MISSING "PERSONS": EXPEDITED REMOVAL, *FONG YUE TING*, AND THE FIFTH AMENDMENT

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I. INTRODUCTION

In 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").[1] This law cemented the recent trend of cracking down on illegal immigration by increasing the number of border patrols, limiting judicial review, and introducing new penalties for a variety of immigration control violations.[2] This anti-immigrant tendency seems to be gaining strength, with lawmakers and others calling for even tougher measures such as barring legal immigrants from federal programs[3] and withholding public education for children of illegal immigrants.[4] Included in IIRIRA's reforms was the introduction of an expedited removal process for inadmissible aliens.[5] This procedure gives the Immigration and Naturalization Service ("INS") discretion to remove certain noncitizens "without further hearing or review."[6]

This anti-immigration trend is remarkably similar to that which existed one hundred years ago. In the face of rising immigration levels, Congress in the 1880s and 1890s passed a series of restrictionist immigration laws.[7] Popular

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1. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C.).

2. *See* Elaine S. Povich, *Tough Law Keeps Aliens From Going Back Home*, PITTSBURGH POST-GAZETTE, Nov. 24, 1997, at A6, *available in* 1997 WL 11861375.

3. *See* Trudy Rubin, Editorial, *Denying Legal Immigrants Reeks of European Politics*, PHILA. INQUIRER, Dec. 28, 1994, at A13, *available in* 1994 WL 9750724.

4. *See* Barbara Barrett & Anna Dubrovsky, *Building an Uneven Fence*, YORK DAILY REC., April 24, 1998, at A1, *available in* 1998 WL 6213928.

5. *See* 8 U.S.C. § 1225(b)(1) (Supp. II 1996) (IIRIRA amended certain portions of the Immigration and Nationality Act of 1952 ("INA"), ch. 414, 66 Stat. 165 (codified as amended in scattered sections of 8 U.S.C.).

6. 8 U.S.C. § 1225(b)(1)(A)(i) (Supp. III 1997).

7. *See* SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, STAFF REPORT (1981), *reprinted in* THOMAS A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 158–60 (4th ed. 1998).

sentiment was also decidedly anti-immigrant, as evidenced by waves of violence against immigrants around the country.[8] In 1893, the Supreme Court decided *Fong Yue Ting v. United States*, holding that the Constitution's procedural protections did not apply to noncitizens faced with expulsion.[9] *Fong Yue Ting* was notable not only for its unprecedented holding but also for the dissents of Justice Brewer, Justice Field, and Chief Justice Fuller.[10] These dissents offered alternative philosophies toward United States immigration law,[11] which remain, even now, useful to explore.[12]

The purpose of this Note is to analyze IIRIRA's expedited removal procedure in light of the *Fong Yue Ting* dissents. Part II explains the mechanics of the expedited removal procedure. Part III identifies this procedure's apparent constitutional defects. Part IV defines the *Fong Yue Ting* majority position and examines the expedited removal process under its standard. Part V explores the *Fong Yue Ting* dissents and applies its proposed standards to the expedited removal process. In conclusion, this Note argues that any challenge to the expedited removal provision must be linked with a challenge to *Fong Yue Ting* itself.

II. THE MECHANICS OF EXPEDITED REMOVAL

A. Rejection of the "Entry" Doctrine

Before IIRIRA's passage in 1996, the procedure that applied to deportation and exclusion proceedings was dependent on the "entry" doctrine.[13] If a noncitizen had entered into the United States, whether with inspection and admission at a port of entry or without inspection through a "hole in the fence," that person had a right to a deportation hearing and was subject to the grounds of deportation.[14] If the noncitizen never entered the United States, that person was subject to exclusion grounds administered during an exclusion proceeding.[15]

IIRIRA totally reconceptualized this area of United States immigration law. Now, the process that applies no longer turns on "entry" but on "admission."[16] Deportation proceedings now apply *only* to those noncitizens "in and admitted to the United States."[17] Accordingly, inadmissibility proceedings apply to any noncitizen not admitted into the United States, including those who have entered

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8. *See* HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 259–61 (revised & updated ed. 1995).

9. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

10. *See id.* at 732–63.

11. *See id.*

12. *See* Ira Gollobin, *On the Constitutional Rights of Noncitizens in Expulsion Proceedings COMMON SENSE*, IMMIGRATION NEWSLETTER (National Immigration Project of the National Lawyer's Guild, Boston, Mass.), June 1998, at 1, 1.

13. *See* THOMAS A. ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 426 (4th ed. 1998).

14. *See id.*

15. *See id.*

16. *See id.*

17. 8 U.S.C. § 1227(a) (Supp. III 1997).

without inspection.[18] This conceptual reworking makes the expedited removal procedure possible.[19] Noncitizens illegally present in the United States no longer receive the procedural safeguards present in deportation proceedings.[20] Rather, this class of noncitizens can now be subject to expedited removal.

B. The Expedited Removal Statute

The expedited removal procedure may be utilized whenever an immigration officer determines a noncitizen is either inadmissible for misrepresentation in order to gain admission or inadmissible for lack of proper documentation.[21] Once such a determination is made, "the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum...or a fear of persecution."[22] If the noncitizen indicates either, the immigration officer will refer the noncitizen to an asylum officer for an asylum interview.[23]

The expedited removal procedure can also be applied to noncitizens who are inadmissible but already present in the United States.[24] The statute defines such noncitizens as those "who [have] not been admitted or paroled into the United States" and who are unable to prove continuous physical presence in the United States "for the 2-year period immediately prior to the date of the determination of inadmissibility."[25] The decision whether to apply the expedited removal procedure to this class of noncitizens is "in the sole and unreviewable discretion of the Attorney General."[26]

C. Possibilities for Review

The possibilities for administrative review of an expedited removal decision are extremely limited.[27] Review by an immigration judge of a determination that a noncitizen does not possess a credible fear of persecution[28] is

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18. *See* 8 U.S.C. § 1182(a)(6)(A)(i) (Supp. III 1997) (establishing inadmissibility of illegal entrants and immigration violators). *See generally* 8 U.S.C. § 1182(a) (defining classes of aliens ineligible for admission).

19. *See* Bo Cooper, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501, 1513–14 (1997).

20. Deportation proceedings are ordinarily subject to the Due Process clause of the Fifth Amendment, while inadmissibility proceedings are not. *See infra* Part III for discussion of the origin of and legal justification for this rule.

21. *See* 8 U.S.C. § 1225(b)(1)(A)(i) (Supp. III 1997). *See also* 8 U.S.C. § 1182(a)(6)(C) (Supp. III 1997) (inadmissibility ground for misrepresentation); 8 U.S.C. § 1182(a)(7)(A)(i)(I) (1994) (inadmissibility ground for lack of documentation).

22. 8 U.S.C. § 1225(b)(1)(A)(i).

23. *See* 8 U.S.C. § 1225(b)(1)(A)(ii).

24. *See* 8 U.S.C. § 1225(b)(1)(A)(iii).

25. 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

26. 8 U.S.C. § 1225(b)(1)(A)(iii)(I).

27. *See infra* notes 29–32 (available administrative review).

28. *See* 8 U.S.C. § 1225(b)(1)(A)(ii) (claims for asylum).

available at the noncitizen's request.[29] This is the only available administrative review of an expedited removal decision, except where the noncitizen claims to already have been admitted as a legal permanent resident, refugee, or asylee.[30] In that case, "the Attorney General shall provide by regulation for prompt review."[31]

Judicial review of expedited removal decisions is limited even further. Judicial review of individual determinations pursuant to the expedited removal procedure is expressly forbidden.[32] Habeas corpus proceedings based on an expedited removal order are available, but judicial inquiry is limited to issues regarding whether the petitioner is: an alien, a lawful permanent resident, a refugee, or an asylee and whether the petitioner was ordered removed under the expedited removal procedure.[33]

To summarize, the expedited removal procedure may apply to any noncitizen who seeks admission to the United States but is found inadmissible.[34] Expedited removal may also apply to a noncitizen who is present in, but never admitted to, the United States.[35] In that case, unless the noncitizen can establish continuous physical presence in the United States for the two-year period immediately preceding the inadmissibility determination, expedited removal is applied.[36] Administrative or judicial review of any expedited removal order is limited to a series of threshold inquiries.[37]

III. APPARENT CONSTITUTIONAL DEFECTS

A. Procedural Due Process Concerns

The expedited removal procedure raises apparent procedural due process concerns. This Note first looks to the traditional application of procedural due process in immigration law, then investigates a more modern approach, and ends with an examination of the expedited removal procedure in light of those standards.

1. The Traditional Approach

As United States immigration law developed, constitutional issues were framed within the parameters of the "entry" doctrine.[38] As mentioned above, this

29. *See* 8 U.S.C. § 1225(b)(1)(B)(iii)(III). *See also* Cooper, *supra* note 19, at 1514.

30. *See* 8 U.S.C. § 1225(b)(1)(C). *See also* Cooper, *supra* note 19, at 1514.

31. 8 U.S.C. § 1225(b)(1)(C).

32. *See* 8 U.S.C. § 1252(a)(2)(A)(iii) (Supp. III 1997). *See also* Cooper, *supra* note 19, at 1515.

33. *See* 8 U.S.C. § 1252(e)(2). *See also* Cooper, *supra* note 19, at 1515.

34. *See* 8 U.S.C. § 1225(b)(1)(A)(i).

35. *See* 8 U.S.C. § 1225(b)(1)(A)(iii).

36. *See id.*

37. *See* 8 U.S.C. §§ 1225(b)(1)(B)(iii)(III), 1225(b)(1)(C), 1252(a)(2), 1252(e)(2). *See also supra* note 33 and accompanying text.

38. *See* ALEINIKOFF, *supra* note 13, at 792.

meant that the procedure differed in deportation as opposed to exclusion proceedings.[39]

Yamataya v. Fisher[40] set the standard for procedural due process in deportation proceedings. In that case, Kaoru Yamataya, a Japanese citizen, was found deportable because she had entered the United States as a "pauper and a person likely to become a public charge."[41] Yamataya complained that the investigation in which she was found deportable was inappropriately conducted. Yamataya did not understand English, did not know the investigation concerned her deportability, did not have the assistance of counsel, and did not have an opportunity to refute the charges.[42] The Supreme Court held that a noncitizen who is present in the United States, even though present illegally, shall not be "deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States."[43] The Court went on to explain that "[n]o...arbitrary power [of deportation] can exist where the principles involved in due process of law are recognized."[44] In spite of this holding, the Court upheld Yamataya's deportation.[45] Of course, *Yamataya* was decided well before the "due process revolution" that began in the 1970s.[46] How modern procedural due process issues are addressed in an immigration context is discussed below.[47]

Circumstances similar to *Yamataya* informed the case of *Nishimura Ekiu v. United States*,[48] where the Supreme Court set the procedural due process standard for exclusion proceedings. In that case, Nishimura Ekiu, a citizen of Japan, was found excludable from the United States because she was "likely to become a public charge."[49] Ekiu challenged the constitutionality of her exclusion on due process grounds.[50] The Court held, however, that as to persons who are seeking entry into the United States "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[51] Thus, the procedures for exclusion proceedings are determined solely by

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39. *See supra* text accompanying notes 14–15.

40. 189 U.S. 86 (1903).

41. *Id.* at 87. *See also* 8 U.S.C. § 1182(a)(4) (1994) (current inadmissibility ground for persons likely to become a public charge, i.e., dependent on government programs for financial support).

42. *See Yamataya*, 189 U.S. at 88.

43. *Id.* at 101.

44. *Id.*

45. *See id.* at 102.

46. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1651–52 (1992) ("[T]he 'due process revolution'...began with the Supreme Court's 1970 decision in *Goldberg v. Kelly*. [T]he Court moved beyond the restrictive...doctrines that guaranteed procedural safeguards only for traditional forms of property...to include statutory 'entitlements' or other forms of 'new property....'" (footnote omitted)).

47. *See infra* Part III.A.2 (examining Landon v. Plasencia, 459 U.S. 21 (1982)).

48. 142 U.S. 651 (1892).

49. *Id.* at 653 n.1 (quoting Law of March 3, 1891, ch. 551, § 7, 26 Stat. 1084–86 (codified as amended at 8 U.S.C. § 1552 (1994)).

50. *See id.* at 653–56.

51. *Id.* at 660 (citations omitted).

administrative officers. Those procedures are not subject to a due process inquiry by the courts. Noncitizens, like Ekiu, who had never entered the United States do not enjoy traditional due process rights.[52]

Fifty-eight years later, the Supreme Court reaffirmed this holding relating to the due process right of noncitizens in exclusion proceedings in *United States ex rel. Knauff v. Shaughnessy*.[53] The issue in that case was whether the exclusion of a wife of a United States serviceman, based on undisclosed information and without a hearing, was appropriate.[54] The holding of the Court was unambiguous: "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[55]

Thus the traditional approach to due process claims is a direct application of the "entry" doctrine. Noncitizens who have entered the United States are afforded traditional due process rights as conceived of by the Constitution. Noncitizens who have not entered the United States are not afforded traditional due process rights.

2. The Modern Interpretation

The traditional approach to procedural due process issues in immigration law was modified in *Landon v. Plasencia*.[56] In that case, Maria Antonieta Plasencia, a citizen of El Salvador and a legal permanent resident of the United States, traveled briefly to Mexico. There, she and her husband arranged to assist several noncitizens illegally enter the United States.[57] While attempting to cross the border, Plasencia was stopped and detained by INS officials.[58] Plasencia was placed in exclusion proceedings and found excludable for attempting to smuggle noncitizens into the country.[59] She argued that she was denied due process in her exclusion hearing.[60] The Supreme Court held that Plasencia could "invoke the Due Process Clause,"[61] but remanded to the Court of Appeals the question of whether she "was accorded due process under all of the circumstances."[62] Nevertheless, the Court enunciated why Plasencia was entitled to an increased level of due process than that normally afforded noncitizens seeking admission under *Knauff* and *Nishimura Ekiu*.[63] Specifically, the Court explained that "once an alien gains admission to our country and begins to develop the ties that go with permanent

52. *See* David M. Grable, Note, *Personhood Under the Due Process Clause: A Constitutional Analysis of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 83 CORNELL L. REV. 820, 830 (1998).
53. 338 U.S. 537 (1950).
54. *See id.* at 539, 541.
55. *Id.* at 544 (citing Nishimura Ekiu v. United States, 142 U.S. 651 (1892)).
56. 459 U.S. 21 (1982).
57. *See id.* at 23.
58. *See id.*
59. *See id.* at 24.
60. *See id.* at 32.
61. *Id.*
62. *Id.* at 37.
63. *See id.* at 32.

residence his constitutional status changes accordingly."[64] The Court also explained that the three-part balancing test introduced in *Mathews v. Eldridge*[65] would be utilized to determine whether the exclusion hearing was constitutionally sufficient.[66] The Court described Plasencia's interests under this test as "weighty," including the right "to stay and live and work"[67] as well as "the right to rejoin her immediate family."[68]

The Court in *Plasencia* endorsed the idea that constitutional status in the immigration context should depend on more than just geographic location.[69] *Plasencia* acts as a precursor to IIRIRA's rejection of the "entry" doctrine as a framework for immigration decisions. The Court's analysis in *Plasencia* is more in line with constitutional norms.[70] Whether IIRIRA's reconceptualization brings this area closer to or further away from those constitutional norms is a question addressed below.[71]

3. Expedited Removal and Procedural Due Process

a. As Applied to Noncitizens Present in the United States

The expedited removal procedure, viewed under the "entry" doctrine and applied to noncitizens present in the United States, is clearly at odds with the procedural protections mandated by *Yamataya*.[72] According to *Yamataya*, deportation proceedings, including those of noncitizens illegally present in the United States, must not involve the exercise of arbitrary power.[73] The expedited removal procedure, as applied to noncitizens present in the United States,[74] clearly holds the potential for the arbitrary exercise of the deportation power. Congress gave no indication of what the standard of proof should be or how the proof offered by a noncitizen should be evaluated.[75] This problem is compounded by the difficulty many noncitizens will have in proving their presence in the United States

64. *Id.*

65. 424 U.S. 319 (1976). The three factors are: "the private interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

66. *See Plasencia*, 459 U.S. at 34.

67. *Id.* (quoting Bridges v. Wixon, 326 U.S. 135, 154 (1945)).

68. *Id.*

69. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 575 (1990).

70. That is, *Placensia* recognizes that the rights to live, work, and be with immediate family are a form of "new property" that deserve constitutional protection. *See Plasencia*, 459 U.S. at 34. *See also supra* note 47 and accompanying text.

71. *See infra* Part III.A.3.a.

72. Yamataya v. Fisher, 189 U.S. 86, 101 (1903). *See also supra* Part III.A.1.

73. *See Yamataya*, 189 U.S. at 101.

74. *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(II) (Supp. II 1996).

75. *See* Gollobin, *supra* note 12, at 8.

for the requisite statutory period.[76] The unreviewability for abuse of discretion in decisions by immigration officers exacerbates the problem even further.[77] This potential for the exercise of arbitrary power in deportation proceedings seems to be at odds with *Yamataya*.

However, IIRIRA provides that expedited removal of noncitizens present in the United States does not constitute deportation but, rather, should be viewed as inadmissibility proceedings.[78] This change flows directly from IIRIRA's rejection of the "entry" doctrine.[79] Yet, the language of *Yamataya* is unequivocal: "it is not competent for...any executive officer [to]...arbitrarily cause an alien who has entered the country...although alleged to be illegally here, to be...deported without giving him all the opportunity to be heard."[80] Obviously, the *Yamataya* Court assumed any noncitizen present in the United States, legally or illegally, would be subject to deportation.[81] However, IIRIRA approaches the question from an entirely different angle: "admission" rather than "entry" is the threshold for deportation.[82] This tension gives rise to an important question: would the Supreme Court abandon its precedents decided under the "entry" doctrine in the face of IIRIRA's reconceptualization of the deportation threshold?[83]

Plasencia provides some clues as to how the Court might address this question. In that case, the Court scrutinized the INS action under the three-part balancing test set forth in *Mathews*.[84] The Court undertook this review even though the underlying action was an exclusion rather than a deportation proceeding.[85] The reasoning for this review was that Plasencia had been admitted and developed important ties within the United States.[86] The Court identified the right of a noncitizen to be with his or her family as a constitutionally-protected interest.[87]

For a noncitizen present in the United States and faced with expedited removal, some of the reasoning the Court employs in *Plasencia* may apply. For instance, the noncitizen may have developed ties or have family in the United States. Of course, *Plasencia* is readily distinguishable because the petitioner therein had already been granted permanent residence.[88] However, *Plasencia* shifts

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76. *See id.* The statutory period is defined at 8 U.S.C. § 1225(b)(1)(A)(iii)(II).

77. *See* 8 U.S.C. §§ 1252(a)(2), 1252(e)(2) (1994 & Supp. III 1997).

78. *See* 8 U.S.C. §§ 1182 (a)(6) (1994 & Supp. III 1997) (inadmissibility of illegal entrants and immigration violators), 1182(a)(7) (inadmissibility for lack of documentation).

79. *See* Cooper, *supra* note 19, at 1513–14.

80. *See* Yamataya v. Fisher, 189 U.S. 86, 101 (1903).

81. *See id.*

82. *See* 8 U.S.C. § 1227(a) (1994 & Supp. III 1997). *See* ALEINIKOFF, *supra* note 13, at 426.

83. *See* ALEINIKOFF, *supra* note 13, at 871.

84. *See* Landon v. Plasencia, 459 U.S. 21, 34 (1982). *See also supra* note 65 and accompanying text.

85. *See Plasencia*, 459 U.S. at 22.

86. *See id.* at 32.

87. *See id.* at 34 ("[S]he may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual.").

88. *See id.* at 23.

the focus away from the strict "presence equals rights" idea inherent in the "entry" doctrine and moves closer to a modern, flexible, balanced approach to due process issues.[89] This shift reveals the Court is willing to ostensibly, but not officially, overrule traditional "entry" doctrine precedent.[90] This may mean the Court is amenable to IIRIRA's reconceptualization of the "entry" doctrine. However, the Court's willingness to perform a searching inquiry of the constitutional interests possessed by noncitizens cuts the opposite way; it makes the arbitrariness and procedural deficiencies of the expedited removal procedure stand out in even greater relief.

b. As Applied to Noncitizens Seeking Admission to the United States

The expedited removal procedure, viewed under "entry" doctrine precedent and applied to noncitizens seeking admission to the United States, is within the procedural protections mandated by *Nishimura Ekiu* and *Knauff*. Essentially, the expedited removal procedure, as developed by Congress, falls within the broad range of "procedure[s] authorized by Congress," and thus constitutes "due process as far as an alien denied entry is concerned."[91] The constitutional tensions that adhere to IIRIRA's rejection of the "entry" doctrine[92] have little, if any, application here.

B. Plenary Power Concerns

In addition to apparent due process concerns,[93] the expedited removal procedure also raises difficult questions concerning Congress' exercise of plenary power. This Note analyzes and defines Congress' plenary power over immigration, then examines specific portions of IIRIRA which vest this power in the INS, and finally demonstrates how this delegation of power raises constitutional concerns.

1. Congress' Plenary Power Over Immigration

In 1875 and 1882, the first federal immigration statutes were enacted,[94] prohibiting the entry of criminals, prostitutes, idiots, lunatics, and persons likely to become a public charge.[95] The first immigration laws to be reviewed by the judiciary were the so-called "Chinese exclusion laws." At first, the federal government had welcomed Chinese immigration as a means of providing cheap labor enabling completion of the trans-continental railroad.[96] Pursuant to those goals, the United States and China entered into the Burlingame Treaty,[97] which

89. *See id.* at 34.

90. *See id.* ("We need not now decide the scope of [*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)].").

91. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

92. *See supra* Part III.A.3.a.

93. *See supra* Part III.A.

94. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974); Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (repealed 1974).

95. *See* ALEINIKOFF, *supra* note 13, at 179.

96. *See id.* at 180.

97. Burlingame Treaty, July 28, 1868, U.S.-China, 16 Stat. 739.

allowed the free migration and emigration of American and Chinese citizens.[98] However, as popular sentiment turned anti-immigrant, demand for federal legislation restricting Chinese immigration grew.[99] The Burlingame Treaty was amended in 1880 to allow the United States to regulate Chinese immigration.[100] Just two years later, the first restrictionist law was ratified, suspending the immigration of Chinese laborers for ten years.[101] As to Chinese laborers already in the United States, the Act provided that they be issued "certificates of identity" entitling them to re-enter the United States after a trip abroad.[102] The certificate system was made mandatory in 1884 so that only a certificate would permit a Chinese immigrant to re-enter the United States.[103] This legislation did not end anti-Chinese sentiment. Violence against Chinese immigrants was widespread in 1885 and 1886.[104] In 1888, Congress passed a statute prohibiting the return of all Chinese laborers whether they possessed a certificate or not.[105]

It was in light of these events that *The Chinese Exclusion Case*[106] arose, in which the Supreme Court identified the source of federal immigration power. Chae Chan Ping was a Chinese laborer who had lived in San Francisco since 1875.[107] On June 2, 1887, he "left for China on the steam-ship Gaelic, having in his possession a certificate in terms entitling him to return to the United States...."[108] Ping returned to the United States via steam-ship, arriving in the port of San Francisco on October 8, 1888.[109] The absolute prohibition on the return of Chinese laborers had been enacted seven days before.[110] Accordingly, Ping was not allowed to enter the United States and was detained on board the steamer.[111] Ping petitioned for a writ of habeas corpus and, once granted, went before the circuit court of the United States for the Northern District of California and alleged the 1888 Act violated existing treaties between the United States and China and was unconstitutional.[112] That court found that Ping "was not entitled to enter the United States, and was not unlawfully restrained of his liberty...."[113]

The appeal was taken directly to the Supreme Court.[114] The Court found that Congress possessed an unenumerated power to exclude aliens from the United

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98. *See* ALEINIKOFF, *supra* note 13, at 180–81.
99. *See id.* at 181.
100. Treaty of Nov. 17, 1880, U.S.-China, 22 Stat. 826.
101. Act of May 6, 1882, ch. 126, 22 Stat. 58. (repealed 1943). *See also* ALEINIKOFF, *supra* note 13, at 181.
102. *See* ALEINIKOFF, *supra* note 13, at 181.
103. Act of July 5, 1884, ch. 220, 23 Stat. 115 (repealed 1943).
104. *See* ALEINIKOFF, *supra* note 13, at 182.
105. Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1943).
106. Chae Chan Ping v. United States, 130 U.S. 581 (1889).
107. *See id.* at 582.
108. *Id.*
109. *See id.*
110. *See* Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504. (repealed 1943). *See also supra* note 105 and accompanying text.
111. *See Chae Chan Ping*, 130 U.S. at 582.
112. *See id.*
113. *Id.*
114. *See id.*

States.[115] This power was found to be plenary (unlimited) and granted to Congress and the executive, not to the individual states.[116] It was found to be a political power and as such, not reviewable by the courts.[117] Curiously, the Court did impose some limit on this "sovereign power," finding that it is "restricted...only by the Constitution itself and considerations of public policy and justice which control, more or less, the conduct of all civilized nations."[118] As to the existence of the treaty, the Court succinctly stated that "the last expression of the sovereign will must control."[119] Thus, the Court found that the power to exclude aliens from the United States is federal, plenary, and political. As such, the judiciary has no role in reviewing its exercise. The Constitution provides some limit, as does the "conduct of all civilized nations," but neither prevents Congress from basing exclusion on an immigrant's race.

The modern interpretation of Congress' plenary power in immigration is remarkably consistent with *The Chinese Exclusion Case*. A slight modification, however, was advanced in *Fiallo v. Bell*.[120] At issue in *Fiallo* were INA definitional statutes[121] granting special preference immigration status to aliens who are illegitimate children seeking preference by virtue of their relationship with their United States citizen or legal permanent resident natural mothers.[122] Three natural fathers, citizens of the United States, brought suit, claiming the statute was unconstitutional because it denied them equal protection under the law.[123] Although the Court recognized the broad power of Congress in this area[124] and the

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115. *See id.* at 603 ("That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation.").

116. *See id.* at 604.

117. *See id.* at 606 ("In both cases [immigration in the context of war or peace], [Congress'] determination is conclusive upon the judiciary.). *See also id.* at 609–10 ("If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject.").

118. *Id.* at 604. This was curious because the Court goes on to say that "[i]f, therefore, the government...through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed...." *Id.* at 606. Thus, the Court utilizes a patently unconstitutional example to explain how the federal power over immigration is limited only by the Constitution. *See* U.S. CONST. amend. XIV, § 1 (1868) ("nor deny to any *person* within its jurisdiction the equal protection of the laws." (emphasis added)). This begs the question: does the Constitution provide any limits? *See* Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (holding that the Equal Protection Clause protects Chinese nationals from discriminatory San Francisco ordinance regulating laundries).

119. *Chae Chan Ping*, 130 U.S. at 600.

120. 430 U.S. 787 (1977).

121. 8 U.S.C. §§ 1101(b)(1)(D), 1101(b)(2) (Supp. III 1997).

122. *See Fiallo*, 430 U.S. at 788.

123. *See id.* at 790.

124. *See id.* at 792 "This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." *Id.* (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

tradition of judicial deference,[125] it nonetheless imposed a rational basis test in reviewing the exclusionary statutes.[126] The Court found that Congress had made an intentional, versus an arbitrary choice, in determining that some relationships (illegitimate children and natural mothers) are more likely to satisfy national immigration objectives than others (illegitimate children and natural fathers).[127] While certain justifications were offered (fear of fraud, family closeness, administrative convenience),[128] the Court explicitly stated that "it is not the judicial role in cases of this sort to probe and test the justifications...."[129]

Thus, *Fiallo* defines the judicial role in light of *The Chinese Exclusion Case*. The Court is to ensure that Congress, in enacting immigration laws, makes an intentional, rather than an arbitrary, choice. While *The Chinese Exclusion Case* and *Fiallo* seem to pay mere lip service to the idea that the Constitution may restrict congressional power to exclude certain immigrants, they do recognize that constitutional limits exist[130] and that the arbitrary exercise of plenary power should be avoided.[131] These concepts become important in light of IIRIRA's expedited removal provision.

2. IIRIRA Vests a Portion of Congress' Plenary Power with the INS

IIRIRA sets forth the specific instances whereby judicial review of an order of removal relating to expedited removal is permitted.[132] Before doing so, however, IIRIRA ensures that no unenumerated cause of action will slip through the cracks, stating that "no court shall have jurisdiction to review – except as provided in [IIRIRA]..., any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to [expedited removal]...."[133] IIRIRA also forecloses any possibility of injunctive relief.[134] As stated above,[135] IIRIRA allows habeas corpus proceedings, but judicial inquiry is limited to three threshold

125. *See id.* "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Id.* (quoting Shaughnessy v. Mezei, 345 U.S. 206, 210 (1953)) (citations omitted).

126. *See Fiallo*, 430 U.S. at 794–95. "The Court held that 'when the Executive exercises this [delegated] power negatively on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification....' We can see no reason to review the broad congressional policy choice at issue here under a more exacting standard...." *Id.* (alteration in original) (quoting Kleindienst v. Mandel, 408 U.S. 753, 770 (1972)).

127. *See id.* at 798.

128. *See id.* at 799.

129. *Id.*

130. *See* Chae Chan Ping v. United States, 130 U.S. 581, 604 (1889).

131. *See Fiallo*, 430 U.S. at 794–95.

132. *See* 8 U.S.C. § 1252 (Supp. III 1997).

133. 8 U.S.C. § 1252(a)(2)(A)(i).

134. *See* 8 U.S.C. § 1252(e)(1)(A) ("[N]o court may enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) [the expedited removal provision].").

135. *See* discussion *supra* Part II.C.

determinations.[136] IIRIRA also includes a section entitled "Challenges on validity of the system."[137] This allows for judicial review of expedited removal determinations in the United States District Court for the District of Columbia.[138] However, this review is limited to two issues: "whether [expedited removal], or any regulation issued to implement [expedited removal] is constitutional,"[139] and "whether such a regulation, or a written policy directive...[or] guideline, or written procedure...is not consistent with applicable provisions of this title or is otherwise in violation of the law."[140]

Noticeably absent from this list of possible subjects for judicial review is the possibility of review for abuse of discretion.[141] By insulating INS action from review for abuse of discretion, Congress vests part of its plenary power to the executive agency.[142] The INS has unlimited, unreviewable power to make individual expedited removal determinations. This clearly allows for the possibility of arbitrary action. The only potential for review comes from the INA[143] at 8 U.S.C. § 1252(e)(3)(A)(i), which allows courts to determine whether the entire expedited removal section is constitutional. This would ostensibly require application of the *Fiallo* rational basis test. However, both *Fiallo* and § 1252(e)(3)(A)(i) apply only to legislative action. Individual determinations by INS officers on whether to apply expedited removal are explicitly placed outside the purview of judicial review.[144] Thus, Congress, relying on its ability to delineate the jurisdiction of federal courts[145] and the tradition of judicial deference in immigration legislation, has vested in the INS part of its plenary power.

3. Constitutional Concerns Over the Vesting of Plenary Power in the INS

As a preliminary issue, many commentators have criticized the mere existence of Congress' plenary power over immigration. One of the most persuasive and passionate critiques was advanced by Louis Henkin:

> The doctrine that the Constitution neither limits governmental control over the admission of aliens nor secures the right of admitted aliens to reside here emerged in the oppressive

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136. *See* 8 U.S.C. § 1252(e)(2). *See also* Cooper, *supra* note 19, at 1515.
137. 8 U.S.C. § 1252(e)(3).
138. *See* 8 U.S.C. § 1252(e)(3)(A).
139. 8 U.S.C. § 1252(e)(3)(A)(i).
140. 8 U.S.C. § 1252(e)(3)(A)(ii).
141. *See* Gollobin, *supra* note 12, at 8.
142. *See* 8 U.S.C. § 1225(b)(1)(A)(iii)(I) (Supp. III 1997).

> The Attorney General may apply [expedited removal] to any or all aliens [who have not been admitted/paroled into the United States or cannot affirmatively show continuous physical presence in the United States for 2 years immediately prior to the date of the determination of inadmissibility]. *Such designation shall be in the sole and unreviewable discretion of the Attorney General....*

Id. (emphasis added).

143. 8 U.S.C. § 1252(e)(3)(A)(i) (Supp. III 1997).
144. *See* 8 U.S.C. § 1252(a)(2).
145. *See* U.S. CONST. art. I, § 7, cl. 9. *See also* U.S. CONST. art. III, § 2, cl. 2.

> shadow of a racist, nativist mood a hundred years ago.... It has no foundation in principle. It is a constitutional fossil, a remnant of a prerights jurisprudence that we have proudly rejected in other respects.
>
> Nothing in our Constitution, its theory, or history warrants exempting any exercise of governmental power from constitutional restraint. No such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional.
>
> As a blanket exemption of immigration laws from constitutional limitations, *Chinese Exclusion* is a 'relic from a different era....'
>
> The power of Congress to control immigration and to regulate alienage and naturalization is plenary. But even plenary power is subject to constitutional restraints. I cannot believe that the Court would hold today that the Constitution permits either exclusion on racial or religious grounds or deportation of persons lawfully admitted who have resided peacefully here....
>
> *Chinese Exclusion*--its very name is an embarrassment--must go.[146]

The problems identified by Professor Henkin are exacerbated by the vestiture of power in the INS. In *Fiallo*, the Court, by applying a rational basis test to an immigration statute,[147] revealed a slight crack in Congress' plenary power. By requiring congressional action to be intentional and not arbitrary, the Court provides the reasoning as to why vesting plenary power in an executive agency is so troublesome. Under IIRIRA, congressional action can be reviewed under a constitutional standard.[148] Agency action, however, cannot be reviewed.[149] Thus, in enacting IIRIRA, which vests the INS with part of its plenary power, Congress is permitting the possibility of arbitrary action. This is precisely the danger lurking in the background of *Fiallo*. Arbitrary action presents two basic constitutional problems. First, it infringes on due process of law by not providing a clear, consistent standard of proof. Second, it violates equal protection of the laws by allowing INS officials to enforce expedited removal in different ways to different people.

To summarize, examination of the expedited removal procedure reveals two apparent constitutional defects. First, it contains procedural deficiencies that, even leaving the Fifth Amendment to one side, compromises the flexible, balanced approach to due process issues in the Court's most recent immigration decisions. Second, expedited removal creates an unbalanced separation of powers by vesting Congress' plenary power over immigration into an executive agency. Part of the

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146. Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 862–63 (1987) (footnotes omitted) (quoting Reid v. Covert, 354 U.S. 1, 12 (1957)).

147. *See* Fiallo v. Bell, 430 U.S. 787, 794–95 (1977).

148. *See* 8 U.S.C. § 1252(e)(3)(A)(i).

149. *See* 8 U.S.C. § 1252(a)(2).

blame for these defects must fall on *The Chinese Exclusion Case*, *Fiallo*, and the tradition of judicial deference. However, those cases concerned the exclusion of noncitizens, while expedited removal concerns the deportation (now removal) of noncitizens. The root cause is the *Fong Yue Ting* decision, which applies the *Chinese Exclusion* reasoning to deportation and is explored at length below.

IV. *FONG YUE TING*: THE MAJORITY POSITION

The Supreme Court in *The Chinese Exclusion Case* held that Congress has plenary power to exclude Chinese laborers pursuant to the Act of October 1, 1888.[150] The Act of May 5, 1892[151] returned to this subject, extending the ten-year suspension of immigration by Chinese laborers provided for in the 1882 Act.[152] The 1892 Act struck new ground, however, in providing for the deportation of Chinese immigrants residing in the United States.[153] Pursuant to the 1892 Act, all Chinese laborers were required to apply for a "certificate of residence" within one year after the Act's passage.[154] Applications were to be made to the Collector of Internal Revenue.[155] The Secretary of the Treasury was responsible for creating regulations "necessary for the efficient execution of this act...."[156] Pursuant to this legislative order, the Secretary provided that residence must be proved by "at least one credible witness of good character."[157] This was construed by the Court to mean a white witness.[158] If a Chinese laborer was found within the United States without the certificate, that person would be "adjudged to be unlawfully within the United States, and may be arrested...and taken before a United States judge, whose duty it shall be to order that he be deported from the United States...."[159] However, if the Chinese laborer could prove to the judge that "by reason of accident, sickness, or other unavoidable cause" he could not acquire a certificate and that "by at least one credible white witness, that he was a resident of the United States" on May 5, 1892 he would "be granted [a certificate], provided he could pay the cost."[160]

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150. *See* Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889). *See also* Act of October 1, 1888, ch. 1064, 25 Stat. 504 (repealed 1974).

151. Act of May 5, 1892, ch. 60, 27 Stat. 25. (repealed 1943).

152. *See* Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943). *See also* text accompanying *supra* note 101; ALEINIKOFF, *supra* note 13, at 198.

153. *See* Act of May 5, 1892, ch. 60, 27 Stat. 25, § 6 (repealed 1943). *See also* ALEINIKOFF, *supra* note 13, at 198.

154. *See* Act of May 5, 1892, ch. 60, 27 Stat. 25, § 6 (repealed 1943).

155. *See id.*

156. *Id.* at § 7.

157. Fong Yue Ting v. United States, 149 U.S. 698, 726 (1893).

158. *See id.* at 703, 731.

159. Act of May 5, 1892, ch. 60, 27 Stat. 25, § 6 (repealed 1943).

160. *Fong Yue Ting*, 149 U.S. at 729–30. The reasoning behind the white witness requirement deserves mention for its blatant pandering to ethnic stereotypes.

> The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence...'by at least one credible white witness' may have been the experience of [C]ongress...that the enforcement of former acts, under which testimony of Chinese persons was admitted to prove similar facts, 'was attended

The 1892 Act was challenged in *Fong Yue Ting v. United States* by three Chinese laborers: Fong Yue Ting, Wong Quan, and Lee Joe.[161] Each was granted a writ of habeas corpus by the circuit court of the United States for the Southern District of New York and consolidated on direct appeal to the Supreme Court.[162] Ting came to the United States in 1879 "with the intention of remaining and taking up residence therein...."[163] He lived in New York City.[164] He was found by a U.S. marshal without a certificate of residence.[165] He was then arrested and taken before the court.[166] Quan's arrest came under essentially identical circumstances.[167] Joe, however, alleged a different set of facts. On April 11, 1893, Joe applied for a certificate of residence.[168] His application was denied because "the witnesses whom he produced to prove that he was entitled to the certificate were persons of the Chinese race, and not credible witnesses...."[169] The collector of internal revenue "required of him to produce a witness other than a Chinaman to prove that he was entitled to the certificate, which he was unable to do...."[170] Joe was then immediately arrested and taken before the circuit court for an order of deportation.[171] On appeal, each of the petitioners alleged that they were arrested and detained without due process of law and that the 1892 Act was unconstitutional.[172]

Justice Gray, writing for the Court, began by finding that the federal power to deport aliens came from the same source identified in *The Chinese Exclusion Case*.[173] The issue was framed as "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."[174] Thus, the Court set up the same pattern of reasoning as in

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> with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.'

Id. (quoting Chae Chan Ping v. United States, 130 U.S. 581, 598 (1889)).

161. *See id.*
162. *See id.*
163. *Id.* at 702.
164. *See id.*
165. *See id.*
166. *See id.*
167. *See id.* at 702–03.
168. *See id.* at 703.
169. *Id.*
170. *Id.*
171. *See id.* at 704.
172. *See id.* at 689.
173. *See id.* at 707 ("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."). Later, the Court went even further, calling the power to exclude and the power to expel "but parts of one and the same power." *Id.* at 713.
174. *Id.* at 711. This "right" was defined as "the right to...expel all 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...." *Id.* This language mirrors, almost exactly, the language

The Chinese Exclusion Case: plenary power, inherent in sovereignty, limited (but not really) by the Constitution. Following this line of reasoning, the Court explained that Congress could 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...."[175] However, the Court did not merely identify the existence of plenary power and move on. It recognized, despite its own language, that excluding and deporting are two very different actions. Why else would Justice Gray take the next step, insulating deportation proceedings from the strictures of the Fifth Amendment? The Court stated that the proceeding before a judge provided for in the 1892 Act is "in no proper sense a trial and sentence for a crime or offence."[176] The Court went on to hold that deportation is "not a punishment for crime. It is not a banishment, in the sense [of]...the expulsion of a citizen from his country by way of punishment."[177] Rather, the Court explained, deportation is merely "a method of enforcing the return to his own country of an alien who has not complied with the conditions upon...which the government of the nation, acting within its constitutional authority...has determined that his continuing to reside here shall depend."[178] This conceptual differentiation between deportation and punishment for a crime allowed the Court to hold that the petitioners had not "been deprived of life, liberty, or property without the 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*."[179]

With the Constitution having no application, "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."[180] Thus, *Fong Yue Ting* takes *The Chinese Exclusion Case* one step further. Not only is Congress' power plenary, and thus insulated from judicial scrutiny, but the Fifth Amendment does not apply to deportation because deportation is not a punishment for a crime. So, whatever Congress decides is an appropriate cause for deportation, here being Chinese and not being able to provide a white witness to testify as to residency, is sufficient. Even if Fong Yue Ting and the others were deprived of life, liberty, or property without due process of law, it would not make a difference.

The parallels between *Fong Yue Ting* and IIRIRA's expedited removal provision are obvious. As stated above, Lee Joe was deported for being Chinese and not supplying a white witness to testify.[181] Whether his "trial" satisfied the strictures of the Fifth Amendment's due process clause was of no consequence. Under the expedited removal provision, a noncitizen can be removed without

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employed in *The Chinese Exclusion Case*. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889).

175. *Fong Yue Ting*, 149 U.S. at 728.
176. *Id.* at 730.
177. *Id.*
178. *Id.*
179. *Id.* (emphasis added).
180. *Id.* at 731.
181. *See id.* at 732.

further hearing or review unless he can prove continuous physical presence in the United States for two years prior to the determination of deportability.[182] The determination is made by an immigration officer.[183] Judicial review is not available.[184] Whether the determination by the immigration officer satisfies the strictures of due process is of no consequence because, pursuant to *Fong Yue Ting*, deportation is not punishment for a crime and thus, the Fifth Amendment has no application.

In fairness, the INS does provide some basic due process rights to a noncitizen facing expedited removal to ensure that, if he does have an asylum claim, it will be heard.[185] For example, the INS reads a statement to the noncitizen explaining that asylum seekers with a credible fear of returning to their home country will not be removed.[186] The INS also provides an interpreter, access to telephones, a list of local representatives who may help the noncitizen present his claim and the telephone number of the United States office of the United Nations High Commissioner for Refugees.[187] Furthermore, the INS relies on "specially trained corps of full time asylum officers" to make the determination of whether a noncitizen will be removed.[188] Most importantly, the INS "has chosen not to exercise its expedited removal authority at the outset with respect to persons who are not 'arriving' but cannot demonstrate that they have been in the country for at least two years."[189] Rather the INS "has created a regulatory mechanism to invoke that authority in the future should it chose to do so."[190] Thus, the INS has chosen not to apply expedited removal to deport noncitizens currently in the United States, although it may at any time.

As stated above, the expedited removal provision applies to two types of noncitizens, those present in the United States and those seeking admission to the United States.[191] As to noncitizens seeking admission, the expedited removal procedure is within the procedural protections mandated by the case law.[192] As to noncitizens present in the United States, the expedited removal process raises troubling due process, equal protection, and separation of powers questions.[193] However, IIRIRA inoculates those questions from judicial review.[194] This insulation of executive action from judicial review is constitutionally permissible because of the rule established in *Fong Yue Ting*; deportation decisions are

182. *See* 8 U.S.C. § 1225(b)(1)(A) (1994 & Supp. IV 1998).
183. *See id.*
184. *See* 8 U.S.C. § 1252(a)(2) (1994 & Supp. IV 1998).
185. *See* Cooper, *supra* note 19, at 1516.
186. *See id.*
187. *See id.* at 1518.
188. *See id.*
189. *Id.* at 1520.
190. *Id.*
191. *See* ALEINIKOFF, *supra* note 13, at 871; 8 U.S.C. § 1227(a) (1994 & Supp. IV 1998). *See also supra* Part III.A.3.
192. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950). *See also supra* Part III.A.3.b.
193. See generally discussion *supra* Part III regarding IIRIRA's apparent constitutional defects.
194. *See* 8 U.S.C. § 1252(a)(2) (1994 & Supp. IV 1998).

immune from Fifth Amendment scrutiny because deportation is not punishment for a crime.[195] However, even in 1892, some thought was given to the idea that deportation procedures should be limited by the Fifth Amendment. This was the position of the *Fong Yue Ting* dissenters and is explored below.

V. *FONG YUE TING*: THE DISSENTING OPINIONS

Three justices dissented from the majority in *Fong Yue Ting*: Justice Brewer, Justice Field,[196] and Chief Justice Fuller. Each found the majority's unwillingness to evaluate the Act of 1892 under a constitutional standard troubling. Each also identified the crucial fact that the petitioners had previously acquired lawful admission to the United States. This, the dissenters argued, brought the petitioners within the protection of the Constitution.[197]

The Chief Justice entered the most concise dissent. His main concern was over the proper role of the Court. Unlike the majority, who found no role for the Court in evaluating the Act of 1892, the Chief Justice stated that "the question whether this act of [C]ongress...is in conflict with [the Constitution], is a judicial question, and its determination belongs to the judicial department."[198] What brings the issue within the purview of the Court is the "universality" of the Constitution: "I entertain no doubt that the provision of the fifth and fourteenth amendments...are...'universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality....'"[199] The problem with the 1892 Act, according to the Chief Justice, was that "[i]t 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."[200] Thus, the Chief Justice recognized the problems inherent in the Court's interpretation of Congress' power over deportation as plenary. When Congress exercises this plenary power, or delegates it to certain executive officials, it issues "a legislative sentence of banishment."[201] Such a sentence, in the Chief Justice's mind, should only be inflicted with "a judicial trial."[202] The Chief Justice ended his dissent on an ominous note, stating that Congress' plenary power over deportation "contains within it the germs of...an unlimited and arbitrary power...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."[203]

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195. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

196. Justice Field delivered the Court's opinion in *The Chinese Exclusion Case*. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

197. *See Fong Yue Ting*, 149 U.S. at 733 (Brewer, J., dissenting); *id.* at 745 (Field, J., dissenting); *id.* at 761 (Fuller, C.J., dissenting).

198. *Id.* at 761 (Fuller, C.J., dissenting).

199. *Id.* at 761–62 (Fuller, C.J., dissenting) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

200. *Id.* at 763 (Fuller, C.J., dissenting).

201. *Id.*

202. *Id.*

203. *Id.*

While the Chief Justice concerned himself mainly with defining the appropriate judicial role, Justice Brewer's dissent focused on the apparent constitutional violations. The Brewer dissent rested on three propositions: (1) that the petitioners were lawfully admitted to the United States; (2) that "as such they are within the protection of the [C]onstitution"; and (3) that the 1892 Act deprived the petitioners of various "constitutional guaranties," especially those found in the Fourth, Fifth, Sixth, and Eighth Amendments.[204]

As evidence of the petitioner's lawful entrance into the United States, Justice Brewer cited the Burlingame Treaty and the subsequent Chinese Exclusion Acts, noting that "no act has been passed, denying the right of those laborers who had once lawfully entered the country to remain...."[205] As to the application of the Constitution, Justice Brewer points out that, in "the first 10 amendments...the word 'citizen' is not found. In some of them the descriptive word is 'people,' but in the fifth it is broader, and the word is 'person'...while in the third, seventh, and eighth there is no limitation as to the beneficiaries...."[206]

However, Justice Brewer uses most of his dissent to list the constitutional violations inherent in the exercise of the 1892 Act. He states that the law "imposes punishment without a trial, and punishment cruel and severe. It places the liberty of one individual subject to the unrestrained control of another."[207] Justice Brewer characterizes the act of deportation as punishment. "It involves—First, an arrest, a deprival of liberty; and second, a removal from home, from family, from business, from property."[208] Furthermore, Justice Brewer complains, the 1892 Act provides no check on the potential for arbitrary action.[209] The accumulation of these constitutional deficiencies, Justice Brewer argues, demands due process: "[P]unishment implies a trial.... 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."[210] Thus, just as the Chief Justice recognized plenary power problems, Justice Brewer recognizes the inherent due process problems with summary deportation. And again, like the Chief Justice, Justice Brewer ends his dissent on an equally ominous, if racist, note: "[i]t 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?"[211]

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204. *Id.* at 733 (Brewer, J., dissenting).

205. *Id.* at 734 (Brewer, J., dissenting). Justice Brewer also points to the irony that the petitioners "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 [C]ongress that passed this act of punishment and expulsion." *Id.*

206. *Id.* at 739 (Brewer, J., dissenting).

207. *Id.* at 739–40 (Brewer, J., dissenting).

208. *Id.* at 740 (Brewer, J., dissenting).

209. *See id.* at 741 (Brewer, J., dissenting). Justice Brewer goes on to state that "[i]t will not do to say...that the official will act reasonably, and not arbitrarily. When the right to liberty and residence is involved, some other protection than the mere discretion of any official is required." *Id.* at 742 (Brewer, J., dissenting).

210. *Id.* at 741 (Brewer, J., dissenting).

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

Concern over the potential for arbitrary exercise of power is also present in the dissent of Justice Field. While considering the plenary power of Congress over deportation he wondered if "[C]ongress can, at its pleasure, in disregard of the guaranties of the [C]onstitution, expel at any time the Irish, German, French, and English...simply on the ground they have not been naturalized?"[212] Before reaching this point, however, Justice Field had to reconcile his dissent with the fact that he wrote the Court's opinion in *The Chinese Exclusion Case*, which established Congress' plenary power over immigration. He did so by pointing out a crucial difference between *The Chinese Exclusion Case* and *Fong Yue Ting*: "between legislation...to prevent [Chinese persons] from entering the country, — and legislation for the deportation of those who have acquired a residence in the [United States]...there is a wide and essential difference."[213] The difference, according to Justice Field, is that "[a]liens...domiciled within our country by its consent, are entitled to all the guarantees for the protection of their persons and property which are secured to native-born citizens."[214] When such persons with such rights are "to be removed out of the country by executive officers, without judicial trial or examination," such an action "would not be a reasonable seizure of the person, within the meaning of the [Fourth Amendment]. It would be brutal and oppressive."[215] Justice Field then made the strongest statement of all the dissents, stating that "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."[216] Justice Field then defined the nature of that cruelty in phrases that closely parallel constitutional language:

> 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.... [I]f a banishment of the sort described be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.[217]

Justice Field, as the author of *The Chinese Exclusion Case*, is clearly the most important dissenter. He identifies the clear difference between exclusion and deportation and based his decision in *Fong Yue Ting* on that basis. His point is simple: when someone lives in the United States, he develops important friendship, family and business ties. These connections deserve constitutional protection.

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212. *Id.* at 750 (Field, J., dissenting).
213. *Id.* at 746 (Field, J., dissenting).
214. *Id.* at 754 (Field, J., dissenting). Justice Field went on to say that "[a]rbitrary and despotic power can no more be exercised over them, with reference to their persons and property, than over the persons and property of native-born citizens." *Id.*
215. *Id.* at 755 (Field, J., dissenting).
216. *Id.* at 756 (Field, J., dissenting).
217. *Id.* at 759 (Field, J., dissenting).

VI. CONCLUSION

It is clear that the analysis of the *Fong Yue Ting* dissenters does not apply directly to IIRIRA's expedited removal procedure. *Fong Yue Ting* deported noncitizens who were lawfully admitted to the United States. Expedited removal would deport noncitizens who were never lawfully admitted.[218] However, even with this difference in mind, the same analysis applies. The cruelty of severing the friendship, family, and business ties a noncitizen makes in the United States is not any less severe because that noncitizen was never admitted to the United States. Deportation of a noncitizen never admitted to the United States is not any less a punishment than deportation of an admitted noncitizen. Time spent in INS detention is not any less traumatic. The potential for an arbitrary determination by an immigration officer is not somehow less likely. Essentially, the concept of due process is not less important merely because the noncitizen has not been lawfully admitted. The *Fong Yue Ting* dissenters would probably disagree. Yet, in their dissents, they formulated arguments which support granting procedural due process rights to all noncitizens, whether admitted or not, in deportation proceedings. Shouldn't any person, whether admitted to the United States or not, receive notice and the opportunity to be heard before he is deported from his home? Isn't that, to borrow the phrasing of Chief Justice Fuller, compatible with the immutable principles of justice, consistent with the nature of our government, and in harmony with the written constitution by which that government was created, and those principles secured?[219]

The expedited removal provision should be found unconstitutional and the strictures of the Fifth Amendment, in particular the clause providing for due process of law, should be applied to noncitizens whom the United States Government seeks to summarily deport. In many ways, this argument seeks a return to the "entry" doctrine, where the process applied depended on whether the noncitizen had entered the United States. Those who entered had the opportunity to go before a judicial court to ensure they received due process in their deportation proceeding.[220] Those who had not entered the United States did not have this opportunity as to their exclusion proceeding.[221]

However, IIRIRA makes the "entry" doctrine obsolete. Now, the process due depends on whether a noncitizen has been admitted to, not whether he has merely entered, the United States. This conceptual shift abandons the procedural protections for deportation mandated by *Yamataya*.[222] The justification for this change is obvious: to crack down on illegal immigration. Expedited removal

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218. In fact, Justice Field recognized this difference in his dissent, stating that "[t]here were two classes of Chinese persons in the country,—those who had evaded the laws excluding them and entered clandestinely, and those who had entered lawfully...[w]ith [those who entered clandestinely], we have no concern in the present case." *Id.* at 751 (Field, J., dissenting). Thus, Justice Field explicitly removes "illegal aliens" from his analysis.

219. *See id.* at 763 (Fuller, C.J., dissenting).

220. *See* Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903).

221. *See* Nishimure Ekiu v. United States, 142 U.S. 651 (1892).

222. *See Yamataya*, 189 U.S. at 101.

makes it easier, faster, and less expensive for the INS to deport illegal immigrants.[223]

However, as has been shown, expedited removal is a troubling procedure from a constitutional standpoint. It provides little due process protection, it contains the potential for arbitrary action leading to the unequal administration of the law, and it vests part of Congress' plenary power over immigration to executive officials. While these deficiencies are important, the main problem with expedited removal is that it cannot be scrutinized by the judiciary. A series of nativist, racist decisions, especially *The Chinese Exclusion Case*[224] and *Fong Yue Ting*,[225] ensure that the judiciary will have no role in evaluating any immigration legislation, including expedited removal, from a constitutional perspective. While it seemed that the Court was moving away from those cases and toward a more modern due process analysis in *Plasencia* and *Fiallo*,[226] that avenue is foreclosed by the careful drafting of IIRIRA. As discussed above, only the expedited removal procedure itself, and not any individual determination, is eligible for judicial review. Thus, no individual noncitizen will have a case that is "ripe" for judicial review.

Any challenge to the expedited removal provision must strike at the root of *Fong Yue Ting*: that deportation is a civil action and as such, the Fifth Amendment has no application. The arguments against such a rule are contained within the dissents of *Fong Yue Ting* itself. Chief Justice Fuller argues that only the judiciary can issue a judicial sentence.[227] Justice Brewer points out that the Fifth Amendment reads "person" not "citizen."[228] And Justice Field identifies the important interests, such as those dealing with friends, family, and business, that are at stake in a deportation determination.[229] These arguments provide the foundation for a challenge to *Fong Yue Ting* and its most recent offspring, IIRIRA's expedited removal provision.

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223. *See* Cooper, *supra* note 19, at 1502.

224. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889).

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

226. *See* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (applying the *Mathews* three-part balancing test to evaluate an INS exclusion proceeding involving a legal permanent resident of the U.S.); Fiallo v. Bell, 430 U.S. 787, 797–98 (1977) (applying a rational basis test to evaluate a definitional section of the INA).

227. *See Fong Yue Ting*, 149 U.S. at 763 (Fuller, C.J., dissenting).

228. *See id.* at 739 (Brewer, J., dissenting).

229. *See id.* at 759 (Field, J., dissenting).