The Plenary Power-Shaped Hole in the Core Constitutional Law Curriculum: Exclusion, Unequal Protection, and American National Identity

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When we teach our students law, we introduce them to a world. It is a world that they will inhabit for many years to come, one that we hope will enable them, not only as lawyers, but as citizens, to lead better, more worthwhile lives. But our very entry into such a world is simultaneously the successful inculcation of a canon, a rule of practice and a discipline of thought that shapes our imaginations, colonizes our consciousness, and helps make us, for better and for worse, the kind of people that we are. To imagine that one can escape this canonicity is fantasy. To imagine that we can exercise a greater degree of self-consciousness about the canons that constitute our professional lives is not. It is time that we did so.¹

INTRODUCTION

Since its birth, the legal education curriculum has been attacked on all fronts. Much of the commentary condemns the curriculum's theoretical focus

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and inattention to practical training. Critics argue that each year, the legal education system produces legions of fresh-faced law school graduates who have had no exposure to the actual practice of law. Advocates of interdisciplinary education decry the historically Eurocentric domination of the legal institution and curriculum.

The legal curriculum, created in the nineteenth century, has changed little despite major social and political changes in the United States. The list of required classes—Torts, Contracts, Property, Criminal Law, and Civil Procedure—remains essentially the same, with only a few additions to the core curriculum. Although many schools now include Constitutional Law in their list of core classes, others do not require any knowledge of U.S. constitutional law.

2. See Phillip K. Kissam, The Discipline of Law Schools 28 (2003) ("At least since the 1920s law professors and students have vigorously criticized the core curriculum's lack of relationship and progression, its lack of close connections to law practices, its autonomy from the social sciences, its emphasis on private law subjects and its repetitive or boring qualities."); Roger C. Cramton, The Current State of the Law Curriculum, 32 J. Legal Educ. 321, 327-32 (1982) (criticizing the law curriculum's weak structure and lack of diversity, its lukewarm commitment to both theory and practice, and its lack of rigor).

3. See Robert S. Chang, Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space, 81 Calif. L. Rev. 1241, 1251 n.25 (1993), 1 Asian L.J. 1 (1994) (criticizing U.S. history textbooks which distort or omit Asian Americans from U.S. history); see also Christine E. Sleeter & Carl A. Grant, Making Choices for Multicultural Education: Five Approaches to Race, Class, and Gender 114 (5th ed. 2007) (dispelling the myth that education is a neutral process which does not promote any particular ideology or point of view).

4. Kissam, supra note 2, at 25 ("Most law schools provide the same basic curriculum, which is not unlike the curriculum installed by Dean Langdell at Harvard in the late nineteenth century.") Christopher Columbus Langdell, who developed the new legal education at Harvard Law School in the 1870s, emphasized private law, which governed relations between citizens, over public law, which regulated relations between citizens and the state. See Richard P. Cole & Gabriel J. Chin, Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law, 17 L. & Hist. Rev. 325, 335-36 (1999). For a brief phase, Harvard primarily focused on common law, such as contract law, and omitted Constitutional Law courses. See id. at 336. However, "the focus upon the development of orthodox legal doctrine by histories of common law tradition was ethnocentric, allowing no room for the study of diverse legal cultures." Id. at 337 (citing Robert Gordon, Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography, L. & Soc'y Rev. 9, 19-20 (1975)).

history.\(^6\)

As many legal academics now recognize, constitutional law is critical to understanding the underlying values and principles that drive legal and social policy. For lawyers and non-lawyers alike, studying constitutional law is an essential component of legal reasoning\(^7\) and cultural literacy.\(^8\) Constitutional law reveals how judicial decisions shape the construction of nationalism and the nature of the U.S. political community. In particular, the Supreme Court’s decisions “interpret” the United States’ founding document, the Constitution, and its relationship to the people. Moreover, the Court’s decisions define which individuals and groups constitute “the American people,” as well as the scope of their participation in the established political community.\(^9\)

Importantly, two key constitutional cases involving immigration and citizenship, *Chae Chan Ping v. United States*\(^10\) and *Fong Yue Ting v. United States*,\(^11\) profoundly affect the development of the American national identity,\(^12\) but are notably absent from the legal curriculum. These two cases are the roots of Congress’s plenary power over immigration, which maintains that “the power of Congress over the admission of aliens to this country is absolute.”\(^13\) This plenary power has effectively immunized the federal government’s substantive immigration decisions from judicial scrutiny.\(^14\) Accordingly, *Chae Chan Ping* and *Fong Yue Ting* have had profound implications concerning the significance of race in relation to citizenship, equality, and national identity in the United States. Surprisingly, these two

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7. See J. M. Balkin & Sanford Levinson, Legal Canons: An Introduction, in Legal Canons 3 (J. M. Balkin & Sanford Levinson eds., 2000). Balkin and Levinson observe that legal academics look to the common law for their canonical examples, especially to constitutional law:

> Common law subjects and constitutional law have become, for good or ill, the canonical examples of law for American legal theorists . . . [A] majority of the most frequently cited articles of all time are about constitutional law subjects, even though there are many subjects of equal or greater importance to government policymakers and to the practicing bar. *Id.* at 22.


9. See discussion infra Part II.B.

10. 130 U.S. 581 (1889).

11. 149 U.S. 698 (1893).

12. See discussion infra Part III.


14. See discussion infra Part II.B.
cases, as well as the government’s plenary power over immigration, receive little-to-no treatment in the constitutional law canon\textsuperscript{15} or in the core constitutional law curriculum.

The absence of these two cases from the legal curriculum parallels their exclusion from constitutional law doctrine, which has been reluctant to examine immigration under equal protection principles. The omission of \textit{Chae Chan Ping} and \textit{Fong Yue Ting}, which were decided on racially exclusionary grounds, from legal education has multiple detrimental consequences. First, because law students are not asked to critically examine the cases that established Congress’s power over immigration, these future policymakers, judges, and lawyers may never understand how the Constitution applies, or does not apply, to non-citizens. Additionally, students may have an inadequate understanding of how constitutional protections are unequally applied to racial minorities perceived as “foreign.” Consequently, those entrusted with the power to shape the United States’ national identity will do so without grasping the historical racism underlying the nation’s early development.

Second, the omission of these cases and their subsequent impact on constitutional immigration law from the core constitutional law curriculum is an example of the way in which the structure and substance of the legal curriculum maintains the racial exclusion and discrimination underlying the United States’ early national identity development. This omission symbolically perpetuates the invisibility or “foreignness” of non-Black racial minorities, such as Asian Americans and Latinas/os, and forces modern American racial discourse into a multiculturally-insufficient Black/White racial paradigm.

Third, the cases establishing the government’s plenary power over immigration significantly impact our understanding of constitutional protections and principles. By failing to teach these cases, we run the risk that future policymakers will continue to overlook the connection between weak constitutional protections for non-citizens and the erosion of constitutional protections for citizens.

Finally, omitting the plenary power over immigration cases from the constitutional law curriculum impedes the accurate development and advancement of constitutional law doctrine, as well as the American national identity narrative. By deconstructing the function of canons in constructing legal knowledge,\textsuperscript{16} this Comment argues that the narrative of the American

\textsuperscript{15} For a definition and an in-depth analysis of the constitutional law canon, see discussion \textit{infra} Part III.

\textsuperscript{16} As discussed in Part I, the Supreme Court cases involving Chinese immigrants, which established the government’s plenary power over immigration and the framework for America’s future treatment of all immigrants, provides an informative parallel with which to understand the experiences of other immigrant and “foreignized” groups. Although this comment focuses on two cases, \textit{Chae Chan Ping} and \textit{Fong Yue Ting}, which address the treatment of Chinese immigrants in the United States, this general type of canonical critique can and should be exported to all historically marginalized and excluded groups in order to ensure the accuracy of their portrayal in
national identity, which has been used to justify racial discrimination and significant rights violations of citizens and non-citizens, also constitutes a type of canon. The interaction of constitutional law, the government’s plenary power over immigration, and the formation of the present American national identity demonstrates how inclusion in, or exclusion from, the legal curriculum impacts not only the constitutional law curriculum and canon’s doctrinal development, but the canon of the American national identity as well. This Comment concludes by emphasizing the need to integrate the history of the federal government’s plenary power over immigration into the core constitutional law curriculum in order to produce a broader, more robust understanding of the connection between immigration regulation, equality, and race in the construction of the American national identity.

Part I explores the process of immigrant adaptation in the United States and critically examines two foundational cases establishing the government’s plenary power over immigration and their impact on the development of U.S. immigration law and policy. Part II discusses how these two Supreme Court decisions reflect past, and shape present, conceptions of race in the United States. Part II further analyzes how the Court’s treatment of the plaintiffs’ constitutional rights in these cases affected historical and contemporary applications of constitutional protections for both citizens and non-citizens. Notably, these foundational cases and their progeny expose the Court’s inconsistent attitude toward racial discrimination in the domestic and foreign arenas. Finally, Part III deconstructs the role of the American national identity narrative as a canon, exploring the function of canons in legal education. This Part also exposes the dearth of discussion regarding the treatment of immigrants, and citizens perceived as “foreign,” in the existing core constitutional law curriculum. This Comment concludes with a call to reconstruct the American national identity by reforming the constitutional law canon in the core legal curriculum to be more in line with true civic principles of a multicultural America.

I

THE GOVERNMENT’S PLENARY POWER OVER IMMIGRATION

The doctrine establishing Congress’s absolute authority over immigration, also known as the “plenary power doctrine,”17 arose in the 1880s and continues to impact constitutional jurisprudence and the development of American national identity today. The Supreme Court has used the plenary power doctrine to announce that courts will defer to the immigration policy decisions

17. See Chin, supra note 13, at 5. The use of “plenary power” and “plenary power doctrine” in this comment refer to the Supreme Court’s deference to the federal government’s sweeping power in the area of immigration. The term “plenary power cases” refers to Chae Chan Ping and Fong Yue Ting.
of Congress and the Executive because, in this arena, the political branches of government have absolute authority. Under the Court’s deferential approach, constitutional safeguards, such as strict scrutiny for due process and equal protection purposes, inconsistently and elusively apply to immigration policies and regulations. Consequently, even those with clearly defined citizenship status only tenuously enjoy the Constitution’s democratic principles of equal protection and due process.

A. Journey from Undesirable Immigrant to American Citizen

Citizenship, as a legal status, shapes a country’s national identity by defining the members and non-members of its political community. In the United States, only individuals with clearly defined citizenship status may claim full protection of the Constitution and membership in the political community; thus, critics propose that America is truly a “nation of citizens,” in contrast to its self-perception as a “nation of immigrants.” The United States’ immigration laws categorize persons as either U.S. citizens or aliens; under the Fourteenth Amendment, “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States,” and under the Immigration and Nationality Act, non-U.S. citizens are “aliens.” Aliens fall into immigration categories that afford varying rights and obligations, such as the right to sponsor relatives and the right to reside or work in the United States. As non-citizens, aliens receive less protection than citizens under the Constitution, and even though aliens enjoy additional constitutional rights after attaining citizenship through naturalization, their protections do not equal those of American-born citizens.

Immigration, “the act of entering a country with the intention of settling

20. See T. Alexander Aleinikoff & Ruben G. Rumbaut, Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?, 13 GEO. IMMIGR. L.J. 1, 2-3 (1998). Although 10% of the U.S. population is foreign-born, most residents of the United States were born into citizenship through the rule of jus soli—citizenship of the place of one’s birth. Id. at 3.
25. See id.
there permanently," transforms the culture of a nation and the meaning of its legal rights. By controlling immigration and the conditions for citizenship, members of a nation-state reaffirm and reconstruct their vision of the nation's identity. T. Alexander Aleinikoff and Ruben G. Rumbaut describe the typical course of immigrant adaptation in the United States: non-members of a nation-state residing outside state borders gain entry, take up residence, and (usually) seek and (frequently) obtain full membership in the state. In terms of legal status, non-members attain full membership through the transformation from "alien to citizen, from stranger to rights-holder, from foreigner to governor." In terms of social belonging, non-members typically become a part of the national community through assimilation over a span of two to three generations. However, not all ethnic and racial immigrant groups undergo such a smooth adaptation process. Thus, analyzing the entrance and treatment of various immigrant groups in the United States helps uncover the dominant values, principles, and players that shape the United States' past and future national identity. In turn, this national identity fuels the constitutional interpretation of legal doctrines, such as equal protection, due process, and civil liberties.

B. America's Reaction to Early Chinese Immigration

Racial conflict and exclusionary immigration laws have shaped the United States' legal history of citizenship and naturalization. The entry of Chinese

29. Id.
30. See id.
32. Id. Robert S. Chang and Keith Aoki note that the "project of national self-definition vis-à-vis the immigrant inevitably intersects with the project of national self-definition vis-à-vis this country's racial minorities." Chang & Aoki, supra note 27, at 1396 n.3. "How the United States treats the immigrant is part of the 'project of national self-definition . . . [which] includes not only deciding whom to admit and expel, but also providing for each alien's transition from outsider to citizen.'" Id. at 1396 (quoting Hiroshi Motomura, Whose Alien Nation?: Two Models of Constitutional Immigration Law, 94 MICH. L. REV. 1927, 1944-45 (1996)).
33. See id. at 1399-1400; see also discussion infra Part II.B.
immigrants into the country and the immigration policies imposed on them helped define the American national identity, establish the nation’s sovereignty, and shape the country’s racial community. Analyzing the evolution of restrictive immigration laws, which first targeted the Chinese and subsequently excluded all immigrants from Asia, exposes the racial prejudice and xenophobia behind the nation’s efforts to formulate a mainstream ideal “American” identity.

Following the United States’ western expansion in the early 1850s, Chinese immigrants arrived in the United States as the rift over slavery widened between the North and the South. In 1868, the United States negotiated the Burlingame Treaty with China, which tenuously ensured unrestricted Chinese immigration in order to obtain cheap labor and improve trade relations with China. Spurred by the discovery of gold in California, Chinese and European immigrants provided crucial manpower for settling the Western frontier. Although they were ethnically and culturally distinct, Chinese immigrants were initially generally welcomed, experiencing informal, as opposed to state-sanctioned, discrimination.

In the late 1800s, restrictions against immigration from China gradually expanded, first in state-level legislation and case law—particularly in California—and then in federal legislation. Beginning around 1852, for example, the Supreme Court ruled in Dred Scott v. Sanford, 60 U.S. 393 (1856), that Blacks would never be citizens, even though the U.S. Constitution in 1787 did not address national citizenship. See Randall Kennedy, Race Relations in the Canon of Legal Academia, in LEGAL CANONS, supra note 7, at 211, 213.

35. See Kuo, supra note 31, at 58-65; see also discussion infra Part I.D.
36. See Johnson & Hing, supra note 31, at 1348 (reviewing SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2004)).
37. See id. at 1370 (“[T]he resentment toward the Chinese in the 1800s was sustained by a need to preserve ‘racial purity’ and ‘Western civilization’.‘”). For an account of Asian exclusion and marginalization in U.S. history, see Chang, supra note 3, at 1286-1307.
39. See Neil Gotanda, “Other Non-Whites” in American Legal History: A Review of Justice at War, 85 COLUM. L. REV. 1186, 1188 (1985) (reviewing PETER IRONS, JUSTICE AT WAR (1983)). For additional discussion of the United States’ long history of race-based immigration policies, see IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 31-32 (2006) (citations omitted). Between 1790 and 1870, only White persons had the ability to naturalize. Naturalization privileges were extended to Blacks after 1870, but remained unavailable to non-White, non-Black immigrants, separating racial minorities eligible for citizenship into two classes: “Blacks” and “other non-Whites.” See id. For a detailed history of racial immigration restrictions, see id. at 27-34.
41. See Coleman, supra note 38, at 3.
42. See id.
43. See Chae Chan Ping v. United States, 130 U.S. 581, 596 (1889).
hostilities towards Chinese immigrants due to labor competition arose in the West, leading to "wide-spread, sustained, violent campaigns to expel them." Congress began to pass immigration restrictions, which culminated in an absolute ban against all Asian immigration. The Page Law of 1875 signified the start of direct federal immigration regulation and was the first federal law to prohibit specific categories of people from entering the United States. China and the United States later negotiated a supplemental treaty in 1880 allowing the United States to "regulate, limit, or suspend" immigration of Chinese laborers.

In 1882, Congress shifted from a policy of purely status-based immigration restrictions and passed the first national race-based immigration law. The Chinese Exclusion Act of 1882 was a defining moment in U.S. immigration policy. Aptly titled, the Act expressly prohibited the entry of Chinese immigrants into the country for ten years and required those who wished to exit and re-enter the United States to get certificates showing that they had resided in the United States before November 17, 1880. The Chinese

44. Gotanda, * supra* note 39, at 1188. Kenneth L. Karst observes that [d]istrust and fear of persons with different cultural backgrounds usually finds expression in language emphasizing a conflict of values. In American history, however, the expressed concern for values has often provided the excuse—as well as the emotional fuel—for hostile action aimed at preserving interests that are mainly economic. Typically, people who are themselves on the margin of society and economy feel the most threatened by cultural outsiders and are the most likely to resort to intercultural violence... Chinese workers in nineteenth century California received their harshest treatment at the hands of white labor union members.


47. Chae Chan Ping, 130 U.S. at 596 (citing the supplemental treaty of Nov. 17, 1880). Notably, the United States' authority only extended to Chinese laborers, not immigration in general. *See id.*


49. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943) ("An act to execute certain treaty stipulations relating to Chinese.")

50. *See id.; Chae Chan Ping,* 130 U.S. at 597-99.
Exclusion Act, which marked the beginning of racially discriminatory restrictions in U.S. immigration policy, would markedly shape immigrant communities in the United States and set the tone for how the U.S. legal system conceptualizes the rights of both citizens and non-citizens under the Constitution.  

C. Cases Establishing the Federal Government's Plenary Power over Immigration

The Supreme Court's decisions in two critical challenges to the Chinese Exclusion Acts validated and entrenched the constitutionality of the federal government's plenary power to impose racially exclusionary immigration restrictions, at least in respect to Chinese immigrants. The Court's decisions in Chae Chan Ping in 1889 and Fong Yue Ting in 1893 relied on the notion of national sovereignty to establish the federal government's expansive powers over immigration matters. Not surprisingly, these decisions were infused with the racially discriminatory and nativist sentiments prevalent in the late 1800s.

1. Chae Chan Ping v. United States

The same Court that upheld the doctrine of "separate but equal" in Plessy v. Ferguson also gave birth to of the federal government's plenary power over immigration, which has been used to abrogate the rights of marginalized groups based on their race, ethnicity, national origin, or citizenship status. In Chae Chan Ping v. United States, the Court pronounced that an 1888 amendment to the 1882 Chinese Exclusion Act was constitutional, finding that congressional power to exclude aliens was a necessary incident of national

51. See Torok, supra note 46, at 97 (citations omitted). See Johnson & Hing, supra note 31, at 1371 (discussing how the Exclusion Acts weakened the development of the Chinese American families by barring the immigration of Chinese women). See discussion infra Part II.

52. See Cole & Chin, supra note 4, at 332.

53. See id. at 332 n.37; see also Louis Henkin, Foreign Affairs and the United States Constitution 16 (2d ed. 1996) (affirming the Court's conclusion in Chae Chan Ping that Congress's plenary power to regulate aliens derives from powers inherent in the United States' sovereignty and nationhood).

54. See Chin, supra note 13, at 18-22 (revealing the racial bias, reflected in the plenary power cases, of Congress, the Justice Department, and the Supreme Court in excluding Asians reflected in the plenary power cases). "Nativism" has been defined as the "intense opposition to an internal minority on the grounds of its foreign (i.e. 'un-American') connections." Juan F. Perea, Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 MINN. L. REV. 269, 278 (1992) (citing John Higham, Strangers in the Land 4 (2d ed., 1998)). Perea adds that "American nativism has often taken the form of reinforcing the core culture through the law—using the law to restrict the expression of ethnic traits, including languages, different from those of the majority," resulting in such atrocities in the nation's legal history as the Alien and Sedition Acts and the persecution of Communists during the McCarthy era. Id.

55. 163 U.S. 537 (1896).

56. 130 U.S. 581 (1889).
sovereignty. 57

Chae Chan Ping, a Chinese laborer, immigrated to the United States in 1875 under the protection of the Burlingame Treaty. 58 In 1887, Chae Chan Ping temporarily returned to China holding a valid certificate of residence, but in 1888 while he was abroad, Congress amended the Chinese Exclusion Act of 1882. 59 The amendment, which took effect one week before Chae tried to reenter the United States, canceled all certificates of residence, thus preventing all Chinese previously residing in the United States from returning. 60 Chae Chan Ping had left for China with the required documentation and obeyed all procedural conditions for reentry, yet the Court retroactively enforced the conditions of the 1888 amendment to block his reentry. 61

What is remarkable in this case is the Court's reasoning. In sweeping terms, the Court held that the federal government could regulate immigration free from judicial review, because the power to exclude aliens was a necessary and absolute incident of national sovereignty. 62 Accordingly, the Court found that any certificate authorizing Chinese workers to reenter the United States issued before the 1888 amendment was "held at the will of the government, revocable at any time, at its pleasure." 63

Evaluating Chae's constitutional challenge to the Chinese Exclusion Acts, the Court began its justifications for exclusion by portraying the Acts as being based on years of experience. 64 After recounting the Court's version of the "history" of the Chinese in the United States, Justice Field portrayed Chinese immigrants as a long-recognized threat to the American civilization. 65 Drawing attention to the competition Chinese immigrants posed to primarily White workers, the Court depicted Chinese immigrants as a foreign race which refused to assimilate, and therefore, threatened the concept of American nationhood.

The differences of race added greatly to the difficulties of the situation . . . [Chinese immigrants] remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own

57. See id. at 609.
58. See id. at 582.
59. See id. at 582, 599.
60. See id. at 589.
61. See Kuo, supra note 31, at 76.
62. See Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) ("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, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one.").
63. Id.
64. Id. at 594 ("[The amendments to the Burlingame Treaty of 1868] have been caused by a well-founded apprehension—from the experience of years—that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there.") (emphasis added).
65. Id. at 544-96.
country. It seemed impossible for them to assimilate with our people, or to make any change in their habits or modes of living. As they grew in numbers each year the people of the coast saw, or believed they saw, in the facility of immigration... great danger that at no distant day that portion of our country would be overrun by them, unless prompt action was taken to restrict their immigration.66

Reflecting the underlying racist and xenophobic social dynamics of the 1880s, Field’s narrative set the stage for the Court’s racially discriminatory and assimilationist justifications for exclusion.

Relying on the principle of national sovereignty,67 the Court portrayed the government’s exclusion of Chinese immigrants as the country’s utmost obligation:68 “[t]o preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated.”69 Equating people of Chinese descent living in the United States with the Chinese nation, Field listed two possible sources of encroachment on American sovereignty—"from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us"70—and placed Chinese immigrants in the latter category.71 Finally, the Court broadly characterized the mere presence of Chinese immigrants in the United States as a national security threat and therefore as an issue entirely within Congress’s discretion and unreviewable by the Court.72 The Chae Chan Ping Court’s reasoning established an attitude of judicial deference to federal immigration policy which continues to protect racially biased immigration restrictions from judicial scrutiny today.

2. Fong Yue Ting v. United States

Three years later, in Fong Yue Ting v. United States,73 the Court expanded the scope of the federal government’s plenary power over immigration to allow deportation of aliens already residing in the United States. The Court upheld an 1892 Exclusion Act, entitled “An act to prohibit the coming of Chinese persons into the United States,” which targeted only Chinese immigrants.74 The Act

66. Id. at 595.
67. For discussion of Chae Chan Ping’s sovereignty and nation-building implications internally, see Kuo, supra note 31, at 78.
68. See Chae Chan Ping, 130 U.S. at 609-10.
69. Id. at 606.
70. Id. (emphasis added).
71. See id.
72. Id. at 606-09 (“If, therefore, the government... considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities... its determination is conclusive upon the judiciary.”); see Chang & Aoki, supra note 27, at 1412.
73. 149 U.S. 698.
74. Id. at 726-30 (citing Act of May 5, 1892, ch. 60, § 6 27 Stat. 25 (1892) (repealed 1943)).
renewed the ban on Chinese immigration for ten years and required all Chinese persons residing in the United States to either register and obtain certificates of residence or face deportation.\textsuperscript{75} In order to obtain a certificate, a Chinese immigrant had to present "one credible white witness" to verify that he was a resident of the United States at the time of the passage of the Act.\textsuperscript{76}

Fong, a Chinese laborer who was ordered to be deported, challenged the order and the 1892 law, maintaining that he had lived in the United States prior to 1892, but was denied a certificate of residence because he could not provide a white witness.\textsuperscript{77} Fong also alleged that he was deprived of due process of law, because he had been arrested without a warrant and detained without a hearing.\textsuperscript{78} Relying on \textit{Chae Chan Ping} and equating the government's power to deport aliens with its power to exclude aliens at the border,\textsuperscript{79} the Court reiterated that the federal government had absolute authority over immigration free from judicial review.\textsuperscript{80} Emphasizing the racial and cultural foreignness of Chinese immigrants as it had in \textit{Chae Chan Ping}, the Court held that Congress could deport aliens of any "unwanted" race residing in the United States.\textsuperscript{81} Because their immigration status was at the discretion of the federal government, Chinese aliens remained "subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment their removal is necessary or expedient for the public interest."\textsuperscript{82}

Most importantly, the Court characterized deportation not as "a punishment for crime," but merely as "a method of enforcing the return to his own country of an alien who has not complied with the [government's lawful conditions for residence]."\textsuperscript{83} By portraying deportation accordingly, the Court could conclude that Fong was not deprived of due process of law and that

\begin{footnotesize}
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\item Id. at 726-28.
\item Id. at 701 n.1 (citing Act of May 5, 1892, ch. 60, § 6, 27 Stat. 25).
\item See Fong Yue Ting, 149 U.S. at 703-704.
\item See id.
\item See id. at 713 ("The power to exclude aliens and the power to expel them rest upon one foundation, are derived from one source, are supported by the same reasons, and are in truth but parts of one and the same power.").
\item See id. at 714 ("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.").
\item See id. at 717 (citing Chae Chan Ping v. United States, 130 U.S. 581, 595-96 (1889)) ("[T]he presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests." (emphasis added)).
\item Fong Yue Ting, 149 U.S. at 724.
\item Id. at 730.
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constitutional guarantees, such as the right to a jury trial, the prohibition against unreasonable searches and seizures, and the prohibition against cruel and unusual punishment, did not apply. This strategy effectively set the stage for future denials of constitutional rights to non-citizens.

The Supreme Court’s decisions in *Chae Chan Ping* and *Fong Yue Ting*, which solidified Congress’s absolute power over immigration by establishing a practice of judicial deference regarding federal immigration policy, form the cornerstone of current U.S. immigration law and have shaped the development of racism and nativism in the United States. The Court’s contemporary immigration decisions continue to either expressly cite these cases or rely on cases that cite them. In *Galvan v. Press*, Justice Frankfurter admitted that even though the federal government’s expansive control over immigration conflicted with modern constitutional principles, it was beyond reconsideration because it was too deeply rooted. Accordingly, as the paradigm for granting or denying membership in the national community, *Chae Chan Ping* and *Fong Yue Ting* provide critical insight into modern constitutional protections and social perceptions of racial minorities in the United States.

84. See id. at 730-31.

85. See Fran Ansley, Recognizing Race in the American Legal Canon, in Legal Canons, supra note 7, at 255.


87. Gabriel Chin notes that in *Reno v. Flores*, 507 U.S. 292 (1993), in determining the scope of judicial review of immigration statutes, the Court cited to five cases that either directly cited *Fong Yue Ting* or *Chae Chan Ping* or to other cases that cited them. Chin, supra note 13, at 15 n.95 (citations omitted).


89. Id. at 531-32. Despite finding that deportation of an alien, who was legally “part of the American community” entitled to the same protection of life, liberty, and property under the due process clause as a citizen, was equivalent to punishment for a crime, Justice Frankfurter deferred to Congress and conceded that the *ex post facto* clause of the Constitution did not apply to deportation. Id. (“We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors, especially those who have been most zealous in protecting civil liberties under the Constitution, and must therefore under our constitutional system recognize congressional power in dealing with aliens on the basis of which we are unable to find the Act of 1950 [authorizing the petitioner’s deportation due to his past membership in the Communist Party] unconstitutional.”).
D. Aftermath of Chae Chan Ping and Fong Yue Ting: “Foreignness” as a Basis for Exclusion

1. Foreignness and Unassimilability in Subsequent Supreme Court Decisions

Rendered in an atmosphere of xenophobia and racial tension, the Court’s decisions in Chae Chan Ping and Fong Yue Ting established a foundation for future racially discriminatory immigration, citizenship and naturalization restrictions, which reflect past and shape present conceptions of race in the United States. In subsequent decisions, the Court used the label of foreignness, connoting unassimilability, to justify restrictions against Asian immigrants. Although the Supreme Court held in United States v. Wong Kim Ark that a child of Chinese nationals born on American soil was entitled to American citizenship under the Fourteenth Amendment, Chief Justice Fuller, joined by Justice Harlan, opposed the decision. The dissent cited Fong Yue Ting, reiterating the “foreignness” and “unassimilable” nature of the Chinese. Neil Gotanda observes that although the majority and dissent in Wong Kim Ark agreed that Chinese Americans were American citizens, the dissent emphasized that

[Chinese Americans] retain a dimension of “foreignness”—they are unassimilable strangers. This inclusion of foreignness into racial identity, begun with the Chinese, became a part of the American understanding of Japanese immigrants as well, and also part of the explicitly racial classification “Oriental.”

Foreignness and unassimilability also surfaced in the Court’s construction of the racial identities of all Asian immigrants. In Ozawa v. United States, the Court decided that Japanese immigrants were not included in the category of “white persons” eligible for naturalization. In 1923, the Court in United States v. Thind denied naturalization rights to an Indian immigrant. The Court

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91. Karst observes that:
[to call a group unassimilable implied that its people were not sufficiently similar to the old stock to adapt themselves to a society defined by the old stock’s world view, and thus that they should be excluded from the American community . . . The irony is that the universalism . . . that full membership in America would be extended to all who would embrace the nation’s ideals . . . was so easily twisted into racist nativism.]

KARST, supra note 44, at 84.

92. 169 U.S. 649 (1898).

93. Id. at 731 (Fuller, J., & Harlan, J., dissenting) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893)).

94. Gotanda, supra note 39, at 1190.

95. 260 U.S. 178 (1922).

96. 261 U.S. 204 (1923).
declared that even American-born persons of Indian ancestry were unassimilable, comparing them to persons of European ancestry, who the Court believed could easily integrate into American culture.97 Although opponents of Asian immigration cited labor competition or over-population to justify exclusion, the Court's reasoning was founded on the notion that the race of Asian immigrants prevented them from assimilating and becoming "American."98

2. Race-Based Discrimination in U.S. Immigration Policy

By validating early racially discriminatory immigration restrictions, such as the Chinese Exclusion Acts, cases characterizing the racial identity of Asian immigrants as foreign and unassimilable left the door open for subsequent exclusionary immigration laws. The Immigration Act of 192499 completely banned immigration by "aliens ineligible to citizenship." Despite the Act's seemingly neutral language, "aliens ineligible to citizenship" targeted Asians, because, as defined in the Act itself, an "alien[] ineligible to citizenship" was either an alien excluded under the Chinese Exclusion Act or racially unable to naturalize.100 This effectively excluded Asian immigrants completely on racial grounds.101 Similarly, between the 1920s and 1960s, the "National Origins Quota" system expressly used national origin and race as factors to exclude immigrants, including those from Asia.102

The United States' selective exclusion of "racially inferior" immigrants, driven by the notion of a "White" America, has played a central role in shaping traditional and modern attitudes toward immigration.103 Although U.S.

97. See id. at 215 ("The children of English, French, German, Italian, Scandinavian, and other Europe parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children born in this country of Hindu parents would retain indefinitely the clear evidence of their ancestry. It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.").

98. For example, Chinese immigration constituted only a minute portion of overall immigration, and anti-immigration proponents did not contest labor competition from White aliens. See Chin, supra note 13, at 29. For statements of senators welcoming European immigrants while disparaging Asian immigrants, see id. at 29-31.


100. Chin, supra note 13, at 14 (citing the Immigration Act of 1924, ch. 190, § 28(c), 43 Stat. 153, 168 ("The term 'ineligible to citizenship,' when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States ... under section 14 of the Act entitled 'An Act to execute certain treaty stipulations relating to Chinese.").

101. See id. at 14 (arguing that the Exclusion Acts "operated on the basis of race, not nationality or place of birth" and adding that the Acts considered ethnically-Japanese individuals to be Japanese, instead of Brazilian, even if they had lived in Brazil since birth (citing Hitai v. INS, 343 F.2d 466, 467 (2d Cir. 1965))).

102. See Aleinikoff & Rumbaut, supra note 20, at 4 (citing HANEY LOPEZ, supra note 39, at 37-38).

103. See Torok, supra note 46, at 101-103.
naturalization laws since 1952 no longer distinguish by race, this appearance of neutrality masks the past and present impact of exclusionary immigration laws and policies targeting Asian immigrants. Tellingly, modern anti-immigration arguments resemble the "historical constructions of Chinese immigrants as unassimilable, foreign, inferior, dangerous, and ineligible to be 'American.'" The increase in debate over immigration issues in the 1990s led to legislative initiatives to limit immigration on state and federal levels. However, while anti-immigration advocates called for stricter immigration laws, the 1990 Immigration Act contained provisions promoting immigration from traditionally White populations, such as Ireland and other northwestern European countries. The 1990 Act also reduced due process protections for visa applicants and for respondents in deportation and exclusion matters. As reflected in the United States' history of discriminatory immigration laws, the strong racist and anti-immigrant sentiments declared in Chae Chan Ping and Fong Yue Ting still linger today.


105. Torok, supra note 46, at 101.

106. See Chang & Aoki, supra note 27, at 1409-10. Chang & Aoki discuss how the English-Only movement and restrictive immigration laws, such as California's Proposition 187, resemble the discriminatory alien land laws of the early 1900s, which prevented persons ineligible for citizenship from owning land. These laws were upheld as constitutional because they did not explicitly mention race, even though Asians were the only racial group that could not acquire citizenship. See id. See also Jan C. Ting, "Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 Temp. Pol. & Civ. Rts. L. Rev. 301 (1995).


108. See William R. Tamayo, Asian Americans and Present U.S. Immigration Policies: A Legacy of Asian Exclusion, in ASIAN AMERICANS AND THE SUPREME COURT 1105-1130. Under the Act, the INS did not have to explain its reason for denial of an application, making it harder for persons seeking admission to correct mistakes in their applications or records. See id. at 1122. The Act also enabled the INS to deport aliens without affording them "their 'real and full day in court.'" Id. at 1122-23.

109. Chin argues that the fact that the plenary power doctrine appears to have been motivated by racism is "a sound basis for departing from precedent." Chin, supra note 13, at 16.
II
SOCIO-CULTURAL AND CONSTITUTIONAL REPRECUSSIONS OF CHAE CHANG PING AND FONG YUE TING

A. Socio-cultural Impacts of Chae Chan Ping and Fong Yue Ting

1. Foreignness and Unassimilability in the Construction of Race in the United States

By reiterating the racial "foreignness" of Asians as a basis for exclusion, Chae Chan Ping and Fong Yue Ting shaped the development of race in the United States. Although these two cases were some of the first constitutional decisions using foreignness as a factor to distinguish between groups, the notion of foreignness was already playing a prominent role in structuring social relations between racial groups in the United States.111

In the adaptation process of European immigrants, the idea that these immigrants could more easily assimilate into American culture was used to deflect the anti-immigrant hostilities directed toward them. Initially, those who had already acculturated into the American system saw almost all new immigrants, including Irish, Southern European, and Eastern European immigrants, as racially distinct and thus threatening to "real" Americans.112 European immigrants, who were in all appearances White, were able to control their acculturation process by contrasting themselves against immigrants from Asia and non-European countries.113 As Chang and Aoki propose, European immigrants successfully deflected xenophobia by engaging in "identity...

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110. See Chae Chan Ping, 130 U.S. at 595, 606-09; see also Fong Yue Ting, 149 U.S. at 717; see also Chang, supra note 44, at 51.

111. In fact, state courts were establishing the racial status of Chinese immigrants in America as early as 1854. In People v. Hall, 4 Cal. 399 (1854), the California Supreme Court established that the racial condition of the Chinese was as inferior as that of Blacks and Indians. Under an 1850 California statute which provided that "no Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man," the California Supreme Court held that Chinese testimony was inadmissible by extending "Indian" to include Chinese and other Asians, and alternatively expanding the definition of "Black" to denote any non-White, thus encompassing the Chinese. Hall, 4 Cal. at 399. The Hall court particularly emphasized the "foreign" nature of the Chinese, which distinguished them from both White and Black Americans:

The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State, except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference. Id. at 405 (emphasis added). See also Gotanda, supra note 39, at 1189.

112. See Chang, supra note 44, at 51. This comment uses the term "real' Americans" to denote people who claim membership in the accepted dominant culture of the United States.

113. See Chang & Aoki, supra note 27, at 1400. Indeed, the first racially exclusionary immigration law in U.S. history targeted the Chinese despite the mass influx of European immigrants entering the country prior to this time. See Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (1882) (repealed 1943).
politics” by claiming a White identity; in defining themselves against the “Other,” they aligned themselves with mainstream culture and became “American.” Racism aimed at new European immigrants “was displaced onto the ‘real’ racial Other, Blacks,” while “nativism, transformed into nativistic racism, was displaced onto the ‘real’ foreign Other, Asians.” Although Blacks and Asians also engaged in identity politics, Asians were unable to shed the label of foreignness.

2. Development of the United States’ Black/White Racial Paradigm

The dominant White American culture’s imposition of foreignness on Asian immigrants has impacted modern perceptions of minority communities in the United States, establishing a hierarchy of racial minorities. Proponents of exclusion pitted Blacks against Asian immigrants; politicians compared Blacks to the Chinese, declaring that “the negro is thoroughly American, if he is not Caucasian,” while the Chinese were “neither Caucasian nor American, but are alien to our race, customs, religion and civilization.” Many lawmakers defended exclusion by arguing that the Chinese were inferior to Blacks, would take their jobs, and foster moral corruption. Justice Harlan’s famous dissent in Plessy v. Ferguson echoed the notion that Blacks and Asians could be treated differently; there, Harlan condoned excluding the Chinese both from constitutional protection and from entering the United States, while he condemned the exclusion of Blacks from riding in White-only railway cars.

114. See Chang & Aoki, supra note 27, at 1402. Blackness and Asianness “provided the racial predicate for exclusion,” while “whiteness became the predicate for inclusion in the family that is America.” Chang, supra note 44, at 50-51. Under the false impression of White superiority and the declaration of a common Whiteness, European immigrants created a notion that they were above other marginalized groups, such as Chinese, and later all Asian, immigrants. See id. at 52 (citation omitted).

115. Chang, supra note 44, at 51. “Racial nationalism, or ‘the identification of American with white,’” initially excluded Blacks from the political community; the principle of “separate but equal” facilitated the “economic disempowerment, political disenfranchisement, and physical terrorization of Blacks, preserving the national community as White.” Chang & Aoki, supra note 27, at 1402-03.

116. Chang, supra note 44, at 50-51; see Chang & Aoki, supra note 27, at 1412 (arguing that citizenship and immigration restrictions derived from the sense of the national community, which defined itself by portraying Asian immigrants and their descendants as “perpetual internal foreigners . . . Without Asian Americans, the ‘real’ Americans would not have known who they were”).

117. Chin, supra note 13, at 35 (citing 13 CONG. REC. 1584, 1636 (1882) (Statement of Sen. Slater)); see also Plessy v. Ferguson, 163 U.S. 537 (1896) (Harlan, J., dissenting), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954). This distinction between non-White Blacks and non-White non-Blacks also affected other immigrant racial minorities. See Tom I. Romero II, Our Selma is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado and Multiracial Conundrums in American Jurisprudence, 3 SEATTLE SOC. JUST. 73, 100-01 (2004) (discussing how by the early 1900s, courts generally held that the racial standing of Mexican Americans, in terms of the Constitution, was completely different from that of Blacks).

118. See Chin, supra note 13, at 36.

119. 163 U.S. 537 (1896) (Harlan, J., dissenting), overruled by Brown v. Bd. of Educ., 347
Accordingly, the perception of Blacks and Whites as the two legitimate racial groups in the United States would affect the presence and portrayal of all racial minority groups in the modern American identity narrative.

The perception of Blacks as American and non-White non-Blacks as foreigners has led to the current understanding of race in America as a Black/White binary. Scholars note that Americans generally think of race as either Black or White. J.M. Balkin and Sanford Levinson observe that in the dominant cultural paradigm, African Americans eclipse other minorities, such as Latinas/os, Asian Americans, the disabled, and homosexuals, as the quintessential marginalized group. Given the historic emphasis on African Americans as the primary racial minority group in race-based civil rights litigation, the Black/White binary dominates the understanding of race in academic scholarship and, consequently, the legal curriculum. However, viewing African Americans as the canonical marginalized racial group in legal dialogue, in light of America's growing multiculturalism, significantly impairs the discourse on race in the United States.

Although the bipolar paradigm recognizes the African American experience, the equally important experiences

U.S. 483 (1954). Although Justice Harlan's dissent in Plessy is often cited as the first articulation of "color-blind" constitutional interpretation, Harlan strongly opposed extending the same recognition to the Chinese. His dissent reflected the view that Chinese immigrants' racial and cultural differences precluded them from becoming citizens through birthright or naturalization:

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the [segregation] statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana... who are entitled, by law, to participate in the political control of the State and nation... and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.

Id. at 561. For further critique of Harlan's "color-blind" constitutionalism, see Gotanda, supra note 39; see also Gabriel J. Chin, The Plessy Myth: Justice Harlan and the Chinese Cases, 82 IOWA L. REV. 151 (1996). Justice Harlan's nativism is particularly evident in a letter to his son: "Our policy is to keep this country, distinctively, under American influence. Only Americans, or those who become such by long stay here, understand American institutions." Id. at 160 (citing Letter from Justice Harlan to his son, James (Jan. 21, 1883) (unpublished manuscript, available in John Marshall Harlan Papers, Library of Congress)).


121. See Balkin & Levinson, supra note 7, at 23 ("African Americans, in short, are the canonical example for thinking about issues of equality in the United States.").

122. See id. See also Chang, supra note 3, at 1265-67 (arguing that emphasizing the White racial paradigm oversimplifies America's complex racial dynamics and overlooks concerns such as nativistic racism); see also Deborah Ramirez, Multicultural Empowerment: It's Not Just Black and White Anymore, 47 STAN. L. REV. 957 (1995).
of other groups go unnoticed.\textsuperscript{123}

3. \textit{Limits on Constitutional Reform Imposed by the Black/White Racial Paradigm}

The Black/White paradigm inadequately represents the United States' presently multicultural society, because it fails to address the struggles of racial minorities who are perceived as foreign, such as Latinas/os and Asian Americans. Neil Gotanda observes that in the United States, African Americans and Whites are presumed "to be legally a U.S. citizen and socially an American," but Asian Americans, Latinas/os, Arab Americans, and other non-Black racial minorities are presumed to be foreigners; "or, if they are U.S. citizens, then their racial identity includes a foreign component."\textsuperscript{124} Consequently, this aspect of foreignness impedes non-Black racial minorities from securing a wholly American identity legitimized within the dominant racial paradigm.\textsuperscript{125}

This label of "foreignness" is particularly hazardous to non-Black racial minorities because both the government and private persons use foreignness as "a proxy for exclusion from the national community, such that [these groups']

\begin{itemize}
\item \textsuperscript{123} See Bowman, \textit{supra} note 120, at 1757. Asian Americans, Native Americans, and Latinas/os, are generally invisible in legal race discourse, particularly in the constitutional law canon. \textit{See} Torok, \textit{supra} note 46, at 643 (citing John Hayakawa Torok, \textit{Finding the Me in LatCrit Theory: Thoughts on Language Acquisition and Loss}, 53 U. MIAMI L. REV. 1019, 1027-34 (1999) (discussing Native Americans and Critical Race Theory); \textit{see also} Bowman, \textit{supra} note 120, at 1796-99 (discussing how the Latina/o experience is "often overlooked in legal education, especially in the area of constitutional law—a required first-year course in law schools across the United States"). For discussion of how the United States' Black/White racial paradigm discourages people from relating to the past and present status of Asian Americans and Latinas/os in the U.S., \textit{see generally} Robert S. Chang, \textit{The Nativist's Dream of Return}, 9 \textit{LA RAZA} L.J. 55 (1996) (analyzing how Asians were historically omitted from American racial discourse).
\item \textsuperscript{124} Neil Gotanda, \textit{Asian American Rights and the "Miss Saigon Syndrome," in ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY 1087, 1096 (Hyung-Chan Kim ed., 1992). \textit{See} Torok, \textit{supra} note 46, at 644 (arguing that Asian Americans, whose cultures, beliefs, and origins are extremely diverse, are unified by a "shared legacy of racially defined foreignness"). \textit{See also} Gotanda, \textit{supra} note 39, at 1188 ("One of the critical features of legal treatment of Other non-Whites has been the inclusion of a notion of 'foreignness' in considering their racial identity and legal status."). For similar challenges faced by other groups perceived as foreign, \textit{see} Francisco Valdes, \textit{Under Construction: LatCrit Consciousness, Community, and Theory}, 85 CALIF. L. REV. 1087, 1122-25 (1997), 10 \textit{LA RAZA} L.J. 1 (1997) (discussing how Asian Americans and Latinas/os share a label of foreignness). \textit{But see id.} at 1133 (noting differences between the Asian American and Latina/o experience).
\item \textsuperscript{125} Harvey Gee observes that throughout history, "Asian Americans were treated as honorary whites, or black, but always foreign." Harvey Gee, \textit{Book Review: Race, Rights, And The Asian American Experience}, 13 GEO. IMMIGR. L.J. 635, 638 (1999) (reviewing \textit{ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE} (1998)). Gee discusses how in the 1800s, Chinese laborers in the United States were conceptualized as White, "enjoy[ing] white racial privileges over subordinate black laborers." \textit{Id}. In contrast, Asian Americans were considered to be Black, for purposes of school desegregation, and "foreign" in World War II as well as in current immigration discourse. \textit{See id.} Finally, in the recent debates over affirmative action, Asian Americans are regarded as White. \textit{See id.} (citing \textit{ANCHETA, supra}, at 3-4).\
\end{itemize}
demands for justice and fair treatment may be ignored, leaving their rights unprotected. The conflation of race and citizenship for such groups creates the risk that facially neutral, but racially discriminatory, laws may go unnoticed. Accordingly, to truly uphold modern constitutional principles, the United States’ current Black/White binary of racial analysis must make way for an expanded multicultural paradigm.

B. Federal Plenary Power over Immigration and Unequal Protection Under the Constitution

In addition to their impact on the construction of race in the United States, Chae Chan Ping and Fong Yue Ting indicate that an entirely different interpretation of constitutional principles applies in the area of immigration. Justice Brewer’s dissent in Fong Yue Ting is particularly salient today: “It is true this statute is directed against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised tomorrow against other classes and other people?” The Court’s consistent refusal to review immigration decisions affirms Congress’s plenary power over immigration and allows the federal government to discriminate in violation of fundamental constitutional principles, rendering constitutional protections for non-citizens—and arguably for all Americans—uncertain. Both Congress and the courts have used Chae Chan Ping and Fong Yue Ting as precedent to circumvent constitutional safeguards designed to protect individual rights. Moreover, these cases and their progeny demonstrate that granting to the political branches of the federal government absolute power to make and enforce immigration laws may lead to

126. Chang & Aoki, supra note 27, at 1408 (noting that comments like “if you don’t like it here, go back where you came from” are directed at groups perceived to be foreign).
127. See Tom I. Romero II, Our Selma is Here: The Political and Legal Struggle for Educational Equality in Denver, Colorado and Multiracial Conundrums in American Jurisprudence, 3 Seattle Soc. Just. 73, 100-01 (2004) (discussing how judicial decisions refused to extend equal protection principles to Mexican Americans even though they encountered discrimination; by viewing them as a nationality group, as opposed to a racial group, courts could hold that the Constitution afforded them less protection).
128. See Gee, supra note 125, at 641-42.
129. 149 U.S. 698, 743 (1893) (Brewer, J., dissenting) (declaring that the 1892 Exclusion Act amounted to a deprivation of liberty without due process of law).
130. See Chin, supra note 13, at 6-7.
131. The government has used the plenary power doctrine to regulate foreign and domestic issues. See id. at 73-74 (arguing that Congress’s immunity from judicial review under the plenary power doctrine encouraged its “casual attitude” and artlessness in creating the Immigration and Nationality Act); see also Saito, supra note 18, at 13 (“[T]he plenary power doctrine also became a cornerstone of federal law governing both American Indian nations and external colonies such as Puerto Rico and Guam.”). For further discussion of the plenary power doctrine’s effect on modern immigration law, see id. at 17-18 (discussing the government’s use of its plenary power over immigration to indefinitely detain Mariel Cubans prohibited from returning to Cuba, to imprison and return Haitian refugees found on the high seas, and to prohibit vessels of undocumented Chinese laborers and asylum applicants from entering American ports).
violations of both citizens' and non-citizens' civil rights.  

1. Unequal Protection

Congress's plenary power over immigration has allowed it to enact immigration laws that adversely affect "undesirable" groups in contravention of equal protection principles that apply to citizens.  

The Court's decision in *Chae Chan Ping* immunized the government's immigration policy from judicial scrutiny under equal protection challenges. By holding that the government could exclude resident aliens on the basis of race, the Court declared that non-citizens were not entitled to equal protection of the laws.

The Supreme Court's deference to Congress's immigration policy decisions validates discriminatory laws that would contravene the Constitution were they scrutinized under the Equal Protection Clause. Gabriel Chin observes that racial classifications are regularly allowed only in the area of immigration, and that "[i]n recent decades, [District and Circuit courts] have said not only that aliens may be excluded or deported on the basis of race without strict scrutiny, but also that such racial classifications are lawful per se." In addition to its unjust treatment of Asian immigrants, Congress has relied on its plenary power over immigration to justify discriminatory immigration laws targeting non-citizen "homosexuals, Mormons, the mentally retarded, Southern and Eastern Europeans, persons of African descent, and Mexicans, to name but a few." While approving of such racially, ethnically, and politically discriminatory immigration laws directed at non-citizens, the Court itself has


135. See Kuo, supra note 31, at 76.

136. Chin, supra note 13, at 3-4.


138. See, e.g., *Chae Chan Ping*, 130 U.S. at 599, 608-09 (upholding and analogizing the federal government's discretion to exclude Chinese immigrants to the government's authority to exclude "incorrigible criminals or hopelessly dependent paupers"); see also Nguyen v. INS, 533
admitted that such laws, if applied to citizens, would be unconstitutional.\textsuperscript{139}

2. Lack of Due Process

The Court's reasoning in \textit{Chae Chan Ping} and \textit{Fong Yue Ting} further deprived non-citizens of constitutional due process protection. To support its validation of the 1888 amendment rescinding the plaintiff's certificate to reenter the United States, the \textit{Chae Chan Ping} Court reasoned that Congress's power to regulate immigration came from the United States' authority as a sovereign, not from provisions of the Constitution.\textsuperscript{140} By framing the power to exclude aliens as a part of an independent nation's "necessary jurisdiction over its own territory," the Court was able to close its eyes to the rights of the individual plaintiff on the ground that he was an alien.\textsuperscript{141} In doing so, the Court validated the law's retroactive nature and tacitly condoned the deprivation of Chae's due process rights.\textsuperscript{142} Similarly, in \textit{Fong Yue Ting}, by characterizing deportation not as a criminal punishment but as an exercise of sovereign power, the Court exempted the racially discriminatory 1892 law from constitutional provisions "securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments" and from due process scrutiny.\textsuperscript{143}

The Court has employed the principle of judicial deference under the plenary power doctrine to deprive non-citizens of due process guarantees in subsequent immigration and deportation decisions. Because the Court in \textit{Fong Yue Ting} held that deportation did not constitute a punishment,\textsuperscript{144} persons in immigration proceedings are not entitled to constitutional safeguards available in criminal proceedings, such as protection against the use of undisclosed

\textsuperscript{139} See Matthews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."); see also Karst, supra note 44, at 85 ("Most of [the measures instituted to bring about Americanization] plainly violate today's constitutional norms.").

\textsuperscript{140} See Kuo, supra note 31, at 35-36 (noting that although the Court could have implied Congress's power to regulate immigration and exclude aliens from "both the Necessary and Proper Clause and the naturalization power of Article I, section 8, clause 4," it chose to ignore these provisions).

\textsuperscript{141} See id. at 35-36 (citations omitted).

\textsuperscript{142} See Chin, supra note 13, at 6-7. The Court failed to address the possibility that the 1888 Exclusion Act violated the Constitution's Ex Post Facto Clause. Ming-sung Kuo argues that the Court's decision to ignore this potential constitutional violation shows that it placed national sovereignty above constitutional principles. See Kuo, supra note 31, at 77.

\textsuperscript{143} 149 U.S. 698, 730-31 (1893).

\textsuperscript{144} Id. at 730.
evidence and indefinite detention without a hearing. For example, the Court refused to apply Fifth Amendment due process rights in *Yamataya v. Fisher*. There, the government ordered the deportation of a non-English speaking Japanese alien without informing her that she was under investigation for deportation and without providing language or legal assistance during the proceedings. Justice Harlan, delivering the Court’s opinion, held that decisions of administrative or executive officers acting under their delegated powers constituted due process of law and thus were not subject to judicial review. The Court deferred to the government’s plenary power over immigration to permit the federal government, for “security” purposes, to rely on undisclosed information in order to indefinitely detain aliens without an opportunity for an administrative or judicial hearing. Additionally, the Court has held that the government may deport a long-term resident alien because he was a former member of the Communist Party, even though he was not a member at the time of deportation.

Gabriel Chin notes that one possible reason why the Court failed to analyze the claimants’ constitutional rights under equal protection principles in *Fong Yue Ting* and *Chae Chan Ping*, even though the decisions turned on race, was because the cases were decided more than fifty years before *Bolling v. Sharpe*, which extended Fourteenth Amendment equal protection principles to the federal government through the Fifth Amendment Due Process Clause. Accordingly, Chin suggests that if *Fong Yue Ting* was decided under current understandings of equal protection and due process, the Court would find for Fong.

Yet despite recent Supreme Court decisions which appear to limit the political branches’ plenary power over immigration, the Court continues to inconsistently apply constitutional principles to non-citizens. The Court declared that the government’s power over immigration was “subject to important constitutional limitations” in a 2001 challenge to the government’s indefinite detention of two aliens: the first, who was deportable because of his criminal record, could not be deported because no country would accept

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145. See Saito, supra note 18, at 20.
146. 189 U.S. 86 (1903).
147. See id. at 86-94.
148. See id. at 101-02.
149. See id. at 101-02.
150. See Chin, supra note 13, at 7 (citing Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 214-15 (1953)).
153. See id. at 57-58 (suggesting that the Court should find that *Bolling* overruled *Chae Chan Ping* and *Fong Yue Ting*).
him, and the second was deemed a threat to society even though his period for deportation had expired.\textsuperscript{156} However, the Court noted that its decision neither considered Congress’s and the Executive’s ability to control entrance into the United States nor special circumstances, such as terrorism, which could warrant heightened deference to national security judgments of the political branches.\textsuperscript{157} Although the Court ruled that under constitutional principles, the statute in question precluded indefinite detention since it required the length of an alien’s detention to be “reasonably necessary to bring about that alien’s removal from the United States,” the Court indicated that it would defer to Congress if Congress had expressed an intent to permit the Attorney General to indefinitely detain an alien in deportation proceedings.\textsuperscript{158} Additionally, in 2003, the Court upheld a statute which required preventative detention of foreign nationals who were being deported, even though they were not flight risks or threats to the community.\textsuperscript{159} As David Cole points out, “[t]he decision marks the first time outside of a war setting that the Court has upheld preventative detention of anyone without an individualized assessment of the necessity of such detention . . . Demore thus asserts but does not justify differential treatment of foreign nationals’ due process rights.”\textsuperscript{160} Notwithstanding the Court’s statements that the Constitution applies in some degree to non-citizens, the Court, time and time again, has failed to consistently apply constitutional principles.

3. Modern Symptoms of Chae Chan Ping and Fong Yue Ting

By generally deferring to Congress’s and the Executive’s decisions involving immigration, the Supreme Court preserved an avenue for those branches to deprive non-citizens of protection under the Constitution and to commit massive violations of citizen’s constitutional rights. In many of these cases, the government relied on the same rhetoric of “foreignness” found in \textit{Chae Chan Ping} and \textit{Fong Yue Ting} to justify its actions.

\textit{a. Japanese Internment}

The Court’s failure to reconcile the federal government’s sweeping power over immigration established in \textit{Chae Chan Ping} and \textit{Fong Yue Ting} with modern constitutional equal protection principles has had devastating consequences for both aliens and U.S. citizens. In \textit{Korematsu v. United States},\textsuperscript{161} the Supreme Court refused to hold that the government’s orders to intern persons of Japanese descent during World War II were unconstitutional,

\begin{flushleft}
\textsuperscript{156} \textit{Id.}.
\textsuperscript{157} \textit{Id.} at 695-96.
\textsuperscript{158} \textit{Id.} at 696-97.
\textsuperscript{160} COLE, \textit{supra} note 154, at 224.
\textsuperscript{161} 323 U.S. 214 (1944).
\end{flushleft}
finding a sufficient probability of disloyalty to justify forcing "all citizens of Japanese ancestry" to leave their homes and confining them in military internment camps for an indeterminate period of time.\(^{162}\) Perhaps the most repugnant aspect of Japanese internment was that in emphasizing the "foreignness" of both Japanese aliens and Japanese citizens, the government and the Court basically nullified the value of many internees' lawful U.S. citizenship, including that of Korematsu.\(^{163}\) Instead, the Court presumed that because they were ethnically Japanese, their "foreignness" made them inherently more apt to betray the United States.\(^{164}\) Therefore, both citizens and non-citizens could be denied due process and equal protection.

Vestiges of *Chae Chan Ping* resurfaced in the *Korematsu* holding. Although the government provided no concrete evidence of disloyalty by the Japanese on the West Coast, the Court reasoned, as it did in *Chae Chan Ping*, that the federal government could exclude (or in this case detain) a racial group if the government determined that their mere presence threatened national security, even without proof of actual hostilities.\(^{165}\) Although the Court professed to find any legal restriction on the civil rights of one racial group immediately suspect and subject to rigid scrutiny,\(^{166}\) it proceeded to defer to Congress and the Executive.\(^{167}\) Using the artifice of national security and plenary power to justify racial and ethnic discrimination, Japanese immigrants and citizens as a group were subjected to massive rights violations, regardless of their legal status.\(^{168}\)

### b. Federal Power over Immigration Post 9/11

Today, the U.S. Justice Department's broad application of its plenary power over immigration is equally controversial. The xenophobic and racist sentiments expressed in *Chae Chan Ping* and *Fong Yue Ting* have resurfaced

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\(^{162}\) *Id.* at 215, 222-23, 229 (emphasis added).

\(^{163}\) *See id.* at 219, 242-43 ("[In upholding the exclusion order], we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are a part of war, and war is an aggregation of hardships." (citations omitted)).

\(^{164}\) *See Gotanda, supra* note 39, at 1191.

\(^{165}\) *See Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889).

\(^{166}\) *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

\(^{167}\) *Id.* at 218 (citing *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943) ("[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.").)

\(^{168}\) Kenneth L. Karst notes that one lesson from *Korematsu* implicates the relationship between "empathy and judicial defense of the Constitution... The invasion of constitutional rights is least likely to encounter judicial resistance when the judges, like the politicians, perceive the victims to be markedly different from themselves. Even a Justice can be blinded by the abstract image of the inscrutable Other." *Karst, supra* note 44, at 91.
after September 11, 2001, coloring the perception of Muslims, Arabs, and other racial minorities in the United States. In essence, the federal government has used its plenary power over immigration to arbitrarily detain and deport Muslim, Arab, and Middle Eastern immigrants. David Fontana, observing that the federal government drastically curtailed the rights of non-citizens after September 11th, notes that under the USA PATRIOT Act, non-citizens receive fewer due process protections than the number of protections granted to criminal defendants under the Constitution. Prior to the USA PATRIOT Act, the government could only detain aliens in removal proceedings under the same standards for detaining a criminal defendant; they had to be a threat to the community or pose a risk of flight. Under the Act, the Attorney General may “detain aliens without a hearing and without proof that the alien poses a national security or flight risk.”

Importantly, anti-immigrant hostilities generated by the “war on terror” have impacted more that just Muslim, Arab, or Middle Eastern immigrants. As Kevin R. Johnson argues, because “[n]ativism historically has proven difficult to limit to certain immigrant groups,” September 11th may have sparked a resurgence of xenophobia affecting other immigrant populations. In fact, after the terrorist attacks, deportation of Mexican immigrants escalated.

The federal government’s claim of authority to withhold constitutional protections from aliens evokes the rationale used to inflict massive rights violations on Japanese Americans in the 1940s. Moreover, the rhetoric used to justify both the USA PATRIOT Act and Japanese internment resemble the sentiments in Chae Chan Ping and Fong Yue Ting. Peggy Nagae observes:

As happened with Japanese Americans in World War II, the current government has arrested and detained more than a thousand “suspected” terrorists and has imprisoned U.S. citizens indefinitely without bail, without having filed criminal charges, and without providing access to attorneys. In addition, the government has

169. See Kuo, supra note 31, at 27-28 (arguing that the September 11th terrorist attacks “rekindled the national debate on the status of non-citizen immigrants in the United States,” which resembles the debate over the constitutional standing of Chinese immigrants in the 1800s); see also Akram & Johnson, supra note 132, at 313 (arguing that “institutional racism through the law and its enforcement has contributed to the racialization and targeting of Arabs and Muslims” after September 11th).


173. Id.


proposed the creation of detention camps for U.S. citizens deemed "enemy combatants," without judicial review. The government believes that, in the name of safety, racial profiling is justified now as it was then. In the name of safety, the government passed the USA Patriot Act in 2001 . . . While neutral on its face, this legislation is being used against Arab Americans, Muslim Americans, and South Asian Americans. Why? Because those who committed the acts on September 11 are believed to be Arab immigrants. But there is another reason: Arab Americans, Muslim Americans, and South Asian Americans are easy to identify, they can be targets of U.S. cultural scapegoating, and doing something against "them" ("the other") can make "us" (those who are not "the other") feel safer.  

Although the government now uses "national security" in lieu of "military necessity," the phrase used in Korematsu, the government, relying on stereotypes, continues to use race as a proxy for loyalty and patriotism. The sentiments expressed in Fong Yue Ting and Chae Chan Ping, that Asian immigrants are foreign, unassimilable, and unable to become truly "American," continue to resound in the government's targeting of immigrant and racial groups today. Accordingly, these cases and the federal government's plenary power over immigration play a critical role in analyzing the United States' abusive treatment of citizens and non-citizens after September 11th.

4. Reconciling the Federal Government’s Plenary Power over Immigration with Modern Constitutional Principles

Natsu Taylor Saito cautions that "those who believe [the government’s discriminatory actions in immigration] are contrary to the rule of law need to have a clear understanding of the plenary power doctrine, and must carefully consider how we can ensure that American jurisprudence protects fundamental human rights." Because civil rights jurisprudence has changed significantly since Chae Chan Ping and Fong Yue Ting were decided, these cases must be concretely reconciled with modern equal protection doctrine. Society now

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177. Id. at 1149-50.
178. See Johnson & Hing, supra note 31, at 1369 ("Part of this nation’s identity has always rested on the respect for fundamental individual rights. That commitment has been placed in question throughout U.S. history by the nation’s immigration policies. Most recently, the harshness of the anti-terrorism policies after September 11 dramatically impacted immigrants; Muslims and Arab communities were under siege and suffered hate violence.").
179. Saito, supra note 18, at 24. See also Fontana, supra note 172, at 80 ("Any narrative about discrimination, however, must consider the history of discrimination in determining who could come to the United States and what would happen to immigrants after they arrived here.").
recognizes and condemns the United States' legacy of racially discriminatory laws. For instance, law students read *Plessy v. Ferguson*,\textsuperscript{181} which upheld the principle of "separate but equal," not to condone or adopt the Court's racism, but to understand the reality that racism taints the United States' historical legal narrative.\textsuperscript{182} Today, Justice Harlan's criticism of "separate but equal" in *Plessy*\textsuperscript{183} is lauded as the keystone of modern equal protection and civil rights jurisprudence.\textsuperscript{184}

While *Chae Chan Ping* and *Fong Yue Ting* also expose the Court's racist past, these cases do not hold an equally prominent place in constitutional doctrine as do other unjust cases,\textsuperscript{185} and racial discrimination in immigration law remains immune from judicial scrutiny.\textsuperscript{186} Since both racially discriminatory domestic and immigration laws intended to maintain White superiority, immigration law should be subject to the same legal standards used in the domestic context.\textsuperscript{187} Surprisingly, immigration law, through the Court's preservation of Congress's and the Executive's plenary power over immigration, is still immune from consistent modern equal protection review.\textsuperscript{188} As Chin recognizes, "Under these circumstances, as well as the racial history, the Supreme Court would be justified in asking itself why these cases remain the principle explanatory sources of the federal immigration power."\textsuperscript{189} Indeed, it is time to confront and rectify the Court's tradition of judicial deference at the expense of constitutional rights of citizens and fundamental rights of all.

\textsuperscript{181.} 163 U.S. 537 (1896) (Harlan, J., dissenting).
\textsuperscript{182.} See Balkin & Levinson, supra note 7, at 13.
\textsuperscript{183.} 163 U.S. at 552-54 (Harlan, J., dissenting).
\textsuperscript{186.} See Chin, supra note 13, at 4.
\textsuperscript{187.} Foreign racial classifications in immigration resemble domestic racial classifications now rejected as unconstitutional. See id. at 10-11. Chin notes that "[j]ust as the Jim Crow laws were designed to exclude those of African descent from American society, the laws excluding Asian immigrants upheld in *Chae Chan Ping* and *Fong Yue Ting* betray a belief in racial separation." Id. at 2.
\textsuperscript{188.} See id. at 11.
\textsuperscript{189.} Id. at 72.
III

A NEW NATIONAL NARRATIVE THROUGH CURRICULUM INTEGRATION

A. Sovereignty in the American National Identity Narrative

Ensuring the protection of fundamental rights requires that constitutional law scholars and students understand the construction of national identity and race revealed in the narrative of the United States' development. J.M. Balkin and Sanford Levinson note that "[e]very society has a set of stock stories about itself, which are constantly retold and eventually take on a mythic status. These stories explain to the members of that society who they are and what values they hold most dear"; they paint a picture of the country's past and provide a framework to guide its future. Constitutional interpretation, and thus constitutional law, "is full of such stock stories." Accordingly, these stories recount a narrative of the nation's identity and development that constitutional law scholars and students must comprehend.

The Supreme Court has often drawn on the narrative of the United States' national identity development to guide its decisions, particularly in resolving the nature of the nation's sovereignty. Initially, the United States' sovereignty was unclear due to the founders' failure to articulate the meaning of national citizenship—and thus define "the People"—in the Constitution. Eventually, through judicial interpretation and amendments, the Supreme Court stepped in to resolve the issue of citizenship. It defined what constituted membership in the American community by creating its own narrative of American sovereignty. The Marshall Court, "intent on expanding its own power, settled the sovereignty disputes between the federal government and the states so as to support the emergence of a national consciousness."

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190. Balkin & Levinson, supra note 7, at 17.
191. See id.
193. Leonard Dinnerstein proposes that the Framers failed to define national citizenship because:
they saw little reason to restrict the relatively small number of Europeans who arrived periodically and contributed [sic] the nation's wealth. Moreover, they could not imagine that in a land as large as the United States immigration would ever constitute a problem or a source of concern. The young republic needed to bring people in, not keep them out.

Dinnerstein, supra note 24, at 1. Ming-sung Kuo observes that the nature of the American nation was unclear at the founding, because the concurrent establishment of "thirteen 'sovereign' colonies . . . complicated the constitutional allocation of sovereignty between the federal and state governments." Kuo, supra note 31, at 52-53.
194. Kuo, supra note 31, at 53 n.121 ("National citizenship is the legal mechanism that gives definition to 'the people.'" (citation omitted)). Kuo notes that "[n]either the Articles of Confederation nor the original Constitution expressly provided for national citizenship." Id. at 53 n.121.
195. See id. at 53.
196. Id. at 54.
McCulloch v. Maryland197 "justified" an expansive conception of federal power not merely through textual and structural interpretation, but also by telling a story about what the United States was and what it would become.198

The Chae Chan Ping and Fong Yue Ting Courts bolstered the U.S. sovereignty narrative by drawing on the national identity narrative established in McCulloch. In Chae Chan Ping, the Court inserted its rendition of the Chinese experience in the United States into the American identity narrative.199 Likewise, in Fong Yue Ting, the Court employed the same narrative strategy by recounting, for twenty pages of its decision, the government's "rightful" tradition of "constitutional" exclusionary immigration laws.200 In both Chae Chan Ping and Fong Yue Ting, the Court preceded its discriminatory holdings with an account of the history of foreign relations between the two sovereigns, China and the United States. Telling a story of foreignness and unassimilability, the Court solidified the racial and citizenship status of Chinese immigrants into constitutional doctrine. This choice would impact other racial and immigrant groups in America.

B. The American National Identity Narrative as a Canon

The American national identity narrative, describing past and guiding future understandings of the United States' development as a nation, is, in a sense, a canon. Paul Lauter defines a "canon" as "the set of literary works, the grouping of significant philosophical, political, and religious texts, the particular accounts of history generally accorded cultural weight within a society."201 Canons establish normalcy and models to which other policies and challenging questions are compared. The development of a canon is a self-perpetuating and self-affirming process. Because canonical materials embody certain "habits of thought," "[e]xposure to those materials, in turn, helps reproduce and reinforce the habits of mind that shape what materials are deemed canonical."202 Thus, the inclusion of a story in the canon emphasizes that story over others, and "[b]ecause space and attention in human minds are limited, frequent transmission of canonical works helps draw greater attention

197. 17 U.S. 316 (1819).
198. Balkin & Levinson, supra note 7, at 17. Marshall's account of the American nation-state became known as "Manifest Destiny." Id. One might argue that aspects of Marshall's Manifest Destiny, which was used to justify America's expansion into the West, echo in the current political vision of an "American 'mission' to promote and defend democracy throughout the world." G. William Rice, Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box, 82 N. Dak. L. Rev. 811, 832 n.97 (2006).
199. See 130 U.S. 581, 594-600 (1889). See also discussion supra Part I.C.1.
200. See 149 U.S. 698, 705-725 (1893). See also Johnson v. M'Intosh, 21 U.S. 543 (1823) (tracing history back two hundred years to a source of sovereignty—the King of England—in order to explain why Native Americans had no ownership rights to land).
201. Sleeter & Grant, supra note 3, at 124 (citing Paul Lauter, Canons and Contexts ix (1991)).
202. Canons, supra note 1, at 1002.
to them and thus helps ensure their perpetuation and proliferation."\(^{203}\) In this sense, canons are substantively as well as procedurally self-perpetuating.

Canons play a critical role in understanding a society; a canon "helps to determine precisely whose experiences and ideas become central to academic study."\(^{204}\) As Balkin and Levinson note, "[T]here is no better way to understand a discipline—its underlying assumptions, its current concerns and anxieties—than to study what its members think is canonical to that discipline. The study of canons and canonicity is the key to the secrets of a culture and its characteristic modes of thought."\(^{205}\) Indeed, the American national identity narrative reflected in the constitutional law canon imparts a particular account of national identity development, political community formation, and fundamental rights protection in the United States and provides critical insights into what it means to be "American."

C. The American National Identity Canon in the Core Constitutional Law Curriculum

The legal educational curriculum reflects a traditional canonical narrative of American national identity development. Most core law school courses present casebooks as the principal texts\(^{206}\) and the initial point of inquiry into the constitutional law canon.\(^{207}\) Importantly, the content and structure of the casebook impacts students’ understanding of constitutional law. Through the selection and presentation of cases and materials, the casebook "reflects a narrative about the development of the Constitution and constitutional law."\(^{208}\) As Balkin and Levinson note, "Every casebook tells a story . . . [I]ndeed, it is almost impossible to organize a casebook that tells no story at all."\(^{209}\) Accordingly, casebook authors significantly impact the way in which students

\(^{203}\) Id. at 1002-03 ("[T]hings do not become canonical simply because they are important; often they become important because they are canonical.").

\(^{204}\) Id.

\(^{205}\) Balkin & Levinson, supra note 7, at 3.

\(^{206}\) See Kissam, supra note 2, at 31-32. Casebooks usually consist of excerpts from appellate court cases, based on editors' ideas of "what 'cases and materials' students ought to be exposed to on their intellectual journey from uninitiated laypersons to well-educated, 'disciplined' lawyers," followed by related notes, questions, and hypothetical scenarios. Balkin & Levinson, supra note 7, at 6.

\(^{207}\) Although law professors play an important role by supplementing the casebook in their individual courses with materials that reflect perspectives missing from the tome, in practice, very few actually do. See Balkin & Levinson, supra note 7, at 6 (noting that while some "energetic law professors sometimes add supplemental materials of their own devising . . . for the most part American law students are fed a steady diet of increasingly thick (and increasingly expensive) casebooks"). Accordingly, if professors do not provide supplementary materials, the casebook remains the sole source of information for the Constitutional Law course; if professors do provide supplementary materials, the casebook defines those perspectives that are already represented and those that need to be included.

\(^{208}\) Canons, supra note 1, at 1014 (describing various ways in which casebook editors can present the law).

\(^{209}\) Id.
understand the Constitution, constitutional law, and the narrative of membership in the U.S. community.

D. The Plenary Power Gap in the Legal Curriculum

A casebook's inclusion, or exclusion, of a case communicates a message about the value of the decision to constitutional jurisprudence.\textsuperscript{210} In 1992, Jerry Goldman conducted a survey of casebooks most often used to teach Constitutional Law and found that ten cases were included in every surveyed text.\textsuperscript{211} Referring to Jerry Goldman's survey of cases found in all of the most commonly used constitutional law casebooks, Balkin and Levinson note that \textit{McCulloch}'s inclusion in each of the casebooks indicated that "every law student should be exposed to \textit{McCulloch} and should be able to offer some informed commentary about its holding and arguments."\textsuperscript{212} Conversely, omission from a constitutional law casebook signals that a particular case has little to contribute to law students' basic understanding of the Constitution. Neither \textit{Chae Chan Ping} nor \textit{Fong Yue Ting} appeared in Goldman's survey of cases making up the dominant constitutional law canon.\textsuperscript{213}

Attempting to determine whether the current key constitutional law casebooks, and thus the core constitutional law curriculum, continues to omit \textit{Chae Chan Ping}, \textit{Fong Yue Ting}, and the federal government's plenary power over immigration, I conducted an informal survey in the Spring of 2006. My survey revealed that these two cases and the government's plenary power over immigration received little-to-no treatment in the main constitutional law casebooks assigned by professors teaching basic constitutional law courses at elite law schools in the United States. I requested syllabi from professors teaching first or second year basic constitutional law courses ("Basic Constitutional Law," "Constitutional Law I," etc.), as determined by examining the websites of the top ten law schools ranked by \textit{U.S. News and World Report} in 2007.\textsuperscript{214} Overall, the survey included approximately twenty-five syllabi from

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\item \textsuperscript{210} See id. at 973.
\item \textsuperscript{211} Jerry Goldman surveyed eleven major constitutional law casebooks to determine whether a constitutional law canon exists. See Jerry Goldman, \textit{Is There a Canon of Constitutional Law?}, \textit{Am. Pol. Sci. Ass'n NewsL.} (Law and Courts Section of the Am. Political Science Ass'n), Spring 1993, at 135-137. For the list of Goldman's canonical cases with case synopses, see Balkin & Levinson, supra note 7, at 6 n.20.
\item \textsuperscript{212} Canons, supra note 1, at 973-74. \textit{McCulloch} has been regarded as the "most canonical of constitutional cases." Id. at 987.
\item \textsuperscript{213} See Goldman, supra note 211, at 136.
\item \textsuperscript{214} See \textit{America's Best Graduate Schools 2007: Schools of Law}, \textit{U.S News & World Rep.} (Special Rep.), Apr. 9, 2006, at 92 (listing the following schools: Yale University, Stanford University, Harvard University, Columbia University, New York University, University of Chicago, University of Pennsylvania, University of California at Berkeley, University of Michigan at Ann Arbor, Duke University, and University of Virginia). Out of the top ten schools, constitutional law professors responded from Yale University, Stanford University, Harvard University, New York University, University of Chicago, University of Pennsylvania, University of California at Berkeley, and University of Virginia; however, not every professor contacted at
courses taught between Fall 2006 through Fall 2007. Based on the syllabi, I compiled a list of the top seven most commonly used constitutional law casebooks as a sample to examine the treatment of Chae Chan Ping and Fong Yue Ting, as well as the federal government’s plenary power over immigration generally, in the constitutional law canon.

A general survey of the Index and Table of Contents of each casebook revealed that the Brest, Levinson, Balkin, Amar, & Siegel casebook, *Processes of Constitutional Decisionmaking*, was the only text to extensively present cases establishing the government’s plenary power over immigration. The text specifically excerpts Chae Chan Ping, devoting five pages to the case and places it in a section on the development of the “American” nation. Additionally, the casebook discusses Asian Americans within the Black/White paradigm and the treatment of race and alienage in constitutional history. The only other casebook that remotely addressed either Chae Chan Ping or Fong Yue Ting was the Cohen, Varat & Amar casebook, *Constitutional Law: Cases and Materials*, which devoted a few sentences to Chae Chan Ping under a section on congressional legislation and treaty conflict, although Chae Chan Ping and Fong Yue Ting were cited in a case discussing the regulation of aliens.

Finally, although the Choper, Fallon, Kamisar & Shiffrin casebook, *Constitutional Law*, did not mention either Chae Chan Ping or Fong Yue Ting, it contained a section on equal protection and alienage and briefly addressed the federal government’s plenary power over immigration in a note, referring readers wanting further discussion of racial discrimination against immigrants to Gabriel Chin’s article, *Segregation’s Last Stronghold*.


217. See id. at 399-404.

218. Id. at 979-81.

219. Id. at 1157-60.


221. Id. at 217 (citing Kleindienst v. Mandel, 408 U.S. 753 (1972)). The section on regulation of aliens covered approximately one page. See id. at 217-18.

The dearth of discussion regarding the government's plenary power over immigration in the most commonly used constitutional law casebooks results in an incomplete, and thus inaccurate, portrayal of the United States' development as well as its constitutional principles. Because most constitutional law casebooks use *McCulloch* to introduce the concepts of federal supremacy and national sovereignty, they implicitly reflect the Marshall Court's version of the American nation building narrative. Yet, even though *Chae Chan Ping* and *Fong Yue Ting* deeply impacted the development of constitutional doctrine and race in the United States, they hold a weak position, if any, in the constitutional law canon presented in the legal curriculum. Using *McCulloch* alone to explain the nation's identity formation ignores important aspects of the Court's interpretation of American sovereignty and presents an incomplete account of the nation's constitutional history. Indeed, the lack of discussion regarding the federal government's plenary power over immigration in the constitutional law canon, casebooks, and core curriculum produces a unitary and false notion of American national identity development.

**E. A New National Identity Through Curriculum Reform**

The existing constitutional law canon constructs a narrative that reflects traditional, but outdated, approaches toward developing a national identity: exclusion or assimilation of immigrants. In turn, this national identity narrative fosters nativist and assimilationist attitudes toward immigrants by promoting "one dominant national culture" and by requiring members of minority cultures to conform to the standards of that dominant culture. This has detrimental effects: the exclusion of *Chae Chan Ping* and *Fong Yue Ting* from the core constitutional law curriculum allows future lawyers, judges, and policymakers to more easily overlook the racist and nativist foundations of the federal government's plenary power over immigration.

Although ignored by the core constitutional law curriculum, the government's sweeping power over immigration has had an equally profound effect on the American national identity as have currently recognized canonical cases. Specifically, these cases add important historical context to America's treatment of non-citizens and citizens stigmatized as foreign. Kenneth L. Karst argues that constitutional law, although often taught from the perspective of individual rights, is in fact about the value of national belonging: "[g]oing to court to claim a right under the United States Constitution is an assertion of membership in the national community." Immigration and naturalization

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223. See *Canons*, supra note 1, at 973-74, 987.
224. See *Goldman*, supra note 211, at 136.
225. See *Kuo*, supra note 31, at 66; see discussion, supra, Part I.
policies determine whether groups can acquire citizenship and thus whether they are entitled to claim such membership rights. Yet, through the Supreme Court's deference, the federal government has used its plenary power to justify limited constitutional rights in the areas of immigration and naturalization. Thus, studying the government's plenary power over immigration through its foundational cases provides historical insight into the strength of constitutional protections for past and future immigrants to the United States.

Specifically, Chae Chan Ping and Fong Yue Ting expose how the judicial deference to Congress regarding immigration established in these cases laid the foundation for subsequent racially discriminatory immigration laws, such as the Immigration Act of 1990. Because these laws and policies altered, and are still altering, the ethnicity and ideology of the United States, studying these cases can shed light on the current racial and cultural composition of the American community. For example, David Fontana proposes that the racial landscape of the United States would be distinctly different today if not for America's legacy of racially restrictive immigration laws. Accordingly, if the composition of the United States had been different, its constitutional principles would also have changed, because "the rights 'rooted in the traditions and conscience of our people' would be different." Accordingly, the history of Asian exclusion and the current state of immigration policy in the United States reveals the dangers of leaving the government's attempts to maintain a homogenous national identity unchecked. Given the increasing multiculturalism of the United States, a unitary concept of "America" no longer works.

Because of the canon's tendency to maintain the status quo, David Fontana adds that as changes occur in society and the law, the content of the

1160 (2000).


229. See Fontana, supra note 172, at 78 ("From 1790 until 1952, federal law stipulated that a person basically had to be considered 'white' in order to be eligible for American citizenship. Were it not for the Chinese Exclusion Act of 1892 and the Immigration Act of 1924, for instance, many more Asian Americans would live in the United States today. These regulations explain why eighty-five percent of the American population in 1900 was white, and why it is projected that it will be about fifty percent non-white by the year 2050. This projected demographic figure might have been the reality in 1850, but for immigration regulation.") (citations omitted).


231. Kevin R. Johnson and Bill Ong Hing point out that "[t]he nation had a more coherent national identity in a time when minorities were subordinated in an era of Jim Crow and other unforgiving assimilationist measures." Johnson & Hing, supra note 31, at 1362-63. Additionally, the century of anti-immigration laws, domestic laws, and violence "may well have facilitated a cohesive national identity." Id. at 1363 ("It is much easier to ensure a unified national identity when a society is not multiracial and multicultural."). Johnson and Hing propose a new formulation of American identity applicable to a multicultural society, consisting of "respect for the laws, for the democratic political and economic system, and for equal opportunity." Id. at 1390. Additionally, they assert that "[t]he requirement of inclusion and respect for diversity is reciprocal and applies to all persons in the United States." Id.
canon must also change accordingly.\textsuperscript{232} Even though racism and religious discrimination continue to exist socially, the modern American political community generally condemns the nineteenth century notions of White racial and religious supremacy, which "no longer serve as explicit bases for legitimizing choices in the national polity."\textsuperscript{233} We now include materials on slavery in the canon to reveal how the Supreme Court's analysis and construction of constitutional arguments has varied over the course of history.\textsuperscript{234} This reminds legal scholars and students that the Court has failed to protect fundamental values while claiming to uphold the Constitution. Being conscious of these decisions, which still affect American society today, reminds policymakers, judges, and lawyers to be vigilant in ensuring that the constitutional interpretations of our era do not mirror those of the past.\textsuperscript{235}

Accordingly, a truly informed lawyer must be able to recognize where and how immigration policies shaped the construction of America's national identity and thus the meaning of the Constitution. As Natsu Taylor Saito observes, "A working knowledge of the history and the current applications of the plenary power doctrine is, therefore, essential to lawyers and legal scholars concerned with unjust or unconstitutional aspects of American law and policy affecting [groups subject to U.S. jurisdiction]."\textsuperscript{236} Understanding how the liberties of immigrants have been restricted by the Court's constitutional interpretations is an essential component of historical legal knowledge.\textsuperscript{237} Accordingly, Chae Chan Ping, Fong Yue Ting, and their impact on U.S. immigration policy are a part of the American national identity narrative, and their effect on constitutional doctrine will continue to have powerful implications for the future of the American narrative. Moreover, the cases show how "discrimination against the ethnic outsider is a form of exclusion—not only physical exclusion from the country, but exclusion from belonging as a respected and responsible participant in a community's public life."\textsuperscript{238} Accordingly, these cases should be recognized alongside canonical cases such as Marbury v. Madison,\textsuperscript{239} McCulloch v. Maryland,\textsuperscript{240} Plessy v. Ferguson,\textsuperscript{241}

\textsuperscript{232} See David Fontana, \textit{A Case for the 21\textsuperscript{st} Century Constitutional Canon}: Schneiderman v. United States, 35 CONN. L. REV. 35, 40-41 (2002) (arguing that social change, such as the aftermath of September 11\textsuperscript{th}, should change the composition of the constitutional canon).

\textsuperscript{233} Karst, \textit{supra} note 44, at 196.

\textsuperscript{234} For example, Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown v. Bd. of Educ., 347 U.S. 483 (1954), which upheld the concept of "separate but equal," is commonly taught to reveal the racist history of the interpretation of the Equal Protection Clause in the United States. See Balkin & Levinson, \textit{supra} note 7, at 13.

\textsuperscript{235} See Balkin & Levinson, \textit{supra} note 7, at 13.

\textsuperscript{236} Saito, \textit{supra} note 18, at 14.

\textsuperscript{237} See \textit{id.} at 78-79.

\textsuperscript{238} Karst, \textit{supra} note 44, at 89.

\textsuperscript{239} 5 U.S. 137 (1803).

\textsuperscript{240} 17 U.S. 316 (1819).

\textsuperscript{241} 163 U.S. 537 (1896).
and Brown v. Board of Education. Yet Fong Yue Ting and Chae Chan Ping are generally ignored by constitutional law casebooks and courses, and instead are relegated to elective courses on immigration law or Asian American legal studies.

Fortunately, legal academic leaders, who mold future political leaders, have the ability, through changing the legal canon, to adopt a new and more accurate American national identity narrative in which diversity and commonality are not mutually exclusive. As Fran Ansley argues:

In legal education and in American communities, we should teach about the boundaries of American citizenship, should probe the meanings and the mechanisms behind this "nation of immigrants," and we should do so with the history of immigration law, the national quota system, and the long line of Mexican guest worker programs in plain view. Given the impact of immigration and immigration law on our society and economy, and given the difficult immigration questions confronting us today, this is an issue that should be prominently in the canon. Immigration even has its own national monument surrounded by controversy, surely a sign that it has canonical status in the American imagination.

Culturally literate lawyers must be conscious of the United States’ constitutional immigration history and its impact on American national identity development, especially since the meaning of American national identity has taken on new salience after September 11th.

Faculty and casebook authors should be encouraged to diversify their core courses and texts to make the curriculum "genuinely pluralist, rather than merely ‘multicultural’ at the margins." The addition of elective or mandatory specialized courses to the legal curriculum does not sufficiently address the underlying hegemony in the core constitutional law curriculum. More
importantly, curriculum integration prevents the experiences of marginalized groups from being resegregated into ethnic studies-based courses. Specialized courses may infer that the material taught in those courses can be easily compartmentalized and separated from the mainstream curriculum. Additionally, because students self-select electives, a high possibility exists that historically overlooked perspectives will only reach students who are already sensitive to issues affecting marginalized groups but not students who would benefit from increased exposure to such issues. Integrating the plenary power cases into the core constitutional law curriculum gives all law students, not merely a small subgroup, an understanding of the profound impact of the federal government's plenary power over immigration and, in turn, a better grasp of the conflict between U.S. immigration policies and modern domestic constitutional norms.

**CONCLUSION**

Change must occur in the core constitutional law curriculum. Arthur M. Schlesinger, Jr. accurately identifies the centrality of the curriculum to our conception of the American national identity:

"A] struggle to redefine the national identity is taking place . . . in many arenas—in our politics, our voluntary organizations, our churches, our language—and in no area more crucial than our system of education . . . The debate about the curriculum is a debate about what it means to be an American. What is ultimately at stake is the shape of the American future."

The absence of *Chae Chan Ping* and *Fong Yue Ting*, the sources of Congress's plenary power over immigration, from the core constitutional law curriculum does a disservice to future lawyers, legislators, judges, and society as a whole. As a consequence, many law school graduates may fail to understand the impact of the government's plenary power over immigration on the contemporary political environment. Consequently, the federal government may never be forced to take responsibility for, and remedy, its past and present violations of both citizens' and non-citizens' rights.

The core constitutional law canon must be revised. As Amy Gutmann, quoting Emerson, observes: "'Each age . . . must write its own books.' Why? Because well-educated, open-minded people and liberal democratic citizens

248. See Ansley, *supra* note 8, at 1591.

249. Fran Ansley recounts how, in her second year of law school, she realized the impact of Reconstruction and the Fourteenth Amendment on the Constitution in a course called "Con Law II": "I found myself worrying about the students who did not take Con Law II. Would they somehow, through some other route, learn this inspiring and thought-provoking fact about the amendment's genesis? It seemed important to me that they should." Ansley, *supra* note 85, at 239.

must think for themselves.”\textsuperscript{251} The task of each generation is to rewrite the constitutional canon according to evolving notions of constitutional equality. We must expose how the omission of the plenary power cases from the constitutional law curriculum perpetuates the nativism and racism that was—and currently is—used to arbitrarily exclude groups from the national community. Bringing these cases into the core curriculum will shine a spotlight on why and how the government justifies the discrimination and rights violations of citizens and non-citizens alike. It can open the door to a new understanding of constitutional principles, membership in the American political community, and racial dynamics in the United States. Our generation must begin to reject the assimilationist undertones of the existing American national identity narrative and embrace what America purports to be—but in actuality is not: a refuge for immigrants and a nation that, in theory and practice, defends the principles of equality, civil rights, and democracy for all. We must edit the constitutional law canon, beginning in the core legal curriculum, and, in doing so, help redefine what it truly means to be American.
