LawAndBorder.com

a U.S. & China visa policy blog by an American immigration lawyer in Beijing

Congress Has Apologized for the Chinese Exclusion Act of 1882: Now the Court Should Undo the Damage

By Gary Chodorow[1]
June 19, 2012
www.lawandborder.com

The U.S. House of Representatives has adopted a resolution[2] apologizing for the Chinese Exclusion Act of 1882, which barred the admission to the U.S. of nearly all Chinese until 1943.[3] The Act enshrined race and nationality discrimination in law. It devastated the Chinese-American community that had been established in the mid-19th century and reinforced racial stereotypes.

The House's June 18 resolution follows the adoption of a companion resolution in the Senate on October 6, 2011.[4]

Unfortunately, not all the damage of the Act has been undone. In upholding the Act, the Supreme Court announced the "plenary power doctrine." This doctrine holds that the power of Congress over the admission and deportation of aliens is absolute and not subject to judicial review as to constitutionality. The doctrine has been called the "last vestige of an antique period of American law."[5] Its stubborn persistence continues to oblige courts to turn a blind eye to laws that infringe on due process or make invidious distinctions based on race, nationality, ideology, or sex.

---

[1] Mr. Chodorow is a lawyer with Frederick W. Hong Law Offices in Beijing. His practice is limited to U.S. immigration and nationality law.
[2] H. Res. 683, 112th Cong. (2012). The House sponsor was Judy Chu (D.-Calif.), the first Chinese-American Congresswoman.
[3] Act of May 6, 1882, ch. 126, 22 Stat. 58.
[4] S. Res. 201, 112th Cong. (2011), *as reported in* 157 Cong. Rec. S6352-54 (Oct. 6, 2011). The Senate sponsor was Scott Brown (R.-Mass.).
[5] Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. Rev. 1 (1998).

Congress' apology for the Chinese Exclusion Act should give the Supreme Court pause to consider overruling the doctrine that the Act engendered.

Background

Chinese immigrants were drawn to the U.S. by the discovery of gold in California in 1848 then by the lure of jobs building the transcontinental railroad in the 1860s.[6] The 1868 Burlingame Treaty allowed "free migration" to ensure the necessary supply of labor.[7]

Outflows from China were also caused by the Opium War with Britain (1839-42) and then the Taiping Rebellion (1851-64), which took twenty to thirty million lives.[8]

While gold was plentiful, the Chinese were tolerated. But as gold became scarce and competition increased, animosity toward the Chinese grew. Forced out of mining and other occupations, many Chinese settled in cities like San Francisco and took up work in restaurants and laundries.[9]

When economic growth slowed beginning in the 1870s, the Workingman's Party and California Governor John Bigler both blamed Chinese "coolies" for depressed wages.[10] Chinese even faced violent assaults, including the 1887 Snake River Massacre in Oregon, during which 31 Chinese miners were killed.[11]

The Act

Nativist sentiments propelled passage of the Chinese Exclusion Act of 1882 over objections, such as that of Senator George Frisbie Hoar (R.-Mass.), an anti-slavery activist who viewed the Act as the legalization of racial discrimination.[12] It was signed by President Chester A. Arthur.[13]

The Act's preamble asserted that "the coming of Chinese laborers to this country endangers the good order of certain localities." The Act placed a ten-year moratorium on entry of Chinese skilled and unskilled laborers and denied them naturalization. It effectively reached all Chinese people except travelers, teachers, students, and merchants, who had to obtain certificates from the Chinese Government confirming they were not laborers.

---

[6] Bill Ong Hing, *Making and Remaking Asian America through Immigration Policy, 1850–1990* 19-21 (1993).
[7] 16 Stat. 739. The treaty also granted U.S. and Chinese citizens "most favored nation" treatment while visiting or residing in each other's countries. Secretary of State William Seward intended through the treaty to preempt local laws discriminating against Chinese citizens, which had appeared in California. Warren I. Cohen, *America's Response to China* 32 (5th ed. 2010).
[8] Jack Chen, *The Chinese of America* 9 (1990).
[9] Hing, *supra*, at 22.
[10] Chen, *supra*, at 26, 137.
[11] *Id.* at 152.
[12] Richard E. Welch, Jr., *George Frisbie Hoar and the Half-Breed Republicans* 193 (1971).
[13] Passage of the Act was preceded by the 1881 Angell Treaty, 22 Stat. 826, which modified the Burlingame Treaty by authorizing the U.S. to regulate, limit, or suspend the immigration of Chinese laborers.

The 1892 Geary Act extended the moratorium and required Chinese within the U.S. to apply for certificates of residence proving lawful admission. Failure to do so was punishable by imprisonment at hard labor followed by deportation, unless the failure was unavoidable and a "credible white witness" testified to the lawful admission.[14]


Congress of the United States, At the First Session,

An Act

To prevent certain treaty stipulations relating to Chinese

Whereas, in the opinion of the Government of the United States

Enrolled bill, Act of May 6, 1882, ch. 126, 22 Stat. 58. Source: http://www.ourdocuments.gov/doc.php?flash=true&doc=47.

Impact of the Chinese Exclusion Act

In the wake of the Chinese Exclusion Act, Chinese population in America dwindled from over 140,000 in the mid-19th century to 75,000 in 1940.[15] Those who remained were permanently relegated to being foreigners because they were barred from naturalization.

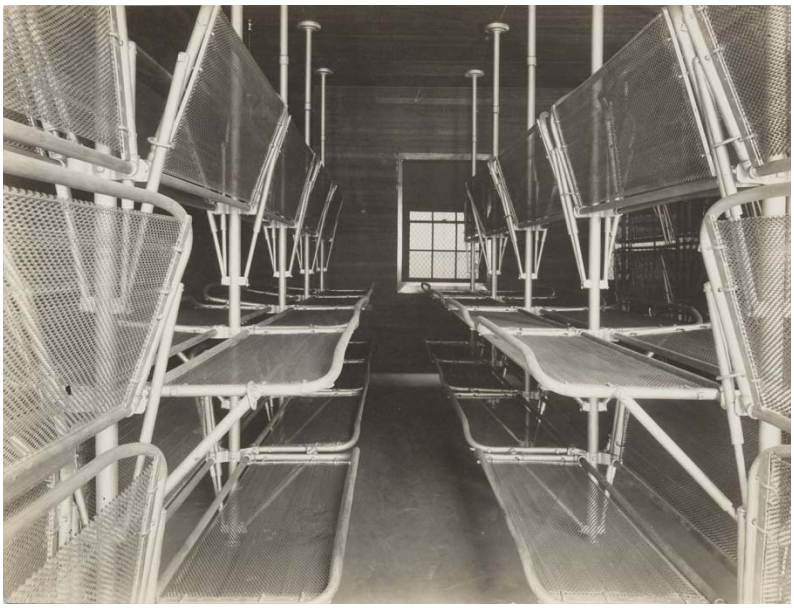
Family life was tough for most Chinese laborers. Men remained single or endured long separations from their wives and children, who could not legally immigrate from China. Nor could Chinese laborers get reentry certificates to visit their families in China unless they had U.S. property worth $1000.[16]

Human smuggling proliferated.[17] Some Chinese merchants, who were allowed to bring dependents to the U.S., falsely claimed unrelated children as theirs.[18] Other "paper" sons and daughters made false claims of birth in San Francisco after the 1906 earthquake and fire destroyed vital records at the City Hall and Hall of Records.[19] To pass official interrogations, which often took place at Angel

[14] Act of May 5, 1892, ch. 60, 27 Stat. 25.
[15] Hing, *supra*, at 47.
[16] Lucy Salyer, Federal Judicial Center, *Chew Heong v. United States: Chinese Exclusion and the Federal Courts* (2006).
[17] *Fong Yue Ting v. United States*, 149 U.S. 698, 750-751 (1893) (J. Field, dissenting).
[18] Chen, *supra*, at 189.
[19] Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850* 94 (1988).

Island Immigration Station in San Francisco and could last for weeks or months, these "paper" sons and daughters would memorize coaching books with specific information about family histories and ancestral villages, which the immigration inspector would check against information from their alleged parents.[20] ("How many water buffalo were there in your village?").

The Act's worst legacy is that it reinforced stereotypes that Chinese immigrants are dangerous, inferior, "alien," un-American, and unwilling or unable to assimilate.



Angel Island Immigration Station Dormitory B. Source: Hart Hyatt North, The Bancroft Library, University of California, Berkeley. BANC PIC 1980.098:42--PIC, http://memory.loc.gov/cgi-bin/query/h?ammem/cic:@field(NUMBER+@lit(brk1197))

Emergence of the Plenary Power Doctrine

Supreme Court opinions rebuffing Chinese immigrants' challenges to the Act created the "plenary power doctrine." The doctrine holds that the power of Congress over the admission and deportation of aliens is absolute and not subject to judicial review as to constitutionality.

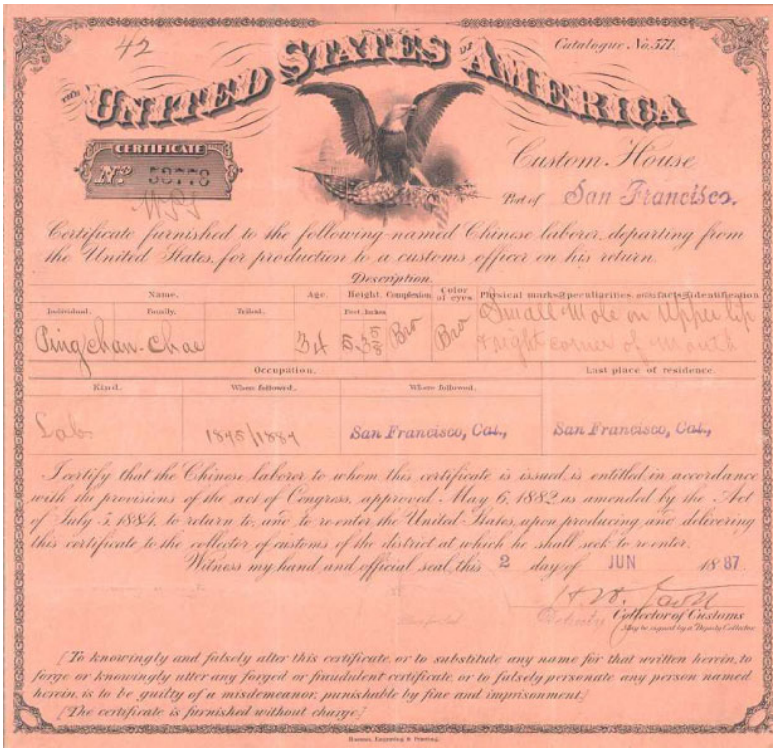
The first case before the Court was *Chae Chan Ping v. United States (the Chinese Exclusion Case)*.[21] It involved a Chinese laborer who lived in San Francisco for over a decade. In preparation for a trip to China, he applied for and was issued a reentry certificate under the Act. But, while he was sailing back to the U.S., an 1888 amendment retroactively voided such certificates. He was detained aboard ship in San Francisco Bay. The Court held unanimously that he could be excluded from the U.S.

[20] *Id.* at 94-96.
[21] 130 U.S. 581 (1889)

The Court's opinion, written by Justice Field, is filled with racial stereotypes, asserting that exclusion of Chinese laborers was "essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there."[22] Further,

> [The Chinese] remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people…. As they grew in numbers each year the people of the coast saw … great danger that at no distant day that portion of our country would be overrun by them….[23]

The Court determined that Congress' authority to pass immigration legislation is "an incident of sovereignty"[24] and necessary to preserve the nation's independence from foreign aggression, including the "vast hordes … crowding in on us."[25] Although Chae Chan Ping had argued his constitutional rights were violated, the Court didn't directly address that point, except to state that if Congress "considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous … [that] determination is conclusive upon the judiciary."[26]


42

Catalogue No. 571.

THE UNITED STATES OF AMERICA

CERTIFICATE

No. 50770

Custom House

Port of San Francisco.

Certificate furnished to the following-named Chinese laborer departing from the United States for production to a customs officer on his return.

Description.

Name.			Age.	Height.	Complexion	Color of eyes	Physical marks, peculiarities, scars, facts of identification
Individual.	Family.	Tribal.		Feet. Inches.			
Ping Chan. Chae			34	5 5/8	Bro	Brn	Small Mole on Upper Lip right corner of mouth

Occupation.		Last place of residence.	
Kind.	Where followed.	Where followed.	
Lab.	1845/1884	San Francisco, Cal.,	San Francisco, Cal.,

I certify that the Chinese laborer to whom this certificate is issued, is entitled in accordance with the provisions of the act of Congress, approved May 6, 1882, as amended by the Act of July 5, 1884, to return to, and re-enter the United States upon producing and delivering this certificate to the collector of customs of the district at which he shall seek to re-enter.

Witness my hand and official seal this 2 day of JUN 1887.

Collector of Customs

[To knowingly and falsely alter this certificate, or to substitute any name for that written herein, to forge or knowingly utter any forged or fraudulent certificate, or to falsely personate any person named herein, is to be guilty of a misdemeanor, punishable by fine and imprisonment.]

[The certificate is furnished without charge.]

Chae Chan Ping's reentry certificate. Source: *In re Chae Chan Ping*, No. 10100, Oct. 11, 1888, U.S. Cir. Ct. N. Dist. Calif., Records of the District Courts of the U.S., RG 21, National Archives, Pacific Coast Reg., San Bruno, Calif., http://www.fjc.gov/history/home.nsf/page/tu_exclusion_doc_6.html.

---

[22] 130 U.S. at 594.
[23] *Id.* at 595.
[24] *Id.* at 609.
[25] *Id.* at 606.
[26] *Id.* For a summary of the parties' briefs, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1, 125 (2002).

The second case before the Court was *Fong Yue Ting v. United States*.[27] Three petitioners had brought this as a test case by surrendering themselves at the federal building in New York, where they were arrested for not having the certificates of residence required by the Geary Act.[28] At a hearing, none of the petitioners produced the "credible white witness" required to overcome the presumption of deportability created by their failure to obtain certificates.[29] When the case reached the Supreme Court, a 5–3 majority held that deportation of resident aliens for failure to produce a "credible white witness" as required by the Geary Act didn't violate Fifth Amendment due process.[30]

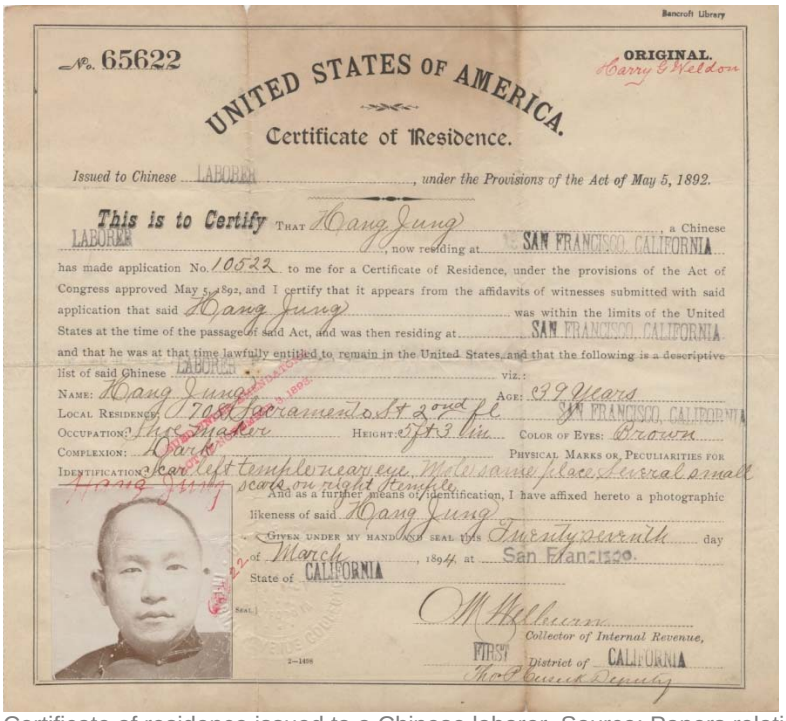
The Court found that Congress' power to deport "rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit entry" described in *Chae Chan Ping*.[31] The Court denied having power to review the statute's constitutional validity because deportation is a political question related to foreign affairs.[32] The Court concluded, in the alternative, that the Geary Act had not violated due process because the "credible white witness" requirement was justified by Chinese witnesses' "loose notions" of the obligation to tell the truth.[33]

The dissenting justices would have distinguished *Fong Yue Ting* from *Chae Chan Ping* because in the new case the petitioners were present on U.S. soil and lawfully resident, not merely applicants for admission. As such, the dissenters would find that the petitioners had a right to due process in deportation proceedings, and that right was violated by the "credible white witness" rule.[34] Still, the dissenters didn't question Congress' ability to discriminate through race or nationality classifications.

By the turn of the century, the dissents' position on due process in deportation hearings had gained some traction. In *Yamataya v. Fisher (the Japanese Immigrant Case),* 189 U.S. 86 (1903), the Court held that where Congress has delegated responsibility for determining deportability to an agency, due process requires notifying the respondent of the charges and providing an opportunity to respond.[35] Nevertheless, this holding leaves unaltered the core of the plenary power doctrine, that in regulating admission and deportation *Congress* is unrestrained by aliens' constitutional rights.

---

[27] 149 U.S. 698 (1893).
[28] *Ready for the Supreme Court: Preliminary Formalities in the Test of the Chinese Exclusion Act*, New York Times, May 7, 1893; *See* Cleveland, *supra*, at 162.
[29] 149 U.S. at 702-704.
[30] *Id.* at 704, 711. The issue of equal protection wasn't raised because the Fourteenth Amendment, by its terms, applies only to States, and didn't become applicable to the federal government through the doctrine of "reverse incorporation" until *Bolling v. Sharp*, 347 U.S. 497 (1954).
[31] 149 U.S. at 707.
[32] *Id.* at 718, 731. *See also Nishimura Ekiu v. United States*, 142 U.S. 651(1892) (rejecting applicant for admission's claim that due process requires a judicial hearing because Congress entrusted final decisionmaking power to the agency).
[33] 149 U.S. at 730.
[34] Id. at 734-37 (Brewer, J., dissenting); *id.* at 746 (Field, J., dissenting); *id.* at 762 (Fuller, J., dissenting).
[35] *See also Reno v. Flores*, 507 U.S. 292 (1993) (reviewing a regulation on detention during deportation proceedings and determining that it "rationally advance[ed] … legitimate governmental purpose[s]") and *Zadvydas v. Davis*, 533 U.S. 678 (2001) (recognizing that deportation procedures are "subject to important constitutional limitations").



Certificate of residence issued to a Chinese laborer. Source: Papers relating to Chinese in America, The Bancroft Library, University of California, Berkeley. BANC MSS C-R 153: fol. 1, http://ucblibrary3.berkeley.edu/cgi-bin/flipomatic/cic/images@ViewHiRes?img=brk00004694_16a.

Plenary Power in the Modern Court

The McCarthy-era Court relied on the plenary power doctrine to uphold exclusion and deportation on security and ideological grounds in several cases.[36]

Then, in 1954, *Brown v. Board of Education*[37] overturned *Plessy v. Ferguson*,[38] rejecting the constitutionality of racial segregation under the doctrine of "separate but equal." *Brown* specifically addressed segregation in public schools, and its progeny invalidated discrimination in virtually every area of American life, such as employment,[39] housing,[40] voting,[41] jury selection,[42] criminal justice,[43] and marriage.[44]

---

[36] *United States* ex rel. *Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (exclusion of U.S. citizen's wife without a hearing on the basis that admission prejudicial to the national interest); *Shaughnessy v. United States* ex rel. *Mezei*, 345 U.S. 206 (1953) (exclusion based on secret evidence, without judicial or administrative review, for security reasons); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (upholding deportation of resident aliens based on statute retroactively covering past lawful communist party membership).
[37] 347 U.S. 483 (1954).
[38] 163 U.S. 537 (1896).
[39] *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (applying strict scrutiny test to claim of racial discrimination in minority business set-asides).
[40] *Hunter v. Erickson,* 393 U.S. 385 (1969) (holding unconstitutional a city charter provision requiring referendum on any real estate ordinance containing race classifications).
[41] *Hunter v. Underwood*, 471 U.S. 222 (1985) (Facially neutral voter qualifications rule, purpose of which was to discriminate against black persons, violates equal protection.).

Except for immigration. *Chae Chan Ping* and *Fong Yue Ting* had been decided in the same era as *Plessy* and reflect the same belief in racial separation. Yet a week after *Brown* was decided, the Court in *Galvan v. Press*[45] asserted that stare decisis obliged perpetuation of the plenary power doctrine: "We are not prepared to deem ourselves wiser or more sensitive to human rights than our predecessors."[46]

The post-*Brown* Court has taken only timid half measures to distance itself from this "last vestige of an antique period of American law."[47]

In *Kleindienst v. Mandel*,[48] a scholar had been excluded on the ground that he was a communist, and the Immigration and Naturalization Service had denied his application for a waiver. The plaintiffs, U.S. citizens who sought to hear the scholar's lectures, conceded that the plenary power doctrine barred any constitutional claim by the scholar but asserted the denial had violated their own First Amendment rights.[49] The Court suggested it may have the power to review the citizens' constitutional claim but didn't reach the issue because the agency had a "facially legitimate and bona reason" for its denial.[50] *Mandel,* then, hints but doesn't decide that when Congress delegates to an agency the power to decide admissibility the Court may review such decisions for constitutionality, at least where the asserted constitutional rights belong to citizens.

In *Fiallo v. Bell*,[51] the Court applied a deferential (but unspecified) standard in reviewing an equal protection challenge to the Immigration and Nationality Act. The Act recognizes only an illegitimate child and mother, but not the father, to have the parent-child relationship required for a family-based immigrant petition.[52] The Court ruled that the gender and legitimacy classifications are constitutional. Still, the Court recognized "a limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens."[53]

And in *Landon v. Plasencia*,[54] the government conceded that a permanent resident seeking admission after a brief trip abroad has due process rights in exclusion proceedings.[55] The Court remanded to the court of appeals to determine the scope of her rights and whether they were violated.[56] So, today, under *Yamataya*, due process is required for hearings on deportability, but not for determinations of inadmissibility, with the exception of returning permanent residents. As a consequence, for example,

---

[42] *Castaneda v. Partida*, 430 U.S. 482 (1977) (Statistical underrepresentation of Mexican-Americans over time on grand juries is prima facie violation of equal protection.).
[43] *Lee v. Washington*, 390 U.S. 333 (Racial segregation in state penal system violates equal protection.).
[44] *Loving v. Virginia*, 388 U.S. 1 (1967) (Statute prohibiting mixed-race marriages violates equal protection.).
[45] 347 U.S. 522 (1954).
[46] 347 U.S. at 743 (internal citations omitted).
[47] Chin, *supra* note 15, at 5.
[48] 408 U.S. 753 (1972).
[49] 408 U.S. at 762.
[50] *Id.* at 769.
[51] 430 U.S. 787 (1977).
[52] *See* INA § 101(b)(1)(D) and (b)(2).
[53] 430 U.S. at 793 n.5.
[54] 459 U.S. 21 (1982).
[55] 459 U.S. at 34. *See id.* at 30-35 (discussing *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), which turned on statutory interpretation but suggested that due process may apply in this context).
[56] 459 U.S. at 37. *Chae Chan Ping* may well have been decided differently under the rationale of *Plasencia*, for he was a long-term resident who left on a temporary trip abroad with a certificate entitling his return. Chin, *supra*, at 58.

other than returning permanent residents, persons denied visas or admission have no constitutional right to be told why or to appeal.

Conclusion

The Chinese Exclusion Act was finally repealed by the 1943 Magnuson Act after China became a U.S. ally against Japan in World War II. The repeal of the Chinese Exclusion Act wasn't accompanied by a genuine acknowledgement of its prejudicial nature. In fact, it came at the same time that the U.S. was detaining thousands of Japanese-Americans at internment camps throughout the West.[57] The Magnuson Act allowed admission of just 105 Chinese immigrants per year.[58] Not until the Immigration and Nationality Act of 1965 was more significant Chinese immigration allowed.[59]

Congress' apology for the Chinese Exclusion Act is fitting. The Act devastated the Chinese-American community and reinforced negative stereotypes. Rep. Judy Chu (D.-Calif.), author of the House resolution, says its intent is to illuminate a past mistake in order to guard against its future recurrence.[60] This echoes Lincoln's Gettysburg Address, which posited that nations bind citizens together not just geographically but also across time—past, present, and future. A national apology for the Chinese Exclusion Act won't erase past wrongs or their effects, but by acknowledging those wrongs the present generation may allow for reconciliation, allowing for future relationships without the wrongs at the center.[61]

Congress' apology should give the Supreme Court pause to consider overruling the plenary power doctrine that the Act engendered. The *Plessy*-era plenary power doctrine should be rejected in favor of a doctrine better reflecting the modern Court's more inclusive and pluralistic views of national membership and more robust jurisprudence of individual rights.

But don't hold your breath. An amendment to the Congressional resolution as initially drafted deleted an acknowledgment that "Chinese Exclusion Act … is incompatible with the spirit of the United States Constitution."[62] That amendment may signify Congress' unwillingness to forswear race, nationality, and other discriminatory classifications in future immigration legislation. Similarly, the Court may not be ready to advance immigration jurisprudence from the "antique period of American law" to the post-*Brown* era.

---

[57] Statement of Sen. Patrick Leahy (D.–Vt.) in support of S. Res. 201, 157 Cong. Rec. S6352 (Oct. 6, 2011).
[58] Chinese Exclusion Repeal Act of 1943, Pub. L. 78-199, 57 Stat. 600. *See* Hing, *supra*, at 36.
[59] 89 Pub. L. 236 § 2, 79 Stat. 911.
[60] Pete Kasperowicz, *Rep. Chu Seeks House Acknowledgment of Chinese Exclusion Act of 1882*, The Hill, June 1, 2011.
[61] *See* Brian A. Weiner, *Sins of the Parents: The Politics of National Apologies in the United States* 186-187 (2005). In the past, Congress has apologized for African-American slavery, H. Res. 194, 110th Cong. (2008); S. Con. Res. 26, 111th Cong. (2009), for historical mistreatment of Native Americans, Department of Defense Appropriations Act of 2010, 111. Pub. L. 118, § 8113, 123 Stat. 3409, for detention of Japanese-Americans during World War II, Civil Liberties Act of 1988, Pub. L. 100-383, 102 Stat. 903, and for the 1893 overthrow of the Kingdom of Hawaii, Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kindgom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993).
[62] 157 Cong. Rec. S6353 (Oct. 6, 2011). Senator Patrick Leahy (D.-Vt.) complained the amendment was made at the behest of "anonymous Republicans." *Id.* at 6352.