

January 1996

## Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws

John Hayakawa Torok

Follow this and additional works at: <http://scholarship.law.berkeley.edu/aalj>

---

### Recommended Citation

John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN AM. L.J.* 55 (1996).  
Available at: <http://scholarship.law.berkeley.edu/aalj/vol3/iss1/4>

### Link to publisher version (DOI)

<http://dx.doi.org/https://doi.org/10.15779/Z38N292>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Asian American Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact [jcera@law.berkeley.edu](mailto:jcera@law.berkeley.edu).

# Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws

John Hayakawa Torok†

*The Reconstruction amendments and civil rights law historically have been viewed in the context of African American emancipation, naturalization, and enfranchisement. However, Chinese immigrants' presence and the racial nativism they engendered in the white polity influenced the debates surrounding that legislation and the attendant Supreme Court decisions. The author shows that the ubiquitous perception of Asian Americans as intrinsically foreign and unassimilable, and their perceived threat to American institutions and society informed the Congressional debates on the Reconstruction amendments and the subsequent Supreme Court decisions. His exploration of the anti-Chinese rhetoric during the debates reveals that the deliberate language of the Reconstruction amendments and civil rights law were directly influenced by these fears. He concludes by examining the current resurgence of racial nativism in the context of these historical events.*

[T]he Chinese do not desire to become citizens of this country, and have no knowledge or appreciation of our institutions. Very few of them learn to speak our language . . . . To admit these vast numbers of aliens to citizenship and the ballot would practically destroy republican institutions on the Pacific coast, for the Chinese have no comprehension of any form of government but despotism, and have

---

Copyright © 1996 Asian Law Journal

† Law clerk to the Honorable Ronald L. Ellis, United States Magistrate Judge, S.D.N.Y. B.A. 1987, University of California, Santa Cruz; J.D. 1991, City University of New York School of Law; LL.M. 1995, New York University School of Law. The research for this Article was supported by a 1992-1993 Rockefeller Humanities Fellowship from the Center for Studies of Ethnicity and Race in America, University of Colorado at Boulder. Special thanks to William Nelson and members of the New York University Legal History Colloquium, Peggy Davis, Christian Fritz, Lane Hirabayashi, F. Michael Higginbotham, Lisa Ikemoto, Charles McClain, Philip Tajitsu Nash, John Wunder, and to all my editors at the Asian Law Journal for critiques. An earlier draft of this Article appeared in *ASIAN AMERICANS AND CONGRESS* (Hyung-chan Kim ed., 1996).

not the words in their own language to describe intelligibly the principles of our representative system.<sup>1</sup>

### INTRODUCTION

This statement from the 1877 Report of the Joint Special Committee to Investigate Chinese Immigration reflected widespread perceptions of Chinese immigrants, who were the principal group of Asian immigrants present in the United States during the late nineteenth century. During the congressional debates on the Reconstruction amendments, members of Congress articulated concerns and fears about the threat posed by Chinese immigration to American institutions and society. Their statements in these debates prefigured the arguments used to justify exclusion in subsequent legislative enactments<sup>2</sup> and the perceptions and treatment of other Asian immigrant groups.<sup>3</sup> This Article shows that members of Congress during the Reconstruction debates perceived the threat posed by Chinese immigrant suffrage to "republican institutions" as based on cultural and "racial" differences.<sup>4</sup>

The Article will also explore the limited protection that these constitutional and legal developments,<sup>5</sup> which preceded the Chinese exclusion acts by several years, extended to Asian immigrants in the broader context of judicial decisions concerning citizenship and the citizenship status of Blacks.<sup>6</sup> Historically, the locus of racially discriminatory law has been the

---

1. S. REP. NO. 689, 44th Cong., 2d Sess. (1877) quoted in JOINT SPECIAL COMMITTEE TO INVESTIGATE CHINESE IMMIGRATION vii (1978).

2. See, e.g., Act of June 23, 1913, Pub. L. No. 3, ch. 3, 38 Stat. 4, 65, repealed by Act of Dec. 17, 1943, Pub. L. No. 199, 57 Stat. 600; Act of Mar. 3, 1911, Pub. L. No. 475, ch. 231, § 25, 36 Stat. 1087, 1094; Act of Aug. 24, 1912, Pub. L. No. 302, ch. 355, 37 Stat. 417, 476; Act of Apr. 27, 1904, Pub. L. No. 189, ch. 1630, 33 Stat. 394, 428; Act of Apr. 29, 1902, Pub. L. No. 90, ch. 641, 32 Stat. 176; Act of Mar. 3, 1901, ch. 845, 31 Stat. 1093; Act of June 6, 1900, ch. 791, 31 Stat. 588, 610-11; Act of Apr. 30, 1900, ch. 339, 31 Stat. 141, 161; Joint Res. No. 55 of July 7, 1898, 30 Stat. 750, 751 (1898) (annexing Hawaii); Act of May 5, 1892, ch. 60, 27 Stat. 25 (1892), amended by Act of Nov. 3, 1893, ch. 14, 28 Stat. 7 (1893); Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476; Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882), amended by Act of July 5, 1884, ch. 220, 23 Stat. 115 and Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504.

3. See, e.g., Immigration Act of 1924, Pub. L. No. 139, ch. 190, 43 Stat. 153; Act of Feb. 5, 1917, Pub. L. No. 301, ch. 29, 39 Stat. 874. Section 13(c) of the 1924 Act, at 43 Stat. 162, prohibited the admission of "aliens ineligible to citizenship." This provision prevented Japanese persons (and by extension other Asians) from immigrating to the United States because they were defined as "aliens ineligible to citizenship," a categorization based on restrictive language in the naturalization laws defining whites and Africans as eligible for naturalization. See *Ozawa v. United States*, 260 U.S. 178 (1922) (holding Japanese are neither white nor African and thus are ineligible for naturalization).

4. See *infra* text accompanying notes 44-48.

5. U.S. CONST. amend. XIII; U.S. CONST. amend. XIV; U.S. CONST. amend. XV; Civil Rights Act of 1875, ch. 114, 18 Stat. 335; Civil Rights Act of 1871, ch. 22, 17 Stat. 13; Civil Rights Act of 1870, ch. 114, 16 Stat. 140; Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

6. I capitalize the word "Black" because I share the view that "Blacks, like Asians, Latinos, and other "minorities," constitute a specific cultural group and, as such, require denotation as a proper noun." Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710 n. 3 (1993) (citing Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 HARV. L. REV. 1331, 1332 n. 2 (1988)). Accord Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 4 n. 12 (1991).

states. For example, the law of slavery was principally a matter of colonial and then state law.<sup>7</sup> The Reconstruction amendments created the federal power to police discriminatory state laws. However, later judicial interpretations limited the reach of that federal power, making possible the new regime of state discrimination known as "Jim Crow" laws.<sup>8</sup> Thus federalism and arguments about the scope of federal power are central to the questions of equal citizenship and minority rights.<sup>9</sup>

Three important themes emerge from the debates on the constitutional amendments and civil rights laws. First, while the discussion on Asian American history at the federal level often starts with Chinese exclusion in 1882, the presence of Chinese immigrants affected earlier federal legislation. The deliberate and careful choice of language in the Reconstruction amendments and laws, regarding words such as "citizens," "aliens," or "inhabitants," was made with these immigrants in mind and is particularly significant given the continuing debate on immigration. Second, contradictory views were held of Chinese immigrants. On the one hand, they were viewed as racially inferior and in need of protection. On the other hand, there was a deep fear of granting them political power as they were seen as threatening white Christian hegemony. Third, American citizenship was redefined to include persons other than white men. The congressional debates on citizenship for Blacks included discussions of Chinese immigrants because they were in the United States, and their very presence made necessary a determination of their possible inclusion as citizens. I focus on the suffrage and naturalization discussions because the relationship between these issues and the Chinese immigrants' presence were most troubling to white supremacist Congress members.

Congress members' statements during Reconstruction represent some early articulations of what legal scholar Neil Gotanda calls the "racial association of Other non-Whites with foreignness."<sup>10</sup> For this reason, Asian Americans are often not recognized as "American." Being positioned as "foreign" is something that Asian Americans, even to the fifth generation in this country, constantly face.<sup>11</sup> As Gotanda has shown, the "separability of the juridical categories of 'citizen' and 'alien' [related to] the parallel [racialized] social distinction between 'American' and 'foreign,'"<sup>12</sup> creat-

7. A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD* (1978).

8. See, e.g., C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955); STETSON KENNEDY, *JIM CROW GUIDE: THE WAY IT WAS* (1959).

9. See, e.g., MARY FRANCES BERRY, *BLACK RESISTANCE, WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA* (1994).

10. Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review Essay on Justice at War*, 85 COLUM. L. REV. 1186, 1190 (1985).

11. Leti Volpp, (Mis)identifying Culture: Asian Women and the "Cultural Defense," 17 HARV. WOMEN'S L.J. 57, 61 n. 19 (1994) (citing Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1938 (1993)).

12. Gotanda, *supra* note 10 at 1191 (emphasis added).

ing an ideological presumption of "foreignness" based on "Other non-White"<sup>13</sup> racial status that influenced judicial outcomes in the nineteenth and twentieth centuries.<sup>14</sup> Gotanda illustrates his thesis by discussing the 1854 *People v. Hall*<sup>15</sup> and the 1898 *United States v. Wong Kim Ark*<sup>16</sup> decisions.<sup>17</sup> In this Article, I demonstrate that this system of categorization (American/foreign) informed (1) Reconstruction era congressional discussions about legislative initiatives and proposed constitutional amendments,<sup>18</sup> and (2) the post-Reconstruction Supreme Court decisions upholding the Chinese exclusion laws.<sup>19</sup> I start from the premise that "race" is socially constructed.<sup>20</sup> "Race" can be conceptualized as "an unstable and 'decentered' complex of social meanings constantly being . . . formed and transformed . . . through political contestation over racial meanings."<sup>21</sup> "Race" includes systems of racial categorization. Changes in the meanings attached to racial categories can occur in constitutional,<sup>22</sup> judicial, legislative, academic, and popular discourse. Law can be seen as ideological, "both constitutive of, and structured by, society" and existing "as part of the complex of implicit and explicit understandings within which we live and act."<sup>23</sup> If law constitutes "race" by providing authoritative understand-

---

13. Gotanda defines "Other non-Whites" as non-Black racial minorities. *Id.* at 1188.

14. Gotanda argues that the Japanese American concentration camp cases (in particular, *Hirabayashi v. United States*, 320 U.S. 81 (1943), *Yasui v. United States*, 320 U.S. 115 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944)) represented a "continuation of the racial association of other non-whites with foreignness" in Supreme Court jurisprudence. He argues that the ideological presumption of "foreignness" of both citizen and non-citizen Japanese Americans made "possible the judgment that likelihood of disloyalty was high enough to justify wholesale internment." *Id.* at 1191.

15. 4 Cal. 399 (1854).

16. 169 U.S. 649 (1898).

17. Gotanda, *supra* note 10 at 1188-89.

18. A complete analysis of both the constitutional significance of these discussions and the development and influence of this system of legal and social categorization in American law is clearly beyond the scope of this article. It would be interesting to examine the briefs, and to the extent that they survive, the oral arguments, in those nineteenth century decisions that extended federal constitutional protection to Chinese immigrants and their descendants to see whether explicit white supremacist arguments were made based on "congressional intent." See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding that persons born in the United States are citizens); *In re Wo Lee*, 11 Sawyer's Rep. 429 (9th Cir. 1886), *rev'd*, 118 U.S. 356 (1886) (striking down on equal protection grounds facially neutral laundry licensing ordinance applied discriminatorily against Chinese laundry owners); *Yick Wo v. Hopkins*, 68 Cal. 294 (1885).

19. See discussion *infra*, Part III.

20. Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27 (1994).

21. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1980s* 68, 69 (1986) (emphasis in original). Accord John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992).

22. Constitutional discourse is defined as the "continuing conversation about the Constitution's origins, principles, meaning and applications that takes place among politicians, lawyers, judges, scholars, and the public." RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE TRY TO KEEP CHANGING IT?* 270 (1993).

23. Neil Gotanda, *Critical Legal Studies, Critical Race Theory and Asian American Studies*, 21 AMERASIA J. 127, 130 (1995).

ings and definitions of "race," then the examination of historical statements from legislative and judicial discourse about Asian immigrants itself allows for a better understanding of historical and contemporary "race." The premises that (1) "race" is socially constructed and transformed through political contestation and (2) the law's ideological dimension has continuing significance for "race" account for the extensive quotations about Chinese immigrants from the debates. Chinese immigrants were "race-ed" (defined as a racial category and their political status as a "race" demarcated) in part through the congressional discussions of Chinese immigrants during Reconstruction. This racialization of Chinese immigrants in turn affected the legal outcomes in the Supreme Court decisions which upheld the Chinese Exclusion Laws.

In this Article, "Asian" is used to denote the racial category used in Anglo-American and European societies to describe persons whose ancestors lived in "Asia."<sup>24</sup> The legally and discursively constructed boundary of the geographical and/or racial category "Asia" and "Asians" has varied over time in American immigration and naturalization law and public discourse.<sup>25</sup> "Chinese" is often used as shorthand to represent heterogeneous Asian groups. Such use is inappropriate given the diversity of the immigrant stream from Asia since the late nineteenth century. I use the term here because Chinese immigrants are the relevant group in the historical period that is the focus of this Article. I use the term Chinese "immigrant" deliberately. Much of the post-Reconstruction, anti-Chinese rhetoric and agitation were premised upon a claim that Chinese were not in fact immigrants, but mere "sojourners," unlike European migrants to the United States. This alleged difference in these groups' relative interest in becoming "American" was one basis for the systematic denial of rights and opportunities to, and the enactment of discriminatory laws directed at, Chinese immigrants.<sup>26</sup>

Part I of this Article provides background on (a) the historiography of Reconstruction scholarship and its relationship to racial history, (b) a historiography of the definition of racial nativism particularly with respect to Asian Americans, and (c) the state-level legal-historical background for the later federal legislative exclusion of Chinese immigrants. Part II summarizes the congressional debates on the Reconstruction constitutional amendments and laws, focusing on the discussion of Chinese immigrants then to

24. The older terminologies, such as "asiatic," oriental," "mongolian," or "yellow" or "brown race," will appear in quotations from the debates and other sources later in the article. See EDWARD SAID, *ORIENTALISM* (1979).

25. Charles J. McClain, Jr., *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 *ASIAN L.J.* 33 (1995); Stanford M. Lyman, *The Chinese Before the Courts: Ethnoracial Construction and Marginalization*, 6 *INT'L. J. POL. CULTURE & SOC'Y* 443 (1993).

26. Charles J. McClain, Jr. & Laurene Wu McClain, *The Chinese Contribution to American Law, in ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943* 3-4 (SUCHENG CHAN ed., 1991) [hereinafter *ENTRY DENIED*].

show that racial nativist views were prevalent. Part III examines the Supreme Court decisions which upheld the Chinese Exclusion Laws to show that racial nativist rationales similar to those articulated in the earlier congressional debates were a factor in these decisions as well. I conclude with a brief discussion on the relationship of the contemporary resurgence of racial nativism to these historical phenomena.

## I.

### BACKGROUND

#### A. *Reconstruction Scholarship*

The national debate on race, gender, and citizenship in nineteenth-century America is the broader context in which the discourse on Chinese immigrants that is the focus of this Article occurred.<sup>27</sup> Post-Reconstruction historical work on race and citizenship by mainstream scholars functioned effectively as legitimation for Black subordination.

Congressional Reconstruction was concerned in part with the conditions under which the secessionist states could be readmitted to the Union after the Civil War.<sup>28</sup> There has been considerable debate in Reconstruction historiography as to the motivations of the framers of the constitutional amendments and civil rights laws. The dominant school for much of the following century argued that the Republicans' constitutional and civil rights programs represented an unwarranted attack on southern states' rights and were motivated largely by partisan considerations.<sup>29</sup> This school argued further that Blacks were incapable of governance and that Black participation in political power that resulted from the Reconstruction constitutional and statutory changes was therefore a terrible mistake.<sup>30</sup> More recent scholarship has argued that the Reconstruction amendments and laws need to be understood as having represented the best efforts of all Republicans to secure the gains wrought by the Union victory.<sup>31</sup> Those gains include the abolition of slavery in the southern states through the Emancipation Proclamation,<sup>32</sup> the redefinition of national citizenship to include previously excluded classes through the Thirteenth and Fourteenth Amendments,

27. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 218-229, 504-10 (2d ed. 1985).

28. See generally WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 40-44, 47-48 (1988).

29. CLAUDE G. BOWERS, *THE TRAGIC ERA* (1929); E. MERTON COULTER, *THE SOUTH DURING RECONSTRUCTION 1865-1877* (1947); WILLIAM A. DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC 1865-1877* (1907); WALTER L. FLEMING, *THE SEQUEL OF APPOMATTOX* (1919).

30. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, 609-10 (1988). For an early indictment of the "Dunning School," see W.E.B. DuBois, *BLACK RECONSTRUCTION IN AMERICA* 711-729 (1935). See also W.E.B. DuBois, *Civil Rights Legislation Before and After the Passage of the 14th Amendment*, 6 *LAWYERS GUILD REV.* 640 (1946); W.E.B. DuBois, *The Thirteenth, Fourteenth and Fifteenth Amendments*, 9 *LAWYERS GUILD REV.* 92 (1949) JOHN HOPE FRANKLIN, *RECONSTRUCTION: AFTER THE CIVIL WAR* 48-49 (1961).

31. NELSON, *supra* note 28, at 112-13.

32. Emancipation Proclamation, 1863 app. 17, 12 Stat. 1268-69 (1863).

and the allocation of power to the national government to address violations of those amendments.<sup>33</sup> Historians have reassessed the "Radical Republicans'" motivations as having been substantially related to a vision of racial equality rooted in the abolitionist movement.<sup>34</sup> Partly because of changes in attitude, wrought perhaps by the "Second Reconstruction,"<sup>35</sup> that vision has become less controverted. However, the debate as to the proper interpretation and application of the Reconstruction amendments continues to the present in legal-historical scholarship.<sup>36</sup>

Federal constitutional adjudication since Reconstruction can be viewed in large part as commentary on these amendments, in particular the Fourteenth.<sup>37</sup> This lends significance to the legislative history of the Reconstruction constitutional and statutory changes. Subsequent legal commentary often focused on the intent of the framers of the amendments.<sup>38</sup> However as historian Eric Foner notes, "[W]hether the courts *should* be bound by the 'original intent' of a constitutional amendment is a political, not historical question."<sup>39</sup>

### B. Asian Americans and Racial Nativism

Nineteenth century anti-Chinese enactments at the state and federal level were the product of intense racial nativism. The historian John Higham defines nativism as "intense opposition to an internal minority on

33. HERBERT WECHSLER, *THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS* 26 (1968).

34. See generally HAROLD M. HYMAN & WILLIAM E. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875* (1982); HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* (1971); JACOBUS TENBROEK, *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 CAL. L. REV. 171 (1951).

35. MANNING MARABLE, *RACE, REFORM AND REBELLION: THE SECOND RECONSTRUCTION IN AMERICA, 1945-1990* (1991) ("The Second Reconstruction was a series of massive confrontations concerning the status of African-American and other national minorities (e.g. Indians, Chicanos, Puerto Ricans, Asians) in the nation's economic, social and political institutions."). Marable analogizes the First and Second Reconstructions extensively in terms of their structure and effects. *Id.* at 3-4.

36. For narrow interpretations of the scope of the Reconstruction amendments, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS, 1863-1869* (1990). For broader interpretations, see NELSON *supra* note 28, at 112-13; JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* (1983); G. SIDNEY BUCHANAN, *THE QUEST FOR FREEDOM: A LEGAL HISTORY OF THE THIRTEENTH AMENDMENT* (1976); ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* (1985); HOWARD N. MEYER, *THE AMENDMENT THAT REFUSED TO DIE* (1973); Christopher L. Eisgruber, *Dred Again: Originalism's Forgotten Past*, 10 CONST. COMMENTARY 37 (1993).

37. NELSON, *supra* note 28, at 90, 182.

38. See, e.g., A BLAUSTEIN & R. ZANGRANDO, *CIVIL RIGHTS AND THE BLACK AMERICAN* 428-32 (1968) (quoting John W. Davis' argument before the Supreme Court on behalf of the State of South Carolina, Dec. 7, 1953); Alexander Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

39. FONER, *supra* note 30, at 256 (italics in original).

the ground of its foreign (i.e., "un-American") connections[.]”<sup>40</sup> He defines racial nativism as the Anglo-Saxon tradition that “characterized the in-group directly, the alien forces only by implication.” The concept that the United States belongs in some special sense to the Anglo-Saxon “race” was offered as one explanation for the source of national greatness. The idea crystallized in the early nineteenth century as a way of defining American nationality in a positive sense, “*not as a formula of attack on outsiders.*”<sup>41</sup> Higham focused primarily on the hostility of American nationalists towards European immigrants and saw the attack on Asian immigrants, such as the Chinese and to a lesser extent the Japanese, as tangential to the main currents of American nativism.<sup>42</sup>

Higham’s focus meant that he missed the centrality of “race” in the construction of American national identity. The 1877 Congressional Joint Special Committee to Investigate Chinese Immigration Report quoted earlier had nothing to do with defining American nationality in a positive sense. The Committee, formed in 1876, was charged with investigating and reporting on the nature and extent of the problems posed by Chinese immigrants. California Congress members represented the Chinese immigrants to be deeply dangerous and undesirable.<sup>43</sup> The Committee laid the groundwork for Chinese exclusion in its 1877 report.<sup>44</sup> In the Preface, the Committee Report stated that Chinese immigrants neither wanted to become citizens nor gain the right to vote. It further stated that Chinese immigrants failed to understand or appreciate American institutions, generally failed to learn the English language, and that to give Chinese immigrants the vote would be dangerous because their population was close in number to all the adult voters in the state and their bosses would control their votes. The Committee argued that Chinese immigrant participation in the polity would inexorably lead to the destruction of republican institutions and the representative system because the only governance Chinese immigrants knew was despotism.<sup>45</sup> The 1877 Committee Report was an expression of racial nativism precisely “as a formula of attack on outsiders.”<sup>46</sup> It clearly articulated a deep fear of outsiders participating in the American polity, and this fear became the basis for arguments that Chinese immigrants should be prevented from immigrating altogether. Furthermore, the later exclusion laws themselves can also be seen as a racial nativist attack on outsiders. As legal scholar Bill Ong Hing observed, the very presence of Asians in the

---

40. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* 4 (2d ed. 1963). This definition was perhaps shaped by prevailing attitudes during the era in which Higham wrote the book: 1948 to 1953—the beginning of the Cold War and McCarthyism.

41. *Id.* at 9 (emphasis added).

42. *Id.* at ii-iii.

43. ELMER CLARENCE SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 82 (1939).

44. S. REP. NO. 689, *supra* note 1.

45. *Id.* at vii.

46. HIGHAM, *supra* note 40, at 9.

United States "fostered a fundamental rethinking and reordering of the role that immigration law might play in the construction of the United States as a national community."<sup>47</sup>

### C. Discriminatory State Regulation of Asian Immigrants

The discussions of Chinese immigrants during the Reconstruction debates and Chinese exclusion itself cannot properly be understood without some background on state-level discriminatory laws designed to prevent, hinder, or render undesirable Chinese immigration to the United States. These discriminatory state laws were also expressions of racial nativism as a formula of attack on outsiders.

After migrating to California during the Gold Rush period starting in 1848, Chinese immigrants quickly experienced various forms of institutionalized discrimination.<sup>48</sup> Legal efforts to prevent Chinese migration occurred at the state and municipal levels in California both before and after the Civil War. Pre-Civil War legislation included the 1852 "Foreign Miners' License Tax,"<sup>49</sup> which was directed at and enforced against Chinese miners. An 1852 "Commutation Tax" required masters of vessels entering California ports to post \$500 bonds for each "foreign" passenger unless they paid five to ten dollars to "commute" the bond.<sup>50</sup> Another example of pre-Civil War discriminatory legislation was the 1855 "Capitation Tax,"<sup>51</sup> which required a fifty dollar tax to be levied on the master or owner of a vessel for the landing of each passenger who was not eligible for state or federal citizenship by law.<sup>52</sup> That the Chinese were viewed as ineligible for such citizenship<sup>53</sup> is illustrated by California Governor Bigler's 1852 message to the legislature that Chinese could not become citizens because the naturalization laws permitted only "free white persons" to be naturalized.<sup>54</sup>

After the Civil War, lawmakers viewed the growth of the Chinese population with alarm. By 1870, 8.6% of California's population was Chinese,

47. BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY, 1850-1990 19 (1993).

48. See SANDMEYER, *supra* note 43 at 43; ALEXANDER SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA (1971).

49. Foreign Miners' License Tax, Act of May 4, 1852, ch. 37, 1852 Cal. Stat. 84, *repealed and superseded* by Act of Mar. 30, 1853, ch. 44, 1853 Cal. Stat. 62.

50. Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in 19th-Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 539-40 (1984). McClain also discusses other discriminatory taxes intended to discourage Chinese immigration. *Id.* at 543-45.

51. Act of Apr. 28, 1855, ch. 153, 1855 Cal. Stat. 194.

52. This law was struck down by California's Supreme Court in *People v. Downer* 7 Cal. 169 (1857). McClain, *supra* note 50, at 544-45.

53. *Id.*, at 538 n.46.

54. Hudson N. Janisch, *The Chinese, the Courts and the Constitution: A Study of the Legal Issues Raised by Chinese Immigration to the United States, 1850-1902* 8 (1971) (unpublished J.S.D. dissertation, University of Chicago).

and they constituted one-quarter of all wage-earners.<sup>55</sup> Further discriminatory state and local laws were enacted, including prohibitions on fishing<sup>56</sup> and employment by corporations,<sup>57</sup> as well as discriminatory application of municipal regulatory power over health and safety.<sup>58</sup> Discrimination in education was also widespread<sup>59</sup> and Chinese immigrant workers were systematically paid less than white workers for comparable work.<sup>60</sup>

An early judicial expression of racial nativism can be found in the California Supreme Court's 1854 decision in *People v. Hall*.<sup>61</sup> The *Hall* court ruled that Chinese testimony was inadmissible as evidence against whites. The court ordered the release of a white defendant charged with the murder of a Chinese man because the defendant's conviction was based on the testimony of another Chinese man. The *Hall* court expressed fear at the prospect of Chinese immigrants participating in the polity as one rationale for its decision. The court found the Chinese unfit for American citizenship based on their "race." The *Hall* court stated:

[T]he same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench and in our legislative halls . . . . The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds in which they indulge in open violation of the law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.<sup>62</sup>

---

55. RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN 19TH CENTURY AMERICA* 216 (1979).

56. Charles J. McClain, Jr., *In re Lee Sing: The First Residential- Segregation Case*, 3 W. LEG. HIST. 179, 185 (1990). The court in *In re Ah Chong*, 2 F. 733 (C.C.D.Cal. 1880) struck down the law specifically directed by its terms at Chinese.

57. McClain, *supra* note 56, at 185. The court in *In re Tiburcio Parrott*, 1 F. 481 (C.C.D.Cal. 1880) struck down the corporate employment prohibition.

58. *Yick Wo v. Hopkins*, 181 U.S. 356, 373 (1886) (finding municipal regulation of laundries in CA applied only to the Chinese a violation of the Fourteenth Amendment); Charles J. McClain, Jr., *Of Medicine, Race and American Law: The Bubonic Plague Outbreak of 1900*, 13 LAW & SOC. INQ. 447 (1988).

59. CHAN, *supra* note 26, at 48-50.

60. RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 85 (1989) (discussing Central Pacific Railroad's savings on labor costs through hiring a 90% Chinese workforce).

61. 4 Cal. 399 (1854).

62. *Id.* at 404-05.

The *Hall* decision reinforced popular anti-Chinese sentiment and sanctioned the violence perpetrated with impunity by whites against Chinese immigrants.<sup>63</sup> For example, an 1862 Joint Select Committee of the California Legislature received a list of "88 Chinamen who are known to have been murdered by white people, eleven of which number are known to have been murdered by Collectors of the Foreign Miners' License Tax, sworn officers of the law. [Only] two of the murderers have been convicted and hanged. Generally they have been allowed to escape without the slightest punishment . . ."<sup>64</sup> The Hall court's view as to the racial inferiority of Chinese immigrants and their consequent unfitness for citizenship resonates with the views of the United States Supreme Court regarding African slaves and their descendants. In 1857, the Court in *Dred Scott v. Sandford*<sup>65</sup> found that Dred Scott was not a citizen of Missouri and could not therefore invoke federal diversity jurisdiction for a determination as to his "slave" or free status. Chief Justice Taney held that Scott did not have the right to sue in federal court since African slaves or their descendants could not "become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, privileges, and immunities, guaranteed by that instrument to the citizen[.]"<sup>66</sup> Writing for the Court, Justice Taney expressed the view that Blacks were a subordinate class of beings "so far inferior that they had no rights which the white man was bound to respect[.]"<sup>67</sup>

Though Chinese immigrants who were non-citizens were able to bring suit in federal courts<sup>68</sup> and thus in this respect were in a stronger legal position than arguably even free Blacks under *Dred Scott*, they were regarded as ineligible for naturalized citizenship. The 1790 Naturalization

---

63. Janisch, *supra* note 54, at 58-60.

64. CALIFORNIA LEGISLATURE, JOINT SPECIAL COMMITTEE RELATIVE TO THE CHINESE POPULATION, REPORT, 13TH SESS. (1862), *quoted in* Janisch, *supra* note 54, at 18-19. In his 1862 inaugural address, Governor Leland Stanford, who previously served as President of the Central Pacific Railroad which sought importation of Chinese laborers, argued that Chinese immigration should be restricted because of their racial inferiority and the dangers their settlement presented to "the superior race." SANDMEYER, *supra* note 43, at 43-44. While the Special Committee was perhaps instigated to build the case for restriction, the report it produced was quite favorable to Chinese immigrants. *Id.*; CHARLES J. MCCLAIN, JR., IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA 25-26 (1994).

65. 60 U.S. 393 (1857).

66. *Id.* at 403. The Court circumscribed the reach of its opinion, stating "the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country, and sold as slaves." *Id.*

67. *Id.* at 407.

68. The first cases involving Chinese immigrants in the federal courts were *Ten Cases of Opium*, 23 F. Cas. 840 (D. Or. 1864) and *Hinckley v. Byrne*, 12 F. Cas. 194 (C.C.D. Cal. 1867). Nelson G. Dong, *The Chinese and the Anti-Chinese Movement: The Judicial Response in California, 1850-1886* 235 (1974) (unpublished manuscript, on file with the author). These cases preceded the Fourteenth Amendment and the 1870 Enforcement Act, which by their terms provided for non-citizen access to the federal courts for the vindication of constitutional and statutory rights. See *infra* notes 87-90 and accompanying text.

Act<sup>69</sup> provided that "free white persons" were eligible for naturalization; and under an 1870 Act persons "of African nativity, and . . . descent" became eligible to become naturalized citizens.<sup>70</sup> Although Chinese were neither "white" nor "African," state and local courts did naturalize at least ten Chinese in New York.<sup>71</sup> Historian Sucheng Chan states that "several hundred Chinese and Japanese and dozens of Asian Indians - particularly on the Atlantic Coast - obtained citizenship."<sup>72</sup> However, in 1878, a lower federal court ruled that Chinese immigrants were not eligible for naturalization because they were neither white nor of African descent.<sup>73</sup> That decision was codified in the 1882 Chinese Exclusion Act, and thereafter applied to the entire United States.<sup>74</sup> The act also excluded Chinese laborers for ten years.<sup>75</sup> Race-based preclusions on access to citizenship, either at the federal or the state level, meant that Blacks and Chinese immigrants had to resort to strategies outside the usual political process to advance their interests.

---

69. Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, *repealed and superseded by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414, *repealed and superseded by* Act of June 18, 1798, ch. 54, 1 Stat. 566 *amended by* Act of Apr. 14, 1802, ch. 28, 2 Stat. 153.

70. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254, 256 (codified as amended at Title 30 § 2169, Revised Statutes, 18 Stat. 378, 380 (2d ed. 1878)).

71. RENQUI YU, *TO SAVE CHINA, TO SAVE OURSELVES: THE CHINESE HAND LAUNDRY ALLIANCE OF NEW YORK* 19 (1992).

72. She notes further that this occurred "before exclusion laws and landmark Supreme Court cases precluded that possibility." CHAN, *supra* note 26, at 43. One such naturalized Chinese immigrant, who was admitted to practice law in New York, unsuccessfully sought admission to the California bar. *In re Hong Yen Chang*, 84 Cal. 164 (1890). Hong Yen Chang's certificate of naturalization was voided because he was "mongolian" and ineligible for naturalization under *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878). He was denied the license to practice law, because California required either United States citizenship or a bona fide declaration of intention to become a citizen if admitted to the bar of another state, for admission to practice law.

73. *In re Ah Yup*, 1 F. Cas. 223. For further discussion of the jurisprudence of race and naturalization, see Ian Haney Lopez, *supra* note 20; Stanford M. Lyman, *The Race Question and Liberalism: Casuistries in American Constitutional Law*, 5 INT'L J. POL. CULTURE & SOC'Y. 183, 204-32 (1991). See generally, JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608-1870* (1978).

74. Act of May 6, 1882, ch. 126, § 14, 22 Stat. 58, 61 (repealed 1943). For further discussion, see Shirley Hune, *Politics of Chinese Exclusion: Legislative-Executive Conflict 1876-1882*, 9 AMERASIA J. 5 (1982).

75. Act of May 6, 1882, *supra* note 74, at § 1. Naturalization preclusion and immigration exclusion of Chinese was repealed by Pub. L. No. 199, ch. 344, 57 Stat. 600 (1943). The naturalization preclusion and immigration exclusion of Asian Indian and Filipino immigrants was repealed by Pub. L. No. 483, ch. 534, 60 Stat. 416 (1946). In 1952, American naturalization law was made race-neutral, and all other Asian immigrants became eligible for citizenship under the Immigration and Nationality Act, Pub. L. No. 414, ch. 477, 66 Stat. 163 (1952) (amended 1965). Section 311, entitled "Eligibility for Naturalization," states: "The right of a person to become a naturalized citizen shall not be denied or abridged because of race or sex or because such person is married . . ." 66 Stat. at 239. Laws affecting Asian Americans that regulated the racial composition of the migration stream were repealed in 1965. Immigration and Nationality Act Amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965).

## II.

## SOURCES OF LEGAL PROTECTION

There were two principal sources of legal protection for Chinese immigrants and their children. The first source was the bilateral, albeit unequal, treaties between the United States and China.<sup>76</sup> In particular, the Burlingame Treaty of 1868 appeared to provide expansive legal protection by its terms. The treaty provided for the free, voluntary migration and emigration of citizens of both countries and guaranteed Chinese subjects visiting or residing in the United States "the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."<sup>77</sup> However, the treaty stated, "nothing herein contained shall be held to confer naturalization . . . upon the subjects of China in the United States."<sup>78</sup> Notwithstanding the explicit preclusion of naturalization rights, lower federal courts and the California Supreme Court occasionally cited the Burlingame Treaty as relevant authority in naturalization cases brought by Chinese immigrants.<sup>79</sup>

The second source was the legal protection afforded by the Reconstruction amendments and civil rights acts. This Article focuses on this second source of protection. Congress members, as they proposed and enacted the Reconstruction amendments and laws, made deliberate choices with terms such as "citizen." The nature of citizenship and the rights, privileges, and immunities of citizenship status were critical to the extension of

---

76. Treaty of Tientsin, June 18, 1858, 12 Stat. 1023 (1860); Burlingame Treaty, July 28, 1868, 16 Stat. 739; Treaty of Nov. 17, 1880, 22 Stat. 826; Treaty of Mar. 17, 1894, 28 Stat. 1210. These treaties were the basis for Chinese immigrants' assertions of numerous claims for judicial protection in state and lower federal courts. See, e.g., *In re Ah Chong*, 2 F. 733, 735 (C.C.D. Cal. 1880) (striking down 1880 California prohibition on Chinese fishing in state waters on treaty and Fourteenth Amendment grounds).

77. Burlingame Treaty, 16 Stat. 739 at 740. Articles Five and Six of the Burlingame treaty dealt with migration:

The United States of America and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from one country to the other for purposes of curiosity, of trade, or as permanent residents. The high contracting parties, therefore, join in reprobating any other than an entirely voluntary emigration for these purposes. They consequently agree to pass laws making it a penal offence for a citizen of the United States or Chinese subjects to take Chinese subjects either to the United States or to any other foreign country, or for a Chinese subject or citizen of the United States to take citizens of the United States to China or to any other foreign country without their free and voluntary consent, respectively.

Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation. But nothing herein contained shall be held to confer naturalization upon citizens of the United States in China, nor upon the subjects of China in the United States.

*Id.*

78. *Id.*

79. McCLAIN, *EQUALITY*, *supra* note 64 at 89-90, 96-97, 118-19, 318 n.50.

protection to Black freedmen and women<sup>80</sup> after their emancipation and in light of the Supreme Court's decision in *Dred Scott*. Some constitutional provisions and laws were limited by their terms to "citizens." Others referred to "persons" or "inhabitants."<sup>81</sup> However, the precise meaning of these distinctions was not easy to discern.

Chinese immigrants used the ambiguities in terminology to demand protection by arguing that these laws and amendments applied to Chinese "aliens."<sup>82</sup> Non-citizen Chinese immigrants argued that they were legally protected by those provisions that referred to "persons" or "inhabitants." They won a number of significant constitutional victories at the Supreme Court level. For instance, the Court found that the Equal Protection Clause of the Fourteenth Amendment applied to Chinese aliens residing permanently on United States soil.<sup>83</sup> The Court also struck down a provision of the 1892 Immigration Act which provided that an alien found to be in the United States unlawfully could serve up to one year at hard labor prior to deportation.<sup>84</sup> Similarly, in 1898 the Supreme Court held that American-born children<sup>85</sup> of Chinese aliens were citizens, and thus those children could seek protection under the laws referring to "citizens."

The exclusion of Chinese immigrants, and later other Asians, from access to citizenship by naturalization affected their ability to participate in the polity and protect their interests. In a representative democracy, the right to vote and thereby affect the outcomes of elections, is an important

---

80. I use the term "freedmen and women" for those situations where the legal changes benefited both women and men. However, in the discussion of suffrage later in this paper, I use "freedmen," as the franchise was not at that time extended to women.

81. Even "a cursory examination of the debates of the Thirty-Ninth Congress reveals that those who framed the Fourteenth Amendment were acutely aware of the differentiation between aliens and citizens and drafted legislation with this distinction in mind." MALTZ, *supra* note 36, at 97. See also, Nelson, *supra* note 28, at 52-53. Chief Justice Rehnquist stated that "the Constitution itself recognizes a basic difference between citizens and aliens [which] is constitutionally important in no less than 11 instances in a political document noted for its brevity." *Sugarman v. Dougall*, 413 U.S. 634, 651 (1973) (Rehnquist, J., dissenting).

82. See generally Christian G. Fritz, *Due Process, Treaty Rights, and Chinese Exclusion, 1882-1891*, in ENTRY DENIED, *supra* note 26, at 25; McClain, *EQUALITY* *supra* note 64; Lucy E. Salyer, "Laws Harsh as Tigers": Enforcement of the Chinese Exclusion Laws, 1891-1924, in ENTRY DENIED, *supra* note 26, at 57. For further illustrations of Chinese and other Asian immigrant use of the judicial process, see, for example, FRANK F. CHUMAN, *THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS* (1976); YUJI ICHIOKA, *THE ISSEI: THE WORLD OF THE FIRST GENERATION JAPANESE IMMIGRANTS, 1885-1924* 176-243 (1988) (describing the political/legal battles from a Japanese American community perspective); Bruce A. Castleman, *California's Alien Land Laws*, 7 W. LEG. HIST. 24 (1994); Linda C.A. Przybyszewski, *Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit*, 1 W. LEG. HIST. 23 (1988); John R. Wunder, *South Asians, Civil Rights, and the Pacific Northwest: The 1907 Bellingham Anti-Indian Riot and Subsequent Citizenship and Deportation Struggles*, 4 W. LEG. HIST. 59 (1991); John R. Wunder, *Law and the Chinese on the Southwest Frontier, 1850s-1902*, 2 W. LEG. HIST. 139 (1989); John R. Wunder, *The Chinese and the Courts in the Pacific Northwest: Justice Denied?*, 52 PAC. HIST. REV. 191 (1983).

83. *Yick Wo v. Hopkins*, 118 U.S. at 369.

84. *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896).

85. *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (holding American-born child of resident alien parents is a citizen, even when the parents are racially ineligible for naturalization).

mechanism for protecting group interests.<sup>86</sup> Chinese immigrants, racially defined as ineligible for naturalization, could not become citizens and thus did not have access to the ballot. Since the Chinese were unable to effect change through the political process, they sought protection against discrimination through the courts.

The Chinese immigrant litigation victories cannot be understood outside the context of the late nineteenth century judicial evisceration of the protections extended to Black freedmen and women by the Reconstruction amendments and laws. While they established the basic rights of Blacks to citizenship, these legal changes did little to secure them political or economic rights.<sup>87</sup> In a series of cases affecting or involving Black citizenship rights, the Supreme Court narrowly construed the reach of the protections extended by the Reconstruction amendments and laws. These limitations affected Chinese immigrants and their American-born children by defining the maximum available protection for American citizens. For example, when Chinese immigrants argued for the admission of their American-born children to public schools in San Francisco, the school board arranged for an amendment to state law to allow for separate schools.<sup>88</sup> It was not until 1954, in *Brown v. Board of Education*<sup>89</sup> that racial segregation in public schools was held to violate the Equal Protection Clause of the Fourteenth Amendment.

In 1873 the Supreme Court construed the Thirteenth and Fourteenth Amendments for the first time in *The Slaughterhouse Cases*.<sup>90</sup> An association of butchers in New Orleans challenged the state's grant of an exclusive privilege to one corporation to provide landing, storage and slaughtering facilities for three parishes around New Orleans. The Court stated that the principal focus of these amendments was to end slavery as a legal institution and to provide former slaves with basic civil rights. The Court further stated that the Fourteenth Amendment overturned the *Dred Scott* decision by making "all persons born or naturalized in the United States . . . citizens of the United States and of the State wherein they reside."<sup>91</sup>

---

86. CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S: A REPORT OF THE UNITED STATES CIVIL RIGHTS COMMISSION 157 (1992). New York City, which has had a significant Chinese immigrant population for 110 years, has yet to elect a Chinese American City Council member.

87. BELL, RACE, RACISM, AND AMERICAN LAW, at 39 (1992).

88. *Wong Him v. Callahan*, 161 F. 381, 382 (1902) (challenge to the racial segregation of Chinese students). The circumstances surrounding these cases are discussed in VICTOR LOW, *THE UNIMPRESSIBLE RACE: A CENTURY OF EDUCATIONAL STRUGGLE BY THE CHINESE IN SAN FRANCISCO* 59-73, 84-88 (1982). The Supreme Court in *Gong Lum v. Rice*, 275 U.S. 78 (1927), upheld a Mississippi school board's requirement that Martha Lum attend a "colored" school. For an account of the circumstances surrounding this litigation, see JAMES W. LOEWEN, *THE MISSISSIPPI CHINESE: BETWEEN BLACK AND WHITE* 66-68 (2d ed. 1988).

89. 347 U.S. 483 (1954).

90. 83 U.S. (16 Wall.) 36 (1872).

91. *Id.* at 73.

However, in construing this sentence and the next clause respecting the privileges and immunities of citizens of the United States, the Court distinguished between state and national citizenship and found that the Amendment was intended to protect federal citizens only in the exercise of their federal privileges and immunities, which it declined to enumerate.<sup>92</sup> The Court argued that the Amendment was not intended to protect citizens against state encroachments on their civil rights, unless the state was discriminating against former slaves as such.<sup>93</sup> While the Court noted that the Fourteenth Amendment's protections were not limited to former slaves, it argued that their primary purpose was the eradication of the civil legal disabilities associated with the status of slavery.<sup>94</sup>

The Court's reasoning in *The Slaughterhouse Cases* had profound implications. *United States v. Reese*<sup>95</sup> was a federal criminal prosecution of two Kentucky municipal voting rights inspectors charged with refusing to permit a Black man to vote. The Court held that two voting rights sections of the 1870 Enforcement Act exceeded congressional power under the Fifteenth Amendment because they were not expressly limited to racially motivated actions. In *United States v. Cruikshank*,<sup>96</sup> the Court held the criminal conspiracy section of the 1870 Enforcement Act inapplicable to three persons convicted of lynching two Black men at a peaceful assembly. The Court found that punishment of the killings exceeded congressional power under the Fourteenth Amendment because the government failed to allege that the assembly was for the purpose of petitioning the federal government, and thus no rights of national citizenship were implicated. The Court further stated that the Fourteenth Amendment's Due Process Clause, which proscribes deprivations of life without due process of law, was enforceable against states but not against private citizens. Finally, in the *Civil Rights Cases*,<sup>97</sup> the court invalidated the public accommodations sections of the 1875 Civil Rights Act. The Court found that individual invasions of individual rights were outside the Fourteenth Amendment's reach because the amendment's proscriptions were directed to the state. This grew out of the Court's view expressed in *Slaughterhouse* that the states, not the federal government, were the primary protectors of individual rights. As legal historian Charles McClain documents, these developments affected the Chinese immigrants in their efforts to secure legal protection from racist mob violence by private individuals. In the absence of state

---

92. *Id.* at 75.

93. *Id.* at 78-79.

94. *Id.* at 74-75.

95. 92 U.S. 214 (1875).

96. 92 U.S. 542 (1875).

97. *Id.* at 552-553.

action, that violence was found not to implicate the federally protected rights of Chinese immigrants.<sup>98</sup>

The opposition faced by Hiram R. Revels, a Black Republican of Mississippi, when he attempted to take his seat in the Senate after his election in 1870 further illustrates that access to citizenship, political participation, and representation continued to be understood in racial terms even after the ratification of the Reconstruction Amendments. The enfranchisement of Black freedmen made Revels' election possible. Democratic senators, even after the ratification of the Fourteenth Amendment overruling *Dred Scott*, questioned Revels' qualifications. They argued that as a person of African ancestry he was not a citizen, and therefore could not be a United States senator.<sup>99</sup> Revels was admitted after a three day debate.<sup>100</sup> The fight to seat Revels was significant because of the contestation of racialized definitions of citizenship. His being seated made citizenship more inclusive and constituted a rejection of the ideology that political representation in the United States is for "whites only."

The Chinese immigrants' litigation campaign may have reflected a greater faith in the efficacy of federal constitutional adjudication for the protection of minority rights<sup>101</sup> than either the juridico-political context or the Reconstruction legislative record warranted. The largely unsuccessful results at the Supreme Court level after the enactment of the Chinese Exclusion Act of 1882 indicates that that faith, if it existed, may have been misplaced. In the following discussion, I focus principally on those provisions or enactments that either had or continue to have some relevance to Chinese immigrants.

#### A. *The Thirteenth Amendment*

What acts in a slave towards a white person will amount to insolence it is manifestly impossible to define - it may consist in a look, the pointing of a finger, a refusal or neglect to step out of the way

98. Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in 19th-Century America: The Unusual Case of Baldwin v. Franks*, 3 LAW & HIST. REV. 349, 370 (1985). But see Ralph James Mooney, *Matthew Dady and the Federal Judicial Response to Racism in the Early West*, 63 OR. L. REV. 561, 608-11 (1984) (discussing *In re Impaneling and Instructing the Grand Jury*, 26 F. 747 (D. Or. 1886)).

99. U.S. CONST. art. I, § 3, cl. 3 states: "No person shall be a Senator who shall not have . . . been nine Years a Citizen of the United States."

100. Du Bois, RECONSTRUCTION *supra* note 30, at 442; CONG. GLOBE, 41st Cong., 2d Sess. 1510-13, 1543, 1557-59, 1565-66 (1870).

101. The paradigmatic believer in constitutional adjudication for this purpose was the late Justice Thurgood Marshall. His former NAACP Legal Defense Fund colleague and Southern District Judge, Robert L. Carter, stated Marshall had a "vivid, almost religious faith in the efficacy of the National Constitution in protecting the individual against government discrimination and abuse. He believed the 13th, 14th and 15th Amendments to the United States Constitution were an updated Magna Carta, insuring equal citizen rights for blacks and that his mission was to see this concept of the Constitution become a firm facet of constitutional jurisprudence. He never faltered in this belief." 114 S. Ct. CXXXVI (1993) (citation omitted).

when a white person is seen to approach. But each of such acts violates the rules of propriety, and if tolerated would destroy that subordination upon which our social system rests. They must be restrained, and nowhere can the punishment of such offences with so much propriety be placed as with the justices of the peace, and much in the enforcement of the law must be left to their sound discretion.<sup>102</sup>

The above quotation from a judicial decision on the law of slavery illustrates that that law regulated the minutiae of interpersonal interactions between "slaves" and "white persons." The nature and scope of the evil sought to be remedied by the Thirteenth Amendment's prohibition of slavery and involuntary servitude has been much written about. The Amendment relates to Chinese immigrants because "coolieism" was often viewed as a species of slavery.

The Thirteenth Amendment, ratified on December 18, 1865, provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."<sup>103</sup> The adoption of the Thirteenth Amendment left a number of legal questions unresolved. Does it secure for persons or classes of persons equality of rights under law? Does it extend to class discrimination against racial groups other than African Americans? Does it reach private (non-governmental) action? Does it proscribe "badges and incidents" of slavery and involuntary servitude? If so, what are those "badges and incidents?"<sup>104</sup> Does it protect against other forms of class discrimination? What was the precise legal effect of the amendment on the citizenship status of people released from bondage? For what, if any, specific civil rights does the amendment provide a constitutional basis? Many of these questions were discussed during the congressional debates and in subsequent judicial decisions; they continue to be discussed to this day in contemporary legal scholarship.<sup>105</sup>

The language of the Thirteenth Amendment has never been limited to the concept of citizenship, and consequently, this provision has always applied to non-citizens as well as citizens.<sup>106</sup> It is notable that the earliest congressional legislation relating to Chinese migration preceded the amend-

102. *The State v. Bill, a Slave*, 35 N.C. 346, 350 (1852). "Insolence" by Blacks against whites was a crime while "insolence" by whites would incur civil liability at most. *Id.* at 349-50.

103. U.S. CONST. amend. XIII.

104. These questions are largely a paraphrase of a set of questions asked in BUCHANAN, *supra* note 36, at 3.

105. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that 42 U.S.C. § 1982 reaches private refusals to sell housing to Blacks and that 42 U.S.C. § 1982 is a valid exercise of the Thirteenth Amendment); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 201 (1992).

106. EDWARD P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965* 47-48 (1981).

ment and prohibited the "coolie" trade.<sup>107</sup> The proponents of this law sought to remedy the evil of "involuntary servitude" or slavery. The Senate committee that proposed the bill analogized the "coolie trade" to the slave trade thus:

The committee would not consent that a negro should be brought from the coast of Africa to be sold with or without his consent, and they would not be in favor of transporting and selling a white man against his consent, or even with it, or under a pretense of his will having been obtained.<sup>108</sup> The committee stated that "coolies," as members of an "inferior race," were susceptible to mistreatment and therefore in need of protection.<sup>109</sup> To the extent that Chinese migrant labor was associated with slavery-like status, this early effort to regulate the trade during the Civil War is noteworthy. Later, the 1878-79 California Constitution also made explicit the association between slavery and Chinese migrant labor and stated that "Asiatic coolieism is a form of human slavery, and is forever prohibited in this State; and all contracts for coolie labor *shall* be void . . . ."<sup>110</sup>

Legal scholar Earl Maltz argues that the Thirteenth Amendment would not have passed the House without the support of "moderate" Republicans, who would have opposed passage of the amendment if it went beyond the abolition of slavery and involuntary servitude to the extension of citizenship rights. He suggests, therefore, that the amendment should be construed narrowly.<sup>111</sup> However, Congress' passage of the 1866 Civil Rights Act a year later reflected a broad reading of congressional power under the amendment.<sup>112</sup> Moreover, in the Court's first interpretation of the amendment in *The Slaughterhouse Cases*,<sup>113</sup> the majority stated that the Thirteenth Amendment forbade not only "all shades and conditions of African slavery," but also stated "while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of

107. An Act to Prohibit the "Coolie Trade" by American Citizens in American Vessels, 12 Stat. 340 (1862). The Senate committee proposed that language from the original bill qualifying the prohibition - that persons be traded "against their will and without their consent" - be removed. HUTCHINSON, *supra* note 106, at 48. Both the Senate and House acceded to this proposal, thereby prohibiting the trade entirely. The bill was signed into law by President Lincoln, before he executed the Emancipation Proclamation and before the Thirteenth Amendment was proposed and ratified, on Feb. 19, 1862. 12 Stat. 340, 341 (1862); HUTCHINSON, *supra* note 106, at 48.

108. CONG. GLOBE, 37th Cong., 2d Sess. 556 (1862). Later statements include: "As the public policy and law justly holds coolieism to be a species of slavery, and as the system of Chinese prostitution is the most barefooted and shameful offense against public morality . . ." CONG. GLOBE, 41st Cong., 2d Sess. 752 (1870) (Jan. 25, 1870 remarks of Representative Johnson, quoting Sacramento Bee). See also CONG. GLOBE, 41st Cong., 2d Sess. 5151 (1870) (remarks of Senator William Stewart, R.-Nev. equating "coolie" trade with slave trade).

109. CONG. GLOBE, 37th Cong., 2d Sess. 555 (1862).

110. CAL. CONST. of 1879, § 4, quoted in BENJAMIN B. RINGER "WE THE PEOPLE" AND OTHERS: DUALITY AND AMERICA'S TREATMENT OF RACIAL MINORITIES 595 (1983) (emphasis in original).

111. MALTZ, *supra* note 36, at 27.

112. See *supra* note 37 and accompanying text.

113. 83 U.S. (16 Wall.) 36, 68-69 (1872).

slavery now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void."<sup>114</sup>

Many advocates of the Thirteenth Amendment held a broad view of its scope. In particular, abolitionist senators such as William Sumner of Massachusetts and Lyman Trumbull of Illinois, among others, viewed slavery as destroying natural rights that the Constitution had been intended to protect. They believed that abolition of slavery would restore a *status quo ante* in which all persons' natural rights would be protected regardless of race.<sup>115</sup> Under this theory, former slaves were protected not only from the status of legal bondage, but more broadly in their rights to participate in civil society through protecting their rights to make and enforce contracts, to sue and be sued, to testify, and so forth.<sup>116</sup> Justice Harlan, in his dissent in the *Civil Rights Cases*,<sup>117</sup> shared this view and argued that the amendment reached not only the institution of slavery, but also its "badges and incidents."<sup>118</sup> Consequently, Harlan stated that the congressional enforcement power encompassed the power to "enact laws to protect . . . people against the deprivation, *because of their race*, of any civil rights granted to other freemen in the same State . . . ."<sup>119</sup>

The *Slaughterhouse* Court stated that peonage,<sup>120</sup> a variety of involuntary servitude, might well be reached by the Thirteenth Amendment. However, the Southern system of labor control from the late nineteenth to the early twentieth century included peonage not far different from slavery itself. The cornerstone of this system was forced convict labor.<sup>121</sup> Reconstruction laws, such as laws against "vagrancy," were enacted and enforced largely against Blacks, thus ensuring a steady supply of convicts.<sup>122</sup> Some convicts were leased by the state to private interests.<sup>123</sup> The annual death rate for prisoners under convict-lease arrangements was high, "typically

---

114. *Id.* at 72.

115. Buchanan, *supra* note 36, at 9-10.

116. *Id.* at 10-11.

117. 109 U.S. 3 (1883).

118. *Id.* at 35 (Harlan, J., dissenting).

119. *Id.* at 36 (emphasis in original). The Court restored the "amendment to its intended position in the regulation of arbitrary class prejudice," in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). BUCHANAN, *supra* note 36, at 7. The Court in *Jones v. Alfred H. Mayer Co.* held that a refusal by a white homeowner to sell a house to a Black purchaser because of the purchaser's race constituted a badge of slavery proscribed by the Thirteenth Amendment and the 1866 Civil Rights Act. *Jones*, 392 U.S. at 41-43.

120. Peonage is defined as a "condition of servitude. . . compelling persons to perform labor in order to pay off a debt." BLACK'S LAW DICTIONARY 1135 (6th ed. 1990).

121. The amendment provides that involuntary servitude shall not exist in the United States "except as a punishment for crime whereof the party shall have been duly convicted."

122. Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases*, 82 COLUM. L. REV. 616, 649 (1982).

123. *Id.*

close to twenty percent and in some places approaching fifty percent."<sup>124</sup> Other convicts were put to work on state and county chain gangs.<sup>125</sup> Death rates for prisoners in state custody ranged from sixteen to twenty-five percent annually.<sup>126</sup> Under slavery, the death of a slave represented the loss of an investment, but under convict-lease or chain gang arrangements, the death of a convict represented merely the temporary loss of labor power. Finally, those convicted could sign up with private employers under "criminal surety" arrangements. Employers would advance money to pay the convict's fine in exchange for a promise by the convict to work for a longer period of forced labor than the convict was originally sentenced.<sup>127</sup> Criminal surety agreements were enforceable through the judicial process, and their breach was punishable through criminal sanctions.<sup>128</sup>

A comparison of the actual operation of "cooly" contracts of an earlier era and these criminal surety agreements might reveal some commonalities.<sup>129</sup> It is noteworthy that the death rate of Chinese immigrant workers during the building of the transcontinental railroad was also high and that the employers' principal concern was the replenishment of labor power.<sup>130</sup> However, I am not aware of any legal challenges to "cooly" contracts on Thirteenth Amendment grounds.

### B. *The 1866 Civil Rights Act*

On April 9, 1866, Congress passed the Civil Rights Act over President Johnson's veto.<sup>131</sup> Its passage reflected a broad reading of the congressional power under the Thirteenth Amendment to protect Black citizenship

124. *Id.* at 651 (citation omitted).

125. *Id.*

126. *Id.* at 652-53.

127. *Id.* at 653. However, those convicted often sought such private and lengthy servitude because it was preferable to the state-administered varieties. *Id.*

128. In the "Peonage Cases"—*Bailey v. Alabama*, 219 U.S. 219 (1911) and *United States v. Reynolds*, 235 U.S. 133 (1914)—the Court struck down certain laws supporting peonage, but not on Thirteenth Amendment grounds.

129. An early effort to render labor contracts enforceable in California, dubbed the "Coolie Bill," failed passage in 1852. The bill would have made enforceable contracts to perform manual labor for a period up to ten years entered into by an inhabitant or citizen of a foreign country. JANISCH, *supra* note 54, at 6-8.

130. SAXTON, *INDISPENSABLE ENEMY*, *supra* note 48, at 64-66. Cf. TAKAKI, *STRANGERS*, *supra* note 60, at 85-86.

131. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866). Sections One and Two of the Civil Rights Act provided:

(1) That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory of the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom, to the contrary notwithstanding.

rights. The debates on this Act further reflect the delineation of "citizens" from "aliens" during Reconstruction.

The 1866 Act's aim was "to protect all Persons in the United States in their Civil Rights, and furnish means of their vindication."<sup>132</sup> A few months later Congress also passed the Freedmen's Bureau Act, which provided for relief and legal protections for freedmen and women and refugees over President Johnson's veto.<sup>133</sup> The two acts contained virtually identical lists of specific civil rights to be protected by the judicial and legislative branches of the national government. Their passage was based on the theory that Congress, under the Thirteenth Amendment, could effectively implement laws to protect these civil rights.<sup>134</sup>

Opposition to the civil rights bill focused on the bill's allocation of power to the federal government to protect the rights of citizens.<sup>135</sup> Representative Michael Kerr, a Democrat from Indiana, believed that the rights conferred by the bill derived from state as opposed to national citizenship. However, his arguments were also based in part on racial nativist concerns. He stated that if Congress had the power to enact the bill, then Congress could also:

admit into Indiana negroes or mulattoes, coolies or Mexicans, Hot-tentots or Bushmen, and make them equal there in civil rights and privileges to the highest type of human beings . . . . We may thus,

---

(2) That any person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

BUCHANAN, *supra* note 36, at 30.

132. BUCHANAN, *supra* note 36, at 30.

133. Freedmen's Bureau Act, ch. 200, 14 Stat. 173 (1866) (re-enacting and extending Act of Mar. 3, 1865, ch. 90, 13 Stat. 507). Section 14 of the Act provides:

(14) That in every State or district where the ordinary course of judicial proceedings has been interrupted by the rebellion, and until the same shall be fully restored, and in every State or district whose constitutional relations to the government have been practically discontinued by the rebellion, and until such State shall have been restored in such relations, and shall be duly represented in the Congress of the United States, the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have the full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens of such state or district without respect to race or color, or previous condition of slavery.

BUCHANAN, *supra* note 36 at 28-29.

134. BUCHANAN, *supra* note 36, at 15.

135. The 1866 Act includes the original versions of the statutory language which survives as 42 U.S.C. §§ 1981, 1982 and 28 U.S.C. § 242. A comparison of the language of sections one and two of the 1866 Act, as modified and reenacted at §§ 16 and 17 of the Act of May 31, 1870 (First Enforcement Act), ch. 114, 16 Stat. 140, 144 (1870), is undertaken *infra* notes 182-203.

by the liberal exercise of this mighty power, become substantially Africanized, Mexicanized, or Coolyized . . . .<sup>136</sup>

The Act's protections were limited to a specific class of beneficiaries - citizens. As originally proposed by Senator Lyman Trumbull, Republican of Illinois, the first section of the bill read:

[T]here shall be no discrimination in civil rights or immunities among the *inhabitants* of any State or territory of the United States on account of race, color or previous condition of slavery; but inhabitants of every race and color . . . shall have the same rights to make and enforce contracts . . . .<sup>137</sup>

Maltz states that the change from "inhabitants" to "citizens" in the first section was in response to Democratic Senator Reverdy Johnson's critique that the bill would prevent states from discriminating against aliens with respect to ownership of property.<sup>138</sup> The Senate nonetheless passed the original version of the bill by an overwhelming margin. However, the House later modified the bill to address Senator Johnson's concerns.<sup>139</sup> Maltz argues that "[f]ederal action for the protection of rights thus became tied to the status of citizenship."<sup>140</sup> Maltz further states that, in order to limit the bill's scope to racial discrimination, language providing that non-white citizens would have the same rights as "white citizens" was added.<sup>141</sup>

However, even as modified, the bill was understood to extend some protection to Chinese immigrants.<sup>142</sup> Section One of the Act provided that "all persons born in the United States . . . are hereby declared to be citizens of the United States."<sup>143</sup> In a March 27, 1866, veto message on the Civil Rights Act, President Johnson wrote to Congress that the "provision comprehends the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes and persons of African blood."<sup>144</sup> Thus, this provision was understood to protect American-born children of Chinese immigrants. The language as to "inhabitant" was retained in Section Two of the Act which stated therefore that an "inhabitant" had the right to be free from "different punishment, pains or penalties . . . by reason of his race or color."<sup>145</sup> Accordingly, Chinese immigrants could argue that this provision reached differences in criminal sentencing or fines.

136. CONG. GLOBE, 39th Cong., 1st Sess. 1268 (1866).

137. *Id.* at 211.

138. MALTZ, *supra* note 36, at 63-64.

139. *Id.*

140. *Id.* at 64.

141. *Id.* at 66-67.

142. BUCHANAN, *supra* note 36, at 20 (citation omitted).

143. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

144. BUCHANAN, *supra* note 36, at 15 (citation omitted).

145. Act of Apr. 9, 1866, ch. 31, 14 Stat. 27.

### C. *The Fourteenth Amendment*

Legal historian William Nelson observes that during the closing decades of the nineteenth century the Supreme Court transformed "American constitutional history . . . [into] little more than a commentary on the Fourteenth Amendment."<sup>146</sup> He argues that the Amendment was a "vague charter for the future" until the Supreme Court began to construe it in *The Slaughterhouse Cases*<sup>147</sup> and states that "[s]ection one [became] the single most important text in constitutional adjudication."<sup>148</sup> The amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.<sup>149</sup>

Maltz observes that the amendment is divisible in two sections.<sup>150</sup> The first part provides a definition of citizenship and specifies that a class of citizens' rights - their privileges and immunities - shall not be abridged. As stated earlier, the *Slaughterhouse* majority distinguished between national and state citizenship, which distinction was later to have profound consequences for the protection of minority rights against discriminatory state laws. The second part, the Due Process and Equal Protection Clauses, uses the word "person" and thus applies to aliens. The amendment was proposed at least in part to put these due process and equal protection guarantees, originally included in the 1866 Civil Rights Act, beyond the reach of legislative repeal.<sup>151</sup> The Fourteenth Amendment reflected a broad view of the scope of federal power to define citizenship status and to protect the rights of citizens and others under the federal constitution.

On February 3, 1866, an initial version of the Fourteenth Amendment was introduced in the Senate.<sup>152</sup> On February 26, Representative John A. Bingham, Republican of Ohio, introduced the amendment in the House for the Joint Committee on Reconstruction. The original language provided:

---

146. NELSON, *supra* note 28, at 182 (quoting WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 1-2 (1898)).

147. 83 U.S. (16 Wall.) 36 (1873).

148. NELSON, *supra* note 28, at 90.

149. U.S. CONST. amend. XIV, § 1.

150. MALTZ, *supra* note 36, at 96-97. This interpretation was upheld in two important nineteenth century decisions on civil rights for Chinese immigrants construing the word "person" in the Due Process and Equal Protection Clauses: *Yick Wo v. Hopkins*, 181 U.S. 356, 369 (1886); and Justice Field's decision in *Ho Ah Kow v. Nunan*, 5 Sawyer's Rep. 552 (9th Cir. 1879). I am indebted to Charles McClain for this point.

151. CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (remarks of Representative Thaddeus Stevens (R-PA) upon introduction of proposed 14th Amendment).

152. *Id.* at 806.

Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property.<sup>153</sup>

Maltz states "moderate" Republicans and Democrats opposed the proposed language because of their view that it would give the the federal government too much power.<sup>154</sup> Representative Bingham ultimately withdrew the draft of the amendment which provided for an express grant of congressional power because the language that was adopted, although stated in negative terms, rendered the requisite protections self-executing. The final language of the Fourteenth Amendment placed the initial burden of protection on the state governments. Though the amendment described the power of the states in negative terms — "[n]o state shall make or enforce any law which shall abridge the privileges and immunities"—these protections would be effective without additional federal legislation.<sup>155</sup> Those whose rights were violated by states would have recourse through a constitutional claim in the courts. The negative language also did not preclude direct congressional enforcement, as the subsequent spate of civil rights legislation indicates.<sup>156</sup>

Senator Jacob M. Howard, Republican of Michigan, became the official spokesperson for the Committee in the Senate after the amendment was introduced there.<sup>157</sup> In his remarks, he drew a distinction between the rights of citizens and those of other persons, namely that the Due Process and Equal Protection Clauses prohibited the states from depriving not only citizens, "but any person, whoever he may be," of those rights. He further stated that these provisions abolished "all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another."<sup>158</sup>

During the debates on the Fourteenth Amendment, a number of congress members expressed concerns regarding the fitness of Chinese immigrants for naturalization and citizenship. Representative William Higby, Republican of California, distinguished the Chinese as foreigners. He stated that:

---

153. *Id.* at 813, 1034.

154. Earl M. Maltz, *The Fourteenth Amendment as Political Compromise: Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 936, 945-46 (1984).

155. NELSON, *supra* note 28, at 55.

156. Section five of the amendment provides for congressional enforcement power: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." CONG. GLOBE, 39th Congress, 1st Sess. 2766 (1866). Senator Howard discussed the relation of §§ 1-5 and the importance of congressional enforcement power under § 5. *Id.*

157. MALTZ, *supra* note 36, at 97.

158. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

The Chinese are nothing but a pagan race. They are an enigma to me, although I have lived among them for fifteen years. You cannot make good citizens of them; they do not learn the language of the country; and you can communicate with them only with the greatest difficulty, as their language is the most difficult of all those spoken; they even dig up their dead while decaying in their graves, strip the putrid flesh from the bones, and transport the bones back to China. They bring their clay and wooden gods with them to this country, and as we are a free and tolerant people, we permit them to bow down and worship them.

Sir, they do not propagate in our country. A generation is not growing up in the State, except an insignificant few in comparison with the great number among us. Judging from the daily exhibition in our streets, and the well established repute among their females, virtue is an exception to the general rule. They buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character. You cannot make citizens of them.<sup>159</sup>

When asked why the Chinese should be excluded if Africans were to be naturalized, Higby answered: "[t]hey are foreigners and the negro is a native."<sup>160</sup> Higby's opposition was premised upon a construction of Chinese immigrants as profoundly foreign and alien in culture, and thus unfit both for naturalization and citizenship.

The status of the Chinese born in the United States was also considered during the discussion on the first section of the amendment which defined "citizenship." Senator Cowan, Republican of Pennsylvania, expressed the following concerns:

Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy born in Pennsylvania a citizen? If so, what rights have they? Have they any more rights than a sojourner in the United States? . . . [Are Californians] to remain quiescent while they are overrun by a flood of immigration of the Mongol race? Are they to be immigrated out of house and home by the Chinese? . . . [I]f another people of a different race, of different religion, of different manners, of different traditions, different tastes and sympathies are to . . . have an opportunity of pouring in such an immigration as in a short time will double or treble the population of California . . . I mean the yellow race; the Mongol race. They outnumber us

---

159. *Id.* at 1056. The Chinese migrants were mostly male, and few Chinese male immigrants were able to marry or have children in the United States. Chinese-white intermarriage was prohibited by statute from 1880. Cal. Stats., 1880, Code Amendments, Ch. 41, Sec. 1, at 3, cited in Megumi Dick Osumi, *Asians and California's Anti-Miscegenation Laws*, in *ASIAN AND PACIFIC AMERICAN EXPERIENCES: WOMEN'S PERSPECTIVES* 1, 6 (Nobuya Tsuchida ed., 1982).

160. CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866).

largely. Of their industry, their skill, and their pertinacity of all worldly affairs, nobody can doubt . . . . They may pour in their millions upon our Pacific coast in a very short time. Are the States to lose control of this immigration? Is the United States to determine that they are to be citizens?<sup>161</sup>

Cowan's fear of Chinese immigration related not only to cultural differences and the potential for large numbers, but also to the perception that their "industry, . . . skill, and . . . pertinacity of all worldly affairs" constituted a threat. Interestingly, competence in a group defined as "different" (racially subordinate, if not inferior) constituted a threat.

Ultimately the Senate adopted language which defined as citizens "[a]ll persons born or naturalized in the United States" because Higby and Cowan's concerns were not central to the primary issue in the debate, which was citizenship rights for Black freedmen. That Senator John Conness from California, the state most impacted by Chinese immigration, favored a broad definition of citizenship was perhaps influential. Conness supported the idea "that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights."<sup>162</sup> He stated further that the Senate should take

no further trouble on account of the Chinese in California or on the Pacific coast. We are fully aware of the nature of that class of people and their influence among us, and feel entirely able to take care of them and to provide against any evils that may flow from their presence among us. We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others.<sup>163</sup>

Conness' support for this provision is intriguing. As a Californian, he represented the state that took the lead in anti-Chinese enactments from the 1850s onwards. The limited numbers of Chinese born in the United States apparently had something to do with his willingness to dismiss the "evils" and "influence" of the Chinese presence.<sup>164</sup> Historian Alexander Saxton also notes that Conness was identified with the railroad interests that had sought the importation of Chinese labor,<sup>165</sup> and that perhaps Republican party discipline may have been a factor in his decision to support the provision.

---

161. *Id.* at 2890-91.

162. *Id.* at 2891.

163. *Id.* at 2892.

164. *Id.* at 2891.

165. SAXTON, *supra* note 48, at 84.

On June 13, 1866 the House concurred with the Senate's changes, including the citizenship definition,<sup>166</sup> and the amendment was sent to the states for ratification. On July 28, 1868, Secretary of State Seward announced that the amendment had become part of the Constitution.<sup>167</sup>

#### D. The Fifteenth Amendment

After the Republican victory in the fall 1868 elections, Congress moved to protect the voting rights of Black freedmen. Led by William Sumner of Massachusetts in the Senate and George Boutwell of Massachusetts in the House, some Republicans argued that universal adult male suffrage could be achieved through statutory means,<sup>168</sup> but the apparently "moderate" Republicans believed otherwise.<sup>169</sup> The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."<sup>170</sup>

Pacific coast opposition to the possibility of Chinese immigrant suffrage was explicit. For example, Republican Senators Conness of California and Williams and Corbett of Oregon opposed Senator Sumner's proposal to eliminate the limiting word "citizens" in the amendment so that aliens would also be protected in their voting rights.<sup>171</sup> Senator George H. Williams, Republican of Oregon, proposed an alternative amendment that would allow states to regulate the right to suffrage and to hold office, subject to congressional supervision. He feared that the enfranchisement and political empowerment of Chinese immigrants would result in Chinese hegemony on the west coast. He stated:

They are a people who do not or will not learn our language; they cannot or will not adopt our manners or customs and modes of life; they do not amalgamate with our people; they constitute a distinct and separate nationality, an *imperium in imperio* - China in the United States; and sir, they continue to be the ignorant and besotted devotees of absolutism in politics and the blind disciples of paganism in religion. Suppose that the control of all our educational and

---

166. CONG. GLOBE, 39th Cong., 1st Sess. 3148-49 (1866).

167. NELSON, *supra* note 28, at 60. The two best known nineteenth century decisions regarding civil rights for Chinese immigrants under the Fourteenth Amendment were *Yick Wo v. Hopkins*, 181 U.S. 356 (1886) and *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). *Yick Wo* held that facially neutral laws applied unfairly violated the Equal Protection Clause and struck down a San Francisco municipal ordinance which regulated the operation of laundries in wooden buildings. *Wong Kim Ark* ruled that the American-born children of parents ineligible to be naturalized were United States citizens.

168. MALTZ, *supra* note 36, at 146-47.

169. *Id.* at 143.

170. U.S. CONST. amend. XV.

171. Gerald L. Neuman, "We Are The People": Alien Suffrage in German and American Perspective, 13 MICH. J. INT'L. L. 259, 307 n.311 (1992) citing CONG. GLOBE, 40th Cong., 3d. Sess. 1030-35 (1869).

religious institutions was transferred to the hands of these people, what would be the consequences . . . ?<sup>172</sup>

Senator Williams further expressed the fear that if large numbers of Chinese immigrants migrated to the west coast and were given access to political power they would "take possession" of the coast and "appropriate" all its productive capacity for their own use.<sup>173</sup>

Senator Henry W. Corbett, Republican of Oregon, also opposed suffrage for Chinese immigrants. He stated:

[if] the amendment proposed be adopted . . . Chinese suffrage will virtually be adopted. . . . [T]he Chinese, they are a pagan nation. . . . [T]his class of people are not beneficial to the advancement of those Christian institutions that lie at the foundation of our Government . . . . Allow Chinese suffrage, and you may soon find established pagan institutions in our midst which may eventually supersede . . . Christian influences . . . . [I object to granting] the right of suffrage to a class of people . . . of perhaps four or six hundred million persons who can come to our shores and supersede us in the establishment of institutions of their own, which may be detrimental to us, and finally overthrow our cherished system.<sup>174</sup>

The opposition to Chinese suffrage was based on perceptions that deep-seated, ineradicable cultural and religious differences rendered Chinese immigrants unfit to be members of the polity. Furthermore, Congress feared that a grant of political rights to Chinese immigrants would encourage further migration, leading to possible Chinese hegemony.

Democrats who opposed suffrage exposed the contradiction in the views of Pacific coast Republican proponents of Black suffrage. On the one hand they advocated suffrage for the freedmen, and on the other, denied it to Chinese immigrants on a racial basis.<sup>175</sup> However, some Democrats' arguments were based on a conviction that "[o]ur system of religion and government and of social organization is threatened by this wave of emigration from Eastern Asia."<sup>176</sup>

I would be willing to lay a perpetual and absolute embargo upon it. . . there never should be allowed the privilege to one son or daughter of the Mongolian race again to put foot upon the shores of America. I want no negro government; I want no Mongolian government; I want the government of the white man which our fathers incorporated. The Declaration of Independence was made as irrespective of the negro as it was of the red man of the forest. It embraced neither. Neither of them was a party to it. Neither had

172. CONG. GLOBE, 40th Cong., 3rd Sess. 901 (1869).

173. *Id.*

174. *Id.* at 939-940.

175. *Id.* at 989-90 (remarks of Senator Thomas A. Hendricks, D-Ind).

176. *Id.* (remarks of Senator Garrett Davis, D-Ky).

any hand in its organization. Neither was to take part in it, and that truth is evidenced not only by contemporaneous history, but by the act of Congress . . . . Passed in 1803, which expressly limits the naturalization of foreigners to white men.<sup>177</sup>

Despite these white supremacist and nativist attitudes, a proposal to restrict the expansion of suffrage to Black freedmen only was eventually defeated by a wide margin.<sup>178</sup> The nativist attitudes expressed against Chinese immigrants were not central to the debate on the expansion of Black voting rights, which were regarded as important to their ability to protect their other citizenship rights. On February 26, 1869, the proposed amendment passed the Senate and was sent to the states.<sup>179</sup> The amendment was declared ratified a year later.<sup>180</sup>

### *E. The 1870 Enforcement Act*

On May 31, 1870, shortly after the ratification of the Fifteenth Amendment, Congress passed "An Act to Enforce the Right of Citizens of the United States to Vote . . . and for Other Purposes" (the first "Enforcement Act").<sup>181</sup> As the title suggests, it was designed primarily to enforce citizens' voting rights and civil rights.<sup>182</sup> Other than perhaps for the few naturalized and American-born citizens of Chinese ancestry,<sup>183</sup> the protections for voting rights were irrelevant to the Chinese immigrant community. However, two provisions directly relating to Chinese immigrant civil rights issues were included. These provisions were introduced at the behest of Chinese merchants from San Francisco and may well represent the first effective participation in the federal legislative process by Chinese immigrants.<sup>184</sup>

On January 10, 1870, Senator William M. Stewart, Republican of Nevada, introduced the bill which ultimately became sections sixteen and seventeen of the Enforcement Act.<sup>185</sup>

Section sixteen provided:

[A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to

---

177. *Id.*

178. *Id.* at 1008-09, 1112.

179. *Id.* at 1641-42; see also MALTZ, *supra* note 36, at 155.

180. MILTON R. KONVITZ & THEODORE LESKES, *A CENTURY OF CIVIL RIGHTS: WITH A STUDY OF STATE LAW AGAINST DISCRIMINATION* 57 (1961).

181. Civil Rights Act of 1870, ch. 114, 16 Stat. 140.

182. KONVITZ AND LESKES, *supra* note 180, at 57.

183. See *supra* note 167 and accompanying text.

184. Dong, *supra* note 68, at 271-285; McClain, *supra* note 50, at 565-67.

185. Civil Rights Act of 1870, 16 Stat. at 144; CONG. GLOBE, 41st Cong., 2d Sess. 323 (1870). The discussion regarding the enactment and enforcement of these provision in the next five paragraphs draws substantially from Dong, *supra* note 68, at 269-94.

the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void.<sup>186</sup>

Section seventeen provided:

[A]ny person who, under color of any law, statute, ordinance, regulation or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.<sup>187</sup>

These provisions modified the first and second sections of the 1866 Civil Rights Act. Section eighteen of the 1870 Act reenacted the 1866 Act in its entirety and provided that sections sixteen and seventeen would be enforced in accordance with the enforcement provisions of the 1866 Act.

The first clause of section sixteen broadened the statute's reach by specifying that the class of persons to be protected by its provisions was "all persons within the jurisdiction of the United States."<sup>188</sup> The words "taxes, licenses and exactions," added to the language of the 1866 Act regarding

186. Section 16 survives as amended at 42 U.S.C. 1981 (1991):

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. (b) For the purpose of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

187. Section 17 survives at 18 U.S.C. 242 (1994):

Whoever, under color of any law, statute, ordinance, regulation or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined under this title or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life.

188. Civil Rights Act of 1870, 16 Stat. at 144. Section one of the 1866 Act had provided that

"like punishments pains and penalties,"<sup>189</sup> seem directly applicable to California's practice of selectively taxing or regulating Chinese immigrants through various enactments. The next added sentence could hardly have been drafted to remedy any other evil: "No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally enforced and imposed upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void."<sup>190</sup>

The changes in language in section seventeen similarly indicate an intent to reach Chinese immigrants. First, the language specifying the class of persons to be protected was made more expansive. The changes specifically provided for the inclusion of "aliens" as a protected class who, when convicted, were subject to punishment equal to that received by a "citizen."<sup>191</sup> Senator Stewart's bill also proscribed the deprivation of certain rights of aliens on account of alienage.<sup>192</sup> Second, the Stewart bill changed the standard by which equal treatment was to be measured and thereby expanded the scope of the legal protection.<sup>193</sup> Section Two of the 1866 Act proscribed different treatment than "white persons" of "any inhabitant . . . on account of such person having at any time been held in a condition of slavery or involuntary servitude . . . or by reason of his color or race."<sup>194</sup> However, section seventeen of the 1870 act proscribed different treatment than a "citizen" of the "alien, or by reason of his color or race[.]"<sup>195</sup> The

---

all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted.

The word "persons" was modified by the word "citizens"; the statute therefore left open the possibility that there might be persons not born in the United States who were consequently not citizens and therefore were not protected by the act. The 1870 modification largely precluded this interpretation. Of course, the intervening ratification of the 14th Amendment, with its first clause defining national citizenship differently from the 1866 Act, may have provided some of the impetus for the changes. The 1870 Act also dropped the clause "to inherit, purchase, lease, sell, hold, and convey real and personal property" that was among the enumerated "same right[s]" in the 1866 Act, although it retained the language providing access "to the full and equal benefit of all laws and proceedings for the security of person and property" *Compare* § 1, 14 Stat. at 27 with § 16, 16 Stat. at 144.

189. The 1866 Act provided that protected persons "shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding." Act of Apr. 9, 1866, 14 Stat. 27. The 1870 Act stated that they "shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." Civil Rights Act of 1870, 16 Stat. at 144.

190. Civil Rights Act of 1870, § 16, 16 Stat. at 144.

191. *Id.* at § 17.

192. *Id.*

193. Section 18 of the 1870 Act re-enacted the entire Act of Apr. 9, 1866, 14 Stat. 27, and provided that §§ 16 and 17 of the 1870 Act were to be enforced in accordance with the 1866 Act's provisions. Thus the protections afforded by the 1870 Act were additional to those afforded by the 1866 Act.

194. Act of Apr. 9, 1866, 14 Stat. 27.

195. Civil Rights Act of 1870, § 17, 16 Stat. at 144.

1866 Act provided that any person who deprived another of certain specified rights "on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons"<sup>196</sup> was subject to certain penalties. The analogous language in the 1870 Act states "on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens."<sup>197</sup> In their enforcement as well as in their legislative intent, sections sixteen and seventeen of the 1870 Act provided protections for the Chinese immigrants.<sup>198</sup>

Despite the protections afforded the Chinese by Senator Stewart's bill, Stewart's own remarks reflect the ambivalence of its purpose.

[T]he other provision which has been added is one of great importance. It is of more importance to the honor of this nation than all the rest of this bill. We are inviting to our shores, or allowing them to come, Asiatics. We have got a treaty allowing them to come. Now while I am opposed to Asiatics being brought here, and will join in any reasonable legislation to prevent anybody from bringing them, yet we have got a treaty that allows them to come to this country. We have pledged the honor of the nation that they may come and shall be protected. For twenty years every obligation of humanity, of justice, and of common decency toward those people has been violated by a certain class of men—bad men I know; but they are violated in California and on the Pacific coast. While they are here I say it is our duty to protect them. I have incorporated that provision in this bill on the advice of the Judiciary Committee, to facilitate matters and so that we shall have the whole subject before us in one discussion. It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here, are entitled to that protection. If the State courts do not give them the equal protection of the law, if public sentiment is so inhuman as to rob

---

196. Civil Rights Act of 1866, § 2, 14 Stat. at 27.

197. Civil Rights Act of 1870, § 17, 16 Stat. at 144.

198. Section 16 of the 1870 Act rendered unenforceable California laws precluding testimony of Chinese immigrants against white persons in civil and criminal proceedings and laws providing for selective taxation of Chinese. J.A.C. Grant, *Testimonial Exclusion Because of Race: A Chapter in the History of Intolerance in California*, 17 UCLA L. REV. 192, 201 (1969). In a student paper, Nelson Dong found substantial evidence that the federal government vigorously enforced § 17 by prosecuting collectors of the Foreign Miners License Tax for violating § 16's proscription of selective taxation of aliens. At least one such tax collector was convicted. Dong, *supra* note 68, at 286-294 (citing *United States v. Jackson*, 26 F. Cas. 563 (C.C.D. Cal. 1874)). Dong shows that this decision was misreported as an 1874 decision when in fact it was prosecuted in 1870 shortly after the enactment of the 1870 Act. Jackson, along with several other collectors of the tax, was indicted in 1870-71, and Jackson was convicted. *Id.* at 291-92.

them of their ordinary civil rights, I say I would be less than man if I did not insist, and I do here insist that the provision shall go on this bill, and that the pledge of this nation shall be redeemed, that we will protect Chinese aliens or any other aliens whom we allow to come here, and give them a hearing in our courts; let them sue and be sued; let them be protected by all the laws and by the same laws that other men are. That is all there is in this provision.<sup>199</sup>

Here, even while advocating for legislative protections for Chinese immigrants, Senator Stewart expressed his opposition to Chinese immigration. He categorized them as both "Asiatics" and "aliens."

The proposed Act engendered opposition in both the Senate and the House. Some Senators objected to the procedure by which the provisions regarding civil rights for Chinese immigrants were incorporated into the bill.<sup>200</sup> In the House, James A. Johnson, a Democrat from California, stated his substantive opposition to the bill.

[T]his bill ought to be entitled an act to foster paganism in the States and Territories of the United States; to foster child murder, to strike down Christianity, and to deprive the people of their liberties . . . . [T]hese [Chinese] people might become troublesome citizens; might without an effort overthrow our institutions; and further, they would always be pagans . . . . The Chinese empire . . . possesses, perhaps, four hundred million people. This immense, teeming, swarming, seething hive of degraded humanity turned loose upon our country would drown out and destroy our institutions and our race. . . . [T]hey will come, and by millions, if invited. Allow them more liberties than they have in their native land, and give them greater compensation for their labor, that is, let them understand that they may not only own the country, but control it, and it will not be long before a white man in California will be a rare sight . . . . I must say, in my humble opinion, the very highest crime a man can commit is committed where he turns against his country and his race. All agitation in favor of enfranchising the Chinese is a war upon the rights of the States and a war against republican self-government—a war in the interest of paganism and against the ever-living God . . . . Laws for the enfranchisement of the Chinese would be . . . manifestly unjust to the white citizens of the Pacific coast . . . .<sup>201</sup>

Johnson's fears about the impact of the bill seem overdrawn, since the bill did not provide for the enfranchisement of Chinese immigrants. However, he clearly states his belief that Chinese immigrants were categorically racially undesirable as prospective members of the polity and his fear of "inundation" by Chinese migrants. Congress, despite both the procedural

199. CONG. GLOBE, 41st Cong. 2nd Sess. 3658 (1870), *quoted in* Dong, *supra* note 68, at 275-276.

200. CONG. GLOBE, 41st Cong. 2nd Sess. 3570 (1870) (remarks of Senator John Sherman, R-Ohio).

201. *Id.* at 3877-80.

and substantive objections, voted to adopt the proposed bill with the Chinese civil rights provisions intact.<sup>202</sup>

### *The 1870 Chinese Immigration Bills*

The second session of the Forty-First Congress, which saw the first federal legislation protecting Chinese immigrants' civil rights, was also notable for the rising tide of congressional concern over Chinese immigration. On the first day of the session, Senator Williams of Oregon introduced a bill to regulate Chinese immigration. That bill sought to prohibit the encouragement of Chinese immigration, the importation of any Chinese women unaccompanied by a husband or father, and to void contracts to provide employment to Chinese immigrants.<sup>203</sup> On January 25, 1870, Representative Johnson introduced a joint resolution on Chinese immigration. The resolution provided:

That any state suffering injury from the filthy habits, degrading vices, or customs practiced by Chinese residents thereof, may, if such habits, vices or customs become a nuisance, protect itself by state legislation, notwithstanding the existence of any treaty between the United States and the Chinese government. . . . That the free importation and immigration of Chinese laborers and debased and abandoned females is not for the best interest of the country, and therefore should be restrained and discouraged by all lawful means.<sup>204</sup>

In support of this resolution on immigration Representative Johnson stated:

I hope a large majority of the good people of this country believe its future greatness can best be secured by preserving the Caucasian blood in its purity; that the white man is superior to the Chinaman; that our country would be better off peopled entirely with our own kind than if mixed with an inferior and degraded race; that the better and more enlightened the inhabitants of a country are the more equitable, safe and certain are its laws; that a good virtuous, educated kindred population are more likely to cherish morality and religion, prosperity and liberty than would a base, degraded, uneducated, and debased population; even that a man is better off alone than with hostile robbers and thieves, than with a multitude bearing pestilence in their garments and reeking with filth and decay.<sup>205</sup>

202. *Id.* at 3884; Dong, *supra* note 68, at 273, 281. *But see* The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873) (distinguishing between state and federal citizenship); *United States v. Reese*, 92 U.S. 214, 23 L. Ed. 563 (1875) (striking down two voting rights sections of the 1870 Enforcement Act); *United States v. Cruikshank*, 92 U.S. 542 (1875) (criminal conspiracy section of the 1870 Act).

203. HUTCHINSON, *supra* note 106, at 58.

204. CONG. GLOBE, 41st Cong., 2nd Sess. 752 (1870). For the later Chinese exclusion laws, see *infra* note 252.

205. *Id.*

He then went on to argue that Chinese immigrants had all the negative attributes described, citing numerous contemporary writings to that effect.<sup>206</sup> He stated his opposition to Chinese testimony on the ground that they "will not tell the truth and have no regard for a judicial oath whatever."<sup>207</sup> Johnson then expressed his opposition to "universal" (and Chinese) suffrage as follows:

The Hottentots and cannibals from Africa and the Chinaman must all vote and hold office. A Chinese President, Hottentot Senate, cannibal House of Representatives, and a judiciary presided over by the pet lambs from San Domingo would insure tranquility, prosperity, and happiness at home . . . .

. . . If it be true that our civilization is better than their [Chinese] barbarism, then they are unfit for self-government, at least we are safer to keep it from them. The ideas these people have of government, their hatred of our race and institutions, make them a thousand times more dangerous than would be so many wild beasts. The wild beast would vote at random, like the Hottentot and the cannibal; but the Chinaman, if he could, would always vote against the interest of the white man.

If the Hottentot, the cannibal from the jungles of Africa, the West Indian negro, the wild Indian, and the Chinaman are to become the ruling element of our country, then call your ministers from abroad, bring your missionaries home, tear down your school-houses, convert your churches into dens and brothels, wherein our young may receive fatal lessons to end in rotting bones, decaying and putrid flesh, poisoned blood, leprous bodies, and leprous souls.

. . .

Now mark me as I conclude. You will never enfranchise the Chinaman no matter how many laws to that effect you pass; neither will you degrade California and the Pacific Coast by passing a Chinese civil rights bill authorizing the maintenance of a fleet of ships and an army of men to set the Chinamen above or on a level with our people. I threaten nothing but I know California; I know the army and navy is too small to protect the Chinese as voters in that state.<sup>208</sup>

Johnson considered the "Chinese" more dangerous to the polity than "Hottentots" or "cannibals" because the "Chinese" would vote intentionally against white interests, reflecting a race-based unfitness for participation in governance. Moreover, Johnson articulated state opposition to federal

---

206. *Id.* at 752-53. See STUART CREIGHTON MILLER, *THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE, 1785-1882* (1969) for a study of the development of American images of Chinese.

207. CONG. GLOBE, 41st Cong., 2nd Sess. 754 (1870).

208. *Id.* at 755-56.

supremacy with respect to "Chinese" suffrage and civil rights in language implying violent resistance to the assertion of federal military power at a time when many formerly secessionist states were under military rule, indicating the depth of his resistance to such a grant of rights. His proposal to delegate power to the states and to generate federal legislation to stop Chinese immigration was a harbinger of later exclusion laws. As a democratically elected representative, his views on Chinese immigration were likely similar to the views of his constituents.

### G. *The 1870 Naturalization Bill*

Proposals to amend the naturalization laws to extend citizenship to Blacks and Chinese immigrants by removing the word "white" from the naturalization laws were considered in the Fortieth (1867-1869) and Forty-First (1869-1871) Congresses. Though Congress decided to extend naturalization to Blacks, proposals for a similar extension of rights to Chinese immigrants were defeated because of concerns about entrusting political power to "foreigners."

Representative Fitch of Nevada proposed a modification to the naturalization laws during the Fortieth Congress which provided that "any aliens except natives of China and Japan may become citizens of the United States." In response, abolitionist Senator Sumner, Republican of Massachusetts, proposed a bill during the 41st Congress which stated: "all acts of Congress relating to naturalization be, and the same are hereby, amended by striking out the word 'white' wherever it occurs, so that in naturalization there shall be no discrimination of race or color."<sup>209</sup> Sumner's proposal would have rendered Chinese immigrants eligible for naturalization and granted them the rights, privileges and immunities of citizens, including the right to vote after the passage of the Fifteenth Amendment.<sup>210</sup>

Senators George H. Williams, Republican of Oregon, and William Stewart, Republican of Nevada, strongly opposed Sumner's bill. The rationale behind their opposition was typical of the prevailing Congressional views of the threat posed by Chinese immigrant citizenship. Senator Williams proposed an amendment to Sumner's bill: "[T]his act shall not be construed to authorize the naturalization of persons born in the Chinese Empire." A discussion on Chinese undesirability and the dangers of Chinese immigration ensued.<sup>211</sup> Williams stated his opposition to Sumner's bill thus: "Think of putting the political power and control of that beautiful section of the country into the hands of eighty thousand Chinamen; men

---

209. SANDMEYER, *supra* note 43, at 81, (quoting CONG. GLOBE, 41st Cong., 2d Sess. 4275-79, 5121-77 (1869-1870)). The discussion preceding the quoted language, and the language itself is from Sandmeyer. *Id.*

210. *Id.* at 81. The congressional debate on the proposed amendment is summarized in HUTCHINSON, *supra* note 106, at 57-58.

211. HUTCHINSON, *supra* note 106, at 57.

who know nothing of our Constitution, laws, customs, language or religion . . . ."<sup>212</sup>

Senator Stewart opposed naturalization of Chinese immigrants due to his fear of the effect of Chinese enfranchisement on the political future of the Pacific coast. He stated:

I do not propose to hand over our institutions to any foreigners who have no sympathy with us, who do not profess to make this country their home, who do not propose to subscribe to republican institutions, who cling to paganism and to despotism, and who are bound by contracts which make them slaves. I do not propose to surrender to them the political power of this country.<sup>213</sup>

Stewart characterized the naturalization bill as extending

naturalization to Chinese coolies, brought here under coolie contracts, by which they can be controlled by Chinese companies located in the city of San Francisco. They can not only be controlled in their labor, but controlled in their applications to be naturalized, and they will be equally controlled in their votes. They are pagans in religion, monarchists in theory and practice . . . [and the] edict from China or from these Chinese companies will be as perfect a control of these men as could possibly be had. It will be absolute and unqualified. It is proposed to extend to them the elective franchise, which follows citizenship under your fifteenth amendment.<sup>214</sup>

Stewart feared that the failure to check the "coolie trade" would add to the Chinese population already present, and that these voters, under the control of the "companies" and of China, would sway the political destiny of the Pacific Coast. His statements reflected a perception of deep-seated cultural/religious and political difference and a fear that, if such "foreigners" were to receive access to political power, they would gain political control at "our" expense.<sup>215</sup>

Sumner's bill was defeated in 1870, and language providing for naturalization of "aliens of African nativity and persons of African descent" was proposed in its place. A further liberalizing amendment to add "persons born in the Chinese empire" proposed by abolitionist Senator Trumbull of Illinois was soundly defeated. Trumbull stated that it would be inconsistent to deny Chinese "who (were) infinitely above the African in intelligence, in manhood, and in every respect" the privilege of naturalization while granting it to "Africans."<sup>216</sup> The bill extending naturalization to Blacks passed

---

212. CONG. GLOBE, 41st Cong., 2d Sess. 5158 (1870).

213. *Id.* at 5150.

214. *Id.*

215. *Id.*

216. CONG. GLOBE, 41st Cong., 2d Sess. 5177 (1870).

both houses, and was signed into law on July 14, 1870 by President Grant.<sup>217</sup>

#### H. Other Enforcement and Civil Rights Acts

In 1871, Congress passed two Acts which extended additional protections to Chinese immigrants: the 1871 Enforcement Act and the Ku Klux Klan Act. The 1871 Enforcement Act made it a crime "for any person, by force, threat, menace, intimidation, or other unlawful means, to prevent or hinder any person, having a lawful right to register to vote, from exercising such right."<sup>218</sup> This law extended protection to those few naturalized Chinese immigrants who could vote, as well as to the children of Chinese immigrants who were citizens by birth.

Of much greater significance was the Ku Klux Klan Act passed by Congress on April 20, 1871.<sup>219</sup> This law was not limited by its terms to citizens only, and some provisions reaching private conduct in some circumstances continue in effect.<sup>220</sup> Section one of the Ku Klux Klan Act provided a civil cause of action for deprivations of constitutional rights,<sup>221</sup> and survives as 42 U.S.C. section 1983.<sup>222</sup> Section two of the Ku Klux Klan Act<sup>223</sup> included a civil remedy for interference with parties, witnesses,

217. HUTCHINSON, *supra* note 106, at 58.

218. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433. Most of this act was repealed by Act of February 8, 1894, ch. 25, § 1, 28 Stat. 36.

219. Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871).

220. BUCHANAN, *supra* note 36, at 336. This Act was also known as the "Third Enforcement Act." KONVITZ & LESKES, *supra* note 180, at 61.

221. That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

17 Stat. at 13.

222. Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1988).

223. That if two or more persons within any State or Territory of the United States shall conspire together . . . by force, or intimidation, or threat to deter any party or witness in any court of the United States from attending such court, or from testifying in any matter pending in such court fully, freely and truthfully, or to injure any such party or witness in his person or property on account of his having so attended or testified, or by force, intimidation, or threat to influence the verdict, presentment, or indictment, of any juror or grand juror in any court of the United States, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or on account of his being or having been such a juror, or shall conspire together or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws . . . each and every person so offending shall be deemed guilty of a high crime, and, upon conviction thereof in any district or circuit court of the United States . . . shall be punished by a fine not less than five hundred nor more than five thousand dollars, or by imprisonment, with or without hard labor, as the court may determine, for a period of not less

and jurors in federal court proceedings, and is now codified as 42 U.S.C. section 1985(2).<sup>224</sup> Section two also provided a civil remedy for "anti-civil rights" conspiracies that survives as 42 U.S.C. section 1985(3).<sup>225</sup>

As originally enacted, these laws applied to Chinese immigrants since they either extended protection to "any person within the the jurisdiction of the United States"<sup>226</sup> and "any person or class of persons,"<sup>227</sup> or because "parties," "witnesses" and "jurors" were not defined in federal court proceedings as excluding non-citizens.<sup>228</sup> Furthermore, Section two of the May 31, 1870 Act provided for criminal penalties for conspiracies to deprive persons of equal protection of the law or rights or privilege under the law.<sup>229</sup> This provision survives as 18 U.S.C. section 241<sup>230</sup> and was

---

than six months nor more than six years, as the court may determine. And if any one or more persons engaged in such conspiracy shall do, or cause to be done, any act in furtherance of such conspiracy, whereby any person shall be injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the person so injured or deprived of such rights and privileges may have and maintain an action for the recovery of damages . . . against any one or more persons engaged in the conspiracy.

17 Stat. at 13-14.

224. (2) Obstructing justice; intimidating party, witness or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment or indictment lawfully assented to by him, or of his being or having been such a juror . . . .

42 U.S.C. § 1985(2).

225. (3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having or exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3).

226. Sec. 1, 17 Stat. at 13. Section two of this 1871 enactment reached the deprivation of the equal protection of the laws or equal privileges and immunities of "any person or class of persons." 17 Stat. at 13.

227. Sec. 2, 17 Stat. at 13.

228. *Id.*

229. Section six of the Act of May 31, 1870 was a narrower version of the criminal civil rights conspiracy provision that applied the deprivation of the free exercise of rights or privileges secured to citizens and provided for different penalties. 16 Stat. at 141. *But see* *United States v. Harris*, 106 U.S. 629 (1882) (striking down criminal conspiracy section of 1871 Ku Klux Klan Act).

230. If two or more persons conspire to injure, oppress, threaten or intimidate any person in any State, Territory or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or, if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping, aggravated sexual abuse or an attempt to commit aggravated

amended in 1988 to cover non-citizens.<sup>231</sup>

In 1875, Congress passed "An Act to Protect All Citizens in Their Civil and Legal Rights."<sup>232</sup> This act would have extended significant protections to Chinese immigrants had it not been largely eviscerated by the Supreme Court a few years later. The original version of this bill as proposed by Senator Sumner was a supplement to the Civil Rights Act of 1866 and included prohibitions against racial discrimination in public accommodations, schools, juries, and churches.<sup>233</sup> However, as enacted, the law provided for civil and criminal penalties for racial discrimination in public accommodations only; discrimination in schools, juries, and churches was left unaddressed.<sup>234</sup> The 1875 Act was the last piece of congressional civil rights legislation for eighty-two years, until the Civil Rights Act of 1957.<sup>235</sup> The first two provisions of the 1875 Act were struck down by the Supreme Court in the *Civil Rights Cases*.<sup>236</sup> The Court reasoned that Congress' enforcement power under the Thirteenth and Fourteenth Amendments does not reach private racial discrimination.<sup>237</sup>

Several years after the Supreme Court's decision in the *Civil Rights Cases*, the Court upheld a Louisiana statute mandating that railroads provide 'equal but separate' facilities to Blacks and whites in *Plessy v. Ferguson*.<sup>238</sup> Justice Harlan's famous dissent in *Plessy*<sup>239</sup> is frequently cited for its articulation of an ideal of "color-blind" constitutional interpretation.<sup>240</sup> Ironically, Justice Harlan's dissent also includes statements that indicate tacit acceptance of the view that Chinese immigrants' racial/cultural differences precluded their access to American citizenship:

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded

---

sexual abuse, or an attempt to kill, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. § 241 (1994).

231. The change in language was from "citizen" to "person" conforming the language to the companion criminal statute, 18 U.S.C. § 242, 18 U.S.C. § 241 (1996).

232. Act of Mar. 1, 1875, ch. 114, 18 Stat. 335.

233. CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870).

234. 18 Stat. at 336.

235. KONVITZ & LESKES, *supra* note 180, at 63. An 1894 act of Congress repealed all but seven of the 49 provisions in the enforcement acts. Act of Feb. 8, 1894, ch. 25, 28 Stat. 36. In 1909, the civil rights and suffrage enactments were reduced to eight sections in chapter three of the criminal code. Act of Mar. 4, 1909, ch. 321, 35 Stat. 1088, 1153, discussed in KONVITZ & LESKES, *supra* note 180, at 66.

236. 109 U.S. 3 (1883).

237. *Id.* But see *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) (holding that the Thirteenth Amendment's enforcement power reaches private discrimination in the sale or rental of property).

238. 163 U.S. 537 (1896).

239. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id.* at 559.

240. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana . . . are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.<sup>241</sup>

The statement about Chinese immigrants being excluded and forbidden to become citizens by law is factually accurate, but Justice Harlan's use of this fact in a throwaway argument in his dissent seems to reflect an acceptance of the situation that renders his "great dissenter" status problematic for an Asian American reader. Though Justice Harlan may not have meant to suggest that the Chinese exclusion laws were good or just,<sup>242</sup> his statement shows that by 1896 the racial categorical exclusion of Chinese immigrants from access to membership in the polity through denial of access to naturalization was sufficiently well-established to be used as an argument against state-sponsored segregation of United States citizens of African descent.

### III.

#### RACIAL NATIVIST RATIONALES FOR CHINESE EXCLUSION

Congress passed a series of immigration exclusion laws beginning in 1875, including the 1875 Page Law and the 1882 Chinese Exclusion Act. Given the racial nativism expressed in the Reconstruction debates and in the 1877 Joint Special Committee report, it is a fair inference that one purpose of the legislative scheme of Chinese exclusion was the preservation of white supremacy. Legal scholar Bill Ong Hing states that the presence of Asians in the United States resulted in the reconceptualization of the role of immigration law in the construction of the national community.<sup>243</sup> While the Reconstruction amendments and laws expanded the protections afforded to aliens largely as an incident of their expansion of citizens' rights, the later exclusion laws closed the door on immigration from Asia. The Court repeatedly upheld the exclusion laws, echoing the statements of Reconstruction Congress members about the threat posed by Chinese immigration to American institutions and polity.

The 1875 Page Law<sup>244</sup> was significant in that it was the first federal legislation defining certain classes of individuals as "excludable," thereby prohibiting their entrance to the United States. This law marked the "begin-

---

241. *Plessy*, 163 U.S. at 561.

242. Justice Harlan did not dissent in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the Chinese exclusion case). Moreover, Chief Justice Fuller and Justices Brewer and Field dissented in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), but Justice Harlan did not.

243. HING, *supra* note 47, at 19.

244. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.

ning of direct federal regulation of immigration."<sup>245</sup> Most of the act was directed to the regulation of the "problems" of Chinese prostitution and Chinese "coolie" labor.<sup>246</sup> Among the excludable classes were women imported "for the purposes of prostitution" and convicted felons who had not completed their sentences. The law also provided penalties for contracting to supply "coolie" labor, required shipmasters to ascertain prior to receiving a required certificate to embark for the United States whether any immigrant on board was under a service contract for a term of years for "lewd and immoral purposes," and prohibited the importation of "Oriental" persons without their free and voluntary consent.<sup>247</sup>

The 1882 Chinese Exclusion Act<sup>248</sup> was the first national race-based immigration exclusion in American history and thus was a watershed event in U.S. immigration policy.<sup>249</sup> The 1882 Exclusion Act, entitled "An Act to Execute Certain Treaty Stipulations Relating to Chinese," suspended immigration of Chinese laborers for ten years, provided that laborers who left temporarily had to have a certificate of prior residence to return, and declared that Chinese immigrants were racially ineligible to become naturalized citizens.<sup>250</sup> This act "was the culmination of three decades of racist agitation against the Chinese in California . . . [and] marked a change from [a] free and unrestricted to a racist and restricted immigration policy. It [was] a watershed in U.S. immigration history and was to have far reaching effects on the subsequent development of Asian American communities."<sup>251</sup>

Chinese immigrants challenged the 1882 Exclusion Act and later federal restrictions<sup>252</sup> on their migration. In *Chae Chan Ping v. United States*,<sup>253</sup> the Court upheld the constitutionality of an 1888 amendment to

---

245. HUTCHINSON, *supra* note 106, at 66. See also Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in CHAN, *supra* note 26, at 105-09 (discussing the Page Law and its impact).

246. HUTCHINSON, *supra* note 106, at 65-66.

247. *Id.*

248. Act of May 6, 1882, ch. 126, 22 Stat. 58.

249. HUTCHINSON, *supra* note 106, at 430, 478.

250. 22 Stat. at 59-61.

251. H. Mark Lai, *The Chinese Exclusion Act: Observations of a Centennial*, 9 AMERASIA J. 1 (1982). Jan C. Ting, *Other Than a Chinaman*, WASH. POST, July 11, 1993, § C at 7.

252. The major subsequent amendatory acts and renewals included Act of Apr. 27, 1904, Pub. L. No. 189, ch. 1630, 33 Stat. 394, 428 (making permanent Chinese exclusion); Act of Apr. 29, 1902, Pub. L. No. 90, ch. 641, 32 Stat. 176; Act of May 5, 1892, ch. 60, 27 Stat. 25; Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504; Act of July 5, 1884, ch. 220, 23 Stat. 115. Chinese exclusion was repealed during World War Two. Act of Dec. 17, 1943, Pub. L. No. 199, ch. 344, 57 Stat. 600.

253. *In re Chae Chan Ping*, 36 F. 431 (C.C.N.D. Cal. 1888), *aff'd*, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (the Chinese exclusion case). Chae Chan Ping, a Chinese laborer, sought release from the custody of Captain Walker of the steamship *Belgic* by way of a petition for habeas corpus. The Port of San Francisco's customs collector refused to allow Chae Chan Ping to land, based on § 2 of the 1888 Act which provided "[t]hat no certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States." 130 U.S. at 599 (quoting § 2, Act of Oct. 1, 1888, ch. 1064, 25 Stat. 504 (1888)).

the 1882 Exclusion Act which rescinded all certificates of prior residence and thus precluded the return of Chinese residents who had travelled abroad. Although the amendment abrogated in part certain treaties, the Court found that it was a constitutional exercise of the legislative power because the power to exclude aliens is an incident of national sovereignty which cannot be surrendered by the treaty-making power.<sup>254</sup> The Court stated that whatever license Chinese laborers obtained before the 1888 Exclusion Act to return to the United States was "held at the will of the government, revocable at any time, at its pleasure."<sup>255</sup>

The racial construction of Chinese immigrants as a foreign, alien threat articulated in the debates over the Reconstruction amendments and civil rights laws was echoed in the Court's decision in *Chae Chan Ping*. In his opinion for the Court, Justice Field argued that the restrictive changes to the treaty scheme regulating migration of United States citizens to China and of Chinese persons to the United States were

justified "by a well-founded apprehension . . . that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there."<sup>256</sup> The Court stated that Chinese immigrants were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent irritation, proportionately deep and bitter [leading to conflicts and] to the great disturbance of the public peace.<sup>257</sup>

The Court noted that difficulties of enforcement, because Chinese witnesses entertained "loose notions . . . of the obligation of an oath," led to the amendments of the 1882 act.<sup>258</sup> Finally, the Court stated that the Chinese immigrants were

strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any changes in their habits and modes of living. As they grew in numbers each year the people of the coast saw . . . great danger that at no distant

---

254. *Chae Chan Ping*, 130 U.S. at 609.

255. *Id.*

256. *Id.* at 594. The Court noted that the California constitutional convention of 1879 had memorialized the United States Congress that Chinese "immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization." *Id.* at 595.

257. *Id.* at 595.

258. *Id.* at 598.

day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration.<sup>259</sup>

A few years later, in 1892, Congress passed "An Act to Prohibit the Coming of Chinese Persons to the United States."<sup>260</sup> The 1892 Act required all Chinese persons in the United States to register and acquire certificates of lawful residence, and provided for their deportation if found without such a certificate.<sup>261</sup> The Act also contained provisions that Chinese immigrants, under certain circumstances, were required to proffer the evidence of a "credible white witness" to meet their burden of proof that they were eligible to remain in the United States.<sup>262</sup>

In *Fong Yue Ting v. United States*,<sup>263</sup> the Court rejected a constitutional challenge to the 1892 Exclusion Act. The Court upheld the registration and deportation provisions,<sup>264</sup> as well as the statutory requirement that the Chinese person offer proof of entitlement to continued residency by testimony from a "credible white witness."<sup>265</sup> The Court found that the right to expel aliens unlawfully present followed from the right to exclude aliens, and that the act was constitutional even though it directly contravened stipulations of a prior treaty.<sup>266</sup> The Court reiterated the "racial" justification for the exclusion acts:

[T]he presence within our territories of large numbers of Chinese laborers, of distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests.<sup>267</sup>

The very fact that Chinese immigrants mounted a litigation and civil disobedience campaign challenging discriminatory laws and Chinese exclusion though, itself evidences a measure of both familiarity with American

259. *Id.* at 595.

260. Act of May 5, 1892, ch. 60, 27 Stat. 25.

261. *Id.*; *Fong Yue Ting v. United States*, 149 U.S. 698, 726-28 (1893).

262. 27 Stat. at 26.

263. 149 U.S. 698. The differing factual circumstances of the three habeas corpus petitioners who presented challenges indicates that this case was brought as a test case. The first petitioner, Fong Yue Ting, failed to acquire the required certificate, was arrested by the United States Marshal who intended to take him before the district court for a judgment of deportability, and admitted to the Marshal that he did not have a certificate. The second petitioner, Wong Quan, was arrested, brought before a judge, and ordered deported. The third petitioner, Lee Joe, sought a certificate of residence within the time period provided by the statute. The internal revenue collector refused to grant him a certificate because he had been able to produce only Chinese persons as witnesses to prove his entitlement to the certificate, and Chinese persons were not considered credible witnesses. The court also ordered him to be deported. *Id.* at 702-04, 731-32.

264. *Id.* at 726-29.

265. *Id.* at 729-30.

266. *Id.* at 713-14, 720, 724.

267. *Id.* at 717.

institutions and of assimilation. The *Fong Yue Ting* decision ended an organized national campaign in the Chinese immigrant community, which had refused to comply with the 1892 Act's registration requirements, on the theory that the act was unconstitutional.<sup>268</sup> The Chinese immigrants' lobbying efforts and their non-violent resistance to racial discrimination in immigration policy is evidence of their agency in the transformation of racial meanings through political contestation. The Chinese immigrants' resistance shows they were not merely passive victims of oppression, notwithstanding the congressional and judicial articulation of a conception of Chinese immigrants as foreign and unassimilable. This "race-ing" of Chinese immigrants clearly influenced the judicial decisions upholding the Chinese exclusion laws and prefigured the "race-ing" of other Asian immigrant groups prior to their respective exclusions.<sup>269</sup>

### CONCLUSION

Congress and the courts were arenas in which "race-based" determinations about membership and access to membership in the American polity were made. Reconstruction-era Congress members' perceptions about Chinese immigrants reflected an ideological construction of the Chinese as a "foreign" group whose deep-seated, ineradicable cultural, political, and religious differences rendered them undesirable as prospective members of the polity. Congress members expressed fear that Chinese migration and suffrage threatened white supremacy on the west coast. The subsequent enactment of Chinese exclusion laws may have rendered moot the fears of Chinese "inundation."<sup>270</sup>

Reconstruction era constitutional amendments and civil rights laws did provide some protection to Asians in the United States. In particular, the

---

268. L. Eve Atmentrout Ma, *Chinatown Organizations and the Anti-Chinese Movement, 1882-1914*, in ENTRY DENIED *supra* note 26, at 155; see also CHINESE EQUAL RIGHTS LEAGUE, APPEAL TO THE PEOPLE OF THE UNITED STATES FOR EQUALITY OF MANHOOD (1892), excerpted in PHILIP S. FONER & DANIEL ROSENBERG, *RACISM, DISSENT AND ASIAN AMERICANS FROM 1850 TO THE PRESENT* 118-20 (1993). The league was initiated by Chinese merchants in New York City, had some 200 Chinese and 1000 non-Chinese supporters, and formed to oppose the "Chinese Registration Act" upheld by *Fong Yue Ting*.

269. For a comprehensive account of the effects of immigration policy on Asian America, see HING, *supra* note 47.

270. Professor William Nelson of N.Y.U.'s legal history colloquium suggested this perspective. But see DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992). The reconstruction debates make clear that the views expressed by Chief Justice Murray in his opinion for the court in *People v. Hall*, 4 Cal. 399 (1854) regarding Chinese immigrants were not unique to him or his time. I define "racial ideology" as a theory or set of beliefs, which may be either implicitly or explicitly understood, about how power in a society should be organized based on "race." For example, white supremacy is a racial ideology. Works dealing with historical changes in racial ideology include ALEXANDER SAXTON, *THE RISE AND FALL OF THE WHITE REPUBLIC: CLASS POLITICS AND MASS CULTURE IN NINETEENTH CENTURY AMERICA* (1990); Barbara Fields, *Ideology and Race in American History* in RACE, REGION AND RECONSTRUCTION (Morgan Kousser & James M. McPherson eds.,) (1982). For a comparative perspective, see GEORGE FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981).

provisions of the first Enforcement Act in 1870 relating to testimonial exclusion and selective taxation benefited Chinese immigrants. Later judicial interpretations of the Fourteenth Amendment also benefited them. However, legal protections for Asians in the United States were circumscribed along with those of the African freedmen and women by the Supreme Court's interpretations of the scope of protection afforded by these amendments and laws.<sup>271</sup>

In recent years there has been increasing discussion of immigration issues in national political and intellectual discourse.<sup>272</sup> This in turn has led to legislative initiatives at the state and the federal level, to restrict immigration. The views expressed by contemporary advocates of immigration restriction resonate with the historical constructions of Chinese immigrants as unassimilable, foreign, inferior, dangerous and ineligible to be "American." Both the historic and the contemporary views reflect an ideological construction of the American nation as "white." This white supremacist national identity, if it exists, was created in part through the exclusion of immigrant groups, particularly Asians, deemed racially inferior and undesirable.

A sampling of the contemporary views which illustrates the resurgence of racial nativism as a significant factor in American public life includes the following recent events. Senator Alan Simpson, Republican of Wyoming, a leading immigration reformer, stated in a 1981 Select Commission report that

[a]lthough the subject of the immediate economic impact receives great attention, assimilation to fundamental American public values and institutions may be of far more importance to the future of the United States. If . . . a substantial portion of the newcomers and their descendants do not assimilate . . . [and] linguistic and cultural

---

271. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873); *United States v. Reese*, 91 U.S. 214 (1875) (striking down two voting rights sections of the 1870 Enforcement Act); *United States v. Cruikshank*, 92 U.S. 542 (1875) (criminal conspiracy section of the 1870 Enforcement Act); *United States v. Harris*, 106 U.S. 629 (1882) (criminal conspiracy section of 1871 Ku Klux Klan Act); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (1875 public accommodations act). *See also*, *Baldwin v. Franks*, 120 U.S. 678 (1887) (granting writ of habeas corpus to defendant involved in "driving out" Chinese from a California town).

272. RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 423, 440-44 (3d ed. 1988) discusses the anti-Mexican sentiment mobilized around both English-only initiatives and immigration reforms in the 1980s. The terms "alien" or "illegal alien" are often used as a racialized code words to dehumanize Mexican and other immigrants or undocumented persons of color. *See also* Penny Loeb et al., *To Make A Nation: How Immigrants are Changing America for Better or Worse*, U.S. NEWS & WORLD REP., Oct. 4, 1993, at 47, 49 (profiling different immigrant groups and focusing on how immigration affects different communities across the United States); Jack Miles, *Immigration and the New American Dilemma: Blacks vs. Browns*, ATLANTIC MONTHLY, Oct. 1992, at 67 (focusing on economic competition between Blacks and immigrant groups); PETER H. SHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS AND THE AMERICAN POLITY* (1985) (arguing that Fourteenth Amendment need not be read to grant citizenship to American-born children of aliens).

separatism rise above a certain level, the unity and political stability of the nation will in time be seriously eroded.<sup>273</sup>

In a June 1993 program on immigration, news commentator David Brinkley read a letter from "a middle-aged woman" which stated:

Will I or my children see the end of our United States, as we have known it? Will we see the end of our 350-year-old legal and social system and our language, washed away in a flood of immigrants, legal and illegal, while we who have lived here for generations are allowed to have nothing whatever to say about it?<sup>274</sup>

Racial nativist attitudes have been brought to the surface in the 1996 primaries to the presidential race by Republican candidate Patrick Buchanan. On the topic of immigrants and assimilability to American institutions, Buchanan stated:

"If we had to take a million immigrants in, say, Zulus, next year or Englishmen, and put them in Virginia, what group would be easier to assimilate and cause less problems?"<sup>275</sup>

During the 1992 presidential election, Buchanan proposed building a "Buchanan ditch,"<sup>276</sup> a concrete-buttressed fence and ditch along the U.S.-Mexican border to stop Mexican immigration.<sup>277</sup>

In 1993 Governor Wilson of California proposed that children of "illegal aliens" born in the United States should be excluded from birthright citizenship.<sup>278</sup> He blamed California's budget problems on refugee and immigrants of color welfare recipients, and proposed reducing recent immigrants' eligibility for benefits.<sup>279</sup> In 1994, California voters passed "Proposition 187," which provides for, among other things, a system of cooperation and notification between state agencies and the Immigration and Naturalization Service when "illegal aliens" seek primary, secondary or post-secondary education, publicly-funded non-emergency health care, or other benefits, and for criminal penalties for the production or use of

---

273. John Hayakawa Torok, *"Interest Convergence" and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asians, 1943-1965*, in CHINESE AMERICA: HISTORY AND PERSPECTIVES 1995 1, 13-15 (1995).

274. *This Week With David Brinkley* (ABC television broadcast, June 20, 1993) transcript available in LEXIS, Nexis Library).

275. DeWayne Wickham, *Where Do Haitians Fit in the New World Order?*, Gannett News Service, May 25, 1992 available in LEXIS, Nexis Library.

276. David Frum, *Immigration Policy at a Turning Point*, THE FINANCIAL POST, Feb. 6, 1993, § 4, at S2.

277. Sebastian Rotella, *Migrants Hear Buchanan Pitch a Tighter Border Speech*, L.A. TIMES, May 13, 1992, at B1.

278. *Seeking to Deny Citizenship to Some*, N.Y. TIMES, Aug. 11, 1993 at A10 (Governor Pete Wilson, R-CA, proposes denial of citizenship to American-born children of "illegal aliens" in public letter to President Clinton); Alan C. Nelson, *A Governor's Brave Stand on Illegal Aliens*, N.Y. TIMES, Aug. 23, 1993 at A15 (op-ed by former Commissioner of Immigration and Naturalization Service supporting same).

279. *Return of the Nativist*, THE ECONOMIST, June 27, 1992, at 25.

false documentation for immigration purposes.<sup>280</sup> Section one of the proposition states:

The People of California find and declare as follows: That they have suffered and are suffering economic hardship caused by the presence of illegal aliens in this state. That they have suffered and are suffering personal injury and damage caused by the criminal conduct of illegal aliens in this state. That they have a right to the protection of their government from any person or persons entering this country unlawfully. Therefore, the People of California declare their intention to provide for cooperation between their agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States from receiving benefits or public services in the State of California.<sup>281</sup>

This initiative resonates with historic state anti-Chinese legislation directed towards preventing or reducing Chinese immigration to California.<sup>282</sup> The impetus for Proposition 187 was the contemporary resurgence of racial nativism.<sup>283</sup> Relief from this product of state-level majoritarian processes is being sought through the courts,<sup>284</sup> a development which also is consistent with the history of litigation challenges to restrictive immigration legislation. "Race" has as at least as much to do with these political developments, as the current economic climate. Deep-seated views about the racial inferiority of non-white immigrants are a factor that needs to be understood as influential, and perhaps central, in the current debates on and legislative changes affecting United States immigration policy.

---

280. Proposition 187, CAL. PENAL CODE §§ 113, 114, 834b (Deering 1995); CAL. WEL. & INST. CODE § 10001.5 (Deering 1995).

281. *Id.*

282. See generally McCLAIN, *EQUALITY*, *supra* note 64. *Chy Lung v. Freeman*, 92 U.S. 275 (1876) may be applicable. The circumstances surrounding this decision are discussed in Sucheng Chan, *The Exclusion of Chinese Women, 1870-1943*, in CHAN, *supra* note 26, at 94, 97-105; and in JANISCH, *supra* note 54, at 314-41. The Court struck down a California statute that authorized an individual state Commissioner of Immigration to require shipowners to post \$500.00 bonds or to pay such sums as the Commissioner chose to exact, where the commissioner had determined that the passengers were in the statutorily enumerated class of "lewd and debauched women." The Court found that this regulation exceeded the state's police power and to the extent that it interfered with the rights of certain classes of persons to commercial and personal intercourse with the United States, infringed upon Congress' exclusive power to regulate commerce with foreign nations. The Court stated that the "passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States." 92 U.S. at 280.

283. Arthur C. Helton, *Closing the Golden Door: Anti-Immigration Laws*, THE NATION, Oct. 18, 1993, at 428; Jose E. Serrano, *Dehumanizing the Desperate*, N.Y. NEWSDAY, Sept. 9, 1993, at 58; Tim Weiner, *On These Shores, Immigrants Find a New Wave of Hostility*, N.Y. TIMES, June 13, 1993, at 1; *Not Quite So Welcome Anymore*, TIME, SPECIAL ISSUE, THE NEW FACE OF AMERICA: HOW IMMIGRANTS ARE SHAPING THE WORLD'S FIRST MULTICULTURAL SOCIETY, Fall 1993 at 10-12.

284. *Spreading the Word on Prop. 187: Immigration Activists Plan Campaign to Dispel Uncertainty in Wake of Federal Ruling That Put it on Hold*, L.A. TIMES, Dec. 16, 1994 at A3; *Federal Judge Keeps Injunction on Prop. 187*, S.F. CHRON., Dec. 15, 1994 at A1.

