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ASSESSING THE "PROPER JUDICIAL ROLE" IN REVIEWING IMMIGRANT DETENTION

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I. INTRODUCTION

The United States leads the world in the number of immigrants detained. On any given day, the United States administratively detains over 30,000 immigrants.[1] While immigrant detention has been a part of American policy for decades, the scope and usage of detention has greatly expanded.[2] This expansion reflects changes in American policy toward immigrants and the ability of the legislative and the executive branches of government to develop immigration law and policy without much interference from the judicial branch.[3] Immigrant detention is governed by the Immigration and Naturalization Act ("INA").[4] The INA prescribes for mandatory and discretionary detention of immigrants by the Secretary of Homeland Security and the Attorney General.[5] Three of the main provisions for immigrant detention are: 8 U.S.C. 1225(b), 8 U.S.C. 1226(a), and 8 U.S.C. 1226(c). Under these provisions, an immigration officer may detain any immigrant arriving at the borders who is not clearly and beyond a doubt entitled to entry,[6] or any immigrant who is

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1. *United States Immigration Detention*, GLOBAL DETENTION PROJECT (May 2016), https://www.globaldetentionproject.org/countries/americas/united-states; *see also ERO Facts and Statistics*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT 1, 3 (Dec. 12, 2011), http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf.

2. *See generally* Lenni B. Benson, *As Old as the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11 (2010) (providing an in-depth historical account of the development of increased detention).

3. In 1996, the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act made amendments to the Immigration Nationality Act (contained in Title 8 of the U.S. Code) that drastically increased the use of detention. Pub. L. No. 104-132, 110 Stat. 1214 (1996); Pub. L. No. 104-208, 110 Stat. 3009–546 (1996). These amendments widened the definition of an aggravated felony, broadened the use of mandatory detention by applying it to certain crimes, asylum seekers, and noncitizens with final orders of removal. 8 U.S.C. §§ 1225(b), 1226(a), 1226(c) (2011); Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than "Enemy Combatants" and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1837 (2011); *see also* Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POL'Y INST. 1, 1–11 (Jan. 2013), http://www.migrationpolicy.org/research/immigration-enforcement-united-states-rise-formidable-machinery (discussing the growth and expansion of immigration enforcement policies). The terrorist attacks of September 11, 2001 led to the Patriot Act, which allowed for detention double the time allowable of a noncitizen without removal proceedings or criminal charges. Pub. L. No. 107-56, 115 Stat. 272 (2001); *see* Sayed, *supra*, at 1836–44; Benson, *supra* note 2; D'vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History*, PEW RES. CTR. (Sept. 30, 2015), http://www.pewresearch.org/fact-tank/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/; *see also Immigration Detention 101*, DETENTION WATCH NETWORK, https://www.detentionwatchnetwork.org/issues/detention-101 (last visited Apr. 20, 2018).

4. *See* 8 U.S.C. §§ 1225(b), 1226(a), 1226(c) (2011).

5. *Id.*

6. 8 U.S.C. § 1225(b)(2)(A) (2011).

already present in the United States and is subject to removal.[7] The strongest detention provision used is 8 U.S.C. 1226(c), which mandates detention of any immigrant with a criminal background.[8] For years academics have called for substantive and procedural reform to the detention of immigrants.[9] Yet, the expansion has gone virtually uninterrupted.

The Supreme Court recently decided *Jennings v. Rodriguez*, a case involving a challenge to immigrant detention.[10] Before reaching the Supreme Court, in *Rodriguez v. Robbins*,[11] the Ninth Circuit Court of Appeals held that there is an implicit limit of reasonableness on the detention of immigrants, in order to avoid a violation of the Due Process Clause of the Constitution.[12] The Ninth Circuit held that every six months, immigrants detained by the government are entitled to a bond hearing, where the government has the burden to show by clear and convincing evidence that the immigrant is either a danger to the public or a flight risk.[13] If the government does not satisfy its burden, the immigrant should be released on bond.[14] On appeal to the Supreme Court, the government argued that the Ninth Circuit "overstep[ped] the proper judicial role," and that the Ninth Circuit's ruling "conflicts with th[e Supreme] Court's longstanding rule that the political Branches . . . have plenary control over which aliens may physically enter the United States and under what circumstances."[15] The government's argument that the Ninth Circuit overstepped the proper judicial role raises a difficult question: what is the proper judicial role in reviewing immigrant detention?

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7. 8 U.S.C. § 1226(a) (2011).

8. 8 U.S.C. § 1226(c) (2011).

9. *See generally* Brian G. Slocum, *Canons, the Plenary Power Doctrine, and Immigration Law*, 34 FLA. ST. U. L. REV. 363, 365 (2007) [hereinafter Slocum, *Canons*] ("A large part of immigration scholarship has been focused on the goal of ensuring that the government treats aliens fairly."); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (discussing how courts used procedural due process as a surrogate for substantive rights and noting that procedural surrogates stunted the development of needed sound immigration law).

10. Jennings v. Rodriguez, 138 S. Ct. 830 (2018). This Note does not fully address the holding or implications of *Jennings* because *Jennings* was decided by the Court after this note was written. *Jennings* deserves a thorough analysis at a later date.

11. Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (note the name change from Robbins to Jennings reflects a change in the agency official in charge of the detention).

12. *Id.* at 1069.

13. *Id.* at 1070–73.

14. *Id.*

15. Petition for Writ of Certiorari at 10, Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

In modern immigration case law from the Supreme Court, a division exists in regard to the proper judicial role. In a leading case on immigrant detention, *Zadvydas v. Davis*, two competing views on the role of the judiciary are presented.[16] On one end of the spectrum is Justice Kennedy, who advocates for a narrow role for the judiciary in the immigration context.[17] On the other end is Justice Breyer, who uses statutory interpretation and the canon of constitutional avoidance to find that there is a limit of reasonableness on the detention at issue in *Zadvydas*.[18] Yet, both of these conceptions of the judicial role are unsatisfying because both refuse to review the statute for its constitutionality. This Note argues that courts, specifically the Supreme Court, should rule on the constitutionality of immigrant detention, as opposed to deferring to the other branches or using statutory interpretation. This Note further tries to understand why courts try to avoid a constitutional holding in a situation where there are serious constitutional questions.

This work is organized as follows: Part II will discuss the view Justice Kennedy promoted in his dissenting opinion in *Zadvydas* about the proper judicial role in reviewing immigrant detention. This is the view the government presented to the Supreme Court in *Jennings*. Here, the proper judicial role is narrow and circumscribed for two primary reasons: a robust concept of plenary power, and perceived institutional shortcomings of the judicial branch that make it ill-suited to resolve these issues. This section will also present rebuttals to these justifications by arguing the scope of the inquiry is not immigration policy as a whole; rather, the inquiry for courts is the narrower question of whether a detention scheme that could result in the indefinite, possibly permanent, deprivation of liberty violates the Due Process Clause. By shifting the scope of the inquiry, the force of the plenary power doctrine is weakened, and the justiciability and institutional concerns are reduced. Part III presents an opposing view that Justice Breyer in *Zadvydas*, and the Ninth Circuit in *Jennings*, share about the proper judicial role. In this view, courts review detention statutes with a thumb on the scale. Courts use canons of statutory interpretation to enforce constitutional limits. This section will further explore why courts may feel confined to using tools of statutory interpretation and why statutory interpretation may not provide enough protection for immigrants. Part IV

16. Zadvydas v. Davis, 533 U.S. 678 (2001).
17. *Id.* at 705–06, 725 (Kennedy, J., dissenting).
18. *Id.* at 689 (majority opinion).

presents an idea of what the role of the judicial branch should be in immigrant detention. This section argues that courts, including the Supreme Court, should review laws relating to immigrant detention for constitutionality and act as a safeguard against the deprivation of liberty. This section discusses why there is a need for judicial resolution. The constitutional harm in immigrant detention is serious. Courts have the duty and the power to protect individual rights in this situation, and by abdicating this duty to meaningfully review immigrant detention schemes for constitutionality, courts damage their own legitimacy. Finally, this section attempts to suggest changes that would make the detention scheme constitutional.

II. JUSTICE KENNEDY'S VIEW ON THE PROPER ROLE OF THE COURT IN IMMIGRANT DETENTION

This part will discuss the view of the judicial role that Justice Kennedy presented in *Zadvydas*, and what supports this narrow view of the judicial role, specifically a strong version of the plenary power doctrine and institutional weakness of the Court. This section challenges these justifications by arguing that although these justifications may be true in the immigration context generally, they are inapplicable when indefinite detention is at stake. Further, the argument that plenary power prevents courts from acting is particularly weak because the idea of a robust plenary power is outdated.

In *Zadvydas*, Justice Kennedy authored a dissent joined by the Chief Justice Rehnquist, Justice Scalia, and Justice Thomas.[19] Justice Kennedy wrote that by finding ambiguity in a clear statute and invoking the canon of constitutional avoidance the majority of the Court caused, "systemic dislocation in the balance of powers" and that the Court's interpretation of its "proper authority" raised serious constitutional questions.[20] Further, Justice Kennedy stated the Court, "[i]n the guise of judicial restraint" substituted its judgment for the discretion and authority of the Executive.[21] Justice Kennedy acknowledges that, "lengthy, even unending, detention" may in certain situations raise a constitutional question.[22] However, he says the Court's statutory construction has no textual basis and is contrary to the purpose of Immigration

19. *Id.* at 705 (Kennedy, J., dissenting).
20. *Id.* (rejecting the role the Court assumed in reviewing immigrant detention).
21. *Id.* at 705–06.
22. *Id.* at 706.

and Nationality Act.[23] In his view, Congress had taken enough steps in the procedure provided in the initial removal hearings to protect against arbitrary detention.[24] Justice Kennedy's view, although not accepted, is influential, as evidenced by three other Justices joining his dissent. Additionally, this is the view the government argued for in *Jennings*.[25]

In sum, there are two primary justifications for a narrow judicial role in reviewing immigrant detention. First, the power over immigration is a part of the foreign affairs power. Thus, the plenary power doctrine prevents courts from acting. Second, justiciability concerns, such as the political question doctrine, and in a broader sense, institutional limits of the judiciary, justify a narrow role for the judiciary in immigration.

A. A Robust Plenary Power in Immigration

The usage and scope of the plenary power doctrine in immigration has been voluminously written about and discussed.[26] Plenary power in immigration exclusion decisions was prominent in an early decision, *Chae Chan Ping v. United States*.[27] In *Chae Chan Ping*, the Supreme Court held "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory [and] is a proposition which we do not think open to controversy." [28] The Court also held that the exclusion decisions are "not questions for judicial determination." [29] In its holding, the Court forcefully insisted that Congress has broad powers in dealing with foreign affairs, which included immigration. A few years later, the Court ruled in *Fong*

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23. *Id.* at 706–07.

24. *Id.* at 706–07, 718–19.

25. Petition for Writ of Certiorari, *supra* note 15, at 10.

26. *See e.g.,* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 50–62 (5th ed. 2009); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545, 550–54 (1990) (discussing a classic conception of plenary power and a more modern view); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1994) [hereinafter Legomsky, *Ten More Years*]; Ernesto Hernández-López, Kieymba, *Guantánamo, and Immigration Law: An Extraterritorial Constitution in a Plenary Power World*, 2 UC IRVINE L. REV. 193, 194–204 (2012).

27. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889). At issue in *Chae Chan Ping* was legislation Congress passed prohibiting Chinese immigrants from reentering the United States. Chinese laborers who attempted to return to the United States were denied entry. As a result, the Chinese laborers sued the U.S. government. *Id.*

28. *Id.* at 603.

29. *Id.* at 609.

Yue Ting v. United States that "[t]he power of Congress . . . to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers."[30] These early cases laid the framework for broad control of immigration by the political branches. Based on these precedents, the Court was deferential to the judgment of the political branches on immigrant exclusion issues for many years.[31]

Robust plenary power in immigration is often justified by the Court on the basis that control over immigration is part of the foreign affairs power of the government. The Court has held:

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.[32]

From a classical plenary power perspective, the Constitution, through direct textual grants, vests the power over foreign affairs in the Legislative and Executive branches. Based on these textual delegations, the power has been vested in the political branches and there is no role for the Court.[33] Further, there are vestiges of the *Curtiss-Wright* view of the Executive power in foreign affairs. Under the *Curtiss-Wright* view, the President is the "sole organ" in foreign affairs and the Court's role is limited.[34] According to the Court in *Curtiss-Wright*, the President must have discretion and

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30. Fong Yue Ting v. United States, 149 U.S. 698, 713–14 (1893).

31. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). In *Knauff*, a German woman working in the United States sought naturalization after having married a United States citizen. Knauff was detained on Ellis Island and subsequently excluded by immigration officials on national security grounds. The Supreme Court affirmed the executive branch decision stating the following: "[T]he decision to admit or to exclude an alien may be lawfully placed with the President . . . . The action of the executive officer under such authority is final and conclusive. . . . [I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *Id.* at 543.

32. Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).

33. U.S. CONST. art. I, § 8. Article I gives Congress the power to declare war, to raise and support armies, to provide and maintain a navy, and to confirm appointments of ambassadors and treaties. U.S. CONST. art. II, § 2. Article II vests in the President the commander in chief power over the Army and the Navy, the power to appoint and receive ambassadors, negotiate treaties, and take Care that the laws be faithfully executed.

34. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–20 (1936).

the Court must be limited to avoid embarrassment.[35] As a general observation, there is a domestic component of immigration policy. Immigration involves foreign nationals entering the domestic United States and becoming citizens. It seems that to classify immigration as wholly under the foreign affairs power is probably incorrect. This point raises particularly interesting questions about the roles of the Executive and Legislature in relation to each other that are not fully discussed in this paper.[36]

B. Limiting the Plenary Power Doctrine

It is apparent that the Court is still unwilling to second guess the political branches decisions to exclude immigrants.[37] The longstanding precedent and attitude of the Court shows that the decision to exclude is fundamentally a job for the political branches. But there are issues with this, justifying a limited role for the Court in reviewing immigrant detention. Immigrant detention is distinct from immigration exclusion decisions and policy as a whole.

The lens being used to justify a small role for courts is too wide. If the focus is on immigration policy in general, courts should have a limited role. Primarily for the reasons the plenary power exists, there are other textual grants in the Constitution over this power. Additionally, as an institution, courts, specifically the Supreme Court, lack the ability to make policy in immigration.[38] However, if the focus is on the review of the detention itself, the plenary power justification is weakened. Concededly, there is a risk of looking at detention out of context. As Justice Kennedy argues, detention is leverage for the United States in international negotiations and

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35. *Id.* The Court stated that in regards to foreign affairs, "[i]t is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom . . . ." *Id.* at 320. The Court also quoted an earlier case stating, "As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. *We should hesitate long before limiting or embarrassing such powers*." *Id.* at 322 (emphasis added by *Curtiss-Wright* Court) (quoting Mackenzie v. Hare, 239 U.S, 299, 311 (1915)). For more information and analysis on the *Curtiss-Wright* precedent, see Edward A. Purcell Jr., *Understanding* Curtiss-Wright, 31 LAW & HIST. REV. 653 (2013); Sarah H. Cleveland, *The Plenary Power Background of* Curtiss-Wright, 70 U. COLO. L. REV. 1127 (1999).

36. For a discussion of the division of immigration power between the legislature and executive, see Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

37. Legomsky, *Ten More Years*, *supra* note 26, at 934.

38. *See infra* Part II (C).

the Court should not interfere with that.[39] But, this does not overcome the deeply held belief that individuals should be free from detention. The Court has acknowledged in other civil detention scenarios that the freedom from restraint is at the core of American fundamental values.[40] Accordingly, when liberty is at stake, a strong form of plenary power is illogical if the political branches are the actors orchestrating the detention scheme. In his article, *As Old as the Hills: Detention and Immigration*, Professor Benson asks, "[w]hat forces might limit the growth of detention?"[41] The judicial branch could be a force that limits the growth of detention.

Further, the plenary power has been weakened in other areas under the umbrella of foreign affairs. In an analogous area to immigration, the wartime powers, plenary power has not stopped the Court from reviewing actions of the political branches for constitutionality. As in immigration, plenary power is prominent in the war power context because of the textual grants in the Constitution.[42] However, the plenary power doctrine did not stop the Court from reviewing the detention of enemy combatants at Guantanamo Bay.[43] Many scholars have discussed the implications of these cases.[44] For the purpose of this paper it is useful to acknowledge that the Court "reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."[45] In this instance, the plenary power doctrine was undercut, and there is a willingness of the Court to review cases involving foreign affairs when there is a grave rights component to the case.

Although Justice Kennedy's view on the Court's role in immigration was convincing to a few Justices in 2001, it may be

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39. Zadvydas v. Davis, 533 U.S. 678, 725 (2001) (Kennedy, J., dissenting).

40. *See* Foucha v. Louisiana, 504 U.S. 71 (1992) (holding that a Louisiana statute allowing the continued detention of an individual with mental illness violates the Fourteenth Amendment); *see also* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm . . . .").

41. Benson, *supra* note 2, at 54.

42. The Constitution vests in Congress the power to declare war, and to raise and fund an army and navy. U.S. CONST. art. I, § 8. Simultaneously, the Constitution vests in the President the commander in chief power over the army and navy. U.S. CONST. art. II, § 2.

43. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rasul v. Bush, 542 U.S. 466 (2004); Boumediene v. Bush, 553 U.S. 723 (2008).

44. *See, e.g.*, Jennifer L. Milko, *Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance*, 50 DUQ. L. REV. 173 (2012); Brian G. Slocum, The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law, 84 DEN. U. L. REV. 1017 (2007); Daniel S. Severson, *The Court and the World: An Interview with Associate Justice Stephen G. Breyer*, 57 HARV. INT'L L.J. 253 (2016).

45. *Hamdi*, 542 U.S. at 535.

outdated. Part of this is related to the erosion of the plenary power doctrine in other areas, such as wartime power. But, even in modern immigration law, it seems that a strong plenary power argument may be outdated and unconvincing. In three of the most relevant cases on immigrant detention, *Zadvydas v. Davis*, *Demore v. Kim*, and *Clark v. Martinez*,[46] and in most Appellate Circuits, courts have not recognized the plenary power as stopping the courts from reviewing the statutes. There is an early case in immigrant detention that used the plenary power to avoid making a holding on the constitutionality of a detention. In 1953, the Court held in *Shaughnessy v. United States ex rel. Mezei*,[47] that a non-citizen facing exclusion is not entitled to any due process, even if the result is indefinite detention.[48] The Court held that exclusion was a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."[49] *Zadvydas* did not overrule *Mezei*, rather it distinguished the cases by drawing a line between being denied entry at the border and being detained once entered.[50] In *Jennings*, the government cites and relies on the holding in *Mezei*.[51] However, the government's reliance on *Mezei* may be misplaced, as it has not been as relevant in modern immigration cases due to the use of constitutional avoidance.[52]

Another important modern immigration case is *Demore v. Kim*.[53] In *Demore v. Kim*, the Court held that immigrants with

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46. Zadvydas v. Davis, 533 U.S. 678 (2001); Demore v. Kim, 538 U.S. 510 (2003); Clark v. Martinez, 543 U.S. 371 (2005).

47. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). In *Mezei*, an Eastern European immigrant, Ignatz Mezei had lived in the United States for more than 25 years. He left the country to visit his dying mother in Romania, was denied entry into Romania, and remained in Hungary for 19 months. When he returned to the United States, he was permanently denied entry on the basis of national security. Mezei was denied entry to Britain, France, and approximately a dozen other countries. After 21 months of living on Ellis Island, he applied for habeas corpus arguing he was being unlawfully detained.

48. *Id.* at 215.

49. *Id.* at 210.

50. *Zadvydas*, 533 U.S. at 693; *see also* Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 145 (2015) ("In *Zadvydas*, the Court avoided directly overruling *Mezei* by distinguishing it.").

51. Petition for Writ of Certiorari, *supra* note 15, at 10.

52. Kagan, *supra* note 50, at 145.

53. Demore v. Kim, 538 U.S. 510 (2003). Kim was a citizen of South Korea who became a lawful permanent resident of the United States in 1986. In 1996, Kim was convicted of first-degree burglary in a California state court; the following year, he was convicted of a second crime, petty theft with priors. The Immigration and Naturalization Service (INS) administratively determined that Kim was removable because of his convictions. Removal proceedings were commenced, and pursuant to 8 U.S.C. §1226(c), the INS detained Kim. Kim filed a writ of habeas corpus challenging the constitutionality of his detention. He claimed his due process rights were violated because the INS had not determined he was a flight risk or a danger to society. The district court held the statute

criminal records could be detained during their removal proceedings.[54] However, the Court was not wholly deferential to the political branches. Underlying the Court's reasoning was a strong presumption that the majority of these types of detentions lasted less than 90 days.[55] The government recently submitted to the Supreme Court a letter explaining that the figures they presented to the Court regarding the time of detention in *Demore* were incorrect and immigrants are actually being detained a lot longer than 90 days.[56] The third case is *Clark v. Martinez*.[57] Martinez and her husband entered the United States from Cuba during the Mariel boatlift in 1980.[58] They were allowed to temporarily enter the United States on humanitarian parole, but never became permanent residents because of their prior criminal convictions.[59] Based on their past convictions they were ordered removed.[60] They petitioned for habeas corpus relief. The Supreme Court held that inadmissible immigrants ordered removed cannot be held indefinitely after the initial 90-day removal period.[61] The Court held that in order to avoid constitutional problems, the statute must be read to have limits of reasonableness.[62]

More interesting is that the five Circuits that have addressed mandatory detention under 1226(c) have held that, read in the light of the Constitution, there must be a limit on detention.[63] The

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was unconstitutional and ordered Kim released on bond. The Ninth Circuit Court of Appeals affirmed. The Supreme Court reversed the Ninth Circuit, holding that deportable immigrants can be detained during their removal hearings. Writing for the majority, Justice Rehnquist focused on the fact that having deportable immigrants with criminal histories was a danger that Congress properly addressed. The Court distinguished this case from *Zadvydas* because the detention in *Zadvydas* was indefinite; here, the periods of detention were typically less than 90 days.

54. *Id.* at 512.

55. *Id.*

56. U.S. DEP'T. OF JUSTICE, OFFICE OF THE SOLICITOR GEN., RE: DEMORE V. KIM, S. CT. NO. 01-1491 (2016); Jess Bravin, *Justice Department Gave Supreme Court Incorrect Data in Immigration Case*, WALL ST. J. (Aug. 30, 2016, 3:48 PM), http://www.wsj.com/articles/justice-department-gave-supreme-court-incorrect-data-in-immigration-case-1472569756. Based on the letter, it actually seems like the Court's holding in *Demore* was probably wrong.

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

58. *Id.* at 374.

59. *Id.*

60. *Id.*

61. *Id.* at 386.

62. *Id.* at 385.

63. *See* Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005); Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Diop v. ICE/Homeland Sec., 656 F.3d 221 (3d Cir. 2011); Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469 (3d Cir. 2015) (holding that indefinitely detaining an immigrant in a prison is a violation of the Due Process Clause); Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015); Reid v. Donelan, 819 F.3d 486, 498 (1st Cir. 2016).

Ninth Circuit has held that detention cannot be unreasonably long or there is a violation of due process.[64] The Third Circuit heard the case *Diop v. ICE/Homeland Security* that concerned a Senegalese individual being detained under 8 U.S.C. § 1226(c).[65] The petitioner, Cheikh Diop, was detained for 1,072 days.[66] The Third Circuit concluded, "the statute authorizes only detention for a reasonable period of time."[67] Further, the Third Circuit held that the Due Process Clause refers to "'any person,' which means that aliens, no less than native-born citizens, are entitled to its protection."[68] The Sixth Circuit has also held that INS may detain an immigrant for a reasonably required time to complete removal, but if the process takes an unreasonably long time, the detainee may seek habeas review.[69] However, there is a narrow split between the Circuits on what is considered reasonableness. The Ninth and Second Circuits have held that six months is the maximum time allowed for detention that is reasonable.[70] The Third, Sixth, and First Circuits concluded that in reviewing reasonableness, a rigid six-month rule is inappropriate; instead, these Circuits accepted an individualized approach.[71] The Supreme Court's recent decision in *Jennings v. Rodriguez* will impact the decisions in these Circuits because the Supreme Court found that 8 U.S.C. § 1226(c) was not ambiguous.[72]

C. Institutional Shortcomings that Prevent the Judiciary from Answering Immigration Questions

A restricted role for the judicial branch in immigration is also justified on the basis that, as an institution, courts cannot balance and appreciate the policy choices involved in immigration.[73] These

64. *Tijani*, 430 F.3d 1241; *see also Robbins*, 804 F.3d 1060.

65. *Diop*, 656 F.3d 221; *see also Chavez-Alvarez*, 783 F.3d 469 (holding that indefinitely detaining an immigrant in a prison is a violation of the Due Process Clause).

66. *Diop*, 656 F.3d at 226.

67. *Id.* at 223.

68. *Id.* at 231.

69. Ly v. Hansen, 351 F.3d 263 (6th Cir. 2003).

70. Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018); Lora v. Shanahan, 804 F.3d 601 (2d Cir. 2015).

71. Reid v. Donelan, 819 F.3d 486, 498 (1st Cir. 2016); *see also* Chavez-Alvarez v. Warden York Cty. Prison, 783 F.3d 469, 474 (3d Cir. 2015).

72 Jennings v. Rodriguez, 138 S. Ct. 830, 846 (2018).

73. *See* Matthews v. Diaz, 426 U.S. 67, 81 (1976) ("Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary."); Daniel R. Schutrum-Boward, *United States v. Texas and Supreme Court Immigration Jurisprudence: A Delineation of Acceptable Immigration Policy Unilaterally Created by the Executive Branch*, 76 MD. L. REV. 1193, 1206–07 n.119 (2017).

justifications echo that of the political question doctrine. Professor Legomsky has identified seven justifications for the application of the plenary power doctrine, which inhibits the Supreme Court from reviewing immigration policy.[74] One of the most important justifications is that immigration choices are viewed as political questions.[75] Turning back to the *Zadvydas* case, Justice Kennedy argues three main points in his criticism of the majority's outcome. In his first point, Justice Kennedy argues that judicial orders mandating the release of a detained immigrant will undermine the nation's ability to "speak with one voice on immigration and foreign affairs matters."[76] Next, he states there are substantial interests in protecting the community from immigrants with criminal histories.[77] Finally, he states the six-month release period creates perverse incentives.[78]

Justice Kennedy states that the majority's decision will require the Executive to "surrender its primacy in foreign affairs and submit reports to the courts respecting its ongoing negotiations in the international sphere."[79] This critique relates back to the previous discussion of plenary power, which is a part of the political question analysis. However, Justice Kennedy's point is more specific. He argues that the Court's opinion will create ripple effects and will interfere with foreign affairs relationships.[80] Justice Breyer responds in the majority opinion by saying it is unclear how the judicial review of individual detention would impact these negotiations, and further, judges can handle it with the appropriate sensitivity.[81] It is somewhat unclear what Justice Kennedy meant when arguing that review by courts will impact international negotiations, but from other portions of his dissent, it seems that he meant the United States can use immigrants being detained as leverage in international negotiations; yet, that seems problematic. Holding individuals indefinitely to impact any type of foreign affairs negotiation is a dangerous and unfair idea.

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74. LEGOMSKY & RODRÍGUEZ, *supra* note 26, at 114.

75. *Id.*; *see also* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 261 (1984) (providing a general discussion of how the political question doctrine operates as an argument for plenary power in immigration). *See generally* Louis Henkin, *Is There a "Political Question" Doctrine?* 85 YALE L.J. 597 (1976) (providing a general overview and discussion of the political question doctrine).

76. Zadvydas v. Davis, 533 U.S. 678, 711 (2001) (Kennedy, J., dissenting).

77. *Id.* at 711, 713.

78. *Id.* at 711–12.

79. *Id.* at 725.

80. *See id.* at 711–12.

81. *Id.* at 696 (majority opinion).

Justice Kennedy's broader point in his dissent is that as an institution, the Court is just not good at balancing foreign affairs concerns.[82] In his opinion, he states that the Court's six-month rule will incentivize immigrants to hinder or hurt reparation negotiations or removal proceedings.[83] The Court is not privy to the confidential information the political branches have.[84] An additional consideration here is that elected officials are better able to make foreign affairs choices because they are accountable to the citizens. It is more democratic to have elected officials of the legislature and the executive make foreign affairs decisions.[85] In contrast, judges and Justices in the federal system are appointed for life and not politically accountable.[86] Additionally, having elected officials in control of foreign affairs decisions allows for faster change when needed. Citizens can change the direction of foreign affairs by electing a different party or person with different ideas. In contrast, courts may be slow and unlikely to make rapid changes.

Finally, Justice Kennedy presents an argument that the Court risks legitimacy by making decisions in immigration.[87] He mentions a story about an immigrant that had a criminal conviction, who committed a rape while he was released on bail waiting to be removed.[88] Professor Benson asked what forces might limit the growth of immigrant detention.[89] Professor Benson asked this question after providing many examples of how fear of immigrants, largely unjustified, led to the expansion of detention.[90] The fear is that an immigrant who is not detained could pose a danger to the community, and releasing that immigrant would risk the safety of citizens. What actor would be willing to take that risk? Justice Kennedy seems to state that courts should not be the actors taking that risk. Further, by making decisions in immigration, which is considered foreign affairs, the Court risks

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82. *Id.* at 711, 718, 725.

83. *Id.* at 711–12 (Kennedy, J., dissenting).

84. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) ("[The President] has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources . . . . Secrecy in respect of information gathered . . . may be highly necessary, and the premature disclosure of it productive of harmful results.").

85. Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law,* 71 VA. L. REV. 1071, 1170 (1985).

86. *Id.*

87. Zadvydas v. Davis, 533 U.S. 678, 715–17 (2001) (Kennedy, J., dissenting).

88. *Id.* at 715–16.

89. Benson, *supra* note 2, at 54.

90. *Id.*; *see also* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 289 (2004).

the political branches choosing not to follow what the Court decides. Again, this justification is similar to the reasons behind justiciability doctrines. The Court has to carefully weigh how big a problem it would create if it dealt with the foreign affairs questions, compared to how big an issue it would create if the Court did not resolve it.

D. Rebutting the Institutional Shortcomings Argument

The main flaw with these justifications is that they, again, conflate immigration policy generally with the indefinite detention of immigrants. These are two different inquiries. Setting immigration law and policy is a job for the political branches. However, the vindication of an individual right is something courts do all the time. By reviewing a detention for its constitutionality, courts are conducting a routine analysis. One of the arguments against normal judicial review and analysis of detentions is the citizenship status of immigrants. It is argued that aliens in the United States are guests, so they are asking for privileges and are not entitled to rights.[91] The Court's precedent does not support this view. The Court has drawn a line between immigrants that have entered U.S. territory and immigrants stopped at the border. The Court has held that once immigrants enter into the U.S., they are entitled to due process.[92] However, aliens who have not passed "through our gates," are not entitled to due process.[93] This is another area that may have been eroded by an extraterritorial application of the Constitution at Guantanamo Bay.

The prudence and legitimacy concerns of the Court in this area are real. However, the risk of the political branches not following the Court's holding or the risk of bad results from a holding, have to be weighed against the rights that are at stake. The same concerns were present in the Guantanamo cases, which involved the wartime powers of the political branches.[94] But, the Court weighed the need for a judicial resolution and the protection of individual rights against the possible risk of damage to the Court that could result from a bad decision. By continually failing to act to protect the rights of immigrants, the Court risks losing

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91. LEGOMSKY & RODRÍGUEZ, *supra* note 26, at 114.

92. *See* Plyler v. Doe, 457 U.S. 202, 215 (1982); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976).

93. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953).

94. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 54 U.S. 466 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 533 U.S. 723 (2008); *see also* Sayed, *supra* note 3, at 1844–47 (discussing the Guantanamo cases).

legitimacy as well. In his book, *The American Supreme Court*, Professor McCloskey gives a history of the Supreme Court.[95] He notes that some of the low points in the Court's history are when the Court failed to protect individual rights, such as in the *Dred Scott* case, *Plessy v. Ferguson*, and the *Korematsu* case.[96] By not acting, the Court is still acting in the immigrant detention situation, because it is allowing the deprivation of liberty to continue.

III. JUSTICE BREYER'S VIEW OF THE COURT IN IMMIGRANT DETENTION

This Section will focus on a broader, but still limited, view of the proper judicial role that Justice Breyer, writing for the majority, presented in *Zadvydas*. This is the role that the Ninth Circuit took on in *Jennings*.[97] The essence of this view is that courts use their discretion in statutory interpretation to avoid raising doubts about the constitutionality of the statute. This section will discuss why courts may constrain themselves to statutory interpretation instead of constitutional interpretation. Namely, the complexity of the administrative regime regulating immigration and the background influence of plenary power. Further, this section will analyze the cost of taking a statutory approach to the detention question.

Justice Breyer's view is that the Court has a duty to interpret statutes in order to avoid violations of the constitution in immigration law.[98] Justice Breyer states that a "cardinal principle" of statutory interpretation is that the Court should ascertain a construction of the statute that avoids constitutional questions.[99] He writes that the Court has "read significant limitations into other immigration statutes in order to avoid their constitutional invalidation."[100] Justice Breyer writes that a statute authorizing indefinite, possibly permanent, detention would raise serious constitutional issues about due process.[101] Accordingly, in the view of the Court, "the statute, read in light of the Constitution's demands . . . . does not permit indefinite detention."[102] Justice

95. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (4th ed. 2005).
96. *Id.* at 62, 135, 141.
97. Rodriguez v. Robbins, 804 F.3d 1060 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).
98. Zadvydas v. Davis, 533 U.S. 678, 689 (2001).
99. *Id.*
100. *Id.*
101. *Id.* at 690.
102. *Id.* at 689.

Breyer provides a review of limits on civil detention and criticizes the "sole procedural protections available" to aliens, which are administrative hearings where the aliens bear the burden of proof.[103] Justice Breyer finds that the congressional intent is not clear and accordingly, the Court can use the canon of constitutional avoidance.[104] Justice Breyer then reads an implicit limit of six months into the statute for immigrant detention.[105]

In confronting the plenary power argument, Justice Breyer states, "that power is subject to important constitutional limitations."[106] In addressing the institutional concerns about the Court hurting repatriation negotiations, Justice Breyer states it is unclear how the court reviewing immigration detention with the "appropriate sensitivity" would interfere with the negotiations.[107] Further, in regards to the expertise and information superiority of the Executive branch argument, Justice Breyer responds, "that courts can take appropriate account of such matters without abdicating their legal responsibility to review the lawfulness of an alien's continued detention."[108] Justice Breyer hints that the statute, if accepted as authorizing indefinite detention, would be unconstitutional.[109] He is careful to say that the congressional intent is unclear, so the Court can use the canons of construction to resolve the ambiguity.[110] But would the Court find the statute to be unconstitutional if it clearly mandated indefinite or permanent detention? Or would the Court use the plenary power doctrine to avoid the issue? This is a shortcoming of the constitutional avoidance canon. It may seem like a good solution to resolve a constitutional violation without the Court risking much or binding itself to a constitutional holding, but it creates difficult questions. Justice Breyer seems to present an argument for the Court to review the statute for constitutionality, but then says it can be fixed with a six-month limit on the detention.

A. Why the Constitutional Avoidance Canon?

The constitutional avoidance canon is a substantive canon of statutory interpretation that allows courts to put a thumb on the

103. *Id.* at 692.
104. *Id.* at 689–90, 696–99.
105. *Id.* at 701.
106. *Id.* at 695.
107. *Id.* at 696.
108. *Id.* at 700.
109. *Id.* at 690.
110. *Id.* at 689–90, 696–99.

scale to accept one reading of a statute and reject another.[111] In an influential article from 1990, Professor Motomura stated that the application of the constitutional avoidance canon can be characterized as the "'underenforcement' of constitutional norms for prudential reasons."[112] Although his article was written before *Zadvydas*, *Demore*, and *Martinez,* his idea is shown in these cases. When the Court can, it will narrow the question to avoid infringing on the other branches or creating controversy. Professor Motomura argued that by using the constitutional avoidance canon, the Court has created what he calls "phantom constitutional norms."[113] The phantom norms are created because the Court uses one set of constitutional, or sometimes just public policy norms when applying the avoidance canon.[114] But, if the Court is ever forced to confront the constitutional question, it uses a different set of constitutional norms, namely the plenary power.[115] Accordingly, the first set of norms are illusive and unreal. In response to the criticisms of using substantive canons, such as the constitutional avoidance canon, Professor Slocum has argued that the use of the constitutional avoidance canon actually provides protection to immigrants.[116] He introduces what he calls the "'lowest common denominator' principle," which holds that through consistent statutory interpretation, immigrants are afforded greater rights, even if they are not explicitly receiving constitutional protections.[117] There are convincing components to Professor Slocum's argument. It is better to have something than nothing in terms of protecting immigrants. But, it is hard to understand why the Court still chooses statutory interpretation in a situation where constitutional rights are being deprived, and the majority of judges do not adhere to the old version of the plenary power.

1. The complexity of immigration and typical justifications for deference to agencies.

Courts may be more comfortable with the constitutional avoidance canon because of the complicated administrative scheme that manages immigration. For the purposes of this paper, the

111. *See* Slocum, *Canons*, *supra* note 9, at 366; *see also* Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 813 (2010).

112. Motomura, *supra* note 26, at 563.

113. *Id.* at 549.

114. *Id.*

115. *Id.* at 549–50.

116. Slocum, *Canons*, *supra* note 9, at 376.

117. *Id.* at 393.

discussion is limited to the administrative framework governing detention, with a discussion of removal proceedings. An important piece of the detention framework is the administrative adjudication called a *Joseph* hearing.[118] An ICE officer makes the initial determination that an immigrant is included in the mandatory detention scheme.[119] The *Joseph* hearing is held to determine whether the immigrant is "properly included" in the mandatory detention provision.[120] The Immigration Judge, or "IJ," can make this conclusion before or after the conclusion of the underlying removal case and may rely on the underlying merits decision in making the threshold bond decision.[121] The IJ will not consider an immigrant included in the mandatory detention category only when the IJ is convinced that "the Service is substantially unlikely to establish at the merits hearing . . . the charge or charges that . . . subject the alien to mandatory detention."[122] The immigrant may also show that he is not subject to mandatory detention because he is a citizen or he was not convicted of a felony.[123] The burden in a *Joseph* hearing is on the immigrant.[124] After a *Joseph* hearing, the immigrant may appeal to the Board of Immigration Appeals (BIA).[125] The BIA is highly deferential to the initial decision.[126]

If an immigrant meets his burden at the *Joseph* hearing, and establishes that he is not subject to mandatory detention, the IJ will conduct a bond hearing and determine whether the immigrant is a flight risk or danger to the community.[127] However, the Department of Homeland Security (DHS) may obtain an automatic stay of the release on bond by filing a notice of intent to appeal.[128] If the immigrant does not meet his burden at the *Joseph* hearing, there is no opportunity for him to challenge his detention pre-removal.[129] Habeas review is available to detainees, but because of

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118. Joseph, 22 I. & N. Dec. 799 (Bd. of Immigration Appeals 1999). Scholars have criticized the procedural defects of *Joseph* hearings. *See* Sayed, *supra* note 3, at 1849; *see also* Shalini Bhargava, *Detaining Due Process: The Need for Procedural Reform in "*Joseph*" Hearings After* Demore v. Kim, 31 N.Y.U. REV. L. & SOC. CHANGE 51, 73–76 (2006).

119. 8 C.F.R. § 236.1(d) (2016); *see also* Sayed, *supra* note 3, at 1850.

120. *Joseph*, 22 I. & N. Dec. at 800.

121. *Id.*

122. *Id.* at 806.

123. Sayed, *supra* note 3, at 1850.

124. *Id.*

125. *Id.* at 1850–51.

126. *Id.* at 1851; *see also Joseph*, 22 I. & N. Dec. at 800.

127. Sayed, *supra* note 3, at 1851.

128. *Id.* at 1857.

129. 8 C.F.R. § 1003.19(h)(1)(i)(E) (2006); *see also* Sayed, *supra* note 3, at 1851–52.

the fracturing among Circuits and the confusion over what level of deference the IJ deserves, habeas review is not uniformly applied by the courts.[130]

The reasons why courts defer to agencies in general, may also be reasons why courts prefer to make a holding based on a statutory question, as opposed to a constitutional question. Justifications for deferring to agency judgment are: agencies can develop expertise and are more politically accountable than courts.[131] In her article, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, Professor Das discusses the complicated relationship between courts and executive agencies in immigration.[132] She notes that it is still unsettled what degree of deference courts should have toward agency decisions in immigration.[133] Moreover, an invocation of the constitutional avoidance canon avoids the difficult question of what would happen if the Court found detention unconstitutional. Does the Court determine what is required for a detention scheme to be constitutional, does it go to the agency, to Congress?[134] These difficult questions make a decision based on statutory interpretation easier than a decision based on constitutional interpretation. While these questions are tough, there are modest solutions to reforming *Joseph* hearings, capable of relieving some of the procedural and substantive due process issues.[135] For example, providing better access to legal help, a translator at the hearing, and elimination of the automatic stay provision would make the *Joseph* hearings fairer. Additionally, the burden shifting the Ninth Circuit did in *Jennings* seems reasonable and is a step in the right direction.[136]

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130. Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 146–50 (2015).

131. *See* Mark Seidenfeld, *Chevron's Foundation*, 86 NOTRE DAME L. REV. 273, 310–12 (2011).

132. Das, *supra* note 129, at 150–51.

133. *Id.* at 163–66.

134. There are additional administrative hurdles, like the *Vermont Yankee* principle, that prevents a Court from imposing additional procedural requirements on an agency in rulemaking. Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519 (1978). *Vermont Yankee* also applies to agency adjudications. Pension Benefit Guarantee Corp. v. LTV Corp., 496 U.S. 633 (1990).

135. *See infra* Section IV.

136. Rodriguez v. Robbins, 804 F.3d 1060, 1086–90 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

2. Plenary power may factor into the choice between statutory interpretation and a constitutional interpretation.

Statutory interpretation is easier than constitutional interpretation because it creates less waves. Professor Sunstein has argued that courts underenforce constitutional rights using statutory interpretation for good reasons, including "the courts' limited factfinding capacities, their weak democratic pedigree, their limited legitimacy, and their likely ineffectiveness as frequent instigators of social reform."[137] Part of this is included in the discussion about deference to agencies because of their expertise and accountability. The suggestion that the judiciary is ineffective as a frequent instigator of social reform is interesting though, because there have been instances where the judiciary, specifically the Supreme Court, has been a part of instigating important social reform. However, courts rely on the political branches to respect and enforce their holdings. So, if courts, especially the Supreme Court, held that immigrant detention is unconstitutional, the realization of real change in immigration would be dependent on the actions of the legislature and executive. The canon of constitutional avoidance is a way courts can avoid intruding on the political branches. This relates back to the plenary power discussion. Academics have predicted the death of the plenary power since 1990, and largely the old view of the plenary power is gone.[138] But, in the choice between a statutory or constitutional decision, the plenary power may loom in the background of the courts' choices. Courts may want to avoid making a radical constitutional holding because there is this uncertainty about the division of power in the area. This also relates to the institutional and prudence concerns of the courts. Statutory interpretation-based holdings are less powerful in the sense that Congress is free to amend the statute. Statutory interpretation may be courts hedging their bets that their holdings either backfire or the political branches do not adhere to it.

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137. Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2113 (2005); *see also* Slocum, *Canons*, *supra* note 9, at 376; Motomura, *supra* note 26, at 563.

138. *See* Legomsky, *Ten More Years*, *supra* note 26, at 934 (revising his original prediction of the total death of the plenary power); *see also* Motomura, *supra* note 26, at 553–60 (presenting a classic view on the plenary power as well as a more modern view on the plenary power).

B. Why not the Constitutional Avoidance Canon?

Scholars have questioned the wisdom of the Court's use of the constitutional avoidance canon.[139] The constitutional avoidance canon in general is problematic when the Court uses it to dodge difficult questions that deserve real answers. But, there are situations where the use of the constitutional avoidance canon is not really controversial. For example, if a statute is ambiguous, and one reading of the statute seems to limit free speech and another reading does not limit speech, it is reasonable to accept the interpretation that does not limit speech. But, this does not appear to be what is happening in the context of immigrant detention. For example, the language of 1226(c) is not ambiguous; it explicitly states that immigrants who have been convicted of aggravated felonies shall be taken into administrative custody until they are removed.[140] The first issue is that by using the constitutional avoidance canon, courts create ambiguity where there really is not ambiguity. The second issue in using the constitutional avoidance canon is that courts just assert reasonableness and do not provide a full explanation or analysis. Professor Motomura argued the Court's questionable statutory interpretation and use of the constitutional avoidance canon in immigrant detention has confused and led to underdeveloped constitutional law.[141] He advocated for a transition to making "direct and candid" constitutional decisions.[142] The use of the constitutional avoidance canon does address the underlying problem of whether this type of detention is constitutional. As an example, by using this canon in *Zadvydas*, the Court created precedent that detention without a bond hearing is acceptable as long as the detention does not last longer than six months.[143] What makes six months a reasonable limit to hold someone without a bond hearing? The Court seemed to create an arbitrary number that satisfies due process without a full explanation. Further, by not making a constitutional holding, it becomes more unclear as to what rights immigrants have.

As a broader argument against the Court's use of the constitutional avoidance canon, the body entrusted to be the final

139. *See* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1208 (2006); *see also* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397, 463 (2005).

140. 8 U.S.C. § 1226(c) (2011).

141. Motomura, *supra* note 26, at 549.

142. *Id.*

143. Zadvydas v. Davis, 533 U.S. 678, 689–90, 701 (2001).

word on the Constitution should not avoid the question. The most extreme consequence of the Court continually avoiding constitutional questions would be that we stop asking the Court. The generally accepted American practice is judicial supremacy. Although scholars have disagreed over whether judicial supremacy is the best design, for nearly 150 years America has accepted judicial supremacy over the Constitution.[144] If the Court fails to check the political branches, the only hope is that popular support for/against government action will check the government. In the United States, it seems that the public cares about the Constitution and wants constitutional principles followed. However, the general public desire to enforce constitutional norms does not work in immigration because the general public suffers from an overall lack of information and education on immigration.[145] Because of the complexity of immigration, there are many misunderstandings of the process. Additionally, politicians often inflame the public by scapegoating immigrants through manipulated data and inflammatory stories.[146] Accordingly, we have not seen a public movement for immigrant rights and constitutional protection. Further, immigrants have no voice in the government. They cannot express their dissatisfaction or issues with detention through the voting process. All they have is habeas review by the courts. In this type of situation, the Court should objectively make a decision on the Constitution, even if the right thing is unpopular. The Court is the only actor in the government that currently has the ability to protect immigrant's constitutional rights.

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144. MCCLOSKEY, *supra* note 94, at 10.

145. Ana Swanson, *Here's How Little Americans Really Know About Immigration*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/09/01/heres-how-little-americans-really-know-about-immigration/?utm_term=.0229cd605070.

146. As an example, President Donald Trump has made many inflammatory quotes about immigrants. At the announcement of his candidacy he stated, "When Mexico sends its people, they're not sending their best. . . . They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." Carolina Moreno, *9 Outrageous Things Donald Trump Has Said About Latinos*, HUFFINGTON POST (Aug. 31, 2015, 3:49 PM), http://www.huffingtonpost.com/entry/9-outrageous-things-donald-trump-has-said-about-latinos_us_55e483a1e4b0c818f618904b. Further, in a speech where then President-elect Trump discussed his immigration goals, he continually referenced and brought on stage, "parents who lost their children to sanctuary cities and open borders." Domenico Montanaro et. al., *Fact Check: Donald Trump's Speech on Immigration*, NPR (Aug. 31, 2016, 9:44 PM), http://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration. President Trump continually referenced Americans who were killed by immigrants, such as Sarah Root, Grant Ronneback, Kate Steinle, and Marilyn Pharis. *Id.*

IV. WHAT THE COURT'S PROPER ROLE IN IMMIGRANT DETENTION SHOULD BE

This Section will attempt to make suggestions as to what the proper role of the judiciary is in immigrant detention cases, using *Jennings v. Rodriguez*[147] as an example. In *Jennings*, a majority of the Court found the Ninth Circuit improperly applied the canon of constitutional avoidance. Further, the Court reversed and remanded with instructions for the Ninth Circuit to address the constitutionality of indefinite immigrant detention. The Supreme Court's holding and opinions from *Jennings* are not fully analyzed or addressed in this paper.

Because the United States has largely accepted judicial supremacy, the Supreme Court has the final word on the Constitution.[148] The Court should use that power in these instances to protect individual liberties. In a concluding point, this Section will also reiterate suggested procedural changes to immigrant detention that would make the detention of immigrants fairer.

A. Jennings v. Rodriguez

As an illustration of the proper judicial role, this Note will analyze the *Jennings v. Rodriguez* case, which went before the Supreme Court on November 30, 2016 and was decided on February 27, 2018.[149] Again, the opinions and holding of *Jennings* are not adequately addressed in this paper and warrant full analysis at a later date.[150] This part will present the preliminary facts of the case.

Alejandro Garcia commenced the case, filing a petition for a writ of habeas corpus in the Central District of California on May 16, 2007.[151] His case was consolidated with Alejandro Rodriguez

147. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

148. This paper does not fully address the debate between popular constitutionalism and a weaker view of the court and judicial supremacy. Some scholars have suggested that a lot of constitutional interpretation takes place outside of the courts, and therefore discredits judicial legitimacy. *See generally*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

149. *Jennings*, 138 S. Ct. 830.

150. I primarily use the facts of *Jennings* to illustrate why courts should conduct constitutional analysis of immigrant detention laws. The impact of the *Jennings* holding is not fully discussed. Furthermore, at the time this paper was submitted for publication, *Jennings* was still pending before the United States Supreme Court. *Jennings* is an important case that warrants future exploration in the future.

151. Rodriguez v. Robbins, 804 F.3d 1060, 1065 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

and they were certified as a class under Federal Rule of Civil Procedure 23.[152] The district court certified a class defined as:

> all non-citizens within the Central District of California who: (1) are or were detained for longer than six months pursuant to one of the general immigration detention statutes pending completion of removal proceedings, including judicial review, (2) are not and have not been detained pursuant to a national security detention statute, and (3) have not been afforded a [6a] hearing to determine whether their detention is justified.[153]

The district court also approved the creation of subclasses in correspondence to the following statutes: 8 U.S.C. 1225(b), 1226(a), 1226(c), 1231(a).[154] The class does not include suspected terrorists. Additionally, the class excluded any detainee subject to final order of removal.[155]

The district court entered a preliminary injunction that applied to class members detained pursuant to 8 U.S.C. 1225(b) and 1226(c).[156] The preliminary injunction mandated the government provide each detainee with a bond hearing before an IJ.[157] Further, the government must release members of each subclass, unless the government can show by clear and convincing evidence that continued detention is justified based on his or her danger to the community or risk of flight.[158] The government appealed, and on April 16, 2013, the Ninth Circuit affirmed.[159] The Ninth Circuit used a two-prong test for evaluating the injunction. First, the court considered whether the plaintiff was likely to be successful on the

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152. Originally, when they moved for class certification the motion was denied. The Ninth Circuit Court of Appeals reversed the district court's order denying class certification. Rodriguez v. Hayes, 591 F.3d 1105, 1106 (9th Cir. 2010) [hereinafter *Rodriguez* I]. The Ninth Circuit held that the class satisfied the requirement of Federal Rule 23 and any concern that the differing statutes authorizing detention would render class adjudication impractical could be addressed through the formation of subclasses. *Id.* at 1126. The government petitioned for panel rehearing or rehearing en banc. *Robbins*, 804 F.3d at 1066. In response, the appellate panel amended the opinion to expand its explanation of why the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) does not bar certification of the class and the court unanimously voted to deny the government's petition. *Id.* at 1066.

153. *Robbins*, 804 F.3d at 1066.

154. *Id.*

155. *Id.*

156. Rodriguez v. Robbins, 715 F.3d 1127, 1130–31 (9th Cir. 2013) [hereinafter *Rodriguez* II].

157. *Robbins*, 804 F.3d at 1066.

158. *Rodriguez* II, 715 F.3d at 1130–31.

159. *Id.* at 1146.

merits of the case.[160] Second, the court evaluated whether the plaintiff would suffer irreparable harm unless the preliminary injunction was granted.[161] The Ninth Circuit held that freedom from imprisonment is at the heart of the liberty the Due Process Clause protects, and thus, indefinite detention would raise serious constitutional concerns.[162]

On August 6, 2013, the district court granted summary judgment to the class members and entered a permanent injunction.[163] The district court "require[d] the government to provide each detainee with a bond hearing by his 195th day of detention."[164] "[T]he district court further ordered that bond hearings occur automatically . . . [and] that the government bear[s] the burden of proving 'by clear and convincing evidence that [the] detainee[s] [are] a flight risk or a danger to the community to justify [any] denial of bond' . . . ."[165] "[T]he district court declined to order IJs to consider the length of detention or the likelihood of removal during bond hearings, or to provide periodic hearings for detainees who are not released after their first hearing."[166]

The government appealed the entry of the permanent injunction, arguing that the Ninth Circuit erred in applying the canon of constitutional avoidance.[167] Rodriguez cross-appealed regarding the procedural requirements for bond hearings.[168] The Ninth Circuit affirmed the issuance of the permanent injunction.[169] The Ninth Circuit reversed in part and ordered that IJs should consider the length of detention and there should be a new bond hearing automatically every six months.[170]

B. Courts Should Hold that the Indefinite Detention of Immigrants Under 1225(b), 1226(a), 1226(c) is Unconstitutional

The Ninth Circuit used the constitutional avoidance canon and imposed procedural requirements on the detention of immigrants. However, the Court in *Jennings* held that the Ninth Circuit

160. *See id.* at 1144–46.
161. *See id.*
162. *Id.* at 1146.
163. Rodriguez v. Robbins, 804 F.3d 1060, 1071 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 1072.
169. *Id.* at 1090.
170. *Id.* at 1089–90.

improperly applied the constitutional avoidance canon and remanded with instructions for the Ninth Circuit to reach the constitutional question.[171] The Court stated that because the Ninth Circuit erroneously used the constitutional avoidance canon, it did not consider the constitutional arguments on their merits.[172] Thus, the Court did not reach those arguments either.[173] However, the Court also instructed the Ninth Circuit to first decide whether it continues to have jurisdiction and whether a class action is still the appropriate vehicle for the claim.[174]

Leaving aside for a moment the questions over jurisdiction and the class action,[175] federal appellate courts, and eventually the Supreme Court, should hold that indefinite detention of immigrants is unconstitutional. Courts should reach the constitutional question, and find it is unconstitutional, for three reasons: (1) courts, especially the Supreme Court, have the power and duty to make a constitutional holding in a situation where individual rights are being violated, (2) a constitutional holding has value as a symbolic message that immigrant rights matter, and (3) courts can make reasonable suggestions to the detention procedures that would alleviate the substantive and procedural due process issues.

1. Courts, especially the Supreme Court, have the power and duty to make a constitutional holding in the immigrant detention context.

Federal appellate courts have the ability to make authoritative constitutional decisions. This is especially true of Supreme Court. Since Justice Marshall's famous decision in *Marbury v. Madison*, the United States, has largely accepted judicial supremacy.[176] Despite judicial review being well established in American

171. Jennings v. Rodriguez, 138 S. Ct. 830, 851–52 (2018).

172. *Id.* at 851

173. *Id.* (citing Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005)).

174. *Id.* at 851–52.

175. Again, this note is not fully addressing the holding and repercussions of the *Jennings* case. The jurisdictional question, as well as the class action question, will be important findings and crucial for the immigrants' claims.

176. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. . . . It is emphatically the province and duty of the judicial department to say what the law is."); *see also* ALEXANDER HAMILTON, THE FEDERALIST NO. 78 ("[The] courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.")

constitutional law, there remain debates over the scope of judicial review.[177] These debates often include discussion as to the level of deference courts should give to the political branches and justiciability,[178] including standing law and the political question doctrine. As discussed at length above, these debates and doctrines should not prevent the judicial branch from serving as a meaningful check on the executive and legislative branches when they are violating the Constitution. The statutes that authorize immigrant detention are both substantive and procedural violations of the Due Process Clause.

The statutes that authorize detention are substantively unconstitutional. 8 U.S.C. § 1226(c) mandates indefinite, possibly permanent, detention of immigrants.[179] 8 U.S.C. §§ 1225(b) and 1226(a) also authorize the indefinite, possibly permanent, detention of immigrants.[180] Indefinite detention does not comply with the Due Process Clause.[181] Detention may be useful and proper, but there has to be a finite time that an immigrant can be held. Congress must reevaluate this policy. The Court has determined, through the constitutional avoidance canon, that a six-month limit is reasonable before a bond hearing can be held.[182] But, in theory, the government could hold bond hearings every six months and comply with the Court's holding, while still detaining an immigrant forever. This deprives an individual of liberty in contravention of the Constitution.[183]

Further, there are severe procedural due process issues with immigrant detention. *Joseph* hearings need to be completely overhauled.[184] One scholar identified two procedural problems with *Joseph* hearings: the burden on the immigrant and the automatic stay provision.[185] First, at a *Joseph* hearing, the immigrant holds

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177. *See* R. George Wright, *The Distracting Debate over Judicial Review*, 39 U. MEM. L. REV. 47 *passim* (2008); *see also* Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 *passim* (1982); Robert C. Post & Reva B. Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 *passim* (2004).

178. Entrenched in the debate over deference to the political branches is the plenary power doctrine. An additional issue in this debate is the level of deference a court gives an administrative agency in the bureaucratic state. *See, e.g.*, Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, 467 U.S. 837, 844 (1984); Auer v. Robbins, 519 U.S. 452, 463 (1997). *See generally* Das, *supra* note 129.

179. 8 U.S.C. § 1226(c) (2011).

180. *Id.* at §§1225(b), 1226(a).

181. Zadvydas v. Davis, 533 U.S. 678, 690, 699 (2001) (stating that a statute allowing indefinite detention would raise serious constitutional problems because at the heart of the Due Process Clause is a prohibition on endless imprisonment by the government).

182. Zadvydas v. Davis, 533 U.S. 678, 701–02 (2001).

183. U.S. CONST. amends. V, XIV.

184. *See* Sayed, *supra* note 3, at 1849–58, 1865–77.

185. *Id.* at 1852.

the burden of proving that he is not subject to detention.[186] Because of the complexity of immigration law and the lack of legal aid or advice, immigrants are at a disadvantage.[187] Further, immigrants are not adequately advised of their legal rights, and there are difficulties in securing pro bono representation.[188] Additionally, if a non-English speaking immigrant has to proceed pro se, his language barrier might further inhibit the effectiveness of his representation.[189] As a result of these factors, the immigrant may be unable to meet the burden. Moreover, IJs decisions in *Joseph* hearings can be appealed to the Board of Immigration Appeals (BIA); but, the BIA is highly deferential to DHS.[190] Second, the automatic stay provision in *Joseph* hearings is problematic.[191] DHS is not required to give more than a conclusory statement saying there are legal arguments which support continued detention.[192] Based on this meager showing, the IJ will stay the order of the immigrants release on bond.[193]

As a final point, the administration of immigrant detention raises deep concerns. There were fifty-six deaths in ICE custody during the Obama administration.[194] During detention, substandard medical care often endangers immigrants' lives. In a joint report published by the American Civil Liberties Union, the Detention Watch Center, and the National Immigrant Justice Center, the deaths of Evalin-Ali Mandza, Amra Miletic, Pablo Gracida-Conte, Anibal Ramirez-Ramirez, Irene Bamegna, Fernando Dominguez-Valdivia, Victor Ramirez-Reyes, and Mauro Rivera Romero were examined.[195] Each individual died from

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186. *Id.*

187. Sayed, *supra* note 3, at 1852–54; *see also Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court,* NAT'L IMMIGR. JUST. CTR. (Sept. 2010), http://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-04/Isolated-in-Detention-Report-FINAL_September2010.pdf.

188. Sayed, *supra* note 3, at 1854–57, 1874.

189. *Id.* at 1874.

190. Julie Dona, *Making Sense of "Substantially Unlikely": An Empirical Analysis of the* Joseph *Standard in Mandatory Detention Custody Hearings*, 26 GEO. IMMIGR. L.J. 65, 68 (2011); *see also* Sayed, *supra* note 3, at 1851.

191. Sayed, *supra* note 3, at 1857–58.

192. *Id.*

193. *Id.*

194. ACLU, Det. Watch Network & Nat'l Immigrant Justice Ctr., *Fatal Neglect: How ICE Ignores Deaths in Detention*, ACLU 5 (Feb. 2016), https://www.aclu.org/sites/default/files/field_document/fatal_neglect_acludwnnijc.pdf [hereinafter ACLU, *Fatal Neglect*]; *see also* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L.L. REV. 601, 603 (2010) (discussing the poor medical treatment in immigrant detention centers).

195. ACLU, *Fatal Neglect*, *supra* note 193, at 7–21.

treatable medical conditions.[196] In some cases, the ICE officials administered the wrong dosage of medication, refused to call an ambulance, or simply withheld care for an extended time.[197]

There is another issue in the detention of immigrants. Immigrants may be detained in centers privately owned and operated.[198] Over sixty percent of immigrants are held in private facilities.[199] Companies are profiting from the detention of immigrants, which creates perverse incentives.

Courts have a duty to make a constitutional holding. In *Zadvydas*, the Court promised to "listen with care" when liberty is at issue.[200] Liberty and, in some cases, life are at issue here. The Supreme Court, specifically, also has the power to make a constitutional holding. In the wartime powers context, Justice O'Connor in *Hamdi* wrote that the Court will,

> accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[201]

Additionally, Justice O'Connor wrote that "the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government."[202] She further stated that, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are

196. *Id.* at 7–9, 13, 15–16, 18, 20.

197. *Id.* at 3–5.

198. *Id.*; *see also* John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017, 5:00 AM), https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom.

199. *Immigration Detention Map & Statistics*, CIVIC: END ISOLATION, http://www.endisolation.org/resources/immigration-detention (last visited Apr. 20, 2018).

200. Zadvydas v. Davis, 533 U.S. 678, 700 (2001).

201. Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004).

202. *Id.* at 536.

at stake."[203] Based on the individual liberties at stake in immigrant detention, the plenary power should no longer stop the judiciary from acting.

2. A constitutional holding has value as a symbolic message that immigrant rights matter.

Constitutional holdings can help evolve a democratic society and enhance the best parts of civil society, while rejecting the worst. By refusing to make a constitutional holding and dodging the hard questions with either statutory interpretation or the plenary power, courts send the message that immigrant rights are not a priority. After the disappointing deadlock in the Deferred Action for Parents of Americans (DAPA) case, a constitutional holding would convey an important message to immigrants: that they matter.[204] The failure to protect immigrant rights allows for immigrants to continually be repressed and allows the xenophobia and racism that underlies immigration law to persist.

In this situation, courts need to be the champions for immigrant rights and protect them because the immigrants do not have a voice and the public either does not know, does not care, or believes the stereotypical, inflammatory stories used by politicians.[205] Average Americans seem to lack adequate information about immigration.[206] Thus, it seems incorrect to assume majority rule, or the will of the people, should determine the constitutionality of immigrant detention. There is evidence that the popular consensus would have allowed school segregation

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203. *Id.*

204. The Supreme Court affirmed Texas's refusal to implement DAPA, which would have allowed the immigrant parents of children born in the United States to remain in the United States. *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

205. See President Donald Trump's speech in Nevada, blaming immigrants for the loss of American jobs. Domenico Montanaro et al., *supra* note 145 ("[M]ost illegal immigrants are lower-skilled workers with less education who compete directly against vulnerable American workers and that these illegal workers draw much more out from the system than they can ever possibly pay back. And they're hurting a lot of our people that cannot get jobs under any circumstances."). The President has also advocated for the mass deportation of immigrants. *See* Jose A. DelReal, *Trump's Latest Plan Would Target at Least 5 Million Undocumented Immigrants for Deportation*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/politics/trumps-latest-plan-would-target-at-least-5-million-undocumented-immigrants-for-deportation/2016/09/01/d6f05498-7052-11e6-9705-23e51a2f424d_story.html?utm_term=.3b86380da3af.

206. Ana Swanson, *Here's How Little Americans Really Know About Immigration*, WASH. POST (Sept. 1, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/09/01/heres-how-little-americans-really-know-about-immigration/?utm_term=.0229cd605070.

to continue.[207] Thankfully, the Court took a meaningful stand. In discussing *Brown v. Board of Education*, Professor Smith stated, "[s]ometimes inherent limitations on judicial efficacy may hinder effective implementation of judges' declarations of law. However, judges can still make positive contributions to their governmental branch by using the symbolic power of the Constitution."[208] The idea that rulings of courts, whether adhered to or not, are symbolically important, weakens the argument that the judicial branch should not act in foreign affairs because of the risk of losing legitimacy. Even if the political branches do not follow what the Court holds, they have made a statement and that matters to the individuals involved in the litigation and society as a whole.

3. Courts can make suggestions to the detention procedures that would alleviate the substantive and procedural due process issues.

For courts, especially the Supreme Court, the hardest question to answer is what would substantive and procedural due process look like in the area of immigrant detention. The practical consequences may be a reason as to why the courts are hesitant to rule on the constitutionality of the detention scheme. This question is difficult, but not impossible. Ultimately, it would be up to Congress to implement a new structure, but the Court can make procedural suggestions. A constitutional detention would use detention in a very limited way.[209] It would be extremely limited in its applicability and its length.[210] In order to limit the number of immigrants eligible for detention, there needs to be serious reform to what constitutes an aggravated felony under §1226(c).[211] Currently, many misdemeanors are considered aggravated felonies.[212] Crimes of "moral turpitude" have also been overused to

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207. MCCLOSKEY, *supra* note 94, at 148–49; *see also* Christopher E. Smith, *Law and Symbolism*, 1997 DET. C.L. REV. 935, 937 (1997).

208. Smith, *supra* note 206, at 939 (discussing the Court's announcement in Brown v. Board of Education).

209. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("And this Court has said that government detention violates th[e] [Due Process] Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' nonpunitive 'circumstances,' where a special justification, such as harm-threatening mental illness, outweighs the 'individual's constitutionally protected interest in avoiding physical restraint.'") (internal citations omitted).

210. *Id.*

211. 8 U.S.C. § 1226(c) (2011).

212. *See* Erica Steinmiller-Perdomo, *Consequences Too Harsh for Noncitizens Convicted of Aggravated Felonies?*, 41 FLA. ST. U. L. REV. 1173, 1174–77, 1179–87 (2014); Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1699 (1999).

detain more people.[213] Thus, it is important to limit the number of immigrants detained. Instead of contracting with private detention facilities, the government should shift funding to community-based alternatives, which would give immigrants better access to medical care, their families, legal counsel, and the community.[214]

Procedurally, there are also problems with the process immigrants go through when they are detained. In her article, Shalini Bhargava argued that the procedures at *Joseph* hearings violate due process as determined by the test in *Matthew v. Eldridge*.[215] *Matthews v. Eldridge* is the current framework promulgated by the Court to evaluate procedural due process issues in administrative hearings.[216] It involves three prongs: the private interest, the risk of erroneous deprivation of an interest and the value of additional procedures, and the government's interest.[217] Bhargava argued that because immigrants bear a high burden in *Joseph* hearings, and there is a large risk of erroneous deprivation of liberty, the government interest in detaining immigrants is outweighed.[218] Thus, under *Matthews,* to satisfy procedural due process, there must be additional procedures.[219] Several scholars have reviewed the scheme and made suggestions that would fix some of the procedural problems in *Joseph* hearings.[220] The Ninth Circuit's holding to shift the burden to government to prove immigrants are dangerous and a flight risk is a good start.[221] It is an improvement from the previous system that required immigrants to prove they are not subject to mandatory detention.[222] Other suggestions have included: eliminating the automatic stay provision; facilitating better access to legal counsel, translators, and representatives; having different IJs preside over the *Joseph* hearing and removal hearing; and enforcing a hard

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213. 8 U.S.C. § 1182(2)(A) (2013); *see also* Steinmiller-Perdomo, *supra* note 211, at 1175.

214. *See* ACLU, *Fatal Neglect*, *supra* note 193, at 22.

215. Bhargava, *supra* note 117, at, 54–55.

216. Matthews v. Eldridge, 424 U.S. 319, 335 (1976) (The framework promulgated by the Court to evaluate such procedural due process issues is as follows: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.")

217. *Id.*

218. Bhargava, *supra* note 117, at 54–55.

219. *See id.* at 55.

220. *See generally* Sayed, *supra* note 3; Bhargava, *supra* note 117.

221. Rodriguez v. Robbins, 804 F.3d 1060, 1070–73 (9th Cir. 2015), *rev'd sub nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

222. *See id.* at 1090.

deadline for release if the immigrant is still detained after a certain period of time while waiting for a hearing.[223]

V. CONCLUSION

In his article, *As Old as the Hills: Detention and Immigration*, Professor Benson poses the questions, "How will you answer when you are asked: Did you know people were being imprisoned? Did you know how many? Why did you let your government put immigrants in prison?"[224] While extoling the virtue and importance of personal liberty, the United States, in what has been described as a "culture of secrecy," detains thousands of immigrants.[225] Immigrants receive insufficient procedural protections and they are deprived indefinitely, possibly permanently, of their liberty. As a result, scholars such as Professor Benson have asked: why is the Court letting the political branches do this? For years, the Court seemed to accept "immigration exceptionalism," which Professor Motomura defined as "the view that immigration and alienage law should be exempt from the usual limits on government decisionmaking [sic]—for example, judicial review."[226] In modern immigration cases, this has not been wholly true. The Court has accepted that the executive and legislature have discretion in immigration, but it is not unlimited. But, the idea that immigration is nonjusticiable either because of the plenary power or lack of institutional ability still persists.

Justice Kennedy's dissent in *Zadvydas* revealed an outdated belief in a strong plenary power doctrine.[227] Although it is fairly easy to show that the plenary power that was created in *Chae Chan Ping*[228] is no longer the standard, it is more difficult to combat the institutional concerns of the judicial branch in immigration. However, by shifting the focus from immigration policy to the specific immigration detention, courts have the institutional capabilities to decide the case. An alternate view was Justice Breyer's choice to use statutory interpretation to read a limit of reasonableness into the statute.[229] This is the most

223. *See generally* Sayed, *supra* note 3; Bhargava, *supra* note 117.

224. Benson, *supra* note 2, at 11.

225. Nina Bernstein, *Officials Hid Truth of Immigrant Deaths in Jail*, N.Y. TIMES (Jan. 9, 2010), http://www.nytimes.com/2010/01/10/us/10detain.html.

226. Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999).

227. Zadvydas v. Davis, 533 U.S. 678, 705–06 (2001) (Kennedy, J., dissenting).

228. Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889).

229. *Zadvydas*, 533 U.S. at 689.

accepted view and will likely continue to be the way the Court handles these questions. But, there are shortcomings in this approach. By failing to make a constitutional holding, the Court muddles its role, constitutional norms, and fails to adequately protect immigrants.

In both of the ways that the Court has chosen to handle immigrant detention issues, they have missed the mark. The refusal to conduct a constitutional analysis and make a holding shows that there are still undercurrents of hesitance caused by the plenary power doctrine, and there is an unwillingness to make a potentially unpopular decision and protect immigrants. There are times in the history of the Court that are considered institutional failures;[230] not because the Court necessarily overstepped its permissible role, but because the Court failed to properly check the political branches and protect individual rights. Widespread immigrant detention may be one of these situations. The Court should fulfill its duty and use its power as the supreme word on the Constitution to protect immigrants' rights to be free from restraint and end the substantively and procedurally flawed detention of immigrants.

230. *See* MCCLOSKEY, *supra* note 94.