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The Invention of Immigration Exceptionalism

ABSTRACT. American immigration law is a domain where ordinary constitutional rules have never applied. At least, that is the conventional wisdom. Immigration law's exceptionalism is widely believed to flow directly from the Supreme Court's invention, in the late nineteenth century, of the so-called plenary power doctrine. On the standard account, that doctrine has long insulated immigration policies from constitutional scrutiny. The plenary power doctrine is thought to permit everything from President Trump's Muslim ban to the indefinite detention of migrants at the border.

But the reigning historical account of immigration exceptionalism is wrong. Revisiting the field's canonical cases, this Article reveals that the plenary power doctrine lawyers and judges argue over today was not created in a series of late nineteenth-century cases. Far from being exceptional, those cases applied the then-standard framework linking due process and the separation of powers. By failing to understand that nineteenth-century immigration law was ordinary public law, scholars and jurists have, for decades, badly misunderstood immigration law's foundational cases. We have also overlooked the role that immigration law played in the development of modern public law. At the turn of the twentieth century, immigration law evolved apace with the rest of public law as both underwent a dramatic transformation. In some cases, immigration law even led the revolution, driving the development of the legal regime we now call "administrative law."

Immigration exceptionalism is thus a recent invention. Indeed, it might be more accurate to say that the immigration plenary power doctrine was invented in the Roberts Court rather than in the late nineteenth century. Once we locate immigration exceptionalism in its proper moment, we can better appreciate immigration law's centrality to the development of American public law. We can also assemble new arguments against the modern exceptionalism that is responsible for the very worst parts of immigration law today.

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ARTICLE CONTENTS

INTRODUCTION

American immigration law is an area where ordinary constitutional rules have never applied. At least, that is the conventional wisdom. Immigration law's exceptionalism is widely believed to flow directly from the Supreme Court's invention, in the late nineteenth century, of the so-called plenary power doctrine. On the standard account, that doctrine has long insulated immigration policies from ordinary constitutional scrutiny—perhaps from meaningful judicial review altogether.[1] Immigration law's resulting exceptionalism is widely believed to permit everything from a ban on Muslim immigrants to the complete denial of due process to asylum seekers.[2]

This seductive account of immigration law's exceptionalism—that it is an ancient doctrine marking immigration as a constitutionally exceptional sphere—has been embraced by lawyers and scholars of all stripes. Perhaps it should be no surprise that government lawyers, regardless of the presidential administration, routinely invoke the plenary power doctrine when seeking to defeat constitutional claims brought by noncitizens. But these government lawyers are hardly alone. Even lawyers and scholars who are deeply critical of the doctrine nonetheless accept its status as a bedrock principle invented in the Supreme Court's canonical Chinese exclusion cases.[3] That is why, when then-candidate Donald Trump first announced his plan to ban Muslim immigrants, many scholars who wrote opinion pieces decrying the policy nonetheless concluded that it would be perfectly constitutional for the President to exclude immigrants on the basis of their religious beliefs.[4]

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1. *See infra* Part I.

2. *See* Trump v. Hawaii, 585 U.S. 667, 702-05 (2018) (holding that President Trump's anti-Muslim statements were legally irrelevant to the question whether his travel-ban Executive Order violated the First Amendment); Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 140 (2020) (holding that noncitizens apprehended shortly after crossing the border have no due process right to a fair asylum hearing); *see also infra* Part IV (describing the dispositive role played by the plenary power doctrine in these cases).

3. *See infra* Section I.A.

4. *See, e.g.*, Garrett Epps, *The Ghost of Chae Chan Ping*, ATLANTIC (Jan. 20, 2018), https://www.theatlantic.com/politics/archive/2018/01/ghost-haunting-immigration/551015 [https://perma.cc/3BCZ-PCN3]; Leah Litman, *Unchecked Power Is Still Dangerous No Matter What the Court Says*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/opinion/travel-ban-hawaii-supreme-court.html [https://perma.cc/N8SZ-4F7J]; Peter J. Spiro, *Trump's Anti-Muslim Plan Is Awful. And Constitutional.*, N.Y. TIMES (Dec. 8, 2015), https://www.nytimes.com/2015/12/10/opinion/trumps-anti-muslim-plan-is-awful-and-constitutional.html [https://perma.cc/ATG5-MXKB]; Ilya Somin, *Immigration Law Defies the American Constitution*, ATLANTIC (Oct. 3, 2019), https://www.theatlantic.com/ideas/archive/2019/10/us-immigration-laws-unconstitutional-double-standards/599140 [https://perma.cc/T7F9-YH2V].

This Article argues that the reigning historical account of immigration exceptionalism is wrong.[5] Revisiting the field's canonical cases, I will show that the immigration plenary power that lawyers and judges argue over today was not created in a series of late nineteenth-century cases. Far from being exceptional, those cases simply applied the then-standard framework linking due process and the separation of powers. In nineteenth-century American public law, due process was understood to be, in essence, a separation-of-powers requirement—separating judicial functions that could be performed only by a court from those functions that could properly be undertaken by the legislature or by executive-branch officials. And the key to unlocking that old separation-of-functions puzzle was the then-dominant distinction between privileges and private rights. That distinction determined when Congress could interfere with a person's legal interests, when due process was owed, and when disputes could be adjudicated by executive-branch officials rather than an Article III court. Crucially, immigration law's foundational cases were all litigated and resolved within this traditional framework. By failing to understand that nineteenth-century immigration law was ordinary public law, scholars and jurists have, for decades, badly misunderstood immigration law's foundational cases.[6]

We have also overlooked the role that immigration law played in the development of American public law. Contrary to conventional wisdom, the constitutional approach that the Supreme Court applied in late nineteenth-century immigration cases did not stick with us all the way to the present. Indeed, it lasted less than two decades. At the dawn of the twentieth century, American public law underwent an enormous transformation. The Supreme Court, confronting the explosive growth of the administrative state and myriad other legal and political forces, cast aside nineteenth-century ideas about due process and the

5. My focus in this Article is on a particular kind of exceptionalism—the idea that special constitutional rules govern the constitutionality of immigration policies. In other work, Cristina M. Rodríguez and I have argued that there are aspects of immigration law that are indeed distinctive, such as the outsized role the President plays today as our immigration policymaker-in-chief. *See* ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 3-11 (2020) [hereinafter COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020)]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 107-12 (2015); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460-65 (2009) [hereinafter Cox & Rodríguez, *The President and Immigration Law* (2009)]. But as we emphasize in those works—in sharp contrast to scholarship focused on the "plenary power doctrine"—our view is that the President's power is the product of complex historical and structural forces, not the result of the Supreme Court creating some special set of constitutional rules for immigration law. In that sense, this current project joins these earlier works in arguing that far too much importance has long been assigned to the role of late nineteenth-century Supreme Court immigration decisions in explaining the modern structure of American immigration law and policy.

6. *See infra* Part II.

separation of powers that had, for so long, organized public law. In place of that old approach, the Court created an entirely new framework for thinking about the role federal courts would play in policing executive-branch officers. Crucially, immigration law during this period evolved apace with the rest of public law; it underwent the same dramatic transformation taking place elsewhere. Indeed, immigration law was often on the leading edge of the transformation, driving the development of the legal regime we now call "administrative law." This transformative period, most of which is missing in modern accounts of the immigration plenary power, supplies additional evidence of the anti-exceptionalist nature of early American immigration law.[7]

In short, immigration law was ordinary public law for a very long time. This central conclusion raises a new and important question: if the immigration plenary power is not the product of late nineteenth-century cases, and if immigration law was mainstream administrative law during the first decades of the twentieth century, then when was the immigration plenary power doctrine invented? This Article begins to sketch out a possible answer to that question. At the start of the Cold War, in the span of a few short years, immigration cases went from being treated mostly as ordinary administrative law cases to being treated as something very different. The Supreme Court and others suddenly began to recast the Court's earlier case law in a new exceptionalist light. If we want to tell a story about the immigration plenary power's invention, then, we should begin by sleuthing for that story in the 1940s and 1950s—not in the 1890s. Yet even once immigration law became ensconced in the *rhetoric* of exceptionalism, the *outcomes* of immigration cases continued, for the most part, to track the outcomes one would have expected had the policies at stake not been immigration policies. Indeed, it was not until the Roberts Court came along that the Supreme Court, for the first time ever, deployed the rhetoric of an "immigration plenary power" to resolve constitutional challenges to immigration policies in a manner that departed clearly from the way those challenges would have been resolved outside the immigration context. It thus might be more accurate to say that the immigration plenary power was invented by the Roberts Court, in cases like *Hawaii v. Trump* and *Department of Homeland Security v. Thuraissigiam*, than it is to say that it was invented in the waning days of the nineteenth century.[8]

Debunking our common mythology about the invention of immigration exceptionalism has tremendously important implications for the field. It requires that we rethink the entire constitutional edifice of the discipline, and it offers us new and powerful historical arguments against the modern exceptionalism that is responsible for some of the worst parts of immigration law today.

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7. *See infra* Part III.

8. *See infra* Part IV.

Unearthing the true origin story of American immigration law also shows the way in which an area of law so marginalized today was so central, in the early twentieth century, to the development of public law. Crack open a casebook on administrative law, and you are most likely to read a story about administrative law's rise that focuses on commissions regulating railroads, trusts, and financial markets—entities like the Interstate Commerce Commission and the Federal Trade Commission.[9] The bureaucracy of immigration regulation and enforcement is typically nowhere to be found. Contrary to this well-worn narrative, however, immigration law was, in the first decades of the twentieth century, an important source of emerging ideas about the judicial oversight of administrative actors. Recovering the role played by immigration law shows that a number of common stories we tell about the development of public law—whether in federal courts, or administrative law, or constitutional law—are incomplete and misleading. Our understanding of public law's development thus has much to gain from a more accurate account of immigration law's foundations.[10]

I. THE CANONICAL IMMIGRATION "PLENARY POWER DOCTRINE"

Nearly everyone agrees that immigration law is exceptional. But what do scholars, advocates, and judges mean by this? They do not mean only that immigration law looks the way it does today because its origins and development are steeped in racism. This is true—though it hardly makes immigration law different from many other areas of American public law. Instead, the claim that immigration law is exceptional generally entails a very specific doctrinal claim: a claim that the field is governed by a unique doctrine of judicial review and

9. *See generally* THOMAS K. MCCRAW, PROPHETS OF REGULATION (1984) (charting the "history of government regulation in America" through a study of men who spearheaded the regulation of monopolies, anticompetitive behavior by businesses, and securities markets). Recently, work by Jerry L. Mashaw and others has begun to push back on this traditional account, broadening the regulatory focus and tracing developments back much deeper into the nineteenth century. *See generally* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) (providing a history of administrative law in the early American republic). Historians of immigration law and policy have been documenting the reality of nineteenth-century administration for far longer. *See generally* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (tracing the late nineteenth- and early twentieth-century history of the bureaucracy of Chinese exclusion). But perhaps because only field specialists tend to read work by immigration historians, such work has not been appreciated as an important part of the project of understanding the development of American administrative law.

10. For work in a similar vein that focuses on a different marginalized discourse and people, see generally Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019).

constitutional law that does not apply outside the realm of immigration law. That doctrine has long been labeled the immigration "plenary power doctrine."[11] The so-called plenary power doctrine, therefore, is conventionally understood to be the doctrinal basis of immigration law's constitutional exceptionalism.

The conventional account of the immigration plenary power doctrine and its creation—reiterated over the last several decades in casebooks and court filings, in countless academic articles and judicial decisions—supplies the lens through which almost everyone views immigration law today. Nearly every academic paper about immigration law doctrine contains an obligatory nod to this standard account. My own early work is no exception. In the first paper on immigration law that I ever wrote, I embraced fully the idea that "the constitutional core of

11. For some seminal accounts that shaped the academic field of immigration law as it developed, see generally, for example, GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENT. 9 (1990); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) [hereinafter Motomura, *Phantom Norms*]; Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) [hereinafter Chin, *Segregation's Last Stronghold*]; and 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 (2002). For more recent work highlighting the continuing centrality of the immigration "plenary power doctrine," see generally, for example, Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2023); Eisha Jain, *Policing the Polity*, 131 YALE L.J. 1794 (2022); David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017); David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015); Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601 (2013); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008); and Peter J. Spiro, *Explaining the End of Plenary Power*, 16 GEO. IMMIGR. L.J. 339 (2002). The role of the plenary power doctrine has also long been central to the way immigration law is taught in law schools. *See, e.g.*, T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON, JULIET P. STUMPF & PRATHEEPAN GULASEKARAM, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 6-68 (9th ed. 2021); STEPHEN H. LEGOMSKY & DAVID B. THRONSON, IMMIGRATION AND REFUGEE LAW AND POLICY 107-324 (7th ed. 2018); BILL ONG HING, JENNIFER M. CHACÓN & KEVIN R. JOHNSON, IMMIGRATION LAW AND SOCIAL JUSTICE 48-56 (2d ed. 2021); Gabriel J. Chin, Chae Chan Ping *and* Fong Yue Ting*: The Origins of Plenary Power*, *in* IMMIGRATION STORIES 7, 7, 22 (David A. Martin & Peter H. Schuck eds., 2005) [hereinafter Chin, Chae Chan Ping *and* Fong Yue Ting].

immigration law" is "the doctrine of Congress's plenary power over immigration."[12]

My views have clearly changed. But before explaining why this foundational story about immigration law's exceptionalism is wrong, I want to be as clear as possible about what the conventional story is. What exactly does the plenary power doctrine do, on the standard account? And when was it created?[13]

A. Doctrinal Structure

On the standard account, the plenary power doctrine establishes a doctrine of judicial review for immigration cases that is starkly at odds with the canonical American approach set down in *Marbury v. Madison*.[14] Forty years ago, in a foundational paper that helped create and shape the field of immigration law as it developed in American law schools, Stephen H. Legomsky described the then-already-conventional understanding of the doctrine as follows:

> Immigration law is a constitutional oddity . . . . At the heart of that sentiment lies the "plenary power" doctrine, under which the Court has declined to review federal immigration statutes for compliance with substantive constitutional restraints. In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy.[15]

Writing in the same year, Peter H. Schuck concurred: "For almost a century," he wrote, "the Court has abjured any significant judicial role in the area of immigration policy."[16] In subsequent years, other seminal papers echoed the idea that the plenary power doctrine insulates federal immigration policy from meaningful constitutional review. The claim appears in Gerald L. Neuman's important

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12. Adam B. Cox, *Citizenship, Standing, and Immigration Law*, 92 CALIF. L. REV. 373, 377 (2004); *see also* Cox & Rodríguez, *The President and Immigration Law* (2009), *supra* note 5, at 458 ("The plenary power doctrine sharply limits the judiciary's power to police immigration regulation – a fact that has preoccupied immigration law scholars for decades.").

13. Because my goal is to provide an accurate and sympathetic account of the conventional wisdom, I will refer repeatedly in this discussion to the "immigration plenary power doctrine" without scare quotes or qualifiers – despite the fact that my central claim in the rest of this Article is that no such doctrine was invented by the Supreme Court in the late nineteenth century.

14. 5 U.S. (1 Cranch) 137 (1803).

15. Legomsky, *supra* note 11, at 255.

16. Schuck, *supra* note 11, at 14. In this piece, Peter H. Schuck used the term "classical immigration law" as his label for the plenary power doctrine.

1993 article on the "lost" nineteenth century of American immigration law;[17] in Louis Henkin's 1987 article on *A Century of* Chinese Exclusion *and Its Progeny*;[18] in Hiroshi Motomura's canonical 1990 article on the role of "phantom" constitutional norms in immigration law;[19] in Sarah H. Cleveland's pathbreaking 2002 paper on *Powers Inherent in Sovereignty*;[20] and in many more. Today, that basic definition of the immigration plenary power is written into every major immigration law casebook,[21] is agreed upon by pretty much everyone writing in the field, and crops up more widely in writings about American constitutional law.[22]

17. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1839 (1993) ("The Supreme Court long denied that there were any judicially enforceable constitutional limits on federal immigration policy.").

18. Henkin, *supra* note 11, at 854.

19. Motomura, *Phantom Norms*, *supra* note 11, at 551 ("Justice Field's opinion [in *Chae Chan Ping*] established that the federal government has the power to regulate immigration, and it further suggested that the political branches could exercise this power without being subject to judicial review."). Hiroshi Motomura elaborated further that "[t]he *Chinese Exclusion Case* and *Nishimura Ekiu* suggested that no constitutional objection by an alien outside the United States would be successful. All of the *Fong Yue Ting* opinions assumed that an alien in the United States who challenged substantive deportation rules would likewise be unsuccessful." *Id.* at 554.

20. Cleveland, *supra* note 11, at 131-44.

21. *See, e.g.*, ALEINIKOFF ET AL., *supra* note 11, at 30 ("Generations of law students and lawyers raised on the theory of judicial review articulated in *Marbury v. Madison* have been startled by these words from Justice Field in *Chae Chan Ping* . . . . This statement is one articulation of the plenary power doctrine, under which courts should severely curtail their scrutiny of constitutional challenges to a broad range of government immigration law decisions . . . ."); LEGOMSKY & THRONSON, *supra* note 11, at 107 ("Since *Marbury*, generations of American lawyers have come to regard constitutional review as given. Most are unaware that there is a vast but discrete body of law that the Court has explicitly treated as an exception to the principle of constitutional review."). This understanding of the immigration plenary power doctrine also appears in general constitutional law casebooks. *See, e.g.*, PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 975, 1158, 1174-75 (5th ed. 2006) (suggesting that the Chinese exclusion cases held that the federal government had the "power to exclude aliens from the United States, even on the basis of race").

22. *See, e.g.*, Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031, 1079 (2023) ("More generally, there is a 'plenary power' doctrine in immigration law that sharply limits constitutional challenges to the government's immigration decisions.").

It is easy to find this account in recent articles published in the *Yale Law Journal*,[23] the *Harvard Law Review*,[24] the *Stanford Law Review*,[25] and many more.

On the conventional account, the plenary power doctrine's key feature is that it insulates the federal government's immigration policies from meaningful constitutional review by federal courts.[26] To be sure, accounts sometimes differ over

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23. *See* Jain, *supra* note 11, at 1806.

24. *See* Blackhawk, *supra* note 11, at 19; Jennifer M. Chacón, *Legal Borderlands and Imperial Legacies: A Response to Maggie Blackhawk's* The Constitution of American Colonialism, 137 HARV. L. REV. F. 1, 9-10 (2023); Note, *Affirmative Duties in Immigration Detention*, 134 HARV. L. REV. 2486, 2487 (2021).

25. *See* Trillium Chang, *The Chinese Exclusion Cases and Policing in the Fourth Amendment-Free Zone*, 73 STAN. L. REV. ONLINE 209, 209 (2021) ("[T]he Plenary Power Doctrine, the foundation of U.S. immigration law . . . confers absolute federal power over immigration on Congress and the Executive branch. Over the past century, the Plenary Power Doctrine has elevated immigration law to an untouchable pedestal that is subject to little judicial restraint."); Jayashri Srikantiah & Shirin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 203-04 (2019) ("Under the plenary power doctrine announced in the Chinese Exclusion cases, federal courts were to grant broad deference to the political branches to regulate immigration. The plenary power doctrine has subsequently operated, for the most part, to insulate federal immigration statutes from developments in constitutional law for over a century.").

26. Occasionally the label "plenary power doctrine" is used to describe legal ideas that are analytically distinct from the idea of immunity from constitutional review that is my focus in this Article. *See, e.g.*, Rubenstein & Gulasekaram, *supra* note 11, at 594-96. Rather than focus on the distribution of power between courts and the political branches, these alternative accounts focus on the division of power between other institutions: between states and the federal government, or between Congress and the Executive. Sometimes, for example, scholars and courts attach the plenary power label to ideas about enumerated powers and federalism. One idea is the minimal one that the national government has constitutional authority to regulate immigration despite there being no immigration power enumerated in the Constitution; another is the idea that the national government's power to regulate immigration is constitutionally exclusive, such that the states lack any such power. *See id.* at 603. Other times, courts and commentators argue that the plenary power doctrine shapes the distribution of immigration power between Congress and the Executive—claiming, for example, that the President has inherent constitutional authority to exclude noncitizens even in the absence of action by Congress. *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."); Cox & Rodríguez, *The President and Immigration Law* (2009), *supra* note 5, at 460 (observing that the plenary power doctrine's typical "focus on the distribution of power between courts and the political branches, though important, has obscured a second separation-of-powers issue: the question of how immigration authority is distributed between the political branches themselves"). Often these ideas about federalism and executive power are said to derive from the same roots as the plenary power idea about judicial powerlessness. *See, e.g.*, *Knauff*, 338 U.S. at 542; Rubenstein & Gulasekaram, *supra* note 11, at 584-88. While my focus is on the dominant plenary power idea that immigration policies are insulated from judicial

how complete this insulation is. On some accounts, the claim is that the doctrine renders immigration policies and decisions fully immune from judicial review—entirely beyond judicial cognizance. In this form, the doctrine operates effectively as a counter-*Marbury*, denying federal courts the power to engage in any constitutional oversight of federal immigration decisions.[27] Other accounts suggest a slightly weaker form, in which the plenary power doctrine requires courts to treat constitutional claims in immigration cases as subject to uniquely deferential review.[28]

What justifies this anemic or nonexistent judicial review? Scholars have attributed to the Supreme Court a number of different, partially overlapping justifications for the creation of the plenary power doctrine. One common explanation builds on the Court's statement in the Chinese exclusion cases that the federal government's power over immigration is an "incident of sovereignty," rather than one enumerated in the Constitution.[29] If immigration power flows from an extraconstitutional source, the argument goes, it must not be subject to any constitutional constraints.[30] Another explanation is that the Supreme Court treated the constitutionality of immigration policy as a political question because those policies implicated foreign relations.[31]

In these explanations, the plenary power doctrine's relevance turns on the subject matter of the dispute: the doctrine immunizes immigration policies from judicial review by treating immigration law as an exceptional regulatory subject. When Congress acts in most regulatory arenas—when it makes environmental policy, or labor policy, or competition policy—it exercises its enumerated powers

oversight, my arguments raise questions about these other ideas associated with the plenary power doctrine. *See, e.g.*, *infra* note 345 and accompanying text (discussing the Supreme Court's suggestion that the plenary power idea entails the existence of inherent executive power to exclude noncitizens from the country).

27. *See, e.g.*, Stephen H. Legomsky, Immigration and the Judiciary: Law and Politics in Britain and America 213 (1987); Cox, *supra* note 12, at 382-84 (discussing the idea that the plenary power doctrine is thought of as "a close cousin of the political question doctrine").

28. *See, e.g.*, Legomsky, *supra* note 27, at 213 ("In the earlier years the Court disavowed in absolute terms any judicial power to review the constitutionality of immigration legislation. The more recent cases, in contrast, contain language that appears to leave the door slightly ajar."). As the quote from Stephen H. Legomsky's seminal piece highlights, these two flavors are often linked in conventional accounts, which argue that the plenary power initially insulated immigration policies entirely from constitutional scrutiny, but in more recent decades has permitted some, albeit extremely deferential, judicial review. *See, e.g.*, Schuck, *supra* note 11, at 54-73; Fiallo v. Bell, 430 U.S. 787, 792-93 nn.4-5 (1977).

29. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889).

30. The logic of this claim is perplexing because there is no reason given why the source of governmental authority should bear on the applicability of the Constitution's rights-protecting provisions.

31. *See, e.g.*, Legomsky, *supra* note 11, at 261; Henkin, *supra* note 11, at 882.

subject to ordinary constitutional constraints and judicial review. But when the political branches create immigration policies, those ordinary constitutional principles give way: either ordinary constitutional limitations do not apply to immigration policies at all, or whatever limits do exist will not be enforced by courts (or will be enforced only weakly).[32] The key analytic feature of this approach is that the federal government's policy is insulated from judicial scrutiny only if the Court decides that it should be classified as an "immigration" policy; nonimmigration policies do not, on these justifications, implicate the immigration plenary power doctrine.[33]

Scholars have also attributed to the Supreme Court other justifications for the plenary power doctrine—justifications that do not turn on the regulatory subject matter. One such argument is that the plenary power doctrine is a by-product of a Constitution whose reach is territorially limited.[34] If the Constitution has no extraterritorial effect, the argument goes, then it does not constrain the government's decision to exclude a noncitizen from entering the country. A related explanation is that plenary power doctrine reflects limitations on the constitutional rights held by noncitizens. On this account, citizens possess the full panoply of constitutional rights, but noncitizens either lack certain constitutional rights or lack the ability to assert their rights in court.[35]

This second set of justifications makes the operation of the plenary power doctrine turn on features of the claimants coming to court, rather than on the subject matter of the dispute. Immigration decisions are immune from judicial review because the immigrants who are the subjects of those decisions lack the constitutional rights or authority to sue needed to challenge the government's decisions—either because they are outside the United States, not citizens, or otherwise not members of the constitutional community.[36] The important point for

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32. *See* NEUMAN, *supra* note 11, at 14 n.b ("It is unclear whether this doctrine should be considered as denying that constitutional limitations on Congress exist at all, or only as impairing their judicial enforceability."); Cox, *supra* note 12, at 384-86 (discussing the idea that the plenary power doctrine reflects a lack of constitutional limitations on Congress's exercise of its immigration power).

33. Elsewhere I have argued that the way courts and scholars have approached this classification task in recent decades is analytically incoherent. *See* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 348-49 (2008).

34. *See, e.g.*, Legomsky, *supra* note 11, at 275.

35. *See id.* at 269-72 (connecting noncitizens' lesser rights to statements made by the Supreme Court about the lesser "allegiance" of noncitizens; to their position in the country as "guests"; or to the idea that noncitizens "should not expect to enjoy the same domestic rights as citizens, because aliens would then have two sets of rights and therefore be at an unfair advantage").

36. *See, e.g.*, Aleinikoff, *supra* note 11, at 9-20; Legomsky, *supra* note 11, at 258-60; *see also* Cox, *supra* note 12, at 386-88 (discussing the idea that the plenary power doctrine reflects situations

present purposes is not what we make of particular arguments about exactly which noncitizens lack which rights in which contexts. Instead, the key analytic point is that the government's decision is insulated from judicial review only if the claimant coming to court lacks rights or the authority to sue.

These two approaches have radically different implications for the scope of plenary power doctrine. For example, if the plenary power doctrine were only a doctrine about the rights-holding status of those who come to court to complain about government policies, then it would have no bearing when American citizens living in the United States claim that their constitutional rights are violated by the federal government's immigration policies.[37] Conversely, if the doctrine were only about the exceptionalism of immigration as a regulatory subject matter, then the scope of judicial review should turn solely on the type of regulation at stake—not on the legal status of the immigrants subject to the policy. Despite these different, potentially contradictory, implications of the two types of justifications, *both* are often said to be at the root of the immigration plenary power doctrine. In practice, modern courts often blur together these different types of justifications for the plenary power doctrine, creating a lack of analytical clarity about exactly how the doctrine is supposed to operate in certain situations.[38]

This analytic slipperiness has been the subject of some criticism over the years.[39] Ditto for the plenary power doctrine's purported justifications: they suffer from a variety of shortcomings, as commentators have been pointing out for decades.[40] I skate over those shortcomings here because my immediate aim is purely descriptive: to lay out, as clearly as possible, the justifications for the plenary power doctrine that modern scholars *attribute to the Supreme Court*. And my larger ambition is very different—not to criticize the justifications offered for a legal regime of judicial abdication created in the late 1890s by the Supreme Court, but instead to show that no such regime of judicial abdication was in fact created by the Court at that time.

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in which noncitizens lack judicially cognizable constitutional injuries); NEUMAN, *supra* note 11, at 53-63 (describing historical debates about the constitutional rights of aliens); *cf.* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 48-49 (describing categories of aliens according to the constitutional protections afforded to them).

37. *See* Cox, *supra* note 12, at 376-77, 412-17.

38. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 702-03 (2018); Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103, 138-40 (2020); Dep't of State v. Muñoz, 602 U.S. 899, 907-08 (2024); *see also* Cox, *supra* note 12, at 381-90 (discussing this confusion).

39. *See, e.g.*, Cox, *supra* note 12, at 381-90.

40. *See, e.g.*, NEUMAN, *supra* note 11, at 119-38; Legomsky, *supra* note 11, at 261-78.

B. Historical Roots

Everyone agrees that the immigration plenary power doctrine dates all the way back to federal immigration law's founding moment.[41] On the standard account, it was created by the Supreme Court in a series of foundational immigration cases decided in the late nineteenth century. These cases arose when Congress first began to restrict immigration into the United States, and the Supreme Court confronted challenges to those first federal immigration laws. In other words, the immigration plenary power has been with us since the beginning, baked into the doctrinal structure of the canonical cases on which the entire field of immigration law is based.

This conventional view is grounded mainly in a trilogy of cases. Handed down within a decade of each other, the cases *Chae Chan Ping v. United States*,[42] *Nishimura Ekiu v. United States*,[43] and *Fong Yue Ting v. United States*[44] have long stood front and center in nearly every narrative about the plenary power's invention.[45]

These cases arose from challenges to a string of restrictive immigration laws passed by Congress following the end of Reconstruction. *Chae Chan Ping* and *Fong Yue Ting* involved challenges to laws that openly excluded most Chinese immigrants from the United States.[46] *Nishimura Ekiu* concerned a federal statute that made excludable any immigrant who was "likely to become a public charge."[47] While this statute was formally race neutral, it traded on widely held, racially inflected views about the presumed poverty and criminality of

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41. *See, e.g.*, Cleveland, *supra* note 11, at 123-50; Jain, *supra* note 11, at 1796; Motomura, *Phantom Norms*, *supra* note 11, at 550-54; Legomsky, *supra* note 11, at 255-60; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 988 (1998).

42. 130 U.S. 581 (1889).

43. 142 U.S. 651 (1892).

44. 149 U.S. 698 (1893).

45. Stephen H. Legomsky, for example, described these three cases as "the principal building blocks" of the plenary power doctrine. Legomsky, *supra* note 11, at 289 n.174. And every source cited *supra* note 11 treats these three cases as core to the construction of the doctrine.

46. *Chae Chan Ping* involved a challenge to the Scott Act, ch. 1064, 25 Stat. 504 (1888). 130 U.S. at 582. *Fong Yue Ting* concerned a challenge to the Geary Act, ch. 60, 27 Stat. 25 (1892). 149 U.S. at 725-31. Both statutes served to enforce and extend the original Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58.

47. *Nishimura Ekiu*, 142 U.S. at 662. Specifically, the Immigration Act of 1891 provided: "[T]he following classes of aliens shall be excluded from admission into the United States . . . : All idiots, insane persons, paupers or persons likely to become a public charge . . . ." Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

immigrants.[48] Thus, it is no accident that this trilogy of cases featured plaintiffs who were Chinese and Japanese.

On the standard account, the Supreme Court used these cases (and a handful of others decided around the same time) to create, and then to reify and entrench, a doctrine that insulates federal immigration laws from meaningful judicial review. Three aspects of the cases are often emphasized by scholars (and by courts) as providing proof that the Court was creating an exceptional legal regime. First, accounts of plenary power doctrine often highlight the fact that the Supreme Court upheld race-based exclusion in *Chae Chan Ping* and race-based deportation in *Fong Yue Ting*.[49] Modern scholars have argued that this brute fact itself makes the cases feel exceptional, given how central the prohibition of de jure racial exclusion and segregation is to American constitutional law today.[50]

The second feature of these cases often highlighted by commentators is the fact that the Court in *Chae Chan Ping* described the power to exclude noncitizens as an "incident of sovereignty"—a statement the Court repeated in various

48. *See, e.g.*, Hidetaka Hirota, Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy 191 (2017).

49. *See, e.g.*, Blackhawk, *supra* note 11, at 19; Chin, *Segregation's Last Stronghold*, *supra* note 11, at 3-4, 6-7.

50. Gabriel J. Chin is a notable exception. Over two decades ago, he argued that this aspect of the Chinese exclusion cases did not make them exceptional at the time they were decided, given the Court's contemporaneous endorsement of de jure segregation in *Plessy v. Ferguson*. *See* Chin, *Segregation's Last Stronghold*, *supra* note 11, at 22-36. He went on to argue that many later Supreme Court decisions upholding immigration policies that discriminated on the basis of speech and sex also reflected the prevailing antidiscrimination norms of the eras in which they were decided. *See* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 Geo. Immigr. L.J. 257, 258-78 (2000) [hereinafter Chin, *Is There a Plenary Power Doctrine?*]. Leading scholars resisted even this modest effort to show that one aspect of immigration law exceptionalism was overblown. For several examples of this resistance, see generally Stephen H. Legomsky, *Immigration Exceptionalism: Commentary on* Is There a Plenary Power Doctrine?, 14 Geo. Immigr. L.J. 307 (2000); and Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to* Is There a Plenary Power Doctrine?, 14 Geo. Immigr. L.J. 289 (2000). Yet even as Chin questioned this one feature of immigration law that has been used to mark the field off as exceptional, he accepted the core aspects of immigration exceptionalism that are my focus in this Article: he wrote that the Supreme Court created a special set of constitutional rules for immigration cases in a series of late nineteenth-century cases, including *Chae Chan Ping* and *Fong Yue Ting*; that those cases "are the foundation for what has come to be known as the plenary power doctrine, the rule that 'the power of Congress over the admission of aliens to this country is absolute'"; that such policies "are simply beyond judicial review"; and that the plenary power doctrine has persisted largely unchanged to the present, "represent[ing] the last vestige of an antique period of American law." Chin, *Segregation's Last Stronghold*, *supra* note 11, at 5-6.

formulations in *Nishimura Ekiu* and *Fong Yue Ting*.[51] Commentators have read this language as indicating that federal immigration authority is an unenumerated constitutional power, which itself sounds somewhat exceptional.[52] After all, from John Marshall to John Roberts, the Supreme Court has regularly intoned that the Constitution establishes a federal government of enumerated powers—one possessing only those authorities explicitly conferred upon it by the Constitution itself.[53] But the standard account goes much further than merely concluding that immigration authority is exceptional because it is unenumerated. Rather, as I noted earlier, scholars have argued that, being unenumerated, the plenary power is extraconstitutional; and that being extraconstitutional, the exercise of immigration power is necessarily unconstrained by the Constitution.[54]

Third, the conventional story of the plenary power doctrine's creation places great weight on language in this trilogy of cases about the respective roles of the political branches and the judiciary. Several such passages are often cited in explanations of the plenary power doctrine's origins. In *Chae Chan Ping*, the Supreme Court wrote that Congress's determination that it was necessary to exclude Chinese immigrants "is conclusive upon the judiciary."[55] Later in the opinion, the Court stated that "[i]f there be any just ground of complaint on the part of China, it must be made to the political department of our government,

51. *Chae Chan Ping*, 130 U.S. at 609 ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution . . . cannot be granted away or restrained on behalf of any one."); *Fong Yue Ting*, 149 U.S. at 737; *Nishimura Ekiu*, 142 U.S. at 659.

52. *See, e.g.*, Cleveland, *supra* note 11, at 5; Legomsky, *supra* note 11, at 273 (noting that the idea relies "on the existence of an inherent, nonenumerated, Congressional power").

53. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012); *see also* The Federalist Nos. 41-45 (James Madison) (discussing the limited, enumerated powers that the proposed Constitution would confer on the national government).

54. *See* Cleveland, *supra* note 11, at 158; Legomsky, *supra* note 11, at 273; Motomura, *Phantom Norms*, *supra* note 11, at 555. My focus in this project is not principally on this precise language about governmental powers that are "incidents of sovereignty." That said, in a separate project, I am exploring the way in which the conventional interpretation of this language misunderstands the nineteenth-century relationship between constitutional law, international law, and general law—a mistake that has likely contributed to scholars misunderstanding both the significance of this specific language as well as the more general role of international law in early American immigration cases.

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

which is alone competent to act upon the subject."[56] In *Nishimura Ekiu*, the Court emphasized that the power to exclude noncitizens "belongs to the political department of the government"; that "[t]he supervision of the admission of aliens into the United States may be entrusted by Congress" to executive-branch officials; that Congress could make those officials the "sole and exclusive judge" of exclusion decisions; and thus that federal courts could not "reexamine or controvert the sufficiency of the evidence on which [those officials] acted."[57] In *Fong Yue Ting*, the Court extended that idea from exclusion to deportation, concluding that "[t]he power of Congress . . . to expel, like the power to exclude aliens . . . may be exercised entirely through executive officers."[58] On the standard account, these passages all point to the same conclusion: the federal government's immigration policies and decisions are uniquely insulated from judicial review and constitutional challenge.[59]

II. THE REAL CONSTITUTIONAL STORY OF IMMIGRATION LAW'S FOUNDING

The conventional story of the plenary power doctrine's creation is as wrong as it is pervasive. Immigration law's foundational cases created no such doctrine of immigration exceptionalism. Far from being exceptional, they were litigated and resolved in accordance with then-orthodox views about due process, Article III, and the separation of powers. They reflected ordinary late nineteenth-century public law.

A. The Nineteenth-Century Model

To understand American immigration law's foundational cases, one must first inhabit the world of nineteenth-century constitutional law and theory. Rather than diving straight into my account of those immigration cases, therefore,

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56. *Id.* at 609. Many have read this language as alluding to or invoking what today is called the political-question doctrine. *See, e.g.*, T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 164-65 (2002); NEUMAN, *supra* note 11, at 134; Cox, *supra* note 12, at 383.

57. Nishimura Ekiu v. United States, 142 U.S. 651, 659-60 (1892).

58. Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893).

59. *See, e.g.*, Cleveland, *supra* note 11, at 131-32; Schuck, *supra* note 11, at 14; Martin, *supra* note 11, at 39; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1634 (1992) [hereinafter Motomura, *Curious Evolution*]; Motomura, *Phantom Norms*, *supra* note 11, at 552-53 (reading *Chae Chan Ping*'s language as meaning "that the political branches could regulate immigration, immune from judicial review unless provided for by Congress").

I start with a quick sketch of due process and the separation of powers in late nineteenth-century constitutional law.

1. *Due Process as Separation of Powers*

In nineteenth-century constitutional thinking, due process and the separation of powers were tightly linked.[60] Due process was understood to be, in essence, a separation-of-powers requirement—separating judicial functions that could be performed only by a court from those functions that could properly be undertaken by the legislature or by executive-branch officials. For lawyers and judges during this period, the question of when the federal government's actions required "due process" was, therefore, the same as the question of when adjudication was required to take place before an Article III tribunal.[61] And the key to answering both of those questions—and unlocking the doctrinal structure of due process, the separation of powers, and administrative law during this period—was a formalistic division of the sorts of interests that were affected by government action.[62]

Government decisions and actions affect all sorts of interests held by individuals. But under the orthodox approach during this earlier period, the *type of*

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60. *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1675-81 (2012); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 272 (1985) ("[C]onsiderable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law.").

61. *See, e.g.*, Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1415 (2010) ("The question of whether the private party had received due process and the question of whether the decision sought to be reviewed could be decided by administrative adjudication consistent with Article III were essentially the same question."); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565-74 (2007).

62. Over the past few decades, a number of scholars have recovered and written extensively about the linkages between due process, "private rights," and the separation of powers in nineteenth-century American constitutional law. *See, e.g.*, Gregory Ablavsky, *Getting Public Rights Wrong: The Lost History of the Private Land Claims*, 74 STAN. L. REV. 277, 289-308 (2022); Chapman & McConnell, *supra* note 60, at 1726-40; John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 304-14 (2016) [hereinafter Harrison, *Legislative Power and Judicial Power*]; John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 207-09 (2019) [hereinafter Harrison, *Public Rights, Private Privileges*]; Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 946-53 (2011); Nelson, *supra* note 61, at 565-74; Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1298-1302 (2021); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 197-200 (1991).

interest involved dictated how the government could proceed. The government could not interfere with some interests, which were often called "private rights" or "vested rights," without judicial involvement.[63] But government officials could conclusively resolve matters deemed not to involve private rights—disputes often described as involving "public rights" or "privileges"—without any judicial involvement.[64]

This basic idea—that some interests come with special protections while others do not—is a familiar one in modern constitutional law. After all, the Due Process Clause requires "due process of law" only for deprivations of "life, liberty, or property."[65] Yet while nineteenth-century lawyers and judges often understood the category of "private rights" to cover basically those interests of bodily integrity and property that are listed in the Fifth Amendment's Due Process Clause,[66] they did not think of the Due Process Clause as merely mandating fair procedures, as we tend to today. Instead, they understood "due process of law" to require a trial before an Article III tribunal—and thus saw due process as

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63. *See, e.g.*, Nelson, *supra* note 61, at 566-74. For the sake of expositional clarity, I describe the category throughout this Article as the category of "private rights" that have "vested" in a person. As others have noted, however, courts were not always so consistent. *See, e.g.*, Ablavsky, *supra* note 62, at 315-22 (discussing the relationship between "vested" and "perfected" property rights in nineteenth-century constitutional law).

64. *See* William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1541 (2020). In recent years, the Supreme Court itself has (re)elevated the legal significance of the distinction between public rights and private rights in cases concerning the permissibility of adjudication outside of Article III. *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2132-34 (2024); Oil States Energy Servs. v. Greene's Energy Grp., 584 U.S. 325, 334-35 (2018); Stern v. Marshall, 564 U.S. 462, 485 (2011). In these cases, the Court has appeared to draw on recent historical scholarship about public rights—particularly the work of John Harrison, Caleb Nelson, and Ann Woolhandler at the University of Virginia School of Law, who have contributed extensively to the excavation and elaboration of ideas about the relationship between private rights and Article III adjudication. In one recent instance, this apparent reliance prompted Caleb Nelson to revisit and revise his prior views about the history. *See* Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1431-33, 1525-32 (2021) (revising his earlier prior account of franchises in the wake of the Supreme Court's heavy reliance on that account in *Oil States Energy Services*, and concluding that the Supreme Court reached the wrong judgment in that case).

65. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

66. *See* Nelson, *supra* note 61, at 566-68; Chapman & McConnell, *supra* note 60, at 1679; Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL'Y 27, 30 (2018). To be sure, the distinction between private rights and other interests predated the Constitution. *See* Chapman & McConnell, *supra* note 60, at 1682 (tracing the origins of this way of thinking back to the Magna Carta).

tightly tethered to the idea of separating out those functions that must be performed by the judiciary.[67]

Thus, the distinction between private *rights* and other (lesser) private *interests* is key to understanding the nineteenth-century link between due process and the separation of powers.[68] If the government's action or decision would deprive a person of their vested right to life, liberty, or property, then a trial before an Article III tribunal was required. But if the government, exercising some "public right," merely denied the person a "privilege" or withdrew a revocable "license," then no judicial involvement was required.

Two aspects of this approach made it radically different from our modern approaches to these constitutional questions. First, this older framework made separation-of-powers questions turn crucially on the nature of the interests being affected by government action.[69] If an executive-branch official purported to

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67. While this idea was eventually understood to be embodied in the Federal Constitution's Due Process Clauses, the private-rights framework was treated at the time as a generally applicable approach that constrained state governments as well as the national government. *See* Harrison, *Public Rights, Private Privileges*, *supra* note 62, at 149.

68. To be more precise, due process was seen as connected to a Montesquieuian conception of separated powers that emphasizes the *separation of functions*—judicial, executive, and legislative—into three distinct institutions. *See* Adam B. Cox & Emma Kaufman, *The Adjudicative State*, 132 YALE L.J. 1769, 1774 (2023). The idea that separation of powers is concerned with separating functions stands in contrast to the idea that it is all about *mixing* functions in order to achieve checks and balances, or a diffusion of power, or something similar. Both conceptions feature prominently in American constitutional theory and practice, both at the Founding and today. Here, however, my emphasis is on the role separation-of-functions thinking played in nineteenth-century approaches to due process.

69. Importantly, access to judicial process before an Article III tribunal generally did *not* turn on whether the executive-branch official was exercising discretion, on the one hand, or complying with a legal duty, on the other. When executive-branch officials distributed public lands, doled out veterans' benefits, or imposed tariffs on arriving imports, they were often constrained by statutory rules laid down by Congress and obliged to follow those rules. If a Treasury Department official wrongly refused to award veterans' benefits to an applicant who satisfied Congress's statutory criteria, we would say today that the official violated a statutory duty. But under the nineteenth-century framework, the fact that the official violated a legal duty did not give rise to a right to demand the involvement of an Article III court. Because veterans' benefits were understood to be a "privilege," the applicant could not complain that he had been "deprived of property . . . without due process of law." *See* Richard H. Fallon, Jr., *On Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919, 981 (1988) (discussing the assignment by early Congresses of veterans' benefits issues to Treasury Department officials). Thus, the type of interest at stake, not our modern understanding of the distinction between law and executive discretion, determined the permissibility of adjudication outside of Article III. In these contexts, the Court often did talk about the "judgment" and "discretion" entrusted to executive-branch officials—but the Court meant judgment and discretion to decide on the proper construction of the law, free from oversight by Article III courts. *Cf.* Decatur v. Paulding, 39 U.S. (14 Pet.) 497, 516 (1840) (refusing to award

take a person's private right without the involvement of an Article III court, that action would constitute the improper exercise of Article III's "judicial power" by an Article II official. The framework similarly imposed constraints on what Congress could accomplish through legislation: Congress could no more pass a bill taking property from *A* and giving it to *B* than could an executive-branch official take *A*'s property.[70] Congress's attempt to do so would constitute an improper exercise of Article III power by Article I actors.

Second, the nineteenth-century approach made due process largely dichotomous—basically an all-or-nothing proposition. The federal government's actions would require either a full-blown common-law trial (or its equivalent) before an Article III court, or no constitutionally mandated process whatsoever. There was no middle ground: no sliding scale of procedural requirements that is so familiar in modern due process doctrine, and no possibility that constitutionally required due process could be supplied by nonjudicial officials.[71]

2. *Which Private Interests Count as Private Rights?*

Of course, within this framework, everything turned on whether a private *interest* counted as a private *right*. Classifying some interests was relatively easy. There was widespread agreement that a person's interest in real property counted as a private right. So did a person's interest in being free from physical restraint by the government.

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mandamus against the Secretary of the Navy, sought by a widow who argued that she had wrongly been denied part of the pension she was owed under congressional statutes, on the ground that the proper interpretation of those statutes was within the "judgment and discretion" of the Secretary and hence not subject to reconsideration by the Court in the mandamus proceeding); Woolhandler, *supra* note 62, at 212, 218 (noting that matters "within the discretion of the agency" included the interpretation of relevant statutes).

70. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798) (opinion of Chase, J.); Harrison, *Legislative Power and Judicial Power*, *supra* note 62, at 304. These limits on Congress are closely linked to other limits written explicitly into the Constitution: the prohibitions in Article I, Section 10 on ex post facto laws and bills of attainder. These provisions were similarly concerned with preventing Congress from interfering with vested rights (in the case of the prohibition on ex post facto laws) and from engaging in an essentially judicial function (by adjudicating guilt and dispensing punishment via bills of attainder). *See* Harrison, *Legislative Power and Judicial Power*, *supra* note 62, at 300; Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1026-27 (2006).

71. *See, e.g.*, Mashaw, *supra* note 61, at 1412-15 (noting that this dichotomous understanding of due process was reflected not only in nineteenth-century case law but also in Bruce Wyman's 1903 book *The Principles of the Administrative Law Governing the Relations of Public Officers*, which Mashaw describes as "the first attempt to systematize American administrative law at the national level"); *id.* at 1412 (emphasizing that the "internal" law of administrative adjudication that developed during the nineteenth century arose during a period when "[j]udicial requirements of constitutional due process were nonexistent").

Conversely, there was also some agreement—at least at the level of labels—about what kinds of interests did *not* count as private rights. One important set of such interests were private interests that arose in the context of the government's exercise of what lawyers at the time called "public rights." Public rights, in the parlance of nineteenth-century constitutional law, were "interests of the government or the public at large which were administered or exercised by the government."[72] They were often ownership-type interests, such as the government's ownership of public lands, or its control over treasury funds or government employment. When the government exercised public rights, its actions often affected private interests. The government might give away a piece of public land to a homesteader. Or pay a pension from treasury funds to a veteran of the Civil War.[73] Or grant permission for a person to bring into the United States goods coming from abroad. But a person's interest—in receiving title to a piece of public land, or getting their veteran's pension, or importing their goods into the United States—was considered a "privilege" rather than a "private right." Because these interests were classified as privileges, disputes about their distribution could constitutionally be resolved without any judicial involvement.

Consider the customs example to make this idea concrete. Treasury officials would frequently levy tariffs on arriving imports under statutes authorizing those officials to determine the proper tariff for particular goods and then enforce their determinations. In *Hilton v. Merritt*, importers unhappy with an official's tariff decision filed a lawsuit to recover what they viewed as excessive duties that they had been forced to pay.[74] What they wanted was for an Article III court to adjudicate the question whether they had been overcharged.[75] But the Supreme Court rejected this request. The Court upheld the statutory scheme, under which "the decision of the customs officers 'is final and conclusive,'" because only the privilege of importing goods to the United States was at stake.[76] Since bringing in the overseas goods was a privilege, it was constitutional for executive-branch officials in the Treasury Department to determine conclusively the

72. Harrison, *Public Rights, Private Privileges*, *supra* note 62, at 160 (2019); *see also* Nelson, *supra* note 61, at 568-71 (describing the authority of the political branches to exercise or abrogate public rights).

73. *Cf. Decatur*, 39 U.S. (14 Pet.) at 516 (holding that the Secretary of Navy's decision about whether a widow was entitled to a pension under a statute was an executive matter with which the courts would not interfere).

74. 110 U.S. 97, 98-100 (1884).

75. *Id.* at 101 ("The question presented . . . is whether the valuation of merchandise made by the custom officers . . . is . . . conclusive on the importer, or is such valuation reviewable in an action at law brought by the importer to recover back duties paid under protest.").

76. *Id.* at 105, 107 (quoting Belcher v. Linn, 65 U.S. (24 How.) 508, 525 (1861)).

conditions under which the goods would be permitted to land, without Article III involvement.[77]

To be sure, even at the level of labels there was sometimes confusion and disagreement. "Licenses" given out by the government were one example. Sometimes government licenses were considered privileges rather than private rights. So if the government granted a monopoly to a company, or a license to a person to operate a business, the decision to revoke that license often would not require any judicial process.[78] In fact, the term "license" sometimes appears to have been used literally as a synonym for "privilege," such that to describe some grant from the government as a license was itself to conclude that the interest affected by the grant was not a private right. But this was not always the case: not all licenses were considered mere privileges once awarded. A law license, for example, was treated by the Court as a vested right.[79] And in other cases, the Court struggled with the question whether a particular licensing regime should be seen as doling out mere privileges or instead as creating private rights protected from government interference except through judicial action.[80] Contemporary scholars looking back on this period have also struggled to make sense of these rules. For example, after initially suggesting that many nineteenth-century franchises were privileges that conferred no private rights when awarded, Caleb Nelson recently revised his view, writing that he now believes franchises and patents in many cases counted as vested rights once awarded.[81]

Unsurprisingly, the question whether a particular interest counted as a private right or a privilege was frequently in dispute throughout the nineteenth century. And it is far from clear that courts had a coherent approach to answering

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77. *Id.* at 107 (rejecting as already foreclosed, by Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), and Springer v. United States, 102 U.S. 586 (1881), the claim that it "depriv[ed] the importer of his property without due process of law" to deny him "the right to bring an action at law to recover duties paid under an alleged excessive valuation" by the customs officials).

78. *See* Harrison, *Public Rights, Private Privileges*, *supra* note 62, at 172 ("[W]ith franchises, like a bridge monopoly given to a private person in the public interest, the government might well have a component of ownership, like an ongoing power to revoke the franchise.").

79. *See Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 512-13 (1874) (stating that the power to disbar an attorney should be exercised only following a judicial proceeding providing notice and an opportunity for a hearing, a requirement that "should be equally followed when proceedings are taken to deprive him of his right to practice his profession, as when they are taken to reach his real or personal property").

80. *See* Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein, Adrian Vermeule & Michael Herz, Administrative Law and Regulatory Policy: Problems, Text, and Cases 644-47 (7th ed. 2011) (discussing confusion in the doctrine).

81. *Compare* Nelson, *supra* note 61, at 566-67 (distinguishing "franchises" from "core" private rights), *with* Nelson, *supra* note 64, at 1432, 1438 (clarifying that, in the nineteenth century, private rights were understood to vest in franchisees).

this question. Tradition, along with the forms of action that shaped civil procedure in the nineteenth century, clearly influenced the category of interests that counted as vested rights. And as many have documented, eighteenth- and nineteenth-century lawyers and judges often drew on Lockean theory in their efforts to define private rights.[82] But as government grew and began to regulate in new and varied ways, these sources provided ever less guidance. Moreover, in the post-Civil War period, the question of what interests counted as vested rights began to be connected to debates over the substantive authority of government to interfere at all with a particular private interest—that is, with what today we call "substantive due process."[83] These developments put pressure on the nineteenth-century framework, ultimately leading the Court to abandon the distinction—severing the tight connection between due process and separation of powers, transforming American administrative law, and eventually prompting the Court itself to declare the distinction between privileges and vested rights to be dead letter.[84] I will describe those details later.[85] For now, however, the important thing to note is that courts did not have anything like an agreed-upon approach to deciding the answer to the all-important question of what interests should be classified as private rights.

3. When Does a Private Right "Vest"?

Deciding which interests counted as private rights was not the only challenge for the nineteenth-century framework. To apply the framework, courts also had to know whether the person complaining about the government's actions *already possessed* the private right. This is because judicial involvement was required only when the government wanted to *deprive* a person of a private right already held, not when the government sought to dole out (or perhaps we should say "create") private rights.[86]

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82. *See* Chapman & McConnell, *supra* note 60, at 1729-39; Harrison, *Public Rights, Private Privileges*, *supra* note 62, at 160-64; Nelson, *supra* note 61, at 562, 566-67.

83. *See, e.g.*, Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. Chi. L. Rev. 815, 848-52 (2020); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 Va. L. Rev. 493, 506-24 (1997).

84. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harv. L. Rev. 1439, 1439-52 (1968). Despite its purported demise, of course, some of the ideas animating the rights/privileges distinction continue to live on in modern due process doctrine. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 599 (1972).

85. *See infra* Sections III.A-B.

86. The treatment of real property highlights this distinction nicely. Throughout the nineteenth century, both states and the federal government disposed of enormous amounts of land

That made crucial the question of when a private right "vested" in a person—that is, when the right truly became theirs in the eyes of the law. For some interests—like the right to be free from the physical restraint of government incarceration—the question of vesting was not at issue because most everyone agreed that all persons were endowed with a liberty interest in being free from government restraint.[87] But for many interests—like the property interests at stake in public-land-disposition disputes—one needs to decide on the moment when a person's property right "vests."

There are a wide range of options available. One could conclude that the right "vests" whenever some source of positive law, like a congressional statute, says that the person is legally entitled to the property.[88] At the other end of the spectrum, one could adopt a purely proceduralist notion of vesting and conclude that, say, the right vests when a person is given a particular piece of paper that the government deems to represent title to the property. Choosing among these options is inevitably somewhat arbitrary—a fact that Caleb Nelson has noted, and that Gregory Ablavsky documents thoroughly in recent work on land disputes in the American West.[89] But regardless of whether there is a nonarbitrary way to answer the vesting question, the important point is that the answer to

through land grants. Frequently, Congress would empower executive-branch officials to dispose of federal land in accordance with statutory requirements. When homesteaders complained about the refusal of those executive officials to give them titles they were owed under the statute, the Supreme Court held that the homesteaders had no claim cognizable under the Due Process Clause, which meant no right to an Article III resolution of their dispute with the government. *See* Nelson, *supra* note 61, at 577-80. While legal ownership of real property was clearly a private right, the homesteader's right to a particular piece of property did not vest until the homesteader was awarded patent or title to that land by the relevant officials. Therefore, they had no right to Article III resolution of their claim to have been wrongly not given the title to the property. In contrast, once the homesteader's property right was vested, the homesteader's property could be taken from them only through judicial process before an Article III judge. Land-office decisions by executive-branch officials could not strip them of this vested right. *See id.* at 578-79.

87. That private right's existence did not depend on some grant given by nonconstitutional positive law. Moreover, that liberty interest is a nonrivalrous good: its exercise by one person does not affect another person's ability to exercise the same liberty interest, in sharp contrast to a property right to a piece of real estate.

88. The idea that statutory entitlements give rise to property interests protected by the Due Process Clause is, roughly, the position of modern procedural due process doctrine. *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 575-77 (1972); *Perry*, 408 U.S. at 593.

89. *See* Ablavsky, *supra* note 62, at 323; Nelson, *supra* note 61, at 579; *see also* Woolhandler, *supra* note 62, at 234-37 (emphasizing that the Court sometimes adopted a generous approach to vesting and at other times did not, variation that Woolhandler sees as having less to do with some true nature of the interests involved and more to do with various instrumental concerns of the Court, such as the interest in promoting commerce).

this question was crucial to determining whether an Article III court needed to be involved.[90]

4. The Conclusiveness of Executive-Branch Adjudication of Privileges

It is worth emphasizing one final point before turning to immigration law's founding moment. Note that the framework laid out above was used to identify situations where judicial process was *constitutionally required*. It was required when the government wanted to take from a person a vested private right. In practice, this meant that non-Article III actors, like executive-branch officials in the land office or veterans' benefits office, were often empowered to engage in adjudication outside of Article III when privileges (rather than vested private rights) were at stake. They applied the legal rules in Congress's statutes to the facts of a particular applicant's circumstances, resolving disputes over whether a person was entitled to the thing that person sought from the federal government. The fact that executive-branch officials often engaged in what we classically think of as adjudication might seem to run afoul of the separation-of-functions formalisms of this era. But as William Baude and others have explained, formalists could avoid this conclusion by invoking another formalism: the idea that not all "adjudication" need be considered an exercise of "judicial power" reserved to Article III judges.[91] The function that the Constitution separated and vested in Article III judges was the exercise of "judicial power"—not the function of "adjudication" more broadly.

That said, the fact that adjudication before Article III judges was not constitutionally required in such circumstances did not mean that it was prohibited. The Supreme Court made that clear in its earliest decision interpreting the Due

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90. This highlights an unavoidable dilemma associated with *any* legal regime in which the dispute-resolution procedures to which a person is entitled turn on the answer to some prior question—such as whether the person already owns a piece of property, or whether the person has a particular legal status (as a "citizen," for example). If there is a dispute over the answer to that prior question, what procedures govern the resolution of that dispute? For example, if citizens get elaborate procedures before being expelled from the country but noncitizens do not, what happens if a person says they are a citizen while the government says they are not? Do they get the more elaborate procedures to litigate the question of citizenship? Or not? The Supreme Court struggled with this very question in the early twentieth century. *Compare* Ng Fung Ho v. White, 259 U.S. 276, 285 (1922) (requiring judicial hearings on residents' claims to citizenship prior to their deportation), *with* United States v. Ju Toy, 198 U.S. 253, 263 (1905) (deeming such hearings unnecessary). But the key for us is not the Court's resolution of this particular example: it is seeing that this is a completely generalizable problem that appears whenever the procedures available to a person depend on the answer to some prior factual or legal question.

91. *See* Baude, *supra* note 64, at 1514-19; James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 666-67 (2004).

Process Clause, *Murray's Lessee v. Hoboken Land & Improvement Co.*[92] When privileges rather than vested rights were at stake, the Court wrote, Congress had a choice: Congress could choose to empower Article III courts to resolve disputes concerning the distribution of privileges like public lands or veterans' benefits; or, instead, Congress could leave it to executive-branch officials to determine with finality who would receive government privileges.[93] In perhaps its most widely quoted passage synthesizing this nineteenth-century approach to adjudication outside of Article III, the Court wrote:

> [T]here are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[94]

The matters "involving public rights" of which the Court spoke were precisely those situations—like officials distributing treasury funds, or disposing of public lands, or permitting foreign goods to land at a port—in which access to a privilege was at stake. In such situations, Congress could choose to involve Article III courts but was not constitutionally compelled to do so.

Furthermore, the Court emphasized in *Murray's Lessee,* if Congress did decide to leave the final disposition of such disputes to executive-branch officials, the decisions of those officials were conclusive on the judiciary.[95] For this proposition, the Court cited several cases, including an earlier land-office case in which an unhappy homesteader had tried to attack, in federal court, the adverse judgment of the commissioner of the federal land office. In that case, *Foley v. Harrison*, the Supreme Court rejected the attack on the ground that Congress's statutory scheme had conferred on the commissioner the authority to decide "all cases of suspended entries, now existing in said land offices."[96] What the homesteader sought, the Court said in *Foley*, was the "equivalent to calling on the court to exercise an appellate jurisdiction over [the commissioner's] judgment on the merits of the entry."[97] Appellate-style judicial review was antithetical to this

92. 59 U.S. (18 How.) 272, 280-85 (1856).

93. *Id.* at 284.

94. *Id.*

95. *Id.* ("[I]t has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title." (citing Foley v. Harrison, 56 U.S. (15 How.) 433, 445 (1854); Burgess v. Gray, 57 U.S. (16 How.) 48, 63-64 (1854))).

96. *Foley*, 56 U.S. (15 How.) at 448.

97. *Id.* at 445.

separation-of-functions framework. Instead, the decisions of executive-branch officials in such matters were, in the Court's words, "conclusive" upon the federal judiciary.[98]

B. The Birth of Immigration Law Within the Nineteenth-Century Model

Now that we have a picture of the standard late nineteenth-century approach to due process and the separation of powers, we can see that the foundational immigration cases decided during this period were all fought *within* this standard framework. Far from treating immigration cases as exceptional, litigants argued and the Supreme Court reasoned from within the then-conventional approach to dividing executive, judicial, and legislative tasks in the early administrative state. In case after case, the crucial question was whether the interests at stake would be deemed by the Court to be privileges or vested private rights.

1. Private Rights and Legislative Authority

Start with *Chae Chan Ping v. United States*.[99] I begin here because, as I noted earlier, *Chae Chan Ping* is widely described as the font of immigration law's exceptionalism. Scholars typically treat the case as a watershed moment in American history—a moment when the Supreme Court embraced the federal government's power to exclude foreigners and concluded that immigration policies were effectively immune from judicial review.[100]

But this common understanding of the famous case is mistaken. The case had little or nothing to do with whether the Constitution contemplated open borders. Chae Chan Ping's lawyers agreed that the federal government had the authority to restrict immigration however it saw fit, or even to close the nation's borders entirely: they wrote that "[t]he inherent right of a sovereign power to prohibit, even in time of peace, the entry into its territories of the subjects of a foreign state will not be denied."[101] Moreover, the Supreme Court did not hold, in the course of rejecting Chae Chan Ping's claims, that federal immigration law

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98. *Id.*

99. 130 U.S. 581 (1889).

100. *See supra* notes 42-45 and accompanying text.

101. Brief for Appellant (Carter) at 3, *Chae Chan Ping*, 130 U.S. 581 (No. 1446). Nor did they contend that Congress had violated the Constitution by excluding Chinese immigrants on the basis of their race. Such a claim would have been a nonstarter in a world where the Fourteenth Amendment's equality guarantees did not apply to the federal government, and where the Court would soon conclude, in *Plessy v. Ferguson*, that equal protection was perfectly consistent with state-enforced racial apartheid in America. 163 U.S. 537, 550-51 (1896).

was immune from judicial review or that arriving immigrants had no constitutional rights—the twin ideas of subject-matter exceptionalism and noncitizen rightlessness commonly articulated in modern descriptions of the immigration plenary power doctrine.

Rather than being a vehicle for creating an exceptional doctrinal regime, *Chae Chan Ping* was litigated within the conventional separation-of-powers framework laid out above. Chae Chan Ping's core claim was that Congress had impermissibly stripped him of a vested right. And he lost because the Court disagreed that the interest he held should be classified as a vested right.[102]

What exactly was the interest that Congress had taken from Chae Chan Ping? Chae Chan Ping's case arose when he was prohibited from landing in San Francisco's harbor upon returning from a trip abroad.[103] At the time he embarked on his trip, a federal statute guaranteed his right to reenter the United States.[104] Under the statute, that promise was documented by a certificate of reentry—which Chae Chan Ping had applied for and received, prior to leaving on his trip.[105] But while Chae Chan Ping was steaming back across the Pacific, Congress passed the Scott Act, barring the return of resident Chinese immigrants who were traveling abroad and voiding all outstanding certificates.[106]

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102. Indeed, *Chae Chan Ping* was not even the first immigration case to involve claims of vested rights. Five years earlier, in *Chew Heong v. United States*, 112 U.S. 536 (1884), Chew Heong made an argument quite like Chae Chan Ping's. He contended that he had acquired a vested right to remain in the United States when he entered the country under the Burlingame Treaty, and that Congress no more had the power to legislate away that right than it had the power to "take the property of A, and transfer it to B." Brief of Argument (Plaintiff in Error) at 40-42, *Chew Heong*, 112 U.S. 536 (No. 1088). The lawyer who made this argument on Chew Heong's behalf, Thomas Riordan, also represented Chae Chan Ping. And that same year, in a set of consolidated cases, *see* Edye v. Robertson (*The Head Money Cases*), 112 U.S. 580 (1884), one of the parties argued that "treaties confer 'vested rights' on individuals, which cannot be divested by a subsequent municipal law," Brief for Plaintiffs in Error at 33, *The Head Money Cases*, 112 U.S. 580 (No. 772). Thus, while the conventional wisdom paints *Chae Chan Ping* as the beginning of an entirely new doctrinal approach—and consequently as a sharp break from the past—the case was in reality closely linked both to the immigration cases that came before it and to the larger public-law framework within which far more than just immigration cases were litigated at the time.

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

104. *See* Act of July 5, 1884, ch. 220, §§ 3, 4, 23 Stat. 115, 115-16.

105. *See id.* § 4, 23 Stat. at 115-16; *Chae Chan Ping*, 130 U.S. at 582.

106. *See* Scott Act, ch. 1064, §§ 1, 2, 25 Stat. 504, 504 (1888) (providing that, from the date of the Act, no Chinese laborer in the United States who left would be permitted to return, regardless of whether they possessed a reentry certificate). Chae Chan Ping arrived in the San Francisco harbor a week after the statute was signed into law by President Cleveland. For a discussion of developments leading up to the passage of the Scott Act, including Cleveland's failed diplomatic attempt to negotiate treaty concessions with China, see Cox & Rodríguez, The President and Immigration Law (2020), *supra* note 5, at 27-30.

The outcome of Chae Chan Ping's case turned on how the Court classified the interest that Congress had purported to void. Chae Chan Ping argued that the certificate of reentry, and the statutory promise it embodied, vested in him a private right to reenter the country following his trip.[107] Within the then-orthodox approach to due process and the separation of powers, this characterization would be dispositive: if Chae Chan Ping possessed a vested right, Congress could not strip him of that right by passing legislation any more than Congress could strip a person of title to real property. Only through judicial process could his vested right be taken.[108]

In this sense, Chae Chan Ping's claim that he held a vested right of reentry closely paralleled another legal claim he had raised: that the statute prohibiting his reentry exceeded Congress's authority because its restrictions on the travel rights of Chinese immigrants living in the United States violated America's treaty

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107. *See* Argument on Behalf of Appellant (Brown and Riordan) at 2-6, *Chae Chan Ping*, 130 U.S. 581 (No. 1446); Brief for Appellant (Hoadley and Carter) at 18-20, 37-40, *Chae Chan Ping*, 130 U.S. 581 (No. 1446); Brief for Appellant (Carter), *supra* note 101, at 3-4 ("Whatever power Congress may have to prohibit the immigration of other foreign citizens or subjects, it had none to prohibit the *return* to this country of the appellant. He had a *vested right* to return, which could not be taken from him by the exercise of mere *legislative* power."). The Supreme Court's summary of Chae Chan Ping's case in a subsequent case confirms that the Court itself understood the core legal question in Chae Chan Ping's case to be one of vested rights. In *Fong Yue Ting*, the Court described Chae Chan Ping's legal claim as follows: "It was strongly contended in his behalf, that . . . he . . . had a vested right to return to the United States, which could not be taken from him by any exercise of mere legislative power by Congress . . . ." Fong Yue Ting v. United States, 149 U.S. 698, 721-22 (1893).

108. To be clear, the fact that Congress would be powerless to strip Chae Chan Ping of his vested right as he steamed back across the Pacific would not have meant that Congress could pass no laws whose enforcement would deprive a person of her vested right to reside in the United States. In the nineteenth-century model, even vested rights were subject to forfeit. The government could take away your life, or your liberty, or your property. But the government could do so only through the enforcement of a general, prospective law. So, ideas about due process and separation of powers were closely linked to ideas about retroactivity and partiality. This is why Chae Chan Ping also characterized the Scott Act as both an unconstitutional ex post facto law and a bill of attainder. *See* Brief for Appellant (Carter), *supra* note 101, at 9; *Fong Yue Ting*, 149 U.S. at 722. But vested rights often did not impose "substantive" limits on government power in the way that modern doctrine does. *See* Harrison, *supra* note 83, at 498-501. Thus, if the legislature passed a statute saying, "*X* is a crime punishable by death," that law could be applied to a person who engaged in *X* after passage of the statute. But the deprivation of life could be imposed only by a court following a trial. Similarly, if the legislature passed a statute saying, "Any immigrant who engages in *X* crime becomes deportable," then even if the right to reside were a vested right, such a statute would have been okay—so long as it was applied prospectively, and so long as the deprivation of the vested right to reside was imposed by a court following judicial process.

commitments to China.[109] Chae Chan Ping argued that Congress lacked the power to rescind a treaty commitment by ordinary legislation. Echoing a view President Hayes had expressed a few years earlier, when he vetoed an early effort to restrict migration from China, Chae Chan Ping contended that only a subsequent treaty could alter those commitments.[110] Both this treaty claim and the vested-rights claim aimed to persuade the Court that Congress exceeded its *substantive legislative authority* by prohibiting him from reentering the United States at the end of his trip. Importantly, he argued, Congress exceeded its legislative authority not because it lacked power under the Constitution to regulate immigration or exclude noncitizens — a claim often mistakenly associated with this canonical case. Instead, Congress had exceeded its authority by transgressing two specific separation-of-powers limits: first, Congress lacked power to revoke treaty commitments through ordinary legislation; and second, Congress lacked power to revoke a vested right because only an Article III court could conclusively deprive a person of a private right to life, liberty, or property.[111]

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109. *See Chae Chan Ping*, 130 U.S. at 600-03 (agreeing with Chae Chan Ping that the Scott Act conflicted with U.S. treaty commitments, but holding that the emerging last-in-time rule meant that the legal requirements of the statute superseded the treaty obligations, at least so far as judicial enforcement was concerned); COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020), *supra* note 5, at 30-35 (discussing the Scott Act's conflict with the treaty and the Court's rejection of Chae Chan Ping's treaty claim). The Court's treatment of Chae Chan Ping's treaty-rights claim was itself central to the development of foreign-affairs law. *See* Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1488-90 (2022); Marco Basile, How Constitutional Law and International Law Split 54-55 (Nov. 2, 2023) (unpublished manuscript) (on file with author). Interestingly, though Chae Chan Ping vigorously pressed the treaty-power claim in the lower federal courts, some of his lawyers conceded before the Supreme Court that "Congress has the power to abrogate a treaty between the United States and a foreign power." Argument on Behalf of Appellant (Brown and Riordan), *supra* note 107, at 2; *cf.* Brief for Appellant (Hoadley and Carter), *supra* note 107, at 17 ("We do not claim that Chae Chan Ping has the right to enforce [the treaty's] stipulations or to complain of their breach.").

110. *See* RUTHERFORD B. HAYES, VETO OF THE CHINESE IMMIGRATION BILL, H.R. EXEC. DOC. NO. 45-102, at 5-6 (1879) (vetoing a bill sharply limiting the number of Chinese passengers permitted aboard American vessels bound for the United States, on the ground that the Act violated the Burlingame Treaty); COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020), *supra* note 5, at 27-28 (discussing President Hayes's argument that the Constitution "assigned the powers of both treaty negotiation and abrogation to the President, acting with the advice and consent of the Senate"); *cf.* 13 CONG. REC. 2551-52 (1882) (documenting President Arthur's veto of Congress's first Chinese Exclusion Act, which suspended migration for twenty years, on the ground that it violated the country's obligations under the recently ratified Angell Treaty); COX & RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW (2020), *supra* note 5, at 28-29 (discussing this episode).

111. I should also note that if Chae Chan Ping possessed a vested right, then it followed from this conventional approach to the separation of powers that the executive-branch inspector at the

In short, the proper characterization of Chae Chan Ping's interest in reentering the United States had important implications both for the role of courts and for the authority of Congress. If his interest were a mere privilege, then Congress could abrogate it by statute or authorize executive officials to deny or withdraw it (either in their discretion or under rules laid down by Congress). But if his reentry interest counted as a vested right, then neither of these actions would be permissible.[112]

In *Chae Chan Ping*, the parties and the Court all accepted this conventional structure of nineteenth-century constitutional law. The only disagreement was over whether Chae Chan Ping's interest should be classified as a vested right.[113] It should not be, the Supreme Court ultimately concluded. The Court held that the interest created by the government's promise to permit Chae Chan Ping to reenter the country was a mere "license," a term synonymous with "privilege" in this context: "Whatever license, therefore, Chinese laborers may have obtained, previous to the 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

San Francisco port could no more order him excluded than could Congress. Doing so would entail the executive-branch official exercising the judicial power of the United States, a power Article III vested exclusively in the independent federal courts. *See infra* Section II.B.2.

112. *See* Brief for Appellant (Carter), *supra* note 101, at 9. In the classic (perhaps stylized) nineteenth-century view, this conclusion was understood in separation-of-functions terms. Near the tail end of the nineteenth century, courts began to suggest that only "reasonable" legislation could interfere with vested rights. *See* James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 461 (1982). This development led to *Lochner v. New York*, 198 U.S. 45 (1905), and to our modern conception of substantive due process. But the lawyers representing Chae Chan Ping do not appear to have tried to capitalize on these nascent ideas about substantive due process: they did not argue in his briefing that there was a reasonableness constraint on Congress's decision to abrogate Chae Chan Ping's statutory right of return. Instead, their argument was categorical: Congress had unfettered power to do so prospectively, but lacked any authority to do so retrospectively, because retrospective abrogation amounted to an improper exercise of judicial power by Congress. *See, e.g.*, Brief for Appellant (Carter), *supra* note 101, at 3-4; Brief for Appellant (Hoadley and Carter), *supra* note 107, at 37-61; Argument on Behalf of Appellant (Brown and Riordan), *supra* note 107, at 2-6, 16.

113. *See* Brief for the United States at 11, *Chae Chan Ping*, 130 U.S. 581 (No. 1446) ("[T]he petitioner's residence in the United States was only by indulgence of the Government. It was by permission only. The withdrawal of that permission violated no personal right."); *id.* at 12 ("When the privilege to return or remain was absolutely withdrawn, . . . it was of no avail to prove that he had been here before or when he left."); *id.* at 14 ("The law gave him the privilege, and the repeal of the law has taken it away; and he has no rights greater than any other nonresident of the same class."); Brief by Counsel Appointed by the State of California in Support of the Contention of the United States at 2-4, *Chae Chan Ping*, 130 U.S. 581 (No. 1446); Brief for Appellant (Carter), *supra* note 101, at 9 ("If we have succeeded in establishing that the appellant had a vested right to return, acquired by contract, we need spend no time in asserting that it could not be taken away by a mere exercise of legislative power.").

pleasure."[114] It was a license, the Court said, because the power to control access to the United States was a public right—a power "belonging to the government of the United States as part of those sovereign powers delegated by the constitution," and hence a power "incapable of transfer to any other parties."[115] The power to exclude noncitizens, in other words, had the same character as the federal government's power to dispose of public lands: it was a "public trust[] . . . not the subject of barter or contract."[116]

In fact, in the next breath the Court made the analogy to real property explicit. It noted that when a noncitizen acquired real property under a treaty (say, a treaty permitting noncitizens to purchase property, as many treaties of friendship and commerce did during the nineteenth century), the abrogation of the treaty would not destroy or impair the noncitizen's property right because those rights would already have "vested."[117] In other words, abrogating the treaty

114. *Chae Chan Ping*, 130 U.S. at 609. As an illustration of the depth of the conventional wisdom concerning the plenary power doctrine, note that this quote and the entire discussion of Chae Chan Ping's vested rights claim—which on my account is perhaps the most important passage in the case—is omitted from the excerpt of *Chae Chan Ping* that appears in one of the field's leading casebooks. *See* ALEINIKOFF ET AL., *supra* note 11, at 6-10.

115. *Chae Chan Ping*, 130 U.S. at 609. This reasoning reflects the way in which questions of rights and structure were closely intertwined in this nineteenth-century framework. When the government exercised a public right, it often determined the distribution of some privilege. *See generally* Harrison, *Public Rights, Private Privileges*, *supra* note 62 (discussing the relationship between public rights and privileges).

116. *Chae Chan Ping*, 130 U.S. at 609. As the Court's reasoning highlights, nineteenth-century discussions about the relationship between vested rights and government power often had a bit of a chicken-or-egg character. Sometimes courts reasoned from their understanding of vested rights in order to determine the scope of the government's substantive authority. At other times, courts seemed to reason from a proper understanding of the government's power in order to determine whether an interest counted as a vested right. *See, e.g.*, Buttfield v. Stranahan, 192 U.S. 470, 493 (1904) ("As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations . . . ."). Immigration cases were no different in this respect. In fact, often both analytic approaches would appear in different passages of the same decision. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), which I discuss later in this Part, was but one example. In that case, the Court initially appeared to reason from a premise about government power to a conclusion about the nonexistence of a vested right. *See id.* at 706-07 (leading off the discussion by focusing on "the right of a nation to expel or deport foreigners who have not been naturalized"). But within a few paragraphs, the Court reversed that chain of logic. Quoting the seventeenth-century political philosopher Theodore Ortolan, the Court reasoned that the government's power to deport "is based on the fact that, the foreigner not making part of the nation, his individual reception into the territory is a matter of pure permission, of simple tolerance, and creates no obligation." *Id.* at 708 (quoting THEODORE ORTOLAN, RÈGLES INTERNATIONALES ET DIPLOMATIE DE LA MER 297 (Paris, Plon 4th ed. 1864) (1844)). In other words, because residence is a privilege, the government possesses power to deport resident noncitizens.

117. *Chae Chan Ping*, 130 U.S. at 609.

would eliminate the legal right to purchase real property in the future, but it would not affect a purchase in the past. A promise of reentry, however, was not analogous to real property; the promise was "personal and untransferable."[118] Chae Chan Ping, the Court wrote, was trying to insist that his interest had matured into a vested right because, "by the favor and consent of the government, [the power to exclude] has not heretofore been exerted with respect to the appellant."[119] But a legislative promise to permit Chae Chan Ping to reenter did not create a vested right. "Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation," the Court wrote, "there is as wide a difference as between realization and hopes."[120] In short, Chae Chan Ping's interest was unprotected because it was a privilege, not a vested private right.

My focus here is not on whether the Court's classification of Chae Chan Ping's interest was right or wrong. As many judges recognized at the time, and as subsequent generations of scholars have shown repeatedly, the distinction between vested rights and privileges was murky, perhaps incoherent. The important point is that the parties litigated the case, and the Court resolved their dispute, by reasoning within the then-standard framework of constitutional law—not by creating an exception to that conventional framework.[121] The characterization of Chae Chan Ping's interest as a mere license meant, under nineteenth-century separation-of-powers principles, that Congress possessed the power to void his license at will.[122]

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118. *Id.*

119. *Id.* at 610.

120. *Id.*

121. Years later, the government continued to describe the decision in *Chae Chan Ping* as a decision concerning vested rights. *See* Brief for Appellees at 67, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (No. 275) ("[Chae Chan Ping] claimed that by virtue of the treaty with China and the laws of Congress passed prior to the act of 1888 his right to return to the United States was a vested right, and in so far as the act of 1888 conflicted with such right it was unconstitutional and void. The Supreme Court held that such right was not a vested one, and that it could be destroyed or extinguished by subsequent legislation.").

122. Indeed, the characterization of Chae Chan Ping's interest as a privilege, rather than a vested private right, meant Congress was free to give or take the privilege on grounds that, in other contexts, would violate other constitutional rights such as the First Amendment. At the time, many believed that the government could grant or deny privileges for reasons that otherwise would violate the First Amendment. This understanding is what led Justice Holmes to famously quip, when confronted with a case of a police officer who had been fired for his political activity, that the officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). This view is no longer good law. *See* Wieman v. Updegraff, 344 U.S. 183, 192 (1952). That is in large part because the twentieth-century erosion of the distinction between

The corollary of this conclusion was that Chae Chan Ping's complaint about how Congress had exercised that power was not a judicial matter for Article III courts. So just as a person would have no judicial recourse if they were unhappy with the government's decision to award title to public land to their neighbor rather than to them, here too there was no judicial recourse for a person like Chae Chan Ping whose life was upended by the government's decision. It was in this important sense that the Court concluded that Chae Chan Ping's claims, such as his contention that the Scott Act should not apply to those who left the country before its passage (a claim that Congress's statute was impermissibly retroactive), were "not questions for judicial determination."[123] Those questions were instead for the "political department of our government" because the decision to withdraw a privilege *was not a judicial matter*.[124]

This understanding differs dramatically from the meaning that standard accounts of the plenary power's invention ascribe to this language. Scholars and courts have long argued that this language is a primary source of the plenary

rights and privileges gave rise to what we today call the doctrine of unconstitutional conditions—a doctrine "hold[ing] that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); *see also* Van Alstyne, *supra* note 84, at 1445-49 (discussing the doctrine of unconstitutional conditions); Perry v. Sindermann, 408 U.S. 593, 597 (1972) ("[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . ."). At the time, however, this understanding would have meant that Congress could exclude immigrants on the basis of their speech or beliefs without violating the First Amendment—not because those immigrants were outside the protection of the First Amendment, but because they sought a privilege. *See* United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904) (upholding against a First Amendment challenge a provision of the 1903 Immigration Act making anarchists excludable). This raises questions about the way early ideological-exclusion cases have long been interpreted by scholars and lawyers. *See, e.g.*, Pratheepan Gulasekaram, *The Second Amendment's "People" Problem*, 76 VAND. L. REV. 1437, 1503-04 (2023) (reading *Turner* as holding that "a sovereign's absolute right to exclude noncitizens as part of its 'power of self-preservation'"—that is, the plenary power doctrine—"took precedence over the First Amendment" (citing *Turner*, 194 U.S. at 290, 294)); Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CALIF. L. REV. 831, 849-50 (1989) ("The plenary power doctrine has disabled courts from intervening in cases of ideological exclusion since at least 1904, when the Court in *United States ex. rel. Turner v. Williams* upheld the deportation of a resident alien anarchist." (footnotes omitted)).

123. *Chae Chan Ping*, 130 U.S. at 609 ("Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. 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.").

124. *Chae Chan Ping*, 130 U.S. at 609; *see also* Woolhandler, *supra* note 70, at 1016-17 (claiming that the Court has at times approved of and at other times disapproved of express statutory retroactivity).

power doctrine. They have asserted that the Court here held that challenges to immigration policy present nonjusticiable political questions or are for some other reason immune from constitutional scrutiny.[125] But the reality was much more modest. The Court was simply reiterating its then-standard view that privileges, unlike private rights, were fully within the control of the political branches of the government.[126]

2. *Privileges and Adjudication by the Executive*

In the nineteenth-century way of thinking, vested rights imposed limits on the authority of legislative assemblies. This was the way in which Chae Chan Ping had invoked vested rights. But vested rights also imposed limits on the power of the Executive, because only judicial process could deprive a person of a vested right. Thus, the distinction between privileges and (vested) private rights arose frequently in disputes over when adjudication could take place outside of an Article III court.

Immigration law was no exception to this pattern. In a series of immigration cases decided in the wake of *Chae Chan Ping*, the Court repeatedly confronted the question whether executive-branch officials could conclusively determine a

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125. *See, e.g.*, Motomura, *Phantom Norms*, *supra* note 11, at 552 ("Suggesting that immigration cases might be nonjusticiable as political questions, Field wrote that any remedy for the aggrieved alien must be sought on the alien's behalf by the Chinese government from the political branches of the United States government."); Legomsky, *supra* note 11, at 257 (citing this language to support the conclusion that "[i]n the early years, the Court disavowed in absolute terms any judicial power to review the constitutionality of immigration legislation"); Henkin, *supra* note 11, at 853-54 (recounting that the Court has given great deference to Congress in regulating immigration); Abrams, *supra* note 11, at 636 & n.145 (citing *Chae Chan Ping* for the proposition that the early plenary power cases held "that power over immigration resides in the 'political' branches of the government at the expense of the judicial branch").

126. The Court's suggestion that "China," not Chae Chan Ping, might have a complaint that it would have to address "to the political department of our government," *Chae Chan Ping*, 130 U.S. at 609, suggests that modern readers have also not been sufficiently attentive to the relationship between international and domestic law that structured public law in the nineteenth century and likely informed the Court's thinking in *Chae Chan Ping*, *see* David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593, 1595 (2018); Jud Campbell, *General Citizenship Rights*, 132 YALE L.J. 611, 614 (2023). Congress's decision to void Chae Chan Ping's certificate, in contravention of its treaty commitment to China, may well have amounted to a violation of international law even if, as a matter of American constitutional law, the last-in-time rule governed the *domestic effect in court* of Congress's legislation. *See* Bowie & Rast, *supra* note 109, at 1437. But the violation of international law itself did not, the Court appears to have been suggesting, give rise to a judicially enforceable legal claim. Thus, China had to seek recourse for any violation of international law by the United States in some other way, such as by complaining "to the political department of the government." *Chae Chan Ping*, 130 U.S. at 609.

person's inadmissibility and order her excluded from the country.[127] Immigrants argued regularly in these cases that executive-branch officials were wrongly exercising the "judicial power of the United States"—power reserved to Article III courts.[128] And time and again, these claims were resolved within the standard nineteenth-century framework in which the crucial question was whether the immigrant's interest was properly characterized as a privilege or a private right.

The question arose first in cases like *Nishimura Ekiu v. United States*, a now-canonical case concerning the conclusiveness of administrative decisions to exclude arriving immigrants.[129] Nishimura Ekiu's case arose when she arrived in San Francisco and was ordered excluded by a federal official under a statute that made excludable any noncitizen "unable to take care of himself or herself without becoming a public charge."[130] Nishimura Ekiu did not contest Congress's power to exclude such immigrants from the country. She simply disagreed with the inspector's determination that she fell within this category. And she argued that permitting an executive-branch official conclusively to determine those facts deprived her of liberty without due process of law. Due process, she contended, required judicial (meaning Article III) resolution of the dispute.[131]

The Supreme Court agreed that there was a private right at stake in Nishimura Ekiu's case. Because she was being detained by the federal government at a local Mission house, the Court held, she was deprived of her physical liberty. Thus, she was "entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."[132]

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127. The issue of non-Article III adjudication did not arise in *Chae Chan Ping*, perhaps because it was a test case with no real factual disputes. *See* SALYER, *supra* note 9, at 69-93 (discussing the concerted litigation campaign to challenge many aspects of the Chinese exclusion laws). Everyone agreed that Chae Chan Ping was who he said he was, that the certificate of reentry he possessed was real and had been properly issued prior to his departure from the United States, that he had departed prior to the passage of the Scott Act, and so on.

128. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

129. 142 U.S. 651 (1892).

130. *Id.* at 661 (quoting Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214).

131. *See* Appellant's Brief at 13-17, *Nishimura Ekiu*, 142 U.S. 651 (No. 1393).

132. *Nishimura Ekiu*, 142 U.S. at 660. This conclusion by the Court was unsurprising, given that it had already implicitly agreed, in *Chae Chan Ping* and other earlier cases, that noncitizens detained upon arrival were entitled to habeas corpus. But it also helps reinforce the centrality of the nineteenth-century framework in these cases—here, the way in which nineteenth-century thinking about forms of proceeding and the nature of liberty interests intersected with the brute realities of immigration enforcement. When Chae Chan Ping was ordered excluded by the inspector in the San Francisco harbor, he was prohibited from disembarking and held aboard the steamer pending its return to Yokohama and Hong Kong. *See* Argument on Behalf

But, the Court concluded, Nishimura Ekiu's "right to land" in the United States was no such private right.[133] It was a privilege connected to the exercise of a public right. Decades earlier, in *Murray's Lessee*, the Supreme Court had made clear that Congress could choose whether to empower Article III courts to resolve disputes concerning public rights or, instead, to leave it to executive-branch officials to determine with finality who would receive government privileges.[134] Now, in *Nishimura Ekiu*, the Court noted that this standard separation-of-powers regime applied equally to a noncitizen's privilege of entering the United States:

> Congress may, if it sees fit . . . authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted.[135]

In other words, executive-branch officials could conclusively adjudicate Nishimura Ekiu's right to land because their decision to exclude her deprived her of a mere privilege—not a vested private right.[136]

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of Appellant (Brown and Riordan), *supra* note 107, at 1-2. Deprived of his physical liberty, his lawyers filed a writ of habeas corpus—that great historical writ designed to test the legality of a person's detention. *Id.* The parties and the Court all appear to have agreed he had the right to go to court to complain about the deprivation of his physical liberty. The lawfulness of his detention turned on whether he had been wrongly deprived of a vested right by Congress. Because the Court concluded on the merits that he had not been, his detention was lawful. *See* Chae Chan Ping v. United States, 130 U.S. 581, 609-10 (1889).

133. *Nishimura Ekiu*, 142 U.S. at 660-64.

134. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 285 (1856).

135. *Nishimura Ekiu*, 142 U.S. at 660.

136. Again, this does not mean that Nishimura Ekiu could be denied access to an Article III court, full stop. The Court itself concluded that she had a right to seek a writ of habeas corpus from an Article III court in order to challenge the lawfulness of her detention because she was being held in custody (and hence deprived of her physical liberty) by immigration officials. *See supra* note 132 and accompanying text. The Court's conclusion in this quoted passage about Article III involvement is more limited: it held only that factual determinations related to her excludability could be entrusted to executive-branch officials and not reexamined by the federal court considering her habeas petition. This is analogous to the Court's approach in land-patent cases, where it regularly held that factual determinations by land office officials could not be reconsidered in later federal-court litigation over the property in question. *See, e.g.*, Vance

Today, this quoted language is commonly misread as establishing a regime that insulates immigration decisions from judicial review.[137] But the passage has nothing to do with judicial review, at least not as we commonly use that term today. Nor does it articulate an exceptional constitutional framework for evaluating immigration policies. To the contrary, it simply restates the then-orthodox framework governing when adjudication outside of Article III was permissible. The conventionality of the approach is plain in the language of the passage itself, which closely tracks the Supreme Court's language in *Murray's Lessee*.[138] And the conventionality is reinforced by the six cases the Court cited in support of its conclusion that executive-branch officials could conclusively adjudicate Nishimura Ekiu's right to land.[139] Not a single one of the cited cases was an immigration case. One was none other than *Murray's Lessee* itself, which concerned whether Treasury Department officials could conclusively determine a debt owed by a rogue customs agent.[140] The others range across a diverse set of subject matters — one concerned a challenge to a patent,[141] another was about a customs dispute,[142] and a third involved an attack on a sentence imposed by a military tribunal.[143] What united these otherwise disparate precedents was that they all involved adjudication outside of Article III courts. And in each case, the Court concluded that the determinations made by executive-branch officials — by a

v. Burbank, 101 U.S. 514, 519 (1880). But a federal court in land cases might be permitted to consider some other questions — such as whether the land office officials had actually been given authority by Congress to dispose of the public lands in question. Similarly, in *Nishimura Ekiu*, the Supreme Court resolved on the merits Nishimura Ekiu's claim that the immigrant inspector had been improperly appointed and, therefore, lacked legal authority to adjudicate her right to land. *See* 142 U.S. at 664**.** The fact that the Court decided this legal claim is puzzling, even inexplicable, if you read this passage as announcing some general immunity of immigration decisions from judicial review, as so many do today. But the Court's consideration of the inspector's jurisdiction makes perfect sense in the public-law framework within which the Court was working.

137. *See, e.g.*, Motomura, *Phantom Norms*, *supra* note 11, at 552; Schuck, *supra* note 11, at 15.

138. *Compare Nishimura Ekiu*, 142 U.S. at 660 ("[T]he final determination of . . . facts may be entrusted by Congress to executive officers; and in such a case . . . in which a statute gives a discretionary power to an officer, . . . he is made the sole and exclusive judge of the existence of those facts . . . ."), *with Murray's Lessee*, 59 U.S. (18 How.) at 284 ("[I]t has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of congress, were conclusive either upon particular facts involved in the inquiry or upon the whole title." (citing Foley v. Harrison, 56 U.S. (15 How.) 433, 445 (1854); Burgess v. Gray, 57 U.S. (16 How.) 48, 63-64 (1854))).

139. *E.g.*, Benson v. McMahon, 127 U.S. 457, 471 (1888); *In re* Oteiza y Cortes, 136 U.S. 330, 337-38 (1890).

140. *Murray's Lessee*, 59 U.S. (18 How.) at 274-75.

141. Phila. & Trenton R.R. Co. v. Stimpson, 39 U.S. (14 Pet.) 448, 458 (1840).

142. Hilton v. Merritt, 110 U.S. 97, 98 (1884).

143. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31 (1827).

collector of customs, by accounting officers of the Treasury Department, and so on—were conclusive upon the judiciary because the official's decisions affected privileges, not private rights.[144]

Again, my point is not that the Court's decision in *Nishimura Ekiu* was correct, or somehow inevitable in light of the state of constitutional law in the late nineteenth century. As I noted above, nineteenth-century lawyers who practiced within this separation-of-powers-as-separation-of-functions framework regularly clashed over whether an interest should be treated as a privilege or a private right. That there was room for debate on the issue was, in fact, what made much of this immigration litigation possible.[145] Moreover, the Supreme Court itself would, within a decade of its decision in *Nishimura Ekiu*, begin to abandon the entire nineteenth-century framework for thinking about due process and its connection to the separation of powers.[146] But that was the framework within which these earliest immigration cases were argued and resolved. And within that framework, the choice the Court understood itself to be facing in *Nishimura Ekiu* was a stark one: accept the government's contention that Nishimura Ekiu's interest was a mere privilege, in which case an immigrant inspector could conclusively resolve her right to land; or agree that her exclusion deprived her of a vested right, in which case every arriving immigrant could demand a hearing before an Article III court to resolve any dispute over the immigrant's admissibility. Given the stark choice of either no process or a common-law trial before an Article III tribunal, it is perhaps unsurprising that the Court reached the conclusion it did.

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144. Early scholars of administrative law described the conclusive nature of administrative adjudication in just this fashion. Bruce Wyman, for example, noted in his administrative law treatise (in a section aptly titled "Final") that

> [t]he truth of the matter is that the power of the administration in its adjudication is often final; that is, without appeal to any other tribunal. Whenever a matter is entrusted to the adjudication of the administration, the decision of that department is final unless other provision is made. The rule that the power of the administration is final within the scope of its authority goes to this extent.

Bruce Wyman, The Principles of the Administrative Law Governing the Relations of Public Officers 329 (1903).

145. Indeed, the Court's decision in *Nishimura Ekiu* did little to quell this debate. Lawyers representing immigrants continued for years to argue that Congress's scheme of administrative immigration adjudication was unconstitutional because it "transfer[s] judicial power to the executive branch of the Federal Government." *See, e.g.*, Brief and Argument of Appellant at 55, United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904) (No. 561).

146. *See infra* Part III.

3. *Deportation: A Vested Right in Continued Residence?*

Chae Chan Ping and *Nishimura Ekiu* resolved one question about the boundary between privileges and private rights. In the Court's eyes, a noncitizen's interest in entering the United States was a privilege. It did not qualify as a private right — even if the interest was backed by a statutory promise, and even if the noncitizen had previously resided in the United States. But this left many questions unresolved. For example, did the character of an immigrant's interest change when they accepted an offer of entry and took up residence in the United States?

Consider two very different ways this question might be answered within the then-orthodox framework. On the one hand, an immigrant's interest might mature into a (vested) private right when the government granted her the privilege of entry and she took up residence in the United States. The right to reside in the United States would be treated, once acquired, as analogous to real property. On the other hand, the right to continued residence could be deemed to be a privilege even after an immigrant entered and took up residence. It would remain a license that, like government employment, could be revoked without impairing private rights.

These two understandings would have enormously different consequences for noncitizens who were granted entry and permitted to take up residence in the United States. If the right of residence was, once conferred, a private right like the right to real property, then deporting such a person would deprive her of a private right and therefore entitle her to a judicial proceeding before an Article III court.[147] But if the right to reside was a privilege — a license that could be revoked at any time by the government — then revoking that license and ordering a person deported would not infringe upon a private right, and therefore would not require a judicial proceeding.

Just four years after *Chae Chan Ping* was decided, a case reached the Court that squarely raised the question of how to treat a resident immigrant's continued right to remain in the United States. The case arose when the federal government attempted to deport Fong Yue Ting and two other Chinese immigrants.[148] Fong Yue Ting and the other petitioners argued that their legal interests were distinguishable from Chae Chan Ping's and should be treated as private rights.[149] But the Court disagreed. Justice Gray, writing for the majority

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147. Congress would also be prohibited from passing legislation that retroactively impaired a person's right to remain after they had already taken up residence in the country. *See supra* Section II.B.1.

148. Fong Yue Ting v. United States, 149 U.S. 698, 702 (1893).

149. Brief for the Appellants at 31-32, *Fong Yue Ting*, 149 U.S. 698 (Nos. 1345, 1346, 1347).

in *Fong Yue Ting v. United States*, held that the petitioners' continued residence in the country was a "matter of pure permission, of simple tolerance, and creates no obligation."[150] For this reason, the grant by the government of a legal right to reside in the United States remained revocable even after Fong Yue Ting entered the United States and took up residence.[151] His interest in continued residence was treated like an individual's interest in the continuation of government employment, or like a Civil War veteran's interest in the continuation of veterans' benefits. The grant of privilege created no private right. So it was open to the legislature to revoke the license at will, or to authorize executive officials to do so (as a matter of their discretion or subject to rules laid down by the legislature).

Fong Yue Ting is today taught as the case in which the Supreme Court held that Congress's power to deport is no different than its power to exclude; that deportation is not banishment; and that deportation hearings need not involve an Article III tribunal or conform to the requirements of the Fourth, Fifth, or Sixth Amendments. These holdings are almost universally treated as further evidence of exceptionality in immigration jurisprudence.[152] Yet all of these holdings followed quite conventionally from the Court's initial decision to characterize a settled immigrant's interest in continued residence as a privilege as opposed to a vested right.

First, the Court's characterization meant that Congress had the power to revoke by statute a resident noncitizen's legal right to remain in the United States. It was in this sense that Congress's power to deport was no different that its power to exclude. Justice Gray wrote that these two powers "are in truth but parts of one and the same power" simply because both concerned government

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150. *Fong Yue Ting*, 149 U.S. at 708 (quoting Theodore Ortolan, Règles Internationales et Diplomatie de la Mer 297 (Paris, Plon 4th ed. 1864) (1844)).

151. *Id.* at 723-24.

152. *See, e.g.*, Motomura, *Phantom Norms*, *supra* note 11, at 553 ("In *Fong Yue Ting v. United States*, decided in 1893, the Court further extended plenary power to the deportation of resident aliens already in the United States." (footnote omitted)); Jain, *supra* note 11, at 1805-06 (describing *Fong Yue Ting* as "reiterat[ing] the plenary power doctrine"); Chin, Chae Chan Ping *and* Fong Yue Ting, *supra* note 11, at 16-23; Rubenstein & Gulasekaram, *supra* note 11, at 595 ("Soon after [*Chae Chan Ping*], in *Fong Yue Ting v. United States*, the Court extended this reasoning to uphold a federal statute that made Chinese laborers presumptively deportable. Because of Congress's plenary authority over immigration, the lack of due process afforded to the petitioners was constitutionally irrelevant." (footnote omitted)); Legomsky, *supra* note 11, at 257 (characterizing *Fong Yue Ting* as extending the plenary power doctrine to deportation); Schuck, *supra* note 11, at 24 (treating *Fong Yue Ting*'s holding that deportation is not banishment as "a fundamental tenet of classical immigration law," which is the term Schuck uses to refer to what others call the plenary power doctrine).

decisions about when to give out (or continue giving out) the privilege of residence in the United States.[153]

Second, treating the settled immigrant's interest as a privilege meant that adjudication outside of Article III was just as permissible here as in the exclusion context. In other words, the case became a carbon copy of *Nishimura Ekiu*. So while Congress had, in the Scott Act, provided that Chinese persons charged with being deportable under the Act be brought before an Article III judge, the Court was quick to conclude that this was a matter of choice, not a constitutional obligation:

> Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country. But Congress has not undertaken to do this.[154]

Third, once the Court concluded that Fong Yue Ting's continued residence was a matter of privilege rather than a vested right, it followed that deportation was not "banishment." Banishment was the term traditionally applied to the sovereign act of expelling a person from the territory or removing him to a remote frontier or outlying colony.[155] While there had long been controversy in England

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153. *Fong Yue Ting*, 149 U.S. at 713. It also meant that Congress was free to change the terms of a noncitizen's right to reside after she entered the country and took up residence. So there was no concern with retroactivity when Congress, in the statute at issue in *Fong Yue Ting*, told immigrants who had previously taken up residence in the United States under earlier treaty rights that they would now have to comply with new legal requirements in order to retain their residence. *See supra* Section II.B.1.

154. *Fong Yue Ting*, 149 U.S. at 728; *see also id.* at 713-14 ("The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers, or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend. . . . It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.").

155. Sovereigns claimed the power as far back as Roman times, and Great Britain relied on the practice heavily during its colonial period, banishing English convicts to Australia and Quakers to America. For religious dissidents in Scotland during the 1660s and 1670s, "transportation to Barbados, Virginia, or Tangier was the usual fate of those who proved too obdurate." Gwenda Morgan & Peter Rushton, Banishment in the Early Atlantic World: Convicts, Rebels and Slaves 69-70 (2013).

and the United States over the power to banish, the famous jurist William Blackstone and many others believed that it could be imposed only on the authority of Parliament, not unilaterally by the Crown, and then only as punishment for a criminal conviction rendered by a court of law.[156] At the time *Fong Yue Ting* was decided, many American lawyers and judges held a similar separation-of-powers view. Justice Field, for example, had written while riding circuit that "no citizen can be excluded from this country except in punishment for crime. Exclusion for any other cause is unknown to our laws, and beyond the power of congress."[157] Judge Deady of the Oregon Circuit Court had noted, a few years earlier, the corollary to this belief—that banishment must be imposed by a court—concluding that

> [a] legislative act [barring the reentry into the United States of] a citizen thereof, and thereby depriv[ing] him of the right to live in the country, for any cause or no cause, or because of his race or color, is a bill of attainder, within the clause of the constitution.[158]

This understanding of banishment tethered the legal concept closely to the distinction between privileges and private rights. Banishment was a judicial function because it was understood to be a deprivation of a particular vested right—the right of a citizen to live in their own country. But if the deportation of a noncitizen did not deprive him of any vested right (continued residence being a privilege), then the deportation of a noncitizen could not amount to a "banishment" in the legal sense. And this is exactly what the Court concluded in *Fong Yue Ting*:

> It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. . . . He has not, therefore, been deprived of life, liberty, or property without due process of law, and the provisions of the Constitution

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156. *See* Cox & Rodríguez, The President and Immigration Law (2020), *supra* note 5, at 32 (discussing the history of banishment).

157. *In re* Look Tin Sing, 21 F. 905, 910-11 (Field, Circuit Justice, C.C.D. Cal. 1884). As a result, Justice Field held that the 1882 Chinese Exclusion Act could not be applied to bar the reentry of a U.S. citizen of Chinese descent who had traveled abroad. *Id.*

158. *In re* Yung Sing Hee, 36 F. 437, 439 (C.C.D. Or. 1888). For this conclusion, Judge Deady drew on a Reconstruction-era opinion by Justice Field himself, in which Field had condemned legislative banishment as a violation of the Constitution's separation of legislative and judicial functions. Deady quoted Field's reasoning that "in [such] cases . . . the legislative body, in addition to its legitimate functions, exercises the powers and office of a judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial." *Id.* at 440 (quoting Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867)).

securing the right of trial by jury and prohibiting unreasonable searches and seizures and cruel and unusual punishments have no application.[159]

4. Disagreement over the Privileges/Private-Rights Boundary

In short, the core holdings in *Fong Yue Ting* all flowed from the Court's characterization of Fong Yue Ting's interest in continued residence as a mere privilege. But unlike in earlier cases, where the Court had been unanimous in its characterization of the legal interests at stake, the Court this time was deeply divided. Justice Field, who had authored the Court's unanimous opinion in *Chae Chan Ping*, now joined Chief Justice Fuller and Justice Brewer in dissent.[160] They disagreed sharply with the majority about two central matters: about *when* rights of residence become vested, and about *whether* Fong Yue Ting and the other petitioners had crossed the "vesting" threshold.

a. Vesting

Consider first the question of "vesting." Under the nineteenth-century way of thinking about the separation of powers, judicial process was required only when a private right had already become vested in a person. That is why land office decisions disposing of public land did not require judicial involvement, even though the office was dealing with the classic private right of real property. Only once a person's right to a piece of real estate had "vested" would government interference with that right become a judicial matter.[161] Inevitably, this required courts to decide what counted as the moment a real-property right became vested. Did the right vest only when title passed? Or could it vest at some earlier point?

This same question arose in *Fong Yue Ting* with respect to the right to reside in the United States. Every member of the Court agreed that at least some persons possessed a vested right to reside in the country. For those persons, a government decision to expel the person would amount to a deprivation of a private right—a deprivation that could be imposed only by an Article III court, not by

159. *Fong Yue Ting*, 149 U.S. at 730; *see also id.* at 709 (emphasizing the legal importance of recognizing that "'transportation,' 'extradition' and 'deportation,' although each has the effect of removing a person from the country, are different things, and have different purposes").

160. Justices Field and Brewer and Chief Justice Fuller each wrote separate dissents. Brewer was the only dissenter not on the Court when *Chae Chan Ping* was decided, having joined the Court six months after the case was handed down (replacing Justice Matthews, who had died while *Chae Chan Ping* was under consideration). Thus, the division that emerged in *Fong Yue Ting* cannot be fully explained by changes in the Court's membership.

161. *See supra* Section II.A.3.

the unilateral action of either the Executive or Congress. But when did the right to reside vest in a person? For the majority, the answer was that it vested when the person acquired citizenship. Citizens, and only citizens, possessed a vested right to reside in the United States.[162]

The dissenters disagreed. They concluded that the right vested when an immigrant lawfully entered the United States and took up residence. Justice Field, the author of *Chae Chan Ping*, found support for this view from no lesser figures than James Madison and Thomas Jefferson, who themselves had famously argued, during the debates over the Alien and Sedition Acts, that resident noncitizens had a right to remain no different than that held by a citizen.[163] Justice Brewer, looking to "the law of nations" rather than the Founders for support, reached an identical conclusion: that domicile, not citizenship, defined the dividing line between privilege and private right in this context.[164] Chief Justice Fuller agreed: "The right to remain in the United States . . . is a valuable right, and certainly a right which cannot be taken away without taking away the liberty of its possessor. This cannot be done by mere legislation."[165] The presence of a vested private right was, for Fuller and the other dissenters, precisely what distinguished deportation from exclusion:

> Conceding that the exercise of the power to exclude is committed to the political department, and that the denial of entrance is not necessarily the subject of judicial cognizance, the exercise of the power to expel, the manner in which the right to remain may be terminated, rests on

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162. *See Fong Yue Ting*, 149 U.S. at 707.

163. *See id.* at 747-48 (Field, J., dissenting). Justice Field noted that, outside the sole example of the Alien Friends Act, which was widely criticized when it was adopted in 1798 and expired by its own terms two years later, *id.* at 750, the "power to deport from the country persons lawfully domiciled therein by its consent, and engaged in the ordinary pursuits of life, has never been asserted by the legislative or executive departments, except for crime, or as an act of war, in view of existing or anticipated hostilities," *id.* at 746.

Justice Field also worried that the majority's view would lead down a dangerous slippery slope. If a right to reside did not become vested when a noncitizen took up lawful domicile, he wondered, why should it vest when an immigrant acquired citizenship through naturalization? Raising the specter of future legislation targeting naturalized citizens for deportation, he wrote: "What answer could the naturalized citizen [subjected to such a deportation statute] make to his arrest for deportation, which cannot be urged in behalf of the Chinese laborers of to-day?" *Id.* at 761.

164. *Id.* at 734-38 (Brewer, J., dissenting). In his view, therefore, resident noncitizens were on the same footing as citizens with respect to their right to reside: "I deny that there is any arbitrary and unrestrained power to banish residents, even resident aliens." *Id.* at 738.

165. *Id.* at 762 (Fuller, C.J., dissenting).

> different ground, since limitations exist or are imposed upon the deprivation of that which has been lawfully acquired.[166]

The dissenters' conclusion meant that expelling a lawful resident would not count as an exercise of the public right to control access to the nation's territory, any more than would expelling a U.S. citizen. In that sense, lawfully resident immigrants would pass beyond the scope of Congress's power to regulate immigration as that power was conceptualized in cases like *Chae Chan Ping*.[167] That would not mean that Congress would be powerless to expel resident noncitizens. It would simply mean that their expulsion could be accomplished only pursuant to Congress's exercise of some other power. Enemy aliens could be expelled, Justice Field emphasized, as an exercise of Congress's war power.[168] Other resident noncitizens could be banished as punishment following conviction for a federal criminal offense, both he and Justice Brewer agreed.[169] But banishment could be imposed only by a court following a conviction. It could not be imposed by Congress or the Executive. It was this understanding that led all three dissenters to conclude that the Geary Act "is, in effect, a legislative sentence of banishment, and, as such, absolutely void."[170]

In short, the dissenters' view would have put lawfully domiciled immigrants on the same footing as U.S. citizens when it came to their right to remain in the

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166. *Id.*

167. Later jurists, including Justice Holmes, understood clearly this implication of Justice Field's approach. *See, e.g.*, Keller v. United States, 213 U.S. 138, 149-51 (1909) (Holmes, J., dissenting). In *Keller*, Holmes reasoned that "[f]or the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts." *Id.* at 149. But for Holmes, the key question was how long that control could continue. Put differently, Congress's deportation power contained a temporal constraint:

> If a woman were found living in a house of prostitution within a week of her arrival, no one, I suppose, would doubt that it tended to show that she was in the business when she arrived. But how far back such an inference shall reach is a question of degree like most of the questions of life. And while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that it is too long.

Id.; *see also* Siegfried Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Pre-1917 Cases*, 68 YALE L.J. 1578, 1606-10 (1959) (arguing that Holmes's view likely reflected the view of a majority of the Court at the time *Keller* was decided).

168. *Fong Yue Ting*, 149 U.S. at 748-50 (Field, J., dissenting).

169. *Id.* at 749; *id.* at 737 (Brewer, J., dissenting).

170. *Id.* at 763 (Fuller, C.J., dissenting); *id.* at 758-59 ("His deportation is thus imposed for neglect to obtain a certificate of residence . . . . That is the punishment for his neglect, and that being of an infamous character can only be imposed after indictment, trial, and conviction."); *id.* at 741 (Brewer, J., dissenting) ("[H]ere, the Chinese are . . . arrested and, without a trial, punished by banishment.").

country. This might feel confusing, given that today it is generally assumed that citizens cannot, consistent with the Constitution, be expelled from the United States.[171] But late nineteenth-century lawyers and judges did not share this view. As I noted earlier, many at the time believed that the banishment of citizens was permitted by the Constitution, so long as it was imposed as a punishment for a crime following a judicial trial. Thus, Fong Yue Ting and the other petitioners were not arguing that the government could never expel them from the country. Their contention was simply that Fong Yue Ting's expulsion should be considered a banishment, just as it would if he were a citizen. That is why, they argued, expulsion could be imposed only following a judicial process that conformed to the Fourth, Fifth, and Sixth Amendments.

b. Status

The dissenters thus concluded that the privilege of residence matured into a vested right when an immigrant lawfully took up residence in the United States. But that raised a second question: were Fong Yue Ting and the other petitioners lawful residents?

Understanding how the dissenters answered this question requires a bit of background about the Geary Act. The Act was passed by Congress with the putative aim of solving a screening problem that plagued immigration enforcement at the time. Since 1882, when Congress passed the first of the infamous Chinese Exclusion Acts, the federal government had openly restricted immigration to the United States on the basis of race.[172] Yet the first Chinese Exclusion Act did not exclude all Chinese immigrants. The statute continued to permit immigration by Chinese noncitizens who did not count as "laborers," as well as by family

171. The idea that a citizen's right to reside in the United States is a "liberty" interest that can never be taken from the citizen by the government is generally attributed by constitutional lawyers and scholars to a series of citizenship-stripping decisions handed down by the Supreme Court in the 1960s. *See, e.g.*, Afroyim v. Rusk, 387 U.S. 253, 268 (1967) (overruling Perez v. Brownell, 356 U.S. 44 (1958)). On that understanding of those cases, a citizen's right to reside receives greater substantive protection than, say, the person's right to life, which can be taken by the government as punishment following a criminal conviction. More importantly, that development helps highlight the way in which the more procedural vested-rights idea of the nineteenth century (in which a vested right could be taken by the government, but only pursuant to a judicial trial that applied general, prospective law) was, in at least some areas, transformed into the more substantive conception of fundamental rights that today goes under the label "substantive due process."

172. Chinese Exclusion Act of 1882, ch. 126, § 1, 22 Stat. 58, 59 (repealed 1943).

members of existing residents.[173] In addition, more than one hundred thousand Chinese immigrants had arrived in the United States prior to the passage of the first Chinese Exclusion Act. And, of course, some of these immigrants had children in the United States. Even under the regime of Chinese exclusion, therefore, a large and growing number of people of Chinese ancestry were living lawfully in the United States.[174]

At the same time, many members of Congress believed that violations of the Chinese exclusion laws were pervasive. They thought that fraud in the admissions process was rampant, with immigrants either lying about their occupations or pretending to be related to existing residents.[175] These members also believed that many Chinese immigrants were evading inspection altogether, landing in Canada or Mexico and entering over land borders that would not be regularly policed until the Border Patrol's creation in 1924.[176] This produced a screening problem for those enforcing federal immigration law: if an inspector encountered a person of Chinese ancestry in the United States, how would the inspector determine whether the person had entered in violation of the Chinese exclusion laws and was therefore deportable?

The Geary Act created a registration system that was supposed to ameliorate this problem. The Act required every Chinese immigrant to obtain, from the government, a certificate attesting to their lawful residence at the time of the Act's passage.[177] In principle (but not in practice), those lawfully in the United States would be able to obtain documentation attesting to their lawful status. Those who had entered unlawfully would be left without documents. And so immigration-enforcement officials could rely on people's papers to determine

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173. *Id.* (prohibiting, for a ten-year period, "the coming of Chinese laborers to the United States"); *id.* § 3, 22 Stat. at 59 (exempting from the prohibition "Chinese laborers who were in the United States on [the day the Act passed], or who shall have come into the same before the expiration of ninety days next after the passage of this act").

174. *See* BETH LEW-WILLIAMS, THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA 27, 53-62 (2018).

175. *See* H.R. REP. NO. 48-614, at 2 (1884). This report of the House Committee of Foreign Affairs was quoted in the United States's brief in *Chew Heong*. Brief for the United States at 11-12, Chew Heong v. United States, 112 U.S. 536 (1884) (No. 1088).

176. *See* LEW-WILLIAMS, *supra* note 174, at 197-204.

177. Geary Act, ch. 60, § 6, 27 Stat. 25, 25-26 (1892) (repealed 1943). Technically, the Act imposed this requirement only on "Chinese laborers"—the class of Chinese immigrants who were prohibited from entering the United States under the already-existing Chinese Exclusion Acts. But since the statute authorized federal officials to arrest any "Chinese laborer" they found who was not holding a certificate, and since there was no obvious way for other Chinese immigrants to prove to a federal marshal on the street that they were not "laborers," the statute created a powerful incentive for *all* Chinese immigrants—indeed, even for American citizens of Chinese descent—to try to obtain the certificates of residence.

who was deportable. The statute even formalized this notion, stipulating that any immigrant who failed to obtain a certificate of residence required under the statute, as well as any immigrant found in the United States not in possession of a certificate, "shall be deemed and adjudged to be unlawfully within the United States."[178]

The Geary Act, therefore, provided a seemingly easy answer to the question whether Fong Yue Ting should be considered a lawful resident. Fong Yue Ting and the other two petitioners conceded that they did not possess certificates of residence—Fong Yue Ting and Wong Quan because they had not applied for one, and Lee Joe because he had been refused one when he applied.[179] Under the statute, the majority concluded, this meant that the petitioners were all unlawfully present.[180] Even on the dissenters' understanding of vested rights, the majority argued, this fact left Fong Yue Ting and the others on the privilege side of the dividing line between privileges and vested rights.

The dissenters disagreed. Rather than follow the formalisms of Congress's statutory scheme, they focused on the practical realities of the statute's operation. Everyone knew that the vast majority of Chinese immigrants, most of them lawful residents, lacked certificates of residence. This was partly because the Chinese community had organized a massive boycott of the registration system.[181] But many lacked certificates because the regulatory scheme was designed to ensnare and deport plenty of lawful Chinese immigrants (a fact that likely pleased many who voted for it in Congress). The Geary Act required any immigrant who lacked a certificate to prove, using "at least one credible white witness," his lawful residence before a judge.[182] The Treasury officials who administered the registration system applied this same requirement to immigrants' initial applications.[183] Thus, if an immigrant had only Chinese witnesses who could attest to their residence—likely a common situation given the Jim Crow laws that

178. *Id.* This approach to the concept of status was widely used by Congress in its early immigration statutes. While Congress provided for deportation (as opposed to exclusion) in a number of statutes during this period, deportation was in all instances authorized only for immigrants who had "come in violation of law" or were "found unlawfully within." As I have explained elsewhere, those statutes all formally reflected a model of ex ante rather than ex post screening. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 836-37 (2007) (providing several examples of such deportation provisions). Not until 1907 did Congress enact immigration provisions that made *lawful residents* deportable for engaging in prohibited post-entry conduct. *See id.*

179. Fong Yue Ting v. United States, 149 U.S. 698, 731-32 (1893).

180. *Id.* at 727-32.

181. For more on this early example of coordinated civil disobedience in the fight for civil rights, see SALYER, *supra* note 9, at 46-48.

182. Geary Act § 6, 27 Stat. at 26-27.

183. *Fong Yue Ting*, 149 U.S. at 726-27.

segregated Chinese communities in places like San Francisco—then they could not obtain a certificate.

So Justice Field and the other dissenters refused to accept the statute's stipulation that Fong Yue Ting and the other petitioners were "unlawfully present" simply because they lacked certificates of residence. Instead, the dissenters concluded that Fong Yue Ting and the others had all taken up residence in the United States with the consent of the government under preexisting treaties with China, prior to the passage in 1882 of the first Chinese Exclusion Act: Fong Yue Ting in 1879, Wong Quan in 1877, and Lee Joe in 1874.[184] Thus, Fong Yue Ting and the others were "lawfully within the United States, and are here as residents, and not as travelers."[185] At least with respect to them, the Act was not providing a means of identifying unlawfully present noncitizens.[186] Instead, it was simply punishing (with deportation) lawful residents for failing to obtain a piece of paper from the government.[187]

In rejecting the dissenters' view and concluding that Fong Yue Ting and the other petitioners were unlawfully present, the majority made its ultimate resolution of the case even easier: Fong Yue Ting's unlawful presence meant that he lost, regardless of whether lawful entrance and domicile could give rise to a vested right. But perhaps predictably, Justice Gray's decision to write the majority opinion in a way that hinged on Fong Yue Ting's status invited further litigation. And a year later, lawyers were back before the Court arguing that *Fong Yue Ting* did not reach cases involving lawful domicile and that, in fact, a domicile lawfully acquired by a noncitizen amounted to a vested right and could not "be legally taken from him, nor its exercise obstructed by any action of executive

184. *Id.* at 734 (Brewer, J., dissenting).

185. *Id.*

186. In fact, both Justice Brewer and Chief Justice Fuller argued, the Geary Act applied *only* to lawful immigrants. Section 6 of the statute created a legal duty to register only for "Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States." Geary Act § 6, 27 Stat. at 26-27. Since immigrants who were not "entitled to remain in the United States" were not covered by that duty, the dissenters cleverly concluded that the registration requirements and penalties applied only to lawful residents. *Fong Yue Ting*, 149 U.S. at 743 (Brewer, J., dissenting); *id.* at 762-63 (Fuller, C.J., dissenting). Whether or not this was a fair reading of the statute, it bolstered the dissenters' view that the entire scheme was unconstitutional.

187. *See Fong Yue Ting*, 149 U.S. at 733 (Brewer, J., dissenting); *id.* at 761 (Field, J., dissenting); *id.* at 762-63 (Fuller, C.J., dissenting) (concluding that the statute requires "Chinese laborers entitled to remain in the United States" to register for "the purpose of identification" and imposes deportation as a "punishment to coerce compliance with that requisition").

officers of the government."[188] Giving those officers' decisions conclusive effect in such a case would deny such immigrants "that due process of law which is required by the Constitution of the United States."[189] Drawing explicitly on the language of privilege and private right, the lawyers argued that taking a noncitizen's lawfully acquired domicile without judicial process would amount to an "arbitrary exercise of the powers of government unrestrained by the established principles of *private right*."[190] When squarely confronted with this question, the Court reaffirmed what the majority had already said (albeit in dicta) in *Fong Yue Ting*: that citizenship, not lawful domicile, marked the moment at which a private right to reside in the United States vested in a person.[191]

5. *Vested Rights, Not Plenary Power*

In every case I have discussed thus far, the Court deemed the interest at stake in the suit to be a privilege. But when the Court finally confronted an immigration case in which it characterized the immigrant's interest as a vested right, it did precisely what one would expect within this nineteenth-century framework: it followed through and concluded that the right could not be taken except

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188. Lem Moon Sing v. United States, 158 U.S. 538, 546 (1895). Lem Moon Sing's lawyer, Maxwell Evarts, emphasized that the Court had previously decided only cases concerning privileges, such as the "right of an alien immigrant to enter this country for the first time." Brief for Appellant at 5, *Lem Moon Sing*, 158 U.S. 538 (No. 946). And, as he wrote, the Court had been careful to restrict its prior holding to "foreigners who have never been naturalized, *nor acquired any domicile or residence within the United States.*" *Id.* (quoting Nishimura Ekiu, 142 U.S. 651, 660 (1892) (emphasis added)). Noncitizens who had acquired a lawful domicile, Evarts argued, stood on equal footing with citizens with respect to their right of residence. *Id.* at 6. Since a person alleging himself to be a citizen could not be excluded without a judicial hearing and determination of the facts, neither could a person alleging to be lawfully domiciled. *Id.* at 7.

Interestingly, Justice Harlan resolved the case by mischaracterizing Evarts's argument. Harlan wrote that Lem Moon Sing contended that all persons alleging a right to land were entitled by due process to a judicial trial—a contention Harlan suggested was absurd and foreclosed by earlier cases like *Nishimura Ekiu*. *See Lem Moon Sing*, 158 U.S. at 547 ("That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the government."). But Evarts's due process claim did not turn on whether a person claimed a legal entitlement to entry. It turned on whether a person had already acquired a vested right to reside. That is why, Evarts took pains to explain, Lem Moon Sing's due process claim was consistent with the Court's earlier holding in *Nishimura Ekiu* that executive-branch officials could conclusively determine a newly arriving immigrant's right to land. *See* Brief for Appellant, *supra*, at 10.

189. Brief for Appellant, *supra* note 188, at 7.

190. *Id.* at 4 (emphasis added).

191. *See Lem Moon Sing*, 158 U.S. at 547-48.

through judicial process. As a result, for the first time in American history, the Supreme Court concluded that a federal immigration law violated the Constitution.

The case in which all of this happened was *Wong Wing v. United States*.[192] Decided in 1896 under the same statute at issue in *Fong Yue Ting*, the dispute began much the same way as in that earlier case, when Wong Wing and two other Chinese immigrants were arrested and ordered deported for failing to obtain certificates attesting to their lawful residence.[193] At that point, however, Wong Wing's case took a different turn. Federal officials did more than simply order him deported. They also sentenced him "to be imprisoned at *hard labor* in the Detroit House of Correction for a period of sixty days" prior to being deported—a penalty explicitly authorized by the Geary Act.[194]

Wong Wing contended that the imposition of hard labor in a Michigan penitentiary made a crucial constitutional difference. Even if deportation was the loss of a mere privilege, the imposition of hard labor constituted criminal punishment, a classic deprivation of liberty. And because it was a criminal punishment, it could be imposed, consistent with the Fifth and Sixth Amendments, only following an indictment and a trial before an Article III court.[195]

The government's response, and the Supreme Court's ultimate rejection of the Justice Department's position, reinforce the conclusion that these early cases were being litigated within the traditional separation-of-powers framework and not creating some sort of exceptional "immigration plenary power." In its reply brief, the Justice Department first tried to respond to Wong Wing's argument from within the vested-rights framework.[196] But the government then made a much bolder claim. It acknowledged openly that Wong Wing's case was different: it was not about "the question of the right to exclude aliens by summary proceedings through an executive officer, as in *Fong Yue Ting v. United States*."[197] Instead, it concerned "punishment before deportation."[198] And in the

192. 163 U.S. 228, 235-38 (1896).

193. *Id.* at 229.

194. Brief for Appellants at 1-2, *Wong Wing*, 163 U.S. 228 (No. 204). The Geary Act provided that "any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States." Geary Act, ch. 60, § 4, 27 Stat. 25, 25 (1892) (repealed 1943).

195. *See* Brief for Appellants, *supra* note 194, at 6-11.

196. Brief for the United States at 4-6, *Wong Wing*, 163 U.S. 228 (No. 204) (arguing that resident noncitizens could never acquire a vested right to reside, but that even if some could, Wong Wing had not shown that he was among that class).

197. Brief for the United States, *supra* note 196, at 12 (citation omitted).

198. *Id.* at 11.

government's framing, the central question was whether "a foreigner who comes to this country . . . against the express will of the sovereign and in defiance of its laws, acquire[s] a status which will give him a right to rely on constitutional guaranties intended to be acquired only in a lawful way."[199] The answer to that question, the government argued, had to be no. If Wong Wing entered and remained in the United States unlawfully, then he could not hide behind the Constitution when the federal government chose to punish him for that act.[200]

The government's brief suggested two reasons for this conclusion—reasons that parallel modern claims about the nature of the immigration plenary power. First, the government argued, the sovereign power over migration recognized by the Court in *Chae Chan Ping* and other earlier cases must be understood to authorize the government to do whatever it deemed necessary to enforce its immigration policies, unfettered by constitutional constraints.[201] Put differently, the government was arguing that federal immigration law is an exceptional subject, one uniquely immune from constitutional limits. This idea of subject-matter exceptionalism, as I explained earlier, is one of the two modern ideas that animate contemporary understandings of the immigration plenary power.[202] Second, the government contended, unlawful entrants like Wong Wing were, by virtue of their unlawful status, outside the protection of the Constitution despite being within the territory of the United States.[203] The petitioner was thus in a constitutionally exceptional position. This notion of claimant exceptionalism—that judicial review is weaker or nonexistent because the immigrants coming to court are outside the protection of constitutional provisions that would otherwise apply—is the other idea driving contemporary claims about the immigration plenary power.[204]

Had the Supreme Court accepted the Justice Department's position, it would have been fair to say that the Court was well on its way to inventing the sort of immigration exceptionalism that today many claim the Court created during this period. But the Court did exactly the opposite. It rejected the government's position. It held that the Geary Act's hard-labor provision was not immune from constitutional scrutiny simply because it was an important immigration

199. *Id.* at 12 (emphasis omitted).

200. *Id.*

201. *Id.* at 18-20.

202. *See supra* notes 26-38 and accompanying text.

203. Brief for the United States, *supra* note 196, at 21 (rejecting the notion that "aliens can, *against the will of the United States*, acquire or hold the Constitutional guaranties to personal liberty and rights of property").

204. *See supra* notes 26-38 and accompanying text.

enforcement policy.[205] It concluded that Wong Wing was fully protected by the Constitution's criminal-procedure protections in the Fourth, Fifth, and Sixth Amendments, despite his unlawful presence in the United States. And it ruled, ultimately, that because hard labor, being a traditional criminal punishment, constituted a deprivation of Wong Wing's vested right to liberty, it could not be imposed upon Wong Wing without judicial process, before an Article III court, that comported with the Bill of Rights.[206]

It is difficult to imagine more of a smoking gun—a more direct piece of evidence demonstrating that the Court understood itself to be working within the confines of ordinary nineteenth-century constitutional law, rather than creating some exceptional regime for overseeing American immigration policy. The Court openly rejected the government's invitation to create an exceptional approach. Instead, it applied its familiar framework, one that knit together the question whether a vested right was violated and the question whether judicial involvement was required.

Rights and structure are tied together in *Wong Wing* in exactly the same way they were connected in *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting*. The only difference was that this time, the Court concluded that federal officials had deprived the immigrants of a cognizable vested right. To drive home that point, Justice Shiras noted that the Court would have reached the same conclusion had Congress chosen to "further promote [its exclusion] policy" against deportable noncitizens "by confiscating their property."[207] That too, he concluded, would have required "a judicial trial to establish the guilt of the accused" because it would have deprived noncitizens of a vested right to property protected by the Due Process Clause.[208]

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205. *See* Wong Wing v. United States, 163 U.S. 228, 237 (1896). Some scholars have tried to square the decision in *Wong Wing* with the existence of an "immigration plenary power" by suggesting that the Court concluded in *Wong Wing* that the hard-labor provision was not really an "immigration policy," and thus was not entitled to the special constitutional treatment they believe applied to immigration laws during this period. *See infra* Section II.C. I explain below how this view of the case is mistaken. *See infra* Section II.C.

206. *Wong Wing*, 163 U.S. at 238.

207. *Id.* at 237.

208. *Id.* ("But when congress sees fit to further promote [its exclusion] policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by *confiscating their property*, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused." (emphasis added)).

C. The Conventional Wisdom, Redux

Where does all of this leave us? My goal in this Part has been to persuade readers that the way we have long understood the doctrinal structure of American immigration law's foundational late nineteenth-century cases is wrong. To do that, I have laid out, in some detail, an alternative understanding of those cases. My focus has been primarily on the cases and the public-law environment in which they were decided, rather than on other modern scholars' accounts of those cases. That expositional choice was quite deliberate — a decision to begin by building the affirmative account, rather than by framing each step in my argument as a critique of the views of other scholars.

Starting with the affirmative account allows readers — especially those not steeped in the last several decades of immigration law scholarship — to evaluate the account on its own terms. Focusing first on the affirmative story also helps highlight the fact that seemingly disparate aspects of these early cases are in fact intimately related as a doctrinal matter. We can now see, for example, that the Court's treatment of Chae Chan Ping's substantive complaint about Congress's power to void his reentry certificate is linked, doctrinally, to the Court's treatment of Nishimura Ekiu's procedural demand for a hearing before an Article III tribunal in her case. We can see that the Court's resolution of the whole cluster of claims raised in *Fong Yue Ting* — claims about non-Article III adjudication, about banishment, and about the applicability of the Fourth, Fifth, and Sixth Amendments — are all doctrinally connected to each other through the thread of private rights in nineteenth-century constitutional reasoning. And we can see that this same connecting thread explains the Court's otherwise stunningly different decision in *Wong Wing*.

Now that I have laid out that affirmative account, however, it is useful to circle back to the conventional wisdom I described in Part I. When we do so, it is immediately apparent that conventional accounts of the immigration plenary power doctrine's origins and analytic structure cannot be squared with the story I have told.

Modern accounts of the inception of immigration exceptionalism contend that the Supreme Court, in *Chae Chan Ping* and subsequent cases, insulated federal immigration policies and decisions from meaningful constitutional scrutiny: it was in these cases that the Court "disavowed in absolute terms any judicial power to review the constitutionality of immigration legislation."[209] But that is

209. Legomsky, *supra* note 11, at 257; *accord* Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1369-70 (1999) ("The *Chinese Exclusion Case*, decided in 1889, was the first clear judicial statement that courts will not hear constitutional challenges to the political branches' immigration-related decisions. In this

not what happened. Had that actually happened, the Court wouldn't have even needed to consider Chae Chan Ping's constitutional challenge to the Scott Act, which had declared his reentry certificate void. Yet the Court considered Chae Chan Ping's claim on the merits. Ditto for *Nishimura Ekiu* and *Fong Yue Ting*. The Court did not hold in either of those cases that the constitutionality of immigration procedure was immune from attack. It instead held on the merits that, under the then-reigning account linking due process and the separation of powers, the Constitution did not require the government to provide a judicial trial or other procedural protections when it deprived people of mere privileges. And *Wong Wing* drives home that reality: there, the Court did not just assert its authority to review the constitutionality of immigration legislation—it actually invalidated a federal immigration statute as unconstitutional.

On my account, *Wong Wing* fits neatly into the nineteenth-century public-law framework within which the other foundational immigration cases were decided. But *Wong Wing* looks like an aberration on the standard account. If the plenary power insulated federal immigration policies from judicial scrutiny and the ordinary rules of constitutional law, then how did the Supreme Court hold in *Wong Wing* that a federal immigration law violated the Constitution?

To make sense of *Wong Wing* without giving up on the idea of the plenary power doctrine, standard accounts gerrymander the scope of the doctrine, arguing that it applies only in immigration cases and that *Wong Wing* is somehow not an immigration case.[210] Hiroshi Motomura has described *Wong Wing* as a case concerning not "the law of admission and expulsion of aliens" but instead "the more general law of aliens' rights and obligations," an arena where "the force of the plenary power doctrine diminishes considerably."[211] Others have described the category distinction slightly differently, arguing that the Supreme Court distinguished between "immigration cases," where the plenary power doctrine applied with full force, and "criminal cases," where it did not.[212]

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respect, the *Chinese Exclusion Case* belongs to the bedrock of the plenary power doctrine." (footnote omitted)).

210. *See generally* Cox, *supra* note 33 (explaining the way in which the entire academic field of immigration law is organized around the idea of distinguishing immigration laws from other kinds of laws).

211. Motomura, *Phantom Norms*, *supra* note 11, at 565; *accord* THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 212 (6th ed. 2008) (asserting that "constitutional law relating to immigration may differ from [that] relating to noncitizen immigrants"). Another example from this period that Hiroshi Motomura cites as a "seminal case in this regard" is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Motomura, *Phantom Norms*, *supra* note 11, at 565.

212. *See* LEGOMSKY, *supra* note 27, at 219 ("Several contrasts can be noted between the courts' unusually restrained posture in immigration cases and the standards of constitutional review

Formally, these ways of distinguishing *Wong Wing* reconcile the case perfectly with the other trilogy of foundational cases. The difficulty is that the Supreme Court drew no such distinction in *Wong Wing* itself. The Court did not say that ordinary rules of constitutional law applied because the law at issue was not an immigration law. To the contrary, the Supreme Court agreed with the government that the hard-labor provision was a means of enforcing the policy of Chinese exclusion—and thus an exercise of Congress's constitutional power to regulate migration.[213] Indeed, had the Court *not* understood the law as an exercise of the national government's authority to regulate immigration, there would have been a serious question—in this era of much more limited federal power—about whether Congress had constitutional authority to enact this penalty provision.[214] In the Court's view, Wong Wing's case differed not because the

in certain closely related areas. The criminal cases are especially noteworthy. In *Wong Wing v. United States*, the Supreme Court struck down a federal statute imposing the criminal punishment of imprisonment at hard labour, as a sanction for violation of the immigration laws . . . ." (footnote omitted)). Along these lines, Peter H. Schuck has argued that *Wong Wing* did not undermine his argument that "classical immigration law" involved no constitutional constraints on exclusion and deportation because *Wong Wing* "was a deportation case and involved not simply exclusion but expulsion plus *punishment*." Schuck, *supra* note 11, at 19 n.94.

213. The Court, after noting that it had already affirmed Congress's constitutional authority to exclude and expel noncitizens, said that

> [t]he question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, to be inflicted by the judgment of any justice, judge or commissioner of the United States, without a trial by jury.

Wong Wing, 163 U.S. at 235. The Court quickly concluded that the answer to the first half of the question presented was yes: "[W]e think it would be plainly competent for Congress to declare the act of an alien in remaining unlawfully within the United States to be an offence, punishable by fine or imprisonment, if such offence were to be established by a judicial trial." *Id.* The problem, the Court ultimately concluded, was that the answer to the second half of the question was no: Congress could not exercise that constitutional authority without a trial by jury or the other trappings of the Fifth and Sixth Amendments. *Id.* at 238.

214. To see this point clearly, consider two cases that bookend *Wong Wing* chronologically. In *Lees v. United States*, decided three years before *Wong Wing*, the Supreme Court considered a claim that Congress lacked the power to criminally punish prospective employers who violated the Alien Contract Law of 1885 by entering into contracts with prospective migrants. 150 U.S. 476, 479-80 (1893).The Court summarily rejected that argument: "If Congress has power to exclude such laborers, as by the cases cited it unquestionably has, it has the power to punish any who assist in their introduction." *Id.* at 480. A decade after *Wong Wing*, however, the Court concluded in *Keller v. United States* that a federal law punishing brothel owners in which immigrant prostitutes were found living was beyond Congress's power to regulate immigration. 213 U.S. 138, 139-40 (1909). The connection to immigration regulation, the Court concluded, was simply too attenuated. *Id.* at 147-49 (reaching this conclusion in part because the statute required no proof that the owner had "assist[ed] in the importation" of the noncitizen). In other words, having found in *Keller* that the statute was not really an exercise of Congress's

policy at issue was not an immigration policy. It differed because the *interest* being taken from Wong Wing was different: it was a private right, not a privilege.

This highlights a more general problem with the standard story of the plenary power doctrine. The conventional account's core premise is that the plenary power doctrine, at its outset, insulated all immigration cases from constitutional scrutiny—irrespective of the precise constitutional claims at stake. But when scholars have confronted cases that do not seem to fit that model, they have generally decided not to question the core premise of their accounts. Instead, they have assumed that the model is correct and then tailored the scope of the plenary power doctrine so that it would not cover cases that do not fit the model.[215] If a

power to regulate immigration, the Court concluded that the power exercised was beyond Congress's constitutional authority and instead reserved to the states. But whether the statute was considered an immigration law was emphatically not determined by whether the statute imposed a criminal punishment, as *Lees* had already made clear.

215. Consider, as another example, Legomsky's efforts to distinguish immigration cases from criminal cases on just this ground. In addition to contrasting *Wong Wing* with what he sees as core plenary power cases like *Fong Yue Ting*, Legomsky argues that this distinction in case types explains the relationship between cases like *Keller* and *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). *See* LEGOMSKY, *supra* note 27, at 219-22. His argument appears to be that the plenary power doctrine applied in *Oceanic Steam Navigation*, which concerned a civil sanction, but did not apply in *Keller*, which concerned a criminal statute. In my view, this claim is incorrect. First, that reasoning seems to imply that the Supreme Court was willing to scrutinize and invalidate the use of criminal sanctions related to immigration but would hold immune from review under the plenary power doctrine the use of civil sanctions related to immigration. But that is not at all what the Supreme Court said in *Wong Wing* (or any other case). In *Wong Wing*, in fact, the Supreme Court said something close to the opposite: the Court said that if Congress had enacted a statute that made it a crime to be unlawfully present in the United States, and punished that crime through the imposition of hard labor (after a criminal trial), that would have been perfectly constitutional. *See Wong Wing*, 163 U.S. at 235. Second, the very act of holding *Keller* and *Oceanic Steam Navigation* up against one another, and then suggesting that there needs to be an explanation for the "different level of scrutiny" by the Court in the two cases, reflects a deep methodological problem with the conventional account of the plenary power. Those accounts all start from the premise that the plenary power doctrine was a transsubstantive doctrine of judicial deference (or abdication) that applied in all immigration cases. If you start with that premise, then it makes sense to compare one immigration case with any other immigration case. But this approach assumes the transsubstantivity of the doctrine that their accounts are supposed to be establishing. The entire argument becomes circular.

On my approach, there is little reason to compare a case like *Keller* to a case like *Oceanic Steam Navigation* because those cases concern radically different legal claims. *Keller* concerned the question whether Congress possessed constitutional authority (whether enumerated or not) to punish "brothel" owners in whose brothels the immigration service found a "prostitute" living. 213 U.S. at 138-40. It was a case about the scope of federal authority in a constitutional world of limited federal power. It is more closely related to Commerce Clause cases of the early twentieth century than it is to *Oceanic Steam Navigation*, which itself was concerned with what rights a steamship owner had to ask a federal court to redetermine the fine imposed on it by

case like *Wong Wing* seemed at odds with the idea that immigration law is immune from judicial review, then it must be because it is not an immigration case.[216] That approach encourages ex post rationalizations that are not closely connected to the reasoning that actually undergirded the Court's decisions. But we can avoid that trap if we begin by questioning the basic premise: that the Court decided in its foundational immigration cases that all immigration policies are immune from judicial review. Doing so allows us to see that those cases were argued and resolved on the basis of the then-conventional way of thinking about separation of powers and due process. These cases were not, contrary to popular misconception, the font of immigration exceptionalism.

III. THE TRANSFORMATION OF IMMIGRATION LAW . . . AND ALL OF PUBLIC LAW

As we can now see, immigration exceptionalism was not invented in the late nineteenth century. The canonical cases handed down during that period reflected then-orthodox views about public law. But at the dawn of the twentieth century, those orthodox ideas were under tremendous pressure. Within a few short decades, the nineteenth-century model relating due process to the separation of powers was largely cast aside as the Supreme Court grappled with the explosive growth of the administrative state. In its place, the Court created an entirely new framework for thinking about the role federal courts would play in policing executive-branch officers.

This period of dramatic change suggests an alternative place we might look for the invention of immigration exceptionalism. Perhaps as the rest of public law underwent a revolution, immigration law remained rooted in the past—adhering to the earlier framework even as it was abandoned elsewhere. But this hypothesis—that immigration law remained fixed while the rest of public law evolved—is also wrong. During the first few decades of the twentieth century, immigration law did not stand still. It evolved apace with the rest of public law, undergoing the same dramatic transformation taking place elsewhere.

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immigration officials. 214 U.S. at 322-24. *Oceanic Steam Navigation* is much more closely related to *Nishimura Ekiu*—though, as I will explain in the next Part, the Court's approach in *Oceanic Steam Navigation* reflected the Court's transition away from the due process approach in that earlier case and toward the appellate model of judicial review that emerged in the early twentieth century. In that sense, *Oceanic Steam Navigation* is a close cousin of a case decided in 1932 called *Lloyd Sabaudo*. *See infra* notes 288-296 and accompanying text (discussing *Lloyd Sabaudo* and *Oceanic Steam Navigation*'s connection to its approach).

216. Moreover, as we will see in the next Part, yet more manipulation of the plenary power doctrine's scope would soon be required in order to square the Court's cases with the conventional wisdom. See *infra* text accompanying notes 260-268.

Immigration law was not insulated from the new framework the Court was developing for thinking about due process and the separation of powers. Indeed, immigration law was often on the leading edge of the transformation, helping develop important pieces of that emerging framework. Far from operating as a constitutionally exceptional arena, American immigration law was in some ways at the forefront of the development of what we today call administrative law. This period, therefore, supplies additional evidence of the anti-exceptionalist nature of early American immigration law.

A. The Breakdown of the Nineteenth-Century Model

The first few decades of the twentieth century brought with them dramatic changes in thinking about the separation of powers, Article III, and due process. Courts began to reject the all-or-nothing nature of the old separation-of-functions approach, *expanding* the sorts of interests that were protected by due process while simultaneously *contracting* the adjudicative rights associated with protected interests. These changes, which permitted agencies to adjudicate many matters that previously had been committed exclusively to the jurisdiction of Article III courts, had the effect of breaking the tight connection between due process and the separation of powers — and of creating, as Jerry L. Mashaw and others have chronicled, our "more modern understanding of the reach of judicial review of administrative action."[217]

When due process and the separation of powers were tightly linked, due process dictated both who could resolve a matter implicating a vested private right (a court) and what procedures were due (a hearing akin to a common-law trial). Once that link was broken, however, due process began to be radically reconceptualized in two ways. First, the Court began to speak about the possibility of "due process" being supplied by nonjudicial actors. This new idea, which would have been oxymoronic under the earlier framework, meant that due process could in many instances be provided by administrative officials holding hearings and adjudicating matters that implicated interests protected by the Due Process Clause. Second, the Court began to treat the procedural requirements of due process as flexible — with the formality of the procedures turning on the balance of interests at stake, rather than always inflexibly tracking the basic structure of a common-law trial.

This watering down of the procedures "due" made it easier for courts to conclude that a particular interest was protected by due process. Doing so, after all, would no longer force the court then to require an elaborate hearing before an Article III tribunal. And, sure enough, around this time, the set of interests

217. MASHAW, *supra* note 9, at 65-78.

protected by due process began to expand, becoming less closely tied to nineteenth-century conceptions of private rights.[218] Courts began concluding that interests that would not have counted as core private rights in the nineteenth century nonetheless triggered the constitutional protections of the Due Process Clause.[219] Thus, a transformation in thinking about the separation of executive and judicial functions emerged hand in hand with a transformation in thinking about due process.

These changing attitudes regarding administrative law in the early twentieth century affected the Supreme Court's approach in immigration cases as much as in other regulatory matters. Within a decade of its decisions in cases like *Nishimura Ekiu* and *Fong Yue Ting*—exemplars of the earlier approach—the Court began to retreat from its categorical approach to separating out judicial and executive functions in immigration cases.

The outlines of this new approach appeared first in *Yamataya v. Fisher*,[220] another famous (and famously misunderstood) case in the immigration law canon.[221] The case arose when Kaoru Yamataya, a teenager from Japan, was

218. To be sure, pressure on the nineteenth-century model was also coming from the rise of what we today call substantive due process—meaning not just the expansion of interests protected by the Due Process Clause, but the idea that those interests imposed substantive limits on legislative authority such that legislatures were barred from legislating, even prospectively, in ways that interfered with those interests. *See supra* note 83.

219. *See, e.g.*, Aditya Bamzai & Samuel L. Bray, Debs *and the Federal Equity Jurisdiction*, 98 Notre Dame L. Rev. 699, 704 (2022) (discussing the expansion of the concept of property during this period and its connection to expanding judicial authority to issue injunctions in equity against government officials); *see also, e.g.*, Felix Frankfurter & Nathan Greene, The Labor Injunction 134-98 (1930) (discussing the implications of the Court's expanding due process doctrine for legislation concerning labor injunctions); *In re* Debs, 158 U.S. 564, 582-86 (1895) (expanding the notion of what counted as "property" for the purposes of establishing equity jurisdiction); Int'l News Serv. v. Associated Press, 248 U.S. 215, 238-41 (1918) (same). Eventually this evolution went so far that the Court would declare dead the distinction between private rights and privileges. *See supra* note 84. Yet the demise of the distinction between rights and privileges was always a little overstated. Even today, traces of that distinction affect the procedures required by the Due Process Clause, as well as the permissibility of adjudication outside of an Article III court. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 260-66 (1970); Mathews v. Eldridge, 424 U.S. 319, 332-35 (1976); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-57 (1986); Stern v. Marshall, 564 U.S. 462, 482-95 (2011).

220. 189 U.S. 86 (1903).

221. It is hard to overstate the continuing significance of *Yamataya*. More than a century after it was decided, the government and immigrants continue to disagree sharply about what it held, even as both sides agree that its holding is crucial to determining the due process rights of immigrants in deportation proceedings. *See, e.g.*, Brief for the United States at 23-24, Dep't of Homeland Sec. v. Thuraissigiam, 591 U.S. 103 (2020) (No. 19-161); Brief for Respondent at 39-40, *Thuraissigiam*, 591 U.S. 103 (No. 19-161); *see also* Brief of Amici Curiae Immigration Scholars in Support of Respondent at 11-13, *Thuraissigiam*, 591 U.S. 103 (No. 19-161) (disputing the government's interpretation of *Yamataya*).

arrested and ordered deported by an immigration inspector just a few days after she had been permitted to land in Seattle.[222] The executive-branch official who ordered her deported, Thomas M. Fisher, concluded that she was excludable because she was liable to become a public charge.[223] Yamataya argued that the inspector's finding was wrong. Worse, she complained, the "hearing" before Fisher had been a "pretended" one because she did not speak English and did not understand the questions put to her.[224]

Yamataya ultimately lost her case. Yet even as the Court rejected Yamataya's claims, it began to repudiate the separation-of-functions framework within which it had decided earlier immigration cases. While the Court dutifully cited those prior cases and purported to follow them, in reality the Court began to embrace an entirely new approach to due process and the separation of powers that was emerging throughout administrative law.

First, the Court expanded its views about what sorts of interests were protected by due process. In *Nishimura Ekiu* and *Fong Yue Ting*, the Court had held emphatically that the right to enter and remain in the United States was a privilege. That was why the deportation decisions at issue in those cases were treated by the Court as executive matters requiring no judicial process.[225] Now, in sharp contrast, the Court held for the first time ever that deportation implicated liberty interests protected by the Due Process Clause.[226]

Second, the Court conceptualized due process as something that could be supplied by administrative officers rather than by a federal court. In the nineteenth-century approach, due process meant judicial process, and nothing else. Now, however, the Court indicated that a hearing before an administrative officer might be sufficient to satisfy the requirements of due process:

> [T]his court has never held . . . that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without

222. We know far too little about Yamataya's story. For perhaps the most complete account, see Eleanor Boba, *Little Girl Lost: The Japanese Immigrant Case*, REMNANTS (June 9, 2018, 4:25 PM), https://remnantsofourpast.blogspot.com/2018/06/little-girl-lost-japanese-immigrant-case.html [https://perma.cc/EGJ9-Y2JV].

223. *See Yamataya*, 189 U.S. at 87; Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (making excludable "paupers or persons likely to become a public charge").

224. *See Yamataya*, 189 U.S. at 88; Transcript of Record at 6-8, *Yamataya*, 189 U.S. 86 (No. 171).

225. *See supra* Sections II.B.2-3.

226. *See Yamataya*, 189 U.S. at 99-101.

> opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends.[227]

Most modern scholars treat this passage as important for what it added: a requirement of a hearing at which the immigrant would have an opportunity to be heard. But equally important is what the Court subtracted: any requirement that the hearing be before a judicial officer. Instead, a person whose liberty was at stake needed to be provided with a hearing only "before such [administrative] officers." By emphasizing the obligations of administrative officers, to the exclusion of judicial process, the Court's evolving approach severed the tight link between due process and the exercise of "judicial power" under Article III.

Third, the Court made clear that due process operated as a sliding scale rather than as an all-or-nothing requirement. The Court wrote that "though 'due process of law' generally implies and includes *actor*, *reus*, *judex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings, yet this is not universally true."[228] Prefiguring developments that would be canonized some seventy years later in *Mathews v. Eldridge*,[229] the Court concluded that the requirements of due process could adapt flexibly to different circumstances. An opportunity to be heard in some fashion was crucial. But for Yamataya, that meant

> not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act.[230]

Embracing these novel ideas about due process put Article III courts in a new posture: rather than supplying due process themselves in an original proceeding, they would sit in review, evaluating the actions of administrative officers to determine whether those officers had provided procedures adequate to satisfy due process. Reviewing the record in Yamataya's case, the Court concluded that the inspector had done so.[231]

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227. *Id.* at 100-01.

228. *Id.* at 100 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 280 (1856)).

229. 424 U.S. 319, 340-48 (1976).

230. *Yamataya*, 189 U.S. at 101.

231. The Court concluded that Yamataya "had notice, although not a formal one, of the investigation instituted for the purpose of ascertaining whether she was illegally in this country." *Id.* It concluded further that she had had a chance to present her case when she was before the

These innovations made immigration law's evolution away from the nineteenth-century model undeniable. Had the Court simply been applying the older model, it could have reached its conclusion that due process was implicated only by deciding that deportation (at least sometimes) deprived a noncitizen of a vested private right to reside or remain in the United States. But within the older framework, such a conclusion would have meant that deportation was (at least sometimes) a judicial matter, not a matter that could be adjudicated by executive-branch officials. The entire scheme of administrative adjudication for deportation would have been unconstitutional. Yet the Court emphatically rejected this possibility even as it accepted the application of due process to deportation.

Indeed, that result suggests a reason why the Court was suddenly willing to hold that deportation could implicate the Due Process Clause—a possibility the Court had squarely rejected only a decade earlier in *Fong Yue Ting* and other cases. The reason is that the emerging approach to due process and the separation of powers reduced the stakes of judicial involvement in immigration decisions. Acknowledging that deportation implicated due process no longer had to mean that deportation would require a common-law trial before an Article III tribunal. Executive-branch officials could continue to adjudicate deportation cases. But courts would now sit in review of those judgments.

The rejection of the nineteenth-century model was further reinforced by an important development in the years following *Yamataya*: the application of *Yamataya*'s model of judicial oversight to exclusion contexts. Had *Yamataya* been working within the nineteenth-century framework—rejecting *Fong Yue Ting*'s conclusion that resident noncitizens lacked a vested right to remain, but retaining the old model's basic approach to separation of powers and due process—then its holding would have been utterly irrelevant in cases concerning entry (or even reentry). For in such cases, noncitizens would still be seeking a privilege, not the protection of a private right. And because a mere privilege would be at stake, no judicial involvement would be required when executive-branch officials ordered a noncitizen excluded at the border.[232] Courts would have become more involved in overseeing decisions to deport resident noncitizens. When officials excluded noncitizens at the border, however, courts would have retained the earlier hands-off approach without change.

But this is not at all what happened. While *Yamataya* certainly contained dicta suggesting that its holding might be limited to deportation decisions—and

inspector and provided answers to his questions. *Id.* While the Court acknowledged her contention that she did not speak English and had not understood the nature of the hearing, it said that such considerations should have been presented to the inspector or on appeal to the Secretary of the Treasury, and thus could not be raised for the first time in her habeas petition. *See id.* at 101-02.

232. *See supra* Section II.B.2.

while scholars and lawyers today often read *Yamataya* as hinging entirely upon the distinction between border exclusion and interior deportation—courts quickly extended *Yamataya*'s basic approach to exclusion contexts.[233] In case after case, the Supreme Court applied *Yamataya*'s approach to exclusion cases, requiring a fair hearing and prohibiting arbitrary administrative action.[234] Neither the Supreme Court nor lower federal courts drew a sharp distinction between

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233. *Yamataya*'s now-famous dicta came at the outset of its due process analysis, where the Court said that it was

> [l]eaving on one side the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed . . . .

189 U.S. at 100. Today, lawyers, scholars, and lower federal courts often argue that this language limited *Yamataya*'s relevance to interior deportation cases, preventing arriving noncitizens and at least some clandestine entrants from invoking the Due Process Clause to challenge their removal procedures. *See, e.g.*, Castro v. Dep't of Homeland Sec., 835 F.3d 422, 448 (3d Cir. 2016); Brief for the United States, *supra* note 221, at 8-9; Motomura, *Phantom Norms*, *supra* note 11, at 554 ("According to the [*Yamataya*] Court, aliens inside the United States can invoke more constitutional safeguards than aliens seeking admission . . . ."); Cleveland, *supra* note 11, at 161; *see also infra* Section III.C (explaining further why it is a mistake to read *Yamataya* and subsequent cases as carving out from the conventional plenary power doctrine a limited exception for procedural challenges to deportation brought by noncitizens who had already entered the country).

234. *See, e.g.*, Chin Yow v. United States, 208 U.S. 8, 12 (1908) (subjecting "statutes purport[ing] to exclude aliens" to due-process-type review); Low Wah Suey v. Backus, 225 U.S. 460, 467-68 (1912) (holding that "laws forbidding aliens or classes of aliens from coming within the United States" were subject to the same due process scrutiny as laws "provid[ing] for the expulsion of aliens or classes of aliens from its territory"); Kwock Jan Fat v. White, 253 U.S. 454, 464 (1920) (finding the administrative exclusion hearing unfair, and noting that the power to exclude "is a power to be administered, not arbitrarily and secretly, but fairly and openly," it being possible to prevent abuses of power only "when a full record is preserved of the essentials on which the executive officers proceed to judgment"); Ng Fung Ho v. White, 259 U.S. 276, 285 (1922) (remanding on the ground that the petitioners excluded at the border were entitled to a judicial determination of their citizenship claims); Tulsidas v. Insular Collector of Customs, 262 U.S. 258, 263, 266 (1923) (holding that the petitioners seeking admission were entitled to judicial review to determine whether "the administrative officers have manifestly abused the power and discretion conferred upon them," though ultimately rejecting their claims that they were entitled to admission); Tod v. Waldman, 266 U.S. 113, 119-20 (1924) (remanding to require that petitioners, who were denied entry on public-charge and illiteracy grounds, be provided a "fair hearing" by administrative officials, after the Court criticized the inadequacy of the record, noting its lack of detail as to the literacy test and lack of evidence as to whether the medical condition of one of the petitioners would affect her ability to work); *cf.* Chieng Ah Sui v. McCoy, 239 U.S. 139, 143-44 (1915) (considering on the merits Chieng Ah Sui's claim that his exclusion hearing was unfair and thus a violation of the "due process of law secured in the Philippine Islands by act of Congress," without suggesting that such protections would be available only to those who had already entered and taken up residence).

noncitizens residing in the country and those seeking entry at the border. To the contrary, they treated these groups as largely interchangeable and held that both groups were entitled to basic procedural fairness in administrative adjudication.

Commentators writing contemporaneously about these developments took note of this significant fact. As early as 1912, in what may well have been the first treatise ever written on American immigration law, Clement L. Bouvé described the federal-court immigration cases he surveyed as holding that "[t]he [due process] principles" applicable to resident noncitizens "are equally applicable to aliens, who, not having been admitted to the United States are detained for deportation by executive officers."[235] Indeed, Bouvé saw the equal application of due process protections to exclusion proceedings as entirely unsurprising. Editorializing on his survey of the cases, he concluded that the due process holdings flowed inextricably from the fact that noncitizens facing exclusion at the border are within the jurisdiction of the United States every bit as much as noncitizens facing deportation from the interior.[236] And like lower courts of the time, he made no reference whatsoever to the dicta in *Yamataya* that would, decades later, be read by government lawyers to suggest that *Yamataya* drew a sharp distinction between admission at the border and deportation from the interior. This bit of language that today has outsized importance in immigration litigation was, in the years after it was written, ignored and treated as irrelevant by courts and commentators. All of this further reinforces the conclusion that in *Yamataya* the Court was beginning to develop an entirely different model of separation of powers and due process.

This new understanding of *Yamataya* helps resolve a mystery that has long plagued conventional accounts of immigration exceptionalism. According to the conventional account, the Supreme Court established a special set of constitutional rules for immigration law in the 1880s and 1890s—a plenary power doctrine that barred immigrants from challenging the constitutionality of both the substantive criteria used to exclude and deport immigrants, as well as the procedures used to exclude or deport them. Adherents to the conventional wisdom have generally read *Yamataya* as narrowing the plenary power doctrine slightly to permit procedural (but not substantive) constitutional claims in deportation (but not exclusion).[237]

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235. Clement L. Bouvé, A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States 139 (1912).

236. *Id.* at 335-38.

237. Motomura, *Phantom Norms*, *supra* note 11, at 554 ("According to the Court, aliens inside the United States can invoke more constitutional safeguards than aliens seeking admission, and courts reviewing deportation orders should examine procedural due process questions more closely than they should examine substantive immigration rules.").

But this characterization of *Yamataya* creates some puzzles. If the Court was really committed, in cases like *Chae Chan Ping* and *Fong Yue Ting*, to establishing a special set of constitutional rules for immigration law, then why would the Court reverse course just ten years later in *Yamataya*? Proponents of the standard story have never offered much of any explanation for this aspect of their account. Certainly, there is little reason to believe that the Court became less racist or nativist in the intervening decade. And even if the Court had decided in *Yamataya* to retreat from earlier decisions fully insulating immigration law from judicial review, why would it retreat in this particular fashion—permitting procedural constitutional claims but not substantive ones, and permitting those procedural claims in only deportation but not exclusion cases? Again, the conventional story of the plenary power doctrine's rise has no real explanation for the scope of this purported exception.[238]

Once we see that *Yamataya* was ushering in an entirely new framework for thinking about due process and the separation of powers, however, these puzzles disappear. *Yamataya*'s existence is no longer mysterious. And its arrival so swiftly on the heels of *Fong Yue Ting* is much less surprising once we see that the decision was the product of the broader transformation of public law underway during the early years of the twentieth century.

B. The Rise of the Appellate Model

The breakdown of the old separation-of-functions framework ushered in a new model of judicial oversight for administrative actors.[239] Under this new model, courts would review a broader array of administrative decisions, no longer restricting their intervention to matters involving the deprivation of traditional private rights. In that sense, the new model expanded judicial intervention to encompass a broader array of administrative decisions. At the same time, under the new model, judicial involvement was less searching: courts would sit in "review" of administrative decisions rather than simply deciding matters of

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238. Standard accounts often suggest that the scope of the purported exception follows from the underlying justifications for the plenary power doctrine. But the conventional reading of *Yamataya* requires a strange amalgamation of the claimant-exceptionalism version of the plenary power (noncitizens in the country have more constitutional rights because they are already here) with the subject-matter exceptionalism version of the plenary power (yet noncitizens who are already here are still nonetheless prohibited from bringing substantive challenges because deportation rules are at the core of the special subject matter of immigration law).

239. The leading account of this transformation is Merrill, *supra* note 62, which describes the way that courts, during the first few decades of the twentieth century, rejected the separation-of-functions model and embraced "the salient features of the appellate review model [of administrative law], which allowed decisional authority to be shared between agencies and courts," *id.* at 942.

private right in original actions before trial courts.[240] In those original actions, courts had traditionally decided facts and applied law independently, on the basis of a record developed by the court itself.[241] Under the new model, in contrast, courts self-consciously "reviewed" agency action to ensure that administrative officials had acted in conformity with Congress's statutory requirements, had provided a fair hearing, and had reached a decision for which there was some factual support.

This "appellate-review model" of judicial oversight quickly became ubiquitous. And it was enduring. These forms of review, eventually codified in the Administrative Procedure Act (APA), constitute the familiar framework of judicial oversight that remains central to administrative law today.[242] Yet the framework was far from familiar when it was created in the early twentieth century. Its adoption revolutionized the way courts reviewed administrative action and deepened the repudiation of the nineteenth-century framework.

For our story, what is most important is that immigration law went through this revolution right along with the rest of administrative law. This common path of development for immigration and other regulatory areas demonstrates that courts were elaborating a unified model of judicial oversight, not developing principles of immigration exceptionalism, during this period. To be sure, the Supreme Court did not describe what it was doing in immigration cases (or elsewhere) as a revolution. Instead, as is commonly seen in the evolution of law, the Court stretched earlier legal concepts and doctrinal ideas beyond recognition to accommodate the emerging framework. In that way, it could purport to be following and building on existing case law, even as it radically reconfigured the relationship between the courts and executive-branch officials enforcing immigration law. That is how the Court was ultimately able to reject the nineteenth-

240. *See id.* at 953-65. As Thomas W. Merrill and others have noted, the rise of the appellate model meant decreased judicial oversight of administrative action affecting private rights, permitting administrative adjudication of matters that previously could be resolved only through judicial process. *See, e.g.*, *id.* at 959-63. For other matters, however, including immigration, it led to an increase in judicial oversight—something largely overlooked in the literature on this period. *See infra* Section III.D.

241. *See* Merrill, *supra* note 62, at 944, 947-48. Given the nineteenth-century approach, it is somewhat anachronistic to describe judicial involvement within that traditional framework as "judicial review," as courts did not think of themselves as sitting in "review" in the sense that that term is typically invoked today. In fact, throughout the nineteenth century, many believed that it would be a violation of the separation of powers to grant Article III tribunals appellate jurisdiction over Article I or Article II tribunals. *See, e.g.*, United States v. Ritchie, 58 U.S. (17 How.) 525, 533-34 (1855); WYMAN, *supra* note 144, at 75-85; Ablavsky, *supra* note 62, at 335; Mashaw, *supra* note 61, at 1414-15; Jerry L. Mashaw, *Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861*, 117 YALE L.J. 1568, 1679-81 (2008).

242. *See* 5 U.S.C. § 706 (2018); *see also* Merrill, *supra* note 62, at 942-43 ("The appellate review model was . . . incorporated into the Administrative Procedure Act . . . .").

century framework used to decide cases like *Fong Yue Ting* without ever openly overruling those cases.[243] But that is also why, from the time *Yamataya* was decided until the mid-1940s, the Supreme Court never once cited *Chae Chan Ping*, *Fong Yue Ting*, or *Nishimura Ekiu* for the sweeping propositions with which they are so often associated today.

Before I proceed to tell this part of the story, one caveat is in order. The account of the appellate model's rise in American public law is multifaceted and complex. The model emerged in response to myriad legal, political, and social forces that were putting pressure on the traditional nineteenth-century framework.[244] Its invention was also abetted by other legal developments—including the emergence of equity jurisdiction as a source of authority to review agency action,[245] the expansion of mandamus and habeas review,[246] and the rejection of the idea that the Constitution prohibited Congress from granting an Article III court jurisdiction to sit in review of the decision of an administrative adjudicator.[247] Today, there is plenty of scholarly disagreement about exactly what caused the transformation, about precisely how it unfolded in the courts, and about how far it went in banishing the intellectual framework that had guided the nineteenth-century approach. For our purposes, however, those ongoing disagreements are not important. What is critical is seeing the way in which the appellate model was quickly embraced (and developed) by American immigration law.

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243. The fact that the Court did not openly repudiate those earlier cases may be part of the reason why this early twentieth-century transformation has been missed by lawyers and scholars today.

244. The growth of the federal bureaucracy, the increase in business regulation by agencies like the Interstate Commerce Commission, growing judicial skepticism of some of this regulation, and the political reaction in Congress to that skepticism all play roles in many of the accounts of this period. *See, e.g.*, Merrill, *supra* note 62, at 953-63; MASHAW, *supra* note 9, at 245-50, 300-08.

245. *See* 3 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.5, at 1927 (6th ed. 2019) (discussing the role of the Court's decision in Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), in this development); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 122-26 (1998) (same); Merrill, *supra* note 62, at 949 n.35 (same).

246. *See, e.g.*, Mashaw, *supra* note 61, at 1405-07 (discussing the expansion of mandamus); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 478-83 (1963) (discussing the expansion of habeas review); Anne Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 596-605 (1993) (tracing these post-Reconstruction changes in habeas doctrine and noting the way in which, "[d]uring this same period, a similar rejection of narrow 'jurisdictional' review took place more generally in civil suits questioning the legality of actions taken by state and federal officials").

247. *See* United States v. Duell, 172 U.S. 576, 581-82 (1899). Prior to the Court's decision in *Duell*, many believed that appellate review of administrative judgments would violate the separation of powers. *See supra* note 241.

In the years following *Yamataya*, the scope of judicial review in immigration cases quickly came to encompass each of the elements of review embodied in the appellate model. As was true in administrative law more generally, there was no single immigration case in which the Supreme Court explicitly repudiated the old model and embraced a new one. (And, of course, even today, traces of the old model continue to influence administrative law and due process doctrine.) Nonetheless, *Yamataya* marked an important turning point. To be sure, in *Yamataya*, the Court reviewed only the question whether there had been a fair hearing.[248] But soon the Supreme Court and lower federal courts broadened their review of both exclusion and deportation decisions to ask whether administrative officials had acted in conformity with immigration statutes, whether those officials had acted arbitrarily, and whether there was some factual evidence to support those administrators' conclusions. The nineteenth-century model slowly receded into the background, and the Court embraced ever more fully the appellate model that was simultaneously emerging in other regulatory areas.

Review to ensure that administrators correctly applied the immigration statutes was among the first of the "appellate forms" to emerge in the post-*Yamataya* period. As early as 1904, just a year after deciding *Yamataya*, the Court reviewed (and reversed) an exclusion order on the ground that immigration officials had misinterpreted the immigration statutes they were charged with applying.[249] Within less than a decade, this form of review was widespread and mature.[250] The Court's decision in *Gegiow v. Uhl* is illustrative.[251] In *Gegiow*, the Court overturned an exclusion decision on the ground that executive-branch officials wrongly considered the state of the labor market in Portland, Oregon, when they determined that the petitioners were likely to become public charges.[252] The Court concluded that the statute did not permit consideration of local labor-market conditions: "The persons enumerated [in the grounds of exclusion] . . . are to be excluded on the ground of permanent personal objections accompanying

248. *See* Yamataya v. Fisher, 189 U.S. 86, 99-102 (1903).

249. *See, e.g.*, Gonzales v. Williams, 192 U.S. 1, 12-16 (1904) (reviewing an administrator's resolution of whether citizens of Puerto Rico counted as "alien immigrants" subject to the 1891 Immigration Act); *infra* text accompanying notes 309-313 (discussing *Gonzales*).

250. Low Wah Suey v. Backus, 225 U.S. 460, 469-74 (1912) (reviewing the question whether a statute providing that women who married U.S. citizens could be naturalized applied to women who were not otherwise within the scope of the Naturalization Acts); Lewis v. Frick, 233 U.S. 291, 296-97 (1914) (resolving the question whether prior residence exempted a person from the operation of the exclusion provisions of the statute); Chieng Ah Sui v. McCoy, 239 U.S. 139, 142-43 (1915) (reviewing the question whether the relevant immigration statute authorized the collector to appoint a board to adjudicate disputes about the right to land).

251. 239 U.S. 3, 8-10 (1915).

252. *Id.* at 8-9 ("We assume the report to be candid, and, if so, it shows that the only ground for the order was the state of the labor market at Portland at that time . . . .").

them irrespective of local conditions . . . ."[253] Because the reasons given by the inspector did not "agree with the requirements of the act," Justice Holmes wrote, the order was invalid.[254]

During this period, the Court also deepened its review of exclusion and deportation decisions to ensure that a fair hearing had been provided. While the Court's review in *Yamataya* had been perfunctory, in later cases the Court often dug deep into the record in order to evaluate claims that a hearing had been unfair. In *Chieng Ah Sui v. McCoy*, for example, the Court reviewed the record below to resolve "the assertion that there was a violation of the due process of law secured in the Philippine Islands by act of Congress both because of the want of a hearing and the disregard of the testimony" pertaining to the petitioner's right to enter.[255] The Court affirmed, but only after an extensive record review led it to conclude that there was abundant opportunity to be heard (including several rehearings) and that "an examination of the record" showed the claim that the board or the collector had disregarded testimony was "devoid of all merit."[256] This was no rubber stamp. And in other cases, the Court's review ultimately led it to deem the administrative hearing inadequate and remand the case for a new hearing.[257]

Review of facts emerged a bit more haltingly. In the first few years following *Yamataya*, the Supreme Court continued to state that it would not review the factual determinations made by administrative officials deciding exclusion and

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253. *Id.* at 10.

254. *Id.* at 9.

255. *Chieng Ah Sui*, 239 U.S. at 143; *accord* United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923) ("To render a hearing unfair the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process.").

256. *Chieng Ah Sui*, 239 U.S. at 144. Some other examples include *Tang Tun v. Edsell*, 223 U.S. 673, 680-82 (1912); *Low Wah Suey v. Backus*, 225 U.S. 460, 469-73 (1912); *Chin Yow v. United States*, 208 U.S. 8, 12 (1908); and *Bilokumsky*, 263 U.S. at 155-57.

257. In some cases, the Court ordered that the agency itself hold a new hearing after concluding that the initial hearing had been unfair. *See, e.g.*, Tod v. Waldman, 266 U.S. 113, 120-21 (1924) (remanding the matter for a new hearing before the agency). In other instances, the Court held that the claimant was entitled to a judicial hearing before an Article III tribunal. *See, e.g.*, Ng Fung Ho v. White, 259 U.S. 276, 284-85 (1922) (holding that a person ordered deported was entitled to a judicial hearing). This distinction in the remedies for hearing defects highlights one way in which the idea of "vested rights" continued to influence the Court's thinking. When a person subject to deportation claimed to be a citizen *and* provided some meaningful evidence supporting that claim, the Court concluded that the person was entitled to a judicial hearing because an administrative hearing would be inadequate to meet the demands of due process. *See id.* at 284; *Chin Yow*, 208 U.S. at 12. But when the person raised no citizenship claim, the Court concluded, as it had in *Yamataya*, that a (fair) hearing before an administrative tribunal was sufficient to satisfy due process. *See Waldman*, 266 U.S. at 119.

deportation cases.[258] Adhering to the position it had articulated in earlier cases like *Nishimura Ekiu*, the Court concluded that such review was prohibited by statutory provisions stating that the Executive's exclusion and deportation determinations "shall be final."[259]

Nothing about those statutory provisions changed in the following decades.[260] Yet within just a few years, seemingly in the face of these statutory prohibitions, the Court began to review exclusion and deportation decisions to ensure that the officers' decisions were supported by some evidence.[261] In 1912, for example, the Court wrote that judicial review encompassed "an examination of the evidence upon which the order of deportation was based" in order to determine whether the evidence "was adequate to support the Secretary's conclusion of fact."[262] Two years later, the Court made clear just how extensive such review

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258. *See, e.g.*, Zartarian v. Billings, 204 U.S. 170, 176 (1907) (declining to review the administrative decision that the "trachoma" the petitioner's child had contracted aboard a ship was of a dangerous or contagious quality that would warrant exclusion).

259. Nishimura Ekiu v. United States, 142 U.S. 651, 662 (1892); *see also* Immigration Act of 1891, ch. 551, § 8, 26 Stat. 1084, 1085-86 ("All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury.").

260. *See* Heikkila v. Barber, 345 U.S. 229, 233-35 (1953) (describing the origins of the finality provisions in the Immigration Act of 1891 and the Chinese Exclusion Acts, as well as the way in which finality provisions were carried forward over the decades in subsequent immigration legislation).

261. I say "some evidence," but the Court used varying language during this period to describe the intensity of its fact review. *See, e.g.*, United States *ex rel.* Vajtauer v. Comm'r of Immigr., 273 U.S. 103, 106, 110 (1927) (using synonymously the terms "substantial evidence" and "some evidence"); *cf.* Gerald L. Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 SAN DIEGO L. REV. 631, 730-32 (1988) (discussing the possible origins and potential differences among review for "some evidence," "substantial evidence," and the "sufficiency of evidence"). As late as 1945, when the Supreme Court decided *Bridges v. Wixon*, noncitizens and the government were still fighting about whether "substantial evidence" or only "some evidence" was required. *See* 326 U.S. 135, 149-50 (1945); Brief for Harry Bridges at 29-35, *Bridges*, 326 U.S. 135 (No. 788). Interestingly, the Commissioner of the Immigration and Naturalization Service (INS) himself, in a speech given at NYU School of Law in 1947 (and reprinted in the agency's monthly public bulletin), said that courts would overturn immigration decisions "not supported by substantial evidence." *See* Ugo Carusi, Comm'r of Immigr. & Naturalization, The Federal Administrative Procedure Act and the Immigration and Naturalization Service, Address Before the Institute of the School of Law, New York University, on the Federal Administrative Procedure Act and the Administrative Agencies (Feb. 5, 1947), *in* 4 MONTHLY REV. 95, 104 (1947).

262. Zakonaite v. Wolf, 226 U.S. 272, 274-75 (1912). *Zakonaite* concerned a woman who was ordered deported on the grounds "that she was a prostitute, and had been found practicing prostitution within three years after her entry into the United States" — grounds for deportation under the Immigration Act of 1907. *Id.* at 274.

could be when it considered "the question . . . whether there was sufficient evidence to fairly sustain the finding of the Secretary of Commerce and Labor" that a noncitizen, Samuel Lewis, was excludable for bringing "into the United States a woman for an immoral purpose."[263] The Court scoured the record, discussing at length Lewis's contention that the woman was his wife, as well as the government's proffered reasons for concluding that his story was a fabrication. Ultimately, the Court found that there was sufficient evidence to support the government's conclusion.[264] Only *after* reaching that judgment did the Court conclude that, therefore, "the finding of the Secretary upon the question of fact is binding upon the courts."[265]

How did courts justify this sort of review in the face of statutory provisions that purported to make administrative decisions final and not subject to reexamination by courts? Often, as Clement L. Bouvé noted in his 1912 immigration law treatise, courts did so by concluding that fact review was entailed by the basic due process requirement of a fair hearing. In his treatise, Bouvé discussed at length the judicial review of exclusion and deportation decisions.[266] He noted that, despite the existence of statutory finality provisions, courts regularly overturned exclusion and deportation decisions on the ground that there was no evidence to support the administrative decision. After cataloging a large number of lower-court cases that engaged in judicial oversight of the factfinding by immigration officials, he concluded:

> [T]he right of the courts to interfere in such cases can only (and it would seem correctly) be supported on the principle that an executive order of deportation, not based on any facts which tend to show that the person to be deported is excludable under the exclusion or immigration acts is . . . necessarily arbitrary, and, if arbitrary, cannot be said to be the result of a fair hearing.[267]

Some evidentiary review, in other words, flowed ultimately from the fair-hearing requirement imposed by *Yamataya*. And that requirement was itself grounded in the Court's conception of due process.

Both lower courts and the Supreme Court quickly coordinated around this understanding. As a result, fact review was so firmly established within a few

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263. Lewis v. Frick, 233 U.S. 291, 297 (1914).

264. *Id.* at 297-300. For other similar immigration examples of extensive fact review during this period, see *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133-34 (1924); and *Vajtauer*, 273 U.S. at 106-11.

265. *Lewis*, 233 U.S. at 300.

266. *See* BOUVÉ, *supra* note 235, at 518-24.

267. *Id.* at 523-24.

short years that the Court treated it as just another well-settled aspect of the mature appellate-review model that applied in immigration cases:

> It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were "manifestly unfair," were "such as to prevent a fair investigation," or show "manifest abuse" of the discretion committed to the executive officers by the statute, or that "their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law." The decision must be after a hearing in good faith, however summary, and it must find adequate support in the evidence.[268]

This is a far cry from the Court's position in the late nineteenth-century cases. Indeed, this passage captures not just the acceptance of fact review of immigration decisions but also the wholesale adoption of the appellate model.[269] And while, in this passage and others, the Court does formally square the circle—purporting to reconcile its application of the appellate model with the language of immigration statutes stating that administrative determinations were "final"—it is plain that the Court had adopted a radically different approach than it took in late nineteenth-century cases like *Nishimura Ekiu*.

Lawyers working during this period understood well the radical transformation that had taken place in immigration law. Their views are evident in a

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268. Kwock Jan Fat v. White, 253 U.S. 454, 457-58 (1920) (first quoting Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912); and then quoting Tang Tun v. Edsell, 223 U.S. 673, 681-82 (1912)). While *Kwock Jan Fat* concerned a claim that the person ordered excluded was in fact a U.S. citizen, fact review under the emerging appellate framework was not limited to cases concerning citizenship claims—a point cases like *Zakonaite* and *Lewis* make clear. Relatedly, fact review was not limited to deportation cases. The Supreme Court also regularly reviewed the facts extensively when considering administrative exclusion decisions. *See, e.g.*, Tulsidas v. Insular Collector of Customs, 262 U.S. 258, 264-66 (1923).

269. Moreover, review within this new framework was far from toothless. On a number of occasions, the Supreme Court overturned administrative exclusion and deportation decisions under this framework. *See* Tod v. Waldman, 266 U.S. 113, 119-21 (1924) (holding that the hearing before the agency was unfair and remanding to the agency for a new hearing); Mahler v. Eby, 264 U.S. 32, 44-45 (1924) (holding that the Secretary of Labor failed to make a finding required by statute as a predicate to deportability); *Kwock Jan Fat*, 253 U.S. at 463-65 (holding that the hearing was unfair because important evidence was not provided to the commissioner who decided the administrative appeal, and doubting that the evidence as a whole supported the commissioner's conclusion); Gegiow v. Uhl, 239 U.S. 3, 9-10 (1915) (holding that the immigration inspector erred in concluding that the public-charge-exclusion provision in the statute authorized him to consider local labor-market conditions); Gonzales v. Williams, 192 U.S. 1, 13-15 (1904) (holding that the agency wrongly concluded that the immigration statute applied to Puerto Rican citizens seeking admission to the mainland United States).

number of contemporaneous studies of immigration law. To give but one example: between 1930 and 1940, the federal government commissioned no less than three different studies of immigration administration.[270] While these studies differed in focus, as well as in the identity and professional backgrounds of the authors, the studies all expressed basically the same views about judicial review of immigration adjudication within the bureaucracy. Consider, for example, the major report on immigration prepared by the Department of Labor as part of a larger project examining principles of administrative law.[271] The report documented the rise during the first decades of the twentieth century of a general principle—applicable in both exclusion and expulsion proceedings—that immigration procedures must be fair and reasonable.[272] This requirement, the drafters of the report remarked, was "nothing less than a transformation in judicial doctrine when compared with the doctrines enunciated in the *Nishimura Ekiu*, *Fong Yue Ting* and immediately succeeding cases."[273] They made no effort to square the nineteenth-century cases with those that came later because they recognized that the later cases were developing a fundamentally different approach to thinking about judicial oversight of administrative action.

Moreover, the authors of the Department of Labor's report understood this approach to oversight to be one shared across agencies, not one that was unique to immigration law. The immigration agencies, they noted, possessed powers that "are not materially greater than the powers admittedly possessed by many administrative agencies over essential interests of citizens. And the restraints to which they are declared to be subject are not materially less."[274] In 1947, even the head of the federal immigration bureaucracy, Immigration and Naturalization Service (INS) Commissioner Ugo Carusi, described judicial oversight in

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270. *See* U.S. Dep't of Lab., The Secretary of Labor's Committee on Administrative Procedure: The Immigration and Naturalization Service (1940); Ellis Island Comm., Report of the Ellis Island Committee (1934); Nat'l Comm'n on L. Observance & Enf't, Report of the Enforcement of the Deportation Laws of the United States (1931). The Department of Labor's report also drew heavily on two independent studies by legal academics: Jane Perry Clark, Deportation of Aliens from the United States to Europe (1931); and William C. Van Vleck, The Administrative Control of Aliens: A Study in Administrative Law and Procedure (1932).

271. *See* U.S. Dep't of Lab., *supra* note 270. The results of this Department of Labor study were folded into and relied on in the famous report on administrative procedure, prepared by the Attorney General at the request of President Roosevelt, that played a central role in debates that led to the passage of the Administrative Procedure Act (APA). *See* Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 77-8 (1941).

272. *See* U.S. Dep't of Lab., *supra* note 270, at 45.

273. *Id.*

274. *Id.*; *see also* Brief for Harry Bridges, *supra* note 261, at 30 (relying on this passage in the Department of Labor report).

basically these same terms: "It will readily be observed that the formulas developed by the courts in passing upon habeas corpus applications which seek to review orders in immigration proceedings resemble quite closely the principles applied in reviewing the determinations of other agencies."[275] For Carusi, this was powerful evidence that the judicial-review provisions of the newly enacted APA—themselves a self-conscious effort to restate and codify existing case law governing the judicial review for agency action—would apply to immigration adjudication.[276] And because immigration oversight already looked just like judicial oversight of other agencies, Carusi believed that applying the APA's provisions would not change the way that judicial review operated for immigration law.[277]

C. Debunking Plenary Power's Conventional Tropes

To recap: During the early decades of the twentieth century, immigration law went through the same dramatic transformation taking place elsewhere in public law. Immigration law was not left behind as American public law developed. That fact is doubly fatal for the conventional account of immigration exceptionalism. First, the transformation of immigration law shows that the conventional view—that immigration plenary power is defined by jurisprudential continuity since the late nineteenth century—is far from historical reality. Second, the adoption of the appellate model demonstrates that immigration exceptionalism did not emerge in this second historical period. During the first several decades of the twentieth century, immigration law continued to be ordinary public law.

More specifically, this history helps debunk the common accounts of how the immigration plenary power operated. As I noted earlier, today there are two dominant accounts of the plenary power doctrine. The first turns on the exceptional legal position of the noncitizens coming to court—a position produced by their lack of citizenship or by their territorial position (or, perhaps more precisely, their position as a person seeking "entry"). The second turns on the

275. *See* Carusi, *supra* note 261, at 105. Other lawyers working within the INS expressed similar views, such as Max Wilfand, an attorney working for the INS's Board of Immigration Appeals. Max Wilfand, *The Right to a Fair Hearing in the Exclusion and Expulsion Processes*, 2 MONTHLY REV. 83, 83-88 (1945).

276. *See* Carusi, *supra* note 261, at 105.

277. *Id.* ("Indeed, an examination of Section 10 of the Administrative Procedure Act discloses that similar formulations are incorporated in that section. In approving the Administrative Procedure Act the Attorney General expressed the opinion that Section 10 merely restated and codified the existing case law on judicial review. I believe that this conclusion is abundantly justified with respect to immigration proceedings, and it is my opinion that Section 10 will effect no appreciable change in the principles governing the judicial review of such proceedings." (footnote omitted)).

exceptionality of the sphere of immigration policymaking. But the rise of the appellate model in immigration cases during this period is fundamentally inconsistent with the idea that either version of the plenary power doctrine was operating in these cases.

Start with territoriality. As I mentioned earlier, the appellate model was applied to both exclusion and deportation cases as it emerged in immigration law. Courts enforced fair-hearing requirements and inquired into the factual foundation of immigration orders not only when resident noncitizens were ordered to leave the United States, but also when noncitizens were stopped at the border and ordered excluded.[278] The pattern of decisions, as well as the language within those decisions, makes plain that courts during this period were not erecting some sharp constitutional distinction between noncitizens seeking entry and those who had already entered.

Today it is common for scholars and courts to try to reconcile *Yamataya* with earlier cases like *Nishimura Ekiu* on the ground that Yamataya had been admitted while Nishimura Ekiu had been stopped at the border. On that interpretation, *Yamataya* is an integral part of core plenary power doctrine created by *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting*: *Yamataya* merely establishes a wrinkle in the doctrine, permitting noncitizens who have already entered the United States to challenge the constitutionality of their deportation procedures.[279] *Yamataya*, on that reading, "suggested that an alien in the United States" may challenge his "deportation procedures" (though not the substantive ground of his deportation), while "*Nishimura Ekiu* suggested that no constitutional objection by an alien outside the United States would be successful."[280] But this way of reconciling those cases is a modern invention. Moreover, this reading misses the revolution that was afoot in *Yamataya* and elides the subsequent developments

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278. *See supra* text accompanying notes 234-268 (discussing cases).

279. *See, e.g.*, Motomura, *Phantom Norms*, *supra* note 11, at 554 ("These four cases established a classical immigration law with two significant dimensions – the alien's location and the nature of the constitutional challenge to the adverse decision. The *Chinese Exclusion Case* and *Nishimura Ekiu* suggested that no constitutional objection by an alien outside the United States would be successful. All of the *Fong Yue Ting* opinions assumed that an alien in the United States who challenged substantive deportation rules would likewise be unsuccessful. Finally, *Yamataya* suggested that an alien in the United States who objected to deportation procedures might have some success.").

280. *Id.*; *accord* Motomura, *Curious Evolution*, *supra* note 59, at 1638 ("*Yamataya* thus established that when aliens are in the United States, the Court would hear constitutional challenges based on procedural due process."); Aleinikoff, *supra* note 11, at 11; Cleveland, *supra* note 11, at 161; Chin, *Segregation's Last Stronghold*, *supra* note 11, at 57; Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493, 503 n.49 (2001); Rubenstein & Gulasekaram, *supra* note 11, at 596 n.62; Aleinikoff et al., *supra* note 11, at 308; Stephen H. Legomsky & David B. Thronson, Immigration and Refugee Law and Policy 152 (6th ed. 2015).

in nearly four decades of case law. It is a strange yet consistent fact that most modern discussions of the immigration plenary power skip over all of these post-*Yamataya* developments, jumping straight from *Yamayata* to the late-1940s cases I discuss in Part IV. Yet these developments were not missed by lawyers and academics at the time. As I noted earlier, Clement L. Bouvé captured them clearly in his 1912 immigration law treatise.[281] Two decades later, when the then-dean of the George Washington University Law School published a study tracing the rise of judicial review in immigration cases, he also emphasized that courts applied the same sort of judicial oversight to exclusion and deportation contexts—oversight grounded in both instances in the idea that the Due Process Clause demanded a fair (administrative) hearing prior to a noncitizen's exclusion or deportation.[282] Even the INS itself acknowledged in public statements that the appellate model applied to the review of both deportation and exclusion decisions by agency officials.[283]

The same is true of citizenship. Contemporary accounts of the plenary power doctrine and early immigration history sometimes suggest that meaningful judicial oversight of exclusion orders came only in cases in which a person claimed to be a U.S. citizen.[284] Were this true, it might be possible to square the pattern of Supreme Court decisions with the idea that judicial oversight of exclusion was different than judicial oversight of deportation (at least for acknowledged noncitizens).[285] But this contention is mistaken: in exclusion cases, the Supreme Court did not restrict the application of the appellate model to disputes concerning people who had claimed to be citizens. Instead, it regularly applied the model

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281. *See supra* text accompanying note 227.

282. *See* VAN VLECK, *supra* note 270, at 149. William C. Van Vleck even emphasized that the "entry fiction"—an idea that today is often invoked as a reason for reduced judicial oversight of exclusion at the border—had not stood in the way during this period of judicial oversight of exclusion decisions: "This technical argument, however, has not been allowed to interfere with the granting in exclusion cases of the same intervention by the judiciary as has taken place in expulsion cases." *Id.* at 150.

283. For some examples of this public acknowledgment, see generally sources cited *supra* notes 261, 275.

284. *See, e.g.*, Schuck, *supra* note 11, at 19 n.94 (arguing that cases like *Chin Yow* and *Kwock Jan Fat* are special exceptions to the plenary power doctrine because these cases "involved claims of United States citizenship, which have long been considered sui generis"); Cleveland, *supra* note 11, at 161 (treating the judicial review available in cases like *Chin Yow* and *Ng Fong Ho* as available only to people who "claimed to be U.S. citizens").

285. I say "might" because one would still have to discount entirely the fact that the Court itself *says* repeatedly during this period that the appellate model applies generally to exclusion and deportation orders, not only to a subset of orders concerning people who have claimed to be citizens.

in cases where everyone agreed that the petitioner was a noncitizen.[286] Moreover, when the Court cited its own prior immigration decisions as authority for the basic tenets of the appellate model (such as review to ensure that there had been a fair administrative hearing), the Court routinely lumped cases in which there was a citizenship claim together with cases in which there was no such claim. Clearly the Court itself did not act as though the application of the appellate model turned on this distinction—a fact well understood by lawyers during the first half of the twentieth century.[287]

Moreover, if the citizenship of claimants was supposed to be crucial to the scope of judicial review, then one would have expected judicial oversight to have looked different in cases where everyone agreed that the claimants were citizens. But this was not true either. Consider cases in which executive-branch officials issued orders not against noncitizens themselves but instead against steamship companies and others who provided passage to noncitizens seeking admission. *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting* provides an illustrative example.[288] That case concerned an early immigration statute that made it unlawful for transportation companies to bring to the United States certain excludable noncitizens and subjected companies violating those prohibitions to fines.[289] In *Lloyd Sabaudo*, a steamship company fined by administrative officials sued to recover the fine it had paid.[290] The company argued that it was entitled, as a matter of due process, to have an Article III court adjudicate de novo the applicability of the fines.[291]

The Court rejected this due process claim. Due process did not prohibit Congress from giving administrative actors the authority to adjudicate disputes about these fines, the Court concluded; de novo determination by an Article III

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286. *See supra* Section III.B; *see also* Neuman, *supra* note 261, at 640 (noting that "[w]hile the concerns that led the Court to adopt" features of the appellate model like some evidence review "may have arisen in cases involving claims of citizenship, the Court treated it as equally applicable to other factual disputes under the immigration laws" (footnote omitted)).

287. *See, e.g.*, U.S. Dep't of Lab., *supra* note 270, at 44 (noting that *Chin Yow*'s requirement of a fair hearing for those stopped at the border was not confined to citizenship claims); Brief of the American Civil Liberties Union as Amicus Curiae at 3, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (No. 54) (same).

288. 287 U.S. 329 (1932). Another similar example arises in *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909)—though in this earlier case the appellate model was more nascent, and the Court's decision is written more within the framework of the nineteenth-century model.

289. *Lloyd Sabaudo*, 287 U.S. at 331-32.

290. *Id.* at 330-31.

291. *Id.* at 334.

court was therefore not constitutionally required.[292] In support of this conclusion, the Court pointed to two disparate areas of administration: tax-revenue-collection cases on the one hand and cases involving the exclusion of noncitizens at the border on the other.[293] It read both sets of cases as sources of general, uniform principles regarding Article III and due process—principles that permitted adjudication outside Article III. The Court did agree that "[t]he action of the Secretary is, nevertheless, subject to some judicial review."[294] What sort of judicial review? Precisely the review required by the emerging appellate model: review to determine whether the administrator had acted within his statutory authority, whether his decision was supported by some evidence, and whether he provided a fair hearing.[295] Judicial review of administrative fines levied against steamship companies was thus the same as judicial review in exclusion and deportation cases (and, in fact, the Court cited such cases as the authority for this scope of review).[296]

If the limited review in those exclusion and deportation cases had really been the result of the constitutionally exceptional position of the noncitizens at the border, then these steamship-fine cases should have been treated differently. After all, they involved money being taken as fines from citizens and corporations—something the Court unquestionably treated as a deprivation of property under the Due Process Clause. Instead, the Court's acceptance of adjudication outside of Article III, along with its imposition of appellate-style judicial oversight, reflects the Court's own understanding that, in immigration cases, it was applying ordinary rules relating to the judicial review of administrative action during this period.

Last, consider the common claim that the plenary power doctrine is about the exceptionalism of the subject matter of immigration law. On that account, immigration law is isolated from the rest of public law because it is a special sphere. As the above discussion already suggests, this account cannot make sense of early twentieth-century immigration law's adoption of the appellate model of judicial oversight. It bears repeating: the model of judicial oversight that emerged in the immigration cases above looks largely the same as the model that was emerging in other regulatory arenas. Across diverse regulatory schemes, each governed by disparate statutory frameworks containing very different

292. *See id.* Thus, there was nothing constitutionally objectionable about the fact that "[b]y the words of the statute the Secretary's is the only voice authorized to express the will of the United States with respect to the imposition of the fines." *Id.*

293. *Id.* at 335-36.

294. *Id.* at 335.

295. *See id.* at 335-36.

296. *Id.* (citing, among other cases, *Gegiow*, *Vajtauer*, *Kwock Jan Fat*, *Chin Yow*, and *The Japanese Immigrant Case*, a popular name for *Yamataya*).

provisions regarding judicial review (ranging from provisions making administrative decisions "final" to provisions explicitly providing for judicial review), the Court began to apply a relatively unified, transsubstantive framework for review. It did so in spite of these statutory distinctions. It also did so despite the fact that the cases from these different regulatory areas often arrived in federal court by way of very different forms of action (equity rather than habeas, for example)—forms of action that had, during the nineteenth century, been closely tied to the scope of judicial intervention.

Moreover, the citation networks that link immigration and nonimmigration cases highlight the fact that these cases were elaborating a unified model of judicial oversight, not developing principles of immigration exceptionalism. The Court in immigration cases during this period often drew support for its model of judicial oversight from nonimmigration cases, and vice versa.[297] Even the very cases that today are held up as the creators of the plenary power doctrine—the Chinese exclusion cases from the late nineteenth century—were cited regularly by nonimmigration cases as standing for completely conventional ideas about which matters could be constitutionally adjudicated by agencies rather than by Article III courts.

Consider the Court's 1929 decision in *Ex parte Bakelite Corp.*[298] That case concerned the permissibility of an administrative court (a "legislative court," in the words of the decision) resolving customs appeals.[299] The Court affirmed the constitutionality of the customs court by invoking the old public-rights idea: that there are some matters "which from their nature do not require judicial determination . . . . Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."[300] It is little surprise that the string cite supporting this proposition included *Murray's Lessee*, given that the quoted language is basically a paraphrase of that earlier

297. *See, e.g.*, Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (drawing support for fact review not from an immigration case, but from Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902), an equity case concerning an injunction against the postmaster that scholars of administrative law treat as central to the development of modern forms of judicial review of administrative action); United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 157 (1923) (citing, in support of the Court's description of the fair-hearing requirement in deportation proceedings, ICC v. Louisville & Nashville R.R. Co., 227 U.S. 88 (1913), one of a series of railroad ratemaking cases that Thomas W. Merrill has credited with developing the appellate model, *see* Merrill, *supra* note 62, at 959-65); L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 802 (1948) (relying on *Yamataya* to determine whether a hearing was required under a section of the Communications Act that did not specifically provide for a hearing).

298. 279 U.S. 438 (1929).

299. *Id.* at 446-48, 461.

300. *Id.* at 451.

case. But also included in that string cite were the foundational immigration cases *Nishimura Ekiu* and *Fong Yue Ting*.[301]

Crowell v. Benson, the canonical 1932 case concerning the constitutionality of adjudication outside of Article III, further reinforces this view.[302] By the time of *Crowell*, the appellate model of judicial review was well established—for immigration matters and many others as well.[303] And in *Crowell* it is clear that the Court considered immigration to be of a piece with these larger developments, not some exception to the ordinary way of thinking about due process and the separation of powers. In *Crowell*, the majority cited immigration cases as among the set of matters that can be adjudicated by agencies.[304] In dissent, Justice Brandeis said much the same thing: he saw immigration cases as analogous to land-patent, military-discipline, and postal cases—as "matters which are within the power of Congress to commit to conclusive executive determination."[305] Yet as he emphasized, "conclusive executive determination" did not mean that there was no judicial oversight. Even though Congress typically provided "no method of judicial review" in those sorts of cases, Brandeis wrote, courts nonetheless intervened regularly to ensure that the administrative officer had not "acted outside his authority."[306]

D. Immigration Law and the Creation of Modern Administrative Law

Up to this point, I have focused on showing that the erosion of the nineteenth-century framework for thinking about due process and Article III, along with the rise of the appellate model of judicial oversight, affected immigration law every bit as much as it affected the rest of American public law during this period. This showing is enough to debunk the hypothesis that immigration exceptionalism emerged in these decades. But the story I have told is even more interesting: immigration law's adoption of the appellate model was not simply the product of immigration cases following important developments happening elsewhere in administrative law. Instead, immigration cases were themselves an important part of the development of these new administrative law ideas—a

301. *Id.* at 451 n.8.

302. 285 U.S. 22 (1932).

303. *See* Merrill, *supra* note 62, at 980 (noting that modern scholarship often mistakenly treats *Crowell* as the "first case that broadly approved transfers of trial jurisdiction from courts to agencies," when the appellate model was in fact mature by the time *Crowell* was decided (quoting Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Cromwell *to* Schor, 35 BUFF. L. REV. 765, 779 (1986))).

304. *Crowell*, 285 U.S. at 51 n.13 (citing United States v. Ju Toy, 198 U.S. 253, 263 (1905)).

305. *Id.* at 89 (Brandeis, J., dissenting).

306. *Id.* at 90 & n.26.

reality too often overlooked in conversations about the development of American administrative law.

Consider, for example, the appearance of modern forms of judicial review of agency action. Today, administrative law scholars typically trace the appearance of those more modern forms to a handful of early twentieth-century cases decided by the Supreme Court. One is the Court's 1902 decision in *American School of Magnetic Healing v. McAnnulty*.[307] This case is treated by both Louis L. Jaffe, in his canonical treatise on administrative law, and Jerry L. Mashaw, in his path-breaking book on administrative law's historical development, as marking the birth of more modern forms of judicial oversight of administrative decision-making—specifically, the practice of judicial review of administrative action for error of law.[308]

But contemporaneously, judicial review for error of law was also emerging in immigration cases. In 1904, barely a year after *McAnnulty* was handed down, the Supreme Court reviewed an administrative immigration order for an error of law. The case arose when Isabella Gonzales, a citizen and resident of Puerto Rico, was ordered excluded upon arriving at the Port of New York in 1902.[309] She was, the federal immigration commissioner concluded, likely to become a public charge and therefore excludable under the Immigration Act of 1891.[310] Gonzales disputed that the 1891 Act applied to her at all. The Act applied by its terms only to an "alien immigrant," and Gonzales argued that citizens of Puerto Rico were not "aliens" within the meaning of the statute—even though they were, all agreed, not (at the time) citizens of the United States.[311]

Despite language in the 1891 Act stating that the decisions of immigration inspectors "shall be final," the Court took up this question. After engaging in a lengthy analysis of the 1891 Act's language and purpose, interpreting that

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307. 187 U.S. 94 (1902). The case arose when the postmaster, McAnnulty, seized mail sent to the American School of Magnetic Healing, a company that he argued had used the postal system to distribute fraudulent advertisements. *Id.* at 98-99. A federal statute authorized the postmaster to refuse to deliver mail to those engaged in fraud. *Id.* at 100-01. The Supreme Court was careful to characterize a person's interest in receiving mail through the postal system as a privilege, and careful too to emphasize that the postmaster's factual determinations were, in general, conclusive upon the judiciary. *Id.* at 107. Nonetheless, the Court concluded, judicial intervention was available if the postmaster acted in violation of the law by seizing mail in a case that was, according to uncontested facts, "beyond the statutes [authorizing seizure], and not covered or provided for by them." *Id.* at 108.

308. *See* Louis L. Jaffe, Judicial Control of Administrative Action 327-53 (1965); Mashaw, *supra* note 9, at 248-49; Mashaw, *supra* note 61, at 1411-12; *see also* 3 Hickman & Pierce, *supra* note 245, § 19.5, at 1927 (discussing the role of *McAnnulty* in this development).

309. Gonzales v. Williams, 192 U.S. 1, 7 (1904).

310. *Id.*

311. *See id.* at 12.

language in conjunction with the treaty ceding Puerto Rico to the United States and the federal statute establishing a civil government for the island, the Court concluded that the word "alien" in the Act did not "embrace[] the citizens of Porto Rico."[312] Consequently, the commissioner could not order her deported simply by "deciding the mere question of law to the contrary."[313]

In *Gonzales*, the Court built the foundation for error-of-law review in immigration cases by stretching a much older legal principle — the nineteenth-century idea that courts could intervene when executive-branch officials acted wholly outside their jurisdiction. The idea that a court might intervene if the official lacked authority to act altogether appears in old land-administration cases and had been applied in the immigration context as early as *Nishimura Ekiu*, in which the Court considered on the merits (and rejected) Nishimura Ekiu's claim that the inspector who ordered her excluded lacked jurisdiction to do so because he had been improperly appointed.[314] In *Gonzales* and other cases, the Court began to use the slipperiness of the distinction between jurisdictional questions and other legal questions to expand oversight so that it encompassed essentially all legal errors.[315] In this fashion, *Gonzales* contributed to the development of the appellate model of judicial review.

Gonzales's case was not the only appellate-model immigration case decided on the heels of *McAnnulty*. While Mashaw treats *McAnnulty* as an important milestone in the development of judicial review of administrative action, he says

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312. *Id.*

313. *Id.* at 15.

314. Nishimura Ekiu v. United States, 142 U.S. 651, 663 (1892); Nelson, *supra* note 61, at 578-86; Woolhandler, *supra* note 62, at 217-18.

315. This move was not limited to immigration cases. It is precisely what the Court was doing in other contexts as well to develop the appellate model. *See, e.g.*, Mashaw, *supra* note 61, at 1408; Woolhandler, *supra* note 62, at 219. Indeed, *McAnnulty*, which I noted is widely considered a transformative case along the road to modern appellate-style review of administrative decisions, did something quite similar. One innovation in *McAnnulty* was the acceptance of equity as a vehicle by which the parties got into court to challenge administrative action. But once in court, the court did not simply exercise independent judgment, resolving the dispute de novo the way it would have under the nineteenth-century model. In fact, the Court stated explicitly that it would typically treat the postmaster's findings as conclusive. Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 107 (1902). Nonetheless, the Court concluded, judicial intervention was warranted because the postmaster had acted beyond his jurisdiction. *Id.* at 107-08. Yet even as the Court invoked this distinction to engage in greater oversight, it simultaneously attempted to assimilate the case to the traditional model's focus on core private rights: the Court justified its intervention in part on the ground that the postmaster's decision to withhold mail had "violate[d] the property rights of the person whose letters are withheld" because those letters contained "checks, drafts, money orders and money itself, all of which were their property as soon as they were deposited in the various post offices for transmission by mail." *Id.* at 110.

in his seminal history of administrative law that it was many more years before courts used due process to regulate administrative adjudication through judicial review.[316] Yet this is precisely what the Supreme Court began to do in *Yamataya*, decided within five months of *McAnnulty*. In *Yamataya*, the Court deployed the Due Process Clause as a source of fair-hearing requirements in immigration proceedings before agency officials. Thus, while the origins of procedural due process in administrative adjudication are often traced to midcentury cases like *Wong Yang Sung v. McGrath*,[317] or even to the 1960s "new property" cases involving welfare and other public benefits,[318] the true origins are much older. It did not take decades for this development; it took mere months. Remarkably, however, *Yamataya* and its progeny are scarcely mentioned in most accounts of the appellate model's rise.

Yet another immigration law lacuna exists in contemporary accounts of the appellate model's crystallization. Thomas W. Merrill traces the appellate model's appearance to a series of Supreme Court decisions reviewing ratemaking decisions of the Interstate Commerce Commission (ICC).[319] While his is perhaps the most comprehensive account of the appellate model, many other scholars of administrative law similarly ascribe enormous significance to these ICC cases. On Merrill's account, these decisions, culminating in 1912 in *ICC v. Union Pacific Railroad Co.* and *Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild*, essentially invented the appellate model, combining de novo review for errors of law with deferential factual review.[320]

Again, however, this appellate-style combination of de novo legal review with deferential factual review was developing simultaneously in immigration cases. As I noted above, as early as 1904 the Supreme Court engaged in de novo review of questions of law in an immigration case. Review to ensure that immigration administrators provided a fair hearing dated even earlier, to *Yamataya* in 1903. And while fact review in immigration cases lagged slightly, by the time the Court decided *Union Pacific* in 1912 such review was already extremely common

316. *See* MASHAW, *supra* note 9, at 250 (writing that in "the early twentieth century . . . it would be many more years before a concept of 'administrative due process' would be developed that separated the question of administrative due process from the question of whether adjudicatory jurisdiction was required to be placed in an Article III court").

317. 339 U.S. 33 (1950).

318. *See, e.g.*, Baude, *supra* note 64, at 1579-80 (pointing to the 1960s new-property cases as the origins of expanded procedural due process protections in administrative adjudication).

319. *See* Merrill, *supra* note 62, at 942.

320. ICC v. Union Pac. R.R. Co., 222 U.S. 541 (1912); Washington *ex rel.* Or. R.R. & Navigation Co. v. Fairchild, 224 U.S. 510 (1912); *see also* Merrill, *supra* note 62, at 964 (discussing the appellate model of review).

in the lower federal courts and was beginning to appear in the Supreme Court's immigration cases.[321]

Acknowledging immigration law's role in the development of the appellate model of judicial review—what today we think of as a core attribute of "administrative law"—casts that model of judicial oversight in a very different light than suggested by Merrill. In Merrill's account, the rise of the appellate model in the ICC context led the Court to grant deference where it previously had engaged in de novo review.[322] This is *the* central theme of Merrill's story. On his telling, the Court invented the appellate-review model in ICC cases in response to a backlash against its earlier practice of reviewing ICC decisions de novo: "[T]he Court, facing a political crisis to its own authority, looked into the doctrinal tool bag for something that would permit it to back off without losing face."[323] The creation of the appellate model, in this story, is about judicial modesty and retreat.

But in the immigration context, the rise of the appellate-review model led to *greater* judicial scrutiny of administrative decisions, not less. Rather than accepting the decisions of immigration administrators as "conclusive upon the judiciary,"[324] the Court began to ask whether those administrative decisions were consistent with the legal obligations imposed on administrators, were made according to fair procedures, and were supported by some evidence. This is hardly the pattern one would have expected in light of the conventional wisdom about the so-called immigration plenary power.

These crucial details have often been missed, perhaps because the myth of immigration law's exceptionalism has led it to be marginalized in conversations about the growth of administrative law in America. Historical accounts of American administrative law almost always focus on the ICC and the regulation of monopoly power; Merrill's attention to ICC ratemaking cases is no anomaly. In contrast, the growth and operation of the federal immigration bureaucracy is rarely a part of these stories. Whatever the reason, however, it is clear that immigration law belongs at the center of conversations about the creation of American administrative law.

IV. WHEN WAS IMMIGRATION EXCEPTIONALISM INVENTED?

If the plenary power as we know it today cannot be traced back to the late nineteenth century, and if immigration law during the first half of the twentieth

321. *See* BOUVÉ, *supra* note 235, at 478; *supra* Section III.B.

322. *See* Merrill, *supra* note 62, at 953-63.

323. *See id.* at 963.

324. Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

century was mostly mainstream administrative law, then what happened? When exactly was the immigration plenary power doctrine invented?

Answering that question in great detail would take me beyond my core project here, which has been to debunk the reigning mythology about the nineteenth-century invention of immigration exceptionalism. But once we see the way in which that myth has long misled us, we can begin to sketch a new, much more modern account of immigration exceptionalism. In this new account, which I will divide loosely into three parts, the immigration plenary power doctrine in its mature form was arguably invented within just the last few Supreme Court Terms. That is a far cry from its purported origins in the late nineteenth century.

A. Creeping Cold War Exceptionalism

To pick up where we left off in the last Part: in the early 1940s, amid a devastating global war, on the cusp of the adoption of the APA, and just a few years before the onset of the Cold War, immigration law remained mainstream public law. But the emergency of wartime, compounded by the perceived threat of communism at home and abroad, was changing American immigration policy. Confronting some of those changes in the immediate postwar period, the Supreme Court took an important step toward inventing our modern immigration mythology.

The two most important cases in which the Court did this were *United States ex rel. Knauff v. Shaughnessy* and *Shaughnessy v. United States ex rel. Mezei*, decided in 1950 and 1953, respectively.[325] Both cases concerned noncitizens who were excluded from the United States when they arrived at Ellis Island. Ellen Knauff was coming to the United States from Germany under the War Brides Act, which gave special immigration preferences to the spouses of American service members abroad.[326] Ignatz Mezei, who had lived for decades in the United States, was returning after traveling to Romania to visit his dying mother.[327] Knauff and Mezei were each ordered excluded by the Attorney General on national-security grounds. Crucially, the statute and implementing regulations authorized the

325. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953). These cases are widely considered canonical applications of the so-called plenary power doctrine. Two other cases from this period often cited as examples of that doctrine are *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), and *Galvan v. Press*, 347 U.S. 522 (1954). *See, e.g.*, LEGOMSKY & THRONSON, *supra* note 11, at 175-86; ALEINIKOFF ET AL., *supra* note 11, at 568. I discuss in a few footnotes below how these cases fit into my account. *See infra* notes 355-368 and accompanying text.

326. *Knauff*, 338 U.S. at 539, 545-46.

327. *Mezei*, 345 U.S. at 208.

Attorney General to make his exclusion decision without a hearing and on the basis of secret evidence.[328] There was really no way to square that process with the due-process-derived requirement of a fair hearing that courts had, for decades, imposed on both exclusion and deportation decisions by executive-branch officials.[329]

In *Knauff* and *Mezei*, the Supreme Court sustained the legality of this system of border exclusion without process. While the Court was clearly reluctant to second-guess the Attorney General's assertions that admitting Knauff and Mezei would imperil national security (assertions that turned out to be unfounded), it did not decide the case solely by invoking deference to executive-branch national-security judgments.[330] Instead the Court chose to write a pair of opinions that began to construct our modern mythology of immigration exceptionalism.

The Court set the stage for its myth-making by first wrenching the nineteenth-century immigration cases out of their doctrinal and historical contexts. It ignored the fact that the earliest cases were mostly about the permissibility of adjudication outside of Article III courts. It ignored the fact that those cases were resolved in a decidedly nineteenth-century way of thinking about the separation of powers and due process. It ignored the fact that the old model was largely abandoned early in the twentieth century. And it ignored the fact that the Court's change of heart between *Fong Yue Ting* and *Yamataya*—going from denying that deportation implicated due process to holding that it did—was the direct result of the Court retreating from the nineteenth-century model and moving towards a radically different understanding of the relationship between due process and the requirements of Article III.

Having done this, the Court swiftly demolished half a century of immigration jurisprudence. Ignoring the twentieth-century transformation of immigration law, the Court treated the foundational immigration cases as good law, unaffected by subsequent developments. In fact, the Court opened its reasoning by reviving the language about privileges and private rights that had dominated the nineteenth-century cases: it intended that "an alien who seeks admission to this country may not do so under any claim of right. Admission of aliens to the United States is a *privilege* granted by the sovereign United States

328. *Knauff*, 338 U.S. at 540-41; *Mezei*, 345 U.S. at 208.

329. *See supra* Section III.B.

330. For rich accounts of each case, the government's weak evidence, and the political outcry that ultimately led to both Knauff and Mezei being permitted to enter in spite of their losses in court, see Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933, 955-84 (1995). *See also* ELLEN RAPHAEL KNAUFF, THE ELLEN KNAUFF STORY 76-139 (1952) (detailing Ellen Knauff's struggle to be admitted into the United States).

Government."[331] As we have already seen, this nineteenth-century framework had long since been abandoned by the Court, which during the early decades of the twentieth century had adopted the appellate model of judicial oversight and extended due process protections to all noncitizens facing expulsion—even those, like Knauff and Mezei, who were at the border seeking admission to the country.[332]

Yet the Court did not simply revert to its earlier nineteenth-century views about the separation of powers and due process. Doing so would have required the Court to abandon the foundations of modern administrative law. It also would have forced the Court to overrule *Yamataya v. Fisher*. Instead of returning to this earlier framework, therefore, the Court, after gesturing to this old way of thinking, invented a new interpretation of its foundational immigration cases. Ignoring the public-law transformation that actually explained the evolution of early immigration case law, the Court contended that its radically different approaches in cases like *Nishimura Ekiu* and *Yamataya* were not part of an evolution at all. Instead, the Court argued, the pattern of early cases was explained simply by whether the immigrants complaining about their treatment had "gained entry into the United States." In one of the most famous passages in the canon of American immigration law, the Court wrote:

> Whatever the rule may be concerning deportation of persons who have gained entry into the United States, it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien. [*Nishimura Ekiu v. United States*, 142 U.S. 651, 659-60 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893); *Ludecke v. Watkins*, 335 U.S. 160, 163-66 (1948); *cf. Yamataya v. Fisher*, 189 U.S. 86, 101 (1903).] . . . Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.[333]

Of course, to assert that the fact of entry into the United States tidily explained its own immigration jurisprudence, the Court was forced to paper over a number of problems with this explanation. One is that distinguishing immigrants based on whether they have entered makes a hash of *Fong Yue Ting*—a case involving the deportation of long-term-resident noncitizens where the Court held explicitly that the right to continued residence was a "privilege" every bit as much as was the right to admission.[334] (The Court's inclusion of *Fong Yue*

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331. *Knauff*, 338 U.S. at 542 (emphasis added); *accord Mezei*, 345 U.S. at 212.

332. *See supra* Sections III.B-C.

333. *Knauff*, 338 U.S. at 543-44.

334. *See supra* Section II.B.3.

Ting in its language quoted above is, for that reason, utterly baffling.) Another difficulty is that courts for decades had applied *Yamataya*'s holding in exclusion contexts, requiring a fair hearing for those stopped at the border as well as those being deported after gaining admission.[335]

Even the government felt obliged to acknowledge that reality. The Justice Department grudgingly conceded in its brief that "[i]t is true that it has been said in other contexts that an alien seeking to enter the United States is entitled to a fair hearing."[336] After conceding this indisputable fact, the government attempted to distinguish away this doctrinal history with two arguments. First, it contended that a fair-hearing requirement had only ever been imposed in cases "involv[ing] an applicant for admission who claimed to be a *citizen*."[337] Second, the government argued that an entitlement to a hearing had been found only in cases where "statutes or administrative regulations . . . provided for a hearing"; where a statute did "not *explicitly* require a hearing, none need be accorded."[338] As I have already shown, both of these assertions were false—which might explain why the Court declined to adopt them.[339] Instead of saying anything at all, therefore, the Court stuck its head in the sand and pretended that the decades of post-*Yamataya* jurisprudence simply did not exist.

By inventing this new take on its old cases, however, the Court did two things that laid the groundwork for its later invention of the modern immigration plenary power. First, the Court imposed on the cases an idea of jurisprudential continuity, pretending that immigration cases from *Chae Chan Ping* forward were all decided within a single, unchanging constitutional framework. Second, the Court held that a noncitizen's due process right to a fair immigration hearing would turn on whether or not the noncitizen had entered the United States. This idea is part of what ultimately matured into one arm of the modern immigration plenary power. For as I noted earlier, courts today often reason that immigration cases are exceptional because of the uniquely weak legal position of the noncitizens coming to court: this "plenary power" idea is that noncitizens "seeking entry" to the United States cannot invoke the U.S. Constitution to protect at least some of their interests.[340]

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335. *See supra* Sections III.B-C.

336. Brief for the Respondent at 24, *Knauff*, 338 U.S. 537 (No. 54).

337. *Id.* at 25.

338. *Id.* (emphasis added).

339. *See supra* Section III.B (showing that the appellate model was applied in the face of statutory language which explicitly made administrative findings final and did not require a hearing); Section III.C (showing that the Court required a fair administrative hearing even in cases that did not concern citizenship claims).

340. *See supra* Section I.A.

What about the other idea undergirding the modern plenary power—that immigration is a special regulatory sphere? While the idea of subject-matter exceptionalism does not appear as prominently in *Knauff* or *Mezei* as does the idea of claimant exceptionalism, it does make two brief appearances. The first is in the Court's rejection of a nondelegation challenge brought by Knauff. She had argued that the broad authority Congress conferred on the President—to impose any immigration restrictions the President "find[s] that the interests of the United States require"—impermissibly delegated Congress's legislative power to the President.[341] Little more than a decade removed from *Schechter Poultry* and *Panama Refining*, in which the Supreme Court invoked the nondelegation doctrine to strike down New Deal legislation, it is unsurprising that Knauff raised such a challenge to the broad delegation of authority to the President.[342] But the Court ducked the challenge by concluding that the nondelegation principles applicable in cases like *Schechter Poultry* did not apply to immigration policy. Immigration law was special, the Court wrote, because

> [t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.[343]

The Court's reasoning, it seems, was that Congress cannot run afoul of the nondelegation doctrine if the Executive has inherent constitutional power to exclude noncitizens even absent any delegation of authority from Congress.[344] This idea,

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341. Act of June 21, 1941, ch. 210, 55 Stat. 252, 252; *see* Appellant's Brief at 26-30, *Knauff*, 338 U.S. 537 (No. 54); *Knauff*, 338 U.S. at 542-43.

342. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 432-33 (1935).

343. *Knauff*, 338 U.S. at 542 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1892)).

344. To support this nondelegation idea, the *Knauff* Court cited *Curtiss-Wright*. Decided just a year after the Supreme Court invoked the nondelegation doctrine to strike down New Deal legislation in *Schechter Poultry* and *Panama Refining*, *Curtiss-Wright* has often been read to support a foreign-affairs exception to the nondelegation doctrine. *Curtiss-Wright*, 299 U.S. at 315-20; Curtis Bradley & Jack Goldsmith, *Foreign Affairs, Nondelegation, and the Major Questions Doctrine*, 172 U. Pa. L. Rev. 1743, 1753-58 (2024). While the scope (and even existence) of a foreign-affairs exception has long been debated, Curtis Bradley and Jack Goldsmith have recently argued that the exception is best understood as not an exception, and as not limited to foreign affairs. Instead, they argue, cases like *Curtiss-Wright* simply reflect that there is no nondelegation concern when "the recipient of a congressional authorization has independent

which has never again been taken up directly by the Supreme Court, would have significant implications for the power of the President to set immigration policy.[345] At a minimum, it would dramatically change the posture of the countless lawsuits filed over the last decade challenging presidential immigration initiatives. The legal challenges to President Obama's Deferred Action for Childhood Arrivals program, to President Trump's travel ban, and to President Biden's humanitarian-parole initiatives would all look profoundly different — and be much less likely to succeed — in a world where the Supreme Court once again concluded that the President has inherent constitutional authority to regulate immigration.[346]

The Court's second, interrelated suggestion of subject-matter exceptionalism followed immediately after this nondelegation discussion. The Court asserted that the executive branch's inherent constitutional authority to regulate admission was the reason why the Court had held in the late nineteenth century that it was constitutionally permissible to have executive-branch officials, rather than Article III courts, adjudicate exclusion cases.[347] Of course, that was not the reason why those old cases permitted the adjudication of exclusion and deportation decisions outside of Article III courts. Those foundational cases permitted executive adjudication of immigration cases because the Court concluded in *Chae Chan Ping* and *Fong Yue Ting* that the ability to enter and reside in the United

constitutional authority relating to the subject of the authorization." Bradley & Goldsmith, *supra*, at 1760 (emphasis omitted). The logic of the quoted language from *Knauff* tracks their theory tightly.

345. *See* Adam B. Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1674 (2007); Cox & Rodríguez, *The President and Immigration Law* (2009), *supra* note 5, at 475 (discussing this passage in *Knauff* and the separation-of-powers implications of the inherent-power theory); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (discussing the circumstances where the President has power to act "in absence of either a congressional grant or denial of authority"). While the Court has never explicitly returned to the idea of inherent presidential power over immigration, presidents themselves have subsequently asserted such authority as a basis for their immigration policies. *See* Cox & Rodríguez, *The President and Immigration Law* (2009), *supra* note 5, at 498-99 (discussing an Office of Legal Counsel opinion that invoked the inherent-authority idea from *Knauff* in defense of some of President Reagan's immigration policies).

346. For example, in the challenge to the Deferred Action for Childhood Arrivals (DACA) program brought by Texas and other states, the Fifth Circuit recently held that the executive branch lacked the authority to create DACA because it was a major question that could be authorized only by a clear statement from Congress. *See* Texas v. United States, 50 F.4th 498, 526-27 (5th Cir. 2022). In a world of inherent presidential authority, the major questions doctrine — indeed any kind of nondelegation doctrine — would have no application.

347. *See Knauff*, 338 U.S. at 543 ("Thus the decision to admit or to exclude an alien may be lawfully placed with the President, who may in turn, delegate the carrying out of this function to a responsible executive officer of the sovereign, such as the Attorney General. The action of the executive officer under such authority is final and conclusive.").

States was a privilege rather than a private right—not because the Court had held in the nineteenth century that the Executive had inherent constitutional authority to restrict immigration. Yet now the Court asserted that those foundational cases were about subject-matter exceptionalism. The limitations on judicial involvement in those cases, the Court stated, were due to the exceptional nature of immigration law: the reason why it was "not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien" suddenly derived directly from the fact that the immigration power was "a fundamental act of sovereignty."[348] Thus, by ignoring the constitutional framework within which those foundational cases were actually resolved, the Supreme Court again invented a new reading of them that set the stage for the development of the modern plenary power.

Why at this moment the Court walked away from a half-century of immigration jurisprudence and began to sharpen the twin ideas that undergird the modern plenary power remains, to me at least, a bit of a mystery. The ideas themselves were nothing new: Justice Department lawyers had been arguing at least since *Wong Wing* that immigration law was a special subject matter that should be governed by an exceptional set of constitutional rules.[349] And the idea that some or all constitutional rights might not extend to those outside U.S. territory had long played a prominent (and divisive) role in American public law.[350]

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348. *Id.* at 542-43. Moreover, because of the way the Court reasoned its way through this passage, it is not hard to see why later courts and advocates saw this as a general statement about the judicial review of immigration policies, rather than a technical statement about the permissibility of non-Article III adjudication. *See infra* Section IV.B (discussing the way that later cases like Kleindienst v. Mandel, 408 U.S. 753 (1972), and Fiallo v. Bell, 430 U.S. 787 (1977), interpreted this language as a more general statement about judicial deference).

349. That was why, the government argued in *Wong Wing*, the ordinary constitutional rules of criminal procedure had to give way whenever the government concluded that playing by those rules would interfere with immigration enforcement efforts. *See supra* Section II.B.5. The government continued to advocate this view in famous cases like *Bridges v. Wixon*, 326 U.S. 135 (1945). In that case, which involved the government's efforts to deport Harry Bridges because of his membership in the Communist Party, the government argued that Congress's deportation power "is unaffected by considerations which in other contexts might justify the striking down of legislation as an unwarranted abridgment of constitutionally guaranteed rights of free speech and association." Brief for the Respondent at 118, *Bridges*, 326 U.S. 135 (No. 788). The Court avoided reaching the core First Amendment question whether the government could deport a person for engaging in constitutionally protected speech or association. *See Bridges*, 326 U.S. at 156-57. Concurring, Justice Murphy emphatically rejected the idea that "the 'plenary' power of Congress to deport resident aliens is unaffected by the guarantee of substantive freedoms contained in the Bill of Rights." *Id.* at 160 (Murphy, J., concurring).

350. Kal Raustiala, Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law (2009) (surveying the history of fights over the territorial scope of the U.S. Constitution and its protections).

But prior to this period, the Supreme Court had rejected efforts to organize immigration law around these principles. Clearly something changed.

Perhaps members of the Court, during these early years of the Cold War, felt an increasing pressure to forge doctrinal pathways that would allow them to defer more to the decisions of the Executive. Or perhaps it was no accident that these changes followed close on the heels of the 1946 enactment of the APA.[351] That might seem improbable, given that the APA was itself an effort to codify the appellate model of judicial oversight that had been developed and applied in exclusion and deportation cases over nearly half a century. But perhaps the very act of codification prompted a new focus on statutory language and interpretation that disrupted the older common-law process through which courts had long developed due process principles in immigration cases.[352] If so, that would be a deeply ironic result.

For the moment, the causes of this transformation remain mysterious largely because no one has been sleuthing around to uncover the story. And the reason for that, of course, is that the myth of immigration exceptionalism has obscured the fact that a major transformation began in these cases, rather than sixty years earlier during the era of Chinese exclusion.

B. "Plenary Power" Rhetoric Versus Reality

In the years following *Knauff* and *Mezei*'s reimagining of more than half a century of immigration jurisprudence, the rhetoric of immigration exceptionalism began to take hold in American immigration law. Yet at the same time, American public law in general was going through a rights revolution. Spurred by the civil-rights movement and other forces, the Warren Court was expanding constitutional law's protections for individual rights in a host of domains,

351. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

352. Indeed, there is some support for this possibility. Immediately after the APA was enacted, lawyers began arguing that the APA's newly codified formal adjudication procedures applied to deportation cases. In 1950, the Supreme Court held in *Wong Yang Sung v. McGrath* that the APA's formal procedures did govern deportation proceedings. 339 U.S. 33, 52-53 (1950). Two aspects of the *Wong Yang Sung* litigation are intriguing for the story here. First, the case was focused, of necessity, on statutory language and interpretation—a sharp contrast to earlier decades of disputes about deportation hearings, in which the Court had largely ignored statutory language as it fashioned the appellate-review model for immigration proceedings. Second, *Wong Yang Sung* was argued on the same day that the Court heard argument in Ellen Knauff's case. The government argued in the former case that fair deportation hearings had historically been required by due process (not earlier immigration statutes), while it argued in the latter that this due process requirement protected only noncitizens facing deportation, not those like Knauff who were excluded at the border.

including equal protection, free speech, and criminal procedure.[353] These developments raised a pressing question: would these new constitutional constraints extend to immigration law?

Up to this point, nearly all of the Supreme Court's constitutional immigration cases had concerned what we tend to think of as procedural rights: the right to due process, the right to habeas corpus, or the right to adjudication by an Article III tribunal rather than by an executive-branch official. Even though federal immigration restrictions had been openly race-based from the beginning, the Supreme Court had never prior to the 1950s confronted an equal protection challenge to a federal exclusion or deportation law.[354] It had heard a few free speech challenges to such laws—challenges that proliferated as deportations of suspected communists rose—but premodern First Amendment doctrine was sufficiently weak that it did not require any sort of "immigration exception" for the Court to reject those challenges.[355]

But as the Court renewed its constitutional commitment to racial equality in the 1950s, developed a more speech-protective First Amendment doctrine in the early 1960s, and began to police sex discrimination as a matter of constitutional law in the 1970s, new constitutional challenges to immigration law percolated through the federal courts. Advocates argued that Congress's national-origins quota system discriminated on the basis of race in violation of the Constitution. Universities argued that executive-branch decisions denying admission to

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353. *See, e.g.*, J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 945-50 (1975) (describing the Warren Court's general expansion of equal protection rights); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 411-82 (2004) (detailing the Warren Court's expansion of free speech rights); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5, 16-17, 26-27, 64, 76 (1997) (discussing the Warren Court's changes to criminal-procedure jurisprudence).

354. Chin, *Is There a Plenary Power Doctrine?*, *supra* note 50, at 260-64.

355. The earliest First Amendment immigration case to be resolved by the Supreme Court, *United States ex rel. Turner v. Williams*, arose when John Turner was denied admission under a new congressional statute making excludable "anarchists." 194 U.S. 279, 292-93 (1904). While the Supreme Court rejected his First Amendment claim (as well as his other arguments), *id.* at 291-92, the Court's approach was consistent with then-conventional wisdom about the relationship between privileges and free speech rights, *see supra* note 122 (discussing this reason why modern accounts of *Turner* likely misunderstand the case). A half-century later, when the Supreme Court rejected the First Amendment claim of noncitizens ordered deported under an immigration provision making members of the Communist Party deportable, the Court explicitly cited to and purported to apply then-conventional free speech doctrine. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 592 (1952) (relying explicitly on Dennis v. United States, 341 U.S. 494 (1951), a First Amendment case that concerned a criminal prosecution and had nothing to do with immigration). For a discussion of ideological deportations during World War I and the subsequent Red Scare, see STONE, *supra* note 353, at 180-84, 220-26.

speakers supporting Marxism violated the First Amendment. And fathers argued that immigration statutes treating them worse than mothers amounted to unconstitutional discrimination on account of sex.

During this formative period, the Supreme Court decided two cases that today are widely regarded as canonical plenary power cases. The first, *Kleindienst v. Mandel*, concerned the Attorney General's decision to deny a visa to Ernst Mandel, a Belgian journalist and self-described revolutionary Marxist, who had been invited to speak at several universities in the United States.[356] The second, *Fiallo v. Bell*, concerned immigration preferences that drew distinctions among parents based on their sex.[357]

By the time these cases were decided, the Supreme Court's reimagining of the late nineteenth-century cases was complete. Those old cases now stood for an entirely new proposition: that the ordinary rules of constitutional law did not apply to immigration policies. Judicial review of immigration law would be uniquely deferential. One of the Court's early passages in *Fiallo v. Bell* articulates this idea of immigration exceptionalism clearly:

> At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that "over no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. [*Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909); *accord Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972).] Our cases "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." [*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); *see, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 591 (1952); *Lem Moon Sing v. United States*, 158 U.S. 538, 547-48 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).] Our recent decisions have not departed from this long-established rule.[358]

Notice the three interlocking moves the Court makes in this passage. First, the Court claims that immigration policies are subject to an exceptional—and exceptionally deferential—form of judicial review when they are challenged on

356. 408 U.S. 753, 756-60 (1972).

357. 430 U.S. 787, 788-91 (1977).

358. *Id.* at 792; *accord Mandel*, 408 U.S. at 765-66.

constitutional grounds.[359] Second, the Court grounds this deferential review in the idea of subject-matter exceptionalism—in a claim that the domain of immigration power is constitutionally unique. Third, the Court claims that this idea originated in foundational cases like *Chae Chan Ping* and *Fong Yue Ting* and that this "long-established rule" has been applied consistently for nearly a century. Together, these three claims make up the subject-matter-exceptionalism version of the so-called immigration plenary power. And these three interlocking claims are ones that the Court made repeatedly throughout this period in the 1970s.[360]

Of course, we are now in a position to see that these claims amount to a reinvention of the Supreme Court's early immigration cases rather than a restatement of them. Those early cases did not establish anything like a general doctrine of judicial deference in immigration cases. And they did not treat immigration cases as constitutionally exceptional. To repurpose them in this new light, the Court in *Fiallo*, *Mandel*, and other cases did the same thing it did in *Mezei*, overlooking both the actual legal issues raised in those old cases and the nineteenth-century constitutional framework within which those claims were resolved. Having done so, the Court then wrenched selective quotations from those cases out of their original context, seizing on them as support for its new idea that immigration policy was constitutionally exceptional. To take but one example: when old cases like *Lem Moon Sing* and *Fong Yue Ting* held that it was constitutionally permissible to have Congress's exclusion policy "enforced exclusively through executive officers, without judicial intervention," they were holding merely that exclusion decisions could be adjudicated outside of an Article III court because exclusion concerned the deprivation of a privilege rather than a private right.[361] But for the Supreme Court in the 1970s, this language could be refashioned from an ordinary nineteenth-century principle about non-Article III adjudication into a new principle requiring exceptionally weak constitutional review in all immigration cases.[362]

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359. Indeed, the Justice Department went even further, claiming that this old language rendered all challenges to immigration law nonjusticiable political questions—a stunning proposition given the dozens of challenges to immigration law that the Supreme Court adjudicated on the merits in the late nineteenth and early twentieth centuries. *See* Brief for the Appellees at 14-15, 19-24, 47, *Fiallo*, 430 U.S. 787 (No. 75-6297). While the Court rejected this broader conclusion, it accepted the Justice Department's contention that those early cases established a general doctrine of judicial deference in immigration law. *Fiallo*, 430 U.S. at 793 n.5.

360. *See, e.g.*, *Mandel*, 408 U.S. at 765-70; Mathews v. Diaz, 426 U.S. 67, 81-84 (1976).

361. Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895); *accord* Fong Yue Ting v. United States, 149 U.S. 698, 713-14 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659-60 (1892).

362. The Court's reimagining of other quotations is similar. Consider the Court's 1909 statement in *Oceanic Steam Navigation Co. v. Stranahan* that "over no conceivable subject is the legislative

After deploying this rhetoric of immigration exceptionalism, the Supreme Court rejected the free speech challenge to Ernst Mandel's exclusion, as well as the sex equality challenge brought by fathers who were denied immigration benefits available to mothers.[363] For many, these outcomes confirm that *Fiallo* and *Mandel* are exemplars of the immigration plenary power doctrine. To those reading these cases today, it may feel obvious that these speech and equality claims would have succeeded had ordinary principles of constitutional law been applied. Their failure thus seems like it must be the result of the Court applying an exceptional set of constitutional rules to immigration policy.

But is it obvious that these cases would have come out differently had they not concerned immigration policies? This is not so clear. The mistake in the above thinking is that it involves us anachronistically applying our contemporary understanding of constitutional rights to cases decided during an earlier period, when the scope of those rights was vastly different.[364]

It is true that the canonical plenary power cases taught to law students around the country are, indeed, cases upholding policies that blatantly discriminated on the basis of race, sex, ideology, and other grounds that ordinarily receive special scrutiny under the First, Fifth, and Fourteenth Amendments. In *Chae Chan Ping*, the Supreme Court upheld the Chinese Exclusion Acts; in *Harisiades v. Shaughnessy*, it rejected a First Amendment challenge to the deportation of former members of the Communist Party; and in *Fiallo v. Bell*, the Court rejected an equal protection challenge to a sex classification that disadvantaged fathers in the green-card preference system.[365]

But what is too often overlooked about these cases is when they were decided: each of them was decided during a constitutional era when such policies

power of Congress more complete than it is over" the admission of aliens. 214 U.S. 320, 339 (1909). In *Fiallo*, the Court linked this language to its general claim of constitutional exceptionalism. *See* 430 U.S. at 792. But the old case concerned nothing of the sort: again, it was a fight over whether a dispute could be adjudicated outside of Article III. In *Oceanic Steam Navigation*, the dispute concerned a penalty imposed on a steamship company by an executive-branch official. *See* 214 U.S. at 329-33; *supra* note 215 (discussing the Court's application of the appellate model to such claims).

363. *Mandel*, 408 U.S. at 769-70 (rejecting Ernst Mandel's free speech claim); *Fiallo*, 430 U.S. at 788-89, 799-800 (rejecting Fiallo's sex discrimination claim).

364. *See* Adam Cox, *Why a Muslim Ban Is Likely to Be Held Unconstitutional: The Myth of Unconstrained Immigration Power*, JUST SEC. (Jan. 30, 2017), https://www.justsecurity.org/36988/muslim-ban-held-unconstitutional-myth-unconstrained-immigration-power [https://perma.cc/7SCA-VS5W].

365. Chae Chan Ping v. United States, 130 U.S. 581, 589, 603-04, 609-11 (1889); Harisiades v. Shaughnessy, 342 U.S. 580, 591-92 (1952); *Fiallo*, 430 U.S. at 799-800.

were often accepted outside the domain of immigration law.[366] *Chae Chan Ping* was decided seven years before *Plessy v. Ferguson*, which upheld Jim Crow segregation and birthed the infamous jurisprudential principle of "separate but equal."[367] *Harisiades* was decided in 1952, a time when First Amendment protections were much weaker than they are today—and when Communist Party members were not infrequently criminally prosecuted.[368] And, most relevantly for the present discussion, *Fiallo* was handed down in the mid-1970s, during the nascent phase of the Court's sex equality jurisprudence, when a number of nonimmigration laws that discriminated on the basis of sex were upheld by the Supreme Court.[369] The *Fiallo* statute was even defended by the government using the same reasoning offered by the Court when it upheld those other laws—that it was permissible for the statute to treat men and women differently because "real differences" between men and women, relating to childbirth and parenting, rendered them not similarly situated.[370]

In subsequent decades, of course, the Supreme Court struck down many government policies that had been defended on the ground that they reflected "real differences" between the sexes—an evolution that, many have argued, reflected the Court's growing commitment to the idea that the Equal Protection Clause prohibits sex-role stereotyping.[371] And as sex equality doctrine matured, the Court's approach to sex discrimination in immigration law changed, too. In

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366. For a fantastic earlier effort to document this fact, see generally Chin, *Is There a Plenary Power Doctrine?*, *supra* note 50.

367. *See* 163 U.S. 537, 540, 550-51 (1896).

368. *See* Dennis v. United States, 341 U.S. 494, 495-96 (1951) (rejecting a First Amendment challenge to the criminal prosecution of Eugene Dennis, the General Secretary of the Communist Party in America); *see also* STONE, *supra* note 353, at 311-426 (discussing First Amendment doctrine during the Cold War). Indeed, the Supreme Court denied Harisiades's First Amendment claim by evaluating it under the then-standard free speech doctrine, not some special free speech rule crafted for immigration cases. *See Harisiades*, 342 U.S. at 592 & nn.18-19 (citing *Dennis*, a nonimmigration criminal case, as supplying the framework for evaluating Harisiades's claim).

369. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 316 (1977).

370. *See* Brief for the Appellees, *supra* note 359, at 39 ("A natural mother has, by definition, once been united with her illegitimate child, and both reason and common experience suggest that that close relationship has continued in the vast majority of cases. No such intimacy generally exists between natural fathers and their illegitimate children . . . .").

371. *See* United States v. Virginia, 518 U.S. 515, 531-46, 556-58 (1996) (holding unconstitutional the Virginia Military Institute's male-only admissions policy, which the state defended in large part on the ground that admitting women to the school would undermine its educational mission because of real differences between the sexes). *See generally* Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83 (2010) (tracing the emergence and evolution of an anti-sex-role-stereotyping principle in equal protection jurisprudence).

2017, when the Court confronted an equal protection challenge to an immigration policy nearly identical to the policy it had upheld in *Fiallo*, the Court reached the opposite conclusion, holding that the challenged statute was unconstitutional. The case that raised the challenge, *Sessions v. Morales-Santana*, involved a federal statute that conferred citizenship on some children, but not others, who were born abroad to a U.S.-citizen parent.[372] The statute treated men worse than women: it required men to have previously lived in the United States for a longer period in order to pass on citizenship to their newborn.[373] The policy could not be explained by anything other than the perpetuation of outmoded sex-role stereotyping of the sort that the Supreme Court had, in recent decades, repeatedly rejected as incompatible with equal protection.[374] The Court applied those conventional equal protection principles to conclude that the derivative-citizenship rule violated the Constitution. While the Court's rhetoric about the immigration exceptionalism had not waned in the intervening decades, changes in sex equality jurisprudence helped produce a different result.

Since *Brown v. Board of Education* inaugurated a new doctrinal era of racial equality in 1954,[375] the Court has assiduously worked to avoid confronting the question whether the government can constitutionally exclude or deport people on the basis of their race. Sex equality cases were hardly the only ones where the Supreme Court avoided following through on its rhetoric of immigration exceptionalism. Back in 1957, the Supreme Court did grant certiorari in what could have been the test case for whether open racial discrimination was permissible in immigration law.[376] But the Court ducked the merits in a move that paralleled the Court's avoidance just a few years later of an equal protection challenge to antimiscegenation laws.[377] (The Court ultimately struck down

372. 582 U.S. 47, 51 (2017).

373. *Id.*

374. *Id.* at 62 (explaining that the policy was based on an old "familiar stereotype [that unwed citizen fathers] would care little about, and have scant contact with, their nonmarital children").

375. 347 U.S. 483 (1954).

376. United States *ex rel.* Lee Kum Hoy v. Murff, 355 U.S. 169, 169-70 (1957) (remanding a case involving an equal protection challenge to an INS policy that required blood tests to confirm the biological relationships of parents and children of Chinese ancestry but did not require such tests for other parents and children seeking immigration benefits); *see* Gabriel J. Chin, Cindy Hwang Chiang & Shirley S. Park, *The Lost* Brown v. Board of Education *of Immigration Law*, 91 N.C. L. Rev. 1657, 1690-98 (2013).

377. *Lee Kum Hoy*, 355 U.S. at 169-70 (declining to "pass upon the claim of unconstitutional discrimination" while nonetheless vacating the constitutional ruling below"); Naim v. Naim, 350 U.S. 891, 891 (1955) (per curiam) (refusing to consider the question whether Virginia's antimiscegenation statute violated the Equal Protection Clause, while nonetheless vacating the

antimiscegenation laws more than a decade later in *Loving v. Virginia*, but by that time, the national-origins quota system had been repealed by Congress, saving the Court from ever having to confront directly the constitutionality of those rules.[378]) A few decades later, in *Jean v. Nelson*, the Court again avoided the question whether race discrimination was constitutionally permissible in immigration law.[379] That case concerned the Reagan Administration's treatment of unauthorized migrants from Haiti.[380] The plaintiffs attacked as unconstitutional race discrimination the Administration's policy of detaining arriving Haitians while releasing many arriving Cubans.[381] The lower court reached the constitutional question, decided that ordinary constitutional law did not apply to immigration matters, and held that the arriving Haitian migrants could not complain about otherwise unconstitutional race discrimination.[382] But in a familiar pattern, the Supreme Court dodged the constitutional question and declined to adopt the plenary power doctrine described by the lower federal court. The Court concluded instead that the immigration statute and its implementing regulations themselves prohibited executive-branch officials from considering race or national origin when making the decision whether to release arriving immigrants.[383]

Avoidance has marked the Court's free-speech immigration cases as well—including its decision in *Kleindienst v. Mandel*. That characterization of *Mandel* might seem surprising, as the case is often described as holding that the government can exclude noncitizens on the basis of their otherwise-protected speech—

Virginia Supreme Court's decision rejecting the constitutional challenge). *See generally* Richard Delgado, Naim v. Naim, 12 Nev. L.J. 525 (2012) (discussing the Court's avoidance of substantive review in *Naim*).

378. 388 U.S. 1, 7-12 (1967) (holding that Virginia's antimiscegenation law violated the Equal Protection Clause); Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (repealing the national-origins quota system of immigrant admissions).

379. 472 U.S. 846, 848, 852, 854-55 (1985).

380. *Id.* at 848-49.

381. *See* Cox & Rodríguez, The President and Immigration Law (2020), *supra* note 5, at 56-69 (discussing the administration's policies).

382. *See* Jean v. Nelson, 727 F.2d 957, 964, 973, 975 (11th Cir. 1984) (holding that the federal government's "plenary power to control immigration," an "inherent attribute of national sovereignty" recognized in the Chinese exclusion cases, meant that the "Haitian plaintiffs cannot challenge the refusal of executive officials to parole them on the basis of the fifth amendment's equal protection guarantee").

383. *Jean*, 472 U.S. at 857. The Supreme Court's avoidance strategy makes clear that it was unwilling, during this period, to embrace fully an exceptional set of constitutional rules for immigration cases—despite the fact that some lower federal courts (like the Eleventh Circuit) were reading the Supreme Court's own prior precedents as endorsing such an exceptional regime.

a seemingly clear violation of ordinary First Amendment principles.[384] But that common description does not accurately capture the legal issue actually decided by the Supreme Court. In *Mandel*, the Court assiduously avoided considering the constitutionality of the immigration provision making excludable those who spoke out in favor of communism.[385] It did so by characterizing Mandel's exclusion as based on nonspeech grounds: the government, the Court noted, stated that Mandel was denied admission because he had violated the terms of his visa on a previous trip to the United States.[386]

Mandel and the universities that had joined his suit argued that the government's stated ground for refusing to let him in was a pretext.[387] The real reason, they argued, was that the government did not approve of his speech. The case, therefore, was treated by the Supreme Court as raising a claim of selective enforcement. When the case is understood in that light, it is not at all surprising that the Court rejected the claim. Selective-enforcement claims raised against law-enforcement officials are extremely disfavored in American public law. The Supreme Court has long held that it is loath to question the reasons underlying the exercise of enforcement discretion, even when it looks suspiciously like the official may have acted unconstitutionally. When a prosecutor provides a facially legitimate basis for charging a criminal defendant, for example, the Court has refused — even in the face of powerful circumstantial evidence — to permit the defendant to litigate his claim that the prosecutor's charge was motivated by race.[388] When police provide a facially legitimate basis for a traffic stop, the Court has held that it is constitutionally irrelevant, so far as the Fourth Amendment is concerned, that the police may have actually stopped the person because of their race.[389] Thus, despite the rhetoric of immigration exceptionalism laced throughout the *Mandel* opinion, the Court's actual holding is quite conventional:

> We hold that when the Executive exercises this power [of enforcement discretion] . . . on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test

384. ALEINIKOFF ET AL., *supra* note 11, at 32-42, 455 ("Mandel held that government officials could exclude a noncitizen on the basis of ideology despite the First Amendment, as long as the government presented a facially legitimate and bona fide reason.").

385. *See* Immigration and Nationality Act, ch. 477, § 212(a)(28)(G)(v), 66 Stat. 163, 185 (1952) (making excludable "[a]liens who write or publish . . . the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship").

386. Kleindienst v. Mandel, 408 U.S. 753, 759 (1972).

387. *See* Brief for Appellees at 8-10, 13, 32-33, *Mandel*, 408 U.S. 753 (No. 71-16).

388. *See* United States v. Armstrong, 517 U.S. 456, 470 (1996).

389. *See* Whren v. United States, 517 U.S. 806, 813-15 (1996).

it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.[390]

C. Plenary Power with Teeth

By the 1970s, therefore, the rhetoric of immigration exceptionalism was well established in the Supreme Court's case law. Indeed, even critics of the Court during this period embraced the erroneous idea that the Court really had held, way back in the Chinese exclusion cases, that immigration law was immune from the ordinary rules of constitutional law.[391] Yet canonical cases like *Mandel* and *Fiallo* all might plausibly have come out the same way under ordinary principles of constitutional law as they were applied at the time. And it is not just that we can imagine alternative rationales for reaching the same results in those cases: it is that the Court itself leaned into those conventional constitutional rationales when it decided them. In the Court's own telling, *Mandel* turned importantly on American public law's longstanding reluctance to look behind a prosecutor's stated motives; *Fiallo* turned importantly on the then-prominent idea in sex equality jurisprudence that "real differences" between men and women could justify laws treating them differently. And despite the rhetoric of immigration exceptionalism, the Court steadfastly avoided deciding whether an immigration law that openly discriminated on the basis of race was constitutional.

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390. *Mandel*, 408 U.S. at 770. As we will see shortly, the language of this passage about "facially legitimate and bona fide" reasons for government action was later repurposed by the Court into a general statement of the deferential judicial review required in exclusion cases—without any acknowledgment that the language concerned selective-enforcement claims. *See, e.g.*, Trump v. Hawaii, 585 U.S. 667, 704 (2018) (applying rational-basis review but noting the general applicability of *Mandel*'s "facially legitimate and bona fide" standard to "admission and immigration cases that overlap with 'the area of national security'" (quoting Kerry v. Din, 576 U.S. 86, 104 (2015) (Kennedy, J., concurring))). There is no evidence that Justice Blackmun, author of the majority opinion in *Mandel*, believed himself to be articulating some new standard of judicial review for all constitutional challenges to immigration policies.

391. *See, e.g.*, Rosberg, *supra* note 11, at 317-18 ("Even when Congress decided to make race a test of admissibility—in the laws barring entry of Chinese aliens on the basis of ancestry alone—the Court upheld the legislative judgment. Indeed, it was in the *Chinese Exclusion Cases* that the Court first articulated the plenary power thesis. . . . In all three areas—exclusion, deportation, and naturalization—the Court has refused to enforce the constitutional standards that control the exercise of other powers of the national government." (footnote omitted)); Legomsky, *supra* note 11, at 255 ("At the heart of that sentiment lies the 'plenary power' doctrine, under which the Court has declined to review federal immigration statutes for compliance with substantive constitutional restraints. In an undeviating line of cases spanning almost one hundred years, the Court has declared itself powerless to review even those immigration provisions that explicitly classify on such disfavored bases as race, gender, and legitimacy." (citing Fiallo v. Bell, 430 U.S. 787 (1977); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Chae Chan Ping v. United States, 130 U.S. 581 (1889))).

This seemingly unstable equilibrium managed to persist for nearly a half-century. But in just the past few years, the Supreme Court has handed down a pair of cases that mark the arrival of a new era of immigration exceptionalism. These cases—one involving President Trump's travel ban, the other concerning asylum screening at the border—have been widely criticized for continuing to embrace the so-called plenary power doctrine. But the Court's approach marks a departure from the past, not continuity with it. In these new cases, immigration exceptionalism finally appears to play a clearly dispositive role.

1. Discriminatory-Intent Exceptionalism

The first case concerned constitutional challenges to President Trump's travel ban. Announced four days after he took office, the travel ban barred immigrants from several majority-Muslim nations from entering the United States.[392] To many, the policy looked like President Trump was following through on his oft-repeated campaign promise to ban Muslims from immigrating to the United States. Indeed, after the policy was announced, President Trump made a number of statements implying that this was exactly what he aimed to do—though, he noted frequently, he avoided calling his plan a "Muslim ban" because his lawyers had advised him not to do so.[393]

In a flurry of lawsuits, plaintiffs argued that the travel ban was motivated by animosity towards Muslim immigrants and, as such, was plainly unconstitutional. The Supreme Court ultimately rejected this constitutional challenge in *Trump v. Hawaii*.[394] Chief Justice Roberts's opinion for the Court feels superficially similar to the opinions in earlier cases like *Mandel* and *Fiallo*. It emphasizes the boilerplate that "[f]or more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'"[395] And the opinion follows up this quote with a passage rehashing the Court's by now well-established reinterpretation of the late

392. *See* Exec. Order No. 13,769, 3 C.F.R. 272 (2018).

393. Amy B. Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says—And Ordered a Commission to Do It 'Legally*,' WASH. POST (Jan. 29, 2017, 3:32 PM EST), https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally [https://perma.cc/Q2GV-W8L8]; Ryan Teague Beckwith, *President Trump's Own Words Keep Hurting His Travel Ban*, TIME (Mar. 16, 2017, 11:45 AM EDT), https://time.com/4703614/travel-ban-judges-donald-trump-words [https://perma.cc/U5QK-5S7C].

394. 585 U.S. at 710.

395. *Id.* at 701 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

nineteenth-century cases—reading those cases as formulating a generalized, deferential standard of constitutional review for immigration cases.[396]

But this superficial similarity belies a deep difference between the cases. Prior to *Trump v. Hawaii*, the Supreme Court had never upheld an immigration policy that openly discriminated on the basis of race, religion, speech, or sex during a period of constitutional history when an identical policy would have been obviously unconstitutional outside the immigration context. Yet in *Trump v. Hawaii*, the Court crafted a rule of decision that would require upholding an immigration policy that was indisputably motivated by official animus against a religion, so long as the government proffered some rational national-security basis for the policy.

That holding cannot be squared with mainstream principles of ordinary constitutional law. Under modern antidiscrimination doctrine, proof that a government decision was motivated in part by religious or racial animosity renders the policy presumptively unconstitutional.[397] The only way for the policy to be saved from invalidity is for the government to prove, counterfactually, that "the same decision would have resulted even had the impermissible purpose not been considered."[398] The mere presence of some other legitimate reason for the policy is not enough to rescue it from invalidity. And the existence of some other rational basis for the policy is certainly not sufficient to preclude any inquiry into whether the policy was actually motivated by religious animosity.[399]

Yet this is precisely what the majority held in *Trump v. Hawaii*. Chief Justice Roberts made clear that the travel ban was constitutional so long as there was some plausibly legitimate reason for the policy. Only if it were "impossible to 'discern a relationship to legitimate state interests' or that the policy is 'inexplicable by anything but animus'" would the Court hold it unconstitutional.[400]

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396. *Id.* at 701-05.

397. *See* Washington v. Davis, 426 U.S. 229, 238, 246 (1976) (holding that a facially neutral policy that has a disparate racial impact is subject only to rational-basis review—unless it is shown to be motivated by discriminatory animus, in which case it receives the same strict scrutiny applied to facially discriminatory policies); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (holding that the racially discriminatory application of a facially neutral statute violated the Equal Protection Clause).

398. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977).

399. *See Davis*, 426 U.S. at 246 (assessing evidence of discriminatory intent behind a facially neutral hiring practice, despite the legitimate justifications proffered for the practice).

400. Trump v. Hawaii, 585 U.S. at 704-07 (quoting Romer v. Evans, 517 U.S. 620, 632, 635 (1996)). The Court borrowed this language from the famous few rational-basis-review cases in which the Court has held that a government policy failed rational-basis review. *See, e.g.*, *Romer*, 517 U.S. at 631-32, 635; City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 448 (1985). The Court's reliance on those precedents reinforces the conclusion that the Court pretermitted

Once the government proffered a plausible national-security basis for the policy, therefore, the Court's inquiry was at an end. The existence of a potentially legitimate basis for the policy precluded any inquiry into whether the policy was in fact motivated by anti-Muslim animus. Whether such animus motivated the policy was, on the Court's reasoning, legally irrelevant.

This approach turns canonical antidiscrimination doctrine on its head. Normally, evidence of discriminatory intent *precludes* a court from upholding a policy merely because government officials offer up a potentially legitimate basis for the policy. But under the Court's approach in *Trump v. Hawaii*, the existence of a potentially legitimate basis for an immigration policy *precludes* a court from considering evidence of discriminatory intent.[401]

To be sure, the Court could have considered Hawaii's evidence of animus and deemed the evidence insufficient to prove that the travel ban was motivated by religious animosity. For some, this surely would have seemed like a strained application of the ordinary constitutional rules regarding proof of discriminatory intent. Nonetheless, it would at least have counted in some sense as an application of the antidiscrimination framework that operates outside immigration law. But Chief Justice Roberts did not take that route. Instead, he refused even to consider evidence of invidious motive — never once in his constitutional analysis mentioning, let alone evaluating, Trump's repeated calls for a "total and complete

ordinary antidiscrimination doctrine. In those earlier cases, the reason the Court applied rational-basis review was that it concluded that the forms of discrimination at issue — including discrimination against gay people and discrimination against people with disabilities — were not forms of discrimination that triggered heightened scrutiny. But the form of discrimination asserted in *Trump v. Hawaii* — discrimination against people because of their religious beliefs — is canonically a form of discrimination that triggers strict scrutiny in modern constitutional law. Thus, only by treating any religious discrimination as legally irrelevant can the Court avoid considering the evidence of religious discrimination and hold that the existence of a plausible national-security justification is *sufficient* (not merely necessary) to prove the policy's constitutionality.

401. Consider how radical such an approach would be in other areas of constitutional law. Imagine the Court saying, "Because there is persuasive evidence that the felon-disenfranchisement law adopted by the Alabama constitutional convention in 1901 has a legitimate grounding in punishment and deterrence, quite apart from any racial hostility, we must accept that justification." Such a statement would be shocking. And we know that the Court has held exactly the opposite, striking down Alabama's 1901 felon-disenfranchisement law because it was motivated by racial animosity, just a few years after the Court had held that felon-disenfranchisement policies in general had both a legitimate basis and constitutional sanction. *Compare* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (holding that a California felon-disenfranchisement law did not violate the Equal Protection Clause), *with* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (invalidating Alabama's felony-disenfranchisement provision under the Equal Protection Clause).

shutdown of Muslims entering the United States."[402] Once the Court identified a plausibly legitimate basis for the travel ban, its inquiry was at an end.

The upshot of the Court's approach is that the travel ban would have been found constitutional *even if* the plaintiffs had uncovered smoking-gun evidence that the policy was motivated by blatant official animus against Muslims. There is no plausible way to reconcile that conclusion with principles of ordinary constitutional law. Moreover, ordinary equal protection doctrine would have required the Court to consider the plaintiffs' evidence of discriminatory intent. Only by applying a new and exceptional equal protection doctrine — one reserved just for immigrant admissions policies — was the Court able to avoid this black-letter legal obligation. In that sense, *Trump v. Hawaii* is much more radical than *Fiallo* or *Mandel*.

2. *Due Process Exceptionalism*

Two years after the travel-ban decision, the Roberts Court handed down a second decision reinforcing the decisive role that immigration exceptionalism is playing today in the Supreme Court's immigration cases. That case, *Department of Homeland Security v. Thuraissigiam*, arose when Thuraissigiam was apprehended by Customs and Border Protection agents shortly after he crossed the border.[403] Department of Homeland Security (DHS) officials gave him a summary hearing and found that he lacked a "credible fear" of persecution in Sri Lanka.[404] He sought federal-court review of that decision, arguing that the statute restricting review of his deportation order effectively suspended the writ of habeas corpus — which provides a means to seek release from unlawful restraint on liberty — in violation of the Suspension Clause of the Constitution.[405]

Thuraissigiam's case could have been resolved by the Supreme Court without relying on ideas of immigration exceptionalism at all. Prior doctrine had generally limited the Suspension Clause's protections to legal claims, such as a claim that Congress had not authorized deportation on the basis asserted by the agency. While Thuraissigiam characterized his claims as legal, they were arguably quite fact intensive. For example, he claimed DHS officials had displayed

402. Trump v. Hawaii, 585 U.S. at 699-701. That statement, and others by the President, appear only in the Chief Justice's recitation of the case's factual background. *See id.*

403. 591 U.S. 103, 114 (2020).

404. *Id.* at 114-15.

405. *Id.* at 114-16; U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

insufficient knowledge of conditions in Sri Lanka when assessing his claim.[406] Indeed, Justice Breyer (joined by Justice Ginsburg) concurred on just this ground, concluding that Thuraissigiam's claims were too fact intensive to qualify for protection under the Suspension Clause.[407]

Instead, the Court leaned into plenary power ideas to decide Thuraissigiam's case. It held, for the first time in American history, that the Suspension Clause does not give noncitizens the opportunity to assert their right to remain lawfully in the United States via habeas corpus.[408] This holding directly contradicted the Court's own prior statements about the Suspension Clause's scope, as well as the Court's unbroken practice, dating all the way back to the Chinese exclusion cases, of accepting habeas petitions filed by noncitizens facing exclusion or deportation.[409] But that is not the holding that I want to focus on here. For while the Court's holding that Thuraissigiam had no right to be in court fully resolved the case, the five-Justice majority nonetheless reached out to decide another massive question about the constitutional rights of noncitizens.

The question was whether the Due Process Clause safeguarded the fairness of Thuraissigiam's summary deportation hearing.[410] Thuraissigiam had argued

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406. Brief for Respondent at 7, *Thuraissigiam*, 591 U.S. 103 (No. 19-161).

407. *Thuraissigiam*, 591 U.S. at 150-58 (Breyer, J., concurring in the judgment).

408. *Id.* at 117-21 (majority opinion).

409. The Supreme Court justified its denial of habeas to Thuraissigiam in three steps. First, it read its foundational immigration cases as not establishing a constitutional right to habeas corpus for arriving noncitizens held in custody by immigration officials, *id.* at 128-36, despite those cases saying things like: "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful," Nishimura Ekiu v. United States, 142 U.S. 651, 660 (1892). Second, it rejected its prior explicit conclusion, in both *Heikkila v. Barber*, 345 U.S. 229 (1953), and *INS v. St. Cyr*, 533 U.S. 289 (2001), that the foundational cases established such a constitutional right. *Thuraissigiam*, 591 U.S. at 136-38. Third, the Court dismissed the relevance of *Boumediene v. Bush*, 553 U.S. 723 (2008), in which the Court held that alleged enemy combatants held at Guantanamo Bay had a constitutional right to habeas, *id.* at 771, on the ground that "*Boumediene* . . . is not about immigration at all," *Thuraissigiam*, 591 U.S. at 136—an ambiguous statement, but one that certainly nods at the idea that immigration cases are subject to an exceptional constitutional regime of habeas corpus.

410. Because the majority had already held that the Suspension Clause did not give Thuraissigiam a right to be in court, *Thuraissigiam*, 591 U.S. at 107, and because he had not asserted that the Due Process Clause itself provided an independent, constitutional right to be in court, it is unclear how the Court even had authority to consider this due process claim. The majority stated that it should resolve the issue because "due process provided an independent ground for the decision below" and because "respondent urges us to affirm on this ground." *Id.* at 138. But the fact that a party urges the Court to decide an issue is not usually seen as a reason to rule on an issue *after* the Court has already concluded that it lacks jurisdiction over a case. And

in his habeas petition that the government's decision to expel him had to comply with due process.[411] Justice Alito rejected his contention in three pages tacked on to the end of a majority opinion that had already concluded that Thuraissigiam had no right to habeas corpus in the first place. Alito held that immigrants "in Thuraissigiam's position"—those who entered the United States illegally and were apprehended shortly thereafter—could not invoke the Due Process Clause to challenge the procedures used by the government to order them deported.[412]

This was, perhaps, an even bigger blockbuster of a holding than the Court's habeas holding. Prior to Thuraissigiam's case, the Supreme Court had not held since *Fong Yue Ting* that a noncitizen who had already entered the United States lacked due process rights to contest the adequacy of her deportation hearing. To be sure, this is precisely what the Court held in *Fong Yue Ting*. But *Fong Yue Ting*, *Nishimura Ekiu*, and other immigration cases from that period do not support Justice Alito's conclusion. Those cases drew no distinction between noncitizens who had entered and those who had not (let alone those who had entered, but just barely, and without permission). Recall, the early cases rejected due process claims because they treated *both* the right to enter the United States *and* the right to remain as privileges, not private rights. In the nineteenth-century framework within which those cases were decided, this meant that exclusion and deportation decisions could be made by executive officials rather than Article III courts, that those decisions could be made pursuant to whatever procedures Congress chose, and that those decisions could be made final and conclusive upon the judiciary.[413]

So how did Justice Alito justify denying Thuraissigiam due process rights? He reasoned in two steps. First, he relied on *Knauff* and *Mezei*'s mid-twentieth-century reimagining of those foundational immigration cases from the nineteenth century.[414] *Knauff* and *Mezei*, I explained earlier, had ignored four decades of jurisprudence in which the Supreme Court had required due process for *all*

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the claim that due process provided an "independent ground" below is misleading if the Court means that the Ninth Circuit held that the Due Process Clause, rather than the Suspension Clause, provided a jurisdictional basis for Thuraissigiam's claim. The Ninth Circuit did not hold that, and Thuraissigiam did not allege that in his complaint. *See* Thuraissigiam v. U.S. Dep't of Homeland Sec., 917 F.3d 1097, 1103 (9th Cir. 2019).

411. *See* Brief for Respondent, *supra* note 406, at 6 (describing the habeas petition).

412. *Thuraissigiam*, 591 U.S. at 140. It is important to note that the Court did not hold that Thuraissigiam was entirely unprotected by the Due Process Clause. It held only that he had no due process rights with respect to his deportation procedures. *See id.*

413. *See supra* Section II.B.

414. *Thuraissigiam*, 591 U.S. at 138-40 (lumping together a mash-up of selected quotes from *Nishimura Ekiu*, *Knauff*, and *Mezei* to suggest a stable, unbroken, century-long tradition of rejecting the application of due process to decisions denying admission to noncitizens stopped at the border).

noncitizens facing expulsion, even those stopped at the border who had yet to enter. *Knauff* and *Mezei* then invented a new understanding of the foundational nineteenth-century cases, treating them as establishing a special due process rule for noncitizens seeking entry into the United States—a rule that did not apply to noncitizens who had already entered.[415]

But even that mid-twentieth-century reimagining was not enough to resolve Thuraissigiam's due process claim, because he had already crossed the border and entered the United States. The rule established by *Knauff* and *Mezei* applied, by its own terms, only to "an alien on the threshold of initial entry."[416] Indeed, *Mezei* explicitly distinguished those stopped at the border from "aliens who have once passed through our gates, even *illegally*," whom the *Mezei* Court held "may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."[417]

Explaining why *Mezei*'s holding about the due process rights of noncitizens "on the threshold of initial entry" should be extended to encompass recent illegal entrants like Thuraissigiam thus required an additional justification—a justification that could not come from *Mezei* itself, given that its reasoning stated explicitly (albeit in dicta) that the rule should not extend to those who had already entered. So, in the final paragraphs of his opinion, Justice Alito turned instead to the idea that the power to regulate immigration is a constitutionally exceptional power. Drawing on the rhetoric of "plenary power," he concluded that granting Thuraissigiam a constitutional right to a fair hearing

> disregards the reason for our century-old rule regarding the due process rights of an alien seeking initial entry. That rule rests on fundamental propositions: "[T]he power to admit or exclude aliens is a sovereign prerogative," [*Landon v. Plascencia*, 459 U.S. 21, 32 (1982)]; the Constitution gives "the political department of the government" plenary authority to decide which aliens to admit, [*Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)]; and a concomitant of that power is the power to set the procedures to be followed in determining whether an alien should be admitted, [*see United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)]. This rule would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil.[418]

Notice the way in which Alito's reasoning tracks the rhetoric of immigration exceptionalism. He asserts that the due process rights of immigrants seeking

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415. *See supra* Section IV.B.

416. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953).

417. *Id.* (emphasis added).

418. *Thuraissigiam*, 591 U.S. at 139.

admission are "century-old," having been established in the earliest immigration cases like *Nishimura Ekiu*. He concludes that those rights were necessarily diluted in those foundational cases *precisely because* the power to admit or exclude noncitizens is "a sovereign prerogative," one that the Constitution gives to "the political department of the government." And he implies that this exceptional due process doctrine has persisted, largely unchanged, from the earliest immigration cases to the present.

All three of these claims are wrong. The due process rights of noncitizens facing expulsion have not remained fixed since the foundational immigration cases. The Supreme Court abandoned the due process framework within which those earliest immigration cases were decided shortly thereafter. Moreover, even in those earliest cases, the Supreme Court did not reason that due process rights were watered down because the power to admit or exclude noncitizens was "a sovereign prerogative." The existence of such sovereign power never meant for the Court in *Nishimura Ekiu* or other cases of the time that immigration law was constitutionally exceptional. At the time, immigration power could be wielded exclusively by "the political department of the government" not because immigration law was immune from judicial review but because immigration decisions, affecting privileges rather than private rights, could be resolved without the involvement of an Article III court. Yet in a now-familiar theme, the majority trotted out these well-worn quotes not to rely on history, but to reinvent it—the old language now standing unequivocally for a new principle of immigration exceptionalism.

CONCLUSION

Debunking the common mythology that immigration law was exceptional from the beginning has important implications—both for immigration law itself and for public law more generally.

For immigration law, one implication is crystal clear: it is time to stop treating early immigration cases like *Chae Chan Ping* and *Fong Yue Ting* as though they established the principle of immigration exceptionalism. Those cases did not hold that immigration policies are uniquely insulated from constitutional challenge, that courts must engage in some exceptionally deferential form of judicial review when evaluating immigration policies, or that noncitizens resisting their expulsion are without constitutional rights. That does not mean that these cases are unimportant or should be banished from the immigration canon. But we should describe these cases as standing for the propositions they actually established, rather than as standing for a set of propositions that were ascribed to them more than a half-century later, when the Court began to invent immigration exceptionalism in the middle part of the twentieth century.

Of course, once we do this, it is only natural to question the entire edifice of modern immigration exceptionalism. The Supreme Court and others have often argued that the plenary power doctrine's supposedly ancient historical pedigree makes abandoning the doctrine unthinkable today.[419] As I have shown, however, there is no century-old doctrine deserving of special respect. In fact, the plenary power doctrine may be more an invention of the Roberts Court than the Fuller Court of the late nineteenth century. There is some irony in this fact, given the current Court's stated commitment to originalism as a theory of constitutional interpretation. Modern plenary power doctrine is about as far from originalism as you can get.

To be clear, that does not mean we should try to return to the rules established in the nineteenth-century immigration cases in order to recover the "true" Constitution of immigration law. Even for those committed to originalism as an interpretive method, this would make little sense. The foundational immigration cases were decided more than a century after the Constitution was ratified, and it is clear that the views articulated in decisions like *Fong Yue Ting* were anathema to many Founding Era political actors. James Madison and Thomas Jefferson both argued after the Founding that resident noncitizens possessed a vested right to remain in the United States that could not be taken from them except as punishment following a criminal trial.[420] They believed that deportation was banishment, precisely the opposite of what the Court held in *Fong Yue Ting*. Moreover, the principle advanced by the majority in *Fong Yue Ting*—that continued residence in the United States is a mere privilege for noncitizens, and thus that deportation does not implicate due process at all—was repudiated by the Supreme Court a mere decade after it was announced. It would be extremely odd to elevate as the "true" constitutional framework for immigration law a view that was openly rejected by many during the Founding generation—a view whose brief adoption in 1893, by a deeply divided Supreme Court, was swiftly

419. *See* Galvan v. Press, 347 U.S. 522, 531 (1954); Legomsky, *supra* note 11, at 285 (concluding that stare decisis is an important reason for the persistence of the plenary power doctrine and noting that "[t]he more support the plenary power doctrine accumulated, the more entrenched it became"); Legomsky, *supra* note 11, at 306 ("The precedent has simply become too deeply embedded.").

420. They made this argument in opposition to the nation's first deportation statutes, a pair of statutes known as the Alien Enemies Act, Act of July 6, 1798, ch. 66, 1 Stat. 577, and the Alien Friends Act, Act of June 25, 1798, ch. 58, 1 Stat. 570. The Alien Friends Act authorized the President to deport, without judicial process, any noncitizen the President deemed a security threat. Madison and Jefferson did not challenge the Alien Enemies Act, but they argued that the Alien Friends Act was unconstitutional for a number of reasons—one being that the Act authorized the President to banish resident noncitizens without a trial before an Article III court. *See* Cox & Kaufman, *supra* note 68, at 1805-07.

repudiated in an opinion that has subsequently been followed by the Court for more than a century.[421]

Most importantly, however, it would make little sense to wind back the clock in this fashion because doing so would ignore the fact that those early immigration cases were decided within a framework for thinking about due process and the separation of powers that was long ago abandoned in American public law. In that nineteenth-century framework, due process was tightly linked to the separation of powers. There is no chance that the Supreme Court will return to that old framework for public law writ large.[422] Doing so would require the Court to choose between two radical, unpalatable options. The Court could hold that all matters implicating due process must be heard by Article III courts, effectively ending administrative adjudication as it has existed for over a century. Or the Court could hold instead that all forms of liberty and property that have been recognized by the Court since the turn of the twentieth century are no longer protected by the Due Process Clause, effectively rolling back due process protections to the nineteenth century. Given that the Court is unlikely to go down either of these roads for public law in general, it would be extremely strange to revert to the nineteenth-century framework for immigration law alone.

Along with these implications for the future of immigration law, the history I have uncovered makes clear that public-law scholarship has much to learn from immigration law. Immigration law has long been treated as a specialty discipline, largely ignored in broader conversations about public law. Cases concerning immigration law are seldom taught in courses about constitutional law, federal

421. That said, one member of the current Supreme Court, Justice Thomas, seems keen to do just this. In recent dissenting opinions, he has laid out a purportedly originalist argument that noncitizens are not entitled to due process when the government seeks to deport them. *See, e.g.*, Sessions v. Dimaya, 584 U.S. 148, 205-23 (2018) (Thomas, J., dissenting). To make this argument, he minimized the significance of opposition to the Alien Friends Act; suggested that the Court's holding in *Fong Yue Ting* somehow liquidated the meaning of the Due Process Clause in immigration contexts; and ignored entirely the fact that the Supreme Court rejected *Fong Yue Ting*'s due process holding just a decade after that case was decided, failing to cite *Yamataya* altogether. *Id.* at 210-16.

422. To be sure, the Court has recently suggested that it may once again embrace the nineteenth-century idea that the permissibility of adjudication outside Article III will turn on whether the interest at stake in the adjudication is labeled a "privilege" or a "private right." SEC v. Jarkesy, 144 S. Ct. 2117, 2132-34 (2024); *see supra* note 64. But it is impossible to imagine the Court adopting the nineteenth-century understanding of that distinction, according to which all due-process-protected interests are "private rights." *See* Cox & Kaufman, *supra* note 68, at 1793-95.

courts, or administrative law. And immigration law is rarely front and center in academic conversations about the historical development of those areas of law.[423]

The idea that immigration law is exceptional is one reason often given for the marginalization of immigration law in broader public-law discourse. After all, if immigration law has always been an exceptional legal regime that stands outside of, and in contrast to, mainstream public law, then there is less reason for it to be a focus of conversations about public law's development and evolution.

But as this Article has shown, the premise of this argument is wrong: immigration law has not always been an exceptional legal regime. During its formative period, and for a half-century afterwards, it was part and parcel of mainstream public law. During the late nineteenth century, it was grounded in the then-dominant framework for thinking about due process and Article III. When support for that model eroded around the turn of the twentieth century, giving rise to the appellate model of administrative oversight by courts, those changes affected immigration law every bit as much as they affected the rest of American public law. Indeed, immigration law was often on the leading edge of that transformation, driving the development of what we today call "administrative law."

Once we bring immigration law into conversations about American public law, we can begin to see the ways in which a number of canonical public-law stories are incomplete or misleading. Consider three. First, both the federal courts account of the rise of non-Article III adjudication, as well as the administrative law account of the evolution of judicial review, have long been told as narratives of judicial retreat. Federal courts scholars emphasize the Supreme Court's 1932 decision in *Crowell v. Benson*,[424] which accepted the initial administrative adjudication of claims concerning private rights. Administrative law scholars emphasize the ICC cases, in which the Court established deferential judicial review in place of its earlier de novo regime. But these accounts of judicial retreat overlook half the story. In the very same moment, the Supreme Court was establishing judicial review for matters that previously had been left entirely to executive-branch officials, without any possibility of judicial intervention. Far from becoming more deferential, the Court in immigration cases during the

423. Interestingly, this was less true for turn-of-the-twentieth-century contemporaries who studied administration. *See, e.g.*, WYMAN, *supra* note 144, at 105-07 (surveying "foreign" powers associated with administration, including immigration); *id.* at 360-61 (discussing the powers of immigration administrators to make determinations that were "conclusive" upon the judiciary); *cf. id.* at 118-25 (treating colonial administration as an important aspect of administrative law).

424. 285 U.S. 22 (1932).

early twentieth century was becoming more aggressive in its oversight of administrative officials.[425]

Second, standard accounts of the administrative state's birth focus centrally on agencies—like the ICC or the Federal Radio Commission—that were designed to regulate monopolistic markets. The regulation of what many today call networks, platforms, and utilities is generally treated as the origin of much modern administrative law.[426] But at the turn of the twentieth century, Congress was also constructing a very different bureaucracy—one that was focused on law enforcement and mass adjudication, on the regulation of hundreds of thousands of human subjects rather than a relatively small number of business firms. Excluding the federal immigration bureaucracy's rise from conversations about the growth of the administrative state impoverishes our understanding of the forces that drove administrative law's evolution during the decades leading up to the adoption of the APA.

Third, in constitutional law casebooks and scholarship, the modern due process revolution is typically taught as a story about the rise, in the 1960s and 1970s, of so-called new property.[427] Canonical cases like *Goldberg v. Kelly*[428] and *Mathews v. Eldridge*[429] sit at the center of the story. It is supposedly in those cases that the Court dramatically expanded the kinds of interests protected by the Due Process Clause, moving away from older, more traditional notions about what counted as liberty or property. In fact, however, this revolution had begun nearly seventy years earlier. In cases like *Yamataya v. Fisher*,[430] the Supreme Court catalyzed the revolution by extending due process protections to legal interests that previously had been treated as mere privileges in our constitutional system. This

425. *See supra* Section III.D.

426. *See generally* Morgan Ricks, Ganesh Sitaraman, Shelley Welton & Lev Menand, Networks, Platforms & Utilities: Law & Policy (2022) (surveying the legal field of networks, platforms, and utilities).

427. *See, e.g.*, Baude, *supra* note 64, at 1579-80 (attributing the expansion of protected interests and the watering down of due process to *Goldberg v. Kelly*); Mashaw, *supra* note 61, at 1439 n.288 (capturing "the received wisdom that surrounds *Goldberg v. Kelly* and its progeny" (citation omitted)); *see also* Charles A. Reich, *The New Property*, 73 Yale L.J. 733, 787 (1964) ("We must create a new property."); Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1268 (1975) (explaining that since *Goldberg*, "we have witnessed a due process explosion").

428. 397 U.S. 254 (1970).

429. 424 U.S. 319 (1976).

430. 189 U.S. 86 (1903). As I explained earlier, *Yamataya* also articulated the balance-of-interests approach to due process that is often attributed to the Court's 1976 decision in *Mathews v. Eldridge*. *See supra* Section III.A.

shows that the boundary between old rights and new rights lies much further in the past than is typically understood.[431]

Accounting for the central role of immigration law in each of these stories makes clear just how much public law has to learn from immigration law. It also drives home this Article's central thesis: that American immigration law was, for a very long time, ordinary public law. Immigration exceptionalism is a thoroughly modern invention.

431. *See* Cox & Kaufman, *supra* note 68, at 1792-96, 1803-08 (discussing the evolution of due process doctrine as well as the way in which the Supreme Court is poised to deepen the differential treatment of old and new due process rights).