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CHAE CHAN PING AT 125: AN INTRODUCTION

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It was 125 years ago that the U.S. Supreme Court decided *Chae Chan Ping v. United States*, also known as the *Chinese Exclusion Case*.[1] This symposium issue is dedicated to exploring the continued relevance of this seminal immigration decision.

Chae Chan Ping was a Chinese migrant who first came to the United States in 1875.[2] After living in in this country for twelve years, he took a brief trip back to China.[3] Wanting to make sure he could return to the United States, he departed only after receiving advance permission to return in the form of a reentry certificate, a requirement introduced by the 1882 Chinese Exclusion Act.[4] But while Chae Chan Ping was sailing back to the United States, Congress revoked all reentry certificates with the Scott Act.[5] Congress took this action on October 1, 1888, with the law going into effect immediately. One week later, on October 8, Chae Chan Ping landed in San Francisco and presented his certificate. Pursuant to the act of Congress, he was denied reentry to the United States, and he was detained onboard by his ship's captain.[6] He filed a petition for a writ of *habeas corpus* in California federal court seeking permission to enter.[7] That court held the detention lawful, and Chae Chan Ping appealed to the Supreme Court.

In a unanimous opinion authored by Justice Stephen Field, the Supreme Court held that Chae Chan Ping had no right to reenter the United States. The Court determined that Congress's decision to revoke reentry certificates was "conclusive upon the judiciary."[8] This holding has since become known as the "plenary power doctrine," and it has been foundational to constitutional immigration jurisprudence. Under this

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1. 130 U.S. 581 (1889). The full opinion is reprinted following this introduction.
2. *Id.* at 582.
3. *Id.*
4. *Id.* A copy of Chae Chan Ping's reentry certificate is reprinted on page 2 of this symposium edition.
5. *Id.* at 582-83. Congress revoked all reentry certificates with the Scott Act. *Id.*
6. *Id.* at 582. Chae Chan Ping traveled from China to the United States on board the *S.S. Belgic*. A photo of the ship is reprinted on page 2 of this symposium edition.
7. *Id.*
8. *Id.* at 606.

doctrine, any law passed by Congress with respect to immigration, even those that would be unconstitutional if applied to citizens, is not subject to judicial challenge. For instance, as *Chae Chan Ping* itself noted, Congress would be free to write immigration laws to exclude individuals explicitly on the basis of race, even though Congress could not, of course, exclude U.S. citizens from opportunities on the basis of race.

As for what happened to Chae Chan Ping after his final deportation and return to China, nothing is known. As for what to make of his Supreme Court case, the debate continues. This symposium volume contains an array of contributions to thinking about the plenary power doctrine and the legacy of *Chae Chan Ping* on American immigration law.

In the first article, Professor David A. Martin argues that the importance of *Chae Chan Ping* lies in its *reasons* for deferring to the political branch on immigration issues.[9] He emphasizes the Court's conclusion that the federal government's power to exercise immigration control was necessary for the nation to speak "with one voice on the world stage"[10] in "realms touching upon foreign relations and potential national self-preservation."[11] This was, Martin notes, a federalism issue. For, if the federal government did not control immigration, foreign affairs would be in the hands of what were then thirty-eight different states. Thus, the lesson of *Chae Chan Ping*, Martin argues, is about the nation speaking as one given that immigration laws "*might* need to be in the mix to respond to, or to help shape, actions that others are taking abroad."[12] Martin also points out that this deference does not give the political branches a blank check for immigration law. For one, he notes that courts frequently employ sub-constitutional means — such as statutory interpretation — in ways that "adhere more closely to constitutional values" than lawmakers may have even intended.[13] And even more importantly, political bodies are responsive to political pressures. In the end, Martin concludes that *Chae Chan Ping* is a "call to roll up our sleeves and get to work in the political arena rather than the courts."[14]

Professor Kevin R. Johnson takes a different tack. Instead of focusing on the rationale of *Chan Chan Ping*, he examines its doctrinal durability in the

9. David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29 (2015).

10. *Id.* at 37.

11. *Id.* at 41.

12. *Id.* at 47.

13. *Id.* at 51.

14. *Id.* at 55.

modern Supreme Court.[15] He closely examines each of the Court's most recent immigration decisions — including important denials of certiorari — from the 2009 through the 2013 terms. Johnson concludes that the plenary power doctrine espoused in *Chae Chan Ping* is "heading toward its ultimate demise."[16] He sees the Court moving away from a reliance on "immigration exceptionalism," which is the idea that because of *Chae Chan Ping* immigration cases are just *different*.[17] Instead, he finds that the Court has handled numerous immigration cases in "ordinary, standard, and unremarkable" ways. For instance, the contemporary Court has often resolved immigration cases through statutory interpretation[18] and administrative deference, instead of relying on the constitutional approach of *Chae Chan Ping*. The result, Johnson notes, has been a trend to bring "immigration law more in line with conventional norms of judicial review."[19] Johnson's comprehensive review of the period points to a new era of immigration *un*exceptionalism.

Professor Michael Scaperlanda offers a direct critique of *Chae Chan Ping*'s plenary power doctrine.[20] Scaperlanda argues that the Court erred in suggesting that the rights of the sovereign include an "absolute and unqualified right to exclude or deport aliens."[21] He characterizes the Court's move as an error of "rejecting the universal in favor of the particular."[22] Scaperlanda goes on to argue that liberal political theory, popular among scholars, cannot provide an alternative answer to explain what criteria should govern the state's control over migration as it makes the "opposite error by rejecting the particular in favor of the universal."[23] Scaperlanda concludes that Christian tradition offers a third and more valuable narrative whereby "the universal dignity of the person is realized within particular political communities who achieve their own good

15. Kevin R. Johnson, *Immigration in the Supreme Court, 2009-13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57 (2015).

16. *Id.* at 61.

17. *Id.* at 63-64.

18. It is important to note that both Professor Martin and Professor Johnson emphasize that statutory interpretation is a principal mechanism for judicial review of immigration laws despite the plenary power doctrine.

19. Johnson, *supra* note 15, at 65.

20. Michael Scaperlanda, *Scalia's Short Reply to 125 Years of Plenary Power*, 68 OKLA. L. REV. 119 (2015).

21. *Id.* at 125.

22. *Id.* at 129.

23. *Id.*

partially by their openness to outsiders in need of the resources they possess in abundance."[24]

The next set of articles considers aspects of the *Chae Chan Ping* decision beyond the plenary power doctrine.

Professor Rose Cuison Villazor discusses the decision in terms of Chae Chan Ping's unsuccessful claim that his reentry certificate[25] amounted to a property right entitling him to admission into the United States.[26] Villazor delves into the legal arguments actually raised by Chae Chan Ping at trial and on appeal as well as the government's counter-arguments and the courts' conclusions. She notes that Chae Chan Ping really claimed a right to "new property," a concept the Supreme Court would not recognize for another eighty years.[27] She concludes by emphasizing the connections between property law and immigration law, both of which regulate "who belongs in a particular space."[28]

Professor Victor Romero focuses on the author of *Chae Chan Ping*: Justice Stephen Field.[29] He compares the majority opinion of *Chae Chan Ping* with Field's dissent four years later in *Fong Yue Ting v. United States*. Romero finds in these opinions a struggle between Justice Field's personal views on the effect of mass Chinese migration on the U.S. citizenry and his duty as a federal judge to protect the constitutional rights of individual migrants lawfully present in the United States regardless of their race or citizenship.[30] Romero argues that Field's personal struggle evidences a larger conflict in immigration law: the "tension between viewing immigrants as an undifferentiated mass and recognizing each immigrant as a person worthy of constitutional protection."[31] Romero finds further understanding of Justice Field's decisions in social psychology research, which explains the perennial human inability to empathize with or understand large numbers. He concludes that immigrant rights advocates should recognize and work within the constraints on human empathy identified by social psychologists to "emphasize and guard against our

24. *Id.* at 136.

25. *See supra* notes 4-6 and surrounding text.

26. Rose Cuison Villazor, Chae Chan Ping v. United States*: Immigration as Property*, 68 OKLA. L. REV. 137 (2015).

27. *Id.* at 152-53.

28. *Id.* at 160.

29. Victor Romero, *Elusive Equality: Reflections on Justice Field's Opinions in* Chae Chan Ping *and* Fong Yue Ting, 68 OKLA. L. REV. 165 (2015).

30. *Id.* at 166.

31. *Id.*

inherent parochialism" as Justice Field appeared to do in *Fong Yue Ting* notwithstanding his opinion in *Chae Chan Ping*.[32]

In the final article of this symposium issue, Professor Margaret Taylor and I focus not on the legal implications of *Chae Chan Ping* but its rallying message that the federal government's "highest duty" is to protect its people from "vast hordes" of migrants "crowding in upon us."[33] That message, we write, continues to echo in today's response to mass migration, including the 2014 incarceration of undocumented mothers with children in a remote detention facility in Artesia, New Mexico.[34] In particular, we critique the government's use of expedited removal, its predetermination to deny claims of fear upon removal, its insistence on denying bond to those with potentially meritorious claims, and its position that due process does not protect women with children inside our borders.[35] We conclude that these moves are the modern iteration of the fears of mass migration that permeated *Chae Chan Ping*.[36]

In 1888, one Chinese man was denied entry to the United States. His faltering legal challenge sent him swiftly away from American shores. But his ghost has haunted American immigration law ever since. In 125 years, we still haven't gotten over it: The acrid racism of the opinion, the brash sweeping aside of constitutional confines, and the crisp heartbreak of his seven-day-too-late return. As the papers in this symposium volume illustrate, *Chae Chan Ping* continues to fascinate, frustrate, and confound.

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32. *Id.*

33. Margaret H. Taylor & Kit Johnson, *"Vast Hordes… Crowding in Upon Us": The Executive Branch's Response to Mass Migration and the Legacy of* Chae Chan Ping, 68 OKLA. L. REV. 185 (2015).

34. *Id.* at 190-93.

35. *Id.* at 193-206.

36. *Id.* at 207.