

A CONSTITUTION THAT STARVES, BEATS, AND LASHES (OR
THE PLENARY POWER DOCTRINE): *JENNINGS V. RODRIGUEZ*
AND A PEEK INTO IMMIGRATION DISSENT HISTORY

“[T]HE CONSTITUTION DOES NOT AUTHORIZE ARBITRARY
DETENTION. AND THE REASON THAT IS SO IS SIMPLE:
FREEDOM FROM ARBITRARY DETENTION IS AS ANCIENT
AND IMPORTANT A RIGHT AS ANY FOUND WITHIN THE
CONSTITUTION’S BOUNDARIES.”¹

On February 27, 2018, the Supreme Court handed down *Jennings v. Rodriguez*, a 5–3 decision² met with panic,³ followed by reassurance,⁴ and ultimately a steadfast determination that a constitutional battle over liberty itself rages on.⁵ That *Jennings* could elicit such a passionate response is unsurprising, given the subject it takes up. *Jennings* is a class-action lawsuit challenging federal laws that seemingly permit indefinite civil detention without a bail hearing while noncitizens fight to stay in the United States.⁶ Although some of the media response implied that *Jennings* was the last word upholding indefinite detention,⁷ the decision itself concluded only that the laws under review unambiguously allow for prolonged detention without a required bond hearing.⁸ *Jennings* did not address whether the Constitution permits such laws.⁹ Justice Alito, writing for the majority, concluded that the Ninth Circuit relied improperly on the canon of constitutional avoidance to read a required periodic bond hearing into certain immigration laws.¹⁰ The Ninth Circuit now has

1. *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (Breyer, J., dissenting).

2. Justice Kagan recused herself.

3. Michael Kagan, *Jennings v. Rodriguez Might Not Be About Immigration After All*, 36 YALE J. REG.: NOTICE & COMMENT (Mar. 2, 2018), <http://yalejreg.com/nc/jennings-v-rodri-guez-might-not-be-about-immigration-after-all/> (“There has been much alarmism from immigrant rights advocates about the Supreme Court’s decision in *Jennings v. Rodriguez*.”).

4. *Id.*

5. *SCOTUS Jennings Decision Won’t Be the Last Word on Bond Hearings for Immigrants*, AM. IMMIGR. L. ASS’N (Feb. 27, 2018), <http://www.aila.org/advo-media/press-releases/2018/scotus-jennings-decision-wont-be-the-last-word> (“Notwithstanding today’s decision, the battle against prolonged detention without a hearing wages on.”)

6. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836, 838–39 (2018).

7. Amy R. Grenier, *The Supreme Court Punts on the Constitutional Right to a Bond Hearing for Detained Immigrants*, MIGRATIONIST (Mar. 6, 2018), <https://themigrationist.net/2018/03/06/the-supreme-court-punts-on-the-right-to-a-bond-hearing-for-detained-immigrants> (describing the media portrayal as “technically accurate, yet deceptive”).

8. *Jennings*, 138 S. Ct. at 847–48. As the Court explains, one of the statutes at issue does allow release for witness-protection purposes, but otherwise the statute does not require a periodic bond hearing to assess whether an individual is a flight risk or poses a danger and thus merits release on bond.

9. *Id.* at 851.

10. *Id.*

a chance to decide whether the Constitution tolerates such laws, unless, as the Court implied it should, it finds it lacks jurisdiction.¹¹

Writing with impassioned opposition to the majority, Justice Breyer, joined by Justice Ginsburg and Justice Sotomayor, dissented.¹² Justice Breyer would apply the avoidance doctrine to allow the three classes of migrants certified in the lawsuit to receive a bond hearing every six months.¹³ Under the avoidance doctrine, a court interpreting a statute that raises grave doubts about its constitutionality will interpret the statute to avoid the constitutional problem where feasible.¹⁴ The majority found that the statutes clearly enable prolonged detention without a bond hearing, arguing that the Ninth Circuit's use of constitutional avoidance amounted to a legislative rewrite rather than a judicial interpretation.¹⁵ Justice Breyer disagreed, devoting nine pages of a formidable dissent explaining why the statutes as interpreted by the majority are likely unconstitutional,¹⁶ and another eight pages supporting his argument for a constitutional reading of those statutes.¹⁷

In so doing, he touched upon themes that have disturbed other dissenting justices since the federal government first established its stunning authority over immigration in the late nineteenth century. For instance, while not going so far as to argue that detention and deportation are a form of punishment that would require providing noncitizens with the same panoply of constitutional protections afforded criminal defendants, Justice Breyer draws on the criminal context, urging that civil confinement for immigration purposes is “in every relevant sense identical” to pretrial criminal confinement: “the constitutional language, purposes, and tradition that require bail in instances of criminal confinement also very likely require bail in these instances of civil confinement.”¹⁸ Further, he challenged the Government's suggestion that we need not concern ourselves with due process for “arriving aliens” because the law pretends that such noncitizens are not within U.S. territory.¹⁹ For Justice

11. *Jennings v. Rodriguez*, 138 S. Ct. 830, 851 (2018).

12. *Id.* at 859.

13. *Id.*

14. *Clark v. Martinez*, 543 U.S. 371, 380–81, 385 (2005); *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (“[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.”); *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.”)).

15. *Jennings*, 138 S. Ct. at 836 (“[A] court relying on [the canon of avoidance] still must interpret the statute, not rewrite it.”).

16. *Jennings v. Rodriguez*, 138 S. Ct. 830, 861–69 (2018) (Breyer, J., dissenting).

17. *Id.* at 869–76.

18. *Id.* at 865.

19. *Id.* at 862.

Breyer, “indulg[ing] in [this] ‘legal fiction’” means nothing more than “shutting our eyes to the truth.”²⁰ He asks:

Whatever the fiction, would the Constitution leave the Government free to starve, beat, or lash those held within our boundaries? If not, then whatever the fiction, how can the Constitution authorize the Government to imprison arbitrarily those who, whatever we might pretend, are in reality right here in the United States? The answer is that the Constitution does not authorize arbitrary detention. And the reason that is so is simple: Freedom from arbitrary detention is as ancient and important a right as any found within the Constitution's boundaries.²¹

With these powerful words, Justice Breyer joins a legacy of Supreme Court justices whose protests of major immigration decisions have rung in the ears of immigration law students since Congress first declared its power to exclude, incarcerate, and banish noncitizens.²²

With commentators on *Jennings* noting Justice Breyer’s “scathing dissent,”²³ immigration law students might take this opportunity to re-

20. *Id.*

21. *Jennings v. Rodriguez*, 138 S. Ct. 830, 862–63 (2018) (Breyer, J., dissenting); *see also* *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 226–27 (1953) (Jackson, J., dissenting) (“Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law?”).

22. *See, e.g., Demore v. Kim*, 538 U.S. 510, 541 (2003) (Souter, J., dissenting) (“The Court's holding that the Constitution permits the Government to lock up a lawful permanent resident of this country when there is concededly no reason to do so forgets over a century of precedent acknowledging the rights of permanent residents, including the basic liberty from physical confinement lying at the heart of due process.”); *Kleindienst v. Mandel*, 408 U.S. 753, 772 (1972) (Douglas, J., dissenting) (“Thought control is not within the competence of any branch of government.”); *id.* at 785 (Marshall, J., dissenting) (“Nothing is served-least of all our standing in the international community-by Mandel's exclusion. In blocking his admission, the Government has departed from the basic traditions of our country, its fearless acceptance of free discussion. By now deferring to the Executive, this Court departs from its own best role as the guardian of individual liberty in the face of governmental overreaching.”);

Mezei, 345 U.S. at 224 (Jackson, J., dissenting) (“Severe substantive laws can be endured if they are fairly and impartially applied.”); *id.* at 217 (Black, J., dissenting) (“No society is free where government makes one person's liberty depend upon the arbitrary will of another.”); *Harisiades v. Shaughnessy*, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) (“Banishment is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while.”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) (“The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.”); *Fong Yue Ting v. United States*, 149 U.S. 698, 738 (1893) (Brewer, J., dissenting) (“I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens.”); *id.* at 749 (Field, J., dissenting) (“If aliens had no rights under the constitution, they might not only be banished, but even capitally punished, without a jury, or the other incidents to a fair trial.”); *id.* at 762 (Fuller, J., dissenting) (“The right to remain in the United States, in the enjoyment of all the rights, privileges, immunities, and exemptions accorded to the citizens and subjects of the most favored nation, is a valuable right, and certainly a right which cannot be taken away without taking away the liberty of its possessor. This cannot be done by mere legislation.”).

23. Grenier, *supra* note 7.

member the dissents of immigration past to see how, if at all, the debate has shifted over the past 130 years. In some respects, not much has changed. The specter of immigration law's notorious plenary power doctrine still looms large. What has changed, of course, is the context in which these dissenters were writing. Since Chief Justice Fuller, writing in 1893, told us that plenary power over the deportation of resident noncitizens "contains within it the germs of the assertion of an unlimited and arbitrary power . . . incompatible with the immutable principles of justice,"²⁴ the United States government has created a massive deportation and detention regime.²⁵ Notably, some of the justices who would provide the most constitutional protections for noncitizens were writing at a time when deportation and detention were rare practices.²⁶ Now that many of us unthinkingly accept deportation and detention as inevitable,²⁷ we seem to have narrowed the debate, asking more limited questions about what protections noncitizens deserve.²⁸ By remembering what arguments some of our nation's greatest legal minds once thought feasible, we can begin to reframe what might be possible today. We can thus look into the past to imagine a different future.

THE PLENARY POWER DOCTRINE

Underlying much of the debate between dissenters and majority writers over the years is immigration law's much-criticized plenary power doctrine, which has historically allowed the legislative and executive branches to exercise significant control over immigration with minimal intrusion from the judiciary. In 1889, the Supreme Court upheld Congress' explicitly racist Chinese Exclusion Act, the federal government's first major attempt to exclude noncitizens from U.S. borders.²⁹ The Court found that the power to exclude migrants was inherent in sovereignty (as

24. *Fong Yue Ting*, 149 U.S. at 763.

25. See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 7–8 (2015); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 631–33 (2012); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44–45 (2010); see also *Aliens Removed or Returned: Fiscal Years 1892 to 2016*, DEP'T HOMELAND SECURITY (Nov. 30, 2017), <https://www.dhs.gov/immigration-statistics/yearbook/2016/table39> (providing removal data from 1892 to 2016) (hereinafter *Aliens Removed*); see also DORIS MEISSNER ET AL., *IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 16–17 (2013) (documenting growth in spending on immigration enforcement).

26. See *infra* Conclusion.

27. See generally César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1513 (2015) [hereinafter *Naturalizing Immigration Imprisonment*].

28. There are, of course, notable exceptions to the general trend toward accepting deportation and detention as inevitable. See, e.g., Molly Walsh, *Yes, ICE Deserves to Be Abolished*, WASH. POST (Mar. 13, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/03/13/of-course-democrats-should-want-to-abolish-ice/?utm_term=.da785a005c08; Sean McElwee, *It's Time to Abolish ICE*, NATION (Mar. 9, 2018), <https://www.thenation.com/article/its-time-to-abolish-ice>; César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246 (2017).

29. *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

opposed to enumerated in the Constitution)³⁰ and held by the political branches of government, whose “determination is conclusive upon the judiciary.”³¹ Although the Court has since allowed some judicial review of the constitutionality of immigration laws and their execution,³² the plenary power doctrine remains a prominent feature of immigration law that leaves some wondering just how much protection the Constitution provides noncitizens. Indeed, the Court has famously declared that “whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”³³

Although the extent to which the political branches retain plenary power over immigration today remains a lively question,³⁴ the Government’s *Jennings* briefs relied heavily on this doctrine.³⁵ That doctrine also lurked beneath Justice Breyer’s dissent insofar as he argued both that the judiciary has a role to play in assessing the constitutionality of immigration laws³⁶ and that arriving noncitizens deserve constitutional protections.³⁷ Justice Breyer’s dissent, then, continues a history of dissents pushing back on the political branches’ immense power over immigration laws. As discussed below, that history began at the end of the nineteenth century.

BREYER IN 2018 OR BREWER IN 1893?

Among the greatest dissents of immigration law are the three fiery protests that accompanied the Court’s 1893 decision in *Fong Yue Ting v. United States*.³⁸ In *Fong Yue Ting*, the Court upheld a law allowing executive officers to arrest, detain, and deport Chinese residents without trial or judicial review when those noncitizens were unable to produce a certificate of residency available only upon the testimony of one credible

30. The Constitution contains a Naturalization Clause but no clause enabling exclusion or expulsion of noncitizens.

31. *Chae Chan Ping*, 130 U.S. at 606.

32. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 794–95 (1977) (asking whether there was a facially legitimate and bona fide reason for execution of immigration law).

33. *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950); *see also Mathews v. Diaz*, 426 U.S. 67, 80 (1976) (“Congress regularly makes rules that would be unacceptable if applied to citizens.”).

34. *See, e.g.*, Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 22–23 (2015).

35. For example, the Government’s Petition for Writ of Certiorari opens its statement of the applicable law with a robust recitation of the plenary power doctrine: “This Court has ‘long recognized [that] the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.’ Petition for Writ of Certiorari, *Jennings v. Rodriguez*, 138 S. Ct. 830, 863 (2018) (No. 15-1204) (citing *Fiallo*, 430 U.S. at 792) (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953)).

36. *Jennings v. Rodriguez*, 138 S. Ct. 830, 859 (2018) (Breyer J., dissenting).

37. *Id.* at 862–63; *see also* Brief of Professors of Constitutional, Immigration, and Administrative Law as Amici Curiae in Support of Respondents, *Jennings*, 138 S. Ct. 830 (No. 15-1204) (explaining that the Government’s conclusion that arriving noncitizens lack constitutional rights does not follow from the plenary power doctrine).

38. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

white witness.³⁹ As it had done when it upheld federal power to exclude noncitizens, the Court found that, although the Constitution provides no enumerated deportation power, the power to expel resident noncitizens is inherent to sovereignty and might be exercised whenever the government felt removal was “necessary or expedient for the public interest.”⁴⁰ Dissenting, Justice Brewer vigorously challenged the notion that a government of enumerated powers possesses the power to expel resident noncitizens as incident to sovereignty:

This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? . . . The governments of other nations have elastic powers. Ours are fixed and bounded by a written [C]onstitution. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely . . . they gave to this government no general power to banish.⁴¹

Additionally, the Court held that deportation was “not a punishment for a crime,” and therefore “the provisions of the [C]onstitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.”⁴² All three dissenting justices challenged this proposition.⁴³ Justice Brewer responded:

39. *Id.* at 729.

40. *Id.* at 724.

41. *Id.* at 737; *see also id.* at 762 (Fuller, J., dissenting) (“Conceding that the exercise of the power to exclude is committed to the political department, and that the denial of entrance is not necessarily the subject of judicial cognizance, the exercise of the power to expel, the manner in which the right to remain may be terminated, rests on different ground, since limitations exist or are imposed upon the deprivation of that which has been lawfully acquired. And while the general government is invested, in respect of foreign countries and their subjects or citizens, with the powers necessary to the maintenance of its absolute independence and security throughout its entire territory, it cannot, in virtue of any delegated power, or power implied therefrom, of a supposed inherent sovereignty, arbitrarily deal with persons lawfully within the peace of its dominion.”). For echoes of Justice Brewer’s dissent in today’s discourse, see McElwee, *supra* note 28 (“[I]t’s time for progressives to put forward a demand that deportation be taken not as the norm but rather as a disturbing indicator of authoritarianism.”).

42. *Id.* at 730.

43. *Fong Yue Ting v. United States*, 149 U.S. 698, 744 (1893) (Brewer, J., dissenting); *id.* at 749 (Field, J., dissenting) (“If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness,—a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent as well as the movable and temporary kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; if a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied.”); *id.* at 763 (Fuller, J., dissenting) (“As to them, registration for the purpose of identification is required, and the deportation denounced for failure to do so is by way of punishment to coerce compliance with that requisition. No euphuism can disguise the character of the act in this regard. It directs the performance of a judicial function in a particular way, and inflicts punishment without a judicial trial. It is, in effect, a legislative sentence of banishment, and, as such, absolutely void.”).

[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel . . . And no person who has once come within the protection of the constitution can be punished without a trial.”⁴⁴

Similarly, Chief Justice Fuller objected to the majority’s finding that the Court had no role to play in assessing the constitutionality of the law,⁴⁵ insisting that deportation “inflicts punishment without a judicial trial”⁴⁶ in violation of the Fifth and Fourteenth Amendments, which are “universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”⁴⁷

Justice Field likewise “utterly dissent[ed],”⁴⁸ expressing outrage at the majority’s willingness to leave whatever constitutional protections a noncitizen might hold to the whims of the political branches of government:

If a foreigner who resides in the country by its consent commits a public offense, is he subject to be cut down, maltreated, imprisoned, or put to death by violence, without accusation made, trial had, and judgment of an established tribunal, following the regular forms of judicial procedure? If any rule in the administration of justice is to be omitted or discarded in his case, what rule is it to be? If one rule may lawfully be laid aside in his case, another rule may also be laid aside, and all rules may be discarded. . . . That would be to establish a pure, simple, undisguised despotism and tyranny, with respect to foreigners resident in the country by its consent.⁴⁹

These dissents are, of course, far from perfect,⁵⁰ and they each approach the majority opinion differently. Collectively, however, they raise a series of arguments that for many would be unthinkable today: denying that the federal government possesses the power to deport resident

44. *Id.* at 744 (Brewer, J., dissenting).

45. *Id.* at 761 (Fuller, J., dissenting) (“However reluctant courts may be to pass upon the constitutionality of legislative acts, it is of the very essence of judicial duty to do so, when the discharge of that duty is properly invoked.”).

46. *Id.* at 763.

47. *Id.* at 761–62.

48. *Fong Yue Ting v. United States*, 149 U.S. 698, 755 (1893).

49. *Id.* at 754.

50. For instance, the blatant racism of the Chinese Exclusion Cases is also present in the dissents. *See, e.g., id.* at 743 (1893) (Brewer, J., dissenting) (“It is true this statute is directed only against the obnoxious Chinese, but, if the power exists, who shall say it will not be exercised tomorrow against other classes and other people?”). Note also that Justice Field authored the majority opinion in *Chae Chan Ping v. United States*, upholding the political branches’ unquestioned power to exclude “vast hordes” of Chinese migrants, who were “crowding in upon us.” 130 U.S. 581, 606 (1889).

noncitizens, rejecting the limited role that the judiciary would play in assessing the constitutionality of certain immigration laws, insisting that deportation is a form of punishment, and urging that noncitizens facing deportation receive the same constitutional protections that criminal defendants enjoy.

Writing today, Justice Breyer's wish list is in many respects more moderate. Unlike Justice Brewer, Justice Breyer does not challenge the federal government's power to expel resident noncitizens, nor does he question whether a government of enumerated powers can possess other, ill-defined inherent powers. Nor does he urge that deportation or the detention preceding it constitutes punishment and that the same constitutional protections afforded criminal defendants should therefore attach. Rather, he merely suggests that the courts must play a role in assessing the constitutionality of immigration laws;⁵¹ that both noncitizens seeking admission and resident noncitizens in removal proceedings hold due process rights;⁵² and that the Due Process Clause cannot tolerate indefinite civil detention without a periodic bond hearing.⁵³ His dissent is thus in some respects a more moderate dissent than those in *Fong Yue Ting*. That Justice Breyer did not question the federal government's power to deport is hardly surprising, of course, given that he could only address the questions before him in *Jennings*. Nonetheless, that his dissent is more moderate than Justice Brewer's tells us something about the sorts of questions advocates deem worthy of asking in a world where deportation and detention are largely accepted as normal.

CONCLUSION

One hundred thirty years ago, some of our nation's brightest legal minds were shocked by the notion that the federal government possessed the power to expel resident noncitizens at all. If the federal government did possess the power to banish, the notion that it could do so without providing the full protections given criminal defendants was also shocking.

51. *Jennings v. Rodriguez*, 138 S. Ct. 830, 859 (2018) (Breyer, J., dissenting). Applying the avoidance doctrine assumes that courts have some role to play in testing the constitutionality of immigration laws.

52. *Id.* at 862–63. On this point, Justice Breyer does seem to ask more than did the dissenting justices in *Fong Yue Ting*, all of whom were concerned about federal power to expel resident noncitizens, not new arrivals. See *Fong Yue Ting*, 149 U.S. at 733 (Brewer, J., dissenting); *id.* at 745 (Field, J., dissenting); *id.* at 761 (Fuller, C.J., dissenting).

53. *Jennings*, 138 S. Ct. at 859. In this sense, Justice Breyer's dissent asks for no greater judicial role in assessing the constitutionality of immigration laws than have prior decisions. See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (using constitutional avoidance to read an implicit reasonable time limitation into a statute otherwise allowing for indefinite detention after entry of a removal order). Further, the majority is not necessarily opposed to Justice Breyer on this point. Rather, it merely disagreed that the statutes might reasonably be interpreted as requiring periodic bond hearings. *Jennings*, 138 S. Ct. at 847–48. By leaving the constitutional question to the Ninth Circuit, the majority did not show its cards regarding how much deference it would provide Congress in evaluating whether prolonged detention without a bond hearing is constitutional.

When *Fong Yue Ting* came out, the number of deportations carried out annually was negligible compared to today, and immigration detention was so little used that the Supreme Court had not yet addressed it.⁵⁴ Since then, a behemoth deportation and detention regime has arisen, and many unthinkingly accept that regime.⁵⁵ According to the Department of Homeland Security, in 1893 the government removed 1,630 noncitizens.⁵⁶ In 2016, that number was 340,056.⁵⁷ Likewise, the government rarely detained noncitizens until the 1990s,⁵⁸ but since then immigration detention has become gargantuan, incarcerating hundreds of thousands of people every year.⁵⁹

Yet today, the Supreme Court justices most favorable toward the rights of noncitizens ask (unsuccessfully) only that a statute be construed such that certain noncitizens—those held in civil detention based on decisions made by executive branch officials—receive a hearing every six months at which another executive branch official would assess whether incarceration remains necessary. It seems then that the range of rights once thought possible for noncitizens has narrowed. Might the time be ripe to ask some bigger questions?

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54. The Court would uphold temporary civil detention to effect deportation three years later in *Wong Wing v. United States*, 163 U.S. 228, 235 (1896). However, the practice of immigration detention was rather rare until the 1990s. See GARCÍA HERNÁNDEZ, *supra* note 25, at 8.

55. See *Naturalizing Immigration Imprisonment*, *supra* note 27, at 1513; Garrett Epps, *How the Supreme Court is Expanding the Immigrant Detention System*, ATLANTIC (Mar. 9, 2018), <https://www.theatlantic.com/politics/archive/2018/03/jennings-v-rodriguez/555224> (“The ERO archipelago is metastasizing, with almost no public attention or debate.”).

56. *Aliens Removed*, *supra* note 25.

57. *Id.*

58. GARCÍA HERNÁNDEZ, *supra* note 25, at 8; Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1138 (2017) (“Since 1996, the number of individuals detained on immigration violations has tripled.”).

59. See Epps, *supra* note 55; Vázquez, *supra* note 58, at 1138 (“From 2011 to 2014, over 427,000 individuals were detained each year.”).

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