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Sovereignty Migrates in U.S. and Mexican Law: Transnational Influences in Plenary Power and Non-Intervention

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ABSTRACT

Mexico and the United States exercise sovereignty that is increasingly transnational and less absolute with respect to migration. This is evident in changes to Mexico's norm of non-intervention and the United States' plenary power doctrine, two doctrines rooted in international sovereignty. Both have historically defined sovereign authority in absolute terms, avoiding any foreign influence or domestic limitation. The non-intervention norm prohibits Mexican foreign relations from interfering in another state's domestic affairs. Traditionally, it barred a foreign policy on migrants in the United States, which led to Mexico's "no policy" on migrants. The U.S. plenary power doctrine labels immigration law as immune from judicial review because the political branches have complete, "plenary" authority over it. Traditionally, the plenary power doctrine barred constitutional limitations to this migration authority.

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Since 2001, two events have occurred that indicate a slight migration from the plenary power doctrine and non-intervention norm's traditional conceptions of sovereignty. First, in Zadvydas v. Davis, *the U.S. Supreme Court explicitly stated that the plenary power doctrine is "subject to important constitutional limitations." Second, Mexico has actively lobbied U.S. lawmakers for reforms to U.S. immigration laws, an effort sometimes called the "whole enchilada." These developments lead to the opposite conclusions espoused by each doctrine: that there are constitutional limits to the plenary power doctrine and that foreign relations may influence another state's lawmaking.*

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Does domestic law reinterpret conceptions of international sovereignty[1] when it decides questions of international migration? Yes; recent changes in the legal landscape governing migration—namely, Mexico's foreign relations doctrine of non-intervention and the plenary power doctrine traditionally applied by the United States to immigration issues—indicate a distancing from traditional conceptions of sovereignty.[2] These doctrines are rooted in international sovereignty, and both historically defined sovereign authority in absolute terms, attempting to stop any foreign influence or domestic limitation.[3] Non-intervention prohibits Mexican foreign relations from interfering in another state's domestic affairs.[4] Traditionally, it also barred a Mexican foreign policy on migrants in the United States because such a policy "intervened in US jurisdiction," which violated both the non-intervention norm and the United States' international sovereignty. Consequently, non-intervention doctrine had a significant influence on Mexico's traditional "policy of no policy" on migrants.[5] The plenary power

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1. This Article defines sovereignty as the "final political and legal authority," in accordance with F.H. Hinsley's comprehensive historical study of sovereignty. *See* F.H. HINSLEY, SOVEREIGNTY 25–26 (2d ed. 1986). This Article analyzes two legal doctrines rooted in sovereignty. The first is the plenary power doctrine that claims the political branches' authority over immigration is final and absolute because this authority is derived from sovereignty. *See, e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889). The second is the norm of non-intervention classifies a state's authority over immigration as within its domestic jurisdiction, and this is the final and absolute authority regarding migrant treatment. *See e.g.* Amos S. Hershey, *The Calvo and Drago Doctrines*, 1 AM. J. INT'L L. 26, 41 (1907).

2. The norm is included in Article 89(X) of Mexico's Constitution, which states that foreign relations should observe the normative principle of "non-intervention." *See* Constitutución Política de los Estados Unidos de México [Const.], *as amended*, art. 89(X), Diario Oficial de la Federación [D.O.], 11 de Mayo de 1988 (Mex.). For U.S. immigration law, the plenary power doctrine has its initiation in *The Chinese Exclusion Case*.

3. For the United States, plenary power is inherent in sovereignty, is not enumerated in the Constitution, and is consequently understood to be unlimited. *See generally* 1 GABRIEL J. CHIN ET AL., IMMIGRATION AND THE CONSTITUTION: THE ORIGINS OF CONSTITUTIONAL IMMIGRATION LAW 25 (2000) (analyzing the doctrinal importance of initial holdings in The Chinese Exclusion Case, and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)). The norm of non-intervention is a "necessary corollary" of "complete equality and independence of sovereign states and is a fundamental principle of international law." *See* Amos S. Hershey, *The Calvo and Drago Doctrines*, *supra* note 1..

4. The norm has a rich history within Mexico's customary and codified foreign relations law, as well as in public international law that is customary and treaty-based. *See infra* Part III.A.

5. *See* Marc R. Rosenblum, *Moving Beyond the Policy of No Policy: Emigration from Mexico and Central America*, LATIN AM. POL. & SOC'Y, Winter 2004, at 91, 91–92 [hereinafter Rosenblum, *Moving Beyond*] (describing Mexico's traditional "no policy" in the new context of migrant sending states trying to influence U.S. immigration policy). In Mexico, this policy has been called "la política de la omisión" (policy of omission). Rodolfo Turián, *México y el debate migratorio en Estados Unidos*, FOREIGN AFFAIRS EN

doctrine of the United States, on the other hand, labels immigration law as immune from judicial review because the political branches have complete, "plenary" authority over immigration.[6] Traditionally, the doctrine barred constitutional limitations to this authority.[7]

This Article makes two central claims: (1) contemporary developments in the norm of non-intervention in Mexican foreign relations law and other developments in the plenary power doctrine of U.S. immigration law suggest that states may apply sovereignty-based legal doctrines regarding migration in less absolute and traditional manners, and (2) this distancing from traditional conceptions of sovereignty implies that sovereignty may be defined in increasingly transnational terms. These doctrinal claims stem from observations of two events. First, in 2001, contrary to a century of precedent, the U.S. Supreme Court in *Zadvydas v. Davis* explicitly stated that plenary power over immigration is "subject to important constitutional limitations."[8] Second, in the same year that the U.S. Supreme Court decided *Zadvydas*, Mexico conducted its most active campaign—colorfully labeled by some as the "whole enchilada"[9]—to lobby U.S. lawmakers to reform U.S. immigration law, an action that was itself contrary to traditional interpretations of non-intervention. These developments point to the opposite of each doctrine's conclusion: that there are constitutional limits to plenary power and foreign relations may influence another state's lawmaking.

As its title suggests, this Article argues that sovereignty, as envisioned in the United States' plenary power doctrine and in Mexico's non-intervention norm, has moved from a traditional concept

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ESPAÑOL, Oct.–Dec. 2006, available at http://www.foreignaffairs-esp.org/20061001faenespessay060403/rodolfo-tuiran/mexico-y-el-debate-migratorio-en-estados-unidos.html.

6. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (describing this power as "plenary"); *see also* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (stating "that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

7. *See* Mathews v. Diaz, 426 U.S. 67, 81–82 (1883) (discussing the immunity of such decisions from judicial inquiry); see also Fiallo, 430 U.S. at 792 ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953); Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952) (noting that immigration policies "are largely immune from judicial inquiry or interference"); Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895) (emphasizing the power of Congress to enact immigration policies "without judicial intervention"); *Fong Yue Ting*, 149 U.S. at 705 (stating that this power "belongs to the political department of the government"); *The Chinese Exclusion Case*, 130 U.S at 602 (reasoning that Congress may exclude aliens for any reason it may deem sufficient).

8. Zadvydas v. Davis, 533 U.S. 678, 695 (2001).

9. Colin L. Powell, U.S. Sec'y of State, Press Remarks With Mexican Secretary Jorge Castañeda Following Their Meeting (Sept. 4, 2001), http://www.state.gov/secretary/former/powell/remarks/2001/4800.htm.

to one that is more transnational. Just as millions of people in U.S. and Mexican history have crossed, and will cross, political borders, sovereignty may similarly cross conceptual borders. Consequently, this Article's approach is transnational, examining international migration's influence on domestic law in Mexico (a migrant-sending state) and in the United States (a migrant-receiving state). It also presents cross-border migration as a transnational subject, which differs from the traditional view that migrants that cross national borders influence only host states, while severing ties to sending states.[10] This transnational lens is comprised of one phenomenon (international migration), one international law concept (sovereignty), and an examination of how two states' legal systems consequentially but distinctly reinterpret sovereignty. For both states, even though the examined experiences are distinct, their common legal thread is sovereignty.[11] It is the source of authority for a state's foreign relations power and power to control migration and borders.[12] It is central to both doctrines' justifications.

The transnational picture is "eye-catching" for a student of international law because the plenary power and non-intervention doctrines are based on absolute sovereignty ideals, which are, conceptually speaking, diametrically opposed to transnational influence.[13] These doctrines were "conceived as . . . nineteenth century application[s] of absolute sovereignty." Traditionally applied, they have the same ultimate goal: to "protect independent and autonomous sovereign authority."[14] In an absolute fashion, plenary power shields

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10. International migration is a transnational force because it intrinsically involves people crossing national borders. *See* Ernesto Hernández-López, *International Migration and Sovereignty Reinterpretation in Mexico*, 43 CAL. W.L. REV. 203, 203–04 (2006).

11. Economic integration between Mexico and the United States has spurred much discussion regarding whether there will be changes in sovereignty for the two neighbors. *See generally* Joyce Hoebing et al., NAFTA AND SOVEREIGNTY: TRADE-OFFS FOR CANADA, MEXICO, AND THE UNITED STATES xi–xiii (1996) (discussing the loss of sovereignty caused by multilateral trade agreements and the fear this has caused in Canada, Mexico, and the United States); Stephen Zamora, *Allocating Legislative Competence in the Americas: The Early Experience Under NAFTA and the Challenge of Hemispheric Integration*, 19 HOUS. J. INT'L L. 615 (1997) (discussing increased desire for economic integration and the potential effects of a regional trade agreement).

12. *See* CHIN ET. AL., IMMIGRATION AND THE CONSTITUTION, *supra* note 3; Brian G. Slocum, *Canons, the Plenary Power Doctrine and Immigration Law* 3 (Berkeley Electronic Press (bepress), Working Paper No. 1520, 2006), *available at* http://law.bepress.com/expresso/eps/1520/ (noting that the plenary power is based upon the notion that the "United States' existence as a sovereign state should give it unfettered power to control immigration.").

13. *See* Hernández-López, *supra* note 10, at 204–05 (stating that a "transnational influence . . . occurs when sovereign authority is conceptualized to include" the interest or impact of events or actors outside national territory).

14. *Id.* at 205; *see* discussion *infra* Part II.

domestic political authority over immigration regulation.[15] Similarly, the norm of non-intervention shields a state's domestic affairs from foreign influence. [16]

This Article takes a transnational approach to a transnational subject and provides an introductory observation in the next five sections on how international migration influences changes in legal sovereignty reasoning. Part I describes the scholarly significance of transnational analysis. First, it explains how migration can be studied as a transnational subject and describes definitions and approaches from the migration studies discipline. It then expands on Philip Jessup and Dean Harold Koh's ideas on transnational law, using those ideas as guideposts to identify how legal interpretations in Mexico and the United States change with exposure to migration.[17] Part II describes how the U.S. plenary power and Mexican non-intervention doctrines are based on absolute sovereignty ideals.[18] Both doctrines envision sovereign authority, over migrants in national territory and over domestic law-making or migrant regulation, as exclusive and without limitations.

Part III reports on the ways in which Mexican foreign relations law has reinterpreted the norm of non-intervention and altered its application in response to continual emigration by Mexican nationals. Historically, the norm resulted in a "policy of no policy," with Mexican foreign policy not advocating for its nationals abroad. Since the mid-1990s, however, Mexican foreign relations have deviated from this tradition. Five examples illustrate this: (1) aggressive lobbying of U.S.

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15. *See* Lees v. United States, 150 U.S. 476, 480 (1893) (describing the power to exclude aliens as "absolute" and one not "open to challenge" by judicial review); *Fong Yue Ting v. United States*, 149 U.S. 698, 706 (1893) (stating that congressional decisions to exclude aliens are "conclusive upon" the courts and citing Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889)).

16. Hernández-López, *supra* note 10, at 204; *see* discussion *infra* Part III.A.

17. *See* Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 182–85 (1996) [hereinafter Koh, *Transnational Legal Process*] (presenting the "transnational legal process" as a method to examine how legal norms change after extended exposure to foreign influence).

18. This Article defines "international sovereignty" as the final political and legal authority that states use to demarcate their respective authority within the international system. The Author treats the term "sovereignty" as synonymous with "international sovereignty," which is different than sovereignty distinguishing between central and regional domestic governmental authority. Likewise, "sovereignty reasoning" refers to how legal doctrines use the concept of final legal authority, i.e. sovereignty, in making a determination of where to allocate governmental authority. "Sovereignty-based legal doctrines" are legal norms that justify their reasoning with claims of final legal authority. This exists because the entity making these claims is a sovereign. For this Article, "absolute sovereignty" and "traditional sovereignty" refer to the same thing, which is the characterization of sovereign authority as exclusive, autonomous, and independent authority. "Country" or "state" refers to what is often termed a "nation-state" or an independent political member of the international community. For simplicity's sake, but a very arguable point, "countries" or "states" are the only political entities with international sovereignty.

lawmakers for changes to U.S. immigration law in 1996, (2) consular programs for Mexicans in the United States, (3) changes in Mexican nationality law that permit Mexican nationals to become dual-nationals, (4) negotiations between Mexico and the United States on an immigration agreement, and (5) the presentation of foreign policy positions that advocate for Mexican nationals during U.S. legislative debates on immigration reform. In these five examples, the norm is applied transnationally because events outside Mexican territory and within U.S. jurisdiction motivate these policies. Sovereign authority over migration is not defined as exclusive to one state, i.e. U.S. jurisdiction, but is instead regarded as inviting Mexican influence.

Part IV comments on the transnational turn that the U.S. plenary power doctrine has taken in recent years. Supreme Court decisions such as *Zadvydas*, *Demore v. Kim* (2003) and *Clark v. Martinez* (2005) suggest that the doctrine is applied with less frequency and in a less absolute manner than in the past.[19] In each of these decisions, the Court—contrary to the urgings of the government—did not base its decision solely on plenary power reasoning, which it could have done. Instead, it interpreted immigration statutes to avoid constitutional conflict. Employing the judicial canon of avoidance, the Court did not use blanket invocations of the plenary power doctrine to reach a decision. The effect of this is that the Court has decided cases in a way that limits absolute-sovereignty reasoning in migration issues.[20] Transnational considerations influence this analysis: the court recognizes as an initial matter that the foreign national has a right, and then courts examine whether the statute and the constitution

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19. *See* Clark v. Martinez, 543 U.S. 371, 386 (2005) (refusing to sanction indefinite detention of aliens); Demore v. Kim, 538 U.S. 510, 511 (2003) (emphasizing that legislative intent to preclude judicial review must be clear); Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (noting that the plenary power "is subject to important constitutional limitations").

20. This Article adds a transnational perspective and sovereignty analysis to immigration law scholarship of plenary power jurisprudence and the canon of avoidance. This research stresses that lower courts and the Supreme Court increasingly interpret immigration statutes to avoid constitutional conflict and avert holding that the political branches have complete deference. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (analyzing the development of due process rights protection, emphasizing procedural over substantive protections, in immigration law jurisprudence); Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter Motomura, *Immigration Law after a Century of Plenary Power*] (discussing how courts use statutory interpretation in immigration law to avoid finding executive or congressional determinations are unconstitutional); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (discussing contemporary case law examples suggesting the possible transformation of immigration law including statutory interpretation to limit the plenary power doctrine); Slocum, *supra* note 12, at 1 (discussing the "fundamental dichotomy" that exists in interpretation of immigration laws).

permit its infringement. The jurisprudence is also transnational because it disregards the traditional premise that courts should not influence foreign relations, and it alters the view that the political branches have exclusive authority. Part V concludes by analytically incorporating doctrinal changes in U.S. and Mexican law into a transnational analysis of legal sovereignty concepts.

I. MIGRATION:[21] A TRANSNATIONAL SUBJECT AND A TRANSNATIONAL ANALYSIS[22]

This Article uses a transnational perspective to examine how the cross-border movement of people influences how sovereignty is conceptualized in Mexican and U.S. law.[23] This approach permits

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21. This Article's examination is not specifically about U.S. sovereignty reasoning with respect to Mexico or Mexican migrants. This Article's approach follows the innovative paths from legal scholars, historians, sociologists, and political scientists analyzing how the long-term movement of people across national borders influences how sovereignty is defined. For examples of this migration-and-sovereignty research, see MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004) (providing historical analysis of illegal immigration to the United States, as a "social reality and legal impossibility," from 1924 to 1965 and critically examining how sovereignty, as an expression of nationalism, shapes immigration policy); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN THE AGE OF GLOBALIZATION (1996) (explaining how the mass global movement of capital and people indicates sovereignty is no longer confined to the nation-state); CHERYL SHANKS, IMMIGRATION AND THE POLITICS OF AMERICAN SOVEREIGNTY 1890–990 (2001) (explaining how changes in U.S. immigration policy such as the Chinese Exclusions Acts of the 1890s, McCarran-Walter Act of 1952 (a.k.a Immigration and Nationality Act), Immigration Reform Act (IRCA) of 1965, and IRCA 1986, and their justifications, were responses to perceived threats to U.S. sovereignty); and T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197 (2000) (suggesting the development of the field of "sovereignty studies" since sovereignty is typically assumed to be absolute and an unquestioned paradigm in U.S. constitutional law but has dramatic influence in areas such as citizenship, immigration, Indian nations, and territorial possessions).

22. Benefiting from analytical tools from the migration studies and international relations disciplines, this Article is inspired by Professor Berman's "law and globalization" inter-disciplinary approach, which examines how "legal norms are disseminated" in a globalized world. Professor Berman's appraoch draws interdisciplinary insight from international relations theory, anthropology, sociology, critical geography, and cultural studies disciplines. *See* Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 491 (2005) (discussing potential fields of study beyond the law that can transform international law scholarship into the study of "law and globalization"). These disciplines explain how "people actually form affiliations, construct communities, and receive and develop legal norms . . . with little regard for the fixed geographical boundaries of the nation-state system." *Id.* at 485–86. Specifically, this Article incorporates tools from the migration studies and international relations disciplines to identify changes in how sovereignty is characterized by U.S. immigration law and Mexican foreign relations law.

23. Professor Ediberto Román suggests a similar transnational analysis for Latina/o issues in the Americas. See Ediberto Román, Latcrit VI, Outsider

studying one legal concept—sovereignty—and how international migration influences changes in this concept's application.[24] Each state has different migration experiences, ranging from the migrant-receiving to the migrant-sending contexts.[25] These contexts influence changes in how domestic legal doctrines interpret sovereignty.[26] This

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Jurisprudence and Looking Beyond Imagined Borders, 55 FLA. L. REV. 583, 586 (2003) (addressing subordination of Latinas/os across international political borders). Professor Enid Tricios-Haynes makes similar suggestions looking at migration and sovereignty as having transnational influences. See Enid Trucios-Haynes, Latcrit Theory and International Civil and Political Rights: The Role of Transnational Identity and Migration, 28 U. MIAMI INTER-AM. L. REV. 293 (1996–1997) (using transnational identity as a means of addressing the decline of state sovereignty and promotion of international political and civil rights within the United States).

24. This transnational focus is in the spirit of Kim Barry's research on emigration and "external citizenship." *See generally* Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006) (Before her sudden and tragic passing, Ms. Barry examined how the concept of citizenship exists in contexts when citizens may leave, emigrate, or relocate from the territory of the country where they are citizens. She analyzed this emigration-and-citizenship dynamic in various states such as Mexico, the Philippines, Jamaica, Eritrea, Jamaica, and others.). In this Article, emigration is referred to as Mexico's migrant-sending context. Similar to Ms. Barry's focus on emigration and citizenship, this Article focuses on emigration and the sovereignty of the state to which the migrant ultimately relocates (i.e., the United States) and the state of the migrant's origin (i.e., Mexico).

25. For this Article, U.S. experiences with international migration are generally as a receiving state, while Mexico's experiences are mostly as a sending state. While not a focus of this Article, in reality both states do receive migrants and have nationals emigrate.

26. Although vivid arguments are made about "transnational reasoning," this Article's claims are not that sovereignty has changed in a complete fashion and will never be applied in an absolute manner, even for something as specific as the U.S. power to remove aliens or to detain them or Mexican interpretations concerning how U.S. jurisdiction over migration excludes Mexican influence. Instead, the Article argues that with regard to one sovereign power, control of migration and borders, legal interpretations in Mexico and in the United States may evoke absolute notions of sovereignty with less frequency. In the past, this was not the case, and legal interpretations rigidly relied on absolute applications of the plenary power doctrine and norm of non-intervention. Previously, sovereignty was interpreted in a more absolute fashion. This does not discount the fact that traditional sovereignty applications still occur. *See* Turkmen v. Ashcroft, No. 02 CV 2307(JG), 2006 WL 1662663 1, at *42 (E.D.N.Y. June 14, 2006) (stating the political branches have "broad powers over" immigration and any policy regarding aliens is "vitally and intricately interwoven with" foreign relations, war power and "republican form of government" when reasoning the three-to-eight month detention without any criminal charges of eight unlawfully present foreign nationals in the aftermath of Sept. 11, 2001, was authorized by immigration laws, quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1883) and Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)). *But see* Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006); Tijani v. Willis, 430 F.3d 1241 (9th Cir. 2005); Morales-Fernandez v. I.N.S., 418 F.3d 1116 (10th Cir. 2005). It is important though to isolate how in two examples regarding migration (one migrant-receiving and the other migrant-sending), legal determinations currently exist to limit absolute invocations of sovereignty within both doctrines. As national borders are sealed through border control to limit migrant entry, state and local governments venture into alienage and migrant law, national economic policy pushes emigration, migrants become the

Part provides a simple definition of "transnational analysis" and applies that definition in situations where migration influences the concept of sovereignty as articulated through the plenary power and non-intervention doctrines. These situations suggest that a transnational influence, however limited, exists in both doctrines.[27]

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scapegoats of national politics, and state and national legislatures eliminate various immigrant rights and benefits (all of the mentioned developments occur in Mexico and the U.S.), in no way does this Article suggest sovereignty no longer limits migrant's legal rights. Exclusionary concepts of sovereignty rear their influence in other applications of immigration law or in other legal regimes. Instead, this Article points to some examples of how legal doctrines, based on sovereignty, change their application through the transnational contexts of migrant-receiving and migrant-sending.

27. This Article takes a position that sovereignty should be studied as a subject that changes in meaning over time, that this meaning is socially constructed, and that it is constantly contested. This perspective is influenced by similar approaches from Professor Paul Schiff Berman and Professor Thomas J. Biersteker. Professor Berman explains that a focus on sovereignty (what it is and what it should be) may not help our understanding of transnational "norm development and governance." Berman, *supra* note 22, at 523–30. Professor Biersteker argues sovereignty research should move away from "sterile debates" on its possible erosion and instead seek to identify "qualitative changes or variation in operational meaning" of sovereignty to find how its meaning has changed. Thomas J. Biersteker, *State, Sovereignty, and Territory, in* HANDBOOK OF INTERNATIONAL RELATIONS 157, 167 (Walter Carlsnaes & Beth A. Simmons eds., 2002) [hereinafter Biersteker, *State, Sovereignty, and Territory*]. Scholars seeking a more traditional definition of sovereignty would most likely contest any "transnational influence" and instead paint the Article's examples as "erosions in" or a "lack of sovereignty." Regardless, the examples should stand, even to those who fundamentally disagree that sovereignty is an evolving concept, as changes in sovereignty-reasoning. The Article's aim is to positively identify changes in how the concept of sovereignty is used and to examine the context which influences these changes. This differs from a more normative approach of claiming whether the changes in sovereignty reasoning are good or bad. For a current example using traditional sovereignty (or absolute sovereignty) reasoning, see JEREMY A. RABKIN, WHY SOVEREIGNTY MATTERS, at ix (1998) (the "traditional" approach). Five alternative approaches varying their incorporation of theoretical understandings, contextual analsysis, and legal doctrine to the traditionalist approach could be: (1) "Westphalian sovereignty" ("absolute sovereignty" for purposes of this Article), which defines independent polities with sole jurisdiction over territory and its populace, currently does not exist and most likely never did exist. Thus, any deviations from these characterizations of sovereignty are merely a matter of degree. *See* STEPHEN D. KRASNER, SOVEREIGNTY : ORGANIZED HYPOCRISY 20–25 (1999) ("the realist approach") [hereinafter KRASNER, SOVEREIGNTY]; (2) sovereignty includes when states are active in the international community, seeking cooperation and sharing authority, thus what may be labeled deviations or erosions in sovereignty are actually examples of exercising "New Sovereignty." *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 27 (1995) (stating sovereignty is no longer the freedom of states to act independently in their self-interest but that "the only way most states can realize and express their sovereignty is through participation in the various regimes that regulate and order the international system."); Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999) (describing sovereignty's (the "S word") negative implications and arguing for international cooperation to promote responsibility and "human values"); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J. INT'L L. 283, 285 (2004) ("States can only govern effectively by actively cooperating with other states and by collectively

Although it is a varied and highly debated concept in the migration studies discipline, "transnationalism" generally refers to migrants (people who cross international borders) and migration (the act of crossing) as having political, cultural, social, and economic relationships in sending and receiving societies.[28] Alejandro Portes builds on this articulation of the concept by arguing further that transnational government policies react to and occur after widely known transnational activity.[29] This perspective illuminates a sense of agency for migration (a socio-economic force) and migrants (the

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reserving the power to intervene in other states' affairs.") (the "New Sovereignty approach"); (3) sovereignty is a socially constructed concept and any variations in its application or definition is the product of "powerful agents and resistances to [their actions]," thus any transnational influence or erosion of sovereignty is just an agent seeking to socially construct, reproduce, reconstruct, resist, or deconstruct sovereign ideals. THOMAS J. BIERSTEKER & CYNTHIA WEBER, STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 1–21 (Smith et al. eds., 1996); Biersteker, State, Sovereignty, and Territory, *supra* (the "constructivist approach"); (4) sovereignty as a concept, whether used in the plenary power doctrine as rooted in natural law or as applied in non-intervention doctrine as articulated in positive law, attempts to separate European and non-European powers and persons; this division serves imperial, colonial, and Eurocentric goals and denies perspectives and voices from subordinated forces, i.e. non-European states or migrants. *See generally* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005) (the "Third World and International Law (TWAIL) approach"); and (5) sovereignty is a legal concept heavily influenced by race-based assumptions, whether this is in the legal doctrine of plenary power and race-based assumptions regarding migrants, non-Euroepean, or non-western persons, or whether referring to the norm of non-intervention used to protect European states' interference in non-European states internal affairs. *See generally* Ediberto Roman, *A Race Approach To International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519, 1531 (2000) (the "RAIL approach").

28. As this Article elucidates there are two separate states where sovereignty reasoning is influenced by migration. Specifically, there is one state (Mexico) identified with a "departure," "origin," "home," or "sending" context. There is another state (United States) identified with an "arrival," "destination," "host," and "receiving" context. Rainer Baubock suggests that "political transnationalism" happens when migrants have "overlapping memberships" in "territorially separated and independent polities." Rainer Baubock, *Towards a Political Theory of Migrant Transnationalism*, 37 INT'L MIGRATION REV. 700, 700–02 (2003); see also LINDA BASCH ET AL., NATIONS UNBOUND: TRANSNATIONAL PROJECTS, POSTCOLONIAL PREDICAMENTS, AND DETERRITORIALIZED NATION STATES 7 (1994) (defining "'transnationalism' as the processes by which immigrants forge and sustain multi-stranded social relations that link to together their societies of origin and settlement" which "cross geographic, cultural, and political borders").

29. "Popular transnational activity" refers to efforts led not by governments but by persons who are not acting in representation or in the duty of a state. *See* Alejandro Portes, *Conclusion: Theoretical Convergencies and Empirical Evidence in the Study of Immigration Transnationalism*, 37 INT'L MIGRATION REV. 874–92 (2003). Portes' transnational examples include new cultural practices brought on by migrants changing value systems, migrants becoming the equivalent of economic exports for migrant-sending countries, migrants' political influence in origin and host countries, and the increasing adoption of dual nationality and dual citizenship regimes. *Id.*

individuals) in the political change process in both sending and receiving societies.

The scholarly appeal of this analysis is that it examines the consequences of the transnational influence in localities that migrants have left and those where migrants have relocated. This analysis contrasts with an approach that examines migration issues solely from the receiving or sending point of view. As David Fitzgerald explains, a transnational approach rids one of "national blinders" and helps to isolate the influence (cross-border, local, and national) of migration.[30] Across many disciplines, transnational research in Mexico-U.S. migration is quite sophisticated, inspiring this Article's examination of a similar influence in legal doctrines.[31]

Exploring the legal aspects of transnationalism, Judge Philip Jessup defined "transnational law" as "laws which regulate actions or events that transcend frontiers."[32] In contrast, national law concerns rules belonging to one state, and international law concerns rules governing interactions between states. Building on this definition, Dean Koh pinpoints the central tenets of "transnationalist jurisprudence."[33] These tenets include a belief in the political and economic interdependency between states, the critical role of domestic courts in norm-internalization for international and foreign relations

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30. David Fitzgerald, *Towards a Theoretical Ethnography of Migration*, 29 QUALITATIVE SOCIOLOGY 1, 1 (2006).

31. Examples of transnational research on Mexico-U.S. migration include: analyses of dual nationality and legal voting rights for Mexicans abroad and the corresponding influence of links between communities located in U.S. and Mexican territory. *See generally* CROSS-BORDER DIALOGUES: U.S.-MEXICO SOCIAL MOVEMENT NETWORKING (David Brooks & Jonathan Fox eds., 2002) (examining cross-border social movements on issues such as labor rights, migrants rights, farm worker unions, and citizen advocacy); DAVID FITZGERALD, NEGOTIATING EXTRA-TERRITORIAL CITIZENSHIP (2000) (examining extra-territorial citizenship in the context of Mexican migrants who desire citizenship rights despite their physical absence); David Fitzgerald, *For 118 Million Mexicans: Emigrants and Chicanos in Mexican Politics*, *in* DILEMMAS OF POLITICAL CHANGE IN MEXICO 523 (Kevin Middlebrook ed., 2004) [hereinafter Fitzgerald, For 118 Million Mexicans] (discussing transborder politics in the context of Mexican migrants); David Fitzgerald, *Rethinking Emigrant Citizenship*, 81 N.Y.U. L. REV. 90 (2006) [hereinafter Fitzgerald, *Rethinking Emigrant Citizenship*] (arguing that extra-territorial citizenship typically maximizes individual liberty, but at the cost of allowing those who are not subject to regulation make them and tilting citizenship towards claiming rights rather than fulfilling obligations); MARC. R. ROSENBLUM, THE TRANSNATIONAL POLITICS OF U.S. IMMIGRATION POLICY (2004); Rosenblum, *Moving Beyond, supra* note 5 (discussing the interaction between domestic and international interests in U.S. immigration policy and Mexican foreign policy on migration); ROBERT C. SMITH, MEXICAN NEW YORK: TRANSNATIONAL LIVES OF NEW IMMIGRANTS 1–18 (2006) (providing ethnographic analysis of sustained links evident in migrants-leaving-and-returning in Mexican communities in New York, N.Y. and Puebla, Mexico).

32. PHILIP JESSUP, TRANSNATIONAL LAW: STORRS LECTURES ON JURISPRUDENCE 2 (1956).

33. Harold Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 6 (2004) [hereinafter Koh, *The Supreme Court Meets International Law*].

law, and limiting executive power over foreign relations with judicial review.[34] He advocates viewing "transnational law" as a category of law that is not solely local or solely global.[35]

Building on these premises, Dean Koh describes the transnational legal process as a "theory and practice of how public and private actors . . . interact . . . to make, interpret, enforce, and ultimately, internalize transnational law."[36] The process has four features: (1) nontraditional breakdowns of international law dichotomies, such as between domestic and international, public and private; (2) participation from both nonstate and state actors; (3) dynamism with transnational law transforming, mutating, and moving between public and private spheres and domestic and international levels; and (4) normativity "with new rules of law emerg[ing], which are interpreted, internalized, and enforced."[37] The process develops through "interaction, interpretation, and internalization," with those actors who seek new rules "trigger[ing] interactions that yield interpretations that are then internalized."[38] Similarly, advocating for individual or human rights is often central to the process.[39]

Applying this type of transnational analysis, which is common in the social science disciplines, to legal scholarship reveals how domestic legal systems are influenced by overseas forces. While it is signficant that the transnational legal process tracks the development of transnational law (through four steps), the most important function of transnational analysis is to demonstrate how different legal systems address the issue of migration when faced with similar but not identical experiences. A key assumption of this Article is that legal regimes in Mexico and the United States are both influenced by migration, even though their experiences vary as sending and receiving states. Specifically, this Article builds on the premises that migrants have political influence in both sending and receiving societies, governmental action promoting transnationalism responds to popular activity, and law may have a transnational effect. Using those claims as a springboard, this Article asks: is there is a transnational influence in the law used to regulate migration in the United States and Mexico?

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34. *Id.* at 6–7 (contrasting these transnational tenets with a "nationalist" perspective, which instead values state autonomy, the political branches having exclusive power to internalize international law, the courts solely focusing on domestic law, and affording broad deference to the executive branch in foreign affairs). For this Article, this "nationalist perspective" characterizes absolute sovereignty conceptions.

35. Harold Koh, *The Globalization of Freedom*, 26 YALE J. INT'L L. 305, 306 (2001).

36. Koh, *Transnational Legal Process*, *supra* note 17, at 183–84.

37. *Id.* at 184.

38. Harold Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT'L L. 337, 339 (2004).

39. *See* Harold Koh, The 1998 Frankel Lecture: Bringing International Law Home, 35 HOUS. L. REV. 623, 625 n.1 (1998) (summarizing human rights litigation and scholarly writings on the Transnational Legal Process and individual rights).

This inquiry has scholarly significance for students of international law, because the legal doctrines governing the sending and receiving of migrants are based on legal assumptions that squarely reject transnational influence and embrace absolute sovereignty. Historically, both foreign relations law and immigration law were based on the concepts of absolute sovereignty, as expressed in the doctrines of non-intervention and plenary power.[40] Under the absolute sovereignty model, a sovereign country's authority is exclusive and independent, leaving no room for transnational influence.[41]

Put bluntly, in the past, legal regimes that governed migration, a transnational subject, were grounded in a rejection of transnationalism. This inquiry has historical relevance as well; over a century ago, migration was not regarded as having transnational effects and sovereignty primarily valued autonomous and absolute authority.[42] Recent humanitarian interventions, international relations, and international law scholarship suggest that the norm of non-intervention is being reinterpreted in the security context.[43] This Article follows these

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40. *See* sources cited *supra* notes 1–2.

41. *Id.*

42. International law interpretations of absolute sovereignty changed during the last century with the increased importance of individual human rights in international law, the Nuremburg trials finding that international sovereignty does not limit international law from judging state action, and increased foreign relations and interdependency between states. Tom Farer, *Collectively Defending Democracy in the Western Hemisphere*, *in* BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS 1–25 (Tom Farer ed., 1996). The plenary power and non-intervention doctrines were developed in the nineteenth century, when Mexico and the United States sought international legitimacy and centralized legal authority and international law primarily valued autonomy and independence (to the exclusion of shared authority or international cooperation. *See* sources cited *supra* notes 1–2. These doctrines were developed when geopolitical and international law contexts mandated absolute conceptions of sovereignty. *See supra* Part I. But currently international relations increasingly values interdependency and sharing elements of sovereign authority. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (examining the possibility of countries sharing and cooperating through networks to promote global governances). For a sophisticated analysis of how non-intervention has decreased in importance in U.S.-Mexican relations due to increased interdependence and cooperation, *see* Thomas J. Biersteker, *The Rebordering of North America*, *in* THE REBORDERING OF NORTH AMERICA: INTEGRATION AND EXCLUSION IN A NEW SECURITY CONTEXT 153 (Peter Andreas & Thomas J. Biersteker eds., 2003).

43. *See generally* Fernando Tesón, *Changing Perceptions of Domestic Jurisdiction and Intervention*, *in* BEYOND SOVEREIGNTY, *supra* note 42, at 29–51. (explaining that the international law norm of non-intervention has changed in the humanitarian intervention context with the norm evolving to recognize distinctions between national and international jurisdiction); HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (1988) (providing moral arguments based on lack of international legitimacy for tyrannical regimes and the importance of human rights law in favor of legitimate humanitarian intervention); ROBERT O. KEOHANE, HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 1 (J.L. Holzgrefe ed., 2003) (providing a varied perspective and multidisciplinary inquiry into when "unauthorized humanitarian intervention is ethically, legally, or politically justified"); Biersteker, *State, Sovereignty, and Territory*, *supra* note 27, at 163–64

leads by examining non-forcible intervention between Mexico and the United States. Similarly, recent immigration law scholarship has argued that the plenary power doctrine's "grave is dug," and that the increased use of canons by the judiciary has lessened the doctrine's ability to foreclose determinations on migrants' rights.[44]

U.S. immigration law's and Mexican foreign relations law's sustained contact with migration has led to new interpretations of sovereignty-based doctrine. In one isolated instance, the United States determined that there are constitutional limits to the political branches' plenary power; similarly, Mexican foreign relations law has determined that another state's domestic jurisdiction over migration does not preclude foreign influence.[45] These determinations suggest that new norms are developing in the plenary power and non-intervention doctrines. To isolate these new norms and apply a transnational analysis, this Article first identifies the historical foreign relations and international law contexts that created the plenary power and non-intervention doctrine. Second, it discusses the ways in which these doctrines applied absolute sovereignty reasoning to exclude migrants from individual constitutional rights and judicial review (in the United States) and from the objectives of foreign relations (in Mexico). Third, the Article pinpoints the movement away from absolute sovereignty conceptions in doctrinal terms.

II. ABSOLUTE SOVEREIGNTY[46] IN NON-INTERVENTION AND PLENARY POWER

A state derives its authority to regulate migration and to conduct foreign relations from its international sovereignty. [47] Traditionally,

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(arguing the international community's recent increased tolerance of intrusion in issues previously exclusive to domestic jurisdiction is an example of sovereignty's meaning being in a "continual contestation of practicing" and with actors "resisting and countering").

44. *See* Slocum, *supra* note 12 (arguing courts using canons of interpretation results in aliens being afforded more rights); Peter Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339, 340 (2001) [hereinafter Spiro, *Explaining the End of Plenary Power*] (describing the international context, which previously regarded foreign affairs as a political issue and has changed with increased international cooperation and globalization, as a step towards understanding why the Supreme Court's majority opinions in *Zadvydas* and *Ngyuen* limited plenary power).

45. Zadvydas v. Davis, 533 U.S. 678, 696 (2001); Spiro, *supra* note 44, at 340.

46. Defining sovereignty, Hinsley explains "sovereignty was the idea that there is a final and absolute political authority in the political community; and everything that needs to be added to complete the definition is added if this statement is continued in the following words: 'and no final and absolute authority exists elsewhere.'" HINSLEY, *supra* note 1, at 26.

47. These powers are articulated as the power to have foreign relations and the power to regulate the entry and removal of foreign nationals. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201 (1987) (defining a state as "an entity that

states have claimed complete authority to regulate the movement of people across borders.[48] Under this traditional view, anything less than complete authority over such people challenged a country's international sovereignty.[49] International sovereignty allows a state to posses broad authority and wide discretion to determine non-citizen policies (e.g., admission, residence, expulsion, and naturalization).[50] When the non-intervention and plenary power doctrines were developed in the nineteenth century, the authority of the state was defined in absolute terms. By conferring exclusive authority with unconditional limits, even where foreign relations and judicial review are concerned, these doctrines are based on absolute sovereignty concepts. This section's central argument is that the norm of non-intervention, which is used to regulate Mexico's migrant-sending context, and the plenary power doctrine, which is used to regulate the U.S. migrant-receiving context, were conceived as legal expressions of absolute sovereignty.

"Absolute sovereignty" defines the contours of sovereign authority as exclusive, autonomous, and independent.[51] To infringe on this authority is to share, limit, question, or interfere with it. Plenary power doctrine models absolute sovereignty concepts because it defines the political branches' authority to regulate migration as unlimited and independent of constitutional limits.[52] Non-intervention is also an application of absolute sovereignty conccepts because it regards a sovereign's authority within its domestic jurisdiction as independent, exclusive, and not subject to any foreign influence.[53] For example, if a foreign state were to express an opinion on domestic political matters, a breach of this norm would occur.[54] By setting absolute and exclusive demarcations, the plenary power doctrine and the non-intervention norm each exemplify traditional sovereignty applications.

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has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities"). *See generally* Thomas C. Heller & Abraham D. Sofaer, Sovereignty: *The Practitioners' Perspective, in* PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL RESPONSIBILITIES 24 (Stephen D. Krasner ed., 2001) (giving a legal-practice background to the concept of sovereignty).

48. *See* T. Alexander Aleinikoff, *International Legal Norms and Migration: A Report, in* MIGRATION AND INTERNATIONAL LEGAL NORMS 1, 3 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003) (stating that international law affirms authority of states to "regulate movement of persons across their borders").

49. *Id.* at 9–10 (presenting the argument that migrants possess fundamental human rights to limit traditional claims of complete sovereign authority).

50. *Id.* at 3–7 (describing this authority/international sovereignty as the source of power for policies "managing admissions and residence," border security, nationality, and national security).

51. *See* sources cited *supra* notes 1–2.

52. *See supra* note 3.

53. *See* sources cited *supra* note 1.

54. *Cf.* HINSLEY, *supra* note 1, at 25–26 (defining sovereignty as the final political authority).

For over a century for the North American neighbors, these two doctrines determined numerous foreign policy and judicial interpretati ons concerning migration issues.[55] Non-intervention protected absolute sovereignty from external threats, such as another country interfering in domestic affairs. Plenary power protected absolute sovereignty from domestic restrictions, which ensured that the political branches would have the liberty to conduct foreign relations and regulate migration. As codified in Article 89:X of Mexico's Constitution, the norm of non-intervention prohibits Mexican foreign relations from interfering in another country's domestic affairs.[56] The norm is also included in Article 46:I of Mexico's Foreign Service Law, *Ley del Servicio Exterior Mexicano*, within a chapter on "Obligations of the Foreign Service Members."[57] The law prohibits members of the Foreign Service from "intervening in the internal and political affairs of or the international affairs of the State where they are commissioned."[58]

Using traditional sovereignty reasoning to apply the norm, Mexico developed a "policy of no-policy" regarding those emigrating to the United States.[59] After the Bracero program (1942-1962), in which the United States invited Mexican influence on the issue, Carlos Rico F. explained that Mexico's decision to "not intervene" was due "to respect [for] 'a sovereign right' of the U.S. to pass legislation on this question without attempting to influence the U.S. policymaking process."[60] In other words, Mexico determined that immigration policy was a unilateral exercise for the United States, and it wanted to preserve a non-intervention position in U.S. politics.[61] Mexico reasoned that a foreign policy on migrants would intervene in U.S. jurisdiction because the United States possessed sovereign authority to govern aliens in its national territory.[62] The most poignant example of this "no-policy"

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55. In the U.S. legal system, the judicial branch makes these determinations, while in Mexico this determination is made by the executive in exercising its foreign relations power contained in Article 89 of the Constitution. In theory, Mexican courts could make this determination, but this does not appear to have occurred.

56. Alonso Gómez-Robledo Verduzco, *Mexican Foreign Policy: Its Fundamental Principals*, 3 MEX. L. REV. 197, 198 (2005), *available at* http://info8.juridicas.unam.mx/cont/3/arc/arc5.htm.

57. Ley del Servicio Exterior Mexicano [L.S.E.M.], ch. VIII, art. 46:I, 4 de Enero de 1994 (Mex.), *available at* http://www.sre.gob.mx/acerca/marco_normativo/leysem/default.htm (published in the D.O. on Jan. 4, 1994, with the most recent reforms enacted on Feb. 25, 2002).

58. *Id.*

59. Carlos Rico F., *The Immigration Reform and Control Act of 1986 and Mexican Perceptions of Bilateral Approaches to Immigration Issues*, *in* IMMIGRATION AND INTERNATIONAL RELATIONS: PROCEEDINGS OF A CONFERENCE ON THE INTERNATIONAL EFFECTS OF THE 1986 IMMIGRATION REFORM AND CONTROL ACT (IRCA) 90, 95 (Georges Vernez ed., 1990) [hereinafter Rico, *Immigration Reform and Control Act of 1986*].

60. *Id.*

61. *Id.*

62. *Id.*

occurred when Mexico declined to cooperate with Alan Simpson, a Senator soliciting support from Mexico during the preparation of the Immigration and Reform Control Act (IRCA) of 1986.[63] Mexican foreign relations reasoned that a Mexican foreign policy on migrants in the United States would violate the norm of non-intervention, infringing on U.S. and international sovereignty over migration issues in which the United States had domestic jurisdiction.

Following a similar sovereignty posture, in 1889 with the *Chinese Exclusion Case,* the U.S. Supreme Court reasoned that international sovereignty was the source of the federal government's authority to regulate the entry and removal of migrants.[64] Sovereignty gave the political branches "plenary" authority in determining how immigration law treated foreign nationals.[65] Consequently, many legal issues concerning migrants could not be reviewed by the courts.[66] This has been labeled the plenary power doctrine.[67] Migrants could not count on the judiciary to rule over potential rights infringements, including the most basic constitutional protections, because courts lacked authority to review these issues.

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63. *Id.*

64. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 722 note (1987) (Federal regulation of aliens).

65. The doctrine has received a great deal of scholarly attention. For examples of how the international law concept of sovereignty relates to plenary power, see T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002) [hereinafter ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY]; T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989 (2004); Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127 (1999); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987) [hereinafter Henkin, *The Constitution and United States Sovereignty*]; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255 (1985) [hereinafter Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*]; Meredith K. Olafson, Note, *The Concept of Limited Sovereignty and the Immigration Law Plenary Power Doctrine*, 13 GEO. IMMIGR. L.J. 433 (1999); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965 (1993) [hereinafter Scaperlanda, *Polishing the Tarnished Golden Door*]; Spiro, *supra* note 44.

66. *See* Kleindienst v. Mandel, 408 U.S. 753, 766, 768–69 (1972) (discussing the dangers of allowing courts to review certain legal issues concerning immigrants).

67. *See id.* at 753 (explaining that Congress may exercise "plenary power to exclude aliens or prescribe the conditions for their entry"); Boutilier v. INS, 387 U.S. 118, 123 (1967) (declining to require fair warning in a deportation ruling).

A. *Non-Intervention Externally Protects Absolute Sovereignty*

The international law norm of non-intervention was conceived as an outgrowth of absolute sovereignty.[68] The norm prohibits one state from influencing or interfering in the affairs of another state.[69] States followed the principle to avoid forcible (military or violent) and non-forcible (non-violent and often political) interference.[70] In this century, the norm has been codified in treaties, conventions, and declarations of the Organization of American States, United Nations, and other multilateral institutions.[71] Nineteenth century inter-national law

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68. Hershey writes that the norm of non-intervention is a "necessary corollary" of "complete equality and independence of sovereign states and is a fundamental principle of international law." Hershey, *supra* note 3, at 41. *See generally* Tesón, *supra* note 43 (explaining that prohibited intervention is "coercive" but not necessarily forcible, and its ends are to influence the target state on a matter falling under the state's domestic jurisdiction."); Lori Fisler Damrosch, *Changing Conceptions of Intervention in International Law, in* EMERGING NORMS OF JUSTIFIED INTERVENTION 91, 91 (Laura W. Reed & Carl Kaysen eds., 1993) (explaining "intervention's" general meaning in international law as "an improper interference by an outside power with the territorial integrity or political independence of a state"). Krasner explains that while the norm of non-intervention was not included in the Peace of Westphalia of 1648, for "many observers" the norm is "the key element of sovereign statehood." KRASNER, SOVEREIGNTY, *supra* note 27, at 20.

69. KRASNER, SOVEREIGNTY, *supra* note 27, at 29 (examining how the Drago and other non-intervention doctrines characterize sovereignty as an "inherent qualification" that "no judgment may be instituted or carried out against it," which is based on the "freedom and independence of states" and serves as the basis of international law).

70. *See generally* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1 (1989) (arguing that nonforcible intervention should be used to enhance human rights, but providing limits for how a state should intervene); Hernan Vales, *The Latin American View of the Doctrine of Humanitarian Intervention*, J. OF HUMAN. ASSISTANCE, Feb. 2001, www.jha.ac/articles/a064.htm (last visited Oct. 20, 2007) (discussing the Latin American historical policy of nonintervention and its eventual relaxation).

71. Entering into force in 1948, the Organization of American States' (OAS) Charter's Article 18 states: "[n]o State or group of States has the right to intervene, directly or indirectly, for any reasons whatever, in the internal or external affairs of any other State." OAS Charter art. 15, Apr. 30, 1948, 2 U.S.T. 2394. In 1965, the UN's General Assembly passed the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Declaration on Intervention). G.A. Res. 2131 (XX), U.N. Doc. A/6014 (Dec. 21, 1965) (stating the Declaration "reaffirms" non-intervention principles from the OAS, Organization of African Unity, and the League of Arab States and declaring: "no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State" and "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference . . . ."); G.A. Res. 2225 (XXI), U.N. Doc. A/RES/2225 (Dec. 19, 1966). In 1970, the UN General Assembly passed the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (Friendly Relations Declaration). G.A. Res. 2625 (XXV),

scholars proclaimed the norm, with the Monroe, Calvo, and Drago doctrines, in reaction to European and North American interventions (imperial and economic) in the Western Hemisphere.[72] If an issue fell within one country's jurisdiction, any foreign policy by another country on that issue breached the norm. Out of a concern for sovereignty, countries applied the norm in their foreign relations.[73] At that time in history, sovereignty was conceptualized as a state's possession of absolute, unshared, and autonomous authority.[74] This included the authority of a state to regulate both its borders and the entry of persons into its national territory. In this regard, states were viewed as juridically equal and recognizing "full sovereignty."[75] This required eliminating any foreign interference in domestic affairs.[76]

The norm's most recent articulation is in amendment X to Article 89 of the Mexican Constitution.[77] Article 89:X presents seven "normative

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U.N. Doc. A/8028 (Oct. 24, 1970) (stating States have the "duty not to intervene in matters within the domestic jurisdiction of any State in accordance with the Charter"). Article III of the Charter for the Organization of African Unity protects states from "non-interference in the internal affairs of States." May 25, 1963, 2 ILM 766 (1963). *But see* Pact of the League of Arab States art. 8, Mar. 22, 1945, 70 U.N.T.S. 237 (stating each member "shall respect the form of government obtaining in the other States of the League . . . and shall pledge itself not to take any action tending to change that form").

72. The Monroe Doctrine articulates the international law norm of non-intervention by the United States, declaring European interference in the affairs of sovereign nations of the Western Hemisphere, usually by means of colonialism or military invasion, as impermissible. It declared that the United States regarded any interference in this hemisphere as an assault on the United States. To this end, the United States went to war with Spain to stop its colonial rule of Cuba in 1898. While the Doctrine claimed to minimize European interference, it also inspired U.S. invasions and political interference in Latin American affairs with military invasions of Mexico in 1847 and 1914–1917; Dominican Republic, 1907–1941; Nicaragua 1912–1925; Cuba, 1898-1902 and 1906–1922; Haiti, 1915–1934; and Panama in 1904. *See generally* ANN VAN WYNEN THOMAS & AARON J. THOMAS, JR., NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 10 (1956) (describing the Monroe Doctrine as the first example of the norm in the Americas); Hershey, *supra* note 3, at 27, 42 (explaining how the Calvo Doctrine arose, in part, from the view that European states' justification for intervention in American states was based on "no legitimate principles," and citing over fourteen contemporary international law treatises claiming the norm is an "every-day rule" of international law and practice); Marc Trachtenberg, *Intervention in Historical Perspective*, *in* EMERGING NORMS OF JUSTIFIED INTERVENTION, *supra* note 59 (discussing the historical context which led to the shift from the norm of non-intervention to a "right to intervene").

73. Philip C. Jessup, *The Estrada Doctrine*, 25 AM. J. INT'L. L. 719, 720 (1931) [hereinafter Jessup, *The Estrada Doctrine*] (explaining the norm's objective is to avoid criticizing the legal capacity of foreign states, a right viewed as derogatory to other states' sovereignty).

74. *Id.* at 721.

75. *Id.*

76. *Id.*

77. Article 89 of Mexico's Constitution, which is in Chapter III (Executive Power), labels the foreign relations power as the power "to conduct foreign relations and establish international treaties," but Article 89's subsection X also states that "when conducting this power, the Executive" should observe the normative principle of

principles," including non-intervention, that the executive power observes in conducting Mexico's foreign relations.[78] Article 89:X was included in 1988 to align Mexico's foreign relations authority with contemporary international law.[79] Article 89 specifically assigns Presidential powers, such as the power to "promulgate and execute laws passed by Congress," appoint cabinet members, declare war, conduct foreign relations, and conclude treaties (with the approval of the Senate).[80] Article 89:X's other six principles include national self-determination, peaceful solutions of controversies, banishment of threat of or use of force in international relations, legal equality between states, international cooperation for development, and the struggle for peace and international security.[81]

The norm's legal history predates this 1988 amendment.[82] This history includes numerous international codification efforts.[83] Mexican legal theorists and policymakers first applied the norm of non-

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"non-intervention." Constitutución Política de los Estados Unidos de México art. 89(X) (author's translation).

78. Gómez-Robledo Verduzco, *supra* note 56, at 198.

79. *Id.*

80. Mexico's Constitutional framework for the executive/President's power is contained in Articles 80 to 93. Id; STEPHEN ZAMORA ET AL., MEXICAN LAW 14, 142 (2004); Bernardo Sepúlveda Amor, *Los Intereses De La Política Exterior*, *in* LA POLÍTICA INTERNACIONAL DE MÉXICO EN EL DECENIO DE LOS OCHENTA 17, 96–99 (César Sepúlveda ed., 1994) [hereinafter Sepúlveda Amor, *Los Intereses De La Política Exterior*].

81. Constitutución Política de los Estados Unidos de México art. 89(X).

82. Lori Damrosch explains that the first use of the term "non-intervention" in international law was by Emerich de Vattel in 1758. Damrosch, *supra* note 68 (citing Mitrovic, *Non-intervention in the Internal Affairs of States*, *in* PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION 219 (M. Sahovic ed., 1972)). Thomas and Thomas identify the "birthplace" of the principle of non-intervention as the international law treaties of Christian Wolff and Vattel. Non-intervention later gained conceptual sophistication with the Calvo and Drago Doctrines. In 1868, Argentine scholar Carlos Calvo reasoned that European interventions in the Americas compromised national independence and international sovereignty. These ideas became the basis for the Calvo Doctrine, which condemned intervention by foreign powers to collect international money obligations. In 1902, Luis M. Drago, Argentina's foreign minister, extended the concept to a prohibition of foreign intervention in order to coerce government payment of its public debt. These doctrines illustrate the importance of absolute conceptions of sovereignty in the non-intervention norm. The norm's central objective was to limit foreign interference in domestic affairs by defining exclusive and independent authority. THOMAS & THOMAS, *supra* note 72, at 7.

83. In the early part of the twentieth century, there were many efforts through a series of international conventions and conferences in the Western Hemisphere to codify the norm as part of an international treaty. Before then, it remained as an expression of customary international law. The first step along this path resulted in the 1933 Montevideo Convention on the Rights and Duties of States, which stipulated that "no state has the right to intervene in the internal or external affairs of another." *See* THOMAS & THOMAS, *supra* note 72, at 61–62 (describing the Convention as the norm's "triumph").

intervention in the nineteenth century.[84] Geopolitical concerns of an expansionary neighbor (the United States) during "Manifest Destiny," as well as the exercise of European power in domestic politics and economics, influenced Mexico to interpret sovereignty as independent authority.[85] In very normative and doctrinaire fashions, Mexican foreign relations viewed international sovereignty as autonomy and legal equality between countries.[86]

Initially, non-intervention for Mexico focused on protection from the interference of foreign powers.[87] This principle became central to Mexican foreign relations; the objective was that other countries' non-intervention in Mexican affairs would be reciprocated by Mexico's non-intervention in their domestic affairs.[88] With this approach, Mexico conceptually contributed to an international law framework that protected its own fragile independence.[89] A basic motive was that

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84. *See generally* MERCEDES PERENA-GARCÍA, LAS RELACIONES DIPLOMATICAS DE MÉXICO 29, 35–36, 53–54 (2001) (explaining that, historically, Mexican foreign policy's primary goals have been defending national sovereignty and promoting non-intervention with legal doctrines such as the Drago, Calvo, Carranza, and Estrada doctrines.)

85. *Id.*

86. Green and Smith explain that Mexico's foreign policy highly valued "political negotiation and compliance with norms of international law" and its "respect for the international juridical order is the most effective means of defending the sovereignty and integrity of Mexico and other nations, especially weaker countries in the world." FOREIGN POLICY IN U.S.-MEXICAN RELATIONS 7 (Rosario Green & Peter H. Smith eds., 2004). Mexico's foreign policy has historically been characterized by an overly normative and doctrinaire focus. This resulted in a foreign policy reduced to a "simple enumeration of principles," such as self-determination, political sovereignty, non-intervention, legal equality, international cooperation, and human rights. Guadalupe González, The Foundations of Mexico's Foreign Policy: Old Attitudes and New Realities, in FOREIGN POLICY IN U.S.-MEXICAN RELATIONS, *supra*, at 25. *See* Andrés Rozental, *Fox's Foreign Policy Agenda: Global and Regional Priorities*, *in* MEXICO UNDER FOX 89 (Luis Rubio & Susan Kaufman Purcell eds., 2004) (explaining the Constitution's foreign relation principles traditionally justified almost all foreign policy positions for Mexico and this contrasts recent changes in Mexican foreign relations).

87. Sepúlveda Amor, *Los Intereses De La Política Exterior*, *supra* note 80, at 17, 96–99.

88. *Id.*; Bernardo Sepúlveda Amor, *Reflexiones Sobre la Política Exterior de Mexico*, 24 FORO INTERNACIONAL 409 (1984).

89. Since their legal independence in the mid-nineteenth century, many Latin American states had the objective of codifying in public international law a norm that would prevent intervention in domestic politics. The first example of this occurred in 1826 when Simón Bolivar (liberator of Colombia, Venezuela, Panama, Peru, Bolivia, and Ecuador) pursued a "Treaty of Perpetual Union between the newly independent [Gran] Colombia, Peru, and Mexico." THOMAS & THOMAS, *supra* note 72, at 57. Although not ratified, it had the objective of common defense of "sovereignty and independence" "against foreign subjection." *Id.* Subject to numerous interventions during the late-nineteenth and early twentieth century that were done on the grounds of protecting the lives and property of foreigners in these countries, many Latin American states viewed the development of a public international law norm of non-intervention as a way to deter future interventions. See generally Wanjohi Wacuima, United States—Latin American Relations: A Study of the Evolution of the Doctrine of

Mexico suffered from violations of its international sovereignty with U.S. and European invasions.[90] Mexican foreign policy sought to avoid future invasions.[91] It proclaimed concerns for other newly independent and similarly situated states with little military and economic power.[92] Mexico sought to codify the norm in international law.[93] The norm was so important that Mexican foreign relations actively sought to avoid expressing opinion on the affairs of other nations.[94] Noted Mexican international relations expert Jorge Chabat explains that, traditionally, the "mere expression of an opinion was regarded as an act of meddling" and thus violated the norm of non-intervention.[95]

These ambitions—stopping foreign influence and attaining domestic independence—appear as normative concepts in international law of the period.[96] The significance of non-intervention in Mexican law becomes apparent by examining the country's geopolitical history.

Non-Intervention in the Inter-American System 311–14 (Aug. 24, 1971) (unpublished Ph.D. dissertation, City University of New York) (on file with author).

90. *See* Wacuima, *supra* note 89, at 311–14.

91. *Id.*

92. Historic examples of when Mexico protested U.S. intervention in the affairs of other countries include: the overthrow of Jacobo Arbenz in Guatemala in 1954, campaigns against the Cuban revolution of 1959, military force in the Dominican Republic in 1965, pressures against Salvador Allende in Chile from 1970–1973 and Nicaragua after the 1979 revolution, and the invasions of Grenada in 1983 and Panama in 1989. FOREIGN POLICY IN U.S.-MEXICAN RELATIONS, *supra* note 86, at 8. Similar non-intervention protests included when: Italy invaded Ethiopia (1935–1936), Japan invaded China (1931–1945), Germany annexed Austria (1939), Russia's interest in Finland (1939-1940), and the Soviet Union's invasion of Afghanistan (1979–1988). *Id.* Also relying on non-intervention reasoning, Mexico did not break relations with Cuba in 1964 and voted against an OAS system of democratic consultations in 1965. *See* Antonio Carrillo Flores, *Genaro Estrada, Diplomático*, *in* SECRETARÍA DE RELACIONES EXTERIORES, HOMENAJE A GENARO ESTRADA 12–13 (1986).

93. Mexico proposed and voted for non-intervention principles in UN General Assembly resolutions; see G.A. Resolution 2131(XX), *"Inadmissibilidad de la Intervención en los Asuntos Internos de los Estados y la Protección a su Independencia y Soberania"* (1965) and G.A. Res. 2625 (XXV), U.N. Doc. A/8082 (Oct. 24, 1970). The International Court of Justice referred to these resolutions in a case involving Nicaragua and the U.S. *See* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); *see also* Cesar Sepúlveda, *Aportaciones de México al Derecho Internacional, a la Organización Universal y la Paz, 1981–1990*, *in* LA POLÍTICA INTERNACIONAL DE MÉXICO EN EL DECENIO DE LOS OCHENTA 267 (1994).

94. Jorge Chabat, *Mexico's Foreign Policy after NAFTA: the Tools of Interdependence*, *in* BRIDGING THE BORDER: TRANSFORMING MEXICO-U.S. RELATIONS 35 (Rodolfo O. de la Garza & Jorge Velasco eds., 1997) [hereinafter Chabat, *Mexico's Foreign Policy after NAFTA*].

95. *Id.*

96. *See generally* Hershey, *supra* note 3 (discussing the Calvo and Drago Doctrines, which prohibit the use of armed intervention to collect public debts or enforce private claims); Trachtenberg, *supra* note 72 (discussing the history of the shift from the norm of non-intervention to a "right to intervene").

Mexican independence occurred in 1821.[97] Transforming from the colony of *Nueva España* to the sovereign state of Mexico, its territory included present-day Guatemala, El Salvador, Honduras, Nicaragua, and the U.S. states of California, New Mexico, Arizona, Colorado, Nevada, Utah, and Texas.[98] By 1848, Mexico lost all of the mentioned territories in wars with foreign states in which foreign forces intervened in its domestic politics.[99] This created a national fear that there could be future territorial losses or intervention.[100] The resulting foreign policy objectives were to protect national territory.

Consequently, an international law perspective developed to address these challenges: sovereign authority should be protected to provide states with ample independence. These objectives painted sovereignty as absolute and exclusive, with states proclaiming interference in each other's affairs as violations of sovereignty. For many states, the concept of absolute sovereignty was necessary to ensure their national independence.[101] Stemming from this international-law view and geopolitical reality, states with less military or political power became the strongest advocates for non-intervention.[102]

The non-intervention norm became a fixture of Mexican foreign policy.[103] In July 1867, President Benito Juarez declared equality and respect between nations as a fundamental principle of Mexican foreign policy.[104] This developed into the Juarez Doctrine, as Mexico exerted a foreign policy amidst an expansionary neighbor and ever-watchful European forces.[105] In 1913, President Francisco Madero affirmed the

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97. Raúl Benítez Manaut, *Sovereignty, Foreign Policy, and National Security in Mexico, 1821–1989*, *in* NATURAL ALLIES?: CANADIAN AND MEXICAN PERSPECTIVES ON INTERNATIONAL SECURITY 58–60 (H.P. Klepak ed., 1996).

98. *Id.*.

99. *Id.*

100. *Id.*

101. *See* KRASNER, SOVEREIGNTY, *supra* note 27, at 21 ("Weaker states have always been the strongest supporters of the rule of nonintervention.").

102. *See id.* at 21–22 (describing Latin American positive and customary law efforts to this end, e.g., the Calvo doctrine in 1826, the Drago doctrine in 1848, Sixth International Conference of American States in Havana in 1928, International Conference of American States in 1933, and the Charter of the OAS in 1948).

103. Rosario Green and Peter H. Smith explain that Mexico's foreign policy developed "through the traumatic experiences of threats to national sovereignty." FOREIGN POLICY IN U.S.-MEXICAN RELATIONS, *supra* note 86, at 7; *see also* Raúl Benítez Manaut, *Política exterior mexicana en la encrucijada vital del siglo XXI*, FOREIGN AFFAIRS EN ESPAÑOL, Oct.-Dec. 2006, http://www.foreignaffairs-esp.org/20061001faenespreviewessay060432a/raul-benitez-manaut/politica-exterior-mexicana-en-la-encrucijada-vital-del-siglo-xxi.html (describing the Juarez, Carranza, and Estrada Doctrines as "sacred" expressions of the foreign relations for Mexican governments since the Mexican Revolution of 1910).

104. Benítez Manaut, *supra* note 98, at 57, 60.

105. President Juarez articulated the international law norms of non-intervention and self-determination in limiting European influence since 1861. *See* Jorge Flores, *Genaro Estrada y su labor Diplomática Secretaría de Relaciones Exteriores*, *in* GENARO ESTRADA: DIPLOMÁTICO Y ESCRITOR 19, 38 (1978).

importance of this equality by explaining that relations between the United States and Mexico should "be based on respect for the sovereignty, the integrity and the dignity of the Mexican Republic."[106] These ambitions characterized the later Carranza Doctrine, which emphasized non-intervention and self-determination in international relations.[107] The norm sought to negate the right of powerful states (i.e., the United States) to judge a foreign government.[108] This judgment was invariably conducted through the process of diplomatically recognizing foreign governments.

In 1931, Foreign Relations Minister Genaro Estrada developed Mexico's most important contribution to the international law norm of non-intervention.[109] Eventually labeled the Estrada Doctrine,[110] its objective was for Mexico to remain neutral in foreign controversies and to reject the common practice for countries to "recogniz[e] foreign governments."[111] Often, European powers and the United States used this practice of recognition to influence the political power of a specific

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106. *See* Manaut, *supra* note 98, at 61.

107. Presidents Juarez and Carranza responded to foreign intrusions in Mexican affairs. During President Juarez's political career, Mexico lost much of its territory to the United States in the War of 1848. Ernesto Hernández-López, *International Migration and Sovereignty Reinterpretation in Mexico*, 43 CAL. W. L. REV. 203, 219 (2006). Under President Carranza, Mexico was a victim of extensive diplomatic and military intervention by the United States during the Mexican Revolution, such as the invasion of Veracruz in 1914 and the United States' pursuit of Pancho Villa in 1916. *Id.*

108. *See* Carillo Flores, *supra* note 92, at 13.

109. *See* Jessup, *supra* note 73 (introducing the Estrada Doctrine after its creation); Declaration of Señor Don Genaro Estrada, Sec'y of Foreign Relations of Mex., Relating to the Express Recognition of Governments (Sept. 27, 1930), *reprinted in Estrada Doctrine of Recognition*, 25 AM. J. INT'L L. 203 (Supp. 1931) [hereinafter *Estrada Doctrine of Recognition*] (the doctrine itself).

110. Antonio Carrillo Flores explains the Doctrine was initially called the "*Doctrina de México*" by Mexican diplomats, but internationally, and currently, it is referred to as the "*Doctrina Estrada*." Carillo Flores, *supra* note 92, at 10.

111. Jorge Chabat provides this translation of the Estrada Doctrine:

> Mexico is not inclined to express recognition because it considers this a denigrating practice which, besides hurting the sovereignty of other nations, places them in a position in which their internal matters can lead to remarks by other governments, who have already assumed a critical attitude as they decided, favorably or unfavorably, to judge the legal status of foreign governments

Chabat, *Mexico's Foreign Policy after NAFTA*, *supra* note 94, at 44 (referencing SECRETARÍA DE RELACIONES EXTERIORES, GENERO ESTRADA: DIPLOMÁTICO Y ESCRITOR 135 (Santiago Roel ed., 1978)). Antonio Carrillo Flores provides this summation of the doctrine:

> Our country will not use the practice of recognizing of a government, whether the government came to power by peaceful or violent means, in an attempt to impose conditions trying to influence the conduct of its sovereign authority.

Carillo Flores, *supra* note 92, at 10 (author's translation).

actor or political party in another state's domestic politics.[112] Latin American states were particularly subject to this practice.[113] This Doctrine inspired the development of the non-intervention norm in the region.[114] Domestically, forces gained or lost political power because of this foreign influence. Similarly, for foreign states with more economic influence and geopolitical power, recognition became a powerful weapon.[115] In developing the doctrine and protecting notions of absolute sovereignty, Mexico instead proclaimed it would not judge or support any particular domestic political actor in a foreign country.[116] The Doctrine's central objective of not interfering in domestic matters of other countries was applied to situations beyond just the recognition (or non-recognition) of a foreign government.[117] For instance the year after its declaration, the norm was re-articulated as a Mexican foreign relations policy of "not intervening in the internal politics of other states."[118]

In sum, seeking to protect its own territorial integrity and to contribute to an international law framework solidifying the independence of weaker states, Mexico has applied the norm of non-intervention since its early foreign relations. By protecting this independence with claims of legal equality between states and the autonomy of each state's domestic affairs, the non-intervention norm seeks to protect absolute sovereignty from foreign influences.

B. *Plenary Power Internally Protects Absolute Sovereignty*

The plenary power doctrine also employs absolute notions of sovereignty.[119] In an application of the doctrine, the Supreme Court

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112. *See Estrada Doctrine of Recognition*, *supra* note 109, at 203 (describing the practice after World War I).

113. *Id.*

114. Carillo Flores, *supra* note 92, at 11.

115. Jessup, *The Estrada Doctrine*, *supra* note 73, at 723.

116. The objective was to avoid having the "legal capacity and national leadership of governments and authorities . . . subordinated to the opinions of foreigners." Manaut, *supra* note 98, at 64. The Estrada Doctrine initially started as official instructions to the Mexican diplomats but became a central objective of Mexican foreign policy. *See id.* at 63–64 (discussing the Estrada Doctrine as part of the foundation of Mexico's relations with other countries).

117. *See* Jorge Chabat, *The Making of Mexican Policy Toward the United States*, *in* FOREIGN POLICY IN U.S.-MEXICAN RELATIONS, *supra* note 86, at 73, 78 (describing non-intervention as "a cornerstone of Mexican foreign policy").

118. *See* Flores, *supra* note 105, at 40 (emphasizing the principle of not interfering ("no mezclarse") (author's translation) in the domestic politics of other states).

119. Professors Rotunda and Nowak describe Supreme Court decisions on immigration issues and characterize Congress' power over admission of aliens as "absolute." 5 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 22.2 (Ronald D. Rotunda & John E. Nowak eds., 3d ed. 1999). In *The Chinese Exclusion Case*, Judge Field writes that Congress' power to exclude aliens is part of "[the]

determined that the federal government's power to regulate immigration affairs came from international sovereignty.[120] In the past, this permitted the political branches to exercise authority without most constitutional checks or judicial review.[121] Plenary power protects sovereignty internally (i.e., within domestic U.S. law) from the checks of judicial review and individual rights limitations. The plenary power doctrine is an example of absolute sovereignty reasoning because it completely defers to political branches on immigration and foreign relations matters, and rationalizes such deference by recourse to international sovereignty, the source of the foreign relations power.[122] In the late nineteenth century, legal experts and the Supreme Court used this rationale to define sovereignty in absolute terms: the plenary power doctrine interpreted the state's authority to be broad and autonomous in foreign relations between states as well as interactions between host states and foreign individuals.[123] Few if any restrictions limited this sovereign authority.

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[j]urisdiction over its own territory [and] to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power." Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603–04 (1889).

120. The Supreme Court has referred to the plenary power as part of international law. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (stating the plenary power, as applied to immigration, is not "expressly affirmed by the Constitution," and is sourced within "the law of nations"). For a description of how nineteenth-century courts actively used international law doctrine to shape federal immigration power, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 83–87 (2002) [hereinafter Cleveland, *Powers Inherent in Sovereignty*] (describing late nineteenth and early twentieth century development of federal immigration power as part of more expansive plenary power doctrine also applied to federal authority over Native Americans and territories).

121. Justice Gray writes that it is "an accepted maxim of international law," a power of "every sovereign nation," "inherent in sovereignty," and "essential to self-preservation" to forbid alien entry, and in the United States this power is federal, "to which the Constitution has committed the entire control of international relations." Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (citing 2 EMER DE VATTEL, THE LAW OF NATIONS §§ 94, 100 (Joseph Chitty ed., 1849), and 1 ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW, 192–93 (1854)); *see also Curtiss-Wright Export Corp.*, 299 U.S. at 315–19 (stating that external sovereignty passed from Great Britain to the United States upon its independence and not to the states severally; such rights from external sovereignty are granted to the federal government even though not enumerated in the Constitution; and the right to forbid alien entry is one such right).

122. *See Curtiss-Wright Export Corp.*, 299 U.S. at 318 (stating sovereignty is important to the United States because "[a]s a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.").

123. *See Nishimura Ekiu*, 142 U.S. at 659; Cleveland, *Powers Inherent in Sovereignty*, *supra* note 120, at 83 (describing "absolute power" derived from international law).

The *Chinese Exclusion Case* sets the stage for the application of absolute sovereignty principles, both specifically in the migration authority context and generally in the foreign relations context.[124] The dispute questioned the source of authority for the federal government to deny re-entry of a Chinese national into the country.[125] The Chinese national claimed that a treaty between the United States and China secured his right to re-enter.[126] The Court ruled the United States could deny his re-entry and confirmed that the federal government's authority came from its international sovereignty.[127] The United States' sovereignty was described as "necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself."[128]

With plenary power's doctrinal development, sovereignty jumped from an international law principle of foreign relations to the basis for non-justiciability in immigration issues. International law defined sovereignty as a country's independent and absolute authority.[129] Since immigration law fell within the political branches' foreign relations power, these branches enjoyed "plenary" authority when creating, interpreting, and implementing this law.[130] With this deference to the political branches, the government easily excluded or deported foreigners with few limitations.[131] This deference existed because there were no limits to international sovereignty, an authority characterized as absolute and exclusive.

The plenary power doctrine is an outgrowth of the U.S. federal government's determination that its source of power for immigration regulation derives from international sovereignty. This power is not derived from a constitutionally-enumerated source, resulting in the

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124. *See* Henkin, *The Constitution and United States Sovereignty*, *supra* note 65, at 853–54 (stating that the Court in *The Chinese Exclusion Case* enunciated two doctrines: Congress has the power to control immigration since it is an inherent power in the sovereignty of a nation, and that the "Constitution does not bar Congress from enacting laws inconsistent with [its] international obligations").

125. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 603 (1889).

126. *Id.* at 604.

127. *Id.*

128. *Id.* (quoting *Schooner Exch. v. McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812)).

129. The traditional international law perspective was that states possessed the absolute right to exclude aliens as an attribute of sovereignty, and this right was inherent to a state's power of self-preservation. *See* James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983) (questioning this perspective by closely examining the writings of Francisco de Vitoria, Vattel, and others, whose sovereignty conceptions are central to characterizations of absolute authority).

130. *Kleindienst v. Mandel*, 408 U.S. at 766 (describing this power as "plenary").

131. *See, e.g.*, The Chinese Exclusion Case, 130 U.S. at 603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.")

political branches' having a nearly complete or "plenary" discretion.[132] Because its source is sovereignty, this authority is not limited by judicial review or constitutional rights limitations.[133] When applied, the plenary power doctrine forecloses courts from reviewing the constitutionality of immigration laws. The rationale for this foreclosure is that Congress has complete (and unchecked) power to determine what immigration law should be.[134] Likewise, Executive branch decisions regarding how to interpret or enforce immigration law are also not reviewable.[135]

As a historical matter, the plenary power doctrine developed during a period in U.S. history when the federal government was exerting its primacy over the states.[136] The United States also sought to expand its geopolitical influence through the acquisition of colonies abroad and the subordination of Native American people within domestic borders. The federal government, rather than the states,

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132. *See* Mathews v. Diaz, 426 U.S. 67, 81 (1976) (stating:

> For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.)

One of the Supreme Court's strongest plenary power justifications is that immigration matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952).

133. *See* Fong Yue Ting v. U.S., 149 U.S. 698, 712 (1893) (stating that when determining if immigration law is constitutional, "it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the constitution to the other departments of the government.").

134. While precedent-making claims are varied and long, contemporary court decisions and government arguments often point to *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) ("[I]t is important to underscore the limited scope of judicial inquiry into immigration legislation."), and *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) ("The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'" (quoting Boutilier v. I.N.S., 387 U.S. 118, 123 (1967)).

135. *See, e.g., Fong Yue Ting*, 149 U.S. at 706 (showing a high degree of judicial deference to executive decisions regarding the enforcement of immigration laws); Lees v. U.S., 150 U.S. 476, 480 (1893) (reaffirming the Court's holding in *Fong Yue Ting*).

136. Professor Cleveland explains that the political branches' plenary power over foreign affairs, immigrants, Indian (or Native American) affairs, and U.S. territorial possession issues received its clearest articulation as inherent in U.S. international sovereignty with the 1936 *Curtiss-Wright Export Corp.* decision. Cleveland, *Powers Inherent in Sovereignty*, *supra* note 120, at 273. Here, the Court labeled this authority as an unenumerated constitutional power. Professor Cleveland examines the crafting of the doctrine as part of a long judicial process, beginning in 1886 with *United States v. Kagama*, 118 U.S. 375 (1886), deciding that in foreign affairs the political branches possessed inherent powers.

possessed the power to control border and migration matters.[137] For the federal government to exercise this power effectively, it could not be limited by domestic restraints.[138] A goal of this doctrine was that, with respect to its foreign relations, the United States would enjoy the power European states had.[139] Such a doctrine, providing expansive powers to the political branches, would facilitate control of national borders and immigration policy, Native American persons, and overseas acquisitions.[140] Traditional constitutional interpretation, before the doctrine, regarded national sovereignty as divided and shared between the national government, the states, and the people.[141] The people and the states ceded specific or enumerated powers to the federal government.[142] The federal government did not have powers which were not specifically enumerated by the Constitution.[143] Before the plenary power doctrine was developed, immigration authority was not textually committed to the federal government by the Constitution.[144] It could thus be limited by state authority or individual rights limitations in the Constitution.[145]

By the late-nineteenth century, U.S. courts began to address foreign relations developments, such as foreign nationals migrating to the United States, territorial possession in building an overseas empire, and the treatment of Native American tribes.[146] The United States generally became more involved in global affairs. Prior constitutional interpretations limiting federal authority to enumerated constitutional sources had the potential to severely limit this global activity.[147] Consequently, the Court derived the federal government's plenary power over foreign relations, including immigration, from

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137. Gerald Neuman demonstrates how before 1875 the states, and not just the federal government, had active immigration policies. *See* Gerald Neuman, *The Lost Century of American Immigration Law* (1776–1875), 93 COLUM. L. REV. 1833, 1841 (1993) (providing examples of state legislation regarding immigration, e.g., "[s]tate opposition to the immigration of persons convicted of crime").

138. Cleveland, *Powers Inherent in Sovereignty*, *supra* note 120, at 12.

139. *Id.*

140. *See id.* at 11 (noting that these areas of law "shared a number of characteristics that led the Court to treat them as constitutionally exceptional").

141. *See id.* at 11–14; ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY, *supra* note 65, at 11–18 (outlining the traditional view).

142. U.S. CONST. amend. X; see also Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 477 (1939) (stating that the federal government "derives its authority wholly from powers delegated to it by the Constitution").

143. *See* Cleveland, *Powers Inherent in Sovereignty*, *supra* note 120, at 81 ("The constitutional text does not expressly address authority to regulate immigration.").

144. *Id.*

145. *See id.* (citing eighteenth-century examples of concurrent federal and state legislation regarding immigration).

146. *See generally* Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998) (outlining the federal exercise of immigration and territorial possession powers with respect to Puerto Rico).

147. *See, e.g.*, Smith v. Turner, 48 U.S. (7 How.) 283, 399 (1849) ("[T]he Federal authority is void when exercised beyond its constitutional limits.").

international sovereignty, rather than the text of the Constitution's.[148] In creating the doctrine, U.S. courts interpreted public international law to confer this unchecked authority on sovereign nations to control migration and the nation's territorial borders.[149] In *Curtiss-Wright Export Corp.*, the Court characterized the federal government's foreign relations power as unenumerated and inherited from sovereignty.[150] As an extra-constitutional power, the executive exercise of foreign relations was beyond the scope of judicial review.[151]

The doctrine's foundational decisions regarding immigration were *The Chinese Exclusion Case* (1889), *Nishimuria v. United States* (1892), and *Fong Yue Ting v. United States* (1893).[152] These cases held that the judicial branch could not review exercises of federal power over issues of migrant admission, exclusion, and deportation.[153] These

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148. Cleveland, *Powers Inherent in Sovereignty*, *supra* note 120, at 3.

149. Justice Sutherland wrote about the United States being a part of the "family of nations, [which requires that] the right and power of the United States in the field are equal to the right and power of the other members of the international family." U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

150. *Id.*

151. *Id.* at 319.

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.

Id.

152. 130 U.S. 581; 142 U.S. 651; 149 U.S. 698. These foundational plenary power cases sought to exclude Asians and Asian-Americans with little regard for blatantly discriminatory effects and racist reasoning. *Id.* While the doctrine involves substantial international law assumptions, as noted in this Article, its genesis was very much a racial and culturally discriminatory effort of the U.S. government. *See* Gabriel "Jack" Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) (reviewing racist underpinnings of early plenary power cases in the field of immigration). This Article does not focus on these discriminatory and racist elements. For current descriptions of how the plenary power doctrine has racially discriminatory effects, see Kevin Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000) (responding to Professor Chin's analysis by highlighting contemporary de facto discrimination the doctrine supports and how the doctrine is used to interpret current statutory laws and agency regulations), and Ediberto Román, The Citizenship Dialectic, 20 GEO. IMMIGR. L.J. 557 (2006) (presenting how the doctrine is related to traditional exclusionary determinations in U.S. citizen versus non-citizen and white versus non-white treatments in U.S. legal history and in the varying treatment currently afforded in "war on terror" cases involving John Walker Lindh, Yaser Esam Hamdi, and Jose Padilla).

153. *See, e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

> If, therefore, the government of the United States . . . considers the presence of foreigners of a different race in this country, who will not assimilate with us, to

cases placed immigration law within a category of nonjusticiable cases and within the exclusive power of the political branches. This link between the regulation of migration and foreign relations solidified that most immigration issues would be regarded as political questions and that these issues would be beyond the Court's review.[154]

In the mid-twentieth century during the Cold War, which had significant political and legal importance in national security at that time, the plenary power doctrine's basic tenets received added judicial approval, further strengthening precedent in this area of the law.[155] The plenary power doctrine became a set of reasons to preclude judicial interference in most immigration issues.[156] Constitutional limitations were not applied to the executive and legislative branches' authority over immigration, and the judiciary only provided substantive

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> be dangerous to its peace and security, their exclusion is not to be stayed . . . . [The federal government's] determination is conclusive upon the judiciary.

Id.

154. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952).

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

For similar references, see Mathews v. Diaz, 426 U.S. 67, 81 (1976); Kleindienst v. Mandel, 408 U.S 753, 765–67 (1972); and *Fong Yue Ting*, 149 U.S. at 711–713.

155. *See, e.g.*, Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 704–05 (2002).

> Several of the decisions most restrictive of alien rights were, not coincidentally, delivered at the height of the Cold War. The plenary power cases repeatedly advert to the sensitive element of foreign relations in immigration decision-making and the resultant need for extreme judicial deference to the will of the political branches.

Id.

156. Professor Legomsky identifies six theories evident in court decisions which support the doctrine. These are that: (1) the constitutionality of immigration law is inherently a political question because it is part of foreign affairs; (2) aliens are "guests" trying to assert a "privilege" as opposed to "members" of the United States asserting a "right;" (3) the unfairness of aliens benefiting from international law remedies and U.S. constitutional law; (4) aliens possess no allegiance to the United States and, thus, they cannot enjoy full constitutional protection; (5) the power to regulate immigration is inherent in sovereignty and separate from constitutional limits; and (6) for exclusion proceedings, an alien has not yet entered the United States, and thus, constitutional limits do not apply. Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HASTINGS CONST. L.Q. 925, 927–28 (1995) [hereinafter Legomsky, *Ten More Years of Plenary Power*]. He adds that "an unrelenting stream of plenary power decisions lent overpowering force to stare decisis" with the Court stating by 1954 "the slate is not clean" and suggesting the doctrine could not be overturned. *Id.* (quoting *Galvan v. Press*, 347 U.S. 522, 530–31 (1954)). Extensive analysis of the courts' misplaced and erroneous reliance on precedents is available at STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY—LAW AND POLITICS IN BRITAIN AND AMERICA (1987).

constitutional limits to the political branches' immigration authority in limited situations.[157]

In analyzing legal foundations for the plenary power doctrine, Professor Michael Scaperlanda describes how international law definitions for sovereignty evolved.[158] Examining Emerich de Vattel's writings on sovereignty, which the Supreme Court cites in early plenary power cases, he explains how absolutist and deferential definitions articulated the concept of sovereignty.[159] In the mid-eighteenth century, Vattel's notions of sovereignty justified increased independence and autonomy for a state's conduct.[160] Professor Scarpalenda quotes Vattel:

> [T]he State remains absolutely free and independent with respect to all other men, and all other Nations, so long as it has not voluntarily submitted to them. . . .
>
> Nations being free and independent, though the conduct of one of them be illegal and condemnable by the laws of conscience, the others are bound to acquiesce in it. . . . The liberty of that nation would not remain entire, if the others were to arrogate to themselves the right of inspecting and regulating her actions; an assumption on their part, that would be

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157. While the doctrine provided significant deference to the political branches, a few exceptions did exist that permitted aliens the benefit of limited judicial review and constitutional rights protection. For instance, courts have consistently afforded aliens procedural due process during deportation proceedings since *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903). Here, the Court relied on the Fifth Amendment's wording that "no person shall be deprived," which does not bar protections for aliens or limit protection to citizens. *Id.* Likewise, foreign nationals were not barred from some constitutional protections in criminal prosecutions or for issues concerning alien property. *See* Wong Wing v. U.S., 163 U.S. 228 (1896). Similarly, scholars noticed that there were limited judicial deviations in some applications of the plenary power doctrine without overturning it. *See* Legomsky, *Ten More Years of Plenary Power*, *supra* note 156, at 928–29 (describing the courts' "draw[ing of] esoteric distinctions," expanded use of procedural distinctions, and decision not to characterize the power as "complete"); Motomura, *Immigration Law after a Century of Plenary Power*, *supra* note 20, at 560 (emphasizing the expanded use of statutory interpretation to avoid constitutional determinations).

158. Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 65, at 1005.

159. In *Fong Yue Ting*, Justice Grey writes:

> Vattel says: "Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and, in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner."

149 U.S. at 707 (quoting 1 VATTEL, *supra* note 121, §§ 230–231).

160. Previous legal definitions of sovereignty were limited by natural law, providing less state independence and autonomy. *See* Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 65, at 1002 (describing relationship between individual rights and the state's sovereignty).

> contrary to the law of nature, which declares every nation free and independent of all the others.[161]

Placing Vattel's ideas in the context of plenary power, Professor Scarpalenda summarizes that "all nations are bound to obey the laws of nature," "it would violate the laws of nature for any other nation to judge another nation's alleged violation of these laws," and "[e]ach nation interprets natural law itself."[162]

Under the foundational plenary power cases, sovereignty had no limits based upon individual rights or foreign obligations. Absolute sovereignty concepts developed in seventeenth and eighteenth century Europe when state governments (nation-states or monarchies) identified their legal basis for authority within their territories and amongst other states in the international system. This need for order, domestic and international, justified absolute definitions of this sovereign authority.

U.S. courts in the late nineteenth century applied similar justifications when faced with the need to centralize federal authority and allocation of governmental authority over foreign relations. The concept of plenary power, which applied absolute sovereignty ideals, provided this justification. It fit neatly with the expectation of the political branches that judicial branch should not question their authority or subject political decisions regarding foreign relations to review. The political branches' foreign relations power included the entry and removal of foreign nationals.[163] Since immigration law intrinsically involves the international aspect of foreign nationals, the political branches' justification for deference in immigration law was that it implied foreign relations. The plenary power doctrine has consistently drawn vocal and powerful dissents since its inception.[164]

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161. *Id.* at 1008 ("In a State, the individual citizens do not enjoy them fully and absolutely, because they have made a partial surrender of them [liberty and independence] to the sovereign." (quoting 2 VATTEL, *supra* note 121, §§ 4, 9)). States, however, remain absolutely free because they remain in a "state of nature." *Id.*

162. *Id.* at 1008–09.

163. *See, e.g.*, Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604 (1889) (listing the admission of "subjects of other nations to citizenship" as one of the powers "which belong to independent nations").

164. Many justices claimed that sovereignty and plenary authority were without limits and that this was undesirable because: (1) constitutional rights designations included rights for individuals or "persons" that protected foreign nationals despite foreign relations or political questions; (2) the plenary authority was a weak permission for xenophobia or racism; and (3) such deference to the political branches upset the liberty the separation of powers protected. For instance, dissenting in Fong Yue Ting, Justice Brewer explained:

> This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism

In sum, over the course of its traditional application to immigration issues throughout history, the plenary power doctrine established an absolute line between such issues and the judiciary's power to review these issues. This line manifested absolute sovereignty concepts and effectively excluded migrants from most constitutional rights.

III. MIGRANTS AND MEXICO'S REINTERPRETATION OF NON-INTERVENTION[165]

Traditionally Mexican migrants were excluded from the concerns of Mexico's foreign relations. This exclusion resulted from a strict line demarcating U.S. sovereignty and Mexico's desire to refrain from interfering with it. In Mexico, the traditional sovereignty perspective was that migrants in the United States fell within U.S. jurisdiction because they were in U.S. territory. How they were treated once they crossed the international border was a matter left to the sovereign United States. In other words, Mexico regarded the United States' international sovereignty as absolute, and the norm of non-intervention supplied a traditional view of sovereignty that prohibited Mexico from influencing issues within the United States' jurisdiction. A change in such reasoning took place, however, when the Mexican government modified its view that migrants fell solely within U.S. jurisdiction.[166] In the mid-1990s, Mexican foreign policy began to

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> exists. . . . I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens.

149 U.S. at 737–38 (Brewer, J., dissenting). Dissenting opinions from Justice Field and Chief Justice Fuller, respectively, claimed: (1) "sovereignty" is greatly confused by "law writers," and U.S. sovereignty is vested in the people or the states and is not an unenumerated power, and (2) "unlimited and arbitrary power" is "incompatible with the immutable principles of justice" of "our government" and "the written constitution by which that government was created." *Id.* at 757–58 (Field, J., dissenting), 763 (Fuller, C.J., dissenting). *See also* Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) (quoting criticism of plenary power and sovereignty in Justice Brewer's dissent in *Fong Yue Ting*).

165. The greater part of this analysis follows Jorge Chabat's decades of ground-breaking foreign policy analysis, such as Jorge Chabat, *Mexico's Foreign Policy after NAFTA*, *supra* note 94. This section builds on prior descriptions of changes to the norm of non-intervention included in Ernesto Hernández-López, *International Migration and Sovereignty Reinterpretation in Mexico*, 43 CAL. W. L. REV. 203 (2006).

166. In 1988, Jorge Chabat explained that any change in Mexico's foreign policy to become more active in representing Mexican migrants (through the consulates or influencing U.S. lawmaking) would require reinterpreting non-intervention. He explains the norm is a "cornerstone of Mexican foreign policy." Chabat, *supra* note 117, at 78 (referring to Ley Orgánica del Servicio Exterior Mexicana [L.O.S.E.M.], Diario Oficial de la Federación [D.O.], art. 48, 8 de Enero de 1982 (Mex.)). Domínguez and Fernández de Castro explain that traditionally Mexico did not lobby U.S. lawmakers for immigration reforms because it did not wish to "undermine its principled political opposition" to U.S. interference in Mexico. JORGE I. DOMÍNGUEZ & RAFAEL FERNÁNDEZ

define the treatment of its nationals outside its national territory as a domestic concern.[167] This determination provided a conceptual base to move from a "policy of no policy" towards reinterpreting the norm of non-intervention.[168] This section elaborates on five examples since the mid-1990s in which Mexican foreign relations have taken elaborate and nuanced approaches to advocating on behalf of migrants to the United States. These changes elucidate how Mexican foreign relations law has reinterpreted sovereignty in the doctrine of non-intervention with regards to migration. The changes include: (1) lobbying U.S. lawmakers for changes to U.S. immigration legislation in 1996 as IIRIRA was passed; (2) developing consular programs for Mexican nationals in the United States; (3) changing nationality law to permit Mexican nationals to have dual nationality, thus facilitating their naturalization as U.S. citizens in order to influence changes in U.S. immigration policy; (4) President Vicente Fox's aggressive negotiation of a bilateral migration agreement with the United States; and (5) publicly voicing Mexican foreign policy positions on domestic U.S. immigration debates as part of a general effort to influence U.S. immigration reform. These approaches seek to influence U.S. lawmaking and, in doing so, they reinterpret the norm of non-intervention by not reasoning that sovereignty bars Mexico's influence altogether.

A. *Seeking Change in U.S. Laws for Mexican Domestic Benefit*

Mexico's first step from "no-policy" took place when it lobbied U.S. legislators in response to the proposed legislation that become the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996. IIRIRA eliminated many migrant rights and

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DE CASTRO, THE UNITED STATES AND MEXICO: BETWEEN PARTNERSHIP AND CONFLICT 126 (2001).

167. One concept that facilitated the reinterpretation of prior notions of non-intervention was Mexico's national recognition of interdependency between Mexico and events and actors outside its territorial borders. Chabat, *Mexico's Foreign Policy after NAFTA*, *supra* note 94, at 39. This was most evident during the Presidency of Carlos Salinas de Gortari (1988–1994). *Id.* Jorge Chabat explains that during the Salinas presidency, Mexico's foreign relations identified the value of interdependency with the outside world and its foreign policy became more active. *Id.* at 38. This altered the application of the norm of nonintervention. Mexican ideals of sovereignty shifted from a concept highlighting the international system's autonomous and absolute authority between countries to a concept emphasizing a country's international cooperation, shared authority, and interdependent relations. *Id.*

168. Rafael Fernández de Castro and Andrés Rozental explain that the "no-policy policy" was traditional and fundamental to both countries' positions on migration and that the policy began to change in 1995 when a binational study examined the consequences and effects of Mexico-U.S. migration. Rafael Fernández de Castro and Andrés Rozental, *El amor, la decepción y cómo aprovechar la realidad: la relación México-Estados Unidos 2000–2003*, *in* EN LA FRONTERA DEL IMPERIO 117 (Rafael Fernández de Castro ed., 2003).

initiated the current focus of migration control through border security.[169] Sectors of the U.S. public as well as lawmakers advocated for measures limiting or eliminating many rights or benefits enjoyed by migrants in the United States.[170] Many reformers called for increased deportations.[171] The prospect of restrictive reforms in the United States concerned Mexican migrants, who exerted a large economic influence in Mexico despite their physical location outside of the national territory.[172] There was an enormous Mexican fear of mass deportations after IIRIRA's implementation.[173]

IIRIRA was enacted nearly a decade after the Immigration Reform and Control Act (IRCA) of 1986, in which Mexico did not lobby or attempt to influence U.S. legislators while it was under legislative

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169. The comprehensive bill contained provisions which created three- and ten-year bars to re-entry for aliens who were "unlawfully present," "expedited removals," a one-year filing deadline for asylum applications, changes to eligibility for suspension of deportation, increasing removability classification for alien-criminals, mandatory detention for immigrants convicted of certain crimes, and statutory limitations to judicial review over immigration law claims. T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 440–42, 446–51, 529–33, 609–16 (5th ed. 2003). *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (1999) (summarizing the recent Congressional legislation).

170. IIRIRA was implemented in 1996 in the same year that federal legislation eliminated many public and welfare benefits to aliens. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 503, 110 Stat. 3009, 3009–671 (included at 42 U.S.C. § 402(y) (2000)) (denying Social Security benefits to aliens unlawfully present in U.S.); § 562, 110 Stat. 3009, 3009–682 (included at 8 U.S.C. § 1369 (2000)) (denying medical payments when a patient's immigration status is not verified). These reforms were enacted two years after California passed Proposition 187. 1994 Cal. Legis. Serv. Proposition 187 (West). From the perspective of Mexican policymakers and civil society, the California proposition and the federal reforms were parts of the same anti-immigrant wave, ultimately denying access to the United States for many Mexicans. *See* Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition* 187, 17 CHICANO-LATINO L. REV. 1 (1995) (outlining "the way in which the rhetoric permeating the debate over Proposition 187 created an environment that gave license to discrimination and intolerance"). Federal welfare reform legislation was passed in August and September of 1996, making documented and undocumented immigrants ineligible for certain public benefits. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 401, 110 Stat. 2105 (included in at 8 U.S.C. § 1611 (2000)) (denying federal public benefits to nonqualified aliens).

171. *See* Morawetz, *supra* note 169, at 1948 ("Congress also continues to place considerable pressure on the INS to increase deportations.").

172. *See* Victoria Lehrfeld, *Comment, Patterns of Migration: The Revolving Door from Western Mexico to California and Back Again*, 8 LA RAZA L.J. 209, 221 (1995) ("In 1990, the money migrant workers sent to Mexico (including Social Security payments) represented 1.5% of Mexico's gross domestic product for that year and exceeded the value of agricultural and livestock exports and foreign investment the same year." (internal quotations omitted)).

173. *See* DOMÍNGUEZ & FERNÁNDEZ DE CASTRO, *supra* note 166, at 126 (describing the Mexican government's increased willingness to become involved in U.S. politics on behalf of its citizens).

consideration.[174] IRCA's main proponent, Senator Alan Simpson, solicited support and input from President José López Portillo.[175] The President, however, explained that although immigration reform in the United States did affect Mexican nationals, Mexico could not have a policy on this issue because the issue was one in which the United States had a sovereign right.[176] President López Portillo told Senator Simpson, who had gone to Mexico to attain support for IRCA, "You have a sovereign right to do what you want with your borders. But I am glad a man as sensitive as you appears to be in charge of immigration up there because I want you to look after our workers."[177] As was true of traditional Mexican foreign relations' policy, Mexico did not question U.S. immigration regulation since the authority to regulate migration came from the United States' sovereignty.[178]

In the mid-1990s, Mexico developed an active foreign policy regarding its migrants in the United States, and implemented diplomatic and congressional lobbying to limit IIRIRA's most restrictive measures.[179] It developed a more "hands-on" or active approach to migrant issues.[180] It focused bilateral consultations on topics that it had avoided in the past.[181] In the preceding years, Mexico had gained extensive and new experience lobbying U.S. lawmakers for NAFTA ratification.[182]

Mexico sought to directly influence U.S. lawmaking, beyond diplomatic channels, as part of its IIRIRA lobbying. Building on its NAFTA experiences, Embassy congressional and executive branch liaisons met with officials from the Immigration and Naturalization Service (INS), Department of State, and Department of Justice, as well as congressional leaders serving on the Foreign Affairs and Judiciary

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174. *See* Rico, *Immigration Reform and Control Act of 1986*, *supra* note 59, at 90 ("Mexico showed a clear lack of initiative and active lobbying on Capitol Hill during the process that led to IRCA.").

175. Richard W. Day, U.S. Senate Judiciary Comm., Subcomm. on Immigr.and Refugee Aff., Keynote Address, *in* IMMIGRATION AND INTERNATIONAL RELATIONS 16, 19 (Georges Vernez ed., 1990).

176. *Id.*

177. *See id.* (quoting Diego C. Asencio of the Commission for the Study of International Migration and Cooperative Economic Development).

178. *See* Sepúlveda Amor, *Los Intereses de la Política Exterior*, *supra* note 80, at 62.

179. *See* Rafael Fernández de Castro & Carlos A. Rosales, *Migration Issues: Raising the Stakes in U.S.-Latin American Relations*, *in* THE FUTURE OF INTER-AMERICAN RELATIONS 237, 248 (Jorge I. Dominguez ed., 2000) (outlining specific steps taken during the Zedillo administration).

180. *Id.*

181. *Id.*

182. T. A. Eisenstadt describes Mexico's lobbying efforts as a change from a passive player to "one of the most visible" lobbyists in Washington. *See* Todd A. Eisenstadt, *The Rise of the Mexico Lobby in Washington: Even Further from God, and Even Closer to the United States*, *in* BRIDGING THE BORDER, *supra* note 94, at 89.

Committees.[183] These liaisons articulated Mexico's concerns over IIRIRA provisions.[184] Early versions of IIRIRA included the Gallegly Amendment, which denied school access to the children of undocumented migrants.[185] Mexico lobbied for this amendment's exclusion.[186] President Clinton lobbied against this provision's inclusion and threatened to veto the bill if the Gallegly amendment was included.[187] Mexico's persistent and direct lobbying is seen as key to the President's position regarding this amendment.[188]

Through an international law lens, a significant shift in sovereignty reasoning took place with Mexico's lobbying to influence changes in U.S. law. Mexico reinterpreted the norm of non-intervention; consequently, its efforts to influence U.S. lawmaking did not violate the norm. In doing so, Mexico moved away from absolute notions of sovereignty in its reasoning because it did not perceive its participation in the U.S. legislative process to be impeded by a need to protect U.S. independence and sovereignty. The U.S. legislative process was not viewed as something within autonomous and absolute sovereign power. Instead, Mexico could participate because it had a stake in the U.S. legislative process. The mid-1990s provided a unique context for this to happen. Economically, more and more Mexican nationals were working in the United States, and Mexico counted on their remittances as a vital source of foreign capital and employment.[189] Furthermore, the neo-liberal economic agenda at that time facilitated a more tolerant position on the part of Mexico with regard to overseas influence and, conversely, made Mexico more open to engagements overseas.[190] Mexican economic and foreign policy, as exercised by the PRI's neo-liberal presidents, distanced itself from the prior nationalist focus.[191] The restrictionist agenda in the U.S. Congress had made an overseas issue—the U.S. policy to deport foreign nationals and limit their benefits—a prime domestic concern for

183. Rosenblum, *Moving Beyond*, *supra* note 5, at 111.

184. *Id.*

185. *Id.*

186. *Id.* It also pushed for increased numerical limits for family-based immigration. *See id.* (stating that Mexico "won concessions on deeming requirements (regulating the ability of poor immigrants to sponsor additional family member migration)").

187. *Id.*

188. Mexico's foreign policy on migrants developed through binational governmental networks during the post-1986 period. *Id.* at 109.

189. Lehrfeld, *supra* note 172, at 221.

190. *See* Rosenblum, *Moving Beyond*, *supra* note 5, at 108–09 (providing examples of Mexican government officials' new approach to foreign policy).

191. *See, e.g., id.* (referring to this change from a "policy of no policy" to one of actively involving itself in migration policy through lobbying as a "philosophical change").

Mexico.[192] By 1995, the national reverberations of California's proposition 187 were felt in Washington D.C. with transnational effects in Mexico.[193] It is in this context that Mexico began to reinterpret how the norm of non-intervention was applied. Most important, a bar to commenting on or influencing U.S. lawmaking on migration was eventually eliminated.[194] This bar derived from prior interpretations of international law and foreign relations law norms in the Constitution.[195]

These events evidence a transnational influence in foreign relations law. Foreign relations, giving consideration to domestic need, began to look across national borders to justify how to apply the norm through foreign policy. Subtly, Mexico moved from a policy of non-involvement due to jurisdictional concerns for autonomy to a new position of ensuring that Mexico attains national benefits by influencing U.S. lawmaking. This influence in U.S. lawmaking reinterprets the norm of non-intervention, because a rigid concern for U.S. jurisdiction would have prevented influencing U.S. lawmaking. Under a traditional interpretation of non-intervention, Mexico would have limited its negotiation to diplomacy and refused to influence U.S. lawmaking, based on concerns of international sovereignty and non-intervention.

B. *Consular Representation without Fear about Interference Abroad*

A second example of Mexico's reinterpretation of the norm of non-intervention began in 1990 when Mexico implemented the Program for Mexican Communities Living in Foreign Countries, within the Secretary of Foreign Relations. This program developed into the current *Instituto de los Mexicanos en el Exterior* (IME), which follows the program's initial objectives but has a far larger institutional presence within Mexico and abroad.[196] The Program's goal was to build relationships between Mexican migrants abroad, Mexican-Americans in the United States, and the Mexican government.[197] Its objectives were to "raise awareness among Mexicans around the world

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192. *See, e.g.*, David Clark Scott, *Mexico Unhappy with U.S. Border Policy*, CHRISTIAN SCI. MONITOR, Mar. 15, 1994, at 6 (outlining Mexican criticism of American "hard-line immigration policies").

193. *See* Timothy J. Mattimore, Jr., *Dual Citizenship Legislation Could End Pragmatic Response to California's Proposition* 187, 9 GEO. IMMIGR. L.J. 391, 392 (1995) (detailing the public response in both the U.S. and Mexico).

194. *See* Fernández de Castro & Rosales, *supra* note 179, at 242 (stating that in response to developing U.S. immigration policy, "Mexico abandoned its traditional position of deliberate nonengagement and developed and pursued dialogue with Washington.").

195. *See* Jorge Cicero, *International Law in Mexican Courts*, 30 VAND. J. TRANSNAT'L L. 1035, 1039 (1997) (listing nonintervention as one of the "[s]everal basic rules of contemporary international law [to] now enjoy the status of constitutional principles governing Mexican foreign policy").

that the 'Mexican Nation extends beyond the territory contained by its borders' and to implement international cooperation projects offered by Mexico for the benefit of its diaspora, 98.5 percent of it in the United States."[198] Migrants in the United States became a central focus of the Program. It included an educational exchange for Mexican teachers with U.S. schools, migrant community organizations in the United States, preventive health campaigns, cultural exchanges between home community governments and migrant organizations, soccer leagues, youth programs, and fund drives for home community development projects.[199] The Program eventually developed into a method for the Mexican government to advocate on behalf of migrants to protect their political and legal rights.[200]

Before the Program's creation, Mexico's consulates avoided any active support or engagement with Mexican migrants in the United States because of concerns over violating the norm of non-intervention. The program's first director, Carlos González Guitiérrez explains:

> The crux of the problem for the consulates was the issue of nonintervention. As the relationship between the two nations has strengthened, it is becoming more difficult to clearly distinguish boundaries between domestic and foreign policies. The new functions of Mexican consular offices are not a cause but rather a reflection of this change."[201]

He further notes that consulates redefined their role to support, represent, advocate for, and nurture home-nation ties for migrants.[202] This required a surrender of "their simplistic and pre-established definitions of the principle of nonintervention."[203]

This new position of increasing consular support for Mexican migrants abroad, in particular in the United States, is reflected in

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196. The IME was created by executive decree and established within the Secretary of Foreign Relations on April 16, 2003. See Instituto de los Mexicanos en el Exterior, Diario Oficial de la Federación [D.O.], 16 de Abril de 2003 (Mex.), *available at* http://www.ime.gob.mx/ime/decreto.htm. *See generally* Secretaría de Relaciones Exteriores, Antecedentes, http://www.ime.gob.mx/ime/antecedentes.htm (last visited Sept. 27, 2007).

197. *See* Carlos González Gutiérrez, *Fostering Identities: Mexico's Relations with Its Diaspora*, 86 J. AM. HIST. 545, 546 (1999) (providing examples of steps taken to foster a sense of cultural identity).

198. *Id.* at 545–46 nn.2–3 (citing relevant public sources: "Presidencia de la República, *Plan nacional de desarrollo, 1995–2000* (Mexico City, 1995); . . . Secretaría de Relaciones Exteriores, *Programa para las Comunidades Mexicanas en el Extranjero: Informe de actividades 1998 y proyectos 1999* (Program for Mexican Communities Abroad: Report on activities in 1998 and projects for 1999) (Mexico City, 1999)").

199. *Id.* at 546.

200. Carlos González Gutiérrez, *Decentralized Diplomacy: The Role of Consular Offices in Mexico's Relations with its Diaspora*, *in* BRIDGING THE BORDER, *supra* note 94, at 50.

201. *Id.*

202. *Id.*

203. *Id.* at 51.

current foreign service regulations. The internal regulations of the Secretary of Foreign Relations, *Reglamento Interior de la Secretaría de Relaciones Exteriores*, specify duties and objectives for divisions of the Secretary regarding consular services for migrants and foreign policy on migration issues.[204] These duties and objectives present a changed perspective from the traditional "hands off" position, which avoided working with migrants in the United States or influencing U.S. immigration policy. For instance, Article 18:IV (describing the function of the Secretary's North American Division) and Article 21:III (presenting the functions of the Division for General Protection and Consular issues) articulate roles for the foreign service to cooperate with international migration control and to support the development of a Mexican migration policy.[205] Sub-sections of Article 21 enumerate various consular services specific to Mexican migrants abroad, such as investigation and informational services to prevent violations of a migrant's dignity, human rights, and other guarantees; elaborate protection programs for migrants abroad;[206] reporting services to facilitate finding violations of migrants' human, labor, civil and other rights under international treaties and agreements;[207] and liaison services between migrants abroad on the one hand and the Secretary of the Interior and National Migration Institute on the other.[208] Article 22 describes the Program for Mexican Communities Abroad's specific consular functions benefiting migrants.[209] These functions seek to positively influence migrants' "quality of life" and "standard of living" by supporting community-organization, educational, cultural, health, sport, and investment-in-Mexico projects.[210] The Program also supports the development of a foreign policy on Mexican migrants.[211]

C. *Tailoring Domestic Nationality Law to Influence U.S. Politics*

A third instance of changing how the norm of non-intervention is applied occurred in 1997 when Mexico reformed its nationality law permitting Mexican nationals to be dual nationals.[212] This reform was

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204. Secretaría de Relaciones Exteriores, Reglamento Interior de la Secretaría de Relaciones Exteriores [Rules of Procedure of The Sectretary of Foreign Relations], revisida 7 de Septiembre de 2004, Diario Oficial de la Federación [D.O.], 10 de Agosto de 2001 (Mex.).

205. *Id.* arts. 18(IV), 21(III).

206. *Id.* art. 21(V).

207. *Id.* art. 21(XIV).

208. *Id.* art. 21(XVIII).

209. *Id.* art. 22(XXII).

210. *Id.* art. 22(XXII)(I).

211. *Id.* art. 22(IX).

212. In Mexico, "nationality" and "citizenship" are governed by Articles 30, 37, and 38 of the 1917 Constitution and the *Ley de Nacionalidad* (Nationality Law) enacted in 1993 after prior laws were developed and implemented in 1854, 1886, and 1934. *See* Jorge A. Vargas, *Dual Nationality for Mexicans*, 35 SAN DIEGO L. REV. 823,

enacted by Mexico so that its nationals abroad could retain their Mexican nationality if they acquired another nationality (e.g., if they naturalized as U.S. citizens).[213] A primary motivation for these changes was an expectation that Mexican nationals in the United States would naturalize as U.S. citizens and could use their newly-acquired status to influence U.S. immigration lawmaking.[214] Previously, Mexico was legally hostile and would deny Mexican nationality to any Mexican national that naturalized in another country.[215] These laws had a very nationalist goal and reflected Mexican attitudes of official disdain for Mexican-Americans and regard of Mexican immigrants in the United States as *"chaqueteros"* (traitors).[216] With reforms in Mexican law, these Mexican nationals would not fear losing their Mexican nationality. By changing its domestic legal regime regarding eligibility to claim Mexican nationality, Mexico sought to increase the capacity Mexicans had to influence U.S. immigration policy. The objectives of private individuals with simultaneous U.S. and Mexican nationality would coincide with

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839–42 (1998). Mexican nationality (*"[ser] mexicano"* or "to be a Mexican") is provided for before citizenship (*ciudadania*), which a Mexican national may only attain at the age of 18 years; among others, the right to vote is conferred when a national becomes a citizen. *Id.* at 847 (translations are the Author's own). Before this age, an individual is a national but not a citizen. *Id.* at 839–40, 847.

213. Since 1993, Mexico's nationality law required adult Mexican nationals born abroad to choose between Mexican nationality and their second nationality. Fitzgerald, *Rethinking Emigrant Citizenship*, *supra* note 31, at 95.

214. For analysis on Mexican reforms to nationality law and their consequential sovereignty conceptualization, see Barry, *supra* note 24, at 45–47 (stating Mexico's best protection for its nationals in the U.S. was to "help them to take on the citizenship (and thus protection) of another sovereign"); Nuria González Martín, *Ley de Nacionalidad*, 2000 REVISTA JURÍDICA: BOLETIN MEXICAN DE DERECHO COMPARADO 873 (explaining the reform's motivation was for Mexicans in the United States not to lose legal rights as Mexicans and to inspire their naturalization as U.S. citizens to combat anti-immigrant measures); and Fitzgerald, *For 118 Million Mexicans*, *supra* note 31, at 532–33 (stating these reforms were done by Mexico "with little fear" of sovereignty concerns and with active promotion of dual nationality); *see also* Alfredo Corchado, *Zedillo Seeking Closer Ties with Mexican-Americans*, L.A. TIMES, Apr. 8, 1995 (reporting a primary motive for Mexico's legislature dual-nationality law was to create a political U.S. lobby and counter-act anti-immigrant forces); Mark Fineman, *Mexican Citizens May Gain Right to Dual Nationality*, L.A. TIMES, May 21, 1995 (same); *Mexico Passes Law on Dual Citizenship*, N.Y. TIMES, Dec. 12, 1996 (same). Most recently there have been discussions of proposing a congressional district in Mexico's legislature for migrants in the United States. *See* Patrick J. McDonnell, *Fox Vows Better Ties with Mexican Immigrants in the U.S.*, L.A. TIMES, Nov. 11, 2000, at B1 (President Fox stating that "Mexican lawmakers will give serious consideration" to such proposals).

215. *See* Jorge G. Castañeda, *U.S. Policy Shift Wakes Up the Neighbors*, L.A. TIMES, Aug. 28, 1995 (explaining that Mexico's nationality law heavily discouraged Mexicans to naturalize abroad and the nation's traditional ambivalence to Mexican-Americans and migrants in the United States, and how these positions have changed in reaction to U.S. efforts to restrict migration).

216. Vargas, *Dual Nationality for Mexicans*, *supra* note 212, at 823–24.

Mexico's foreign policy goals. As such, changes in Mexican nationality law were enacted to eventually influence U.S. immigration law.

The changes were initially announced in March of 1997 with amendments to Articles XXX, XXXII, and XXXVII of the Constitution, establishing that no Mexican by birth would forfeit their nationality because they had double or multiple nationalities.[217] The introduction of the non-forfeiture right opened the door for Mexicans to have two nationalities without fear of losing their Mexican nationality, effectively creating a "dual-nationality" regime. Enacting legislation was later implemented in March of 1998 with reforms to the Nationality Law, *Ley de Nacionalidad*.[218] Most recently amended in March of 1997, Article XXX states that the methods to attain Mexican nationality, i.e., to be a "*Mexicano*," are by birth or by naturalization.[219] In addition to persons born in Mexican territory, the amendment clarified the category of "Mexicans by birth" to include children born (1) outside national territory to Mexican-national parents who were born in national territory and (2) to naturalized Mexican nationals.[220] Article XXXVII provides the heart of the dual nationality project by stating no Mexican by birth may lose his Mexican nationality.[221] This is expanded upon in the Nationality Law, which guarantees that Mexicans will not lose their Mexican nationality after acquiring another nationality.[222]

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217. Declaración Consul, Diaro Oficial de la Federación [D.O.], 30 du Marzo de 1997 (Mex.). These laws announce the "no pérdida" (non-forfeiture) of Mexican nationality for Mexican nationals who acquired or had another nationality. *Id.*

218. Declaración Consul, Diaro Oficial de la Federación [D.O.], 30 de Marzo de 1998 (Mex.); González Martín, *supra* note 214.

219. González Martín reports prior reforms to Article 30 in 1934, 1969, and 1974 created a naturalization process, provided for Mexican nationality to children born to Mexican mothers abroad, and provided for non-Mexican men married to Mexican women to acquire Mexican nationality by naturalization. González Martín, *supra* note 214.

220. The Mexican nationality legal regime recognizes two manners of attaining Mexican nationality: (1) by descent or birth to Mexican national parents (*jus sanguinis*) and (2) by birth in Mexican territory (*jus soli*). Constitución Política de los Estados Unidos Mexicanos [Const.] art. 30; Vargass, *supra* note 212, at 840. Amendments to the Constitución Política de los Estados Unidos Mexicanos specifically prohibited foreigners or naturalized citizens from holding public office, such as federal deputy, federal senator, president, or state governor. *E.g.*, Constitución Política de los Estados Unidos Mexicanos [Const.] arts. 33, 55, 91.

221. *Id.* art. 37(A).

222. Two specific categories of dual nationals are identified: (1) Mexicans by birth who acquired another nationality before March 20, 1998 (prior to this law, such an acquisition would result in the loss of Mexican nationality), and (2) Mexicans by birth who have the right to another nationality after March 20, 1998. *Id.* art. 30. The process for certifying dual nationality is readily explained in Mexican consulate webpages. *See* Ministry of Foreign Affairs, Nationality and Naturalization, http://www.sre.gob.mx/english/services/nationality/default_nationality.htm (Mexican consulate).

D. *Mexico-Initiated International Negotiations to Change U.S. Law*

A fourth example of reinterpreting the norm of non-intervention developed due to President Vicente Fox's migrant-focused foreign policy. Fox's presidency (2000-2006) initiated a political discourse based on displaying Mexico's redemocratization and an engaged foreign policy, based on democracy, human rights, and multilateralism.[223] Within this conceptual context created by Fox's presidency, Mexico added to its efforts to reinterpret the norm of non-intervention. President Fox made achieving a migration agreement with the United States a central foreign policy goal.[224] Mexico initiated this negotiation and prioritized its negotiation strategy with the Department of State, the Department of Justice, the Office of the President, and key members of Congress.[225] It presented the issue as important for US domestic concerns by stressing that untaxed or underground migrant labor decreased the US social security tax base, that Hispanic voters would approve many pro-migrant measures—especially comprehensive immigration reform, and that there were security benefits of incorporating "undocumented" or "illegal" foreign nationals.[226] In April of 2001, Mexico proposed a five-part plan, colloquially referred to as the "whole enchilada,"[227] comprised of temporary worker, regularization, improved border security, regional development, and increased visa allotment measures.[228]

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223. In describing Foreign Secretary Jorge Castaneda's foreign policy goals, Ambassador Heller reiterates that Mexico's six foreign policy objectives confirm that sovereignty has evolved from concepts of unshared authority to increasingly include shared authority between states, non-state actors, and multilateral institutions. Claude Heller, *Los principios de la política exterior a la luz del contexto internacional*, *in* CAMBIO Y CONTINUIDAD EN LA POLÍTICA EXTERIOR DE MÉXICO: MÉXICO EN EL MUNDO 87 (Rafael Fernández de Castro ed., 2002).

224. Rafael Fernández de Castro, *La migración sobre la mesa de negociación*, *in* CAMBIO Y CONTINUIDAD, *supra* note 223 [hereinafter Fernández de Castro, *La migración sobre la mesa de negociación*].

225. *Id.* at 121–23.

226. *Id.* at 120–21.

227. For "whole enchilada" references, see Secretary Powell, *supra* note 9 (Mexican Secretary Castañeda explaining that the "whole enchilada" strategy means every aspect of migration should be dealt with and not just one at a time); Duncan Campbell, *Mexico Goes for the Whole Enchilada*, GUARDIAN UNLIMITED (London), Sept. 5, 2001, *available at* http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,547248,00.html (discussing Secretary Castañeda's attempt to go for the "whole enchilada" and legalize all illegal Mexicans in the U.S.); Pamela Starr, *U.S.-Mexico Relations*, HEMISPHERE FOCUS, Jan. 9, 2004, at 1, 5 (discussing how Secretary Castañeda and Mexico for awhile remained adamant that the U.S. takes its proposal in its entirety or not at all).

228. The five part plan included: (1) a temporary worker plan in various sectors beyond agriculture, reflecting cyclical migration trends and encompassing between 250,000 and 350,000 workers; (2) a regularization program for undocumented Mexicans in the United States; (3) a regional development program in Mexican communities with high emigration rates; (4) improved border security to decrease the

Ultimately, the negotiations failed to reach an agreement, much of this due to the United States' changed security context after September 11th and the resulting changes in domestic political attitudes in both countries. [229] The negotiation's most contentious point was regularization.[230] For Mexico, it represented the most attractive benefit, resulting in the biggest change to U.S. policy (and the greatest change in non-intervention); such a policy would advocate that the United States relinquish immigration law claims against aliens.[231] Likewise, Mexico's negotiation of this point at all suggested to the United States that it cede, through international agreement, its sovereign authority to determine who is legally present in the United States. For many sectors of the U.S. public, and politicians representing those sectors, regularization for any unlawfully present alien would reward prior immigration law violations.[232] For them, including such a provision in

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number of deaths suffered by border crossers and to eliminate human trafficking; and (5) revised visa allotments to Mexican nationals, within the existing NAFTA-TN visa framework. Fernández de Castro, *La migración sobre la mesa de negociación*, *supra* note 224, at 122–23. The heart of the proposal was the temporary worker program and regularization. *Id.* at 123. These elements complimented domestic forces in the United States, such as the AFL-CIO, Hispanic political groups, and migrant-rights groups, advocating for these changes. *See generally id.* at 111; Starr, *supra* note 227.

229. In the U.S., immigrant issues took on a more security-focused and suspicious tone. Its foreign policy reflected this shift in tone. Rafael Fernández de Castro, *Seguridad y migración un nuevo paradigma*, FOREIGN AFFAIRS EN ESPAÑOL, Oct.-Dec. 2006, *available at* http://www.foreignaffairs-esp.org/20061001faenespessay060402/rafael-fernandez-de-castro/seguridad-y-migracion-un-nuevo-paradigma.html. In Mexico, the public viewed the U.S. response to September 11th as an act of aggression against Iraq and suggestive of an imperialist foreign policy. Starr, *supra* note 227, at 6–7. As it was a non-permanent member of the U.N. Security Council, Mexico's position on whether to authorize an Iraqi invasion became extremely influential. U.N. Security Council, Members in 2003, http://www.un.org/sc/searchres_sc_year_english.asp?year=2003 (last visited Sept. 30, 2007). Ultimately, Mexico did not support the U.S. resolutions in 2003 seeking UN support for invasion. Starr, *supra* note 227, at 6–7. These events signified temporal disunion of the diplomatic closeness regarding migration shared by the two neighbors during the 2000–2001 period. *See* Fernández de Castro, *La migración sobre la mesa de negociación*, *supra* note 224; Fernández de Castro, *supra* note 229.

230. In approving any regularization or amnesty of undocumented or illegally present aliens, the U.S. Congress is determining to forego some of the sovereign power that the United States may have. *See* Spiro, *supra* note 44, at 340. Border control and immigration law are sourced in international sovereignty. *See generally* sources cited *supra* notes 44–46. Any law, whether a product of domestic lawmaking or an international treaty, that alters immigration or border functions by the United States is thus an exercise of sovereignty. For a policy perspective, which this Author does not agree with, that a migration agreement with Mexico unwisely limits U.S. authority and congressional power, see ROBERT S. LEIKEN, CTR. FOR IMMIGR. STUDIES, ENCHILADA LITE: A POST-9/11 MEXICAN MIGRATION AGREEMENT (2002), *available at* http://www.cis.org/articles/2002/leiken.html.

231. Eric Schmitt, *Bush Says Plan for Immigrants Could Expand*, N.Y. TIMES, July 27, 2001, at A1.

232. Julia Preston, *Grass Roots Roared, and an Immigration Plan Fell*, N.Y. TIMES, June 10, 2007, at 1.1.

any international agreement or domestic legislation was not politically viable.[233]

An initial review of Mexico-U.S. foreign relations since September 2001 suggests much discord regarding migration. Nevertheless, Mexico has not returned to a "policy of no policy" on migrants in the United States. It has not stopped trying to influence U.S. lawmaking.[234] The North American neighbors have found common ground and instituted agreements in the areas of economic development, border security, and security cooperation.[235] Each agreement decreases tensions on migration policy.[236] Similarly, Mexico's diplomats continue to voice in public fora an official foreign policy of seeking a migration agreement and improved treatment for migrants in the United States.[237] Border security and economic policy fall squarely within a nation's sovereign powers. More traditional

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233. Carl Hulse, *Kennedy Plea Was Last Gasp for Immigration Bill*, N.Y. TIMES, June 9, 2007, at A1.

234. *See* Press Release, Mexican Ministry of Foreign Affairs, The Mexican Government's Position on the Announcement Made by the Leadership of the U.S. Senate (May 11, 2006), *available at* http://www.sre.gob.mx/press/b099.htm; Press Release, Mexico: Presidency of the Republic, President Fox Meets with George W. Bush and Stephen Harper within Framework of SPPNA (Mar. 30, 2006), *available at* http://fox.presidencia.gob.mx/en/activities/order/?contenido=24281&pagina=3 (last visited Nov. 24, 2007).

235. This Article does not examine the cooperation and agreements between the United States and Mexico, as they focus on economic, security, and border policy. Post-2001, cooperation and agreements between the two governments include: (1) the Partnership for Prosperity, a public-private bilateral initiative for regional economic development in Mexico; (2) the Border Partnership, an agreement for implementing increased technology to manage the movement of goods and services and monitor security threats; and (3) the Security and Prosperity Partnership of North America, which includes Canada and seeks to explore cooperation and harmonization of immigration, border, and security policies. K. LARRY STORRS, CONGRESSIONAL RESEARCH SERV., MEXICO-UNITED STATES DIALOGUE ON MIGRATION AND BORDER ISSUES, 2001–2005, at summary (2005), *available at* http://www.fas.org/sgp/crs/row/RL32735.pdf. This brief synopsis takes the government declarations at face-value, with a critical examination left out. It cannot be overstated that this cooperation includes identifying and monitoring security risks and a great deal of private sector involvement and free-market objectives. A more thorough analysis would examine how these goals relate to discrimination through racial, nationality, or ethnic profiling; alien rights exclusion; and increased deference to executive agency and state and local governmental authority. Likewise, any economic policy resulting from this cooperation may have substantial impact on migration since migration is often caused by elimination of employment options. *Id.* at 4. For basic public descriptions of these agreements, see Storrs, *supra*. *See also* Biersteker, *supra* note 42, at 153–64 (analyzing this cooperation emphasizing the "asymmetric interdependence" between the United States and Mexico and the United States and Canada, as well as highlighting policy harmonization and intra-governmental networks); Monica Serrano, Bordering on the Impossible, in THE REBORDERING OF NORTH AMERICA, *supra* note 42, at 46–65 (explaining how historically cooperation between the U.S. and Mexico has resulted in political liability for leaders in each country).

236. Storr, *supra* note 235.

237. *Id.*

interpretations of non-intervention, however, would identify these areas as solely within U.S. jurisdiction and off-limits for Mexican foreign relations. Interestingly, security cooperation and regional development are similar to two points contained in Mexico's five-point proposal.[238] Migration issues remain part of the bilateral discourse, as an integral part of Mexican foreign relations and an influential element in U.S. immigration lawmaking.[239]

E. *Seeking Change in U.S. Immigration Policy*

A fifth example of Mexico's reinterpreting the norm of non-intervention is how Mexican foreign policy to the United States continues to contemplate a variety of immigration issues. These issues include seeking a migration agreement, lobbying for comprehensive migration reform of U.S. laws, and improving treatment of Mexican nationals in the United States.[240] Mexican officials explain how U.S. law, whether in the form of prospective legislation, current agency policy, or judicial decisions, harm Mexican migrants in the United States.[241] Examples include: Arizona's Proposition 200 (2005),[242] vigilantism of the Minutemen on the Arizona-Sonora border since February of 2005, House passage of the border security-and-criminalization-focused Sensenbrenner Bill in December 2005,[243] and persistent requests for investigation into the deaths of migrant border-crossers.[244] U.S. border security policy has pushed border-crossers to seek more dangerous and less fortified paths.[245] The direct and

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238. *See* Fernández de Castro, *La migración sobre la mesa de negociación*, *supra* note 224, at 122–23

239. *See* MARC R. ROSENBLUM, THE TRANSNATIONAL POLITICS OF U.S. IMMIGRATION POLICY 22–48 (2004) (presenting how U.S. and Mexican political forces, as a two-stage process with domestic and international concerns for both Mexican and U.S. actors, influence U.S. immigration policy).

240. *See* SECRETARÍA DE RELACIONES EXTERIORES, MEXICO AND THE MIGRATION PHENOMENON (Feb. 16, 2006), *available at* http://www.ime.gob.mx/agenda_migratoria/congreso/mexico_and_the_migration_phenomenon.pdf [hereinafter MEXICO AND THE MIGRATION PHENOMENON].

241. *See, e.g.*, sources cited *infra* notes 242–44.

242. Mexican Secretary of Foreign Relations, The Foreign Ministry of Mexico states its position on passage of proposition 200 (Taxpayer and Citizen Protection act) in Arizona, Nov. 3, 2004, *available at* http://portal.sre.gob.mx/usa/index.php?option=displaypage&Itemid=122&op=page&SubMenu= (Dec. 4, 2007).

243. Mexican Secretary of Foreign Relations, The Mexican Government will intensify its efforts to achieve a comprehensive immigration reform, Dec. 16, 2005, *available at* http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=156&Itemid=67 (Sept. 21, 2006) (on file with author).

244. Mexico, Secretary of Foreign Relations, The Mexican Government rejects the declarations of the California Governor regarding the so-called, Apr. 29, 2005, *available at* http://www.embassyofmexico.org/eng/index.php?option=com_content&task=view&id=121&Itemid=67 (Sept. 21, 2006) (on file with author).

245. *See generally* Wayne A. Cornelius, *Controlling "Unwanted" Immigration: Lessons from the United States, 1993–2004*, 31 J. ETHNIC & MIGRATION STUD. 775, 779,

foreseeable consequence of this policy choice is an alarming increase in fatalities for border-crossers.[246] These deaths total over 1,900 since 1998, when the U.S. government began counting deaths, and average deaths per year are estimated at 404.[247] Seeking to decrease the number of deaths, Mexico issued a "Guide for Mexican Migrants" in January of 2005, which provides safety and institutional advice for crossers.[248]

This reinterpretation of non-intervention continued during the spring of 2006. As the U.S. Senate debated proposed immigration legislation and civil society in Mexico and the United States actively and jointly voiced their concerns in migrant advocate demonstrations, Mexican foreign policy continued to advocate for Mexican migrants' interests and to influence U.S. lawmaking.[249] In February 2006, Mexico presented a more nuanced immigration position in a resolution titled "Mexico and Migration Phenomenon," approved by the executive and Mexico's Congress.[250] The plan stresses that migration is a shared governmental responsibility, has domestic and international consequences and causes, and should be regulated in coordination with border, security, economic, and immigration policies.[251] It emphasizes that current U.S. border policy forecloses many migrants from returning to Mexico; instead, Mexico seeks a "circular migratory flow" of migrants (Mexico to the United States and back to Mexico).[252] The resolution suggests various Mexican policy options to facilitate a circular flow.[253] These options focused on developing financial

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783 (2005) (arguing a border control focus has resulted in a redistribution of crossings along the Southwest border; "undocumented migrants" staying longer in the U.S.; dramatic increases in migrant deaths; anti-immigrant border violence; and "no evidence that unauthorized migration is being deterred at the point of origin").

246. *Id.* at 783–84.

247. Olga R. Rodriguez, *Mexico's Migrant-Smugglers Hike Rates*, ASSOCIATED PRESS, Jun. 14, 2006. For 2006, the Mexico's Secretary for Foreign Relations reports 425 deaths with 130 unidentified bodies. Press Release, Secretaría de Relaciones Exteriores (Mex.), Informe de la SRE sobre cifras de migrantes mexicanos fallecidos en la frontera norte (Apr. 26, 2007), http://www.sre.gob.mx/csocial/comunicados/2007/abr/b_117.htm (last visited Oct. 20, 2007).

248. The guide was published in Spanish and English and clearly suggests that migrants not use false documents and not employ smugglers or "*coyotes*." SECRETARÍA DE RELACIONES EXTERIORES, GUÍA DEL MIGRANTE MEXICANO [GUIDE FOR THE MEXICAN MIGRANT], *available at* http://www.cfif.org/htdocs/legislative_issues/federal_issues/hot_issues_in_congress/immigration/mexican-booklet.pdf (last visited Oct. 20, 2007). Unfortunately, U.S. media and policy makers classified the guide as a "comic book," ignoring the portable needs of the intended audience and the guide's "easy to decipher" format. See, e.g., James C. McKinley, *A Mexican Manual for Illegal Migrants Upsets Some in U.S.*, N.Y. TIMES, Jan. 6, 2005, at A5 (discussing an adverse reaction by some in the U.S. who see the guide as encouraging Mexicans to violate U.S. law).

249. *See infra* note 185.

250. MEXICO AND THE MIGRATION PHENOMENON, *supra* note 240.

251. *Id.* at 2–3.

252. *Id.* at 5.

253. *Id.* at 4–5.

incentives for return migrants in the form of income savings accounts, mortgages, and pension benefits.[254] In addition, Mexican officials continued to voice support and lobby legislators for regularization and guest-worker programs to be included in bills before Congress.[255] On March 20, 2006, Mexico included full page ads in the *New York Times*, *Washington Post*, and *Los Angeles Times* summarizing the resolution's main points.[256]

In the spring of 2006 and spring of 2007, the U.S. Congress attempted twice to draft and pass comprehensive immigration reform, with a mix of provisions concerning border security, regularization, and guest-worker programs.[257] As the final version of this Article is written, immigration reform as encompassed during the legislative debates of the preceding years appears to be stalled, put on-hold, or impassable given current political demands, especially with the U.S. Presidential elections in 2008. Yet despite these legislative contests, Mexico continues to voice its opinion on the possibility of changes to U.S. immigration laws.[258]

In sum, since the mid-1990s the concept of sovereignty in Mexican law has transitioned from a prior position that precluded any Mexican influence in U.S. immigration regulation to the current dynamic wherein Mexico is quite active in seeking to influence U.S. lawmaking. This Article labels this as migration by legal concepts, i.e. "sovereignty migration." This movement displaces prior interpretations of the norm

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254. *Id.* at 5.

255. E. Eduardo Castillo, *Mexican Government Applauds Senate Action on Immigration*, ASSOCIATED PRESS, Mar. 28, 2006; Olga. R. Rodriguez, *Mexico Optimistic for Immigrant Program*, ASSOCIATED PRESS, Mar. 27, 2006.

256. MEXICAN MINISTRY OF FOREIGN AFFIARS, A MESSAGE FROM MEXICO ON MIGRATION (2006), *available at* http://www.ime.gob.mx/agenda_migratoria/Mexico_about_Migration.pdf.

257. Secure Borders, Economic Opportunity and Immigration Reform Act, S. 1348, 110th Cong. (2007); Comprehensive Immigration Reform Act, S. 2611, 109th Cong. (2006).

258. See *Calderón Says New Congress Should Aid Immigration Issues*, SAN DIEGO UNION-TRIB., Jan. 27, 2007, *available at* http://www.signonsandiego.com/news/mexico/20070127-9999-1n27calderon.html ("With the new composition of the U.S. Congress there are greater opportunities and more potential for making progress on the immigration issue."); Jim Rutenberg, *Mexican President Presses Bush on Border Fence*, N.Y. TIMES, Mar. 13, 2007 (President Calderón criticizing plans to build a fence on the border and calling for a temporary-worker program); Matt Spetalnick, *Bush Reassures Skeptical Mexico on Immigration*, NAT'L POST, Mar. 13, 2007, *available at* http://www.canada.com/nationalpost/news/story.html?id=cabf3590-7be8-40c8-b3b1-d3020c70db6e&k=8527 (reporting Bush's reassurance to Mexico that he hasn't given up on immigration reform yet); Press Release, Secretaría de Relaciones Exteriores, Abordan Gobernadores el Tema Migratorio con la Titular de la SRE (May 28, 2007), *available at* http://www.sre.gob.mx/csocial/comunicados/2007/may/b_141.htm; Ernesto Derbez, Mex. Sec'y of Foreign Relations, Remarks with Foreign Secretary Derbez of Mexico (Mar. 24, 2006), available at http://www.state.gov/secretary/rm/2006/63692.htm ("The United States and Mexico will continue working together and continue to resolve their common problems.").

of non-intervention, which rested on absolute sovereignty principles and viewed U.S. jurisdiction over migration as exclusive and absolute. With this, Mexican foreign relations have crossed a line previously set by sovereignty reasoning from "no policy" to active engagement. This Article argues that this crossing of conceptual lines, inspired by the journey of migrants and the consequences of their presence, implies a transnational reinterpretation of the norm of non-intervention.

IV. "LESS IS MORE": PLENARY POWER AND TRANSNATIONAL STEPS FROM ABSOLUTES[259]

Across the border just to the North, a similar idea of absolute sovereignty echoed the traditional norms found in Mexico; the plenary power doctrine in the United States set a stark line excluding the topic of migration from judicial review. Historically, the doctrine applied traditional sovereignty reasoning by excluding judicial review and

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259. While this Article suggests there are judicial deviations in the doctrine's reasoning, plenary power determinations continue to this day. Four examples are provided. First, for a recent 2006 example, see Turkmen v. Ashcroft, No. 02 CV 2307(JG), 2006 WL 1662663, at *42 (E.D.N.Y. June 14, 2006) (stating immigration is intricately part of foreign relations, alien policy may use rules unacceptable if applied to citizens, and concluding such matters are "largely immune from judicial inquiry," quoting Mathews v. Diaz, 426 U.S. 67, 79–80, and Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)). Second, the doctrine continues with Government briefs in immigration disputes citing over a century of precedent. See Brief for the Respondent at 14–21, Benitez v. Mata, 542 U.S. 902 (2004) (No. 03-7434); Brief for the Petitioners at 15–21, *Crawford v. Martinez*, 542 U.S. 902 (2004) (No. 03-878). Third, the doctrine remains alive in the executive branch, which relies on its reasoning to craft immigration regulations and couple its regulation with statements of justification such as "over no conceivable subject" is the power more complete, or that the power is "a fundamental sovereign attribute." See Registration and Monitoring of Certain Nonimmigrants, 67 Fed. Reg. 52,583, 52,585 (August 12, 2002) (codified at 8 CFR pts. 214, 264) (responding to comments that INS registration procedures target specific minority ethnic groups and members of specific religions, and stating the political branches have "historically drawn [these] distinctions" and have plenary authority in the immigration area and "over no conceivable subject" is this power, determined to be "a fundamental sovereign attribute," more complete, quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)). Fourth, despite the doctrine's nuanced judicial limitations examined by this Article, the doctrine's historical legacy and convenience for the political branches continues to influence how the U.S. legal system treats foreign nationals and how it justifies this with the concept of sovereignty. This has been most recently evident in the treatment foreign nationals have received during the "War on Terror." *See generally* NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE (2007); Raquel Aldana, *The September 11 Immigration Detention and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5 (2005) (analyzing how "War on Terror" security policies implemented by the Department of Justice represent huge shifts in plenary power to the executive branch); Natsu Taylor Saito, *Beyond the Citizen/Alien Dichotomy: Liberty, Security, and the Exercise of Plenary Power*, 14 TEMP. POL. & CIV. RTS. L. REV. 389 (2005); Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115 (2002).

providing the political branches great deference in creating and implementing immigration law.[260] This Article follows the lead of scholars from the international law arena who examined the doctrine and predicted its demise.[261] It analyzes how recent changes in the doctrine's application, especially with respect to the canon of avoidance in the majority opinions of *Zadvydas*, *Demore*, and *Clark*, suggest there has been a transnational influence in the Court's view of plenary power doctrine. Generally, these decisions limit or do not invoke plenary reasoning in an absolute sense. Because a limit is placed on the deference afforded the political branches in each, these three holdings suggest the U.S. Supreme Court has, to a small degree, interpreted sovereignty in less absolute terms than it had traditionally when resolving immigration disputes.[262] It is important to view these three decisions together and within the larger global context of changes to how sovereignty is interpreted. This Article's position assumes that sovereignty is an evolving legal concept, and that changes to this concept have been resisted historically across a wide variety of actors. As such, the three holdings may be isolated in their immediate legal effect, but they are part of a larger sovereignty discourse that is not at all static.

Specifically, the way *Zadvydas*, *Demore*, and *Clark* treat the plenary power doctrine suggests a degree of sovereignty reinterpretation in how governmental authority is allocated when deciding immigration issues. This reinterpretation occurs in deportation settings, when governmental authority to remove someone physically present in the United States is at issue, and not in exclusion settings, when a foreign national is regarded as attempting to enter the United States.[263] The explicit limits to the doctrine articulated in *Zadvydas* and the Court's use of the canon of avoidance to interpret statutes in all three cases discard prior conceptions that all

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260. *See supra* Part II.B.

261. For examples of this research, see Aleinikoff, SEMBLANCES OF SOVEREIGNTY, *supra* note 65; Henkin, *The Constitution and United States Sovereignty*, *supra* note 65; *Scaperlanda, Polishing the Tarnished Golden Door*, *supra* note 65. Likewise, Professor Spiro described how the international context may explain Zadvydas treatment of plenary power. *See* Spiro, *Explaining the End of Plenary Power*, *supra* note 65.

262. It can not be overstated that this Article does not claim that the sovereignty within the plenary power, even for the specific power to remove aliens, has been completely reinterpreted. *See supra* notes 26–27, 259. Instead, this Article examines sovereignty as a concept whose meaning and definition changes over time. Accordingly, the alterations in plenary reasoning by the judiciary, as seen in Zadvydas, Demore, and Clark, elucidate the potential for more widespread change.

263. This Article does not examine how plenary power reasoning is applied to the exclusion settings of removal, such as expedited removal. It is generally regarded that traditional applications of plenary power reasoning persist in exclusion determinations. Saito, *supra* note 259, at 16–18; Registration and Monitoring of Certain Nonimmigrants, *supra* note 259, at 52,585.

immigration issues are intrinsically political questions. Traditionally, the Court did not review these issues because international sovereignty required the political branches to have complete, "plenary," power over them. As illustrated below, recent judicial interpretations point to a variety of steps the Court may take to be less hands-off (and less influenced by absolute sovereignty conceptions) in adjudicating the constitutionality of immigration law. Instead, the Court may be more engaged by reviewing immigration statutes and executive immigration policy to determine whether such statutes and policies potentially infringe on any constitutional rights.

This Article posits that this distancing from traditional plenary power reasoning hints that sovereignty has been reinterpreted in immigration law disputes, which suggests the potential for a more transnational conception of sovereignty.[264] The plenary power doctrine has its roots in absolute sovereignty conceptions. Its central justification is that a sovereign state needs unfettered authority to control its borders, regulate migration, and conduct foreign relations. In the United States, the political branches exercise this authority and not the courts.[265] The decisions presented below show one avenue wherein complete judicial immunity is no longer required, but instead

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264. Two important caveats should be mentioned in regard to the plenary power reasoning examined in this Part. First, the changed plenary power reasoning referred to in this Article could be limited to such extreme situations as indefinite detention, which *Zadvydas* and *Clark* attempt to resolve. Clark v. Martinez, 543 U.S. 371 (2005); Zadvydas v. Davis, 533 U.S. 678 (2001). These situations are extreme because they concern a foreign national who is removable and whose home country does not cooperate. These cases are more limited than other common exercises of immigration authority. In these cases (*Zadvydas* and *Clark*), questions arose concerning the allocation of power between government branches to justify or limit rights abuses. *Clark*, 543 U.S. at 385–86; *Zadvydas*, 533 U.S. at 690–91. But in more common immigration law disputes, the political branches' authority may be seen as more settled by plenary authority. This suggests that traditional plenary power reasoning still has much influence. For an analysis of how courts could reach similar discriminatory results without plenary power reasoning and the remoteness of any possibility that the Court or Congress would overturn the doctrine, see Gabriel J. Chin, *Is There a Plenary Power Doctrine—A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (1999). For responses to Chin's "apology and prediction" see Johnson, *supra* note 152 (arguing that the doctrine's discriminatory effects are not limited to de jure or facially-neutral norms); Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine*, 14 GEO. IMMIGR. L.J. 307 (2000). Second, the three decisions examined include significant dissenting opinions that suggest future similar issues could reach different holdings. *See supra* note 198. Immigration law presents detailed statutory distinctions that, in the future, the justices present from 2001 to 2005 and newer justices could decide differently (after applying divergent plenary power reasoning).

265. Justice Kennedy's dissenting opinion in Zadvydas articulates these sovereignty concerns best when arguing that the judiciary lacks the "appropriate sensitivity" to address foreign relations. *Zadvydas*, 533 U.S. at 717 (Kennedy, J., dissenting) (characterizing the majority as making a "sweeping rule" that provides no justification "for wrestling this sovereign power" away from the political branches.).

courts may be more engaged.[266] This engagement stems from a transnational influence in how sovereignty is conceived by the judiciary. As such, this section argues in favor of less plenary power reasoning by the judiciary with respect to migration issues and more transnational legal analysis.

Three factors point to a transnational influence in the Court's plenary power reasoning and consequently how it interprets sovereignty. First, in determining if there is a constitutional violation, the Court initially identifies an alien's potential rights and then examines the political branches' plenary authority.[267] In *Zadvydas*, the majority first found a potential rights infringement (indefinite detention without due process).[268] It then asked whether plenary authority exists to implement the infringement.[269] Professor David Martin argues this point best by contrasting Justice Breyer's opinion, which starts with the "individual 'condemned' to an 'imprisonment,'" with the dissent's contrary beginning concerning the "national will," which is determined with a final removal order.[270] Here, the transnational influence in sovereignty reasoning is that individual rights are identified first and then the plenary authority is examined, suggesting the authority is not as absolute. The contrary exists in the *Zadvydas*' dissenting opinions where the first priority is to assert the authority of the political branches to detain and the second is to explain that the foreign national is not entitled to constitutional rights.[271]

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266. Peter Spiro argues that historically, U.S. foreign relations law compromised "important Constitutional values" because the international context necessitated it due to hostile or less cooperative foreign relations; however, with current trends in international cooperation and globalization, these constitutional values may be bolstered. He explains three doctrines that may be affected, thereby minimizing foreign relations law's current differential. They are: (1) the "political question" doctrine, which reversed the domestic presumption for judicial review; (2) "federal exclusivity" doctrine, which lessened state and local government's influence in foreign relations; and (3) "the dilution of individual rights" in the name of national security, which reversed the centrality of fundamental rights in the Constitution. Peter Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 673–75 (2002).

267. *Zadvydas*, 533 U.S. at 688.

268. *Id.* at 688–89.

269. *Id.* at 682 (stating the Court must decide if the Attorney General may "detain a removable alien indefinitely beyond the removal period or only for a period reasonably necessary to secure the alien's removal," and "indefinite detention of aliens . . . would raise serious constitutional concerns. . . .")

270. David A. Martin, *Graduated Application of Constitutional Protections for Aliens: the Real Meaning of* Zadvydas v Davis, 2001 SUP. CT. REV. 47, 76.

271. *Zadvydas*, 533 U.S at 702–03 (Scalia, J., dissenting) (stating the Attorney General has "clear statutory authority to detain criminal aliens with no specified limit" and such an alien has "no legal right to be here" and referring to prior case law upholding indefinite detention, e.g., *Mezei*); *id.* at 718 (Kennedy, J. dissenting) (presenting the majority intrusion in foreign relations as "unprecedented" and "results in part" from a misunderstanding about the aliens' liberty interests.). See also Demore

This transnational influence becomes apparent when the *Zadvydas* majority opinion is analytically compared to larger themes of changing sovereignty interpretations. Although an individual crossed an international border and is subject to the jurisdiction determined by international sovereignty, he is also entitled to individual rights.[272] This is contrary to traditional plenary power reasoning, which did not find for protection of individual rights absent a political determination. This change suggests a transnational influence.

A second factor pointing to a transnational influence is the Court's willingness to consider foreign relations issues, e.g., immigration, rather than simply deferring to the political branches.[273] The judiciary having an active international role is a central tenet of a transnational jurisprudence.[274] By examining how the executive implements its immigration authority, factually distinguishing prior plenary case law, and closely interpreting statutes for constitutional doubt, the Court's approach to plenary power questions in these three cases appears to be quite transnational.[275] Specifically, the judiciary's role is engaged and not at all deferential. This changes the allocation of governmental authority to a varying degree with a more active judiciary. Because these developments are made in response to migration, they are the product of a transnational influence. While this does not represent explicit constitutional holdings, it does show the judiciary is engaged.

A third factor pointing to a transnational influence in the *Zadvydas* and *Clark* cases is how the legal issues the Supreme Court faces stem from foreign relations between states. Because these issues are caused by cross-border developments, they reify the interdependent nature of legal issues between U.S. law and an international context. The situations in these cases develop when foreign states will not accept the removal of a foreign national by the United States.[276] The relationship between the United States and a foreign state creates the

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v. Kim, 538 U.S. 510, 513 (2003) (beginning its presentation of the legal issue with a statutory reference to the "Attorney General shall take into custody any alien who" is removable because of his conviction for a set of specified crimes).

272. *See generally* Koh, *The Supreme Court Meets International Law*, *supra* note 33 (discussing transnationalism and individual rights).

273. Peter Spiro explains that traditionally the political branches are afforded deference in foreign relations since the judiciary was not versed in foreign affairs and the international context required action by the political branches. He explains that globalization minimizes these risks in the international relations context, and that the judiciary is more versed in these issues than traditionally was the case, *see* Spiro, *supra* note 266, at 682.

274. *See* Koh, *The Supreme Court Meets International Law*, *supra* note 33, at 7 (explaining: (1) "transnationalists" regard domestic courts as exercising a critical role in internalizing international legal norms; (2) this internationalization is not limited to only the political branches; and (3) executive power should be checked by judicial review).

275. *See supra* Part IV.A–C.

276. *See supra* Part IV.A, C.

dispute.[277] Diplomatically the states can not agree. Interaction at a consular level between the United States and countries such as Cuba or Cambodia result in the inability to remove a person.[278] With this ineffective exercise of executive power, the U.S. legal system must then determine whether there is appropriate authority to detain the person after an inability to remove them.[279] In this light, the political branches' plenary power faces a serious challenge when it does not attain its objective—removal—due to failed diplomatic exchange. This results in bringing the issue back to the U.S. legal system.[280] Because these disputes develop from a cross-border dynamic, in which the United States is trying to remove a foreign national but the foreign state is not accepting this removal, there is an intrinsically transnational influence in these court decisions. Because of developments overseas and because the executive can not carry out its objective, a court must decide if plenary power authority determines where to allocate government authority. This is transnational because there are two instances of crossing international borders: once to remove the individual, and again when this inability to remove the individual brings a legal issue back to the United States.

In order to place the *Zadvydas*, *Demore*, and *Clark* decisions within a legal transnational context that extends beyond immigration, these holdings and their reasoning are examined within the current context of the Courts' use of the canon of avoidance to develop constitutional norms. Because the plenary power doctrine has an extensive history, because it provides the executive and legislative branches much liberty to avoid protecting migrant's individual rights, and because Supreme Court decisions on immigration law are often limited to minute statutory interpretations, it is conceivable that the plenary power doctrine's future is not at all set in stone by its treatment in *Zadvydas*, *Demore*, and *Clark*.[281] Accordingly, this Article presents changes in the plenary power doctrine as part of sovereignty reinterpretation discourse, wherein its definition is continually contested. In order to explore the twists and turns of the plenary power doctrine, this section is divided into four Subparts: (A) *Zadvydas v Davis*: Transnational Limits to Plenary Power; (B) *Demore v. Kim*: Not Applying *Zadvydas* Limitations and Less Plenary Power; (C) *Clark v. Martinez:* Extending *Zadyvdas'* Limitations, More Avoidance; and (D) Avoidance: Avoids Absolute Sovereignty and Develops New Norms.

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

278. *See id.* (discussing the United States' difficulty in removing the petitioners since it could not find a country that would accept them).

279. 8 C.F.R. § 241.4 (2007).

280. *Id.*

281. *See, e.g.*, Clark v. Martinez, 543 U.S. 371 (2005); Zadvydas v. Davis, 533 U.S. 678 (2001).

A. Zadvydas v. Davis: *Transnational Limits to Plenary Power*

In *Zadvydas*, a majority of the Supreme Court justices held that the executive branch did not have the power to indefinitely detain removable aliens in situations when a home country would not accept alien repatriation (thereby making the detention of the removable alien effectively indefinite).[282] Joined by four justices, Justice Breyer wrote the majority opinion.[283] That opinion overturns the indefinite detention and announces that important limits do exist to the political branches' plenary authority over immigration.[284] After describing the Government's claims that plenary power precedent requires the judicial branch to defer to the political branches, the majority opinion states "[b]ut that power is subject to important constitutional limitations."[285] Such explicit claims by the Supreme Court limiting the doctrine had not been seen before in immigration law decisions and proved immediately eye-catching to immigration law scholars.[286]

Three elements stand out in the majority opinion's limits on plenary power. The opinion (1) recognizes that there is plenary authority and then examines if there has been a "constitutionally permissible means [of] implementing" it ("means of implementation" limitations);[287] (2) limits plenary power precedent to the specific factual holdings in those cases, which do not apply in the present

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282. *Zadvydas*, 533 U.S. at 678.

283. *See id.* at 696 (the majority also included Justices Stevens, O'Connor, Souter, and Ginsburg).

284. The *Zadvydas* limits articulated by the Supreme Court in 2001 followed suggestions by the Court in preceding years that the plenary power doctrine's justification was less absolute than in the past. See T. Alexander Aleinikoff & Cornelia T. L. Pillard, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in* Miller v Albright, 1998 SUP. CT. REV. 1 (arguing *Miller v. Albright*'s five opinions illustrate "fundamental reconsideration of the underpinnings of the plenary power doctrine" and deny prior practices of "extreme judicial deference").

285. *Zadvydas*, 533 U.S. at 695.

286. The Georgetown Immigration Law Journal's Winter 2002 issue, 16 GEO. IMMIGR L.J. 271, 271–530 (2002), included many essays examining the previous year's important Supreme Court immigration law decisions including *Zadvydas*, *St. Cyr*, and *Nguyen*. *See* INS v. St. Cyr, 533 U.S. 289 (2001); *see* Tuan Anh Nguyen v. INS, 533 U.S. 53 (2001). These essays include: Margaret H. Taylor, *Behind the Scenes of* St. Cyr *and* Zadvydas: *Making Policy in the Midst of Litigation*, 16 GEO. IMMIGR L.J. 271 (2002); David A. Martin, *Behind the Scenes on a Different Set: What Congress Needs to Do in the Aftermath of* St. Cyr *and* Nguyen, 16 GEO. IMMIGR L.J. 313 (2002); Peter Spiro, *Explaining the End of Plenary Power*, *supra* note 44; T. Alexander Aleinikoff, *Detaining Plenary Power: The Meaning and Impact of* Zadvydas v. Davis, 16 GEO. IMMIGR L.J. 365 (2002); Michele R. Pistone, *Times Sensitive Response to Professor Aleinikoff's Detaining Plenary Power*, 16 GEO. IMMIGR L.J. 391 (2002); Linda Bosniak, *A Basic Territorial Distinction*, 16 GEO. IMMIGR L.J. 407 (2002); Daniel Kanstroom, St. Cyr *or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR L.J. 413 (2002).

287. *Zadvydas*, 533 U.S. at 695–96.

dispute ("factual distinctions to limit prior precedent");[288] and (3) interprets a statute to avoid constitutional doubt ("avoidance in statutory interpretation").[289] For this Article, these three steps are not only vital to limiting plenary power's absolute invocation, but they also allude to a reinterpretation of sovereignty. If, alternatively, sovereignty were regarded in absolute terms when applying plenary power doctrine, the Court would have regarded the political branches' power as plenary and unquestionable regardless of the possibility of indefinite detention. This would be a "hands-off" position with no judicial review at all, as prior Supreme Court decisions had reasoned.[290]

Instead, the *Zadvydas* majority opinion migrates away from blanket invocations of plenary power and deferential treatment through the use of the three mentioned tactics. It implicitly reinterprets sovereignty, by determining how to allocate governmental power regarding migration, with these three steps. All three reify a judiciary's engaged approach and undercut a traditional hands-off position. First, the majority examined the "means of implementation," effectively reviewing how the executive enforces Congressional determinations.[291] Second, it disregarded the notion that prior plenary precedent completely determined the governmental allocation of authority in the present dispute, which thereby paved the way for factually distinguishing a long line of plenary power precedent. During the plenary power's long history, the weight of precedent often became too much to bear and invariably resulted in pro-Government decisions, with absolute sovereignty in the plenary power doctrine repeatedly affirmed.[292] Third, the majority used a canon of statutory interpretation to acutely review statutes for possible rights infringement.[293] The objective here was to identify if the statute creates a constitutional doubt. The court then interpreted the statute to avoid a potential infringement of a constitutional right. Collectively, these three judicial maneuvers indicate that the Supreme Court is not hands-off when faced with a question about the constitutionality of an immigration statute. While it does not explicitly state that the statute is unconstitutional, the three steps affirm the Court's movement away from a deferential stance. This distancing from the traditional judicial application of plenary power

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288. *Id.* at 692–94.

289. *Id.* at 689–90.

290. *See supra* notes 6–7.

291. *Zadvydas*, 533 U.S. at 695–96.

292. Most famously, Justice Frankfurter wrote "the slate is not clean" with regards to the political branches' plenary power and that plenary power was "firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." Galvan v. Press, 347 U.S. 522, 530–31 (1954). *See also Fiallo v. Bell*, 430 U.S. 787, 792 (1977); Kleindienst v. Mandel, 408 U.S. 753, 766–67 (1972) (reiterating this idea found in Galvan).

293. *Zadvydas*, 533 U.S. at 688–89.

doctrine indicates a rethinking of the concept of sovereignty since traditionally, deference was required by absolute sovereignty.

Supporting its "means of implementation" limits analysis, the majority opinion refers to two prior cases: *I.N.S. v. Chadha*[294] and the *Chinese Exclusion Case.*[295] Mentioning *Chadha*, the majority reasoned that judicial review is not barred by a "nonjusticiable political question" of Congress' plenary authority over immigration.[296] Citing the *Chinese Exclusion Case,* it repeated that plenary power is limited by the Constitution.[297]

In *Chadha*, the Court did not question whether the political branches had the plenary authority, but instead it "challenged" that "Congress must choose 'a constitutionally permissible means of implementing that power.'"[298] This reasoning first identifies the extent of the political branches' authority and then applies constitutional rights limitations to the authority's implementation of its authority (referred to in this Article as the "means of implementation" step in *Zadvydas*' plenary limitation).[299] In *Zadvydas*, the majority recognizes that the executive has primary responsibility over immigration and foreign policy matters and has "greater immigration-related expertise," but it reasons that "ordinary principles of judicial review" allow for its review of the lawfulness of an alien's detention.[300]

Next, the opinion refers to the *Chinese Exclusion Case* stating that "congressional authority" is limited "by the Constitution itself and considerations of public policy and justice which control, more or less,

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294. *Id.* at 695 (citing INS v. Chadha, 462 U.S. 919, 941–942 (1983)).

295. *Id.* at 695 (citing Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604 (1889)).

296. *Id.* at 695–96 (citing Kwong Hai Chew v. Colding, 344 U.S. 590, 602 (1953)).

297. *Id.* at 695.

298. INS v. Chadha, 462 U.S. 919, 941 (1983) (referring to requirements that this authority not offend constitutional limits, citing Buckley v. Valeo, 424 U.S. 1, 132 (1976)). To determine if the means are constitutionally permissible, the *Chadha* court applied *Baker v. Carr*'s five-part test and found that the issue might seem political because it touches on legislative authority, but that nonrevewiability did not necessarily follow. *Id.* The Court applied *Baker v. Carr*'s five-part test and found no assault of legislative authority and that "the presence of constitutional issues does not automatically invoke the political question doctrine." *Id.* at 942. For a discussion of how, with globalization, many foreign relations law issues do not qualify as political questions under the five-part *Baker v. Carr* test, see Spiro, *Globalization and the (Foreign Affairs) Constitution, supra* note 266, at 675–81.

299. The "means of implementation" test has had limited applicability in other immigration disputes post-*Zadvydas*. Welch v. Ashcroft, 293 F.3d 213, 221–22 (4th Cir. 2002); Hoang v. Comfort, 282 F.3d 1247, 1257–58 (10th Cir. 2002); Patel v. Zemski, 275 F.3d 299, 307–08 (3d Cir. 2001).

300. *Zadvydas*, 533 U.S. at 700 (emphasizing courts are required to "listen with care" to the executive's foreign policy judgments including the "status of repatriation negotiations" and to grant "appropriate leeway" when the Government's judgments rest on foreign policy expertise).

the conduct of all civilized nations."[301] Because *The Chinese Exclusion Case* first declared the doctrine, this reference effectively demonstrates that, when it was initially conceived, the plenary power doctrine was not regarded as totally separate from any constitutional limitation.[302] In quoting Justice Field, the majority opinion reports "congressional authority," but in the *Chinese Exclusion Case* Justice Field wrote that the United States had "sovereign powers" such as the power "to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican governments to the states, and admit subjects of other nations to citizenship."[303] Justice Field then explains (in a passage that Justice Breyer cites) that "all [these] sovereign powers" are "restricted in their exercise only by the constitution."[304] Accordingly, the "authority" the *Zadvydas* majority opinion refers to is sovereignty.

Chadha and the *Chinese Exclusion Case* as references elucidate that there is prior precedent specifically restricting the plenary authority to constitutional limits. Referring to *Chadha*, the Court rejects the notion that immigration issues are intrinsically a political question and non-justiciable because they are related to foreign relations. The Court can recognize there is exclusive authority for the political branches to make determinations about immigration (for instance when exclusion or deportation may occur), but if the issue is not a political question, then the means of implementing the authority must be constitutional.

After explaining how constitutional limits to the plenary power exist, the opinion examines the power's "means of implementation."[305] For the *Zadvydas* dispute, Justice Breyer clearly specifies Congress' plenary authority.[306] Likewise, the opinion clearly explains that it does not deny the executive or Congress any authority already prescribed.[307] It states that the authority is to "remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of

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301. *Id.* at 695 (quoting The Chinese Exclusion Case, 130 U.S. at 604).

302. *See* Henkin, *The Constitution and United States Sovereignty*, *supra* note 65, at 358 ("Even in Chinese Exclusion, the Court did not say that the power to regulate immigration is immune from constitutional constraints.").

303. *The Chinese Exclusion Case*, 130 U.S. at 604.

304. *Id.* (alteration in original); *see also Zadvydas*, 533 U.S. at 695 (citing *The Chinese Exclusion Case* with the parenthetical "congressional authority limited 'by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations'").

305. *See Zadvydas*, 533 U.S. at 696–99 (referring to how effect is given to the intent of Congress after such intent has been expressed).

306. *See id.* at 695 (stating that Congress has certain undeniable powers regarding aliens).

307. *See id.* (expressing that neither the Court nor its precedent deny Congressional or Executive authority to control entry into the US).

those conditions."[308] The rest of the opinion limits this power and follows *Chadha's* "means of implementation" analysis.[309]

The *Chinese Exclusion Case* referred mostly to international law (involving a treaty between the United States and China), and its reasoning relies greatly on an interpretation of sovereignty as absolute.[310] This conception of sovereignty as absolute provided the political branches freedom to treat foreign nationals without restraint from judicial intervention. The *Chinese Exclusion Case* and its progeny clarified the plenary power doctrine on assumptions made initially about sovereignty.

Although not explicitly mentioned in *Zadvydas*, the question of "whether plenary power is subject to constitutional limits" is a question of "whether the Constitution may limit sovereign authority," since plenary authority derives from international sovereignty and sovereignty concerns foreclosed prior attempts to limit the power.[311] These questions can be answered in two manners: (1) there are no limits, or (2) limits do apply to the political branches' authority. The first option, not followed in the *Zadvydas* majority, finds plenary power justifications to be absolute and to require restriction-free operation for the political branches. This reflects traditional sovereignty reasoning by focusing on exclusive and autonomous authority.[312]

The second option—that limits to plenary power do apply—holds that sovereignty does not provide the political branches with exclusive and unrestrained authority. With this option, the authority is envisioned as limited by the Constitution. This requires a determination that individual rights are protected in spite of, or at the same time as, the political branches' authority to make and implement immigration law. The political branches' authority is not reasoned to be absolute or completely independent of constitutional limits. This is the option chosen by the *Zadvydas* majority.

Taking a second step in limiting plenary power, the *Zadvydas* majority opinion distinguishes plenary power case law. The Government advocated for expansive plenary power reasoning and substantial judicial deference.[313] In distinguishing prior cases finding

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308. *Id.*

309. *See id.* at 696–99 (holding that once Congress has shown intent, the means for implementing that intent are restricted by constitutional limitations).

310. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604 (1889).

311. For a discussion of the derivation of plenary authority, see *supra* Part II.B.

312. For examples of scholarship examining the rigid and absolute nature of sovereignty conceptions in the plenary power doctrine, see Aleinikoff, SEMBLANCES OF SOVEREIGNTY, *supra* note 65; Olafson, *supra* note 65; Scaperlanda, *Polishing the Tarnished Golden Door*, *supra* note 65.

313. Brief for the Respondents at 17, Zadvydas v. Davis, 533 U.S. 678 (No. 99-7791) ("The Attorney General's detention of an alien, pursuant to the statutory authority granted her by Congress, must be accorded substantial deference under the plenary power doctrine.") (citing Harisiades v. Shaughnessy, 342 U.S. 580, 588–89

that plenary authority precludes any review of the present dispute, the majority opinion avoids the substantial weight of prior decisions.[314] In doing so, it also avoids precedent that would eliminate any constitutional limits to plenary authority. Before presenting its plenary power limits analysis, the majority opinion distinguishes *Shaugnessy v. United States ex rel. Mezei*, a prior Supreme Court case regarding alien indefinite detention.[315] The *Mezei* opinion contains some of the most deferential plenary power analysis.[316] This is also an extremely important judicial maneuver because *Mezei* involved a similar set of facts.[317] A more traditional plenary analysis would have regarded *Mezei* as controlling since both cases address aliens who were detained indefinitely because they could not be removed to another country.[318] Under *Mezei*'s reasoning, there would be a determination, made in absolute terms, that the political branches had unreviewable authority over migration issues.

However, the *Zadvydas* opinion reasons that *Mezei* does not apply because the alien in that case (who had been stopped on Ellis Island) had not entered into the United States; it was "as if [he was] stopped at the border."[319] On the other hand, the aliens in *Zadvydas* had entered the United States.[320] By entering, the aliens' "legal circumstance[s] change[], for the Due Process Clause applies to all 'persons' within the United States."[321] Importantly, this distinction restricts the plenary

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(1952), which explains that immigration policy is interwoven with foreign relations, war power, and republican government maintenance, and stating decisions regarding alien detentions "are subject to only the most deferential standard of judicial review.").

314. Zadvydas v. Davis, 533 U.S. at 694 ("In light of this critical distinction between Mezei and the present cases, . . . [it does not support the Government's position,] and we need not consider the aliens' claims that subsequent developments have undermined Mezei's legal authority.").

315. *Id.* at 692–95.

316. *See* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212–16 (1953) (giving Congress and the Executive defferential review in the exercise of their plenary power).

317. *See generally id.* (involving a set of facts similar to Zadvydas). See also Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995) (presenting the legal decisions of the Knauff and Mezei plenary power cases and the significant popular and political resistance to such absolute plenary determinations, which effectively resulted in non-implementation of the court's determinations).

318. *See Zadvydas*, 533 U.S at 705 (Scalia, J., dissenting) ("I believe Mezei controls these cases . . . [and find] no constitutional impediment to the discretion Congress gave to the Attorney General."). *See also Weisselberg*, *supra* note 317, 991–1000 (discusing the aftermath of *Mezei*).

319. *Zadvydas*, 533 U.S at 213. *See* Linda Bosniak, *A Basic Territorial Distinction*, *supra* note 286 (arguing that while the limits to plenary power *Zadvydas* announces received much positive attention from immigrant-rights groups and immigration law scholars, the decision explicitly cemented the rights distinction for aliens inside and outside national territory).

320. *Zadvydas*, 533 U.S at 679.

321. *Id.* at 693.

power justifications, as included in *Mezei*, to the facts of that case. As explained in the majority opinion, these facts are not applicable to *Zadvydas*.[322] In order to avoid the weight of plenary power precedent, the opinion limits the doctrine's application based on factual distinctions. Previous courts had been unwilling to make these factual distinctions and instead used prior plenary precedent to justify application of the doctrine to different factual situations.[323]

In its third plenary limitation step, the majority opinion uses the canon of avoidance to interpret possible constitutional doubt in a statute. In reaching its decision, the majority goes to great effort and follows "a cardinal principle" by reading the relevant statute, 8 U.S.C. Section 1231(a)(6), to avoid any "'serious doubt' as to its constitutionality."[324] As part of applying this canon, the opinion identifies an "implicit limitation" in the statute, limiting detention to ninety days.[325] It reasons this limitation exists because the statute must be "read in light of the Constitution's demand," and Congress did not intend the statute to be unconstitutional.[326]

The opinion explains that a statute permitting indefinite detention "would raise a serious constitutional problem" because the Fifth Amendment prohibits "depriv[ing]" any "person . . . of . . . liberty . . . without due process of law."[327] The Majority added that detention violates Due Process unless it is ordered in a criminal proceeding, but here the removal proceeding was civil.[328] The opinion continues to reason that the government's justifications—preventing flight and protecting the community—do not apply in these contexts because removal is a remote possibility and the dangerousness rationale must be accompanied by special circumstances.[329] The opinion justifies its avoidance of interpreting the statute with constitutional doubt because

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322. *See* Mezei, 345 U.S. at 212–16 (stating that those allowed temporary refuge in the U.S. after being stopped at the border, pending determination of their status, are treated "as if stopped at the border").

323. *See* Legomsky, *supra* note 156, at 936 (stating that one approach the Court could use to weaken the plenary power doctrine would be to deny special judicial deference in deportation cases where the alien is formally within the United States, but to continue to adhere to the doctrine in exclusion cases).

324. *Zadvydas*, 533 U.S. at 689 (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932)). *See also* United States v. Witkovich, 353 U.S. 194, 195, 202 (1957) (reading limitations into the immigration statutes to "avoid their constitutional invalidation"); *but cf.* Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998) (finding that in the case the "constitutional doubt" doctrine need not be applied).

325. *Zadvydas*, 533 U.S. at 689.

326. *Id.* ("In our view, the statute, read in light of the Constitution's demands, limits an alien's post-removal-period detention to a period reasonably necessary to bring about that alien's removal from the United States. It does not permit indefinite detention.").

327. *Id.* at 690.

328. *Id.*

329. *Id.* at 691.

such a doubt "permits an indefinite, perhaps permanent, deprivation of human liberty" without any protection.[330]

Under traditional plenary reasoning, this detention would be regarded as a political question. For an opposing perspective then, a close reading of the statute would limit plenary authority. The opinion then indicates that Congress has not made its intent in the statute clear, especially since a constitutional doubt exists.[331] The Court added that the statute's purpose was to effectuate alien removal rather than to indefinitely detain persons.[332] Consequently, the Court found that the statute does not explicitly state Congress' clear intent to grant the Attorney General power to "hold indefinitely."[333] The statute's purpose is to effectuate alien removal, not to detain indefinitely. The statute's purpose is not to indefinitely detain, but its effective reality is indefinite detention. Because this reality would raise serious constitutional doubts, the majority interprets the statute to avoid such doubt.

This statutory interpretation is important because it illustrates the majority's less-than-absolutist interpretation of sovereignty. Here the majority does not view the judiciary's role as protecting the political branches from review. The Court does not remain hands off by refusing to question the statute created by Congress and implemented by the executive. Instead, the Court actively interprets the statute in light of constitutional concerns. With a clearer statement of congressional intent, in this case the objective of indefinite detention, the Court would not contemplate constitutional doubts. The doubt would not exist because Congress' intent would be clear. With *Zadvydas*' limitations, the majority regards the political branches to have plenary authority, but it analyzes the authority's "means of implementation."[334] The means by which the authority implements the statute is contained in the statute itself, and the analysis is done to see if the effect of the statute is constitutionally permissible. Congress is free to state its intent in future legislation or when reforming current statutes.[335]

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330. *Id.* at 692.
331. *Id.* at 697.
332. *Id.*
333. *Id.* at 699.

> We have found nothing in the history of these statutes that clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent, detention. Consequently, interpreting the statute to avoid a serious constitutional threat, we conclude that, once removal is no longer reasonably foreseeable, continued detention is no longer authorized by statute.

Id.

334. *Id.* at 695–99.

335. The *Zadvydas* decision resulted in Congress and the executive branch's creating legislation and regulations to comply with the decision's limits. For descriptions of this see generally Rachel Canty, *The New World of Immigration*

In sum, the reading of a statute to avoid constitutional doubt migrates away from a bright line that regarded the political branches' authority as autonomous from any judicial scrutiny. Prior plenary power cases reasoned that there could be no limitation to the political branches' authority because the authority was rooted in sovereignty. Thus, this authority was plenary. In *Zadvydas* though, the majority opinion, with a three-step analysis, avoids such absolute invocation of plenary power reasoning.

B. Demore v. Kim: *Not Applying* Zadvydas *Limitations and Less Plenary Power*

In 2003, the Supreme Court in *Demore v. Kim* held that mandatory detention of criminal resident aliens pending deportation proceedings does not violate the Fifth Amendment's Due Process Clause.[336] In *Demore*, the Court overturned several Courts of Appeals' decisions that had applied *Zadvydas*' constitutional "means of implementation" limitation to the plenary power and found that mandatory detention before deportation proceedings did violate Due Process.[337] With an initial comparison to *Zadvydas*, *Demore* appears to be a step back to absolute plenary reasoning, by finding mandatory detention does not violate Due Process.[338] *Zadvydas*' reasoning of curtailing plenary power application is hardly evident. Moreover, mandatory detentions are approved in a civil context for foreign nationals, and the likelihood of the alien individual contesting this is unlikely.[339]

Nevertheless, this Article argues that the majority's justification for its decision suggests there has been minimal distancing from the

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Custody Determinations After Zadvydas v. Davis, 18 GEO. IMMIGR. L. J. 467 (2004) (reporting how the INS responded to the decision with new procedures and regulations governing alien detention and how it has also increased its efforts to pressure foreign states to accept aliens ordered removed); Martin, *supra* note 286 (urging Congress to review the judicial review provisions of 1996 IIRIRA and Antiterrorism and Effective Death Penalty Act, in the aftermath of clear-statement requirements in *Zadvydas* and *St. Cyr*).

336. Demore v. Kim, 538 U.S. 510, 531 (2003).

337. *See* Welch v. Ashcroft, 293 F.3d 213 (4th Cir. 2002); Hoang v. Comfort, 282 F.3d 1247 (10th Cir. 2002); Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001) (referencing cases overturned by the Demore holding).

338. This Article does not attempt to provide any normative analysis of the Demore decision. As such, its description of the decision's plenary treatment is more likely than not less critical than expected. The Article's objective is to place Demore within a context of similar reasoning in *Zadvydas* and *Clark* and a global context of how sovereignty is interpreted. For a comprehensive examination of the decision's negative effects, see M. Isabel Medina, *Demore v. Kim—A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697 (1994).

339. See *Demore*, 538 U.S. at 514–15 (finding that current removal procedures permit the alien to contest, in a Joseph hearing, whether he or she falls under mandatory detention classification). *Cf. id.* at 555–56 (Souter, J., dissenting).

plenary power justifications. The decision does not merely evoke plenary power precedent and decide that mandatory detentions are constitutional because the political branches have complete authority.[340] Instead, the Court is more engaged in its review, balancing the government's interest with the alien's freedom from imprisonment.[341]

The majority does not solely justify its reasoning on traditional plenary power analysis.[342] It presents a limited version of plenary power, with weaker characterizations of this power when compared to plenary reasoning in over a century of case law. The opinion states that prior decisions show that the authority of the political branches over immigration issues is "broad" and that the political branches and the Court make rules that "would be unacceptable if applied to citizens."[343] This plenary power analysis is focused on foreign nationals receiving different treatment than citizens.[344] This differs from blanket invocations of plenary power and nonreviewability doctrines.[345] Plenary authority is presented instead as something broad that provides for distinctions between citizens and non-citizens. While this is definitely not the explicit limits articulated in *Zadvydas*,

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340. *Id.* at 522 (stating, in contrast to the dissenting opinion, that immigration is related to foreign relations and that Congress may make rules regarding aliens that are "unacceptable if applied to citizens").

341. To a certain degree, the *Demore* opinion's balancing approach is similar to prior immigration law minimal scrutiny tests. *See, e.g.*, Francis v. INS, 532 F.2d 268, 272–73 (2d Cir. 1976) (using the minimal scrunity test to find a violation of the equal protection clause for interpreting a statute to allow for discretionary relief for alien residents who temporarily proceeded abroad but not for those who never departed).

342. The decision does not reason that the political branches' power is plenary because immigration law's relations with foreign affairs, because whatever policy Congress makes is due process, or because sovereignty concerns limit any judicial review. *Demore*, 538 U.S. at 522–24.

343. *Id.* at 522 (quoting Matthews v. Diaz, 426 U.S. 67, 79–80 (1976)). The majority then responds to Justice Souter's argument in dissent that this quote is in dictum by contextualizing the Matthews analysis as being "in reliance on clear precedent establishing that '"any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government."' *Id.* at 81 n.17 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952)).

344. *See* Zadvydas v. Davis, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) ("The liberty rights of the aliens before us here are subject to limitations and conditions not applicable to citizens."); Reno v. Flores, 507 U.S. 292, 305–06 (1993) (finding no violation of equal protection, since Congress can treat citizens and aliens differently). For a discussion of why the *Demore* majority opinion's application of plenary power precedent is wrong since *Matthews* concerns equal protection claims and the instant issue is Due Process, see *Demore*, 538 U.S. at 547–58 (Souter, J., dissenting).

345. Professor Medina explains that the precedent used to justify the different treatment for non-citizens is misapplied since *Mathews* and *Verdugo* concern "government benefits," "extraterritorial governmental action directed at a Mexican drug dealer apprehended in Mexico," and *Zadvydas* and *Flores* "recognize that non-citizens have due process liberty rights." Medina, *supra* note 338, at 722–27.

it is also not the absolute and deferential analysis of historic plenary precedent.

The *Demore* majority approves mandatory detention based upon the Government's claimed justification for prehearing detention—to prevent "deportable aliens from fleeing prior to or during their removal proceeding."[346] It reasons that Congress was concerned with increases in criminal rates by foreign nationals.[347] This results in an inability to remove deportable criminal aliens because the agency can not detain them during deportation proceedings.[348] The majority reasons that the Government's and Congress' use of this evidence illustrates that detention does have a purpose.[349]

The Court's reasonable deference shows there is a distancing from blanket plenary power justifications. The Court examines whether the executive and the legislative branches had a purpose and whether there is evidence in support of that purpose. This differs from a traditional judicial reasoning that the political branches' authority is without limits and is plenary.

Lastly, the majority distinguishes *Zadvydas* as "materially different" because, in *Zadvydas*, detention was possibly indefinite and such duration was evidently not within Congress' intent.[350] In pre-removal detention, as in *Demore*, the duration was not indefinite. The Court reasoned "detention at stake under § 1226(c) lasts roughly a month and a half in the vast majority of cases in which it is invoked, and about five months in the minority of cases in which the alien chooses to appeal."[351] For the court in *Demore*, the reasonable purpose of securing an alien's presence in removal proceedings was attainable.

Comparing *Demore* with *Zadvydas* reveals several things.[352] First, the Court does not read the statute to avoid a conflict with due process considerations.[353] This could be because Congressional intent for pre-proceeding detention is more explicit than in the *Zadvydas* situation. Second in *Demore,* executive action does not implicate foreign relations as clearly as it does in *Zadvydas* (where the position of an alien's home country made removal impossible). In the latter, foreign relations with Cuba and Cambodia constructively limited

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346. *Demore*, 538 U.S. at 522–23.

347. *Id.* at 519.

348. *Id.*

349. *Id.* at 528 (stating detention "necessarily serves the purpose of preventing deportable criminal aliens" from fleeing and making removal more likely). It adds for deportable aliens, Congress is not required to choose the "less burdensome means." *Id.*

350. *Id.* at 527–29.

351. *Id.* at 530.

352. For a description of why Demore's approval of mandatory alien detention may further complicate plenary power analysis by confusing substantive and procedural due process analysis, see *The Supreme Court, 2002 Leading Cases: Constitutional Law: D. Due Process*, 117 HARV. L. REV. 226, 287 (2003).

353. *Demore*, 538 U.S. at 523–24; Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

executive action, which made detention's purpose unachievable.[354] This Article argues that events and actors outside U.S. territory influence the U.S. immigration law regime to address the issue of alien detention. This need to respond to overseas actors and events indicates a transnational relationship. With *Demore*, the executive could achieve its purpose—detention before removal proceedings—and this purpose had a rational justification.[355] This was evidenced by the statistical analysis of alien flight before proceedings.[356] This differs from a scenario such as *Zadvydas*, where the statutory intent cannot be met and indefinite detention is a strong likelihood. Third, in *Demore*, the Court saw the detention as having a fixed duration (i.e., not indefinite).[357] In this respect, the executive's justification of plenary authority is limited and does not run into the potential of constitutional doubt. Fourth, *Zadvydas*' "means of implementation," which limits plenary power reasoning, is not applied by the majority in *Demore*.[358] The three justices who joined the dissenting opinion do refer to the "means of implementation," but base their argument more heavily on a "century of precedent," which affirms that permanent residents enjoy "the basic liberty from physical confinement."[359] The dissent explains that the issue is not whether the executive has the power to detain aliens in removal proceedings, i.e., whether the political branches have the plenary power.[360] Instead, the question is "whether Congress has chosen 'a constitutionally permissible means of implementing' [its immigration] power."[361] They argue that this means of implementation results in "important constitutional limitations."[362]

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354. *See Zadvydas*, 533 U.S. at 686, 716 (stating there was no "realistic chance" that Cambodia would accept Ma, and "no credible proof that there is any possibility that Cuba may accept Rosales's return anytime in the foreseeable future").

355. *Demore*, 538 U.S. at 517–18, 528.

356. *Id.* at 519.

357. *Id.* at 529–31.

358. *See id.* at 517–22 (examining the plenary power of Congress and the INS without referring to "means of implementation").

359. *Id.* at 541, 559–60 (Souter, J., concurring in part and dissenting in part).

360. *See id.* at 559 (dismissing the statement of the majority that the issue at hand is whether there is plenary authority to detain aliens during their removal proceedings).

361. *Id.* (quoting Zadvydas v. Davis, 533 U.S. 678, 695 (2001)); *see also* Carlson v. Landon, 342 U.S. 524, 537 (1952) (reasoning that the deportation power is "subject to judicial intervention under the 'paramount law of the Constitution.'").

362. *Demore*, 538 U.S. at 559 (quoting Zadvydas, 533 U.S. at 695). The dissent also qualifies the majority's support in *Wong Wing v. United States*, 163 U.S. 228 (1896). *See id.* (stating detention was "necessary to give effect" to removal and reasoning that judicial pronouncements limiting on aliens rights made at the time in history should be understood as part of context that also permitted for "judicial relief from detention pending deportation proceedings").

C. Clark v. Martinez: *Extending* Zadyvdas *Limitations, More Avoidance*

In 2005, the Supreme Court held in *Clark v. Martinez* that the Attorney General may not indefinitely detain excludable aliens, thus answering whether the *Zadvydas* holding extended to excludable aliens.[363] Justice Scalia wrote the majority opinion, focusing on preventing one statute (the same in *Zadvydas* and *Clark*) from having two different meanings (one for removable and one for excludable aliens).[364] The opinion states: "To give these same words a different meaning for each category would be to invent a statute rather than interpret one."[365] The majority and the dissenting opinions do not mention the plenary power doctrine as providing any basis for its decision, although the Government's two briefs argued amply for its applicability.[366] The majority finds that the *Zadvydas* decision interpreted the statute one way (which prohibited the executive from detaining aliens indefinitely) and that this interpretation should be applied to another class of aliens since the statute makes no distinction.[367] As such, the *Clark* majority finds that the *Zadvydas* interpretation of the statute, which first identifies an alien right and then a problem with the statute, stands as precedent.[368]

The Government did argue that an expansive view of plenary power was justified by "more than a century" of precedent and that "over no conceivable subject" is Congress' power more complete.[369] It also argued that the United States' international sovereignty required

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363. Clark v. Martinez, 543 U.S. 371, 377–79 (2005) ("To give these same words a different meaning . . . would be to invent a statute, rather than interpret one.").

364. *See id.* (characterizing the issue before the Court as one of the application of statute construction).

365. *Id.*

366. The first argument in each brief is that the political branches have this authority: "The Executive and Legislative Branches Have Comprehensive Control Over Immigration" and "The Executive and Legislative Branches Have Plenary Control Over Aliens at the Border." Brief for the Respondent (May 7, 2004) at 14–21, Benitez v. Mata, 543 U.S. 371 (No. 03-7434); Brief for the Petitioner at 15–21, Crawford v. Martinez, 542 U.S. 902 (2004) (No. 03-878).

367. *Clark*, 543 U.S. at 377–79; *see also Zadvydas*, 533 U.S. at 678 (applying the statute to aliens who are removable under a section of the governing statute); *The Supreme Court, 2004: Term Leading Cases*, 119 HARV. L. REV. 337, 386 (2005) (explaining the position that the Court's use of the canon of avoidance has led some to see the decision as denying Congressional intent).

368. *Clark*, 543 U.S. at 377–79. In fact, Justices Scalia and Kennedy dissented in *Zadvydas* but joined the majority in Clark.

369. *See* Brief for the Respondent, *supra* note 366, at 15 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977) and citing the *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889)).

the "singular authority" over immigration, a part of foreign relations, to be in the political branches, which the judiciary could not review.[370]

Importantly, the majority is not willing to overturn *Zadyvdas* (as the Government requested) by sanctioning indefinite detention.[371] It argues that to do so would establish a "dangerous principle" in its jurisprudence that judges give the same statutory text different meanings.[372] While the *Clark* holding is presented as statutory, it explicitly refuses to overturn *Zadvydas*, which applies constitutional limitations analysis to the political branches' political authority over immigration.[373]

Likewise, the Court does not reason that sovereignty, i.e., the plenary power, provides the executive the power to indefinitely detain aliens. Instead, the majority finds *Zadvydas* limitations apply here as well. Likewise, the Court does not regard plenary power as excluding its role in reviewing or casting constitutional doubt on the statute. As explained generally in this Article, sovereignty reasoning has changed and is exercised in a less absolute manner than in the past. Here, these two pronouncements by the Court reify these central contentions.

A significant distinction should be noted: the *Clark* majority does not argue that detention of aliens is impermissible given current statutory legal frameworks.[374] Importantly for this Article's analysis, the majority is unwilling to justify this power with invocations of the plenary power doctrine or by overturning *Zadvydas* limits. In other words, the Court will not approve alien detention with legal doctrine based on traditional sovereignty reasoning, even when the Government argues that national security will be compromised without this power.

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370. *Id.* at 15–17 (quoting plenary power precedent from five years prior and from over a century ago to justify deference). It states the power is: "to be largely immune from judicial inquiry or interference" (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 589 (1952)); not subject to judicial review because "officials exercise especially 'sensitive political functions that implicate questions of foreign relations'" (quoting INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)); a "singular authority" derived from the "inherent and inalienable right of every sovereign and independent nation" (quoting Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893)) that is "not only "inherent in sovereignty," but also "essential to self-preservation" (quoting Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)); "an incident of every independent nation. It is a part of its independence" (quoting *The Chinese Exclusion Case*, 130 U.S. at 603–04); required to have "normal international relations" and defense (quoting Kleindienst v. Mandel, 408 U.S.753, 765 (1972)); "inherent executive" (quoting Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950)); and "a fundamental sovereign attribute" exercised by the political departments "largely immune from judicial control" (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 210 (1953)).

371. *See Clark*, 543 U.S. at 385–86 (explicitly stating that the holding is not authorizing indefinite detention).

372. *Id.*

373. *See id.* (stating that the Court will not read different meaning into the same statute in different cases).

374. *See generally id.* (holding that detention of aliens is permissible under the current statute if applied to aliens falling under specified circumstances).

When the Government claimed that national security would be compromised absent the ability of the executive to indefinitely detain, the majority responded that the USA PATRIOT Act provided the ability to detain aliens for a six-month period after the removal period.[375] This change in judicial reasoning on sovereignty-based legal concepts affirms the central claims of this Article. While in practice or in policy the political branches may exert great influence and be granted deference in foreign relations and immigration by the courts, this is not achieved with a hands-off judiciary or blanket invocation of plenary authority. As the *Clark* majority shows, statutory law provides the executive the authority to detain for the period it requests.[376] This authority will not be justified as extending from the plenary power. Effectively, the executive may be able to do the same thing, but a legal doctrine that is based on sovereignty will not serve as its justification or provide unfettered authority.

D. *Avoidance: Avoids Absolute Sovereignty and Develops New Norms*

Since the mid-1980s, immigration law scholars have analyzed how, when faced with important immigration law issues, courts often use tools of statutory interpretation to determine that migrants have rights, thereby avoiding the most deferential plenary power reasoning.[377] In doing this the Supreme Court and numerous lower courts have applied the "canon of avoidance," which allows a member of the judiciary to interpret a statute so as to avoid any constitutional doubt.[378] The Court's use of this canon is particularly relevant in the

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375. *See id.* at 386 (referring to Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), § 412(a), 115 Stat. 350 (enacted Oct. 26, 2001) (codified at 8 U.S.C. § 1226(a)(6) (2000 ed., Supp. II)).

376. *Clark*, 543 U.S. at 377–78.

377. For a discussion of how immigration law scholars have analyzed this issue, see generally LEGOMSKY, IMMIGRATION AND THE JUDICIARY, *supra* note 156; Motomura, *Immigration Law after a Century of Plenary Power*, *supra* note 20; Schuck, *supra* note 20.

378. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (explaining the "canon of avoidance" as developed in this opinion). Brian Slocum explains there are two general types of canons which courts use in immigration law decisions: substantive canons and textual canons. Substantive, sometimes called normative, canons are used when a statute lacks clarity or there is insufficient guidance as to how to interpret a statute. See Slocum, *supra* note 12 (defending and encouraging the expansion of the use of canons in the interpretation of immigration provisions). While this Article only addresses the canon of avoidance, other substantive canons include: rule of lenity, presumption against retroactivity, and statute interpretation as to avoid conflict with international law. *Id.* at 5–6. Textual canons seek to interpret the meaning of terms used in a statute by examining the choice of words, grammatical structure, or organization of a statute. For a discussion of these issues, see WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634 (2nd ed. 1995).

immigration law field for two reasons. First, the plenary power doctrine severely limits many substantive constitutional rights for migrants. Using the canon may lead to holdings favorable to aliens but without making substantive constitutional determinations. Second, the practice of immigration law, whether in the context of advocating for foreign-national clients, enforcing legislation, or adjudicating in administrative law or judicial settings, necessarily involves large quantities of statutes where the canon may in theory be applied. To anybody practicing immigration law for the first time, the sheer size, Kafkian complexity, and detailed nature of the statutory legal regime become immediately apparent. Accordingly, canons are specifically applicable to this statutory legal reality. While the canon's use has been ample and it has been regarded as resulting in favorable decisions for migrants in light of the plenary power's influence, legal scholars note that it ultimately adds confusion to immigration law.[379] They argue against its long-term use and instead urge the reversal of the plenary power doctrine.[380] More recently, though, immigration law scholarship has argued that alien-favorable decisions employing the canon are not limited to statutory holdings and instead represent larger shifts in judicial lawmaking.[381]

Inspired by these scholarly leads, this section briefly examines what the canon's application in immigration law suggests about how sovereignty is currently conceived. The objectives here are to identify how the Court's use of the canon of avoidance circumvents the use of traditional plenary power doctrine and analytically relates this to an examination of international sovereignty. Since the plenary power doctrine powerfully attempts to close the door on judicial review, the Court's use of the canon subtly prances away from this position. The canon inevitably results in statutory holdings for the immediate parties. With its persistent application, long-term effects develop that deviate from the plenary power's powerful past. This section argues

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379. *See* Motomura, *Immigration Law after a Century of Plenary Power*, *supra* note 20, at 549 (stating the canon's use in immigration law "confuses and contorts the law" creating a "doctrinally 'improper'" constitutional norm that "do[es] not control in cases which explicitly involve interpreting the Constitution").

380. *Id.* Scholars arguing against the canon's application are by no means limited to the immigration law context. See RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM (1996) (arguing the courts' interpretation of statutes in this manner leads to judges making the law around the Constitution); Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71 (1995) (arguing that instead of claiming to interpret statutes out of respect for Congress' legislative powers, courts should reach decisions on constitutional grounds instead); William K. Kelly, *Avoiding Constitutional Questions As a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001) (arguing the canon's use results in confusing executive and legislative intentions).

381. *See* Slocum, *supra* note 12 (averring the use of canons do not result in unpredictability and do result in greater rights for aliens); Spiro, *supra* note 44, at 339 (arguing that while Zadvydas was "statutory interpretation" it cast "serious constitutional doubt on the indefinite detention of removable aliens.").

that the canon permits courts to avoid absolute-sovereignty conceptions when applying the plenary power doctrine; become more engaged in issues previously deferred to the executive or legislative branches as political questions; and step towards redefining lawmaking roles for the three branches of government.

Using the canon, the Court becomes more engaged in determining legal issues that plenary reasoning sought to exclude from judicial review in the past.[382] By employing the canon, the Court (1) sends a message to Congress on how to draft statutory provisions, (2) makes a statutory determination contrary to what the Government and the executive have argued for, and (3) finds a way to provide aliens more rights without a constitutional determination. In any of these scenarios, the Court is not exercising a "hands-off" position or affording the political branches the deference requested. The Court provided this deference in the past, when relying on traditional plenary reasoning. When it did this, it conceived of sovereignty in absolute terms, with an absolute limitation as to what issues the judiciary could review. Use of the canon evades this limitation.

This Article argues that current use of the canon suggests a more transnational interpretation of sovereignty because the Court is more engaged in areas it historically regarded as hands-off. Traditional or blanket invocations of the plenary power doctrine excluded judicial review, viewing governmental separations of power as determined by international sovereignty. While the engagement of the judiciary by way of the canon is not explicitly making constitutional norm determinations, it is also clearly not affording judicial immunity for the political branches. Likewise, employing the canon, the Court is more concerned about the potential infringement on an alien's individual rights.[383] Without this concern, the Court would not bother to employ a canon (i.e., there would be no doubt). These two factors—active engagement on the part of the Court and the Court's concern for individual rights—point to a transnational influence in how sovereignty regarding migration is conceived.[384]

The use of the canon is also particularly relevant to concerns of separation of powers.[385] Critics of the canon argue it disrupts

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382. *See* Zadvydas v. Davis, 533 U.S. 678, 718 (2001) (Kennedy, J., dissenting) ("[The Court] assumes a role in foreign relations which is unprecedented, unfortunate, and unwise.").

383. *See id.* at 689 (reading an implicit limitation in the detention period due to constitutional demands); Clark v. Martinez, 543 U.S. 371, 380–85 (2005) (interpreting the statute so that it is in accordance with constitutional guarantees).

384. *See* Koh, *The Supreme Court Meets International Law*, *supra* note 33, at 5–6 (describing increasing judicial review over international issues and individual rights as part of transnational jurisprudence).

385. *See Zadvydas*, 533 U.S. at 705 (Kennedy, J., dissenting) ("The Court's ruling causes systemic dislocation in the balance of powers, thus raising constitutional

separation of powers. When the Court applies the canon of avoidance, it explicitly decides to interpret the statute in a certain way, contrary to alternative interpretations, out of concern for separation of powers.[386] Applying the canon, the Court claims Congress did not create a statute to be unconstitutional, so it interprets it (i.e., reads the terms in the statute) so as not to violate a constitutional norm. Critics argue that this effectively rejects Congressional intent and popular political will (which Congress represents). A statute has a plain meaning, and this is obscured or rejected by the Court's choice of readings.[387]

Advocates of the canon explain that its use results in holdings that are more just by protecting individual rights without having to address larger constitutional questions. A decision made by using the canon is an implicit statement to Congress to clearly and explicitly state its intention in statutes. For instance, in *Zadvydas*, the majority suggests to Congress that, if indefinite detention is its intent, it must be stated explicitly in the statute.[388] The rationale is that intentions must be clear because statutes with multiple meanings should not produce rights infringements.[389]

The canon's use gains particular relevance to this Article's inquiry on sovereignty since its protracted use leads to the development of new norms. Traditionally, court decisions based on statutory interpretations have a tendency to increase rights protections for aliens, in spite of the plenary power doctrine.[390] With the reversal of plenary power not occurring as predicted for over twenty years, the canon of avoidance may be the most likely relief. Given the wide

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concerns not just for the cases at hand but for the Court's own view of its proper authority.").

386. *See id.* at 679 (holding that the Court will review Executive and Legislative Branch decisionmaking regarding immigration law, because that decisionmaking is subject to constitutional limitations).

387. *See id.* at 689 (stating "we read an implicit limitation into the statute before us," even though the Government argues "the statute means what it literally says," i.e. there is no limit and the Attorney General and not the courts should decide the duration of detention).

388. *See id.* at 696–97 ("Despite this constitutional problem, if 'Congress has made its intent' in the statute 'clear, "we must give effect to that intent."' We cannot find here, however, any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed.").

389. Concerns regarding Congress' actual intent become increasingly germane since the legislative process for immigration lawmaking is characterized by limited procedural clarity or transparent opportunity to review a bill's provisions. These lawmaking realities cast severe doubt as to the clarity of what is congressional intent. *See generally*, PHILIP SCHRAG, A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA (2000) (providing an insider's description of the political maneuvers of congressional committees and ensuing debates about the legislation that became IIRIRA).

390. *See* Slocum, *supra* note 12, § IV (arguing courts using canons of interpretation results in aliens afforded more rights).

statutory make-up of most immigration law, it is possible that canons may be applied more often than the status quo. The canon may provide the best avenue to not overturn the doctrine but instead reinterpret its applicability. This confirms the central claim of this Article that, when addressing migration issues, interpretations of sovereignty have moved from an absolute vision to a more transnational vision. The latter seeks increased individual rights for aliens and more judicial participation in international legal issues such as foreign relations and immigration.

This view is in accord with scholarly perspectives advocating for the canon of avoidance. Not just limited to immigration law, these perspectives argue that extended use of the canon result in confirming constitutional values.[391] The canon permits the Court to be engaged in lawmaking in contexts where, for political concerns, Congress cannot legislate.[392] This Article predicts that, given the serious political resistance to immigration reform, the canon will provide the Court with a likely method to influence immigration policy. This process has transnational influences by protecting migrants' individual rights and increasing judicial participation in legal areas historically barred from the judiciary as political questions.

V. CONCLUSION

This Article has examined sovereignty as a concept that changes in meaning over time.[393] Different historical periods, distinct public actors, and divergent non-state forces all characterize a "final political and legal authority," i.e., a sovereign, differently.[394] This examination commenced with an inquiry: does the cross-border movement of people (international migration) influence how sovereignty is interpreted in domestic law? The Article identified changes in sovereignty-based legal doctrine in domestic Mexican and U.S. laws governing migration.

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391. *See* Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397 (2005) (arguing the canon is not a tool of statutory interpretation, but it is a way to protect constitutional norms that may not be enforced due to political reasons, based on analysis of Warren Court decisions of the 1950s); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEXAS L. REV. 1549, 1551 (2000) (arguing the Court's use of the canon in disputes involving IIRIRA and the AEDPA "push interpretations" to reflect "enduring public values" in the Constitution's Article III such as Due Process and the Suspension Clause) .

392. *See* Frickey, *supra* note 391 (when constitutional norms cannot be enforced due to political pressures, those norms can be enforced by use of the cannon).

393. *See* Biersteker, *State, Sovereignty, and Territory*, *supra* note 27, at 167 (presenting a constructivist approach to sovereignty).

394. *See* HINSLEY, *supra* note 1, at 25–26 (referring to F. H. Hinsley's definition of sovereignty).

This analysis covered one phenomenon (migration), one international law concept (sovereignty), and how two states' migration experiences influence changes in sovereignty-based legal doctrine. This review suggests there are elements of sovereignty's reinterpretation in Mexico's norm of non-intervention and the United States' plenary power doctrine.

Put simply, the Mexican norm of non-intervention has moved from a position that barred any Mexican influence in U.S. immigration lawmaking to a stance of tolerating such an influence. This implies a movement of sovereignty reasoning in the norm from absolute terms to those that are more transnational with respect to the final authority on migrants in the United States. In the United States, the Supreme Court has judicial tools at its disposal to lessen the plenary power doctrine's traditional deference to the executive and legislative branches. By reviewing the means of implementing authority, limiting plenary power precedent to their specific factual holdings, and interpreting statutes to avoid constitutional doubt, a court may be far less deferential than traditional plenary power doctrine previously required. This minimized deference similarly suggests a transnational conception since it results in additional protections for an alien's individual rights and engages the judiciary in an area of governmental authority where it was previously hands-off. These changes to plenary power are not suggested as a reversal of the doctrine but instead should be viewed as part of constant and contested sovereignty reinterpretation discourse. In both the United States and Mexico sovereignty-based legal doctrines have moved, "migrated," to a small degree to less absolute and exclusive stances. As such, this Article does not present limits to absolute sovereignty in the plenary power doctrine or the non-intervention doctrine as concrete and fixed. Instead, there is a discourse that encompasses both doctrines as well as the changing definitions of sovereignty. That discourse accurately characterizes the minute changes in non-intervention regarding migrants in the United States and jurisdiction over them, and in the plenary power analysis of post-removal detention of foreign nationals.

For over a decade, transnational research in the social sciences has illuminated that despite not being solely incorporated into one national society or physically bound by political or territorial borders, migrants exert important political influence in immigrant-receiving and immigrant-sending societies. This Article presents these claims to examine if there has been any influence in the legal doctrines that address migration. This is accomplished by examining U.S. immigration law, which governs migrant entry and stay, and Mexican foreign relations law, which governs events outside national territory, such as emigration to the United States. Both legal regimes are intimately related to sovereignty, since sovereignty is the source of authority for a state's foreign relations and immigration law. Paradoxically, these transnational contexts are regulated with legal

doctrines premised on foreclosing foreign influence: absolute sovereignty in non-intervention (Mexico) and plenary power (United States).

Developments in Mexico indicate that there may be a transnational movement that influences how sovereignty is conceptualized, which is demonstrated through Mexico's changing attitude regarding the foreign relations non-intervention norm. Previously with traditional sovereignty reasoning, Mexico interpreted the norm of non-intervention to have a "policy of no policy" regarding its migrants in the U.S. Mexico viewed the concept of sovereignty as absolute and as excluding any Mexican influence on the United States concerning its nationals. This non-intervention norm has been reinterpreted, as evidenced by lobbying activities directed at U.S. lawmakers to bring about changes to IIRIRA and recent immigration proposals; negotiating a migration accord with the United States to change U.S. immigration law; changing Mexican nationality law in order to influence U.S. immigration lawmaking; and developing a comprehensive consular program for migrants abroad.

There is a transnational influence in these changes because Mexico began making foreign policy decisions (to advocate for nationals abroad) for domestic benefit. Moreover, Mexico is less concerned that its foreign policy decisions will conflict with U.S. domestic jurisdiction, because U.S. jurisdiction is viewed in less absolute and exclusive terms. The objectives of Mexican domestic politics and foreign relations are not clearly separate since migrants are abroad but have important influences in a migrant-sending society. Traditionally, Mexican foreign relations did not disturb U.S. jurisdiction out of concern for international sovereignty, as protected in the *Doctrina Estrada* and Constitutional Article 89:X. With the developments presented in this Article, however, sovereignty has been interpreted as tolerant of Mexican influence. This exhibits a transnational influence because sovereignty is not defined as exclusively eliminating foreign (i.e., Mexican) influence when it coincides with domestic (i.e., U.S.) jurisdiction.

These changes reflect many features of Dean Koh's transnational legal process.[395] Alterations in the international law principle of non-intervention result from the non-public force of migration (i.e., individual migrants), as opposed to change solely engendered from a judicial or legislative body. New norms develop for Mexican nationals from this sovereignty reinterpretation such as the right to dual-nationality and the right to assistance and representation from Consular services. An additional benefit from this non-public force is

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395. *See* Koh, *Transnational Legal Process*, *supra* note 17 (describing a transnational legal process to examine how legal norms change with extended exposure to foreign influence).

that Mexican foreign relations now lobby U.S. lawmakers for changes to U.S. immigration law. In these ways, foreign relations influence change in Mexican domestic law. Mexican foreign relations have changed by becoming more engaged in the international system and by responding to a large migrant population overseas. Traditional legal notions of absolute sovereignty conflict with these foreign policy positions. In sum, the sovereignty changes presented hint at the process' interaction, internalization, and enforcement of transnational law. Here, the interaction is the domestic Mexican exposure to emigration. New norms are internalized and enforced in the Constitution (Article 89:X), Foreign Service regulations, and nationality law.

A less obvious but subtle transnational influence appears with plenary power in U.S. courts. For over a century, the plenary power doctrine foreclosed meaningful judicial review of migration issues because immigration law fell within the political branches' plenary authority, which derived from international sovereignty. The doctrine set an exclusive border between judicial review and constitutional rights on one side, and the political branches' complete authority to treat migrant issues on the other side. Because sovereignty was defined in absolute terms and it was the source of the plenary authority, it could not be checked by judicial review.

This Article provides initial observations of recent plenary power jurisprudence. In *Zadvydas*, the majority opinion stated that the plenary power was "subject to important constitutional limitations."[396] With this, the Court's reasoning migrated away from a traditional position of relying on the plenary power doctrine. This Article suggests this deviation is indicative of changed sovereignty reasoning regarding migration—a foreign relations and transnational law context much larger than the immediate issue of indefinite detention or alien removal. The plenary authority, which was traditionally regarded as unlimited and immune from judicial review, may in the future be subject to a series of hurdles suggested in *Zadvydas*. Instead of relying on plenary power analysis to decide the dispute, the *Zadvydas* majority (1) required the authority be implemented with constitutional means, (2) distinguished prior precedent with specific factual determinations, and (3) interpreted a statute to avoid a constitutional conflict. While *Demore* does not apply these limitations, it does use a rational basis inquiry to see if the executive's authority has a purpose. This is clearly not *Zadvydas'* limitations, but it is also not a blanket and traditional plenary power invocation. *Clark* affirms *Zadvydas'* holding and emphasizes the significance of using canons of interpretation, effectively increasing judicial influence in foreign relations.

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396. Zadvydas v. Davis, 533 U.S. 678, 696 (2001).

These changes imply a transnational influence in the plenary power doctrine. First, in these decisions, often the Court first identifies an alien's individual right and then proceeds to see if the political branches have the authority to potentially infringe the right.[397] Second, the judiciary is more active in reviewing immigration issues as opposed to just deferring to the political branches. This happens by stating explicitly that there are constitutional limits to the power,[398] by approving the exercise of the plenary authority only if Congress provides a rational basis,[399] or by interpreting a statute to avoid constitutional doubt.[400] Third, the *Clark* and *Zadvydas* issues develop from failed diplomatic objectives (i.e., foreign states will not accept aliens to be removed) and the consequential ineffective exercise of plenary authority.[401] As such, legal determinations in domestic law—whether the executive may effectively detain someone indefinitely—result from overseas developments. This crossing, by legal issues from overseas back to the domestic law, is transnational.

These changes in the doctrine's application resemble many features of the transnational legal process.[402] For instance, as with non-intervention in Mexico, the socio-economic force of migration in the form of the movement of private individuals across borders, spurs a change in this public law doctrine. As the Court relies less on deference to political branches for immigration issues, the judiciary migrates increasingly into foreign relations. Similarly, this happens when it uses canons of interpretation. The canon's byproduct is that the judiciary slowly becomes more active in internalizing, interpreting, and enforcing new norms—such as the norm that removable and excludable aliens may not be indefinitely detained.

In conclusion, this Article suggests that immigration law and international law scholarship examine transnational subjects, break away from domestic and international law dichotomies, and apply transnational analysis to identify how legal norms develop in an increasingly interdependent world. Many issues facing local communities and domestic governments cross national boundaries and are transnational, such as the flow of goods, capital, services, labor, ideas, security risks, environmental degradation, rogue states interfering in domestic politics, and crime. To this effect, introductory observations are made examining how the transnational force of migration has influenced changed applications of the plenary power

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397. *Id.* at 678–79; Clark v. Martinez, 543 U.S. 371, 371–72 (2005).

398. See discussion *supra* Part IV.A.

399. See discussion *supra* Part IV.B.

400. See discussion *supra* Part IV.C-D.

401. See discussion *supra* Part IV.

402. *See* Koh, *Transnational Legal Process*, *supra* note 17 (describing a transnational legal process to examine how legal norms change with extended exposure to foreign influence).

and non-intervention doctrines in the United States and Mexico, concepts engendered as examples of absolute sovereignty. Doctrinal illustrations and conceptual tracking affirm the Article's basic objective: to show that the concept of sovereignty has migrated in two domestic law regimes. These insights serve as examples of sovereignty's evolving nature, the similarities different domestic legal regimes experience in responding to migration, the benefit of removing "national blinders" [403] to study cross-border phenomena, and the migration of transnational law into our scholarly lenses.

403. *See* Fitzgerald, *supra* note 30 (arguing that a transnational approach rids one of "national blinders" and helps to isolate the influence of migration).