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INTRODUCTION

President Trump's era of immigration enforcement harkens back to some of the United States' darkest, most nativist, racially, and ideologically-tinged immigration moments. The new administration's rhetoric and policies reinforces the myth of the Mexican or Central American "criminal alien." Immigration detention of asylum seekers arriving via the U.S.-Mexico border is indicative of the inherently racialized response to migration from Central America and Mexico.

Noncitizens are deemed "detained" in immigration prisons rather than incarcerated because immigration law is civil and immigration imprisonment is authorized by immigration law rather than criminal law. The legal characterization of this civil preventive immigration "detention" results in a unique constitutional due process analysis where noncitizens in immigration jails have less due process protection, compared to those in criminal custody or other forms of civil preventive detention.[1] The experience of confinement, however, is no less oppressive than the experience within the criminal justice system.

Immigration exceptionalism and the plenary power doctrine explain in part why noncitizens have lesser due process rights than citizens in non-immigration contexts. Historically, the U.S. Supreme Court has deferred to Congress in determining applicability of constitutional protections in the realm of immigration law. The Court's reluctance to recognize constitutional protections for noncitizens has also been attributed to exceptional deference to the political branches pursuant to the plenary power doctrine.[2]

Particularly, Congress has curtailed the Court's discretion since the 1996 immigration law reforms and following the events of September 11, 2001. Further, immigration enforcement has become increasingly punitive. Immigration authorities have exercised discretion in ways that have been criticized as undermining or further eroding rights and equality norms.[3] Racialized immigrants of color, particularly Latinxs from Central America and Mexico, have borne the brunt of decreased rights and legal protections, experiencing disproportionate apprehension and detention. One set of the *Jennings v. Rodriguez* class members, detained noncitizen asylum seekers with adjudicated credible fears [hereinafter credible fear asylum seekers], are

1. Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1098 (1995) (exploring the Court's reading of constitutional due process protections to challenges of conditions of confinement of noncitizens pursuant to the plenary power doctrine, including consideration of the foundational cases).

2. By and large, the Supreme Court has applied these principles to review the actions of Congress and the executive branch without meaningful differentiation. *See* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950); Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953).

3. Along the same lines yet broadening the analysis beyond the class of noncitizens to vulnerable people in general, the Court's contemporary jurisprudence in other contexts—like the Eighth Amendment—has evolved to protect vulnerable people, like immigrants, "uniquely subject to majoritarian retributive excess." Robert J. Smith & Zoë Robinson, *Constitutional Liberty and The Progression of Punishment*, 102 CORNELL L. REV. 101, 101 (2016). Combining this progress with the Court's recent increased recognition of the right to liberty by recognizing a substantive due process right in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), these doctrinal developments may represent the Court's willingness to be an independent arbiter of legislative excesses when the political branches undermine the basic right to human dignity by impinging upon individual liberty. But, immigration exceptionalism still may stall this progress in manifesting in immigrant protections equal to those experienced by citizens.

representative of this problem.[4]

The issue of the increased use of detention absent determination of a flight risk, dangerousness, or a bona fide national security risk, presented a multi-pronged, missed-opportunity for the *Jennings* Court. In recent years, the judicial branch has given less deference to Congress when constitutional rights and protections are in question, moving towards the potential constitutional mainstreaming of immigration law.[5] The Supreme Court could have continued this trend and served as a check on the political and executive branches by further bringing constitutional norms into immigration law. Particularly, the *Jennings* Court's validation of the constitutional due process question would have had ramifications beyond the immediate due process issue because of the history of systemic ethnic and racial bias in immigration law. Racialized noncitizens of color are being incarcerated for attempting to migrate, and not necessarily for migration-related crimes. The validation of their claims would have indirectly addressed a rights deficit with a historic racial dimension.

The first section of this article will set forth doctrinal principles concerning detention of asylum seekers arriving at a U.S. port of entry. The second section will explore the Court's substantive due process jurisprudence pertaining to immigration detention, including discussion of the *Jennings* litigation. The third section will continue the examination of preventive civil immigration detention, with a focus on one district court's articulation of a potential limit on such detentions. The fourth section will broaden the discussion to non-immigration civil and criminal preventive detention to present due process limitations in those contexts to highlight the potential due process analysis if civil immigration detention due process questions were brought within the constitutional mainstream. The fifth section will transition to the historical mistreatment in immigration law, of Central American and Mexican immigrants to contextualize their modern-day extra-constitutional incarceration as asylum seekers. The fifth section will also touch on the role of the plenary power doctrine in continuing to enable implicit racial and ethnic bias in immigration law to better understand the role the doctrine continues to play in adversely racializing particular groups of immigrants. Finally, the last section proposes a combined methodology of disaggregation and application of rule of law principles to provide a path to move immigration law towards the constitutional mainstream.

I. DETENTION OF ASYLUM SEEKERS

There are currently more incarcerated persons in immigration prisons than ever before in U.S. history, and the majority are Mexican and Central American nationals.[6] Many of those incarcerated have fled violence in their home countries and

4. Jennings v. Rodriguez, No. 15-1204, slip op. (S. Ct. Feb. 27, 2018).

5. *See* Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 59 (2015); Kevin R. Johnson, *No Decision In Two Immigration-Enforcement Cases*, SCOTUSBLOG (Jun. 26, 2017), http://www.scotusblog.com/2017/06/no-decision-two-immigration-enforcement-cases; Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1092 (2017).

6. Determining total numbers of noncitizens in custody is difficult and complicated because they are held in county jails and federal immigration detention centers. In recent years, Immigration and Customs Enforcement has detained over 400,000 people every year who are accused of or found to have violated a civil immigration law. Yet annually, there are even more noncitizens who have been detained in some form of restricted or secure immigration detention facility, as many as half a million people as of 2008. *See* César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246

present themselves at the U.S. border or ports of entry asking for humanitarian protection. The latest spending bill passed by Congress allocates funding for a record $7 billion budget, with funds to maintain an average of 40,354 beds daily in immigration detention centers—a significant increase yet still less than the President had requested.[7] Immigration and Customs Enforcement (ICE) arrests have spiked since the beginning of the Trump presidency, with 41,000 arrested in just the first 100 days after the President signed his executive order on border security and immigration enforcement.[8]

Expedited removal is one critical legal mechanism facilitating the rise in immigration incarceration of asylum seekers in particular.[9] Expedited removal allows a Department of Homeland Security (DHS) official to summarily remove a noncitizen, without a hearing before an immigration judge, and precludes appeal to the Board of Immigration Appeals (BIA). Alternatively, expedited removal authorizes detention where a noncitizen expresses a credible fear of harm.[10] An agent of the DHS (usually a Customs and Border Protection or an ICE agent) decides whether a noncitizen is subject to expedited removal and adjudicates the expedited removal process resulting in deportation, imprisonment, or both.[11] CBP or ICE must refer those they do not parole but detain, to a United States Citizenship and Immigration Services (USCIS) asylum officer trained to conduct non-adversarial "credible fear" screening-style

(2017).

7. *See* David Nakamura & Seung Min Kim, *Spending Deal Marks End of Immigration Debate for Year, Kicks off New Round of Blame Game*, WASH. POST (Mar. 22, 2018), https://www.washingtonpost.com/politics/spending-deal-marks-end-of-immigration-debate-for-year-kicks-off-new-round-of-blame-game/2018/03/22/b5387a50-2de4-11e8-b0b0-f706877db618_story.html?noredirect=on&utm_term=.84d548f55eb9.

8. *See* Press Release, U.S. Immigr. & Customs Enf't, ICE ERO Immigration Arrests Climb Nearly 40% (Nov. 2, 2017) (available at https://www.ice.gov/features/100-days); *see also* Laurel Wamsley, *As It Makes More Arrests, ICE Looks For More Detention Centers*, NPR (Oct. 28, 2017), https://www.npr.org/sections/thetwo-way/2017/10/26/560257834/as-it-makes-more-arrests-ice-looks-for-more-detention-centers ("[A]verage daily population in [ICE] detention facilities was a little more than 38,000 for the 2017 fiscal year; the president's 2018 budget plan requests an increase of $1.2 billion in funding for detention beds, to support an average population of over 48,000 adults").

9. *See also* Supplemental Brief of Amicus Curiae Human Rights First in Support of Respondents at 29, Jennings v. Rodriguez, 138 S. Ct. 830 (2018), 2017 WL 564165.

10. *See* 8 U.S.C. § 1225(b)(1) (2018); *Expedited Removal: What Has Changed Since Executive Order 13767, Border Security and Immigration Enforcement Improvements*, NAT'L IMMIGR. PROJECT PRAC. ADVISORY (Am. Immigr. Council/Nat'l Immig. Project/ACLU, Feb. 20, 2017 (available at https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/final_expedited_removal_advisory-_updated_2-21-17.pdf); Jill E. Family, *The Executive Power of Process in Immigration Law*, 91 CHI.-KENT L. REV. 59, 75–76 (2016); Jill E. Family, *A Broader View of the Immigration Adjudication Problem*, 23 GEO. IMMIGR. L.J. 595, 624–27 (2009); Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CALIF. L. REV. 181, 194–203 (2017).

11. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (2018) (designating an inadmissible noncitizen as one who the agent decides made a misrepresentation or false claim to U.S. citizenship, under 8 U.S.C. § 1182(a)(6)(C) (2018) or lacks a valid visa or documentation authorizing their entry into the United States, see 8 U.S.C. § 1182(a)(7) (2018); *see also* Designating Aliens For Expedited Removal, 69 Fed. Reg. 48877, 48880 (2004).

DHS used to focus use of expedited removal on particular inadmissible noncitizens arriving at a port of entry or who were apprehended within fourteen days of arrival and within 100 miles of an international land border. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (2018) (An inadmissible noncitizen is one who the agent decides made a misrepresentation or false claim to U.S. citizenship or lacks a valid visa or documentation authorizing their entry into the United States); *see also* Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without A Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 219 (1999) (discussing expedited removal in the context of the plenary power doctrine and proposing that the Court concede that the plenary power doctrine can no longer be justified, so it could find the expedited removal procedure in violation of the Fifth Amendment of the Constitution).

interview. If the officer determines that the applicant has a credible fear, the case proceeds to an immigration judge for more complete review. During the pendency of the immigration court proceedings, ICE has been consistently and aggressively exercising its power to continue detaining the applicant.[12]

Asylum seekers arriving at the border may be considered "arriving aliens" pursuant to the Code of Federal Regulations.[13] Because an arriving alien is not admitted or paroled, even if actually, physically in the United States, they are treated differently and with less protections than someone who has been inspected and admitted or paroled in.

The Code of Federal Regulations provides guidelines for DHS' parole of a noncitizen following positive credible fear findings.[14] But, while Congress gave the U.S. Attorney General authority to parole inadmissible aliens into the United States, DHS generally does not grant parole prior to finding credible fear.[15] After a finding of credible fear, DHS has all but ceased granting parole, resulting in prolonged detention.[16] These so-called "no-bond" directives became more common after the events of September 11, 2001. After September 11, there was an increase in the use of no-bond directives absent individualized assessment of flight risk or dangerousness, instead relying on broad categorical presumptions, premised often, on national security.[17] Prolonged detention significantly impacts an asylum seeker's willingness

12. Under § 1225(b)(1)(B)(iii)(IV), "[a]ny alien . . . shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV) (2018). Additionally, C.F.R. § 235.3(c) requires mandatory detention of inadmissible aliens with limited parole opportunities. ICE could release asylum applicants on parole, exempting them from this detention policy but it has a uniform policy not to do so. *See* 8 C.F.R. § 235.3(c) (2017).

13. *See* 8 C.F.R. § 1.1(q) (2007) (defining "arriving aliens" as persons presenting themselves at a port of entry, lacking documentation authorizing their entry or parole as immigrants or nonimmigrants, who immigration agents have the authority to temporarily parole into the United States under 8 U.S.C. § 1182(d)(5)(A)(2018). This, however, creates a legal fiction where they are physically present, but legally under the INA, treated as if they have not been inspected and admitted, and therefore entitled to less rights than someone inspected and admitted. *See* 8 U.S.C. §1225 (2000) (codifying the Immigration and Nationality Act governing inspection and admission of arriving aliens, including asylum seekers).

14. *See* 8 C.F.R. § 212.5(b) (2007) (authorizing parole of aliens within the United States under limited circumstances for "urgent humanitarian reasons" or "significant public benefit" where "the aliens present neither a security risk nor a risk of absconding") (citation from Kristen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 ADMIN. L.R. 589, 591 n.6 (2007)).

15. *See* Immigration and Nationality Act, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952).

16. *See generally* Michael Kagan, *Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Isreal and the United States*, 51 TEXAS INT'L L.J. 191 (2016); *see also* Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197 (1999) (examining former INS policy regarding detention of asylum seekers pending claim adjudication and arguing that detention to deter, prevent absconding or protect public safety are not effective, necessary, nor appropriate); Kristen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 ADMIN. L.R. 589, 594 (2007) (explaining that noncitizens seeking refuge are incarcerated alongside, and treated akin to U.S. citizens convicted of crimes); *see also* Donald Kerwin, *Looking for Asylum, Suffering in Detention*, 28 HUM. RTS. 3, 3 (2001) (describing the credible fear and detention process for asylum seekers arriving at a land border, critiquing "inconsistent release practices," describing conditions of confinement and lack of access to legal representation, and urging the elimination of detention for asylum seekers with credible fears subjected to expedited removal).

17. Expedited removal, and mandatory detention as a result of a policy of no-bond was also used against Haitian asylum seekers. *See* In re D-J-, 23 I&N Dec. 572, 572–73 (A.G. 2003)); *see also* Hiroshi Motomura, *Haitian Asylum Seekers: Interdiction and Immigrants' Rights*, 26 CORNELL INT'L L.J. 695, 696 (1993) (considering Haitians interdicted at sea and arguing that the government's reliance on interdiction with respect to the applicability of constitutional due process rights of the Haitians contained "a paradox" because "[o]n the one hand, interdiction represents an attempt by the government to enhance its immunity

to continue to pursue their request for protection or to give up and return to the harm that precipitated their flight.[18]

Almost a decade before the recent increase in migration from the U.S.-Mexican border, the BIA held noncitizens, subject to expedited removal pursuant to § 235(b)(1)(A) of the Immigration and Nationality Act,[19] who are deemed to have credible fears but are subsequently placed in removal proceedings under § 240,[20] *are* eligible for a custody redetermination hearing before an immigration judge. There is an exception where the alien is a member of any of the listed classes of aliens who are specifically excluded from the custody jurisdiction of immigration judges.[21] Even for those who are eligible, however, redetermination hearings and release has been radically curtailed.

Even after an asylum officer has found that the applicant has a credible fear, detention authorization derives from the statute.[22] Authorized detention may continue for weeks or months, until the political asylum claim is fully adjudicated. The alternative is to release the applicant from custody and parole them into the United States while their case is pending.[23] DHS's current practice is to detain all asylum seekers who have presented themselves at the border and been deemed to have a credible fear throughout the duration of their removal proceedings.[24]

The quasi-mandatory detention of asylum seekers has been used expressly to deter migration, but it may still deter asylum seekers implicitly. Before the Trump administration's expansion of the use of detention for asylum seekers and expansion of expedited removal, the Obama administration announced a policy to pursue "wide-

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from judicial review." So "[a]t the same time . . . interdiction undercuts the government's position by strengthening the Haitians' claim that courts can protect them from forcible repatriation without ordering their entry into the United States" and disallowing their indefinite civil immigration preventative [sic] detention").

18. Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157 (2016) (examining immigration detention, "critiquing the role and functioning [of] the immigration custody determination process" and "propos[ing] normative changes to the immigration custody determination process"); *see also* Mary Bosworth & Emma Kaufman, *Foreigners in A Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL'Y REV. 429, 450 (2011) (proposing scholars and policymakers "turn[] attention to incarcerated foreigners" to "refocus prison studies and penal reform" and "[r]egardless of citizenship status, the indefinite nature of immigration detention creates a considerable psychological burden on detainees" which re-traumatizes and deters detainees from fighting their deportation cases).

19. 8 U.S.C. § 1225(b)(1)(A) (2018).

20. 8 U.S.C. § 1229a (2018).

21. In Re X-K-, 23 I.&N. Dec. 731, 731 (B.I.A. 2005); *see also* 8 C.F.R. § 1003.19(h)(2)(i) (2004).

22. 8 U.S.C. § 1225(b)(1(B)(ii) (2018). Mandatory detention of arriving aliens is presumably somewhat mitigated by the Attorney General's authority to order an asylum seeker released after establishing a credible fear, however, where executive policy shifts such and discretion to release is not exercised, the detention effectively becomes mandatory for the duration of the asylum seeker's case. Where there is the potential for the discretion to be unjustifiably misused or not used, and evidence of an absence of use of discretion to release arguments could be explored concerning treating such a policy as effectively mandatory, though were not addressed in *Jennings.*

23. 8 U.S.C. § 1225(b)(1)(B)(ii) (2018) ("arriving individuals who are otherwise subject to expedited removal but establish a "credible fear of persecution" during an initial interview, "shall be detained for further consideration" of their application for asylum, which occurs at a removal hearing" and authorizes detention pursuant to further review of asylum claim after finding of credible or reasonable fear); 69 Fed. Reg. at 48877–81 (parole for some who have a credible fear and are released from immigration custody while their asylum claim is pending).

24. 8 U.S.C. § 1225(b)(1)(B); *see also* 8 U.S.C. § 1229a(a)(1); Johnson, *supra* note 16, at 612 (2007).

scale detention of mothers and children to deter other families from seeking asylum in the United States" in June 2014.[25] ICE began summarily using expedited removal, incarcerating asylum seekers throughout the duration of their removal proceedings in "Family Residential Centers."[26] DHS used their authority to exercise discretion uniformly, to detain, essentially refraining from using discretion.[27]

Subsequently, between June 2014 and February 2015, ICE's initial discretionary custody determination was to deny release to *almost all detained families*.[28] At the time of publication, DHS began a new practice, perceived as intending to discourage migration: separating parents from children at the border and detaining them in separate institutions.[29]

During the Obama administration's use of the high- or no-bond policy, when asylum seekers sought review of no-bond or high-bond determinations ICE argued—often against pro se litigants—the policy was necessary to "significantly reduce the unlawful mass migration of Guatemalans, Hondurans and Salvadorans."[30] When applicants had counsel, they were often able to convince immigration judges to set bonds that would permit release of asylum-seeking families.[31] One U.S. district court has considered whether immigration detention may be used as a deterrent; and at the time of publication, litigation of this issue has recommenced.[32]

In *Jennings*, the Supreme Court considered the due process rights of three separate classes of detained noncitizens, one of which falls into the category discussed here: noncitizens who presented themselves at a U.S. port of entry and were subject to expedited removal, but demonstrated a credible fear of persecution and detained during their removal hearings. The Court had the opportunity to bring due process norms into the constitutional mainstream, un-exceptionalizing immigration law by issuing a decision that did not engage in constitutional avoidance. Such a ruling would have implicitly validated important underlying principles of equality where a majority of those detained are racialized Latinx peoples from Central America and Mexico.[33]

On March 15, 2018, a coalition of nonprofit organizations filed a class

25. Dora Schriro, *Weeping in the Playtime of Others: The Obama Administration's Failed Reform of ICE Family Detention Practices*, 5 J. MIGRATION AND HUMAN SEC. 452, 463 (2017).

26. *Id.*

27. *Id.* at 455.

28. *Id.* at 463.

29. John Burnett, *To Curb Illegal Immigration, DHS Separating Families at the Border*, NPR (Feb. 27, 2018), https://www.npr.org/2018/02/27/589079243/activists-outraged-that-u-s-border-agents-separate-immigrant-families; *see also* Petition For Writ Of Habeas Corpus And Complaint For Declaratory And Injunctive Relief, Ms. L v. ICE (3:18-cv-00428-DMS-MDD) (available at https://www.aclu.org/legal-document/ms-l-v-ice-complaint).

30. Schriro, *supra* note 25, at 463, n.36. Michael Kagan has argued deterrence is not a constitutionally supportable basis for overriding a noncitizens' liberty interest, noting that in *Zadvydas*, the Court found that even deportable immigrants with serious criminal records had a liberty interest where indefinite or prolonged detention was at stake. *See* Michael Kagan, *Limiting Deterrence: Judicial Resistance to Detention of Asylum-Seekers in Israel and the United States*, 51 TEX. INT'L L.J. 191, 194 (2016) ("even deportable immigrants with serious criminal records have a 'liberty interest [that] is, at the least, strong enough to raise a serious question as to whether . . . the Constitution permits detention that is indefinite and potentially permanent'" (citing Zadvydas v. Davis, 533 U.S. 678, 696 (2001)).

31. Schriro, *supra* note 25, at 463. For criticisms of expedited removal as implemented, see U.S. Comm'n on Int'l Religious Freedom, Report on Asylum Seekers in Expedited Removal (2005).

32. *See* infra. Section III. *R.I.L-R*—Substantive Due Process Asylum Seekers—Immigration Detention Cannot Be Punishment; *see also* Class Complaint for Injunctive and Declaratory Relief, Damus v. Nielsen (available at https://www.humanrightsfirst.org/sites/default/files/parole_litigation_Mar15.pdf).

33. *See* infra section V. The Plenary Power Doctrine and Systemic Racial Bias—Asylum Seekers in Detention.

complaint for an injunction and declaratory relief, arguing the *Jennings* Court held that "parole is the only exception to detention under the INA for asylum seekers who presented themselves at ports of entry to the United States."[34] The coalition emphasized that ICE's policy to refuse to grant parole in spite of a lack of flight risk or dangerousness findings as a means to deter asylum seekers from seeking protection "effectively and unlawfully eliminates this opportunity for release at the five ICE field offices, leaving asylum seekers within these field offices with no meaningful way to avoid detention during the pendency of their asylum cases."[35]

II. SUBSTANTIVE DUE PROCESS RIGHTS OF NONCITIZENS

The Fifth Amendment provides, "No person shall be . . . deprived of life, liberty, or property, without due process of law." Note that all "persons" are entitled to the Fifth Amendment substantive due process right to life, liberty, and property, without improper government interference.

The Constitution's Framers considered deprivation of liberty to be of tantamount importance, resulting in their enshrining protections from unjust incarceration in substantive and procedural due process and habeas corpus, pursuant to the Suspension Clause. Procedural due process requires individualized proceedings to provide adequate notice and a reasonable opportunity to respond to the charges resulting in confinement, while substantive due process requires the government have a legitimate purpose in restricting an individual's liberty by detaining or incarcerating them. Historically, when not at war, the government cannot incarcerate someone without a good, individualized reason, and the Court has never held that civil detention absent an individualized finding of dangerousness would comport with the constitution.[36]

In the context of immigration law, however, the courts have often considered detention-related challenges under the Fourth Amendment's Due Process Clause concerning the process due, rather than the underlying, substantive right to liberty. There are instances where interpretations by the Court of one doctrine have potential implications for the other doctrine.[37] While removal proceedings must comport with

34. Class Complaint for Injunctive and Declaratory Relief, *supra* note 32, ¶ 6. The complaint also discusses the district court preliminary injunction in *R.I.L-R. v. Johnson*, where the same district court enjoined the DHS policy of "detaining families seeking asylum that was designed to 'send[] a message of deterrence' to other migrants." R.I.L-R. v. Johnson, 80 F. Supp. 3d 164, 188–89 (D.D.C. 2015). The plaintiffs emphasized that the district court had applied established Supreme Court precedent "that immigration detention could not lawfully be founded on general deterrence—which may inform *criminal, but not civil*, detention." Class Complaint for Injunctive and Declaratory Relief, *supra* note 32 (emphasis added).

35. *Id.*

36. David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1008 (2002) (outlining "the general principles that apply to civil preventive detention," contending that "they establish that substantive due process is violated without an individualized showing after a fair adversarial hearing that there is something to prevent, namely danger to the community or flight" and applying this "general framework to immigration detention"). Several months after September 11, eighty-seven noncitizens were detained after getting voluntary departure or final orders, without charges, findings of flight risk or danger, and not because they could not be returned, but because the FBI would not clear them to be released. *Id.* at 1005–06). The September 11 detentions highlight the need for consideration of the and individual rights where the statutory basis for detention should be flight risk or dangerousness. The post-September 11 detentions are comparable to the preventive detention of asylum seekers pursuant to expedited removal addressed here to the extent that they were representative of a misuse of civil preventive detention.

37. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates*

procedural due process, the Court has held that noncitizens seeking entry or admission are due whatever process Congress states they are due, and they have little or no right to challenge that process.[38] Immigration detention and the plenary power doctrine, have played a role in "civil" immigration law enforcement since the "temporary harborage" of Mr. Mezei over sixty years ago.[39] Civil immigration detention and has been justified as "preventive" rather than punitive because immigration authorities lack the authority to punish because by definition, punitive detention can only arise in the express context of criminal law.[40]There are limitations on the use of immigration detention. Even when the plenary power doctrine was particularly robust, the Court indicated that civil detention for punitive purposes would violate the U.S. Constitution, and immigration detention had to be confined to the purpose of aiding deportation.[41]

By characterizing detention as an implicitly mandatory part of the deportation process, Congress and the judiciary are responsible for exceptional treatment of immigration detention from the standpoint of constitutional norms.[42] After the events of September 11, the power to detain is confused and conflated with the power to deport, effectively erasing the requirement of danger to the community or flight risk.[43]

The following section will explore substantive due process law as it pertains to this class of asylum seekers, within the context of the three main categories that have been addressed in the Court's more recent jurisprudence leading up to, and through the current state of the *Jennings* litigation highlighting their relevance to that decision. Prior to *Jennings*, the Court had not considered a substantive due process challenge to the government's ability to detain a noncitizen for a prolonged period, after a positive credible fear finding.

A. Zadvydas v. Davis and Clark v. Martinez

1. Zadvydas v. Davis

The Supreme Court's decision in *Zadvydas v. Davis* signaled the potential for due process principles to meaningfully apply in immigration and civil detention contexts, holding that a noncitizen with a final order of removal could not be detained indefinitely following the ninety-day removal period.[44] The Court also interpreted the detention statute to implicitly include a six-month limit on detention following the ninety-day removal period to avoid a constitutional due process problem,[45] and reasoned that detention to prevent flight risk was a weak rationale where removal was

for Substantive Constitutional Rights, 92 COLUM. L. REV. 1625, 1665–66 (1992).

38. Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953) (refraining from affording Mezei either statutory or constitutional rights by citing national security concerns that were not described, nor defined, and suggesting the detention was a "temporary harborage").

39. *Id.*

40. *See* Zadvydas v. Davis, 533 U.S. 678 (2001) (finding that the government detention violates the Fifth Amendment's Due Process Clause unless the detention is "ordered in a criminal proceeding with adequate procedural protections").

41. Wong Wing v. United States, 163 U.S. 228, 235 (1896).

42. *See, e.g.*, Demore v. Kim, 538 U.S. 510, 530–31 (2003) (prolonged mandatory detention during removal proceedings); Shaughnessy, 345 U.S. at 215–16 (upholding immigration detention of noncitizen on Ellis Island as "temporary harborage").

43. Cole, *supra* note 36, at 1038.

44. *Id.* at 1017.

45. *Zadvydas*, 533 U.S. at 701.

a "remote possibility."[46]

Both foreign nationals in the consolidated cases of Kim Ho Ma and Kestutis Zadvydas had final orders of removal. But, Zadvydas was stateless and Kim Ho Ma could not be repatriated to Cambodia.[47] Before being consolidated before the Supreme Court, the U.S. Fifth Circuit Court of Appeal and the U.S. Ninth Circuit Court of Appeal split on whether indefinite detention violated the Constitution. The Ninth Circuit found it would. The Fifth Circuit, however, concluded the detention had the potential to be definite and the government would continue efforts to effectuate removal, such that detention was still part and parcel of the deportation process.[48]

The *Zadvydas* Court answered the question of when and why due process rights should accrue by considering the potential indefinite length of detention, as well as by comparing the detention to other kinds of civil or criminal detention where due process rights attach as soon as the detention is contemplated, regardless of factors outside of the legitimate ones designated for consideration.[49] Notably, Justice Breyer cited non-immigration, criminal preventive detention cases, *United States v. Salerno* and *Foucha v. Louisiana*, in expressing concern about the constitutional question raised by indefinite detention after the ninety-day removal period.[50]

The majority opinion indicated that civil immigration detention would violate due process "unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, in certain special and narrow nonpunitive [sic] circumstances, where a special justification . . . outweighs the individual's constitutionally protected interest in avoiding physical restraint."[51] The Court determined that Zadvydas' confinement was not punishment, referencing *Wong Wing, Wong Wing v. United States* decades earlier, where imprisonment at hard labor absent judicial proceedings was deemed punishment.[52] Because the confinement at issue in *Zadvydas* was "temporary" and did not include hard labor, the Court upheld the statute with a temporal limitation.[53]

The Court's ruling has been construed as implicit recognition of the criminal-civil divide with respect to the recognition that, "[g]overnment detention violates the [Fifth Amendment Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections or, in certain special and 'narrow' non-punitive 'circumstances,' where a special justification, such as harm-threatening

46. *Id.* at 690.

47. *Id.* at 684.

48. Philip L. Torrey, Jennings v. Rodriguez *and the Future of Immigration Detention*, 20 HARV. LATINX L. REV. 171, 175 (2017) (examining the Court's decisions in *Zadvydas* and *Demore* to consider "when and how Court has limited the government's use of detention," reviewing the Jennings litigation, and "discuss[ing] how the Court's decision in *Jennings* may affect the detention regime and political branch plenary power authority").

49. Along the same lines, scholar David Cole has suggested that immigration detention really is not different when comparing to civil preventive detention. *See* Cole, *supra* note 36, at 1038.

50. *Zadvydas*, 533 U.S. at 690.

51. *Id.*

52. *Id*.

53. César Cuauhtémoc García Hernández observes that the *Wong Wing* court did not clarify what type of pre-trial confinement absent judicial review would be converted from civil to punitive other than the presence of hard labor. César Cuauhtémoc García Hernández, *Immigration Detention As Punishment*, 61 UCLA L. REV. 1346, 1355 (2014) ("It did not, unfortunately, elaborate on why this type of confinement is so clearly permissible without judicial involvement. Allowing one type of detention without judicial process while prohibiting another is, as Kanstroom explains, 'not so clear in practice as it seems in theory.'" (citing Daniel Kanstroom, *The Right to Deportation Counsel in Padilla v. Kentucky: The Challenging Construction of the Fifth-and-A-Half Amendment*, 58 UCLA L. REV. 1461, 1475 (2011)).

mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'" [52] And, while suggesting that indefinite detention would not be lawful in the facially non-punitive immigration detention context, the Court did not and has not expressly invalidated preventive detention on substantive due process grounds where there is no individual determination of flight risk or dangerousness findings.[54]

Justice Kennedy's dissent expressed concern about the possibility of the government being forced to release noncitizens into the United States who were not admissible, since they could not be deported and could no longer be detained.[55] This tension between substantive due process and the absence of a clear, permanent right to remain in the United States may persist as a rationale to detain rather than parole into the country.

Congress' plenary power over immigration and sovereignty concerns will likely continue to impede equal recognition of substantive due process protections for noncitizens.[56] Even if substantive due process rights are not absolute and hinge on a noncitizen's permanent right to remain in the United States or lack thereof, as was the case for Kim Ho Ma and Kestutis Zadvydas, the *Jennings* asylum seekers detained following positive credible fear findings could have been considered to have an even greater liberty interest because of their higher likelihood to have a right to remain. Breyer's dissent in *Jennings* suggested that the case should have followed "a fortiori from *Zadvydas*" because the issue was a bail hearing not release on bail, and there was no finding in Jennings that any of the respondents lacked a legal right to stay in the United States.[57]

2. Clark v. Martinez

Subsequently, four years later, in *Clark v. Martinez*, the Court held that the *Zadvydas* construction of the detention statutes in the post-removal order context also applied to noncitizens apprehended at entry.[58] The petitioners had arrived in the United States as a part of the 120,000 Cubans known as the "Mariel boatlift," and were first paroled into the United States to apply for permanent resident status under the Cuban Adjustment Act. But, when found ineligible due to criminal convictions, their parole was revoked and they were placed in removal proceedings and treated as arriving aliens who had never been admitted.[59] Lacking an ability to repatriate to Cuba, they

54. Cole, *supra* note 36, at 1018.

55. *Zadvydas*, 533 U.S. at 705.

56. Also relevant is the way in which the Court has allowed the question of whether a noncitizen has been admitted or paroled to justify lesser constitutional due process protections, again a function of immigration exceptionalism and the plenary power doctrine. See *generally* T. Alexander Aleinikoff, Detaining Plenary Power: The Meaning and Impact of Zadvydas v. Davis, 16 GEO. IMMIGR. L.J. 365, 366 (2002) (considering the problematic nature of Zadvydas' affirmance of the distinction between aliens who have entered officially and those who have entered illegally); Linda Bosniak, A Basic Territorial Distinction, 16 GEO. IMMIGR. L.J. 407, 407 (2002) (examining the Court's "analytical confusion" and conflation of categories of aliens, declaring that "the [Zadvydas] victory came at a real cost" because "the Court all but reaffirmed the long-deplored decision in Mezei").

57. Jennings v. Rodriguez, No. 15-1204, slip op. at 6 (S. Ct. Feb. 27, 2018) (Breyer, J., dissenting).

58. Clark v. Martinez, 543 U.S. 371, 380 (2005).

59. *Id.* at 373; *see also* José Javier Rodríguez, Clark v. Martinez*: Limited Statutory Construction Required by Constitutional Avoidance Offers Fragile Protection for Inadmissible Immigrants from Indefinite Detention*, 40 HARV. C.R.-C.L. L. REV. 505, 521–22 (2005) (noting in the context of critiquing the limited constitutional due process value of the *Clark v. Martinez* decision, "[i]n the current

faced indefinite detention. Similar to the stigmatization and racialization of Mexicans and Central Americans currently comprising the majority of detained asylum seekers, the "Marielitos" were portrayed as criminals.[60]

In seeking to be paroled into the United States, they brought Eighth and Fifth Amendment challenges.[61] A panel for the U.S. Tenth Circuit Court of Appeal paroled some of the detainees primarily on statutory grounds determining that INS did not have the authority to engage in indefinite detention.[62] Before the Supreme Court, Justice Scalia, while having dissented in *Zadvydas*, indicated in the majority opinion that the statute had to be interpreted in a way consistent with the Constitution for different categories of noncitizens, including those who were treated as if they had not been admitted or paroled, which is more procedurally like asylum seekers in detention after positive credible fear finings.[63] The Court also kept intact the six-month standard as the "presumptive period" necessary to effectuate removal, beyond which would suggest a violation.[64] Even though there are procedural similarities between the *Clark* noncitizens and the *Jennings* asylum seekers, the *Jennings* court similarly abstained from a constitutional ruling and did not articulate a limit to preventive detention without a hearing on dangerousness or flight risk.

B. Rodriguez-Fernandez v. Wilkinson

In *Rodriguez-Fernandez v. Wilkinson*,[65] the Tenth Circuit ordered parole of noncitizens detained in a capacity the court considered potentially indefinite, ruling on "sub-constitutional" or statutory grounds concerning INS's authority to detain immigrants indefinitely, while employing constitutional reasoning.[66] By expressing willingness to explore the substantive due process "liberty" interest of the migrants "serious enough to weigh heavily in the alien's favor under the *Eldridge* analysis," and

political climate where the line between matters of national security and matters [] of immigration is often blurred, the urgency of strengthening protections of the rights and liberties of immigrants only grows).

60. *See* Rodríguez, *supra* note 59, at 522 (noting that representations of "Marielitos" were "conflated with that of criminality, violence, and deviance" and citing); see, e.g., GASTÓN A. FERNÁNDEZ, THE MARIEL EXODUS: TWENTY YEARS LATER: A STUDY ON THE POLITICS OF STIGMA AND A RESEARCH BIBLIOGRAPHY 23–41 (Miami: Ediciones Universal 2002) (recounting how the Cuban regime promoted the pathological stereotype of Mariel Cubans for internal political reasons and how that stigma was transferred to the United States and has been amplified, particularly by the U.S. media); Benigno E. Aguirre, Cuban Mass Migration and the Social Construction of Deviants, 13 BULL. LATIN AM. RES. 155, 155 (1994) (explaining the divergence between popular American knowledge about Mariel Cubans and sociological knowledge about them); Ramiro Martinez, Jr. et al., Reconsidering the Marielito Legacy: Race/Ethnicity, Nativity, and Homicide Motives, 8 SOC. SCI. Q. 397, 408 (2003) (studying homicides among Mariel Cubans and concluding that "the crime-related hysteria over the Mariel Boatlift was largely unjustified").

61. *See, e.g.*, Fernandez v. Wilkinson, 505 F. Supp. 787, 789 (D. Kan. 1980).

62. *Clark*, 543 U.S. at 386; *see also* Motomura, *supra* note 37, at 1666 (discussing the way in which procedural due process has functioned as a surrogate for substantive rights—*Clark* as one example of such a proxy/surrogate).

63. *Clark*, 543 U.S. at 378.

64. *Id.*; *see also* Cade, *supra* note 5, at 1092; Ian Bratlie & Adriana Lafaille, *A 180-Day Free Pass? Zadvydas and Post-Order Detention Challenges Brought Before the Six-Month Mark*, 30 GEO. IMMIGR. L.J. 213, 217 (2016) (proposing that when a noncitizen alleges that detention will not further removal because his removal is impracticable or impossible, the claim goes to the heart of the Constitution's protections against punishment without trial, and a six-month requirement for judicial review contradicts constitutional due process protections).

65. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

66. *See* Motomura, *supra* note 37, at 1666 (sub-constitutional ruling in the context of examining the plenary power doctrine and evolution of substantive rights via procedural surrogates).

referencing *Wong Wing* to compare the detention to *criminal punishment*,[67] the circuit court created the possibility of a level of scrutiny previously reserved to detention under the criminal standard, or the cases following *Wong Wing*.[68]

While the Tenth Circuit may have avoided the plenary power doctrine in an analysis that was neither clearly procedural nor substantive, the "procedural" interests in "liberty" were and could be used to bring mainstream procedural due process analysis into immigration law, where it can serve as a surrogate for "substantive" constitutional challenges to admission and expulsion categories.[69]

If there is a judicial path towards greater recognition of rights of detained immigrants in this modern era of enforcement, it may begin with incremental procedural due process validation. In this respect, procedural due process could serve as a proxy for substantive due process rights; and in *Jennings*, had the potential to fill the equality gap where to address the historic mistreatment of Latinx noncitizens in immigration law.

C. Demore v. Kim

After *Zadvydas* and before *Clark*, in *Demore v. Kim*,[70] the Court held that in the context of mandatory detention of lawful permanent residents with certain criminal convictions, during proceedings, detention without an individualized finding of dangerousness or flight risk was a valid part of the deportation process and not a violation of due process if limited in duration.[71] The Court's ruling was contrary to the ruling of each circuit court that had heard the issue.

The *Demore* Court distinguished *Zadvydas* by suggesting that the post-removal order detentions were complicated by the impracticality of removing the noncitizens[72] because the detentions with facts analogous to Zadvydas', did not fulfill the purpose of effectuating deportation because deportation could not be effectuated. Because those detentions were pre-removal order unlike *Demore*, if Demore was ordered removed, he could foreseeably be deported, justifying the detention as preventing potential flight.[73]

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67. *Id.* at 1667.

68. *Id.*

69. *Id.*

70. Demore v. Kim, 538 U.S. 510 (2003).

71. *See id*. at 511 ("Although the Fifth Amendment entitles aliens to due process in deportation proceedings, detention during such proceedings is a constitutionally valid aspect of [deportation] process.") (citations omitted). "Reasonable presumptions" and "generic rules," were considered sufficient. Margaret H. Taylor, Demore v. Kim: *Judicial Deference to Congressional Folly*, *in* IMMIGR. STORIES 343 (David A. Martin & Peter H. Shuck eds., 2005).

72. *Demore*, 538 U.S. at 526–29.

73. *Id.* at 528–29. The *Demore* Court also referenced *Carlson v. Landon*, explaining that while the Attorney General had discretion to release "detained Communist aliens on bond, the INS had adopted a policy of refusing to grant bail . . . in light of what Justice Frankfurter viewed as the mistaken "conception that Congress had made [alien Communists] in effect unbailable.") *Id.* at 524 (citing Carlson v. Landon, 342 U.S. 524, 559, 568 (1952)).

With the political and ideological backdrop of the perceived threat of communism, the Court held in *Carlson*, that there was no fundamental right to bail and substantive due process rights were not violated because there was "reasonable apprehension of hurt from aliens charged with a philosophy of violence against the Government." Carlson v. Landon, 342 U.S. 524, 538, 542 (1952). Part of the rationale for detention as a necessary part of the deportation procedure supposed that a noncitizen in the U.S. "would have opportunities to hurt the United States." *Id.* at 533. Not only did the noncitizen lack a criminal or violent history, but the Court conflated detention with the deportation process to effectively diminish the significance of due process. And while the Court acknowledged that it would not be appropriate to assume

While *Demore* concerned detention during removal proceedings and *Zadvydas* concerned detention after a final order of removal, the focus on the allegedly shorter duration for detention was not particularly normatively or doctrinally convincing.[74] A significant portion of the opinion recited statistics in government briefing concerning recidivism, rates of noncitizens allegedly absconding and evading deportation, and the costs associated with both, suggesting that the Court was largely persuaded by this data in declining to recognize what otherwise could have been deemed a due process violation. However, the government later corrected a misrepresentation to the Court regarding general length of detentions.

Both the district court and Ninth Circuit had found that the detention violated substantive due process, but in emphasizing Congress's power over immigration, including to make rules that would be "unacceptable if applied to citizens," the Supreme Court upheld the statute.[75] In spite of finding the detention not to violate due process, the Court noted that due process prohibits "arbitrary deprivations of liberty" such that an individualized determination of flight risk and dangerousness would be necessary if the detention became "unreasonable or unjustified," presumably by extending beyond the time generally, understood to be necessary to complete a removal cases.[76] However, the time needed to complete a removal case and the corresponding time the noncitizen would be detained during proceedings was misrepresented to the Court.

Signaling the tension between the constitutional due process right to be free from bodily restraint and the government's power over immigration, including the power to deport, the Court cited the 1896 case *Wong Wing* and conflated the power to deport with the power to detain.[77] The Court's emphasis on the government's power over immigrants in the deportation process, overshadowing due process rights, may have been informed by the plenary power doctrine. The interpretation that the "Court has recognized detention during deportation proceedings" as a constitutionally valid aspect of the deportation process" seems unconnected to the process of determining the character of the noncitizen.[78] In addition, when *Wong Wing* was decided, detention was not contemplated to span months, and impacting thousands of noncitizens.

Professors Taylor and Schuck observe that the statute at issue in *Demore* resulted in a "sweeping detention mandate" not as a manifestation of "careful deliberation" by congress, but arising from politics and "overreaction," borne of the September 11 disaster. They suggest that the Court's focus was not on precedent, but

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that all noncitizens would intend to harm the United States, (but impliedly, certain ideological foes) the appropriate check to avoid inappropriate—or more accurately unconstitutional detentions—was to defer to the discretionary authority of the Attorney General, who was and is also essentially the prosecutor in immigration removal cases. *Id.* at 539. The class-wide decision to deny bond with respect to asylum seekers in *Jennings*, in spite of statutory authority to exercise discretion to release on bond, suggests that these asylum seekers were unbailable. However, there is less statutory justification for the notion that Congress made asylum seekers unbailable, particularly given the humanitarian concerns. At the present moment, the Attorney General and ICE are treating asylum seekers as unbailable.

74. *Demore*, 538 U.S. at 528 (stating the detention in *Demore* was presumably of "much shorter duration" than in *Zadvydas*).

75. *Id.* at 521("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.") (citing Mathews v. Diaz, 426 U.S. 67 (1976)).

76. *Id.* at 532 (Kennedy, J., concurring).

77. *Id.* at 511.

78. *Id.* at 523 ("As we said more than a century ago, deportation proceedings 'would be vain if those accused could not be held in custody pending the inquiry into their true character.'") (citing Wong Wing v. United States, 163 U.S. 228, 235 (1896)).

instead on the political and social-historical influences.[79] The Court's decision in *Jennings* considered a statute arising in the same kind of context, and the decision not to either rein it in, or recognize a constitutional due process right may also be related to political influences. The Court's change of course from *Zadvydas* to *Kim*[80] was more predictive of the *Jennings* outcome, even absent the pretext or context of fear of terrorism in the wake of a national security crisis.[81] Federal immigration policy of using detention as a means of deterrence[82] was not litigated in *Jennings* but may have been implicitly condoned. Distinguishing *Demore*, Breyer's dissent noted that *Demore* was a deviation from "the history and tradition of bail and alien detention."[83] He also found it inapplicable, both because the detention in *Demore* was alleged to be short-term and for the purposes, post deportation-order, of facilitating actual deportation, and because the duration of detention had been misrepresented by the government.[84]

D. Jennings v. Rodriguez

The *Jennings* decision had the unfulfilled potential to contribute to a new path in the mainstreaming of constitutional due process.[85] The particular class of noncitizens considered in this article concerns one of the three Jennings' classifications: asylum seekers who are "detained under Section 1225(b)(1)(B)(ii) . . . who presented themselves at the border *and* were found by an asylum officer to have a credible fear of persecution warranting consideration in a full removal proceeding."[86] Once proceedings have begun, detention is governed by § 1226(a), which authorizes detention "pending a decision on whether the alien is to be removed." Regulations implementing that statute permit the immigration judge to decide whether an individual should be released on bond.

In *Jennings*, the Court engaged in constitutional avoidance[87]—as has been a

79. Margaret Taylor remarks on the absence of reference to the foreboding political context in which the *Kim* case was decided: "'It is striking that no member of the Court mentioned any possible connection between Kim's detention and the large-scale detention of Arab and Muslim men without bond in the aftermath of September 11.'" Taylor, *supra* note 71, at 365.

Similarly, Central American women and children, family units, and men, with no criminal history, are being subject to the same mass incarceration faced by Arab and Muslim men, all the more striking in the absence of any sort of legitimate national security threat.

80. Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 365, 376 (2014).

81. Though fear should not be considered a normative justification for racism or race or religiously based harm or fear.

82. See R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 175 (D.D.C. 2015).

83. Jennings v. Rodriguez, No. 15-1204, slip op. at 19 (S. Ct. Feb. 27, 2018) (Breyer, J., dissenting).

84. *Id.*

85. Kagan, *supra* note 30, at 194; *see also* Torrey, *supra* note 48; Cade, *supra* note 5; David Rubenstein, *Immigration symposium: The future of immigration exceptionalism*, SCOTUSBLOG (Jun. 29, 2017), http://www.scotusblog.com/2017/06/immigration-symposium-future-immigration-exceptionalism/.

86. *Jennings*, No. 15-1204 at 20 (The particular class of noncitizens considered in this article concerns one of the three Jennings' classifications, asylum seekers detained pursuant to Section 1225(b)(1)(B)(ii), who presented themselves at the border, and who an asylum officer deemed to have a credible fear of persecution, entitling them to a hearing in immigration court).

87. While Justices Alito and Roberts may be more suspect, Justice Kagan suggested that in interpreting the statute so as to avoid a constitutional due process problem, "we're not making up a statute; we're devising a constitutional limit" Oral Argument at 63, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 6996473.

trend in the prior detention cases.[88] All detainees shared the common characteristic of being in detention prior to having a final order of removal and were grouped together in the action based on the statutory section of the INA pertaining to their detention. One of the issues before the Court was the question of what detention period is "reasonably necessary" to effect removal when a noncitizen has only the narrowest chance of being removed.[89]

One of the three classes of detained noncitizens being considered by the *Jennings* Court are those subject to detention pursuant to "Section 1225(b)(1)(B)(ii) provides that arriving individuals who are otherwise subject to expedited removal, but establish a "credible fear of persecution" during an initial interview, "shall be detained for further consideration" of their application for asylum, which occurs at a removal hearing.[90] The litigation is examined here from the perspectives of the role of the plenary power doctrine, immigration exceptionalism, normative conceptions of proportionality and justice,[91] as well as the broader socio-political setting.

After the federal district court issued an injunction requiring bond hearings for all three subclasses to assess the need for continued detention,[92] the government appealed, and the Ninth Circuit affirmed the lower court's ruling, finding that periodic review was necessary for the statute to be upheld.[93] The Ninth Circuit considered the prolonged detention that many noncitizens face under discretionary, § 1226(a) detention,[94] and found that the district court ruling regarding § 1226(a) was within its precedents that a noncitizen detained pursuant to that statute is entitled to a hearing to determine if they are a danger or flight risk.[95] The appellate court indicated that immigration judges must provide bond hearings at least every six months, and release was required unless the government met its burden in proving the class member was a flight risk or danger.[96]

In finding that the government did have an obligation to provide periodic bond hearings, the Ninth Circuit emphasized the unique vulnerability of incarcerated immigrants and the court's precedent indicating they had already ruled on that issue as well:

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88. Torrey, *supra* note 48, at 175 (analyzing the pre-decision Jennings litigation in the context of the relevant historical detention cases, including the constitutional avoidance).

89. Bratlie & Lafaiille, *supra* note 64, at 214.

90. 8 USC section 1225(b)(1)(B)(ii) does not authorize detention once the individual is in removal proceedings, just the period between apprehension and initiation of proceedings, after proceedings have begun, detention is governed by 1226(a) – detention "'pending a decision on whether the alien is to be removed." Brief for Respondent at 42, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 6123731.

91. Cade, *supra* note 5.

92. Rodriguez v. Holder, No. 07-3239, 2013 WL 5229795, at 3 (C.D. Cal. Aug. 6, 2013).

93. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1074 (9th Cir. 2015).

94. *Id.* at 1084.

95. *Id.* at 1085.

96. *Id.* at 1074. In describing the relevant requirements and procedures for discretionarily held, 1226(a) detainees, the Ninth Circuit Court explained that a noncitizen can apply for redetermination of their initial bond determination set by DHS before an immigration judge and can appeal to the Board of Immigration Appeals. *See* 8 C.F.R. §§ 236.1, 1003.19. According to the statute and regulations, the noncitizen in custody bears the burden of proving that they are not a danger to the community (or to national security) or flight risk. *See* In re Guerra, 24 I&N Dec. 37, 38 (B.I.A. 2006). Further review after the bond redetermination "shall be considered only upon a showing that the alien's circumstances have changed materially since the prior bond redetermination." *See* 8 C.F.R. § 1003.19(e). In the *Jennings* litigation, the government contended, "additional time spent in detention is not a "changed circumstance" that entitles a detainee to a new bond hearing." *Rodriguez*, 804 F.3d at 1084.

> Detainees, who typically have no choice but to proceed *pro se*, have limited access to legal resources, often lack English-language proficiency, and are sometimes illiterate. As a result, many class members are not aware of their right to a bond hearing and are poorly equipped to request one. Accordingly, we conclude that class members are entitled to automatic bond hearings after six months of detention.[97]

The government appealed the Ninth Circuit's ruling.

At the Supreme Court, the petitioner argued that the Court would erroneously re-writing the statute if it found for the respondents.[98] The respondents asserted that 8 USC § 1226(a), and the other relevant sections did not authorize prolonged detention, were asylum seekers determined by DHS to have a credible fear of persecution, and retained Fifth Amendment rights prohibiting arbitrary imprisonment, and their civil commitment constituted a significant deprivation of liberty."[99]

Writing for the majority, Justice Samuel Alito ruled that §§ 1225(b), 1226(a), and 1226(c) did not give any of the classes of noncitizens a right to periodic bond hearings during the course of their detention, reversing the Ninth Circuit, determining that it had misapplied the canon of constitutional avoidance.[100] The question of whether the indefinite civil immigration detention without a bond hearing proscribed by the statue is constitutional, was sent back to the Ninth Circuit Court of Appeals.[101]

While Justice Thomas' concurrence with the majority referenced *Demore v. Kim*, *Reno v. Flores*, and *Shaughnessy v. United States ex rel. Mezei*,[102] for the proposition that the Supreme Court has never held that detention during removal proceedings is unconstitutional; the Court has also never ruled, including in those cases, that detention without any bail or bond hearing whatsoever, to determine dangerousness or flight risk, *is* constitutional.[103] Justice Breyer's dissent also provided more thorough consideration of why these cases do not recognize such an extreme exceptionalizing of immigration law so as to abrogate the Due Process Clause for noncitizens.[104]

The Court chose not to follow the rationale of preventive detention cases outside of immigration law such as *United States v. Salerno*, where the Court upheld the pre-trial detention of criminal defendants only upon an individualized finding of dangerousness or flight risk at bond hearings.[105] In *Foucha v. Louisiana*, the Court similarly required an individualized finding of mental illness and dangerousness for

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97. *Id.* at 1085.

98. Kevin R. Johnson, *Argument analysis: Justices seem primed to find constitutional limits on detention of immigrants*, SCOTUS BLOG (Oct. 4, 2017), http://www.scotusblog.com/2017/10/argument-analysis-justices-seem-primed-find-constitutional-limits-detention-immigrants/.

99. Brief for Respondent at 15–16, *supra* note 90.

100. *Id.* This summary will focus on the substantive finding regarding the relevant due process issue and will not discuss the jurisdictional issue raised by the Court (and not the parties), nor will it consider the jurisdictional issues that were raised by the parties.

101. Johnson, supra note 98.

102. Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953).

103. Jennings v. Rodriguez, No. 15-1204, slip op. at 5, 10–11 (S. Ct. Feb. 27, 2018) (Thomas, J., concurring).

104. *Id.* at 13–20 (Breyer, J., dissenting).

105. United States v. Salerno, 481 U.S. 739, 750 (1987).

civil commitment.[106] In *Kansas v. Hendricks*, the Court upheld the civil commitment of sex offenders after a hearing before a jury on the issue of dangerousness.[107] But, the rationale of those cases did not persuade the majority.

Engaging in constitutional avoidance, as many predicted, Justice Breyer's dissenting opinion, joined by Justices Sonia Sotomayor and Ruth Bader Ginsburg, concluded the statute did not authorize indefinite or prolonged detention without a bond hearing. The dissent focused in large part, on the question of why these respondents' detention should be treated differently than other classes of persons subject to civil or criminal preventive detention, or even other noncitizens afforded a right to a hearing. The dissent also emphasized that the majority seemingly ruled that the statute would not allow a bond hearing after a period of even six months of confinement, when no prior hearing had been conducted indicating that they were a danger or flight risk.[108] Accordingly, the dissent found that that the majority interpretation of the statute rendered it unconstitutional, and that per *Zadvydas*, it must therefore require a bail hearing after six months of confinement.[109]

Justice Breyer was concerned that the groups included asylum seekers who immigration agents determined had a credible fear, noncitizens who completed time being criminal confined, or had a strong claim for admittance, combined with the reality that detention is lengthy, and thousands of people are impacted.[110] Additionally, many of these noncitizens eventually obtain relief sought, and the asylum seekers at the border would have been entitled to a bond hearing had they been arrested in the United States rather than at the border, and conditions of confinement are "inappropriately poor."[111]

Considering the tenets of the Due Process Clause and implicitly challenging immigration exceptionalism and the plenary power doctrine, Justice Breyer explained that the Due Process Clause "foresees eligibility for bail as a part of 'due process,' and is 'basic to our system of law.'"[112] Prevention of bail also interferes with preparation of a defense, or here, pursuit of affirmative relief from deportation or removal, and bail is designed to prevent infliction of punishment prior to conviction. [113] Bail is also intended to limit the Government's ability to deprive one of physical liberty where it is not needed to protect the public or prevent flight risk and should apply to these detained individuals as much as anyone else.[114] In keeping with these principles, the majority's statutory interpretation could have mainstreamed the statute's due process

106. Foucha v. Louisiana, 504 U.S. 71, 81–83 (1992).

107. Kansas v. Hendricks, 521 U.S. 346, 357 (1997).

108. *Jennings*, No. 15-1204 at 19, 25 (Breyer, J., dissenting) ("Does the statute require members of these groups to receive a bail hearing, after, say, six months of confinement, with the possibility of release . . . *provided* that they do not pose a risk of flight or a threat?").

109. *Id.* at 2, 17, 30–33.

110. *Id.* at 33.

111. *Id.* at 4.

112. *Id.* at 6.

113. *Id.*

114. *Id.* At oral argument, the fundamental issue of an individual's right to be free from physical restraint, noncitizen alien or not, seemed to drive some of the Court's concerns at the first oral argument. Justice Kagan's remarks indicated a potential to dispense with immigration exceptionalism and validate individual rights, irrespective of immigration status: "[Y]ou can't just lock people up without any finding of dangerousness, without any finding of flight risk, for an indefinite period of time, and not run into due process." Oral Argument at 17, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 6996473. She contemplated why the Constitution itself "does not set an outer bound in the way that we've consistently required, in for example, civil commitment cases?" *Id.*

considerations, rather than exceptionalize immigration due process. The plenary power doctrine and immigration exceptionalism provide the unarticulated philosophy or meta-principles behind the Court's ultimate conclusion and statutory interpretation.

Justice Breyer challenged the appropriateness of the legal fiction that asylum seekers should be afforded less rights, including denial of a bond hearing, because they legally have not entered the United States, even though they physically have entered.[115] Quite aptly and significantly, he reminded the majority that since the time of slavery, the Court has never held that persons can be held totally without constitutional protection.[116] As far back as the American Revolution it has been well-settled law that the right to bail exists in criminal *and* civil cases.[117] These references conjure the underlying equality principles that lack an express remedy within existing immigration, or even equal protection jurisprudence for noncitizens.

In addition, Justice Breyer proposed that the Eighth Amendment reinforces the notion that the Fifth Amendment's Due Process Clause applied because the prevention of "excessive bail" is intended to avoid prevention of provisional release as otherwise is sanctioned here by the majority's interpretation of the statute.[118] The refusal to hold any bail hearing at all would impliedly raise an Eighth Amendment issue, and perhaps such arguments will be brought in the future.

The relevance of criminal law and its relationship to civil immigration preventive detention was also explored by Justice Breyer. He emphasized these are not criminal cases, and implied that the civil-criminal distinction should not result in *fewer* protections for the person being detained. Instances of civil confinement outside of immigration detention are rare. However, even those with mental illnesses in civil settings have a right to a hearing prior to confinement although it may not technically be a "bail hearing."[119] Mentally-ill persons are detained because they are dangerous, yet are still entitled to periodic review for release after an initial assessment of dangerousness.[120] Pursuant to the majority's conclusion, under this statute, these noncitizens have less right to a hearing to determine suitability of release, prior to or after confinement, than mentally-ill persons who have already been deemed a danger to themselves or others. Justice Breyer concluded that the detention without bail is arbitrary, even if there were a reason to treat these noncitizens worse than ordinary criminal defendants, civilly committed citizens, noncitizens found in the United States, and noncitizens who have committed crimes, served sentences, and been ordered removed.[121]

The Constitution, its purpose, its history, and the cases all "point in the same interpretive direction"—away from an interpretation authorizing prolonged detention absent bail or bond proceedings.[122] Justice Breyer's conclusion reasonably considered

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115. *Jennings*, No. 15-1204 at 7 (Breyer, J., dissenting).

116. *See id.* at 7 ("[T]he Constitution does not authorize arbitrary detention." because "[f]reedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries.").

117. *Id.* Note that initially the standard for granting bail only required the adjudicator consider the potential flight risk of the individual requesting release on bond, and it evolved to include considerations of public safety per the Bail Reform Acts of 1966 and 1984.

118. *Id.* at 10.

119. *Id.*

120. *Id.* at 10–11.

121. *Id.* at 13.

122. *Id.* at 19. At oral argument, Justice Sotomayor expressed disapproval of the interpretation of the constitution, in the context of an individual is not provided a proceeding to determine if they are a

the reality that the timeframe for detention varies significantly and tends to be increasing, and substantive due process has not historically been a question of duration (outside of the somewhat arbitrary finding of the *Zadvydas* Court). The dissent would have read the statue as constitutional by interpreting the provision to require bail proceedings where prolonged detention is at issue.

The outcome in *Jennings* demonstrated that the plenary power doctrine has yet to fully recede in the context of statutory interpretation concerning immigration due process. The socio-political context of these detentions, including the political climate, criminalization of Mexican and Central American immigrants, conditions of confinement, the vulnerability of the population, and international obligations may have been relevant subtext for the dissent, but did not persuade the majority to find that the statute required the same constitutional due process protections for these classes of noncitizens. [123] The resolution of the fundamental due process question failed to continue the trend of mainstreaming due process for noncitizens. The majority read the statute in a manner that implicitly failed to recognize credible fear asylum seekers as having a liberty interest mandating a right to a bail hearing equivalent to a citizen in criminal proceedings, or other civil detention contexts.

Scholars have suggested that in recent years the Court has signaled a break from plenary power in general with respect to rights of noncitizens.[124] Professor Jason Cade traced a trajectory of past fifteen years to speculate that in part, based on extra-judicial or implicit factors, the Court could have followed this trend and unexceptionalized immigration law.[125] In spite of the trend departing from deference to the plenary power doctrine within the Supreme Court's 2009–13 docket (and beyond), Professor Kevin Johnson correctly speculated that cases concerning mass migration could cause greater deference to plenary power.[126] The *Jennings* Court's more deferential approach departed from the trend, and may have been perceived by the majority, as relevant to the issue of mass migration.

As will be considered in the next section, in *R.I.L-R v. Johnson*, the U.S. District Court for the District of Columbia suggested that an official government policy deterring future asylum seekers and migrants by detaining those who had already arrived would amount to punishment of the migrants who were already detained, and therefore, an improper function of civil preventive detention and a

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flight risk or a danger, even when considering classes of noncitizens with criminal histories: "We are in an upended world when we think 14 months or 19 months is a reasonable time to detain a person." Oral Argument at 27, Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (No. 15-1204), 2016 WL 6996473.

123. Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 UST 6223, 189 U.N.T.S. 150.

124. Johnson, *supra* note 5, at 59 (reviewing key cases during the 2009–2013 terms and finding a chipping away at the plenary power doctrine, including increasing protection of procedural due process rights of noncitizens in cases like Landon v. Plasencia, 459 U.S. 21, 22 (1982), where the Supreme Court held that a lawful permanent resident who departed the United States for a brief period was entitled to a hearing comporting with Due Process before she could be denied return into the country); *see also* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 4 (1984) (examining the historical arch towards increased rights and protections for noncitizens characterized by "communitarian" principles where a "central idea is that the government owes legal duties to all individuals who manage to reach America's shores" and an "ideological shift, an altered legal consciousness" are moving immigration law toward the constitutional mainstream).

125. Cade, *supra* note 5, at 1092 ("[T]he modern Court's detention cases reflect a break with longstanding [sic] precedent in establishing an outer limit on the time that the Executive can detain noncitizens without an individualized hearing regarding the appropriateness of continued confinement.").

126. Johnson, *supra* note 5, at 65–66.

violation of due process.[127] But, by erasing that language from policy directives, detention has avoided scrutiny as punitive where it is implicitly intended to deter migrants from coming, including asylum seekers. The coercive and punitive nature of preventive immigration detention, particularly with respect to asylum seekers, persists, and this ruling further shields that practice.[128]

Even when intended to deter migrants from coming to the United States, imprisoning asylum seekers metaphorically (and for practical intents and purposes even if not from a legal doctrinal standpoint) criminalizes immigrants. Deterrence is a rationale most associated with the criminal justice system— albeit morally and pragmatically questionable there as well.[129] Professor César Cuauhtémoc García Hernández has contended that the governments' use of the deterrence rationale for civil immigration detentions rises to the level of punishment.[130] If such detention functions as punishment or deterrent, migrants lack the moral culpability implied by normative criminal justice deterrence-based policies. Simply removing that label— "criminal"— however, without changing the nature of the confinement and the lack of procedural protections, does not undo the reality of the punitive and deterrent function of detention.

Until the Court revisits the issue of due process in connection with such preventive detentions, these and similar rulings stand to undermine long-standing principles of constitutional democracy, in addition to fueling racialization of constitutional rights and protections.

III. R.I.L-R—SUBSTANTIVE DUE PROCESS ASYLUM SEEKERS— IMMIGRATION DETENTION CANNOT BE PUNISHMENT

There is a growing trend in recent years of nations increasingly looking to incarceration of arriving immigrants in response to mass migration caused by political unrest, climate change, and other factors. This practice undermines international human rights standards and effectively criminalizes the act of migration itself. Further, this practice has a disparate impact on noncitizens of color. Any amount of detention of asylum seekers (or any noncitizens), without an individualized bond hearing raises due process questions.[131] The *Jennings* decision had the potential to dissuade the use of detention as deterrence.

It is no accident that migrants fleeing violence in Mexico and Central American in recent years have "fare[d] worse" as far as their treatment within the immigration adjudication system, including the process for determining whether they should be incarcerated, merely for coming.[132] However, the legal mechanisms to

127. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 189 (D.D.C. 2015).

128. Kagan, *supra* note 30, at 194.

129. García Hernández, *supra* note 53, at 1353–54; *see also* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601 (2010).

130. *See* García Hernández, *supra* note 53, at 1392–93.

131. Anello, *supra* note 80, at 403 ("A six-month outer limit on mandatory detention is consistent with the Supreme Court's jurisprudence and would provide the best option for interpreting *Demore* in a manner consistent with *Zadvydas* and other civil detention jurisprudence" to create an easy to apply and administer substantive safeguard to prevent unconstitutional prolonged detention of noncitizens.).

132. Julia Preston, *Migrants in surge fare worse in immigration court than other groups*, The WASH. POST (July 30, 2017), https://www.washingtonpost.com/national/migrants-in-surge-fare-worse-in-immigration-court-than-other-groups/2017/07/30/e29eeacc-6e51-11e7-9c15-177740635e83_story.html?tid=ss_fb&utm_term=.e3ecc153bad0.

challenge the use of immigration incarceration in response to migration are doctrinally limited. In recent years, prior to President Trump's inauguration, one district court examined use of detention as a deterrent, yet the resulting preliminary injunction left questions unanswered.

Outside of the exceptional immigration law civil system, there are very few non-criminal, civil circumstances where the Supreme Court has considered incarceration or confinement to meet constitutional muster, including the special and narrow situations where: (1) an individualized finding has been made determining that the individual is a noncitizen in removal proceedings and is a danger or flight risk;[133] or (2) is dangerous due to a mental illness that prevents the individual from controlling their dangerousness; and (3) the person is an "enemy alien" during a declared war.[134] The Court has not deemed constitutional the practice of using detention to deter migration.

In the one case addressing detention as deterrence, the district court for the District of Columbia issued a preliminary injunction after immigration advocates sued DHS challenging the categorical detention of asylum-seeking families to deter future migrants.[135] The district court issued a preliminary injunction, finding that deterrence was not an acceptable rationale for detaining families or in making custody determinations. The high-bond or no-bond policy was one of the mechanisms of deterrence.[136] The preliminary injunction affirmed the principle that immigrants cannot be detained without regard to the merits of their individual cases as a deterrent to future migration by others.

In its due process analysis, the *R.I.L-R* court emphasized that because immigration detention is civil and not criminal, the government was required to articulate a legitimate government interest in requiring detention and that detention could not constitute punishment.[137] Depriving one person or family of liberty to deter another potential future migrant was determined not to constitute a legitimate government interest justifying civil immigration detention. The court also noted that deterrence in this manner was unlikely to address any potential national security issue as argued by ICE, irrelevant in most cases asylum-seeking detainees, in general, and

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133. *See* 8 U.S.C. § 1226 (2018) (setting forth standard for apprehension and detention of "criminal aliens").

134. *Ludecke v. Watkins*, 335 U.S. 160, 171–73 (1948) (upholding detention of "enemy aliens" during a "declared" war). The similarities of other aspects of the Trump administration's immigration policies, particularly the travel ban, harken back to Japanese internment, also upheld during World War II. *See Korematsu v. United States*, 323 U.S. 214, 217–19 (1944); Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2017 B.Y.U. L. REV. 779, 780 (2017) (suggesting that a "Muslim registry could very well be the precursor to mass internment" vis a vis Japanese Internment); *see also* Margaret Hu, *Crimmigration-Counterterrorism*, 2017 WIS. L. REV. 955, 994 (2017) (examining the travel ban through the historical lens of the Chinese Exclusion Act and contemporary parallels between the travel ban and Japanese internment); Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633, 634 (2017) (proposing that because "current immigration- and security-related vetting protocols risk promulgating an algorithmically driven form of Jim Crow" because they will have disparate impact along lines of race, color, ethnicity, national origin, gender and religion equality law must evolve); Karen Korematsu, *My father resisted Japanese internment. Trump's travel ban is just as unfair.*, WASH. POST (Dec. 4, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/12/04/my-father-resisted-japanese-internment-trumps-travel-ban-is-just-as-unfair/?noredirect=on&utm_term=.e1c4f89da178.

135. *See* R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 175 (D.D.C. 2015).

136. This strategy has been resurrected by the Trump administration, with more force and consistency than the prior administration. *See* discussion above in Section I. Detention of Asylum Seekers.

137. *R.I.L-R*, 80 F. Supp. 3d at 187 ("The relevant question, accordingly, is whether the Government's justification for detention is sufficiently "special" to outweigh Plaintiffs' protected liberty interest.").

in the recent *Jennings* litigation.

The *R.I.L-R* court asserted the detention at issue was "undisputedly civil—i.e., non-punitive in nature," and found the detention failed to meet the relevant test—"whether the Government's justification for detention" was "sufficiently 'special' to outweigh Plaintiff's protected liberty interest."[138] The court rejected the Government's immigration exceptionalist claim that, because the class was comprised of noncitizens who lacked permission to enter the country, they had "extremely limited, if any, due process rights regarding [their] custody determinations."[139] The court recognized that "once an alien enters the country . . . the Due Process Clause applies" regardless of the nature of presence as lawful, unlawful, short or longer term;[140] and "especially when it comes to deprivations of liberty," asylum seekers in the United States were entitled to Due Process Clause protections.

The court also considered the justification the government proposed with respect to the need for detention—"deterrence of mass migration"[141] and implied that it was not a legitimate justification for civil immigration detention. In drawing this conclusion, the court found the government's rationale for detention was impermissible because it was not based on characteristics of the detained individual, but those who had yet to attempt to come.[142] The court noted that "general deterrence" is not mandated by the Supreme Court's consideration of civil commitment of the sort urged by the government.[143] The court referenced the *Kansas* holding that "[w]hile incapacitation is a goal common to both the criminal and civil systems of confinement, *retribution and general deterrence* are reserved for the criminal system alone."[144] Following the *R.I.L-R* litigation, in May 2015, DHS agreed to engage in individualized custody determinations but still asserted authority to detain for deterrence.[145]

If the detention is not criminal but is punishment, it is generally impermissible and violates substantive due process, unless the government establishes a substantial and permissible justification for such deterrence—which historically, only an enemy alien during war. If deterrence is viewed outside of the perspective of the Refugee Convention, deterrence may be mischaracterized as more rational and proportional than it actually is for those coming to seek protection.[146] The question of proportionality may even be inappropriate if the detention is not designed, nor

138. *Id.* at 187.

139. *Id.*

140. *Id.* (quoting Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953)).

141. *Id.* at 188; *see, e.g.*, Stephen Meili, *Do Human Rights Treaties Matter?: Judicial Responses to the Detention of Asylum-Seekers in the United States and the United Kingdom*, 48 N.Y.U. J. INT'L L. & POL. 209, 214 (2015) (considering relevant literature on the limited rights of asylum seekers in the United States and the United Kingdom, where detention is used to deter mass migration); Mark Noferi, Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 46 (2014) (considering problems posed by use of detention as a response to mass migration and arguing "that even if more accurate, evidence-based immigration detention were achieved under a future risk assessment regime, it would nonetheless likely be accompanied by several disadvantages. Particularly, risk assessment could facilitate a transition from mass detention to mass supervision of an even wider net of supervisees, by justifying lesser deprivations of liberty such as electronic supervision").

142. *R.I.L-R*, 80 F. Supp. 3d at 188.

143. *Id.* at 189.

144. *Id.*

145. Schriro, *supra* note 25, at 13.

146. Kagan, *supra* note 30, at 200 (discussing *Matter of D-J-*, suggesting Attorney General undervalued and failed to recognize the import of the Refugee Convention and the constitutional right to one's liberty, "which thus allowed a skewed analysis in which detaining such people as a deterrence to others might more easily appear proportional").

permitted to punish.

Hypothetically, even deterring the same noncitizen from coming in the future could still be punishment disguised as deterrence, but the court did not consider this question. The court's rationale fell short in failing to consider that detention could be punitive or retributive by another more empirical measure, instead of relying on the assumption that civil immigration detention is not punitive or criminal because the statutes authorizing incarceration are within federal civil immigration law.

In the relatively short duration of writing this article, the current administration has increased detention of asylum seekers and other categories of noncitizens, in part by resurrecting the high-bond or no-bond policy of the prior administration. The Trump administration also commenced a policy of separating children from parents and incarcerating them in separate institutions—implicitly intended to deter migration.[147] While these issues were not raised in *Jennings*, they provide context for the direness of punitive responses to migration that compromise constitutional protections and human rights and fall disproportionately on racialized communities of color.

While it is an acute matter now, deterrence has not always been the predominant theme in immigration law. Before the passage of the Chinese Exclusion Act in 1868, the Burlingame Treaty, entered into by China and the United States specifically articulated a respect for "the inherent and inalienable right of a man to change his home and allegiance, and also the mutual advantage of free migration and emigration . . . for purposes of curiosity, of trade, or as permanent residents."[148] The treaty validated and recognized that, even absent horrific human rights or economic conditions triggering flight, people's inherent right to move and migrate is not only not criminal but "inalienable"—and impliedly, quite reasonable. This philosophy did not find its way into the *Jennings*' analysis, but may over time again be part of the rationale the shifts the tide towards recognition of individual rights of noncitizens.

IV. NON-IMMIGRATION CIVIL AND CRIMINAL PREVENTIVE DETENTION

The plenary power doctrine and immigration exceptionalism help explain the lesser recognition of a noncitizen's substantive due process right to liberty within constitutional immigration law jurisprudence, as was referenced in the prior discussion of the *R.I.L-R* case. Because of the formal differences between civil immigration law and criminal law, preventive immigration detention is treated differently. Yet the civil statutory scheme of another context provides a useful tool for civil preventive detention analysis in immigration law that would give greater deference to constitutional due process rights of those detained. Justice Breyer's dissent in *Jennings* traces and analyzes civil preventive bail statutes and practices to contend that there is no plausible reason that civil immigration detention should be treated as outside the reach of the constitution.[149]

147. At the time of writing, the ACLU sued for and won the release of a mother and daughter who had fled the Democratic Republic of Congo, and were detained separately once arriving in the United States. *See* Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *supra* note 29.

148. Gabriel Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, *in* IMMIGRATION LAW STORIES 2 (David Martin & Peter Shuck eds., 2005).

149. Jennings v. Rodriguez, No. 15-1204, slip op. at 1–33 (S. Ct. Feb. 27, 2018).

The Bail Reform Act provides a potential model for immigration substantive due process to find a constitutional norm. It is often cited as the most relevant, analogous civil detention statutory scheme outside of the INA, and is examined thoughtfully in Justice Breyer's dissenting opinion.[150] In the context of preventive detention for individuals accused but not convicted of crimes, the Supreme Court has indicated that a detention violates substantive due process, as a non-criminal custodial matter, where there is no individualized finding of dangerousness, and therefore, no legitimate "non-punitive" interest in protecting the community.[151]

Yet for a civil and non-punitive detention not to violate substantive due process, because a "legitimate and compelling interest" is served, an individual must be accused of a "specific category of extremely serious offenses." Additionally, the probable cause for arrest and prosecution is subject to the clear and convincing evidence standard in a "full-blown adversarial hearing." There must be "no conditions of release" that could "reasonably assure" community safety."[152] Civil detention based on mental illness does not escape the Due Process Clause in that an adjudged mentally-ill person determined to be dangerous to themselves or others cannot be confined to a mental hospital without a hearing *prior* to such confinement, and then are entitled to review, at least annually, of the need for continued confinement.[153] The Court has recognized, as far back as 1903, that even those in non-criminal, civil preventive detention for extradition proceedings have a right to a bail hearing, even though the relevant statute did not expressly refer to bail proceedings.[154]

Compare the preventive detention of asylum seekers—those fleeing their home countries, facing no criminal charges, have not been determined to be a danger to themselves or others, nor a flight risk. There is no hearing before they are confined to determine if such confinement would violate their constitutional rights or be legally appropriate and sustainable. Asylum seekers do not receive an adversarial hearing, and there is no standard of probable cause for arrest prior to their confinement. Nor is there a finding by a neutral arbiter that no conditions of release could reasonably assure community safety. When considering detention of asylum seekers pursuant to the civil detention standard of the Bail Reform Act, not only does detention of asylum seekers seem to raise substantive due process questions, but it again highlights the problem of treating noncitizens as criminals, yet not extending relevant constitutional protections. Instead of treating immigrants as criminals and failing to extend them proper constitutional protections, the Court could have recognized the relevance of the

150. *See, e.g.*, Whitney D. Frazier, Note, *The Constitutionality of Detainment in the Wake of September 11th*, 90 KY. L.J. 1089, 1093 (2002) (considering *reasonableness* of a seizure in the context of September 11); Barbara A. Frey, X. Kevin Zhao, *The Criminalization of Immigration and the International Norm of Non-Discrimination: Deportation and Detention in U.S. Immigration Law*, 29 LAW & INEQ. 279 (2011) (contending that the convergence of criminal and immigration law undermines rights, and considering the Bail Reform Act standards for civil detention); Anello, *supra* note 130 (arguing that mandatory detention statute should be construed to govern detention for no longer than six months in civil immigration detention).

151. *See* Cole, *supra* note 36, at 1010–12 (citing United States v. Salerno, 481 U.S. 739, 749(1987).

152. *Id.*

153. *See, e.g.*, United States v. Comstock, 560 U.S. 126, 130–131 (2010); Kansas v. Hendricks, 521 U.S. 346, 353 (1997).

154. Wright v. Henkel, 190 U.S. 40 (1903). In Justice Breyer's dissent in *Jennings*, he notes that the *Wright* Court read a requirement into the statute, following bail principles under English law, that bail proceedings had to be authorized. *Jennings*, No. 15-1204 at 11.

principle of treating like cases alike.[155] To do so would mean that civil immigration detention should be treated no differently than other civil confinement (or pre-trial criminal confinement).

V. THE PLENARY POWER DOCTRINE AND SYSTEMIC RACIAL BIAS—ASYLUM SEEKERS IN DETENTION

Systemic racial bias has plagued the criminal justice system since its inception.[156] Racialized bias has similarly permeated immigration law, including immigration incarceration outside of the "crimmigration" context. "Though it does not have to be so, immigration prisons are filled with Mexicans and Central Americans."[157] And though it need not have been so, Mexicans and Central Americans have experienced racialized harms in the context of immigration law and applicability of constitutional protections, for decades.

The plenary power doctrine has facilitated structural disparate impacts in immigration law, including in the contemporary incarceration of asylum seekers. Even though the *Jennings* Court did not address an equal protection or race-based claim, the Court's constitutional avoidance in declining to recognize a due process violation, perpetuates this racialized rights deficit. The failure to bring immigration substantive due process further into the constitutional mainstream has the potential to have the opposite effect, reinforcing the myth of the criminal immigrant.

The plenary power doctrine and immigration exceptionalism have contributed to disproportionate racialized impacts, and may have played, and continue to potentially play a role in legitimizing such outcomes. This has been true in overt enforcement policies, as well as slightly more subtle attrition via enforcement policies, including the increased reliance on immigration detention. If there is a plenary power doctrine, erosion of it in the arena of substantive due process rights might have chipped away at the problematic racialized history of role of incarceration in immigration enforcement. Immigration law cases extending individual rights to noncitizens could have signified more rights in the future for noncitizens and citizens alike.

A. Immigration Law and History of Mistreatment of Central American and Mexican Immigrants

Detention of asylum seekers represents one facet of a modern manifestation

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155. *Id.* at 12.

156. *See, e.g.*, Dorothy E. Roberts, *Constructing A Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 263 (2007) (presenting a theoretical framework aimed at shaking the racist foundations of the criminal justice system by highlighting its racial origins and antidemocratic impact); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 510 (1994) (assessing the civil rights movement absence from the realm of criminal justice including particularly, capital punishment); *see also* Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660 (1996); MICHELLE ALEXANDER, THE NEW JIM CROW, MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (The New Press 2010); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 427 (1997) (examining the impact of pretextual traffic stops on African Americans and Latinos, critiquing the Supreme Court's failure to provide a remedy for such discriminatory stops, and urging creative legal and policy solutions).

157. García Hernández, *supra* note 6, at 300 (indicating that Mexicans and Central Americans took up over seventy-five percent of the ICE detention population between 2011 and 2013 (quoting John F. Simanski, *Immigration* Enforcement Actions: 2013, U.S. DEP'T OF HOMELAND SEC. ANN. REP. 1, at 5 tbl. 5)).

of a historically explicitly and implicitly racially biased immigration enforcement system.[158] The increase in the use of immigration prisons to contain and confine Mexican and Central American immigrants became a phenomena with the birth and growth of private prisons in the 1980s, 1990s, and after the events of September 11, but other legal and sublegal harms were long-standing.[159] Systemic racialization sustains the normative deprivation of equal constitutional substantive due process rights.

The tenor of the response to the Mexican and Central American refugee crisis has resonated in fear and coded racial animus, not unlike the imagined threat, generations earlier, of the "vast hordes" of immigrants from southeast Asia, culminating in the *Chae Chan Ping* decision over 125 years ago.[160] Generations after the Chinese Exclusion Act and the Court's ushering in the plenary power doctrine, the Chinese Exclusion Act and Supreme Court rulings upholding that Act have been largely condemned as one of the darker moments in U.S. immigration policy, and constitutional law.[161] The current state of immigration enforcement policy has reinvigorated concerns about mistreatment of immigrants, and those perceived to be immigrants.[162]

Criminal immigration enforcement has disproportionately impacted Central American and Mexican immigrants who constitute over ninety percent of deportations yet are approximately fifty percent of all immigrants.[163] Similarly, those impacted by

158. *See generally* Kristina M. Campbell, *A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S.-Mexico Border*, 117 W. VA. L. REV. 1081 (2015).

159. See Alissa R. Ackerman et al., The New Penology Revisited: The Criminalization of *Immigration* as a Pacification Strategy, 11 JUST. POL'Y J. 1, 4 (2014); *see also* Susan M. Akram & Kevin R. Johnson, Race, Civil Rights, and *Immigration* Law After September 11, 2001: The Targeting of Arabs and Muslims, 58 N.Y.U. ANN. SURV. AM. L. 295, 295 (2002) (explaining the intense investigations following the events on September 11, many of which "racial[ly] profil[ed]" Arabs and Muslims. This expansion of the use of incarceration or "detention" in the immigration context grew substantially after September 11 and the net widened beyond Arabs and Muslims); the legislative reforms of 1996, IIRIRA, also expanded the use of immigration jails by increasing the kinds of criminal histories that triggered mandatory detention.

160. Margaret H. Taylor & Kit Johnson, *"Vast Hordes . . . Crowding in Upon Us": The Executive Branch's Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 186 (2015) (discussing how fear of mass migration influenced Chae Chan Ping, recounting "the modern iteration of Chae Chan Ping fears" including "the 2014 detention of migrant mothers with children in the remote town of Artesia, New Mexico" and criticizing the government choice to detain "families even after they demonstrated a significant possibility of success in their claims"); *see also* Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L REV. 963, 1006–07 ("the U.S. Supreme Court upheld congressional plenary power to restrict the immigration of Chinese immigrants to the United States, echoing much of the same tenor as in present-day restrictionist narratives, though with obvious and explicit racist goals—as opposed to the current implicit racism pervading the anti-immigrant rhetoric."); Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. ON MIGRATION & HUM. SEC. 145 (2018) (critiquing the money bond system's perpetuation of inequality in the context of immigration private prison expansion).

161. Taylor & Johnson, *supra* note 159, at 186 ("*Chae Chan Ping v. United States* has been cited in 1763 law review pieces (which would include articles, essays, and student notes)"); Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 31–52 (2010).

162. *See, e.g.*, David Kairys, *Unconscious Racism*, 83 TEMPLE L. REV. 857 (2011); Ian F. Haney-Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010).

163. *See, e.g.*, Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in A "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015) ("Latinos . . . have consistently represented over 90% of those in immigration detention, prosecuted for immigration violations, and removed as "criminal aliens."); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 157

immigration detention are also disproportionately Mexican and Central American.[164] Using incarceration in response to migration, and the disproportionate representation of Latinxs in immigration jails fit within historic U.S. immigration narratives.[165]

The processes of identifying noncitizens subject to immigration incarceration is facially race-neutral, yet the "inextricably intertwined . . . identities of criminality and noncitizen," has resulted in race serving as a powerful subordinating and marginalizing force.[166] This is equally true of noncitizen asylum seekers who have not had contact with the criminal justice system. Part of this marginalization stems from the criminalization of migrants, and their civil incarceration, and is a component of the history of racial and ethnic discrimination in immigration law.

The imprisonment of Mexican and Central American immigrants is paralleled by official, state-sanctioned anti-immigrant and anti-Latinx measures, as well as racism and hate crimes against people of Mexican and Central American origin in the U.S.[167] Sub-federal immigration restrictionist measures, and the rise in anti-immigrant rhetoric, provide a theoretical context for exploring the question of due process rights of disproportionately Mexican and Central American asylum seekers. Border enforcement and detention of asylum seekers results in immigration prisons filled with migrants from Mexico and Central America, and fits neatly within the treatment of Latinxs with U.S. immigration history.

The history of exclusion and expulsion of Latinxs in the United States follows a trajectory of a denial of citizenship rights, prevention from obtaining lawful entry to the U.S., lynching, the 1917 Bisbee,[168] Arizona deportations, Mexican Repatriation, Operation Wetback, and the Chandler Roundup.[169] These markers of racialized mistreatment of Latinx immigrants underscore the way the immigration and criminal justice system has been coopted or transformed into a means of "stigmatiz[ing],

(2012) (describing the "rise of an intertwined regime of "crimmigration" law . . . attributed to some combination of nativism, overcriminalization"); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1461–67 (2013) (assessing the disparate racial impacts of the criminal justice system on contemporary immigration enforcement); *see also* Yolanda Vázquez, Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System, 54 HOW. L.J. 639, 666 (2011) (examining the disparate deportation of Latinxs; in 2009 comprising ninety-four percent of deportations).

164. *See, e.g.*, Doris Marie Provine, *Institutional Racism in Enforcing Immigration Law*, 8 NORTEAMERICA 31 (2013). However, abuse of the use of detention, and abuse of those in immigration detention impacts all racialized immigrants of color. At the time of writing, two law school clinics, Texas A&M School of Law Immigrant Rights Clinic and the Immigration Clinic at the University of Texas School of Law, in conjunction with a nonprofit organization RAICES, commenced litigation concerning abuses at the West Texas Detention Facility near El Paso. Somalian asylum seekers reported beatings, denial of medical care, racial slurs, multiple incidents of pepper spraying, and arbitrary use of segregation, and the organization and clinics filed complaints. TEXAS A&M UNIVERSITY, SCHOOL OF LAW, IMMIGRATION RIGHTS CLINIC, ABUSES AGAINST AFRICAN DETAINEES AT THE WEST TEXAS DETENTION FACILITY (2018).

165. Olivares, *supra* note 160, at 1014 ("[T]he emphasis on demographic trends obscures the long-standing and well-established racially discriminatory motives of immigration law and policy."); *see also id.* ("Not surprisingly, 97% of the apprehended and detained 'family units' (i.e., mothers and children) are from the four same Latin-American countries that constitute the general detained population: Guatemala, Honduras, El Salvador, and Mexico.").

166. *Id.* at 1006.

167. *See* Campbell, *supra* note 158.

168. James W. Byrkit, *The Bisbee Deportation*, *in* AMERICAN LABOR IN THE SOUTHWEST: THE FIRST ONE HUNDRED YEARS 88 (James C. Foster ed., 1982).

169. Vázquez, supra note 163 (tracing the U.S. history of racial bias and marginalization of Latinxs contributing to the criminalization of Latinx migration and migrants, and the extension of anti-Latinx immigration policies are extended to the larger Latinx community, in part through the criminal justice system).

punish[ing] and remov[ing]" Latinxs.[170] This equation—the criminal justice system serving an anti-Latinx immigration system—also works in reverse. The immigration justification for detaining asylum seekers and denying equal due process rights defines the noncitizen Latinx as criminal, and a commodity.[171] By stigmatizing noncitizens as criminals, punishment is rationalized, and minimized because it is characterized as mere civil detention.

Beginning with the 1790s Naturalization Act, permitting only "Free White Persons" to become naturalized citizens, Mexicans, who could migrate to the U.S., were prevented from becoming citizens.[172] This was perhaps the beginning of the systematic racialization of Latinxs in immigration law in order to deny rights and privileges.[173] What followed has been a decades-long cycle of encouragement of irregular migration to fill largely unskilled labor needs[174] absent willingness to fully welcome Latinxs as more long-term and complete members of society. They are then targeted for mistreatment, expulsion, and more recently, incarceration, through crimmigration enforcement, and now just as an alleged part of the removal process.

Mexican and other racialized immigrants of color have also been subject to "selective enforcement." Such selective enforcement encompasses policies like the public charge bar, preventing the immigration of an otherwise qualified applicant, based on financial factors. Similarly, Mexican nationals who entered the United States unlawfully from Mexico and were permitted to work, then some were later deported. Racialized immigrants of color who had been given temporary permission to stay, many who have lived in the United States for decades, are soon to lose their status as a result of Trump administration policy changes.[175] Deferred Action for Childhood Arrivals (DACA) recipients are similarly subject to this selective enforcement and their status is in a precarious state of legal limbo.[176]

Selective enforcement presents a somewhat less aggressive mechanism of enforcement, with some blurred lines of legality where the line between lawful and unlawful immigration did not have the same political significance that it has today. Through a combination of selective enforcement of immigration restrictions, and the Bracero program for temporary workers and temporary protected status for particular

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170. *Id.* at 641 (examining the use of the criminal justice system as the current primary means to stigmatize, punish and remove Latinxs); s*ee also* Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093 (2017).

171. Olivares, *supra* note 160, at 1005; *see also* Denise Gilman & Luis A. Romero, *Immigration Detention, Inc.*, 6 J. ON MIGRATION & HUM. SEC. 145 (2018) (critiquing the money bond system's perpetuation of inequality in the context of immigration private prison expansion).

172. ANNA SAMPAIO, TERRORIZING LATINA/O IMMIGRANTS: RACE, GENDER, AND IMMIGRATION POLICY POST-9/11 32–33 (Temple U. Press 2015) (describing case of Ricardo Rodriguez, denied citizenship as a "non-white" person).

173. *Id.* at 33 ("Although immigration policy has moved through several phases, it repeatedly privileges particular racial and ethnic groups who approximate a standard of 'whiteness.' Policies have "discriminated against" and "actively constructed whiteness.").

174. MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 67, 71 (Gary Gerstle ed., 2004).

175. Shannon Dooling, *Citing Racism, Haitian, Salvadoran Immigrants Sue Trump Over End Of Temporary Immigration Program*, WBUR NEWS (Feb. 22, 2018), http://www.wbur.org/news/2018/02/22/immigrants-sue-trump-tps (noting that immigrant rights advocates have sued alleging racism in these policy decisions).

176. Catherine L. Gonzalez & Kenrya Rankin, *Trump Administration Officially Ends DACA, Placing Nearly 800,000 Immigrants at Risk for Deportation* (Sept. 5, 2017), https://www.colorlines.com/articles/trump-administration-officially-ends-daca-placing-nearly-800000-immigrants-risk-deportation.

foreign nationals, groups of immigrants came to be a large, flexible, disposable labor force, and one the U.S. economy has relied on.[177]

After the agriculture industry recruited workers from Mexico to fill a labor shortage at the beginning of the century, the U.S. economic depression of the 1920s resulted in scapegoating of Mexican migrants for the economic crisis. As long as Mexican migrants only worked in the fields, nativists were less successful in pushing restrictionist agendas targeting Mexican migration, but when Mexican labor transcended the labor market more broadly, there was backlash.[178] Mexican migrants working in the U.S., with or without authorization, were referred to as a "menace"[179], and not "qualified" for "citizenship" nor "assimilation."[180] Thus the mid-1920s witnessed nativist, racist sentiment by restrictionist legislators and discussion of Mexican-specific immigration restrictions, leading up to the next targeted expulsion.[181] These expulsions were not in response to tangible enumerated harms articulated by legislators, but by racism disguised as irrational fears of immigrants.

Between the turn of the century and the Great Depression significant civil and social changes in the means of production and labor more generally were occurring; restructuring of industry was responsible for social change and perceived unrest, yet Mexican migration and Mexicans were blamed.[182] Depression-era deportations employed explicitly racialized tactics to target those perceived to be undocumented Mexican migrants, and included U.S. citizen Latinxs.[183] Prior to the next wave of half-welcoming, in 1929, coinciding with the stock market crash and high unemployment, a violent, mass expulsion, euphemized as a "repatriation" resulted in approximately one million Mexican nationals violent and abrupt deportations.[184]

In what became known as the "Bracero Program," from 1942 to 1962, the U.S. government invited approximately 400,000 temporary workers from Mexico, welcoming their labor, but not the rest of their families, or their continued presence or participation in North American culture.[185]

In 1954, the government's method of signaling a shift away from inviting migrant workers was to create and enforce Operation Wetback. The name for the

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177. Hiroshi Motomura, The *President's Dilemma*: *Executive* Authority, Enforcement, and the Rule of Law in Immigration Law, 55 WASHBURN L.J. 1 (2015).

178. Rodolfo Acuna, *Greasers Go Home*, *in* THE LATINO CONDITION: A CRITICAL READER 86–88 (Richard Delgado & Jean Stefancic eds., 2010).

179. *Id.* at 87.

180. *Id.* at 88.

181. *Id.* at 89.

182. *Id.* at 90; *see also* Carey McWilliams, "*The Mexican* Problem*," in* THE LATINO CONDITION: A CRITICAL READER 149 (Richard Delgado & Jean Stefancic eds., 2010) (The so-called "Mexican Problem" was manufactured, as described by Carey McWilliams, in part by social science and the approach of "social work" in the 1920s and 1930s—finding inadequacy and weakness as flawed character traits of Mexicans, justifying oppression, restrictionist, and nativism).

183. STEVEN W. BENDER, MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY 40 (N.Y.U. Press 2015) (describing manifestations of racist violence after the "economic downturn" of the early 1920s, when "police and local government officials terrorized and displaced Mexican workers and their families" and "vigilante mobs ran then out of town").

184. *See* FRANCISCO E. BALDERRAMA & RAYMOND RODRIGUEZ, DECADE OF BETRAYAL: MEXICAN REPATRIATION IN THE 1930S3, 9 (U.N.M. Press 2006) (describing the injustice and discrimination that the Mexican community experienced in 1930s America).

185. Vázquez, *supra* note 163, at 648; *see also* Cristina M. Rodriguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219 (2007) (detailing the history of the Bracero program of the 1940s, 50s, and 60s).

deportation plan omitted any effort to hide racialization and demonization of Latinxs, and resulted in another round of mass deportations, resulting in approximately 3.7 million people, including U.S. citizens of Mexican descent, being rounded up and deported.[186]

In 2008, ICE conducted a raid of a meat-packing plant and arrested 390 workers, and used an emerging tactic to criminalize undocumented workers, charging them with the crime of aggravated identity theft.[187] The use of mass plea agreements facilitated the potential for a workplace raid to yield a significant number of particularly damaging deportations, making future migration that much harder for those arrested, detained, and then deported. It also helped reinforce the stigmatizing and criminalization of Latinx immigrants who had come to work and attempt to build a better life for their families.

These immigration enforcement actions either targeting, or falling heaviest on Latinx noncitizens, continue today. While the latest trend in enforcement seems to be more scattershot and devoid of priorities[188], the impact is still reportedly being felt acutely in Mexican and Central American immigrant communities.[189] While the Obama administration had made an effort to announce immigration enforcement priorities, allegedly targeting more serious or dangerous criminal noncitizens and those suspected of terrorism, the subsequent administration has eliminated those express policy goals, and apprehension, detentions and deportations have been reported to lack a coherent rationale, other than to terrorize communities.[190] Noncitizens with no criminal history, U.S. citizen family members, with gainful employment have been aggressively arrested, detained and deported, as well as immigrant rights activists.[191]

These enforcement actions are a part of the overarching, anti-immigrant sentiment implicit in the current administration/regime's immigration enforcement policies. Immigration incarceration fits into this historical arch of criminalizing and racializing Latinx immigrants. The persistence of implicit racial bias and racialized preferences in immigration policies undergirds the most recent proposal for

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186. JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 at 228 (Praeger 1980); IAN F. HANEY-LOPEZ, RACISM ON TRIAL: THE CHICANO FIGHT FOR JUSTICE 83 (Belknap Press 2003).

187. Jennifer Chacon, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 144 (2009) (in spite of the fact, as detailed by Jennifer Chacon, many who pled guilty to the offense lacked the mens rea because they did not know that they had taken the identity of an existing person).

188. AM. IMMIGR. COUNCIL, THE END OF IMMIGRATION ENFORCEMENT PRIORITIES UNDER THE TRUMP ADMINISTRATION (2018) (available at https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration; Kari Hong, *My Great-Grandparents Weren't 'Illegal' When They Came To The U.S. They Would Be Now*, HUFFINGTON POST (Feb. 2, 2018), https://www.huffingtonpost.com/entry/opinion-hong-immigrants-iirira_us_5a734e0ae4b01ce33eb0b97b.

189. Andrea Castillo, *Immigrant arrested by ICE after dropping daughter off at school, sending shockwaves through neighborhood*, L.A. TIMES (Mar. 3, 2017), http://www.latimes.com/local/lanow/la-me-immigration-school-20170303-story.html.

190. Haley Sweetland Edwards, *'No One Is Safe.' How Trump's Immigration Policy Is Splitting Families Apart*, TIME (Mar. 8, 2018), http://time.com/longform/donald-trump-immigration-policy-splitting-families/.

191. Amy Gottlieb, Opinion, *ICE Detained My Husband for Being an Activist*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/opinion/ravi-ragbir-immigration-ice.html (detailing activist Ravi Ragbir's arrest); *see also* Melissa Siegler, *Wisconsin Rapids father of two Buba Jabbi deported to West Africa* WIS. RAPIDS TRIB. (Mar. 7, 2018), https://www.wisconsinrapidstribune.com/story/news/2018/03/07/wisconsin-rapids-father-two-buba-jabbi-deported-west-africa/405208002/.

immigration reform as well, expressing preference for immigrants based on financial factors rather than family unity.[192]

One explanation for the racialization and mistreatment of immigrants and Latinxs has been fear or economic strife of the dominant political (presumably "white identifying") culture.[193] Yet restrictionist immigration policies emerge in "[p]eriods of economic growth as well as economic crisis" and encourage or deter migration with shifting racial disgraces about immigrants' places in American life." Racialization and demonization of immigrants serves as a convenient cover for the more accurate causes of economic strife, such as wage stagnation, un- and under-employment, and growth in the gap between rich and poor.[194]

The disingenuousness of the reasons for racial bias economics and fear highlight the insidiousness and expansiveness of the problem and the importance of constitutional rights. Dehumanization of Latinx immigrants is not justified by nationalism, nor sovereignty. Facially neutral policies influenced by systemic racism, including ICE raids, selective enforcement, and use of incarceration to implicitly deter migration, constitute a moral wrong.[195] The unequal recognition of noncitizens' right to be free from deprivations of liberty should be viewed within this historical context of racialized enforcement actions that metaphorically criminalize Latinx immigrants, and as a moral wrong.

Incarceration of immigrant families seeking asylum is part of the system of social control and containment that originated with, or prior to the prison system's role in the Jim Crow era.[196] Racial hierarchies (combined with class and gender) have normalized a racialized milieu such that the hierarchies inherently justify punitive policies and reinforce "social forces that situate women of color within contexts . . . that render them disproportionately available to punitive policies and discretionary

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192. Tina Vasquez, *Immigration Advocates: RAISE Act 'Inherently Racist'*, REWIRE.NEWS (Aug. 3, 2017), https://rewire.news/article/2017/08/03/immigration-advocates-raise-act-inherently-racist/; Hong, *supra* note 188.

193. SAMPAIO, *supra* note 172 (exploring the way in which government policies have played a role in racialization of immigrants, particularly in the context of national security).

194. *See generally* BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850–1990 1–36 (Stan. U. Press 1st ed. 1994); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 79–131 (Little, Brown and Co. 1998) (analyzing anti-Chinese outbursts in the United States); ABRAHAM HOFFMAN & JULIAN NAVA, UNWANTED MEXICAN AMERICANS IN THE GREAT DEPRESSION: REPATRIATION PRESSURES, 1929–1939 (U. Ariz. Press 1974); Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 B.Y.U. L. REV. 1139, 1162–74 (analyzing emergence of "new" nativism in the United States in 1990s).

Immigrants are also mistakenly blamed for crime in such periods of unrest. *See* Marjorie S. Zatz & Hilary Smith, *Immigration, Crime, and Victimization: Rhetoric and Reality*, 8 ANN. REV. L. & SOC. SCI. 141, 141 (2012) ("contrary to popular perceptions that immigration increases crime, the research literature demonstrates that immigration generally serves a protective function, reducing crime").

195. *See* BENDER, *supra* note 183.

196. *See* Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 STAN. J. C.R. & C.L. 177 (2016) (suggesting that societal construction and associations of "blackness" with criminality developed during slavery in the early American South and focuses on what he describes as "mass incarceration" of slave property in penal facilities in spite of a lack of any cognizable connection to criminality or the criminal justice system, and the role this practice had on criminalization along lines of race); *see also* Anita Sinha, Slavery by Another Name: "Voluntary" *Immigrant* Detainee Labor and the Thirteenth Amendment, 11 STAN. J. C.R. & C.L. 1, 6 (2015) (describing how detainee labor allows prisons to maximize profits); Nina Bernstein, Officials Obscured Truth of Migrant Deaths in Jail, N.Y. TIMES, Jan. 10, 2010, at A1 (reporting that immigrants die in immigration prisons which lack standards and accountability).

judgments that dynamically reproduce these hierarchies."[197]

The Latinx immigrant, as a detained mother, "is at the height of intersectional marginalization (and the lowest part of the dominant hierarchy) as a non-citizen [sic] person of color—and a woman judged by societal forces as a bad mother" for embarking on the dangerous journey to seek protection in the United States.[198] The subordination of racialized immigrants of color is furthered, and erased, by a facially race-neutral immigration system, not unlike the criminal justice system.[199] The use of incarceration as a response to migration fits within, and is characteristic of the racialized history of immigration law.[200] This normalizing of oppression of racialized immigrants is reflected in the denial of equal constitutional rights, such as due process protections.

Professor Jennifer Chacón's metaphor of "legal liminality" provides another framework for understanding the invisible mechanisms that result in different treatment of racialized immigrants. Legal liminality suggests a failure of the rule of law because of a lack of predictability in enforcement, transparency, and, perhaps most importantly with respect to the issue of equity.[201] Liminality is less dependent on formal immigration status categories which are characterized as representations of the rule of law—express legal categories. Instead, it is dependent on the whim of an administration and its enforcement policies, and a function of time, place and social context.

The immigration exceptionalism at play in shaping immigration substantive due process jurisprudence fits within this framework of legal liminality. Immigration detention, and the failure to recognize full constitutional rights embodies a liminality of sorts because of the characterization of the detention as not criminal, and civil, therefore not punitive. The failure to accord due process protections to immigrants, particularly asylum seekers in detention also has the potential to serve as an institutional and systemic vehicle for implicit and insidious bias that is generally less overt today, than in the time of the Chinese Exclusion Act. To the extent that jurisprudentially, immigration incarceration is a vehicle for, but obscures institutionalized racism, it might be the fourth dimension of legal liminality.

Following cycles of raids and expulsions, Latinxs are targeted through workplace raids targeting racialized Latinx workers rather than their employers,[202]

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197. Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1427 (2012).

198. Olivares, *supra* note 160, at 1015.

199. *Id.*

200. Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149 (2004).

201. Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709 (2016).

202. The Trump administration has brought back Bush administration workplace raid tactics described as "silent raids" of employers, reviewing employee paperwork to identify potential undocumented workers and then arresting them. *See* Natalie Kitroeff, *Workplace Raids Signal Shifting Tactics in Immigration Fight*, N.Y. TIMES (Jan. 15, 2018), https://www.nytimes.com/2018/01/15/business/economy/immigration-raids.html; Sarah Ruiz-Grossman, *Immigration Agents Raid Nearly 100 7-Elevn Stores Nationwide in Show of Force*, HUFFINGTON POST (Jan. 10, 2018), https://www.huffingtonpost.com/entry/immigration-7-eleven_us_5a56a322e4b08a1f624b3839 (noting that all arrests targeted employees); *see also* Bill Ong Hing, *Institutional Racism, ICE Raids, and Immigration Reform*, 44 U.S.F. L. REV. 307, 318–20 (2009) (describing racial profiling in immigration raids); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 982–83 (2004); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1104 (2004).

inherently biased crimmigration tactics, and other civil immigration enforcement techniques. Corresponding with the history of rights deprivations tinged with racism and justified by immigration exceptionalism, asylum seekers with credible fears of return to their home country are being subjected to mass, or finely tuned incarceration[203] and rights deprivations. The plenary power doctrine, intertwined with systemic bias, have interfered with the recognition of equivalent due process rights for noncitizens.

B. The Plenary Power Doctrine's Role in Immigration Racial Classifications

In the Chinese Exclusion cases, where the plenary power doctrine was born, the *Chae Chan Ping* Court held that a noncitizen returning resident could be excluded for any reason Congress proposed, including his race.[204] Similarly, in *Fong Yue Ting v. United States*, the Court upheld deportation on the basis of race.[205] Now less explicit than in the past, what would be improper and unlawful racial bias in all other areas of domestic law is permissible in immigration law.[206] The disparate treatment of noncitizens with respect to immigration incarceration, and the lack of full due process protection continues to implicate the existence of systemic bias shielded by plenary power.

When the plenary power doctrine is justified by the notion of nationalism or sovereignty, it serves as a cover for ethnic or racial bias because nativism has been a proxy or substitute for racism. "Defensive nationalism" justifies and erases racialized harms caused by laws defended as necessary for nationalism and sovereignty. [207] Nationalism, like sovereignty, fortified by plenary power, are responsible for treatment

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203. *See* Vázquez, *supra* note 162, at 1100 (examining the "impact that the incorporation of migration enforcement has had on the criminal justice system" exacerbation of "pre-existing problems within it" particularly "finely targeted" Latinxs).

204. Chae Chan Ping v. United States, 130 U.S. 581 (1889); *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 2 (1998) (contending that the Chinese Exclusion cases of Chae Chan Ping and Fong Yue Ting, similar to Jim Crow laws designed to exclude Afro-descendent peoples from American society, were founded in a "belief in racial separation." Writing before the Supreme Court would resurrect the plenary power doctrine's foundation in international law concerns, Chin suggested that the "Supreme Court has recently recognized the availability of some limited judicial review within the plenary power doctrine" and proposing that "racial classifications would not survive that review"); KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 13–14 (Temple U. Press, 2004) (explaining the plenary power doctrine's role in shielding "substantive immigration judgments made by the political branches" that harm noncitizens of color from meaningful judicial review and that the Court has invoked the doctrine to permit federal government discrimination against immigrants).

205. Fong Yue Ting v. United States, 149 U.S. 698 (1893); *see also* Chin, *supra* note 204, at 57 (suggesting that while Fong Yue Ting may have been understood as indicating that "resident aliens being deported from the United States, like aliens at the border seeking initial entry, had no constitutional right to procedural due process" but if it were "decided today, the outcome should be in favor of the Chinese," because they were "deported under a statute that allowed the testimony only of whites to prove lawful presence in the United States" which would now be deemed inconsistent with due process because of the racially discriminatory white witness requirement).

206. JOHNSON, supra 204, at 47 (noting that although the Plenary Power doctrine has not been used contemporarily to uphold express racial and national origin exclusions, facially neutral immigration laws still may have racial impacts and even motivations).

207. Rene Galindo & Jami Vigil, *Are Anti-Immigrant Statements Racist or Nativist? What Difference Does it Make?*, in THE LATINO CONDITION: A CRITICAL READER 161, 161–67 (Richard Delgado & Jean Stefancic eds., 2011).

of immigrants that would not meet constitutional muster if meted out on citizens.[208] When the plenary power doctrine enables non-recognition of discrimination based on nativism, patterns of discrimination directed against racialized Latinxs are obscured. This obfuscation is evident in the underpinnings of constitutional immigration law decisions denying equal rights to noncitizens.[209] By exposing nativism as a smokescreen for racism, previous and current patterns of prejudice and discrimination directed against immigrants that proceeded under the cover of defensive nationalism can be made more visible. Allowing nationalism or nativism to erase racialization may also normalize immigration detention of Latinx peoples.

In spite of some signs of a departure from the plenary power doctrine,[210] the Court still gives significant deference to Congress in the area of immigration law. Justice Frankfurter declared in his *Harisiades* concurrence that "it was *not* the Court's job to re-write the laws to eliminate such xenophobia and bias," but instead, is "up to Congress" still rings true.[211] While judicial review could "ripen . . . into a judicial standard that would strike down a modern reincarnation of the Chinese Exclusion Act," this has yet to occur.[212] Plenary power's persistence in sustaining colorblind racism within immigration law manifests in the racialized harm of immigration imprisonment which lacks substantive due process protections relevant in other civil preventive detention contexts.

VI. MAINSTREAMING CONSTITUTIONAL PROCEDURAL DUE PROCESS – DISAGGREGATION AND RULE OF LAW

Deference to the political branch has historically directly, and indirectly, evidenced an implicit or explicit condoning of ethnic, national origin, and racial bias in immigration law enforcement.[213] Even though the explicit rationale for treating

208. Chin, *supra* note 204, at 2.

209. *See generally* Chin, *supra* note 204.

210. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2017) (ending differentiation in law based implicitly on gender, favoring mothers over fathers); Kevin R. Johnson, *Breaking News: Supreme Court Holds that the Constitution Applies to Gender Distinctions in Derivative Citizenship Laws*, IMMIGR.PROFBLOG (June 12, 2017), http://lawprofessors.typepad.com/immigration/2017/06/breaking-news-supreme-court-hold-that-constitution-applies-to-gender-distinctions-in-derivative-citi.html.

211. Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring) ("[I]f federal immigration law has been 'based in part on discredited racial theories [and] whether immigration laws have been crude and cruel, whether they have reflected xenophobia in general . . . the responsibility belongs to Congress.").

212. Chin, *supra* note 204, at 28.

213. *See* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (Chinese Exclusion case); Chae Chan Ping v. United States,130 U.S. 581 (1889) (same); Iqbal v. Ashcroft, 129 S.Ct. 1937 (2009) (contemporary cases denying due process on the basis of the plenary power doctrine); *see also* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 2 (1998) (examining the plenary power cases suggesting that the racism within them reflect values deeply at odds with those of contemporary society); Beth Caldwell, *Reducing the Deportation's Harm by Expanding Constitutional Protections to Functional Americans*, 37 WHITTIER L. REV. 355, 363 (2016) (noting that "continued racism against immigrant groups—focused primarily against Latino immigrants in recent years—has allowed the plenary power doctrine to persist despite its troubling origins" (citing LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION 25–47 (2nd ed. 2013)); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1971 (2013) (proposing that the role of race in the adjudication of citizenship claims persists, and deportations of U.S. citizens necessitates a wholesale rethinking of the

immigration due process differently is not race, the racially disparate impact of immigration deportations and detention underscores the continued implicit acceptance of disparate impacts caused by immigration policy and jurisprudence.[214]

In the context of substantive due process rights of incarcerated asylum seekers, greater judicial equity could have been achieved by adjudication on constitutional, rather than statutory grounds in the recent *Jennings v. Rodriguez* litigation. A brief look at the rule of law, and the theory of disaggregating immigration law for plenary power purposes may help understanding the potential future of due process rights for asylum seekers in immigration detention.

A. Rule of Law and Disaggregating Immigration Law Along Criminal Immigration Lines

One solution to the problem of plenary power resulting in lesser protections for immigrants may be more consistent application of the rule of law, and disaggregation along the lines of crimmigration. Particularly in light of the current balance of immigration powers between the three branches of government, and the power of the executive,[215] examination of rule of law principles in the may help in reconsidering the role of the plenary power doctrine in immigration substantive due process.[216] Broader rule of law conceptions can emphasize criteria other than just blind adherence to a presumably validly enacted law. Equal treatment under the law, and moral justice also comprise the rule of law and could shift the outcome in cases where equal treatment under the law is not achieved by strict adherence to a presumably valid law.[217] If an administration's execution of the laws is assessed with an eye towards

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system's procedural norms).

214. *Compare* John F. Simanski, *Immigration* Enforcement Actions: 2013, U.S. DEP'T OF HOMELAND SEC. ANN. REP. 1 ("The leading countries of origin for those removed from the United States in fiscal year 2013 were Mexico (72 percent), Guatemala (11 percent), Honduras (8.3 percent), and El Salvador (4.8 percent)."), *with* U.S. CENSUS BUREAU, USA Quick Facts, available at http://quickfacts.census.gov/qfd/states/00000.html (last revised Mar. 31, 2015) (noting that Latinx population of United States in 2013 was 17.1 percent of total population); U .S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, U.S. LAWFUL PERMANENT RESIDENTS 2013 4 tbl.3 (2014), available at http://www.dhs.gov/sites/default/files/publications/ois_lpr_fr_ 2013.pdf (compiling data showing that 13.6 percent of lawful permanent residents came from Mexico) *and* PEW RESEARCH CTR., 5 Facts About Illegal Immigration in the U.S. (Nov. 18, 2014), available at http:// www.pewresearch.org/fact-tank/2014/11/18/5-facts-about-illegal-immigration-in-the-u-s/ (stating that citizens of Mexico make up about half of all unauthorized immigrants in the United States, although their numbers have been declining in recent years).

215. Edward G. Carmines & Matthew Fowler, *The Temptation of Executive Authority: How Increased Polarization and the Decline in Legislative Capacity Have Contributed to the Expansion of Presidential Power*, 24 IND. J. GLOBAL LEGAL STUD. 369 (2017) (arguing that that "increasingly polarized politics has led to political stalemate and policy gridlock in Congress" contributing to a shift whereby "executive power has increased at the expense of a diminished legislature"); William E. Scheuerman, *Emergencies, Executive Power, and the Uncertain Future of Us Presidential Democracy*, 37 LAW & SOC. INQUIRY 743 (2012) (examining "the seemingly inexorable expansion of executive power within the US version of liberal democracy"); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 25 (2002) (considering the role of the executive in sustaining adverse constructions of race and limiting rights accordingly, where such "deference not only gives too much unchecked power to the Executive, but also reinforces racial myths by using them as tools of legal reasoning, which in effect elevates them to the status of law").

216. David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEORGE WASH. L. REV (forthcoming 2017).

217. PAUL GOWDER, THE RULE OF LAW IN THE REAL WORLD (Cambridge U. Press 2016) (explaining the significance of equality to the rule of law).

rule of law principles that incorporate equal treatment and moral justice, such a doctrinal inquiry could be authoritative irrespective of the administration in power. This would be a kind of constitutionalizing of immigration law that has the potential to complete a doctrinal inquiry, particularly to the extent that constitutional norms can implicate equal treatment.

The inconsistency of constitutional due process doctrines for noncitizens in the immigration sphere, compared to citizens facing civil preventive detention, or criminal incarceration, is antithetical to the rule of law. Even just from the perspective of adherence to a validly enacted law, a constitutionally consistent interpretation of due process outside of and within immigration law, would be a ratification of rule of law principles. If adherence to the rule of law, including constitutional norms, is a function of the judiciary's role in keeping executive's administration honest,[218] particularly important during an administration openly hostile to racialized immigrants of color, an executive policy of abstaining from exercising discretion created by statute is contrary to the rule of law. Such an executive practice could indirectly influence an analysis of the constitutional due process question.[219]

An organizing metatheory could help distinguish exception and mainstream doctrines, both within and across constitutional dimensions in striving to move away from, or find a new definition for immigration exceptionalism.[220] Such a metatheory could also help explain why immigration should remain exceptional in some cases. If

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218. Rubenstein, *supra* note 216 ("The mere availability of judicial review might help keep the President *legally honest* – not only with respect to the content of executive policies, but also the motivations behind them."). (Though it is worth noting that advocates persuaded courts under the due process clause to add procedures for processing Haitains to help protect them and result in fewer removals but the plan backfired because the executive interdicted them before their due process rights attached, at sea. Executive authority over immigration supported and maybe legitimized that result. Yet immigration law can be exceptional in ways that benefit noncitizens rather than harm them.)

219. For consideration of the role of rule of law and the plenary power doctrine in the context of another immigration policy matter concerning executive authority, *see* Hiroshi Motomura, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority*, 55 WASHBURN L.J. 189 (2016) (noting that regarding DACA and DAPA litigation, the Court might have been more willing to move away from the plenary power doctrine because based on a "rule of law perspective, the plenary power doctrine prompts the same core concern that arises when executive branch officials and employees exercise prosecutorial discretion in ways that are unpredictable, inconsistent, or discriminatory, and yet elude scrutiny"); *see also* Shoba Sivaprasad Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority- Response to Hiroshi Motomura*, 55 WASHBURN L.J. 189 (2015) (responding to presentation by Hiroshi Motomura given in March 2015, for the Washburn University School of Law's Foulston Siefkin Lecture, titled "The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority).

Yet, as is described in this article, with respect to detention of asylum seekers with credible fears, discretion has been exercised *not* to release any asylum seekers found to have a credible fear. Accordingly, had the Court followed Motomura's sound logic, it could have taken into consideration the way in which the executive's actions ran afoul of the rule of law, and even implicitly had a disparate impact on disproportionately Latinx asylum seekers.

Motomura's comments regarding the plenary power doctrine and discretion in the DACA, DAPA, and admissions and removal contexts echo the sentiment here, that "[t]he plenary power doctrine is troubling from a rule of law perspective" because it enables Congress and the executive to make decisions which have adverse consequences for, or "disregard procedural due process, equal protection, and other constitutional considerations." *See* Motomura, *supra* note 219, at 28; *see also* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES, 26–37, 43–45, 65–68, 91–92, 100–13, 121–22, 158–59 (2006); Motomura, *supra* note 37; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990).

220. *See* Rubenstein, *supra* note 216.

the organizing metatheory were grounded in principles of rights and equality norms,[221] such a principle could counterbalance the historic racial bias of immigration law. The *Jennings* court had the opportunity to put this theory into practice by unexceptionalizing due process in the immigration context by acknowledging that immigrants in detention should be entitled to full constitutional protections.

At the intersection of criminal and immigration law, where the issue of immigration detention emerges, the plenary power doctrine has already shifted in ways signaling greater judicial equity for noncitizens. The Court's willingness to consider deportation a collateral consequence of alleged criminal conduct in *Padilla v. Kentucky* was read by some as recognition of relevance of constitutional consistency and norms in immigration law.[222] *Padilla* may be a stepping stone towards judicial recognition of constitutional norms when a civil immigration statute appears to permit something that is otherwise clearly, punishment, or has punishment-like effects, including collateral ones.[223]

Professor Daniel Kanstroom proposed a theoretical framework he described as a Fifth-and-A-Half Amendment arising from the *Padilla* decision.[224] In the context of this proposal, he noted that in a previous decision, the Court considered deportation and substantive due process on racially biased grounds, and found it appropriate to apply constitutional scrutiny unshielded by plenary power.[225] *Padilla* echoed the reasoning of that particular case with respect to departing from plenary power in favor of constitutionalizing immigration law by recognizing that there might be instances where the "civil" immigration label should not shield Congress from depriving a noncitizen the same rights as a citizen where consequences are fundamentally punitive in nature.[226] Kanstroom's Fifth-and-A-Half Amendment could readily be invoked in the context of immigration detentions which arise in a context that is neither exclusively nor formally criminal, nor civil.[227]

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221. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982) (striking down a Texas regulation that allowed local school districts to deny undocumented children admission to the state's public schools); Brown v. Board of Education, 347 U.S. 483 (1954).

222. Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-A-Half Amendment*, 58 UCLA L. REV. 1461, 1473 (2011) (starting with the question: "Thus, the specific question raised by Padilla is: What is the constitutional status of post-entry social control deportation?" and proposing that Padilla signified "a new constitutional norm for . . . the post-entry social control type of deportation that would account for both the harshness and the complexity of deportation" embodying "the flexible due process guarantees of the Fifth Amendment and—at least for certain types of deportation—the more specific protections of the Sixth Amendment").

223. *Id.* at 1508 ("Thus, the *Wong Wing* Court, in addition to its plenary power discourse, also saw the constitutional civil/criminal line as applicable to deporteesFalseThe year at hard labor could not be insulated from constitutional scrutiny simply because Congress had placed the sanction within the deportation system.").

224. *Id.* at 1466 (Kanstroom states that the *Padilla* Court implicitly challenged the civil-criminal distinction, and proposes a conceptual framework, a "5.5 amendment," to reconcile the "historical, formalist" relegation of deportation to the civil collateral sphere omitted constitutional rights (there, to counsel), and modern realism, which can embody some of the due process protections of the Fifth Amendment, and with limitations, the Sixth Amendment).

225. *Id.* at 1508.

226. *Id.* ("Essentially *Wong Wing* raised the same question that has been re-visited [sic] by *Padilla v. Kentucky*. How should courts draw the line between what we might call regulatory civil deportation procedures and punitive deportation-related enforcement mechanisms that require constitutional protections similar to those which criminal defendants are due?").

227. Kanstroom states that the *Padilla* Court implicitly challenged the civil-criminal distinction, and proposes a conceptual framework, a "5.5 amendment," to reconcile the "historical, formalist" relegation of deportation to the civil collateral sphere omitted constitutional rights (there, to counsel), and modern realism, which can embody some of the due process protections of the Fifth

Disaggregating immigration law suggests that it should not be construed as one coherent body of law because of the fragmented way in which it is created and implemented.[228] Kagan suggested disaggregating immigration law to help specify a more appropriate role for the plenary power doctrine that creates consistency outside of immigration law, with respect to due process and application of constitutional principles.[229] *Padilla v. Kentucky* is one example of how the plenary power doctrine could be disaggregated on the basis of subject matter. Because the *Padilla* Court considered deportation as analogous to imprisonment in criminal cases, the Court's logic could be expanded to suggest that deference to Congress is less relevant where grounds of removal or detention are at issue because the issue is more analogous to criminal punishment and pre-trial detention in criminal procedure.[230] In other words, where individuals are in custody and the issue of deprivation of physical liberty is raised, those constitutional concerns can be separated from other issues in immigration law that might more logically trigger the plenary power doctrine.

CONCLUSION

Immigration law's exceptional treatment by the Court has shielded both express racialized mistreatment, as well as systemic bias. The failure to recognize full constitutional protections, particularly in the context of substantive due process, and the right to liberty, remain a critical point of systemic inequity. U.S. immigration law has historically resulted in mistreatment and different treatment of Central American and Mexican immigrants. The use of immigration incarceration to contain and deter migrants from Mexico and Central America seeking protection is emblematic of this history. The *Jennings v. Rodriguez* Court had the opportunity to indirectly address the racialized harm experienced by Mexican and Central American immigrants by issuing a ruling on constitutional grounds, validating the due process rights of asylum seekers in immigration jails. One theory to shift away from plenary power, and towards greater equity would be a doctrinal approach where immigration law is disaggregated to afford greater constitutional protections when issues of liberty are at stake. Similarly, if rule of law principles recognized the historic racialized harms of immigration law and policy and reflect concern for equality and morality, immigrant law cases involving detention could be decided differently.

Amendment, and with limitations, the Sixth Amendment. *See* Kanstroom, *supra* note 222, at 1466. While this discussion does not address the right to counsel, Kanstroom's frame is relevant to the question of substantive due process rights of immigration detainees because their detentions live at the crossroads of criminal and civil immigration law, could be characterized as collateral consequences of attempting to seek protection (not even collateral consequences of criminal conduct), and fall within what the *Padilla* Court recognized was a grey zone where immigration law is not purely civil, even if not formally doctrinally criminal.

228. Michael Kagan, *Shrinking the Post-Plenary Power Problem*, 68 FLA. L. REV. F. 59, 64 (2016).

229. *Id.*; *see also* Johnson, *supra* note 5, at 38.

230. Kagan, *supra* note 228, at 66–67.