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ARTICLES

THE TROUBLE WITH TREATIES: IMMIGRATION AND JUDICIAL REVIEW

ANGELA M. BANKS[†]

Human rights activists describe United States deportation law and policy as draconian and unjust. These activists are not alone; outrage by everyday people is expressed in response to stories like that of Mary Anne Gehris. Mary Anne Gehris immigrated to the United States at eighteen months old and has lived in the South ever since.[1] She married, had two children, one with cerebral palsy, and considered America her home. At the age of twenty-two Mary Anne pulled another women's hair during a fight over a boyfriend. She was charged with a misdemeanor—simple battery.[2] On the advice of a public defender, she pleaded guilty.[3] She was given a one-year sentence that was suspended and received one-year probation, which she successfully completed.[4] Almost a decade later, Mary Anne applied to become a United States citizen, and she noted her misdemeanor conviction on her application. One year after submitting her citizenship application, Mary Anne received a letter from the Immigration and Naturalization Service. She thought she was finally getting the date of her citizenship

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[1] Anthony Lewis, *Abroad at Home*; *Ray of Hope*, N.Y. TIMES, Feb. 10, 2001, at A15; Press Release, Georgia State Board of Pardons and Paroles, Mary Anne Gehris Receives a Full Pardon (Mar. 2, 2000), *available at* http://oldweb.pap.state.ga.us/NewRelea.nsf/0/561F933BDA945727852568D50069908F?OpenDocument.

[2] Stephen Davis, *Deported from America*, NEW STATESMAN, Nov. 22, 2004, at 14, 15.

[3] Lewis, *supra* note 1.

[4] *Id.*; Georgia State Board of Pardons and Paroles, *supra* note 1.

ceremony.[5] She was mistaken; the letter informed her that she was to be deported.[6] By 1999 her simple battery conviction made her deportable as an aggravated felon.[7] The 1996 immigration reforms created new deportation grounds, which included Mary Anne's 1988 hair pulling fight, and made those grounds retroactive.[8] The fact that Mary Anne's entire family resided in the United States, that she was responsible for caring for a sick child, that she knew no other country, and that her simple battery conviction was not a deportable offense at the time she pleaded guilty could not save her. Once Mary Anne was found to have committed a deportable offense, there was virtually no opportunity for her to challenge the deportation decision as a violation of her fundamental rights.

One might ask, where are the courts and the Constitution? Why is it that the courts do not invalidate such results on the basis of well-established constitutional guarantees such as proportionality, family privacy, or protection against ex post facto laws that apply to citizens and noncitizens alike? The primary answer to that question resides in the Supreme Court's plenary power doctrine. This doctrine dictates that "Congress and the executive branch have exclusive decision-making authority without judicial oversight for constitutionality" when regulating immigration.[9] The plenary power doctrine rests on the assumption that anything related to immigration is a question of national sovereignty and foreign affairs. As a consequence, the plenary power doctrine respects the broad authority of the legislative and executive branches to regulate immigration. Although some monitoring role for the courts has been carved out of this doctrine, it is a limited role that focuses on procedural due process.[10]

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[5] Lewis, *supra* note 1.

[6] *Id.*

[7] *Id.* Mary Anne was subsequently pardoned by the Georgia Board of Pardons and Paroles. Immigration and Naturalization Services, the agency then responsible for making deportation decisions, then concluded that deportation was no longer required. *Id.*

[8] The relevant acts are the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

[9] HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 27 (2006).

[10] Courts have been known to creatively characterize legal challenges in the area of immigration as procedural in order to provide more robust judicial review. Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural*

The Constitution, however, is not the only source of rights in the immigration context. The United States has ratified human rights treaties that seem on their face to provide much needed protection to immigrants. As a consequence, human rights activists and international law scholars have called for judges to review challenges to deportation decisions in light of these treaties. They do so in the hope that greater judicial enforcement of U.S. human rights treaty obligations will create a more robust judicial role in monitoring deportation decisions. In particular, it is hoped that recourse to human rights treaties and the jurisprudence of human rights bodies interpreting those treaties will undermine the strength and legitimacy of the plenary power doctrine. Within the human rights literature, domestic enforcement is considered one of the most effective tools for ensuring treaty compliance.[11] While I generally agree with this proposition, in the immigration context, it fails to recognize that the very doctrines that would allow U.S. courts to review human rights treaty claims are the doctrines that require judicial deference to the political actors. From the beginning of our republic through the mid-nineteenth century, the federal government used "friendship, commerce, and navigation" treaties to regulate immigration. Part I of the Article examines the connection between the Court's treaty enforcement jurisprudence and its deferential stance in immigration cases. This Part demonstrates that a key principle underlying the Court's treaty enforcement doctrines—maintaining flexibility when addressing national soveriengty issues—was transferred to the immigration context. From this analysis it becomes evident that the

Surrogates for Substantive Constitutional Rights, 92 COLUM. L. REV. 1625, 1628 (1992).

[11] *See, e.g.*, HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT; LAW, POLITICS, MORALS 1087–96 (3d ed. 2008); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 497 (2005) ("[M]uch of international law is obeyed primarily because domestic institutions create mechanisms for ensuring that a state abides by its international legal commitments whether or not particular governmental actors wish it to do so."); Christof H. Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUMAN RIGHTS Q. 483 (2001); Shayana Kadidal, *"Federalizing" Immigration Law: International Law as a Limitation on Congress's Power To Legislate in the Field of Immigration*, 77 FORDHAM L. REV. 501, 515–16 (2008); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2656–57 (1997); Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 350–51 (2000).

principles of judicial treaty enforcement are unlikely to inhibit the plenary power doctrine because they actually informed the very development of that doctrine.

Part II reconceptualizes the relationship between the Court's plenary power doctrine and treaty enforcement jurisprudence as developing reinforcing strategies for maintaining American flexibility when addressing national sovereignty issues. More particularly, Part II shows that those who believe that treaties can provide an effective basis for restricting the United States immigration power ignore significant challenges relating both to the status of the relevant treaties as well as the Court's historical reluctance to enforce U.S. treaty obligations in the face of conflicting or contradictory federal action.

The very real obstacles that identified in Part II could be ameliorated, as discussed at the end of that Part, but that leads to the exploration in Part III of perhaps the most formidable hurdle to the effective use of treaties to create structures of judicial monitoring of immigration decisions: the problems of framing and indeterminacy. "Indeterminacy" refers to the fact that the obligations contained in treaties rarely dictate specific outcomes. Rather, the treaty articulates a combination of rules and standards that grant State parties and adjudicators varying degrees of discretion to determine what constitutes compliance. This creates indeterminacy as to the required outcome in cases alleging treaty violations.[12] Consequently, the frames used by decision makers to analyze the treaty claims are more determinative than the treaty standards. Frames are thought organizers. They focus our attention on certain events, their causes and consequences, and obscure other events, causes, and consequences. For instance, the deportation decisions of European States and international and regional treaty bodies use proportionality review to balance an individual's right to family life and the State's interest in regulating migration.[13] They do so in large part because proportionality review fits with the dominant features of the legal tool kit that these adjudicators

[12] It is not my contention that human rights treaties suffer from absolute indeterminacy but rather that the use of standards creates a certain amount of indeterminacy due to the discretion given to decision makers. I do not have broader indeterminacy concerns because I contend that law as an institution provides certain constraints on legal decision makers. *See infra* text accompanying notes 182–94.

[13] Throughout this Article, I use the term "State" to refer to sovereign states and the term "state" to refer to the political sub-divisions within the United States.

rely upon when applying the rules and standards governing individual rights. A different set of features are dominant within the legal tool kit relied upon by U.S. adjudicators, and they consequently lead to a different application of similar rules and standards. Thus, because treaty standards are not determinative and because the frames used by adjudicators significantly influence the outcome of the case, the application of treaty standards to the immigration context would have no meaningful effect. Changing the source of law that U.S. judges are analyzing will not avoid or minimize the role that frames play. U.S. adjudicators would continue to use the same frames that give rise to significant judicial deference and would thereby reach the same substantive outcomes.

This Article therefore concludes that greater judicial enforcement of human rights treaties in the United States will not enhance judicial monitoring of deportation decisions. Despite the popularity of this approach within the human rights literature, its effectiveness within a specific State depends upon how treaty compliance is allocated within the State and the frames used to analyze the legal questions at issue. That said, treaty body jurisprudence and foreign treaty-based jurisprudence can demonstrate alternative uses of the tools within our legal tool kit and can thereby encourage Americans to rethink the validity and appropriateness of the frames currently utilized. But overestimating the influence of treaty jurisprudence will waste resources and blind us to other more efficacious mechanisms for enhancing oversight of deportation decisions.

I. IMMIGRATION, TREATIES, AND DEFERENCE

There is a great irony in the claim that greater judicial enforcement of U.S. human rights obligations will increase judicial monitoring of deportation decisions. The historical use of treaties to regulate immigration enabled the U.S. Supreme Court to understand immigration as a foreign affairs issue. Consequently, the Court applied a key principle underlying its treaty enforcement jurisprudence in immigration cases. This principle dictates that the government should have maximum flexibility when making foreign affairs decisions, which are inherently political. Maintaining such flexibility in the face of treaty breach allegations and claims of constitutional violations requires judicial restraint and deference to political decision

makers. This is the essence of the plenary power doctrine. Relying on judicial enforcement of human rights treaties to increase judicial review of deportation decisions actually reinforces the need for judicial restraint and deference.

A. Regulating Immigration with Treaties

Historically, treaties have played a significant role in the regulation of immigration in the United States, and the use of this legal tool has played an important role in the U.S. Supreme Court's review of immigration decisions. Although the Alien Acts of 1798[14] were enacted soon after our nation's founding, many believe that the federal government did little to regulate migration until the 1875 Page Act.[15] This act prohibited the admission of "women for the purposes of prostitution," involuntary Asian laborers, and convicts.[16] Yet within this seventy-five year time period, the federal government regulated admission to the United States through treaties, specifically friendship, commerce, and navigation treaties ("FCN treaties").[17] Through these treaties, the United States provided for the admission and residence of specific noncitizens. To promote foreign commerce, the United States entered into FCN treaties that allowed the citizens, subjects, or inhabitants of the foreign State to enter and reside in the United States. Treaty provisions such as the following from the FCN treaty with Austria-Hungary were common:

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[14] The Alien Acts of 1798 empowered the President of the United States to deport noncitizens who were "dangerous to the welfare of the nation." THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 160 (2008). These acts were set to expire in 1800. Between 1798 and 1800, the President never used his authority under these acts to deport noncitizens. The Alien Acts of 1798 were the first federal legislative action regulating migration, but Congress passed the first naturalization law in 1790.

[15] *See, e.g.*, ALEINIKOFF ET AL., *supra* note 14, at 161 ("For the next 75 years, the federal government did little about the regulation of immigration."); Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1894–96 (1993) (discussing state regulation of migration in the late eighteenth and early ninteenth centuries).

[16] Act of Mar. 3, 1875, ch. 141, 18 Stat. 477, 477 (1875) (repealed 1974) (also referred to as the Page Act).

[17] Neuman, *supra* note 15, at 1894. Within this category, I am including treaties that governed each of these three topics. All of the relevant treaties referred to two or more of the following terms: amity, friendship, commerce, or navigation. The seventy-five year period refers to the time the Alien Friends Act expired in 1800 and the enactment of the Page Act. *See* ALEINIKOFF ET AL., *supra* note 14.

> The inhabitants of their respective States shall mutually have liberty to enter the ports, places and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their commercial affairs . . . .[18]

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[18] Treaty of Commerce and Navigation, U.S.-Austria-Hung., art. I, Aug. 27, 1829, *reprinted in* 1 WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776–1909, S. DOC. No. 357, at 30 (1910) [hereinafter 1 MALLOY TREATIES & CONVENTIONS]; *see also* Treaty of Commerce and Navigation, U.S.-Japan, art. I, Nov. 22, 1894, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 1028–29; Treaty of Amity, Commerce and Navigation, U.S.-Congo, art. I, Jan. 24, 1891, *reprinted* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 328–29; Convention of Commerce and Navigation, U.S.-Serb., art. I, Oct. 14, 1881, *reprinted in* 2 WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776–1909, S. DOC. No. 357, at 1613 (1910) [hereinafter 2 MALLOY TREATIES & CONVENTIONS]; Treaty of Commerce and Navigation, U.S.-Italy, art. I, Feb. 26, 1871, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 969–70; Treaty of Amity, Commerce, and Consular Privileges, U.S.-Salvador, art. III, Dec. 6, 1870, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1551–52; Treaty of Friendship Commerce and Navigation, U.S.-Nicar., art. II, June 21, 1867, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1279–80; Convention of Amity, Commerce, and Navigation and for the Surrender of Fugitive Criminals, U.S.-Dom. Rep., art. III, Feb. 8, 1867, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 403–04; Treaty of Friendship, Commerce, and Navigation, U.S.-Hond., art. II, July 4, 1864, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 952–53; Treaty of Commerce and Navigation, U.S.-Liber., art. II, Oct. 21, 1862, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 1050–51; Treaty of Peace, Friendship, Commerce, and Navigation, U.S.-Bol., art. III, May 13, 1858, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 113–14; Treaty of Friendship, Commerce, and Navigation, U.S.-Arg. Rep., arts. I, IX, July 27, 1853, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 20–21, 23; Treaty of Friendship, Commerce, and Navigation, U.S.-Peru, art. II, July 26, 1851, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1388–89; Treaty of Friendship, Commerce, and Navigation, U.S.-Costa Rica, art. II, July 10, 1851, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 341–42; Convention of Friendship, Commerce, and Extradition, U.S.-Switz., art. I, Nov. 25, 1850, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1763–64; Convention of Amity, Commerce, and Navigation, U.S.-Borneo, art. II, June 23, 1850, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 130–31; Treaty of Peace, Friendship, Commerce, and Navigation, U.S.-Guat., art. III, Mar. 3, 1849, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 861–62; Treaty of Commerce and Navigation, U.S.-Port., art. I, Aug. 26, 1840, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1452–53; Treaty of Commerce and Navigation, U.S.-Hanover, art. I, May 20, 1840, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 885–86; Treaty of Peace, Friendship, Navigation, and Commerce, U.S.-Ecuador, art. III, June 13, 1839, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 421–22; Convention of Commerce and Navigation, U.S.-Sardinia, art. I, Nov. 26, 1838,

The United States began entering into these treaties as early as 1778, and by the time the Supreme Court was asked to review the Chinese Exclusion Acts, treaties represented a significant form of federal immigration regulation.[19] Between 1778 and 1889, when the U.S. Supreme Court decided the first major case challenging the federal immigration power, the United States had entered into FCN treaties with thirty-seven States.[20] Treaty partners included States as diverse as Italy, Serbia, Mexico, Prussia, Liberia, Japan, and Orange Free State.[21]

The United States entered into a similar treaty with China in 1868, which became the basis for legal challenges to anti-Chinese California laws and the federal Chinese Exclusion Acts.

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reprinted in 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1603–04; Treaty of Commerce and Navigation, U.S.-Greece, art. I, Dec. 22, 1837, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 848–49; Treaty of Peace, Amity, Commerce, and Navigation, U.S.-Venez., art. III, Jan. 20, 1836, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1831–32; Treaty of Commerce and Navigation, U.S.-Russ., art. I, Dec. 18, 1832, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1514–15; Convention of Peace, Amity, Commerce, and Navigation, U.S.-Chile, art. III, May 16, 1832, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 171–72; Treaty of Amity, Commerce, and Navigation, U.S.-Mex., art. III, Apr. 5, 1831, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 1085–86; Treaty of Amity, Commerce, and Navigation, U.S.-Braz., art. III, Dec. 12, 1828, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 133–34; Treaty of Commerce and Navigation, U.S.-Prussia, art. I, May 1, 1828, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1496; Convention of Friendship, Commerce, and Navigation, U.S.-Den., art. II, Apr. 26, 1826, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 373–74; Treaty of Amity and Commerce, U.S.-Swed.-Nor., art. I, Sept. 4, 1816, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra*, at 1742–43; Convention of Commerce and Navigation, U.S.-Gr. Brit., art. I, July 3, 1815, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra*, at 624–25.

[19] In 1778, the United States entered into a treaty of amity and commerce with France. *See* 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 3 (Hunter Miller ed., 1931); *see also* Neuman, *supra* note 15, at 1894–96.

[20] 1 MALLOY TREATIES & CONVENTIONS, *supra* note 18, at ix–xxi.

[21] Treaty of Commerce and Navigation, U.S.-Japan, art. I, Nov. 22, 1894, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra* note 18, at 1028–29; Treaty of Commerce and Navigation, U.S.-Serbia, art. I, Oct. 14, 1881, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra* note 18, at 1613; Treaty of Friendship, Commerce, and Extradition, U.S.-Orange Free State, art. I, Dec. 22, 1871, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra* note 18, at 1310; Treaty of Commerce and Navigation, U.S.-Italy, art. I, Feb. 26, 1871, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra* note 18, at 969–70; Treaty of Commerce and Navigation, U.S.-Liber., art I, Oct. 21, 1862, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra* note 18, at 1050; Treaty of Amity, Commerce, and Navigation, U.S.-Mex., art. III, Apr. 5, 1831, *reprinted in* 1 MALLOY TREATIES & CONVENTIONS, *supra* note 18, at 1085–86; Treaty of Commerce and Navigation, U.S.-Prussia, art. I, May 1, 1828, *reprinted in* 2 MALLOY TREATIES & CONVENTIONS, *supra* note 18, at 1496.

In 1868 the United States entered into the Burlingame Treaty with China,[22] which recognized the "inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of [Chinese] citizens."[23] To realize the benefits of migration, the parties agreed that "Chinese subjects visiting or residing in the United [sic] shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation."[24]

Significant Chinese migration began in the mid-nineteenth century, which was a time when there was a great need for labor in the West due to the California Gold Rush and construction of the transcontinental railroad.[25] The Burlingame Treaty was enacted to facilitate Chinese immigration to meet this need for inexpensive labor.

By the 1870s, however, anti-Chinese sentiment hardened when American workers blamed Chinese laborers for taking jobs and depressing wages.[26] As economic tension increased so did concerns regarding assimilation. As Justice Field noted in *Chae Chan Ping v. United States*, "[t]he differences of race added greatly to the difficulties of the situation. . . . It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living."[27] In response to these concerns, California began enacting laws limiting the economic opportunities available to Chinese laborers.[28] When local laws of

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[22] MOTOMURA, *supra* note 9, at 16.

[23] Chae Chan Ping v. United States, 130 U.S. 581, 592 (1889).

[24] *Id.* at 593.

[25] MOTOMURA, *supra* note 9, at 15. In *Chae Chan Ping v. United States*, the Court noted that "for some years little opposition was made to [Chinese laborers], except when they sought to work in the mines, but, as their numbers increased, they began to engage in various mechanical pursuits and trades, and thus came in competition with our artisans and mechanics, as well as our laborers in the field." 130 U.S. at 594.

[26] MOTOMURA, *supra* note 9, at 16.

[27] *Chae Chan Ping*, 130 U.S. at 595.

[28] For example, San Francisco enacted an ordinance in 1880 regulating the location of laundries. In *Yick Wo v. Hopkins*, the U.S. Supreme Court found that the ordinance was only enforced against Chinese individuals operating laundries and as such was a violation of Fourteenth Amendment. 118 U.S. 356, 374 (1886). In 1852, California enacted a Foreign Miners License Tax that required noncitizens to have a license that cost $3.00 per month. This rate was increased periodically reaching $20.00 per month by 1870. UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN, THE CHINESE EXPERIENCE IN 19TH CENTURY AMERICA: SOME STATE OF CALIFORNIA AND CITY OF SAN FRANCISCO ANTI-CHINESE LEGISLATION AND SUBSEQUENT ACTION

this type were challenged, the federal courts declared them unconstitutional or in violation of the Burlingame Treaty.[29]

In 1882 Congress took action and enacted the first of several Chinese Exclusion Laws. The 1882 law suspended the entry of Chinese laborers for ten years but did not apply to Chinese laborers present in the United States as of November 17, 1880 or those arriving within ninety days after the passage of the act.[30] To enforce these provisions, Chinese laborers eligible to remain in the United States had to obtain a certificate upon their departure from the United States that would facilitate their return.[31] The certificate was evidence of eligibility to be admitted to the United States under the terms of the 1882 Chinese Exclusion Act.[32] Enforcement of the 1882 Chinese Exclusion Act became difficult because individuals were allowed entry into the United States based on evidence of prior residence other than the government-issued certificate. Significant concerns regarding fraud lead to the enactment of the 1884 Chinese Exclusion Act. This act made the government-issued certificate the only valid evidence for establishing a Chinese laborer's eligibility to reenter the United States.[33] The 1884 revisions were still not deemed sufficient to address the concerns of Congress, and in 1888

(2006) [hereinafter THE CHINESE EXPERIENCE], *available at* http://teaching resources.atlas.uiuc.edu/chinese_exp/resources/resource_2_4.pdf. In 1855, the state adopted "An Act to Discourage the Immigration to this State of Persons Who Cannot Become Citizens," and San Francisco introduced a tax of $50.00 per person for any individual attempting to dock in California who was not eligible for naturalization. *Id.* At this time, only blacks and whites were eligible to naturalize and become U.S. citizens. IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 43 (2006). In 1879, California's constitution prohibited corporations and municipalities from hiring Chinese individuals and it authorized cities to remove Chinese residents from the city limits to specific remote areas. THE CHINESE EXPERIENCE, *supra*.

[29] Each of the acts discussed in note 28 were held unconstitutional. THE CHINESE EXPERIENCE, *supra* note 28.

[30] Act of May 6, 1882, ch. 126, § 3, 22 Stat. 58 (repealed 1943) [hereinafter 1882 Chinese Exclusion Act]; *Chae Chan Ping*, 130 U.S. at 599.

[31] 1882 Chinese Exclusion Act, *supra* note 30, § 4.

[32] *Id.*

[33] Act of July 5, 1884, ch. 220, 23 Stat. 115 (repealed 1943) [hereinafter 1884 Chinese Exclusion Act]; *see also* MOTOMURA, *supra* note 9, at 25–26 (noting that it was hard to enforce the Chinese Exclusion Act "because it was not clear who was exempt as a returning Chinese immigrant who had originally arrived in the United States before the effective date of the ten-year moratorium"). *See generally* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 79–131 (1989).

Congress enacted another Chinese Exclusion Act, which prohibited Chinese laborers from returning to the United States even if they had a certificate.[34]

It was this last Chinese Exclusion Act that was challenged in *Chae Chan Ping v. United States*. Immigration scholars and students are familiar with the constitutional claims raised in *Chae Chan Ping*, but what is often overlooked is that Chae Chan Ping also challenged the 1888 Chinese Exclusion Act as a violation of the 1880 treaty between the United States and China (the "1880 Treaty"), which modified the Burlingame Treaty.[35] Chae Chan Ping had resided in San Francisco, California from 1875 until June 1887 when he traveled to China. When he departed, he had a certificate that, pursuant to the 1882 and 1884 Chinese Exclusion Acts, permitted his admission to the United States upon his return.[36] While Chae Chan Ping was away, the 1888 Chinese Exclusion Act was enacted, which prohibited his entry into the United States despite his possession of a certificate of identity. He arrived back in San Francisco on October 8, 1888, just seven days after the passage of the 1888 Chinese Exclusion Act.[37]

Chae Chan Ping argued that, pursuant to the Burlingame Treaty and the 1880 Treaty, he acquired property and liberty rights that enabled him to return, reside, and work in the United States and that these rights could not be limited through subsequent legislation.[38] This argument was based on the

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[34] Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943) [hereinafter 1888 Chinese Exclusion Act]. The law provided that "it shall be unlawful for any chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States." *Id* at 504.

[35] *See* Treaty Concerning Imigration, U.S.-China, Nov. 17, 1880, 22 Stat. 826 [hereinafter 1880 Treaty]; Chae Chan Ping v. United States, 130 U.S. 581, 599–600 (1889) ("The validity of this act, as already mentioned, is assailed, as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of congress."). The 1880 Treaty was ratified in 1881. 1880 Treaty, *supra*, at 826. The 1880 Treaty allowed the United States to "regulate, limit, or suspend" the immigration or residence of Chinese nationals, but the treaty stated that the United States could not absolutely prohibit such migration. *Id.*

[36] *Chae Chan Ping*, 130 U.S. at 582.

[37] *Id.*

[38] Brief for Appellant at 18, *Chae Chan Ping*, 130 U.S. 581 (No. 1446) [hereinafter Hoadly & Carter Brief]; Brief for Appellant at 2, *Chae Chan Ping*, 130 U.S. 581 (No. 1446) [hereinafter Brown & Riordan Brief].

Court's prior case law upholding treaty-based property rights when they conflicted with state law.[39] The Court's response to the treaty-based claims helps to explain the development of the plenary power doctrine.[40]

Chae Chan Ping encountered an unreceptive court partly because he claimed that the federal government, rather than one of the states, violated his treaty-based rights. By the late 1800s, the Court was willing to police state action to ensure compliance with U.S. treaty obligations, but the Court was not willing to place the same restraints on the federal government. Due to concerns about institutional competence, the Court deferred to political branch decisionmaking regarding treaty compliance.[41]

Chae Chan Ping's treaty compliance arguments were based on the Court's jurisprudence developed in *Ware v. Hylton*.[42] In this case, the Court had to determine whether or not a provision in the 1783 Treaty of Peace between the United States and Great Britain was superseded by Virginia law. The peace treaty stated that "creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted."[43] In 1777, Virginia law allowed one to repay British debt with an equivalent amount of Virginia paper currency.[44] The depreciation of the Virginia pound made this an attractive repayment option.[45] Five years later, Virginia went further by enacting legislation stating that "no debt or demand whatsoever, originally due to a subject of Great Britain, shall be recoverable in any court in this

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[39] *See infra* text accompanying notes 42–59.

[40] *See infra* text accompanying notes 42–59.

[41] The Court's understanding of institutional competence with regard to foreign affairs was influenced by separation of powers norms articulated in the U.S. Constitution. *See also infra* text accompanying notes 54–56.

[42] 3 U.S. (3 Dall.) 199 (1796). Chae Chan Ping also argued that the Burlingame Treaty and the 1880 Treaty operated as contracts under which he obtained the right to return to and reside in the United States. This Article focuses on the role of judicial treaty enforcement as an explanation of the plenary power doctrine and for evaluating modern claims for greater judicial treaty enforcement in immigration. Therefore, the treaty as contract arguments are not examined.

[43] Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 602 (2007) (quoting Definitive Treaty of Peace, U.S.-Gr. Brit., art. IV, 8 Stat. 80 (1783)).

[44] *Id.* (citing *An Act for Sequestering British Property* (1777), *in* AT A GENERAL ASSEMBLY, BEGUN AND HELD AT THE CAPITOL, IN THE CITY OF WILLIAMSBURG 17 (Williamsburg, Alexander Purdie 1778)).

[45] *Id.*

commonwealth."[46] This act prevented the United States from complying with article IV of the 1783 Treaty of Peace. A British creditor challenged the Virginia laws as a violation of the 1783 Treaty of Peace and the Supreme Court upheld the treaty rights of the creditor.[47] Justice Chase, in the main opinion, notes that "[i]t is the declared will of the people of the United States that every treaty made, by the authority of the United States, shall be superior to the Constitution and laws of any individual State."[48]

Ware marks the beginning of the Court's treaty enforcement jurisprudence vis-à-vis state action.[49] It is this jurisprudence that Chae Chan Ping called upon in discussing *Society for the Propagation of the Gospel v. New Haven*.[50] This case involved a tension between property rights pursuant to New Haven rules and the 1783 Treaty of Peace. Chae Chan Ping's inclusion of this case to support his argument that treaty-based rights cannot be divested by Congress failed to appreciate the distinction that the Court had made by 1884 between alleged state treaty breaches and alleged congressional treaty breaches. The *Head Money Cases* were decided in 1884, and the Court boldly concluded that, when faced with congressional action that allegedly violated U.S. treaty obligations, the congressional action will be upheld by the judiciary.[51] Articulating the last-in-time doctrine, the Court drew upon previous circuit court decisions addressing the same issue—a tension between a congressional act and a previously ratified treaty.[52] In all of these cases, the courts recognized that treaties and federal statutes are on equal footing, so the most recent

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[46] *Id.* (quoting *An Act To Repeal So Much of a Former Act as Suspends the Issuing of Executions Upon Certain Judgments Until December, One Thousand Seven Hundred and Eighty Three* (1782), *reprinted in* 11 WILLIAM WALLER HENING, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 76 (Univ. Press of Va. 1969) (1823)).

[47] *Id.* at 604.

[48] Ware v. Hylton, 3 U.S. (3 Dall.) 199, 237 (1796).

[49] *See* Wu, *supra* note 43, at 584.

[50] 21 U.S. (8 Wheat.) 464 (1823).

[51] Edye v. Robertson (*The Head Money Cases*), 112 U.S. 580, 597 (1884) ("We are of opinion that, so far as the provisions in that act may be found to be in conflict with any treaty with a foreign nation, they must prevail in all the judicial courts of this country.").

[52] *See id.* at 597–98 (citing Taylor v. Morton, 23 F. Cas. 784 (C.C.D. Mass. 1855); *In re* Ah Lung, 18 F. 28 (C.C.D. Cal. 1883); *In re* Clinton Bridge (*The Clinton Bridge Case*), 5 F. Cas. 1060 (C.C.D. Iowa 1867); Ropes v. Clinch, 20 F. Cas. 1171 (C.C.S.D.N.Y. 1871); Bartram v. Robertson, 15 F. 212 (C.C.S.D.N.Y. 1883)).

expression of the sovereign controls. Just as Congress can repeal or amend previously enacted statutes, it can similarly "repeal" or modify treaty obligations within the United States.[53]

By adopting the last-in-time doctrine, the Court decided that Congress has the power to determine the effect of treaties within the United States.[54] Despite the existence of a treaty obligation, the last-in-time doctrine states that Congress can decide that a treaty has no legal effect within the United States by enacting conflicting legislation. The Court could have concluded that due to the United States' international legal obligations, Congress does not have the authority to enact legislation that would cause the United States to abrogate a treaty obligation.[55] This is essentially the approach the Court took when state legislation conflicted with a treaty obligation. The Court did not take this route and instead concluded that Congress has the authority to enact conflicting legislation. The last-in-time doctrine reflects a strategy for maintaining flexibility when regulating issues that implicate national sovereignty. Here, Congress, rather than the judiciary, is recognized as the entity that ultimately decides whether a treaty or conflicting domestic law will have the force of law within the United States.[56] The plenary power doctrine similarly maintains flexibility for the political branches when regulating national sovereignty issues. While the last-in-time

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[53] *Id.* at 599 ("[S]o far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."); *see also infra* note 98 for a discussion about the different domestic and international effects of such congressional action.

[54] This reflects judicial deference to Congress on this issue. *See also* Wu, *supra* note 43, at 581–82, 608–11.

[55] The general principle within international law, *pacta sunt servanda*, could support such a conclusion based on the idea that only the entity authorized to enter into a treaty has the authority to abrogate a treaty obligation. Attempted abrogation by any other entity is simply a failure to perform the treaty in good faith. *See* RESTATEMENT (THIRD) ON FOREIGN RELATIONS § 321.

[56] The executive branch also plays a role here in either signing the congressional legislation into law or by signing a new treaty, which requires the advice and consent of the Senate. U.S. CONST. art. II, § 2. Additionally while the last-in-time doctrine prioritizes the most recent legal act, commentators have noted that courts rarely enforce later ratified treaties despite being the most recent expression from the sovereign. *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 422 (Edward S. Corwin ed., 1953); 1 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 555 (1st ed. 1910); Wu, *supra* note 43, at 595–97 (discussing Cook v. United States, 288 U.S. 102 (1933)).

doctrine allows Congress to determine what the governing domestic law will be, the plenary power doctrine lets Congress and the executive decide how the law will be implemented. When individuals raise substantive constitutional challenges to immigration law or decisions, the courts provide very minimal review due to the deference accorded to the political branches pursuant to the plenary power doctrine.

Chae Chan Ping acknowledged that Congress could prohibit the future immigration of Chinese laborers despite the Burlingame Treaty and the 1880 Treaty but argued that Congress could not divest previously granted treaty rights.[57] This is where the property rights cases play a significant role in Chae Chan Ping's arguments. In a line of cases addressing the tension between state property laws and treaty-based property rights, courts concluded that as long as property rights were acquired pursuant to a valid treaty, the subsequent repeal or termination of the treaty does not divest the previously acquired property rights.[58] In cases like *Society for the Propagation of the Gospel v. Town of New Haven*, the Court noted that,

> it would be most mischievous to admit, that the extinguishment of the treaty extinguished the right to such estate. In truth, it no more affects such rights, than the repeal of a municipal law affects rights acquired under it. If, for example, a statute of descents be repealed, it has never been supposed, that rights of property already vested during its existence, were gone by such repeal. Such a construction would overturn the best established doctrines of law, and sap the very foundation on which property rests.[59]

Chae Chan Ping thus argued that even if Congress had the power, as articulated in the *Head Money Cases*, to "repeal" the Burlingame Treaty and the 1880 Treaty, it could not divest Chae Chan Ping of the migration rights he acquired under these treaties. In response to Chae Chan Ping's treaty-based claims, the United States recognized that the 1888 Chinese Exclusion Act was inconsistent with the Treaty but stated that this act successfully repealed the 1880 Treaty. Relying on the 1798 congressional repeal of U.S. treaties with France, the *Head*

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[57] Hoadly & Carter Brief, *supra* note 38, at 17 (citing *The Head Money Cases*, 112 U.S. at 598–99).

[58] *Id.* at 18–19.

[59] 21 U.S. (8 Wheat.) 464, 493–94 (1823).

Money Cases and its progeny, the United States argued that Congress has the power to repeal treaties because the Constitution grants treaties and federal statutes the same status—"the supreme Law of the Land."[60] Just as Congress can repeal or modify federal statutes, it can do the same with treaties. Invoking the last-in-time rule, the United States argued that when faced with an irreconcilable conflict between a treaty and a federal statute, the most recent provision will control.[61] Since the Chinese Exclusion Acts post-dated the 1880 Treaty, the federal statutes repealed the treaty.[62] The United States did not directly engage Chae Chan Ping's argument that Congress lacked the power to divest rights previously granted by treaty even after such treaty is repealed or terminated. Rather, the United States focused on the power of Congress to repeal a treaty through subsequent legislation and characterized the treaty provisions regarding migration as extending privileges that can be taken away.[63] The United States' arguments prevailed.

Treaties also formed the basis for the claims in *Fong Yue Ting v. United States*, which decided the scope of the State's power to deport noncitizens.[64] This case challenged the 1892 Chinese Exclusion Act, which extended the 1888 Chinese Exclusion Act for an additional ten years and required all Chinese laborers within the United States to obtain a certificate of residence.[65] Failure to have a certificate of residence was

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[60] U.S. CONST. art. VI, cl. 2.

[61] *But see* Wu, *supra* note 43, at 596 (noting that the Court has only once held that a more recent treaty controls pursuant to this rule; in all other instances, this rule is used to enforce a more recent federal statute).

[62] Brief for the United States at 10–11, Chae Chan Ping v. United States, 130 U.S. 581 (1889) (No. 1446) [hereinafter U.S. Chae Chan Ping Brief].

[63] The United States argued that

> the reply is that he held his exceptional privileges only by virtue of the laws which *then* existed, but which have since been repealed; and as there is no law extending to him those privileges, the privileges died with the law. The law gave him the privilege, and the repeal of the law has taken it away; and he has no rights greater than any other non-resident of the same class.

Id. at 14. Similar arguments were presented in the brief submitted by the State of California. Brief by Counsel Appointed by the State of California in Support of the Contention of the United States at 1–2, *Chae Chan Ping,* 130 U.S. 581 (No. 1446) [hereinafter California Chae Chan Ping Brief]. This brief forcefully presents the treaty migration provisions as the grant of privileges rather than rights. As privileges, they are "not of a nature to be enforced in a court of justice." *Id.* at 2.

[64] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[65] Act of May 5, 1882, ch. 60, 27 Stat. 25 (repealed 1943) [hereinafter 1892 Chinese Exclusion Act].

grounds for deportation.[66] The regulations promulgated by the Secretary of the Treasury stated that in order to obtain a certificate of residence, a Chinese laborer must provide an affidavit "of at least one credible witness of good character" attesting to the Chinese laborer's residence and lawful status within the United States.[67] If a Chinese laborer was found without the required certificate, the individual would have the opportunity to prove to the satisfaction of the court and "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act."[68] If these requirements were met, a certificate of residence would be issued.[69]

Fong Yue Ting arose after three Chinese laborers were arrested and detained for failure to have the required certificate of residence. One petitioner was denied the certificate because he was unable to produce a credible witness to attest his residence and lawful status.[70] The only witnesses the petitioner could produce were Chinese, and the collector of internal revenue—the officer issuing the certificates—concluded that these witnesses were not credible.[71] The collector required the petitioner to "produce a witness other than a Chinaman," which the petitioner was unable to do because "there was no person other than one of the Chinese race who knew and could truthfully swear that he was lawfully within the United States on May 5, 1892, and then entitled to remain" in the United States.[72]

The petitioners in this case not only argued that they were arrested and detained without due process of law in violation of the Fifth Amendment but also that the Chinese Exclusion Acts violated the Burlingame Treaty and the 1880 Treaty.[73] The Burlingame Treaty not only granted Chinese laborers lawful residence in the United States,[74] but it ensured that they would

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[66] *Id.* § 6.

[67] *Fong Yue Ting*, 149 U.S. at 701 n.2.

[68] 1892 Chinese Exclusion Act, *supra* note 65, § 6.

[69] *Id.*

[70] *Fong Yue Ting*, 149 U.S. at 703.

[71] *Id.*

[72] *Id.* at 703–04.

[73] Brief for Appellants at 5–6, *Fong Yue Ting*, 149 U.S. 698 (Nos. 1345, 1346, 1347) [hereinafter Choate & Evarts Brief].

[74] *Id.* at 12. The treaty "recognized [Chinese nationals'] inalienable right to change their allegiance and residence and to come and settle [in the United States],

be granted the same rights as United States citizens. The 1880 Treaty provided that Chinese laborers would have the same "rights, privileges, immunities, and exemptions" that were granted to the citizens of the most favored nation.[75] At the time that this treaty was ratified, the United States granted the citizens of Austria, Switzerland, Italy, and Belgium the right to enter and reside in the United States and "the same rights in respect to their property, commerce, trade, and industry, and to receive the same protection and security for their persons and property as the native-born inhabitants or other citizens of the United States."[76] Petitioners therefore argued that pursuant to these treaties, Chinese laborers were entitled to the same right to reside in the United States as United States citizens.[77] Since citizens are protected from deportation, Chinese laborers residing in the United States pursuant to the Burlingame Treaty were similarly protected from deportation.[78] Thus section 6 of the 1892 Chinese Exclusion Act, which provided for the deportation of Chinese laborers who could not establish by "at least one credible white witness" that he was a United States resident at the time the act was enacted, violated the Burlingame Treaty and the 1880 Treaty.

By the mid-1800s, the Court began to recognize immigration regulation as a federal prerogative and started to limit the ability of states to regulate admission through substantive restrictions or taxes.[79] When the Court came to review the Chinese Exclusion Acts, it not only understood immigration regulation to be a federal power, but it understood that treaties were the mechanism by which that power was exercised. This connection

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and the Treaty of 1880 finding them so here guaranteed their right to remain here, and as to those then here, at any rate guaranteed them against any future legislation for their removal." *Id.*

[75] *Id.* at 7 (quoting 1880 Treaty, *supra* note 35, art. II) (internal quotation marks omitted) ("Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." (quoting 1880 Treaty, *supra* note 35, art. II) (internal quotation marks omitted)).

[76] Brief for the Appellants at 28–29, *Fong Yue Ting*, 149 U.S. 698 (Nos. 1345, 1346, 1347) (emphasis removed) [hereinafter Ashton Brief].

[77] Choate & Evarts Brief, *supra* note 73, at 12.

[78] *Id.*

[79] *See* Smith v. Turner (*The Passenger Cases*), 48 U.S. 283, 300–01, 305 (1849); *see also* Neuman, *supra* note 15, at 1848.

between treaties and federal immigration regulation was significant in the development of the plenary power doctrine. The use of treaties to regulate immigration reinforced the idea that immigration is a foreign affairs matter. This shaped the Court's framing decisions, which influenced the scope of available judicial review. As a foreign affairs issue, Congress and the executive are entitled to judicial deference when immigration decisions are reviewed. This reflects the Court's concerns about separation of powers and institutional competence. Similar concerns led the Court to conclude that treaty compliance decisions are political decisions left to the executive and Congress.[80] Any decision to exercise robust judicial review of substantive constitutional challenges to immigration decisions would create an end run around the treaty enforcement doctrines. Congress would no longer have the final say as to what the law is regulating immigration or how it would be implemented—the judiciary would. To maintain maximum flexibility for international political decisionmaking, the Court would need to defer to congressional and executive immigration decisions. Yet judicial deference when faced with allegations of unconstitutional action undermines rather than reinforces the checks and balances provided by our separation of powers system.[81]

By challenging the validity of the Chinese Exclusion Acts based on the Burlingame Treaty and the 1880 Treaty, the Court was asked to decide whether or not the United States was in compliance with its treaty obligations. This is a task that the Court historically has shied away from when congressional action was the basis for the alleged treaty breach. Despite this jurisprudential backdrop, Fong Yue Ting argued that the Burlingame Treaty and the 1880 Treaty granted him, and similarly situated Chinese laborers, the right to continued residence in the United States and that Congress had not repealed these treaty rights with the 1892 Chinese Exclusion Act.[82] Unlike Chae Chan Ping, Fong Yue Ting did not argue that

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[80] *See supra* text accompanying notes 54–56.

[81] The Court has never indicated that the political branches are free to ignore or disobey the Constitution. Rather, based on their obligation to uphold and defend the Constitution, the Court seems to contend that it can rely on these branches to act in accordance with the Constitution without judicial oversight.

[82] Ashton Brief, *supra* note 76, at 28–30; Choate & Evarts Brief, *supra* note 73, at 5–6, 12.

Congress could not divest an individual of treaty-granted rights; rather he argued that Congress had not done so. Recognizing the last-in-time rule, the petitioners argued that Congress did not intend to abrogate or repeal the Burlingame Treaty with the enactment of the 1892 Chinese Exclusion Act. Rather, this act was an explicit effort by Congress to protect the Burlingame Treaty rights of Chinese laborers.[83] The Court ruled against the Chinese petitioners, concluding that the 1892 Chinese Exclusion Act, as the last expression of the sovereign, controlled rather than the Burlingame Treaty or the 1880 Treaty.[84]

Together *Chae Chan Ping* and *Fong Yue Ting* make two important points for judicial review of immigration decisions. First, these cases reinforce the Court's conclusion from the mid-1800s that immigration regulation is a federal prerogative.[85] Second, they remind us that Congress has the authority to repeal prior treaty obligations. When the Court came to review the Chinese Exclusion Acts, it understood that treaties were the mechanism by which the immigration power was exercised. Thus, the principles underlying the Court's treaty enforcement jurisprudence were influential in the development of the plenary power doctrine.[86] In *Chae Chan Ping*, Justice Field acknowledged that the 1882 Chinese Exclusion Act contravened the 1880 Treaty but concluded that this did not invalidate the 1882 statute.[87] Justice Field turned to standard norms and rules regarding treaty compliance in determining the validity of the

[83] Ashton Brief, *supra* note 76, at 30–32. The petitioners argued that there were two classes of Chinese laborers residing in the United States at the time these cases were heard. There were those that settled in the United States based on "the invitation held out to them by the Burlingame Treaty," and then there were those who entered in contravention of the Chinese Exclusion Acts. Choate & Evarts Brief, *supra* note 73, at 7–8; *see also* Fong Yue Ting v. United States, 149 U.S. 698, 750–51 (1893) (describing the strategies used by Chinese migrants to evade the first time entry restrictions of the Chinese Exclusion Acts). With regard to the lawful Chinese migrants, the petitioners argued that "[t]he act does not purport to take away any rights of the laborers who came lawfully into the country under the treaties with China and the Restriction Acts, by abrogating or repealing those treaties or those laws, but explicitly assumes that they are rightfully here, intends that they may remain, and proposes to legislate in regard to them as a part of the lawful population of the United States." Ashton Brief, *supra* note 76, at 31.

[84] *Fong Yue Ting*, 149 U.S. at 720–21.

[85] *See The Passenger Cases*, 48 U.S. 283 (1849); Neuman, *supra* note 15, at 1848.

[86] The plenary power doctrine dictates that "Congress and the executive branch have exclusive decision-making authority without judicial oversight for constitutionality" when regulating immigration. MOTOMURA, *supra* note 9, at 27.

[87] *See In re* Ah Lung, 18 F. 28, 32 (1883).

1882 Chinese Exclusion Act.[88] Based on the last-in-time rule, the Court concluded that the 1882 act was the controlling expression of the sovereign.[89] The fact that this legislative act constituted a breach of the Burlingame Treaty did not factor into the Court's analysis. The Court's analysis in *Fong Yue Ting* similarly applied the last-in-time doctrine.[90]

The Court's analysis in *Chae Chan Ping* focused on whether Congress had the authority to enact the 1882 Chinese Exclusion Act. One aspect of this analysis was whether Congress could enact legislation that contravened U.S. treaty obligations.[91] Justice Field applied the prevailing norms and rules regarding the relationship between treaties and federal statutes—treaties and federal statutes are on equal footing and the last-in-time will control.[92] He noted that

> 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
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> legislative act, to be repealed or modified at the pleasure of

[88] *See id.* at 29–30.

[89] *See id.* at 30. In this case, the Circuit Court for the District of California was faced with a challenge from an individual born in Hong Kong who claimed exemption from the 1882 Chinese Exclusion Act. At the time that the petitioner was born in Hong Kong, it was under British control. Petitioner argued that as a British subject, the 1882 Chinese Exclusion Act should not apply to him. *Id.* at 29. The court concluded that the act was meant to cover all individuals who because of their "race, language, and color" are Chinese. *Id.* at 29, 31. Justice Field went on to reference the last-in-time rule, stating that "[w]hether a treaty has been violated by our legislation, so as to be the proper occasion of complaint by the foreign government, is not a judicial question. To the courts it is simply the case of conflicting laws, the last modifying or superseding the earlier." *Id.* at 30.

[90] Fong Yue Ting v. United States, 149 U.S. 698, 720–21 (1893).

[91] Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889).

[92] *Id.*

> congress. In either case the last expression of the sovereign will must control.[93]

Quoting the *Head Money Cases*, the Court stated "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal."[94]

The Court has sought to maintain maximum flexibility for the United States when conducting foreign affairs. According to the Court, States have a sovereign right to breach treaty obligations, but breaches have consequences. A breaching State may be subject to countermeasures or liable for damages.[95] A State's decision to open itself up to such liability is a political decision that courts should not second guess. The Court's treaty enforcement jurisprudence reflects the Court's unwillingness to enter this political quagmire.[96] Treaty enforcement is a task that is shared by the judiciary and the political branches of government. Vis-à-vis the states, courts are responsible for ensuring that state action does not cause the United States to breach a treaty obligation. Yet the judiciary does not have the same responsibility vis-à-vis Congress or the executive branch because the Constitution explicitly grants these entities authority to regulate foreign affairs, foreign commerce, and national security. Due to this understanding of institutional competences, the Court has deferred to the political branches when faced with treaty-based challenges to federal law. Deference in this context created the last-in-time rule, which states that when there is a conflict between federal law and a treaty provision, the most recent provision will control.[97]

This Article contends that the plenary power doctrine extends this approach to judicial review to constitutional

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[93] *Id.* The circuit court opinion in this case focuses heavily on the treaty claims and reaches the same conclusion. Judge Sawyer quotes extensively from *In re Ah Lung* and the *Head Money Cases* to conclude that Congress has the authority to "legislate in such manner as to control and repeal stipulations of treaties granting this latter class of rights." *In re* Chae Chan Ping, 36 F. 431, 434–35 (C.C.N.D. Cal. 1888).

[94] *Chae Chan Ping*, 130 U.S. at 600 (quoting Edye v. Robertson (*The Head Money Cases*), 112 U.S. 580, 599 (1884)).

[95] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 362–66 (2007).

[96] *See supra* text accompanying notes 54–56.

[97] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115 (1987). *But see* Wu, *supra* note 43, at 596.

challenges. This doctrine reflects the Court's desire to defer to Congress when faced with treaty-based claims and to defer to Congress and the executive when faced with substantive constitutional claims. Invalidating the relevant Chinese Exclusion Acts based on substantive constitutional challenges would have limited the State's flexibility within the international context. In light of this broader concern, it would have been surprising for the Court to defer to Congress when faced with treaty-based claims but not when faced with constitutional claims. The plenary power doctrine, like the last-in-time doctrine, seeks to maintain maximum political flexibility in areas related to foreign affairs. This Article's claim that treaty enforcement doctrines have influenced and shaped the development of the plenary power doctrine is developed further in the next Section.

B. The Plenary Power Doctrine: Extending Treaty Enforcement Doctrines

The Court's desire to maintain flexibility for the government to make international political decisions stems from the Court's conclusion that treaty compliance decisions are political decisions rather than legal decisions. The President is responsible for carrying out treaty obligations pursuant to the foreign affairs power and Congress determines how, or if, a treaty will be enforced within the United States through the enactment of implementing legislation.[98] As early as 1798, Congress took

[98] LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 206, 210–12 (Oxford University Press 2d ed. 1996) (1972); *see* Wu, *supra* note 43, at 587. This reflects the process for non-self-executing treaties. As the Court held in *Medellín v. Texas*, non-self-executing treaties that lack implementing legislation are not binding in domestic courts and the President cannot make them so through an executive order. 552 U.S. 491, 530 (2008). In 2004, the International Court of Justice held that the United States violated the Vienna Convention on Consular Relations and as such, fifty-one named Mexican nationals were entitled to review and reconsideration of their state court convictions and sentences. *Id.* at 497–98 (discussing the *Case Concerning Avena and Other Mexican Nationals* (*Mex. v. U.S.*), 2004 I.C.J. 12 (Mar. 31)). To abide by this international obligation, President Bush issued a memorandum to the Attorney General stating that "the United States would 'discharge its international obligations' under *Avena* 'by having State courts give effect to the decision.' " *Id.* at 498. The Court concluded that the President's memo sought to make law, which is a power explicitly granted to Congress in the Constitution. *Id.* at 527. The Court did not, however, foreclose other means by which the President can seek to comply with treaty obligations. *Id.* at 530. The Court stated that "[n]one of this is to say, however, that the combination of a non-self-

action to alter the international legal obligations of the United States. That year, Congress declared that treaties with France were "no longer obligatory on the United States."[99] After specifying the ways in which France had breached the treaties, failing to compensate the United States for its injuries and refusing to negotiate a response for the breaches, Congress declared that the treaties were no longer "legally obligatory on the government or citizens of the United States."[100] The Court recognized Congress's power to alter international legal obligations in 1884, holding that treaties are "subject to such acts as congress may pass for its enforcement, modification, or repeal."[101] To modify or repeal an international obligation,

executing treaty and the lack of implementing legislation precludes the President from acting to comply with an international treaty obligation." *Id.* The President is only precluded from "unilaterally making the treaty binding on domestic courts." *Id.* The President is free to "comply with the treaty's obligations by some other means, so long as they are consistent with the Constitution." *Id.*

Congress is responsible for enacting implementing legislation. An inconsistency between federal statutes and a treaty reflects a congressional choice and such choices will have international political or legal consequences. Any of these actions can implicate foreign affairs, which is an area that the political branches have unique authority and competence in. Any breach of the international obligations, despite compliance with the implementing legislation, can authorize an injured party to undertake countermeasures or pursue a legal claim before an international adjudicatory body. *See, e.g.*, HENKIN, *supra*, at 211. This is true even if the U.S. law in question is the implementing legislation. To the extent the implementing legislation conflicts with the treaty or does not comply in some other fashion, the United States will be internationally liable for a breach absent an acceptable defense. Legislative pronouncements "repealing" a treaty do not alter the international obligations of the United States. *Id.* at 211–14. Historically, arguments have been made that this power is held jointly by the President and Congress or the President and the Senate. *Id.* at 211. The issue was addressed in *Goldwater v. Carter*, 444 U.S. 996 (1979), when Senator Barry Goldwater challenged President Carter's termination of the 1955 Mutual Defense Treaty with Taiwan without senatorial or congressional approval. HENKIN, *supra*, at 213. The Supreme Court declared the issue a nonjusticiable political question "because it involves the authority of the President in the conduct of our country's foreign relations." *Goldwater*, 444 U.S. at 1002 (Rehnquist, J., concurring). Absent action by the President, the United States remains bound by its treaty obligations internationally. Any congressional "repeal" is only effective with regard to governing domestic law.

[99] Act of July 9, 1798, ch. 68, 1 Stat. 578 (1798).

[100] *Id.*

[101] Edye v. Robertson (*The Head Money Cases*), 112 U.S. 580, 599 (1884).

> 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

Congress must express its intent to do so very clearly. Mere inconsistency is not sufficient for the Court to conclude that Congress has modified or repealed a U.S. treaty obligation.[102]

Since *Marbury v. Madison*, however, courts review congressional action for compliance and compatibility with the U.S. Constitution. This is understood to be an essential mechanism for protecting the separation of powers outlined in the U.S. Constitution. Ensuring that U.S. action is compatible with U.S. treaty obligations is similarly necessary for protecting the constitutional separation of powers scheme.[103] The Court, however, has been reluctant to exercise the judicial power in contexts involving foreign affairs or other political matters. This reluctance is based on the idea that the institutional competences of the executive and legislative branches better suit them to resolving such disputes. This separation of powers concern is reflected in numerous judicial self-restraint doctrines, such as the political question doctrine, the last-in-time rule, and the plenary power doctrine.[104]

Regulating treaty compliance vis-à-vis Congress is an area in which the courts have decided that Congress is better equipped to ascertain the consequences of breaching a treaty, and the judiciary should respect such a decision because of the foreign affairs implications. If the sovereign has decided that it is in its best interests to breach a treaty obligation, then the injured party must seek relief through diplomatic channels or international adjudicatory bodies. It is not, however, for domestic courts to provide such relief. The provision of relief by U.S. courts would minimize the ability of the United States to take action deemed politically necessary and to speak with one voice internationally.

In light of the international political implications surrounding treaty obligations, courts have been reluctant to

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> inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.

Whitney v. Robertson, 124 U.S. 190, 194 (1888).

[102] *See, e.g.*, United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1464–65 (1988).

[103] U.S. treaty obligations are the supreme law of the land along with the U.S. Constitution and federal law. *See* U.S. CONST. art. VI, cl. 2.

[104] *See* Baker v. Carr, 369 U.S. 186, 262 (1962); *see also supra* text accompanying notes 54–56.

enforce treaty obligations in the face of conflicting federal law.[105] As long as Congress acts within its constitutional power, courts have upheld its actions, "even if they violate treaty obligations or other international law."[106] In *Taylor v. Morton*, Justice Curtis of the Circuit Court of Massachusetts refused to determine if the 1842 Tariff Act violated the 1832 Friendship and Commerce Treaty between the United States and Russia.[107] The treaty provided that Russia would have most favored nation status for tariffs. This ensured that the tariffs for Russian imports would be the lowest tariff granted by the United States. The 1842 Tariff Act set the tariff for hemp from Manilla, Suera, and India at $25 per ton and all other hemp at $40 per ton.[108] Justice Curtis recognized that states have the power to "refuse to execute a treaty," but the power to do so in the United States rests with Congress.[109] He concluded that it was not within the judicial power to determine

> whether a treaty with a foreign sovereign ha[d] been violated . . . ; whether the consideration of a particular stipulation in a treaty, ha[ving] been voluntarily withdrawn by one party, [was] no longer obligatory on the other; [and] whether the views and acts of a foreign sovereign, manifested through his representative [gave] just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty, or to act in direct contravention of such promise.[110]

Our courts have concluded that these are matters for the political branches of government because they implicate diplomacy and law making.[111] As such, the judiciary should defer

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[105] HENKIN, *supra* note 98, at 214 ("Courts do not sit in judgment on the political branches to prevent them from terminating or breaching a treaty.").

[106] *Id.*; *see also* Fong Yue Ting v. United States, 149 U.S. 698, 706–08 (1893); Ekiu v. United States, 142 U.S. 651, 662–64 (1892); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

[107] 23 F. Cas. 784, 788 (C.C.D. Mass. 1855).

[108] *Id.* at 784–85.

[109] *Id.* at 786.

[110] *Id.* at 787.

[111] *Id.*

to the political decisions regarding treaty compliance rather than enforcing treaty obligations domestically.[112]

The plenary power doctrine reflects the same concerns that the U.S. Supreme Court has with regard to treaty compliance—flexibility in foreign affairs. The Court has treated immigration as a foreign affairs matter not only because it deals with the citizens of other States but because historically the federal government regulated immigration with treaties. At the time that the federal immigration power cases were decided, friendship, commerce, and navigation treaties granted the citizens of the contracting State the right to enter and reside in the United States.[113] The use of treaties to regulate immigration created a context in which the Court would be deferential to the political branches of government. The Court's treaty enforcement jurisprudence mandated deference to the executive and Congress in the face of treaty breach allegations. The plenary power doctrine extended that approach to constitutional challenges. Just as the Court deferred to congressional decisions to legislate contrary to treaty obligations, the Court would similarly defer to congressional and executive decisions that allegedly violated the U.S. Constitution in the area of immigration.[114] The Court's deference in the treaty context is based on the idea that treaty compliance decisions are political decisions rather than legal decisions. Since the U.S. Constitution grants the executive branch and Congress the power to make such political decisions, courts should not review these decisions in hindsight. Immigration decisions are similarly seen as political rather than legal because they implicate foreign affairs,

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[112] *Id.* at 786 ("To refuse to execute a treaty . . . is a matter of utmost gravity and delicacy; but the power to do so, is prerogative, of which no nation can be deprived, without deeply affecting its independence.").

[113] *See supra* text accompanying notes 17–19.

[114] The early constitutional challenges of the Chinese Exclusion Laws claimed that Congress did not have the authority to enact the laws and that executive officials violated the Fifth Amendment rights of the plaintiffs by enforcing the laws. In response to these claims, which have not been the focus of my discussion, the Court articulated the contours of the plenary power doctrine: "Congress and the executive branch have exclusive decision-making authority without judicial oversight for constitutionality." MOTOMURA, *supra* note 9, at 27; *see also* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889); Fong Yue Ting v. United States, 149 U.S. 698, 706–08 (1893). In *Chae Chan Ping*, the Court stated that the immigration decisions of the political branches were "conclusive upon the judiciary." 130 U.S. at 606.

as demonstrated by the use of treaties to regulate. In both contexts, treaty-based claims and substantive constitutional claims, the Court did not want to limit the power or flexibility of the United States when making international political decisions.

In the treaty enforcement context, the Court created doctrines that reinforced the power of the political branches to make political decisions even when those decisions conflicted with existing treaty obligations.[115] In the substantive constitutional context, the Court took a different but related route to protect flexibility in foreign affairs. Rather than stating that these actors have the authority to regulate immigration in ways that contradict the U.S. Constitution, the Court decided that it would provide minimal judicial review of substantive constitutional challenges. Judicial deference in this context gives the executive branch and Congress space to make the necessary political decisions, but it does not absolve them of their obligation to uphold and defend the Constitution.[116]

Despite these different strategies for maintaining flexibility in foreign affairs, the Court's treaty compliance jurisprudence created a context in which the plenary power doctrine was required. In the nineteenth century, immigration was regulated with treaties and was therefore understood to be a political foreign affairs matter. The Court's treaty compliance jurisprudence put treaties and federal statutes on equal footing, thus empowering Congress to pass later in time statutes altering treaty obligations. When the government's immigration decisions were challenged as treaty violations, the last-in-time doctrine insulated the government's decisions. Because our courts view immigration decisions as political foreign affairs decisions, the same insulation was needed when immigration decisions were challenged as violating the U.S. Constitution. The plenary power doctrine provides that insulation by limiting the review that courts will provide.

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[115] *See supra* text accompanying notes 54–56, 93–112.

[116] *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002). The Court assumes that Congress and the executive branch will regulate immigration in a manner that is consistent with the Constitution.

II. THE LIMITS TO PROTECTING IMMIGRANTS' HUMAN RIGHTS

The plenary power doctrine has persisted despite the decreasing use of treaties to regulate immigration. While the legal tools used to regulate immigration have changed from treaties to federal statutes, the perception of immigration as a national sovereignty issue that implicates foreign affairs has endured. Human rights scholars therefore seek greater judicial enforcement of U.S. human rights treaty obligations as a tool to bolster the judiciary's role in monitoring deportation decisions. Human rights treaties, and more specifically the jurisprudence of treaty bodies, are seen as tools for undermining the veracity of the plenary power doctrine. This claim ignores three significant challenges: the status of the relevant human rights treaties, the application of treaty enforcement doctrines, and the indeterminacy of human rights treaties. The combination of these factors prevents human rights treaties from providing an effective check on the United States' power to deport noncitizens. This Part contends that bringing treaties back into immigration reinforces the need for judicial deference to political decision makers.

Common law judges around the world have utilized non-self-executing treaties and treaties that have been signed but not ratified to confirm interpretations of domestic law, to resolve statutory ambiguities, and as a source for constitutional interpretation.[117] This trend has motivated legal scholars and advocates in the United States to seek greater judicial recognition and enforcement of U.S. treaty obligations as a tool for constraining the State's power to deport noncitizens.[118]

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[117] *See* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 635–36, 653–54, 660, 679–80 (2007).

[118] Kadidal, *supra* note 11; Roth, *surpa* note 11; *see also* STEINER, ALSTON & GOODMAN, *supra* note 11; Hathaway, *supra* note 11; Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 863–64 (1987); Heyns & Viljoen, *supra* note 11; James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 805 (1983); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1022. Henkin and Nafziger analyze the classic international legal texts to conclude that the power to regulate immigration is not absolute. *See* Henkin, *supra*, at 863–64; Nafziger, *supra*, at 806–23. Neither scholar relies exclusively on the development of human rights legal norms and rules. Rather these scholars argue that the Supreme Court incorrectly concluded that the power to exclude and deport is absolute. *See* Henkin, *supra*, at 863–64; Nafziger, *supra*, at 823. While the

Within the United States, the use of non-self-executing treaties without implementing legislation has been limited to confirming interpretations of domestic law. Even this limited use of such treaties has been rejected in immigration jurisprudence. Professor Waters has shown that common-law judges use a variety of interpretive incorporation techniques to give human rights treaties domestic legal effect absent implementing legislation.[119] Referring to this development as creeping monism, Professor Waters identifies five interpretive incorporation techniques that range from gilding the domestic lily to a constitutional *Charming Betsy* canon.[120] Gilding the domestic lily refers to judges using non-self-executing human rights treaties to provide additional support for the court's interpretation of a domestic legal text.[121] Use of a constitutional *Charming Betsy* canon refers to a much more ambitious use of non-self-executing treaties. Through this technique, judges construe domestic constitutional provisions to conform to international human rights law.[122] Human rights treaties are treated as authoritative and binding sources for interpreting domestic constitutions. Professor Waters examined the practices of high courts in Australia, Canada, New Zealand, and the United States in addition to the British Privy Council in the Commonwealth Caribbean. Of the five techniques identified, Waters notes that the only technique utilized by the United States Supreme Court is gilding the domestic lily. The Supreme Court's use of this technique has been limited to constitutional interpretation. Gilding the domestic lily has not been used by the Court to interpret domestic statutes or develop the common law.[123] In cases like *Roper v. Simmons*, *Lawrence v. Texas*, and *Grutter v.*

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regulation of immigration may be an inherent aspect of State sovereignty, international legal norms and rules place limits on this sovereign power.

[119] Waters, *supra* note 117.

[120] *Id.* at 653. The five techniques include gilding the domestic lily, developing a rights-conscious *Charming Betsy* canon for statutory interpretation or updating the common law, engaging in "contextual" constitutional interpretation, and developing a constitutional *Charming Betsy* canon. *Id.*

[121] *Id.* at 654.

[122] *Id.* at 679.

[123] *Id.* at 655.

Bollinger, Supreme Court justices referenced international law to bolster the conclusions they reached based on domestic legal sources and traditions.[124]

In *Roper v. Simmons*, the Court held that the Eighth and Fourteenth Amendments to the Constitution prohibit the juvenile death penalty.[125] In determining whether or not a punishment is prohibited by the Eighth Amendment, the Court evaluates evolving standards of decency to determine whether or not a punishment is so disproportionate that it is cruel and unusual.[126] Justice Kennedy cited human rights treaties such as the International Covenant on Civil and Political Rights ("ICCPR") and the United Nations Convention on the Rights of the Child ("CRC") "as evidence of an international consensus prohibiting the juvenile death penalty."[127] Yet he also noted that the international consensus "while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[128] This sentiment was even shared by Justice O'Connor, who dissented in *Roper* because she concluded that no American consensus against the juvenile death penalty existed. Nonetheless, she agreed that "the existence of an international consensus . . . can serve to confirm the reasonableness of a consonant and genuine American consensus."[129]

In *Grutter v. Bollinger*, the Court held that the University of Michigan's affirmative action program did not violate the Equal Protection Clause. In her concurring opinion, Justice Ginsburg utilized international law to bolster the Court's conclusion that affirmative action "must have a logical end point."[130] She discussed the International Convention on the Elimination of All

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[124] *See* Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) (discussing foreign case law rather than treaty obligations or treaty jurisprudence to support conclusions regarding the scope of liberty); Grutter v. Bollinger, 539 U.S. 306 (2003).

[125] *Roper*, 543 U.S. at 578.

[126] *See* Corinna Lain, *The Unexceptionalism of "Evolving Standard*s," 57 UCLA L. REV. 365 (2009); Corinna Lain, *Deciding Death*, 57 DUKE L.J. 1 (2007).

[127] Waters, *supra* note 117, at 658. Scholars, however, debate whether Justice Kennedy used international law to play a confirmatory role or used it determine what the legal standard should be.

[128] *Roper*, 543 U.S. at 578.

[129] *Id.* at 605 (O'Connor, J., dissenting). Justice O'Connor acknowledged this role that international law can play in Eighth Amendment jurisprudence but concluded that no domestic consensus existed regarding the juvenile death penalty and "the recent emergence of an otherwise global consensus does not alter that basic fact." *Id.*

[130] Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women to illustrate the international understanding of affirmative action. Both of these treaties indicate that affirmative action measures should be discontinued when the goals of equal opportunity and treatment have been achieved.[131] In *Lawrence v. Texas*, rather than referencing specific treaties, Justice Kennedy cited decisions by the European Court of Human Rights ("ECtHR") to support his conclusion that liberty protects the "right of homosexual adults to engage in intimate, consensual conduct."[132] He noted that many other countries rejected the values articulated in *Bowers v. Hardwick*, and that this right to "engage in intimate, consensual conduct . . . has been accepted as an integral part of human freedom in many other countries."[133] In each of these cases, the Court turned to treaties and treaty jurisprudence to reinforce its analysis regarding the scope of constitutional protection. Yet in the Court's immigration cases, these strategies have not been utilized.

Noncitizens have not been successful challenging deportation decisions based on human rights treaties. Courts have responded to human rights treaty-based arguments by concluding that the court does not have jurisdiction to review the claim, that the deportation decision does not violate the treaty, or that the last-in-time doctrine decides the matter. Most of the treaty-based claims raise one of two arguments based on the ICCPR. The first claim is that deporting the noncitizen will violate their right to family life under article 17 of the ICCPR. The second claim is that ineligibility for cancellation of removal based on an aggravated felony conviction before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") violates article 13 of the ICCPR. Article 13 states that noncitizens facing deportation

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[131] *Id.* (citing The International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(4), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, and the Convention on the Elimination of All Forms of Discrimination Against Women, art. 4(1), Dec. 18, 1979, 1249 U.N.T.S. 13).

[132] Lawrence v. Texas, 539 U.S. 558, 576 (2003).

[133] *Id.* at 576–77. In *Bowers v. Hardwick*, the U.S. Supreme Court upheld Georgia's sodomy law and held that the constitutional right to privacy did not protect consensual homosexual sexual conduct. 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. 558.

must be "allowed to submit the reasons against his expulsion and to have his case reviewed by . . . the competent authority."[134] Similar claims based on the CRC and the United Nations Declaration of Human Rights have also been raised.[135]

When courts deny the claims based on jurisdiction, one of two justifications is offered. Courts find that either the treaty cannot be enforced in U.S. courts because it is a non-self-executing treaty or the treaty does not create a private right of action.[136] For example, in *Beshli v. Department of Homeland Security*, the petitioner challenged his deportation as a violation of his right to family life under the ICCPR.[137] The court did not reach the merits of Beshli's claim. It concluded that the ICCPR could not be enforced in U.S. courts because it is not a self-executing treaty and because Congress has not enacted implementing legislation.[138]

In other cases, courts assume jurisdiction for the sake of argument and conclude that the deportation decision does not contravene the treaty. For example, in *Fernandez v. Immigration & Naturalization Services*, the petitioner argued that deporting him would arbitrarily interfere with his right to family life protected by article 17 of the ICCPR.[139] The court concluded that international law did not prohibit Fernandez's deportation simply because he had family members residing in the United States.[140] The ICCPR may require a "compassionate hearing," but Fernandez had a hearing in which he could challenge the deportation.[141]

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[134] International Covenant on Civil and Political Rights art. 9(2), adopted Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368, art. 13 [hereinafter ICCPR].

[135] *See* Naoum v. Attorney Gen. of the U.S., 300 F. Supp. 2d 521, 526–27 (N.D. Ohio 2004) (CRC); Fernandez v. INS, No. 03-CV-2623, 2004 WL 951491, at *3 (E.D.N.Y. 2004) (CRC).

[136] See *Naoum*, 300 F. Supp. 2d 521, for a case in which the court concludes that the relevant treaty does not create a private right of action.

[137] 272 F. Supp. 2d 514, 525 (E.D. Pa. 2003).

[138] *Id.* at 526.

[139] No. 03 CV 2623, 2004 WL 951491, at *2 (E.D.N.Y. Apr. 29, 2004).

[140] *Id.* at *3.

[141] *Id.* In this case, the court initially decided that it did not have jurisdiction to review the treaty-based claims because the CRC had not been ratified by the United States and the ICCPR was a non-self-executing treaty. *Id.* The court's discussion of the merits of Fernandez's ICCPR claim is based on the assumption of jurisdiction for the sake of argument. *Id.*

The third way in which these cases are addressed is by applying the last-in-time doctrine. In cases like *El Zoul v. Bureau of Citizenship & Immigration Services*, *Guaylupo-Moya v. Gonzales*, and *Taveras-Lopez v. Reno*, the courts apply the last-in-time doctrine to ICCPR claims.[142] In each of these cases, petitioners challenged the retroactivity of IIRIRA provisions that limited access to discretionary relief from deportation for aggravated felons. The petitioners claimed that the unavailability of discretionary relief constituted a violation of the ICCPR right to family life. The court concluded that because the United States ratified the ICCPR in 1992 and enacted IIRIRA in 1996, IIRIRA "displaces any obligation assumed by the United States as a 1992 signatory to the ICCPR."[143] Congress's intent regarding the retroactivity of IIRIRA is clear, and as such, it displaces inconsistent prior treaty obligations.[144]

In some cases, courts combine approaches finding no jurisdiction but also noting that if the court had jurisdiction there would be no violation. As in *Fernandez*, the court in *Naoum v. Attorney General of the United States*[145] provided both of these analyses. The court started by concluding that it lacked jurisdiction over the ICCPR-based claims because this treaty does not create a private right of action, and as a non-self-executing treaty without implementing legislation it is not enforceable in U.S. courts.[146] The court then went on to conclude that the deportation in the case violated neither the ICCPR nor the CRC because the petitioner had been allowed to submit his reasons against the deportation. While the immigration judge considered the length of his residence and the citizenship of his wife and children, he concluded that these factors were outweighed by "significant and serious negative factors."[147]

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[142] El Zoul v. Bureau of Citizenship & Immigration Servs., No. 04-4349, 2006 WL 526091 (2d Cir. Mar. 3, 2006); Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005); Taveras-Lopez v. Reno, 127 F. Supp. 2d 598 (M.D. Pa. 2000).

[143] *Taveras-Lopez*, 127 F. Supp. 2d at 609; *see also Guaylupo-Moya*, 423 F.3d at 124–25, 135–36.

[144] *Guaylupo-Moya*, 423 F.3d at 129, 135–36; *see also Taveras-Lopez*, 127 F. Supp. 2d at 609 ("[T]he congressional declaration controls and Taveras-Lopez may not rely upon treaty or customary international law as the predicate for a discretionary waiver from removal.").

[145] 300 F. Supp. 2d 521 (N.D. Ohio 2004).

[146] Naoum v. Attorney Gen. of the U.S., 300 F. Supp. 2d 521, 526 (N.D. Ohio 2004).

[147] *Id.* at 528.

Two important and notable exceptions to these three approaches to treaty-based challenges to deportation orders are two cases decided by Judge Weinstein. In both *Maria v. McElroy* and *Beharry v. Reno*, Judge Weinstein held that the deportations at issue would violate the United States' treaty obligations.[148] In *Maria v. McElroy*, the Board of Immigration Appeals confirmed an immigration judge's decision that petitioner Eddy J. Maria was deportable as an "aggravated felon," and thus ineligible for discretionary relief from deportation.[149] Maria was admitted to the United States as a lawful permanent resident ("LPR") in 1985 when he was ten years old.[150] He had lived continuously in the United States since his admission.[151] His entire immediate family resided in the United States, which included his parents and six siblings.[152] Both of his parents and two of his siblings were United States citizens and his remaining siblings were LPRs. In 1996, Maria pled guilty to attempted unarmed robbery and was sentenced to two to four years.[153] At the time that Maria committed his crime, a single conviction for attempted robbery with a sentence of two to four years would not have made him deportable.[154] Around two months after Maria's arrest and one month before his conviction, AEDPA was enacted.[155] IIRIRA was enacted several months after Maria's conviction.[156] Post-AEDPA and IIRIRA, Maria's robbery conviction made him deportable as an aggravated felon and thus ineligible for discretionary relief from deportation.[157]

Judge Weinstein examined whether or not the retroactive application of IIRIRA's aggravated felony definition violated Maria's rights under the ICCPR. The ICCPR protects an

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[148] Maria v. McElroy, 68 F. Supp. 2d 206 (E.D.N.Y. 1999), *overruled by* Restrepo v. McElroy, 369 F.3d 627 (2d Cir. 2004); Beharry v. Reno, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd and remanded by* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

[149] *Maria*, 68 F. Supp. 2d at 209.

[150] *Id.* at 213.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] At that time, robbery was a deportable offense if one was sentenced to at least five years or one had a previous conviction for a crime involving moral turpitude. Maria had no previous criminal convictions. *Id.*

[155] *Id.* at 214.

[156] *Id.*

[157] The statutory definition of an aggravated felony for theft and burglary changed from requiring a sentence of five years to one year. *Id.* at 210.

individual from unlawful or arbitrary interference with one's right to family life. As such, a noncitizen cannot be deported if the deportation, "while in accordance with its domestic law, is nonetheless unreasonable and in conflict with the underlying provisions of the ICCPR."[158] Additionally, article 13 of the ICCPR requires that noncitizens facing deportation "be allowed to submit the reasons against his expulsion" unless doing so would threaten compelling national security interests.[159] Maria was denied an opportunity to provide such reasons, including interference with family unity, because he was deportable as an aggravated felon and was ineligible for discretionary relief from deportation.[160] Judge Weinstein concluded that denying Maria this opportunity violated the ICCPR.[161]

Judge Weinstein addressed this issue again in *Beharry v. Reno*. Don Beharry immigrated to the United States when he was seven years old from Trinidad.[162] Beharry had resided in the United States continuously since his admission.[163] His United States citizen mother and daughter and his LPR sister also resided in the United States.[164] Beharry was convicted of second degree robbery for stealing $714 from a coffee shop and was sentenced to two-and-a-quarter to four-and-a-half years.[165] He had previously been convicted of petty larceny, criminal mischief, and second degree riot; however, he was never incarcerated as a result of these convictions.[166] Reviewing the ICCPR, the United Nations Convention on the Rights of the Child, the Universal Declaration of Human Rights, and customary international law, Judge Weinstein concluded that the ICCPR required that Beharry have an opportunity "to present the reasons he should

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[158] *Id.* at 232.

[159] *Id.*

[160] Section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 excluded individuals "deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)" from 212(c) relief. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277.

[161] *Maria*, 68 F. Supp. 2d at 234. Judge Weinstein also concluded that the retroactive application of section 440 of AEDPA violated customary international law. *Id.*

[162] *See* Beharry v. Reno, 183 F. Supp. 2d 584, 586 (E.D.N.Y. 2002).

[163] *See id.*

[164] *See id.*

[165] *See id.* at 586–87.

[166] *See id.* at 587.

not be deported."[167] Failing to provide this opportunity "violates the ICCPR's guarantee against arbitrary interference with one's family, and the provision that an alien shall 'be allowed to submit the reasons against his expulsion.' "[168] In interpreting the INA "in a way not inconsistent with international law," Judge Weinstein concluded that Beharry was entitled to a compassionate hearing.[169]

The Second Circuit abrogated *Maria* on other grounds and overruled *Beharry* on other grounds, but in 2005, the Second Circuit decided *Guaylupo-Moya v. Gonzales*, which abrogated *Beharry*'s treaty-based holdings.[170] As noted above, in *Guaylupo-Moya*, the court concluded that pursuant to the last-in-time doctrine congressional intent regarding the availability of discretionary relief from deportation for aggravated felons was clear. To the extent these rules violate the ICCPR, the immigration laws, which post-date ratification of the ICCPR, displace the conflicting treaty provisions.[171]

Claims that treaties can provide an effective basis for restricting the State's immigration power ignore two significant challenges. The first is the Court's historical reluctance to enforce U.S. treaty obligations in the face of conflicting or contradictory federal action. The second is the status of the relevant treaties. The Court has refused to enforce bilateral treaties explicitly granting individuals migration rights when Congress or the executive branch has taken subsequent action that limits or contradicts the treaty rights.[172] Because immigration is still seen as a political matter, the Court seeks to maintain maximum flexibility in decisionmaking. The relevant human rights treaties are either non-self-executing or have not been ratified. The United States ratified the ICCPR in 1992 and signed the CRC in 1995 but has not ratified it. The ICCPR is not

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[167] *Id.* at 604.

[168] *Id.*

[169] *Id.* Such a hearing would also remedy potential violations of the UDHR's prohibition against arbitrary exile and the requirement that all individuals are entitled to a full and fair hearing to determine rights and obligations.

[170] *See* Restrepo v. McElroy, 369 F.3d 627 (2d Cir. 2004) (abrogating *Maria*'s retroactivity analysis in light of Domond v. INA, 244 F.3d 81 (2d Cir. 2001)); *see also* Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003) (reversing the district court judgment due to petitioner's failure to exhaust his administrative remedies).

[171] *See* Guaylupo-Maya v. Gonzalez, 423 F.3d 121, 135–36 (2d Cir. 2005).

[172] *See supra* text accompanying notes 93–112.

a self-executing treaty.[173] As such it does not "automatically have effect as domestic law."[174] The Court's decision to apply the last-in-time doctrine to self-executing treaties like the Friendship, Commerce, and Navigation treaties, the Burlingame Treaty, and the 1880 Treaty suggests that judicial enforcement of the ICCPR would be limited.

This does not suggest that human rights treaties are all together powerless in the United States.[175] This Article has focused on the specific use of human rights treaties, such as the ICCPR, to bolster judicial review by U.S. courts of deportation decisions.[176] The distinctive way in which immigration has been framed by U.S. courts presents a difficult challenge for human rights enforcement. The framing of immigration as a foreign affairs matter catapults it into a special domain in which national sovereignty is implicated. Courts are not only faced with treaty enforcement, which historically has been seen as a political issue, but also with a domestic issue that is seen to be inherently political. This double dose of political decisionmaking in the immigration context makes judicial enforcement of human rights treaty obligations harder than it would be in other contexts.

The problems discussed in this Part present formidable challenges to the use of human rights treaties to constrain the United States' power to deport noncitizens. However, the most significant hurdle could be addressed through the enactment of implementing legislation for the ICCPR. Then the issue would become, what exactly does the ICCPR require and how can State parties comply? Does the ICCPR only require a hearing in which

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[173] The FCN treaties at issue in much of the treaty enforcement jurisprudence of the nineteenth century were considered self-executing treaties. *See* Medellín v. Texas, 552 U.S. 491, 518–21 (2008). As such, they could form the basis of a legal claim in a U.S. court. The Court never explicitly addressed whether or not the Burlingame Treaty or the 1880 Treaty were self-executing, but the Court's opinions in *Chae Chan Ping* and *Fong Yue Ting* treat these treaties as having domestic effect.

[174] *Medellín*, 552 U.S. at 504, 505 n.2.

[175] For example, courts play an important role in enforcing treaty obligations by deciding cases brought pursuant to the Alien Torts Claims Act. Courts and administrative adjudicative bodies are similarly effective at monitoring U.S. compliance with the Refugee Convention and Protocol.

[176] I have chosen not to examine the effectiveness of using international forums to review U.S. deportation decisions for compliance with treaty obligations. This is primarily because the United States has not ratified the optional protocol that grants the Human Rights Committee jurisdiction to review claims of ICCPR violations.

deportable noncitizens have the opportunity to be heard as the courts in *Naoum* and *Fernandez* contend?[177] Alternatively does it require that adjudicators conduct a proportionality analysis to determine whether or not the deportation order would violate the noncitizen's article 17 rights as Judge Weinstein suggests?[178] Article 17 does not answer these questions; it provides a standard for State conduct. The use of a standard—"[n]o one shall be subjected to arbitrary or unlawful interference with his . . . family"—gives decision makers a great deal of discretion to determine what constitutes arbitrary interference.[179] The indeterminacy of particular human rights obligations presents the most significant hurdle to the use of human rights treaties to increase judicial monitoring of deportation decisions.

III. TREATY INDETERMINACY

The limits that the ICCPR imposes on a State's power to deport noncitizens cannot be determined solely by the language of the treaty. The ICCPR dictates standards that do not mandate a specific outcome. Rather, the treaty articulates a combination of rules and standards that grant State parties and adjudicators varying degrees of discretion to determine what constitutes compliance. This creates indeterminacy as to the required outcome in specific cases alleging treaty rights violations. This Part begins by detailing the relationship between treaty indeterminacy and framing. Through this relationship, this Part demonstrates the limited role that human rights treaties can play in increasing the U.S. judiciary's role in monitoring deportation decisions.

It is commonly understood that a mix of rules and standards are used to protect individual rights pursuant to domestic constitutions and that domestic constitutions are often indeterminate. Yet human rights activists and scholars rarely acknowledge the indeterminacy of human rights treaties when seeking greater domestic judicial enforcement of treaty

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[177] Naoum v. Attorney Gen. of the U.S., 300 F. Supp. 2d 521, 528 (N.D. Ohio 2004); Fernandez v. INS, No. 03-CV-2623, 2004 WL 951491, at *3 (E.D.N.Y. Apr. 29, 2004).

[178] *See* Maria v. McElroy, 68 F. Supp. 2d 206, 234 (E.D.N.Y. 1999); *see also* Beharry v. Reno, 183 F. Supp. 2d 584, 604 (E.D.N.Y. 2002).

[179] ICCPR, *supra* note 134, art. 17.

obligations.[180] The assumption is that if judges took a more active role in reviewing human rights treaty-based claims, specific outcomes would be achieved.[181] Rather than acknowledging this issue, human rights advocates and treaty body members often portray State parties advocating alternative approaches to interpreting and applying treaty obligations as defending noncompliance rather than offering legitimate alternatives. There is a tendency to forget that the combined use of rules, standards, and principles to articulate individual rights creates indeterminacy.[182] This indeterminacy creates space in which a variety of outcomes are possible. The use of different frames by decision makers to analyze allegations of rights violations illustrates how States can legitimately reach a variety of outcomes. Increased judicial enforcement of human rights treaty obligations would therefore not necessarily lead to the same outcomes reached by treaty bodies.

International law, like all areas of law, is subject to a certain level of indeterminacy.[183] The desire for universalism requires structuring human rights obligations in a way that accommodates a variety of national legal practices and

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[180] *See generally* Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139 (2006); Kadidal, *supra* note 11; Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271 (2008); Roth, *supra* note 11.

[181] This position fails to acknowledge the extent to which law and judicial decisionmaking reflects rather than sets a society's normative commitments. Absent recognition that security of residence for noncitizens does not inevitably implicate foreign affairs or national security, U.S. courts will continue to apply standards in a manner that maintains maximum flexibility for the government.

[182] *See* Karl Klare, *Legal Theory and Democratic Reconstruction*, 25 U. BRIT. COLUM. L. REV. 69, 99–100 (1991). It is not my contention that human rights treaties are so indeterminate as to be useless. Rather, my position is that law as an institution provides certain constraints on legal decision makers but that treaties by themselves do not provide clear directives regarding outcomes. *See infra* text accompanying notes 186–88.

[183] Referencing H.L.A. Hart's *The Concept of Law*, Koskenniemi notes that "[i]n every legal system a large and important field is left open for the exercise of discretion by Courts and other officials rendering initially vague standards determinate, in resolving the incertainites of statutes, or in developing and qualifying rules only broadly communicated by the authoritative standards." MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 36 (2005) (quoting H.L.A. HART, THE CONCEPT OF LAW 136 (Clarendon Press 1994) (1961)).

traditions.[184] The use of standards and evaluative terminology assists in achieving this goal.[185] Commitment to universal application recognizes that States will operationalize and implement treaty obligations in a variety of ways despite acceptance of a broad set of legal rules and principles.[186] The options available to States, however, are limited. Law as an institution provides its own internal constraints on decision makers.[187] These constraints prevent human rights treaties from becoming meaningless because of the indeterminacy. The indeterminacy here is relative rather than extreme.[188]

Human rights treaties create a variety of obligations for State parties. Professors Steiner, Alston, and Goodman identify five categories of obligations: (1) to respect the rights of others; (2) to create institutional machinery essential to the realization of rights; (3) to protect rights and prevent violations; (4) to provide goods and services to satisfy rights; and (5) to promote rights.[189] Challenges to deportation decisions implicate a State's third obligation to protect rights and prevent violations. Yet the articulation of rights can take the form of bright-line rules or flexible standards.[190] Articles 7 and 17 of the ICCPR illustrate this distinction. Article 7 of the ICCPR states that "No one shall be subjected to torture or to cruel, inhuman or degrading

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[184] *See, e.g.*, Klare, *supra* note 182, at 99.

[185] KOSKENNIEMI, *supra* note 183, at 39 n.72 (citing Wrongful Imprisonment for Fraud Case, 72 I.L.R. 1987 (1971)); Klare, *supra* note 182, at 99–102.

[186] STEINER, ALSTON & GOODMAN, *supra* note 11, at 366–68.

[187] The development of case law by treaty bodies is one way in which legal institutions provide internal constraints on State decision makers.

[188] KOSKENNIEMI, *supra* note 183, at 590–96. Indeterminacy can be beneficial, but it gives rise to a certain level of uncertainty regarding what constitutes compliance with a specific legal obligation. On the one hand, the indeterminacy of article 17 of the ICCPR creates space for judges like Judge Weinstein to conclude that deportation proceedings must include individualized proportionality reviews. *See infra* text accompanying notes 148–69. Yet it also allows for a narrower reading of article 17 in which the deportation of certain categories of noncitizens is ex ante deemed proportionate. Neither the text of article 17 nor the Human Rights Committee jurisprudence dictates which approach is required. *See* KOSKENNIEMI, *supra* note 183, at 590–96.

[189] STEINER, ALSTON & GOODMAN, *supra* note 11, at 187–90. Elsewhere, I have referred to these treaty obligations and commitments as falling into three categories: structural, programmatic, and legal. Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 FORDHAM INT'L L.J. 781, 807 (2009).

[190] *See, e.g.*, KOSKENNIEMI, *supra* note 183, at 37; Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57–59 (1992).

treatment or punishment," and article 17 of the ICCPR states, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation."[191] Article 7 establishes a bright-line rule about a State's ability to torture individuals; such behavior is absolutely prohibited. State parties and adjudicators have little discretion when torture is involved.[192] Article 17 does not create a bright-line rule regarding State interference with family life—it does not prohibit all such interferences. Rather, article 17 only prohibits arbitrary and unlawful interferences. The use of evaluative terminology grants State parties and adjudicators discretion in determining whether or not the State has violated an individual's article 17 rights.[193] Determining what constitutes arbitrary interference requires taking account of a variety of factors. Frames play an important role in determining how those factors will be evaluated.[194] Human rights obligations like article 17 do not dictate how States should balance a noncitizens' right to family life and a State's interest in deporting a noncitizen. The different approaches taken by the Human Rights Committee ("HRC") and U.S. federal courts to substantive challenges to deportation decisions reflect the role of background norms, legal tradition, and governance structure in determining how legal rules and standards will be applied in specific categories of cases. While State practice and treaty body jurisprudence may coalesce around more concrete interpretations of treaty obligations like article 17 over the long-term, for the short- to medium-term, we have significant divergence. This divergence makes it difficult for courts to use the ICCPR to definitively increase their monitoring of deportation decisions.

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[191] ICCPR, *supra* note 134, arts. 7, 17.

[192] This does not, however, prevent States from contending that certain "interrogation techniques" do not constitute torture. *See* Memorandum from John Yoo, Deputy Assistant Attorney Gen. to Alberto Gonzales, Counsel to the President (Aug. 1, 2002) (contending that the interrogation techniques being used to "capture[ ] al Qaeda operatives" do not constitute torture).

[193] KOSKENNIEMI, *supra* note 183, at 39.

[194] The bar against unlawful interference also raises a few questions. For example, is unlawful interference limited to interference that would violate domestic law or does it include interference that is not explicitly authorized by law? The discretion that adjudicators must exercise in answering these questions is narrower than the discretion exercised when determining what constitutes arbitrary interference.

The debate within the United States about the State's power to deport noncitizens centers on the role of the judiciary in monitoring and checking political actors. Article 17 provides a potential substantive check on the State's power to deport noncitizens, but it does not stipulate who should enforce that check or the scope of the check. Article 17 does not mandate robust judicial review for allegations of article 17 violations, nor does it demand proportionality review to determine arbitrariness. Pursuant to the discretion provided by article 17, the HRC has concluded that domestic administrative or judicial adjudicators should review deportation decisions for proportionality.[195] This same discretion could support the U.S. approach of judicial deference to political actors. Current U.S. law provides a mechanism for political officials—immigration judges and the BIA—to consider family unity in a limited set of circumstances.[196] This could plausibly reflect the instances in which deportation would constitute an arbitrary interference with family life.

The arbitrariness standard in article 17 grants decision makers more discretion than bright-line rules like article 7's absolute prohibition against torture. The availability of this

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[195] The same is true for the European Court of Human Rights, which has evaluated similar claims pursuant to the European Convention on Human Rights ("ECHR"). Article 8 of the ECHR states that

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

Discretion is afforded to the State parties and adjudicators based on the standard that interferences with the right to family life must be "necessary in a democratic society" to promote specific state interests.

[196] Immigration judges and the BIA are authorized to cancel the removal of noncitizens when their removal will be in the best interests of the United States or constitute an exceptional and extremely unusual hardship to the noncitizen's U.S. citizen or LPR spouse, parent, or child. *See* 8 U.S.C. § 1229b (2006 & Supp. II); *In re* C-V-T-, 22 I. & N. Dec. 7, 11 (BIA 1998) (quoting Matter of Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978)).

discretion creates a context in which frames play an important role in determining what factors will be considered in the arbitrariness analysis and how the factors will be evaluated.

Frames are thought organizers and they "call our attention to certain events and their underlying causes and consequences and direct our attention away from others."[197] Lawyers utilize frames as a key component of legal argument. Legal issues can be presented in a variety of ways. For example, a State's failure to criminalize female genital cutting can be presented as State protection and respect for freedom of religion or as endangering the health and welfare of minor girls. These alternative approaches to defining the legal issue significantly impact the decisions courts make regarding the applicable legal rules, relevant precedent, and standards of review. Good legal advocacy requires defining the legal issues as advantageously as possible. But it is the adjudicator who will ultimately define the issues presented and he or she will utilize frames in making that decision. While the advocacy skills of the lawyers will play a role in how the issue is presented, other factors play a role. Some frames will be more useful than others, because they resonate with existing norms and values and thus appear natural and familiar.[198] Human rights treaties do not dictate what frames a State party must or should use when evaluating a social or legal issue. This is left to the parties to the dispute and the relevant decision makers. Yet these frames play a key role in influencing what questions are asked and how they are answered. Different social histories, approaches to judicial review, and governance systems cause different frames to dominate in different States.[199] Thus, the usefulness of foreign jurisprudence can vary greatly. The same is true for the jurisprudence of treaty bodies.

U.S. courts rely heavily on a national sovereignty frame while European adjudicative bodies utilize a public order frame.

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[197] MYRA MAX FERREE ET AL., SHAPING ABORTION DISCOURSE: DEMOCRACY AND THE PUBLIC SPHERE IN GERMANY AND THE UNITED STATES 14 (2002); *see also* Banks, *supra* note 189, at 792–93. Additionally, frames "organize and make coherent an apparently diverse array of symbols, images, and arguments, linking them through an underlying organizing idea that suggests what is at stake on the issue." *Id.*

[198] FERREE ET AL., *supra* note 197, at 70; *see also* Banks, *supra* note 189, at 793–94.

[199] A State's governance system refers to the various ways in which States allocate power and authority to different governance institutions and the relationships between these different institutions in their ability to check and balance each other.

The names for these frames reflect not only the fundamental question asked within each frame but also the source of the immigration power in these States. In U.S. deportation jurisprudence, the fundamental question examined is how to protect the United States national interests domestically and internationally. In European States the key question is how to balance the rights of the noncitizen with the State's duty protect the health and safety of its residents.[200] Both frames are concerned with protecting national interests, but European courts focus on a narrower set of national interests, while U.S. courts consider the broadest possible range of national interests. The use of a national sovereignty frame by U.S. courts suggests that any article 17 analysis would grant significant deference to political decision makers. Such deference in determining arbitrariness may mirror the facially legitimate and bona fide reason review applied in *Kleindienst v. Mandel*[201] and *Fiallo v. Bell*.[202] In each of these cases, the U.S. Supreme Court sought to determine whether the government had a legitimate and bona fide reason for its immigration decision.[203] The arbitrariness standard articulated in article 17 does not preclude or mandate either of these approaches. It empowers decision makers to determine what factors should be considered and how those factors should be evaluated to determine arbitrary interference with family life. The HRC's use of proportionality review reflects specific conclusions regarding the basis for the State's power to deport noncitizens, which government institutions are authorized

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[200] These bodies rely on proportionality review to determine the appropriate balance between State interests and individual rights. The individual's right to family life is evaluated by examining family and social ties to the individual's State of residence and their State of nationality. Relevant factors for this analysis include length of residence, location of family members, relationship with family members, language skills, and employment history. *See generally* Angela M. Banks, *Deporting Families: Legal Matter* or *Political Question?*, 27 GA. STATE U. L. REV. 489 (2010). The State's interest in protecting public safety is measured by the seriousness of the criminal activity giving rise to deportation. The vast majority of the deportation cases challenged before the HRC and the ECtHR involve deportation orders based on criminal convictions. *Id.*

[201] 408 U.S. 753 (1972).

[202] 430 U.S. 787 (1977).

[203] Both of these cases dealt with admissions decisions that were challenged as violating the rights of U.S. citizens. Whether the Court would apply even this minimal level of judicial review to deportation challenges raised by noncitizens is a bit of an open question. However, these cases articulate the highest standard of review provided by the Court to substantive challenges to immigration decisions.

to exercise that power, and the role of courts and administrative bodies in reviewing uses of that power. United States courts have reached different conclusions on each of these points, and calls for greater judicial enforcement of the ICCPR will not necessarily bring about HRC-style proportionality review.[204]

Noncitizens facing deportation in the United States, Europe, Australia, and Canada have challenged their deportation orders as violations of their right to family unity. All of these States have domestic laws that protect an individual's right to family life, yet this right as with many other domestic rights is not absolute. Neither domestic law nor international law absolutely prohibits State interference with family life—certain interferences are permitted. Standards, rather than bright-line rules, are used to police the boundary between permitted and prohibited interferences. For example, as noted above, the ICCPR only prohibits arbitrary or unlawful interferences with family life.[205] Within the United States, the constitutional right to family privacy protects against undue State interference.[206] Despite legal recognition of an individual's right to family life, adjudicators around the world have reached different conclusions about the judiciary's role in reviewing immigration decisions that interfere with family life. Federal courts in the United States defer to the decisions of the political actors while European courts actively monitor and evaluate the political actors' immigration decisions.

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[204] *See* Banks, *supra* note 200.

[205] ICCPR, *supra* note 134, art. 17.

[206] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that there is "a private realm of family life which the State cannot enter"); *see also* David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 547–48 (2000); Lois A. Weithorn, *Can a Subsequent Change in Law Void a Marriage That Was Valid at Its Inception? Considering the Legal Effect of Proposition 8 on California's Existing Same-Sex Marriages*, 60 HASTINGS L.J. 1063, 1119–20 (2009). What constitutes undue state interference is a matter of some controversy. While the Court's jurisprudence discusses family privacy as a fundamental right, the standards of review used by the Court have been something other than strict scrutiny. *See* Meyer, *supra*, at 539–48. Meyer argues that the actual review provided by the Court examines state interference with family privacy for reasonableness rather than seeking to ensure that the interference is based on a compelling state interest that is narrowly tailored to address that interest. *Id.*

The deferential stance of U.S. courts is due in part to the courts' conclusions regarding institutional competences.[207] The discussion in Part I detailing the relationship between treaties and immigration helps to explain why the Court views immigration decisions as political decisions implicating national sovereignty. As long as immigration is viewed this way there is a "lack of judicially discoverable and manageable standards for resolving" challenges to immigration decisions, or, alternatively, it is impossible to resolve the challenge without making an initial policy decision that is "clearly for nonjudicial discretion."[208] European courts did not face similar institutional competence concerns because they did not view immigration laws and regulations as distinct from other forms of domestic legislation. States regulated migration pursuant to their authority to maintain public order, which empowers public authorities to act to protect public welfare, peace, and security.[209] Judicial review of government decisions regarding public order did not necessitate judicial deference or self-restraint. As public order decisions, the political branches of government are not uniquely qualified or exclusively empowered to make immigration decisions. Consequently, courts throughout Europe perform their traditional review functions when faced with challenges to immigration decisions.[210] For example, in Germany, migrant workers challenged family reunification restrictions as a violation of article 6 of Germany's Basic Law, which protects family life.[211] The Basic Law does not distinguish between

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[207] Foreign affairs and national security are matters that the Constitution has committed to other branches of government. Baker v. Carr, 369 U.S. 186, 211 (1962). This creates a separation of powers concern that is amplified by the political nature of foreign affairs and national security.

[208] *Id.* at 217.

[209] *See, e.g.*, Roger Warren Evans, *French and German Administrative Law with Some English Comparisons*, 14 INT'L & COMP. L.Q. 1104, 1116 (1965). Despite the use of bilateral treaties and multinational agreements to facilitate labor migration, European courts did not view immigration regulation as a foreign affairs matter. STEPHEN CASTLES & MARK J. MILLER, THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD 101–02 (2009). See Banks, *supra* note 200, for further discussion of the frame choices made by U.S. and European courts.

[210] *See* Banks, *supra* note 200.

[211] Tugrul Ansay, *The New UN Convention in Light of the German and Turkish Experience*, 25 INT'L MIGRATION REV. 831, 836–37 (1991) [hereinafter Ansay, *The New UN Convention*]; Tugrul Ansay, *Legal Problems of Migrant Workers*, *in* 156 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF

citizens and noncitizens and the German courts' analysis of the family reunification claims did not differ from its analysis of other article 6 challenges.[212]

Increased judicial enforcement of the ICCPR in the United States is unlikely to lead to the use of proportionality review in cases challenging deportation decisions. The United States has the legal infrastructure available to reach the same outcomes as the ECtHR or the HRC when deportation decisions are challenged as violating rights to family life.[213] Our legal system recognizes family privacy, which provides analogous protection as article 17 of the ICCPR and article 8 of the European Convention on Human Rights. Neither the domestic nor the international legal protection of family life is absolute. States are permitted to interfere with family life under certain conditions, which creates a degree of indeterminacy as to which interferences are permissible. The relevant legal standards require adjudicators to exercise discretion in determining what factors will be considered and how such factors will be evaluated. The frames utilized by the adjudicators play an important role in shaping how this discretion is exercised. The use of a national sovereignty frame in the United States guides U.S. judges to emphasize the political nature of deportation decisions, which has specific implications for the scope of judicial review. This emphasis would not change if claims were based on article 17 of the ICCPR rather than the constitutional right to family privacy.

Framing helps us understand divergent approaches to addressing allegations of human rights abuses. The insights gained from viewing divergent outcomes as a result of framing

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INTERNATIONAL LAW 1, 24 (Sijthoff & Noordhoff 1980) (1977) [hereinafter Ansay, *Hague Lectures*]. National courts in France and Germany limited the State's ability to restrict or limit family based migration. Virginie Guirdudon, *European Courts and Foreigners' Rights: A Comparative Study of Norms Diffusion*, 34 INT'L MIGRATION REV. 1088, 1100 (2000). For example, in 1978 the French Conseil d'État struck down a suspension of family reunification for noncitizens because it was contrary to the general legal principle protecting an individual's right to family life. *Id.* Similarly, in 1983 the Federal Constitutional Court in Germany prohibited Bavaria and Baden-Wurtenberg from creating a three-year waiting period for the admission of noncitizen spouses. The court considered this measure a violation of Article 6 of the Basic Law, which protects family life. *Id.*; *see also* CASTLES & MILLER, *supra* note 209, at 108.

[212] Ansay, *The New UN Convention*, *supra* note 211; Ansay, *Hague Lectures*, *supra* note 211; Guirdudon, *supra* note 211, at 1100.

[213] *See* Banks, *supra* note 200.

choices rather than as defiant noncompliance create opportunities for developing effective compliance strategies. For example, the use of different frames to analyze female genital cutting ("FGC") has had a significant impact on the way States approach regulating the practice. In Egypt, when a religious freedom frame was used to analyze FGC, the State was hesitant to regulate for fear of impermissibly infringing upon individuals' right to religious freedom. Once a public health frame was utilized, the State had greater flexibility and legal tools available to regulate FGC and enforce those regulations.[214] Similar framing decisions affected the quality of public participation in the drafting of Rwanda's 2003 constitution.[215] Rwanda used a participatory constitution-making process that lead to the adoption of a constitution that enjoys significant public support. The constitution facilitated women's participation in the national legislature but discouraged multi-party democracy.[216] Gender equity advocates and multi-party democracy advocates participated in the constitution-making process, yet only the former achieved internal inclusion in the process.[217] Prior to the adoption of the 2003 constitution, women had not played a significant role in Rwandan politics. Traditional cultural norms did not support women's active political participation as elected officials.[218] Despite these background norms, gender equity advocates were able to persuade key decision makers to utilize a peace and unity frame when analyzing public participation.[219] Due to other background norms, women were viewed as conciliatory members of society whose skills and social experience would be invaluable for creating a unified Rwanda. This perception of women supported increased political participation.[220] As a result of Rwanda's history with ethnic political parties, multi-party democracy was seen as a threat to

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[214] *See* Lan Cao, *Culture Change*, 47 VA. J. INT'L L. 357, 405 (2007).

[215] *See* Angela M. Banks, *Challenging Political Boundaries in Post-Conflict States*, 29 U. PA. J. INT'L ECON. L. 105, 106–07 (2007).

[216] *Id.* at 106, 157.

[217] *Id.* at 128–30, 145–61 ("Internal *exclusion* exists when 'people lack effective opportunity to influence the thinking of others even when they have access to the fora and procedures of decision-making.' " (quoting IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 55 (2000)) (emphasis added)).

[218] *Id.* at 149–50.

[219] *Id.* at 156–57.

[220] *Id.*

peace, unity, and reconciliation.[221] Despite claims by both groups for greater political participation, the use of a peace and unity frame privileged women's participation and disadvantaged multi-party participation. In both Rwanda and Egypt, framing decisions have played an important role in shaping human rights outcomes precisely because human rights treaties are indeterminate.

Human rights scholars and activists who seek greater domestic judicial treaty enforcement tend to focus on the outcomes of foreign or treaty body jurisprudence. Less attention is given to the role that social history, approaches to judicial review, or the State's governance system have played in these adjudicative bodies' legal analysis. While human rights treaties attempt to reflect universal principles and legal rules, the application of such rules in specific cases must take account of unique social histories, approaches to judicial review, and governance systems.[222] To achieve lasting change within a society, courts must root human rights-enforcing decisions within the legal and social norms of the society. Importing outcomes without domestically based legal analysis is a shortcut. The deportation jurisprudence of the HRC and ECtHR offers the United States an alternative way to think about the relationship between noncitizens and the State. Current U.S. law provides the tools for enabling the judiciary to play a more active role in reviewing substantive challenges to deportation decisions.[223] Yet these tools cannot be utilized to achieve this outcome until judges begin to use different frames when analyzing immigration

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[221] *Id.* at 157.

[222] A State's decision to ratify a treaty indicates its willingness to adhere to the provisions of the treaty. The fact that as of February 2009, eighty-five percent of the United Nations Member States had ratified the ICCPR suggests that these treaties reflect a degree of universality. *But see* MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002) (questioning the universality of the existing human rights canon due to the lack of participation by a significant number of the current United Nations members); Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 651 (2004) (discussing isomorphism as an explanation for treaty ratification and domestic legal reform despite lack of compliance); Hathaway, *supra* note 11 (focusing on legal enforcement and collateral consequences to explain treaty ratification and compliance rather than universal norms).

[223] *See* Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009).

matters. As long as immigration is seen primarily as a national sovereignty matter, judicial self-restraint will persist due to separation of powers concerns.

CONCLUSION

When noncitizens like Mary Anne Gehris raise substantive challenges to deportation decisions in the United States, their claims receive scant judicial review. Despite the initial appeal of using human rights treaties to increase the judicial monitoring role, this Article calls the viability of this strategy into question. The very doctrines that would allow U.S. courts to review ICCPR claims are the doctrines that would require judicial deference to the political actors. Even if our courts were willing to adjudicate ICCPR claims, the judiciary's use of a national sovereignty frame combined with the indeterminacy of the relevant treaty obligations would permit continued judicial deference.

Treaties were the primary tool used to regulate immigration in the United States from the beginning of the republic through the mid-nineteenth century. Through friendship, navigation, and commerce treaties, the United States determined which noncitizens could enter and reside within the country. During this time period, the Court was developing a treaty enforcement jurisprudence in which the Court exercised robust review of allegations that state action violated a U.S. treaty obligation but was extremely deferential when the allegations were directed toward the federal government. Part I of this Article demonstrates that these treaty enforcement doctrines informed the development of the plenary power doctrine and are unlikely to restrict its force. Closely scrutinizing treaty-based challenges to immigration decisions would have undermined the Court's efforts to ensure maximum flexibility for the federal government in conducting foreign affairs. The plenary power doctrine enabled the Court to maintain such flexibility when faced with constitutional claims. Based on this re-conceptualization of the relationship between treaty enforcement principles and the plenary power doctrine, Part II illustrates two significant challenges to using human rights treaties to increase judicial monitoring of deportation decisions. The first challenge is the status of the relevant treaties, and the second is the historical reluctance of U.S. courts to enforce treaty obligations vis-à-vis the federal government. Human rights treaties like the ICCPR

are non-self-executing treaties, and U.S. courts have declined to recognize such treaties as having domestic force. When courts are willing to assume binding force for the sake of argument in immigration cases, they generally conclude that the last-in-time doctrine prevails. U.S. ratification of the ICCPR in 1992 predates the most recent significant immigration reforms in 1996. While these problems could be addressed by enacting implementing legislation, a more fundamental problem exists due to the indeterminacy of the human rights obligations. The ICCPR does not dictate what constitutes arbitrary interference with family life or prescribe a specific role for domestic judiciaries. Rather, the use of a standard to protect family life grants decision makers a significant degree of discretion in determining what is and is not an arbitrary interference. Part III contends that the manner in which this discretion is exercised is determined by the frames used by decision makers to analyze the legal issues presented.

Despite changes in the legal tools used to regulate immigration, concerns about social cohesion, national identity, and loyalty continue to shape the U.S. judiciary's approach to immigration issues. The dominance of a national sovereignty frame diminishes the effectiveness of treaties like the ICCPR in limiting the scope of the United States' power to deport noncitizens. The failure of U.S. courts to exercise robust judicial review of immigration laws, regulations, and decisions is not due to a lack of existing law protecting family unity or the nonexistence of proportionality principles. Rather, it is due to the Court's desire to maintain maximum flexibility for international political decisionmaking. The Court's dedication to this goal is attributable to two factors: its pre-existing treaty enforcement doctrines and its use of a national sovereignty frame to analyze immigration issues.

The jurisprudence of treaty bodies like the HRC reaches the desired outcome for many of us concerned about the current state of the United States' deportation jurisprudence. Yet as long as there continues to be different understandings of a State's experience with immigration, approach to judicial review, and allocation of immigration authority, U.S. judicial enforcement of human rights treaties will not achieve the same outcomes as the treaty body deportation jurisprudence. Over-estimating the influence of treaty jurisprudence limits the ability of legal

scholars and practitioners to develop alternative strategies for enforcing human rights obligations. In the immigration context, more attention needs to be given to administrative treaty enforcement strategies in addition to non-legal strategies that can broaden our nation's perception of immigration beyond national sovereignty.