NOTES

AFFIRMATIVE DUTIES IN IMMIGRATION DETENTION

Detention has become an undeniably central part of immigration enforcement today. 1 In principle, the constitutional right to be free from deprivation of “life, liberty, or property, without due process of law” 2 extends to all “persons” within U.S. territory, regardless of citizenship. 3 In practice, due process for noncitizen detainees tends to be far more circumscribed. 4 Against this background, hundreds of immigrant detainees across the nation filed lawsuits during the COVID-19 pandemic, claiming that continued confinement in overcrowded and inadequate conditions amounted to a violation of their constitutional due process rights. 5 The litigation has forced courts to directly confront a critical issue that affects thousands, yet remains obscured by a lack of judicial guidance: the extent of substantive due process protection that the government owes to noncitizens held in its custody.

This Note analyzes this recent development and its wider implications. The discussion proceeds in three stages. Part I explains the theoretical background for constitutional challenges by noncitizens and describes the two competing frameworks that govern such claims. The first is the plenary power doctrine, under which courts grant special deference to political branches over decisions to admit or exclude noncitizens. 6 The second is the “aliens’ rights tradition,” characterized by a line of cases that apply heightened scrutiny to government action and affirm the status of noncitizens as “persons” protected under the

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2 U.S. CONST. amend. V.
3 Mathews v. Diaz, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons . . . .”).
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Constitution. As scholars have previously observed, the two frameworks are meant to govern separate spheres, but the boundary is not always clear. Part II turns to the specific context of substantive due process claims in immigration detention, particularly those cases that challenge the conditions of detention facilities or deprivations and mistreatment therein. As will be shown, cases addressing these claims reflect inconsistencies among courts. Part III describes the recent litigation arising from the COVID-19 pandemic. While recognizing that the fact-specific nature of the lawsuits limits their precedential value, this Note argues that the decisions collectively shift the emphasis away from the logic of judicial deference toward a recognition of the government’s affirmative duty to protect and provide care for immigrant detainees.

I. CONSTITUTIONAL CHALLENGES BY NONCITIZENS

Since its foundational cases, the Court has adopted two contrasting approaches to the rights and obligations of noncitizens. Under the plenary power doctrine, it has long recognized that, as a matter of sovereign prerogative, political branches have broad and near-exclusive authority over immigration law governing the admission and exclusion of noncitizens. This heightened judicial deference developed alongside a competing “aliens’ rights tradition,” which extends constitutional protections

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8 See Taylor, supra note 7, at 1092.


10 E.g., Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889); see also Motomura, Phantom Norms, supra note 6, at 547 (defining immigration law and distinguishing it “from the more general law of aliens’ rights and obligations, which includes, for example, their tax status, military obligations, and eligibility for government benefits and certain types of employment”). For extensive academic criticism of the doctrine, see Louis Henkin, Essay, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HAW. L. REV. 853, 862–65 (1987); Stephen H. Legomsky, Immigration Law and the Principle of Plenary Congressional Power, 1984 SUP. CT. REV. 255, 255; and David A. Martin, Why Immigration’s Plenary Power Doctrine Endures, 68 OKLA. L. REV. 29, 30 & n.2 (2015).
to noncitizens in matters unrelated to their admission and exclusion.\(^\text{11}\) This Part summarizes the development of these two frameworks and discusses the limits of the plenary power–aliens’ rights distinction.

A. Development of the Competing Frameworks

1. Plenary Power Doctrine. — The plenary power doctrine can be traced back to the Chinese Exclusion Case,\(^\text{12}\) which involved a noncitizen laborer who temporarily left the United States with a certificate permitting his return.\(^\text{13}\) After his departure, Congress declared the certificate void, effectively barring his reentry.\(^\text{14}\) The Court upheld this action, noting that the federal government enjoys considerable independence and discretion to exclude foreigners.\(^\text{15}\) Fong Yue Ting v. United States\(^\text{16}\) extended this deference to the power to expel, by allowing Congress to deport Chinese laborers who lacked a certificate of residence and failed to prove their lawful status by testimony of a “credible white witness.”\(^\text{17}\) The full breadth of the plenary power doctrine was demonstrated in a series of 1950s cases. United States ex rel. Knauff v. Shaughnessy\(^\text{18}\) first held that the wife of a U.S. citizen could be “permanently excluded without a hearing”\(^\text{19}\) solely based on a finding that “her admission would be prejudicial to the interests of the United States.”\(^\text{20}\) In so doing, the Court infamously declared that, with regard to noncitizens seeking admission, “[w]hatever the procedure authorized by Congress is, it is due process.”\(^\text{21}\) Shaughnessy v. United States ex rel. Mezei\(^\text{22}\) expanded upon Knauff by upholding the exclusion and

\(^{11}\) Taylor, supra note 7, at 1091 (internal quotation marks omitted); see Legomsky, supra note 10, at 256 (“[I]mmigration law] is the sphere in which the plenary power doctrine has operated. It should be distinguished from the more general law of aliens’ rights and obligations.”); Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 COLUM. L. REV. 1625, 1626 (1992) (“The stunted growth of constitutional immigration law contrasts sharply with the flowering of constitutional protections for aliens in areas other than immigration law.”).

\(^{12}\) 130 U.S. 581.

\(^{13}\) Id. at 582; see also Motomura, Phantom Norms, supra note 6, at 550 (“The story of the plenary power doctrine’s role in constitutional immigration law begins with . . . the Chinese Exclusion Case.”).

\(^{14}\) See Chae Chan Ping, 130 U.S. at 599.

\(^{15}\) See id. at 606 (noting that the legislative department’s determination that “the presence of foreigners of a different race” harms the country “is conclusive upon the judiciary”); see also Henkin, supra note 10, at 859 (“[B]oth [the Chinese Exclusion Case’s] holding and its sweeping dictum have been taken to mean that there are no constitutional limitations on the power of Congress to regulate immigration.”).

\(^{16}\) 149 U.S. 698 (1893).

\(^{17}\) Id. at 729; see id. at 729–30.

\(^{18}\) 338 U.S. 537 (1950).

\(^{19}\) Id. at 539.

\(^{20}\) Id. at 539–40; see id. at 547.

\(^{21}\) Id. at 544.

\(^{22}\) 345 U.S. 206 (1953).
detention of a long-term permanent resident returning from a trip abroad.\textsuperscript{23}

The Court has since qualified the plenary power doctrine and alleviated its harshest effects in important ways.\textsuperscript{24} Nonetheless, its early decisions continue to provide a “century of precedent” in favor of the government’s broad discretion to expel or exclude,\textsuperscript{25} on the basis of distinctions that continue to provide a “century of precedent” in favor of the government’s broad discretion to expel or exclude,\textsuperscript{25} on the basis of which protections for noncitizens have been significantly curtailed. Most recently, in 2018, Trump v. Hawaii\textsuperscript{26} confirmed the endurance of the doctrine, with the majority applying a highly deferential standard of review to uphold a controversial travel ban despite allegations of discriminatory intent against Muslim immigrants and Islam.\textsuperscript{27}

2. The Aliens’ Rights Tradition. — The early plenary power cases were accompanied by sharply worded and powerful dissents.\textsuperscript{28} The dissenters highlighted the need for a limiting principle, cautioning that the doctrine’s “excludable” noncitizens, who are arriving in the country and found ineligible for entry, 25 on the basis of which protections for noncitizens have been significantly curtailed. 27

of review to uphold a controversial travel ban despite allegations of discriminatory intent against Muslim immigrants and Islam.\textsuperscript{27}

The earliest of such cases, Vick Wo v. Hopkins\textsuperscript{31} upheld

\begin{footnotes}
\item 23 See id. at 208, 215 (reasoning that Mezei would be “treated as if stopped at the border” for purposes of his due process claim, id. at 215; id. at 219 (Jackson, J., dissenting).
\item 24 See Martin, supra note 10, at 50–55; Michael Scaperlanda, Partial Membership: Aliens and the Constitutional Community, 81 IOWA L. REV. 707, 725 n.90 (1996) (observing that since its early plenary power cases, “the Court has retired the language of total abdication” of judicial review).
\item 25 Dep’t of Homeland Sec. v. Thumarasigiam, 140 S. Ct. 1959, 1982 (2020); see id. (first citing Knauff, 338 U.S. at 544; then citing Mezei, 345 U.S. at 212; and then citing Landon v. Plasencia, 459 U.S. 21, 32 (1982)). The Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.), previously distinguished “excludable” noncitizens, who are arriving in the country and found ineligible for entry, id. § 212(a), from “deportable” noncitizens, who have entered but been found subject to expulsion, id. § 241(a). This focus on physical entry was replaced in 1996. Under the current statutory scheme, the key inquiry is whether noncitizens have been lawfully admitted into the country. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 240(a), 110 Stat. 3009-546, 3009-589 (codified as amended at 8 U.S.C. § 1229a).
\item 26 138 S. Ct. 2392 (2018).
\item 27 See id. at 2418–19; see also Cristina M. Rodríguez, Trump v. Hawaii and the Future of Presidential Power over Immigration, 2017–2018 AM. CONST. SOC’Y SUP. CT. REV. 161, 188–90.
\item 28 See, e.g., Mezei, 345 U.S. at 218, 224–28 (Jackson, J., dissenting); Knauff, 338 U.S. at 550–52 (Jackson, J., dissenting); see also Motomura, Phantom Norms, supra note 6, at 560.
\item 29 Fong Yue Ting v. United States, 149 U.S. 698, 750 (1893) (Field, J., dissenting).
\item 30 See Taylor, supra note 7, at 1132–33; see also Linda Kelly, Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens’ Rights, 41 VILL. L. REV. 725, 730–31 (1996); David A. Martin, Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 88 (noting the “difference between immigration law on the one hand, where a discount in protections may give the federal political branches a freer rein in decisions about aliens, and immigrant or aliens law on the other hand, where all persons must be treated equally?”); Motomura, Phantom Norms, supra note 6, at 566–67.
\item 31 118 U.S. 356 (1886).
\end{footnotes}
a noncitizen’s challenge to the discriminatory enforcement of a municipal ordinance, reasoning that the equal protection of laws under the Fourteenth Amendment is “universal in [its] application, to all persons within the territorial jurisdiction.”\textsuperscript{32} \textit{Wong Wing v. United States}\textsuperscript{33} extended this principle to the Fifth and Sixth Amendments, stressing that while Congress had broad power to exclude and expel noncitizens, it lacked authority to sentence them to “imprisonment at hard labor” prior to removal.\textsuperscript{34} Since the latter “inflicts an infamous punishment,” it triggered judicial scrutiny for compliance with constitutional constraints of criminal procedure.\textsuperscript{35} In other words, the “punishment” of hard labor removed the case from the domain of immigration law to that of criminal law, where special judicial deference was not warranted.\textsuperscript{36}

\textbf{B. Limits of the Distinction}

The plenary power–aliens’ rights distinction thus turns on whether the subject matter in controversy lies within or beyond the scope of immigration law. Subsequent cases have challenged this dichotomy, however, with some scaling back the government’s plenary power in the immigration context, and others restricting noncitizens’ rights in the nonimmigration context.\textsuperscript{37} Notably, \textit{Landon v. Plasencia}\textsuperscript{38} narrowed the Court’s holding in \textit{Mezei} by finding that permanent residents who briefly left the country were entitled to greater \textit{procedural} due process protection in their exclusion hearings.\textsuperscript{39} The Court reasoned that “once an alien gains admission to our country and begins to develop . . . ties[,] . . . his constitutional status changes accordingly.”\textsuperscript{40}

\textbf{If Landon exemplifies a divergence from the strict application of the plenary power doctrine, United States v. Verdugo-Urquidez}\textsuperscript{41} may suggest a deviation from the aliens’ rights tradition.\textsuperscript{42} In \textit{Verdugo-Urquidez},

\textsuperscript{32} Id. at 369; see id. at 373.
\textsuperscript{33} 163 U.S. 228 (1896).
\textsuperscript{34} Id. at 238; see id. at 233–34.
\textsuperscript{35} Id. at 234 (emphasis added).
\textsuperscript{36} See id. at 237; see also Taylor, supra note 7, at 1134.
\textsuperscript{37} See Kelly, supra note 30, at 731 & n.27.
\textsuperscript{38} 459 U.S. 21 (1982).
\textsuperscript{39} See id. at 33–34 (distinguishing Mezei as a case involving “extended” absence, id. at 33).
\textsuperscript{40} Id. at 33.
\textsuperscript{41} 494 U.S. 259 (1990).
\textsuperscript{42} See Kelly, supra note 30, at 743–47 (analyzing Landon as “defeating the plenary power doctrine,” id. at 743 (capitalization omitted)), and Verdugo-Urquidez as “defeating the aliens’ rights tradition,” id. at 745 (capitalization omitted); see also Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) (finding that the government may allow federal Medicare benefits to some noncitizens but not to others “[i]n the exercise of its broad power over naturalization and immigration”). Scholars have suggested that both Verdugo-Urquidez and Mathews v. Diaz, 426 U.S. 67, illustrate the plenary power doctrine’s extension into matters outside of immigration law. See Michael Scaperlanda, \textit{Polishing the Tarnished Golden Door}, 1993 Wis. L. REV. 965, 994–1000; Taylor, supra note 7, at 1135–39.
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the noncitizen-plaintiff sought to suppress evidence seized by federal agents from his Mexican residence while he remained incarcerated in the United States pending his criminal proceeding.\footnote{See Verdugo-Urquidez, 494 U.S. at 262–63.} Rejecting this claim, the Court held that the Fourth Amendment does not extend to extraterritorial searches, adding that reliance on aliens’ rights tradition cases such as \textit{Yick Wo} and \textit{Wong Wing} would be misplaced, as the plaintiff “had no previous significant voluntary connection with the United States.”\footnote{Id. at 271.}

As both cases demonstrate, while the competing frameworks are meant to govern distinct realms, they often bleed into each other in seemingly inconsistent ways.\footnote{See Stephen H. Legomsky, \textit{Essay, Ten More Years of Plenary Power: Immigration, Congress, and the Courts}, 22 HASTINGS CONST. L.Q. 925, 930–34 (1995) (describing how lower courts have circumvented a strict application of the traditional version of the plenary power doctrine); Motomura, \textit{supra} note 11, at 1627–28 (exploring how “[c]ourts have created an important exception to the plenary power doctrine by hearing constitutional claims sounding in ‘procedural due process’”); Motomura, \textit{Phantom Norms, supra} note 6, at 549 (discussing the “gradual demise of the plenary power doctrine”); Taylor, \textit{supra} note 7, at 1145–56.} In light of this difficulty, critics have offered a variety of alternative theories.\footnote{See Kelly, \textit{supra} note 30, at 748–51, 765–67 (providing a detailed summary of the main alternative theories); \textit{see also} Linda S. Bosniak, \textit{Membership, Equality, and the Difference that Alienage Makes}, 69 N.Y.U. L. REV. 1047, 1058 (1994) (noting that the traditional “inside” versus “outside” immigration law framework “tends to obscure the complex and contested nature of the status of aliens”).} One such theory focuses on “membership” or “community ties,” broadly suggesting that noncitizens who have developed more connections with American society are entitled to greater due process.\footnote{See David A. Martin, \textit{Due Process and Membership in the National Community: Political Asylum and Beyond}, 44 U. PITT. L. REV. 165, 191–92 (1983), reprinted in 1986 IMMIGR. & NAT’Y L. REV. 177, 203–04; T. Alexander Aleinikoff, \textit{Aliens, Due Process and “Community Ties”: A Response to Martin}, 44 U. PITT. L. REV. 237, 244 (1983), reprinted in 1986 IMMIGR. & NAT’Y L. REV. 249, 256 (“[W]hat we ‘owe’ persons in terms of process is better understood as a function of what we are taking from them (community ties) than our relationship to them (membership in a national community.”); \textit{see also} Scaperlanda, \textit{supra} note 24, at 712–14, 713 nn.15–16 (examining and contrasting the paradigms of “membership” and “personhood”).} In contrast, the “municipal law approach” focuses less on noncitizens’ physical location or voluntary ties with the country and instead posits that constitutional rights may extend to noncitizens by virtue of them being required to comply with U.S. laws.\footnote{See Gerald L. Neuman, \textit{Whose Constitution?}, 100 YALE L.J. 909, 978 (1991).}

II. SUBSTANTIVE DUE PROCESS IN IMMIGRATION DETENTION

A. Unsettled Questions

While the Court has recognized that both procedural and substantive due process challenges are available in the context of immigration
detention, the contours remain unsettled. One possible explanation for this uncertainty is the previously described “porous border between the plenary power doctrine and the aliens’ rights tradition.”

In immigration detention cases, courts are asked to separate the nature of the constitutional complaint from the “underlying predicate” of immigration detention; this may be particularly complex when the remedy sought — whether that be parole into the country or relief from removal — seemingly interferes with the government’s control over immigration. Additional sources of ambiguity are the lack of definitive judicial guidance and the Court’s sidestepping of constitutional questions, even for more frequently litigated issues such as the durational limits on detention.

Of the various substantive due process issues related to immigration detention, this Note focuses on challenges to conditions of confinement and the deprivations and mistreatment therein. While these are separate claims, they are related in the sense that they all implicate the government’s duty under the Constitution to protect and provide for individuals under certain circumstances. Such claims warrant more attention than they currently receive, especially in light of the growing salience of constitutional claims in immigration law.

In 1995, Professor Margaret Taylor observed that “[o]nly a handful of reported cases have decided the due process challenges to conditions

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49 See Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (“Freedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects.”); see also id. at 694 (noting that Wong Wing “concerned substantive protections for aliens . . . not procedural protections”); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 100 (1903); Cole, supra note 4, at 1006–09.

50 Taylor, supra note 7, at 1156; see also id. at 1145–56 (exploring how the plenary power doctrine improperly extends into challenges to conditions of confinement).


52 In Jean v. Nelson, 711 F.2d 1455, the court initially applied the aliens’ rights analysis to detainees challenging the discriminatory enforcement of the government’s parole policy, reasoning that plaintiffs sought “not a right to admission[,] . . . but a right to be considered for parole in a nondiscriminatory fashion.” Id. at 1484. On rehearing, it reached the opposite conclusion, noting that discretion to grant parole “is an integral part of the admissions process.” 727 F.2d at 963; see also Motomura, supra note 11, at 1628–30, 1665–66 (highlighting cases in the “gray area” where the outcome may differ based on whether the court characterizes the claim as a “substantive” challenge to the government’s decision to admit or expel or a “procedural” challenge to the manner in which such decision is made, id. at 1665).


54 See infra pp. 2494–95.

55 See Aleinikoff et al., supra note 9, at vi (noting “the greater prominence of litigation against the federal government raising challenges grounded in statutes and the U.S. Constitution”).
of confinement suffered by alien detainees,” and even those “reflect[ed] confusion over which of the two competing lines of cases — the plenary power doctrine or the aliens’ rights tradition — should govern.” More than two decades later, the problem persists. Such claims are often resolved through settlement agreements or consent decrees — as was the case in Reno v. Flores. There is also no federal statute that explicitly sets forth the standard for conditions of immigration detention. And while U.S. Immigration and Customs Enforcement (ICE) has published nationwide detention standards, these are implemented through individually negotiated contracts, leading to varying degrees of protection across detention facilities.

In the absence of clear judicial and statutory guidance, lower courts addressing constitutional challenges to immigration detention have looked to the case law governing similar claims by prisoners and pretrial

56 Taylor, supra note 7, at 1092; see also id. at 1092 n.25 (collecting cases where “courts have alluded to conditions problems at alien detention facilities, or have addressed conditions claims only tangentially in the midst of litigation challenging other aspects of [immigration] detention”).

57 507 U.S. 292 (1993); see id. at 301 (declining to entertain challenges to conditions previously settled by a consent decree); see also Haitian Ctrs. Council Inc. v. Sale, 823 F. Supp. 1028 (E.D.N.Y. 1993)), Harold Hongju Koh, Essay, The “Haiti Paradigm” in United States Human Rights Policy, 103 YALE L.J. 2391, 2397 n.32 (1994) (noting that the order in Haitian Centers Council Inc. v. Sale, 823 F. Supp. 1028, was vacated after the parties entered a settlement agreement). While the federal district court overseeing the Flores settlement agreement has sometimes ruled that the government failed to comply with the agreement’s mandate to maintain “safe and sanitary” conditions for minors, these opinions do not address constitutional issues. See, e.g., Flores v. Barr, No. CV 85-4544, 2020 WL 5491445, at *8–9 (C.D. Cal. Sept. 4, 2020); Flores v. Sessions, 394 F. Supp. 3d 1041, 1057 (C.D. Cal. 2017).

58 See SMITH, supra note 53, at 47 (“[N]either the INA nor its implementing regulations currently provide any specific standards for the conditions of confinement.”).


detainees under the Fifth, Eighth, and Fourteenth Amendments. As will be explored below, however, the legal standard for noncitizen detainees has been applied inconsistently, resulting in a patchwork of protections that is difficult to navigate. But before proceeding to such cases, it helps to first discuss *DeShaney v. Winnebago County Department of Social Services*, in which the Court established the broader framework for when, and to whom, the government owes an affirmative duty to protect and provide care under the Due Process Clause.

**B. Theories of Substantive Due Process Violations**

*DeShaney* was a tragic case involving a young child who had been repeatedly beaten by his father. Social workers and local officers were allegedly aware of the possible abuse but failed to intervene. *DeShaney* and his mother brought suit under the Fourteenth Amendment, arguing that the officials’ “failure to act” had unconstitutionally deprived DeShaney of his liberty. The Court rejected this claim and declared that the Due Process Clause “confer[s] no [general] affirmative right to governmental aid.” The *DeShaney* Court thus championed the notion that the Constitution delineates what the government *cannot* do, rather than what it must do; individuals generally have no enforceable positive rights against the government.

Importantly though, the Court carved out two exceptions to the rule of no duty. First, under the “special relationship” doctrine, it held that “when the State takes a person into its custody and holds him there against his will,” this triggers a special custodial relationship giving rise to “a corresponding duty to assume some responsibility for his safety and general well-being.” Second, under what has become known as

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63 Id. at 191.

64 Id.

65 Id.; see id. at 193.

66 Id. at 196; see id. at 203.


68 *DeShaney*, 489 U.S. at 197 n.4 (discussing the “special relationship” doctrine).

69 Id. at 199–200.

70 Id. at 200. Explaining the rationale for this principle, the Court cited precedents involving claims by individuals in various custodial settings. See id. at 198–99 (first citing *Estelle v. Gamble*, 429 U.S. 97 (1976) (incarcerated prisoners); then citing *Youngberg v. Romeo*, 457 U.S. 307 (1982) (involuntarily institutionalized patients); and then citing *City of Revere v. Mass. Gen. Hosp.*, 463
the “state-created danger” doctrine, courts have found the government liable for affirmatively placing individuals in danger or positions of vulnerability that they would otherwise not have faced.\(^1\) In doing so, they point to language in *DeShaney* finding significant that the government neither “played [a] part in [the] creation” of the dangers that *DeShaney* faced, “nor did . . . anything to render him any more vulnerable.”\(^2\) While the elements of a state-created danger claim vary across circuits,\(^3\) a state-created danger suit commonly requires government action as opposed to mere failure to act\(^4\) and typically involves a higher level of culpability than deliberate indifference.\(^5\) For instance, the doctrine has been applied to find police officers liable for abandoning a passenger in a crime-prone area while arresting a motorist,\(^6\) and for kicking out an intoxicated bar patron and preventing him from getting into his car on an extremely cold night.\(^7\) With this background in mind, the following sections examine how *DeShaney*’s two exceptions have developed in the context of constitutional challenges by noncitizens.

1. Special Relationship Doctrine. — The special relationship doctrine imposes a duty on the government to provide “basic human needs” including “food, clothing, shelter, medical care, and reasonable safety” for persons held in its custody.\(^8\) This duty provides the basis for challenges by incarcerated and institutionalized individuals including immigrant detainees, who claim that confinement under the circumstances amounts to an unconstitutional “punishment[ ]” in violation of the Eighth Amendment and the Due Process Clauses.\(^9\)

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\(^1\) See 879 F.2d 583, 588 (9th Cir. 1989).
\(^2\) See *Munger v. City of Glasgow Police Dep’t*, 227 F.3d 1082, 1087 (9th Cir. 2000); see also *Currier v. Doran*, 242 F.3d 905, 923 (10th Cir. 2001) (applying the doctrine to a social worker who transferred two children to their potentially abusive father); *Davis v. Brady*, 143 F.3d 1021, 1023 (6th Cir. 1998) (applying the doctrine to police officers who abandoned the intoxicated plaintiff on a highway).
\(^4\) U.S. CONST. amend. VIII; *see id.* amend. V, XIV.
For prisoners, the controlling test is whether the government exhibited “deliberate indifference” to a basic human need. This includes both an objective and a subjective component: the government must have knowingly disregarded an objectively substantial risk to the prisoner’s health or safety. For pretrial detainees, the standard is less clear. While the Court has suggested that detainees awaiting trial without a conviction are entitled to “at least as great” protection as convicted prisoners are, it has done so without specifying whether this standard requires equal or greater protection. Bell v. Wolfish clarified that, in any case, pretrial detainees may not be held in “punitive” conditions, which exist if they are (1) expressly intended to punish; (2) not rationally related to a legitimate government objective; or (3) excessive to that objective. But lower courts have applied this test in different ways, with some “assimilat[ing] pretrial detainees’ claims to those by convicted prisoners, applying the Eighth Amendment standards to both,” and others suggesting that Bell’s reasonable-relationship test is purely objective.

The case law for immigrant detainees has evolved largely parallel to that of pretrial detainees, but with some critical deviations and added layers of complexity. Here too, the case law remains in flux, and the fact-specific Bell test leads to varying

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83 City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); see Bell v. Wolfish, 441 U.S. 520, 545 (1979) (“[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”).
84 See Revere, 463 U.S. at 243–45; City of Canton v. Harris, 489 U.S. 378, 388 n.8 (1998) (noting that in City of Revere v. Massachusetts General Hospital, 463 U.S. 239, the Court “reserved decision on the question whether something less than the Eighth Amendment’s ‘deliberate indifference’ test may be applicable in claims by detainees”); Struve, supra note 82, at 1012.
85 441 U.S. 520.
86 Id. at 538; see id. at 538–39.
87 Struve, supra note 82, at 1012; see also Burrell v. Hampshire County, 307 F.3d 1, 7 (1st Cir. 2002); Lopez v. LeMaster, 172 F.3d 756, 759 n.2 (10th Cir. 1999); Thompson v. County of Medina, 29 F.3d 238, 242 (6th Cir. 1994) (“[D]etainees are . . . entitled to the same Eighth Amendment rights as other inmates.”).
88 See, e.g., Slade v. Hampton Rds. Reg’l Jail, 407 F.3d 243, 251 n.7 (4th Cir. 2005); Jones v. Blanas, 393 F.3d 918, 933–34 (9th Cir. 2004) (holding that conditions for civil detainees are presumptively punitive if similar to those for pretrial criminal detainees or convicted prisoners); Aygeman v. Corp. Corp. of Am., 390 F.3d 1101, 1104 (9th Cir. 2004); Brogsdale v. Barry, 926 F.2d 1184, 1187 & n.4 (D.C. Cir. 1991); see also Struve, supra note 82, at 1024–30.
89 See, e.g., Doe v. Kelly, 878 F.3d 710, 720 (9th Cir. 2017); Edwards v. Johnson, 209 F.3d 772, 778 (5th Cir. 2000) (“We consider a person detained for deportation to be the equivalent of a pretrial detainee . . . .”); Al Najjar v. Ashcroft, 186 F. Supp. 2d 1235, 1243 (S.D. Fla. 2002).
90 In particular, recent decisions cite to the Court’s holding in Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015), that a pretrial detainee bringing an excessive force claim need show only that the
outcomes. In addition, though, the continued perplexity over whether the plenary power doctrine or aliens’ rights tradition should govern amplifies uncertainties. Some courts have concluded that the government’s plenary discretion over the admission and exclusion of noncitizens should not affect noncitizens’ protection from inhumane treatment while detained. These opinions thus reaffirm the aliens’ rights tradition and reinforce the notion that substantive due process claims based on the government’s failure to protect fall outside the domain of immigration law. In contrast, others have invoked plenary power reasoning to hold that detained noncitizens who have not yet been admitted into the country possess only a limited right to be free from “gross physical abuse” or “malicious infliction of cruel treatment.”

In effect, these decisions markedly deviate from the generally applicable standard for pretrial detainees and establish a uniquely stringent standard for a significant number of noncitizens.

The officer’s use of force was objectively unreasonable. Id. at 2472–73; see C.G.B. v. Wolf, 464 F. Supp. 3d 174, 211 n.31 (D.D.C. 2020) (compiling cases that have extended Kingsley’s objective standard). The question of whether Kingsley also applies to conditions of confinement claims, however, remains unsettled. See Gomes v. U.S. Dep’t of Homeland Sec., 460 F. Supp. 3d 135, 146–47 (D.N.H. 2020).

Compare Justiz-Cepero v. INS, 882 F. Supp. 1582, 1584 (D. Kan. 1995) (“Although the conditions described by plaintiff are indeed harsh, it is apparent plaintiff’s essential needs of food, clothing, shelter, and medical care were provided.”), with Belbachir v. County of McHenry, 726 F.3d 975, 981–83 (7th Cir. 2013) (reversing summary judgment for defendant on claim that failure to place noncitizen on suicide watch amounted to deliberate indifference to risk of suicide).

See Taylor, supra note 7, at 1092.

See, e.g., Castro v. U.S. Dep’t of Homeland Sec., 835 F.3d 422, 449 n.32 (3d Cir. 2016) (“[W]e are certain that this ‘plenary power’ does not mean Congress or the Executive can subject . . . aliens to inhumane treatment.” (citing Wong Wing v. United States, 163 U.S. 228, 237 (1896))); Martinez-Aguero v. Gonzalez, 459 F.3d 618, 623 (4th Cir. 2006) (“There are, however, no identifiable national interests that justify the wanton infliction of pain.”); Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987).

See Kwai Fun Wong v. United States, 373 F.3d 952, 972 (9th Cir. 2004) (noting that precedent relating to “the narrow question of the scope of procedural rights available in the admissions process . . . is not necessarily applicable with regard to other constitutional rights”); Chi Thon Ngo v. INS, 192 F.3d 390, 396 (3d Cir. 1999).

Medina v. O’Neill, 838 F.2d 800, 803 (5th Cir. 1988) (emphases added) (quoting Lynch, 810 F.2d at 1374); see, e.g., Gishert v. U.S. Att’y Gen., 988 F.2d 1437, 1442 (5th Cir. 1993); Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990) (concluding that “severe overcrowding, insufficient nourishment, and inadequate medical treatment” did not constitute “gross physical abuse” (internal citation omitted)); Corea v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990) (stating that excludable noncitizens are entitled to “little or no” due process protection); Medina, 838 F.2d at 803 (“The stowaways alleged neither that cruel treatment was maliciously inflicted upon them nor that they suffered gross physical abuse. They stated no claim for violation of due process rights.”); see also Taylor, supra note 7, at 1152–54.

See Taylor, supra note 7, at 1152; see also id. at 1149 (“Adras, like Medina, extracted language from Lynch to set an unusually high threshold for excludable aliens seeking to challenge the conditions of their confinement.”).
2. State-Created Danger Doctrine. — Claims by noncitizens under the state-created danger theory have similarly been shaped by the enduring influence of the plenary power doctrine. A particularly clear illustration of this impact is the Third Circuit’s decision in Kamara v. Attorney General of the United States, where a noncitizen challenged the government’s deportation order by contending that removal to his home country would affirmatively subject him to the likelihood of torture. Rejecting this argument, the court explained that granting such a claim “would impermissibly tread upon the Congress’ virtually exclusive domain over immigration.” It added that, as a matter of law, “the state-created danger exception has no place in our immigration jurisprudence.” Several courts have followed suit, citing Kamara for its categorical approach to foreclose the state-created danger exception as a theory of due process violation.

Critically, others have gone further and extended Kamara to quite distinguishable facts. In particular, similar reasoning has been invoked to strike down claims by so-called “alien informants” who assist U.S. law enforcement and face a risk of retribution in their home country as a result of such activity. In one such case, a noncitizen argued that his cooperation with the U.S. government’s drug investigation implicating members of the Nigerian military created a risk of torture if he were to be deported. The district court allowed his claim to proceed, stressing that the plenary power doctrine was inapplicable, since at issue was not a “right to remain in the United States, but the right to live and . . . be free from state sanctioned torture, the danger of which . . . the executive created.” The court thus treated the availa-

97 420 F.3d 202 (3d Cir. 2005).
98 See id. at 206–07, 216.
99 Id. at 217–18.
100 Id. at 217.
101 See, e.g., Paulino v. Att’y Gen., 445 F. App’x 558, 561 (3d Cir. 2011); Beibei Zhang v. Holder, 358 F. App’x 216, 218 (2d Cir. 2009); Vicente-Elias v. Mukasey, 532 F.3d 1086, 1095 (10th Cir. 2008); see also Daniel J. Moore, Comment, Protecting Alien-Informants: The State-Created Danger Theory, Plenary Power Doctrine, and International Drug Cartels, 80 TEMP. L. REV. 295, 325 (2007) (“The Third Circuit . . . held that the plenary power doctrine categorically bars the recognition of state-created danger claims in deportation proceedings.”).
102 See Medina-Araujo v. Whitaker, 754 F. App’x 432, 434–36 (7th Cir. 2018); Williams v. Att’y Gen., 219 F. App’x 258, 265 (3d Cir. 2007); Vasquez v. Att’y Gen., 208 F. App’x 184, 188 (3d Cir. 2006); Carias v. Harrison, Nos. 13-CT-3264, 14-CT-3104, 2017 WL 1155740, at *13–14 (E.D.N.C.), aff’d, 705 F. App’x 181 (4th Cir. 2017); Rosciano v. Sonchik, No. 01-0472, 2002 WL 32166630, at *5–6 (D. Ariz. Sept. 9, 2002). See generally Moore, supra note 101 (describing alien-informant cases and suggesting that the state-created danger doctrine be available for noncitizens who assisted the government in reliance on explicit assurances against deportation and whose removal would entail significant and foreseeable danger).
103 Enwonwu v. Gonzales, 438 F.3d 22, 24, 35 (1st Cir. 2006).
bility of the state-created danger doctrine as a separate and distinct inquiry from whether the remedy sought implicated the government’s control over immigration. On appeal, however, the First Circuit reversed, echoing Kamara’s language that entertaining such a claim would be “an impermissible effort to shift to the judiciary the power to expel or retain aliens.” From this determination, it reached a sweeping conclusion that, regardless of whether a citizen might have a substantive due process right not to be exposed to state-created danger, a noncitizen facing removal has no such right.

III. TOWARD AN AFFIRMATIVE DUTY TO PROTECT

A. The Recent Litigation

While the COVID-19 pandemic has devastated many communities, incarcerated and institutionalized individuals have felt some of its worst effects. Immigration detention facilities run by ICE were responsible for over 245,000 coronavirus cases between May and August 2020 alone, and detainees reported an infection rate thirteen times higher than that of the general population. This urgent reality has led to more than 100 lawsuits by immigrant detainees across the country challenging their conditions of confinement. Broadly, the suits argue that the detention facilities fail to comply with public health guidance by the Centers for

105 Cf. Morgan v. Gonzales, 495 F.3d 1084, 1093 (9th Cir. 2007) (“The state-created danger doctrine may . . . be invoked to enjoin deportation.”); Wang v. Reno, 81 F.3d 808, 810–11, 818 (9th Cir. 1996) (concluding that the government owes a constitutional duty to protect a noncitizen who was paroled into the country to testify in a drug conspiracy trial and as a result faced a risk of future torture).

106 Enwonwu, 438 F.3d at 30; see also id. (“The [state-created danger] theory itself simply is not viable . . . .”).

107 See id.


Disease Control and Prevention\textsuperscript{111} (CDC) and ICE’s Pandemic Response Requirements (PRR).\textsuperscript{112}

The litigation is ongoing and varied in form; however, the typical litigant moves for a temporary restraining order (TRO) seeking injunctive and declaratory relief in the form of temporary release and/or implementation of measures to improve the conditions of confinement.\textsuperscript{113} Under the standard for granting a TRO, the immigrant-detainee plaintiff is required to show (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of relief; (3) favorable balance of equities; and (4) furtherance of the public interest.\textsuperscript{114} Procedurally, the motions are filed under 28 U.S.C. § 2241, which allows federal judges to grant a writ of habeas corpus if the petitioner is held “in custody in violation of the Constitution.”\textsuperscript{115} While many are filed as separate habeas petitions, there have been a number of class actions seeking relief on a wider scale and providing important context for the litigation.


\textsuperscript{113} See Shah, supra note 5; see also, e.g., C.G.B., 464 F. Supp. 3d at 106–97.


\textsuperscript{115} 28 U.S.C. § 2241(c)(3); see id. § 2241(a). While outside the scope of this Note, a key threshold issue precluding relief has been the circuit split over whether a habeas petition under § 2241 is an appropriate vehicle to assert conditions challenges, which the Court has left as an open question. See Aslanturk v. Hott, 459 F. Supp. 3d 681, 691 (E.D. Va. 2020) (describing the circuit split); see also Preiser v. Rodriguez, 411 U.S. 475, 499–500 (1973). Another threshold issue that courts remain divided over is “whether the INA’s jurisdictional bars preclude [courts] from ordering ICE to release noncitizens” whose parole requests have been denied. C.G.B., 464 F. Supp. 3d at 221; see, e.g., id. (contrasting courts that have exercised jurisdiction to order release when based on a constitutional challenge from those that consider this as an impermissible restraint on the agency’s discretionary authority).
at large.116 For instance, the district court in Fraihat v. ICE117 certified a nationwide class including “all people who are detained in ICE custody who have one of the [CDC-recognized] Risk Factors placing them at heightened risk” of contracting COVID-19.118 Similarly, in Flores v. Barr,119 the district court overseeing the longstanding Flores Settlement Agreement ordered the release of all minors who had been detained at ICE-managed family residential centers for over twenty days.120

Unlike Flores, which involved whether the government breached its contractual obligations under a settlement agreement, many of the lawsuits address constitutional challenges under the Due Process Clause. The claims center around two distinct but related theories of substantive due process that derive from the principle established in DeShaney121 — namely, that the government must care for those who are unable to care for themselves “by reason of the deprivation of [their] liberty.”122 Specifically, plaintiffs have alleged that ICE’s inadequate response to the pandemic renders continued detention (1) an unconstitutional punishment123 and (2) a violation of the government’s affirmative duty to provide detainees with reasonable protection.124

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118 Id. at 736.
120 Id. at *3.
124 DeShaney, 489 U.S. at 200; see also cases cited supra note 121. Less commonly, due process claims have also been brought under the state-created danger doctrine. See Castillo v. Barr, 449 F. Supp. 3d 915, 919 (C.D. Cal. 2020); Gayle v. Meade, No. 20-21553, 2020 WL 1949737, at *27 (S.D. Fla.) (discussing but ultimately rejecting “the possibility that other detainees with COVID-19 are (or could be, under a creative legal theory) the third parties from whom ICE should be providing
To assess the likelihood of success on the merits of either claim, courts ask whether the condition or deprivation in question is punitive under the Bell test. Given the difficulty of showing an express punitive intent and in light of precedents recognizing the government’s legitimate interest in immigration detention, the relevant inquiry often becomes whether the conditions are “excessive” in relation to that objective. Under this excessiveness inquiry, courts look to whether the government acted with “deliberate indifference to the challenged condition[]” or deprivation. And here the courts remain divided: some apply an objective test and inquire whether the government placed the detainee at “substantial risk of suffering” without taking “reasonable” mitigatory measures while others additionally require a subjective mens rea showing that the government actually knew of such risk.

In either case, the inquiry considers “the totality of circumstances,” which inevitably invites different conclusions based on various permutations of factors such as the petitioner’s health or the specific precautions taken by each detention facility. For instance, a young and healthy petitioner in a private cell may be denied relief, whereas an elderly petitioner with underlying medical conditions in a shared cell may
 Likewise, what constitutes a “reasonable” measure of protection depends on the specific factual context. As to the remaining factors under the TRO standard, some decisions have found that the likelihood of irreparable harm is “speculative” or “too attenuated” when petitioners lack preexisting medical conditions, or when there are no confirmed cases of COVID-19 at the particular facility. The analysis of the balance of equities and the public interest similarly hinges on a weighing of factors including the potential public health impact of releasing the detainee and the strength of the government’s interest in keeping the individual detained, which in turn varies depending on whether the detention was mandatory or discretionary under the statutory immigration scheme.

As such, the lawsuits involve fact-intensive analyses and have produced considerably different outcomes — ranging from orders granting

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133 Cf. C.G.B., 464 F. Supp. 3d at 213 (noting that conditions of confinement claims in the COVID-19 context are evaluated “on a sliding scale” that considers “an individual detainee’s age and specific health conditions, the conditions at her detention facility, and the legal basis and factual circumstances of her detention”).

134 See id. at 212 (“Plaintiffs do not articulate precisely what ‘reasonable safety’ means in the context of detention during a global pandemic.”); O.M.G. v. Wolf, 474 F. Supp. 3d 274, 287 (D.D.C. 2020) (“The government’s obligation to provide ‘reasonable safety’ does not require that detention facilities reduce the risk of harm to zero . . . .” (internal quotation marks omitted) (citing C.G.B., 464 F. Supp. 3d at 211–12)).


136 Compare Habibi, 445 F. Supp. 3d at 1000 (finding release not in the public interest as petitioner was in quarantine due to his exposure to COVID-19), with A.R., 453 F. Supp. 3d at 689 (noting that “the public interest . . . supports the release of Petitioners before they contract COVID-19 to preserve critical medical resources”).

137 See, e.g., Coreas, 451 F. Supp. 3d at 429 (suggesting that the government’s general interest in immigration enforcement was not as strong as its specific interest in mandatory detention of detainees who had been convicted of serious crimes and posed a flight risk); C.G.B., 464 F. Supp. 3d at 211. Under the statutory detention framework, the Department of Homeland Security has discretion to detain noncitizens pending removal proceedings or as part of efforts to secure their removal. See SMITH, supra note 53, at 8 (explaining the INA’s detention provisions). Noncitizens removable on grounds of specific crimes or terrorist-related activities, or those seeking initial entry and believed to be removable, face mandatory detention. See id.
immediate release,\textsuperscript{138} to orders denying relief upon findings that the particular condition was not “excessive,”\textsuperscript{139} to orders dismissing the petition based on a threshold issue of jurisdiction.\textsuperscript{140} Yet others have admonished “blanket release from immigration detention” as an inappropriately broad remedy\textsuperscript{141} and granted the motion only in part, mandating narrower remedies such as the cure of deficient conditions or compelled compliance with specific preventive measures.\textsuperscript{142}

\textbf{B. Limits and Implications}

Before analyzing the wider implications of the recent lawsuits, it helps to first acknowledge a number of limitations. Perhaps most obviously, the fact-specific analyses and inconsistencies among courts may lessen the precedential impact of any particular outcome. One might also argue that the cases, taken together, have limited future application, \textsuperscript{\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash\textendash}\textsuperscript{142}

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\item See, e.g., Sallaj v. ICE, No. CV 20-167, 2020 WL 1975819, at *4 (D.R.I. Apr. 24, 2020). In \textit{Pimentel-Estrada v. Barr}, 458 F. Supp. 3d 1226 (W.D. Wash. 2020), the court granted a detainee immediate release “on reasonable conditions of supervision.” \textit{Id.} at 1253. In a subsequent determination, the court converted the TRO into a preliminary injunction and ordered that the “continued release be conditioned only on [the detainee’s] compliance with federal, state, and local laws, and his keeping ICE reasonably informed of his current residence and mailing address.” \textit{Pimentel-Estrada v. Barr}, 464 F. Supp. 3d 1225, 1237 (W.D. Wash. 2020). In \textit{Thakker v. Doll}, 451 F. Supp. 3d 358 (M.D. Pa. 2020), the court ordered immediate release of petitioners who were at a high risk of infection due to age and/or underlying health conditions. \textit{See id. at} 365, 372. The court subsequently determined that some, but not all, of the immigrants should be granted continued release. \textit{See} \textit{Thakker v. Doll}, 456 F. Supp. 3d 647, 661, 666 (M.D. Pa. 2020) (“Because each Petitioner presents a unique set of circumstances that we must balance against the public interest, we shall consider Petitioners individually . . . .”).
\item See, e.g., Dawson v. Asher, 447 F. Supp. 3d 1047, 1050–51 (W.D. Wash. 2020) (concluding that plaintiffs failed to meet burden of proof where there was no evidence that anyone at the facility had COVID-19 and the government had taken specific precautionary measures); Hope v. Warden York Cnty. Prison, 972 F.3d 310, 320, 331 (3d Cir. 2020).
\item See, e.g., \textit{Habibi}, 445 F. Supp. 3d at 997 (finding the court lacked jurisdiction to review the immigration judge’s discretionary determination as to the detainee’s flight risk).
\item See, e.g., \textit{Habibi}, 445 F. Supp. 3d at 997 (finding the court lacked jurisdiction to review the immigration judge’s discretionary determination as to the detainee’s flight risk).
\item O.M.G. v. Wolf, 474 F. Supp. 3d 274, 277 (D.D.C. 2020); \textit{see id. at} 285.
\item See, e.g., Jones v. Wolf, 467 F. Supp. 3d 74, 80 (W.D.N.Y. 2020) (holding that “immediate release . . . [was] not the appropriate remedy — at least at this juncture” and instead requiring the government to “submit a detailed plan to the Court . . . demonstrating how [it would] provide those petitioners who are vulnerable . . . with a living situation that facilitates ‘social distancing’” (emphasis omitted)). Other courts have signaled that they would be willing to consider granting a narrower remedy than release if petitioners suggested one. \textit{See, e.g., O.M.G.}, 474 F. Supp. 3d at 285–86 (citing to cases that require a plaintiff seeking injunction to show that the court-ordered remedy is “specifically tailored” and not a “global remedy,” \textit{id. at} 285 (citations omitted)); \textit{Toure v. Hott}, 458 F. Supp. 3d 387, 401–02 (E.D. Va. 2020).
\end{enumerate}
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given that COVID-19 itself presents a unique challenge with unparalleled urgency, requiring extraordinary measures. Yet another limitation could be the difficulty of extending cases that grant predeprivation equitable relief to postdeprivation damages claims.

Despite these caveats, analyzing lower court decisions and identifying common themes is both important and instructive, especially in the absence of definitive Supreme Court guidance. This section highlights one such crosscutting theme: the explicit recognition by courts that — even if the facts of the particular case require denial of relief — the government nonetheless owes an affirmative duty to protect and provide adequate care for noncitizen detainees. Given the rarity of cases that directly recognize and address the scope of such a duty, the new slew of decisions that foreground an affirmative duty to protect noncitizens is significant in itself. If anything, this rhetoric marks a shift away from the narrative that the government owes a bare minimum to noncitizens — a notion still prevalent in legal and political discourse, partly due to the longstanding doctrine that the admission of noncitizens is a “matter of pure permission, of simple tolerance, and creates no obligation,” and the related notion that even after they set foot on American soil, the default expectation is for noncitizens to remain self-sufficient.

143 Cf. Savino v. Souza, 459 F. Supp. 3d 317, 332 (D. Mass. 2020) (observing that, while the government generally has competing responsibilities to “guard the health and safety of those incarcerated within its facility, as well as protect the outside public from dangerous detainees,” in the pandemic context, such a “dichotomy is somewhat misleading” since the government’s duties to the public “are jeopardized by locking up as many inmates as possible” and causing a viral outbreak); Shah, supra note 5 (suggesting that the pandemic context has led to “a modified definition of ‘public interest’”).
144 Cf. Ziglar v. Abbasi, 137 S. Ct. 1843, 1861 (2017) (noting the different concerns involved when a court provides constitutional protection under its traditional equitable power compared to when it allows monetary damages against government officials).
145 Cf. Erwin Chemerinsky, Government Duty to Protect: Post-DeShaney Developments, 19 TOURO L. REV. 679, 679-80 (2003) (“To make sense of the post-DeShaney developments, one must recognize that certain patterns have begun to emerge in lower court cases.”).
146 See, e.g., Savino, 459 F. Supp. 3d at 327 (citing to DeShaney as the “cardinal principle” underlying the detainees’ claim); Castillo v. Barr, 440 F. Supp. 3d 915, 920 (C.D. Cal. 2020) (citing to DeShaney after stating that “[t]he law is clear — the Government cannot put a civil detainee into a dangerous situation, especially where that dangerous situation was created by the Government”); Ousman D. v. Decker, No. 20-2292, 2020 WL 1847704, at *5 (D.N.J. Apr. 13, 2020) (agreeing that DeShaney requires the government to furnish reasonable safety to detainees); D.A.M. v. Barr, 474 F. Supp. 3d 45, 63-64 (D.D.C. 2020) (while noting that “[d]ue process only requires . . . ‘reasonable safety,’ not perfect safety,” id. at 63 (quoting DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs., 489 U.S. 189, 200 (1989)), recognizing that DeShaney imposes an affirmative duty nonetheless).
148 Fong Yue Ting v. United States, 149 U.S. 698, 708 (1893).
149 See Mathews v. Diaz, 426 U.S. 67, 80 (1976) (reasoning that there could not be “even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to
More concretely, though, the recent addition to case law provides much-needed clarity for litigants with regard to the availability of substantive due process claims under *DeShaney*’s two exceptions. This development has practical significance for immigration detention litigation more broadly. For instance, cases that expressly recognize noncitizen detainees’ constitutional right to safety and medical care help counter the qualified immunity defense, which shields government officers from suit if their conduct does not violate a “clearly established” right and often poses a substantial hurdle for noncitizens seeking monetary damages under 42 U.S.C. § 1983.150

Furthermore, while the bulk of the pandemic-related lawsuits rely on *DeShaney*’s special relationship doctrine,151 recognizing a broader affirmative duty to protect also reinforces claims under the state-created danger doctrine, insofar as the two are derived from the same underlying principle. This, in effect, weakens *Kamara*-like cases that categorically foreclose the state-created danger doctrine for noncitizen detainees facing deportation.152 That is, if *DeShaney*’s first exception can be invoked to grant release (albeit temporary) from custody, it is unclear why the second exception “has no place” simply because the remedy sought is relief from removal.153 Establishing the validity of the state-created danger doctrine has potentially wide-ranging implications, as demonstrated by the groundbreaking ruling in *J.P. v. Sessions*,154 where a dis-
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district court invoked the doctrine to mandate government-provided mental health services for immigrant families who were forcibly separated at the border.\(^{155}\)

Another noteworthy aspect of the pandemic litigation is that several of the cases directly addressed and expressly rejected the argument that “noncitizen immigration detainees are entitled to lesser due process protections than citizens.”\(^{156}\) Critically, others went further and concluded that for purposes of substantive due process analysis, excludable noncitizens and removable noncitizens are treated alike.\(^{157}\) As one court explained: “[A]ll petitioners claim that the government is forcing them to live in conditions that fall below acceptable societal standards of decency. By holding [excludable petitioners] in detention, the respondents have assumed a burden they cannot ignore — [their] status as . . . excludable alien[s] notwithstanding.”\(^{158}\) Echoing the language in DeShaney, these opinions have offered a straightforward explanation for placing all noncitizens on an equal footing with citizens: “[T]he power to incarcerate implies the duty to protect.”\(^{159}\) That is, the government’s duty to protect arises not from the detainee’s individual legal status, “but from the limitation which [the government] has imposed on [the detainee’s] freedom to act on his own behalf.”\(^{160}\)

These decisions thus directly challenge precedents that have held excludable noncitizens to the uniquely high standard of “gross physical abuse” or “malicious infliction of cruel treatment.”\(^{161}\) A broader impli-

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\(^{155}\) See id. at *35–36, *40 (reasoning that “[d]efendants took affirmative steps to implement the zero-tolerance policy in which immigrant parents were separated from their children . . . [and] this conduct caused severe mental trauma to parents and their children,” id. at *36); see also Miriam Jordan, U.S. Must Provide Mental Health Services to Families Separated at Border, N.Y. TIMES (Nov. 6, 2019), https://nyti.ms/2CnxIby [https://perma.cc/CWQ7-BLLZ].


\(^{157}\) Jones v. Wolf, 467 F. Supp. 3d 74, 83 n.6 (W.D.N.Y. 2020) (“[T]his Court does not find that [petitioner’s] interests as an excludable alien are materially lower than those of removable aliens for purposes of this analysis and . . . the injunctive relief ordered . . . ” (emphasis omitted)).

\(^{158}\) Id. (emphasis added); see also D.A.M. v. Barr, 474 F. Supp. 3d 45, 62–63 (D.D.C. 2020) (rejecting the government’s argument that petitioners did not have substantive due process rights since they were excludable); Cristian A.R. v. Decker, 453 F. Supp. 3d 670, 683 n.20 (D.N.J. 2020) (“Respondents emphasize that they have lawfully exercised their discretionary authority to detain Petitioners during their removal proceedings. This detention triggers a corresponding obligation under the Constitution to provide for Petitioners’ reasonable safety and medical needs[,]” (emphasis added)).


\(^{161}\) See sources cited supra notes 95–96 and accompanying text.
cation, however, is that by extending *DeShaney*’s rationale to the context of immigration detention, they implicitly reject the plenary power doctrine as inapplicable to substantive due process claims alleging the government’s failure to protect or provide care. That is, the opinions subtly but clearly shift away from cases that withhold due process protections from noncitizens based on the subject matter in controversy, or otherwise tailor protections based on noncitizens’ level of “voluntary connection[s]” to the community. Instead, by adopting *DeShaney*’s rationale in full, the decisions identify the locus of protections for noncitizens as the government’s involuntary control over them and its causal role in creating or exacerbating the danger in question.

**CONCLUSION**

This Note has examined an issue that is increasingly important yet continues to suffer from an unfortunate lack of clarity: the extent of the government’s duty to protect noncitizens in immigration detention. Parts I and II discussed the broader constitutional framework and examined how the case law in this area often tolerates ambiguity and apparent inconsistencies. Part III considered how recent challenges to conditions arising from the COVID-19 pandemic may suggest a shift in the legal landscape. As scholars have previously noted, constitutional principles in immigration law are shaped by unprecedented events that test the limits of immigration jurisprudence and compel courts to seek “new answers to . . . fundamental questions.” This Note suggests that the COVID-19 pandemic is one such event. The decisions that recognize immigrant-detainee claims under *DeShaney* collectively stand for the proposition that the government, by virtue of its own actions, assumes a positive constitutional duty to protect and care for those individuals that it detains — irrespective of their citizenship status.

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162 United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990); see id. at 272–73.  
163 Motomura, *Phantom Norms*, supra note 6, at 546.