the country by a peculiar magnificence. The mountains of America are much superior in height to those in the other divisions of the globe. From those lofty mountains descend rivers proportionably large. Its lakes are no less conspicuous for grandeur, than its mountains and rivers." We imitate, for we ought to imitate, the operations of nature; and the features of our policy, like those of our country, are distinguished by a peculiar magnificence.

In a former lecture, we have seen how easily the essential rights of citizenship can be acquired in the United States, and in every state of the Union. Let us now see, how liberally the doors are thrown open for admission to the publick trusts and honours, as well as to the private rights and privileges, of our country.[81]

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had no rights based on a geographic limitation on English rights extended from *Cowle*, was issued alongside the *King's Speech of Nov. 30, 1774* that was endorsed by a majority of Parliament and published in the American Colonies declaring the rebellion in Massachusetts Bay Colony traitorous and sending military forces to bring them to heel. In response to seeing this hideous speech printed widely in America a few months after it was originally made, Abigail Adams indelibly wrote, "*The die is cast.*" Letter from Abigail Adams (draft) to Mercy Otis Warren (Feb. [3?], 1775); Hannah Griffitts, *The Patriotic Minority in Both Houses of the British Parliament.—1775*, *in* MILCAH MARTHA MOORE'S BOOK 244–46 (Catherine La Courreye Blecki & Karin A. Wulf eds., 1997); Campbell v. Hall [1774] 1 Cowp. 206, 208, 211–12 (Eng.); 20 HOWELL, *supra* note 71, at 270–73 (the transcript of the arguments before the King's Bench in *Campbell* shows that its feudal ruling was derived from *Cowle*); King George III, *The King's Speech of Nov. 30, 1774* [1775]; Thomas Hutchinson, *Diary*, Nov. 28, 1774, *in* 1 THOMAS HUTCHINSON, THE DIARY AND LETTERS OF HIS EXCELLENCY THOMAS HUTCHINSON 307–09 (Peter Orlando Hutchinson ed., 1883) (confirming the timing of King's Speech was contemporaneous with the ruling of *Campbell v. Hall*, and that the *Campbell* case and the King's Speech both harkened back to Cromwell's conquest of Jamaica and endorsed the sentiment that Americans had no rights); THOMAS HUTCHINSON & ANDREW OLIVER, COPY OF LETTERS SENT TO GREAT-BRITAIN 16 (1773) ("There must be an abridgement of what are called English liberties." Lord Mansfield in *Campbell* officially created Governor Hutchinson's secret petitions to the Lords of England into undoubted law.) (statement of Thomas Hutchinson).

[81] 2 WILSON, *supra* note 48, at 1050–51 (quoting Virgil, *The Eclogues* I.64–66; 2 WILLIAM ROBERTSON, THE HISTORY OF AMERICA 3 (10th ed., 1803)).

It is strange to observe the Court attempt to secure Donald Trump's promise of American greatness through anti-immigrant policies, while abandoning this real source of greatness bestowed upon us by the immigrant founder James Wilson for the protection of immigrants.[82] *Alliance's* so called "fundamental principle" was of British origin; *Alliance's* application of the feudal British rule from *Bancoult*, *Campbell*, and *Cowle* as if it were American was doubly absurd because that law by its own terms was not made for the world at large, but should exist only in England according to its small, island politics under Virgil's ancient maxim presented by Wilson above—*divisos* toto orbe Britannos.[83]

III.
CONCLUSION: WHY *BOUMEDIENE* CANNOT LEGITIMATELY BE OVERRULED

If the holdings of *Boumediene* are overruled, rewritten, or otherwise permanently swapped out *sub silentio* in future cases, the nation that was the United States may pass into history.[84] For access to habeas corpus was long regarded by our ancestors as the difference between freedom and tyranny.[85] What could emerge as a

[82] *Alliance*, 140 S. Ct. at 286–87; DHS v. Thuraissigiam, 140 S. Ct. 1959, 1970 (2020).

[83] *See* 2 WILSON, *supra* notes 68–72, 80–82. *Cf.* Torres v. Madrid, No. 19–292, slip op. at 3–4, 7 (2021) (Scalia's version of the common law, which at some points did include the citation of actual common law sources, also scandalously included the direct citation of feudal law as exemplified in his *Boumediene* dissent. Here, Chief Justice Roberts writing for the majority cited directly to Scalia's version of common law definition of "seizure" and drew directly from Star Chamber precedent, which was the seat of feudal power in England, as if it was common law precedent in apparent ignorance of how the first habeas corpus statute of England abolished the Star Chamber as an illegitimate, royal indulgence not to be continued anywhere in the world. The reason Coke, who was himself arrested, tried, and nearly executed by the Star Chamber, included the case in his Reports was to illuminate the Star Chamber's illegitimacy; the Court lost this thread when it applied Star Chamber precedent as common law rather than as a dereliction of the common law.) (citing Countess of Rutland's Case, 6 Co. Rep. 52b (Star Chamber 1605)); Habeas Corpus Statute 1640, 16 Car. 1, c. 10, § 6 (Eng.) (abolishing the Star Chamber).

[84] THE DECLARATION OF INDEPENDENCE para. 2, 9, 28 & 31 (U.S. 1776) (Blaming the King of England for "obstructing the Laws for Naturalization of Foreigners" and for "render[ing] the Military independent of and superior to the Civil power."), *cited in* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16–23, n. 9 (1955) (noting that the application of habeas corpus legitimizes the U.S. Government by distinguishing it from the English Crown). *Cf.* MARY BEARD, SPQR 60 (2016) (Rome was also known to be a nation of immigrant asylum seekers.); HANNAH ARENDT, ON REVOLUTION 213 (1965) ("'For the beginning, because it contains its own principle, is also a god who, as long as he dwells among men, as long as he inspires their deeds, saves everything.'") (quoting and translating Plato, *The Laws* VI.775).

[85] *See* Rasul v. Bush, 542 U.S. 466, 474–75 (2004) ("As Justice Jackson wrote in an opinion respecting the availability of habeas corpus to aliens held in U.S. custody: 'Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint.'") (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 218–19, 225–26 (1953) (Jackson, J., dissenting) (Justice Jackson, who was appointed Chief Prosecutor for the United States at the Nuremberg Trials, explicitly drew a connection between the majority's denial of habeas corpus, the wicked King John, and dictatorship generally: "[T]he Government's theory of custody for 'safekeeping' without disclosure to the victim of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the 'protective custody' of the

result of the Court's recent attacks on *Boumediene* is unclear, for as Sotomayor wrote of *Thuraissigiam*, "Where its logic must stop . . . is hard to say."[86]

For Hobbes predicted as much, that America would one day fall under the sway of the starry eyed sentimentality of Conservative Progressivism, which is an oxymoron.[87] For just after the Court penned *Thuraissigiam* as one among the most important, final group of cases in the 2019 term, President Trump stated that "the Supreme Court gave the president of the United States powers that nobody thought the president had," and sent elite ICE Troops to Portland, Oregon to kidnap and harass U.S. Citizen protesters, legal observers, and members of the press.[88] The promises of *Felker* and *St. Cyr*, that were made law in *Boumediene*, were transgressed in *Thuraissigiam*, which was the only case in the 2019 term that could have effectively put a check on the President's Power to quell protesters by using ICE and CBP as domestic police forces.[89]

Nazis more than of any detaining procedure known to the common law. Such a practice, once established with the best of intentions, *will drift into oppression of the disadvantaged in this country as surely as it has elsewhere*.") (emphasis added), and citing generally *Ex parte* Milligan, 71 U.S. 2, 37–38, 50–51 (1866) ("On the 7th of November, 1775, Lord Dunmore declared martial law throughout the commonwealth of Virginia . . . yet he was denounced by the Virginia Assembly for having assumed a power which the king himself dared not exercise, as it 'annuls the law of the land, and introduces the most execrable of all systems, martial law.'"), and at 69 ("A tyrannical government calls everybody a traitor who shows the least unwillingness to be a slave. In the absence of a constitutional provision it was justly feared that statutes might be passed which would put the lives of the most patriotic citizens at the mercy of minions that skulk about under the pay of an executive.")); *Toth*, 350 U.S. at 43 (Reed, J., dissenting) (*Toth's* winning argument stated "that Congress . . . should not override the Constitution or be allowed to foreshadow a 'military dictatorship.'"); Reid v. Covert, 354 U.S. 1, 33 (1956); Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946) ("Our system of government clearly is the antithesis of total military rule . . . .").

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

[87] Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("an alien seeking initial admission to the United States . . . has no constitutional rights"); THOMAS HOBBES, LEVIATHAN 3–13, 46–52 (A.R. Waller ed., 1904) ("The Passion, whose violence, or continuance maketh Madnesse, is either great *vaine-Glory*; which is commonly called *Pride*, and *selfe-conciept*; or great *Dejection* of mind.").

[88] *Transcript: 'Fox News Sunday' interview with President Trump*, FOX NEWS, July 19, 2020 (Statement of President Trump) (citing generally DHS v. Regents of the Univ. of Cal. (*The DACA Case*), 140 S. Ct. 1891 (2020) as example of the many cases that granted the President extra powers); Temporary Restraining Order Enjoining Federal Defendants, Index Newspapers LLC v. City of Portland, No. 3:20-cv-1035-SI, slip op. at 2 (D. Or. 2020). *See also* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2203 (2020) (Trump's statement also likely drew inspiration from *Seila Law's* adoption of Scalia's Unitary Executive Theory only four days after deciding *Thuraissigiam* where it stated: "The Executive Branch is a stark departure from all this division [of power]. . . . The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency . . . Through the President's oversight, 'the chain of dependence [is] preserved,' so that 'the lowest officers, the middle grade, and the highest' all 'depend, as they ought, on the President, and the President on the community.'") (quoting reference omitted).

[89] Ed Pilkington, *'These are his people': inside the elite border patrol unit Trump sent to Portland*, THE GUARDIAN, July 27, 2020, https://www.theguardian.com/us-news/2020/jul/27/trump-border-patrol-troops-portland-bortac (talking about Trump's use of Bortac as a domestic police force); Emily Green & Keegan Hamilton, *Border Patrol Snipers Were Authorized to Use Deadly Force at George Floyd's Burial*, VICE, Oct. 1, 2020, https://www.vice.com/en/article/5dz7zd/border-patrol-snipers-were-authorized-to-use-deadly-force-at-george-floyds-burial ("'The Border Patrol has for many years attempted to expand their mission and evolve into what they believe is their core role as a national

While *Thuraissigiam* only distinguished *Boumediene*, any Court that departs from the precepts of *Boumediene* does a major injury to itself and to the nation.[90] *Thuraissigiam* harmed itself by destroying its own jurisdiction for no reason but to administer an injustice.[91] Along these lines, *Thuraissigiam* may be characterized as an advisory statement that can be disregarded in the future, in favor of equal rights and equal freedoms as required by the U.S. Constitution.[92]

For the equal rights of immigrants were defended by America even while England occupied Washington, D.C. and burned down the first White House, the Library of Congress, and the first meetinghouses of Congress.[93] Equal rights mean

police force,' Tomscheck said. 'They have used the current political environment to advance that agenda.'"). Once habeas corpus is suspended for one class of person it is suspended for all as demonstrated by *Thuraissigiam*, where the Court could have made a rule based on *Boumediene's* six holdings that could have checked Trump's power to quell U.S. Citizen protesters across the United States, but seeing immigrants as undeserving of constitutional rights the Court unlawfully distinguished *Boumediene* and thereby failed to vindicate the rights of U.S. Citizens at a critical moment. *Thuraissigiam*, 140 S. Ct. at 1970. *See* Laura Romero, *Marine Veteran was among US Citizens detained by ICE, ACLU Says*, ABC NEWS, Dec. 12, 2019, https://abcnews.go.com/Politics/ marine-veteran-us-citizens-detained-ice-aclu/story?id=67465583. *Cf.* Apology Act for the 1930's Mexican Repatriation Program, West's Ann. Cal. Gov. Code § 8720–23 (Around 1.2 million of the deported were natural born U.S. Citizens: "Throughout California, massive raids were conducted on Mexican-American communities, resulting in the clandestine removal of thousands of people, many of whom were never able to return to the United States, their country of birth."); Alex Wagner, *America's Forgotten History of Illegal Deportations*, THE ATLANTIC, Mar. 6, 2017, https://www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/.

[90] *Thuraissigiam*, 140 S. Ct. at 2014–15 (Sotomayor, J., dissenting).

[91] *Id.* at 2015 (describing the majority opinion as "nothing short of a self-imposed injury to the Judiciary, to the separation of powers, and to the values embodied in the promise of the Great Writ").

[92] *Id.* If Sotomayor is correct that the majority erred and condoned an unconstitutional Suspension of the Writ, then the *Thuraissigiam* opinion may be regarded in future cases as a mere advisory statement that the Court was not empowered to make. *See* U.S. CONST. art. I, § 9, cl. 2 (restricting Congress from enacting laws that suspend the "Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it"). The *Thuraissigiam* opinion might also be viewed as an advisory statement if the Court did not have the authority to decide the due process question since it had not been fully reviewed by the lower court. *Compare Thuraissigiam*, 140 S. Ct. at 1982–83 (majority opinion) ("For these reasons, an alien in respondent's position has only those rights regarding admission that Congress has provided by statute. . . . [T]he Due Process Clause provides nothing more . . . ."), *and id.* at 2011 (Sotomayor, J., concurring) ("The Court stretches to reach the issue whether a noncitizen like respondent is entitled to due process protections in relation to removal proceedings, which the court below mentioned only in a footnote and as an aside. In so doing, the Court opines on a matter neither necessary to its holding nor seriously in dispute below."), *with* Thuraissigiam v. USDHS, 917 F.3d 1097, 1119 (9th Cir. 2019) ("[W]e do not profess to decide in this opinion what right or rights Thuraissigiam may vindicate via use of the writ."). Compare FREEDMAN, *supra* note 38, at 81, who correctly noted that habeas jurisdiction does not rest on the petitioner's rights, but on the Court's power over the jailer.

[93] NCC Staff, *On this day, the British set fire to Washington, D.C.*, CONSTITUTION DAILY, Aug. 24, 2020, https://perma.cc/ZY5F-U2JZ (describing the War of 1812 when the first White House, first meeting houses of Congress, and the first Library of Congress were all burned down, and which was primarily fought to defend the right of British people to leave England and to become U.S. citizens); Madison, *supra* note 34 ("British cruisers have been in the continued practice of violating the American flag on the great highway of nations, and of seizing and carrying off persons sailing under it . . . . The practice, hence, is so far from affecting British subjects alone, that, under the pretext of searching for

more to us than preserving federal government buildings—for they can be rebuilt.[94] They mean more than the Capitol Building itself, because that building is only sacred in so much as it houses our democracy, which barely survived Trump's siege of January 6, 2021.[95]

Equal rights were defended by the immigrant founder James Wilson on behalf of immigrants in *Henfield's Case* and *Collet v. Collet*; its spirit was maintained in Thomas Jefferson's proclamation in defense of the kidnapped officers of the *U.S.S. Chesapeake*; and finally when Congress declared war on England in 1812.[96] It is baffling to see how these beginnings laid with the sacred sacrifices of life and limb by our ancestors were so openly besmirched by the jurists of the *Thuraissigiam* Court.[97]

As to their absurd reasoning, in which "the Cry for Liberty, and the reverse Disposition for the exercise of oppressive Power over others agree," Phillis Wheatley must hold the final say.[98] We may yet follow her example "to convince them of the strange Absurdity of their Conduct whose Words and Actions are so diametrically, opposite."[99] For *Thuraissigiam* is particularly threatening; if we are not careful the despicableness of opinions such as *Thuraissigiam* alone, like a manmade *Leviathan*, can swallow the nation whole.[100]

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these, thousands of American citizens, under the safeguard of public law, and of their national flag, have been torn from their country, . . . [and] have been dragged on board ships of war of a foreign nation . . . .").

[94] Jeremiah Drummer, *A Defence of the New-England Charters* 23, 44 [1715] ("Burnt houses may rise again out of their ashes, and even more beautiful than before, but 'tis to be feared that liberty *once lost, is lost forever*."). *See, e.g.,* CNN, *Community organizer [DeRay McKesson] speaks to CNN about Baltimore protests*, YOUTUBE (June 23, 2015), https://www.youtube.com/watch?v=j8CNxbjJUP8 ("I know that Freddie Gray will never be back, but those windows will be. . . . Broken windows are not broken spines.").

[95] *See House Impeachment Managers' Video Compilation of January 6 Attack on the U.S. Capitol*, C-SPAN, Feb. 9, 2021, available at https://www.c-span.org/video/?c4944572/house-impeachment-managers-video-compilation-january-6-attack-us-capitol.

[96] *See supra* note 48; Jefferson, *supra* note 51 (Of the four sailors taken off the Chesapeake, three were black natural born U.S. Citizens and one was an immigrant deserter from the British Navy. Jefferson officially claimed all four as natural born citizens, which had implications for both the rights of immigrants and black folk. The theory by which England claimed it was justified to take all four was that the American Revolution was not legitimate and that England had a right to impress U.S. Citizens as if they were still British subjects. The opposing American position of citizenship by birth was set forth in *Wong Kim Ark*.); Madison, *supra* note 34.

[97] *Thuraissigiam*, 140 S. Ct. at 1970.

[98] Letter from Phillis Wheatley to Reverend Samson Occom (Feb. 11, 1774).

[99] *Id.*

[100] *Thuraissigiam*, 140 S. Ct. at 1970; Barr v. Lee, No. 20A8, slip op. at 3 (2020) (per curiam); HOBBES, *supra* note 87, at 119 ("This is the Generation of that great LEVIATHAN . . . .").