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CHAE CHAN PING v. UNITED STATES: IMMIGRATION AS PROPERTY

ROSE CUISON VILLAZOR*

Introduction

There is arguably no other case that is more familiar to immigration legal scholars than *Chae Chan Ping v. United States*.¹ Chae Chan Ping, a Chinese laborer and long-term non-citizen resident of the United States found himself excluded at the border after a trip to China.² Border officers denied him entry under an amendment to the Chinese Exclusion Act,³ which voided the certificate to re-enter the United States that Ping obtained prior to embarking on his trip to China.⁴ Ping challenged the constitutionality of the Chinese Exclusion Act but ultimately failed.⁵ Upholding Ping's exclusion, the Supreme Court declared that Congress's power to "exclude aliens from its territory is a proposition" that is not open to controversy.⁶ Moreover, maintaining that "jurisdiction over its own territory . . . is an incident of every independent nation," the Court explained that if the United States did not have the ability to exclude non-citizens, it would mean that "it would be subject . . . to the control over another power."⁷ Crucially, the Court stated that Congress's decision to deny entry to non-

* Professor of Law & Martin Luther King Jr. Research Scholar, University of California at Davis School of Law. This Essay builds on and provides historical context to my remarks at the *Oklahoma Law Review's* Symposium on *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). I am indebted to Kit Johnson for inviting me to participate in such an enriching symposium. This Essay benefitted tremendously from feedback that I received from participants and attendees at the symposium and a faculty workshop at Fordham University Law School. I am also grateful to Eleanor Brown, Hanoch Dagan, Kevin Johnson, Peter Lee, Melissa Murray, Joseph Singer, and Leti Volpp for their comments on earlier versions of this Essay and to Andrew Alfonso ('15), Sarah Chi ('15), Anna Pifer-Foote ('16), and Steven Vong ('16) for their excellent research assistance.

1. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). For an in-depth examination of this case, see Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in *IMMIGRATION STORIES* 5-29 (David A. Martin & Peter H. Schuck eds., 2005) [hereinafter Chin, *Chae Chan Ping*].

2. *Chae Chan Ping*, 130 U.S. at 582.

3. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

4. Act of Oct. 1, 1888, § 2, 25 Stat. 504, 504 (1888).

5. *Chae Chan Ping*, 130 U.S. at 610-11.

6. *Id.* at 603.

7. *Id.* at 603-04.

citizens is “conclusive upon the judiciary.”⁸ In so doing, the Supreme Court laid the foundation for the federal government’s plenary power over immigration.⁹ *Chae Chan Ping* remains good law today and continues to support the federal government’s virtually unfettered power to regulate and enforce immigration law.¹⁰

The 125th year anniversary of this foundational immigration and constitutional law case¹¹ offers an appropriate time to revisit it. In this Essay, I explore an overlooked aspect of Ping’s challenge: Ping’s argument that his right to re-enter the United States constituted a property right. In particular, Ping contended that the government-issued certificate that he acquired prior to leaving the United States gave him the right to return to the United States.¹² Such right was based on “title or right to *be* in [the United States] when the writ issued.”¹³ Importantly, Ping claimed that this right could not be “taken away by mere legislation” because it was “a

8. *Id.* at 606.

9. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5 (1998) [hereinafter Chin, *Segregation*]; Joseph Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 CONN. L. REV. 879, 896-97 (2015); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255. *But see* Maureen Callahan VanderMay, *The Misunderstood Origins of the Plenary Power Doctrine*, 35 WILLAMETTE L. REV. 147, 152-57 (1999) (arguing, among other things, that *Chae Chan Ping v. United States* provides little support for the plenary power doctrine).

10. Shoba Sivaprasad Wadhia, *Business as Usual: Immigration & the National Security Exception*, 114 PENN ST. L. REV. 1485, 1525 (2010) (explaining that *Chae Chan Ping* has never been overruled). A recent Westlaw search using the terms “130 U.S. 581” showed that at least 231 reported cases cited *Chae Chan Ping*. For a more recent discussion of the plenary power doctrine in light of recent caselaw, see Michael Kagan, *Plenary Power Is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21 (2015), <http://michiganlawreview.org/plenary-power-is-dead/>.

11. Curiously, despite *Chae Chan Ping*’s importance to the development of the federal government’s plenary power over immigration law, it does not seem to be a case that has received significant attention in constitutional law casebooks. The following casebooks do not include the case: GREGORY E. MAGGS & PETER J. SMITH, *CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH* (2d ed. 2011); GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* (7th ed. 2013). These casebooks feature the case: PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (6th ed. 2014); JONATHAN VARAT, WILLIAM COHEN, & VIKRAM AMAR, *CONSTITUTIONAL LAW, CASES AND MATERIALS* (13th ed. 2009).

12. See *infra* Part II.

13. See *id.*

valuable right like an estate in lands.”¹⁴ Similar to his other claims,¹⁵ the Supreme Court rejected this property argument. The Court’s treatment of his property claim is understandable because Ping’s contention may perhaps be described as “new property,”¹⁶ which did not become legible to courts until several decades later.¹⁷

In reconsidering Ping’s property arguments, I aim to achieve two goals. First, as a thought piece, this Essay aims to show what the plenary power doctrine might have looked like had Ping succeeded in convincing the Court that his right to return constituted a property right. Second, this Essay highlights the intersections between property law and immigration law and the ways in which individual property rights might serve as limiting principles to the Supreme Court’s formulation of the nation’s absolute right to exclude non-citizens from the United States.

Part I briefly discusses the facts of *Chae Chan Ping*. Part II explains Ping’s argument that his government-issued certificate of re-entry gave rise to a property violation and analyzes the Supreme Court’s treatment of his claim. Part III places Ping’s argument within the context of property law’s development and considers the difference that recognition of his claim would have made to the plenary power doctrine. Part IV calls for further exploration of the ways in which property law may promote a more inclusive immigration law. Part V briefly concludes.

I. Chae Chan Ping v. United States

Arriving in the United States in 1875,¹⁸ Chae Chan Ping was one of approximately 138,941 Chinese who had immigrated to the United States

14. See Brief of Appellant at 5, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (No. 1446) [hereinafter Carter, Appellant Brief] (emphasis omitted).

15. See *infra* notes 50-52 and accompanying text (discussing Ping’s other claims as to why the Chinese Exclusion Act was unconstitutional, including that he had a contract with the United States and that the law constituted an *ex post facto* law).

16. Charles Reich, *The New Property*, 73 YALE L.J. 733, 785-87 (1964) (arguing that certain forms of government entitlements and benefits should be recognized as property). I thank Melissa Murray for suggesting this point to me.

17. See, e.g., *Arnett v. Kennedy*, 416 U.S. 134, 138 n.2 (1974) (citing Reich’s work in holding that job security is a form of property); *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970) (citing Reich’s work in recognizing welfare benefits as a form of property); *City of Clearwater v. Garretson*, 355 So. 2d 1248, 1250 (Fla. Dist. Ct. App. 1978) (citing Reich’s work and holding that employment interests constitute property).

18. *Chae Chan Ping*, 130 U.S. at 582.

between 1870 and 1880.¹⁹ Their immigration to the United States was made possible by the Burlingame Treaty—a treaty that was signed between China and the United States in 1868²⁰—that guaranteed the citizens of both countries the same rights and privileges that they would enjoy in their own countries.²¹ Although Chinese were not eligible for naturalization,²² the Burlingame Treaty recognized their right to acquire permanent residence in the United States.²³ By 1880, there were approximately 105,465 Chinese residing in the United States, which represented less than 2% of the overall population at that time.²⁴

Most of these Chinese migrants were laborers who toiled in the Gold Rush and worked for railroad companies in California.²⁵ By the mid-1870s, racial animosity and economic recession in California led to calls for restricting the migration of Chinese.²⁶ Thus, the Burlingame Treaty was amended on November 17, 1880, to restrict the prospective migration of Chinese.²⁷ Those laborers already in the United States, however, could continue to reside in the country and could also leave and come back to the United States.²⁸

Against this hostile background, Ping and other Chinese continued to reside in California and the West Coast. Anti-Chinese sentiments, however, continued. California residents in particular sought to further restrict

19. See Chin, *Chae Chan Ping*, *supra* note 1, at 8 (discussing the population of Chinese between 1870 and 1880).

20. Burlingame Treaty, U.S.-China, July 28, 1868, 16 Stat. 739 (1868).

21. *See id.*

22. Naturalization Act of 1870, ch. 254, 16 Stat. 254 (limiting naturalization to non-citizens who were white or of African descent); *see also* *Thind v. United States*, 261 U.S. 204, 215 (1923) (concluding that an Indian immigrant was not eligible for naturalization because he was not white); *Ozawa v. United States*, 260 U.S. 178, 198-99 (1922) (holding that a Japanese immigrant was not eligible for citizenship because he was not white).

23. *See* Burlingame Treaty, *supra* note 20, art. 5; *Chae Chan Ping*, 130 U.S. at 592-93 (noting that Article 5 of the Burlingame Treaty provided that the United States and China recognized the “inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration . . . for purposes of . . . permanent resid[ence]”).

24. *See* Chin, *Chae Chan Ping*, *supra* note 1, at 8 (discussing the population of Chinese in 1880).

25. *See* Freddy Funes, Note, *Beyond the Plenary Power Doctrine: How Critical Race Theory Can Help Move Us Past the Chinese Exclusion Case*, 11 SCHOLAR 341, 343-44 (2009) (discussing the reasons Chinese immigrants went to California).

26. *See* Chin, *Chae Chan Ping*, *supra* note 1, at 8.

27. *See id.*

28. *See id.* (explaining that laborers already in the United States could carry documentation when they left the country to be readmitted).

Chinese migration because “the presence of Chinese laborers had a baneful effect upon the material interests of the state” and “their immigration was in numbers approaching the character of an Oriental invasion.”²⁹ Congress complied in 1882 when it passed “An Act to Execute Certain Treaty Stipulations Relating to Chinese.”³⁰ Enacted on May 6, 1882, this Act, which would more popularly be known as the Chinese Exclusion Act,³¹ suspended “the coming of Chinese laborers to the United States.”³² Similar to the 1880 amendment to the Burlingame Treaty, Chinese laborers already in the United States on November 17, 1880 could remain in the country and freely leave and reenter the United States.³³

By the time Congress passed the Chinese Exclusion Act, Ping had been a resident of San Francisco for seven years.³⁴ At some point, he decided that he would like to visit China. Because both the 1880 amendment to the Burlingame Treaty and Chinese Exclusion Act itself provided that he would be able to return, Ping had no reason to believe that he would be barred from coming back. Indeed, Ping was likely confident that he would be able to return to his country of residence. The Chinese Exclusion Act provided that the government would issue to a Chinese laborer who had been present in the United States prior to November 17, 1880, a certificate which “shall entitle the Chinese laborer to whom the same is issued to return to and reenter the United States.”³⁵ Congress amended the law in 1884—apparently to address evasions by Chinese³⁶—and provided that certificates would

29. *Chae Chan Ping*, 130 U.S. at 595. For a discussion of the history of the Chinese Exclusion Act, see Chin, *Chae Chan Ping*, *supra* note 1, at 8-9; Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111, 1120 (1998); John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 96 (1996).

30. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

31. The press used this term as early as 1888. See, e.g., *The Chinese Exclusion Act*, N.Y. TIMES, Oct. 2, 1888, at 4.

32. Chinese Exclusion Act § 1, 22 Stat. at 58.

33. *Id.* § 3, 22 Stat. at 59. The Act also did not apply to Chinese laborers within ninety days of the passage of the Act. See *id.* The law also did not apply to Chinese laborers who left before Congress passed the Chinese Exclusion Act in 1882. See *Chew Heong v. United States*, 112 U.S. 536, 560 (1884) (holding that since Heong left in 1881 before the Chinese Exclusion Act required that he obtain a certificate before leaving the United States, then the law did not apply to him).

34. See Carter, Appellant Brief, *supra* note 14, at 4 (explaining that Ping was a resident of California for twelve years prior to June 2, 1887).

35. Chinese Exclusion Act § 4, 22 Stat. at 59-60.

36. See *Chae Chan Ping*, 130 U.S. at 598.

count as the only “evidence permissible to establish [the] right of reentry.”³⁷ Relying on these laws, Ping acquired a certificate³⁸ and, on June 2, 1887, he sailed for China after having been a California resident for twelve years.³⁹ Approximately one year and four months later, on October 7, 1888, Ping presented his certificate when his ship arrived in San Francisco.⁴⁰

Little did Ping know that just a few days before his arrival, Congress passed yet another amendment to the Chinese Exclusion Act. This amendment was significant because it provided that “every certificate heretofore issued in pursuance [of the law] is declared void and of no effect, and the Chinese laborer claiming admission . . . shall not be permitted to enter the United States.”⁴¹ In other words, the certificate that Ping had carried as proof of his lawful right to return to the United States was null and void. Ping was excluded from the border and detained.⁴²

II. Ping’s Property Claim to Re-Enter the United States

Represented by counsel, Ping challenged the denial of his entry and detention under the Chinese Exclusion Act.⁴³ A person by the name of Jaia Mon Tong filed a *habeas corpus* petition on behalf of Ping on October 10, 1888.⁴⁴ Unfortunately for Ping, the circuit court judges upheld the Chinese Exclusion Act and ruled that Ping was “expressly forbidden” by the Act.⁴⁵ Ping immediately appealed to the Supreme Court.

37. *Id.*

38. *Id.* at 582; see *Chae Chan Ping’s Reentry Certificate*, 68 OKLA. L. REV. 2 (2015).

39. See *Chae Chan Ping*, 130 U.S. at 582.

40. *Id.*

41. Act of Oct. 1, 1888, § 2, 25 Stat. 504, 504 (1888).

42. See *Chae Chan Ping*, 130 U.S. at 582 (stating that Ping was detained on his boat after being denied entry); Paul Yin, *The Narratives of Chinese-American Litigation During the Chinese Exclusion Era*, 19 ASIAN AM. L.J. 145, 152 (2012) (explaining that a few months after the case, Chae Chan Ping was deported and banned from returning).

43. Ping was represented by four lawyers who were considered to be the “Dream Team” of that time. See Chin, *Chae Chan Ping*, *supra* note 1, at 9 (explaining that Ping’s lawyers were “elite lawyers of the day”). Notably, many of the lawyers of the period that represented Chinese laborers in challenging the Chinese Exclusion Act were not working *pro bono* but rather working on behalf of railroad companies, who had an economic interest in overturning the law because Chinese worked for lower wages than other workers. See *id.*

44. See *Chae Chan Ping v. United States*, Supreme Court of the United States, October 1888 Term, Transcript of Record, No. 1446, In the Matter of Chae Chan Ping on *Habeas Corpus*, at 1 (petition filed by Jaia Mon Tong) [hereinafter Transcript of Record] (on file with the *Oklahoma Law Review*).

45. *In re Chae Chan Ping*, 36 F. 431, 437 (C.C.N.D. 1888).

On appeal, Ping emphasized that his case had a broad impact in that the lower court's approval of the revocation of his certificate impacted many other Chinese. As he noted in his "Motion to Advance" to the Supreme Court, there were "many thousands of these certificates outstanding."⁴⁶ Indeed, at least one scholar noted that there were perhaps 30,000 Chinese who were residents of the United States but had left the country who had obtained re-entry certificates prior to leaving.⁴⁷ Moreover, Ping urged the Supreme Court to determine the constitutionality of the Chinese Exclusion Act so "that those who have acquired property interests here may take some means of protecting those interests."⁴⁸ According to the Chinese Consulate at that time, Chinese laborers who had left with certificates had property interests in the United States in the "amounts [of] several millions of dollars."⁴⁹

In seeking to overturn the Chinese Exclusion Act, Ping raised a number of arguments on appeal. Scholars have examined in detail several of these arguments, including that his exclusion violated rights that he obtained under a treaty between the United States and China,⁵⁰ that the denial of his re-entry constituted a violation of a contract that he had with the United States⁵¹ and that the law was an *ex post facto* law.⁵² Less scholarly attention has been fully devoted to the nature of his claim that his exclusion violated his property rights.⁵³

46. See Transcript of Record, *supra* note 44, at Motion to Advance, at 3.

47. See Chin, *Chae Chan Ping*, *supra* note 1, at 11.

48. See Transcript of Record, *supra* note 44, at Motion to Advance, at 2.

49. *Id.* at 3.

50. See, e.g., Angela Banks, *The Trouble with Treaties: Immigration and Judicial Review*, 84 ST. JOHN'S L. REV. 1219, 1227-31 (2010) (examining Ping's challenge to the Chinese Exclusion Act as a violation of treaties between the United States and China).

51. See, e.g., Victor C. Romero, *United States Immigration Policy: Contract or Human Rights Law?*, 32 NOVA L. REV. 309, 314-15 (2008) (noting Ping's contract claim, which the Supreme Court rejected).

52. See Chin, *Chae Chan Ping*, *supra* note 1, at 11-16.

53. To be sure, scholars have noted that Ping did have a property claim, which he contended emanated from treaties that were signed between China and the United States. See Chin, *Chae Chan Ping*, *supra* note 1, at 15; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 69-76 (2002) (discussing the Supreme Court's rejection of Ping's claimed vested property rights violation based on treaties between the United States and China). Yet, the literature has yet to fully explore the scope of Ping's property-based arguments.

A. Ping's Claim That He Had a Vested Property Right to Return

In three separate briefs to the Supreme Court, Ping's lawyers put forward four arguments as to why his exclusion from the United States constituted a violation of his property rights.⁵⁴ One argument focused on the concept of the state intentionally conferring on Ping what constitutes a property right. In particular, one of his lawyers, George Hoadly—whose brief was the lengthiest of all three submitted briefs—contended that the plain language of an 1881 treaty between China and the United States demonstrated that Congress intended “to vest appellant with the right to re-enter the United States.”⁵⁵ Using statutory analysis, Hoadly emphasized that section four of the treaty used the word “entitle” to grant to the Chinese laborers the right to return. He explained that, “[t]he word ‘entitle’” was not loosely or idly adopted. It is a word of vesting, descriptive of an acquired condition, right or title.”⁵⁶ Thus, Hoadly asserted that Congress essentially functioned as the “grantor” who conveyed to Ping, the “grantee” title, or the right to come

54. It is unclear whether Ping raised his property arguments during the habeas corpus hearing. The record does not include a transcript of the hearing itself. Moreover, the habeas corpus petition that was filed on his behalf did not make specific property arguments but instead made a general argument that the Chinese Exclusion Act was invalid. The circuit court, in upholding the law, relied on three grounds for ruling against Ping (which presumably addressed arguments raised during the habeas corpus hearing): (1) there was no contract between Ping and the United States; (2) that Congress had the authority to pass the Chinese Exclusion Act and override previous treaties governing Chinese laborers; and (3) the Chinese Exclusion Act did not constitute an ex post facto law. *See In re Chae Chan Ping*, 36 F. 431 (C.C.N.D. 1888). Thus, the circuit did not specifically address a property argument that may have been raised during the hearing. Nevertheless, a closer look at the opinion alludes to what Ping would raise as a property rights violation on appeal. In particular, the circuit court, in responding to Ping's claim that he was “divested a right [that was] indefeasibly vested,” explained:

Some rights accrue and become indefeasibly vested by covenants or stipulations that have ceased to be executory and have become fully executed, as in the case of title to property acquired thereunder. But we do not regard the privilege of going and coming from one country to another as of this class of rights.

Id. at 432. Here, the court appears to be referring to rights associated with the system of estates in land in which a defeasible fee has yet to become indefeasible until the happening of an event, which leads to the estate becoming an absolutely indefeasibly vested fee. *See* 28 AM. JUR. 2D *Estates* § 142 (updated Feb. 2015).

55. *See* George Hoadly, Brief for Appellant at 34, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (No. 1446). [hereinafter Hoadly, Brief for Appellant].

56. *Id.* at 35.

back to the United States, when it provided in the 1881 treaty that Ping would be able to return.⁵⁷

Convincing the Court to accept that the government intended to convey Ping a property right was critical and relates to a second property argument: that such property cannot be taken without due process of law. Once a “thing” is considered property, it gains paramount protection from the law.⁵⁸ Hoadly’s brief maintained that Ping’s “right to return . . . and resume his actual residence in California, and to remain” in the United States are as “secure from legislative intrusion and disturbance as would have been his title to and possession of property acquired by the permission of treaty stipulations.”⁵⁹ In other words, Ping’s vested property right to return is akin to ownership in fee simple absolute that would have received protection under the treaties. Indeed, Hoadly’s brief emphasized this point. He noted, “He who is ‘entitled’ cannot be divested, except by the process of eminent domain or during a state of war.”⁶⁰

Another one of Ping’s lawyers, James Carter, expanded on the argument regarding the protection that law ought to accord to property rights. Conceding that the federal government has the power to deny “the entry into its territories of the subjects of a foreign state,”⁶¹ Carter nevertheless argued that Congress did not have the right to “prohibit the *return* to this country of the appellant.”⁶² Ping had a “*vested right* to return, which could not be taken from him by an exercise of mere *legislative* power.”⁶³ Underscoring that Ping’s property claim was not based in contract law⁶⁴ and echoing arguments that Hoadly made in his brief, Carter noted,

It will be observed that the right of the appellant *to return* to the United States is based . . . upon a title or right to *be* in that

57. Under the common law, the grantor is the typically the person who owns an estate in fee simple and the grantee is the person who acquires property from the grantor.

58. The government may not deprive a person of property without due process of law. See U.S. CONST. amend. V.

59. See Hoadly, Brief for Appellant, *supra* note 55, at 20.

60. *Id.* Curiously, Hoadly does not expand on his eminent domain argument by explaining, for example, what would constitute just compensation for the taking of Ping’s property. Further, it should be noted that although this line of argument invoked eminent domain, Hoadly subsequently relates such vested right as part of a contractual obligation. *Id.* at 34-35.

61. See Carter, Appellant Brief, *supra* note 14, at 3.

62. See *id.* at 4.

63. *Id.*

64. See *id.* at 5 (“[T]he right of appellant *to return* to the United States is based, so far as above insisted upon, not upon any *contract* between him and that Government.”).

country when the writ issued—a title or right fully acquired by, and vested in him by his coming here under the permission of the laws and treaties under which he came. It was granted to him by *law*; but, when once granted, could not be taken away by mere law.⁶⁵

Again, Ping's argument here is that his vested right was similar to title in fee simple that may not be taken automatically by mere legislation. Indeed, Carter points out that such a right was a "*valuable* right like an estate in lands, and the taking of it away would necessarily involve the taking away of his *liberty*."⁶⁶

Carter raised a third property claim: not only did Ping have a right to re-enter the United States but he also had "a lawful right to *be* in that United States."⁶⁷ Emphasizing that Ping had been a resident of California for twelve years after deciding to make a permanent home in the United States as a result of the Burlingame Treaty,⁶⁸ Ping cannot be "*ejected* from the United States by mere legislation."⁶⁹ In so doing, Carter's theory is slightly distinguishable from Hoadly's by underscoring Ping's connections to the United States as a long-term resident. Hoadly's argument appears to invoke a property right that is grounded on continuous and long-term possession and use of property (which in this case would be the United States). Establishing one's deep roots to property is an accepted rationale that has long animated two ways of acquiring a property right—adverse possession⁷⁰ and prescriptive easement.⁷¹

However, neither adverse possession nor prescriptive easement is directly on point because both doctrines require non-permissive possession or use of property over a statutory period for property rights to vest.⁷² Certainly, in this case, Ping had resided in the United States for over a

65. *See id.*

66. *Id.*

67. *Id.* at 4.

68. *See id.*

69. *Id.*

70. *See* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 665 (1988) (explaining that under adverse possession, "property owners lose their property to a possessor of that property if the possession has been sufficiently open and longstanding and without the owner's permission").

71. *See id.* at 669 (recognizing that when a prescriptive easement is established, "the true owner loses not the entire property but the right to prevent another from using her property in a specific way").

72. *See id.* at 665-69 (explaining the requirements for adverse possession and prescriptive easements).

decade, which would satisfy some jurisdictions' requirements for adverse possession or prescriptive easement.⁷³ However, Ping's possession or use of a residence in the United States was permissive during his residence in the country. As explained previously, the original Chinese Exclusion Act did not apply to Chinese laborers like Ping who were present in 1880 when Congress passed the law in 1882. Non-permissive access to the United States would not begin until his exclusion from the United States based on the 1888 amendment to the Chinese Exclusion Act that voided his certificate.

A fourth line of property argument focused on the concept of labor as property. Specifically, Harvey Brown and Thomas Riordan argued that denying Ping and other Chinese laborers the right to re-enter the United States violated their right to acquire property.⁷⁴ Quoting *In re Tiburcio Parrott*, a case which struck down a law that penalized the employment of Chinese laborers,⁷⁵ Brown noted “[n]o enumeration would, I think, be attempted of the privileges, immunities . . . of man in civilized society which would exclude the right to labor for a living.” Evoking John Locke's labor theory of property,⁷⁶ Brown further explained that the right to labor is “an inviolable as the right of property, for property is the offspring of labor.”⁷⁷ Applying these principles to Ping's situation, Brown maintained that, under the Burlingame Treaty, Ping “had acquired the right to live in the United States to labor, to acquire property and to protect it in the same manner as any citizen would.”⁷⁸ Indeed, because Ping had been a resident of the United States for several years, he had presumably acquired property as a result of his labor and thus, his exclusion from the United States means

73. Ping resided in the United States for twelve years prior to his trip to China. *See Chae Chan Ping*, 130 U.S. at 582 (mentioning that Ping resided in the United States from 1875 until 1887).

74. *See* Harvey S. Brown & Thomas Riordan, Brief for Appellant at 1, 5, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (No. 1446) (italics omitted) [hereinafter *Brown & Riordan, Appellant Brief*].

75. 1 F. 481, 499 (C.C.D. 1880) (invalidating California statute that criminalized the employment of Chinese laborers).

76. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 290-91 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (stating that every person has the right to the products or fruits of one's labor).

77. *See* Brown & Riordan, Appellant Brief, *supra* note 74, at 7 (quoting *In re Tiburcio Parrot*, 1 F. at 498).

78. *See id.* at 9.

that he—as well as thousands of other Chinese immigrants—are being prevented from enjoying the fruits of their employment.⁷⁹

In sum, although Ping’s “right to return” to the United States might not constitute property as typically understood under the common law, Ping nevertheless claimed that it was sufficiently close to it. Through four specific property arguments, Ping contended that the government could not automatically take away his right without violating his due process rights.

B. The Government’s Response

Expectedly, the briefs filed on behalf of the United States disagreed that Ping had a vested property right to return.⁸⁰ The United States brief contended that Ping’s residence in the country was “only by indulgence of the Government”—that is, by “permission only.”⁸¹ The State of California submitted two briefs in support of the United States. The Attorney General of California submitted a brief, and so did two lawyers who were appointed by the state.

The California Attorney General G.A. Johnson acknowledged that a treaty may confer certain rights on non-citizens, including “rights of property by descent or inheritance.”⁸² Yet, Attorney General Johnson asserted that there “are no rights of property by descent or inheritance” or “fixed private property rights” that were involved in the case.⁸³ Consistent with the lower court’s decision, Attorney General Johnson articulated a very traditional conception of what constitutes property.

The two state-appointed attorneys, John F. Swift and Stephen M. White, provided a more fulsome counter-argument to Ping’s property assertions. At the outset, this brief also conceded that if a treaty allowed a non-citizen to purchase property, then such property “is absolutely and beyond the

79. See Transcript of Record, *supra* note 44, at Motion to Advance, 2.

80. There were three briefs filed on behalf of the United States: brief filed by Solicitor General G.A. Jenks, brief submitted by the Attorney General G.A. Johnson, and a brief filed by Stephen M. White and John F. Swift, who appear to be counsel appointed by the State of California.

81. Brief of the United States as Amicus Curiae Supporting Petitioner at 11, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (No. 1446). The brief did not elaborate further and instead focused on addressing Ping’s other arguments.

82. Brief of the State of California Attorney General as Amicus Curiae Supporting Petitioner at 8-9, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (No. 1446).

83. See *id.* at 9.

reach of Congressional attack.”⁸⁴ Yet, similar to the United States’ position, the special counsel’s brief described Ping’s ability to enter the country as a privilege.⁸⁵ Echoing the bundle of sticks analogy often used to describe property rights,⁸⁶ this brief rejected the idea that Congress did not have the “right to exclude” non-citizens like Ping.⁸⁷ Moreover, the appointed counsel’s brief maintained that Ping was not deprived of his property in violation of his due process. Underscoring the view that property refers to “real property,” the brief states that, “[n]o one is attempting to get any of Ping’s property[;] in fact, it is not shown that he has an estate[.]”⁸⁸

C. The Supreme Court’s Property Analysis

Ultimately, Ping’s arguments that he had a vested right to return to the United States were unavailing.⁸⁹ Although the Supreme Court recognized that the Burlingame Treaty conferred certain rights to Chinese laborers, it held that a subsequently enacted treaty—the 1888 amendments—trumped the earlier treaty.⁹⁰ Importantly, the Court rejected Ping’s claim that his right to return constituted property akin to an estate in land. It distinguished Ping’s certificate which it described as “personal and untransferable” in character from those property rights that flow from treaties that vest and the ownership of which cannot be destroyed.⁹¹

Critically, the Supreme Court focused on qualities that make a “thing” property. One such trait, explained the Court, is that property is “capable of sale and transfer or other disposition.”⁹² Ping’s certificate, however, was “personal and untransferable” and thus, lacked the essential qualities of property. Accordingly, it may be voided.⁹³

84. Brief of John F. Swift and Stephen M. White, Counsel Appointed by the State of California, at 10, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (No. 1446) [hereinafter Brief of Swift & White].

85. *See id.* at 11.

86. For examples of courts using the “bundle of sticks” metaphor, see Audrey G. McFarlane, *The Properties of Instability: Markets, Prediction, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 864 n.35.

87. Brief of Swift & White, *supra* note 84, at 11-12.

88. *Id.* at 15.

89. *See Chae Chan Ping*, 130 U.S. at 603 (holding that nothing in the treaties “impair[s] the validity of the act of congress of October 1, 1888”).

90. *See id.* at 600.

91. *Id.* at 609.

92. *Id.*

93. *Id.* at 610.

Despite rejecting Ping's property claim, the Supreme Court used property language to describe the scope of Ping's rights. Specifically, the Supreme Court characterized Ping's certificate as a license. A license is a personal property right given by an owner or possessor of property to a non-possessor.⁹⁴ Importantly, a license may typically be revoked at any time.⁹⁵ Applying that property concept in this case, the Court noted that, "Whatever license, therefore, Chinese laborers may have obtained, previous to the [Chinese Exclusion Act] act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure."⁹⁶

Ironically, although the Supreme Court refused to accept Ping's property claim, the Court's holding nevertheless resulted in the recognition of strong property rights in favor of the United States. In particular, by holding that Congress may exclude Ping—a long-term non-citizen resident of the United States—and other Chinese laborers, the Supreme Court essentially articulated that the federal government had a very strong, unimpaired and absolute right to exclude. The right to exclude has long been considered the strongest "stick" in the bundle of property rights.⁹⁷ One of the normative justifications for protecting the right to exclude is its ability to promote an owner's autonomy and sovereignty over her estate, including the right to exclude persons from her property with the protection of the state.⁹⁸ The connection between property and sovereignty is particularly evident in *Chae Chan Ping*. Stating that the United States is a sovereign nation, the Supreme Court reasoned that the federal government has the duty to "preserve [the nation's] independence, and give security against foreign aggression and encroachment."⁹⁹ Thus, here, the Supreme Court emphasized the role of the United States' right to exclude as a means of achieving safety and security within its own property.

94. See RESTATEMENT (FIRST) OF PROPERTY § 512 cmt. a (1944) (defining a license, generally, as "any permitted unusual freedom of action").

95. See *id.* § 519 cmt. a (explaining that licenses are "terminable at the will of the possessor"). But see *infra* Part IV (discussing circumstances that prohibit the revocation of licenses).

96. See *Chae Chan Ping*, 130 U.S. at 609.

97. See Kristine S. Tardiff, *Analyzing Every Stick in the Bundle: Why the Examination of a Claimant's Property Interests Is the Most Important Inquiry in Every Fifth Amendment Takings Case*, FED. LAW., Oct. 2007, at 30, 31 (explaining that the right to exclude "is frequently described as the most 'fundamental' and 'treasured' of all property rights").

98. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927), available at <http://scholarship.law.cornell.edu/clr/vol13/iss1/3>.

99. *Chae Chan Ping*, 130 U.S. at 606.

Importantly, the Supreme Court's holding illuminates the power of the right to exclude and its connections to exclusions from private and public property on the basis of race.¹⁰⁰ In this case, the Court notes that the federal government has the power to exercise its right of exclusion to address aggression in whatever form it may appear, including when "vast hordes of [foreign] people are crowding in upon" the United States.¹⁰¹ The Chinese Exclusion Act cast Chinese laborers as the aggressors that needed to be excluded from the United States. Although it was not the first immigration law that excluded on the basis of race,¹⁰² it was the first one that explicitly made race an exclusionary factor and one that escaped equal protection review.¹⁰³ Indeed, the Supreme Court did not find the law's race-based content problematic, noting that if Congress leaders determine that "the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace . . . [such] determination is conclusive upon the judiciary."¹⁰⁴

Through these words, the Supreme Court established Congress's plenary power over immigration and, in so doing, upheld Ping's exclusion from the United States. Thus, Ping ultimately had to be ejected from the United States. Having been released on bond, Ping was residing in Chinatown, San Francisco during the pendency of his case. He continued to reside in

100. I have written previously on the extent to which property law was deployed to exclude persons on the basis of race. See Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race and Citizenship*, 87 WASH. U. L. REV. 979 (2010) [hereinafter Villazor, *Rediscovering Oyama*]; see also ALFRED BROPHY, ALBERTO LOPEZ & KALI MURRAY, *INTEGRATING SPACES: PROPERTY AND RACE* (2010).

101. See *Chae Chan Ping*, 130 U.S. at 606. The Court's description of Chinese as aggressors who were "crowding" upon the United States is troubling and consistent with the anti-Chinese sentiment of the period. As noted earlier, the population of Chinese in the United States during this period was approximately two percent of the U.S. entire population. See *supra* note 24.

102. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 641 (2005) (stating that in 1875, Congress passed the Page Act, which was the first federal restrictive immigration statute and it was done to target primarily Chinese women).

103. To be sure, as Jack Chin has pointed out, Ping did not bring a claim that the Chinese Exclusion Act was racially discriminatory under the Equal Protection Clause of the Fourteenth Amendment. See Chin, *Chae Chan Ping*, *supra* note 1, at 15. Even if he did, it would have failed. At that time, the Equal Protection Clause applied only to the states and although the Due Process of the Fifth Amendment later incorporated the equal protection principle, the Supreme Court has noted that the Fifth Amendment does not provide a guarantee against discrimination by Congress. *Id.*

104. See *Chae Chan Ping*, 130 U.S. at 606.

Chinatown after the Supreme Court issued its opinion. A news article reported that it was not until “the indignant howl of an ever-vigilant press” that the authorities were awakened “to a realization of the fact that Ping . . . had intended to stay.”¹⁰⁵ As a result, government authorities contacted one of his lawyers, Riordan, who then brought Ping to the dock to be placed on a ship to sail back to China.¹⁰⁶ Fearing that Ping might “leave the vessel in a surreptitious manner,” federal authorities reportedly “locked him in a stateroom and set a guard over it until the vessel should set out to sea.”¹⁰⁷ He was never heard from again.¹⁰⁸

III. Why Property in Immigration Law

Ping’s articulation of his property right did not fit the mold of what the Supreme Court understood as property. But what if he prevailed? What difference would it had made had the Supreme Court recognized that Ping had a property right to return to the United States? This Part explores the answers to these questions and contends that if Ping succeeded, the plenary power doctrine would arguably look different today.

A. Ping’s “New Property” Claim

To understand the difference that Ping’s property claim would have made to his assertion that he should be allowed to re-enter the United States, it would be helpful to consider why his property argument failed to convince the Court in the first instance. As may have been evident from the Supreme Court’s opinion, the Court had a traditional understanding of what constituted “property.”¹⁰⁹ Justice Field emphasized “real property” as the type of property he believed would have received protection from treaties.¹¹⁰ Additionally, he emphasized that the concept of a government

105. *Chan Ping Leaves US.: He Refuses to Pay His Fare and the Company Takes Him as a Guest*, N.Y. TIMES, Sept. 2, 1889, available at <http://query.nytimes.com/mem/archive-free/pdf?res=990DE6DF1130E633A25751C0A96F9C94689FD7CF>.

106. *Id.*

107. *See id.*

108. *See* Paul Yin, *The Narratives of Chinese-American Litigation During the Chinese Exclusion Era*, 19 ASIAN AM. L.J. 145, 152 (2012) (explaining that a few months after the case, Chae Chan Ping was deported and banned from returning).

109. *See supra* Part II.A (examining the district court’s analysis of Ping’s property claim); *supra* Part II.C (analyzing the Supreme Court’s examination of Ping’s property argument).

110. *See Chae Chan Ping*, 130 U.S. at 609.

entitlement—such as the conferral of a right to return to the United States—could not possibly constitute property.¹¹¹

Yet, although the notion of a government entitlement as property was incomprehensible to the Supreme Court in 1889, it would eventually become recognized as such in the next century. Specifically, in 1964, in a groundbreaking article, Professor Charles Reich called for the recognition of a “new property.”¹¹² He explained that the government has become a major source of wealth by distributing different types of rights, benefits, privileges, services, and power to various individuals.¹¹³ These varied forms of “largess” or public entitlements have become the main source of wealth or income for many individuals.¹¹⁴ The governments that issue these benefits or “largess” have acquired tremendous power¹¹⁵ over the distribution, regulation and maintenance of these benefits and privileges.¹¹⁶ Accordingly, Reich contended that these benefits constituted new forms of property and, similar to traditional property, should be given legal protection.¹¹⁷ Because these “forms of largess . . . are closely linked to status[,]” they must be “deemed to be held as of right.”¹¹⁸ As such, they should be bound to a system of regulation “rather than a system based upon denial, suspension and revocation.”¹¹⁹

Notably, Reich’s call for the protection of government benefits and privileges as property led to important individual procedural due process protection.¹²⁰ In the landmark case *Goldberg v. Kelley*,¹²¹ the Supreme

111. *See id.*

112. *See* Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964).

113. *See id.* at 734-38.

114. *See id.* at 734-39.

115. *See id.* at 746 (“When government—national, state or local—hands out something of value, whether a relief check or a television license, government’s power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess.”).

116. *See id.* at 751 (“[G]ranting, regulation, and revocation of government largess is carried on by procedures which, in varying degrees, represent short-cuts that tend to augment the power of the grantor at the expense of the recipient.”).

117. *See id.* at 785.

118. *Id.*

119. *Id.*

120. Ronald A. Cass & Jack M. Beermann, *Throwing Stones at the Mudbank: The Impact of Scholarship on Administrative Law*, 45 ADMIN. L. REV. 1, 9-13 (1993) (explaining the significance of Reich’s article influencing the Supreme Court); Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 9, 12-14 (1997) (referring to Reich as the “‘father’ of the due process revolution”). *But see* David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1780 (2013) (noting that after the Supreme Court decided *Goldberg v. Kelly*, 397 U.S. 254 (1970), “the

Court cited Reich in noting that a welfare entitlement was “more like ‘property’ than a ‘gratuity’”¹²² and thus, a welfare recipient should be entitled to an evidentiary hearing “before the termination of benefits.”¹²³ Rejecting the view that a welfare benefit is a privilege rather than a right, the Court explained that public assistance benefits provide their recipients with daily essentials including food, housing, and medical care.¹²⁴ Accordingly, beneficiaries have the procedural right under the Due Process Clause to a hearing on whether the benefit should be discontinued.¹²⁵ Since *Goldberg*, the Supreme Court and other courts applied Reich’s “new property” to other contexts.¹²⁶

Ping was thus ahead of his time when he contended that the government-issued certificate evidencing his right to return constituted property that could not be automatically revoked without violating his constitutional rights.¹²⁷ And, as noted earlier, the Supreme Court seemed strongly resistant to according “property” status to Ping’s claim. Rejecting the characterization of Ping’s asserted right to return as property, the Court

remainder of Reich’s insights into the role of property in protecting individual rights in modern society was largely forgotten”).

121. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

122. *See id.* at 262 n.8.

123. *See id.* at 259.

124. *See id.* at 262-64.

125. *See id.* at 268.

126. *See, e.g.*, Geoffrey Jones, *The Fifth Amendment Due Process Rights of Interdicted Haitian Refugees*, 21 HASTINGS CONTS. L.Q. 1071, 1087-88 (1994) (noting cases that cited Reich’s “New Property” article); *see also* Joseph Blocker, *Reputation as Property in Virtual Economies*, 118 YALE L.J. POCKET PART 120 (2009) (applying Reich’s “new property” to reputation online); Paula Lindsey Wilson, Note, *Rejection of the New Property Right Theory as Viewed Through the Rear Window: Stewart v. Abend*, 24 CREIGHTON L. REV. 155, 189-90 (1990) (exploring how different courts treated “new property” in the context of copyright). *But see* Super, *supra* note 120, at 1780 (discussing the limits of Reich’s influence since *Goldberg*).

127. At least one legal scholar has applied Reich’s concept of “new property” in the immigration context. *See* Eleanor Marie Lawrence Brown, *Visa as Property, Visa as Collateral*, 64 VAND. L. REV. 1047, 1084-85 (2011). Brown wrote,

Although a visa would not typically be thought of as either a franchise or a license, in fact, a visa is deeply analogous to both. Indeed, U.S. visas may be described as licenses to work in the United States. Like licenses, visas make it possible for their recipients to engage in particular kinds of work. Like other forms of licensees, visa holders are only able to receive what is usually their primary source of income because they hold visas. Thus, the “new property” analogy fits.

Id. at 1085.

instead classified Ping's right to return as a mere benefit.¹²⁸ Notably, the Court's framing of Ping's right as *not* property did not rest on his status as a non-citizen. The Court acknowledged that non-citizens' property rights may, depending on the circumstances, deserve protection. It mentioned, for instance, that there are some property rights held by non-citizens that emanate from treaties and are thus enforceable among private parties, including "rights of property by descent or inheritance."¹²⁹ Importantly, the Court acknowledged that the extinguishment of a treaty would not abolish these property rights.¹³⁰ The Court explained, however, that what Ping had was a privilege or a benefit conferred to him by the government.¹³¹ Crucially, such benefit was not protectable property. As the Court explained, "Between 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."¹³²

Yet, the fact that Ping merely had a license or benefit might not necessarily be detrimental to his property claim today.¹³³ Applying Reich's "new property" allows us to consider the value of the certificate to return to Ping and other Chinese laborers as well as the procedural protections that should have been accorded to their property. For Ping and the thousands of Chinese who had left the United States with the belief that they could return, the certificate constituted their return ticket that would have allowed them to continue working and residing in their country of residence. For many, the certificate would have given them the ability to recoup their possessions and perhaps reunite with their families. Seen from the lens of "new property," Congress's automatic revocation of Ping's certificate and right to return may be regarded as a violation of Ping's property rights.¹³⁴

128. *Chae Chan Ping*, 130 U.S. at 610.

129. *Id.* (quoting *The Head Money Cases*, 112 U.S. 580 (1884)).

130. *Id.* (stating that it would be "most mischievous to admit that the extinguishment of the treaty extinguished the right to such estate").

131. *Id.*

132. *Id.*

133. As Reich noted in his article, courts have described certain benefits or "largess" as "privileges" even though they should be considered "rights." See Reich, *supra* note 112, at 740.

134. See *id.* at 740 ("If the holder of a license had a 'right,' he might be entitled to a hearing before the license could be revoked; a 'mere privilege' might be revoked without notice or a hearing.").

B. Difference that Property Would Have Made

Although ultimately unsuccessful, Ping's property claim allows us to imagine what the plenary power doctrine would have looked like had Ping prevailed. Arguably, had the Supreme Court accepted Ping's contention that he had a vested property right to return, the plenary power would not be the absolute, powerful and unrestricted doctrine as it is today.¹³⁵ That is, the Court would have recognized a limiting principle to the plenary power doctrine based on Ping's individual property rights. Thus, at minimum, Ping (and other returning Chinese laborers who are also long-term residents of the United States and had permission to return) would have been entitled to a hearing on the validity of the automatic revocation of his certificate without notice. Perhaps more broadly, the Court would have acknowledged that some non-citizens deserve greater protection than other non-citizens because of their deeper connections to the United States. After all, Ping considered the United States to be his residence, having lived in California for over twelve years before he left for China. He was not an immigrant who was seeking entry for the first time but rather a long-term resident of the United States. Such long-term presence and link to the United States may be viewed to have matured in ways that would have conferred him with a non-revocable right to return.

Thus, the Court would have rejected the view that the nation has an *absolute* right to exclude non-citizens under the plenary power doctrine. Instead, the Court would have established a *qualified* right to exclude—one that recognized that the federal government has the power to exclude non-citizens but that, in some circumstances, such power must give way to the rights of some non-citizens to gain access to the United States. Had the Court inaugurated such a more tempered right to exclude in the first instance, immigration law as we know it would look remarkably different.

To be sure, today, lawful permanent residents are accorded more rights than other non-citizens when seeking to return to the United States. In *Landon v. Plasencia*,¹³⁶ the Supreme Court held that lawful permanent residents are entitled to due process rights during exclusion hearings.¹³⁷ Maria Plasencia, a lawful permanent resident of the United States for five years, was excluded at the border after a brief visit to Mexico and

135. See Chin, *Chae Chan Ping supra* note 1, at 1 (“Congressional power to determine who may come or stay, and who may not, is virtually unrestricted.”).

136. 459 U.S. 21 (1982).

137. See *id.* at 31.

attempting to illegally transport noncitizens to the United States.¹³⁸ Although the Court maintained that Plasencia must go through an exclusion and not deportation hearing where she would have the burden of proving her admissibility, it recognized that “once an alien gains admission to our country and begins to develop ties that go with permanent residence, his constitutional status changes accordingly.”¹³⁹ As such, she was entitled to an analysis that would have balanced her interests and the interests of the government.¹⁴⁰ Congress would later amend the Immigration and Nationality Act to provide that lawful permanent residents who are seeking to re-enter the United States would be treated differently from those non-citizens who are seeking to enter the first time.¹⁴¹ Under section 101(a)(13)(c) of the Immigration and Nationality Act (INA), lawful permanent residents are regarded as not seeking admission unless, among other things, they abandoned or relinquished their status¹⁴² or had been absent from the United States for a continuous period in excess of 180 days.¹⁴³ These constitutional and statutory protections conferred to lawful permanent residents in the context of (re)entering the United States show that certain non-citizens are bestowed more rights than others.

Yet, those rights are generally limited to lawful permanent residents who have taken “innocent, casual and brief excursions”¹⁴⁴ or who have not been absent from the United States for more than 180 days. Indeed, it is unclear whether Ping would have been allowed to re-enter the United States under *Plasencia* and section 101(a)(13)(c) today. Because he was absent from the United States for over one year and four months, he would have to establish that he did not abandon his residency. Additionally, as a result of Ping’s lengthy absence from the United States, immigration officers would likely invoke section 101(a)(13)(c) and deem Ping as a non-citizen seeking admission for the first time. He would then have to show that he is both admissible and not inadmissible.¹⁴⁵

138. For a more detailed analysis of *Landon v. Plasencia*, see Kevin R. Johnson, *Maria and Joseph Plasencia’s Lost Weekend: The Case of Landon v. Plasencia*, in IMMIGRATION STORIES 221-44 (David A. Martin & Peter H. Schuck eds., 2005).

139. *Landon*, 459 U.S. at 32.

140. *See id.* at 34 (citing *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1975)).

141. 8 U.S.C. § 1101(a)(13)(C)(i) (2012).

142. *See id.*

143. *Id.* § 1101(a)(13)(C)(ii).

144. *Rosenberg v. Fleuti*, 374 U.S. 449, 462 (1963).

145. *See* 8 U.S.C. § 1225(b)(2)(A) (providing that a non-citizen seeking admission must show that she is clearly and beyond any doubt admissible).

In brief, revisiting Ping's property claims—albeit futile given the nature of his arguments as akin to “new property”—over a century later allows us to visualize what the starting point of immigration law could have looked like. It is plausible that had Ping convinced the Supreme Court that he had a property right to re-enter the United States that the plenary power doctrine would have some limits at least. Such qualified right to exclude would have taken into account the rights of, at minimum, lawful permanent residents of the United States and, perhaps more broadly, to any non-citizen long-term residents with deep ties and connections to the country who are seeking to return or re-enter the United States.

IV. Intersection of Immigration and Property

Examining Ping's property claims is valuable for another and more extensive reason: it allows an exploration of the ways in which property law intersects with immigration law and how each doctrine might inform the other.¹⁴⁶ To be sure, I recognize that immigration law and property law are

146. I have previously examined the ways in which property law may be used in immigration law. See Rose Cuison Villazor, *Citizenship for the Guest Workers of the Northern Mariana Islands*, 90 CHI.-KENT L. REV. 525 (2015) (arguing for the conferral of lawful permanent residency and citizenship to long-term guest workers in the Commonwealth of the Northern Mariana Islands using the concept of *jus nexi*—acquisition of citizenship based on one's deeply rooted and strong connections to a territory and a theory that borrows from property law's adverse possession). For more information on how property law and immigration law intersect, see generally Villazor, *Rediscovering Oyama*, *supra* note 100, at 1003-12 (discussing connections between immigration and property law). Other scholars have also explored the connection between the two. See e.g., Brown, *Visa as Property*, *supra* note 127 at 1085 (discussing the immigration and property connection, how visas are a form of “new property” by providing a certain legal status granted by the government that allows access to a particular set of economic benefits); David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1812-18 (2013) (examining the parallels between immigration law and property law); Leti Volpp, *Imaginings of Space in Immigration Law*, 9 LAW, CULTURE & HUMAN. 456, 466-67 (2013) (examining the metaphor of immigration as property). Scholars and commentators have also examined how property law may be deployed in immigration law. See AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 184-89 (2009) (evoking the adverse possession principle in arguing for granting citizenship to undocumented immigrants based on the length of their stay in the receiving country); Monica Gomez, Note, *Immigration by Adverse Possession: Common Law Amnesty for Long-Residing Illegal Immigrants in the U.S.*, 22 GEO. IMMIGR. L.J. 105 (2007); Timothy J. Lukes & Minh T. Hoang, *Open and Notorious: Adverse Possession and Immigration Reform*, 27 WASH. U. J.L. & POL'Y 123 (2008). For a broader and more theoretical exploration of property law in immigration, see Jeremy Waldron, *Immigration: A Lockean Approach* (NYU School of Law Pub. Research Paper No. 15-37, May 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652710. Other

two distinct areas of law. Property law is private law and developed from the common law,¹⁴⁷ which relied heavily on William Blackstone (dominion and control),¹⁴⁸ John Locke (labor),¹⁴⁹ and Jeremy Bentham (settled expectations).¹⁵⁰ By contrast, immigration law is public law and is based on the Immigration and Nationality Act.¹⁵¹

Yet, a closer look at these two areas reveals overlooked commonalities. In particular, both deal with the tension between a person's right to gain entry to or remain in a particular space and the right of the owner or possessor to exclude the person seeking access or desiring to stay in the property. In property law, this tension occurs in a number of situations, including when an individual is seeking entry to property that is privately held,¹⁵² private property that is open to the public,¹⁵³ or a privately owned place that is recognized as a place of public accommodation.¹⁵⁴ Additionally, property law recognizes that persons who do not have privileged entry or consent to enter property may be ejected from private

scholars have examined the ways in which property law affects the lives of non-citizens. *See, e.g.*, Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1, *passim* (2013); Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 GEO. IMM. L.J. 77, *passim* (2012); Keith Aoki, *No Right to Own? The Early Twentieth Century "Alien Land Laws" as a Prelude to the Internment*, 40 B.C. L. REV. 37, *passim* (1998).

147. *See generally* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 12, 736 (5th ed. 2010) (discussing how trespass and the landlord-tenant relationship are property concepts developed from common law).

148. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES 2 (1753).

149. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 17-18 (Bobbs-Merrill ed. 1952) ("[W]hatsoever then he removes out of the state that nature has provided and left it in, he has mixed labor with, and joined to it something that is his own, and thereby makes it his property.").

150. *See* JEREMY BENTHAM, THEORY OF LEGISLATION 138 (Boston: Weeks, Jordan & Co., R. Hildreth trans. 1840) ("[The] idea of property consists in an established expectation . . . if being able to draw . . . an advantage from the thing possessed.").

151. 8 U.S.C. § 1227 (2012).

152. *See* *State v. Shack*, 277 A.2d 369, 371-75 (N.J. 1971) (discussing whether defendants' entrance upon private property to aid migrant farmworkers constituted trespass).

153. *See* *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 372 (N.J. 1982) (discussing whether owners of places open to the public enjoy an absolute right to exclude patrons).

154. Civil Rights Act of 1964, tit. II, 42 U.S.C. §§ 2000a, 2000a-6 (2012); *see* *Denny v. Elizabeth Arden Salons, Inc.*, 456 F.3d 427 (4th Cir. 2006) (holding that the list in § 2000a is exhaustive).

property.¹⁵⁵ Armed with trespass law, owners can thus remove non-owners and seek damages for harms associated with unprivileged entry.¹⁵⁶ Such power to both exclude and remove non-owners is based on the right to exclude—which, as noted earlier, has long been regarded as the strongest “stick” in the bundle of rights that attend private property.¹⁵⁷

This conflict between access and removal that transpires in property law also takes place in immigration law. The issue in the admissions context is whether a person should gain entry to the United States. Although the phrase “Give me your tired, your poor, your huddled masses yearning to be free”¹⁵⁸ is inscribed on the base of the Statue of Liberty, the United States is not a place that is publicly available or open to all persons. First, all persons, citizen and non-citizen alike, are required to present themselves at a port of entry and seek permission to enter the United States.¹⁵⁹ Second, the Immigration and Nationality Act (INA) details which persons may be admitted to the United States.¹⁶⁰ Citizens may not be excluded from entering the country; non-citizens, by contrast, may be denied entry.¹⁶¹ Moreover, non-citizens’ ability to remain in the United States may be cut off.¹⁶² That is, non-citizens, despite their length of stay in the United States, may be removed or deported from the country.¹⁶³ Thus, the United States’ ability to deny a visa, deny one’s entry to the U.S. border (whether one has a visa), or remove a non-citizen from the United States are immigration law’s expressions of the right to exclude.

Recognizing that both property law and immigration law administer who belongs in a particular space is valuable because it prompts us to examine both areas of law more closely to consider what lessons may be drawn from

155. JOSEPH WILLIAM SINGER, *PROPERTY* 27 (2010).

156. *See Shack*, 277 A.2d at 374-75 (discussing whether defendants’ entrance upon private property to aid migrant farmworkers constituted trespass and invaded possessory right).

157. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (stating that “the power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights”).

158. Emma Lazarus, *The New Colossus*, in *THE POEMS OF EMMA LAZARUS* (1889).

159. *See* 8 U.S.C. § 1185 (2012) (regulating the admission of citizens and non-citizens in the United States); *Inspection of Persons Applying for Admission*, 8 C.F.R. § 235.1(a-b) (2012).

160. *See* 8 U.S.C. § 1182 (listing which non-citizens are inadmissible to the United States).

161. *See id.*

162. *See id.* § 1227.

163. “Any alien who is present in the United States in violation of this chapter or any other law of the United States . . . is deportable.” *Id.* § 1227(a)(1)(B).

each one.¹⁶⁴ For instance, as some legal scholars have pointed out, the traditional view of the absolute right to exclude in property law has changed over time. Various statutes and public policy reasons have placed limitations on the ability of possessors of property to exclude non-owners. Thus, in some contexts, courts have recognized that owners may not exclude non-owners from their private property. Consider for example a license. The term license, as noted earlier, refers to a permit.¹⁶⁵ In property law, a license may be revoked at any time.¹⁶⁶ Yet, it is also the case that at some point, a license may become irrevocable and this license will become an implied easement.¹⁶⁷ The holder of this implied easement acquires a permanent right of access.¹⁶⁸ Had this development in property law been applied in *Chae Chan Ping*, Ping's license could have been viewed as some type of an implied easement, which would have given him the ability to return to his home.

Indeed, one area in property law that offers a rich site of exploration for its potential application to immigration law is what scholars refer to as "social relations theory" of property¹⁶⁹ and part of the development of "progressive" theories in property.¹⁷⁰ This theory moves away from

164. It should be noted that one drawback of examining the property and immigration analogy is the way in which the non-citizen seeking access to the United States may be viewed as the "intruder" or burglar in a trespass action. *See* Volpp, *supra* note 114, at 467 (examining the concept of the undesirable non-citizen/undocumented immigrant has been cast as trespassers through local criminal prosecutions).

165. *See* *Holbrook v. Taylor*, 532 S.W.2d 763, 765 (Ky. 1976) (discussing license in the context of easements by estoppel).

166. *Indus. Disposal Corp. of America v. City of E. Chicago, Dep't of Water Works*, 407 N.E.2d 1203, 1205 (Ind. Ct. App. 1980); *Eileen T. Quigley, Inc. v. Miller Family Farms, Inc.*, 629 A.2d 110, 116 (N.J. App. Div. 1993); *Tarin's, Inc. v. Tinley*, 2000-NMCA-048, ¶ 22, 129 N.M. 185, 3 P.3d 680 (Ct. App. 1999) ([N]otice goes to the reasonableness of the opportunity a licensee is afforded to remove his personal property from the servient estate, not to the revocability of the license.); *City of Norwood v. Forest Converting Co.*, 476 N.E.2d 695, 703 (Ohio Ct. App. 1984); *Port of Coos Bay v. Dep't of Revenue*, 691 P.2d 100, 103 (Or. 1984).

167. *Holbrook*, 532 S.W.2d at 765.

168. *See id.* at 766.

169. *See* JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 2-19 (2001); Stephen R. Munzer, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36 (Stephen R. Munzer ed., 2001).

170. *See* Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009). *But see*

thinking of property as a relationship between a person and thing and towards thinking of property rights as about the relationship between persons with respect to valued resources.¹⁷¹ The starting place in modern property law is not about one's ability to exclude from her bounded property¹⁷² but rather on how property rights have shaped people's relationships with each other and how relationships among people have affected rights to property.¹⁷³ This approach to property law recognizes limits to property rights, including the right to exclude, such that a private property owner must give way to the rights of non-owners for various reasons, including public policy.¹⁷⁴

By highlighting the intersection between property and immigration law, I hope to prompt further examination of how property law might inform the development of immigration law. There are a number of questions that may be explored. For instance, what might immigration law learn from progressive property? What would a "social relations theory" of immigration law look like? Should there be an unfettered right of return for lawful permanent residents? Indeed, should there be a right of return for citizens?¹⁷⁵ And how would a social relations theory of immigration apply in situations affecting undocumented immigrants who have been criminally prosecuted for trespass or formerly undocumented immigrants who have acquired temporary status under the Deferred Action for Childhood Arrivals?¹⁷⁶ By raising these questions, I hope to encourage further

Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107 (2013) (critiquing some progressive property theorists).

171. "The common conception of property as protection of individual control over valued resources is both intuitively and legally powerful." Gregory S. Alexander, Eduardo M. Penalvar, Joseph William Singer & Laura Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

172. See Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, REPRESENTATIONS, Spring 1990, at 162, 169 (discussing how property exacerbates the problem of boundary).

173. See *id.* at 177 ("Property really is a set of legal rules and norms that structure power and relationships.").

174. See *id.* ("The power to exclude that our legal structure of property gives us is the starting point of all contract, all negotiation over use of, access to, and exchange of property and labor.").

175. See Jeffrey Kahn, *International Travel and the Constitution*, 56 UCLA L. REV. 271 (2008) (contending that there should be a fundamental right for citizens to return to the United States); Leti Volpp, *Citizenship Undone*, 75 FORDHAM L. REV. 2579, *passim* (2007) (examining the ways in which U.S. citizens have been excluded from the country).

176. See Memorandum from Janet Napolitano, Sec'y of the Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., and John Morton, Dir., U.S. Immigration on

exploration of how developments in property law could lead to a more inclusive immigration law.¹⁷⁷

Conclusion

On June 2, 1887, in accordance with the Chinese Exclusion Act, Chae Chan Ping obtained the following certificate from the Deputy Collector of Customs, which stated that:

I certify that the Chinese laborer to whom this certificate is issued is entitled, in accordance with the provisions of the Act of Congress, approved May 6th, 1882, as amended by the Act of July 5th, 1884, to return and re-enter the United States upon producing and delivering this certificate to the Collector of Customs of the district at which he shall seek to re-enter. Witness my hand and official seal, this second day of June, 1887.¹⁷⁸

Ping believed that this certificate guaranteed that he had a right to return to the United States, which he regarded as his residence for twelve years. Indeed, he believed that such certificate evidenced a property right. Rejecting Ping's asserted property rights, the Supreme Court in *Chae Chan Ping* established the absolute right of the United States to exclude non-citizens.

One-hundred-and-twenty-five years later, it is time to reconsider this absolute right to exclude that animates the plenary power doctrine. Ultimately, Ping's property arguments, albeit unsuccessful, forces a re-examination of the role that a non-citizen's property interests in the United States should play in their ability to continue residing in this country. At bottom, Ping's right to return as property should prompt recognition that

Customs Enforcement 1 (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

177. See, e.g., Brown, *supra* note 127, at 1084-85. Note that Eleanor Brown has applied Reich's theory in the context of visas for guest workers. To be sure, immigration law has recognized some exceptions to the right to exclude. For instance, the INA provides that persons who have a credible fear of being persecuted may be interviewed for purposes of determining whether they should be granted asylum, which would give them lawful permanent residency. See 8 U.S.C. § 1158 (2012). Moreover, as previously explained, courts have placed limitations on the ability of immigration officers to exclude certain non-citizens, such as lawful permanent residents, by ensuring that their exclusion hearings are subject to due process. See *Landon v. Plasencia*, 459 U.S. 21, 28-29 (1982).

178. *Chae Chan Ping's Reentry Certificate*, *supra* note 38.

persons who have spent considerable time in the United States deserve the right to return, reside and/or remain in the country that they call their home.