

Oklahoma Law Review

Volume 68 | Number 1

Symposium: Chae Chan Ping v. United States: 125 Years of Immigration's Plenary Power Doctrine

2015

Why Immigration's Plenary Power Doctrine Endures

David A. Martin
University of Virginia

Follow this and additional works at: <http://digitalcommons.law.ou.edu/olr>

 Part of the [Immigration Law Commons](#)

Recommended Citation

68 Okla. L. Rev. 29 (2015)

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized administrator of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

WHY IMMIGRATION'S PLENARY POWER DOCTRINE ENDURES

DAVID A. MARTIN*

Abstract

The plenary power doctrine, traditionally traced to the Supreme Court's decision in Chae Chan Ping, has persisted despite a steady and vigorous stream of scholarly criticism. This essay undertakes to explain why. First, the Court's strong deference to the political branches does not derive from the concept of sovereignty. Justice Field's opinion for the Court invoked sovereignty not to trump rights claims but to solve a federalism problem — structural reasoning that locates the immigration control power squarely in the federal government, though not explicitly enumerated in the Constitution. The Chae Chan Ping Court's deference to the political branches instead rested primarily on the close linkage between foreign affairs and immigration control decisions. The essay illustrates why such linkage is more significant than is often appreciated, even today, as the federal government seeks to work in a complex and uncertain global context, where many powers taken for granted in the domestic arena simply are not reliably available. The Court implicitly remains willing to give the political branches leeway to use immigration authorities in rough-hewn ways, even though deference does mean that some governmental acts deriving from illicit motives rather than genuine foreign affairs considerations may go unremedied in court. The Court adheres to a strong deference doctrine because it is concerned that lower courts, if given wider authority to review, will overvalue individual interests and undervalue governmental interests. In an increasingly dangerous world, the Supreme Court is unlikely to overrule the plenary power doctrine. Academics and activists should respond by focusing more attention on rigorous policy analysis coupled with advocacy addressed to the political branches — a forum where constitutional values can be pursued and successfully, though unevenly, vindicated, as Justice Field recognized.

* Warner-Booker Distinguished Professor of International Law and Joel B. Piassick Research Professor, University of Virginia. The author served, during leave from his university position, as General Counsel of the Immigration and Naturalization Service from 1995 to 1998 and as Principal Deputy General Counsel of the Department of Homeland Security from 2009 through 2010. The views expressed herein are his alone and do not necessarily represent the views of his former agencies or the U.S. government. Warm thanks go to Sarah Allen for excellent research assistance.

Chae Chan Ping v. United States,¹ also known as *The Chinese Exclusion Case*, is traditionally taken as the fountainhead of the plenary power doctrine. Both the case and the doctrine have been widely and persistently condemned in the scholarly literature.² It almost seems an obligatory rite of passage for scholars embarking on the study of immigration law to provide their own critique of plenary power or related doctrines of deference.³

To be sure, there are many reasons for twenty-first-century observers to be deeply troubled by *Chae Chan Ping*. The 1888 law it sustained stemmed from xenophobic and racist agitation in California, scapegoating the

1. 130 U.S. 581 (1889).

2. See, e.g., T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 12-14, 151-96 (2002); STEPHEN H. LEGOMSKY, *IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA* 177-218 (1987); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 124-34 (2002); Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 378-90 (2004); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 858-63 (1987); Berta Esperanza Hernández-Truyol, *Nativism, Terrorism, and Human Rights—The Global Wrongs of Reno v. American-Arab Anti-Discrimination Committee*, 31 COLUM. HUM. RTS. L. REV. 521, 538-46 (2000); Linda Kelly, *Preserving the Fundamental Right to Family Unity: Championing Notions of Social Contract and Community Ties in the Battle of Plenary Power Versus Aliens' Rights*, 41 VILL. L. REV. 725, 733-38 (1996); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255-57; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 550-54 (1990); Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The "Plenary Power" Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J. 13, 13 (2003); John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 TEX. L. REV. 1481, 1499-1504 (1988); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 1022-31; Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1127-29 (1995). Some find that plenary power doctrine is waning. See, e.g., Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 34-54 (1984); Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 345-55 (2002).

3. My own young-scholar contribution to this genre focused not on *Chae Chan Ping*'s plenary power doctrine, but rather on its procedural cousin, the doctrine deriving from *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-44 (1950), which largely bars the courts from entertaining procedural due process claims in exclusion cases. David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 PITTS. L. REV. 165 (1983).

Chinese in the midst of a severe economic recession.⁴ And Chae Chan Ping himself is a highly sympathetic petitioner. He had lawfully resided in the United States for fifteen years, journeying back to visit family in China only after carefully obtaining the official certificate provided by law as the means for his readmission.⁵ He was already at sea on his return voyage when Congress changed the law, with immediate effect, nullifying the use of those certificates to gain reentry.⁶ Hence his exclusion and his habeas corpus challenge.⁷

Nonetheless, the case receives more blame than it deserves. For example, the Court's invocation of sovereignty in *Chae Chan Ping* is sometimes seen as an illegitimate judicial move meant to introduce a factor that will trump rights claims.⁸ The Court invoked sovereignty, however, not to deny rights but instead primarily to answer a federalism question. It used the concept to establish, through structural reasoning, that the federal government in fact does possess the authority to regulate migration, even though such a power is not enumerated in the Constitution. Furthermore, though the plenary power doctrine forecloses most direct constitutional challenges against congressional immigration statutes, it is hardly the blank check for the executive that is sometimes suggested. Significant statute-based challenges to executive action remain available, as do procedural due process challenges, at least to deportation proceedings.⁹

Offered here is an exploration of the reasons given in *Chae Chan Ping* and the kindred case of *Fong Yue Ting*¹⁰ for deference to the political branches. (Decided four years later, *Fong Yue Ting* extended the Court's deferential stance beyond exclusion at the border to give Congress wide authority in setting and changing substantive standards governing

4. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 15-26 (2006).

5. *Chae Chan Ping*, 130 U.S. at 581.

6. *Id.*

7. See Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of the Plenary Power*, in *IMMIGRATION STORIES* 7, 11-13 (David A. Martin & Peter H. Schuck eds., 2005).

8. See, e.g., Hernández-Truyol, *supra* note 2, at 539 (“Flowing from this notion [of sovereignty] is the principle that the federal government has preemptive, unfettered regulatory power over the exclusion of others or outsiders”); Saito, *supra* note 2, at 33 (“[T]he Supreme Court’s justification for the exercise of plenary power is that the power is inherent in sovereignty.”).

9. See, e.g., *Yamataya v. Fisher*, 189 U.S. 86 (1903).

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

deportation, even of long-time settled residents.¹¹) I go on to consider why the plenary power doctrine nonetheless endures, despite the scholarly condemnation and the proffered alternatives, even as the Supreme Court has assumed a far more assertive role in rights protection in other domains. Ultimately, the reasons for the doctrine's survival are likely to gain in strength over coming decades, in a world facing new and more challenging forms of violence and conflict, a growing number of weak or failing states, a possible increase in virulently contagious diseases, and more severe migration pressures.

In that light, I conclude by suggesting a few lessons about the scholarly reaction. The litigation picture is not so bleak as often portrayed. Subconstitutional litigation is plentiful, with a significant success rate for challengers and a de facto sparsity of judicial deference to the government, though the Supreme Court occasionally reaches down to curb a few of the more ambitious judicial interventions.¹² Moreover, even though bold constitutional reforms through the judicial branch are not in the offing, constitutional values can be invoked in other ways besides litigation — and in fact have been invoked over the past fifty years to win highly significant changes in immigration laws through the political process. We scholars need to focus on expanding our toolbox and improving the ways we train our students to use methods other than constitutional litigation, particularly rigorous policy analysis attuned to the true complexity of migration management and the political constraints. We should also foster a realistic perspective on the high level of immigration opportunity and noncitizen protection that mark our overall system — especially when viewed against the backdrop of global practices — even while working to improve those features.

I. The Deployment of Sovereignty

A. Immigration Control: A Structural Feature of Sovereign Nationhood

Much of the scholarly criticism focuses on the invocation of sovereignty in *Chae Chan Ping* and *Fong Yue Ting*, blaming that analytical move for the decisions' broad deference to the political branches and the later

11. *Id.* at 713-15, 728-29.

12. *See, e.g.*, *I.N.S. v. Ventura*, 537 U.S. 12 (2002) (per curiam); *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999).

development of immigration exceptionalism.¹³ But if we take a closer look, we find the Court did not deploy sovereignty as a basis for denying rights; instead, it used the concept primarily to solve a federalism problem.

Justice Stephen Field, author of the unanimous decision in *Chae Chan Ping*, first examined the petitioner's claim that he should be admitted because the 1888 Chinese Exclusion Act violated an 1880 treaty with China.¹⁴ Clearly the statute did violate the treaty, but Field, in his first reference to sovereignty, wrote that treaties and statutes are of equal rank, and in the case of a conflict, "the last expression of the sovereign will must control."¹⁵ This is a logical reading of the Supremacy Clause in Article VI of the Constitution, which places treaties and statutes on an equal plane as supreme law of the land. And by 1889, the Court had already so ruled in other cases.¹⁶ Any particular decision to breach a treaty is of course fair game for policy objection, even condemnation. But it remains a necessary part of international practice that a nation's leadership retain the power to breach a treaty. Most compellingly, in our underdeveloped and decentralized international legal system, the primary enforcement tool available to address another party's own treaty violations is a responsive breach by the wronged party.¹⁷ Objection to any treaty breach, the Court

13. See *supra* note 8 and accompanying text. On immigration exceptionalism, see, e.g., T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 34 (1990); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1392-94 (1999).

14. 130 U.S. at 596-601.

15. *Id.* at 600.

16. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 597-99 (1884).

17. Vienna Convention on the Law of Treaties art. 60, January 27, 1980, 1155 U.N.T.S. 331; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 335 (1986); JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 391-92 (8th ed. 2012). The terminology generally used in these sources speaks of treaty termination or suspension in response to a material breach, but this is simply diplomatic terminology for what is in reality a responsive breach. Justice Field also emphasized this feature in *Chae Chan Ping*:

It will not be presumed that the legislative department of the government will lightly pass laws which are in conflict with the treaties of the country; but that circumstances may arise which would not only justify the government in disregarding their stipulations, but demand in the interests of the country that it should do so, there can be no question. Unexpected events may call for a change in the policy of the country. Neglect or violation of stipulations on the part of the other contracting party may require corresponding action on our part. When a reciprocal engagement is not carried out by one of the contracting parties, the other may also decline to keep the corresponding engagement.

insists, must be lodged in other forums, via diplomacy or domestic political action, and in either case be addressed to the political branches.¹⁸ This initial part of the opinion, ratifying Congress's authority to violate treaties, actually tells us little about the concept of sovereignty.

The next section of the opinion, however, is where that concept draws primary attention. Beyond the treaty claim, Justice Field took the petitioner to be asserting that there were "other ground[s]" placing the Chinese Exclusion Act "beyond the competency of Congress to pass it."¹⁹ The challenge is not framed in exactly this manner, but it basically poses a federalism issue. Under our constitutional system, it is the states, not the federal government, that possess residual general powers, commonly called police powers. The federal government is conventionally understood to possess only those powers enumerated in the Constitution. By what authority, then, does the federal government assert the power to block certain foreigners from entering the country?²⁰ The closest enumerated power would seem to be Congress's authority to adopt "an uniform Rule of Naturalization."²¹ But naturalization is not the same thing as admission to the territory, and the Naturalization Clause has never seemed fully up to the task of supporting the complicated superstructure of federal immigration controls erected since the adoption of the Chinese Exclusion Acts.

130 U.S. at 600-01.

18. 130 U.S. at 602-03.

19. *Id.* at 603.

20. The question could be taken as the same one with which Justice Sutherland struggled fifty years later, first in a lecture at Columbia Law School, but more famously in his majority opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1946). He answered it by propounding an eccentric but elaborate sovereignty transmission theory. For analysis and critique of Sutherland's doctrine, see, e.g., Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000). Field's mode of overcoming the conceptual difficulty posed by the sparse list of foreign-affairs powers in the text of the Constitution is far more successful and convincing than Sutherland's.

The Supreme Court recently resolved a narrow question regarding the derivation and allocation of certain foreign affairs authorities. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (holding that the President's authority to recognize other governments is exclusive, and that a congressional statute mandating certain statements on a U.S. citizen's passport was therefore unconstitutional). But broader issues about how to construe the Constitution's parsimonious language on foreign affairs powers remain unresolved. *Compare id.* at 2076-96 (Kennedy, J., majority opinion), *with id.* at 2096-2113 (Thomas, J., concurring in part and dissenting in part), *and id.* at 2113-16 (Roberts, C.J., dissenting), *and id.* at 2116-26 (Scalia, J., dissenting).

21. U.S. CONST. art. I, § 8, cl. 4.

We might first note that this type of challenge to congressional power was something of a dangerous argument for the Chinese community to propound in 1889.²² To prove that the federal government lacks the authority to control migration would not have spelled the end of U.S. migration controls. It would instead almost surely have meant that such power belongs to the states as part of their general police powers. As of 1889, that prospect certainly did not point toward adoption of more humane laws.²³

In any event, Field rose to meet the federalism challenge:

That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is *an incident of every independent nation*. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.²⁴

By invoking the very concept of independent nationhood, Field is staking out an additional theoretical foundation for specific federal powers — one not confined to enumerated text. As Charles Black has elegantly argued in his classic work, *Structure and Relationship in Constitutional Law*, not all constitutional powers and restrictions must trace to a specific text. Certain structural features or premises of our basic charter can also provide a legitimate source of constitutional interpretation and reasoning.²⁵

At its base, the Constitution is a founding document that constitutes — establishes the framework for — governance of a *nation*. This nation was

22. As documented in Lucy Salyer's fine book on the Chinese experience with the immigration laws, Chae Chan Ping's case was part of a broad litigation effort against anti-Chinese legislation, financed and skillfully managed by the Chinese Six Companies, an umbrella community organization, which had scored several notable courtroom victories against hostile state and federal enactments in the late nineteenth century. LUCY SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 40-41 and *passim* (1995); *see also* Chin, *supra* note 7, at 7, 9-10.

23. *See* RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 200-09* (1993) (describing the growing nativist resentment against Chinese in the late nineteenth century, accompanied by new legislative restrictions at the federal, state, and local levels).

24. 130 U.S. at 603-04 (emphasis added).

25. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 22-23, 67-98 (1969).

clearly intended to take its place in the global community of nations, possessed of all the powers implicit in the understanding of such an institution. As of 1787, the United States would be a nearly unique player in that league. The framers created a republic rather than a monarchy, and one with a written charter that intentionally sets out both governmental powers and individual rights, along with restrictions and specifications governing some of those powers. Nonetheless, the Constitution emphatically was written to establish a nation, not a mere association of persons seeking to achieve a limited range of contractual purposes. Asserting jurisdiction over a territory, which includes authority to choose which noncitizens to admit or exclude, is simply part of what it means to be a sovereign nation.²⁶ This is the primary context in which Field deploys the concept of sovereignty.²⁷

26. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (listing “a defined territory and a permanent population” as required characteristics of a state for international law purposes).

27. This same mode of reasoning dominates the Court’s decision in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), which involved deportation of a Chinese national already in the United States, rather than exclusion at the border. The majority, in essence, saw Justice Field’s structural, sovereignty-based reasoning in *Chae Chan Ping* as fully applicable: “The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] . . . an inherent and inalienable right of every sovereign and independent nation . . .” *Id.* at 711 (emphasis added).

Intriguingly, Field dissented with exceptional vehemence in *Fong Yue Ting*, objecting in particular to the notion that the U.S. government “take[s] any power by any supposed inherent sovereignty.” 149 U.S. at 757. But at the same time, he expressed pride at being the author of the earlier decision. *Id.* at 746. The objection and the pride are at best in tension, if not in flat contradiction. See Cleveland, *supra* note 2, at 144-49 (offering thoughtful reflections on Field’s contradictory stances in the two cases). His dissent seeks to reconcile the difference by taking refuge in the argument that the U.S. Constitution has no extraterritorial application (a geographical designation which also renders it inapplicable to aliens at ports of entry), whereas it applies fully within our borders.

Elsewhere, Field puts a somewhat different spin on the distinction, however, emphasizing the injustice of applying new restrictions to “persons lawfully domiciled therein by [the nation’s] consent.” 149 U.S. at 754-55 (Field, J., dissenting). In modern terms, the latter distinction would essentially be that between lawful permanent residents (entitled to the strongest measure of procedural and substantive due process protection) and other aliens within the borders. The other two dissenters in *Fong Yue Ting* also placed emphasis on the unfairness of applying new restrictions so as to uproot persons who had taken up residence with governmental consent. *Id.* at 734-35 (Brewer, J., dissenting); *id.* at 762-63 (Fuller, J., dissenting). I find the more functionalist distinction, based essentially on the legitimate expectations that spring from the nation’s *consent* to domicile, far more faithful than the geographic one to the premises of our overall constitutional scheme. See Martin, *supra* note 3, at 214-215; see also David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47.

Building on several earlier Supreme Court decisions from previous decades,²⁸ Field goes on to explain why this sovereign authority cannot be a power exercised by the states:

[T]he United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . . “[T]he government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. . . . It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. . . .” . . . It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws²⁹

Justice Field thus clearly claims the immigration control power for the federal government. At the same time, he generalizes further, in a way that helps solve a broader constitutional difficulty — namely, finding federal authority to engage in the full range of actions entailed in the conduct of foreign relations, rather than simply those rather skeletal specific actions adumbrated in the Constitution’s text, such as receiving foreign ambassadors. In fact, many writers have commented on the paucity of text to support the full range of actions actually undertaken in the conduct of diplomacy and foreign policy.³⁰

This requirement that the nation speak with one voice on the world stage (rather than thirty-eight different state voices, as would have been the case in 1889) has become a refrain importantly repeated in many later court

28. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875), *Henderson v. Mayor of City of New York*, 92 U.S. 259, 272 (1875), *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 593-94 (1884).

29. 130 U.S. at 604-05 (quoting the opinion of Chief Justice Marshall in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 413-14 (1821)).

30. *E.g.*, LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 79 (2d ed. 1996); Ramsey, *supra* note 19, at 437-38.

decisions with foreign-affairs implications, including the 2012 immigration decision in *Arizona v. United States*.³¹ Field invokes sovereignty in *Chae Chan Ping*, then, primarily to justify exclusive *federal* power to control immigration, despite the lack of an anchor in explicit constitutional text. Ironically, most of today's critics of the 1889 decision, having the *Arizona* decision in mind, would probably endorse this part of the Court's conclusions.

B. Sovereignty Is Subject to Constitutional Limits

Some commentators blame the invocation of sovereignty for a different feature of the opinion to which they strongly object — the Court's refusal to engage in probing judicial review of the Chinese Exclusion Act or the executive action applying the exclusion rule to Chae Chan Ping.³² If the migration control authority is an extra-constitutional power deriving from sovereignty, the argument goes, then it follows that it is immune to constitutional constraints. But this critique misunderstands the reasoning at work in the opinion. Judicial deference to certain kinds of immigration actions, especially to congressional enactments, did not derive from the concept of sovereignty. It arose instead from the Court's understanding of proper institutional roles, given the complex dynamics in the foreign affairs realm and the limited range of tools available to a government to affect behavior globally, as compared to the domestic arena.

First, as a conceptual matter, there is no reason why sovereign powers, at least in a polity like the United States, necessarily escape constitutional constraints. Imposing the loss of liberty (or even life) based on conviction of a crime, for example, certainly amounts to the exercise of a sovereign power — justifiable because it is carried out only by those sovereign

31. *Arizona v. United States*, 132 S. Ct. 2492, 2506-07 (2012); *Crosby v. Nat'l. Foreign Trade Council*, 530 U.S. 363, 381-82 (2000); *Japan Line Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 449 (1979).

32. See Henkin, *supra* note 2, at 857-58; Hernández-Truyol, *supra* note 2, at 539-42; Saito, *supra* note 2, at 24. This concern also figures prominently in Justice Brewer's dissent in *Fong Yue Ting*:

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? . . . May the courts establish the boundaries? Whence do they obtain the authority for this?

149 U.S. at 737. Brewer, a nephew of Justice Field, joined the Court a half year after *Chae Chan Ping* was decided. Owen M. Fiss, *David J. Brewer: The Judge as Missionary*, in *THE FIELDS AND THE LAW: ESSAYS* 53-54 (Philip J. Bergan et al. eds., 1986).

institutions considered to have a monopoly on the legitimate use of coercive force. Nonetheless, in our polity, criminal punishment remains subject to a host of constitutional restrictions that protect individual rights.

Second, at a deeper level, subjecting sovereign powers to constitutional restrictions is thoroughly consistent with the innovative public philosophy developed during our nation's founding in order to explain the new form of nation the framers were building. As explicated by Gordon Wood in his magisterial work *The Creation of the American Republic*,³³ the founding generation pioneered a new philosophy of government wherein sovereignty belongs to the people, not to a monarch or some other governmental organ. In this new republic, governments — federal or state — exercise sovereign powers only by delegation from the people. The delegation comes subject to whatever conditions the sovereign people choose to impose. There is no conceptual reason why a power that is not expressly enumerated, but instead is structurally derived from the fact of nationhood, should be free of constitutional constraints equally stemming from the decision of the sovereign people. Nonetheless — and this is key to understanding Justice Field's ultimate treatment — subjection to constitutional constraints *vel non* is a different issue from deciding precisely which institutions are properly involved in fulfilling a faithful discharge of the people's bounded delegation.

II. Foreign Affairs Linkage

A. Foreign Affairs as the Central Reason for Judicial Deference in Chae Chan Ping

Justice Field, of course, does wind up treating the political branch's conclusions, in this particular setting, as conclusive on the judiciary — but he does not rest that outcome on the idea that immigration control is a sovereign power outside the reach of the Constitution. Instead, he offers a statement about institutional roles seen as appropriate for the respective branches of government in this specific domain. In the foreign arena, he writes, as a matter of “self-preservation,”³⁴ the government has the “highest duty” to “preserve . . . independence, and give security against foreign aggression and encroachment.”³⁵ To achieve these ends, the government

33. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 344-89 (1969).

34. 130 U.S. at 608.

35. *Id.* at 606.

is clothed with authority to *determine the occasion* on which the powers shall be called forth; and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers. . . . The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and *the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary.*³⁶

In other words, in 1888, the political branches judged necessary the application of a new absolute rule excluding Chinese laborers, in order to achieve security against what Congress deemed a type of foreign encroachment.³⁷ Even with misgivings about the justice or fairness of the

36. *Id.* (emphasis added). An earlier part of the opinion takes a similar approach in refusing to examine the congressional decision to breach the treaty with China when it passed the 1888 statute that led to Chae Chan Ping's exclusion. After noting that there have been many occasions when a breach of treaty terms has been unquestionably appropriate (e.g., as part of our nation's 1798 non-military conflict with revolutionary France), the opinion indicates that if the power rests with Congress, the Court is not to pass judgment upon Congress's motives. *Id.* at 602. The *Fong Yue Ting* majority expresses the same view, suggesting that the substantive basis for invoking one of these protective powers amounts to a political question. 149 U.S. at 712.

37. It is hard for the modern observer to see Chinese migration in late nineteenth century as a form of deliberate "encroachment," especially if this concept is meant to suggest insidious plots by the government of the source nation. Field's characterization probably reflects more a reaction to scale. By some estimates, Chinese nationals constituted nearly one-eighth of California's population as of 1880. HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 16 (2006) (noting that in 1880 California's Chinese immigrant population equaled 105,000 out of the total 865,000 residents). This migration was largely drawn by the gold rush and its aftermath, which opened up high demand for cheap labor, especially in mining and railroad construction. See TAKAKI, *supra* note 23, at 191-204.

As of 2015, however, we unfortunately do have recent examples of insidious forms of deliberate encroachment in the guise of migration — Russia's sending into Ukraine skilled soldiers who have stripped away identifying insignia, as well as convoys pretending to be humanitarian. See Alison Smale and Steven Erlanger, *Ukraine Mobilizes Reserve Troops, Threatening War*, N.Y. TIMES, Mar. 1, 2014, http://www.nytimes.com/2014/03/02/world/europe/ukraine.html?_r=0; Sam Frizell, *Russia Now Has 20,000 Troops on Ukraine Border*, NATO Warns, TIME, Aug. 6, 2014, <http://time.com/3085889/nato-russia-ukraine-troops-buildup/>; Reuters, *Putin Calls for Talks on East Ukraine Statehood, But Not Independence*, NEWSWEEK (Aug. 31, 2014, 11:31 AM), <http://www.newsweek.com/putin-calls-talks-east-ukraine-statehood-not-independence-267778>. This tactic achieved enough success in

action, the courts will not second-guess that judgment of necessity. In realms touching upon foreign relations and potential national self-preservation, Field indicates, the nation must speak with one voice, and it is not for the courts to introduce a discordant sound.

B. Complexity, Prophecy, and Experimentation in Foreign Affairs Decisionmaking

Some critics of the plenary power doctrine question this asserted linkage between immigration and foreign affairs. Chinese exclusion was not a foreign affairs decision, they assert, but one driven by domestic political considerations — and in fact it worsened our relations with China.³⁸ The invocation of foreign affairs is seen as a pretext covering up uglier motives, and the plenary power doctrine prevents courts from looking behind the mask.³⁹ Therefore, some assert that courts should simply provide the ordinary measure of constitutional scrutiny — to smoke out invidious motives or at least to provide an appropriate evaluation of the weight of the governmental interest in light of the individual stake.⁴⁰

This kind of pretextual invocation certainly can occur. But here is the difficulty: We should not assume that pretexts in the foreign affairs arena

Ukraine that future variants may prove tempting, for Russia and for other expansionist powers.

38. See THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 12 (1st ed. 1985) (suggesting that the Chinese Exclusion Laws were passed despite foreign policy objectives, not because of them); Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, *supra* note 2, at 263 (suggesting that domestic political forces rather than international relations served as the primary impetus for the Chinese Exclusion Laws).

39. Hernández-Truyol, *supra* note 2, at 539-40; Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, *supra* note 2, at 261; Saito, *supra* note 2, at 20.

40. It is far from clear, however, that this change in approach would have produced wins for the noncitizen claimants in the most frequently criticized cases, because the Court's own constitutional doctrine at the specific time would often have accepted an imposition on individual rights that by today's lights seems deeply objectionable. Jack Chin's iconoclastic article on the plenary power doctrine has developed this argument quite effectively. Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Exceptional Constitutional Immigration Law*, 14 *GEO. IMMIGR. L.J.* 257 (2000). *Fong Yue Ting*, for example, upheld an evidentiary rule allowing proof of prior residence only through the testimony of white witnesses. Such a rule would evoke the strictest scrutiny today, but that would hardly have been the likely outcome in 1893, three years before *Plessy v. Ferguson*, 163 U.S. 537 (1896), was decided. To take another example, by the time the Court was consistently applying strict scrutiny to racial classifications in the mid-1960s, Congress had acted to terminate the national-origins quota system. Chin, *supra*, at 261-64.

are readily identifiable. As Justice Breyer observed in a recent political question case:

Decisionmaking in [the foreign affairs] area typically is highly political. It is “delicate” and “complex.” It often rests upon information readily available to the Executive Branch and to the intelligence committees of Congress, but not readily available to the courts. It frequently is highly dependent upon what Justice Jackson called “prophecy.” And the creation of wise foreign policy typically lies well beyond the experience or professional capacity of a judge. At the same time, where foreign affairs is at issue, the practical need for the United States to speak “with one voice and ac[t] as one,” is particularly important.⁴¹

Many of the nation’s policy tools in the foreign arena are crude and imprecise, with uncertain impact. This very uncertainty may require trial-and-error application, with a need for quick policy changes, especially in times of crisis. Therefore, deference to the political branches is called for, not because we can always be sure that their motives are pure and nondiscriminatory — we cannot — but because subjecting these measures to detailed litigation would interfere with the flexibility often necessary to act beyond our borders. A too-ready judicial interference would also impair our ability to deploy uncertain tools — deriving from immigration control, trade regulation, or other components of our international relations — according to a single unified strategy.⁴²

C. An Example: The Contrast to Domestic Measures

Consider the seizure of U.S. diplomats by militants in Tehran in 1978. After the embassy invasion was ratified and defended by the new Iranian

41. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 132 S. Ct. 1421, 1437-38 (2012) (Breyer, J., dissenting) (quoting Justice Jackson’s majority opinion in *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948), and Justice Frankfurter’s concurring opinion in *United States v. Pink*, 315 U.S. 203, 242 (1942)).

42. Justice Jackson captured some of this strategic consideration, coupled with the need for clear accountability in the face of the looming risk that particular courses of action on the global stage may prove unsuccessful, perhaps disastrously so, in the following passage from in his opinion in *Chicago and Southern Air Lines*, 333 U.S. at 111. Foreign policy decisions, he wrote, “are and should be undertaken only by those *directly responsible to the people* whose welfare they advance *or imperil*. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.” 333 U.S. at 111 (emphasis added).

government, the U.S. government turned to a disparate variety of countermeasures to try to win release of the American hostages, including the seizure of billions of dollars in assets of Iran and of its companies and nationals, litigation in the International Court of Justice, an ill-fated military rescue attempt after Iran defied the International Court, diplomatic overtures through Algeria, and certain immigration-law-based restrictions imposed on Iranian nationals in the United States.⁴³ There were even proposals at the time to use immigration or other powers to intern large numbers of Iranian nationals so they could perhaps be part of an exchange that would bring the diplomats home.⁴⁴ Thankfully, such internment was never put into motion.

Contrast the trial-and-error use of these generally crude and scattershot measures with how the government would respond to a domestic kidnapping and potential hostage situation. The police could deploy quickly to investigate who seized the victims and where they were currently located. In that process the authorities could use judicial search warrants to facilitate the inquiry, plus arrest warrants and compulsory grand jury subpoenas as appropriate. They could call on a wide range of assistance and technical support from a host of fully empowered domestic agencies, state and federal. Once the kidnapers were located, the police would establish perimeter control around the hostage site. No hostile militias would stand in the way (or if such appeared, other governmental power,

43. Marian L. Nash, *Contemporary Practice of the United States Relating to International Law: Aliens*, 74 AM. J. INT'L L. 917, 920-21 (1980); Marian L. Nash, *Contemporary Practice of the United States Relating to International Law: Foreign Assets Control*, 74 AM. J. INT'L L. 418, 427-29 (1980); Marian L. Nash, *Contemporary Practice of the United States Relating to International Law: Termination of Relations*, 74 AM. J. INT'L L. 657 (1980). The Attorney General imposed a special call-in requirement on Iranian postsecondary students to report to an office of the Immigration and Naturalization Service or to a campus representative to present certain documentation and thus permit review of whether they remained in compliance with the conditions placed on their immigration status. The court of appeals sustained this action against constitutional challenge in *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979).

44. The celebrated foreign policy thinker George Kennan proposed interning Iranian nationals in the United States, though he focused on using a formal declaration of war, rather than relying upon statutory immigration authorities, to do so. See *U.S. Security Interests and Policies in Southwest Asia: Hearings on U.S. Security Requirements in the Near East and South Asia Before the Subcomm. on Near Eastern and South Asian Affairs of the S. Comm. on Foreign Relations*, 96th Cong. 87-123 (1980) (statement of Hon. George Kennan, Former Ambassador to the U.S.S.R.), available at <http://babel.hathitrust.org/cgi/pt?id=pur1.32754074685235;view=1up;seq=92>; William F. Buckley, *George Kennan's Bomb*, 32 NATIONAL REVIEW 432 (1980).

including the National Guard, could be deployed). In a protracted standoff, judicially issued search warrants might help legitimate a forcible rescue operation. And the full weight of criminal punishment, imposed through efficiently functioning courts, could be expected for the kidnappers or hostage takers.

This comparison helps reveal why courts are positioned to apply close constitutional scrutiny of official domestic action, whenever it is credibly challenged, but properly feel more constrained in the international arena. In the international arena, U.S. actors generally cannot invoke compulsory process or other reliable coercive means under their own government's control. Moreover, the stakes are typically higher, as is the number of people potentially affected — not only by the immediate outcome but also by downstream effects, as the resolution either deters similar adverse actions in the future or instead stimulates them because the U.S. effort failed. With a domestic operation, judges can be confident that the government will still have plenty of capacity to deal with public safety threats, even in the presence of robust judicial review. One cannot have such confidence about the efficacy of alternative policy tools in the global arena if domestic judicial action begins to prevent or second-guess or slow down the use of those initially chosen by the political branches.

Another difference between the two settings is relevant. In the domestic arena, we do not tolerate individuals using tit-for-tat responses to remedy wrongful behavior. I cannot justify seizing and carrying away my neighbor's television on the ground that he borrowed my riding mower months ago and never returned it. But this prohibition on messy self-help obtains precisely because efficient hierarchical legal mechanisms, involving professional police and a developed court system, stand available to redress my neighbor's wrongful act. In recent decades, the world has taken limited but hopeful steps toward investing transnational institutions with comparable powers, but progress remains quite uneven across different policy domains. The plenary power doctrine manifests the Supreme Court's judgment that the kind of detailed constitutional scrutiny appropriate for the mature and developed domestic public order is not workable in the more primitive international legal system, marked primarily by horizontal action-and-response to try to rectify breaches.

D. The Nongovernmental Component of Foreign Affairs Decisionmaking

Foreign affairs are involved in immigration decisionmaking for another, more entangling reason, even when there is no clear effort to retaliate against or to influence a foreign government. Most high-level immigration

decisions — by Congress or by the executive branch — are designed, at least in part, to influence or shape behavior overseas by individuals and nonstate actors, including both prospective immigrants (contemplating either legal or illegal channels) and smuggling organizations. For example, the decision (part of Operation Streamline⁴⁵) to prosecute a high percentage of simple entrants without inspection caught along the southern border, causing them to spend some time in jail or prison before being repatriated, has been criticized as disproportionate to the inherent nature of this misdemeanor offense.⁴⁶ But this critique misunderstands the policy decision. Operation Streamline is primarily meant to send a deterrent message to others contemplating a future clandestine crossing.⁴⁷ The same is true of decisions to repatriate violators to a distant part of the land border rather than back to the border town from which they entered and where their *coyote* may be waiting to help them try again to enter.⁴⁸ To take another example, in 1994, the Clinton administration decided to decouple the grant of work authorization from the simple act of filing for asylum, as had been provided under earlier regulations, though this change would mean that many applicants would be without a means of support, other than private or family charity, for as long as 180 days. This austere step was taken, in significant part, to discourage people planning to come to the United States to file an ill-founded claim that previously would have

45. See Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POL'Y INST. (Apr. 29, 2010), <http://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes>.

46. E.g., Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, POL'Y BRIEF, Jan. 2010, at 7, available at https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

47. See *Successful Border Program Assures Consequences*, HOMELAND SECURITY NEWSWIRE, Feb. 2011, <http://www.homelandsecuritynewswire.com/successful-border-program-ensures-consequences>. U.S. Customs and Border Protection Commissioner Alan Bersin explained the strategy imposing more severe consequences as a way to “[l]et the word go out” to potential future border crossers. *Id.*; see also Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L. REV. 285 (1998) (describing an earlier administration’s effort to use prosecution strategically).

48. THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 932-41 (7th ed. 2012); LISA SEGHELLI, CONG. RESEARCH SERV., R42138, *BORDER SECURITY: IMMIGRATION ENFORCEMENT BETWEEN PORTS OF ENTRY* 7-12 (2014).

secured several years of residence and lawful work while they awaited a hearing.⁴⁹

Changes to the treatment or opportunities of noncitizens in the United States, whether in the direction of restriction or liberalization, almost inevitably affect the decisions of people and organizations abroad who are thinking about organizing or participating in migration to the United States. Smuggling organizations, in fact, often build their business plans around finding and exploiting weak spots in immigration laws or processes.⁵⁰ As a result, some U.S. government measures take on a more severe or restrictive aspect than might initially seem to be warranted by the acts of the individuals most immediately affected. This is because the policymakers mean the action not just for those who are the direct object of enforcement on U.S. soil but also for the message sent to others they want to deter. This dynamic appears to explain, in significant part, the Obama administration's decisions to respond to the southwest border migration surge in summer of 2014 with a surprisingly severe set of measures, including sustained detention, even though the subjects were mainly children traveling with a mother or other relative. The executive branch also implemented accelerated removal processing where the law permitted such action, and assured substantial publicity for the flight whenever recent migrants were deported by airplane to their home country.⁵¹ Despite sharp criticism, these

49. See David A. Martin, *Making Asylum Policy: The 1994 Reforms*, 70 WASH. L. REV. 725 (1995).

50. Peter Andreas, *The Transformation of Migrant Smuggling Across the U.S.-Mexico Border*, in GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES 107-22 (David Kyle & Rey Koslowski eds., 2001).

51. See Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES, Dec. 15, 2014, <http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html>; Julia Preston, *In Remote Detention Center, a Battle on Fast Deportations*, N.Y. TIMES, Sept. 5, 2014, <http://www.nytimes.com/2014/09/06/us/in-remote-detention-center-a-battle-on-fast-deportations.html>; *M.S.P.C. v. Johnson*, AM. CIVIL LIBERTIES UNION, Jan. 30, 2015, <https://www.aclu.org/immigrants-rights/mspc-v-johnson> (fact sheet on pending litigation). In his November 20, 2014, speech announcing what was otherwise a wide range of liberalizing immigration measures taken on the unilateral authority of the executive branch, President Obama somewhat uncharacteristically emphasized his administration's successful efforts to stem this flow, as a sign of his commitment to rigorous border control in the future. See Press Release, The White House, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>. I present a more complete analysis of the administration's reaction to the 2014 migrant surge in David A. Martin, *Resolute Enforcement Is Not Just for*

practices persisted, and they seem to have had much of the desired deterrent impact in the foreign nations at issue. In fact, monthly arrivals of unaccompanied minors from these countries declined from 10,631 in June 2014 to 2,432 in September.⁵²

This kind of deterrence-based action, focused on overseas individuals and nongovernmental players, is also an aspect of foreign affairs, even though it falls below the plane of high-level geopolitics. It likewise may need to take the form of rough-hewn trial-and-error, like the more traditional foreign-relations actions directed at governments. The Supreme Court's case law over the years appears to consider such policy choices equally worthy of foreign-affairs deference.⁵³

This analysis is not meant as advocacy for the quick or expansive use of immigration restrictions to respond to objectionable or unwelcome actions of foreign governments or nonstate actors. For reasons of both policy and proportion, immigration sanctions of this type should be sparingly deployed. But the Court's doctrine of deference in *Chae Chan Ping* and later cases is based on the recognition that even for relatively liberal foreign-affairs decisionmakers, rough-hewn actions that initially seem outsized or individually unfair *might* need to be in the mix to respond to, or to help shape, actions that others are taking abroad.⁵⁴

Restrictionists: Building a Stable and Efficient Immigration Enforcement System, 30 J. L. & POLITICS 411, 418-24 (2015).

52. See U.S. BORDER PATROL, TOTAL MONTHLY UNACCOMPANIED ALIEN APPREHENSIONS BY MONTH, BY SECTOR (FY 2010 – FY 2014), Dec. 19, 2014, <http://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20UACs%20by%20Sector%2C%20FY10.-FY14.pdf> (indicating that the monthly flow averaged approximately 2,000 in FY 2012 and approximately 3,200 in FY 2013; the flow rose sharply in 2014, ultimately exceeding 10,000 arrivals in May and June before falling below 2,500 in September as a result of the executive branch's policy responses).

53. E.g., *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 187-88 (1993).

54. President Clinton's decision to continue across-the-board interdiction of Haitian migrants when he assumed office, even though he had sharply criticized this policy during his campaign, provides an illustration. See DAVID A. MARTIN, THOMAS ALEXANDER ALEINIKOFF, HIROSHI MOTOMURA, & MARYELLEN FULLERTON, *FORCED MIGRATION: LAW AND POLICY* 775-90 (2d ed. 2013). The Supreme Court approved his action on an eight-to-one vote, despite expressing policy concerns about the harshness of this outcome. *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 159, 179 (1993). But for Clinton this was not the end of the story. Uneasiness about the continuation of interdiction, despite the Court's affirmance of its legality, contributed to the President's ultimate decision to use military deployments, under UN Security Council authority, to oust the Haitian generals and restore the democratically elected president, Jean-Bertrand Aristide. MARTIN, *et al.*, *supra*, at 775-90. For reflections both on the Clinton experience in Haiti and more generally on the occasional need for rough-hewn policy measures

*III. Why the Court Resists Even Moderate
Proposals for a More Active Judicial Role*

A more nuanced branch of the *Chae Chan Ping* criticism accepts that foreign affairs considerations may well be at stake in some immigration decisions, but would modify the doctrine to allow for a carefully structured closer judicial look.⁵⁵ The courts, such observers contend, should not take political branch assertions as controlling, but instead should perform an initial judicial probe of the asserted reasons, to decide whether the challenged immigration restriction rests on a significant foreign affairs foundation. If the answer is yes, then the reviewing court should treat the political branches' decision as dispositive — essentially, as a political question not subject to judicial review. But if not, then the court should apply ordinary modes of constitutional review, which might well bring a form of heightened scrutiny.

At first glance, this kind of proposal would seem to offer an attractive middle ground to the Supreme Court. Yet the Court in practice has manifested great resistance to these scholarly invitations. Why? In my view, a majority of the Justices harbor a deep skepticism that lower courts can be trusted to give sufficient weight to foreign policy concerns in making any such threshold assessment. The very nature of immigration litigation in the courts of appeals, with an actual and often sympathetic human being front and center, makes a reviewing judge far more likely to overvalue the individual interests at stake and undervalue the more subtle and complex reasons why a particular measure may be needed for system stability or to influence behavior beyond our borders — connections that often would not become fully apparent until broader damage is manifested months or years after an interventionist judicial decision.⁵⁶

with regard to immigration, see David A. Martin, *Interdiction of Asylum Seekers: The Realms of Policy and Law in Refugee Protection*, in YALE LAW SCHOOL SALE SYMPOSIUM (2014), OPINIO JURIS (Mar. 15, 2014), <http://opiniojuris.org/2014/03/15/yls-sale-symposium-interdiction-asylum-seekers-realms-policy-law-refugee-protection/>.

55. Stephen Legomsky led the way to developing and defending this thoughtful proposal. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, *supra* note 2, at 255, 262-63.

56. A revealing example, involving the interplay between the district court and the court of appeals, is provided by litigation involving Hany Kiardeeen. The district court found due process violations in the government's use of secret evidence to keep Kiardeeen in detention pending final resolution of his deportation case. *Kiardeeen v. Reno*, 71 F. Supp. 2d 402 (D.N.J. 1999). The government maintained that he was linked to terrorist organizations. *Id.* at 404. Eventually the government yielded to the district court's demands, dropped its appeal of the initial merits ruling, released Kiardeeen, and ceased its efforts to

Anna Law's book, *The Immigration Battle in American Courts*, documents this disparity in outlook between the Supreme Court and the lower courts quite revealingly. She describes "how [lower court] judges can disregard congressional edicts limiting their scope of review in order to reach a desired result,"⁵⁷ and can usually get away with it because the Supreme Court can review only a tiny fraction of their decisions.⁵⁸ Professor Law regards this stance by the courts of appeals as a virtue, but the Supreme Court doubtless views it otherwise. Keeping the plenary power doctrine categorical gives the Supreme Court greater assurance that lower courts will preserve the space needed for government actions to meet real foreign affairs imperatives (even if this stance inevitably also leaves room for some ill-motivated actions adopted by the political branches).

If this symposium were being held at the time of *Chae Chan Ping's* centennial, in 1989, we might have had greater reason to expect some softening by the Supreme Court regarding the deference doctrine in the foreign affairs arena. Exactly twenty-five years before the week when this symposium convened in Norman, Oklahoma, the Berlin Wall fell, signaling that the Soviet bloc was coming apart, about to be replaced, in many instances, by democratic governments. Lengthy wars were ending in Latin America, and dictators were being forced from office. It appeared we were on the cusp of a far more benign world order — one that might permit the rapid flowering of more protective international legal institutions and thereby reduce reliance on crude action-and-response in the international arena.

Today's global scene is far more grim. Not only has the United States experienced the trauma of al Qaeda's September 11 attacks, which revealed a genuine need for more vigilant immigration screening, but democratic nations are also facing new global threats from other nongovernmental actors who actually glorify the use of beheadings, crucifixion, and slavery, in addition to other players using more old-fashioned forms of terrorism directed at civilians. Failed states are more common, and well-armed

deport him. *Kiareldeen v. Reno*, 92 F. Supp. 2d 403, 404-05 (D.N.J. 2000). The district court then awarded attorney's fees to Kiareldeen, finding that the government's position was not substantially justified. *Id.* at 409. The government appealed that award. *Kiareldeen v. Ashcroft*, 273 F.3d 542 (3d Cir. 2001). The Third Circuit wound up ruling on that ancillary appeal after the 9/11 terror attacks. Partially in light of the 9/11 experience, the higher court reversed the award, leveling harsh criticism at the district court's initial rulings, essentially for being naïve about the need for secrecy to protect intelligence sources and about the range of necessary government responses to terrorism. *Id.* at 555-57.

57. ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS* 139 (2010).

58. *See id.* at 126-43, 231-36.

insurgencies have proliferated. The march of democracy has slowed and, in several countries, reversed. Climate change and even plague-like diseases presage more complicated foreign policy challenges, many of which will have a migration dimension. The risks to the United States, if our government's foreign-policy-linked initiatives are unsuccessful, now seem far higher than in 1989. Thus, I do not foresee the Supreme Court retreating significantly from the strong deference doctrines derived from *Chae Chan Ping*.⁵⁹

IV. The Continuing Relevance of Judicial Review and of Constitutional Values

The foregoing conclusions about the plenary power doctrine's persistence should not be taken as a counsel of despair. To start with, let us be candid about the significant court role left open even after *Chae Chan Ping*. I have spent six years as a government lawyer dealing with immigration matters, in three different administrations over the course of thirty-five years. The picture from inside government is not at all one of agencies taking comfort in a bullet-proof shelter fortified by the plenary power doctrine and upholstered with judicial deference. The opposite feeling more often prevails. Courts review thousands of immigration cases

59. If the twenty-first-century Court were ready to make inroads into the plenary power doctrine, this year's *Kerry v. Din* case, 135 S. Ct. 2128 (2015), presented a golden opportunity, because a sympathetic petitioner there asked for what appeared to be a quite modest judicial intervention. Nonetheless the majority rejected the claim. *Id.* at 2138. Din is a U.S. citizen who had petitioned for the immigration of her husband, an Afghan national. The consular officer denied an immigrant visa, and the only reason given to Din was a citation to the broad terrorism ground of inadmissibility. She argued that the due process clause's protection of marital rights mandates in these circumstances a more complete statement of reasons so that she might have a meaningful opportunity to seek reconsideration. *Id.* at 2131. The four dissenters would have ruled in her favor, *id.* at 2141 (Breyer, J., dissenting), while the other five Justices combined to reject the claim. Justice Scalia, for the three-member plurality, held that the due process clause does not apply because the government's action denied Din no constitutionally recognized liberty interest. *Id.* at 2138. Of more relevance here, however, was the opinion by Justice Kennedy for himself and Justice Alito. *Id.* at 2139. They assumed without deciding that a liberty interest was involved, but they relied on the exceedingly deferential test announced in the First Amendment case of *Kleindienst v. Mandel*, 408 U.S. 753 (1972), to hold that Din received all the process she was due. *Id.* at 2139-41. That test requires a court to uphold a visa denial if it is based on a "facially legitimate and bona fide reason," *Mandel*, 408 U.S. at 770 (emphasis added). Kennedy specifically relied on Congress's plenary power over conditions of admission in finding that the bare-bones reason given to Din was facially legitimate. *Din*, 135 S. Ct. at 2139-41 (Kennedy, J., concurring).

each year.⁶⁰ *Chae Chan Ping* imposes no barrier to challenges alleging that administrative action departed from legal requirements based in statute or regulation. And, in deportation cases, procedural due process review can be demanding and significant. The government loses a significant percentage of these cases.⁶¹ This give-and-take between the branches provides valuable checks and balances, particularly on administrative action.

Nonetheless, whatever the perception within the administrative agencies, aren't advocates still foreclosed by the plenary power doctrine from bringing immigration statutes into compliance with modern understandings of the Constitution? No, for two important reasons. First, although immigration statutes officially are not subject to constitutional review and invalidation under the usual understanding of *Chae Chan Ping* and *Fong Yue Ting*, statutory interpretation and application certainly remain part of judicial duty. In this endeavor, courts frequently employ the doctrine of constitutional avoidance to implement interpretations that adhere more closely to constitutional values than what Congress may have intended.⁶²

This way of bending measures toward constitutional harmony is not a new departure for courts. As Lucy Salyer has documented, before the dawn of the twentieth century the lower federal courts in California countered or buffered the first decades of anti-Chinese agitation. They issued many courageous rulings reading state and federal statutes narrowly so as to minimize intrusions on the rights or interests of the targeted foreigners.⁶³ Circuit Judge Lorenzo Sawyer, who decided the *Chae Chan Ping* case at the trial level, had participated extensively in that protective judicial

60. For fiscal years 2009 through 2013, the U.S. Courts of Appeals received an average of nearly 7000 cases annually seeking review of decisions by the Board of Immigration Appeals (BIA). U.S. COURTS, TABLE B-3—U.S. COURTS OF APPEALS JUDICIAL BUSINESS 1 (2013), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2013/appendices/B03Sep13.pdf>. These statistics do not include other immigration cases that reach the federal courts, such as challenges to detention and various petitions for injunctive relief, which are typically filed in the district courts.

61. For example, BIA decisions were reversed by the federal courts of appeals at a rate of 15.9% in calendar year 2014. John Guendelsberger, *Circuit Court Decisions for December 2014 and Calendar Year 2014 Totals*, IMMIGRATION L. ADVISOR, Jan. 2015, at 5, available at <http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/02/26/vol9no1final.pdf>. Because only the noncitizen may petition the courts for review of a BIA decision, each of those reversals represents a loss for the government.

62. See, e.g., *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Woodby v. I.N.S.*, 385 U.S. 276, 284 (1966). The classic treatment of this phenomenon is Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, *supra* note 2.

63. SALYER, *supra* note 22, at 12-13, 18-21.

process. In his ruling on Chae Chan Ping's petition he noted, somewhat ruefully, that he could not achieve a more equitable result this time, owing to the clarity of the statute and Congress's (by then) clear intention to violate the treaties with China. He explained:

We have, heretofore, found it our duty, however unpleasant, at times, to maintain, fearlessly, and steadily, the rights of Chinese laborers under our treaties with China, and the acts of congress passed to carry them out. That we have been right in law, is established by the fact that our decisions have been affirmed by the supreme court of the United States on every point of law and construction of the act that has been raised, or discussed before us As we faithfully enforced the laws, as we found them, when they were in favor of the Chinese laborers, we deem it, equally, our duty to enforce them in all their parts, now that they are unfavorable to them. . . . [We also] deem it proper to express the hope, that, so long as we sit upon the judgment seat, we shall be endowed with sufficient courage and firmness to administer honestly, and faithfully, according to its true import, any valid law [But it] is not the function of the courts to abrogate an unsatisfactory law by arbitrarily refusing to enforce it. The only proper mode of getting rid of such a law, is, for congress to repeal or modify it.⁶⁴

Judge Sawyer's closing observation calls attention to a second avenue for achieving just and constitutional outcomes, one that is more often overlooked. Courts are not the only venues where one may defend constitutional values against objectionable statutes. The Chinese Exclusion Laws disappeared from our code not because a court issued a decree, but because Congress finally saw fit to repeal them in 1943.⁶⁵ The national origins quota system ended in 1965 not because the Warren Court struck them down but because decades of advocacy won that significant victory on Capitol Hill.⁶⁶

64. *In re Chae Chan Ping*, 36 F. 431, 436-37 (C.C.N.D. Cal. 1888), *aff'd sub nom.* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

65. Magnuson Act, Pub. L. No. 78-199, § 1, 57 Stat. 600 (1943).

66. Hart-Celler Act, Pub. L. No. 89-236, § 2(a), 79 Stat. 911, 911-12 (1965). For rich accounts, see DANIEL TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 211-16 (2002); ARISTIDE ZOLBERG, *A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA* 324-33 (2006).

Justice Field may have had in mind something like this nonjudicial process for defending constitutional values when he penned what otherwise seems a puzzling passage in *Chae Chan Ping*, given that the opinion's main message is that courts will not entertain a constitutional challenge to exclusion. After describing and listing foreign-affairs-related powers (which also include declaring war, making treaties, repelling invasions, and accepting new citizens), Field adds these words: "[These] are all sovereign powers, *restricted in their exercise only by the constitution itself and considerations of public policy and justice* which control, *more or less*, the conduct of all civilized nations."⁶⁷ Other branches, he suggests, are primarily responsible for applying the constitutional restrictions and for making any trade-offs between policy and justice; as a result there will come times when constitutional principles are honored less, rather than more. (Perhaps we can even find in Field's careful words a hint that he regards the particular treatment of *Chae Chan Ping* as unjust.) The assignment of institutional roles for the various branches of government, in other words, may make for imperfect realization — and perhaps sometimes for actions out of harmony with constitutional values, properly understood. But — and this is critical — Field does not see these decisions as somehow beyond constitutional restriction and certainly not beyond considerations of public policy and justice.

In his discussion of *Chae Chan Ping*'s treaty claim, Field gives a further glimpse of his ideas about how the influence of the Constitution and just public policy might be brought to bear, even in the absence of judicial intervention. Speaking of various foreign affairs authorities, including the war power, Field observes:

This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. . . . We do not mean to intimate that the moral aspects of legislative acts may not be proper subjects of consideration. Undoubtedly they may be, at proper times and places, before the public, in the halls of congress, and in all the modes by which the public mind can be influenced. Public opinion thus enlightened, brought to bear upon legislation, will do more than all other causes to prevent abuses⁶⁸

67. 130 U.S. at 604 (emphasis added).

68. *Id.* at 602-03.

Field illustrates these modes of influence and enlightenment by referring to the nation's earlier disputes over the 1846 war against Mexico. There "the propriety and wisdom and justice of [the government's] action were vehemently assailed by some of the ablest and best men in the country."⁶⁹ This line probably refers, at least in part, to Abraham Lincoln, who assailed the Mexican war in 1848 as a young congressman, calling it "unnecessarily and unconstitutionally commenced."⁷⁰ That constitutional argument occurred not in the courtroom, but in the halls of Congress.

The half-century struggle against the 1921 national origins quota system⁷¹ affords an instructive modern illustration of the phenomenon to which Field made reference. When Congress passed the Immigration and Nationality Act in 1952, President Harry Truman vetoed the bill. His veto message details many flaws in the lengthy statute, but focuses primarily on the national origins quota system, which Congress had chosen to perpetuate with only minor changes. Truman's message repeatedly emphasizes that such quotas amount to "invidious discrimination," based on discredited social theories "at variance with our American ideals"⁷² — clearly invoking constitutional values. When Congress overrode his veto, Truman appointed a blue-ribbon commission to critique existing immigration laws and propose changes. That commission continued the harsh criticism of the national origins quotas, considering that they (and certain other provisions of the Act) "flout fundamental American traditions and ideals."⁷³ Although the courts continued into the 1960s to sustain against constitutional

69. *Id.* at 629.

70. Representative Abraham Lincoln, Speech on the Mexican War, Speech to Congress (Jan. 12, 1848), available at [http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field\(DOCID+@lit\(d0007400\)\)#I31](http://memory.loc.gov/cgi-bin/query/r?ammem/mal:@field(DOCID+@lit(d0007400))#I31); see 30 CONG. GLOBE 145, 154-156 (1848) (recording the congressional account of Mr. Lincoln's speech). Lincoln was the President who appointed Stephen Field to the Court, over twenty-five years before the *Chae Chan Ping* case arose. See *Biographies of the Robes: Stephen Johnson Field*, PBS, http://www.pbs.org/wnet/supremecourt/personality/robes_field.html (last visited June 15, 2015).

71. Emergency Quota Act, Pub. L. No. 67-5, § 2(a), 42 Stat. 5, 5-7 (1921); TICHENOR, *supra* note 66, at 138-43; ZOLBERG, *supra* note 66, at 251-54.

72. Harry S. Truman, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, PUB. PAPERS 441 (June 25, 1952); see also TICHENOR, *supra* note 66, at 188-99, 211-18 (describing the battles over the national origins quotas in the 1952 Act, the veto, and the aftermath, including success in repealing the quotas in 1965).

73. PRESIDENT'S COMM'N ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME xv (1953). For the Commission's full analysis of and objections to the national origins quotas, see *id.* at 83-109.

challenge even the most racially discriminatory quota provisions,⁷⁴ a wide range of advocates and members of Congress kept up the fight against the quotas, and the struggle finally achieved repeal in 1965.⁷⁵ A similar effort, invoking First Amendment values, was directed toward the ideological exclusion provisions,⁷⁶ which had been subjected to the most minimal judicial scrutiny by the Supreme Court in *Kleindienst v. Mandel* in 1972.⁷⁷ This effort won success with the major revision of the exclusion provisions in 1990.⁷⁸

V. Conclusion

Chae Chan Ping should not be taken as a reason to vent anger over judicial timidity. Instead, it stands as a call to roll up our sleeves and get to work in the political arena rather than the courts. Accepting that implicit challenge, we should do more toward training our students in disciplined policy analysis and broader legislative and regulatory advocacy skills. We should encourage more of them, and more of our scholarly colleagues, to take up positions in the immigration agencies and on Capitol Hill.

Taken seriously, that type of engagement will also reveal that turning constitutional values into precise and workable changes in the immigration field is far from an easy or automatic process. Subtle but important reasons for tempering beneficence with prudence are more likely to become apparent in the arena of politics and governance than in the judicial arena. Having to deal with tradeoffs and complex objectives, as part of a team that bears long-term and continuing responsibility for outcomes, can be educational, in the best sense of the term. The political path to reform is of course more uncertain, more diffuse, and less precise than a clean constitutional victory would be in the Supreme Court. The former method will take longer, and it will doubtless produce many disappointments and

74. *E.g.*, *Hitai v. INS*, 343 F.2d 466 F.3d (2d Cir. 1965) (sustaining statutory provisions that attributed descendants of Japanese to the highly restricted Japan quota, even though they were natives and citizens of Brazil).

75. Hart-Celler Act, Pub. L. No. 89-236, § 2(a), 79 Stat. 911, 911-912 (1965).

76. *See, e.g.*, Scanlan *supra* note 2; Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987); Alexander Wohl, *Free Speech and the Right of Entry into the United States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Nationality Act*, 4 AM. U. J. INT'L L. & POL'Y 443 (1989).

77. 408 U.S. 753 (1972).

78. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, *replacing inter alia*, Immigration and Nationality Act, Pub. L. No. 82-414, § 212(a)(28), 66 Stat. 163 (1952)).

disputes along the way. But that path has at times produced truly important results.

In *Choruses from The Rock*, T.S. Eliot writes disparagingly of those who “dream[] of systems so perfect that no one will need to be good.”⁷⁹ The relentless critique of the plenary power doctrine, with its exaggerated expectations about how judges deploying constitutional law can cure bad policy and injustice — in the midst of an uncertain, complex, and dangerous world — partakes of that sort of dream. We need instead to shoulder the hard responsibility of struggling, collectively, to discern what is good, and then working to achieve a realistic measure of that vision through the political process.

79. T.S. Eliot, *Choruses from the Rock*, in COLLECTED POEMS, 1909-1962, at 160 (1963).