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Deporting Families: Legal Matter or Political Question?

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DEPORTING FAMILIES: LEGAL MATTER OR POLITICAL QUESTION?

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ABSTRACT

Last year 245,424 noncitizens were removed from the United States, and courts played virtually no role in ensuring that these decisions did not violate individual substantive rights like freedom of speech, substantive due process, or retroactivity. Had these individuals been deported from a European country, domestic and regional courts would have reviewed the decisions to ensure compatibility with these types of rights. Numerous international law scholars and immigration scholars seek to minimize the gap between the legal processes offered in the United States and Europe for noncitizens challenging deportation orders. Many of these scholars contend that greater recognition of international human rights in U.S. courts would bring U.S. deportation jurisprudence closer to its European counterpart. While appealing, these arguments fail to recognize that the availability of rights is not what distinguishes the European deportation jurisprudence from the American deportation jurisprudence. European courts play a more active role in reviewing deportation decisions than U.S. courts because of institutional cultural norms regarding the State interests at stake in regulating immigration. European adjudicators conceptualize immigration

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regulation as a legal matter rather than as a political matter as U.S. adjudicators do. This distinction between "immigration regulation is political" and "immigration regulation is legal" leads to different understandings of the judicial role and thus, to drastically different approaches to judicial review.

Deportation jurisprudence provides a useful case for analyzing the relationship between legal rules and institutional culture in protecting individual rights. The literature addressing the domestic enforcement of human rights under-analyzes the role that institutional culture plays in human rights enforcement. This literature tends to focus on the importance of adopting specific laws, an independent judiciary, political will at the highest levels of government, and effective law enforcement personnel. While these are all important factors, institutional culture helps to explain compliance problems when States have the right laws, personnel, and political will. This Article addresses this gap in the literature by exploring the relationship between judicial norms regarding immigration and judicial review of deportation decisions.

INTRODUCTION

Last year 245,424 noncitizens were removed from the United States, and courts played virtually no role in ensuring that these decisions conformed to the substantive provisions of the U.S. Constitution.[1] A number of these individuals, like Charlie Castillo, lived the majority of their lives in the United States and considered the United States home. Charlie immigrated to the United States at

1. U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 102 tbl.37 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf [hereinafter 2008 YEARBOOK]; U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 4 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf [hereinafter IMMIGRATION ENFORCEMENT ACTIONS: 2008]. This figure reflects the individuals removed through regular removal proceedings. An additional 113,462 individuals were removed in expedited removal proceedings. These proceedings take place at the border and do not involve an immigration judge. *See* Immigration and Nationality Act (INA), § 235, 8 U.S.C. § 1225 (2006).

the age of one and spent his entire life in the Detroit metro area.[2] He is fifty-four years old and spent thirty-three years working at General Motors factories and retired with a pension.[3] He married a U.S. citizen and raised three children in a house he purchased in the suburbs.[4] Charlie was also convicted of growing two marijuana plants in his yard and possessing a quarter-pound of marijuana in his home ten years ago.[5] Despite the fact that Charlie's entire family resides in the United States, his wife suffers from multiple sclerosis, and he is responsible for supporting his grandchild with autism, Charlie was deported in October 2009.[6] He had taken his wife to Cancun believing that the environment would be good for her multiple sclerosis.[7] Upon his return to the United States, immigration officials at the airport became aware of his criminal convictions and Charlie was subsequently deported.[8] When Charlie was convicted he paid fines and was allowed to return home to his suburban ranch house.[9] He thought that he "had paid [his] dues and that [he] was all right."[10] Yet because Charlie's parents brought him to the United States, he was wrong. No court was able to review his case for proportionality or consistency with other fundamental rights principles. Had Charlie's family migrated to Europe instead, his legal process would have been different and his outcome may have been as well.[11]

Numerous international law scholars and immigration scholars seek to minimize the gap between the legal processes offered in the United States and Europe for noncitizens challenging deportation

2. Charlie Leduff, *Stuck Between Old Charges, Post–9/11 Convictions*, THE DETROIT NEWS, Jan. 14, 2010, at A4, *available at* 2010 WLNR 770911.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Leduff, *supra* note 2.

9. *Id.*

10. *Id.*

11. As used throughout this article Europe and European refer to the following States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom—the twenty-seven Member States of the European Union. *See* European Union, European Countries, http://europa.eu/abc/european_countries/index_en.htm.

orders.[12] Many of these scholars contend that greater recognition of international human rights in U.S. courts would bring U.S. deportation jurisprudence closer to its European counterpart.[13] While appealing, these arguments fail to recognize that the availability of rights is not what distinguishes the European deportation jurisprudence from the U.S. deportation jurisprudence. European courts play a more active role in reviewing deportation decisions than U.S. courts because of institutional cultural norms regarding the State interests at stake in regulating immigration. European adjudicators conceptualize immigration regulation as a legal matter rather than as a political matter as U.S. adjudicators do. This distinction between "immigration regulation is political" and "immigration regulation is legal" leads to different understandings of the judicial role and thus, to drastically different approaches to judicial review. I contend that this distinction is tied to the different immigration histories, sources of State authority to regulate immigration, and allocations of immigration authority in the United States and Europe. As long as

12. Immigration scholars frequently question the propriety of the U.S. judiciary's deference to the political branches. *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); BILL O. HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY (2006); KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS (2007); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L. Q. 925 (1995) [hereinafter *Ten More Years*]; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 268–69 (1984) [hereinafter *Plenary Congressional Power*]; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) [hereinafter *Procedural Surrogates*]; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L. J. 545 (1990) [hereinafter *Phantom Constitutional Norms*]; James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 805 (1983); Michael Scaperlanda, *Polishing the Tarnished Golden Doo*r, 1993 WIS. L. REV. 965 (1993).

13. *See, e.g.*, Anna Maria Gabrielidis, *Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139 (2006); Shayana Kadidal, *"Federalizing" Immigration Law: International Law as a Limitation on Congress's Power to Legislate in the Field of Immigration*, 77 FORDHAM L. REV. 501 (2008); Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L. REV. 1271 (2008); Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347 (2000).

immigration regulation is seen as a political issue, U.S. courts will continue to play a minimal role in reviewing deportation decisions.

Deportation jurisprudence provides a useful case for analyzing the relationship between legal rules and institutional culture in protecting individual rights. The literature addressing the domestic enforcement of human rights under-analyzes the role that institutional culture plays in human rights enforcement.[14] This literature tends to focus on the importance of adopting specific laws, an independent judiciary, political will at the highest levels of government, and effective law enforcement personnel. While these are all important factors, institutional culture helps to explain compliance problems when States have the right laws, personnel, and political will. This Article addresses this gap in the literature by exploring the relationship between judicial norms regarding immigration and judicial review of deportation decisions.

Part I of this Article critically analyzes the deportation jurisprudence of the U.S. Supreme Court. I demonstrate that despite a general recognition of substantive individual rights, courts defer to the decisions of political actors when reviewing deportation decisions pursuant to the plenary power doctrine. This doctrine dictates that "Congress and the executive branch have exclusive decision-making authority without judicial oversight for constitutionality" when regulating immigration.[15] It is my contention that this deference grows out of (1) the United States' experience with Chinese immigration in the late nineteenth century, (2) the basis for the State's authority to regulate immigration, and (3) the allocation of that authority to the federal government exclusively.

In Part II I extend this analysis to the European jurisprudence and contend that the same factors—immigration history, source of immigration authority, and allocation of immigration authority—supported the use of proportionality review of challenges to deportation decisions. European adjudicators utilize proportionality

14. For a notable exception see Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 AM. J. OF INT'L L. 647 (2009).

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

review not because of the availability of specific individual rights, but because immigration is seen as a legal matter subject to traditional forms of judicial review. U.S. adjudicators conceptualize their authority and competence differently and thus provide less monitoring of deportation decisions. Based on these insights, Part III critiques the U.S. process as inadequate for protecting individual rights, but argues that the European jurisprudence cannot be as easily replicated in the United States as its proponents contend. The conceptualization of immigration regulation as a traditional legal issue, rather than a political matter, is the most valuable insight from the European jurisprudence. Yet our immigration history, source of State authority to regulate immigration, and allocation of immigration authority make it difficult to view immigration as something other than political decisions about national sovereignty.[16] Part III concludes with sketching a discursive strategy for shifting our conceptualization of immigration from a political national sovereignty issue to a traditional legal issue. This strategy is based on the increasing use of deportation as a tool for crime control.

I. ADJUDICATING DEPORTATION IN THE UNITED STATES

Noncitizens in the United States and in Europe frequently challenge deportation decisions as a violation of their fundamental rights. Despite the broad similarities with regard to democratic governance and commitment to individual rights, these challenges are handled very differently in these jurisdictions. U.S. courts treat these challenges as political questions while European courts treat them as legal questions. These differences have serious implications for the judicial protection of noncitizens' fundamental rights. Parts I and II analyze the jurisprudence of each of these jurisdictions to reveal the differences in immigration histories, sources of State authority to regulate immigration, and allocations of immigration authority. This

16. By national sovereignty I am referring to the physical, political, social, and cultural integrity of the State. Throughout this Article when referring to nation states I will use the word State with a capital "S." When referring to the states that make up the United States I will use the word state with a lower case "s."

analysis illustrates that treating deportation as a political question limits the role of the judiciary in protecting noncitizens' fundamental rights. The European treatment of these challenges as legal questions ensures that noncitizens have a forum in which claims of rights violations will be heard and decided.

A. Framing Deportation

It is my contention that the differences in U.S. and European deportation jurisprudence stem from the different frames that decision makers utilize when analyzing challenges to deportation decisions. American adjudicators rely on one frame while European adjudicators rely on another because they are working with different, albeit similar, legal tool kits. An adjudicator's legal tool kit includes principles, norms, values, legal doctrine, precedent, and rules. By frame I am referring to the "schemata of interpretation" utilized by legal decision makers to make sense of the State interests involved in the regulation of immigration. Erving Goffman introduced this term in 1974 as a way to refer to "schemata of interpretation" that allow an individual "to locate, perceive, identify, and label a seemingly infinite number of concrete occurrences . . . ."[17] The success of a given frame is tied to the ability of the frame to resonate with individuals. Whether or not a frame will resonate depends in large degree on the extent to which the frame aligns with the interpretative framework that individuals rely upon. In the case of legal decision makers, their interpretative framework is their legal tool kit.

Lawyers and adjudicators rely upon frames when making and analyzing legal arguments. Frames assist lawyers in focusing decision makers' attention on specific facts and issues.[18] Facts and issues can often fit within multiple doctrinal categories, and decisions regarding which category to use can significantly impact decision-making. For example, the regulation of immigration can be seen as an

17. ERVING GOFFMAN, FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE 21 (1974).

18. Morton Horwitz, *Framing Devices*, THE BRIDGE, http://cyber.law.harvard.edu/bridge/Framing/framing1.htm (last visited Oct. 21, 2010) ("[G]ood lawyers when describing the facts of cases often select narrative frames that cast in favorable light the behavior of their clients.").

issue that primarily concerns national sovereignty or alternatively local police powers.[19] Each of these conceptions of immigration implicates different legal doctrines and standards of judicial review. Historically both of these conceptions of immigration have existed within U.S. immigration jurisprudence.[20] With the adoption of the plenary power doctrine the national sovereignty frame has dominated.[21] By national sovereignty I am referring to a State's interest in protecting the physical integrity of the State in addition to specific political, social, and cultural attributes of the State. These interests are connected to foreign affairs, national security, and self-definition—matters over which the federal government is considered to have authority. Recently, however, there has been a surge in state and local government efforts to regulate immigrants, which has resurrected the debate over the most appropriate conception of immigration for judicial review purposes.[22] Both of these approaches to conceptualizing immigration reflect the use of a particular frame. The dominance of the national sovereignty frame within U.S. immigration jurisprudence reflects our history with immigration, source of State authority to regulate immigration, and allocation of immigration authority. These same factors counsel in favor of the use of a public order frame in Europe.

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19. By local police powers I am referring to the power of states to protect public health, safety, and morals.

20. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1894–96 (1993) (discussing state regulation of migration in the late eighteenth and early nineteenth centuries).

21. There are additional explanations for the limited judicial review provided in this context. Examples include: immigrants are guests whose presence in the United States is a bonus, noncitizens benefit from international law and should not have the benefit of U.S. constitutional protection and international legal protection in this context, noncitizens are not entitled to constitutional protection in this context because of their noncitizen status, or the power to exclude and deport is absolute and not subject to domestic legal limits. Stephen Legomsky has outlined these options in great detail in *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 268–69 (1984). I have chosen to focus on the role of national sovereignty because it corresponds with the international legal norms and rules that the Court relied upon in creating the plenary power doctrine, and I believe that it continues to best explain the U.S. Supreme Court's deferential approach.

22. *See, e.g.*, Cristina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008).

B. The Development of the Plenary Power Doctrine

The United States' immigration history is fraught with contradictions. While the Statue of Liberty proclaims the United States as a refuge for the world's tired, poor, and "huddled masses yearning to breathe free," the reality for non-European immigrants has been quite different.[23] The Supreme Court developed the plenary power doctrine through a number of cases addressing the individual rights of Chinese immigrants to enter and reside in the United States. At the time that these cases were being decided, animosity toward Chinese immigrants had been growing for decades. Justice Field provided an overview of Chinese immigration that highlights this history. He noted that Chinese laborers

> were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace. The differences of race added greatly to the difficulties of the situation. . . . [T]hey remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, *great danger that at no distant day that portion of our country would be overrun by them* unless prompt action was taken to restrict their immigration.[24]

23. EMMA LAZARUS, *The New Colossus*, *in* 1 THE POEMS OF EMMA LAZARUS 202–03 (1889).
24. Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889) (emphasis added).

Hostility towards Chinese immigrants was growing throughout the mid-to-late-1800s, and during this time period California enacted legislation limiting the rights of Chinese immigrants.[25] Proponents of restricting Chinese immigration realized, however, that federal action was needed to accomplish their goal. By 1882 Congress was listening and enacted the first legislation limiting the immigration of Chinese laborers. The 1882 Chinese Exclusion Act suspended the entry of Chinese laborers for ten years.[26] These entry prohibitions did not apply to Chinese laborers present in the United States as of November 17, 1880, or those arriving within ninety days after the passage of the act.[27] To enforce these provisions, Chinese laborers eligible to remain in the United States had to obtain a certificate upon their departure from the United States that would facilitate their return. The certificate was evidence of eligibility to be admitted to the United States under the terms of the 1882 Chinese Exclusion Act.[28] Enforcement of this law became difficult because individuals were allowed entry into the United States based on evidence of prior residence other than the government-issued certificate. Significant concerns regarding fraud led to the enactment of the 1884 Chinese Exclusion Act, which made the government-issued certificate the only valid evidence for establishing a Chinese laborer's right to reenter the United States.[29] This amendment was still not deemed

25. *See id.* at 595–97; MOTOMURA, *supra* note 15, at 16–17; RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 79–131 (1989). California had adopted numerous measures aimed at reducing the Chinese population in California. For example, in 1852 there was a tax on Chinese miners to push them into other employment. MOTOMURA, *supra* note 15, at 16–17. In 1879 a statute was enacted that "required incorporated towns and cities to remove Chinese from their city limits." *Id.* at 17. San Francisco enacted an ordinance in 1880 regulating the location of laundries. In *Yick Wo v. Hopkins* the U.S. Supreme Court found that the ordinance was only enforced against Chinese subjects operating laundries and as such was a violation of Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Federal courts also struck down similar laws restricting the rights of Chinese migrants as violations of either the Burlingame or 1880 treaties. Tim Wu, *Treaties' Domain*, 93 VA. L. REV. 571, 616–17 (2007).

26. An act to execute certain treaty stipulations relating to Chinese, ch. 126, 22 Stat. 58 (1882) (amended 1884) [hereinafter 1882 Chinese Exclusion Act].

27. *Id.* at sec. 3; *Chae Chan Ping*, 130 U.S. at 599.

28. 1882 Chinese Exclusion Act, *supra* note 26, at sec. 4.

29. An Act to Amend an Act entitled "An Act to Execute Certain Treaty Stipulations Relating to Chinese Approved May sixth eighteen hundred and eighty-two," ch. 220, 23 Stat. 115 (1884) [hereinafter 1884 Chinese Exclusion Act]; *see also* MOTOMURA, *supra* note 15, at 25–26 (noting that it was hard to enforce the Chinese Exclusion Act "because it was not clear who was exempt as a returning

sufficient to address the concerns of Congress so the 1888 Chinese Exclusion Act was enacted, which prohibited Chinese laborers from returning to the United States even if they had a certificate.[30]

Congress was willing to restrict Chinese immigration because Chinese immigrants were seen as a threat to national sovereignty. The Court viewed Chinese immigration as a form of aggression by China and a threat to social cohesion in the United States.[31] In the face of such threats, Justice Field concluded that if the U.S. government "through its legislative department, 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, their exclusion is not to be stayed."[32] Concerns about Chinese immigration were discussed in terms of aggression, peace, security, and assimilation—all aspects of national sovereignty. This perception of the State interests at stake facilitated the Court's conclusion that the State's authority to regulate immigration is based on its sovereign power to defend the State and is unlimited.

In *Chae Chan Ping*, *Nishimura Ekiu v. United States*[33] and *Fong Yue Ting v. United States*,[34] the Court relied on international legal principles to support its conclusions regarding the source and scope of a State's authority to regulate immigration.[35] The commentary by

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Chinese immigrant who had originally arrived in the United States before the effective date of the ten-year moratorium."); TAKAKI, *supra* note 25, at 79–131.

30. A Supplement to an Act entitled "An Act to Execute Certain Treaty Stipulations Relating to Chinese," approved the sixth day of May eighteen hundred and eighty-two, ch. 1064, 25 Stat. 504 (1888) [hereinafter 1888 Chinese Exclusion Act]. The law provided that

> it shall be unlawful for any chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.

Id. at sec. 1.

31. Justice Field wrote, "It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us." *Chae Chan Ping*, 130 U.S. at 606.

32. *Id.*

33. Nishimura Ekiu v. United States, 142 U.S. 651, 656 (1892). While this case addresses claims by a Japanese immigrant rather than a Chinese immigrant, the Court expresses similar concerns about national sovereignty as it did in *Chae Chan Ping*.

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

35. This Article focuses on these three cases in the development of the plenary power doctrine because these cases represent the culmination of the doctrine. The foundation for this doctrine, however,

leading international law scholars that the Supreme Court relied upon reinforced the relationship between national sovereignty and immigration regulation.[36] In each of these cases the Court's reference to international law highlights a specific national sovereignty concern. Chae Chan Ping challenged his exclusion from the United States,[37] and the Court's initial question was whether or not Congress had the power to prohibit Chinese laborers who had previously resided in the United States from returning.[38] The Court responded with a resounding yes, stating that this conclusion is "not . . . open to controversy."[39] A State's "[j]urisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power."[40] Any exception to this

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was laid decades earlier in cases conflating federalism constraints with individual rights constraints. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY—LAW AND POLITICS IN BRITAIN AND AMERICA ch. 3 (1987).

36. After concluding that international law did not limit a State's immigration authority, the Court held that the Constitution delegated immigration authority to the political branches of the federal government. At no time did the Court seek to determine whether or not the U.S. Constitution provided a different set of limits on the State's immigration authority. In other work I have argued that this move reflects the Court's desire to maintain maximum flexibility for the State in international political decision-making. Angela M. Banks, *The Trouble with Treaties: Immigration & Judicial Review*, ST. JOHN'S L. REV. (forthcoming 2011).

37. Chae Chan Ping had resided in San Francisco, California from 1875 until June 1887 when he traveled to China. When he departed he had a certificate that pursuant to the 1882 and 1884 Chinese Exclusion Acts permitted his admission to the United States upon his return. *Chae Chan Ping*, 130 U.S. at 582. While he was away, the 1888 Chinese Exclusion Act was enacted, which prohibited his entry into the United States despite his possession of a certificate of identity. He arrived back in San Francisco on October 8, 1888, just seven days after the passage of the 1888 Chinese Exclusion Act. *Id.* Chae Chan Ping challenged the validity of the 1888 Chinese Exclusion Act as a violation of the U.S. Constitution, the 1880 treaty between the United States and China, and the 1882 and 1884 Chinese Exclusion Acts. *Id.* at 599–600. The 1880 treaty provided:

> [w]henever, in the opinion of the Government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it.

Id. at 596.

38. *Id.* at 603.

39. *Id.*

40. *Id.* at 603–04. The Court subsequently quotes Chief Justice Marshall in *The Exchange v. McFaddon*, stating that any restriction upon a State's jurisdiction within its territory "would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the

general principle "must be traced up to the consent of the nation itself. They can flow from no other legitimate source."[41] Nishimura Ekiu similarly challenged her exclusion from the United States, and Justice Gray relied on international law to conclude that her exclusion was lawful.[42] Justice Gray's opinion begins by stating that

> [i]t 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.[43]

Justice Gray cited the work of Vattel and Phillimore to support this proposition.[44] In one of the Vattel works cited by the Court, Vattel discusses a State's right to exclude noncitizens. He contends that a "sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the state."[45] In an ironic twist, given the use of Vattel to support the exclusion of Chinese laborers, Vattel explains that China forbade all foreigners from entering the State out of a concern that foreigners

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same extent in that power which could impose such restriction." *Id.* at 604 (quoting Exch. v. McFaddon, 11 U.S. 116, 136 (1812)).

41. *Chae Chan Ping*, 130 U.S. at 604.

42. She was denied admission based on the commissioner's conclusion that she was "a person without means of support, without relatives or friends in the United States," and "a person unable to care for herself, and liable to become a public charge." Nishimura Ekiu v. United States, 142 U.S. 651, 656 (1892). Ms. Ekiu arrived in San Francisco with $22.00 and told the commissioner that "she has been married two years, and that her husband has been in the United States one year, but she does not know his address." *Id.* at 652. She was to "stop at some hotel until her husband calls for her." *Id.* The commissioner's actions were taken pursuant to an 1891 immigration law prohibiting the admission of "[a]ll idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude." *Id.* at 653 n.1. Ms. Ekiu challenged the 1891 immigration statute, arguing that granting the commissioner of immigration, superintendent of immigration, and the secretary of the treasury with exclusive authority to determine her ability to be admitted to the United States deprived her of liberty without due process of law. *Id.* at 656.

43. *Id.* at 659.

44. *Id.*

45. EMER DE VATTEL, THE LAW OF NATIONS 169–70 (Joseph Chitty, trans., T & J. W. Johnson & Co., 1863) (1758).

would "corrupt the manners of the nation."[46] Vattel states that this action was "not at all inconsistent with justice" and in fact was "salutary to the nation, without violating the rights of any individual, or even the duties of humanity, which permits us, in case of competition, to prefer ourselves to others."[47] Phillimore expresses similar sentiments in *Commentaries Upon International Law* stating that "[i]t is a received maxim of International Law, that the Government of a State may prohibit the entrance of strangers into the country, and may therefore regulate the conditions under which they shall be allowed to remain in it, or may require and compel their departure from it."[48] Justice Gray continues his use of international law in *Fong Yue Ting*, in which the State's power to deport noncitizens was challenged.[49] Building upon *Chae Chan Ping* and

46. *Id.* at 170.

47. *Id.* (noting however that justice would require granting "human assistance to those whom tempest or necessity obliged to approach their frontiers"). Connected to the right of a sovereign to exclude, Vattel discusses the right of a sovereign to place conditions on the entrance of noncitizens. *Id.* at 171 ("Since the lord of the territory may, whenever he thinks proper, forbid its being entered (§94), he has, no doubt, a power to annex what conditions he pleases to the permission to enter."). A similar obligation to humanity, however, simultaneously limits a sovereign's ability to exclude. *See id.* at 171 ("[W]e shall see, in Chap. X., how his duty towards all mankind obliges him, on other occasions, to allow a free passage through, and a residence in his state."). In Chapter X Vattel states that States are "bound to grant a passage [through the State] for lawful purposes, whenever he can do it without inconvenience to himself." *Id.* at 183. Vattel later explains that States "cannot, without particular and important reasons, refuse permission, either to pass through or reside in the country, to foreigners who desire it for lawful purposes." *Id.* at 184. The law of nature does not give States a right to refuse entry in these circumstances. *Id.* at 184–85 (noting that a State cannot "without some particular and cogent reason, refuse the liberty of residence to a foreigner who comes into the country with the hope of recovering his health, or for the sake of acquiring instruction in the schools and academies.").

48. 1 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW, pt. III ch. X § 219, 192–93 (Fred B. Rothman & Co. 1985).

49. This case challenges the 1892 Chinese Exclusion Act, which extended the 1888 Chinese Exclusion Act for an additional ten years, and required all Chinese laborers within the United States to obtain a certificate of residence. *Fong Yue Ting v. United States*, 149 U.S. 698 (1892); An act to prohibit the coming of Chinese persons into the United States, 27 Stat. 25 (May 5, 1892) [hereinafter 1892 Chinese Exclusion Act]. Failure to have a certificate of residence was grounds for deportation. *Id.* at sec. 6. The regulations promulgated by the Secretary of the Treasury stated that in order to obtain a certificate of residence, a Chinese laborer must provide an affidavit "of at least one credible witness of good character" attesting to the Chinese laborer's residence and lawful status within the United States. *Fong Yue Ting*, 149 U.S. at 701 n.1. If a Chinese laborer were found without the required certificate the individual would have the opportunity to prove to the satisfaction of the court and "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act." 1892 Chinese Exclusion Act, *supra*, at sec. 6. If these requirements were met a certificate of residence would be issued. *Id. Fong Yue Ting* arose after three Chinese laborers were arrested and detained for failure to have the required certificate of residence. One petitioner was denied the certificate because he

Ekiu, Justice Gray states early in his opinion for the Court that the "right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."[50] Justice Gray contends that it is every State's inalienable right to exclude and expel in order to protect safety, independence, and welfare.[51]

The connection between immigration and national sovereignty was not unknown within international law; it was an association made by many commentators.[52] The commentators relied upon by the Supreme Court agreed that a State's right to exclude and expel is absolute when the State's security is in jeopardy. Vattel noted that a State can refuse entry to aliens when there was "just cause to fear that

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was unable to produce a credible witness regarding his residence and lawful status. The only witnesses the petitioner could produce were Chinese and the collector of internal revenue (the officer issuing the certificates) concluded that these witnesses were not credible. The collector required the petitioner to "produce a witness other than a Chinaman," which the petitioner was unable to do because "there was no person other than one of the Chinese race who knew and could truthfully swear that he was lawfully within the United States on May 5, 1892, and then entitled to remain" in the United States. *Fong Yue Ting*, 149 U.S. at 703–04. The petitioners contended that they were arrested and detained without due process of law and that section 6 of the 1892 Chinese Exclusion Act was unconstitutional. *Fong Yue Ting*, 149 U.S. at 704.

50. *Fong Yue Ting*, 149 U.S. at 707.

51. *Id.* at 711. To support the idea that a sovereign State's right to exclude and expel is "absolute and unqualified" Justice Gray relies upon the work of Vattel, Ortolan, and Phillimore. *Fong Yue Ting*, 149 at 707–08. Justice Gray similarly relied upon the commentary of Vattel and Phillimore in *Ekiu*. *Ekiu*, 142 U.S. at 659. The passages selected from each of these international law scholars support the idea that sovereign States have the right to exclude and expel, yet they do not suggest an unlimited right. In fact Vattel's statements emphasize the need for a State's safety to be in jeopardy in order to exclude or expel noncitizens. *Fong Yue Ting*, 149 at 707–08 (citing EMMERICH DE VATTEL, THE LAW OF NATIONS Book I, §§ 230, 231; ORTOLAN, DIPLOMATIE DE LA MER, (4th Ed.) lib. 2, c. 14, p. 297; 1 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW (3d Ed.) c. 10, § 220). The Supreme Court's discussion of international law and the sovereign rights of States to exclude and expel presents the matter as being conclusive. There are no references to Vattel's conditions regarding public safety or national security or any indication that international legal scholars disagreed about the scope of the power to exclude and expel noncitizens. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TX. L. REV. 1, 83–87 (2002) (discussing international legal commentators who identified additional restrictions on a State's power to exclude and expel). Rather, the Supreme Court used a national sovereignty frame to analyze the State's power to exclude and expel, which allowed the Court to focus on the State's responsibility to self-preservation and conclude that the State's power to regulate immigration was unencumbered.

52. Cleveland, *supra* note 51, at 83.

they will corrupt the manners of citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, in this respect, to follow the suggestions of prudence."[53] The Supreme Court may not have explicitly discussed these limitations on the right to exclude and expel because it saw the cases as falling squarely within the exception that gave a State an unfettered right to exclude and expel—to protect national sovereignty.[54] As such, the United States had absolute sovereignty to exclude and expel.[55]

The U.S. governance system is one of delegated authority, and thus, the Court had to identify a constitutional source of authority for the federal government to regulate immigration.[56] This was not a straightforward task because authority over immigration is not enumerated within the U.S. Constitution. The closest explicit delegation of immigration authority is Article I's statement that "Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization."[57] However, additional federal powers include declaring war, making treaties, suppressing insurrections, repelling invasions, and regulating foreign commerce.[58] Based on a structural approach to identifying government powers, the Court concluded that the immigration power sits with the political branches of the federal government because of its connection to the aforementioned enumerated powers.[59] In *Chae Chan Ping* and *Fong Yue Ting*, the

53. VATTEL, *supra* note 45, at 108

54. *See* Cleveland, *supra* note 51, at 83–87; Nafziger, *supra* note 12, at 816–23.

55. The congressional records regarding the Chinese Exclusion Acts and the Court's opinions in *Chae Chan Ping* and *Fong Yue Ting* indicate that the immigration power was exercised to facilitate self-preservation.

56. In the cases establishing the plenary power it was Congress' authority to enact the various Chinese Exclusion Acts that were at issue in addition to the authority of executive officials to execute other immigration laws, such as the 1891 immigration act.

57. U.S. CONST. art. I, § 8, cl. 4.

58. Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889). "The United States are a sovereign and independent nation, and are vested by the constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective." Fong Yue Ting v. United States, 149 U.S. 698, 711 (1892).

59. ALEINIKOFF, *supra* note 12, at 154–59; Legomsky, *Plenary Congressional Power*, *supra* note 12, at 268–69. Elsewhere I argue that the use of treaties to regulate immigration from 1776 through the mid-nineteenth century reinforced the Court's perception of immigration as a national sovereignty matter. *See* Banks, *supra* note 36.

Court concluded that Congress was authorized to enact the Chinese Exclusion Acts.[60] In *Ekiu* the Court similarly concluded that the commissioner was lawfully authorized to detain Ekiu based on the 1891 Immigration Act.[61] Due to the deeply political nature of national sovereignty matters, the Court also concluded that the judicial branch should defer to the judgments and decisions of the political branches.[62] In *Chae Chan Ping* the Court concluded that the immigration decisions of the political branches are "conclusive upon the judiciary."[63] It is this conclusion regarding institutional competence that solidifies the plenary power doctrine. This doctrine stipulates that in regulating immigration "Congress and the executive branch have exclusive decision-making authority without judicial oversight for constitutionality."[64] The Court concluded that because immigration authority was delegated to the federal political branches of government and because these decisions implicate sensitive political matters, courts should exercise self-restraint and defer to the decisions of the political actors. By linking immigration to national sovereignty, the Court limited its ability to play a significant role in monitoring State use of the immigration power.

The development of this limited judicial role is connected to the U.S. experience with Chinese immigration at the time that the immigration power was challenged. The Supreme Court Justices shared the perspective that Chinese immigration during the late nineteenth century represented a threat to U.S. sovereignty and thus viewed immigration as a matter related to self-defense and foreign affairs. The Court utilized commentary by international legal scholars to bolster the conclusion that immigration regulation implicates these specific State interests. Based on our constitutional structure of government, the Court concluded that the political branches of the federal government were granted authority over national defense and foreign affairs. Concluding that these areas of expertise are entitled to

60. *Chae Chan Ping*, 130 U.S. at 606; *Fong Yue Ting*, 149 U.S. at 711–12.
61. Nishimura Ekiu v. United States, 142 U.S. 651, 664 (1892).
62. *See, e.g.*, *Chae Chan Ping*, 130 U.S. at 606; *Fong Yue Ting*, 149 U.S. at 711–12.
63. *Chae Chan Ping*, 130 U.S. at 606.
64. MOTOMURA, *supra* note 15, at 27.

deference from the judiciary, the Court adopted the plenary power doctrine and decided that admission and deportation decisions are "conclusive upon the judiciary."[65] Despite greater recognition of individual rights vis-à-vis the federal government in the United States, judicial review of deportation decisions has remained minimal. It is my contention that these factors giving rise to the plenary power doctrine continue to guide the Court's understanding of its competence in the area of immigration.

C. The Plenary Power Doctrine in the Twentieth Century

Deportation presents a series of difficult challenges to noncitizens who are long-term residents of the United States. As noted by David Wood, "Losing the right to live in what one regards as one's homeland can be seen as even more serious a deprivation than losing one's liberty."[66] Long-term residents create families and become integral parts of local communities. Often the families created are mixed-status families that include U.S. citizens.[67] The retroactive nature of deportation grounds creates uncertainty as to what behavior or activities could lead to deportation and thus the separation of families. Furthermore, the drastic expansion of aggravated felony deportation grounds raises serious questions about the proportionality of deportation in a number of circumstances.[68] The 1996 Illegal

65. *Chae Chan Ping*, 130 U.S. at 606–08.

66. David Wood, *Deportation, the Immigrants Power, and Absorption into the Australian Community*, 16 FED. L. REV. 288, 288 (1986).

67. A growing number of U.S. citizen children are living in mixed status families. In 2008, four million U.S. citizen children had a parent who was an unauthorized immigrant. Jeffrey S. Passel, A Portrait of Unauthorized Immigrants in the United States, Pew Research Center Publications (Apr. 14, 2009), http://pewresearch.org/pubs/1190/portrait-unauthorized-immigrants-states. Approximately two million families in the United States are comprised of U.S. citizen children and at least one unauthorized immigrant parent. Kari Lydersen, *'Mixed-Status' Families Look to Obama*, WASH. POST, Nov. 16, 2008, at A4, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/11/15/AR2008111502436.html.

68. An aggravated felony is a term of art defined in section 101(a)(43) of the Immigration and Nationality Act (INA). The current list of aggravated felonies includes murder, rape, sexual abuse of a minor, drug trafficking, illicit trafficking in firearms or explosive materials, money laundering, crime of violence for which the term of imprisonment is at least one year, theft (including receipt of stolen property), burglary, extortion, child pornography, racketeering or gambling, prostitution offenses, slavery offenses, espionage offenses, fraud or deceit involving a loss of more than $10,000, alien smuggling, improper alien entry, and immigration related document fraud. INA § 101(a)(43), 8 U.S.C. §

Immigration Reform and Immigrant Responsibility Act (IIRAIRA) expanded the conduct that constitutes an aggravated felony and increased the immigration consequences of such a conviction.[69] For example, since 1996, receipt of stolen goods is conduct that will constitute an aggravated felony, as is murder. If an individual has been convicted of an aggravated felony, that person no longer has access to discretionary relief from deportation, and they are barred from being readmitted to the United States permanently.[70] Despite these potential consequences, the plenary power doctrine continues to limit the ability of courts to review deportation orders for consistency with individual fundamental rights.

Noncitizens have access to statutory discretionary relief, but this does not adequately address review of substantive constitutional challenges. Discretionary relief prevents certain individuals from being deported, but not because these deportation decisions are deemed to violate a substantive constitutional right. The Immigration and Naturalization Act empowers the Attorney General to cancel removal in particular kinds of cases. The following discussion outlines the statutory discretionary relief available and contends that it inadequately addresses fundamental rights challenges. Through an analysis of twentieth century immigration cases, I demonstrate that

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1101 (2006). Noncitizens have been deported for minor criminal convictions. Mary Gibbs was facing deportation in 2000 for writing five bad checks in 1976 totaling around $100. Anthony Lewis, *Measure of Justice*, N.Y. TIMES, July 15, 2000, at A13, *available at* http://www.nytimes.com/2000/07/15/opinion/abroad-at-home-measure-of-justice.html. Similarly Il Choi was deemed deportable due to a guilty plea to shoplifting a $39 item in 1994. *Id.* Thirty-two year old Xuan Wilson had resided in the United States for twenty-eight years when she was facing deportation for writing a forged check in the amount of $19.83 at age twenty-three. Terry Coonan, *Dolphins Caught in Congressional Fishnets-Immigration Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 591 (1998–1999). A fifty-four year old woman from Annandale, Virginia was convicted of stealing perfume in 1987 and sentenced to four years in prison. Pamela Constable, *Years Later, Immigrants Pursued by Their Pasts; Even Minor Offenses Now Mean Deportation*, WASH. POST, Feb. 24, 1997, at B1. She was paroled after eight months, but she was facing deportation ten years later pursuant to the 1996 reforms. *Id.*

69. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, div. C, sec. 304, 110 Stat. 3009, 3009-587 to -597 (codified as amended at 8 U.S.C. §§ 1229-1229c (2006 & Supp. II 2008); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1891 (2000).

70. INA § 212, 8 U.S.C. §§ 1101(a)(43), 1182(a)(9)(A)(ii)(II) (2006).

immigration continues to be considered a political, rather than a legal, matter.

1. Discretionary Relief from Deportation

Congress has recognized that immigration adjudicators should have some discretion in determining which noncitizens eligible for deportation should actually be deported. The provision of discretionary relief is provided for in the Immigration and Nationality Act (INA). The Attorney General is authorized to grant cancellation of removal, which restores or grants the noncitizen lawful permanent resident status.[71] Before 1996, discretionary relief from deportation was primarily available through sections 212(c) and 244 (suspension of deportation). Section 212(c) relief was available to lawful permanent residents (LPR) who had resided in the United States for at least seven years. Otherwise, deportable noncitizens who had been continuously present in the United States for seven years, who had good moral character, and whose deportation would cause extreme hardship to the noncitizen or their citizen or LPR spouse, parent, or child, was eligible for suspension of deportation.[72] The INA granted the Attorney General the discretion to grant these forms of relief from deportation, and the discretion was exercised by the Executive Office of Immigration Review.[73] In 1996, with the passage of IIRAIRA, these forms of relief from deportation were eliminated and replaced with cancellation of removal.[74] Cancellation of removal is available to LPRs who have held that status for at least five years, have resided in the United States for at least seven years, and have not been convicted of an aggravated felony.[75] For noncitizens who do not meet these criteria, cancellation of removal is available if the noncitizen has been physically present in the United States for at least ten years, is a person of good moral character, has not been convicted of

71. *See* INA § 240A, 8 U.S.C. § 1229b (2006).

72. *Id.* § 244(a), 8 U.S.C. §1254a (2006).

73. The Executive Office of Immigration Review includes immigration judges and the Board of Immigration Appeals.

74. INA § 240A, 8 U.S.C. § 1229b (2006).

75. *Id.* § 240A(a), 8 U.S.C. §1229b(a) (2006).

specified crimes,[76] and demonstrates that his or her removal would "result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence."[77]

The Board of Immigration Appeals (BIA or Board) outlined the appropriate standards for granting cancellation of removal because the prerequisites listed above are the only guidance given to the Attorney General.[78] In *Matter of C-V-T-*, the BIA concluded that as with exercising discretion in section 212(c) cases, an immigration judge "must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf to determine whether the granting of . . . relief appears in the best interest of this country."[79] Favorable factors considered by immigration judges include family ties to the United States, length of residence in the United States, evidence of hardship to the individual deemed deportable and his or her family in the case of deportation, employment history, property or business ties to the United States, service in the U.S. Armed Forces, value and service to the community, proof of genuine rehabilitation from criminal behavior, and other evidence of good character.[80] Adverse factors considered by immigration judges include the nature and underlying circumstances of the exclusion or deportation ground at issue, additional significant violations of U.S. immigration law, a criminal record, and other evidence of bad character.[81] Immigration judges evaluate these factors in individual cases, but this analysis is not

76. These crimes include convictions for activities such as crimes involving moral turpitude, violations of controlled substance laws, convictions for two or more offenses for which the aggregate sentence of imprisonment was more than five years, prostitution, human trafficking, money laundering, aggravated felonies, domestic violence, and immigration document fraud. *Id.* §§ 212(a)(2), 237(a)(2), 237(a)(3), 8 U.S.C. §§ 1182(a)(2), 1227(a)(2), 1227(a)(3) (2006).

77. *Id.* § 240(b), 8 U.S.C. § 1229b(b)(1)(D) (2006).

78. C-V-T-, 22 I. & N. Dec. 7, 10 (BIA 1998–2000) ("Section 240A(a) does not provide express direction as to how this discretion is to be exercised.").

79. *Id.* (quoting Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978)).

80. Marin, 16 I. & N. Dec. 581, 584–85 (BIA 1978).

81. Marin, 16 I. & N. Dec. at 584. Immigration judges evaluating claims for cancellation of removal rely on the same factors outlined in *Matter of Marin* for section 212(c) relief. In re C-V-T-, 22 I. & N. Dec. 7, 11–12 (1998).

available as a matter of right. It is only available to those Congress has deemed eligible, and the analysis only considers affiliation and hardship factors. Concerns regarding fundamental rights, such as ex post facto laws, cannot be raised in these proceedings.[82] Thus, Article III courts continue to have an important role to play in immigration adjudication.

2. Legal Relief from Deportation

In addition to seeking discretionary relief, noncitizens can also legally challenge a deportation order; yet, it will be difficult to obtain robust administrative or judicial review of substantive constitutional challenges. Within the United States the initial phase of challenging a removal order or obtaining discretionary relief is administrative. The Executive Office for Immigration Review, within the Department of Justice, oversees immigration judges and the Board of Immigration Appeals. Currently, noncitizens seeking to challenge a deportation order must first raise their claim before an immigration judge during a removal proceeding.[83] During this proceeding the noncitizen is permitted to challenge the deportation order as violating procedural due process requirements. Yet immigration judges do not have jurisdiction to adjudicate constitutional challenges.[84] Consequently,

82. *See infra* text accompanying notes 85–86 for additional discussion about jurisdiction over substantive constitutional claims. Furthermore, the Attorney General can only cancel a limited number of removals annually. Consequently this form of relief may not be available to all noncitizens who can demonstrate the requisite hardship.

83. INA § 240, 8 U.S.C. § 1229a(1) (2006).

84. American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1055 (9th Cir. 1995) ("Both the [immigration judge] conducting the deportation proceeding and the Government agree that neither the [immigration judge] nor the BIA has jurisdiction to consider a selective enforcement claim during a deportation proceeding."); Matter of C-, 20 I. & N. Dec. 529, 532 (BIA 1992) ("Moreover, it is settled that the immigration judge and this Board lack jurisdiction to rule upon the constitutionality of the Act and the regulations."); Santana, 13 I. & N. Dec. 362, 365 (BIA 1969) ("And the proper function of this tribunal in the administrative scheme does not encompass passing upon constitutional questions such as this."); *see also* Panitz v. District of Columbia, 112 F.2d 39, 42 (D.C. Cir. 1940) ("It is this consideration for the orderly, efficient functioning of the processes of government which makes it impossible to recognize in administrative officers any inherent power to nullify legislative enactments because of personal belief that they contravene the constitution. Thus it is held that ministerial officers cannot question the constitutionality of the statute under which they operate."); Samuel, Bonat & Bro. Inc., 81 N.L.R.B. 1249, 1250 (1949) ("The Board [NLRB] has held that as an administrative agency created by Congress it cannot question the constitutionality of the Act which created it and that it will leave such questions to the courts for determination.").

any challenge based on the Ex Post Facto Clause, Equal Protection, the First Amendment, or Fifth Amendment liberty rights cannot be decided by an immigration judge.[85] Immigration judges have similarly concluded that they do not have jurisdiction to review challenges based on the International Covenant on Civil and Political Rights (ICCPR). Due to the status of the ICCPR as a non-self-executing treaty for which implementing legislation has not been adopted, the ICCPR cannot form the basis of a claim in a U.S. court.[86] Decisions by immigration judges are appealable to the BIA, which does not have jurisdiction over substantive constitutional challenges either.[87] Certain BIA decisions are appealable to federal

85. Nothing in the Supreme Court's jurisprudence states or suggests that noncitizens do not have constitutional rights within the immigration context. The Court has stated that noncitizens do not have an independent right to enter the United States, but when faced with deportation the Court has held that noncitizens are entitled to procedural due process in deportation proceedings. *See* Chew v. Colding, 344 U.S. 591, 596–98 (1952); Yamataya v. Fisher, 189 U.S. 86, 100–101 (1903). The plenary power doctrine, which limits judicial review of immigration decisions, is based on the notion of absolute sovereignty and deference to the political branches, not a conclusion that noncitizens lack constitutional rights. *See* ALEINIKOFF, *supra* note 12, at 153–64. In the admissions context the Court has repeatedly concluded that excluded noncitizens have not been deprived of life, liberty, or property without due process. *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). Rather than concluding that noncitizens seeking admission to the United States have no right to due process, the Court has held that the process provided by administrative officials constitutes due process of law. *See* Ekiu v. United States, 142 U.S. 651, 660 (1892).

86. *See, e.g.*, Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133–34 (2nd Cir. 2005). The United States has yet to adopt implementing legislation due to the contention that the U.S. Constitution protects all of the ICCPR rights for which there is no reservation, declaration, or understanding. Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 349 (2000). The United States explained this position in its periodic reports to the Human Rights Committee:

> Similarly, because the basic rights and fundamental freedoms guaranteed by the International Covenant on Civil and Political Rights (other than those to which the United States took a reservation) have long been protected as a matter of federal constitutional and statutory law, it was not considered necessary to adopt special implementing legislation to give effect to the Covenant's provisions in domestic law. That important human rights treaty was accordingly ratified in 1992 shortly after the Senate gave its advice and consent.

U.S. REPORT UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (July 1994), *available at* http://dosfan.lib.uic.edu/ERC/law/Covenant94/05.html. For example, the United States has explained that ICCPR article 17's protection from arbitrary and unlawful interference with privacy is protected by the Fourth Amendment, while the right to family privacy is protected by the First Amendment. DEPARTMENT OF STATE, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2005), at art. 17, para. 291, *available at* http://www.state.gov/g/drl/rls/55504.htm#art17.

87. Matter of C-, 20 I. & N. Dec. at 532.

courts, and questions of law, including substantive constitutional challenges, can be raised before the federal courts.[88] Yet, pursuant to the plenary power doctrine, the federal courts apply deferential standards of review to substantive constitutional challenges, which results in essentially no review.

Noncitizens wishing to challenge a deportation order as a violation of their substantive rights, such as First or Fifth Amendment rights, will find that federal courts only look to ensure that the government had a rational basis for its decision.[89] In a number of cases challenging deportation orders based on membership in the Communist Party, the Court failed to conduct the robust judicial review one would expect in cases raising First and Fifth Amendment claims. In *Galvan v. Press*, decided in 1954, the Court relied on *Harisiades v. Shaughnessy* to conclude that there was no First Amendment violation.[90] Yet when reviewing the Fifth Amendment

88. *See* INA § 242, 8 U.S.C. § 1252 (2006).

89. The judiciary similarly defers to the decisions of political actors in the admissions context. When the wife of a U.S. citizen was excluded based on security grounds and was denied a hearing to review the exclusion, the Court then stated that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542–44 (1950).

90. In *Harrisiades v. Shaughnessy*, the petitioners challenged the 1940 Alien Registration Act, 8 U.S.C. § 137 (1940), (54 Stat. 670), as a violation of their First and Fifth Amendment rights. 542 U.S. 580, 594 (1952). This act made noncitizens who had ever been a member of an organization that advocated the forceful or violent overthrow of the United States government during their residence in the United States deportable. *Id.* at 581–83. Thirteen years earlier the Court decided that the Act of October 16, 1918, which made noncitizens deportable for membership in an organization that believes in, advises or teaches the overthrow, by force or violence, of the Government of the United States, only applied to current members. Kessler v. Strecker, 307 U.S. 22 (1939). Past membership did not make a noncitizen deportable pursuant to the Act of October 16, 1918. *Id.* at 698. Congress was unhappy with this holding and enacted the 1940 Alien Registration Act clearly making membership in an organization that advocates the overthrow of the U.S. government by force or violence at any time cause for deportation. *Harisiades*, 542 U.S. at 593–94. Each of the noncitizens in this case had at one time during their residence in the United States been members of the Communist Party. *Harisiades*, 542 U.S. at 581–83. The petitioner also argued that the 1940 Alien Registration Act deprived them of liberty without due process of law. Justice Jackson, writing for the Court, began by outlining the relationship between national sovereignty and immigration and ultimately declined to evaluate the constitutionality of the deportation ground. *Harisiades*, 542 U.S. at 585–90. Justice Jackson stated that "in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government's power of deportation." *Harisiades*, 542 U.S. at 591 ("Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers."). Both *Galvan* and *Harisiades* were decided after *Dennis v. United States*, 341 U.S. 494 (1951), which held that membership in the Communist Party was not protected speech. Thus, the First Amendment holdings in these immigration cases were consistent with non-immigration First

claims in *Galvan*, the Court lamented that it was not writing upon a clean slate, but rather that "a whole volume" of history had been written regarding "the power of Congress under review."[91] Justice Frankfurter, writing for the Court, remarked that due to the expanding notion of substantive due process, a clean slate would have allowed the Court to see the Due Process Clause as limiting "the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens" and possibly categorizing deportation as punishment making the Ex Post Facto Clause relevant.[92] Absent a clean slate, Justice Frankfurter noted that noncitizens facing deportation are entitled to procedural due process but Congress is "entrusted exclusively" to formulate the necessary policies.[93] Relying on precedent, the Court declined to reevaluate the plenary power doctrine and review Mr. Galvan's Fifth Amendment claim. Rather, the Court noted that the "power of Congress over the admission of aliens and their right to remain is necessarily very broad."[94]

In 1972, the Supreme Court opened the door to a more robust judicial monitoring role of immigration decisions.[95] In *Kleindienst v. Mandel* the Court was faced with a First Amendment challenge to a denial of admission.[96] Rather than stating that the Court could not or would not review this substantive constitutional claim, the Court sought to determine whether or not the government had a facially legitimate and bona fide reason for the admission denial.[97] This is the first time that the Court articulated a standard for reviewing substantive constitutional challenges to immigration decisions. Interestingly, the rights challenged in this case were those of U.S.

Amendment cases. The petitioners also raised an ex post facto claim, but the Court concluded that the ex post facto clause only applied to criminal laws. *Id.*

91. Galvan v. Press, 347 U.S. 522, 531 (1954).

92. *Id.* at 530–31.

93. *Id.* at 531.

94. *Id.* at 530.

95. *See* NEUMAN, *supra* note 12, at 619.

96. Kleindienst v. Mandel, 408 U.S. 753 (1972).

97. *Mandel*, 408 U.S. at 769–70. In 1952 the Court reviewed a First Amendment challenge but held that the conduct under review was not protected under the First Amendment. Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952).

citizens in addition to those of Mandel. The appellees claimed that U.S. citizens' First Amendment rights were being infringed upon due to the government's decision not to admit Ernest Mandel.[98] The Court evaluated the U.S. citizens' constitutional claims but not Mandel's claims. The Court reiterated a recurring theme within immigration jurisprudence—that admission to the United States is a privilege; noncitizens do not have a right to enter the United States.[99] In reviewing the U.S. citizens' claims, the Court utilized a standard of review much more deferential than would apply in a non-immigration First Amendment case.[100] The Court required Mandel's exclusion to be based upon a facially legitimate and bona fide reason:

> [W]hen the Executive exercises this power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.[101]

The U.S. citizen appellees argued that the First Amendment should prohibit executive officials from denying waivers for admissions absent justification.[102] The Court concluded that the facially legitimate and bona fide reason standard was satisfied because the Attorney General provided a reason for denying Mandel a waiver—engaging in activities beyond the scope of the stated purpose of a previous trip to the United States.[103]

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98. Mandel was a Belgian journalist seeking entry to meet with U.S. academics and students. *Mandel*, 408 U.S. at 753, 756. The Court specifically noted that it "is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." *Id.* at 762.

99. *Id.* at 762; *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

100. First Amendment challenges involve fundamental rights, and restrictions on fundamental rights are generally subjected to strict scrutiny analysis by the courts.

101. *Mandel*, 408 U.S. at 770.

102. Mandel had been deemed inadmissible due to his support of communist doctrines, but unbeknownst to him he had been granted a waiver allowing his admission to the United States in the past. *Id.* at 756. Mandel was denied a waiver for his inadmissibility in 1969 because "he had engaged in activities beyond the stated purposes" of his 1968 trip. *Id.* at 757–58.

103. *Id.*

The facially legitimate and bona fide reason standard of review was also utilized by the Court in *Fiallo v. Bell*, another case in which admission decisions were challenged by U.S. citizens and lawful permanent residents.[104] In this case three unwed fathers challenged the definitions of child and parent within the Immigration and Naturalization Act as violations of the First, Fifth, and Ninth Amendments.[105] The INA grants preferential immigration status to the children of U.S. citizens and lawful permanent residents. Child was defined to include "an unmarried person under 21 years of age who is a legitimate or legitimated child, a stepchild, an adopted child, or an illegitimate child seeking preference by virtue of his relationship with his natural mother."[106] The appellants in this case failed to qualify as parents but would have satisfied the definition if they had been mothers. Pursuant to the Fifth Amendment, the appellants claimed that the INA denied them equal protection.[107] In response to this claim, the Court began by noting that the scope of the Court's inquiry is limited when reviewing immigration legislation because "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens."[108] Relying on their recent decision in *Mandel*, the Court held that if the government's policy decision regarding the definition of child and parent is based on a "facially legitimate and bona fide reason," then the Court will not "look behind the exercise of that discretion, nor test it by balancing its justification against" the constitutional rights of citizens or LPRs challenging the INA.[109] In applying this standard of review, the Court deferred not only to a facially legitimate and bona fide reason articulated by the government, but to such reasons inferred by the Court. In *Fiallo*, the Court stated that preferential

104. Fiallo v. Bell, 430 U.S. 787 (1977).

105. *Id.* at 790–91.

106. *Id.* at 788. An individual is a parent based on their relationship with a "child" under the INA. *Id.*

107. The equal protection claim was not limited to discrimination on the basis of sex, but also the father's marital status and the illegitimacy of the child. *Id.* at 791.

108. *Fiallo*, 430 U.S. at 792 (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)) (internal quotations omitted).

109. *Id.* at 794–95 (quoting Kleindienst v. Mandel, 408 U.S. 753 (1972)) (internal quotations omitted).

immigration status "is not warranted for illegitimate children and their natural fathers, *perhaps* because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations."[110] Yet, as noted by Justice Marshall in his dissenting opinion, the legislative history did not provide any indication as to why the admission privilege was denied to children born out of wedlock and their fathers, and that the lack of such information suggests that the decision was "very likely 'habit, rather than analysis or actual reflection.'"[111]

Despite the deferential nature of the standard of review applied in *Mandel* and *Fiallo*, these cases mark a significant break from the nineteenth century conclusion that the immigration decisions of the political branches are "conclusive upon the judiciary."[112] For the first time, the Court acknowledges that the State's use of the power to regulate immigration is subject to constitutional limitations and that the judiciary will monitor and evaluate the use of that power. District and appellate federal courts have broadened the role of the courts in monitoring and evaluating immigration decisions based on the openings provided in *Mandel* and *Fiallo*. Most notably, these courts have utilized the rational basis test to review equal protection and substantive due process challenges to deportation orders, have expanded the procedural due process exception to the plenary power doctrine, and have created new exceptions to the doctrine.[113] The Supreme Court, however, has not ratified these strategies.[114] Rather, the Court has played a more active role in reviewing immigration decisions through statutory interpretation and the interpretation of

110. *Id.* at 799 (emphasis added).

111. *Id.* at 811 & n.10 (Marshall, J., dissenting) (quoting Califano v. Goldfarb, 430 U.S. 199, 222 (1977)).

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

113. Legomsky, *Ten More Years*, *supra* note 12, at 930–34.

114. *See, e.g.*, Acosta v. Gaffney, 413 F. Supp 827 (D.N.J. 1976), *rev'd*, 558 F.2d 1153 (3d Cir. 1977); Lieffi v. United States INS, 389 F. Supp. 12 (N.D. Ill. 1975), *rev'd in unreported decision*, 529 F.2d 530 (7th Cir. 1976); *see also* Legomsky, *Ten More Years*, *supra* note 12, at 934 (noting that the "Supreme Court has decided no cases in which the constitutionality of congressional action in the field of immigration has been at issue").

other subconstitutional texts.[115] These strategies have not, however, given rise to meaningful review of deportation decisions.

Use of the rational basis test to review constitutional challenges to deportation orders represents a significant departure from the plenary power doctrine as applied in *Fong Yue Ting*. This approach mirrors the developments created in *Mandel* and *Fiallo* in which the Supreme Court looked for a "facially legitimate and bona fide" reason for the government's action.[116] In applying the rational basis standard of review, courts determine whether or not the immigration laws or regulations are rationally related to a legitimate government purpose.[117] The cases applying this standard of review have typically concluded that the government's interest in regulating migration is legitimate and the challenged laws and regulations are rationally related to that purpose.[118] In the few cases in which a court has concluded that there is a constitutional violation, the decision was reversed on appeal.[119] The courts continuously conclude that aliens do not represent a suspect class and that the immigration action does not interfere with fundamental rights. [120] Consequently, more robust standards of review are not applicable. Thus, Congress's decisions about which categories of noncitizens are deportable and Executive decisions about which individual noncitizens are deportable are not subject to robust judicial review.

The use of rational basis review for equal protection and substantive due process challenges is a dramatic break from the standards of review applied to similar challenges in non-immigration cases.[121] Several district courts have acknowledged this mismatch in the First Amendment context. In *American-Arab Anti-Discrimination*

115. Motomura, *Phantom Constitutional Norms*, *supra* note 12, at 560.

116. Kleindienst v. Mandel, 408 U.S. 753, 769 (1972); *Fiallo*, 430 U.S. at 1479.

117. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 84 (2000) (applying rational basis review to a state law creating an age classification).

118. *See* Legomsky, *Plenary Congressional Power*, *supra* note 12, at 296 n.215

119. *See id.* at 296 n.216.

120. *See, e.g.*, Noel v. Chapman, 508 F.2d 1023, 1027 (2d. Cir. 1975) (concluding that denying the ability to extend voluntary departure dates did not interfere with right to marry or raise a family); Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970) (deportation of American citizen's spouse did not violate constitutional right to live together); Swartz v. Rogers, 254 F.2d 338 (D.C. Cir. 1958) (same).

121. *See* Aleinikoff, *supra* note 12, at 151–54.

Committee v. Meese (AADC)[122] and *Rafeedie v. INS*,[123] the district courts concluded that traditional First Amendment standards applied in both deportation cases and exclusion cases. In *AADC*, which addressed a First Amendment challenge to a deportation order based on selective enforcement, the district court was reversed on other grounds by the court of appeals, but dicta in the Supreme Court opinion suggests that the traditional First Amendment analysis would not be applicable in cases challenging deportation.[124] Justice Scalia, writing for the majority, notes that requiring the government to provide the information necessary to conduct a First Amendment analysis may disclose "foreign-policy objectives" or "foreign intelligence products and techniques."[125] Here, the separation of powers concerns raised in *Ekiu* and *Fong Yue Ting* continue to support limited judicial review of substantive constitutional challenges to deportation decisions. Justice Scalia's opinion reflects the continuing notion that immigration regulation implicates national sovereignty interests and therefore presents political, rather than legal, questions.

The protection of procedural due process is another limitation on the reach of the plenary power doctrine. Since 1903 when *Yamataya v. Fisher* was decided, the plenary power doctrine has not limited judicial review of procedural due process claims.[126] As a result of this exception, "[j]udges with constitutional misgivings about an immigration decision by the government have ameliorated the harshness of the plenary power doctrine by first construing the constitutional challenge as 'procedural,' and then invalidating the

122. Am.-Arab Anti-Discrimination Comm. v. Meese, 714 F.Supp. 1060 (C.D. Cal. 1989), *rev'd on other grounds*, Am.-Arab Anti-Discrimination Comm. v. Thornburgh, 940 F.2d 445 (9th Cir. 1991).

123. Rafeedie v. INS, 795 F.Supp. 13 (D.D.C. 1992).

124. Reno v. Am.-Arab Anti-Discrimination Comm. (*AADC*), 525 U.S. 471, 488 (1999) (stating "an alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation").

125. *AADC*, 525 U.S. at 491.

126. Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903); Motomura, *Procedural Surrogates*, *supra* note 12, at 1627–28; Legomsky, *Plenary Congressional* Power, *supra* note 12, at 298–99; *see also supra* note 85.

decision on procedural due process grounds."[127] This approach is particularly evident in cases involving conditions of detention and has even been extended to apply in exclusion cases.[128] It has not, however, been as prominent in cases involving substantive constitutional challenges to deportation orders.

Another significant means by which noncitizens challenging immigration decisions have obtained greater judicial oversight is through the interpretation of statutes and regulations. Hiroshi Motomura has argued that the use of phantom constitutional norms to interpret the relevant statutes and regulations has enabled courts to provide more robust review.[129] The constitutional norms utilized are phantom constitutional norms because they "are not indigenous to immigration law but come from mainstream public law instead."[130] The indigenous constitutional norm that informs the interpretation of immigration statutes is the plenary power doctrine, which would provide for limited judicial review.[131] The phantom constitutional norms

> operate indirectly, by serving as the unstated background context that informs our interpretation of statutes and other subconstitutional texts. In other words, contemporary constitutional law is a significant element of the legal culture that judges inevitably, if often subconsciously, absorb and rely upon when acting in their judicial capacity, including those instances in which they engage in statutory interpretation.[132]

This approach has proved successful in allowing the judiciary to monitor and evaluate the ways in which immigration authorities

127. Motomura, *Procedural Surrogates*, *supra* note 12, at 1628 ("procedural due process has served in a significant number of cases as a 'surrogate' for the substantive judicial review that the plenary power doctrine seems to bar"); *see also* Legomsky, *Ten More Years*, *supra* note 12, at 931–32.

128. Motomura, *Procedural Surrogates*, *supra* note 12, at 1628; Legomsky, *Ten More Years*, *supra* note 12, at 931–32.

129. Motomura, *Phantom Constitutional Norms*, *supra* note 12, at 560.

130. *Id.* at 549.

131. *Id.*

132. *Id.* at 561.

utilize the State's power to regulate immigration and even constrain the use of that power at times. The Supreme Court's 2001 decision in *Zadvydas v. Davis* exemplifies this trend.[133] This case involved a challenge to the continued detention of noncitizens who were ordered to be removed, but who the government was unable to remove.[134] The relevant portion of the Immigration and Naturalization Act permitted noncitizens ordered removed to be detained for ninety days in order to effectuate the removal. The statute also provided for a "post-removal period" in case the individual could not be removed within the ninety-day removal period, yet the statute was silent regarding the length of the post-removal period. The Court had to determine whether or not the government could detain a removable alien indefinitely under the statute. This was a case of statutory interpretation, yet the Court noted that because indefinite detention would "raise serious constitutional concerns," the Court construed the statute to "contain an implicit 'reasonable time' limitation" subject to federal court review.[135] The Government argued that the plenary power doctrine was applicable in this case such that the Court was required to defer to the political branches.[136] The Court responded by noting that the political branches' plenary power over immigration is "subject to important constitutional limitations."[137] The pressing question in the United States is who will monitor and enforce these constitutional limitations.

By conceptualizing immigration as a political matter, the courts have decided not to perform this monitoring function in the vast majority of substantive constitutional challenges to deportation decisions. This has created a significant monitoring gap that neither Congress nor the Executive have sought to fill. As the earlier discussions in this Part have illustrated, the Court's perspective of

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

134. The relevant statutory provisions deal with both exclusion and deportation.

135. *Zadvydas*, 533 U.S. at 682. The Court also noted "we believe that an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent." *Id.* at 696 (internal citations omitted).

136. *Id.* at 695.

137. *Id.*

Chinese immigration as a threat to national cohesion and a form of aggression, international law's apparent lack of restrictions on a State's power to expel and deport, and separation of powers concerns all supported the Court's conclusion that immigration implicates national sovereignty and is, therefore, a political rather than a legal matter. Despite encroachments on the plenary power doctrine in the twentieth century, federal courts continue to refuse to apply traditional standards of review to substantive constitutional challenges to deportation decisions. It is my contention that this decision reflects the Court's conclusion that immigration regulation implicates national sovereignty issues, which raise political questions that are not well suited to legal decision-making. As political matters it is appropriate for the judiciary to defer to Congress and the Executive in reviewing immigration laws, regulations, and decisions.

II. ADJUDICATING DEPORTATION IN EUROPE

European deportation jurisprudence treats immigration matters as legal matters for which courts play a significant role in monitoring deportation decisions. European courts have been able to develop this role because of the fundamentally different way in which immigration regulation is conceptualized. The State's power to regulate immigration is rooted in the State's authority to protect public order.[138] Much like the United States during the first century of our republic, regulating immigration is akin to regulating health and safety.[139] In the United States the power to regulate for the protection of health and safety was retained by the states.[140] In the face of growing pressure for national action in the area of immigration in the nineteenth century, the U.S. Supreme Court had to identify a different source of authority for federal immigration regulation. Europe has not faced a similar challenge and thus has retained the conception of immigration as a public order matter.

138. The European concept of public order is akin to the police power idea in the United States.

139. Neuman, *supra* note 20, at 1894–96.

140. *See, e.g.*, Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Powers*, 45 HARV. C.R.-C.L. L. REV. 1, 9–10 (2010).

Europe's history with large-scale immigration after World War II occurred at a time when the concept of individual human rights was prominent. This created a context in which European courts could view immigration as an issue of public order and thus as a legal matter rather than a political matter. This conclusion enables courts throughout Europe to play a significant role in monitoring State deportation decisions. This Part discusses the impact of Europe's post-World War II history with large-scale immigration, public order as the basis for regulating immigration, and the allocation of this authority on the development of the European Court of Human Rights' (ECtHR) deportation jurisprudence. I have chosen to examine ECtHR jurisprudence because the European Convention on Human Rights (ECHR) provides the standard for individual rights protection within Europe. Domestic fundamental rights jurisprudence tracks that of the ECtHR because allegations of fundamental rights violations are often brought in domestic courts pursuant to the ECHR. Domestic courts adjudicate these claims and rely on ECtHR jurisprudence as binding precedent.[141] As all members of the European Union are required to ratify the ECHR, the ECtHR's jurisprudence offers the most efficient way to analyze deportation jurisprudence. This Part also analyzes the deportation jurisprudence of the Human Rights Committee (HRC) because it provides an international analogue to the ECtHR analysis.[142]

Significant immigration within Western Europe grew for the same reason that Chinese immigration grew in the United States—the need for labor. After World War II, Western Europe needed to rebuild, and there was an inadequate supply of domestic labor. Immigrant labor was seen as an important and valuable resource in accomplishing the

141. *See, e.g.*, Mokrani v. France, App. No. 52206/99, 40 Eur. H.R. Rep. 5 (2005); Ezzouhdi v. France, App. No. 47160/99 (Feb. 13, 2001), http://www.echr.coe.int; Baghli v. France, 1999-I Eur. Ct. H.R. 170; Bouchelkia v. France, 1997-I Eur. Ct. H.R. 47; El Boujaïdi v. France, 1997-VI Eur. Ct. H.R. 1980.

142. The Human Rights Committee is the body responsible for monitoring compliance with the International Covenant for Civil and Political Rights. *See generally* Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, http://www2.ohchr.org/english/bodies/hrc/ (last visited Sept. 29, 2010).

reconstruction goals.[143] The assumption was that foreign workers would come for a limited period of time to address the labor demands and then return home once these demands were satisfied.[144] There were two main sources of immigrant labor to Western Europe between 1945 and 1973—Southern Europe and former colonies.[145] For example, men from Italy and Spain were recruited in significant numbers to work in Britain, Belgium, France, and Switzerland. Countries like Britain, France, and the Netherlands also made use of immigrant labor from their former colonies.[146] These workers began with the advantage of being citizens and thus were entitled to citizen-based social and political rights, including protection from deportation. However, this beneficial status did not persist. As the former colonies obtained independence, the immigrants' citizenship status changed.[147]

Guest worker programs were created to address the low-skill labor needs. Guest workers were granted permits that provided for temporary residence and work authorization, but they generally were valid for specific jobs in specific areas.[148] Governments discouraged guest workers from bringing dependents with them, but over time family reunification could not be prevented completely.[149] Host states also limited the social and political rights of guest workers. By the early 1970s, Western Europe was experiencing a reversal of economic fortunes.[150] The oil crisis was having a significant impact on economic growth, and the demand for labor in Western Europe declined significantly. Once the governments stopped actively recruiting guest workers, they assumed the immigration flows would stop and the current guest workers would return home. This

143. STEPHEN CASTLES & MARK J. MILLER, THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD 96–97 (2009).

144. *Id.* at 100–01.

145. *Id.* at 97, 101. In addition to Southern Europeans individuals from Finland and Ireland also migrated to more economically prosperous Western European States. *Id.* at 97.

146. For example, by 1970 over 600,000 Algerians, 140,000 Moroccans, and 90,000 Tunisians had immigrated to France. *Id.* at 99, 102.

147. *Id.* at 102–03.

148. *Id.* at 100.

149. CASTLES & MILLER, *supra* note 143, at 99–100, 102.

150. *Id.* at 100–03.

expectation did not occur, and these States began to realize that the guest worker model was giving rise to a permanent immigrant population.

In Western Europe legal action was taken to prevent the growth of the immigrant population, and noncitizens challenged these actions as violations of their fundamental rights. An example of such action was limiting family reunification. In both France and Germany legislation was enacted that either suspended family reunification or created multi-year waiting periods.[151] In 1978 the French Conseil d'État struck down a law suspending family reunification for noncitizens because it was contrary to the general legal principle protecting an individual's right to family life.[152] Migrant workers in Germany challenged restrictions on family reunification as a violation of Germany's domestic protection of family life—Article 6 of the Basic Law.[153] There is no distinction between citizens and noncitizens in Germany's Basic Law, and the domestic court's analysis of the family life claims mirrored the analysis that would have been conducted in a non-immigration case.[154] In 1983 the Federal Constitutional Court in Germany prohibited Bavaria and Baden-Wurtenberg from creating a three-year waiting period for the admission of noncitizen spouses. The court considered this measure a violation of Article 6 of the Basic Law.[155] Western Europe's experience with immigration, like that of the United States, grew exponentially during a time of economic boom. Once that boom subsided and fewer jobs were available, tensions arose and legal action was taken by the State to limit or prohibit future immigration.

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151. Virginie Guiraudon, *European Courts and Foreigners' Rights: A Comparative Study of Norms Diffusion*, 34 INT'L MIGRATION REV. 1088, 1100 (2000).

152. *Id.*

153. Tugrul Ansay, *The New UN Convention in Light of the German and Turkish Experience*, 25 INT'L MIGRATION REV. 831, 836–38 (1991) [hereinafter *New UN Convention*]; Tugrul Ansay, *Legal Problems of Migrant Workers*, *in* 3 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 7, 24 (1977) [hereinafter *Hague Lectures*]. National courts in France and Germany limited the State's ability to restrict or limit family-based migration. Guiraudon, *supra* note 151, at 1100.

154. Ansay, *New UN Convention*, *supra* note 153, at 836–37; Ansay, *Hague Lectures*, *supra* note 153, at 24; Guiraudon, *supra* note 151, at 1100.

155. Guiraudon, *supra* note 151, at 1100; *see also* CASTLES & MILLER, *supra* note 143, at 108.

Noncitizens in both jurisdictions challenged these actions as violations of their fundamental rights, yet European courts did not discuss immigration regulation as raising national sovereignty concerns—as threats to social cohesion or as a form of aggression. Rather, regulating the conduct and movement of immigrants was akin to regulating citizens, and the State was empowered to do so pursuant to its power to protect public order.[156]

In viewing immigration challenges as raising legal issues rather than political issues, European States have a variety of legal texts to abide by. States not only have domestic bases for protecting individual rights, but also regional and international human rights treaties. Historically, international law has placed very few explicit limits on a State's power to regulate immigration.[157] Decisions regarding admission, conditions of residence, and deportation have largely been unregulated by international law, even by human rights treaties.[158] Provisions within the Convention on the Elimination of All Forms of Racial Discrimination (CERD) exemplify this approach. CERD seeks to prohibit "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic

156. While European courts were reviewing immigration claims, European borders were vanishing in order to develop an economic community for the free movement of labor, goods, and capital. It is possible that the growth and legalization of European migration enabled European adjudicators to view immigration regulation as a matter of public order rather than national sovereignty.

157. A notable exception to the lack of international law regulating immigration is the regulation of asylum and refugees. The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees limit a State's right to exclude and expel refugees. Refugee is a term of art defined in each document essentially as an individual who is outside of their country of nationality and unable or unwilling to return to that country because of persecution or a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. *See* Convention Relating to the Status of Refugees, art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, art. 1(2), Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967). Nonrefoulement and asylum are key obligations under these treaties. Nonrefoulement prevents a State from returning a refugee to territory where her life or freedom would be at risk or where she is at risk of being persecuted. Refugee Convention, *supra* note 157, at art. 33. Asylum enables a refugee to reside in a particular State with certain rights regarding employment and family reunification. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 845 (2008).

158. *See* Kif Augustine-Adams, *The Plenary Power Doctrine After September 11*, 38 U. CAL. DAVIS L. REV. 701, 721–29 (2005).

origin."[159] Yet the treaty states that it does "not apply to distinctions, exclusions, restrictions or preferences . . . [between] citizens and non-citizens."[160] Additionally, the treaty does not regulate the rules States adopt regarding nationality, citizenship, or naturalization, provided that the rules "do not discriminate against any particular nationality."[161] Similarly, the European Convention on Human Rights permits States to restrict the political activity of noncitizens.[162] Human rights enforcement bodies such as the Human Rights Committee have repeatedly stated that noncitizens do not have an independent right to reside in the territory of a State other than their State of citizenship.[163] The International Covenant on Civil and Political Rights acknowledges that States may deport noncitizens, but does require that deportation proceedings comply with procedural due process norms.[164] The European Court of Human Rights similarly acknowledges the expansiveness of States' immigration power by noting that it "is a matter of well-established international law" that States can control the "entry, residence and expulsion of aliens."[165] Yet the introduction of these and other human rights

159. International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1), Mar. 7, 1966, 660 U.N.T.S.195 [hereinafter CERD].

160. *Id.* at art. 1(2). The CERD Committee has, however, issued a general recommendation in which it encourages States to avoid "expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life." CERD Committee, General Recommendation 30 on Discrimination Against Non-Citizens, ¶ 28, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (May 4, 2005).

161. *Id.* at art. 1(3).

162. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 16, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

163. *See* U.N. Human Rights Comm., *Winata v. Australia*, Communication No. 930/2000, U.N. Doc. CCPR/C/72/D/930/2000 (Aug. 16, 2001); U.N. Human Rights Comm., *Madafferi v. Australia*, Communication No. 1011/2001, U.N. Doc. CCPR/C/81/D/1011/2001, at para. 9.7 (Aug. 26, 2004). The Human Rights Committee is the body responsible for monitoring State Party compliance with the ICCPR. Article 12(4) of the ICCPR provides that no "one shall be arbitrarily deprived of the right to enter his own country." *See infra* note 164.

164. International Covenant on Civil and Political Rights, art. 9(2), *came into force* Mar. 23, 1976, 999 U.N.T.S. 172 [hereinafter ICCPR]. The United States ratified this treaty in 1992.

165. Beldjoudi v. France, 229 Eur. Ct. H.R. (ser. A) at para. 74 (1992); Berrehab v. The Netherlands, 131 Eur. Ct. H.R. (ser. A) at para. 28 (1988) (stating that the court "accepts that the Convention does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens"); Abdulaziz, Cabales & Balkandali v. United Kingdom, 83 Eur. Ct. H.R. (ser. A) at para. 67 (1985) (noting that it is "a matter of well-established international law" that "a State has the right to control the entry of non-nationals into its territory").

treaties has played an increasingly important role in regulating immigration, particularly within Europe.[166]

The ECtHR and the Human Rights Committee provide robust review, through proportionality review, of challenges that deportation orders violate a noncitizen's right to family life. The ICCPR provides that no individual "shall be subjected to arbitrary or unlawful

166. Human rights treaty obligations and the ECtHR jurisprudence have limited the State's ability to deport noncitizens, and they have influenced the way in which political actors are allocating immigration rights. The provisions of the ICCPR and the ECHR impact a significant portion of the world. As of February 2009, 85% of the United Nations Member States have ratified the ICCPR and 94% of the European countries have ratified the ECHR. As of February 2009, 164 States have ratified the ICCPR and 47 have ratified the ECHR. Both of these treaties protect individuals in their capacity as humans rather than as citizens of a particular State. The ICCPR states that each State Party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction" the rights recognized in the treaty. ICCPR, *supra* note 164, at art. 2(1). Similarly the ECHR states that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" defined within the treaty. ECHR, *supra* note 162, at art. 1. In both of the treaties the substantive provisions discuss the rights as belonging to all individuals. *See, e.g.*, ICCPR, *supra* note 164, at arts. 2, 6, 10; ECHR, *supra* note 162, at arts. 3, 4, 6. *But see* ICCPR, *supra* note 164, at art. 25 (protecting the right to participate in the conduct of public affairs, vote and be elected and have access to public service of citizens only); *id.* at art. 24 (protecting specific rights for children); *id.* at art. 27 (protecting community cultural rights for ethnic, religious, and linguistic minorities). Consequently noncitizens have been able to challenge expulsion decisions based on a claim that the expulsion would violate an individual right protected in either the ICCPR or the ECHR.

Additionally, recent European Union Council directives are allocating immigration-related rights based on an individual's affiliation with the State of residence. These directives regulate admission and expulsion in a manner that comports with provisions of the European Convention on Human Rights. For example, the opportunity to enter and protection against deportation are both given to noncitizens based on affiliation factors such as family connections within the State of residence and length of residence. In 2003, the European Union Council issued a directive harmonizing the conditions for third-country nationals' right to family reunification. Council Directive 2003/86, 2003 O.J. (L 251) 12 (EC) (addressing the right to family reunification). Third-country nationals are those individuals who are not citizens of a European Union Member State. *Id.* at art. 2(a); Treaty Establishing the European Community, art. 17, Feb. 7, 1992, 1992 O.J. (C224) 1 (as amended by Provisions Amending the Treaty Establishing the European Economic Community With a View to Establishing the European Community art. G(5)). Pursuant to this directive, Member States are required to admit the noncitizen spouse and minor children of third-country nationals holding residence permits valid for at least one year who have reasonable prospects of obtaining permanent residence. Council Directive 2003/86, arts. 4, 3, 2003 O.J. (L 251) 12 (EC). Member States may additionally provide for the admission of long-term unmarried partners or unmarried adult children who are unable to provide for themselves. Long-term resident third-country nationals also receive protection against deportation. Pursuant to a 2004 Council Directive, Member States are limited in their ability to expel long-term resident third-country nationals. Council Directive 2003/109, art. 12, 2004 O.J. (L 16) 44 (EC) (concerning the status of third-country nationals who are long-term residents). Deportation is only allowed if the noncitizen "constitutes an actual and sufficiently serious threat to public policy or public security." *Id.* at art. 12(1). Any decision to deport such a noncitizen must take into account four factors: length of residence, age, consequences for the individual noncitizen and their family members, and connections with the country of residence or the absence of connections with the State of citizenship. *Id.* at art. 12(3).

interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."[167] The ECHR notes that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[168] Any interference with this right has to be "in accordance with the law" and "necessary in a democratic society."[169] Noncitizens throughout Europe have challenged expulsion orders[170] on the ground that effectuating the expulsion would arbitrarily interfere with noncitizens' family lives. Petitioners filing these cases have lived throughout Europe, but the vast majority of the cases arise in France.[171] While each case presents a different set of facts, the general claim raised in these cases is that the noncitizens expelled will be deprived of their family lives because they will be separated from their spouse, partner, children, parents, or siblings. The noncitizen petitioners generally claim that it would be unreasonable for their family members to join them in their state of nationality because of language barriers, economic opportunities, or distance from non-nuclear family members.[172]

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167. ICCPR, *supra* note 164, at art. 17(1).

168. ECHR, *supra* note 162, at art. 8(1).

169. *Id.* at art. 8(2). The provision elaborates that the interference must be "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *Id.*

170. Expulsion orders are like deportation orders in that they mandate that the non-citizen leave the territorial boundaries of the State.

171. France was the respondent in twelve of the twenty-eight cases under review. *See* Mokrani v. France, 40 Eur. Ct. H.R. 5 (2003); Ezzouhdi v. France, App. No. 47160/99 (2001), http://www.echr.coe.int; Baghli v. France, 33 Eur. Ct. H.R. 32 (1999); Bouchelkia v. France, 25 Eur. Ct. H.R. 686 (1999); El Boujaïdi v. France, 30 Eur. Ct. H.R. 223 (1999); Mehemi v. France, 30 Eur. Ct. H.R. 739 (1999); Dalia v. France, 33 Eur. Ct. H.R. 26 (1998); Boujlifa v. France, 30 Eur. Ct. H.R. 419 (1997); Boughanemi v. France, 22 Eur. Ct. H.R. 228 (1996); Nasri v. France, 21 Eur. Ct. H.R. 458 (1995); Beldjoudi v. France, 14 Eur. Ct. H.R. 32 801 (1992); Moustaquim v. Belgium, 13 Eur. Ct. H.R. 802 (1991).

172. Chair and J.B. v. Germany, App. No. 69735/01 (2008), http://www.echr.coe.int; Kaya v. Germany, App. No. 31753/02 (2007), http://www.echr.coe.int; Maslov v. Austria, 47 Eur. H.R. Rep. 20 (2007); Sezen v. The Netherlands, 43 Eur. H.R. Rep. 30 (2006); Üner v. The Netherlands, 45 Eur. H.R. Rep. 14 (2006); Lupsa v. Romania, 46 Eur. H.R. Rep. 36 (2006); Keles v. Germany, 44 Eur. H.R. Rep. 12 (2005); Radovanovic v. Austria, 41 Eur. H.R. Rep. 6 (2004); Jakupovic v. Austria, 38 Eur. H.R. Rep. 27 (2003); Mokrani v. France, 40 Eur. H.R. Rep. 5 (2003); Slivenko v. Latvia, 39 Eur. H.R. Rep. 24 (2003); Al-Nashif v. Bulgaria, 36 Eur. H.R. Rep. 37 (2002); Yildiz v. Austria, 36 Eur. H.R. Rep. 32 (2002); Amrollahi v. Denmark, App. No. 56811/00 (2002), http://www.echr.coe.int; Ezzouhdi v. France, App. No. 47160/99 (2001), http://www.echr.coe.int; Bensaid v. United Kingdom, 33 Eur. H.R. Rep. 10 (2001); Boultif v. Switzerland, 33 Eur. H.R. Rep. 50 (2001); Baghli v. France, 33 Eur. H.R. Rep. 32

Between 1988 and mid-2008, the European Court of Human Rights decided twenty-eight cases in which noncitizens challenged expulsion orders based on Article 8 of the ECHR. Within roughly the same timeframe, the Human Rights Committee reviewed six expulsion orders that were challenged as violating Article 17.[173] The ECtHR found violations in sixty-four percent of the cases, while the Human Rights Committee only found violations in thirty-three percent of the cases. Both of these adjudicative bodies conducted proportionality reviews to determine whether or not the expulsion of the noncitizen would violate the noncitizen's right to family life as articulated in the ICCPR or the ECHR. In conducting a proportionality review, the ECtHR does not seek to "pass judgment" on a State's "immigration and residence policy as such."[174] Rather it seeks to determine whether or not the expulsion decision "would constitute an interference with the rights protected by paragraph (1) of Article 8" and whether or not such interference is "'necessary in a democratic society,' that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued."[175] Similarly, the Human Rights Committee seeks to determine if the interference with family life can be justified. In making this determination, the HRC considers "the significance of the State party's reasons for the removal of the person concerned" and "the

(1999); Bouchelkia v. France, 25 Eur. H.R. Rep. 686 (1999); El Boujaïdi v. France, 30 Eur. H.R. Rep. 223 (1999); Mehemi v. France, 30 Eur. H.R. Rep. 739 (1999); Dalia v. France, 33 Eur. H.R. Rep. 26 (1998); Boujlifa v. France, 30 Eur. H.R. Rep. 419 (1997); Boughanemi v. France, 22 Eur. H.R. Rep. 228 (1996); C v. Belgium, 32 Eur. H.R. Rep. 2 (1996); Nasri v. France, 21 Eur. H.R. Rep. 458 (1995); Lamguindaz v. United Kingdom, 17 Eur. H.R. Rep. 213 (1993); Beldjoudi v. France, 14 Eur. H.R. Rep. 32 801 (1992); Moustaquim v. Belgium, 13 Eur. H.R. Rep. 802 (1991); Berrehab v. The Netherlands, 11 Eur. H.R. Rep. 322 (1988).

173. The Human Rights Committee also addressed a similar challenge in *Rajan & Rajan v. New Zealand*, CCPR/C/78/D/820/1988 (2003). Yet in this case the petitioner was deemed deportable based on gaining entry under fraudulent means. The cases reviewed in this Article focus on deportation orders issued based on post-entry behavior, rather than deportation that corrects improper or incorrect admissions decisions.

174. *Berrehab*, 11 Eur. H.R. Rep. 322 at para. 29; *see also Moustaquim*, 13 Eur. H.R. Rep. 802 at para. 43.

175. *Moustaquim*, 13 Eur. H.R. Rep. 802 at para. 44; *see also Berrehab*, 11 Eur. H.R. Rep. 322 at para. 29.

degree of hardship the family and its members would encounter as a consequence of such removal."[176]

Both bodies repeatedly convey the idea that "there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons."[177] The HRC has noted that it is "certainly unobjectionable" under the ICCPR "that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits."[178] Yet the discretion that the State parties have is not absolute; it "may come to be exercised arbitrarily in certain circumstances."[179] In determining whether or not the exercise of the expulsion power is arbitrary or is "necessary in a democratic society," both the ECtHR and the HRC acknowledge the rights of both the noncitizen and the State and seek to ensure that each is adequately protected. This review is conducted without automatically deferring to the State's interest.

The use of individual treaty rights to monitor and evaluate a State's use of the power to regulate immigration is possible because of the conclusion by both the ECtHR and the Human Rights Committee that immigration presents legal questions that can competently and justifiably be resolved by legal decision makers. In both of these bodies, the State power to regulate immigration is understood to be based on a State's sovereign duty to maintain public order. This is a broad power enabling public authorities to regulate in the interest of protecting public welfare, peace, and security.[180] The ECtHR has repeatedly noted that States have a sovereign right to maintain public order within their territory and that a feature of that sovereign power is regulating the residence of noncitizens. In *Jakupovic v. Austria* the court stated that

176. Madafferi, *supra* note 163, at para. 9.8; *see also* Winata, *supra* note 163, at paras. 7.1–7.3.
177. Winata, *supra* note 163, at para. 7.3.
178. *Id.*
179. *Id.*
180. *See, e.g.*, Roger Warren Evans, *French and German Administrative Law: With Some English Comparisons*, 14 INT'L & COMP. L. Q. 1104, 1116 (1965).

> [i]t is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences.[181]

This sentiment was repeated in additional cases including *Üner v. The Netherlands*, a 2006 case decided by the Grand Chamber.[182] Unlike national sovereignty, public order regulation does not categorically involve sensitive political matters. Consequently, there is little reason for courts or other adjudicative bodies to exercise self-restraint.

Legal challenges by individuals regarding the manner in which the State exercises its power to protect public order are generally evaluated to determine whether or not the State action was necessary. This is the basis for proportionality review. Focus on the necessity of the State action is written into the ECHR provision protecting the right to private life and family life. Article 8 prohibits States from interfering with this individual right unless the interference is

> in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of

181. Jakupovic v. Austria, App. No. 36757/97, 38 Eur. H.R. Rep. 27, at para. 25 (2004).

182. Üner v. The Netherlands, App. No. 46410/99, 45 Eur. H.R. Rep. 14, at para. 51 (2007) ("[I]n pursuance of their task of maintaining public order, contracting states have the power to expel an alien convicted of criminal offences."); *see also* Chair and J.B. v. Germany, App. No. 69735/01, at para. 56 (2008), http://www.echr.coe.int ("In pursuance of their task of maintaining public order, Contracting States have the power to expel aliens convicted of criminal offences."); Kaya v. Germany, App. No. 31753/02, at para. 51 (2007), http://www.echr.coe.int ("In pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences."); Radovanovic v. Austria, App. No. 42703/98, 41 Eur. H.R. Rep. 6, at para. 31 (2005) ("[I]t is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences."); Slivenko v. Latvia, App. No. 48321/99, 39 Eur. H.R. Rep. 24, at para. 115 (2004) ("It is for the Contracting States to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens . . . .").

> disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[183]

To determine necessity the ECtHR has required the State action to "correspond[] to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued."[184] In cases challenging deportation orders, the ECtHR has sought to determine whether or not the appropriate balance has been struck between the "legitimate [State] aim pursued" and the "seriousness of the interference with the applicant's right to respect for their family life."[185] The legitimate State interest invoked has been the prevention of disorder, and in most of these cases, the noncitizens challenging their deportation had been ordered deported due to criminal convictions. The criminal convictions have ranged from assault to burglary to drug trafficking to rape.[186] The ECtHR deportation jurisprudence reflects that the State interest implicated in deporting noncitizens is often crime control. The U.S. jurisprudence is still beholden to a doctrine that was created when immigration cases implicated the Chinese Exclusion Acts, communism, and terrorism. Neither the U.S. Supreme Court nor the lower courts have revised this doctrine to account for the wide variety of State interests at stake in regulating immigration.

A. Judicial Review with Proportionality Analysis

1. European Court of Human Rights Jurisprudence

Noncitizens frequently challenge deportation or expulsion decisions as a violation of their right to family life. The ECtHR has

183. ECHR, at art. 8.

184. Berrehab v. The Netherlands, 11 Eur. H.R. Rep. 322 , para. 28. (1988)

185. *Id.* at para. 29.

186. *See, e.g.*, Beldjoudi v. France, 14 Eur. H.R. Rep. 32 801 (1992); Aoulmi v. France, App. No. 50278/99 (2006); Amrollahi v. Denmark, App. No. 56811/00 (2002), http://www.echr.coe.int; Baghli v. France, 33 Eur. H.R. 32; Bouchelkia v. France, 25 Eur. H.R. Rep. 686 (1999). A similar pattern exists in the United States—many noncitizens are deported due to a criminal violation. The latest figures available comparing deportation grounds indicate that 19.2% of noncitizens removed from the United States were removed due to a criminal violation. U.S. DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 96 tbl.40 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf [hereinafter 2005 YEARBOOK].

utilized proportionality review to examine these challenges in twenty-eight cases between 1998 and mid-2008. Abdellah Berrehab brought the first case, which was decided in 1988. In 1983 Mr. Berrehab, Sonja Koster, and Rebecca Berrehab filed an application with the European Commission of Human Rights contending that the expulsion order issued against Mr. Berrehab violated his family rights in addition to those of Ms. Koster and Miss Berrehab.[187] Mr. Berrehab and Ms. Koster married in 1977 and had a daughter, Rebecca, in 1979.[188] After marrying in 1977, Mr. Berrehab obtained permission from the Dutch government to reside in the Netherlands "for the sole purpose of enabling him to live with his Dutch wife."[189] Mr. Berrehab and Ms. Koster divorced in May 1979, and when Mr. Berrehab sought to renew his residence permit in December 1979, he was denied. The Dutch authorities denied the residence permit because granting it would "be contrary to the public interest" since "Mr. Berrehab had been allowed to remain in the Netherlands for the sole purpose of living with his Dutch wife, which condition was no longer fulfilled on account of the divorce."[190] Dutch law at the time allowed noncitizens who had been married for more than three years to apply for an independent residence permit if they had resided in the Netherlands with their spouse for at least one year.[191] The purpose of this provision was to allow noncitizens who had "forged sufficient links with the country" to avoid making their immigration status subject to conditions.[192]

Dutch courts recognized a right to family life as articulated in Article 8 of the ECHR and recognized that Mr. Berrehab's right to family life could limit the State's ability to exercise its immigration power, specifically its power to deport noncitizens.[193] The Litigation

187. *Berrehab*, 11 Eur. H.R. Rep. 322 at para. 1.
188. *Id.* at paras. 7–8.
189. *Id.* at para. 8.
190. *Id.* at para. 10.
191. *Id.* at para. 15. The residence period in the Netherlands was initially three years, but it was subsequently reduced to one year. *Id.*
192. *Id.* at para. 15.
193. While the Dutch courts recognized this right, the Litigation Division of the Raad van State had taken a narrower conception of family life than the Court of Cassation had. The Litigation Division of

Division of the Raad van State evaluated the State interests involved and balanced them against Mr. Berrehab's right to family life. This body concluded that Mr. Berrehab's obligations to his daughter "did not serve any vital national interest and that those obligations subsisted independently of his place of residence."[194] More significantly, the Raad van State concluded that "four meetings a week were not sufficient to constitute family life within the meaning of Article 8" of the ECHR.[195] Mr. Berrehab was arrested in December 1983 in order to effectuate his expulsion, and he was residing in Morocco in 1984.[196] In August 1985, Mr. Berrehab and Ms. Koster remarried and Mr. Berrehab was granted permission to reside in the Netherlands "for the purpose of living with his Dutch wife and working during that time."[197]

The European Court of Human Rights' analysis of Mr. Berrehab's Article 8 claim turned on whether or not the expulsion was "necessary in a democratic society."[198] The court acknowledged that the failure to grant Mr. Berrehab a residence permit and his subsequent expulsion were in accordance with the law and for a legitimate aim.[199] The court accepted that the ECHR "does not in principle prohibit the Contracting States from regulating the entry and length of stay of aliens."[200] Yet in order for the interference to be necessary, it must "correspond to a pressing social need and, in

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the Raad van State is the adjudicative body that hears a full examination of the merits of the case while the Court of Cassation hears urgent applications. *Berrehab*, 11 Eur. H.R. Rep. 322 at para. 16.

194. *Id.* at para. 11. The Litigation Division of the Raad van State concluded that the residence permit could be denied in the public interest because he "no longer satisfied the condition upon which the grant of the residence permit depended." *Id.* at para. 11. Mr. Berrehab first appealed the denial of his residence permit to the Minister of Justice, who rejected the appeal. He appealed the Minister of Justice's denial to the Litigation Division of the Raad van State, which dismissed his appeal. *Id.* at paras. 10–11.

195. *Id.* at para. 11. The Raad van State noted that the failure to grant Mr. Berrehab a residence permit would not "necessarily entail a break in relations between the child and her father, as the latter could remain in contact with his daughter by agreement with his ex-wife." *Id.*

196. *Id.* at para. 12.

197. *Id.* at paras. 12–13.

198. *Id.* at para. 27.

199. *Berrehab*, 11 Eur. H.R. Rep. 322 at paras. 24–26. The court concluded that the legitimate aim pursued by the Dutch government was "the preservation of the country's economic well-being . . . rather than the prevention of disorder: the Government were in fact concerned, because of the population density, to regulate the labour market." *Id.* at para. 26.

200. *Id*. at para. 28.

particular that it is proportionate to the legitimate aim pursued."[201] The court sought to determine whether or not the correct balance had been struck between the "legitimate aim pursued" and the "seriousness of the interference with the applicant's right to respect for their family life."[202] In conducting this analysis, the court noted that Mr. Berrehab was not seeking entry to the Netherlands for the first time, but rather had already lived lawfully in the Netherlands for several years with a home and a job, and he had "real family ties" by marrying a Dutch woman, and a child was born of that union.[203] Rebecca's young age heightened the impact of the interference of refusing the independent residence permit and the subsequent expulsion.[204] In light of these facts, and that the Dutch government did not have any complaints about Mr. Berrehab during his residence in the Netherlands, the court concluded that the "proper balance was not achieved between the interests involved" such that "the means employed and the legitimate aim pursued" were disproportionate.[205]

This case began to have an impact on the treatment of Article 8 challenges to expulsion and deportation orders within national proceedings in Europe. Until this case was decided, noncitizens' ECHR right to private life and family life was given little weight before the Conseil d'État in France. The French administrative courts looked to see whether or not the administrative official had exceeded his or her statutory authority. There was no examination of ECHR-based substantive legal challenges to a deportation decision. This approach to fundamental rights challenges mirrors that of the U.S. Supreme Court during the mid-to-late nineteenth century.[206] For example, in a 1980 case, Touami ben Abdeslem challenged his deportation order on the basis that it violated his right to family life under Article 8 of the ECHR. The French Conseil d'État held that "an alien cannot to any effect rely on . . . the provisions of Article 8 (art.

201. *Id*.
202. *Id*. at para. 29.
203. *Id.*
204. *Id*.
205. *Berrehab*, 11 Eur. H.R. Rep. 322 at para 29.
206. *See supra* text accompanying notes 33–63.

8) of the Convention for the Protection of Human Rights and Fundamental Freedoms . . . in support of his submissions asking for the deportation order against him to be set aside."[207] Five years later the same adjudicative body reiterated this approach when it held that "Article 8 . . . of the European Convention on Human Rights did not prevent exercise of the power conferred on the Minister of the Interior" by the relevant immigration regulation.[208] Yet in 1991, the Conseil d'État changed course in the case of Mohand Beldjoudi. Mr. Beldjoudi challenged the deportation order issued against him on the ground that it violated his ECHR article 8 right to private life and family life.[209] Unlike previous cases, the Conseil d'État reviewed Mr. Beldjoudi's Article 8 claim; however, it concluded that the deportation order was necessary to protect public order due to the seriousness of the crimes committed.[210] When the Conseil d'État issued its decision in Mr. Beldjoudi's case, there was only one ECtHR case reviewing a deportation order in light of an Article 8 challenge (*Berrehab*), and the court had yet to decide a case involving the expulsion of noncitizens based on criminal activity.[211] Mr. Beldjoudi's case would eventually be decided by the ECtHR in 1992, but before this case was decided, the Court decided *Moustaquim v. Belgium* in 1991, which was the ECtHR's first case involving an expulsion order based upon criminal activity.

Abderrahman Moustaquim arrived in Belgium in July 1965, at twenty-one months old, with his mother, in order to join his father who had immigrated to Belgium earlier and ran a butcher's shop.[212]

207. Beldjoudi v. France, 14 Eur. H.R. Rep. 801 at para. 27 (1992) (quoting Touami ben Abdeslem, [Recueil Lebon, tables], p. 820; JCP [Juris-Classeur périodique] 1981.II.19.613) (internal quotation marks omitted)).

208. *Id*. at para. 27 (citing Chrouki judgment of Dec. 6, 1985 (appeal no. 55912)).

209. *Id*. at para. 24.

210. *Id*. at para. 28. The use of international law within national French courts met with significant resistance until 1991 despite French ratification of the ECHR in 1974. It was not until 1981 that individual petitions under Article 25 of the Convention were permitted in France, and it was in 1988 that the Conseil d'État fully recognized that treaties, once signed, ratified, and published, take precedence over national statutes. Guiraudon, *supra* note 151, at 1094, 1102.

211. The only case decided was *Berrehab v. Netherlands*, which did not involve criminal activities. *See* 11 Eur. H.R. Rep. 322.

212. Moustaquim v. Belgium, App. No. A/193, 13 Eur. H.R. Rep. 802 at para. 9 (1991).

Mr. Moustaquim was a Moroccan national born in Casablanca.[213] Unlike Mr. Berrehab, Mr. Moustaquim had a criminal record. By 1981 Mr. Moustaquim had 147 charges against him: 82 for aggravated theft, 39 for attempted aggravated theft, and 5 for robbery.[214] He was eventually charged with 26 offenses and was ultimately found guilty of 22 of them and sentenced to two years imprisonment for aggravated theft, attempted aggravated theft, theft, and handling stolen goods.[215] Additionally, he was sentenced to one month for destroying a vehicle, sixteen days for assault, and fifteen days for threatening behavior.[216] He served eighteen months of this sentence before he was released in April 1984.

While serving his sentence, the Ministry of Justice referred the case to the Advisory Board of Aliens. While this board concluded that deporting Mr. Moustaquim would be justified, it decided such action was not appropriate because of his young age at the time of the offenses and because he arrived in Belgium at approximately twenty-one months old, his entire family lived in Belgium, he was learning a trade, and when he was granted prison leave he did not engage in any untoward behavior.[217] Despite this decision, a royal order requiring Mr. Moustaquim to leave Belgium and not return for ten years was issued on February 28, 1984. This order was based on the conclusion that Mr. Moustaquim's offenses constituted "serious prejudice to public order" and that as a "leader[] of a dangerous gang of juvenile delinquents" he was "a real danger to society."[218] Based on these factors, it was concluded that "the maintenance of public order must prevail over the social and family considerations set out by the Board."[219]

Mr. Moustaquim's father applied to the Conseil d'État to have the execution of the deportation order stayed and to have the deportation

213. *Id*. at para. 9.
214. *Id*. at para.10.
215. *Id*. at para. 15.
216. *Id*.
217. *Id*. at para. 17.
218. Moustaquim v. Belgium, App. No. A/193, 13 Eur. H.R. Rep. 802 at para. 18 (1991).
219. *Id.*

order quashed.[220] Both applications were rejected.[221] Mr. Moustaquim's father challenged the deportation order as a violation of Article 8 of the ECHR and in 1984 the Conseil d'État concluded that "respect for private and family life as guaranteed in Article 8 of the Convention is not an obstacle to the taking of a measure which, in a democratic society, is necessary for public safety."[222] At the time this decision was made, the ECtHR had yet to decide that a State's interest in protecting public safety does not automatically trump a noncitizen's right to private life and family life. Proportionality review, in cases involving deportation based on criminal activity, was not addressed until 1991 by the ECtHR in Mr. Moustaquim's case. When the ECtHR was confronted with this issue, it conducted a proportionality review to determine whether or not the deportation of the noncitizen "would constitute an interference with the rights protected by paragraph (1) of Article 8" and whether or not such interference is "'necessary in a democratic society,' that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued."[223] The court concluded that "a proper balance was not achieved between the interests involved, and that the means employed was therefore disproportionate to the legitimate aim pursued."[224] This conclusion was based on Mr. Moustaquim's family ties in Belgium, his arrival at a very young age, the almost two years that elapsed between the time he was incarcerated and the time he was ordered deported with no intervening criminal convictions, and his limited connections to Morocco.[225]

Since Mr. Berrehab's case, the ECtHR has been hearing Article 8 challenges to deportation orders for approximately twenty years. In the first ten years, the ECtHR heard ten cases and found violations in five cases.[226] During the second ten-year span of cases, the court

220. *Id.* at para. 20.
221. *Id.*
222. *Id.*
223. *Id.* at para. 43.
224. Moustaquim v. Belgium, App. No. A/193, 13 Eur. H.R. Rep. 802 at para. 46 (1991).
225. *Id.* at paras. 43–46.
226. The ECtHR found violations in Berrehab v. The Netherlands, 11 Eur. H.R. Rep. 322 (1988); *Moustaquim*, 13 Eur. H.R. Rep. 802; Beldjoudi v. France, 14 Eur. H.R. Rep. 32 801 (1992); Nasri v.

heard eighteen cases and found Article 8 violations in twelve of the cases.[227] In each of the cases the ECtHR conducted a proportionality review, and affiliation norms played a significant role in the court's analysis. In determining whether or not deportation was proportionate to the public safety interests of the State, the ECtHR weighed not only the noncitizen's affiliation with the state of residence, but also with his or her state of nationality. For example, in *Moustaquim v. Belgium*, the ECtHR noted that the petitioner had lived in Belgium since he was twenty-one months old and had only been to his country of nationality, Morocco, twice in twenty years.[228] Similarly, in *Nasri v. France*, the court took note that Mr. Nasri had lived in France since age five and did not speak or understand Arabic, the language of his state of nationality, Algeria.[229] This theme continues in the cases decided between 1998 and 2008. In *Ezzouhdi v. France*, the fact that the petitioner had "intense links with France" and that his only connection to Morocco was his nationality supported the court's conclusion that deporting him would interfere with his private life and family life.[230] A related but different concern raised by the ECtHR was the failure of noncitizens to naturalize. In *Boughanemi v. France*, *Boujlifa v. France*, *Dalia v. France*, *Baghli v. France*, and

France, App. No. A/324, 21 Eur. H.R. Rep. 458 (1995); Mehemi v. France, 30 Eur. Ct. H.R. 739 (1999) and did not find violations in Boughanemi v. France, 22 Eur. H.R. Rep. 228 (1996); Bouchelkia v. France, 25 Eur. H.R. Rep. 686 (1999); Boujlifa v. France, 30 Eur. H.R. Rep. 419 (1997); El Boujaïdi v. France, 30 Eur. H.R. Rep. 223 (1999).

227. During this time period the ECtHR found violations in *Maslov*, *Sezen*, *Lupsa*, *Keles*, *Radovanovic*, *Jakupovic*, *Mokrani*, *Slivenko*, *Al-Nashif*, *Yildiz*, *Ezzouhdi*, and *Boultif*. Maslov v. Austria, 47 Eur. H.R. Rep. 20 (2007); Sezen v. The Netherlands, 43 Eur. H.R. Rep. 30 (2006); Lupsa v. Romania, 46 Eur. H.R. Rep. 36 (2006); Keles v. Germany, 44 Eur. H.R. Rep. 12 (2005); Radovanovic v. Austria, 41 Eur. H.R. Rep. 6 (2004); Jakupovic v. Austria, 38 30 Eur. H.R. Rep. 27 (2003); Mokrani v. France, 40 Eur. H.R. Rep. 5 (2003); Slivenko v. Latvia, 39 Eur. H.R. Rep. 24 (2003); Al-Nashif v. Bulgaria, 36 Eur. H.R. Rep. 37 (2002); Yildiz v. Austria, 36 Eur. H.R. Rep. 32 (2002); Ezzouhdi v. France, App. No. 47160/99 (2001), http://www.echr.coe.int; Boultif v. Switzerland, 33 Eur. H.R. Rep. 50 (2001). The ECtHR did not find Article 8 violations in Chair and J.B. v. Germany, App. No. 69735/01 (2008), http://www.echr.coe.int; Kaya v. Germany, App. No. 31753/02 (2007), http://www.echr.coe.int; Üner v. The Netherlands, 45 Eur. H.R. Rep. (2006); Bensaid v. United Kingdom, 33 Eur. H.R. Rep. 10 (2001); Baghli v. France, 33 Eur. H.R. Rep. 32 (1999); Dalia v. France, 33 Eur. H.R. Rep. 26 (1998).

228. Moustaquim v. Belgium, 13 Eur. H.R. Rep. 802 at para. 45 (1991).

229. Nasri v. France, 21 Eur. H.R. Rep. 458 at para. 38 (1996).

230. Ezzouhdi v. France, App. No. 47160/99 (Feb. 13, 2001), http://www.echr.coe.int; *see also* Radovanovic v. Austria, 41 Eur. H.R. Rep. 6 at para. 36 (2004) (noting that "his family and social ties with Austria were much stronger than with Serbia and Montenegro").

Kaya v. Germany, the ECtHR used the petitioners' failure to naturalize as a proxy for limited affiliation with the state of residence.[231] In each of these cases, the ECtHR held that the State of residence did not violate the noncitizens' Article 8 rights by ordering their deportation.[232]

Proportionality review is the basis upon which the European Court of Human Rights determined whether or not a specific deportation decision violated fundamental rights.[233] This court and domestic adjudicative bodies reviewing ECHR Article 8 claims are able to have such an active role in reviewing deportation decisions because immigration is treated as a legal, rather than a political, issue. Europe's history with large-scale migration did not foster the idea that immigration is primarily a national sovereignty issue. These decision makers viewed immigration regulation as a function of regulating public order. As such, it did not raise the separation of powers or institutional competence concerns that U.S. courts confronted. This construction of immigration enabled legal decision makers to review challenges to deportation decisions as pure legal issues rather than political issues that required deference to political decision makers. This contrasts sharply with the role of U.S. courts. By conceptualizing immigration primarily as a national sovereignty

231. Boughanemi v. France, 22 Eur. Ct. H.R. 228 at para 44 (1996); Boujlifa v. France, 30 Eur. Ct. H.R. 419 at para. 44 (1997); Dalia v. France, 33 Eur. H.R. Rep. 26 at para. 53 (1998); Baghli v. France, 33 Eur. H.R. Rep. 32 at para. 48 (1999); Kaya v. Germany, App. No. 31753/02 at para. 64 (2007), http://www.echr.coe.int.

232. *Boughanemi*, 22 Eur. Ct. H.R. 228 at para. 45; *Boujlifa*, 30 Eur. Ct. H.R. 419 at para. 45; *Dalia*, 33 Eur. H.R. Rep. 26 at para. 55; *Baghli*, 33 Eur. H.R. Rep. 32 at para. 49; *Kaya*, App. No. 31753/02 at para 71.

233. *See* Daniel Thym, *Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay*, 57 INT'L & COMP. L.Q. 87, 93–101 (2008). This standard of review resembles the approach advocated in Justice Marshall's dissenting opinion in *Fiallo*, rather than the deferential approach required by the plenary power doctrine. *See* Fiallo v. Bell, 430 U.S. 787, 809 (1977) (Marshall, J. dissenting); *supra* text accompanying note 111. Justice Marshall concluded that the statute used gender-based classifications, which required intermediate scrutiny. *Fiallo* 430 U.S. at 809 ("We require that gender-based classifications 'serve important governmental objectives and . . . be substantially related to achievement of those objectives.'" (quoting Califano v. Webster, 430 U.S. 313, 317 (1977))). While this standard of review does not mirror proportionality review, like proportionality review it enables a court to closely scrutinize the alleged rights violation. *See* Alec Stone Sweet & Judd Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 75–78 (2008–2009) (describing proportionality review and comparing it to strict scrutiny as used in the United States).

issue, immigration becomes a political matter. This conceptualization presents U.S. courts with separation of powers issues that support judicial deference to political actors.[234] The Human Rights Committee has taken the approach of the ECtHR rather than that of the United States.

2. Human Rights Committee Jurisprudence

Applying proportionality review, the Human Rights Committee, the body responsible for adjudicating individual complaints pursuant to the ICCPR, has twice decided that the deportation of a noncitizen would violate Article 17 of the ICCPR. Article 17 provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honor and reputation."[235] The HRC began hearing challenges to deportation orders in 1996, and between 1996 and 2004 it heard six such cases, finding violations in two cases.[236] In the four cases in which the HRC found no violation of Article 17, the noncitizen petitioners had been convicted of crimes ranging from multiple petty offenses to aggravated assault.[237] In the two cases in which the HRC found an Article 17 violation, the noncitizen petitioners had no criminal records within their state of residence.[238] This contrasts with the ECtHR cases in which fifteen of the seventeen cases where the ECtHR found a violation of Article 8, the noncitizen petitioner had a criminal record.[239] The HRC was more likely to conclude that

234. *See supra* text accompanying notes 33–63.

235. ICCPR, *supra* note 164, at art. 17(1).

236. U.N. Human Rights Comm., Byahuranga v. Denmark, U.N. Doc. CCPR/C/82/D/1222/2003 (Dec. 9, 2004) (no violation); U.N. Human Rights Comm., Madafferi v. Australia, U.N. Doc. CCPR/C/81/D/1011/2001 (Aug. 26, 2004) (violation); U.N. Human Rights Comm., Truong v. Canada, U.N. Doc. CCPR/C/77/D/743/1997 (May 5, 2003) (no violation); U.N. Human Rights Comm., Winata v. Australia, U.N. Doc. CCPR/C/72/D/930/2000 (Aug. 16, 2001) (violation); U.N. Human Rights Comm., Canepa v. Canada, U.N. Doc. CCPR/C/59/D/558/1993 (June 20, 1997) (no violation); U.N. Human Rights Comm., Stewart v. Canada, U.N. Doc. CCPR/C/58/D/538/1993 (Dec. 16, 1996) (no violation).

237. *See, e.g.*, Stewart, *supra* note 236; Truong, *supra* note 236.

238. Winata, *supra* note 236; Madafferi*, supra* note 236.

239. Chair and J.B. v. Germany, App. No. 69735/01 (2008), http://www.echr.coe.int; Kaya v. Germany, App. No. 31753/02 (2007), http://www.echr.coe.int; Maslov v. Austria, App. No. 1638/03, 47 Eur. H.R. Rep. 20 (2007); Sezen v. The Netherlands, App. No. 50252/99, 43 Eur. H.R. Rep. 30 (2006);

separation from one's family due to deportation was reasonable and proportionate when the noncitizen had criminal convictions within the State of residence. The ECtHR was less likely to find deportations in such instances proportionate, but that is due in great part to the wider range of factors considered by the ECtHR.[240] Additionally, the HRC shows more deference to the balancing conducted by the national adjudicative bodies.[241]

In 2001 and 2004, the Human Rights Committee concluded that Australia had violated the Article 17 rights of Francesco Madafferi, Hendrik Winata, and his wife So Lan Li by ordering their removal from Australia.[242] Francesco Madafferi entered Australia in 1989 on a tourist visa valid for six months.[243] Mr. Madafferi continued to reside in Australia after the expiration of his tourist visa and married Anna

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Üner v. The Netherlands, App. No. 46410/99, 45 Eur. H.R. Rep. (2006); Lupsa v. Romania, App. No. 10337/04, 46 Eur. H.R. Rep. 36 (2006); Keles v. Germany, App. No. 32231/02, 44 Eur. H.R. Rep. 12 (2005); Radovanovic v. Austria, App. No. 42703/98, 41 Eur. H.R. Rep. 6 (2004); Jakupovic v. Austria, App. No. 36757/97, 38 30 Eur. H.R. Rep. 27 (2003); Mokrani v. France, App. No. 52206/99, 40 Eur. H.R. Rep. 5 (2003); Al-Nashif v. Bulgaria, App. No. 50963/99, 36 Eur. H.R. Rep. 37 (2002); Yildiz v. Austria, App. No. 37295/97, 36 Eur. H.R. Rep. 32 (2002); Amrollahi v. Denmark, App. No. 56811/00 (2002), http://www.echr.coe.int; Ezzouhdi v. France, App. No. 47160/99 (2001), http://www.echr.coe.int; Bensaid v. United Kingdom, App. No. 44599/98, 33 Eur. H.R. Rep. 10 (2001); Boultif v. Switzerland, 33 Eur. H.R. Rep. 50 (2001); Baghli v. France, 33 Eur. H.R. Rep. 32 (1999); Bouchelkia v. France, 25 Eur. H.R. Rep. 686 (1999); El Boujaïdi v. France, 30 Eur. H.R. Rep. 223 (1999); Mehemi v. France, 30 Eur. H.R. Rep. 739 (1999); Dalia v. France, 33 Eur. H.R. Rep. 26 (1998); Boujlifa v. France, 30 Eur. H.R. Rep. 419 (1997); Boughanemi v. France, 22 Eur. H.R. Rep. 228 (1996); C v. Belgium, App. No. 21794/93, 32 Eur. H.R. Rep. 2 (1996); Nasri v. France, App. No. A/324, 21 Eur. H.R. Rep. 458 (1995); Lamguindaz v. United Kingdom, 17 Eur. H.R. Rep. 213 (1993); Beldjoudi v. France, 14 Eur. H.R. Rep. 32 801 (1992); Moustaquim v. Belgium, App. No. A/193, 13 Eur. H.R. Rep. 802 (1991).

240. While the ECtHR has examined a variety of affiliation factors, the HRC has focused on the family's financial dependence on the noncitizen ordered deported and on whether or not the family ties would be severed. Stewart, *supra* note 236, at para. 3.2, 12.10; Canepa, *supra* note 236, at para. 11.5; Truong, *supra* note 236, at para. 7.4.

241. *See, e.g.*, Byahuranga, *supra* note 236, at paras. 2.3, 11.9; Stewart, *supra* note 236, at para. 12.10. Another significant difference in these two bodies' jurisprudence concerns the 1.5-generation. These are individuals who migrated to their state of residence as young children. Roberto G. Gonzales, *Left Out But Not Shut Down: Political Activism and the Undocumented Student Movement*, 3 NW. J. L. & SOC. POL'Y 219, 221 (2008). Concerns regarding the deportation of this generation are addressed through the ECtHR's analysis of affiliation factors. The fact that an individual migrated at a young age, has spent the majority of his or her life within the state of residence, and has social ties to the state of residence all weigh heavily in favor of finding a deportation order to be disproportionate. *See* KEES GROENENDIJK, ELSPETH GUILD & HALIL DOGAN, SECURITY OF RESIDENCE OF LONG-TERM MIGRANTS: A COMPARATIVE STUDY OF LAW AND PRACTICE IN EUROPEAN COUNTRIES 15 (1998).

242. Madafferi, *supra* note 236, at para. 9.8; Winata, *supra* note 236, at paras. 7.1–7.3.

243. Madafferi, *supra* note 236, at para. 2.1.

Maria Madafferi, an Australian national. Mr. Madafferi incorrectly believed that his marriage to an Australian citizen automatically granted him residence status.[244] The couple had four children born in Australia, and in 1996 Mr. Madafferi was brought to the attention of the Department of Immigration and Multicultural Affairs. At that time he filed an application to remain permanently in Australia as the spouse of an Australian citizen.[245] Mr. Madafferi's application was denied because he was considered to have a "bad character" based on his criminal record in Italy before his admission to Australia.[246] On appeal, the Administrative Appeals Tribunal remanded the case to the Minister of the Department of Immigration and Multicultural Affairs, yet the Minister decided to refuse Mr. Madafferi's visa based on another provision of the Migration Act.[247] The Minister explained that due to Mr. Madafferi's prior convictions and outstanding prison term in Italy, it was in the national interest to remove him from Australia.[248]

Mr. Winata arrived in Australia in 1985 on a visitor's visa, and Ms. Li arrived in 1987 on a student visa. After Mr. Winata's and Ms. Li's visas expired, each remained in Australia unlawfully. Mr. Winata and Ms. Li met in Australia, entered into a relationship that was akin to marriage, and had a son in 1988 who is an Australian citizen.[249] In 1998 Mr. Winata and Ms. Li filed for asylum, claiming that they faced persecution in Indonesia, their State of nationality, on account of their Chinese ethnicity and Catholic religion.[250] This claim was denied, and Mr. Winata and Ms. Li subsequently appealed to the Minister for Immigration and Multicultural Affairs, but the appeal was also denied.[251] This appeal was based on Article 17 of the ICCPR, and they argued that they had "strong compassionate

244. *Id.* at para. 2.2.
245. *Id.* at para. 2.3.
246. *Id.* at para. 2.4.
247. *Id.* at para. 2.5.
248. *Id.* at para. 2.7.
249. Winata, *supra* note 236, at para. 1.
250. *Id.* at para. 2.2.
251. Pursuant to section 417 of the Migration Act, the Minister for Immigration and Multicultural Affairs may substitute a decision of Refugee Review Tribunal with a more favorable decision if such a decision would be in the public interest. Winata, *supra* note 236, at n.4.

circumstances such that failure to recognize them would result in irreparable harm and continuing hardship to an Australian family."[252]

In both of these cases, the petitioners filed complaints with the Human Rights Committee after exhausting their national remedies. In each case the Human Rights Committee sought to determine first whether or not the deportation would interfere with family and second whether or not that interference was arbitrary or objectively justified.[253] In Madafferi's case the HRC concluded:

> [A] decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to a long-settled family life would follow in either case.[254]

In *Winata*, the HRC similarly concluded the deportation of Mr. Winata and Ms. Li would constitute an interference with family.[255] Articulating a similar justification, the HRC stated that

> a decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents is to be considered "interference" with the family, at least in circumstances, where, as here, substantial changes to long-settled family life would follow in either case.[256]

In determining the second prong of the Article 17 analysis, the HRC in *Madafferi* focused on balancing the State interests in deportation against the "hardship the family and its members would

252. *Id.* at para. 2.6.
253. Madafferi, *supra* note 236, at para. 9.8; Winata, *supra* note 236, at para. 7.2.
254. Madafferi, *supra* note 236, at para. 9.7.
255. Winata, *supra* note 236, at para. 7.2.
256. *Id.*

encounter as a consequence of such removal."[257] In *Winata*, the HRC required Australia to demonstrate factors beyond enforcement of its immigration laws to justify the deportation of both parents of an Australian citizen.[258] Unable to demonstrate additional factors, the HRC concluded that the removal of Mr. Winata and Ms. Li would be arbitrary. In balancing the various interests at stake in *Madafferi*, the HRC significantly discounted the factors supporting a conclusion that Mr. Madafferi was a person of bad character, and it gave significant weight to the factors supporting hardship to Mr. Madafferi's family. The HRC noted that Mr. Madafferi's outstanding sentences in Italy had been extinguished, there were no outstanding warrants for his arrest in Italy, and his criminal convictions in Italy were based on criminal acts committed twenty years ago.[259] Additionally, the Committee noted the

> considerable hardship that would be imposed on a family that had been in existence for 14 years. If Mrs. Madafferi and the children were to decide to emigrate to Italy in order to avoid separation of the family, they would not only have to live in a country they do not know and whose language the children (two of whom are already 13 and 11 years old) do not speak, but would also have to take care, in an environment alien to them, of a husband and father whose mental health has been seriously troubled, in part by acts that can be ascribed to the State party.[260]

In four other cases decided between 1996 and 2004, in which a noncitizen challenged an expulsion decision based on Article 17, the Committee found no violation. In those cases the HRC concluded that deporting the noncitizen was a proportionate response. The HRC gave significant weight to the State's interest in promoting and

257. Madafferi, *supra* note 236, at para. 9.8.

258. Winata, *supra* note 236, at para. 7.3. The HRC noted that Mr. Winata and Ms. Li had resided in Australia for fourteen years and their son was born in Australia, had attended Australian schools, and had developed "the social relationships inherent in that." *Id.*

259. Madafferi, *supra* note 236, at para. 9.8.

260. *Id.*

protecting public safety and less weight to family ties in cases where the noncitizen was unmarried, had no children or was not the primary caregiver for the children, or was married to a noncitizen.[261] Like the ECtHR, the HRC examined the noncitizen's age at entry, length of time in the state of residence, family connections in the state of residence, the nature of the criminal offense involved, the number of criminal offenses committed, and the noncitizen's criminal history.[262]

The standards of review utilized by the European Court of Human Rights, the Human Rights Committee, and the U.S. Supreme Court demonstrate the variety of options available for judicial review of the same issue. The U.S. Supreme Court either looks for a facially legitimate and bona fide reason for the government's immigration decision or it defers to the government's decision after concluding that officials responsible for making the immigration decision were acting within their authority.[263] Neither the ECtHR nor the HRC provide this level of deference to the national authorities, although the margin of appreciation doctrine would allow such deference by the ECtHR. Rather, these adjudicative bodies utilize proportionality review to balance the interests of the States and the rights of the noncitizens. Both the HRC and the ECtHR seek to balance the State's interest in public safety and enforcing the immigration laws with the noncitizen's right to family. Viewing immigration regulation as public order regulation empowers both bodies to utilize nondeferential standards of review, which provides a forum in which the State's use of the immigration power can be monitored and evaluated.

The United States and Europe provide alternative approaches for regulating immigration and monitoring State use of the power to regulate immigration. The combined roles of administrative and judicial adjudicative bodies within the United States and Europe create different opportunities for States to ensure that noncitizens

261. Stewart, *supra* note 236; Canepa, *supra* note 236; Truong, *supra* note 236.

262. Stewart, *supra* note 236; Canepa, *supra* note 236; Truong, *supra* note 236.

263. *See* Fiallo v. Bell, 430 U.S. 787, 794–95 (1977); Kleindienst v. Mandel, 408 U.S. 753, 770 (1972); Ekiu v. United States, 142 U.S. 651, 660 (1892); *see also supra* text accompanying notes 95–111.

have a meaningful legislative, administrative, or judicial forum within which to challenge State use of the deportation power and have access to an effective remedy if required. The difference in the available opportunities is connected to the State interests understood to be at stake. Comparing the U.S. and European approaches to judicial monitoring and evaluation of immigration decisions provides an opportunity to think about alternative frames for analyzing immigration cases and the impact that such frames can have on a State's ability to adhere to other fundamental norms like the rule of law.

B. Judicial Deference in Europe

In this Article I have argued that European courts do not view immigration primarily as a national sovereignty issue, and consequently, do not automatically defer to political actors' decisions. This does not mean, however, that the ECtHR or other European courts do not have doctrinal tools available to address immigration decisions that might implicate national sovereignty and require judicial deference. Both proportionality review and the margin of appreciation doctrine allow adjudicators to take account of these State interests. The use of proportionality review enables judicial bodies to balance the specific State interests involved ("legitimate aim pursued")[264] with the violation of the individual's right. If the legitimate aim pursued is the prevention of disorder due to the noncitizen's conviction for assault and battery, that case would be analyzed differently than one in which the legitimate aim pursued is protecting national security because the noncitizen has engaged in terrorism. The more serious the threat to the State's public order or national security, the more likely the ECtHR will be to uphold the State's deportation decision. For example, the seriousness of convictions for drug trafficking, rape, and manslaughter have weighed heavily in the State's favor, and in these cases the ECtHR found that the deportation was not disproportionate and there was no

264. Berrehab v. The Netherlands, 11 Eur. H.R. Rep. 322 at para. 28 (1988).

violation of Article 8.[265] A State's ability to protect its national security is not jeopardized by the use of proportionality review because this form of judicial review provides space for the seriousness of the State interest to be taken into account. The ECtHR has another mechanism by which it can accommodate sensitive State interests such as national security—the margin of appreciation doctrine. Rather than conducting the proportionality review, the ECtHR can decide that the issues at stake in the case implicate sensitive political matters such that the court should not exercise judicial review.[266] This doctrine enables the ECtHR to exercise self-restraint in the same way that the plenary power doctrine does.[267] Yet the margin of appreciation doctrine is more akin to the political question doctrine in that it does not apply automatically to an entire subject area as the plenary power doctrine does to immigration.

Institutional competence provides a justification for judicial deference. Within the United States, the Supreme Court has concluded that immigration decisions implicate national sovereignty for which the political branches have constitutional responsibility.[268] Thus, the political branches have greater institutional competence to balance the various interests at stake in deportation decisions. The ECtHR faces a different issue of competence: the relative competence of national authorities compared to that of an international body to review and decide claims alleging human rights violations.[269] The issue of international versus national competence is particularly relevant in two contexts. The first context is when there

265. Baghli v. France, 33 Eur. H.R. Rep. 32 at para. 12 (1999) (drug trafficking conviction); Bouchelkia v. France, 25 Eur. H.R. Rep. 686 at para. 10 (1999) (aggravated rape conviction); Chair and J.B. v. Germany, App. No. 69735/01 at para. 13 (2008), http://www.echr.coe.int (rape conviction); Dalia v. France, 33 Eur. H.R. Rep. 26 at para. 8 (1998) (heroin trafficking conviction); Kaya v. Germany, App. No. 31753/02 at para. 12 (2007), http://www.echr.coe.int (attempted aggravated human trafficking conviction & aggravated battery conviction); Üner v. The Netherlands, App. No. 46410/99 at para. 15 (manslaughter conviction).

266. GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 81 (2007).

267. *See* Ronald St. J. Macdonald, *The Margin of Appreciation, in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 123 (Ronald St. J. Macdonald, Franz Matscher & Herbert Petzold eds., 1993).

268. *See supra* text accompanying notes 33–63.

269. LETSAS, *supra* note 266, at 90–91.

is no consensus within Europe regarding what counts as a human rights violation, and the second context is politically sensitive cases.[270]

The first category of cases often addresses whether or not State interference with ECHR rights is "necessary in a democratic society."[271] This type of analysis often appears in cases in which the court is required to evaluate State interference with freedom of expression due to State regulation protecting freedom of religion.[272] For example, in *Otto-Premiger-Institut v. Austria* the court was faced with a challenge regarding the seizure and forfeiture of a film entitled Council in Heaven. Criminal charges were also brought alleging that the film "disparaged religious doctrines."[273] In conducting the proportionality analysis, the court noted that it was

> not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.[274]

Within the cases alleging an Article 8 violation due to an expulsion order, the ECtHR has not expressed any concern that there is a lack of consensus regarding what constitutes a violation. The ECtHR's jurisprudence in this area suggests that there is a consensus that long-term foreign residents should have a level of security of residence that is similar to that of citizens.[275] This is likely connected to the

270. *Id.* at 91. See *supra* text accompanying note 276 for discussion regarding the characterization of deportation decisions that makes the margin of appreciation doctrine is less applicable.

271. LETSAS, *supra* note 266, at 93.

272. *Id.* at 92–98 (discussing additional ECtHR cases).

273. *Id.* at 94 (citing Otto-Premiger-Institut v. Austria, 19 Eur. H.R. Rep. 34, para. 48 (1995)).

274. *Id.* (quoting Otto-Premiger-Institut v. Austria, 19 Eur. H.R. Rep. 34, para. 50 (1995)).

275. This is despite the fact that these cases require the court to determine whether or not an individual's affiliation with the State of residence justifies continued residence despite engaging deportable behavior. See *supra* text accompanying notes 198–232 for discussion of the factors the

broader movement within the European Union and the Council of Europe to grant long-term third-country nationals the same substantive rights that Member State citizens enjoy.[276] Citizens are not deported based on criminal activity, so only in the most extreme situations should long-term foreign residents be subjected to deportation. The second category of cases in which the ECtHR utilizes the margin of appreciation doctrine is politically sensitive matters. Concerns about the connection between deportation decisions and national sovereignty would fit within this category, yet the ECtHR does not make this connection in the same way that the U.S. Supreme Court does. The only State interests discussed by the court in these cases are public safety, public order, and enforcement of the immigration law.[277]

In not significantly utilizing the margin of appreciation doctrine within the Article 8 jurisprudence regarding deportation, the ECtHR essentially exercises de novo review of the national authorities' deportation decisions.[278] Of the twenty-eight ECtHR cases addressing

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ECtHR considers when evaluating allegations that the deportation of a noncitizen will violate their Article 8 right to private life and family life.

276. *See* Council Directive 2003/86, *supra* note 166, at arts. 4, 3; Council Directive 2003/109, *supra* note 166, at art. 12.

277. This is connected, however, to the types of cases that have been decided by the ECtHR. The Article 8 cases challenging deportation orders have not involved direct threats to a State's physical security or to a State's self-definition as occurred in the United States. As such, the ECtHR has been able to develop a framework for reviewing State immigration decisions in a context in which national sovereignty was not front and center. Yet concerns about the need for greater harmonization of immigration regulation across Europe have led to increasing regulation of immigration by the European Union and the Council of Europe. This move reinforces the idea that immigration is not seen categorically as raising politically sensitive matters such that the ECtHR should defer to the judgment of national authorities.

278. The court seeks to determine whether or not the State party "struck a fair balance between the relevant interests, namely the individuals' rights protected by the Convention, on the one hand, and the community's interests on the other." Slivenko v. Latvia, App. No. 48321/99, 39 Eur. H.R. Rep. 24 at para. 113 (2003). This analysis focuses on affiliation factors and public safety to determine whether or not any "interference corresponds to a pressing social need and . . . that it is proportionate to the legitimate aim pursued." Berrehab v. The Netherlands, 11 Eur. H.R. Rep. 322 at para. 28 (1988). The affiliation factors examined include age at time of admission to the state of residence, length of stay, family and other ties within the state of residence, family and other ties within the state of nationality, ease of family to establish family life in state of nationality, and employment within the state of residence. The ECtHR balances these factors against the State's interest in public safety and upholding the immigration legal regime. The vast majority of the ECtHR cases involve individuals deported due to criminal behavior. Thus the court reviews the nature of the criminal offense involved, the number of criminal offenses committed, and the noncitizen's criminal history.

Article 8 claims and deportation, the margin of appreciation doctrine was addressed in seven cases, one of which was only in a dissent.[279] Of the remaining six cases, the doctrine was only mentioned as part of the government's presentation in three cases, and there were only three cases in which the doctrine was addressed in the court's analysis or holding.[280] In the cases where the doctrine was addressed in the court's analysis, the court stated that State parties are entitled to a certain margin of appreciation in determining whether or not State interference with an ECHR right is "necessary in a democratic society."[281] When the doctrine was addressed in the holding, the court simply declared that the State party overstepped their margin of appreciation.[282] In these cases, the court appears to conflate granting discretion to the national authorities due to the margin of appreciation doctrine with the outcome of the proportionality analysis. For example, in *Jakupovic v. Austria*, the ECtHR concluded that "the Austrian authorities have overstepped their margin of appreciation under Article 8 as the reasons in support of the necessity of the residence prohibition are not sufficiently weighty."[283] Similarly, in *Slivenko v. Latvia*, the court concluded that "the Latvian authorities overstepped the margin of appreciation enjoyed by Contracting Parties in such a matter."[284] It appears that the reason the Latvian authorities overstepped the margin of appreciation enjoyed was because "they failed to strike a fair balance between the legitimate aim of the protection of national security and the interest of the protection of the applicants' rights under Article 8."[285] The margin of appreciation doctrine is playing a minor role in the ECtHR's Article 8 jurisprudence related to deportation. It is my contention that this

279. Maslov v. Austria, App. No. 1638/03, 47 Eur. H.R. Rep. 20 (2007).

280. Üner, Üner v. The Netherlands, App. No. 46410/99, 45 Eur. H.R. Rep. 14 (2006) (government); Boultif v. Switzerland, App. No. 54273/00, 33 Eur. H.R. Rep. 50 (2001) (government); Radovanovic, Radovanovic v. Austria, 41 Eur. H.R. Rep. 6 (2004) (government); Jakupovic v. Austria, App. No. 36757/97, 38 Eur. H.R. Rep. 27 (2003) (court); *Slivenko*, 39 Eur. H.R. Rep. 24 (court); *Berrehab*, 11 Eur. H.R. Rep. 322 (court).

281. *Slivenko*, 39 Eur. H.R. Rep. 24 at para. 113; *Berrehab*, 11 Eur. H.R. Rep. 322 at para. 28.

282. *Jakupovic*, 38 Eur. H.R. Rep. 27 at para 32; *Slivenko*, 39 Eur. H.R. Rep. 24 at para 128.

283. *Jakupovic*, 38 Eur. H.R. Rep. 27 at para. 20.

284. *Slivenko*, 39 Eur. H.R. Rep. 24 at para. 128.

285. *Id.*

doctrine is not very prominent within this jurisprudence because immigration is not seen as implicating inherently political decision making, and there is significant consensus throughout Europe about the right to family life. This is a right that has been recognized in numerous European State constitutions before the ratification of the ECHR.[286] Additionally, national judicial bodies had a pre-ECtHR history of balancing State immigration interests with noncitizens' interests in family life. This is most evident in challenges to family reunification restrictions.[287] By viewing immigration as a public order issue, national and international judicial bodies do not have to address the separation of powers concerns raised when immigration is seen primarily as a national sovereignty issue. Additionally, the ECtHR was able to build upon existing national jurisprudence, balancing State interests in immigration and noncitizens' rights to family life. This significantly reduced any ambiguity as to what interference with private and family life is "necessary in a democratic society" for noncitizens.[288]

Courts within Europe provide robust judicial review of deportation decisions, not because they are enforcing human rights obligations, but because these cases are seen as raising legal rather than political questions. International law scholars and immigration scholars—seeking greater judicial enforcement of international human rights obligations as a means for more judicial monitoring—fail to recognize this critical distinction. It is my contention that this distinction better explains the difference in U.S. and European judicial review of deportation decisions. The differences in immigration histories, sources of State authority to regulate immigration, and allocations of immigration authority in these jurisdictions have led to two different conceptions of immigration. U.S. courts see immigration regulation as implicating national sovereignty, while European courts see public order interests at the heart of immigration regulation. It is this difference that leads to

286. Guiraudon, *supra* note 151, at 1100.
287. *Id.*; *see supra* text accompanying notes 153–56.
288. *Supra* text accompanying note 281.

distinct understandings of the judicial role and to drastically different approaches to judicial review. Until there is a shift away from viewing immigration regulation as a political issue, U.S. courts will continue to play a minimal role in reviewing deportation decisions. Such a shift is critical, however, to ensure that the constitutional rights of noncitizens are adequately protected when they are facing deportation.

III. RETHINKING DEPORTATION IN THE UNITED STATES

The use of a national sovereignty frame to analyze immigration decisions by U.S. courts is problematic because it fails to ensure that the substantive fundamental rights of noncitizens are protected in the deportation context. Use of a national sovereignty frame facilitates judicial deference to political actors, and it leaves no one monitoring deportation grounds or decisions for constitutionality. The lack of robust judicial review would be less problematic if the traditional concerns involved in regulating national sovereignty were at issue in regulating deportation. Yet the State interests at stake in most deportation cases are more akin to a State's interest in crime control. This mismatch counsels against automatic judicial deference to political actors when reviewing deportation decisions.[289] The ECtHR and the HRC offer an alternative frame for analyzing deportation decisions that is more closely aligned with the State interests at stake in most deportation cases. Yet use of that frame by U.S. courts will remain elusive until there is a shift in legal and public discourse about the State interests at stake in regulating immigration.

A key feature of modern democratic governance is adhering to the rule of law and being accountable to the governed.[290] In the context of regulating immigration, accountability requires structural mechanisms for monitoring, evaluating, and constraining when

289. *But see* Mark Krikorian, *Keeping Terror Out—Immigration Policy and Asymmetric Warfare*, NATIONAL INTEREST, Spring 2004, at 77 (arguing that immigration policy is fundamental to protecting national security).

290. Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 34–35 (Thomas Carothers, ed. 2006).

necessary, the State's power to regulate immigration. Deportation in both the United States and Europe operates within a system of laws that government officials utilize when deciding to deport a noncitizen. Yet, individual deportation decisions can and do challenge whether the State has exceeded the scope of its power by violating fundamental individual rights. The European system for adjudicating deportation decisions provides a forum in which these types of challenges can be rigorously reviewed. The ability to raise Article 8 claims before national adjudicative bodies and appeal those decisions to the ECtHR provides domestic and regional opportunities for legal review. The use of proportionality review by these bodies facilitates robust rather than deferential review. The United States provides limited opportunities for monitoring, evaluating, and constraining State use of the immigration power. The connection between immigration and national sovereignty has been critical to the creation and longevity of the plenary power doctrine as a limit to judicial review of substantive constitutional challenges to deportation orders.[291] While the Court has not stated that substantive challenges to immigration decisions are nonjusticiable, it has stated that the "reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization."[292] Congress and executive officials are obligated to uphold and defend the U.S. Constitution, yet there are no institutional mechanisms in place to review deportation grounds or deportation

291. As Gerald Neuman has noted,

> But their [foreign nationals] substantive constitutional rights may not effectively constrain congressional deportation policy, and courts will apparently not protect them from being deported for engaging in activities for which they could not be 'punished' by imprisonment or even fine. Indeed, they can be deported for characteristics rather than activities, and for activities preceding the adoption for the policy as well as those postdating it.

Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 620 (2006).

292. Matthews v. Diaz, 426 U.S. 67, 81–82 (1975) (internal citations omitted) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)). While this case addressed Medicare eligibility requirements, the Court still noted that "decisions in these matters may implicate our relations with foreign powers" and as such are more appropriately dealt with by the Legislature of the Executive. *Id.* at 81.

decisions for constitutionality.[293] Courts defer to executive officials and Congress in the area of deportation, but there is no indication that these officials consider the substantive constitutional rights of noncitizens in making their decisions.[294] Absent executive or congressional review of immigration decisions for consistency with substantive fundamental rights, the United States is not accountable for the constitutionality of its immigration decisions. This lack of accountability undermines the rule of law. This state of affairs would be more palatable if deportation decisions involved the same State interests as traditional national sovereignty matters.

Regulating the foreign affairs component of national sovereignty implicates interstate relationships and diplomatic affairs. The national security component seeks to ensure the preservation of the State—both its physical, political, social, and cultural components.[295] Most deportation grounds are not concerned with addressing these interests.[296] Overwhelmingly noncitizens are deportable for activities engaged in after admission—post-entry social control deportation grounds.[297] The vast majority of these deportation grounds are related to criminal activity.[298] Deporting noncitizens because they have

293. There are mechanisms in place, however, to review procedural constitutional claims. *See supra* text accompanying notes 126–28.

294. *See supra* text accompanying notes 84–85 (noting that the Executive Office of Immigration Review does not have jurisdiction over constitutional challenges to the INA or specific immigration decisions).

295. The relationship that the United States, as a sovereign State, has with another sovereign State is based on political considerations. Immigration, however, regulates the relationship between an individual and a sovereign State. The United States has regulated immigration through interstate relationships. Between 1776 and the mid-1800s, the federal government regulated immigration through treaties. Friendship, Navigation, and Commerce treaties were used to grant the citizens of the treaty partner the ability to enter and reside in the United States. *See* Banks, *supra* note 36.

296. Immigration regulation *can* implicate interstate relationships, but it does not have to and rarely does. An example of this actually occurring was after the 1979 hostage crisis in Iran. Iranian students with nonimmigrant visas were required to report to the Immigration and Naturalization Service to provide information regarding their residence and school enrollment. *See* Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1379–80 (2007).

297. DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007).

298. The deportation grounds outlined in INA § 237 do not indicate an overwhelming State interest in national sovereignty. Of the seven broad categories of deportable activities, one covers national security and one covers criminal activities. Each of these categories has six sub-categories of related activities. For example, within criminal activities a noncitizen is deportable for general criminal activities, criminal activities related to controlled substances, firearms, miscellaneous, domestic violence, and trafficking.

stolen property or written a bad check is not an attempt at self-preservation or maintaining or protecting interstate relationships or diplomatic affairs. Rather, it reflects the State's interest in crime control. Deporting noncitizens who engage in criminal activity is seen as a tool for deterring future criminal activity and punishing past criminal conduct.[299] Several senators clearly expressed these sentiments during debates about the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Senator William Roth noted that broadening the definition of aggravated felonies made "more crimes punishable by deportation," and Senator Abraham remarked, "You don't shut down the borders. What you do is you say we're going to apply the criminal laws more harshly."[300] Crime-based deportation now accounts for a significant number of all deportations. In 2005, the last year that the Department of Homeland Security reported the administrative reason for deportations, criminal violations were the third most common reason for deportation. The most common reasons were attempted entry without proper documents, through fraud, or misrepresentation and presence without authorization.[301] This trend is evident from 1996 through 2005.[302] National security, on the other hand, only accounted for 10 of the 208,521 removals in 2005.[303] Crime-based deportations continue to

See INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2008). The security-related sub-categories include general security threatening activities, terrorist activities, activities implicating foreign policy, Nazi-related activities, violating religious freedoms, and recruiting or using child soldiers. *See* INA § 237(a)(4), 8 U.S.C. § 1227(a)(4) (2008).

299. *See* Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009) (discussing Congressional motivations for crime-based deportation grounds).

300. *See* Lisa Zagaroli, *Senators Use Rank to Set Pet Priorities*, DET. NEWS, Mar. 23, 1997, at B5; Kanstroom, *supra* note 69, at 1894 (citing 142 CONG. REC. S4600).

301. U.S. DEP'T OF HOMELAND SEC., 2005 YEARBOOK, *supra* note 186, at 96 tbl.40.

302. *Id.*

303. *Id.* It is possible that additional noncitizens were deported due to national security concerns, yet the formal basis for the deportation was not related to national security. *See, e.g.*, Jaya Ramji-Nogales, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, 39 COLUM. HUM. RTS. L. REV. 287 (2008). However, in many instances it is easier for the government to deport a noncitizen under the national security deportation grounds rather than other deportation grounds. For example, the criminal activity deportation grounds generally require that the noncitizen have been convicted of the relevant activity in order to be deportable. *See* INA § 237(a)(2), 8 U.S.C. 1227(a)(2). The national security deportation grounds do not require a criminal conviction. The language of these deportation grounds only requires that the noncitizen engage in activity that is deemed

be significant. In 2008, thirty-nine percent of all noncitizens removed in non-expedited proceedings were removed based on criminal activity, and in 2007 the figure was approximately thirty-one percent.[304]

Within the United States, national sovereignty interests in regulating immigration should be secondary, as they are in criminal law enforcement, when noncitizens are involved. Interstate issues can arise when noncitizens are charged with or convicted of state or federal crimes, but such issues rarely arise.[305] The fact that criminal law enforcement can implicate national sovereignty does not exempt noncitizens from state criminal laws. Nor does it cause federal courts to defer to federal law enforcement officials when noncitizens allege a substantive constitutional violation. Rather, the default presumption is that the courts will perform the traditional judicial functions and review allegations of substantive constitutional violations. Alternative procedures exist to deal with the rare cases in which national sovereignty is implicated by state or federal criminal law enforcement. Judicial deference to federal law enforcement officials is not the default approach because the presumption is that criminal law enforcement implicates the State's interest in public safety, not national sovereignty. A similar presumption should apply to regulating immigration.

Judicial deference should be the exception rather than the rule in immigration adjudication. In the rare cases in which national

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to threaten national security. For example, engaging in "any other criminal activity which endangers public safety or national security" makes a noncitizen deportable. INA § 237(a)(4)(A)(ii), 8 U.S.C.A. 1227(a)(4)(A)(ii) (2006). The emphasis on public safety as the basis for a significant number of deportations fits with a history of communities in the United States using banishment as a tool for addressing public safety concerns. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 63–90 (2007).

304. U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK, *supra* note 1, at 102 tbl.37; U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, *supra* note 1, at 4; U.S. DEP'T OF HOMELAND SEC., 2007 YEARBOOK OF IMMIGRATION STATISTICS 102 tbl.37 (2008) *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf; U.S. DEP'T HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2007, at 4 (2008) *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf. These statistics include individuals who were denied admission and those who were deported.

305. *But see* Medellin v. Texas, 552 U.S. 491, 493–96 (2008) (addressing President's attempt to comply with an International Court of Justice decision regarding noncitizens' rights to consular relations when arrested).

sovereignty is implicated in a deportation case, it would be appropriate for a court to take these State interests into account when deciding the appropriate standard of review.[306] The European Court of Human Rights has two mechanisms for dealing with this situation: first, recognizing the State interest in national security when conducting the proportionality review, and second, deferring to the decision of the national authority pursuant to the margin of appreciation doctrine.[307] The existing political question doctrine provides a framework for U.S. courts to determine whether or not the court should exercise self-restraint and decline judicial review. In the vast majority of cases, the *Baker v. Carr* requirements for judicial deference would not be satisfied.[308]

Europe is not unaware of the potential connection between immigration and national sovereignty. These States simply do not apply an irrebuttable presumption that all immigration cases implicate such interests, as the United States does. Rather, proportionality review allows these unique factors to be considered in a court's analysis and the margin of appreciation doctrine allows the ECtHR to exercise self-restraint and decline to review a claim. Recognizing that most deportation decisions rarely involve national sovereignty interests is a critical first step for re-thinking the relationship between the judiciary and the political branches in ensuring that the State's immigration decisions conform to the limits imposed by domestic and international law.

The jurisprudence of the European Court of Human Rights and the Human Rights Committee provides one approach for monitoring and

306. Absent such a finding, traditional standards of review are more appropriate. This is the approach that Justice Marshall took in his dissenting opinion in *Fiallo*. After finding that the statutory scheme for admitting children at issue in this case was "unrelated to foreign policy concerns or threats to national security," Justice Marshall concluded that there was no need for the Court to exercise self-restraint and utilize a deferential standard of review. Fiallo v. Bell, 430 U.S. 787, 808, 815–16 (1977) (Marshall, J., dissenting).

307. *See supra* text accompanying notes 265–67 (discussing the ways in which the ECtHR is able to take national security concerns into account when adjudicating rights claims in the immigration context).

308. Baker v. Carr, 369 U.S. 186 (1962). See Legomsky, *Plenary Congressional Power*, *supra* note 12, at 265–69 for a detailed discussion of the application of the political question doctrine in the immigration context. Legomsky argues that in immigration cases in which foreign affairs are implicated, courts should "balance the likely impact of its interference against the importance of the individual right allegedly violated." *Id.* at 268–69.

reviewing State immigration decisions, but it is an approach ill-suited to the current U.S. legal system. Conceptualizing immigration regulation as essentially legal rather than political is the most valuable insight from the European jurisprudence and the hardest to implement in the United States. It is our immigration history, source of State authority to regulate immigration, and allocation of immigration authority that make it difficult to view immigration as something other than political decisions about the physical, political, social, and cultural integrity of the State. Absent recognition that the national sovereignty interests implicated in immigration regulation are secondary, robust judicial review of deportation decisions will remain elusive.

The link between immigration and national sovereignty has a long history in the United States.[309] The U.S. Supreme Court's jurisprudence in this area culminated in cases implicating the Chinese Exclusion Acts, the Cold War, and terrorism.[310] The facts surrounding these cases have reinforced the idea that a State's power to regulate immigration stems from the State's sovereign duties and authority regarding national sovereignty.[311] The fact that most immigration decisions, particularly deportation decisions, do not implicate national sovereignty has yet to be acknowledged by either the courts or the administrative bodies responsible for regulating immigration in the United States.[312]

A combination of legal and non-legal strategies is necessary to shift the current understanding of the State interests at stake in regulating immigration. One important non-legal strategy is shifting the public discourse regarding immigration. The human rights

309. *See supra* text accompanying notes 33–63.

310. *See, e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 473–75 (1999); U.S. *ex rel*. Knauff v. Shaughnessy, 338 U.S. 537, 539–40 (1950); Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 207–08 (1953); Kleindienst v. Mandel, 408 U.S. 753, 756 (1972); Fong Yue Ting v. U.S, 149 U.S. 698, 699 (1892); Chae Chan Ping v. U.S., 130 U.S. 581, 581(1889).

311. *See* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1832–35 (2007).

312. *See id.* at 1856–65 ("[C]urrent removal policies have almost nothing to do with national security."); Legomsky, *Plenary Congressional Power, supra* note 12, at 268–70 (arguing that it is a stretch to conclude that the entirety of the INA affects national sovereignty interests and that even when such interests are implicated *Baker v. Carr* requires individualized review).

enforcement literature has empirically demonstrated that changing legal practices to correspond with new legal norms is a multi-stage process in which nonlegal factors play a critical role. Keck and Sikkink have demonstrated the importance of changing the discursive position of States and international organizations in achieving legal reform and the role that advocacy networks play in bringing about such discursive changes.[313] These scholars have identified information, accountability, leverage, and symbolic politics as tactics useful in achieving this discursive goal.[314] Shifting the frame used by U.S. courts to analyze deportation cases will similarly require a change in the discursive position of legal officials and more broadly, the public.

National sovereignty concerns have dominated the comprehensive immigration reform debate.[315] The popular media has played a significant role in maintaining the link between national sovereignty and immigration. News coverage over the past three years has consistently made a connection between immigration and security.[316] This connection was reinforced by the title of the 2005 House bill introduced for comprehensive immigration reform, "Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005."[317] The idea that immigration and national sovereignty are inescapably and permanently linked is prevalent throughout American society. This perception is distorting the national debate regarding comprehensive immigration reform by skewing the

313. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

314. *See, e.g.*, Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 FORDHAM INT'L L. J. 781, 800–01 n.101 (2009) ("Information politics is about 'quickly and credibly generat[ing] politically usable information and mov[ing] it to where it will have the most impact.' Holding political actors to their commitments is the focus of accountability politics and leverage politics uses powerful actors to assist less powerful members of the network." (quoting KECK & SIKKINK, *supra* note 313, at 16)) (internal citations omitted). Symbolic politics refers to the use of "symbols, actions, or stories that make sense of a situation for an audience that is frequently far away." KECK & SIKKINK, *supra* note 313, at 16.

315. *See* Johnson & Trujillo, *supra* note 296, at 1373; Chacón, *supra* note 311, at 1829–30.

316. A Westlaw search of the Major Newspapers database for the terms immigration /s "national security" provides numerous examples.

317. H.R. 4437, 109th Cong. (2006).

relationship between immigration and law enforcement,[318] which facilitates breaching rule of law norms. The judicial use of a national sovereignty frame to analyze immigration cases gives rise to judicial deference, such that political actors are not monitored or evaluated to ensure that their actions comport with the substantive provisions of the U.S. Constitution. Nonlegal strategies will play an important role in shifting popular and legal understandings of the relationship between immigration and national sovereignty. A critical aspect of achieving comprehensive immigration reform that will create an effective and just immigration system is recognizing that regulating immigration implicates State interests such as economic development, family reunification, and social integration as well as national sovereignty. The European immigration jurisprudence assists with this conceptualization of immigration. Recognizing a broader range of State interests involved should support the development of a legal framework that can adequately monitor and evaluate immigration decision making yet still allow for judicial deference when required by national sovereignty.

CONCLUSION

The number of individuals residing outside of their state of nationality has grown exponentially over the last twenty years causing a significant portion of the world's population to be vulnerable to deportation. This is a significant power that States hold, particularly with regard to long-term foreign residents who have been granted permission to reside in a State indefinitely. The manner in which a State exercises its deportation power can unsettle the lives of noncitizens, their families, and their communities, which often include citizens. As Justice Brewer stated in his dissenting opinion in *Fong Yue Ting*, "[e]very one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and

318. *See* Johnson & Trujillo, *supra* note 296; Chacón, *supra* note 311; Daniel Kanstroom, *Reaping the Harvest: The Long, Complicated, Crucial Rhetorical Struggle over Deportation*, 39 CONN. L. REV. 1911 (2007).

sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel."[319]

In this Article, I have argued that the United States and Europe have developed two different approaches for balancing the fundamental rights of noncitizens and the State's right to deport undesirable noncitizens. The European approach treats fundamental rights challenges to deportation decisions as legal questions that legal institutions are competent to resolve. Alternatively, the United States treats these same claims as political questions that political actors are empowered to decide. The U.S. approach does not provide adequate institutional mechanisms by which political actors review deportation decisions for substantive constitutionality. While Congress's enactment of the INA may represent a broad decision regarding the constitutionality of categories of deportation cases, it does not provide for individualized assessments. It is my contention that U.S. courts and European legal institutions developed these different approaches because of (1) their experiences with immigration, (2) the source of the State's authority to regulate immigration, and (3) the allocation of that authority within the State. The United States' experience with Chinese immigration in the mid- to late-nineteenth century enabled Congress and the U.S. Supreme Court to view immigration as a form of aggression that implicated foreign affairs. Unsurprisingly, the Court located the federal government's authority to regulate immigration in its constitutionally granted power to declare war, make treaties, suppress insurrections, repel invasions, and regulate foreign commerce.[320] European legal institutions, alternatively, identified the State's power to protect public order as the basis for regulating immigration. This conception of immigration authority is not unknown within U.S. jurisprudence. As discussed, states regulated immigration in the United States between 1776 and 1875, and this was understood to be an aspect of the state's police

319. Fong Yue Ting v. U.S, 149 U.S. 698, 740 (1892) (Brewer, J., dissenting).

320. Chae Chan Ping v. U.S., 130 U.S. 581, 604 (1889). "The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control, and to make it effective." *Fong Yue Ting*, 149 U.S. at 711.

powers.[321] Once there became a need for federal coordination of immigration law and policy, the Court had to identify a basis for federal rather than state regulation of immigration. Rooting federal authority in national sovereignty satisfied this goal. The Court appears to have had a broad conception of national sovereignty, one that included not only the physical security of the State, but also the social and cultural identity of the State. To the extent immigration implicates these interests, they are political decisions that are difficult to evaluate with legal standards. Yet deportation decisions, specifically crime-based deportation, do not readily implicate these broader self-definition and security concerns any more than state and federal criminal law do. Legal standards do exist to protect against retroactivity, ensure proportionality of punishment, and prohibit undue interference with family life. Until legal decision makers recognize the primacy of these interests rather than national sovereignty interests, judicial deference will continue. The European approach acknowledges the variety of State interests implicated in immigration decision making. Legal decision makers have the flexibility necessary to provide robust judicial review when faced with substantive fundamental rights challenges, but also deferential review when appropriate. The lack of judicial oversight in the United States minimizes the accountability of the political actors responsible for regulating immigration and increases the risk of arbitrary deportation decisions. This undermines the rule of law in the regulation of immigration. Shifting the meaning of immigration within U.S. legal discourse is one strategy for increasing the monitoring role that the judiciary can play. Absent movement away from viewing immigration through a national sovereignty frame, the judiciary's monitoring and evaluative role will remain negligible.

321. Neuman, *supra* note 20, at 1894–96.