THE DEVIL MADE ME DO IT: THE PLENARY POWER DOCTRINE AND THE MYTH OF THE CHINESE EXCLUSION CASE

Deborah A Leak
Earl Maltz

Available at: https://works.bepress.com/deborah_leak/1/
THE DEVIL MADE ME DO IT:
THE PLENARY POWER DOCTRINE AND THE MYTH OF THE CHINESE
EXCLUSION CASE

by Earl M. Maltz
Distinguished Professor of Law
Rutgers (Camden)
ABSTRACT

For many commentators, *Chae Chan Ping v. United States*—commonly known as the *Chinese Exclusion Case*—occupies a prominent place in the rogues gallery of infamous Supreme Court decisions. In large measure, the reaction the decision is simply a byproduct of the outcome of the case; in both *Chae Chan Ping* and its first cousin, *Fong Yue Ting v. United States*, the Court upheld measures that explicitly singled out Chinese immigrants for unfavorable treatment on the basis of their national origin. But *Chae Chan Ping* and *Fong Yue Ting* are also reviled for another reason; together with the contemporaneous decision in *Nishimura Ekiu v. United States*, they are generally seen as the source of the hated “plenary power” doctrine—the view that, for constitutional purposes, congressional decisions on immigration and naturalization issues are qualitatively different from other federal legislation, and thus should generally not be subjected to judicial scrutiny. This Supreme Court has also cited these decisions as the source of the plenary power doctrine.

This article will contend that the standard interpretation of *Chae Chan Ping*, *Fong Yue Ting* and *Nishimura Ekiu* is simply wrong. It will argue that, far from being based on the plenary power doctrine, the decisions in those cases were based upon constitutional principles that the Court viewed as equally applicable to immigration and nonimmigration cases.
Despite the best efforts of academic commentators, the plenary power doctrine—the idea that decisions related to immigration law should be immune from normal constitutional constraints—remains entrenched in the Supreme Court’s immigration law jurisprudence.\(^1\) The modern Court has not made any sustained effort to provide a principled defense of the plenary power doctrine. Instead the justices have defended their continued adherence to the doctrine primarily in terms of fidelity to precedent. Thus, in *Kleindeinst v. Mandel*,\(^2\) the Court conceded that "were we writing on a clean slate," "much could be said for the view" that the Constitution imposes significant substantive restraints on federal legislative authority over immigration. Nonetheless, citing a group of late nineteenth century cases, the Court also observed that

> But the slate is not clean. As to the extent of the power of Congress under review, there is not merely 'a page of history' . . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. . . . But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government.\(^3\)

---


\(^2\) 408 U.S. 572 (1972).

Despite their distaste for the plenary power doctrine itself, commentators have almost uniformly agreed with the Court’s description of the source of the doctrine. In particular, scholars—like the Court itself—have contended that the doctrine finds its origins in what might be described as an unholy trinity of cases decided between 1889 and 1893—Chae Chan Ping v. United States,4 Nishimura Ekiu v. United States,5 and Fong Yue Ting v. United States.6 They assert that these decisions were based on the principle that congressional regulation of immigration-related issues was entirely immune from ordinary constitutional constraints,7 and that the Court retreated from its earlier decisions in Yamataya v. Fisher,8 which held that the structure of deportation proceedings must be consistent with the requirements of procedural due process imposed by the Fifth Amendment.9

This article will argue that the standard accounts fundamentally mischaracterize the decisions in Chae Chan Ping, Nishimura Ekiu and Fong Yue Ting. The article will begin by recounting the historical background of the dispute over Chinese immigration that led to the passage of the statutes that were at issue in those cases. It will then analysis each of the decisions in detail, focusing not only on the opinions themselves, but also on the arguments put forward by the lawyers in each case. Based on this analysis, the article will conclude that, rather

---

4 130 U.S. 581 (1889).
5 142 U.S. 651 (1892).
6 149 U.S. 698 (1893).
8 189 U.S. 86 (1903).
9 E.g., Legomsky, supra n. , at 198-99; Motomura, supra n. , at 554.
than embracing the plenary power doctrine, the decisions proceeded from the premise that the federal power over immigration was in fact subject to constitutional constraints, and thus *Yamataya* did nothing more than follow the principles established in the earlier cases.

**HISTORICAL BACKGROUND**

The evolution of the legal issues that were raised in *Chae Chan Ping* and *Fong Yue Ting* began with the signing of the Burlingame Treaty between China and the United States in 1868. By the terms of that treaty, the two nations recognized “the inherent and inalienable right of a man to change his home and allegiance, and also the mutual advantage of free migration and migration of their citizens and subjects...for purposes of curiosity, of trade, or as permanent residents.” In addition, the treaty guaranteed to travelers from one of the countries to the other “the same privileges, immunities and exemptions in respect to travel or residence, as may be enjoyed by the citizens or subjects of the most favored nation.”

These provisions of the treaty were very unpopular in California and other western states, which had witnessed an influx of Chinese immigrants beginning with the gold rush that had begun in 1849. These immigrants had never been popular with much of the white population, and the hostility toward the Chinese intensified during an economic depression in California in the mid-1870s. Against this background, in 1880 the United States and China modified the original treaty to allow the United States to restrict Chinese immigration. But at the same time, the new treaty explicitly protected the rights of those who were in the United States prior to November 17, 1880, including their right to return after leaving the United States.

---

The federal government moved quickly to take advantage of the modification of the treaty. In 1882, Congress passed the first Chinese Exclusion Act, which suspended immigration of Chinese laborers for ten years. In addition, the statute required those already in the United States who wished to depart and return to obtain certificates of re-entry, and to present the certificate when returning from trips abroad. Two years later, Congress passed a second statute designed to strengthen and clarify the provisions of the 1882 act.

Although the 1882 and 1884 statutes slowed the influx of Chinese immigrants to a trickle, the anti-Chinese forces remained dissatisfied. Thus, in 1888, Congress passed the Scott Act, this time denying re-entry to all Chinese laborers who had left the country and not returned prior to the effective date of the act. The 1888 statute also explicitly prohibited the issuance of any new re-entry certificates and voided the re-entry certificates that had already been issued. In 1889, this provision came before the Court in *Chae Chan Ping*.

**CHAE CHAN PING AND NISHIMURA EKIU**

The facts of *Chae Chan Ping* illustrated the draconian impact of the Scott Act.\(^\text{11}\) The case arose from the situation of a Chinese laborer who had come to the United States in 1875 and returned for a visit to China on June 2, 1887 after obtaining a re-entry certificate as required by the 1882 and 1884 statutes. He boarded a ship to return to the United States on September 7, 1888—before the Scott Act had even been introduced in Congress. However, by the time that Chae Chan Ping arrived in San Francisco in early October, the passage of the statute had voided his re-entry certificate and he was denied entry into the country. He petitioned for a writ of habeas corpus, challenging the legality of the refusal of immigration officials to allow him to

\(^{11}\) Cite.
leave the ship and enter the country. The case was appealed to the Supreme Court after the United States Circuit Court for the Ninth Circuit had ruled against Chae Chan Ping.12

Against the background of *Yick Wo*, in theory the attorneys in *Chae Chan Ping* might have argued that the Chinese Exclusion Acts were unconstitutional because they discriminated on the basis of race or national origin. However, any such argument would have seen far-fetched in the late nineteenth century. Beginning in 1790 and continuing through the mid-twentieth century, racial classifications were a staple of the federal naturalization statutes. A holding that racial classifications were unacceptable in immigration statutes would also have implicitly threatened the continued viability of these naturalization provisions as well. Thus, arguments based on race would have had virtually no chance to succeed in *Chae Chan Ping*, and the idea of making such arguments may well not even occurred to George Hoadley, James C. Carter, Harvey S. Brown and Thomas D. Riordan, the attorneys who represented Chae Chan Ping.

Hoadly and Carter were also foreclosed from arguing that, in general, federal statutes that abrogated treaty obligations could not be enforced by the courts. This contention had been considered and rejected in a number of decisions prior to the consideration of *Chae Chan Ping*. Thus, for example, in 1888, in *Whitney v. Robertson*, the justices declared that “when a law is clear in its application, its validity cannot be assailed in the courts for want of conformity to stipulations of a current treaty not already executed. Considerations of that character belong to another department of government. The duty of the courts is to construe and give effect to the latest expression of the sovereign will.”13

---

12 The lower court proceedings in *Chae Chan Ping* are described in Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting*, in David A. Martin and Peter H. Schuck, eds., *Immigration Stories* 7-30 (2005), at 11-13

Faced with these difficulties, Chae Chan Ping’s attorneys took a different tack. They based their arguments primarily on the theory that, having obtained the certificate of re-entry by the 1882 and 1884 statutes, Chan Chae Ping had a vested right to re-enter the country, and that by mandating that the certificate not be honored, Congress had not simply denied him re-entry, but had in effect banished him from his home in the United States. Moreover, they asserted that the 1888 statute was an unconstitutional ex post facto law.

But Hoadley and Carter in particular were not content to rest their attack on the 1888 statute solely on the ground that it violated Chan Chae Ping’s constitutional rights. They bolstered their attack on the statute by invoking the doctrine of enumerated powers. Continuing to insist that the statute should be characterized as one of banishment, they contended that nothing in the Constitution vested Congress with the authority to adopt such a statute.

On this point, their argument began by restating the basic principle that “the Constitution is a grant of enumerated powers only [and] [t]he reservation of the remaining or non-delegated powers to the States and the people was...fully established by the necessary implications of the Constitution.” Their brief then featured a detailed recapitulation of the discussions of the constitutionality of the Alien Act of 1798, which had vested the President with the authority to expel “all...aliens as he shall judge dangerous to the peace and safety of the United States, or shall reasonable grounds to suspect are concerned [sic] in any treasonable or secret machinations against [the United States].” After quoting extensively from the constitutional arguments

14 Brief for Appellant, Chae Chan Ping v. United States, 130 U.S. 581 (1889), at 17-67 (Hoadly and Carter); [hereinafter, Hoadly and Carter Brief]; Brief for Appellant, Chae Chan Ping v. United States, 130 U.S. 581 (1889), at 2-11 (Brown and Riordan) [hereinafter, Brown and Riordan Brief].


16 Hoadly and Carter Brief, supra n. , at 39.
deployed by both the supporters and opponents of the Alien Act and noting that the statute had been passed against the background of a fear that war with France was imminent, Hoadley and Carter asserted the supporters of the statute had relied primarily on the war power, and that because there was no fear of a war with China, authority to pass the 1888 statute could not be derived from this provision.\(^{17}\) Hoadley and Carter also considered and rejected the possibility that the Commerce Clause could be used as the source for congressional power to adopt the statute,\(^{18}\) and concluded their treatment of the enumerated powers issue by observing that “it is manifest that the expulsion of Chinese laborers cannot be the subject of police power, for they are reserved by the States, not confided to the Federal Government.”\(^{19}\)

Briefs in support of the constitutionality of the 1888 statute were filed by California Attorney General George A. Johnson and United States Solicitor General George A. Jenks. While Johnson did quote a lower court decision which had concluded that “the immigration of foreigners to the United States and the conditions upon which they shall be permitted to remain are appropriate subjects of legislation,”\(^{20}\) his brief focused largely on refuting the claims that Chae Chan Ping had been deprived of a vested right by the statute, and that the refusal to allow him to reenter violated either the Due Process Clause of the Fifth Amendment or the prohibition on ex post facto laws. Thus, for example, emphasizing that “[t]his is not a case of a chinaman

\(^{17}\) *Id.* at 59-61.

\(^{18}\) *Id.* at 67.

\(^{19}\) *Id.* at 68.

born on American soil. It is the case of an alien who has voluntarily left the country,”\textsuperscript{21} Johnson asserted that “these so-called rights [claimed by Chae Chan Ping] are not contracts...but are mere privileges, matters of favor, incentives of hope and expectation, and are not of a nature to be enforced in a court of justice.”\textsuperscript{22} Similarly, Jenks averred that “[Chae Chan Ping’s] residence in the United States was only by indulgence of the Government. It was by permission only. The withdrawal of that permission violated no personal right.”\textsuperscript{23}

In addition, Jenks responded in some detail to the challenge based on the doctrine of enumerated powers. Noting that international law in general recognized the right of each nation to exclude foreigners from its borders,\textsuperscript{24} he argued that the Slave Trade Clause, which had barred Congress from prohibiting “[t]he migration or importation of persons” until the year 1808 implicitly recognized the power of Congress to restrict such migration after the ban had expired. Further, Jenks contended that explicit grants of power such as the Commerce Clause, the Naturalization Clause and the war power demonstrated that “[t]he whole tenor of the Constitution is that...as to foreign nations and their subjects, [the federal government] is endowed with full sovereign powers.”\textsuperscript{25}

These arguments provided the backdrop for the Court’s decision rejecting the constitutional challenge to the 1888 statute in \textit{Chae Chan Ping}. Speaking for a unanimous Court, Justice Stephen J. Field began by recounting the events that culminated in the passage of

\begin{flushright}
\textsuperscript{21} \textit{Id.} at 7.
\textsuperscript{22} \textit{Id.} at 2.
\textsuperscript{23} Brief for the United States, Chae Chan Ping v. United States, 130 U.S. 581 (1889), at 11.
\textsuperscript{24} \textit{Id.} at 6-7.
\textsuperscript{25} \textit{Id.} at 5.
\end{flushright}
Among other things, he observed that the passage of the Scott Act had been motivated “by a well-founded apprehension—from the experience of years—that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there,” and that “[a]s [Chinese immigrants] grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration, and in the crowded millions of China, where population presses upon the means of subsistence, great danger that at no distant day that portion of our country would be overrun by them.” These observations formed the background for the legal analysis that followed.

Field apparently viewed the objections based on the Due Process and Ex Post Facto Clauses as insubstantial. He referred only obliquely to those claims, implicitly rejecting the assertion that Chae Chan Ping had a vested right to return and “[b]etween property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hopes.”

Field focused more directly on the other potential objections to the statute. While conceding that, by their terms, the limitations on re-entry imposed by the statute were inconsistent with the treaty obligations of the federal government, he noted that the Court had

---

26 *Chae Chan Ping*, 130 U.S. at 590-99.

27 *Id.* at 594.

28 *Id.* at 595.

29 *Id.* at 610.
already held that such statutes were nonetheless binding on the judicial branch and reaffirmed the vitality of the caselaw which had established that principle.\textsuperscript{30}

Field then turned to the federal power issue. Having determined that there was “nothing in the treaties between China and the United States to impair the validity of the act of Congress of October 1, 1888,” Field asked “was it on any other ground beyond the competency of Congress to pass it.”\textsuperscript{31} He asserted that, “[i]f so, it must be because it was not within the power of Congress to prohibit Chinese laborers who had at the time departed from the United States, or should subsequently depart, from returning to the United States.”\textsuperscript{32}

Field’s treatment of this issue is the most widely-discussed and criticized portion of the opinion. In concluding that Congress possessed ample authority to limit the entrance of aliens into the United States, Field eschewed the reliance on an inference from the Slave Trade Clause. Instead, he focused on more general principles of sovereignty, asserting that

- that the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence.
- If it could not exclude aliens, it would be to that extent subject to the control of another power.\textsuperscript{33}

and that

\textsuperscript{30} Id. at 600-03.
\textsuperscript{31} Id. at 603.
\textsuperscript{32} Id.
\textsuperscript{33} Id. at 603-04
To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth, and its determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers...[The decision of Congress] is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which in its judgment its interests or dignity may demand, and there lies its only remedy.  

Commentators have often suggested that, by describing the power to control immigration as a basic incident of sovereignty, Field at least implied that immigration statutes would generally be immune from judicial review. This view ignores the context in which the appeal to the concept of sovereignty was made. None of the briefs in *Chan Chae Ping* suggested that

---

34 *Id.* at 606.

the Court should give special deference to immigration statutes. Instead, Field was responding to the contention that Congress had no authority to exclude persons in Chan Chae Ping’s position because the Constitution does not mention immigration among the enumerated powers granted to Congress in Article I, section 8. Field was analogizing control of immigration to other “sovereign powers” which were explicitly mentioned in the Constitution—powers that “can be invoked for the maintenance of the [United States’] absolute independence and security throughout its entire territory,” in contradistinction to “the great mass of local matters which are controlled by local authorities,” under the Constitution.36 At the same time, Field recognized that the exercise of such powers could be “restricted in their exercise....by the constitution itself.”37 Indeed, the language of the Chae Chan Ping opinion is strikingly similar to the terms in which Chief Justice John Marshall described the commerce power in Gibbons v. Ogden

This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress,

36 Chae Chan Ping, 130 U.S. at 604.

37 Id. (emphasis added).
their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse.\footnote{22 U.S. (9 Wheat.) 1, 196-97 (1824).}

Moreover, in 1909 the Court explicitly analogized the congressional authority to exclude aliens to the power to regulate foreign commerce, noting that

Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that, from the beginning, Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly, by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion.

* * * *

As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country, and the terms upon which a right to import may be exercised.\footnote{Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 334-35 (1909), quoting Buttfield v. Stranahan, 192 U.S. 470, 492-93 (1904).}

\footnote{22 U.S. (9 Wheat.) 1, 196-97 (1824).}
Despite these sweeping descriptions of the scope of the commerce power, no one would suggest that congressional enactments designed to regulate interstate commerce were free from the limitations imposed by the Bill of Rights and other constitutional provisions that applied to federal action more generally. Field’s account of congressional authority over immigration should be understood in similar terms. He was not addressing the question of whether Congress was immune from constitutional constraints in dealing with immigration issues; rather, he was simply arguing that, despite the lack of specific language granting the federal government authority to adopt measures that limited immigration, the passage of such regulations was generally within the power of Congress.\footnote{Legomsky, \textit{supra} n. at 193, takes a similar view.}

Against this background, \textit{Chae Chan Ping} is best understood to stand only for the relatively uncontroversial proposition that, whatever the source of its authority, Congress has the power to control the entry of aliens into the United States, and that that power is constrained only by limitations imposed by the Constitution itself. Other than Field’s implicit rejection of the specific claim made on behalf of Chae Chan Ping himself, the case quite literally has nothing to say about what the nature and scope of those limitations might be. Instead, the Court began to grapple with this issue three years later with its decision in \textit{Nishimura Ekiu v. United States}.\footnote{142 U.S. 561 (1892).}

\textit{Nishimura Ekiu} was not a challenge to actions taken under the Chinese Exclusion Acts themselves; instead, the case arose under the Immigration Act of 1891, which provided for the exclusion of any alien who was “likely to become a public charge.” A woman who was excluded under this statute challenged the constitutionality of a provision that made the decision of an inspector of immigration on her status final, subject only to an appeal to the Commissioner
of Immigration or the Secretary of the Treasury, arguing that this procedure did not satisfy the requirements of the Due Process Clause of the Fifth Amendment. Speaking for a near-unanimous Court, Justice Horace Gray rejected this constitutional challenge, proclaiming that “[a]s to [aliens seeking entry], the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.”\textsuperscript{42} Based on this language, commentators such as Stephen H. Legomsky and Hiroshi Motomura have asserted that \textit{Nishimura Ekiu} reinforced the unique status of congressional decisions dealing with immigration under the Constitution.\textsuperscript{43} But in fact, as Lucy E. Salyer has observed, the opinion in the case is best understood as simply applying then-current notions of due process generally to the immigration context.\textsuperscript{44}

This point emerges clearly from the government’s brief. In theory, the government might have simply relied on \textit{In re Ross} and argued that, prior to being lawfully admitted, the petitioner had no enforceable constitutional rights at all. The brief did assert that “[t]he Constitution has no application to the appellant any more than it has to any other foreigner.”\textsuperscript{45} However, it devoted much more time to the claim that the hearing that was provided was entirely consistent with the basic thrust of the Supreme Court’s due process jurisprudence, relying on cases dealing

\footnotesize
\textsuperscript{42} Id. at 660

\textsuperscript{43} \textit{Stephen H. Legomsky, Immigration and the Judiciary: Law and Politics in Britain and America} 194 (1987); Motomura, \textit{supra} n. , at 552.

\textsuperscript{44} Salyer, \textit{supra} n. , at 28-31.

\textsuperscript{45} Brief for Appellees, Nishimura Ekiu v. United States, 142 U.S. 651 (1892), at 13.
with a wide variety of issues, including government collections, the disbarment of attorneys, taxation, and the requirement that doctors obtain a certificate in order to practice medicine.\textsuperscript{46}

This argument was also the basis for the reasoning of the Court itself. Justice Gray did not rely on decisions related to immigration issues to support his argument. Instead, he cited a taxation case and a case involving the collection of customs duties as authority for his conclusion.\textsuperscript{47} The import of these citations is clear: rather than being judged by a special set of constitutional rules, immigration cases were to be judged under the same standards that applied to constitutional problems more generally.

A rarely-discussed portion of the \textit{Nishimura Ekiu} opinion provides further evidence that the Court did not view the congressional power to control immigration as free from constitutional constraints. In addition to her other arguments, the petitioner argued that John L. Hatch, the immigration inspector who made the decision to exclude her, lacked the legal authority to make the decision because he had been appointed by the Secretary of the Treasury, while the statute required inspectors to be appointed by the Superintendent of Immigration. In response to this argument, Justice Gray cited Article II, section two of the Constitution—the Appointments Clause—and declared that

\begin{quote}
the Constitution does not allow Congress to vest the appointment of inferior officers elsewhere than "in the President alone, in the courts of law, or in the heads of departments." The act of 1891 manifestly contemplates and intends that the inspectors of immigration shall be appointed by the Secretary of the Treasury, and appointments of such officers by the Superintendent of Immigration could be
\end{quote}

\textsuperscript{46} \textit{Id.} at 14.

upheld only by presuming them to be made with the concurrence or approval of the Secretary of the Treasury, his official head.\footnote{Id. at 663.}

Once again, the structure of the Court’s analysis belies any claim that the viewed the power over immigration as unconstrained by constitutional limitations. Instead, by asserting that the immigration inspectors could legitimately exercise power only if their appointments were “made with the concurrence or approval of the Secretary of the Treasury,” the opinion necessarily rested on the assumption that the scope of congressional authority was limited by the terms of the Appointments Clause and, by implication, the other provisions of the Constitution as well.

In short, properly read, neither \textit{Chae Chan Ping} nor \textit{Nishimura Ekiu} provides support for the modern plenary power doctrine. Instead, both cases involved the orthodox application of then-standard principles of constitutional analysis to the problems raised by immigration law. The justices relied on similar principles in \textit{Fong Yue Ting v. United States}.

\textit{Fong Yue Ting} was a challenge to the constitutionality of the Geary Act,\footnote{Cite.} which added significantly to the legal burdens borne by Chinese laborers in America. Spurred by the 1890 report of a Senate committee documenting difficulties in enforcing the provisions of the Chinese Exclusion Acts, the Congress passed the Geary Act in 1892.\footnote{The background of the Geary Act is described in detail in Salyer, \textit{supra} n. , at 43-46.} In addition to extending the strictures imposed by the original Chinese Exclusion Act for an additional ten years, the Geary Act required Chinese laborers to obtain certificates of residence from the local federal collector of internal revenue within one year after the passage of the statute. Any such laborer who was
found without the requisite certificate was subject to arrest by local federal officials and deportation by a federal judge unless the laborer could show that his failure to procure the certificate was due to “accident, sickness, or other unavoidable cause,” and also through the testimony of a “credible white witness” that he had in fact been a legal resident of the United States at the time that the Geary Act was passed. In addition, the statute required any person of Chinese descent found to be illegally in the country to be imprisoned for one year at hard labor.

The Chinese community was outraged at being singled out for the requirement that its members obtain the certificate of residence. Community leaders organized a boycott of the certificate requirement and also retained three eminent attorneys to challenge the constitutionality of the Geary Act in court—Joseph H. Choate, J. Hubley Ashton and Maxwell Evarts, the son of the Secretary of State who had negotiated the treaty of 1880. In 1893, their lawsuit came to the Supreme Court in *Fong Yue Ting*.

The intensity of the emotions engendered by the Geary Act was reflected in the tenor of the arguments in the briefs in *Fong Yue Ting*. Ashton, for example, assailed the statute as “a product of that vicious system of legislation by reports of conference committees in which so many objectionable, imperfect and obscure enactments have had their origin.” He also noted that the Chairman of the Senate Committee on Foreign Affairs, had declared that “[i]t seems to me that in severity of language and in its prohibition of the ordinary rights of humanity [the Geary Act] goes beyond any bill ever introduced into the Congress of the United States,” and

---


52 Brief for Appellants, *Fong Yue Ting* v. United States, 149 U.S. 893 (1893) (Hubly Ashton), at 4-5 (hereinafter, Ashton Brief)

53 *Id.* at 5.
that Sen. John Sherman of Ohio had analogized the provisions statute to the restrictions imposed on African-Americans during the era of slavery.\footnote{Id. at 6-7.}

Against this background, unlike the brief in \textit{Chae Chan Ping}, Choate and Everts explicitly challenged the Geary Act on the ground that it discriminated against Chinese immigrants on the basis of race. While conceding that racial discrimination in this context was not explicitly barred by any provision of the Constitution, they drew an analogy to the prohibitions imposed on the states by the Fourteenth Amendment and argued that

\begin{quote}
\textit{Th[e] selection of the Chinese race from all the mass of aliens in this country to bring under the ban of the law and the principles of our Constitution. That instrument breathes in every clause the breath of freedom and equality...[I]f aliens are to be registered, then all aliens should be included, and not simply Chinamen. Otherwise, it is against the spirit of the Constitution.} \footnote{Brief for Appellants, Fong Yue Ting v. United States, 149 U.S. 893 (1893) (Brief of Joseph H. Choate and Maxwell Evarts) at 57-58 (hereinafter, Choate and Evarts Brief).}
\end{quote}

In addition, Choate and Evart attacked the requirement that a Chinese immigrant without a certificate produce a white witness in support of his claim, analogizing the requirement to state laws excluding African-Americans from jury service\footnote{Id. at 72.} observing that “there is nothing in the statute to prevent the Government from proving [its case through the testimony of] Chinamen or negroes \textit{[sic]}”\footnote{Id. at 71.} and asserting that “a provision that a Chinaman should not be a witness has no more reason in it than a provision that no man shall testify who is over six feet high or happens

\begin{footnotesize}
\footnote{Id. at 6-7.}
\footnote{Brief for Appellants, Fong Yue Ting v. United States, 149 U.S. 893 (1893) (Brief of Joseph H. Choate and Maxwell Evarts) at 57-58 (hereinafter, Choate and Evarts Brief).}
\footnote{Id. at 72.}
\footnote{Id. at 71.}
\end{footnotesize}
to be have red hair.” However, the significance of these arguments should not be overstated; the attack on the racially-discriminatory nature of the Geary Act played only a minor role in the brief, comprising only one paragraph in ninety pages of text. Instead, the constitutional assault on the statute focused on other themes.

Choate and Everts began by contending that Congress lacked all power to banish alien residents in time of peace, except as a punishment for crime. They rejected the claim that Congress could rely on inherent incident of sovereignty as a source of power, characterizing *Chae Chan Ping* as a case in which the Court had relied on the Commerce Clause as the source of authority for the Chinese Exclusion Acts. Asserting that the authority to banish of aliens in time of peace could not be derived from the commerce power, they concluded that the doctrine of enumerated powers required the Court to invalidate the statute.

The other arguments in the briefs relied on a concept that had been established by the Court’s 1886 decision in *Yick Wo v. Hopkins*—the principle that lawfully-present aliens were entitled to the benefit of constitutional rights and were developed in the context of claims that, in part because of the provisions of the Burlingame Treaty, the status of Chinese immigrants was different from that of aliens more generally. Ashton characterized Chinese immigrants as “citizens *de facto*, though not *de jure*,” while Choate and Evart described that status as similar to that of “denizens” under British law—those who held “letter patent” from the king.” Both of

58 *Id.*

59 118 U.S. 356 (1886).

60 Ashton Brief, *supra* n., at 25.

61 Maxwell and Evarts Brief, *supra* n., at 55-57.
the briefs argued that the claimed status enhanced the immigrants’ claim to protection under constitutional law.

Against this background, Ashton contended that the Geary Act would have been unconstitutional even if it had not run afoul of any specific constitutional prohibition. He asserted that “[t]he [Geary Act] is repugnant to the body and spirit, the very soul of the Constitution, and if there were not one word in the instrument setting bounds to and qualifying the legislative power of the Government, the court would find no difficulty in declaring that the legislative power did not extend to the enactment of [such] a statute.”

But the briefs spent much more time in developing claims that the procedures established by the Geary Act were inconsistent with the strictures of the Due Process Clause and the other procedural protections of the Bill of Rights for reasons that were unrelated to race. For example, Choate and Evarts focused on the possibility that the relevant officials could arbitrarily deny certificates of residence to Chinese nationals who were in fact legally present in the country while Ashton argued that, since banishment was punishment, it could not be imposed without a proceeding that provided the full panoply of protections available to criminal defendants. The briefs were dominated by these and similar arguments.

Responding, Solicitor General Charles A. Aldritch characterized the Geary Act as “reasonable and humane,” an appropriate adjunct to the Chinese Exclusion Acts themselves, which in turn he asserted were necessary to protect the United States from an influx of “a people

62 Ashton Brief, supra n. , at 40.

63 Maxwell and Evarts Brief, supra n. , at 64-68.

64 Ashton Brief, supra n. , at 40.

1 Brief for the United States, Fong Yue Ting v. United States, 149 U.S. 698 (1893), at 8.
not suited to our institutions, remaining a separate and distinct race, incapable of assimilation, having habits often of the most pernicious character, working at wages that debase our own laboring classes, not bound by any considerations of the sanctity of an oath [and] given to evasions of other laws of Congress.”

Aldritch was also unsparing in his criticism of the boycott of the statutory registration procedure and those who had encouraged the boycott.

We have in these cases subjects of an alien power who have deliberately defied the laws of the country in which they are resident, and under whose beneficent institutions they seek to live. Afforded every opportunity to obtain the certificates required, they have refused, basing their refusal on the belief, perhaps engendered by hasty advice of distinguished members of the American bar whose multifarious engagements prevented a full consideration of the question involved, that constitutional or treaty rights were thereby violated. [One might think that] the American lawyer and patriot—terms that should be synonymous might well hesitate to make such a declaration against a law that could be easily complied with, and that without expense. And yet it has been proclaimed throughout the length and breadth of the land that compliance need not be yielded to the mandates of this law, because, in the opinion of certain eminent legal gentlemen, the law is unconstitutional.

Aldritch was equally aggressive in his response to the specific constitutional arguments against the Geary Act. He contended that the passage of the act was a “necessary and proper” means of carrying into effect a number of specific enumerated powers, and also that the power of

---

2 *Id.* at 12.

67 *Id.* at 11-12.
Congress to adopt the statute could be derived from general incidents of sovereignty, as well “a police power of the United States which extends to and embraces all subjects confided to the general government.”

Focusing on what he described as an inherent right of self-preservation, Aldritch insisted that “when shall the right be exercised, and what are the dangers calling for its exercise, are questions belonging to the supreme political or lawmaking power, and are beyond the power of the judiciary.

In addressing the claim that the statute violated the Due Process Clause, Aldritch did not address the specific contentions of the challengers individually. Instead, rejecting the assertion that Chinese immigrants had a greater claim to the protections of the Constitution than aliens generally, he relied on an overarching theory about the relationship between aliens and the Constitution. While conceding that aliens might interpose constitutional claims against actions by the states, Aldritch asserted that “they are not entitled to appeal to the Federal Constitution for protection against the Federal Government itself,” contending that “anyone acquainted with the history and purpose of [the Bill of Rights] knows that they were designed to limit Federal power as against the citizen and the States. It was no part of that purpose to lessen the dignity or extent of the power of the United States as against foreign nations or their subjects.”

Chief Justice Melville W. Fuller and Justices David J. Brewer and Stephen J. Field—the author of the *Chae Chan Ping* opinion—were unimpressed by these arguments. Each filed an opinion concluding that the provisions of the Geary Act authorizing the deportation orders were

---

68 *Id.* at 44.
69 *Id.* at 32.
70 *Id.* at 40.
71 *Id.* at 40-41.
unconstitutional. The cornerstone of all of these opinions was the assertion that *Fong Yue Ting* was distinguishable from both *Chae Chan Ping* and *Nishimura Ekiu*. Brewer provided part of the rationale for this distinction

> What, it may be asked, is the reason for any difference? The answer is obvious. The Constitution has no extraterritorial effect, and those who have not come lawfully within our territory cannot claim any protection from its provisions; and it may be that the National Government, having full control of all matters relating to other nations, has the power to build, as it were, a Chinese wall around our borders, and absolutely forbid aliens to enter. But the Constitution has potency everywhere within the limits of our territory, and the powers which the National Government may exercise within such limits are those, and only those, given to it by that instrument.

Similarly, while reaffirming his support for the decision in *Chae Chan Ping*, Field analogized the Geary Act to the much-maligned Alien Act that had been adopted during the administration of John Adams in 1798, proclaiming that

> The moment any human being from a country at peace with us comes within the jurisdiction of the United States, with their consent -- and such consent will always be implied when not expressly withheld, and, in the case of the Chinese laborers before us, was, in terms, given by the treaty referred to -- he becomes subject to all their laws, is amenable to their punishment, and entitled to their protection. Arbitrary and despotic power can no more be exercised over them,

---

72 *Fong Yue Ting*, 149 U.S. at 732-44 (Brewer, J., dissenting); *id.* at 744-61 (Field, J., dissenting); *id.* at 761-63 (Fuller, C. J., dissenting).

73 *Id.* at 738 (Brewer, J., dissenting).
with reference to their persons and property, than over the persons and property of
native-born citizens. They differ only from citizens in that they cannot vote or
hold any public office. As men having our common humanity, they are protected
by all the guaranties of the Constitution.74

Brewer also echoed the challenger’s contention that the Chinese who had come to the
United States under the auspices of the Burlingame Treaty should be treated as more than mere
sojourners. He asserted “[t]hat those who have become domiciled in a country are entitled to a
more distinct and larger measure of protection than those who are simply passing through or
temporarily in it has long been recognized by the law of nations.”

Building on this foundation and drawing on the principles established in Yick Wo, Fuller
warned that “[the Geary Act] contains within it the germs of the assertion of an unlimited and
arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent
with the nature of our Government, and in conflict with the written Constitution by which that
Government was created and those principles secured.”75 Brewer and Field expressed similar
sentiments, and also outlined a number of more specific constitutional objections. Brewer
asserted that the collector of internal revenue had unbridled discretion to grant or deny a
certificate of residence and complained that “[i]t cannot be due process of law to impose
punishment on any person for failing to have that in his possession, the possession of which he
can obtain only at the arbitrary and unregulated discretion of any official.”76 Field, on the other
hand, attacked the race-based restriction on testimony

74 Id. at 734 (Brewer, J., dissenting).
75 Id. at 762 (Fuller, C. J., dissenting).
76 Id. at 741-42 (Brewer, J., dissenting).
When taken before a United States judge, [a Chinese immigrant] is required, in order to avoid the doom declared, to establish clearly, to the satisfaction of the judge, that, by reason of accident, sickness, or other unavoidable cause, he was unable to secure his certificate, and that he was a resident of the United States at the time, by at least one credible white witness. Here the Government undertakes to exact of the party arrested the testimony of a witness of a particular color, though conclusive and incontestable testimony from others may be adduced. The law might as well have said that, unless the laborer should also present a particular person as a witness, who could not be produced, from sickness, absence, or other cause, such as the archbishop of the State, to establish the fact of residence, he should be held to be unlawfully within the United States.77

However, the central focus of Brewer and Field’s arguments was the contention that the deportation of resident Chinese constituted a criminal penalty that could only be imposed through procedures that met the standards of the Bill of Rights. In making this claim, Brewer drew on Madison’s critique of the Alien Act

If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness -- a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for . . . if,

77 Id. at 759-60 (Field, j., dissenting).
moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked -- if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied. 78

Field took a similar tack, asserting that “deportation is thus imposed for neglect to obtain a certificate of residence, from which he can only escape by showing his inability to secure it from one of the causes named. That is the punishment for his neglect, and that, being of an infamous character, can only be imposed after indictment, trial, and conviction.” 79 He also contended that deportation violated the Eighth Amendment ban on cruel and unusual punishment, drawing once again on Madison’s analysis and averring that

The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offense. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, his family, and his business, and taken before the judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business. Mr. Madison well pictures its character in his powerful denunciation of the alien law of 1798, in his celebrated

78 Id. at 740-41 (Brewer, J., dissenting).

79 Id. at 758-59 (Field, J., dissenting).
report upon the resolutions, from which we have cited, and concludes, as we have seen, that if a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.\(^{80}\)

However, these arguments did not persuade a majority of the Court. Five justices sided with Aldritch and rejected the constitutional challenge to the Geary Act.\(^{81}\) Speaking for the majority, Justice Horace Gray began by addressing the issue of federal power in detail. Analogizing *Fong Yue Ting* to *Chae Chan Ping*, Gray first concluded that Congress had inherent authority to exclude or expel aliens generally, asserting that “[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare.”\(^{82}\) and that “[t]he power to exclude aliens, and the power to expel them, rest upon one foundation, are derived from one source, are supported by the same reasons, and are, in truth, but parts of one and the same power.”\(^{83}\) However, Gray plainly viewed the issue of federal power as independent of the question of whether the manner in which Congress had exercised the power through the Geary Act was consistent with the Constitution, declaring that

\[\text{[t]he power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be}

\(^{80}\) *Id.* at 759 (Field, J., dissenting).

\(^{81}\) Justice John Marshall Harlan did not participate in the decision.

\(^{82}\) *Id.* at 711.

\(^{83}\) *Id.* at 713.
regulated by treaty or by act of congress, and to be executed by the executive authority according to the regulations so established, except so far the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution to intervene. (emphasis added)

In addressing the latter issue Gray explicitly rejected Aldritch’s contention that aliens could not invoke the protections of the Constitution against federal action, declaring that “Chinese laborers...like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the Government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility.” But at the same time, Gray also asserted that, given the holding in *Chae Chan Ping*, “it appears to be impossible to hold that a Chinese laborer acquired, under any of the treaties or acts of Congress, any right, as a denizen, or otherwise, to be and remain in this country except by the license, permission, and sufferance of Congress, to be withdrawn whenever, in its opinion, the public welfare might require it” and that immigrants from China “remain subject to the power of Congress to expel them or to order them to be removed and deported from the country whenever, in its judgment, their removal is necessary or expedient for the public interest.” Thus, Gray observed that “Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of

---

84 *Id.* (emphasis added).
85 *Id.* at 724.
86 *Id.* at 723-24.
87 *Id.* at 724.
the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country”\textsuperscript{88} and insisted that [t]he order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the Government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend.\textsuperscript{89}

Beginning with this premise, Gray did not argue that the due process issues raised by the Geary Act were in any way unique. Instead, he asserted that “[i]t is no new thing for the lawmakers power...to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.”\textsuperscript{90} Taking a tack similar to that which had been taken in \textit{Nishimura Ekiu}, Grey explicitly analogized the procedures established by the Geary to those used in extradition proceedings mandated by treaties and petitions to recover duties that had allegedly been illegally exacted on imports. In particular, Gray focused on language from the 1856 opinion of Justice Benjamin Robbins Curtis in \textit{Murray’s Lessee v. Hoboken Land and Improvement Co.}—the seminal case for 19\textsuperscript{th} century due process analysis—where Curtis had declared that

\textsuperscript{88} \textit{Id.} at 729.

\textsuperscript{89} \textit{Id.} at 730.

\textsuperscript{90} \textit{Id.} at 714.
To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law or in equity or admiralty, nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time, there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. 91

Against this background, Gray observed that the federal government could have, if it wished, ordered Chinese immigrants found without a certificate of residence by government officials to be deported immediately, without any recourse to the courts whatsoever. But in addition, he took the opportunity to address a number of the specific objections to the Geary Act that had been raised in the challengers’ briefs. Rejecting the challengers’ claim that a collector of internal residence could arbitrarily deny a certificate of residence to an applicant, Gray contended that “the duty of the Chinese laborer to apply to the collector of internal revenue of the district for a certificate necessarily implies a correlative duty of the collector to grant him a certificate upon due proof of the requisite facts.” 92

Asserting that earlier hearings on the status of Chinese immigrants had been “attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the

91 Id. at 715, quoting Murray’s Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

92 Fong Yue Ting, 149 U.S. at 726.
loose notions entertained by [Chinese] witnesses of the obligation of an oath,“93 Gray characterized the requirement that a “credible white witness” be produced to verify the immigrant’s status as “within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own Government”94 and analogized the requirement to the mandate that an applicant for naturalization produce testimony from a citizen attesting to the fact that the applicant had been a resident of the United States for five years.95 These arguments formed the backdrop for Gray’s conclusion that the portions of the Geary Act that were before the Court in *Fong Yue Ting* were constitutionally unobjectionable.

The dissenters criticized this conclusion in unusually blunt terms. Field asserted that The decision of the Court, and the sanction it would give to legislation depriving resident aliens of the guaranties of the Constitution, fill me with apprehensions. Those guaranties are of priceless value to every one resident in the country, whether citizen or alien. I cannot but regard the decision as a blow against constitutional liberty when it declares that Congress has the right to disregard the guaranties of the Constitution intended for the protection of all men domiciled in the country with the consent of the Government, in their rights of person and property.96

He then asked rhetorically

93 *Id.* at 730.

94 *Id.* at 729.

95 *Id.* at 730.

96 *Id.* at 760 (Field, J., dissenting).
How far will [federal] legislation go? The unnaturalized resident feels it today, but if Congress can disregard the guaranties with respect to any one domiciled in the country with its consent, it may disregard the guaranties with respect to naturalized citizens. What assurance have we that it may not declare that naturalized citizens of a particular country cannot remain in the United States after a certain day unless they have in their possession a certificate that they are of good moral character, and attached to the principles of our Constitution, which certificate they must obtain from a collector of internal revenue upon the testimony of at least one competent witness of a class or nationality to be designated by the Government? What answer could the naturalized citizen in that case make to his arrest for deportation which cannot be urged in behalf of the Chinese laborers of today?97

Similarly, Brewer warned that “[W]hile [i]t is true this statute is directed only against the obnoxious Chinese, but, if the power exists, who shall say it will not be exercised tomorrow against other classes and other people? If the guaranties of these amendments can be thus ignored in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to?”98 He also complained that “[T]he grievous wrong [sanctioned by the majority] suggests this declaration of wisdom coming from the dawn of English history: ‘Verily, he who dooms a worse doom to the friendless and the comer from afar than to his fellow injures himself.’... In view of this enactment of the highest legislative body of

97 Id. at 761 (Field, J., dissenting).

98 Id. at 741 (Brewer, J., dissenting).
the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, ‘Why do they send missionaries here?’”  

However one evaluates the respective merits of the arguments of the majority and the dissent, one point emerges clearly. The decision in Fong Yue Ting was not based in any meaningful sense on considerations that were viewed as uniquely associated with congressional power over immigration. Instead, as it had in Nishimura Ekiu, the majority simply concluded that the Geary Act passed constitutional muster when measured against the same standards that were applied to other exercises of congressional power.

**EPILOGUE–YAMATAYA V. FISHER**

The Court continued to grapple with the legal problems raised by the regulation of immigration in the first decade of the twentieth century. The cases that came before the Court during this period raised a wide variety of statutory and constitutional issues. For example, in United States v. Ju Toy, the Court held that the government could rely on administrative determinations to adjudicate the claims of those people of Chinese descent who alleged that they were American citizens and therefore could not be excluded from the country. However, Yamataya v. Fisher is particularly significant for the subsequent development of immigration law.

Yamataya arose from the case of a Japanese woman who had landed in Seattle on July 11th, 1901 who, like the woman in Nishimura Ekiu, was found by the local immigration inspector

---

99 Id. at 744 (Brewer, J., dissenting).

100 198 U.S. 253 (1905).

The background and significance of Ju Toy are described in Salyer, supra n. , at 99-114.

101 189 U.S. 86 (1903).
to be a person “likely to become a public charge” and ordered deported by the Secretary of the Treasury on July 23rd. The deportee asserted the issuance of the order violated the due process clause, with her attorneys arguing that, because she did not speak English, she had not had a meaningful opportunity to be heard. The government responded by denying that the Due Process Clause had any applicability in deportation proceedings, asserting that “deportation merely enforcing the withholding of the privilege of coming here or remaining here”\(^{102}\) and that “liberty is no more involved than property or life.”\(^{103}\)

The Court upheld the deportation order over the dissents of Justices David Brewer and Rufus Peckham. However, the most widely-cited passage from Justice John Marshall Harlan’s majority opinion also rejected the government’s most sweeping assertions of authority, declaring that

this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends,-not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are


\(^{103}\) Id. at 12.
required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.  

Yamataya is often characterized as a retreat from the principles enunciated in Chae Chan Ping and Fong Yue Ting. For example, Lucy Salyer contends that Yamataya “departed in significant ways from the Court’s earlier immigration decisions,” while Hiroshi Motamura asserts that the decision reflects the influence of the Fong Yue Ting dissents. Comments such as these misconstrue the import of the majority opinion in Fong Yue Ting. As already noted, far from claiming that deportation decisions enjoyed any special exemption from the strictures of the Fifth Amendment, Justice Gray relied on principles of due process analysis that had been established in other contexts and argued that the procedures established by the Geary Act were consistent with those principles. The major point of disagreement between the majority and the dissents was over the question of whether deportation should be considered a criminal penalty—a point that was simply not raised in Yamataya. Viewed from this perspective, the opinions fit comfortably together; the majority opinion in Yamataya was simply noting that, just as in cases

104 Yamataya v. Fisher, 186 U.S. at 100-01.

105 Salyer, supra n. , at 173.

106 Motomura, supra n. , at 554.
where other interests were at stake, the Due Process Clause required the government to provide potential deportees with some opportunity to be heard.

CONCLUSION: REORIENTING THE CONSTITUTIONAL ANALYSIS OF IMMIGRATION CASES

Properly read, the cases from *Chae Chan Ping* through *Yamataya v. Fisher* do not support the proposition that federal legislation on immigration issues should generally be free from constitutional limitations. To the contrary, the Court analyzed those regulations under the standards applicable to constitutional challenges more generally and simply concluded that the relevant statutes did not run afoul of the limitations that had been established in the case law. Admittedly, the principles that guided the Court’s analysis were quite different from those which govern modern constitutional adjudication. Nonetheless, they did not reflect the belief that immigration-related decisions were somehow entitled to special deference.

Of course, in theory at least, it might be possible to provide a persuasive justification for limiting the scope of judicial review in immigration cases. But the point is that any such justification must be evaluated on its own merits. The justices should not feel that a more activist approach to the review of immigration statutes would be somehow inconsistent with the foundational decisions of the late nineteenth and early twentieth century.