SEPARATION OF POWERS AND *THURAISSIGIAM*: THE ENTRY FICTION AS JUDICIAL AGGRANDIZEMENT

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In Department of Homeland Security v. Thuraissigiam*, the Supreme Court rejected Vijayakumar Thuraissigiam's challenge to the procedurally threadbare "expedited removal" he faced. The Court relied, in part, on the "entry fiction" — a doctrine under which certain physically present noncitizens are legally considered never to have entered the country and are therefore entitled to limited procedural due process rights. Before* Thuraissigiam*, the Court had only ever used the fiction where immigration authorities met an arriving noncitizen at the border and authorized physical — but not legal — admission. And it had been widely maligned as a separation-of-powers violation, allowing the whims of Congress to dictate the Constitution's reach. Yet the* Thuraissigiam *Court breathed new life into the doctrine. What's more, it took the unprecedented step of using the fiction against a noncitizen halted by immigration authorities in the interior, rather than at the border. But the Court failed to recognize — let alone justify — this sea change in the fiction's use. Nor could it.*

This Essay argues that the entry fiction's new use effects a constitutional harm distinct from, and less defensible than, that wrought by its historical use. Its premise is that a clandestine entrant has frustrated the political branches' ability to exercise their otherwise plenary power to decide, at the border, whether she may enter. However lamentable (or not) that may be as a policy matter, the fact remains: she is in. In this context, courts would use the entry fiction to make a normative political judgment too late for the political branches to make — that a noncitizen should not be "let into" the country. And courts would do so despite it being the political branches' exclusive province to make that call. This Essay argues that such judicial aggrandizement is illegitimate and should be rejected, regardless of whether one holds a formalist or functionalist view of the separation of powers.

INTRODUCTION

Vijayakumar Thuraissigiam had made it twenty-five yards into the United States when he was arrested.[1] He had fled his native country of Sri Lanka, where Thuraissigiam claimed to have faced severe persecution as a Tamil man[2] and supporter of a Tamil political candidate.[3] He alleged that, in 2007, he was "detained and beaten" by Sri Lankan officers, who instructed him not to support the Tamil candidate.[4] But Thuraissigiam maintained his support, backing the candidate in 2014 — prompting Sri Lankan officials to once again punish him.[5] Thuraissigiam alleged that government intelligence officers approached him on his

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[1] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1964 (2020).

[2] *See id.* at 1995 (Sotomayor, J., dissenting).

[3] Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1101–02 (9th Cir. 2019), *rev'd*, 140 S. Ct. 1959. Tamils are an ethnic minority group in Sri Lanka. *See Thuraissigiam*, 140 S. Ct. at 1995 (Sotomayor, J., dissenting).

[4] *Thuraissigiam*, 917 F.3d at 1102.

[5] *See id.*

farm and shoved him into a van,[6] after which they bound and beat him "during an interrogation about his political activities."[7] Thuraissigiam further alleged that he was "lowered into a well, simulating drowning, threatened with death, and then suffocated, causing him to lose consciousness."[8] On February 17, 2017 — after spending some time in hiding in Sri Lanka and India and navigating through Latin America — Thuraissigiam made it to the U.S.-Mexico border.[9] He crossed just west of the San Ysidro Port of Entry in Southern California.[10]

After arresting Thuraissigiam, U.S. immigration authorities promptly placed him in expedited removal proceedings.[11] Thuraissigiam informed the authorities of the persecution he feared facing in Sri Lanka, in response to which they referred Thuraissigiam to an asylum officer for a "credible fear" interview.[12] But Thuraissigiam's claim went nowhere. The asylum officer and their supervisor found that Thuraissigiam had not demonstrated a credible fear, and an immigration judge affirmed that finding "in a check-box decision."[13] Thuraissigiam therefore never saw his asylum application formally adjudicated in an ordinary removal hearing.[14] Thuraissigiam's case was instead returned to the Department of Homeland Security (DHS) for his expedited removal.[15]

Though convinced that the government had committed numerous errors in issuing its negative credible fear determination,[16] Thuraissigiam

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[6] Thuraissigiam v. U.S. Dep't of Homeland Sec., 287 F. Supp. 3d 1077, 1078 (S.D. Cal. 2018), *rev'd*, 917 F.3d 1097, *rev'd*, 140 S. Ct. 1959.

[7] *Thuraissigiam*, 917 F.3d at 1102.

[8] *Id.*

[9] *Thuraissigiam*, 287 F. Supp. 3d at 1078–79.

[10] *Thuraissigiam*, 917 F.3d at 1101.

[11] *Id.* See *infra* note 26 for a brief summary of the expedited removal regime.

[12] *See Thuraissigiam*, 917 F.3d at 1101. Should a noncitizen demonstrate a credible fear of persecution — a "significant possibility" that she would be eligible for asylum, 8 U.S.C. § 1225(b)(1)(B)(v) — she would receive full consideration of her asylum claim in an ordinary removal hearing. *See id.* § 1225(b)(1)(B)(ii), (v).

[13] *Thuraissigiam*, 917 F.3d at 1101.

[14] *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1967–68 (2020).

[15] *Id.*

[16] Factually, Thuraissigiam alleged that both the asylum officer and the immigration judge failed to elicit and consider all relevant and useful information bearing on his credible fear claim, including relevant country conditions evidence; that Thuraissigiam, his translator, and the government faced significant language-based communication difficulties; and that Thuraissigiam was unaware whether the information he divulged would be shared with the Sri Lankan government. *See Thuraissigiam*, 917 F.3d at 1102. Two legal claims supported Thuraissigiam's habeas petition: (1) that the government violated his Fifth Amendment due process rights by "not providing him with a meaningful opportunity to establish his claims, failing to comply with the applicable statutory and regulatory requirements, and in not providing him with a reasoned explanation for their decisions" and (2) that the government violated his statutory and regulatory rights to apply for asylum and other forms of relief, including by applying an incorrect legal standard to his credible fear application. *Id.*; *see also* 8 U.S.C. § 1225(b)(1)(B)(v) (setting credible fear standard as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility

had limited judicial recourse. Apart from a few narrow exceptions inapplicable to Thuraissigiam, federal courts have no jurisdiction to resolve a noncitizen's challenge to her expedited removal.[17] That left Thuraissigiam no choice but to attack the law's jurisdiction-stripping provision as an unconstitutional suspension of the writ of habeas corpus. So that is exactly what he did — and with intermittent success. Though his case was initially dismissed, the Ninth Circuit reversed, finding the jurisdiction strip a violation of the Suspension Clause.[18] But the Supreme Court, in *Department of Homeland Security v. Thuraissigiam*,[19] disagreed, employing an originalist account of the Suspension Clause at odds with the Ninth Circuit's reasoning.[20]

And the Court did not stop there. Apart from its habeas holding (and of principal interest here), the Court reached out to opine on Thuraissigiam's due process entitlements as a recent clandestine entrant.[21] The fundamental move the Court made in its due process analysis was to treat Thuraissigiam as if he were at the border, seeking to be let into the country.[22] Of course, that was not true — when Thuraissigiam was stopped, he had already made it into the United States. Nonetheless, the Court pretended that had not happened by applying the so-called "entry fiction," a legal make-believe under which physically present noncitizens are considered never to have entered the country.[23] Once fictitiously "assimilated to [the] status" of a noncitizen on the "threshold of initial entry," Thuraissigiam was denuded of

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for asylum"); *id.* § 1225(b)(1)(E)(i) (requiring asylum officers to have "had professional training in country conditions"); 8 C.F.R. § 208.30(d) (2021) (stating that the purpose of the credible fear interview is to "elicit all relevant and useful information bearing on whether the alien can establish a credible fear of persecution, reasonable possibility of persecution, or reasonable possibility of torture"); *id.* § 208.30(d)(1)–(2), (5) (requiring government to provide translation services in credible fear interviews where necessary and to ensure that noncitizen is notified of all relevant information and is able to participate effectively in interview).

17 *See* 8 U.S.C. § 1252(a)(2), (e)(2).

18 *See Thuraissigiam*, 917 F.3d at 1100, 1119; U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

19 140 S. Ct. 1959.

20 *See id.* at 1968–81. For a comprehensive analysis of the Suspension Clause's historical origins germane to the *Thuraissigiam* majority's originalist account, see generally Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008).

21 *See Thuraissigiam*, 140 S. Ct. at 1981–83; *id.* at 1989 (Breyer, J., concurring in the judgment) ("I would . . . avoid . . . com[ing] to conclusions about the Due Process Clause, a distinct constitutional provision that is not directly at issue here."); *id.* at 2011 (Sotomayor, J., dissenting) ("The Court stretches to reach the issue whether a noncitizen like respondent is entitled to due process protections in relation to removal proceedings, which the court below mentioned only in a footnote and as an aside. In so doing, the Court opines on a matter neither necessary to its holding nor seriously in dispute below." (citation omitted)).

22 *See id.* at 1982–83 (majority opinion).

23 *See id.* at 1982 (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953)) (citing Leng May Ma v. Barber, 357 U.S. 185, 188–90 (1958); Kaplan v. Tod, 267 U.S. 228, 230–31 (1925)).

comprehensive constitutional rights.[24] Though inside of the country, his procedural due process rights with respect to his admission suddenly were diminished to only whatever Congress had deigned to provide.[25] For Thuraissigiam, who faced expedited removal, that meant virtually no process at all.[26]

Thuraissigiam's utter vulnerability as a fictional applicant for admission derived from the political branches' "plenary power" to set the terms of admission for those seeking initial entrance. Rooted in turn-of-the-century cases regarding the exclusion and deportation of Chinese laborers, the doctrine identifies as inherent in the notion of sovereignty virtually unfettered legislative and executive authority to regulate the nation's border.[27] Numerous commentators have observed the flaws in

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[24] *Mezei*, 345 U.S. at 212, 214 (quoting Kwong Hai Chew v. Colding, 344 U.S. 590, 599 (1953)). Whether the country's border acts as a constitutional on/off switch has long been the subject of much debate. *Compare* Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020) ("[I]t is long settled as a matter of American constitutional law that foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution."), *with id.* at 2099 (Breyer, J., dissenting) ("[T]his Court has studiously avoided establishing an absolute rule that forecloses [constitutional] protection in all circumstances."), *and* Boumediene v. Bush, 553 U.S. 723, 770–71 (2008) (applying dynamic inquiry into whether extraterritorial application of the Suspension Clause would be impracticable and anomalous). The Court has generally declined to issue a sweeping rule on the matter, instead analyzing the extraterritoriality of constitutional provisions in specific and distinguishable contexts. *Boumediene*, for instance, dealt with enemy combatants imprisoned at Guantanamo Bay. *See id.* at 732; Jennifer K. Elsea, *Substantive Due Process and U.S. Jurisdiction over Foreign Nationals*, 82 FORDHAM L. REV. 2077, 2089–93 (2014) (canvassing the issue). *See generally* Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After* Boumediene *and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719 (2012) (analyzing whether *Boumediene*'s reasoning can be extended to the Due Process Clause); Eunice Lee, *The End of Entry Fiction*, 99 N.C. L. REV. 565, 631 & n.416 (2021) (surveying doctrinal development of territorial understanding of the Constitution's reach).

[25] *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892).

[26] As the name suggests, expedited removal allows the government in most cases to summarily remove certain noncitizens without first providing them a hearing before a neutral adjudicator. *See* 8 U.S.C. § 1225(b)(1)(A)(i). *But see id.* § 1225(b)(1)(A)(ii) (entitling noncitizens seeking asylum to a credible fear hearing). Moreover, those subject to expedited removal are mandatorily detained pending removal, unable to seek release on bond. *Id.* § 1225(b)(1)(B)(iii)(IV). *But cf. id.* § 1226(a) (establishing discretionary detention regime allowing for bond hearings for noncitizens in general, nonexpedited removal proceedings). Nor do they enjoy the right to counsel in connection with their removal. *See* United States v. Barajas-Alvarado, 655 F.3d 1077, 1088 (9th Cir. 2011). And lurking beneath all of this is the Suspension Clause problem that compelled the Ninth Circuit to invalidate the jurisdiction-stripping element of the law, *see* 8 U.S.C. § 1252(e)(2). *See* Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1119 (9th Cir. 2019), *rev'd* 140 S. Ct. 1959. For an overview of the extent of the regime's potential, see generally HILLEL R. SMITH, CONG. RSCH. SERV., LSB10336, THE DEPARTMENT OF HOMELAND SECURITY'S NATIONWIDE EXPANSION OF EXPEDITED REMOVAL (2020).

[27] *See* Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the

that doctrine.[28] But those discussions are outside the scope of this Essay, and the *Thuraissigiam* majority and dissent agreed that plenary power doctrine remains good law.[29]

This Essay instead examines the Court's unprecedented application of the entry fiction to subject Thuraissigiam to that plenary power in the first place. The move marked a sea change in the doctrine's use, applying for the first time to a clandestine entrant arrested in the interior.[30] Indeed, as far back as the 1903 case of *Yamataya v. Fisher*,[31] the Court has been careful not to use the entry fiction to pretend that a clandestinely entered noncitizen never made it inside in order to strip

executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene."); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 603–04 (1889) ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.").

[28] *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 17–18 (1972) ("The attempt to build all the foreign affairs powers of the federal government with the few bricks provided by the Constitution has not been accepted as successful. It requires considerable stretching of language, much reading between lines, and bold extrapolation from 'the Constitution as a whole,' and that still does not plausibly add up to all the power which the federal government in fact exercises." (footnote omitted)); Lee, *supra* note 24, at 584 n.114 (citing literature calling to end the plenary power doctrine); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1035–36 (2002) ("It is reasonable to decline to allow [physical presence] to act as a bootstrap, giving the alien rights with respect to *entry* that he would not otherwise enjoy if stopped at the border and turned away. But it does not follow that he has no right to object to the process *by which he was deprived of his liberty once stopped*."); Louis Henkin, Essay, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987) ("The power of Congress to control immigration and to regulate alienage and naturalization is plenary. But even plenary power is subject to constitutional restraints. I cannot believe that the Court would hold today that the Constitution permits either exclusion on racial or religious grounds or deportation of persons lawfully admitted who have resided peacefully here. . . . *Chinese Exclusion* — its very name is an embarrassment — must go." (footnote omitted)).

[29] *See Thuraissigiam*, 140 S. Ct. at 1982 (noting "century-old rule regarding the due process rights of an alien seeking initial entry"); *id.* at 2011 (Sotomayor, J., dissenting) ("[O]ur cases have long held that foreigners who had never come into the United States — those 'on the threshold of initial entry' — are not entitled to any due process with respect to their admission." (quoting *Mezei*, 345 U.S. at 212)).

[30] *See* Catherine Y. Kim, *Rights Retrenchment in Immigration Law*, 55 U.C. DAVIS L. REV. 1283, 1315 (2022) ("[D]ecades of precedent suggested that the central doctrinal distinction was between (a) individuals apprehended at a port of entry — and thus deemed outside of the U.S. under the entry fiction doctrine and thereby without any right to procedural due process, and (b) individuals physically within the United States, who were deemed to enjoy constitutional protections. *Thuraissigiam* appears to eliminate that distinction, denying procedural due process protections to both those apprehended at the border *as well as to those apprehended* in the nation's interior."); Ahilan Arulanantham & Adam Cox, *Immigration Maximalism at the Supreme Court*, JUST SEC. (Aug. 11, 2020), https://www.justsecurity.org/71939/immigration-maximalism-at-the-supreme-court [https://perma.cc/9SAK-G4AC] ("[The Court] both doubled down on the 'entry fiction' doctrine applied at the border and extended that rule into the interior — to an uncertain extent.").

[31] (*The Japanese Immigrant Case*), 189 U.S. 86 (1903).

her of procedural due process rights — thin as those rights may prove to be.[32] That approach has comported with the Court's longstanding recognition that noncitizens who have "passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[33]

Thuraissigiam's novel use of the entry fiction occurred in a few paragraphs bereft of any meaningful analysis,[34] and the academy is only beginning to analyze it.[35] The dearth of rigorous treatment is of enormous concern given the move's potential to vastly erode the constitutional rights of noncitizens inside the United States: taken to its logical extreme, it "could mean that any undocumented individual can be summarily detained and removed by immigration officials without judicial review."[36] In order to aid scholars' and jurists' efforts to grapple with

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[32] Admittedly, the Court's reasoning in *Yamataya* suggests that social ties to the country bear on clandestine entrants' due process rights. While recognizing the due process rights of the petitioner in that case, the Court explicitly left aside the question "whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population." *Id.* at 100. And, in any event, procedural due process entitlements may prove to be of little help. *See* Kim, *supra* note 30, at 1313 n.128 (citing *Yamataya*, 189 U.S. at 101–02) ("[T]he scope of procedural protections was thin at that time. *Yamataya* went on to hold that the [petitioner's] procedural due process rights were satisfied, even though she spoke no English, was unable to consult with friends or family, and did not understand the nature of the removal proceedings that were occurring."). *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976) (establishing basic framework for determining what process is due); Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975) (outlining the contours of what process is due in an ordinary hearing).

[33] *Mezei*, 345 U.S. at 212. *But see* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP 535 (8th ed. 2016) (querying whether *Mezei*'s "passed through our gates, even illegally" language may refer to noncitizens who enter after inspection but are deported because of "some defect — some illegality — that comes to light thereafter").

[34] *See Thuraissigiam*, 140 S. Ct. at 1963–64, 1982.

[35] *See* Lee, *supra* note 24, at 573 n.37 ("[I]n this Article I focus on entry fiction's impact on due process rights in the *detention* context. While a thorough contemporary assessment of entry fiction with regard to admissions procedures and removal orders is outside the scope of this Article, it would be a fruitful avenue for future exploration. *Thuraissigiam* did not deeply explore contextual or historical arguments based on evolving immigration law practices, doctrines, or structures."); Kim, *supra* note 30, at 1307–16, 1360, 1364 (reflecting on *Thuraissigiam*'s potential implications for multiple constitutional rights); Diana G. Li, Note, *Due Process in Removal Proceedings After* Thuraissigiam, 74 STAN. L. REV. 793, 793 (2022) (arguing that *Thuraissigiam*'s due process holding should be limited to its facts); Lucas Guttentag, *The President and Immigration Law: The Danger and Promise of Presidential Power*, JUST SEC. (Oct. 19, 2020), https://www.justsecurity.org/72863/the-president-and-immigration-law-the-dangerand-promise-of-presidential-power [https://perma.cc/MD76-KGCZ] ("[*Thuraissigiam* is] the most under-reported yet deeply consequential immigration ruling in decades.").

[36] Kim, *supra* note 30, at 1312. In its current form, as well as when Thuraissigiam was apprehended, expedited removal reaches noncitizens detained within one hundred air miles of a U.S. international land or sea border who have not demonstrated continuous presence in the country for more than fourteen days. *See Thuraissigiam*, 140 S. Ct. at 1964 n.2; Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877, 48,877 (Aug. 11, 2004); Press Release, U.S. Dep't of Homeland Sec., Department of Homeland Security Streamlines Removal Process Along Entire U.S. Border (Jan. 30, 2006), https://www.hsdl.org/?abstract&did=476965 [https://perma.cc/7HHJ-5KCX].

entry fiction's paradigm shift, this Essay provides a novel conceptual framework to understand it.

It begins by contextualizing the historical use of the doctrine in a manner responsive to the principal separation-of-powers critique from which it suffers. Specifically, it understands entry fiction's historical work as a kind of deference to the political branches' political choice at the border — where those branches enjoy plenary power to set the terms of an arriving noncitizen's admission. That understanding blunts the force of the separation-of-powers critique from a functionalist perspective of the doctrine, which cares more about the *degree* of one branch's encroachment on another than the formalist perspective does, which concerns itself with the *fact* of encroachment. The Essay then probes the entry fiction's novel use, arguing that its conceptual work is fundamentally distinct, offending the separation of powers in a different way. In the novel context, the immigration authorities have not made an ex ante political choice at the border to which courts may defer, as that noncitizen has evaded them. Thus, the entry fiction becomes a tool for the judiciary to act as a third political branch: courts pretend that a noncitizen is still at the border and, meeting her there, ask a purely political question ("Should she be let in?") and answer it themselves ("No."). The Essay submits that such judicial aggrandizement is indefensible no matter what view of the separation of powers one takes.

I. THE ENTRY FICTION BEFORE *THURAISSIGIAM*

A. Origins and Historical Application

The entry fiction can be traced back to the turn-of-the-century wave of immigration to the United States. Noncitizens arrived — largely from Europe and East Asia, and typically by boat — in numbers far greater than the American immigration system could handle.[37] The situation posed a humanitarian crisis: immigrants needed to be inspected

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But in the interim, the Trump Administration attempted to expand expedited removal to its statutory maximum, reaching noncitizens nationwide who could not demonstrate continuous presence in the country for two years or more. *See* Designating Aliens for Expedited Removal, 84 Fed. Reg. 35,409, 35,409 (July 23, 2019); *see also* Make the Rd. N.Y. v. McAleenan, 405 F. Supp. 3d 1, 10–11 (D.D.C. 2019) (enjoining proposed expansion), *rev'd sub nom.* Make the Rd. N.Y. v. Wolf, 962 F.3d 612 (D.C. Cir. 2020). The Biden Administration recently rescinded that attempted expansion, restoring expedited removal to the way it had existed before July 23, 2019. *See* Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal, 87 Fed. Reg. 16,022, 16,022 (Mar. 21, 2022). Even the current reach of expedited removal is substantial, however, as more than half of the U.S. population lives within a hundred miles of the border. *See* Gerald Neuman, *The Supreme Court's Attack on Habeas Corpus in* DHS v. Thuraissigiam, JUST SEC. (Aug. 25, 2020), https://www.justsecurity.org/72104/the-supreme-courts-attack-on-habeas-corpus-in-dhs-v-thuraissigiam [https://perma.cc/3DTQ-7UB4].

[37] *See* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 951 (1995) ("By the late nineteenth century, it became impossible to complete all immigration inspections aboard vessels.").

and formally admitted into the country before disembarking, but they suffered on boats in squalid conditions in the meantime.[38] Passenger ships at the time were infamously hot and dark — the stench of sickness and death pervasive.[39]

As early as 1891, the entry fiction emerged as a solution. Newly enacted legislation allowed arriving noncitizens to debark and be safely housed ashore during the pendency of their examinations, while maintaining, in the eyes of the law, their constitutional status as extraterritorial outsiders.[40] Soon thereafter, in *Nishimura Ekiu v. United States*,[41] the Supreme Court first recognized the entry fiction.[42] There, a Japanese immigrant named Nishimura Ekiu was placed in a mission "more suitable" than the steamship by which she had arrived at the Port of San Francisco.[43] But, "by agreement between her attorney and the attorney for the United States," she was "in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steamship."[44] The doctrine allowed for arrivals like Nishimura to be welcomed stateside in reality, if not in law.

In the decades that followed, the Court continued to use the entry fiction to recognize immigration authorities' plenary power over arrivals conditionally let into the country. For instance, in *United States ex rel. Knauff v. Shaughnessy*,[45] Ellen Knauff, a noncitizen spouse of a United States soldier, sought to enter the country under the War Brides Act.[46] Knauff had been detained on Ellis Island — American soil — for months before the Attorney General, without a hearing, summarily declared her inadmissible on the ground that "her admission would be

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[38] *See id.*

[39] *See* Lee, *supra* note 24, at 585–87 (describing turn-of-the-century investigation by the Dillingham Immigration Commission reporting the "disgusting and demoralizing conditions" of passenger ships, including first-person accounts of crowdedness and stench). *See generally* WILLIAM P. DILLINGHAM, U.S. IMMIGR. COMM'N, ABSTRACT OF THE REPORT ON STEERAGE CONDITIONS, S. DOC. NO. 61-747, at 291 (1911).

[40] *See generally* Lee, *supra* note 24, at 581–600 (describing entry fiction's origins as a humanitarian regime working in immigrants' favor); Brief of *Amici Curiae* Immigration Scholars in Support of Respondent at 8, *Thuraissigiam* (No. 19-161), 2020 WL 402610, *8 ("The entry fiction was designed to deal with circumstances in which immigration authorities could not conclusively resolve an immigrant's right to enter the United States immediately upon arrival, while the immigrant remained aboard the ship on which he had arrived. Detaining the immigrant aboard the ship during the pendency of his case was often considered both inhumane and unrealistic. So almost immediately after the United States first adopted laws excluding certain classes of immigrants, immigration authorities adopted a practice in some cases of permitting immigrants to land temporarily while their right to enter was being resolved."); Weisselberg, *supra* note 37, at 951 n.72 (citing examples of turn-of-the-century legislation using language providing that noncitizens' "temporary removal" from vessels for inspection would not be considered a "landing" within the United States).

[41] 142 U.S. 651 (1892).

[42] *See id.* at 661.

[43] *Id.*

[44] *Id.*

[45] 338 U.S. 537 (1950).

[46] *See id.* at 539–40.

prejudicial to the interests of the United States."[47] In upholding the Attorney General's decision, the Court, citing *Nishimura Ekiu*, (in)famously announced: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[48] And, in *Shaughnessy v. United States ex rel. Mezei*,[49] the Court again upheld the Attorney General's refusal to let a noncitizen into the country, without a hearing, based on unspecified "prejudice[] to the public interest."[50] Mezei, who had lived in New York for twenty-five years,[51] attempted to visit his dying mother in Romania, behind the Iron Curtain; when he returned twenty-one months later, he was detained on Ellis Island — for years.[52] The Court again applied the entry fiction, describing Mezei's detention on Ellis Island as "an act of legislative grace" and understanding "such temporary arrangements as not affecting [his] status; he is treated as if stopped at the border."[53] Like Knauff (and Nishimura), Mezei was physically in the United States but legally "an alien on the threshold of initial entry."[54] So situated, Mezei — unlike "aliens who have once passed through our gates, even illegally" — was unentitled to removal "proceedings conforming to traditional standards of fairness encompassed in due process law."[55] The version of the entry fiction in *Knauff* and *Mezei* — in which the doctrine works on noncitizens allowed into the country by humanitarian or logistical necessity — is today known as "parole," and it accounts for the lion's share of the Court's entry fiction precedents.[56]

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[47] Weisselberg, *supra* note 37, at 955 (quoting *Knauff*, 338 U.S. at 539–40).

[48] *Knauff*, 338 U.S. at 544.

[49] 345 U.S. 206 (1953).

[50] *Id.* at 208, 214–15.

[51] United States *ex rel.* Mezei v. Shaughnessy, 195 F.2d 964, 966 (2d Cir. 1952).

[52] *Mezei*, 345 U.S. at 217 (Black, J., dissenting). Mezei was not let into the United States, and his repeated efforts to be let into other countries failed. *See* Weisselberg, *supra* note 37, at 964–66 (describing Mezei's unsuccessful efforts to be admitted into France, Great Britain, Hungary, and a dozen Latin American countries).

[53] *Mezei*, 345 U.S. at 215.

[54] *Id.* at 212.

[55] *Id.*

[56] *See* 8 U.S.C. § 1182(d)(5)(A) ("The Attorney General may . . . in his discretion parole into the United States temporarily . . . on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien . . . ."). Tens of thousands of noncitizens are paroled into the country every month. *See* Biden v. Texas, 142 S. Ct. 2528, 2554 n.5 (2022) (Alito, J., dissenting) ("For the month of April 2022, DHS reported that . . . 27,654 individuals [were] ' . . . Paroled into the U. S. on a case-by-case basis pursuant to 8 U.S.C. § 1182(d)(5).'" (second omission in original) (quoting Defendants' Monthly Report for April 2022, at 3, Texas v. Biden, 554 F. Supp. 3d 818 (N.D. Tex. 2021) (No. 21-cv-00067)) (citing Defendants' Monthly Report for March 2022, at 3, Texas v. Biden, 554 F. Supp. 3d 818 (No. 21-cv-00067))); Transcript of Oral Argument at 37, Biden v. Texas (No. 21-954), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-954_m6hn.pdf [https://perma.cc/6UHM-KCY9] ("JUSTICE BREYER: So how many are paroled [in every month]? GENERAL PRELOGAR: In March 2021, I believe the parole figure

On occasion, the Court has used the entry fiction in the other direction, treating a noncitizen outside of the country as if she were inside, to ensure ample procedural protections in her removal proceedings. For instance, in *Kwong Hai Chew v. Colding*,[57] the Court applied a kind of "reverse" entry fiction, legally treating a lawful permanent resident returning to the United States as if he had never left, even though he was in fact at the border.[58] Also writing of a lawful permanent resident, the Court in *Landon v. Plasencia*[59] explained that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."[60] So true of the respondent there, the Court recognized that she had procedural due process rights in her removal proceedings, despite having been detained before crossing the southern border — and the fact that she was caught in the process of attempting to illegally smuggle someone across it.[61]

In sum, the Court's general practice throughout the entry fiction's first century in the *U.S. Reports* has been to apply the doctrine fairly cautiously. Apart from in a narrow band of noncitizen-friendly cases designed to protect lawful permanent residents' due process rights, the Court has generally used the doctrine only where the political branches have paroled into the country for humanitarian and administrative reasons certain arrivals at the border. *Thuraissigiam* changed that.[62]

B. Conceptual Underpinnings and Separation-of-Powers Critique

A critical understanding of the entry fiction starts from the premise that the Due Process Clause applies differently to those excluded from entering the country and those deported from the interior.[63] The Court's plenary power precedents teach that, for noncitizens arriving at the border, procedural due process is limited to what Congress has authorized.[64] Conversely, in deportation cases, the Constitution guarantees at least

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was about 37,000, and then there were another 43,000 that received bond or conditional parole under Section 1226(a)."). For early entry fiction cases in the parole context other than *Knauff* and *Mezei*, see, for example, *Leng May Ma v. Barber*, 357 U.S. 185 (1958); *Kaplan v. Tod*, 267 U.S. 228 (1925); *Zartarian v. Billings*, 204 U.S. 170 (1907); and *United States v. Ju Toy*, 198 U.S. 253, 263 (1905).

[57] 344 U.S. 590 (1953).

[58] *Id.* at 596; *see id.* at 595.

[59] 459 U.S. 21 (1982).

[60] *Id.* at 32.

[61] *See id.* at 23, 32. The Court's holding arguably expanded upon its earlier position that a lawful permanent resident returning to the United States from an "innocent, casual, and brief" trip was entitled to be considered, as a legal matter, as if he had never left. Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963).

[62] *See infra* Part II, pp. 245–50.

[63] While modern statutory law has collapsed "exclusion" and "deportation" under the umbrella term "removal," the distinction still matters to the Constitution. *See supra* note 24.

[64] *See supra* notes 23–29 and accompanying text.

some procedural safeguards independent of statutory entitlements,[65] as measured by the familiar *Mathews v. Eldridge*[66] framework. Even the entry fiction's defenders would agree that the Due Process Clause reaches persons "inside" the country: the Clause's text and longstanding Supreme Court precedent demand it.[67]

The real question at the heart of the entry fiction is what (or rather, who) determines whether someone is "inside" or "outside" of the country in the first place. Without the entry fiction, the border is the traditional — indeed, obvious — answer to the question. That conclusion follows from the traditional territorial understanding of presence. Courts understand the Fifth Amendment's Due Process Clause, like other constitutional provisions applying to "persons," to reach "all persons *within the territory* of the United States"[68] or within "our *geographic* borders"[69] — and conversely, that it does not reach "foreign citizens outside U.S. *territory*."[70] The Fifth Amendment so understood, the Court has recognized that procedural due process rights are owed even to those "whose [physical] presence in this country is unlawful,

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[65] *See* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 2012 (2020) (Sotomayor, J., dissenting) ("[T]he Court has . . . determined that presence in the country is the touchstone for at least some level of due process protections."); Zadvydas v. Davis, 533 U.S. 678, 693–94 (2001) (citing, inter alia, *Plasencia*, 459 U.S. at 32–34; Kwong Hai Chew v. Colding, 344 U.S. 590, 596–98, 596 n.5 (1953); Johnson v. Eisentrager, 339 U.S. 763, 784 (1950); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law." (citing, inter alia, Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86, 100–01 (1903); Wong Yang Sung v. McGrath, 339 U.S. 33, 49–50 (1950))); Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("[O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."). *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976); Friendly, *supra* note 32.

[66] 424 U.S. 319.

[67] *See* U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); *Zadvydas*, 533 U.S. at 693 ("[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." (citing, inter alia, Plyler v. Doe, 457 U.S. 202, 210 (1982) ("Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."); Mathews v. Diaz, 426 U.S. 67, 77 (1976) (recognizing that the Fifth Amendment reaches every noncitizen person inside the United States, including "one whose presence in this country is unlawful, involuntary, or transitory"))). *But cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 265–66 (1990) (distinguishing Fourth Amendment rights, which apply to "the people," from Fifth Amendment rights, which apply to "person[s]").

[68] *Wong Wing*, 163 U.S. at 238 (emphasis added); *see* Brief of *Amici Curiae* Immigration Scholars in Support of Respondent, *supra* note 40, at 17–20 (listing federal appellate court decisions adopting territorial understanding of Due Process Clause's reach); *cf. Yick Wo*, 118 U.S. at 369 (noting that the Equal Protection Clause applies "to all persons within the territorial jurisdiction" of the United States).

[69] *Zadvydas*, 533 U.S. at 693 (emphasis added).

[70] Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 140 S. Ct. 2082, 2086 (2020) (emphasis added); *see supra* note 24.

involuntary, or transitory."[71] For those physically outside, it has not.[72] But the bottom line is that, when it comes to procedural due process, presence matters.[73]

The entry fiction throws a wrench into that paradigm by framing the "inside or outside" question as a legal, not literal, one. It assumes that two camps of noncitizens exist: those "legally inside" the United States and those "legally outside" of it. And, animated by the Court's plenary power authorities,[74] it recognizes that the political branches have the authority to sort an arriving noncitizen into one of those two camps. The framework is thus premised on the political branches' authority as territorial — and by extension, constitutional — gatekeeper. Courts identify the camps into which the political branches have sorted arriving noncitizens at the border — and then they apply the law governing those camps, regardless of the facts on the ground. The fiction is to pretend that a noncitizen were back in the time and place where the political branches had full plenary authority over her admission or exclusion from the country (at the border) and make real the legal implication (limited due process) of the political choice made there (legal exclusion).

The entry fiction's sourcing of a constitutional right on a political determination has been handily rebuked as a separation-of-powers violation. And the critique is hard to dispute. The doctrine inarguably expands the political branches' ability to ensure a legal outcome (minimal due process rights) otherwise limited by the Fifth Amendment's territorial applicability. That aggrandizes legislative and executive power by, in Justice Sotomayor's words, allowing "[c]ongressional policy in the immigration context [to] dictate the scope of the Constitution."[75] In other words, the entry fiction transforms the physical border into a legal one that travels with a noncitizen at the political branches' discretion, impossible to cross without authorization. As Professor Eunice Lee canvassed in her critique of the doctrine in the detention context, sundry

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[71] *Diaz*, 426 U.S. at 77; *see also* Brief of *Amici Curiae* Immigration Scholars in Support of Respondent, *supra* note 40, at 26 ("For more than a century, this Court, lower courts, and, until recently, the Government have uniformly acknowledged that *all* noncitizens inside the United States are entitled to due process protection."); *see also supra* note 56.

[72] *See supra* note 24 and accompanying text.

[73] *See generally supra* notes 24, 63–72; Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005) (discussing the relationship between physical location and legal rights); Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389, 391 (2007) (contrasting status-based determination of rights with a "territorial conception of rights for immigrants [that] treats a person's geographical presence itself as a sufficient basis for core aspects of membership").

[74] *See supra* note 27 and accompanying text.

[75] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 2013 (2020) (Sotomayor, J., dissenting); *see also* Boumediene v. Bush, 553 U.S. 723, 765 (2008) ("To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

scholars agree,[76] lamenting not only the separation-of-powers problem in theory but also the "deplorable governmental conduct"[77] it invites and "racially disparate impacts"[78] it produces.

The separation-of-powers critique — prolific in the literature, argued in the briefing,[79] and invoked in the dissent — was no secret to the *Thuraissigiam* majority. But the Court declined to address the critique, implicitly rejecting it. In doing so, the majority analogized Thuraissigiam to arriving noncitizens in historical entry fiction cases.[80] That analogy conflates the legitimacy of the doctrine as applied in the presentment-at-the-border (historical) and clandestine-entry (new) contexts. But its legitimacy (or lack thereof) in those two contexts is not coterminous. As described below, while the historical use of the doctrine is characterized by legislative and executive overreach, the new use of the doctrine bespeaks *judicial* overreach. And, while there is a colorable counter-argument to the separation-of-powers critique in the former context, that same justification falls short in the latter. The Essay proceeds to make the point by first providing what the *Thuraissigiam* majority failed to: a response to the standard separation-of-powers critique of the entry fiction in the historical context.

C. The Functionalist Response to the Separation-of-Powers Critique

The main vulnerability from which the standard critique suffers reflects the conceptual indeterminacy of the "separation of powers." While the American legal regime is predicated on a division of governmental authority marked by checks and balances, the Constitution, Dean John Manning reminds, "contains no Separation of Powers Clause."[81] Locating the precise contours of the doctrine has long bedeviled theorists and

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[76] Lee, *supra* note 24, at 574–76; *see, e.g.*, Cole, *supra* note 28, at 1035–36; Ibrahim J. Wani, *Truth, Strangers, and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 CARDOZO L. REV. 51, 67–75 (1989); *id.* at 91–92 ("[The entry fiction] has been described as scandalous, shocking, morally outrageous, deplorable, an embarrassment and an anomaly in constitutional government. Despite its acknowledged falsity and outrageousness, entry [fiction] has had tremendous staying power and is still used as the primary determinant of procedural due process."); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1389–96 (1953); *id.* at 1395 ("I cannot believe that judges adequately aware of the foundations of principle in this field would permit themselves to trivialize the great guarantees of due process and the freedom writ [of habeas corpus] by such distinctions [as 'entry' and 'non-entry'].").

[77] Lee, *supra* note 24, at 575 (quoting Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 20 (1984)).

[78] *Id.* at 574; *see also* Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 153 (2018).

[79] Brief of *Amici Curiae* Immigration Scholars in Support of Respondent, *supra* note 40, at 21 ("[T]his new rule would bind the *constitutional* due process line to a *statutory* line of admission, allowing Congress to dictate the reach of a constitutional provision that should instead restrict unfettered power.").

[80] *See Thuraissigiam*, 140 S. Ct. at 1982–83.

[81] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011).

jurists, providing much in the way of interesting law review articles but little in the way of reliable tests to administer. In any event, the most prominent theories of the doctrine reflect either a "formalist" or "functionalist" view of constitutional power.[82]

Formalism, put simply, reads constitutional provisions that expressly source power within one of the three branches (such as each's Vesting Clause[83]) to imply firm divisions among them. From that premise, formalists critique legal regimes in which one branch exercises power understood to have been strictly delegated to another.[84] One branch so "encroaching" upon another troubles formalists, even where little more than the "abstract norm of strict separation"[85] is offended. The entry fiction's standard critique tracks this view. It argues that, insofar as the political branches' status determinations dictate the scope of noncitizens' constitutional rights, those branches exercise the quintessential judicial function of saying what the law is.[86] They thus aggrandize their power by encroaching upon the judiciary's.[87]

A functionalist view of the separation of powers provides a colorable response to the standard critique. Functionalism appreciates the "apparent background purpose of balance among the branches,"[88] eschewing rigid commitments to cabined powers. Of chief concern to functionalists is maintaining a system of checks and balances where one branch does not compromise the core functions of another.[89] In Justice White's words, the question is whether the law at issue "so alters the balance of authority among the branches of government as to pose a

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[82] *See* Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 229–35 (1992) (describing the two camps); *see also* M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 609–10 (2001) ("[T]he Supreme Court vacillates back and forth between the two dominant approaches, relying on something resembling the formalist approach to invalidate certain arrangements . . . and something similar to functionalism to validate other arrangements . . . .").

[83] *See* U.S. CONST. art. I, § 1 (legislative powers); *id.* art. II, § 1, cl. 1 (executive power); *id.* art. III, § 1 (judicial power).

[84] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 417–18 (1998) (invalidating line-item veto); INS v. Chadha, 462 U.S. 919, 923, 928 (1983) (invalidating legislative veto).

[85] Manning, *supra* note 81, at 1961; *see also id.* at 1960 ("Perhaps reflecting the founders' special concern about the potential for legislative usurpation of other branches' powers, formalists are quick to equate certain forms of legislative regulation or oversight of executive or judicial functions with *encroachment* on the coordinate branches." (footnote omitted)).

[86] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[87] That critics of the entry fiction would implicitly adopt a formalist view of the separation of powers is somewhat unintuitive. Formalism is ordinarily associated with strict textualist and originalist commitments to constitutional interpretation that, as demonstrated in *Thuraissigiam* itself, are often at odds with pro-immigrant outcomes. *See* Manning, *supra* note 81, at 1958 n.96; Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 859 (1990) ("[F]ormalism is inextricably tied to both textualism and originalism . . . ."); *supra* pp. 228–29.

[88] Manning, *supra* note 81, at 1946.

[89] *See id.* at 1950–52.

genuine threat to the basic division" of power.[90] Thus, even if one accepts that the entry fiction allows the political branches to exercise a judicial function, functionalists would tolerate that outcome, so long as the allowance does not upset the basic tripartite balance.[91]

The historical use of the entry fiction arguably maintains that balance. The facts of each of the Court's pre-*Thuraissigiam* entry fiction cases involved immigration authorities having met a noncitizen at the border and made a gatekeeping decision about whether and on what terms she may enter — *before* she did so. In the parole cases like *Knauff* and *Mezei*, arrivals had been stopped at ports of entry and let in subject to certain conditions. In the lawful permanent resident cases like *Chew* and *Plasencia*, the noncitizen's status alone indicated that the political branches had earlier met and authorized their presence in the country. In each case, from the Court's perspective, an ex ante political decision whether to let someone into the country had been made — and by authorities with plenary authority to make it, to boot.

The fact that the entry fiction's historical use was predicated on an ex ante political decision at the border is critical from a power-balance (functionalist) perspective. Again, the entry fiction is typically criticized for letting a political choice determine whether an arriving noncitizen is constitutionally entitled to certain process.[92] But, constitutionally, the political branches do not need the entry fiction to wield that power. As demonstrated recently by the invocation of Title 42,[93] allowing the border-closing, isolationist response to the COVID-19 pandemic, the reality is that the political branches would face little obstacle in broadly excluding arrivals from the country until inspection if they so desired.[94]

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[90] Bowsher v. Synar, 478 U.S. 714, 776 (1986) (White, J., dissenting); *see also* Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 711 n.127 (1997) ("Although he wrote none of the majority opinions in which the Court itself adopted a functionalist approach, Justice White is nonetheless credited with its essential definition.").

[91] Manning, *supra* note 81, at 1951 ("As Professor Kathleen Sullivan once put it, under a functionalist approach, 'Congress's choice of demonstrated social benefits' in a particular institutional arrangement prevails over the formalities of separation of powers, 'as long as the policies underlying the original structure are satisfied.'" (quoting Kathleen M. Sullivan, *The Supreme Court, 1994 Term — Comment: Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 93–94 (1995))).

[92] *See supra* pp. 237–38.

[93] *See* 42 U.S.C. § 265 (authorizing the executive branch, during a public health emergency, to "prohibit, in whole or in part, the introduction of persons and property from such countries or places as [it] shall designate in order to avert such danger, and for such a period of time as [it] may deem necessary for such purpose").

[94] The D.C. Circuit recently rejected, in relevant part, a challenge to executive action under Title 42. *See* Huisha-Huisha v. Mayorkas, 27 F.4th 718, 726, 733 (D.C. Cir. 2022); *see also id.* at 723 ("Although Congress has sometimes limited executive discretion in such ways, at other times it has granted the Executive express powers over immigration. As early as 1798, Congress provided that the Executive could expel certain aliens."). The policy has been enormously effective in walling off the country to arrivals. *See* John Gramlich, *Key Facts About Title 42, The Pandemic Policy*

Such bright-line exclusion would, of course, deprive arriving noncitizens of comprehensive due process rights just as much as the entry fiction would. The entry fiction helps the political branches get there the easy way, not the hard way. But there is always a road.

And there is reason to believe that, without the tool of the entry fiction, the political branches would take the harsher road of outright exclusion. Fiscal and administrative limitations would dampen the resolve of even the most progressive of administrations to authorize arrivals' physical admission into the country, should they bring with them additional procedural rights the government is ill equipped to service. Process is expensive and administratively taxing, and Congresses across the political spectrum have consistently proven themselves unwilling to pay for it. For instance, in the detention context, congressional funding for every presidential administration for over a quarter century has "consistently fallen well short of the amount needed to detain all land-arriving inadmissible aliens at the border."[95] That has predictably resulted in inhumane conditions for many detained arrivals[96] and necessitated widespread parole and monitoring, which bring about their own unique problems, to process others.[97] These problems would only be

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that Has Reshaped Immigration Enforcement at the U.S.-Mexico Border, PEW RSCH. CTR. (Apr. 27, 2022), https://www.pewresearch.org/fact-tank/2022/04/27/key-facts-about-title-42-the-pandemic-policy-that-has-reshaped-immigration-enforcement-at-u-s-mexico-border [https://perma.cc/6F8J-PBWC] ("Overall, there were nearly 2.9 million encounters with migrants along the U.S.-Mexico border between April 2020, the first full month after Title 42 went into effect, and March 2022, the most recent month with available data. Nearly 1.8 million of those encounters, or 61%, resulted in migrants being expelled under Title 42."). While statutory hindrances to expulsion exist, *see, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 419 (1999) (stating that, in general, statutory withholding is mandatory where certain conditions are met), this Essay is concerned with constitutional guardrails on the political branches' ability to exclude.

[95] Biden v. Texas, 142 S. Ct. 2528, 2543 (2022).

[96] *See, e.g.*, Lee, *supra* note 24, at 611–12 (describing many detention facilities as marked by rampant "food safety issues that endangered detained individuals' health and welfare, such as contamination, spoilage, and expired food," as well as "segregation[,] . . . overuse of restraints and strip searches," *id.* at 611, "[f]ailure to provide basic hygiene items such as shampoo and toothpaste, . . . inadequate provision of medical care," and more); *see also, e.g.*, Flores v. Barr, 934 F.3d 910, 911–12 (9th Cir. 2019) ("The district court found that the government was . . . detaining minors in unsanitary and unsafe conditions at Border Patrol stations[,] . . . based on evidence that minors in U.S. Customs and Border Protection custody were held in conditions that deprived them of sleep and did not provide adequate access to food, clean water, and basic hygiene items.").

[97] *See supra* note 56; Lee, *supra* note 24, at 610–28 (describing immigration detention system as a "sprawling, multibillion-dollar industry," *id.* at 610, and highlighting intrusive, often discriminatory, use of immigration monitoring regimes); Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 673 (2019); Trinh Q. Truong, *Immigrants and Asylum-Seekers Deserve Humane Alternatives to Detention*, CTR. FOR AM. PROGRESS (July 13, 2022), https://www.americanprogress.org/article/immigrants-and-asylum-seekers-deserve-humane-alternatives-to-detention [https://perma.cc/EQN6-3DRH] (describing invasive and expensive electronic monitoring regime and advocating for less-restrictive and more effective community-based models to ensure compliance with immigration authorities); Jordana Signer, Opinion, *Immigrant Detention Is Expensive, And Alternatives Are Just as Effective*, DALL. MORNING NEWS (Nov. 14, 2021, 1:30 AM), https://www.dallasnews.com/opinion/commentary/2021/11/14/immigrant-detention-is-expensive-and-alternatives-are-just-as-effective [https://perma.cc/FWA2-ZU5R].

magnified were legal entitlements to outpace funding at a more rapid clip than they already do — the expected result of eliminating the entry fiction without a concomitant commitment by Congress to radically increase its spending on immigration. And none of this is to speak of the sheer volume of litigation that would arise around new procedural rights — meritorious or not — that would further drain government resources that already fail to keep up with demand.[98]

Humanitarian considerations might also lead progressive administrations to pursue exclusionary policies to quell the uptick in attempted crossings one would expect should success guarantee additional rights. The harrowing journeys often required to get to the border, and miserable, dangerous conditions upon arrival, have commanded the national spotlight in recent years.[99] Those problems in mind, members of the Biden Administration have already publicly discouraged migrants from traveling to the southern border.[100] The Biden Administration has

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[98] *See, e.g.*, AM. IMMIGR. COUNCIL, EMPTY BENCHES: UNDERFUNDING OF IMMIGRATION COURTS UNDERMINES JUSTICE 1 (2016) (noting immigration court backlog increase of 163% from fiscal year 2003 to April 2015 but immigration court spending increase of only seventy-four percent during fiscal years 2003 to 2015).

[99] *See, e.g.*, Jasmine Aguilera, *A Shelter in Juárez Prepares for Another Wave of Migrants as the "Remain in Mexico" Policy Is Reinstated*, TIME (Dec. 22, 2021, 3:04 PM), https://time.com/6130688/remain-in-mexico-mpp-biden [https://perma.cc/6VE4-Y88D] ("Human Rights First has documented 1,500 reported cases of violence, including murder, rape and kidnapping, during the first iteration of MPP. It has also documented more than 7,600 cases of violence against migrants in Mexico as a result of Title 42."); Arelis R. Hernández & Nick Miroff, *Thousands of Haitian Migrants Wait Under Bridge in South Texas After Mass Border Crossing*, WASH. POST (Sept. 16, 2021, 9:46 PM), https://www.washingtonpost.com/national/haitian-migrants-mexico-texas-border/2021/09/16/4da1e366-16fe-11ec-ae9a-9c36751cf799_story.html [https://perma.cc/DDC7-YC66] (detailing "humanitarian emergency and . . . logistical challenge" at an impromptu border camp, including limited access to food, shelter, and toilets); Camilo Montoya-Galvez, *Biden Administration Increases Border Deportations and Prosecutions to Deter Migration*, CBS NEWS (Aug. 10, 2021, 7:31 AM), https://www.cbsnews.com/news/immigration-border-deportations-prosecutions-deter-migration-biden-administration [https://perma.cc/B7A4-WCPF] (quoting Lee Gelernt, renowned ACLU attorney leading organization's litigation efforts against Title 42 and in other arenas, saying: "Families with small children are living in horrendous conditions in outdoor migrant camps and are sitting ducks for the cartels"); Samantha Schmidt, *Thousands of Migrants Overwhelm Colombian Coastal Town*, WASH. POST (July 28, 2021, 6:14 PM), https://www.washingtonpost.com/world/2021/07/28/colombia-migrants-haiti-africa-necocli [https://perma.cc/52AP-DVTL].

[100] *See* Eileen Sullivan, *Biden Administration Has Admitted One Million Migrants to Await Hearings*, N.Y. TIMES (Sept. 11, 2022), https://www.nytimes.com/2022/09/06/us/politics/asylum-biden-administration.html [https://perma.cc/8TG9-9RZQ] ("The Biden administration has repeatedly warned migrants not to make the dangerous and expensive journey to the border."); Brendan Cole, *Antony Blinken Says It's "Unacceptable" Children at the Border Are Left in Danger*, NEWSWEEK (May 3, 2021, 6:54 AM), https://www.newsweek.com/antony-blinken-immigration-cbs-news-1588192 [https://perma.cc/J2WN-97VQ] (reporting Secretary of State Antony Blinken's statement to *60 Minutes* that "[o]ur message is very clear, 'Don't come. The border is not open. You won't get in.'"); Brian Naylor & Tamara Keith, *Kamala Harris Tells Guatemalans Not to Migrate to the United States*, NPR (June 7, 2021, 10:55 PM), https://www.npr.org/2021/06/07/1004074139/harris-tells-guatemalans-not-to-migrate-to-the-united-states [https://perma.cc/RC4Q-RZ34] (reporting on Vice President Kamala Harris's meeting with Guatemalan President Alejandro

ramped up deportation and prosecutorial efforts against unlawful entrants during surges of border apprehensions.[101] And it has largely kept in place Title 42–related restrictions, only recently beginning the process of rescinding them.[102] The lure of additional rights would naturally amplify the crises to which those efforts have largely been directed, compelling — perhaps especially — future progressive administrations to devote yet more resources to patrolling and preventing irregular migration. As to conservative administrations, in addition to the politically neutral reasons canvassed above, one need only recall the Trump Administration's divisive "Remain in Mexico" policy[103] for evidence that

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Giammattei, after which Vice President Harris stated at a press conference: "I want to be clear to folks in this region who are thinking about making that dangerous trek to the United States-Mexico border: Do not come. Do not come. . . . The United States will continue to enforce our laws and secure our border."); Joel Rose & Scott Neuman, *The Biden Administration Is Fighting in Court to Keep a Trump-Era Immigration Policy*, NPR (Sept. 20, 2021, 3:31 PM), https://www.npr.org/2021/09/20/1038918197/the-biden-administration-is-fighting-in-court-to-keep-a-trump-era-immigration-po [https://perma.cc/Y8LL-NNBJ] (quoting DHS Secretary Alejandro Mayorkas's statement at a news conference that "[i]f you come to the U.S. illegally, you will be returned . . . . Your journey will not succeed."); *see also* Press Release, White House, Fact Sheet: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System (July 27, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/27/fact-sheet-the-biden-administration-blueprint-for-a-fair-orderly-and-humane-immigration-system [https://perma.cc/95SX-8YU2] (identifying policy of "[b]olstering public messaging on migration by ensuring consistent messages to discourage irregular migration").

101 Montoya-Galvez, *supra* note 99 (reporting on the Biden Administration's efforts to ramp up deportations and prosecutions of migrations in light of a spike in apprehensions, overcrowding in Border Patrol facilities, and COVID-19 spread).

102 *See* Order Terminating the Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists, 87 Fed. Reg. 19,941, 19,941–42 (Apr. 6, 2022) (rescinding CDC orders issued pursuant to Title 42 on the ground that COVID-19 presented a less serious risk than it once did). *But see* Louisiana v. Ctrs. for Disease Control & Prevention, No. 22-CV-00885, 2022 WL 1604901, at *1, *23 (W.D. La. May 20, 2022) (preliminarily enjoining CDC order rescinding Title 42 orders). The Justice Department intends to appeal from the court's decision entering the preliminary injunction. *See* Press Release, U.S. Dep't of Just., Release No. 22-548, Justice Department Statement on Ruling in *Louisiana v. CDC* (May 20, 2022), https://www.justice.gov/opa/pr/justice-department-statement-ruling-louisiana-v-cdc [https://perma.cc/EUN9-SLV4].

103 *See* Memorandum from Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec., to L. Francis Cissna, Dir., U.S. Citizenship & Immigr. Servs. et al. 1 (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [https://perma.cc/NB8C-32HM]. The policy "provided that certain non-Mexican nationals arriving by land from Mexico would be returned to Mexico to await the results of their removal proceedings under 8 U.S.C. § 1229a." Biden v. Texas, 142 S. Ct. 2528, 2535 (2022). Other conservative efforts to discourage migration have included, for example, Texas's controversial Operation Lone Star, which makes efforts to "crack down on border crossings, inlcud[ing by] jailing asylum-seekers, making disaster declarations and building a border wall," Jaclyn Diaz, *In Texas, Officials Are Reporting a Surge of Migrants at the Southern Border This Week*, NPR (Sept. 17, 2021, 6:16 AM), https://www.npr.org/2021/09/17/1038157965/in-texas-officials-are-reporting-a-surge-in-migrants-at-the-southern-border-this [https://perma.cc/98W7-XZZD], and Republican governors' recent campaigns of sending busloads of migrants to Democratic cities, *see* Miriam Jordan, *G.O.P. Governors Cause Havoc by Busing Migrants to East Coast*, N.Y. TIMES (Sept. 15, 2022), https://www.nytimes.com/2022/08/04/us/migrants-buses-washington-texas.html [https://perma.cc/AUJ3-GVDG]; Sullivan, *supra* note 100.

they would go even further to wall off the country from arrivals, should the stakes of entry rise.

Of course, this is all a counterfactual. It is impossible to predict with certainty the financial and political fallout of doing away with the entry fiction. Many of the costs of providing adequate process to those detained might be offset by savings wrought by the shorter detention periods that due process demands.[104] Unpredictable global crises might turn up the political pressure to admit arrivals regardless of cost.[105] Exclusionary policies may prove feckless in actually deterring migration, compelling administrations to pursue other avenues to address humanitarian and managerial problems created by increased demand.[106] Congress could spend more on immigration. But, at the end of the day, it can hardly be gainsaid that enhanced procedural entitlements upon physical entrance would put serious fiscal, managerial, and political strain on the government, no matter which party governed. One plausible way to avoid that pain would be a policy of outright exclusion prior to inspection — for many, even if not all. In that scenario, there would be no need for a legal fiction to treat noncitizens as if they were outside the country. They would just be there.

The entry fiction encourages the government to regulate the border less bluntly. In light of the above considerations, one could understand the entry fiction's traditional conceptual work in the admission context less as one branch usurping the power of another than as a kind of partnership in governance to provide good (humanitarian relief), if not great (humanitarian relief *and* enhanced constitutional rights). That upshot is no doubt debatable from a policy perspective — and, to be sure, whether the entry fiction actually achieves a net "good" is suspect, to say the least, particularly when assessing its impact in the detention

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[104] *See* Lee, *supra* note 24, at 603–08, 641–42 (noting that the entry fiction shields many suspect features of immigration detention from judicial oversight, allowing for arbitrary and indefinite detention of certain noncitizens).

[105] For instance, a March 2022 Reuters/Ipsos poll found that seventy-four percent of American adults supported admitting Ukrainian refugees following Russia's invasion. Anushka Patil, *Americans' Support for Admitting Refugees Is at a Record High, Gallup Finds*, N.Y. TIMES (Apr. 26, 2022), https://www.nytimes.com/2022/04/26/world/europe/ukraine-refugees-us-gallup-poll.html [https://perma.cc/D2LK-TVZY]. And, indeed, the United States had granted humanitarian parole to 39,000 Ukrainians by mid-June 2022. *See* Muzaffar Chishti & Jessica Bolter, *Welcoming Afghans and Ukrainians to the United States: A Case in Similarities and Contrasts*, MIGRATION POL'Y INST. (July 13, 2022), https://www.migrationpolicy.org/article/afghan-ukrainian-us-arrivals-parole [https://perma.cc/Y9HW-A6SM].

[106] *See* Lee, *supra* note 24, at 639 ("[E]ven if the government changes its parole policy, studies have shown that the prospect of detention in the United States does not meaningfully alter the migration decisions of individuals fleeing violence and persecution." (citing Jonathan T. Hiskey, Abby Córdova, Mary Fran Malone & Diana M. Orcés, *Leaving the Devil You Know: Crime Victimization, US Deterrence Policy, and the Emigration Decision in Central America*, 53 LATIN AM. RSCH. REV. 429, 442 (2018))).

context.[107] But, from a *powers* perspective — the currency of the standard critique — concerns of aggrandizement are softened. While they still exist,[108] if one rejects a formalist, yes/no inquiry into the fact of an encroachment, in favor of a functionalist inquiry into the degree of that encroachment, one could at least acknowledge a colorable response to the critique. If "no matter which branch — or combination of branches — made a decision, . . . the conclusion reached would be the same, then there would be little reason to be concerned about the allocation of decisionmaking authority among them."[109]

II. *THURAISSIGIAM*'S PARADIGM SHIFT: JUDICIAL AGGRANDIZEMENT

The *Thuraissigiam* Court failed to recognize that the conceptual work the entry fiction does in the clandestine-entrant context is wholly distinct from its work in the presentment-at-the-border context. Again, in the latter context, the entry fiction works a kind of deference to an ex ante political decision made by the political branches at the border, where they have plenary power over the question of admission. But a clandestine entrant has evaded that checkpoint, depriving the political branches of the ability to make the threshold "in-or-out" decision at the border. The noncitizen has answered that question for herself: she is in. That may or may not be lamentable as a policy matter, but it is what has happened. In this context, because no ex ante border decision has been made — and because it is too late for the political branches to make one — the entry fiction does not (because it cannot) defer to such a decision. It instead operates as a tool for a court to pretend a noncitizen is at the border and make the "in-or-out" choice itself (choosing "out").[110] That is so notwithstanding the fact that the "in-or-out" choice is so quintessentially political that the foundational plenary power cases were built atop the Legislature's exclusive province to make it.[111]

It is no response that the expedited removal regime *is* an ex ante admission decision — that those subject to it have been categorically deemed legally "out" of the country. Even if the enactment of expedited removal could be described as an ex ante admission decision analogous

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[107] The entry fiction might embolden the government to let in arrivals otherwise subject to harsh conditions on the other side of the border. But, for many let in subject to the entry fiction, those conditions are merely substituted with a different kind of suffering to bear. *See, e.g.*, Lee, *supra* note 24, at 611–14, 633–36 (highlighting discriminatory and punitive nature of immigration detention faced by those subject to entry fiction).

[108] *See supra* section I.B, pp. 235–38.

[109] Magill, *supra* note 82, at 629–30 (footnote omitted).

[110] *See* Lee, *supra* note 24, at 593 (describing *Thuraissigiam*'s use of the entry fiction as transforming the doctrine "into a border-management tool, used to ensure the 'governing [of] admission to this country' by federal authorities and to prevent creating 'a perverse incentive to enter at an unlawful rather than lawful location' by individuals" (quoting Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1983 (2020))).

[111] *See supra* note 27 and accompanying text.

to the one made at the border in the historical context, *Thuraissigiam*'s due process holding was not expressly limited to those subject to expedited removal. "[A]n alien like" Thuraissigiam lacked procedural due process rights, the Court reasoned, because "an alien who tries to enter the country illegally is treated as an 'applicant for admission,' and an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry.'"[112]

But not every noncitizen who is statutorily treated as an "applicant for admission" or is detained "shortly after" unlawful entry — whatever that means — is subject to expedited removal.[113] By statute, the furthest expedited removal can reach, in relevant part, is noncitizens unable to demonstrate physical presence for two continuous years;[114] by regulation, it extends only to those who fail to demonstrate physical presence for fourteen days and are apprehended within a hundred miles of a border.[115] Thus, notwithstanding some jurists' and commentators' read of *Thuraissigiam* as limited to its facts,[116] the majority left a broader interpretation on the table.

And courts have begun to adopt that interpretation. Take, for example, the Ninth Circuit's decision in *Rauda v. Jennings*.[117] That case regarded a Salvadorian man named Willian Matias Rauda, who had unlawfully entered the United States in early 2014.[118] In November 2018, Immigration and Customs Enforcement detained Matias Rauda and initiated regular — not expedited — removal proceedings against him, which he unsuccessfully challenged in administrative proceedings

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112 *Thuraissigiam*, 140 S. Ct. at 1982–83 (citation omitted) (quoting 8 U.S.C. § 1225(a)(1); Zadvydas v. Davis, 533 U.S. 678, 693 (2001)).

113 *See* 8 U.S.C. § 1225(b)(2)(A) ("Subject to [certain statutory exceptions], in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding under section 1229a of this title.").

114 *See id.* § 1225(b)(1)(A)(iii)(II).

115 *See supra* note 36. While expedited removal also applies to noncitizens inadmissible for having committed fraud or lacking valid paperwork, *see* 8 U.S.C. § 1225(b)(1)(A)(i) (citing 8 U.S.C. § 1182(a)(6)(C) (misrepresentation bar) & (a)(7) (documentation requirements)), "[t]hose who have been lawfully admitted (i.e., with visas) generally retain formal procedural protections," Daniel Kanstroom, *Deportation in the Shadows of Due Process: The Dangerous Implications of* DHS v. Thuraissigiam, 50 SW. L. REV. 342, 347 (2021) (citing David A. Martin, Comment, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 679–80 (2000)).

116 *See, e.g.*, *Thuraissigiam*, 140 S. Ct. at 1988 (Breyer, J., concurring in the judgment) (stressing that agreement with majority's application of law was specific to "*this particular case*" and "*as applied to respondent*" (quoting Petition for a Writ of Certiorari at i, *Thuraissigiam* (No. 19-161))); *id.* at 2013 (Sotomayor, J., dissenting) ("[T]he Court cabins its holding to individuals who are 'in respondent's position.' Presumably the rule applies to — and only to — individuals found within 25 feet of the border who have entered within the past 24 hours of their apprehension." (citation omitted) (quoting *id.* at 1983 (majority opinion))); Kanstroom, *supra* note 115, at 356 ("[T]he concurrence of Justices Breyer and Ginsburg appears as a valiant, if perhaps tragic, attempt to limit the implications of Alito's reasoning."); Li, *supra* note 35, at 817–19 (arguing that *Thuraissigiam*'s holdings should be limited to its facts).

117 8 F.4th 1050 (9th Cir. 2021).

118 *Id.* at 1052.

and on petition for review to the Ninth Circuit.[119] Matias Rauda thereafter filed a habeas petition and a motion for an emergency temporary restraining order (TRO) to prevent his removal pending resolution of the habeas petition.[120] The district court denied the TRO on the ground that, by statute, it lacked jurisdiction to hear Matias Rauda's claims — an outcome that, under *Thuraissigiam*, did not run afoul of the Suspension Clause.[121]

On appeal, in an opinion authored by Judge VanDyke, the Ninth Circuit affirmed. In a portion of the opinion rejecting Matias Rauda's attempt to distinguish his case from *Thuraissigiam*, the Ninth Circuit reasoned that a noncitizen's unlawful presence in the country alone — regardless of its duration or her community ties — justified minimal due process rights:

> If we were to grant Matias more process because he had successfully eluded immigration authorities for longer than than the petitioner in *Thuraissigiam*, we would likewise be creating the same "perverse incentive" the Court warned against. Matias differs from *Thuraissigiam* only in that he managed to "reside" unlawfully in the U.S. for a longer period, which is irrelevant because both petitioners were present in the U.S. illegally. As the government points out, it would be strange to afford Matias, who committed crimes and evaded authorities, *more* process than an alien who lawfully presented himself at the border. Matias, like Thuraissigiam, is entitled to the process afforded by statute, but no more.[122]

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[119] *See id.* at 1053.

[120] Rauda v. Jennings, No. 21-cv-03897, 2021 WL 2413006, at *1 (N.D. Cal. June 14), *aff'd* 8 F.4th 1050 (9th Cir. 2021).

[121] *Id.* at *5–6 ("In sum, because Mr. Matias's claims do not 'call for traditional habeas relief' even under an evolving understanding of the writ, applying § 1252(g) to bar his claims does not implicate the Suspension Clause." *Id.* at *6 (quoting *Thuraissigiam*, 140 S. Ct. at 1970).).

[122] *Rauda*, 8 F.4th at 1057 (citations omitted) (quoting *Thuraissigiam*, 140 S. Ct. at 1983). This reasoning, of course, fails to address even the *Thuraissigiam* majority's recognition that "aliens who have established connections in this country have due process rights in deportation proceedings." *Thuraissigiam*, 140 S. Ct. at 1963–64. And it should be noted that other courts do not read *Thuraissigiam*'s due process holding as broadly as the *Rauda* court did. *See, e.g.*, Sergio S.E. v. Rodriguez, Civil Action No. 20-6751, 2020 WL 5494682, at *5 (D.N.J. Sept. 11, 2020), *appeal dismissed sub nom.* Erazo v. Warden Elizabeth Det. Ce, No. 20-3301, 2021 WL 1895927 (3d Cir. Feb. 22, 2021) (distinguishing *Thuraissigiam* from case brought by habeas petitioner who did not face expedited removal, in part on the ground that petitioner had "established connections in the United States. He has apparently been in the county over 10 years and has a family here."). But even substantial community ties have not led other courts to distinguish *Thuraissigiam*, where an order of expedited removal had been issued. *See, e.g.*, United States v. Gonzales-Lopez, No. CR-18-213, 2020 WL 5210923, at *1, *5 (N.D. Cal. Sept. 1, 2020) (recognizing that, though noncitizen had lived "most of his life," *id.* at *1, in the United States, under *Thuraissigiam*, he was entitled only to those procedural due process rights Congress had codified in expedited removal regime); Sandoval-Linares v. Albencer, No. 20-cv-00928, 2020 WL 7343128, at *9 (C.D. Cal. Dec. 10, 2020), *report and recommendation adopted*, 2020 WL 7343125 (C.D. Cal. Dec. 14, 2020) (recognizing that "unlike Thuraissigiam, Petitioner has lived in the United States over the last eight years" but that his "due

The *Rauda* court invoked the *Thuraissigiam* majority's own explicitly political reasoning. As touched upon above, the *Thuraissigiam* Court stated that "an alien like [Thuraissigiam]" is treated as an "applicant for admission" because "an alien who is detained shortly after unlawful entry cannot be said to have 'effected an entry.'"[123] To hold otherwise, the Court reasoned, "would undermine the 'sovereign prerogative' of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location."[124] Whatever wisdom or folly in that observation, it is precisely the kind of nakedly political consideration that courts are routinely instructed — by the Supreme Court — to ignore.[125] But, as modeled by *Thuraissigiam* and repeated by *Rauda*, that is precisely what courts using the entry fiction in the clandestine-entrant context would do.

From a formalist perspective, then, this novel use of the entry fiction invites an entirely new aggrandizement problem: that of the *judicial* branch encroaching upon the political branches' authority to decide whether a noncitizen may enter the country. The irony of a case like *Thuraissigiam* is that, in an attempt to recognize the political branches' plenary authority over noncitizen admission, the Court seized that power for itself. And the harm risked by other courts doing the same in the wake of *Thuraissigiam* is particularly acute here, where the move can be the difference between life and death.[126] Separation-of-powers

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process claims [we]re barred under the logic of *Thuraissigiam*" because he "only entered the United States after an expedited removal order had already been entered against him and his mother"). That *Thuraissigiam*'s "an alien like respondent" language has effectively introduced a judicial Rorschach test only reinforces another danger wrought by the decision: the lack of a predictable, bright-line rule and resulting risk of disparate treatment of similarly situated litigants.

123 *Thuraissigiam*, 140 S. Ct. at 1982–83 (quoting 8 U.S.C. § 1225(a)(1); Zadvydas v. Davis, 533 U.S. 678, 693 (2001)).

124 *Id.* at 1983 (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)).

125 *See generally, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (establishing a rule for political question doctrine); Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641, 642 (2012) (reflecting on Chief Justice Roberts's comment to the Senate Judiciary Committee that a judge's role is "to call balls and strikes, and not to pitch or bat").

126 For example, Matias Rauda argued before an immigration judge that Salvadorian authorities would torture him if he were deported back to El Salvador, where he "had been forced to do tasks for MS-13 and was repeatedly beaten and harassed by police officers who considered him a gang member." *Rauda*, 2021 WL 2413006, at *1. The immigration judge found that Matias Rauda was credible and that he had indeed been tortured by Salvadorian authorities on two occasions, but that "changed circumstances" (Matias Rauda's "new lifestyle as a family man" and "El Salvador's improved track record of attempting to control gang violence") "made it unlikely that [he] would be tortured again." *Id.* at *2. After that decision, Matias Rauda's significant other allegedly received a text message from an MS-13 member — corroborated by an acquaintance in El Salvador — that Matias Rauda had been labeled a "snitch" and would be killed upon return to El Salvador, prompting Matias Rauda's renewed (unsuccessful) effort to avoid removal. *Id.* *See also generally, e.g.*, Brief for *Amici Curiae* Former DHS Secretary Jeh C. Johnson & Former Ambassador to Mexico Roberta S. Jacobson in Support of Petitioners at 3, 8–9, Biden v. Texas, 142 S. Ct. 2528 (2022) (No. 21-954), 2022 WL 867987, at *3, *8–9 ("Due to COVID-19, U.S. removal proceedings for those

formalists should reject this exercise of political decisionmaking as judicial aggrandizement.[127]

And so should separation-of-powers functionalists, as the power balance arguably retained in the entry fiction's historical context does not hold up in the clandestine-entrant context. Again, the balance in the former context is predicated on the political branches' plenary authority as gatekeeper.[128] But a clandestine entrant has evaded that gate. And neither the fact of a removal proceeding nor the lack of paperwork implies that the political branches *would* have excluded a noncitizen at the gate had they the chance. No doubt some arrivals would have been excluded, such as those who threatened national security.[129] Others, such as those seeking withholding or asylum, may have been let in, or at least may have been entitled to greater procedural protections in the adjudication and appeal of their claims than Thuraissigiam — who faced expedited removal — had.[130] And yet others would have been discretionarily paroled for humanitarian or practical reasons.[131] A court's use of the entry fiction against all clandestine entrants assumes

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enrolled in [Migrant Protection Protocols (MPP)] were suspended, and migrants were then stuck in limbo on the Mexican side of the border. . . . To make matters worse, 'there were pervasive and widespread reports of MPP enrollees being exposed to extreme violence and insecurity at the hands of transnational criminal organizations.' All of this created an increased level of stress, instability and insecurity in communities on Mexico's northern border." (citations omitted)).

127 *See* Josh Chafetz, Essay, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 129 (2021) (describing "judicial self-aggrandizement" as "the judiciary empower[ing] itself by disempowering Congress"); Allen C. Sumrall, *Nondelegation and Judicial Aggrandizement*, 15 ELON L. REV. (forthcoming 2023) (manuscript at 17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4119098 [https://perma.cc/42QC-2UYT] (describing judicial self-aggrandizement as a "mechanism of institutional change or constitutional change" whereby "judicial decisions . . . reify courts as political actors even [if their] decisions do not result in any formal institutional change, like a new jurisdictional statute or increase in resources"); Yvonne Tew, *Strategic Judicial Empowerment*, AM. J. COMP. L. (forthcoming) (manuscript at 21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3323022 [https://perma.cc/DWJ5-9A3Z] (defining judicial power as "the strength of a court's ability to assert itself against the governing political branches and to affect the outcomes of constitutionally and politically significant issues"). One might also describe the move as judicial activism. *See* Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 10 (2011) (canvassing literature and identifying signs of judicial activism as, inter alia, "departing from history or tradition, issuing maximalist and not minimalist holdings, using broad remedial powers, [and] basing decisions upon partisan preferences").

128 *See supra* section I.C, pp. 238–45.

129 *See, e.g.*, 8 U.S.C. § 1182(a)(3) (establishing security and related grounds for inadmissibility).

130 *See* Huisha-Huisha v. Mayorkas, 27 F.4th 718, 724 (D.C. Cir. 2022) ("[T]he Immigration and Nationality Act . . . provides aliens with procedural and substantive rights to resist expulsion. Their procedural rights include the opportunity to contest removal before an immigration judge and then to appeal that immigration judge's decision to the Board of Immigration Appeals and a federal court of appeals. And their substantive rights include . . . asylum, withholding of removal, and protections under the Convention Against Torture." (citations omitted)). Thuraissigiam's procedural rights were particularly thin because he faced expedited removal — but not every removable clandestine entrant does, and *Thuraissigiam*'s entry fiction analysis was not limited to those who do. *See supra* notes 113–15 and accompanying text.

131 *See supra* note 56 and accompanying text.

that, of the myriad options available, the government would have declined to make an entry decision resulting in the recognition of procedural rights above those owed an outright excluded noncitizen. But that is ultimately a guess. What's more, it is guesswork complicated by the fact that a clandestine entrant has proven herself evasive of the law, inviting post hoc rationalizations that frustrate insight into what the admission decision would have been absent the illicit conduct.

Even if one could predict with certainty what the political branches would have decided had a clandestinely entered noncitizen presented for inspection, that would not cure the problem. It would be too late. The decision whether to let a noncitizen into the country occurs at the border. And, while the political branches' power to answer that question *at that time and place* might be plenary, that is where it ends.[132] To borrow from Justice Kagan in another context, the government's power is "potent in its place, but cabined in its scope."[133] To use the entry fiction in the clandestine-entrant context implies, remarkably, that just because the government had sweeping authority over someone at one time and in one place, it has that authority over her at all times and in all places. That cannot be the law. But, after *Thuraissigiam*, it is. Formalists, functionalists, and everyone in between should recognize the entry fiction's paradigm shift — and rebuke it.

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[132] The "plenary power" authorities use language specific to the gatekeeping question of admission or exclusion at the border. *See, e.g.*, Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1982 (2020) (noting "century-old rule regarding the due process rights of an alien seeking initial entry"); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) ("power to exclude or to expel aliens"); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (power "to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe"); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 603 (1889) (power to "exclude aliens from its territory").

[133] Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).