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# Comprehensive Immigration Reform in the Jim Crow Era: Chinese Exclusion and the McCreary Act of 1893

Gabriel J. Chin<sup>†</sup> & Daniel K. Tu<sup>††</sup>

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For ways that are dark,  
And for tricks that are vain,  
The heathen Chinese is peculiar—  
Which the same I would rise to explain.<sup>1</sup>

How the law should deal with large groups of deportable non-citizens is both a venerable question of federal legal policy and a major controversy today. This Article examines the first debate in the United States over the choice between mass deportation of those in violation of law, and compromising the firmness of the law, a problem involving Chinese migrants that arose over a century ago.

Since the founding of the United States, immigration and citizenship law contemplated a white America. The Naturalization Act of 1790, signed

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1. 25 CONG. REC. 2453 (1893) (remarks of Rep. Bartlett, quoting Bret Harte poem “The heathen Chinese”).

by George Washington, Thomas Jefferson, and John Adams, limited the privilege to “free white persons.”<sup>2</sup> As an act of the First Congress, the 1790 law was approved by many of the Constitution’s Framers.<sup>3</sup> Racial restriction remained part of naturalization law until 1952.<sup>4</sup>

Federal immigration law, like naturalization law, was race-conscious. It developed and grew in the second half of the nineteenth century as a means of excluding Asians.<sup>5</sup> A major step was the Chinese Exclusion Act of 1882.<sup>6</sup> General numerical limitation would not become a part of federal immigration law until 1921; before then, in principle, any number of immigrants could come, although there were “qualitative” exclusions based on an immigrant’s health or criminal record. Yet Chinese workers were not just limited or subject to quotas; instead, they were excluded absolutely on the basis of race.<sup>7</sup>

Congress expanded and tightened racial exclusion over time. In 1892, the Geary Act,<sup>8</sup> authored by Representative Thomas Geary (D-CA), required Chinese, and only Chinese, to register with the U.S. government on pain of imprisonment and deportation.<sup>9</sup> On the advice of distinguished attorneys, almost all Chinese declined to register.<sup>10</sup> However, the Supreme Court upheld the Geary Act’s registration requirement in *Fong Yue Ting v. United States*.<sup>11</sup> As a result, Chinese people and the government faced a dramatic problem: U.S. policy deemed Chinese laborers undesirable and prohibited their future entry into the country. Almost all Chinese laborers currently in the United States had become deportable because they chose not to comply with the law: they were unauthorized migrants.<sup>12</sup>

This was not a racially egalitarian era for Congress; another major accomplishment of the then-sitting 53rd Congress was the repeal of

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2. Act of Mar. 26, 1790, 1 Stat. 103 (repealed 1795).

3. Michael Bhargava, *The First Congress Canon and the Supreme Court’s Use of History*, 94 CAL. L. REV. 1745, 1745 (2006) (noting that the Supreme Court sometimes give special weight “to the actions of the First Congress in resolving a modern-day legal dilemma”).

4. Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 14 (1998).

5. *Id.* at 13–14.

6. *Id.* at 13.

7. *Id.* at 234.

8. Act of May 5, 1892, ch. 60, 27 Stat. 25 (1892) (“Geary Act”).

9. *Id.* The Court later upheld both detention to facilitate deportation as well as criminalization of immigration violations. *Wong Wing v. United States*, 163 U.S. 228, 235 (1896) (“We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid . . . So, too, we think it would be plainly competent for congress to declare the act of an alien in remaining unlawfully within the United States to be an offense punishable by fine or imprisonment, if such offense were to be established by a judicial trial.”).

10. See notes 37–50, *infra*, and accompanying text.

11. 149 U.S. 698 (1893).

12. As Rep. Geary explained “the only Chinese here and legally entitled to be here . . . were those who had already registered, because under the operation of the law of 1892, the status of all those who did not register was fixed by providing that they should be held to be illegally in the country on the 5<sup>th</sup> day of May, 1893.” 25 CONG. REC. APP. 234 (1893).

Reconstruction-era laws protecting the African American franchise,<sup>13</sup> which was part of a larger national project aimed at excluding African Americans from politics.<sup>14</sup> As the great historian Oscar Handlin explained: “By the end of the [nineteenth] century the pattern of racist practices and ideas seemed fully developed: the Orientals were to be totally excluded; the Negroes were to live in a segregated enclave; the Indians were to be confined to reservations as permanent wards of the nation . . .”<sup>15</sup> Nonwhites of whatever race or ethnicity had been effectively subordinated by law.

The connection between Western racists and Southern white supremacists was explicit. For example, during the debate on the McCreary Act, Representative John Williams (D-MS) explained: “I am willing to trust the motives, the manhood, the generosity, the capacity for self-government, and the capacity for governing inferior races, inherent in the white people of the Pacific Slope, just as I have appealed to them, and to others, to trust the capacity for self-government of the people of the South.”<sup>16</sup> In the West as well as the South, minorities were to be excluded from political participation.

Anti-Chinese legislators also made the connection between equality for African Americans and the presence of Chinese. Geary noted that he opposed a voting rights bill, a “bill having its origin, no doubt, in the same place as this, which was directed against your people of the South, against your society and the right of the white man to be supreme in the sunny South.”<sup>17</sup> He explained that anti-Chinese legislators in the West voted for white supremacy in the South:

The two Senators from my own golden State, from the State of Nevada, Republicans from Colorado and Oregon, all joined hands with you and said whenever an attack is made by any alien race upon our brother white men of the South, or upon white civilizations anywhere, you can command our friendship and support . . . We freely perceived, as brethren,

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13. Act of Feb. 8, 1894, 28 Stat. 36.

14. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65 (2008).

15. OSCAR HANDLIN, RACE AND NATIONALITY IN AMERICAN LIFE 48 (1957). He also memorably wrote: “Once I thought to write a history of the immigrants in America. Then I discovered that the immigrants were American history.” OSCAR HANDLIN, THE UPROOTED 3 (1<sup>st</sup> ed. 1951).

16. 25 CONG. REC. 2527 (1893). See also *id.* at 2528 (“I am glad to see that early in the history of this Chinese problem [the white people of the Pacific Slope] have been wiser than we were in the early history of the negro problem in the South, when the small number of Africans on this continent constituted a condition other than that with which we are now confronted, and that they are willing to take the question up frankly and deal with it boldly and resolutely.”); *id.* at 2498 (remarks of Rep. Milliken) (“Is it not true that there is no instance in the history of mankind where any two of the five distinct types of the human race have ever lived together in peace, harmony, and prosperity? Is not that a fact? We have tried to assimilate with the Indian. And we have had a continual conflict, which will end when the Indian goes out of existence. We have tried to assimilate with the Ethiopian; we have had four years of war; and still the end has not come. And now, when the Mongolian lands upon our shore, there is trouble with him.”).

17. 25 CONG. REC. 236 (1893).

our duty in upholding the idea that white civilization must be dominant on this continent.<sup>18</sup>

In this environment, one might reasonably assume that racial restrictionists would seize any opportunity to rid the country of a group whose presence, in their belief, would harm the body politic.

Instead of directing mass deportation, however, the 53rd Congress virtually unanimously granted the Chinese another chance. The McCreary Act<sup>19</sup> gave Chinese an additional six months to register while also tightening the Chinese Exclusion Act in several ways. This Article examines the legislative history of the McCreary Act to outline the political and ideological forces leading to its enactment.

### I. THE PROBLEM OF CHINESE IMMIGRATION

In the mid-nineteenth century, the United States encouraged Chinese immigration. Anson Burlingame, Lincoln's minister to China, advocated an open door for Chinese immigrants<sup>20</sup> when he negotiated an 1868 treaty bearing his name providing for unrestricted immigration between the United States and China.<sup>21</sup> U.S. industry, rich in resources but deficient in labor, wanted cost-effective Chinese laborers to work in factories and mines and to construct the transcontinental railroad.<sup>22</sup>

Conditions in China also encouraged migration. The Qing government in China was on the decline. After the Opium War of 1842, China was seen internationally as weak and pliable, and Western powers negotiated a series of unfavorable treaties.<sup>23</sup> Domestic problems included inflation, famine, civil unrest, opium abuse, and local rebellions.<sup>24</sup> Understandably, many Chinese sought their fortunes in the American West.

Chinese Americans became an increasing percentage of the Californian workforce. Historian Lucy Salyer writes: "By 1870, Chinese constituted 46 percent of the workers in the four main industries in San Francisco and 25 percent of the wage-earning force in California as a whole."<sup>25</sup> However, the increase in the Chinese labor force coincided with rising unemployment and a severe depression from 1873 to 1878, leading many white Americans to blame their economic problems on the Chinese.<sup>26</sup>

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18. *Id.* at 236.

19. Act of Nov. 3, 1893, ch. 14, 28 Stat. 7 (1893) ("McCreary Act") (repealed 1943).

20. LUCY SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* 9 (1995).

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

22. SALYER, *supra* note 22, at 2, 8.

23. TEEMU RUSKOLA, *LEGAL ORIENTALISM CHINA, THE UNITED STATES AND MODERN LAW* (2013). Thus, U.S. citizens were not subject to Chinese law. *See, e.g.*, 25 CONG. REC. 2436 (1893) (remarks of Rep. Hitt).

24. JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 346 (2d ed. 1999).

25. SALYER, *supra* note 22, at 10.

26. *Id.* at 9.

Immigration restrictionists urged a change to the Burlingame Treaty, and succeeded in negotiating a revision allowing suspension or restriction of the immigration of Chinese laborers, but not an absolute prohibition.

The Chinese Exclusion Act of 1882 excluded “Chinese laborers” from the United States for a period of ten years.<sup>27</sup> President Arthur vetoed an earlier version imposing a 20-year ban, concluding that it was inconsistent with the treaty. The Act had a number of enforcement mechanisms. For example, shipmasters who brought in Chinese laborers would be guilty of a misdemeanor. Chinese present in the country in violation of the Act were deportable. The Act also, redundantly, prohibited state and federal courts from naturalizing Chinese persons,<sup>28</sup> even though they were already prohibited under the general racial restriction of the naturalization law.

However, Chinese laborers already in the U.S. on November 17, 1880, or who came within 90 days of passage of the Act, were permitted to be in the United States. Furthermore, a Chinese laborer lawfully in the United States who wanted to travel abroad could obtain a certificate authorizing his re-entry. Exclusion did not apply to merchants and diplomats; those in the U.S. could remain and others could enter in the future. The Chinese widely resented the Act and many evaded it.<sup>29</sup> However, Congress strengthened it over time. In 1884, responding to conflicting lower court decisions, Congress made clear that exclusion was based on Chinese race, not Chinese citizenship, nationality, or birth.<sup>30</sup> A few years later, the Scott Act of 1888 invalidated re-entry certificates held by Chinese who had left the United States for overseas trips with the assurance that they could come back.<sup>31</sup> The Supreme Court upheld this retroactive repudiation of a promise many had relied upon in the unanimous decision of *Chae Chan Ping v. United States*.<sup>32</sup>

The Geary Act extended the Chinese Exclusion Act for another 10 years.<sup>33</sup> Sections 1 through 5 reenacted existing law. Section 6 required any lawful Chinese laborer to register, by May 5, 1893, with the collector of internal revenue of the district of his residence. Failure to register would mean that a Chinese person was unlawfully in the United States and could be arrested by any U.S. customs official, collector of internal revenue, or U.S. marshal. In addition, any Chinese person “convicted and adjudged not to be lawfully entitled to be in or remain in the United States shall be imprisoned at hard labor for a period not exceeding one year and thereafter

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27. Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

28. *Id.*

29. See, e.g., ERIKA LEE, AT AMERICA’S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882-1943 (2003).

30. Act of July 5, 1884, 25 Stat. 115, 118, § 15 (repealed 1943).

31. Act of Oct. 1, 1888, 25 Stat. 504 (repealed 1943) (“Scott Act”).

32. 130 U.S. 581 (1889). See generally Gabriel J. Chin, *Chae Chan Ping and Fong Yue Ting: The Origins of Plenary Power*, in IMMIGRATION LAW STORIES 7 (David Martin & Peter Schuck, eds. 2005).

33. Act of May 5, 1892, 27 Stat. 25 (“Geary Act”).

removed from the United States.”<sup>34</sup> The burden of proving registration was on the Chinese arrestee. A Chinese person failing to produce a residence certificate would be taken before a federal judge, who would order his deportation unless he had a good excuse for failing to obtain a certificate. “[A]t least one credible white witness” was required to establish a valid excuse.<sup>35</sup> The witness would have to testify that the Chinese person was a U.S. resident when the Geary Act was passed. Non-laborers authorized to stay, including merchants and students, could obtain the certificate of residence without charge. The law required certificates to include the applicant’s name, age, local residence, occupation, and physical description.<sup>36</sup>

In an early act of collective civil disobedience, the Chinese refused to register because they considered the law discriminatory. Yung Hen, a poultry dealer in San Francisco’s Chinatown complained, “For some reason you people persist in pestering the Chinese . . . you now insist on labeling us.”<sup>37</sup> The Chinese vice-consul in San Francisco suggested that the registration requirement placed the Chinese on the same level as dogs.<sup>38</sup> The Chinese Six Companies, an important community group, protested to the collector of internal revenue at San Francisco, and called the Geary Act “[a]n unwarranted and unnecessary insult to the subjects of a friendly nation . . . [a]n insult that has not been inflicted upon the subjects of any other nation.”<sup>39</sup>

The Chinese Six Companies led the fight against the Geary Act, posting flyers in major American Chinatowns urging Chinese not to register.<sup>40</sup> The flyers called the Geary Act a cruel and unjust law violating both the U.S. Constitution and the treaty with China.<sup>41</sup> The Six Companies asked each Chinese person to contribute \$1 to finance litigation against the Geary Act, even though the registration certificate itself cost only 50 cents.<sup>42</sup> The group also petitioned the Chinese government to use diplomatic pressure to fight against the Act.<sup>43</sup>

The Six Companies’ campaign of resistance was enormously successful. The Secretary of the Treasury reported that at the time the

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34. 27 Stat. 25, § 4. The Supreme Court ultimately held that imprisonment could not be imposed administratively. *Wong Wing v. United States*, 163 U.S. 226 (1896); *Wong Wing v. United States*, 163 U.S. 226 (1896). *See also* *United States v. Wong Dep Ken*, 57 F. 206, 216 (S.D. Cal. 1893) (holding administrative order of imprisonment void).

35. 27 Stat. 25, 26 § 6.

36. 27 Stat. 25, 26 § 7.

37. SALYER, *supra* note 22, at 46–47.

38. *Id.* at 47.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Fighting the Geary Law*, S.F. CHRON., Mar. 28, 1893, at 6.

43. SALYER, *supra* note 22, at 47.

registration deadline passed, 93,445 Chinese had failed to register.<sup>44</sup> In San Francisco, one month before the registration deadline, only 439 out of approximately 26,000 eligible Chinese had applied.<sup>45</sup> In an unsuccessful effort to incentivize registration, the Treasury Department made some concessions by dropping the photograph requirement and reducing the required number of credible white witnesses.<sup>46</sup>

The Six Companies hired three prominent East Coast attorneys to challenge the Geary Act. J. Hubley Ashton had been an Assistant Attorney General, a Georgetown law professor, and a founder of the American Bar Association.<sup>47</sup> Joseph H. Choate, a prominent Supreme Court litigator, served as president of the New York City, New York State, and American Bar Associations, and was President McKinley's ambassador to the United Kingdom. Maxwell Evarts was a prominent railroad attorney, and son of former Secretary of State, Attorney General and U.S. Senator William M. Evarts. The three argued persuasively against the Act in *Fong Yue Ting*.<sup>48</sup> First, they argued that Congress had power to exclude Chinese seeking to enter the United States, but not to deport Chinese already lawfully here. Second, they argued that the registration and deportation procedures violated due process.<sup>49</sup> The test case was not brought until the law came into effect, after the opportunity to register had expired, possibly because of the limitations on declaratory judgments under the jurisprudence of the time.

However, on May 15, 1893, the Court in *Fong Yue Ting* held, 5-3,<sup>50</sup> that because Congress had the power to deport absolutely, it necessarily had authority to impose the lesser burden of registration upon Chinese aliens.<sup>51</sup> The Chinese found themselves in a difficult position. They had refused to comply with an insulting law they believed was unconstitutional. But the law, at least according to five members of the Supreme Court, was valid. As a result, most Chinese in the United States lacked legal status, and were therefore subject to immediate deportation. Instead of mass deportation, however, Congress agreed to give them another chance to register.

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44. H.R. REP. NO. 53-70, at 1 (1893).

45. SALYER, *supra* note 22, at 47.

46. *Id.* The text of the forms and instructions can be found in H.R. EX. DOC. 53-10.

47. *J. Hubley Ashton Dead*, N.Y. TIMES, Mar. 16, 1907.

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

49. SALYER, *supra* note 22, at 52 (discussing the appellants' brief in Brief for Appellants *Fong Yue Ting* and noting the role of the appellants' attorneys Joseph H. Choate and Maxwell Evarts).

50. Justice Harlan did not participate, as he was out of the country on, as was not entirely uncommon at the time, a U.S. diplomatic mission. Cf. Gerard N. Magliocca, *The Legacy of Chief Justice Fortas*, 18 GREEN BAG 2d 261 (2015) (describing historical practice of Justices performing non-judicial functions).

51. *Fong Yue Ting*, 149 U.S. at 713.

## II. WHY DID CONGRESS GRANT RELIEF?

A. *Executive Enforcement Policy and the Practical Impossibility of Deportation.*

President Grover Cleveland suspended the Geary Act while waiting for Congress to act. Attorney General Richard Olney also withheld enforcement of the act pending the *Fong Yue Ting* decision. On May 4, 1893, one day before the deadline for Chinese to register, he instructed U.S. Attorneys “to defer proceedings under [the Geary] [A]ct of May 5, 1892, except under order of court, until necessary arrangements for the arrest, imprisonment, and deportation of persons accused can be perfected, of which due notice will be given you. Communicate this telegram to the United States marshal within your district.”<sup>52</sup>

Similarly, Secretary of the Treasury John Carlisle instructed his enforcement officers “to refrain from making arrests” under the Geary Act.<sup>53</sup> However, with respect to Chinese who were deportable for some reason other than non-registration, he wrote, “you are directed to use all the means under your control to vigorously enforce said provisions of law.”<sup>54</sup>

According to Attorney General Olney, the reason for non-enforcement was that only \$25,000 had been allocated to arrest and deport the Chinese under the Geary Act.<sup>55</sup> This amount would be insufficient to support the deportation of the 93,445 unregistered Chinese that were estimated to be in the United States in 1890.<sup>56</sup> In another letter to a U.S. Attorney, dated September 2, 1893, Olney wrote “I am advised by the Secretary of the Treasury that there are no funds to execute the Geary law so far as same provides for deportation of Chinamen who have not procured certificates of residence.”<sup>57</sup> The Chinese immigrants involved in the *Fong Yue Ting* test case were not deported, even though they lost.<sup>58</sup>

Some Chinese were arrested for non-registration. Olney took the position that the correct response, as ordered by a New York federal court,<sup>59</sup> was to discharge them from federal custody, at least temporarily.<sup>60</sup>

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52. H.R. EXEC. DOC. NO. 53-9, at 3 (1893).

53. *Id.*

54. *Id.* at 3–4.

55. *Id.* at 2.

56. H.R. EXEC. DOC. NO. 53-10, at 2 (1893).

57. H.R. EXEC. DOC. NO. 53-9, at 4.

58. 25 CONG. REC. 233 (1893) (remarks of Rep. Geary) (“Why did not the Attorney-General of the United States deport the men who were used to test the constitutionality of this law, the men whom the Supreme Court of the United States said had no right to be within the limits of the United States?”); *id.* at App. 409 (remarks of Rep. Maguire) (“Why did not the Department of Justice proceed with deportation to the extent of the means at its disposal? Why did it not deport the two Chinamen who were demanded by the United States Supreme Court in the test case?”). Gabriel Chin mistakenly stated in an earlier work that the men had actually been deported.

59. *In re Ny Look*, 56 F. 81 (C.C.S.D.N.Y. 1893).

60. H.R. EXEC. DOC. NO. 53-9, at 4 (1893).

In a letter to a U.S. Attorney, Olney stated, “[P]reserve the existing status as far as possible until Congress has acted—inasmuch to deport a few Chinamen for not registering while the like offences of all others equally guilty are condoned, would be manifestly and grossly unfair.”<sup>61</sup>

Executive inaction received criticism from some quarters. As the *San Francisco Chronicle* complained, “the party in power has allowed nearly a year to elapse without making any attempt to put the Geary Act into operation.”<sup>62</sup> The *Chronicle* also stated:

The whole gist of the Geary [A]ct, that which tends to make it new and effective legislation on the subject of the Chinese, is to be found in the sixth and seventh sections of the act, both of which Cleveland and Carlisle cool[ly] ignore . . . Things have certainly come to a pretty pass if the executive department of the United States Government deems itself at liberty to execute only such portions of an act of Congress as meet its approval . . . The anti-Chinese Law and Labor League in San Francisco called for the impeachment of the “law-defying traitor known as Grover Cleveland.”<sup>63</sup>

Some members of Congress criticized the Cleveland Administration for its reluctance to enforce the Geary Act. One representative was so outraged that courts were releasing Chinese people that he threatened retaliation: “Evidently there is one thing of more importance to this country than the subjugation of the Chinese. It is the impeachment of a few Judges.”<sup>64</sup> Representative Eugene Loud (R-CA) believed the remaining available options were to “[e]ither go forward, and direct those charged with the execution of law to perform their duty, to execute a statutory law, or; to say to our officers we were in earnest when we passed this act, or to endorse the Administration, turn our backs on the enemy, and retreat in disorder and disgrace.”<sup>65</sup> Representative William Bowers (R-CA) insisted that the \$25,000 on hand should have been spent.<sup>66</sup> Representative Binger Hermann (R-OR) argued that the extension “indirectly recognizes and indorses the arbitrary, illegal, and unwarranted interference of the Executive and the Executive Departments of the Government in the orderly execution of the laws of Congress . . . [I]f such unwarranted interference can be exercised as to one law, it can be as to any other; and where is it to end? What becomes of the independence, of the power, and the integrity of

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61. SALYER, *supra* note 22, at 56.

62. *Geary Act*, S.F. CHRON., Aug. 25, 1893, at 6.

63. SALYER, *supra* note 22, at 55. *See also, e.g.*, 25 CONG. REC. 1160 (Sept. 2, 1893) (remarks of Sen. Dolph) (“To repeal a law, reasonable in itself . . . because a class of aliens in this country refuse to obey it, would be an extraordinary proceeding, and, in my judgment, inconsistent with national dignity.”); *id.* (“[T]he Chinese question is a question which cannot be avoided or trifled with. We must abandon the effort to restrict the coming of Chinese laborers to this country . . . or we must make the necessary provision for the enforcement of our laws.”)

64. *Ignoring the Geary Act*, S.F. CHRON., May 27, 1893, at 6.

65. 25 CONG. REC. at 2440.

66. *Id.* at 2493.

the law-making body when a coordinate branch—the Executive body—not only presumes to construe the law but declines to enforce it?”<sup>67</sup>

Representative Isidor Rayner (D-MD) took a different view:

The Administration and its officers were, in my opinion, perfectly justified in suspending the operation of a law which was then under argument in the Supreme Court of the United States, and before any decision whatever had been rendered upon its validity. In the second place, I go a step farther and I say that the Administration, even now, if it had the means at its disposal (but it has not the means to enforce the law), would be perfectly justified in suspending the operation of this law while an act for its extension was under consideration by the Congress of the United States.<sup>68</sup>

Congress knew the executive branch could not fully enforce the Geary Act. Just after the law was passed, the Commissioner of Internal Revenue wrote to Speaker of the House Charles Crisp (D-GA) explaining that the existing appropriation of \$60,000 was inadequate to cover the expenses of deportation, salaries and expenses of officers, and engraving and printing of forms. “I have been compelled to reduce the compensation of the Chinese inspectors to a figure below that which should be fairly paid for their services, and restrict them in their expenses, thus impairing their efficiency.”<sup>69</sup> He believed that the recently passed Geary Act would increase the number of deportations and their overall costs. He estimated that he would need an additional \$50,000 to pay for twenty-five more deputies and expenses incident to trial, imprisonment, and deportation.<sup>70</sup>

The campaign of resistance by the Chinese Six Companies and their attorneys dramatically raised the cost of deporting unregistered Chinese. Assuming that transportation from San Francisco to Hong Kong cost \$35, and “expenses incident to the arrest, trial, and inland transportation would average not less than \$35 more” the House Foreign Affairs Committee report estimated that enforcing the act would cost \$6,000,000.<sup>71</sup>

On the floor of Congress, the estimate increased. Representative James McCreary (D-KY) stated:

The Secretary of the Treasury says that he has but \$25,000 available of the fund for enforcing the deportation act of 1892; that the lowest cost for the transportation of Chinese from San Francisco to Hongkong is \$51 per capita for steerage passage, and that other expenses incident to the arrest, trial, and inland transportation would average not less than \$35 more per capita. If, therefore, all Chinese persons within the United States who are required to register under the law and have failed to do so should be transported to China, the cost involved would amount to \$7,310,000. It

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67. *Id.* at 2518.

68. *Id.* at 2484.

69. H.R. EXEC. DOC. NO. 52-244, at 2 (1892).

70. *Id.*

71. H.R. REP. NO. 53-70, at 2.

will therefore not only be fair and just to Chinese persons, but wise economy to pass the spending bill and save millions of dollars for the United States.<sup>72</sup>

The *Congressional Record* reflects several unsuccessful requests for enforcement funding. Representative Loud complained that only sixteen of his colleagues supported his proposal to appropriate \$500,000 to enforce the Geary Act:<sup>73</sup> “If \$500,000 is beyond the measure of your sincerity you should have repealed the act at that time, ere this proud Nation has been brought to the humiliating position she now occupies.”<sup>74</sup> Representative Robert Hitt (R-IL) said that there was no money to pay executive officials to deport 100,000 people under the Geary Act:<sup>75</sup> “[M]en will not do this work gratis and there is no money appropriated to pay them for it.”<sup>76</sup> Senator Joseph Dolph (R-OR) introduced S. 745, also seeking \$500,000 for enforcement,<sup>77</sup> but it failed in both the Senate and the House.<sup>78</sup> One Representative asked, “Is the House prepared to increase the expenditures to that extent, with a Treasury bankrupt, with new bonds and new taxes on the people to pay them?”<sup>79</sup> Senator Stephen White (D-CA) observed, “The number of Chinese to be deported is so numerous that if there is a commencement made it will result in immense expenditure, and there is not sufficient money in the Treasury for the purpose, and has not been, to justify the inauguration of such a proceeding.”<sup>80</sup>

Some members of Congress invoked a notion that conservative immigration theorist Kris Kobach recently called “attrition through enforcement,”<sup>81</sup> essentially encouraging self-deportation. Kobach has argued that attrition through enforcement occupies a middle ground between non-enforcement and formal deportation.<sup>82</sup> Senator Watson Squire (R-WA) proposed a modest appropriation along with the other provisions of the law.

I am not proposing to provide a sufficient fund to deport the Chinese in very large numbers . . . The penalty is to be as a deterrent. If the sum of

72. 25 CONG. REC. 2421–22 (1893).

73. *Reprieve for the Chinese: Western Congressmen Show the Economic Evils of the Oriental*, WASH. POST, Oct. 13, 1893, at 2 [hereinafter *Reprieve for the Chinese*].

74. 25 CONG. REC. at 3054.

75. *Id.*

76. *Id.* at 2435.

77. *Id.* at 1155.

78. *Id.* at 3052.

79. *Id.* at 2451 (remarks of Rep. Hooker).

80. *Id.* at 1161. *See also id.* at 2513 (remarks of Rep. Outhwaite) (“In the face of an election, we passed the Geary bill; but after the election we failed to provide the necessary means for putting that law into execution, and now we blame somebody else for not having done their duty.”); *id.* at 2552 (remarks of Rep. Blair) (“[W]ithout appropriations from the national purse the existing law would be absolutely nullified for want of the means of enforcement.”)

81. Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT’L L. 155 (2008).

82. *Id.*

money to be provided and the machinery of the law shall go into effect so that these Chinese who fail to register shall be actually deported in exemplary number, the effect as a deterrent will be immense upon those who have failed to register.<sup>83</sup>

Geary himself contended that the government's duty was clear: "The law says that on the 5<sup>th</sup> day of May the Chinamen who did not have the certificates described should be deported. No discretion was left with any man to suspend the enforcement of that law; and in a Government like ours we should not permit the assumption of such authority by any officer." He insisted that a small appropriation would be sufficient:

Just as soon as they understand that the American Congress means law when it makes it and that the American Executive can be trusted to enforce it, those Chinamen will take their departure and your treasury will not be troubled by the expense . . . I believe that if the present officers of this Government had done their duty on the 5th day of May and had continued doing it as the law directed, this condition would not be presented to us, and there would have been no necessity for an appropriation or an extension of time . . . Twenty-five thousand dollars would have demonstrated the intent of the Administration to enforce the law just as well as \$25,000,000.<sup>84</sup>

Others saw selective enforcement as another alternative. Although Representative James Maguire (D-CA) criticized the Department of Justice for not "[p]roceed[ing] with deportations to the extent of the means at its disposal," he also favored focusing on Chinese with criminal records:

Why not let the Geary law stand as it is for two years, provide a reasonable fund for the deportation of those with whom the courts can deal in that time, and let the worse element in our Chinese population be disposed of before we further discuss the propriety of giving the less objectionable another chance to register?<sup>85</sup>

Representative Franklin Bartlett (D-NY), another staunch opponent of Chinese immigration, made a reasonable point:<sup>86</sup> he observed that allowing an extension made no difference, because even with an extension the cost to deport the Chinese would remain unchanged.<sup>87</sup>

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83. 25 CONG. REC. at 3054.

84. *Id.* at App. 232–23. Representative Maguire agreed that if "immediate steps had been taken to enforce the deportation clause of the Geary act they would have gone from our country in thousands, and they would have gone at once." *Id.* at App. 410.

85. *Id.* at App. 409.

86. Representative Bartlett explained: "There are three counts in the indictment against the Chinese laborers which have been framed by our experience. The first count is the morality of the Chinese. The second charge is their degradation of American labor, and the third is their nonassimilation with our own people. Every one of these counts has been fully proven." *Id.* at 2456. "I am in favor of a liberal and well-regulated immigration of the Indo-Germanic or the Indo-European nations and of the Semitic tribes but I oppose the entry of one additional laborer from the great monosyllabic nation of southeastern Asia. I say keep them all out, and it would be a good thing for this country if they could all be sent away tomorrow and be kept away." *Id.* at 2457.

87. *Id.*

Congress probably never intended to carry out the harsh and expensive sanctions in the law; Congress assumed Chinese would comply, and therefore sanctions would be unnecessary. As Hitt explained:

Some parts of that [Geary] law contain provisions of such unexampled harshness, provisions which it was never expected would be enforced, that now, when we come face to face with the cruel fact of legal obligation on the part of public offices to at once enforce them and the frightful consequences that are before us, it is necessary for Congress to interpose.<sup>88</sup>

The House concluded that it would be more prudent to extend the registration deadline rather than appropriate several million dollars for the deportation of 85,000 Chinese.<sup>89</sup>

Unauthorized migrants in the United States today face a similar situation in that Congress has not allocated sufficient funds to deport them. Congress has appropriated funds to the executive branch sufficient to deport approximately 400,000 people annually. A president might conclude that the money Congress appropriated for deportation is inadequate, and that it would be better to take money earmarked for, say, an aircraft carrier and spend it instead on additional immigration enforcement. However, federal law is quite clear that funds cannot be spent nor obligations incurred in the absence of federal appropriations.<sup>90</sup> The executive simply cannot spend more money for any particular purpose than Congress has authorized. In other words, Congress knows that the amount of money it dedicates to immigration enforcement is a small fraction of what would be necessary to deport most or all of the millions of unauthorized immigrants in the United States, and therefore, Congress knows that those unauthorized immigrants are likely to stay. Accordingly, the Supreme Court has said that undocumented children may have “an inchoate federal permission to remain.”<sup>91</sup>

### *B. Anti-Racist Views in Congress*

Congress was not monolithically racist even in the nadir of the Jim Crow era. To be sure, during that time, the Yellow Peril theory of Chinese immigration predominated. Congressman Hilborn stated, “China has a population of four hundred millions and we have sixty-five millions . . . Every one of this vast collection of human beings could come from Hongkong [*sic*] to San Francisco with as little expense and danger as that attending a trip from Omaha to Washington. They could overrun us like an army of locusts . . . China could spare a man to compete for the bread of

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88. *Id.*

89. *Id.* at 2567.

90. 31 U.S.C. § 1341.

91. Gabriel J. Chin, *Sweatt v. Painter and Undocumented College Students in Texas*, 36 T. MARSHALL L. REV. 39, 49 (2010) (quoting *Plyler v. Doe*, 457 U.S. 202, 226 (1982)).

every American laborer, and his absence would not be noted in that great hive of humanity.”<sup>92</sup> The Chinese in America were demonized as an overwhelming mass of people that would overwhelm American civilization.<sup>93</sup>

Others, though, regarded the Chinese as a hard-working, industrious people of “inestimable value to California,”<sup>94</sup> and saw no legitimate justification for excluding them. They criticized the racism of the exclusion laws, and given the hopelessness of eliminating them, saw the McCreary Act as the next best solution.

As Representative William Draper (R-MA) explained, his constituents “of both political parties, [were] generally opposed to this Chinese-exclusion legislation; largely for the reason that it [was] aimed at a particular race which, so far as we can see, is not greatly inferior to many other immigrants who are allowed to enter our ports without conditions.”<sup>95</sup> Senator Wilkinson Call (D-FL) likewise offered a “protest against the conclusions which are presented here, that on account of the vicious propensities of a small portion of this people, they are unfit for any relations with us.”<sup>96</sup> Additionally, Representative Rayner railed against the law’s discrimination against the Chinese, comparing America’s targeting of the Chinese with that of Russia during its recent expulsion of the Jews:

There are but one or two instances in history parallel to the harsh legislation here practiced by the American Congress. It is almost identical with the treatment of the Jews by the Government of Russia in recent years . . . Every impulse of my being thrills with indignation and resentment as I behold the liberal and enlightened governments of the world standing by with folded hands and supreme indifference as this ghastly procession of human beings marches on to the gates of exile and despair. And still in this age of enlightened progress in this boasted civilization of the nineteenth century we are asked to perpetuate an indignity in this country just as flagrant and monstrous as the government of Russia has perpetrated against that people, an injustice and a wrong that we have over and over again denounced and condemned in the most unmeasured terms.<sup>97</sup>

He continued: “The Chinese are evidently human beings; God must have created them for some purpose other than to be hunted and pursued like the beasts of the jungle. The gentleman from California would subject them to the same treatment that the Pariahs in India are subjected to except, perhaps, that he would drive them into the sea instead of to the

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92. 25 CONG. REC. 2530 (1893) (remarks of Rep. Hilborn).

93. *Id.*

94. *Id.* at 2449 (remarks of Rep. Draper)

95. *Id.* at 2494.

96. *Id.* at 3087.

97. *Id.*

mountains.”<sup>98</sup>

Representative Elijah Morse (R-MA) was similarly displeased with the discriminatory provisions of the Geary Act. He quoted former governor of Massachusetts John Andrew: “I know not what record of sin awaits me in another world, but this I do know. I never despised any man because he was poor or black or ignorant.”<sup>99</sup> He went on to say, to a round of applause: “I think he spoke the sentiment of the people of Massachusetts.” He believed his constituents opposed the racism inherent in Chinese Exclusion. “They do understand that this law denies to Chinese rights accorded to every other class of immigrants. They do understand that it denies to these people the constitutional right that presuppose every man to be innocent until proven a criminal.”<sup>100</sup> Representative Morse argued that if the restrictions were placed on the Chinese because they were undesirable, they should also be placed on the “thugs from Italy,” Greeks, Russians, anarchists, communists, nihilists, bomb-throwers, Mormons, lunatics, idiots, and paupers.<sup>101</sup>

### *C. Popular Constitutionalism: Due Process in Spite of the Court*

Other Representatives and Senators, supporting Chinese Exclusion in principle, believed that under the circumstances, it was fair and reasonable to give the Chinese a second chance to register. Although the Chinese legal strategy failed, they had convinced a significant minority of justices that the Geary Act was unconstitutional. Some in Congress believed the reasonableness of the error warranted mercy.

McCreary himself fell into this camp. Although author of the relief bill, he explained, “I have voted for every act passed by Congress since 1884 to exclude and prevent Chinese laborers from coming to the United States, and I am as much in favor of excluding them from our country as any Representative from California or any other State in the Union.”<sup>102</sup> However, he was also of the opinion that “[i]t seems just and fair that, as many Chinese persons were misled by the opinions rendered by Messrs. Choate, Carter, and Ashton . . . [and] as the opinions of these eminent lawyers were sustained on the main question by the Chief Justice of the Supreme Court of the United States and two associate justices, the Chinese should have six months additional time in which to register and obtain certificates of residence.”<sup>103</sup> Because of the cost, an extension “will

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98. *Id.* at 2487.

99. *Id.* at 2498.

100. *Id.*

101. *Id.* at 2496. Unfortunately, he was prescient, capturing the motivation for the National Origins Quota System adopted in 1924.

102. *Id.* at 2564.

103. *Id.* at 2421. Another supporter of the bill stated: “I am as much opposed as my friend from California [Mr. Perkins] to the immigration of Chinese laborers. I do not want to see this element grow in our country. I wish to see it steadily diminished in efficacy and in numbers until it shall cease to

therefore not only be fair and just to Chinese persons, but wise economy.”<sup>104</sup>

Representative Rayner agreed. He explained: “These lawyers gave an opinion shared in by almost every member of the profession that I have ever talked to about the question before its decision by the Supreme Court.”<sup>105</sup>

Unsurprisingly, not all were persuaded. Senator Henry Teller (R-CO) suggested that counsel were “probably moved more by the large fee that was offered by the Six Companies than by any other motive—that always being a motive with the profession.”<sup>106</sup> Representative Hermann noted that “the maxim is that every person is presumed to know the law. To relax or suspend the law upon the plea of ignorance would indeed be a most dangerous practice. But in fact the Chinese know the law.”<sup>107</sup>

Another group of legislators opposed the particular techniques employed by the law, despite their approval by the Court. Representative Rayner, quoting Madison, insisted that deportation of an alien was punishment.<sup>108</sup> During the arguments against the Geary bill, Representative Hitt railed against the registration requirement, stating:

Never before in a free country was there such a system of tagging a man, like a dog to be caught by the police and examined, and if his tag or collar

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exist. But what I object to, and concerning which I have the clearest convictions of my duty, is the manner in which it is proposed to depopulate the country of those people.”

104. *Id.* at 2422.

105. *Id.* at 2485 (1893). *See also, e.g., id.* at 2516 (remarks of Rep. Everett) (counsel’s opinion “can not be sneered away or considered insignificant, in the face of the dissenting opinion of Justice field, Chief Justice Fuller, and Justice Brewer. Those opinions, form the highest legal authority, show that there was good ground for anticipating that the act might be declared unconstitutional.”); *id.* at 2494 (remarks of Rep. Draper) (noting that the “only crime” of the Chinese “is that they have followed legal advice which was so nearly correct that it lacked only one or two votes of being sustained by the highest legal tribunal of the country.”).

106. *Id.* at 1162.

107. *Id.* at 2522. *See also id.* at 2453 (remarks of Rep. Bartlett) (“When I was a law student twenty years ago I was taught that *ignorantia legis neminem excusat*”); *id.* at 2489 (remarks of Rep. Bowers) (“Why, Mr. Speaker, many a white American citizen has been misled by one, two, three, or four able lawyers, and I never knew that plea to be made in the courts of the United States or in this Chamber, that a law should be changed or annulled because a man had been deceived by a lawyer.”). For a discussion of the circumstances when mistake of law provides a defense, see Gabriel J. Chin et. al., *The Mistake of Law Defense and an Unconstitutional Provision of the Model Penal Code*, 93 N.C. L. REV. 139 (2014).

108. 25 CONG. REC. at 2486. Madison considered deportation a criminal punishment:

[I]t can never be admitted that the removal of aliens, authorized by the act, is to be considered, not as punishment for an offence, but as a measure of precaution and prevention. If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, a country where he may have property . . . where he enjoys, under the laws, a greater share of the blessings of personal security, and personal liberty, that he can elsewhere hope for; and where he may have nearly completed his probationary title to citizenship; . . . if a banishment of this sort be not punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.

Michael Scaperlanda, *Who Is My Neighbor?: An Essay on Immigrants, Welfare Reform, and the Constitution*, 29 CONN. L. REV. 1587, 1602-08 n.87 (1997) (citing James Madison).

is not all right, taken to the pound to be drowned or shot. Never before was it applied by a free people to a human being, with the exception<sup>109</sup> (which we can never refer to with pride) of the sad days of slavery.

Hitt referred to the proposed photograph requirement as a “ticket-of-leave . . . like that which the British Government requires from convicts in its penal colonies in Australia.”<sup>110</sup> Representative Morse contended that “If similar treatment were accorded to American residents in China it would result in a declaration of war inside of 30 days.”<sup>111</sup>

Many members of Congress opposed the provisions of the Geary Act because they believed they violated constitutional protections and bound the hands of the courts. Representative Hitt stated, “Recollect there is no option of officers, no discretion of the judge, no power of relief, no escape for the victim, though he may have the clearest proof of his right to remain. The time for proof is past.”<sup>112</sup> He continued, stating that under the Geary Act: “The presumption of innocence that always accompanie[d] an American citizen was taken away from these people under the anti-Chinese laws, and they were assumed to be guilty until they proved their innocence . . . [they] are judged by the law itself. They are all guilty, and there is no possibility of proof to the contrary.”<sup>113</sup>

Representative William Morrow (R-CA) objected to the Geary Act’s placement of the burden of proof on the defendant. He quoted Section Three, which provided “that any Chinese person . . . arrested under the provisions of this act . . . shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof . . . his lawful right to remain in the United States. He objected to “throwing the onus of proof upon the defendant—a proceeding almost unheard of in the courts of justice with regard even to the highest crimes perpetrated by poor, weak, frail, depraved humanity.”<sup>114</sup>

Morrow also railed against what he regarded as unusually harsh punishments set out in the Geary Act. He quoted Section Four: “That any such Chinese person . . . convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period not exceeding one year and thereafter removed from the United States.”<sup>115</sup> He asked, “Do you not think that is sufficiently penal for you? By what sense of justice or right can you demand a more rigid statute than

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109. *Reprieve for the Chinese*, *supra* note 52, at 2. Representative Morse of Mississippi added: “Let me suggest that we ought to go one step further and put a brass collar around his neck, like a dog, with his name and number on it.” 25 CONG. REC. 2450 (1893).

110. 25 CONG. REC. at 2450.

111. *Id.* at 2495.

112. *Id.* at 2436.

113. *Id.*

114. *Id.* at 2447.

115. *Id.*

that?”<sup>116</sup>

Senator Cushman Davis (R-MN) stated, “Hence I am anxious to see this legislation changed in some way so that if immigration from China to this Country is to cease (and I confess it seems to me very desirable that it shall) this country shall not scandalize and disgrace itself by such political, arbitrary, and administrative processes as this legislation has been held to warrant.”

Anticipating Derrick Bell’s interest convergence thesis, which proposes that legal doctrines supporting minorities are most likely to come into existence when those doctrines also benefit white interests,<sup>117</sup> Davis warned, “If a Chinese can be deported, any other aliens can be deported, coming here under the sanction of whatever treaty, however liberal.”<sup>118</sup>

Senator Davis also noted that bail was not allowed for violators of the Geary Act, despite the fact that the Constitution provided for bail in nearly all criminal cases. “Section 5 provided: That . . . on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States . . . no bail shall be allowed . . .”<sup>119</sup> He continued, “Under the general constitutions of all the States and the United States, bail is allowed in all cases except in cases of murder, where the proof is evident or the presumption great; and yet this House denied the right to bail when the question arose as to whether the party was rightfully or wrongfully in this country.”<sup>120</sup> He asked, “Can you ask for anything more severe than that?”<sup>121</sup>

Representative Morse also objected to what he saw as the Geary Act’s violation of constitutional rights:

I denounce the Geary law, which commits a Chinaman to jail without bail pending his trial, or pending proceedings under writ of habeas corpus, and denies to him the right to subpoena witnesses without paying the expense of the process.”<sup>122</sup> He continued: “The law, as I understand it . . . deports a man and his wife born in China, and leaves the children born in China, and leaves the children born in this country like an orphan or a pauper.”<sup>123</sup>

Some legislators appealed to natural law. Representative Hitt quoted Chief Justice Fuller’s criticism of the Geary Act: “It contains within it the germs of the assertion of an unlimited and arbitrary power in general incompatible with the immutable principles of justice, inconsistent with the

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116. *Id.*

117. Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

118. 25 CONG. REC. at 3084.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 2496.

123. *Id.*

nature of our Government.”<sup>124</sup> Senator John Palmer (D-IL) contended that “there are principles of justice, humanity, and right which are older and higher sanctions than constitutions.”<sup>125</sup>

#### *D. Missionaries and the Institutional Church*

While some members’ opposition to Chinese Exclusion was founded on religious principle,<sup>126</sup> others supported it on the same basis.<sup>127</sup> Religion was prominent in the debates. One group of representatives insisted that fair treatment of Chinese people was necessary to protect Christian missionaries in China. Representative Charles Hooker (D-MS) argued “Sir, you have now in China missionaries of the great denominations of this country. They have gone there and planted the cross of our Saviour, and they have made converts.”<sup>128</sup> He continued:

Does the honorable gentleman from California mean to say that he intends to restrict the power of the Almighty to have the cross of our Saviour carried into all lands, whether savage or civilized . . . I hold that we ought to pass no laws which may endanger for a moment the gallant band of men who, representing all Christian denominations of this country, have gone into that far-distant land and planted there the cross of our religion, and are preaching the gospel to those Mongolians.<sup>129</sup>

Representative Morrow couched his criticism of the discrimination against the Chinese using Christian language:

Does he mean to say that the Saviour, who died upon the cross, did not die for the 430,000,000 of Mongolians in China, constituting one-third of the human family? Are they to be excluded from the plan of redemption on account of the color of their skins or the almond shape of their eyes? This is a new doctrine to come from a Christian Representative.<sup>130</sup>

He shared stories about the success of the missionaries:

Those upon whom Christian care has been bestowed are making decided progress in general knowledge as well as in the Gospel, and not a few of them are Christians . . . Two of the former pupils of the [Chinese Mission School in Oakland, California], Huie Kin and Chin Gim, are students in Lane Theological Seminary, Cincinnati . . . These two young men have been studying at this seminary two years, and intend to return to China

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124. *Id.* at 2436.

125. *Id.* at 3043.

126. *See id.* at 2495 (remarks of Rep. Morse) (“Why, Mr. Speaker, some of these gentlemen from California manifest a spirit which would amend the Lord’s Prayer and the Sermon on the Mount: ‘Love your enemies (except John Chinamen);’ ‘Suffer little children (except little Mongolians).’”)

127. *See, e.g., id.* at 2524–25 (remarks of Rep. Sibley) (“I set no value upon that namby-pamby sentimentalism which talks about humanity and Christianity, but will not reach out a helping hand to the suffering fellow-man at its side, but is ready to send ulster overcoats to the inhabitants of tropical Africa; which sends presents of books and flowers to the condemned felon in his cell, but has no care for his victims though they may be in distress and want.”)

128. *Id.* at 2450.

129. *Id.*

130. *Id.* at 2483.

after graduation and . . . will adopt the ministry as a profession.<sup>131</sup>

Senator Wilkinson Call (D-FL) stated:

While this country is almost unanimous, and there is scarcely any opposition, upon the question of the exclusion of Chinese, . . . there is a feeling on the part of a large portion of the religious people of this country that this legislation has been harsh and unjustifiable; that it has a tendency to interrupt and destroy the efforts of the humane and religious people of this country for the propagation of our ideas of religion and civilization over a large part of the human race.<sup>132</sup>

Of course, the susceptibility of Chinese to Christianity was an empirical question, and some said the effort was wasted. One representative insisted that “[F]or every Christian convert that has been made in the ranks of the Chinamen they have paganized, corrupted, defiled, and debauched fifty American youths. They have betrayed and ruined fifty American girls for every Chinaman you can show as a convert to Christianity among the hordes who infest the city of San Francisco and Mott Street, New York.”<sup>133</sup> Representative Maguire explained, “I claim, sir, that the moral and physical ruin wrought among our people by this invasion will outweigh a hundredfold, aye, a thousandfold, all the good that all the ministers have ever done in the matter of improving the moral condition of the Chinese.”<sup>134</sup>

There was also a substantial debate about the role of the institutional church. Much organized opposition to the Chinese Exclusion Act came in the form of memorials from church bodies requesting Congress to repeal or mitigate the law.<sup>135</sup> No one questioned, of course, the right of individual religious adherents to express their views. But some objected to the idea that churches in their institutional capacity had a role or voice in politics; Representative Geary said “a member of a church as a citizen has the same right of petition as any other citizen, but that he had no right to come to this body backing himself up with the power and might of his church organization.”<sup>136</sup> Similarly, Representative Maguire denied “that any religious conference in this country, or any religious association in the United States, represents or is authorized to speak for the political sentiments or political opinions of those who constitute the membership of

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131. *Id.* at 2450.

132. *Id.* at 1166.

133. *Id.* at 2525.

134. *Id.* at App. 415.

135. *See, e.g., id.* at 1372 (remarks of Sen. Dolph, inserting into the record a petition of the Oregon Annual Conference of the Methodist Episcopal Church, seeking repeal of the Geary law); *id.* at 2459 (referring to similar petitions from Wisconsin and Minnesota). Representative Johnson of Indiana presented a petition of 18,000 Indianans and a petition by 40,000 members of the M.E. church of Ohio asking to repeal the Geary law. *Id.* at 2450.

136. *Id.* at 2437; *id.* at App. 227 (“The members of the congregation as citizens have the same rights as other citizens; but the church as such has no right to interfere in the political affairs of this nation.”)

their churches.”<sup>137</sup> Representative William Everett (D-MA) replied that the right to petition for redress of grievances was established in the Magna Carta, based on the precedent of bishops acquitted on the ground “that they had a right, as ministers of the church, to protest against the illegal acts of the government.”<sup>138</sup>

#### *E. A Relief Bill Becomes an Enforcement Bill*

Undoubtedly, Congress passed the bill in part because of a series of enforcement provisions acquired in the course of the legislative process. As introduced by Representative Everett, H.R. 1973, which became the McCreary Act, simply extended the registration deadline for six months, discontinued existing deportation proceedings, and limited the testimonial exclusion to Chinese. When it came out of the Committee on Foreign Affairs as H.R. 3687, it included a broader definition of “laborer,” thus expanding the prohibited class. Even in that form, many Senators and Representatives opposed it.<sup>139</sup> Representative Loud spoke of the “evils of the Chinese invasion of the Pacific coast.”<sup>140</sup> Representative Bartlett of New York opposed the bill “on behalf of American labor.”<sup>141</sup> Representative Bowers of California threatened that California would defect to the Populist Party if the McCreary bill passed.<sup>142</sup> However, the proposal ultimately passed 178-1.<sup>143</sup> Reluctant legislators were persuaded to support the Act by provisions pursuant to which “the fight would be forever ended,”<sup>144</sup> measures “to have this Chinese question settled once for all time.”<sup>145</sup> Tough enforcement provisions had won them over.

A floor amendment originating with Representative Maguire made those with felony convictions ineligible for registration certificates. For practical purposes, then, any Chinese American with a criminal record could not register and was deportable,<sup>146</sup> unless the person was in the minority who had registered before the initial deadline.<sup>147</sup>

137. *Id.* at App. 415.

138. *Id.* at 2517.

139. *Discussing the Chinaman: Speeches in the House for and Against the McCreary Bill*, WASH. POST, Oct. 14, 1893, at 2.

140. *Reprieve for the Chinese*, *supra* note 52, at 2.

141. 25 CONG. REC. at 2452 (1983).

142. *Id.*

143. *Unanimity on the Chinese: McCreary's Bill Passes the House Without Opposition*, WASH. POST, Oct. 17, 1893, at 2.

144. 25 CONG. REC. at 2458 (remarks of Rep. Bartlett).

145. *Id.* at 3047.

146. *See, e.g., United States v. Chew Cheong*, 61 F. 200, 203 (N.D. Cal. 1894) (holding felon ineligibility valid; “a classification that selects alien criminals for deportation is certainly the exercise of a just discrimination in the administration of the laws, and a wise authority in preserving the institutions of the country.”).

147. *See, e.g., United States v. Jung Jow Tow*, 110 F. 154, 155 (D. Or. 1901) (certificate issued to person with a felony conviction under Geary Act valid even though ineligible for certificate under McCreary Act; “[i]f . . . such a person has a certificate of residence issued under the act of 1892, he is

Furthermore, the statute narrowed the definition of “merchants” who were exempted from exclusion.<sup>148</sup> It also provided that merchants would be required to produce witnesses “other than Chinese” to establish their status when returning from a foreign voyage.<sup>149</sup> A merchant was now required to have a fixed place of business conducted in his or her name, and was not classified as a merchant if he or she had engaged in another job requiring manual labor.<sup>150</sup> Not surprisingly, the term was construed strictly.<sup>151</sup>

The statute also added a requirement that a deportation order “shall be executed by the United States Marshal . . . with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States Marshal and shall not be admitted to bail.”<sup>152</sup>

The bill also included a technological means of promoting enforcement: certificates issued under the McCreary Act would bear a photograph. This would help solve the problem Representative Geary identified, which was that “[a]ll Chinamen look alike, all dress alike, all have the same kind of eyes, all are beardless, all wear their hair in the same manner.”<sup>153</sup>

In theory, these enhanced enforcement mechanisms would lead to the end of unauthorized Chinese immigration. In practice, ending unauthorized migration was and continues to be a distant dream. Despite the massive growth in the size of our immigration bureaucracy and the increasing sophistication of technology used in preventing unauthorized migration, such as forced biometric scanning and the interlinking of state and FBI criminal databases, the goal of “ending” unauthorized immigration continues to elude U.S. policymakers.<sup>154</sup>

#### *F. Civil Rights For African Americans*

One provision of the McCreary Act was nominally a civil rights measure. The Geary Act, as drafted, required the testimony of “at least one

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entitled to remain in the country, notwithstanding the fact that he has no certificate issued under the later act, and is not allowed to have one.”)

148. 28 Stat. 7, 8.

149. *Id.*

150. *Id.*

151. *Lee Jim v. United States*, 66 F. 953 (9th Cir. 1895); *Lai Moy v. United States*, 66 F. 955 (9th Cir. 1895). *But see Lee Kan v. United States*, 62 F. 914 (9th Cir. 1894) (reversing deportation order of merchant based on failure to conduct business in his own name); *United States v. Leo Won Tong*, 132 F. 190, 195 (E.D. Mo. 1904) (declining to order deportation of former merchant who had failed to maintain that status; “[t]he prevention of Chinese laborers from coming into the country is quite a different thing from deporting a merchant who has failed in business, and from necessity become a laborer, and especially after the passage of the act and the expiration of the period of limitation within which a laborer had the right to apply for a certificate of residence.”).

152. 28 Stat. 8.

153. 25 CONG. REC. APP. 231 (1893).

154. Immigration and Customs Enforcement, Immigration Enforcement, *Criminal Alien Program*, <http://www.ice.gov/criminal-alien-program>. (last visited Aug. 14, 2015).

credible white witness” to establish that a Chinese person was a resident of the United States if that person did not have a residency certificate.<sup>155</sup> Senator James Z. George (D-MS) objected to the provision, because it disqualified African Americans and constituted a “direct statement, an assertion that no one of eight million citizens of the United States was to be credited on his oath when he came to testify in relation to the exclusion of Chinamen.” Senator George asked why the word “white” was inserted in the statute at all, finding the word particularly incongruous “in a government having a constitution which makes the black man the equal, if not the superior, of the white man.”<sup>156</sup>

Representative Bartlett objected, considering the change pointless and dangerous: “There are not enough negroes in California now to be of any importance, and I doubt if one would ever appear in any of these cases. One possible construction of the new amendment is that it might allow a Chinaman who had been born in America to testify, as he might claim that he was an American.”<sup>157</sup>

On the other hand, Representative Samuel McCall (D-MA) wanted to make the provision entirely race-neutral. Why not, he asked, simply “provide simply that the Chinaman shall establish this fact to the satisfaction of the United States judge? Truth knows no color.”<sup>158</sup>

However, the majority seemed to accept the views of Senator Stephen M. White (D-CA), who believed that requiring witnesses not to be Chinese was essential to the success of the Act and explained, “Never—and I say it unqualifiedly—never have I known a Chinaman whom I would believe under oath in a matter in which he was interested. Can that be said of any other class or of any other people? . . . This clause is essential to the efficiency of the measure.”<sup>159</sup> Congress made witnesses “other than Chinese” competent, extending the privilege of testifying to African Americans and other non-whites. Congress thus made the law less racist without making it non-racist.

### *G. Diplomatic and Trade Concerns*

Another important motivation for the law was foreign policy. In March 1893, Tsui Kwo Yin, the Minister of the Chinese Legation, wrote to U.S. Secretary of State Walter Gresham objecting to “the unjust and discriminating legislation of the Congress of the United States against the Chinese people and their rights and property interests, without regard to

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155. Act of May 5, 1892, ch. 60, 27 Stat. 26 (1892) (“Geary Act”).

156. 25 CONG. REC. at 1166.

157. *Id.* at 2452.

158. *Id.* at 2500. *See also id.* at 3043 (remarks of Sen. Palmer (“I can not, with my views of the rights of man, consent that any race, either on account of color or nativity, shall be adjudged by law to be unworthy of credit.”)); *id.* at 3082–83 (remarks of Sen. Davis).

159. *Id.* at 3088.

existing treaty stipulations.”<sup>160</sup> Yin urged the administration to get the *Fong Yue Ting* test case heard as quickly as possible; Gresham replied that the Attorney General would be “glad to concur” in a motion to advance the case “and do all in his power to secure the advancement of the case and its early determination.”<sup>161</sup>

The Chinese Minister also hoped for “the suspension of the arrest and punishment of Chinese laborers until the Supreme Court could determine the constitutionality of the law.”<sup>162</sup> When the law was upheld, Gresham explained:

[T]he President cannot suspend a law of Congress . . . [but] owing to its terms and requirements, its enforcement will necessarily be attended with some delay. I do not believe the Chinese will be deported in large numbers between now and the assembling of Congress, when I have reason to believe there will be further legislation on the subject.<sup>163</sup>

Yin wrote to Gresham: “I pray that you will kindly request His Excellency the president to suggest in his message to Congress the repeal of the said Geary law, to the end that the stipulations of the treaties between the United States may be maintained and upheld.”<sup>164</sup>

Members of Congress were aware of the foreign policy issues at stake. On the day he introduced the bill, Representative McCreary argued:

Mr. Speaker, the bill under consideration is very important, and the necessity for its passage is urgent. It involves the continuance of amicable relations between two great countries, and it concerns nearly 100,000 Chinese persons. If passed, it will save millions of dollars to the United States, and meet a widespread demand for legislation that will prevent the further coming of the Chinese to the United States.<sup>165</sup>

The Cleveland Administration also emphasized the diplomatic importance of the bill. In a letter to the Senate, Gresham wrote:

While the government of China has not formally requested that the time for registration provided by the act of Congress (Geary Act), be extended, and no formal assurance has been given that if extended Chinese laborers in the United States will take out certificates as provided by the act, the Chinese minister has repeatedly asserted, in conference with the undersigned, that his countrymen residing in the United States at the time of the passage of the act, on the advice of eminent counsel and in good faith, refrained from registering within the time allowed, and that it would be unjust to deny them another opportunity to register. The minister more than once has given assurance that an additional opportunity to register

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160. 1 U.S. DEPT. OF STATE, THE EXECUTIVE DOCUMENTS OF THE HOUSE OF REPRESENTATIVES FOR THE SECOND SESSION OF THE FIFTY-THIRD CONGRESS, 1893-'94, 245 (1895) (available online at <http://digital.library.wisc.edu/1711.dl/FRUS.FRUS189394v01>).

161. *Id.* at 247.

162. *Id.* at 248.

163. *Id.* at 250.

164. *Id.* at 252.

165. 25 CONG. REC. 2421 (1893).

would afford his government great satisfaction.<sup>166</sup>

As a result of Chinese diplomatic concern, many legislators worried that the violation of the treaties with China undermined America's diplomatic and business interests in China. Representative Hitt lamented: "We have so insulted, harassed, wounded the dignity of that empire that American credit and influence have gradually disappeared."<sup>167</sup> He explained that Supreme Court had already declared that the Geary Act violated 1868 treaty and the 1880 supplemental treaty with China.<sup>168</sup> Hitt continued, "The court did not comment upon or censure this humiliating action of Congress. They only said in dignified restraint: 'The judicial department can not properly express an opinion upon the wisdom and policy or the justice of the measures enacted by Congress.'<sup>169</sup> In an effort to shame Congress, he said "[t]hat was as far as that grave tribunal would go in rebuking a breach of faith by a coordinate branch of the Government."<sup>170</sup>

America had much to lose from its violation of the treaties with China. Hitt explained, "Some of you may have observed how the Chinese Government is of late proceeding upon the theory that we have disregarded the treaty, and they may now declare it null or not, as they please."<sup>171</sup> He outlined some of the advantages that America gained from the treaties with China, writing: "[w]hy, an American who goes to China does not merely receive the privileges we grant here to Chinamen . . . Far more than that—far more than we will grant to anyone—more than we permit to the British Ambassador."<sup>172</sup> One of these rights included extraterritoriality, which meant that, "[An American] may murder the first man he meets, he may burn houses, he may assault, destroy, wound, rob, and no Chinese judge can touch him."<sup>173</sup>

Representative Hitt spoke of the other interests that America risked losing beyond the privilege of extraterritoriality, including the rights of residence port dues, tariffs, and other special trade advantages.<sup>174</sup> These advantages were rapidly eroding, he explained:

The American merchants have many of them gone. Our trade grows precarious. American foreigners are disliked by the people. The rulers have become chilled to us by our contemptuous treatment. The missionaries are to-day protected by troops under the very treaty that we are violating by this law. In the papers of yesterday are accounts of disturbances in which the lives of the missionaries at this hour trembling

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166. S. EXEC. DOC. NO. 53-31, at 1–2 (1893).

167. 25 CONG. REC. 2437 (1893).

168. *Id.* at 2436.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* See generally RUSKOLA, *supra* note 23 (discussing extraterritoriality).

174. 25 CONG. REC. 2436 (1893).

in the balance, and they are now being protected under the clauses of this treaty.<sup>175</sup>

Representative Hooker also worried about the potential loss of treaty privileges for American businesses. He presented testimonials taken from the *Presbyterian Banner*, a publication from Pittsburgh, Pennsylvania, which said: “If the present agitation [to deport violators of the Geary Act] should be successful, it will not be creditable to the United States nor will it inure to our financial advantage, to say nothing of higher considerations.”<sup>176</sup>

Representative Morse explained that some American businesses feared the loss of trading privileges with China. He said:

The financial aspect is that we sell China millions of dollars' worth of American goods annually, and we buy of China nearly \$24,000,000 worth of tea and silk. I have three large silk factories in the town in which I reside. We can get the tea and the silk nowhere else but in China, and we can not run the silk business without raw silk . . . Already there are mutterings from China, and they are getting ready for retaliation and nonintercourse: and when China is driven to nonintercourse, which it is to be feared she will be, than American citizens there, our missionaries, must leave the Empire, then we will have to buy our tea and silk second hand from the merchants of London at largely increased prices and the great Chinese market will be closed for American goods.<sup>177</sup>

Some Congressmen feared that China would abrogate the disadvantageous treaties it had made with America. Hitt told the House that China would soon “escape” the treaty, saying, “The Chinese Government have indicated in many ways that as soon as it is prudent they will restore the old nonintercourse with ours and every other country. I think they will be glad to do it, when they can do it safely.”<sup>178</sup> He reminded Congress that all treaties with China were originally signed and sustained by the force of Western and European Nations and pointed out the consequences of China breaking those treaties. As Hitt said, “What then? Americans, merchants, missionaries—all must leave. Where will be our twenty-four millions annually of trade? But we must buy from them . . . who conceives of the possibility of the American people doing without tea—ten millions worth this year . . . or without silk?”<sup>179</sup> Again, there were multiple views on the issue; Representative Bartlett dismissed any concerns about diplomatic or trade retaliation, as “it is all ‘talkee, talkee.’”<sup>180</sup>

After the McCreary Act became law, another Chinese diplomat, Yang Yu, thanked the United States for the extension and the discontinuation of

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175. *Id.* at 2437.

176. *Id.* at 2451.

177. *Id.*

178. *Id.* at 2436.

179. *Id.*

180. *Id.* at 2454.

existing deportation actions. However, he objected that “if the repeal of the Geary law was an impossibility, the simple extension of the time for a term of six months was the worse treatment anticipated by the Chinese people and by the Imperial Government, and the additional objectionable provisions are a surprise and disappointment.”<sup>181</sup> Given the right of Chinese, under the treaty, to be treated identically to citizens of the most favored nation, he said:

I feel it my duty to express sincere regret and disappointment of the passage of these laws, inasmuch they are aimed at my people to the exclusion of foreigners from all other countries. If this legislation were so extended as to include the people of other nationalities in the United States, I should deem it my duty to maintain silence on the subject.<sup>182</sup>

#### *H. Federalism and State Choice*

Senator Call was generally an opponent of Chinese exclusion, denying that “six to seven hundred millions of the people of the globe are so demoralized in character, so destitute of virtue and of the characteristics which belong to the improvement of mankind, as to be unworthy of relations, social, political, literary, and commercial with the other parts of the globe.”<sup>183</sup> Yet he did not dispute the concerns of California and other specific states, saying, “I acquiesce in the proposition that there may be an excess of population in any particular locality; that there may be an excess of labor; and that the community where it exists should be protected from it.”<sup>184</sup> He proposed that the United States should negotiate a treaty pursuant to which Chinese immigration should be regulated and permitted, but Chinese would “not be permitted, under this treaty regulation, to reside in the state which objected to their residence and whose laws forbade it.” He contended that Article I of the Constitution<sup>185</sup> gave states the power to decide whether to prohibit or allow the migration or immigration of any persons.<sup>186</sup> He continued:

Why cannot the State of California, if it is so anxious to prohibit any Chinaman from ever landing upon her soil, procure an enactment by Congress allowing the State of California to prohibit the migration of persons into that State? . . . Why can they not ask for a treaty with China which shall permit Chinamen of certain classes to come here, but not to enter into the States prohibiting their immigration or residence? I can see

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181. *Id.* at 3086.

182. *Id.* at 264.

183. *Id.* at 3086.

184. *Id.*

185. U.S. CONST., ART. I, § 9 provides: “The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”

186. 25 CONG. REC. 3091 (1893).

no reason for it.<sup>187</sup>

### III. CONCLUSION

There are substantial similarities between the situation leading to the passage of the McCreary Act and the immigration situation the United States confronts today. As in 1893, the number of unauthorized migrants is so large that the federal government simply does not have the infrastructure or resources to deport them all.<sup>188</sup> And as in 1893, the problem is not simply financial. Many believe humanitarian and moral concerns should preclude mass removals even if ample resources were available for immigration enforcement.<sup>189</sup> At the same time, others contend that the most important principle at stake is compliance with the law, regardless of the human cost.<sup>190</sup>

187. *Id.* at 3091–92.

188. As one conservative critic noted:

Rounding up 12 million or more illegal immigrants, even if they could be located, would require internal use of the military or a military-like force and at least temporary housing in detention camps. To place the problem in perspective, it is useful to realize that the entire prison population in U.S. totals about 1.6 million people held in state and federal criminal detention facilities. The resources necessary to arrest and detain even a few hundred thousand illegal immigrants far outstrips the capacity of the non-military resources of the federal government.

John S. Baker, Jr., *A Letter to Lou Dobbs: How to Reverse Illegal Immigration*, 22 GEO. IMMIGR. L.J. 373, 380 (2008). See also Terri R. Day & Leticia M. Diaz, *Immigration Policy and the Rhetoric of Reform: “Deport Felons Not Families,”* Moncrieffe v. Holder, *Children at the Border, and Idle Promises*, 29 GEO. IMMIGR. L.J. 181, 182 (2015) (“Notwithstanding this large-scale surge in deportations under this administration, in an announcement to Americans on November 20, 2014, regarding immigration, President Obama claimed that mass deportation is both “impossible and contrary to [the American] character.”).

189. See, e.g., Hiroshi Motomura, *The Rule of Law in Immigration Law*, 15 TULSA J. COMP. & INT’L L. 139, 146 (2008) (advocating view “that the rule of law in immigration law is more than just enforcement, and that instead it is tempered by discretion and due process, and by the legalization of immigrants in light of their role in American society.”); Sheldon Novick, *Citizenship Is Not the Only Goal: Reform Should Bring an End to Mass Deportations*, 27 GEO. IMMIGR. L.J. 485, 517 (2013) (“The mass deportation program and the participation of local police forces in it are reminiscent of the Chinese Exclusion Act and the Jim Crow laws, and are all the more puzzling and troubling.”); Victor C. Romero, *Christian Realism and Immigration Reform*, 7 U. ST. THOMAS L.J. 310, 313 (2010) (article offering “some thoughts on executive leadership in immigration reform through the lens of Christian realism, a worldview that realistically acknowledges the role of self-interest and power in political relations, but simultaneously hopes and aspires to do God’s will on earth”).

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The fairness objections start with the idea that unlawful presence is not complex. These noncitizens are clearly violating federal immigration law, as did their parents. If there is an immigration contract, they broke it by breaking the law. Parents often make choices that their children have to live with. And even assuming these young people were not to blame for their arrival, nothing keeps them from leaving now. According to this argument, they have no legitimate claim to lawful status, and granting it would undermine the rule of law.

Hiroshi Motomura, *Making Legal: The Dream Act, Birthright Citizenship, and Broad-Scale Legalization*, 16 LEWIS & CLARK L. REV. 1127, 1132 (2012). A Tea Party Website titled “No Amnesty” contends: “Illegal aliens broke the law getting here and continue to break the law staying here now; now the Obama Regime is trying to reward them with precious U.S. citizenship!” <http://www.teaparty.org/no-amnesty/> See also, e.g., Kevin R. Johnson, *Immigration and Civil Rights: Is the “New” Birmingham the Same As the “Old” Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 369

One can view the McCreary Act as a blueprint for comprehensive immigration reform today, even in a nation with deep political divides. In 1893, groups of legislators had incompatible views and interests. As a consequence of these differences, they managed to pass a bill that fully satisfied none of them, while each group got some significant part of what they sought. Members of Congress unwilling to raise taxes found a way to resolve the issue without significant new expenditures. Those who believed it was inhumane to deport the Chinese avoided that outcome. Business interests and their allies in Congress avoided a major political and economic disruption of the U.S.–China relationship. Those opposed to Chinese immigration on the ground of race were able to include measures such as the photograph requirement and restrictions on Chinese merchants that were reasonably calculated to answer the “Chinese question” once and for all. The McCreary Act was not a civil rights bill, a humanitarian bill, a business bill, or an enforcement bill—but it had aspects of each of those things, which made it broadly acceptable.

In short, in 1893, when the consequences of the Civil War still reverberated in the halls of Congress, a fractured nation solved the immigration problem. If comprehensive immigration reform ever does come to the United States, it may well follow the path of the McCreary Act: horse-trading, political compromise, and negotiation leading to a bill that gives the major interests involved less than all they want, but significant parts of what is most important to them.

Conversely, another way of viewing the McCreary Act is to see it as part of a historical explanation for the difficulty of immigration reform. One part of the verdict on the McCreary Act must be that the restrictionists did not achieve their goals. The restrictionist group of McCreary Act voters hoped that amnesty for those here now, coupled with heightened enforcement, would finally solve the problem of Chinese immigration. It failed; after McCreary, there was a decades-long series of responses that never managed to shut down unauthorized Chinese migration. Photographs, fingerprints and blood tests helped only to a certain extent.<sup>191</sup> More broadly, the history of immigration regulation suggests that at all times in the United States, there has been, and therefore in the future will be, some significant level of undocumented migration. The alternative—the condition under which there could be virtually no unauthorized presence—is a level of government control and monitoring that is not and has never been part of the tradition in the United States.

The McCreary Act also rested on the idea, which is not an established

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(2012) (“Supporters of state intervention often claim that they merely want to promote obedience to the rule of the law; such claims are usually combined with the exaggerated and unproven accusation that the federal government has ‘failed’ to enforce the immigration laws.”).

191. Gabriel J. Chin et al., *The Lost Brown v. Board of Education of Immigration Law*, 91 N. C. L. REV. 1657 (2013) (discussing blood testing program used only on Chinese).

legal principle but is supported by intuition,<sup>192</sup> that there is a difference between denying a benefit to someone who does not have it and taking away a benefit already enjoyed. Even after the Supreme Court ruled in *Fong Yue Ting* that Congress had a free hand to deport Chinese already in the United States, legislators opposed to future Chinese immigration concluded that Chinese residents had equitable claims that should be honored in the political system. That is, despite being technically deportable, Chinese already here had interests deserving of governmental respect.

It may be that some level of undocumented immigration is inevitable. It also may be inevitable that many Americans will believe that noncitizens who have lived in the United States for a period of time deserve to stay even if they are not of legal status. The result may be that restrictionists may simply be unable to get the permanent solution they seek from immigration reform and instead must learn to accept that compromise and some level of tolerance is the historical way in which the United States has engaged in deportation proceedings.

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192. For example, in the maxim that "possession is nine-tenths of the law." Cf. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985).