

'Habeas corpus Mongols' – Chinese litigants and the politics of immigration in 1888

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As is very well known to students of colonial history, the year 1888 was an important one for Australian political development. The arrival in April and May of that year of a number of boats carrying large numbers of Chinese passengers inspired a frenzy of popular and political action to stop what was imagined as a Chinese invasion. Two colonial governments directed their customs officials to prevent boats from disembarking their Chinese passengers, first in Melbourne and then Sydney, in spite of many of those passengers either carrying the required naturalisation papers or else paying the requisite poll-tax in accordance with the statutory regime of immigration restriction.¹

The actions of these two colonies, Victoria and New South Wales, were nevertheless challenged in successful legal action taken by a number of the passengers. The success of the Chinese legal actions in both jurisdictions prompted more sustained attention by colonial governments to the scope of their constitutional position in the Empire, as well as stimulating policy development for the future control of Chinese immigration. Whether or not immigration policy was a driver of the federation debate in the 1890s², there is evidence in

¹ Ann Curthoys, "Liberalism and Exclusionism: a Prehistory of the White Australia Policy," in *Legacies of White Australia: Race, Culture and Nation*, ed. Laksiri Jayasuriya, David Walker, and Jan Gothard (Crawley: UWA Press, 2003), 8–32, 216–220, 251–256; Graeme Davison, "Unemployment, Race and Public Opinion: Reflections on the Asian Immigration Controversy of 1888," in *Surrender Australia? Geoffrey Blainey and Asian Immigration*, ed. Andrew Markus and M C Ricklefs (Sydney: George Allen & Unwin, 1985), 101–111; Geoffrey Serle, *The Rush to Be Rich: a History of the Colony of Victoria, 1883-1889* (Melbourne: Melbourne University Press, 1971), 295–302.

² J. B Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Melbourne: Oxford University Press, 2000); Helen Irving, *To Constitute a Nation: a Cultural History of Australia's Constitution* (Cambridge University Press, 1999); R. Norris,

1888 of colonial division over the scale of a Chinese threat, with Tasmania and Western Australia standing apart from the demands of the larger eastern states for British imperial action to stem the tide.³ The NSW and Victorian governments however were in no doubt about where they stood, and the greatest challenge to their actions came from the Chinese passengers themselves. .

The *success* of Chinese litigants in challenging the administration of immigration law is not the memory of these events that one gathers from the literature on 1888 which has focussed on the deployment of racial politics to exclude the Chinese. Of course, exclusion politics and policies followed from the clash of rights in the ports of Melbourne and Sydney – the rights of Chinese to disembark from ships which had brought them, the rights of colonial governments to stop them. Some sense of the stakes in play are evident in the sardonic commentary in the *Sydney Morning Herald* after the success of two of the Chinese men in the NSW Supreme Court:

When that august oracle, the Supreme Court, opens its mouth (we ought to know how to behave ourselves), let no dog bark, on pain of attachment for contempt. Even the disappointed Executive, much as it is given to barking, does not mean to appeal to that still more august oracle the Privy Council; and yet the decision in the case of the poll-tax Chinaman seems a little more appealable from than the case of the exempts. I suppose it must be good law, nevertheless, although it does seem, to a lay mind, rather an anomaly that when the Government is taking such extreme pains to protect its pure-bred Caucasian stud farm from invasion by promiscuous "yellow scrubbers," the Judges are determined to let loose an infinite number of the £10 poll taxers on it. The merino purity of our

The Emergent Commonwealth: Australian Federation, Expectations and Fulfilment 1889-1910 (Carlton, Vic: Melbourne University Press, 1975).

³ Ian Britain, "Victoria, the Chinese and the Federal Idea, 1887-8," *ANU Historical Journal* 6 (1969): 44–60.

pedigrees may be sadly compromised in the course of a single generation by an unlimited infusion even of habeas corpus Mongols.⁴

The references to miscegenation were not gratuitous journalistic inventions – on the previous evening the NSW Premier Henry Parkes had opposed to the Supreme Court's acknowledgment of the rights of Chinese passengers, the 'sacred obligation on every citizen to preserve the British type in the nation which they were seeking to found here'. Parkes outlined a case against the Chinese which insisted on their alien status – alien customs, alien religion, alien 'to our system of jurisprudence', alien 'to our objects as a free people', alien in arriving without their women. But to the applause of the crowd at St Leonards Centennial Hall he stated that the first objection was to their race: 'In the first place they [the colonists] wanted no admixture of Asiatic blood, for although they might very freely admit the admixture of the blood of European peoples, they did not want any Asiatic infusion'.⁵

It is such exclusionary discourse that has captured attention of Australian historians of the politics of 1888. Parkes' speech in the midst of the crisis over the Chinese passengers demands attention for its expression of a racist ideology that is reproduced time and again in the development and legacy of the White Australia Policy. But the history of the White Australia Policy is not only a history of the politics of racist ideologies and exclusion. It is also a history of law and government, one that has been captive in the historiography to the politics of race. Symptomatic is the writing on the subject of this paper, the late colonial legal contests over the scope of immigration restriction. The most attentive to legal events was Willard's first and influential history of the White Australia Policy, originally published in 1923.⁶ Willard nevertheless paid little

⁴ 'As you like it', *Sydney Morning Herald*, 26 May 1888: 7.

⁵ 'The Premier at St Leonards', *Sydney Morning Herald*, 26 May 1888: 8

⁶ Myra Willard, *History of the White Australian Policy to 1920* (Carlton South, Vic: Melbourne University Press, 1967), 69–98. See also E.C. Rolls, *Sojourners: Flowers and the*

attention to the legal reasoning of the cases in which the Chinese prevailed, nor to the momentous constitutional and jurisprudential issues arising from the cases, including sovereignty, crown prerogative, responsible government and the status of aliens. The broader political context of the Victorian case (*Toy v Musgrove*) in which a Chinese passenger sued the Collector of Customs for damages flowing from his exclusion was addressed by Geoffrey Serle in *The Rush to be Rich*, although with little attention to the Chinese community politics that sustained that action.⁷ The 1970s historiography of colonial immigration restrictions focussed on the intersections of colonial life and racist politics more than the way these were inflected by the legal cases.⁸ More recently the transnational, imperial and settler colonial contexts of these politics have dominated the literature, though with limited attention to the way in which the law opened up spaces for contestation at the same time as statute sought to define boundaries and borders.⁹

The *legal* historiography of immigration law and the White Australia Policy might be expected to pay some attention to these late colonial cases, but the focus is on post-Federation statutory invention and the associated case law.¹⁰ The specialists in legal history report regularly the importance of the Victorian case *Toy v Musgrove* but with the exception of Finn (in a work significantly entitled *Law and Government in Colonial Australia*) pay little attention to the

Wide Sea (St Lucia, Qld: University of Queensland Press, 1993), 464–508, informative but unreferenced, and unreliable on the detail of the legal cases.

⁷ Serle, *The Rush to Be Rich*, 295–302.

⁸ Andrew Markus, *Fear and Hatred: Purifying Australia and California, 1850-1901* (Sydney: Hale & Iremonger, 1979); Charles Archibald Price, *The Great White Walls Are Built: Restrictive Immigration to North America and Australasia 1836-1888* (Australian Institute of International Affairs in association with Australian National University Press, 1974).

⁹ Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the Question Of* (Carlton, Vic: Melbourne University Publishing, 2008).

¹⁰ Mary E Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Annandale, N.S.W: Federation Press, 2011); Irving, *To Constitute a Nation*; Kim Rubenstein, 'Citizenship and the Centenary — Inclusion and Exclusion in 20th Century Australia,' *Melbourne University Law Review* 24, no. 3 (2000): 576-608..

habeas corpus cases in the NSW Supreme Court.¹¹ What has attracted attention in the legal historiography and even in case law has been the implication of judicial reasoning in the 1888 cases for the nature of prerogative power (the power exercised by the Crown through executive government) and the development of the constitutional law of responsible government.¹² These are matters highlighted indeed in *Toy v Musgrove* and then in the appeal case in which the Privy Council overturned the Victorian Supreme Court's judgment. This was the focus of H V Evatt's enthusiastic embrace of the colonial independence demonstrated by the dissenting judges, in his 1924 doctoral thesis on the 'Royal Prerogative'.¹³ Less attention has been paid to the NSW cases, which are remembered mainly by legal analysts of habeas corpus.¹⁴ One result of the uneven historiography, legal and political is a confusion reflected in contemporary case law about the very nature of the legal actions pursued in the colonial courts in 1888. In 2001, in the judicial outcome of one of the most compelling contemporary legal and political struggles over the status of refugees, a habeas corpus action on behalf of the passengers on the MV Tampa, the Federal Court of Australia did indeed find reason to go back to the 1888

¹¹J. M Bennett, *George Higinbotham: Third Chief Justice of Victoria 1886-1892*, Lives of the Australian Chief Justices (Annandale, N.S.W: Federation Press, 2007); Alex Castles, *An Australian Legal History* (Sydney: Law Book Co., 1982); P. D Finn, *Law and Government in Colonial Australia* (Melbourne: Oxford University Press, 1987), 46–7; Bruce Kercher, *An Unruly Child: a History of Law in Australia* (St Leonards: Allen & Unwin, 1995).

¹² David Wood, "Responsible Government in the Australian Colonies: Toy V. Musgrove Reconsidered," *Melbourne University Law Review* 16 (1988): 760–783; John Waugh, "Chung Teong Toy v Musgrove and the Commonwealth Executive," *Public Law Review* 2 (1991): 160 – 178; J. M. Bennett, *Colonial Law Lords: (the Judiciary and the Beginning of Responsible Government in New South Wales)* (Sydney: Federation Press, 2006); Bennett, *George Higinbotham*.

¹³ Herbert Vere Evatt, *The Royal Prerogative* (Law Book Co., 1987), 26, 94–5, 99–100, 143.

¹⁴ David John Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Oxford University Press, USA, 2000); David John Clark, *Habeas Corpus: Australia, New Zealand, the South Pacific* (Leichhardt, N.S.W: Federation Press, 2000). The most detailed study of the NSW cases is a recent honours thesis focussing on the prerogative to exclude aliens, the legal status of which was at heart of the government's response to the habeas corpus writs: Alice Rumble, "That's Not Your Prerogative: An Examination of the Governor's Powers of Exclusion in New South Wales in 1888" (L.I.B (Hons) thesis, ANU, 2012)..

cases – but in doing so, represented *Toy v Musgrove* as a habeas corpus case, rather than what it was, a suit for damages against the government.¹⁵

In what follows I aim to recover these overlooked remnants of the struggles of 1888 and do so remembering two contexts, one the histories of Chinese community and identity in Australia, the other the histories of settler colonial sovereignty, which is also the history of a settler political community and its imagined boundaries. The changing historiography of Chinese Australian experience provides an essential context for understanding the activism of Chinese litigants in 1888. Displacing an earlier preoccupation with the politics of exclusion in which they were mostly objects of racist oppression, the recent historiography of the Chinese emphasises the subjectivity of Chinese immigrants, who thought themselves as settlers and sought advantage from that status.¹⁶ Such re-thinking did not have to wait until the 1880s by which time there were prominent urban merchant elites in Sydney and Melbourne able to articulate community demands directly to colonial politicians. In the 1850s it

¹⁵ *Ruddock v Vadarlis* (includes corrigendum dated 20 September 2001), 10 (FCA 2001). The relevant paragraph reads: 'He [Toy] applied to the Supreme Court for a writ of habeas corpus in response to which the customs officials asserted a prerogative of the Crown to exclude alien friends. Only two members of the six judges who constituted the full bench of the Supreme Court (Higinbotham CJ and Kerferd J) upheld the prerogative claim of the customs officers. The other judges (Williams, Holroyd, A'Beckett, and Wrenfordsley JJ) rejected the claim of prerogative power, and considered that habeas corpus should issue for the reason that the colonial government did not have the requisite prerogative power.' In fact there is no mention of habeas corpus in the judgment at all. The judges here have confused the Victorian and NSW cases, as will become clear below.

¹⁶ Paul Jones, "What Happened to Australia's Chinese Between the World Wars?," in *After the Rush: Regulation, Participation and Chinese Communities in Australia, 1860-1940*, ed. Sophie Couchman, Paul Macgregor, and John Fitzgerald (Kingsbury, Vic.: Otherland Literary Journal, 2004), 217–236; John Fitzgerald, *Big White Lie: Chinese Australians in White Australia* (Sydney: University of New South Wales Press, 2007); Mei-fen Kuo, "The Making of a Diasporic Identity: The Case of the Sydney Chinese Commercial Elite, 1890s-1900s," *Journal of Chinese Overseas* 5, no. 2 (2009): 336–363; Paul MacGregor, ed., *Histories of the Chinese in Australasia and the South Pacific: Proceedings of an International Public Conference Held at the Museum of Chinese Australian History, Melbourne, 8-10 October 1993* (Melbourne: The Museum of Chinese Australian History, 1995); Keir Reeves and Tseen Khoo, "Dragon Tails: Re-interpreting Chinese Australian History," *Australian Historical Studies* 42, no. 1 (2011): 4–9.

has been shown that Chinese on the goldfields also adopted and adapted the constitutionalist rhetoric of other protesting miners in pressing their claims to relief from oppressive regulation and restriction.¹⁷ But by the 1880s Chinese community leaders, particularly in Melbourne, were pressing the claims for recognition of the rights and liberties of Chinese to livelihood and mobility on a par with other settlers.¹⁸ It was this confidence in their standing as subjects of a civilised community that was on display when the Chinese went to law in 1888, using the remedies available in the common law for relief from the actions of executive government.

Had the Chinese litigants been dismissed out of hand there would be little story to consider here, only once again the harshness of a politics of exclusion. But the measure of their success in 1888 was not only the triumph of a number of them (though not all) in the colonies' highest courts, but the degree to which their litigation exposed the fragility of colonial political authority and its imagined territorial sovereignty. This then is the second context in which the Chinese legal cases of 1888 should be seen. By the second half of the nineteenth century nation-states and their colonial proxies were confidently asserting their absolute territorial sovereignty through executive and statutory assertion of authority over persons and behaviour within their defined borders.¹⁹ This was

¹⁷ Andrew Charles Messner, 'Popular Constitutionalism and Chinese Protest on the Victorian Goldfields,' *Journal of Australian Colonial History* 2, no. 2 (2000): 63-78.

¹⁸ Marilyn Lake, 'Chinese Colonists Assert Their 'Common Human Rights': Cosmopolitanism as Subject and Method of History,' *Journal of World History* 21, no. 3 (2010): 375-92; Paul Macgregor, 'Before We Came to This Country, We Heard That English Laws Were Good and Kind to Everybody': Chinese Immigrants' Views of Colonial Australia,' in *Double Vision: Asian Accounts of Australia*, ed. Alison Broinowski (Canberra: Pandanus Books, 2004), 41-60; Ian Welch, 'Alien Son: The Life and Times of Cheok Hong Cheong (Zhang Zhuoxiong) 1851-1928' (Thesis (PhD), ANU, 2003), <https://digitalcollections.anu.edu.au/handle/1885/49261>.

¹⁹ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900*, 1st ed. (Cambridge University Press, 2009); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002); Lake and Reynolds, *Drawing the Global Colour Line*;

the time in which the subjection of indigenous claims to jurisdiction was largely completed, or such jurisdiction made entirely conditional on the authority of new European empires and their colonial outposts.²⁰ The contentious challenge of colonial self-government to British imperial governance was another symptom of the emerging emphasis on territorial sovereignty as the basis of power over persons and things. In this context we see even more urgently the need to distinguish colonial and *settler* colonial order.²¹ The Chinese legal challenge to immigration restriction in 1888 unexpectedly questioned the pretension of colonial political authority and challenged colonial certitude about distinctions between the subjects of a territory. The magnitude of the challenge is evident in Parkes' rhetoric, as we have noted above. It is also evident in the course of the case themselves, as I consider here.

The Chinese at law

In their status as colonial settlers, and even as British subjects, Chinese immigrants were familiar with the courts, policing and prisons of colonial Australia. Their appearance in courts has been most often noted in respect of criminal prosecution.²² But a review of Australian higher court appeal reports suggests that Chinese litigants were familiar with the potential of law to redress their grievances across a broad range of matters, civil and criminal, including significant challenges to police powers directed against them in gambling and

Lucy E. Salyer, *Laws Harsh As Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (The University of North Carolina Press, 1995).

²⁰ Paul G McHugh, *Aboriginal Societies and the Common Law: a History of Sovereignty, Status, and Self-determination* (Oxford: Oxford University Press, 2004).

²¹ Cf. Lauren Benton, "From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900," *Law and History Review* 26, no. 3 (Fall 2008); Lorenzo Veracini, *Settler Colonialism: a Theoretical Overview* (Basingstoke: Palgrave Macmillan, 2010).

²² Catherine May, *Topsawyers, the Chinese in Cairns, 1870-1920* (Townsville: James Cook University. History Department, 1984); Jan Ryan, *Ancestors: Chinese in Colonial Australia* (Fremantle: Fremantle Arts Centre, 1995); Heather Holst, 'Equal Before the Law?: The Chinese in the Nineteenth-century Castlemaine Police Courts,' *Journal of Australian Colonial History* 6 (2004): 113-36.

opium cases.²³ In these areas as much as in immigration law, Chinese settlers played a creative role in resisting, attempting to work around, or work within the constraints of statute and administration. In that respect their legal activism was the foundation for post-Federation challenges to the White Australia Policy. Their occasional success as litigants even in that hostile environment helped shape the characteristic procedures of a highly bureaucratised immigration regime. Indeed, in a thorough inquiry into the administration of the White Australia Policy in the first four decades of the twentieth century Paul Jones has demonstrated that the policy may be better thought of as a mechanism for the regulation of Chinese movement in and out of Australia rather than as simply a policy of exclusion. That is because Australian as well as Chinese interests, diplomatic and commercial and personal, were best served by a policy that facilitated the mobility of people, goods and money.²⁴

The productive use of legal remedies to test the limits of the White Australia Policy had a pre-Federation history that has been little appreciated from the point of view of its role in Australia politics in the late colonial period. In all those areas in which the Chinese appealed to the courts for protection of their putative legal rights none was as significant as that affecting their very capacity for remaining in the colonies at all. The regulation of immigration was a colonial invention, the product of attempts by various settler states to use their powers of self-government to set new boundaries around and within their communities. It operated not by exclusion of races (highly contestable in an Empire of many races) but by the introduction of conditions of transit, residence and activity. In the Australasian colonies the conditions constraining the entry

²³ Mark Finnane, 'Law as Politics: Chinese Litigants in Late Colonial Court-rooms,' *Journal of Chinese Overseas* (forthcoming) (2013).

²⁴ Paul A Jones, 'Alien Acts: The White Australia Policy, 1931 to 1939' (PhD, Melbourne, 1998); Adam McKeown, 'Ritualization of Regulation: The Enforcement of Chinese Exclusion in the United States and China,' *The American Historical Review* 108, no. 2 (2003): 377-403; Adam McKeown, *Melancholy Order: Asian Migration and the Globalization of Borders* (Columbia University Press, 2008); Salyer, *Laws Harsh As Tigers*.

or residence of Chinese passed through two broad phases from the 1850s to the 1880s. The most important measure was reportedly an Australian innovation, the specification of a limit on the number of passengers allowable per tonnage of the vessel concerned. This adapted a British measure for the health regulation of the trans-Atlantic shipping trade to the colonial regulation of Chinese influx.²⁵ Shipping regulations, poll-taxes and goldfields regulation were statutory innovations of the 1850s, all measures provoking Chinese protest and proving difficult to implement given the porous nature of colonial borders within the Australian mainland.²⁶ A second intensive wave of regulation followed from 1879, again focussed on restriction through passenger load requirements, though stopping short of prohibition. This revival of restriction policy was embraced with varying degrees of conviction by the different colonies, only New South Wales and Victoria going as far as limiting the Chinese passenger tariff to one per 100 tons of vessel²⁷. By this stage, with significant numbers of Chinese immigrants having becoming residents and some even voters following their naturalisation, the monitoring of passenger movement had to take account of the residency rights of Chinese colonial settlers. On the eve of the 1880s the case for recognition of Chinese equality with colonial subjects of the Crown was famously and eloquently advanced by three leading Chinese settlers of Victoria, all of whom re-appear in the story of the legal and political challenges thrown out by the Chinese in 1888.²⁸

The Chinese passengers

²⁵ Price, *The Great White Walls Are Built*, 69.

²⁶ Ann Curthoys, 'Men of All Nations, Except Chinamen': Europeans and Chinese on the Goldfields of New South Wales,' in *Gold: Forgotten Histories and Lost Objects of Australia*, ed. Iain McCalman, Alexander Cook, and Andrew Reeves (Cambridge: Cambridge University Press, 2001); Messner, 'Popular Constitutionalism and Chinese Protest on the Victorian Goldfields.'

²⁷ Price, *The Great White Walls Are Built*, chap. 7.

²⁸ Louis Ah Mouy, Cheok Hong Cheong, and Lowe Kong Meng, *The Chinese Question in Australia, 1878-79* (Melbourne: F.F. Bailliere, 1879), <http://nla.gov.au/nla.aus-vn2818165..>

The mechanics of port and quarantine were at the heart of the Chinese immigration crisis in the autumn of 1888. On 27 April the SS *Afghan* arrived at the Port of Melbourne having already cleared health checks at the quarantine station at Portsea. On board were 268 Chinese passengers, 67 of whom were reported to intend disembarking at Melbourne. The *Afghan* had departed Hong Kong with nearly 500 passengers, many of whom left the ship at Singapore for the Straits Settlements.²⁹

The processing of such passengers involved inspection of their naturalisation papers, if they were returning to the colony, or payment of a poll-tax of £10, both provisions under the law.³⁰ Under the more restrictive immigration provisions adopted by Victoria and New South Wales in 1881, the number of new immigrants who could be carried on any ship bringing Chinese passengers was limited to one for every 100 tons of vessel.³¹ Prior to the arrival of the *Afghan*, allegations that trafficking of naturalisation papers had been increasing rapidly during the 1880s had led the Victorian government to direct a strict application of the law. This was to effect a policy decision taken late in 1887, published in the media and advised to shipping agents in Hong Kong, to apply strictly the provisions of the Act, following the allegations of fraud and trafficking in naturalisation papers.³² On the arrival of the *Afghan*, the Collector of Customs, A W Musgrove, was ordered by the responsible minister, the Commissioner of Trade and Customs, to undertake a comprehensive scrutiny of the papers presented by the passengers.

²⁹ *Argus*, 28 Apr 1888: 13

³⁰ (Victoria) The Chinese Act 1881, 45 Vic 11, ss. 3, 5

³¹ (Victoria) The Chinese Act 1881, 45 Vic 11, s. 2; (NSW) Influx of Chinese Restriction Act 1881, 45 Vic 16, s.3

³² See 'Correspondence relating to Chinese Immigration into the Australasian Colonies', British Parliamentary Papers, 1888 [C.5448], pp. 24-6 for the Victorian Premier's communication to the Governor 11 April 1888, outlining Victoria's changing policy; *Argus*, 4 May 1888: 7; David Day, *Smugglers and Sailors: the Customs History of Australia 1788-1901* (Canberra: AGPS Press, 1992), 407-9; Welch, "Alien Son," chap. 8; Willard, *History of the White Australian Policy to 1920*, chap. 4..

Musgrove's inquiry seemed however wholly directed to excluding all the passengers; none were cleared for landing. The vessel was allowed to unload its cargo, but then placed in quarantine pending a decision of government on the fate of the passengers. The vessel's movements were documented in great detail in the Melbourne press and helped bring a simmering anti-Chinese agitation to a boil. When another inter-colonial vessel, the *Burrumbeet*, arrived a couple of days later carrying 14 Chinese passengers who had boarded at Sydney, the agitation intensified. The *Burrumbeet* was also placed in quarantine pending the government's decision on its passengers.³³ When the *Afghan* proceeded to Sydney a few days later an even more ferocious public response at that port resulted in a precipitate decision by the Premier Sir Henry Parkes to refuse landing rights to any of the passengers on any vessels arriving at Sydney, even including those holding naturalisation papers or prepared to pay the poll-tax.³⁴ The decisions of both governments quickly became an international issue, with the Chinese Ambassador in Britain complaining that the colonial governments had breached international treaties, the law of nations and even their own laws. There followed an intensive diplomatic correspondence over the next two months as the Colonial and Foreign Offices sought to mollify the Chinese government while largely acceding to the increasingly intransigent colonial governments.³⁵

From the start of these events, in the face of the popular agitation and government action that threatened all Chinese landing rights, leading members of the Chinese community explored their options. In both Melbourne and Sydney, the merchants had long approached political hostility with the tools

³³ *Argus*, 1 May 1888: 8.

³⁴ *SMH*, 5 May 1888: 11

³⁵ 'Correspondence relating to Chinese Immigration into the Australasian Colonies', British Parliamentary Papers, 1888 [C.5448]; Cheok Hong Cheong, *Chinese Remonstrance to the Parliament and People of Victoria: Together with Correspondence with Government of the Same, and Address to Sydney Conference. Also, Public Address by Cheok Hong Cheong* (Melbourne, 1888).

available to them through local alliances with sympathetic colonial leaders. In 1881 William Bede Dalley, the NSW lawyer appeared by invitation before the bar of the Legislative Council at the request of the Chinese community to oppose the proposed toughening of immigration law.³⁶ Soon after the arrival and quarantining of the *Afghan* it became clear that the three Chinese authors of the 1879 pamphlet, *The Chinese question in Australia* were agitating the case of the detained passengers in Victoria. Kong Meng was early engaged directly with the Collector of Customs on the reasons for the detention, while Louis Ah Mouy was on board the vessel when the Collector of Customs investigated the papers and announced that none could land. Over the following month Cheok Hong Cheong was the most prominent of the three in a public debate challenging the actions of the Victorian government. These men were only some of those involved in support of the passengers, who were also reported to be visited by numbers of Chinese seeking to contact passengers from their home counties, providing them with money and food.³⁷

The Chinese community leaders then exercised what was the most potent power available to them in an otherwise hostile environment, that of law. The day after the *Afghan* sailed for Sydney, a writ for damages was laid at the Victorian Supreme Court against the Collector of Customs, A W Musgrove. The plaintiff was a passenger identified as Chun[sic]Teong Toy, and damages were claimed at £1000.³⁸ The financial resources behind the claim were considerable: the two counsel engaged on Toy's behalf included a leading member of the bar, Dr John Madden, later (1893) appointed Chief Justice. Toy's became the best known of the 1888 legal cases, though not the only one in which the Chinese plaintiff was successful. His case was also unique in its cause of action (as we will see, the

³⁶ Bede Nairn and Martha Rutledge, 'Dalley, William Bede (1831–1888),' in *Australian Dictionary of Biography* (Canberra: National Centre of Biography, Australian National University, 1972), <http://adb.anu.edu.au/biography/dalley-william-bede-3356>.

³⁷ *Argus*, 4 May 1888: 8, 9 May 1888: 6.

³⁸ Supreme Court Victoria Civil Action/Cause Books, 4 May 1888, VPRS 05238/P0000.

New South Wales' litigants deployed the writ of habeas corpus). The litigation was sponsored by the Chinese merchants to make a point to government, rather than to force review of Toy's own detention, since by the time it was launched the *Afghan* was already sailing for Sydney and Hong Kong.

Toy was a cabinetmaker who had been engaged on contract as a foreman by a relative in Melbourne³⁹. When he arrived on the *Afghan*, he was prevented from leaving the ship, in spite of the captain having offered to pay the tax of £10 as provided by law. When the action came to hearing before the Supreme Court, Musgrove's defence was that he was acting as directed by a Minister of the Crown. The Minister's reason was described in court as the apprehension of government that a large influx of Chinese into Victoria 'would be a danger and menace to the said colony and to the public peace thereof, and to Her Majesty's subjects residing therein'⁴⁰.

Toy's challenge was not readily dismissed. The constitutional issues raised by counsel on both sides, escalated the case from a hearing by a single judge to a case before the Full Court of six judges. There the court divided, with the majority supporting Toy's claim that the Minister's direction was illegal; it was held to be beyond the power of the Victorian government to exclude aliens from entry. The six judges agreed on some issues. The court was unanimous in dismissing the attempt of the government to argue that the action was an 'act of state', since the colony was something less than a state at international law. All the judges also agreed that Victoria, even if self-governing in local affairs, did not possess that sovereignty that would enable it to act without the Crown's direct consent on a matter affecting external affairs. Jurisdiction of the Victorian Supreme Court was thus asserted, the matter being regarded as one of local administration.

³⁹ *Argus*, 18 Oct 1888: 13

⁴⁰ *Chung Cheong Toy v Musgrove* (VSC) [1888], VLR 351-2.

The constitutional issues remained of the first importance because the Chief Justice, George Higinbotham, a former attorney-general, and a leading liberal and advocate of colonial self-government,⁴¹ saw the actions of the executive as lying wholly within the powers of a responsible government.

This part of the argument raises for the first time in this Court constitutional questions of supreme importance. We are called upon for the purpose of adjudicating upon the rights of the parties in this case to ascertain and determine what is the origin and source of the constitutional rights of self-government belonging by law to the people of Victoria, and, if such rights exist, what is the extent and what are the limits assigned to them by law.⁴²

Those questions had indeed been raised in argument before the court and answered by Madden for Toy in ways that emphasised the limits of Victorian self-government and in particular its capacity to exclude aliens and constrain their rights. Madden even had to hand the evidence of the NSW Supreme Court's judgment (discussed below) that 'a man on board an English vessel is protected by, or amenable to English law'.⁴³ But while the majority of the court struggled to find evidence of a local constitutional power to exclude aliens, seeing this as lying wholly within the power of the Sovereign in England, Higinbotham saw The Constitution Act of 1854⁴⁴ as conferring implicitly such a power. 'It appears to me', wrote Higinbotham,

to be beyond doubt that the exercise by the government of Victoria of the right to exclude aliens is an act that may be necessary to be done in a variety of possible cases by the government of Victoria for the security,

⁴¹ Bennett, *George Higinbotham*; Stuart Macintyre, *A Colonial Liberalism: The Lost World of Three Victorian Visionaries* (Melbourne: Oxford University Press, 1991).

⁴² *Toy v Musgrove*, 379.

⁴³ *Toy v Musgrove*, 356. The Victorian case was heard in court on July 10-13, the NSW habeas corpus cases were heard and determined in May.

⁴⁴ (Vic) An Act to establish a Constitution in and for the Colony of Victoria [1854] 17 Vic.

safety, peace, or welfare of the people of Victoria. The facts disclosed in this case and the further fact of the proximity of Victoria to the French convict settlement on New Caledonia, suggest that it is highly probable that it may be necessary in the existing circumstances of the present day to exercise this power in Victoria at any moment.

For Higinbotham, the court was in no position to question the government's discharge of its constitutional function ('a function, I will repeat, the exercise of which this court has no jurisdiction to review or to question') The exercise of that function in this case had been 'the opinion and determination that it was necessary for the public peace that no further Chinese other than British subjects should be permitted to land in Victoria'.⁴⁵

The Chief Justice however was unable to persuade four of his colleagues of this view, which was shared only by Justice Kerferd, who tellingly was a former attorney-general and briefly premier (1874-5) of the colony.⁴⁶ Likewise, where Kerferd, and with him Higinbotham, dismissed the idea that the Chinese immigration statutes constituted a kind of invitation to immigrants, requiring them only to meet certain contractual commitments, the majority judges insisted that meeting the requirement to pay a poll-tax to the captain of the *Afghan* did indeed give Toy rights which could not be over-ridden by an erroneous claim of the colonial government that it had power to exclude aliens.

Finding comfort in the approach of the minority, however, with its powerful claim for the powers of a colonial government, the Victorian government subsequently appealed the Full Court's decision to the Privy Council in London. In 1891 the Privy Council overturned the Victorian Supreme Court judgment, dismissing the idea that there was a 'licence to land' under Victorian

⁴⁵ *Toy v Musgrove* (VSC) [1888], VLR 398.

⁴⁶ Margot Beever, "Kerferd, George Briscoe (1831–1889)," in *Australian Dictionary of Biography* (Canberra: National Centre of Biography, Australian National University), accessed August 3, 2013, <http://adb.anu.edu.au/biography/kerferd-george-briscoe-3947>.

immigration law, on payment of the poll-tax. Moreover it determined that an alien did *not* have 'an absolute and unqualified right' to contest in a British court a decision taken to exclude him.⁴⁷ While the Privy Council did not embark on an extended review of constitutional government in the mode of Higinbotham and the colonial judges, its decision was certainly welcome to a colonial government eager to assert its power to manage what it saw as its own internal affairs.⁴⁸ The decision was however three years too late to prevent Chung Teong Toy achieving a measure of satisfaction in the Victorian courts. Following the Supreme Court's judgment in his favour in June, Toy's case proceeded to the assessment of damages which were awarded in the amount of £150 in November 1888, with costs of £439 18s 2d also awarded against the government.⁴⁹ The award of damages was a significant victory for the Melbourne Chinese community which had supported him and others whose interests were affected by the government's policy.⁵⁰ The significance of their actions was amplified by contemporaneous events in Sydney.

After being refused landing of his passengers at Melbourne Captain George Roy had taken the *Afghan* to Sydney. There he faced even more determined opposition with massed crowds opposing the landing of any Chinese, and a Premier 'drunk with the noise of agitation' as Melbourne's *Argus* put it.⁵¹ Once again the Chinese passengers were denied the right of landing, in spite of the status of some of them as residents and even naturalised subjects of the colony. And again the Sydney Chinese merchants took up the case. Leading them in this regard was Mei Quong Tart, whose actions were more in the style of diplomat and mediator between the restless and aggrieved Chinese passengers and the

⁴⁷ *Musgrove v Toy* [1891] AC 272, at 281, 283.

⁴⁸ See Waugh, "Chung Teong Toy v Musgrove and the Commonwealth Executive," 172–3. for a discussion of the impact of the case on the 1891 Convention debates over the constitutional machinery for 'responsible government'.

⁴⁹ *Argus*, 2 Nov 1888: 6-7; PROV, VPRS 05238/P0000.

⁵⁰ Welch, "Alien Son," chap. 8.

⁵¹ *Argus*, 18 May 1888: 6.

intransigent government.⁵² After the failure of the Chinese deputation to Parkes to obtain release of the passengers entitled to land, arrangements for legal proceedings were begun. Again the Chinese community demonstrated its resourcefulness by employing the best legal advice.

On 14 May a leading Sydney Queen's Counsel, Charles Edward Pilcher, obtained a Supreme Court writ for habeas corpus in the name of passenger Lo Pak and advised that another 47 applications were in process.⁵³ This common law writ, whose most common and mundane purpose was to bring prisoners on remand before a court, had from the seventeenth century become a remedy used by those seeking their liberty from wrongful arrest. Lo Pak's application in fact was sought under the provisions of the (UK) *Habeas Corpus Act* of 1816 which 'declared the writ's availability in noncriminal matters'.⁵⁴ Such an action required the persons named (in this case a NSW police inspector and the captain of the *Afghan*) to produce evidence justifying the detention of the person involved. A 'good return' to the writ would be a warrant for arrest or some other legal justification for detention, something other than 'the king's command' as the Chief Justice reminded counsel in Lo Pak's case.⁵⁵ Without such documentation in hand the respondents were at risk of the court's judgment against the detention.

⁵² E. J. Lea-Scarlett, "Mei Quong Tart (1850–1903)," in *Australian Dictionary of Biography* (Canberra: National Centre of Biography, Australian National University), accessed August 3, 2013, <http://adb.anu.edu.au/biography/mei-quong-tart-4181>; Margaret Tart, *The Life of Quong Tart, or, How a Foreigner Succeeded in a British Community, Compiled and Edited by Mrs Quong Tart* (Sydney: W.M. Maclardy, 1911); "Quong Tart Visits Afghan to Persuade Passengers to Go to Hulk," *The Sydney Morning Herald*, May 9, 1888, 9.

⁵³ *SMH*, 15 May 1888: 4. Pilcher is described by his biographer as 'one of the great common law barristers of his time': J K McLaughlin, 'Pilcher, Charles Edward (1844–1916),' in *Australian Dictionary of Biography* (Canberra: National Centre of Biography, Australian National University, 1988), <http://adb.anu.edu.au/biography/pilcher-charles-edward-8051>.

⁵⁴ Paul D. Halliday, *Habeas Corpus: From England to Empire* (Belknap Press of Harvard University Press, 2010), 246.; *Ex parte Lo Pak*, 1888 NSWSC, 225.

⁵⁵ *Ex parte Lo Pak*, 1888 NSWSC, 230.

In the proceedings that followed, the NSW Supreme Court proved even less a friend to executive government than its Victorian counterpart. In Parliament Parkes was confident in legal advice that a habeas corpus action on behalf of an alien would not succeed in a British court.⁵⁶ But when government counsel contended that the matter was one of international law and that the habeas corpus statutes of the 17th and 18th centuries were not intended to apply to foreigners the Chief Justice, Sir Frederick Darley riposted: 'Those Acts are no more than procedure Acts; the common law remains as it was by *Magna Charta*'.⁵⁷ Hence the court insisted on its jurisdiction to hear the actions. From the outset both Darley and Justice W J Windeyer looked to statutes enacted by the NSW Parliament to measure the merits of the plaintiffs' case. As Windeyer queried the government's counsel:

We have passed an act virtually inviting Chinese to come here, or at any rate admitting their right to do so under certain restrictions. So far the Queen has not shewn any disinclination to Chinese immigration. How can this government step in and say, "We do not like it; we have decided not to let these people come in"?⁵⁸

Windeyer acknowledged that there were circumstances that would justify a government decision 'to exclude foreigners from landing if they come infected with disease, or in such vast and overwhelming numbers as really to threaten danger to our liberties'. To this he answered that 'it is enough to say that there not half a million Chinese waiting to be landed, and no impending danger to the country is shown upon the affidavits'.⁵⁹ With the court insisting that the

⁵⁶ *SMH*, 16 May 1888: 5.

⁵⁷ *Ex parte Lo Pak*, 1888 NSWSC, 227.

⁵⁸ *Ex parte Lo Pak*, 1888 NSWSC, 231

⁵⁹ *Ex parte Lo Pak*, 1888 NSWSC, 243. Although quarantine on health grounds was not at issue in the 1888 cases its influence was a central element in executive government policy on the threat of the Chinese passengers in the 1880s. In 1881 Henry Parkes in NSW declared Hong Kong an infected port and ordered the quarantining of any vessels arriving from there at Sydney (Day, *Smugglers and Sailors*, 408). In 1888 one of the first decisions (adopted only

provisions of statute governed the admission of immigrants, the outcome for the three plaintiffs was then determined by the prior status of the respective plaintiffs - two were allowed their discharge from custody while the third failed in his application.

Lo Pak was a long-time resident and had a certificate exempting him from the provisions of the 1881 *Influx of Chinese Restriction Act*: his release was ordered by the court on 17 May.⁶⁰ A second passenger Leong Kum, who had paid the tax of £10 to the ship's captain, again as provided by the legislation, was also granted his freedom to land, on May 23.⁶¹ A third litigant, however, had no exemption certificate, nor had he paid the poll tax. Instead Lau You Fat presented papers of naturalisation that had been granted in Victoria. The same court that had released Lo Pak and Leong Kum declined to look with favour on Lau You Fat, declaring that naturalisation papers did not have extra-territorial validity, although one of the three judges was of a mind to agree that they did.⁶²

The decisions of the NSW Supreme Court were a determined assertion of judicial autonomy exercised against executive indifference to legal rights. The judges did not shrink from vigorous criticism of a government that had been shown to have acted illegally in prohibiting the landing of passengers who had met the legal requirements of the immigration statutes. Encouraged by these outcomes more Chinese passengers used the same legal tactic in early June to enforce their release from the *SS Changsha*. On this occasion the Chief Justice berated the government for its wilful indifference to the court's earlier

after considerable debate between the Governor and the Cabinet) of the Victorian Executive Council following the arrival of the *Burrumbeet* was to order the vessel into quarantine under the public health statutes (*Argus*, 2 May 1888: 7). On the conflation of immigration and public health (contagion) law in Australian immigration policy see Alison Bashford, "At the Border: Contagion, Immigration, Nation," *Australian Historical Studies* 120 (2002): 344–58; Alison Bashford and Carolyn Strange, "Asylum-seekers and National Histories of Detention," *Australian Journal of Politics and History* 48, no. 4 (2002): 509–527.

⁶⁰ *Ex parte Lo Pak*, 1888 NSWSC 221; *SMH* 19 May 1888: 10

⁶¹ *Ex parte Leong Kum*, 1888 NSWSC 250

⁶² *Ex parte Lau You Fat* 1888 NSWSC 269

judgments. In his persistence on the rights of the Chinese passengers, there may have been a legacy of personal commitment on the substance of the Chinese question – in the Legislative Council in 1879 and again in 1881, some years before his appointment as Chief Justice, Darley had opposed the NSW government's tightening of Chinese immigration laws.⁶³ On the bench Darley may have had a reputation for insipid judgments, but that was not his disposition on this occasion. He noted that this was the third time on which the court had been invoked to grant a writ of habeas corpus to Chinese affected by the government's actions.

Upon the second application we pointed out that we had already declared what the law of the colony upon the subject is, and further, that everyone in this colony, no matter how high his position, or how low, was bound by that declaration, and bound to scrupulously obey what the law has declared. Now we find that the law as enunciated by us, is for the second time knowingly and of purpose disregarded and set at nought, and this too by those who, above all others in this community, are by their prominent position, by the duty they owe their country, and by their oath of allegiance to their Sovereign, bound to see that the law of the country as pronounced by the due properly constituted authorities (the Judges of the land) is duly and faithfully carried into execution.

Darley instructed the government in constitutional law, drawing the attention of the executive to its responsibility to enforce decisions of the court:

The constitution of our country does not provide the judges with a separate staff of officers for the purpose of enforcing obedience to the

⁶³ *SMH*, 23 Apr 1879: 2 and *SMH*, 19 Aug 1881: 4 – on the second occasion Darley moved, unsuccessfully to increase from 1 to 2 the number of Chinese passengers per ton of vessel allowed under the new bill. See also Price, *The Great White Walls Are Built*. For Darley's biography: J. M. Bennett, 'Darley, Sir Frederick Matthew (1830–1910),' in *Australian Dictionary of Biography* (Canberra: National Centre of Biography, Australian National University, 1972), <http://adb.anu.edu.au/biography/darley-sir-frederick-matthew-3366>.

decrees and judgements of the court. The constitution cast this duty upon the executive and never before in the history of any British community, so far as our knowledge extends, has this second step been disregarded.

While Parkes invoked the dangers to peace and good order that would flow from the Chinese invasion, Darley saw a greater threat arising from the government's indifference to court decisions.

The danger of the course here pursued is obvious. We say nothing of the evil example set to the weak and thoughtless in the community, pernicious as this in itself is. If the court has once held that a certain class of persons are illegally imprisoned, the danger of holding others who fall exactly within the same class in illegal custody is extreme.

The government was forced to give way.⁶⁴

Inevitably, given the political mood of the time, the legal victory proved short-lived. The 1888 legal contests asserted Chinese entitlements to be heard in colonial courts and be treated equitably. Politically the threat of legal action, well-funded as it was in both Sydney and Melbourne, proved a potent weapon. In Melbourne too writs of habeas corpus were sought when the government detained passengers on the *Burrumbeet* who had boarded at Sydney; the writs were withdrawn after the Victorian government gave way on the landing rights of the passengers who had paid the poll-tax.⁶⁵ The longer term impact nevertheless was to stimulate colonial governments to guard ever more jealously the British character of Australasian settlement. By July the NSW government had enacted an amended restriction statute that abolished even the

⁶⁴ *Ex parte Woo Tin and 14 others* [1888] NSWSC: *SMH*, 6 Jun 1888: 5.

⁶⁵ *SMH*, 24 May 1888: 5; the writs had been sought as early as 14 May in this case, see *SMH*, 15 May 1888: 4. See also Welch, "Alien Son," 239–45.

availability of naturalisation for Chinese residents and imposed prohibitive entry requirements for incoming passengers.⁶⁶

Even so, colonial courts continued to watch closely the administration of these laws. Just as the new Commonwealth was taking over immigration law, in 1901 a Western Australian man, Choong Man Kit, successfully appealed a conviction of being a prohibited immigrant under that State's 1897 *Immigration Restriction Act*. Quashing the conviction, the two judges of the Supreme Court rebutted the lower court magistrate's presumption that the burden of proving he was not a prohibited immigrant fell on Choong. The judges insisted, like their counterparts in NSW in 1888, on a strict adherence to the letter of the law and observance of the rules of the common law. Further, the court determined that the 1897 Act did not refer to Chinese at all, 'for whose immigration into Western Australia provision had already been made by law'. For Justice Hensman 'it was hardly necessary to say that if a Chinaman was not prohibited by statute, he was just as much entitled to the full benefit of the law of England as an Australian, and it was one of their principles that a man had to be proved guilty of a charge before he could be imprisoned'.⁶⁷ The Privy Council had determined that an alien could not seek relief via a writ of habeas corpus but Australian courts continued to recognise the many ways in which immigration law was an invitation as much as a prohibition to enter the country. That presumption would continue to inform much judicial commentary during the highly restrictive period of the White Australia Policy, making it into something other than a blanket exclusion of unwanted races.

A Chinese contribution to the development of Australian law?

⁶⁶ (NSW) Chinese Restriction and Regulation Act of 1888 No 15a, 52 Vic no. 4. The Act was also intended to indemnify the government against any claims arising from its illegal actions in May.

⁶⁷ Choong Man Kit v Sampson [1901] WASC (unreported); *Western Mail* 25 May 1901: 14.

The Chinese litigation of 1888 was made possible by the wealth and resourcefulness of a Chinese community even in the face of unprecedented political hostility. The litigation also exposed fractures in the colonial constitutional order and differences within its leading ranks. Those differences spoke to the complexity of the issues, a fact illustrated in contemporary writing by legal authorities responding to the questions thrown up by colonial responses to aliens.⁶⁸ Law turned out to be a weapon that could be used politically with considerable effect, by more than one side, in a contest of rights and interests. The Chinese cases of 1888 exhibited the working of colonial law and politics across a number of dimensions.

In part, notably with respect to the NSW actions and their consequences, the story told here is one that both exemplifies and qualifies for this part of the Empire the longer history of habeas corpus as Paul Halliday has recounted it – the progressive winding back of its scope by the constraining effects on the one hand of codifying the writ, and on the other by legislative power providing sufficient authority for detention (and thus a successful return to the writ wherever it was served)⁶⁹. The success of the NSW cases, and the threat of the use of habeas corpus in Victorian contexts that may have played a role in freeing the passengers on the *Burrumbeet*, suggests the continuing viability of such ancient legal remedies in colonial contexts.

There are other dimensions however – the cases are important moments in late colonial debates about self-government, about the rights of aliens in British law,

⁶⁸ See the contrasting accounts of the existence of the prerogative to exclude aliens in W. F. Craies, "Right of Aliens to Enter British Territory," *Law Quarterly Review* 6 (1890): 27; Thomas W. Haycraft, "Alien Legislation and the Prerogative of the Crown," *Law Quarterly Review* 13 (1897): 165. Recent judicial opinion in Australia has favoured Haycraft's insistence on the survival of the prerogative over Craies' sceptical case: *Ruddock v Vadarlis* (includes corrigendum dated 20 September 2001), 21 (FCA 2001), para. 21 (Black CJ) citing *Re Minister of Immigration and Ethnic Affairs v Matthew Rak Rain Mayer* (FCA 1985) (McGregor J).

⁶⁹ Halliday, *Habeas Corpus*.

and about the notions of British subjecthood and its deployment by naturalised subjects at this time and later. In the longer history the cases also find their echo in the law and politics of immigration policy and practice in Australia.

The most important reported judgments in these cases distributed themselves variously around the prerogative of colonial governments in decision-making on the exclusion of aliens. Two of the most interesting figures of late colonial judiciaries, Higinbotham in Victoria and Windeyer in NSW, liberals in politics and on the bench, lined up on opposite sides on this core issue. Their differing stances may be attributed in part to the different causes of action involved – Toy's was an action against the government for damages for refused entry, the NSW cases were all habeas corpus writs brought against a government which was held to be detaining them without lawful warrant. Along the way to judgment both Higinbotham and Windeyer found plenty of room for expansive commentary on constitutional law, the common law heritage of British subjects, and colonial self-government. Higinbotham advanced a powerful case for the constitutional basis on which the colonial government of a 'quasi-independent Victoria' as he put it, had exercised a power to exclude aliens as part of a responsibility for securing the public peace and safety. His example of the potential threat of convicts from New Caledonia made it clear that the security threats being imagined were not simply racial. Windeyer joined with Chief Justice Darley in being unable to agree that colonial government could assert a power to exclude aliens without the consent of the imperial crown. When government counsel attempted to argue that the court had no jurisdiction since the matter was one of international law, the Chinese litigants being subjects of the Chinese emperor, the NSW judges insisted that the common law still applied to them, since they were detained on a British ship in a colonial harbour. Against the evidence of an increasing statutory control over the status of aliens and foreigners, Darley in particular emphasised the particular conditions of war

that had produced the alien statutes and inferred from this the limits of their application in local conditions. The texture of these leading judgments deserves an attention in Australian historiography that they have not received.

In asserting their legal subjectivity the Chinese litigants ran against the political tide turning against them, and challenged those in the judiciary who could not contemplate the entitlements of aliens, even alien friends, to take action in British courts. But the Victorian judges in the majority in favour of Toy, like the NSW judges in the habeas corpus cases, explored the possibilities that British justice was more characterised by its openness to all those wishing to test its boundaries than by the narrowing confines implicit in Higinbotham's judgment, with its over-riding deference to the authority of the legislature crowding out any privileging of the status of persons seeking the protection of the courts. Such expansions and contractions of the legal spaces of the colonial court-room are remarkably reminiscent of more recent contests between government and judiciary over the status of non-citizens in Australian courts.⁷⁰ We cannot read these judgments as reflecting a particular sympathy with Chinese colonials so much expressing these judges' immersion in the traditions of the common law.⁷¹ A striking instance of this is evident in Darley's contemporaneous embrace of a class-based vision of the appropriate Chinese immigrant. In the very month of hearing and judging the 1888 habeas corpus cases he also wrote to Parkes urging the government take action over the crime in and around Chinese camps in country NSW; he was particularly concerned over the evidence of miscegenation and the possibility that Chinese men were marrying white

⁷⁰ See especially the recent High Court judgment against the so-called Malaysian solution: Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship [2011] HCA 32.

⁷¹ In this respect the 1888 cases are important also for their standing in the line of Australian legalism, as argued recently by Ann Genovese in another famous instance: Ann Genovese, "Australian Communist Party of Australia v The Commonwealth: Histories of Australian Legalism," *Australian Historical Studies* 44, no. 1 (2013): 6–22, doi:10.1080/1031461X.2012.760632.

women for the sole purpose of circumventing the immigration restriction statutes. His letter was read to the NSW Legislative Council during debate on the 1888 Chinese Restriction and Regulation Bill.⁷²

The assertiveness of the Chinese community in the face of colonial executive decisions in these years was no isolated incident in Chinese diaspora experience. Nor was the (always conditional) receptiveness of the judiciary evident in eastern Australia in 1888 idiosyncratic. Across the Pacific these same years witnessed determined Chinese litigants opposing the restrictions imposed on their entry or residence in British Columbia and California. A run of cases examined by John McLaren some time ago showed a British Columbia judiciary in a light familiar to anyone scrutinising the record of the NSW judiciary in the 1888 Chinese cases.⁷³ In California in the 1890s and up to 1905 the Chinese communities proved remarkably tough combatants, clogging up the local courts with habeas corpus writs, to a point relieved only by Congressional action in 1905. Their success in this endeavour led some historians to speak of the Chinese contribution to American law. That is, an enduring legacy of the activism of Chinese litigants was the refinement of immigration restriction law to achieve the goal of choking off the stream of Chinese immigration.⁷⁴ The evidence of the 1888 cases in Australia suggest a similar effect. On both sides of the Pacific we may be led to the view that the hardening of borders in the late nineteenth century was provoked by the success of Chinese litigants in using the local courts to assert their legal rights. The fact that some of these actions were frequently launched from on board vessels aggravated the jurisdictional contests

⁷² SMH, 31 May 1888 p. 3; J. M. Bennett, "The Life and Influence of Sir Frederick Matthew Darley" (MA (Hons), Macquarie University, 1969), 395–6.

⁷³ John McLaren, 'The Early British Columbia Supreme Court and the 'Chinese Question': Echoes of the Rule of Law,' *Manitoba Law Journal* 20 (1991): 107-147.; see also Price, *The Great White Walls Are Built*; Salyer, *Laws Harsh As Tigers*.

⁷⁴ Charles J McClain and Laurence Wu McClain, "The Chinese Contribution to the Development of American Law," in *Entry Denied: Exclusion and the Chinese Community in America, 1882-1943*, ed. Sucheng Chan, Asian American History and Culture (Philadelphia: Temple University Press, 1991); Salyer, *Laws Harsh As Tigers*.

that enlivened these proceedings and judgment. In the readiness with which many in the judiciary heard such litigants we see the grounds for a longer term emergence of immigration law grounded in ever more elaborate categories of personhood and of jurisdiction.