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Joan Fitzpatrick
University of Washington School of Law

William McKay Bennett

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A LION IN THE PATH? THE INFLUENCE OF INTERNATIONAL LAW ON THE IMMIGRATION POLICY OF THE UNITED STATES

Joan Fitzpatrick* and William McKay Bennett**

I. INTRODUCTION

In February 1879,¹ the Senate of the United States debated H.R. 2423, “[a]n act to restrict the immigration of Chinese to the United States.”² Resentful and fearful whites in Western states, especially California, demanded reduction in the number of Chinese arrivals. The Senate debate did not focus solely on the desirability of Chinese immigration. Senators paid great attention to whether the bill would violate Article V of the Burlingame Treaty of 1868³ and, if so, whether Congress could abrogate the treaty.⁴ Senator Roscoe Conkling of New York,⁵ arguing in

* Professor of Law, University of Washington; B.A., Rice University; J.D., Harvard Law School; Diploma in Law, Oxford University.

** Honor Program Attorney, United States Department of Justice, Immigration and Naturalization Service (beginning August, 1995); B.S., University of California, Berkeley (1990); J.D., University of Washington School of Law (1995) (the views expressed herein are solely those of the authors and are not intended to be attributed in any way to the Department of Justice or the Immigration and Naturalization Service).

1. See 8 Cong. Rec. 1072, 1235–36, 1264–76, 1299–1316, 1383–1400 (1879).

2. 8 Cong. Rec. 791–92 (January 28, 1879). The bill proposed reducing to fifteen the number of Chinese passengers who could arrive on any one vessel.

3. Treaty of July 28, 1868, 16 Stat. 739. Section V provided that:

The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents. The high contracting parties, therefore, join in reprobating any other than an entirely voluntary emigration for these purposes. They consequently agree to pass laws making it a penal offense for a citizen of the United States or Chinese subjects to take Chinese subjects either to the United States or to any other foreign country, or for a Chinese subject or citizen of the United States to take citizens of the United States to China or to any other foreign country, without their free and voluntary consent respectively.

4. See, e.g., a lengthy essay included in the report of the House Committee on Education and Labor on H.R. No. 2423, answering in the affirmative the question, “Can Congress Repeal a Treaty?” 8 Cong. Rec. 793 (January 28, 1879). This essay observed that the question of Chinese immigration “is not one of right but of policy,” and that, if the presence of Chinese “endangers the peace or prosperity of our people, no mere technical considerations should intervene . . .” *Id.*

5. 8 Cong. Rec. 1307–09 (February 14, 1879).

opposition to the act, picturesquely described the Burlingame Treaty as “a lion in the path” of those seeking to limit Chinese immigration.⁶ Conkling instead proposed instructing the President to renegotiate the treaty with China.⁷ President Rutherford B. Hayes vetoed H.R. 2423⁸ and then pursued Conkling’s proposed alternative, negotiating a supplementary treaty in 1880 that conferred on the United States the authority to regulate, limit, or suspend the immigration of Chinese laborers, but not to prohibit it.⁹

The desire to keep faith with treaty partners carried the day again in 1882 when President Chester A. Arthur vetoed S. 71, a twenty-year suspension of Chinese immigration disingenuously titled “An act to execute certain treaty stipulations relating to Chinese.”¹⁰ In subsequent years, however, Congress repeatedly passed Chinese exclusion laws that contravened the treaty obligations of the United States.¹¹ The power of Congress to override treaty commitments was ultimately sustained by the Supreme Court in the *Chinese Exclusion Case*.¹² As a result, the courts permit the political branches to abrogate the rights that non-citizens hold under international law.

Has international law truly been “a lion in the path” of immigration policymakers? Or has it been a near irrelevance? While the racism that filled the pages of the Congressional Record and the United States Reports during the Chinese exclusion era has thankfully disappeared, the discourse of international law seems to have vanished along with it. That immigration policy necessarily implicates our relationships with other nations is self-evident. In consequence, one would expect the bilateral and multilateral obligations of the United States to play a prominent role

6. 8 Cong. Rec. 1309 (February 14, 1879) (“[T]he difficulty with Congress [restricting Chinese immigration] is that here stands a treaty, a lion in the path in the estimation of a great part of this body and of a great part of the nation.”). Conkling’s metaphor is probably an allusion to a passage in *Pilgrim’s Progress* in which Christian encounters two lions on the path to the Palace Beautiful. See John Bunyan, *Pilgrim’s Progress* 48–49 (James Blanton Wharey ed., 1928).

7. 8 Cong. Rec. 1390 (February 15, 1879). The amendment was defeated by a vote of 34 against to 31 in favor. *Id.* at 1390–91.

8. 8 Cong. Rec. 2275 (March 1, 1879). See *infra* notes 65–67 for discussion of Hayes’s veto message.

9. Treaty of November 17, 1880, 22 Stat. 826.

10. 13 Cong. Rec. 2551 (April 4, 1882). See *infra* note 71 for discussion of Arthur’s veto message.

11. Act of September 13, 1888, 25 Stat. 476; Act of October 1, 1888, 25 Stat. 504 (Scott Act); Act of May 5, 1892, 27 Stat. 25 (Geary Act).

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

in shaping, if not dictating, immigration policy. Yet, especially in recent decades, this is often not the case.

This article explores the place of international law in the immigration policy process in four settings: (1) the tentative and ultimately failed efforts of the executive and the judiciary to keep Congress within the bounds of internationally law-abiding conduct with respect to Chinese exclusion; (2) the almost complete disregard by Congress and the executive of international norms concerning health-related travel restrictions relating to HIV/AIDS; (3) Congressional inaction in the face of executive and judicial hypocrisy toward fundamental principles of refugee law in relation to interdiction of asylum-seekers; and (4) the emergence of a perverse canon presuming the abrogation of uncodified customary norms in cases involving temporary refuge for victims of armed conflict and arbitrary detention of excludable aliens. This article does not treat these four subjects exhaustively. Instead, it poses the question of the proper respect immigration policymakers should pay to the United States' pre-existing international obligations and examines how this respect has varied over time and among the branches.

A. The Status of International Law as Law of the United States

The basic conceptual framework concerning the status of international law in the United States can be concisely described. Treaties are the supreme law of the land,¹³ whether they be self-executing treaties (which the judiciary may immediately enforce) or non-self-executing treaties (which Congress must implement by statute before the courts will enforce them).¹⁴ Non-self-executing treaties that have not been implemented by statute are nevertheless the law of the land, in the sense of expressing a national policy binding on the states.¹⁵ Some ambiguity exists regarding which branch may terminate a treaty so as to extinguish, lawfully, the nation's international obligation.¹⁶ As between a treaty and a conflicting statute, the later in time controls.¹⁷ Thus, an act of Congress

13. U.S. Const. art. VI.

14. *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

15. Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 Harv. L. Rev. 853, 866-67 (1987).

16. See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979); David Gray Adler, *The Constitution and the Termination of Treaties* (1986); Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties—The Original Intent of the Framers of the Constitution Historically Examined*, 55 Wash. L. Rev. 4 (1979).

that results in a breach of pre-existing treaty obligations will nonetheless be given domestic legal effect. Tempering this result, an important rule of construction provides that statutes should not be interpreted as inconsistent with treaties unless no other construction is possible.¹⁸

Customary international law is formed by the consistent practice of states undertaken by them from a sense of legal obligation.¹⁹ Following inherited British tradition,²⁰ customary law is automatically incorporated into domestic law. It is generally regarded as a species of federal common law,²¹ although no specific reference to customary law is made in the Supremacy Clause.²² The power to abrogate customary international law is the subject of much controversy, centering on opaque dictum in the Supreme Court's seminal decision in *The Paquete Habana*.²³

B. *Receptivity to International Law in the Immigration Context*

At one time, awareness of the relevance of the United States' international obligations as a source of rules in the immigration field was highly visible. The Supreme Court recognized that treaties have equivalent status with statutes and that any of the three branches of the federal government may be required to implement their terms. In *Fong*

17. *Head Money Cases*, 112 U.S. 580, 599 (1884); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Chae Chan Ping v. United States*, 130 U.S. 581, 628 (1889).

18. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev. 1103, 1105 (1990).

19. Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987).

20. *Triquet v. Bath*, 97 Eng. Rep. 936, 938 (K.B. 1764).

21. Louis Henkin questions the utility and accuracy of this characterization, noting that it stems from an unthinking "tendency to define all law that is not legislative in origin as common law" and that it fails to consider the important ways in which customary law differs from common law. Henkin, *supra* note 15, at 875-76.

22. The "law of nations" is referenced in the United States Constitution, however. U.S. Const. art. I, § 8, cl. 10.

23. 175 U.S. 677 (1900). The Court held, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700. It immediately qualified this holding by stating, "For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . ." *Id.*

*Yue Ting v. United States*²⁴ the Court described the process by which immigration policy is defined:

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution, to intervene.²⁵

As Louis Henkin has noted, the *Chinese Exclusion Case* established dual propositions—first, that the power of Congress over the exclusion of aliens, being derived from inherent sovereignty, is plenary; and, second, that Congress may effectively deprive individuals of their rights under treaties by passage of inconsistent legislation.²⁶ Thus, while notions of sovereignty drawn from the public international law of the time were accepted as a source of Congressional power to exclude the Chinese, the idea that international law might restrain Congress's policy choices was less obvious.

In the decades since the Supreme Court decided the *Chinese Exclusion Case*, immigration policymakers have become increasingly indifferent to international law as a factor in the policy mix. Recently, they have failed to note the existence of relevant international obligations, disingenuously misconstrued international norms, and paid undeserved deference to the law-breaking conduct of a coordinate branch.

The thesis of this article is that even if the political branches possess raw power to violate treaties and customary norms, they must act unambiguously when doing so. At a minimum, their awareness of the

24. 149 U.S. 698 (1893). This was a test case involving three Chinese immigrants, Fong Yue Ting, Wong Quan and Lee Joe. Chinese immigrant societies popularly known as the Six Companies, *see infra* note 54, had requested the advice of several prominent attorneys on the constitutionality of the 1892 Geary Act and had been advised that the statute was unconstitutional. The Six Companies thereupon advised Chinese immigrants not to apply for the certificates of residence required under the Geary Act to avoid deportation. Mary Roberts Coolidge, *Chinese Immigration* 219–221 (1909). Fong Yue Ting, president of the Chinese Civil Rights League of New York, refused to obtain a certificate and called a mass meeting at the Cooper Union. Shih-Shan Henry Tsai, *China and the Overseas Chinese in the United States, 1868–1911*, at 97 (1983) [hereinafter Tsai, *Overseas Chinese*]. Only 13,242 of 106,668 resident Chinese complied with the Geary Act's registration requirements. Facing an estimated removal cost of over \$7 million once the Supreme Court sustained the Geary Act, Congress chose to extend the registration period for an additional year. Coolidge, *supra*, at 226–27.

25. 149 U.S. at 713.

26. Henkin, *supra* note 15, at 853–54.

existence of a relevant international obligation should be clearly demonstrated. Breach of treaty or customary law should not be permitted to occur by implication. As the following case studies will show, to allow such breaches can lead to disastrous consequences.

II. THE CHINESE EXCLUSION ACTS

The United States, a nation largely composed of recent migrants, rarely attempted to regulate immigration at the federal level during the first century of its existence.²⁷ In the second half of the nineteenth century, as Congress began to establish criteria for entry into the United States,²⁸ the Chinese were the targets of increasingly restrictive measures. In 1862, Congress acted against the "coolie trade,"²⁹ banning the coercion or trickery of Chinese laborers into indentured servitude while preserving their right to immigrate voluntarily.³⁰ In 1874, President Ulysses Grant, responding to agitation by groups such as Dennis Kearney's Workingman's Party in California,³¹ suggested the need to cure the "Chinese immigration problem"—defined as the persistence of the coolie trade and the entry of Chinese women as prostitutes.³²

27. The primary exception was enactment of the Aliens Act and the Alien Enemies Act in 1798. See Edward P. Hutchinson, *Legislative History of American Immigration Policy, 1798–1965*, at 11–16 (1981).

28. See, e.g., 18 Stat. 477 (1875) (excluding persons convicted of felonies and women "imported for the purposes of prostitution" from entry into the United States); see also Hutchinson, *supra* note 27, at 65–66 (1981).

29. An Act to Prohibit the "Coolie Trade" by American Citizens in American Vessels, 12 Stat. 340 (1862).

30. In 1864, Congress clarified that labor contracts under which would-be immigrants pledged their wages to pay for their transportation were valid, as long as the contract did not exceed one year's duration. An Act to Encourage Immigration, 13 Stat. 385 (1864). Many Chinese laborers immigrated under this "credit-ticket" system and were not considered to be coolies. See Hyung-chan Kim, *A Legal History of Asian Americans, 1790–1990*, at 51–52 (1994).

31. See, e.g., Shih-Shan Henry Tsai, *The Chinese Experience in America 57–60* (1986) [hereinafter Tsai, *Chinese Experience*]; Coolidge, *supra* note 24, at 109–41; Tien-Lu Li, *Congressional Policy of Chinese Immigration 24–25* (1916).

32. In a message delivered December 7, 1874, President Grant stated:

[T]he great proportion of the Chinese immigrants who come to our shores do not come voluntarily In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes, to the disgrace of communities where settled and to the great demoralization of the youth of these localities.

Hutchinson, *supra* note 27, at 65.

The coolie trade never figured largely in Chinese migration to the United States.³³ Opponents of Chinese migration falsely characterized Chinese laborers as coolies in order to press for severe restrictions on the entry of workers attracted by opportunities in the gold mines, on the railroads, and in service industries such as laundries. A characteristic assessment of the “unfair competition” posed by voluntary Chinese migrants was offered by Justice Stephen Field, sitting as Circuit Justice in *In re Low Yam Chow*:³⁴

Chinese laborers, including in that designation not merely those engaged in manual labor, but those skilled in some art or trade, in a special manner interfered in many ways with the industries and businesses of [California]. Their frugal habits, the absence of families, their ability to live in narrow quarters without apparent injury to health, their contentment with small gains and the simplest fare, gave them great advantages in the struggle with our laborers and mechanics, who always and properly seek something more from their labors than sufficient for a bare livelihood, and must have and should have something for the comforts of a home and the education of their children.³⁵

These sentiments were translated both into direct action by hostile whites and into oppressive and discriminatory state regulation of the employment and living conditions of Chinese residents. The most violent anti-Chinese agitation was carried out by working class white men, sometimes with the encouragement of certain labor leaders.³⁶ Whites engaged in a series of massacres of Chinese miners and attacks upon

33. China agreed to a ban on the coolie trade in Article VI of the Burlingame Treaty of 1868. *See supra* note 3.

34. 13 F. 605 (C.C.D. Cal. 1882).

35. *Id.* at 607.

36. Coolidge, *supra* note 24; Tsai, *Overseas Chinese*, *supra* note 24, at 60–63 (describing Denver riot of 1880); *id.* at 72–80 (describing Rock Springs massacre and Seattle riot of 1885); *id.* at 83 (describing role of Knights of Labor and Cigar-makers Union in burning of San Francisco’s Chinatown).

areas of Chinese residence,³⁷ complicating the relationship between China and the United States.³⁸

State and local government bodies in the West adopted a variety of measures designed to deprive the Chinese of economic opportunity and to discourage further entry. The victims of anti-Chinese state legislation in the 1860s and 1870s experienced a high degree of success in challenging these measures by means of litigation. The Chinese and their attorneys established important equal protection precedents³⁹ and obtained relief even from virulently anti-Chinese and politically ambitious jurists such as Justice Stephen Field.⁴⁰ Field advised California

37. Anti-Chinese attacks occurred in 1885 in Squaw Valley and Coal Creek in Washington Territory; Sacramento; San Francisco (where rioters burned Chinatown and murdered thirteen Chinese); and in 1887 at the Snake River in Oregon. These attacks sometimes involved the robbery and murder of Chinese gold miners. Tsai, *Overseas Chinese*, *supra* note 24, at 83, 86–89; Tsai, *Chinese Experience*, *supra* note 31, at 67–72.

38. The Chinese government demanded reparation for killed and injured Chinese and contemplated limiting emigration unless the safety of the Chinese residents in the United States could be secured. Tsai, *Overseas Chinese*, *supra* note 24, at 81–89.

39. For example, the classic case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), was funded by a Chinese laundryman's guild and handled by prominent San Francisco lawyer Hall McAllister. Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to the Development of American Law*, in *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*, at 12–15 (Sucheng Chan ed., 1991).

40. *Id.* at 8–16 (discussing Field's attitudes and his decision as Circuit Justice in *Ho Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (No. 6,546), and in *In re Quong Woo*, 13 F. 229 (C.C.D. Cal. 1882)). Some of Field's decisions striking down oppressive state laws were conceptually innovative, even by today's standards. In *Ho Ah Kow*, Field struck down San Francisco's "queue ordinance," which prescribed close-cropping the hair of male prisoners. This measure was applied against Chinese laborers convicted under California's "cubic air" statute (making it a criminal offense to inhabit overcrowded accommodations), which was also aimed at the Chinese. McClain & McClain, *supra* note 39, at 9–10. Field stressed the relevance of racial motivation in the adoption and administration of the "queue ordinance":

[W]e cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race . . . it being universally understood that it is to be enforced only against that race . . . we may justly conclude that it was the intention . . . that it should only have such operation, and treat it accordingly.

12 F. Cas. at 255.

politicians to seek an alternative remedy at the federal level,⁴¹ and this advice was eventually taken.⁴²

Congressional debates over immigration restrictions on the Chinese tended to divide along geographical and class lines.⁴³ California Senator Sargent demanded the empathy of his colleagues for his state, asserting that by 1879 there were more Chinese immigrants than voters residing there.⁴⁴ Although his opponents caricatured the supporters of Chinese exclusion as “sand-lot orators and hoodlums,”⁴⁵ violent anti-Chinese attitudes were held by many members of political elites in the Western states.⁴⁶ In contrast, elites in other parts of the country sometimes favored Chinese migration, either out of sympathy for the rights of migrants,⁴⁷

41. See *In re Ah Fong*, 1 F. Cas. 213, 217 (C.C.D. Cal. 1874) (No. 102). In 1876, California congressmen submitted several resolutions asking the President to modify existing treaties between China and the United States to “prevent any further immigration of the subjects of that empire to the United States.” Hutchinsohn, *supra* note 27, at 68 (footnotes omitted). On February 28, 1877, the House received a report from a special joint committee appointed to investigate Chinese immigration on the West Coast. *Id.* at 69–70.

42. Congress adopted a joint resolution in 1878 requesting the President to seek a modification of the Burlingame Treaty. 7 Cong. Rec. 4782 (June 17, 1878).

43. Tsai, *Overseas Chinese*, *supra* note 24, at 46 (“[T]he Chinese immigration issue, to a certain extent, was a sectional as well as a partisan one, with the West and the South on one side and the East on the other.”).

44. 8 Cong. Rec. 1265 (February 13, 1879). In 1849, 715 Chinese entered the United States. The following year 4,000 entered California alone, and by 1852 the rate of entry into California had reached a magnitude of 20,000. By the end of the 1850s, several California counties had populations that were half Chinese. Kim, *supra* note 30, at 47.

45. 8 Cong. Rec. 1392 (February 15, 1879) (remarks of Sen. Matthews) (“[T]here are some other people in this country who are interested in this question of Chinese immigration besides the citizens who dwell on the Pacific coast, and there are some people in the country to be conciliated otherwise than sand-lot orators and hoodlums.”).

46. See, e.g., Christian G. Fritz, *Due Process, Treaty Rights, and Chinese Exclusion, 1882–1891, in Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*, at 25–56 (Sucheng Chan ed., 1991).

47. For example, Sen. Hoar of Massachusetts associated the anti-Chinese racism of the Californians with the anti-black racism of the South:

[T]he Senator from California in his argument struck hands with the Senator from Alabama and but repeated the old taunts and the old arguments which had been ringing in our ears for two generations. I do not believe that it is necessary for the future of this Republic to prohibit to any man who seeks its shores of his own volition the right to enter in the mode and at the time he may choose, and to remain as a citizen or as a laborer or as a resident so long as he may choose. I believe that right is the right to the pursuit of happiness with which the Creator has clothed every human being . . .

8 Cong. Rec. 1314 (February 14, 1879).

concern for treaty obligations,⁴⁸ or out of approval of the impact upon the labor market.⁴⁹

The Chinese government's attitude toward the migration of its subjects to the United States was complex but generally passive. Initial treaty relationships between China and the United States focused upon opening up the Chinese economy and society to American merchants and missionaries.⁵⁰ Americans were limited to certain treaty ports, however, as were other Westerners.⁵¹ The treaties of 1844 and 1858 did not specifically address the rights of Chinese to enter and to work in the United States.⁵² Chinese legal tradition prohibited the emigration of the Emperor's subjects—indeed, migration out of China was punishable as a capital offense.⁵³ Yet, the demographics of Guangdong (Kwangtung) Province compelled labor migration.⁵⁴ This migration remained technically criminal until China acceded to the Burlingame Treaty in 1868, formally recognizing the “inherent and inalienable right of man to change his home and allegiance.”⁵⁵

The drafting history of the Burlingame Treaty illustrates the general tendency toward passivity by the Chinese government on the question of its subjects' rights in the United States. Anson Burlingame had served as American minister to China; upon his retirement, he essentially reversed roles and became minister from China to the United States.⁵⁶ Convinced

48. See *supra* notes 5–6 (remarks of Sen. Conkling).

49. See, e.g., 8 Cong. Rec. 1385–87 (February 15, 1879) (remarks of Sen. Hamlin of Maine).

50. Treaty of July 3, 1844, 8 Stat. 592; Treaty of Tientsin of June 18, 1858, 12 Stat. 1023. Tien-lu Li notes that these treaties were one-sided, guaranteeing protection for Americans in China but neglecting reciprocal protection for Chinese in the United States. Tien-lu Li, *supra* note 31, at 16–17.

51. These geographical restrictions were cited in Congressional debates as grounds for abrogating the Burlingame Treaty. See, e.g., 8 Cong. Rec. 1267–69 (February 13, 1879) (remarks of Sen. Grover).

52. See *supra* note 50.

53. Tsai, *Overseas Chinese*, *supra* note 24, at 8–12.

54. *Id.* at 10–13. Most Chinese emigrants to California originated in Guangdong Province. L. Eve Armentrout Ma, *Chinatown Organizations and the Anti-Chinese Movement, 1882–1914*, in *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*, at 149 (Sucheng Chan ed., 1991). Regional associations (*huiquan*) attracting members from various districts in Guangdong were prominent in the Chinese immigrant community in California; the Six Companies of San Francisco's Chinatown were essentially a confederation of these *huiquan*. *Id.* at 149–51; 8 Owen M. Fiss, *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888–1910*, at 304 n.33 (1993).

55. Burlingame Treaty, *supra* note 3, Article V. This language was reminiscent of the Hostages Act of 1868, 15 Stat. 223.

56. Burlingame had served for six years as U.S. Minister to China, prior to resigning “in the interest of his country and civilization” to take up the post of “High Minister empowered to attend to

of the potential profitability of the China trade, Burlingame found a fellow believer in Secretary of State Seward, who acted as the primary drafter of the Burlingame Treaty.⁵⁷ The Chinese authorities ratified Burlingame's actions after the fact, apparently surprised but pleased with his efforts.⁵⁸

While this history suggested that China would be largely indifferent to violations of its subjects' treaty rights, Congress occasionally pondered the potential adverse impact upon Americans resident in China if the Burlingame Treaty was breached by Chinese exclusion laws. For example, during the Senate debate on H.R. 2423 in 1879, Senator Edmunds unsuccessfully proposed an amendment stating:

That the United States hereby recognize a reciprocal right and power in the government of China to regulate, as far as its own dominions are concerned, intercourse between the two countries according to its own sense of propriety notwithstanding existing treaties with the United States⁵⁹

As it turned out, the risks to American interests in China resulting from the exclusion acts emanated primarily from threats of popular violence⁶⁰ and a boycott of American-made goods organized by non-governmental elements,⁶¹ rather than from the Chinese government.

In light of this official passivity, the defense of Chinese treaty rights fell to those in Congress who placed a high value on maintaining the national honor, to Presidents contemplating exercise of the veto power, and to the courts, as individuals affected by the exclusion and deportation acts raised challenges based on international law. For over a decade after proponents of Chinese exclusion sought relief at the federal level, these combined efforts were sufficient to maintain the international legality of United States immigration policy.

When the President failed to secure revisions to the Burlingame Treaty in response to a joint resolution adopted by Congress in 1878,⁶²

every question arising between China and the treaty powers," on November 22, 1867. Li, *supra* note 31, at 17.

57. *Id.*

58. Tsai, *Overseas Chinese*, *supra* note 24, at 24–29.

59. 8 Cong. Rec. 1391 (February 15, 1879).

60. Tsai, *Overseas Chinese*, *supra* note 24, at 89–90.

61. *Id.* at 104–08 (discussing boycott aimed at protesting the Geary Act of 1892, which provided for the deportation of Chinese residents who failed to procure a certificate of residence from federal authorities).

62. *See supra* note 42.

impatient legislators suggested that this executive inaction might signal an implicit invitation to adopt measures frankly breaching the treaty.⁶³ Congress in 1879 passed H.R. 2423, severely limiting the number of Chinese passengers that could board American vessels to the United States.⁶⁴

President Hayes vetoed H.R. 2423, citing two principal reasons: (1) under the Constitution, it is the President, not Congress, who has the ability to abrogate a treaty, with the advice and consent of the Senate; and (2) since it was likely that China would agree to some modification of the treaty, pursuing diplomatic negotiation would be preferable to unilateral action.⁶⁵ President Hayes concluded his veto message by indicating that he found it unnecessary to refer to "more general considerations of interest and duty which sacredly guard the faith of the nation . . . [and which] animate the deliberations of Congress and pervade the minds of our whole people."⁶⁶ He expressed his confidence that "renewed attention" by Congress would "maintain the public duty and the public honor."⁶⁷

The President negotiated a supplementary treaty with China in 1880, allowing the United States to "regulate, limit or suspend" immigration by Chinese laborers but "not absolutely prohibit it."⁶⁸ Any regulation or suspension was to be reasonable and would apply only to laborers.⁶⁹ Chinese laborers already residing in the United States were granted the right to leave and to re-enter, a right frequently used in order to marry or to visit family residing in China.⁷⁰

63. See, e.g., 8 Cong. Rec. 1271 (February 13, 1879) (remarks of Sen. Morgan) ("The apparent willingness of the Government to allow this important subject to drift away from its diplomatic control into the control of the legislative department seems to imply an expectation, if not a desire, that Congress will cut the Gordian knot.")

64. 8 Cong. Rec. 447, 791, 793 (1879).

65. 8 Cong. Rec. 2275 (1879).

66. 8 Cong. Rec. 2276 (March 1, 1879).

67. *Id.*

68. Treaty of November 17, 1880, U.S.-China, 22 Stat. 826.

69. Article II of the 1880 treaty provided that "teachers, students, merchants or [persons travelling] from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and to come of their own free will and accord . . ." *Id.*

70. Relatively few Chinese laborers brought wives with them or married in the United States. Few job opportunities other than prostitution were open to Chinese women in the United States. As a consequence, the representation of women among Chinese immigrants in the United States ranged as low as 3.6% (in 1890) to 7.2% (in 1870). Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in *Entry Denied: Exclusion and the Chinese Community in America, 1882-1943*, at 94 (Sucheng Chan ed., 1991).

Opponents of Chinese immigration were not satisfied with the new treaty and soon demanded legislation exceeding its moderate terms. Senate Bill No. 71 of 1882 would have “suspended” immigration by Chinese laborers for a period of twenty years. President Chester A. Arthur, after examining the negotiating history of the 1880 treaty, concluded in his veto message of April 4, 1882, that:

neither contracting party in concluding the treaty of 1880 contemplated the passage of an act prohibiting immigration for twenty years . . . or thought that such a period would be a reasonable suspension or limitation, or intended to change the provisions of the Burlingame Treaty to that extent. I regard this provision of the act as a breach of our national faith [T]he honor of the country constrains me to return the act with this objection to its passage.⁷¹

Despite these high-minded views, little more than a month later President Arthur signed into law a bill suspending immigration of Chinese laborers for a period of ten years.⁷² Later in the decade, California’s importance in presidential politics became so great that it deeply affected the Executive’s attitude toward the question of Chinese exclusion.⁷³ After President Arthur’s 1882 veto, the executive branch ceased playing a central role in preserving the international legality of immigration policy toward the Chinese.

Federal officials in fact began implementing the Chinese exclusion laws with draconian severity.⁷⁴ Chinese immigrants sought relief through litigation, just as they had successfully challenged discriminatory state laws.⁷⁵ Their efforts provide a valuable object-lesson for present-day lawyers seeking to insure that the United States conforms to its

71. 13 Cong. Rec. 2551–52 (1882) (veto message concerning Senate Bill No. 71 by President Chester A. Arthur).

72. The bill was misleadingly titled “an Act to execute certain treaty stipulations relating to Chinese.” 22 Stat. 58 (1882). It also contained provisions for the deportation of Chinese persons found to be unlawfully present in the United States and prohibited any court from admitting Chinese persons to citizenship. 13 Cong. Rec. 2967–74 (1882).

73. For example, Democratic President Grover Cleveland, alarmed at electoral losses in California, Colorado, Nevada and Oregon, ordered Secretary of State Bayard to renegotiate the 1880 treaty so as to provide a political advantage in the 1888 elections. Tsai, *Overseas Chinese*, *supra* note 24, at 88–89.

74. See Lucy E. Salyer, “Laws Harsh as Tigers”: *Enforcement of the Chinese Exclusion Laws, 1891–1924*, in *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*, at 57–93 (Sucheng Chan ed., 1991).

75. See *supra* notes 39–42 and accompanying text.

international obligations in the treatment of aliens. Legal challenges to the Chinese exclusion laws were carefully orchestrated, with test cases selected and litigated by prominent white attorneys retained by organized Chinese groups.⁷⁶ Chinese access to excellent representation generated much resentment.⁷⁷ That nearly 90% of the federal habeas corpus applications filed on behalf of returning or entering Chinese were successful aroused hostility not only against the Chinese, fueling efforts to make the exclusion laws ever more draconian, but also against their lawyers and the federal judges whose sense of duty and fairness overrode their racial prejudice.⁷⁸

A crucial test of judicial respect for the international obligations of the United States arose out of the Act of July 5, 1884, which required Chinese to produce a certificate of identity as "the only evidence permissible to establish [their] right of re-entry" into the United States.⁷⁹ The Act was necessary, opponents of Chinese immigration argued, because perjury was frequently committed by Chinese laborers claiming prior residence in the United States. Furthermore, they contended that procurement of "Canton certificates," issued pursuant to the 1882 act to signify membership in the excepted classes, was riddled with fraud.⁸⁰

The bill lacked specific provision for Chinese laborers who resided in the United States as of November 1880 but who had departed temporarily prior to the effective date of the law. These persons were beneficiaries of the Supplementary Treaty's guarantee of a right to re-enter, but they lacked certificates because no such certificates existed prior to their departure. Congress's intention regarding the re-entry rights of this particular group of Chinese laborers was ambiguous.

76. See, e.g., McClain & McClain, *supra* note 39, at 3-24.

77. Fritz, *supra* note 46, at 37-38, 45.

78. *Id.* at 28-51 (noting, *id.* at 46, a report in the *Alta California* newspaper that 87% of the roughly 4000 habeas corpus petitions filed by arriving Chinese between 1882 and January 1888 had been granted).

79. An act to amend an act entitled "An act to execute certain treaty stipulations relating to Chinese," 23 Stat. 115 (1884).

80. "Canton certificates" (so-called because of the locale of most embarkations from China toward the United States) were to be procured from Chinese officials prior to the departure of merchants, students and other non-laborers who retained rights of entry under the 1880 Supplementary Treaty. In his annual message on December 4, 1883, President Arthur stated that there was "reason to believe that the law restricting immigration of Chinese has been violated, intentionally or otherwise, by the officials in China on whom is devolved the duty of certifying that the immigrants belong to the excepted classes." Hutchinson, *supra* note 27, at 85. The committee report on the 1884 House bill referred to "the notorious capabilities of the lower classes of Chinese for perjury." H.R. Rep. No. 614, 48th Cong., 1st Sess. (1884); 15 Cong. Rec. 240, 3752 (1884).

In typically strict fashion, immigration officials on the West Coast denied entry to all returning Chinese laborers who lacked certificates. Pursuant to this policy, the collector excluded returning laborer Chew Heong in September 1884. Chew Heong was prepared to prove residence in the United States as of November 1880 and departure to Hawaii in 1881, prior to the availability of re-entry certificates.⁸¹ A mixed panel consisting of Circuit Justice Field, Circuit Judge Sawyer and District Judges Hoffman and Sabin reviewed his application for a writ of habeas corpus.⁸² Under the jurisdictional statutes of the time, the opinion of the Circuit Justice was regarded as prevailing.⁸³ Thus, Field rendered the opinion for the court even though the other three members of the panel strenuously dissented.

Field's opinion is concise, emphasizing: (1) that if the collector's application of the statute leads to absurd or harsh results, the remedy lies with his administrative superiors or with Congress; (2) that "loose notions . . . as to the obligation of an oath" manifested by Chinese seeking entry fully justified Congress's determination to require U.S.-issued certificates as exclusive proof of re-entry entitlement; and, most significant, (3) the need for responsiveness to "a sense of impatience in the public mind with judicial officers for not announcing the law to be what the community at the time wishes it should be."⁸⁴

Circuit Judge Sawyer's dissent repeatedly stresses the importance of national faith and honor in construing the statute in light of the treaty. He asserts that:

[The court] cannot attribute to congress a deliberate intention to commit [an] act of bad faith, without provisions manifesting such a purpose, far more explicit than any found in the act. It would be disrespectful to that body, if not absolutely indecent, to attribute to it such an act of bad faith.⁸⁵

Noting that the re-entry provisions of the 1880 treaty had been carefully negotiated by a "special mission, composed of three distinguished gentlemen,"⁸⁶ Sawyer insists that, had Congress intended to

81. *In re Cheen Heong* [sic], 21 F. 791, 791 (C.C.D. Cal. 1884).

82. *Id.* Sabin was District Judge for Nevada but often sat on circuit panels in California.

83. Fritz, *supra* note 46, at 41.

84. 21 F. 791, 793-94.

85. *Id.* at 798 (Sawyer, J., dissenting).

86. *Id.* at 797. They were James B. Angell, former President of the University of Michigan who had recently been appointed U.S. Minister to China; John F. Swift of California; and William H. Trescott of South Carolina. Tsai, *Overseas Chinese*, *supra* note 24, at 53-54.

deprive Chew Heong of a reasonable opportunity to exercise the right of re-entry, it "would certainly have acted in a manly way, and expressed that intention boldly, openly, and by plain and direct language which could not be misunderstood."⁸⁷

Addressing the political context within which the federal judges in California of that time operated, Sawyer notes that the tide of Chinese immigration had not only moderated but perhaps reversed.⁸⁸ Even assuming that the problem of Chinese immigration remained acute, Sawyer concludes that "there is a price too high to be paid, without absolute necessity, in any case, for the exclusion of Chinese laborers, and that price is the national honor."⁸⁹

When Chew Heong sought review in the Supreme Court, Sawyer's theme of faith and honor resounded in Justice Harlan's majority opinion.⁹⁰ Harlan alludes to the principle of *pacta sunt servanda*,⁹¹ and sets forth the required interpretive framework:

[T]he court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by [treaties] shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted.⁹²

Harlan describes an interesting allocation of roles and responsibilities. He suggests that a failure by Congress to legislate with careful attention

87. 21 F. at 806.

88. Sawyer cites a statistic indicating that in the 28 months since the adoption of the 1882 act, the number of Chinese departures had exceeded arrivals by 12,000. *Id.* at 807-08.

89. *Id.* at 808.

90. *Chew Heong v. United States*, 112 U.S. 536 (1884). The Court reversed by a vote of seven to two, with Field and Bradley in dissent. In a letter to District Judge Matthew Deady of Oregon marked "Confidential—Destroy," Judge Sawyer expressed his sense of vindication as follows:

[I]t is some consolation, after all the lying, abuse, threatening of impeachment etc. as to our construction of the Chinese restriction act, and the grand glorification of brother Field for coming out here and so easily, promptly and thoroughly sitting down on us and setting us right on that subject to find that we are not so widely out of our senses after all.

Quoted in Fritz, supra note 46, at 43.

91. 112 U.S. at 539 (citing Vattel); *id.* at 550 (referring to the "inviolable fidelity with which, according to the established rules of international law, the stipulations of treaties should be observed").

92. *Id.* at 540.

to international obligation denotes both a lack of intelligence and a lack of patriotism. The repudiation of international obligation would reflect badly not only on Congress, but on the people as a whole. Finally, Harlan postulates a responsibility of the courts that is simultaneously activist and deferential. The command to construe statutes consistently with international law, against an otherwise plausible literal meaning, may involve an intrusion by the courts into immigration policymaking. But Harlan suggests that this posture is ultimately deferential, being shaped by the courts' "proper respect" for a coordinate branch.

Field's intemperate dissent not only reviles the Chinese for their allegedly repulsive habits and character but argues that the Burlingame Treaty was a bad bargain:

The stipulations of the treaty, so far as the residence of the citizens or subjects of one country in the other and the trade which would follow such residence are concerned, are . . . one-sided. . . . There is not and never has been any "mutual advantage" in the migration or emigration of the citizens or subjects, respectively, from one country to the other which the treaty, in "cordially recognizing," assumes to exist. Suggestions of any such mutuality were deceptive and false from the outset.⁹³

He insists that principles of construction to avoid unjust or absurd results have no application where it is alleged that Congress has legislated in derogation of a treaty.⁹⁴ Field's position in *Chew Heong* contradicts his earlier decisions as Circuit Justice attempting to construe the certificate provisions of the 1882 act consistently with the 1880 treaty,⁹⁵ a change of heart he explicitly acknowledges.⁹⁶

Chew Heong's victory could not protect his countrymen from further deprivation of treaty rights. In 1888, Congress passed legislation repealing both the 1882 and the 1884 acts.⁹⁷ Anticipating renegotiation of the treaty with China, the original act of 1888 provided for a twenty-year

93. *Id.* at 567.

94. *Id.* at 561–562.

95. *See, e.g., In re Ah Sing*, 13 F. 286, 289 (C.C.D. Cal. 1882); *In re Low Yam Chow*, 13 F. 605, 610 (C.C.D. Cal. 1882).

96. 112 U.S. at 568–569 (noting that he had formerly been of the view that legislation restricting Chinese immigration would violate the Burlingame Treaty, until China's failure to eradicate the coolie trade and to provide any real commercial advantages to America had been called to his attention).

97. Act of September 13, 1888, 25 Stat. 476.

suspension of immigration by Chinese laborers.⁹⁸ Acting with unseemly haste based upon unconfirmed rumors in a London newspaper that the Chinese government had rejected the twenty-year suspension,⁹⁹ Congress passed the Scott Act indefinitely prohibiting the re-entry of Chinese laborers holding certificates issued under the 1882 and 1884 acts.¹⁰⁰ Despite his knowledge that negotiations with China were continuing in good faith, President Cleveland signed this bill into law.¹⁰¹

Chae Chan Ping was a Chinese laborer who had lived in the United States for twelve years prior to making a visit to China in 1887. Before he left the United States he obtained the required certificate for re-entry. In transit at the time the Scott Act was passed, Chae Chan Ping and roughly 600 of his compatriots soon landed seeking entry.¹⁰² Another 20,000 Chinese laborers with re-entry permits were sojourning in China, most with the intention of returning to their former U.S. residence.¹⁰³

Congress deliberately acted without the concurrence of the Chinese government, leaving no question that the statute intentionally violated the 1880 treaty.¹⁰⁴ The Supreme Court's opinion in *Chae Chan Ping* (The *Chinese Exclusion Case*) sided with Congress, conclusively pronouncing the "later in time" rule sustaining the operative domestic effect of statutes violating international norms.¹⁰⁵ Writing for a unanimous Court, Justice Field justified this doctrine on the basis of deference to the authority of Congress:

The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts 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. When once it

98. *Id.*

99. Tsai, *Overseas Chinese*, *supra* note 24, at 90-93.

100. 25 Stat. 504 (1888).

101. Some scholars claim that, even while Secretary of State Bayard was engaged in active negotiations, unaware of the change in strategy, President Cleveland signalled his approval of the bill to Sen. Scott, in the unrealized hope that this action would gain the Democratic Party popularity on the West Coast in the presidential elections of 1888. Tsai, *Overseas Chinese*, *supra* note 24, at 92-93.

102. Tsai, *Chinese Experience*, *supra* note 31, at 73.

103. Shien-woo Kung, *Chinese in American Life: Some Aspects of Their History, Status, Problems, and Contributions* 63-64 (1962).

104. *Chae Chan Ping v. United States* (the *Chinese Exclusion Case*), 130 U.S. 581, 600 (1889).

105. This decision had been presaged by similar rulings in the *Head Money Cases*, 112 U.S. 580, 599 (1884), and *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

is established that congress possesses the power to pass an act, our province ends with its construction, and its application to cases as they are presented for determination.¹⁰⁶

The contemporaneous discourse concerning the international legality of the Chinese exclusion acts is instructive in several respects. First, although proponents of the exclusion acts sometimes offered cynical rationales for abrogating the treaty with China, presidents sometimes acquiesced in the breach for political gain, and the courts ultimately sustained the breach out of deference, all three branches seriously addressed the risk that international obligations would be violated. In the aftermath of the *Chinese Exclusion Case*,¹⁰⁷ a more cavalier attitude toward the interrelationship between international law and immigration policy took hold. One can find few contemporary echoes of the ringing pronouncements concerning national honor made by congressional opponents of the exclusion acts,¹⁰⁸ by the key lower federal court judges,¹⁰⁹ by the Supreme Court in *Chew Heong*,¹¹⁰ and by Presidents Hayes and Arthur.¹¹¹

Second, the inclination to avoid responsibility for an international law violation initially had the tendency to direct U.S. policy toward international lawfulness, for example by canons of construction such as the *Charming Betsy* presumption.¹¹² Once the political impetus toward severe Chinese exclusion measures became unstoppable, the various branches, facing an imminent or actual breach of international law, began to play a game of political “dodgeball.” They tried to displace responsibility for the violation onto another actor, be it a treaty partner¹¹³ or a coordinate branch of the federal government.¹¹⁴

106. 130 U.S. at 602–03.

107. *See supra* note 12.

108. *See supra* notes 1, 6–7, 45, 47–49.

109. *See supra* notes 40, 46, 78, 81, 85–89.

110. *See supra* notes 90–92.

111. *See supra* notes 8, 10, 65–67, 71.

112. *See supra* note 18.

113. For example, proponents of H.R. 2423 insisted that China had breached the Burlingame Treaty by failing to eradicate the coolie trade. 8 Cong. Rec. 1299 (February 14, 1879) (remarks of Sen. Blaine).

114. For example, proponents of Chinese exclusion measures in 1879 suggested that the President, by not responding to Congressional demands to renegotiate the Burlingame Treaty, had implicitly invited Congress to abrogate it. *See, e.g.*, 8 Cong. Rec. 1271, 1274 (February 13, 1879) (remarks of Sen. Morgan).

Third, at one time there was substantial doubt concerning the constitutional authority of Congress to legislate in violation of international obligations.¹¹⁵ The raw power of Congress to adopt immigration laws that breach treaties is generally recognized following the *Chinese Exclusion Case*.¹¹⁶ A long-term, and possibly unanticipated, consequence is the radical diminution of the seriousness with which Congress, as well as the Executive and the courts, ponder the international legality of proposed immigration policies.

Finally, the weakness of China as a treaty partner was a significant factor emboldening proponents of the Chinese exclusion acts. Participants in the debates agreed that China was unlikely to take serious retaliatory action for the denial of its subjects' treaty rights.¹¹⁷ While international norms relevant to U.S. immigration policy in the twentieth century are primarily derived from multilateral treaties or from customary law, the problem of weak enforcement mechanisms persists. The improbability of serious international repercussions for adopting even flagrantly illegal policies continues to breed cynicism and disregard for preserving the "national honor" in the course of devising immigration policy.

III. HIV EXCLUSION

Since 1987, the United States has excluded immigrants and travelers¹¹⁸ who are HIV¹¹⁹ positive. Although several waivers are now available for international travelers, the policy itself violates the International Health Regulations, a treaty binding on the United States.¹²⁰ Despite this

115. See *supra* notes 65–67 (1879 Hayes veto message).

116. See *supra* note 12.

117. Sen. Matthews of Ohio, an opponent of H.R. 2423, questioned whether similar proposals would be made to breach a treaty with a "fighting nation" such as Great Britain, France, or Germany. 8 Cong. Rec. 1274 (February 13, 1879). Sen. Conkling suggested that, if Congress voted to breach the treaty, it would be subject to the criticism, "in the phrase of boys, that we had not taken somebody of our size." 8 Cong. Rec. 1309 (February 14, 1879). A sponsor of the legislation, Sen. Sargent of California, stressed that both France and Great Britain had adopted tax measures that arguably violated their treaties with China and had not suffered any retaliation. 8 Cong. Rec. 1313 (February 14, 1879).

118. "Travelers" refers to persons who enter the United States for purposes other than permanent residence, such as for business, tourism, or education.

119. "HIV" refers to both human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS).

120. World Health Organization (WHO), *International Sanitary Regulations*, 4th World Health Assembly, Official Rec. No. 37, at 334 (1952), *reprinted as amended in WHO, International Health Regulations (1969)* (3d ed. 1983) [hereinafter *International Health Regulations*]. The United States

transgression and strong opposition of the World Health Organization (WHO) to any HIV/AIDS exclusion policy, both Congress and the Executive have participated in the implementation of this policy since its inception.

Unlike the debates over the Chinese exclusion acts,¹²¹ the discussions about HIV/AIDS exclusion by Congress and the Executive lack any serious discourse concerning U.S. obligations under international law. Although the bigotry of the nineteenth century is no longer part of the public record,¹²² the modern dialogue focuses solely on domestic concerns such as economics and health, ignoring international considerations. The history of HIV/AIDS exclusion illustrates the astonishing disappearance of international law from immigration policy discourse since the *Chinese Exclusion Case*.¹²³

A. *The International Health Regulations*

WHO, an organ of the United Nations, has the authority to adopt regulations necessary to fight the international spread of disease.¹²⁴ Under the WHO Constitution, these regulations are binding on United Nations member states unless a state submits a reservation within a designated time period that is accepted by the World Health Assembly.¹²⁵ Based on this authority, in 1951 the International Health Regulations (Regulations) were adopted by the World Health Assembly.¹²⁶ The purpose of the Regulations is to “ensure the maximum security against the international spread of diseases with a minimum interference with world traffic.”¹²⁷

has adopted the regulations without reservation. *Id.*, Annex I at 52. For a discussion of the historical development of international cooperation in public health, see 1 David M. Leive, *International Regulatory Regimes* 15–42 (1976).

121. See *supra* part II.

122. *But cf.* 139 Cong. Rec. S1721 (daily ed. Feb. 17, 1993) (statement of Sen. Jesse Helms) (“I had reached the conclusion that every possible concession had already been made to the AIDS lobby and to the homosexual rights movement which feeds it. But the Clinton Administration’s kowtowing to this arrogant and repugnant political group is beyond belief.”).

123. 130 U.S. 581 (1889).

124. WHO Const. art. 21.

125. The WHO Constitution provides that “Regulations adopted pursuant to Article 21 shall come into force for all members after due notice has been given of their adoption by the Health Assembly except for such members as may notify the Director General of rejection or reservations within the period stated in the notice.” *Id.* art. 22.

126. *International Health Regulations*, *supra* note 120.

127. *Id.* at 5.

The Regulations state that they are to be the maximum measures applicable to international traffic a member state may adopt to protect its territory against certain enumerated diseases.¹²⁸ Moreover, in 1957 the World Health Assembly declared that the Regulations also apply to diseases not specifically listed.¹²⁹ For unlisted diseases, the Regulations require that any actions taken by member states be in accordance with the principle of minimal interference with international traffic.¹³⁰

For health measures implemented by member states to control the spread of unlisted diseases, the Regulations act as a ceiling. They permit a state to require a health document only for the listed diseases.¹³¹ Therefore, any state requiring a document for diseases that are not listed is acting in violation of the Regulations.¹³² In 1985, WHO stated:

In accordance with Article 81 of the International Health Regulations . . . no health document, other than those provided for in the Regulations, shall be required in international traffic; thus it is pointed out that there is no provision for any certificate guaranteeing that a person entering any country or coming from any country is free from a given disease. This also applies to AIDS, and no country bound by the Regulations may refuse entry into its territory to a person who fails to provide a medical certificate stating that he or she is not carrying the AIDS virus.¹³³

The prohibition on health-related documents outside the scope of the Regulations applies to any questionnaires a traveler must complete prior to entry.¹³⁴ Thus, the United States policy of requiring travelers to

128. *Id.* art. 23. The Regulations initially covered plague, cholera, yellow fever and smallpox. Dr. P. J. Delon, *The International Health Regulations: A Practical Guide* 9 (1975).

129. WHO, *Fourth Report of the Committee on International Quarantine*, 10th World Health Assembly, Official Rec. No. 79, Annex 1, at 495 (1957).

130. *Id.*

131. *International Health Regulations*, *supra* note 120, art. 81 ("No health document, other than those provided for in these Regulations, shall be required in international traffic.").

132. See Nancy E. Allin, Note, *The AIDS Pandemic: International Travel and Immigration Restrictions and the World Health Organization's Response*, 28 Va. J. Int'l L. 1043, 1050 (1988).

133. 60 Epidemiological Rec. 311 (1985). WHO reiterated this statement in 1986 in response to requests from Member States for advice about certificates guaranteeing that a person is free from AIDS. 61 Epidemiological Rec. 27 (1986). See also WHO/SPA/GLO/87.1 (1987) ("No measures, and no health document, other than those provided for in the Regulations, may be imposed on arriving travelers.").

134. See Delon, *supra* note 128, at 20 ("No other document can be required for travellers: for example, it is not admissible to make a traveller fill in, for health reasons, a questionnaire . . .").

complete a visa application stating whether they are HIV-positive¹³⁵ is not permitted.

The Regulations recognize an important distinction between international travelers and migrants. For migrants, i.e., persons intent on residing in another country for a protracted period of time, the Regulations allow additional health measures to be taken.¹³⁶ Although the Regulations do not address immigrants specifically, it is logical to assume that a country could also impose additional health requirements on those seeking permanent residence. States that choose to impose extra conditions on migrants must notify WHO of such provisions.¹³⁷

Despite their apparent violation, the Regulations have not been invoked to challenge the U.S. policy on HIV/AIDS. Although the Regulations provide for a dispute resolution procedure with final authority in the International Court of Justice,¹³⁸ WHO historically has relied on informal negotiation with state and public health officials and the “good offices” of the Director-General.¹³⁹ No alleged violation of the Regulations, however, has ever been brought before the International Court of Justice.¹⁴⁰ As a result, the legally binding Regulations are treated more like recommendations.¹⁴¹

B. *The WHO Global Programme on AIDS*

Although the Regulations are the only binding international law prohibiting HIV-related restrictions on travel, WHO has also launched a crusade of “soft-law”¹⁴² through its “Global Strategy for the Prevention

135. See *infra* part III.C.

136. *International Health Regulations*, *supra* note 120, art. 84 (“Migrants, nomads, seasonal workers or persons taking part in periodic mass congregations . . . may be subjected to additional health measures . . . Each State shall notify the Organization of the provisions of any such laws and regulations . . .”). See also Delon, *supra* note 128, at 20 n.3 (“The Mecca Pilgrimage constitutes one of these congregations, though it is not mentioned by name in the Regulations.”).

137. *International Health Regulations*, *supra* note 120, art. 84.

138. Leive, *supra* note 120, at 46.

139. *Id.*

140. See Delon, *supra* note 128, at 22.

141. Leive, *supra* note 120, at 46.

142. See Anthony S. DiNota, Note, *The World Health Organization’s Resolution Condemning AIDS-Related Discrimination and Ongoing United States Noncompliance at the Border*, 12 N.Y. L. Sch. J. Int’l & Comp. L. 151 (1991) (arguing that WHO declarations are merely moral in character with no legal authority).

and Control of AIDS.”¹⁴³ As part of this campaign, WHO in 1988 issued a resolution entitled “Avoidance of discrimination in relation to HIV-infected people and people with AIDS,”¹⁴⁴ and a “Statement on Screening of International Travellers for Infection with Human Immunodeficiency Virus.”¹⁴⁵ The Resolution urges member states to avoid discriminatory action against HIV-infected people in national policies, including those affecting travel, aimed at the prevention and control of HIV infection and AIDS.¹⁴⁶ The Statement asserts that screening international travelers for HIV is “ineffective, impractical and wasteful.”¹⁴⁷ The United States has consistently espoused the tenets of the Global Programme, despite current U.S. travel restrictions.¹⁴⁸

C. *United States Policy*

Notwithstanding binding international law to the contrary, the United States began its policy of excluding travelers with HIV in 1987. This policy was amended several times before being codified in 1993. The debates consistently failed to recognize the clear conflict with U.S. international obligations.

1. *The Helms Amendment*

In 1987, Senator Jesse Helms attached an amendment to an appropriations bill that required the President to add HIV infection to the

143. See WHO, *Global Strategy for the Prevention and control of AIDS*, U.N. Doc. A/43/341 (1988). WHO is authorized “to make recommendations to members with respect to any matter within the competence of the Organization.” WHO Const. art. 23. Therefore, all statements and resolutions issued by WHO, other than the International Health Regulations, are mere recommendations with no legally binding effect. However, it could be argued that at some point a recommendation by WHO becomes customary international law.

144. Res. WHA 41.24, WHO/GPA/INF/88.2 (1988).

145. WHO/GPA/INF/88.3 (1988). For a more comprehensive discussion of these resolutions see DiNota, *supra* note 142.

146. WHO/GPA/INF/88.2 (1988).

147. WHO/GPA/INF/88.3 (1988). The Statement also refers to a consultation of experts that convened in March 1987. *Id.* At that meeting, the consultation noted that “[n]o measures, and no health documents, other than those provided for in the [International Health] Regulations, may be imposed on arriving travellers.” WHO/SPA/GLO/87.1 (1987).

148. For example, on December 1, 1994, the United States signed the Paris AIDS Summit Declaration which stated, among other things, that persons with HIV/AIDS should not be discriminated against and should enjoy equal protection of the law with regard to travel. International observers noted that the United States’ policy was “paradoxical” because despite funding AIDS research, the U.S. maintains irrational travel restrictions on foreigners. Scott Kraft, *42 Nations Sign Symbolic AIDS Pact*, L.A. Times, Dec. 2, 1994, at A6.

list of dangerous contagious diseases for which persons seeking entry to the United States could be excluded.¹⁴⁹ President Reagan signed the bill into law on July 11, 1987.¹⁵⁰ Under the Helms Amendment, persons seeking permanent residence in the United States were required to be tested for HIV/AIDS prior to arrival. Those who tested positive were subject to exclusion without the opportunity of a waiver and were denied permanent residence.¹⁵¹ Persons seeking entry for limited visits, i.e., tourism or business, were required to complete a visa application stating that they were free from infection with any excludable diseases and were subject to testing at the discretion of consular officials and INS officials.¹⁵² Those who declared they had HIV/AIDS could seek a thirty-day waiver that, if granted, would allow them to enter. However, such a waiver resulted in a passport stamp indicating they had a dangerous contagious disease as well as a record in the American Embassy of their home country.¹⁵³

Congressional debate about the Helms Amendment was limited and did not consider international law. Senator Helms, in support of the amendment, stated that “[t]he Federal Government has the obligation to protect its citizenry from foreigners . . . who carry deadly diseases which threaten the health and safety of U.S. citizens.”¹⁵⁴ Citing WHO statistics and the fact that other countries, including China, South Korea, Saudi Arabia, Belgium and India, test immigrants for HIV infection, Senator Helms could not “see any logical reason for opposing th[e] amendment.”¹⁵⁵ One Senator, afraid that the Senate was “going to go off

149. The bill initially required the President take this step before funds authorized by the bill for the emergency provision of drugs determined to prolong the life of persons with AIDS could be released. 133 Cong. Rec. S7405 (daily ed. June 2, 1987).

150. For a more comprehensive discussion of the legislation see Juan P. Osuna, *The Exclusion from the United States of Aliens Infected with the AIDS Virus: Recent Developments and Prospects for the Future*, 16 Hous. J. Int'l L. 1, 7–12 (1993).

151. 52 Fed. Reg. 32,542 (1987).

152. 52 Fed. Reg. 21,607 (1987). Although the INS regulations applied to travelers as well, it appears from the limited debate that the Helms Amendment was only intended to apply to those seeking permanent residence. 133 Cong. Rec. S7405 (daily ed. June 2, 1987). See also Sandra G. Boodman, *U.S. Ban on Tourists With HIV Surprises Some Lawmakers; Jailing of Visitor Sparks Calls for Change in Policy*, Wash. Post, Apr. 19, 1989, at A2 (quoting Sen. Alan Cranston as saying “Congress intended this policy to apply . . . only to individuals seeking permanent residency At no time during the debate was there any discussion indicating that this policy was intended to bar entry of individuals visiting the United States.”).

153. See Philip J. Hiltz, *U.S. to Ease Passport Curbs on Visitors Infected with AIDS Virus*, N.Y. Times, Jan. 17, 1990, at B6.

154. 133 Cong. Rec. S7405 (daily ed. June 2, 1987).

155. *Id.*

half-cocked," did acknowledge that such legislation should be subject to public debate and was not well suited for an appropriations bill.¹⁵⁶ Nonetheless, the amendment was unanimously approved by the Senate without any mention of possible international implications.¹⁵⁷

This exclusion policy received worldwide attention in 1989 when a Dutch official, Hans Paul Verhoef, was detained as he attempted to enter the United States to attend an international AIDS conference.¹⁵⁸ Mr. Verhoef had not declared on his visa application that he had AIDS and was stopped by customs officials when the medication AZT was found in his luggage.¹⁵⁹ Although an immigration judge granted him a waiver after he had spent several days in a Minnesota prison, the incident starkly highlighted the U.S. policy.¹⁶⁰ Calls for a change immediately followed.¹⁶¹

In May 1989, one month after the Verhoef affair, the Attorney General issued a directive that eased visa restrictions and allowed entries of people with HIV for up to thirty days to seek medical treatment, attend conferences, and visit relatives.¹⁶² However, tourists and general business travelers with HIV were still denied admission.¹⁶³ The Bush Administration later granted the State Department authority to issue special ten-day visas for persons attending professional, scientific, or academic conferences in the United States.¹⁶⁴ During this period, members of Congress frequently noted that the U.S. policy was contrary

156. *Id.* (statement of Sen. Danforth) ("This is not an issue that has enjoyed the analysis of committees before coming to the Senate. . . . I am going to vote for the Helms Amendment regretting that it is coming up on a supplemental appropriations bill, but I would also like to urge . . . [a] forum in which we in the Senate could be educated as to the facts of AIDS and also directed to those major philosophical, political issues, and budgetary issues that we are going to have to face up to.").

157. *Id.* The actual vote was 96 yeas to 0 nays with four senators absent. *Id.* The amendment required a serologic test for HIV as part of the medical examination necessary for admission into the United States. 52 Fed. Reg. 32,540-03 (1987) (codified at 42 C.F.R. pts. 34.2(b), 34.4(a)(1), (1)(iii), (2), (3), (5)).

158. Victor F. Zonana, *Dutch AIDS Patient Freed, Travels to S.F.*, L.A. Times, Apr. 9, 1989, at A3.

159. *Id.*

160. Boodman, *supra* note 152.

161. *Id.*

162. See *Foreigners with AIDS Allowed Limited Entry to U.S.*, 66 Interpreter Releases 624, 625-26 (1989); Sandra G. Boodman, *Foreigners With AIDS to Be Permitted Limited Entry to U.S.*, Wash. Post, May 19, 1989, at A20.

163. 66 Interpreter Releases at 625.

164. See *U.S. Creates Special AIDS Visas*, 67 Interpreter Releases 467 (1990).

to WHO standards¹⁶⁵ and undermined international efforts to fight the spread of HIV/AIDS.¹⁶⁶

Controversy about the HIV exclusion policy created confusion and buck-passing among lawmakers during 1990. Members of Congress claimed that the Executive could remove HIV from the list administratively through the Secretary of Health and Human Services (HHS).¹⁶⁷ The Bush Administration, on the other hand, maintained that, because Congress had passed legislation adding HIV to the list, only Congress could take HIV off the list.¹⁶⁸

2. *IMMACT*

The passage of the Immigration Act of 1990 (IMMACT)¹⁶⁹ mooted the buck-passing controversy. IMMACT provided that the HHS Secretary was to maintain a list of “communicable disease[s] of public health significance” for the health-related exclusion grounds.¹⁷⁰ In January 1991, HHS published proposed regulations that removed HIV and all other diseases except active tuberculosis from the list for which persons could be excluded.¹⁷¹ During the public comment period that followed, members of the public, Congress, and the Executive all voiced strong opposition.¹⁷² One proposal, made by a group of fifteen Republican members of the House, asked that the HHS Secretary, then Dr. Louis Sullivan, make a distinction between visitors and immigrants. They encouraged Dr. Sullivan to continue the exclusion of people with

165. See, e.g., Philip J. Hilts, *U.S. to Ease Passport Curbs on Visitors Infected with AIDS Virus*, N.Y. Times, Jan. 17, 1990, at B6 (quoting Rep. Henry A. Waxman); 136 Cong. Rec. S4069–70 (daily ed. April 5, 1990) (statement of Sen. Alan Cranston).

166. See, e.g., Philip J. Hilts, *U.S. Urged to End Screening on AIDS*, N.Y. Times, Dec. 13, 1989, at B14 (quoting Sen. Edward M. Kennedy); Boodman, *supra* note 152. In 1989, the National Commission on AIDS also criticized the exclusion policy, stating that it was contrary to international opinion and practice. Osuna, *supra* note 150, at 14.

167. See Malcolm Gladwell, *HHS Can Lift AIDS-Virus Immigration Barrier, Opinion Says*, Wash. Post, May 23, 1990, at A9.

168. *Id.* See also Osuna, *supra* note 150, at 16–17.

169. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended in scattered sections of 8 U.S.C.).

170. 8 U.S.C. § 1182 (1994).

171. 56 Fed. Reg. 2484, 2485 (1991).

172. See, e.g., Malcolm Gladwell, *Reversal of AIDS Exclusion is Said to be Shelved; 4-Year Ban to Immigration Criticized as Discriminatory and Medically Unjustified*, Wash. Post, May 25, 1991, at A6 (citing the receipt of 40,000 letters by HHS in opposition to removing HIV from the exclusion list); Robert Pear, *Health Dept. Loses in AIDS Rule Dispute*, N.Y. Times, May 28, 1991, at A18 (discussing division in Bush Administration between the HHS and the Department of Justice).

HIV who sought permanent residence but not those seeking entry for limited duration.¹⁷³ Although the Representatives did not acknowledge the International Health Regulations in their proposal, such a policy would have been consistent with the Regulations. Instead, in the face of vast criticism, Dr. Sullivan backed down completely, issuing regulations that kept HIV on the list.¹⁷⁴ These regulations remained in effect throughout the remainder of the Bush Administration despite continued criticism.¹⁷⁵

As with the Helms Amendment, Congressional debates about IMMACT did not mention international law, the International Health Regulations, or the WHO Global Programme on AIDS as they pertain to HIV travel restrictions. Ironically, on October 1, 1990, just twenty-six days before the passage of IMMACT, a resolution was introduced in Congress designating December 1, 1990 as "World AIDS Day."¹⁷⁶ This resolution declared that "the one hundred and sixty-seven Member States of the World Health Organization . . . have accepted the responsibility to . . . control the spread of HIV infection . . . in conformity with the WHO Global AIDS Strategy."¹⁷⁷ Despite Congress's awareness of WHO's Global Strategy, no hearings on IMMACT discussed the possible international consequences of health-related exclusion. WHO's "Statement on Screening of International Travellers for Infection with Human Immunodeficiency Virus"¹⁷⁸ references the "Report of the Consultation on International Travel and HIV Infection."¹⁷⁹ Even a cursory reading of this Report reveals that HIV exclusion of international travelers is contrary to the Regulations. Yet, Congress operated as if completely oblivious to the Regulations.

3. *The Clinton Administration*

When President Clinton took office, it appeared HIV would finally be removed from the exclusion list of contagious diseases. As part of his

173. Alexander Peters, *15 Republicans Target AIDS Immigration Plan*, *The Recorder*, Feb. 12, 1991, at 1.

174. 56 Fed. Reg. 25,000 (1991) (codified at 42 C.F.R. pt. 34).

175. *See, e.g.*, 138 Cong. Rec. H6253 (daily ed. July 21, 1992) (statement by Rep. McDermott that the "policy toward HIV infected people . . . has embarrassed and isolated the United States in the international community"). *See also* Osuna, *supra* note 150, at 20–22.

176. 136 Cong. Rec. E 3065 (daily ed. Oct. 1, 1990).

177. 136 Cong. Rec. E3065, E3066 (daily ed. Oct. 1, 1990).

178. WHO/GPA/INF/88.3 (1988).

179. WHO/SPA/GLO/87.1 (1987).

“10-point plan” for immigration reform, issued during the presidential campaign, he had vowed to end AIDS immigration restrictions.¹⁸⁰ When HHS Secretary Donna Shalala was poised to drop HIV from the list in February 1993,¹⁸¹ Congress reacted by codifying the existing policy.¹⁸² The debate on this legislation, although extensive, focused primarily on public health and economics.¹⁸³

With the state of the Nation’s health care system at the forefront of public concern, the focus was turned toward the cost of allowing people with HIV into the country.¹⁸⁴ Unlike the 1987 debate, where the threat to public health and the economic impact were two separate questions, the 1993 debates blurred the issues by asking whether the “public charge” exclusion ground¹⁸⁵ would be sufficient to keep those with HIV out of the country.¹⁸⁶ Although some members of Congress focused on the difference between travelers and immigrants,¹⁸⁷ the final legislation made no such distinction. International law was not discussed. It was noted, however, that the United States has “been boycotted for [its] travel policy by the International Red Cross [and] by the World Health Organization”¹⁸⁸

With enough Congressional support to override a veto, the legislation was enacted without any protest from President Clinton.¹⁸⁹ Whether Congress or the Executive was aware of the International Health Regulations and their application to HIV exclusion remains unclear.

180. See *Bush, Clinton Differ on Immigration*, 69 Interpreter Releases 1030 (1992).

181. Joyce Price, *Dropping AIDS Ban Irks Doctors*, Wash. Times, Feb. 10, 1993, at A1 (noting also that the American Medical Association was against the proposed policy as it would apply to permanent residents).

182. National Institutes of Health Revitalization Act of 1993 § 2007, Pub. L. 103-43, 107 Stat. 122 (1993) (amending 8 U.S.C. § 1182(a)(1)(A)(i) to include aliens with HIV). For an in depth analysis of this legislation and the accompanying debates see Osuna, *supra* note 150, at 25–39. See also H.R. Conf. Rep. No. 100, 103rd Cong., 1st Sess. 118 (1993) (stating that the HIV/AIDS exclusion policy is intended to be “a codification of current administrative practice”).

183. Osuna, *supra* note 150, at 25–39.

184. Amy L. Fairchild & Eileen A. Tynan, *Policies of Containment: Immigration in the Era of AIDS*, 84 Am. J. Pub. Health 2011, 2017 (1994) (citations omitted).

185. 8 U.S.C. § 1182(a)(4) (1994) (allowing for the exclusion of persons who may, at any time, become a public charge). Although “public charge” is not defined, the greatest number of visa denials are based on this provision. See James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 Wash. L. Rev. 1, 12 (1991).

186. Fairchild & Tynan, *supra* note 184, at 2018.

187. *Id.*

188. 139 Cong. Rec. H1204 (daily ed. Mar. 11, 1993) (statement of Rep. Waxman).

189. Frank J. Murray, *Clinton Loses Fight to Remove HIV Ban; House Backs Senate on Immigration*, Wash. Times, March 12, 1993, at A1.

Neither branch ever acknowledged that international law had any bearing on the matter. President Clinton, when asked about the HIV exclusion provision at the signing ceremony for the bill, merely remarked, "That's the will of Congress."¹⁹⁰

IV. INTERDICTION AND FORCED RETURN OF ASYLUM-SEEKERS

With the May 2, 1995, announcement that irregular Cuban migrants intercepted on the high seas would be repatriated directly to Cuba,¹⁹¹ the issue of the international legality of interdiction and forced repatriation of asylum-seekers gained newfound urgency.¹⁹² In the press briefing announcing the new Cuban policy, no mention was made of the 1967 Protocol relating to the Status of Refugees, which the United States ratified in 1968,¹⁹³ nor to its prohibition on refoulement (forced repatriation) of refugees.¹⁹⁴ While Attorney General Reno stated that interdicted Cuban asylum-seekers with good reason not to seek entry by means of in-country processing at the U.S. interest section in Havana would be screened prior to repatriation,¹⁹⁵ the laconic text of the accord

190. *President Clinton Remarks During a White House Signing Ceremony for the National Institutes of Health Reauthorization Bill*, Reuters, June 10, 1993, available in LEXIS, News Library, Script File.

191. Transcript of Press Briefing by Attorney General Reno, Gen. Sheehan, Under Secretary Tarnoff, May 2, 1995, U.S. Newswire, May 3, 1995, available in LEXIS, News Library, Cumwv File.

192. With the closure of the safe haven for Haitians at Guantanamo in January 1995, for all but certain unaccompanied minors, a similar policy of repatriation of Haitian asylum-seekers also prevails. *U.S. Policy Changed with Guantanamo Safe Havens; Providing Haitian Refugees Temporary Shelter Offered Protection without Promise of Permanent Resettlement*, Wash. Post, Feb. 5, 1995, at A24.

193. Protocol relating to the Status of Refugees, done January 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force October 4, 1967).

194. Article 33 of the 1951 Convention relating to the Status of Refugees, 189 U.N.T.S. 150, incorporated by reference into the 1967 Protocol, *supra* note 193, establishes the principle of *non-refoulement*, prohibiting states from returning refugees "in any manner whatsoever" to the frontiers of territories where they face threats to life or freedom. In the May 2, 1995, press briefing, Attorney General Reno indicated that "[m]easures will be taken to ensure that persons who claim a genuine need for protection which they believe cannot be satisfied by applying at the U.S. interest section will be examined before return." Transcript of Press Briefing, *supra* note 191. Most Cubans intercepted at sea and indicating an intent to apply for asylum will be directed to make use of the possibility for in-country refugee processing in Havana. *Id.*

195. *Id.*

with Cuba vaguely reaffirms only unspecified international obligations of both nations.¹⁹⁶

The Administration's lack of careful attention to international norms in crafting this new agreement may be explained by its victory in *Sale v. Haitian Centers Council*,¹⁹⁷ establishing the surprising proposition that asylum-seekers intercepted on the high seas may be returned directly to their persecutors without violating the prohibition on refoulement.¹⁹⁸ It may also reflect a recent tendency for developed states to craft bilateral accords in order to evade their obligations under multilateral refugee treaties. Unfortunately, this tactic has become all too common in contemporary European immigration policy as well.¹⁹⁹

We will not attempt to provide an exhaustive critique of *Haitian Centers Council*.²⁰⁰ Rather, this section explores why policymakers chose, in Justice Field's words, to "announc[e] the law to be what the community at the time wishes it should be."²⁰¹ In the case of interdiction, all branches played a role. The Executive took the initiative to please the public, regardless of international obligation. The Supreme Court conferred its somewhat equivocal blessing on the policy.²⁰² And Congress remained passive, despite its previous explicit commitment to a policy of bringing our immigration law into conformity with the Refugee Protocol.²⁰³

196. U.S.-Cuba Joint Statement on Migration, May 2, 1995, 6 U.S. Dep't St. Dispatch 397 (1995) ("All actions taken will be consistent with the parties' international obligations").

197. 113 S. Ct. 2549 (1993).

198. *Id.* at 2562-63.

199. See Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations*, 35 Va. J. Int'l L. 13, 33, 38-39 (1994) (discussing removal agreements between European Union and Central European buffer states).

200. For such critiques see, e.g., Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994); Thomas David Jones, *The Haitian Refugee Crisis: A Quest for Human Rights*, 15 Mich. J. Int'l L. 77, 102 (1993) (characterizing *Haitian Centers Council* as "Dred Scott case of immigration"); Nicholas R. Koberstein, Comment, *Without Justification: Reliance on the Presumption against Extraterritoriality in Sale v. Haitian Centers Council, Inc.*, 7 Geo. Immigr. L.J. 569 (1993); Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 Yale L.J. 2391 (1994); Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 Harv. Int'l L.J. 1 (1994).

201. See *supra* note 84 and accompanying text (the relevant community in this instance being primarily voters and politicians in Florida).

202. See 113 S. Ct. at 2567.

203. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified at 8 U.S.C. § 1158(a) (1988)); S. Rep. No. 256, 96th Cong., 2d Sess. 4, 9 (1979), *reprinted in* 1980 U.S.C.C.A.N. 141, 144, 149.

At the early stages of the Haitian interdiction program, the United States paid careful heed to the terms of the Refugee Protocol. A formal opinion of the Office of Legal Counsel in the Department of Justice indicated that the prohibition on refoulement applied on the high seas.²⁰⁴ The 1981 United States-Haiti accord stated that return of interdicted Haitians would be "selective."²⁰⁵ The Executive Order implementing the interdiction policy²⁰⁶ provided for screening of asylum seekers aboard Coast Guard vessels, to insure "strict observance of our international obligations concerning those who genuinely flee persecution in their homeland."²⁰⁷ Thus, in the initial phases of interdiction, the Government recognized the relevance of international law and shaped its policy with the prohibition of refoulement clearly in mind.

During the decade that Executive Order No. 12,324 governed the Haitian interdiction program, however, very few Haitians managed to pass beyond shipboard screening to receive full asylum hearings in the United States.²⁰⁸ Thus, when the infamous Kennebunkport Order²⁰⁹ was issued in May 1992, mandating repatriation without screening, the practical impact on Haitian asylum-seekers was arguably marginal. Nevertheless, the symbolic importance of the Kennebunkport Order was substantial. Many feared the potential damage to respect for international refugee law that the Order might engender, and litigation resulted.²¹⁰

Harold Koh, drawing on his earlier studies of the contemporary dynamics of separation of powers,²¹¹ has convincingly explained the pattern of executive action,²¹² judicial imprimatur,²¹³ and legislative

204. 5 Op. Off. Legal Counsel 242, 248 (1981).

205. Agreement Effectuated by Exchange of Notes, Sept. 23, 1981, U.S.-Haiti, 33 U.S.T. 3559.

206. Exec. Order No. 12,324, 46 Fed. Reg. 48,109 (1981).

207. *Id.* at 48,109.

208. Over 25,000 Haitians were repatriated from the inception of the interdiction program in 1981 until the coup against President Aristide in September 1991. Andrew G. Pizor, Comment, *Sale v. Haitian Centers Council: The Return of Haitian Refugees*, 17 Fordham Int'l L.J. 1062, 1086 (1994).

209. President George Bush issued Executive Order No. 12,807 from his vacation home in Kennebunkport, Maine, on May 23, 1992, ordering that persons seeking to enter the United States illegally could be intercepted at sea and returned to the country of origin, without screening for refugee status. It declared that the United Nations Protocol Relating to the Status of Refugees does not apply "beyond the territorial sea of the United States." 57 Fed. Reg. 23,133-34 (1992).

210. See Victoria Clawson, Elizabeth Detweiler & Laura Ho, *Litigating as Law Students: An Inside Look at Haitian Centers Council*, 103 Yale L.J. 2337 (1994).

211. See, e.g., Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (1990).

212. Koh notes that Presidents Bush and Clinton were more reactive than active, pursuing interdiction not as part of a forward-looking plan, but in response to precipitous events and out of fear of potential political damage from appearing impotent to stem an uncontrolled tide of arrivals.

acquiescence²¹⁴ that characterized the “Haiti Paradigm.” The Haitian situation of 1992 and 1993 was in some senses unique rather than the embodiment of a paradigm. Unusual factors included the frustrated expectation that President Clinton would keep his campaign promise to reverse the Bush policy²¹⁵ and the equally frustrated hope that the flow of refugees would cease if President Jean-Bertrand Aristide returned to power in late 1993 pursuant to the Governor’s Island Accords.²¹⁶ When the Haitian military refused to comply with those Accords,²¹⁷ the policy dilemma became even more acute.

Eventually, the Clinton Administration moderated the Haitian interdiction policy, replacing it in 1994 with a policy of offshore screening²¹⁸ and then safe haven.²¹⁹ These policies continued to impede Haitian access to the political asylum system in the United States, but they were more consistent with U.S. obligations under the Refugee Protocol than interdiction without screening had been.²²⁰

Although U.S. policy toward Haitian asylum-seekers took various turns away from and then back towards international legality, the disregard for international norms that characterized certain phases appears deeply entrenched in the attitudes of contemporary policymakers. At the time of Koh’s 1994 article, the Clinton Administration had already extended the interdiction policy to ships containing Chinese migrants.²²¹ The May 1995 migration accord with Cuba suggests that *Haitian Centers Council* has diminished, almost to the vanishing point, the shaping influence of international law on U.S. immigration policy. This disregard of international norms persists even in contexts most clearly implicating foreign relations.

One of the striking aspects of *Haitian Centers Council* is the Supreme Court’s reliance on a highly contrived reading of the Refugee Protocol in

The specter of the Marielito boatlift haunted both. Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 Yale L.J. 2391, 2409–11 (1994).

213. *Id.* at 2413–23.

214. *Id.* at 2411–13.

215. *Id.* at 2401.

216. *Id.* at 2397–98 (describing negotiation of Accords in meetings held on Governor’s Island in New York).

217. *Id.*

218. See Pizor, *supra* note 208, at 1086–88.

219. See Fitzpatrick, *supra* note 199, at 19–20.

220. *Id.* at 48–49.

221. Koh, *supra* note 212, at 2434.

order to sustain the validity of the Executive's policy.²²² Possibly this strategy represents the Court's effort to put the best face on a bad policy, by creating a pretence that it is not, contrary to all appearances, in breach of international law. On the other hand, specious interpretation of international agreements has become rather a bad habit for the present-day Court, illustrated most notably by the Court's decision a year earlier in *United States v. Alvarez-Machain*.²²³

The trend toward ratifying Executive policy by giving narrow readings to U.S. treaty obligations is disturbing for two reasons. First, it suggests an attitude of contempt for international law. While the "later in time" rule²²⁴ also limits the domestic legal effect of treaties, it does nothing to impair the survival of those obligations on the international plane, leaving open the possibility that victims of treaty breach may find recourse through traditional means such as diplomatic protection.²²⁵ Second, by reading key provisions out of treaties that protect important human rights, this judicial technique may do immense harm, by inviting other state parties to treat their obligations in an equally cavalier fashion.

V. A PERVERSE CANON PRESUMING ABROGATION OF UNCODIFIED CUSTOMARY NORMS

Less noted than *Haitian Centers Council* is the emergence of a perverse canon, presuming that Congress has abrogated customary international norms that have not been specifically implemented by statute. This canon has played a dispositive role in at least two immigration-related contexts: (1) the efforts to establish that civilians fleeing armed conflict are entitled to protection under an expanded, non-

222. The Court held that Article 35 of the 1951 Convention Relating to the Status of Refugees (incorporated by reference in the Refugee Protocol) prohibits only the expulsion and not the return of refugees, despite the Article's plain text ("No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened . . ."). Convention Relating to the Status of Refugees, *supra* note 194.

223. 504 U.S. 655 (1992). The Supreme Court held that the U.S.-Mexico Extradition Treaty did not prohibit kidnapping as a substitute for extradition. *Id.* Koh notes that the trend toward questionably narrow readings of treaties arguably dates further back. Koh, *supra* note 212, at 2416 (citing Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694 (1988), and Société Nationale Industrielle Aérospatiale v. United States District Court, 482 U.S. 522 (1987)). George Washington University Law Professor Ralph Steinhardt jokingly refers to this trend of straitened interpretation as "Honey, I *Schlunk* the treaty" (comment in private conversation with author).

224. See *supra* notes 12, 26, 104, 105 and accompanying text.

225. In the *Chinese Exclusion Case*, Justice Field observed that "[i]f there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject." 130 U.S. 581, 609 (1889).

conventional norm of non-refoulement;²²⁶ and (2) cases challenging the indefinite imprisonment of excludable aliens who cannot be returned to any other country,²²⁷ under the customary prohibition on arbitrary detention.²²⁸

The status of customary international law in U.S. domestic law remains beset by troublesome uncertainties.²²⁹ The ambiguities arise from the opaque dictum of Justice Gray in *The Paquete Habana*.²³⁰ The basic holding of that case was hardly innovative—that the “law of nations” is operative law enforceable by domestic U.S. courts, on behalf of affected individuals, even in the absence of its formal implementation by statute.²³¹ Gray, like his eighteenth century predecessors on the Court, displayed an admirable familiarity with the authoritative sources of the “law of nations” and comfort with its status as “law.”²³²

Perhaps coincident with the emergence of the United States as a significant world power, Gray tempers his holding on the enforceability of customary international law with the caveat that it may be negated by a “controlling” act of any of the three branches of the federal government.²³³ With respect to Congress, Gray may have been extending the doctrine of the *Chinese Exclusion Case* (then of fairly recent memory) from treaties to customary law.²³⁴ But his careless recognition of a power of abrogation in the Executive²³⁵ and in the Judiciary has created serious conceptual difficulties, especially vexing in the immigration context.

226. See *American Baptist Churches v. Meese*, 712 F. Supp. 756 (N.D. Cal. 1989).

227. See, e.g., *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), cert. denied sub nom. *Ferrer-Mazorra v. Meese*, 479 U.S. 889 (1986); *Gisbert v. U.S. Att’y Gen.*, 988 F.2d 1437 (5th Cir.), amended, 997 F. 2d 1122 (5th Cir. 1993).

228. See, e.g., Restatement (Third) of Foreign Relations Law of the United States §702 (1987) (listing “prolonged arbitrary detention” among the norms included in the customary international law of human rights recognized in the United States).

229. See, e.g., Monroe Leigh, *Is the President Above Customary International Law?*, 86 Am. J. Int’l L. 757 (1992); Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. Rev. 321 (1985); Jordan J. Paust, *The President Is Bound by International Law*, 81 Am. J. Int’l L. 377 (1987).

230. 175 U.S. 677 (1900); see supra note 23.

231. See, e.g., *Hilton v. Guyot*, 159 U.S. 113 (1895).

232. 175 U.S. at 708–12.

233. See supra note 23.

234. See supra note 12.

235. In a recent article, Jordan Paust notes that the Brief for the United States in *The Paquete Habana* did not assert a right in the President to violate customary international law. Instead, it argued, unsuccessfully, that the seizures were consistent with custom. Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 Va. J. Int’l L. 981, 984 (1994).

The problems posed by the *Paquete Habana* dictum are illustrated by *American Baptist Churches v. Meese*.²³⁶ Plaintiffs alleged that the practice of deporting civilians to situations of internal armed conflict in El Salvador and Guatemala violated customary international law.²³⁷ Assuming the existence of pertinent customary law,²³⁸ Judge Peckham concluded that "Congress has specifically rejected the asserted norm of temporary refuge."²³⁹ His support for this proposition was that "Congress did not include within the 1980 [Refugee] Act any reference to a right of temporary refuge for aliens fleeing general conditions of violence or internal armed conflict."²⁴⁰

Responding to plaintiffs' argument that this approach ignores the presumption that acts of Congress should be construed to be consistent with international law, Judge Peckham found that "the only 'possible construction' of the Refugee Act of 1980 is that it was intended to provide the exclusive means for obtaining refugee status in this country."²⁴¹ He also noted that various bills to provide suspension of deportation to Salvadorans had failed.²⁴²

Judge Peckham did not mention any evidence that Congress had explicitly discussed the existence of a customary norm of temporary refuge nor deliberately chosen to abrogate it. The failure of Congress to codify the norm, standing alone, was taken as a "controlling" legislative act placing the United States in breach of its assumed customary law obligation. As Ralph Steinhardt has observed, Judge Peckham "transform[ed] the stated intention of Congress to conform domestic law with international refugee standards into a silence with respect to customary norms arising out of other doctrinal sources,"²⁴³ a silence that was then misinterpreted as an intention to abrogate all uncodified customary norms.

Judge Peckham's approach is the precise reverse of that taken by the Supreme Court in *Chew Heong*²⁴⁴ and in *Charming Betsy*,²⁴⁵ requiring

236. 712 F. Supp. 756 (N.D. Cal. 1989). For a powerful critique of the District Court's lack of understanding of customary law and interpretive principles, see Steinhardt, *supra* note 18, at 1168-1171.

237. 712 F. Supp. at 770.

238. *Id.* at 771.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. Steinhardt, *supra* note 18, at 1170.

244. *Chew Heong v. United States*, 112 U.S. 536 (1884).

courts to construe domestic law to be consistent with international norms if at all possible. *American Baptist Churches v. Meese* reflects the emergence of a perverse canon presuming internationally law-breaking intention whenever Congress fails to advert to customary international norms when legislating in the immigration field.

This new canon has also figured in cases concerning the indefinite detention of Cubans who arrived as part of the Mariel boatlift but were found to be excludable.²⁴⁶ These cases have sometimes been misleadingly characterized as posing the question, "May the President violate customary international law?"²⁴⁷ The real issue concerns the appropriate response by the courts when their jurisdiction is invoked by persons whose rights under customary international law are apparently violated by executive action. Two separate questions are presented: (1) as a threshold interpretive matter, should it be presumed, in the absence of an explicit presidential repudiation of the customary norm, that lower-level executive officials are bound to act in conformity to it; and (2) must the courts acquiesce in a clear executive breach of customary law, as they acquiesce in legislative acts that conflict with pre-existing treaty obligations?

The courts considering the Marielito cases have failed to engage these issues sufficiently, and in recent years have tended to dismiss summarily arguments based on customary law. Because a great deal has already been written about the *Garcia-Mir* litigation,²⁴⁸ we illustrate our discussion with a recent Ninth Circuit case, in which a panel decision granting a writ of habeas corpus to a Mariel Cuban was reversed en banc.²⁴⁹

Judge Noonan, writing for the panel majority in *Barrera-Echavarría*, emphasizes the central importance of proportionality in assessing whether detention is permissible.²⁵⁰ He premises his grant of relief for the petitioner primarily upon a narrow reading of the relevant, inexplicit

245. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The case concerned construction of the Nonintercourse Act of February 27, 1800, 2 Stat. 7, in light of customary international standards on diplomatic protection.

246. *See, e.g., Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied sub nom. Ferrer-Mazorra v. Meese*, 479 U.S. 889 (1986).

247. *See, e.g., Essays, Agora: May the President Violate Customary International Law?*, 80 Am. J. Int'l L. 913 (1986), 81 Am. J. Int'l L. 371 (1987).

248. *See supra* notes 229, 247.

249. *Barrera-Echavarría v. Rison*, 21 F.3d 314 (9th Cir. 1994), *rev'd*, 44 F.3d 1441 (9th Cir. 1995) (en banc).

250. 21 F.3d at 316.

statutes.²⁵¹ In finding that those statutes do not delegate authority to the Attorney General to confine a non-aggravated felon indefinitely in maximum security,²⁵² Judge Noonan writes evocatively of the “rights of the human person”²⁵³ and notes that “[t]imes have changed, and so has what a person—any person—has a right to expect from our government.”²⁵⁴ Yet, nowhere does he mention the customary norm against prolonged arbitrary detention that was thoroughly briefed by the American Civil Liberties Union as *amicus curiae*.²⁵⁵ Michel Foucault’s historical analysis of the 18th century French practice of *lettres de cachet* merits repeated reference in Judge Noonan’s opinion,²⁵⁶ but not the “law of nations” on the subject at hand.

The panel decision was reversed *en banc*,²⁵⁷ but customary law, while not ignored, was treated carelessly. Assuming the existence of a customary prohibition on prolonged arbitrary detention,²⁵⁸ the *en banc* majority concluded that the petitioner could not “avail himself of its protections” because “international law is displaced in this area . . . by a combination of ‘controlling acts’ of the legislative, executive and judicial branches.”²⁵⁹ The fact of carelessly breaching the norm, without its conscious and deliberate abrogation, is now apparently sufficient to dissipate the nation’s commitment to the most basic principles of human rights.

In reviewing U.S. compliance with the International Covenant on Civil and Political Rights,²⁶⁰ the Human Rights Committee noted that U.S. policy on indefinite detention of excludable aliens may violate fundamental human rights.²⁶¹ Thus, U.S. policy on Marielitos is

251. *Id.* at 317.

252. Barerra-Echavarria had been confined in various maximum security federal prisons for nine years following his completion of a criminal sentence. 21 F.3d at 315–16.

253. *Id.* at 319.

254. *Id.*

255. 44 F.3d at 1441.

256. 21 F.3d at 318–19.

257. 44 F.3d 1441.

258. *Id.* at 1450.

259. *Id.* at 1450–51 (citing, *inter alia*, *Gisbert and Garcia-Mir*).

260. *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, U.N. Doc. CCPR/C/79/Add. 50 at ¶¶ 18, 33 (1995).

261. The Committee’s conclusion is somewhat tentative, however:

The Committee is concerned that excludable aliens are dealt with by lower standards of due process than other aliens and, in particular, that those who cannot be deported or extradited may be held in detention indefinitely.

questionable not only under the well-settled customary prohibition on arbitrary detention, but also under the Covenant.²⁶² Unfortunately, this fact is unlikely to shift the courts from their indifference toward holding executive branch officials accountable to international standards.

VI. CONCLUSION

The connection between international obligation and national honor dominated early discussion of the Chinese exclusion laws within all three branches of the federal government.²⁶³ After the Supreme Court decided that Congress could breach a treaty in order to meet popular demand for harsh immigration laws,²⁶⁴ however, the level of concern for international law in shaping U.S. immigration policy diminished dramatically. Recent history exposes a Congress ignorant of a treaty prohibiting exclusion of travelers with HIV/AIDS,²⁶⁵ presidents ignoring the Refugee Protocol in subjecting asylum-seekers to interdiction,²⁶⁶ and courts ratifying unlawful executive acts with little serious attention to international norms.²⁶⁷

It is profoundly disturbing that contemporary U.S. immigration policy, in a number of respects, falls short of international standards. Even more troubling is the absence of international law as a relevant factor in immigration policy discourse. That the political branches of the federal government may consciously choose, without domestic legal consequence, to abrogate the nation's international obligations is perhaps an inescapable reality after the *Chinese Exclusion Case*.²⁶⁸ That contemporary policymakers should be permitted by the courts to do so unconsciously or cavalierly is not unavoidable.

....

The Committee recommends that appropriate measures be adopted as soon as possible to ensure to excludable aliens the same guarantees of due process as are available to other aliens and guidelines be established which would place limits on the length of detention of persons who cannot be deported.

Id.

262. International Covenant on Civil and Political Rights, *adopted* December 16, 1966, *entered into force* March 23, 1976, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966).

263. *See supra* parts I–II.

264. *See supra* note 12 and accompanying text.

265. *See supra* note 120 and accompanying text.

266. *See supra* notes 191, 194, 209, 212 and accompanying text.

267. *See supra* part IV.

268. *See supra* note 12 and accompanying text.

Retired Justice Blackmun has written eloquently of the Supreme Court's recent failures to show a "decent respect to the opinions of mankind" in denying operative force to international norms.²⁶⁹ The slipshod nature of recent immigration policymaking can be corrected by a return to the values that animated the Supreme Court's interpretive approach in *Chew Heong*.²⁷⁰ International law should once again be taken as seriously as a lion in the path, avoided or overcome only after careful consideration and with awareness of the dangers and costs inherent in such action.

269. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 40 (1994) (quoting the Declaration of Independence).

270. See *supra* notes 90–92 and accompanying text.