

Regulating Race: Asian Exclusion and the Administrative State

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I. INTRODUCTION

“The rise of administrative bodies,” Justice Robert Jackson wrote, “probably has been the most significant legal trend of the last century. . . . They have become a veritable fourth branch of the Government”¹ It is easy to see why Justice Jackson’s view is widely shared.² The great federal regulatory agencies exert significant influence over large sectors of the national economy. Other governmental bodies administer programs, like Social Security and Medicare, that will benefit nearly every American at one time or another; others maintain programs that

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¹ *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

² *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 984 (1983) (White, J., dissenting) (quoting *Ruberoid*, 343 U.S. at 487 (Jackson, J., dissenting)); *Ballerina Pen Co. v. Kunzig*, 433 F.2d 1204, 1208 (D.C. Cir. 1970) (“[A]s the ‘fourth branch of government,’ the administrative agencies may well have a more far-reaching effect on the daily lives of citizens than do the combined actions of the executive, legislative and judicial branches”); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 1 (4th ed. 1999) (“Modern government is administrative government.”); RONALD A. CASS ET AL., *ADMINISTRATIVE LAW: CASES AND MATERIALS* 1 (3d ed. 1998) (“We live in an administrative state.”); William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 527 (1992) (noting change from original intent arising from “[t]he advent of the administrative state, in which much ‘lawmaking’ is accomplished by agencies dominated by the President”); James Willard Hurst, *Consensus and Conflict in Twentieth Century Public Policy*, 105 DAEDALUS: J. AM. ACAD. ARTS & SCI. 89, 89 (1976) (calling the administrative state a “significant watershed”); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 959 (1999) (“One of this century’s most profound developments in the American social and political structure was the rise of the bureaucratic state.”); Kenneth Starr, *Tribute*, 1988 ANN. SURV. AM. L. xiii (calling the emergence of the independent agency “the principal structural development of this century”).

impose burdens, such as the Internal Revenue Service and Selective Service System. Literally from our cradles³ to our graves,⁴ federal administrators are ubiquitous in American life and business.

The conventional account describes the origins of federal administrative law sympathetically, as a triumph of the Progressive Era. The story begins in 1887 with the Interstate Commerce Commission's regulation of railroads.⁵ The purpose of administrative regulation was to promote rationality—by using specialists and experts, for example—and to restrain the power of capital, which sometimes achieved its position through corruption or other wrongs. Administration also was expected to promote efficiency in various ways; its factfinding procedures were superior to those of Congress, and its flexible adjudicatory procedures could be cheaper and better than the formalities of a court.⁶ As a result, the traditional story is in many respects a happy one.⁷

This Article explores another milestone in the development of the administrative state and of administrative law—a development that has received little attention from legal scholars:⁸ the system of laws that began to develop in 1875 to enforce the federal policy of Asian exclusion. If the founding of the Interstate Commerce Commission (“ICC”) is the starting point for understanding modern federal authority over businesses, the Asian Exclusion Laws represent an early expansion of federal authority over individuals. The Asian Exclusion Laws might be thought of as the ICC's evil twin. Both rested on Progressive-era rationality and

³ 16 C.F.R. § 1508 (2001) (Consumer Product Safety Comm'n Requirements for Full Size Baby Cribs).

⁴ 16 C.F.R. § 453 (2001) (FTC Funeral Industry Practices Regulations).

⁵ See discussion *infra* Part II.A.

⁶ See Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 935–36 (1988) (identifying expertise, efficiency, flexibility, accuracy, and preservation of funds for beneficiaries as potential benefits of the modern administrative form).

⁷ In a phrase which if not quite Orwellian is at least remarkable, Walter Gellhorn wrote: “Our increasingly complex industrial civilization has required us to abandon the view that ‘liberty’ means the absence of government restraints and controls” WALTER GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 3 (1940). Cf. GEORGE ORWELL, 1984, at 218 (Signet Classics ed., Penguin Books 1977) (“You know the Party slogan: ‘Freedom is Slavery.’ Has it ever occurred to you that it is reversible? Slavery is freedom.”).

⁸ See BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* 5 (3d ed. 1991) (“Administrative lawyers have concentrated primarily upon the regulatory agency”); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 230 (2000) (questioning the conventional focus on the New Deal as an era of federal expansion) (“The New Deal created eight to ten new agencies, doubling the existing number. But doubling the existing number means that there were already quite a few agencies out there.”); Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 18 n.71 (2000) (“There has been very little scholarship regarding pre-New Deal administrative law doctrines.”); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 198 (1991) (“The first century of federal administrative law . . . remains something of a dark age.”).

expertise, but the intellectual foundations of the immigration laws were eugenics and scientific racism. Both used the administrative form, but the immigration laws regulated individuals, not businesses. Finally, both employed procedures that were indeed more efficient, but the purposes of immigration law were not economy or accuracy; rather, it served to reinforce bureaucratic authority even when there was reason to doubt the validity of the government's position.

As a matter of constitutional law, the early ICC was largely irrelevant; a series of Supreme Court decisions interpreted its enabling act as granting little authority. In contrast, the Asian Exclusion Laws gave rise to a series of important due process and other constitutional challenges in the Supreme Court. Several of the Court's decisions became leading precedents upholding administrative authority to determine important individual claims and have been used by state and federal courts to justify administrative action in areas having nothing to do with immigration. As a result, immigration cases are one of the earliest and most important sources of constitutional administrative law.

The role of immigration law in the development of administrative law requires contemporary scholarship to modify its understanding of both fields in several ways. First, a focus on the ICC to the exclusion of other, similar bodies obscures the increasing federal role in regulation of the lives of average people at the turn of the twentieth century. At one time, the only federal agency with which an average American was likely to deal regularly was the Post Office. Now, as the various federal paycheck deductions regularly remind American workers, federal agencies allocating individual benefits and burdens also control a significant share of the national economy. Furthermore, the administration of federal benefits programs, such as Temporary Assistance for Needy Families ("TANF") and Social Security retirement benefits, may well be more important to the average American than even the weightiest decisions of the Federal Reserve Board or the National Labor Relations Board ("NLRB"). Decades before the New Deal, immigration regulation contributed to the creation of a new and sometimes unpleasant relationship between the federal government and the individual, a change obscured by centering attention on the ICC alone.

Focus on the ICC and regulation of business also obscures the particular issue that moved Congress to intervene in the lives of individuals—namely, implementation of national race policy. Even "adlaw," often wrongly considered a technical and obscure discipline, was shaped in part by America's struggle with race. From the beginning, the administrative method's potential for oppression was manifest: Rationality and expertise helped operationalize the scientific theories of race and human breeding that were in vogue during the period. Recognizing immigration's role in the development of federal administrative law makes clear that racist assumptions were part of its original structure.

The ICC and immigration system jointly established a structure that remains in place today. Although there are exceptions, administrative procedure tends to offer greater protection to businesses than to individuals. And thanks in part to the Asian Exclusion cases, due process requirements in administrative law are so minimal as to be largely irrelevant, making politics the more meaningful venue for appeals by those seeking more elaborate administrative procedure. Groups with limited access to the political process can expect to encounter procedures that grant substantial authority to the administrator.

Part II of this Article briefly describes the late nineteenth-century origins of the ICC⁹ and immigration law,¹⁰ suggesting that they were modern in similar ways. In both cases, the federal government broke new ground by assuming authority over important areas of the economy that previously had been regulated by the states. The reasons for federal intervention also were related. Immigration and railroads were causes and effects of the increasing nationalization and internationalization of American economic life; their importance made some kind of regulation inevitable, particularly after federal courts concluded that the federal government, rather than the states, was the appropriate regulatory authority for both areas. Finally, railroads and immigration were both part of the Progressive era's reform agenda. They reflected a belief in the value of efficiency and expertise and were premised on the idea of government intervention and experimentation in new government structures. The political motivations, however, were somewhat different. Railroad regulation stemmed from a desire to control capital; immigration regulation flowed, in part, from a less noble aspect of the age of reform: racism and xenophobia.¹¹

Part III discusses the contributions to administrative law doctrine of cases that interpreted the Asian Exclusion Laws.¹² Asian Exclusion cases played a role in establishing both the constitutionality of final administrative factfinding¹³ and its limits, particularly by determining when due process violations invalidate administrative proceedings.¹⁴ Immigration cases also contributed to the requirement of exhaustion of administrative remedies¹⁵ and to limits on administrative agencies' ability to impose penalties.¹⁶ Almost all contemporary due process cases, in all fields, rely in part on Asian Exclusion cases or their progeny.¹⁷

⁹ See discussion *infra* Part II.A.

¹⁰ See discussion *infra* Part II.B.

¹¹ See discussion *infra* Part II.C.

¹² See discussion *infra* Part III.

¹³ See discussion *infra* Part III.A.

¹⁴ See discussion *infra* Part III.B.

¹⁵ See discussion *infra* Part III.C.

¹⁶ See discussion *infra* Part III.D.

¹⁷ See discussion *infra* Part III.E.

Part IV suggests there is significant reason to believe these cases were affected by racism. The Court did not simply create a significant body of common law in cases that addressed racial issues; rather, there is evidence that members of the Court accepted the racial premises underlying the laws. In particular, the Court appears to have envisioned Asian immigration as a form of war that justified extreme governmental intervention. Although there is no way to know for certain what caused the Court to decide these cases as it did, the Court's decisions and the justices' political backgrounds suggest that the outcomes in Asian Exclusion cases were influenced by racial considerations.¹⁸

Finally, Part V discusses how these outcomes could have been different. The administrative system could have been subject to greater judicial constraint without sacrificing its vigorous form or usefulness. The structure of constitutional administrative law could have offered further protection of individual liberty and property by drawing lines in slightly different places, and the Court might have done so if the cases had arisen in a different context.

Instead, Justice David Brewer's warning seems to have come true. He predicted that precedents established under pro-government conditions in the immigration context would diminish individual rights in other areas of law. In *Fong Yue Ting*,¹⁹ a case authorizing the deportation of lawfully resident Chinese aliens, he argued:

It is true this statute is directed only against the obnoxious Chinese; but if the power exists, who shall say it will not be exercised to-morrow [sic] against other classes and other people? If the guarantees of these amendments can be thus ignored in order to get rid of this distasteful class, what security have others that a like disregard of its provisions may not be resorted to?²⁰

Brewer feared that the doctrines set forth in the Asian Exclusion cases might legally turn all Americans into persons with no more rights than Chinese immigrants; he was at least partially correct.

¹⁸ See discussion *infra* Part IV.A.

¹⁹ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

²⁰ *Id.* at 743 (Brewer, J., dissenting).

II. FEDERALIZING REGULATION

A. *Federal Regulation of Business: The Interstate Commerce Commission*

The Interstate Commerce Commission is routinely described as the first modern federal administrative agency.²¹ It was influential as well as novel, providing a structural model for agencies that followed.²² Over time, “it was vested with broad powers of rulemaking and adjudication, as well as the more traditional types of executive power. [Eventually it became] a virtual combined Executive, Congress and Supreme Court over the railroad industry.”²³

The ICC’s novelty rested to some extent on its administrative character; the ICC was not Congress, not an Article III court, and not part of a cabinet department.²⁴ Unlike traditional tribunals, the ICC possessed a specialized jurisdiction. It combined investigative and adjudicative functions with status as a party to the cases it decided.²⁵ And in addition to

²¹ See, e.g., *Stark v. Wickard*, 321 U.S. 288, 311 (1944) (Frankfurter, J., dissenting) (“Apart from legislation touching the revenue, the public domain, national banks and patents, not until the Interstate Commerce Act of 1887 did Congress begin to place economic enterprise under systems of administrative control.”); STEPHEN BREYER, *REGULATION AND ITS REFORM* 1 (1982); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 9 (1965) (“It is customary and appropriate to date the present federal era from the creation of the Interstate Commerce Commission in 1887.”); CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW* 35 (3d ed. 1996) (“The most spectacular post-Civil War development was the Interstate Commerce Commission.”); JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM* 4 (4th ed. 1998); THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 61–62 (1984); SCHWARTZ, *supra* note 8, at 29 (“The establishment of the ICC was . . . a quantum step forward.”); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1271 (1974) (“The first great federal regulatory statute [was the] Interstate Commerce Act of 1887.”); Carol M. Rose, *The Ancient Constitution v. The Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74, 101 (1989) (suggesting that the beginning of federal regulation was “the regulation of the railroads under the Interstate Commerce Commission”); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Actions*, 1987 DUKE L.J. 387, 413–14; James Q. Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INT. 77, 94–95 (1975); Woolhandler, *supra* note 8, at 197.

²² See Morton Rosenberg, *Congress’s Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration’s Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 657 (1989) (describing agencies patterned on the ICC); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 572 (1992) (“The ICC served as the prototype for the so-called independent regulatory commission that followed.”).

²³ SCHWARTZ, *supra* note 8, at 29.

²⁴ The ICC’s relationship to the Department of the Interior was eliminated in 1889. Act of Mar. 2, 1889, ch. 382, 25 Stat. 855 (1889) (codified as amended at 49 U.S.C. § 10761 (1988 & Supp. IV 1992)).

²⁵ Cf. SCHWARTZ, *supra* note 8, at 13 (noting that a common feature of administration is that “[t]he decisions are made, not by detached judges, but by those who are part and parcel of the administration”). As one scholar observed:

deciding individual cases, the ICC promulgated broad rules. Yet most of these features already existed in other agencies and bodies.²⁶ After all, Congress had regulated railroads before the ICC, although in more limited ways.²⁷ Congress also had created independent administrative agencies outside the cabinet departments.²⁸ In these respects, the ICC was not dramatically different from what had come before.

Even the federal government's involvement in economic affairs was hardly new. The Post Office and Customs Service were major national and international business enterprises. The government collected taxes, maintained a defense establishment and paid those who retired from it, acquired and distributed territory, and sometimes used administrative agencies to carry out these operations. If economic importance, independence, specialization, and combined adjudicatory and investigatory authority were all that was new about the ICC, it would deserve much less attention.

The ICC's significant innovation was federal assumption of what previously had been a matter of state responsibility. Most of the federal government's earlier activities were traditional in a significant sense: they were part of the Founders' plan as enumerated in the original Constitution.²⁹ As Robert Rabin explained, the ICC's novelty was that "[f]or the

Consider the typical enforcement activities of a typical federal agency—for example, of the Federal Trade Commission. The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can then appeal to the Commission. If the Commission ultimately finds a violation, then, and only then, the affected private party can appeal to an Article III court.

Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994).

²⁶ See SCHWARTZ, *supra* note 8, at 28–29. See generally WILLIAM E. NELSON, *THE ROOTS OF AMERICAN BUREAUCRACY, 1830–1920* (1982).

²⁷ *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687 n.13 (1982) (describing the Pacific Railroad Act of 1862, 12 Stat. 489, as “[t]he initial exercise of the federal authority over railroads”).

²⁸ See SCHWARTZ, *supra* note 8, at 28–29; Woolhandler, *supra* note 8, at 197 (noting that “federal agencies existed before the establishment of the ICC”).

²⁹ See U.S. CONST. art. I, § 8, cl. 1 (authorizing Congress “[t]o lay and collect Taxes”); *id.* cl. 7 (authorizing Congress “[t]o establish Post Offices”); *id.* cl. 8 (authorizing Congress to grant patents and copyrights); *id.* cl. 12 (authorizing Congress “[t]o raise and support Armies”); U.S. CONST. art. IV, § 3, cl. 1 (authorizing Congress to admit new states); *id.* cl. 2 (authorizing Congress to regulate the territory and property of the United States).

first time, a national legislative scheme was enacted that provided for wide-ranging regulatory controls over an industry that was vital to the nation's economy;" therefore, "it initiated a new epoch in the responsibilities of the federal government."³⁰

There are important differences between state administrative adjudication and identical procedures carried out by federal officers. The Constitution imposes requirements on federal courts that are inapplicable to other government actors. In the states, by contrast, there are few constitutionally mandated distinctions between courts and other decisionmakers. Federal judges appointed under Article III receive life tenure, but state judges do not necessarily have job security.³¹ Federal civil cases are bound by the jury-trial requirement of the Seventh Amendment, but state courts need not use juries to find facts.³² Most questions of procedure and evidence are governed by local law,³³ including fundamental issues such as the availability of appeal.³⁴ Thus, a state might create a railroad commission, or a district court for railroads, and in both cases do precisely the same things with the same officers in the same way without raising many constitutional issues. The Constitution demands a federal judicial structure that is not so flexible.

The Supreme Court's role in federalizing railroad regulation in the late nineteenth century must be analyzed in the context of interstate commerce jurisprudence as a whole. In *Munn v. Illinois*,³⁵ the Court upheld the authority of states to regulate activities within their borders, regardless of the effects on interstate commerce. The decision, involving grain warehouses, recognized broad and flexible state authority to monitor and control private economic behavior. "When private property is devoted to a public use," the Court explained, "it is subject to public regulation."³⁶ The Court declined to inquire into the wisdom of the policy,³⁷

Professor Paul Finkelman suggests that the Fugitive Slave Acts also may represent an important escalation of federal power insofar as this legislation put federal law enforcement officers into every district. Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring and Abolitionist Attorneys*, 17 *CARDOZO L. REV.* 1793, 1800 (1996). However, the obligation to return fugitive slaves was established in the original Constitution. See U.S. CONST. art. IV, § 2, cl. 3 (fugitive slave clause).

³⁰ Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1189 (1986).

³¹ See *Palmore v. United States*, 411 U.S. 389, 409–10 (1973).

³² See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 719 (1999); *Minneapolis & St. Louis R.R. Co v. Bombolis*, 241 U.S. 211, 217 (1916).

³³ See, e.g., *Iowa Cent. Ry. Co. v. Iowa*, 160 U.S. 389 (1896); *Fong Yue Ting v. United States*, 149 U.S. 698, 729–30 (1893).

³⁴ *McKane v. Durston*, 153 U.S. 684 (1894). But see *Triestman v. United States*, 124 F.3d 361, 379 n.22 (2d Cir. 1997) (Calabresi, J.).

³⁵ 94 U.S. 113 (1876).

³⁶ *Id.* at 130.

³⁷ *Id.* at 132 ("For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute under consideration was passed.").

and noted that it was not “a matter of any moment that no precedent can be found for a statute precisely like this.”³⁸ Finally, it rejected the asserted Commerce Clause problem; without denying an effect on interstate commerce, the Court explained that the regulation was valid at least “until Congress acts.”³⁹ *Munn* was followed by two decisions, issued the same day, upholding state regulation of interstate railroads.⁴⁰

However, the Court reversed course only a decade later. In *Wabash, St. Louis & Pacific Railway Co. v. Illinois*,⁴¹ the Court held that state regulation of interstate railroad operations, even those taking place within the regulating state, unconstitutionally interfered with interstate commerce. Justice Miller, writing for the Court, apologized for misleading the states in earlier opinions,⁴² but insisted that if there was to be regulation of the railroads—and, by implication, of other important forms of interstate commerce—the national government was going to have to do it.⁴³ The Court’s reasoning reflected the increased importance of railroads to the national economy. Congress agreed, and the next year passed the Interstate Commerce Act, which created the ICC.⁴⁴

B. Federal Regulation of Individuals: Asian Exclusion and Immigration

The development of federal immigration regulation paralleled that of railroad regulation in that both expanded federal regulation to areas previously administered by states. They differed in that the immigration system’s primary object of concern was individuals rather than businesses.

The immigration system was, like the ICC, administrative in nature.⁴⁵ Although the details of its structure changed over time,⁴⁶ immigra-

³⁸ *Id.* at 133.

³⁹ *Id.* at 135.

⁴⁰ *Peik v. Chi. & N.W. Ry. Co.*, 94 U.S. 164 (1876); *Chi., Burlington & Quincy R.R. Co. v. Iowa*, 94 U.S. 155 (1876).

⁴¹ 118 U.S. 557 (1886).

⁴² *Id.* at 568 (Miller, J.) (stating that he was “prepared to take his share of the responsibility for the language used in those opinions”).

⁴³ *Id.* at 577 (holding that railroad rate regulation “must be, if established at all, of a general and national character . . . [and] can only appropriately exist by general rules and principles, which demand that it should be done by the congress of the United States under the commerce clause of the Constitution”).

⁴⁴ Act of Feb. 4, 1887, ch. 104, 24 Stat. 379.

⁴⁵ *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (“Familiar illustrations of administrative agencies created for the determination of [public rights] are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.”); OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, at 20 (1994) (noting “the emergence of a new institution of government such as the administrative agency charged with policing immigration or the railroads”).

⁴⁶ *See, e.g.*, Michael J. Churgin, *Immigration Internal Decisionmaking: A View from History*, 78 *TEX. L. REV.* 1633 (2000); Paul S. Pierce, *The Control of Immigration as an Administrative Problem*, 4 *AM. POL. SCI. REV.* 374 (1910).

tion authorities always operated within a specialized, limited jurisdiction. The immigration authorities performed investigative and adjudicative functions, making both factual and legal determinations in individual cases. Immigration authorities also promulgated regulations pursuant to statutory authorization.⁴⁷

Just as the ICC had federal antecedents, the Asian Exclusion Laws were the product of an incremental development process. One early law was intended to prevent the importation of “Coolies,”⁴⁸ but this prophylactic measure failed to end concerns about Asian immigration. In 1874, President Grant called

the attention of Congress to a generally conceded fact, that the great proportion of the Chinese immigrants who come to our shores do not come voluntarily In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes If this evil practice can be legislated against, it will be my pleasure as well as duty to enforce any regulation to secure so desirable an end.⁴⁹

Congress responded with the Immigration Act of 1875.⁵⁰ This law was notable not only for being the first direct federal regulation of immigration, but also because it was the first statute to employ the technique of excluding aliens and the first to categorize Asians as a group.

More specifically, the statute required that U.S. consulates, when dealing with “the immigration of any subject of China, Japan or any Oriental country,” ensure that none were subject to a contract “for a term of service within the United States, for lewd and immoral purposes.”⁵¹ It criminalized the importation of “any subject of China, Japan, or any Oriental country, without their free and voluntary consent,”⁵² and prohibited “the importation into the United States of women for the purposes of prostitution.”⁵³ Although ostensibly limited to narrow classes, President Grant’s assertion that “the great proportion” of Chinese were involuntary immigrants and that “hardly a perceptible percentage” of women were not prostitutes gave all Asian immigrants reason to be concerned that the law might apply to them. The statute created only a narrow ground of

⁴⁷ See, e.g., Act of Sept. 13, 1888, ch. 1015, § 8, 25 Stat. 476, 478 (repealed 1943) (authorizing the Secretary of the Treasury to enact regulations to secure Chinese treaty rights and “protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles”).

⁴⁸ Act of Feb. 19, 1862, ch. 27, § 3, 12 Stat. 340 (repealed 1974).

⁴⁹ 2 CONG. REC. 3–4 (1874).

⁵⁰ Act of Mar. 3, 1875, ch. 141, §§ 1–2, 4, 18 Stat. 477 (repealed 1974).

⁵¹ *Id.* § 1.

⁵² *Id.* § 2.

⁵³ *Id.* § 3.

exclusion that was not directly related to Asians—it prohibited entry of aliens who were either serving criminal sentences or whose sentences had been suspended “on condition of their emigration.”⁵⁴

Another foundation of Asian racial policy was solidified in 1875 when Congress reaffirmed Asian immigrants’ ineligibility for citizenship. The naturalization statute had been limited to “free white persons” since 1790.⁵⁵ In 1870, Congress extended benefits to Africans,⁵⁶ but after vigorous debate refused to permit Asian naturalization.⁵⁷ When the Revised Statutes were promulgated in 1874, the “free white persons” restriction was inadvertently omitted, but, with Asians in mind, Congress restored the clause a month before it passed the immigration law.⁵⁸

Congress then began considering Chinese Exclusion bills directly. A number were vetoed by Presidents Hayes and Arthur⁵⁹ before the Chinese Exclusion Act⁶⁰ finally became law in 1882. This Act was the first statute to employ the technique of deportation.⁶¹ Later that year, Congress enacted a general immigration bill that provided for the inspection and exclusion of the mentally ill and persons likely to become a public charge, in addition to the prostitutes and convicts already banned.⁶²

Like the regulation of railroads, the broad federal regulation of immigration followed a judicial retreat from earlier intimations that states had substantial regulatory authority. From colonial days, states had regulated immigration in a variety of ways.⁶³ State regulation was chal-

⁵⁴ *Id.* § 5.

⁵⁵ Act of Mar. 26, 1790, ch. 3, 1 Stat. 103.

⁵⁶ Act of July 14, 1870, ch. 254, § 7, 16 Stat. 256 (superseded by 8 U.S.C. 703 (1940) (repealed 1952)).

⁵⁷ 2 CONG. REC. 1081 (1875) (Remarks of Rep. Poland).

⁵⁸ Act of Feb. 18, 1875, ch. 80, § 300B, 18 Stat. 316, 318. *See generally* John Haya-kawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN L.J.* 55 (1996).

⁵⁹ E. P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY* 72, 78, 81 (1981).

⁶⁰ Act of May 6, 1882, ch. 126, 22 Stat. 58.

⁶¹ *Id.* at 61 (“any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came”). The Alien and Sedition Acts had temporarily authorized the technique. *See, e.g.*, Aliens Act of June 25, 1798, ch. 63, 1 Stat. 570 (1798).

The Chinese Exclusion Act was periodically extended in time and in scope. Ultimately, with few exceptions, the law prohibited the immigration of all “aliens ineligible to citizenship,” thereby excluding virtually all immigrants of Asian racial background. *See* Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 *UCLA L. REV.* 1, 13–15 (1998), *reprinted in* 19 *IMMIGR. & NATIONALITY L. REV.* 3, 15–17 (1998). The Asian Exclusion Laws were in effect in one form or another until 1965, when Congress made immigration race-neutral. *See* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 *N.C. L. REV.* 273 (1996), *reprinted in* 17 *IMMIGR. & NATIONALITY L. REV.* 87 (1995–96).

⁶² Immigration Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (1882).

⁶³ *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 *COLUM. L. REV.* 1833 (1993).

lenged fairly early on in *Mayor of New York v. Miln*,⁶⁴ but the Court upheld a requirement that ships' masters report the names and addresses of landing passengers to the local mayor. The Court suggested that states could regulate immigration under their police power, and noted that, before the Constitution was adopted, any sovereign state could "forbid the entrance of his territory, either to foreigners in general, or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state."⁶⁵ The Court concluded that New York had authority to "enact such laws for internal police as it deemed best; which laws operate on persons and things within her territorial limits, and therefore, within her jurisdiction."⁶⁶ The Court understood immigration as largely a social problem:

New York, from her particular situation, is perhaps more than any city in the Union, exposed to the evil of thousands of foreign emigrants arriving there, and the consequent danger of her citizens being subjected to a heavy charge in the maintenance of those who are poor. It is the duty of the state to protect its citizens from this evil; they have endeavored to do so, by passing, amongst other things, the section of the law in question. We should, upon principle, say that it had a right to do so.⁶⁷

In the *Passenger Cases*,⁶⁸ decided in 1849, the Court struck down state taxes on arriving immigrants, but five separate opinions for the majority and four separate dissenting opinions left it less than obvious that the case represented a retreat from *Miln*.

The states might be forgiven for thinking that precedent gave them broad discretion to deal with aliens as they deemed fit, but by the 1870s the courts clearly disagreed. In *In re Ah Fong*,⁶⁹ Justice Field held unconstitutional a state statute authorizing the California Commissioner of Immigration to exclude "lewd and debauched women,"⁷⁰ those likely to become public charges, and other undesirables. Field explained that aliens' "immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to

Indeed, as late as 1941, the Supreme Court had to reverse the California Supreme Court's ruling that states could regulate the entry of "undesirable" citizens. *Edwards v. California*, 314 U.S. 160 (1941). *See also* *Saenz v. Roe*, 526 U.S. 489 (1999) (invalidating California law reducing welfare benefits for new residents); Stephen Loffredo, "If You Ain't Got the Do, Re, Mi": *The Commerce Clause and State Residence Restrictions on Welfare*, 11 *YALE L. & POL'Y REV.* 147 (1993).

⁶⁴ 36 U.S. (11 Pet.) 102 (1837).

⁶⁵ *Id.* at 132.

⁶⁶ *Id.* at 141.

⁶⁷ *Id.*

⁶⁸ *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849).

⁶⁹ 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102) (Field, Circuit Justice).

⁷⁰ *Id.* at 215.

state control or interference.”⁷¹ Referring to *Miln* and the *Passenger Cases*, Field acknowledged “that the right of the state to exclude from its limits any persons whom it may deem dangerous or injurious to the interests and welfare of its citizens has been asserted by eminent judges of the Supreme Court of the United States,” but concluded that such broad statements were not holdings.⁷² He also recognized that the facially neutral immigration statute was in fact aimed at the Chinese:

I am aware of the very general feeling prevailing in this state against the Chinese, and in opposition to the extension of any encouragement to their immigration hither. It is felt that the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible assimilation of them with our people. Admitting that there is ground for this feeling, it does not justify any legislation for their exclusion If their further immigration is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies.⁷³

In 1876, the Supreme Court confirmed Field’s understanding of the federal role. The Court’s perception of the national economic importance of immigration had changed, altering its view of the relationship between immigration and foreign and interstate commerce. In *Henderson v. Mayor of New York*,⁷⁴ the Court explained that individual states could no longer regulate immigration because of its role in the developing national economy. The Court’s understanding of the nature of immigration stands in remarkable contrast to that in *Miln*:

[T]he transportation of passengers from European ports to those of the United States has attained a magnitude . . . far beyond its proportion [at the time of earlier decisions] to other branches of commerce. It has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders. In addition to the wealth which some of them bring, they bring still more largely the labor which we need to till our soil, build our railroads, and develop the latent resources of the country in its minerals, its manufactures, and its agriculture.⁷⁵

⁷¹ *Id.* at 216.

⁷² *Id.*

⁷³ *Id.* at 217.

⁷⁴ 92 U.S. 259 (1876).

⁷⁵ *Id.* at 270.

In *Chy Lung v. Freeman*,⁷⁶ decided the same day, the Court invalidated California's subjective and discretionary immigrant inspection scheme that Field, as a Circuit Justice, had found unconstitutional the year before. If a solution to unfortunate consequences of this generally beneficial economic phenomenon existed, it would now have to come from the national government. As with railroads, Congress responded when state regulation became impossible.⁷⁷

If immigration and railroad regulation were similar in some respects, they also differed in important ways. The immigration system did not often promulgate general rules, but instead adjudicated individual cases in accordance with statutory standards. The immigration system also generally regulated individuals, except when regulating business was necessary as a method for enforcing the exclusion of individuals. And while the ICC was an independent agency, the immigration system was housed within an executive department. Accordingly, it cannot be thought of as an ancestor to the great regulatory agencies. But regulation of business—the story told by the ICC—represents only one part of the administrative state.

Whereas the modern administrative state symbolized by the ICC created a new relationship between the federal government and business, the Asian Exclusion Laws contributed to the development of a new relationship between the federal government and individuals—one in which the federal government would assume increasing responsibility for allocating benefits and burdens.

Viewed from the perspective of the twenty-first century, regulation of immigration is as obviously a federal job as is regulation of securities or airlines, but from the nation's founding until the Progressive era, that responsibility fell upon the states. Indeed, when the immigration laws were passed there was almost no connection between individual citizens and the national government. As Jerry Mashaw observed, “prior to 1933 governmental activity directly affecting individual citizens and enterprises was carried on primarily by states and localities.”⁷⁸ “[N]othing [is]

⁷⁶ 92 U.S. 275 (1875).

⁷⁷ As Professor Hutchinson explains, concern about “the alleged importation of Chinese prostitutes and European criminals” was the immediate impetus for action, but in other respects “the time was ripe for this exercise of federal authority. For one thing, the old state rights issue was in disrepute. [The federal courts] progressively declared unconstitutional and struck down the efforts of the states to protect themselves against unwanted immigration and the financial burdens it brought. Almost by default the regulation of immigration was falling to the federal government” HUTCHINSON, *supra* note 59, at 66.

⁷⁸ JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 2 (1985). See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS* 87–88 (1992); ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877–1920*, at 36 (David Donald ed., 1967) (describing “[t]he irrelevance of government to most citizens’ lives”); Lawrence M. Friedman, *Looking Backward, Looking Forward: A Century of Legal Change*, 28 *IND. L. REV.* 259, 263 (1995) (“[F]rom our standpoint, the national government was small and feeble [in this period] The federal government of the day did not . . . do very much.”). See also Fallon, *supra*

certain, except death and taxes,” Benjamin Franklin wrote,⁷⁹ but he probably meant state taxes; there were no federal income taxes.⁸⁰ There were grim state and local “social services,” but no Medicare, Medicaid, Social Security, AFDC, or TANF.⁸¹ Many Americans were required to serve in state militias,⁸² but there was no peacetime federal draft or draft registration.⁸³

In contrast, federal bureaucratic allocations of benefits and burdens to individuals currently represent a significant share of the national economy and has a tremendous impact on individuals’ daily lives. Since the New Deal,

a striking expansion of governmental activity has occurred in “service” functions—the provision of goods and services and the administration of transfer payments and insurance schemes—with concomitant increases in government employment. Both the discharge of these functions and the control of officials responsible for their execution involve a degree of governmental power over individual welfare that is, if anything, greater than that involved in governmental regulation of private activity.⁸⁴

note 6, at 920 (“The role of the federal government has expanded far beyond that contemplated by the framers.”).

⁷⁹ JOHN BARTLETT, *BARTLETT’S FAMILIAR QUOTATIONS* 310 (Justin Kaplan, ed., 16th ed. 1992).

⁸⁰ An income tax measure was passed during the Civil War but repealed in 1872. The Court struck down a short-lived income tax in *Pollock v. Farmers’ Loan & Trust Co.* 158 U.S. 601 (1895). Federal taxation of individual incomes was put on a permanent footing only with the ratification of the Sixteenth Amendment in 1913. See JOHN F. WITTE, *THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX* 67–79 (1985). For the history of state income taxes, see ALZADA COMSTOCK, *STATE TAXATION OF PERSONAL INCOMES* (1921).

⁸¹ An important exception, however, was federal spending on pensions for veterans and their dependents. See SKOCPOL, *supra* note 78, at 65. See also JAMES T. PATTERSON, *AMERICA’S STRUGGLE AGAINST POVERTY, 1900–1994*, at 28–31 (1994) (discussing local poor laws); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 45–48 (2d ed. 1993) (discussing primarily local system of poor relief prior to New Deal); Michele L. Landis, “*Let Me Next Time be ‘Tried by Fire’*”: *Disaster Relief and the Origins of the American Welfare State 1789–1874*, 92 *Nw. U. L. REV.* 967 (1998).

⁸² See *Arver v. United States*, 245 U.S. 366, 380 & n.3 (1918) (listing states that imposed militia duty at time of founding).

⁸³ The Confederacy and Union drafted troops during the Civil War, but “[t]he validity of the draft act of 1863 was never passed on by the Supreme Court.” *Angelus v. Sullivan*, 246 F. 54, 58 (2d Cir. 1917). The Court first upheld the constitutionality of conscription in *Arver*, 245 U.S. 366.

⁸⁴ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1669, 1717 (1975); see also SCHWARTZ, *supra* note 8, at 6 (“The Welfare State has converted an ever-growing portion of the community into government clients Quantitatively, the work of the Department of Health and Human Services completely dwarfs that of a regulatory agency like the Interstate Commerce Commission.”); Rabin, *supra* note 30, at 1274 (noting that welfare programs represented a “major extension of federal executive

Despite the ICC's importance as the first institution of the regulatory era, its influence waned while immigration regulation grew more robust with the passage of time. Cars, trucks, buses, and airplanes gradually made the railroad industry less significant, and the ICC was finally abolished in 1995.⁸⁵ In contrast, immigration has remained important economically, and the immigration system has been a locus of innovation and invention in administrative law enforcement. Following the pattern of the Asian Exclusion Laws, modern immigration statutes are enforced by civil, criminal, and administrative measures embodied in a variety of statutes, regulations, executive orders, and treaties.⁸⁶ The Asian Exclusion Laws were a prototype, an early example of how federal power could be wielded systematically to achieve a policy goal. The prototype remains strong: Congress has called on the Departments of Justice, Labor, State, and Health and Human Services to administer various parts of the Immigration and Nationality Act, has created at least four administrative courts,⁸⁷ and has devoted more federal officers to immigration enforcement than to any other area of federal concern.⁸⁸

C. *Rationality and Racism in the Age of Reform*

The concerns and priorities of post-Reconstruction reformers made railroads and immigration logical choices as first national regulatory projects to be undertaken by the federal government. Richard Hofstadter wrote that the Progressive movement "took place during a rapid and sometimes turbulent transition from the conditions of an agrarian society to those of modern urban life."⁸⁹ The economy expanded; new technologies and industries developed. Centralized capital in the form of corporations and trusts assumed greater power. Unions developed to protect the interests of their constituents, and the market for goods and labor became increasingly national and international. As Professor Wiebe explained: "An age never leant itself more readily to sweeping, uniform description:

power"); cf. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

⁸⁵ ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

⁸⁶ See GABRIEL J. CHIN & EVELINA ERICKSSON, BLACK LETTER ON THE YELLOW PERIL: A COMPENDIUM OF LAWS, TREATIES, REGULATIONS AND EXECUTIVE ORDERS GOVERNING THE EXCLUSION OF ASIANS TO THE UNITED STATES (forthcoming).

⁸⁷ Within the Justice Department, Immigration Judges preside over removal hearings; their decisions are appealable to the Board of Immigration Appeals. The Office of the Chief Administrative Hearing Officer deals with claims of discrimination against permanent resident aliens and unlawful employment of undocumented aliens. In the Department of Labor, the Board of Alien Labor Certification Appeals deals with claims that aliens should be admitted because American workers are unavailable for their particular jobs.

⁸⁸ See IMMIGRATION & NATURALIZATION SERV., THIS MONTH IN IMMIGRATION HISTORY: AUGUST, 1997, at <http://www.ins.usdoj.gov/graphics/aboutins/history/5aug1997.html> (last modified Nov. 13, 2001) (noting that as of fiscal year 2000, the "INS was the largest federal law enforcement agency in the United States").

⁸⁹ RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R. 7 (1955).

nationalization, industrialization, mechanization, urbanization.”⁹⁰ Yet, for many people, these developments “meant only dislocation and bewilderment.”⁹¹ America was, at this time, “a society without a core. It lacked those national centers of authority and information which might have given order to such swift changes.”⁹²

The pleasant face of the Progressive movement responded to the sense and reality of rapid change in a number of ways.⁹³ One was an exploration of the idea that government could legitimately be the source of positive change.⁹⁴ Another important idea was that the application of expertise and rationality could reform and control the growing institutions of government and business. An ideal of depoliticization took form in the creation of a professional federal civil service,⁹⁵ and corporate power was met with antitrust laws and other business regulation.⁹⁶

The ICC was created in response to a compelling need for government intervention to address a market failure.⁹⁷ The agency represented acceptance of the idea that the government could legitimately intervene

⁹⁰ WIEBE, *supra* note 78, at 12. The extent to which localism prevailed before this era is remarkable; for example, the United States did not adopt uniform railroad track widths and standardize time zones across the country until the 1880s. *Id.* at 23.

⁹¹ *Id.* at 12.

⁹² *Id.*

⁹³ See, e.g., BENJAMIN PARKE DEWITT, *THE PROGRESSIVE MOVEMENT* (1915); SAMUEL HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA* (1964); HOFSTADTER, *supra* note 89; GEORGE HENRY PAYNE, *THE BIRTH OF THE NEW PARTY OR PROGRESSIVE DEMOCRACY* (1912); WILLIAM ALLEN WHITE, *THE OLD ORDER CHANGETH: A VIEW OF AMERICAN DEMOCRACY* (1912).

⁹⁴ See, e.g., DEWITT, *supra* note 93, at 15 (“The idea that permanent relief from oppressive conditions [created by capital, wealth and the corporations] could be obtained only through governmental intervention slowly gained ground.”); *id.* at 113, 123.

⁹⁵ See, e.g., *id.* at 16.

⁹⁶ See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965); HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* (1954).

⁹⁷ *Tex. & Pac. Ry. Co. v. ICC*, 162 U.S. 197, 210–11 (1896). The Court set out its version of the problem posed by railroads setting their own rates, and why some form of regulation was necessary:

[Regulation] grew out of the use of railroads as the principal modern instrumentality of commerce. While shippers of merchandise are under no legal necessity to use railroads, they are so practically. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation At the same time, the immense outlay of money required to build and maintain railroads . . . in effect disable[s] individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies and the evils that usually accompany monopolies soon began to show themselves The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations . . . between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities.

Id.

in the market; the goal was promotion of the common good through restraint of selfish capital. The ICC was intended not to harm the railroad industry, but to rationalize it by using an expert and specialized staff who were as free as possible from political pressures.

If expertism, independence, and rationality found a positive outlet in the ICC, they were less pleasantly expressed in immigration. In addition to their interest in controlling economic change, some reformers also supported active government management of cultural change. As Richard Hofstadter explained, “the industrialization and urbanization of the country were coupled with a breakdown in the relative homogeneity of the population . . . Progressivism [was] in considerable part colored by the reaction to this immigrant stream among the native elements of the population.”⁹⁸ Many Progressives supported efforts to assimilate immigrants,⁹⁹ including “soft” techniques such as common schools.¹⁰⁰ Others adopted more explicit racial strategies that could be carried out through increasingly powerful and creative government mechanisms. The longing for national unity was satisfied in part through “suspicion of immigrants” and “an increasingly elaborate race theory, designed to cover all peoples, and the spread of a cold, formalized anti-Semitism.”¹⁰¹

Whenever general anxieties rose across the nation, followers of the bureaucratic way had to turn for help to one of several traditional techniques for achieving tighter cohesion.

One of these time-honored devices was exclusion: draw a line around the good society and dismiss the remainder. . . . The most elaborate method—a compound of biology, pseudo-science, and hyperactive imaginations—divided the people of the world by race and located each group along a value scale according to its distinctive, inherent characteristics.¹⁰²

A number of reformers honored for their critical, scientific, rational, and forward-looking approaches to social problems applied their gifts to the relationship between genetic racial characteristics and citizenship. Race, many Progressives recognized, was an important factor in determining suitability for citizenship.

⁹⁸ HOFSTADTER, *supra* note 89, at 8–9. See also Barbara Holden-Smith, *Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era*, 8 YALE J.L. & FEMINISM 31 (1996).

⁹⁹ See, e.g., WHITE, *supra* note 93, at 167 (“The reform movement is a deep tendency of our life; it is our mysterious link with the infinite body of humanity—the body in which, through some strange alchemy, the good of one is the good of all.”).

¹⁰⁰ See *id.* at 172–73 (discussing the importance of schools for operation of democracy).

¹⁰¹ WIEBE, *supra* note 78, at 110.

¹⁰² *Id.* at 156. See also ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 177–80 (1995).

Theodore Roosevelt had excellent Progressive credentials as an environmentalist, trustbuster, internationalist, and as the 1912 Progressive Party candidate. He considered excessive births by undesirables “[t]he greatest problem of civilization” which could lead to “race suicide.”¹⁰³ With respect to Asian immigration, he made clear that race was a perfectly legitimate ground of distinction.

There has always been a strong feeling in California against the immigration of Asiatic laborers, whether these are wage-workers or men who occupy and till the soil. I believe this to be fundamentally a sound and proper attitude which must be insisted upon¹⁰⁴

Editor William Allen White, “one of the outstanding publicists of reform, a friend and associate of famous muckrakers, and an enthusiastic Bull Mooser,”¹⁰⁵ explained:

The best blood of the earth is here—a varied blood of strong indomitable men and women brought here by visions of wider lives. But this blood will remain a clean Aryan blood, because there are no hordes of inferior races about us to sweep over us and debase our stock. We are segregated by two oceans from the inferior races, and by that instinctive race revulsion to cross-breeding that marks the American wherever he is found.¹⁰⁶

The intersection of progressive economics, government innovation, and racism was personified in a group of academic entrepreneurs who readily moved between academia, government, and work in the popular media during this period. Professor Edward A. Ross, for example, was a public intellectual of enviable success. A pioneer in two disciplines, he served as secretary of the American Economic Association and president of the American Sociological Society during a career that included appointments at Indiana, Cornell, Stanford, Nebraska, and Wisconsin. He also wrote popular works that attracted widespread attention. His interest in social reform led him to chair the National Committee of the ACLU; respected figures such as Oliver Wendell Holmes wrote him flattering letters,¹⁰⁷ while Theodore Roosevelt wrote the introduction to a collection of his essays supporting government regulation of the economy and of

¹⁰³ Theodore Roosevelt, *A Letter from President Roosevelt on Race Suicide*, 35 AM. MONTHLY REV. REVS. 550, 550–51 (1907).

¹⁰⁴ THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 411–12 (1913).

¹⁰⁵ HOFSTADTER, *supra* note 89, at 132.

¹⁰⁶ WHITE, *supra* note 93, at 252.

¹⁰⁷ SEAN H. MCMAHON, *SOCIAL CONTROL AND PUBLIC INTELLECT: THE LEGACY OF EDWARD A. ROSS* 53 (1999).

corporations.¹⁰⁸ As his biographer explains, Ross wrote “as an economic reformer and focused on the corporate abuses of people, not institutions or prices.”¹⁰⁹

Ross concluded that government intervention was necessary to control capitalism’s reckless racial policies. He “lashed out against imported Chinese workers who toiled for the railroad barons and corrupted the democracy of the West. The Chinese took jobs from native workers, challenged cultural and religious standards and resisted all efforts to naturalize.”¹¹⁰ Ross may have invented the term “race suicide” in a 1901 article warning against the possibility that “the American farm hand, mechanic and operative might wither away before the heavy influx of a prolific race from the Orient.”¹¹¹ By 1914 he could write with satisfaction that the policies he advocated had succeeded: “But for Chinese exclusion we should by this time have six or eight million Celestials in the far West, and mud villages and bamboo huts would fill the noble valleys of California.”¹¹²

Another prominent racist was John Rogers Commons, president of the American Economic Association, professor at the University of Wisconsin, and confidant of Progressive Wisconsin Governor Robert LaFollette. A labor historian, he was instrumental in developing state and federal policies reforming workplace safety, unemployment insurance, workers’ compensation, civil service, and public utilities.¹¹³ Race also presented a central problem for Commons. In his book *Races and Immigrants in America*, he explained:

These are the basic qualities which underlie democracy,—intelligence, manliness, cooperation. If they are lacking, democracy is futile. Here is the problem of races, the fundamental division of mankind. Race differences are established in the very blood and physical constitution. They are the most difficult to eradicate, and they yield only to the slow processes of the centuries. Races may change their religions, their forms of government, their modes of industry, and their languages, but underneath all these changes they may continue the physical, mental and moral capacities and incapacities which determine the real character of

¹⁰⁸ *Id.* at 88; *see also id.* at 117.

¹⁰⁹ *Id.* at 12.

¹¹⁰ *Id.* at 110.

¹¹¹ Edward A. Ross, *The Causes of Race Superiority*, 18 ANNALS AM. ACAD. POL. & SOC. SCI. 67, 88 (1901). Professor Ross was unenthusiastic about other non-white races, noting that “our average of energy and character is lowered by the presence in the South of several millions of an inferior race.” *Id.* at 88–89.

¹¹² EDWARD ALSWORTH ROSS, *THE OLD WORLD IN THE NEW: THE SIGNIFICANCE OF PAST AND PRESENT IMMIGRATION TO THE AMERICAN PEOPLE* 226 (1914).

¹¹³ *See* JOHN R. COMMONS, *MYSELF* (1934); L. G. HARTE, *JOHN R. COMMONS: HIS ASSAULT ON LAISSEZ-FAIRE* (1962).

their religion, government, industry, and literature. Race and heredity furnish the raw material, education and environment furnish the tools, with which and by which social institutions are fashioned; and in a democracy race and heredity are the more decisive, because the very education and environment which fashion the oncoming generations are themselves controlled through universal suffrage by the races whom it is hoped to educate and elevate.¹¹⁴

According to Commons, “the question of the ‘race suicide’ of the American or colonial stock should be regarded as the most fundamental of our social problems, or rather as the most fundamental consequence of our social and industrial institutions.”¹¹⁵

A book written by academics who served on a federal immigration advisory committee in the first decade of the twentieth century forged another direct link between Progressive racial theory and law. Cornell professor Jeremiah Jenks and former Washington and Lee professor W. Jett Lauck wrote about their service on the U.S. Immigration Commission. The title of their book, *The Immigration Problem*, suggests the attitude of the era.¹¹⁶ They made clear that race was relevant. In supporting the policy of Asian Exclusion, they wrote:

The chief objection, however, to all of these races comes from the social and assimilative viewpoint. . . . [T]he presence of these races in large numbers on the coast doubtless prevents the migration from eastern cities of white immigrants In spite of the criticism of the immigrants from Southern and Eastern Europe, there is every reason to believe that . . . in a comparatively short time they will become . . . both as laborers and as citizens, more satisfactory than the Asiatics.¹¹⁷

The intellectual careers of Professors Ross, Commons, Jenks, and Lauck demonstrate the correctness of Professor Wiebe’s observation that “[a]nti-alien sentiments [were] cousins to anti-monopoly. . . .”¹¹⁸ In retrospect, it

¹¹⁴ JOHN R. COMMONS, *RACES AND IMMIGRANTS IN AMERICA* 7 (3d ed. 1967).

¹¹⁵ *Id.* at 200–01.

¹¹⁶ JEREMIAH W. JENKS & W. JETT LAUCK, *THE IMMIGRATION PROBLEM: A STUDY OF AMERICAN IMMIGRATION CONDITIONS AND NEEDS* (4th ed. 1917).

¹¹⁷ *Id.* at 258–60.

¹¹⁸ WIEBE, *supra* note 78, at 54. *See also* HOFSTADTER, *supra* note 89, at 178. Hofstadter wrote:

The Mugwump type, resentful of the failure of both capitalist and immigrant to consider the public good before personal welfare, had always been troubled about the long-range consequences of unrestricted immigration and had begun to question universal suffrage out of a fear that traditional democracy might be imperiled by the decline of ethnic homogeneity. Early civic reform was strongly tainted

is not surprising that just like the problems, the solutions designed for railroads and immigration were related and developed together as well.

III. ASIAN EXCLUSION AND THE CONSTITUTIONAL CONTOURS OF ADMINISTRATIVE LAW

Because the Asian Exclusion Laws represented an early expansion of federal administrative power, cases testing and exploring the limits of the immigration laws had the potential to provide an early source of administrative law. Many scholars, however, deny the impact of immigration on administrative law and other fields. Perhaps the central theme in American immigration law scholarship is that immigration law is distinct from “mainstream” law. Gerald Neuman has asserted that, “[f]or over a century, immigration law has been an isolated specialty within American law, to which normal constitutional reasoning does not necessarily apply.”¹¹⁹ In a recent, important study, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law*,¹²⁰ Professor Lucy Salyer argued that “[t]he basic doctrines established in the immigration cases set immigration law on a quite different trajectory from that of other branches of administrative law.”¹²¹ Many other immigration and

with nativism.

Id. at 177.

¹¹⁹ Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 988 (1998). See also Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) (“Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.”).

¹²⁰ LUCY E. SALYER, *LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).

¹²¹ *Id.* at 248. Professor Salyer continues:

While all administrative agencies shared certain characteristics—freedom from the technical rules of judicial procedure, flexibility, an emphasis on policy objectives, faith in experts—striking differences had developed among agencies by 1924. At the same time that the Supreme Court was busily developing the doctrines freeing immigration officials from constitutional norms of due process, Interstate Commerce Commission chair Thomas Cooley complained that courts were forcing his agency to treat common carriers “precisely as . . . if charged with criminal conduct and arraigned upon an indictment.” The Supreme Court eventually acknowledged the authority of the ICC and other agencies in regulating the economy, but it continued to require higher procedural standards. In 1920, for example, when the federal courts were generally sanctioning the bureau’s summary methods in the Red Raids, the Supreme Court struck down [an FTC] order on the grounds that the agency’s original complaint failed to meet the technical requirements of adequate notice. This decision stands in stark contrast to the federal judiciary’s willingness to uphold deportation orders made on warrants which it conceded were vague and technically inadequate.

Id. at 248–49 (citations omitted).

constitutional law scholars, including Alex Aleinikoff,¹²² Philip Frickey,¹²³ Henry Hart,¹²⁴ Louis Henkin,¹²⁵ Kevin R. Johnson,¹²⁶ Stephen H. Legomsky,¹²⁷ and Hiroshi Motomura¹²⁸ are in accord with the idea that immigration law is constitutionally distinct.¹²⁹

The language in Supreme Court immigration cases also reflects the notion that immigration is exceptional. Early Asian Exclusion cases suggest that immigration cases come close to presenting political questions.¹³⁰ And the modern Court has frequently stated that “[o]ver no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.”¹³¹ In *Mathews v. Diaz*,¹³² Justice Stevens, writing for a unanimous Court, explained that “[i]n the exercise of its broad power over naturalization and immigration, Congress regularly

¹²² T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT’L L. 862, 865 (1989) (“Immigration law has remained blissfully untouched by the virtual revolution in constitutional law since World War II . . .”).

¹²³ Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 41 (1996) (noting that immigration law stands “well outside the ‘constitutional law mainstream’”).

¹²⁴ Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1392 (1953).

¹²⁵ Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 862 (1987) (describing immigration law as “a constitutional fossil”).

¹²⁶ Kevin R. Johnson, A “Hard Look” at the Executive Branch’s Asylum Decisions, 1991 UTAH L. REV. 279, 353 (1991) (suggesting that there is a “vast divergence of immigration law from mainstream American jurisprudence”).

¹²⁷ Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255 (calling immigration law an “oddity”).

¹²⁸ Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1657 (1992) (discussing difference between “mainstream law and immigration law”); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

¹²⁹ See, e.g., Annie M. Chan, *Community and the Constitution: A Reassessment of the Roots of Immigration Law*, 21 VT. L. REV. 491, 545 (1996) (“[I]mmigration law still stands isolated from the body of modern constitutional doctrine.”); Chin, *Segregation’s Last Stronghold*, *supra* note 61, at 3–9. But see, e.g., Paul R. Verkuil, *A Study of Immigration Procedures*, 31 UCLA L. REV. 1141, 1144 (1984) (“Today, with new public values, immigration law is returning to the mainstream.”).

¹³⁰ In *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889), a Chinese Exclusion case, the Court stated that government “determinations, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers”; a decision of a political branch in this context “is conclusive upon the judiciary.” See also *Fong Yue Ting v. United States*, 149 U.S. 698, 712 (1893) (“[In determining] whether the acts of the legislature or of the executive are consistent with the Constitution, it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of the government.”). For a more recent example, see *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application.”).

¹³¹ *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)); accord *Reno v. Flores*, 507 U.S. 292, 305 (1993).

¹³² 426 U.S. 67 (1976).

makes rules that would be unacceptable if applied to citizens.”¹³³ Over the years, the Court has rebuffed various challenges to immigration laws that discriminate on the basis of sex, race, national origin, sexual orientation, and political belief.¹³⁴

This idea of immigration law as isolated is, however, a revisionist view. In the first part of the twentieth century, the Chinese cases were treated by scholars as part of mainstream administrative law. A 1911 text written by Ernst Freund, a University of Chicago law professor, is regarded as the first administrative law casebook;¹³⁵ it included several Asian Exclusion cases as principal decisions.¹³⁶ Justice Frankfurter’s 1932 casebook prominently features immigration, including ninety-three pages of immigration cases.¹³⁷ Administrative Procedure Act (“APA”) drafter¹³⁸ Walter Gellhorn’s 1940 casebook included many immigration cases as well.¹³⁹

Law review articles written during that period, including work by persons central to the development of administrative law, also treated the Asian cases as generally applicable precedents. Prior to receiving the Story Professorship at Harvard Law School, Thomas Reed Powell wrote an article about administrative finality¹⁴⁰ that relied almost exclusively on immigration cases in the sections discussing personal liberty and procedure.¹⁴¹ Other prominent scholars whose articles relied on Asian Exclusion cases include former SEC Chair and Harvard Law School Dean

¹³³ *Id.* at 79–80.

¹³⁴ *See, e.g.*, *Nguyen v. INS*, 121 S. Ct. 2053 (2001) (rejecting an equal protection challenge to an INS policy making it easier for non-citizen children of American women to obtain citizenship than for non-citizen children of American men); Chin, *Segregation’s Last Stronghold*, *supra* note 61, at 6–7; *see also* HOUSE JUDICIARY COMM., 100TH CONG., 2D SESS., GROUNDS FOR EXCLUSION OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT, HISTORICAL BACKGROUND AND ANALYSIS (Comm. Print 1988). There also is some debate about whether Congress has discriminated against immigrants at times when comparable discrimination against citizens was unconstitutional. Compare Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for our Strange but Unexceptional Constitutional Immigration Law*, 14 *GEO. IMMIGR. L.J.* 257 (2000) with Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 *GEO. IMMIGR. L.J.* 289 (2000) and Stephen Legomsky, *Immigration Exceptionalism: Commentary on Is There a Plenary Power Doctrine?*, 14 *GEO. IMMIGR. L.J.* 307 (2000).

¹³⁵ ERNST FREUND, *CASES ON ADMINISTRATIVE LAW* (1911).

¹³⁶ *Id.* at 611–32.

¹³⁷ FELIX FRANKFURTER & J. FORRESTER DAVISON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* 952–1044 (1932).

¹³⁸ 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, *ADMINISTRATIVE LAW TREATISE* 14 (3d ed. 1994).

¹³⁹ *See* GELLHORN, *supra* note 7, at 448, 615, 682, 916, 918–19 (1940). In the Ninth Edition, published in 1995, only a brief mention of *Ng Fung Ho v. White*, 259 U.S. 276 (1922), remained of these original cases, although other, more recent immigration cases had been added. PETER STRAUSS, ET AL., *GELLHORN & BYSE’S ADMINISTRATIVE LAW* 550 (9th ed. 1995).

¹⁴⁰ Thomas Reed Powell, *Conclusiveness of Administrative Determinations in the Federal Government*, 1 *AM. POL. SCI. REV.* 583 (1907).

¹⁴¹ *See id.* at 594–607.

James M. Landis,¹⁴² Michigan Law School Dean and member of the Attorney General's Committee on Administrative Procedure E. Blythe Stason,¹⁴³ and University of Pennsylvania administrative law scholar John Dickinson.¹⁴⁴

Of course, the ultimate answer to the question of legal influence lies with the courts rather than law reviews. Immigration precedents have not been treated as outliers by the courts, but rather as ordinary constitutional precedents. Indeed, the immigration cases contributed to the development of important legal doctrines, and thus are part and parcel of modern constitutional administrative law. The critical legacy of these cases is that the due process threshold for administrative procedures is indeed minimal. In many administrative systems, most notably the APA, Congress has chosen to provide elaborate procedural protections or generous judicial review. But when Congress wants to grant administrators the discretion to work without oversight, the constitutional minimum is still set in many respects by the Asian Exclusion cases. Areas of influence include the constitutionality of final administrative factfinding, exceptions to final administrative factfinding, exhaustion of remedies, and the permissibility of administrative punishment.

A. *Final Factfinding by Administrators*

The ability to make factual decisions that will not be reviewed in court on a *de novo* basis is a critical component of administrative power for several reasons. First is the question of efficiency: agency factfinding is pointless if the reviewing court will conduct its own factual investigation. Second is the question of authority: a party will not waste time bringing claims before an agency if the real action will be in court. The importance of final factfinding is suggested by the "unscrupulous administrator's prayer" imagined by critics of administrative authority: "Let me find the facts for the people of my country, and I care little who lays down the general principles."¹⁴⁵

Closely related is the idea that keeping the case out of federal court is often advantageous to the institutional party and disadvantageous to the individual. A string of sovereign immunity cases¹⁴⁶ and habeas corpus

¹⁴² James M. Landis, *Administrative Policies and the Courts*, 47 YALE L.J. 519, 524 (1938).

¹⁴³ E. Blythe Stason, "Substantial Evidence" in *Administrative Law*, 89 U. PA. L. REV. 1026, 1030 & n.25 (1941).

¹⁴⁴ John Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"*, 80 U. PA. L. REV. 1055, 1077 & nn.64-65 (1932).

¹⁴⁵ *NLRB v. Curtin Matheson Scientific*, 494 U.S. 775, 819 (1990) (Scalia, J., dissenting) (quoting *United States v. Forness*, 125 F.2d 928, 942 (2d Cir. 1942) (Frank, J.) (quoting *Legislative Perils Pictured by Hughes*, N.Y. TIMES, Feb. 13, 1931, at 18.)).

¹⁴⁶ See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that an Age

cases brought by state prisoners¹⁴⁷ make this point clear, as do several recent “Reform Acts,”¹⁴⁸ and even arbitration clauses inserted in consumer contracts.¹⁴⁹ Perhaps the quality of decisionmaking and accuracy is higher because federal judges enjoy life tenure. As the Supreme Court explained in an immigration case, administrative action “has not the safeguards of impartiality and providence” that provide “the security of procedure and ultimate judgment of a judicial tribunal, where all action which precedes judgment is upon oath and has its assurances and sanctions.”¹⁵⁰ Perhaps, on the other hand, individuals want to appear in federal court because an additional forum simply gives them another chance to win.¹⁵¹ Whatever the reason, eliminating or limiting federal judicial review generally disadvantages the individual.

Although early cases suggested that due process did not always require judicial process, many of them involved traditional governmental functions.¹⁵² In defending administrative collection of taxes or customs duties, the government could argue that such practices were consistent with the design of the Constitution’s drafters. Immigration law provided a significant forum for transplanting these concepts into new activities of the federal government.¹⁵³ In a series of Chinese Exclusion and public charge cases involving Asian immigrants, the Court held that factfinding

Discrimination in Employment Act suit could not be maintained against state by private party); *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261 (1997) (holding that neither individuals nor a tribe could sue the state for a claim of land ownership).

¹⁴⁷ See, e.g., *Calderon v. Thompson*, 523 U.S. 538 (1998); *Gray v. Netherland*, 518 U.S. 152 (1996); *Coleman v. Thompson*, 501 U.S. 722 (1991). See generally JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (3d ed. 1998); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Anti-Terrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997).

¹⁴⁸ See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1995) (codified as amended at 18 U.S.C. § 3626 (Supp. III 1997)); Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended at 15 U.S.C. § 78a).

¹⁴⁹ See, e.g., Monogram Credit Card Bank of Georgia Credit Card Agreement, para. 20, at http://www.onlinecreditcenter2.com/exxon/corp/driver/rfs_credit_terms.html (last visited Nov. 13, 2001).

¹⁵⁰ *United States v. Woo Jan*, 245 U.S. 552, 556 (1918). See also *White v. Chin Fong*, 253 U.S. 90, 92–93 (1920).

¹⁵¹ Some administrative schemes do not permit the agency to appeal if the individual wins; even if government appeal is allowed, government counsel may have little incentive to appeal routine cases.

¹⁵² See, e.g., *Hilton v. Merritt*, 110 U.S. 97 (1884) (customs assessment); *Murray’s Lessee v. The Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) (tax).

¹⁵³ An important early treatise noted that “[i]t has been the subject of comment how seldom the courts in a case arising in one of these fields reason from cases coming from the others. There are exceptions; the leading immigration case of *United States v. Ju Toy* was decided on the authority of *Murray’s Lessee v. Hoboken Land Co.*, a revenue case, and *Public Clearing House v. Coyne*, a postal case, among others” JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 56 (1927).

could be assigned to administrators and that administrative factfinding could be final.¹⁵⁴ The process culminated in Justice Holmes's 1905 opinion in *United States v. Ju Toy*,¹⁵⁵ a decision that represents a disturbingly rigid commitment to administrative finality. Ju Toy was trying to enter the country; if born abroad, he was excludable under the Chinese Exclusion Act, but he claimed to be a United States citizen by birth. After administrators excluded him, Ju Toy sought reexamination of the factual question on habeas corpus. The court of appeals certified to the Supreme Court the question of whether the facts were open to judicial review.

Holmes cited earlier cases holding that immigration authorities could make final, unreviewable decisions about the admissibility of particular applicants, but he acknowledged that none of those cases involved claims of United States citizenship. Holmes declined to find an exception to the principle of administrative finality, noting that the law "purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicil [sic]"¹⁵⁶ Holmes explained:

[Even if] for the purpose of argument, we assume that the 5th Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the

¹⁵⁴ See *Chin Yow v. United States*, 208 U.S. 8 (1908); *Yamataya v. Fisher* (the Japanese Immigrant case), 189 U.S. 86, 99–100 (1903); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660–64 (1892).

Yamataya and *Nishimura Ekiu* were public charge cases, but it seems reasonable to treat them as part of the Asian Exclusion line. Although immigrants of Japanese racial ancestry were not formally excluded by treaty until the Gentlemen's Agreement of 1907–1908 and the Immigration Act of 1924, the Immigration Act of 1875 reflected concern for the admission of Japanese, and of Japanese women in particular. Justice Field's decision in *In re Ah Fong*, 1 F. Cas. 213, 217 (C.C.D. Cal. 1874) (No. 102), reflects the authorities' use of neutral grounds to exclude racial undesirables. See *infra* note 381 and accompanying text.

The ineligibility of Japanese for citizenship also may be relevant. In *Terrace v. Thompson*, 263 U.S. 197, 220 (1923), the Court held that racial ineligibility for citizenship justified other forms of discrimination against Asians: "[I]t is not to be supposed that [Congress's] acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable." See also Stephen Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 289 (discussing anti-Asian sentiment and noting that "[i]t was during this era of public hostility to Asians that the Supreme Court adopted and solidified the plenary power doctrine. In many cases, the Asian ancestry of the particular aliens prompted judicial tirades about their negative influences.") (citing, inter alia, *Fong Yue Ting*, *Nishimura Ekiu*, and *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)).

¹⁵⁵ 198 U.S. 253 (1905).

¹⁵⁶ *Id.* at 262.

almost necessary result of the power of Congress to pass exclusion laws.¹⁵⁷

Accordingly, the Court held that the application should have been dismissed by the district court.

Justice Brewer's furious dissent highlighted the stakes involved in judicial review in this category of cases. After the administrative order of deportation was issued, a district court referee held a hearing resulting in a finding that Ju Toy was a United States citizen by birth.¹⁵⁸ The district court overruled the prosecutor's exception to the referee's report. Thus, the majority held that the administrative finding was final, even though a more recent judicial finding suggested that an injustice had been done. Justice Brewer's protest that the procedures were unfair was supported by verbatim quotes from the rules governing admission of Chinese; such rules created a system bearing little relation to a judicial proceeding. He explained:

It will be seen that under these rules it is the duty of the immigration officer to prevent communication with the Chinese seeking to land by any one except his own officers. He is to conduct a private examination, with only the witnesses present whom he may designate. His counsel, if under the circumstances the Chinaman has been able to procure one, is permitted to look at the testimony but not to make a copy of it. He must give notice of appeal, if he wishes one, within two days, and within three days thereafter the record is to be sent to the Secretary at Washington; and every doubtful question is to be settled in favor of the Government. No provision is made for summoning witnesses from a distance or for taking depositions, and if, for instance, the person landing at San Francisco was born and brought up in Ohio, it may well be that he would be powerless to find any testimony in San Francisco to prove his citizenship. If he does not happen to have money he must go without the testimony, and when the papers are sent to Washington (three-thousand miles away from the port, which in this case was the place of landing) he may not have the means of employing counsel to present his case to the Secretary. If this be not a star chamber proceeding of the most stringent sort, what more is necessary to make it one?

. . . .

¹⁵⁷ *Id.* at 263.

¹⁵⁸ *Id.* at 264–65 (Brewer, J., dissenting).

It will be borne in mind that the petitioner has been judicially determined to be a free-born American citizen, and the contention of the Government, sustained by the judgment of this court, is that a citizen, guilty of no crime . . . must by the action of a ministerial officer be punished by deportation and banishment Such a decision is to my mind appalling. . . . I cannot believe that Congress intended to provide that a citizen, simply because he belongs to an obnoxious race, can be deprived of all the liberty and protection which the Constitution guarantees, and if it did so intend, I do not believe that it has the power to do so.¹⁵⁹

¹⁵⁹ *Id.* at 268–69, 279–80. Justice Brewer supported this argument by quoting at length from several of the relevant rules:

Rule 6 declares that “immediately upon the arrival of Chinese persons . . . it shall be the duty of the officer . . . to adopt suitable means to prevent communication with them by any persons other than the officials under his control, to have said Chinese persons examined promptly, as by law provided, touching their right to admission and to permit those proving such right to land.

. . . .

“Rule 7. The examination prescribed in Rule 6 should be separate and apart from the public, in the presence of Government officials and such witness or witnesses only as the examining officer shall designate, and, if, upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal and his counsel should be permitted, after duly filing notice of appeal, to examine, but not make copies of, the evidence upon which the excluding decision is based.

“Rule 8. Every Chinese person refused admission under the provisions of the exclusion laws by the decision of the officer in charge at the port of entry must, if he shall elect to take an appeal to the Secretary, give written notice thereof to said officer within two days after such decision is rendered.

“Rule 9. Notice of appeal provided for in Rule 8 shall act as a stay upon the disposal of the Chinese person whose case is thereby affected until a final decision is rendered by the Secretary; and, within three days after the filing of such notice, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits, and statements as are to be considered in connection therewith, shall be forwarded to the Commissioner General of Immigration by the officer in charge at the port of arrival, accompanied by his views thereon in writing; but on such appeal no evidence will be considered that has not been made the subject of investigation and report by the said officer in charge.

“Rule 10. Additional time for the preparation of cases after the expiration of three days next succeeding the filing of notice of appeal will be allowed only in those instances in which, in the judgment of said officer in charge, a literal compliance with Rule 9 would occasion injustice to the appellant or the risk of defeat of the purposes of the law and the reasons for delay beyond the time prescribed shall in every instance be stated in writing in the papers forwarded to the Commissioner General of Immigration.”

“Rule 21. The burden of proof in all cases rests upon Chinese persons claiming the right of admission to or residence within the United States to establish such

Counsel for *Ju Toy* explicitly and fruitlessly injected the question of accuracy into the case by arguing that the body of habeas corpus cases “show beyond all reasonable doubt that many natives of the United States have been refused landing by the immigration officers and the department.”¹⁶⁰ Given the outcome, a fair reading of *Ju Toy* is that it stands for the proposition that final administrative factfinding is constitutional, even when very substantial individual interests are at stake, and even with extremely summary procedures.¹⁶¹

If immigration cases like *Ju Toy* are part of mainstream constitutional law, their potential to be influential in the development of the federal administrative system is obvious. Immigration cases dealt with government authority in the context of “public rights,” of “new property” the government could freely grant or withhold.¹⁶² Yet denial of the benefit in question, the Supreme Court recognized, could “visit great hardship on the alien,” and “result in the loss ‘of all that makes life worth living.’”¹⁶³ If applicable to other areas, immigration cases could be widely cited in cases dealing with public rights. On the other hand, if the federal government has distinctively greater power over immigration than over other areas, immigration cases should not be relied on in contexts where due process and other constitutional rights apply with full force.

The *Ju Toy* line has not been limited to immigration. Indeed, the many opinions that have cited *Ju Toy* make almost no suggestion that it is

right affirmatively and satisfactorily to the appropriate Government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt shall be given by administrative officers to the United States government.”

Id. at 266–68.

¹⁶⁰ Brief for Appellee at 11, *United States v. Ju Toy*, 198 U.S. 253 (1905) (No. 535-1904).

¹⁶¹ Holmes’s authorship of *Ju Toy* has been cited as evidence of his sporadic respect for civil rights. Dennis G. Lyons, Book Review, 69 HARV. L. REV. 403, 407 n.6 (1955).

¹⁶² As Professor Fallon explained: “Types of disputes that represent the historical core of the public rights doctrine include cases involving the actual or threatened exercise by government of coercive powers other than under the criminal law, cases presenting claims of entitlement to benefits distributed by the government, and cases concerning immigration and naturalization.” Fallon, *supra* note 6, at 952. *Crowell v. Benson*, 285 U.S. 22, 51 (1932), uses immigration as an example of a public right that can be addressed administratively, as does *Helvering v. Mitchell*, 303 U.S. 391, 399 & n.2 (1938), which characterized deportation as “revocation of a privilege voluntarily granted.” See also MILTON M. CARROW, THE BACKGROUND OF ADMINISTRATIVE LAW 21 (1948) (more protection is offered for invasion of private property rights than for the loss of government privileges or benefits; examples of the latter are “administering of pensions, the exclusion cases decided upon by immigration authorities, determinations of the General Land Office, and the determinations of the Post Office Department in fraud cases”); J. ROLAND PENNOCK, ADMINISTRATION AND THE RULE OF LAW 163 (1941) (noting that immigration cases have received only limited judicial review because they fall into the broad category of “suits arising out of gratuities or favors granted by the government”).

¹⁶³ *Fiswick v. United States*, 329 U.S. 211, 222 n.8 (1946) (citing *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) and quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)).

anything other than an ordinary due process precedent.¹⁶⁴ Courts that use the *Ju Toy* line to support robust administrative authority often emphasize the individual interest at stake and do not discuss any special limits on the rights of immigrants.¹⁶⁵ Because the “extreme case”¹⁶⁶ already has been approved, anything less is necessarily acceptable. In an early case, *United States v. Great Northern Railroad Co.*,¹⁶⁷ a railroad charged with a rate violation defended itself in part on the ground that the ICC’s rates violated the due process rights of both shippers and carriers. The Circuit Court for the Southern District of New York rejected the claim, relying on *Ju Toy*:

It seems to me sufficient for the present argument that property rights, however dear, are not to be ranked higher than those of citizenship and personal liberty; and it is now held that officers appointed by the executive, and boards created by that authority, answering directly to the executive only, may pass upon the status of one who alleges himself to be a native-born citizen of the United States, and, by finding adversely to his assertion the place of his birth, debar him from the only country that he swears he ever knew, and this without any recourse to the courts of his alleged native land, unless there be found in the proceedings of the executive malice or abuse of discretion. *United States v. Ju Toy*. I think that the deprivation here alleged is very far within the executive power recognized by the case last cited.¹⁶⁸

Another federal judge observed in a case involving second class mailing privileges that

it is impossible to give any convincing reason why Congress cannot delegate powers of this nature to the Postmaster General without judicial intervention, in the same manner as the regulation and enforcement of the immigration laws have been en-

¹⁶⁴ Apparently only one case specifically distinguishes *Ju Toy* as an immigration case. See *Dukich v. Blair*, 3 F.2d 302, 306 (E.D. Wash. 1925), *appeal dismissed*, 270 U.S. 670 (1926).

¹⁶⁵ See, e.g., *Phillips v. Comm’r*, 283 U.S. 589, 595 (1931); *PENNOCK*, *supra* note 162, at 164 (“To say that this was an instance of qualified rights was to beg the question at issue; for if *Ju Toy* were a citizen his rights were not ‘qualified.’ But the decision stands—a high watermark in its class.”).

¹⁶⁶ *United States v. N.Y. & New Haven & Hartford R.R. Co.*, 165 F. 742, 746 (C.C.D. Mass. 1908) (“‘Due process of law,’ as understood when the Constitution was adopted, . . . [does not] always entitle persons claiming mere civil rights to adjudications by strictly judicial tribunals. This was established as early as *Murray’s Lessee v. Hoboken Land Improvement Co.* . . . and, finally, by the extreme case of *United States v. Ju Toy*.”).

¹⁶⁷ 157 F. 288 (C.C.S.D.N.Y. 1907).

¹⁶⁸ *Id.* at 291 (citation omitted).

trusted to the heads of other departments. That this may be done in the latter cases is no longer open to discussion.¹⁶⁹

The Supreme Court cited *Ju Toy* in *Phillips v. Commissioner*,¹⁷⁰ an important case holding that factfinding in tax cases could be delegated to non-Article III tribunals.¹⁷¹ The Court also cited *Ju Toy* in NLRB¹⁷² and Federal Communications Commission (“FCC”)¹⁷³ cases in support of the argument that due process does not require any particular form of procedure. None of the opinions hinted that immigration cases turned on a distinct constitutional analysis. Examination of the authorities in *Atlas Roofing Co. v. OSHA*,¹⁷⁴ holding that the imposition of penalties by an administrative agency does not violate the Seventh Amendment, shows that many of them rely on Asian Exclusion cases as well.¹⁷⁵

Immigration cases also are frequently cited in the Selective Service context. A World War I draft case decided by the Second Circuit, *Angelus v. Sullivan*,¹⁷⁶ discussed *Ju Toy*’s approval of administrative finality and concluded: “We see no reason why the same doctrine is not equally applicable to the case in hand. And we therefore hold that the complainant is not deprived of due process of law by being compelled to submit to the

¹⁶⁹ *Lewis Pub. Co. v. Wyman*, 152 F. 787, 799 (C.C.E.D. Mo. 1907) (citing *Nishimura Ekiu*, *Yamataya*, and *Ju Toy*). See also *Cruikshank v. Bidwell*, 86 F. 7, 7 (C.C.S.D.N.Y. 1898) (“The act which plaintiff criticizes in this case is apparently framed, as are the exclusion acts, in conformity with prevailing theories, to leave the decision of disputable questions with an administrative officer rather than with the courts. Such a system is, of course, open to abuse, but it is not, necessarily, in all cases unconstitutional. . . . In view of the decisions of the United States Supreme Court in *Lem Moon Sing* . . . and a line of similar cases, such legislation seems not to be obnoxious to the objection that it is unconstitutional.” (citation omitted)), *aff’d*, 176 U.S. 73 (1900).

¹⁷⁰ *Phillips v. Comm’r*, 283 U.S. 589 (1931).

¹⁷¹ *Id.* at 599–600. See also *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 & n.8 (1929) (noting that with respect to many questions, “Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals”) (citing, inter alia, *Nishimura Ekiu* and *Fong Yue Ting*); *St. Joseph Stockyards v. United States*, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring) (noting that decisions such as *Ju Toy* “tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another”).

¹⁷² *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 710 n.14 (1945) (citing, inter alia, *Ju Toy*).

¹⁷³ *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 276 n.9 (1949) (citing, inter alia, *Ju Toy*).

¹⁷⁴ 430 U.S. 442 (1977).

¹⁷⁵ The Court quoted extensively from *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). See *Atlas*, 430 U.S. at 451 & n.9. *Stranahan*, authorizing penalties for violation of the immigration laws, relied on *Ju Toy* and *Wong Wing v. United States*, 163 U.S. 228 (1896), among other immigration cases. 214 U.S. at 335–36. Many of the non-immigration cases cited by the Court also relied on immigration precedents. See *Atlas*, 430 U.S. at 450–51 (citing, inter alia, *Phillips v. Comm’r*, 283 U.S. 589, 599–600 (1931) (citing, inter alia, *Ju Toy*), *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929) (citing, inter alia, *Fong Yue Ting* and *Nishimura Ekiu*)).

¹⁷⁶ 246 F. 54 (2d Cir. 1917).

final decision of the local and district boards”¹⁷⁷ The Fourth Circuit reached the same result, stating as a general principle that the “action of such executive boards within the scope of their authority is final, and not subject to judicial review, when the investigation has been fair and the finding supported by substantial evidence. . . .”¹⁷⁸ Other draft cases also rely on immigration precedents,¹⁷⁹ but the *Ju Toy* line was by no means limited to that context. Many federal courts took “the view that the Chinese exclusion cases, like [*Fong Yue Ting*] and [*Ju Toy*], and others, have a strong analogous bearing upon the question of the conclusiveness of an authorized executive regulation”¹⁸⁰ Thus, federal courts have invoked the *Ju Toy* line in support of administrative finality in antitrust,¹⁸¹ postal rate,¹⁸² tax,¹⁸³ patent,¹⁸⁴ railroad rate,¹⁸⁵ customs,¹⁸⁶ criminal habeas cor-

¹⁷⁷ *Id.* at 61.

¹⁷⁸ *Arbitman v. Woodside*, 258 F. 441, 442 (4th Cir. 1919) (citing, inter alia, *Angelus, Tang Tun v. Edsell*, 223 U.S. 673 (1912), and *Ju Toy*).

¹⁷⁹ For example, in *United States ex rel. Trainin v. Cain*, 144 F.2d 944, 948 (2d Cir. 1944), the court noted that constitutional support for administrative finality “can be drawn from the analogy of the immigration cases, which have long been utilized in construing the selective service laws. . . .” (citing, inter alia, *Angelus, Tang Tun, Chin Yow v. United States*, 208 U.S. 8 (1908), *Ju Toy*, and *Nishimura Ekiu*). See also *Oestereich v. Selective Serv. Sys.*, 393 U.S. 233, 241 (1968) (citing *Chin Yow*); *United States v. VanDenBerg*, 139 F.2d 654, 656 (7th Cir. 1944) (citing *Chin Yow*); *United States v. Messersmith*, 138 F.2d 599, 602 (7th Cir. 1943) (citing *Chin Yow*); *Ex parte Stanziale*, 138 F.2d 312, 315 n.10 & 316 n.11 (3d Cir. 1943) (citing *Chin Yow*); *Graf v. Mallon*, 138 F.2d 230, 234 (8th Cir. 1943) (citing *Chin Yow*); *Franke v. Murray*, 248 F. 865, 869 (8th Cir. 1918) (citing *Chin Yow*); *United States ex rel. Pascher v. Kinkead*, 248 F. 141, 143–44 (D.N.J. 1918) (citing *Low Wah Suey v. Backus*, 225 U.S. 460 (1912), *Chin Yow, Ju Toy, Fong Yue Ting*, and *Nishimura Ekiu*), *aff’d*, 250 F. 692 (3d Cir. 1918); *United States v. Buttecali*, 46 F. Supp. 39, 44 (S.D. Tex. 1942) (citing *Chin Yow*), *aff’d*, 130 F.2d 172 (5th Cir. 1942).

¹⁸⁰ *United States v. Am. Express Co.*, 177 F. 735, 738 (C.C.D. Mass. 1910).

¹⁸¹ See, e.g., *United States v. New York, N.H. & H.R. Co.*, 165 F. 742, 746 (C.C.D. Mass. 1908) (citing, inter alia, *Ju Toy*).

¹⁸² See, e.g., *Lewis Pub. Co. v. Wyman*, 152 F. 787, 799 (C.C.E.D. Mo. 1907) (citing *Ju Toy, Yamataya*, and *Nishimura Ekiu*).

¹⁸³ See, e.g., *Slayton v. Comm’r*, 76 F.2d 497, 498 (1st Cir. 1935) (citing *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91 (1913) (citing *Zakonaite v. Wolf*, 226 U.S. 272 (1912), *Tang Tun, Low Wah Suey*, and *Chin Yow*)); *Comm’r v. Liberty Bank & Trust Co.*, 59 F.2d 320, 323 (6th Cir. 1932) (citing, inter alia, *Fong Yue Ting*); *Park Falls Lumber Co. v. Burlingame*, 1 F.2d 855, 857 (7th Cir. 1924) (citing, inter alia, *Ng Fung Ho* and *Ju Toy*); *Cappellini v. Comm’r*, 14 B.T.A. 1269, 1285 (1929) (Milliken, J., dissenting) (citing *Ng Fung Ho* and *Ju Toy*).

¹⁸⁴ See, e.g., *Richards v. Meissner*, 155 F. 135, 137 (C.C.E.D. Mo. 1907) (citing, inter alia, *Yamataya* and *Ju Toy*).

¹⁸⁵ See, e.g., *United States v. Great N. R. Co.*, 157 F. 288, 291 (C.C.S.D.N.Y. 1907) (citing *Ju Toy*), *error dismissed*, 214 U.S. 530 (1909).

¹⁸⁶ See, e.g., *Frischer & Co. v. Elting*, 60 F.2d 711, 714 (2d Cir. 1932) (Augustus N. Hand, J., joined by Learned Hand & Swan, JJ.) (citing *Ju Toy*); *Cruikshank v. Bidwell*, 86 F. 7, 7 (C.C.S.D.N.Y. 1898) (citing *Lem Moon Sing v. United States*, 158 U.S. 538 (1895)), *aff’d*, 176 U.S. 73 (1900).

pus,¹⁸⁷ veterans,¹⁸⁸ labor¹⁸⁹ and land claim¹⁹⁰ cases.

State courts also have relied on the *Ju Toy* line. The Washington Supreme Court, after extensive discussion of *Ju Toy*, *Nishimura Ekiu*, and other cases, upheld as unreviewable the administrative quarantine of an allegedly diseased person.¹⁹¹ “It would seem that the analogy of these cases is complete,”¹⁹² said the court, ruling that it was constitutional “to make the determination of a fact by a properly constituted health officer final and binding upon the public as well as upon the courts.”¹⁹³ Other state courts applied the *Ju Toy* line to a variety of administrative schemes: settlement of government officers’ accounts in Alabama,¹⁹⁴ pest control in California,¹⁹⁵ workers’ compensation in Illinois,¹⁹⁶ movie censorship in Kansas,¹⁹⁷ lease disputes¹⁹⁸ and oil and gas regulation¹⁹⁹ in Louisiana, condemnation proceedings in Nebraska,²⁰⁰ removal of officers in New

¹⁸⁷ See, e.g., *Christianson v. Zerst*, 89 F.2d 40, 41 (10th Cir. 1937) (citing *United States ex rel. Tisi v. Tod*, 264 U.S. 131 (1924), *United States ex rel. Vajtauer v. Comm’r of Immigration*, 273 U.S. 103 (1927), and *Chin Yow*); *In re Anderson*, 140 Cal. Rptr. 546, 551 (App. 1977); *Uram v. Roach*, 37 P.2d 793, 796 (Wyo. 1934).

¹⁸⁸ See, e.g., *Tietjen v. United States Veteran’s Admin.*, 692 F. Supp. 1106, 1111 (D. Ariz. 1988) (citing *Chin Yow* and *Yamataya*), *aff’d on other grounds*, 884 F.2d 514 (9th Cir. 1989).

¹⁸⁹ See, e.g., *Lewis v. Am. Fed’n of State County & Mun. Emp., AFL-CIO*, 407 F.2d 1185, 1194 & n.24 (3d Cir. 1969) (citing *Chin Yow* and *Kwock Jan Fat v. White*, 253 U.S. 454 (1920)).

¹⁹⁰ See, e.g., *Edwards v. Bodkin*, 249 F. 562, 570 (9th Cir. 1918).

¹⁹¹ *State ex rel. McBride v. Super. Ct.*, 174 P. 973, 977–78 (Wash. 1918).

¹⁹² *Id.* at 978.

¹⁹³ *Id.* at 979.

¹⁹⁴ See *Almon v. Morgan County*, 16 So. 2d 511, 516 (Ala. 1944) (citing *Yamataya*).

¹⁹⁵ See *Irvine v. Citrus Pest Dist. No. 2*, 144 P.2d 857, 860 (Cal. App. 1944) (citing, inter alia, *Ju Toy*); see also *Dare v. Bd. of Med. Exam’rs*, 136 P.2d 304, 316 (Cal. 1943) (Traynor, J., concurring in part and dissenting in part) (due process not violated by investing administrative boards with factfinding powers) (citing *Ju Toy*).

¹⁹⁶ See *Nega v. Chicago Rys. Co.*, 148 N.E. 250, 253 (Ill. 1925).

¹⁹⁷ See *Mid-W. Photo-Play Corp. v. Miller*, 169 P. 1154, 1156 (Kan. 1918) (Mason, J., concurring) (citing, inter alia, *Fong Yue Ting*).

¹⁹⁸ See *State ex rel. Porterie v. Grace*, 166 So. 133, 137 (La. 1936) (citing, inter alia, *Ju Toy*, *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904), and *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909)).

¹⁹⁹ See *Hunter v. McHugh*, 11 So. 2d 495, 500 (La. 1942) (“It is recognized consistently that a statute which delegates to an administrative officer or board or commission the authority to find the facts upon which the law is to be applied is not a delegation of either the judicial or the legislative power.”) (citing, inter alia, *Ju Toy*, *Stranahan*, *Turner*), *appeal dismissed*, 320 U.S. 222 (1943).

²⁰⁰ See *May v. City of Kearney*, 17 N.W.2d 448, 462 (Neb. 1945) (citing, inter alia, *Ju Toy*).

Jersey,²⁰¹ taxation for improvements in Oklahoma,²⁰² insurance regulation in Pennsylvania,²⁰³ and, coming full circle, immigration in the Republic of Hawai'i.²⁰⁴

B. *Exceptions to Administrative Finality*

1. *Due Process*

Just as immigration cases contributed to the evolution of administrative finality, they also helped establish the limits thereof. Fairly early on, the Supreme Court made clear that violations of due process could invalidate an otherwise final administrative decision.²⁰⁵ However, the Court's view afforded immigrants little protection. In *Fong Yue Ting*, the majority was untroubled by a rule deeming the testimony of "at least one credible white witness" sufficient to prove that a Chinese person was lawfully a resident.²⁰⁶ Yet, in *Chin Yow v. United States*,²⁰⁷ the Court held that a Chinese person ordered deported would be entitled to habeas corpus relief if he "had been allowed nothing but the semblance of a hearing"²⁰⁸ because he was "prevented by the officials of the commissioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States."²⁰⁹ In *Tang Tun v. Edsell*,²¹⁰ the Court suggested that habeas relief might be warranted if "the evidence for the applicants was of such an indisputable character that their rejection argues the denial of the fair hearing and consideration

²⁰¹ See *Allan v. Durand*, 57 A.2d 668, 670 (N.J. 1948) ("Where the highest administrative official has rendered his decision and final determination has been vested, as here, by statute in an administrative officer the Court has no power to pass upon such officer's action unless expressly authorized to do so. [*Ju Toy*] is likewise authority for the proposition that the vesting of the power of final determination in an administrative official, as here, is not a denial of due process of law." (citations omitted)). See generally *McGann v. La Brecque Co.*, 109 A. 501, 502 (N.J. 1920) (citing, inter alia, *Ju Toy*).

²⁰² See *Pryor v. W. Paving*, 184 P. 88, 90 (Okla. 1919) ("It is not a denial of due process of law for commissioners and boards to exercise administrative powers when executing statutory enactment affecting the rights of citizens, so long as they observe the fundamental principles which inhere in due process of law.") (citing, inter alia, *Yamataya*).

²⁰³ See *National Auto. Serv. Corp. v. Barford*, 137 A. 601, 602 (Pa. 1927) (citing, inter alia, *Ju Toy*) (holding insurance regulatory act unconstitutional for allowing insurance commissioner to close and liquidate without notice, opportunity to be heard, or right of appeal).

²⁰⁴ See *In re Tatsu*, 10 Haw. 701 (1897) (citing *Wong Wing v. United States*, 163 U.S. 228 (1896), *Lem Moon Sing v. United States*, 158 U.S. 538 (1895), and *Fong Yue Ting*).

²⁰⁵ See, e.g., *Yamataya*, 189 U.S. at 99–100.

²⁰⁶ *Fong Yue Ting*, 149 U.S. at 729–30.

²⁰⁷ 208 U.S. 8 (1908).

²⁰⁸ *Id.* at 12.

²⁰⁹ *Id.* at 11.

²¹⁰ 223 U.S. 673 (1912).

of their case to which they were entitled.”²¹¹ And in *Low Wah Suey v. Backus*,²¹² the Court summarized that “hearings before executive officers may be made conclusive when fairly conducted.”²¹³

As Professor Mashaw has explained, “until the New Deal virtually all of the Supreme Court’s due process jurisprudence was concerned with the activities of state government.”²¹⁴ Accordingly, these unusual explorations of due process in the context of federal administration were pressed into service in areas beyond immigration. The Supreme Court recognized the influence of these immigration rulings in *ICC v. Louisville & Nashville Railroad Co.*,²¹⁵ a “well-known”²¹⁶ 1913 decision in which the Court restated the due process limits on administrative procedures primarily by citing immigration cases:

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the ‘indisputable character of the evidence’ (*Tang Tun*; *Chin Yoh* [sic]; *Low Wah Suey*; . . .), or, if the facts found do not, as a matter of law, support the order made. [Citations of ICC cases omitted.]²¹⁷

The citation of these Asian Exclusion cases in non-immigrant settings suggests that they are part of the same due process approach and casts doubt on the idea that immigration due process is constitutionally distinct. In fact, just as the ICC cases sometimes relied on immigration precedents, so immigration cases cited ICC decisions.²¹⁸

However, even the cases that individuals won did little to limit administrative authority, for in such cases the administrative action was extreme or the ground of relief was narrow. In *Chin Yow*, for example, the Court, while recognizing that a person of Chinese ancestry who claimed to be a citizen might be entitled to *habeas corpus* if “it could be shown . . . that the petitioner had been allowed nothing but the semblance

²¹¹ *Id.* at 681.

²¹² 225 U.S. 460 (1912).

²¹³ *Id.* at 468.

²¹⁴ MASHAW, *supra* note 78, at 2.

²¹⁵ 227 U.S. 88 (1913).

²¹⁶ Friendly, *supra* note 21, at 1271.

²¹⁷ 227 U.S. at 91. *See also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161–62 (1951) (Frankfurter, J., concurring) (citing *Yamataya* as a general due process case).

²¹⁸ *See, e.g.,* Flynn *ex rel.* Lum Hand v. Tillinghast, 62 F.2d 308, 310 (1st Cir. 1932) (citing *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91 (1913)); Svarney v. United States, 7 F.2d 515, 517 (8th Cir. 1925) (same); Whitfield v. Hanges, 222 F. 745, 749 (8th Cir. 1915) (same).

of a hearing,”²¹⁹ found that due process would not be violated “simply by proving that the Commissioner [of immigration] and the Department of Commerce and Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced.”²²⁰ The Court concluded that “the denial of a [proper] hearing cannot be established by proving that the decision was wrong.”²²¹ *Chin Yow* does not represent an expansive view of due process.

2. “Some Evidence”

In addition to requiring a fair hearing, early immigration cases recognized that an administrative decision was invalid if unsupported by evidence.²²² Gerald Neuman suggests that a constitutional requirement of “some evidence” for federal administrative decisions originated in the immigration context.²²³ Even recent cases reflect the immigration origins of this requirement. In the landmark case of *Superintendent v. Hill*,²²⁴ in which the Supreme Court held that prison disciplinary hearings that could lead to the loss of “good time” credits had to be supported by “some evidence,” two Supreme Court precedents the Court cited were immigration cases,²²⁵ both of which relied on earlier Asian Exclusion cases.²²⁶

3. Jurisdictional Facts

In another immigration case, the Court also recognized that final resolution of certain questions is beyond the competence of federal administrative bodies. In *Ng Fung Ho v. White*,²²⁷ the Court adopted Justice Brewer’s *Ju Toy* dissent with respect to persons being deported from the interior of the United States, whereas *Ju Toy* addressed exclusion at the nation’s border. In *Ng Fung Ho*, persons of Chinese racial ancestry living in San Francisco were subjected to deportation proceedings; the admin-

²¹⁹ 208 U.S. at 12.

²²⁰ *Id.* at 11–12.

²²¹ *Id.* at 13.

²²² See, e.g., *Zakonaite v. Wolf*, 226 U.S. 272, 274–75 (1912) (“[A]n examination of the evidence upon which the order of deportation was based convinces us that it was adequate to support the Secretary’s conclusion of fact. That being so, and the appellant having had a fair hearing, the findings of fact are not subject to review by the courts.”); *Tang Tun v. Edsell*, 223 U.S. 673 (1912).

²²³ Gerald L. Neuman, *The Constitutional Requirement of “Some Evidence,”* 25 SAN DIEGO L. REV. 633, 636 (1988).

²²⁴ 472 U.S. 445 (1985).

²²⁵ *Id.* at 455–56 (quoting *United States ex rel. Vajtauer v. Comm’r of Immigration*, 273 U.S. 103, 106 (1927), and citing *United States ex rel. Tisi v. Tod*, 264 U.S. 131, 133–34 (1924)).

²²⁶ *Vajtauer*, 273 U.S. at 106 (citing *Tisi*, *Kwock Jan Fat v. White*, 253 U.S. 454 (1920), and *Chin Yow*); *Tisi*, 264 U.S. at 133–34 (citing *Ng Fung Ho v. White*, 259 U.S. 276 (1922), *Kwock Jan Fat*, *Tang Tun v. Edsell*, 233 U.S. 673 (1912), and *Chin Yow*).

²²⁷ 259 U.S. 276 (1922).

istrative officers rejected their claims of citizenship. On appeal, the Court recognized that claims of citizenship made adherence to the principle of administrative finality inappropriate.²²⁸ The court held that such claims could be pursued in a judicial trial.²²⁹

Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact

To deport one who so claims to be a citizen obviously deprives him of liberty It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law

It follows that [the petitioners] are entitled to a judicial determination of their claims that they are citizens of the United States²³⁰

Ng Fung Ho has been assimilated into mainstream law in contexts having nothing to do with citizenship or immigration. In *Crowell v. Benson*,²³¹ a case Professor Fallon called “[t]he fountainhead for the stream of cases legitimating the role of the modern administrative agency,”²³² the Court held that certain claims in an employment compensation system had to be subject to judicial reexamination. *Ju Toy* and its progeny were among the cases the Court cited in support of the general authority of administrative tribunals,²³³ but the Court invoked *Ng Fung Ho* as to what it perceived to be the most important facts:

In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function Persons claiming to be citizens of the United States “are entitled to a judicial determination of their claims,” said this Court in *Ng Fung Ho v. White*

²²⁸ *Id.* at 284–85.

²²⁹ *Id.* at 285.

²³⁰ *Id.* at 284–85. A similar jurisdictional fact argument had been considered and rejected in *Ju Toy*.

²³¹ 285 U.S. 22 (1932).

²³² Fallon, *supra* note 6, at 923.

²³³ 285 U.S. at 50–51 & n.13.

. . . [W]hen fundamental rights are in question, this Court has repeatedly emphasized “the difference in security of judicial over administrative action.” *Ng Fung Ho v. White*, supra.²³⁴

John Dickinson wrote that “[t]here can be no doubt that the holding in [*Ng Fung Ho*] paves the way for *Crowell v. Benson*.”²³⁵ In *Jacobellis v. Ohio*,²³⁶ a First Amendment case, the Court cited *Ng Fung Ho* and *Crowell* to justify independent judicial review of obscenity, noting that “[e]ven in judicial review of administrative agency determinations, questions of ‘constitutional fact’ have been held to require de novo review.”²³⁷ The scope of *Ng Fung Ho*’s assimilation is reflected in Justice Frankfurter’s dissent in *Stark v. Wickard*.²³⁸ Citing *Ng Fung Ho*, he wrote:

Except in those rare instances, as in a claim of citizenship in deportation proceedings, when a judicial trial becomes a constitutional requirement because of “The difference of security of judicial over administrative action,” whether judicial review is available at all and, if so, who may invoke it, under what circumstances, in what manner, and to what end, are questions that depend for their answer upon the particular enactment under which judicial review is claimed.²³⁹

Although a dissent, the opinion seems an accurate statement of law.²⁴⁰

²³⁴ *Id.* at 60–61.

²³⁵ DICKINSON, *supra* note 153, at 1077 n.65.

²³⁶ 378 U.S. 184 (1964).

²³⁷ *Id.* at 190 n.6.

²³⁸ 321 U.S. 288 (1944).

²³⁹ *Id.* at 312 (Frankfurter, J., dissenting). *See also* Solesbee v. Balkom, 339 U.S. 9, 24 (1950) (Frankfurter, J., dissenting) (arguing that a determination of the sanity of a person under a capital sentence “does not require the safeguards of a judicial proceeding”) (citing *Ng Fung Ho*); *United States v. ICC*, 337 U.S. 426, 446 (1949) (Frankfurter, J., dissenting); *Phyle v. Duffy*, 334 U.S. 431, 439–40 (1948) (in death penalty case, describing *Ng Fung Ho* as meaning that “life shall not be taken by a state as the result of the unreviewable ex parte determination of a crucial fact made by a single executive officer”), *on remand*, 208 P.2d 668, 677 (Cal. 1949) (Traynor, J., concurring) (citing, *inter alia*, *Ju Toy* and other immigration cases in support of finality under the circumstances); *Estep v. United States*, 327 U.S. 114, 120 (1946) (“Judicial review may indeed be required by the Constitution.”) (citing *Ng Fung Ho*); *Schiller v. Lefkowitz*, 219 A.2d 378, 384 & n.5 (Md. 1966); *Valley & Siletz R.R. Co. v. Thomas*, 48 P.2d 358, 380 (Or. 1935) (Rossman, J., dissenting).

²⁴⁰ As *Thomas v. Union Carbide Agricultural Products Company*, 473 U.S. 568, 583 (1985), explains:

Many matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts. *See, e.g.*, 5 U.S.C. §§ 701(a)(1), 701(a)(2); *Heckler v. Chaney*, 470 U.S. 821, 837–838 (1985); *United States v. Erika, Inc.*, 456 U.S. 201, 206 (1982) (no review of Medicare reimbursements); Monaghan, *Marbury and the Administrative State*, 83 Colum.L.Rev. 1, 18 (1983) (administrative agencies can conclusively adjudicate claims created by the administrative state, by and

In sum, the *Ju Toy* line served as an early and influential authority for the idea that final factfinding in regulatory or benefit programs could be committed to administrative agencies. However, with *Ng Fung Ho* and subsequent cases, the Court recognized the limitations on administrative finality with respect to issues of fundamental rights. Professor Frank Goodnow, wrote of *Nishimura Ekiu* and similar importation and tax decisions:

On their face these decisions, or rather the opinions in which they are given, would seem to go a long way toward laying down the rule that it is perfectly consistent with due process of law to vest in administrative officers the final determination, after a hearing of the persons concerned, of facts upon which the right to property or liberty depends.²⁴¹

Professor Goodnow suggested that this principle might be limited to situations involving public benefits, rather than private rights recognized by the common law.²⁴² But that is exactly the point; in this era, “[i]ndividual welfare is shaped less and less by common law rules, more and more by legislative and administrative action.”²⁴³ Authority to distribute

against private persons); Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 Duke L.J. 197 (same).

See also *Franklin v. Massachusetts*, 505 U.S. 788, 820 n.21 (1992); *United States v. Touby*, 909 F.2d 759, 768 (3d Cir. 1990).

²⁴¹ FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 336–37 (1905).

²⁴² As Professor Goodnow explained:

It is, however, to be remembered that these cases—that is, cases of government officials, tax and importation cases, and cases of the admission of aliens—were decided largely in view either of historical considerations or of the plenary power of the government to regulate foreign commerce and to expel aliens. It cannot, therefore, be said that under the decisions of the United States Supreme Court it is absolutely certain that the power of final determination may constitutionally be vested, in all cases, in an administrative authority where such determination seriously infringes upon private rights.

Id.

In *Northern Pipeline Construction Co. v. Marathon Pipeline*, Justices Brennan, Marshall, Blackmun, and Stevens issued an opinion that suggested agreement with the structure of *Ju Toy* and *Ng Fung Ho*, recognizing a distinction for due process purposes between “congressionally created rights and constitutionally recognized rights.” 458 U.S. 50, 82 n.34 (1982) (citing *Crowell* and *Ng Fung Ho*). Similarly, John Dickinson noted that in immigration, land and postal cases—all prototypical benefits cases—“the courts have tended to leave to the officials a very free hand.” DICKINSON, *supra* note 153, at 59. *See also* *In re Cumberland Power Co.*, 249 S.W. 818, 820 (Tenn. 1923) (“The determination of pension claims, decisions of the land department adjudicating the rights to public lands, decisions of draft boards upon the eligibility for military service, and decisions of the emigration officials upon deportation of aliens, all involve the power to hear and determine, but have been held properly placed in the executive or administrative departments.”) (citing, *inter alia*, *Fong Yue Ting* and *Ju Toy*).

²⁴³ Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95

tax proceeds as benefits or other government largess through exclusively administrative tribunals means most federal programs are covered.

C. Exhaustion of Administrative Remedies

A now-common feature of administrative law is that a party must exhaust administrative remedies before proceeding to court.²⁴⁴ This principle contributes to efficiency and administrative authority in several ways. The individual may win an administrative appeal, obviating the need for judicial involvement. In addition, administrative processes will develop facts and legal issues in the event judicial review is necessary.²⁴⁵ On the other hand, requiring resort to administrative appeals may delay vindication of fundamental rights. Perhaps more importantly, an individual faced with mandatory administrative hurdles may fail to raise arguments or introduce facts, precluding their consideration in court. Even worse, the individual may miss a required step in the administrative process, eliminating judicial review entirely.

Authorities recognize *United States v. Sing Tuck*²⁴⁶ as the first Supreme Court opinion requiring exhaustion of federal administrative remedies prior to judicial proceedings. Writing for the Court, Justice Holmes concluded that an individual could not test an order of deportation through habeas corpus because he failed to take advantage of an appeal to the Secretary of Labor and Commerce authorized by statute. As the Davis treatise explained: “In 1904 in *United States v. Sing Tuck*, the Supreme Court denied an alien relief from an exclusion order issued by immigration officers, on the ground that the petitioner had not appealed to the Secretary of Commerce and Labor. This principle has been followed ever since, with occasional departures for exceptional cases.”²⁴⁷ Similarly, Professor Berger observed that “[a] definitive formulation of the doctrine by the Supreme Court had . . . been enunciated in an immigration case, *United States v. Sing Tuck*.”²⁴⁸

HARV. L. REV. 1195, 1204 (1982).

²⁴⁴ See, e.g., *Shalala v. Ill. Council on Long Term Care*, 120 S. Ct. 1084, 1093 (2000); *United States v. Williams*, 514 U.S. 527, 532–33 (1995); *McNeil v. United States*, 508 U.S. 106 (1993). But see *Darby v. Cisneros*, 509 U.S. 137 (1993) (noting that exhaustion is not required under the Administrative Procedure Act, unless the statute at issue specifically so requires).

²⁴⁵ See, e.g., *Christian v. N.Y. State Dep’t of Labor*, 414 U.S. 614, 622 (1974).

²⁴⁶ 194 U.S. 161 (1904).

²⁴⁷ 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 20.08, at 104 (1958) (citations omitted).

²⁴⁸ Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 981–82 (1939). See also *United States v. Consol. Mines & Smelting Co.*, 455 F.2d 432, 439 (9th Cir. 1971) (noting that the exhaustion “rule was formulated in *United States v. Sing Tuck*”); *United States v. Carroll*, 203 F. Supp. 423, 428 (W.D. Ark. 1962) (noting that exhaustion “principle has been followed ever since [*Sing Tuck*]”); *Dunham v. Westminster*, 20 Cal. Rptr. 772, 774 (Dist. Ct. App. 1962); *Levinson v. Del. Comp. Rating Bur.*, 616 A.2d 1182, 1189 & n.3 (Del. 1992); *Tex. Air Control Bd. v. Travis County*, 502 S.W.2d 213, 215 (Tex.

Although excluded as an alien, what Sing Tuck lost was a chance to prove that he was a United States citizen. The Second Circuit had ruled in his favor based in part on an earlier Ninth Circuit decision holding that a person claiming citizenship need not pursue administrative appeals.²⁴⁹ Since existing law did not require exhaustion, rejection of the claim on a novel theory seemed harsh.²⁵⁰ Justice Brewer's dissent made a jurisdictional fact argument—noting that “by its very terms that act applies only to an alien, and these parties assert that they are not aliens. If not aliens, certainly that act is inapplicable.”²⁵¹ The real problem was more fundamental:

Must an American citizen, seeking to return to this his native land, be compelled to bring with him two witnesses to prove the place of his birth or else be denied his right to return, and all opportunity of establishing his citizenship in the courts of his country? No such rule is enforced against an American citizen of Anglo-Saxon descent, and if this be, as claimed, a government of laws and not of men, I do not think it should be enforced against American citizens of Chinese descent.²⁵²

Sing Tuck has been applied widely beyond the immigration context. It has been cited by state and federal courts in cases involving FCC licensing,²⁵³ energy regulation,²⁵⁴ draft²⁵⁵ and other military²⁵⁶ issues, civil service,²⁵⁷ labor,²⁵⁸ employment²⁵⁹ and voting²⁶⁰ discrimination, public

Civ. App. 1973). In the criminal habeas corpus context, the roots of the exhaustion doctrine are older. *See, e.g., Ex parte Royall*, 117 U.S. 241 (1886).

²⁴⁹ *Sing Tuck v. United States*, 128 F. 592, 593 (2d Cir. 1904) (citing *Gee Fook Sing v. United States*, 49 F. 146 (9th Cir. 1892)), *rev'd*, 194 U.S. 161 (1904).

²⁵⁰ *See also In re Tom Yum*, 64 F. 485, 490 (N.D. Cal. 1894).

²⁵¹ 194 U.S. at 171 (Brewer, J., dissenting).

²⁵² *Id.*

²⁵³ *Black River Valley Broad. v. McNinch*, 101 F.2d 235, 239 (D.C. Cir. 1938) (Vinson, J.).

²⁵⁴ *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300, 306 (1937).

²⁵⁵ *Ex parte Tinkoff*, 254 F. 222, 224 (N.D. Ill. 1918) (citing, inter alia, *Sing Tuck, Nishimura Ekiu*, and *Summertime v. Local Bd.*, Div. No. 10, 248 F. 832, 834 (E.D. Mich. 1917) (citing *Sing Tuck*)), *aff'd per curiam*, 254 F. 225 (7th Cir. 1918).

²⁵⁶ *Lichtenfels v. Orr*, 604 F. Supp. 271, 275 (S.D. Ohio 1984), *aff'd per curiam*, 878 F.2d 1444 (Fed. Cir. 1989).

²⁵⁷ *Hardy v. Rossell*, 135 F. Supp. 260, 263 & n.6 (S.D.N.Y. 1955) (quoting *Sing Tuck*); *State ex rel. Jones v. Nashville*, 279 S.W.2d 267, 268 (Tenn. 1955) (“An oft quoted statement of the Supreme Court of the United States is that such a rule is enforced to prevent attempts ‘to swamp the courts by a resort to them in the first instance’”) (quoting *Sing Tuck*, 194 U.S. at 170).

²⁵⁸ *McNish v. Am. Brass Co.*, 89 A.2d 566, 571 (Conn. 1952).

²⁵⁹ *Simmons v. Schlesinger*, 13 Fair Empl. Prac. Cas. (BNA) 1765 (4th Cir. 1976); *Alleggheny Airlines v. Fowler*, 261 F. Supp. 508, 517 (S.D.N.Y. 1966); *Ward v. Keenan*, 70 A.2d 77, 79 (N.J. 1949).

²⁶⁰ *Darby v. Daniel*, 168 F. Supp. 170, 193 & n.39 (S.D. Miss. 1958) (three-judge court).

benefits,²⁶¹ securities,²⁶² attorney discipline,²⁶³ and federal review of state²⁶⁴ and federal²⁶⁵ criminal convictions.

D. *The Civil-Criminal Distinction and Administrative Punishment*

Even outside the criminal context, individuals dealing with the government still want, and can benefit from, the due process protections that traditionally accompany criminal prosecutions. In *Fong Yue Ting*, the Court considered and rejected the idea that deportation was punishment or anything akin to criminal conviction.²⁶⁶ “The order of deportation is not a punishment for crime,” and, therefore, “the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.”²⁶⁷

Three years after *Fong Yue Ting*, Chinese immigrants earned a rare win from the Supreme Court in *Wong Wing v. United States*.²⁶⁸ On the very day it upheld racial segregation in *Plessy v. Ferguson*,²⁶⁹ the Court invalidated a portion of the Chinese Exclusion Act requiring summary imprisonment of unauthorized Chinese in the United States. The Court explained that *Wong Wing* could not be confined to the Detroit house of correction at hard labor based on a summary hearing rather than a full trial. The Court observed that “no limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens.”²⁷⁰ Yet, the Court found that “[i]t is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.”²⁷¹

²⁶¹ *Abelleria v. Dist. Court*, 109 P.2d 942, 948 (Cal. 1941); *Okla. Pub. Welfare Comm’n v. State ex rel. Thompson*, 105 P.2d 547, 549 (Okla. 1940).

²⁶² *Touche, Ross & Co. v. SEC*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,415 (S.D.N.Y. 1978).

²⁶³ *Melnick v. Statewide Grievance Comm’n*, 1995 WL 387579, at *2 (Conn. Super. Ct. June 26, 1995) (docket number unavailable).

²⁶⁴ *Ex parte Simon*, 208 U.S. 144, 147–48 (1908).

²⁶⁵ *McKart v. United States*, 395 U.S. 185, 205 (1969) (White, J., concurring).

²⁶⁶ 149 U.S. 698 (1893).

²⁶⁷ *Id.* at 730.

²⁶⁸ 163 U.S. 228 (1896).

²⁶⁹ 163 U.S. 537 (1896).

²⁷⁰ *Wong Wing*, 163 U.S. at 236.

²⁷¹ *Id.* *Wong Wing* and *Fong Yue Ting* are both cited frequently on the question of what constitutes punishment. *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 668 (1977) (citing *Fong Yue Ting* in support of conclusion that corporal punishment of children did not violate Eighth Amendment); *Flemming v. Nestor*, 363 U.S. 603, 616 (1960) (citing *Fong Yue Ting* and *Galvan v. Press*, 347 U.S. 522 (1954), in support of conclusion that termination of Social Security retirement benefits is not punishment); *Helvering v. Mitchell*, 303 U.S.

While *Wong Wing* held federal action through summary process unconstitutional, in an odd way it has operated to enhance rather than restrict governmental authority. Almost anything the government does to a person will appear less severe than summary imprisonment and thus may look good by comparison. For example, in *Bell v. Wolfish*,²⁷² the Court upheld many restrictive practices imposed on pretrial detainees awaiting criminal proceedings. The Court cited *Wong Wing*, *Kennedy v. Mendoza-Martinez*,²⁷³ and *Ingraham v. Wright*²⁷⁴ for the proposition that persons could not be punished without trial,²⁷⁵ but concluded that regulatory measures, including body cavity searches without probable cause, would not constitute punishment.²⁷⁶ *Wong Wing* is sometimes cited in vain by dissenting justices who argue that it is being evaded,²⁷⁷ but their critiques usually are ignored, and *Wong Wing* has not proved to be a restriction on government power. On the contrary, the case is now customarily cited by courts holding that because a deprivation is imposed administratively, it is presumptively not punishment.²⁷⁸

E. Contemporary Impact: *Mathews v. Eldridge*

Perhaps the most important modern due process case is *Mathews v. Eldridge*,²⁷⁹ which sets forth the test for evaluating the constitutional sufficiency of government procedures. Examination of the due process authorities on which *Mathews* relies reveals the contemporary influence of the Asian Exclusion cases. Several of these authorities cite Asian Exclusion cases directly, including *Flemming v. Nestor*,²⁸⁰ *Joint Anti-Fascist*

391, 399 & n.2 (1938) (holding that monetary penalty in tax case is not punishment) (“Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted Typical of this class of sanctions is the deportation of aliens.”) (citing *Fong Yue Ting*, *Ng Fung Ho* and other deportation cases).

²⁷² 441 U.S. 520 (1979).

²⁷³ 372 U.S. 144, 165–67, 186 (1963) (citing *Wong Wing*).

²⁷⁴ 430 U.S. 651, 671–72 n.40 (1977).

²⁷⁵ *Bell*, 441 U.S. at 535–36 & n.17.

²⁷⁶ *Id.* at 537 (citing *Flemming v. Nestor*, 363 U.S. 603, 613–14 (1960)).

²⁷⁷ See, e.g., *United States v. Spector*, 343 U.S. 169, 176 n.3 (1952) (Jackson, J., joined by Frankfurter, J., dissenting); *United States ex rel. Milwaukee Soc. Democratic Publ’g Co. v. Burlinson*, 255 U.S. 407, 434 (1921) (Brandeis, J., dissenting) (arguing that administrative denial of second class mailing privileges constituted punishment) (citing *Wong Wing*).

²⁷⁸ See, e.g., *Hudson v. United States*, 522 U.S. 93, 103 (1997) (concluding that the fact that the authority to occupationally debar “was conferred upon administrative agencies is prima facie evidence that Congress intended to provide for a civil sanction”) (citing *Helvering*, *Spector*, and *Wong Wing*). But see *United States v. Moreland*, 258 U.S. 433 (1922) (following *Wong Wing*); *Weatherington v. Moore*, 577 F.2d 1073, 1078 n.2 (6th Cir. 1978).

²⁷⁹ 424 U.S. 319 (1976).

²⁸⁰ 363 U.S. 603, 613 (1960) (citing *Wong Wing*); *id.* at 616 (citing *Fong Yue Ting*).

Refugee Committee v. McGrath,²⁸¹ and *Phillips v. Commissioner*.²⁸² Other leading cases on which *Mathews* relies, including *Goldberg v. Kelly*,²⁸³ and *Cafeteria & Restaurant Workers Union v. McElroy*,²⁸⁴ do not cite Asian Exclusion cases directly but still rely heavily on cases that do; almost all of the other cases referred to in *Mathews* cite one or more of these decisions.²⁸⁵ Because of the age²⁸⁶ of the Asian Exclusion cases and their presently distasteful racial taint,²⁸⁷ their import is greater than their

²⁸¹ 341 U.S. 123, 138 n.11 (1951) (citing *Chin Yow*); *id.* at 163 (Frankfurter, J., concurring) (citing *Ng Fung Ho*); *id.* at 201 n.15 (Reed, J., dissenting) (citing *Nishimura Ekiu* and *Ng Fung Ho*).

²⁸² 283 U.S. 589, 595 (1931) (citing *United States v. Woo Jan*, 245 U.S. 552 (1918) and *Ng Fung Ho*); *id.* at 600 (citing *Ju Toy*).

²⁸³ 397 U.S. 254, 263 (1970) (citing *Joint Anti-Fascist Refugee Committee* and *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961)); *id.* at 268 n.15 (citing *FCC v. WJR*, 337 U.S. 265 (1949)); *id.* at 269 (citing *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88 (1913)); *id.* at 271 (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950)).

²⁸⁴ 367 U.S. at 895 (citing *WJR*, *Joint Anti-Fascist Refugee Committee*, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909), *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), *Jay v. Boyd*, 351 U.S. 345 (1956), and *Buttfield v. Stranahan*, 192 U.S. 470 (1904)).

²⁸⁵ *N. Ga. Finishing v. Di-Chem*, 419 U.S. 601, 610 (1975) (citing *Phillips*); *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) (citing *McElroy* and *Goldberg*); *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974) (citing *McElroy* and *Joint Anti-Fascist Refugee Committee*); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610–11 (1974) (citing *Inland Empire Dist. Council v. Millis*, 325 U.S. 697 (1945), *McElroy*, and *Phillips*); *Arnett v. Kennedy*, 416 U.S. 134, 152, 154 (1974) (citing *McElroy* and *Goldberg*); *Bd. of Regents v. Roth*, 408 U.S. 564, 570 n.7, 576 (1972) (citing *Phillips*, *Goldberg*, and *Flemming*); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (citing *McGrath* and *Goldberg*); *Fuentes v. Shevin*, 407 U.S. 67, 92 n.24 (1972) (citing *Phillips*); *Richardson v. Belcher*, 404 U.S. 78, 80 (1971) (citing *Flemming* and *Goldberg*); *Bell v. Burson*, 402 U.S. 535, 540 (1971) (citing *Goldberg*); *Richardson v. Perales*, 402 U.S. 389, 401–02 (1971) (citing *Flemming* and *Goldberg*); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969) (citing *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 598–99 (1950) (citing *Phillips* and *Millis*)); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940) (citing *ICC v. Baird*, 194 U.S. 25 (1904)).

The cases with no obvious reliance on immigration cases include *Armstrong v. Manzo*, 380 U.S. 545 (1965), and *Grannis v. Ordean*, 234 U.S. 385 (1914), both of which deal with sufficiency of notice, and *Dent v. West Virginia*, 129 U.S. 114 (1889), which was decided before the first Asian Exclusion due process cases in the Supreme Court.

²⁸⁶ “Casebooks, which are the nearest thing to anthologies in our field, usually cite and excerpt only the most recent things written; older works sink back into the shadows.” Marvin A. Chirelstein, *Walter J. Blum and My Brilliant Career*, 55 U. CHI. L. REV. 725, 725 (1988).

²⁸⁷ Patricia Wald, a former Chief Judge of the U.S. Court of Appeals for the District of Columbia, wrote that judges sometimes select cases for their opinions based not simply on the legal propositions they embody but also for other associations:

Collegial oversight . . . can influence the choice of case precedent to be relied on or even cited. Certain Supreme Court rulings are so distasteful to some lower court judges that they will ask for their excision in a colleague’s opinion if there is another more acceptable precedent for the same general proposition; *Korematsu v. United States* and *Rust v. Sullivan* are two examples of such pariahs.

Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1379 (1995). Notably, Judge Wald does not suggest these cases are any less influential for their distasteful associations, only that their influence is ob-

citation alone might indicate. Although the Asian Exclusion cases are by no means at the root of all due process, the connections do suggest that the cases are completely integrated into mainstream due process jurisprudence.

F. *The Minimal Impact of the Early ICC*

If the immigration system created law, the ICC should have created more. Administrative control of business raised numerous legal questions, particularly in the *Lochner* era, and the railroad industry surely had access to lawyers. However, the ICC was denied the opportunity to explore the constitutional limits of the administrative form because of the Supreme Court's narrow construction of its enabling act. The Court suggested in 1896 that the ICC had no power to issue orders of general applicability; instead, it only had jurisdiction over particular alleged violations of the Act by specific carriers.²⁸⁸ The Court also held that the ICC could not establish maximum rates for particular rail routes,²⁸⁹ even in an order remedying a proven violation.²⁹⁰ Most fundamentally, the ICC's orders were enforceable despite objection by a private party only after a *de novo* trial.²⁹¹ Justice Harlan dissented in one of many cases in which the Commission lost before the Court, arguing that the Court had come close to making the "commission a useless body for all practical purposes [I]t has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which . . . were intended to be conferred upon it."²⁹²

The pattern set by the ICC and Asian Exclusion cases persists to some extent today: without pretending to have knowledge of all federal administrative structures, it seems a fair generalization that business benefits from more elaborate procedures, individuals less. Critically, the question of administrative procedure is generally answered at the discretion of Congress, not by looking to the due process clause or elsewhere in the Constitution.

The high-end administrative model is the 1946 Administrative Procedure Act. The APA provides for substantial participation in rulemaking by the public and by regulated entities through the notice-and-comment

scured.

²⁸⁸ *Tex. & Pac. Ry. Co. v. ICC*, 162 U.S. 197, 234 (1896).

²⁸⁹ *Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. ICC*, 162 U.S. 184, 196–97 (1896) (holding that the ICC may determine reasonableness of specific rates, but may not prescribe rates in advance without considering individual facts).

²⁹⁰ *ICC v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479, 499 (1897) ("It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act.").

²⁹¹ Fallon, *supra* note 6, at 950.

²⁹² *ICC v. Ala. Midland Ry. Co.*, 168 U.S. 144, 176 (1897) (Harlan, J., dissenting).

process.²⁹³ In formal adjudication, parties have the right to counsel, compulsory process,²⁹⁴ presentation of evidence and cross-examination,²⁹⁵ and a verbatim transcript.²⁹⁶ The APA provides for a separation of prosecution and decision-making functions.²⁹⁷ Parties may respond to initial decisions,²⁹⁸ and they may seek judicial review of final agency action.²⁹⁹

Before 1971, APA judicial review often involved *de novo* factfinding.³⁰⁰ Judicial review in the absence of adequate agency factfinding procedures currently involves an analysis of whether the decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,”³⁰¹ or “unsupported by substantial evidence.”³⁰² However, “arbitrary and capricious” review is “a substantial inquiry . . . [a] probing in-depth review” that explores “whether the decision was based on a consideration of relevant factors.”³⁰³ “[I]nquiry into the facts is to be searching and careful . . . [although] [t]he court is not empowered to substitute its judgment for that of the agency.”³⁰⁴ If the record is insufficient to perform the review, perhaps because the adjudication was informal, the court may order additional inquiries to facilitate review.³⁰⁵

Not all agencies or decisions are subject to this elaborate scheme. Notice-and-comment provisions for rulemaking are inapplicable to “public property, loans, grants, benefits, or contracts”³⁰⁶—in other words, rules governing the broad category of “New Property” are excluded. While some agencies have voluntarily agreed to employ notice-and-comment in such situations, this procedure is discretionary.³⁰⁷

Moreover, many agencies that deal with individuals (as opposed to businesses) have been removed from APA purview. The APA is inapplicable in whole or in part to the incarceration by the U.S. Bureau of Pris-

²⁹³ 5 U.S.C. § 551(c) (1994).

²⁹⁴ 5 U.S.C. § 555(d) (1994).

²⁹⁵ 5 U.S.C. § 556(d) (1994).

²⁹⁶ 5 U.S.C. § 556(e) (1994).

²⁹⁷ 5 U.S.C. § 554(d) (1994).

²⁹⁸ 5 U.S.C. § 557(c) (1994).

²⁹⁹ 5 U.S.C. § 702 (1994).

³⁰⁰ See *Sierra Club v. Peterson*, 185 F.3d 349, 367–68 (5th Cir. 1999) (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402 (1971)).

³⁰¹ 5 U.S.C. § 706(2)(A) (1994).

³⁰² 5 U.S.C. § 706(2)(E) (1994).

³⁰³ 401 U.S. at 415, 416.

³⁰⁴ *Id.* at 416.

³⁰⁵ See *Camp v. Pitts*, 411 U.S. 138 (1973) (per curiam). See generally Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park’s Requirement of Judicial Review “On the Record,”* 10 ADMIN. L.J. AM. U. 179 (1996).

³⁰⁶ 5 U.S.C. 553(a)(2) (1994).

³⁰⁷ *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 447 (9th Cir. 1994) (HUD); *Cosby v. Ward*, 843 F.2d 967, 980 (7th Cir. 1988) (Labor); *Vance v. Hegstrom*, 793 F.2d 1018, 1023 (9th Cir. 1986) (HHS); *Rodway v. U.S. Dep’t of Agriculture*, 514 F.2d 809, 813–14 (D.C. Cir. 1975).

ons,³⁰⁸ deportation decisions by the INS,³⁰⁹ Veteran's benefits,³¹⁰ and activities of the U.S. Sentencing Commission.³¹¹ Because the APA applies only to the federal government, state implementation of Medicaid, Medicare, AFDC, and TANF are not directly regulated by the APA.³¹²

On the other hand, some administrative decisions are subject to review beyond that required by the APA. A tour through the United States Code reveals that many forfeitures, penalties, and other economic decisions are subject to de novo review in federal district court. Major categories include forfeitures imposed by the FCC,³¹³ penalties imposed by FERC,³¹⁴ and all contested actions of the Federal Election Commission.³¹⁵ Ironically, in the areas of Customs and taxation, where the practical arguments and doctrinal tradition supporting administrative finality may be at their strongest, Congress has provided for de novo review of Customs penalties³¹⁶ and IRS tax assessments.³¹⁷ De novo review is also available for a number of other issues, mainly involving business penalties or terminations of property rights.³¹⁸

³⁰⁸ 18 U.S.C. § 3625 (1994).

³⁰⁹ *Ardestani v. INS*, 502 U.S. 129, 133 (1991) (citing *Marcello v. Bonds*, 349 U.S. 302 (1955)).

³¹⁰ *Beamon v. Brown*, 125 F.3d 965 (6th Cir. 1997).

³¹¹ Hence Judge Posner's comments regarding a Sentencing Guideline that was not well supported: "No court would let the Federal Energy Regulatory Commission adopt a rule with such elliptic explanation. But the portion of the APA that authorizes judicial review of the adequacy of agencies' explanations does not apply to the Sentencing Commission." *United States v. Tomasino*, 206 F.3d 739, 744 (7th Cir. 2000).

³¹² *See, e.g., Johnson v. Wells*, 566 F.2d 1016 (5th Cir. 1978).

³¹³ 47 U.S.C. § 504(a) (1994). *See also Dougan v. FCC*, 21 F.3d 1488 (9th Cir. 1994).

³¹⁴ 16 U.S.C. § 823b(d)(3)(B) (1994). *See also FERC v. MacDonald*, 862 F. Supp. 667, 672 (D.N.H. 1994).

³¹⁵ 2 U.S.C. § 437g(a)(6)(A) (1994) (providing for a de novo civil suit in federal court to enforce provisions of the Campaign Act if the FEC fails to reach a "conciliation agreement" with the respondent).

³¹⁶ 19 U.S.C. § 1592(e)(1) (1994). *See also Nippon Miniature Bearing Corp. v. Weise*, 230 F.3d 1131, 1137 (9th Cir. 2000).

³¹⁷ *Ruth v. United States*, 823 F.2d 1091, 1093-94 (7th Cir. 1987); *Fund for the Study of Economic Growth and Tax Reform v. IRS*, 997 F. Supp. 15, 18 (D.D.C. 1998) (discussing 26 U.S.C. § 7428 (1994)).

³¹⁸ *See* 7 U.S.C. § 499g(c) (1994) (Department of Agriculture reparation orders); 7 U.S.C. § 2023(a)(15) (1994) (orders disqualifying businesses from Food Stamp participation); 12 U.S.C. § 1828(c)(7)(A) (1994) (FDIC antitrust clearance of financial institution merger); 12 U.S.C. § 1849(b)(1) (1994) (Federal Reserve Board antitrust clearance); 16 U.S.C. § 3373(c) (1994) (penalties for wildlife violations); 18 U.S.C. § 923(f)(3) (1994) (revocation or denial of federal firearms licenses by the Secretary of the Treasury); 21 U.S.C. § 844a(g) (1994) (civil controlled substance assessments by the Attorney General); 25 U.S.C. § 2103(d) (1994) (Secretary of the Interior's determinations of certain mineral rights); 25 U.S.C. § 314 (1994) (Secretary of the Interior's determinations of rights of way through Indian lands); 30 U.S.C. § 1719(j) (1994) (penalties for failing to pay federal royalties); 33 U.S.C. § 1320(f) (1994) (Environmental Protection Agency international water pollution violations); 42 U.S.C. § 300e-9(e)(3) (1994) (certain sanctions against HMOs imposed by the Department of Health and Human Services); 42 U.S.C. § 2282a(c)(3)(B) (1994) (penalties for safety violations imposed by the Nuclear Regulatory Commission); 42 U.S.C. § 6303(d)(3)(B) (1994) (Department of Energy conservation penalties); 42 U.S.C. § 8433(d)(3)(B) (1994) (industrial fuel penalties imposed by the Department of

In some situations, de novo review is explicitly intended to protect individual rights—for example, the review of administrative denial of naturalization.³¹⁹ In others, however, the provision of de novo review is motivated by more complex considerations. For instance, Equal Employment Opportunity Commission (“EEOC”) decisions are subject to de novo review,³²⁰ but the Supreme Court has recognized that “the requirement of a trial de novo in federal court following EEOC proceedings was added primarily to protect employers from overzealous enforcement by the EEOC.”³²¹ Punishment for criminal contempt under the Civil Rights Act of 1957 is subject to de novo jury trial,³²² but the effect was to put enforcement of the law in the hands of all-white juries often unenthusiastic about compliance with desegregation.

One critical difference between the APA and many individual rights provisions lies in the area of exhaustion.³²³ The APA generally does not require administrative exhaustion of claims, “unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.”³²⁴ Although application of the exhaustion doctrine sometimes seems quite harsh,³²⁵ exhaustion has routinely been required in the largest programs that offer benefits to individuals, including Social Security,³²⁶ Medicare,³²⁷ Medicaid,³²⁸ Veteran’s

Energy).

³¹⁹ 8 U.S.C. § 1421(c) (1994).

³²⁰ See *Chandler v. Roudebush*, 425 U.S. 840, 844–45 (1976). See also 22 U.S.C. § 4140(b)(2) (1994) (discrimination claims by Foreign Service officers).

³²¹ *Kremer v. Chem. Constr. Co.*, 456 U.S. 461, 474 (1982).

³²² 42 U.S.C. § 1995 (1994).

³²³ See generally *Darby v. Cisneros*, 509 U.S. 137 (1993); William Funk, *Exhaustion of Administrative Remedies—New Dimensions Since Darby*, 18 PACE ENVTL. L. REV. 1 (2000).

³²⁴ 5 U.S.C. § 704 (1994).

³²⁵ See *Sheehan v. Sec’y of Health, Educ. & Welfare*, 593 F.2d 323, 325 & n.4 (8th Cir. 1979) (“We recognize the harshness of our ruling. The district court makes clear the overwhelming weight of the evidence supported a disability award for the claimant.”).

³²⁶ 42 U.S.C. § 405(g)–(h) (1994); *Bowen v. City of New York*, 476 U.S. 467, 482–83 (1986); *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975); *Hoye v. Sullivan*, 985 F.2d 990, 991 (9th Cir. 1992) (per curiam); *Huseman v. Finch*, 424 F.2d 1237, 1239 (10th Cir. 1970) (applying exhaustion requirement to old age benefits); *Dickerson v. Crutcher*, 613 P.2d 934, 935–36 (Idaho 1980).

³²⁷ The Medicare Act adopted the Social Security Act’s exhaustion requirement. See 42 U.S.C. § 1395ii (1994) (making 42 U.S.C. § 405(h) (1994) applicable to Medicare claims). See *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1 (2000); *Heckler v. Ringer*, 466 U.S. 602 (1984).

³²⁸ *State ex rel. Oakwood Manor Nursing Ctr. v. Stangler*, 809 S.W.2d 90, 92–93 (Mo. App. 1991); *Evans v. Stanton*, 419 N.E.2d 253, 254–55 (Ind. App. 1981); *Mass. Respiratory Hosp. v. Dep’t of Pub. Welfare*, 607 N.E.2d 1018, 1023–24 (Mass. 1993); *Bien-Aime v. New York City Human Resources Admin.*, 685 N.Y.S.2d 54, 55 (App. Div. 1999); *Jackson v. N.C. Dep’t. of Human Res.*, 505 S.E.2d 899, 903–05 (N.C. App. 1998).

disability,³²⁹ Selective Service classifications,³³⁰ AFDC,³³¹ and food stamp³³² programs.³³³ Other regimes, such as federal habeas corpus³³⁴ and the Federal Tort Claims Act,³³⁵ also require exhaustion. However, the Supreme Court has not required exhaustion for some constitutional challenges under 42 U.S.C. § 1983.³³⁶

IV. RACE AND AUTHORITY

It is perhaps inevitable that, even when the Supreme Court questions the actions of coordinate branches, it rarely questions their motivations or good faith. Yet the baleful motives of policymakers in the Asian Exclusion project should caution against wholesale adoption of the resulting constitutional principles.

There is a fundamental inconsistency between the administrative goals of Asian Exclusion and the considerations which the modern Court uses to justify truncated administrative procedures. The Court has sometimes said that flexibility and informality are designed in part to *protect* the regulated parties. In *Walters v. National Ass'n of Radiation Survivors*,³³⁷ the Court justified the practical prohibition of counsel in veterans' cases on the ground that "additional complexity will undoubtedly engender greater administrative costs, with the end result being that less government money reaches its intended beneficiaries."³³⁸ Similarly, in *Mathews v. Eldridge*,³³⁹ the Court stated:

³²⁹ *Ledford v. West*, 136 F.3d 779 (Fed. Cir. 1998).

³³⁰ *Oesterreich v. Selective Serv. Sys.*, 393 U.S. 233, 235 n.5 (1968) (citing *Estep v. United States*, 327 U.S. 117 (1946), and *Falbo v. United States*, 320 U.S. 549, 553 (1944)); *United States v. Weislow*, 485 F.2d 560, 562 (9th Cir. 1973); *United States v. Tobias*, 447 F.2d 227, 228 (3d Cir. 1971); *United States v. Houston*, 433 F.2d 939, 940-41 (2d Cir. 1971) (per curiam) (Clark, J., Lumbard & Kaufman, JJ.).

³³¹ *Tomas v. Rubin*, 926 F.2d 906, 911-12 (9th Cir. 1991); *Chicago Welfare Rights Org. v. Weaver*, 305 N.E.2d 140, 143-44 (Ill. 1973); *Richard J.A. v. Wing*, 670 N.Y.S.2d 948, 949 (App. Div. 1998).

³³² 7 U.S.C. § 2023 (1994) (participation by food sellers); *United States v. Tran*, 11 F. Supp. 2d 938 (S.D. Tex. 1998); *Comm'r of Fin. and Control v. Whitfield*, 403 A.2d 709, 709 (Conn. Super. 1979); *Rivera v. Wing*, 670 N.Y.S.2d 761 (App. Div. 1998). *Cf.* *Thomas v. N.C. Dep't of Human Res.*, 478 S.E.2d 816, 817 (N.C. Ct. App. 1996) (noting that applicant had exhausted administrative remedies). *But see* *Robinson v. Block*, 869 F.2d 202 (3d Cir. 1989) (holding that exhaustion is not required with respect to purely legal issues).

³³³ One exception seems to be claims for military pay and allowances. *Heisig v. United States*, 719 F.2d 1153, 1155 (Fed. Cir. 1983).

³³⁴ *See* LIEBMAN & HERTZ, *supra* note 147.

³³⁵ *See* *McNeil v. United States*, 508 U.S. 106, 111-12 (1993).

³³⁶ *Rosado v. Wyman*, 397 U.S. 397 (1970); *King v. Smith*, 392 U.S. 309, 312 n.4 (1968); *Damico v. California*, 389 U.S. 416 (1967). *See generally* *Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982) (exhaustion of state administrative remedies not required for 42 U.S.C. § 1983 action).

³³⁷ 473 U.S. 305 (1985).

³³⁸ *Id.* at 326.

³³⁹ 424 U.S. 319 (1976).

At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost of protecting those whom the preliminary administrative process has identified as likely to be undeserving may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.³⁴⁰

Process is not curtailed simply so the government can win, but rather to ensure that deserving parties receive benefits.³⁴¹

The Court also has justified administrative informality with reference to administrators' expertise. In the frequently cited case *Far East Conference v. United States*,³⁴² the Court explained:

[I]n cases raising issues of fact not within the conventional experiences of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, insight gained through experience, and by more flexible procedure.³⁴³

The Asian Exclusion cases did not result from such motivations on the part of administrators. Instead, numerous doctrines created by the Asian Exclusion cases favor bureaucratic authority *at the expense of* individuals. In *Fong Yue Ting*, the "white witness rule" was designed to exclude a category of testimony favorable to the individual. In *Ju Toy*, the applicable rules both placed the burden of proof on the individual and explicitly provided that "in every doubtful case the benefit of the doubt shall be given by administrative officers to the United States government."³⁴⁴

³⁴⁰ *Id.* at 348 (citing Friendly, *supra* note 21, at 1303). *Accord* Sullivan v. Everhart, 494 U.S. 83 (1990).

³⁴¹ *See also, e.g.*, Fallon, *supra* note 6, at 937 ("Litigation over claimed entitlements not only burdens government officials and taxpayers; it may drain away dollars that otherwise would have gone to a program's beneficiaries."); Stewart & Sunstein, *supra* note 243, at 1255 n.258 ("The Supreme Court has repeatedly asserted that the purpose of procedural protection is to ensure accurate application of the relevant statute.")

³⁴² 342 U.S. 570 (1952).

³⁴³ *Id.* at 574–75.

³⁴⁴ 198 U.S. 253, 268 (1905).

Ju Toy and *Fong Yue Ting* not only were driven by concerns of efficiency and judicial economy, but also were decided in the wake of a campaign by the Department of Justice to end the successful resort of Chinese to the courts. Christian Fritz studied the success of Chinese immigrants in habeas corpus proceedings in San Francisco in the 1880s. He explained that the results turned on the opportunity to present evidence and have individual facts considered on a case-by-case basis, for even judges who personally opposed Chinese immigration were often persuaded:

[U]nlike the customs house officials who were able and certainly willing to implement a bureaucratic procedure that systematically excluded the Chinese, [U.S. District Judge Ogden] Hoffman's conduct of habeas corpus proceedings presented too many opportunities for individual expression and argument. While the sheer number and similarity of many of these cases "bureaucratized" the process in some respects . . . they never became automatic decisions. Having asserted the right to such hearings, it followed for Hoffman that each Chinese petitioner could present any evidence, testimony or argument in favor of establishing his liberty. The nature of the judicial process itself thus forced a case-by-case appraisal of the Chinese petitioners, which resulted in decisions affecting one person at a time rather than an entire race or class. In contrast [Circuit Justice] Stephen Field could speak in sweeping terms about how to deal with "the Chinese problem." His perspective, like that of the [Customs] collector, did not include the need to look at the Chinese coming before the federal court as individuals. The collector was quite willing to make an executive decision that would unilaterally affect Chinese people.³⁴⁵

Similarly, Professor Salyer's study of habeas petitions from 1891 to 1905 revealed that judicial review resulted in case-by-case determinations, in contrast to the blanket policy favored by administrators:

The judges and the commissioner shared their contemporaries' negative, stereotypical view of the Chinese and supported the Chinese exclusion policy. Consequently, they allowed certain procedures that made it more difficult for Chinese to prove their claims. Yet, the judges . . . also felt bound by judicial rules and

³⁴⁵ Christian G. Fritz, *A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347, 372 (1988).

norms that called for hearing and weighing evidence in individual cases, regardless of their litigants' Chinese birth or descent.³⁴⁶

The lack of individual process or case-by-case consideration of claims was not the unintended result of administrative devices aimed at achieving other legitimate goals; rather, ending individual consideration was the very purpose of the administrative doctrines.

The Asian Exclusion laws are long gone, but the Asian Exclusion cases are still the law. There is reason to believe the justices who made that law were influenced by racial considerations. Race has been a pervasive influence on American law, of course, not only in cases and political controversies dealing with race explicitly, but also with respect to doctrine that was covertly influenced by race.³⁴⁷ The historical record reflects that some of the justices who decided the Asian Exclusion cases were personally opposed to Asian immigration. Accordingly, racism may have covertly contributed to the development of these aspects of administrative law by affecting the outcome or making the opinions more forceful than they otherwise would have been.

A. Racial Influences on the Decisions

The influence of race may explain why the decisions were as extreme as they were. Judges are expected to interpret statutes and the Constitution in accordance with some external constraint, but in many cases there is more than one possible outcome. As a recent Solicitor General explained, some cases are determined by

magnetism. One often hears attorneys say that the optics of a case are not good, the atmospherics are bad, or there is an unattractive odor to the matter. Those sensory descriptions all point to what is a singular phenomenon: courts often find particular results attractive or repellent for reasons other than the force of legal argument. Forces like magnetism . . . can cause the law to begin moving in the wrong direction.³⁴⁸

³⁴⁶ Lucy Salyer, *Captives of Law: Judicial Enforcement of the Chinese Exclusion Laws, 1891–1905*, 76 J. AM. HIST. 91, 117 (1989).

³⁴⁷ There are many examples of ostensibly neutral legal doctrine which seems to have been influenced by considerations of race or sex. See, e.g., Peggy Cooper Davis, *The Proverbial Woman*, 48 REC. ASS'N B. CITY N.Y. 7, 20 (1993); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000); Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2120 (1996); Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L.J. 775–76 (1992).

³⁴⁸ Seth P. Waxman, *The Physics of Persuasion: Arguing the New Deal*, 88 GEO. L.J. 2399, 2400 (2000).

It is impossible to determine with assurance how immigration law's contributions to administrative law would have differed if the cases had not involved a despised minority.³⁴⁹ Yet intuition suggests that cases involving disfavored groups may have magnetism of a particular kind—"as both an analytical and a practical matter, the procedures for implementing a regulatory program cannot be separated from its substance."³⁵⁰ A program premised on discrimination and protection against those who are racially undesirable might warrant more resolute procedures than a program dealing with peers.

Racial background to facially neutral legal principles may be doctrinally relevant as well. In *City of Chicago v. Morales*,³⁵¹ the Court invalidated an ordinance aimed at loitering gang members, notwithstanding the long history of judicial acceptance of loitering and vagrancy laws. A plurality relied on racist aspects of the legal history of loitering:

While anti-loitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality. In 16th-century England, for example, the "Slavery acts" provided for a 2-year period of enslavement for anyone who "liveth idly and loiteringly, by the space of three days." In *Papachristou* we noted that many American vagrancy laws were patterned on these "Elizabethan poor laws." These laws went virtually unchallenged in this country until attorneys became widely available to the indigent In addition, vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery. In 1865, for example, Alabama broadened its vagrancy statute to include "any runaway, stubborn servant or child" and "a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause." The Reconstruction-era vagrancy laws had especially harsh consequences on African-American women and children. Neither this history, nor the scholarly compendia in Justice THOMAS' dissent persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not part of the liberty protected by the Due Process Clause.³⁵²

³⁴⁹ See, e.g., *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) ("When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review and we must presume that the process was impaired.") (citing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)).

³⁵⁰ Stewart & Sunstein, *supra* note 243, at 1221.

³⁵¹ 527 U.S. 41 (1999).

³⁵² *Id.* at 53, n.20 (quotation marks within quotation marks omitted) (citing L. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZEN-

At least two aspects of this passage are remarkable. First, the plurality recognizes the common law tradition as suspect without inquiring into judicial or legislative motives, instead examining how the laws were applied; in contrast, current doctrine suggests that a statute's discriminatory effect is insufficient to establish a violation of equal protection.³⁵³ Second, the plurality did not base its conclusion exclusively on legislative or judicial materials, but rather on secondary sources. Again, current doctrine suggests that for a facially neutral provision, direct evidence of legislative motive is generally necessary to establish discriminatory intent.³⁵⁴ At the same time, the plurality probably got it right: the loitering statutes aimed at alleged gang members (all African Americans) were descendants of the loitering, vagrancy, and other criminal statutes of the Jim Crow era, which were designed to perpetuate a particular set of race relations.³⁵⁵ The plurality in *Morales* was unprepared to ignore as judges what they knew as people. By invalidating a legal provision that was facially neutral and traditionally accepted, but that was also probably rooted in Jim Crow, the plurality recognized the inherent weakness of precedent that may have been influenced by racist policies and were willing to ask what the law would look like if untainted by invidious racial considerations.

The opinions in the Asian Exclusion cases were not untainted. On the contrary, the decisions appear to have rested on an understanding and acceptance of the racial premises underlying the laws—that the Chinese were not simply different or even inferior, but were waging a form of war through immigration. On occasion, the justices explicitly acknowledged that they were interpreting the exclusion laws in accord with the policies behind them.³⁵⁶ *Chae Chan Ping v. United States*,³⁵⁷ decided in 1889, upheld the authority of Congress to exclude Chinese residents of the United States returning from overseas visits, despite their possession of government issued documents allowing them to return; Congress had voided the documents during their voyage. The Court explained that there was “a well-founded apprehension—from the experience of years—that a limitation to the immigration of certain classes from China was essential to

SHIP 50–69 (1998); T. WILSON, *BLACK CODES OF THE SOUTH* 76 (1965); Note, *Homelessness in a Modern Urban Setting*, 10 *FORDHAM URB. L.J.* 749, 754 n.17 (1982)).

³⁵³ *Washington v. Davis*, 426 U.S. 229 (1976).

³⁵⁴ *Hunter v. Underwood*, 471 U.S. 222 (1985).

³⁵⁵ See, e.g., *Bailey v. Alabama*, 219 U.S. 219 (1911).

³⁵⁶ See, e.g., *Toyota v. United States*, 268 U.S. 402, 412 (1925) (interpreting statute “in view of the policy of Congress to limit the naturalization of aliens to white persons and to those of African nativity or descent”); *Yee Won v. White*, 256 U.S. 399, 401–02 (1921) (interpreting statute in light of the fact that “[t]his well defined purpose of Congress would be impeded rather than facilitated by permitting entry of the wives and minor children of Chinamen”). But see *White v. Chin Fong*, 253 U.S. 90, 93 (1920) (rejecting Justice Department’s argument “against the explicit words of the provision to the purpose of the exclusion laws, which is, it is said, to keep the country free from undesirable Chinese”).

³⁵⁷ 130 U.S. 581 (1889).

the peace of the community on the Pacific coast, and *possibly to the preservation of our civilization there*.”³⁵⁸ The Court went on:

To preserve its independence and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us.³⁵⁹

*Fong Yue Ting v. United States*³⁶⁰ held that Chinese resident aliens could be deported from the United States if they failed to register, even though aliens of other races were not required to register and, indeed, could not be deported for any reason whatsoever. Having made its point at length in *Chae Chan Ping*, the majority opinion in *Fong Yue Ting* contains an abbreviated discussion of the racial justifications for Chinese exclusion.³⁶¹ That the threat of civilization-destroying war was overblown does not diminish the importance of these cases: they nonetheless hold that the government has almost unlimited leeway to repel invasion or preserve civilization, and they are based on a theory that Chinese immigration presented such a grave emergency to American civilization.

There is reason to think that many members of the Court were personally sympathetic to the ends of exclusion.³⁶² Chief Justice Fuller’s biographer noted that “[r]acist assumptions permeated both popular attitudes and scientific thought in late nineteenth century America There is little doubt that Fuller shared the prevalent racial outlook.”³⁶³ One member of the *Chae Chan Ping* Court, Lucius Q. C. Lamar, supported the Chinese Exclusion Act in 1882 as a U.S. Senator from Mississippi,³⁶⁴ suggesting that he thought Chinese exclusion was wise as well as constitutional.³⁶⁵ Justice Howell E. Jackson, part of the *Fong Yue Ting*

³⁵⁸ *Id.* at 594.

³⁵⁹ *Id.* at 606.

³⁶⁰ 149 U.S. 698 (1893).

³⁶¹ *Id.* at 717.

³⁶² The *Chae Chan Ping* Court had only eight members; Justice Stanley Matthews had died and Justice David Brewer had not yet taken his seat.

³⁶³ JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910*, at 155 (1995). Fuller’s voting record was mixed; he dissented in *Fong Yue Ting*, yet he also dissented in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), disagreeing with the majority’s holding that persons of Chinese ancestry born in the United States were citizens.

³⁶⁴ 13 CONG. REC. 3412 (1882). Lamar was not present for the vote, but made his position known by “pairing”—agreeing in advance not to show up and vote in person—with a senator who opposed the bill. A colleague announced the positions of each.

³⁶⁵ Slave-owning Lamar left Congress to campaign for secession; during the Civil War, he served in military and political positions in the Confederate government. See Arnold M. Paul, *Lucius Quintus Cincinnatus Lamar*, in 2 *THE JUSTICES OF THE UNITED STATES SUPREME COURT, THEIR LIVES AND MAJOR OPINIONS*, at 694, 696–99 (Leon Friedman &

majority, also supported the Chinese Exclusion Act as a Senator.³⁶⁶ Justice Harlan, as his *Plessy* dissent reflected, believed that the Chinese were racially unsuited to live in the United States.³⁶⁷ Justice Field, author of the majority opinion in *Chae Chan Ping*, supported exclusion of the Chinese as a matter of policy.³⁶⁸ Similarly, *Plessy* author Henry Billings Brown's belief that blacks "were inherently inferior to whites"³⁶⁹ may have made it difficult for him to be objective about cases involving members of other nonwhite races.

Important cases in the decades that followed were likewise decided by justices whose impartiality could be questioned. *Sing Tuck*³⁷⁰ and *Ju Toy*³⁷¹ were written by Justice Holmes in 1904 and 1905. The composition of the Court at this point suggests that the justices continued to be

Fred L. Israel eds., 1997) [hereinafter 2 JUSTICES].

³⁶⁶ 13 CONG. REC. 1749 (1882) (reflecting a vote in favor of an amendment explicitly prohibiting the naturalization of Chinese); *id.* at 1753 (reflecting a vote in favor of a bill excluding Chinese); *id.* at 3412 (reflecting support for a bill excluding Chinese through "pairing" with a senator opposed to the bill).

³⁶⁷ In *Plessy*, he wrote: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting). Justice Harlan voted with the majority in *Chae Chan Ping*, but did not participate in *Fong Yue Ting*. See 149 U.S. iii, n.1 (noting that Justice Harlan was absent for the portion of the Term in which *Fong Yue Ting* was decided). There is little doubt, however, that Harlan supported the reasoning and result of the case. See Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 161 & n.71 (1996) (listing cases in which Justice Harlan relied on *Fong Yue Ting*); see also Gabriel J. Chin, *The First Justice Harlan by the Numbers: Just How Great Was "The Great Dissenter?"*, 32 AKRON L. REV. 629 (1999) [hereinafter Chin, *The First Justice Harlan*].

³⁶⁸ As Charles McCurdy wrote:

"You know I belong to the class who repudiate the doctrine that this country was made for the people of all races," Field wrote to a California friend in 1882. "On the contrary, I think it is for our race—the Caucasian race." The Chinese ought to be excluded from the United States, he said, for "[t]he manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable."

Charles W. McCurdy, *Stephen J. Field and the American Judicial Tradition*, in *THE FIELDS AND THE LAW* 5, 17 (1986). Field wrote in *Chew Heong v. United States*:

Thoughtful persons who were exempt from race prejudices saw . . . the certainty, at no distant day, that, from the unnumbered millions on the opposite shores of the Pacific, vast hordes would pour in upon us, overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization.

112 U.S. 536, 569 (1884) (Field, J., dissenting). Nonetheless, Field dissented in *Fong Yue Ting*.

³⁶⁹ Joel Goldfarb, *Henry Billings Brown*, in 2 JUSTICES, *supra* note 365, at 771.

³⁷⁰ 194 U.S. 161 (1904).

³⁷¹ 198 U.S. 253 (1905).

receptive to racial considerations.³⁷² Justice Holmes, a proponent of eugenics,³⁷³ was by no means a defender of minority rights.³⁷⁴ Justices Harlan, Fuller, and Brown were in the majority, as they had been in earlier Asian Exclusion cases. Chief Justice Edward D. White, a former Confederate army officer, was reputed to have been a member of the Ku Klux Klan; upon his death his friends on the Louisiana Supreme Court also noted his participation in an armed coup d'état by the White League (a supremacist group) against the integrated government of Louisiana.³⁷⁵ Justice McKenna's decisions upholding segregation³⁷⁶ and African American disenfranchisement³⁷⁷ gave little hint of an anti-racist attitude,

³⁷² See, e.g., PENNOCK, *supra* note 162, at 164–65 (“It has been suggested, probably with merit, that the Court may have been influenced by the difficulty of establishing the identity of Orientals in this country . . .”).

³⁷³ See, e.g., *Buck v. Bell*, 274 U.S. 200, 205, 207 (1927) (upholding involuntary sterilization of “a feeble minded white woman”) (“We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence . . . Three generations of imbeciles are enough.”); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833 (1986).

³⁷⁴ See Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1642–44 (1986); Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion* (pt. 2), 15 STAN. L. REV. 254 (1963). Professor Kennedy notes that in a case not involving race, Holmes voted to strike down municipal regulation of the South Covington and Cincinnati Street Railway as an undue burden on interstate commerce, but then voted to uphold a seemingly similar ordinance requiring segregation affecting the exact same railroad. 86 COLUM. L. REV. at 1643–44. Similarly, Professor Rogat has observed that Holmes dealt with the problem of whether partially unconstitutional laws could be saved through severance so vigorously and inconsistently that one scholar suggested he was the most prominent proponent of the position that they could, while another argued that he was the leader of the idea that they could not. 15 STAN. L. REV. at 265–67. In several cases, Holmes' inconsistency was “instrumental in denying Negro claims.” *Id.* at 267.

³⁷⁵ 149 La. vii, viii (1922). See also Kennedy, *supra* note 374, at 1637 n.61 (1986).

³⁷⁶ *Chiles v. Chesapeake & Oh. Ry. Co.*, 218 U.S. 71, 77 (1910) (McKenna, J.) (“The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it.”).

³⁷⁷ In *Williams v. Mississippi*, 170 U.S. 213 (1898), the Court unanimously upheld the capital conviction of an African American indicted and tried by all-white juries. Under the Mississippi Constitution, jurors were selected from registered voters, who had to pay poll taxes and could not have been convicted of particular crimes. *Id.* at 222. Mississippi's Supreme Court had candidly admitted that “[W]ithin the field of permissible action under the limitations imposed by the Federal Constitution, the [Mississippi Constitutional Convention] swept the field of expedients, to obstruct the exercise of suffrage by the negro race.” *Id.* (quoting *Ratcliff v. Beale*, 20 So. 865 (Miss. 1896)). The Mississippi court further explained that African Americans were “careless . . . without forethought; and its criminal members given to furtive offences, rather than the robust crimes of the whites. Restrained by the Federal Constitution from discriminating against the negro race, the convention discriminates against its characteristics, and the offences to which its criminal members are prone.” *Id.* Justice McKenna was unmoved by Williams' argument that the system was discriminatory: “nothing tangible can be deduced from” the court's admissions about the origins of the law. *Id.* Justice McKenna's analysis did not stand the test of time. The 24th Amendment now prohibits disenfranchisement for failure to pay a poll tax; in *Hunter v. Underwood*, 471 U.S. 222 (1985), the Supreme Court declared the disenfranchisement for

although he later authored some important pro-immigrant decisions.³⁷⁸ Justices Brewer and Peckham, the most loyal friends of Asian immigrants on the Court, dissented in both cases.³⁷⁹

In addition to the circumstances suggesting judicial racism in cases where Asians lost, there also is evidence of race-consciousness in cases where they won. While the language of some decisions suggests they were based on principle,³⁸⁰ Asians tended to win judicial support when a government victory appeared to hold negative implications for the rights of whites. In deciding that California could not regulate foreign immigration in its own right, Justice Field explained: “The doctrine now asserted by counsel for [California], if maintained, would certainly be invoked, and at no distant day, when other parties, besides low and despised Chinese women, are the subjects of its application, and would then be seen to be a grievous departure from principle.”³⁸¹ In *Ng Fung Ho v.*

crime provided for by the Alabama constitution unconstitutional because it was motivated by discriminatory animus.

For a discussion of Justice McKenna’s unwillingness to recognize discrimination in criminal law enforcement against Chinese, see Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1402 n.62 (1988) (discussing *Ah Sin v. Wittman*, 198 U.S. 500 (1905)).

³⁷⁸ His decisions in *White v. Chin Fong*, 253 U.S. 90 (1920) and *United States v. Woo Jan*, 245 U.S. 552 (1918) recognized the protection afforded individuals by judicial, rather than administrative, procedure.

³⁷⁹ See Chin, *The First Justice Harlan*, *supra* note 367, at 652–53.

³⁸⁰ When Kwock Jan Fat’s administrative appeal of a deportation order was denied, the Court reversed because of procedural irregularities. *Kwock Jan Fat v. White*, 253 U.S. 454 (1920). The Court scolded the agency:

The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. . . . It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country.

Id. at 464. See also, e.g., *Ex parte Tom Toy Tin*, 230 F. 747 (N.D. Cal. 1916).

³⁸¹ *In re Ah Fong*, 1 F. Cas. 213, 217 (C.C.D. Cal. 1874) (No. 102) (Field, J.). See also *Fong Yue Ting*, 149 U.S. at 750 (Field, J., dissenting) (“Is it possible that Congress can, at its pleasure, in disregard of the guarantees of the Constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here . . . ?”); *Baker v. Portland*, 2 F. Cas. 472, 475 (C.C.D. Or. 1879) (No. 777) (Deady, J.) (“This treaty having guaranteed to the Chinese the right to reside here permanently with the same privileges and immunities as the subjects of Great Britain, Germany and France . . .”). When the full Court considered the issue, it also noted that if California were allowed to regulate Chinese directly, citizens of other countries could also be incarcerated for failure to pay the head tax:

[W]e venture the assertion, that, if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress.

Or, if this plaintiff and her twenty companions had been subjects of the Queen

White,³⁸² the Court noted that if Chinese residents could be deported despite their claims of citizenship, “then obviously deportation of a resident may follow upon a purely executive order whatever his race or place of birth.”³⁸³ In *United States v. Wong Kim Ark*,³⁸⁴ the Court held that persons of Chinese ancestry born in the United States were in fact citizens, notwithstanding the fact that the Emperor of China might also claim them as his own: “To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or other European parentage”³⁸⁵ Lower courts also frequently mentioned the potential impact on the rights of others when defending the Chinese.³⁸⁶

Knowledgeable commentators recognized the influence of racial exigency on these decisions. In his article on administrative finality, Thomas Reed Powell acknowledged that the Chinese cases turned in part on the judicially perceived threat to American society. Writing about *Ju Toy*’s preclusion of judicial review, he explained that if review were available, “each incoming celestial would allege the fact and raise a cloud of yellow witnesses to prove it. . . . [A]dministrative action absolutely essential to

of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress?

Chy Lung v. Freeman, 92 U.S. 275, 279 (1875).

³⁸² 259 U.S. 276 (1922).

³⁸³ *Id.* at 284.

³⁸⁴ 169 U.S. 649 (1898).

³⁸⁵ *Id.* at 694.

³⁸⁶ *See, e.g., Lau Hu Yuen v. United States*, 85 F.2d 327, 329 (9th Cir. 1936) (“From the standpoint of our citizenship and of the duty of the nation to each of its citizens, however lowly his status, this is as true of this Hawaiian born son of a Chinese dressmaker, now a shopkeeper and, incidentally, of his two sons, as it is of a judge of this court.”); *Johnson v. Kock Shing*, 3 F.2d 889, 890 (1st Cir. 1924) (Anderson, J., dissenting) (issue same as if returning child of ambassador or missionary); *In re Tie Toy*, 26 F. 611, 613 (D. Cal. 1886) (“It should be remembered that the same clause in our constitution which protects the rights of every native citizen of the United States, born of Caucasian parents, equally protects the rights of the Chinese inhabitant who is lawfully in the country. When this barrier is broken down as to the Chinese, it is equally swept away as to every American citizen”); *In re Ah Chong*, 2 F. 733, 738 (D. Cal. 1880) (“While it is not very likely that the act in question was *in fact* intended by its framers to apply to any but Chinese, yet, owing to carelessness in the phraseology used, others than Chinese may have occasion to invoke the national constitution for their protection German, French, Italian, English, and Irish women, before becoming citizens [are affected] Many persons of the Caucasian race are natives of China, and probably not a few descendants of citizens of the United States, who would fall within the terms of this provision.”); *In re Tiburcio Parrott*, 1 F. 481, 498 (C.C.D. Cal. 1880) (Hoffman, J.) (“Had the labor of the Irish or Germans been similarly proscribed, the legislation would have encountered a storm of just indignation. The right of persons of those or other nationalities to support themselves by their labor stands on no other or higher ground than that of the Chinese.”); *id.* at 509 (Sawyer, J.) (“In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing”).

national well-being is due process of law within the meaning of the Constitution.”³⁸⁷ He elaborated:

[F]rom the standpoint of a petitioner judicially determined to be a citizen, the *Ju Toy* decision at first blush is monstrous. But starting with the presence of a horde of immigrants on the frontier, whom the proper authority in the government has determined we must exclude, if our national ideals are to be preserved, the case has more to justify it. The demands of public necessity collide with the possible infringement of private right, and, rightly or wrongly, it has been determined to be law in the United States that the exigencies of the national welfare are to have the right of way. . . . It may be that many of the decisions here reviewed were not contemplated as possible by the framers of the Constitution, who placed the protection of private rights in the hands of the judiciary. But there was as little anticipation of the external conditions on which those decisions are based.³⁸⁸

A 1907 Third Circuit case also suggested that judicial determinations under the Chinese Exclusion laws were analytically unique. The court struggled to avoid upholding the deportation of a diseased alien who had been abroad temporarily, noting the harshness of deporting those “whom have here had their homes and families for years, carried on business and acquired wealth and distinction, and have while here received equally with citizens protection of person and property.”³⁸⁹ In order to do so, they had to get around the Supreme Court’s Chinese Exclusion decisions. They set them aside

because cases arising under the Chinese exclusion acts are *sui generis*, involving the judicial or administrative enforcement of a particular policy on the part of the United States having as its object the prevention of competition between Chinese labor and other labor in this country. . . . [I]t may be that the principles of statutory construction properly may be applied to the Chinese exclusion acts in a manner somewhat different from that in which they are applicable [to other immigration laws.]³⁹⁰

Finally, there is a noticeable difference in the judicial treatment of an analogous legal regime, the contract labor laws that were in force and interpreted around the same time as the Asian Exclusion statutes. Al-

³⁸⁷ Powell, *supra* note 140, at 598.

³⁸⁸ *Id.* at 605, 606.

³⁸⁹ *Rodgers v. United States ex rel. Buchsbaum*, 152 F. 346, 351 (3d Cir. 1907).

³⁹⁰ *Id.* at 352.

though the courts certainly declined to grant relief in many cases,³⁹¹ as a general matter they construed the laws with some leniency. In *Church of the Holy Trinity v. United States*,³⁹² Justice Brewer, writing for a unanimous Court, held that the contract labor laws did not apply to a Christian clergyman even though he came pursuant to a contract to perform labor, explaining “[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”³⁹³ Both because the statute was aimed at “cheap unskilled labor”³⁹⁴ and because of the Court’s conclusion that “this is a Christian nation,”³⁹⁵ the statute could not mean what it said. Justice Peckham also interpreted the statute broadly in *United States v. Laws*,³⁹⁶ holding that a chemist working on a sugar plantation was “in the practice of a profession.”³⁹⁷ That Brewer and Peckham wrote for the Court itself suggests that these cases were different from the Asian Exclusion cases, where Brewer and Peckham almost always voted for the Asian litigant, and almost always in dissent.³⁹⁸ By the time the Supreme Court held that the same principles of finality that applied to the Asian Exclusion cases governed the contract labor laws,³⁹⁹ the case law had sharply limited the categories of aliens to which the laws applied.⁴⁰⁰ These cases indicate that the Third Circuit and Professor Powell were correct when they suggested that the Supreme Court treated the Chinese cases differently from other kinds of decisions.

B. *An Administrative Law Untainted by Racism?*

The project of reconceptualizing U.S. administrative law as it might have developed in the absence of invidious prejudice is beyond the scope of this paper. However, the concept of due process in constitutional administrative law clearly could have been construed more broadly in the Asian Exclusion cases without undermining the legitimate imperatives of administrative entities in an activist state. The most direct evidence of this proposition may be found in the Administrative Procedure Act itself. The APA offers a default structure of hearing rights and methods of judi-

³⁹¹ See, e.g., *United States v. Arteago*, 68 F. 883 (5th Cir. 1895); *In re Howard*, 63 F. 263 (C.C.S.D.N.Y. 1894).

³⁹² 143 U.S. 457 (1892).

³⁹³ *Id.* at 459.

³⁹⁴ *Id.* at 465.

³⁹⁵ *Id.* at 471.

³⁹⁶ 163 U.S. 258 (1896).

³⁹⁷ *Id.* at 266.

³⁹⁸ Chin, *The First Justice Harlan*, *supra* note 367, at 652–53.

³⁹⁹ See *Pearson v. Williams*, 202 U.S. 281, 285–86 (1906).

⁴⁰⁰ See, e.g., *Botis v. Davies*, 173 F. 996 (N.D. Ill. 1909) (holding laws inapplicable to informal contract made in good faith); *United States v. Aultman Co.*, 143 F. 922 (N.D. Ohio 1906) (holding laws inapplicable to returning resident alien); *In re Maiola*, 67 F. 114 (C.C.S.D.N.Y. 1895) (same).

cial review that is far friendlier to the regulated entity than were the procedures employed by the Asian Exclusion laws. Although Congress has made the APA inapplicable to some regimes, the fact that the APA has been the presumptive guide for hearing and review⁴⁰¹ suggests that departures from it are based on political considerations other than unworkability or unreasonable expense.

The decision in *Ju Toy* resulted in the permanent elimination of private rights in the absence of judicial review. Such a principle could be reversed without threatening the administrative state. Louis F. Post, Assistant Secretary of Labor, had the last word administratively in immigration cases during the early twentieth century,⁴⁰² but after describing the process for determining the citizenship of racial Chinese and other private rights,⁴⁰³ he observed:

Nothing in my official experience in the Department of Labor has impressed me more deeply than the conviction that fundamental personal rights should be more scrupulously guarded . . . than is possible through administrative decisions made in the course of executive routine Whenever fundamental individual rights are at issue, their protection by some method inherently more judicial than it is possible for administrative decisions to be, is demanded no less in the interest of public policy than in the interest of personal security.⁴⁰⁴

This criticism of the *Ju Toy* rule seems valid. There was room for the Court to hold that even if private rights can be assigned to administrators for initial determination, the Constitution requires some form of judicial review of the facts before those rights could be extinguished.

Another holding that could be revisited without unduly interfering with government operations is the doctrine, established in *Fong Yue Ting*, that deportation is not punishment. The Court has questioned this rule in more recent cases but has ultimately followed it on stare decisis grounds.⁴⁰⁵ Because *Fong Yue Ting* has been assimilated into other areas

⁴⁰¹ In *Richardson v. Perales*, 402 U.S. 389, 409 (1971), the Court noted that “the social security administrative procedure does not vary from that prescribed by the APA. Indeed, the latter is modeled upon the Social Security Act.”

⁴⁰² See, e.g., *Backus v. Owe Sam Goon*, 235 F. 847, 853–54 (9th Cir. 1916) (discussing deportation order issued by Post); *Moy Wing Sun v. Prentis*, 234 F. 24 (7th Cir. 1916); *Ex parte Ng Kwack Kang*, 233 F. 478 (W.D. Wash. 1916).

⁴⁰³ Louis F. Post, *Administrative Decisions in Connection with Immigration*, 10 AM. POL. SCI. REV. 251 (1916).

⁴⁰⁴ *Id.* at 261.

⁴⁰⁵ In *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952), the Court explained:

Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. [This doctrine and the rule that the ex post facto clause applies only to criminal laws] as original proposals might be de-

of law, it may represent a concrete example of race-influenced precedent migrating into mainstream jurisprudence.

The Court could also revisit *Sing Tuck*'s holding that claims of citizenship can be lost by means of the exhaustion requirement. Prior to *Sing Tuck*, federal trial and appellate courts held that administrative remedies need not be exhausted. It would have been reasonable for the Court to hold that, whatever the rule might be with respect to future cases, the Due Process Clause prohibited deprivation of an important aspect of liberty or property in reliance on the misleading statements of government actors. A constitutional limit on the exhaustion doctrine also might have changed the results in cases like *Booth v. Churner*,⁴⁰⁶ where a unanimous Court dismissed a claim for non-exhaustion even though the agency lacked the authority to award the only relief requested.

V. CONCLUSION

The Interstate Commerce Commission was, in theory, a noble exercise in deploying government power to improve an important part of the economy and to enhance the opportunities and welfare of all. The principle behind the ICC still resonates today; although many would debate the proper aims of government and the institutions that should carry them out, opponents of flexibility, efficiency, expertise, and fairness—the articulated aims of the administrative form—are few. The ICC's distant cousin may help explain why the administrative state has been controversial despite its evident virtues. As the Asian Exclusion laws make clear, nothing intrinsic to the administrative form makes it better for the individuals involved.

batable, but both have been considered closed for many years and a body of statute and decisional law has been built upon them.

In *Galvan v. Press*, 347 U.S. 522, 531 (1954), Justice Frankfurter, writing for the Court, acknowledged that “since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation,” but precedent precluded that result. *But see* *Jordan v. DeGeorge*, 341 U.S. 223, 243 (1951) (Jackson, J., joined by Black & Frankfurter, JJ., dissenting) (“Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation.”).

⁴⁰⁶ 121 S.Ct. 1819 (2001). *See also* *Crawford v. Babbitt*, 186 F.3d 1322 (11th Cir. 1999).