AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURE OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Constitutional Litigation

**Guerrero-Lasprilla v. Barr, 140 S. Ct. 1062** (2020)

*Pedro Pablo Guerrero-Lasprilla was deported from the United States in 1998 after violating federal immigration law by committing a drug crime. In 2016, he asked the Board of Immigration Appeals [BIA] to reconsider his removal. This claim was rooted in federal case law and federal statutory law. The Fifth Circuit had recently ruled that 90 day time limit on appeals from a BIA decision could be equitably tolled. Imagine, for example, that newly discovered evidence proved that Guerrero-Lasprilla had not committed the drug crime that led to his deportation. Federal law permitted judicial review of BIA decisions on “constitutional claims or questions of law.” Guerrero-Lasprilla claimed that this provision, called the “Limited Review Provision,” permitted federal courts to review his claim that he had used due diligence to discover new evidence, when the facts were not in dispute. The Fifth Circuit ruled that federal courts had no jurisdiction to resolve this claim. Guerrero-Lasprilla appealed to the Supreme Court of the United States.*

 *The Supreme Court of the United States reversed by a 7-2 vote. Justice Stephen Breyer’s majority opinion interpreted the Limited Review Provision as granting federal courts to power to review claims by aliens that they had been illegally been deported when the review consisted of applying the law to agreed upon facts. The majority and dissenting opinions disputed the proper interpretation of the Limited Review Provision. While much of that dispute centered upon the legislative history and past precedent, Breyer and Justice Clarence Thomas also disputed how constitutional principles should influence statutory interpretation. What constitutional principles does Breyer insist support interpreting statutes as granting federal jurisdiction? What constitutional principles does Thomas rely on? Who has the better of the argument? Suppose this was a case involving access of a major corporation to federal courts. Would the justices split in the same way?*

JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Id819770f6cd611ea96bae63bc27a1895&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Id819770f6cd611ea96bae63bc27a1895) delivered the opinion of the Court.

. . . .

Consider first “a familiar principle of statutory construction: the presumption favoring judicial review of administrative action.”  Under that “well-settled” and “strong presumption,”  when a statutory provision “is reasonably susceptible to divergent interpretation, we adopt the reading that accords with traditional understandings and basic principles: that executive determinations generally are subject to judicial review.” . . . .As discussed above, we can reasonably interpret the statutory term “questions of law” to encompass the application of law to undisputed facts. And as we explain further below, interpreting the Limited Review Provision to exclude mixed questions would effectively foreclose judicial review of the Board's determinations so long as it announced the correct legal standard. The resulting barrier to meaningful judicial review is thus a strong indication, given the presumption, that “questions of law” does indeed include the application of law to established facts. . . .

. . . .

Consider also the Limited Review Provision's statutory history and the relevant precedent. The parties agree that Congress enacted the Limited Review Provision in response to this Court's decision in *INS v. St. Cyr* (2001). In that case, the Court evaluated the effect of various allegedly jurisdiction-stripping provisions, including the predecessor to [contemporary federal law]. That predecessor (which today is modified by the Limited Review Provision) essentially barred judicial review of removal orders based on an alien's commission of certain crimes. This Court interpreted that predecessor and the other purportedly jurisdiction-stripping provisions as not barring (*i.e.,*as permitting) review in habeas corpus proceedings, to avoid the serious constitutional questions that would be raised by a contrary interpretation.

In doing so, the Court suggested that the Constitution, at a minimum, protected the writ of habeas corpus “ ‘as it existed in 1789.’ ”  The Court then noted the kinds of review that were traditionally available in a habeas proceeding, which included “detentions based on errors of law, including the erroneous *application* or interpretation of statutes. And it supported this view by citing cases from the 18th and early 19th centuries English cases consistently demonstrate that the “erroneous application ... of statutes” includes the misapplication of a legal standard to the facts of a particular case. The Court ultimately made clear that “Congress could, without raising any constitutional questions, provide an adequate substitute [for habeas review] through the courts of appeals.”

. . . . This statutory history strongly suggests that Congress added the words before us because it sought an “adequate substitute” for habeas in view of [*St. Cyr*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536099&originatingDoc=Id819770f6cd611ea96bae63bc27a1895&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s guidance. See *supra,* at 1071. If so, then the words “questions of law” in the Limited Review Provision must include the misapplication of a legal standard to undisputed facts, for otherwise review would not include an element that [*St. Cyr*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001536099&pubNum=0000780&originatingDoc=Id819770f6cd611ea96bae63bc27a1895&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))said was traditionally reviewable in habeas.

. . . .

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Id819770f6cd611ea96bae63bc27a1895&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Id819770f6cd611ea96bae63bc27a1895), with whom JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Id819770f6cd611ea96bae63bc27a1895&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Id819770f6cd611ea96bae63bc27a1895) joins in part, dissenting

. . . .

As an initial matter, I have come to have doubts about our modern cases applying the presumption of reviewability. Courts have long understood that they “generally have jurisdiction to grant relief ” when individuals are injured by unlawful administrative action. Applying this well-settled principle, we have refused to read a statute's “silence ... as to judicial review” to preclude such review.  But the modern presumption of reviewability relied on by the majority today goes far beyond this traditional approach.

. . . .

Rather than recognize that courts should give the words of both the APA and agencies’ organic statutes their natural meaning, the Court relied on “[t]he spirit of [legislators’] statements” in Committee Reports and the “broadly remedial purposes of the [APA]” to craft a strong presumption of reviewability.  The Court ultimately concluded that statutory text alone, even that which “appears to bar [judicial review],” is “not conclusive.”  Under this approach, a court will yield its jurisdiction “only upon a showing of ‘clear and convincing evidence,’ ” drawn from a statute's purpose and legislative history, that Congress “intended” as much

. . . .

[T]he clear-and-convincing-evidence requirement appears to conflict with the text of the Constitution. Under Articles I and III, Congress has the authority to establish the jurisdiction of inferior federal courts and to regulate the appellate jurisdiction of this Court. It occasionally wields this power to prevent federal courts from reviewing certain actions through jurisdiction-stripping statutes. Using this modern presumption, however, the Court has reached the opposite result, despite a statute's plain text. By placing heightened requirements on statutes promulgated under Congress’ exclusive authority rather than simply giving effect to their ordinary meaning, courts upset the delicate balance of power reflected in the Constitution's text.

. . . .

Ironically, the majority refers to [the relevant statutory text] as the “Limited Review Provision.” But according to the majority's interpretation, it is anything but “limited”—nearly all claims are reviewable. That reading contradicts the plain text and structure of [the statute] which was enacted to strip federal courts of their jurisdiction to review most criminal aliens’ claims challenging removal proceedings. The Constitution gives the Legislative Branch the authority to curtail that jurisdiction. We cannot simply invoke this presumption of reviewability to circumvent Congress’ decision. Doing so upsets, not preserves, the separation of powers reflected in the Constitution's text.