International Law as a Tool of Constitutional Interpretation in the Early Immigration Power Cases

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NOTES

INTERNATIONAL LAW AS A TOOL OF CONSTITUTIONAL INTERPRETATION IN THE EARLY IMMIGRATION POWER CASES

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Do late-nineteenth-century cases on the federal power to regulate immigration hold an important lesson for modern legal xenophobes? This Note will argue that the Supreme Court of a century ago comfortably relied on customary international law in interpreting our Constitution. The Court treated international law as persuasive, not binding, authority but discussed

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and cited it as though the law of nations carried real weight in the Court's deliberations.

To understand why the Court was so comfortable with international law where many modern scholars and judges are not, the last section of this Note explores the meaning of the "law of nations" in the late 1800s. It concludes that the "law of nations" at that time represented principles of "reason and natural justice" that the Court expected would govern the behavior of civilized nations—something in some ways akin to the modern customary law of human rights or to older ideas of natural law.

I. INTRODUCTION: THE MODERN CONTROVERSY

In the last decade, a firestorm of sorts has erupted over the role of international law in constitutional jurisprudence. A number of recent Supreme Court decisions have cited international or foreign law as persuasive authority on questions of constitutional rights, including Lawrence v. Texas, Atkins v. Virginia, and a concurrence by Justice Ginsburg in Grutter v. Bollinger.

Pundits, activists, legislators, and justices of the Supreme Court have harshly criticized the use of international precedent. Justice Scalia, dissenting in Lawrence, wrote, "[t]he Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is ... meaningless dicta. Dangerous dicta, however, since 'this Court ... should not impose foreign moods, fads, or fashions on Americans.'"

1. Lawrence v. Texas, 539 U.S. 558, 559 (2003) (recognizing a due process right to consensual sexual relations between adults, regardless of sexual orientation). The Court cited the European Court of Human Rights' "affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct" to rebut the argument that "values shared with a wider civilization" oppose such a holding. Id. at 560, discussing Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) ("Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization."). The Lawrence Court wrote, "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction." 539 U.S. at 572.

2. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citing international consensus against execution of the mentally retarded to support a finding that such executions violate the Eighth Amendment). The majority opinion notes that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved .... Brief for European Union as Amicus Curiae.


Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. "We must never forget that it is a Constitution for the United States of America that we are expounding .... [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the
Nonetheless, the use of international and foreign precedent seems to be growing. Justice Breyer has argued in favor of its use as empirical evidence of the consequences of possible constitutional rules:

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity.\(^5\)

Chief Justice Rehnquist, arguing against affirming the right to abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, noted that West Germany had given constitutional protection to life in the womb and compared Canadian practice.\(^6\) In certain circumstances, even Justice Scalia has been quite comfortable citing foreign practice, as in a 1995 case involving the constitutionality of bans on anonymous political campaigning.\(^7\) Although he has condemned the use of international precedent for interpretation of the constitution (as opposed to a demonstration of the empirical consequences of possible legal rules),\(^8\) Scalia in one case conceded that:

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The third and last question relevant to our decision is whether the prohibition of anonymous campaigning is effective in protecting and enhancing democratic elections. In answering this question no, the Justices of the majority set their own views... up against the views of 49... state legislatures and the Federal Congress. We might also add to the list on the other side the legislatures of foreign democracies: Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning. See, e.g., Commonwealth Electoral Act 1918, § 328 (Australia); Canada Elections Act, R.S.C., ch. E-**1536 2, § 261 (1985); Representation of the People Act, 1983, § 110 (England). How is it, one must wonder, that all of these elected legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly...?

8. Anne Gearan, *Foreign Rulings Not Relevant to High Court, Scalia Says*, *WASH. POST*, Apr. 3, 2004, at A7. In the same speech, Justice Scalia indicated he is not opposed to the use of international precedent to demonstrate the empirical consequences of various legal rules (personal notes on file with author). Indeed, Scalia used comparative precedent to make an empirical point about the accuracy of judicial fact-finding in a decision issued about two months after this speech. *Schriro v. Summerlin*, 124 S.Ct. 2519, 2525 (2004):
The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. 9

Outside the pages of the United States Reports, the argument has taken on a decidedly more ardent tone. After Justice Sandra Day O'Connor gave a speech endorsing the use of international jurisprudence as persuasive authority, 10 several dozen members of the U.S. House of Representatives introduced a resolution condemning the Supreme Court's use of international jurisprudence. 11 "This resolution advises the courts that it is improper for them to substitute foreign law for American law or the American Constitution," said the resolution's primary sponsor, Rep. Tom Feeney (R-FL). 12 "To the extent they deliberately ignore Congress' admonishment, they are no longer engaging in 'good behavior' in the meaning of the Constitution and

Finally, the mixed reception that the right to jury trial has been given in other countries, see Vidmar, The Jury Elsewhere in the World, in WORLD JURY SYSTEMS 421-447 (N. Vidmar ed., 2000), though irrelevant to the meaning and continued existence of that right under our Constitution, surely makes it implausible that judicial factfinding so "seriously diminishes" accuracy as to produce an "impermissibly large risk" of injustice.

9. Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (Scalia, J., dissenting, quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.). Scalia continues, stating: "But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." Id.; see also Vicki C. Jackson, Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism, 1 U. PA. CONST. L. 583, 585-86 (1999) (arguing that Chief Justice Rehnquist has also expressed openness to comparative constitutionalism).


[C]onclusions reached by other countries and by the international community, although not formally binding upon our decisions, should at times constitute persuasive authority in American courts . . . . There has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes. While ultimately we must bear responsibility for interpreting our own laws, there is much to be learned from other distinguished jurists who have given thought to the difficult issues we face here . . . . I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in the decisions of foreign courts.

11. H.R. Res. 568, 108th Cong. (2004) ("Whereas Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any of hundreds of other foreign organizations; Whereas inappropriate judicial reliance on foreign judgments, laws, or pronouncements [sic] threatens the sovereignty of the United States, the separation of powers and the President's and the Senate's treaty-making authority . . . .")

they may subject themselves to the ultimate remedy, which would be impeachment."\(^{13}\)

At a March 25, 2004 hearing on the proposed resolution, the chairman of the House Judiciary Committee’s Constitution Subcommittee quoted a commentator warning of the dangers to come: “If an international agreement that the United States has refused to ratify can be invoked as a guide to the meaning of the 136-year-old 14th Amendment, what will be next? Constitutional interpretation based on the sayings of Chairman Mao? Or Barbra Streisand?”\(^{14}\) A witness warned that “promiscuous use of foreign law will undermine domestic support for the Constitution.”\(^{15}\)

Robert Bork’s latest book, *Coercing Virtue: The Worldwide Rule of Judges*, devotes a good deal of space to condemning Supreme Court Justices for citing international legal authority in constitutional decisions. Bork argues that the experiences of foreign countries have little to contribute to American constitutional interpretation:

Internationalism is illegitimate when courts decide to interpret their own constitutions with guidance from the decisions of foreign courts under their national constitutions. The American Constitution, for example, was framed and amended in light of specific American history, culture, and aspirations. It has a meaning given to it not only by judicial decisions but by the practices of national and state governments. It is not apparent when an American court should take guidance from the decisions of the courts of Jamaica, India and Zimbabwe, reflecting their very different histories, cultures, aspirations and practices.\(^{16}\)

The controversy seems only to be growing,\(^{17}\) with the opponents of interna-
tional persuasive authority presenting a strong and united front.

Meanwhile, from the other side of the political spectrum, some scholars have argued for a more influential role for international law in U.S. courts. In the field of immigration law, a few of the many scholars hoping to undermine the much-loathed "plenary power" doctrine—which allows Congress enormous discretion in the field of substantive immigration law—have turned to international law.

Under the plenary power doctrine, as one scholar writes, "the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender and legitimacy." Based on the early cases that first established a broad Congressional power to regulate immigration, some scholars have argued that the doctrine is "deeply rooted in" international concepts of sovereignty; and that modern international concepts of sovereignty no longer support Congressional discretion to violate human rights norms like nondiscrimination and the obligation not to return refugees to a country in which they will be persecuted. They see international law as a tool with the potential to alter our constitutional jurisprudence.

The arguments over the place of international law in constitutional jurisprudence have often involved a misunderstanding of history that this Note hopes to help correct. I will not offer arguments for either side on the question of whether, as a policy matter, international law has a place in our constitutional jurisprudence. Instead, I will offer close readings of three cases from the late nineteenth century as evidence that neither the anti-internationalists, nor those who would use international law to undermine the plenary power doctrine, have properly understood the role that international law has played in the development of our constitutional law.

In Section II, I will take issue with the frequently heard claim that international citation is a new and unprecedented practice. It is not. An


examination of the early Supreme Court cases dealing with the federal power to restrict immigration demonstrates that in the Supreme Court of a century ago, arguments about the contents of the law of nations were routine and perhaps even unremarkable.

In Section III, I will consider the possibility that these early cases relied on international law as binding authority, which I find unlikely. Section IV argues that to understand the role of international law in these cases, it is necessary to understand that the “law of nations” was understood differently in the eighteenth century than it is today, as something more akin to natural law or principles deducible by reason. In this light, the law of nations’ prominent role in the early cases becomes easier to understand.

II. RELIANCE ON INTERNATIONAL LAW IN THE EARLY IMMIGRATION POWER CASES

In the course of the arguments over the use of international law as persuasive authority, many have described the practice as if it were a new development. Bork, for example, writes, “[t]he insidious appeal of internationalism is illustrated by the fact that some justices of the Supreme Court have begun to look to foreign decisions and even to foreign legislation for guidance in interpreting the Constitution.”

At the hearing on the “Affirmation of American Independence Resolution,” Jeremy Rabkin said, “Let me start by placing these recent Court rulings in larger context. To date, the U.S. Supreme Court has invoked the legal standards of foreign countries in only a handful of cases—that is, cases dealing with the U.S. Constitution.” Even Justice O’Connor has described the use of foreign precedent as new: “We have also, historically, declined to consider international law and the law of other nations when interpreting our own constitution . . . . But the first indicia of change have appeared.”

The practice of citing international opinion and practice did not suddenly

22. See, e.g., Press Release, Rep. Tom Feeney, Feeney Authors Resolution on Courts (Mar. 2, 2004) (on file with author) (“[W]ith growing frequency, the Supreme Court has relied upon decisions of foreign judicial tribunals when deciding American constitutional and statutory cases”).

23. Bork, supra note 16, at 22 (emphasis added). Elsewhere, Bork writes, “The internationalization of law and the corresponding internationalization of judicial activism take various forms. The first is the recent tendency of national courts, when applying their constitutions, to cite the decisions of foreign courts in applying their own constitutions.” Id. at 17 (emphasis added).

[Judges on national courts have begun to confer with their foreign counterparts and to cite foreign constitutional decisions as guides to the interpretation of their own constitutions. One telling indication of the judicial activism and uniformity of outlook among judges is the way that legal interpretations of constitutions with very different texts and histories are now giving way to common attitudes expressed in judicial rulings. Judicial imperialism is manifest everywhere . . . .

Id. at 10-11 (emphasis added).


emerge in the 1990s. International law and practice were discussed by the Court in a 1958 decision on the constitutionality of expatriation as a punishment,26 a 1977 decision on the constitutionality of the death penalty as a punishment for rape,27 and other decisions.28 In the famous case of *Miranda v. Arizona*, the Court discussed the practices of England, Scotland, Ceylon (Sri Lanka), and India, arguing that because those countries had no specific guarantees comparable with the Fifth Amendment, there should be at least as much protection under the U.S. Constitution as in those countries.29

As Justice Breyer noted in *Printz*, international precedent is discussed at some length in the *Federalist Papers*.30 And in 1804, Chief Justice Marshall, in the case of *Murray v. Schooner Charming Betsy*, wrote that the Supreme Court should never construe an act of Congress to violate the law of nations if any other possible construction exists.31 It has been noted that the Supreme Court made use of international law for constitutional interpretation throughout the early nineteenth century.32 This Note will explore in some depth the role of international law in constitutional jurisprudence in the late nineteenth


The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids that to be done.

(citations omitted).

27. *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) ("In *Trop v. Dulles*... the plurality took pains to note the climate of international opinion concerning the acceptability of a particular punishment. It is thus not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue. United Nations, Department of Economic and Social Affairs, Capital Punishment 40, 86 (1968).")

28. See, e.g., *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) ("It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.").


31. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) ("The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect.").

32. See Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 Loy. L.A. L. Rev. 271, 336 n.228 (2003) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569-72 (1840); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 227 (1824) (Johnson, J., concurring)). *Worcester v. Georgia* dealt with the status of Indian territories, holding that our Constitution vested intercourse with the Indian territories exclusively in the federal government. 31 U.S. at 561. It is thus arguably distinguishable from cases in which international law was used directly for constitutional interpretation, because the status of Indian nations is, at least in part, itself a question of international law. *Holmes v. Jennison* uses international law to find that the treaty power must include the power to extradite fugitives. 39 U.S. at 569. In effect, the case argues that the Framers must have intended the treaty power to include the power to extradite, because extradition was a common feature of the law of nations.
A. The Early Immigration Power Cases

In the late nineteenth century, three seminal and somewhat cryptic Supreme Court cases established the existence of Congress' power to regulate immigration. In these cases, the Court and the parties arguing before it relied extensively on the law of nations. The following sections analyze each case in turn, paying particular attention to the way the Court and the parties, in their briefs, made use of the law of nations.

If one wished to distinguish these cases from modern cases referencing international law, one might note that these cases dealt with federal powers, not federal rights. It is difficult, however, to imagine any principled reason to object to international precedent in cases involving constitutional rights, but not constitutional distribution of powers. Indeed, Justice Scalia has objected with equal vehemence to the use of foreign authority in a case dealing with the distribution of powers. If American sovereignty is somehow threatened by an internationally-influenced expansion of rights, one would think it equally threatened when courts rest federal powers on a foundation that is, in part, international.

B. Chae Chan Ping

In *Chae Chan Ping v. United States* (also known as the *Chinese Exclusion Case*), the Court decided that Congress had the power to exclude aliens, even in peacetime. The Court held that the immigration power is "an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power." In support of its holding on the immigration power issue, the Court cited

[A]s the rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law: it follows, that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognised and enforced, when it demands the surrender of any one charged with offences against it."

*Id.* Although the Court here is using international law to interpret the Constitution, it is perhaps less of a leap to do so in the context of the treaty power than in the context of other federal powers. Justice Johnson's concurrence in *Gibbons v. Ogden* rather remarkably asserts that "[t]he definition and limits of [the commerce] power are to be sought among the features of international law." 22 U.S. at 227.

33. *Printz,* 521 U.S. at 921 n.11 (1997). Scalia, for the Court: "Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one." Scalia then quotes the comparative international legal analysis in the *Federalist* No. 20, which discusses the system of government in the Netherlands at the time, to demonstrate that Breyer's analysis is wrong. Scalia notes, "The fact is that our federalism is not Europe's." *Id.*

34. *Chae Chan Ping v. United States,* 130 U.S. 581, 609 (1889).

35. *Id.* at 603-04.
only three cases, none of which had anything to do with immigration. Rather, the cases in this discussion supported the proposition that the United States is "a single nation," of which the states are constituent parts: "for some purposes sovereign, for some purposes subordinate." The Court relied on an 1812 opinion by Chief Justice Marshall for the proposition that:

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. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This certainly sounds like the Court is rejecting the influence of international law, in a way that would perhaps satisfy the modern anti-internationalists. But it is not clear what any of this has to do with the immigration power as a constitutional question. Of course the United States is a nation—but many sovereign powers were retained to the states; why not this one?

The Court offers a few answers, almost all of them policy-based. Following its demonstration that America is one nation, it explains that the national government has control of national matters. It continues: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all considerations are to be subordinated." If the government were unable to exclude foreigners, the Court says, the nation could be overwhelmed by a hostile sovereign. This seems obviously true, but does nothing to demonstrate why the power must be located in the federal, rather than state, government.

The Court concludes that the exclusion power's "existence is involved in the right of self-preservation" and famously announces that the exclusion

36. The Court cited a few other cases, but none in support of its proposition that the immigration power was "inherent in sovereignty." Id. at 609-10 (citing The Head Money Cases (Edye v. Robertson), 112 U.S. 580, 598 (1884) in support of the proposition that treaties create vested interests only in respect of property rights); id. at 610 (citing Society for the Propagation of the Gospel v. New Haven, 21 U.S. (8 Wheat) 464 (1823), in support of the same). These, together with the three cases cited below, see notes 35-37, were the only authorities cited in the Court's discussion of the source of the immigration power.
37. Chae Chan Ping, 130 U.S. at 604 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 413 (1821)).
38. Id. at 605 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 413 (1821)).
39. Id. at 604 (quoting The Schooner Exchange v. McFadden, 111 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.)).
40. Id. at 605 ("It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people") (citation omitted).
41. Id. at 606.
42. Id. at 607.
43. Id. at 608.
power is "[a]n incident of sovereignty ... part of those sovereign powers delegated by the Constitution."

The only law cited by the Court dealing directly with the exclusion power is found in seven letters from various American secretaries of state. It cites these for the proposition that "[e]very society possesses the undoubted right to determine who shall compose its members." This appears to be a statement about the content of international law, and indeed the briefs in the case confirm that international law was relied on by both sides as they built their arguments about the structure of national power.

The brief for Chae Chan Ping relies extensively on international law to argue that the exclusion power does not exist, quoting a variety of international legal sources that point to limits on the exclusion power in the law of nations. One quote is reproduced as follows:

Modern international law maintains that it is a duty to protect the friendly intercourse of mankind. The old theory was derived from the idea of the sovereignty of the state, from which followed the power of the state to exclude all foreigners; but states, however, are but members of the human race, (Glieder der Menschheit), and therefore are obliged to regard the unity of mankind. Their sovereignty is therefore not absolute, but is limited by the law of nations.

Chae Chan Ping’s lawyers also quote David Dudley Field’s draft code of international law: “No nation can expel the members of another nation without special cause which must be explained to the nation, the members of

44. Id. at 609.
45. Id. at 607-09 (quoting “Mr. Marcy, Secretary of State under President Pierce”; also quoting the secretaries of state for Presidents Fillmore, Pierce, Grant, Hayes, and Arthur).
46. For some reason, the appellants’ brief initially claims not to contest the existence of a power to exclude aliens. “The inherent right of a sovereign power to prohibit, even in time of peace, the entry into its territories of the subjects of a foreign state will not be denied.” First Brief for Appellant at 3, Chae Chan Ping v. United States, 130 U.S. 581 (1889). The second brief begins with another disclaimer: “It is not our purpose to appeal to any higher law than the Constitution and Laws of the United States, although it is doubtless a principle of the law of nations, as understood among civilized nations and in modern times, that no nation has the right to close its door to foreigners.” Second Brief for Appellant at 14, Chae Chan Ping, 130 U.S. 581. But, as we will see, the briefs go to argue precisely this point: that international law does prohibit the deportation of Chae Chan Ping. Presumably, this opening disclaimer means only that their argument does not depend on international law; they also argue a due process right.
47. Including Woolsey, Second Brief for Appellant at 14, Bluntschli, id. at 15, and “Mr. David Dudley Field’s draft of a proposed Code of International Law,” id. at 14, Chae Chan Ping, 130 U.S. 581. The sources cited largely seem to prescribe the large-scale or “entire” exclusion of foreigners. The works of commentators have been commonly recognized as a legitimate source for determining the content of international law since the time of these cases. See Hilion v. Guyot, 159 U.S. 113, 141 (1895); The Paquete Habana, 175 U.S. 677, 700 (1900). Modern international law also recognizes the works of commentators as a source for determining international law. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060.
which are expelled."\(^49\)

Were the immigrant's lawyers merely appealing to international law as a last desperate measure, knowing U.S. law did not support their argument? To the contrary, the government relied on international law even more heavily and confidently in its brief. The government talks about international law from the beginning of the brief, arguing that it cannot be said that the Burlingame Treaty was passed "in order to increase or even secure the coming hither of Chinese, for that they could always do so long as we allowed it, under our constitutions and laws then in force, and \textit{under the general customs and usages of civilized nations, existing as part of our laws}."\(^50\)

The government's first brief states that as a sovereign state, the U.S. must have the power to exclude.\(^51\) "\textit{Under the law of nature and nations} the right of a man, or body of men, to leave one country and pass into another for any purpose—that other being free and sovereign,—must, in the end, come to be a right represented by force alone, and end in a question of the strongest arm and best guns."\(^52\) The government then portrays the law of nations as the background law that applies once an individual is beyond the legal system of any particular country. Having been excluded by Congress, it argues, Chae Chan Ping "is thrown back upon the general law of nature and nations, and has no right to come to this country, except by consent of Congress, which he has not obtained, or by invincible force and arms which he does not seem to have."\(^53\)

The third brief for the government includes a section on international law, which seems to be included in support of the structural argument about the national powers being granted to Congress: "The whole tenor of the Constitution is that the United States is a nation, and, as to foreign nations and their subjects, is endowed with full sovereign powers."\(^54\) The following section is

\(^49\) Second Brief for Appellant at 16, \textit{Chae Chan Ping}, 130 U.S. 581; see DAVID DUDLEY FIELD, OUTLINES OF AN INTERNATIONAL CODE 165 (2d ed. 1876, reprint 2001). This choice of authorities was perhaps an appeal to the family pride of Justice Field, brother of David Dudley Field, who proved himself immune to this kind of appeal by authoring the decision against Chae Chan Ping.

\(^50\) First Brief for Respondent at 3, \textit{Chae Chan Ping}, 130 U.S. 581. Exclusion power is an essential attribute of sovereignty. First Brief for Respondent at 3, \textit{Chae Chan Ping}, 130 U.S. 581. "[T]he power of peace and war and all other matters touching our relations with foreign nations as well as matters of commerce between our country and others under which term alien immigration is included are exclusively within the province and control of Congress . . . ." First Brief for Respondent at 6, \textit{Chae Chan Ping}, 130 U.S. 581.

\(^51\) There is but one question before the Court, which is, as to the power of Congress to rescind the treaty. "If the United States is a sovereign and independent State it cannot be deprived of its sovereignty by anything short of superior force coming from without. It certainly cannot be deprived of it in piecemeal by Congress or the Executive through the treaty making power." First Brief for Respondent at 3, \textit{Chae Chan Ping}, 130 U.S. 581.

\(^52\) First Brief for Appellant at 8, \textit{Chae Chan Ping}, 130 U.S. 581 (emphasis added).

\(^53\) Id. The rest of the brief dealt with the issue of whether Chae Chan Ping had acquired a vested right akin to property (the U.S. conceded a treaty grant of property could not be taken away).

\(^54\) Third Brief for the United States at 5, \textit{citing} The Migration Clause (U.S. Const. art. I § 9), \textit{Chae Chan Ping}, 130 U.S. 581.
entitled "The law of nations." Its conclusion, not surprisingly, is that "international law fully establishes the right of a nation to exclude foreigners from its domain." For authority, it cites Chief Justice Marshall in *The Schooner Exchange* ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute") and Vattel's *Law of Nations* ("the lord of the territory may, whenever he thinks proper, forbid its being entered").

So it seems that both sides in this case believed international law to be highly relevant to the constitutional questions presented. Interestingly, even when discussing issues of domestic law that do not derive from the Constitution, Chae Chan Ping's brief is very comfortable with international law. Discussing a contract issue, it cites Roman and German legal doctrine, as well as civil law and modern continental law in general. Similarly, in a discussion of what constitutes domicile for purposes of Fifth Amendment due process rights, the brief cites Woolsey's treatise on *International Law* for its discussion of what constitutes domicile for international law purposes. It appears that international law could be persuasive authority not only in matters of constitutional interpretation, but in the interpretation of subconstitutional domestic law as well.

But back to our main concern: the role of international law in constitutional interpretation. There are two ways international law could be functioning here in the arguments made by Chae Chan Ping's lawyers. First, international law could be relevant as a potential external limit on—or source of—the federal government's power. In other words, regardless of what U.S. constitutional law has to say on the subject, it might be said that international law forbids or authorizes exclusion. Second, international law could be constitutionally relevant, as authority supporting a certain interpretation of the U.S. Constitution. The briefs are not entirely clear on which it is.

Although the decision appears not to rely heavily on the law of nations in reaching its conclusion, no other law is cited for the central holding that an immigration power inheres in Congress. The case discusses letters from American secretaries of state explaining that under international law nations may remove hostile or dangerous aliens but never explains the letters' relevance to the constitutional issue. It is left to later cases to explain the source of the constitutional inference that the exclusion power is "rooted in sovereignty." And *Chae Chan Ping* leaves ample room for speculation on the role of international law in justifying that inference.

55. Id. at 6 (§ II.B.).
56. Id.
57. Id.
59. Id. at 62.
60. *Chae Chan Ping*, 130 U.S. at 607-09.
C. Nishimura Ekiu

In Nishimura Ekiu v. United States,61 the Court heard a due process challenge to a procedure that summarily excluded immigrants who were not naturalized or domiciled in the United States. It held that as to foreigners who had never been naturalized or domiciled, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."62 In other words, for non-resident immigrants, "due process" was whatever Congress said it was. Justice Gray begins his opinion (after a sentence dealing with a jurisdictional issue) with the following:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. 1 Phillimore (3d ed.) c. 10, § 220.63

Justice Gray goes on: "[I]n the United States, this power is vested in the national government."64 His opinion gives a clearer suggestion than does Chae Chan Ping as to the sources of this power, suggesting that it stems from certain enumerated powers; Gray names the powers to regulate commerce with foreign nations, to establish a rule of naturalization, to declare war, to provide and maintain armies and navies, and to make all laws necessary and proper to carry out the enumerated powers.65 In other words, the power is penumbral, like the modern right to privacy.66

The advocates in the case, like Justice Gray, considered it appropriate to use international law in their arguments. The government's brief contains a section entitled "The United States Has the Right to Exclude Foreigners and Aliens From Its Territory," the first half of which deals exclusively with international law.67 Like Justice Gray's opinion in Nishimura Ekiu,68 the opinion cites Vattel and Phillimore, arguing that the power to exclude is "treated as a power recognized by the law of nations."69 The parties, like the Court itself, considered the law of nations highly relevant to the question presented, which was a matter of constitutional interpretation.

61. 142 U.S. 651 (1892).
62. Id. at 660.
63. Id. at 659.
64. Id.
65. Id.
66. See Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . . Various guarantees create zones of privacy.").
68. Nishimura Ekiu, 142 U.S. at 659.
69. Brief for Appellees at 15, Nishimura Ekiu, 142 U.S. 651.
D. Fong Yue Ting

In May 1893, Justice Gray delivered the opinion of the Court in *Fong Yue Ting v. United States*, holding that Congress had the power to provide for the deportation of aliens already within U.S. borders, and to create any rule of evidence it chose for the hearings in this process, even a rule requiring the testimony of "at least one credible white witness." 70

*Fong Yue Ting* begins with a repetition of *Nishimura Ekiu*’s initial pronouncement that “[i]t is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty” to regulate immigration, and that in the U.S. this power was vested in the national government. 71 The Court in *Fong Yue Ting* then makes more of an effort than the *Chinese Exclusion* Court to provide sources for this proposition. Interestingly, it begins with a lengthy discussion of “statements of leading commentators on the law of nations,” including Vattel, Ortolan, Phillimore, and Bar. 72

The final paragraph of the decision somewhat startlingly refers to the law of nations before our own Constitution: “Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the Constitution and law of the United States, and with the previous decisions of this court, is that ... the judgment of the circuit court ... must be [a]ffirmed.” 73

Justice Brewer’s dissent places even more reliance on the law of nations, arguing that the law of nations grants more protection to aliens who have been domiciled. 74 He cites Vattel, Phillimore, an opinion by Secretary Marcy, 75 and affirmations of the principle of domicile protection by the Supreme Court in earlier cases. 76 Only then does he move on to the issue of constitutional text and criticize the idea of a power “inherent in sovereignty.” 77

Justice Field, in dissent, seems to have objected to the Court’s use of international precedent. Field quotes James Madison as saying that alien enemies are under the law of nations, and can only be tried under it; alien friends, he argued, are under the municipal law, and must be tried and punished according to that law only. 78 Field makes it clear that he believes the international sources are not binding: “The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any

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70. *Fong Yue Ting v. United States*, 149 U.S. 698, 727 (1893).
71. *Id.* at 705.
72. *Id.* at 707-09.
73. *Id.* at 732.
74. *Id.* at 734.
75. *Fong Yue Ting v. United States*, 149 U.S. 698, 735 (1893).
76. *Id.* at 734-36 (citing *The Venus*, 12 U.S. 253, 278 (1814) and *Lau Ow Bew v. United States*, 144 U.S. 47, 61 (1892)).
77. *Fong Yue Ting*, 149 U.S. at 737.
78. *Id.* at 748-49.
power by any supposed inherent sovereignty."79

In a passage that anticipates Justice Scalia’s “[e]qually irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people,”80 Field notes that the power of “banishment” has indeed been routinely exercised by European governments—in mass deportations of Jews, Huguenots and others throughout history.81 “[E]ven if that power were exercised by every government in Europe,” he writes, “it would have no bearing in these cases.”82 Despite his objection to the international sources, Field carefully analyzes the citations from Vattel and Phillimore to show that they only endorse a power of exclusion, not deportation.83 Perhaps Justice Field recognized that his colleagues valued these sources, even if he himself did not; or perhaps he only objected to what he saw as their misuse in this particular case. In any case, despite Field’s objections, the majority of justices seem to have approved the use of international law.

In the Fong Yue Ting briefs, we again see customary international law being used freely by the advocates. The lawyers for Fong Yue Ting began with an argument that no power to expel immigrants was enumerated:

If Congress cannot make a race of people citizens of their nation in the full sense of the term without an amendment to the Constitution giving them such power, then how can Congress pass a law removing a body of inhabitants out of its borders without an amendment to the Constitution?84

But before moving to their due process arguments against the deportation procedure, the appellants argued that “according to the practices of civilized nations,” a country by admitting an alien precludes itself from expelling him except as punishment or during war.85 They cited Pufendorf, St. Ambrose, and Grotius, among other authorities.86

The government brief replied that the other side’s arguments were “a denial of the sovereignty of the United States in the exercise of the enumerated powers of the Constitution, of the authority of the previous decisions of this court, and of the well-settled principles of the law of nations.”87 The brief then spends eleven pages arguing that “A NATION HAS A RIGHT, ACCORDING TO INTERNATIONAL LAW, TO PRE-

79. Id. at 757.
81. Fong Yue Ting, 149 U.S. 757.
82. Id.
83. Id. at 756.
84. Brief for Appellants at 20, Fong Yue Ting, 149 U.S. 698.
85. Id. at 41.
86. Id. at 41-42.
87. Brief for Respondents at 12, Fong Yue Ting, 149 U.S. 698.
SCRIBE THE TERMS UPON WHICH THE CITIZENS OR SUBJECTS OF OTHER NATIONS SHALL BE ADMITTED . . .”88 This discussion begins with Phillimore, Vattel and other commentators, then discusses English common law, then recent French practice.89

In the next section, apparently in response to the argument that “counsel for the United States cannot point to any clause of the Constitution which warrants the exercise” of the deportation power,90 the government offered among other arguments the claim that “[t]he right of expatriation exists as a question of American policy, and has probably, by recent treaties, become a principle of international law.”91

To demonstrate that Fong Yue Ting remained a citizen of China until he gained citizenship elsewhere, the government wrote that “[i]nternational law recognizes no such person as the Wandering Jew, or the Man Without a Country . . . When he proceeds to terminate one citizenship, as incident to so doing he must commence or initiate the acquisition of another by conduct or positive act.”92

In short, the government seems to blur the questions of constitutional authority and international rules. “And, therefore, as we have seen under the law of nations, such persons may be summarily expelled, so the United States, which possess all the powers of any nation in this respect, can thus expel aliens for violation of any law rightfully enacted . . . ”93 In these passages, it is difficult to draw any line where international law ends and the Constitution begins.

E. Persuasive Authority

What weight did the Court give to the law of nations it cited? We can say with confidence it was treated at least as persuasive authority. As one writer notes, mandatory authority is that which binds the Court; “[p]ersuasive authority is everything else.”94 As we have seen, the parties in these early cases were quite comfortable citing foreign and international sources to support their arguments on everything from immigration law to

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88. Id. at 22 (capitals in original).
89. Id. at 22-33.
90. Id. at 34.
91. Id. at 37.
92. Id. at 38.
93. Id. at 43; see also id. at 53:

A nation has the right, according to international law, to prescribe the terms upon which the citizens or subjects of other nations shall be admitted to its territory, to forbid such admission, or, having admitted such citizens or subjects, to regulate and limit their residence therein, and, whenever it chooses to do so, suspend such residence altogether and require that they shall depart its territory.

contracts questions. And these were not merely citations to show the empirical legal effect of various legal rules; the law of nations was being invoked as directly relevant to the interpretation of the U.S. Constitution.

It could be argued that the customary international law was brought into these cases because they dealt with the relations between sovereign states: the field of immigration law, after all, is necessarily composed of both domestic and international rules. Perhaps the courts were merely addressing the issue of whether the immigrant appellants had a claim arising under international law, aside from the interpretive issues relating to our own on the constitution. In this approach, international law and the Constitution would be seen as separate, each an independent body of law with the potential to give rise to claims of a right not to be deported.

In one passage, the government’s brief in *Fong Yue Ting* seems to adopt this approach, when it concludes a harshly worded passage with a formulation that seems to separate the two issues: “It is generally conceded that the Mongolians are practically incapable of assimilation with our people. They come as a foreign element, and they remain as such. The right of Congress to restrict and even forbid such immigration, must be conceded as a question of both international and constitutional law.”

International law appears not to be working here as a servant of domestic constitutional interpretation but as a separate body of law with the potential to compel government behavior. The parties, it could be said, are merely arguing about whether international law, as a potential independent source of constraint, forbids exclusion of these immigrants: a question unrelated to the constitutional analysis.

This is an entirely sensible way to conceptualize the relevant issues. Immigration matters necessarily implicate international law and foreign policy, and it would be reasonable for the Court to have considered the two issues as separate: a potential claim under our constitution and a potential claim in international law.

But this is not how the Court conceived its work. The opening passage of *Fong Yue Ting* ties the international legal authority directly to the constitutional issue:

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95. First Brief for Respondents at 18, *Fong Yue Ting*, 149 U.S. 698 (emphasis added).
It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty . . . to forbid the entrance of foreigners . . . . In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations . . . .97

It is difficult to read into this language any separation between an issue arising in international law and an issue arising under our Constitution. Justice Brewer's dissent strongly implies that the majority looked to the practices of other nations to create the powers "inherent in sovereignty," when it asks rhetorically, "[s]hall [courts] look to the practices of other nations to ascertain the limits?"98

It appears that the Court considered international law relevant, not as a separate claim, but as an integral part of its interpretation of our own Constitution. If one were looking to distinguish the immigration power cases from modern cases referring to international law, one might observe that immigration is by its nature an international issue. But so today are human rights issues like gay rights and race relations, subjects in which international human rights law takes a keen interest. And even if the early Supreme Court used international law only in constitutional discussions with international implications, it was still operating in a world quite alien to the Borks and Feeneys of the modern era, who see any citations of international sources as a threat to American sovereignty. Ironically, far from undermining American sovereignty, customary international law was used in the immigration power cases to find (or create) a major Congressional power, arguably strengthening the sovereignty of the American federal government far beyond what the Framers imagined.

In sum, the immigration power cases can stand for the proposition that customary international law can at least sometimes serve as persuasive authority in interpreting the Constitution, even on a question as sensitive as the existence of an unenumerated federal power. In the next section, this Note examines attempts to use these cases as authority for a more extreme position: that the exclusion power is tied so closely to international law that modern limits on sovereignty, as expressed in international human rights law, should be understood to limit the scope of the Constitutional power.

97. Fong Yue Ting v. United States, 149 U.S. 698, 704 (1893).
98. The full passage reads:

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. May the courts establish the boundaries? Whence do they obtain the authority for this? Shall they look to the practices of other nations of ascertain the limits? The governments of other nations have elastic powers. Ours are fixed and bounded by a written constitution.

Id. at 737.
Professor Aleinikoff, discussing these cases, writes:

To find that regulation of immigration implicates the foreign relations of the United States does not entail a holding that international law provides the source of constitutional rules. Certainly, the Constitution may supply constraints on the foreign affairs power quite distinct from those recognized under international law. But the Court viewed the issues as all of a piece, and it deemed international law as relevant to, if not the basis of, constitutional norms.99

As we have seen, it is correct to say that “the Court viewed the issues as all of a piece.” The question we will now consider is the one Aleinikoff leaves open: whether international law was “relevant to” or “the basis of” the constitutional norms in question.

III. INTERNATIONAL LAW AS BINDING AUTHORITY?

Modern constitutional analysis would allow us to comfortably locate the immigration power within the commerce power, or a structural analysis of the Constitution.100 But the Court did not choose that route, instead finding the power “inherent in sovereignty,” and supporting its decision with customary international law, but practically no domestic precedent. This gave rise to the so-called “plenary power doctrine,” under which the Court has given Congress enormous discretion to regulate immigration.101 The plenary power doctrine has been widely criticized by immigration law scholars for its virtually limitless grant of power to the government and its apparent lack of support in the Constitution.102

In the early immigration power cases themselves, the immigrants’ lawyers and the dissenting justices made many of the same enumerated-powers arguments as modern critics. As the immigrant’s brief argued in *Fong Yue Ting*, when the federal Constitution was created, certain powers were delegated, “leaving still in the people those sovereign powers which they had originally upon their separation from England, and which were not by them placed in either the Constitutions of the respective States, or in the Constitution of the United States.”103 In this sense, the early immigration power

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99. Aleinikoff, supra note 96, at 863.
100. Id. at 866.
103. Brief for Appellants at 18, *Fong Yue Ting*, 149 U.S. 698; see also Field’s dissent in *Fong Yue Ting*, arguing that the Tenth Amendment expressly prohibits the doctrine of inherent powers. *Fong Yue Ting*, 149 U.S. at 758. Field also argued that the original intent of the Framers provides no support for the Court’s result, discussing how the Alien Act, giving the President the power to expel enemy
decisions were the ultimate in what we might now call "judicial activism." The Court openly reached beyond the scope of the powers enumerated in the Constitution to create a new Congressional power.

The plenary power doctrine has been harshly criticized on other grounds as well. Many have noted the harsh results it leads to, and one scholar has argued that the early cases badly misread the international law on which they relied. I will not attempt to summarize here the vast literature criticizing the plenary power doctrine. It is enough to note that many scholars have been tempted to reach for any means by which it might be undermined, and that a few have looked to the role of international law in the early cases as a possible way of doing so.

If the principal source of the immigration power was international law – rather than some essential aspect of sovereignty itself – then we might reasonably say that the immigration power would need to evolve as international law evolved. Apparently reasoning along these lines, Michael Scapelanda writes:

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 oc-

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aliens, was denounced by Jefferson, Madison, and Adams. *Id*. at 31-32. Madison apparently thought only *enemy* aliens could be deported. *Id.*

104. See, e.g., Henkin, *supra* note 102, at 859:

Whatever the Court intended, both its holding and its sweeping dictum have been taken to mean that there are no constitutional limitations on the power of Congress to regulate immigration. Congress can determine whether to admit aliens, how many to admit, and whom to admit. *The Chinese Exclusion* doctrine and its extensions have permitted, and perhaps encouraged, paranoia, xenophobia, and racism, particularly during periods of international tension.

See also Henkin, *supra* note 102, at 861-62:

More than three decades later, in new contexts, the offspring of *Chinese Exclusion* still reign to deny constitutional protection to many thousands of aliens against new indecencies. Lower courts have refused to consider claims of discrimination based on race and national origin in the treatment of undocumented aliens physically present in the United States, despite the principles of equal protection now firmly incorporated in the due process clause of the fifth amendment. *C*ourts have held that detaining thousands of undocumented Cubans for several years does not deprive them of liberty without due process of law. A district court has condoned not only the seizure on the high seas by United States officers of persons believed to be coming unlawfully to this country from Haiti but also the forcible return of such persons to the country from which they fled. Aliens argue in vain that deportation deprives them of life, liberty, or property without due process of law.

(citations omitted.)

105. James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 Am. J. Int'l L. 804, 806-815 (1983) (arguing that the Court's analysis of international law was thoroughly wrong, and that the authority cited by the Court in fact supports the proposition that aliens can be excluded only when they pose a danger to peace and security).
curred within municipal constitutional law, totally undermine the legiti-
macy of the Court’s continued adherence to the plenary power doc-
trine.\textsuperscript{106}

But this thesis seems workable only if international law was more than
persuasive authority in the early cases. Surely no one would argue that
American First Amendment law should evolve, for example, alongside the
English understandings of free speech that originally influenced it, because
the English doctrines had merely persuasive authority when the doctrine was
created. Similarly, only if customary international law is the continuing
source of the immigration power must the immigration power evolve along
with it.

In 1936, in \textit{United States v. Curtiss-Wright Export Corp.},\textsuperscript{107} the Supreme
Court finally identified the source of the immigration power, holding that the
doctrine “that the federal government can exercise no powers except those
specifically enumerated in the Constitution, and such implied powers as are
necessary and proper to carry into effect the enumerated powers, is categori-
cally true only in respect of our internal affairs.”\textsuperscript{108} Certain powers, it
reasoned, never resided in the several states, but passed directly from the
original sovereign, Great Britain, to the United States government.\textsuperscript{109} These
so-called “powers of external sovereignty” included the power to regulate
immigration.\textsuperscript{110}

This appears to suggest that the source of the power is sovereignty itself,
not any specific legal authority. But another passage in \textit{Curtiss-Wright} that
sounds very much as though the law of nations was the source of these
“powers of external sovereignty.” The Court states:

\begin{quote}
The power to acquire territory by discovery and occupation, the power
to expel undesirable aliens, the power to make such international
agreements as do not constitute treaties in the constitutional sense, none
of which is expressly affirmed by the Constitution, nevertheless exist 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.\textsuperscript{111}
\end{quote}

The Court continued to refer to international law to justify the power of
exclusion into the 1950’s. In the 1952 case of \textit{Harisiades v. Shaughnessy}, the
Court wrote, “That aliens remain vulnerable to expulsion after long residence

\begin{itemize}
\item [106] Scaperlanda, \textit{supra} note 20, at 965. For a similar argument, see Olafson, \textit{supra} note 21.
\item [107] 299 U.S. 304 (1936).
\item [108] \textit{Id.} at 315-16.
\item [109] \textit{Id.} at 317.
\item [110] \textit{Id.} at 317.
\item [111] \textit{Id.} at 318 (emphasis added).
\end{itemize}
is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." For this proposition, the Court cited three treatises on international law—and Fong Yue Ting. Justice Frankfurter wrote a concurring opinion that begins:

It is not for this Court to reshape a world order based on politically sovereign States. In such an international ordering of the world a national State implies a special relationship of one body of people, i.e., citizens of that State, whereby the citizens of each State are aliens in relation to every other State. Ever since national States have come into being, the right of people to enjoy the hospitality of a State of which they are not citizens has been a matter of political determination by each State.

The Court was concerned about inserting itself into a realm of international politics of which it had little understanding. But what if the world order is no longer based on "politically sovereign states," but on states whose sovereignty is limited, with their consent, by international human rights norms?

As a policy matter, it might make sense to argue that the plenary power doctrine should now be re-worked in light of changes in customary international law. I believe this is what Professor Henkin means when he argues that Chinese Exclusion is outdated because it was created during

[A]n era before United States commitment to international human rights; before enlightenment in and out of the United States brought an end both to official racial discrimination at home and to national-origins immigration laws; before important freedoms were recognized as preferred, inviting strict scrutiny if they were invaded and requiring a compelling public interest to uphold their invasion.

But there is a big difference between arguing that our law should evolve, and arguing that it must evolve. And there is little evidence in the original immigration power cases that the Court intended to ground the immigration power in international law, rather than simply citing international law to justify a holding which otherwise had little supporting precedent. Justice Field, dissenting in Fong Yue Ting, makes it clear that these international sources are not binding: "[t]he government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed

113. Id. at 588 n.14.
114. Id. at 596.
inherent sovereignty."\textsuperscript{116}

Of course, this was only a dissent. But nothing in the majority opinion indicates a view that international law is binding on us, in the sense that it would prevail should there be a conflict with our Constitutional precedent.\textsuperscript{117} In none of the three cases discussed in this Note was the Court required to resolve the issue of whether international law had binding effect, because in none of the cases did it conflict with domestic law. The Court found the two in agreement, and accordingly announced that the immigration power was "inherent in sovereignty." Perhaps the concept of "sovereignty" stems more from international custom than our own constitutional tradition. But because the Court never explicitly reached the issue, this close relationship between "sovereignty" and international custom is not enough to support an inference that international law dictates the results in matters of constitutional interpretation.

The most honest reading of our three cases, perhaps, is that the Court simply reached for international law when no domestic precedent or constitutional text would support the conclusion it felt it had to reach. (Of course, this is exactly what modern anti-internationalists fear, but thus far no conservative attack on the plenary power doctrine has been forthcoming.) In any event, it seems all but impossible to imagine the modern Supreme Court accepting the proposition that customary international law imposes limits on the scope of a constitutional power, however deeply "rooted" in international law that power may be.

IV. INTERNATIONAL LAW AND NATURAL LAW

The reading that seems most obvious to us today, and the reading that was adopted by the Supreme Court in later years, is that the law of nations functioned as persuasive authority to support the Court's doctrine of powers "inherent in sovereignty." But modern legal categories may not exactly match up with late nineteenth century doctrines. I have discussed two possible ways of understanding the role of international law in the early immigration power cases: as persuasive authority, and as mandatory authority. The distinction between persuasive and mandatory authority was understood in the late nineteenth century.\textsuperscript{118} But the law of nations itself may have been understood differently. An 1889 legal dictionary, drawing heavily on

\textsuperscript{116} Fong Yue Ting v. United States, 149 U.S. 698, 757 (1893).

\textsuperscript{117} Admittedly, a proponent of the Scaperlanda view might argue that modern international law does not conflict with constitutional precedent; on the contrary, because the power is "rooted in" an international concept of sovereignty, constitutional precedent directs courts to examine modern international law. Still, there is nothing in the cases that explicitly says international law controls domestic constitutional law in this way.

\textsuperscript{118} See WILLIAM C. ANDERSON, A DICTIONARY OF LAW, CONSISTING OF JUDICIAL DEFINITIONS AND EXPLANATIONS OF WORDS, PHRASES AND MAXIMS, AND AN EXPOSITION OF THE PRINCIPLES OF LAW, COMPRISING A DICTIONARY AND COMPRENDIUM OF AMERICAN AND ENGLISH JURISPRUDENCE 319 (1889):
Blackstone, defines “Law of nations; international law” as:

A system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world... And, as none of these states will allow a superiority in the other, no one can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned and every nation agree; or they depend upon mutual compacts or treaties, in the construction of which there is no judge to resort to but the law of nature and reason,—the only law in which all the parties are equally conversant and to which they are equally subject.119

In this understanding, international law is perhaps more like natural law than positive law. In the works of commentators with whom the late-nineteenth century Supreme Court would have been familiar, we frequently see this conception of international law: a law derived from the will of God, or naturally deducible, or both.

According to Phillimore, “The [p]rimary [s]ource, then, of [i]nternational [j]urisprudence is Divine Law,” which is comprised of natural law and revealed law.120 “Reason,” he explained elsewhere, “... may be regarded as a distinct source of International Law.”121 Vattel wrote, “[T]he law of Nations is originally no other than the law of Nature applied to Nations.”122 The title of Vattel’s treatise was “The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns.”123

Treatises written at the time of the early immigration power cases contain similar formulations. According to one treatise, “the law of nations is the law of nature, realized in the relations of separate political communities.”124 According to Woolsey, “[i]nternational law, in a wide and abstract sense, would embrace those rules of intercourse between nations which are deduced from their rights and moral claims; or, in other words, it is the expression of

Where there has been a series of decisions by the highest tribunal, the rule stare decisis is regarded as impregnable – except by legislative enactment. ... In considering the soundness of the doctrine enunciated courts of concurrent or of foreign jurisdiction pay regard to the thoroughness of the arguments of counsel, the ability, learning and jurisdictional authority of the court, and the care and research bestowed in preparing the opinion.

119. Id. at 696 (closely following 1 BLACKSTONE’S COMMENTARIES *43).
120. ROBERT PHILLIMORE, 1 COMMENTARIES UPON INTERNATIONAL LAW 15 (2d ed. 1871).
121. Positive Law, whether National or International, being only declaratory... may add to, but cannot take from the prohibitions of Divine Law.” Id. at 26.
123. Id.
124. JAMES LORIMER, 1 THE INSTITUTES OF THE LAW OF NATIONS 19 (1883; 1980)
the jural and moral relations of states to one another."\textsuperscript{125}

Woolsey goes on, however, to say that "\textquote{[i]t is important, again, not to confound international law with natural law,"\textsuperscript{126} because international law is created by the usages of nations as well as by principles of morality. He criticizes Pufendorf for "failing to distinguish sufficiently between natural justice and the law of nations; [and for] spinning the web of a system out of his own brain, as if he were the legislator for the world."\textsuperscript{127} Despite his insistence on this distinction, Woolsey believed that international law must be described in terms of both law and morality.\textsuperscript{128}

In short, although scholars debated the relationship between natural law and the law of nations, a lawyer of the 1890's might have seen much less difference between the two than we do today. This helps to explain the role of international law in the early immigration power cases, as in the following passage from \textit{Chae Chan Ping}, where it would be just as accurate to describe the Court as reasoning from first principles as to say it reasons from international law:

\begin{quote}
To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends all other concerns are to be subordinated.\textsuperscript{129}
\end{quote}

The phrase "every nation" suggests the Court is considering the practices of nations around the world.\textsuperscript{130} But it would be just as accurate to say that the

\textsuperscript{125} Theodore Woolsey, \textit{Introduction to the Study of International Law} 2 (5th ed. 1885).
\textsuperscript{126} Id. at 11.
\textsuperscript{127} Id. at 13.
\textsuperscript{128} Id. at 14-15. In a section marked "The two aspects of international law," Woolsey writes:

\begin{quote}
There are, then, always two questions to be asked: \textit{the first}, and most important, What is the actual understanding and practice of nations? otherwise we have a structure that floats in the air, subjective speculation, without authority; and \textit{the second}, On what rational and moral grounds can this practice be explained and defended? otherwise it is divorced from truth and right.
\end{quote}

\textit{Id.} (emphasis in original). Other commentators were less hesitant to dispense with the positive law in favor of natural law:

\begin{quote}
The law of nations we derive from the fountain of all law, from God the Creator . . . . Having ascertained the certainty of a moral law of nations invariably and necessarily inflicting punishment for all violations of its high and holy enactments, we shall not seek for the sanction of international law in the contradictory customs of warring states and empires . . . . Our law of nations we derive from heaven's high chancery, from the Lord Almighty, maker of all things, and we shall unfold it as the high and Holy One hath enacted it, revealed it in the Gospel, and interwoven it in the nature of man.
\end{quote}


\textsuperscript{129} Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).
\textsuperscript{130} In modern terms, this passage could be read as discussing comparative law, but not customary international law, because the Court is not discussing a legal obligation which states believe to be binding, but a power possessed by states worldwide. Customary international law exists when state practice is accompanied by a sense of legal obligation (\textit{opinion juris}); no one would argue
Court is merely making a common-sense observation about the nature of nation-states. There is essentially no difference.

As the 1889 dictionary goes on to say, "International law is part of the universal law of reason, justice and conscience."131 In this sense, saying the Court considered international law as persuasive authority is practically the same thing as saying the Court reasoned from first principles about the nature of the nation-state. In *Thirty Hogsheads of Sugar v. Boyle*, an 1815 case dealing with the international law governing property captured in wartime, the Supreme Court gave clear voice to this concept of the law of nations:

> The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional. *To ascertain that which is unwritten, we resort to the great principles of reason and justice:* but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.132

In other words, the law of nations is composed partly of conventional (i.e., treaty) obligations, and partly of naturally deducible principle. In *Thirty Hogsheads*, the law of nations was directly at issue (because it governed who had a claim to the property in question). In *Chae Chan Ping*, where the issue was a constitutional one (whether the power to regulate immigration was granted to the federal government), the Court seems again to conceptually merge the law of nations with principles of reason and justice:

> The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the States, and admit subjects of other nations to citizenship, 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.*133

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133. *Chae Chan Ping*, 130 U.S. at 604 (emphasis added).
These considerations of public policy and justice which control "more or less" the conduct of all civilized nations, perhaps, are the law of nations. There is no higher enforcement authority, but the law of nations is composed of naturally deducible principles of justice, and the Court expects that nations will govern themselves according to its fundamental dictates.

In this sense, late nineteenth century conceptions of customary international law may not have been so different from the modern customary international law of human rights. To be sure, nothing so codified or extensive as modern human rights law existed, nor the law of nations in 1889 intrude so extensively on national sovereignty. But "considerations of public policy and justice which control, more or less, the conduct of all civilized nations" is not a bad description of the modern customary international law of human rights.134 And if the principles of the law of nations are "deducible by natural reason," it is perhaps not irrational to imagine that the late nineteenth-century Court would have agreed that the law of nations evolves along with the understanding of "reason and natural justice" common to "civilized nations"—and that powers grounded in "reason and natural justice" should evolve along with it.

V. CONCLUSION

Whatever the precise status of international law in the mind of the late-nineteenth century Court, the early immigration power cases represent a snapshot of a time when attitudes towards international law were very different than they are today. This Note has attempted to examine all the possible interpretations of the role of international law in these cases; it is perhaps significant that the Court itself felt no need to do so. Whether or not the immigration power should grow and change alongside the international legal doctrines that influenced it, we can at least say for certain that international law was regarded as an appropriate subject for discussion in the Supreme Court of a century ago.

The purpose of this Note was to examine three particular cases as a study in the use of international law, but they are hardly the earliest examples of the practice; throughout the 1800's, the Court cited the law of nations when deciding the scope of the powers granted by our Constitution.135 Resistance to the influence of international law on constitutional interpretation too has a

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134. Compare, for example, the Restatement's definition of customary international law: "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

135. See Jackson, supra note 32, at 336 (citing inter alia Worcester v. Georgia, 31 U.S. 515, 561 (1832)) (in a discussion of the status of Indian tribes under the U.S. Constitution: "the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection"); Holmes v. Jennison, 39 U.S. 540, 569-73 (1840) (practices of other nations and works of Vattel considered during discussion of whether the Constitution prohibits a state governor from extraditing a fugitive to Canada).
long history. In a recent address,\textsuperscript{136} Justice Ginsburg cited a passage written by the Chief Justice of the Supreme Court in 1857:

No one, we presume, supposes that any change in public opinion or feeling . . . in the civilized nations of Europe or this country, should induce the Court to give the words of the Constitution a more liberal construction . . . than they were intended to bear when the instrument was framed and adopted.

That case was \textit{Dred Scott},\textsuperscript{137} and the Chief Justice was defending a result few modern readers would support, however enthusiastic they might be about this link in his chain of reasoning.

The current debate over the use of international law in constitutional interpretation is nothing new. Although it has long been controversial, at least to some, our tradition of using international law as persuasive authority—and our tradition of debating its legitimacy—dates to the early years of the Republic.

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\textsuperscript{137} \textit{Dred Scott v. Sandford}, 60 U.S. 393, 426 (1856).