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Frozen in Time: The Supreme Court's Outdated, Incoherent Jurisprudence on Congressional Plenary Power over Immigration

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> "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[1]

Rights activists have been fighting for decades to extend constitutional rights–particularly due process rights–to immigrants facing detention and deportation to little avail.[2] Their successes, while important (and despite commentary to the contrary), have done little more than dent Congress' seemingly indestructible plenary power over immigration.[3] Congress' powers to place the burden of proof on the detainee to show she should be released or even to order detention without a hearing, for example, remain intact although neither is constitutionally permissible for any other form of detention, including detention of enemy combatants.[4] The Supreme Court at times seems sympathetic to the obvious injustice in failing to fully extend constitutional rights to immigration proceedings, given their consequences, but believes its hands are tied by more than a century of precedent it used to guarantee full federal control over an area of law and policy that was originally shared with the states.[5] The Constitution's failure to specifically enumerate immigration as a federal power required the Court to

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1 Demore v. Kim, 538 U.S. 510, 521 (2003) (quoting Mathews v. Diaz, 426 U.S. 67, 79-80 (1976)).

2 *See* discussion *infra* Part III(C).

3 *See id*.

4 *See Demore*, 538 U.S. at 518-19 (allowing for mandatory detention of immigrants in immigration proceedings); *see also* United States v. Salerno, 481 U.S. 739, 747 (1987) (setting standards for pretrial detention); *see also* Foucha v. Louisiana, 504 U.S. 71, 81-82 (1992) (setting standards for mental health detention); *see also* Boumediene v. Bush, 553 U.S. 723, 33 (2008) (setting standards for enemy combatant detention).

5 *See* Harisiades v. Shaughnessy, 342 U.S. 580, 587-88 (1952); *see also* Galvan v. Press, 347 U.S. 522, 530-31 (1954).

identify a source for that exclusive power.[6] It landed on international law's sovereignty rights, which at the time were absolute, with a little help from foreign affairs and national security powers that, depending on the Court opinion or scholar, may or may not arise from the Constitution.[7] The Court then used the sources of power to justify Congressional plenary power over immigration.[8] The Supreme Court initially shielded this newly exclusive federal power from constitutional or international law oversight by deeming immigration a foreign affairs and national security matter and therefore a wholly political question.[9] It has since implemented some judicial review, but only after granting extraordinary deference to Congress and, by delegation, the Executive because of what it perceives as the political nature of immigration powers.[10] It has used muddied and muddled jurisprudence to almost wholly avoid the nearly century of evolution of international and constitutional law that would undo the worst of immigration law and policy's injustices. In doing so, it has effectively given the federal government permission to "make rules that would be unacceptable if applied to citizens."[11]

Neither international law nor Supreme Court jurisprudence on foreign affairs and national security powers provide support for the continuation of Congressional plenary power over immigration or the extraordinary deference it grants the federal government in the area of immigration.[12] A dive into international law shows that sovereignty rights–or what the Court terms "inherent sovereignty"–are no longer absolute, and questions of immigrants' rights are explicitly a legal, not political, matter.[13] After World War II, the international community, including the United States, adopted human rights expressly to limit sovereignty rights to protect individuals from abusive and arbitrary government behavior and

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6 *See* DANIEL WEISSBRODT & LAURA DANIELSON, IMMIGRATION LAW AND PROCEDURE: IN A NUTSHELL 53-54 (5th ed. 2005).

7 *See id*. at 54-60.

8 *See id*. at 54-60.

9 *See id*. at 57.

10 *See id*. at 70-82.

11 Mathews v. Diaz, 426 U.S. 67, 80 (1976).

12 *See* Fiallo *v*. Bell, 430 U. S. 787, 792 (1977); *see also* Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018).

13 *See* discussion *infra* Part IV(B).

guaranteed a legal remedy in domestic courts for any rights violations.[14] A dive into Supreme Court jurisprudence also shows that while Congress and the Executive benefit from deference in foreign affairs and national security matters, that deference need not be so extreme–a point the Court clarified when it thwarted the Executive's efforts to claim similarly extraordinary deference over its treatment of enemy combatants after 9/11.[15] Yet, Congressional plenary power over immigration remains justified by absolute sovereignty, and otherwise "unacceptable rules" remain subject to only minimal judicial review because of their political nature. At this point, the Supreme Court's continued reliance on absolute sovereignty and extraordinary deference to prop up an unjust immigration system is little more than rote recitation of case law from a bygone era, rather than a considered judgment of what international law and foreign affairs and national security powers permit when the government exercises its power to control immigration. The Supreme Court, effectively, is allowing nothing more than the weight of precedence to override the sources of power and shield unjust immigration law and policy from appropriate judicial review.

This Article proposes that immigrant rights activists could pose a more effective challenge to unjust immigration law and policy by taking direct, textual aim at the two crumbling pillars of Congressional plenary power. In its post-World War II plenary power decisions, the Supreme Court seems to assume Congress has the power to pick and choose whether international law applies to immigration proceedings based on the Constitution's federal treaty powers. It neither examines what it means to claim international law as a source of power or reconsiders whether international law continues to support Congressional plenary power and the rights violations that power justifies. The Court's failure to apply international human rights law to Congress' immigration powers is the equivalent of failing to apply a constitutional amendment to the very government behavior the amendment was designed to check. The Court also has failed to reconsider its policy of extraordinary deference to the political branches over immigration even as it has refused to employ that level of deference to wartime decision-making, which is much more closely tied to foreign affairs and

14 *See* LOUIS HENKIN ET AL., HUMAN RIGHTS 135-36 (2d ed. 2001).

15 *See, e.g.,* Hamdi v. Rumsfeld, 542 U.S. 507, 580-86 (2004).

national security powers than immigration. This failure leads to the absurd result that in some important aspects noncitizens facing immigration proceedings receive fewer due process protections than enemy combatants bent on the destruction of the United States. Rather than tying ourselves up in jurisprudential knots to find constitutional rights justifications for judicial protection of immigrant rights, this Article looks to use the main sources of immigration power–international law and foreign affairs and national security powers–to finally topple Congressional plenary power.

Part I begins by setting out a specific example of the problem this Article seeks to address: the gross injustice of Congressional plenary power over immigration. It details the United States' law and policy on immigration detention and compares it to the due process and liberty standards that apply to all other forms of nonpunitive detention in the United States to illustrate the otherwise "unacceptable" rules Congressional plenary power allows the government to make. This illustration then serves as a reference point for understanding Congressional plenary power as extraconstitutional and seemingly absolute and to highlight why it is so essential to hold the government accountable for these rights violations.

Part II then examines the origin of Congressional plenary power to (1) establish why relying solely on constitutional arguments to extend rights to immigrants in immigration proceedings may be an impossible task; (2) to offer the background for the fundamental inconsistencies in Supreme Court jurisprudence explored in Part IV; and (3) to ultimately provide a sounder basis for challenging Congress' nearly absolute power. This part documents the evolution of the Supreme Court's jurisprudence that first recognized the Constitution granted both the states and the federal government the sovereign right to control immigration; to sole federal control first under the Constitution's Commerce Clause, and then finally under inherent sovereignty granted by international law, with some added support from foreign affairs and national security powers. Part III then explains how federal immigration powers became relatively absolute. It examines the concept of absolute sovereignty as well as the Court's determination that foreign affairs and national security matters, at least with respect to immigration law, are subject to only the most minimal judicial review. With this knowledge, immigration rights activists can build cogent legal arguments that

are both loyal to the Supreme Court's decisions on the source of federal immigration powers but capable of exploiting the profound weaknesses in how it maintains that power as nearly absolute.

The remainder of the Article identifies those jurisprudential weaknesses. Part IV begins by highlighting that inherent sovereignty no longer means absolute sovereignty. Section A articulates the post-World War II limits international law places on the sovereign right to control immigration and underscores that the United States has consented to these limits, which means the judiciary must enforce them. It then spotlights the Supreme Court's anemic approach to what it means for international law to be a source of power, which currently allows it to rhetorically claim international law's inherent sovereignty over immigration as equal in authority to the Constitution, but still somehow subordinate international law to federal statutes. Section B identifies the similar incoherency in the Court's unwillingness to revoke its extraordinary deference to Congress and the Executive although foreign affairs and national security powers no longer justify it under its nonimmigration jurisprudence. All of this is to spotlight that the Supreme Court has been derelict in its duty to protect immigrant rights as required by international law and the foreign affairs and national security powers that are the source of federal immigration powers.

I. The Consequences of Congressional Plenary Power: Immigration Detention

Part I examines how Congress uses its plenary power to grossly violate the rights of immigrants with a Supreme Court stamp of approval. It uses the example of immigration detention to expose the naked injustice of subjecting immigration law and policy to only the most minimal oversight. Detention inherently revokes a person's right to liberty. It makes it impossible for detainees to work, to enjoy their families, or to move around freely, among numerous other hardships. Congress has used its nearly absolute power over immigration to deprive immigrants of their right to liberty in a manner the Constitution would not allow, under any circumstance, for citizens and even noncitizens facing detention in other contexts–including during war.

The contrast between due process rights granted to immigrants and all other non-criminally convicted detainees is stark. Pretrial detention and mental health detention are governed by the

Constitution and are granted full constitutional rights. Detention during war for enemy combatants, which in the post-9/11 world includes suspected terrorists, is governed by a combination of the Constitution and International Humanitarian Law. In some important respects, our Constitution provides people believed to be intent on the destruction of the United States with greater rights than those granted under immigration detention.[16]

To begin the comparison, it is important to understand the differences and similarities between immigration detention and other types of detention as they help explain some differences in legal treatment as well as highlight the gross unfairness of immigration detention. Pretrial detention shares the same grounds for detention as immigration detention and, like immigration detention, anticipates a short period of confinement before a final resolution of the case.[17] But, pretrial detention falls under criminal law, which typically requires stricter standards of due process than civil law, which governs immigration detention.[18] Mental health detention is also a form of civil detention, but shares only one of the grounds for detention; it could be lifelong, and detainees, at least in theory, receive a therapeutic benefit, which makes it less analogous to immigration detention. Detention during war or insurrection employs emergency powers to contain an impending threat necessitated by situations not easily handled by the ordinary justice system. In these urgent circumstances, due process requirements are typically less than in ordinary times or for pretrial and mental health detention. These differences should make wartime detention the least analogous of the detention regimes to that of the immigration detention regime, but wartime detention invokes the same foreign affairs and national security powers that, in part, justify Congressional plenary power over immigration, making it more

16 *See generally* Boumediene v. Bush, 553 U.S. 723 (2008) (discussing the president's power "to use all necessary and appropriate force against those . . . he determines planned, authorized, committed, or aided the terrorist attacks . . . on September 11, 2001").

17 *See Pre Trial Detention Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/p/pre-trial-detention/ (last visited Jan. 17, 2022) [https://perma.cc/EDC9-V7JE].

18 *What Every Lawyer Needs to Know about Immigration Law*, A.B.A. (June 2017), https://www.americanbar.org/news/abanews/publications/youraba/2017/june-2017/immigration-law-basics-every-lawyer-should-know/ [https://perma.cc/LYR2-6DZK].

analogous in practice. By comparing the due process rights of immigrant detainees and all other detainees, Part I underscores the stark discrimination underpinning the Supreme Court's grant of Congressional plenary power over immigration law and policy that neither the Constitution nor international law otherwise permit.

Part I proceeds in three sections. Section A sets out the due process requirements for the three forms of non-punitive detention other than immigration detention practiced in the United States. Section B then describes the Immigration and Nationality Act's detention scheme and the limited due process the proceedings require. Section C concludes by comparing the differences in the due process requirements between detention regimes to underscore the disparity in standards between immigration detention and all other forms of detention created by the Court's choice to employ an extraconstitutional source of federal power and then grant extraordinary deference to the federal government when it employs that power. In doing so, it highlights the myriad ways the Supreme Court allows Congress and the Executive to grossly violate immigrant rights.

A. Due Process Standards for Non-Immigration Detention

The underlying assumption contained in any Supreme Court decision on the legality of detention and due process requirements for detainees, outside of the immigration context, is the core belief that: "'[i]n our society liberty is the norm,' and detention without trial 'is the carefully limited exception.'"[19] The Court's first requirement for achieving that norm is to limit the grounds for which a person may be detained.[20] So far, the only acceptable grounds for depriving a person of her liberty rights are that the person is a threat to public safety or the continued existence of the United States or is likely to flee rather than appear at future court hearings or government proceedings.[21]

Where the justification for detention is public safety, the Supreme Court limits detention to "to specially dangerous

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19 *Hamdi*, 542 U.S. at 529 (superseded by statute) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987) (superseded on other grounds)).

20 *See generally* United States v. Salerno, 481 U.S. 739, 755 (1987) (holding that the Bail Reform Act's authorization of pretrial detention is not unconstitutional).

21 *See* 18 U.S.C. §3143(b)(1) (2018).

individuals."[22] It has not established a baseline for what constitutes "specially dangerous."[23] With that said, it approved a pretrial detention statute in part because it "carefully limits the circumstances under which detention may be sought to the most serious of crimes,"[24] and approved mental health detention for persons with a mental disorder who are a found to be a threat of "injury to the public" or to her "own survival or safety."[25] Sex offender detention falls into this category. Enemy combatants and insurrectionists are deemed an inherent and serious physical threat to Americans and an existential threat to the United States.[26]

The Supreme Court also requires relatively strict due process rights before the government can override the right to liberty. The general test for adequate due process requires a balancing of the following 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.[27]

For each type of detention, the detainees' interests differ significantly depending on the duration of detention or if they are likely to suffer from a stigma if detained. The government's interests differ based on the number of people threatened by a dangerous person, whether it can provide a benefit to the detainee, and whether the United States as an entity is threatened and other consequences of war. Another point of differentiation is that pretrial and mental health detention are carried out as ordinary functions of the government, while enemy combatant detention

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22 Zadvydas v. Davis, 533 U.S. 678, 691 (2001).

23 *Salerno*, 481 U.S. at 739. The Bail Reform Act currently allows pretrial for those who committed violent crimes that could lead to at least 10 years imprisonment, any crime that could be punished with lifetime imprisonment or the death penalty; drug crimes that lead to at least 10 years imprisonment, convictions for two more felonies or a felony that involves a minor victim or use of a weapon. 18 U.S.C. §3142 (f)(1) (2018).

24 *Salerno*, 481 U.S. at 747.

25 O'Connor v. Donaldson, 422 U.S. 563, 573-74 (1975).

26 HALLIE LUDSIN, PREVENTIVE DETENTION AND THE DEMOCRATIC STATE 305-06 (2016).

27 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

forms part of the extraordinary powers of the government during a war or insurrection. The relevance of these points will become clearer throughout the discussion.

With a few exceptions, the Supreme Court has not established minimum due process standards for detaining someone considered to be dangerous. Rather, it has approved or disapproved various statutes based on the strength of their rights protections and their efforts to reduce the risk that a person will be erroneously detained. In *U.S. v Salerno*, the Court approved the due process requirements for pretrial detention under the federal Bail Reform Act because (1) the government must first show probable cause that a crime was committed; (2) it "must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person;" and (3) detention is permitted only for a short period under the Speedy Trial Act.[28] In addition to the right to a hearing, the statute guarantees a right to counsel including free counsel for anyone who cannot afford it; a right to cross examine witnesses; and a right to written reasons for the court's decision.[29]

For purposes of later comparison, the approved Bail Reform Act places the burden of proof on the government, establishes an objective, clear and convincing standard of proof, and requires proof that detention is necessary. The Supreme Court approved the burden and standard of proof as a reflection of an appropriate balance between the individual's "strong interest" in liberty and the government's "compelling" interest in preventing the "most serious of crimes."[30]

The Court's *Salerno* decision suggests that lesser due process standards may fulfill the government's constitutional obligations but its later decisions treat the Bail Reform Act as setting the bar.[31] In *Foucha v. Louisiana*, the Supreme Court overturned a mental health detention statute because "[u]nlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement

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28 *See Salerno*, 481 U.S. at 750. For pretrial detention, the Court has established that individuals confronting pretrial detention and who are indigent are entitled to a free attorney. The basis for this rests in the 6th Amendment, which applies to criminal cases only.

29 *See* Bail Reform Act of 1966, 18 U.S.C. § 3142(f)(2)(b).

30 *Salerno*, 481 U.S. at 746-50.

31 *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 82-83 (1992).

[was] not carefully limited."[32] The Court rejected the statute in *Foucha* in large part because it placed the burden on the potential detainee to prove he was not dangerous, which the Court declared allowed the state to "prove nothing to justify . . . detention."[33] Along with shifting the burden of proof to the state, in *Addington v. Texas*, the Court further held that the 14th Amendment's due process clause requires a standard of proof of clear and convincing evidence that the person is dangerous and detention is necessary for mental health detainees.[34] It explained that the choice of who carries the burden of proof reflects who should carry the risk of a wrongful decision.[35] Stated differently, due process requires the party with the least at stake to carry the burden of proof. The strictness of the standard of proof reflects the seriousness of the consequences of an erroneous decision on the person with the most at stake.[36] The more serious the consequences, the more difficult the standard of proof. At stake in mental health detention is the individual's liberty interest, her interest in avoiding the stigma of mental health detention, and the state's interest in protecting public safety and caring for the ill.[37] In *Addington,* the Court determined that the individual facing a loss of liberty had the most at stake.[38] It then rejected a preponderance of the evidence standard for mental health detention because of the gravity of harm that a wrongful loss of liberty could cause. Rather, it concluded that the lesser standard of proof is appropriate where the risk is a "mere loss of money."[39] Balancing the state's interests against a detainee's liberty rights, the Court rejected a beyond the reasonable doubt standard because of how difficult it is to prove future dangerousness.[40]

The scales pictured below capture how the Supreme Court weighs the individual's interests compared to the state's interests when the government seeks to detain someone as dangerous in non-wartime. Under *Addington*, the party whose interests weigh less

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32 *Id*. at 81.

33 *Id*. at 81-82.

34 *See* Addington v. Texas, 441 U.S. 418, 423, 425, 432 (1979).

35 *See id*. at 423-24.

36 *See id*.

37 *See id*. at 426.

38 *Id*. at 427.

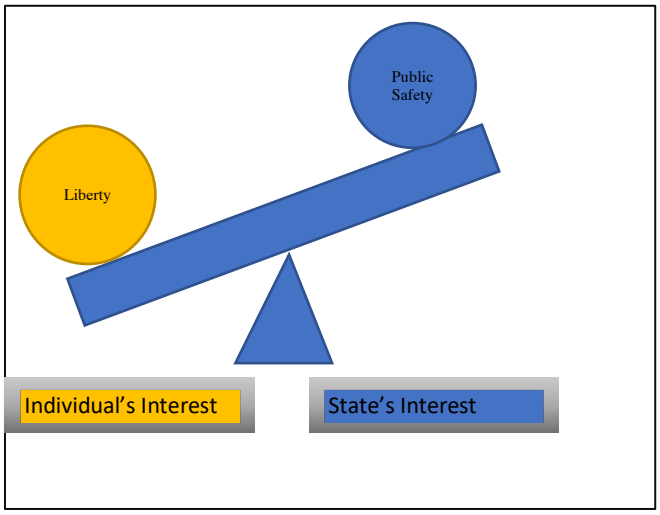
39 *See* Addington v. Texas, 441 U.S. 418, 423, 424 (1979)..

40 *See id*. at 422.

carries the burden of proof, and with it, a greater risk of error or a wrongful outcome. The more heavily the scale is weighed down, the stricter the standard of proof required to justify detention.[41]

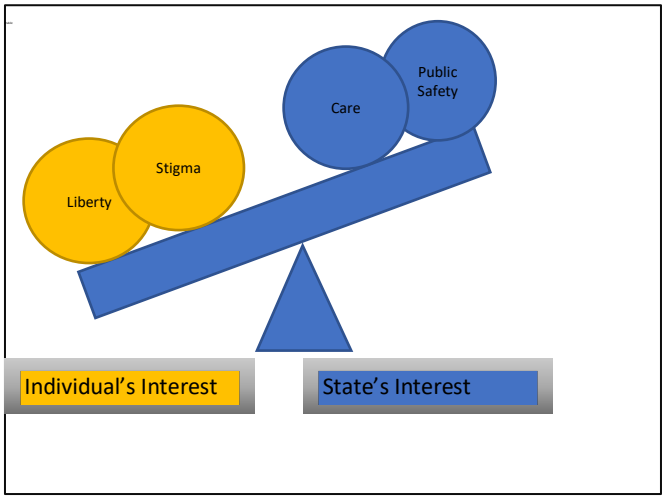
41 Steve Wexler, *Burden of Proof, Writ Large*, 33 U.B.C.L. REV. 75, 78 (1999) ("The heavier a burden, the harder it is to meet; the more likely a certain result, the steeper the slant of the law. If the law makes a burden of proof heavy enough, no one will try to bear it. This is why we have such a high standard of proof in criminal cases.")

Figure A: Pretrial Detention: Most Serious Crimes



Individual's interests: liberty
State's interests: public safety
Burden of proof: government
Standard of proof: clear and convincing evidence

Figure B: Mental Health Detention



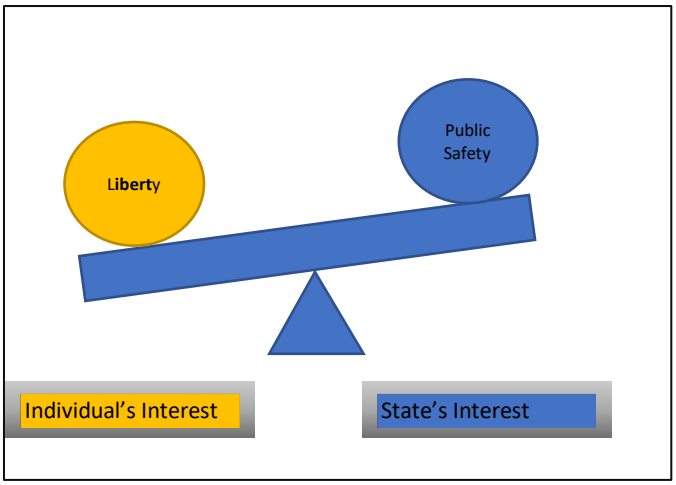
Individual's interests: liberty; freedom from stigma
State's interests: public safety and caring for the ill
Burden of proof: government
Standard of proof: clear and convincing evidence

The Constitution's due process and liberty protections do not allow for mandatory detention, or detention without an individualized hearing, in either mental health or pretrial detention. But, the Bail Reform Act does allow for a rebuttable presumption of dangerousness for (1) people accused of certain, particularly egregious, violent crimes, capital offenses and drug felonies that could lead to 10 or more years in prison; or (2) if a person had been convicted of a violent crime subject to at least 10 years imprisonment within the past 5 years and committed this offense while released on bail.[42] The potential harm if the released accused person commits a similarly egregious crime justifies the presumption. Notably, the burden of proof remains with the government, but if one of those criteria is met, the accused must provide at least some evidence to rebut the presumption of dangerousness in a pretrial hearing.[43] The effect of the rebuttable presumption is to weigh the government's interest in public safety more heavily, as pictured in Figure 3.

42 *See* § 3142(e)(3). Federal courts have upheld the constitutionality of the rebuttable presumption. *See e.g.,* United States v. Jessup, 757 F.2d 378, (1983); United States v. Perry, 788 F.2d 100, 111-18 (1986); United States v. Moore, 607 F. Supp. 489, 493-500 (1985).

43 *See* 18 U.S.C. § 3142(e)(3).

Figure 3: Pretrial Detention – Egregious Crimes



Individual's interests: liberty

State's interests: public safety at its greatest

Burden of proof: government

Standard of proof: clear and convincing evidence with rebuttable presumption of dangerousness

The Supreme Court decisions on due process standards for flight risk are less robust. The Supreme Court has not ruled on the burden or standard of proof that a person is a flight risk, but federal court decisions have required the government to prove that conditions of release, like bail, are necessary by the preponderance of the evidence.[44] Substantively, the Court uses the Constitution's 8th Amendment excessive bail clause to determine the constitutionality of conditions of release.[45] It employs another balancing test to measure the "government's proposed conditions of release or detention" against "the perceived evil" the conditions are meant to

44 *See* United States v. Jackson, 823 F.2d 4, 5 (1987); *see also* CHARLES DOYLE, CONG. RES. SERV., R40221, BAIL: AN OVERVIEW OF FED. CRIM. L.10 (2017). The U.S. Department of Justice's Criminal Resource Manual that was archived and not replaced by the Trump Administration, listed preponderance of the evidence as the correct standard of proof for determining flight risk for pretrial detention. U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL §26 (last updated, Jan. 2020).

45 *See* United States v. Salerno, 481 U.S. 739, 752 (1987).

prevent.[46] To avoid a finding of excessive bail, "when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more."[47] The amount of bond or other conditions, then, must be only as much as necessary to constitute "adequate assurance that he will stand trial and submit to sentence if found guilty."[48]. The assessment must be individualized and focused on "assuring the presence of that individual defendant."[49] In *Stack v. Boyle,* the Court described the traditional standards for assessing bail amounts as those listed in the Federal Rule of Criminal Procedure Rule 46(c), which required courts to consider "the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."[50] It described any attempt to set the amount based solely on the alleged crime as "an arbitrary act" and finds suspicious "bail in an amount greater than that usually fixed for serious charges of crimes."[51]

To put the Supreme Court's assessment in this context onto the same scale used for other forms of detention, the state's primary interest is in ensuring the accused appears for trial, although it may account for other interests in the determination of bail amounts. The individual's interest is in liberty. The burden of proof is on the state, because its interests weigh less heavily than the accused's and therefore should bear the greater risk of a wrongful decision. Following current federal practice, the standard of proof is preponderance of the evidence, equivalent to the risk of a mere loss of money, which often is what is at stake for criminally accused who are not considered "specially dangerous." The scale is pictured in Figure 4.

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46 *Id*. at 754.

47 *Id*.

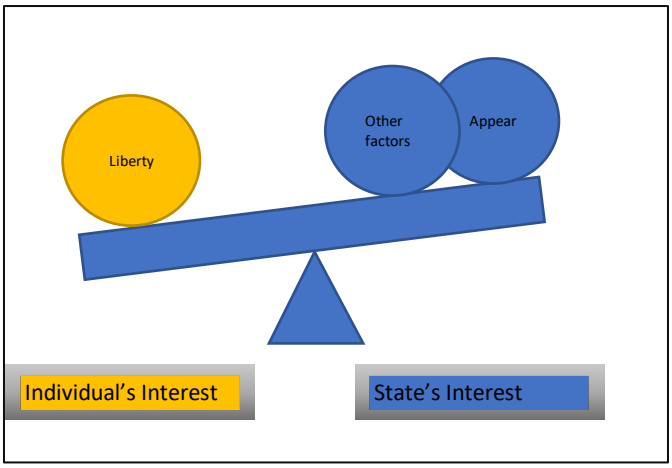
48 Stack v. Boyle, 342 U.S. 1, 4 (1951).

49 *Id*. at 1, 5.

50 *Id*. at 8.

51 *Id*. at 6.

Figure 4: Pretrial Detention: Flight Risk



Individual's interests: liberty

State's interests: ensuring appearance in court, other factors

Burden of proof: government

Standard of proof: preponderance of the evidence

Liberty rights and the presumption of liberty are more circumscribed for detention during a war or insurrection. The Supreme Court treats threats from a war or insurrection as exceptional circumstances because of the broad danger they pose to the country and its population as well as the difficulty the ordinary legal system has in responding to an uncommon threat.[52] It describes the interest in protecting society as "at its peak,"[53] especially in its goal of preventing enemies from "return[ing] to battle against the United States."[54] With foreign combatants in times of a declared war, the Supreme Court allows the federal government to simply assume that "[t]he alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy."[55]

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52 *See* Ludecke v. Watkins, 335 U.S. 160, 165 (1948); *see also* Korematsu v. United States, 323 U.S. 214, 218 (1944); *see also* Hamdi v. Rumsfeld 542 U.S. 507, 518-19 (2004).

53 United States v. Salerno, 481 U.S. 739, 748 (1987).

54 *Hamdi*, 542 U.S. at 531.

55 Johnson v. Eisentrager, 339 U.S. 763, 772 (1950).

The Supreme Court's most recent decisions on detention of enemy combatants have come in response to the government's detention scheme under the post-9/11 Authorization of the Use of Military Force (AUMF).[56] The AUMF grants the Executive the power to use "necessary and appropriate force" against those who attack the U.S.[57] The federal government sought to use its war powers to detain suspected terrorists as enemy combatants and to prohibit petitions for a Writ of Habeas Corpus for release, which would mean no judicial oversight of the detention decision. The Supreme Court repeatedly acknowledged that wartime detention "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress [] authorized the President to use" in the AUMF; yet it refused to find that power unlimited.[58] Each decision fretted the founders' fear that unchecked executive detention would lead to tyranny.[59]

In *Hamdi v. Rumsfield*, the government sought to detain Hamdi, a United States citizen taken in Afghanistan and initially held in Guantanamo Bay, without judicial oversight.[60] By the time of the decision, the government had transferred Hamdi to a detention facility in the United States.[61] The government argued that Hamdi was not entitled to petition for habeas corpus or to due process checks because it carried out Hamdi's detention as part of its wartime powers in emergency circumstances.[62] While the Court relied heavily on the fact that Hamdi is a U.S. citizen in justifying its decision, the Court later employed its holdings in *Hamdi* to noncitizen detainees, which makes *Hamdi* highly relevant to

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56 Authorization for Use of Military Force, Pub. L. No. 107-40, S.J. Res. 23, 107th Cong. (2001).

57 *Id*.

58 *Hamdi*, 542 U.S. at 518, 526; *see also* Boumediene v. Bush, 553 U.S. 723, 733 (2008).

59 THE FEDERALIST NO. 84 (Alexander Hamilton); *see* Boumediene v. Bush, 553 U.S. 723, 744 (2008) (quoting THE FEDERALIST NO. 84 (Alexander Hamilton) "[T]he practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.")); *Hamdi*, 542 U.S. at 530-531 (quoting Ex Parte Milligan, 71 U.S. 2 (Sup. Ct. 1866) "[The Founders] knew--the history of the world told them--the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen")).

60 *Hamdi*, 542 U.S. at 510.

61 *See id*.

62 *See id*. at 527.

understanding the limits of the government's wartime detention powers.

Relying on the traditional balancing test, the Court balanced the interests of the detainee against the interests of the government, and ultimately rejected the government's argument.[63] The Court described Hamdi's interests as "the most elemental of liberty interests–the interest in being free from physical detention by one's own government."[64] It found that the government had weighty interests in protecting its citizens from war and "treasonous behavior," including by preventing enemy combatants from returning to the fight.[65] It further recognized the government's interests in "reducing the process" in recognition of "the practical difficulties" of searching for evidence and holding hearings during a war.[66] The Court ultimately found that while weighty, these interests were not enough to wholly override the "values that this country holds dear or the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[67] The Court held that the government is required to provide citizen-detainees with the factual basis for the declaration of enemy combatant status, and a fair hearing to challenge their status "before a neutral decisionmaker."[68]

This requirement of a constitutionally adequate process does not mean that the government cannot limit due process given the context. The Court in *Hamdi* concluded: "At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[69] In dicta, the Court contemplated the possibility of relying on hearsay evidence or a presumption in favor of the government's evidence to alleviate the burden.[70] Even with

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63 *See id*. at 527.

64 *Id*. at 529.

65 *Id*. at 530.

66 *Hamdi*, 542 U.S. at 531-32.

67 *Id*. at 532.

68 *Id*. at 533.

69 *Id*. at 533.

70 *See id*. at 533-34.

that said, the language in the dicta requires that the government must first provide evidence that the person is an enemy combatant before shifting the burden to the detainee to rebut the presumption.[71]

For the purposes of this article, the most interesting aspect of this decision is that the Supreme Court rejected that constitutional war powers and foreign affairs powers justify extraordinary deference to the federal government. However, as Part II below shows, these powers traditionally support that exact justification for immigration detention. The Supreme Court specifically spurned the government's argument that separation of powers and the Constitution's grant of war powers to Congress and the Executive demand that the courts "circumscribe" their oversight.[72] It stated:

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[73]

It further relied on International Humanitarian Law, a subset of international law, to bolster checks on the President's wartime and foreign affairs powers.[74]

While the *Hamdi* decision emphasized the detainee's American citizenship in its reasoning, the Supreme Court in *Boumediene v. Bush* refused to dispense with habeas petitions and due process requirements for noncitizens facing enemy combatant detention.[75] It did not find compelling the government's argument that Boumediene's noncitizen, enemy combatant status and the fact that he was captured and detained on foreign territory barred him from constitutional protection.[76] To the contrary, the Court found that the Constitution protects noncitizens and citizens alike.[77] It then dispensed with the argument that separation of powers during war revokes judicial oversight of enemy combatant detention by looking

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71 *See id*. at 534.

72 *Hamdi*, 542 U.S. at 535-36.

73 *Id*.

74 *Id*. at 521.

75 *See* Boumediene v. Bush, 553 U.S. 723 (2008).

76 *See id*. at 739, 742-743.

77 *See id*. at 742-43.

back at the Framer's intent to guarantee the Writ of Habeas Corpus as an essential component of a constitutionally limited government.[78]

Part and parcel of the Court's decision is the importance of the right to liberty.[79] It found that national security depends as much on guaranteeing liberty as it does on military might:

> [S]ecurity depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers.[80]

The Court rebuffed the extraterritoriality argument on the basis that Boumediene was being detained at Guantanamo Bay, which was under the *de facto* sovereignty of the United States.[81] In doing so, the Supreme Court extended the reach of the Constitution to all places where the government has effective sovereignty.[82]

The Supreme Court again refused to employ extraordinary deference to the government because the circumstances implicated the political branches' wartime and foreign affairs powers.[83] Rather, the Court noted that executive-ordered detention inherently makes the need for access to habeas corpus review "more urgent."[84] It looked to balance the need to protect detainees from arbitrary detention and the practicalities of detention proceedings during a war, relying on *U.S. v. Curtiss-Wright*, for the proposition that the judiciary must give "proper deference . . . to the political branches" that are seeking to combat terrorism, but that this deference did not require it to abstain from real judicial oversight.[85] The Court concluded: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be

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78 *See id*. at 743-44.

79 *See id*.

80 *Id*. at 797.

81 *See Boumediene*, 553 U.S. at 770-71.

82 *See id*.

83 *See id*. at 778.

84 *Id*. at 785.

85 *Id*. at 797 (citing United States *v*. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)). As described in Part II, the Supreme Court relies on U.S. v. Curtiss-Wright to effectively strip immigration detention of judicial oversight.

reconciled; and in our system they are reconciled within the framework of the law."[86]

Having established Boumediene's entitlement to liberty and due process rights, the Court identified a variety of failings in the government's detention review process, including the lack of access to a lawyer, the presumption favoring the government's evidence, the "[in]ability to rebut the Government's evidence" and the inability to present new evidence after an initial detention hearing.[87] The Court concluded that the process the government chose for enemy combatant detention review created a "considerable risk of error" of a wrongful loss of liberty and, as such, ruled the detention scheme as constitutionally inadequate.[88] It did not consider whether using preponderance of the evidence as the standard of proof is appropriate.[89] The lower courts hearing challenges to enemy combatant detention continue to follow the burden and standard of proof required in *Hamdi*, along with the rebuttable presumption of dangerousness.[90]

For comparative purposes, the Supreme Court requires the government to retain the burden to prove that the detainee is an enemy combatant.[91] However, once the government shows the person fits the category of enemy combatant, the burden of evidence shifts to the detainee to provide some evidence rebutting a presumption of dangerousness.[92] The burden of persuasion of the necessity of detention–at all times–remains on the government.[93] Figure 4 reflects the balance between the individual's interest and the government's interests in enemy combatant detention.

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86 *Boumediene*, 553 U.S. at 798.

87 *Id*. at 767, 789-90.

88 *Id*. at 778, 785.

89 *See id*. at 778, 785.

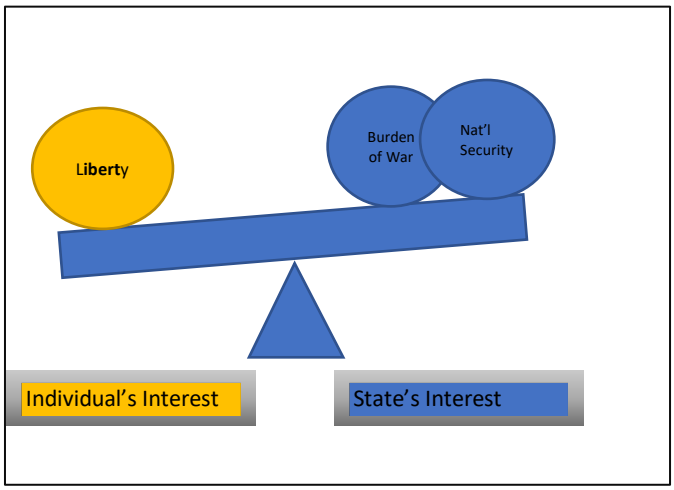
90 *See* BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 12 (The Brookings Inst., 2012); *see also The Legal Rights of Guantanamo Detainees: What are they, Should they be Changed, and is an End in Sight?: Hearing before the Senate Comm. of the Judiciary*, 110th Cong. 9 (2007) (statement of Steven Engel, Deputy Assistant Att'y Gen. of the United States).

91 *See* WITTES ET AL., *supra* note 90, at 12.

92 *See id*.

93 *See id*. at 14.

Figure 4: Enemy Combatant Detention



Individual's interests: liberty

State's interests: national security "at its peak"; burden of gathering evidence during war

Burden of proof: government

Standard of proof: preponderance of the evidence; rebuttable presumption if an enemy combatant

As this review shows, pretrial, mental health and enemy combatant detainees are entitled to a presumption of liberty intended to make it difficult for the government to erroneously strip individuals of their liberty. Even noncitizen enemy combatants waging war against the United States are entitled to constitutional liberty and due process protections that place the burden on the government to prove by the preponderance of the evidence that the individual is dangerous. That is not to say that the protections are ideal, but that the Court places meaningful constitutional limits on this type of detention despite the strength of the government's interest in protecting society and the United States as an entity. It also rejects government efforts to claim extraordinary deference to its use of foreign affairs and national security/war powers.

B. Detention under the Immigration and Nationality Act

Although noncitizens gain a right to liberty under the

Constitution when they enter the United States, that right is severely limited for immigration detention when compared to all other forms of detention.[94] The Immigration and Nationality Act (INA) allows the Department of Homeland Security (DHS) to detain immigrants pending a determination of whether they should be removed from the United States and for those ordered to be removed.[95] The INA requires mandatory detention for certain categories of immigrants deemed to be particularly dangerous or a grave flight risk and grants discretion to the Department of Homeland Security (DHS) to detain all other immigrants on those same grounds.[96] Under INA §1226(c)(1), the government must detain any noncitizens who are found to be inadmissible–meaning they cannot be granted permission to enter the United States–because of convictions for crimes of moral turpitude, drug offenses, or for involvement in terrorist activities.[97] Also subject to mandatory detention is anyone who is deportable because she committed a crime of moral turpitude that led to at least 1 year of imprisonment, multiple crimes of moral turpitude, aggravated felonies, drug crimes, firearm offenses, espionage, or was involved in terrorist activities.[98] These noncitizens are categorized, as a group, as a threat to society and are simply presumed to be a danger. They cannot rebut this presumption. Additionally, INA §1231(a)(2) requires mandatory detention for anyone who has already been ordered removed from the United States on the assumption that this category of noncitizens poses a serious flight risk.[99]

Importantly, mandatory detention dispenses with the need for an individualized hearing before the government strips noncitizens of their liberty rights. It means there is no judicial or administrative oversight of the detention decision. In *Demore v. Kim*, The Supreme Court upheld mandatory detention as a reasonable response to evidence that some noncitizens convicted of crimes pose a risk of recidivism and that the government was having

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94 *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

95 *See* HILLEL R. SMITH, CONG. RES. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 9-10 (2019).

96 *See id*. at 9.

97 *See* Immigration and Nationality Act, 8 U.S.C.A. §1226(c)(1); *see also* 8 U.S.C.A. §1227(a)(1).

98 *See* 8 U.S.C.A. §1227.

99 *See* 8 U.S.C.A. §1231(a)(2).

difficulty locating noncitizens subject to removal.[100] Despite making reference to the 5th Amendment, the Court only asked whether mandatory detention is a reasonable response to these concerns.[101] Because mandatory detention falls under the government's immigration powers, it concluded that the "Due Process Clause does not require [the government] to employ the least burdensome means" to ensure that noncitizens appear for their hearings.[102] It also rejected any requirement that the government prove detention is "necessary" to ensure the noncitizen shows up for immigration proceedings or to protect the community.[103] Rather, it weighted heavily the risk of recidivism and the cost to the United States of having to locate removable immigrants.[104] The Court never even discussed the noncitizens' liberty interest.

Figure 5 shows the balance of interests the Supreme Court uses for detention of noncitizens Congress deemed most dangerous and Figure 6 shows the balance for those considered at greatest risk for flight. Consistent with the Court's decision to give no weight to the noncitizen detainee's liberty interest, the figures do not show detainees as having any liberty interest.

100 *See* Demore v. Kim, 538 U.S. 510, 518-19 (2003).

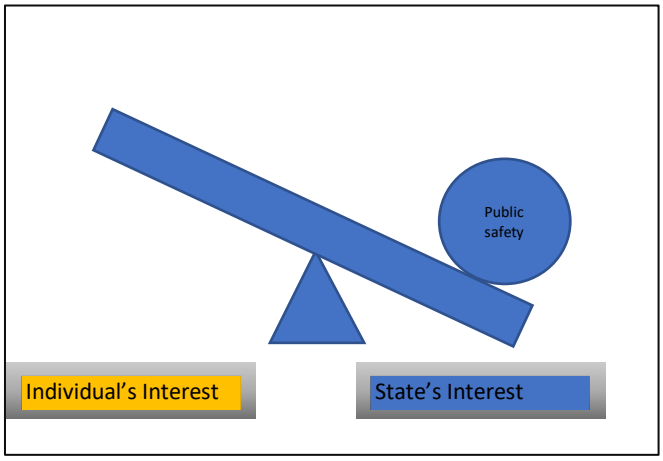
101 *See id*. at 528.

102 *Id*.

103 *Id*.

104 *See id*. at 518-19.

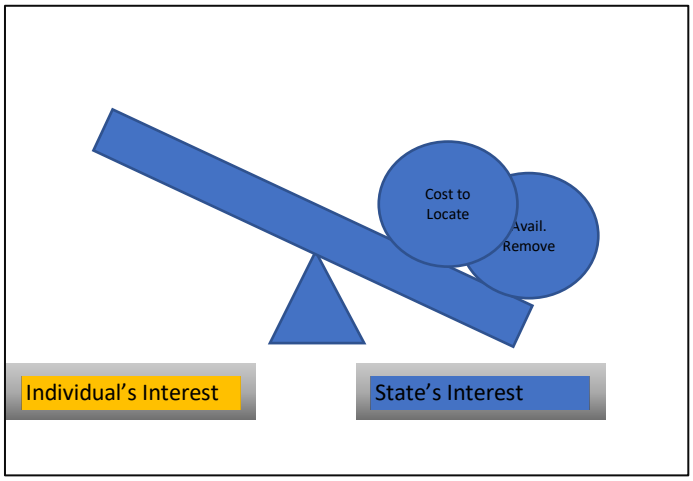
Figure 5: Immigration Detention: most dangerous



Individual's interests: none

State's interests: public safety

Figure 6: Immigration Detention: ordered removed



Individual's interests: none

State's interests: ensuring immigrant available for removal; cost in failing to remove deportable immigrant

Under INA §1226(a), for all other noncitizens facing removal proceedings, DHS has the discretion to order detention.[105] Immigration and Customs Enforcement officers first order detention, at which point noncitizens may request a custody hearing before an immigration court to determine whether they may be released from detention and, if so, under what conditions.[106] Under the immigration regulations, the grounds for detaining a noncitizen are whether the person poses a flight risk or is a danger to the community, including because she is a national security threat.[107] These noncitizens are entitled a right to a lawyer at their own cost, a right to an interpreter during the proceedings, a right to present evidence and to cross examine witnesses, along with a right to appeal.[108]

Under the INA regulations, detainees shoulder the burden of proof. They must "demonstrate to the satisfaction of the officer that such release would not pose a danger to property or persons, and that the alien is likely to appear for any future proceeding."[109] Based on Supreme Court jurisprudence, that means the government is considered to have more at stake if a dangerous person is released or a noncitizen fails to appear at a court hearing than the noncitizen who could lose her liberty. There is no set standard of proof. The Board of Immigration Appeals, which hears appeals from the immigration courts, has established nine factors Immigration Judges should consider when assessing flight risk and dangerousness and when setting any bond or other conditions for release. They are:

> (1) whether the alien has a fixed address in the United States; (2) the alien's length of residence in the United States; (3) the alien's

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105 *See* 8 U.S.C.A. §1226(a) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. Except as provided in subsection (c) and pending such decision, the Attorney General— (1) may continue to detain the arrested alien; and (2) may release the alien on— (A) bond of at least $1,500 with security approved by, and containing conditions prescribed by, the Attorney General; or (B) conditional parole . . . ").

106 *See* 8 U.S.C.A. §1226(c)(2).

107 *See* 8 C.F.R. § 1236.1 (2022); *see also* KEVIN R. JOHNSON ET AL., UNDERSTANDING IMMIGRATION LAW 422 (2d ed. 2015).

108 *See* Plyler v. Doe, 457 U.S. 202, 210 (1982); *see also* Immigration and Nationality Act, 8 U.S.C.A. §1229(b)(4); *see also* Reno v. Flores, 507 U.S. 292, 309 (1993); *see also* JOHNSON, *supra* note 107, at 423.

109 *See* 8 C.F.R. § 236.1(c)(8).

> family ties in the United States, and whether they may entitle the alien to reside permanently in the United States in the future; (4) the alien's employment history; (5) the alien's record of appearance in court; (6) the alien's criminal record, including the extensiveness of criminal activity, the recency of such activity, and the seriousness of the offenses; (7) the alien's history of immigration violations; (8) any attempts by the alien to flee prosecution or otherwise escape from authorities; and (9) the alien's manner of entry to the United States.[110]

How much weight the immigration judge gives those factors is also left to the immigration judge "as long as the decision is reasonable."[111]

The lack of a standard of proof and the near wholesale discretion of the immigration judge means that an immigration judge could require anywhere from as little as a modicum of support to overwhelming evidence that the noncitizen is either a flight risk or dangerous. Drawing a scale of the individual and government interests is more complicated here, as it needs to reflect a range of possibilities. Where the immigration judge requires only a modicum of evidence, the standard is best reflected as equivalent to preponderance of the evidence.[112] Where the immigration judge's standard is overwhelming evidence, the standard would then correlate with beyond a reasonable doubt.[113] Figure 7, therefore, reflects that range. Placing the individual and government interests on the scale heavily weighted toward the government captures the freedom immigration judges have to weigh the government's interests at its heaviest.

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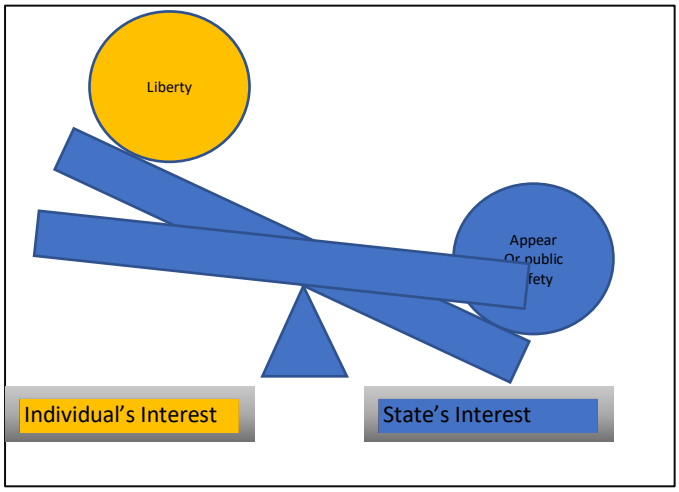
110 In the Matter of Guerra, 24 I&N Dec. 37, 40 (BIA 2006) (citing In the Matter of Saelee, 22 I&N Dec. 1258 (B.I.A. 2000); In the Matter of Drysdale, 20 I&N Dec. 815, 817 (B.I.A. 1994); In the Matter of Andrade, 19 I&N Dec. 488 (B.I.A. 1987)).

111 *Guerra*, 24 I&N at 40.

112 *See* Addington v. Texas, 441 U.S. 418, 423 (1979).

113 *See id*.

Figure 7: Discretionary Immig. Detention Flight/Danger



Individual's interests: liberty

State's interests: ensure appearance in court or public safety

Burden of proof: noncitizen

Standard of proof: from preponderance of the evidence to beyond a reasonable doubt

There have been a handful of habeas corpus cases in federal district courts that have successfully challenged the burden and standard of proof established by the federal regulations as a violation of constitutional due process standards.[114] These decisions conclude that the Due Process Clause requires the government to prove dangerousness by clear and convincing evidence and flight risk by preponderance of the evidence or clear and convincing evidence.[115] Several also add a requirement of proof that detention is necessary for anyone without a criminal record.[116] So far, the Supreme Court has avoided reconsidering challenges to immigration detention burden and standard of proof as violations of

114 *See, e.g.*, Darko v. Sessions, 342 F. Supp. 3d 429, 435 (S.D.N.Y. 2018) (listing other District Court decisions from other jurisdictions); Brito v. Barr, 415 F. Supp. 3d 258 (D. Mass. 2019); Pensamiento v. McDonald, 315 F. Supp. 3d 684, 692-93 (D. Mass. 2018).

115 *See Darko*, 342 F. Supp. 3d at 435.

116 *See Pensamiento*, 315 F. Supp. 3d at 692-93.

due process.[117] This is despite noting that "[t]he Constitution demands greater procedural protection even for property" than what it requires when depriving an immigrant of liberty.[118] The Supreme Court has also failed to tackle the issue of how to set bond amounts in the context of immigration detention.[119]

C. Distinctions between Noncitizens Detained under Immigration Law and All Other Nonpunitive Detainees

This section explicates the stark differences between immigration detention and all other forms of detention in the United States by directly comparing the standards and burdens of proof, along with the calculations behind them, described fully in Part I(A) and Part I(B). This comparison is intended to highlight the importance of meaningful judicial oversight of detention and the gross unfairness of Congressional plenary power over immigration. As these preceding sections highlighted, outside the emergency circumstances of war, the Constitution requires the government to meet rigorous due process standards to override liberty. The government must prove by clear and convincing evidence in an individual hearing that a potential mental health detainee or pretrial detainee is a danger to the community.[120] It places the risk of a wrongful decision on the government because the stakes for the person subject to detention are greater than for the government.[121] And, it treats the gravity of those stakes as greater than a "mere loss of money."[122] In contrast, under immigration law and regulations, the federal government is permitted to order mandatory detention for certain categories of noncitizens, which means no hearing at all. They place the burden of proof on detainees to subjectively satisfy immigration courts that they are not dangerous. The detainee alone carries the risk that the government makes a wrongful decision using a standard of proof that treats the loss of liberty as less weighty

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117 *See generally* Jennings v. Rodriguez, 138 S.Ct. 830 (2018) (demonstrating an instance where the Supreme Court has avoided reconsidering such a challenge).

118 Zadvydas v. Davis, 533 U.S. 678, 692 (2001).

119 The Massachusetts District Court, in contrast, applies the constitutional requirement that bond or conditions of release be no greater than necessary to ensure a person's appearance in courts. *See* Brito v. Barr, 415 F. Supp. 3d 258, 267 (D. Mass. 2019).

120 *See* Addington v. Texas, 441 U.S. 418, 423-24 (1979).

121 *See id*.

122 *Id*. at 425.

than "mere loss of money." In fact, as the Supreme Court has acknowledged, standards like those under the immigration regulations require the government "prove nothing to justify . . . detention."[123] Even in the context of war, when the government's interests are the greatest, the Constitution requires the government to carry the burden of proof of the necessity of detention, albeit subject to a rebuttable presumption in favor of the government's evidence. Even then, every detainee is entitled to an individual hearing and an opportunity to rebut the government's evidence.

The preceding sections of Part I also show the same disparity of treatment for detainees held as a flight risk. Only immigrant detainees can be subjected to mandatory detention and even those who may be released are required to carry the burden of proof and meet a subjective, and therefore arbitrary, standard of proof set by each individual judge. In contrast, pretrial detainees are held only if the government can prove by a preponderance of the evidence that no conditions of release could ensure the detainee's appearance or the detainee is unable to meet the conditions placed on her release.

The starkness of the differential treatment is most apparent in a side-by-side comparison of the balancing the due process requirements for the different types of detention. Starting with detention for dangerousness, there are two threats that reflect the highest government interest in security–detention of persons accused of the most egregious crimes and enemy combatant detention. For pretrial detention and enemy combatant detention, the seriousness of the risk of harm from wrongfully releasing the most dangerous criminally accused or an enemy combatant warrants a rebuttable presumption of dangerousness, although at all times the government retains the burden of proof. For pretrial detention, the standard of proof is clear and convincing evidence; because the threat from an enemy combatant is not just to a potentially large number of people but also to the country itself, and because of the exigencies of war, the standard is preponderance of the evidence. Mandatory immigration detention captures the highest level of threats, but also covers crimes that by comparison are serious, but not to the same level of egregiousness as threatened by those detained as enemy combatants or those considered "specially dangerous" for pretrial detention. For example, noncitizens who threaten a crime of moral turpitude punishable with 1 year

123 Foucha v. Louisiana, 504 U.S. 71, 82-83 (1992).

imprisonment are subject to mandatory detention, while pretrial detention is mostly limited to those whose crimes could be punished with at least with 10 years of imprisonment.[124] There is simply anon-rebuttable presumption of immigration detention for noncitizens convicted of serious crimes. To put a fine point on it, a noncitizen accused of passing a fraudulent check that could subject her to a year's imprisonment cannot be held in pretrial detention because the harm if the crime is repeated is not sufficiently serious to revoke her liberty rights. Yet, the same noncitizen, now convicted of the crime and sentenced to 1 year in prison, is considered so dangerous that there can be no justification for releasing her from immigration detention. It would be easy to say the difference is the conviction, but the detention decision is about the possibility of future harm, not punishment for past harm, which means that the possible harm is identical in both cases.

Below is a comparison of the weighted scale of individual and government interests in each of these circumstances as set out in Parts I(A) and (B). The weight of the public safety concern should either be identical for all three forms of detention or the public safety concern for mandatory immigration detention – which covers lower-level crimes – should be less. Yet, the Supreme Court effectively allows Congress and the Executive to weigh the public safety concern for immigration detention as so heavy as to wholly negate any individual's liberty interest. Even national security concerns–where the safety of large numbers of people and the country as an entity are under threat–is not enough to effectively eradicate the individual's liberty interest.

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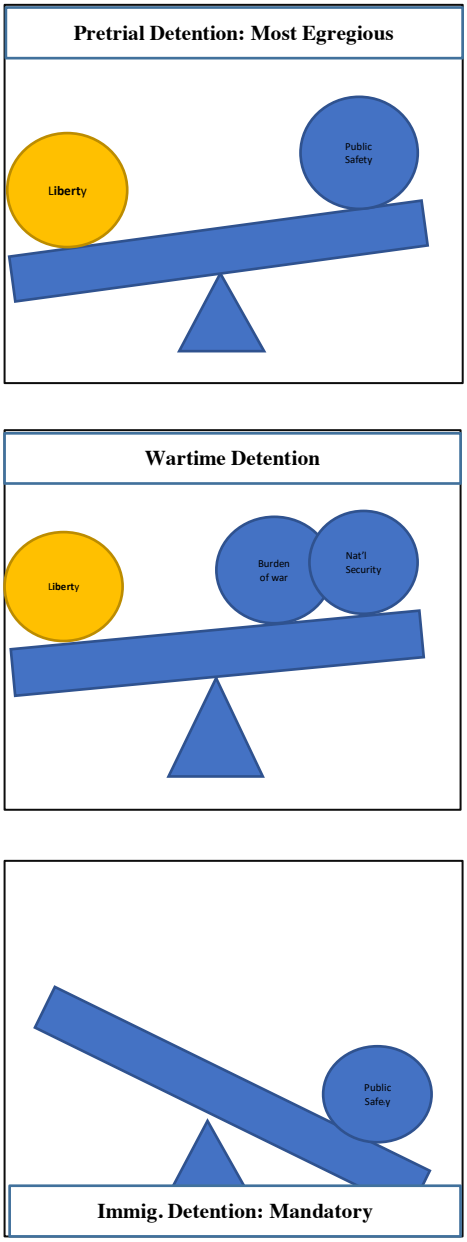
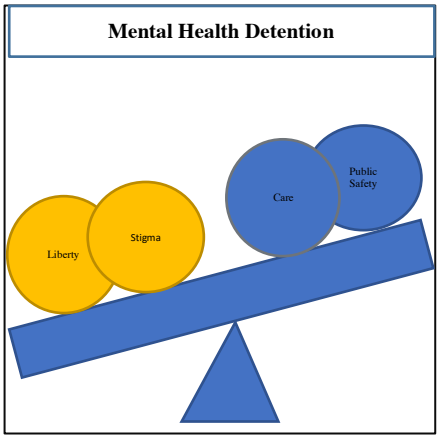
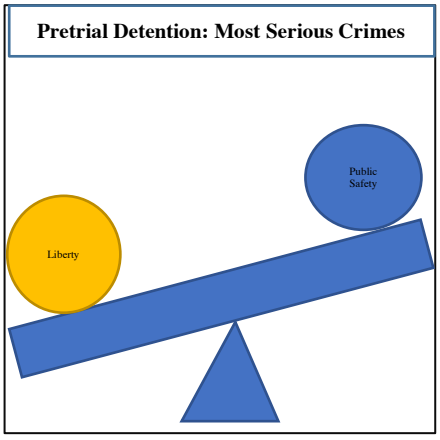
124 *See* 18 U.S.C. § 3142(f)(1) (2018). Importantly, what the government treats as the most egregious crimes is not identical to those that result in mandatory detention for immigrants. Pretrial detention under the Bail Reform Act currently is limited to those who committed violent crimes that could lead to at least 10 years imprisonment, any crime that could be punished with lifetime imprisonment or the death penalty, drug crimes that lead to at least 10 years imprisonment, convictions for two more felonies, or a felony that involves a minor victim or use of a weapon. A fine grain analysis likely will show even greater discrimination against immigrants facing detention; however, it is not necessary for purposes of this article.

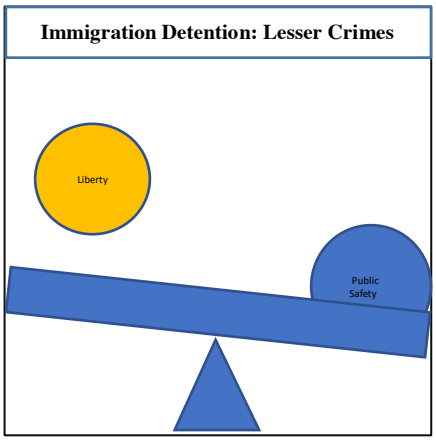


While noncitizens regain their liberty interest when the danger they pose is not to the level of a crime of moral turpitude subject to 1 year of imprisonment, the contrast again with pretrial detention for the most serious, but not most egregious, crimes and with mental

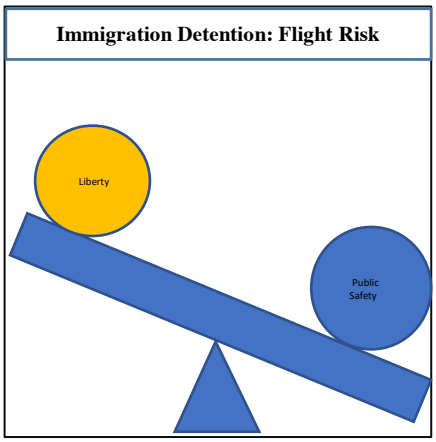
health detention remains just as stark. As shown below, an individual's liberty interest substantially outweighs the government's public safety interest for the most serious crimes or its combined interest in public safety and the need to care for a person suffering a mental health disorder. Yet, once a person's status as a noncitizen possibly subject to removal is introduced, the government's interest in public safety against lesser crimes skyrockets and the weight of the individual's interest in liberty plummets.

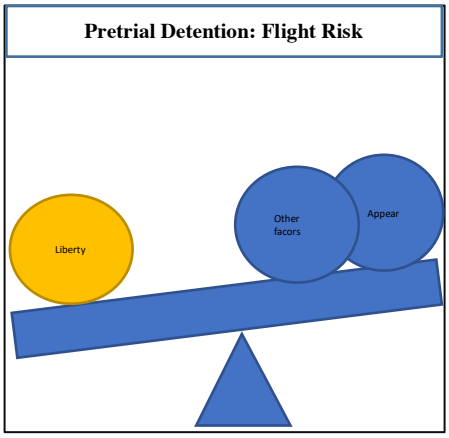






The difference in the scales where the government's goal is to ensure appearance in court or other government proceedings evidences the same discrimination against noncitizens. Pretrial detention for anyone deemed a flight risk is comparable in terms of goals with discretionary immigration detention for flight risk since both focus on ensuring a person's appearance in court hearings. Mandatory detention for anyone already ordered removed reflects flight concerns, but its goal is to ensure a person is available for removal. Despite that, it is important to compare all three forms of detention next to each other because it again highlights that the only context in which the government's interests, whatever they are, outweighs an individual's liberty interest is immigration detention.


Immigration Detention: Flight Risk
Liberty
Public Safety


Pretrial Detention: Flight Risk
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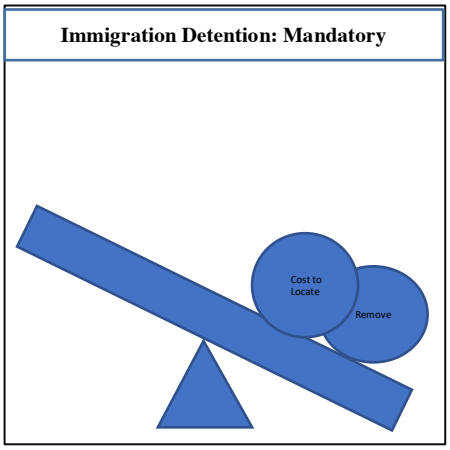
Immigration Detention: Mandatory
Cost to Locate
Remove

The differential treatment in the burden and standards of proof for immigration detention and all other forms of detention discriminates against noncitizens, creates unequal protection of the law based on an immigrant's status as a noncitizen in removal proceedings and leads to serious violations of the noncitizen immigrants' rights to liberty and due process. So far, the Supreme Court has refused to address those violations, offering instead that "since *Mathews*, this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."[125] The next Part explains why and, in doing so, seeks to identify a new, cogent foundation for challenging Congressional plenary power over immigration that would replace so far unsuccessful constitutional rights arguments.

II. Immigration Regulation as a Sovereign Power

The most obvious question that results from the comparisons of the different types of detention is how does the federal government have the power to so blatantly discriminate against immigrant detainees? The surface answer is Congressional plenary power, but that begs another question. The real question is where does Congressional plenary power come from? How does the Supreme Court justify finding that Congress, and by delegation the Executive, have the power to violate what most of us believe are sacred constitutional protections for the rights to liberty and equality? The Court does not rely on the Constitution to justify these rights violations, but instead located an extraconstitutional source for those violations. It then shielded the violations from meaningful judicial review by treating immigration law as a matter of foreign affairs and national security and therefore subject to extraordinary judicial deference.

Together, Parts II and III explain how the Supreme Court birthed Congressional plenary power over immigration. Part II starts the story with by explaining the Court's search a source for federal immigration powers it believed the Constitution did not explicitly provide. Its search identified sovereignty rights under international law, or what it terms inherent sovereignty, as a new source of immigration powers, with some bolstering from what the court terms foreign affairs and national security powers that at least partially derive from the Constitution. Part III picks up the tale

125 Demore v. Kim, 538 U.S. 510, 522 (2003).

where the Court combined this extraconstitutional source with the political question doctrine, which allowed it to unmoor those powers from the Constitution and maintain them as relatively absolute long after international law rejected sovereignty rights as absolute and the Supreme Court ruled that the government's exercise of foreign affairs and national security powers did not turn otherwise legal questions into political concerns. The decision to locate a new source of federal powers shreds the notion that most of us learn in grade school –United States government is one of Constitutionally enumerated powers and can act only within the bounds of the power the Constitution delegates to it. If the Constitution remained the source of immigration power, the 5th and 14th Amendments would restrict how the federal and state governments utilize those powers. Instead, Congress has plenary powers.

Tracking the chronology of plenary power cases set out by legal historian Matthew Lindsay, this Part examines the evolution of immigration powers from state powers to federal powers, creating the conditions for the Court's rejection of meaningful judicial oversight, whether constitutional or under international law, of immigration law and policy.[126] This historical distillation is essential to understanding why, so far, constitutional arguments challenging immigration law do little more than dent Congressional plenary power; why the Supreme Court jurisprudence on immigration law and policy is anemic at best and mostly incoherent, as explored in Part IV; and, therefore, why international law provides a much sounder foundation for challenging nearly absolute immigration power.

First, Section A explains the conception of sovereignty that ultimately underpins federal immigration powers. Section B then describes the Court's initial decision to employ the Constitution's 10th Amendment and grant states control over immigration, limited only where that power bumped up against federal powers under the Constitution's Commerce Clause. Section C next describes how Supreme Court jurisprudence slowly transformed immigration control into a solely federal power, initially by claiming

126 *See generally* Matthew Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.C.L.L. REV. 1 (2010). Much of this exploration, particularly the chronology and the choice of cases, derives from Lindsay's history of Congressional plenary Power over immigration in the United States.

immigration or the movement of people as a form of commerce under the Commerce Clause and later immigration law as part and parcel of federal naturalization, foreign affairs and war powers under the Constitution. Section C concludes by explaining how the Court upended the assumption of enumerated powers to embed international law as a direct source of federal immigration power, bolstered by foreign affairs and national security powers, to allow the federal government to claim plenary power over immigration.

A. Construction of Sovereignty

Even from the earliest decisions on immigration law the Supreme Court understood control over which foreigners to allow entry into the United States, and under what conditions, as part of the sovereignty rights every independent country enjoys. The earliest cases mostly focused on whether the federal or state governments are entitled to those rights.[127] Before jumping into how the Court answered that question and how the answer led to the creation of Congressional plenary power over immigration, it is important to understand what sovereign rights and the relationship between sovereignty rights and immigration are as well as sovereignty rights and the Constitution. This understanding serves as part of the answer to the ultimate question of how the Court justifies allowing the government to violate immigrants' rights in ways that are not permitted outside of immigration proceedings or against citizens.

The concept of sovereignty rights developed from the Treaty of Westphalia ending the Thirty Years War that gripped Europe in the 17th Century.[128] The goal of these rights was to establish clear boundaries of authority between countries to ensure peace. The United Nations Charter Article 2 has since codified these rights, granting all states the following four rights:

- ☐ The right to sovereign authority over state territory;
- ☐ The right to sovereign equality;
- ☐ The right to be free from foreign interference in domestic affairs; and

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127 *See e.g.* New York v. Miln, 36 U.S. 102, 132 (1837); Smith v. Turner, 48 U.S. 283 (1849) (*Passenger Cases*); Henderson v. Mayor of New York, 92 U.S. 259 (1873).

128 *See* Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 374 (2005).

- The right to be free from threat or use of force against a country's political or territorial integrity.[129]

Sovereign powers over immigration are tied to the right to authority over the state–the state and its citizens decide who may visit or live there.[130] Sovereign equality is implicated in that one country cannot force another country to allow entry to foreign citizens or impose any immigration law or policy or limits on them without the consent of the affected country.

In its immigration jurisprudence, the Supreme Court conceives of sovereignty as granting countries full authority–and therefore power–over the state and the role of the Constitution as distributing that power to the state or federal governments or both. In its 1837 decision in *New York v. Miln*, the Supreme Court established that the power to control immigration "undeniably existed at the formation of the Constitution" and derived from the sovereign's right under international law to "forbid the entrance of his territory either to foreigners in general or in particular cases or to certain persons or for certain particular purposes, according as he may think it advantageous to the state."[131] This sovereign right "is an incident of every independent nation. It is a part of its independence."[132] The right to control immigration underpins the Supreme Court's decision to make immigration power federal while the right to sovereign equality underpins the Court's refusal to place any limits–constitutional or otherwise–on Congress' plenary power to control immigration, as described in Parts II and III.

Having established that part and parcel of sovereignty is the

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129 *See* U.N. Charter art. 2, ¶¶ 1, 4, 7; *see also* Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. TRANSNAT'L L. 97, 102 (2013).

130 *See* U.N. Off. High Comm'r f Hum. Rts., *Expulsions of Aliens in International Human Rights Law*, OHCHR Discussion Paper, 1 (2006) (describing "the sovereign prerogative of states to regulate the presence of foreigners on their territory."); *see also* Int'l Law Comm'n, Draft Articles on the Expulsion of Aliens, with Commentaries, art. 3 (2014) (right to expel aliens).

131 New York v. Miln, 36 U.S. 102, 132 (1837) (quoting Vattel, Book 2, ch. 8, § 100); s*ee also* Trump v. Hawaii, 138 S.Ct. 2392, 2418 (2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" (quoting Fiallo v. Bell, 430 U. S. 787, 792 (1977)); *see also* Harisiades v. Shaughnessy, 342 U. S. 580, 588–89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power.").

132 Ping v. United States, 130 U.S. 581, 603 (1889) (*Chinese Exclusion Case*).

power to control immigration, the Supreme Court fight that ultimately concludes with the development of Congressional plenary power is over which government entity is entitled to exercise the sovereign power–the state governments, the federal government or both. Under the structure of the Constitution, some of that power could belong to the states.[133] Initially, the fact that the Constitution did not expressly delegate immigration powers to the federal government led the Court to grant states shared control with the federal government over immigration.[134] How the Supreme Court wrested all immigration powers from the states, described in the remainder of this section, is essential to how it determined that Congress is entitled to plenary powers. Stated differently, the justifications for federal immigration powers also justify making them absolute.

B. The States as the Sovereign

Having established sovereignty rights as the basis for immigration powers, the next question is who is the sovereign entitled to those rights? From the mid-nineteenth century, the federal government sought to claim exclusive immigration powers against coastal states seeking to regulate immigration to protect public health, morals and finances. In *Miln*, in 1837, the federal government challenged a New York regulation that required ship captains to provide the state with the demographic information of passengers upon arrival in its ports to regulate the number of foreigners arriving, especially those likely to be indigent.[135] The federal government argued that it alone could control immigration because immigrants were objects of commerce under the Constitution's Commerce Clause.[136] The Court, however, concluded that the title of sovereign passed directly from Britain to the states at the end of the Revolutionary War and that it remained there unless the Constitution delegated that power to the federal

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133 *See* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 856 (1987).

134 *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."); *see also Miln*, 36 U.S. at 139 (The states' powers over immigration end when they bump up against federal powers, such as under the commerce clause.).

135 *See Miln*, 36 U.S. at 104.

136 *See id.* at 131.

government.[137] The Court rejected the characterization of immigrants as objects of commerce and instead treated them as a threat to public order and subject to the state's police powers – powers not delegated elsewhere.[138] For the Court, New York's desire to control immigration was not just logical but a "duty of the state."[139] In an enduring description of the danger of immigration, the Court explained that New York uniquely suffered from the "evil of thousands of foreign emigrants arriving there" who may need public assistance.[140] Accordingly, "states were, like nations, endowed by international law with the absolute power to defend their territorial integrity against foreign encroachment."[141] Importantly, the decision followed the doctrine of constitutionally enumerated powers.

C. The Evolution of Federal Sovereignty over Immigration

The federal government spent the next eighty years fighting for the title of sovereign solely entitled to immigration powers.[142] The erosion of the states as the sovereign began in 1849 with the *Passengers Case*, when the Supreme Court treated the passage of immigrants on a ship as an act of commerce, preempting state police powers.[143] New York sought to tax arriving passengers and crews to cover the cost of caring for indigent immigrants.[144] The Court determined that "[i]f the transportation of passengers be a branch of commerce, of which there can be no doubt, it follows that the act of New York, in imposing this tax is a regulation of commerce."[145] Once the passengers arrive, however, they are no longer objects of commerce but instead subject to state law.[146] States could then regulate immigrants upon arrival. The Court bolstered federal

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137 *See id*. at 132.

138 *See id*. at 133.

139 *Id*. at 141.

140 New York v. Miln, 36 U.S. 102, 136 (1837).

141 Lindsay, *supra* note 126, at 16.

142 *See* Henkin, *supra* note 133, at 854-55.

143 Passenger Cases, 48 U.S. 283, 452 (1849) (determining that "all persons and property on board, as a unit belonging to foreign commerce . . . was exempt from the state taxing power").

144 *Id*. at 403, 407.

145 *Id*. at 405.

146 *Id*.

claims to immigration powers by linking commerce to international relations. The Court equated this type of commerce with "foreign intercourse" and declared: "All the powers which relate to our foreign intercourse are confided to the general [federal] government. Congress have the power to regulate commerce, to define and punish piracies."[147] With this finding, the Court began to develop another constitutional pillar on which to rest federal immigration powers claims–foreign affairs powers–that will prove fundamental to the extraordinary judicial deference the Court grants federal immigration powers.

In 1875, the Supreme Court extended the period in which a noncitizen would be considered an object of commerce to the point of disembarkation.[148] In its *Henderson* decision, the Court concluded that the commercial transaction ended only after the immigrant disembarked; as such it could not be completed if a state placed a barrier to an immigrant leaving the ship.[149] Once disembarkation is complete, however, the states could regulate immigration using its police powers "for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases and other matters of legislation of like character."[150]

As with the earlier *Passenger Cases*, the Court sought to strengthen the federal government's claim to immigration powers by relying on constitutional foreign affairs powers. The *Henderson* decision clarifies that federal power derives from the fact that immigration regulation "belongs to that class of laws which concern the exterior relation of this whole nation with other nations and governments."[151] Immigration is "international" and the Constitution grants the federal government authority over international relations through its treaty making powers.[152] If the federal government can execute a treaty that regulates international commerce, then Congress can pass laws on the subject.[153] For the Court, the need for uniform international relations further justified

147 *Id*. at 393 (quoting Holmes v. Jennison, 39 U.S. 540, 570 (1840)).

148 Henderson v. Mayor of New York, 92 U.S. 259, 271 (1873).

149 *Id*.

150 *Id*.

151 *Id*. at 273.

152 *Id*. (referencing U.S. CONST. art. II, § 2).

153 *See id*.

federal power.[154] The 1875 *Chy Lung* decision bolstered this reasoning by pointing out that if a foreign government is dissatisfied with international commerce or the regulation of its citizens, the federal government would be held responsible, as opposed to any individual state being held responsible.[155] By the *Chy Lung* decision, the federal government had sole control over immigration, including after disembarkation, under the Commerce Clause and the foreign affairs power.[156] In its 1888 decision in the *Head Money Cases*, the Court used the necessary and proper clause in Article 1 Section 8 of the Constitution to establish immigration powers as a wholly implied federal power under the Commerce Clause.[157]

Despite having wrested control over immigration from the States, the federal government was dissatisfied with its powers under the Commerce Clause, even when bolstered by foreign affairs powers. Treating people as objects of commerce was an uncomfortable fit because their regulation was based on "the perceived economic impact of immigration."[158] By the 1880s, American leadership began to view immigrants as an "existential threat to the Republic" that required more than commercial powers to address.[159] It began to fear not just the cost of immigrants as public charges but "'unfit' nationalities and races that . . . pose a fundamental challenge to the nation's most cherished political and economic values."[160] If federal power to control immigration stopped when noncitizens were no longer objects of commerce, it would have limited power to respond to these perceived challenges.

In response, the Supreme Court established sovereignty rights

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154 *See Henderson*, 92 U.S. at 273.

155 Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

156 *See id*. at 279-80; *see also* Edye v. Robertson, 112 U.S. 580, 593-94 (1884) (reaffirming the *Chy Lung* decision). It has also been said that the federal government's success was a direct result of the civil war: "That the federal government had unenumerated powers probably would not have been claimed, and surely would not have been accepted, before Union victory in the Civil War vanquished states' rights and established federal supremacy by constitutional amendments imposed as the peace treaty of the war." Henkin, *supra* note 133, at 855.

157 *See* Head Money Cases, 112 U.S. 580, 595 (1880) (opining that when Congress deems something necessary and proper, the Court is not permitted to inquire beyond it).

158 Matthew Lindsay, *Immigration, Sovereignty and the Constitution of Foreignness*, 45 CONN. L. REV. 743, 793 (2013); Henkin, *supra* note 133, at 856.

159 Lindsay, *supra* note 126, at 32.

160 *Id*. at 14.

as the direct source of immigration powers, cementing full federal control over immigration. The starting point is *Chae Chan Ping*, also known as *The Chinese Exclusion Case*.[161] In a xenophobia-riven decision, the Supreme Court upheld federal power to exclude Chinese immigrants from the United States in violation of an earlier bilateral treaty with China that allowed relatively unfettered migration of Chinese citizens to the United States.[162] The Court found that the government's authority over immigration is part and parcel of the exclusive sovereign authority that belongs to "independent nations."[163] The Court explained that the Constitution effectively delegated all powers related to foreign affairs to the federal government as evidenced by its constitutionally enumerated "powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship."[164] The expectation, more fully developed in *Chy Lung*, is that the United States speaks with one voice in the international arena and not as "50 separate states."[165]

The *Chinese Exclusion Case* also marked the turning point of the Court's view of noncitizens as a national security threat, rather than as objects of commerce. The Court construed protecting the nation against the "vast hordes of its [China's] people crowding in upon us" as "the highest duty" of the nation to which "nearly all other considerations are to be subordinated."[166] More concretely, the Court described the Chinese "race" as:

> strangers in the land, residing apart by themselves and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year, the people of the coast saw, or believed they saw, in the facility of immigration and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be

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

162 *See id*. at 581, 603.

163 *Id*. at 604.

164 *Id*.

165 Arizona v. United States, 567 U.S. 387, 395 (2012) (citing *Chy Lung*, 92 U.S. at 275-280).

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

> overrun by them unless prompt action was taken to restrict their immigration.[167]

By constructing immigrants as a national security threat–or as the opinion later says–a threat of "foreign aggression"–the Supreme Court created a new justification for federal immigration powers.[168] Importantly, the basis for national security powers seems to be sovereignty rights as distributed by the Constitution to the federal government through its war powers.[169] The 1892 *Nishimura Ekiu*[170] and 1893 *Fong Yue Ting*[171] cases reinforced that federal immigration powers were "inherent in sovereignty and essential to self-preservation."[172]

The 1936 case *United States v. Curtiss-Wright*[173] reinforced immigration powers as extraconstitutional, rather than "implied, necessary or incidental to the expressed [constitutional] powers."[174] *Curtiss-Wright* had nothing to do with immigration powers, yet the case is essential to finally and wholly establishing them as emanating from international law. The Court heard a dispute over whether the President had the power to sell arms to a South American government despite a Congressional Joint Resolution disallowing any such sales.[175] The Court determined that national law applies based on territory and, as such, the Constitution was restricted in application to United States territory or internal affairs.[176] Extraterritorial matters, in contrast, fell under the purview of international law.[177] The Court explicitly declared that "[t]he broad statement that the federal government can exercise no powers

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167 *Id*. at 595.

168 Lindsay, *supra* note 158, at 807 (quoting *Chae Chan Ping*, 130 U.S. at 606).

169 *See Chae Chan Ping*, 130 U.S. at 606 (reiterating that "[t]he existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other.").

170 *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

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

172 *Nishimura Ekiu*, 149 U.S. at 659.

173 United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

174 Mackenzie v. Hare, 239 U.S. 299, 311 (1915).

175 *See Curtiss-Wright Exp. Corp*., 299 U.S. at 304.

176 *See id*. at 316; *see also* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 4-5 (2002).

177 *See Curtiss-Wright Exp. Corp*., 299 U.S. at 318.

except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."[178] According to the Court, sovereign powers over external or international affairs never belonged to the states separately but, rather, passed directly from Great Britain "to the colonies in their collective and corporate capacity as the United States."[179] The decision rendered the Constitution's division of powers irrelevant, since "[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality."[180] Included in these federal external powers is control over immigration.[181]

The decision effectively overruled *Miln*, which treated the several states as the inheritors of many sovereign rights at the end of the American Revolution.[182] *Curtiss-Wright* also clarified that international law serves as the source of power; it "found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations."[183] The Supreme Court has repeatedly confirmed its *Curtiss-Wright* decision to fully transition immigration powers from an implied power needed by Congress in support of its commerce powers and by the Executive under its foreign affairs powers to a power "inherent in every sovereign state" and divorced from the Constitution.[184] In 2012, the Supreme Court in *Arizona v. United States* explained that the federal government's power to control immigration "rests, in part, on the National Government's constitutional power to 'establish an uniform Rule of Naturalization,' and its inherent power as sovereign to control and

178 *Id.* at 315-16.

179 *Id.* at 316.

180 *Id.* at 318.

181 *See id.* (referencing *Fong Yue Ting* as authority on the subject).

182 *See* New York v. Miln, 36 U.S. 102, 102-03 (1837) (noting that states have authority to pass and enforce laws so long as they do not conflict with the laws of Congress).

183 *Curtiss-Wright Exp. Corp.*, 299 U.S. at 318.

184 *Harisiades*, 342 U.S. at 587-88; *see also Arizona*, 567 U.S. at 395; *see also* Pasquantino v. United States, 544 U.S. 349, 369 (2005).

conduct relations with foreign nations."[185]

Overall, discerning the source of immigration powers is messy. In fact, one scholar describes the search for the source of immigration power as trying to "solve a larger mystery."[186] Treatises on immigration law regularly reference the variety of different sources that *may* justify Congressional plenary power.[187] For example, one treatise avoids any definitive statement of the source of immigration powers, instead describing "clusters of sources for immigration power [that] suggest themselves."[188] It breaks down the potential sources of power to include (1) constitutionally enumerated powers over naturalization, the Migration and Importation Clause that protected the slave trade; the Commerce Clause and war powers; (2) the extraconstitutional sovereignty rights and foreign affairs powers; and (3) practical considerations built on necessity, the structure of the Constitution and consolidation of society.[189]

Part of the confusion over the source of immigration power may be that the Supreme Court offers a wide variety of options to justify federal powers, the strongest of which is extraconstitutional and therefore the hardest to defend. It needed to reference as many constitutional powers as possible to bolster what Americans are otherwise taught is antithetical to our constitutional system.

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185 *Arizona*, 567 U.S. at 394-95 (citations omitted). *Curtiss-Wright* remains good law despite several opinions that distinguish from its facts. *See, e.g.*, United States v. Lara, 541 U.S. 193, 201 (2004) (recognizing continued application of "preconstitutional powers necessarily inherent in any Federal Government" as "necessary concomitants of nationality") (referencing *Curtiss-Wright Exp. Corp.*, 299 U.S. at 315-22).

186 STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 99 (2015).

187 *See* 1 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE § 9.02 (2013), Lexis (database updated quarterly); *See* THOMAS A. ALIENKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTONG, IMMIGRATION AND CITIZENSHIP 188-94 (7th ed. 2012).

188 Gordon, *supra* note 187, § 9.02.

189 *See id*; *See* ALIENKOFF ET AL., *supra* note 187, at 155-94. This book similarly breaks down the sources of powers to include the enumerated powers from the Commerce Clause, Naturalization Clause, War Powers Clause, and the amorphous set of foreign affairs powers that include the President's powers to make treaties, and to send and receive ambassadorships; inherent power – which is inherent sovereignty; and constructional and structural arguments. Still another treatise divides the sources between powers enumerated in the Constitution, such as the Commerce Clause and Naturalization Clause, and implied powers that include inherent sovereignty. LEGOMSKY & RODRIGUEZ, *supra* note 186, at 100-06.

Another explanation is simply sloppiness–absolute power over immigration has existed since *The Chinese Exclusion Case*, but the justification for it has changed over time. It is not necessary to determine the source of plenary power if the goal is simply to enforce it. For example, the Supreme Court's 2020 decision in *Dept. of Homeland Security v. Thuraissigiam* found that:

> "[T]he power to admit or exclude aliens is a sovereign prerogative"; the Constitution gives "the political department of the government" plenary authority to decide which aliens to admit; and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted.[190]

The Court cites the 1892 case *Nishimura Ekiu v. United States*, which describes immigration power as an inherent sovereign right that the Constitution then distributes to Congress under the Commerce Clause, treaty powers, foreign relations, naturalization and war powers–basically any part of the Constitution that grants the federal government powers in the international arena.[191] In contrast, the citation trail for Congressional plenary power in the 2003 *Demore v. Kim* decision leads to *Mathews v. Diaz*, which quotes *Harisiades v. Shaughnessy*.[192] The *Harisiades* decision explains that plenary power is built on sovereignty rights:

> That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.[193]

For those who would treat Congressional plenary power over immigration as a constitutional power, the difficulty is that none of the constitutional powers referenced in support of federal immigration powers, not even combined, provide the breadth of powers the federal government now claims. This absence of

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190 Dep't of Homeland Security v. Thuraissigiam, 140 S.Ct. 1959, 1982 (2020) (alteration in original) (citations omitted) (citing Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)).

191 *See id*.

192 Demore v. Kim, 538 U.S. 510, 522 (2003). The full citation it employs reads "[Mathews v. Diaz], 426 U.S. [67,] 81, n. 17 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952))."

193 *Harisiades,* 342 U.S. at 587-88.

authority was the very reason the Supreme Court struggled to find constitutional support for federal monopoly on those powers in the earliest cases. For the sake of thoroughness, however, it is worth running through all constitutional powers named in support of Congressional plenary power over immigration. Notably, the Constitution does not expressly grant the federal government wholesale foreign affairs power. The foreign affairs power, rather, appears to be an amalgamation of Congress's powers to "regulate commerce with foreign nations, to define offenses against the law of nations, and to declare war," and the President's powers "to make treaties and to send and receive ambassadors."[194] One more provision rounds out constitutional support for federal immigration powers: the naturalization provision that grants the federal government the power to "establish an uniform Rule of Naturalization," or a law for granting naturalized citizenship.[195] On its face, the naturalization provision seems the strongest candidate for immigration powers, except that it applies only to the narrow subject of making a noncitizen a citizen and has no application to removal proceedings.[196] Nor is there a direct connection between full range of these powers and the Commerce Clause, as captured by Justice Jackson's concurring opinion in *Edwards v. California*:

> [T]he migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights.[197]

War powers are also too narrow to support all immigration powers, since they apply only in the narrow circumstance of war. The remaining federal powers of receiving ambassadors, defining offenses under international law and treaty making also provide no support for full immigration powers. This leaves the basis of Congressional plenary power over immigration either the wholly extraconstitutional, inherent sovereignty rights or a combination of extraconstitutional sovereignty rights and the enumerated constitutional powers over international commerce, naturalization

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194 GORDON ET AL., *supra* note 187, § 9.02 n.19.

195 U.S. CONST. art. I, § 8, cl. 4.

196 *See id.*; GORDON ET AL., *supra* note 187, § 9.02(1)(b).

197 Edwards v. California, 314 U.S. 160, 182 (1941) (Jackson, J., concurring).

and war. For the sake of thoroughness, this Article will treat the latter as the source of plenary power;by doing so, it can then address how to use these sources of power to do more than dent those powers but instead grant noncitizens in immigration proceedings the rights to which they are otherwise entitled under international and constitutional law.

The Supreme Court's decision to vest immigration power in the federal government is not the issue at the heart of this Article. Rather, the decision to imbue the federal government with nearly unchecked power over immigration is. By itself, shifting immigration powers solely to the federal government did not make Congressional plenary power inevitable or even likely. Rather, the Supreme Court took the opportunity to build immigration powers on an extraconstitutional source and constitutional foreign affairs and national security powers so it could expand federal powers. Part III next explores how the Court unmoored immigration powers from any meaningful limitation by employing the concept of absolute sovereignty and then removed much constitutional oversight by relying initially on the political question doctrine and later the extraordinary deference the Court believed foreign affairs and national security powers justify. It underscores that by locating a separate, nearly absolute source of power in international law and proclaiming it mostly a political question subject to extraordinary deference, the Court established "'a secret reservoir of unaccountable power'" that "'makes shambles out of the very idea of a constitutionally limited government.'"[198]

III. Absolute Sovereignty is Absolute Power

The Supreme Court conceives of Congress' immigration powers as nearly absolute or unrestrained by the Constitution or international law. While it has applied both substantive and procedural due process increasingly to check other areas of Congressional and Executive power, the Court has used international law's inherent sovereignty rights, which historically were absolute, and extraordinary deference to foreign affairs and national security powers to create and protect Congressional plenary

198 Louis Fischer, "*The Law": Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 150 (2007) (quoting David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 493, 497 (1946)).

power over immigration.[199] Part A details the Supreme Court's conception of the absolute sovereign right to control immigration that underpins the powers it granted directly to the federal government. Part B describes how the Supreme Court then relies on the categorization of immigration as a foreign affairs and national security matter to justify labelling much of immigration law and policy a political matter subject to extraordinary deference, stripping the Judiciary of the bulk of its power of judicial review.

A. Absolute Sovereign Right

The Chinese Exclusion Case, the first decision to identify sovereignty rights as an extraconstitutional source of immigration powers, envisioned Constitutional and public policy restrictions on immigration powers. The case described the constitutionally enumerated foreign affairs powers that it used to underpin federal immigration power as "restricted in [its] exercise only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."[200] The latter part of the sentence is a reference to international law, which is also termed the law of nations. The idea of Constitutional or international law boundaries, however, never gained traction; what took hold instead was the Court's statement that:

> The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of [anyone].[201]

That statement captures two ideas: absolute sovereignty and sovereign equality. Absolute sovereignty in practice means that countries have total, unlimited control over their territory, and they must consent before international law becomes binding on them, including any restrictions placed on sovereignty rights. Thus, allowing another country to limit the United States' immigration powers would make the United States "subject to the control of

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199 *See, e.g.,* Raquel E. Aldana & Thomas O'Donnell, *A Look Back at the Warren Court's Due Process Revolution Through the Lens of Immigrants*, 51 U. PAC. L. REV. 633, 634-35 (2020).

200 Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889).

201 *Id.* at 609.

another power" in violation of sovereign equality, as described in Part II(A) above.[202] This statement should be read with the knowledge that at issue in the case was whether congressional legislation can override a United States treaty with China that allowed easy migration of Chinese citizens to the United States. For the Court, allowing China or Chinese citizens to enforce that treaty against congressional wishes was a violation of sovereign equality, despite the government's prior consent to the treaty.[203]

Fong Yue Ting, quoting in part *The Chinese Exclusion Case,* next described federal immigration power as "absolute and unqualified."[204] It rested its opinion on international law:

> "The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments."

This statement was supported by many citations from the diplomatic correspondence of successive Secretaries of State, collected in Wharton's International Law Digest, §206.[205]

By 1909, the Court, in *Oceanic Steam Navigation Co. v. Stranahan*, compiled an extensive list of immigration powers built on precedent that form part of federal absolute power:

> Repeated decisions of this Court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application.[206]

The Court explicitly described these powers as "absolute," declaring, on the basis of the weight of precedent, that "over no conceivable subject is the legislative power of Congress more

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202 *Id*. at 604.

203 *See id*. at 604.

204 Fong Yue Ting v. United States, 149 U.S. 698, 708 (1893).

205 *Id*. (citation omitted) (quoting *Chae Chan Ping*, 130 U.S. at 606-07).

206 Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 335 (1909) (quoting United States ex rel. Turner v. Williams, 194 U.S. 279, 289-90 (1904)).

complete than it is over" immigration.[207]

The effect of defining immigration powers as absolute is to pass on those powers to the federal government unrestricted by international law. At the time of these early decisions, sovereignty rights, including over immigration, were relatively absolute and the Supreme Court's statements were an accurate reflection of international law. In the post-World War II era, however, much of the world, including the United States, adopted international human rights law as an explicit restriction on those absolute sovereignty rights, including with respect to immigration powers. As Part IV(A) explores, the Supreme Court uses the weight of precedent to avoid having to apply these new restrictions, although other Supreme Court jurisprudence recognizes that the government, including the Court, are required to follow international law as it is now and not as it once was.[208]

B. Extraordinary Judicial Deference

Proclaiming sovereignty rights as absolute, even if that is now a legal fiction, should not insulate federal immigration powers from constitutional review. To the extent the Supreme Court relies on the amorphous category of constitutional foreign affairs and national security powers to justify granting immigration powers to the federal government, Constitutional limits on government powers apply. The Constitution does not just divide the labor of governing, it also limits the manner in which the government can act. The Supreme Court initially employed the political question doctrine to avoid those constitutional limits and later a form of extraordinary judicial deference to accomplish roughly the same goal.[209] The Court did so by connecting immigration to foreign affairs and national security, which to the Supreme Court were matters best left to the political branches of government.

The Supreme Court first proclaimed this connection in *The Chinese Exclusion Case* when it refused to review the Executive's decision to breach its treaty with China on the basis that the "promise contained in a treaty" is not a "judicial question;" rather, it "belongs to diplomacy and legislation, and not the administration

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207 *Id*. at 342, 339.

208 *See infra* Part IV(A).

209 *Chae Chan Ping*, 130 U.S. at 602

of existing law."[210] Although this case was specifically a dispute over a treaty between the United States and a foreign government, which directly implicates foreign affairs, the Court continues to restrict its judicial oversight even when there is no specific treaty at issue and no particular country's citizens are targeted by immigration law and policy – removing that direct connection to foreign relations and national security.

By the time the Court decided *Nishimura Ekiu v. United States*, the Supreme Court moved away from invoking the political question doctrine to render immigration law and policy nonjusticiable, but it invoked inherent sovereignty and the political nature of foreign affairs powers to strip the Constitution's Due Process Clause of any real meaning in immigration proceedings.[211]

Similarly, faced with the question of the constitutionality of requiring Chinese immigrants to provide "one credible white witness" to prove their residency in the United States, which would entitle them to remain there under the Chinese Exclusion Act, the Supreme Court in *Fong Yue Ting* warned that it must be "careful that it does not undertake to pass upon political questions" before refusing to overturn it.[212] The Court explained that it had little power to overturn actions carried out according to powers wholly conferred to Congress.[213]

In the 1903 *Japanese Immigrant Case*, the Supreme Court rejected the government's argument that its immigration powers are not subject to judicial oversight and imposed a due process requirement of a hearing before a person could be deported, regardless of whether the person arrived in the United States legally.[214] The Court justified its holding on the need to "bring [immigration statutes] into harmony with the Constitution," rather than on the basis that the Due Process Clause applied to immigration law and policy.[215] The Court then proceeded to strip that requirement of any real teeth when it refused to judge the quality of the hearing or whether substantive due process was met:

It is true that she pleads a want of knowledge of our language, that

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210 *Id*.

211 *See* Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).

212 *Fong Yue Ting*, 142 U.S. at 712, 731.

213 *See id*.

214 Japanese Immigrant Case, 189 U.S. 86, 100-01 (1903).

215 *See id*. at 100-01.

> she did not understand the nature and import of the questions propounded to her, that the investigation made was a "pretended" one, and that she did not, at the time, know that the investigation had reference to her being deported from the country. These considerations cannot justify the intervention of the courts.[216]

Over time, the Court established a standard of extraordinary deference to the political branches on immigration law and policy. The Court, in the 1977 *Fiallo v. Bell* case, explicated:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Our recent decisions have not departed from this long-established rule. Just last Term, for example, the Court had occasion to note that "the power over aliens is of a political character, and therefore subject only to narrow judicial review." And we observed recently that, in the exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens."[217]

The Court describes this as "special judicial deference."[218] The Supreme Court recently reaffirmed this deference in *Trump v. Hawaii*, citing specifically this section of the *Fiallo* decision.[219]

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216 *Id.* at 101-02.

217 Fiallo v. Bell, 430 U.S. 787, 792 (1977) (citations omitted). *See also* Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need for flexibility in policy choices, rather than the rigidity often characteristic of constitutional adjudication.").

218 *Fiallo*, 430 U.S. at 793.

219 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2418 (2018) (quoting *Fiallo*, 430 U.S. at 792). *Cf. id.* (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) ("[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations [and] the war power.")); *id.* at 2418-19

To be clear, absolute immigration power does not mean that due process is never a consideration for the judiciary. Rather, when the Court does engage with a due process review, extraordinary judicial deference leads the Court to apply something akin to the administrative law standard of whether the government action was reasonable, rather than the strict constitutional standard required by the 5th Amendment.[220] In *Trump v. Hawaii*, the Court described its "circumscribed judicial inquiry" over immigration as requiring it to seek nothing more than "a facially legitimate and bona fide reason" for the government's immigration law or policy.[221] When faced with a complaint that the Trump Administration was fulfilling President Trump's campaign promise to impose a discriminatory ban on Muslim immigration when it temporarily stopped immigration from some Muslim-majority countries, the Court accepted the Administration's national security justification and refused "to look behind the exercise" of the President's delegated discretion to regulate immigration.[222]

C. The Net Effect

The net effect of combining absolute sovereign rights over immigration with extraordinary judicial deference is to allow Congress and the Supreme Court to sidestep any real oversight of immigration law. The 2018 *Trump v Hawaii* decision, for example, confirmed this effect:

> For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a "fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." . . . Because decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the

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(quoting *Mathews*, 426 U.S. at 81 (noting that decisions in these matters may implicate "relations with foreign powers," or involve "classifications defined in the light of changing political and economic circumstances," such judgments "are frequently of a character more appropriate to either the Legislature or the Executive.")).

220 Demore v. Kim, 538 U.S. 510, 528-31 (2003) (applying something like a reasonableness standard by evaluating whether the statute achieves the goals Congress set for it).

221 *Trump*, 138 S. Ct. at 2419.

222 *Id.* at 2417-19.

Legislature or the Executive."[223]

The Supreme Court is well aware of the gross unfairness of Congressional plenary power over immigration, but it finds the weight of precedent too heavy to overturn it. Starting in the 1950s, the Supreme Court began expressing consternation over the nearly absolute power it granted Congress and the Executive, describing how it "bristles with severities," yet it continued to justify this power as "a weapon of defense and reprisal confirmed by international law."[224] The Court lamented the lack of fairness in immigration law even as it upheld the government's power to deport a noncitizen after he was "duped into joining the Communist Party."[225] The Court stated that if it were "writing on a clean slate," given that "deportation may . . . deprive a man 'of all that makes life worth living,'" it would apply substantive due process to limit Congress' power.[226] Instead, the Justices found their hands tied by "not merely 'a page in history, but a whole volume.'"[227] Although the Court's recitation of this rule became rote, its lament that it could not approach immigration powers differently seemed to fall by the wayside.[228]

In contrast to this pessimistic view, a myriad of scholars suggest that the Supreme Court has been watering down Congressional plenary power over the last several decades.[229] Their primary

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223 *Id*. at 2418-19 (citations omitted) (quoting, respectively, *Fiallo*, 430 U.S. at 792, and *Mathews*, 426 U.S. at 81).

224 *Harisiades*, 342 U.S. at 587-88.

225 Galvan v. Press, 347 U.S. 522, 530-31 (1954).

226 *Id*.

227 *Id*. at 531 (citation omitted).

228 *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972) ("Since [*Chinese Exclusion*], the Court's general reaffirmations of this principle have been legion."); Demore v. Kim, 538 U.S. 510, 521-22 (2003) ("[S]ince *Mathews*, this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens."); *Trump*, 138 S. Ct. at 2417 ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is . . . 'largely immune from judicial control.'").

229 Kevin R. Johnson, *Immigration "Disaggregation" and the Mainstreaming of Immigration Law*, 68 FLA. L. REV. F. 38, 39 (2016); Catherine Y. Kim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. REV. 77, 79 (2017); Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029, 1052 (2015); Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47

evidence comes from the Court's 2001 decision in *Zadvydas v. Davis*.[230] In *Zadvydas*, the Court determined that the government could not indefinitely detain a noncitizen who was ordered removed but who could not be safely deported to another country.[231] The Court ruled that the government has the power to detain an immigrant while working towards her deportation, but in this instance, where deportation is impossible, continued detention was unreasonable.[232] While it is wholly possible that the Court was seeking to circumvent the nearly absolute power it granted Congress over immigration, the reality is that it utilized statutory interpretation, not constitutional rights, to justify ending indefinite detention.[233] The decision employed the constitutional avoidance canon, which is a "'cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'"[234] The Court determined that indefinite detention to achieve an unachievable purpose would be a violation of the Constitution's Fifth Amendment because it did not fall into an established form of permissible indefinite detention, and that unachievable goal could not justify creating a new one: "where detention's goal is no longer practically attainable, detention no longer 'bear[s] [a] reasonable relation to the purpose for which the individual [was] committed.'"[235] The Court used the canon to avoid this unconstitutional result, although the government attempted to invoke Congressional plenary power to justify continued detention.[236] The Court could not find an intention in the

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CONN. L. REV. 879, 885 (2015); Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1929 (2015).

230 *See, e.g.*, Johnson, *supra* note 229, at 42-43; Kim, *supra* note 229, at 88.

231 Zadvydas v. Davis, 533 U.S. 678, 682 (2001).

232 *Id.* at 699-700.

233 *See id.*

234 *Id.* at 689. *Zadvydas* built on earlier immigration cases that similarly interpreted ambiguous elements of the Immigration and Nationality Act to avoid constitutional violations. For example, in *Woodby v. INS*, the Supreme Court required that the government prove deportability using a clear and convincing evidence standard because the Act was silent on the matter, leaving it to the judiciary to decide. 385 U.S. 276, 284, 286 (1966).

235 *Zadvydas*, 533 U.S. at 690.

236 *Id.* at 695.

immigration legislation to permit indefinite detention.[237]

While this decision provides at least a modicum of liberty rights to noncitizens, it fails to challenge Congressional plenary power. It checked congressional power not as a matter of right but because the statute was unclear about whether the government could hold detainees indefinitely. The Court is unambiguous on this point:

> Despite this constitutional problem, if "Congress has made its intent" in the statute "clear, 'we must give effect to that intent.'" We cannot find here, however, any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed.[238]

The canon is an extremely limited and easily undermined outlet for achieving substantive due process.[239] As the Court explained in *Clark v. Martinez*:

> It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it.[240]

The *Zadvydas* ruling was followed by two more decisions that underscore its failure to effectively limit Congressional plenary power. In *Demore v. Kim*, the Supreme Court upheld mandatory immigration detention without an individualized hearing for certain classes of noncitizens–a clear Due Process Clause violation as described in Part II(A) above–on the basis of Congressional plenary power.[241] Additionally, in its 2018 *Jennings v. Rodriguez* decision, the Court refused to employ the constitutional avoidance canon to invalidate indefinite, mandatory immigration detention, finding it

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237 *See id.* at 696-97.

238 *Id.*

239 *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1627 n.11 (1992) ("The nominally subconstitutional reasoning [employed in statutory interpretation] often has deep roots in mainstream constitutional law, but in immigration law it remains a 'phantom'—real enough to influence statutory interpretation, but not real enough to govern explicitly constitutional decisions in the face of the plenary power doctrine."); *cf.* David A. Martin, *Why Immigration's plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 53 (2015) (locating the remedy for violations of non-citizens' rights in the political branches).

240 Clark v. Martinez, 543 U.S. 371, 381-82 (2005) (citations omitted).

241 *See* Demore v. Kim, 538 U.S. 510, 521-22 (2003).

inapplicable given Congress' clear intent to permit indefinite detention for some categories of noncitizens.[242]

The Supreme Court continues to use Congressional plenary power to mostly shield immigration law from due process challenges, allowing the federal government to grossly violate immigrants' rights. It does so without any meaningful consideration of whether the source of power–international law's sovereignty rights and foreign affairs and national security powers–permit those violations or of what it means for international law to be a source of power. The Court effectively abdicates its obligations to enforce the limits on immigration power set by international law by hiding behind extraordinary judicial deference it grants this area of law. The next section examines potential challenges to Congressional plenary power that build on this understanding of international law as a source of power and that highlight the incoherency of the Supreme Court jurisprudence on inherent sovereignty and foreign affairs and national security powers. The section underscores the assertion that the only thing propping up plenary power is the weight of precedent, since neither inherent sovereignty nor foreign affairs and national security powers justify the nearly absolute power to violate noncitizens' rights.[243]

IV. What the Supreme Court Gets Wrong: A Better Challenge to Congressional Plenary Power

Part IV is dedicated to identifying the weaknesses in the Supreme Court's Congressional plenary power jurisprudence that immigrant rights activists may be able to exploit to finally topple nearly absolute immigration power. Most importantly, it highlights that the foundation for that power—sovereignty rights and foreign affairs and national sovereignty powers—is too deteriorated to support Congressional plenary power. The main source of immigration power is international law. But, as Section A shows,

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242 Jennings v. Rodriguez, 138 S. Ct. 830, 842, 851 (2018); *see also id*. at 869 (Breyer, J., dissenting) (quoting *Zadvydas*, 533 U.S. at 696) ("The question remains whether it is possible to read the statute as authorizing bail. As desirable as a constitutional interpretation of a statute may be, we cannot read it to say the opposite of what its language states. The word "animal" does not include minerals, no matter how strongly one might wish that it did. Indeed, where "'Congress has made its intent in the statute clear, we must give effect to that intent,'" even if doing so requires us to consider the constitutional question, and even if doing so means that we hold the statute unconstitutional.").

243 *See infra* Part IV.

international law does not allow countries to violate immigrant rights to liberty, non-discrimination and equal protection of the law, even in the exercise of their sovereign right to control immigration. For example, it prohibits any type of mandatory detention and it requires immigration hearings to comply fully with due process requirements. Section A also underscores that the Supreme Court's failure to protect these rights is a direct result of its failure to address what it means for international law to be a source of power, rather than a type of law on the same footing as Congressional legislation. If international law is truly the source of power, the Supreme Court can no longer justify its general refusal to provide meaningful limits to Congress' and, by delegation, the Executive's immigration powers. Section B then tackles how the Court inappropriately hides behind its framing of foreign affairs and national security powers as inherently political to avoid meaningful judicial oversight of immigration powers in light of the structure of international law and the Court's rejection of the framing in the enemy combatant detention and other decisions. International law makes clear that human rights are legally binding obligations enforceable in domestic courts, not merely political considerations. And, outside of the context of immigration law and policy, the Supreme Court refuses to treat the political branches' national security and foreign affairs powers as subject to the same extraordinary deference. Whether international law or the Constitution is a source of power, or both, the federal government does not have the authority to grossly violate noncitizens' rights. It is time for the Supreme Court to stop shirking its oversight responsibilities on the basis of a nearly absolute power that only its precedent permits.

A. Limitations on Inherent Sovereignty: International Human Rights Law

The first essential element to challenging Congressional plenary power is challenging the Supreme Court's interpretation of inherent sovereignty as absolute sovereignty. At the time the Supreme Court developed Congressional plenary power over immigration, international law considered sovereignty rights absolute. Absolute sovereignty as a concept treated "sovereign authority as exclusive, autonomous, and independent."[244] This concept was meant to

244 Ernesto Hernandez-Lopez, *Sovereignty Migrates in U.S. and Mexican Law:*

regulate relations between countries to guarantee peace. This left no room for ambiguity: states could not interfere in each other's domestic affairs, attack each other's territorial or political integrity, or otherwise challenge each other's sovereign authority over their territory and they were all equal. Under this structure, individuals–citizens and noncitizens alike–had no enforceable rights under international law.[245] The Supreme Court's initial decision to make immigration powers absolute was consistent with international law at the time.

The era of absolute sovereignty came to an end with World War II and the development of International Human Rights Law ("IHRL").[246] The horrors of two World Wars and the mass atrocities during the Holocaust led to a new world order in which countries agreed to circumscribe their sovereignty rights in favor of human rights for everyone.[247] The Nuremberg Trials, along with the development of crimes against humanity, created a new international obligation: states were required to refrain from widespread and systematic abuse of any population.[248] The tribunals stripped away one of the primary defenses governments claimed when committing horrific human rights abuses–that states had complete sovereign authority over their territory and anyone in it and, therefore, all other states must refrain from interfering in that authority.[249]

The United Nations ("U.N.") Charter makes clear the international intention to limit sovereignty rights to better protect human rights. Along with codifying sovereignty rights in Article 2, as described above, the Charter expresses in Article 1 that one of the U.N.'s primary purposes is to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."[250] The

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Transnational Influences in plenary Power and Non-Intervention, 40 VAND. J. TRANSNAT'L L. 1345, 1360 (2007).

245 Jeffrey Kahn, *"Protection and Empire": The Martens Clause, State Sovereignty, and Individual Rights*, 56 VA. J. INT'L L. 1, 3 (2016).

246 Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 971 (1998).

247 Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1074 (1985).

248 *Id*.

249 *Id*.

250 U.N. Charter art. 1, ¶ 3.

Charter envisioned human rights as a check on sovereignty rights, although it does not itself guarantee human rights. Rather, IHRL developed primarily through the adoption of multilateral human rights treaties, customary international law and *jus cogens* norms. Because sovereign equality means that no authority can impose rules or limits on a country without its consent, international law is a consent-based system. The human rights treaties bind only those states that ratify them. Customary international law is created by "a general and consistent practice of states that they follow from a sense of legal obligation."[251] The general and consistent practice is considered implicit consent, with only states that can show they are persistent objectors to customary international law exempted from its obligations. To qualify as a persistent objector, a country must expressly and continuously declare to the international community its objection, starting at the time of the creation of the customary law norm.[252] *Jus cogens* norms, in contrast, are considered so fundamental that no country can object to them or derogate from them.[253] They are identified by nearly universal consent of the international community. As with customary international law, consent is shown implicitly through state practice. The remainder of this section examines the limitations IHRL places on the sovereign right to control who enters and remains in the country's territory and whether and under what conditions the United States has consented to these limits.

1. Limits on the Sovereign Right to Control Immigration

While international law certainly grants countries the sovereign right to determine who may enter and remain in the country, IHRL limits how the government may treat noncitizens during the process of exercising that right. The bedrock of human rights for noncitizens facing detention and deportation, and therefore limits on sovereign powers, is customary international law, the International Covenant on Civil and Political Rights ("ICCPR"),

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251 LEGAL INFO. INST., CUSTOMARY INT'L L., https://www.law.cornell.edu/wex/customary_international_law [https://perma.cc/DH27-JT3W] (last visited Jan. 21, 2022).

252 *See* U.N. High Comm'r for Refugees, *NGO Manual on Int'l and Reg'l Instruments Concerning Refugees and Hum. Rights*, Eur. Series, Vol. 4, No. 2, at xiii (July 1998) [hereinafter *NGO Manual*].

253 *See* U.N. Hum. Rts. Council, Rep. of the Working Grp. on Arbitrary Det., ¶ 51, A/HRC/22/44 (Dec. 24, 2012) [hereinafter Working Grp. 2012].

and the International Covenant on the Elimination of Racial Discrimination ("CERD"). The ICCPR and CERD are multilateral treaties written under the auspices of the United Nations. Together, these sources of international law guarantee noncitizens the rights to liberty, and correspondingly freedom from arbitrary detention; nondiscrimination; and equal treatment under the law.[254] IHRL does not grant a noncitizen a right to enter or remain in a country; that right remains a sovereign prerogative.[255] As such, the human right to freedom of movement into and within a territory belongs only to those "lawfully within the territory of the state."[256]

The starting point for understanding how IHRL limits sovereign immigration powers is the right to be free from discrimination, a right closely tied to the right to equal protection under the law. The right to be free from discrimination is binding as a matter of customary international law.[257] It was first expressed in the nonbinding Universal Declaration of Human Rights ("UDHR"). Article 2 reads: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status."[258] ICCPR Article 2 contains similar language:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social

254 *See* Int'l Covenant on Civ. and Pol. Rts. arts. 2, 9, 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Int'l Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

255 *See* U.N. Hum. Rts, Comm., *CCPR Gen. Comment No. 15: The Position of Aliens under the Covenant*, 27th Sess. (Apr. 11, 1986), U.N. Doc. HRI/GEN/1/Rev.1, ¶ 5 (1994) [hereinafter HRC No. 15] (reiterating that "[t]he Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory.").

256 ICCPR, *supra* note 254, art. 12(1). The only other right that excludes noncitizens is the right of citizens to public participation.

257 *Rule 88. Non-Discrimination*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule88 [https://perma.cc/5THB-77MY] (last visited Jan. 18, 2022) [hereinafter ICRC Rule 88].

258 G.A. Res. 217 (III) A, Universal Declaration of Hum. Rts., art. 2 (Dec. 10, 1948) [hereinafter UDHR].

origin, property, birth or other status.[259]

One of the core tenants of IHRL is that human rights belong to everybody regardless of where they live and regardless of national law and citizenship.[260] The United Nations Human Rights Council ("HRC"), the treaty body created by the ICCPR to interpret and monitor implementation of ICCPR rights, has determined that states must guarantee each right "without discrimination between citizens and noncitizens" as part of the prohibition on discrimination on the basis of national origin.[261] Under IHRL, the only right that belongs solely to citizens is the right to public participation in the government, which includes the right to choose a government.[262]

CERD's guarantee of equality for noncitizens is more complicated because Article 1(2) specifically states that its prohibition on discrimination does "not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens."[263] The Committee on the Elimination of Racial Discrimination, the treaty body responsible for interpreting and monitoring the implementation of CERD, explains that Article 1(2) "must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized" by IHRL.[264] As such, the CERD Committee reads Article 1(2) as recognizing that there might be legitimate reasons to differentiate between citizens and noncitizens, such as with the right to public participation, but that such recognition does not grant governments a license to discriminate against noncitizens.[265]

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259 ICCPR, *supra* note 254, art. 2(1).

260 *See, e.g.,* Comm. on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination against non-citizens*, ¶ 1, (2004) U.N. Doc CERD/C/64/Misc.11/ rev.3. (mentioning that this core tenant can be found in the International Covenant on Economic, Social and Cultural Rights; the ICCPR; the ICERD, the Charter of the United Nations; and the UDHR) [hereinafter General Recommendation 30].

261 HRC No. 15, *supra* note 255, ¶¶ 1-2.

262 *See* ICCPR, *supra* note 254, art. 25.

263 CERD, *supra* note 254, art. 1(2).

264 U.N. Comm. on the Elimination of Racial Discrimination, *CERD Gen. Recommendation XXX on Discrimination Against Non-Citizens*, ¶ 2, (Oct. 1, 2002) [hereinafter CERD Committee].

265 *See id.* at ¶ 3.

A major component of nondiscrimination is the right to equality under the law. ICCPR Article 26 and CERD Article 5 protect this right.[266] The right to equality under the law sits in tension with the sovereign right of governments to determine who may enter and remain in the county and under what conditions. The sovereign right allows for differentiation that human rights law does not. IHRL manages tensions between rights by allowing limitations on rights when appropriate. The CERD Committee articulates the test for whether differentiation between citizens and noncitizens is an appropriate limitation on rights as a consideration of the following two elements: (1) whether differentiation serves a legitimate aim; and (2) whether the distinction is "proportional to the achievement of this aim."[267] The Human Rights Committee employs the same test to determine when a state can limit ICCPR rights.[268]

Applying this test to the United States' immigration detention process described in Part I(b) to highlight how these rights operate, the question is whether immigration detention violates equal protection for the right to liberty. As with any right, governments may limit liberty but not arbitrarily. The prohibition on arbitrary detention is captured in UDHR Article 9, ICCPR Article 9 and CERD Article 5, which protect the right to liberty or "freedom from confinement of the body."[269] Under IHRL, detention must be the exception, not the rule.[270] All people are entitled to protection against arbitrary detention, including "aliens, refugees and asylum seekers, stateless persons [and] migrant workers."[271] The U.N. Working Group on Arbitrary Detention (UNWGAD) determined

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266 CERD, *supra* note 254, art. 5; ICCPR, *supra* note 254, art. 25.

267 *Id*. at ¶ 4.

268 *See* OHCHR, *Civ. and Pol. Rts.: The Hum. Rts.* Comm., at 8, No. 15 (Rev.1) (May 2005), (It emphasizes "that in any case the permissible limits are neither wide nor generous, and certainly do not permit a State party effectively to void a certain right of practical meaning. The burden of justification in such a case lies with the State party to show, including to the Committee, that a certain limitation satisfies the tests of legality, necessity, reasonableness and legitimate purpose.").

269 U.N. Hum. Rts. Comm., *General Comment No. 35: Art. 9 (Liberty and security of person),* 112th Sess., (Dec. 6, 2014), U.N. Doc. CCPR/C/GC/35, ¶ 3 [hereinafter HRC No. 35].

270 *See* U.N. Working Grp. on Arbitrary Det., *Compilation of Deliberations* (2013) ¶ 43 (affirming a consensus that "the prohibition of arbitrary deprivation of liberty is of a universally binding nature under customary international law") [hereinafter Compilation of Deliberations].

271 HRC No. 35, *supra* note 269, ¶ 3.

the right to liberty and prohibition on arbitrary detention is so universally accepted (or consented to) that it constitutes both customary international law and a *jus cogens* norm.[272] It reached this conclusion based on the fact that the right and corresponding prohibition are protected "in all major international and regional instruments for the promotion and protection of human rights," including the ICCPR, which has been ratified by 172 states including the United States.[273] Adding weight to the customary law and *jus cogens* status, signatories to the ICCPR and the other human rights treaties protect the right to liberty in their constitutions and in national law, again including the United States.[274] The ICRC noted that the United States' national law has contributed to the development of the right to liberty and prohibition on arbitrary detention as customary international law, including with respect to detention of suspected terrorists following 9/11 and through its adoption of the Allied Control Council Law No. 10 at Nuremberg, which treated "imprisonment . . . or other inhumane acts committed against any civilian population" as a crime against humanity.[275]

Under IHRL, detention is arbitrary if there is no legal basis for holding a person or if the procedure for detaining a person is arbitrary.[276] To ensure the detention is nonarbitrary, ICCPR Article 9 grants all detainees the right "to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[277] The Human Rights Committee expressly prohibits detention without the possibility of periodic review or any type of mandatory detention, treating it as inherently arbitrary.[278] In terms

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272 *See* Compilation of Deliberations, *supra* note 270, ¶ 42.

273 *Id*; *see also FAQ: The Covenant on Civ. and Pol. Rts. (ICCPR)*, ACLU, https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr [https://perma.cc/55QU-7V39] (last updated Apr. 2019).

274 *See* Compilation of Deliberations, *supra* note 270, ¶ 43.

275 *Practice Relating to Rule 99. Deprivation of Liberty*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule99 [https://perma.cc/3RVE-SD72] (last visited Jan. 19, 2022) [hereinafter ICRC Rule 99].

276 *See* HRC No. 35, *supra* note 269, ¶ 12.

277 ICCPR, *supra* note 254, art. 9(4).

278 *See id*. art. 15. Additionally, the UNWGAD determined that detainees are entitled to automatic, prompt review of the detention decision, meaning the government is implicitly required to hold a hearing regardless of whether a noncitizen requests one; *see*

of process, its test for nonarbitrary detention is whether the detention is (1) permitted by law; (2) reasonable; (3) necessary; and (4) proportionate "in the light of the circumstances."[279] The Human Rights Committee anticipates at least three grounds for detaining immigrants while deciding on their asylum status and that, presumably, apply to all forms of immigration detention: (1) risk of flight; (2) danger to others; and (3) national security threats.[280] Necessity requires the courts to "take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding."[281] Proportionality requires courts to take into account whether detention will harm the detainee's mental or physical health.[282] Overall, the arbitrariness test is meant to incorporate considerations of "inappropriateness, injustice, lack of predictability and due process of law."[283]

In 2017, the United Nations Working Group on Arbitrary Detention ("UNWGAD") issued a report on the extent to which the United States has complied with its human rights obligations with respect to immigration detention. The Group listed five areas of concern with the U.S. detention regime, including mandatory detention, failure to assess the need for detention on an individual basis, and failure to ensure adequate access to legal assistance.[284] Additionally, the UNWGAD raised concerns that efforts to use detention as a form of immigration deterrence were meant to, and might, deter legitimate asylum claims.[285] Importantly, UNWGAD acknowledged the difficulties the United States faces balancing "a large movement of immigrants" and "fully respecting [] human

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also Hum. Rts. Council, Rep. of the Working Grp. on Arbitrary Det. on its Visit to the U.S. of Am., ¶ 26, U.N. Doc. A/HRC/36/37/Add.2 (July 17, 2017) [hereinafter Working Grp. 2017].

279 HRC No. 35, *supra* note 269, ¶ 18.

280 *See id*.

281 *Id*.

282 *See id*.

283 *Id*. at ¶12.

284 *See* Working Grp. 2017, *supra* note 278, ¶ 23. UNGWAD commented further that even GPS monitoring and "excessive bond amounts" smacks of "criminal settings" and that appropriate alternatives to detention include releasing individuals to family or community custody; "non-monetary parole and release on recognizance." *See also* HRC No. 35, *supra* note 269, ¶ 30.

285 *See* Working Grp. 2017, *supra* note 278, ¶ 27.

rights."[286] It found the United States' balance inappropriate, however, concluding instead that the high rates of detention are "excessive" and "cannot be justified based on legitimate necessity."[287]

Overall, the United States' regime for detaining immigrants pending immigration proceedings violates international law. Mandatory detention fails to guarantee an individual hearing for all immigrants facing detention. Hearings are not required even when detention is discretionary, but instead depend on an immigrant's request. The federal regulations do not require the government to prove detention is necessary or that the harm from detention is proportionate to the harm if a noncitizen does not appear at court hearings or to the danger the immigrant poses. And the failure of the immigration regulations to establish a standard of proof, leaving it simply to each immigration judge to be satisfied, or not, that each detainee is not a flight risk or dangerous, is inherently arbitrary as each immigration judge can choose her own standard of proof. These failures constitute violations of the right to liberty.

As Part II(A) showed, the standards governing pretrial and mental health detention in the United States place the burden of proof on the government to prove detention is necessary, take into account the detainee's liberty interests, and offer an individualized hearing. Thus, they comply with IHRL requirements to avoid arbitrary detention. It is more complicated to assess the compliance of enemy combatant detention, because of the use of secret evidence, the extended nature of detention, and a host of other issues, but the placement of the burden and standard of proof in such proceedings affords enemy combatants due process rights far more in compliance with IHRL than those afforded to noncitizens facing immigration detention.[288] This differential treatment shows that the immigration detention regime violates IHRL's prohibition on discrimination and its guarantee of equal protection of the law, in addition to the right to liberty. The next section details the United States' consent to each of these rights, a necessary component to finding these limitations binding on the government as a matter of international law.

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286 *Id*. at ¶ 21.

287 *Id*. at ¶ 31.

288 LUDSIN, *supra* note 26, at 369-70.

V. United States' Consent to IHRL

The United States' specific consent to limits on its sovereign right to determine who enters and remains in the country first comes from customary international law. Again, customary international law is binding on all states that have not persistently and loudly objected to it from the time of its creation.[289] According to the Supreme Court, the United States is bound by customary international law because it is based on state practice and, therefore, "tacit consent."[290] Because of the element of tacit consent, the Supreme Court treats customary law's development as consistent with the right to sovereign equality.[291]

> The Court explained that it locates customary international law by "resort . . . to the customs and usages of civilized nations, and, as evidence of these, to works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[292]

The work of UNWGAD, the ICRC and the Human Rights Committee in cataloguing the creation of the customary international law rights to liberty and equality under the law and the prohibition on discrimination would undoubtedly fit the Court's requirement of expert research. Further, as noted in the previous section, these groups identified U.S. practice as contributing to the development of these rights as customary international law.

There are rampant debates about how international law becomes part of U.S. law, more particularly around whether it forms part of

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289 *See NGO Manual*, *supra* note 252, at xiii.

290 Ware v. Hylton, 3 U.S. 199, 231 (1796) (Chace, J.); *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004) (describing customary international law as a source of law "we have long, albeit cautiously, recognized"). Some scholars push back against the idea of tacit consent to international law, preferring instead evidence of an intent to consent. *See e.g.,* Rebecca Crootof, *Change Without Consent: How Customary Int'l L. Modifies Treaties*, 41 YALE J. INT'L L. 237, 240 (2016). The United States Constitution as well as its ratification of the ICCPR and CERD show an intent to be bound by the rights to liberty, equal protection of the law and freedom from discrimination.

291 *Ware,* 3 U.S. at 231. Later decisions do not challenge the issue of tacit consent but recognize the customary international law is binding on countries. *See, e.g., Sosa,* 542 U.S. at 735.

292 The Paquete Habana, 175 U.S. 677, 700 (1900).

federal common law (whose existence is disputed) or must be adopted by Congress. The Supreme Court cautiously recognizes international law, including customary international law, as part of federal common law.[293] This debate, however, is irrelevant with respect to federal immigration powers because international law is a source of the power. In this context, international law is neither subservient to the constitution nor equal to statutory or common law. As the Court in *The Paquete Habana* described, "International 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," including by resort to customary international law.[294] Doubtless, when international law is the source of power, any rights it grants are enforceable by courts without consideration of whether Congress adopted it into law.

Additionally, the United States has ratified the ICCPR and the CERD, which means it is bound by their terms on the international plane and, therefore, when passing immigration laws and regulations.[295] Ratification is an act of sovereignty.[296] The United States has explicitly consented to be bound by to the right to liberty, with its attendant due process obligations, the right to equal protection of the law, and the prohibition of discrimination on grounds of national origin, which covers immigration status.[297] The United States designated the ICCPR and CERD as non-self-executing,[298] which means that ordinarily the courts cannot directly enforce these limitations unless Congress passes legislation implementing the treaties.[299] Anyone seeking to avoid international law's limits is likely to raise this point as a barrier. In reality, the designation of the ICCPR and CERD as non-self-executing poses no limit on the application of the provisions of the treaties to

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293 *See Sosa,* 542 U.S. at 729.

294 *Paquete Habana*, 175 U.S. at 700 (*Paquete Habana* is still good law); *see also Sosa,* 542 U.S. at 730.

295 *See generally* ICCPR, *supra* note 254; *see also* CERD, *supra* note 254.

296 U.S. CONST. art. II, § 2 (providing that the United States can ratify a treaty only if it is signed by the President and with the agreement of the Senate).

297 *See generally* ICCPR, *supra* note 254; *see also* CERD, *supra* note 254.

298 *See* 140 Cong. Rec. 14,326 (1994) (CERD); *see also* 138 Cong. Rec. 8,071 (1992) (ICCPR).

299 *See Sosa,* 542 U.S. at 735.

immigration law because they are a source of law, rather than derivative of the Senate's or Executive treaty powers. The United States remains bound internationally by non-self-executing treaties, regardless if they are enforceable in domestic courts.[300] As such, they form part of the source of immigration powers. Putting this discussion into the context of constitutional supremacy, constitutional guarantees do not depend on implementing legislation not because they have been designated self-executing but because the government does not have the authority to override its boundaries. Even if the courts conclude otherwise, and even if the United States were to withdraw from the treaties, the United States remains bound by customary international law, making this contention moot.

Another likely point of contention is that the United States added an "understanding" to the ICCPR's prohibition on discrimination and to the guarantee of equal protection of the law that some might read as permitting the extraordinary deference the Supreme Court currently employs to restrict its oversight. The understanding reads:

> That the Constitution and laws of the United States guarantee all persons equal protection of the law and provide extensive protections against discrimination. The United States understands distinctions based upon race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status - as those terms are used in Article 2, paragraph 1 and Article 26 - to be permitted when such distinctions are, at minimum, rationally related to a legitimate governmental

300 *See* Vienna Convention on the L. of Treaties art. 27, May 23, 1969, 1155 U.N.T.S., 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). While the US has not ratified the Vienna Convention, its provisions are considered customary international law. LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW CASES AND MATERIALS 115 (7th Ed. 2019) (quoting RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 reporters' note 1 ("Although the United States is not a party to the Convention, it accepts that the Convention generally reflects international practice concerning treaties and that many of its provisions are binding as a matter of customary international law.")). The U.N. Human Rights Committee, the treaty body created by the ICCPR, explains that Art. 27 "prevent[s] States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty." Hum. Rts. Comm., Gen. Comment No. 31, *The Nature of the Gen. Legal Obligation Imposed on State Parties to the Covenant* ¶ 4, CCPR/C/21/Rev.1/Add. 13 (2004) [hereinafter HRC No. 31].

> objective. The United States further understands the prohibition in paragraph 1 of Article 4 upon discrimination, in time of public emergency, based "solely" on the status of race, color, sex, language, religion or social origin not to bar distinctions that may have a disproportionate effect upon persons of a particular status.[301]

Under international law, an understanding does not alter the legal effect of a treaty provision but is used to explain how the government will interpret the provision.[302]

The understanding does not insulate the United States government from a finding that its immigration detention regime violates the ICCPR. The decision to treat immigrants under immigration law differently from all other detainees is not based on a legitimate government objective, a point that comes out in the Supreme Court jurisprudence. The Court repeatedly notes that the United States restricts immigrant rights in ways it would not be allowed to restrict citizens' rights not to achieve a particular policy objective but because Congressional plenary power governs rather than the Constitution. This is glaringly evident in the Court's conclusion that enemy combatant detention, which could capture citizens and noncitizens alike, must comply with the Constitution's due process obligations, although it implicates the very war powers and foreign affairs powers that help prop up Congressional plenary power.[303] The difference in source of power does not provide a legitimate justification for the differential treatment of immigrants in immigration proceedings when compared to all other potential detainees. The harm from deprivation of liberty does not become less because Congress is acting under sovereignty rights, nor do the government's interests grow stronger.

The Supreme Court further cannot hide behind precedent to justify the differentiation. International law requires all states to keep up with its changes.[304] The Supreme Court acknowledges that international law changes over time and that what violates

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301 138 CONG. REC. 8,071 (1992).

302 DAMROSCH & MURPHY, *supra* note 300, at 134.

303 *See supra* Part I(A).

304 According to the International Court of Justice, "the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred." Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 99, ¶ 58 (Feb. 3).

international law "must be gauged against the current state of international law."[305] As such, it must apply IHRL to limit immigration powers regardless of the weight of precedent.

The United States government, guided by the Supreme Court, expressly and intentionally treats noncitizens facing the prospect of immigration detention differently than all other persons facing all other nonpunitive detention based on what it claims is allowed by international law's sovereignty rights. The reality, however, is that international law does not allow for discrimination against noncitizens or for circumscribed due process in detention proceedings without adequately showing the differential treatment is not arbitrary. The Supreme Court has never required the government to make that showing, instead continuing to apply international law as though it allows for absolute sovereignty. The Committee on the Elimination of Racial Discrimination expressly treats this failure as discrimination:

> Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.[306]

The next section addresses how this failure to follow international law is a result of the Supreme Court misconstruing what it means for inherent sovereignty, or international law, to be the main source of power.

A. Misconstruing the Source of Power

The Supreme Court's rote recitation of precedents creating Congressional plenary power over immigration ignores the decades old limits to sovereignty rights the United States and the rest of the international community adopted. The Court has made clear at various points that without the weight of precedent, it would not adopt Congressional plenary power given its obvious injustice.[307] It has never reconsidered what happens if the source of law sets new limits on government power. In fact, the Court never seems to

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305 Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004).

306 Comm. on the Elimination of Racial Discrimination, Gen. Recommendation 30, Discrimination Against Non-Citizens, ¶ 4, CERD/C/64/Misc.11/rev.3 (2004).

307 *See supra* Part III(C).

consider what it means for international law to be a source of power at all.

The Supreme Court should treat international law as a source of immigration powers consistent with the doctrine of constitutional supremacy as applied to constitutional powers. The Court has been nothing but clear since *Marbury v. Madison* that the limited government established by the Framers of the Constitution has no meaning unless government powers are in fact checked by the Constitution and the courts:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act . . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.[308]

But while international law, once the government consents to it, is the source of federal immigration powers, the Supreme Court has yet to consider whether international law also limits those powers. It guarantees the powers international law confers on states without also guaranteeing the limits international law places on those powers. The Court allows Congressional legislation to simply override the source of immigration powers, something the *Marbury* passage makes clear it would never allow if that source was the Constitution.[309] This inconsistency creates grave incoherence in the Court's source of power jurisprudence.

The incoherence stems from how the Court attempts to reconcile the Constitution's grant of treaty powers to Congress and the Executive with its decisions from the *Chinese Exclusion Case* to

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308 Marbury v. Madison, 5 U.S. 137, 176-77 (1803).

309 *See id.*

Curtiss-Wright to elevate international law's inherent sovereignty over foreign affairs into a separate source of law. Ordinarily, the Supreme Court allows an act of Congress to violate international law. If the law is in the form of a treaty, congressional legislation will override a treaty if it comes later in time and is clearly intended to do so or there is no way to reconcile the statute and the treaty.[310] According to the Court, Congress' power to override international treaties derives from Constitution Article VI, which lists both treaties and federal legislation as the supreme law of the land, as coequal forms of law, one is not inherently superior to the other.[311] The *Chinese Exclusion Case*, in which the Supreme Court allowed the Chinese Exclusion Act to override a treaty with China, emphasized this point.[312] Importantly, the *Chinese Exclusion Case* never considers whether Congress can override a treaty that is actually a source of law.

Even more glaring of a problem is that the Supreme Court does not treat customary international law as a coequal form of law, but rather as a gap filler. The Court will apply customary international law only "where there is no treaty and no controlling executive or legislative act or judicial decisions."[313] As with treaties, the Court

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310 *See* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963); *see also* Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984).

311 *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other: provided always the stipulation of the treaty on the subject is self-executing.").

312 *See* Ping v. United States, 130 U.S. 581, 600 (1889) (The Chinese Exclusion Case) ("The treaties were of no greater legal obligation than the act of congress. By the constitution, laws made in pursuance thereof, and treaties made under the authority of the United States, are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force and relates to a subject within the power of congress, it can be deemed in that particular only 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.").

313 The Paquete Habana, 175 U.S. 677, 700 (1900).

has not mulled the impact of establishing customary international law as a source of immigration powers.[314]

These failures effectively misconstrue what it means to use international law as a source of immigration power. In this instance, international law is neither coequal to congressional legislation nor a gap filler in the absence of any other immigration law, but is coequal only to the Constitution. The Court intentionally placed immigration powers derived from international law outside of constitutional control when it established Congressional plenary power. To allow Congress then to use its constitutional powers to overturn the source of immigration authority would essentially (and incredibly) make Congress the source of its own power. Congress could both decide what powers it, and by delegation, the Executive has and could choose what limits to apply to those powers. The Supreme Court rejected similar efforts by the government in *Boumediene* to avoid constitutional oversight when it detained enemy combatants in Guantanamo Bay, which, in the government's view, was outside the constitution's territorial jurisdiction.[315] The Supreme Court refused to grant the "political branches . . . the power to switch the Constitution on or off at will."[316] Allowing ordinary congressional acts to override international law using Congressional plenary power over immigration grants the government the power to switch international law on and off at will despite being the source of its power. International law is explicit in how it is created, how a country consents to it, and how a country revokes its consent. If international law is truly the source of power, those rules would govern, not the Constitution. By ignoring its precedent on what it means to be a source of power, the Supreme Court is letting the federal government have its cake and eat it too.

Further, if federal immigration law is allowed to override customary and treaty law based on inherent sovereignty rights, international law would then justify the very discrimination it prohibits. The Supreme Court is clear that noncitizens are entitled to a right to liberty and to due process in the United States, but it allows the government to limit or even wholly revoke those rights based on powers given to it under international law that it then mostly shields from judicial scrutiny using extraordinary deference.

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314 *See Ping*, 130 U.S. at 600.

315 *See* Boumediene v. Bush, 553 U.S. 723, 765 (2008).

316 *Id*.

In reality, the power to arbitrarily limit liberty and due process rights no longer exists under international law. International law is not a source for statutory construction but rather is the source of law. It cannot then be used as a source for violating itself.

Part and parcel of sovereignty rights are the limits to those rights, limits that the United States consented to, as evidenced by its ratification of the ICCPR and CERD and by its constitutional and legal practice that contributed to the development of customary international law and *jus cogens* norms. In this instance, these limits stand above Congressional acts, otherwise, the source of immigration power is Congress, not international law. The failure to construe international law as a source of law similarly to the Constitution leads to an incoherence in the Supreme Court's jurisprudence and, more importantly, serious harm to noncitizens deprived of their rights.

B. A Legal, Not Political, Question

International law and relations also do not offer a justification for the extraordinary deference the Supreme Court employs to avoid enforcing limits on Congressional plenary power over immigration, regardless of the source of law. The Court claims that immigration powers are a matter of foreign affairs and national security best left to the discretion of the political branches of government and is therefore subject to "special judicial review."[317] It claims to fear that if it intervenes or allows lower courts to intervene in immigration powers, even by giving immigrants the same rights citizens receive, the Court could harm foreign relations and make the federal government less nimble in addressing foreign affairs and national security concerns.[318] The Court's rationale ignores that international law treats human rights violations as legal, not political matters, that it assigns the judiciary the role of safeguarding those rights, and that using the government's claims of foreign affairs and national security powers to avoid its oversight responsibilities is not just illogical but flies in the face of its decisions on enemy combatant detention and other political question cases.

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317 *See supra* Part III(B).

318 *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952); Mathews v. Diaz, 426 U.S. 57, 81-82 (1976).

1. IHRL is a Legal, Not Political, Matter

If international law is a source of power on par with the Constitution, the Court has failed to articulate a principled reason, based in international law, for why it applies extraordinary deference to immigration law and policy. Nor is it likely to find one. To protect sovereignty to the greatest extent possible, the international community specifically designed the IHRL system to place responsibility on domestic governments to implement and enforce IHRL requirements.[319] The international community only steps in if the violating state consents or if the human rights violations that constitute a "threat to the peace, breach of the peace, or act of aggression."[320]

The international human rights treaties make clear that at all times, the primary responsibility for human rights enforcement belongs to the national governments and, more specifically, to the judiciary in these countries. ICCPR Article 2 exemplifies this:

> *Article 2*
>
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[321]

UDHR Article 8 also expressly places enforcement

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319 *See* William M. Carter Jr., *Rethinking Subsidiarity in Int'l Hum. Rts. Adjudication*, 30 HAMLINE J. PUB. L. & POL'Y 319, 319-22 (2008); U.N. Charter art. 39. Under the United Nations Security Council's Chapter VI powers, the Security Council may make recommendations for the peaceful settlement of such threats, but intervention is limited to its Chapter VII powers. U.N. Charter arts. 33-38.

320 U.N. Charter art. 39; *see also, e.g.,* G.A. Res. 60/1, 2005 World Summit Outcome, ¶¶ 138-39 (Oct. 24, 2005).

321 ICCPR, *supra* note 254, art. 2(3); *see also* CERD, *supra* note 254, art. 6; *see also* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, T.I.A.S. 94-1120.1, 1465 U.N.T.S 85.

responsibilities on domestic courts: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[322] These provisions, like their corollary provisions in other human rights treaties, including CERD, require state parties to change their constitutions and legislation to conform to their human rights obligations and to adopt any other necessary measures to implement human rights. Most importantly for purposes of this Article, it requires the government to ensure that anyone suffering from a human rights violation has a legal remedy for that violation that is "determined by competent judicial, administrative or legislative authorities." IHRL expressly places responsibility for enforcing rights and remedying their violations on the domestic courts of the countries that have consented to it.

The treaties explicitly reject that enforcement of human rights is a political question and, instead, make it crystal clear that it is a legal requirement. Human rights, accordingly, are not a matter of politics, but a matter of law. The Human Rights Committee explains that Article 2 and all other human rights provisions "are binding on every State Party as a whole, including "[a]ll branches of government (executive, legislative and judicial.)"[323] It "attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law."[324] The fact that the Senate deemed the ICCPR and CERD non-self-executing is irrelevant. As described in Part IV(A)(2) above, the ratification of the treaties serves as consent to these provisions and now form part of the source of law for immigration powers.[325] Under international law and the Supreme Court's constitutional supremacy jurisprudence, Congress does not need to adopt implementing legislation for them to be binding.

The decision to abdicate its judicial responsibilities is not a requirement of international law but rather is based on constitutional separation of powers as described in *Curtiss-Wright*, which makes the Supreme Court's jurisprudence only that much more incoherent. If international law is the source of power, then it grants that power

322 UDHR, *supra* note 258, art. 8.

323 HRC No. 31, *supra* note 300, ¶ 4.

324 *Id*. at ¶ 15.

325 *See supra* Part IV(A)(2).

to all branches of the federal government. It is illogical to say that inherent sovereignty rights grant the federal government exclusive power over immigration, separately from the Constitution, and then say it does not grant the federal judiciary the power to enforce constraints that are part of inherent sovereignty rights. How does the federal government get all the powers but none of the constraints? How does the Constitution divvy legislative and enforcement powers over immigration, without also divvying adjudication powers to the judiciary?

The Vienna Convention on the Law of Treaties Article 27, which the United States has not ratified but is considered customary international law, including by federal courts, prohibits states from "invok[ing] the provisions of its internal law as justification for its failure to perform a treaty."[326] That means that under international law, which is the source of immigration powers, the Supreme Court cannot use the Constitution or its precedence to avoid implementing the right to a remedy for human rights violations contained in the treaties it has ratified.

The Supreme Court's efforts to shield Congressional plenary power from international law oversight through its extraordinary deference to the political branches is also simply illogical. International law is specifically designed to make conflict less likely.[327] To argue that the courts threaten foreign relations by implementing international law, then, is disingenuous. Rather, the failure of the courts to uphold limits on sovereignty rights derived directly from obligations between states threatens foreign relations and, at an extreme, war.

2. The Illogic and Inconsistencies of Extraordinary Deference

To the extent that Congressional plenary power over immigration derives from foreign affairs and national security

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326 HRC No. 31, *supra* note 300, ¶ 4, 14. Similarly, the U.N. Human Rights Committee makes clear that the ICCPR requires state parties to give "unqualified and immediate effect" to the rights in the treaty and that a "failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations in the State." *See also* Evan J. Criddle, *The Vienna Convention on the L. of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INTL L. 431, 434 (2004).

327 *See* U.N. Charter art. 55 (stating commitment "to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations").

powers, shielding that power through extraordinary deference makes no sense when applied to immigration law and policy that applies to all noncitizens regardless of national origin. Much of the deference to the political branches, and especially to the Executive, is based on the idea that the President starts the day with confidential national security briefings that may require her to act immediately to protect the country.[328] The Court's claim that immigration law and policy, when applied to all immigrants, is connected to foreign affairs and national security powers seems specious given that much of immigration law and policy on removal and detention does not differentiate between noncitizens based on nationality, although permission to enter may and special humanitarian visas certainly do.[329] The recognition that much of immigration law and policy is a legal, not political, question does not deprive the government of the ability to use detention (and deportation) in response to national security threats or in emergency circumstances, a point the decisions in *Hamdi* and *Boumediene* make clear. If the government chooses to adopt immigration legislation that differentiates between

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328 *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 797 (2008) ("Unlike the President and some designated members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) ("It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war."); Mathews v. Diaz, 426 U.S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.").

329 The limited exception to the lack of connection between removal proceedings and foreign affairs may be when the United States government needs to identify a removal destination when a noncitizen cannot be returned to her country of origin. *See* Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 348 (2005). The rules on detention and removal apply regardless of nationality, even if the actual removal process may require some foreign affairs negotiations.

nationalities for foreign affairs or national security reasons, the courts will consider its reasons as part of the weight of the government's interests in depriving noncitizens of their liberty or other rights. Finally, it is hard to see how judicial decisions enforcing constitutional and international law's due process requirements and anti-discrimination limits threaten foreign relations or national security. The traditional justifications for deference to the Executive or even Congress do not apply to immigration law and policy that is not based on the specific context of immigrants' country of citizenship. Yet, the Court continues to apply extraordinary deference when reviewing Congressional plenary power over immigration without considering whether that deference can be justified.[330]

Hamdi and *Boumediene* also make clear that foreign affairs and national security powers (including war powers) are not immune from meaningful judicial review. Rather, the connection to those powers only requires the courts to give some deference to the political branches, without permitting the federal government run roughshod over detainee rights. These decisions should carry serious weight in understanding the limits of foreign affairs and national security deference since enemy combatant detention is much more tightly connected to those powers than immigration detention.

Notably, the *Hamdi* and *Boumediene* decisions form part of a more recent Supreme Court trend outside of immigration law and policy that is undermining the continued treatment of foreign affairs and national security as a political matter. Scholars mark the end of the Cold War as the point at which the Court began to apply greater constitutional limits to these powers.[331] The Court continues to retain deference to the political branches, but not to the point that foreign affairs and national security matters are effectively nonjusticiable, as is often the case with immigration law and

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330 *See, e.g.*, Elad D. Gil, *Totemic Functionalism in Foreign Affairs Law*, 10 HARV. NAT'L SEC. J. 316, 323 (2019) ("Functionalism is an interpretive approach that asks what interpretation— here, of the Constitution's separation-of-powers scheme—would make the challenged policy or act work best. Judicial deference is thus functionally desired when in a given context it facilitates better results than judicial involvement. But what has played out in practice is that judges often cite the executive's special competence in foreign affairs as a sort of heuristic for applying a de facto presumption of near-total deference.")

331 Sitaraman & Wuerth, *supra* note 229, at 1900-01.

policy.[332] The Guantanamo detention cases were remarkable because the strength of the connection between the issue at hand and foreign affairs/national security powers did not lead the Court to apply extraordinary deference.

The Supreme Court bolstered its effort to limit its deference on foreign affairs matters in *Zivotosky v. Clinton*.[333] It refused to apply the political question doctrine to the issue of whether the State Department must list on a United States passport an American citizen's birthplace as "Jerusalem, Israel" when requested under a federal statute.[334] State Department policy required listing "Jerusalem" in recognition that sovereignty over the city was the subject of peace negotiations between Israeli and Palestinian representatives.[335] The District Court of DC had determined it could not rule on the issue because it would "require the Court[s] to 'decide the political status of Jerusalem.'"[336] The Court disagreed, finding instead that it is only being asked to determine whether Zivotofsky "may vindicate his statutory right," which required statutory interpretation and a determination of the constitutionality of the statute.[337] The Court concluded that the Executive cannot employ the political question doctrine unless it is "being asked to supplant a foreign policy decision of the political branches with the courts' own unmoored determination of what United States policy toward Jerusalem should be."[338] Rather, it is being asked to determine the constitutionality of a statute, which is "emphatically the province and duty of the judicial department," a duty the "courts cannot avoid . . . merely 'because the issues have political implications.'"[339]

While *Zivotofsky* is about the political question doctrine, which is no longer used in immigration law and policy, the rationale for why immigration law and policy is not a political matter rests on the same determination the Court made in the *Zivotofsky* case. Judicial review of generally applicable immigration law and policy, law and

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332 *Id*. at 1935.

333 566 U.S. 189 (2012).

334 *Id*. at 194-96.

335 *Id*. at 191-92.

336 *Id*. at 193.

337 *Id*. at 195.

338 *Clinton,* 566 U.S. at 196.

339 *Id*.

policy that does not differentiate by nationality, does not require the Court to supplant the federal government's foreign policy decisions. As noted earlier in this section, there is nothing about generally applicable immigration law and policy that touches on foreign policy.

Importantly, the Supreme Court initially established immigration law and policy as tightly connected to foreign affairs and national security in cases involving the Chinese Exclusion Act, starting with the *Chinese Exclusion Case*. Cases challenging the constitutionality of the legislation certainly were directly tied to foreign affairs and, in its pernicious xenophobia, to national security. Directly at stake was the United States' relationship with China. Rightly or wrongly, the fact that the statute targeted a particular country's citizens at least draws some connection to the political powers the Court employs to justify deference. The Court relies on these cases as precedent to continue its deference on immigration matters although the generally applicable immigration law and policy lacks that connection.[340]

When the Supreme Court attached immigration law and policy to foreign affairs and national security powers, it created a loophole to ensure that the federal government has little accountability for its human and civil rights abuses in the immigration arena. To continue to uphold this position is to shirk its responsibilities, violate international law, and to allow the United States to violate immigrant rights with impunity. As Part IV shows, the Court is effectively allowing nothing but the weight of precedent to justify

340 The citations for foreign affairs extraordinary deference directly or indirectly lead back to Chinese Exclusion Act cases, particularly *Fong Yue Ting*. For example, the Court in *Trump v. Hawaii* cited to *Mathews v. Diaz* in support of its deference to the political branches. Trump v. Hawaii, 138 S.Ct. 2392, 2418-19 (2018). *Mathews v. Diaz* cites to *Fong Yue Ting, Harisiades v. Shaughnessey* and *Kleindienst v. Mandel*. Mathews v. Diaz, 426 U.S. 67, 81 n.17 (1976). *Harisiades v. Shaughnessy* cites to *Curtiss-Wright*, which cites to *Fong Yue Ting* to support treating immigration law and policy as part of foreign relations. Harisiades v. Shaughnessy, 342 U.S. 580, 589 n.16 (1952); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936). *Kleindienst v. Mandel* does not specifically cite a case for the extraordinary deference it grants Congress, although it cites to the *Chinese Exclusion Case* and *Fong Yue Ting* for absolute Congressional plenary Power. Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972). *Fiallo v. Bell* also cites directly to *Fong Yue Ting*, as well as to *Mathews v. Diaz*. Fiallo v. Bell, 430 U.S. 787, 792 (1977). The point of this exercise is to show that the decision to grant such extraordinary deference and, initially, make immigration law and policy nonjusticiable as a political question fundamentally comes from Chinese Exclusion Act cases that are directly tied to foreign affairs and, wrongly, rhetorically tied to national security.

violations of constitutional and international law, leading to a gross unfairness to noncitizens in immigration proceedings.

VI. Conclusion

Immigrant rights activists have struggled for decades with little success to overturn unjust immigration law and policy as unconstitutional. While noncitizens in the United States benefit from constitutional rights overall, the Supreme Court stripped them of meaningful constitutional protections when facing immigration proceedings as part of its effort to locate a source for a monopoly of federal power over immigration. When the Court landed on international law's sovereignty rights as the primary source of power, it relied on absolute sovereignty to establish Congressional plenary power. It then employed extraordinary deference to Congress and the Executive on foreign affairs and national security matters to avoid all but the barest judicial review.

The Supreme Court continues to resist constitutional rights arguments, which suggests that the best avenue for undoing Congressional plenary power over immigration and the injustice it creates is to target its deteriorating foundation in inherent sovereignty rights and foreign affairs and national security powers. Absolute sovereignty rights no longer exist and the Court has curtailed its deference to the political branches on other foreign affairs and national security matters, yet the Court's jurisprudence on immigration law and policy remains frozen in time. International law to which the United States has consented cannot justify human rights violations that it does not permit. Nor can the Court employ its constitutional jurisprudence that treaties are equal to Congressional legislation and that customary international law is inferior to that legislation to override a source of power. To do so would effectively treat Congress as the source of its own power, a legal impossibility. Continuing to rely on its absolute plenary power jurisprudence that predates the United States' consent to international human rights law is the equivalent of relying on jurisprudence that predates a constitutional amendment intended to overturn that very jurisprudence.

Further, the Supreme Court's continued claim that immigration law and policy is a foreign affairs and national security matter entitled to extraordinary deference is a woeful misunderstanding of international law and its obligations and is grossly out of step with the Court's post-9/11 jurisprudence. International human rights law

requires states provide a domestic legal remedy for all human rights violations. And, at least since 9/11, the Court has rejected the federal government's efforts to claim extraordinary deference when it uses its national security and foreign affairs powers to incapacitate enemy combatants. Continuing to employ this deference leads to the absurd result that in some important respects enemy combatants bent on the destruction of the United States are entitled to greater due process and liberty rights than noncitizens in immigration proceedings.

The Supreme Court allows Congress, and by extension, the Executive to violate noncitizens' rights to liberty, due process, non-discrimination, and equality under the law, not because of deep considerations of the source of immigration powers or of the need to limit the rights of noncitizens because of weighty government interests, but simply because it always has. It is long past time for the Supreme Court to wholesale reevaluate its outdated rulings and incoherent logic that continue to allow the government to commit gross injustices against noncitizens in immigration proceedings. It is long past time for the Supreme Court to stop shirking its responsibilities and provide oversight of immigration powers as required by international law and the Constitution.