# Feminist Judgments: Immigration Law Opinions Rewritten

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## Commentary on *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)

*Eunice C. Lee*

On May 7, 1891, Ms. Nishimura Ekiu arrived in San Francisco aboard the steamship *Belgic*. At age twenty-five, she had journeyed from her home country of Japan to reunite with her husband in the United States. Ms. Nishimura had the misfortune of coming at a time of heightened fearmongering against "yellow peril"[1] and "Oriental invasion."[2] Although the immigration laws did not yet bar admission of Japanese nationals – that blanket prohibition would happen in 1924[3] – Japanese immigrants were nonetheless swept up in waves of anti-Asian sentiment. Congress had passed the Chinese Exclusion Act in 1882 and continued to further restrict Chinese immigration in the years following. In 1892, a decade after the original Exclusion Act and the same year as the Court's decision in *Nishimura Ekiu v. United States*,[4] Congress extended the ban on Chinese nationals.

The exclusion laws reflected and responded to virulent anti-Chinese sentiment of the time. Although reluctantly tolerated for providing cheap labor for railroad construction in the mid-1800s, Chinese immigrants came under increasing attack and vilification as the need for their labor diminished.[5] White Americans targeted Chinese immigrants with mob violence and lynching,[6] as well as concerted legal efforts.

The strongest anti-Chinese movement arose out of California: The Workingman's Party, founded in San Francisco in 1877 by white laborers, called for the removal of all Chinese persons from California. The Party's advocacy led to several anti-Chinese state laws as well an amendment to the California Constitution, authorizing

[1] *See* Erika Lee, *The "Yellow Peril" and Asian Exclusion in the Americas*, 76(4) PAC. HIST. REV. 537 (2007).

[2] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[3] *See* Immigration Act of 1924, Pub. L. 68–139, 43 Stat. 153 (1924) (prohibiting entry of all noncitizens ineligible for naturalization, which included all immigrants from Asia).

[4] 142 U.S 651 (1892).

[5] *See* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 8–9 (1995).

[6] *See* BETH LEW-WILLIAMS, CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA (2021).

localities to expel Chinese residents.[7] Eventually, the Party's work helped secure the passage of the federal exclusion laws.

Yet, even before the general ban on Chinese nationals, Congress had targeted Asian women in particular. The Page Act of 1875 prohibited admission of women sex workers and made their "importation" a felony offense.[8] Horace F. Page, a Congressman from California and the named sponsor of the Act, built a platform around anti-Chinese legislation (including later sponsorship of the 1882 Exclusion Act).[9] In his speech introducing the Page Act, he called upon Congress to protect America's wives and daughters from the immorality, vice, and "deadly blight" of "Chinese prostitutes."[10]

Although legislative debates over the Page Act focused on Chinese women sex workers, the law expressly singled out Japanese women as well. The Act prohibited admission of women sex workers of all nationalities, but specifically mandated the pre-embarkation inspection of women from "China, Japan, or any Oriental country." The Act required U.S. consuls in these countries – and these countries only – to screen women for "lewd and immoral purposes." In implementing the Page Act, officials presumed nearly all Chinese women to be prostitutes and excluded them accordingly.[11]

When Ms. Nishimura arrived in San Francisco in 1891, she encountered a milieu of laws and policies that constituted her as doubly undesirable: a foreigner, racially inferior and unassimilable; and an "Oriental" woman, lewd and immoral.[12] Although the immigration inspector found her excludable as a public charge pursuant to the 1891 Immigration Act rather than under the Page Act, his disbelief in her testimony reflected gendered and racialized skepticism. Ms. Nishimura explained that she had come to the United States to reunite with her husband, consistent with the notation in her passport – but the immigration inspector refused to view her a legitimate wife. She challenged her exclusion in federal court and remained in custody at the Methodist Japanese and Chinese Mission house in San Francisco for the duration of her suit.

[7] *See* Cal. Const. of 1879, art. XIX. Chinese community members successfully sued to enjoin the provision. *See, e.g.*, In re Tiburcio Parrot, 1 F. 481 (C.C.D. Cal. 1880). However, that victory only prompted the Workingman's Party to push for federal legislation.

[8] Act of Mar. 3, 1875, Pub. L. 43–141. 18 Stat. 477, ch. 141 (1875).

[9] Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105(3) COLUM. L. REV. 641, 690 (2005).

[10] 3 Cong. Rec. appx. 40 (1875) (speech of Horace Page); Catherine Lee, *"Where the Danger Lies": Race, Gender, and Chinese and Japanese Exclusion in the United States, 1870–1924*, 25(2) SOCIOL. FORUM 248 (2010). An earlier California statute also targeted Chinese sex workers. That law, passed in 1866 by the California legislature and titled "An Act for the Suppression of Chinese Houses of Ill-Fame," declared Chinese prostitution to be a public nuisance and banned the issuance of leases to Chinese brothels. Act of Mar. 21, 1866, 1866 Cal. Stat. 641, ch. 505.

[11] Abrams, supra note 10, at 698.

[12] See Pooja Dadhania, *Deporting Undesirable Women*, 9 U.C. IRVINE L. REV. 53 (2018) (analyzing immigration law's long history of targeting of noncitizen women sex workers, including Chinese and Japanese women, as "undesirable").

At the time of Ms. Nishimura's arrival, immigration restrictionists had begun focusing their attention on Japanese nationals. The 1882 law almost entirely stopped immigration from China, paving the way for greater flows from other parts of Asia, particularly Japan. The Workingman's Party adopted a new slogan: "The Japs Must Go."[13] On May 4, 1891, a headline in the *Bulletin*, a prolabor San Francisco newspaper, proclaimed: UNDESIRABLES; ANOTHER PHASE IN THE IMMIGRATION FROM ASIA; JAPANESE TAKING THE PLACE OF THE CHINESE; IMPORTATION OF CONTRACT LABORERS AND WOMEN.[14] Just three days later, the *Belgic* arrived in that same port city with Ms. Nishimura onboard.

Racism and sexism against Asian women pervaded immigration law and enforcement at the turn of the twentieth century. The treatment Ms. Nishimura received from government officials reflected this, as did the Supreme Court's eventual ruling in her case. Even the decision to hold Ms. Nishimura in the Methodist mission home instead of keeping her onboard her ship, considered by the Court to be "suitable,"[15] had racist and sexist overtones. The missionaries at the home sought to "rescue" the Asian women in their care from their immoral and inferior cultures, and to inculcate them with Protestant and Victorian values.[16]

Ms. Nishimura's custody in the mission home – reflective of the racism and sexism of the era – led the Court to pronounce a novel doctrine with wide-reaching contemporary ramifications. In siding with the government, the Supreme Court established immigration's "entry fiction" – a judicial construct that treats noncitizens present on U.S. soil as outside the bounds of its territory. When individuals are "stopped at the gates," i.e., refused formal admission at a port of entry, "entry fiction" doctrine excludes them from the full protection of the U.S. Constitution with regard to immigration decisions.

Rather than cabining the fiction to the ignominious era of its pronouncement, the Court has seen fit to expand it. The fiction of nonentry now limits the rights of thousands of immigrants at our borders and ports of entry each year, including many asylum seekers.[17] The fiction applies even when Immigration and Customs

[13] ROGER DANIELS, ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850 111 (1988).

[14] *See id.* at 112 (describing article and headline in The Bulletin).

[15] 142 U.S. at 661.

[16] See PEGGY PASCOE, RELATIONS OF RESCUE: THE SEARCH FOR FEMALE MORAL AUTHORITY IN THE AMERICAN WEST, 1874–1939 121 (1990); Laura Curry, *"Sweep All These Pests from Our Midst": The Anti-Chinese Prostitution Movement, the Criminalization of Chinese Women, and the First Federal Immigration Law*, 2(1) W. VA. U. HIST. REV. 1, 3.

[17] *See* Detention FY 2022 YTD, Alternatives to Detention FY 2022 YTD and Facilities FY 2022 YTD, IMMIG. & CUSTOMS ENFORCEMENT; see also Control of Communicable Diseases; Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56424 (Sept. 11, 2020); AMERICAN IMMIGRATION COUNCIL, A GUIDE TO TITLE 42 EXPULSIONS AT THE BORDER (Oct. 2021).

Enforcement (ICE) has transported these individuals hundreds of miles into the interior and detained them in prison-like facilities for months or even years. ICE's mass incarceration system primarily benefits private prison companies, which operate the vast majority of detention beds and garner over a billion taxpayer dollars each year.[18]

The far-reaching ramifications of *Nishimura Ekiu* would likely have been unimaginable to the Justices of the time. The decision pre-dated contemporary mass incarceration of immigrants and an established asylum system by almost a century. Yet the Court recently relied upon *Nishimura Ekiu* in a dramatic expansion of entry fiction. In the 2020 case of *DHS v. Thurassigiam*,[19] the Court rejected the habeas and due process claims of a Sri Lankan asylum seeker. Its reasoning compounded the errors of its earlier decision, while also failing to consider drastically different contemporary circumstances. Consequently, in other work, I have proposed the abandonment of entry fiction as a legal fiction. The current Court both misapprehends the origin of the doctrine and relies on its outdated justifications that have long since expired.[20]

## THE ORIGINAL OPINION

Ms. Nishimura was one of several Japanese women aboard the ***Belgic*** when it landed in San Francisco. William H. Thornley, the Commissioner of Immigration for California, boarded the ship to inspect her along with other passengers. Upon questioning, Ms. Nishimura explained that she had journeyed to join her husband of two years, but Mr. Thornley disbelieved this account. He faulted her for not knowing her husband's address and deemed her excludable as "a person unable to care for herself, and liable to become a public charge." He wrote in his report, "She has $22, and is to stop at some hotel until her husband calls for her."[21]

The relevant law had passed only two months prior. The Immigration Act of 1891 prohibited admission of "[a]ll idiots, insane persons, paupers or persons likely to become a public charge" (among others).[22] It also established the office of the superintendent of immigration within the Treasury Department.[23]

On May 13, 1891, Ms. Nishimura brought a habeas corpus suit in federal court. Rather than keeping her aboard the ship, the U.S. government agreed with her attorney that she would remain in the custody of the Methodist Episcopal Japanese and Chinese Mission boarding home in the City of San Francisco.

[18] Eunice Cho, *More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration*, ACLU.ORG (Oct. 5, 2021).

[19] 140 S. Ct. 1959 (2020).

[20] *See* Eunice Lee, *The End of Entry Fiction*, 99 N. C. L. REV. 565 (2021).

[21] 142 U.S. at 651.

[22] An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens under Contract or Agreement to Perform Labor, Pub. L. 51–551, 26 Stat. 1084, c. 551, §1 (1891).

[23] *Id.* § 7.

On May 14, 1891, the Secretary of Treasury appointed John L. Hatch as inspector of immigration at the port of San Francisco. Mr. Hatch adopted the findings and conclusions of Mr. Thornley verbatim in his own report, deeming Ms. Nishimura excludable as a public charge.

In her hearing before the circuit court, Ms. Nishimura argued that the Immigration Act of 1891 deprived her of liberty without due process of law under the Fifth Amendment.[24] She also contended that her right to habeas corpus mandated review of the legality of her detention, including an inquiry into the facts. Finally, she offered to introduce new evidence on her right to land. The circuit court rejected Ms. Nishimura's arguments and proffer of evidence, holding that the decision of Mr. Hatch was lawful, final, and unreviewable.

The Supreme Court granted Ms. Nishimura's petition for certiorari but ultimately affirmed the court below. Justice Gray penned the near-unanimous decision. After confirming its appellate jurisdiction to hear the appeal, the majority decision opened by stating that "inherent in sovereignty and essential to self-preservation" is the power of the federal government to "forbid the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit." This power, the Court emphasized, "belongs to the political department of the government."[25]

Importantly, the Court agreed that Ms. Nishimura had a clear right to habeas review of her exclusion by the federal court: "[a]n alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of *habeas corpus* to ascertain whether the restraint is lawful."[26] But the Court shied away from full constitutional review, reasoning that:

> It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. *As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law.*[27]

Deeming executive decisions authorized by Congress "due process of law" reflected a drastic abdication of the judiciary's role. Rather than protecting individual rights against executive and Congressional overreach, the Court simply stepped aside. It did so even though the action at issue had enormous impact on the lives and liberty of people subject to governmental coercion. Under the majority's analysis, the

[24] U.S. Const. amend. V.
[25] 142 U.S. at 659
[26] *Id.* at 660
[27] *Id.* (emphasis added).

Constitution faded out of view – subsumed by statute and executive action, rather than serving as a check against them.

The fact that the immigration action here concerned *exclusion* – and not deportation – would prove key to the majority decision. Immigration officers never formally admitted Ms. Nishimura, and she was brought onto U.S. territory in government custody. In other words, she did not effect a technical immigration "entry," which entails either formal admission or a crossing onto territory free from restraint.[28] The fact of her physical presence on U.S. soil at the time of her lawsuit did not constitute an entry, and thus did not confer constitutional or statutory protections. The Court explained:

> Putting her in the mission-house as a more suitable place than the steam-ship, pending the decision of the question of her right to land, and keeping her there, by agreement between her attorney and the attorney for the United States, until final judgment upon the writ of *habeas corpus*, left her in the same position, so far as regarded her right to land in the United States, as if she never had been removed from the steam-ship.[29]

The Court here emphasized the "suitable" nature of the mission house, as well as her custody there pursuant to her own agreement.[30] As noted the mission home was not a jail, but rather a boarding house in the city center of San Francisco, offering shelter, food, clothing, transportation, and social services to its residents. This infers a humanitarian impulse underpinning entry fiction in statute and doctrine. Later cases reaffirming the fiction also reflect a desire to benefit individuals by minimizing detention in harsh condition on ships or in detention centers.[31] In this specific context, the Court assimilated Ms. Nishimura's constitutional status to that of a person outside the United States despite her presence within it – pronouncing immigration's entry fiction.

A little over a decade later, in a 1903 case also involving a young Japanese woman, the Court would recognize due process principles for entrants. The petitioner, Kaoru Yamataya, had made a landing in the United States; just four days later, an immigration inspector deemed her wrongly admitted and found her excludable as a public charge. The fact of formal entry made all the difference in her case. The Court in *Yamataya v. Fisher* declined to extend the reasoning in *Nishimura Ekiu* to recent entrants. Rather than accepting executive decisions pursuant to federal statute as "due process of law" in and of themselves, it explained that the government could not deport the petitioner absent a hearing: "[n]o such arbitrary power can exist where the principles involved in due process of law are recognized."[32] But for Ms. Nishimura, a technical non-entrant present in San Francisco, due process protections against governmental power did not apply.

[28] *See in re Z-*, 20 I. & N. Dec. 707, 707–08 (B.I.A. 1993); *in re* Patel, 20 I. & N. Dec. 368 (B.I.A. 1991).
[29] 142 U.S. at 661.
[30] *See* Lee, supra note 19, at 587–97; *see also* Leng May Ma v. Barber, 57 U.S. 185 (1958).
[31] *See* ESTHER CRAIN, THE GILDED AGE IN NEW YORK, 1870–1910 (2016).
[32] Yamataya v. Fisher, 189 U.S. 86, 101 (1903).

## THE FEMINIST JUDGMENT

Professor Stella Burch Elias, writing as Justice Elias, concurring in part and dissenting in part, would grant habeas relief to Ms. Nishimura. At the outset of her opinion, she recounts the facts presented to the Court with far more care and concern than the majority.[33] She casts a skeptical eye on the Court's characterization of Ms. Nishimura's inspection by Mr. Thornley as "careful," noting that "the record is silent as to Ms. Nishimura's knowledge of, or proficiency in, the English language" and "equally silent as to whether Ms. Nishimura had any access to the services of a skilled interpreter." Thus, "it is impossible to ascertain with any certainty that Mr. Thornley was able to question Ms. Nishimura effectively or that Ms. Nishimura was able to respond knowingly or appropriately to Mr. Thornley's questions." Similarly, she observes that the record did not clarify whether Mr. Hatch ever met with the petitioner, "or whether he gave her any opportunity at all to present her case in any meaningful way."

Professor Elias concurs with the majority that the federal courts have jurisdiction to review Ms. Nishimura's challenge to her exclusion. As she notes, English common law has long recognized the availability of the writ of habeas to all persons detained by the government, including foreign subjects; and Article I of the U.S. Constitution enshrines this "fundamental and longstanding" right.[34] Thus, she agrees with the majority that noncitizens arriving at our shores and prevented entry have the right to seek habeas relief with regard to their exclusion.

In the remainder of her opinion, Professor Elias diverges significantly from the holdings and reasoning of the majority. First, she disagrees that the statutory framework of the Immigration Act of 1891 divests federal courts of full judicial review of exclusion decisions. The majority emphasized Section 8 of the Act which provides that: "all decisions by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final, unless appeal[ed] ... to the superintendent of immigration, whose action shall be subject to review by the secretary of treasury." Professor Elias, however, points out that Section 13 of the Act instructs federal circuit and district courts to remain "invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any provisions of this act." This language permits – indeed, requires – federal courts to review the exclusion decisions of executive officers.

In Section IV of her opinion, Elias sets forth her most salient and important dispute with the majority, regarding due process rights in immigration proceedings. In this section, she deviates from not only the majority decision but also the Court's prior plenary power doctrine decisions.[35] Rather than deferring to the political

[33] Angela Harris, *Compassion and Critique*, 1 COLUM. J. RACE L. 326 (2012).
[34] U.S. Const. art. I, § 9 cl. 2.
[35] See Chae Chan Ping, 130 U.S. 581 (1889); Fong Yue Ting, 149 U.S. 698 (1893).

branches on immigration matters, she persuasively argues that the judiciary should engage in normal constitutional review of executive action and congressional laws. She contends that "when executive officers are actively engaged in implementing the provisions of a statute that authorizes the deprivation of a person's liberty, whether through that person's detention, exclusion, or deportation, *it is more important than ever* that the officers' behavior comports with the Due Process guarantees in our Constitution." (emphasis added).

Professor Elias unequivocally rejects the majority's statement that as to exclusion, the actions of executive officers pursuant to federal statute are due process of law. She emphasizes that government officials are not immune from "the mandates of the Constitution" or from judicial review. Thus, "[n]o officer of the United States may disregard the fundamental precept set forth in the Fifth Amendment to the Constitution of the United States that: 'No person shall be ... deprived of life, liberty, or property, without due process of law.'"[36] Nor does the 1891 Act envision such a scenario: "the statute does not furnish the executive and administrative officers with unfettered and arbitrary power."

In the final section of her opinion, Professor Elias applies constitutional scrutiny to the facts of the case. She first addresses whether the immigration proceedings afforded Ms. Nishimura due process of law. She reiterates the lack of detail in the sparse, identical reports of Messrs. Hatch and Thornley and identifies several potential due process concerns. These include the record's silence on: (1) whether Ms. Nishimura received notice of the importance of her initial or subsequent interview; (2) the extent of Ms. Nishimura's English proficiency and education; (3) whether she was provided an interpreter who accurately translated questions to her; and (4) whether the officers took her testimony under oath. Elias concludes that there is simply no indication that Ms. Nishimura "was granted any opportunity at all to present her case in any meaningful way." In light of the history of the case, Elias "suspect[s] that she was not," but stops short of finding a due process violation given the record's deficiencies.

Professor Elias next considers Ms. Nishimura's treatment by the circuit court, and here, finds the record clear enough to reach a firm conclusion. She notes that although Ms. Nishimura "attempted vigorously and repeatedly to present evidence" contesting her exclusion, the lower court rejected Ms. Nishimura's proffer, wrongly deciding it had no authority to consider her claims. Elias determines that in those judicial proceedings, "Ms. Nishimura was denied her opportunity to be heard, and was therefore deprived of her liberty without due process of law."

In the last paragraph of her opinion, Professor Elias highlights the moral as well as legal failures of the lower court and government, compounded by her fellow Justices. "In denying her the opportunity to present her claims," she writes, "the immigration officials and the Circuit Court denied her humanity, failing to treat her as 'person' who could not be deprived of her liberty without due process of law."

[36] U.S. Const. amend. V.

Elias eloquently avers that recognizing a "person" for constitutional purposes not only gives substance to their legal claims, but also affirms that they are human. In refusing to see Ms. Nishimura as a full person, the justices in the majority rejected the common humanity they share with her.

Professor Elias acknowledges the limitations of her own perspective and role. Given the deficiencies of the record, she cannot fully know what happened to Ms. Nishimura. Even less uncertain, she notes, are the fates of the other young women who arrived with Ms. Nishimura on the *Belgic*:

> Ms. Nishimura was not alone on May 13, 1891, when the *Belgic* sailed into the Port of San Francisco. We know from Mr. Thornley's report that five other women aboard the vessel were also excluded from the United States, and in the majority's recounting of the facts of this case, their personhood is even more ephemeral than that of Ms. Nishimura. We do not know what happened to them next. We do not even know their names.

Professor Elias's insistence on seeing these women radically departs from judicial practice. The five women were not parties to the suit, and their claims were never presented to the Court. Rather than taking this as license to ignore their existence, Elias draws our attention to these women – to the lacuna of their absence, and the injustice it entails. She cannot give them names or voices, nor rectify their unconstitutional treatment, but she can recognize and acknowledge them. And this she does, concluding:

> All immigrants arriving at our borders, whatever their sex, race, nationality, or creed, are entitled to be treated humanely and justly, in accordance with due process of law. They are entitled to tell their stories and to have their voices heard. Therefore, I respectfully dissent.

Professor Elias reminds us that all immigrants who come to our shores are persons, under our Constitution and otherwise. Fictions notwithstanding, they are here.[37]

Following the majority decision, we never get to hear Ms. Nishimura's full story, nor those of the women who arrived with her. Professor Elias calls our attention to this silencing. Although she cannot speak for the women, she makes us feel their absence. Her Constitution does not discriminate on the basis of race, national origin, gender, manner of entry, or immigration status. Under her interpretation, the Due Process Clause would instead rectify government overreach reflecting these prejudices.

Professor Elias handles Ms. Nishimura's claims with fairness and an ethic of care.[38] She does not allow gendered, racialized stereotypes to color her judgment; rather, she closely scrutinizes the decisions of government officials who likely held these prejudices and who enforced laws explicitly rooted in them. She refuses to

[37] Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991).

[38] Carol Gilligan, *Moral Injury and the Ethic of Care: Reframing the Conversation about Differences*, 45 J. SOC. PHILOS. 89 (2014).

validate governmental action on a defective record and does not shy away from criticizing the lower court and majority for miscarriage of justice.

Elias's opinion rises above the racism and sexism of an era that viewed "Oriental" women as threats to the nation. The majority's treatment of Ms. Nishimura as a nonperson under the Constitution is deeply rooted in this historical context.[39] In the intervening century and a quarter, significant changes in law and jurisprudence might have prompted a careful Court to revisit entry fiction as pronounced in *Nishimura Ekiu*. Our immigration laws now prohibit rather than mandate discrimination on the basis of race and national origin.[40] We have an asylum system, and laws that prevent return to persecution and torture.[41] Meanwhile, in legal doctrine, over a century of due process jurisprudence has deepened the rights of individuals against governmental overreach.

Much has changed in the treatment of immigrants as well. In 1892, when the Court rendered its decision in her case, Ms. Nishimura's form of custody was a room at the Methodist mission home in San Francisco: a boarding house complete with a parlor room and dining hall.[42] The Court deemed this placement a "suitable" alternative to forcing her to stay aboard her passenger ship. Today, the Department of Homeland Security (DHS) keeps tens of thousands of noncitizens each day in immigration prisons. Immigration enforcement has also dramatically changed in scale, scope, and capability. The Treasury's immigration inspection office was nascent and tiny in Ms. Nishimura's time; in ours, Congress provided DHS with $52.81 billion in fiscal year 2022 alone, including billions for military-grade technology.[43]

The Court continues to ignore the history of racism and sexism underpinning the cases of the Chinese Exclusion era. And it consistently fails to consider the lived reality of immigrants swept up in our enforcement and legal systems today. In *DHS v. Thuraissigiam*,[44] the Court relied on *Nishimura Ekiu* in stripping asylum seekers at the border of due process rights against removal. Justice Alito, writing for the majority, applied the fiction against a petitioner apprehended twenty-five yards north of the border, holding that his crossing did not constitute an entry for constitutional purposes. Quoting *Nishimura Ekiu*, the opinion concluded that as to Mr. Thuraissigiam, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."[45] It also

[39] Angela Harris, *Compassion and Critique*, 1 COLUM. J. RACE L. 326 (2012).

[40] *See* 8 U.S.C. § 1152(a)(1)(A) ("[N]o person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.").

[41] *See* 8 U.S.C. § 1158; 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(c).

[42] For turn-of-the-twentieth-century photos of the San Francisco mission home from the archives of the Methodist Church, see Lee, supra note 19, at 590–92.

[43] U.S. House of Representatives, Appropriations Committee Releases Fiscal Year 2022 Homeland Security Funding Bill (June 29, 2021).

[44] 140 S. Ct. 1959 (2020).

[45] 140 S. Ct. at 1980 (quoting Nishimura Ekiu, 142 U.S. at 660).

held that he had no right under the Suspension Clause to federal court review of his legal challenge to his expedited removal order. The majority's application of entry fiction to Mr. Thurassigiam was an unprecedented expansion of the doctrine, which the Court had never before applied to border crossers. *Thurassigiam* also distorts and misunderstands the earlier decision, which had in fact reaffirmed the habeas rights of noncitizens and rested upon drastically different circumstances. Had Professor Elias's opinion been the majority in *Nishimura Ekiu*, the *Thuraissigiam* Court likely would have exercised far greater scrutiny over border officials' actions to ensure due process protections at the border. At a minimum, her opinion would have constrained the *Thuraissigiam* Court's unprecedented expansion of entry fiction.

## CONCLUSION

Entry fiction stands out as a constitutional anomaly, rooted in the misconceptions and prejudices of an earlier era. Instead of cabining or rejecting the fiction, today's Supreme Court has done the opposite. Its continuous and unquestioned acceptance of *Nishimura Ekiu* ignores the drastic differences in our lives and our immigration system between 1892 and today. The Court also blindly fails to ask whether *Nishimura Ekiu*, rooted in the racism and sexism of over a century ago, was correctly decided.

The Court should ask this question and reconsider its approach. Professor Elias's feminist judgment provides a roadmap for a fairer interpretation of the Constitution. Her opinion better reflects the plain text and history of the Due Process Clause. And it honors our moral obligation to treat others as persons, in government practice and in law and jurisprudence.

For Ms. Nishimura *was* a person, and she *was* here. She endured a long and arduous voyage across the Pacific to unite with her husband. She had aspirations and dreams for life in the United States, just like all who live and have lived here, via birth or migration. The Court gave in to prejudices and status distinctions in 1892, and it continues to do so today. Professor Elias reminds us that we as a nation can do better – that we share a common humanity with all who come to our borders and shores. Our Constitution, correctly interpreted, would do the same.

## *NISHIMURA EKIU v. UNITED STATES, 142 U.S. 651 (1892)*

Justice Stella Burch Elias, concurring in part and dissenting in part.

This action was originally instituted by the petitioner, Nishimura Ekiu, a native and subject of the Empire of Japan. The petitioner was denied entry to the United States at the Port of San Francisco and was placed in detention at the Methodist Episcopal Japanese and Chinese Mission, pending her return to her native country. She immediately filed a petition for habeas corpus, praying for release from

detention. That petition was denied by the Circuit Court of the United States for the Northern District of California. Pending now before this Court is Nishimura Ekiu's appeal of the Circuit Court's denial of her petition for habeas corpus.

## I FACTUAL AND PROCEDURAL BACKGROUND

On May 7, 1891, the Oriental and Occidental steamship *Belgic* arrived at the port of San Francisco. One of the passengers aboard the vessel was "Nishimura Ekiu," a twenty-five-year-old native and citizen of the Empire of Japan. Ms. Nishimura[46] was one of several young women aboard the vessel, all of whom had undertaken the lengthy and arduous 4,477 nautical-mile voyage from Yokohama, Japan, to San Francisco, California. The record before us provides only limited information about Ms. Nishimura's background before her encounter with U.S. immigration officials. But we are nonetheless able to glean some understanding of her circumstances through the reports that those officials submitted describing the questioning that she endured and her eventual detention, pending her return to Japan, in the Methodist Episcopal Church Japanese and Chinese Mission-House.

After the *Belgic* arrived in San Francisco, the Commissioner of Immigration of the State of California, Mr. William H. Thornley, boarded the vessel to inspect the arriving passengers. Mr. Thornley claimed that in so doing he was acting under instructions from, and pursuant to a contract with, Charles Foster, the Secretary of the Treasury of the United States. Mr. Thornley conducted what the majority characterizes as "a careful examination of the alien immigrants aboard the *Belgic*." It is, however, unclear from the record before us whether Mr. Thornley's examination of Ms. Nishimura was indeed "careful." As a native and subject of the Empire of Japan, Ms. Nishimura was presumably a native speaker of Japanese, and the record is silent as to Ms. Nishimura's knowledge of, or proficiency in, the English language. The record is equally silent as to whether Ms. Nishimura had any access to the services of a skilled interpreter, so it is impossible to ascertain with any certainty that Mr. Thornley was able question Ms. Nishimura effectively or that Ms. Nishimura was able to respond knowingly or appropriately to Mr. Thornley's questions.

The only contemporaneous account of the interview that Mr. Thornley conducted with Ms. Nishimura is a report, which Mr. Thornley drafted six days later, on May 13, 1891. That document, entitled "Report of alien immigrants forbidden to land under the provisions of the act of congress approved August 3, 1882, at the port of San Francisco, being passengers upon the steamer Belgic, Walker, master, which arrived May 7, 1891, from Yokohama," contains a series of brief notes about

[46] Although the petitioner's name appears in the record as "Nishimura Ekiu," it seems that the immigration officials, the Circuit Court, and the majority, misapprehended the petitioner's family name. Cognizant of that error, I have chosen to use the more accurate surname, Nishimura, throughout this opinion.

Ms. Nishimura. First Mr. Thornley lists her sex, "female," and her age "25." Then he notes that Ms. Nishimura's: "Passport states that she comes to San Francisco with her husband, which is not a fact." Mr. Thornley apparently questioned Ms. Nishimura further on this point, leading her to attempt to explain that she was travelling to the United States to reunite with her husband – a situation plausibly summarized in the passport notation indicating that she was traveling to San Francisco *to be* with her husband. But Mr. Thornley doubted the veracity of Ms. Nishimura's explanation, noting with suspicion that: "she has been married two years, and that her husband has been in the United States one year, but she does not know his address." Mr. Thornley was apparently skeptical that a young woman with presumably limited English language proficiency had not memorized her husband's permanent address in the United States – if indeed he had such an address at the time she sailed for San Francisco. Mr. Thornley further noted that: "She has $22, and is to stop at some hotel until her husband calls for her." Once again, Mr. Thornley doubted the plausibility of Ms. Nishimura's plan.

At the conclusion of his questioning, Mr. Thornley determined that Ms. Nishimura and five additional similarly situated young women aboard the *Belgic* were "prohibited from landing by the existing immigration laws." In his role as a contracted agent for the Secretary of the Treasury, Mr. Thornley therefore determined that, pending a final decision by the Secretary's subordinate, the Collector of the Port of San Francisco, as to the six women's right to land, he would detain them "temporarily" in the Methodist Episcopal Japanese and Chinese Mission. Mr. Thornley ordered that the women be sent to the mission-house because, according to his report, "the steamer was not a proper place to detain them, until the date of sailing."

On May 13, 1891, the same day that Mr. Thornley filed his report, Ms. Nishimura's legal counsel filed a petition for habeas corpus in the Circuit Court of the United States for the Northern District of California, seeking her release from detention in the mission-house. On the same day, Mr. Thornley responded:

> In obedience to the within writ I hereby produce the body of Nishimura Ekiu, as within directed, and return that I hold her in my custody by direction of the customs authorities of the port of San Francisco, Cal., under the provisions of the immigration act; that, by an understanding between the United States attorney and the attorney for petitioner, said party will remain in the custody of the Methodist Episcopal Japanese and Chinese Mission pending a final disposition of the writ.

The three men named in this brief response – Mr. Thornley, the District Attorney, and Ms. Nishimura's attorney – clearly came to an agreement that Ms. Nishimura would remain in detention for the pendency of her suit. Ms. Nishimura's acquiescence is, of course, implied in her attorney's participation in this "understanding," but it is impossible to ascertain the extent to which she knowingly consented to this arrangement.

Three days later, on May 16, 1891, the District Attorney of the United States intervened in the suit, arguing in opposition to the petition for habeas corpus,

and insisting that the decisions of the customs and immigration officials – i.e., Mr. Thornley and the Collector of the Port of San Francisco – were final, conclusive, and nonreviewable by a court of law.

On May 14, 1891, the Secretary of the Treasury appointed John L. Hatch as Inspector of Immigration at the Port of San Francisco. And on May 16 – the same day that the District Attorney argued that federal officials' determinations about immigrants' admissibility to the United States could not be reviewed by courts – one of Mr. Hatch's first official duties was to question Ms. Nishimura.

As the majority notes, Mr. Hatch's examination of Ms. Nishimura was authorized by federal statute: "An act in amendment to the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor," of March 3, 1891. Section 8 of that Act states that: "Upon the arrival by water at any place within the United States of any alien ... proper inspection officers ... shall ... go or send competent assistants on board such vessel, and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made." Where previously such inspections were carried out by state officials, like Mr. Thornley, the 1891 Act conferred this responsibility on federal officers, like Mr. Hatch. "All duties imposed and powers conferred by the second section of the act of August third, eighteen hundred and eighty-two, upon state commissioners, boards, or officers acting under contract with the secretary of the treasury, shall be performed and exercised, as occasion may arise, by the inspection officers of the United States." *Id.*

At the conclusion of his examination of Ms. Nishimura, he, too, refused to allow her to "land" in the United States. Once again, the only record that we have of Mr. Hatch's examination of Ms. Nishimura is a report that he prepared for the Collector of the Port of San Francisco, entitled: "Report of alien immigrants forbidden to land under the provisions of the act of congress approved March 3, 1891, at the port of San Francisco, being passengers upon the steamer Belgic, Walker, master, which arrived May 7, 1891, from Yokohama." As the majority astutely observes, Mr. Hatch's report was identical, "in the very words," to that submitted by Mr. Thornley, save that the date of the relevant statutory enactment was changed from August 3, 1882, to March 3, 1891. The record is silent as to the circumstances of Mr. Hatch's examination of Ms. Nishimura. We do not know when or where he met with her. We do not know whether she was afforded the assistance of an interpreter. We do not know whether Mr. Hatch took her testimony under oath, or indeed whether he gave her any opportunity at all to present her case in any meaningful way.

Two days later, on May 18, 1891, Mr. Hatch intervened in Ms. Nishimura's habeas suit. In his opposition to Ms. Nishimura's petition for habeas corpus Mr. Hatch stated that upon examination of Ms. Nishimura he found her to be "a person without means of support, without relatives or friends in the United States," and "a person unable to care for herself, and liable to become a public charge, and therefore inhibited from landing under the provisions of [the Act] of 1891, and previous acts

of which said act is amendatory." Mr. Hatch insisted that his findings and decision were reviewable by the Superintendent of Immigration and the Secretary of the Treasury only, and not by the courts of the United States.

The case proceeded to a hearing before the Commissioner of the Circuit Court. At that hearing, through her counsel, Ms. Nishimura offered to introduce evidence to establish her right to land in the United States, and to rebut Mr. Hatch's claim that she was a person without means of support or relatives in the United States and therefore liable to become a public charge. She also argued that if the Act of 1891 deprived her of judicial review of the Inspector of Immigration's findings and decision, the Act was itself unconstitutional, because it deprived her of liberty without due process of law. She contended that she was entitled, under the Constitution of the United States, to petition for habeas corpus and to seek judicial review of the legality of her detention, and that the court had the right to examine the factual predicates for that detention.

The Commissioner of the Circuit Court disagreed. He excluded the evidence that Ms. Nishimura offered pertaining to her right to land, stating that it was beyond the purview of the court. He concluded that the question of her right to land in the United States had already been tried and determined by the statutorily authorized decision-maker. He stated that Mr. Hatch, as Inspector of Immigration, was entitled to decide conclusively whether Ms. Nishimura could land in the United States. Moreover, Mr. Hatch's determination that she could not land could not be reviewed by the Circuit Court. Review of Mr. Hatch's decision could be reviewed only by the Commissioner of Immigration and the Secretary of the Treasury. He therefore concluded that Ms. Nishimura was not unlawfully restrained of her liberty and was not entitled to be released from detention.

On July 24, 1891, after Ms. Nishimura had been detained at the mission-house for a subsequent two months, the Circuit Court confirmed its commissioner's report. The Court ordered that Ms. Nishimura be: "remanded by the marshal to the custody from which she has been taken, to-wit, to the custody of J. L. Hatch, immigration inspector for the port of San Francisco, to be dealt with as he may find that the law requires, upon either the present testimony before him, or that and such other as he may deem proper to take." Ms. Nishimura appeals this decision.

This case falls within the appellate jurisdiction of this Court because it involves the constitutionality of a federal statute, even though the filing of Ms. Nishimura's appeal occurred after the Act establishing Circuit Courts of Appeal took effect. Act March 3, 1891, c. 517, § 5, (26 St. 827, 828, 1115.)

## II THE RIGHT TO PETITION FOR HABEAS CORPUS

In her petition for habeas corpus, Ms. Nishimura claims that she has been deprived of her liberty by officers of the United States, without due process of law. This is a grave charge, and therefore one which must be answered by those officers. It

is a longstanding tenet of our laws that the writ of habeas shall run to all those detained by the organs of the state, whether those detainees are U.S. citizens or aliens.

In England, from whence our common law traditions have evolved, habeas corpus has long been available to all manner of persons detained by the Crown or otherwise subject to the sovereign's authority, including those who were not subjects of the nation. See, for example, *Somersett's Case*, 20 How. St. Tr. 1, 79–82 (K.B. 1772) (releasing an "African slave" purchased in Virginia and briefly detained on English soil pending voyage to Jamaica) or the *Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344 (K.B. 1810) (reviewing the habeas petition of "native of South Africa" allegedly held against her will in England). Even those prisoners of war designated "enemy aliens" remained entitled to challenge the legality of their detention before the King's Bench by seeking habeas relief, and even though such relief was ultimately denied by the Court, searching review on the merits of the case was undertaken. See, for example, *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) or *The Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779).

In our own nation, courts have not hesitated to exercise their jurisdiction to review habeas petitions filed by, or on behalf of, those who are not nationals of the United States. See, for example, *Ex parte D'Olivera*, 7 F. Cas. 853 (C.C.D. Mass. 1813) (Story, J., on circuit), in which Portuguese sailors imprisoned for desertion, were released from detention upon the court's ruling that American desertion laws only applied to American ships, or *Lockington's Case*, in which the Pennsylvania Supreme Court considered the habeas petition of an Englishman imprisoned as an enemy alien during the War of 1812. 9 Bright (N.P.) 269 (Pa. 1813).

This fundamental and longstanding common law principle is so significant that it is enshrined in the U.S. Constitution itself, which states that the writ of habeas corpus may only be suspended when public safety requires it in the event of rebellion or invasion. U.S. Const., Art. I, § 9, cl. 2 ("[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The Habeas Corpus Act of 1867 does not diminish the fundamental right of detainees to seek habeas relief, nor does it preclude this Court from reviewing whether a noncitizen has been detained by agents and officers of the federal government in violation of her due process rights.

Here, the majority acknowledges this clear and settled principle of law: "An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful." I concur. For this reason, I join in this part – and this part only – of the Court's opinion, before turning to the reasons why I believe that the majority has erred in its further determination of the laws governing this case, and in its ultimate conclusion that Ms. Nishimura's detention was lawful.

## III THE IMMIGRATION ACT OF 1891

In the United States, as the majority explains, the power "to forbid the entrance of foreigners within its dominions, or to admit them" is vested in the "political department" of the "national government," which "may be exercised either through treaties made by the president and senate, or through statutes enacted by congress." Congress has passed a series of statutory enactments to control migration, and those acts have granted decision-making powers with respect to the admission or exclusion of immigrants arriving at our borders to the Secretary of the Treasury, to Collectors of Customs, and to Inspectors acting under their authority. See Acts of March 3, 1875, c. 141, (18 St. 477;) August 3, 1882, c. 376, (22 St. 214;) February 23, 1887, c. 220, (24 St. 414;) October 19, 1888, c. 1210, (25 St. 566).

The Immigration Act of 1891 is the most recent legislative enactment pertaining to the admission and exclusion of arriving immigrants. The various provisions of this statute are purported to provide the basis for the ongoing detention and pending exclusion of Ms. Nishimura. Section 1 of the Act of 1891 provides that:

> The following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude,' etc.'

Ms. Nishimura was excluded from admission on the basis that Mr. Hatch and Mr. Thomley believed that she was impoverished and friendless and therefore "likely to become a public charge."

Section 7 of the Act of 1891 creates the office of Superintendent of Immigration:

> Who shall be an officer in the treasury department, under the control and supervision of the secretary of the treasury, to whom he shall make annual reports in writing of the transactions of his office, together with such special reports in writing as the secretary of the treasury shall require.

And Section 8 of the Act sets forth the duties of the immigration inspectors, including Mr. Hatch, who are employed by the office of the Superintendent of Immigration:

> Upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel, and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. But such removal shall not be considered a landing during the pendency of such

> examination.... The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record. During such inspection, after temporary removal, the superintendent shall cause such aliens to be properly housed, fed, and cared for, and also, in his discretion, such as are delayed in proceeding to their destination after inspection.

This Section of the Act further states that:

> All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final, unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the secretary of the treasury.

This provision, referring to the process for internal review of the inspection officers' decisions, apparently forms the basis of the majority's conclusion that Mr. Hatch's determination that Ms. Nishimura should be excluded at the port of entry was "final and conclusive against the petitioner's right to land in the United States." The majority therefore reaches the chilling conclusion that: "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." (See, for example, *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1856); and *Hilton v. Merritt*, 110 U. S. 97 (1884)).

I believe, however, that such a conclusion goes too far. The majority misapprehends the scope and finality of the powers of the Superintendent of Immigration and his inspection officers, as set forth in this Act. This is made explicit in Section 13 of the Act which provides that, notwithstanding the enumerated powers of the immigration inspectors, the circuit and district courts of the United States remain: "Invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act," from the date that it entered into effect, April 1, 1891. 26 St. 1084–1086. Moreover, and more importantly, the majority misapprehends the fundamental guarantees within the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

## IV DUE PROCESS IN IMMIGRATION PROCEEDINGS

This Court has established that the power to admit or exclude noncitizens arriving at our nation's ports of entry is entrusted to the political branches of the federal government, and that executive officers serving in the Department of the Treasury may be charged with the enforcement of our immigration laws at our borders. See, for example, *The Head Money Cases*, 112 U.S. 580 (1884), *Ping v. United States*, 130 U.S. 581 (1889). However, we have never held previously, and should not now hold, that administrative officers undertaking such duties are unburdened by the restraints that our Constitution imposes on actions by the government of the United States. Indeed,

when executive officers are actively engaged in implementing the provisions of a statute that authorizes the deprivation of a person's liberty, whether through that person's detention, exclusion, or deportation, it is more important than ever that the officers' behavior comports with the Due Process guarantees in our Constitution.

No officer of the United States may disregard the fundamental precept set forth in the Fifth Amendment to the Constitution of the United States that: "No person shall be ... deprived of life, liberty, or property, without due process of law." Immigrants arriving at our ports who are subject to custody determinations by our officers are "persons" within the meaning of this Clause, and, therefore, they may not be deprived of their liberty and placed in detention without the benefit of "due process of law." In the case of an arriving immigrant, who faces exclusion or detention at the border, "due process of law" need not mean a trial before a court of law – such a requirement would arguably be both impractical and unfeasible. See *Den ex dem. Murray v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (1855) (providing for summary actions against revenue officers, rather than full trials, in the interests of expediency). But it should mean that all individuals, be they citizens or aliens, will have the opportunity upon arrival in the United States to be given notice that an immigration inspector will examine them to ascertain their admissibility. It should also mean that, during that examination, the arriving individual will have a meaningful opportunity to be heard.

The majority's assertion that insofar as arriving noncitizens are concerned, "the decisions of executive or administrative officers ... are due process of law" flies in the face of the guarantees of the Fifth Amendment. Executive or administrative officers are not immune from the mandates of the Constitution. They do not enjoy absolute powers, immune from judicial review, to determine for themselves how much process is due. They may not arbitrarily detain a person, take her into their custody, confine her in isolation for months, and then ship her to a foreign land, without giving her an opportunity to be fully heard upon the questions involving her rights to enter and reside in the United States.

The majority suggests that the Immigration Act of 1891 authorizes immigration officers to disregard the Due Process guarantees found within the Constitution, but this is manifestly not the case. Indeed, allowing an arriving alien to fully present her case for admission is wholly consistent with both the Due Process Clause and the provisions in the Immigration Act of 1891. Section 8 of the Act, after all, empowers immigration inspectors "to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record." The very existence of this statutory provision illustrates that Congress contemplated a searching inquiry by executive officers into arriving immigrants' personal circumstances and a meaningful opportunity for those immigrants to present their own case for admission.

The majority further suggests that the Immigration Act of 1891 precludes this Court from reviewing the decisions and actions of immigration inspectors, such as Mr. Hatch. Once again, the text of the statute itself belies this assertion. Section 13

of the Act provides that the circuit and district courts of the United States remain: "Invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this act." Under the plain language of the statute, review of petitions for habeas corpus, such as that filed by Ms. Nishimura, therefore fall firmly within the jurisdiction of the courts of the United States. And indeed, it is fortunate that they do, for if the Immigration Act were to strip the courts of their jurisdiction, then it would, as the petitioner has argued, call into question the constitutionality of the statute itself. But we need not reach that potentially thorny question, because the statute does not furnish the executive and administrative officers with unfettered and arbitrary powers, nor does it make their actions immune from judicial review.

Having established that this Court has jurisdiction to consider Ms. Nishimura's petition for habeas corpus, and that this Court has the authority, under the Constitution of the United States and the Immigration Act of 1891, to determine whether Ms. Nishimura has been deprived of her liberty without due process of law, I now turn to the facts of her case, as set forth in the record before the Court.

## V APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

It is hard to ascertain, based on the scant record before the Court, whether Ms. Nishimura was afforded due process of law before being confined to the Methodist Episcopal Japanese and Chinese Mission, pending her return to her native country. It is, however, apparent, that she was denied the opportunity to be heard when she sought review of that detention by the Circuit Court.

There are just two documents in the record describing immigration officials' examinations of Ms. Nishimura, namely Mr. Thornley's "Report of alien immigrants forbidden to land under the provisions of the act of congress approved August 3, 1882, at the port of San Francisco, being passengers upon the steamer Belgic, Walker, master, which arrived May 7, 1891, from Yokohama" dated May 13, 1891, and Mr. Hatch's "Report of alien immigrants forbidden to land under the provisions of the act of congress approved March 3, 1891, at the port of San Francisco, being passengers upon the steamer Belgic, Walker, master, which arrived May 7, 1891, from Yokohama," dated May 16, 1891. As I previously noted, the two reports are essentially identical, with the only difference between them being the substitution of the date of the most recent statutory enactment in the title of the document. Moreover, the information contained in the reports is, at best, characterized as sparse – a simple recitation of Ms. Nishimura's name, age, sex, country of origin, the reason for her journey to the United States, the amount of money in her possession, and her immediate destination in San Francisco, followed by a conclusory statement that she and five other women were "prohibited from landing by the existing immigration laws."

There is no indication in the record that Ms. Nishimura was given notice of the import of the initial interview with Mr. Thornley, or the subsequent interview with

Mr. Hatch, nor is there any evidence that she was given a meaningful opportunity to be heard by either of these men. The record is silent as to her educational background and English language proficiency. We do not know if she was assisted by an interpreter during her initial examination aboard the *Belgic*, or during her questioning by Mr. Hatch, and even if she was accompanied by a translator, we have no way of knowing if Mr. Hatch's questions and Ms. Nishimura's answers were translated accurately. Similarly, we do not know whether the immigration officers, pursuant to their powers under the Immigration Act took Ms. Nishimura's testimony about her circumstances under oath, or whether she was granted any opportunity at all to present her case in any meaningful way. I suspect that she was not, because there is no indication in the record before us that Ms. Nishimura fully understood the gravity of her situation, until she was placed in detention and retained local counsel to represent her interests.

The record is, however, clear that as soon as Ms. Nishimura was apprised that she would be excluded from the United States, because Mr. Hatch had determined that she was "a person without means of support, without relatives or friends in the United States," and "a person unable to care for herself, and liable to become a public charge," she attempted vigorously and repeatedly to present evidence to the contrary. She filed a petition for habeas corpus setting forth her argument that she had been wrongfully detained. She attended a hearing before the Commissioner of the Circuit Court and offered to present evidence in support of her contention that she possessed means of support in the United States. She therefore, refuted that she was liable to become a public charge. She argued that she should be offered an opportunity to be heard, on the merits of her claim that she had the right to enter and remain in the United States. But her petition was denied, and the evidence that she offered to present was excluded by the Commissioner, who erroneously concluded that he did not have the authority to consider her claims. Months later, the Circuit Court confirmed the Commissioner's ruling, affording Ms. Nishimura no further opportunity to present her evidence or arguments. In short, Ms. Nishimura was denied her opportunity to be heard, and was therefore deprived of her liberty without due process of law.

We know nothing about the evidence that Ms. Nishimura wished to present in support of her claims, and so we cannot speculate as to whether her attempt to remain in the United States would ultimately have proven successful if it had been fully and properly adjudicated. But, in refusing her the opportunity to present her claims, the immigration officials and the Circuit Court denied her humanity, failing to treat her as a "person" entitled to the protections enshrined in the Fifth Amendment to the U.S. Constitution. Instead, they deprived her of her liberty, without due process of law. Ms. Nishimura was not alone on May 13, 1891, when the *Belgic* sailed into the Port of San Francisco. We know from Mr. Thornley's report that five other women aboard the vessel were also excluded from the United States. In the majority's recounting of the facts of this case, their personhood is even more

ephemeral than that of Ms. Nishimura. We do not know what happened to them next. We do not even know their names. The majority's ruling in this case deprives Ms. Nishimura and her fellow passengers aboard the *Belgic* the most fundamental protections to which they are assuredly entitled, under our Constitution and our immigration laws. All immigrants arriving at our borders, whatever their sex, race, nationality, or creed, are entitled to be treated humanely and justly, in accordance with due process of law. They are entitled to tell their stories and to have their voices heard. Therefore, I respectfully dissent.