Fordham Law Review

Volume 69 | Issue 4 Article 7

2001

Should Aliens Be Indefinitely Detained under 8 U.S.C. 1231--Suspect Doctrines and Legal Fictions Come under Renewed Scrutiny

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SHOULD ALIENS BE INDEFINITELY DETAINED UNDER 8 U.S.C. § 1231? SUSPECT DOCTRINES AND LEGAL FICTIONS COME UNDER RENEWED SCRUTINY

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INTRODUCTION

In 1979, Kim Ho Ma's family fled their native country of Cambodia taking Ma, who was then two years old, with them.[1] The family spent the next five years in refugee camps before being granted legal entry to the United States as refugees in 1985.[2] Ma has lived here ever since and, in 1987, was given the status of lawful permanent resident.[3]

In 1996, at the age of seventeen, Ma was involved in a gang-related shooting and was convicted of first-degree manslaughter.[4] Tried as an adult, he was sentenced to thirty-eight months in prison.[5] After serving twenty-six months and receiving credit for good behavior, he was released and immediately taken into custody by the Immigration and Naturalization Service ("INS"), which ordered him removed from the United States under the Illegal Immigrant Responsibility and Immigration Reform Act of 1996 ("IIRIRA")[6] because of the conviction.[7] The INS could not remove him, however, because Cambodia does not have a repatriation agreement with the United

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* J.D. Candidate, 2002, Fordham University School of Law. I would like to thank Professor Martin S. Flaherty for his insight and guidance during the writing of this Note. Also, I would especially like to thank my wife, Tara Griffin Montague, for her support and understanding.

1. Kim Ho Ma v. Reno, 208 F.3d 815, 819, 821-22 (9th Cir.) (holding that because indefinite detention of resident alien who had been ordered removed might violate due process and international law, court would construe immigration statute as authorizing detention only for a reasonable time, thus avoiding the constitutional question and harmonizing the statute with international law), *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38), *sub nom. for oral argument* Kim Ho Ma v. Holder.

2. *Id.* at 819.

3. *Id.*

4. *Id.*

5. *Id.*

6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 and 18 U.S.C.).

7. *See Kim Ho Ma*, 208 F.3d at 819.

States and refused to accept Ma's return.[8] INS policy requires that aliens in Ma's position be detained indefinitely unless they can show that they are not a threat to the community and not a flight risk.[9] Therefore, Ma remained in INS custody until a district court ordered him released under a writ of habeas corpus on September 29, 1999.[10] A three-judge panel of the Ninth Circuit Court of Appeals upheld the writ in April of 2000.[11] The court held that the statute under which the INS detained Ma did not explicitly authorize indefinite detention.[12] Because indefinite detention of aliens raised substantial constitutional questions and violated international law, the court construed the statute to authorize detention only for a reasonable time.[13]

The ruling by the Ninth Circuit presents a serious challenge to the INS' policy of indefinitely detaining aliens who have been ordered removed under provisions of the IIRIRA. But for the Ninth Circuit's ruling, Kim Ho Ma would still be among the estimated 4000 aliens who have been ordered removed from the United States, but are presently detained indefinitely by the INS because their "home" countries will not take them back.[14] Had he not been granted habeas relief, Ma would now have been in prison for nearly five years with no end in sight, despite the fact that his criminal sentence was satisfied after twenty-six months.[15] This harsh policy of indefinitely incarcerating aliens has led to riots[16] and suicide attempts among detainees,[17] and has also prompted substantial criticism from the international human rights community.[18]

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8. *See id.*

9. The INS detains aliens who have been ordered removed under 8 U.S.C. § 1231. *See infra* notes 33-46 and accompanying text.

10. *Kim Ho Ma*, 208 F.3d at 819.

11. *Id.* at 818.

12. *Id.* at 819.

13. *Id.* at 820-22.

14. *See* Warren Richey, *Liberty and Justice... For Citizens Only?*, Christian Sci. Monitor, Feb. 11, 2000, at 3. The exact number of aliens detained indefinitely is in dispute. Although 60 Minutes also reported that 4000 aliens are currently in indefinite detention, *see 60 Minutes: INS Holds Immigrants for Deportation* (CBS News television broadcast, Mar. 26, 2000) [hereinafter *60 Minutes*], the *Seattle Times* reported the number to be 3500, *see* Alex Tizon, *For INS, A Matter of Time*, Seattle Times, June 18, 1999, at B1. The court in *Chi Thon Ngo v. INS* noted that the INS was detaining indefinitely over 3550 aliens, including 1750 who were part of the Mariel boat-lift in 1980. *See* 192 F.3d 390, 395 (3d Cir. 1999).

15. *See Kim Ho Ma*, 208 F.3d at 819.

16. *See 60 Minutes*, *supra* note 14.

17. *See* Yvette M. Mastin, Comment, *Sentenced to Purgatory: The Indefinite Detention of Mariel Cubans*, 2 Scholar: St. Mary's L. Rev. on Minority Issues 137, 140-42 (2000) (detailing the continued plight of Mariel Cubans detained by the INS and calling for expanded due process protections for detainees).

18. *See Concluding Observations of the Human Rights Committee: United States of America*, U.N. Hum. Rts. Comm., 53d Sess., para. 283 U.N. Doc. CCPR/C/79/Add.50 (1995) (expressing concern at the low level of due process protection given to aliens

The indefinite detention of aliens is not a new phenomenon in the United States. In fact, the practice dates back to at least the 1950s. In 1953, the Supreme Court ruled that a stateless alien, who had been excluded from the country because he was a suspected communist, could be indefinitely detained because allowing him entry would present a threat to national security.[19] In the 1980s, the INS detained thousands of Cubans who were seeking entry into the United States as part of the Mariel boat-lift.[20] Because Cuba refused to take back Cuban nationals whom the INS ruled excludable, these nationals were indefinitely detained.[21]

Most recently, the INS' interpretation of the IIRIRA has greatly expanded the number of aliens subject to such detention.[22] The IIRIRA removed longstanding distinctions between resident aliens who had obtained entry into the United States (including both legal and illegal resident aliens) and excludable aliens who had been detained at the border (including aliens who had been paroled into the United States).[23] Previously, excludable aliens stopped at the border and excludable aliens who had been paroled into the United States could be detained indefinitely,[24] while legal or illegal resident aliens could not. According to the INS, resident aliens, who have

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and the use of indefinite detention), *available at* http://www.unhchr.ch/tbs/doc.nsf (last visited Jan. 30, 2001); Human Rights Watch, Locked Away: Immigration Detainees in Jails in the United States, Part I (1998) (criticizing the harsh conditions and indefinite length of immigration detention), *available at* http://www.hrw.org/reports98/us-immig (last visited Jan. 30, 2001).

19. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215-16 (1953).

20. *See* Mastin, *supra* note 17, at 143-44.

21. According to the court in *Chi Thon Ngo v. INS*, 1750 Cubans who came to the United States as part of the Mariel boat-lift remain in INS detention. 192 F.3d 390, 395 (3d Cir. 1999). For a discussion of the legal justifications and human toll of the indefinite detention of these individuals, see Mastin, *supra* note 17.

22. Although specific numbers of aliens in indefinite detention are not available for prior years, the number of total INS detainees has drastically increased. In 1996, the year the IIRIRA was passed, the average daily detention population was 8592. Cheryl Little, *INS Detention in Florida*, 30 U. Miami Inter-Am. L. Rev. 551, 552 (1999). By 2000 the number had risen to about 20,000. *See* Chris Hedges, *Policy to Protect Jailed Immigrants is Adopted By U.S.*, NY Times, Jan. 2, 2001, at A1. Thus, one could arguably conclude that the number of aliens being detained indefinitely has also increased dramatically.

23. *See* Pub. L. No. 104-208, div. C, § 301, 110 Stat. 10009-546, 575 (codified at 8 U.S.C. §§ 1182(a), 1227) (classifying illegal resident aliens and excludable aliens as inadmissible); *infra* notes 36-38 and accompanying text. Because the distinctions are important in understanding the constitutional jurisprudence on the rights of aliens, this Note uses the terms "deportable" and "resident aliens" when discussing aliens who have effected either legal or illegal entry into the country, and uses the term "excludable" to describe aliens who have been excluded at the border, or excluded and paroled into the country.

24. *See Mezei*, 345 U.S. at 215 (ruling that excludable aliens could be indefinitely detained); Gisbert v. United States Atty. Gen. 988 F.2d 1437, 1443-44 (5th Cir. 1993) (ruling that excludable aliens who had been paroled into the country could be indefinitely detained).

lived most of their life in the United States, are now subject to indefinite detention under the IIRIRA, in addition to aliens excluded at the border.[25] These changes, coupled with the increasingly broad range of crimes for which aliens can be deported, have significantly expanded the number of aliens subject to indefinite detention.[26] The Ninth Circuit's ruling, however, has resulted in a current circuit split over whether the relevant provisions of the IIRIRA do, in fact, authorize indefinite detention of resident aliens.[27] In addition, the Ninth Circuit's ruling and several district court opinions call into question whether indefinite detention of aliens violates due process and principles of international law.[28] As a result, the Supreme Court granted certiorari on October 10, 2000 to resolve these issues.[29]

This Note examines indefinite detention from a legal and public policy perspective, with a focus on how indefinite detention affects the United States' aspirations to be a global leader in human rights. Part I outlines the statutory framework under which aliens are indefinitely detained, the relevant constitutional principles, and the relevant principles of international law. Part II examines the competing views of the circuit courts as to whether the statute authorizes indefinite detention, and whether indefinite detention is a violation of due process or international law. Part III argues that the indefinite detention of resident aliens violates due process as well as international law, and that this casts a pall over the United States' assertions that it is a leader in the field of human rights and, more

25. Under the IIRIRA, both inadmissible aliens and deportable aliens are subject to the same "removal proceedings." *See* Pub. L. 104-208, div. C, § 304, 110 Stat. 30009-546, 587, 589 (codified at 8 U.S.C. § 1229a). Thus, both excludable and deportable aliens are subject to indefinite detention under 8 U.S.C. § 1231(a)(6). *See infra* notes 38-43 and accompanying text.

26. *See* 8 U.S.C. § 1227(a)(2) (Supp. IV, 1998); *infra* note 39 and accompanying text.

27. *Compare* Kim Ho Ma v. Reno, 208 F.3d 815, 821-22 (9th Cir.) (holding that the statute authorizes detention of removable resident aliens only for a reasonable time), *cert. granted*, 121 S. Ct. (2000) (No. 00-38) *with* Duy Dac Ho v. Greene, 204 F.3d 1045, 1058-60 (10th Cir. 2000) (holding that the statute authorizes the indefinite detention of removable resident aliens and excludable aliens who have been paroled into the United States and that such detention does not violate due process under the Fifth Amendment), *and* Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999) (holding that the statute authorizes the indefinite detention of removable resident aliens and that such detention does not violate due process) *cert. granted*, 121 S. Ct. 297 (2000) (No. 99-7791). *Cf.* Chi Thon Ngo v. INS, 192 F.3d 390, 394-95 (3rd Cir. 1999) (holding that the statute authorizes the indefinite detention of excludable aliens and that such detention does not violate due process).

28. *See Kim Ho Ma*, 208 F.3d at 822-23; Kay v. Reno, 94 F. Supp. 2d 546, 553 (M.D. Pa 2000) (holding that indefinite detention of deportable aliens violates substantive due process); Sivongxay v. Reno, 56 F. Supp. 2d 1167, 1173 (W.D. Wash. 1999) (same).

29. The Court consolidated the case *Kim Ho Ma*, 208 F.3d 815, *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38), with *Zadvydas*, 185 F.3d 279, *cert. granted*, 121 S. Ct. 297 (2000) (No. 99-7791).

importantly, undermines its efforts to encourage compliance with international norms. Part III also argues for a uniform approach to aliens' rights that relies on the protections afforded all persons under the Constitution, but that is informed by principles of international law.

I. INDEFINITE DETENTION UNDER 8 U.S.C. § 1231

In resolving issues of indefinite detention, courts have relied on statutes,[30] INS regulations,[31] and principles of constitutional and international law.[32] This part examines the statutory framework and INS regulations by which the INS indefinitely detains aliens who have been ordered removed or deported. Further, this part discusses the constitutional due process principles and international law principles that are relevant to evaluating the policy of indefinite detention.

A. *The IIRIRA and INS Regulations*

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the statutes that cover the removal[33] and detention[34] of aliens who have committed crimes while in the United States.[35] The IIRIRA made three significant changes to the prior sections of the Immigration and Nationality Act that are relevant to indefinite detention. First, the IIRIRA redefined the longstanding distinctions between excludable and deportable aliens. Previously, aliens who had been detained at the border and denied entry were considered excludable and retained this classification even if they were paroled into the United States.[36] Alternatively, aliens who had gained entry either legally or illegally were considered deportable.[37] Under the IIRIRA, excludable aliens and aliens who have illegally entered the country are termed "inadmissible" and, along with aliens who have legally entered the United States, are subject to uniform removal proceedings.[38]

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30. *See, e.g.*, *Zadvydas*, 185 F.3d at 287 (holding that detention of an alien was governed by 8 U.S.C. § 1231).

31. *See, e.g.*, *Chi Thon Ngo*, 192 F.3d at 399 (holding that Interim Rules announced by the INS were sufficient, if conscientiously applied, to withstand a due process challenge by an excludable alien subject to indefinite detention).

32. *See, e.g.*, *Kim Ho Ma*, 208 F.3d at 822-26, 829-30 (noting the serious constitutional questions raised by the indefinite detention of resident aliens and the clear prohibition of arbitrary detention under international law).

33. 8 U.S.C. § 1229a (Supp. IV, 1998).

34. *Id.* § 1231 (Supp. IV, 1998).

35. Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 and 18 U.S.C.).

36. *See Chi Thon Ngo*, 192 F.3d at 394 n.4.

37. *See id.*

38. *See* Pub. L. 104-208, div. C, § 304, 110 Stat. 3009-546, 587 (codified at 8 U.S.C. § 1229a); *see also supra* note 23 and accompanying text.

Second, the IIRIRA expanded the offenses for which aliens can be removed or deported. Any crime that carries more than a one year prison sentence or involves drugs or a firearm will result in removal or deportation.[39]

Third, the IIRIRA mandates that aliens be removed within ninety days once they are determined to be removable or deportable.[40] During these ninety days, termed the removal period, aliens must be detained.[41] The statute further provides:

> An alien ordered removed who is inadmissible . . . removable . . . or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to . . . terms of supervision . . . .[42]

Additionally, the statute lists detailed terms of supervision for removable aliens released from INS custody.[43]

As a result of the IIRIRA, thousands more aliens are detained and deported or removed by the INS than under previous statutes.[44] The INS interprets the statute to allow the detention of removable and deportable aliens at its discretion for as long as necessary.[45] Because the IIRIRA does not distinguish between excludable and deportable aliens for the purpose of authorizing detention after the removal period, the INS interprets the statute to allow for the indefinite detention of aliens who were detained at the border (formerly termed excludable), as well as for aliens who have entered the United States legally or illegally (formerly deportable).[46] As a result the INS not

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39. *See* 8 U.S.C. § 1227(2) (Supp. IV, 1998). The effects of this expansion have been extraordinary. From 1997 to 1999 roughly 170,000 aliens were removed due to criminal convictions. *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1890, 1890 n.2 (2000).

40. *See* 8 U.S.C. § 1231(a)(1)(A) (Supp. IV, 1998).

41. *See id.* § 1231(a)(2).

42. *Id.* § 1231(a)(6).

43. *See id.* § 1231(a)(3).

44. *See supra* notes 22, 39 and accompanying text. The cost of this expansion has also been extraordinary. In 1986, the INS budget was $600 million. By 1999, it had risen to $4.3 billion. Little, *supra* note 22, at 554. In 2001, President Clinton asked for $4.8 billion to fund the agency. *See* Hedges, *supra* note 22.

45. *See, e.g.*, Kim Ho Ma v. Reno, 208 F.3d 815, 821 (9th Cir.) *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38).

46. *See e.g.*, Zadvydas v. Underdown, 185 F.3d 279, 285 (5th Cir. 1999) *cert. granted*, 121 S. Ct. 297 (2000) (No. 99-7791) ("The INS argues, however, that once a resident alien such as Zadvydas is . . . ordered deported and that order becomes final, the resident alien may claim no greater rights than an excludable alien in like circumstances."); *see also* Detention of Aliens Ordered Removed, Supplementary Information, 65 Fed. Reg. 40540, 40540 (proposed June 30, 2000) (to be codified at 8 C.F.R. pts. 212, 236, and 241) (noting that previous statutes required deportable aliens to be released from INS custody if they could not be deported within six months but that this restriction has been removed by provisions of the IIRIRA and that this has led to a considerable increase in the number of aliens who are in detention but cannot

only indefinitely detains many more aliens under the provisions of the IIRIRA, it also indefinitely detains aliens previously labeled deportable who had not been subject to indefinite detention.

The INS is experiencing significant strain from the increased number of detainees as well as from adverse court opinions that have held that INS procedures for reviewing the ongoing detention of removable aliens are inadequate.[47] As a result, the complex INS regulations that govern the detention of aliens who have been ordered removed but whose removal cannot be effected are currently in the process of modification.[48]

The existing regulation leaves the decision of whether an alien will be released up to the discretion of INS officials who review the criminal files of aliens ordered removed for committing crimes.[49] From February to August of 1999, the INS supplemented this rule through a series of internal memoranda known collectively as "the Pearson memoranda" to afford indefinitely detained aliens a more rigorous review of their status.[50] These memoranda require review of custody decisions before the end of the ninety day removal period, nine months after that, and every six months thereafter.[51] The first review after the expiration of the removal period requires that the district director of the INS (or his or her designated subordinates) conduct an interview with the detainee.[52] This review and alternate subsequent reviews are also subject to review by INS headquarters.[53] In all of these proceedings, detained aliens must show, through clear and convincing evidence, that they are not a threat to society or a flight risk.[54] Moreover, the Department of Justice recently issued a

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be removed from the country).

47. *See* Detention of Aliens Ordered Removed, Supplementary Information 65 Fed. Reg. 40540, 40540 (proposed June 30, 2000) (to be codified at 8 C.F.R. pts. 212, 236, and 241) (citing the increase in the number of aliens detained, the lack of a time limit on detention, and the ruling in *Kim Ho Ma* as reasons for expanding the review process for deportable aliens detained beyond the statutory removal period).

48. *See id.*

49. *See* Apprehension and Detention of Aliens Ordered Removed, 8 C.F.R. § 241.4(a). The rule states:

> The district director may continue in custody any alien inadmissible ... or removable under ... the Act ... beyond the removal period, as necessary, until removal from the United States. If such an alien demonstrates by clear and convincing evidence that the release would not pose a danger to the community or a significant flight risk, the district director may, in the exercise of discretion, order the alien released from custody on such conditions as the district director may prescribe ....

Id.

50. *See* Detention of Aliens Ordered Removed, Supplementary Information 65 Fed. Reg. 40540, 40540 (proposed June 30, 2000) (to be codified at 8 C.F.R. pts. 212, 236, and 241); Chi Thon Ngo v. INS, 192 F.3d 390, 399-401 (3d Cir. 1999).

51. *See Chi Thon Ngo*, 192 F.3d at 400.

52. *See id.*

53. *See id.*

54. *See id.* at 400-01.

proposed rule that incorporates and expands upon the procedures outlined in the memoranda.[55] The proposed rule requires that all decisions to detain an alien more than ninety days beyond the initial removal period be made by a centralized office, called the Headquarters Post-Order Detention Unit ("HQPDU").[56] Under the proposed rule, the district director or the Executive Associate Commissioner from the HQPDU may release an alien "if the alien demonstrates to the satisfaction of the Attorney General or her designee that his or her release will not pose a [risk to the community or a risk of flight pending removal.]"[57]

The INS bases these regulations on the authority vested in the Attorney General under 8 U.S.C. § 1231(a)(6),[58] which the INS interprets as authorizing the detention of aliens for as long as necessary.[59] Ordinarily, courts grant substantial deference to agency interpretations of the statutes that they administer.[60] *Chevron v. Natural Resources Defense Council* held that if congressional intent is not clear from the statute, the court will defer to the agency's interpretation if it is reasonable.[61] Because the indefinite detention of aliens raises substantial questions of constitutional and international law, however, two venerable canons of statutory construction apply. Under the principle of constitutional avoidance articulated in *Ashwander v. TVA*,[62] courts must interpret ambiguous statutes so as to avoid reaching substantial constitutional questions.[63] Moreover,

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55. *See* Detention of Aliens Ordered Removed, Supplementary Information 65 Fed. Reg. 40540, 40540-41 (proposed June 30, 2000) (to be codified at 8 C.F.R. pts. 212, 236, and 241).

56. *See id.* at 40541.

57. Detention of Aliens Ordered Removed, 65 Fed. Reg. 40544 (proposed June 30, 2000) (to be codified at 8 C.F.R. pt. 241).

58. *See* Detention of Aliens Ordered Removed, Supplementary Information 65 Fed. Reg. 40540, 40541 (proposed June 30, 2000) (to be codified at 8 CFR pts. 212, 236, and 241); *supra* note 42 and accompanying text.

59. *See* Kim Ho Ma v. Reno, 208 F.3d 815, 821 (9th Cir.), *cert granted*, 121 S. Ct. 297 (2000) (No. 00-38); Detention of Aliens Ordered Removed, Supplementary Information 65 Fed. Reg. 40540, 40541 (proposed June 30, 2000) (to be codified at 8 C.F.R. pts. 212, 236, and 241).

60. *See* Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

61. *See id.* at 843 ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

62. 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

63. *See id.*; *see also* Int'l Assoc. of Machinists v. Street, 367 U.S. 740, 749 (1961) ("Federal statutes are to be so construed as to avoid serious doubt of their constitutionality."); United States v. Witkovich, 353 U.S. 194, 201-02 (1957) (citing *Ashwander* and *Benson* and construing a statute narrowly so as to avoid the constitutional questions that might be raised by allowing the Attorney General to question deportable aliens about matters unrelated to their availability for deportation); Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act

under *Murray v. The Schooner Charming Betsy*,[64] an ambiguous statute must be interpreted so as to comply with international law.[65]

Even though agency interpretations are given deference under *Chevron*, the Court has indicated that the older and more venerable *Ashwander* and *Charming Betsy* canons still trump agency interpretations when applicable.[66] For example, a few years after *Chevron* was decided, the Court overruled the National Labor Relations Board's interpretation of a statute on the basis of the *Ashwander* doctrine, and it cited *Charming Betsy* as the root of that doctrine.[67] The doctrine of avoidance prevents needless confrontation of constitutional questions and, more importantly, it stands for the

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of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

64. 6 U.S. (2 Cranch) 64 (1804).

65. *See id.* at 117-18.

66. *See* Rust v. Sullivan, 500 U.S. 173, 190-91 (1991) (noting that the doctrine of constitutional avoidance applied to agency regulations by holding that the regulations in question did not present the kind of grave constitutional concerns that might require avoidance); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 574-75 (1988) (holding that agency's interpretation of National Labor Relations Act was not entitled to deference where that interpretation raised serious constitutional questions).

67. *See Edward J. DeBartolo Corp.*, 485 U.S. at 575 (White, J.). Although Justice White did not explicitly lay out how the roots in *Charming Betsy* grew into the forest of constitutional avoidance, it could be surmised that *Charming Betsy* rests on a presumption that Congress generally does not intend to violate international law, because that law binds the nation and has domestic effect, *see* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 495-97 (1998), and thus the Constitution, which also binds the nation and has domestic effect, deserves at least the same consideration. There are other similarities between the doctrines. *Charming Betsy* may be influenced by an understanding that courts are obligated to act as "agents of the international order" and where possible, construe statutes to conform to that order. *See id.* at 498-99 (quoting Richard A. Falk, The Role of Domestic Courts in the International Legal Order 72 (1964)). Courts have a similar obligation to enforce the Constitution; indeed both treaties and the Constitution are the "supreme Law of the Land." U.S. Const. art. VI; *see infra* notes 1613-84 and accompanying text. Finally, *Charming Betsy* has been associated with the understanding that international law is closely related to natural law. *See* Bradley, *supra* at 494-95. Inasmuch as the United States Constitution protects natural rights, international law and constitutional law spring forth from the same universal principles, which are entitled to deference. *See id.*; *cf.* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) ("An [act] of the Legislature (for I cannot call it law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority." (emphasis removed)). *But cf. id.* at 399 (Iredell, J., concurring). Justice Iredell surmised:

> The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Id.

proposition that courts should presume that Congress is performing its duty to uphold the Constitution.[68]

The Court's decision in *Rust v. Sullivan* raised some ambiguity as to the applicability of the *Ashwander* doctrine in cases involving agency interpretations.[69] In that case, the Court applied *Chevron* deference to Health and Human Services regulations that prohibited abortion counseling in any federally funded facility in spite of the constitutional questions raised.[70] However, Chief Justice Rehnquist, writing for the majority, did not question the continued validity of the *Ashwander* doctrine.[71] Rather, he found that the constitutional questions presented by the government regulation were not serious or grave enough to warrant the application of *Ashwander*.[72] The Court's unwillingness to apply *Ashwander* may have signaled a retreat from that doctrine where agency interpretations are involved,[73] or perhaps only an eagerness to address the constitutional issues presented by *Rust*,[74] or a genuine belief that no serious constitutional question was presented.[75] The last two possibilities seem to be the most plausible in light of the Court's recent decision, also written by Chief Justice Rehnquist, in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*.[76] In that case, the Court struck down the Army Corps of Engineer's interpretation of the Clean Water Act,[77] noting that administrative interpretations are not entitled to deference where such interpretations raise substantial constitutional questions.[78] The Court stated that in such instances, it would construe statutes to avoid constitutional questions, unless such a construction was "plainly contrary to the intent of Congress."[79]

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68. *See Edward J. DeBartolo Corp.*, 485 U.S. at 575.

69. *See Rust*, 500 U.S. at 190-91.

70. *See id.* at 186-91.

71. *See id.* at 190-91.

72. *See id.* at 191.

73. Such a retreat seems unlikely, however. *See id.* at 204 (Blackmun, J., dissenting, joined by Marshall & O'Connor, JJ.). Justice Blackmun noted:

> The majority does not dispute that '[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality.' Nor does the majority deny that this principle is fully applicable to cases such as the instant ones in which a plausible but constitutionally suspect statutory interpretation is embodied in an administrative regulation.

Id. (alteration in original) (citations omitted).

74. *See id.* at 204-05 ("[I]n its zeal to address the constitutional issues, the majority sidesteps this established canon of construction with the feeble excuse that the challenged regulations 'do not raise . . . grave and doubtful constitutional questions . . . .'").

75. *But see id.* at 205 ("This facile response to the intractable problem the Court addresses today is disingenuous at best.").

76. No. 99-1178, slip op. (U.S. Jan. 9, 2001).

77. *See id.* at 11.

78. *See id.* at 12.

79. *Id.* (quoting Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988)). Interestingly, the opinion in *Solid Waste*

B. *Due Process*

In addition to the statutory and regulatory framework under the IIRIRA, the U.S. Constitution also provides guidelines that are relevant to evaluating the policy of indefinitely detaining aliens. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law,"[80] which protects people in the United States from violations of both substantive due process and procedural due process.[81] The Fourteenth Amendment prohibits the states from violating these rights.[82]

Substantive due process protects those rights "implicit in the concept of ordered liberty" and prevents government conduct that "shocks the conscience."[83] The Supreme Court's decisions on exactly which rights are protected by due process, however, have not always been consistent.[84] Through a long line of cases applying the due process protection of the Fourteenth Amendment to the states, the Court has extended substantive due process protection to most of the rights protected in the first eight amendments,[85] as well as to the right to marital privacy[86] and the right to an abortion before the third trimester.[87] When determining whether a right is implicit in the concept of ordered liberty, the Court considers "(1) the text of the Constitution and the original intent of the [Framers]; (2) the history and traditions of [the United States]; (3) the political philosophy or moral philosophy [of] any just society . . . ."[88] The Court also takes

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highlights a new wrinkle in the doctrine of constitutional avoidance. Chief Justice Rehnquist indicates that constitutional avoidance takes on a more prominent role when an administrative interpretation potentially infringes on states' rights. *See id.* at 12 ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.").

80. U.S. Const. amend. V.

81. *See* United States v. Salerno, 481 U.S. 739, 746 (1987).

82. U.S. Const. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

83. *Salerno*, 481 U.S. at 746 (citations omitted).

84. *Compare* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding that the Fourteenth Amendment due process clause did not protect against double jeopardy in a state criminal trial because such a protection was not implicit in the concept of ordered liberty), *with* Benton v. Maryland, 395 U.S. 784, 795-96 (1969) (holding that the Fourteenth Amendment due process clause incorporated the protection against double jeopardy).

85. *See e.g.*, Duncan v. Louisiana 391 U.S. 145 (1968) (Sixth Amendment right to jury trial); Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment prohibition on cruel and unusual punishment); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment right to be free from unreasonable searches and seizures); Fiske v. Kansas, 274 U.S. 380 (1927) (First Amendment right to freedom of speech).

86. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

87. *See* Roe v. Wade, 410 U.S. 113 (1973).

88. John E. Nowak & Ronald D. Rotunda, Constitutional Law 438 (6th ed. 2000); *see also* Sanford H. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 Yale L.J. 319, 328 (1957) (discussing four primary sources

into account whether a right is best protected by the courts or by the legislature.[89] The right to be free from detention has been recognized as a fundamental liberty interest, a right implicit in the concept of ordered liberty.[90]

To prevent the government from engaging in conduct that shocks the conscience, any infringement on a fundamental right must survive strict scrutiny. That is, the infringement must be narrowly tailored to further a compelling government interest.[91] Detention does not survive this scrutiny and is a violation of substantive due process if it is for the purpose of punishment without a trial.[92] Civil, non-punitive detention, however, is not a violation of due process if it is applied to achieve a compelling end and is narrowly tailored to reach this end.[93] The Court has held that detention without bail prior to trial is justified—provided there is a hearing—by the compelling government interest in preventing certain dangerous defendants from committing crimes while released on bail, where the detention is strictly limited to defendants facing particular charges and is for a limited time.[94] The Court has also ruled that civil detention passes the strict scrutiny test where the detainee is shown through a hearing to be insane and a danger to the community.[95]

If a government action that deprives an individual of life, liberty, or property survives substantive due process review, it must still comply with the requirements of procedural due process.[96] Procedural due process requires that the procedure by which a person is deprived of life, liberty, or property be fair.[97] In the context of a criminal trial, this requires, among other things, that there be proof beyond a reasonable doubt before a defendant is punished.[98] In the context of commitment

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the Court has looked to: "(1) the opinions of the progenitors and architects of American institutions; (2) the implicit opinions of the policymaking organs of state governments; (3) the explicit opinions of other American courts that have evaluated the fundamentality of [the right]; or (4) the opinions of other countries in the Anglo-Saxon tradition").

89. *See* Nowak & Rotunda, *supra* note 88, at 439.

90. *See* Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (White, J.) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . . ."); United States v. Salerno, 481 U.S. 739, 750 (1987) (Rehnquist, J.) ("On the other side of the scale . . . is the individual's strong interest in liberty. We do not minimize the importance and fundamental nature of this right.").

91. *See* Reno v. Flores, 507 U.S. 292, 302 (1993) (Scalia, J.) ("[Substantive due process] forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.").

92. *See Salerno*, 481 U.S. at 746.

93. *See id.* at 755.

94. *See id.*

95. *See Foucha*, 504 U.S. at 81-82.

96. *See Salerno*, 481 U.S. at 746.

97. *See id.*

98. *See, e.g.*, Davis v. United States, 160 U.S. 469, 493 (1895) (Harlan, J.) ("No man should be deprived of his life under the forms of law unless the jurors who try

to a mental institution, the government must show clear and convincing evidence in a hearing that a person is a threat to himself or to society before he can be detained.[99] In the context of welfare benefits granted by statute, a person is entitled to an administrative hearing and to confront witnesses before those benefits are taken away.[100]

The degree of process that must be provided depends on the nature of the right or interest asserted.[101] For example, a person's liberty interest in being free from bodily restraint[102] is stronger than his or her property interest in welfare benefits granted by statute.[103] Basically, the strength of the right asserted dictates the measure of process that is due.[104]

The Fifth Amendment is also generally understood to incorporate equal protection as a function of due process.[105] If an infringement on a right or interest is based upon a suspect classification, it must pass strict scrutiny review.[106] Whether a classification is suspect depends on whether it targets groups that are "discrete and insular minorities" subject to democratic process breakdown[107]—that is, a group that is vulnerable to the dictates of the majority and has also been, to some degree, excluded from the political process. The Supreme Court has granted this protection to racial minorities[108] and, to a lesser extent, women.[109]

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him are able . . . to say that the evidence before them . . . is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."); Nowak & Rotunda, *supra* note 88, at 553.

99. *See Foucha*, 504 U.S. at 81-82.

100. *See* Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970).

101. *See id.* at 262-63; Landon v. Plasencia, 459 U.S. 21, 34 (1982).

102. *See Salerno*, 481 U.S. at 750.

103. *See Goldberg*, 397 U.S. at 262 n.8.

104. *See id.* at 263-64. Compare the Court's test in *Mathews v. Eldridge*:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 334-35 (1976). *See also* Connecticut v. Doehr, 501 U.S. 1, 10-11 (1991) (applying a similar test to a statute providing for civil attachment procedures between private parties).

105. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

106. *Id.*

107. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

108. *See e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (applying strict scrutiny to invalidate a statute that prohibited interracial marriages on the grounds that there could be no legitimate purpose to such a prohibition).

109. *See* Craig v. Boren, 429 U.S. 190 (1976) (requiring that distinctions based on gender be for an important governmental purpose achieved through substantially related means).

Historically, however, aliens have not fared well under due process analysis. In the late nineteenth century, the Court decided a series of now infamous cases involving the exclusion of Asian immigrants.[110] These cases established the plenary power of the legislative and executive branches to regulate immigration,[111] which the government has subsequently invoked to deny aliens the protection of due process.[112] Notably, the power to enact immigration laws is not enumerated in the Constitution.[113] The Court, however, based this power on principles of international law and natural law that entitled sovereign nations to control their borders.[114] Thus, the power over immigration was understood to be essentially a function of foreign relations, the province of the federal government, and more specifically, the political branches.[115]

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110. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889); Nishimura Ekiu v. United States, 142 U.S. 651 (1892); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

111. *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 Harv. L. Rev. 853, 853-54 (1987) [hereinafter Henkin, Chinese Exclusion *and Its Progeny*]; Maureen Callahan VanderMay, *The Misunderstood Origins of the Plenary Power Doctrine*, 35 Willamette L. Rev. 147, 151-52 (1999).

112. *See e.g.*, Zadvydas v. Underdown 185 F.3d 279, 289 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (2000) (No. 99-7791) ("[T]he governmental power to exclude or expel aliens may restrict aliens' constitutional rights when the two come into direct conflict."). *But see* Vandermay, *supra* note 111, at 165 (arguing that this understanding of the plenary power doctrine is based on a misreading of the cases establishing the doctrine).

113. *See* Henkin, Chinese Exclusion *and Its Progeny*, *supra* note 111, at 858.

114. *See Nishimura Ekiu*, 142 U.S. at 659. The Court stated:

> 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.

Id.; *see also Chae Chan Ping*, 130 U.S. at 603-04 ("That the government of the United States . . . can exclude aliens from its territory is a proposition which we do not think open to controversy. . . . It is a part of its independence."). The Court in *Chae Chan Ping* went on to justify this notion of sovereignty, quoting Chief Justice John Marshall:

> 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 . . . . All exceptions, therefore, . . . must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Id. at 604.

115. *See Fong Yue Ting*, 149 U.S. at 713 ("The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress . . . ."); *Nishimura Ekiu*, 142 U.S. at 659 ("[The power over immigration] is vested in the national government, to which the Constitution has committed the entire control of international relations . . . . It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress . . . .").

From its inception, the plenary power was subject to some constitutional limitations. In fact, each of the decisions that established the plenary power doctrine contains language indicating that the power over immigration, while exclusive to the executive and legislative branches of the federal government, was limited by the Constitution.[116] Furthermore, in *Fong Yue Ting v. United States*,[117] the Court noted that aliens present in the United States, although subject to deportation by Congress, were protected by the "safeguards of the Constitution."[118] A few years later, in *Wong Wing v. United States*,[119] the Court ruled that, although Congress could exclude or expel aliens for whatever reasons it prescribed, it could not impose punishment in the form of imprisonment at hard labor on aliens without a trial, as this violated the Fifth and Sixth Amendments of the Constitution.[120]

In the 1950s, the Supreme Court decided another series of cases that expanded the deference courts would give the legislative and executive branches in regulating immigration, while at the same time acknowledging the constitutional limits of this deference. Each of these cases involved regulations that restricted the rights of aliens under the guise of national security, in order to protect the country from communist infiltration. In 1950, the Court in *United States ex rel. Knauff v. Shaughnessy*[121] ruled that excludable aliens had no constitutional rights with regard to their application to enter the country.[122] Two years later, in *Carlson v. Landon*,[123] the Court held that aliens could be held without bail during deportation

116. *See Fong Yue Ting*, 149 U.S. at 713 ("The power to exclude or to expel aliens . . . is vested in the political departments of the government . . . except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene."); *Nishimura Ekiu*, 142 U.S. at 660 ("An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful." (italics in original)); *Chae Chan Ping*, 130 U.S. at 604 ("The powers to declare war, make treaties . . . 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.").

117. 149 U.S. 698 (1893).

118. *Id.* at 724.

119. 163 U.S. 228 (1896).

120. *See id.* at 233-34. The Court further noted that just as the protections of the Fourteenth Amendment applied to all persons, including aliens, within the territorial jurisdiction of the United States, so too did the protections of the Fifth and Sixth Amendments. *Id.* at 238.

121. 338 U.S. 537 (1950).

122. *See id.* at 542-43. The Court further noted that the power to exclude aliens is rooted in the foreign affairs power. *Id.* at 542 ("The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."); *see also supra* notes 114-15 and accompanying text.

123. 342 U.S. 524 (1952).

proceedings.[124] Although the Court invoked the plenary power doctrine, it noted that "[t]his power is, of course, subject to judicial intervention under the 'paramount law of the Constitution.'"[125] The Court, however, found no due process violation because the purpose of detention during deportation proceedings was not punishment, but rather was to effect deportation and to protect the public from communist sympathizers.[126] Yet the Court was careful to note that it was not addressing the issue of prolonged detention.[127]

Prolonged detention was at issue a year later, however, when the Court decided *Shaughnessy v. United States ex rel. Mezei*.[128] Building on the ruling in *Knauff*, the Court held that an excludable alien, who was stateless and had no country to which he could return, could be detained indefinitely on the basis of secret evidence.[129] The Court's ruling rested on two propositions: first, that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control;"[130] and second, that "[i]n the exercise of these powers, Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife."[131] The Court reasoned that the government's need to control the country's borders and protect its citizens during times of crisis justified the continued detention of excludable aliens without a hearing.[132] The Court, however, distinguished between deportable aliens, who had entered the United States either legally or illegally, and excludable aliens, who were detained at the "threshold of initial entry."[133] Aliens who had entered the country could only be expelled after proceedings that satisfied constitutional due process requirements.[134] On the other hand, aliens who had been stopped at the gate, so to speak, were subject to exclusion without constitutional due process protection.[135] The Court further noted that the detention of an excluded alien on American soil does not afford her any constitutional rights.[136] She is considered to be legally excluded from the country, even though she is physically within the country.[137] This has come to be known as the

124. *See id.* at 545-46.
125. *Id.* at 537 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893)).
126. *See id.* at 541-42.
127. *See id.* at 546.
128. 345 U.S. 206 (1953).
129. *See id.* at 207, 214-16.
130. *Id.* at 210.
131. *Id.*
132. *See id.* at 210-11.
133. *Id.* at 212.
134. *See id.*
135. *See id.*
136. *See id.* at 215.
137. *See id.*

"entry fiction."[138] Relying on this "fiction," the Court held that excluded aliens who are detained in the United States do not gain any constitutional rights by virtue of their presence.[139]

The current reach and limitations of the plenary power doctrine are uncertain. Shortly after the decision in *Mezei*, the Court employed the doctrine of constitutional avoidance to hold that the Attorney General was not authorized to require aliens to answer questions unrelated to their availability for deportation as part of a program of supervision while they were awaiting deportation.[140] The Court noted that allowing these questions would raise "issues touching liberties that the Constitution safeguards, even for an alien 'person' . . . ."[141] In *Hampton v. Mow Sun Wong*[142] the Court refused to extend the plenary power to allow a regulation promulgated by the Civil Service Commission that would have prevented aliens from holding most

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138. *See e.g.*, Chi Thon Ngo v. INS, 192 F.3d 390, 397 (3d Cir. 1999) ("[T]hese holdings are based on the fiction that 'detention is not punishment,' and the 'entry' fiction that an excludable alien 'stands at the border' even when he has been physically present within the country for years.").

139. *See Mezei*, 345 U.S. at 215. *Mezei* and its "fictions" did not win by a landslide. In fact, Justices Black, Douglas, Jackson, and Frankfurter all dissented vigorously. Justice Black wrote:

> The Founders abhorred arbitrary one-man imprisonments. Their belief was—[and] our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken 'without due process of law.' This means to me that neither the federal police nor federal prosecutors nor any other governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice.

Id. at 218.

In his dissent, Justice Jackson argued that the indefinite detention of Mezei was no longer a means of exclusion, but rather an alternative to exclusion. *See id.* at 227. Jackson thought that Mezei's detention clearly constituted a deprivation of liberty that was protected by due process. *See id.* at 222-23. Jackson argued that although Mezei's detention might be justified if it was essential to the safety of the state, and thus it could survive substantive due process review, *see id.* at 223-24, such detention would still have to comply with procedural due process, which required at least a fair hearing with fair notice of the charges. *See id.* at 227-28. He remarked, sardonically:

> Because the respondent has no right of entry, does it follow that he has no rights at all? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law? Suppose the authorities decide to disable an alien from entry by confiscating his valuables and money. Would we not hold this a taking of property without due process of law? Here we have a case that lies between the taking of life and the taking of property; it is the taking of liberty. It seems to me that this, occurring within the United States or its territorial waters, may be done only by proceedings which meet the test of due process of law.

Id. at 226-27.

140. *See* United States v. Witkovich, 353 U.S. 194, 201-02 (1957).

141. *Id.* at 201.

142. 426 U.S. 88 (1976).

government jobs.[143] The Court held that aliens were entitled to equal protection under the law[144] and invalidated the regulation on the grounds that it was not sufficiently related to immigration policy, nor was it justified by speculative assertions that it would promote administrative efficiency.[145] In sum, the Court's jurisprudence on the plenary power seems to afford the political branches of the government some deference where a statute, regulation, or practice is closely related to immigration policy. This deference is strongest where the governmental act deals with excludable aliens. These aliens may be excluded, even at the cost of constitutional rights that are guaranteed to all persons.

Recent Supreme Court decisions have passed on the opportunity to further define the parameters of the plenary power doctrine. In 1993, the Court ruled that unaccompanied juvenile aliens had no substantive due process right to be placed in the custody of a willing private custodian rather than remain in the custody of the INS.[146] Justice Scalia, writing for the Court, noted that "in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens.'"[147] Nonetheless, the Court recognized that aliens present in the United States were afforded substantive and procedural due process protection, but held that the right asserted was not a fundamental one, since all children are in one form of custody or another.[148] In 1999, the Court held that a group of illegal aliens could not bring a selective prosecution challenge to deportation proceedings against them.[149] Justice Scalia, rather than relying on the plenary power doctrine, noted that the bar for selective prosecution claims was high in criminal cases, and higher still in deportation proceedings because deportation was not punishment.[150] Justice Scalia did point to foreign policy considerations involving immigration that made the government's interest more compelling.[151] However, he avoided explicit discussion of the plenary power.[152]

C. *International Law*

International law also provides standards relevant to determining the lawfulness of the indefinite detention of aliens. International law is derived from three principle sources: (1) treaties or international

143. *See id.* at 101-02.
144. *See id* at 102-03.
145. *See id.* at 115-17.
146. *See* Reno v. Flores, 507 U.S. 292, 302-03 (1993).
147. *Id.* at 305-06 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).
148. *See id.* at 301-03.
149. *See* Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 488 (1999).
150. *See id.* at 489-91.
151. *See id.* at 490-91.
152. *See id.*

agreements; (2) international custom; and (3) the "general principles common to the major legal systems of the world."[153] Of these, treaties and international custom are the main sources of international law.[154] Treaties create binding obligations between parties in international law. Also, treaties may create obligations enforceable domestically and may contribute to customary international law.[155]

"Customary international law results from a general and consistent practice of states [generality] followed by them from a sense of legal obligation [opinio juris]."[156] States may opt out of a developing customary international legal practice by clearly and consistently indicating their intent not to be bound to international custom.[157] United States courts generally ascertain principles of customary international law "by consulting the works of jurists, writing professedly on public laws; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law."[158]

International law binds the international community of states. [159] Also, many states incorporate international law into their domestic legal systems.[160] The United States, in addition to being bound internationally, incorporates international law into domestic law.[161] International law enforced domestically consists primarily of treaty-based law and customary international law.[162]

The U.S. Constitution grants the authority to incorporate treaties into domestic law. According to the Constitution, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[163] Interestingly, the treaty power, not unlike the plenary power doctrine, allows the federal

153. Restatement (Third) of the Foreign Relations Law of the United States § 102 (1987) [hereinafter Restatement (Third)]. Judicial decisions and the writings of scholars have also been considered a fourth source of international law. *See* Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 1060, T.S. No 993, 3 Bevans 1179, 1224 (1945). United States courts generally consider these factors as a means of discerning customary international law.

154. *See* Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. Cin. L. Rev. 367, 368 (1985) [hereinafter Lillich, *Invoking International Law*].

155. Restatement (Third), *supra* note 153, § 102 cmt. f.

156. *Id.* § 102(2).

157. *Id.* § 102 cmt. d.

158. United States v. Smith, 18 U.S. 153, 160-61 (1820); *see also* Jama v. INS, 22 F. Supp. 2d 353, 362 (D.N.J. 1998) (citing *United States v. Smith* and finding that abuse of immigration detainees was a violation of customary international law and thus actionable under the Alien Tort Claims Act).

159. Restatement (Third), *supra* note 153, pt. 1, ch. 1, introductory note.

160. *Id.*

161. *Id.*

162. *See id.*; Lillich, *Invoking International Law*, *supra* note 154, at 368.

163. U.S. Const. art. VI, § 2.

government to reach beyond some of the limitations placed on it by the Constitution, particularly those involving the powers reserved to the states.[164] The treaty power, however, does not allow the federal government to infringe on the rights guaranteed to individuals through the Bill of Rights.[165]

Treaties that are self-executing, that is, treaties not requiring implementing legislation by Congress, are considered federal law and trump prior inconsistent statutes under a last-in-time principle.[166] Therefore, self-executing treaties are enforceable in U.S. courts, but they may be overruled by a subsequent statute.[167] Treaties that require implementing legislation are considered non-self-executing, and are not enforceable in U.S. courts until Congress has passed legislation to implement them.[168] Another way to view this distinction is as between those treaties "that require an act of the legislature to remove or modify the courts' enforcement power (and duty)" (i.e. self-executing), and "those that require an act of the legislature to authorize judicial enforcement" (i.e. non-self-executing).[169]

The determination of whether a treaty is self-executing or not rests generally on: (1) the intent of the parties; (2) whether the treaty, by

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164. *See* Missouri v. Holland, 252 U.S. 416, 433-35 (1920) (holding that the need for the nation to speak with one voice in foreign affairs justified federal enforcement of a treaty that infringed on the powers reserved to the states under the Constitution).

165. *See* Reid v. Covert, 354 U.S. 1 (1957) (holding that Congress' powers are limited by the Bill of Rights and noting that treaties are also subject to this limitation).

166. *See* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) ("[A self-executing treaty] can be deemed . . . the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control."); Foster v. Neilson, 27 U.S. 253, 314 (1829) ("Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision."); Lillich, *Invoking International Law*, *supra* note 154, at 368. The basic premise of the last in time rule is that a treaty can be overruled by a statute and vice versa. The later of the two will be controlling.

167. *See supra* note 166. The orthodox view that treaties are, with some exceptions, *see* infra notes 168-70 and accompanying text, self-executing and directly enforceable in U.S. courts has come under recent criticism. *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955 (1999) (arguing that the Framers of the Constitution did not intend treaties to have domestic effect without implementing legislation by Congress). *But see*, Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 Colum. L. Rev. 2095 (1999) (arguing that a careful examination of history shows that the framers did intend treaties to be self-executing, in large part to ensure swift compliance by the Nation to international obligations); Carlos Manuel Vázquez, *Laughing at Treaties*, 99 Colum. L. Rev. 2154 (1999) (arguing that the text, structure and doctrine of the Constitution clearly give treaties status as domestic law).

168. *See Foster*, 27 U.S. at 314; Lillich, *Invoking International Law*, *supra* note 154, at 368.

169. Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 696 (1995) [hereinafter, Vázquez, *Four Doctrines*].

its terms, addresses obligations to the legislature; (3) whether the treaty requires action, such as the appropriation of funds, which can only be accomplished by the legislature; and (4) whether it confers a cause of action on an individual seeking to enforce the treaty.[170] In recent years, the United States has signed several human rights treaties, but it has attached declarations that they are non-self-executing.[171] In the absence of such declarations, these treaties would probably be self-executing given consideration of the above factors because, by their terms, they create readily enforceable rights and do not require implementing legislation.[172] However, lower courts have accepted less explicit indications of intent of non-self-execution as controlling and presumably will accept explicit non-self-executing declarations as controlling.[173] Commentators, on the other hand, have criticized these declarations as inconsistent with two important purposes of the Constitution's Supremacy Clause: to avoid conflicts with other nations resulting from treaty violations, and to enlist the judiciary in carrying out international treaty obligations.[174] Additionally, non-self-executing declarations create unjustifiable conflict between the United States' obligations under international law and its domestic law.[175] Even if a treaty is non-self-executing, it is still the supreme law of the land, and the political branches of government—Congress and the President—have an international and constitutional obligation to implement legislation or regulations to take care that the law is executed.[176]

In addition to consistently declaring treaties non-self-executing, the United States has also recently ratified several human rights treaties subject to extensive reservations, understandings, and declarations, which affect the substantive content of the obligations undertaken pursuant to these treaties.[177] Under international law, a reservation is a unilateral statement made by a party state when entering into a treaty that limits or modifies the legal obligations undertaken by that

170. *See id.* at 696-97.
171. *See id.* at 706 & n.54.
172. *See id.*
173. *See* Vázquez, *Four Doctrines*, *supra* note 169, at 707.
174. *See id.* at 708 & n.61.
175. *See* Malvina Halberstam, *United States Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women*, 31 Geo. Wash. J.Int'l L. & Econ. 49, 75 (1997); Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DePaul L. Rev. 1257, 1257-59 (1993).
176. *See* Restatement (Third), *supra* note 153, pt. 1 ch. 1, introductory note; Jordan J. Paust, *Customary International Law and Human Rights Treaties* are *Law of the United States*, 20 Mich. J. Int'l L. 301, 322-35 (1999).
177. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129, 139 (1999); *see also* Louis Henkin et al., Human Rights 784 (1999) [hereinafter Henkin, Human Rights].

state.[178] States may enter reservations to a treaty unless: (1) reservations are generally prohibited by the terms of the treaty; (2) a particular reservation is one which is prohibited by the treaty; or (3) the reservation is incompatible with the object and purpose of the treaty.[179] Declarations and understandings also modify the obligations that a state purports to enter into under a treaty.[180] A declaration can have the same effect as a reservation, but, if it modifies or limits the obligations of a state, it is subject to the same limitations as a reservation.[181] An understanding, on the other hand, is an interpretation of the agreement a state makes in a treaty.[182] If an understanding reflects the accepted view of the agreement, it is valid.[183] If an understanding is contrary to the purpose of the treaty, however, another state party that is not willing to accept it may challenge that understanding.[184]

Customary international law is also enforceable in U.S. courts.[185] Although customary international law is not explicitly mentioned in the Constitution, the Supreme Court has held that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[186] Customary international law has the same status as treaty law and trumps prior inconsistent statutes.[187] However, subsequent federal statutes, and in some cases judicial and executive acts, can overrule customary international law.[188] Even so, some customary

178. Restatement (Third), *supra* note 153, § 313 cmt. a.
179. *Id.* § 313.
180. *Id.* § 313 cmt. g.
181. *Id.*
182. *See* Restatement (Third), *supra* note 153, § 313 cmt. g.
183. *Id.*
184. *Id.*
185. The Paquete Habana, 175 U.S. 677, 700 (1900).
186. *Id.*; *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (confirming that international law is federal law); Henkin, Chinese Exclusion *and its Progeny*, *supra* note 111, at 865-66 (noting how the incorporation of international law into U.S. domestic law has its roots in the corresponding status of international law in English law and the law of the American Colonies); Beth Stephens, *The Law of our Land: Customary International Law as Federal Law After* Erie, 66 Fordham L. Rev. 393 (1997) (defending the position that international law is federal law, not common law, and thus still enforceable in federal courts and binding on the states).
187. Lillich, *Invoking International Law*, *supra* note 154, at 368.
188. *See Paquete Habana*, 175 U.S. at 700 ("[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . ."); Garcia-Mir v. Meese, 788 F.2d 1446, 1454-55 (11th Cir. 1986) (holding that the controlling act of the Attorney General, an executive officer, as well as the judicial act of the Court in *Mezei*, precluded the international law prohibition against prolonged arbitrary detention from being applied to the indefinite detention of excludable Cuban aliens). *But see* Henkin, Chinese Exclusion *and its Progeny*, *supra* note 111, at 873-85 (arguing that the notion that customary international law can be preempted by legislative, executive and judicial acts is based on dicta, and has never been supported by a Supreme Court

international law is considered to be so universally accepted and fundamental that it cannot be legally overruled or derogated from. These principles of international law are known as jus cogens.[189] For example, genocide is considered to be a violation of jus cogens.[190]

In addition to applying treaty-based law and customary international law directly, U.S. courts invoke international law in the interpretation of federal law.[191] In 1804, Chief Justice Marshall, writing for the Court, held that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains."[192] Since that time the *Charming Betsy* doctrine has been consistently invoked to harmonize congressional statutes with principles of international law.[193] This doctrine allows courts to effect the presumed will of Congress to legislate consistently with international law and to fulfill the judicial branch's obligation to apply international law.[194]

The United States has entered into several treaties that give rise to international obligations that potentially conflict with the indefinite detention of aliens. While these treaties may or may not be directly enforceable in United States courts because they may or may not be self-executing, the United States is obligated internationally by the terms of these treaties. Also, the terms of these treaties are evidence of customary international law, which is directly enforceable in U.S. courts.[195]

In 1945, the United States signed and ratified the United Nations Charter,[196] "a multilateral treaty to which virtually all states are parties."[197] The U.N. Charter lists one of its central purposes as "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[198] In addition, the Charter obligates states to promote "universal respect for, and observance of, human rights and fundamental freedoms for all . . ."[199] and "to take joint and separate

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holding).

189. Restatement (Third), *supra* note 153, § 102 cmt. k.

190. *See id.* § 702 cmt. n.

191. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *supra* notes 64-67 and accompanying text.

192. *Charming Betsy*, 6 U.S. at 118.

193. *See, e.g.*, Trans World Airlines v. Franklin Mint, Corp., 466 U.S. 243, 252 (1984) (noting that in the absence of clear congressional intent, the Court would assume that international obligations under a treaty had not been abrogated or modified).

194. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 495-99 (1997).

195. *See* Restatement (Third), *supra* note 153, § 102 cmt. i.

196. *See* Lillich, *Invoking International Law*, *supra* note 154, at 371.

197. Henkin, Human Rights, *supra* note 177 at 320.

198. U.N. Charter art. 1, para. 3.

199. *Id.* art. 55.

action" to accomplish these goals.[200] The human rights and fundamental freedoms that are protected by the U.N. Charter are generally understood to be those listed in the Universal Declaration of Human Rights ("Universal Declaration").[201] These include the right to "life, liberty and security of person,"[202] the right to personhood,[203] the right to "equal protection of the law,"[204] and the right not to be arbitrarily detained.[205]

While the U.N. Charter is a treaty that the United States has signed and ratified, and is thus the supreme law of the land, whether it is enforceable domestically is a subject of debate.[206] In 1952, the California Supreme Court overruled a lower state court's decision, which had held that the U.N. Charter was self-executing.[207] In overturning the decision, the court remarked that "[t]he charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs. We are satisfied, however, that the charter provisions relied on by plaintiff were not intended to supersede existing domestic legislation. . . ."[208]

Lower courts have come to accept the view that the U.N. Charter, and through it, the principles of the Universal Declaration, are non-self-executing, although the Supreme Court has never addressed the issue.[209] Indeed, the California Supreme Court's ruling has been criticized on the following grounds. First, critics argue that the provisions of the Charter should be read broadly and not strictly limited by the original intent of the drafters, just as broad provisions of the U.S. Constitution have been expanded over time to protect individual rights.[210] Second, given the development of human rights laws and norms, the human rights provisions of the Charter arguably are now less vague than the California court maintained in 1952.[211] Third, even if all of the rights in the Universal Declaration are not self-executing through the Charter, the provisions of non-

200. *Id.* art. 56.

201. *See* Restatement (Third), *supra* note 153, § 701 cmt. d; Lillich, *Invoking International Law*, *supra* note 154, at 378. The Universal Declaration enumerates rights thought to be universal to all persons. *See* Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration], *reprinted in* International Human Rights Documentary Supplement, at 17 (Richard B. Lillich and Hurst Hannum eds. 1995).

202. Universal Declaration, *supra* note 201, art. 3, at 18.

203. *Id.* art. 6, at 18.

204. *Id.* art. 7, at 18.

205. *Id.* art. 9, at 18.

206. *See* Lillich, *Invoking International Law*, *supra* note 154, at 376.

207. *See* Sei Fujii v. State, 38 Cal. 2d 718, 722-25, 242 P.2d 617, 620-22 (1952).

208. *Id.* at 724-25, 242 P.2d at 622.

209. *See* Lillich, *Invoking International Law*, *supra* note 154, at 376.

210. *See id.* at 377.

211. *See id.* at 377-78.

discrimination are now sufficiently defined to be considered self-executing.[212] Fourth, when the United States signs and ratifies a treaty, each department of the government is obligated to carry into effect the terms of the treaty. Therefore, the judicial branch, as a department of the government, is obligated to give effect to the terms of U.S. treaties within its jurisdiction.[213] Fifth, the test for determining whether a treaty is self-executing has developed since 1952.[214] Under a more recent test, which focuses on whether a treaty provides "direct, affirmative, and judicially enforceable rights,"[215] a court might determine that the U.N. Charter is self-executing.[216]

Regardless of whether the U.N. Charter is self-executing, the principles enumerated in the U.N. Charter and the Universal Declaration contribute to the understanding of customary international law. In fact, the principles of the Universal Declaration are generally considered to be part of customary international law among nations.[217]

The United States also signed and ratified the International Covenant on Civil and Political Rights ("ICCPR") in 1992.[218] Under this treaty, every person within the jurisdiction of a party state has "the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law."[219] In addition, "[e]veryone shall have the right to recognition everywhere as a person before the law."[220] The ICCPR also provides for equal protection of the rights of individuals.[221] These rights, however, with the exception of the right to personhood before the law, may be derogated from to the extent strictly required to maintain public order in time of emergency.[222]

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212. *See id.* at 379.
213. *See id.* at 380.
214. *See id.* at 380-82.
215. *Id.* at 381 (quoting People of Saipan *ex rel.* Guerrero v. United States Dept. of Interior, 502 F.2d 90, 97 (9th Cir. 1974)).
216. *See id.* at 382.
217. *See id.* at 394-96; Restatement (Third), *supra* note 153, § 701 cmt. d. ("[I]t is increasingly accepted that the states parties to the Charter are legally obligated to respect some of the rights recognized in the Universal Declaration."); Henkin, Human Rights, *supra* note 177, at 322 ("It is also commonly accepted that at least some of the provisions of the [Universal] Declaration were, or may have become, obligations under customary law.").
218. Henkin, Human Rights, *supra* note 177, at 784.
219. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 9, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR] *reprinted in* International Human Rights Documentary Supplement, *supra* note 201, at 33, 36.
220. *Id.* art. 16, at 39.
221. *Id.* art. 2, at 34.
222. *Id.* art. 4, at 34-35.

In signing the ICCPR, the United States attached an understanding that allows discrimination on the basis of race, sex, or other distinctions when it is rationally related to a legitimate government interest.[223] Moreover, the United States attached a declaration that the ICCPR is non-self-executing.[224] While these limitations potentially diminish the international obligations undertaken by the United States,[225] the ICCPR still contributes to, and, to a certain extent, reflects the substance of customary international law.[226]

The United States is also party to the Charter of the Organization of American States ("OAS").[227] The OAS is part of the regional Inter-American human rights system.[228] Through its membership in the OAS, the United States is generally considered to be bound to the terms of the American Declaration of the Rights and Duties of Man ("American Declaration").[229] The American Declaration protects the right to life, liberty and security,[230] the right to equal protection,[231] the right to personhood before the law,[232] and the right to due process.[233] The rights protected under the American Declaration may be binding as incorporated through the OAS Charter or as an indication of customary international law norms.[234] The Inter-American system also includes the American Convention on Human Rights ("American Convention").[235] The American Convention protects the right to recognition as a person before the law,[236] freedom from

223. International Covenant on Civil and Political Rights: The Administration's Proposed Reservations, Understandings and Declarations, *reprinted in* Richard B. Lillich and Hurst Hannum, International Human Rights: Problems of Law, Policy, and Practice 251, 252 (1995) [hereinafter Lillich, International Human Rights]. Notably, the rational relationship required in this understanding is lower than the strict scrutiny review of suspect classifications compelled by U.S. constitutional jurisprudence.

224. *Id.* at 253.

225. *See supra* notes 171-84 and accompanying text.

226. *See supra* note 155 and accompanying text.

227. Henkin, Human Rights, *supra* note 177, at 524.

228. *Id.* at 523-24.

229. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, 1948 [hereinafter American Declaration], *reprinted in* International Human Rights Documentary Supplement, *supra* note 201, at 137; *see* Henkin, Human Rights, *supra* note 177, at 343; Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 Fordham L. Rev. 2351, 2381-82 (2000) (arguing that international human rights standards, including those under the American Declaration, have given rise to an evolving standard of decency that obligates the United States to improve prison conditions).

230. American Declaration, *supra* note 229, ch. 1, art. I, at 138.

231. *Id.* art. II, at 138.

232. *Id.* art. XVII, at 140.

233. *Id.* art. XXVI, at 142.

234. *See* Henkin, Human Rights, *supra* note 177, at 343.

235. *See id.* at 523-24.

236. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, pt. 1, ch. 2, art. 3, O.A.S.T.S., No. 36, at 1, 9 I.L.M. 673 (entered into force July 18,

punishment other than for a crime,[237] the right to personal liberty and security, which includes the right to be free from arbitrary imprisonment,[238] and the right to equal protection of the law.[239] Although the United States has not ratified the American Convention, there is some support for the proposition that it further clarifies the obligations of all parties to the OAS.[240] The American Convention grants expanded authority to the Inter-American Commission to review violations of the American Convention and the American Declaration committed by OAS members.[241] Therefore, as a member of the OAS, the United States is subject to review by the Commission.[242] Additionally, the American Declaration and the American Convention are further evidence of customary international law norms.[243]

These treaties, in addition to being directly enforceable to one degree or another in United States courts, indicate emerging customary international law norms that are relevant to the indefinite detention of aliens. These norms include the right to personhood, the right to liberty, the right to be free from prolonged arbitrary detention, the right to due process and the right to equal protection.[244] Of these, the *Restatement (Third) of the Foreign Relations Law of the United States* recognizes that prolonged arbitrary detention and systematic racial discrimination are violations of customary international law[245] and perhaps even violations of jus cogens.[246] However, customary international law is constantly developing, and it is therefore possible that the *Restatement's* understanding of customary international law is outdated and thus incomplete.[247] Moreover, the *Restatement* itself emphasized that its understanding was conservative, erring on the side of under-inclusion.[248]

Whether the indefinite detention of aliens violates these norms has not been conclusively decided. United States courts have generally

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1978) [hereinafter American Convention], *reprinted in* International Human Rights Documentary Supplement, *supra* note 201, at 145, 146.

237. *Id.* art. 5, at 146-47.

238. *Id.* art. 7, at 147.

239. *Id.* art. 24, at 152.

240. *See* Henkin, Human Rights, *supra* note 177, at 343, 523-24.

241. *See id.* at 523-24.

242. *See id.* at 524.

243. *See supra* note 155 and accompanying text.

244. *See supra* notes 201-39 and accompanying text.

245. Restatement (Third), *supra* note 153, § 702(e)-(f).

246. *See id.* § 702 cmt. n.

247. *See id.* § 702 cmt. a.

248. *Id.* ("This section includes as customary law only those human rights whose status as customary law is generally accepted (as of 1987) and whose scope and content are generally agreed. The list is not necessarily complete, and is not closed . . . ." (citations omitted)); *see* Richard B. Lillich, Remarks, 1985 Am. Socy. Intl. L. Proceedings 84, *reprinted in* Lillich, International Human Rights, *supra* note 223, at 163 (noting that the list in the Restatement is a "cautious one").

recognized that the customary international law prohibition against prolonged arbitrary detention is in conflict with the indefinite detention of aliens.[249] However, this has not always resulted in judicial enforcement of the norm.[250] Furthermore, the Working Group on Arbitrary Detention, a body of the United Nations, considers detention arbitrary either when there is no legal basis for the detention or when the detention results from a process that does not comply with international standards for a fair trial.[251] In addition, the Human Rights Committee, a body created by the ICCPR to review states' compliance with that treaty, expressed concern at the lower degree of due process protection given to excludable aliens and the indefinite detention of aliens in the United States.[252] Also, Human Rights Watch, a non-governmental organization, argued that the detention of immigration detainees violates international norms when aliens are held indefinitely and are not informed when, or if, they will be released. [253] Thus, even if the detention was initially legal, it becomes prolonged and arbitrary by virtue of its indefiniteness.[254]

The United States Supreme Court recently granted certiorari to decide the substantial questions of what protections are owed to aliens under the United States Constitution and international law.[255] The Court agreed to resolve a circuit split between the Ninth and Fifth Circuits regarding whether the current immigration statute authorizes the Attorney General to detain indefinitely both excludable and deportable aliens.[256] Part II describes this circuit split.

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249. *See e.g.,* Fernandez v. Wilkinson, 505 F. Supp. 787, 795-800 (D. Kansas, 1980) (looking to several international human rights treaties, including the Universal Declaration, The American Convention, and the ICCPR to identify a customary international law prohibition against prolonged arbitrary detention and holding that the indefinite detention of aliens violates this prohibition), *aff'd on other grounds sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

250. *See e.g,* Garcia-Mir v. Meese, 788 F.2d 1446, 1454-55 (11th Cir. 1986) (holding that acts of the Attorney General were controlling executive acts that preempted the application of the international law prohibition against prolonged arbitrary detention).

251. *See* Fact Sheet No. 26, The Working Group on Arbitrary Detention, § IV(B), *available at* http://www.unhrchr.ch/html/menu6/2/fs26.htm (last visited Jan. 30, 2001).

252. *See Concluding Observations of the Human Rights Committee: United States of America,* U.N. Hum. Rts. Comm., 53d Sess., para. 283, U.N. Doc. CCPR/C/79/Add.50 (1995), *available at* http://www.unhchr.ch/tbs/doc.nsf (last visited Jan. 30, 2001).

253. *See* Human Rights Watch, Locked Away: Immigration Detainees in Jails in the United States, Part III. (1998), *available at* http://www.hrw.org/reports98/us-immig (last visited Jan. 30, 2001).

254. *See id.*

255. *See supra* notes 27-29 and accompanying text.

256. *See supra* notes 27-29 and accompanying text.

II. THE CIRCUIT COURTS' DECISIONS REGARDING INDEFINITE DETENTION UNDER 8 U.S.C. § 1231

Circuit courts are currently in disagreement over whether the IIRIRA permits the indefinite detention of deportable aliens and whether such detention violates the Fifth Amendment and/or international law. Both the Fifth Circuit and the Ninth Circuit directly addressed the indefinite detention of resident aliens under the provisions of the IIRIRA. The Fifth Circuit ruled that resident aliens could be detained indefinitely under the IIRIRA,[257] while the Ninth Circuit held they could not.[258] In a related ruling, the Tenth Circuit recently held that excludable aliens could be detained indefinitely under the statutory predecessor of the IIRIRA,[259] and presumably the IIRIRA,[260] and that resident aliens could be detained indefinitely under the IIRIRA,[261] and arguably, its predecessor statute.[262] The Tenth Circuit further held that indefinite detention of excludable and resident aliens did not violate due process.[263] Additionally, the Third Circuit recently held that excludable aliens could be detained indefinitely under the IIRIRA as well as its predecessor,[264] provided that the INS followed its newly supplemented regulations for reviewing the necessity of detention.[265] The split between the Fifth and Ninth Circuits is now before the Supreme Court.[266] This part examines the differing views of these circuit courts on the statutory interpretation of the IIRIRA, due process and international law, which have led to the circuit split.

A. *Interpretations of 8 U.S.C. § 1231*

The contrary holdings of the Fifth Circuit and the Ninth Circuit rest on differing readings of 8 U.S.C. § 1231(a)(6), which provides that "[a]n alien ordered removed who is inadmissible . . . removable . . . or

257. Zadvydas v. Underdown 185 F.3d 279, 286-87, 297 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (2000) (No. 99-7791).

258. Kim Ho Ma v. Reno 208 F.3d 815, 818-19 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38).

259. Duy Dac Ho v. Greene, 204 F.3d 1045, 1055 (10th Cir. 2000) (holding that the indefinite detention of excludable aliens was clearly authorized by former 8 U.S.C. § 1226(e) (1994)).

260. *Id.* at 1056 (noting that if the current 8 U.S.C. § 1231(a)(6) were applicable, it, too, would authorize the indefinite detention of excludable aliens).

261. *Id.* at 1057 (holding that 8 U.S.C. § 1231(a)(6) authorized the indefinite detention of deportable aliens).

262. *Id.* at 1054 (noting that, arguably, former 8 U.S.C. § 1252 might apply and would authorize indefinite detention of certain deportable aliens).

263. *Id.* at 1060.

264. Chi Thon Ngo v. INS, 192 F.3d 390, 394-95 (3d Cir. 1999).

265. *See id.* at 399. The INS supplemented its current regulation with a series of internal memoranda, known as the "Pearson memoranda," which provide for more rigorous review of prolonged detention. *See supra* notes 50-54 and accompanying text.

266. *See supra* notes 27-29 and accompanying text.

who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to . . . supervision."[267] The Fifth Circuit held § 1231(a)(6) to be an unambiguous grant of authority by Congress to the INS to detain those aliens who could not be removed for as long as necessary, subject to the district director's discretion as outlined in the Pearson memoranda.[268] The Fifth Circuit's reading is in accord with that of the Tenth Circuit, which held that § 1231 expressly granted the Attorney General the authority to detain deportable aliens at her discretion without any time limit.[269] Also in agreement, the Third Circuit has held that § 1231 contains an express grant of authority to the Attorney General to detain excludable aliens indefinitely.[270]

The Ninth Circuit read 8 U.S.C. § 1231 differently. The court found that, on its face, the statute did not authorize an indefinite period of detention, nor did it require a time limit on detention.[271] The court noted that the INS' interpretation of the statute, which would have allowed for indefinite detention, was not entitled to *Chevron* deference because of the serious constitutional questions raised by that interpretation.[272] To avoid a potentially unconstitutional result, the court interpreted the statute to authorize detention for a reasonable time only.[273] The court further held that where there was no reasonable likelihood that a deportable alien could be repatriated in the reasonably foreseeable future, the INS was not authorized to detain an alien beyond the removal period.[274] The Ninth Circuit reached this interpretation because: (1) it avoided the constitutional question of whether indefinite detention of aliens who had entered the United States (i.e. deportable aliens) violated due process; (2) it comported with the language of the statute and avoided a harsh result which was not expressly authorized by the statute; (3) it was consistent with prior readings of similar statutes in the Ninth Circuit; and (4) it was more consistent with international law.[275]

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267. 8 U.S.C. § 1231(a)(6) (Supp. IV 1998).

268. *See* Zadvydas v. Underdown 185 F.3d 279, 286-87 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (2000) (No. 99-7791); *supra* notes 50-54 and accompanying text.

269. *See* Duy Dac Ho v. Greene, 204 F.3d 1045, 1056-57 (10th Cir. 2000).

270. *See Chi Thon Ngo*, 192 F.3d at 394-95.

271. Ma v. Reno 208 F.3d 815, 821-22 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38).

272. *Id.* at 821 n.13; *supra* notes 60-79 and accompanying text for a discussion of the relationship between *Chevron* deference and the avoidance doctrines.

273. *Kim Ho Ma*, 208 F.3d at 821-22.

274. *Id.* at 822.

275. *Id.*

B. *Due Process*

The Fifth and the Ninth Circuits also reached contrary conclusions on the degree of due process protection afforded to resident (i.e. deportable) aliens. In *Zadvydas v. Underdown*,[276] the Fifth Circuit held that resident aliens, once ordered removed, had the same right to due process protection as excludable aliens, and could thus be indefinitely detained.[277] The Fifth Circuit based its ruling on the plenary power outlined in the Asian exclusion cases, *United States ex rel Knauff v. Shaughnessy* and *Shaughnessy v. United States ex rel Mezei*.[278] The court found these cases to stand for the proposition that the federal government is free to act in the immigration sphere without judicial scrutiny.[279] The court noted that both resident and excludable aliens were entitled to substantive due process protection when those rights did not conflict with the government's plenary power to regulate immigration.[280] The court held, however, that where the violation of an alien's constitutional rights is incidental to the exercise of governmental power over immigration, the violation is an "acceptable price to pay."[281] The court distinguished *Wong Wing v. United States*[282] on the grounds that *Wong Wing* stood for the proposition that aliens could not be subject to punishment without a trial, which would violate their substantive due process rights, because such punishment was not related to their deportation.[283] In *Zadvydas*, the Fifth Circuit reasoned that detention under 8 U.S.C. § 1231 was not punishment and was a necessary step in effectively deporting aliens and protecting citizens from criminal activity.[284]

The Fifth Circuit further noted that the distinction between excludable and resident aliens that was apparent in *Mezei*[285] was not a substantive bright line distinction.[286] Rather, the only reason resident aliens would have more substantive due process rights than excludable aliens was because, having entered the country, they have more opportunity to assert rights in matters unrelated to immigration.[287]

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276. 185 F.3d 279 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (2000) (No. 99-7791).

277. *See id.* at 297.

278. *See id.* at 288-89; *supra* notes 110-35 and accompanying text (discussing how these cases established the plenary power of Congress to regulate immigration).

279. *Zadvydas*, 185 F.3d at 288.

280. *See id.* at 289, 294-95.

281. *Id.* at 289.

282. 163 U.S. 228 (1896).

283. *See Zadvydas* 185 F.3d at 289-90; *supra* notes 119-20 (discussing *Wong Wing* and the limits it places on the government's treatment of aliens).

284. *Zadvydas*, 185 F.3d at 289-90.

285. *See supra* notes 133-35 and accompanying text (describing the heightened constitutional protections available to resident aliens, as opposed to excludable aliens).

286. *Zadvydas*, 185 F.3d at 294.

287. *See id.* at 294-95 ("Since many will never enter the country or will do so only briefly, they will have little opportunity to assert [constitutional] rights in matters

The court held that resident aliens did have a right to a higher degree of procedural due process regarding the determination of whether or not they should be removed from the country.[288] Once resident aliens have been ordered removed, however, they stand on the same footing as excludable aliens, and their substantive right to be free from detention is subordinate to the government's interest in regulating immigration.[289]

The Fifth Circuit's ruling accords with recent rulings of the Tenth and the Third Circuits. The Tenth Circuit, in *Duy Dac Ho v. Greene*,[290] held that the Fifth Amendment does not prohibit the indefinite detention of either resident or excludable aliens.[291] The Tenth Circuit reasoned that an order of removal places all aliens on the same footing: that of an excludable alien seeking entry into the country.[292] The court found that the right that aliens are asserting in this situation is the right to be allowed into the country, not the right to be free from detention.[293] Furthermore, the court held that because aliens have no right to enter the country, they have no right to be released from detention.[294] The court also noted that any heightened due process protection held by resident aliens involved only the process by which they are determined to be removable.[295]

In a forceful dissent, Judge Brorby remarked that the majority's ruling rested on "a tenuous foundation of legal fiction stacked upon legal fiction."[296] Judge Brorby pointed out that freedom from bodily restraint was a fundamental right and that any infringement on that right must be subject to strict scrutiny; requiring a compelling government interest and narrowly tailored means.[297] Judge Brorby distinguished legislative and executive immigration policy, which he viewed as entitled to deference under the plenary power doctrine, from indefinite detention, which he saw as a means by which Congress' directives are carried out.[298] Therefore, he argued that, to

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unconnected to the plenary power.").

288. *Id.* at 295.

289. *See id.* at 295-96.

290. 204 F.3d 1045 (10th Cir. 2000).

291. *Id.* at 1059-60.

292. *Id.*

293. *Id.* at 1058.

294. *Id.* at 1060.

295. *See id.* at 1059.

296. *Id.* at 1061 (Brorby, J., dissenting).

297. *Id.* at 1062.

298. *See id.* at 1062 n.1 (citing to Phan v. Reno, 56 F. Supp. 2d 1149, 1155 (W.D. Wash. 1999)). Interestingly, Judge Brorby also noted that "[t]he dangers at which the detention scheme is directed, chiefly the prevention of flight and the protection of the community pending deportation of aliens who have been convicted of crimes, involve domestic interests rather than international concerns." *Id.* (quoting *Phan*, 56 F. Supp. 2d at 1155). His point seems to be that inasmuch as the plenary power is based on the foreign affairs power of Congress, *see supra* notes 110-20 and accompanying text, the plenary power doctrine does not support deference to legislation that is basically

survive strict scrutiny, the need for detention must be proportional to the likelihood that deportation could be effected, the dangerousness of the individual detainee, and the risk of flight.[299] Moreover, Judge Brorby argued that this balancing test should be applied to both excludable and deportable aliens in the same manner.[300]

The Third Circuit's ruling dealt with the indefinite detention of excludable aliens. The court, in *Chi Thon Ngo v. INS*,[301] held that excludable aliens, including excludable aliens who had been paroled into the United States, could be indefinitely detained, as long as there were adequate procedures in place to ensure that the detained aliens were, in fact, a danger to the community and a flight risk.[302] The court based its ruling on the plenary power of the political branches of the government to regulate immigration[303] and it reasoned that the constitutional rights of excludable aliens could not restrict the right of the United States to deny them entry into the country.[304] The court held, however, that even excludable aliens have a liberty interest that is protected by due process.[305] Because of this, the court held that when excludable aliens face prolonged detention, they must be granted periodic reviews that carefully scrutinize whether the justification for their detention is still valid.[306] That is, there must be a meaningful review of whether they are still actually a danger to the community or a flight risk.[307] The court held that while the previous INS regulations were not adequate, the interim rules in the Pearson memoranda were sufficient.[308] In sum, the Third Circuit's holding asserted that excludable aliens have no fundamental right to be free from detention where that right conflicts with the government's power to control immigration, but that they do have a liberty interest which entitles them to some degree of procedural due process in determining whether their detention is justified. The court was careful to point out that its ruling did not apply to deportable aliens.[309]

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domestic.

299. *See Duy Dac Ho*, 204 F.3d at 1062-63 (Brorby, J., dissenting).

300. *Id.* at 1063 n.3.

301. 192 F.3d 390 (3d Cir. 1999).

302. *See id.* at 398-99.

303. *See id.* at 395-96.

304. *See id.*

305. *Id.* at 396. Interestingly, the court noted that even excludable aliens were persons entitled to substantive due process, but did not discuss whether aliens had a fundamental right to liberty, and it did not engage in strict scrutiny review. Rather, the court went straight into a review of procedural due process, analyzing the adequacy of the procedures by which detention is reviewed. *See id.* at 396-99.

306. *Id.* at 398.

307. *See id.*

308. *See id.* at 398-99.

309. *Id.* at 398 n.7.

In contrast, the Ninth Circuit, in *Kim Ho Ma v. Reno*,[310] found that the indefinite detention of resident aliens raised substantial constitutional questions. As a result, the court interpreted the statute to authorize the detention of deportable aliens only for a reasonable time beyond the removal period.[311] Further, the court held that where there is no reasonable likelihood that an alien's country of origin will accept her return in the foreseeable future, the statute does not authorize any detention beyond the removal period.[312] The court recognized that the law was settled on allowing the indefinite detention of excludable aliens who had not yet entered the territory of the United States.[313] However, the court did not view the cases supporting this proposition as justifying the indefinite detention of aliens who had entered the United States either legally or illegally. The rulings supporting the indefinite detention of excludable aliens relied on the entry fiction, which justified withholding constitutional protection from aliens who were not considered to be within the territory of the United States.[314] In contrast, aliens who have entered the country and begun to develop the ties that come with permanent residency are entitled to protection under the Fifth Amendment.[315] The court cited to *Wong Wing v. United States*[316] for the proposition that even aliens who have been ordered deported are entitled to substantive due process.[317] The court also noted that extending the entry fiction to aliens who had gained entry would mean "strip[ping]" them of constitutional protections which they had previously been granted.[318]

In addition, the court stated that it was not clear to what degree the plenary power applied to indefinite detention, and it cited to relatively recent Supreme Court decisions for the proposition that the plenary power doctrine is subject to constitutional constraints.[319] In light of these substantial constitutional questions, the court interpreted the statute to avoid a construction that would allow for the indefinite detention of deportable aliens.[320]

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310. 208 F.3d 815 (9th Cir.), *cert. granted*, 121 S. Ct. (2000) 297 (No. 00-38).

311. *See id.* at 818-19; *supra* notes 62-79 and accompanying text (discussing the doctrine of constitutional avoidance in statutory interpretation).

312. *Kim Ho Ma*, 208 F.3d at 818-19, 821-22.

313. *See id.* at 823.

314. *See id.* at 823-25.

315. *See id.* at 825.

316. 163 U.S. 228 (1896).

317. *Kim Ho Ma*, 208 F.3d at 826.

318. *See id.*

319. *Id.* at 826 n.24 (citing to Reno v. Flores, 507 U.S. 292 (1993), INS v. Chadha, 462 U.S. 919 (1983) and Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) for the proposition that the plenary power does not apply in all cases, and that when it does, it is subject to constitutional contraints).

320. *Id.* at 827.

C. *International Law*

The Fifth and the Ninth Circuits also arrived at different conclusions with regard to the applicability of international law proscriptions of arbitrary detention. The Fifth Circuit, while noting that it did not believe the detention at issue was arbitrary, held that the applicability of international law was precluded by its previous decision in *Gisbert v. United States Attorney General*.[321] In that case, the court held that international law proscriptions of arbitrary detention were preempted in the United States by a combination of executive, legislative, and judicial acts that authorized the indefinite detention of excludable aliens.[322] As a result the *Zadvydas* court held that although the alien in *Zadvydas* was deportable, because there was no distinction in international law between excludable and resident aliens, the decision in *Gisbert* was controlling.[323]

In contrast, the Ninth Circuit found that the *Charming Betsy* canon of statutory construction dictated that the statute be construed to avoid violating international law.[324] The court held that customary international law clearly prohibited prolonged arbitrary detention, and noted further that the ICCPR, which the United States had ratified, also prohibited arbitrary detention.[325] Thus prolonged detention of aliens without being charged likely violated international law.[326] Although the court noted that Congress could pass statutes that would displace international law, it reasoned that where a statute is ambiguous, it should be construed so as to comply with international law.[327] Therefore, the court construed the statute to authorize the detention of removable aliens only for a reasonable time after the statutory detention period. In cases where there is no reasonable likelihood of an alien being removed in the foreseeable future, the court held that detention after the statutory removal period is not authorized.[328]

These cases indicate that the circuit courts are currently divided over whether 8 U.S.C. § 1231 authorizes the indefinite detention of deportable aliens, and whether such detention violates the

321. *See* Zadvydas v. Underdown, 185 F.3d. 279, 285 (5th Cir. 1999) (citing to Gisbert v. United States Atty. Gen., 988 F.2d. 1437 (5th Cir. 1993)), *cert. granted* 121 S. Ct. 297 (2000) (No. 99-7791).

322. *See Gisbert*, 988 F.2d. at 1448.

323. *See Zadvydas*, 185 F.3d. at 285. The logic of this holding is elusive. The fact that controlling executive, legislative and judicial acts dealing with excludable aliens have displaced the international standard does not necessarily imply that the standard has been displaced with regard to deportable aliens.

324. *See Kim Ho Ma*, 208 F.3d at 829-30; *see also supra* notes 191-94 and accompanying text (discussing the *Charming Betsy* canon of statutory construction).

325. *Kim Ho Ma*, 208 F.3d at 829-30.

326. *See id.*

327. *See id.* at 830.

328. *Id.* at 830-31.

Constitution and/or international law. Resolving these issues potentially requires substantial clarification of several extra-constitutional legal doctrines; the plenary power doctrine, the entry fiction, the divide between civil detention and punishment, and the applicability of international law are all implicated in the circuit courts' decisions. These questions, and the continuing role of these doctrines, are currently before the Supreme Court. Part III of this Note argues that the doctrines used to exclude aliens from due process protection stand on shaky ground, and should not be extended to justify the indefinite detention of deportable aliens. Further, Part III argues that indefinite detention of aliens violates international law and jeopardizes the United States' efforts to encourage other countries to comply with international human rights norms. Finally, Part III argues that international law can inform due process analysis resulting in uniform protections for aliens under the Constitution.

III. THE SUPREME COURT SHOULD PROHIBIT THE INDEFINITE DETENTION OF ALIENS AS UNCONSTITUTIONAL AND A VIOLATION OF INTERNATIONAL LAW

The indefinite detention of aliens under the IIRIRA, especially in the case of resident aliens, raises substantial constitutional and international law concerns. These questions have led to a split among circuit courts regarding whether the detention provisions of the IIRIRA authorize indefinite detention, and whether that detention violates due process and/or international law.[329] The Supreme Court has granted certiorari in the cases of *Kim Ho Ma v. Reno*[330] and *Zadvydas v. Underdown*[331] to resolve the controversy. In light of the standards articulated by the Constitution and international human rights law, this part argues that, rather than extend the legal fictions which have allowed aliens to be detained indefinitely, the Supreme Court should recognize aliens as persons entitled to due process protection where a fundamental liberty interest, such as the right to be free from detention, is implicated. This part also argues that

329. *Compare id.* at 821-22 (holding that the statute authorizes detention of removable resident aliens only for a reasonable time and that indefinite detention of resident aliens might violate due process and international law) *with* Duy Dac Ho v. Greene, 204 F.3d 1045, 1053-56 (10th Cir. 2000) (holding that the statute authorizes the indefinite detention of removable resident aliens and excludable aliens who have been paroled into the United States and that such detention does not violate due process) *and* Zadvydas v. Underdown, 185 F.3d 279, 297 (5th Cir. 1999) (holding that the statute authorizes the indefinite detention of removable resident aliens and does not violate due process), *cert. granted* 121 S. Ct. 297 (2000) (No. 99-7791). *Cf.* Chi Thon Ngo v. INS, 192 F.3d 390, 394-95 (3rd Cir. 1999) (holding that the statute authorizes the detention of excludable aliens and does not violate due process). *See also supra* Part II (analyzing the rulings of the circuit courts).

330. 208 F.3d 815 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38).

331. 185 F.3d 279 (5th Cir. 1999), *cert. granted* 121 S. Ct. 297 (2000) (No. 99-7791).

indefinite detention of aliens violates international law and, therefore, the United States has an obligation to fulfill its international obligations by enacting statutes that give effect to the treaty standards to which it is a party. Failure to do so jeopardizes the United States' influence on the development of international human rights law. Finally, this part contends that international law norms can inform due process analysis. Incorporation of international human rights standards into United States constitutional law provides an evolving understanding of which rights are "implicit in the concept of ordered liberty,"[332] as well as guidance as to whom they should be extended.

A. *Due Process*

The constitutional justification for the indefinite detention of aliens rests on a shaky foundation of legal fiction. Courts have relied on the plenary power doctrine, the entry fiction, and the classification of immigration detention as regulatory rather than punitive to prevent aliens from claiming due process and equal protection under the Fifth Amendment.[333] Each of these justifications is of questionable validity.

The plenary power over immigration is not based on any specific grant of power in the Constitution.[334] Academics have widely criticized the plenary power in recent years, as might be expected of judge-made law, especially when it is as harsh as the plenary power doctrine.[335] Specifically, commentators have called for the doctrine to be restricted or overturned on a number of grounds, including: (1) that the development of the doctrine is based on a misreading of Supreme Court decisions;[336] (2) that the doctrine is based on an outdated understanding of immigration law as exclusively a means of border control, and does not adequately take into account the increased emphasis on post-entry social control in recent immigration law;[337] and (3) that the doctrine is based on an outdated understanding of international law under which immigration matters involved solely the rights of sovereign nations to control their borders, and thus should be reevaluated because international law now provides extensive protections for the rights of individual persons.[338]

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332. Palko v. Conneticut, 302 U.S. 319, 325 (1937).

333. *See supra* Part I.B.

334. *See* Henkin, Chinese Exclusion *and its Progeny*, *supra* note 111, at 858.

335. *See infra* notes 336-38 and accompanying text.

336. *See* VanderMay, *supra* note 111, at 165 (arguing that the cases credited with establishing the plenary power doctrine, when read in context, do not stand for the proposition that aliens do not get certain constitutional protections, but rather address the allocation of power over immigration among the branches of the federal government and the states).

337. *See* Kanstroom, *supra* note 39, at 1897-98.

338. *See* Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. Colo. L. Rev. 1361, 1369-75 (1999).

Moreover, some argue that the lifting of controls over the flow of information, capital and services that has come with globalization has reshaped the nature of sovereignty and that the sanctity of borders is no longer a valid proposition.[339] For example, international norms and structures now substantially modify the behavior of sovereigns.[340] Subnational groups such as ethnic groups, tribes and regional bodies within nation states are beginning to demand and receive more autonomy and voice in state relations.[341] Transnational populations of immigrants and migrants have sprung up across the globe.[342] These developments perhaps diminish, and certainly change, the meaning and power of sovereignty in relation to how it was understood at the time of the Asian exclusion cases.[343]

This change has important implications for the application of the "foreign affairs exceptionalism"[344] on which the plenary power over immigration is based.[345] According to one scholar, the foreign affairs power is under pressure in the United States from several sources.[346] The increased involvement by states in foreign affairs, the Supreme Court's renewed willingness to impose federalism restrictions on the national government, and heightened skepticism of judicial lawmaking all threaten the continued unfettered application of the foreign affairs power.[347] Without the justification of nineteenth century notions of sovereignty, "foreign affairs exceptionalism" or of any provision in the Constitution, there is little support for the claim that the plenary power excludes aliens from due process protection. Perhaps in light of these concerns, the Court has been careful not to rely explicitly on the plenary power doctrine in recent immigration cases, although the doctrine has not yet been overturned.[348]

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339. *See* Saskia Sassen, *Beyond Sovereignty: Immigration Policy Making Today*, *in* Immigration: A Civil Rights Issue for the Americas 15, 15-26 (Susanne Jonas & Suzie Dod Thomas eds., 1999); *cf.* T. Alexander Aleinikoff, *Between National and Post-National: Membership in the United States*, 4 Mich. J. Race & L. 241, 241-62 (1999) (arguing that individual rights and membership in the United States are generally becoming more transnational, but that this indicates a shift toward a more international world view, rather than a post-national world view).

340. *See* T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 Const. Comment. 197, 202 (2000).

341. *See id.*

342. *See id.*

343. *See supra* notes 110-15 and accompanying text (discussing the development of the plenary power cases involving the exclusion of Asian immigrants, and the role of sovereignty in that doctrine).

344. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. Colo. L. Rev. 1089, 1096 (1999) [hereinafter Bradley, *Foreign Affairs*] ("Foreign affairs exceptionalism is the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers.").

345. *See supra* notes 114-15 and accompanying text.

346. Bradley, *Foreign Affairs*, *supra* note 344, at 1097.

347. *See id.* at 1097-1104.

348. *See supra* notes 146-52 and accompanying text.

Even if the plenary power doctrine is still valid, its reach is limited.[349] The Supreme Court has extended constitutional protection, including due process, to resident aliens in deportation proceedings[350] and has indicated that even excludable aliens are afforded some constitutional protection.[351] Moreover, the Court has not allowed the government to infringe on aliens' fundamental rights where the infringement is tangential to the regulation of deportation or exclusion.[352] In other words, the plenary power doctrine affords the government a degree of deference in matters of immigration, and supports an assumption that the government's interests in matters of deportation are compelling. However, any infringement of an alien's fundamental rights must still be narrowly tailored to the government's interest.[353] Any such infringement must be directly related to exclusion or deportation, otherwise it will not fall under the shroud of the plenary power. Thus, the Fifth Circuit's reliance on this doctrine to justify the indefinite detention of deportable aliens is misplaced, because the plenary power does not allow deportable aliens to be deprived of fundamental rights without strict scrutiny.[354] Moreover, when deportable aliens cannot be deported because their country of origin will not accept their return, prolonged detention does not substantially increase the likelihood of deportation. Thus detention in such cases is tangential to the plenary power justification of enforcing immigration policy. Although there may be an ancillary relation between indefinite detention and enforcing immigration policy, that relation is not narrowly tailored.

In addition, the cases articulating the strongest version of the plenary power doctrine were decided during the height of the Cold War, and relied substantially on the need to protect the nation from the threat of Communism.[355] Perhaps realizing that the justification

349. *See supra* notes 116-45 and accompanying text.

350. *See* Landon v. Plasencia, 459 U.S. 21, 32 (1982); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953); *supra* notes 1156-45 and accompanying text.

351. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896) (noting that the Fifth and Sixth Amendments protect all persons within the territory of the United States, without distinguishing between excludable and deportable aliens); *supra* notes 1156-45 and accompanying text.

352. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88, 116-17 (1976); *supra* notes 1156-45 and accompanying text.

353. Another justification for this limit might be that the plenary power, as it is based on the foreign affairs power, should be subject to at least the same limitations as the treaty power. The federal government can make treaties that infringe on the areas of regulation traditionally reserved to the states, but it may not enter into treaties that infringe on individual rights protected by the Constitution. *See supra* notes 164-65 and accompanying text.

354. *See supra* notes 276-81 and accompanying text (discussing the Fifth Circuit's reliance on the plenary power doctrine).

355. *See Mezei*, 345 U.S. at 210 ("In the exercise of these powers, Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife."):

for this robust application of the plenary power doctrine has passed, more recent cases have sought to limit its application.[356] Extending the plenary power to allow the indefinite detention of deportable aliens would reverse this trend. Rather than being based on the fear of an international coalition hostile to the United States, however, this heightened version would be based on a desire to expel criminals from the country and prevent them from committing further crimes.[357] These goals are essentially domestic concerns and do not implicate the foreign affairs justifications of the plenary power.[358]

The related entry fiction doctrine allows courts to withhold the protections of the Constitution from excludable aliens who are detained at the threshold of entry.[359] Through this fiction, excludable aliens are considered to be beyond the territory of the United States even though they are physically inside the border, and, therefore, beyond the reach of the Constitution.[360] While the entry fiction is firmly rooted in Supreme Court precedent with regard to excludable

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Carlson v. Landon, 342 U.S. 524, 535-36 (1952) ("We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens."); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 546 (1950) ("The special procedure followed in this case was authorized not only during the period of actual hostilities but during the entire war and the national emergency proclaimed May 27, 1941. The national emergency has never been terminated. Indeed, a state of war still exists." (citation omitted)); *supra* notes 121-39 and accompanying text. The Court in *Carlson* gave an indication of the perception in 1952 of the threat Communism posed to national security:

> The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination.

342 U.S. at 535 n.21 (quoting former 8 U.S.C. § 781(15)).

356. *See supra* notes 140-52 and accompanying text.

357. *See supra* note 284 and accompanying text; *see also* Kanstroom, *supra* note 39, at 1892.

358. This argument is also made by the ACLU, *see* Brief for the American Civil Liberties Union and the American Civil Liberties Union of Washington as Amici Curiae in Support of Respondent at 27-30, Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38), *available at* 2000 WL 1890976, and is further developed in the Brief of Law Professors as Amici Curiae Supporting Affirmance at 6-13, *Kim Ho Ma* (No. 00-38), *available at* 2000 WL 1890987. On the other hand, the government argues that because indefinite detention is the result of foreign nations' unwillingness to accept the return of their nationals, the foreign affairs justification of the plenary power is implicated. *See* Brief for Petitioners at 43-44, *Kim Ho Ma* (No. 00-38), *available at* 2000 WL 1784982.

359. *See supra* notes 133-39 and accompanying text.

360. *See supra* notes 133-39 and accompanying text.

aliens,[361] it has never been applied to deportable aliens. To do so would require equating the determination that an alien is deportable with an exit from the country that removes that alien from the reach of constitutional protections afforded to all persons within the territory of the United States.[362] This would be an especially troubling extension in light of Supreme Court cases which have held that actual exits from the United States do not have this effect on resident aliens, provided that the absence is brief.[363]

The notion that detention is regulatory rather than punitive in cases where aliens are being deported and detained based on past criminal conduct is also dubious.[364] Immigration detainees subject to indefinite detention are often housed in state and county prisons, with other prison inmates, under conditions virtually indistinguishable from those used to punish criminal conduct.[365] Detainees who are held in INS detention centers face similar conditions.[366] Moreover, these detainees have been ordered deported as a result of criminal activity and are held in detention based primarily on their criminal record.[367] Additionally, the relation between indefinite detention and the regulatory purpose of the statute is suspect. Where an alien cannot be deported because the United States does not have normalized diplomatic relations with his or her country of origin, or because that country refuses to take him or her back, prolonged detention bears tenuous relation to the goal of effecting such deportation. Keeping aliens in detention does not make it more likely that the impediment to their deportation will be removed. Even if there is a relation, indefinite detention under the aforementioned conditions is excessive as a means of achieving this goal. Where civil penalties are similar to punitive ones, and are insufficiently related to the regulatory purpose, courts have held that the regulation is punitive and therefore they require the constitutional protections afforded in criminal proceedings.[368]

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361. *See Mezei* 345 U.S at 215-16.

362. *See* Duy Dac Ho v. Greene, 204 F.3d 1045, 1061 (10th Cir. 2000) (Brorby, J., dissenting).

363. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982) (holding that a brief visit to Mexico to smuggle aliens did not render a deportable alien excludable for due process analysis upon return); Rosenberg v. Fleuti, 374 U.S. 449 (1963) (holding that an afternoon trip to Mexico did not render alien's return to the U.S. an entry for immigration purposes).

364. *See supra* note 126 and accompanying text; *see also* Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 Admin. L. Rev. 305, 307 (2000).

365. *See* Cheryl Little, *INS Detention in Florida*, 30 U. Miami Inter-Am. L. Rev. 551 (1999).

366. *See id.*

367. *See, e.g.*, Chi Thon Ngo v. INS, 192 F.3d 390, 398 (3d Cir. 1999).

368. *See* Pauw, *supra* note 364, at 323-24. Another way to ascertain whether a sanction is punitive is to analyze it in relation to different theories of punishment. Under one theory, punishment is defined by severity and the imposition of suffering.

Extending these legal fictions to deprive deportable aliens of due process protections would also implicate the Court in a troubling shift in immigration law. The IIRIRA is one of several laws that have sought to regulate immigration by limiting the civil rights of immigrants.[369] Immigration legislation in the late 1980s and early 1990s took a different approach, recognizing that immigrants come to the United States primarily for jobs, and therefore imposed fines on employers who knowingly employed illegal aliens.[370] Extending the plenary power doctrine, the entry fiction, and civil indefinite detention to cover deportable aliens would further deprive resident aliens of constitutional rights to due process and equal protection that protect all persons in the United States. Disturbing on its own, this result takes on an insidious quality when viewed in light of the IIRIRA's failure to penalize companies that willingly employ illegal aliens, and provisions that ensure the admission of thousands of laborers to fill low wage agricultural provisions.[371] Viewed in this light, it could be argued that the IIRIRA is an attempt to create a cheap and vulnerable labor force, unprotected by even the minimum safeguards of the Constitution that apply to all persons.[372]

While these legal fictions may have some validity based on precedent when applied to excludable aliens, they do not justify depriving deportable aliens of due process protection.[373] Traditional due process analysis would not allow for indefinite detention of deportable aliens. Because the right to be free from detention is a fundamental right, any infringement on this right must survive strict scrutiny.[374] The government's interest in cases involving the indefinite detention of aliens have been articulated as first, effecting their deportation, and second, protecting society from their potential criminal activity.[375] While these may be compelling government

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See id at 325-26. Under another, punishment is a means of incapacitating individuals so that they can not repeat their offense. *See id.* at 326. Punishment is also seen as a means of rehabilitation, and retribution. *See id.* at 327-28. Each of these theories, with the exception of rehabilitation, supports the notion that indefinite detention of criminal aliens is punitive. This argument is also made in the Brief Amici Curiae of the Catholic Legal Immigration Network, Inc., Florida Immigrant Advocacy Center, The National Association of Criminal Defense Lawyers, and The Asian Law Caucus in Support of the Judgement Below at 24-27, Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-98), *available at* 2000 WL 1881916.

369. *See* Susanne Jonas et al., *Introduction* to Immigration: A Civil Rights Issue, at vii, vii-viii (Susanne Jonas & Suzie Dod Thomas eds., 1999) [hereinafter *Introduction* to Immigration: A Civil Rights Issue].

370. *See* Debra L. DeLaet, U.S. Immigration Policy in an Age of Rights 49-51 (2000).

371. *See id.* at 111-13.

372. *See Introduction* to Immigration: A Civil Rights Issue, *supra* note 369, at viii.

373. *See supra* notes 128-39 and accompanying text.

374. *See supra* notes 90-93 and accompanying text.

375. *See, e.g.*, Zadvydas v. Underdown, 185 F.3d 279, 296-97 (5th Cir. 1999), *cert. granted*, 121 S. Ct. 297 (2000) (99-7791).

interests, indefinite detention without a hearing is not a narrowly tailored means. First, with regard to the purpose of effecting deportation, there is not even a rational relationship between keeping an alien detained and the possibility of establishing the ties with governments such as Vietnam or Cambodia that would lead to those countries accepting repatriation. Second, while indefinite detention will certainly prevent further criminal conduct, it is by no means a narrowly tailored means of effecting this result.[376] While this type of detention is allowed in our system of justice for the criminally insane and as a sentence after trial for heinous crimes, it has never been accepted as a way to control individuals who are deemed dangerous by government officials.[377] Moreover, once it is accepted that resident aliens are afforded due process,[378] applying indefinite detention to alien criminals raises equal protection concerns. Immigrants, who cannot vote and are commonly targeted by xenophobic legislation, are a "discrete and insular minorit[y]" subject to democratic process breakdown.[379] Indefinite detention applied to deportable aliens to protect society is out of step with the punishment applied to non-immigrants who may be just as dangerous to society, or more so. These constitutional concerns justify the Ninth Circuit's interpretation of the statute, which avoided serious constitutional questions under the *Ashwander* doctrine.[380]

Even assuming that the indefinite detention of deportable aliens could survive strict scrutiny review, the procedures under current INS regulations and the proposed rules do not meet the requirements of procedural due process. Civil detention involves a restriction on a fundamental liberty interest and requires a high level of process.[381] As with the detention of insane persons, deportable aliens should be granted at least a hearing before they are determined to be a danger to society.[382]

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376. This argument is also made in the Brief for the Respondent at 23-27, Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38), *available at* 2000 WL 1891006.

377. *See* Foucha v. Louisiana, 504 U.S. 71, 80-81 (1992).

378. *See supra* note 134 and accompanying text.

379. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see supra* notes 105-09 and accompanying text; Lowell Sachs, *Treacherous Waters in Turbulent Times: Navigating the Recent Sea Change in U.S. Immigration Policy and Attitudes*, *in* Immigration: A Civil Rights Issue for the Americas 145, 145-56 (Susanne Jonas & Suzie Dod Thomas eds., 1999).

380. *See supra* notes 62-63, 273-74 and accompanying text (discussing the *Ashwander* doctrine and the Ninth Circuit's ruling).

381. *See supra* notes 96-104 and accompanying text.

382. *See supra* notes 96-104 and accompanying text. This argument is the focus of the Brief of the American Civil Liberties Union and the American Civil Liberties Union of Washington as Amici Curiae in Support of Respondent at 7-16, Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38), *available at* 2000 WL 1890976.

Excludable aliens face a tougher task when it comes to seeking relief from indefinite detention. Their claim to the protections of the Fifth Amendment is seemingly precluded by the Supreme Court's ruling in *Shaughnessy v. United States ex rel. Mezei*.[383] Arguably, the ruling in *Mezei* was motivated by the threat of Communism, then considered a national emergency.[384] In the absence of such an emergency, there is little justification for such a restrictive reading of individual rights. The notions of the plenary power and the entry fiction articulated in that case, however, have taken on a life of their own, independent of the justification by which they were spawned.[385] Excludable aliens are considered beyond the reach of the Constitution, although several of the previous arguments[386] could apply to excludable aliens as well, especially those who are paroled into the United States. Importantly, though, excludable aliens detained in the United States are not beyond the reach of international law, which contains clear prohibitions against indefinite detention as it is applied to both excludable and deportable aliens under the IIRIRA.

B. *International Law*

Of the international law standards that potentially prohibit the indefinite detention of aliens, the proscription against prolonged arbitrary detention is the most explicit.[387] The Universal Declaration of Human Rights, which is generally accepted as the enumeration of the rights that states are obliged to promote under the U.N. Charter, protects the rights of all persons to be free from arbitrary detention.[388] Although the U.N. Charter was held to be non-self-executing shortly after its adoption, many argue that during the passing decades the human rights protections of the Charter have become sufficiently specific to elevate it to the status of self-executing.[389] The ICCPR also clearly prohibits arbitrary detention.[390] Although this treaty has been declared non-self-executing by the United States, there is a strong argument that such a declaration has no effect on a treaty like the

383. 345 U.S. 206 (1953). *See supra* notes 128-39 and accompanying text.

384. *See supra* note 355 and accompanying text.

385. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21, 32-33 (1982) (noting the lesser status afforded to excludable aliens under the Constitution).

386. *See supra* notes 334-68 and accompanying text.

387. *See supra* notes 196-2456 and accompanying text (describing standards of international law which are relevant to indefinite detention). For further argument that the indefinite detention of aliens violates international law, see the Brief of Amici Curiae Human Rights Watch, Human Rights Advocates, et al. in Support of Respondent and Affirmance at 3-16, *Kim Ho Ma* (No. 00-38), *available at* 2000 WL 1890982.

388. *See supra* notes 201-05 and accompanying text.

389. *See supra* notes 210-16 and accompanying text.

390. *See supra* note 218-19 and accompanying text.

ICCPR, which by its terms, is self-executing.[391] In any case, a clear customary international law norm exists that prohibits prolonged arbitrary detention.[392] Even if the U.N. Charter and the ICCPR are not domestically enforceable, customary international law would ordinarily be directly enforceable in U.S. courts.[393]

A precedent exists in United States courts, however, that principles of international law can be overruled by subsequently enacted federal statutes, and perhaps, executive and judicial acts.[394] The IIRIRA was enacted subsequent to the ratification of the U.N. Charter and the ICCPR, as well as after the emergence of the customary international law prohibition against prolonged arbitrary detention.[395] In addition, the Attorney General's promulgation of regulations that allow for the indefinite detention of aliens might also prevent international law from being applied.[396]

While an inconsistent statute or acts of the Attorney General might preclude the direct domestic enforcement of international law, they do not preclude application of international law in the interpretation of an ambiguous statute. Thus, the IIRIRA's lack of specificity with regard to the duration of time beyond the removal period should be interpreted in a manner consistent with international law under the *Charming Betsy* doctrine.[397] This doctrine affords adequate respect to the law of nations and assumes that Congress would not knowingly place the United States in violation of that law without explicit authorization.[398] Where, as here, the Attorney General is acting pursuant to authority granted by a congressional statute, she may not act beyond the scope of that authority.

The *Charming Betsy* doctrine rests in large part upon an understanding that the United States is bound internationally by the provisions of international law.[399] This obligation includes the provisions of treaties that the United States has ratified but declared non-self-executing.[400] By violating the terms of these agreements and

391. *See* Vázquez, *Four Doctrines*, *supra* note 169, at 706-08 (noting that such declarations conflict with the supremacy clause and the intent of other parties that the treaty be self executing); *supra* notes 171-76 and accompanying text.

392. *See supra* note 245 and accompanying text.

393. *See supra* notes 185-87 and accompanying text.

394. *See supra* note 188 and accompanying text.

395. The IIRIRA was enacted in 1996, *see supra* note 6 and accompanying text, the ICCPR was ratified in 1992, *see supra* note 218 and accompanying text, the Restatement (Third) recognized the customary international law prohibition against arbitrary detention at least as early as 1987, *see* Restatement (Third), *supra* note 153, § 702, and the United States ratified the U.N. Charter in 1945, *see supra* note 196 and accompanying text.

396. *See supra* notes 58-59 and accompanying text.

397. *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); *supra* notes 64-65 and accompanying text.

398. *See supra* notes 191-94 and accompanying text.

399. *See supra* note 67 and accompanying text.

400. *See supra* notes 174-76 and accompanying text.

the standards of international custom, the United States distances itself from the international community and loses a degree of legitimacy in its endeavors to promote human rights. While the United States routinely encourages and in fact demands that other nations comply with the standards of the Universal Declaration and the ICCPR, such exhortations ring hollow if the United States ignores those standards at home.[401] Moreover, the United States' failure to enforce standards domestically to which it is bound internationally may set a troubling precedent for other nations that may wish to be party to international treaties for political reasons, yet contemplate only sham compliance.

The United States has two ways in which it could comply with international law prohibitions against prolonged arbitrary detention. First, it could simply put a time limit on immigration detention for aliens who cannot be excluded or deported. In addition, the United States could grant immigration detainees a hearing with counsel present. These steps would satisfy international law standards and address the concerns voiced by international bodies on indefinite detention. The alternative is for courts to inform their constitutional interpretations with an understanding of international law standards by extending the full protections of the Fifth Amendment to deportable and excludable aliens.[402]

The second is the more compelling solution. Ensuring that both excludable and deportable aliens who are present in the United States are protected by due process would not only prevent detention from being considered arbitrary, it would bring the United States in line with international law standards that provide for the right to personhood before the law, personal liberty and due process, and equal protection.[403] It would also remove the United States from the morally questionable position of denying certain persons the

401. *See e.g.*, Lillich, International Human Rights, *supra* note 223, 48 (noting that the United States urged the International Court of Justice to condemn Iran for taking hostages and thus violating fundamental human rights which all states have a duty to uphold under the U.N. Charter (citing Memorial of the United States (U.S. v. Iran), 1980 I.C.J. Pleadings (Case Concerning United States Diplomatic and Consular Staff in Tehran) 182 (Jan. 12, 1980))); Press Statement, James Rubin, Spokesman, Dept. of State, State Department Hosts Bilateral Human Rights Dialogue with China (Jan. 11, 1999) *available at* http://secretary.state.gov (last visited Jan. 30, 2000) ("We will address the protection of human rights and fundamental freedoms through the rule of law, including legal reform and due process. We will encourage China to ratify and adhere to the [ICCPR] and other human rights instruments.").

402. *See* Lillich, *Invoking International Law*, *supra* note 154, at 408-12 (describing how international human rights norms can infuse constitutional interpretation). A related argument, that evolving international standards require a reevaluation of Supreme Court precedent regarding excludable aliens, is made in the Brief for Amicus Curiae of the Lawyers Committee for Human Rights in Support of Respondent Kim Ho Ma at 15-19, Kim Ho Ma v. Reno, 208 F.3d 815 (9th Cir.), *cert. granted*, 121 S. Ct. 297 (2000) (No. 00-38), *available at* 2000 WL 1881913.

403. *See supra* text accompanying note 244.

fundamental rights protected by the Constitution, many of which are considered universal to all human beings by the international community. This alternative is attractive in that it is fully consistent with United States constitutional jurisprudence, under which freedoms implicit in the concept of ordered liberty can be determined by looking to the traditions of other civilized societies.[404] In addition, invoking international law to extend due process to all aliens in the United States would avoid a dichotomy between the rights under international law, afforded to aliens, and rights under the Constitution, available only to citizens.[405] Applying international standards to protect the rights of aliens, while reserving constitutional protections for citizens, fails to recognize the stake that aliens have in United States society: aliens work, pay taxes, and even serve in the military. In addition, such a dichotomy would fail to recognize the effect that a lower standard of rights for aliens would have on the rights of citizens, because aliens are often the parents, children and spouses of citizens.[406]

Aliens deserve, at least, those protections of the Constitution available to all persons. The justifications previously relied on by courts to deny aliens due process protection are of dubious origin and of even more questionable validity in the twenty-first century. Changing notions of sovereignty, the progression of globalization, and the rise of international human rights norms require a reevaluation of how the United States treats its immigrants. The United States has also stated its intent to promote human rights norms and encourage other countries to do the same. These factors should not be ignored by the Supreme Court in deciding whether the indefinite detention is permissible under United States law. In light of these factors, the Court should not permit the INS to continue its policy of indefinitely detaining aliens.

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404. *See supra* note 88 and accompanying text.

405. *See* Motomura, *supra* note 338, at 1390-92.

406. Justice Jackson recognized this connection in his dissent in *United States ex rel. Knauff v.* Shaughnessy 338 U.S. 537, 550 (1950) (Jackson, J. dissenting). He wrote:

> I do not question the constitutional power of Congress to authorize immigration authorities to turn back from our gates any alien or class of aliens. But I do not find that Congress has authorized an abrupt and brutal exclusion of the wife of an American citizen without a hearing. . . .
>
> Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace to free institutions inherent in procedures of this pattern.

Id. at 550-51; *see also* Motomura, *supra* note 338, at 1390-92. A similar argument is made in the Brief of the American Association of Jews from the Former U.S.S.R., et al. as Amici Curiae, Supporting Affirmance at 18-21, *Kim Ho Ma* (No. 00-38), *available at* 2000 WL 1881915.

CONCLUSION

Unquestionably, the government has a compelling interest in maintaining control over its borders and ensuring the safety of those within its jurisdiction. However, these interests do not justify broad restrictions, such as indefinite detention, that narrowly target persons within a particular social class, such as immigrants. The U.S. Constitution, through the Fifth and Fourteenth Amendments, prohibits these types of restrictions in principle. International law not only prohibits these types of restrictions, but specifically prohibits prolonged arbitrary detention as well. The changing nature of sovereignty and foreign affairs provide a provident opportunity for the Supreme Court to take international law into account in determining what constitutional protections will be afforded to aliens. Indeed, such consideration is compelled by the United States' stated policy of promoting human rights norms. The Supreme Court should take the opportunity presented by the current circuit split to overrule suspect doctrines, and extend the protections of the Constitution and international law to aliens. At the very least, the Court should not assume that Congress intended such a denial of due process without explicit instructions.