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A "Chinese Wall" at the Nation's Borders: Justice Stephen Field and The Chinese Exclusion Case

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In 1882, Congress passed the first of a series of acts to exclude Chinese laborers from the United States.[1] Known as "The Chinese Exclusion Act,"[2] the popular title of the legislation also became the informal title of the ensuing constitutional challenge in the U.S. Supreme Court. Although the litigation officially came before the Court as *Chae Chan Ping v. United States,*[3] Justice Stephen Field entitled it "*The Chinese Exclusion Case,*" no doubt drawn from the term used by the popular press, who followed the case as closely as any in its day. The name stuck. Indeed, to this day *The Chinese Exclusion Case* is the most common citation form for the momentous decision that set the parameters of legal debate over immigration for the next century and through the present.

The Chinese Exclusion Case was the first of a series of cases in the early Progressive Era about Chinese immigration. With uncanny echoes of political discourse today, those following the case spoke of a deleterious effect on American workers, and argued the morality and constitutional permissibility of banning an entire race, given that the United States had viewed itself to be a welcoming nation for all immigrants. Even whether a wall (and yes, the term "Chinese wall" was used) could stop the flow of illicit entry via land borders—from Canada primarily, but also by way of Mexico. The "Chinese wall" was mostly figurative, not literal, but it signified an increased demand for border guards and the rise of an administrative structure designed to enforce the terms of Chinese exclusion as set by Congress.[4]

The Court's unanimity in *The Chinese Exclusion Case* could lead the modern observer to overlook a highly contentious set of issues. Headlines from news articles bore remarkable similarity to recent division of opinion in America about immigration, including "The Chinese Invasion: Alleged Violations of the Exclusion Law,"[5] "Anti-Coolie Agitation,"[6] "Still They Come: The

This 1870 Thomas Nast cartoon depicts Irish and German immigrants who have scaled the "Emigration" wall now declaring that Chinese access to America is closed. At the time, political debate over stopping the illicit entry of Chinese via Canada and Mexico included discussions of building a "Chinese wall," which meant increasing the number of border guards and implementing an administrative structure to enforce the terms of Chinese exclusion as set by Congress.

Chinese Exclusion Act a Dead Letter in San Francisco,"[7] and "Exclusion of the Chinese: Efforts to Manufacture Political Capital Out of the Question."[8] Arguments about Chinese exclusion pitted labor against employers and restrictionists against those favoring open immigration, and posed the question whether unauthorized immigration could effectively be stopped. These debates continued throughout the Progressive Era, well beyond *The Chinese Exclusion Case* of 1889.

It is not my aim to engage current debates over immigration, or attempt to draw lessons from the racial tenor of the Supreme Court's decisions in the Chinese exclusion era. Instead, I provide some observations about *The Chinese Exclusion Case* that have received less attention but are worthy of more. Given its importance as a foundational case of modern immigration law, the historical terrain is well traveled, including a 2015 article in this journal examining Justice Field's view of immigration as a national police power.[9]

Yet there is some new ground to cover, and I will make three points. First, the sweeping implications of *The Chinese Exclusion Case* had as much to do with the Supreme Court's concerns about its relationship with both Congress and the President as it did with the Chinese as a disparaged racial group. There are other dimensions beyond race, and one of these was the Supreme Court's view of its role with respect to the other branches of government. Importantly, the Court did not decide the balance of authority between the President and Congress on matters of

immigration, an omission that surely lessens its precedential value today.

Second, the Court's pronouncement in the *Chinese Exclusion Case* validated another Act of Congress that applied to *all* immigrants brought in for cheap labor, not just the Chinese. Throughout the progressive era, the Alien Contract Labor Act limited the rights of industrialists, manufacturers, and owners of capital to hire non-citizens.[10] There was no serious question of the constitutionality of this sweeping legislation because the nation's ability to exclude sources of cheap immigrant labor had been settled by *The Chinese Exclusion Case*. While undoubtedly animated by racial hatred, the Chinese Exclusion Act specifically targeted Chinese laborers, ostensibly allowing merchants, teachers, tourists, and some skilled workers to enter and to remain in the United States. The Alien Contract Labor Act, best known to lawyers through the case of the *Church of the Holy Trinity v. United States*,[11] rested its foundation on the structure and function of the Chinese Exclusion Act of 1882.

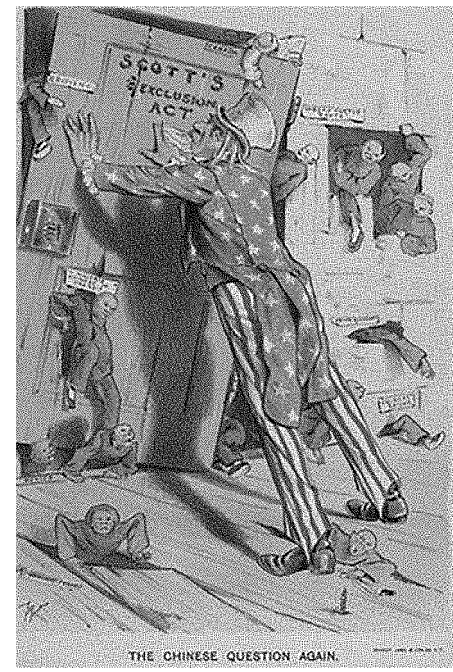
Third, in the midst of Chinese exclusion and a new concern about porous land borders, the Supreme Court handed down the most significant citizenship case it ever decided, *United States v. Wong Kim Ark*.[12] The same era of Chinese exclusion saw the Supreme Court resolve another highly contentious issue, again involving the Chinese: whether all persons born within the United States were citizens, or whether the Fourteenth Amendment's citizenship clause applied only to former slaves. After citizenship by birth in the United States was established for all races, the administrative process for exclusion and deportation of Chinese laborers was forever changed, altering in turn the role of the executive branch and the judiciary with respect to the Chinese question.

The Plaintiff, Chae Chan Ping

Chae Chan Ping was a Chinese laborer who had come to San Francisco in 1875. Twelve years later, he took a trip to China to visit his family. When he left San Francisco, Congress had already banned new immigrant laborers from China. But Congress made an exception for Chinese laborers who were already living here. Those who wanted to leave the United States temporarily would be readmitted if they had a U.S. government certificate to prove that they had been in America before the ban took place.[13]

Chae Ping obtained one of these certificates before he went on his trip to China. He returned with his certificate, but by then the law had changed. A few days before his arrival, a new law went into effect precluding the entry of *all* Chinese laborers, even if they held a certificate of re-entry issued by the United States government.[14]

These are the facts of the Supreme Court's decision in *The Chinese Exclusion*



The Scott Act (1888), authored principally by Congressman William Scott of Erie, Pennsylvania, expanded upon the Chinese Exclusion Act of 1882, and was the statute at issue in the *Chinese Exclusion Case*. The Act prevented even those with government-issued certificates from returning to the United States.

Case of 1889. The Supreme Court held that the government's certificate promising Chae Ping a right to reenter the United States had no legal effect. He was refused admission to the country where he had lived and worked for twelve years—even though he could not have known about the new law before he sailed, and even though Congress's action violated a treaty with China.[15]

The Chinese Exclusion Case was unanimous and sweeping in its scope. The Supreme Court established that the power to control all aspects of immigration is inherent in the sovereignty of the United States, even though not enumerated in the Constitution. It was the first of a series of cases concerning Chinese immigration that are still considered the "foundation cases" of modern immigration law.[16]

The Court soon extended the holding of the *Chinese Exclusion Case* to declare an unqualified right to deport non-citizens. In *Fong Yue Ting v. United States*,[17] the Court specified that the nation could deport any alien or all aliens, for any reason or for no reason. Its power of deportation, like its power of exclusion, the Court deemed to be "absolute and unqualified." There was to be no role for the judiciary. The wisdom of such decisions were not matters for judicial review.

To situate Chinese exclusion in the era in which it occurred, the progressive era was a critical phase in the history of immigration in America. The foundation of modern immigration law was set, not in the context of the immense numbers flowing from Europe, but in the much smaller scale of Chinese immigration to the West Coast. In fact, between 1889 and 1920, the Supreme Court heard some seventy cases involving Chinese litigants. Through advocacy groups such as the Chinese Benevolent Association, the Chinese on the West Coast hired some of the best lawyers of the day, and they pursued a litigation strategy seeking judicial protection of the Chinese against the white race.[18]

At this time, of course, other racial divisions were certainly evident. It was an era of black/white segregation and violence as well as exclusion from the vote. *Plessy v. Ferguson*[19] was decided in 1896, just a few years after the *Chinese Exclusion Case*.

It was also a turbulent time for labor. The Pullman strike of 1894 and labor unrest in general led to conflict between industrialists and workers. Class divisions and disparity of wealth in the progressive era marked what Owen Fiss characterized as "the beginnings of the modern state."[20] As the noted legal historian Robert Gordon put it, the 1890s was "a society riven by violent class conflict; mass unemployment, industrial injury and poverty-stricken old age, unspeakable levels of urban and rural squalor, corporate domination of politics and systemic racial oppression . . . a truly nightmarish prospect to anyone who knows anything at all about it."[21]

Chinese immigration had been encouraged as a source of cheap labor in the United States from the 1840s through the 1870s. Chinese labor contributed greatly to building the western portion of the Transcontinental Railroad, but upon its completion in 1869 these hired laborers turned to other endeavors such as mining. Railroad interests were largely finished with their intense need for Chinese labor by the time Congress began to restrict further Chinese immigration.[22]

Before 1852, the Chinese population in the United States amounted to about 10,000 people. But by 1854, more than 40,000 had arrived in three years. Thereafter on average more than 20,000 Chinese arrived each year. By the turn of the century, one in three persons in San Francisco was of Chinese descent.[23]

This influx caused dissatisfaction among the white laborers of California, who would not compete with the cheap labor provided by the Chinese. Unemployment and economic depression drove resentment against immigrants, and especially the Chinese, leading to disturbing acts of violence in California and elsewhere. In 1886, United States troops

were ordered to Seattle to quell rioting by white laborers against the Chinese in that city, after the Governor of Oregon Territory had declared martial law.[24] The *North American Review* wrote that a war of races seemed imminent.[25] In a referendum on Chinese immigration held in California in 1879, the white voting population was decidedly against further immigration from China—only 883 voted in favor, with over 150,000 against.[26] But by then Stephen Field, while serving as a Circuit judge, had already settled that states could not regulate immigration; it was solely a federal power.[27]

Western states pressured Congress to act. In 1876, both the Republican and Democratic National platforms "took strong ground" against the Chinese, and they did so again in 1880.[28] In 1882 Congress passed the Chinese Exclusion Act, the first legislation to exclude would-be immigrants by race. It suspended for ten years the immigration of new Chinese laborers (but merchants, teachers, and others of the professional class could still enter). Ultimately the ban against laborers would become permanent through World War II.[29]

Initially, Chinese laborers who were already here were allowed to travel abroad and return to the United States, but even that possibility was soon removed by Congress.[30] Later, Congress would add the requirement that all Chinese residents must obtain and carry with them an identity certificate proving they had come to the United States before the ban went into effect, or proving that they were of the exempt class of merchants, teachers, students, or diplomats. Each certificate required

Risking their lives because of harsh winters and perilous working conditions, 12,000 Chinese immigrants constructed the western section of the Transcontinental Railroad. They earned one third less than other workers and were given the most difficult and dangerous jobs. Upon the completion of tracks in 1869, railroad interests no longer lobbied for Chinese labor, allowing Congress to restrict further Chinese immigration.

at least one white witness. Anyone who could not produce this certificate could be deported.[31]

In the background to all of this, the U.S. government had been anxious to open up trade with China, in competition with Great Britain. In 1868 the United States entered into the Burlingame Treaty, a provision of which specified "the inherent and inalienable right of man to change his home and allegiance, and... the mutual advantage of free migration" between the United States and China. Each government's citizens were to receive the privileges and immunities that were accorded citizens of "the most favored nation." Congress would pass legislation inconsistent with this treaty a number of times by the turn of the century.[32]

"The Political Departments of Government": Congress or the President?

With this historical backdrop in mind, I turn to the *Chinese Exclusion Case* of 1889. The holding disavowed any role for the judiciary in reviewing the immigration choices made by Congress. The Supreme Court did not locate Congress's power over immigration in any specific provision of the federal Constitution. Instead, it held that power over immigration was inherent in the existence of any national government and need not be located in the Constitution itself. The Court viewed this to be self-evident, stating simply that this was "a proposition which we do not think open to controversy."[33]

Justice Field, the author of the opinion, spent much of his career in California and had served on the California Supreme Court. He replaced the former Chief Judge of that court who had killed a U.S Senator from California in a duel, and immediately afterward fled the state. Field was serving as Chief Judge of the California Supreme Court when he was appointed to the United States Supreme Court by President Lincoln, where he had a long career.[34] As a sitting Justice, he made two unsuccessful attempts to become the Democratic party's nominee for President. Distancing himself from the perception that he favored Chinese immigration and was sympathetic to their plight, his campaign literature denied this: "I have always regarded the immigration of the Chinese in large numbers into our state as a serious evil, and likely to cause great injury to the morals of our people as well as their industrial interests."[35] Again, in 1882, Field told a friend, "You know I belong to the class who repudiate the doctrine that this country was made for the people of all races. On the contrary, I think it is for our race—the Caucasian race."[36]

Field's prior experience and his knowledge of the western region made him a good choice to write for the unanimous Court. His opinion in the *Chinese Exclusion Case* is the Supreme Court's clearest articulation of the "plenary power" doctrine. The Court stated that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security... its determination is conclusive upon the judiciary."[37] In other words, Congress's power over immigration was "plenary" in the sense that the judiciary would not review what it considered to be purely a political question. Congress and the President—the "political departments" of government, as Field put it—had complete power over such issues.[38]

The Court's opinion includes numerous references to international law. But in U.S. constitutional law, prior to the *Chinese Exclusion Case* there was no suggestion that the *international sovereignty* of the United States, by itself, implied powers for the federal government that were not enumerated in the Constitution. The strongest proponents of federal authority sometimes talked about "implied powers," but most would consider it heresy that federal power might exist unsupported by constitutional language.[39]

The Court could have, but did not, anchor an enumerated power for Congress in the Commerce Clause, the Naturalization Power, or even the Migration and Importation Clause. None seemed to quite fit the question presented to the Court. Instead, the Court's pronouncement of an unreviewable power outside of the Constitution strengthened the reach of the federal government. *The Chinese Exclusion Case* seemed to endorse a "police power" for Congress for the first time.[40]

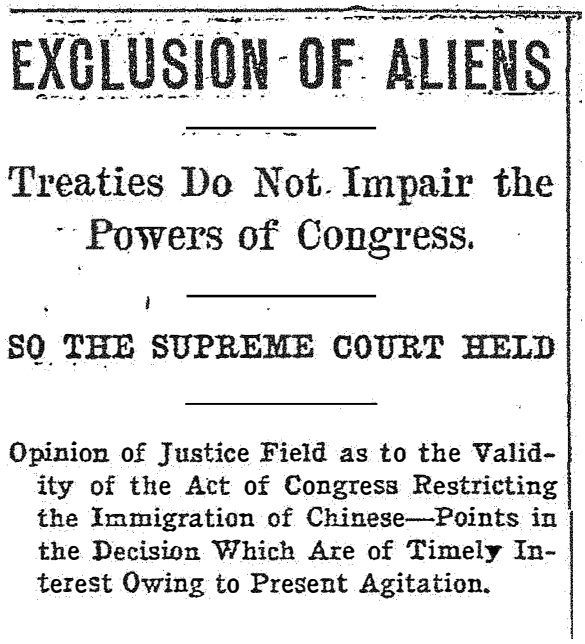
In briefs before the Court, Chae Ping's lawyers argued that he was a returning U.S. resident from a country at peace with the United States. If the two countries were at war, Ping's lawyers conceded that he could be excluded. But the Supreme Court declined to accept any link between Chinese exclusion and the ability of the nation to protect itself from foreign hostile invasion. Instead, the Supreme Court equated the protection of domestic prosperity and tranquility with the right of national self-preservation.[41] It declined to consider the notorious Alien and Sedition Act of 1798 as any sort of precedent.[42] In a few sentences, the Court elevated the protection of domestic labor interests to equal wartime necessity—a right of self-preservation against other nations.[43]

This basic proposition of unreviewable federal power was widely accepted at the time.[44] But for most observers, the issue was not federal immigration power per se, but whether Congress could abrogate a treaty by legislation. As the *Washington Post* explained in a headline, the Court's opinion confirmed that "Treaties Do Not Impair the Powers of Congress."[45] Because the unanimous court upheld views promoted by both Congress and the President, we seem to have a happy agreement among all three branches about a federal immigration authority unlimited by the Constitution. And while the immediate question was the validity of an Act of Congress alleged to violate a treaty with China, Justice Field said the judiciary would defer to "the political departments" of the national government.[46] Thus, properly read, the "plenary power" of the national government resides somewhere between the other two branches—Congress and the President.

The Supreme Court has used this doctrine to say that in certain substantive areas, especially immigration, the judiciary will not intervene because Congress and the executive—the "political department" of government—have complete power. The plenary power doctrine became a cornerstone of federal law governing American territories such as Puerto Rico.[47] The *Insular Cases*[48] of 1901 determined the status of U.S. territories acquired in the Spanish-American War. The Supreme Court held that the U.S Constitution does not automatically extend to all places under American control.

All of this came within a larger effort to determine what was "civilized" and essential to the American character defining the country. The Chinese were not. Residents of Guam and the Philippines were not. They could not assimilate with us or respect our institutions, it was said, while at the same time others wished to preserve America as a "Christian nation." Justice Field had written that the Chinese "remained strangers in the land, residing apart by themselves and adhering to the customs and usages of their own country."[49] Field said, "It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living."[50] Justice Field acknowledged the political pressure that Congress faced from California. Quoting Field again —"As the Chinese grew in numbers each year, the people of the coast saw great danger that at no distant day, that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration."[51]

In fact, just four years after the *Chinese Exclusion Case* the Supreme Court went out of its way to once again disavow any judicial role over immigration. In a case known as



EXCLUSION OF ALIENS

Treaties Do Not Impair the Powers of Congress.

SO THE SUPREME COURT HELD

Opinion of Justice Field as to the Validity of the Act of Congress Restricting the Immigration of Chinese—Points in the Decision Which Are of Timely Interest Owing to Present Agitation.

A 1902 article in *The Washington Post* framed *The Chinese Exclusion Case* as a "treaty" issue. It also noted the "Present Agitation" over Chinese immigration, indicating the continued contentiousness of the issue.

Fong Yue Ting,[52] the Supreme Court held that aliens reside in the United States under the absolute authority of Congress to expel them whenever it feels their removal is necessary. Justice Horace Gray wrote for the Court, "The right of a nation to expel or deport foreigners rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[53]

But unlike *The Chinese Exclusion Case*, this one was not unanimous. Justices Brewer, Field, and Fuller dissented. Justice Brewer was particularly incensed at what the majority had done. He believed strongly that *all* persons lawfully residing within the United States were within the protection of the Constitution. He emphasized that the Chinese had been invited here. But now, he said, "a hundred thousand people are subject to arrest and forcible deportation from the country."[54] Such action against them, he wrote, was a "grievous wrong."[55] He emphatically denied that Chinese residents were "beyond the reach of the protecting power of the Constitution."[56]

That Justice Field was among the dissenters is surprising, given that he wrote for the unanimous court in *The Chinese Exclusion Case*. But for Field, an unqualified right to exclude operated on a different principle from a nation's relationship with persons within its borders.[57] Within U.S. borders, all immigrants who entered with permission and were "from a country at peace with us" are entitled to "all the guarantees for the protection of their persons and property which are secured to native-born citizens."[58]

Whatever the Court intended in all of its Chinese cases in this period, they have been taken to mean that there were no constitutional limitations on the power of Congress to regulate immigration. Deportation is not considered "punishment," for example, and so the usual constitutional rights applicable to criminal defendants do not apply in deportation proceedings.[59] Congress could determine whether to admit aliens, how many to admit, whom to admit, and also that entire classes of persons could be excluded or deported.

Both political parties supported the Chinese Exclusion Acts, and only one President during this period negotiated with Congress in a feeble effort to salvage the earlier treaty with China.[60] It was a mild gesture indeed—President Cleveland asked Congress to reduce the ban on Chinese immigrant laborers from twenty years to ten years, which it did, although as expected, the ban was soon made permanent.[61]

The Supreme Court seemed not to foresee that there would *ever* be disagreement among "the political departments" on immigration issues. This led to the easy step of judicial deference to a general "federal power," with no need to anticipate any potential clash between the President and Congress. Locating the power as one "inherent in the sovereignty and nationhood of the United States" says nothing about how Congress and the President might divide that power. The contours of presidential versus Congressional authority simply did not arise.

The Supreme Court did not entirely abandon the Chinese. In California, the Workingman's Party and other labor groups pursued all sorts of legislation designed to make life harder for the Chinese, so that they would essentially "self deport."[62] In the case of *Yick Wo v. Hopkins*,[63] decided in 1886, a unanimous Court ruled that the Fourteenth Amendment's equal protection clause protected the Chinese against a California law aimed at shutting down Chinese laundries. But with respect to Chinese immigration, Congress could do what the states could not.

Paving the Way for the Alien Contract Labor Act

My second point has to do with the larger conflict between labor and capital in this period, and the Supreme Court's role in mediating that conflict.

Another act of Congress passed just three years after the Chinese Exclusion Act—the Alien Contract Labor Act of 1885[64]—bears consideration because of its relationship to the exclusion of Chinese laborers and the habeas petition of Chae Chan Ping. Noteworthy is its full title: "An Act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor or service of any kind in the United States."[65] This legislation prohibited the importation of immigrant laborers of any race or nationality, especially those coming through the Atlantic crossing. The problem that Congress sought to remedy was the importation of cheap labor, recruited abroad, who were contracted to work in mines, railroads, and other labor-intensive occupations at substandard wages. It was an idea first drawn from the Chinese Exclusion Act, then expanded by Congress to *all* imported contract labor.

The Alien Contract Labor Act was designed to protect the American labor market. The act made it unlawful to assist or procure the immigration of any alien under contract to perform labor in the United States, or knowingly transporting any such alien. It declared void all contracts of labor made by aliens prior to their landing. The law made an exception for actors, artists, lecturers, singers, and (no doubt of benefit to members of Congress) domestic servants.[66] Just as they had with respect to Chinese immigration, big businesses, including railroads, steamship, and mining companies, opposed any restrictions on importing European labor. They opposed the Alien Contract Labor Act because it removed additional sources of cheap labor, unless they could work around its restrictions.[67]

Legislators had learned from the Chinese experience that the problem was the draw of the labor market—the desire of capitalists to import cheap labor from whatever source. Henry Cabot Lodge, for instance, wrote that the legislation excluding Chinese laborers had led to an "awakening" nationwide that "great reservoirs" of cheap labor "threatened with a flood of low-class labor which would

absolutely destroy good rates of wages among American workingmen by a competition which could not be met."[68] Like the Chinese Exclusion Act, Lodge wrote, the Alien Contract Labor Law was "intended to stop the importation of this low-priced labor."[69]

The political debates surrounding the Alien Contract Labor Act make clear that Chinese exclusion served as a model to extend the ban on imported labor universally. The Labor Reform party resolved that they were "inflexibly opposed to the importation by capitalists of laborers from China *and elsewhere* for the purpose of degrading and cheapening American labor."[70] The Democratic and Republican parties followed with similar resolutions. The Alien Contract Labor Act enjoyed broad support in Congress and with the President.

The Supreme Court considered the Alien Contract Labor Act only once, in the case of the *Church of the Holy Trinity* in 1892, just three years after the *Chinese Exclusion Case*. Because of that earlier decision, the constitutionality of the Alien Contract Labor Act was not in question. *The Chinese Exclusion Case* had settled recently and emphatically that Congress had the authority to exclude immigrant laborers.[71] Instead, as Justice Brewer wrote, the case turned on who was meant to be excluded by use of the statutory term "labor," not on Congressional power to prohibit the entrance of cheap labor at all. Whoever else might be covered by the term "labor or service of any kind" (manual labor only, or skilled labor as well?), the Act was certainly *not* intended to prevent religious groups from bringing over a minister. Congress meant *manual* labor, even if it had not used or defined that word in the text.[72] The Court could have noted, but did not, that "labor" was defined in the Chinese Exclusion Act to include "both skilled and unskilled laborers."[73] (Justice Brewer's opinion is also noted for his statement "this is a Christian nation," meaning that Congress could not have intended to exclude ministers in its general ban on contract labor.)[74]

Because no case challenged the constitutionality of the Alien Contract Labor Act, the Supreme Court had no occasion to revisit this limitation on economic rights of industrialists. That issue had been settled with the exclusion of Chinese laborers. In *The Chinese Exclusion Case*, the Court implicitly rejected the commercial interests of business owners, and paved the way for restricting immigrant laborers from anywhere in the world. At least one contemporary thought that the Chinese Exclusion Act and the Alien Contract Act should have been drafted as one piece of legislation:

> The Chinese exclusion acts proceed, first of all, on the theory that our country and its laborers should be protected against the cheap labor of China. In this aspect, the question is in its nature one that arises with respect to immigrants from many other countries. General legislation, not alone applicable to Chinese persons, would be here more properly in order, and the result would be that we would not then run counter to such fundamental principles of democratic government as find expression in our Declaration of Independence in asserting the equality of all men.[75]

Property rights were at stake more prominently in the debates over the Alien Contract Labor Act than with respect to the Chinese. In opposition to organized labor, some members of Congress argued in favor of "natural rights" for employers to engage whomever they wished, as well as for immigrant laborers to earn a living.[76] There was some hope for a sympathetic ear on the Supreme Court. Earlier, Justice Field, then sitting as a Circuit Justice in California, had overturned a California statute penalizing corporations who employed "any Chinese or

Mongolian."[77] Moreover, freedom of contract would reach its peak just over a decade later in *Lochner v. New York*.[78] Although state legislation was at issue, not an Act of Congress, the *Lochner* Court stated that "the freedom of master and employee to contract with each other in relation to their employment . . . cannot be prohibited or interfered with, without violating the Federal Constitution."[79]

Chae Ping's lawyers had also argued from natural rights—that his certificate of reentry was not only a contract but also represented a vested right.[80] The liberty to continue to reside and labor in the United States, as guaranteed in the treaty with China, was a valuable right like an estate in land. This vested right was acquired by contract, suggesting that domestic employers had a right to employ labor without government restrictions. Chae Ping's lawyers were speaking the language of economic liberty, but the Court did not engage it. Justice Field never addressed this claim in *The Chinese Exclusion Case*. Instead, in both *The Chinese Exclusion Case* and *Church of the Holy Trinity* we see a judicial passivity to the claims of industrialists and manufacturers to be able to hire anyone they chose.

As with the Chinese, the restriction on immigrant contract labor of any sort was considered "no more than a measure of peaceful self-defense." Legislative debate over the Alien Contract Labor Act included many references to the earlier example of Chinese exclusion, such as the need to "Build a Chinese Wall" to prevent the entry of "Coolie Labor." "Coolie labor" became a description of *all* low-wage labor—it became a generalized term to include all foreigners willing to work for substandard wages and in appalling working conditions.[81]

Thus, the Alien Contract Labor Act shows that the concern with imported cheap labor was not limited to the Chinese. Chinese exclusion was about cheap labor, recalling that Chinese merchants, students, teachers, professionals, or "travelers for curiosity, but not laborers" were not barred from admission to the United States.[82] A lengthy article in the *New York Times* termed these persons "the privileged, non-laboring class," distinguishing between two classes of Chinese applicants, the "privileged class," who were allowed in, and the laboring class, who were excluded. Allowing in the "privileged class" was the only concession Congress was willing to make to salvage the earlier treaty with China.[83]

As one proponent of the Chinese Exclusion Act put it, "The chief opposition to the exclusion of Chinese comes from a certain section of employers of labor who think of nothing but their profits. They rise superior to patriotic feeling, and appeal to economic interests."[84]

Industrialists and employers favored the importation of labor, but religious groups also lobbied Congress for the free entry of Chinese laborers, raising a distinct ground of opposition to Chinese exclusion. They feared for the safety of American missionaries living in China because of anger in China over the Exclusion Act. On the same day the Supreme Court handed down its decision upholding Chinese exclusion, The Presbyterian Board of Foreign Missions telegraphed the news to its missionaries in China, to alert them to the possibility of retaliation. "Missionaries fear violence" was one U.S. headline.[85] A coalition of Protestant groups called for a day of special prayer, "That our government may be led to just and right action in this emergency."[86] Justice David Brewer, soon to join the Court and a nephew of Justice Field, had been born abroad to missionary parents.[87] He surely took note of these pleas. After he joined the Court, Brewer took part in another Chinese exclusion case, stating in dissent: "In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, Why do they send missionaries here?"[88]

Religious groups emphasized the damage to trade as well as to religious conversion —"all American interests" were in peril, they said, including those of American businessmen who owned property there. One missionary, the Rev. Gilbert Reid, said: "There are open doors for Americans to enter for selling the things that the Chinese empire needs in her mining, railway, steamship, and war equipment. If American legislators can do nothing to help, they can at least refrain from utterly destroying American trade relations with China." He continued, "Americans should consider what would be thought of this government if Congress has the right to pass a law which takes precedence over a treaty."[89]

But *The Chinese Exclusion Case* gave Congress a green light to make any laws it saw fit. According to Justice Field, "If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject."[90] The Court disavowed any opinion on the merits: "The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts."[91] Then, in *Fong Yue Ting*, Justice Horace Gray doubled down on judicial withdrawal from the field:

> The question whether and upon what conditions these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the Government, the Judicial Department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.[92]

Wong Kim Ark, a cook, was born in San Francisco in 1873 to parents who had emigrated from China but were not U.S. citizens. In November 1894, Wong sailed to China for a temporary visit, but when he returned in August 1895, he was detained at the Port of San Francisco by the Collector of Customs, who denied him permission to enter the country, arguing that Wong was not a U.S. citizen because his parents were Chinese. Wong (pictured in 1904) was confined for five months on steamships off the coast of San Francisco while he challenged the government's refusal to recognize his citizenship.

As the progressive era unfolded, so too did further restrictions on immigrants, particularly those from southern Europe, including the rejection of any immigrant based on education, physical and mental health, and poverty. The Supreme Court, by endorsing the racial animus driving Chinese exclusion, had freed Congress to choose any immigration conditions it wished, including siding with domestic labor over capital if it so chose.

In fact, the progressive era saw an explosion of immigration restrictions from Congress:

1903: Anarchists, epileptics, polygamists, and beggars were barred. (Excluding "anarchists," by the way, was the first exclusion based on political views—communists would be barred later.)

1906: Knowledge of English became a basic requirement

1917: Literacy tests were introduced for those over sixteen, and *all* immigrants from Asia were barred, not just the Chinese.

1921: The National Origins Act of 1921 established a quota for the first time, limiting immigration from many areas of the world whose people were considered "undesirable." This cut the number of new immigrants dramatically, especially from southern and eastern European. In 1924 the quotas were further restricted, and were made permanent in 1929. Asians were still barred entirely.

The National Origins Act of 1921 clamped down on immigration in a big way, so that by the end of the progressive era, the number of new immigrants each year was dramatically reduced. In 1922, for example, only around 200,000 immigrants passed through Ellis Island, compared to over one million just fifteen years earlier.

Birthright Citizenship Intervenes

In 1898, in the midst of Chinese exclusion supported by all three branches of the federal government, the Supreme Court determined the question of birthright citizenship in the United States. This was the case of *Wong Kim Ark*,[93] decided almost ten years after *The Chinese Exclusion Case*. Wong Kim Ark's situation was similar to that of Chae Chan Ping. In 1890 Wong Kim returned from a trip to China only to be denied entry on the basis of the Scott Act. Wong Kim's case was different, however, because he had been born in San Francisco, and as a result claimed United States citizenship under the Fourteenth Amendment to the U.S. Constitution. The very first sentence of that amendment, after all, states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The U.S. Solicitor General had argued before the Supreme Court that the Fourteenth Amendment's citizenship clause applied only to former slaves, and not to the Chinese race. He pointed to the fact that Chinese were barred by law from naturalization.[94] But a majority of the Court disagreed. In a 7-2 decision, the Supreme Court sided with Wong Kim, holding that the simple fact of birth within the territorial United States—and not race or parentage—determined that he was a U.S. citizen. The decision came thirty years after ratification of the Fourteenth Amendment, and it meant that Wong Kim, unlike Chae Ping, must be allowed to re-enter the United States.

John Marshal Harlan was notably in dissent, joining Chief Justice Fuller. We might be surprised by this, given Justice Harlan's eloquent dissent in *Plessy v. Ferguson*.[95] In *Plessy* he wrote: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."[96] But in that same dissent he also contrasted the status of black

Americans, who were citizens, with the Chinese. He wrote: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."[97]

Justice Field, who had joined the majority in *Plessy v. Ferguson*, was no longer on the Court at the time Wong Kim Ark's case was decided, so we can only speculate about his views on birthright citizenship for the Chinese. Justice Field had sometimes sided with the Chinese when the issue was discriminatory *state* legislation, and indeed he was viewed in California as a protector of the Chinese. This characterization lost him a Presidential bid in both 1880 and 1884.[98] (Field did not resign from the Supreme Court while he campaigned for the Presidency, a situation difficult to imagine today.) In order to win over California, his campaign rhetoric indicated that he would be "tough on the Chinese." Analogous, perhaps, to modern campaign rhetoric of being "tough on crime."

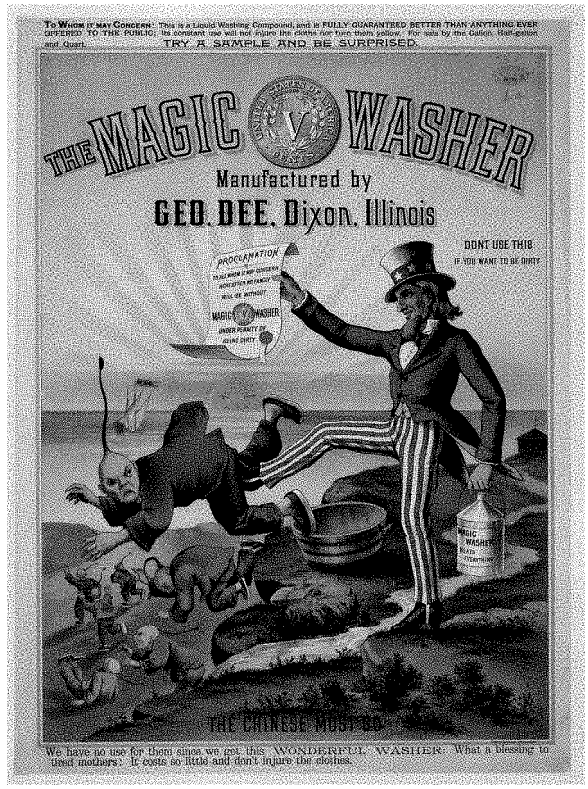
From this point over the entirety of the Progressive Era, many lawsuits turned on issues of proof, particularly as to place of birth. If a person could prove birth in the United States, that made him or her a citizen. But birth certificates were not the norm, and the Chinese were precluded from serving as witnesses.

This matters because Congress still excluded Chinese from becoming citizens through naturalization. But the stakes had changed—throughout the late nineteenth and early twentieth centuries, Chinese immigrants allegedly found other ways in. There was strong suspicion that American industrialists connived with British steamers and Canadian railroads to get the workforce they needed. In 1891, Secretary of the Treasury Charles Foster claimed "unremitting efforts of the Department to enforce the Chinese exclusion act," but he added: "Any legislation, however, looking to exclusion will fail of its full purpose so long as the Canadian government admits Chinese laborers to Canada, when, armed with Canadian permits to leave and return to Canada at pleasure, they are at liberty to invade our territory along its entire northern frontier."[99]

To be clear, the fact that some Chinese might be U.S. citizens by birth did not ameliorate their treatment at the hands of federal inspectors and other law enforcement officers.[100] Claims of citizenship were met with deep skepticism, and insurmountable proof issues (the burden was on the subject, who had to acquire white witnesses to testify) meant undoubtedly some U.S. citizens were deported, and life remained difficult for all those whose papers were questioned.[101] A contemporary noted in 1901, "Chinese persons, who have violated no law, or persons appearing to be Chinese subjects—for they are as likely as not to be American citizens of Chinese extraction—are now constantly arrested and are treated as felons . . ."[102]

In the case of *Fong Yue Ting,* the Court had answered the bigger question gripping the country at the time. The federal government's power to expel entire classes of noncitizens was as absolute as its power to deny them entrance in the first place. It also held that residence in the United States, for however long, did not create a "vested right" subject to judicial protection. Thus, the case of Wong Kim Ark located rights in citizenship status rather than race, at a time of nativist discontent and amid concerns that poor and undesirable persons from abroad would destroy American civilization.

It also made securing the borders of greater importance to labor restrictionists. The explosion of immigration legislation in the early twentieth century, including quotas and the exclusion of poor or unhealthy immigrants, is surely tied to the Supreme Court's strong stance on birthright citizenship. Such persons—however undesirable on



The Geo Dee company advertised its new washers in 1886 by exploiting anti-Chinese sentiment and touting that its washers could replace Chinese launderers. Chinese immigrants began setting up laundries in the 1850s because the work required no special skills or venture capital and Americans considered it undesirable work. By the 1870s, Chinese laundries were operating in all U.S. towns with Chinese populations.

grounds of race or poverty—would give birth to United States citizens if not prevented from entry.

Why this period is important is not just because it set the foundation of U.S. immigration law, but because at the same time the Court recognized our most basic principle of citizenship. If Justice Field could peremptorily title *Chae Chan Ping v. United States* as *The Chinese Exclusion Case*, we might as well refer to the decision in *Wong Kim Ark* as the "Chinese *Inclusion* Case."

Modern Resonances of Chinese Exclusion

Although I disavowed at the outset the purpose of drawing lessons from historical events, the modern resonance inescapably sheds some light on issues with which the Supreme Court has continued to struggle. The plenary power doctrine in particular is contested, especially as to the notion that the same power to exclude persons from entering the country implies the power to expel. The latter contention has been consistently undermined by Supreme Court decisions involving due process rights of immigrants. A plethora of legal scholars have criticized the plenary power doctrine over the years, including Louis Henkin, who termed it "a constitutional fossil." He continued, "Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional."[103]

In addition, some question today the doctrine of birthright citizenship for the children of undocumented immigrants. The Supreme Court has not revisited the case it decided in 1898, although some suggest that it should. Most scholars, however, agree that the language of the Fourteenth Amendment is clear, and that Wong Kim Ark's case was correctly decided.[104]

Another modern resonance is the difficulty of preventing the free movement of labor. This country's labor needs are to some extent dependent on immigrants with whom we have an ambivalent relationship. The draw of jobs makes it difficult to control unauthorized immigration, whether this comes from visa overstays or clandestine border crossing. Justice Brewer in 1889 wrote of Congress's authority to "build a Chinese wall" at the nation's borders.[105] Senate debates and newspaper editorials did the same.[106] (Although I must point out there was no suggestion that China should pay for it.)

Immigrants found ways to avoid Angel Island, the official port of entry on the West Coast. Here is how this concern was expressed more than 100 years ago:

> Like water from a sieve, the Chinese are showered upon us from every conceivable point on Puget Sound, and all along the line from Victoria to Halifax. So with reference to the Mexican border. They cross the fifteen hundred miles of our Southern boundary without detection into the United States.[107]

The author claimed 16,000 Chinese laborers entered the United States from Canada after the completion of the Canadian Pacific Railroad.[108] Contemporaries recognized the difficulty of excluding immigrant labor, especially when it was encouraged and even subsidized by U.S. employers.

We tend to see the exclusion of Chinese as aberrational in our immigration history. And in many ways it is, but Chinese exclusion also pointed the way to political success in the progressive era of other sweeping immigration restrictions held to be within the power of Congress, not subject to judicial oversight. It began with a pronounced racism against the Chinese, but we also see a strong theme of labor protectionism for American workers that moved across races.

It is helpful to understand the Supreme Court's work from this additional angle. What began as Congressional acquiescence to demands from the western states paved the way, with the Court's explicit blessing, to bans on all immigrant labor imported from abroad, not just Chinese labor.

It is also important to keep in mind that *The Chinese Exclusion Case* was decided well before the due process revolution of the twentieth century. Indeed, inroads into the plenary power doctrine have been identified especially in cases involving individual due process, not in questions of the ability of Congress to exclude entire classes of persons on grounds that could not possibly be applied to American citizens.

In striking contrast to the modern emphasis on both substantive rights and due process in individual immigration cases, Justice Field never once used Chae Chan Ping's name in his opinion for the Court in *The Chinese Exclusion Case*. To Field, the case was simply a challenge to the Scott Act of 1888, and nothing more. Not only did Justice Field avoid any reference to Chae Ping, Field never responded to Ping's claims that he had money on deposit and property in San Francisco, and debts owed to him that he should be entitled to collect. All of those would be forfeited if the Supreme Court ruled against him.[109]

But one wonders about the fate of Chae Ping, the Chinese laborer whose certificate of re-entry was held to be worthless. Initially, Ping was held on board the ship he had arrived in, resulting in the habeas petition that allowed him to leave the ship under a security bond. He had about nine months of relative

freedom in San Francisco during the pendency of his case, although under conditions very close to house arrest. His pursuit of litigation, according to the *San Francisco Call*, "has given the United States courts a great deal of trouble in his endeavors to force his unwelcome presence upon the citizens of this fair and free country."[110]

Shortly after the Supreme Court's decision against him, Chae Ping was escorted by a U.S. Marshal to the sailing ship *Arabic*, where he was locked in a room, under guard, until the ship's departure to China. The Captain of the ship tried to get Chae Ping to pay for his own passage, which he understandably refused. He said: "I don't want to go back to China. I want to stop in California. If they make me go back they must pay the passage. I don't care, I won't pay." The U.S. government also refused to pay. In the end, Chae Chan Ping was transported "as a guest" of the shipping line.[111]

Some speculated that Chae Ping would attempt to return in the guise of a merchant or tourist, and thus be allowed back in, but we do not know. We have lost sight of him in history.

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ENDNOTES

[1] For a summary of legislation involving Chinese exclusion—in 1882, 1884, 1888, 1892, and 1902—*see* Owen M. Fiss, **Troubled Beginnings of the Modern State, 1888-1910**, The Oliver Wendell Holmes Devise, History of the Supreme Court, Vol. VIII (Macmillan, 1993), p. 301.

[2] The Chinese Exclusion Act of 1882, 22 Stat. 58.

[3] 130 U.S. 581 (1889).

[4] Scholars have noted the growth of a federal immigration bureaucracy in response to the Chinese Exclusion Acts. *See, e.g.*, Emily Ryo, "Through the Back Door: Applying Theories of Legal Compliance to Illegal Immigration during the Chinese Exclusion Era," 31 *Law and Social Inquiry* 109 (2006); Kitty Calavita, "The Paradoxes of Race, Class, Identity, and "Passing": Enforcing the Chinese Exclusion Acts, 1882-1910," 25 *Law and Social Inquiry* 1 (2000).

[5] "The Chinese Invasion: Alleged Violations of the Exclusion Law," *Chicago Daily Tribune*, Nov. 3, 1883, p. 3.

[6] "Anti-Coolie Agitation," *Los Angeles Times,* Nov. 28, 1885, p. 4.

[7] "Still They Come: The Chinese Exclusion Act a Dead Letter in San Francisco," *Detroit Free Press*, Sept. 21, 1889, p. 4.

[8] "Exclusion of the Chinese: Efforts to Manufacture Political Capital Out of the Question," *The Baltimore Sun*, Sept. 21, 1888, p. 1.

[9] Adam Carrington, "Police the Border: Justice Field on Immigration as a Police Power," 40 *Journal of Supreme Court History* 20 (2015). In-depth histories of the Chinese exclusion era include Beth Lew-Williams, **The Chinese Mnst Go: Violence, Exclnsion, and the Making of the Alien in America** (Harvard Univ. Press, 2018); Mae M. Ngai, **Impossible Snbjects: Illegal Aliens and the Making of Modern America** (Princeton Univ. Press, 2014); Deirdre M. Maloney, **National Insecnrities: Immigrants and U.S. Deportation Policy since 1882** (U.N.C. Press, 2012); Estelle T. Lau, **Paper Families: Identity, Immigration Administration, and Chinese Exclnsion** (Duke Univ. Press 2007); Hiroshi Motomura, **Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States** (Oxford Univ. Press, 2006); Erika Lee, **At America's Gates: Chinese Immigration dnring the Exclnsion Era**, 1882-1943 (U.N.C. Press 2003); Andrew Gyory, **Closing the Gate: Race, Politics, and the Chinese Exclnsion Act** (U.N.C. Press 1998); and Lucy E. Salyer, **Law Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law**, (U.N.C. Press 1995).

[10] Alien Contract Labor Act of 1885, 23 Stat. 332.

[11] *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 (1892).

[12] *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

[13] The facts of the case are drawn both from the Court's opinion in *The Chinese Exclusion Case*, 130 U.S. 581 (1889), as well as briefs filed on behalf of the appellant.

[14] The Scott Act of 1888, 25 Stat. 476, expanded the Chinese Exclusion Act of 1882. An estimated 20,000 Chinese holding certificates of return were stranded in China upon passage of the act. *See* Lee, **At America's Gates**, p. 45.

[15] *See* Joan Fitzpatrick & William McKay Bennett, "A Lion in the Path? The Influence of International Law on the Immigration Policy of the United States," 70 *Wash. L. Rev.* 589, 606 (1995).

[16] *See* T. Alexander Aleinikoff, **Semblances of Sovereignty: The Constitntion, the State, and American Citizenship** (Harvard Univ. Press, 2002); Louis Henkin,

"The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny," 100 *Harv. L. Rev.* 853 (1987); Hiroshi Motomura, "Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation," 100 *Yale L.J.* 545, 554 (1990); Peter H. Schuck, "The Transformation of Immigration Law," 84 *Colum. L. Rev.* 1, 14 (1984).

[17] *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893). The majority opinion stated emphatically that "The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country." 140 U.S. at 707.

[18] *See* Paul Yin, "The Narratives of Chinese-American Litigation during the Chinese Exclusion Era," 19 *Asian Am. L.J.* 145 (2012).

[19] *Plessy v. Ferguson*, 163 US 537 (1896).

[20] Fiss, **Troubled Beginnings of the Modern State**. *See also* Michael McGerr, **A Fierce Discontent: The Rise and Fall of the Progressive Movement in America** (Oxford Univ. Press, 2003); Benno C. Schmidt Jr., "The Court in the Progressive Era," 22 *Journal of Supreme Court History* 14 (1997).

[21] Robert W. Gordon, "The Constitution of Liberal Order at the Troubled Beginnings of the Modern State," 58 *U. Miami L. Rev.* 373, 400 (2003).

[22] Natsu Taylor Saito, "The Enduring Effect of the Chinese Exclusion Cases: The 'Plenary Power' Justification for on-Going Abuses of Human Rights," 10 *Asian L.J.* 13, 14 (2003). *See also* Chinese Railroad Workers in North America Project at Stanford University, "Timeline," available at http://web.stanford.edu/group/chinese railroad/cgi-bin/wordpress/timeline.

[23] Fiss, **Tronbled Beginnings of the Modern State**, pp. 298-99.

[24] *See, e.g.,* "Holding the Mob at Bay: United States Troops Ordered to Seattle," *New York Times*, Feb. 10, 1886, p. 1.

[25] Charles Frederick Holder, "The Chinaman in American Politics," *The North American Review*, Feb. 1898, at 227.

[26] *See* Samuel E. Moffett, "The Constitutional Referendum in California," *Political Science Quarterly*, March 1898, p. 1.

[27] *In re Ah Fong*, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (Field, J., Circuit Justice) (striking down a California inspection statute on the grounds that immigration power is "exclusively within the jurisdiction of the General Government, and is not subject to State control or interference").

[28] J. Thomas Scharf, "The Farce of the Chinese Exclusion Laws," *The North American Review*, Jan. 1898, p. 85.

[29] The Chinese Exclusion Act of 1882 was repealed in 1943 by the Magnuson Act, 57 Stat. 600.

[30] The Scott Act of 1888, 25 Stat. 476.

[31] Fiss, **Tronbled Beginnings of the Modern State**, pp. 303-306.

[32] *Id.*

[33] 130 U.S. at 603.

[34] For these facts and other insights I am indebted to Paul Kens's excellent biography of Justice Field. *See* Paul Kens, **Jnstice Stephen Field: Shaping Liberty from the Gold Rnsh to the Gilded Age** (Kansas Univ. Press, 1997).

[35] Quoted in Kens, **Jnstice Stephen Field**, p. 205.

[36] *Id.*, p. 212.

[37] 130 U.S. at 606.

[38] 130 U.S. at 609.

[39] Henkin, "The Constitution and United States Sovereignty," 100 *Harv. L. Rev.* p. 855.

[40] *See* Adam Carrington, "Police the Border: Justice Field on Immigration as a Police Power," 40 *Journal of Supreme Court History* 20 (2015); Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny," 100 *Harv. L. Rev.* 853, 854-55 (1987).

[41] 130 U.S. at 608.

[42] 130 U.S. at 602.

[43] 130 U.S. at 608.

[44] *See* Aleinikoff, **Semblances of Sovereignty**, p. 12. ("Throughout this period, the foundational plenary power cases were not questioned.") There were some critics as to both content and application, primarily legal scholars. *See, e.g.,* "The Injustice of Chinese Exclusion," *The Central Law Journal*, Jan. 13, 1905, p. 21; Max J. Kohler, "Our Chinese Exclusion Laws: Should They Be Modified or Repealed?" *New York Times*, Nov. 24, 1901, p. 4; R.T. Colburn, "The Chinese Exclusion Act in Court and Council," *The Independent*, June 20, 1889, p. 5.

[45] "Exclusion of Aliens: Treaties Do Not Impair the Powers of Congress," *The Washington Post*, Jan. 27, 1902, p. 4.

[46] 130 U.S. at 602.

[47] *See* Aleinikoff, **Semblances of Sovereignty**, pp. 74-94.

[48] The *Insular Cases* are generally considered to be six Supreme Court cases all decided in 1901. These include *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Huus v. New York and Porto Rico Steamship Co.*, 182 U.S. 392 (1901). *See generally* Juan R. Torruella, "Ruling America's Colonies: The Insular Cases," 32 *Yale L. & Pol'y Rev.* 57, 58 (2013).

[49] 130 U.S. at 595.

[50] *Id.*

[51] *Id.*

[52] *Fong Yue Ting v. U.S.*, 149 U.S. 698 (1893).
[53] 149 U.S. at 707.
[54] 149 U.S. at 744 (Brewer, J., dissenting).
[55] *Id.*
[56] *Id.*
[57] Carrington, "Police the Border: Justice Field on Immigration as a Police Power," 40 *Journal of Supreme Court History*, p. 32.
[58] 149 U.S. at 754 (Field, J., dissenting).
[59] *See Wong Wing v. United States*, 163 U.S. 228 (1896) (deportation is not "punishment" in the criminal sense, and thus is a civil matter).
[60] *See generally* Earl M. Maltz, "The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment," 17 *Harv. J.L. & Pub. Pol'y* 223, 249 (1994); Stuart C. Miller, **The Unwelcome Immigrant: The American Image of the Chinese, 1785-1882** (University of California Press, 1969); R.G. Ingersoll, "Should the Chinese Be Excluded?" *The North American Review*, July 1893, p. 52 ("Both of the great political parties pandered to the leaders of the crusade against the Chinese for the sake of electoral votes.").
[61] The political background of the various Chinese Exclusion Acts is ably described in Salyer, **Law Harsh as Tigers**, pp. 15-21, *passim*.
[62] *See* Mary D. Fan, "Post-Racial Proxies: Resurgent State and Local Anti-'Alien' Laws and Unity-Rebuilding Frames for Antidiscrimination Values," 32 *Cardozo L. Rev.* 905, 914-20 (2011).
[63] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
[64] Alien Contract Labor Act of 1885, 23 Stat. 332.
[65] *Id.*
[66] *Church of the Holy Trinity v. U.S.*, 143 U.S. 457 (1892). *See also* William S. Blatt, "Missing the Mark: An Overlooked Statute Redefines the Debate over Statutory Interpretation," 104 *Nw. U.L. Rev. Colloquy* 147 (2009).
[67] *See* John Hawks Noble, "The Present State of the Immigration Question," *Political Science Quarterly*, June 1892, p. 232.
[68] Henry Cabot Lodge, "The Restriction of Immigration," *The North American Review,* Jan. 1981, p. 27.
[69] *Id.*
[70] J. Thomas Scharf, "The Farce of the Chinese Exclusion Laws," *The North American Review*, Jan. 1898, p. 85.
[71] For analyses of the Court's decision in *Holy Trinity* as statutory interpretation, *see* Carol Chomsky, "Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation," 100 *Colum. L. Rev.* 901 (2000); Adrian Vermeule, "Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church," 50 *Stan. L. Rev.* 1833 (1998).
[72] 143 U.S. at 462. Labor groups urged enforcement of the Contract Labor Act in a variety of circumstances, including an attempt to exclude Strauss's Vienna Orchestra from a U.S. tour. *See* "What Is an Artist? The Attempt to Prevent Strauss's Orchestra from Coming Here," *New York Times*, Feb. 13, 1890, p. 8.
[73] The Chinese Exclusion Act of 1882, 22 Stat. 58, Sec. 15.
[74] 143 U.S. at 471.
[75] Max J. Kohler, "Our Chinese Exclusion Laws: Should They Not Be Modified or Repealed?" *The New York Times,* Nov. 24, 1901, p. 14.
[76] "Contract Labor: The Senate Debates the Bill to Prohibit the Importation of Foreigners under Contract," *Chicago Daily Tribune,* Feb. 14, 1885, p. 7.
[77] *In re Tiburcio Parrott*, 1 Fed. 481 (C.C.D. Cal. 1880). For an insightful analysis of the case, *see* Paul Kens, "Civil Liberties, Chinese Laborers, and Corporations," in Gordon Morris Bakken, ed., **Law in the Western United States** (U. Okla. Press, 2000).
[78] 198 U.S. 45 (1905). *See generally* Schmidt, "The Court in the Progressive Era," 22 *Journal of Supreme Court History*, p. 19.
[79] 198 U.S. at 64.
[80] *See* Brief of Appellant, No. 1446, *Chae Chan Ping v. United States*, pp. 7-11.
[81] Senate Committee on Education and Labor, June 28, 1884, 48th Cong., 1st Sess. (Report on the Alien Contract Labor bill) (comparing with "coolie labor" and Chinese exclusion); "A Day in Congress," *Los Angeles Times*, April 24, 1892, p. 5 (Senator's use of the term "Chinese Wall").
[82] Kohler, "Our Chinese Exclusion Laws," p. 14.
[83] *Id.*
[84] M.J. Farrelly, "The United States Chinese Exclusion Act," *The American Law Review*, Sept/Oct 1894, p. 7.
[85] "Missionaries Fear Violence: Believed That the Geary Act Will Cause Retaliation," *New York Times*, May 18, 1893, p. 9.
[86] *Id.*
[87] Fiss, **Tronbled Beginnings of the Modern State**, p. 311.
[88] *Fong Yue Ting* v. *U.S.,* 149 U.S. 698, 744 (1893) (Brewer, J., dissenting); Fiss, **Tronbled Beginnings of the Modern State**, p. 311-12.
[89] "Would Cause Retaliation: Missionary Reid on the Effect of the Geary Act," *New York Times*, April 17, 1893, p. 6.
[90] *The Chinese Exclusion Case*, 130 U.S. 609. In this and other instances, Justice Field uses the term "political department" in the singular to refer to both Congress and the President.
[91] 130 U.S. 602.
[92] *Fong Yue Ting v. U.S.*, 149 U.S. at 731.
[93] *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).
[94] Brief for the United States, *U.S. v. Wong Kim Ark*, no. 449 (1898). Some legal scholars also believed the

Fourteenth Amendment did not confer automatic citizenship, although usually on grounds of international law and comity. *See, e.g.,* Marshall B. Woodworth, "Citizenship of the United States under the Fourteenth Amendment," *The American Law Review*, July/Aug 1896, p. 535. The same author later conceded the point, following the Supreme Court's decision. Marshall B. Woodworth, "Who Are Citizens of the United States?," *The American Law Review*, Jul/Aug 1898, p. 554.

[95] *Plessy v. Ferguson*, 163 US 537 (1896).

[96] 163 U.S. at 559 (Harlan, J., dissenting).

[97] 163 U.S. at 561 (Harlan, J., dissenting).

[98] *See* Kens, **Justice Stephen Field**, p. 205-206.

[99] "State of the Treasury: Annual Report of Secretary Foster on the National Finances," *The Washington Post*, Dec. 10, 1891, p. 2.

[100] *See* "Application of the Procedure under the Chinese Exclusion Acts to the Determination of the Right of Entrance of Persons of Chinese Descent Asserting American Citizenship," *The Central Law Journal*, June 17, 1904, p. 481.

[101] *See generally* Estelle T. Lau, **Paper Families: Identity, Immigration Administration, and Chinese Exclnsion** (Duke Univ. Press 2007); Hiroshi Motomura, **Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States** (Oxford Univ. Press, 2006).

[102] Kohler, "Our Chinese Exclusion Laws," p. 4.

[103] Henkin, "The Constitution and United States Sovereignty," 100 *Harv. L. Rev.*, p. 862.

[104] *See, e.g.,* "Birthright Citizenship on Trial: *Elk v. Wilkins* and *United States v. Wong Kim Ark*," 37 *Cardozo L. Rev.* 1185 (2016).

[105] *Fong Yue Ting v. U.S.*, 149 U.S. at 738 (Brewer, J., dissenting).

[106] *See, e.g.,* "A Day in Congress," *Los Angeles Times*, April 24, 1892, p. 5 (attributing "Chinese Wall" sentiment to Senator William P. Frye); "No Chinese Wall in America," *New York Observer and Chronicle*, Jan. 24, 1878, p. 30.

[107] J. Thomas Scharf, "The Farce of the Chinese Exclusion Laws," *The North American Review*, Jan. 1898, p. 85.

[108] *Id.*

[109] *See* Brief of Appellant, No. 1446, *Chae Chan Ping v. United States*, pp. 12-13.

[110] "Chan Ping Leaves US," *New York Times*, Sept. 2, 1889, p. 3 (reprinting article from the *San Francisco Call*).

[111] *Id.*