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## "In Search of Equality," Review Essay

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# REVIEW ESSAY

IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA. BY CHARLES J. McCLAIN.† BERKELEY, CALIFORNIA: UNIVERSITY OF CALIFORNIA PRESS, 1994. PP. X, 385.

*Reviewed by Robert C. Berring‡*

I was reading *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America* [hereinafter *In Search of Equality*] by Charles J. McClain while riding a taxi to the Oakland airport. The taxi driver noticed the book and asked me what it was about. So I regaled him with stories of Chinese American history, stories about the 1879 Constitution and the anti-Chinese riots of 1885-1886. I told him how the Chinese, despite ever-present obstacles, attempted to utilize the legal system to its fullest extent and to invoke the protection of the law against discrimination. The driver's very real shock took me aback. He professed complete astonishment and queried how it could be that he, a college-educated, 45-year old Californian, could know nothing of this. The driver's question was a fair one, and it highlights the importance of this book as a first step towards enlightenment about the Chinese struggle for equality. The driver made me realize Professor McClain's achievement: he had rediscovered and made accessible an important aspect of Chinese American history.

Professor McClain clearly sets out his mission in writing this book: "The thesis of this book is that the conventional wisdom concerning the Chinese and their supposed political backwardness needs to be stood on its head" (p. 3). He wants us to see a period of legal history in an entirely new way, with the characters in different roles. McClain finds that contrary to the traditional view of the Chinese as a helpless, isolated, and alienated group acted upon by a hostile society, the Chinese were active, adept users of the legal system, who often successfully resisted oppression by the legislature and the courts. As McClain writes, "[t]he book may be seen then, in this respect, as part of a movement in the historiography of the Chinese immigration that has taken hold in recent years, one that tries to break free

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of stereotypes and to see the Chinese more as subjects and shapers than as objects of history" (p. 4).

Does this book fulfill the goal it sets for itself? Through *In Search of Equality*, McClain retells the story of anti-Chinese discrimination that has been forgotten by popular consciousness. Such discrimination, rooted in hatred and born of ignorance, was planted in the legal codes and judicial decisions themselves. McClain recounts the many losses and victories of the Chinese as they actively resisted each violation of their rights. Instead of being helpless victims, unaware of available protections, the Chinese immigrants were skilled at using the full power of the legal system to defend themselves. Unfortunately, the fact that they were legally correct did not always protect them. The importance of McClain's book lies in the lessons taught by these stories of the Chinese and their struggle against discrimination.

The failings of *In Search of Equality* may well lie in the tasks that it did not set for itself, tasks that run beyond the simple recounting of a story. This book is strong on providing data, but weak on analysis. The interplay of racism and politics boils beneath the surface of the narrative—but it stays there. This criticism may be somewhat unfair because Professor McClain set out to tell the story of the Chinese struggle, not to analyze it. And inherently, the factual narrative has enormous value, at the very least as a potential stepping stone for similar analytical tools to come.

In this review essay, I will summarize the book, following the layout and headings used by McClain. While Professor McClain's treatment is so replete with detail that no summary can do it complete justice, a brief discussion and analysis of the major sections of the book will be useful to convey the way the book documents the history of Chinese Americans. In the last section, I assess the book overall and its dual importance as a source of forgotten Chinese American history and as a basis for future works of this kind.

## PART I.

### THE BEGINNINGS OF DISCRIMINATION AND THE FIRST CHINESE RESPONSE

In Part I of his book, Professor McClain methodically documents pre-1880 attempts to discriminate against the Chinese. In the first chapter, McClain discusses how the Chinese presence in California was seen first as a benefit and then increasingly as a threat to the white majority and especially to miners (pp. 9-10).<sup>1</sup> McClain chronicles a progression of attempts by both the California legislature and various municipal governments to make life difficult for the Chinese immigrants. He begins by carefully reviewing the legislature's attempts to force the Chinese to pay special dis-

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1. However, the initial roseate vision of the Chinese passes in two pages.

criminatorial taxes. Among the taxes which McClain discusses are: miners' taxes,<sup>2</sup> which applied even to the Chinese who were not miners;<sup>3</sup> commutation taxes, which forced the posting of bonds for each Chinese person who arrived in the state;<sup>4</sup> and police taxes, which were designed to force all Chinese to pay a per capita tax while denying them police assistance.<sup>5</sup> The purpose of these enactments was clear; they were designed to drive the Chinese out of California.

The Chinese response was also clear, as they skillfully and repeatedly attempted to defeat this hostile legislation in the courts. In the second chapter, McClain recounts how the Chinese challenged the validity of the taxes and as a result were often able to avoid paying them.<sup>6</sup> What is especially striking is the organized and sophisticated way the Chinese community fought the hostile laws at each step. Operating through the Chinese Six Companies, which were regional affinity groups that represented Chinese American residents, the Chinese mobilized community support. They hired American lawyers, including some of the most astute legal minds in the nation, to underwrite a series of test cases that challenged each piece of discriminatory legislation as it was enacted.<sup>7</sup> Also, as early as 1853, the

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2. In May 1852, the California legislature passed a bill to reenact the Foreign Miners' License Tax which set a monthly license fee of three dollars and denied access to the courts to anyone who did not have a license. Act of May 4, 1852, ch. 37, §§ 1, 6-10, 1852 Cal. Stat. 84, 84-86 (repealed 1853).

3. In 1861, this law was revised so that all foreigners residing in mining districts who were not eligible for citizenship would be considered miners and thus made liable under the law. Act of May 17, 1861, ch. 401, § 93, 1861 Cal. Stat. 419, 448.

4. Masters of all vessels arriving in California ports were required to prepare a list of all foreign passengers and to post a \$500 bond for each of these passengers. Act of May 3, 1852, ch. 36, §§ 1-2, 1852 Cal. Stat. 78, 78-79 (repealed 1945). The bond could be commuted by the payment of five to fifty dollars per passenger. § 3, 1852 Cal. Stat. at 79. "In practice, the bond was routinely commuted by the payment of the [five-dollar] fee, the sum having been simply added as a surcharge to the basic price of passage. The Chinese passengers, in other words, bore the full burden of the act" (pp. 12-13).

5. The Chinese Police Tax, entitled "An Act to protect Free White Labor against competition with Chinese Coolie Labor, and to discourage the Immigration of the Chinese into the State of California," imposed a tax of two dollars and fifty cents per month on all Chinese residing in the state except those who were operating businesses, had licenses to work in the mines, or were engaged in the production or manufacture of sugar, rice, coffee, or tea. Act of Apr. 26, 1862, ch. 339, § 1, 1862 Cal. Stat. 462, 462 (repealed 1939).

6. See *Lin Sing v. Washburn*, 20 Cal. 534 (1862) (holding that the police tax was void because it interfered with the federal government's exclusive power over foreign commerce, including foreign immigration); *Ah Hee v. Crippen*, 19 Cal. 491 (1861) (holding that a Chinese miner could recover his horse which had been seized to enforce payment of the Foreign Miners' License Tax because, based on statutory construction, the tax only applied to those who mined public lands); *Ex parte Ah Pong*, 19 Cal. 106 (1861) (holding, based on statutory construction, that a Chinese laundryman living in a mining district could not be forced to pay a miners' tax).

7. To challenge an amendment to the San Francisco laundry licensing order that would have resulted in the Chinese paying the highest quarterly fees, Chinese "laundrymen hired Henry H. Haight, former Democratic governor of California, to represent them" (p. 51).

Leander Quint, a former judge, was retained to apply for writs of habeas corpus on behalf of twenty-two women who were detained on a steamship. The women were accused of being prostitutes and were therefore not allowed into California based on a statute which required all Chinese women seeking to enter the state to show proof of voluntary immigration and "correct character" (pp. 56-57).

Chinese sent delegations to plead their case to the state legislature and by 1860 had hired a lobbyist to speak for their interests in Sacramento.<sup>8</sup>

With respect to the miners' taxes, representatives from the Chinese Six Companies, armed with copious information and records, presented their grievances to the legislative Committee on Mines and Mining Interests. The representatives opposed the increasing attacks on the Chinese by white miners and the courts' refusals to accept the testimony and statements of Chinese witnesses because of their race. The association leaders argued for justice and equity and offered a proposal, focusing on trade and commerce issues, which they claimed might persuade the people in mining counties that the Chinese presence was a benefit. Although its report agreed in part with the Chinese, the Committee on Mines and Mining Interests ultimately recommended that the monthly license fee be increased by one dollar (pp. 15-16).<sup>9</sup>

Perhaps the longest, most bitter fight of this period was the struggle over the right of Chinese persons to testify in California courts. Professor McClain provides a careful analysis of *People v. Hall*,<sup>10</sup> one of the most shameful cases in the California Reports. From Professor McClain's account, the reader sees that *Hall* is both an emblem of legalized discrimination and a symbol of vacuous legal reasoning (pp. 20-22). In this case, the testimony of a Chinese witness was challenged under a California statute that stated, "No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person."<sup>11</sup> The testimony had been used to convict George W. Hall, a white man, and two others for the murder of a Chinese man, Ling Sing (pp. 20-21).<sup>12</sup>

The statute was offensive enough on its face, but what the court did, in an opinion by Chief Justice Hugh C. Murray, was even more twisted. Judge Murray "reasoned" that Columbus thought that he was in India when

In 1876, the California Senate launched an inquiry into Chinese immigration. Not surprisingly, the California Senate determined that Chinese immigration was an "unmitigated evil" and demanded that Congress suppress it. In response, the Joint Special Committee to Investigate Chinese Immigration held a hearing in San Francisco, ultimately agreeing with the state senate's findings. During the hearings, Frederick A. Bee, a legally-trained businessman, and Benjamin Brooks, a prominent local attorney, represented the Chinese. They proved to be "valuable allies" in the future (pp. 63-65).

8. The Chinese had approached Reverend A.W. Loomis, head of the San Francisco mission to the Chinese and told him that they needed "some laws altered." Loomis persuaded a lawyer who was a former city judge to serve their interests (pp. 23-24). Typical of Professor McClain's careful research and direct approach, he states in a footnote that "[u]nfortunately, the judge's identity remains a mystery. We know only that he was 'an elder in Dr. Anderson's church'" (p. 295 n.107).

9. ASSEMBLY COMMITTEE ON MINES AND MINING INTERESTS, REPORT TO CAL. GEN. ASSEMBLY OF 1853, at 9 (1853). The legislature enacted this recommendation into law in March 1853. Act of Mar. 30, 1853, ch. 44, § 6, 1853 Cal. Stat. 62, 63 (repealed 1939).

10. 4 Cal. 399 (1854).

11. Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230 (repealed 1955). A similar provision applied to testimony in civil cases. Act of Apr. 29, 1851, ch. 5, § 394(3)-(4), 1851 Cal. Stat. 51, 114 (repealed 1955).

12. *Hall*, 4 Cal. at 399.

he landed in America, and that thus the Indians he encountered were Asiatics. Judge Murray further "reasoned" that at the time the statute was enacted, most scientists thought that the Mongoloid and Native American races were the same (p. 21).<sup>13</sup> On this basis, Judge Murray concluded that Chinese immigrants were encompassed within the term "Indian."<sup>14</sup> Judge Murray concluded with a more straightforward statement that the word "black" in the statute must be understood in the generic sense as including all races other than white.<sup>15</sup>

McClain underlines the legacy of anti-Chinese discrimination and Chinese resistance by explaining the implications of *Hall* and the Chinese community's futile attempt to fight it. By prohibiting the testimony of any Chinese person in California criminal cases, the court in *Hall* left the Chinese without recourse to the courts. The incensed Chinese community did everything it could to overturn the decision. The community quickly protested the decision, including an open letter from Lai Chun-chuen, a prominent San Francisco merchant, to then Governor John Bigler. Although ethnocentric in its attack on the *Hall* decision, in that it communicated disgust at the court's conclusion that the "Chinese are the same as Indians and Negroes," the letter exemplified the deep, widespread resentment in the Chinese community against *Hall* (p. 22). This resentment was not limited to the Chinese; many whites also actively protested the decision (p. 22). Despite the protests from the Chinese as well as some members of the white community, the legislature codified the *Hall* decision in 1863<sup>16</sup> and even extended it to civil cases.<sup>17</sup>

Perhaps the best example McClain offers of Chinese resistance in the face of high-level legal discrimination is his account of *People v. Brady*.<sup>18</sup> When the Fourteenth Amendment of the U.S. Constitution was passed, the Chinese community was quick to invoke the equal protection clause to challenge the discriminatory holding in *Hall*. The rationale made logical sense: Would not the equal protection clause protect a Chinese person's right to testify in court? After a series of lower court victories, however, the California Supreme Court answered that question with a "no," dashing hopes for the protection of the right of the Chinese to testify.

In *Brady*, a case almost as stunning as *Hall* in its perverse use of legal reasoning and argument, the Supreme Court of California found that since *no* defendant, neither white nor Chinese, could use the testimony of a Chinese witness to buttress a case in court, the statute applied equally to all. Therefore, it did not violate the equal protection clause. Writing for the

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13. *Id.* at 400-04.

14. *Id.* at 400. These exercises in legal casuistry are so offensive that I have used them as examples in a seminar on language and the law.

15. *Id.* at 403.

16. Act of Mar. 18, 1863, ch. 70, § 14, 1863 Cal. Stat. 69, 69 (repealed 1872).

17. Act of Mar. 16, 1863, ch. 68, § 394(3), 1863 Cal. Stat. 60, 60 (repealed 1872).

18. 40 Cal. 198 (1870).

court, Justice Jackson Temple reaffirmed the finding of the legislature that the testimony of a white person was reliable while that of a Chinese person was not. The court could not disturb or dispute such a legislative finding.<sup>19</sup> *Hall* and *Brady* were direct expressions of discrimination against the Chinese and indirect reflections of the confused and insidious racial theories of the time.

Despite the decisions in *Hall* and *Brady*, the Chinese continued to fight for the right to testify in court, and two months after the *Brady* decision, federal law recognized the right of Chinese persons to testify. The opening lines of Section Sixteen of the Civil Rights Act of 1870 stated that all persons, not just citizens, within the jurisdiction of the United States had the right to testify in court.<sup>20</sup> Section Sixteen, specifically included to assist the Chinese, was a direct result of lobbying efforts by the Chinese. McClain describes how on June 25, 1869, when the House Ways and Means Committee was visiting San Francisco as part of a fact-finding tour of the West Coast, a prominent Chinese merchant named Fung Tang voiced several grievances on behalf of the Chinese community. One of these grievances concerned the ban on Chinese testimony. As a result of Fung Tang's effort, Congress passed Section Sixteen of the Civil Rights Act of 1870 (pp. 36-40).

One battle was won, but the war continued. Despite the passage of the Civil Rights Act of 1870, California courts continued to reject the testimony of Chinese persons.<sup>21</sup> It was not until 1872 that the California legislature succumbed and repealed the state law, thereby allowing testimony by the Chinese (p. 42).

McClain traces each common and statutory law attempt to discriminate against the Chinese, including California's attempts to discriminatorily and prohibitively tax Chinese laundry owners and to interfere with the Chinese community's rights to habitation and movement in California. McClain's patient recitation of these officially enacted pieces of retaliatory legislation carries great power. He builds the house of discrimination brick by legal brick. He sets out the story in exquisite detail, drawing heavily on original sources. As told through the people and the courts, the story is compelling.

But history has served McClain, and consequently the reader, poorly. Unlike the law, which is especially well-preserved, little of the record of the

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19. *Id.* at 209-12.

20. Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (repealed 1894). "While the overriding purpose of that [A]ct was to protect black voters in the South in the exercise of the franchise and other civil rights, no one in Congress could have had any doubt that § 16 was aimed at securing the rights of the Chinese" (p. 40).

21. A police court refused to allow the testimony of a Chinese man who claimed he had been robbed by a white man (p. 42). And in March 1872, the Twelfth District Court in San Francisco refused to admit the testimony of a Chinese woman against a white murder defendant. *The Harrington Murder Case*, EVENING BULL. (San Francisco), Mar. 11, 1872, at 2; *Chinese Testimony*, S.F. CHRON., Mar. 13, 1872, at 3.

Chinese experience exists. The acts of the legislature, the decisions of the courts, and even related documents relevant to these matters are all still available. However, the Chinese story exists only tangentially in these sources. While reading *In Search of Equality*, the reader begins to yearn for insight as to why the Chinese acted as they did, what they thought, and how their strategies were conceived. In a book so rich in detail, the reader ends up knowing very little about the Chinese individuals involved. In a strange way, even in his efforts to show the Chinese immigrants as an empowered and active group, the author leaves them largely bloodless. Passion lies in the evil deeds accomplished under the guise of the legal system, but the Chinese themselves remain remote. We are left asking: Who were these people? Why did they cling so savagely to life in this hostile environment? What led them to believe that the legal system would provide relief from oppression? This part of the story remains untold. The reader's impression is that McClain would share it with us if it was to be found in legal documents, but it clearly is not. Such discussion lies beyond the parameters of this book, but the need for a fuller analysis of the Chinese situation is clear.

## PART II.

### THE DECADE OF THE 1880S: SEEKING THE EQUAL PROTECTION OF THE LAWS

Part II of the book discusses in three chapters the Chinese pursuit of equal protection rights in California. This section sets forth the saga of the Chinese as they adroitly attempted to assert the rights that should have been theirs under treaties between the United States and China as well as under the Fourteenth Amendment and the Civil Rights Act of 1870. In order to insure that U.S. nationals had full rights and protection while doing business and proselytizing for Christianity in China, the United States and China entered into a reciprocal agreement, urged upon China by the United States.<sup>22</sup> Although the genesis of the treaty thus lay in the desire of the United States to protect its nationals as they operated in China, reciprocity meant that Chinese nationals in the United States should have received the full protection of U.S. laws. Californians, however, consistently argued that state sovereignty precluded the application of the reciprocal agreement to California. This discussion sets out some wonderful examples of the role of

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22. Additional Articles to the Treaty of June 18, 1858, July 28, 1868, U.S.-China, 16 Stat. 739 [hereinafter *Burlingame Treaty*]. Modifying the Treaty of Tientsin, Treaty of Peace, Amity, and Commerce, June 18, 1858, U.S.-China, 12 Stat. 1023, the Burlingame Treaty of 1868 extended certain rights to both U.S. citizens in China and reciprocally Chinese citizens in the United States. Specifically, the treaty ordered that citizens of either country when visiting the other "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." *Burlingame Treaty, supra*, 16 Stat. at 740. Further amendments in 1880 maintained the most favored nation rights of Chinese subjects already within the United States but additionally granted the United States the right to regulate the immigration of Chinese laborers. *Treaty Concerning Immigration*, Nov. 17, 1880, U.S.-China, 22 Stat. 826.

international law in domestic affairs. Some interesting analysis of the role of real power and treaty enforcement in domestic law could be written based on the facts that Professor McClain sets forth. However, as he does in other parts of the book, the author lays out the problem without actually exploring any answers or causes.

The most disturbing aspect of Part II may well be the discussion of the California Constitution of 1879. This document, drafted at a Constitutional Convention which concluded on March 3, 1879, was produced under the sway of the Workingman's Party, a political party under the leadership of Dennis Kearney,<sup>23</sup> an anti-Chinese demagogue. Article XIX of the California Constitution emerged from the efforts of the Workingman's Party. Entitled "Chinese," Article XIX declared that the Chinese presence was dangerous to the well-being of the state and implored the legislature to do everything in its power to deter Chinese immigration into California. Article XIX also forbade corporations from employing the Chinese and prohibited their employment on any public project—state, county, or municipal—except as criminal punishment. Section Four of Article XIX gave the state's cities and towns the power "for the removal of Chinese without the limits of such cities and towns, or for their location within prescribed portions of those limits."<sup>24</sup> The voters of California passed this version of the Constitution on May 7, 1879, thus codifying racial hatred.

The fact that such a blatant statement of racism was enacted into the state constitution attests to the strength and depth of anti-Chinese racism in a way which no theoretical analysis of cases or statutes can. Although McClain's goal in this section and throughout his book is to describe the Chinese resistance to discriminatory legislation, he forces the reader, by recounting the indisputably racist language of the legislature and courts, to confront the white majority's naked hatred of the Chinese and their use of the law to express it. Since a constitution is the organic document of a government, and especially since the modern American legal consciousness associates a constitution with human rights, the racism of Article XIX strikes deep nerves.

The other fascinating feature of this section is McClain's exploration of a few famous cases, like *Yick Wo v. Hopkins*,<sup>25</sup> to chronicle individual struggles for basic rights. *Yick Wo* arose out of the continuing discrimination against Chinese laundrymen by the city of San Francisco. At issue was the legality of the San Francisco Board of Supervisors' arbitrary use of power to deny laundry operating permits to all Chinese applicants. This

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23. Kearney arrived from Ireland in 1868 as a merchant seaman. By fall of 1877, he had plunged himself into the leadership of San Francisco's anti-Chinese movement and urged his audiences to "vote the moon-eyed nuisance out of this country." Encouraging his followers to carry weapons, he suggested that the use of force would be justified if they could not achieve their objective through peaceful means (pp. 79-80).

24. CAL. CONST. of 1879, art. XIX, § 4 (repealed 1952).

25. 118 U.S. 356 (1886).

issue successfully made the long and difficult journey to the U.S. Supreme Court, where Justice Stanley Matthews upheld the constitutional principle that “the exercise of fundamental rights, including the right to pursue a profession or trade [must] not be made subject to the exercise of arbitrary governmental power” (pp. 122-23). Just as important as the constitutional principle protected by the Court is the simple fact that the Chinese were able to bring forward test cases like *Yick Wo* and follow them through the system. Again, the Chinese are seen as organized, informed, and able to fight against the system, using every tool at their disposal.

This section also records the struggle of the Chinese to enroll their children into San Francisco schools. The fight to accomplish this goal took place in the local and state legislatures and ultimately in the courts. In 1860, the legislature amended the existing law to prohibit the enrollment of “Negroes, Mongolians, and Indians” into public schools, but it gave school districts the discretion to establish separate schools for children of color.<sup>26</sup> After operating a separate school for Chinese students for ten years, the school board shut it down, claiming insufficient interest on the part of Chinese parents. As a result, some Chinese children turned to private schools while others applied without success for entry into public schools (pp. 134-35).<sup>27</sup>

In response to the closing of the separate school and the exclusion of Chinese children from public schools, the Chinese petitioned the board of education. When that effort failed, they appealed to the legislature, pointing out that Chinese taxpayers paid several thousand dollars a year to support public education but Chinese children were being denied entry because of prejudice (pp. 135-36). Although the assembly largely ignored their pleas, two years later the legislature again amended the law, codified as Section 1662 of the Political Code, to read: “Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district.”<sup>28</sup> However, because this measure was passed during the most anti-Chinese session in California legislative history, McClain finds it “safe to assume that [it was] probably not intended in any sense to benefit the Chinese” but was instead intended to benefit African Americans and Native Americans (p. 136).

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26. Act of Apr. 28, 1860, ch. 329, § 8, 1860 Cal. Stat. 321, 325 (repealed 1863). An act was passed six years later which required school districts to open separate schools if parents of ten nonwhite children applied, or, if that was impractical, allowed school districts to admit colored children to white schools provided that a majority of the white parents did not object. Act of Mar. 24, 1866, ch. 342, §§ 57-58, 1866 Cal. Stat. 383, 398.

27. For a more detailed account of Chinese attempts to access public education, see VICTOR LOW, *THE UNIMPRESSIBLE RACE: A CENTURY OF EDUCATIONAL STRUGGLE BY THE CHINESE IN SAN FRANCISCO* (1982).

28. Act of Apr. 7, 1880, ch. 80, § 26, 1880 Cal. Stat. 131, 142.

In his account of the Chinese struggle for educational equality, McClain cites the case of *Tape v. Hurley*,<sup>29</sup> which arose out of immigrant Joseph Tape's<sup>30</sup> failed attempt to enroll his half-Chinese, half-white daughter, Mamie Tape, in a public school. After battling in the lower courts, he eventually prevailed in the California Supreme Court<sup>31</sup> but found in the aftermath that "the men responsible for educating the state's young were as bigoted and narrow-minded as any other public officials" (p. 133). However, in anticipation of an adverse ruling from the high court, the legislature amended the state education law to read:

Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, *and also to establish separate schools for children of Mongolian or Chinese descent. When such separate schools are established, Chinese or Mongolian children must not be admitted into any other schools.*<sup>32</sup>

The San Francisco Board of Education complied with the legislative amendment by establishing a separate school for Chinese children in Chinatown. Thus, the Chinese struggle for education continued. Despite a challenge seven years later to the legality of segregation, the court, relying on the growing body of authority upholding the "separate but equal" doctrine, allowed the practice of segregating Chinese children in San Francisco to continue well into this century (p. 143).<sup>33</sup>

The issues here are appealing to a reader versed in modern American law. The case of *Yick Wo v. Hopkins* is familiar to every student of constitutional law. The struggle for equality in public education is also well-known. The role of constitutions in the functioning of society is generally accepted. These familiar touchstones lend power to the reader's understanding of the Chinese experience.

Again, however, the reader wishes that the discussion could have been taken further, deeper. Each one of these issues is so telling, so moving, that the reader wants more. The author simply sets out the scenario, recites the facts, and moves on. At the same time, the reader must sympathize with the author's inability to take each of these topics to a deeper level. After all Professor McClain cannot produce a 2,000-page book. Ironically, the hunger for more detail and analysis which the book provokes in its readers may be one of the book's greater contributions. Perhaps McClain hopes that

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29. 66 Cal. 473 (1885).

30. As is apparent from his name, Joseph Tape was not a typical Chinese immigrant. After arriving in California in 1869, he cut his queue and wore American-style clothes. He married a white woman in 1875, apparently taking her surname as his own (p. 137).

31. The court based its decision on the unambiguous language of the Political Code and found that Mamie Tape should be admitted to the school. *Tape*, 66 Cal. at 474.

32. Act of Mar. 12, 1885, ch. 117, § 1, 1885 Cal. Stat. 99, 100 (emphasis added).

33. The law permitting segregation of Chinese students was not repealed until 1947. Act of June 14, 1947, ch. 737, § 1, 1947 Cal. Stat. 1792, 1792.

others will take the narrative foundation that he has laid and develop the analysis further.

### PART III.

#### THE DECADE OF THE 1880s: COURT CONTESTS WITH THE FEDERAL GOVERNMENT

In Part III, which also covers the decade of the 1880s, the saga of the Chinese using legal authority to counter hatred and prejudice continues. In this section, the focus shifts to the federal government, and two of the three chapters in this section deal with the federal Chinese Exclusion Acts. The federal Exclusion Acts operated to exclude the Chinese from the United States<sup>34</sup> and sometimes prevented Chinese who were residents of the United States from returning if they left.<sup>35</sup> This is the story of U.S. authorities using every means possible to deny the Chinese entry into the United States, and the Chinese response to each undeniably racist attempt to do so.<sup>36</sup> The same care for detail exercised throughout the book is again present here, but again there is the same yearning for more analysis. Professor

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34. The first Chinese Exclusion Act, titled "An Act to Execute Certain Treaty Stipulations Relating to Chinese" and passed on May 6, 1882, was the first federal immigration statute to single out an ethnic group by name for separate treatment and represented a drastic reversal of the open immigration policy of the United States (p. 149). It forbade the immigration of Chinese laborers for ten years and assessed severe criminal and civil penalties on violators. Act of May 6, 1882, ch. 126, §§ 1-2, 22 Stat. 58, 59. Major California newspapers rejoiced at the passage of this Act, "declaring that it heralded the beginning of the end of Chinese immigration and all the controversy that had engendered" (p. 149). The newspapers felt that the Chinese question was on its way to settlement, but as is evident from subsequent events, this prophecy was, in Professor McClain's words, "laughably premature" (p. 150).

35. In 1888, the Chinese Exclusion Act was supplemented to provide that no Chinese laborer would ever be allowed to enter the country, even if his former residence was the United States. Act of Oct. 1, 1888, ch. 1064, § 1, 25 Stat. 504, 504. The Act banned the issuance of any new return certificates and voided all certificates previously distributed. § 2, 25 Stat. at 504. The people of California eagerly greeted the passage of the Act—this included a one-hundred gun salute ordered by the Democratic State Central Committee. In addition, the Republican State Committee chairman urged Congress to enact a stricter law which would require all Chinese residents to register and carry identification certificates or be immediately deported (p. 193). For further information on the supplemental act, known as the Scott Act (named after Congressman William Scott, who introduced the bill), see CHARLES C. TANSILL, *THE FOREIGN POLICY OF THOMAS F. BAYARD, 1885-1897* 166-81 (1940); see also, SHIH-SHAN H. TSAI, *CHINA AND THE OVERSEAS CHINESE IN THE UNITED STATES, 1868-1911* 90-96, 100 (1983).

36. See, e.g., *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) (denying re-entry to a Chinese San Francisco resident because the Scott Act, which passed during his absence, voided his certificate and right to land); *Chew Heong v. U.S.*, 112 U.S. 536 (1884) (holding that the Act of May 6, 1882, and later amendments, which made a certificate the "only evidence permissible to establish [the] right of re-entry" into the United States, were inapplicable to a Chinese laborer who left before such certificates were available); *In re Look Tin Sing*, 21 F. 905 (C.C.D. Cal. 1884) (holding, based on the Fourteenth Amendment, that the Chinese Exclusion Act did not apply to a Chinese person born in this country who had been gone for five years); *In re Ah Quan*, 21 F. 182 (C.C.D. Cal. 1884) (holding that an amendment to the Chinese Exclusion Act did not apply to Chinese laborers who left prior to the passage of the amendment, and thus their privilege to return to the United States could be established by evidence other than certificate); *In re Chin A. On*, 18 F. 506 (D. Cal. 1883) (holding that the Act of May 6, 1882, did not apply to Chinese laborers who left the United States before the Act's passage); *In re Low Yam*

McClain continues to do the same craftsmanlike job of following each narrative trail through its factual details and its legal elements. However, given the potentially fruitful set of questions concerning the balancing of federal and state interests, especially in light of federal treaty interests, the reader wishes for more analysis.

Chapter Seven, "Seeking Federal Protection Against Mob Violence: The Unusual Case of *Baldwin v. Franks*," chronicles the rise of anti-Chinese violence in 1885-1886 and Chinese attempts to use national civil rights legislation to protect themselves. McClain carefully describes the rising tide of violent race riots that swept the western United States at this point in time and the attempts of the Chinese to stop them. Against a background of state anti-Chinese conventions and the failure of local authorities to offer protection, the Chinese mounted this case<sup>37</sup> based on violations of their civil rights (p. 177). McClain recounts the agony of the Chinese and those who wanted to help them, as they searched for statutory maneuvering space. There is bitter piquancy in the federal government's failure to act, leaving the matter in the hands of the states.

The *Baldwin* case was an attempt to bring to justice a group of men who had physically evicted the Chinese population of the town of Nicolaus, California. The Chinese hired lawyers to bring the action and tried to use applicable sections of the federal Civil Rights Act of 1870 in a very sophisticated way to force the federal government to intercede. In the end, the effort failed and Justice Stephen Field, in his U.S. Supreme Court dissent, observed:

The result of the decision is, that there is no national law which can be invoked for the protection of the subjects of China in their right to reside and do business in this country . . . . Their only protection . . . is to be found in the laws of the different states. Such a result is one to be deplored.<sup>38</sup>

This chapter shows both the strength and the weakness of the book. The analysis of the legal arguments is clear and careful, and yet at almost each point in this account, the reader wishes that there was more than that. Professor McClain alludes to the fact that violence by groups like the Ku Klux Klan against Southern blacks paralleled that of white mobs against the Chinese but does not examine this further. The issue of the relationship of the Chinese immigrant community to the development of general civil rights legislation and common law is touched upon but largely left unexplored. The reader senses that there is a much bigger story here. Perhaps the reader's understanding of the situation of the Chinese immigrants would

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Chow, 13 F. 605 (C.C.D. Cal. 1882) (holding that the Act of May 6, 1882, did not bar Chinese merchants from entry to the United States).

37. *Baldwin v. Franks*, 120 U.S. 678 (1887).

38. *Id.* at 707 (Field, J., dissenting).

be enhanced by comparisons with other oppressed groups. The book only tantalizes the reader to speculate.

PART IV.  
CENTURY'S END: LAST EPISODES OF XENOPHOBIA

This final section, consisting of Chapters Nine, Ten, and a Conclusion, brings the story to a close. The first two chapters replicate the virtues and the vices in the rest of the book. The reader is confronted with careful analysis of legal issues, meticulous sourcing, as well as a string of unfulfilled wishes to explore policy discussion at each inviting juncture. Chapter Nine discusses residential segregation and the various attempts to exclude the Chinese from the city of San Francisco. It is a continuation and culmination of the many threads that run throughout the book. The Constitution, statutes, and judicial decisions together weave a tapestry of racial struggle. In this instance, the decision of Judge Lorenzo Sawyer in *In re Lee Sing*<sup>39</sup> vindicated the case of the Chinese, although it earned the Judge the sobriquet "Mandarin Sawyer" (p. 231).

Chapter Ten discusses questions of public health and plague in San Francisco and the treatment of the Chinese community in this regard. Again, the same underlying issues appear, but here the story is somewhat different. Professor McClain initially set out to explore the reaction of the Chinese in California to discrimination by the legal system in all of its forms. This chapter, however, is replete with accounts of forced vaccinations and quarantines, and it does not seem to relate directly to the rest of the book. Here, issues of public health and racial stereotyping hold sway. This is not to say that this story does not involve racism and the legal system. It does, but it fails to blend easily with the rest of the book. In fact, it gave me the impression of being a caboose, tacked on to the end of the book. This may reflect the difference between the perceptions of the reader and author as to the underlying meaning of historical facts. The issues in the health arena were less clearly and less blatantly the product of anti-Chinese hatred. Instead, these particular injustices suffered by the Chinese seem more the product of an irrational fear of bubonic plague, a plague that may have never existed in San Francisco. Reflecting the fear in the Chinese community itself, the Chinese Six Companies and members of the Chinese community agreed to cooperate with health officials' efforts to cleanse and disinfect Chinatown and urged the rest of the Chinese community to do the same. It was not until compulsory inoculation measures were implemented that the Chinese reacted with protests and legal action, which they eventually won (pp. 247-56).

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39. 43 F. 359 (C.C.D. Cal. 1890) (holding that the San Francisco ordinance, limiting the areas in San Francisco where the Chinese could live and operate businesses, violated the U.S. Constitution, statutes, and express treaties with China).

The Conclusion is the only section of the book that attempts any analysis of the facts and circumstances detailed in the preceding ten chapters. In the Conclusion, Professor McClain identifies certain factors that contributed, in his words, to the "remarkable record of success" experienced by the Chinese in the courts (p. 279). These factors included: 1) the resources available to the Chinese to bring claims before the courts, 2) the highly organized community, and after 1878, 3) the Chinese consulate, which worked to protect Chinese rights and helped finance litigation (p. 279). In addition, certain legal dynamics favored the Chinese. This is evidenced by the Burlingame Treaty of 1868, the Civil Rights Act of 1870, the Fourteenth Amendment, Jacksonian principles of economic freedom, and the democratic principle of protecting minorities (pp. 279-81).

In the Conclusion, McClain further explains that courtroom successes against the state ironically led to losses against the federal government. Earlier victories against the state established that the U.S. Congress, not the states, had the power to regulate foreign commerce and immigration. This principle eventually allowed Congress to pass exclusion laws with little say from the judiciary (pp. 281-82).

The Conclusion spans only seven pages but includes some of the critical analysis that is lacking in the rest of the book. I would have liked to see more of this level of analysis throughout the book. It would have provided a certain depth beyond the mere recitation of facts. Despite this, upon reaching the last page of the book, the reader does get the feeling that as the twentieth century approached, the world was changing for the better and that anti-Chinese discrimination was diminishing.

#### ASSESSMENT

In the final analysis, *In Search of Equality* is a remarkable book. Professor McClain does an admirable job. He proves that he is a clinical draftsman who carefully arranges his facts and doggedly follows each lead. He has created one of the most straightforward works of research that I have seen in years. By describing incident after incident of legal racism, the book stands as a testament to the realities of legal prejudice. By writing *In Search of Equality*, McClain makes this history accessible and real.

Mainstream white America has failed to include its ill treatment of other races as part of its acknowledged group history. This is hardly surprising. Who enjoys recalling such unconscionable behavior? The actions of the past are most comfortably left in the past. Yet such a pattern of "forgetting" is inherently dangerous. Failure to confront the uncomfortable past can lead to a disbelief that it happened at all, or perhaps to theories that blame the victims for bringing it upon themselves or not understanding how to protect themselves. *In Search of Equality* is McClain's attempt to counter this tendency. He meticulously combs through history and forces us to deal with the realities that the Chinese faced.

By illustrating the discrimination against the Chinese, McClain forces the reader to face the fact that large elements of society despised the Chinese and quite consciously used the law to subjugate them. By presenting the language in *Hall* that reflects this sentiment regarding the Chinese—"whose mendacity is proverbial, a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development"<sup>40</sup>—McClain demonstrates that the courts can stand in service of prejudice and hatred. This naked xenophobia still sits in the California and U.S. Supreme Court Reports. Thus, one of the most powerful aspects of the book is the perspective it provides on the desperate situation of the Chinese in California in the nineteenth century, surrounded by violence, hatred, and discrimination, and often unable to use laws ostensibly meant to protect them because the laws themselves were permeated by racial hatred.

Does McClain's so-to-speak "straightforward" approach necessarily lead to a more complete understanding of this period? McClain's approach is informative as to the "facts"—dates, names, and incidents of legal racism and Chinese resistance—but not as to the interaction between racism and the Chinese resistance and how they shaped each other. The book is not about change; it does not describe changes in oppression or racism against the Chinese, changes in the legal system as a result of these incidents, or changes in the Chinese resistance. Rather, it is a somewhat static account of Chinese American history where McClain fits the actors into set roles—as oppressors or rebels—who do the same things over and over. As a result, the book becomes very predictable, leaving many questions unanswered.

Although the reader can clearly see that racism is present in these cases, the reader is left wondering to what extent prejudice operated in the decisions and how the legal issues confronting the Chinese altered or reinforced the boundaries of racism in the nineteenth century. What impact, if any, did the test cases have on subsequent legislation or court decisions? Did the Chinese successes in court or their familiarity with the legal system in the United States change the appearance of racism or oppression in general? Racism against the Chinese has operated and faltered in various specific ways—ways distinct as to time period, place, and legal issue. Understanding the nefarious strategies and limits of racism is a counterpart to understanding the Chinese resistance and Chinese American legal history in nineteenth-century America.

McClain's purpose here, however, is not to explain the racism nor to explore the impact of the test cases on racism against the Chinese. He writes merely to change our view of Chinese immigrants as an objectified group. He does so by depicting them as skillful litigants. This book calls upon each of us to reassess the role of racism in society and the use of law

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40. *People v. Hall*, 4 Cal. 399, 405 (1854).

in the service of rights. This is an accomplishment that serves the particular cause of Chinese immigrants and the broader cause of immigrant rights. At a time when the nation in general, and California in particular, is focusing on immigrants in our society,<sup>41</sup> the dangers of demagoguery must be remembered. These are slopes which we have slipped down before.

On a different level, McClain presents a fascinating indictment of legal reasoning and the common law process. In his historical description of cases from the catalyst event, through the trial and appellate court proceedings, all the way to the U.S. Supreme Court, he follows the trail blazed by John Noonan's *Persons and Masks of the Law*,<sup>42</sup> which attempts to place several famous decisions in their social context. McClain shows how the arguments were framed and what they really meant. It is a reinterpretation of case law—a reinterpretation that performs surgery on famous cases like *Yick Wo v. Hopkins*. McClain's account shows how the Chinese were able to confront their oppressors through the legal and political systems, despite the presence of racism in these systems. The book demonstrates that the tools of legal and judicial reasoning, statutory interpretation, and legislative history can be used to serve justice as well as prejudice. Although the reader is left wanting to know how the Chinese resistance itself affected this reasoning and interpretation, it nevertheless makes us reconsider such judicial mutations as *People v. Hall*. This is a sobering experience indeed for those who wish to perceive the law as neutral.

Finally, the book could serve as a partner to Richard Kluger's *Simple Justice*<sup>43</sup> and Taylor Branch's *Parting the Waters*.<sup>44</sup> These two books set out the specifics of the African American civil rights movement in the middle of the twentieth century. The wealth of detail and rich citation to sources that they provide make them baselines from which all subsequent works in the area can build. In an age where information is very malleable, they etch in glass the reality of what happened. McClain does the same thing for Chinese Americans. These stories of Chinese struggles, albeit in the bloodless form of legal analysis, are set for posterity. This is a book that can be cited for years to come.

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41. An example of this focus is Proposition 187, passed by California voters on November 8, 1994. Proposition 187 denies services to illegal immigrants and requires law enforcement and all persons employed in providing public social services and publicly-funded health care services to report suspected illegal immigrants. CAL. PENAL CODE §§ 113, 114, 834b (West Supp. 1995); CAL. WELF. & INST. CODE § 10001.5 (West Supp. 1995); CAL. HEALTH & SAFETY CODE § 130 (West Supp. 1995); CAL. EDUC. CODE §§ 48215, 66010.8 (West Supp. 1995); CAL. GOV'T CODE § 53069.65 (West Supp. 1995). It also requires any person suspected of being an illegal immigrant to produce documentation as to their legal status. Proposition 187 is rife with constitutionally suspect elements and may never actually be implemented. Yet frighteningly enough, it passed by a wide margin and has inspired similar measures in Arizona and Texas.

42. JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* (1976).

43. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1977).

44. TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63* (1988).

However, *In Search of Equality* is more than a source to be cited. People should know of the record of oppression against Chinese Americans. This book has not only awakened me but has also enlightened at least one taxi driver. The heroic Chinese struggle should be honored, and the villains should be remembered. The Dennis Kearneys of the world must be held before us so that they may not rise again. The power of the mob and the smell of violence is always there. The perspective of time and the careful work of an author like McClain can help us see this awful truth and perhaps prevent its recurrence in our own time. The biggest drawback may be that because it is a scholarly work, this book can be somewhat tedious. Thus, it will likely be unappealing, and therefore remain inaccessible to larger audiences outside the academic environment. This is a pity because in order to construct a society free of racial hatred and violence, this story must be told to the widest possible audience. Hopefully, McClain's careful scholarship will be used to construct accounts that are more likely to reach a wider audience and therefore produce a stronger social impact. In the meantime, *In Search of Equality*, despite its shortcomings, fills a void in historical and legal scholarship, and perhaps because of the questions it leaves unanswered, may inspire others to take McClain's important groundwork to another level.

