HUMAN RIGHTS QUARTERLY

Interpreting the Constitution: The Use of International Human Rights Norms

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Federal courts have long been the principal arbiters of rights the United States Constitution protects.[1] The primary sources federal courts traditionally invoke to define these constitutional principles include cases,[2] the opinions of constitutional scholars,[3] and the intent of the Framers.[4] Using these sources, constitutional principles have evolved through a jurisprudence focused on American authority and precedent. While often sufficient, such sources are not exhaustive. When discussing fundamental rights of persons, courts need a broader horizon. Recently some courts have expressed an increased willingness to examine nontraditional sources in seeking to define constitutional principles and fundamental rights.[5] This article examines the

1. U.S. CONST. art. III, § 2, cl. 1. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 24 (1977). 28 U.S.C. § 1331 (1976) provides: "The district courts shall have original jurisdiction of all civil cases . . . [arising] under the Constitution, laws, or treaties of the United States . . . ." For an excellent summary of cases on the role of the courts and the development of the law from the bench, see THE SUPREME COURT: LAW AND DISCRETION (W. Mendelson, ed. 1967) [hereinafter cited as THE SUPREME COURT].
2. *See, e.g.*, the discussion in Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1386–90 (10th Cir. 1981). *See generally* THE SUPREME COURT, *supra* note 1, at 3.
3. *See also* Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964). *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 1; L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).
4. *E.g.*, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934). ("The question is whether the plan of the Constitution involves the surrender of immunity . . . . [James] Madison . . . clearly stated his view as to the purpose and effect of the provision . . . . Hamilton in The Federalist, No. 81, made the following emphatic statement of the general principle of immunity . . . ." *Id.* at 323–324).
5. *E.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); Sterling v. Cupp, 290 Or. 611, 625 P.2d 123 (1981). *Cf.* Chandrahasan, *Freedom from Torture and the Jurisdiction of Municipal Courts: Sri Lanka and United States Perspectives*, 5 HUM. RTS. Q. 58 (1983); Hassan, *The Doctrine of Incorporation: New Vistas for the Enforcement of International Human Rights?*, 5 HUM. RTS. Q. 68 (1983); *See generally*, R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964).

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decisions in *Rodriguez-Fernandez v. Wilkinson* in the United States District Court for the District of Kansas [6] and in the United States Court of Appeals for the Tenth Circuit.[7] These decisions are significant because of the different ways the two courts looked to international human rights norms in the course of making their decisions. The district court found that Rodriguez-Fernandez was entitled to no federal constitutional protection, but held that his release was mandated by binding principles of customary international law. In contrast, the Tenth Circuit construed applicable statutes to require the release of Rodriguez-Fernandez. In its decision the court sets out an approach to defining emerging principles of constitutional law which relies upon international human rights norms. This latter method, as opposed to that of the district court, is a workable approach for incorporating international human rights principles into the United States Constitution.[8]

I. RODRIGUEZ-FERNANDEZ V. WILKINSON

Pedro Rodriguez-Fernandez, a Cuban national, arrived in the United States on 2 June 1980 at Key West, Florida, as part of the Cuban refugee freedom flotilla.[9] He sought admission to this country as a refugee, and was permitted to land by United States immigration officials pursuant to 8 U.S.C. § 1223(a).[10] Rodriguez-Fernandez was placed in the custody of immigration officials at a detention center pending a determination of his eligibility for admission.[11]

In an interview with immigration officials, Rodriguez-Fernandez admitted that when he left Cuba he had been serving a sentence in a Cuban prison for attempted burglary and prison escape.[12] His prison record and his lack of immigration documents indicated that he was excludable under 8

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6. Fernandez v. Wilkinson, 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds sub. nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).
7. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).
8. *See* Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation,* 4 HOUSTON J. INT'L L. 501 (1982).
9. *Rodriguez-Fernandez,* 654 F.2d at 1384.
10. *Fernandez,* 505 F. Supp. at 788. 8 U.S.C. § 1223(a) (1976) provides in pertinent part:

    > Upon arrival at a port of the United States of any vessel or aircraft bringing aliens . . . the immigration officials may order a temporary removal of such aliens . . . but such temporary removal shall not be considered a landing . . . . A temporary removal of aliens from such vessels or aircraft ordered pursuant to this subsection shall be made by an immigration officer . . . .

    Id.
11. *Rodriguez-Fernandez,* 654 F.2d at 1384.
12. *Id.* In the interview Rodriguez-Fernandez denied being guilty of the attempted burglary for which he was tried by a military revolutionary court. He admitted, however, prior convictions for burglary. Rodriguez-Fernandez testified that when he left Cuba he was scheduled for release on 27 June 1981, the expiration of his term of imprisonment. Thus had he remained in Cuba, he would have been released prior to the decision of the Tenth Circuit. *Id.*

U.S.C. § 1182(a)(9) or (a)(20).[13] These facts led to his detention pending further inquiry.[14] The preliminary determination of excludability and a recommendation for further detention pending a more formal exclusion hearing were approved by a panel consisting of three supervisory Immigration and Naturalization Service (INS) officials, an INS attorney, and a staff member from the central office of INS.[15]

Rodriguez-Fernandez was then transferred to a detention center at Camp McCoy, Wisconsin.[16] While there he received the required notice[17] that he was considered excludable and would be further detained pending a formal hearing. On 16 June 1980, the same day he received the notice, he was transferred to the federal penitentiary at Leavenworth, Kansas.[18] At formal exclusion proceedings five weeks later, an immigration judge determined that Rodriguez-Fernandez was excludable under 8 U.S.C. § 1182(a)(9) and (a)(20),[19] and ordered him deported to Cuba pursuant to 8 U.S.C. § 1227(a).[20] Rodriguez-Fernandez waived his statutory right to appeal the validity of the exclusion order.[21] In September 1980, while still being detained in the federal penitentiary awaiting deportation, he filed a petition for a writ of habeas corpus in the federal district court for Kansas. He alleged

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13. 8 U.S.C. § 1182(a)(9) and (a)(20) (1976) provide:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States.
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> (9) Aliens who have been convicted of a crime involving moral turpitude (other than a purely political offense) or aliens who admit having committed such a crime . . . .
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> . . . .
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> (20) Except as otherwise specifically provided in this chapter any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document . . . .

Id.

14. This detention was pursuant to 8 U.S.C. § 1225(b) (1976) which provides: "Every alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer." *Id.*
15. *Fernandez,* 505 F. Supp. at 789.
16. *Id.*
17. "If in accordance with the provisions of § 235(b) of the Act, the examining immigration officer detains an alien for further inquiry before an immigration judge, he shall immediately sign and deliver to the alien a Notice to Alien Detained for Hearing by an Immigration Judge." 8 C.F.R. § 235.6 (1980). On 14 June 1980 Rodriguez-Fernandez submitted a request for political asylum; the request was denied by the INS district director in Kansas City on 14 July 1980. *Fernandez,* 505 F. Supp. at 789. The possible merits of that request by Rodriguez-Fernandez are not considered here, nor was the denial challenged in Rodriguez-Fernandez's petition for writ of habeas corpus to the district court. *Id.* at 788.
18. *Fernandez,* 505 F. Supp. at 789.
19. *Id.* For the text of these provisions, see *supra* note 13.
20. *Fernandez,* 505 F. Supp. at 789. 8 U.S.C. § 1227(a) (1976) provides in pertinent part: "Any alien . . . who is excluded under this chapter, shall be *immediately* deported to the country whence he came . . . unless the Attorney General, in an individual case, concludes that immediate deportation is not practicable or proper." *Id.* (emphasis added).
21. *Fernandez,* 505 F. Supp. at 789.

that his continued confinement without bail and without having been charged or convicted of a crime in this country was a violation of the right against unusual punishment under the eighth amendment as well as a violation of fifth amendment due process guarantees.[22]

On 31 December 1980 the district court issued an order that the government terminate the arbitrary detention of Rodriguez-Fernandez within ninety days and mandating that if such "detention is not terminated at the end of said period, the writ [of habeas corpus] shall be granted and the petitioner released on parole."[23] The district court found that the

> indeterminate detention of [Rodriguez-Fernandez] in a maximum security federal prison under conditions providing less freedom than that granted ordinary inmates constitutes arbitrary detention and is a violation of customary international law; and that the continued detention is an abuse of discretion on the part of the Attorney General and his delegates.[24]

During the ninety-day period, Rodriguez-Fernandez was transferred to the federal penitentiary in Atlanta, where he was held along with some 1,700 other excludable Cubans.[25]

On 22 April 1981 the district court held a compliance hearing on the ninety-day order; the government reported it had determined Rodriguez-Fernandez eligible for release on parole into the United States under 8 U.S.C. § 1182(d)(5).[26] No release had occurred, however, because the Reagan Administration had suspended the release of Cuban refugees to reconsider government policy on the issue.[27] The government asked the court for an additional sixty days either to parole or to deport Rodriguez-Fernandez.[28] The district court denied the government's request for delay

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22. *Id.*
23. *Id.* at 800.
24. *Id.*
25. *Rodriguez-Fernandez,* 654 F.2d at 1384.
26. *Id.* at 1385. 8 U.S.C. § 1182(d)(5) (1976) provides:

> (A) The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.
> (B) The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien require that the alien be paroled into the United States rather than be admitted as a refugee under section 1157 of this title.

Id.

27. *Rodriguez-Fernandez,* 654 F.2d at 1385. The government informed the district court that a special task force was due to file a report on 4 May 1981 recommending what should be done with excluded Cubans still in detention. *Id.*
28. *Id.*

and ordered Rodriguez-Fernandez paroled within twenty-four hours.[29] From this decision the government filed an appeal to the Tenth Circuit.[30] On appeal, the Tenth Circuit held, without discussion, that the relevant statutory provisions mandated the release of Rodriguez-Fernandez. In addition, by way of dicta, it concluded that the due process guarantees of the fifth amendment mandated the release.[31]

II. FEDERAL COURTS, ALIENS, AND INTERNATIONAL LAW

To understand the importance of the courts' decisions, it is necessary to examine two important areas of prior case law: first, constitutional protections that the courts have traditionally afforded non-United States citizens; second, the role of international law in federal court decision-making.

A. Constitutional Protection of Noncitizens

Immigration law has been fraught with inconsistent application of constitutional principles. Whether an alien is afforded constitutional protection often has little to do with factors within his direct control. The United States guards its absolute prerogative to decide how to treat aliens who enter its borders.[32]

Federal courts have traditionally and consistently held that the power to expel or exclude aliens is vested in the legislative branch and largely beyond judicial review.[33] In *Fong Yue Ting v. United States*[34] Justice Horace Gray, writing for the Court, said:

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29. *Id.*
30. *Id.* The Tenth Circuit granted a motion by the government to stay the execution of the release order; the matter was expedited for oral argument on 12 May 1981. On 9 July 1981, the Tenth Circuit issued its opinion. *Id.*
31. "Certainly imprisonment in a federal prison of one who has been convicted of a criminal offense is a deprivation of liberty in violation of the Fifth Amendment. . . . Logic compels the same result when imprisonment is for an indefinite period, continued beyond reasonable efforts to expel the alien." *Rodriguez-Fernandez,* 654 F.2d at 1387.
32. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886), as reflective of this attitude: "Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system . . . the law is the definition and limitation of power."
33. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Boutilier v. INS, 387 U.S. 118 (1967). In *Boutilier* the Court declared that it had sustained the Congress's "plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." *Id.* at 123. *See* Galvan v. Press, 347 U.S. 522, 531 (1954), where Justice Felix Frankfurter noted: "That the formulation of these immigration policies is entrusted exclusively to Congress has become firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Id. See also* Harisiades v. Shaughnessy, 342 U.S. 580 (1952); Wong Wing v. United States, 163 U.S. 228, 237 (1896).
34. 149 U.S. 698 (1893).

> The power to exclude or expel aliens . . . is vested in the political departments . . . and is to be regulated by treaty or by Act of Congress, and to be executed by the executive authority . . . except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.[35]

The Supreme Court has repeatedly expressed its reluctance in immigration matters to interfere with the legislative policy-making of Congress or the executive branch function of carrying out policy. This reluctance, however, is not a total bar to judicial review. While full constitutional protections may not be required, resident and even nonresident aliens have been afforded some protection.

In *Yick Wo v. Hopkins*[36] the Supreme Court recognized that aliens within the United States are entitled to at least some constitutional rights.[37] In striking down a San Francisco ordinance directed at shutting down laundries run by Chinese aliens, the Supreme Court stated "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."[38]

In *Wong Wing v. United States* the Supreme Court extended fifth and sixth amendment protection to aliens within the country.[39] Wong Wing filed a petition for a writ of habeas corpus, alleging wrongful detention. He challenged his imprisonment at hard labor for violation of a federal criminal statute,[40] and claimed that his constitutional rights had been violated by his imprisonment without indictment and without trial.[41] The Court noted that "to declare unlawful residence within the country to be an infamous crime,

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35. *Id.* at 713; *accord, Harisiades,* 342 U.S. at 588–89.
36. 118 U.S. 356 (1886).
37. This article does not exhaustively examine resident aliens' rights under the Constitution. A brief discussion is presented here for the purpose of putting into context the decisions of the district court and the Tenth Circuit in *Rodriguez-Fernandez.* For more in-depth discussions of rights of resident aliens, see Griffith, *Exclusion and Deportation: Some Avenues of Relief for the Alien,* 15 SAN DIEGO L. REV. 79 (1977); Comment, *Extending the Constitution to Refugee-Parolees,* 15 SAN DIEGO L. REV. 139 (1977).
38. *Yick Wo,* 118 U.S. at 369.
39. 163 U.S. 228 (1896).
40. 25 Stat. 504, *extended under* 27 Stat. 25 (1892). Section 4 of the 1892 enactment provided in pertinent part: "Any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States . . . ." 27 Stat. 25.

    Section 6 of the legislation provided for summary adjudication:

    > [A]ny Chinese laborer within the limits of the United States who shall neglect, fail or refuse to comply with the provisions of this act . . . shall be deemed and adjudged to be unlawfully within the United States, and may be arrested . . . and taken before a United States judge, whose duty it shall be to order that he be deported . . . .

    Id.
41. *Wong Wing,* 163 U.S. at 234.

punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provisions were made that the fact of guilt should first be established by a judicial trial."[42] The Court concluded that all persons in the United States are entitled to fifth and sixth amendment guarantees and cannot be "deprived of life, liberty or property without due process of law."[43] The Court, in dicta, made a comment particularly relevant to the *Rodriguez-Fernandez* case:

> We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion of aliens would be valid. Proceedings to exclude or expel would be in vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.[44]

Resident aliens are also entitled to other constitutional protections. The Supreme Court has held that they are entitled to the first amendment freedoms of speech and press[45] and that permanent resident aliens have a constitutional right to seek employment,[46] although they may be restricted from certain types of employment critical to an important governmental interest.[47] In addition, resident aliens have been afforded most of the benefits and services available to citizens, such as admission to the practice of law,[48] entitlement to welfare benefits,[49] and commercial licenses.[50] Virtually

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42. *Id.* at 237.
43. *Id.* at 238. In 1952 the Supreme Court held as a denial of due process the attorney general's statutorily permitted denial of reentry into the United States of a resident alien who had temporarily left the country as a seaman on an American vessel. Kwong Hai Chew v. United States, 344 U.S. 590, 594–95 (1952). The Court held also that a resident alien's fifth amendment right to procedural due process cannot "be capriciously taken from him." *Id.* at 601. *See* Rosenberg v. Fleuti, 374 U.S. 449 (1963); Griffith, *supra* note 37. *Cf.* Knauff v. Shaughnessy, 338 U.S. 537 (1950), where the Supreme Court held that there had been no violation of due process because, in the case of denial of entry to an alien, any procedure authorized by Congress constitutes due process.
44. *Wong Wing*, 163 U.S. at 235.
45. Bridges v. Wixon, 326 U.S. 135, 148 (1945).
46. Truax v. Raich, 239 U.S. 33 (1915) (Arizona statute enacted to protect the citizens of the United States in their employment against noncitizens held in violation of the equal protection clause of the fourteenth amendment).
47. *See, e.g.,* Ambach v. Norwalk, 441 U.S. 68 (1979) (upheld statute that forbade permanent certification as a public school teacher any person who is not a United States citizen unless that person has manifested an intention to apply for citizenship); Foley v. Connelie, 435 U.S. 291, 297 (1978) (allowed state to exclude aliens from the ranks of its police force because the police function fulfilled "a most fundamental obligation of government to its constituency").
48. *In re* Griffiths, 413 U.S. 717 (1973) (state provision prohibiting resident alien from the practice of law held violation of the equal protection clause).
49. Graham v. Richardson, 403 U.S. 365 (1971) (upheld challenge to state statutes denying welfare benefits to resident aliens who have not resided in the United States for a specified number of years).
50. Takahashi v. Fish & Game Comm., 334 U.S. 410 (1948) (California statute barring issuance of commercial fishing licenses to persons "ineligible for citizenship" held unconstitutional).

the only constitutional right of aliens still restricted is the right not to be deported. However, while aliens have no vested right to remain in the United States, they are guaranteed at least procedural due process in deportation proceedings.[51]

As noted earlier, nonresident aliens seeking admission to the United States have no vested constitutional right to admission.[52] The Supreme Court has often repeated the language of *Fong Yue Ting* in upholding congressional or executive decisions to exclude or expel nonresident aliens. In *Knauff v. Shaughnessy* an alien wife of a United States citizen sought admission to the United States.[53] The attorney general denied a hearing, but found that admission of the nonresident alien would be prejudicial to the United States security interests and ordered her excluded.[54] The Court held that exclusion of aliens is a fundamental act of sovereignty.[55] "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[56]

In *Shaughnessy v. United States ex rel. Mezei* an alien who had been a permanent resident in the United States sought reentry.[57] He was permanently excluded without a hearing.[58] Finding his status to be that of any alien seeking entrance,[59] the Supreme Court concluded that failure to grant a hearing did not violate his constitutional rights, because an alien seeking

51. Kwong Hai Chew v. Colding, 344 U.S. 590 (1952). For discussion of the case, see *supra* note 43.

    This section of the article has focused on permanent resident aliens. There are two other types of resident aliens – nonimmigrant aliens and undocumented aliens. *See* Comment, *supra* note 37, at 144–45. The nonimmigrant alien is generally entitled to the same constitutional rights as permanent residents, with some restrictions. *Id.* the nonimmigrant generally must leave the country at the time his entry permit requires and is restricted from employment without first obtaining permission from the INS. *Id.* at 145. He may also be subject to expulsion if he overstays his permitted entry dates. 8 U.S.C. § 1251(a)(2) (1976). *See* U.S. *ex rel.* Kordic v. Esperdy, 279 F. Supp. 880 (S.D.N.Y. 1967) (alien seaman granted temporary entrance into the United States, violated 8 U.S.C. § 1282(c) (1976), which makes it a misdemeanor subject to six months' imprisonment or $500 fine for any alien crewman to remain in the United States in excess of the time granted under his conditional entry permit).

    Undocumented aliens also generally hold the same conditional rights as permanent resident aliens, with three notable exceptions: (a) some length of presence is required; (b) the undocumented alien is not entitled to seek employment; (c) he may not automatically become a permanent resident. Comment, *supra* note 37, at 145.

52. The power of Congress to exclude aliens has been held fundamental in our notion of sovereignty. *See infra* note 55 and accompanying text.
53. 338 U.S. 537 (1950). The alien seeking admission was temporarily detained at Ellis Island. *Id.* at 539. For a discussion of aliens seeking entrance to the United States by sea, see Comment, *The Dilemma of the Sea Refugee: Rescue Without Refuge,* 18 HARV. INT'L L.J. 577 (1977). *See also* Pierre v. United States, 547 F.2d 1281 (5th Cir. 1977).
54. *Knauff,* 338 U.S. at 540.
55. *Id.*
56. *Id.* at 544. *Accord,* Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); Boutilier v. INS, 387 U.S. 118 (1967).
57. 345 U.S. 206 (1953).
58. *Id.* at 208.
59. The Court gave no special consideration to the fact that he had previously been lawfully admitted to the United States. *Id.* at 213.

admission to the United States cannot seek refuge in the United States Constitution.[60] Nor did the Court find his continued detention at Ellis Island to be violative of any constitutional rights: "Temporary harborage, an act of legislative grace, bestows no additional rights. Congress meticulously specified that such shelter ashore 'shall not be considered a landing' . . . . And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as stopped at the border."[61] Therefore continued detention is not cause for invoking constitutional rights because the alien under detention is not considered present in the United States.

Thus an alien who is seeking admission or who is subject to exclusion from the United States could find little protection in the Constitution. This does not mean, however, that courts have never afforded constitutional protections to nonresident aliens.

In *United States v. Toscanino* the United States Court of Appeals for the Second Circuit held that the fourth amendment protected an Italian alien from eavesdropping by United States government agents in Uruguay.[62] The Second Circuit rejected the government's claim that the fourth amendment was not applicable beyond continental limits. It found the fourth amendment protected "people," wherever they are, not an "area."[63]

In *United States v. Henry* the United States Court of Appeals for the Fifth Circuit extended fifth amendment protection to a Jamaican citizen standing at the border.[64] It held that an alien within United States territorial jurisdiction, whether at the border or in the interior, was entitled to fifth amendment protections in criminal proceedings, including the *Miranda* warnings.[65]

The Second Circuit has also held that nonresident aliens owning property in the United States are entitled to protection under the fifth amendment.[66] It called the government's contention that the Constitution conferred no rights on nonresident aliens "so patently erroneous . . . that we are surprised it was made."[67]

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60. *Id.* at 215.
61. *Id.* at 215 n.12 (quoting 8 U.S.C. §§ 151, 154 (1976)). *Accord,* Kaplan v. Todd, 267 U.S. 228, 230 (1925); Ekin v. United States, 142 U.S. 651, 661–62 (1892).
62. 500 F.2d 267 (2d Cir. 1974). Toscanino was appealing a narcotics conviction alleging that the government illegally used wiretapping to gather evidence against him. *Id.* at 268.
63. *Id.* at 280. *Cf.* Reid v. Covert, 354 U.S. 1, 6 (1957) ("When the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land").
64. 604 F.2d 908 (5th Cir. 1979) (Henry was convicted of falsely and willfully representing himself to be a United States citizen in violation of 18 U.S.C. § 911 (1976). He appealed his conviction, alleging violation of his rights under Miranda v. Arizona, 384 U.S. 436 (1966)).
65. *Henry,* 604 F.2d at 914.
66. Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966).
67. *Id.* at 111. *See also* Russian Volunteer Fleet v. United States, 282 U.S. 481, 489 (1931) ("The petitioner was an alien friend and as such was entitled to the protection of the Fifth Amendment").

Clearly, affording constitutional protection to nonresident aliens within or without our borders is not a concept foreign to the federal courts.

B. The Use of International Human Rights Law by United States Courts

It is well recognized that in particular circumstances international law may be held to constitute part of the law of the United States. In *The Paquete Habana* [68] the United States Supreme Court stated:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these to the works of jurists and commentators . . . . Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trust in or the evidence of what the law really is.[69]

In *Murray v. Schooner Charming Betsy* [70] Chief Justice John Marshall noted that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." [71] In *Filartiga v.*

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68. 175 U.S. 677 (1900). *See also* United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820).
69. 175 U.S. at 700. As support for the proposition, Justice Horace Gray quoted from two principle sources:

> Wheaton places, among the principle sources of international law, "Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent." As to these he forcibly observes: "Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles."
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> Chancellor Kent says: "In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law."

   Id. at 700–701 (citations omitted).
70. 6 U.S. (2 Cranch) 64 (1804).
71. *Id.* at 118. *See* Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); Sandberg v. McDonald, 248 U.S. 185, 195 (1918) (construing statute narrowly so as to hold valid foreign contracts). *Cf.* RESTATEMENT OF THE LAW: FOREIGN RELATIONS LAW §§ 134, 135 (Rev. Tent. Draft, April 1980). Comment d to § 135 states:

> The fact that an act of Congress does not expressly exclude from its scope matters that would be inconsistent with international law or with a prior international agreement to which the United States is a party is not necessarily expressive of a purpose of Congress to supersede international law or agreement as domestic law.
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> *Id.* at § 135.

Pena-Irala[72] the United States Court of Appeals for the Second Circuit adopted the language set forth in *The Paquete Habana* in examining whether torture violated customary international law.[73] The court concluded that the evolving standards of the international community had elevated torture to a violation of the customary international law.[74] In reaching this conclusion, Judge Irving Kaufman surveyed documents such as the Universal Declaration of Human Rights,[75] other international instruments, and affidavits submitted by prominent international scholars.[76]

Thus in certain instances courts have expressed a willingness to consider international law – and its subset, international human rights law – as part of the law of the United States.[77] It is in this context of prior case law that the district court in Kansas and the United States Court of Appeals for the Tenth Circuit addressed Rodriguez-Fernandez's petition for a writ of habeas corpus.

III. THE DECISIONS OF THE DISTRICT COURT AND THE TENTH CIRCUIT

The *Rodriguez-Fernandez* decisions are important for their significantly different approaches to the use of international human rights norms in the context of the United States Constitution. The district court held that customary international law guaranteed Rodriguez-Fernandez's freedom from continued detention, although there was no relief to be had under the statutes or the Constitution.[78] The Tenth Circuit, though also looking to international human rights norms, sustained Rodriguez-Fernandez's claim by interpreting the applicable statutory provisions as affording him relief.[79]

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72. 630 F.2d 876 (2d Cir. 1980). Filartiga and his daughter sought relief under the Alien Tort Claims Act, 28 U.S.C. § 1350 (1976), for torture of Dr. Filartiga's son. *Filartiga*, 630 F.2d at 878. *See* Blum & Stenhardt, *Federal Jurisdiction over International Human Rights Claims*, 22 HARV. INT'L L.J. 53 (1981); *The Alien Tort Statute: International Law as the Rule of Decision*, 49 FORDHAM L. REV. 874 (1981); 49 U. CIN. L. REV. 880 (1981); 15 GA. L. REV. 504 (1981); 33 STAN. L. REV. 353 (1981).
73. 630 F.2d at 880–81. The court specifically noted that the "general assent of nations" language of *The Paquete Habana* meant that the court must interpret the international standard of the day. *Id.* at 881.
74. 630 F.2d at 884.
75. *Id.* at 882.
76. *Id.* The court concluded its survey by saying: "Having examined the sources from which customary international law is derived – the usage of nations, judicial opinions, and the works of jurists – we conclude that the act of torture is now prohibited by the law of nations." *Id.* at 884.
77. *See* Dickinson, *The Law of Nations as Part of the National Law of the United States* (parts 1 & 2), 101 U. PA. L. REV. 26, 792 (1952).
78. Fernandez v. Wilkinson, 505 F. Supp. 787, 790 (D. Kan. 1980), *aff'd on other grounds sub. nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).
79. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1386 (10th Cir. 1981).

A. The District Court

The United States District Court for the District of Kansas noted that federal courts had consistently held that aliens detained "at the border" pending exclusion hearings or actual deportation were not "physically present" within the United States for the purposes of applying constitutional protections.[80] Thus excluded or excludable aliens such as Rodriguez-Fernandez, no matter how long they were held "at the border," were not afforded constitutional rights afforded citizens and other entrants.[81]

The court acknowledged the longstanding power of the Congress to control the admission of aliens to this country, but held that executive enforcement action is judicially reviewable for abuse of discretion.[82] As the court saw it, the precise issue for decision on the petition for a writ of habeas corpus[83] was whether an excluded alien may be detained in a maximum security prison indefinitely while awaiting deportation by INS or State Department.[84] The court concluded that indeterminate detention of an alien in a maximum security prison pending an unforeseeable deportation constituted arbitrary detention.[85] In reaching this conclusion the court analogized the indefinite detention of excluded aliens to that of deportable aliens who had been in the United States.[86] In such cases, the court noted, "an abuse of discretion has been found to exist in a district director's refusal to release an imprisoned alien awaiting delayed deportation where the alien has not been charged with a crime."[87] The court then declared that the "indeterminate detention . . . of excluded aliens who have not been convicted of a crime in this country or found to be a security risk is arbitrary and

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80. *Fernandez,* 505 F. Supp. at 790.
81. *Id.* Recall that although technically not present within the United States and therefore "standing at the border," Rodriguez-Fernandez was detained at Camp McCoy, Wisconsin, and incarcerated in the federal penitentiary at Leavenworth, Kansas. *See supra* notes 16–18 and accompanying text. *Cf.* Johnson v. Eisentrager, 339 U.S. 763 (1950), which noted:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights . . . .
> . . . .
> [I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary the power to act.

Id. at 770–71.
82. *Fernandez,* 505 F. Supp. at 791.
83. 28 U.S.C. § 2241 (1976).
84. *Fernandez,* 505 F. Supp. at 791.
85. *Id.* at 795.
86. *Id.* at 792.
87. *Id.* at 792–93. The Court cited Lam Tuk Man v. Esperdy, 280 F. Supp. 303 (S.D.N.Y. 1967) (alien awaiting deportation order released on bail pending final disposition), and Kordic v. Esperdy, 279 F. Supp. 880 (S.D.N.Y. 1967) (alien crewman should be released on bail pending outcome of review of status before INS).

every bit as objectionable as indefinite detention of deportable aliens."[88] Yet the court, persuaded by the legal fiction that an excluded alien is not actually present within the borders of the United States for constitutional purposes, held that arbitrary detention is "an evil from which our Constitution and statutory laws afford no protection."[89] The court thus concluded that domestic law simply affords no protection to excludable aliens.[90]

The district court did, however, find other grounds for relief. "[I]nternational law secures to petitioner the right to be free from arbitrary detention . . . ."[91] It determined that there are two grounds on which international law can be binding upon nations: where "(1) the nation concerned has expressly consented to be bound by such rules, as by ratification of a treaty containing the rules, or (2) where it can be established through evidence of a wide practice by states that a customary rule of international law exists."[92] The court noted that no treaty had been violated; therefore, the first ground was not applicable to Rodriguez-Fernandez. The focus thus shifted to customary international law. The court recognized that the determination of what constitutes customary international law is not easy,[93] but that international agreements that are themselves nonbinding domestically and not legally enforceable can serve to determine what is customary international law.[94] The court adopted the view that international human rights standards, while at first only declaratory and nonbinding, may through wide acceptance become binding customary international law.[95] The court surveyed international human rights sources. The American Convention on Human Rights protects against deprivation of physical liberty without cause and against arbitrary detention.[96] Similarly, the Universal Declaration of Human Rights,[97] the International Covenant of Civil and Political

88. *Fernandez,* 505 F. Supp. at 794.
89. *Id.* at 795.
90. *Id.*
91. *Id.*
92. *Id.* For other cases holding that customary international law may be binding upon domestic courts, see *supra* notes 72–73 and accompanying text.
93. *Fernandez,* 505 F. Supp. at 796.
94. *Id.* at 796–97.
95. *Id.* at 796. *See* Bilder, *The Status of International Human Rights Law: An Overview,* in INTERNATIONAL HUMAN RIGHTS LAW & PRACTICE 1, 8 (J. Tuttle ed., rev. ed. 1978).
96. *Id.* at 797. Article 5(3) of the American Convention on Human Rights provides: "Punishment shall not be extended to any person other than the criminal." Article 5(2) says, in part: "All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." Article 7 states: "No one shall be subject to arbitrary arrest or imprisonment." American Convention on Human Rights, *signed* 22 November 1969, *entered into force* 18 July 1978. O.A.S. Treaty Series No. 36, at 1, O.A.S. OEA/Serv.L/V/II.23, doc. 21 rev. 2.
97. G.A. Res. 217A(III), U.N. Doc. A/810, at 71 (1948). It is generally held that the Declaration did not purport to establish a legal obligation, but rather set a standard of achievement for all nations. 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 623 (1965). Article 9 of the Universal Declaration of Human Rights declares: "No one shall be subjected to arbitrary arrest, detention, or exile." *See also,* NEDJATI, HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION 36 (1978). *Cf.* Bilder, *supra* note 95.

Rights,[98] and the European Convention for the Protection of Human Rights and Fundamental Freedoms[99] serve as important sources of fundamental human rights norms, and all abhor arbitrary detention. The court rejected the argument that the United States Constitution so vigorously protects human rights that international human rights agreements are of little concern to the United States.[100] If it can be determined by examining the works of scholars, international customs, practices, conventions, and relevant judicial decisions that a particular wrong "is found to be of mutual, and not merely of several, concern among nations," it may be termed a violation of customary international law.[101] The court concluded that arbitrary detention is prohibited by international law; and even though there is no direct violation of the United States Constitution or statutes, arbitrary detention "is judicially remedial as a violation of international law."[102] It was on this basis that the district court ordered Rodriguez-Fernandez's release.

B. The Tenth Circuit

The United States Court of Appeals for the Tenth Circuit affirmed the release order of the district court, but did so on quite a different ground. Its discussion and analysis stand in stark contrast to the opinion of the district court, particularly in the use of international human rights norms.[103]

The court recognized that prior case law had always held (1) that Congress had almost absolute authority over immigration policy;[104] (2) that the time-honored legal fiction of standing at the border prevented excluded

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98. The International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), *adopted* 16 December 1966, *entered into force* 23 March 1976. 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). Among the provisions is Article 9(1): "No one shall be subjected to arbitrary arrest or detention." The United States has signed but not ratified this convention.
99. The European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, *entered into force* 3 September 1953, 213 U.N.T.S. 221. Article 5 (1)(f) provides:

    > No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;
    > . . . .
    > (f) the lawful arrest or detention of a person to prevent his effecting unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

    The United States is not a party to this convention, which is open only to members of the Council of Europe.
100. *Fernandez*, 505 F. Supp. at 799.
101. *Id.* at 798, 800.
102. *Id.* at 798.
103. Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1390 (10th Cir. 1981). *Contra*, Hassan, *supra* note 5, at 76–78 arguing that Tenth Circuit did not specifically overrule the district court, and therefore implicitly ratified the district court's *ratio decidendi*).
104. For a discussion of the prior case law, see *supra* notes 31–61 and accompanying text.

aliens from invoking the protection of the Constitution;[105] and (3) that detention pending deportation is only a continuation of the process of exclusion rather than punishment in the constitutional sense.[106] In this case, however, the court concluded that detention was no longer part of the process of deportation; rather, it was being used to punish.[107] While the court, without discussion, construed the applicable statutes[108] to require the release of Rodriguez-Fernandez, the court also, by way of dicta, addressed itself to the constitutional principles it deemed applicable.[109]

The court did not question the validity of the exclusion order rendered against Rodriguez-Fernandez[110] based upon his criminal conduct in Cuba.[111] The court noted, however, that had Rodriguez-Fernandez been accused of committing a crime in this country he would have been entitled to the protections of the fifth and fourteenth amendments.[112]

This led the court to the conclusion, albeit dictum, that an excluded alien in physical custody within the United States cannot be punished "without being accorded the substantive and procedural due process guarantees of the Fifth Amendment."[113] No distinction, the court stated, should be drawn between the resident alien and one "standing at the border."[114]

Thus the court challenged the longstanding legal fiction that an alien temporarily detained within the United States pending deportation is not physically present in the United States and is therefore outside the protec-

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105. *See supra* notes 55–56 and accompanying text.
106. *Rodriguez-Fernandez,* 654 F.2d at 1385.
107. *Id.* at 1386.
108. *Id.* 8 U.S.C. § 1227 (1976). For the text of section 1227, see *supra* note 20.
109. The court indicated that if the applicable statutes were construed differently, serious constitutional issues would be involved. 654 F.2d at 1386.
110. *Id.* The Tenth Circuit, as did the district court, made eminently clear that Rodriguez-Fernandez's petition for writ of habeas corpus did not challenge the constitutionality of the exclusion order. *Id.* The court directs the reader to the cases discussed *supra* notes 32–67 and accompanying text. *See also* Comment, *The Alien and the Constitution,* 20 U. CHI. L. REV. 547, 549–50 (1953).
111. He thus came within the ambit of 8 U.S.C. § 1182(a)(9) (1976), which makes excludable any alien who admits having been convicted of a crime of moral turpitude. See *supra* note 13 for the text of the statute.
112. The application of the fourteenth amendment is not confined to the protection of citizens. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The fourteenth amendment "guarantees of protection . . . extend to all persons within the territorial jurisdiction of the United States, without regard to differences of . . . nationality." *Id.* at 369.
113. Quoting from Wong Wing v. United States, 163 U.S. at 238, the Tenth Circuit said:

> Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury nor be deprived of life, liberty, or property without due process of law.

Rodriguez-Fernandez, 654 F.2d at 1386–87.
114. *Rodriguez-Fernandez,* 654 F.2d at 1387.

tion of the Constitution.[115] The court said logic compelled a finding that indeterminate detention of Rodriguez-Fernandez in a federal penitentiary because Cuba refused to take him back amounted to punishment.[116] Because he had been neither convicted of a crime nor charged with one, the doctrine of *Wong Wing*[117] meant that continued detention violated his fifth amendment due process rights.[118]

The court then distinguished *Mezei*[119] in two key respects. The government contended that *Mezei* supported its view that no due process rights protected Rodriguez-Fernandez's indefinite detention. The court responded that *Mezei* dealt with due process rights to a hearing prior to reentry rather than initial entry.[120] In addition, the court found it significant that Mezei was excluded as a security risk during the Korean War, as aliens have always been treated differently in wartime.[121] Further, the condition of Mezei's confinement was, according to the court, not comparable to that afforded Rodriguez-Fernandez, particularly in light of the numerous efforts that had actually been made to deport Mezei; and Mezei continued to seek admission to the United States, whereas Rodriguez-Fernandez was no longer arguing for admission.[122]

The Tenth Circuit resorted to principles of international law when it addressed the due process claims of Rodriguez-Fernandez.[123] "It seems proper then to consider international law principles for notions of fairness as to the propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment."[124]

The court concluded that while the statute does not set forth specific time limits for detention, once there has been a reasonable time for negotiation of an excluded alien's return to the country of origin, the alien may seek

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115. *Id.*
116. *Id. Accord,* United States v. Henry, 604 F.2d 908 (5th Cir. 1979); *see supra* notes 64–65 and accompanying text.
117. *See supra* notes 39–44 and accompanying text.
118. *Accord,* Petition of Brooks, 5 F.2d 238, 239 (D. Mass. 1925), which declared:

> The right to arrest and hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as punishment for a crime. . . . It is elementary that deportation or exclusion proceedings are not punishment for a crime. . . . He is entitled to be deported, or to have his freedom. He has already been imprisoned, for no crime, about nine weeks for which he is apparently without remedy.

Id.
119. *See supra* notes 57–61 and accompanying text.
120. *Rodriguez-Fernandez,* 654 F.2d at 1388.
121. *Id.*
122. *Id.*
123. *Id.* The court noted that the Supreme Court had similarly sought support in principles of international law. *See* Fong Yue Ting v. United States, 149 U.S. 698 (1893); *supra* notes 34–35 and accompanying text.
124. *Rodriguez-Fernandez,* 654 F.2d at 1388.

and be entitled to release.[125] "This construction is consistent with accepted international law principles that individuals are to be free of arbitrary imprisonment, . . . with the statutory treatment of deportable resident aliens and with the constitutional principles" of due process.[126]

IV. THE IMPACT OF RODRIGUEZ-FERNANDEZ

The sharp contrast between the analysis by the district court and the Tenth Circuit of the same facts presents a unique opportunity to examine ways in which international human rights norms can be used in the federal courts. In affirming the decision of the district court, the Tenth Circuit did not focus, as the district court did,[127] on the binding effect of international law. Instead, it based its decision on the relevant statutory provisions that the district court had held did not protect Rodriguez-Fernandez. After resting its decision on statutory grounds rather than constitutional or international law, the court of appeals proceeded with the analysis of the relevant constitutional and international human rights principles involved. In examining how the due process clause of the fifth amendment might apply to the alien Rodriguez-Fernandez, the Tenth Circuit looked to existing international human rights norms to assist it in defining due process. That is, the court of appeals used international human rights norms in a definitional manner. The net result of the two approaches is the same in *this* case, but the impact is much different.

At first blush it may appear that the Tenth Circuit retreated from a bold assertion by the district court of the *binding* effect of international norms on the United States courts. It might be concluded that international human rights norms will have less impact on federal courts under the Tenth Circuit's analysis than they would under the district court's approach. That approach appears to open the door to the use of international human rights law as a basis for rules of decision. In contrast, the Tenth Circuit's decision would seem disappointing to human rights advocates because it rejects the strong position adopted by the lower court. Yet the definitional approach of the Tenth Circuit is a strong, practicable method for incorporating international human rights principles via interpretation of constitutional language, and may, in the long run, be far preferable to an approach which seeks the direct incorporation of international human rights norms into domestic law.[128]

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125. *Id.* at 1389–90.
126. *Id.* at 1390. Judge McWilliams dissented. While agreeing with the majority that the controversy should be decided under domestic law as opposed to international law, he concluded that domestic law required reversal of the district court. *Id.* at 1390. The dissent would find no abuse of discretion by the attorney general's decision not to release Rodriguez-Fernandez, particularly in light of his prior criminal record. *Id.* at 1391.
127. *See supra* notes 91–102 and accompanying text.
128. *Contra,* Hassan, *supra* note 5.

The use of international law as definitional rather than as controlling minimizes the problem of state sovereignty, a problem that would have severely restricted the impact of *Rodriguez-Fernandez* had the Tenth Circuit adopted the district court's approach. State sovereignty often leads to a preference for United States law and a refusal to apply international law.

American courts will be reluctant to base a decision on customary international human rights law when the Constitution or statutes will suffice. For instance, had the district court interpreted constitutional or statutory provisions to allow Rodriguez-Fernandez the relief he sought, it is unlikely that the court would have found it necessary to inquire into international human rights norms. A fundamental reason for the courts' reluctance to consider international human rights norms as customary international law stems from a preference in American jurisprudence for the law of the forum even where the laws of other states might also apply.[129]

In choice-of-law cases, it is not unusual to expect courts to favor the forum law, particularly when the forum has significant interests in the case.[130] If the district court in *Rodriguez-Fernandez* had weighed the interests of the government in detaining Rodriguez-Fernandez against the interests of the international community in upholding the standard against arbitrary detention in this particular situation, it may have concluded that the purpose behind the federal statute permitting detention pending deportation was more significant than any purported interest of the international community in seeing Rodriguez-Fernandez deported or released on parole. This would have led to the application of American law.

The concept of state sovereignty also stands as a barrier to the use of internationally developed human rights norms. States are particularly sensitive to possible encroachments by outside authorities in their internal affairs.[131] This problem is not new, and has been recognized in the drafting

129. This article does not discuss the so-called "last-in-time" doctrine. Under that judicially created doctrine, in the case of a conflict between a treaty and a federal statute, the one enacted later prevails, if a conflict cannot be avoided through judicial construction. The question of whether the rule applies in the situation where customary international law and treaties and federal statutes are in conflict is not resolved by the district court. This poses yet another problem in adopting the method used by the district court; adopting the approach of the Tenth Circuit would, however, avoid such an issue. For further discussion, see Murphy, *Customary International Law in U.S. Jurisprudence*, INT'L PRACTITIONER'S NOTEBOOK, 17 (October 1982).

130. *See* Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958); Currie, *Notes on Methods and Objectives in the Conflicts of Law*, 1959 DUKE L.J. 171 (1959). Currie does not suggest ruthless pursuit of self-interest by states; but where there is a true conflict, the forum court is likely, and properly so under Currie's theory, to favor forum law. In contrast, while the district court read international law into the law of the United States, in effect avoiding an actual conflict between the laws of two jurisdictions, it was in reality addressing a conflict between international law and municipal law – the former offering a remedy to Rodriguez-Fernandez; the latter, under the district court's view, barring one.

131. The state sovereignty issue has been a major problem in many attempts to draft international documents. For instance, when President Jimmy Carter presented his Human Rights Treaty Message to the United States Senate, he wrote:

of international lawmaking instruments. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights express a high degree of deference for state sovereignty and domestic jurisdiction.[132] This supports the conclusion that few domestic tribunals can be expected to adopt, as binding, laws developed outside domestic lawmaking processes.

It seems more reasonable that international human rights norms be utilized to *define* evolving constitutional standards in the manner adopted by the Tenth Circuit. This approach permits federal judges to work in a context with which they are familiar – the United States Constitution. Although the Tenth Circuit relied on the applicable statutes to afford Rodriguez-Fernandez a remedy, its rationale focused on construing the Constitution in a manner consistent with international law principles. Thus the court adopted a method by which it could use international human rights norms without making those the rule of decision. The court did not have to make the difficult evaluation of whether the norms are of such wide acceptance as to be held as binding on the court.[133] Perhaps more importantly, the sovereignty and forum preference issues are not triggered. When defining due process, customary international law norms are another acceptable point of reference for any court. National sovereignty is respected, while statutory and constitutional provisions are construed to achieve a fair and defensible resolution of the controversy. The court is not forced to address the state sovereignty issue.

The treaties contain a small number of provisions which are or appear to be in conflict with United States law. . . . Reservations to these and other provisions . . . *along with a number of statements of understanding,* are designed *to harmonize the treaties with existing provisions of domestic law.* In addition, *declarations that the treaties are not self-executing are recommended.* With such declarations, the substantive provisions of the treaties would not of themselves become effective as domestic law.

14 WEEKLY COMP. PRES. DOC. 395 (23 February 1978); *reprinted in* Four Treaties on Human Rights: Message from the President of the United States, 95th Cong., 2d sess. at III (1978) (emphasis added). *See generally* Weissbrodt, *United States Ratification of the Human Rights Covenants,* 63 MINN. L. REV. 35 (1978). President Carter's statement reflects the consensus on domestic sovereignty which pervades our governmental system. For an interesting historical discussion of state sovereignty concerns in the development of human rights principles included in the United Nations Charter, see Lauren, *First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter,* 5 HUM. RTS. Q. 1, 18–22 (1983).

132. Del Russo, *International Law of Human Rights; A Pragmatic Proposal,* 9 WM. & MARY L. REV. 749 (1968). Del Russo contends: "The effort to reach a compromise [in passing the Covenants] has whittled away the effectiveness of the original proposal to a point of illusory consistency. The issue of Human Rights has remained a purely political question to be settled by the sovereign states only . . . ." *Id.* at 751.

The Preamble of the International Covenant on Economic, Social and Cultural Rights, *adopted* 19 December 1966, *entered into force* 3 January 1976, G.A. Res. 2200(XXI), 2 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), gives great deference to state sovereignty: "Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."

133. *See* Hassan, *supra* note 5, at 75–78.

In contrast, the district court in *Rodriguez-Fernandez* was obligated to conclude that the norm of freedom from arbitrary detention was so widely accepted that it was binding on the United States government and in turn on the district court.[134] If the district court had reached the conclusion that detention was not sufficiently abhorrent to the international community, then Rodriguez-Fernandez would have been without a remedy. The district court's failure to see any applicability of the Constitution would have meant a diametrically opposite conclusion.

The Tenth Circuit, however, was able to find a constitutional basis for asserting that Rodriguez-Fernandez's constitutional rights were violated, even though prior case law seemed not to support its view. The court's task was facilitated because it was willing to look to international human rights norms for guidance.[135] The notion that an alien "standing at the border" awaiting deportation is not present in the United States and thus not covered by normal guarantees of due process was inconsistent with both international human rights norms and the Tenth Circuit's sense of justice. But by using international human rights norms, the court was able to extend the definition of due process to cover such aliens. The definitional approach enabled the court artfully to fill in a gap in constitutional law.

The Tenth Circuit's decision extends at least some constitutional protections to excluded aliens awaiting deportation. However, its most lasting impact may be the method it employed in extending those protections. The importance of this method cannot be overestimated; it provides a strong basis for further extension of constitutional protections by reference to international human rights norms.

V. CONCLUSION

The two *Rodriguez-Fernandez* opinions serve to illustrate distinct methods by which federal courts can rely on international human rights norms to protect persons who may otherwise be unprotected.

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134. This conclusion may not be as easily arrived at as the district court opinion in *Rodriguez-Fernandez* seems to suggest.

> Only those rights supported by actual patterns of generally shared expectations, evidenced perhaps by several international human rights instruments should be judicially enforceable. . . . Three decades of affirmation and reaffirmation, however, have made its [Universal Declaration of Human Rights] terms binding on all nation-states as part of customary international law and as authoritative guide for interpretation of the human rights provisions of the United Nations Charter.

Paust, Book Review, 56 N.Y.U. L. REV. 227, 234–35 (1981) (reviewing M. MCDOUGAL, H. LASSWELL, & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980)). McDougal, Lasswell, and Chen contend that this increasing set of fundamental human rights is emerging into an "international bill of rights." Paust, *supra* this note, at 234.

135. *See* Perry, *Noninterpretative Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 279 (1981).

The district court's conclusion that customary international law is binding on a federal court is not without precedent, but such a holding is infrequent. Federal courts attempting to define constitutional principles have traditionally relied on prior case law, the intent of the Framers, practices in the states, and opinions of constitutional theorists. References to international human rights norms, it is fair to say, are relatively rare. This paucity seems attributable in part to courts' reluctance to conclude that international law should control a domestic court decision. While the district court so concluded in this case, the instances where courts will adopt such an international law principle as a rule of decision seem limited, particularly when the court is also presented with statutory and constitutional claims. Thus the district court's approach is unlikely to be followed.

In contrast, the Tenth Circuit's decision in *Rodriguez-Fernandez* stands as an important development in the field of human rights law. The court introduced a method by which international human rights norms can be incorporated into the jurisprudential development of federal constitutional standards.[136] The approach is free from the concerns of sovereignty and the difficulties of determining whether international norms are so widely accepted as to be deemed binding on the court. At the same time it contributes to the evolving content of federal constitutional precepts. Federal courts should seize upon this approach and follow it in all appropriate cases. Such a course of action can only serve to further the ends of justice embodied in international human rights norms.

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136. Recognizing the potential for application of international human rights norms in the federal system, the Aspen Institute for Humanistic Studies is currently conducting a series of seminars for federal judges on human rights law. The first seminar was held in March 1982 for judges in the First, Second, Third, Fourth, and District of Columbia Circuits. The second was held in October 1982 for judges in the Sixth, Seventh, and Eighth Circuits. Among the seminars were topics such as "The Political/Historical/Legislative Background of International Human Rights" and "International Human Rights in United States Law." Letter from Alice H. Henkin, Coordinator, Justice and Society Activities, Aspen Institute for Humanistic Studies, to Richard H. Rosswurm, Special Projects Editor, HUMAN RIGHTS QUARTERLY, 17 August 1982.