AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Individual Rights/Due Process

**Jennings v. Rodriquez, 583 U.S. \_\_\_** (2018)

*Alejandro Rodriquez was a lawful permanent resident of the United States who in 2004 was convicted of a drug offence and theft. The federal government than successfully convinced an immigration judge to issue an order mandating that Rodriquez be removed from the United States. Rodriquez appealed. While that appeal was pending, Rodriquez sought a writ of habeas corpus, claiming that he was being illegally detained by David Jennings, the field director of Immigration and Customs Enforcement in Los Angeles. Rodriquez claimed that he had a statutory and constitutional right to a hearing that would determine whether the federal government could detain him during the appeal process. That appeal turned into a class action covering all persons detained for more than six months during their removal proceedings who were not detained as threats to national security. The district court ruled that Rodriquez and those similarly situated had a statutory right to a bail hearing and that decision was affirmed by the Court of Appeals for the Ninth Circuit. The United States appealed to the Supreme Court.*

 *The Supreme Court by a 5-3 vote reversed the decision of the lower federal courts. Justice Samuel Alito’s majority opinion concluded that federal law could not be plausibly interpreted as mandating hearings for aliens detained for more than six months during proceedings for determining whether they should be deported. Alito did not discuss the constitutional issue, insisting that this was for the lower courts to determine initially. Justice Stephen Breyer argued at length that good reasons existed for thinking that civilly confined persons had a right to bail hearings and that these reasons were sufficient to interpret federal law as requiring bail hearings. Why does Breyer believe that Rodriquez probably have a constitutional right to a bail hearing? Is his interpretation of federal law plausible or strained? How likely do you believe the justices in the majority are to find a constitutional right if this case is again appealed from the lower federal courts? What reasons was there for delaying the constitutional decision? Is that reason sound?*

JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court

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When “a serious doubt” is raised about the constitutionality of an act of Congress, “it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Crowell v. Benson* (1932). Relying on this canon of constitutional avoidance, the Court of Appeals construed [federal law] to limit the permissible length of an alien's detention without a bond hearing. Without such a construction, the Court of Appeals believed, the “‘prolonged detention without adequate procedural protections' ” authorized by the provisions “‘would raise serious constitutional concerns.’”

The canon of constitutional avoidance “comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.”  In the absence of more than one plausible construction, the canon simply “‘has no application.’”

The Court of Appeals misapplied the canon in this case because its interpretations of the three provisions at issue here are implausible. . . . Read most naturally, [federal law] . . . mandate detention of applicants for admission until certain proceedings have concluded. [Section 1225(b)(1)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_3fed000053a85) aliens are detained for “further consideration of the application for asylum,” and [§ 1225(b)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_c0ae00006c482) aliens are in turn detained for “[removal] proceeding[s].” Once those proceedings end, detention under [§ 1225(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76) must end as well. Until that point, however, nothing in the statutory text imposes any limit on the length of detention. And neither [§ 1225(b)(1)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_3fed000053a85) nor [§ 1225(b)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_c0ae00006c482) says anything whatsoever about bond hearings.

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. . . . Nothing in the text of [§ 1225(b)(1)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_3fed000053a85) or [§ 1225(b)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_c0ae00006c482) even hints that those provisions restrict detention after six months, but respondents do not engage in any analysis of the text. Instead, they simply cite the canon of constitutional avoidance and urge this Court to use that canon to read a “six-month reasonableness limitation” into [§ 1225(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76). That is not how the canon of constitutional avoidance works. Spotting a constitutional issue does not give a court the authority to rewrite a statute as it pleases. Instead, the canon permits a court to “choos[e] between competing *plausible* interpretations of a statutory text. To prevail, respondents must thus show that [§ 1225(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_a83b000018c76)'s detention provisions may plausibly be read to contain an implicit 6–month limit. And they do not even attempt to defend that reading of the text.

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Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents' constitutional arguments on their merits. Consistent with our role as “a court of review, not of first view,” we do not reach those arguments. Instead, we remand the case to the Court of Appeals to consider them in the first instance.

JUSTICE [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) took no part in the decision of this case.

JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) joins concurring in the judgment.

[*Justice Thomas concluded that the Supreme Court lacked the statutory jurisdiction necessary to adjudicate the case, but agreed with Justice Alito’s opinion on the merits*]

JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), with whom JUSTICE [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and JUSTICE [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) join, dissenting.

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The Court reads the statute as forbidding bail, hence forbidding a bail hearing, for these individuals. In my view, the majority's interpretation of the statute would likely render the statute unconstitutional. Thus, I would follow this Court's longstanding practice of construing a statute “so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”  And I would interpret the statute as requiring bail hearings, presumptively after six months of confinement.

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Consider the relevant constitutional language and the values that language protects. The Fifth Amendment says that “[n]o person shall be ... deprived of life, liberty, or property without due process of law.” An alien is a “person.” See *Wong Wing v. United States* (1896). To hold him without bail is to deprive him of bodily “liberty.” And, where there is no bail proceeding, there has been no bail-related “process” at all. The Due Process Clause—itself reflecting the language of the Magna Carta—prevents arbitrary detention. Indeed, “[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.”

The Due Process Clause foresees eligibility for bail as part of “due process.” Bail is “basic to our system of law.”  It not only “permits the unhampered preparation of a defense,” but also “prevent[s] the infliction of punishment prior to conviction.”  It consequently limits the Government's ability to deprive a person of his physical liberty where doing so is not needed to protect the public or to assure his appearance at, say, a trial or the equivalent. . . .

The Eighth Amendment reinforces the view that the Fifth Amendment's Due Process Clause does apply. The Eighth Amendment forbids “[e]xcessive bail.” It does so in order to prevent bail being set so high that the level itself (rather than the reasons that might properly forbid release on bail) prevents provisional release. That rationale applies *a fortiori* to a refusal to hold any bail hearing at all. . . . .

It is clear that the Fifth Amendment's protections extend to “all persons within the territory of the United States.” . . . Those who enter at JFK airport are held in immigration detention facilities in, *e.g.,* New York; those who arrive in El Paso are held in, *e.g.,*Texas. . . .

No one can claim, nor since the time of slavery has anyone to my knowledge successfully claimed, that persons held within the United States are totally without constitutional protection. Whatever the fiction, would the Constitution leave the Government free to starve, beat, or lash those held within our boundaries? .. .

The Due Process Clause, among other things, protects “those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors,” and which were brought by them to this country. *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856). . . . . Blackstone tells us that every prisoner (except for a convict serving his sentence) was entitled to seek release on bail. . . . American history makes clear that the settlers brought this practice with them to America. The Judiciary Act of 1789 conferred rights to bail proceedings in all federal criminal cases. . . .

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The cases before us, however, are not criminal cases. Does that fact make a difference? The problem is that there are not many instances of civil confinement. . . . Mental illness does sometimes provide an example. Individuals dangerous to themselves or to others may be confined involuntarily to a mental hospital. Those persons normally do not have what we would call “a right to a bail hearing.” But they do possess equivalent rights: They have the right to a hearing prior to confinement and the right to review of the circumstances at least annually. And the mentally ill persons detained under these schemes are being detained *because* they are dangerous. That being so, there would be no point in providing a bail hearing as well. But there is every reason for providing a bail proceeding to the noncitizens at issue here, because they have received no individualized determination that they pose a risk of flight or present a danger to others, nor is there any evidence that most or all of them do.

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The strongest basis for reading the Constitution's bail requirements as extending to these civil, as well as criminal, cases, however, lies in the simple fact that the law treats like cases alike. And reason tells us that the civil confinement at issue here and the pretrial criminal confinement that calls for bail are in every relevant sense identical. There is no difference in respect to the fact of confinement itself. And I can find no relevant difference in respect to bail-related purposes.

Which class of persons—criminal defendants or asylum seekers—seems more likely to have acted in a manner that typically warrants confinement? A person charged with a crime cannot be confined at all without a finding of probable cause that he or she committed the crime. And the majority of criminal defendants lose their cases. A high percentage of the noncitizens before us, however, ultimately win the right they seek, the right to be in the United States.

Nor am I aware of any evidence indicating that the noncitizens seeking to enter, or to remain within, the United States are more likely than criminal defendants to threaten the safety of the community if released. . . . Which group is more likely to present a risk of flight? Again, I can find no evidence suggesting that asylum seekers or other noncitizens generally present a greater risk of flight than persons imprisoned for trial where there is probable cause to believe that the confined person has committed a crime. . . .

If there is no reasonable basis for treating these confined noncitizens worse than ordinary defendants charged with crimes, worse than convicted criminals appealing their convictions, worse than civilly committed citizens, worse than identical noncitizens found elsewhere within the United States, and worse than noncitizens who have committed crimes, served their sentences, and been definitively ordered removed (but lack a country willing to take them), their detention without bail is arbitrary. Thus, 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. That perhaps is why Blackstone wrote that the law provides for the possibility of “bail in any case whatsoever.”

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. . . The Constitution's language, its basic purposes, the relevant history, our tradition, and many of the relevant cases point in the same interpretive direction. They tell us that an interpretation of the statute before us that would deny bail proceedings where detention is prolonged would likely mean that the statute violates the Constitution. The interpretive principle that flows from this conclusion is clear and longstanding: “‘[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.’”  Moreover, 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.”  These legal principles reflect a realistic assumption, namely, that Congress—particularly a Congress that did not consider a constitutional matter—would normally have preferred a constitutional interpretation to an interpretation that may render a statute an unconstitutional nullity. And that is so even where the constitutional interpretation departs from the most natural reading of the statute's language.

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The relevant provision governing the first class of noncitizens, the asylum seekers, is [§ 1225(b)(1)(B)(ii)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=8USCAS1225&originatingDoc=I74b7f6541bd411e8a7a8babcb3077f93&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_ac8800005e040). It says that, if an immigration “officer determines at the time” of an initial interview with an alien seeking to enter the United States “that [the] alien has a credible fear of persecution ..., the alien *shall be detained* for further consideration of the application for asylum.” I have emphasized the three key words, namely, “shall be detained.” Do those words mean that the asylum seeker *must be detained without bail*?

They do not. *First,* in ordinary English and in light of the history of bail, the word “detain” is ambiguous in respect to the relevant point. The Oxford English Dictionary (OED), surveying the history of the word, notes that Edward Hall, a famous 16th-century legal scholar and author of Hall's Chronicle, wrote: “A traytor ... is apprehended and deteigned in prisone for his offence,” a use of the word, as we know from Blackstone, that is consistent with bail. David Hume, the famous 18th-century historian and philosopher, writes of being “detained in strict confinement,” thereby implying the existence of detention without strict confinement. . . . And the OED concludes that the primary meaning of “detain” is “[t]o keep in confinement *or under restraint*; to keep prisoner.” To grant bail, we know, is not to grant unrestrained freedom. Rather, where the Act elsewhere expressly permits bail, it requires “bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General.” Similarly in the criminal context, bail imposes numerous restraints, ranging from the provision of a bond, to restrictions on residences and travel, to the imposition of a curfew, to a requirement to obtain medical treatment, to report at regular intervals, or even to return to custody at specified hours.

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The bail questions before us are technical but at heart they are simple. We need only recall the words of the Declaration of Independence, in particular its insistence that *all* men and women have “certain unalienable Rights,” and that among them is the right to “Liberty.” We need merely remember that the Constitution's Due Process Clause protects each person's liberty from arbitrary deprivation. And we need just keep in mind the fact that, since Blackstone's time and long before, liberty has included the right of a confined person to seek release on bail. It is neither technical nor unusually difficult to read the words of these statutes as consistent with this basic right. I would find it far more difficult, indeed, I would find it alarming, to believe that Congress wrote these statutory words in order to put thousands of individuals at risk of lengthy confinement all within the United States but all without hope of bail. I would read the statutory words as consistent with, indeed as requiring protection of, the basic right to seek bail.