1993

Polishing the Tarnished Golden Door

Michael Scaperlanda, *University of Oklahoma*

POLISHING THE TARNISHED GOLDEN DOOR

MICHAEL SCAPERLANDA*

The plenary power doctrine provides the backbone for our constitutional tradition affecting aliens, placing nearly unfettered authority with the political branches of the federal government. As a result, the Bill of Rights provides only illusory guarantees for aliens, even longtime permanent resident aliens. This doctrine can be traced to nineteenth century international law deeply rooted in the concept of "absolute sovereignty." In the latter half of that century, nation-states operated within a global community lacking a universal human rights tradition. The individual was "object" in international relations, not "subject," in a world devoid of a structural apparatus to rein in abusive sovereigns. Absolute sovereignty informed our constitutional interpretation, giving life to the idea that federal treatment of aliens belonged in the political sphere, undisturbed by the judiciary, as a right inherent in sovereignty.

Over the past half century, with the development of internationally recognized and binding human rights norms, both sovereignty and the individual have undergone a dramatic transformation. A positive law structure now exists, requiring nation-states to act within the parameters of globally accepted norms. And individuals have achieved the status of "subjects" in the global order. Put simply, state sovereignty, at least in relation to the individual, has lost its absolutism.

This Article explores the plenary power doctrine against the backdrop of these internationally changing norms. Because sovereignty serves as the baseline for our constitutional jurisprudence affecting aliens, plenary power may have been justified at a time when sovereignty was considered absolute. The baseline, however, has shifted; sovereignty is no longer considered absolute and the individual has gained respect in international law. These changes on the international front, paralleled by the "rights revolution" that has occurred within municipal constitutional law, totally undermine the legitimacy of the Court's continued adherence to the plenary power doctrine.

TABLE OF CONTENTS

I. Introduction 966
II. Sovereignty Theory of Plenary Power 972
A. The Foundation 976
1. Exclusion 976
2. Deportation 980
B. Entrenchment: The "Chilling" Years 984
1. Exclusion 985
2. Deportation 988

---

* Associate Professor of Law, University of Oklahoma College of Law; B.A. 1981, J.D. 1984, University of Texas. I would like to thank Peter Krug, Stephen Legomsky, Sanford Levinson, Hiroshi Motomura, James Nafziger, and Murray Tabb for their many helpful insights and suggestions during the preparation of this Artiele. Additionally, I would like to thank Robert Cheadle and Thomas March at the University of Oklahoma and Patrick Frey at the University of Texas for their researeh assistance.

C. Steadfastness 991
1. Exclusion 992
2. Expansion 994
a. Government Benefits 995
b. Search and Seizure 997
III. Interplay Between State Sovereignty and Human Rights . . . 1002
A. The Nineteenth Century and Absolute Sovereignty . 1005
B. The Rights Revolution 1009
1. The Development of International Law —Treaties 1012
2. Customary International Law of Human Rights 1014
C. The United States and International Human Rights . 1015
1. Treaty Law 1017
2. Custom and United States Rights Rhetoric . . . 1020
3. Summary 1021
IV. Dismantling Plenary Power in the Age of International Human Rights 1022
V. Conclusion 1031

To say that the validity of the statute may be rested upon inherent 'sovereign powers' of this country in its dealings with foreign nations seems to me to be no more than begging the question.[1]

I. INTRODUCTION

For more than a century the Supreme Court has recognized that aliens are "persons" entitled to constitutional protection.[2] In many respects, this protection has proven illusory. Although states are prohibited, in most cases, from treating aliens differently than citizens,[3] and although aliens are entitled to many of the criminal procedure protections of the Bill of Rights,[4] the federal government remains largely

1. Reid v. Covert, 354 U.S. 1, 66 (1957) (Harlan, J., concurring in the result).

2. *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (aliens protected by Fourteenth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (Fifth and Sixth Amendments).

3. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971) (state and local laws discriminating against aliens "are inherently suspect and subject to close judicial scrutiny"). *But cf.* Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982) (strict scrutiny inapplicable where the state, in attempting to define the political community, reserves certain important government positions for citizens).

4. *See, e.g.*, Wong Wing, 163 U.S. at 238 (Fifth and Sixth Amendments protect all persons within the United States: "[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment . . . nor deprived

free from constitutional constraints in its treatment of aliens. Pursuant to the plenary power doctrine developed in the *Chinese Exclusion Case*[5] three years after *Yick Wo v. Hopkins*,[6] the substantive guarantees of the Constitution fail to protect noncitizens and its procedural guarantees provide only minimal protection.[7] With respect to aliens, the high ideals expressed in the Declaration of Independence and the Bill of Rights echo in the empty chambers of the National Archives, unheard in the halls of power.

A simple hypothetical will serve to illustrate the extent to which the constitutional jurisprudence affecting aliens resides outside of mainstream constitutional norms. Maria and Carlos are wife and husband. Carlos, a citizen of Cuba, has lived in the United States for twenty-five years as a permanent resident alien. Maria, a Colombian national, currently resides in Peru, although she would like to join her husband in the United States. Carlos desires to bring his illegitimate daughter, Juanita, from Cuba to the United States.

The plenary power doctrine allows Congress to expel classes of aliens solely on the basis of race; therefore, should the lawmakers conclude that noncitizen Hispanics are no longer desirable residents, Carlos could face expulsion.[8] He could also face deportation for his

---

of life, liberty, or property without due process of law."). *But see* United States v. Verdugo-Urguidez, 494 U.S. 259, 274-75 (1990) (Fourth Amendment inapplicable to search of noncitizen's home in Mexico even though he was in a United States jail at the time of the search).

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

6. 118 U.S. 356 (1886).

7. The plenary power doctrine is a judicial creation by which the Court severely limits its role in resolving immigration issues, while exalting the role played by Congress and the executive branch. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 863 (1987); Stephen H. Legomsky, *Immigration Law and The Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992) [hereinafter *Curious Evolution*]; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) [hereinafter *Phantom Constitutional Norms*]. This means that there are virtually "no constitutional limitations on the power of Congress to regulate immigration." *See* Henkin, *supra* at 859. For an historical as well as contemporary explanation of the Constitution's application to aliens, both here and abroad, see Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991).

8. Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding law that expelled persons on the basis of their Chinese origin). Xenophobia elicits more than merely an historical interest in a "less enlightened" period. Recent news articles reveal that xenophobia appears to be on the rise in the United States. *See, e.g.*, Maria Puente,

membership in any political party, if Congress were to make membership a deportable offense.[9] Should Maria attempt to immigrate to the United States, she could be denied entry without any explanation or hearing; the Supreme Court has said that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[10] She can then be imprisoned in this country indefinitely, "pending deportation."[11] United States government agents can search

---

U.S.A. Cool to Huddled Masses, U.S.A. TODAY, July 14, 1993, at 1A (U.S.A. Today/CNN/Gallup poll reveals that over half of those surveyed believe racial and ethnic diversity of immigrants threatens American culture and two-thirds believe that too many immigrants are coming from Latin American, Asian, and Middle Eastern countries); Larry Bush, *The Politics of Exclusion: The Enduring Battle Over Immigration Policy Reflects How We Define Ourselves*, S.F. CHRON, Mar. 8, 1992, Sunday Review, at 1 ("The anti-immigration drive is ultimately an attack on nonwhite citizens who have lived in the United States for generations: It says . . . people like you are unwelcome."); John A. Farrell, *Open Doors/Closing Minds: Possibly the Largest Wave of Immigration in U.S. History is Creating Fear, Divisiveness and What Promises to be a Political Free-For-All in an Election Year*, BOSTON GLOBE, Feb. 23, 1992, at 61 (Patrick Buchanan and California Governor Pete Wilson have sought to blame America's problems on immigrants. "Buchanan expressed alarm last year that if present trends hold, white Americans will be in the minority by 2050."). A xenophobic resurgence is not a uniquely American problem. *See, e.g.*, Marcel Garces, *Population: European Racism Seen as a Harsh Reality*, Inter-Press-Service, Aug. 19, 1992, *available in* LEXIS, Nexis Library ("avalanche of displaced people could increase present xenophobic . . . and racist tendencies which already exist in the 12 European Community countries"); Tyler Marshall, *Arson Attacks on Foreigners No Longer Big News in Germany's Media*, L.A. TIMES, July 17, 1993, at 8.

9. *See* Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S. 580 (1952). *But see* Rafeedie v. INS, 795 F. Supp. 13 (D.D.C. 1992) (permanent resident alien could not be excluded for engaging in conduct protected by the First Amendment); American Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060, 1082-83 (C.D. Cal. 1989) (unconstitutional to deport noncitizens for engaging in protected speech), *rev'd on other grounds*, 940 F.2d 445 (9th Cir. 1991). This and other deportation grounds can also be applied retroactively. Because deportation is classified as civil in nature rather than criminal, retroactive application does not offend the constitutional prohibition on *ex post facto* laws. *See Galvan*, 347 U.S. at 531; *Harisiades*, 342 U.S. at 593.

10. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

11. *See, e.g.*, Shaughnessy v. United States *ex rel.* Mezei, 325 U.S. 206, 215 (1953) (indefinite detention of excludable alien, ponding deportation and without a hearing, violates no constitutional rights); Gisbert v. Attorney General, 988 F.2d 1437 (5th Cir. 1993) (continued detention of Mariel Cubans "pending deportation" does not violate substantive or procedural due process guarantees); Garcia-Mir v. Meese, 788 F.2d 1446, 1455 (11th Cir. 1986) (rejecting "all legal theories, constitutional or otherwise, advanced" by indefinitely detained excludable Cubans); Fernandez-Roque v. Smith, 734 F.2d 576 (11th Cir. 1984); Palma v. Verdeyen, 676 F.2d 100, 103 (4th Cir. 1982) (finding *Mezei* dispositive of constitutional challenge to indefinite detention of an excludable Cuban); Tartabull v. Thornburgh, 755 F. Supp. 145, 148 (E.D. La. 1990)

Maria's home in Peru without probable cause or a warrant.[12] Those agents could also kidnap Maria and bring her to the United States to face criminal charges.[13] Juanita can be constitutionally denied the opportunity to reunite with her father in the United States solely on the basis of gender and illegitimacy.[14]

As this hypothetical demonstrates, a wedge has been driven between constitutional norms affecting citizens and those norms affecting noncitizens. What explains this dichotomy? And, is the explanation viable today? This Article explores both questions. Part II searches for a theory of plenary power that coherently explains the denial of substantive constitutional rights in the vast array of factual settings partially illustrated above. While I briefly refer to theories based (1) on constitutional text; (2) on the location of the alleged eonstitutional

---

(indefinite detention of Cuban detainees does not violate constitutional due process guarantee because excludable aliens possess "no constitutional liberty right"); Barrios v. Thornburgh, 754 F. Supp. 1536, 1541 (W.D. Okla. 1990) (distinguishing *Rodriguez-Fernandez,* court found no constitutional violation in continued detention of Cuban detainee who had committed crime in the United States and who would be given yearly review of his eligibility for parole); Sanchez v. Kindt, 752 F. Supp. 1419, 1433 (S.D. Ind. 1990) (Cuban detainee's "petition is an unexceptional variation of a now-familiar theme, the points of which have been rejected by the courts again and again. No constitutional guarantee . . . has been violated through the petitioner's detention."); Alverez-Mendez v. Stock, 746 F. Supp. 1006, 1016 (C.D. Cal. 1990) (continued detention of Mariel Cuban does not violate the Fifth and Sixth Amendments). *But see* Rodriquez-Fernandez v. Wilkerson, 654 F.2d 1382 (10th Cir. 1981) (authority to detain limited by international and constitutional law principles). Through the legal fiction of "parole," many Mariel Cubans, imprisoned for over a decade in plaees such as El Reno, Oklahoma, are not technically within the United States. *See* Leng May Ma v. Barber, 357 U.S. 185, 188 (1958) (physical presence within United States does not constitute entry). This illusion serves to strip an inmate of even the modest procedural guarantees accorded an alien by her presence in the United States.

12. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). Even after Maria arrives in the United States, the Fourth Amendment may not protect her. *See infra* note 155. I am thankful to Professor Legomsky for pointing out a revealing irony in this case and in United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992). Both opinions, grounded in "sovereignty" principles, exhibit blatant contempt for the territorial sovereignty of *other* nations. *See Alvarez-Machain,* 112 S. Ct. at 2197 (Stevens, J., dissenting) (abduction "involves a violation of the territorial integrity" of another country).

13. *See Alvarez-Machain,* 112 S. Ct. 2188 (addressing the United States' failure to comply with an extradition treaty; the Court did not discuss the potential constitutional rights of the Mexican national). Although the district court in the *Alvarez-Machain* case concluded that it lacked jurisdiction over the defendant because of the treaty violation, it rejected a due process challenge, citing the Supreme Court's decision in Ker v. Illinois, 119 U.S. 436 (1886). The Court held in *Ker* that "a forcible abduction does not offend due process." United States v. Caro-Quintero, 745 F. Supp. 599, 604 (C.D. Cal. 1990).

14. *See* Fiallo v. Bell, 430 U.S. 787 (1977).

violation, whether within the United States territory or without; and (3) on the affinity or "ties" between the alien and the United States or specific communities within the United States' borders, the only theory that adequately explains plenary power across the broad spectrum of unique factual settings is one based on national sovereignty.[15] Concepts of sovereignty in international law provide the background norm informing the Court's decisions regarding the constitutional allocation between governmental power and noncitizen rights.[16]

Sovereignty is not a static concept. To illustrate sovereignty's fluidity, Part III briefly sketches the historical development of national sovereignty from its genesis after the fall of the Holy Roman Empire to its place in international law today. The *Chinese Exclusion Case* took a snapshot of sovereignty as it existed in the latter part of the nineteenth century. National sovereignty, the Court concluded, "is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[17] Plenary power developed in this era of "absolute" sovereignty, when no global legal infrastructure existed to harness the power of an individual nation-state within its own domain. Additionally, although the international legal framework ordered relations *among* independent sovereigns,[18] it lacked concern for the status of individual human beings. Persons were *objects*, not *subjects*, in the international arena; they lacked rights and duties. This picture informed the Court's view of the constitutional rights of noncitizens, and it still informs the Court's view today.

This snapshot is but a single frame in a much larger international drama that continues to unfold. The Court's plenary power cases,

---

15. The other three theories may support aspects of plenary power, but they fail to provide a unifying thread holding the doctrine together.

16. Professor Verzijl has observed that "the notion of sovereignty disintegrated into three completely distinct concepts: those of supreme power within the States, of independence from any other earthly power, and of—an initially denied—exemption from any legal or moral boundary whatsoever." J.H.W. VERZIJL, 1 INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 258 (1968). This Article addresses the second conception of sovereignty. For the United States, the first notion vests sovereignty in the people and places constitutional limits on the trustee of that sovereignty. The third concept involves possible natural law boundaries to sovereignty. The second construct, as it relates to plenary power, informs the Court's view of the first, driving a wedge between internal and external constitutional norms.

17. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604 (1889) (quoting Schooner Exch. v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812)).

18. In much the same way, contract rules ordered relationships among individuals without placing substantive limitations on individual sovereignty. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). *See also* Peter Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 6 (1984).

however, continue to cling to the faded still photography of last century, failing to acknowledge sovereignty's motion, including drastic changes in international human rights law in our century.

The seed of individual rights, inalienable and fundamental, deeply embedded in our national ethos, took root in the international community during the past half century. From the devastation wrought by Hitler's Thousand Year Reich a consensus emerged that individual rights, within the framework of sovereign nation-states, deserved global attention. In the period after World War II, what had previously existed only as a moral ideal—that individual humans did matter—found expression not only in the constitutions of many newly formed countries, but also in positive international law. A metamorphosis occurred, transforming individuals from *objects* to *subjects* in the global community.

With the emergence of international human rights norms, the international community has also witnessed the recession of absolute sovereignty. The presence of *binding* human rights standards in the international legal order means, fundamentally, that nation-states have agreed to relinquish some measure of sovereignty over individuals within their borders. In other words, these external restrictions imply a diminution in sovereignty.[19]

Part IV explores the relationship between developing international human rights norms and the plenary power doctrine.[20] Since sovereignty provides the baseline for the constitutional rights of aliens, we simply cannot ignore the developments in that concept over the past fifty years. Plenary power and the corresponding gulf between the rights of citizens and aliens is a product of the era of absolute sovereignty. Today, with external norms and structures to limit sovereignty, the baseline has

---

19. By contrast, the *Chinese Exclusion* Court viewed nineteenth century sovereignty as rejecting external controls precisely because such restrictions "would imply a diminution of [the state's] sovereignty." 130 U.S. at 604 (quoting *The Exch.*, 11 U.S. (7 Cranch) at 136).

20. In this Article, I use the terms "noncitizen" and "alien" interchangeably to include all non-United States citizens who find themselves subject to the power and authority of the United States government. The political branches of the federal government have the broadest power over aliens in the immigration context, but even outside this context, the Court has afforded the political branches great latitude, stating that "Congress regularly makes rules [for aliens] that would be unacceptable if applied to citizens." Mathews v. Diaz, 426 U.S. 67, 80 (1976). *See also* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990); Hampton v. Mow Sun Wong, 426 U.S. 88, 101 n.21 (1976) ("the power over aliens is of a politieal character and therefore subject only to narrow judicial review"). Since I believe that the Court ultimately needs to discard its language in all federal alienage cases and develop a new language, I will use the term "plenary power" in a loose sense to encompass all federal alienage cases applying "only narrow judicial review."

shifted. If sovereignty ever provided a sound basis for plenary power,[21] it does not today. I conclude that the judicially created plenary power doctrine, adrift now in this age of international human rights from its theoretical moorings, should be discarded.[22]

II. SOVEREIGNTY THEORY OF PLENARY POWER

Fraught with conclusory statements, the Court's plenary power analysis proceeds from the premise that generalized and often unenumerated foreign affairs powers are at play, as though that conclusion necessarily follows *a priori* from the incantation, "a power inherent in every sovereign state." A rigorous inquiry into the proper constitutional balance between the powers of the sovereign and the rights of the individual alien never materializes. Likewise, the Court abstains from an informed analysis of the real differences between citizens and

---

21. Professor Nafziger forcefully argues that the *Chinese Exclusion Case* and its progeny erroneously read the international law of sovereignty in adopting the plenary power doctrine. *See* James A. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT. L. 804 (1983) (arguing that international law never permitted unfettered discretion by a sovereign in questions of admission, exclusion, and expulsion of aliens). This Article does not revisit that issue; instead I assume *arguendo* that the Court in the *Chinese Exclusion Case* correctly balanced the interest of nation and alien for its period. I then explore one important and changing baseline that compels reexamination of the plenary power doctrine. Other legal scholars have thoroughly examined the plenary power doctrine in light of the procedural and substantive rights explosion taking place in the United States, which parallels the development of international human rights, and also calls into question the current validity of the plenary power doctrine. *See, e.g.*, T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L. L. 862 (1989); Henkin, *supra* note 7; Legomsky, *supra* note 7; *Curious Evolution*, *supra* note 7; Schuck, *supra* note 18.

22. Justice Frankfurter defended the continued vitality of the plenary power doctrine on longevity grounds:

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens . . . . But the slate is not clean.

Galvan v. Press, 347 U.S. 522, 530-31 (1954), quoted with approval in Fiallo v. Bell, 430 U.S. 787, 792 n.4 (1976). Any follower of the Supreme Court at the beginning of the third century of the Bill of Rights needs no reminder that slates are being wiped clean with great regularity. *See* Payne v. Tennessee, 111 S. Ct. 2597, 2610-11 n.1 (1991) (Chief Justice Rehnquist citing 33 constitutional decisions of the Court that have been fully or partially overruled during the previous 20 terms). The scope of this Article is limited to exploring and criticizing the plenary power doctrine. I leave to a forthcoming article the task of offering a model for reconstructing the constitutional rights of aliens in a post-plenary power world.

aliens and within the heterogeneous class of aliens. The cases rely, for their grant of deference, on the sovereign's foreign affairs concerns without actually testing the validity of these concerns.[23] Justice Frankfurter put it most succinctly in his concurring opinion in *Harisiades v. Shaughnessy*, a deportation case, in which he wrote: "It is not for this Court to reshape a world order based on politically sovereign States."[24]

In this section, I attempt to articulate a coherent theory that will explain the broad framework within which plenary power operates. Once the theoretical base is established, later sections of the Article will assess whether this base supports the continued separation of alienage law from mainstream constitutional norms.

The *Chinese Exclusion Case* and its progeny suggest several reasons for extreme judicial deference to the political branches in the treatment of noncitizens.[25] In my analysis, the four most salient theories of plenary power are an affinities theory,[26] a territorial theory,[27] a textual theory,[28] and a sovereignty theory.[29] Each of these theories has been

---

23. Fiallo v. Bell, 430 U.S. 787 (1977), provides a good example. *See infra* text accompanying notes 127-36, 307-11.

24. 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring). He thought that questions of admission, exclusion, and expulsion of aliens were "matters solely for the responsibility of the Congress and wholly outside the power of [the] Court to control," even when Congress' decisions are departures "from the best traditions of this country." *Id.* at 597 (Frankfurter, J., concurring). "[W]hether immigration laws have been crude and cruel, whether they may have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress." *Id.* (Frankfurter, J., concurring).

25. For treatment of the guest, unfair advantage, allegiance, poetic justice, and interest theories, see STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 314-24 (1987); Legomsky, *supra* note 7, at 261-78. In these works, Professor Legomsky also discusses theories based on territoriality and inherent foreign affairs power based on concepts of national sovereignty. Professor Legomsky states that a sovereignty theory underlies many plenary power cases. *See* LEGOMSKY, IMMIGRATION AND THE JUDICIARY, *supra* at 184-92.

26. An affinities theory examines the "ties" between the affected alien and the United States, devaluing the alien in constitutional analysis because the alien lacks the status of "member" in our constitutional community. *See, e.g.*, T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9 (1990) (suggesting that "current constitutional norms defining the federal immigration power are shaped by a membership model of citizenship and alienage").

27. A "territorial" approach suggests that constitutional norms operate in a less protective fashion outside United States territory, thus compelling a lower level of judicial interference with government action beyond our borders. *See, e.g.*, Legomsky, *supra* note 7, at 275.

28. Text as justification is of recent vintage. In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Court distinguished between the terms "people" in the Fourth Amendment and "person" in the Fifth Amendment, suggesting that the

subjected to sound criticism, in dissents[30] and in the scholarly literature.[31] But plenary power remains. In attempting to understand the steadfastness of this "constitutional oddity,"[32] I have searched for the cornerstone, the one theory that operates across the broad spectrum of plenary power cases. Among these theories, the only one that adequately explains judicial indifference to the plight of noncitizens in every plenary power case is a theory rooted in sovereignty. While affinity, territorial, and textual theories explain some of the plenary power cases, none of these theories provides a unifying whole.[33]

"people" was a more restrictive subgroup of the class of "persons." The Court held that a nonresident alien who was in a United States prison was not one of the "people" entitled to the Fourth Amendment's protection against warrantless and unreasonable searches of his home in Mexico. *Id.* at 266.

29. Sovereignty theory requires judicial deference to the inherent and unenumerated pewer of the political branches to operate within the global eommunity. This power derives from the United States' membership in "the family of nations, [which requires that] the right and power of thc United States in that field are equal to the right and power of the other members of the international family." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

30. *See, e.g.,* United States v. Verdugo-Urquidez, 494 U.S. 259, 279 (1980) (Brennan, J., dissenting) (critical of all four theories); Jean v. Nelson, 472 U.S. 846, 858 (1985) (Marshall, J., dissenting) (would have applied domestic constitutional equal protection norms to case involving the detention pending determination of admissibility of unadmitted aliens with no ties to the United States).

31. *See, e.g.,* LEGOMSKY, *supra* note 25, at 184-222; Legomsky, *supra* note 7.

32. "Immigration law is a constitutional oddity." Legomsky, *supra* note 7, at 255.

33. Throughout the Article, I will explore the limitations of these theories at various places as the sovereignty theory is developed. For now, a brief synopsis should suffice. An affinity theory of plenary power fails to explain adequately the plenary power doctrine's operation when the rights of citizens are at stake in an immigration setting. *See* Fiallo v. Bell, 430 U.S. 787 (1977) (plenary power doctrine employed to defeat citizen's claim that an immigration statute impermissibly discriminated on gender and legitimacy grounds); Kleindienst v. Mandel, 408 U.S. 753 (1972) (subordinating citizen's First Amendment claims to the government's plenary power over exclusion). Territorial theory is limited solely to exclusion cases. *See* Legomsky, *supra* note 7, at 275. It cannot, thereforo, account for or explain the long line of cases granting Congress and the executive branch plenary pewer over deportation. *See, e.g.,* Fong Yue Ting v. United States, 149 U.S. 698 (1893) (plenary power applicable in deportation context). Finally, a textual theory that allows Congress' plenary power to operate in an oppressive way against those not included among the "people" fails to justify the extensive list of cases where plenary power principles of deference operate despite the pleas by constitutionally protected persons for Fifth Amendment protection. *See, e.g.,* Galvan v. Press, 347 U.S. 522 (1954) (alien's classification as a "person" entitled to constitutional protection did not stifle operation of plenary power doctrine in deportation case).

Sovereignty theory, unlike the others, accommodates a host of diverse plenary power cases.[34] Given the uneven and often inconsistent application of the other justifications, they are relegated to tertiary status. The mainstay rationale is that the political branches' power "to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation."[35] This rationale exists in a time warp, trapped within nineteenth century conceptions of national sovereignty.

The Court discusses sovereignty theory in cases spanning plenary power's century of existence. In this section, I will explore representative cases from three periods: the foundational period from 1889 to the early twentieth century; the entrenchment of the doctrine in the "chilling"[36] period of the early 1950s; and the steadfastness of the doctrine during the decade of the 1970s, when the substantive and procedural protections of the Constitution had come to fruition.[37] These periods witnessed the greatest flurry of activity from the Supreme Court in its use of the plenary power doctrine. And, throughout the entire period, sovereignty theory provides a unifying explanation for the doctrine.

---

34. An inherent sovereign powers theory of plenary power, as I understand it, requires judicial deference to the political branches' decisions in immigration and related alienage cases to allow the United States to operate as an "equal" within the community of nations. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). Sovereignty theory does not appear to be limited geographically or by the level of an alien's ties to the United States. Since the power is not enumerated in the Constitution it would not appear to be bounded by textual restrictions. Instead, sovereignty theory seems to provide an explanation for plenary power in all of its manifestations in the various alienage cases.

35. Wong Wing v. United States, 163 U.S. 228, 231 (1896). Deportation "is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." Harisiades v. Shaughnessy, 342 U.S. 580, 587-88 (1952).

36. "Since 1950, the due process rights of aliens in exclusion proceedings might well be summarized in one famous (and rather chilling) sentence written by Justice Minton." T. ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 353 (2d ed. 1991). Justice Minton, writing for the Court in United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950), said: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."

37. I will briefly explore one recent case, United States v. Verdugo-Urquidez, 494 U.S 259 (1990), in conjunction with this third period.

A. The Foundation

The *Chinese Exclusion Case*,[38] *Nishimura Ekiu v. United States*,[39] and *Fong Yue Ting v. United States*,[40] are recognized as the "basic building blocks" of plenary power.[41] These cases firmly established an inherent and seemingly unfettered federal power over issues of admission, exclusion, and expulsion of noncitizens.

1. EXCLUSION

At issue in The *Chinese Exclusion Case* were the parameters of Congress' power to exclude aliens.[42] While the opinion shaped an entire area of constitutional law, it focused on the powers incident to the status of sovereign and not on whether the Constitution limits the exercise of the exclusion power in order to protect individual rights.[43] The Court did

---

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

39. 142 U.S. 651 (1892).

40. 149 U.S. 698 (1893).

41. *See* STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 49 (1992).

42. *Chinese Exclusion*, 130 U.S. 581. Chae Chan Ping, a Chinese citizen, had lived and worked in California for 12 years prior to his return to China in 1887. *Id.* at 582. When he first arrived in the United States, migration between China and the United States was open and unrestricted; in the Burlingame Treaty of 1868, the United States and China recognized "the inherent and inalienable right of man to change his home and allegiance." *Id.* at 592 (quoting Treaty with China, July 28, 1868, U.S.-Ta-Tsing Empire, art. V, 16 Stat. 739, 740). The 1880s brought increased hostility toward the Chinese residents on the west coast. *Id.* at 595-96. By supplemental treaty and statute, the United States suspended the immigration of Chinese laborers. Chinese laborers already present in the United States could leave and return, but only if they obtained a certificate from the United States entitling their return. *Id.* at 597-98. With this certificate in hand, Chae Chan Ping embarked on his trip to China. On September 7, 1888, he set sail on his return trip to California. *Id.* at 582. On October 1, 1888, an act of Congress voided Chae Chan Ping's certificate and all similar certificates held by other Chinese laborers. *Id.* at 599. Chae Chan Ping arrived in the port of San Francisco on October 8, 1888, and was excluded under the eight day old law. *Id.* at 582. The Supreme Court upheld the exclusion, and in the process made two major rulings. First, the federal government has the power to exclude noncitizens. *Id.* at 606. Second, the United States Constitution places treaties and United States statutes on the same level, giving preference to the one adopted later in time. *Id.* at 609-10. This Article explores the first holding. For a thorough examination of the latter holding, see Henkin, *supra* note 7, at 863-86.

43. Two obvious questions arise from the Court's emphasis on inherent and unenumerated sovereign powers. First, can a government of constitutionally enumerated powers possess unenumerated powers? In the *Dred Scott* case, the Court said that the federal government

not address the question of whether exclusion of Chinese nationals on racial grounds violated the Constitution.[44] Neither did the Court inquire into the "liberty" or "property" interest at stake. Finally, the Court did not address the *ex post facto* and bill of attainder issues raised by the United States' refusal to honor the certificate the United States government gave to Chae Chan Ping to guarantee his readmission upon returning from China. The Court apparently presumed the constitutionality of the exclusion.[45] The Court focused not on *internal* structural restraints designed to restrict governmental activity in international affairs, but on whether any *external* controls existed.[46]

The Court took a two-step approach to the question of whether Congress had the power to exclude aliens:[47] 1) does the nation have the power to exclude; and 2) if so, under our Constitution, who has the

---

> does not possess all the powers which usually belong to the sovereignty of a nation. Certain specified powers, enumerated in the Constitution, have been conferred upon it; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution.

Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 401 (1856). Second, even if the political branches possess inherent, unenumerated powers over questions of admission, exclusion, and expulsion of aliens, why is this power plenary, barring meaningful review into individual claims of constitutional protection? Both of these problems with the Court's approach have been thoroughly explored elsewhere. *See, e.g.*, LEGOMSKY, *supra* note 25, at 184-95; Henkin, *supra* note 7, at 854-63; Legomsky, *supra* note 7, at 273-75.

Professor Legomsky concludes that "the plenary power doctrine resulted from misplaced reliance on the sovereignty theory." LEGOMSKY, *supra* note 25, at 195. I agree that the doctrine's origins are questionable. My purpose in this Article, however, is not to revisit the validity of its origins. Instead, I take as a given the Court's reliance, misplaced or not, on sovereignty theory and then explore the changes in the nature of sovereignty that compel reexamination of this constitutional baseline.

44. I recognize that it was not until 1954 that the Court read an equal protection component into the Fifth Amendment. *See* Bolling v. Sharpo, 349 U.S. 294 (1954) (this companion case to *Brown v. Board of Education* outlawed the segregated school system in Washington, D.C.).

45. Chae Chan Ping did argue that he was a "porson" entitled to Fifth Amendment protection and that the act under which he was held excludable was a bill of attainder and violated the prohibition on *ex post facto* laws. *See* The Chinese Exclusion Case, 32 L. Ed. 1068, 1069 (1889) (argument notes). The Court did not appear to address these issues. However, in *Fong Yue Ting*, the Court recognized that the issues had been raised in the *Chinese Exclusion Case* and that the earlier Court had upheld Congress' plenary power to exclude in the face of these claims of constitutional right. *See* Fong Yue Ting v. United States, 149 U.S. 698, 722 (1893).

46. Professor Aleinikoff argues that these internal controls become more accessible to the courts if Congress' immigration power is viewed as emanating from its commerce power or from a structural analysis of the Constitution, rather than from inherent sovereign powers. *See* Aleinikoff, *supra* note 21, at 863-64.

47. *See Chinese Exclusion*, 130 U.S. at 603.

authority to exercise that power? The answer to the first inquiry was clearly yes. The power of a nation to exclude noncitizens is irrefutable because "[j]urisdiction over its own territory to that extent is an incident of every independent nation."[48] The Court said:

> If it could not exclude aliens it would be to that extent subject to the control of another power . . . . "The jurisdiction of the nation within its own territory is necessarily *exclusive and absolute*. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a *diminution of its sovereignty* to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction."[49]

Having found no external restraints on the power of a nation to exclude noncitizens, the Court then addressed the question of where the exclusion power rested in the United States and concluded that it was a power delegated by the Constitution to the national government.[50] The power

---

48. *Id.* The *Chinese Exclusion Case* was premised on the Court's view that

> [t]he power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exereise at any time . . . the interests of the country require it, cannot be granted away or restrained on behalf of anyone.

Id. at 609.

49. *Id.* at 604 (quoting Chief Justice Marshall in Schooner Exch. v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812)) (emphases added). Justice Field, for the *Chinese Exclusion* majority, failed to quote Chief Justice Marshall's qualifying language: "[A]ll sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage." *Schooner Exch.*, 11 U.S. (7 Cranch) at 136.

With the independence and security of the country entrusted to the political branches of the federal government, the Court reasoned, it is incumbent upon those branches to protect such interests:

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.

Chinese Exclusion, 130 U.S. at 606.

50. *Chinese Exclusion*, 130 U.S. at 604-06. Although local authorities control local issues, "the United States, in their relation to foreign countries and their subjects or

is not enumerated in the Constitution; it is, instead, a power belonging to the federal government as an "incident of sovereignty."[51] It also placed this power within the legislative branch and abdicated any judicial oversight responsibility.[52]

After the *Chinese Exclusion Case,* it was clear that the federal government possessed an unenumerated power to exclude. It was unclear, however, whether and to what extent this power was limited by the guarantees found in the Bill of Rights. The Court specifically said that the exercise of this power was restricted "only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations,"[53] but it failed to explore these limitations.[54]

---

citizens are one nation, invested with powers which belong to independent nations." *Id.* at 604.

51. *Id.* at 609.

> We are not told where in the Constitution the Court found this grant of power, how it is to be justified in the face of the provision that the powers not delegated to the federal government are reserved to the States, which are the powers that "belong to independent nations" or how are they to be determined, by whom they can be exercised . . . .

See LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 18 (1972) (quoting *Chinese Exclusion,* 130 U.S. at 604). The Court did not suggest that this unenumerated power was also extra-constitutional. *See* 130 U.S. at 609. (The exclusion power is "part of those sovereign powers delegated by the constitution."). Almost a half century later, the Court suggested that this plenary power over immigration issues was extra-constitutional. *See infra* text accompanying notes 183-85, 297-305.

52. A determination by the legislative branch to exclude the Chinese because "the presence of foreigners of a different race in this country, who will not assimilate with us, [is] dangerous to [the United States] peace and security . . . is conclusive upon the judiciary." *Chinese Exclusion,* 130 U.S. at 606.

53. *Id.* at 604.

54. This failure can be plausibly explained on two grounds. First, in the nineteenth century, the Court maintained that the United States Constitution did not apply beyond the U.S. borders. *See In re* Ross, 140 U.S. 453, 464 (1891). *See also* Neuman, *supra* note 7, at 943-57. Second, equal protection and substantive and procedural due process had much different meanings a century ago. *See, e.g.,* Henkin, *supra* note 7, at 859; *Phantom Constitutional Norms, supra* note 7, at 551. *Fong Yue Ting,* however, seems te foreclose the former explanation. In that ease, the Court held that the deportation power and the exclusion power derived from the same source. And, although the alien was within the United States, the majority, over three dissents, refused to hold that the power to depert must yield to the rights of individual noncitizens. Fong Yue Ting v. United States, 149 U.S. 693, 713-14, 724 (1893). In addition, more recent cases seem to foreclose the latter explanation. In Kleindienst v. Mandel, 408 U.S. 753 (1972), and Fiallo v. Bell, 430 U.S. 787 (1977), the plenary power doctrine came into direct conflict with modern First Amendment and equal protection concerns, respectively. Plenary power emerged unscathed in both decisions. Citing *Chinese Exclusion* and *Fong Yue Ting,* the *Kleindienst* Court concluded that an individual's First Amendment rights had to

2. DEPORTATION

Four years after the *Chinese Exclusion Case*, in *Fong Yue Ting v. United States*,[55] the Court concluded that "[t]he right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens . . . *rests upon the same grounds*, and is as *absolute and unqualified* as the right to prohibit and prevent their entrance into the country."[56] After extensively reviewing international law sources, the Court reiterated the ground upon which plenary power is based: "an inherent and inalienable right of every sovereign and independent nation."[57] Again, it confirmed that this power is vested in the political departments of the federal government.[58]

---

be subordinated to "ancient principles of the international law of nation-states." *Kleindienst*, 408 U.S. at 765.

For an in-depth look at the restrictions found in the "public policy and justice which control, more or less, the conduct of all civilized nations," *Chinese Exclusion*, 130 U.S. at 604, see Nafziger, *supra* note 21.

55. 149 U.S. 698 (1893). This case involved three Chinese laborers facing deportation because they failed to obtain certificates of residence, which were required for all Chinese laborers. *Id.* at 699. They had resided in the United States for 19, 16, and 14 years, "almost as long a time as some of those who were members of the Congress that passed this act of punishment and expulsion." *Id.* at 734 (Brewer, J., dissenting). One of the laborers could not obtain a certificate because he could not produce a credible white witness to testify that he was entitled to the certificate. *Id.* at 703-04.

56. *Fong Yue Ting*, 149 U.S. at 707 (emphasis added). The "have not . . . taken any steps" language is a bit deceptive because at this time and until 1943, Chinese nationals were prohibited by law from becoming United States citizens. *See* Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58, 61 (persons of Chinese origin specifically barred from naturalization), *repealed by* Act of Dec. 17, 1943, ch. 344, § 1, 57 Stat. 601. Chinese nationals were probably forbidden from becoming naturalized even earlier than 1882. *See* Act of Mar. 26, 1790, ch. 111, § 1, 1 Stat. 103 (only free white persons eligible for naturalization). Racial discrimination in the naturalization process ended in 1952. *See* Act of June 27, 1952, ch. 477, § 311, 66 Stat. 163, 239, *codified as amended at* 8 U.S.C. § 1422 (1988). The early removal of the ban to Chinese naturalization was a goodwill gesture to a World War II ally. *See generally* 4 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE, § 15.12 (1990); Charles Gordon, *The Racial Barrier to American Citizenship*, 93 U. PA. L. REV. 237 (1945).

57. *Fong Yue Ting*, 149 U.S. at 711. The Court started its opinion by quoting from Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892), in which the Court had said that "[i]t is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty," to control immigration. *Fong Yue Ting*, 149 U.S. at 705.

58. *Fong Yue Ting*, 149 U.S. at 713. Although the Court referred to the expulsion power as "absolute and unqualified," it left an opening for judicial intervention. "The power to exclude or to expel aliens . . . is vested in the political departments . . . except so far as the judicial department . . . is required by the paramount law of the Constitution, to intervene." *Id.* at 713. But the Court seemed to close this window later

The Court conceded that the Constitution bounded the right to expel.[59] It refused, however, to subordinate this unfettered and inherent power to expel noncitizens to any claim of constitutional protection advanced by the noncitizen.[60] Relying on international law, the Court held that the aliens were entitled to the protections of the Constitution while they are permitted to stay, but they could not invoke those protections as a shield against the government's power to terminate its hospitality.[61] The Court contrasted its decision in *Yick Wo v. Hopkins*[62]

---

in the opinion; it said that immigration questions, which are assigned to the political branches, are ones that the "judicial department cannot properly express an opinion upon." *Id.* at 731. *See also* Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889) (such decisions are "conclusive upon the judiciary"). The Court, obviously, has not seen fit to intervene in the vast majority of constitutional immigration cases. This lack of intervention gives rise, therefore, to this Article and the abundance of other criticism. *See supra* note 43.

59. Upon reaffirming the nature of Congress' power, the Court in *Fong Yue Ting* directly asked whether Congress' exercise of this power was "consistent with the Constitution." *Fong Yue Ting*, 149 U.S. at 711.

60. *Fong Yue Ting*, 149 U.S. at 724.

> [A]ll . . . aliens residing in the United States . . . are entitled . . . to the safeguards of the constitution. . . . But [the Chinese Laborers] continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them . . . whenever, in its judgment their removal is necessary . . . for the public interest.

Id.

61. *See id.* The method by which the Court concluded that aliens are entitled to constitutional protection while permitted to stay is a curious one. The Court could have decided that aliens within the United States are "persons" entitled to constitutional protection. *See, e.g.*, Wong Wing v. United States, 163 U.S. 228, 237 (1896) (imposing Fifth and Sixth Amendment limitations on Congress' power to exclude and expel aliens); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (holding that states must extend Fourteenth Amendment protections to all persons within the United States, including Chinese subjects who have the right to be in the United States). Instead, the Court held that they were entitled to constitutional protection based on principles of international law, which allow resident aliens to claim the protections provided by the country of their domicile. *Fong Yue Ting*, 149 U.S. at 724. If this is the theory under which resident aliens find protection, then Justice Brewer is correct in stating that the constitutional guarantees "are theirs by sufferance and not of right." *Id.* at 743 (Brewer, J., dissenting). In other words, the protections afforded to aliens while here are "illusory." Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).

62. 118 U.S. 356 (1886). *Yick Wo* and its progeny trace a very different constitutional history for aliens affected by oppressive state action than the one we have been following with respect to federal action. *Yick Wo*'s modern permutation finds that state "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 372 (1971). For a more thorough discussion of the relationship between plenary power and the *Yick Wo* line of cases, see Aleinikoff, *supra* note 26, at 19-20;

with the plenary power cases; at issue in *Yick Wo* was the state's power over lawful resident aliens, while the plenary power cases involved Congress' power to expel.[63]

The opinion drew three strong dissents. All three rejected the "power . . . inherent in sovereignty"[64] rationale as tyrannical and repugnant to our form of government.[65] Even assuming, *arguendo*, that the power to deport is among those implied, Justice Brewer argued in dissent that "it can be exercised only in subordination to the limitations and restrictions imposed by the constitution."[66]

The dissenters disagreed with the majority's characterization of the deportation power and the Court's unwillingness to place that power under constitutional limitations; Justices Brewer and Field viewed both international law and the constitution as placing limits on the political branches' deportation ability. Unlike the majority, the dissenters viewed the alien's entitlement to constitutional protection as emanating from her personhood and not from conceptions of international law,[67] and they

---

Aleinikoff, *supra* note 21, at 865-66; Linda S. Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 967-77; *Curious Evolution*, *supra* note 7, at 1688-92; Michael A. Scaperlanda, *The Paradox of a Title: Discrimination Within the Anti-Discrimination Provisions of the Immigration Reform and Control Act of 1986*, 1988 WIS. L. REV. 1043, 1057-80; Schuck, *supra* note 18, at 54-58.

63. *Fong Yue Ting*, 149 U.S. at 725.

64. *Id.* at 737 (Brewer, J., dissenting).

65. *Id.* (Brewer, J., dissenting). *See also id.* at 754, 757 (Field, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting). Although he did not find support for banishment in international law, Justice Brewer did allow that the "expulsion of a race may be within the inherent powers of a despotism" because "the governments of other nations have elastic powers." *Id.* at 737-38 (Brewer, J., dissenting). In a famous passage, he responded to the inherent powers theory:

> It is said that the power here asserted is inherent in 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? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists.

Id. at 737 (Brewer, J., dissenting).

66. *Id.* at 738 (Brewer, J., dissenting). *See also id.* at 756-58 (Field, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting).

67. *See id.* at 739 (Brewer, J., dissenting); *id.* at 754 (Field, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting). Justice Brewer distinguished the exclusion case from the deportation case on territorial grounds because in his view the "Constitution has no extraterritorial effect." *Id.* at 738 (Brewer, J., dissenting). The Court had adopted the view that the Constitution has no extraterritorial effect a few years before. *See In re* Ross, 140 U.S. 453, 464 (1891). Since the *Fong Yue Ting* Court refused to adopt this view, a territorial theory of plenary power, while partially explaining plenary power in exclusion cases, does not provide an all-encompassing theory of the doctrine.

also saw no symmetry between the power to exclude and the power to expel. Therefore, the Constitution's protective umbrella was a matter of right, not sufferance, which extended to questions of expulsion or deportation.[68] Since they concluded that deportation was punishment[69] and a deprivation of constitutionally protected right, several constitutional infirmities surfaced.[70]

The foundational period of plenary power forcefully established an inherent and unenumerated power in the political branches, without any corresponding constitutional limitations. Although the constitutional "rights" explosion was decades away, the Court had clearly laid the groundwork for ensuring that any "rights talk" in immigration cases would be muffled. In extending the power to the deportation context, the Court rejected territorial theory as the sole explanation for the power. It also appears to have rejected an affinities or ties theory as the sole explanation because each of the affected aliens in *Chinese Exclusion* and

---

68. *Fong Yue Ting*, 149 U.S. at 739 (Brewer, J., dissenting); *id.* at 754 (Field, J., dissenting) (Aliens "differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guaranties of the Constitution."); *id.* at 762 (Fuller, C.J., dissenting) ("[T]he rule laid down [in *Yick Wo*] as much applies to Congress under the Fifth Amendment as to the States, under the Fourteenth."). Justice Brewer viewed the word "person" in the Fifth Amendment as "equally comprehensive" as the word "person" in the Fourteenth Amendment. *Id.* at 739 (Brewer, J., dissenting). From his vantage peint, Justice Brewer saw *Yick Wo* differently than did the majority. The majority saw *Yick Wo* as the stronger case for the alien because that case only involved the states' pewer over lawfully resident aliens; the instant case dcalt with the federal government's mucli stronger plenary power to expel. *See id.* at 725; *supra* text accompanying note 63. Justice Brewer viewed *Fong Yue Ting* as providing a stronger case for the alien than *Yick Wo* because lie focused, not on the governmental power at issue, but on the oppression to be suffered by the affected alien, concluding that the oppression was greater in *Fong Yue Ting*. *Id.* at 744 (Brewer, J., dissenting) (The municipal ordinance in *Yick Wo* worked "oppression to a few," while the act in *Fong Yue Ting* affected "a hundred thousand people [who] are subject to arrest and foreible deportation.").

69. Deportation "is a practice that bristles with severities." Harisiades v. Shaughnessy, 342 U.S. 580, 587 (1952). "It may deprive a man and his family of all that makes life worth while." *Id.* at 600 (Douglas, J., dissenting). Justice Field viewed deportation as a punishment "beyond all reason in its severity . . . . It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations . . . there contracted." *Fong Yue Ting*, 149 U.S. at 759 (Field, J., dissenting). Yet the Court concluded that deportation was not punishment. *Id.* at 730. This determination was of epie proportions. If the Court had decided otherwise, deportation proceedings would trigger the full panoply of criminal procedural rights. *Cf.* Wong Wing v. United States, 163 U.S. 228 (1896) (alien entitled to protections of Fifth and Sixth Amendments before he could be punished).

70. *See Fong Yue Ting*, 149 U.S. at 740-43 (Brewer, J., dissenting).

Fong Yue Ting had "ties" to the United States developed over periods in excess of a decade.[71]

International notions of sovereign power provide the Court's cornerstone for plenary power. Instead of looking to the United States' own tradition and text, the Court allowed international law to inform its opinion of the power exercised by the political branches in these decisions and the corresponding lack of restraint on that power. The period between *Fong Yue Ting* and the 1950s witnessed several more examples of plenary power's force.[72] The 1950s, however, brought a flurry of new activity to the Court.

B. Entrenchment: The "Chilling" Years

The latter part of the nineteenth century witnessed immigration restrictions enacted in response to the fear that "vast hordes [of foreigners of a different race were] crowding in upon us."[73] The 1950s cases dealt with ideological fear, not racial fear. "[T]he times being what they [were],"[74] the Court allowed the political branches to take many extreme measures against suspected communist aliens or others who supposedly posed a national security threat. Longtime resident aliens were deported for past membership in the communist party;[75] aliens were held, without entitlement to bail, pending deportation;[76] the spouse of a World War II veteran was excluded on national security grounds, without a hearing,[77] and a permanent resident alien was detained indefinitely pending exclusion.[78] These issues tested the plenary power doctrine; it not only survived but became entrenched at a time when mainstream or domestic

---

71. *See supra* notes 42 & 55.

72. *See, e.g.*, Mahler v. Eby, 264 U.S. 32, 40 (1924) (ruling that Congress can delegate its power to expol "undesirable residents" to the political departments of the federal government); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (ruling that Congress has the power to deport any alien whose presence it determines is harmful); Keller v. United States, 213 U.S. 138, 143-44 (1909) (same); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904) (ruling that an alien is not entitled to First Amendment protection in the deportation context); Fok Yung Yo v. United States, 185 U.S. 296, 302 (1902) (ruling that Congress has the power to regulate the privilege of transit of foreigners).

73. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

74. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 216 (1953).

75. *See* Galvan v. Press, 347 U.S. 522 (1954); Harisiades v. Shaughnessy, 342 U.S 580 (1952).

76. *See* Carlson v. Landon, 342 U.S. 524 (1952).

77. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

78. *Mezei*, 345 U.S. 206.

constitutional norms were undergoing a dramatic transformation.[79] In this Section, I examine four representative cases from this period: two exclusion cases and two deportation cases.

1. EXCLUSION

An early exception to plenary power's nearly unrestrained presence in immigration cases came in the procedural due process area. In the *Japanese Immigrant Case*,[80] the Court, in an opinion written by Chief Justice Harlan, held that an alien who had been in the United States for only four days was entitled to the procedural protections guaranteed by the Due Process Clause of the Fifth Amendment.[81] No similar exception had arisen in the exclusion context. In two cases during the 1950s, the Court specifically refused to extend this exception to the exclusion context. In *United States* ex rel. *Knauff v. Shaughnessy*[82] and *Shaughnessy v. United States* ex rel. *Mezei*,[83] the Court held procedural due process standards inapplicable despite the aliens' significant ties to the United States.[84] "Since 1950, the due process rights of aliens in exclusion proceedings might well be summarized in one famous (and

---

79. Less than a generation had passed since the Court suggested that it might apply a heightened standard of review to government action adversely affecting "discrete and insular minorities." United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). *See also* Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling the "separate but equal" doctrine as it applied to public education).

80. Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903).

81. *Id.* at 101.

82. 338 U.S. 537 (1950).

83. 345 U.S. 206 (1953).

84. 338 U.S. at 544; 345 U.S. at 214-15. Landon v. Plasencia, 459 U.S. 21 (1982), provides a limited but important exception to the *Knauff-Mezei* line of cases by requiring minimum due process procedures in an exclusion proceeding involving a permanent resident alien. In that case, Maria Plasencia, a permanent resident of the United States, was caught attempting to smuggle six nonresident aliens into this country. She had lived in the United States for five years with her citizen husband and minor children. The Immigration and Nationality Service detained her, and following an exclusion hearing she was ordered excluded from the United States. Plasencia appealed, claiming, *inter alia*, that she had been denied due process of law. *Id.* at 32. The Court agreed "with Plasencia that under the circumstances of this case, she can invoke the Due Process Clause on returning to this country, although" the Court did not "decide the contours of the process that is due," remanding the case for a determination of whether she had been accorded due process. *Id.* The fact that Plasencia's claim of constitutional right arose outside the territory of the United States did not defeat her claim. The government's procedures could be judged against a constitutional floor irrespective of the alien's physical location. *See Curious Evolution*, *supra* note 7, at 1655 ("*Plasencia* was an important milestone . . . . The statutory exclusion-deportation line was not constitutionally determinative.").

rather chilling) sentence written by Justice Minton: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'"[85]

Knauff involved Ellen Knauff's attempt to immigrate to the United States shortly after World War II. She married a war veteran and applied for admission to the United States pursuant to the War Brides Act, which provided special immigration preferences for the spouses and children of those who had served the United States during World War II.[86] Without a hearing, the Attorney General ordered her excluded from the United States for security-related reasons.[87] Knauff challenged her exclusion, asserting that Congress had unconstitutionally delegated its power to the executive branch.[88]

In upholding the delegation, the Court concluded that the legislative department does not exclusively possess inherent sovereign power to exclude; rather, it is shared with the executive branch, which derives its exclusionary power from its foreign affairs powers.[89] Relying on the now generally discarded right/privilege distinction, the Court concluded that since admission is a privilege, the Constitution provides no minimum level of procedural safeguards to aliens seeking admission into the United States.[90] The teaching of the foundational period applied: the federal government's political branches possess inherent plenary power over immigration issues without the constraints found in the Bill of Rights.[91]

---

85. ALEINIKOFF & MARTIN, *supra* note 36, at 353 (quoting *Knauff*, 338 U.S. at 544).

86. 338 U.S. at 545 n.8:

87. *Id.* at 539-40.

88. *Id.* at 542.

89. *Id.* (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)).

90. *Id.* at 544. Although the right/privilege distinction no longer governs issues of procedural due process generally, it may still have application in the immigration context. In Landon v. Plascencia, 459 U.S. 21, 32 (1982), the Court stated: "[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *See* ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 158 (1993); *Curious Evolution*, *supra* note 7, at 1654. On the demise of the right/privilege distinction, see William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

91. The three dissenters would have avoided the constitutional issue altogether by construing the statute in such a way as to deny the Attorney General the authority to exclude without a hearing. *See, Knauff*, 338 U.S. at 550 (Frankfurter, J., dissenting) (acknowledging that if Congress had explicitly spoken, he would have acquiesced); *id.* at 551-52 (Jackson, J., dissenting) ("Congress will have to use more explicit language than any yet cited."). Ellen Knauff's attempts to enter the United States did not end in the Supreme Court. Outside the courtroom, a political and public relations campaign

Harsher consequences have befallen aliens with even greater ties to the United States. Ignatz Mezei lived in the United States with his family for twenty-five years prior to a nineteen month trip abroad, allegedly to visit his dying mother in Europe.[92] Attempting to return home to the United States, he was denied entry and permanently excluded from the United States, without a hearing, on national security grounds.[93] No other country would accept him, and he was placed in indefinite detention on Ellis Island.[94]

Addressing his exclusion and detention, the Court found no deprivation of Mezei's constitutional rights.[95] Neither the alien's ties to the United States nor his detention caused the majority to reexamine the plenary power doctrine in light of the affected alien's interest. Because the Court found power to exclude to be a "fundamental sovereign attribute," and since Mezei's detention was merely incidental to the exercise of that power, no constitutional deprivation occurred.[96] In the name of plenary power, a person who had built a quarter of a century's worth of ties within the United States was permanently excluded and indefinitely detained without a hearing or explanation except for the conclusory statement that he constituted a national security risk.[97]

Four Justices dissented. The dissenters thought that the Bill of Rights restricted the government's exercise of its immigration power.[98] Although they did not find an entitlement to substantive constitutional protection, they believed that the Constitution required the government to provide this man, who had lived a life of "unrelieved insignificance," a "fair hearing with fair notice of the charges."[99]

---

eventually bore fruit and she was admitted into the United States. *See* ELLEN R. KNAUFF, THE ELLEN KNAUFF STORY (1952).

92. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213-14 (1953).

93. *Id.* at 213.

94. *Id.*

95. *Id.* at 214.

96. *Id.* at 210, 215. The Court took a territorial approach to the issue in the case, acknowledging that the noncitizen would have been entitled to procedural due process protection after entry into the United States. *Id.* at 212.

97. Like Ellen Knauff, Mezei eventually gained entrance to the United States. After four years of imprisonment on Ellis Island, Mezei was allowed to enter the country pursuant to an executive order. *See* Trop v. Dulles, 356 U.S. 86, 102 n.36 (1958).

98. *Id.* at 217-18 (Black, J., dissenting) (noting that although Communist Russia and Hitler's Germany imprisoned people indefinitely without judicial inquiry, our Constitution forbids such practices); *id.* at 224-27 (Jackson, J., dissenting) ("Because the [alien] 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.").

99. *Id.* at 219, 223.

By concluding that aliens in exclusion proceedings have no right to enter the United States and are, therefore, entitled to no procedural protection, the Court reiterated the plenary nature of the political branches' power over immigration issues. During this period, the Court also addressed challenges to plenary power arising from claims for substantive constitutional protection in the deportation context.

2. DEPORTATION

In *Harisiades v. Shaughnessy*[100] and *Galvan v. Press*,[101] the Court upheld orders of deportation for permanent resident aliens who had each resided in the United States for over thirty years.[102] The basis for the deportation was their membership in the Communist Party, even though that membership had terminated years before the deportation.[103] In *Harisiades*, the majority and dissent both addressed the tension between power and right. As in *Fong Yue Ting v. United States*,[104] the Court reiterated that in the deportation context the federal government holds the power unrestrained by the substantive guarantees found in the Bill of Rights. Once again, an absolutist theory of sovereignty provided the backdrop for this constitutional imbalance. Quoting several international law sources, the *Harisiades* Court held that expulsion, although it "bristles with severities," is a "weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it."[105]

---

100. 342 U.S. 580 (1952).

101. 347 U.S. 522 (1954).

102. 342 U.S. at 581-83; 347 U.S. at 523. The four defendants in *Harisiades* and *Galvan* had a collective 142 year presence in the United States, with each defendant residing here for over 30 years. One defendant had been associated with the Communist Party for only six years, his membership having ceased 23 years prior to his deportation. The majority and dissent in *Harisiades* agreed that "[u]nder our law, the alien in several respects stands on equal footing with citizens." *Harisiades*, 342 U.S. at 586. "An alien's property (provided he is not an enemy alien), may not be taken without just compensation. He is entitled to habeas corpus to test the legality of his restraint, to the protection of the Fifth and Sixth Amendments in criminal trials, and to the right of free speech as guaranteed by the First Amendment." *Id.* at 599 (Douglas, J., dissenting).

103. 342 U.S. at 596; 347 U.S. at 530-31.

104. 149 U.S. 698 (1893).

105. 342 U.S. at 587-88. The Court concluded that "in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation." *Id.* at 591. Justice Frankfurter, concurring, recognized that plenary power grew out of "a world order based on politically sovereign states." *Id.* at 596 (Frankfurter, J., concurring).

Exploring potential constitutional restrictions on the government's power over aliens, the *Harisiades* Court split on how to read and reconcile the *Yick Wo* tradition with the plenary power doctrine. In acknowledging *Yick Wo* and its progeny, the majority agreed with the dissent that aliens "in several respects stand . . . on equal footing with citizens."[106] This legal parity is a "matter of permission and tolerance," however, not of right.[107] Therefore, aliens in the United States with the government's permission share in the protections afforded by the Constitution, but the government's power to "terminate its hospitality" is free from such restrictions.[108]

In the dissent's view, the unrestrained power to deport renders any constitutional protection "illusory."[109] The dissent would have subordinated the deportation power to the Bill of Rights for two reasons. First, since an alien is entitled to protection of her lesser rights (the right to be free from discrimination while in the United States), the greater right ("the right to remain here") ought to receive similar protection.[110] Second, "express" constitutional rights such as the guarantees found in the Fifth Amendment should not be overrun by "implied" powers, such

---

106. *Id.* at 586.

107. *Id.* at 586-87.

108. *Id.* In making this distinction, the Court focused on the *type* of power being executed and not on the *governmental entity* exercising that power. Unlike the Court in *Fong Yue Ting*, the Court here did not focus on the differences between the states' and the federal government's powers over aliens. Rather, in contrasting Yick Wo v. Hopkins, 118 U.S. 356 (1886) (state power restricted by Fourteenth Amendment), Traux v. Raich, 239 U.S. 33 (1915) (same), Wong Wing v. United States, 163 U.S. 228 (1896) (federal criminal proceedings against aliens restricted by the Fifth and Sixth Amendments), and Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (Fifth Amendment takings clause applies to the seizure of non-enemy vessel), with Fong Yue Ting v. United States, 149 U.S. 698 (1893), the Court drew a distinction between exercises of government authority in the immigration context and outside of that context. *See Harisiades*, 342 U.S. at 586 nn.9-10. When either the federal or state government exercises power outside the immigration context, the guarantees of the Constitution protect aliens and citizens alike. *Id.* at 586 n.9. When, however, the federal government exercises its immigration power, no substantive constitutional protections apply. *Id.* at 586 n.10.

109. *Harisiades*, 342 U.S. at 600 (Douglas, J., dissenting) ("Unless they are free from arbitrary banishment, the liberty they enjoy while they live here is indeed illusory. Banishment . . . may deprive a man and his family of all that makes life worth while.").

110. *Id.* at 599 (Douglas, J., dissenting). In this remake of *Fong Yue Ting*, the majority and the dissent held very different views regarding the origins of the constitutional protection for aliens. From the dissent's perspective, constitutional protection flows from the personhood of the alien. *See id.* at 598 (Douglas, J., dissenting). For the majority it appears to be a "matter of permission and tolerance." *Id.* at 586-87.

as the power of deportation, which "flow from sovereignty itself" and not from the constitutional text.[111]

In *Galvan v. Press*,[112] the Court acknowledged the possibility that a tension of constitutional dimensions existed between an alien's rights and sovereign power. It refused, however, to take up the task of seriously addresing this tension. Like *Harisiades, Galvan* involved the deportation of a former Communist Party member.[113] The alien claimed that the Internal Security Act violated his due process rights because the Act did not except innocent members of the Communist Party from deportation.[114] Justice Frankfurter,[115] for the majority, concretely framed the dilemma. On the one hand, Congress' immigration power "is necessarily very broad, touching as it does basic aspects of national sovereignty."[116] However, an alien, as "a 'person,' . . . has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen."[117] Exalting the power to

---

111. *Id.* at 599 (Douglas, J., dissenting). The dissenters, Justiees Douglas and Black, were not suggesting that express constitutional rights must always trump implied governmental powers. They did, however, see a real tension between right and power, a tension the majority simply ignored. The dissent noted that deportation of long time resident aliens may oecasionally be warranted for the "safety and welfare of the Nation," but they would have required proof that the aliens' presence was hostile to the United States' interest. *Id.* at 601 (Douglas, J., dissenting).

112. 347 U.S. 522 (1954).

113. In *Harisiades*, the aliens were deported pursuant to the Alien Registration Act of 1940, which required proof that the noncitizen was a member of an organization that advocated the violent overthrow of the U.S. government. *See Galvan*, 347 U.S. at 529. Galvan's deportation proceeding was brought under the Internal Security Act of 1950, which had disponsed with the government's need to prove that the organization advocated the violent overthrow of overthrow of the United States government. *Id.* Simple proof of membership in the Communist Party suffieed. *Id.*

114. *Id.* at 530. Galvan, a citizen of Mexico, who had resided in the United States since the age of seven, was a Communist Party member between 1944 and 1946. *Id.* at 532 (Black, J., dissenting). At the time of his membership, the Communist Party was lawfully participating in California electoral politics. *Id.* (Black, J., dissenting). With this factual setting, the noncitizen claimed the right to prove that he did not know of the party's advocaey of violence. *Id.* at 530.

115. Frankfurter, a naturalized citizen, had a unique porspective among the Justices on immigration matters. In Schneidermann v. United States, 320 U.S. 118 (1943), Justice Frankfurter voted with the minority to strip Schneidermann of his citizenship. In conference discussing the case, Frankfurter said: "I am saying what I am going to say because the case arouses in me feelings that could not be entertained by anyone else around this table. It is well known that a convert is more zealous than one born to the faith. None of you has had the experienee that I have had with referenee to American citizenship." LEONARD BAKER, BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY 396 (1984).

116. *Galvan*, 347 U.S. at 530.

117. *Id.*

deport over the alien's status as a constitutionally protected person "strikes one with a sense of harsh incongruity."[118]

Having set the stage for a new act, an act potentially filled with tension and suspense, the Court refused to raise the curtain. It said:

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens . . . But the slate is not clean. As to the extent of the power of Congress under review, there is not merely "a page of history," but a whole volume.[119]

Since the *Chinese Exclusion Case* and its progeny fill a "whole volume" of constitutional history, the Court refused to reexamine the relationship between power and right. The powers inherent in sovereignty remained unaffected by the expansion of constitutional rights. More challenges lay ahead.

C. Steadfastness

During the last two decades, litigants have continued to ask the Court to place limits on the federal immigration power. Instead of marching in step with their predecessors who had advocated alien rights, these litigants changed the focus, claiming that the federal government's exercise of its immigration power conflicted with the constitutional rights of *citizens*. The Court, however, stayed the course and resolved the conflict between power and right in favor of the political branches' plenary power over immigration issues.

---

118. *Id.*
119. *Id.* at 530-31 (citations omitted).

1. EXCLUSION

Kleindienst v. Mandel[120] involved a claim by a group of American citizens that their First Amendment right to receive information was trampled by the exclusion of Mandel, a Belgian journalist and avowed Marxist, who had been invited to speak at various colleges and universities in the United States. The Court specifically recognized that the citizens' desire to receive information in person from Mr. Mandel implicated important First Amendment principles.[121] The Court denied their claim, without employing the usual searching First Amendment analysis.[122] What precipitated the Court's blunt refusal to consider seriously the acknowledged rights of United States citizens? The answer, quite simply: a power inherent in international law notions of sovereignty.[123]

> Recognition that First Amendment rights are implicated, however, is not dispositive of our inquiry here. In accord with ancient principles of the international law of nation-states, the Court in *The Chinese Exclusion Case* and in *Fong Yue Ting v. United States*, held broadly . . . that the power to exclude aliens is "inherent in sovereignty . . . ." Since that time, the Court's general reaffirmations of this principle have been legion.[124]

The Court concluded that since the executive branch had provided a "facially legitimate and bona fide" reason for excluding Mandel, it had validly exercised its congressionally delegated plenary power.[125]

A dissent, written by Justice Marshall and joined by Justice Brennan, wanted individual rights taken seriously, even in cases involving

---

120. 408 U.S. 753 (1972).

121. *Id.* at 765. ("[W]e are loath to hold on this record that existence of other [means of communication] extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.").

122. *Id.* ("While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary . . . .").

123. *Id.*

124. *Id.* (citations omitted). "The Court without exception has sustained Congress' 'plenary pewer' . . . ." *Id.* at 766. Quoting Justice Frankfurter's statement in *Galvan v. Press* that "the slate is not clean," the Court decided it was "not inclined in the present context to reconsider this line of cases." *Id.* at 766-67.

125. *Id.* at 769-70.

admission. They argued that when constitutional rights "clash" with governmental power, the Court must balance the interests.[126]

Plenary power's primacy remained firmly embedded, even when pitted against the First Amendment rights of U.S. citizens. The next challenge to the doctrine's enduring reign arose from claims by citizens that congressional immigration policy, as applied to them, "involved 'double-barreled' discrimination based on sex and illegitimacy."[127]

One of the principal goals of the legal morass called the Immigration and Nationality Act is family reunification.[128] Bringing children and their parents together is an integral part of this larger goal. An unlimited number of children of United States citizens can immigrate every year,[129] as can a generous number of children of permanent resident aliens.[130] Until recently the definition of "child" for immigration purposes included the "illegitimate" offspring of the mother while excluding the "illegitimate" offspring of the father.[131] Three sets of natural fathers and their illegitimate issue filed suit claiming that the definition of "child," which excluded their relationship, violated the equal protection rights of the family member already residing in the United States.[132] One of the fathers, Cleophus Warner, a naturalized citizen, sought to bring his son, Serge, to the United States.[133] Cleophus had supported Serge since birth, Serge was abandoned by his mother, and no question of paternity arose.[134]

---

126. *Id.* at 782 (Marshall, J., dissenting) ("At least when the rights of Americans are involved, there is no basis for concluding that the power to exclude aliens is absolute."). Justice Douglas also dissented. Although he rejected the majority's lack of constitutional analysis, he would have avoided the constitutional issue by interpreting the exclusion statute to deny the Attorney General the discretionary authority to exclude on the basis of ideology. *See id.* at 770, 774 (Douglas, J., dissenting).

127. *See* Fiallo v. Bell, 430 U.S. 787, 794 (1977).

128. Through the Immigration and Nationality Act, Congress clearly "intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united." HOUSE JUDICIARY COMM., FACILITATING THE ENTRY INTO THE UNITED STATES OF CERTAIN ADOPTED CHILDREN, AND OTHER RELATIVES OF UNITED STATES CITIZENS, H.R. REP. NO. 1199, 85th Cong., 1st Sess. 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2015, 2020.

129. 8 U.S.C. § 1151(b)(2)(A)(i) (1991).

130. *Id.* at § 1153(a)(2).

131. The relationship between an illegitimate child and her father is now included within the definition of "child," provided a "bona fide parent-child relationship" exists. *See* § 315(a) of the 1986 Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 2613, 3359, *codified at* 8 U.S.C. § 1101(b)(1)(D) (1988).

132. Fiallo v. Bell, 430 U.S. 787 (1977).

133. *Id.* at 804 (Marshall, J., dissenting).

134. *Id.* (Marshall, J., dissenting).

Despite this relationship, which provided Serge with strong ties to this country, the Court found no constitutional violation.[135] As it had in *Kleindienst v. Mandel*, the Court refused to reconsider the plenary power doctrine, holding that immigration decisions "are subject only to limited judicial review."[136] Again, the Court was faced with a tension between this unenumerated sovereign power and a fully developed equal protection doctrine. And again, the Court rejected the individual's claim: "the fallacy of the assumption [that equal protection should be taken seriously in this context] is rooted deeply in fundamental principles of sovereignty."[137]

2. EXPANSION

For over a century, a constitutional imbalance has existed. The rights of aliens (and even citizens) have not been taken seriously when those rights clash with the federal government's plenary immigration power. In the past twenty years, the Court has signalled a willingness to extend some form of this doctrine to cases involving the federal government's general power over aliens outside of the immigration context.[138]

---

135. *Id.* at 799-800. The appellants unsuccessfully tried to distinguish this case from other exclusion cases by suggesting "unique coalescing factors" that set this case apart. First, they asserted that their arguments were based on the rights of those already in the country and not of those seeking entry, and second, they argued that this was "'double-barreled' discrimination based on sex and illegitimacy." *Id.* at 793-94. Claims of discrimination based on sex and illegitimacy normally receive heightened review by the courts. *See* Clark v. Jeter, 486 U.S. 456 (1988) (heightened scrutiny in illegitimacy cases); Craig v. Boren, 429 U.S. 190 (1976) (heightened scrutiny when reviewing claims of sex discrimination).

136. *Fiallo*, 430 U.S. at 795 n.6. This narrow scope of review "turns out to be completely 'toothless.'" *Id.* at 805 (Marshall, J., dissenting).

137. *Id.* at 795 n.6. The dissenters focused on two issues, which they thought distinguished this case from previous plenary power cases: this case involved a congressional policy to help *citizens* and permanent resident aliens reunite with their families, and no real foreign policy or national security issues were involved. *See id.* at 808 (Marshall, J., dissenting); *id.* at 816 (White, J., dissenting).

138. *See* Alienikoff, *supra* note 21, at 869 ("the courts have wrongly assumed that every federal regulation based on *alienage* is necessarily sustainable as an exercise of the *immigration* power"); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275. Earlier cases suggested that citizens and noncitizens alike are protected by constitutional guarantees when federal power is exercised outside of the immigration context. *See supra* note 108 and accompanying text.

a. Government benefits

Companion cases *Mathews v. Diaz*[139] and *Hampton v. Mow Sun Wong*[140] involved the interest of permanent resident aliens in federal welfare benefits and federal civil services positions, respectively.[141] These were not immigration cases; they did not involve the federal government's use of its plenary power over the admission, exclusion, or expulsion of aliens. But, these cases also did not fit neatly into the *Yick Wo* tradition because they did not involve state discrimination against aliens. Into which of the two traditions should these cases fall: the plenary power tradition born in the *Chinese Exclusion Case* or the *Yick Wo v. Hopkins* tradition in which the Court closely scrutinizes state laws that deprive aliens of equal economic opportunity? Although not placing these cases squarely within either tradition, the Court clearly leaned toward the plenary power cases.[142]

In *Mathews*, the Court upheld a federal law denying welfare benefits to all noncitizens who had not resided in the United States for five years and who were not permanent resident aliens.[143] The Court applied a rational basis form of deferential review, concluding that "it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence."[144] Since the line drawn by Congress was not irrational, the Court upheld it.[145]

The congressional action in *Mathews* seemingly received more searching judicial review than the traditional plenary power cases would dictate. The Court rejected, however, the strict scrutiny analysis found in the state alienage cases because "any [federal] policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard

---

139. 426 U.S. 67 (1976).

140. 426 U.S. 88 (1976).

141. If these issues had arisen in the context of state welfare benefits or state civil service employment, state action discriminating against permanent resident aliens would be subject to strict judicial scrutiny. *See* Sugarman v. Dougall, 413 U.S. 634 (1973) (holding unconstitutional New York law limiting civil service employment to citizens); Graham v. Richardson, 403 U.S. 365 (1971) (holding that durational residency requirement for alien entitlement to state welfare benefits violated equal protection). In *Sugarman*, the Court raised but did not decide whether a similar federal law would meet with the same exacting standard of review. *Sugarman*, 413 U.S. at 646 n.12.

142. For a more detailed discussion of these cases, see Scaperlanda, *supra* note 62, at 1074-80.

143. 426 U.S. at 69.

144. *Id.* at 82-83.

145. *Id.*

to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."[146]

In *Hampton v. Mow Sun Wong*, the result was different, but plenary power's extremely deferential language was present. In *Hampton*, the Court struck down a Civil Service Commission rule that restricted employment in the civil service to citizens on grounds that it violated the Fifth Amendment due process guarantee.[147] The Court took the aliens' interest in employment opportunities seriously, saying that the interest "in avoiding the wholesale deprivation of employment opportunities" should be balanced by the Civil Service Commission's justification.[148] The Court did not use the strict scrutiny analysis found in the state alienage cases to strike down the regulation; instead, it "inexplicably meld[ed] together the concepts of equal protection and procedural and substantive due process to produce" its holding.[149] Although the Court was more deferential than in the state alienage cases, it was less deferential than in the traditional plenary power cases.

The reason the Court accorded a lesser degree of deference is similar to the one articulated in the state alienage cases—the Civil Service Commission, like a state government, possesses no responsibility for foreign affairs or immigration policy.[150] Throughout the opinion, the Court assumed that if the citizenship requirement had been imposed by Congress or the President it would have been a valid exercise of the immigration or foreign affairs power.[151]

Outside the immigration context, in the context of economic opportunity, the Court has spurned the *Yick Wo* tradition in favor of allowing the executive branch and Congress broad powers to discriminate against lawfully resident aliens. In the 1990s, the Court has continued this trend, extending it to the search and seizure field.

---

146. *Id.* at 81 n.17 ("This very case [like the plenary power cases] illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication.").

147. *Hampton*, 426 U.S. at 116-17.

148. *Id.* at 115-16.

149. *Id.* at 119 (Rehnquist, J., dissenting).

150. *Id.* at 114.

151. *Id* at 105. After the Court's decision, President Ford issued an executive order requiring that employees in the competitive federal civil service be United States citizens. Lower courts relying on *Hampton*'s language regarding congressional or presidential action upheld the order. *See* Vergara v. Hampton, 581 F.2d 1281 (7th Cir. 1978), *cert. denied*, 441 U.S. 905 (1979); Mow Sun Wong v. Hampton, 435 F. Supp. 37 (N.D. Cal. 1977), *aff'd*, 626 F.2d 739 (9th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); Santin Ramos v. United States Civil Serv. Comm'n, 430 F. Supp. 422 (D.P.R. 1977).

b. Search and seizure

In *United States v. Verdugo-Urquidez*,[152] the Court concluded that the Fourth Amendment did not apply to the Drug Enforcement Agency's search of a Mexican citizen's home in Mexico.[153] The defendant was not a voluntary resident of the United States, although at the time of the search he resided in a California prison.[154] The Court's opinion offers justifications based on text, territoriality, "ties," and foreign affairs rooted in national sovereignty.

The Court explored the textual differences between the words "person" and "accused," on the one hand, and "people" on the other. Although not conclusive, "this textual exegesis . . . suggests that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[155] In contrast to the word "person," which was recognized as having near universal application,[156] the Court viewed the

---

152. 494 U.S. 259 (1990). Hereinafter this opinion will be referred to as "*Verdugo I*" to distinguish it from the later litigation involving Mr. Verdugo-Urquidez, which concerned whether the United States breached its extradition treaty with Mexico by taking part in the forcible abduction of Mr. Verdugo-Urquidez from Mexico. *See* United States v. Verdugo-Urquidez, 939 F.2d 1341 (9th Cir. 1991) [hereinafter "*Verdugo II*"]. The issues raised in *Verdugo II* were resolved in a related case, United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992) (holding that forcible abduction in violation of treaty did not bar criminal trial in the United States).

153. *Verdugo I*, 494 U.S. at 259, 261. For a critical analysis of the Court's approach, see Neuman, *supra* note 7. In contrast to the Court, Professor Neuman argues for a municipal law approach, which would require "the government to afford constitutional rights whenever it asserts legal obligations against any human being." *Id.* at 990.

154. *Verdugo I*, 494 U.S. at 262.

155. *Id.* at 265. For an in-depth look at the potential domestic implications of *Verdugo I*, see Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* United States v. Verdugo-Urquidez*?*, 56 MO. L. REV. 213 (1991) (criticizing the Court's dicta suggesting that the Fourth Amendment does not apply within the United States to protect aliens who do not have "sufficient" ties to the United States); The New York State Bar Association International Litigation Committee, *The Fourth Amendment Rights of Nonresident Aliens*, 27 STAN. J. INT'L. L. 493 (1991) (same).

156. *Verdugo I*, 494 U.S. at 269. Amici curiae pointed out that the phrase "the people," as used in the Fourth Amendment, could be explained simply as a way of avoiding the awkward phrasing that would have followed from the use of the word "persons" - "The rights of persons to be secure in their persons . . . ." Brief for Amici Curiae American Civil Liberties Union in Support of Respondent at 12 n.4, United States

phrase "the people" as a limiting "term of art" employed by the framers in the preamble to the Constitution and in several of the amendments.[157]

The majority's "creative reliance on constitutional text is nothing but a red herring."[158] In addition to conjuring up images of *Dred Scott*,[159] the Court's textual analysis finds no precedential support. Until *Verdugo I*, no Supreme Court case suggested that the word "people" was less catholic than the terms "person" or "accused" when used in the context of the criminal procedure amendments. The courts had uniformly applied the Fourth Amendment to searches of aliens within the United States, without inquiry into whether the alien was one of the "people" entitled to the amendment's protection.[160]

---

v. Verdugo-Urquidez, 494 U.S. 259 (1990) (No. 88-1353).

157. *Verdugo I*, 494 U.S. at 265. Possibly the use of the phrase "the people" in these amendments referred to an implied "core of *collective* right, echoing the Preamble's commitment to the ultimate sovereignty of 'We the People of the United States.'" A textual analysis of this sort may inform the Court as to a proper delineation between political rights, reserved for citizens, and civil rights belonging to a more expansive class of persons. *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1175 (1991). There is less justification for reading the phrase "the people" in the Fourth Amendment as a collective political right as opposed to an individual civil right. *See id.* at 1177. *See also* Lawrence D. Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 31 (1984) (in state constitutions the "people" referred to the collective rights of sovereign citizens while "person" or "man" referred to individual rights).

Even here the line is by no means clear. Reviewing the history of alienage suffrage, Professor Rosberg argues that noncitizens should have the right to vote. Gerald M. Rosberg, *Aliens and Equal Protection, Why Not the Right to Vote*, 75 MICH. L. REV. 1092 (1977). *See also* Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH J. INT'L L. 259, 334 (1992) ("The right to have the right to vote is reserved to citizens, but the right to vote ean be shared with others.").

158. This statement is borrowed from Office of Personnel Management v. Richmond, 496 U.S. 414, 435 (1990) (Stevens, J., concurring in the judgment) (majority had used the Constitution's Appropriations Clause to hold that estoppel did not apply against the government).

159. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (holding that blaeks, whether free or slave, were not part of the "people").

160. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (nonresident alien protected by Fourth Amendment); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (reversing Mexican citizen's drug conviction on Fourth Amendment grounds); Abel v. United States, 362 U.S. 217 (1960) (although concluding that administrative search was proper, the Court assumed that the Fourth Amendment applied to nonresident alien); United States v. Rodriguez, 532 F.2d 834, 838 (2d Cir. 1976); Au Yi Lau v. INS, 445 F.2d 217, 225 (D.C. Cir), *cert. denied*, 404 U.S. 864 (1971); Yam Sang Kwai v. INS, 411 F.2d 683, 686 (D.C. Cir.), *cert. denied*, 396 U.S. 877 (1969).

Textual analysis may play a role in exploring relevant constitutional differences between aliens and citizens, but any attempt to construct a coherent theory of plenary power upon *Verdugo I*'s textual distinction between "people" and "persons" is doomed. Although aliens are considered "persons" entitled to Fifth Amendment protection,[161] this protection is illusory.[162] Inclusion within the definition of "person" provides even a permanent resident alien no buffer against the potentially devastating reach of plenary power's arm, as the deportations in the *Harisiades* decision demonstrate.[163] As applied to aliens, the distinction between the two phrases, therefore, exists in theory only, providing no practical benefit for the affected alien.

In determining that the government's power to search Verdugo-Urquidez home was not limited by the Fourth Amendment, the Court focused alternatively on the defendant's lack of ties with the United States and the fact that the search was conducted outside the United States.[164] As has been stated throughout this Article, both ties and territory may also provide relevant information for the dialogue concerning power and right. They cannot, however, explain the breadth, depth, and

---

161. Mathews v. Diaz, 426 U.S. 67, 77 (1976). In practice, an alien's personhood means more under the Fourteenth Amendment than under the Fifth Amendment. *Compare id.* at 69 (Congress can discriminate among the class of aliens in determining eligibility for welfare benefits) *with* Graham v. Richardson, 403 U.S. 365, 376 (1971) (state discrimination based on determination of eligibility for welfare benefits struck down under strict scrutiny analysis). Professor Ely argues that the Fourteenth Amendment's Privileges and Immunities Clause could apply even to aliens: "'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States' *could* mean that only citizens are protected in their privileges or immunities, but it surely doesn't have to. It could just as easily mean there is a set of entitlements, 'the privileges and immunities of citizens of the United States,' which states are not to deny to anyone." JOHN HART ELY, DEMOCRACY AND DISTRUST 25 (1980). *But see, e.g.*, Kenneth L. Karst, *Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 44 (1977).

162. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).

163. *See, e.g., id.* at 591 (although permanent resident aliens were "persons" within the meaning of the Fifth Amendment, no substantive protection prevented deportation). *See also* Fong Yue Ting v. United States, 149 U.S. 698, 732 (1893) (holding Chinese national who had resided in the United States for at least thirteen years deportable because of his failure to produce a credible white witness to verify residence).

164. By weaving strands of affinity theory and territorial theory together, the Court bolstered its conclusion that the Fourth Amendment was inapplicable to a nonresident home outside the United States. On the territorial issue, the Court concluded that not "every constitutional provision applies wherever the United States Government exercises its power." *Verdugo I*, 494 U.S. at 269. And, with respect to affinity, the Court said "that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Id.* at 271.

persuasiveness of the Court's 100-year refusal to engage in meaningful exploration into possible constitutional limitations on federal power over aliens.

To end its opinion, the Court returned to the now-familiar theme of sovereign powers: "For better or for worse, we live in a world of nation-states in which our Government must be able to 'functio[n] effectively in the company of sovereign nations.'"[165] The plenary power doctrine, rooted in sovereignty, has expanded, gaining a foothold in both the economic opportunity and criminal's rights areas.

Plenary power based on a conception of absolute national sovereignty continues to inform our constitutional jurisprudence as it relates to aliens.[166] The rights of noncitizens continue to be undervalued while the exalted need for the sovereign to maintain absolute control goes unquestioned. As a result, the federal government can search a Mexican citizen's house with impunity,[167] and then kidnap the individual in order to bring him to trial in the United States.[168] Mariel Cubans are well into a second decade of imprisonment "pending deportation" from the United States.[169] And, the United States continues its program of obstructing Haitian attempts to file asylum claims in the United States.[170]

---

165. *Id.* at 275 (quoting Perez v. Brownell, 356 U.S. 44, 57 (1958)). "[W]e must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *Id.* at 277 (Kennedy, J., concurring) (construing United States v. Curtiss-Wright Corp., 299 U.S. 304, 318 (1936)).

166. *See, e.g.*, Boutilier v. INS, 387 U.S. 118, 119 (1967) (homosexual resident alien, who had lived in the United States his entire adult life, deportable on grounds of sexual orientation under Congress' plenary power over immigration); Bugajewitz v. Adams, 228 U.S. 585 (1913); Fonseca-Leite v. INS, 961 F.2d 60, 62 (5th Cir. 1992) (dismissing a constitutional claim in a deportation case because "[t]he power of Congress to expol or exclude aliens is fundamental and plenary"; therefore, "judicial review . . . is very limited."); Campo v. INS, 961 F.2d 309, 316 (1st Cir. 1992) (plenary power in deportation proceeding). *But see* Rafeedie v. INS, 795 F. Supp. 13 (D.D.C. 1992); American Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989) (unconstitutional to deport alien solely for engaging in protected speech), *rev'd on other grounds*, 940 F.2d 445 (9th Cir. 1991).

167. *See* United States v. Verdugo-Urguidez, 494 U.S. 259 (1990).

168. *See* United States v. Alvarez-Machain, 112 S. Ct. 2188 (1992).

169. *See supra* note 11. *See generally* Richard A. Boswell, *Rethinking Exclusion—The Rights of Cuban Refugees Facing Indefinite Detention in the United States*, 17 VAND. J. TRANSNAT'L L. 925 (1984); Paul W. Schmidt, *Detention of Aliens*, 24 SAN DIEGO L. REV. 305 (1987).

170. *See, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549 (1993) (neither statute nor treaty limits the executive's authority to repatriate undocumented Haitians interdicted in international waters); Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1350 (2d Cir. 1992); Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir.) (per

International law norms, not constitutional norms, provide the unifying thread throughout all of the plenary power cases. In short, plenary power and consequently the constitutional rights of aliens rests on international law notions of sovereignty, causing the dignity of the noncitizen to be undervalued and the power of Congress and the executive branch to be overvalued.[171] A theory of plenary power spun from sovereignty's web coherently explains a line of cases spanning more than a century, from the *Chinese Exclusion Case* to *U.S. v. Alvarez-Machain*. Plenary power's caustic stature has been felt whether the affected alien is outside[172] or inside[173] the United States, whether the affected alien has no ties to[174] or a significant affinity with the United States,[175] and regardless of whether the rights of citizens are in jeopardy.[176] Only a theory based on "absolute" sovereignty fully explains these cases.[177] Even the limited procedural due process exceptions to plenary power do not rest dispositively on the alien's ties to the United States[178] or the location of the alien claiming procedural protection.[179]

---

curiam), *cert. denied*, 112 S. Ct. 1245 (1992).

171. In the *Chinese Exclusion Case*, according to the *Curtiss-Wright* Court, the Court "found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

172. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) ("war bride" excludable without a hearing on national security grounds).

173. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (longtime pormanent resident aliens deportable because of prior membership in Communist Party).

174. *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 656 (1892) (new arrival excludable on grounds she was liable to become a public charge); *Baker*, 953 F.2d at 1513 n.8 (agreeing with district court that interdicted Haitians possessed no constitutional rights).

175. *See, e.g.*, Galvan v. Press, 347 U.S. 522 (1954) (53-year-old Mexican citizen who had resided in the United States since he was seven deportable for past membership in the Communist Party).

176. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787 (1977) (equal protection claim failed to protect citizen's interest in family reunification of father and illegitimate child).

177. *See* LEGOMSKY, *supra* note 25, at 184-92; Aleinikoff, *supra* note 21, at 863 (In the *Chinese Exclusion Case* and *Fong Yue Ting*, the Court "deemed international law as relevant to, if not the basis of, constitutional norms."); Nafziger, *supra* note 21 at 823.

178. *See, e.g.*, Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903) (alien who had only been in United States four days entitled to due process protection).

179. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982) (permanent resident alien returning from trip to Mexico protected by the Fifth Amendment and cannot be excluded without due process). I do not want to overstate the point; *Landon*'s territorial exception applies narrowly, operating only in those cases involving the excludability of returning pernanent resident aliens. In the typical case, territorial issues still determine whether due process protections attach. *See, e.g., supra* note 11 (cases holding that indefinite

Since international law provides the baseline—the background norm—shaping the court's constitutional jurisprudence relating to noncitizens, it becomes essential to examine the nature of sovereignty itself. In the next Section of this Article, I explore the evolution in the doctrine of national sovereignty, concluding that the changing nature of sovereignty requires a reexamination of the plenary power doctrine.

III. INTERPLAY BETWEEN STATE SOVEREIGNTY AND HUMAN RIGHTS

Ours has been called the "Age of Rights."[180] It was born in a world that had experienced the darkness of its collective soul manifested in the persona of Adolph Hitler. The world recognized the need for a new international regime that would embed within its legal firmament concerns for the individual *vis a vis* the state. A short half century ago, human rights concerns began transcending national boundaries, creating new legal responsibilities for the nations of the world.

Prior to this time, nation-states conducted their affairs without external legal restraints. A nation's sovereignty was considered "exclusive and absolute," and therefore no external force could bind the sovereign will.[181] Additionally, the global community lacked a universal human rights tradition. The individual was "object" in international law, not "subject," and the treatment of individuals within a nation-state was dictated solely by the domestic laws of the state.[182]

These two guiding principles, absolute sovereignty and the individual's irrelevance, stood steadfast as sentries guarding the gateway

---

detention of excludable aliens pending "deportation" did not violate the constitution).

180. *See* LOUIS HENKIN, THE AGE OF RIGHTS ix (1990).

181. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604 (1889) (quoting Schooner Exch. v. McFadden, 11 U.S. (7 Cranch) 116, 136 (1812)). The Court's language synthesizes the theory of early international law scholars.

> It is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another. Of all the rights that ean belong to a nation, sovereignty is, doubtless the most precious.

EMER DE VATTEL, 2 THE LAW OF NATIONS § 54 (Joseph Chitty ed., 1849). *See also* C. Wilfred Jenks, *The Thesis In Historical Perspective, in* SOVEREIGNTY WITHIN THE LAW 24-28 (Arthur Larson et al. eds., 1965).

182. *See generally* VATTEL, *supra* note 181; 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. II at 70 (1987). Special rules applied to a nation's treatment of noncitizens. But here, the concern was not the individual but the individual noncitizen's nation, which would be injured by the host nation's misdeeds. *See* VATTEL, *supra* note 181, at §§ 346-47; 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. IV at 144; HENKIN, *supra* note 180, at 14. This view is reflected in the *Chinese Exclusion Case*. *See infra* note 192 and accompanying text.

to all of international law. At home, the principles of sovereignty and noninterference informed constitutional decisionmaking, forcing a theoretical wedge between internal and external constitutional jurisprudence. *United States v. Curtiss-Wright Corp.*[183] provides the most arresting example of this doctrinal incongruity. The view that the federal government operates within a framework of limited and defined enumerated powers is "categorically true only in respect of our internal affairs," explained Justice Sutherland.[184] He continued:

> As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to . . . expel undesirable aliens . . . , which is [not] expressly affirmed by the Constitution, nevertheless exist[s] as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions *not in the provisions of the Constitution, but in the law of nations.*[185]

Formidable and multifarious challenges have been made to this jurisprudential dichotomy with little success. The proposition that the foreign affairs power generally and the power over noncitizens specifically rests with the national government does not naturally or necessarily lead to the conclusion that these unenumerated powers reside outside of our mainstream public law traditions. The *Chinese Exclusion Case* contains language suggesting that these "sovereign powers" are restricted by the Constitution itself.[186] This language, however, has not led to significant constitutional constraints on plenary power. One might ask: if our national identity includes the dual concepts of equal protection and due process, why isn't the trustee of the popular sovereignty commanded by these first principles to refrain from discriminating against aliens in invidious ways or from detaining aliens indefinitely without a hint of procedural regularity? Mustn't the trustee of our sovereignty abide by our society's baseline when it interacts with noncitizens? Despite these trenchant inquiries, plenary power remains, prolonging this dialectical tension in our legal firmament. Domestic constitutional norms stand in opposition to internationally applied constitutional norms.

---

183. 299 U.S. 304 (1936).

184. *Id.* at 316.

185. *Id.* at 318.

186. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604 (1889).

In this Article, I address this tension from the vantage point of the international law side of the binary.[187] The sovereign role of the nation-state in the international legal order inhibited the Court from developing a unified due process and equal protection jurisprudence transcending the elusive boundary between domestic and international concerns. While equal protection and due process have come to play a central role in the domestic constitutional law regime, nineteenth century absolutism prevails in today's plenary power cases. I argue that if emerging twentieth century principles of international law and sovereignty informed such cases, the plenary power doctrine would justifiably fade into history.[188]

This section of the Article provides an overview of the changes in international law since the time of the *Chinese Exclusion Case*. Major changes have occurred, particularly during the last half century. The individual's metamorphosis from object to subject, coupled with the continuing evolution of a body of external law designed to place limitations on nation-states, has resulted in a truly remarkable era.[189] International law of sovereignty provides the thread holding together the constitutional fabric of plenary power. Plenary power, as a means of cursorily dismissing the claims of noncitizens, should be rejected now that its sovereign haseline is no longer considered "exclusive and absolute."

---

187. Others have thoughtfully explored the procedural and substantive rights explosion taking place on the constitutional law side, arguing that these developments should lead to a reexamination of the plenary power doctrine. Professor Nafziger explored the international law side, questioning plenary power's foundations, and arguing, in part, that the Court misinterpreted international law relating to the exclusion of aliens. *See* Nafziger, *supra* note 21, at 823-28. Professor Schuck also recognized the transformation taking place in the global community in his call for a reexamination of plenary power. *See* Schuck, *supra* note 18, at 35-36 ("from isolation to superpower to interdependent nation").

188. Louis Henkin said: "*Chinese Exclusion*—its very name is an embarrassment—must go." Henkin, *supra* note 7, at 863. In this Article, I attempt to add to the literature challenging plenary power by exploiting its theoretical underpinning, which I view as rooted in nineteenth century conceptions of international law.

189. For a detailed chronicle of this transformation, see Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982). The "object-subject" discussion had already begun prior to the outbreak of World War II. *See* CHARLES FENWICK, INTERNATIONAL LAW 60 (2d ed. 1934) ("the status of individuals as 'subjects' or 'objects' of international law has been the object of academic discussion and constructive theory").

A. The Nineteenth Century and Absolute Sovereignty

Nineteenth century international law was true to its moniker, the "Law of Nations"[190]: it governed the relationship among nations, *not* between an individual and a nation.[191] The individual was *object*, not *subject*, in international law. An individual's rights in the international sphere were derivative of her status as a citizen of a particular country; such rights did not flow from a common humanity. The *Chinese Exclusion Case*, seasoned with this flavor, instructed Chae Chan Ping, who had been a resident of the United States for twelve years, that if the Chinese government (not Chae Chan Ping) was dissatisfied with the decision to exclude Chae Chan Ping, its (and his) only remedy was to "make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity demand."[192] Chae Chan Ping simply did not count in any primary sense.

The concept of state sovereignty[193] is of relatively recent vintage, dependent for its development on the creation of modern nation-states in Europe in the sixteenth and seventeenth centuries.[194] Conceptually, the meaning of sovereignty has not been static over the centuries; there was never a universal consensus in any given period.[195] As originally conceived, national sovereignty had natural law boundaries. When those limitations proved unworkable, the concept of "absolute sovereignty" took hold, facing only recent dismantling with the rise of international positive law to limit sovereignty.

---

190. In some ways, the "Law of Nations" was broader than modern international law, encompassing, among other things, international commercial law and maritime law. *See, e.g.*, Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26-27 (1952); Henkin, *supra* note 7, at 853 n.2.

191. *See, e.g.*, LASSA OPPENHEIM, INTERNATIONAL LAW § 289 (8th ed. 1955). *Cf. id.* at § 290 (individuals "can only be . . . *objects* of the Law of Nations").

192. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

193. *See* 1 VERZIJL, *supra* note 16.

194. The Peace at Westphalia following the Thirty Years War radically transformed the European political landscape. *See, e.g.*, J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 5-6 (6th ed. 1963). *See also* FENWICK, *supra* note 189, at 18 (after the peace "the international community was to consist of coequal members individually independent of any higher authority").

195. *See* OPPENHEIM, *supra* note 191, at § 70.

Jean Bodin's 1576 work, *Six Livres De la Republique*,[196] generally receives credit as the first comprehensive thesis of sovereignty.[197] Bodin's sovereignty consisted of an "absolute and perpetual power over the people, unrestrained by human law."[198] Although Bodin employed the language of absolutism, the term as he employed it was a misnomer. True, sovereignty knew no earthly limits. But, as conceived by Bodin, absolute sovereignty contained inherent boundaries found in theistic natural law.[199] "Bodin's doctrine can only be understood if we remember always that the state he is describing is one in which the government is . . . neither arbitrary or irresponsible, but derived from, and defined by, a law which is superior to itself."[200] Bodin erroneously and naively believed that universally accepted natural law could and would be systematically discoverable and would serve to rein in potentially abusive sovereigns.[201]

Grotius, often called the Founder of the Law of Nations,[202] wrote in the early part of the seventeenth century. Drawing on earlier works,[203] he constructed a two-pronged theory of international law based on natural law[204] and on the consent of nations.[205] Unlike Bodin's sovereignty, Grotius' sovereignty concerned itself with the relations among states. At the time he wrote, sovereignty was not yet considered truly absolute and without bound, although "Grotius

---

196. *Reprinted in English as* JEAN BODIN, THE SIX BOOKES OF A COMMONWEALE (Kenneth Douglas McRae ed., 1962).

197. *See, e.g.*, BRIERLY, *supra* note 194, at 7; OPPENHEIM, *supra* note 191, at 128. Bodin used the term to refer to *internal* sovereignty, which deals with the sovereign's authority over its subjects, as opposed to *external* sovereignty, which concerns the relationship between sovereigns. *See, e.g.*, BRIERLY, *supra* note 194, at 10; FENWICK, *supra* note 189, at 47 n.1.

198. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 77 (1954).

199. *See id.* at 325 n.75.

200. BRIERLY, *supra* note 194, at 9.

201. *See id.* at 11.

202. *See, e.g.*, T. J. LAWRENCE, THE SOCIETY OF NATIONS: ITS PAST, PRESENT, AND POSSIBLE FUTURE 16 (1919); MARCELLUS D.A.R. VON REDLICH, THE LAW OF NATIONS 2 (1937); OPPENHEIM, *supra* note 191, at § 1.

203. "Grotius even borrowed several of Gentili's miscitations." NUSSBAUM, *supra* note 198, at 331 n.135.

204. HUGO GROTIUS, THE LAW OF WAR AND PEACE 38 (Francis H. Kelsey trans., 1925). Although Grotius confessed a belief in God, his is a secularized theory of natural law, existing even in the absence of God. *See* A.P. D'ENTREVES, NATURAL LAW 53 (1951) (Grotius' natural law is based on secular rationalism); NUSSBAUM, *supra* note 198, at 108-09 ("This is why we may call Grotius' natural law the rule of reasonableness. Little was left, therefore, in his system for truly divine law.").

205. GROTIUS, *supra* note 204, at 44. *See* BRIERLY, *supra* note 194, at 30-31.

encouraged the unfortunate trend of opinion towards a view of sovereignty as absolute and irresponsible power."[206]

Both Bodin and Grotius viewed the Law of Nations, with its recognition of state sovereignty, as a refuge from a chaotic world. The Holy Roman Empire, like its predecessor the Roman Empire, was crumbling. Europe no longer had a superimposed infrastructure capable of maintaining order, as other fledgling states left the nest long provided by the Emperor and the Roman Catholic Church. Far from desiring a patchwork of truly absolute sovereigns, Bodin[207] and Grotius[208] devised legal systems in desperate attempts to impose a system of authority over the newly sovereign states.

It was left to later publicists to construct theories of international law based upon a truly absolutist view of sovereignty.[209] Like Grotius, Vattel, whose writings apparently influenced the Supreme Court at the time of the early plenary power cases,[210] constructed a theory of international law that contained both natural and positive elements. Sovereigns were bound by the necessary law of nations or natural law.[211] Vattel's positive law of nations consisted of three elements: the voluntary,[212] the conventional,[213] and the customary.[214]

---

206. BRIERLY, *supra* note 194, at 32. Grotius would not have viewed sovereignty in its extreme absolutism because he viewed the dictates of natural law, which provided sovereignty's boundary, as "of themselves clear and evident, almost as things perceived with the external senses." *See* FENWICK, *supra* note 189, at 50.

207. Jenks, *supra* note 181, at 25 (For Bodin, "the concept of sovereignty becomes the focus of order and effective administration" in a country courting anarchy.).

208. Grotian theory developed in response to "the licentiousness in regard to war, which even barbarous nations ought to be ashamed of; a running of war upen very frivolous or rather no occasion; which being once taken up, there romained no longer any reverence for right either divine or human, just as if from that time men were authorized and firmly resolved to commit all manner of crimes without restraint." GROTIUS, *supra* note 204, at 28.

209. "Should legal doctrine [in Bodin's] time have conceived sovereignties as absolute . . . then the term would have become synonymous with unlimited freedom. It was reserved for later 'legal philosophers' and statesmen to carry worship of sovereignty to this extreme, *i.e. ad absurdum*." 1 VERZIJL, *supra* note 16, at 258.

210. *See* Fong Yue Ting v. United States, 149 U.S. 698, 707-08 (1893) (quoting Vattel to support the sovereign's right to expel aliens). *See also* Blythe v. Hinckley, 180 U.S. 333, 341 (1901); DeGeofroy v. Riggs, 133 U.S. 258, 270 (1890).

211. VATTEL, *supra* note 181, § 7. He distinguished natural law as applied to nations from natural law as applied to individuals. "A state or civil society is a subject very different from an individual of the human race; from which circumstance, pursuant to the law of naturo itself, there results, in many cases, very different obligations and rights." *Id.* § 6.

212. *Id.* § 27 (element of law based on "presumed consent" of nations). Based on the "presumed consent of nations to consider each other as perfectly free, independent, and equal, each being the judge of its own actions, and responsible to no superior but the

Vattel's work emits strong signals of the arrival of a true absolutist view of sovereignty because, unlike Bodin and Grotius, he recognized that no one method of discerning natural law commanded universal respect.[215] In his preliminaries, Vattel says that nations arise out of a state of nature, as do individuals; therefore, like individuals, "the State remains absolutely free and independent with respect to all other men, and all *other* Nations, so long as it has not voluntarily submitted to them."[216] In discussing natural law as applied to nations, Vattel crosses the abyss and enters into the territory of absolutism:

> Nations being free and independent, though the conduct of one of them be illegal and condemnable by the laws of conscience, the others are bound to acquiesce in it . . . . The liberty of that nation would not remain entire, if the others were to arrogate to themselves the right of inspecting and regulating *her* actions; an assumption on their part, that would be contrary to the law of nature, which declares every nation free and independent of all the others.[217]

In other words, all nations are bound to obey the laws of nature, *and* it would violate the laws of nature for any other nation to judge another nation's alleged violation of these laws. Each nation interprets natural

---

supreme ruler of the universe." HENRY WHEATON, HISTORY OF THE LAW OF NATIONS IN EUROPE AND AMERICA FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON 188 (1845).

213. VATTEL, *supra* note 181, § 27 (element of law based on a nation's "express consent").

214. *Id.* §§ 26-27 (element of law based on a nation's "tacit consent" as derived from "custom and usage").

215. Vattel may have been ahead of his time. *Cf.* Jacques Maritain, *Natural Law in Aquinas*, *in* MAN AND THE STATE (1951), *reprinted in* READINGS IN MORAL THEOLOGY No. 7: NATURAL LAW AND THEOLOGY 114, 118 (Charles Curran & Richard McCormack eds., 1991) ("An angel who knew the human essence in his angelic manner and all the possible existential situations of man would know natural law in the infinity of its extension. But we do not. Though the Eighteenth Century theoreticians believed they did.").

216. VATTEL, *supra* note 181, § 4. Here Vattel explains how the natural law binding individuals differs from the natural law binding nations:

> It is a settled point with writers on the *natural* law, that all men inherit from *nature* a perfect *liberty* and *independence*, of which they cannot be deprived without their own consent. In a State, the individual citizens do not enjoy them *fully* and absolutely, because they have made a *partial* surrender of them to the sovereign.

Id. States, however, remain absolutely free because they remain in a state of nature. *Id.*

217. *Id.* § 9.

law itself.[218] The age of absolute sovereignty was upon the world in full force.

Absolute sovereignty coexisted with its antithesis, international law,[219] from Vattel's time until World War II. The atrocities committed by Nazi Germany compelled the twentieth century world to attempt, like Bodin and Grotius, to place external limits on sovereignty.

In summary, the theory of sovereignty expanded from its introduction by Bodin in the sixteenth century through the nineteenth century, which brought us plenary power. Bodin's sovereignty was inward looking and lacking in international character; more significantly, it was constrained by the force of natural law.[220] In the seventeenth century, sovereignty expanded to include its external component, still bounded by the divine.[221] Vattel, whose influence can be seen in the *Chinese Exclusion Case*, adopted an *absolutist* view of sovereignty, at least with respect to the relations between one state and another, in the eighteenth century.[222] And, in the nineteenth century, further expansion took place, with sovereignty placing the individual state beyond the control of "the community of nations as a whole."[223] By the time of the *Chinese Exclusion Case*, the theory of absolute sovereignty had reached its apex, and was already ripe for gradual decline.

B. The Rights Revolution

Plenary power derived its strength and endurance from the absolute nature of sovereignty in a world order that treated individuals as objects. If sovereignty was ever absolute in nature,[224] it has lost an increment of that luster over the last fifty years, at least *vis a vis* the individual.

---

218. Under this reasoning, no state can judge another state's failure to observe positive international law either because, as Vattel notes, positive law that violates natural law is void, so that if a state decides that its positive international law obligations violate its natural law duties, no other state has a right to judge that action.

219. *See* BRIERLY, *supra* note 194, at 16 ("if sovereignty means absolute power, and if states are sovereign in that sense, they cannot at the same time be subject to law. International lawyers have tried to escape from the difficulties in various ways . . . but if the premisses [sic] be correct there is no escape from the conclusion that international law is nothing but a delusion.").

220. *See* FENWICK, *supra* note 189, at 47 n.1.

221. *Id.*

222. *See supra* text accompanying note 217. *Cf.* FENWICK, *supra* note 189, at 47 n.1 (in the eighteenth century, sovereignty was used to "negativ[e] the overlordship of one state by another").

223. *Id.*

224. *See* Nafziger, *supra* note 21 (questioning whether sovereignty ever possessed the absoluteness necessary to justify blanket exclusion policies).

Pursuant to evolving customary and conventional international law norms, nations no longer possess the unrestrained freedom to govern in a fashion that violates fundamental human rights. The international law premise, that "no state has the smallest right to interfere in the government of another," perished along with the Third Reich.[225]

A half century ago, President Franklin Delano Roosevelt addressed the nation and the world advocating four freedoms for all humans: freedom of speech, freedom of worship, freedom from want, and freedom from fear.[226] The United Nations Charter, adopted in 1945, reflected Roosevelt's call for the development of international human rights. "All Members pledge themselves to take joint and separate action in cooperation with" the United Nations to "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[227]

The Commission on Human Rights, established by the United Nations and chaired by Eleanor Roosevelt, produced the Universal Declaration of Human Rights, which was adopted without dissent by the United Nations General Assembly.[228] Meant as a nonbinding[229]

---

225. Tremors, shaking the foundations of sovereignty, were felt, at least among scholars, prior to World War II. *See* FENWICK, *supra* note 189, at 60 ("a number of scholars have come to the belief that a new theory of international relations is needed, that the old emphasis upon 'sovereignty' must give way to a more realistic acceptance of the actual interdependence of nations").

226. 87 CONG. REC. 44, 46-47 (1941) (message to Congress of Jan. 6).

227. U.N. CHARTER arts. 55(c) and 56.

228. *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3rd Sess., pt. 1, U.N. Doc. A/810, at 71 (1948) [hereinafter *Universal Declaration*]. The Universal Declaration was approved by the United Nations General Assembly by a vote of 48-0, with abstentions by the Soviet Union, Yugoslavia, Poland, Ukraine, Byelorussia, Czechoslovakia, Saudi Arabia, and South Africa. *See* NATALIE H. KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE 67 (1990).

229. South Africa abstained, realizing that inevitably the Universal Declaration would "be interpreted as an authoritative definition of fundamental rights and freedoms which had been left undefined in the Charter." U.N. GAOR, 3d Sess., pt. 1, at 910, Dec. 10, 1948 (statement by delegate from South Africa). South Africa's fears were well founded. A decade and a half later, the United Nations condemned South Africa for perpetuation of racial discrimination, which the United Nations believed was inconsistent with the principles contained in the charter of the United Nations and contrary to South Africa's obligations as a member of the United Nations. S.C. Res. 181, U.N. SCOR, 18th Sess., Supp. for July-Sept. 1963, at 73, U.N. Doc. S/5386 (1963). In 1977, teeth were added to the 1963 resolution—the United Nations imposed a mandatory arms embargo against South Africa. S.C. Res. 418, U.N. SCOR, 32nd Sess., 2046th mtg., Res. and Dec., at 5, U.N. Doc. S/12436 (1977). After applying a patchwork of sanctions for many years, the United States in 1984 imposed comprehensive sanctions against South Africa. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, *amended*, Pub. L. No. 99-631, 100 Stat. 3515 (1986). For a discussion of the

statement of aspirations and proclaimed "as a common standard of achievement for all peoples and all nations,"[230] it provided a moral compass for the future. Influenced by an American rights orientation dating back to the prerevolutionary fervor, the Universal Declaration included, among others, rights to life, liberty, property, and equal protection.[231] The document reflected some influence from non-American traditions. Most notably, article 25 recognized the "right to a standard of living adequate for the health and well-being. . . ."[232]

Neither the Universal Declaration nor the other post-World War II human rights work employed natural law rhetoric. Instead, the Universal Declaration and its progeny provide a set of principals set in positive form, allowing a diverse world with a variety of thoughts about nature, reason, and a deity, to come together and agree that certain basic rights ought to be recognized by all.[233] This has allowed the modern international legal community to avoid the inevitable pitfalls of Vattel's natural law of nations. In essence, we have gone full circle back to Bodin and Grotius,[234] recognizing the status of sovereign independent states but seeking to establish a legal regime outside of the states themselves that would impose limits on sovereignty. The natural law regime failed for lack of universal understanding and acceptance of its meaning. Ultimately, it broke down into absolute sovereignty with a pretense of natural law boundaries. The modern structure, in contrast, imposes generally agreed upon positive limitations on nations' sovereignty.

Universal Declaration's incorporation into customary international law, see *infra* text accompanying notes 250-54.

230. *Universal Declaration, supra* note 228, at Preamble.

231. *Id.* at Arts. 3, 7, and 17. The Soviet Bloc countries abstained because of the inclusion of property rights. *See* KAUFMAN, *supra* note 228, at 67.

232. *Universal Declaration, supra* note 228, at Art. 25.

233. *See* ROBERT F. DRINAN, CRY OF THE OPPRESSED 9 (1987) ("[T]he UN charter assumes that there is enough conviction and consensus in the entire world about the value of human rights that all nations, whether their governments have a sacred or secular orientation, can adhere to the charter and carry out its mandates.").

234. *See, e.g.*, Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, *in* THE INTERNATIONAL BILL OF RIGHTS 32-33 (Louis Henkin ed., 1981) ("The International Covenant on Civil and Political Rights has been traced to classical ideas of divine or natural law."). The difference between the modern human rights work and Grotian international law is that the natural rights and obligations are being transformed into positive law in an agreed-upon fashion.

1. THE DEVELOPMENT OF INTERNATIONAL LAW—TREATIES

The Universal Declaration's drafters conceived of it as a beginning, a focal point for future development of these newly internationalized norms. A binding covenant on human rights with implementing provisions was to follow.[235] This series of documents would together constitute the International Bill of Rights.[236] The advent of the cold war, however, derailed such plans. Instead of one unified and binding covenant on human rights, two emerged, reflecting the disparate priorities of capitalist and socialist, developed and developing nations.[237] The International Covenant on Civil and Political Rights[238] reflected the philosophy of western democracies, while socialist thought radiated from the International Covenant on Economic, Social and Cultural Rights.[239] Both of these documents continue the sound of retreat from the nineteenth century view of absolute sovereignty. The preamble to both documents states that the "foundation of freedom, justice and peace in the world" is "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."[240] The International Covenant on Civil and Political Rights requires each contracting state to "ensure to all individuals within its territory . . . the rights recognized in the present covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[241]

Despite conflicts between east and west and north and south, the human rights work continued, eventually leading to the completion of twenty-two binding human rights documents[242] with international

---

235. *Id.* at 37.

236. *See* REP. OF COMM'N ON HUMAN RIGHTS, 6 U.N. ESCOR, 2d Sess., Supp. No. 1, at 5, U.N. Doc. E/600 (1947). For elaboration, see MYRES S. MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 320-21 (1980).

237. *See* MCDOUGAL, *supra* note 236, at 321 ("the ideological controversy relating to the nature and prominence of 'civil and political rights' and of 'economic, social and cultural rights' led the General Assembly to decide in 1952, that two covenants . . . be simultaneously prepared [and] submitted . . . .").

238. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 717 [hereinafter Covenant on Civil and Political Rights].

239. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 [hereinafter Covenant on Economic, Social and Cultural Rights].

240. Covenant on Civil and Political Rights, *supra* note 238, at Preamble; Covenant on Economic, Social and Cultural Rights, *supra* note 239, at Preamble.

241. Covenant on Civil and Political Rights, *supra* note 238, at Art. 2.

242. *See* RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 170-72 (2d ed. 1991) (chart listing these documents as of July 1, 1990).

application. These other treaties focused on specific and problematic human rights issues, including the problem of genocide,[243] the rights of women,[244] the problem of racial discrimination,[245] the status of refugees,[246] and the problem of apartheid.[247]

Continued interest fanned the flames of this international effort, spreading its message to every part of the world.[248] In an unmistakable fashion, the internationalization of human rights marks the end of Vattel's absolutist view of state sovereignty at least with respect to the individual. As the Inter-American Court of Human Rights stated, the

> object and purpose [of human rights treaties] is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed *to submit themselves to a legal order within which they, for the common good, assume various legal obligations,* not in relation to other states, *but toward all individuals within their jurisdiction.*[249]

Binding human rights treaties reflect a global reassessment of the continual tension between the powers of sovereigns and the rights of

---

243. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Convention on the Prevention and Punishment of the Crime of Genocide].

244. Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1980) [hereinafter Convention on the Elimination of All Forms of Discrimination Against Women]; Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, 193 U.N.T.S. 135 [hereinafter Convention on the Political Rights of Women].

245. Convention on the Elimination of all Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195.

246. Convention Relating to the Status of Refugees, *signed* July 28, 1951, 189 U.N.T.S. 137; Pretocol Relating to the Status of Refugees, *done* Jan. 31, 1967, 606 U.N.T.S. 267.

247. Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068, U.N. GAOR, 28th Sess., Supp. No. 30, at 75, U.N. Doc. A/9030 (1977); Convention Against Apartheid in Sports, G.A. Res. 64, U.N. GAOR, 40th Sess., Supp. No. 53, at 37, U.N. Doc. A/40/53 (1985).

248. In addition to the human rights conventions with worldwide application, several regional human rights treaties were adopted. *See, e.g.* European Convention for the Protection of Human Rights and Fundamental Freedoms, *signed* Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights, *signed* Nov. 22, 1969, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 495 (Ian Brownlie ed., 1992).

249. Advisory Opinion OC-2/82, Inter-Amer. Court H.R. 1, ¶ 29, ser. A/no. 2 (1982) (emphasis added).

individuals. These treaties recognize that the individual has been undervalued. To compensate, sovereign states have agreed to cede a modicum of their power to an external positive law regime.

2. CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS

Customary international law, a source of positive international law separate and distinct from conventional law, finds root in the "general and consistent practice of states followed by them from a sense of legal obligation."[250] This is an important source of international law because, unlike treaty law, every nation is bound by custom unless it specifically dissented during the custom's formative stages.[251] Custom can exist in tandem with treaty law, covering the same ground as an existing treaty obligation. Even in this situation, recognition of the customary law as a distinct and separate source of international law is important for at least three reasons: 1) custom binds non-contracting states; 2) for those contracting states in which treaty law is not self-executing, custom makes the norms reflected in the treaty binding; and 3) for contracting states that have filed reservations to a treaty, custom may abrogate the reservation.[252]

Most authorities agree that the institution of human rights as a limitation on nation-state sovereignty now possesses a place in this legal firmament known as customary international law.[253] Commentators differ on the size and shape of this new constellation. Many would argue that all or portions of the rights reflected in the Universal Declaration of

---

250. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 182, at § 102(2).

251. *See id.* cmt. d.

252. *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 3-8 (1989).

253. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 182, § 702. Section 702 sets out the seven human rights generally agreed to have achieved customary status as of 1987:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
>
> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing of disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) *prolonged arbitrary detention,*
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.

(emphasis added).

Human Rights and portions of the rights reflected in the International Covenant on Civil and Political Rights have become embedded in customary international law binding on all nations whether or not they are signatories to those documents.[254]

For my purposes, the *fact* of a more limited sovereignty *vis a vis* the individual is crucial; the specific limitations are unimportant. My concern is with sovereignty as the theoretical underpinning of plenary power, and with the fact that sovereignty is undergoing a transformation resulting in a retreat from absolutism.

I do not advocate incorporating specific internationally recognized human rights directly into the Constitution. But where the international law of sovereignty provides the background norm for constitutional decisionmaking as it does in alienage cases, the Court ought to look at the current norm with its recent limitations. In the nineteenth century, the state of international law found the power of the sovereign absolute and the rights of individuals seriously discounted. This state of affairs appears to have influenced the Court's decision in the *Chinese Exclusion Case* and other early plenary power cases. The Court now ought to take account of the shift in the balance between power and right when it decides future alienage cases. Because of the United States' historical reluctance to ratify international human rights treaties, the next section explores whether the United States recognizes the diminution in sovereignty resulting from the advent of an international human rights regime.

C. The United States and International Human Rights

Although instrumental in promoting an international human rights regime,[255] the United States resisted joining the world community in ratifying the various human rights treaties.[256] The initial human rights documents emerged from the brief euphoric unity following the defeat of the axis powers. The advancing cold war, like a frigid arctic wind, slapped the United States back to reality. The Senate, stirred to a frenzy

---

254. *See, e.g.*, MCDOUGAL, *supra* note 236, at 274; MERON, *supra* note 252, at 94-98; John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976); Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INTL. L.J. 129, 133 (1977).

255. *See generally* HENKIN, *supra* note 180, at 74; Richard B. Lillieh, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 56 (1990).

256. *See* HENKIN, *supra* note 180, at 74 ("From the beginning the international human rights movement was conceived by the United States as designed to improve the condition of human rights in countries *other* than the United States . . . .") (emphasis added); Lillich, *supra* note 255, at 58.

by these world events and the chill of the McCarthy era, was in no mood to ratify any document that would have subjected the United States human rights record to criticism by the Soviet Union or any of the developing nations of the world.[257] In a shameful display of isolationism, the United States of America, a major exponent of the concept of human rights as well as of the treaties themselves, has to this date ratified few global human rights treaties.[258] Until recently, the United States refrained from becoming a party to the major human right covenants, preferring the sidelines and expending, I would suspect, a large measure of moral capital in the world market place.[259]

This section of the Article explores the question of whether the transformation of sovereignty binds the United States. Given its historical reluctance to participate in most human rights treaties, the answer to this question is not an obvious yes. Plenary power retains its international law theoretical moorings if the United States clings to absolute sovereignty in the face of its abandonment worldwide.[260] In this section, I argue that

---

257. *See infra* text accompanying notes 261-68.

258. *See infra* text accompanying notes 270-74.

259. Failure to ratify the Genocide Convention might be taken as an indication that we have some kind of pogrom in mind for our Negro minority. [Non-Americans] will listen eagerly when Russia [says] that ratification was blocked by southern senators who feared it might lead to a federal antilynching law . . . and who were unwilling to make the mass extermination of racial, religious or national groups a crime under international law for fear that the lynching of a Negro might be considered an act of genocide.

Senate Group, CHRISTIAN CENTURY, Sept. 20, 1950, at 1091, quoted in KAUFMAN, *supra* note 228, at 15. *See also* SENATE COMM. ON FOREIGN RELATIONS, REP. ON THE INT'L COVENANT ON CIVIL AND POLITICAL RTS., S. REP. NO. 23, 102nd Cong., 2d Sess. (1992), *reprinted at* 31 INT'L LEGAL MATERIALS 645, 649 (1992) [hereinafter SENATE REPORT] ("In view of the leading role that the United States plays in the struggle for human rights, the absence of U.S. ratification of the Covenant is conspicuous and, in the view of many, hypocritical."); HENKIN, *supra* note 180, at 74 ("The failure of the United States to adhere to international human rights instruments was resented as arrogant and was decried as hypocritical when the United States sought to invoke international human rights against others.").

260. Even if the United States stubbornly holds to the anachronistic absolutist view of sovereignty, plenary power's current status needs to be reexamined in light of the Constitution's transformation into a document ensuring the substantive and procedural rights of individuals. Unless we take United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), to mean not only that the political branches' power in the international sphere is uncnumerated, but, further, that this unenumerated power trumps all claims of constitutional protection, the rights of the individual noncitizen must be examined. The *Chinese Exclusion Case*, 130 U.S. 581 (1889), seems to require as much. In that case, the Court said that sovereign powers, including the power of exclusion, were "restricted in their exercise only by the constitution itself . . . ." *Id.* at 604. Since aliens, at least

the United States is bound by and accepts the notion that absolutism is gone, replaced by an evolving system of positive law, which imposes external limitations upon the nation-state. First, the United States is now a party to several global human rights conventions, including the International Covenant on Civil and Political Rights, which was ratified in 1992. Second, not only is the United States bound by customary international law, it has recognized and fostered the development of customary international human rights through varyious governmental practices.

1. TREATY LAW

Limitations to be placed on United States sovereignty generated much of the domestic fear of human rights treaties. The Genocide Convention, sent to the Senate by President Truman in 1949, was the first human rights treaty examined by the United States Senate. The forces against ratification, led by the American Bar Association's Committee on Peace and Law Through the United Nations, developed a strategy to exploit this fear and defeat the human rights treaty agenda.[261] The committee's legacy lingers even today.[262]

Genocide treaty opponents lambasted what they perceived as a twofold diminution of sovereignty: first, they argned that federal sovereignty would be ceded to the global community; second, that state sovereignty in our system of dual federalism would be ceded to the national power. To cede a portion of sovereignty, they argued, would lead to the collapse of cherished American rights and freedoms. Frank Holman, president of the American Bar Association, reflected the opposition's sentiment:

> In order to enforce the provisions of a bill of rights, the United Nations will have to interfere continually and minutely in the internal affairs of member nations . . . .
>
> No basic standard or system of human rights can be successfully imposed upon any nation by any other nation or group of nations or by any other outside source. Where such standards exist in the world today, they have developed as a

---

those within the borders of the United States, are constitutional "persons," it should follow that they are entitled to the protections of the Bill of Rights, which operates to restrict sovereign power. *See* Wong Wing v. United States, 163 U.S. 228, 237 (1896) (alien is a "porson" entitled to Fifth Amendment protection); Yick Wo v. Hopkins, 118 U.S. 356, 368-69 (1886) (alien is "porson" within meaning of Fourteenth Amendment).

261. *See generally* KAUFMAN, *supra* note 228.

262. *Id.*

> natural expression of the overwhelming weight of opinion of the local population. They have come from the people and not from the state.[263]

Some of his concern was directed at possible communist influence: "we may be told, if the communist and dictator nations muster a majority at any time in the United Nations, 'You must enforce freedom our way . . . .'"[264] Senator Wiley, speaking specifically about the Genocide Convention, said: "I don't think the peoples of the earth are in any position where they can tell this great people on morals, politics and religion, how they should live. I still feel that we are ahead of them in that respect . . . ."[265]

In addition to encroaching on traditionally domestic affairs, the human rights treaties, beginning with the Genocide Convention, were perceived as a threat to states' rights in our system of federalism. The Genocide Convention was seen by some as "no less tha[n] a part of the pattern of the conspiracy to destroy our American institutions, to nationalize our domestic relations and to deprive the States and the people of the States of their right of self-government."[266] Placing the debate in its historical context at the genesis of the modern civil rights movement,[267] southerners feared that the internationalization of human rights might lead to the demise of segregation and the advent of federal antilynching laws.[268]

---

263. Frank E. Holman, *An "International Bill of Rights": Proposals Have Dangerous Implications for U.S.*, 34 A.B.A. J. 984, 985 (1948).

264. *Id.* at 1079.

265. 2 *Executive Sessions of the Senate Foreign Relations Committee (Historical Series)*, 81st Cong., 1st & 2d Sess. 384 (1949-50). Made public August 1976.

266. *The Genocide Convention: Hearings Before a Subcomm. of the Comm. on Foreign Relations, United States Senate, on Executive O—The International Convention on the Prevention and Punishment of the Crime of Genocide*, 81st Cong., 2d Sess. 230 (1950) (statement of Leander H. Perez, District Attorney of Louisiana).

267. *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950) (Court ordered the all-white University of Texas School of Law to admit black student); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (State has duty to provide black student an equal legal education).

268. The perceived inconsistency between the various treaties, including the Genocide Convention, and our guarantee of free speech found in the First Amendment, also generated some interest among opponents. Although the Convention on Civil and Political Rights recognizes a basic right of free speech, it is restricted; "hate speech" receives no protection under the convention. Therefore, speech attacking racial, ethnic, or religious groups is unprotected. See International Covenant on Civil and Political Rights, *supra* note 238, Arts. 19(3) and 20. The Supreme Court recently reiterated that even "hate speech" receives constitutional protection. *See* R.A.V. v. St. Paul, 112 S. Ct. 2538, 2549 (1992) (invalid selectively to proscribe fighting words "that communicate

Decades later, the Genocide Convention received Senate approval,[269] signalling the United States' affirmation of the external positive law structure developing to limit sovereignty. Prior to the 1990s, however, the United States had ratified very few international human rights treaties, among them the Supplementary Slavery Convention,[270] and the Convention on the Political Rights of Women,[271] in addition to the Genocide Convention. The diminution in sovereignty served as the primary argument for defeating the Genocide Convention; in becoming a party to that convention along with the other two, the United States clearly decided to forgo a modicum of its sovereignty. It joined the global community in recognizing external covenantal limits on sovereignty.

The Senate's consent to the International Covenant on Political and Civil Rights provides the most recent and far-reaching indication of the United States' willingness to participate in the globalization of human rights.[272] President Bush, in urging Senate approval, saw that ratification would "strengthen [U.S.] ability to influence the development of appropriate human rights principles in the international community."[273] The Senate Foreign Relations Committee, in approving the covenant by of 19-0 vote, recognized "the importance to adhering to internationally recognized human rights."[274]

---

messages of racial, gender, or religious intolerance").

269. *See supra* note 243.

270. *See* Supplementary Convention on the Abolition of Alavery, the Slave Trade, and Practices Similar to Slavery, *opened for signature* Sept. 7, 1956, 266 U.N.T.S. 3.

271. *See supra* note 244. For a complete list of human rights treaties ratified by the United States, see Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 4 n.7 (1992).

272. During the Carter presidency, the United States signed the covenant and the Senate Foreign Relations Committee considered it, taking no action in light of two international crises: the invasion of Afghanistan and the Iranian hostage crisis. *See* SENATE REPORT, *supra* note 259, 31 INT'L LEGAL MATERIALS at 649. In 1991, President Bush renewed efforts to ratify the covenant, asking the Senate for its adviee and consent. *See* Letter from George Bush to the Honorable Claiborne Pell, Chairman, Senate Foreign Relations Committee (August 8, 1991), *in* 31 INT'L LEGAL MATERIALS 645, 660 (1992) [hereinafter Bush Letter]. After the Senate provided its advice and eonsent, the instrument of ratification was deposited, and the eovenant entered into foree for the United States on September 8, 1992. *See* 31 INT'L LEGAL MATERIALS at 645.

273. Bush Letter, *supra* note 272.

274. SENATE REPORT, *supra* note 259, 31 INT'L LEGAL MATERIALS at 650. The Senate recognized that while the covenant reflected "western legal and ethical values," our riglits system does not completely parallel the covenant's. For instance, both the Senate and the President viewed Articles 20's prohibition of hate speech as ineonsistent with the First Amendment; therefore, the United States made a reservation to Article 20. *See id.* at 653. The United States reserved the right to inflict the death penalty on 16- and 17-

The political branches' renewed commitment to the internationalization of human rights law through treaties provides the judiciary with an historic opportunity to address anew the plenary power doctrine, with its corresponding schizophrenia between domestic constitutional jurisprudence and the constitutional law of noncitizens. Treaty or covenantal law does not provide the whole story; the United States is also bound by emerging limitations on sovereignty imposed by customary international law. I return to a discussion of that human rights regime below.

2. CUSTOM AND UNITED STATES RIGHTS RHETORIC

The Supreme Court long ago recognized that international law, including customary international law, comprises part of United States law.[275] And, as set forth *supra* in Section III.B.2., customary international law encompasses elements of the emerging human rights tradition. Even though international human rights law is still in its infancy, the time has passed when any nation can reasonably claim that international human rights norms do not apply to it. In addition to being bound by customary human rights norms, the United States also continues to acquiesce in and encourage development of such norms. At Yale's 1991 commencement, former President Bush employed the rhetoric of our national commitment to the global advancement of human rights: "And let me be clear—as a member of the United Nations, China is *bound* by the U.N. Declaration of Human Rights. We will hold China to the obligation it has freely accepted."[276] In short, the United States recognizes that these emerging norms place some restrictions on previously unbridled sovereign discretion.

Vacillation and inconsistency color the United States' record on the advancement of international human rights. Clearly though, the federal government, through one branch or the other, has stalwartly backed the internationalization of human rights for much of the last fifty years. Congress and the President have engaged in a forty-five year tennis match with human rights as the ball. Initially, the executive pushed a human rights agenda at home and abroad, and was met with great resistance in

---

year-olds, despite its prohibition in Article 6 of the covenant. *Id.* at 651. The Senate Committee anticipated, however, that at some future time United States domestic law would change, allowing the "United States [to come] into full compliance." *Id.* at 650.

275. *See* The Paquete Habana, 175 U.S. 677, 700 (1900). *See also* First City National Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983).

276. President George Bush, Commencement Address at Yale University (May 27, 1991), *excerpted in* 1991 CONG. Q. WKLY. REPS. 1459, 1459 (emphasis added).

the Senate and at the bar.[277] Later, Congress served as human rights promoter by tying foreign aid packages to countries' human rights records.[278]

During the Carter administration, Congress and the executive worked together to advance the human rights cause in the world. President Carter unapologetically placed international human rights at the center of his foreign policy agenda.[279] Ronald Reagan's victory in November of 1980 marked a 180 degree change in direction. President Reagan's foreign policy agenda did not include the universal promotion of international human rights norms. East-west tensions and the containment of the Soviet menace claimed center stage. Through the prism of containment, the executive's human rights rhetoric focused more sharply on human rights abuses in communist and communist-aligned nations.[280] During the 1980s, Congress carried the torch of international human rights, continuing to tie eertain foreign aid packages to the receiving countries' human rights records.[281]

For its own reasons, the United States until recently largely opted out of the development of covenantal human rights law.[282] It is equally clear that the United States has chosen to work laboriously in other ways to promote the global application of human rights. Not only does customary international law bind the United States to certain human rights principles; the United States has affirmatively sought to advance these principles through the various mechanisms discussed above. In short, the United States recognizes and promotes the internationalization of human rights, with the concomitant diminution in sovereignty.

3. SUMMARY

In 1992, through the ratification of the Covenant on Civil and Political Rights, the United States demonstrated in a dramatic way its commitment to international human rights norms. Even though the United States provided the major thrust behind the initial human rights

---

277. *See supra* text accompanying notes 261-68.

278. *See* 22 U.S.C. § 2151n (1990) (prohibiting certain U.S. aid to countries engaging "in a consistent pattern of gross violations of internationally recognized human rights") For an in-depth look at Congress' role in promoting human rights, see generally DAVID P. FORSYTHE, HUMAN RIGHTS AND U.S. FOREIGN POLICY, 7-19 (1988); A. GLENN MOWER, JR., HUMAN RIGHTS AND AMERICAN FOREIGN POLICY (1987).

279. *See generally* MOWER, *supra* note 278, at 14-16.

280. *Id.* at 25 ("Moral values as such . . . do not appear to be nearly so prominent in the rationale for the Reagan human rights policy as the struggle against communism in general and the U.S.-Soviet rivalry in particular.").

281. *See supra* note 229 (sanctions against South Africa).

282. *See supra* text accompanying notes 261-68.

documents after World War II, our role in the advancement of human rights since that early period has been beleaguered by inconsistency and, at times, a lack of commitment. The blemish on our national moral fabric, greased by our longstanding failure to participate in the covenantal development of international human rights law, has been cleansed. The United States has now made an affirmative commitment to several global rights conventions by ratifying them. Therefore, by treaty we have accepted some measure of international accountability with respect to the developing human rights law. Secondly, most authorities agree that some human rights have been woven into the fabric of customary international law binding on all nations. The United States has not only acquiesced in but has actually fostered the creation of this body of customary international law. Thus, it is clear that the United States recognizes the existence of a global structure imposing legal constraints on sovereign states.

IV. DISMANTLING PLENARY POWER IN THE AGE OF INTERNATIONAL HUMAN RIGHTS

Today, much like earlier periods, human rights records vary dramatically among countries. Unlike under the old regime, however, a nation's conduct can now be judged by international norms. In the last fifty years, nation-state sovereignty has been limited by emerging substantive standards of human rights. The gap between legal norms and legal remedies, however, remains wide, with international enforcement mechanisms for the most part still in their infancy.

International scrutiny of domestic practices engenders fear and distrust, hindering the development of global and regional enforcement devices. Instead, the evolving human rights jurisprudence relies for much of its enforcement on the willingness of individual countries to incorporate international norms into their domestic legal infrastructure.[283] That only limited enforcement mechanisms exist at this early stage of human rights development should not be overly discouraging. Professor Drinan reminds us that "[i]t took generations, even centuries, for the ideals of the Magna Carta adopted at Runnymeade in the year 1215 to be accepted in England and in the scores of nations to which English law was extended. So too the moral ideas inherent in the nineteen major covenants, or

283. *See generally* Diane F. Brentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2560 (1991) (recent emphasis is on domestic enforcement of international human rights).

treaties, that have emerged from the United Nations will require some time to be accepted."[284]

The United States, long a champion of individual rights and liberties, and chief exporter of the idea of international human rights norms, has a human rights record, as judged by international standards, that is equalled by few. From the beginning we were concerned with rights—in the spirit of revolution we declared our independence from the British Crown with the words, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."[285] Early state constitutions recognized the paramount importance of individual rights.[286] And, although the original Constitution does not contain the rights rhetoric found in these earlier documents, the Bill of Rights followed a short time later.[287] More recently, the Bill of Rights and the Fourteenth Amendment have served as the fulcrum for judicial review of government infringement on individual rights.[288] Our rights orientation also informs the legislative mandate leading to civil rights, voting and political rights, and welfare legislation.[289]

The United States' human rights record is not without major blemishes.[290] At a constitutional level, this record has been improved

---

284. DRINAN, *supra* note 233, at 3.

285. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

286. *See, e.g.*, VA. BILL OF RIGHTS (1776), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY 103-04 (Henry S. Commager & Milton Cantor eds., 9th ed. 1973); MASS. BILL OF RIGHTS (1780), *reprinted in* 1 DOCUMENTS OF AMERICAN HISTORY at 107-10, *supra*.

287. For a view that the Bill of Rights was originally designed as a further structural check on the powers of an attenuated representative government and *not* as a device to protect the rights of unpopular minorities, see Amar, *supra* note 157, at 1131. *Contra* HENKIN, *supra* note 180, at 84-85 (reading Thomas Jefferson's rights rhetoric into American constitutionalism).

288. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE 154-62 (1991); MARY ANN GLENDON, RIGHTS TALK 5-7 (1991).

289. Most recently, see the Americans With Disabilities Act, 42 U.S.C.S. §§ 12101 *et seq.* (Supp. 1993).

290. Slavery and the existence of southern apartheid, dismantled only a generation ago, shame us. We have long applied policies designed to frustrate the ascent to political and economic equality by various groups such as woman and racial minorities. These obstacles to inclusion are slowly being dismantled. We have also been slow to recognize a bundle of "new" rights, economic rights, which place an affirmative duty on the government to assure to the extent possible a measure of economic security above that presently offered in the United States. The current public debate in the United States continues to involve issues of parental leave and universal health care, two economic "rights" recognized in international law. *See* International Covenant on Economic, Social and Cultural Rights, *supra* note 239, Arts. 10(2) and 12(2)(d). The United States has not

by the explosive development of constitutional protections for the individual. Blacks, who were once constitutionally protected property,[291] are now valued individuals entitled to equal protection.[292] A century ago the Court viewed "the paramount destiny and mission of woman [as fulfilling] the noble and benign offices of wife and mother."[293] Today, the Court has shunned "increasingly outdated misconceptions concerning the role of females in the home rather than in the marketplace of ideas."[294] Through these and other decisions, the Court has increasingly re-valued the individual within our constitutional scheme.

Protection for noncitizens stagnated, however, remaining largely as it was in 1889 when the *Chinese Exclusion Case* was handed down.[295] Why hasn't the proliferation in the concern for individuals manifested itself in the alienage cases, calling for the end to the persistent undervaluation of noncitizens? Part II D, *supra*, concludes that the schism developed from outdated notions of external "absolute" sovereignty. The cases, however, never adequately reconciled the internal constitutional limitations on the exercise of sovereign power with the concept of plenary power over alienage questions. For example, why doesn't the racial equality principle limit congressional discretion in developing immigration policy? The Court, in the *Chinese Exclusion Case*, recognized that sovereign discretion could be limited from within, by constitutional rule.[296] In reality, the lesson from *Chinese Exclusion*'s progeny is that no such internal restrictions exist because the United States, in order to compete equally in the global community, must not be bound by inconvenient provisions found in the Constitution.

---

ratified this treaty. For a provocative cost/benefit argument for providing economic aid to the American family, see SYLVIA A. HEWLETT, WHEN THE BOUGH BREAKS: THE COST OF NEGLECTING OUR CHILDREN (1991).

291. *See* Dred Scott v. Sandford, 60 (19 How.) U.S. 393 (1856).

292. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (racial classifications subject to "most rigid scrutiny" under Equal Protection analysis).

293. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (upholding Illinois' denial of law license to a woman).

294. Craig v. Boren, 429 U.S. 190, 198-99 (1976).

295. Professor Motomura argues that while the courts continue to rely on the plenary power doctrine when addressing constitutional questions, at a subconstitutional level the courts use what he refers to as "phantom norms" to superimpose mainstream constitutional doctrine onto interpretation of statutes affecting aliens. *See Phantom Constitutional Norms*, *supra* note 7.

296. 130 U.S. 581, 604 (The foreign affairs powers "are all sovereign powers, restricted in their exercise only by the constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations.").

Justice Sutherland in *United States v. Curtiss-Wright Corp.*[297] opined for the Court that constitutional first principles do not apply in matters of external sovereignty, only to internal sovereignty.[298] Congress, by joint resolution, bad authorized (not mandated) the President to prohibit arm sales to countries involved in the Chaco conflict,[299] and the President by proclamation prohibited sucb sales. The Curtiss-Wright Corporation and others, under indictment for violating the President's order, claimed that Congress lacked the authority to delegate this legislative power to the executive.[300] The opinion, upholding the delegation, focuses on the distinction between domestic (internal) and foreign (external) affairs, concluding that in foreign affairs much more latitude will be afforded congressional delegations.[301]

Sutherland, for the Court, viewed the idea that the federal government was one of enumerated powers as "categorically true only in respect of our internal affairs."[302] "As a result of the separation from

---

297. 299 U.S. 304 (1936).

298. In discussing constitutional principles, the *Curtiss-Wright* Court ostensibly said that only the doctrine of enumerated powers did not apply externally. *Id.* at 315-16. In practical effect, at least with respect to alienage cases, this has led to a constitutional balance that weighs government power as plenary and constitutional protection as nugatory.

299. *See generally* THE CHACO COMMISSION, LEAGUE OF NATIONS, DISPUTE BETWEEN BOLIVIA AND PARAGUAY (1934); WILLIAM R. GARNER, THE CHACO DISPUTE (1966) (exploring the nonmilitary posturing between the United States and Argentina for diplomatic superiority in Latin America); DAVID H. ZOOK, THE CONDUCT OF THE CHACO WAR (1960).

300. The nondelcgation doctrine theoretically prohibits Congress from delegating its legislative power to another branch. *See, e.g.*, RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 47-58 (2d ed. 1992); KENNETH C. DAVIS, ADMINISTRATIVE LAW 26-27 (1972); BERNARD SCHWARTZ, ADMINISTRATIVE LAW 42-43 (3rd ed. 1991). The nondelegation doctrine has been used by the Court to strike down congressional delegations only three times, all around the time of *Curtiss-Wright*. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Scheeter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). Since the "switch in time that saved nine" in West Coast Hotel v. Parrish, 300 U.S. 379 (1937), effectively scuttled Franklin Roosevelt's court-packing plan, no congressional delegation of legislative authority has becn found unconstitutional. For recent nondelegation doctrine cases, sce Touby v. United States, 111 S. Ct. 1752 (1991). On delegation generally, see Peter H. Aranson et al., *A Theory of Delegation*, 68 CORN. L. REV. 1 (1982).

301. *Curtiss-Wright*, 299 U.S. at 319-20.

302. *Id.* at 316. His thesis was not new. In the debate that raged in the aftermath of the Alien and Sedition Laws of 1798, Alexander Addison, in response to Madison, wrote: "The restrictions of the constitution are not restrictions of external and national right, but of internal and municipal right." Alexander Addison, *Analysis of the Report of the Committee of the Virginia Assembly* (1800), *reprinted in* AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1070 (CHARLES S. HYNEMAN & DONALD S. LUTZ

Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."[303] Operating on an even playing field in the international arena requires a different playbook than the one written during that hot summer of 1787 in Philadelphia and amended four years later. "As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of other members of the international family. Otherwise, the United States is not completely sovereign."[304] Although Justice Sutherland's view of the foreign affairs power as extra-constitutional is not the accepted rationale,[305] it undoubtedly stands "for the proposition that [the Court] must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad."[306]

With respect to noncitizens, this recognition led the Court to view the potential sovereign interest as paramount, to the detriment of individual aliens, many of wbom possessed life and death interests in the outcome. In overvaluing the hypothetical government interest and undervaluing real individual interests, the Court simply abdicated oversigbt responsibility. Even the rights of citizens receive diminished judicial respect when

---

eds., 1983). For a good summary of this debate, see Neuman, *supra* note 7, at 927-38.

303. *Curtiss-Wright*, 299 U.S. at 316. *See generally* David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1 (1973). At the Constitutional Convention and the subsequent state ratifying conventions the people and the several states agreed to cede authority to the national government, but this delegated authority and power was expressly enumerated and limited by the Constitution. *See Curtiss-Wright*, 299 U.S. at 315-16. Since external sovereignty vested in the one national government predates the Constitutional Convention, arguably the Constitution does not delegate external sovereign power to the federal government because that government already possessed that power. *See id.* at 316-18. Therefore, issues of external sovereignty are extra-constitutional. *See id.* at 318. The *Chinese Exclusion* Court did not go so far in its analysis. It recognized that external sovereignty could be restricted only by "the consent of the nation itself" and that in the United States such restriction arose "only by the constitution itself and consideration of public policy and justice which eontrol, more or less, the conduet of all civilized nations." Chae Chan Ping v. United States (The Chinese Exelusion Case), 130 U.S. 581, 604 (1889) (citation omitted). The Court in that case simply did not view the due process, *ex post facto*, and bill of attainder provisions in the Constitution as limitations on external sovereignty.

304. *Curtis-Wright*, 299 U.S. at 318.

305. *See* HENKIN, *supra* note 51, at 23.

306. United States v. Verdugo-Urquidez, 494 U.S. 259, 277 (1990) (Kennedy, J., concurring).

questions of the nation's external sovereignty are raised. *Fiallo v. Bell*[307] is typical. The appellants claimed that citizens and permanent resident aliens were denied equal protection because the immigration laws, while recognizing the relationship between mother and illegitimate child, did not recognize the relationship between father and illegitimate child. The Court's denial of relief rested squarely on the external sovereignty concerns:

> [A]ppellants characterize our prior immigration cases *as involving* foreign policy matters and congressional choices to exclude or expel groups of aliens that were "specifically and clearly perceived to pose a grave threat to the national security." . . . We find no indication from our prior cases that the scope of judicial review is a function of the nature of the policy choice at issue. To the contrary, "[s]ince decisions in these matters *may implicate* our relations with foreign powers" . . . such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.[308]

In *Fiallo*, as in the preceding plenary power cases, the Court concluded *a priori* that foreign affairs concerns were implicated. The majority refused to test the strength of the government's foreign affairs claim. If, in the realm of possibility, such concerns may be implicated, the Court's analysis abruptly ends. The Court will venture no further.

The dissent in *Fiallo*, on the other hand, would have tested the "foreign affairs" claim in an effort to detect the existence of delicate foreign affairs concerns, which, if actually present, would require prudential deference to the political branches. Congress, in adopting a definition of "child" for immigration purposes, made a value judgment that ultimately looked to local law: "In administering the [Immigration and Nationality Act] with respect to legitimated children, for example, the critical issue is whether the steps undertaken are adequate under *local law* to render the child legitimate."[309] Therefore, "a fear of involvement with foreign laws and records [is not] a persuasive explanation for

---

307. 430 U.S. 787 (1977).

308. *Id.* at 796 (citations omitted) (emphasis added). As an additional justification for deference, the Court added that "a wide variety of classifications must be defined in the light of changing political and economic circumstances." *Id.* This explanation cannot stand alone. In the domestic sphere the Court grants no such deference to the legislature to make invidious classifications along gender or legitimacy lines. Therefore, the sole justification for plenary power must rest with the foreign affairs justification.

309. 430 U.S. at 814 (Marshall, J., dissenting) (emphasis added).

unequal treatment."[310] Finding no foreign policy implications, the dissent would have viewed this case like any other equal protection case raising gender and illegitimacy issues.[311]

Until now, under the auspices of plenary power, the Court has not seriously checked the political branches' power over aliens. To a great extent, no supreme law has acted to protect the alien from shifts in the political wind. Since the plenary power doctrine is rooted in sovereignty, and since nation-states have agreed that even sovereigns must abide by extra-sovereign obligations in the realm of human rights, the justification for the plenary power doctrine has seriously eroded. Individuals no longer provide legitimate fodder in the foreign policy gambit.

With the theoretical basis for *Chinese Exclusion* and its progeny gone, the Court should insist that the political branches apply constitutional rights evenhandedly with respect to both citizens and aliens. The task will not be an easy one because citizens and noncitizens are not similarly situated for many purposes. For example, very few would dispute the basic right of the United States, as sovereign, to limit entry into its territory or membership in its political community.[312] I certainly do not advocate a constitutionally-based open border/open membership philosophy. Yet any immigration policy formulated by the political branches of the federal government should conform to the substantive and procedural requirements of the Constitution. For instance, Congress ought to be constitutionally prohibited from discriminating on the basis of race or national origin in its admission policy, as it did in the Chinese Exclusion Act. Continual and possibly life-long detention of Mariel Cubans, now entering its second decade, should be struck down as violative of constitutional due process safeguards.

My thesis—that the theoretical underpinnings of the plenary power doctrine have suffered from extensive erosion—rests on the transformative nature of our understanding of sovereignty's role in a global order as we enter the new millennium. The host of human rights treaties show conclusively that sovereignty has undergone just such a transformation over the last half century. Nineteenth century thought on sovereignty can be characterized as absolutist: a sovereign nation retained absolute power over its territory and inhabitants, and no sovereign power had the right to interfere with the internal ordering of another sovereign's society. Today, all countries, even those that have been reluctant to formalize their adherence to these emerging norms, are bound by the customary aspects

310. *Id.* (Marshall, J., dissenting).
311. *See id.* at 809 (Marshall, J., dissenting).
312. *See generally* MICHAEL WALZER, SPHERES OF JUSTICE 61-63 (1983).

of human rights. Although territorial integrity remains a vibrant fixture of international law,[313] no longer can any country claim absolute power over its denizens. Treaties and custom provide baselines by which the sovereign can be judged from the outside. The evolving rights of individuals provide the shears that have begun to cut through the barbed wire of territorial fences erected in an earlier period.[314]

Once, international law did not provide protection for the individual alien and neither did the domestic constitutional framework. With the advent of international human rights, all of this has changed. Individuals do count in the international forum, just as they have for two hundred years under our Constitution. With this new-found claim of right, and the implicit or explicit agreement by the nations of the world to respect those individual rights, absolute sovereign power no longer reigns paramount over individual rights. Given this new international terrain, the Court is no longer justified in brushing aside aliens' constitutional claims for fear of interfering with the national sovereign.

The slow task of incorporating international legal norms into United States domestic law and the creation of enforcement mechanisms, both domestically and internationally, to encourage compliance, falls primarily upon the political branches of the national government. Through the long process of political struggle and compromise, international human rights will eventually find a lasting place in our jurisprudence.

The judiciary, however, need not sit idly on the sidelines. In addition to applying international law as part of the "law of the land,"[315] the United States Supreme Court, by informing its interpretation of the Constitution with the backdrop of international human rights, can gently prod the political branches of the government toward compliance with international standards. I do not suggest here that the Court read international human rights norms into the Constitution.[316] What I do advocate is a reexamination of our own unique constitutional

---

313. For a trenchant inquiry into the tension between state sovereignty and human rights, see RICHARD A. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY (1981).

314. The "barbed wire" metaphor is particularly appropriate here. Barbed wire, invented in DeKalb, Illinois just prior to the *Chinese Exclusion Case*, like the concept of absolute sovereignty, initially served as a taming force. In the twentieth century, however, both have served the cause of oppression and exclusion.

315. *See* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States, which shall be made in Pursuanee thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

316. For a contrary view, see Randall R. Murphy, *The Framers' Evolutionary Perception of Rights: Using International Human Rights Norms as a Source for Discovery of Ninth Amendment Rights*, 21 STETSON LAW REV. 423 (1992) (arguing that international human rights should be incorporated into the Constitution through the Ninth Amendment).

brand of "rights" against the backdrop of the emerging international baseline.[317]

Given the fact that the Constitution applies to protect aliens, at least aliens present in this country, the more difficult question is to decide the level of protection. Permanent resident aliens exist as denizens in our national community, neither complete members nor complete strangers.[318] With other aliens, the more tenuous the relationship, the greater likelihood that the label "stranger" will fit. That someone is a stranger or in a tenebrous state between stranger and member does not mean that he is not a person entitled to the protections of the Bill of Rights. Rather, given the differences in affinity between this country and individual aliens, the pertinent question is how these legitimate differences should count in assessing the level of protection afforded aliens under the Constitution.[319] This inquiry, with its probing and complex questions, is beyond the scope of this article, which was meant solely to examine the continued viability of plenary power's underpinnings. In a companion piece, I will offer my thoughts on a possible jurisprudential structure to replace plenary power.

The demise of the plenary power doctrine, in addition to aiding specific aliens, may create a more subtle, ancillary benefit. As east-west tensions disappear, the United States appears poised for a new leadership role in the global community. Like it or not, this role includes moral

---

317. Other commentators have discussed the relationship between American constitutional rights and international human rights, noting that our conception of rights as embedded in the Constitution has lent much to the development of international human rights, but that international rights have rarely informed our constitutional interpretation. *See, e.g.*, Lillich, *supra* note 255, at 61-62 ("If 'American Constitutionalism' has contributed greatly to the development of international human rights law, the reverse, unfortunately, has yet to occur."). *See also* HENKIN, *supra* note 180, at 65-66.

318. *See* Fong Yue Ting v. United States, 149 U.S. 698, 736 (1893) (Brewer, J., dissenting).

319. *See* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165 (1983); T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237 (1983). The Court has recognized that this is the relevant inquiry. In Mathews v. Diaz, it said: "The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other; and the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this country." Mathews v. Diaz, 426 U.S. 67, 78-79 (1976) (footnotes omitted). The Court concluded that it was for the legislature and not the courts to decide the importance of the distinctions. *Id.* at 83.

leadership, not merely military and economic power. By discarding the plenary power doctrine, which is rooted in outmoded notions of sovereignty, and by bringing aliens into the mainstream of constitutional protection, the United States Supreme Court in a limited but significant way would add its strong moral voice to the advocacy of international human rights. This may, in turn, encourage the political branches to fulfill more fully our human rights obligations at home, and to develop a consistent human rights foreign policy. Such judicial prodding is not unheard of in our jurisprudential tradition. *Brown v. Board of Education*[320] provided the moral precursor to the civil rights legislation developed a decade later. The *Chinese Exclusion Case* and its progeny should be shelved alongside another case of that era, *Plessy v. Ferguson*,[321] which ushered in a period of judicially-sanctioned apartheid in this country, with its separate but equal doctrine.

V. CONCLUSION

It is far too early to conclude that a human rights regime as a limitation on sovereignty will have a lasting place in global jurisprudence. Bodin and Grotius never envisioned a world of nation-states wielding unbridled discretion. Their mission failed when no coherent and universally acceptable structure evolved for employing natural law to limit discretion. In the absence of an external force imposing discipline on potentially abusive sovereigns, a theory of absolute sovereignty gained momentum. Its acceleration, however, came to a grinding halt in the face of the atrocities committed by the Nazi sovereign. Since World War II, the global community has engaged in the delicate task of building a structure capable of reining in abusive sovereigns and protecting the rights of individual members of the global village. The building may be nothing more than a house of cards that will inevitably come crashing down. There is hope, however, that the foundations of this new structure are strong and will endure.

The world finds itself at the crossroads. Soviet communism as a world force has fallen. The United Nations, which never functioned as intended during the cold war, could reach its potential in this new era. It may ultimately provide the infrastructure to ensure order and respect for human rights among the sovereign nations of the world. For now, though, the task of strengthening the international human rights regime continues to fall on individual nations. In the United States, the task of combining the internal with the external to create a forceful synergism of

320. 349 U.S. 294 (1955).
321. 163 U.S. 537 (1896).

rights belongs primarily to the political branches of the federal government.

A window of opportunity exists for the Court to make a modest contribution that might encourage the political branches to proceed more diligently. This contribution, would not, however, interfere with the other branches' development of national policy in this area. The Court, instead, would focus solely upon its own creation, the plenary power doctrine. A malignant tumor on our Constitution, it developed from a nineteenth century absolutist view of sovereignty. For the last 100 years, international conceptions of sovereignty have clouded our vision of the constitutional rights of aliens. Absolute sovereignty has receded as a new external structure emerges to fetter its abuses. Under this new regime, individuals claim the status of *subject,* not *object,* as under the old regime. Instead of casting its glance over its shoulder to what is no longer, the Court has a chance to peer forward, looking, as a visionary, adding one small but invaluable brick to the as yet delicate structure. This bold step would also serve to heal the schizophrenia in our constitutional doctrine that was created in the *Chinese Exclusion Case.*