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**WHEN INTERPRETIVE COMMUNITIES CLASH ON IMMIGRATION
LAW: THE COURTS' MEDIATING ROLE IN NONCITIZENS'
RIGHTS AND REMEDIES**

*Peter Margulies**

ABSTRACT

Immigration law gains clarity through the lens of Robert Cover's compelling work on law as a "system of meaning." Cover's vision inspires us to consider immigration law as a contest between two interpretive communities: acolytes of the protective approach, which sees law as a haven for noncitizens fleeing harm in their home countries, and followers of the regulatory approach, which stresses sovereignty and strict adherence to legal categories.

Immigration law's contest between contending camps need not be a zero-sum game. As Cover and Alex Aleinikoff observed in their classic article on habeas corpus, a legal remedy can also be a "mediating device." In immigration law, courts can serve this mediating function by reconciling the values of protection and enforcement.

This Article considers the mediating devices that courts can employ on three salient immigration law issues: 1) the availability of habeas corpus in expedited removal, which the Supreme Court rejected in *DHS v. Thuraissigiam*; 2) judicial review of executive branch action, such as President Trump's ban on immigration from several majority-Muslim countries, which the Court upheld in *Trump v. Hawaii*, and President Trump's attempted rescission of the Deferred Action for Childhood Arrivals (DACA) program, which the Court invalidated in *DHS v. Regents of the University of California*; and; 3) procedural and substantive bases for challenges to immigration detention.

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In each context, the Article argues that courts should require more tailored government actions and acknowledge the need for workable enforcement. This approach preserves a measure of deference for the political branches while checking arbitrary government actions that put noncitizens at risk.

I. INTRODUCTION

Seeing immigration law through the lens of the late Robert Cover's work yields insight, but also requires accommodation.¹ Cover's conception of interpretive communities perpetually creating law as a "system of meaning" aids in understanding two opposing camps in immigration law: the "protective" approach and the "regulatory" approach. The protective approach seeks to safeguard survivors of persecution and torture, while the regulatory approach stresses sovereignty, democratic process, and orderly law enforcement.² Based on Cover's earlier work with Alex Aleinikoff, courts can be a "mediating device" that reconciles the protective and regulatory approaches.³

On the other hand, mining Cover's work for these nuggets of insight requires recognition that Cover's work is both incomplete and protean. Cover's work is incomplete since the dichotomy between the protective and regulatory approaches is not the stark struggle between private meaning and bureaucratic imperatives that Cover posited in *Nomos and Narrative*.⁴ Instead, conflicts between the protective and regulatory approaches often demarcate different groups *within* government, such as protective asylum officers versus regulatory immigration enforcement officials. In addition, Cover's resonant account in *Nomos and Narrative* is most useful in tandem with the judicial craft that Cover and Aleinikoff celebrated in their article on habeas corpus.

The Supreme Court's record is mixed in mediating between the protective and regulatory camps in immigration cases.⁵ Due to the overall deferential cast of the Supreme Court's immigration jurisprudence, the Court has often sided with the regulatory camp,

¹ My focus here is on two works, one of which is co-authored: Robert M. Cover, *The Supreme Court 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

² Cover, *supra* note 1, at 12.

³ Cover & Aleinikoff, *supra* note 1, at 1048 n.65 (citation omitted).

⁴ Cover, *supra* note 1, at 12.

⁵ Compare *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959 (2020) (upholding statutory restrictions on judicial review), with *Dep't of Homeland Sec. v. Regents Univ. Cal.*, 140 S. Ct. 1891 (2020) (holding that Department of Homeland Security had not provided sufficiently reasoned explanation of rescission of Deferred Action for Childhood Arrivals (DACA) program).

particularly in cases involving noncitizens with no previous ties to the United States who are seeking to enter the country.⁶ Despite this deference, a Supreme Court decision, *Department of Homeland Security v. Thuraissigiam*,⁷ at least acknowledged the intragovernmental battle between the regulatory and protective camps.⁸ In *Thuraissigiam*, the Court held that noncitizens subject to expedited removal lacked access to habeas corpus. However, in writing for the Court, Justice Alito failed to adequately address serious flaws in the regulatory approach's factual claims.⁹

Two other important recent decisions in which Chief Justice Roberts wrote for the Court, *Trump v. Hawaii*¹⁰ and *Department of Homeland Security v. Regents of the University of California*,¹¹ may sketch the outlines of a work in progress. In the former case, Chief Justice Roberts accepted the rationale of the Trump administration regarding the travel ban on entry from a list of countries dominated by those with majority-Muslim populations.¹² In the latter case, Chief Justice Roberts conducted a more robust inquiry into the Trump administration's rationale for seeking to rescind the Deferred Action for Childhood Arrivals (DACA) program, this time finding the administration's rationales wanting.¹³ This Article suggests that this pivot may have been part of a Coverian process of mediation between the regulatory and protective camps. The Article's final case study examines the importance of relief for detained noncitizens through the lens of Cover and Aleinikoff's work, suggesting that the Constitution

⁶ Compare Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 262 (noting judicial deference in immigration law), with David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 44 (2015) (describing most persuasive arguments for deference); see also Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 61-62 (2015) (claiming that recent Supreme Court decisions showed a curtailing of deference).

⁷ 140 S. Ct. 1959 (2020).

⁸ *Id.* at 1966-67 (discussing more generous decisions of asylum officers as compared with immigration judges).

⁹ See *infra* notes 67-71 and accompanying text (discussing Justice Alito's failure to acknowledge the multiple causes of *in absentia* removals).

¹⁰ 138 S. Ct. 2392 (2018).

¹¹ 140 S. Ct. 1891 (2020).

¹² *Hawaii*, 138 S. Ct. at 2403.

¹³ *Dep't of Homeland Sec. v. Regents Univ. Cal.*, 140 S. Ct. 1891, 1902, 1906, 1912 (2020).

requires some remedy for prolonged confinement of noncitizens who have raised substantial questions about their removability.¹⁴

This Article contains four Parts. Part I discusses Cover’s work, including *Nomos and Narrative*, and the Cover and Aleinikoff study of habeas corpus. Part II discusses *Thuraissigiam* and habeas corpus for noncitizens with no previous ties to the United States. Part III analyzes the pivot between *Hawaii* and *Regents*. Part IV discusses remedies for prolonged detention. This article concludes with thoughts on the future of judicial “mediating devices” in immigration law.

II. **NOMOS, NARRATIVE, AND INTERPRETIVE COMMUNITIES IN IMMIGRATION**

While Robert Cover did not examine immigration law in depth, his work on groups creating “system[s] of meaning” suggests two key contending groups in this fraught field: the protective and regulatory camps.¹⁵ My goal in this paper is not to pick a winner in this battle. Instead, this article illustrates how courts referee the contest, using their decisional authority and control over remedies as “mediating devices,” as Cover and Alex Aleinikoff suggested in another path-breaking piece.¹⁶ Subsequent portions of this paper argue that courts have failed to serve as either effective or impartial referees, although the shift in method and tone from *Hawaii* to *Regents* may herald a change for the better.

A. **Cover and Interpretive Communities**

As Cover noted in his classic piece, *Nomos and Narrative*, groups with divergent perspectives relate disparate narratives, from which they draw different normative conclusions.¹⁷ As Cover put it, “every narrative is insistent in its demand for its prescriptive point, its moral.”¹⁸ Groups that organize themselves based on religion or ideology develop a “strong” view of law—in the philosophical sense—

¹⁴ *Gayle v. Warden Monmouth Cty. Corr. Inst.*, 12 F.4th 321, 326 (3d Cir. 2021).

¹⁵ Cover, *supra* note 1, at 12.

¹⁶ Cover & Aleinikoff, *supra* note 1, at 1048 n.65 (citation omitted).

¹⁷ Cover, *supra* note 1, at 5 (observing that, “[i]n this normative world, law and narrative are inseparably related.”).

¹⁸ *Id.* at 5.

“in which law is predominantly a system of meaning.”¹⁹ Cover cited the Mennonites who submitted an *amicus curiae* brief to the Supreme Court supporting the prerogative of the segregationist sectarian college, Bob Jones University, to discriminate on the basis of race. According to Cover, the Mennonites’ understanding of the Constitution “inhabit[s] an ongoing *nomos*”—a self-created legal order.²⁰ For Cover, that group-based understanding “assumes a status equal (or superior) to . . . the understanding of the Justices of the Supreme Court.”²¹ As “wielders of state power,” courts for Cover “must establish their boundary with a religious community’s resistance and autonomy.”²² Speaking of both government officials, including judges, and private groups, such as the Mennonites, Cover explained that, “[e]ach group must accommodate in its own normative world the objective reality of the other.”²³

B. Mediation by Design: The Role of Federal Courts

If Cover’s work in *Nomos and Narrative* posits a dichotomy between the vibrant constitutional visions of private groups and the philosophically “weak” official view of law as order-maintenance, his earlier work with Alex Aleinikoff on habeas corpus and federalism presents a more pragmatic view.²⁴ In Cover and Aleinikoff’s article, courts are not merely bureaucrats. Instead, they display a defining sense of craft that mediates between: (1) rights claims made by criminal defendants and (2) the distinctive worlds of state law enforcement officials and judges.²⁵ Cover and Aleinikoff also described the input that courts receive from the parties and other stakeholders as creating a “forum for negotiation” for equitable decrees, such as injunctions, which can require broad changes by state

¹⁹ *Id.* at 12.

²⁰ *Id.* at 28; *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983).

²¹ Cover, *supra* note 1, at 28.

²² *Id.*

²³ *Id.* at 28-29.

²⁴ By “weak,” Cover meant that the order-maintenance view did not make distinctive, affirmative claims for the virtues of law as creating meaning; instead, believers in the order-maintenance approach rely on generic claims about law as a means to provide stability. Cover, *supra* note 1, at 12.

²⁵ Cover & Aleinikoff, *supra* note 1, at 1038.

officials.²⁶ Moreover, equity had a utopian element that made it become a “midwife of constitutional innovation.”²⁷

Nonetheless, pragmatic forces tempered equity’s role. As Cover and Aleinikoff remarked, “a Court bent upon wholesale utopian reform soon finds the political capital necessary to effectuate change squandered, for it ignores the historical base from which change must proceed.”²⁸ Regarding doctrines such as abstention, standing, and ripeness that limit the role of federal equitable decrees in state court proceedings, Cover noted that the age-old individual remedy of habeas corpus had become a proxy for broad-based equitable relief.²⁹ In this space, courts used dialogue and “mediating devices” to impose change while preserving institutional legitimacy.³⁰

Trade-offs were endemic to this pragmatic vision of the courts’ role in cases involving civil rights and liberties. Cover and Aleinikoff explained that federal courts, as a practical matter, could not decree acceptance of a “utopian” vision of justice in which rights were absolute and unyielding.³¹ Instead, federal courts often had to temper rulings to accommodate state governments’ focus on law enforcement.³² Although Cover’s later work, such as *Nomos and Narrative*, seemed to express a measure of impatience with this hedging, Cover and Aleinikoff viewed such “mediating devices” as necessary. Political realities dictated this conclusion. An additional factor was the constitutional standing of states, which have their own role in creating legal meaning.³³

C. **Protective and Regulatory Communities in Immigration Law**

In immigration law, contending normative communities fall into the protective and regulatory camps. This subsection discusses

²⁶ *Id.*

²⁷ *Id.* at 1039.

²⁸ *Id.* at 1050 n.78.

²⁹ *Id.* at 1041.

³⁰ *Id.* at 1048 n.65.

³¹ *Id.* at 1052-54.

³² *Id.* at 1052-54.

³³ See Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352 (2010) (discussing the interaction between federal jurisdiction and political trends).

the normative commitments of each group. Understanding those commitments is necessary to craft an appropriate mediating role for courts.

The protective camp seems to ensure that prospective immigrants, especially asylum applicants, generally receive a safe harbor in the United States.³⁴ The forces threatening this group are multi-faceted, including persecution, torture, poverty, and climate change.³⁵ Under the protective view, the vast majority of persons seeking asylum presumptively fit legal criteria, which officials should construe liberally in initial screening to avoid false negatives—applicants wrongly returned to countries where they may face persecution, torture, or death.³⁶ In addition, adherents of the protective approach advocate for the favorable exercise of discretion by the executive branch to assist immigrants, even those who do not qualify for asylum or other forms of statutory relief.³⁷ The difficulties encountered by the protective school are two-fold. First, the legal requirements for asylum are daunting, since the process requires not only a risk of harm but also requires that risk to share a connection to one of five limited statutory categories.³⁸ Second, executive discretion occurs against the backdrop of the comprehensive scheme of the Immigration and Nationality Act (“INA”), in which Congress has carved out areas for relief and legal immigration but has also viewed noncitizens outside of the enumerated categories as being subject to removal from the United States.³⁹

³⁴ *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 436-40 (1987).

³⁵ See Christopher R. Rossi, *The Nomos of Climate Change and the Sociological Refugee in a Sinking Century*, 50 GEO. WASH. INT’L L. REV. 613, 635 n.155 (2018).

³⁶ Eunice Lee, *Regulating the Border*, 79 MD. L. REV. 374, 394-95 (2020).

³⁷ Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1, 22-25 (2015).

³⁸ *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992). The five characteristics that trigger asylum protection are race, religion, nationality, political opinion, and membership in a particular social group. *Id.* (citing 8 U.S.C. § 1101(a)(42)).

³⁹ The INA authorizes issuance of immigrant visas for specific groups such as “immediate relatives” (IRs) of U.S. citizens; unmarried sons or daughters of citizens; spouses, children, and unmarried sons and daughters of LPRs; married sons or daughters of citizens, and siblings of citizens. See 8 U.S.C. § 1151(b) (2012) (providing visas for IRs); 8 U.S.C. § 1153(a)(1)-(4) (providing other family-based visas subject to yearly caps). The INA also sets aside limited numbers of employment-based visas for persons with various skills and talents. See 8 U.S.C. § 1153(b). Scholars have commented extensively on the scope of executive discretion. See Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship*,

The regulatory camp is a convenient bookend for the protective approach. This contrasting school of thought regards immigration restrictions as safeguarding U.S. sovereignty through democratic choices.⁴⁰ In this account, the political branches determine criteria for admission into the country—such as family reunification, job skills, or flight from persecution—based on domestic and global factors, including resource allocation, political stability, and legal duties to refugees and others.⁴¹ In setting high levels of legal immigration based on family and employment relationships, and by providing a safe harbor for those fleeing persecution and torture, Congress has balanced the benefits of immigration with the need to allocate resources to those already in the United States.⁴² Entry into the United States by those who do not fit into these categories upsets the balance that Congress has struck.⁴³ Indeed, a system that cannot effectively implement

Prosecutorial Discretion, and the Separation of Powers, 94 B.U. L. REV. 105 (2014) [hereinafter *Taking Care of Immigration Law*]; Peter Margulies, *Rescinding Inclusion in the Administrative State: Adjudicating DACA, the Census, and the Military's Transgender Policy*, 71 FLA. L. REV. 1429 (2019) [hereinafter *Rescinding Inclusion in the Administrative State*]; but see Cristina M. Rodriguez, *The Supreme Court 2020 Term: Foreword: Regime Change*, 135 HARV. L. REV. 1, 95-108 (2021) (arguing for broad executive discretion in immigration law); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (arguing that both the U.S. Constitution and the INA authorize broad discretion by the executive branch to provide a range of benefits, including a reprieve from removal and work permits, for noncitizens without a legal status); cf. Hiroshi Motomura, *Making Immigration Law*, 134 HARV. L. REV. 2794, 2805-13 (2021) (discussing Cox and Rodriguez's treatment of executive discretion).

⁴⁰ Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2418 (2018) (asserting that admission of foreign nationals is a core "sovereign attribute . . . largely immune from judicial control") (internal citation omitted).

⁴¹ See SARAH SONG, *Immigration and Democracy* 65-69 (2019); cf. Martin, *supra* note 6, at 44 (outlining the most persuasive arguments for judicial deference to the political branches). The division between protective and regulatory camps that this Article posits is a heuristic, not a precise demarcation. For example, many scholars of a protective bent accept that Congress has principal authority over immigration. See Motomura, *supra* note 39, at 2805-06 (acknowledging Congress's vital role).

⁴² Other scholars dispute this view, asserting that sovereign states lack an ethical basis for choosing their own nationals over individuals from other countries, given individuals' lack of control over their place of birth. See ILYA SOMIN, *Free to Move: Foot Voting, Migration, and Political Freedom* (2020).

⁴³ See *Texas v. United States*, 809 F.3d 134, 178-82 (5th Cir. 2015).

Congress's choices will trigger a backlash and become an impetus for calls demanding fresh limits.⁴⁴

Regulatory adherents pay particular attention to the problem of fraud in various forms of relief from removal, including asylum.⁴⁵ Claims for asylum that are unfounded or fabricated comprise a collective action problem: those who assert such claims may game the system by persuading decision makers that unfounded claims have merit. However, the prevalence of unfounded claims erodes the public good of support for legal immigration.⁴⁶ Among the current Justices of the Supreme Court, Justice Alito most frequently cites concerns from the regulatory perspective about fraud or the breakdown of immigration adjudication.⁴⁷

Despite the importance of issues such as fraud and systemic breakdown, there are risks in the regulatory approach. Adherents of the regulatory approach may exaggerate the disruption that judicial intervention would cause to immigration adjudication.⁴⁸ That exaggeration unduly discounts the risk of false negatives in asylum decisions, which could lead to a noncitizen's arrest, torture, or death in his or her country of origin.⁴⁹ Left unchecked, this asymmetry between concerns about systemic disruption and false-negative errors can distort immigration law and policy. The rhetoric of the regulatory approach can cloak efforts to curb access to asylum and chill other forms of legal immigration specifically authorized by Congress.⁵⁰ This

⁴⁴ David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 684-85 (2000); Peter H. Schuck, *INS Detention and Removal: A White Paper*, 11 GEO. IMMIGR. L.J. 667, 669 (1997).

⁴⁵ David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 184 (1983) (explaining the arduous task of confirming information from asylum applicants and the incentives that exist for asylum applicants to embellish their claims); *see also* *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017) (noting the flagrant misrepresentation in which an asylum applicant claimed her husband had been victim of persecution when in fact he took part in wartime atrocities).

⁴⁶ *See* Martin, *supra* note 45.

⁴⁷ *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1966-67 (2020); *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2290 (2021).

⁴⁸ *See infra* notes 82-84 and accompanying text (discussing gaps in Justice Alito's analysis of factors that cause *in absentia* removal orders).

⁴⁹ *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 436-41 (1987).

⁵⁰ Lindsay M. Harris, *Asylum Under Attack: Restoring Asylum Protection in the United States*, 67 Loy. L. Rev. 121, 156-60 (2020).

dynamic threatens democratic decisions that the regulatory approach purports to respect.

D. The Importance of Judicial Stewardship

Courts practice a kind of stewardship to accommodate the concerns of the regulatory and protective models.⁵¹ Stewardship connotes a fiduciary obligation on the part of an agent to serve the needs of a principal. In U.S. governance, from the start, the Framers viewed government officials as having a duty to safeguard the framework of the Constitution, including both democratic values and the checks that the Constitution places on popular will.⁵² Tempering tendencies toward short-term thinking and encouraging deliberation about long-term interests is key to the judicial task.⁵³ In stewardship, attention to methodology and judicial craft can be more important than particular substantive commitments. Cover, in his work with Aleinikoff on habeas corpus, echoed this impulse in discussing courts' use of "mediating devices" to reconcile the interests of parties and other stakeholders.⁵⁴

⁵¹ See, e.g., Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159, 168-69 (2019) [hereinafter *The Travel Ban Decision*]; Margulies, *Taking Care of Immigration Law*, *supra* note 37, at 108-10 (discussing stewardship as applied to the executive branch's immigration decisions); Peter Margulies, *The DACA Case: Agencies' "Square Corners" and Reliance Interests in Immigration Law*, 2019 CATO SUP. CT. REV. 127, 127-28 (2019-2020) [hereinafter *The DACA Case*].

⁵² Alexander Hamilton invoked stewardship when he stated that "government ought to be clothed with all the powers requisite to complete execution of its trust." See *The Federalist* No. 23, at 155 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁵³ Alexander Hamilton, *The Federalist* No. 78, at 469-70. Substantive interpretive rules such as the rule of lenity, which counsels courts to construe criminal statutes to resolve ambiguity in favor defendants, perform this task by encouraging clarity in the legislative process and safeguarding reliance interests. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 143-45, 153-55 (2010) (discussing constitutional role of rule of lenity). In immigration and other areas, presumptions against retroactive application of statutes serve a similar purpose. See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 135-41 (1998); Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 FORDHAM URB. L.J. 1743, 1750-55 (2003).

⁵⁴ See Cover & Aleinikoff, *supra* note 1, at 1048 n.65 (citation omitted).

III. IMMIGRATION HABEAS THROUGH A COVERIAN LENS

The failure of the Supreme Court to reconcile the protective and regulatory approaches is evident in *Department of Homeland Security v. Thuraissigiam*,⁵⁵ in which the Supreme Court held that noncitizens apprehended at the border lacked access to habeas corpus to contest their removal.⁵⁶ Justice Alito, writing for the Court, ruled out any role for the courts in this context. He opined that the Suspension Clause did not protect the noncitizen's proposed remedy: a new chance to apply for asylum to rectify alleged procedural flaws in a previous adjudication of his asylum claim.⁵⁷ Despite this stark ruling, Justice Alito's discussion of the likelihood of error in asylum adjudication addressed both protective and regulatory perspectives, although Justice Alito tilted too far toward the regulatory approach.

Viewed against the backdrop of substantive immigration law, which has long showed marked deference to the political branches' decisions regarding noncitizens at the border, Justice Alito's reasoning was not a major departure. Noncitizens at the border may have statutory rights that can provide an avenue to judicial review of a denial of asylum.⁵⁸ However, over a century ago, the Court held that, in cases involving noncitizens seeking to enter the country who lack ties to the United States, "the decisions of executive or administrative officers, acting within powers expressly conferred by [C]ongress, are due process of law."⁵⁹ Call these noncitizens seeking to enter "outsiders,"

⁵⁵ 140 S. Ct. 1959 (2020).

⁵⁶ *Id.* at 1974-75.

⁵⁷ *Id.* at 1974. In his concurrence, Justice Breyer asserted that habeas corpus should be available to redress manifest legal errors and wholesale violations of statutory procedures involving applicants apprehended at the border; Breyer agreed that *Thuraissigiam* had not alleged issues of this kind or degree. *See id.* at 1989-90.

⁵⁸ *See* 8 U.S.C. § 1252(b)(4) (providing for judicial review of certain asylum decisions).

⁵⁹ *Ekiu v. United States*, 142 U.S. 651, 660 (1892) (emphasis added). Professor Kovarsky, who asserted in a provocative piece that *Thuraissigiam* marked a major narrowing of noncitizens eligible for admission, failed to fully reckon with *Ekiu*'s ironclad substantive limits on judicially-ordered relief. *See* Lee Kovarsky, *Habeas Privilege Origination and DHS v. Thuraissigiam*, 121 COLUM. L. REV. F. 23, 38-39 (2021) (recognizing *Ekiu*'s substantive deference, but not conceding that unconditional deference left the shell of habeas intact without any path to meaningful relief). Professor Rodriguez also failed to acknowledge this point in her description of *Thuraissigiam* as a "marked departure" from the Court's immigration precedents. *See* Cristina Rodriguez, *Reading Regents and the Political Significance of Law*,

as opposed to noncitizens who have entered the United States, whom this Article will call “insiders.” True, the Supreme Court had not held before *Thuraissigiam* that noncitizen outsiders lacked access to habeas corpus. Nevertheless, the nominal availability of habeas corpus to noncitizens at the border prior to *Thuraissigiam* made no practical difference to the noncitizen’s prospects for relief. Those prospects were dim, given the Court’s posture of absolute substantive deference.⁶⁰ The *Thuraissigiam* Court’s holding that habeas was categorically unavailable to noncitizen outsiders thus changed little.⁶¹

Justice Alito’s discussion of the policy backdrop for his stark approach echoed the concerns of the regulatory camp about the protective approach’s excesses and their effect on U.S. sovereignty. Justice Alito asserted that the statutory remedies already available to noncitizens at the border tilted too far toward the protective camp.⁶² On paper, those remedies are limited. Among noncitizens arrested at the border, only asylum applicants who received a favorable credible fear finding from an asylum officer have the opportunity to participate in an in-depth, adversarial hearing with an immigration judge from the Department of Justice, which is then followed by Article III appellate court review.⁶³ Without expressly citing the regulatory/protective typology advanced in this Article, Justice Alito implied that asylum

2020(1) Sup. Ct. Rev. 1, 21-22 (2021). As Justice Alito observed, Congress has provided statutory remedies. See *Thuraissigiam*, 140 S. Ct. at 1966-67. The noncitizen in *Thuraissigiam* sought access to habeas because he argued that the statutory remedies were inadequate. *Id.* at 1995.

⁶⁰ Moreover, this absolute substantive deference did not change when officials stopped a noncitizen at a border and transferred that individual to the interior of the United States for detention pending further proceedings. Under the so-called “entry fiction,” courts had for over a century treated a noncitizen in this situation as if she were still at the border awaiting entry. See *Kaplan v. Tod*, 267 U.S. 228, 230-31 (1925) (finding that a foreign national apprehended at the border, charged with being inadmissible due to mental infirmity and then transferred to the interior of the country, was “still in theory of law at the boundary line and had gained no foothold in the United States”) (emphasis added); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (affirming entry fiction); cf. Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 575 (2021) (critiquing entry fiction and suggesting alternatives).

⁶¹ I suggest later in this Part that the Court should have preserved access to habeas and modestly enlarged prospects for substantive relief, while still maintaining a deferential substantive posture. See *infra* note 94-95 and accompanying text.

⁶² *Thuraissigiam*, 140 S. Ct. at 1966-67.

⁶³ 8 U.S.C. § 1225(b)(1)(B)(ii); 8 U.S.C. § 1252(a)(2)(D), (b)(4).

officers belonged to the protective camp.⁶⁴ Justice Alito revealed that asylum officers find credible fear at a high rate, while immigration judges in adversarial hearings grant asylum at a far lower clip.⁶⁵ Put in Coverian terms, Justice Alito asserted that asylum officers have their own *nomos* that centers on reducing false negatives in asylum at all costs, including the cost of finding credible fear in many cases that ultimately result in denial of asylum. According to Justice Alito, resorting to habeas would compound the problem and further marginalize the regulatory perspective.⁶⁶ Indeed, Justice Alito stated that “the credible-fear process [even without judicial review] and abuses of it can increase the burdens currently ‘overwhelming our immigration system.’”⁶⁷ Alito cited an almost 2,000% increase in credible-fear claims and asserted that “[t]he majority have proved to be meritless.”⁶⁸ Furthermore, Justice Alito cited statistics on *in absentia* removal orders.⁶⁹ According to Justice Alito, these statistics showed that thousands of asylum applicants annually abscond rather than pursue their claims.⁷⁰ Justice Alito’s discussion implied that issuance of an *in absentia* removal order was a proxy for an unfounded claim, which the applicant had “voted with her feet” not to press.⁷¹

Even though he did not use Cover’s terms, Justice Alito compared the protective *nomos* of asylum officers with the regulatory *nomos* of immigration enforcement. According to Justice Alito, both the overly protective outlook of asylum officers and the potentially exacerbating effects of judicial review would adversely affect implementation of the INA. For example, Justice Alito claimed that judicial review of asylum denials in cases that could not meet what he called the “low bar” of credible fear “would augment the burdens” on asylum adjudication.⁷² Moreover, Justice Alito’s language went

⁶⁴ *Thuraissigiam*, 140 S. Ct. at 1966-67.

⁶⁵ *Id.* at 1967 (noting that in 2019, an asylum grant was the ultimate disposition in only 15% of the credible fear cases eventually heard by immigration judges).

⁶⁶ *Id.* at 1966 (observing that, “[a]s a practical matter . . . the great majority of asylum seekers . . . do not receive expedited removal and are instead afforded the same procedural rights as other aliens.”).

⁶⁷ *Id.* (citation omitted).

⁶⁸ *Id.* at 1966-67.

⁶⁹ An immigration judge will issue an *in absentia* order after a noncitizen has failed to appear for a hearing.

⁷⁰ *Thuraissigiam*, 140 S. Ct. at 1966-67.

⁷¹ *Id.*

⁷² *Id.*

beyond the philosophically “weak” view of efficient administration that Cover ascribed to state officials.⁷³

Justice Alito’s language formed an ethical narrative driven by the need to identify and deter noncitizens’ use of deception to game the U.S. asylum system.⁷⁴ In the opening sentences of his opinion, Justice Alito expressly linked this theme to concerns about impingement on U.S. sovereignty, recounting that “[e]very year, hundreds of thousands of aliens are apprehended at or near the border attempting to enter this country illegally.”⁷⁵ After acknowledging that some of these noncitizens advance meritorious claims that require recognition based on American “ideals and . . . treaty obligations,” Justice Alito returned to his cautionary theme and warned that “[m]ost asylum claims . . . ultimately fail, and some are fraudulent.”⁷⁶

Justice Alito’s observations were not unfounded. Some noncitizens strategically use the asylum process to flee from harsh and sometimes dangerous conditions, including those that do not meet asylum law’s strict criteria. Specifically, at least 5% of cases, in a system that currently has a backlog of 1.4 million pending applications, could be fraudulent.⁷⁷ Yet, the tone and substance of Justice Alito’s analysis went beyond the generic “order-maintenance” view of law that Cover ascribed to government officials.⁷⁸ Justice Alito’s warnings were grounded in sovereignty and prophecy, which gave the regulatory camp an ethical aspect beyond a mere preference for efficient management.

Despite his legitimate points about unfounded and fraudulent asylum claims, Justice Alito was not sufficiently critical of the regulatory camp’s premises. For example, issuance of an *in absentia*

⁷³ See Cover, *supra* note 1, at 12.

⁷⁴ *Thuraissigiam*, 140 S. Ct. at 1967 (noting the need to deter “fraudulent” claims and the difficulty of doing so under current conditions; citing nonpartisan sources to support this concern).

⁷⁵ *Id.* at 1963.

⁷⁶ *Id.*

⁷⁷ Maslenjak v. United States, 137 S. Ct. 1918, 1923 (2017); U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-50, ASYLUM: ADDITIONAL ACTIONS NEEDED TO ASSESS AND ADDRESS FRAUD RISKS 3 (2015); see also Tarini Parti & Michelle Hackman, *Biden Administration Proposes Asylum Overhaul to Reduce Backlog, Speed Deportations*, WALL ST. J. (Aug. 18, 2021 1:31 PM), <https://www.wsj.com/articles/biden-administration-proposes-asylum-overhaul-to-reduce-backlog-speed-deportations-11629307861> (discussing asylum backlog).

⁷⁸ See Cover, *supra* note 1, at 12.

removal order in a case does not necessarily indicate that the underlying claim is meritless. Some noncitizens whom immigration court statistics count as “absconding,” prompting the issuance of an *in absentia* removal order, received defective notice of the time and place of their hearing or the charges against them.⁷⁹ Moreover, the difficulty of obtaining legal counsel also hampers noncitizens’ participation in the process and their ability to support their claims.⁸⁰ When noncitizens who have received *in absentia* orders retain counsel to reopen proceedings, they are usually successful.⁸¹ Justice Alito’s examination of “meritless” or “fraudulent” claims and noncitizens who “abscond” does not acknowledge these obstacles faced by noncitizens, let alone suggest that the law should help redress such imbalances.⁸²

Justice Alito thus failed to reconcile the protective and regulatory perspectives. To provide an appropriate “mediating device” in a Coverian sense, Justice Alito should have brought means-ends rationality to bear. The Court should have asked whether achieving the goal of a workable immigration system required the drastic means of preclusion of judicial review. Judicial stewardship would have employed proper tailoring by asking whether any type of judicial

⁷⁹ *Pereira v. Sessions*, 138 S. Ct. 2105, 2112 (2018); Ingrid Eagly & Steven Shafer, *Measuring In Absentia Removal In Immigration Court*, 168 U. PA. L. REV. 817, 851-52 (2020).

⁸⁰ Eagly & Shafer, *supra* note 79, at 858-61; Zachary Manfredi & Joseph Meyers, *Isolated and Unreachable: Contesting Unconstitutional Restrictions on Communication in Immigration Detention*, 95 N.Y.U. L. REV. 130, 139-40 (2020); *see also* Mark Noferi, *Making Civil Immigration Detention “Civil,” and Examining the Emerging U.S. Civil Detention Paradigm*, 27 J.C.R. & ECON. DEV. 533, 557 n.155 (2014) (analyzing recommendations on access to counsel for detained noncitizens).

⁸¹ *See* Eagly & Shafer, *supra* note 76, at 856-57 (noting in the period studied, immigration judges granted motions to reopen in 84% of cases where an *in absentia* removal order had issued).

⁸² However, the regulatory perspective mounts a persuasive critique of unduly strict notice requirements. In a recent decision, the Court required one-step notice that included both information about the charges against the noncitizen and details about the time and place of the hearing, even when sequential notice about charges and scheduling did not prejudice the noncitizen. *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). As Justice Kavanaugh observed in a dissent joined by Chief Justice Roberts and Justice Alito, the statutory case for requiring one-step notice is weak. *Id.* at 1487-91 (Kavanaugh, J., dissenting); *see also* Peter Margulies, *Textualism’s Immigration Problem: Stabilizing Interpretive Rules on Noncitizens’ Rights and Remedies*, HOFSTRA L. REV. (forthcoming 2022) (manuscript at 39-44) (<http://ssrn.com/abstract=3918993>).

review could have deterred arbitrary agency decision making in the expedited removal process while still retaining appropriate levels of deference to the political branches. For example, the Court could employ a variant of plain error analysis, which ensures that administrative decisions are not wholly lacking in foundation while also limiting review to claims of manifest mistakes of law.⁸³ In fact, the Court has typically assured itself, as a practical matter, that decisions about extradition and transfer have such a basis.⁸⁴ Judicial stewardship would have counseled a similar approach to expedited removal.

Justice Breyer's concurrence in *Thuraissigiam* comes closer to a Coverian ideal of balancing the needs of interpretive communities. For example, Breyer discussed a hypothetical case of a noncitizen apprehended at the border and placed in expedited removal. The noncitizen referenced in Justice Breyer's example later encountered "rogue immigration officials [who] forged the record of a credible-fear interview that, in truth, never happened[.]"⁸⁵ Similarly, Breyer cited a hypothetical case that demonstrated the manifest misapplication of the relevant legal standard in asylum claims.⁸⁶ In this hypothetical scenario, an asylum officer found that an asylum applicant claiming persecution of the basis of his practice of Judaism simply did not

⁸³ Justice Breyer recommended this approach. See *Thuraissigiam*, 140 S. Ct. at 1989 (Breyer, J., concurring).

⁸⁴ Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 998-1003 (1998); Peter Margulies, *The Boundaries of Habeas: Due Process, the Suspension Clause, and Judicial Review of Expedited Removal Under the Immigration and Nationality Act*, 34 GEO. IMMIGR. L.J. 405, 433-38 (2019). Justice Alito rejected the extradition analogy, asserting that the habeas petitioners in those cases sought release from custody, when continued custody would have resulted in their prosecution in a foreign country. *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1974-75 (2020). In contrast, the noncitizen in *Thuraissigiam* sought a new hearing on his asylum claim. Margulies, *The Boundaries of Habeas*, *supra*, at 433-36. But arguably the stakes for *Thuraissigiam*, who alleged that he would be subject to persecution in his home country, were equivalent to the stakes in the extradition cases. *Id.* at 1967. Justice Alito's focus on habeas as requiring a request for release obscured the parallels between the extradition and expedited removal contexts. *Id.*

⁸⁵ *Thuraissigiam*, 140 S. Ct. at 1989.

⁸⁶ *Id.*

qualify for asylum as a matter of law.⁸⁷ Justice Breyer, who was joined by Justice Ginsburg, expressed concern that barring challenges to such flagrant violations would provide an insufficient check on government. From a Coverian perspective, Justice Breyer was correct.

IV. A TALE OF TWO CASES: INTERPRETIVE COMMUNITIES IN THE TRAVEL BAN AND DACA DECISIONS

Two recent decisions may reveal a pivot toward reconciling the regulatory and protective perspectives. In *Trump v. Hawaii*, Chief Justice Roberts, writing for the Court, displayed the deference that has long characterized the Court's decisions on prospective entrants to the United States.⁸⁸ However, in *Department of Homeland Security v. Regents of the University of California*, Chief Justice Roberts, who again wrote the majority opinion, echoed the concern for noncitizens' welfare characteristic of the protective approach, linking that concern with the well-being of U.S. individuals and entities.⁸⁹ While one can distinguish *Regents* as involving noncitizens already in the United States, Chief Justice Roberts's movement from deference in *Hawaii* to a reconciliation in *Regents* is nonetheless notable.

A. Deference toward the Regulatory Camp in the Travel Ban Case

Deference prevailed in *Trump v. Hawaii*, in which the Supreme Court upheld President Trump's suspension of entry of nationals of several Muslim-majority countries.⁹⁰ The 2017 measure, which followed two earlier attempts that encountered judicial resistance,⁹¹ originated in then-candidate Trump's campaign promise for a "total

⁸⁷ *Id.* (positing hypothetical of "officials [who] denied a refugee asylum based on the dead-wrong legal interpretation that Judaism does not qualify as a 'religion' under governing law[.]") (citing *Tod v. Waldman*, 266 U.S. 113, 119-20 (1924)).

⁸⁸ *Trump v. Hawaii*, 138 S. Ct. 2392, 2409 (2018).

⁸⁹ *Dep't of Homeland Sec. v. Regents Univ. Cal.*, 140 S. Ct. 1891, 1902, 1906, 1912 (2020).

⁹⁰ The travel ban did not include the most populous majority-Muslim countries, Indonesia and Pakistan, or the country that has the largest Muslim population, India. *Cf. Hawaii*, 138 S. Ct. at 2421 (noting that countries included in the travel ban included "just 8% of the world's Muslim population"). The ban also included North Korea and officials in Venezuela and their families and associates. *Id.* at 2405.

⁹¹ *Id.* at 2403-04.

and complete shutdown of Muslims entering the United States”⁹² Chief Justice Roberts’s *Hawaii* opinion shows the tension between uncritical acceptance of the regulatory view and a more skeptical perspective that lurks at the opinion’s edges.

Chief Justice Roberts’s framing of the question at the start of his opinion squarely credited the regulatory view’s premises and viewed President Trump’s travel ban as consistent with those tenets. Chief Justice Roberts described President Trump’s exercise of power under § 212(f) of the INA to suspend the entry of persons the President finds to be “detrimental to the interests of the United States” as a logical corollary of the “vetting process” that any noncitizen seeking admission to the United States must undergo to ensure public safety.⁹³ Conveying President Trump’s rationale in neutral terms, Chief Justice Roberts explained that the countries subject to the ban “do not share adequate information for an informed entry determination or . . . otherwise present national security risks.”⁹⁴ Reinforcing this view of the travel ban as a routine regulatory measure, Chief Justice Roberts elaborated on how agencies that assisted in establishing the travel ban participated in an inter-agency process of “consultation.” Consultation occurs when flagged countries allegedly fail to provide adequate “identity-management information,” including information on lost or stolen passports.⁹⁵ In concluding that this supposedly neutral and reasoned agency process was consistent with both the INA, which barred discrimination in visa issuances, and the Constitution’s Establishment Clause, Chief Justice Roberts noted that “such judgments ‘are frequently of a character more appropriate to the legislature or the Executive,’” rather than the courts.⁹⁶

However, the framing of President Trump’s travel ban as a routine regulatory action clashed with the Chief Justice’s apparent

⁹² *Id.* at 2417.

⁹³ 8 U.S.C. § 1182(f); *Hawaii*, 138 S. Ct. at 2403.

⁹⁴ *Hawaii*, 138 S. Ct. at 2403.

⁹⁵ *Id.* at 2404 (citation omitted).

⁹⁶ 8 U.S.C. § 1152(a)(1)(A) (barring discrimination “in the issuance of an immigrant visa”); *but see Hawaii*, 138 S. Ct. at 2413-14 (reading § 1152(a)(1)(A) narrowly to distinguish between issuance of visa by consular official and entry decision made at port of entry such as border, airport, or port); *see also Hawaii*, 138 S. Ct. at 2418-19 (citation omitted) (discussing importance of judicial deference). It is telling that Chief Justice Roberts quoted here from a decision that addressed the far more anodyne subject of congressional limits on receipt of benefits by noncitizens. *See Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (cited in *Hawaii*, 138 S. Ct. at 2419).

acknowledgement of the invidious stereotypes that spawned the travel ban. Chief Justice Roberts conceded that a series of statements by President Trump “cast[] doubt on the official objective” of the ban.⁹⁷ The opinion documented those statements, starting with then-candidate Trump’s call on the campaign trail for a “total and complete shutdown” of Muslim immigration.⁹⁸ Chief Justice Roberts compared Trump’s remarks unfavorably to those of presidents past, including George Washington. As recounted by the Court, Washington used the standing of the presidency to “espouse the principles of religious freedom and tolerance on which this Nation was founded.”⁹⁹ Chief Justice Roberts then described similar statements by modern presidents, including Dwight Eisenhower and George W. Bush.¹⁰⁰

Roberts’s survey of presidential statements from George Washington to the present made sense only as an acknowledgment of the discontinuity between Trump’s rhetoric and the language used by Trump’s predecessors in the White House. The Chief Justice could have readily framed Trump’s toxic rhetoric as a signal to administration officials to do his bidding on the travel ban. Against the backdrop of that powerful presidential signal, the patina of interagency process that Chief Justice Roberts cited as proof of the travel ban’s bona fides was merely “window dressing.”¹⁰¹ Nevertheless, despite the clear implication that Trump’s statements represented a major falling-off from both Washington and more recent occupants of the White House, Chief Justice Roberts asserted the need for deference.¹⁰²

Chief Justice Roberts could have applied more searching means-ends scrutiny to the travel ban. For example, Chief Justice Roberts could have asked whether the Administration’s vaunted concern with identity management matched the means that the ban

⁹⁷ *Hawaii*, 138 S. Ct. at 2417.

⁹⁸ *Id.*

⁹⁹ *Id.* at 2418 (citing Washington’s letter to Touro Synagogue in Newport, Rhode Island, advising the Temple’s congregants that the U.S. government “gives to bigotry no sanction, to persecution no assistance [and] requires only that [the congregants and others of the Jewish faith] ... demean themselves as good citizens”).

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 2432-33 (Breyer, J., dissenting) (discussing illusory nature of waiver process under travel ban); *id.* at 2433 (Sotomayor, J., dissenting) (asserting that, due to interagency process, Trump’s efforts to single out Muslims for harsh treatment “now masquerades behind a façade of national-security concerns”).

¹⁰² *Hawaii*, 138 S. Ct. at 2418-19.

employed. Precedents that applied a “rational basis with bite” test provided ample precedent for this more probing view of government decisions.¹⁰³ In fact, Chief Justice Roberts cited several of those cases.¹⁰⁴ For example, in *City of Cleburne v. Cleburne Living Center*,¹⁰⁵ the Court found no rational basis for a local ordinance that required a special permit for establishment of a group home for persons with developmental disabilities.¹⁰⁶ The Court determined that the ordinance was radically underinclusive as a means to achieve the town’s stated goals of alleviating noise and congestion. As the Court observed, the town had not required a special permit for other uses in the area, such as fraternity houses, dormitories, and hospitals, that might prompt comparable adverse impacts.¹⁰⁷ Once the Court found a lack of fit between means and ends, only one plausible explanation remained: impermissible animus.¹⁰⁸

The travel ban suffered from a similar lack of fit between the Trump administration’s stated goals and the means it had chosen to achieve those goals. The ban was markedly over-inclusive.¹⁰⁹ Four of the listed countries—Iran, Libya, Somalia, and Venezuela—issued electronic passports, which the Trump administration viewed as the gold standard of passport control.¹¹⁰ Moreover, according to

¹⁰³ Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1319-33 (2018). The discussion in the text borrows from earlier work. See *The Travel Ban Decision*, *supra* note 51, at 178-79.

¹⁰⁴ See, e.g., *Hawaii*, 138 S. Ct. at 2420 (citing *Matthews v. Diaz*, 426 U.S. 67, 81-82 (1975); *R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50 (1985); *Romer v. Evans*, 517 U.S. 620, 632, 635 (1996)).

¹⁰⁵ 473 U.S. 432 (1985).

¹⁰⁶ *Hawaii*, 138 S. Ct. at 2420 (citing *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985)).

¹⁰⁷ *Id.* at 447-50.

¹⁰⁸ *Id.*

¹⁰⁹ *The Travel Ban Decision*, *supra* note 51, at 180-81; David J. Bier, *Travel Ban is Based on Executive Whim, Not Objective Criteria*, CATO AT LIBERTY (Oct. 9, 2017), <https://www.cato.org/blog/travel-ban-based-executive-whim-not-objective-criteria>; see also Brief for The Cato Institute as Amici Curiae Supporting Respondents, *Trump v. Hawaii*, No. 17-965 (Mar. 23, 2018), https://www.supremecourt.gov/DocketPDF/17/17-965/39755/20180323095217542_Cato%20Amicus%20Brief.pdf (discussing sources).

¹¹⁰ *ICAO PKD Participants*, INT’L CIV. AVIATION ORG. (ICAO), <https://icao.int/Security/FAL/PKD/Pages/ICAO-PKDParticipants.aspx>.

international law enforcement officials, Iran was “quite strong” in sharing data on lost or stolen passports,¹¹¹ while Libya, Somalia, Syria, and Venezuela were not far behind.¹¹² The travel ban was also noticeably under-inclusive on identity management. Almost one hundred unlisted countries do not provide electronic passports.¹¹³ Moreover, over 150 unlisted countries are either stingy when providing information or absolutely silent about passports that are lost or stolen.¹¹⁴ Chief Justice Roberts could have readily found that the travel ban failed to pass muster under the same means-ends analysis that the Court applied in *Cleburne*. Yet, the *Hawaii* Court cited *Cleburne* without applying *Cleburne*’s more searching approach.¹¹⁵

The failure of Coverian mediation in *Hawaii* extended beyond the realm of noncitizens outside the United States that both *Hawaii* and *Thuraissigiam* sought to place off-limits. Justice Kennedy, concurring in *Hawaii*, characterized judicial nonintervention in this domain as natural and inevitable.¹¹⁶ Unlike his stance in *Boumediene v. Bush*,¹¹⁷ a case about war-on-terror detainees’ access to habeas, Kennedy did not see the Court’s approval of the travel ban as an act that emboldened the political branches to overreach into other spheres that are closer to home.¹¹⁸ However, the belief that some hermetic seal insulates the zone of “outside” deference from the “inside” realm of accountability has always been naïve. While the exigencies of particular situations may dictate greater flexibility for the political branches, the categorical separation that *Hawaii* and *Thuraissigiam* sought has encouraged habits of overreaching in the executive branch. Furthermore, those

¹¹¹ Bier, *supra* note 109, at 10.

¹¹² *Id.*

¹¹³ *Id.*; ICAO PKD Participants, *supra* note 110.

¹¹⁴ Bier, *supra* note 109, at 2; U.S. House of Representatives Committee on Homeland Security, Subcommittee on Border and Maritime Security, *Passport Fraud: An International Vulnerability* (Apr. 4, 2014) (testimony of officials Alan Bersin and John Wagner), <https://www.dhs.gov/news/2014/04/04/written-testimony-plcy-office-international-affairs-and-cbp-office-field-operations>.

¹¹⁵ *Hawaii*, 138 S. Ct. at 2420.

¹¹⁶ *Id.* at 2424 (describing the “substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs”).

¹¹⁷ 553 U.S. 723 (2008).

¹¹⁸ *Id.* at 765 (affirming courts’ role in denying political branches the “power to switch the Constitution on or off at will”).

habits inevitably find their way into the domestic arena.¹¹⁹ A measure of the mediation that Cover and Aleinikoff urged is necessary in both a foreign and domestic setting; certainly, the Court should not preemptively signal that mediation is unnecessary in the outside domain.

B. Mediation in the DACA Case

The Supreme Court struck a different Coverian balance in *Department of Homeland Security v. Regents of the University of California*, in holding that the Trump administration's effort to rescind the Deferred Action for Childhood Arrivals ("DACA") program failed to comport with the "reasoned decisionmaking" required under the Administrative Procedure Act ("APA").¹²⁰ The Court's robust use of APA review in *Regents* contrasted sharply with the deferential approach to the INA implemented in *Hawaii*. Chief Justice Roberts's opinion highlighted the values of the protective camp. Roberts's opinion also carefully scrutinized agency claims invoking the regulatory position.

Chief Justice Roberts cited to the reliance interests of the DACA recipients, including their commitment to life-building activities such as education and service.¹²¹ Under the APA, an agency must engage in "consideration of the relevant factors" and address "important aspect[s] of the problem" at hand.¹²² Consider a DACA recipient who enrolled in a four-year college in September of 2016 and whose two-year DACA period of participation was due to end on

¹¹⁹ See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019) (finding that Department of Commerce Secretary Wilbur Ross's rationale for seeking to add citizenship question to census was "contrived" and that "the evidence tells a story that does not match the explanation the Secretary gave for his decision.").

¹²⁰ *Dep't of Homeland Sec. v. Regents Univ. Cal.*, 140 S. Ct. 1891, 1905 (2020) (quoting *Michigan v. Env't Prot. Agency*, 576 U.S. 743, 750 (2015)). Under DACA, recipients who came to the United States as children within specified times and are not above thirty years of age at the time of their application receive important benefits, such as a reprieve from removal and eligibility for a work permit. *Id.* at 1901-05.

¹²¹ *Id.* at 1914. This discussion borrows from earlier work. See *The DACA Case*, *supra* note 50, at 149-50.

¹²² *Regents Univ. Cal.*, 140 S. Ct. at 1905 (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 at 416 (1971)); *id.* at 1913 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

March 6, 2018. According to Chief Justice Roberts, this recipient would be “caught in the middle of a time-bounded commitment,” without either sufficient notice of DACA’s rescission to avoid starting her course of study or sufficient time to fulfill degree requirements.¹²³ Chief Justice Roberts described a similar predicament for persons serving in the armed forces or receiving an extended course of needed medical treatment. According to Roberts, Duke could have considered allowing our hypothetical college student and similar “caught in the middle” recipients to complete their respective periods of study, treatment, or service.¹²⁴

In addition, Chief Justice Roberts noted that rescinding DACA would have had spillover effects for U.S. individuals and entities, such as employers, schools, and the U.S. military.¹²⁵ Chief Justice Roberts’s opinion alluded to a sense of mutuality that is implicit in Cover’s explanation of the *nomos*—the notion that all of us share a project of making meaning, even though our respective projects may entail different values and guiding premises.¹²⁶ This brings DACA recipients, the so-called “Dreamers,” within the ambit of a Coverian interpretive community.

In Chief Justice Roberts’s *Regents* opinion, the APA served the same mediating function as habeas did in Cover and Aleinikoff’s work.¹²⁷ Rather than extend substantive statutory or constitutional rights to DACA recipients, Chief Justice Roberts stressed the process values protected by the APA’s requirement of reasoned decision making.¹²⁸ He agreed that the agency could end both prongs of DACA: its reprieve from removal and eligibility for work permits.¹²⁹ However, in a framing exercise that owed much to the tradition of equitable discretion described by Cover and Aleinikoff, the Chief Justice suggested that the Secretary of Homeland Security had

¹²³ *Id.* at 1914.

¹²⁴ *Id.*

¹²⁵ *Id.* (citing reliance interests of third parties with ties to DACA recipients).

¹²⁶ Cover, *supra* note 1, at 12.

¹²⁷ Cover & Aleinikoff, *supra* note 1, at 1048 n.65.

¹²⁸ *Id.* at 1912-13. Chief Justice Roberts did not directly dispute the assertions of Justice Thomas in his dissent, which drew from the regulatory camp’s premises. *Id.* For Justice Thomas, the INA did not authorize the comprehensive relief DACA provided to noncitizens who lacked a legal basis for remaining in the United States. *Id.* at 1921-22 (Thomas, J., dissenting).

¹²⁹ *Id.* at 1910 (majority opinion).

discretion to consider alternative means for ending DACA and discussed the impacts of each of those alternatives.¹³⁰

In the words of Cover and Aleinikoff, the Secretary had failed to mediate between the protective and regulatory camps. In *Regents*, the Court held the Secretary to that mediating objective. While both the Court's role and the Secretary's mission were more minimalist than the expansive judicial pronouncement that Cover expected from the Court in the *Bob Jones* case, *Regents* was still a lifeline for the DACA program and its recipients.¹³¹

IV. DETENTION AND DECLARATORY RELIEF

Finally, I will address the Coverian implications of relief regarding immigration detention. A range of noncitizens are subject to mandatory detention, including those who have committed offenses

¹³⁰ *Id.*

¹³¹ As of the writing of this Article, DACA faces new challenges, including a district court decision echoing Justice Thomas's view that DACA exceeds power delegated to the executive branch under the INA. See *Texas v. United States*, No. 1:18-CV-00068, 2021 U.S. Dist. LEXIS 133114, at *72-98 (S.D. Tex. July 16, 2021). In earlier work, while acknowledging these arguments, I have argued that DACA merits special deference as an exercise of traditional hardship-based deferred action under the INA because of the youth of its recipients, their lack of ties to any other country, and their lack of control over parental decisions to enter the United States. See Margulies, *Rescinding Inclusion in the Administrative State*, *supra* note 51, at 1472-73. Moreover, DACA is also consistent with the exercise of presidential power under the Constitution. See Margulies, *Taking Care of Immigration Law*, *supra* note 51, at 142-77 (arguing that in light of Congress's silence and the foreign-affairs consequences of removing large groups of noncitizens with no ties to any foreign state, DACA fits the President's provisional power to protect current and intending citizens); see generally *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (discussing gradations of judicial deference to presidential power, with deference highest when the President and Congress act together; at a middle stage when Congress is silent; and "at its lowest ebb" when the President acts in opposition to Congress); *id.* at 610-11 (Frankfurter, J., concurring) (asserting that pattern of legislative acquiescence can provide "gloss" on presidential power beyond Constitution's stated authorities that should trigger judicial deference); *Dames & Moore v. Regan*, 453 U.S. 654, 657-58 (1981) (upholding presidential claims settlement as established practice in which Congress has acquiesced); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 415 (2012).

that make them removable.¹³² In non-immigration settings, detention with no prospect for release would trigger judicial intervention.¹³³ For certain immigration detainees, Congress has both precluded release as a substantive matter and curbed judicial remedies in a fashion that echoes the regulatory approach. In particular, Congress has curbed access to both injunctive and class-wide relief.¹³⁴ Courts have sought to balance the Government's commitment to the regulatory approach with rulings that recall the protective approach.¹³⁵

Mandatory detention is problematic for several reasons. First, it is often needless since immigration officials could release many immigration detainees under appropriate conditions that would facilitate their appearance at subsequent hearings.¹³⁶ Needless curtailment of liberty prompts tension with due process. Second, detention adversely affects a noncitizen's ability to defend against removal.¹³⁷ Due process would also generally disfavor needless impediments to a noncitizen's ability to seek relief on the merits.¹³⁸

¹³² See 8 U.S.C. § 1226(c); *Jennings v. Rodriguez*, 138 S. Ct. 830, 847 (2018); *Nielsen v. Preap*, 139 S. Ct. 954, 959. (2019).

¹³³ *Nielsen*, 139 S. Ct. at 978 (Breyer, J., dissenting).

¹³⁴ 8 U.S.C. § 1252(f); *id.* at § (e)(1)(B).

¹³⁵ See Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 109 CAL. L. REV. (Feb. 22, 2021) (manuscript at 36-38); Aditi Shah, *Constitutional and Procedural Pathways to Freedom from Immigration Detention: Increasing Access to Legal Representation*, 35 GEO. IMMIGR. L.J. 181, 199 (2020).

¹³⁶ See 8 U.S.C. § 1226(a)(2)(A) (authorizing release on bond subject to "conditions prescribed by[] the Attorney General" or his or her designates); see also *Johnson v. Guzman Chavez*, 141 S. Ct. 2271, 2295 (2021) (Breyer, J., dissenting) (explaining that at a bond hearing, an IJ will decide whether the noncitizen is likely to abscond and will deny bond if the noncitizen presents a flight risk).

¹³⁷ *Guzman Chavez*, 141 S. Ct. at 2295 (Breyer, J., dissenting) (citing Robert Katzmman, *When Legal Representation is Deficient: The Challenge of Immigration Cases for the Courts*, 143 DAEDALUS 37, 43-44 (2014)) (observing that compared with non-detainees, detainees find it more difficult to obtain counsel to develop a legal claim); Manfredi & Meyers, *supra* note 80, at 139-40; Noferi, *supra* note 77, at 557 n.155.

¹³⁸ The Supreme Court has upheld mandatory detention for certain cohorts of noncitizens who are currently in removal proceedings. See *Demore v. Kim*, 538 U.S. 510, 531 (2003). In a concurrence in *Demore*, Justice Kennedy suggested that an "unreasonable delay" by immigration officials in conducting a removal proceeding might suggest some kind of improper penal purpose. *Id.* at 532-33. However, Justice Kennedy declined to find such a delay in *Demore*. *Id.* at 533; but see Amy Greer, *Giving Joseph Hearings Their Due: How to Ensure that Joseph Hearings Pass Due*

Informed by the protective paradigm, courts have explored creative ways to reduce these impacts and other harms of detention. Some decisions found that Congress did not preclude access to habeas corpus to challenge certain conditions of confinement, such as unsafe practices in light of COVID-19.¹³⁹ Courts have also ordered relief on an individual basis.¹⁴⁰ In addition, courts have used declaratory relief to set procedures that must be followed in all similarly situated cases.¹⁴¹ Unless officials are willing to run the risk of a court ultimately finding them in contempt of court for failing to comply on a class-wide basis with the terms of declaratory relief, this relief functions much like an injunction.

Courts have used declaratory relief adroitly. For example, in *Gayle v. Warden, Monmouth County Correctional Institution*,¹⁴² the Third Circuit Court of Appeals recently issued declaratory relief requiring procedural safeguards for a class of noncitizens subject to mandatory detention. According to the court, in each case in which the government asserted that mandatory detention applied, the Due Process Clause required the Immigration Judge to hold a hearing prior to adjudicating the merits.¹⁴³ At this preliminary hearing, the government had to bear the burden of proof by a preponderance of the evidence that noncitizens, by virtue of their prior criminal convictions, fell within the group of noncitizens subject to mandatory detention under the INA.¹⁴⁴ The Third Circuit recognized that injunctive relief was unavailable for the class.¹⁴⁵ However, the court's declaratory relief

Process Muster, 26 ROGER WILLIAMS U. L. REV. 40, 51-52 (2021) (discussing unreasonable duration of detention in many immigration cases).

¹³⁹ *Nicole B. v. Decker*, No. 20-7467 (KM) 2020 U.S. Dist. LEXIS 126753, at *15-17 (D.N.J. July 20, 2020); *Yanes v. Martin*, 464 F. Supp. 3d 467, 474 (D.R.I. 2020) (interpreting Eighth Amendment to require individual bail hearings when facility could not check COVID spread).

¹⁴⁰ See 8 U.S.C. § 1252(f)(1) (providing that injunctive relief is not barred “with respect to the application of such provisions to an individual alien”).

¹⁴¹ *Gayle v. Warden, Monmouth Cnty. Corr. Inst.*, 12 F.4th 321, 331-34 (3d Cir. 2021). In *Jennings*, Justice Alito suggested that under Rule 23(b)(2) of the Federal Rules of Civil Procedure, declaratory relief might not “sustain the class on its own.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018). If the prospect of contempt is added to the mix, plaintiffs should be able to make this showing.

¹⁴² 12 F.4th 321(3d Cir. 2021).

¹⁴³ *Id.* at 332-34.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 336-37.

provided clear procedural guidance that the government would be wise to follow. The government's only alternative, assuming the Third Circuit's decision is final, would be contesting the requirement of a preliminary hearing in future cases. These repeated contests would be unavailing, given the court's clear guidance. One hopes that the government would instead participate in all future preliminary hearings by shouldering the burden of proof that the Third Circuit had specified.

If the government complies with this procedural guidance, the effect of the *Gayle* court's remedy will approximate the impact of class-wide injunctive relief. Both declaratory and injunctive relief would result in a preliminary hearing on the need for mandatory detention. Individual outcomes in release proceedings will vary. Depending on the facts and law in each case, some detainees will be released, while others will remain in detention. The range of substantive outcomes is endemic to any procedural safeguard; however, while outcomes will be varied, adoption of the procedural safeguard would be uniform. In response to mandatory detention, courts thus have supplied the “mediating devices” that Cover and Aleinikoff had envisioned.¹⁴⁶

V. CONCLUSION

Surveying this case law, one can see that the Supreme Court has not used “mediating devices” as deftly as Cover and Aleinikoff recommended.¹⁴⁷ The analysis of Justice Alito in *Thuraissigiam* reveals the flaws in distinctions between persons “inside” and “outside” the United States.¹⁴⁸ Maintaining judicial review as a check on arbitrary decisions benefits insiders, not just outsiders. As *Trump v. Hawaii* and *Regents* illustrate, “outside” distinctions and classifications do not stay “outside.”¹⁴⁹ Instead, they migrate *inside* and erode reasoned decision making. *Regents* exhibited one approach to correcting the balance between the regulatory and protective camps. Despite the thin character of reasoned decision making under the APA, this safeguard would check arbitrary decisions on entry and

¹⁴⁶ Cover & Aleinikoff, *supra* note 1, at 1048 n.65 (citation omitted).

¹⁴⁷ *Id.*

¹⁴⁸ Dep’t of Homeland Sec. v. *Thuraissigiam*, 140 S. Ct. 1959, 1966-67 (2020).

¹⁴⁹ See *supra* Part II.

admissibility, as well as those about persons, such as DACA recipients, who are “already” here. In cases like *Hawaii*, reasoned decision making would require some measure of means-ends analysis that the Court gestured at but failed to provide.

At the same time, Justice Alito’s account of the regulatory perspective in *Thuraissigiam* raised important issues. Justice Alito acknowledged factors that a mediating institution, like the judiciary, should consider, including the backlog in asylum adjudication and the role of fraud.¹⁵⁰ These are not data points that the protective camp typically acknowledges.¹⁵¹ However, these factors are part of the reality in any high-volume litigation regime, including immigration. Understanding these factors is vital for a comprehensive understanding of immigration law.

Just as Justice Alito could have tailored his analysis to the values of the protective camp, the protective camp would do well to understand the incentives for delay and the incidence of fraud in U.S. immigration adjudication. That may not allow one camp to triumph, as each hopes to do in Cover’s account of *nomos*.¹⁵² Moreover, courts should recognize that the government is a “them, not an it,” with contending factions that seek to further their own agendas.¹⁵³ A total triumph of either side’s agenda would destabilize the system, hindering the progress toward inclusion sought by the protective camp and the respect for enforcement that the regulatory approach promotes. Instead, a more balanced dialogue would best serve the interests of all parties, including legislators, executive branch officials, courts, and immigrants themselves.

¹⁵⁰ *Thuraissigiam*, 140 S. Ct. at 1967 (2020).

¹⁵¹ Among immigration scholars, only David Martin has consistently acknowledged the issue of fraudulent claims. See Martin, *supra* note 43, at 184. Other scholars tend to mention fraud, if at all, in conjunction with dismissals of extreme versions of the regulatory paradigm, such as the Trump administration’s pronouncements. See, e.g., Laila Hlass, *The Adultification of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199, 227 n.225 (2020) (quoting statement of Trump administration official that stressed “loopholes” in immigration law, including those that permitted “aliens” to assert “fraudulent asylum claims”).

¹⁵² Cover, *supra* note 1, at 28.

¹⁵³ See Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch is a “They,” Not an “It,”* 96 MINN. L. REV. 194, 212-16 (2011).