Cornell Law Review

Volume 83
Issue 3 *March 1998*

Article 5

Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

David M. Grable

NOTE

PERSONHOOD UNDER THE DUE PROCESS CLAUSE: A CONSTITUTIONAL ANALYSIS OF THE ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996

David M. Grable†

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .[1]

Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.[2]

† Special thanks to James W. Grable, District Counsel, Immigration & Naturalization Service, Buffalo District, and Stephen Yale-Loehr, Adjunct Professor, Cornell Law School. Although neither may agree with my conclusions, both skillfully guided me through the complex and sometimes frustrating field of immigration law. I alone take credit for any errors.

1 U.S. CONST. amend. V.

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

INTRODUCTION

On September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[3] Characterized by one observer as "the most diverse, divisive and draconian immigration law enacted since the Chinese Exclusion Act of 1882,"[4] the legislation aims primarily at stemming the tide of illegal immigration into the United States.[5] Included in the IIRIRA's broad attack on illegal immigration are sections providing for an expedited removal procedure[6] and for the criminal prosecution of aliens who re-enter or attempt to re-enter the United States within a certain period of time after being expeditiously removed.[7]

These new procedures raise serious constitutional questions. By allowing an individual immigration inspector to make an unreview-

---

3 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter IIRIRA], Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

4 Dan Danilov, *U.S. Courts Offer No Protection from Latest Immigration Law*, SEATTLE POST-INTELLIGENCER, Dec. 17, 1996, at A19.

5 As commentator Dan Carney observed:

> Much of the political endgame over legal immigrants and their benefits distracted attention from the bill's main thrust: clamping down on illegal immigration. There are an estimated 4 million illegal immigrants in the country and their ranks grow by about 300,000 a year. The new law aims to reduce those numbers.

Dan Carney, *As White House Calls Shots, Illegal Alien Bill Clears: Republicans, Eager To Leave Town, Drop Many Provisions on Public Benefits*, 54 CONG. Q. 2864, 2864 (1996).

6 Immigration and Nationality Act [hereinafter INA] § 235(b)(1), 8 U.S.C.A. § 1225(b)(1) (West Supp. 1997).

7 INA § 276, 8 U.S.C.A. § 1326.

able, unappealable determination on an alien's admissibility,[8] the expedited removal procedure potentially violates aliens' due process rights. Furthermore, by attempting to use that unreviewable, unappealable removal order as a basis for a criminal prosecution,[9] and by barring collateral attack of that order in the criminal prosecution,[10] the subsequent prosecution procedure flies in the face of Supreme Court precedent establishing aliens' constitutional rights in criminal prosecutions.

This Note tackles these constitutional issues. Part I provides definitions for the alien classifications that are relevant to the constitutional analysis. Part II sets forth the mechanics of the expedited removal and subsequent prosecution procedures. Part III traces a century of Supreme Court jurisprudence on aliens' procedural due process rights. In so doing, Part III establishes that the Supreme Court's traditional approach treats some aliens as nonpersons for due process purposes.[11]

Part IV uses the traditional approach to examine the constitutionality of the expedited removal procedure. Part IV analyzes the expedited removal procedure as it applies to (1) initially arriving aliens; (2) returning aliens; and (3) aliens present in the United States. The traditional analysis concludes that the expedited removal of initially arriving and returning aliens is clearly constitutional, and that the expedited removal of present aliens is a close constitutional question. In reaching these conclusions, Part IV illustrates that the traditional approach's method of analysis fails to comport with mainstream, contemporary due process doctrine, and leads to troubling constitutional conclusions.

Refusing to accept the shortcomings of the traditional approach, Part V argues that the IIRIRA provides the Court with the ideal opportunity to jettison the traditional due process framework in favor of a new and improved approach. This new approach—the "stake theory"—would afford aliens more due process protection, and, more im-

---

8 *See infra* Part II.A.

9 *See infra* Part II.B.

10 *See infra* Part II.B.

11 Charles Weisselherg uses the person/nonperson distinction in his recent immigration law article. Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 1033 (1995) ("This Article has explored . . . the notion that excludable aliens are not 'persons' within the meaning of the Due Process Clause. It has offered several reasons why all human beings at or inside our gates must be deemed 'persons' and why they must be afforded meaningful access to our courts."); *see also* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 176 (1983) ("The *Knauff-Mezei* doctrine comes close to saying that even though the fifth amendment due process protection applies to 'persons,' we simply do not regard excludable aliens as falling within that category.").

portantly, would bring immigration law into step with mainstream, contemporary due process doctrine.

Part VI goes beyond the expedited removal procedure to examine the IIRIRA's procedure for the subsequent prosecution of any expeditiously removed alien. Applying the Supreme Court's decision in *United States v. Mendoza-Lopez*,[12] Part VI concludes that the subsequent prosecution of any alien for the violation of an expedited removal order is unconstitutional. By treating all aliens subject to prosecution as persons for due process purposes, *Mendoza-Lopez* further supports adoption of the stake theory as a means of analyzing aliens' procedural due process claims.

I
THE CAST OF CHARACTERS

To engage in meaningful discourse on the IIRIRA's constitutionality, one must understand immigration law's[13] different classifications of aliens. Unfortunately, the IIRIRA changed the classifications. Thus, an understanding of both the traditional and the new vocabulary is a prerequisite to any constitutional analysis of the IIRIRA's new procedures.

Traditional immigration parlance classified aliens who did not qualify to be in the United States as either *deportable* or *excludable*.[14] The distinction between the two classifications depended on whether the alien had entered the country: those aliens who had entered were *deportable*, and those who sought entry were *excludable*.[15] The labels referred to the procedures used to expel the alien or to keep the alien from entering the country.[16] The government could remove aliens who had entered the country only through deportation proceedings, while aliens seeking entry had "their admissibility determined in exclusion proceedings."[17] As Part III discusses in detail, the exclusion-deportation distinction acquired constitutional significance: deportable aliens were treated as "persons" under the Due Process Clause, whereas excludable aliens were denied due process protection.[18]

---

12 481 U.S. 828 (1987).

13 For purposes of this Note, immigration regulation and immigration law refer to "the body of law governing the admission and the expulsion of aliens." Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 256. So defined, immigration law can "be distinguished from the more general law of aliens' rights and obligations." *Id.*

14 *See* DAVID A. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 9-10 (1987).

15 *See id.*

16 *See id.*

17 *Id.*

18 *See infra* Part III.

The IIRIRA eliminated the traditional deportable and excludable classifications.[19] The new law classifies aliens who do not qualify to be in the United States as either *deportable* or *inadmissible*.[20] The distinction between *deportable* and *inadmissible* turns on whether the alien has been inspected and admitted.[21] Aliens who have been inspected and admitted but are no longer entitled to be in the country are *deportable*.[22] Aliens who have been neither inspected nor admitted and are not entitled to be in the country are *inadmissible*.[23] This Note focuses on the inadmissible alien category, which is divisible into three subgroups. Two of these subgroups, "initially arriving aliens" and "returning aliens," fall into the inadmissible category because they stand at the border waiting to be inspected and admitted.[24] The third subgroup of inadmissibles are those aliens who have entered the United States without being inspected and admitted.[25] Throughout this Note, this third group is referred to as "present aliens."[26]

One other alien classification, which the new law has left intact, deserves discussion. "Permanent resident aliens" are aliens who have been "lawfully admitted for permanent residence."[27] Although permanent resident aliens are not subject to expedited removal,[28] they are relevant to this Note's analysis because they have received special constitutional treatment under the Supreme Court's traditional approach.[29] Having reviewed the terms relevant to a constitutional analysis of the new procedures, the discussion now turns to the procedures themselves.

---

19 *See* 2 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 64.01[1] (1997). The IIRIRA provides for "a single removal proceeding, rather than separate 'exclusion' and 'deportation' proceedings, as provided under prior law." *Id.*

20 INA § 240(e)(2), 8 U.S.C.A. § 1229a(e)(2) (West Supp. 1997).

21 *See id.* For the definition of "admission," see INA § 101(a)(13), 8 U.S.C.A. § 1101(a)(13).

22 *See* INA § 240(e)(2)(B), 8 U.S.C.A. § 1229a(e)(2)(B).

23 *See* INA § 240(e)(2)(A), 8 U.S.C.A. § 1229a(e)(2)(A).

24 *See* INA § 101(a)(13), 8 U.S.C.A. § 1101(a)(13). The analysis below further divides the initially arriving category into immigrants, nonimmigrants, and undocumented aliens. *See infra* text accompanying note 179; *infra* note 180.

25 *See* INA § 101(a)(13), 8 U.S.C.A. § 1101(a)(13); *see also* 2 GORDON ET AL., *supra* note 19, at § 64.01[2] (stating that "those who were not lawfully admitted—whether they are physically inside or outside the United States . . . . are considered to be seeking admission, and must prove that they are admissible").

26 These aliens are sometimes referred to as "EWIs," which stands for aliens who have "entered without inspection." 7 GORDON ET AL., *supra* note 19, § 71.04[3][a] (discussing aliens who have "entered without inspection (EWI)", and recognizing the potential application of the IIRIRA's expedited removal procedure to EWIs).

27 INA § 101(a)(13)(C), 8 U.S.C.A. § 1101(a)(13)(C).

28 *See infra* note 32 (noting that, under the IIRIRA, permanent residents are entitled to additional procedures before removal from the United States).

29 *See infra* notes 81-95 and accompanying text.

II
THE NEW PROCEDURES

A. Expedited Removal

The IIRIRA vests the power of expedited removal in the hands of individual immigration officers.[30] Under the relevant provisions of the new law, an officer who determines, on the basis of misrepresentation, lack of documents, or both, that an alien is inadmissible "shall order the alien removed from the United States without further hearing or review."[31] Three categories of aliens are potential targets for the expedited removal procedure: (1) initially arriving aliens; (2) returning aliens;[32] and (3) inadmissible aliens already in the United States who have not been admitted or paroled[33] into the country, and "who ha[ve] not affirmatively shown, to the satisfaction of an immigration officer, that [they have] been physically present in the United

---

30 *See* INA § 235(b), 8 U.S.C.A. § 1225(b).

31 *Id.* For an explanation of "misrepresentation," see INA § 212(a)(6)(C)(i), 8 U.S.C.A. 1182(a)(6)(C)(i). That section provides that "[a]ny alien who, by fraud or wilfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this chapter is inadmissible." *Id.*

Documentation requirements for arriving aliens are set forth in INA § 212(a)(7)(A)(i), 8 U.S.C.A. 1182(a)(7)(A)(i), which provides that

> any immigrant at the time of application for admission . . . who is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality if such document is required . . . is inadmissible.

Id.

Federal regulations make clear, in the case of an alien who is inadmissible on the basis of misrepresentation or lack of documents or both *and* is also inadmissible on any other ground, that an expedited removal order can only be based on the misrepresentation or lack of documents grounds. *See* 8 C.F.R. § 235.3(b)(3) (1998).

32 *See* INA § 235(b), 8 U.S.C.A. § 1225(b). The IIRIRA provides additional procedures for the following groups of returning and arriving aliens: (1) returning permanent resident aliens, returning refugees, or returning asylees; (2) arriving nonresident aliens who indicate a fear of persecution or an intent to apply for asylum; and (3) aliens who "[are] . . . native[s] or citizen[s] of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations [i.e., Cuba] and who arrives by aircraft." INA § 235(b)(1)(C), (b)(1)(A)(ii), (b)(1)(F), 8 U.S.C.A. § 1225(b)(1)(C), (b)(1)(A)(ii), (b)(1)(F).

This Note concerns only arriving and returning aliens who are not entitled to additional procedures. Thus, the aforementioned groups of arriving and returning aliens who are entitled to additional procedures fall outside the scope of this Note.

33 The term "parole" refers to the process by which aliens who have been denied admission to the United States are allowed to enter the country "despite some unwaivable ground of inadmissibility." MARTIN, *supra* note 14, at 11. Under the "'entry fiction,'" Weisselberg, *supra* note 11, at 951, these aliens "remain constructively at the border throughout their stay, no matter where they travel." MARTIN, *supra* note 14, at 11. Looking to the entry fiction for support, the Supreme Court has held that parolees have no procedural due process rights. Leng May Ma v. Barber, 357 U.S. 185 (1958).

States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under [the expedited removal provisions]."[34]

The most striking aspect of the new procedure is that expedited removal orders are neither administratively[35] nor judicially[36] reviewable. Thus, an arriving or present inadmissible alien who has been ordered expeditiously removed has no recourse.[37] As Part II.B discusses below, this bar on judicial review acquires additional signifi-

---

34 INA § 235(b)(1)(A)(iii)(II), 8 U.S.C.A. § 1225(b)(1)(A)(iii)(II). This Note refers to this alien group as "present aliens." *See supra* notes 23, 25-26 and accompanying text. Only action by the Attorney General can trigger the application of the expedited removal procedures to present aliens. *See* INA § 235(b)(1)(A)(iii)(I), 8 U.S.C.A. § 1225(b)(1)(A)(iii)(I). The Attorney General has not yet taken such action. *See INS, EOIR Publish Interim Regulations Implementing 1996 Act*, INTERPRETER RELEASES (Fed. Publications Inc. Wash., D.C.), Mar. 10, 1997, at 355 (observing "the INS's decision . . . not to apply at this time the expedited removal provisions to aliens in the U.S. who have not been admitted or paroled and who cannot establish continuous physical presence in the U.S. for the previous two years"). Congress, on the other hand, appears to be anxious to apply expedited removal to present aliens. *See* Letter from Lamar Smith, Chairman, House Subcommittee on Immigration and Claims, to Richard Sloan, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service 7-8 (Feb. 3, 1997):

> We understand that for practical reasons, it may not be advisable at this point to apply expedited removal to *all* aliens who cannot establish 2 years of residence in the United States. However, the discretionary authority should not be kept "in reserve" for emergencies; it should be an ordinary tool of enforcement against illegal migration, directed specifically at recent illegal entrants.

Id. (making argument in comments submitted in response to a Notice of Proposed Rulemaking).

35 INA § 235(b)(1)(A)(i), 8 U.S.C.A. § 1225(b)(1)(A)(i) (stating that upon determination that an arriving alien is inadmissible "the officer shall order the alien removed from the United States *without further hearing or review*") (emphasis added); INA § 235(b)(1)(C), 8 U.S.C.A. § 1225(b)(1)(C) (providing that a removal order entered against an arriving nonresident alien who does not claim refugee or asylum status "is not subject to administrative appeal").

36 "[N]o court shall have jurisdiction to review—(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of [a summary removal order]. . . ." INA § 242(a)(2)(A), 8 U.S.C.A. § 1252(a)(2)(A).

Subsection (e)(5) provides that

> [i]n determining whether an alien has been ordered removed under section 235(b)(1) . . . , the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. *There shall be no review of whether the alien is actually inadmissible or entitled to any relief from removal.*

INA § 242(e)(5), 8 U.S.C.A. § 1252(e)(5) (emphasis added).

The IIRIRA does retain limited habeas corpus review. INA § 242(e)(2), 8 U.S.C.A. § 1252(e)(2). Under the terms of the statute, however, habeas relief is available only to aliens who can prove permanent resident status. *Id.* Because this Note is concerned with only initially arriving, returning, and present aliens who do not claim to be permanent residents, *see supra* note 32, habeas corpus review under the IIRIRA does not provide an avenue for judicial review of the validity of individual expedited removal orders issued against the aliens who are the focal point of this Note.

37 *See* INA § 242(a)(2)(A), 8 U.S.C.A. § 1252(a)(2)(A).

cance when an expedited removal order forms the basis for a subsequent prosecution.

B. Subsequent Prosecution

The mechanics of the subsequent prosecution procedure are straightforward. Under 8 U.S.C.A. § 1326, any alien who has been ordered expeditiously removed and who subsequently "enters, attempts to enter, or is at any time found in, the United States" is subject to felony prosecution.[38] Prosecution for the violation of an outstanding immigration order is not a novel concept; immigration law has provided for such prosecutions for forty-five years.[39] The IIRIRA, however, adds a new wrinkle to subsequent prosecution by preventing collateral attack of an expedited removal order in a § 1326 prosecution.[40] The new expedited removal section provides: "In any action brought against an alien under . . . [8 U.S.C.A. § 1326], *the court shall not have jurisdiction to hear any claim attacking the validity of an* [expedited removal order]."[41]

This bar on collateral attack acquires additional import when coupled with the provisions precluding judicial review of an expedited removal order.[42] Taken together, these new provisions guarantee that no court will ever have an opportunity to scrutinize the validity of an expedited removal order. Thus, under the IIRIRA's new procedures, an individual immigration officer's evaluation of inadmissibility conclusively establishes a material element of a criminal offense.[43]

Keeping the vocabulary of immigration law and the mechanics of the new procedures in mind, the discussion now shifts to the jurisprudential history of aliens' due process rights in the United States.

---

38 INA § 276(a), 8 U.S.C.A. § 1326(a) (stating that § 1326 violators "shall be fined under Title 18, or imprisoned not more than 2 years, or both"). These penalties make the violation of § 1326 a felony. The effective period of an expedited removal order is five years. *See* INA § 212(a)(9)(A)(i), 8 U.S.C.A. § 1182(a)(9)(A)(i) (stating that "[a]ny alien who has been ordered [expeditiously removed] . . . and who again seeks admission within 5 years of the date of such removal . . . is inadmissible").

39 *See* Immigration and Nationality Act of 1952 § 276, Pub. L. No. 82-414, 66 Stat. 163, 229 (codified as amended at 8 U.S.C. § 1326(a) (1994)); 3 GORDON ET AL., *supra* note 19, § 85.07[2][d], at 85-79 ("[T]he 1952 Act imposed the criminal penalty on one who reentered improperly after exclusion or deportation.").

40 INA § 235(b)(1)(D), 8 U.S.C.A. § 1225(b)(1)(D).

41 *Id.* (emphasis added).

42 For a discussion of the bar on judicial review, see *supra* note 36 and accompanying text.

43 The only other material element of the § 1326 offense is that the alien has entered or attempted to enter the United States during the effective period of the removal order. INA § 276(a), 8 U.S.C.A. § 1326(a).

III
THE PLENARY POWER DOCTRINE AND THE SUPREME COURT'S TRADITIONAL APPROACH TO PROCEDURAL DUE PROCESS

For over a century, the Supreme Court has recognized Congress's nearly unfettered power in the realm of immigration regulation.[44] The Court has described this power as "plenary,"[45] and commentators have labeled the Court's recognition of this power the "plenary power doctrine."[46] The doctrine is more than merely judicial rhetoric. It encompasses a "doctrine of special judicial deference to Congress" in the area of immigration regulation.[47]

The Court has invoked the plenary power doctrine to defeat constitutional challenges that aliens have brought against immigration laws.[48] The Supreme Court's statement in *United States ex rel. Knauff v. Shaughnessy* provides perhaps the most dramatic expression of congressional power and judicial deference: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[49] Despite this sweeping rhetoric, the degree of judicial deference given to Congress has varied depending on the context:[50] the Court has recognized procedural due process rights for all

---

44 *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542, 544 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. . . . Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892) (stating that for unnaturalized and nonresident foreigners seeking entry into the United States, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law").

45 *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 769 (1972).

46 *See, e.g.*, Legomsky, *supra* note 13, at 256; Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 927 (1995); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992); Weisselberg, *supra* note 11, at 939.

The plenary power doctrine also applies to executive power in immigration regulation. *See, e.g., Knauff*, 338 U.S. at 543 (stating that "the power of exclusion of aliens is also inherent in the executive department of the sovereign"). However, because this Note concerns the action of Congress in writing the IIRIRA, the plenary power doctrine need only be analyzed here as an expression of deference to congressional power.

47 Legomsky, *supra* note 46, at 926; *see also* Weisselberg, *supra* note 11, at 939 (describing the plenary power doctrine as "a collection of several separate but related principles," one of which is "that the judicial branch has an extremely limited role in reviewing . . . immigration decisions if, indeed, the judiciary may review those decisions at all").

48 *See, e.g., Knauff*, 338 U.S. at 543. For this Note's definition of the phrase "immigration law," see *supra* note 13.

49 338 U.S. at 544.

50 *See* MARTIN, *supra* note 14, at 9-10; Legomsky, *supra* note 46, at 926.

aliens in deportation proceedings,[51] but only for permanent resident aliens in exclusion proceedings.[52]

The Supreme Court planted the seeds of the contemporary plenary power doctrine over a century ago in *The Chinese Exclusion Case* ("*Ping*").[53] In that case, a Chinese laborer left the United States after obtaining a certificate that ostensibly guaranteed his right to return to the United States.[54] During the laborer's year abroad, Congress changed the immigration laws to prohibit the return of all Chinese laborers, even those with certificates.[55] The Court upheld the statute, stating that Congress's determination as to the necessity, and hence the validity of the law, was "conclusive upon the judiciary."[56] Although the *Ping* Court upheld the statute using the plenary power rationale, the Court "did not expressly respond to [the alien's] assertions of individual constitutional rights."[57] Thus, the Court left unanswered the question of whether plenary power would supplant individual claims of constitutional rights.

The Court addressed that issue in *Nishimura Ekiu v. United States*,[58] holding that individual rights yield to plenary power.[59] Ekiu had been denied entry under a statute that gave immigration officers the authority to exclude "persons likely to become a public charge."[60] Ekiu sought judicial review of the administrative finding of excludability.[61] In rejecting Ekiu's challenge, the Court held that Congress's power to regulate immigration supplanted any procedural due process rights of first-time arriving aliens in exclusion proceedings.[62] Thus, by the turn

---

51 *See, e.g.*, The Japanese Immigrant Case (Yamataya v. Fisher), 189 U.S. 86, 101 (1903) (stating that an alien, before he is taken into custody and deported, is entitled to an opportunity to be heard). For an excellent discussion of the procedural due process exception to the plenary power doctrine, see Motomura, *supra* note 46, at 1632-56.

52 *See* Landon v. Plasencia, 459 U.S. 21, 22, 32-33 (1982) (holding that a returning resident alien is protected by the Due Process Clause in exclusion proceedings).

53 Ping v. United States, 130 U.S. 581 (1889).

54 *Id.* at 582.

55 *See id.*

56 *Id.* at 606. The Court further opined that

> Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination.

Id. at 609.

57 Motomura, *supra* note 46, at 1634.

58 142 U.S. 651 (1892).

59 *Id.* at 660.

60 *Id.* at 653 n.1 (quoting Act of March 3, 1891, ch. 551, 26 Stat. 1084, 1084).

61 *See id.* at 653-56.

62 *Id.* at 660 (stating that for immigrants seeking lawful admittance to the United States for the first time, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law").

of the century, the Court had established that aliens in exclusion proceedings have no due process rights.

In *The Japanese Immigrant Case* ("*Yamataya*"),[63] the Court addressed the issue of the procedural due process rights of aliens in a different context. Unlike the aliens in *Ping* and *Ekiu*, Yamataya had already entered the United States and was thus subject to deportation rather than exclusion.[64] The Court held that different principles apply to aliens who have entered the country:

> [I]t is not competent for . . . any executive officer . . . arbitrarily to cause an alien, who has entered the country . . . although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.[65]

Yamataya carved out an important exception to the plenary power doctrine: aliens who had entered the country, and were thus subject to deportation, had procedural due process rights.[66] Following *Yamataya*, the Court adhered to the basic principles set out in the early cases[67]—while excludable aliens had no procedural due process rights, deportable aliens did.[68]

The Cold War brought with it two cases, *United States ex rel. Knauff v. Shaughessy*[69] and *Shaughnessy v. United States ex rel. Mezei*,[70] whose progovernment rhetoric marked the high point of the plenary power doctrine,[71] and whose holdings appeared to cement the exclusion-deportation distinction regarding procedural due process.[72] In *Knauff*, the alien wife of a U.S. serviceman sought entry to the United States

---

63 Yamataya v. Fisher, 189 U.S. 86 (1903).

64 *See id.* at 87. Yamataya had been in the United States for only four days. *See id.*

65 *Id.* at 101.

66 *See* Motomura, *supra* note 46, at 1638 ("*Yamataya* thus established that when aliens are in the United States, the Court would hear constitutional challenges based on procedural due process.").

67 *See* Weisselberg, *supra* note 11, at 948.

68 *See id.* at 948-49 & nn.65-66. The language of a few decisions during the first half of the twentieth century "hinted at increased judicial scrutiny" in exclusion proceedings for "persons claiming United States citizenship." Motomura, *supra* note 46, at 1639. However, "[i]n several early citizenship cases," the Court refused "to overturn exclusion orders on procedural due process grounds." *Id.* at 1639-40. Though one case "upheld a procedural due process challenge [in an exclusion situation] . . . . it is difficult to read the case as a ringing endorsement of nonwhite aliens' right to be heard." *Id.* at 1640-41 (footnotes omitted).

69 338 U.S. 537 (1950).

70 345 U.S. 206 (1953).

71 *See* Motomura, *supra* note 46, at 1642 (stating that in the 1950s, "even the rhetoric turned colder").

72 *See* MARTIN, *supra* note 14, at 22 ("The *Knauff-Mezei* doctrine has generally been applied to require fairly full procedural due process review under the Constitution in deportation cases but to deny it altogether in exclusion cases.").

under the War Brides Act.[73] Based on undisclosed information, the government ordered her excluded without a hearing.[74] In ruling against the alien, the Court declared that Congress had the power to define due process for the alien seeking entry.[75]

In *Mezei*, the Court upheld procedures identical to those used in *Knauff*—exclusion without a hearing, based upon undisclosed information.[76] However, additional circumstances in *Mezei* made the denial of procedural due process rights in that case even harsher. First, the alien had lived in the United States as a permanent resident alien for twenty-five years before leaving the country for nineteen months.[77] In addressing the alien's previous ties to the United States, the majority stated, "the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same . . . ."[78] Second, the holding of exclusion had extra force because it led to the alien's indefinite detention on Ellis Island, for he was similarly denied entry in other countries.[79] The majority remained unimpressed, stating that "an alien in respondent's position is no more ours than theirs."[80] *Knauff* and *Mezei* thus appeared to reinforce the due process rights line between deportation and exclusion.

The deportation-exclusion distinction blurred, however, with the Supreme Court's *Landon v. Plasencia* opinion in 1982.[81] In that case, Maria Plasencia, a permanent resident alien, sought to return to the United States after a two day trip to Mexico.[82] The government refused, via exclusion proceedings, to re-admit Plasencia.[83] Plasencia

---

73 338 U.S. at 539-40.

74 *See id.* at 539-40. Under a statutorily authorized presidential proclamation, the Secretary of State and the Attorney General had "issued regulations governing the entry into and departure of persons from the United States during the national emergency." *Id.* at 540-41. These regulations gave the Attorney General the authority to deny an alien a hearing "in special cases where he determined that the alien was excludable under the regulations on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." *Id.* at 541.

75 *Id.* at 544.

76 345 U.S. at 208-12 & n.7, 214-15.

77 *See id.* at 208.

78 *Id.* at 213.

79 *See id.* at 207. Fortunately, Ignatz Mezei, the stranded alien, did not remain stranded: the Attorney General eventually paroled Mezei into the United States. *See* Weisselberg, *supra* note 11, at 983-84 & n.266.

80 *Mezei*, 345 U.S. at 216.

81 459 U.S. 21 (1982).

82 *See id.* at 23.

83 *See id.* at 23-25. Plasencia and her husband had attempted to facilitate the illegal entry of Mexican and Salvadorian nationals. *See id.* at 23. The relevant statute provided for "the exclusion of any alien seeking admission 'who at any time shall have, knowingly and for gain, . . . assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law.'" *Id.* (quoting Immigration and Nationality Act of 1952 § 212(a)(31) (current version at 8 U.S.C. § 1182(a)(6)(E)(i) (1994))).

filed a petition for a writ of habeas corpus,[84] contending alternatively that she was entitled to a deportation proceeding,[85] and "that she was denied due process in her exclusion hearing."[86] The Court held that Plasencia was not entitled to a deportation proceeding.[87] However, in an opinion that some argue revolutionized contemporary immigration law,[88] the Supreme Court held that Plasencia, as a returning permanent resident alien, was entitled to procedural due process protection in her exclusion proceedings.[89] The Court reasoned that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[90]

Plasencia's ultimate impact on immigration law remains to be seen. The case ostensibly did not overrule *Mezei*,[91] which held that a permanent resident alien is not entitled to due process in exclusion proceedings;[92] in fact, the *Plasencia* Court expressly acknowledged and distinguished *Mezei* on the basis of the alien's length of absence from the United States.[93] Nevertheless, some commentators have suggested that *Plasencia* marks a new era in immigration law: "*Plasencia* was an important milestone because it opened the door for others, with less connection to the United States than returning permanent residents, to raise procedural due process claims."[94] Despite this academic wishful thinking, as of yet, no court has extended procedural due process protections in exclusion proceedings to aliens outside the permanent resident class.[95]

---

84 *See id.* at 22.

85 *See id.* at 28.

86 *Id.* at 32.

87 *Id.* at 30-32.

88 *See, e.g.*, Motomura, *supra* note 46, at 1652 ("The Supreme Court's 1982 decision in *Landon v. Plasencia* marked the arrival of the due process revolution in immigration law.") (footnote omitted).

89 *Plasencia*, 459 U.S. at 32. The Court remanded to determine exactly what process was due under the test enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). *Plasencia*, 459 U.S. at 34, 37.

90 *Plasencia*, 459 U.S. at 32.

91 *See* MARTIN, *supra* note 14, at 24.

92 *See supra* notes 76-80 and accompanying text.

93 459 U.S. at 33-34; *see* MARTIN, *supra* note 14, at 24. *But see* Weisselberg, *supra* note 11, at 989 ("*Plasencia* directly conflicts with *Mezei* and *Knauff*.").

94 Motomura, *supra* note 46, at 1655; *see also id.* (noting that "*Plasencia* thus introduced a new analytical framework, allowing aliens to raise procedural due process claims that would have been futile before"); *cf.* Weisselberg, *supra* note 11, at 988 ("*Landon v. Plasencia* further blurred the line between exclusion and deportation proceedings.") (footnote omitted).

95 See *supra* note 68 for discussion of due process and citizenship claims in exclusion proceedings.

IV
ANALYSIS OF THE EXPEDITED REMOVAL PROCEDURE UNDER THE SUPREME COURT'S TRADITIONAL APPROACH

The century of Supreme Court jurisprudence described in Part III established a straightforward, territorial framework for analyzing aliens' procedural due process claims.[96] Rather than engaging in a nuanced inquiry into the interests involved, the traditional approach categorizes some aliens as *persons* and others as *nonpersons*, depending on their territorial position.[97] Under the pre-IIRIRA legal regime, aliens who entered the country were subject to deportation proceedings that had to comport with due process requirements, while aliens who had not entered the United States were subject to exclusion proceedings and had no due process rights.[98] *Plasencia* introduced the only wrinkle into this traditional territorial approach by holding that, at least in certain circumstances, returning permanent residents were entitled to due process in exclusion proceedings.[99]

This Part analyzes the expedited removal procedure under the traditional due process approach. The analysis divides the entire group of aliens subject to expedited removal into three subgroups: (1) initially arriving aliens; (2) returning aliens; and (3) present aliens.

A. As Applied to Initially Arriving Aliens[100]

A traditional, territorial due process analysis of the expedited removal procedure as applied to initially arriving aliens is straightforward. Under pre-IIRIRA immigration law, initially arriving aliens were subject to exclusion proceedings, and thus enjoyed no procedural due process rights in those proceedings.[101] In recognizing due process rights for arriving permanent resident aliens, *Landon v. Plasencia* expressly reaffirmed this historical constitutional fact: "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."[102]

---

96 Some commentators use the term "territorial" to describe the Supreme Court's approach to aliens' due process claims. *See, e.g.*, Weisselberg, *supra* note 11, at 939 (discussing "the [p]rinciple of [t]erritorial [s]tanding").

97 The alien's territorial position turns on the technical definition of the term "entry" in pre-IIRIRA immigration law. For a discussion of the role of the term "entry" in pre-IIRIRA immigration law, see *infra* notes 116-18 and accompanying text.

98 *See supra* text accompanying notes 14-18, 50-80.

99 *See supra* text accompanying notes 81-90.

100 For a discussion of which aliens constitute "initially arriving aliens" for purposes of this Note, see *supra* notes 23-24 and accompanying text.

101 *See, e.g., supra* note 72.

102 Landon v. Plasencia, 459 U.S. 21, 32 (1982) (citing United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Nishimura Ekiu v. United States, 142 U.S. 651, 659-

Additional language in *Plasencia* further suggests that the Court did not intend for its holding to apply to initially arriving aliens. In contrasting arriving aliens with permanent resident aliens, the *Plasencia* Court stated, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[103] This language suggests that an alien must *both* gain admission to the country, *and* begin to develop ties to the country in order to acquire constitutional protection.[104] Arriving aliens clearly fall short of the first requirement—they stand at the border waiting to be admitted. They also fail to satisfy the requirement of "ties" to the country, as set forth by the *Plasencia* Court.[105] Although arriving aliens could come to the United States already having ties to the country,[106] the language of *Plasencia* suggests that admittance is a prerequisite to the development of ties.[107] Furthermore, the *Plasencia* Court characterized those ties as "the ties that go with permanent residence."[108] Because initially arriving aliens are not permanent residents, they have no such ties. Thus, *Plasencia* does not alter the traditional analysis's conclusion that initially arriving aliens have no procedural due process protection.

Without procedural due process protection, initially arriving aliens cannot mount a due process attack against the expedited removal procedure. Thus, as applied to those aliens, traditional analysis concludes that the IIRIRA's expedited removal procedure is constitutional.

B. As Applied to Returning Aliens[109]

Examination of the expedited removal procedure as applied to returning aliens under the traditional framework is also straightforward. Before the enactment of the IIRIRA, returning aliens, like their initially arriving counterparts, were subject to exclusion proceedings and enjoyed no due process rights in those proceedings.[110] Although

---

60 (1892)). The Court went on to say, "Our recent decisions confirm that view." *Id.* (citing Fiallo v. Bell, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753 (1972)).

103 459 U.S. at 32.

104 *See id.*

105 *See supra* text accompanying note 103.

106 *See infra* Part V.C.1.

107 459 U.S. at 32 (stating that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly"). This interpretation of *Plasencia* is contrary to that offered in THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 629-34 (3d ed. 1995).

108 459 U.S. at 32.

109 For a discussion of which aliens constitute "returning aliens" for purposes of this Note, see *supra* text accompanying notes 23-24.

110 *See, e.g., supra* note 72.

returning aliens come closer to falling within the purview of the holding in *Plasencia* because they have been previously admitted,[111] they fail to satisfy *Plasencia*'s seemingly critical requirement of permanent residence.[112]

Hence, returning aliens, like their initially arriving counterparts, have no due process claim with which to attack the expedited removal procedure. Thus, the traditional analysis holds that the expedited removal procedure is constitutional as applied to returning aliens.

C. As Applied to Present Aliens[113]

A traditional, territorial due process analysis of the expedited removal of present aliens is more complicated. At first blush, the Court's longstanding recognition of procedural due process rights for present aliens[114] appears to establish that present aliens are entitled, at a minimum, to *some* due process before being expelled from the country.[115] The traditional analysis becomes cloudier, however, when one recognizes that provisions of the IIRIRA may have altered the constitutional status of present aliens under a traditional analysis. The obvious question, then, is how a statutory change could possibly have affected constitutional status.

The answer lies in the strange significance that pre-IIRIRA law accorded the concept of "entry," and the IIRIRA's amendment of that concept. In the pre-IIRIRA regime, the technical, legal concept of entry established the constitutional line between deportable and excludable aliens.[116] Aliens who entered the country under the definition of entry[117] enjoyed procedural due process rights in deportation proceedings, while aliens who had not entered the country had no

---

111 *See supra* text accompanying notes 103-04, 107.

112 *See supra* text accompanying notes 103, 108.

113 For a discussion of which aliens constitute "present aliens" for purposes of this Note, see *supra* notes 23, 25-26 and accompanying text.

114 Under pre-IIRIRA law, present aliens were deportable, and thus entitled to due process protection. *See, e.g., supra* note 72.

115 Under the Court's contemporary two-tiered due process framework, aliens who demonstrate that the Due Process Clause protects them must then establish that they are entitled to additional process under *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976). *See infra* text accompanying notes 133-36.

116 *See* ALEINIKOFF ET AL., *supra* note 107, at 474-76. Describing the pre-IIRIRA landscape, Aleinikoff and his coauthors observed that "[t]he concept of 'entry' into the United States play[ed] a crucial, and somewhat curious, role in immigration law. For an alien whom the government [sought] to send home, 'entry' [was] the difference between exclusion and deportation. . . ." *Id.* As discussed *supra* Part III, the deportation/exclusion distinction gained constitutional significance. *See* ALEINIKOFF ET AL., *supra* note 107, at 475-76 (stating, in a discussion of the relevance of the term "entry," that "aliens in deportation hearings [found] it easier to raise constitutional claims, particularly procedural due process claims, than aliens in exclusion hearings.").

117 For one articulation of the definition of entry, see *Matter of G*, 20 I & N Dec. 764 (BIA 1993):

due process protection in their exclusion proceedings.[118] Present aliens fell into the deportable category because they had entered the country.

By replacing the concept of entry with the concept of "admission,"[119] the new law has redrawn the line that once separated excludable from deportable aliens.[120] Under this new classification scheme, present aliens find themselves grouped with formerly "excludable" arriving aliens within the general category of "inadmissibles."[121]

Given this change, a court performing a traditional analysis would face a difficult choice. First, a court could accept the concept of admission as the new due process dividing line. Given pre-IIRIRA courts' willingness to use the hypertechnical notion of entry to reach both harsh[122] and inconsistent conclusions,[123] a strict traditional territorial approach could very well accept admission as the new due process line. Indeed, such an approach would have the benefit of removing the inconsistency in the prior approach.[124] Under this analysis, present aliens would have no procedural due process weapon with which to attack the expedited removal procedure.

> In relevant part, an "entry" for immigration purposes is defined as "any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntary or otherwise." Section 101(a)(13) of the [Immigration and Nationality] Act. Over time, caselaw has led to the formulation of a more precise definition of that term, requiring: (1) a crossing into the territorial limits of the United States, i.e., physical presence; (2)(a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection at the nearest inspection point; and (3) freedom from official restraint.

Id. at 768.

118 *See supra* Part III. As noted above, *Plasencia* broke down this distinction for at least some returning permanent resident aliens. *See supra* notes 81-95 and accompanying text.

119 Stanley Mailman, *"Admission" and "Unlawful Presence" in the New IIRAIRA Lexicon*, *in* 2 AMERICAN IMMIGRATION LAWYERS ASS'N, 1997-98 IMMIGRATION & NATIONALITY LAW HANDBOOK 1 (R. Patrick Murphy ed., 1997) ("Conceptually, one of the [IIRIRA's] most fundamental changes is the downgrading of 'entry' to the United States as a basic immigration concept, and the elevation of 'admission' in its place . . . ."). For the new definition of "admission," see INA § 101(a)(13)(A), 8 U.S.C.A. § 1101(a)(13)(A) (West Supp. 1997) ("The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.").

120 *See* 2 GORDON ET AL., *supra* note 19, § 63.01[3].

121 Mailman, *supra* note 119, at 7 ("Now, not only those seeking admission, but anyone who arrives in the United States, or is present here and not admitted, is deemed an applicant for admission. In general, therefore, those who have entered without inspection . . . remain subject to the admissions process . . . .") (footnote omitted).

122 For an example of harsh results, see the discussion of Ignatz Mezei's case, *supra* notes 76-80 and accompanying text; see also *infra* note 130 (providing examples of critical commentary on the harshness of plenary power doctrine).

123 For a discussion of the inconsistent outcomes, which resulted in large part from the definition of "entry" and its role as the trigger for due process protection, see *infra* note 130 and accompanying text.

124 *See infra* note 130 and accompanying text.

Alternatively, a court could adhere to the prior concept of entry as the due process dividing line, and thus hold that present aliens continue to have due process rights. A court that did not want to increase the already-existing tension between immigration law and contemporary constitutional law[125] by further restricting aliens' due process rights might opt for this approach. Under this approach, the court would use the *Mathews v. Eldridge* balancing test to determine whether additional process was due.[126]

Unfortunately, neither option is attractive. Under the first approach, congressional action takes away the previously recognized personhood of present aliens as far as the Due Process Clause is concerned.[127] The second approach is arguably more palatable because it retains due process protection for a heretofore protected group. The second approach loses some of its luster, however, when one considers its method of analysis: personhood, for due process purposes, continues to turn on a hypertechnical definition of entry, a concept that is no longer directly rooted in codified immigration law.[128] Thus, the traditional approach leaves a court with two unattractive alternatives. As the next Part argues, however, a court should not, and most likely will not, have to choose between these two unattractive options.

In sum, this Part examined the expedited removal procedure under the traditional, territorial mode of due process analysis. For aliens subject to expedited removal, the results are troublesome. The procedure is clearly constitutional as applied to initially arriving and returning aliens, and presents a close constitutional question as applied to present aliens.[129] More disturbing than the results, however, is the traditional framework's method of analysis: initially arriving and returning aliens are treated as *nonpersons* for due process purposes, and the personhood of present aliens is unclear.

---

125 For a discussion of this tension, see *infra* Part V.A.

126 For a general discussion of *Mathews v. Eldridge* balancing, see *infra* text accompanying notes 134-36. For a detailed analysis of the *Eldridge* balancing for present aliens subject to expedited removal, see *infra* Part V.C.3.

127 Commentators have argued that immigration law's plenary power doctrine allows Congress to make classifications that affect constitutional status. *See, e.g.*, Weisselberg, *supra* note 11, at 953-54.

128 Although the concept of admission has replaced the prominent place that the concept of entry once filled, the concept of entry continues to appear in some parts of the INA. *See* Mailman, *supra* note 119, at 10 (noting that "[a]lthough drained of some of its vitality, the concept of entry . . . had been selectively retained as a key term" in various places in the INA).

129 These results are troublesome because expedited removal provides virtually no process beyond the determination of a single immigration inspector. *See supra* Part II.A.

V

AN ALTERNATIVE THEORY OF DUE PROCESS ANALYSIS

After revisiting plenary power and discussing the chasm that separates immigration law's due process approach from the rest of constitutional due process law, this Part argues that the IIRIRA presents an opportunity to repair that division. More specifically, the Supreme Court should look upon the IIRIRA as an opportunity to bring immigration law into step with the larger body of contemporary constitutional law by adopting a new due process approach. This Part concludes that the new approach has distinct process values, apart from its results, that favor its adoption.

A. Problems with Plenary Power and an Invitation for Change

Commentators have attacked the wisdom of the plenary power doctrine on virtually every front. From a practical standpoint, critics point out the harsh and inconsistent results that the doctrine produces.[130] From a doctrinal perspective, critics deconstruct the justifications proffered in favor of plenary power.[131] From a comparative point of view, commentators observe that the plenary power doctrine has created a chasm between immigration law and the larger body of constitutional due process law.[132]

---

130 For an example of the harsh results, see the treatment of Ignatz Mezei, discussed *supra* notes 76-80 and accompanying text. For critical comment on the harshness of the doctrine, see, for example, T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862, 865 (1989) (characterizing the plenary power cases as "harsh"); Weisselberg, *supra* note 11, at 1034 ("[O]ur treatment of aliens ultimately becomes a tale about us and not about them. It is discomforting to be part of a nation that permits indefinite detention and unreviewable decision-making . . . .").

Aleinikoff and his coauthors clearly express the inconsistency of the territorial approach:

> You should now be quite familiar with the curious results occasioned by a constitutional test that largely turns on the location of the alien. For example, an alien who arrives at the border with an immigrant visa and a job or family awaiting him in the United States is essentially unprotected by the Constitution's Due Process Clause. However, an alien who is apprehended a few hours after making a surreptitious entry is afforded, as a matter of constitutional right, a hearing, an opportunity to present evidence and cross-examine witnesses, an unbiased decision-maker and, sometimes, counsel.

ALEINIKOFF ET AL., *supra* note 107, at 629-30.

131 *See* Legomsky, *supra* note 13, at 260-78, 304 (discussing policy-based justifications for the plenary power doctrine, and concluding that "the doctrinal theories advanced from time to time in support of plenary Congressional power over immigration are becoming increasingly difficult to defend"); Legomsky, *supra* note 46, at 937 (noting that "the plenary power doctrine . . . has never been adequately explained on grounds of either policy or precedent").

132 *See, e.g.*, ALEINIKOFF ET AL., *supra* note 107, at 638 (stating that "[t]he border/interior distinction . . . is out of step with modern notions of due process"); Aleinikoff, *supra* note 130, at 865 ("Immigration law has remained blissfully untouched by the virtual revolution in constitutional law since World War II, impervious to developments in due process,

To see this chasm, one need only compare the Supreme Court's modern due process framework to immigration law's approach. Under the Court's modern due process framework, government action must deprive an individual of a life, liberty, or property interest in order to trigger the protection of the Due Process Clause.[133] After the aggrieved establishes such a deprivation, a court moves to *Mathews v. Eldridge*[134] balancing to determine what, if any, additional process is due. *Eldridge* identifies three factors for consideration:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[135]

The individual's interest at stake and the procedural factor are weighed together against the government's interest in maintaining the current procedures in order to determine whether due process requires additional procedures.[136]

As demonstrated above in Parts III and IV, immigration law's traditional due process approach bears no resemblance to the Court's modern due process framework. Rather than engaging in a nuanced balancing of life, liberty, or property interests, immigration law's traditional approach simply treats certain aliens as nonpersons to whom the Due Process Clause does not apply. This dissimilarity in ap-

---

equal protection and criminal procedure."); Legomsky, *supra* note 46, at 937 ("Immigration commentators are well aware that our field has long been a constitutional oddity. For the most part, the Supreme Court has not applied to immigration cases the constitutional norms familiar in other areas of public law."); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) ("In a legal firmament transformed by revolutions in due process and equal protection doctrine and by a new conception of judicial role, immigration law remains the realm in which government authority is at the zenith, and individual entitlement is at the nadir.").

133 *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) (stating that "the range of interests protected by procedural due process is not infinite. . . . [T]o determine whether due process requirements apply in the first place, we must look . . . to the *nature* of the interest at stake."); GERALD GUNTHER, CONSTITUTIONAL LAW 584 (12th ed., 1991) ("Instead of readily assuming that a constitutionally protected interest is involved and dwelling primarily on the question of the appropriate contours of procedural due process in that context, the Court has increasingly paused at the outset to ask whether a constitutionally protected interest *is* presented.").

134 424 U.S. 319 (1976).

135 *Id.* at 335.

136 *See id.*

proaches, and the other problems with the plenary power doctrine,[137] indicate that the doctrine is in dire need of change.[138]

The IIRIRA provides the Supreme Court with the opportunity to make that change. Instead of trying to force the IIRIRA's new classifications into the existing, much maligned territorial framework, the Court should look upon the new law as an opportunity to abandon the territorial framework and implement the stake theory as a means of adjudicating aliens' due process claims.

B. The Stake Theory

Under the stake theory, courts would determine an alien's procedural due process rights by looking to "the relationship of the alien to the community of which he is a part or which he seeks to join."[139] Although stake theorists articulate various definitions of "stake,"[140] they generally agree that an alien's due process rights should turn on that alien's relationship to the United States.[141] Given that different alien groups have different degrees of relationship to the United States, stake theorists envision a sliding scale of due process protection depending on the alien's ties to the country.[142] In order to determine

---

137 *See supra* notes 130-32 and accompanying text.

138 Indeed, some commentators have even gone so far as to argue that *Plasencia* marked the death of plenary power and its territorial due process approach. Hiroshi Motomura argues that

> *Plasencia* was an important milestone because it opened the door for others, with less connection to the United States than returning permanent residents, to raise procedural due process claims. . . . [T]he basic concepts underlying *Plasencia* were simply too difficult to cabin. The statutory exclusion-deportation line was not constitutionally determinative, but rather aliens enjoyed degrees of "entitlement"—and in turn degrees of access to procedural due process rights—depending on the nature and extent of their attachment to the United States. *Plasencia* thus introduced a new analytical framework, allowing aliens to raise procedural due process claims that would have been futile before *Goldberg v. Kelly.*

Motomura, *supra* note 46, at 1655; *see also* ALEINIKOFF ET AL., *supra* note 107, at 635 (stating that "there is much in the [*Plasencia*] opinion that not only undermines *Knauff*, but also siguals adoption of a 'stake' theory").

139 ALEINIKOFF ET AL., *supra* note 107, at 638. For a full discussion of the stake theory, see *id.* at 631-39.

140 *Compare* Martin, *supra* note 11, at 191-204 (arguing that level of membership in the national community should dictate what process is due) *with* T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 244-45 (1983) ("[W]hereas Professor Martin would examine the notion of *community*, I would look at *community ties*. . . . The notion of 'community ties' . . . indicates the actual relationships the individual has developed with a society: a family, friends, a job, association memberships, professional acquaintances, opportunities. 'Community' is a more amorphous concept.").

141 *See* ALEINIKOFF ET AL., *supra* note 107, at 638.

142 *See id.* at 634-38.

what process is due in a particular case under the stake theory, courts would engage in *Eldridge* balancing.[143]

The Supreme Court's approach in *Landon v. Plasencia* indicates that the Court could be amenable to a stake theory.[144] *Plasencia* established that the deportation/exclusion line does not determine constitutional status for permanent resident aliens.[145] Granted, the *Plasencia* Court attempted to limit its holding to the permanent resident class.[146] However, the shift in analytical approach—from territorial distinctions to an examination of aliens' ties to the country—indicates that aliens' due process claims should turn on stake.[147]

Critics of the stake theory are likely to argue, as a preliminary matter, that the theory, as proposed, does not fit within the Supreme Court's contemporary two-step due process framework.[148] Considering that the scope of the concept of liberty appears to have shrunk in recent years,[149] stake theory critics could assert that an alien's stake simply does not satisfy the rigid first requirement of contemporary due process analysis—establishing that the government has deprived the claimant of a life, liberty, or property interest. A number of responses to this argument indicate, however, that the formalistic liberty/property inquiry should not and will not prevent the Supreme Court from adopting the stake theory.

First, the Supreme Court's decision in *Plasencia*, and the subsequent application of *Plasencia* by the District of Columbia Circuit Court of Appeals in *Rafeedie v. Immigration & Naturalization Service*,[150] indicate that the Court may not require a tight fit between the alien's stake and a liberty or property interest. In holding that a returning resident alien was entitled to due process in her exclusion proceedings, the *Plasencia* Court did not identify a particular liberty or property interest that triggered the *Eldridge* inquiry.[151] Rather, the Court stated generally that "once an alien gains admission to our country

143 *See id.* at 636. For an explanation of *Eldridge* balancing, see *supra* text accompanying notes 134-36.

144 *See* ALEINIKOFF ET AL., *supra* note 107, at 635 (arguing that "[a]t a more fundamental level . . . there is much in the [*Plasencia*] opinion that not only undermines *Knauff*, but also signals adoption of a 'stake' theory").

145 Landon v. Plasencia, 459 U.S. 21, 32 (1982).

146 *Id.* (stating that (1) "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application"; and (2) "once an alien gains admission to our country and begins to develop *the ties that go with permanent residence*, his constitutional status changes accordingly") (emphasis added).

147 *See supra* note 138.

148 For a description of the contemporary two-step due process framework, see *supra* text accompanying notes 133-36.

149 *See, e.g.*, GUNTHER, *supra* note 133, at 594. Commentators have criticized the Court's restrictive view of "liberty" interests. *See, e.g., id.* at 596 n.4, 597.

150 880 F.2d 506 (D.C. Cir. 1989).

151 459 U.S. at 32.

and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[152] Thus, the Court was willing to engage in *Eldridge* balancing without first casting the alien's stake as a liberty or property interest.

Despite the Supreme Court's failure to identify a liberty or property interest in *Plasencia*, a 1992 D.C. Circuit opinion characterized the due process trigger in *Plasencia* as a liberty interest.[153] Elaborating on the alien's interest, however, the D.C. Circuit spoke more in terms of stake than liberty:

> A permanent resident may have not only significant personal ties to the United States . . . he may also have, and have discharged, substantial legal obligations to this country [i.e., armed forces service]. These ties give the permanent resident alien a *stake* in the Unites States substantial enough to command the protection of due process before he may be excluded or deported; the result, after all, may be to separate him from family, friends, property, and career, and to remit him to starting a new life in a new land.[154]

Furthermore, one must remember that *Rafeedie* superimposed the label of "liberty interest" after the Supreme Court deemed such labeling unnecessary.[155] The Supreme Court's failure to identify a triggering interest in *Plasencia* indicates that aliens' procedural due process claims may not need to be couched in terms of liberty or property interests.

As a second response to the claim that aliens cannot satisfy the liberty/property threshold requirement, one can make a strong argument that aliens who are subject to expedited removal *do* face the risk of being deprived of a liberty or property interest in the contemporary, formal sense.[156] The Supreme Court has established that the *nature* of the threatened interest is the only factor to consider in

---

152 *Id.*

153 *Rafeedie*, 880 F.2d at 520 (stating that "a permanent resident alien . . . has a liberty interest in being permitted to reenter this country and is therefore entitled to due process before he can be denied admission").

154 *Id.* at 522 (emphasis added). Although the first sentence of the *Rafeedie* excerpt appears to inextricably link permanent residence to the establishment of stake, the second part of the second sentence, which speaks to the deprivation that would result from exclusion, identifies losses that a number of alien groups could suffer. Thus, *Rafeedie* can be read as support for the proposition that the risk of separating an alien from "family, friends, property, and career" triggers due process protection.

155 *See supra* text accompanying notes 151-52.

156 T. Alexander Aleinikoff argues that "it seems sensible to conclude that governmental action that seeks to remove an alien from the territory of the United States implicates a 'liberty' interest of the targeted individual." Aleinikoff, *supra* note 130, at 867. Hiroshi Motomura posits that "aliens . . . could argue that statutes or other expressions of government policy gave them expectations of admission that qualified as 'property' or 'liberty' interests." Motomura, *supra* note 46, at 1655.

determining whether the interest implicates the due process clause.[157] In describing the liberty interests at stake for the permanent resident alien in exclusion proceedings, the *Rafeedie* court stated that "the result [of exclusion], after all, may be to separate him from family, friends, property, and career, and to remit him to starting a new life in a new land."[158] The same *type* of interests are threatened when the expedited removal procedure is applied to initially arriving, returning, and present aliens.[159]

Consider the case of John Psaropoulos, a British subject working in the United States as a television journalist for the past three years.[160] Following a two-week vacation to Greece, Psaropoulos sought to re-enter the United States.[161] Because Psaropoulos's employer had failed to file a required labor form along with Psaropoulos's application to extend his work visa, an immigration inspector ordered Psaropoulos expeditiously removed.[162] Following the statutory procedures, Psaropoulos received no review of the determination of inadmissibility.[163] As New York Times columnist Anthony Lewis observed, "[t]he blow was more traumatic for Mr. Psaropoulos than it might have been for others because more than his job was at stake. He was engaged to be married to an American woman . . . ."[164] Admittedly, permanent residents, as a class, may have *greater* liberty interests at stake when they are subject to removal proceedings. It is difficult, however, to meaningfully distinguish the *nature* of the interest described in *Rafeedie* from the *nature* of the interest in Psaropoulos's case.[165] Using

---

157 *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972) ("[To] determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.") (citation omitted).

158 880 F.2d at 522.

159 *See, e.g., infra* notes 160-67 and accompanying text.

160 The story is described fully in Anthony Lewis, *Is this America?*, N.Y. TIMES, Aug. 18, 1997, at A19.

161 *See id.*

162 *See id.* Actually, Psaropoulos "was allowed into the country temporarily, to be given a 'deferred inspection' later." *Id.* During the five weeks that passed between his re-entry and his deferred inspection, the application to extend his visa was denied. *See id.* At the deferred inspection on May 7, Psaropoulos met with an Immigration and Naturalization officer. *See id.* After Psaropoulos sat down for the meeting with the officer, "'[t]he door opened and two men entered the room with handcuffs. [The officer] explained that [Psaropoulos] was to be Expeditiously Removed from the United States and barred from entering for five years.'" *Id.* Psaropoulos spent the night in a detention center, and was flown out of the country the next day. *See id.* In a rather complicated turn of events, Psaropoulos eventually was granted permission to reapply for admission, and was allowed back into the country. *See id.*

163 *See id.*

164 *Id.*

165 In *Hamaya v. McElroy*, another procedural due process case involving a returning permanent resident, the United States District Court for the Eastern District of New York provided the following description of the liberty interest at issue:

the words of the *Rafeedie* court, the result in the Psaropoulos case was "to separate him from [soon-to-be] family, friends, property, and career, and to remit him to starting a new life in a new land."[166] In other words, the nature of the liberty interest was the same in both cases.[167]

Finally, even if the Court clings to a formalistic, two-tiered mode of due process analysis in immigration cases, and if the Court refuses to recognize liberty or property interests for all aliens, it could still adopt a modified stake theory under which some aliens have liberty or property interests at risk in removal proceedings, and other aliens do

---

> The liberty interest at issue in this case is not merely whether Hamaya is to remain in INS custody; it is whether Hamaya is to be deprived of the freedom to reside, work, and travel *within the United States*, rights which Hamaya was formerly granted when he became a resident alien.

Hamaya v. McElroy, 797 F. Supp. 186, 191 (E.D.N.Y. 1992). Although the *Hamaya* court linked the rights to permanent residence, the case language provides additional support for the argument that the nature of the interest can be the same for aliens subject to expedited removal as it is for permanent resident aliens subject to exclusion proceedings. Thus, *Hamaya* provides additional case support for the position that an alien's stake qualifies as a liberty interest.

166 880 F.2d at 522.

167 One could attempt to distinguish permanent residents by arguing that the liberty interest identified in *Rafeedie* was a liberty interest created by expectations set forth in the immigration laws. In other words, the statutory grant of permanent resident status creates for the alien a reasonable expectation that he or she will not be separated from family, career, property, and friends without appropriate procedures, and other alien groups have no similar statutorily created expectations. *Cf.* GUNTHER, *supra* note 133, at 588-94, 597-98 (describing state law as a source of property and liberty interests in modern cases). The clear response to this argument is that immigration laws create the same sort of expectations for most aliens subject to expedited removal. Initially arriving immigrants, who are subject to expedited removal, *see infra* Part V.C.1, are merely one step removed from official permanent residence. *See* ALEINIKOFF ET AL., *supra* note 107, at 424-26. Thus, they have the same sort of statutorily created expectations as returning permanent residents. Furthermore, the nonimmigrant visa provisions of the immigration laws arguably create the same type of objective expectations for nonimmigrants. Granted, a nonimmigrant visa does not guarantee admission. *See id.* at 422. However, returning permanent residents are subject to the same grounds of inadmissibility as initially arriving nonimmigrants. *See id.* at 427 (observing that permanent resident status "will not *assure* re-entry"); 2 GORDON ET AL., *supra* note 19, § 63.01[3] (stating that "[g]rounds of inadmissibility now apply to any alien who has not been admitted into the United States"). Thus, the nature of the statutorily created expectations appears to be the same.

This statutorily created expectations argument is troublesome, however, when one considers undocumented aliens, especially those apprehended while trying to cross the border. The laws clearly create no reasonable expectations for undocumented aliens attempting to enter the United States. Therefore, this group may justifiably have a difficult time establishing a liberty or property interest at stake in removal proceedings, and the Supreme Court may thus adopt a "modified stake theory" under which undocumented aliens seeking entry do not satisfy the liberty or property interest requirement, and therefore, do not get to the next step, which is *Eldridge* balancing. *See infra* text accompanying note 168. The statutorily created expectations argument is less of a hurdle for undocumented aliens already inside the U.S. borders, because these individuals, by virtue of their physical presence, have stronger non-statutorily created ties that arguably warrant due process protection. *See infra* Part V.C.3.

not.[168] The D.C. Circuit appears to have adopted this approach in *Rafeedie*.[169] In reconciling the Supreme Court's harsh statement in *United States ex rel. Knauff v. Shaughnessy* with mainstream due process doctrine, the *Rafeedie* court stated:

> Before we address the question whether Rafeedie is entitled by the Constitution to any procedural safeguards when the Government would deprive him of his liberty, we pause to clarify a source of potential confusion in the relevant cases. The Supreme Court appeared at one time to suggest that, for aliens initially entering this country, the congressionally prescribed process is, *ipso facto*, due process. As we read *Knauff*, it does not rest on the proposition that an initial entrant is entitled to due process of law before he can be denied entry but that any process provided by statute, no matter how truncated, constitutes all the process due, by the mere fact that Congress prescribed no more. If that were the Court's implication, then the Due Process Clause would apply to, but have no operational significance for, the class of cases presented by aliens denied initial entry into the United States. That may have been the Framer's intent. The Supreme Court long ago determined, however, that the due process concept has a content independent of legislative or common law usage, and contemporary due process jurisprudence is built upon that foundation. *Rather than unsettling the edifice of due process in this casual manner, therefore, we read the* Knauff *Court merely to have been observing that an initial entrant has no liberty (or other) interest in entering the United States, and thus has no constitutional right to* any *process in that context . . . .*[170]

Under this approach, some aliens would be entitled to an *Eldridge* inquiry to determine whether they received the process that was due, while others would never get to *Eldridge*. Even this more limited approach would be an improvement over the traditional, territorial approach because the limited approach would provide some of the process benefits discussed below in Part V.D.

Having identified the basic tenets of the stake theory, the discussion now turns to performing a stake theory analysis of the expedited removal procedure. The next Section attempts to make a realistic forecast of how the Supreme Court would most likely adopt the theory.[171] Thus, this application may differ from what some stake theorists would argue is the proper application of the theory.

---

168 *Cf.* ALEINIKOFF ET AL., *supra* note 107, at 412 (engaging in Socratic dialogue regarding property or liberty interests that are potentially at stake for different classes of aliens seeking admission to the United States).

169 880 F.2d at 519-20.

170 *Id.* (citations omitted) (emphasis added).

171 The analysis proceeds under the assumption that all aliens subject to expedited removal have some liberty or property interest at stake. This assumption reflects the author's belief that the *nature* of the deprivation that the expedited removal procedure im-

C. The Stake Theory in Action: Analysis of the Expedited Removal Procedure

In order to determine whether the expedited removal procedure violates the due process rights of aliens subject to the procedure, one must evaluate the procedure under the *Eldridge* balancing test.[172] This Section looks to the Supreme Court's *Landon v. Plasencia* decision for guidance on *Eldridge* balancing in the immigration context. Although *Plasencia* dealt with permanent resident aliens, a class that is higher in the hierarchy for receipt of procedural due process than those aliens subject to expedited removal,[173] the opinion is useful as a point of reference. The analysis attempts to quantify interests as *high, medium,* or *low.* Recognizing that such quantifications mean little in the abstract, the analysis employs the ratings only as a rough means of comparing the various competing interests.

1. *As Applied to Initially Arriving Aliens*[174]

The Supreme Court's *Plasencia* opinion is the starting point for analysis of the expedited removal procedure as applied to initially arriving aliens. That decision provides some guidance in quantifying two of the *Eldridge* factors—the individual's interest and the government interest.[175] For returning permanent resident aliens, *Plasencia* stated that the individual interest is "without question, a weighty one."[176] In specifically identifying the individual interest, the Court pointed to two rights at stake for a returning permanent resident: (1) "the right 'to stay and live and work in this land of freedom'";[177] and (2) "the right to rejoin her immediate family, a right that ranks high among the interests of the individual."[178]

---

poses on an alien justifies *some* procedural due process protection. See *supra* notes 156-67 and accompanying text for arguments in favor of this position. Of course, the D.C. Circuit has expressly stated otherwise, at least with respect to initially arriving aliens. *Rafeedie*, 880 F.2d at 520; *see supra* text accompanying note 170. Furthermore, note that arriving, undocumented aliens will (perhaps justifiably) have the most difficulty satisfying the liberty/property threshold. *See supra* note 167.

172 The stake theory uses *Eldridge* balancing to determine what process is due. *See supra* text accompanying note 143. For a discussion of *Eldridge* balancing, see *supra* text accompanying notes 134-36.

173 *See* ALEINIKOFF ET AL., *supra* note 107, at 635 (recognizing that "lesser constitutional protections apply for initial entrants than resident aliens").

174 For a discussion of which aliens constitute "initially arriving aliens" for purposes of this Note, see *supra* notes 23-24 and accompanying text.

175 Before remanding for ultimate balancing by the lower court, Justice O'Connor roughly quantified the individual interest and the government interest. Landon v. Plasencia, 459 U.S. 21, 34 (1982).

176 *Id.*

177 *Id.* (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945)).

178 *Id.*

In comparing the weight of initially arriving aliens' interests to the weight of the interests of the returning permanent resident in *Plasencia*, one must first determine the *type* of initial entrant. T. Alexander Aleinikoff draws a distinction between immigrant and nonimmigrant initial entrants.

> [T]hese classes of aliens [immigrants and nonimmigrants] present distinct issues. To be granted an immigrant visa an alien must normally demonstrate that he or she has a close family relative in this country or is coming to perform a needed job. Generally, someone in the United States—a relative or employer—must have filed a petition on the alien's behalf. Aliens arriving with immigrant visas are entitled to stay as long as they wish (subject to deportation for misconduct). In short, they usually come to this country with a preexisting stake awaiting them and with an intention to make the United States their permanent home. Most aliens entering the country with non-immigrant visas, on the other hand, come here as temporary visitors with a fixed time limit on their stays. Many must demonstrate that they have "no intention of abandoning" their residence in a foreign country. To be sure, non-immigrants may come with important business to conduct or studies to pursue; but generally the harm imposed upon a non-immigrant wrongfully denied entry is likely to be far less than an immigrant wrongfully excluded.[179]

Thus, initial entrants with immigrant visas have a higher stake than those with nonimmigrant visas.[180] At the same time, all initial entrants are distinguishable in an important way from the returning permanent resident alien in *Plasencia*: initial entrants have not yet been admitted to the United States. This lack of prior admittance means that initial entrants have not had the opportunity to establish the same degree of ties to the United States that returning permanent residents are likely to have established.[181] Taking all of these considerations into account, we can characterize the personal interest of initially arriving, immigrant visa holders as *medium*, and the personal interest of

---

179 Aleinikoff, *supra* note 130, at 246-47 (footnotes omitted).

180 One could further distinguish undocumented initial entrants from both immigrants and nonimmigrants. *See id.* Because initially arriving nonimmigrants have the lowest possible individual interest on the *Eldridge* scale, *see infra* text accompanying note 182, this Note treats undocumented initial entrants the same as initial entrants with nonimmigrant visas. In the future, once plenary power fades from judicial memory, *see infra* text accompanying note 219, the distinction between nonimmigrant visaholders and undocumented aliens will likely become more important. *See supra* note 167.

181 *See* ALEINIKOFF ET AL., *supra* note 107, at 635 (stating that "lesser constitutional protections apply for initial entrants than resident aliens"); Aleinikoff, *supra* note 130, at 245 ("An alien seeking entry for the first time is likely to be able to demonstrate far fewer existing ties to the community.").

initially arriving, nonimmigrant visa holders (and undocumented aliens[182]) as *low.*

In weighing the government interest, *Plasencia* provides valuable insight into the Court's likely approach to *Eldridge* balancing under a stake analysis. Describing the government's interest, Justice O'Connor stated, "The Government's interest in efficient administration of the immigration laws at the border . . . is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the Executive and the Legislature."[183] This articulation of the government's interest is extremely important for a stake analysis because it signals incorporation of the plenary power doctrine in *Eldridge* balancing. If the Supreme Court adopts a stake theory but imports plenary power into the government side of the balance, aliens will face more difficulty convincing courts that the *Eldridge* balance requires additional process.

Whether the Supreme Court will hold that plenary power should weigh on the government's side of the *Eldridge* balance under a stake theory is a difficult question. Lower courts that have subsequently applied *Plasencia* have not weighed plenary power on the government's side of the balance.[184] Despite the Supreme Court's failure to correct these omissions, the Court is likely to use *Eldridge* balancing to import plenary power into its stake theory in order to reduce the impact of the doctrinal change by maintaining some level of deference to the political branches in immigration regulation.[185] Assuming that the Court will import plenary power into the *Eldridge* balancing, the government interest in maintaining the existing expedited removal procedure for initial entrants is *high.* This factor remains constant for all aliens subject to expedited removal because the plenary power doctrine has traditionally applied to all issues of alien admission and removal.[186]

The final *Eldridge* factor is the procedural factor, that is, "the risk of an erroneous deprivation of such interest through the procedures

---

182 For an explanation of why undocumented initially arriving aliens are grouped together with initially arriving, nonimmigrant visaholders, see *supra* note 180.

183 *Plasencia,* 459 U.S. at 34.

184 *See, e.g.,* Rafeedie v. Immigration & Naturalization Serv., 880 F.2d 506, 525 (D.C. Cir. 1989) (articulating the government's interest in *Eldridge* balancing as "the interests of the Government, on behalf of the public, in summarily excluding terrorists and other undesirables from our shores and in avoiding the cost of additional safeguards"); Hamaya v. McElroy, 797 F. Supp. 186, 193 (E.D.N.Y. 1992) (failing to mention plenary power as part of government's interest); Rafeedie v. Immigration & Naturalization Serv., 795 F. Supp. 13, 19-20 (D.D.C. 1992) (failing to acknowledge plenary power of political branches in area of immigration regulation as part of government interest).

185 *See infra* text accompanying notes 220-21.

186 *See supra* Part III.

used, and the probable value, if any, of additional or substitute procedural safeguards."[187] This factor remains constant for all alien groups subject to expedited removal for two reasons: (1) the two grounds of inadmissibility that trigger expedited removal are identical for all alien groups; and (2) the same procedure is applied to all alien groups subject to expedited removal.[188] Given that the expedited removal procedure vests the decision of admissibility in the hands of an individual immigration inspector, and that the law bars administrative and judicial review of the inspector's determination,[189] the risk of erroneous deprivation and the value of additional procedures is *high.* One could argue that the grounds for expedited removal—lack of documents or fraud—require simple, straightforward determinations whose accuracy would not improve with increased procedures.[190] This argument has three flaws. First, the determinations can be complicated.[191] Second, anecdotal evidence has already demonstrated that inspectors do make mistakes in their determinations of whether aliens should be expeditiously removed.[192] Third, the existing procedures fail to provide any safeguard against arbitrary action by immi-

187 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

188 *See supra* Part II.A. Remember that this Note deals only with those aliens for whom no administrative or judicial review is available. *See supra* notes 32, 35-36.

189 *See supra* Part II.A. The Immigration and Naturalization Service has superimposed extra procedural safeguards over the minimal statutory procedures. *See* 8 C.F.R. § 235.3(b)(7) (1998) (providing that "[a]ny [expedited] removal order entered by an examining immigration officer . . . must be reviewed and approved by the appropriate supervisor before the order is considered final," and that "[s]uch supervisory review shall not be delegated below the level of second line supervisor").

190 *Cf.* Aleinikoff, *supra* note 130, at 247 (stating that, for undocumented aliens, "another of the [*Eldridge*] factors applies . . .: the likelihood that alternative procedures will produce fewer errors").

191 *See, e.g.*, 2 GORDON ET AL., *supra* note 19, § 71.04[2][a][ii][B] (describing a number of different tests for determining whether misrepresentation is material under immigration laws).

192 New York Times columnist Anthony Lewis describes the case of Meng Li, a Chinese executive holding a U.S. nonimmigrant business visa. Anthony Lewis, *It Can Happen Here*, N.Y. TIMES, Sept. 8, 1997, at A19. Li had visited the United States twice before under her visa, and sought to enter a third time to conduct additional business. *See id.* In Anchorage, Alaska, the immigration officer determined that Li was attempting to enter the country by fraud or with improper documents. *See id.* The inspector apparently based his determination on the fact that Li had applied for, and been denied, another type of visa the previous winter. *See id.* However, Li's other visa was still valid, and as noted by Li's attorney, "it is legal for an alien coming here to use a valid visa when another has been denied, so long as the alien uses it for the designated purpose." *Id.* Beyond making an apparently erroneous legal determination, the inspector based that decision on erroneous factual information: the Immigration and Naturalization Service had approved Li's new visa following its original denial *before* Li arrived in Anchorage. *See id.* Li's story shows that a host of factors can cause an erroneous decision to expeditiously remove an alien, and that the additional supervisory review that the regulations superimpose, *see supra* note 189, does not necessarily reduce such errors.

gration inspectors.[193] Given this potential for both error and abuse, additional procedures would clearly improve accuracy.

In sum, *Eldridge* balancing concludes, on the alien's side of the balance, that the individual's interest is medium or low (depending on the type of initial entrant), and the procedural factor is high. On the government's side of the balance, assuming that a court will import plenary power to favor the government *a la Plasencia*, the government's interest is high. For initial entrants holding immigrant visas, the combined individual and procedural factors (medium and high, respectively) outweigh the high government interest, leading to the conclusion that the procedure is unconstitutional. For nonimmigrant initial entrants (and undocumented entrants), who have a low personal interest, the constitutionality of the expedited removal procedure is a closer call. In the end, the Court is likely to determine that the significant weight of the government's interest in regulating immigration, along with the low degree of individual interest, makes the expedited removal procedure constitutional as applied to initially arriving, nonimmigrant aliens.[194]

2. *As Applied to Returning Aliens*[195]

The previous subsection's analysis simplifies the examination of the expedited removal procedure as applied to returning aliens. First, we know that the government's interest in maintaining the existing procedures—especially with the importation of plenary power—is high. Second, we know that the risk of erroneous deprivation and the benefit of additional procedures are also high. Thus, the pivotal fac-

---

193 Columnist Anthony Lewis describes the psychology of immigration inspectors, and the resulting potential for abuse:

> [M]istreatment [of aliens seeking admission] seems to reflect an endemic problem in the I.N.S. Like policemen hardened by the viciousness they see in criminals, some immigration agents generalize from fraudulent aliens to a skepticism of all. The great power given to individual agents by the new law increases the chance of abuse.

Anthony Lewis, *Vigilance and Fairness*, N.Y. TIMES, Sept. 22, 1997, at A27. Again, the supervisory review that the regulations impose, *see supra* note 189, does little to prevent arbitrary decisions, because the supervisor may share the same biases as the examining inspector, or may base his or her determination on facts that the initial inspector has provided.

194 This result is contrary to the conclusion of stake theorist David Martin:

> [I]n most circumstances, aliens at the threshold of entry probably may insist upon the following: an unbiased decision-maker, notice of the proceedings and of the general grounds asserted by the government for denial of admission; a meaningful opportunity to dispute or overcome those grounds, orally or in writing; and a statement of reasons, even if oral and summary, for any adverse decision.

Martin, *supra* note 11, at 218 (footnotes omitted).

195 For a discussion of which aliens constitute "returning aliens" for purposes of this Note, see *supra* text accompanying notes 23-24.

tor for returning aliens in the *Eldridge* analysis is the individual interest.

Unlike the group of initially arriving aliens, the returning alien group includes only nonimmigrant visaholders.[196] Returning aliens (i.e., nonimmigrants) have a greater interest at stake than their initially arriving, nonimmigrant counterparts for the following reason. Returning aliens are distinguishable from initially arriving nonimmigrants because they have been admitted to the country before. Thus, like the returning resident alien in *Plasencia*, returning nonimmigrant aliens, by virtue of their prior legal presence in the United States, have had the opportunity to establish ties with the United States.[197] Although these ties do not reach the same level as those of the permanent resident, they can nevertheless be strong, as illustrated by the previously discussed story of John Psaropoulos.[198] Thus, we can characterize the stake of the returning alien as *medium*. This higher stake makes the expedited removal procedure unconstitutional as applied to returning nonimmigrant aliens, because the individual's interest and the procedural factor (medium and high, respectively) outweigh the government's interest (high).

3. *As Applied to Present Aliens*[199]

As with the analyses in the previous two subsections, the high government interest in maintaining the existing procedure, and the high risk of erroneous deprivation in conjunction with the high value of additional procedures, create a deadlock. Thus, the individual interest is the dispositive factor in the *Eldridge* balancing. Unfortunately, quantifying this factor is a difficult task. Stake theorist David Martin makes the broad argument that all aliens who enter without inspection and admission should be treated for constitutional purposes as first-time applicants.[200] Coupling Martin's approach with the previous analysis of initially arriving aliens, present aliens' ties to the community would be *low*.[201]

---

196 Immigrant visaholders, once admitted, become permanent resident aliens, *see* ALEINIKOFF ET AL., *supra* note 107, at 425-26, and thus fall outside the purview of the barebones expedited removal procedure. *See supra* note 32. Undocumented aliens, who were also included in the initially arriving category, could not have been admitted to the United States previously because they lacked documents, and thus cannot be returning aliens as that phrase is used in this Note.

197 *See* Martin, *supra* note 11, at 191-92 (distinguishing, for procedural due process purposes, "regular nonimmigrants who have been among us for awhile" from first-time applicants for admission).

198 *See supra* notes 160-67 and accompanying text.

199 For a discussion of which aliens constitute "present aliens" for purposes of this Note, see *supra* notes 23, 25-26 and accompanying text.

200 Martin, *supra* note 11, at 230-34.

201 Present aliens would not have immigrant or nonimmigrant visas, so they would be assimilated to the status of undocumented initial entrants. *See supra* note 180.

However, Martin's position has problems. On a fundamental level, one could argue that a present alien can acquire siguificant ties to the United States. Such an alien might be employed (albeit illegally), and have a family, friends, and property in the United States. To completely ignore these ties would propagate a legal fiction.[202] Indeed, by limiting the application of the expedited removal to present aliens who have been in the United States less than two years,[203] Congress arguably implicitly acknowledged that present residents who have been in the United States longer than two years can establish ties sufficient to justify additional process in removal proceedings.

Furthermore, when Martin proffers his position on clandestine entrants, he assumes that all aliens, including initially arriving aliens, are entitled to more process than the expedited removal procedure provides.[204] Unfortunately, as this stake analysis indicates, courts may not agree that initially arriving aliens deserve more process. Using the above stake theory analysis for arriving nonimmigrants, Martin's argument could lead to a conclusion that he would likely deem unacceptable: physically present aliens subject to expedited removal are entitled to no additional process.

Martin's position appears to be driven, at least in part, by concern about an inconsistency in the traditional, territorial framework.[205] Commentators point out that under the traditional approach, the clandestine entrant who is caught two hours after sneaking into the country is entitled to due process, but the initial entrant who abides by the rules is entitled ouly to whatever process Congress deems fit.[206] In identifying the inconsistency, stake theorists present an example most favorable to their position. Examples far less favorable to stake theorists' positions do exist. Imagine a present alien who has been here for one year and 364 days, and who has managed, through menial labor, to support his or her spouse, child, and elderly grandparent and who, during his or her time here, has developed strong relationships with individuals in the United States. Should that individual be

---

202 Commentators, in turn, have criticized immigration law concepts, such as the "entry fiction," that employ the same sort of metaphysical classifications. *See, e.g.*, Weisselberg, *supra* note 11, at 953-54 (discussing the entry fiction and the parole power).

203 *See supra* text accompanying note 34.

204 Martin, *supra* note 11, at 218-19 (discussing minimum procedures that due process mandates for first-time applicants for admission).

205 *Id.* at 230 ("Indeed, to give [clandestine entrants] a better procedural position would only perpetuate the most glaring anomaly of the *Knauff-Mezei* doctrine. Such a result is not required.") (footnote omitted). For an articulation of that anomaly, see *infra* text accompanying note 206.

206 *See, e.g.*, ALEINIKOFF ET AL., *supra* note 107, at 629-30.

treated the same as a first-time applicant for admission for constitutional purposes?[207]

Given the realities of the situation, a better, and more probable, solution would recognize that present aliens have ties to the country sufficient to qualify as *medium* personal interests in *Eldridge* balancing.[208] Under such an approach, the *Eldridge* balance comes out in favor of additional process for present aliens (medium personal interest plus the high procedural factor outweigh the high government interest).

In sum, under the stake theory, the expedited removal procedure is unconstitutional as applied to returning, initially arriving immigrant, and present aliens. The only group that may not be able to mount a successful due process attack on the expedited removal procedure is initially arriving nonimmigrant aliens. Having applied the stake theory, the next Section explores the value of the stake theory in terms of the results the theory provides and its method of analysis.

D. The Value of the Stake Theory

The stake theory is a marked improvement over the Supreme Court's traditional approach to aliens' due process claims in terms of both constitutional conclusions and method of analysis. From the standpoint of conclusions, the stake theory provides more due process protection than the traditional, territorial theory. Some may immediately ask: "Why is more protection necessarily better?" One need look no further than the scant procedures of the new law's expedited removal provisions to find the answer. The expedited removal procedure provides virtually no protection against erroneous or arbitrary determinations of individual immigration inspectors.[209] Of course, efficiency considerations warrant admission and removal procedures that fall short of full, adjudicatory-type hearings.[210] However, fairness requires some process. The stake theory, unlike the traditional approach, ensures that most aliens will receive some process in addition

---

207 If the Court really wants to avoid the inconsistency that irks stake theorists, then the Court should simply say that present aliens, as clandestine entrants, do not have any liberty or property interest because, assuming that they have no documentation (i.e., visa), they can have no justified, statutorily based expectation that they are entitled to enjoy the fruits of their time spent in the United States. *See supra* note 167; *supra* text accompanying note 168.

208 This solution is "more probable" because, by adopting such an approach, the Court would maintain the pre-IIRIRA state of constitutional law for present aliens, that is, that they, due to their status as deportable, are entitled to due process protection. *See, e.g., supra* text accompanying note 68.

209 *See, e.g., supra* notes 192-93 and accompanying text.

210 *See* Martin, *supra* note 11, at 180-82 (suggesting that the sheer number of applicants for admission should affect procedural considerations).

to the unreviewable determination of an individual immigration inspector.

The real allure of the stake theory, however, is its improved method of analysis. For years, immigration law has been a wart on the face of mainstream constitutional law. Almost thirty-five years ago, at the height of the plenary power rhetoric, Henry Hart tagged the traditional, territorial approach as "patently preposterous."[211] The stake theory vastly improves on this method of analysis. Rather than categorically deferring to the determinations of Congress as the traditional approach does, the stake theory engages in a more nuanced analysis of aliens' due process claims. By doing so, the stake theory makes immigration law comport with contemporary, mainstream due process doctrine,[212] and forces court opinions addressing aliens' due process claims to be "intellectually respectable."[213]

At this point, traditionalists may sound their alarms and shout that the stake theory will completely undermine the political branches' power to regulate immigration.[214] A number of factors suggest that these alarmists should calm down. First, the political branches will continue to have authority over immigration regulation. The stake theory simply means that this power, like all other government powers, will be subject to judicial review for constitutional violations.[215] Second, as a number of commentators have noted, the political question doctrine is available to provide the appropriate level of judicial deference to political branch immigration actions when those actions involve thorny matters of foreign policy.[216] Third, given the likely importation of the plenary power doctrine into the government's side of the *Eldridge* balance,[217] courts will continue to give weight to the political branches' power in immigration regulation.[218]

---

211 Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392 (1953).

212 For a discussion of the division between immigration law's traditional due process framework and the Court's general contemporary due process doctrine, see *supra* Part V.A.

213 Hart, *supra* note 211, at 1395; *see also* Motomura, *supra* note 46, at 1704 (stating that the abandonment of the plenary power doctrine would make courts "reach their results in a more reasoned and deliberate way").

214 *See, e.g.*, Weisselberg, *supra* note 11, at 1010 ("A more troublesome criticism is that bringing all immigrants within the reach of the Due Process Clause, and affording judicial review, would diminish the executive's power over foreign affairs.").

215 *See* Aleinikoff, *supra* note 130, at 870-71 ("Other congressional powers have flourished . . . despite the judiciary's active and creative development of constitutional rights on behalf of individuals and groups. There is no reason that immigration law cannot thrive within the constitutional boundaries established for other delegated and implied federal powers.").

216 *See, e.g.*, Legomsky, *supra* note 13, at 261-63; Weisselberg, *supra* note 11, at 1011-20.

217 *See supra* text accompanying notes 183-85.

218 Indeed, Part V.C's conclusion that the expedited removal procedure is unconstitutional as applied to most aliens is not an indication that the stake theory equals judicial

Whether the Court's expected importation of plenary power into the stake theory is desirable bears addressing. The weight that courts give to plenary power in *Eldridge* balancing will play a large role in the substantive impact of the new theory. If courts use plenary power as an insurmountable weight on the government's side of the *Eldridge* balance, then adoption of the stake theory will be a change only in form, and not in substance. If, on the other hand, the plenary power doctrine's extreme form of judicial deference fades from judicial memory, and plenary power becomes merely another factor to weigh in *Eldridge* balancing, then the adoption of the stake theory will generate the positive conclusions and methodological shift discussed above.[219]

Initially, the Court's use of plenary power in the *Eldridge* balance may be prudent for two reasons. First, such an approach best comports with the language of *Eldridge*, which directs courts to consider "the [governmental] function involved" when calculating the government's interest.[220] Given that the function involved is an area in which the political branches have traditionally enjoyed unfettered regulatory power, some additional weight on the government's side of the balance is appropriate. Second, the use of plenary power on the government's side of the balance will reduce the risk that courts will overreact when they begin to adjudicate aliens' due process claims. T. Alexander Aleinikoff articulates the risk, and the cost of such judicial overreaction, as follows:

> In most areas of law, constitutional due process has developed as a dialogue between the courts and the other branches of government. As notions of what constitutes fundamental fairness have evolved over time, the courts have "persuaded" legislators and administrators to add procedural protections when important liberty or property interests are at stake. . . .
>
> This growth of process is less likely when the Supreme Court announces that it has no role to play. . . . The clear signal of *Knauff* and *Mezei* is that the government is free—at least as to initial entrants and undocumented aliens at the border—to provide the procedures it deems appropriate. Given [efficiency considerations], it is not unreasonable to assume that Congress will opt for less rather than more process. More importantly, the border officials will search for ways to avoid the procedures that Congress mandates.
>
> . . . .
>
> Lower courts will obey *Knauff* and *Mezei* for a long time, leading government officials down the garden path. But when the gov-

activism. Rather, it is a testament to the total lack of procedural protection provided under the expedited removal provisions.

219 *See supra* text accompanying notes 209-13.

220 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

> ernment conduct becomes so outrageous, so obviously unfair, federal judges will put a stop to it. *In attempting to do so, however, they will not be able to simply add another flower in the garden of due process, because due process has never taken root at the border. Thus the courts* [*will be*] *forced to leap in with both feet, demanding costly and intrusive procedures that make control of the borders and deportation of aliens considerably more difficult.*
>
> This is hardly a healthy way for due process to grow . . . .[221]

By incorporating plenary power into the balance, courts will be less likely to "leap in with both feet, demanding costly and intrusive procedures."[222] Thus, the due process dialogue will have a better chance of developing smoothly and more efficiently. Remember, however, that for the stake theory to have any substantive impact, plenary power cannot act as a two-ton weight on the *Eldridge* scale.

In summary, the IIRIRA provides the opportunity to jettison the traditional approach in favor of the far more desirable stake theory. As the application of the theory shows, the implementation of the theory will require more effort from courts, for they will have to work through a balance of competing interests in order to determine whether procedures are fair. This increased responsibility, however, is no reason to shy away from the stake theory. After all, courts already engage in such a balancing exercise to resolve the due process claims of citizens and permanent residents. To allow courts to do anything less for alien claims is to ignore the language of the Due Process Clause, which unequivocally protects *persons.*

VI

ANALYSIS OF THE SUBSEQUENT PROSECUTION OF ANY EXPEDITIOUSLY REMOVED ALIEN UNDER *UNITED STATES V. MENDOZA-LOPEZ*[223]

The previous Parts analyzed the IIRIRA's expedited removal procedure, and argued that the procedure provides the Court with an ideal opportunity to change its analytical approach to aliens' due process claims. In so doing, the previous Parts noted that the Court's traditional, territorial approach treats some aliens as nonpersons under the Due Process Clause.

This Part shifts the focus of the Note to the subsequent prosecution of *any* alien who has violated an expedited removal order. The

---

221 Aleinikoff, *supra* note 130, at 258-59 (emphasis added) (footnotes omitted).

222 *Id.* Note that plenary power importation creates immediate casualties: initially arriving nonimmigrants may be unable to raise a successful due process claim against the procedures. *See supra* Part V.C.1. Hopefully, as judicial memory of plenary power fades, the weight afforded to plenary power will decrease, and the stark expedited removal procedures will become unacceptable as applied to arriving nonimmigrants.

223 481 U.S. 828 (1987) [hereinafter *Mendoza-Lopez II*].

analysis reveals that at the moment the government attempts to prosecute an alien, the person/nonperson distinction of immigration law's traditional due process approach falls away. Under the Supreme Court's holding in *United States v. Mendoza-Lopez*, *any* alien who is prosecuted for the violation of an expedited removal procedure is a person entitled to protection under the Due Process Clause.[224] As established below, by coupling a bar on collateral attacks with a bar on judicial review, the subsequent prosecution procedure violates an alien's due process rights.

A. *United States v. Mendoza-Lopez*

1. *Facts and Procedural History*

In *Mendoza-Lopez*, two Mexican nationals were charged with returning to the United States following their deportation in violation of 8 U.S.C. § 1326.[225] The defendants pled the invalidity of the prior deportation order as a defense in the § 1326 prosecution.[226] After ruling that the defendants could collaterally attack their previous deportation orders in the § 1326 prosecution, the district court dismissed the indictments, concluding that the defendants "had not made knowing and intelligent waivers of their rights to apply for suspension of deportation or their rights to appeal."[227]

On appeal, the United States Court of Appeals for the Eighth Circuit acknowledged a circuit split on the issue of whether an alien could collaterally attack the validity of a deportation order in a § 1326 prosecution.[228] In affirming the District Court's dismissal, the Eighth Circuit sided with those circuits that had read into § 1326 a requirement that the deportation order be "lawful."[229] Under this reading, the subsequent prosecution statute itself provided a basis for collateral attack of the underlying deportation order.[230]

The Court of Appeals also based its holding on notions of fundamental fairness.[231] The Eighth Circuit agreed with the district court that the deportation proceedings had violated due process, stating that, "[b]ecause the defendants did not fully understand the proceed-

---

224 *Id.* at 837-39 (holding that due process guarantees an alien some form of judicial review of deportation order before that order can be used in a criminal prosecution for violation of the order).

225 *Id.* at 830.

226 *See id.* at 831 ("They contended that the Immigration Law Judge inadequately informed them of their right to counsel at the hearing, and accepted their unknowing waivers of the right to apply for suspension of deportation.").

227 *Id.* at 831-32.

228 United States v. Mendoza-Lopez, 781 F.2d 111, 112 (8th Cir. 1985) [hereinafter *Mendoza-Lopez I*], *aff'd Mendoza-Lopez II*, 481 U.S. at 828 (1987).

229 *Id.*

230 *See id.*

231 *Id.* at 113.

ings, the hearing was fundamentally unfair, and the deportation order was obtained unlawfully. Thus, it cannot stand as a material element forming the basis of the charges against the defendants."[232] The Supreme Court granted certiorari to resolve the split among the circuits.[233]

2. *Holding*

The Supreme Court held that some form of judicial review of a deportation order must be available before that order can be used "to establish an element of a criminal offense."[234] The Court explicitly answered the collateral attack question by stating that "[d]epriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum," that the alien be able to collaterally attack the deportation order in the subsequent § 1326 prosecution.[235]

3. *Rationale*

Writing for the majority, Justice Marshall began by framing the issue of the case. After acknowledging that the Court was addressing a question left open almost forty years earlier in *United States v. Spector*,[236] he stated:

> Today, we squarely confront this question in the context of § 1326, which imposes a criminal penalty on any alien who has been deported and subsequently enters, attempts to enter, or is found in, the United States. The issue before us is whether a federal court must *always* accept as conclusive the fact of the deportation order, even if the deportation proceeding was not conducted in conformity with due process.[237]

Justice Marshall went on to conclude that nothing in the language or history of § 1326 suggested that the statute itself provided for collateral attack on the validity of the underlying deportation order in a § 1326 prosecution.[238] In so holding, the Court rejected the "lawful" deportation requirement that the Eighth Circuit had read into § 1326.[239] Congressional intent, however, would not control the ultimate disposition of the case.[240]

---

232 *Id.*
233 *Mendoza-Lopez II*, 481 U.S. at 833.
234 *Id.* at 839.
235 *Id.*
236 343 U.S. 169 (1952).
237 *Mendoza-Lopez II*, 481 U.S. at 833-34.
238 *Id.* at 834-37.
239 *See id.* at 834-35.
240 *See id.* at 837 ("That Congress did not intend the validity of the deportation order to be contestable in a § 1326 prosecution does not end our inquiry.").

Moving on to constitutional considerations, Justice Marshall declared that a statute that allows a court to impose "a criminal penalty for reentry after *any* deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been . . . does not comport with the constitutional requirement of due process."[241] After expressing concern over any scheme that allows criminal prosecution for violation of an administrative order and bars collateral attack of that order in the criminal proceeding, Marshall stated that, "at a minimum, the result of an administrative proceeding may not be used as a conclusive element of a criminal offense where the judicial review that legitimated such a practice in the first instance has effectively been denied."[242]

Having established the rule of law, Justice Marshall applied it to the facts of the case.[243] He concluded that the violation of the aliens' due process rights in the deportation proceeding "amounted to a complete deprivation of judicial review of the determination" of deportability.[244] Thus, he continued, the government could not use the deportation order to establish an element of the § 1326 offense.[245]

---

241 *Id.*

242 *Id.* at 838 n.15.

243 *Id.* at 839-40.

244 *Id.* at 840.

245 *Id.* Justice Marshall appears to have resolved two issues at once. Rather than separately determining (1) whether judicial review had been effectively denied, thus requiring collateral attack; and (2) the merits of the collateral attack, that is, whether the underlying deportation order was valid and could thus be used as an element of the § 1326 crime, Marshall determined that because judicial review had been completely denied, the government could not use the deportation order as an element of the § 1326 crime. *Id.*

This conflation has led to inconsistent applications of *Mendoza-Lopez* among the circuits. The majority of circuits have held that an alien must make two showings in order to mount a successful collateral attack on a deportation order in a subsequent prosecution: "[T]he alien must show not only that he was effectively deprived of his right of direct appeal, but also that the administrative proceedings were fundamentally unfair in some respect that would have entitled him to relief on direct appeal." United States v. Fares, 978 F.2d 52, 57 (2d Cir. 1992). The Eighth Circuit, however, has held that effective denial of judicial review in the deportation proceeding is alone sufficient grounds for barring the use of the order in a § 1326 prosecution. United States v. Santos-Vanegas, 878 F.2d 247, 252 (8th Cir. 1989). Some commentators have argued that the Eighth Circuit's holding is correct, and that the other circuits are imposing an additional burden on aliens contrary to the Court's holding in *Mendoza-Lopez*. *See, e.g.*, Noble F. Allen, Note, *Habeas Corpus and Immigration: Important Issues and Developments*, 4 GEO. IMMIGR. L.J. 503, 535 (1990) (stating that "[the two-step approach] is unsupported by precedent; nowhere in the Supreme Court's decision is there a two-step approach for determining whether an alien can collaterally attack a prior deportation proceeding").

Notwithstanding Justice Marshall's consolidation of the issues, the approach of the majority of the circuits appears intuitively correct. To say that an alien can collaterally attack a deportation order in a subsequent prosecution is different from saying that the order is invalid. Rather, allowing the alien to collaterally attack the deportation order means that the alien can question the validity of the order in the subsequent prosecution. Justice Marshall's consolidation of the issues was probably prompted by the government's request that the Court "assume that respondents' deportation hearing was fundamentally

In the final section of the majority opinion, Justice Marshall went to great lengths to distinguish the circumstances of *Lewis v. United States*[246] from the situation presented in *Mendoza-Lopez*. Justice Marshall explained that in *Lewis*, the Court held that "Congress may constitutionally make it a felony for convicted felons—irrespective of the legality of their convictions—to deal in or possess firearms."[247] The government argued by analogy that *Lewis* established the constitutionality of the procedure at issue.[248] Justice Marshall identified a sharp distinction between the two cases: the convicted felon in *Lewis*, unlike the alien in *Mendoza-Lopez*, had means available for obtaining judicial review of the prior conviction.[249] Thus, *Lewis* served to drive home the majority's holding:

> What was assumed in *Lewis*, namely the opportunity to challenge the predicate conviction in a judicial forum, was precisely that which was denied to respondents here. Persons charged with crime[s] are entitled to have the factual and legal determinations upon which the convictions are based subjected to the scrutiny of an impartial judicial officer. *Lewis* does not reject that basic principle, and our decision today merely reaffirms it.[250]

4. *Dissents*

Although Chief Justice Rehnquist conceded that "there may be exceptional circumstances where the Due Process Clause prohibits the Government from using an alien's prior deportation as a basis for . . . liability under § 1326," he argued that "respondents have fallen far short of establishing such exceptional circumstances here."[251] He specifically disagreed with the majority's conclusion that the aliens had been completely denied their right to appeal.[252] By so disagreeing, the Chief Justice sidestepped the collateral attack issue because the majority's holding assumed that the aliens had been effectively denied judicial review in the deportation proceeding. Rehnquist would have allowed use of the prior deportation orders against the aliens in the § 1326 prosecution.[253]

In a separate dissent, Justice Scalia directly disputed the Court's holding that due process requires an opportunity for the alien to at-

---

unfair in considering whether collateral attack on the hearing may be permitted." *Mendoza-Lopez II*, 481 U.S. at 839-40.

246 445 U.S. 55 (1980).

247 *Mendoza-Lopez II*, 481 U.S. at 847 (Scalia, J., dissenting) (citing Lewis v. United States, 445 U.S. 55 (1980)).

248 *See id.* at 840-41.

249 *Id.* at 841.

250 *Id.* at 841-42.

251 *Id.* at 842 (Rehnquist, C.J., dissenting).

252 *Id.* at 844-45 (Rehnquist, C.J., dissenting).

253 *Id.* at 846 (Rehnquist, C.J., dissenting).

tack the unreviewable deportation order in the subsequent prosecution: "[N]either *Lewis* nor any of the other cases relied upon by the Court squarely holds that the Due Process Clause invariably forbids reliance upon the outcome of unreviewable administrative determinations in subsequent criminal proceedings."[254] Alternatively, Justice Scalia stated that even if he did think the availability of judicial review was relevant for due process purposes, the present facts did not establish the unavailability of such review.[255] He stated that "[t]here is a world of difference . . . between denial of a right to appeal and failure to assure that parties understand the available grounds for appeal and forgo them in a 'considered' fashion."[256] Like Rehnquist, Justice Scalia would have upheld the aliens' convictions.[257]

B. Application of *Mendoza-Lopez* to the IIRIRA's Expedited Removal and Subsequent Prosecution Procedure

The IIRIRA's provisions authorizing the subsequent prosecution for the violation of an expedited removal order are unconstitutional. Given that expedited removal orders are not judicially reviewable, *Mendoza-Lopez* establishes that the alien must be able to collaterally attack the validity of the underlying deportation order in the subsequent § 1326 prosecution.[258] The IIRIRA's fatal flaw is that it bars collateral attack of the expedited removal order in the subsequent prosecution.[259] Thus, the subsequent prosecution procedure runs counter to the express constitutional holding in *Mendoza-Lopez*: "[A] collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceeding effectively eliminates the right of the alien to obtain judicial review."[260]

Any grounds for distinguishing the subsequent prosecution procedures of the IIRIRA from the facts of *Mendoza-Lopez* magnify, rather than reduce, the due process violation. *Mendoza-Lopez* involved an issue of waiver: the alien alleged, and the Court agreed, that the aliens had been "effectively [denied] the right . . . to obtain judicial review."[261] In contrast, the IIRIRA's scheme itself expressly precludes judicial review of the expedited removal order.[262] The majority hold-

254 *Id.* at 848 (Scalia, J., dissenting).
255 *Id.* (Scalia, J., dissenting).
256 *Id.* at 849 (Scalia, J., dissenting).
257 *See id.* at 850 (Scalia, J., dissenting).
258 *See supra* text accompanying notes 234-35.
259 *See supra* notes 39-40 and accompanying text.
260 *Mendoza-Lopez II*, 481 U.S. at 839.
261 *Id.* at 835.
262 *See supra* note 35 and accompanying text.

ing in *Mendoza-Lopez* clearly indicates that the IIRIRA's bar on collateral attacks violates the alien's due process rights.

Furthermore, the distinction between the waiver situation in *Mendoza-Lopez* and the statutory denial of collateral attacks under the IIRIRA should capture the votes of Chief Justice Rehnquist and his fellow dissenters.[263] Given that the lack of judicial review is a product of the statute,[264] Chief Justice Rehnquist loses his argument that the aliens did not necessarily suffer from a denial of their right to appeal.[265] Indeed, the aliens have no right to appeal under the present scheme. Without that basis for dissent, Chief Justice Rehnquist would have to concede that the IIRIRA's subsequent prosecution scheme creates an "exceptional circumstance[ ] where the Due Process Clause prohibits the Government from using an alien's prior [order] as a basis for imposing criminal liability under § 1326."[266]

The distinction between waiver of appeal and a complete bar also weakens Justice Scalia's argument. He states:

> [E]ven if I believed the availability of "effective judicial review" to be relevant . . . . [t]here is a world of difference . . . between denial of a right to appeal and failure to assure that parties understand the available grounds for appeal and forgo them in a "considered" fashion.[267]

Because the IIRIRA's scheme provides no right to appeal, Justice Scalia is left with the argument that the Due Process Clause does not "invariably forbid[ ] reliance upon the outcome of unreviewable administrative determinations in subsequent criminal proceedings."[268] The characteristics of the expedited removal scheme take away that argument from Justice Scalia as well. In attempting to refute the majority holding, Justice Scalia sets out the following hypothetical:

> [I]magine that a State establishes an administrative agency that (*after investigation and full judicial-type administrative hearings*) periodically publishes a list of unethical businesses. . . . [T]he State, having discovered that a number of previously listed businesses are bribing the agency's investigators to avoid future listing, passes a law making it a felony for a business that has been listed to bribe agency investigators. It cannot be said that the Due Process Clause forbids the State to punish violations of that law unless it either makes the agency's listing decisions judicially reviewable or permits those

263 Justice Rehnquist wrote in dissent for Justices White and O'Connor. *Mendoza-Lopez II*, 481 U.S. at 842.

264 *See supra* note 35 and accompanying text.

265 *See supra* text accompanying note 252.

266 *Mendoza-Lopez II*, 481 U.S. at 842 (Rehnquist, C.J., dissenting).

267 *Id.* at 848-49 (Scalia, J., dissenting).

268 *Id.* at 848 (Scalia, J., dissenting).

> charged with violating the law [to collaterally attack the validity of the listing].[269]

Justice Scalia's hypothetical assumes that the agency listing upon which the subsequent prosecution is based results from "investigation and full judicial-type administrative hearings."[270] For Justice Scalia, those procedures in the original proceeding serve as a sufficient proxy for judicial procedures, thus justifying the use of the original findings as a conclusive element in a subsequent criminal prosecution. Unfortunately, the expedited removal procedure provides anything but full judicial-type administrative hearings. The sharp contrast between the stark expedited removal procedure and the full hearing procedure that Justice Scalia describes in his hypothetical suggests that he would be unwilling to find that those procedures are a satisfactory proxy for judicial procedures. In other words, he would find the IIRIRA's bar on collateral attacks unconstitutional.

One may argue that the distinction between the prior proceedings cuts in favor of the constitutionality of the IIRIRA's subsequent prosecution procedure. In making such an argument, one would posit that the aliens in *Mendoza-Lopez* were denied judicial review to which they had a right, while aliens under the IIRIRA have no such right, and are thus not deprived of due process. However, this argument fundamentally misinterprets the source of the due process rights. Although the Court in *Mendoza-Lopez* is somewhat cryptic in its due process references, Justice Jackson clearly identified the source of the rights thirty-five years earlier in *United States v. Spector*:[271] "[T]he alien . . . stands on an equal constitutional footing with the citizen when he is charged with crime."[272] The criminal prosecution bestows upon the alien full due process protections. Those due process rights are violated when an element of a crime is conclusively established without any means of judicial review. Without using due process language, the majority in *Mendoza-Lopez* recoguized the source of the due process rights: "Persons charged with crime are entitled to have the factual and legal determinations upon which convictions are based subjected to the scrutiny of an impartial judicial officer."[273] There-

---

269 *Id.* (Scalia, J., dissenting) (emphasis added).

270 *Id.* (Scalia, J., dissenting).

271 343 U.S. 169 (1952).

272 *Id.* at 177 (Jackson, J., dissenting).

273 *Mendoza-Lopez II*, 481 U.S. at 841-42. Commentators point to *Mendoza-Lopez* as an example of a constitutional limit on Congress's power to limit the jurisdiction of the federal courts. *See, e.g.*, PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 214 (3d ed. 1994); PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 1223 (9th ed. 1995) (stating that "*Mendoza-Lopez* present[s] the most compelling paradigm for recognizing a constitutional right to judicial review of agency action") (italics added). The IIRIRA procedures, which *intentionally* deny an alien any judicial review, arguably present a more alarming separation-of-

fore, the IIRIRA's subsequent prosecution procedure cannot be constitutional.

CONCLUSION

As Professor Stephen Legomsky aptly noted over a decade ago, "Immigration law is a constitutional oddity."[274] While individual right flourished under what has been coined "the due process revolution," the plenary power doctrine prevented that revolution from completely reaching the area of aliens' due process rights. This is not to say that constitutional immigration law has been totally static. The landmark holding in *Landon v. Plasencia* suggests that the Court will be unwilling to allow Congress to determine the constitutional status of certain aliens. Furthermore, commentators have observed that lower courts have for years been devising novel means of avoiding the harshness of the plenary power doctrine.[275]

Into this anomalous landscape Congress has dropped the IIRIRA, a law which one commentator has characterized as "the most diverse, divisive, and draconian immigration law enacted since the Chinese Exclusion Act of 1882."[276] The obvious question asks whether the new law will withstand constitutional attack. The answers, under traditional Supreme Court analysis, do not look promising for aliens subject to expedited removal. The procedure is clearly constitutional as applied to initially arriving and returning aliens, and may be constitutional as applied to present aliens. More disconcerting than the traditional approach's conclusions, however, is its method of analysis: certain aliens are nonpersons under the due process clause.

Rather than accepting the traditional analysis, this Note argues that the new law provides the Court with the ideal opportunity to abandon the traditional approach in favor of an improved framework. This new framework—the stake theory—makes all aliens persons under the Due Process Clause. For most aliens, the adoption of the stake theory will mean that the expedited removal procedure is unconstitutional. Personhood, however, will not automatically mean additional process for all aliens. Given the probable use of plenary power in the *Eldridge* balance, courts will likely deem the barebones expedited removal procedure constitutional as applied to at least some initially arriving aliens. Putting aside the constitutional conclusions, the real value of the stake theory lies in its improved method of analysis. As Hiroshi Motomura observed, "[a]fter the demise of ple-

---

powers issue than *Mendoza-Lopez*, where the alien waived an existing right to judicial process.

274 Legomsky, *supra* note 13, at 255.

275 *See, e.g.*, Motomura, *supra* note 46, at 1628-30.

276 Danilov, *supra* note 4, at A19.

nary power, judges in some immigration decisions might reach results similar to those now compelled by the deferential stance required under the present doctrine. . . . The critical difference, however, would be that courts would reach their results in a more reasoned and deliberate way."[277]

Returning to the specific provisions of the new law, the IIRIRA's procedure for the subsequent prosecution of any alien who violates an expedited removal procedure is clearly unconstitutional. Under the Supreme Court's holding in *United States v. Mendoza-Lopez*, any alien who is subject to criminal prosecution is a person under the Due Process Clause, and is entitled to more process than the expedited removal procedure provides.

We must remember that the Due Process Clause, by its own terms, protects "persons." For over a century, immigration law has ignored that restriction on government action, effectively making certain aliens nonpersons for due process purposes. The Supreme Court in *Mendoza-Lopez* held that all aliens subject to subsequent prosecution for the violation of a removal order are persons under the Due Process Clause. This Note urges the Court to take the next step by recognizing personhood for all aliens subject to removal from the United States.

277 Motomura, *supra* note 46, at 1704.