William & Mary Law Review

Volume 59 | Issue 6 Article 7

Embracing the Chinese Exclusion Case: An International Law Approach to Racial Exclusions

Lauri Kai

EMBRACING THE CHINESE EXCLUSION CASE: AN INTERNATIONAL LAW APPROACH TO RACIAL EXCLUSIONS

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INTRODUCTION

On December 7, 2015, Donald J. Trump called for a "total and complete shutdown of Muslims entering the United States."[1] News outlets rushed to various legal scholars to determine whether a ban from entering the United States based on a person's religious views would be legal. Some suggested that such a ban would violate the First Amendment, even if applied to noncitizens.[2] Yet others relied on the Supreme Court's precedent from 1889,[3] *Chae Chan Ping v. United States*, commonly known as the Chinese Exclusion Case, in which the Court upheld the Chinese Exclusion Act of 1882 barring Chinese laborers from entry into the United States.[4]

Indeed, a strict *holding*-based adherence to stare decisis, barely scrutinized for over a century, would give the Court no option but to uphold a ban on Muslims from entering the United States in 2018.[5]

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1. Jeremy Diamond, *Donald Trump: Ban All Muslim Travel to U.S.*, CNN (Dec. 8, 2015, 4:18 AM), http://www.cnn.com/2015/12/07/politics/donald-trump-muslim-ban-immigration/ [https://perma.cc/C8B4-HVTM].

2. *See, e.g.*, Ivan Eland, *Trump's Ban on Muslims Is Unconstitutional and Obscures Real Solution*, HUFFINGTON POST (Dec. 14, 2015, 9:21 AM), http://www.huffingtonpost.com/ivan-eland/ trumps-ban-on-muslims-is_b_8804284.html [https://perma.cc/ZA5M-JCXR].

3. *See, e.g.*, *Donald Trump's Proposed Muslim Ban Is Likely Illegal but...*, REUTERS (June 14, 2016, 10:30 PM), http://www.newsweek.com/donald-trump-muslims-ban-terrorism-radical-islam-guns-orlando-shooting-legal-470470 [https://perma.cc/BT55-QMYZ]; Scott Greer, *Law Professors: Trump's Muslim Moratorium Is Constitutional*, DAILY CALLER (Dec. 12, 2015, 6:10 PM), http://dailycaller.com/2015/12/12/law-professors-trumps-muslim-moratorium-is-consti tutional/ [https://perma.cc/5ERF-RYKG]; Ari Melber, *Legal Scholar: Trump's Muslim Ban Is Probably Legal*, MSNBC (Dec. 22, 2015, 6:28 PM), http://www.msnbc.com/msnbc/trump-muslim-ban-probably-legal [https://perma.cc/CJQ5-9EKD].

4. 130 U.S. 581, 609 (1889). This Note acknowledges that the terrorist attacks in Europe and the United States in 2014 and 2015 provoked Donald Trump's proposal. *See* Diamond, *supra* note 1. To protect the nation in a state of war, the executive's invoking of its war powers may arguably justify a complete ban, even if it targets a religious group. However, this Note focuses on the power to exclude aliens only by virtue of state sovereignty, or international law, and not by the constitutional war powers delegated to the executive.

5. *See also* Margo Schlanger, *Symposium: Could This Be the End of Plenary Power?*, SCOTUSBLOG (July 14, 2017, 9:45 AM), http://www.scotusblog.com/2017/07/symposium-end-plenary-power/ [https://perma.cc/AQ5F-LNSY] ("Under the Chinese Exclusion Case, the Trump Administration would win the current litigation over the travel-ban executive order even if the president testified under oath in open court that his policy was motivated by anti-Muslim animus—indeed, even if the executive order announced an explicit ban on admitting Muslims, as candidate Trump first proposed.")

First, the conceptual framework of constitutional review in discrimination cases, such as whether discrimination against a particular group requires strict- or heightened-scrutiny analysis, does not apply in the immigration context.[6] Second, and more relevant to this Note, although the Court's approval of the Chinese Exclusion Act in *Chae Chan Ping* barred entry based on a national security justification premised on race or nationality rather than religion, such a distinction has no doctrinal significance.[7] The doctrine established in *Chae Chan Ping*—the plenary power doctrine—justifies bans based on both race and national origin, and religion.[8] In *Chae Chan Ping*, the Court established the judiciary's *complete* deference to the political branches' immigration decisions.[9] The doctrine's current form, established in 1972 and reaffirmed in 2015, merely asks whether an exclusion is based on a "facially legitimate and bona fide reason."[10] This test could have also justified the Chinese exclusion in 1889, for Chinese laborers were perceived as a national security threat.[11] As long as an exclusion is, on its face, related to the safety of the nation, it seems that any group is susceptible to such a characterization and is thus excludable.[12] Even today, if the government

6. *See, e.g.*, Bertrand v. Sava, 684 F.2d 204, 212 n.12 (2d Cir. 1982) ("Invidious discrimination against a particular race or group by a public official is ... ordinarily ... inconsistent with a 'facially legitimate and bona fide reason' for government action. However, ... no one disputes [that] 'Congress may employ race or national origin as criteria in determining which aliens to exclude from the country.'" (quoting Vigile v. Sava, 535 F. Supp. 1002, 1016 (S.D.N.Y. 1982))).

7. *See* David G. Savage, *Donald Trump's Proposed Ban on Muslim Immigrants Could Be Legal, Scholars Say*, L.A. TIMES (Dec. 14, 2015, 11:15 AM), http://www.latimes.com/nation/la-na-muslim-ban-legality-20151214-story.html [https://perma.cc/DBX9-68CM].

8. *See Chae Chan Ping*, 130 U.S. at 606 ("[If Congress] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security ... its determination is conclusive upon the judiciary.").

9. *See id.*

10. Kerry v. Din, 135 S. Ct. 2128, 2139-41 (2015) (Kennedy, J., concurring in the judgment); Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972). For an earlier formulation of the doctrine, see *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950).

11. *Chae Chan Ping*, 130 U.S. at 595. Although in that case, the outcome did not even depend on the legitimacy of that threat. *Id.* at 606.

12. Professor Matthew J. Lindsay proposes that in certain contexts, the Court might reject a national security rationale for judicial deference in immigration cases. Matthew J. Lindsay, *Immigration as Invasions: Sovereignty Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.L. L. REV. 1, 54 n.245 (2010). Without rejecting the rationale, the Ninth Circuit has held that it can review the constitutionality of executive actions intended to improve national security. Washington v. Trump, 847 F.3d 1151, 1162-63 (9th Cir. 2017)

linked a person's race or religion to national security concerns, merely facially but with some rational support, the exclusion is upheld.[13]

President Trump did not go so far as to explicitly ban an entire religion[14] when he passed his first executive order in January 2017 that prohibited the entry of refugees and citizens from seven Muslim-majority countries for ninety days.[15] Indeed, lower courts blocked Trump's every attempt—a total of three—to keep out roughly 150 million aliens.[16] The Supreme Court had been reluctant to step in,[17] except when it granted the government's application to stay in part lower courts' injunctions on Trump's first order.[18] But on January 19, 2018, the Court announced that it would hear the latest challenge to Trump's third executive order arising out of the Ninth Circuit.[19]

Whatever happens in the Supreme Court, the plenary power doctrine will survive. The Court's take on the Ninth Circuit's holding[20] in *Hawaii v. Trump* will not disturb the plenary power

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(per curiam), *cert denied*, 138 S. Ct. 448 (2017).

13. This Note assumes that a person's race or religion cannot act as a legitimate proxy to detecting national security threats.

14. Trump's order was, however, recognized as a "Muslim ban." Josh Gerstein & Nolan D. McCaskill, *Trump Eases Up on Travel Ban with New Executive Order*, POLITICO (Mar. 6, 2017, 11:30 AM), https://www.politico.com/story/2017/03/trump-releases-new-travel-ban-executive-order-235720 [https://perma.cc/C78G-G9GD].

15. Exec. Order No. 13769, 82 Fed. Reg. 8977, 8978 (2017).

16. *See* Richard Gonzales, *Supreme Court to Hear Latest Challenge to Trump's Travel Ban*, NPR (Jan. 19, 2018, 7:22 PM), https://www.npr.org/sections/thetwo-way/2018/01/19/579266481/scotus-to-hear-challenge-to-trump-s-travel-ban [https://perma.cc/ED28-YKAA].

17. Lydia Wheeler, *Supreme Court Dismisses Final Case Against Trump Travel Ban*, HILL (Oct. 24, 2017, 5:35 PM), http://thehill.com/policy/transportation/356978-supreme-court-dismisses-final-case-against-trump-travel-ban [https://perma.cc/DD3Q-TK77] (discussing the Court's orders of June and October 2017 to dismiss lawsuits challenging the ban because the ban had expired and thus no "live case or controversy" existed).

18. Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2083 (2017) (per curiam).

19. Gonzales, *supra* note 16; *see also* Trump v. Hawaii, 138 S. Ct. 923 (2018) (mem.); Trump v. Int'l Refugee Assistance Project, 138 S. Ct. 542 (2017) (mem.). Another challenge to the third executive order arising out of the Fourth Circuit has also been appealed to the Supreme Court. *See* Int'l Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018), *petition filed*, No. 17-1194 (U.S. Feb. 23, 2018). As this Note went into print, the Court had reviewed the petition, but postponed its decision as to whether to grant certiorari. *See Int'l Refugee Assistance*, 883 F.3d 233, *appeal docketed*, No. 17-1194 (U.S. Feb. 23, 2018) (distributed for conference of March 23, 2018).

20. The Ninth Circuit's substantive holdings were that the President's third executive order exceeded the scope of his delegated authority under section 1182(f) of the INA; even

doctrine. First, the doctrine treats the exclusion of aliens as a nonjusticiable question without regard to *which* political branch is acting.[21] The current "facially legitimate and bona fide reason" test would thus also apply to the acts of the executive, even if an Establishment Clause challenge is raised.[22] Second, the doctrine would survive even if the Court decided the case on statutory, or nondelegation, grounds, as the Court would determine only whether the executive exceeded its "conditional exercise" of "plenary congressional power to make policies and rules for exclusion."[23] And

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assuming the President's order did not exceed in scope, the President failed to satisfy the requirements of section 1182(f); the President's order violated section 1152(a)(1)(A) of the INA; and the President lacked independent constitutional authority to issue the order. Hawaii v. Trump, 878 F.3d 662, 690, 693-94, 697 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 923.

21. Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[T]he power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments [is] largely immune from judicial control." (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953))); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542-43 (1950) ("The right to [exclude] stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.... [T]he decision to admit or to exclude an alien may be lawfully placed with the President .... The action of the executive ... is final and conclusive."); Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination."); Adam B. Cox & Christina M. Rodríguez, *The President and Immigration Law*, 119 YALE. L.J. 458, 467 (2009).

22. *Knauff*, 338 U.S. at 542 (considering the petitioner-alien's exclusion during Second World War and stating, "The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."); *see also* Sale v. Haitian Ctrs. Council, 509 U.S. 155, 188 (1993) (stating that the executive has "unique responsibility" for foreign and military affairs (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936))). The majority in the Fourth Circuit opinion, *International Refugee Assistance Project v. Trump*, began its analysis of Trump's third executive order by applying this test. 883 F.3d at 263 ("In assessing Plaintiffs' Establishment Clause challenge, we first ask whether the proffered reason for the Proclamation is 'facially legitimate and bona fide.'" (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972))). So did Judge Paul Niemeyer in his dissent, but he reached an opposite conclusion. *Id.* at 364 (Niemeyer, J., dissenting) ("[E]ven assuming a constitutional violation lurked beneath the surface of the Executive's implementation of its statutory authority, the reasons the Executive had provided were 'facially legitimate and bona fide,' so must we reject this similar challenge today.").

23. Kleindienst v. Mandel, 408 U.S. 753, 769-70 (1972); *see also, e.g.*, *Int'l Refugee Assistance Project*, 883 F.3d at 289 (Gregory, J., concurring) ("Simply put, the Court does not consider the 'wisdom of the policy choices' made by the President. Instead, 'we must decide only whether' the Proclamation, 'which reflects and implements those choices, is consistent with' the INA." (quoting *Sale*, 509 U.S. at 165-66)). Similarly, the Ninth Circuit struck down

third, the doctrine would remain untouched if the Court decided the case on separation of powers grounds, as the issue would be whether the executive had constitutional authority, either independently or by the implied or express will of Congress, to issue the executive order.[24]

Instead of finding ways around the plenary power doctrine by appealing to statutory frameworks or constitutional power-allocation theories, this Note tackles the doctrine head on. This Note goes further than the President's "thinly-veiled Muslim ban" and analyzes a twenty-first century *race*-based exclusion, promulgated either by Congress or the executive, under the plenary power doctrine.[25] In analyzing the exclusion, this Note argues that the command of *Chae Chan Ping* is not its holding, the doctrine establishing deference, but its law. Instead of continuing to deform the doctrine through arbitrary and inherently subjective means[26]—efforts that have made

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the executive order on statutory grounds. *Hawaii*, 878 F.3d at 673 ("We conclude that the President's issuance of the Proclamation once again exceeds the scope of his delegated authority.").

24. *See Hawaii*, 878 F.3d at 697-98 ("We therefore must determine whether the President has constitutional authority to issue the Proclamation, independent of any statutory grant—for if he has such power, it may be immaterial that the Proclamation violates the INA."); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

25. Gerstein & McCaskill, *supra* note 14.

26. Professor Hiroshi Motomura, a renowned international law scholar, characterizes the courts' ways around the plenary power doctrine as an improper reliance on "phantom constitutional norms." Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990). For criticisms of the Court's persistent failures to analyze immigration decisions under a traditional constitutional analysis by applying either rational basis or strict scrutiny, see Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 58 (1998) (claiming that the plenary power precedents "are inconsistent with due process and equal protection"); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 1988 IMMIGR. & NAT'LITY L. REV. 115, 124 [hereinafter Henkin, *The Constitution and United States Sovereignty*] (claiming that no theory, including the plenary power doctrine, is exempted from constitutional restraints); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 32 (1985) (claiming that the Constitution requires the U.S. government to respect the rights of human beings everywhere); and Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1028 (suggesting that because "the theoretical basis for *Chinese Exclusion* and its progeny [is] gone, the Court should insist that the political branches apply constitutional rights evenhandedly with respect to both citizens and aliens"); *see also, e.g.*, Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for*

little to no progress over the past 130 years—this Note suggests that the Court revisit *Chae Chan Ping*, reaffirm its source of law, and enforce that law. That law, however, is international law.

The plenary power doctrine, which first excluded Chinese laborers on the basis of their race and nationality, is condemned for its racist and derogatory origins.[27] But even though the foundation of the doctrine was fueled by xenophobic moods and created in an anachronistic worldview, its premises are still largely relevant today.[28] The underlying legal concept—a sovereign nation's inherent power to exclude—is accepted as a given in today's understanding of international relations.[29] Much of the critical scholarship has focused on eliminating the plenary power doctrine and thus pressed the Court to analyze immigration issues under traditional constitutional review.[30] A sovereign state's domestic law may, and likely does, impose direct limitations on its authority to exclude foreign aliens, but such authority—rooted in international law—is not itself unlimited despite domestic law's restraints.[31] Since the Court impliedly approved Congress's act to bar "vast hordes of [Chinese] crowding in upon"[32] the United States based on international law, that law has gone through major changes, primarily by placing limitations on a sovereign's power to exclude. Accordingly, this Note argues that the plenary power doctrine reflects international law norms. Whereas in 1889, when the sovereign's power to exclude based on

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Our Strange but Unexceptional Constitutional Immigration Law, 14 GEO. IMMIGR. L.J. 257, 287 (2000) (hypothesizing that the plenary power doctrine lacks independent force, as the Court's rulings on discrimination cases in the immigration context were consistent with domestic decisions); Motomura, *supra*, at 549 (suggesting a reassessment of the plenary power as a constitutional doctrine as a way out of courts' improper reliance on "phantom constitutional norms"); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J., 339, 353 (2002) (arguing that decreased risks of foreign affairs and the changed nature of international decision-making undermine the reliance on the plenary power doctrine).

27. *See, e.g.*, Henkin, *The Constitution and United States Sovereignty*, *supra* note 26, at 124.

28. *See infra* Part III.B.

29. *See* James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 817 (1983).

30. *See supra* note 26.

31. *See infra* Part III.B; *see also* Scaperlanda, *supra* note 26, at 1015 ("[W]here the international law of sovereignty provides the background norm for constitutional decisionmaking as it does in alienage cases, the Court ought to look at the current norm with its recent limitations.").

32. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

race was accepted both domestically and internationally, that is no longer true. Reconsidering the plenary power doctrine under international law reveals that the doctrine today prohibits race discrimination in admissions.[33]

To accomplish the endeavor set out, Part I discusses the nineteenth-century understanding of the right to exclude prior to *Chae Chan Ping*, the *Chae Chan Ping* Court's grounding of the right to exclude in state sovereignty, and the subsequent erosion of state sovereignty in the twentieth century. Part II argues that customary international law today prohibits racial discrimination in exclusions. Specifically, this Part argues that, assuming the plaintiff succeeds in bringing a prima facie claim against the state for race discrimination under an international law norm, the state would fail in justifying its departure from that norm. This Part also examines the possibility of whether the Court could find racial discrimination in admissions as constituting "degrading treatment." Part III explains why Part II matters. In particular, this Part explains why the *Chae Chan Ping* Court got it right when it relied on international law to define the boundaries of a state's exclusionary power, and how the Court can take advantage of *Chae Chan Ping* to further human rights by holding racial discrimination unlawful in exclusion cases.

I. *CHAE CHAN PING* AND INTERNATIONAL ORDER

Chae Chan Ping created a shift in the international order. Prior to this case, free movement and the humanitarian recognition of individuals dominated the international order; the state's power to exclude stood as an exception.[34] The *Chae Chan Ping* Court flipped the rule and the exception, granting the United States an absolute right to exclude based on the notion of state sovereignty.[35] This Part proceeds by discussing the liberal notions of free movement prior to

33. *See infra* Parts II-III. This Note relies exclusively on racial, and not religious, discrimination because it has been more prevalent. And, while the structural argument in this Note is applicable to religion-based exclusions, this Note is ultimately not concerned with its cross-application to religion and thus renders those considerations outside of its scope.

34. *See infra* Part I.A.

35. *See infra* Part I.B.

Chae Chan Ping, how the Court diverged from that understanding, and how that shift never took hold in its absolute terms.

*A. Pre-*Chae Chan Ping *Era*

Unlike in the post-*Chae Chan Ping* era, a sovereign state's absolute right to exclude was not commonly recognized until the late nineteenth century.[36] The Bible, which influenced the development of international law in the seventeenth and eighteenth centuries, favored free movement across borders.[37] The early Greeks and Romans were fairly liberal in admitting aliens.[38] For Marcus Tullius Cicero, "To debar foreigners from enjoying the advantages of the city [was] altogether contrary to the laws of humanity."[39]

The emergence of the Westphalian system of nation-states created stricter territorial boundaries, but the states continued to endorse the prevailing free-movement policy. In 1852, the Foreign Secretary of the United Kingdom stated that "by the existing law of Great Britain all foreigners have the unrestricted right of entrance into and residence in this country."[40] The United Kingdom did not exclude or expel aliens from the end of the Napoleonic Wars until

36. Nafziger, *supra* note 29, at 809. Patrick J. Charles criticizes James Nafziger's conclusion by claiming that Nafziger "distorts the historical record and ... interprets the Magna Carta too liberally," which was subject to "lawful customs." Patrick J. Charles, *The Plenary Power Doctrine and the Constitutionality of Ideological Exclusions: An Historical Perspective*, 15 TEX. REV. L. & POL. 61, 68 (2010). However, Nafziger does not argue that a sovereign's right to exclude did not exist until the nineteenth century, but rather that it was not *absolute*, meaning that bars to entry were never absolute but subject to preconditions. *See generally* Nafziger, *supra* note 29.

37. Nafziger, *supra* note 29, at 809 & n.20.

38. *Id.* at 809-10.

39. *Id.* at 810 n.25 (first alteration in original) (quoting M. CICERO, DE OFFICILS, bk.III, ch. xi, at 47 (Loeb Classical Library ed. 1923)).

40. JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE 91 (2000) (quoting RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 67 (2d rev. ed. 1988)).

1905.[41] States' constitutions[42] and unilateral declarations[43] also provided for such a right of entry.

Even more noteworthy were the liberal regulations adopted by the Institute of International Law in 1892 regarding aliens' limited right of entry.[44] The regulations provide that a state's right to admit aliens is "'a logical and necessary consequence' of its sovereignty and independence" limited by "humanity and justice."[45] The provisions thereafter articulate a rule of entry based on the aliens' right to enter, and not on a state's right to exclude. Article 6 provides a general rule: "Free entrance of aliens to the territory of a civilized State, may not be generally and permanently forbidden except in the public interest and for very serious reasons."[46] Article 12 then provides some exceptions to an alien's right of entry, such as when he is a vagabond, beggar, criminal, or contagiously ill.[47] Interestingly, the drafters decided against adopting a proposed amendment that would have permitted states to exclude based on "race, customs, or civilization."[48]

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41. GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 97 (1978).

42. *See, e.g.*, CONSTITUCIÓN ESPAÑOLA DE 1876, art. 2 ("Los extranjeros podrán establecerse libremente en territorio español, ejercer en él su industria ó dedicarse á cualquiera profesion." [Foreigners can establish themselves freely in their industry or engage in any profession.]).

43. *See, e.g.*, Déclaration Unilatérale du Gouvernement du Roi de la Haute-Birmanie Indépendente, a la Date du 24 Mai 1884, Officiellement Remise a M. Jules Ferry, Ministre des Affaires Éstrangéres, le 4 Août 1884, par Ambassade Birmane a Paris [1873 Treaty of Friendship, Fr.-Burma], *in* 2 RECUEIL DES TRAITES CONCLUS PAR LA FRANCE EN EXTREME-ORIENT: 1684-1902, 194-95 (Ernest Leroux ed. 1902) ("Le Gouvernement Franscais permettra l'importation en Birmanie des marchandises et matériel nécessaires a la prospéritè, au progrès et á l'indépendance de la Birmanie." [The French Government shall permit the importation into Burma of the goods and materials necessary for the prosperity, progress and independence of Burma.]).

44. The Institute of International Law was created in 1873 as an independent institution to contribute to international law with the aim that it be so implemented. *Origins*, INSTITUT DE DROIT INTERNATIONAL, http://justitiaetpace.org/historique.php [https://perma.cc/F2CQ-2XWM].

45. Nafziger, *supra* note 29, at 832 (footnotes omitted) (quoting INST. OF INT'L LAW, RESOLUTIONS OF THE INSTITUTE OF INT'L LAW: DEALING WITH THE LAW OF NATIONS 104 (James Brown Scott ed. & trans., 1916)).

46. *Id.* (quoting INST. OF INT'L LAW, *supra* note 45, at 105).

47. *Id.* at 833 (quoting INST. OF INT'L LAW, *supra* note 45, at 105).

48. *Id.* (quoting INST. OF INT'L LAW, *supra* note 45, at 104).

In addition to the international order formally recognized by states, the international law publicists of that time, on whose work the Supreme Court later indirectly relied, also denied states an unqualified right to exclude aliens.[49] Hugo Grotius, a prominent early commentator on immigration law, wrote that refugees may not be denied permanent residence provided that they "submit themselves to the established government and observe any regulations [which are] necessary in order to avoid strifes."[50] In discussing the Spaniards' right to travel to the New World, Francisco de Vitoria confirmed they may do so "provided they do no harm to the natives" and claimed that denying admission might constitute an act of war.[51] Christian Wolff, relying on Grotius and Vitoria, similarly argued for free movement, subject to certain state-imposed exceptions.[52] Emerich de Vattel adopted and refined earlier commentators' principles in his influential book, *Le Droit de Gens*,[53] on which the Supreme Court explicitly relied in deciding the progeny cases of *Chae Chan Ping*.[54]

Vattel combined natural and positive law in his international law theory and distinguished between internal and external law.[55] Internal law is rooted in natural law, establishing sovereign duties in "conscience and principle."[56] External law—or positive law, as it is commonly known—is composed of voluntary, conventional, and customary elements[57] and "establishes sovereign rights as a matter of will."[58] Vattel, claimed to have adopted an absolutist view on the states' right to exclude,[59] nonetheless qualified that right.[60] Based on the primitive state of communion and the right of necessity,

49. *Id.* at 810.

50. *Id.* at 811 (quoting HUGO GROTIUS, DE JURE BELLI AL PACIS 202 (Francis W. Kelsey ed., 1925)).

51. *Id.* at 811 (quoting FRANCISCO DE VITORIA, DE INDIS DE JURE BELLI 151 (Ernest Nys ed., 1917)).

52. *Id.* at 812-13.

53. *Id.* at 811-12.

54. Scaperlanda, *supra* note 26, at 1009.

55. Nafziger, *supra* note 29, at 812.

56. *Id.*

57. ASS'N OF AM. LAW SCH., GREAT JURISTS OF THE WORLD 495 (John MacDonnell & Edward Manson eds., 1968).

58. Nafziger, *supra* note 29, at 812.

59. Scaperlanda, *supra* note 26, at 1009.

60. Nafziger, *supra* note 29, at 813.

Vattel provided exceptions to the right to exclude, such as "the right of procuring provisions by force, ... the right of passage," and the right of exiles or fugitives to reside permanently.[61] For Vattel, "Concepts of 'conscience,' [and] 'duties of humanity,' [were] vital."[62]

Vattel's theories proved to be crucial to the twentieth century understanding of a sovereign nation's power to exclude. The decisions of the highest Anglo-American courts, which relied on Vattel to uphold exclusions of specific alien groups in the late nineteenth century, "have been cited as authority throughout the world."[63] The following Section discusses those cases from the U.S. Supreme Court: *Chae Chan Ping v. United States*[64] and its progeny.

B. The Birth of the Plenary Power Doctrine: Chae Chan Ping v. United States

Chae Chan Ping was a Chinese laborer who came to the United States in 1875 during a period of unrestricted Chinese immigration.[65] At that time, the United States sought to promote an influx of cheap Chinese labor.[66] The Burlingame Treaty of 1868, which authorized unrestricted immigration from China, viewed Chinese laborers as subjects of a "most favored nation."[67] Soon after Chae Chan Ping's arrival, nativist anti-Chinese sentiment grew widespread in California and later, throughout the whole nation.[68] In 1878, the California Constitutional Convention expressed to Congress the State's concern about the "Oriental invasion," which was considered "a menace to our civilization."[69]

In 1880, the United States and China negotiated a supplemental treaty limiting the immigration of Chinese laborers.[70] Two years later, Congress passed the Chinese Exclusion Act which suspended

61. *Id.*
62. SATVINDER SINGH JUSS, INTERNATIONAL MIGRATION AND GLOBAL JUSTICE 14 (2006).
63. Nafziger, *supra* note 29, at 823.
64. 130 U.S. 581 (1889).
65. Motomura, *supra* note 26, at 550.
66. *Id.*
67. Lindsay, *supra* note 12, at 40.
68. Motomura, *supra* note 26, at 550.
69. *Chae Chan Ping*, 130 U.S. at 595.
70. Motomura, *supra* note 26, at 550.

the laborers' immigration for ten years.[71] Those Chinese who had come before November 1880 but wished to leave the United States and return at will could obtain a certificate proving their prior entry.[72] In 1884, those certificates became mandatory.[73] Chae Chan Ping obtained a certificate and left for China in 1887.[74] Congress, however, amended the Chinese Exclusion Act on October 1, 1888, categorically prohibiting any Chinese laborer from returning.[75] Chae Chan Ping arrived in San Francisco eight days later, presented his certificate, but was denied entry.[76] In a petition of habeas corpus before the Court, Chae Chan Ping challenged Congress's authority to pass the 1888 amendment, arguing that denial of entry violated the treaty of 1868.[77] The Court responded that, because both treaties and acts of Congress are the supreme law of the land, the one enacted later prevails.[78] Justice Stephen Johnson Field, writing for the majority, then considered Congress's immigration power and rooted it in international law.

The Constitution does not explicitly address the federal government's power to exclude.[79] Before *Chae Chan Ping*, the source of congressional authority to regulate immigration was the Commerce Clause.[80] Justice Field's opinion confirmed that the federal government has the power to regulate immigration but grounded it in the concepts of state sovereignty and self-preservation.[81] Justice Field wrote:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign

71. Act of May 6, 1882, ch. 126, § 1, 22 Stat. 58, 61 (1882) (repealed 1943).
72. Motomura, *supra* note 26, at 550-51.
73. *Id.* at 551.
74. *Chae Chan Ping*, 130 U.S. at 582.
75. Lindsay, *supra* note 12, at 40-41.
76. *Id.* at 41.
77. Motomura, *supra* note 26, at 551.
78. *Chae Chan Ping*, 130 U.S. at 600.
79. Motomura, *supra* note 26, at 551-52.
80. Lindsay, *supra* note 12, at 40.
81. Motomura, *supra* note 26, at 551-52.

> nation acting in its national character or from vast hordes of its people crowding in upon us.[82]

The Court then infamously stated that the political branches could exercise their power to regulate immigration without judicial review, rendering that power plenary: "[If the government] considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security ... its determination is conclusive upon the judiciary."[83]

In claiming that Congress's determinations on the nation's security were "conclusive upon the judiciary," the Court suggested that the political branches had in essence an absolute power to exclude. To obtain deference, the government need only claim that barring a group of people was in the interest of national security. While the doctrine of deference has continued, and the justifications for nonjustificability remain, it is no longer the case under customary international law that race could be considered a factor for admission purposes, even if under the guise of "national security."[84]

The Court expanded Congress's plenary power in immigration matters in two subsequent cases. In *Nishimura Ekiu v. United States*, the Court upheld a provision of the Immigration Act of 1891[85] that made an immigrant who was likely to become a public charge excludable.[86] The Court cited Vattel in creating an oft-quoted proposition for the future, while ignoring the exceptions Vattel afforded to his claim:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.[87]

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82. *Chae Chan Ping*, 130 U.S. at 606.
83. *Id.*
84. *See infra* Part II.
85. Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084 (1891).
86. 142 U.S. 651, 664 (1892).
87. *Id.* at 659.

In *Fong Yue Ting v. United States*, the Court extended the plenary power doctrine to expulsion.[88]

The Court thus made it clear by the late nineteenth century that it would not engage in any judicial review and second-guess the immigration policies set by the political branches.[89] The Chinese Exclusion Act, coupled with the Supreme Court's nod to considering a whole race as a threat to white America, also had a domino effect on other countries.[90] Yet, despite the Court's efforts to articulate an absolutist view of state sovereignty, states began to cede their sovereignty in the twentieth century.

C. Erosion of State Sovereignty: The Individual International Rights Revolution

The turn of the twentieth century saw free movement and entry into a state as an exception, rather than the prior-existing norm, in international relations.[91] But this new absolutist view of a sovereign's powers never took root.[92] Instead, the recognition of the individual as a subject of international law after World War II led to the adoption of binding international covenants on human rights that began to erode state sovereignty.[93] This Section briefly examines this movement.

The atrocities of World War II significantly shifted the international order. One of the effects of the Nuremberg trials was that the individual, and not just the state, became a subject of international law.[94] The United Nations Charter, adopted in 1945, called upon its members to "promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[95] The United Nations established a Commission on Human Rights, which produced an aspirational, nonbinding Universal Declaration of Human Rights

88. 149 U.S. 698, 707 (1893).

89. *See, e.g.*, Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

90. *See infra* Part II.B.2.c.

91. *See supra* Parts I.A-B.

92. *See generally* Nafziger, *supra* note 29.

93. *See* Scaperlanda, *supra* note 26, at 1010.

94. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 839 (1997).

95. U.N. Charter arts. 55(c), 56.

"as a common standard of achievement for all peoples and all nations."[96] A binding covenant on human rights, the International Bill of Rights, followed, along with the western-minded International Covenant on Civil and Political Rights and the socialist-leaning International Covenant on Economic, Social and Cultural Rights.[97] Despite the socio-political conflict between the western and socialist camps, both documents' preambles state that the "foundation of freedom, justice and peace in the world" is "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family."[98] Already by 1990, the international community had developed twenty-two binding international human rights documents,[99] focusing on genocide, apartheid, racial discrimination, the rights of women, and the status of refugees.[100]

The establishment of a legal regime outside of the states suggests a return to the ideas of early international law scholars by transforming natural rights and obligations into positive, or external law.[101] Through the adoption of international treaties, the "individual international rights revolution" fueled the recognition of these rights under customary international law. The following Part discusses customary international law, explains its relevance, and applies it to a hypothetical racial discrimination in the admissions context.

II. CUSTOMARY INTERNATIONAL LAW'S PROHIBITION ON RACIAL DISCRIMINATION IN ADMISSION LAWS

Part I discussed the significant decline of state sovereignty over the twentieth century. Due to this decline, international law came to recognize domestic racial discrimination as unlawful.[102] This Part argues that international law should now recognize *cross-border*

96. Scaperlanda, *supra* note 26, at 1010-11 (quoting G.A. Res. 217A (1948)).

97. *Id.* at 1012.

98. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at pmbl. (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2200, International Covenant on Economic, Social and Cultural Rights, at pmbl. (Dec. 16, 1966).

99. Scaperlanda, *supra* note 26, at 1012.

100. *Id.* at 1013.

101. *Id.* at 1011.

102. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. LAW INST. 1987).

racial discrimination as unlawful as well. Specifically, this Part argues that customary international law prohibits racial discrimination in admissions, which the U.S. Supreme Court can recognize. As later discussed, *Chae Chan Ping* permits—or even demands—an international law analysis because the Supreme Court grounded the United States's exclusionary power in state sovereignty, a concept that is dependent on international order.

This Part proceeds by first discussing the importance of customary international law and its current nonderogable norms. It then lays out the framework for analyzing a racially discriminatory admission law under customary international law and makes a first attempt at analyzing a hypothetical racial exclusion. Finally, this Part discusses the potential of the U.S. Supreme Court to find that racial exclusion constitutes "degrading treatment," which is a violation of a separate human right under customary international law.[103]

A. Jus Cogens and Its Legal Framework

"Customary international law, a source of positive international law, is distinct from conventional law."[104] Every nation is bound by custom unless it specifically dissents during the development of the custom.[105] As immigration law scholar Michael Scaperlanda points out, recognition of customary international law as a distinct source of international law is important because "custom binds non-contracting states," makes the norms reflected in treaties binding even for those states in which treaties are not self-executing, and may abrogate reservations to treaties that states have made.[106]

In international law, "jus cogens" norms function as "very strong rule[s] of customary international law"[107] or even as "international

103. *Id.*

104. Scaperlanda, *supra* note 26, at 1014.

105. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. b.

106. Scaperlanda, *supra* note 26, at 1014.

107. Karen Parker & Lyn Beth Neylon, Jus Cogens*: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 417 (1989) (alteration in original) (quoting ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 132 n.73 (1971)).

constitutional law."[108] Jus cogens refers to norms that are peremptory—that is, they supersede conflicting treaties and custom, are mandatory and nonderogable, and "can be modified only by general international norms of equivalent authority."[109] International human rights limiting states' sovereignty have acquired the status of jus cogens.[110] The seven human rights that have achieved jus cogens status are: prohibitions on "genocide[;] ... slavery[;] ... murder or causing the disappearance of individuals[;] ... torture or other cruel, inhuman, or degrading treatment or punishment[;] ... prolonged arbitrary detention[;] systematic racial discrimination[;] or ... a consistent pattern of gross violations of internationally recognized human rights."[111]

Analyzing violations of jus cogens is fairly straightforward in racial discrimination cases. First, the plaintiff has to make out a prima facie claim of direct or indirect discrimination.[112] If the plaintiff succeeds, the burden shifts to the state to justify its disparate treatment.[113] Because no court has applied the jus cogens prohibition on racial discrimination in admissions, the following analysis *assumes* that a plaintiff has made a prima facie case.[114] It then considers the state's two strongest justifications for treating admissions differently: (1) courts have never applied the jus cogens norm in admissions; and that (2) international treaties prohibiting racial discrimination exempt racial discrimination in the context of admissions.

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108. *Id.* at 417 n.28 (quoting Mark W. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT'L 359, 363 (1988)).

109. Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Duty of Jus Cogens*, 34 YALE J. INT'L L. 331, 331-32 (2009).

110. *See* Scaperlanda, *supra* note 26, at 1014.

111. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. LAW INST. 1987).

112. Emily M. Borich, *"Anti-Haitianismo": From Violence to a Travesty of Justice in the Dominican Republic*, 28 N.Y. INT'L L. REV. 61, 65 (2015).

113. *Id.*

114. The analysis also assumes the legality of discrimination based on nationality alone.

B. The Hypothetical Racial Exclusion: Scrutinizing the State's Justifications

The state would likely argue that, although jus cogens generally prohibits racial discrimination, states' admission of aliens stands as an exception. This broader argument splits into two. First, the state would claim that no court has applied the jus cogens norm in admissions. Second, the state would claim that international treaties that prohibit racial discrimination exempt states' immigration measures.

1. Justification #1: Jus Cogens Against Discrimination Has Never Been Applied in Admissions

The state's first argument, that no court has applied the jus cogens norm against racial discrimination in admissions, does not presumptively favor the state. The argument cuts both ways because the absence of action can explain either the exclusion's legitimacy or the lack thereof. Assuming this argument does favor the state, however, this Note has attempted, but failed to unearth any court decision either *expressly* applying or refusing to apply the antidiscrimination principle as jus cogens in a state's race-based or racially discriminatory exclusion. However, two courts—the European Commission and the New Zealand Supreme Court—have at least domestically rejected the antidiscrimination norm as exempting admissions from its application. These decisions have international-law implications. When finding customary international law, U.S. courts rely on various sources, such as "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by *judicial decisions* recognizing and enforcing that law."[115]

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115. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (emphasis added) (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). In the Court's foundational case for the sources of customary international law, *The Paquete Habana*, the Court stated:

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

In *East African Asians v. United Kingdom*, thirty-one citizens of the United Kingdom sought entry into Britain in 1970.[116] The United Kingdom authorities refused admission to some of them under the Commonwealth Immigrants Act of 1968 (Act),[117] which imposed immigration controls on United Kingdom passport-holders in the United Kingdom's former colonies of Kenya and Uganda, but no other United Kingdom citizens.[118]

The European Commission on Human Rights[119] (Commission) found multiple violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[120] The Commission found that the Act discriminated based on race and, as applied in "special circumstances,"[121] constituted "degrading treatment" within the meaning of the ECHR.[122] This case involved the exclusion of citizens, but to find "degrading treatment," the Commission derived the rights of citizens from the rights of *aliens*.[123] The Commission inferred from its case law regarding aliens' right to asylum and the right not to be expelled—a violation of which may constitute "inhuman treatment"—that the contracting parties to the ECHR "agreed to restrict the free exercise of their powers under *general international law*, including the power to control the *entry* and exit of aliens, to the extent and within the limits of the obligations which they assumed under th[e] treaty."[124]

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175 U.S. 677, 700 (1900) (citing Hylton v. Guyot, 159 U.S. 113, 163-64, 214-15 (1895)).

116. East African Asians v. United Kingdom, App. No. 4403/70, 31 Eur. H.R. Rep. 5, 7 (1973).

117. *Id.*

118. *See id.* at 58.

119. The commission is now known as the European Court of Human Rights. *See European Court of Human Rights*, INT'L JUST. RESOURCE CTR., http://www.ijrcenter.org/european-court-of-human-rights/ [https://perma.cc/84SF-UHJF].

120. *East African Asians*, 31 Eur. H.R. Rep. at 58, 62; *see* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

121. The special circumstances were that (1) the applicants had previously received a "pledge" of free entry; (2) they, as United Kingdom citizens, had nowhere else to seek admission than to the United Kingdom because their East African residence became illegal; and (3) as citizens and not aliens, the discriminatory immigration control rendered them second-class citizens by denying them the same right of entry. *East African Asians*, 31 Eur. H.R. Rep. at 57-58, 60-61.

122. *Id.* at 54-62.

123. *Id.* at 54.

124. *Id.* (emphasis added).

Extending such considerations to citizens, the Commission concluded that although the right to entry was not protected, a refusal of entry may "in certain special circumstances ... violate ... independently another [protected] right"—the right not to be subjected to "degrading treatment."[125]

The Commission's finding of "degrading treatment" is further discussed in Part II.C. For present purposes, however, it is important to highlight the Commission's reasoning. Even though this case involved a state's violation of a treaty, the Commission claimed that when signing this treaty, the contracting parties agreed to restrict their power to control the *entry* of aliens under "general international law."[126] In other words, when finding that the UK citizens' exclusion amounted to "degrading treatment," the Commission presupposed that the ECHR must demand such an interpretation because international law would demand it.[127] The Commission's ultimate finding of a violation within the ECHR is therefore not as significant. Although the Commission focused on a finding of "degrading treatment," its reasoning extended to an analysis of the prohibition against racial discrimination under international law.[128] Here, the Commission had no reason to go that far because its finding of racial discrimination fell under the ECHR's application.[129]

Although racial exclusions were once politically accepted, judicial opinions on such exclusions are rare because states began to repeal their discriminatory admission laws in the mid-twentieth century.[130] This trend makes *East African Asians* exceptional. The case out of New Zealand did not involve a discriminatory exclusion by the State, but the New Zealand Supreme Court still showed hostility toward a state's *absolute* power to exclude.[131] In 1978, the New Zealand Supreme Court rejected the State's view that common law countries possessed an absolute right to exclude aliens, calling it "xenophobic" and stating that "the Royal prerogative to keep foreigners at bay has been superseded by the modern transportation and

125. *Id.* at 54-55.
126. *Id.* at 54.
127. *See id.* at 54-55.
128. *Id.*
129. *See id.* at 58-59, 62.
130. *See infra* Part II.B.2.c.
131. *See Chandra v. Minister of Immigration* [1978] NZSC, [1978] 2 NZLR 559 at [568] (N.Z.).

the mass population movements of the 20th century."[132] Although the court did not reference international law, it based its conclusion on the drastically different international order.[133] Further, its short, yet swift, dismissal of the suggestion that a state has the absolute power to exclude[134] reasonably implies that the court would have rejected the State's argument for a racial exclusion as well.

Although no court has expressly applied the jus cogens norm in race-based exclusions, these two rulings suggest that they could have. The European Commission essentially presupposed such a finding, and the New Zealand Supreme Court's finding a state's absolute exclusionary power as "xenophobic" hardly leaves room to characterize a racial exclusion as anything different. Assuming the lack of cases applying jus cogens in racial exclusions favors the state's position, these courts' opinions overcome any such presumption.

2. Justification #2: Applicable Treaties Prohibiting Discrimination Exempt Admissions

The state's second, and stronger, justification would rely on the widely known treaties prohibiting racial discrimination that seemingly exempt admissions from their application. The state may further argue that these exemptions are evidence of exceptions in the jus cogens prohibition. This Subsection discusses these treaties and their shortcomings. As with judicial opinions, the U.S. Supreme Court has recognized international conventions and treaties as sources of customary international law.[135]

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132. *Id.*

133. *See id.*

134. *See id.*

135. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 734-35 (2004); *see also* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1019 (9th Cir. 2014) (claiming that international conventions are sources of international law). The fact that neither of these treaties is self-executing is insignificant because customary international law can make norms reflected in treaties binding even for those states in which treaties are not self-executing. *See* Scaperlanda, *supra* note 26, at 1014.

a. The International Convention on the Elimination of All Forms of Racial Discrimination

International law scholar Gabriel J. Chin has argued that international covenants addressing racial discrimination suggest that international law does not authorize states to regulate immigration on the basis of race.[136] Chin claims that the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) is "the broadest expression of the antidiscrimination principle in international law."[137] Signatories to this convention, including the United States, commit "to engage in no act or practice of racial discrimination against persons, groups of persons or institutions"[138] and "to prohibit and to eliminate racial discrimination in all its forms."[139]

Other scholars respond that a closer reading of this instrument reveals limitations in the immigration context.[140] Article 1(3) of the CERD provides that the convention does not "in any way" affect the laws states may pass regarding "nationality, citizenship, or naturalization, provided that such provisions do not discriminate against any particular nationality."[141] Article 1(2) of the CERD provides that the convention does not apply to state discrimination "between citizens and non-citizens."[142] Article 1(1) defines racial

136. Chin, *supra* note 26, at 62.

137. *Id.* at 60.

138. International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(1)(a), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]. The United States ratified the convention in 1994. *CERD*, U.S. HUM. RTS. NETWORK, http://www.ushrnetwork.org/our-work/issues/cerd [https://perma.cc/J267-KZSX].

139. CERD, *supra* note 138, art. 5. The convention defines "racial discrimination" as

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Id. art. 1(1).

140. Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U.C. DAVIS L. REV. 701, 730 (2005); Liav Orgad & Theodore Ruthizer, *Race, Religion and Nationality in Immigration Selection: 120 Years After the Chinese Exclusion Case*, 26 CONST. COMMENT. 237, 268-70 (2010).

141. Augustine-Adams, *supra* note 140, at 730-31 (quoting CERD, *supra* note 138, art. 1(3)).

142. CERD, *supra* note 138, art. 1(2).

discrimination only with respect to "human rights and fundamental freedoms," and it is questionable whether entry to a state is either of those.[143]

The CERD therefore seems to exempt immigration matters from its application, including admission criteria. Moreover, the convention protects only citizens by exempting a state's "distinctions, exclusions, restrictions or preferences ... between citizens and noncitizens."[144] However, the apparent exemptions in the CERD fundamentally conflict with another, equally authoritative treaty. The Convention Relating to the Status of Refugees (the Geneva Convention on Refugees) extends the prohibition against racial discrimination to a class of noncitizens by requiring signatories to afford benefits to refugees "without discrimination as to race, religion or country of origin."[145] Therefore, a noncitizen alien petitioning for entry into a state as a refugee enjoys the determination of that right free from racial discrimination. By extension, a noncitizen, nonrefugee alien should also enjoy a determination of entry free from racial discrimination because it seems unreasonable to claim that an individual's right not to be racially discriminated against is somehow stronger once he has a fear of persecution in his country of nationality.[146] An individual's right not to be racially discriminated against is not enhanced just because that same right is not recognized, but violated, in his native country.

Admittedly, this argument assumes that a state *will* admit refugees while excluding other aliens. But a state has no inherent duty to admit refugees.[147] A key customary international law norm recognizes only the prohibition of *removing* an individual to a country where he risks facing persecution—the principle of *non-refoulement*.[148] However, to respect that principle in practice means to

143. Orgad & Ruthizer, *supra* note 140, at 269 (quoting CERD, *supra* note 138, art. 1(1)).

144. CERD, *supra* note 138, art. 1(2).

145. Convention Relating to the Status of Refugees, art. 3, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Geneva Convention on Refugees]; *see also* Chin, *supra* note 26, at 61.

146. A refugee is an individual who is outside of his country of nationality and "is unable" or "unwilling to return to it" due to a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." Geneva Convention on Refugees, *supra* note 145, art. 1(A)(2).

147. JAMES C. HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 301 (2005).

148. Aoife Duffy, *Expulsion to Face Torture?* Non-Refoulement *in International Law*, 20 INT'L J. REFUGEE L. 373, 389 (2008) (arguing that the principle of *non-refoulement* is firmly

admit an individual to determine whether a risk of persecution exists, even if the state later decides to send him to a country where no such risk exists.[149] The principle of *non-refoulement* thus recognizes a limited duty to admit refugees.[150] If a state has a limited duty to admit refugees, whose admission it must consider without discrimination on racial grounds, the state must similarly consider a nonrefugee's admission. If the state could racially discriminate against nonrefugees, but not against refugees, then an alien's right not to be discriminated against would depend on the actions of her native country—persecution or the individual's legitimate fear thereof—and not on the alien herself. This is an unreasonable premise. Thus, if refugees as a class of noncitizens are protected from racial discrimination in the determination of their admissions, then so are other noncitizens.

To justify race discrimination in admissions, the state's reliance on this treaty is therefore undermined because both refugees and nonrefugees have a right not to be racially discriminated against based on the refugees' limited de facto right of entry. However, the state would plead its reliance on another treaty, to which this Note now turns.

b. The International Covenant on Civil and Political Rights

Like the CERD, the International Covenant on Civil and Political Rights (ICCPR), appears to prohibit any kind of racial discrimination. Article 26 of the ICCPR, to which the United States is a party, provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion,

established in customary international law). *But see* HATHAWAY, *supra* note 147, at 364 (claiming that "*refoulement* still remains part of the reality for significant numbers of refugees, in most parts of the world").

149. *See* HATHAWAY, *supra* note 147, at 301.

150. *See id.*

> political or other opinion, national or social origin, property, birth or other status.[151]

However, other articles of the ICCPR seem to exempt immigration and citizenship matters from its application.[152] Article 2 provides that a state signatory commits "to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind, such as race."[153] The covenant also outlines some specific migration rights. Article 12 provides the right to move and choose a residence within a state territory, the right to leave any territory, and the right to return to one's own country,[154] but no other. Thus, the ICCPR is limited to states' territory and domestic jurisdiction, treating territorial boundaries as sacred.

But the United Nations switched course in 1985 when the United Nations General Assembly adopted the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live (Declaration on Aliens' Rights).[155] This instrument further guarantees the human rights of aliens.[156] Notably, unlike the prior international covenants, this declaration is less deferential to states' authority concerning immigration. Article 2 provides:

> Nothing in this Declaration shall be interpreted as legitimizing the illegal entry into and presence in a State of any alien, nor shall any provision be interpreted as restricting the right of any State to promulgate laws and regulations concerning the entry of aliens and the terms and conditions of their stay or to establish differences between nationals and aliens. However, such laws and regulations *shall not be incompatible with the*

151. ICCPR, *supra* note 98, art. 26; *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&clang=_en [https://perma.cc/BLA9-36U2] (listing the United States as a party to the ICCPR).

152. Augustine-Adams, *supra* note 140, at 731-33.

153. ICCPR, *supra* note 98, art. 2 (emphasis added); *see also* Orgad & Ruthizer, *supra* note 140, at 269.

154. ICCPR, *supra* note 98, art. 12(1)-(3). The term "own country" is likely interpreted as one of which an individual has citizenship.

155. G.A. Res. 40/144, Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (Dec. 13, 1985) [hereinafter Declaration on Aliens' Rights].

156. *See id.*

> *international legal obligations* of that State*, including those in the field of human rights*.[157]

The meaning of the term "international legal obligations ... including those in the field of human rights"[158] has not been defined by the courts. However, the background of this declaration suggests that the term, at the very least, implies a general prohibition against racial discrimination. The United Nations adopted the declaration in response to Uganda's mass expulsion of Asians in 1972 when the Ugandan president, in response to Asians' "sabotag[ing] the economy," ordered around fifty thousand alien Asians to leave the country in ninety days.[159] Because that case involved an expulsion, the United Nations need not have included provisions regarding the entry of aliens. But, as it did, the United Nations must have concluded that the jus cogens antidiscrimination principle applies to both entry and exit.

Article 2 of the Declaration on Aliens' Rights appears to directly conflict with the CERD, which exempts distinctions between citizens and noncitizens from its application.[160] This declaration also conflicts with the ICCPR, which commits states to recognize rights only within their domestic jurisdiction.[161] However, as not legally binding,[162] the declaration does not supersede the CERD or the ICCPR. But along with the Geneva Convention on Refugees, which arguably recognizes refugees' limited de facto entry based on customary international law, the Declaration on Aliens' Rights suggests a shift away from the rigid exemptions in the CERD. They are further evidence of the continuing "individual rights revolution."[163]

The state could nonetheless claim that precisely because the Declaration on Aliens' Rights and the Geneva Convention on

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157. *Id.* art. 2 (emphasis added).

158. *Id.*

159. JEAN-MARIE HENCKAERTS, MASS EXPULSION IN MODERN INTERNATIONAL LAW AND PRACTICE 20, 22, 26 (1995).

160. *Compare* Declaration on Aliens' Rights, *supra* note 155, art. 2, *with* CERD, *supra* note 138, art. 1(2).

161. *Compare* Declaration on Aliens' Rights, *supra* note 155, art. 2, *with* ICCPR, *supra* note 98, art. 2.

162. *See* Sandesh Sivakumaran, *The Rights of Migrant Workers One Year on: Transformation or Consolidation?*, 36 GEO. J. INT'L L. 113, 134-35 (2004).

163. *Cf.* Scaperlanda, *supra* note 26, at 1009-11.

Refugees have no formal effect on the CERD and ICCPR, they are irrelevant, and the customary effect in the exception remains. But despite states' adoption of the CERD and ICCPR in the 1960s,[164] their immigration practices suggest they did not think the antidiscrimination principle exempted admissions from its application.[165]

c. State Practices Undermine CERD and ICCPR

Asian immigration into the Americas, Australia, and Canada led to the passage of racially discriminatory exclusion laws.[166] Democratic polities headed this movement, and undemocratic governments in South America followed.[167] The United States was the first among the Western democracies to adopt a racially explicit immigration law, first restricting and then banning the entry of Chinese laborers.[168] Other states quickly followed suit. The Canadian legislature first implemented a head tax for every Chinese immigrant in 1885,[169] then banned "immigrants belonging to any race deemed unsuitable to the climate or requirements of Canada,"[170] and finally banned, with certain exceptions, "any immigrant of any Asiatic race" in 1923.[171] Australia, on the other hand, did not include racial or national-origin terms in its 1901 Immigration Restriction Act.[172] But it nonetheless implemented a "White Australia" policy[173] by selectively enforcing its "dictation test."[174] Britain passed

164. *See supra* notes 98, 138.

165. *See infra* Part II.B.2.c.

166. *See* DAVID SCOTT FITZGERALD & DAVID COOK-MARTIN, CULLING THE MASSES: THE DEMOCRATIC ORIGINS OF RACIST IMMIGRATION POLICY IN THE AMERICAS 334 (2014); Nafziger, *supra* note 29, at 816. New Zealand also experienced an increase in Asian immigration at that time. *Id.* at 816. However, this Note omits New Zealand's policy towards Asians, as it was similar to Australia's. *See* Robert A. Huttenback, *No Strangers Within the Gates: Attitudes and Policies Towards the Non-White Residents of the British Empire of Settlement*, 1 J. IMPERIAL & COMMONWEALTH HIST. 271, 294 (1973).

167. FITZGERALD & COOK-MARTIN, *supra* note 166, at 11.

168. *See supra* Part I.B.

169. FITZGERALD & COOK-MARTIN, *supra* note 166, at 145 tbl.4.1.

170. *Id.*

171. *Id.*

172. CHRISTIAN JOPPKE, SELECTING BY ORIGIN: ETHNIC MIGRATION IN THE LIBERAL STATE 45 (2005).

173. *See id.* at 44-49.

174. The 1901 Immigration Restriction Act defines a "prohibited" immigrant as "[a]ny person who when asked to do so by an officer fails to write out at dictation and sign in the

its Aliens Act of 1905 in response to growing Jewish immigration,[175] but the Act was racially neutral and prohibited "undesirable[s]" on the basis of lack of support, or if the individual was a "lunatic[,] idiot," or diseased.[176]

South American countries, with the exception of Argentina, were adamant in passing racially explicit immigration laws, focusing both on positive and negative preferences.[177] The states welcomed immigration from Europe,[178] but banned or restricted Asian, African, Jewish, or Roma immigration.[179] For example, in 1938 Bolivia declared itself open to all aliens except Chinese, blacks, *gitanos*,[180] and Jews not "valuable to national activities."[181] A 1922 Colombian law barred the entry of immigrants who, due to their ethnicity, would be "inconvenient" for the country and the "better development of the race."[182] In 1934, a Costa Rican law prohibited the migration and employment of "people of color."[183] Guatemala excluded Chinese in 1896, the "Mongolian race" in 1909, Hindus and *gitanos* in 1927, and blacks in 1936.[184] Uruguay "absolutely prohibited" the entry of Asians, Africans, Bohemians, and *gitanos* in 1890, and in 1902

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presence of the officer a passage of fifty words in length in an European language directed by the officer." *Id.* at 45-46 (alteration in original). This was a "trick test," as an individual became "prohibited" only by failing the test, but the government would pick out those individuals before administering the test. *Id.* at 46.

175. Helena Wray, *The Aliens Act 1905 and the Immigration Dilemma*, 33 J.L. & SOC'Y 302, 308 (2006).

176. *Id.* at 311.

177. For reasons why Argentina did not pass racially explicit immigration laws, see FITZGERALD & COOK-MARTIN, *supra* note 166, at 300. Brazil's first immigration law did not make ethnic distinctions either, yet excluded blacks in practice. *See id.* at 274.

178. For example, a Peruvian law of 1891 provided that "foreigners of the white race" would receive room and board upon arrival, tax exemptions, and other incentives. *Id.* at 374.

179. *See id.* at 274-332; *see also* Angela S. García, *Ethnic Selection in Sixteen Countries*, *in* FITZGERALD & COOK-MARTIN, *supra* note 166, app. at 351-77.

180. "Gitano" means "gypsy" in English. *Gitano*, CAMBRIDGE SPANISH-ENGLISH DICTIONARY, http://dictionary.cambridge.org/us/dictionary/spanish-english/gitano?fallbackFrom=english-spanish [https://perma.cc/X3DL-M8DK].

181. García, *supra* note 179, at 351, 354 (quoting Supreme Res. of Mar. 14, 1938, *Selección en el Ingreso de Judíos*).

182. *Id.* at 357 (quoting L. 114 diciembre 30, 1922, DIARIO OFICIAL [D.O.] (Colom.)). Colombia also banned the entry of laborers of African race in 1847, Chinese from 1887-92, and *gitanos* regardless of nationality in 1935. *Id.* at 356-57.

183. *Id.* at 359 (quoting INT'L ORG. FOR MIGRATION, ASPECTOS JURÍDICOS E INSTITUCIONALES DE LAS MIGRACIONES: COSTA RICA 3 (1991)).

184. *Id.* at 364-65.

prohibited "elements harmful to the mass of our population," including "all damaging influences such as inferior races."[185]

As with the institution of racial bans, the United States was the first to reverse the trend, repealing the Chinese Exclusion Act in 1943[186] and granting races native to India the privilege to enter in 1946.[187] Canada repealed its Chinese Immigration Act in 1947[188] and removed all hints of racial discrimination from immigration regulations and procedures in 1967.[189] The "White Australia" policy lasted longer than the racially exclusive immigration policy of other colonist states, but ultimately ended in 1973.[190] The Australian Prime Minister Gough Whitlam's use of language in abandoning "White Australia" is telling:

> One of the crucial ways in which we must improve our global reputation is to apply our aspirations for equality at home to our relations with the peoples of the world as a whole .... [W]e have an *obligation* to remove methodically from Australia's laws and practices all racially discriminatory provisions .... As an island nation of predominantly European inhabitants situated on the edge of Asia, we cannot afford the stigma of racialism.[191]

Britain, the previous head of the Commonwealth states of Australia and Canada, continued to abstain from instituting a "colour bar" in order to "maintain [its] great metropolitan tradition of hospitality to everyone from every part of [its] Empire."[192]

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185. *Id.* at 377.

186. Act of December 17, 1943, Pub. L. No. 199, 57 Stat. 600. For a short discussion on the bill's development, see EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF U.S. IMMIGRATION POLICY 1798-1965, at 264-65 (1981). In 2011, the Senate passed a resolution renouncing anti-Chinese laws as "'incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal' and 'incompatible with the spirit of the United States Constitution.'" FITZGERALD & COOK-MARTIN, *supra* note 166, at 337 (quoting S. Res. 201 (2011)).

187. RICHARD PLENDER, INTERNATIONAL MIGRATION LAW 65 (1972). However, de facto discrimination continued due to the unfavorable quota system. *Id.*

188. *See id.*

189. Harold Troper, *Canada's Immigration Policy Since 1945*, 68 INT'L J. 255, 270 (1993).

190. *See* JOPPKE, *supra* note 172, at 64-65.

191. *Id.* at 64 (alteration in original) (emphasis added) (quoting Commonwealth, *Parliamentary Debates*, House of Representatives, 24 May 1973, 2649 (Gough Whitlam, Foreign Minister (Austl.))).

192. *Id.* at 97 (statement of Sir David Maxwell Fyfe) (quoting RANDALL HANSEN, CITIZENSHIP AND IMMIGRATION IN POST-WAR BRITAIN 50 (2000)). On the other hand, the Common-

South American countries acted likewise. In Argentina, the 1949 constitution prohibited race as a criterion for immigrant selection, although it maintained a preference for Europeans.[193] Brazil repealed its nationality quotas in 1980.[194] Bolivia repealed its restrictions of Jews and *gitanos* in 1996.[195] Costa Rica prohibited all immigration restrictions based on race in 1973.[196] Guatemala repealed its various racial exclusions in 1986.[197] In 2008, Panama became the last country in the Americas to repeal racially explicit immigration restrictions.[198]

Therefore, while states may have *formally* agreed to exempt the admissions context from the antidiscrimination principle's application in the 1950s and 1960s,[199] that agreement meant very little in practice. States' uniform abandonment and even prohibition of race discrimination in admissions since the 1940s until the early 2000s suggests that the seeming exemptions in CERD and ICCPR are antiquated. More importantly, contradiction with state practices implies these exemptions do not reflect current international law. The Supreme Court has stated that claims of international law norms "must be gauged against the current state of international law."[200] Reliance on these treaties for a jus cogens exception is therefore unwarranted.

The state's two likely justifications for differential treatment in admissions under international law would be severely undermined. The state's argument on the lack of cases applying jus cogens to

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wealth Immigrants Act of 1971 created a "racial contrast" by subjecting many British passport-holding Asians of West Africa to migration controls within the Commonwealth. *Id.* at 97-98. (quoting Parl. Deb. HC (5th Ser.) (1971) col. 46). That policy ended in 1981. *See id.* at 102-03.

193. FITZGERALD & COOK-MARTIN, *supra* note 166, at 322. The subsequent military regime abrogated the Constitution of 1949, but the regime's immigration law of 1981 only provided for a positive preference of immigrants. *See id.* at 324, 327.

194. *Id.* at 289.

195. García, *supra* note 179, at 354.

196. *Id.* at 359.

197. *See id.* at 364-65.

198. *Id.* at 372.

199. *See supra* notes 95-98, 137-39 and accompanying text.

200. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 (2004); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) ("[C]ourts must interpret international law not as it was ..., but as it has evolved and exists among the nations of the world today." (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796))).

race-based exclusions[201] can presumptively weigh in favor of either the plaintiff or the state. As an empirical matter, the recent reversals of discriminatory admission laws may explain this absence: courts had no reason to apply international law if changing domestic law aligned with domestic antidiscrimination policies. Even if this absence presumptively weighed in favor of the state, the opinions of at least two courts have international law implications that overcome this presumption.[202] Finally, the exemptions in the applicable international treaties prohibiting racial discrimination fundamentally conflict with state practices and therefore do not reflect current international law.[203] If a plaintiff brought a prima facie case of race discrimination in admission policy, the state would fail in shouldering its burden on these grounds.

C. International Law's Prohibition Against Degrading Treatment

A racially discriminatory admissions measure may also constitute degrading treatment under customary international law. If the plaintiff succeeds in showing a jus cogens violation in admissions, this means that international law can prohibit merely extraterritorial effects. In other words, customary international law may give aliens standing in the admissions context.[204] Following such a finding, a court could further consider whether a race-based exclusion violates other jus cogens norms. This Section analyzes the U.S. Supreme Court's potential to find a race-based exclusion as constituting "degrading treatment" of aliens. To explore this possibility, this Section first discusses as an example the *East African Asians* case that held racial exclusion to be "degrading treatment" based on dignitary harms. Then, it examines whether the Court could do the same.

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201. *See supra* Part II.B.1.

202. *See supra* Part II.B.1.

203. *See supra* Part II.B.2.

204. Admittedly this kind of standing argument is significantly more persuasive in a supranational court, like the ECHR, rather than in a state's domestic court.

1. East African Asians v. United Kingdom

As discussed in Part II, the European Commission found in *East African Asians* that the United Kingdom subjected its citizens to "degrading treatment" in violation of the ECHR when it restricted admission to some of its citizens on racial grounds.[205] Because the U.S. Supreme Court has not defined the term "degrading treatment," the Commission's decision is instructive in defining the term under international law. The Court's jurisprudence is certainly different from that of the Commission in all respects, but the Court, like the Commission, can ground the term "degrading treatment" in "dignity"—a term with which the Court is all too familiar[206]—without appealing to the Commission's decision.

In its decision, the Commission stated that although the right to entry is *not* protected, a refusal of entry may "in certain special circumstances ... violate quite *independently* another [protected] right"—the right not to be subjected to "degrading treatment."[207] In finding "degrading treatment," the Commission denied that the term was limited to physical acts.[208] The Commission stated:

> The term "degrading treatment" in this context indicates that the general purpose of the provision is to prevent *interferences with the dignity of man* of a particularly serious nature. It follows that an action which lowers a person in rank, position, reputation or character can only be regarded as "degrading treatment" in the sense of Article 3 where it reaches a certain level of severity.[209]

The Commission concluded that, as here, racial discrimination in certain circumstances may by itself amount to degrading treatment, and that to "publicly ... single out a group of persons for differential

205. *See supra* notes 116-25 and accompanying text.

206. *See infra* Part II.C.2.

207. East African Asians v. United Kingdom, App. No. 4403/70, 31 Eur. H.R. Rep. 5, 54-55 (1973).

208. *Id.* at 55. The Commission stated the neither the term "torture" nor "inhuman treatment" is limited to physical acts, either. *Id.*

209. *Id.* (emphasis added).

treatment on the basis of race might ... constitute a special form of affront to human dignity."[210]

The Commission's use of the term "dignity" in defining an international human right is nothing new. The concept of dignity as a basis for equal human rights is internationally well-recognized. Signatories to the United Nations Charter commit to "reaffirm faith ... in the dignity and worth of the human person."[211] The Universal Declaration of Human Rights states that "the inherent dignity" and "equal and inalienable rights" of all are "the foundation of freedom, justice and peace."[212] Various countries even protect a person's dignity in their constitutions.[213] For example, Article I of the German Constitution provides: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[214] In addition to the ECHR, another supranational adjudicative body has linked the idea of dignity to discrimination. In 2009, the United Nations Human Rights Committee found Spain in violation of Article 26 of the ICCPR for targeting certain individuals in identity checks based on their race.[215] The Committee stated that to target only persons with specific physical or ethnic characteristics "would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the public at large and would run counter to an effective policy aimed at combating racial discrimination."[216]

Although the Commission found "degrading treatment" within the meaning of the ECHR, a jus cogens norm recognized in the *Restatement (Third) of the Foreign Relations Law of the United*

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210. *Id.* at 62.

211. U.N. Charter pmbl.

212. G.A. Res. 217 (III), A Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948).

213. The South African Constitution speaks of "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms." CONST. OF REPUB. OF S. AFR., Oct. 11, 1996, ch. 1 § 1(a). The constitutions of Brazil, Costa Rica, and Nicaragua also include references to "dignity," whereas Canada and Israel have made dignitary concerns a constitutional importance. Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 682-83 (2005).

214. GRUNDGESETZ [GG] [BASIC LAW] art. 1, *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html [https://perma.cc/E8PY-MUTT].

215. U.N. Human Rights Comm., Williams Lecraft v. Spain, ¶¶ 6.5, 7.3-.4, 9, U.N. Doc. CCPR/C/96/D/1493/2006 (July 27, 2009), https://www.opensocietyfoundations.org/sites/default/files/decision-en_20090812.pdf [https://perma.cc/4S2E-WVAX].

216. *Id.* at ¶ 9.

States similarly prohibits "torture or other cruel, inhuman, or degrading treatment or punishment."[217] The following Subsection shows that the Court could also define the term "degrading treatment" through dignity based on its well-established track record of recognizing dignitary harms.

2. Defining "Degrading Treatment" Through the Court's "Dignity Jurisprudence"[218]

A jus cogens norm prohibits "torture or other cruel, inhuman, or degrading treatment or punishment."[219] Excluding a group of individuals on racial grounds is unlikely to be torture. It is also unlikely that a U.S. court would deem it "punishment," as the Supreme Court has held that deportation—a deprivation[220] of a larger set of rights than exclusion—is not "punishment."[221] The Court, however, cited the dissent of that same case over a hundred years later for the seemingly *opposite* proposition, when it stated that "[w]e have long recognized that deportation is a particularly severe 'penalty.'"[222]

The Court has not defined the term "degrading treatment," but it is very familiar with the term "dignity." Even though the term "degrading treatment" figures within a larger expression of "cruel, inhuman, or degrading treatment or punishment,"[223] suggesting that the Court would limit its definition of the term to the Eighth Amendment and prohibit only those acts barred by the Amendment,[224] references to "dignity" can be found across U.S. jurispru-

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217. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d) (AM. LAW INST. 1987).

218. The term is borrowed from Bracey, *supra* note 213.

219. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d).

220. In the ordinary sense of the word and not within the meaning of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV.

221. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

222. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting)).

223. *See supra* note 217 and accompanying text.

224. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. In *Furman v. Georgia*, Justice William Brennan stated in concurrence: "The primary principle [of the Eighth Amendment's prohibition on cruel and unusual punishment] is that a punishment must not be so severe as to be degrading to the dignity of human beings." 408 U.S. 238, 271 (1972) (Brennan, J., concurring).

dence. As early as 1944, Justice Frank Murphy in *Korematsu v. United States* dissented as follows:

> [The inference that] examples of individual disloyalty prove group disloyalty[,] justify[ing] discriminatory action against the entire group[,] ... has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference ... is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.[225]

The Court's analyses of legal issues involving race have often included references to dignity. In *Heart of Atlanta Motel v. United States*, Justice Arthur Goldberg discussed the purpose of the Civil Rights Act of 1964 and stated: "Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color."[226]

In the jury selection context, the Court has concluded that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."[227] At the cross-section of criminal and immigration law, Justice Brennan portrayed the discriminatory targeting of Mexican Americans at border controls as an "affront to the dignity of American citizens of Mexican ancestry and Mexican aliens."[228]

More recently, the concept of dignity arguably played a central role for marriage equality in *Obergefell v. Hodges*.[229] Although claims for marriage equality may differ from racial equality in important respects, the current Court's use of specific concepts and language can be instructive. Justice Anthony Kennedy, in discuss-

225. 323 U.S. 214, 240 (Murphy, J., dissenting).

226. 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 88-872, at 16 (1964)).

227. Powers v. Ohio, 499 U.S. 400, 402 (1991).

228. United States v. Martinez-Fuerte, 428 U.S. 543, 573 n.4 (1976).

229. 135 S. Ct. 2584 (2015).

ing the harms same-sex couples suffer when excluded from marriage, spoke of "stigma" and "humiliation" of the children of same-sex couples,[230] and the "demeaning," "disrespect," and "subordination" of gays and lesbians.[231] He claimed that by bringing this case, "[same-sex couples] ask[ed] for equal dignity in the eyes of the law."[232]

Based on the Court's repeated use of the concept of dignity when dealing with racial issues, it is unlikely that the Court would limit its definition of "degrading treatment" by thinking solely in "Eighth Amendment terms."[233] The bigger question is whether the Court would consider exclusion of aliens as "treatment" at all. But if, as discussed, the jus cogens norm prohibiting racial discrimination extends to admissions, and thus addresses the discrimination's extraterritorial effects,[234] an exclusion necessarily assumes some kind of "treatment." If the Court extended jus cogens against race discrimination to admissions, it could also consider the discrimination as "degrading treatment."

III. CUSTOMARY INTERNATIONAL LAW MEETS *CHAE CHAN PING* AND LIKES WHAT IT SEES

The Court's reliance on international law to find racial exclusions unlawful may seem like a "back-door" solution. It is to the extent that the Court is generally reluctant to rely on international law, and it has not had the option to consider racial exclusions since 1889.[235] But it ultimately is not because the Court's precedent in *Chae Chan Ping* demands an international law analysis.

The Court's source of authority in *Chae Chan Ping* can—counterintuitively—aid the current Court to justifiably further human rights. Instead of clinging to the holding of *Chae Chan Ping* that consistently justifies deference to political branches,[236] the Court should revisit the underlying law, the core of any precedent, and

230. *Id.* at 2600-01.
231. *Id.* at 2602-04.
232. *Id.* at 2608.
233. *See supra* note 224 and accompanying text.
234. *See supra* Part II.B.
235. *See supra* notes 3-4 and accompanying text.
236. *See supra* notes 9-13 and accompanying text.

place it within the context of current international law to find race-based exclusions unlawful. To bolster this argument, this Part first discusses the authority of customary international laws within the hierarchy of U.S. domestic law. It then examines the arguably flawed, yet necessarily enduring, *Chae Chan Ping* Court's source of law—the concept of state sovereignty. And finally, this Part explains how the Court can take advantage of *Chae Chan Ping* to invalidate racial exclusions.

A. Customary International Law's Authority in U.S. Courts

The Court declared more than a hundred years ago in *The Paquete Habana* that customary international law is part of United States law.[237] The Court recognized in 1964 that customary international law is federal law,[238] and customary international law has been declared U.S. law within the meaning of Article III and the Supremacy Clause.[239] However, in 1986 the Eleventh Circuit relied on dicta from *The Paquete Habana* to claim customary international law as subordinate to a "'controlling' public act."[240] The Supreme Court has neither reached nor justified such a conclusion as part of an actual holding.[241]

In his article titled *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, Louis Henkin adamantly argues in defense of customary international law's preeminent place in U.S. law's hierarchy.[242] Henkin responds to those mistakenly asserting that customary international law is inherently inferior to legislation because it is considered "common law."[243] He then discusses why customary international law is superior to U.S. domestic law.[244] First, Henkin points out that the Framers respected international law—both treaties and customary

237. *See* 175 U.S. 677, 700 (1900).

238. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964); *see also* Henkin, *The Constitution and United States Sovereignty*, *supra* note 26, at 140.

239. Henkin, *The Constitution and United States Sovereignty*, *supra* note 26, at 140.

240. *See id.* at 136 & n.91 (quoting Garcia-Mir v. Meese, 788 F.2d 1446, 1453-54 (11th Cir. 1986)).

241. *Id.* at 136.

242. *Id.* at 134-40.

243. *Id.* at 137-38.

244. *Id.* at 139.

international law—and intended the political branches to abide by it.[245] In 1796, Justice James Wilson wrote, "When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."[246] The Court echoed the relevance of this statement in 2004, quoting it in *Sosa v. Alvarez-Machain*.[247] *Chae Chan Ping* from 1889 is also evidence that the political branches are subject to international law.[248] Second, while the Court has decided that the Supremacy Clause subordinates treaties to subsequent congressional legislation, there is no textual basis for subordinating customary international law.[249] Third, customary international law is enduring and universal—an idea that the Court has acknowledged.[250] In the *Head Money Cases*, one of the first cases in which the Court declared the supremacy of subsequent congressional acts over treaties,[251] the Court suggested that the number of branches of government that contribute to the formation of a law may determine that law's place in the hierarchy of U.S. law.[252] International law, and much of it, existed before the United States became a nation, and customary international law forms according to the practice of many nations, including the United States.[253]

Henkin is not naïve: he admits that "[d]espite these arguments, it is unlikely the Supreme Court will now distinguish customary international law from treaties and declare the former supreme over federal statutory law."[254] This Note agrees: it is unlikely that the Court would invalidate a racial exclusion based on the supremacy

245. *Id.*

246. Ware v. Hylton, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.); *see also* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) ("[T]he *United States* had, by taking a place among the nations of the earth, become amenable to the laws of nations.").

247. 542 U.S. 692, 714 (2004).

248. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

249. *See* Henkin, *The Constitution and United States Sovereignty*, *supra* note 26, at 139; *see also* U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

250. Henkin, *The Constitution and United States Sovereignty*, *supra* note 26, at 139.

251. Richard L. Doernberg, *Treaty Override by Administrative Regulation: The Multiparty Financing Regulations*, 2 FLA. TAX REV. 521, 544-45 (1995).

252. *See* 112 U.S. 580, 599 (1884); Henkin, *The Constitution and United States Sovereignty*, *supra* note 26, at 136-37.

253. Henkin, *The Constitution and United States Sovereignty*, *supra* note 26, at 137.

254. *Id.* at 139.

of customary international law. The Court's political reluctance to do so, however, need not render such a decision correct. But the Court can avoid this broader issue. To find racial exclusions unlawful under international law, the Court need not conclude that all customary international law is superior to U.S. law; it can do so within the limits of *Chae Chan Ping* and stare decisis.[255] To explain, the following Sections first defend the *Chae Chan Ping* Court's theoretical basis and then explain its precedential value today.

B. Customary International Law as the First-Order Inquiry

As discussed in Part I.B, the *Chae Chan Ping* Court grounded the United States's exclusionary power in the concept of state sovereignty. The Court could have continued to rely on the Commerce Clause to regulate immigration, as it did before *Chae Chan Ping*.[256] Invoking state sovereignty as the legal basis instead, the Court necessarily suggested that the United States' power to exclude is subject to international law.

Many international law scholars have criticized the concept of sovereignty in the law,[257] but admit that "[t]heory nevertheless dies hard."[258] Professor Nafziger claims that because the concept of sovereignty is an "international social function" subject to change, it cannot be the basis for international law.[259] But why not? International law itself is a social function. State sovereignty can act as a foundation, or a benchmark, to a state's exclusion power, subject to certain limitations, as the world order changes. After all, sovereignty—the existence of government over a clearly defined territory—is part of the criteria for statehood.[260] And statehood—a concept that

255. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

256. *See* Lindsay, *supra* note 12, at 40.

257. *See* JUSS, *supra* note 62, at 47-57.

258. Nafziger, *supra* note 29, at 822.

259. *Id.* at 819.

260. Article I of the Convention on the Rights and Duties of States states: "The state as a person of international law should possess the following qualifications: (*a*) a permanent population; (*b*) a defined territory; (*c*) government; and (*d*) capacity to enter into relations with the other States." Convention on the Rights and Duties of States, art I, Dec. 26, 1933, 165 L.N.T.S. 19 [hereinafter Montevideo Convention]. For a criticism of these criteria, see Thomas D. Grant, *Defining Statehood: The Montevideo Convention and Its Discontents*, 37 COLUM. J. TRANSNAT'L L. 403, 434-53 (1999).

will similarly persist—is in turn dependent on other states.[261] International law, by definition a fluid construct that develops slowly, must have certain benchmark concepts around which it can progress.

Professor Satvinder Singh Juss adamantly derides the concept of sovereignty as a flawed, outdated doctrine used to justify political dominance.[262] Indeed, international law has changed on account of continually expanding human rights recognition, and "[t]he chief casualty is state sovereignty."[263] But the idea of a nation's right to self-determination as through state sovereignty will continue to endure based on the engrained system of independent nation-states.[264] No matter how flawed contemporary scholars deem the concept of sovereignty to be, it is likely too "'deeply rooted' in 'national sentiment and in the psychology of people,'" making it too difficult to dispose of.[265] A "brick-by-brick" approach will likely remain the only avenue to advance human rights. As discussed earlier, the "wall of sovereignty" is not impermeable[266]: the adoption of international covenants restricting state rights presumed states' willingness to cede sovereignty.

The concept of a nation-state, along with its power to exclude, will continue to prevail. However, the right to exclude whether outright valid or undoubtedly relevant, is equally so in the United States as well as other nation-states. The Court voiced this understanding in 1936 in *United States v. Curtiss-Wright Export Corp.*: "As a member of the family of nations, the right and power of the United States in [foreign affairs] are equal to the right and power of the other members of the international family. Otherwise, the United States

261. The fourth requirement for "statehood" requires a "capacity to enter into relations with other [s]tates." Montevideo Convention, *supra* note 260, art. I. That criterion has received the most criticism. *See* Grant, *supra* note 260, at 434-35. However, some of the possible criteria not listed in the Montevideo Convention—recognition, United Nations membership, or external legality—nonetheless render the term "statehood" inherently dependent. *See id.* at 450-51.

262. *See* JUSS, *supra* note 62, at 47.

263. *Id.* at 51.

264. *Cf. id.* at 52-53.

265. *Id.* at 48 (quoting Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. Rep. 1, 43 (Apr. 9) (separate opinion by Alvarez, J.)).

266. *See supra* Part I.C.

is not completely sovereign."[267] This idea holds even more weight in the twenty-first century due to the ever-globalized world order.

A state's power to exclude, along with that power's limitations, ought to be uniform across the international community to obtain international cohesiveness. Indeed, states have become so financially interdependent[268] that great deviations from particular internationally accepted norms or practices are detrimental to the state with respect to diplomacy and economics.[269] Conversely, trade is what helps deter racial exclusions.[270] Asians are now less vulnerable to explicit discrimination due to Asia's growing market, yet sub-Saharan African citizens lack such "economic leverage."[271]

A state's exclusion of any group could even backfire if the international community chose to condemn rather than follow it, unlike when the United States spearheaded the racial exclusion laws at the turn of the twentieth century.[272] For example, in January 2017, when President Trump signed an executive order temporarily suspending the entry of refugees and citizens from seven Muslim-majority countries,[273] other states felt unease.[274] Countries included in the ban called the order "insulting," expressed "regret and astonishment," and deemed it "unfortunate."[275] The United Kingdom's leaders described the ban as "divisive and wrong," "shameful and cruel."[276] France, Turkey, and Canada openly declared to welcome refugees, while Chancellor Angela Merkel of Germany called President Trump to explain to him the United States' obligations under the Geneva Convention on refugees.[277]

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267. 299 U.S. 304, 318 (1936).

268. States have increasingly reached agreements liberalizing the movement of persons and trade. *See, e.g.*, Consolidated Version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47; Charter of the Association of Southeast Asian Nations, 2624 U.N.T.S. 223 (2007); North American Free Trade Agreement, 32 I.L.M. 289 (1993).

269. Rachel Brewster, *Pricing Compliance: When Formal Remedies Displace Reputational Sanctions*, 54 HARV. INT'L L.J. 259, 267-68 (2013).

270. FITZGERALD & COOK-MARTIN, *supra* note 166, at 345.

271. *Id.*

272. *See supra* Part II.B.2.c.

273. *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017, 8:51 PM).

274. Azadeh Ansari et al., *World Leaders React to Travel Ban*, CNN (Jan. 30, 2017), http://www.cnn.com/2017/01/30/politics/trump-travel-ban-world-reaction/index.html [https://perma.cc/6Q4V-Q8NG].

275. *Id.*

276. *Id.*

277. *Id.*

An analysis of race discrimination in admissions under customary international law cannot ignore international community's outrage due to states' uniform and equal exclusionary powers implied by the Court in *Curtiss-Wright*.[278] Furthermore, the *Restatement (Third) of the Foreign Relations Law of the United States* as an authority for jus cogens explicitly recognizes other states' "official statements of policy" as contributing to the formation of customary international law.[279]

The enduring concept of sovereignty, together with the states' necessarily equal exclusionary power, renders reliance on customary international law a first-order question in exclusions violating human rights. While international law may also provide a "background norm for constitutional decisionmaking,"[280] it first provides an independent authority that checks a state's power to exclude. The following Section explains how the Court can use this authority to find racial exclusions unlawful.

C. The Court's Ability to Invalidate Racial Exclusions Under Customary International Law

Chae Chan Ping held that immigration questions were nonjusticiable, causing the judiciary to defer to the political branches.[281] One of the main justifications for the Court's deference is the fear that the courts would risk "upsetting the delicate balance of relations with other countries and ... undermining [of] national security."[282] As Professor Peter Spiro points out, that risk is significantly lower today than in the late nineteenth century.[283] Considering race-based exclusions and their high "diplomatic price,"[284] the application of the nondiscrimination principle to admissions would amount to a minor intrusion into the political branches' area of competency.

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278. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

279. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. b (AM. LAW INST. 1987) (recognizing that the "[p]ractice of states" as the prong of a two-part test establishing customary international law includes "official statements of policy, whether they are unilateral or undertaken in cooperation with other states").

280. Scaperlanda, *supra* note 26, at 1015.

281. *See supra* Part I.B.

282. Spiro, *supra* note 26, at 340.

283. *Id.*

284. FITZGERALD & COOK-MARTIN, *supra* note 166, at 345.

But more importantly, the Court could justify its incursion by relying on *Chae Chan Ping* to find race-based exclusions unlawful under international law. As this Note has argued, the plenary power doctrine reflects international law norms. Through this lens, embracing *Chae Chan Ping* and the evolving concept of sovereignty can help counteract the outcomes it has thus far produced.[285]

International law is significantly different than what it was in 1889. As Part I.C discussed, the international community has gone through an "individual international rights revolution" to the detriment of state sovereignty. But contrary to Michael Scaperlanda's posit in 1993 that "the *fact* of a more limited sovereignty *vis a vis* the individual is crucial; the specific limitations are unimportant,"[286] this Note has argued that specific limitations *are* important today.[287] Additionally, customary international law has been formally authoritative in U.S. courts only since the second half of the twenty-first century.[288] When addressing a racial exclusion today, the Court can rely on not only precedent—*Chae Chan Ping*'s recognition of sovereignty as the cornerstone to states' exclusionary powers and the implicit incorporation of international law norms—but on the development of customary international law as authority upon it.

A lingering question remains whether the Court would be willing to revisit *Chae Chan Ping*. It is unlikely the Court would agree with the theoretical basis, given the Court's general reluctance to employ international law in assessing domestic law.[289] However, *Chae Chan Ping* is unlike the death penalty cases, for example, in which the Court has been divided in considering other states' laws, let alone their norms.[290] But like the Eighth Amendment, *Chae Chan Ping* is United States law, and state sovereignty as the still-valid rationale for exclusions requires revisiting current international law norms. When confronted with a racial exclusion, the Court should revisit *Chae Chan Ping*, respect its legal basis, and redefine it to reflect current international law and its limitations. In doing so, the Court

285. *See supra* Part III.A-B.

286. Scaperlanda, *supra* note 26, at 1015.

287. *See supra* Parts II.B-C.

288. *See supra* Part III.A.

289. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) (rejecting the majority's claim that American law should conform to the laws of the rest of the world).

290. *See id.*

can both satisfy its obligation to stare decisis and refuse deference to the political branches.

CONCLUSION

This Note argued that the plenary power doctrine reflects international law norms, which the Court must consider when analyzing a racial exclusion. The *Chae Chan Ping* Court grounded the plenary power doctrine in the concept of state sovereignty. While the power to exclude by virtue of sovereignty has lost some of its force through the twentieth century, it will continue to endure.[291] The emergence of international human rights has and will continue to develop against the backdrop of entrenched concepts of the nation-state and national self-determination.[292] But today, international law prohibits race discrimination in admissions.[293] By relying on *Chae Chan Ping* and current international law, the Court may refuse deference to the other branches and find racial exclusions unlawful in accordance with stare decisis.[294] A theory formulated on international law and *Chae Chan Ping*—a case persistently deemed racist in itself—can thus further human rights in this narrow set of cases.[295] At the very least, it has a better chance than the never-failing plenary power doctrine. Although aliens will continue to have no right to enter the United States, they nonetheless "ask for equal dignity in the eyes of the law."[296] International law grants them that right.

Lauri Kai[*]

291. *See supra* Part III.B.
292. *See supra* Part III.B.
293. *See supra* Part II.
294. *See supra* Part III.C.
295. *See supra* Part III.C.
296. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

* J.D. Candidate 2018, William & Mary Law School; B.A. 2015, University of Maryland, Baltimore County. I thank Professors Angela M. Banks and Evan J. Criddle for their guidance, and the *William & Mary Law Review* editors for their input and editing assistance.