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### **Title**

Federalism, International Human Rights, and Immigration Exceptionalism

### **Permalink**

<https://escholarship.org/uc/item/2tq6p73g>

### **Journal**

University of Colorado Law Review, 70

### **Author**

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### **Publication Date**

2013

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# **FEDERALISM, INTERNATIONAL HUMAN RIGHTS, AND IMMIGRATION EXCEPTIONALISM**

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This essay addresses three topics that are connected in subtle but important ways. The first topic—and the one that anchors this essay in the symposium panel on the states and foreign affairs—is immigration federalism. What role should states and localities play in making and implementing law and policy relating to immigration and immigrants?

The prevailing view favors federal exclusivity and leaves little room for states and localities. This is particularly true for “immigration law” as traditionally defined—the law pertaining to the entry of noncitizens and their continued stay in the United States. For some aspects of “alienage law”—the treatment of noncitizens in the United States with respect to matters other than entry and expulsion—federal predominance is also the rule as a result of greater equal protection scrutiny of state discrimination against noncitizens.<sup>1</sup> But as Part I explains, in recent years the state and local role has expanded dramatically in “immigration-related matters.” (In this essay, I use this term to include both immigration law and alienage law.) One endorsement of this expansion draws heavily on the

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1. Throughout this essay, I use the terms “noncitizen” and “immigrant,” depending on the context. Noncitizen is obviously a broader category than immigrant, but this essay is primarily concerned with noncitizens who are in some sense immigrants, that is, noncitizens who have some expectation or desire to remain in the United States indefinitely. These are most typically noncitizens with permanent resident status, but they might include noncitizens who have been in the United States for a time as “nonimmigrant aliens” within the meaning of the Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1994 & Supp. III 1997) [hereinafter “INA”], or even noncitizens who are undocumented.

trend toward greater state activity in foreign affairs.<sup>2</sup> The argument is that federal exclusivity relating to immigration and immigrants is a logical consequence of federal exclusivity in foreign affairs. Thus, if states are more active in foreign affairs, and if federal exclusivity in foreign affairs is no longer justified, then federal exclusivity in immigration-related matters should also end.

I find this argument unconvincing, and Part II explains why.<sup>3</sup> To be sure, immigration-related matters and foreign affairs share a historical connection. Here I focus (as I do throughout this essay) on what I call "policymakers," which I define to include judges, lawyers, legislators, executive branch officials, academics, and others who contribute to discourse on immigration-related matters and thereby shape public opinion, policy, and law. These policymakers once viewed immigration primarily as an aspect of our relationships with foreign nations. International law norms—for example, that sovereign nations may freely choose which aliens to admit or exclude—were central to those relationships and therefore were central to immigration law. Over time, however, the discourse has evolved to include strands recognizing that immigration involves not only relations with foreign nations, but also the rights of immigrants. So even if federal exclusivity in foreign affairs was once the rationale for federal exclusivity relating to immigration and immigrants, it is no longer. Therefore, greater state authority in foreign affairs does not justify greater state authority over immigration and immigrants. As I explain, the reasons why federal exclusivity may be weakening in foreign affairs law do not apply to immigration-related matters, or apply only weakly.

My comments on immigration federalism lead me—via the focus on immigrants' rights—to my second topic: the relationship between international human rights and immigration-related matters. International human rights

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2. For a thorough elaboration of this argument, see Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121 (1994).

3. My comments in Part II roughly parallel my response to Professor Spiro in Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201 (1994). In addressing the second and third topics in this essay, I explore implications of my earlier response that I had not developed at the time.

norms, such as a norm of nondiscrimination against noncitizens, or guaranteed minimums of food, shelter, or health care for noncitizens, might be relevant to immigration and immigrants. But the relationship between international human rights and immigration-related matters is complex and requires more than the scant attention that academic commentary has given it. In Part III, I offer some preliminary comments on this relationship, explaining that international human rights are highly relevant to some questions about immigration and immigrants, but less directly relevant to others. I make two cautionary observations. Both reflect my concern that policymakers may wrongly think of immigration-related law and policy primarily as a transnational question, rather than as a question of progressive, inclusive nation-building.

My first cautionary observation is that international human rights norms are sometimes poorly suited to express fundamental—and characteristically American—concepts of immigration and citizenship in the United States. For this reason, international human rights norms, while quite relevant to some key questions relating to immigration and immigrants, are unlikely to provide complete answers to others, where distinctive American notions of community and immigration play a strong role. Second, the focus on international human rights accentuates what is already a tendency to safeguard noncitizens by focusing only on their interests and rights, without also analyzing carefully and systemically how the interests and rights of noncitizens are intertwined with the interests and rights of citizens.

My third topic, “immigration exceptionalism,” is connected to the first two topics in subtle ways. I define immigration exceptionalism as the view that immigration and alienage law should be exempt from the usual limits on government decisionmaking—for example, judicial review. Almost ten years ago, Alex Aleinikoff called for an end to immigration exceptionalism in these words: “The immigration power should be brought within the fold of other congressional powers and subjected to the constitutional limits normally applied to those powers.”<sup>4</sup> A massive body of scholarship and advocacy has

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4. T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 34 (1990).

challenged a central feature of immigration exceptionalism: the plenary power doctrine, which severely limits judicial review when a government decision regarding a noncitizen's entry or continued presence in the United States is challenged on constitutional grounds.<sup>5</sup>

Many critics of plenary power (myself included) also have endorsed a predominant or exclusive federal role in matters relating to immigration and immigrants.<sup>6</sup> Indeed, this is the basic thrust of my comments on my first topic, immigration federalism. But as Peter Schuck has noted, there is tension between endorsing federal exclusivity as to immigration and immigrants while at the same time urging constitutional judicial review.<sup>7</sup> After all, federal immigration exclusivity is another example of immigration exceptionalism. Suppose courts should abandon the plenary power doctrine and hear constitutional challenges to the government's immigration-related decisions—thereby ending immigration exceptionalism for judicial review. For consistency, shouldn't immigration exceptionalism end for federalism as well? In other words, shouldn't federal exclusivity in immigration-related matters yield to a larger state and local role, consistent with the state and local role in other government decisionmaking?

In Part IV, I argue that this tension is only apparent, not real. Ending immigration exceptionalism for constitutional judicial review does not require, or even suggest, ending immigration exceptionalism for federalism. To make this argument, I draw on my comments in Part II on the relationship between international human rights and immigration-related matters. I rely especially on my two cautionary observations about the relevance of international human rights norms. Those two observations amount to this: decisions about immigration and immigrants—even when they involve individual rights (whether of citizens or of noncitizens)—are not individual rights cases as commonly understood. There is more at stake. These decisions both

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5. See, e.g., Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

6. See, e.g., Motomura, *supra* note 3.

7. See Peter H. Schuck, *The Re-Evaluation of American Citizenship*, 12 GEO. IMMIGR. L.J. 1, 23 (1997).

reflect and define a sense of immigration and citizenship that is (and should be) national, not state or local. Because these decisions are national in character and consequence, immigration exceptionalism is appropriate for federalism purposes. Therefore, federal exclusivity in immigration-related matters is appropriate, and the state and local role should remain limited. This is true even if immigration exceptionalism is inappropriate for judicial review, and even if courts should therefore hear constitutional questions in immigration-related cases.<sup>8</sup>

## I. THE GROWING ROLE OF STATES AND LOCALITIES IN IMMIGRATION-RELATED MATTERS

Among recent developments in immigration-related law and policy, one of the most significant has been a dramatic expansion of the role played by states and localities. The current trend began with Proposition 187, a ballot initiative that California's voters adopted in November 1994.<sup>9</sup> While Proposition 187 did not directly regulate admission to the United States, one of its purposes was to deter undocumented aliens from entering California and to encourage the voluntary exit of those already there.<sup>10</sup> As drafted, Proposition 187 would have barred access by undocumented aliens to most state-provided public services, including nonemergency health care

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8. While I make a general argument for limits on the state and local role, I do not attempt in this essay to present a comprehensive account of immigration federalism that elaborates on how those limits should be defined. For preliminary thoughts on that subject, see Hiroshi Motomura, *Whose Immigration Law?: Citizens, Aliens, and the Constitution*, 97 COLUM. L. REV. 1567, 1587-1601 (1997) (review essay) [hereinafter Motomura, *Whose Immigration Law?*]; Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927, 1945 (1996) (review essay) [hereinafter Motomura, *Whose Alien Nation?*]. My primary point on my third topic is that immigration exceptionalism for judicial review is distinct from immigration exceptionalism for federalism.

9. Cal. Prop. 187 (West 1994) (approved by electors Nov. 8, 1994).

10. Governor Pete Wilson expressed his hope that undocumented aliens, once denied access to public benefits, would "self-deport." See Spiro, *supra* note 2, at 149 n.117. The Supreme Court has recognized that laws affecting immigrants can effectively regulate immigration. See, e.g., *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work.").

and public education at all levels.<sup>11</sup> It also would have required certain state and local government employees to verify the immigration status of persons with whom they had come into contact and to report suspected undocumented aliens to enforcement agencies.<sup>12</sup> Finally, it included substantial new criminal penalties for manufacturing, selling, and using false documents.<sup>13</sup> Largely because it tried indirectly to regulate immigration as traditionally defined (admission and expulsion), a federal district court blocked implementation of all but the criminal provisions on federal preemption grounds.<sup>14</sup>

Proposition 187 marked the beginning of rising state activity relating to immigration and immigrants, particularly in areas involving undocumented immigration and the fiscal costs associated with it.<sup>15</sup> For example, these concerns led states to sue the federal government for compensation for a variety of state expenditures ranging from public education, to benefit payments, to incarceration of undocumented aliens convicted of crimes.<sup>16</sup> While these suits have been unsuccessful

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11. See CAL. EDUC. CODE §§ 48215, 66010.8 (West 1993 & Supp. 1999); CAL. HEALTH & SAFETY CODE § 130 (West 1990 & Supp. 1999); CAL. WELF. & INST. CODE § 10001.5 (West 1991 & Supp. 1999).

12. See CAL. PENAL CODE § 834b (West 1988 & Supp. 1999); CAL. GOV'T CODE § 53069.65 (West 1997).

13. See CAL. PENAL CODE §§ 113-114 (West 1988 & Supp. 1999).

14. See *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786-87 (C.D. Cal. 1995); see also *League of United Latin Am. Citizens v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

15. States were active in immigration-related regulation until the late nineteenth century. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

16. These suits advanced several theories of liability, among them that the federal government violated: (1) its statutory duties under the INA; (2) a requirement implied in the Naturalization Clause, U.S. CONST. art. I, § 8, to reimburse states for the consequences of federal immigration policy; (3) the Spending Clause, U.S. CONST. art. I, § 8, and other constitutional provisions guaranteeing equality among the states; (4) the Guarantee Clause, U.S. CONST. art. IV, § 4, by determining a state's spending; (5) the Invasion Clause, U.S. CONST. art. IV, § 4, by failing to protect states from foreign invasion; and (6) the Tenth Amendment, U.S. CONST. amend. X, by forcing states to make expenditures by dispensing benefits to undocumented aliens. Florida's suit was dismissed on the ground that "[t]he overall statutory scheme established for immigration demonstrates that Congress intended whether the Attorney General is adequately guarding the borders of the United States to be 'committed to agency discretion by law' and, thus, unreviewable." *Chiles v. United States*, 69 F.3d 1094, 1096 (11th Cir. 1995). Similar suits by Texas, Arizona, California, New Jersey, and one by New York counties and legislators were similarly dismissed as raising claims that were nonjusticiable and/or groundless on the merits. See, e.g., *Texas v. United*

in court, they have led to federal legislation to reimburse the states.<sup>17</sup> The federal government has also directly expanded the state and local role in immigration-related matters. For example, in July 1996, the Clinton Administration and the State of Florida announced pooling and coordination of federal, state, and local immigration enforcement efforts.<sup>18</sup>

Later that year, in major legislation—the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“1996 Immigration Act”)<sup>19</sup>—Congress authorized the federal government to enter into agreements with state and local governments to help with immigration law enforcement, including detention of aliens.<sup>20</sup> And for noncitizens already in the United States, the Personal Responsibility and Work Opportunity Reconciliation Act (“1996 Welfare Act”) delegated expressly to the states authority to decide eligibility for many

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States, 106 F.3d 661 (5th Cir. 1997); *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997); *California v. United States*, 104 F.3d 1086 (D.C. Cir. 1997); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996). *Cf.* *California v. United States*, 114 F.3d 1222 (D.C. Cir. 1997) (affirming dismissal of California’s claim that Attorney General failed to satisfy her statutory duty to either incarcerate all undocumented aliens with criminal convictions in federal prison or pay cost of incarcerating them in state prison).

17. *See* INA § 241(i), 8 U.S.C. § 1231(i) (1994 & Supp. III 1997) (requiring the Attorney General, upon request by any state, to enter into a contractual arrangement to compensate that state for incarceration of undocumented criminal aliens or to take the alien into federal custody to the extent of available appropriations).

18. *See* “*Historic*” *Florida Initiative Launched to Combat Illegal Immigration*, 73 INTERPRETER RELEASES 905, 905-06 (1996).

19. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.) [hereinafter “1996 Immigration Act”].

20. As amended in 1996, INA § 103 authorizes “cooperative agreements with State and local enforcement agencies for the purpose of assisting in the enforcement of the immigration laws,” as well as agreements with state and local governments for detention of aliens (including the construction of new detention facilities). INA § 103, 8 U.S.C. § 1103 (1994 & Supp. III 1997). INA § 287 authorizes state and local law enforcement officials to perform immigration law enforcement functions under agreements with the Department of Justice that provide for training and federal supervision of the local officers involved. *See* INA § 287, 8 U.S.C. § 1357 (1994 & Supp. III 1997). And, if the Attorney General determines that “an actual or imminent influx” of aliens off the coast or near a land border presents “urgent circumstances requiring an immediate Federal response,” INA § 103(a) as amended allows the Attorney General to deputize state or local law enforcement officers to perform the duties of INS officers or employees. INA § 103(a), 8 U.S.C. § 1103(a) (1994 & Supp. III 1997).

welfare programs and other public benefits.<sup>21</sup> For example, the states have new authority to decide the eligibility of lawfully present aliens for Temporary Assistance for Needy Families ("TANF") (the state-controlled block grant program that replaced Aid to Families with Dependent Children), nonemergency Medicaid, state-funded public benefits, and several other programs.<sup>22</sup>

In spite of what Proposition 187 might have suggested, many states and localities have treated noncitizens more generously than the federal government has. For example, many states have exercised their new welfare authority to provide some of the benefits that had become unavailable under federal law.<sup>23</sup> At the same time, New York City challenged (unsuccessfully) a 1996 Immigration Act provision under which no federal, state, or local government entity or official may prohibit or restrict any government entity or official from "sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."<sup>24</sup> According to Mayor Rudolph Giuliani, this language was directed against his executive order prohibiting New York City employees from providing such information to the Immigration and Naturalization Service ("INS").<sup>25</sup> With some states and localities more protective of noncitizens and some less so, the expansion of state and local authority has acquired the apparent virtue of substantive neutrality.

Policymakers may find it intuitive to link state and local involvement in immigration and immigrants with state and local involvement in foreign affairs. They also may conclude that if state and local involvement in foreign affairs is

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21. Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 8 U.S.C.) [hereinafter "1996 Welfare Act"].

22. See 1996 Welfare Act, Pub. L. No. 104-193, § 412, 110 Stat. 2105 (1996) (codified as amended at 8 U.S.C. § 1621 (Supp. III 1997)).

23. See U.S. GEN. ACCOUNTING OFFICE, WELFARE REFORM: MANY STATES CONTINUE SOME FEDERAL OR STATE BENEFITS FOR IMMIGRANTS (1998); see also Schuck, *supra* note 7, at 29; Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627, 1639-46 (1997).

24. 1996 Immigration Act § 642, 8 U.S.C. § 1373 (1994 & Supp. III 1997); see *City of New York v. United States*, 971 F. Supp. 789 (S.D.N.Y. 1997).

25. See *States' Early Response to Welfare Reform Reveals Variety, Confusion*, 73 INTERPRETER RELEASES 1431, 1432 (1996).

appropriate, then so is state and local involvement in matters relating to immigration and immigrants. The principal basis for this connection between immigration and foreign affairs is historical, as Part II explains.

## II. THE HISTORICAL LINKS AND THEIR IMPLICATIONS FOR IMMIGRATION FEDERALISM

### A. *The Foundation Plenary Power Cases*

The links among immigration law, foreign affairs, and international law have deep historical roots, especially in several foundational Supreme Court decisions where all three intersect. For example, *Chy Lung v. Freeman*<sup>26</sup> is an 1875 decision often cited for the principle of federal exclusivity in both immigration law and foreign affairs. *Chy Lung* involved a California statute that gave state officials discretion to refuse admission to certain arriving passengers unless the master or owner of their transport vessel met one of two conditions. Either he could post a bond of \$500 in gold to indemnify all California counties, towns, and cities against liability for support and maintenance of the immigrant for two years, or he could pay a sum to be set by the state official, who would retain twenty percent "for his services."<sup>27</sup> In striking down the statute, the Court reasoned that it unconstitutionally interfered with the federal government's exclusive authority to conduct foreign affairs.<sup>28</sup> With time, *Chy Lung* also came to be cited for federal exclusivity in immigration law.<sup>29</sup>

The *Chinese Exclusion Case*,<sup>30</sup> decided in 1889, was the first clear judicial statement that courts will not hear constitutional challenges to the political branches' immigration-related decisions. In this respect, the *Chinese*

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26. 92 U.S. 275 (1875).

27. *Id.* at 278.

28. *See id.* at 280.

29. *See* DeCanas v. Bica, 424 U.S. 351, 354 (1976); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); *cf.* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 45, 48, 51 (1996) (explaining also that *Chy Lung* may not have extinguished state power over immigration as completely as the conventional reading of the decision suggests).

30. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

*Exclusion Case* belongs to the bedrock of the plenary power doctrine. In broader perspective, what is interesting for this inquiry is that the *Chinese Exclusion Case* brought together all three strands of discourse: immigration law, foreign affairs, and international law.

The case arose in the wake of the first Chinese Exclusion Act, which in 1882 suspended immigration by Chinese laborers for ten years.<sup>31</sup> At first, Chinese laborers already in the United States as of November 1880 could obtain certificates that would allow them to leave to make temporary visits to their homeland and then to return to the United States. In 1888, Congress changed the law to bar the return of laborers who had obtained such a certificate.

Chae Chan Ping was one of many such Chinese whom the 1888 amendment barred from returning to the United States. In deciding his challenge to the statute, the Supreme Court had to answer a threshold question concerning the conflict between the amended statute and an 1880 treaty that seemed to guarantee free departure and return of laborers already in the United States.<sup>32</sup> Justice Field acknowledged the conflict, but he found that the statute and treaty were on equal footing and that the statute would control because it was later in time.<sup>33</sup> This part of the *Chinese Exclusion Case* is often cited for the proposition that Congress may enact statutes that are governing domestic law even if they conflict with prior treaty obligations.<sup>34</sup>

Having resolved the subconstitutional conflict between the statute and treaty, the Court turned to the constitutional questions presented. In upholding the statute, the decision characterized the case as a foreign affairs matter. Key to this part of the analysis was the immediate relevance of international law. Thus, the Court's constitutional discussion began with the idea that international law gives sovereign nations the power to exclude aliens:

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31. See Act of May 6, 1882, ch. 126, 22 Stat. 58, amended by Act of July 5, 1884, ch. 220, 23 Stat. 115 (repealed 1943).

32. See Treaty Concerning Immigration, Nov. 17, 1880, U.S.-China, 22 Stat. 826.

33. See *The Chinese Exclusion Case*, 130 U.S. at 600.

34. See, e.g., *Reid v. Covert*, 354 U.S. 1, 18 n.34 (1957).

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.<sup>35</sup>

And when the Court announced its rejection of constitutional judicial review, it characterized the case as an international law problem between two sovereigns:

If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interests or dignity may demand; and there lies its only remedy.<sup>36</sup>

Another landmark plenary power decision from the same period reflects similar thinking. In *Nishimura Ekiu v. United States*,<sup>37</sup> a federal government official had refused to admit a Japanese immigrant on the ground that she would likely become indigent, or in statutory parlance, a "public charge." This was (and remains) a ground for exclusion.<sup>38</sup> The Supreme Court rejected her argument that the Due Process Clause entitled her to judicial review of this administrative finding. Again, international law figured prominently in the Court's reasoning:

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit

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35. *The Chinese Exclusion Case*, 130 U.S. at 603-04.

36. *Id.* at 606.

37. 142 U.S. 651 (1892).

38. See Act of Mar. 3, 1891, ch. 551, §§ 1, 11, 26 Stat. 1084, 1084, 1086. For the current version, see INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (1994 & Supp. III 1997).

them only in such cases and upon such conditions as it may see fit to prescribe.<sup>39</sup>

In short, the early plenary power cases established a pattern of discourse that conceptualized immigration control as a matter of national sovereignty, including national self-preservation against foreign threats. International law norms played a key role in this discourse, primarily by providing the foundation for national decisionmaking with sovereignty and self-preservation in mind. This view of immigration control, in turn, made immigration a matter of foreign affairs.

*B. The Erosion of Plenary Power and the Rise of Immigrants' Rights*

A dominant theme in the history of law relating to immigration and immigrants has been the gradual erosion—and yet the stubborn persistence—of the plenary power doctrine.<sup>40</sup> One key aspect of plenary power's erosion—in other words, of the gradual decline of judicial deference to the political branches—has been greater judicial willingness to sustain noncitizens' claims that the government has violated their constitutional rights,<sup>41</sup> even if some immigration-related decisions have an impact on foreign affairs.<sup>42</sup>

In many settings, ranging from court litigation to legislative debates to academic writings, the central tension in constitutional immigration law discourse has become one between two competing characterizations. One is the classical

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39. *Nishimura Ekiu*, 142 U.S. at 659.

40. See, e.g., Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925 (1995).

41. See, e.g., *Landon v. Plasencia*, 459 U.S. 21 (1982).

42. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 296-97 (2d ed. 1996) ("[I]t is not unthinkable that some discriminations between citizen and alien . . . long accepted as 'reasonable', and the requirement of citizenship for other entitlements, privileges or opportunities, might be reexamined, at least where the distinction between citizen and alien appears to have little significance for U.S. foreign relations."); Legomsky, *supra* note 5, at 262 ("[I]t ignores reality to hold that every provision concerned with immigration, as applied to every fact situation it might encompass, is so intimately rooted in foreign policy that the usual scope of judicial review would hamper the effective conduct of foreign relations."); Neuman, *supra* note 15, at 1898 ("[T]he correlation between the substance of immigration policy and the [foreign relations] factors that have been invoked to justify extreme judicial deference is very weak.").

"immigration as foreign affairs" characterization in the foundational plenary power cases discussed in Part I.A. According to this characterization, immigration primarily concerns foreign affairs between sending and receiving countries, with international law norms forming a framework for sovereign rights. The competing characterization—an "immigrants' rights" model—recognizes that immigrant-outsiders sometimes have rights to enter and ultimately become full members of a national community by becoming citizens, and that the government's immigration decisions may adversely affect those individual rights.<sup>43</sup> In any given case, policymakers need not make a stark choice of one characterization to the exclusion of the other; they can choose instead to adopt some blend. For purposes of analysis and argument, however, these characterizations compete with each other. In this contest of characterizations, policymakers have come to associate any expansion in the judicial role—for example, through more aggressive constitutional judicial review—with judicial recognition of immigrants' rights.<sup>44</sup>

Let me now return to the question of immigration federalism. The intuitive link between state and local involvement with immigration and immigrants with state and local involvement in foreign affairs derives some impetus from revisionist foreign affairs scholarship that has challenged "foreign affairs exceptionalism."<sup>45</sup> These scholars argue that foreign affairs law should not be exempt from the usual limits on government decisionmaking, including judicial review, separation of powers, and federalism.<sup>46</sup>

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43. I have previously discussed this immigrants' rights model in Motomura, *Whose Alien Nation?*, *supra* note 8, at 1942-45.

44. See, e.g., Stephen H. Legomsky, *Immigration, Equality, and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 335 (1993) (urging us to see immigrants as "individual human beings, to be judged according to their individual needs and merits"); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 970-71 (noting that the traditional sovereignty-based plenary power doctrine was based on the now disfavored view that "persons were objects, not subjects, in the international arena" (emphasis omitted)).

45. In adopting this phrase, I follow Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 461 (1998) [hereinafter Bradley, *The Treaty Power*]. See also Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 (1999) [hereinafter Bradley, *A New American Foreign Affairs Law?*].

46. See, e.g., Bradley, *The Treaty Power*, *supra* note 45; Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A*

The challenge to foreign affairs exceptionalism leads in the following way to the argument for greater state involvement with immigration and immigrants. We treat immigration law differently because immigration implicates foreign affairs and we treat foreign affairs differently. If foreign affairs exceptionalism should end, so should immigration exceptionalism. As federalism applies to foreign affairs, it ends federal exclusivity and enlarges the state and local role. Likewise, federalism should apply to immigration-related decisionmaking, and there, too, it should end federal exclusivity and enlarge the state and local role. But this argument assumes a strong connection between immigration-related matters and foreign affairs. As I have explained, there is a historical connection between the two areas, but that connection has weakened as discourse among policymakers has recognized immigrants' rights. As a result, any argument for an expanded state and local role in immigration-related matters that relies on an expanded state and local role in foreign affairs is unconvincing.

For now, my point is only a limited one. I rebut only the historical "immigration as foreign affairs" argument for expanded state and local authority in immigration-related matters. One might support an expanded state and local role with a potentially more cogent argument that does not depend on any connection between foreign affairs and immigration. This argument is that federal exclusivity in immigration-related matters is an aspect of immigration exceptionalism. If immigration exceptionalism should end for some purposes, like judicial review, it also should end for others, like federalism. Therefore, the argument would continue, the state and local role should expand even if the historical connection between foreign affairs and immigration has greatly weakened. Part IV discusses this broader argument and presents my rebuttal, which is based on the idea that law and policy relating to immigration and immigrants are part of a project of national self-definition. This is why the reasons for the weakening of federal exclusivity in foreign affairs—for example, the

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*Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). For examples of critical responses, see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997).

broadened scope of foreign affairs law, the increased effects of international conduct on localities, and the end of the Cold War<sup>47</sup>—do not apply to immigration-related matters or apply only weakly. But to present this rebuttal, I must first lay a foundation by discussing international human rights.

### III. INTERNATIONAL HUMAN RIGHTS AND IMMIGRATION

The expansion of immigration discourse to include immigrants' rights leads me to my second topic: the relationship between international human rights and immigration. For much of this century, policymakers have argued for greater recognition of immigrants' rights by drawing heavily on domestic law, especially the Constitution. Broadly speaking, the argument has been that many noncitizens have a stake in entering the United States and in remaining here. Further, to the extent that that stake is based on the U.S. Constitution, statutes, or treaties, courts should recognize it through judicial review. Putting this argument in simpler terms, there is no good reason to treat immigration decisions as exceptional for purposes of constitutional judicial review. Courts sometimes have sustained these arguments, especially when long-term resident noncitizens have made them.<sup>48</sup> Courts have rejected these arguments in many other cases, especially those involving first-time entrants.<sup>49</sup>

With this ambivalent history of judicial recognition of immigrants' rights, it is not surprising that some commentators who have favored greater recognition of immigrants' rights have relied on norms from outside U.S. law, especially international law norms.<sup>50</sup> Under the view of international law that once prevailed, it was primarily a law between sovereigns, or a "law of nations."<sup>51</sup> This earlier view

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47. See Bradley, *A New American Foreign Affairs Law?*, *supra* note 45, at 1104-07.

48. See, e.g., *Landon v. Plasencia*, 459 U.S. 21 (1982).

49. See, e.g., *Fiallo v. Bell*, 430 U.S. 787 (1977).

50. See Joan Fitzpatrick & William McKay Bennett, *A Lion in the Path?: The Influence of International Law on the Immigration Policy of the United States*, 70 WASH. L. REV. 589 (1995); see also James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983).

51. For the "law of nations" view, see 1 LASSA OPPENHEIM, INTERNATIONAL LAW 640-41 (H. Lauterpacht ed., 8th ed. 1955) ("[I]t is generally recognised that, apart from obligations undertaken by treaty, a State is entitled to treat both its

has lost its grip. The most striking sign of this change has been the dramatic proliferation of international human rights instruments since World War II.<sup>52</sup> These instruments reflect a fundamental shift in international law toward acceptance of the view that international law also creates obligations that states owe to individuals—not only to their own citizens, but to noncitizens as well. In turn, these instruments have laid the foundation for the invocation of international human rights in immigration cases in the United States (and in other countries).

This evolution of discourse to include international human rights draws significant intellectual and rhetorical sustenance from growing bodies of “transnational” and “postnational” scholarship. These scholars question what Linda Bosniak has called the “national political imagination,” one which regards the national community as the predominant community of normative concern and presumes the legitimacy, and perhaps the necessity, of maintaining boundaries around it.<sup>53</sup> As Peter Spiro has explained, transnational scholarship considers “other possible platforms—including subnational jurisdictions, the new diasporas, transnational civil society, and other identity groups—for the protection of rights and the pursuit of political self-realization.”<sup>54</sup> While the transnationalists generally argue that nationality is being replaced by such associational attachments, the postnationalists generally find nationality replaced by the universality of personhood itself.<sup>55</sup> From these perspectives, it is natural to think not only about noncitizens’ rights under U.S. domestic law, but also about their human rights as a matter of international law.<sup>56</sup> For example,

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own nationals and stateless persons at discretion and that the manner in which it treats them is not a matter with which International Law, as a rule, concerns itself.”).

52. See generally FRANK NEWMAN & DAVID WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 5-13 (1990).

53. Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 559 (1996).

54. Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 601 (1999) (reviewing ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)).

55. See *id.* at 623-24 n.133. For examples of postnational scholarship, see DAVID JACOBSON, *RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP* (1996); YASEMIN NUHOGLU SOYSAL, *LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* 1 (1994).

56. See Berta Esperanza Hernández-Truyol, *Reconciling Rights in Collision*,

commentators have relied on international human rights norms to criticize several prominent measures that disadvantage certain noncitizens, such as California's Proposition 187 and the 1996 Welfare Act's new limits on noncitizen eligibility.<sup>57</sup>

This turn toward international human rights takes immigration-related discourse almost full circle—though not quite. The ways in which policymakers talk about immigration law have moved from initial entanglement with international law and foreign affairs to a broader view that includes some consideration of noncitizens' rights as a matter of domestic law. Now, some policymakers are returning to some emphasis on international law. But in contrast to the early plenary power cases, which placed immigration and immigrants within the traditional "law of nations" concept of international law, the new focus has become noncitizens' rights, often as defined by international human rights law. The connection is between immigrants and a changed understanding of international law that addresses the relationship between individuals and sovereign countries. International human rights law, as part of this new international law, regulates primarily a country's treatment of human beings as human beings. Most are its own citizens, but others are noncitizens who invoke international human rights in cases that are, because they involve

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*An International Human Rights Strategy*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 254 (Juan F. Perea ed., 1997); see also Berta Esperanza Hernández-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69 (1996); Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075, 1113-29 (1996); Connie De La Vega, *Protecting Economic, Social and Cultural Rights*, 15 WHITTIER L. REV. 471 (1994).

57. On Proposition 187, see Sandra L. Jamison, *Proposition 187: The United States May Be Jeopardizing Its International Treaty Obligations*, 24 DENV. J. INT'L L. & POL'Y 229, 232-35 (1995). See also Stephen Knight, Note, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT'L & COMP. L. REV. 183, 186-96, 212-19 (1995).

On the 1996 Welfare Act, see Berta Esperanza Hernández-Truyol & Kimberly A. Johns, *Global Rights, Local Wrongs, and Legal Fixes: An International Human Rights Critique of Immigration and Welfare "Reform"*, 71 S. CAL. L. REV. 547 (1998). See also Paul Meehan, Note, *Combating Restrictions on Immigrant Access to Public Benefits: A Human Rights Perspective*, 11 GEO. IMMIGR. L.J. 389, 400-03 (1997); Jason M. Waite, Comment, *The United States Supreme Court's Anomalous Approach to Discriminatory Alienage Classifications: International, Canadian and Domestic Law Compared*, 11 EMORY INT'L L. REV. 697, 711-23 (1997).

noncitizens, "immigration-related."

This recognition among policymakers that international human rights should influence and sometimes even directly govern immigration-related decisionmaking deserves much praise. International human rights norms often are closely related to domestic norms governing immigration and immigrants, and they often provide appropriate and sometimes stronger protections. For example, the International Covenant for Civil and Political Rights<sup>58</sup> has strong parallels to the Bill of Rights of the U.S. Constitution. Other international human rights instruments provide protections in specific categories. For example, the Refugee Convention<sup>59</sup> protects noncitizens against return to countries where they would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion. The Convention Against Torture<sup>60</sup> guards against the return of individuals to countries where they would face torture, even when they would be ineligible for asylum or related forms of relief under domestic law.

At the same time, this growing reliance on international human rights gives me pause for two reasons. First, international human rights norms are sometimes poorly suited to express fundamental American concepts of immigration and citizenship. Second, the focus on international human rights accentuates what is already a tendency to safeguard noncitizens by focusing only on *their* interests and rights. In fact, the failure to recognize immigrants' interests and rights hurts not only noncitizens, but the interests and rights of citizens as well.

Let me make clear what I am saying and what I am not. I do not suggest that international human rights norms can never provide bases on which to challenge government decisionmaking regarding immigration and immigrants. In many situations, they do and they should. Also, I do not

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58. International Covenant for Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

59. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

60. United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985).

suggest that we need to choose between international human rights and domestic law protections for noncitizens. In many situations, both international human rights and domestic law protections should apply, and international human rights may be flexible enough to take national variations into account. Moreover, I do not suggest that there are rigid, *a priori* substantive distinctions between the areas in which international human rights law can help and where it cannot.

Rather, my observations amount to a plea that judges, lawyers, legislators, executive branch officials, academics, and others begin to think more carefully about the relationship between international human rights and immigration law, and in particular about how international human rights and domestic law on immigration-related matters might differ in substance.<sup>61</sup> In this Part III, I offer a few starting points for such an analysis. But my comments on specific international human rights instruments are not intended to amount to an operational analysis of whether they might be invoked to challenge a particular immigration-related decision in the United States. For this reason, I am less concerned with questions such as whether these instruments are binding or not, self-executing or not, or customary international law or not, than I am with the general relationship between international human rights and immigration law. In the same mode, I focus on academic writing about international human rights, not to praise or criticize the specifics of such commentary, but rather to give examples of how it is possible

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61. In making these observations, I generally agree with Linda Bosniak, who has written, although with an emphasis different from mine, about the application of international human rights norms in immigration and alienage law. See Bosniak, *supra* note 53, at 595-98 (citing the "many progressive and critical theorists" who have challenged liberal cosmopolitanism in the form of human rights theory by "arguing, among other things, that its universalist and individualist premises are implausibly abstract and ignore the concrete particularity of commitments which actually give shape and meaning to human life." See *id.* at 598 (footnote omitted)); see also Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT'L L. 179, 197 (1994) ("[I]t is hardly clear that there are any international [human rights] standards to apply when it comes to the kinds of discrimination mandated by Proposition 187."). My views are also consistent with the concerns about reliance on international human rights expressed in Richard Delgado & Jean Stefancic, *Cosmopolitanism Inside Out: International Norms and the Struggle for Civil Rights and Local Justice*, 27 CONN. L. REV. 773, 775 (1995) ("[W]e draw some lessons for reformers who may be tempted to place unwarranted faith in international human rights law as a source of progressive arguments and change.").

to think about international human rights and immigration law.

*A. International Human Rights and Immigrants' Rights*

Immigrants' rights advocates often find international human rights norms useful because they seem not only to parallel, but to exceed domestic law protections for noncitizens. International human rights norms can affect the outcome of cases in U.S. courts, often to the benefit of noncitizens. This may happen when international human rights norms influence the interpretation of domestic law. In other cases, courts might apply such norms directly.<sup>62</sup> However, international human rights sometimes rest on different premises, and even when they parallel noncitizens' rights under domestic law, they are sometimes not as robust as domestic law protections. For this reason, we must ask: when should international human rights norms influence the interpretation of domestic law relating to immigration and immigrants, and when should they not?

A good focus for this inquiry is recent academic commentary criticizing the 1996 Welfare Act.<sup>63</sup> The particular targets of criticism are the provisions that made noncitizen permanent residents ineligible for food stamps and Supplemental Security Income, even if they had arrived in the United States and were receiving these public benefits before August 22, 1996, the date of enactment.<sup>64</sup> Subsequent legislation has restored some of these benefits,<sup>65</sup> and pending

62. See generally Hernández-Truyol & Johns, *supra* note 57, at 589-95; Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985).

63. See *supra* note 57.

64. See 1996 Welfare Act, Pub. L. No. 104-193, §§ 401, 402, 110 Stat. 2105, 2261-62 (1996) (codified as amended at 8 U.S.C. §§ 1611, 1612 (Supp. III 1997)).

65. The Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, modified the Supplemental Security Income ("SSI") bar. Aliens who were lawfully residing in the United States retain eligibility if they were receiving SSI benefits on August 22, 1996, when the 1996 Welfare Act became law. Aliens lawfully residing in the United States on that date but not receiving SSI are eligible for SSI through future blindness or disability, but not by simply turning 65 years of age. The Balanced Budget Act of 1997 also expanded the exceptions for new refugees, asylees, and individuals granted withholding of removal. In June 1998, the Agricultural Research, Extension, and Education Reform Act, Pub. L. No. 105-185, 112 Stat. 523 (1998), restored food stamps for approximately 225,000 legal immigrant children, noncitizen seniors, disabled noncitizens, and refugees who had been in the United States as of August 22, 1996. Benefits for about 20,000

legislation would restore even more.<sup>66</sup> For this inquiry into the role of international human rights, however, it is useful to examine the criticisms of the original restrictions.

There are two general approaches that one might take to argue that these restrictions violate international human rights. The first approach would focus on substantive norms—for example, a subsistence standard of living, adequate health care, food, or financial maintenance—that a state may not deny to a noncitizen.<sup>67</sup> The second approach would emphasize a nondiscrimination norm: that noncitizen permanent residents and citizens must be treated equally. In variations on this second approach, the norm is a norm against discrimination based on other attributes—for example, national origin, gender, or status as a child—in the context of discrimination against noncitizens.<sup>68</sup>

Interestingly, most critics who invoke international human rights have relied primarily on the second general approach. This may acknowledge that the relevant substantive norms are

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additional elderly and disabled immigrants were restored in October 1998. See Noncitizen Benefit Clarification and Other Technical Amendments Act, Pub. L. No. 105-306, 112 Stat. 2926 (1998). See generally Michael Fix & Wendy Zimmermann, *The Legacies of Welfare Reform's Immigrant Restrictions*, 75 INTERPRETER RELEASES 1577, 1577-87 (1998).

66. See Michael Janofsky, *Legal Immigrants Would Regain Aid in President's Plan*, N.Y. TIMES, Jan. 25, 1999, at A1 ("The Clinton administration is proposing a \$1.3 billion, five-year program to close remaining gaps in medical and food-stamp benefits for legal immigrants that have existed since the overhaul of the United States' welfare system three years ago.").

67. Compare the international law concept of a "minimum standard" in the context of state responsibility toward citizens of other states, but traditionally in the contexts of civil rights and property rights, not public assistance. See J. L. BRIERLY, *THE LAW OF NATIONS* 276 (6th ed. 1963) ("No state is legally bound to admit aliens into its territory, but if it does so it must observe a certain standard of decent treatment towards them, and their own state may demand reparation for an injury caused to them by a failure to observe this standard."). The alien's home state, not the individual alien, may seek redress. See International Law Commission: Draft Articles on State Responsibility, 37 I.L.M. 440 (1998). See generally Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1 (Richard B. Lillich ed., 1983).

68. See Hernández-Truyol & Johns, *supra* note 57, at 570-80. For example, Hernández-Truyol and Johns view the status of noncitizen children as derivative of the problems associated with their noncitizen status: "[A]ll international human rights documents forbid the denial of equal treatment or rights because of 'birth'—here birth to undocumented parents. Thus children who fail to enjoy these fundamental rights may claim that denial of services constitutes a violation of international human rights norms." *Id.* at 578.

inadequate to support a serious challenge to the new welfare eligibility restrictions. For instance, article 25 of the Universal Declaration of Human Rights provides in part:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.<sup>69</sup>

The Universal Declaration was not intended as a binding instrument, and there is no persuasive argument that article 25 is customary international law. However, similar provisions have become part of other instruments that *are* intended to be binding, most prominently the International Covenant on Economic, Social and Cultural Rights ("ICESCR").<sup>70</sup> For example, article 12 of the ICESCR recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."<sup>71</sup> The United States has signed but not ratified the ICESCR. But even if the United States were a party, and even if we assume that article 12 imposes some obligations either through the ICESCR itself or as a matter of customary international law, this substantive norm is so vague and general that it can lend only weak support for a serious challenge to the new welfare eligibility restrictions.<sup>72</sup>

69. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt.1, U.N. Doc. A/810 (1948).

70. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

71. *See id.*

72. Further, these substantive provisions are understood not as guarantees, but rather, under the principle of "progressive implementation," as calls for progress toward realization of these rights within the resources available in any given country. In the U.S. context, however, the progressive implementation may not present as great an obstacle as it might in developing countries to challenges based on the ICESCR. *See General Comments of the Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS annex 2 at 442-45 (Asbjørn Eide et al. eds., 1995) (reprinting U.N. Doc. E/1991/23); Victor Dankwa et al., *Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 704, 715-17 (1998); *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691, 694-95 (1998).

It is therefore understandable that critics of the 1996 Welfare Act rely much more heavily on the second, nondiscrimination approach: that countries may not distinguish between citizens and noncitizens, at least in certain important respects.<sup>73</sup> But the nondiscrimination norm, like the substantive guarantees, is also too vague to support a serious challenge to the welfare restrictions. For instance, article 7 of the Universal Declaration provides:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.<sup>74</sup>

Similarly, article 26 of the International Covenant for Civil and Political Rights ("ICCPR"), to which the United States is a party, provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.<sup>75</sup>

The problem that any nondiscrimination approach poses is

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73. For example, Meehan inquires not into a substantive guarantee, but rather a norm of nondiscrimination against noncitizens: "[D]oes discrimination on the basis of alien status violate the non-discrimination principles of these instruments[?]" Meehan, Note, *supra* note 57, at 400; *see also* Elizabeth Landry, Note, *States as International Law-Breakers: Discrimination Against Immigrants and Welfare Reform*, 71 WASH. L. REV. 1095, 1095 (1996) ("[L]egislators must consider international law when crafting proposals that would allow discrimination on the basis of alienage."); *id.* at 1097 ("Proposals that would permit states to discriminate on the basis of alienage are in direct conflict with fundamental international human rights norms."); *cf.* Hernández-Truyol & Johns, *supra* note 57, at 570 ("The general provisions of the recent welfare and immigration legislation disparately affect certain ethnic and racial minorities in derogation of globally accepted human rights norms.").

74. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948).

75. International Covenant for Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976).

to determine what classifications—for example, those based on alienage—are permitted. In ratifying the ICCPR, the United States entered an understanding that distinctions on the listed grounds are “permitted when such distinctions are, at a minimum, rationally related to a legitimate governmental objective.”<sup>76</sup> With or without such an express understanding, and leaving aside the question whether this understanding is valid, the more basic point is that no nondiscrimination norm can be absolute in the context of immigration and citizenship.<sup>77</sup> Even those who urge broader recognition of international human rights recognize that some distinctions between citizens and noncitizens are tolerable or inevitable.<sup>78</sup> To be sure, we might argue for limits; while some differential treatment is permitted, too much is not. But this only begs the question: how much differential treatment is too much? At that point, we move beyond defining a human rights minimum to a more complex inquiry into the degrees of differential treatment of citizens and noncitizens.<sup>79</sup>

Criticism of Proposition 187 from an international human rights perspective is similar. As with the welfare provisions, there are two principal modes of argument: substantive provisions and nondiscrimination norms. Again, the application of the substantive provisions with sufficient specificity to establish a violation of international human rights is doubtful.<sup>80</sup> And the nondiscrimination argument only

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76. *Int'l Covenant for Civil and Political Rights: Hearing Before the Senate Comm. on Foreign Relations*, 102d Cong. 8 (1992) (reprinting the administration's proposed reservations, declarations, and understandings).

77. Of course, I acknowledge that transnationalists and postnationalists would contest this. See *supra* text accompanying notes 53-57.

78. See, e.g., Hernández-Truyol & Johns, *supra* note 57, at 564 (“[T]his general right of the sovereign to exclude foreigners is not unfettered. Rather such ‘right’ is tempered and limited by human rights norms that regulate the way a sovereign may treat such foreigners.”); see also *id.* at 570 (“[E]ven if U.S. domestic law were to allow for or directly cause differential treatment with respect to citizens and noncitizens, international human rights law does not allow the United States to deprive noncitizens of their basic fundamental rights.”).

79. Some of the same commentators who argue that the welfare eligibility restrictions violate international law concede that the nondiscrimination principle is not absolute and even vague. See, e.g., Meehan, Note, *supra* note 57, at 402 n.83 (“It is not my argument that all immigrants should be treated absolutely equally.”); Waite, Comment, *supra* note 57, at 722 (“[T]he absence of a call [in the International Covenant on Economic, Social and Cultural Rights] for the absolute equal treatment of non-nationals leaves the issue unclear.”).

80. One commentator argues that the provisions of Proposition 187 relating

forces us to ask when and how much differential treatment of citizens and noncitizens is permissible.<sup>81</sup>

Once we ask about degrees of differential treatment of citizens and noncitizens, the answer depends heavily on several factors that reflect the national context of U.S. immigration and citizenship, and that therefore go further than the international character of international human rights.<sup>82</sup> First, the particular circumstances of each individual noncitizen in the United States matter a great deal. For example, a permanent resident of the United States should have a stronger claim to favorable treatment under U.S. statutory and constitutional law than an undocumented alien or a noncitizen who is admitted for a limited duration.<sup>83</sup> But even

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to education, health care, and social services violate the U.S. treaty obligations in the ICCPR, International Covenant for Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), the Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, and the Convention on Torture, United Nations Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in* 23 I.L.M. 1027 (1984), *modified in* 24 I.L.M. 535 (1985). See Knight, Note, *supra* note 57, at 186-97, 212-19 (arguing that Proposition 187 violates U.S. international law obligations to provide primary-level education and to not interfere with family life). These arguments face major formal obstacles: the United States is not a party to the Convention on the Rights of the Child, and the United States has declared the ICCPR to be non-self-executing. See Hernández-Truyol & Johns, *supra* note 57, at 567-68, 591-92. For a similar approach to *Plyler v. Doe*, 457 U.S. 202 (1982), see Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 18-20 (1983).

81. See Jamison, *supra* note 57, at 232-35 ("On the broadest level, [the International Covenant on Civil and Political Rights] denounces any law which discriminates on the basis of national or social origin."); see also Knight, Note, *supra* note 57, at 198-208. Knight argues generally that Proposition 187 violates article 26, the nondiscrimination provision of the International Covenant for Civil and Political Rights. But Knight continues: "Of course, it does not immediately follow that every distinction between citizens and aliens constitutes a violation of international law. International instruments recognize, however, that such distinctions are not necessarily permitted." *Id.* at 200.

82. There is an ongoing debate on the question of whether international human rights are "universal." See, e.g., Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1 (1997).

83. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); *Mathews v. Diaz*, 426 U.S. 67, 80 (1976) ("The decision to share . . . bounty with our guests may take into account the character of the relationship between the alien and this country: Congress may decide that as the alien's tie grows stronger, so does the strength of his claim to an equal share of that munificence."); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien . . . has been accorded a

undocumented aliens have some constitutional status.<sup>84</sup>

To be sure, an international human rights minimum begins to explain how and why this is so. Duration and character of a noncitizen's presence in the host country probably matter in any country. And, as I have mentioned, the protections provided by international human rights instruments—for instance, the ICCPR—closely parallel protections under the U.S. Constitution. But more fundamentally, the analysis of differential treatment for citizens and noncitizens must consider the nature of alien status within a host country's history and traditions of immigration and citizenship. An international human rights minimum is an important, basic component of any national body of immigration law and policy. However, an international human rights minimum may not recognize what is distinctive about a nation's particular immigration traditions and what, in those traditions, might lead to additional protections for noncitizens.

The position of the immigrant-noncitizen in the United States is fundamentally different from the position of the immigrant in many other societies. In my view, being accepted as an immigrant in the United States—that is, given permanent resident status—implies an expectation not only of permanent residency, but also of citizenship. In this way, permanent residence is not primarily an outsider status whose central feature is many, but not all, of the rights of citizenship. Rather, permanent residence is primarily a stage toward naturalization, and permanent residents are prospective citizens. Even if permanent residents never naturalize, their children born in the United States will be citizens under *jus soli* citizenship rules.<sup>85</sup> In this very important sense, permanent residence is very much a transition to citizenship as far as the family is concerned. Elsewhere, I have explained

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generous and ascending scale of rights as he increases his identity with our society.”).

84. See *Plyler v. Doe*, 457 U.S. 202 (1982). For a discussion of international human rights protections for migrant workers, including the undocumented, see Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants Under the International Migrant Workers Convention*, 25 INT'L MIGRATION REV. 737 (1991).

85. See U.S. CONST. amend. XIV, § 1; INA § 301, 8 U.S.C. § 1401 (1994 & Supp. III 1997).

this as the “transition model” of permanent residence, which should give permanent residents more than what an international human rights minimum might assure them, even proceeding from the same rhetorical starting point.<sup>86</sup>

In part, these transition model protections are within traditional “immigration law”—for example, the rights of permanent residents who want procedural due process when they seek to return to the United States, or who wish to avoid the retroactive application of newly enacted deportability grounds. Other transition model protections are within alienage law, where, since *Yick Wo v. Hopkins*,<sup>87</sup> constitutional protections traditionally have been available to noncitizens more widely than in matters relating to admission and expulsion. Noncitizen residents of long duration—for example, treaty traders and treaty investors holding “E” visas, and possibly certain undocumented aliens—may enjoy a more modest version of these protections, even if they are not “permanent residents” in a formal sense.

These expectations of eventual full membership are largely absent in countries that do not consider themselves countries of immigration. It is no accident that much of the emphasis on transnational or postnational membership comes from countries and regions that have very different immigration traditions. In Germany, for example, the prevailing self-understanding is that it is not a country of immigration, even if in fact it takes in many non-Germans.<sup>88</sup> It is true that recent legislative proposals sponsored by Chancellor Gerhard Schröder and his Social Democratic Party would acknowledge in unprecedented ways that permanent residence should lead to citizenship opportunities.<sup>89</sup> These proposals, however,

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86. For discussion, see Hiroshi Motomura, *Alienage Classifications in a Nation of Immigrants: Three Models of “Permanent” Residence*, in *IMMIGRATION AND CITIZENSHIP IN THE TWENTY-FIRST CENTURY* 199 (Noah M. J. Pickus ed., 1998). I am at work on an article that will discuss the transition model and other models of permanent residence in greater detail.

87. 118 U.S. 356 (1886).

88. See ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* 165-78 (1992); Rainer Münz & Ralf Ulrich, *Changing Patterns of Immigration to Germany, 1945-1995*, in *MIGRATION PAST, MIGRATION FUTURE: GERMANY AND THE UNITED STATES* 65 (Klaus J. Bade & Myron Weiner eds., 1997).

89. See Jordan Bonfante, *Whose Fatherland? A Proposal to Grant Citizenship to Members of Germany’s Vast Immigrant Community Stirs Passionate Debate*, 15 *TIME INT’L*, Jan. 25, 1999, at 153; Roger Cohen, *Schröder’s*

recognize only that noncitizens should have citizenship opportunities after a long period of residence and do not appear to contemplate noncitizens enjoying an expectation of citizenship as soon as they are admitted—or of being “immigrants” in this sense at all.

Moreover, Europe has a much more fully developed institutional structure to enforce international human rights (and other extranational norms, especially those with their source in the European Union). The European Court of Human Rights is authorized to render binding decisions and thereby develop authoritative interpretations of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>90</sup> It is not surprising that the role of international human rights in European immigration-related discourse has become quite different from their role in the United States, where institutional enforcement of international human rights generally must take place domestically if it takes place at all.<sup>91</sup> In the United States, however, to rely primarily on international human rights may define the position of noncitizens in ways that cannot fully protect them and the citizens who are connected to them.

This does not mean, however, that international human rights norms are unhelpful in all contexts. It is possible, for example, that the transitional model of permanent residence in the United States might be given some normative weight in international human rights analysis as applied to the United States. The key question is how much international human rights norms, as the course of interpretation develops over time, will parallel domestic law and incorporate distinctive national conditions, or reflect different values. As I have just explained, the potential for reflecting different values is greatest where noncitizens have immigration-related expectations that draw on immigration traditions in the United States.

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*New Politics Tripped Up by Hesse Voters*, N.Y. TIMES, Feb. 8, 1999, at A3; William Drozdiak, *Immigrants to Become Citizens of Germany; New Legislation Sets Off Fierce Debate*, WASH. POST, Nov. 28, 1998, at A17.

90. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

91. I acknowledge that international human rights can be enforced through other mechanisms, for example through economic sanctions. See Spiro, *supra* note 54, at 633-36.

Where, however, the noncitizen has no such immigration-related expectations, international human rights may parallel domestic law more naturally and apply directly in domestic cases or influence domestic law interpretation. In these cases, international human rights can make the protections of domestic law more robust. This explains, for instance, the invocation of customary international law to limit indefinite detention of inadmissible arriving aliens<sup>92</sup> and to require minimum standards for detention conditions.<sup>93</sup>

A further example of the second category—where international human rights are more likely to protect noncitizens without the need for supplementation through domestic norms—might be asylum seekers with no prior contact with the United States. Here, of course, the Refugee Convention is directly relevant.<sup>94</sup> Also, important international human rights are set out in the Convention Against Torture, which bars return of arriving aliens to countries where they face torture.<sup>95</sup> But as soon as the asylum seeker builds a life in this country, international human rights norms may need to be supplemented by domestic law norms to protect her adequately

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92. See, e.g., *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795-800 (D. Kan. 1980), *aff'd on other grounds sub nom.* *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

93. See *Jama v. United States INS*, 22 F. Supp. 2d 353, 362-66 (D.N.J. 1998) (denying government's motion to dismiss alien detainees' claims that detention conditions violated customary international law); see also Mirta Ojito, *Judge Allows Detainees to Sue INS Officials*, N.Y. TIMES, Oct. 10, 1998, at B1. See generally Barbara Macgrady, Note, *Resort to International Human Rights Law in Challenging Conditions in U.S. Immigration Detention Centers*, 23 BROOK. J. INT'L L. 271, 292-307 (1997).

94. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954).

95. For discussion of the relationship between international human rights norms and refugee and asylum law, including arguments that they are more closely linked than existing refugee protection regimes recognize, see LOUIS HENKIN, *THE AGE OF RIGHTS* 48-50 (1990); James C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113 (1991). See also James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129 (1990); Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335 (1991). On the Convention Against Torture, see Kristen Rosati, *The United Nations Convention Against Torture: A Self-Executing Treaty That Prevents the Removal of Persons Ineligible for Asylum and Withholding of Removal*, 26 DENV. J. INT'L L. & POL'Y 533 (1998). For a general discussion of the role of international human rights norms in immigration law, see Jeannette Money, *Human Rights Norms and Immigration Control*, 3 UCLA J. INT'L L. & FOR. AFF. 497 (1998-99).

in the context of American traditions of immigration and citizenship. It has become part of those traditions that noncitizens who gain asylum in this country are not only given refuge, but also the opportunity to become Americans.<sup>96</sup> To put this in more general terms, overemphasis on international human rights to protect noncitizens in all cases may dilute potentially stronger protections under U.S. law to a universal lowest common denominator.<sup>97</sup>

### *B. Immigrants' Rights and Citizens' Rights*

In one major respect, the competing foreign affairs and immigrants' rights characterizations of immigration differ radically in focus. The foreign affairs view subsumes the noncitizen under the relationship between sovereign countries. In contrast, the immigrants' rights view separates the noncitizen from her native country and focuses on her as an individual. But these otherwise competing characterizations share one central assumption: that we should look in the direction of the noncitizen, either by focusing on her country of origin or directly on her.

My second note of caution about international human rights has to do with the continuing focus in immigration-related matters on noncitizens. The invocation of international human rights fosters this focus, for we speak of the rights of the noncitizens outside the domestic, national conceptual framework. To focus too much on the role of international human rights in immigration law is to erect a conceptual barrier to understanding the domestic effects of immigration

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96. See INA § 209, 8 U.S.C. § 1159 (1994 & Supp. III 1997). Section 209(b) gives the Attorney General discretion to authorize up to 10,000 asylees to adjust their status to permanent residence if they have been physically present in the United States for one year after being granted asylum and meet certain other conditions. In practice, the maximum 10,000 adjustments have always been authorized, but that number has become insufficient to keep up with demand. Asylees now have to wait more than one year, but the key point, that adjustment is routine, remains true.

97. Here there is a rough parallel to the regional harmonization of asylum law, which can result in providing only those protections to asylum seekers that are universally agreed upon, omitting protections that may be appropriate in individual national settings. See Jacqueline Bhabha, *European Harmonization of Asylum Policy: A Flawed Process*, 35 VA. J. INT'L L. 101 (1994); James Hathaway, *Harmonizing for Whom? The Devaluation of Refugee Protection in the Era of European Economic Integration*, 26 CORNELL INT'L L.J. 719 (1993).

and citizenship decisions.

We will safeguard noncitizens poorly if we focus only on *their* interests and rights without analyzing carefully and systemically how citizens' and noncitizens' interests and rights are intertwined. For this reason, those who care about law and policy relating to immigration and immigrants need to think more carefully about the ways in which immigration-related decisions profoundly affect those individuals who are already citizen-members—for example, through decisions that bar family reunification. We also need to think more carefully about how immigration-related decisions cumulatively affect myriad groups—whether ethnic, economic, or other affiliations—within American society.<sup>98</sup> For this reason, several Supreme Court cases that rejected constitutional challenges based on the effects of immigration-related decisions on citizens are especially disappointing as lost opportunities to begin this project.<sup>99</sup>

Failing to recognize that hurting noncitizens also hurts citizens has a related cost: tacit acceptance of the premise that we recognize noncitizens' rights only out of altruism or guilt. Thus, Peter Brimelow argued in his best-selling anti-immigration polemic, *Alien Nation*, that the 1965 Immigration Act treated "immigration as a sort of imitation civil right, extended to an indefinite group of foreigners who have been selected arbitrarily and with no regard to American interests."<sup>100</sup>

Policymakers naturally view immigration as an issue that involves the rights of immigrants. But even if a predominant focus on immigrants' rights, including their international human rights, is relevant and helpful, it remains incomplete because it fails to capture the domestic effects of immigration and citizenship decisions. We need to remember that through immigration and citizenship law and policy, citizens select who become new citizens and thus shape our national future by deciding who "we" are as Americans. Focusing too much on

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98. For further development of this point, see Motomura, *Whose Immigration Law?*, *supra* note 8, at 1573-87.

99. See *Fiallo v. Bell*, 430 U.S. 787 (1977); *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

100. PETER BRIMELOW, *ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER* 5 (1995) (emphasis omitted); see also *id.* at 103-04, 242-43.

international human rights risks neglect of this basic fact about immigration and immigrants.

#### IV. IMMIGRATION EXCEPTIONALISM

I now come to my third topic, immigration exceptionalism, for which my first two topics have laid the groundwork. In addressing my first topic, immigration federalism, I focused on this argument in favor of an expanded state and local role in immigration-related matters: that the state and local role in foreign affairs is expanding, and, as it does so, the state and local role in immigration-related decisionmaking should expand as well. This argument is unconvincing for the reasons explained in Part II. Policymakers now appear to take a broader view of immigration cases, finding that cases sometimes involve foreign affairs, but are often better viewed as involving immigrants' rights. This suggests that an expanding state and local role in foreign affairs is not enough to justify an expanding state and local role in immigration. Or to put it differently, even if federal exclusivity should end for foreign affairs, it should not necessarily end for matters relating to immigration and immigrants.

But the analysis cannot stop here. At most, this part of my analysis rebuts the "immigration as foreign affairs" argument for expanded state and local authority by pointing out that immigration is about more than foreign affairs. This rebuttal is incomplete because the "immigration as foreign affairs" argument is only one part of a broader argument for expanded state and local authority. This broader argument casts the issue of state and local authority in immigration-related matters as part of the larger question of immigration exceptionalism. So phrased, the question of state and local authority is part of the larger question of whether the usual limits on government decisionmaking should apply in immigration as they do elsewhere.

Now recall my reason to find unconvincing the "immigration as foreign affairs" argument for a limited state and local role in immigration-related matters. That reason was the recognition by policymakers that immigration involves not just foreign affairs, but also immigrants' rights. This same recognition has led to the criticism of the plenary power doctrine. According to this criticism, the immigration power

should be subjected to the constitutional limits normally applied to other government powers. This is an argument that immigration exceptionalism should end for judicial review purposes. And if international human rights emerge as part of the law relating to immigration and immigrants, and if policymakers take seriously the effects of immigration-related decisions on U.S. citizens, the argument to end immigration exceptionalism becomes even stronger.

This argument might continue as follows: if immigration exceptionalism should end for judicial review, it should end for federalism, too, and the state and local role in immigration-related matters should expand. Viewed as a question of immigration exceptionalism, judicial protection of individual rights is broadly consistent with applying our usual federalism principles to immigration, which would mean greater state and local authority over immigration and immigrants. Thus, to rebut the "immigration as foreign affairs" argument for a limited state and local role merely opens the door to an argument against immigration exceptionalism that is much more cogent.

Yet the foregoing argument is also unconvincing. The question of immigration exceptionalism is considerably more nuanced. Immigration can be exceptional for some purposes and not for others. To explain why, I call on my treatment of my second topic—the relationship between international human rights and immigration—and, in particular, my two cautionary observations about international human rights. My first observation was that we should not define immigrants' rights solely through international human rights, because international human rights norms are sometimes poorly suited to express fundamental concepts of American immigration and citizenship. My second observation was that in defining protections for noncitizens, we should consider not only effects of immigration-related decisionmaking on their interests and rights, but also the effects of immigration-related decisionmaking on the interests and rights of citizens.

These two observations suggest that individual constitutional rights in cases involving immigration and immigrants are not merely individual constitutional rights as commonly understood. These individual rights cases decide and reflect not only the individual rights of the immigrants, but also our *national* sense of immigration and citizenship,

including the interests of U.S. citizens as national citizens. This is why international human rights norms do not capture all that is important about individual rights in immigration-related cases. In cases involving immigration and immigrants, what appear to be individual constitutional rights cases are really more. Beginning with the Naturalization Clause of the Constitution, which calls for Congress "to establish [a] uniform Rule of Naturalization,"<sup>101</sup> and certainly since the Civil War and the Civil War Amendments, decisions in these cases have been part of an incremental process by which we define national citizenship and thus, over time, our future as a nation and not as a confederation of several states. And this is why the reasons for the weakening of federal exclusivity in foreign affairs do not apply to immigration-related matters, or apply only weakly. Immigration exceptionalism may be appropriate for federalism, even if it is not for judicial review.

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101. U.S. CONST. art. I, § 8, cl. 4.