AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 7: The Republican Era – Powers of the National Government

Fong Yue Ting v. U.S., 149 U.S. 698 (1893)

The regulation of immigration into the United States was not a major constitutional issue during the country's first century. There was a brief concern about the presence of "radical" French in the late 1790s. Congress responded with the Alien Acts, authorizing the president to deport aliens he considered a threat to the country, but that power was never exercised, and the authority expired in 1800. After that, federal immigration policy was limited to establishing naturalization procedures and requiring that accurate statistics of immigrant arrivals be kept. In the wake of a surge of Irish refugees in the 1830s and 1840s, some states attempted to limit immigration at local ports, but the Supreme Court rejected these efforts in the Passenger Cases *(1849). As the justices put it in* Henderson v. New York *(1876), the regulation of immigration was the exclusive right of Congress, and "whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void. . . ." However, around this time, Caucasians in California responded to years of economic depression with intensifying resentment toward local Chinese workers. They pressured Congress to prohibit Chinese laborers from entering the United States, and in 1882 Congress responded by passing the Chinese Exclusion Acts. The draconian policy was also the first substantial restriction on immigration in American history.*

Fong Yue Ting v. U.S. *confirmed the right of Congress to treat aliens as it wished. Fong and two other Chinese men were arrested for violating provisions of the 1892 amendments to the Chinese Exclusion Act, which required Chinese aliens in the United States to obtain a certificate of residence from an internal revenue officer. Without such a certificate a person of Chinese ancestry had to be deported unless he could prove with the aid of "at least one credible white witness" that he was a resident of the United States at the time of the passage of the law and that he had a good excuse for not obtaining the required document. Of special interest is the fact that the Court's decision was 6-3, with blistering dissents from the conservative Justices David J. Brewer, Stephen Field, and Chief Justice Fuller, who sought to distinguish Congress's acknowledged power to exclude immigrants from the power to expel or "banish" people who were legal residents of the country. In reading over these competing opinions, consider the significance of these discussions for contemporary questions about the scope of the national government's authority over immigrants living in the United States. What constitutional protections should exist for non-citizens who are (nevertheless) lawfully residing in the United States? Justice Field writes that, under the majority's theory, Congress could "have sanctioned towards these laborers the most shocking brutality conceivable." Is that correct?*

JUSTICE GRAY delivered the opinion of the Court.

. . . .

The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country….

The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the act of 1892 is consistent with the constitution.

. . . .

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the president the executive power; has made him the commander in chief of the army and navy; has authorized him, by and with the consent of the senate, to make treaties, and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And the several states are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another state, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. . . .

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene.

In *Nishimura Ekiu's Case* [1892], it was adjudged that, although Congress might, if it saw fit, authorize the courts to investigate and ascertain the facts upon which the alien's right to land was made by the statutes to depend, yet Congress might intrust the final determination of those facts to an executive officer; and that, if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency. . . ..

The power of Congress, therefore, to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by Congress to depend.….

Chinese laborers, . . .like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interest. . . .

. . . .

The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof 'by at least one credible white witness that he was a resident of the United States at the time of the passage of this act,' is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. . . .

The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation,

acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law; and 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. The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject….

. . . . [T]he judgment of the circuit court dismissing the writ of habeas corpus is right, and must be affirmed.

JUSTICE BREWER, dissenting.

. . . . I rest my dissent on three propositions: First, that the persons against whom the penalties of section 6 of the act of 1892 are directed are persons lawfully residing within the United States; secondly, that as such they are within the protection of the Constitution, and secured by its guaranties against oppression and wrong; and, third, that section 6 deprives them of liberty, and imposes punishment, without due process of law, and in disregard of constitutional guaranties, especially those found in the 4th, 5th, 6th, and 8th articles of the amendments.

. . . These appellants . . . are lawfully within the United States, and are here as residents, and not as travelers. They have lived in this country, respectively, since 1879, 1877, and 1874,--almost as long a time as some of those who were members of the Congress that passed this act of punishment and expulsion.

That those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in, it, has long been recognized by the law of nations. . . .

. . . .

It is said that the power here asserted is inherent in sovereignty. This doctrine of powers inherent in sovereignty is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. …. The expulsion of a race may be within the inherent powers of a despotism. History, before the adoption of this Constitution, was not destitute of examples of the exercise of such a power; and its framers were familiar with history, and wisely, and it seems to me, they gave to this government no general power to banish. Banishment may be resorted to as punishment for crime; but among the powers reserved to the people, and not delegated to the government, is that of determining whether whole classes in our midst shall, for no crime but that of their race and birthplace, be driven from our territory. . . .

. . . .

If the use of the word ‘person’ in the fourteenth amendment protects all individuals lawfully within the state, the use of the same word, 'person,' in the fifth must be equally comprehensive, and secures to all persons lawfully within the territory of the United States the protection named therein; and a like conclusion must follow as to the sixth.

I pass, therefore, to the consideration of my third proposition: Section 6 deprives of ‘life, liberty, and property without due process of law.’ It imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of another. Notice its provisions: It first commands all to register. He who does not register violates that law, and may be punished; and so the section goes on to say that one who has not complied with its requirements, and has no certificate of residence, ‘shall be deemed and adjudged to be unlawfully within the United States,’ and then it imposes as a penalty his deportation from the country. Deportation is punishment. It involves--First, an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property. . . .

. . . .

But punishment implies a trial: 'No person shall be deprived of life, liberty, or property without due process of law.' Due process requires that a man be heard before he is condemned, and both heard and condemned in the due and orderly procedure of a trial, as recognized by the common law from time immemorial. . . .

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 against other classes and other people? If the guaranties 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? . . .

In view of this enactment of the highest legislative body of the foremost Christian nation, may not the thoughtful Chinese disciple of Confucius fairly ask, 'Why do they send missionaries here?'

JUSTICE FIELD, dissenting.

… [B]etween legislation for the exclusion of Chinese persons,-- that is, to prevent them from entering the country,-- and legislation for the deportation of those who have acquired a residence in the country under a treaty with China, there is a wide and essential difference. The power … to deport from the country persons lawfully domiciled therein by its consent, and engaged in the ordinary pursuits of life, has never been asserted by the legislative or executive departments, except for crime, or as an act of war, in view of existing or anticipated hostilities, unless the alien act of 1798 can be considered as recognizing that doctrine. . . .

The passage of this act produced great excitement throughout the country, and was severely denounced by many of its ablest statesmen and jurists as unconstitutional and barbarous, and among them may be mentioned the great names of Jefferson and Madison, who are throughout our country honored and revered for their lifelong devotion to principles of constitutional liberty. It was defended by its advocates as a war measure. . . .

The duration of the act was limited to two years, and it has ever since been the subject of universal condemnation. In no other instance, until the law before us was passed, has any public man had the boldness to advocate the deportation of friendly aliens in time of peace. . . . Is it possible that Congress can, at its pleasure, in disregard of the guaranties of the Constitution, expel at any time the Irish, German, French, and English who may have taken up their residence here on the invitation of the government, while we are at peace with the countries from which they came, simply on the ground that they have not been naturalized? . . .

. . . Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens. . . . As men having our common humanity, they are protected by all the guaranties of the Constitution. To hold that they are subject to any different law, or are less protected in any particular, than other persons, is, in my judgment, to ignore the teachings of our history, the practice of our government, and the language of our Constitution. . . .

I utterly dissent from, and reject, the doctrine expressed in the opinion of the majority, that 'Congress, under the power to exclude or expel aliens, might have directed any Chinese laborer found in the United States without a certificate of residence to be removed out of the country by executive officers, without judicial trial or examination, just as it might have authorized such officers absolutely to prevent his entrance into the country.' . . . I utterly repudiate all such notions, and reply that brutality, inhumanity, and cruelty cannot be made elements in any procedure for the enforcement of the laws of the United States. . . .

. . . [D]eportation from the realm has not been exercised in England since Magna Charta, except in punishment for crime, or as a measure in view of existing or anticipated hostilities. . . . Within three years, Russia has banished many thousands of Jews, and apparently intends the expulsion of the whole race,- an act of barbarity which has aroused the indignation of all Christendom. Such was the feeling in this country that, friendly as our relations with Russia had always been, President Harrison felt compelled to call the attention of Congress to it in his message in 1891, as a fit subject for national remonstrance. Indeed, all the instances mentioned have been condemned for their barbarity and cruelty, and no power to perpetrate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the Constitution. . . .

The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offense. It is cruel and unusual. As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business there contracted. The laborer may be seized at a distance from his home, his family, and his business, and taken before the judge for his condemnation, without permission to visit his home, see his family, or complete any unfinished business. . . .

. . . .

I will not pursue the subject further. The decision of the court, and the sanction it would give to legislation depriving resident aliens of the guaranties of the constitution, fill me with apprehensions. Those guaranties are of priceless value to every one resident in the country, whether citizen or alien. I cannot but regard the decision as a blow against constitutional liberty, when it declares that Congress has the right to disregard the guaranties of the Constitution intended for the protection of all men domiciled in the country with the consent of the government, in their rights of person and property. How far will its legislation go? The unnaturalized resident feels it today, but if Congress can disregard the guaranties with respect to any one domiciled in the country with its consent, it may disregard the guaranties with respect to naturalized citizens. . . .

What answer could the naturalized citizen in that case make to his arrest for deportation, which cannot be urged in behalf of the Chinese laborers of today?

I am of the opinion that the orders of the court below should be reversed, and the petitioners should be discharged.

CHIEF JUSTICE FULLER, dissenting.

I also dissent from the opinion and judgment of the court in these cases.

. . . No euphuism can disguise the character of the act in this regard. It directs the performance of a judicial function in a particular way, and inflicts punishment without a judicial trial. It is, in effect, a legislative sentence of banishment, and, as such, absolutely void. Moreover, it contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written constitution by which that government was created, and those principles secured.