California Supreme Court Historical Society
2013 Student Writing Competition

Second Place Prizewinning Entry

" 'The Chinese Must Go': The Workingmen's Party and the California Constitution of 1879"

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“The Chinese Must Go”: The Workingmen’s Party and the California Constitution of 1879

I. Introduction

In March, 1879, the California Constitution was amended and ratified. Among the new provisions in the Constitution was article XIX, concerning Chinese people in the state. All four sections of article XIX sought to deter the presence of Chinese people in California, but section 2 of article XIX contained an unprecedented restriction on employment based on race:

> No corporation now existing or hereafter formed under the laws of this State, shall, after the adoption of this Constitution, employ directly or indirectly, in any capacity, any Chinese or Mongolian. The Legislature shall pass such laws as may be necessary to enforce this provision.[1]

This paper will outline the circumstances under which article XIX was adopted and the influence of Denis Kearney and his Workingmen’s Party of California on the constitutional delegations. Section II of this paper is a brief overview of Chinese immigration to California. Section III outlines the development of anti-Chinese sentiment in the post-Gold Rush era. Because article XIX, section 2 sought to regulate the employment of Chinese people, Section IV of this paper provides a brief summary of certain historical restrictions on Chinese employment. Section V discusses Denis Kearney and the development of the Workingmen’s Party of California. Section VI discusses the California Constitution of 1879 and the debates pertaining to article XIX. *In re Tiburcio Parrott* was filed the following year in the Circuit Court for the District of California,[2] and Section VII of this paper will discuss the case and different approaches taken by Judges Hoffman and Sawyer in holding article XIX as violative of the United States Constitution. Section VIII will briefly discuss the aftermath of *Parrott*, and Section IX will conclude the paper.

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[1] Theodore Henry Hittell, ed., *Supplement to the Codes and Statutes of California*, Vol. III, 39 (1880).

[2] *In re Tiburcio Parrott*, 1 F. 481, 500 (C.C.D. Cal. 1880).

II. Summary of Early Chinese Immigration to California

Prior to the mid-nineteenth century, Chinese immigration to the United States was virtually nonexistent.[3] In January, 1848, gold was discovered in California's Sierra Nevada foothills. As early as the spring of 1848, news of this discovery spread to Hong Kong, and, lured by the promise of untold fortune, or at least higher wages, Chinese immigration to the West Coast began in earnest.[4] By 1851, there were an estimated 25,000 Chinese miners or laborers in California.[5] In the early years of California's statehood, the Chinese were looked upon favorably and were seen as an indispensible part of the workforce.[6] Indeed, in 1852, Governor John McDougal proclaimed the Chinese "one of the most worthy classes of our newly adopted citizens — to whom the climate and the character of these lands are peculiarly suited."[7]

Permanent relocation to California was not the goal of many Chinese immigrants. F.F. Low, minister plenipotentiary from the United States to China, testified before the California Senate Committee on Chinese Immigration in 1876 that Chinese workers "come here because they have good wages, and after serving two or three years they have a competence, and away

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[3] See Elmer Clarence Sandmeyer, The *Anti-Chinese Movement in California*, 12 (1991); only 46 Chinese immigrants to the United States reported between 1820 and 1850. Extrapolating data from *Statistical Review of Immigration, 1820-1910. Senate Doc. No. 756*, 61st Cong., 3rd sess., 14-24. As regards California, these statistics are dubious because, as Sandmeyer notes, "there was no customs office [in California] until after admission to the union." Sandmeyer at 12.

[4] Gunther Barth, *Bitter Strength: A History of the Chinese in the United States 1850-1870*, 31 (1964); Mary Roberts Coolidge, *Chinese Immigration*, 17 (1909). Social conditions in China in the mid-19th century were also a large factor in the emigration, but will not be discussed in this paper. For a discussion of these conditions, see Barth at 9-31.

[5] Coolidge at 17.

[6] *Id.* at 21, noting that "race antipathy was subordinated to industrial necessity . . ."

[7] *California Senate Journal*, 3d Session (1852), 15.

they go."[8] In 1876, it was reported that an average of 14,000 Chinese immigrants arrived annually, and 10,000 Chinese people returned home after an average stay of five years.[9]

In 1860, approximately two-thirds of California's Chinese population was engaged in mining in the Sierra Nevada and Trinity Alps.[10] By the mid-1860s, however, the placer deposits were beginning to play out, and the Chinese laborers began to shift toward heavy construction, most notably, the construction of the railroads.[11] Charles Crocker, founder of the Central Pacific Railroad, allegedly hired the first Chinese railroad workers primarily for the purpose of frightening white workers who had threatened to strike.[12] Chinese railroad workers soon became an indispensible part of the railroad workforce; Leland Stanford, then president of the Central Pacific Railroad, stated that "without [Chinese laborers,] it would be impossible to complete the western portion of this great national highway within the time required by the acts of Congress."[13]

By 1869, the major railroad construction was complete, causing a massive oversupply of newly-unemployed Chinese workers in California.[14] These workers were subsequently employed wherever there was work:

> woolen factories, knitting mills, railroad building, highway and wharf construction, borax beds, farms, dairies, hop plantations, small fruit farms, kitchens, wood cutting, land clearing, potato digging, salt works, liquor manufacturing, cigar and cigarette making, the manufacture of slippers, pantaloons, vests, shirts, drawers, overalls, and shoes, tin shops, shoe blacking, fishing . . . .[15]

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[8] Cal. Senate Committee Report, *The Social, Moral, and Political Effects of Chinese Immigration* (1876), 12.

[9] *Id.* at 39.

[10] Alexander Saxton, *The Indispensible Enemy*, 3 (1995).

[11] *Id.* at 4.

[12] *Id.* at 62.

[13] *Id.* at 62.

[14] John Jung, *Chinese Laundries: Tickets to Survival on Gold Mountain*, 15 (2007).

[15] Sandmeyer at 21, citing an 1869 list of economic activities engaged in by Chinese workers published in *Overland Monthly*, II, 231-239.

In 1876, there were approximately 150,000 Chinese people on the West Coast, and 30,000 in San Francisco alone.[16] By 1877, the *Daily Alta California* estimated that there were 18,000 Chinese factory workers in San Francisco, and that "any sudden expulsion would throw business into confusion."[17]

III. White Fear of Chinese Laborers

White attitudes toward the Chinese ranged from openly hostile, to begrudging acceptance, to welcoming, and everything in between. Governor McDougal's statement, *supra*, that the Chinese were among the most "worthy classes of our newly adopted citizens," illustrates one of the more positive attitudes toward Chinese immigrants in the historical record. Perhaps a more common attitude was accepting the Chinese not as fellow Californians, but as an economic boon to the state:

> The Chinaman is here because his presence pays, and he will remain and continue to increase so long as there is money in him. When the time comes that he is no longer profitable *that* generation will take care of him and will send him back. We will not do it so long as the pockets into which the profit of his labor flows continue to be those appertaining to our pantaloons.[18]

On April 3, 1876, the California Senate formed a committee to investigate the following: the number of Chinese people in California and the effect of their presence on the state; the results of Chinese immigration and the potential results if immigration is not restricted; the means of stemming the tide of Chinese immigration; and other issues regarding Chinese immigration.[19] Five senators were appointed to the committee, which met on April 14, 1876.[20] Much of the testimony taken at the committee's hearings regarded alleged inability of Chinese

[16] Cal. Senate Committee Report, 27.
[17] Sandmeyer at 21, citing *Alta*, Dec. 27, 28, 1877.
[18] Sandmeyer at 31-32, citing the Sacramento *Record-Union*, Jan. 10, 1879.
[19] Cal. Senate Committee Report, 3.
[20] *Id.* at 4.

people to assimilate and the impact of Chinese labor on white workers and on California's economy.

"Otherness" is a historically common motivation for fear and/or exclusion of a group.[21] Frank M. Pixley, a San Francisco attorney, testified before a Joint Committee on Chinese Immigration that the "moral condition [of the Chinese] is as bad and degraded as four thousand years of heathenism can make it, and their physical condition is as low as the practice of all the crimes that have been known since history was written can make it."[22] George Duffield, a San Francisco policeman, testified that Chinatown "could not be much filthier and dirtier,"[23] that more than 90% of Chinese women in Chinatown were prostitutes,[24] and that China was "a nation of thieves. I have never seen [a Chinese person] who would not steal."[25] Since most Chinese immigrants intended to return to China after a period of time, one possible motivation for the overt antipathy was: "The greater the abuse, the stronger would be their inclination to hurry along to the final destination."[26]

The alleged failure of Chinese workers to meaningfully contribute to the economy was another impetus for taking action against Chinese labor.

> As a class [, the Chinese] were harmless, peaceful and exceedingly industrious; but, as they were remarkably economical and spent little or none of their earnings except for the necessities of life and this chiefly to merchants of their own nationality, they soon began to provoke the prejudice and ill-will of those who could not see any value in their labor to the country. . . .[27]

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[21] See, generally, Robert Wistrich, *Demonizing the Other: Antisemitism, Racism and Xenophobia* (1999).

[22] Report of the Joint Special Committee to Investigate Chinese Immigration, 9, 15 (1877).

[23] Cal. Senate Committee Report at 46.

[24] *Id.* at 46.

[25] *Id.* at 48.

[26] Saxton at 17.

[27] Theodore Henry Hittell, *History of California*, Volume IV, 99 (1898).

Much of the money earned by Chinese laborers was sent back to China.[28] As will be discussed in greater detail in Section VII, Judge Sawyer, in his *Parrott* opinion, noted the primary argument against Chinese laborers was that they were "able to labor cheaply and still accumulate large amounts of money to send out of the country . . . ."[29]

The most fervently argued and frequently cited motivator for Chinese restriction was that Chinese workers were much cheaper than white workers. The owner of a woolen mill in the San Francisco area paid Chinese workers one-third to one-fourth the wage paid to white workers in the same position.[30] Similarly, a boot and shoemaker paid Chinese workers $1 per day, and paid white workers up to $4 per day for the same job.[31] This argument will be more fully explored in the context of the Workingmen's Party.

It was also reported that Chinese culture emphasized fiscal constraint, and that the Chinese immigrants brought this mindset to California.

> That [the Chinese] are a very frugal people is undeniable; their wants are few and inexpensive. Hence it is that they can underwork people of European extraction, for the requirements of the latter are greater than those of the former."[32]

W.J. Shaw, a former district attorney for San Francisco and a former California state senator, and one of the few witnesses who testified at senate hearings who had actually traveled to and spent time in China, testified that Chinese people are

> educated to live cheaply, to live on the smallest amount possible to be conceived of. . . . Those habits of living he brings with him to this country; and he can live here for so much less than can men of our own race, that even one-half the wages he can obtain sufficient living, and an equal amount of profit with free labor.[33]

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[28] Cal. Senate Committee Report at 36. A Chinese immigrant sent $30 per year, on average, to China. *Id.*

[29] *Parrott* at 518.

[30] Cal. Senate Committee Report at 67.

[31] *Id.* at 51.

[32] Report of the Joint Committee at 11.

[33] Cal. Senate Committee Report at 20, 21.

An 1876 article from the *Marin Journal* summarizes the anti-Chinese sentiment at the time:

> That he is a slave, reduced to the lowest terms of beggarly economy, and is no fit competitor for an American freeman.
>
> That he herds in scores, in small dens, where a white man and wife could hardly breathe, and has none of the wants of a civilized white man.
>
> That he has neither wife nor child, nor expects to have any.
>
> That his sister is a prostitute from instinct, religion, education, and interest, and degrading to all around her.
>
> That American men, women and children cannot be what free people should be, and compete with such degraded creatures in the labor market.
>
> That wherever they are numerous, as in San Francisco, by a secret machinery of their own, they defy the law, keep up the manners and customs of China, and utterly disregard all the laws of health, decency and morality.
>
> That they are driving the white population from the state, reducing laboring men to despair, laboring women to prostitution, and boys and girls to hoodlums and convicts.
>
> That the health, wealth, prosperity and happiness of our State demand their expulsion from our shores.[34]

IV. Summary of Early Anti-Chinese Legislation in California

The earliest California legislation which had a significant impact on the Chinese were the taxes levied upon miners in 1850 and 1852. The 1850 tax applied to all foreign-born miners, and required the purchase of a license at $20 per month. The penalties for mining without a license were steep: expulsion from the mines for a first offense, three months' imprisonment and a $1,000 fine for subsequent offenses.[35] Because the license fee was so high, this act was seen as unnecessarily restrictive on poorer miners and less revenue was realized than intended.[36] The

[34] Sandmeyer at 25, quoting *Marin Journal*, Mar. 30, 1876.
[35] Lucile Eaves, *A History of California Labor Legislation* , 111 (1910).
[36] *Id.* at 112.

miners' tax was amended in 1852, lowering the license fee to $3 per month[37] and authorized county sheriffs to appoint deputies to collect the tax.[38] The act was modified to exclude naturalized foreigners and foreigners who expressed an intention to become naturalized.[39] Because the majority of Chinese immigrants intended to, and in fact did, return to China, this act targeted the Chinese. Moreover, the act was to be translated and disseminated in the Chinese language.[40]

In 1862 came the passage of "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."[41] This act reiterated the monthly tax of $2.50 on persons "of the Mongolian race" working as miners and included within its scope persons "of the Mongolian race" engaging in *any* business, whatsoever, though not including the production of sugar, rice, coffee, or tea.[42] The California Supreme Court held this act to be an unconstitutional interference with Congress's taxing power and with the president's treaty power.[43] The intent of the act was clear: "No one can read these [laws] and fail to see that they are all directed by the same spirit; hostility to the Chinese, and an intention to banish them from the country."[44]

A number of anti-Chinese ordinances were enacted in San Francisco. In 1870, the "cubic air ordinance" made it a misdemeanor for landlords/hoteliers to let, or tenants to rent, rooms of

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[37] *Id.* The Chinese did not object to this lowered tax. In fact, some wanted it increased "in the hope that its profits might make the Chinese miners more welcome in the counties receiving it, or even win them just protection of the laws." *Id.*, citing Rept. Com. on Mines, *Senate Journal*, 1853, appendix.

[38] Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase*, 1850-1870, 72 Cal. L. Rev. 529, 539 (1984). The deputy authorization led "to severe abuses that had deadly consequences for the Chinese since these deputies had a tendency to exact the fee in a rather violent manner." *Id.* n.52.

[39] Eaves at 113.

[40] *Id.*

[41] Theodore Henry Hittell, Statutes of California, *The General Laws of the State of California From 1850-1864, Inclusive*, 521 (1872).

[42] *Id.*

[43] *Lin Sing v. Washburn*, 20 Cal. 534, 539 (1862).

[44] *Id.* at 538.

less than five hundred cubic feet for each adult person sleeping or dwelling there. This law had a disproportionate effect on San Francisco's Chinese inhabitants, who tended to live communally and/or in smaller spaces than their white counterparts.[45] Also in 1870, the city passed a law making it a misdemeanor to carry baskets suspended from or attached to poles carried across one's shoulders. Chinese fish and vegetable street hawkers were the targets of this legislation.[46] In 1873, an ordinance was passed which imposed licensing fees for laundries.[47] Because approximately 1,300 Chinese laundrymen operated in San Francisco alone, this tax disproportionately affected Chinese.[48]

Some anti-Chinese activists may have been satisfied with this piecemeal and local legislation, but others began to seek a more permanent solution to the Chinese question.

V. Denis Kearney and the Workingmen's Party of California

Anti-Chinese sentiment reached a public boiling point in the early 1870s when unemployed white workers began to congregate at various sand-lot meetings in San Francisco.[49] The chief concern of these demonstrators was that cheap Chinese labor was forcing white workers into unemployment, and that the state government was doing nothing about it. Specifically, the demonstrators called for the "abrogation of the treaty with China,[50] and the prohibition of Chinese immigration, except for commercial purposes."[51]

[45] Charles J. McClain, *In Search of Equality: the Chinese Struggle Against Discrimination in Nineteenth-Century America*, 45 (1994). Future references to "McClain" refer to this work.
[46] *Id.* at 46.
[47] *Id.* at 48.
[48] *Id.* at 47.
[49] Eaves at 136.
[50] The Burlingame Treaty, discussed *infra*.
[51] Eaves at 137, citing *Alta* and *Bulletin* (July 9, 1870).

On September 21, 1877, approximately 2,000 unemployed workers convened in San Francisco. A man named Denis Kearney addressed the crowd, stating that "within one year there would be at least 20,000 laborers in San Francisco, well armed, well organized, and well able to demand and take what they will, despite the military, the police, and the 'safety committee.'"[52] Kearney was born and orphaned in Ireland.[53] He began sailing on English and American ships at an early age, ultimately becoming an officer.[54] In 1868, he arrived in San Francisco as the chief mate on the *Shooting Star*.[55] He continued to sail out of San Francisco for four years and, in 1872, settled down and bought a draying business.[56] Not only a sailor and businessman, Kearney also held a master's degree.[57] The economic depression of 1873 caused Kearney to lose his savings, and he turned to political agitation.[58] Described by opponents as "'a violent revolutionist'" and by supporters as a "'great and efficient apostle of the laboring classes of California,'"[59] Kearney had a gift for oratory that united people around his goals, chief among which was Chinese exclusion: "I made up my mind that if our civilization — California civilization — was to continue, Chinese immigration must be stopped, and I saw in the people the power to enforce that 'must.'"[60]

[52] Winfield Davis, *History of Political Conventions in California; 1849-1892*, 365-366 (1893). Note that this period work is one of the only, if not the only, sources of direct Kearney quotations. As a result, Section V of this paper will cite heavily from it.
[53] Saxton at 117.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] James Bryce, *The American Commonwealth*, Vol. II, 391 (1891)
[58] *Id.* at 389, 391.
[59] Noel Sargent, *California Constitutional Convention of 1878-9*, 6 Cal. L. Rev. 1, 5 (1917), citing *Appleton's Annual Encyclopedia*, 76 (1878).
[60] Bryce at 748. This quote is from an undated letter from Kearney to Bryce.

In the following weeks, the Workingmen's Party of California, with Kearney as president,[61] came to be organized around certain socialist and racist principles including, inter alia:

> The object of this association is to unite all poor and working men and their friends into one political party, for the purpose of defending themselves against the dangerous encroachments of capital on the happiness of our people and the liberties of our country. . . .
>
> We propose to rid the country of cheap Chinese labor as soon as possible, and by all the means in our power, because it tends still more to degrade labor and aggrandize capital. . . .
>
> The party will then wait upon all who employ Chinese and ask for their discharge, and it will mark as public enemies, those who refuse to comply with their request. . . .
>
> [The party] will encourage no riot or outrage, but it will not volunteer to repress, or put down, or arrest, or prosecute the hungry and impatient, who manifest their hatred of the Chinamen by a crusade against 'John,'[62] or those who employ him.[63]

On October 16, 1877, Kearney published a Workingmen's Party manifesto in the *Chronicle*:

> We have made no secret of our intentions. We make none. Before you and before the world we declare that the Chinaman must leave our shores. We declare that white men, and women, and boys, and girls, cannot live as the people of the great republic should and compete with the single Chinese coolie in the labor market. We declare that we cannot hope to drive the Chinaman away by working cheaper than he does. . . . To an American, death is preferable to life on par with the Chinaman.[64]

While Kearney purported to "encourage no riot or outrage,"[65] riots appeared to have been an integral part of the Workingmen's Party's post-rally activities. Following a meeting on July 23, 1877, "the hoodlum element rushed into Chinatown, burned several buildings, sacked fifteen

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[61] Kearney was originally elected treasurer of the nascent party but, following internal squabbling, a second election was held, resulting in Kearney as president. Davis at 366.

[62] "John Chinaman" appears to have been a popular derogatory classification at the time, much like "Charlie" or "Jerry" in the twentieth century. See Eaves at 136.

[63] Davis at 366-367. Original formatting omitted.

[64] *Id.* at 368, Sandmeyer at 65.

[65] Davis at 367.

washhouses, and broke windows in the Methodist Chinese Mission."[66] On November 3, 1877, Kearney was arrested on two counts of using language tending to incite his captive audience. The first complaint regarded statements he made which included:

> I will lead you to the city hall, clear out the police force, [and] hang the prosecuting attorney . . . . I will give the Central Pacific just three months to discharge their Chinamen, and if that is not done Stanford and his crowd will have to take the consequences.[67]

The second complaint regarded language including: "By the eternal, we will take [leaders who oppose the Workingmen's Party] by the throat and choke them until their life's blood ceases to beat and then run them into the sea."[68]

On November 3, 1877, Chinese community leaders sent an appeal to the mayor of San Francisco, bringing the matter to his attention:

> In the multitude of responsibilities which tax your time and strength, it may possibly have escaped your notice that large gatherings of the idle and irresponsible element of the population of this city are nightly addressed in the open streets by speakers who use the most violent, inflammatory, and incendiary language, threatening in plainest terms to burn and pillage the Chinese quarter and kill our people unless, at their bidding, we leave this "free republic." . . . [W]e (as on a former occasion) appeal to you, the mayor and chief magistrate of this municipality, to protect us to the full extent of your power in all our peaceful, constitutional and treaty rights against all unlawful violence and all riotous proceedings now threatening us.[69]

The letter also informed the mayor that, if attacked, the community leaders would not prevent Chinese residents from defending themselves.[70]

The appeal had an effect on the mayor. In January, 1877, city leaders organized a committee to take action on the Kearney problem. A grand jury was convened and indicted Kearney and other Workingmen's Party leaders on charges of "conspiracy and riot, in

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[66] Sandmeyer at 64, citing *Bulletin*, July 19, 20, 23-25, 1877.
[67] Davis at 370.
[68] *Id.*
[69] *Id.* at 371.
[70] McClain at 80.

endeavoring to drive the Chinese and the railroad managers from the state."[71] One charge was tried in criminal court, and Kearney was acquitted by a jury.[72] A bill was submitted to the Legislature which made it a felony for "any person, who in the presence or hearing of twenty-five or more persons, should utter any language, with intent either to incite a riot . . . or any act or acts of criminal violence against any person or property . . . ."[73] The bill was passed and approved after lengthy debates, and Mayor Bryant issued a proclamation on the new law, stating, "Such assemblies, wherever held, in halls, upon the streets, or in sand lots, will be suppressed, and the supremacy of law and order resolutely maintained."[74]

Early in 1878, the Workingmen's Party began to acquire political clout. Workingmen's Party candidates were elected to city offices in Sacramento and Oakland, including the mayors of both cities. Also among Workingmen's Party victories were a state senator from Alameda County and a state assemblyman from Santa Clara County.[75] On January 21, 1878, the Workingmen's Party had its first state convention, where it sought to legitimize its status as a major political force in the state.[76] Most important, however, was the overwhelming presence of Workingmen at the California constitutional convention of 1878; of 152 delegates elected, 50 were Workingmen's Party members.[77]

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[71] Davis at 374.
[72] *Id.* at 375.
[73] *Id.* at 376.
[74] *Id.*
[75] *Id.* at 375, Sandmeyer at 66.
[76] Davis at 377.
[77] Hubert Howe Bancroft, *The Works of Hubert Howe Bancroft*, Vol. 24, *History of California*, Vol. VII (1890) at 374. Fifty delegates were Workingmen's Party members, 85 were non-partisan, 9 were Republicans, and 8 were Democrats. *Id*. For a list of all delegates in attendance at the Convention, listed by party affiliation, see *Inventory of the Working Papers of the 1878-1897 Constitutional Convention,* Appendix A, available at http://www.sos.ca.gov/archives/collections/1879/archive/1879-finding-aid.pdf, hereafter cited as "Inventory."

VI. California Constitution of 1879

Since the passage of the 1849 California Constitution, regular efforts had been made by the California Legislature to adopt a new constitution. Such efforts failed, in 1857, 1859, 1860, and 1873, to earn the support of voters.[78] In September, 1877, voters finally passed a statewide measure in support of constitutional revision.[79] The California Legislature resolved to form a constitutional convention and set June 19, 1878 as the date for the election of delegates.[80] As discussed *supra*, approximately one-third of the delegates were Workingmen's Party members. Part of the Workingmen's Party platform was: "Corporations must discharge their Chinese employes [sic], or go out of business. Laws must be passed to purge the communities of the state of the presence of Chinese, and to prevent their acquiring any further foothold among us."[81] William White, an Irish-born farmer and Workingman's Party delegate,[82] speculated that the Chinese issue was one of two motivators for calling the Convention: "I say that this question of taxation is what has brought this Convention together in a great measure. That and the Chinese trouble have been two great motive powers that have brought this Convention together . . . ."[83]

As mentioned in the introduction, the proposed article XIX was a direct shot at restricting the presence of Chinese persons in California.

> ARTICLE XIX: CHINESE
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> Section 1: The Legislature shall prescribe all necessary regulations for the protection of the State, and the counties, cities, and towns thereof, from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids afflicted with contagious or infectious diseases, and from aliens

[78] Bancroft at 370.
[79] McClain at 79.
[80] *Id*.
[81] Davis at 400.
[82] Inventory at 55.
[83] E.B. Willis and P.K. Stockton, stenographers, *Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878*, Vol. II, 852 (1880), "Debates."

otherwise dangerous or detrimental to the well-being or peace of the State, and to impose conditions upon which persons may reside in the State, and to provide the means and mode of their removal from the State, upon failure or refusal to comply with such conditions; provided, that nothing contained in this section shall be construed to impair or limit the power of the Legislature to pass such police laws or other regulations as it may deem necessary.

> Section 2: No corporation now existing or hereafter formed under the laws of this State, shall, after the adoption of this Constitution, employ directly or indirectly, in any capacity, any Chinese or Mongolian. The Legislature shall pass such laws as may be necessary to enforce this provision.
>
> Section 3: No Chinese shall be employed on any State, county, municipal, or other public work, except in punishment for crime.
>
> Section 4: The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the State, and the Legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this State, and all contracts for coolie labor shall be void. All companies or corporations, whether formed in this country or any foreign country, for the importation of such labor, shall be subject to such penalties as the Legislature may prescribe. The Legislature shall delegate all necessary power to the incorporated cities and towns of this State for the removal of Chinese without the limits of such cities and towns, or for their location within prescribed portions of those limits, and it shall also provide the necessary legislation to prohibit the introduction into this State of Chinese after the adoption of this Constitution. This section shall be enforced by appropriate legislation.[84]

The following statement by William Grace, a carpenter originally from Tennessee,[85] succinctly states the sentiments of his fellow Workingmen's Party delegates:

> I say that the Chinese must go, all of them, out of the country — black, white, old and young, Chinamen born, and native. I want to get rid of them. . . . I would help the gentleman through harvest myself, rather than that he should employ Chinamen. [Applause].[86]

While no delegates directly said so, one reason for the proposed inclusion of article XIX appears to have been to send a message to President Hayes and the United States Congress, who

[84] Hittell, *Supplement* at 39.
[85] Inventory at 54.
[86] Debates, Vol. II at 661, insertion original.

were then considering Chinese immigration. William Van Voorhies, a Tennessee lawyer and delegate on the non-partisan ticket,[87] stated:

> We propose, through Congress, to say to these people, you shall not bring more than fifteen Chinamen. We will take your silks, we will take your teas, your rice, your opium, your whisky . . . but we don't want your people.[88]

Alexander Campbell, also an attorney and non-partisan delegate,[89] hoped that the Convention would "act under the influence of reason and not of passion, and that we will not adopt a section that will shock the humane sentiment of the entire civilized world." Campbell held this view not because he was in support of Chinese immigration, but because he feared that Congress would authorize the citizenship of Chinese immigrants in response.[90]

Clitus Barbour, "a San Francisco attorney who had defended the leaders of the Workingmen's Party"[91] and Workingmen's Party delegate,[92] was likely the most passionate anti-Chinese delegate at the convention. Barbour stated, as justification for the article:

> I do not propose to starve them out, but I propose to work them off, and circumscribe their employment. Is there anything wrong with that? Can you, or any fair minded man, say that we are inhuman because we refuse to open the avenues of employment to them? I dare you to go and do it. [Applause.] That is all we propose to do. . . . Let us show the people of the East that we are in earnest and that we mean to do something, and they will respect us and aid us.[93]

Barbour

> wanted to shock the sensibilities of the people of the East, so that they would realize that the Californians were in earnest, even if barbarous and cruel. If sufficiently startled, Congress might be driven into doing something, — anything was better than what he characterized as "this eternal contempt of the demands of the people of the Pacific Coast."[94]

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[87] Inventory at 53.
[88] Debates, Volume III at 1430.
[89] Inventory at 50.
[90] Debates, Volume III at 1430.
[91] Eaves at 155.
[92] Inventory at 53.
[93] Debates, Volume III at 1430.
[94] Eaves at 155, citing Debates, Vol. II at 651.

As regarded section 2 of article XIX, Barbour hypothesized: "Why is it that Chinamen come here? What is it that draws them to these shores? Demand for labor. If nobody employs them they will not come, will they?"[95]

The anti-Chinese provisions were not without opposition. Charles Stuart, a farmer and non-partisan delegate,[96] in opposing the article, said:

> Such savage monstrosity has never before been penned by man. . . . Is there anything to be conceived more horrible or more savage? . . .
>
> . . . . Such a barbarous, inhuman, or unnatural proposition has never been conceived or entered the brain of either Pagan or Christian man since the foundation of the world. . . . These men, after being invited to our shores, after building our railroads, . . . cleaning up the tailings of our hydraulic mines, scraping the bedrock of our exhausted mining claims, and relieving most of the householders in this State of the household drudgery which would be imposed upon our wives and daughters, thus contributing to our happiness and prosperity. . . . [Y]ou would commit treason against our Government by putting this unjust and inhuman article in our organic law. I beg of gentlemen on this floor to pause, to consider well, and not be carried away through blind prejudice, through political ambition, or through race hatred; but act like civilized, Just, and Christian men; not to do an act that would shock all humane men throughout the world, both Christian and Pagan.[97]

Stuart characterized the oft-repeated phrase of the Workingmen's Party, "The Chinese must go," as being "uttered and continually repeated, day by day, by a few insane foreign and alien leaders of a party in San Francisco, who are deceiving their followers, and will cause want and distress in their wake,"[98] referring, most likely, to Irish immigrant Denis Kearney.

The constitutionality of article XIX received scanty discussion. Eugene Casserly and James Schafter, non-partisan delegates,[99] mentioned that they would not vote for the passage of

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[95] Debates, Vol. II at 651.

[96] Inventory at 52.

[97] Debates, Vol. III at 1238. Stuart was characterized as the "pluckiest man in the Convention" by non-partisan delegate William Howard (Inventory at 50), who yielded his ten minutes to Stuart. *Id.*

[98] Debates, Vol. III at 1238.

[99] Inventory at 50, 52.

article XIX because it would violate their oath to uphold the United States Constitution.[100] James Caples, a non-partisan delegate,[101] and "constant enemy of Chinese immigration," who had "denounce[ed] this curse" for twenty-seven years voted to strike out the article because he recognized that "the Constitution of the United States, and the treaties made in pursuance thereof, are the supreme law of the land."[102] It was reported that a Workingmen's Party representative stated that anyone who questioned the constitutionality of section 2 "stood in danger of losing his head."[103] The only serious discussion of the constitutionality of article XIX dealt with section 4 and was made by Charles O'Donnell, a Workingmen's Party delegate,[104] in a handwritten note to the president of the Convention. O'Donnell argued that the power to quarantine a vessel and/or to prevent the offloading of cargo was within the state's reserved powers.[105] O'Donnell noted that the Supreme Court had held that restrictions on immigration were regulations of commerce, and were thus within the province of the federal government.[106] However, O'Donnell argued that this precedent was not controlling; Chinese persons were not eligible to become American citizens and, at least as regarded the coolie trade, they were imported as chattel, thus, the issue is one of state sovereignty.[107]

Despite Charles Stuart's pleas to strike the "unjust and inhuman article,"[108] and despite the lackluster arguments by Casserly, Schafter, and Caples that the article violated the United States Constitution, article XIX was adopted and inserted in the new Constitution by a vote of

[100] Debates, Vol. III at 1429.
[101] Inventory at 50.
[102] Debates, Vol. III at 1429.
[103] McClain at 316 n. 16, referring to, but not citing, *Alta*.
[104] Inventory at 54.
[105] California Constitution of 1879 working papers, box 11, file 5, page 2.
[106] *Id.* at 3.
[107] *Id.* at 4.
[108] Debates, Vol. III at 1238.

104 ayes to 16 noes.[109] Not surprisingly, not a single Workingmen's Party delegate voted against the adoption of the article.[110]

At the conclusion of the debates on, and passage of, *article* XIX, Clitus Barbour called for a resolution: "That the thanks of this Convention be and they are hereby tendered to Denis Kearney for his services in the anti-Chinese cause. [Applause.]"[111]

VII. *In re Tiburcio Parrott*

The "promise" of article XIX lasted less than one year. Pursuant to the power bestowed on the legislature by article XIX, section 2 to "pass such laws as may be necessary to enforce this provision,"[112] two Penal Code sections were enacted in February, 1880:[113] Section 178 made any corporate officer, agent, or employee guilty of a misdemeanor if such person employed any Chinese person and subjected that employer to a fine or jail time[114]; section 179 made any corporation guilty of a misdemeanor if it employed any Chinese person and subjected it to a fine for a first offense, or the revocation of its corporate status for a subsequent offense.[115]

Tiburcio Parrott, president of the Sulphur Bank Quicksilver Mining Company, a California corporation, was imprisoned for employing Chinese workers, a violation of Penal Code section 178.[116] The next day, Parrott filed a petition for habeas corpus in the Circuit Court

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[109] *Id.* at 1429-1431.
[110] *Id.* at 1431.
[111] *Id*. Insertion original.
[112] Hittell, *Supplement* at 39.
[113] *Id.* at 417.
[114] *Id.* at 351-352.
[115] *Id.* at 352.
[116] *Parrott* at 500.

for the District of California in San Francisco.[117] At the time, the Circuit Court had original jurisdiction over federal law and equity matters, and appellate jurisdiction over the district courts (whose primary jurisdiction was admiralty).[118] Parrott argued that Penal Code sections 178 and 179 and article XIX, section 2 of the California Constitution were void as violative of the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1866, and the Burlingame Treaty.[119] It was not disputed by the California attorney general that

> [sections 5 and 6 of the Burlingame Treaty were] within the treaty-making power of the United States, nor that the law under which the petitioner has been arrested, if in violation of those provisions, or those of the fourteenth amendment, or of the civil rights bill, is void, anything in the constitution of the state notwithstanding.[120]

But, as regarded the Penal Code sections, the attorney general's primary argument was that the power to regulate corporations is within the reserved police powers of the states, and "[t]he state

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[117] McClain at 85. McClain notes that, "Given the rapidity with which this prosecution was mounted . . . it appears probable that this was a collusive legal action, aimed at forcing a quick determination of the corporation law's constitutionality." *Id.*

[118] J. Edward Johnson, *History of the Supreme Court Justices of California*, Vol. 1, 96 (1963).

[119] *Parrott* at 484, 500.

The Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or 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." United States Constitution, Amend. XIV (West 2012).

The Civil Rights Act of 1866 provided, inter alia, "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 . . . shall have the same right, in every State and Territory in 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 full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ." John Hope Franklin, *The Civil Rights Act of 1866 Revisited*, 41 Hastings L.J. 1135 (1990).

Section 5 of the Burlingame Treaty "recognize[d] 'the mutual advantage of the free immigration and emigration of the citizens and subjects' (of the United States and of the Emperor of China) 'respectively, from the one country to the other for purposes of curiosity, or trade, or as permanent residents.' [Article 6 of the Burlingame Treaty] provide[d] that '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 by enjoyed by the citizens or subjects of the most favored nation.'" *Parrott* at 485 (insertion original).

[120] *Parrott* at 485.

may, therefore, in the exercise of this reserved power, prescribe what persons may be employed by corporations organized under its laws . . . ."[121]

The case was argued before a two-judge panel consisting of Judges Ogden Hoffman and Lorenzo Sawyer.[122] The *Parrott* hearings became a hot zone for the anti-Chinese movement and the courtroom was packed for counsels' oral arguments and the decision by Judges Hoffman and Sawyer.[123] When the hearings began, Denis Kearney "incited a rally of unemployed workers, saying, 'I will accept no decision but that of the people, and they say the Chinese must go.'"[124] National Guard troops were stationed in San Francisco where they would stay "'at least until the question of constitutionality of a law forbidding corporations to employ Chinese is decided by the United States Courts . . . .'"[125]

A. Judge Hoffman's Opinion

Judge Hoffman was born in New York in 1822 to a well-known and well-respected family of lawyers and politicians.[126] Hoffman was admitted to the New York bar after having attended law school at Harvard and apprenticing under two New York attorneys.[127] Hoffman moved to San Francisco in 1850 and, after less than one year of practice on the West Coast, was appointed by President Millard Fillmore to the newly created United States District Court for the Northern District of California and confirmed by the Senate in 1851.[128] The 29-year-old Hoffman's appointment was due, in large part, to connections he had made while in New York,

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[121] *Id.* at 486.
[122] McClain at 85. No mention is made of the seeming irregularity of a two judge panel.
[123] Paul Kens, "Civil Liberties, Chinese Laborers, and Corporations," in Law *in the Western United States*, 499 (2000).
[124] *Id*. The Kearney quote is uncited.
[125] Kens at 499, citing the *New York Sun*, March 9, 1880.
[126] Christian G. Fritz, *Federal Justice: the California Court of Ogden Hoffman; 1851-1891*, 1-3 (1991).
[127] *Id.* at 8-10.
[128] *Id.* at 10, 21.

as well as the connections of his prominent father.[129] As one of the first federal judges in the newly created state, Judge Hoffman presided over many of the early Spanish and Mexican land-grant cases.[130] Concerning the Chinese, Hoffman was fairly progressive, allowing the testimony of Chinese persons in his court despite California law excluding such testimony.[131]

Judge Hoffman began his opinion in *Parrott* by taking the attorney general's police powers argument to its logical extreme, stating that if the reserved power were plenary, as the respondent would suggest, states may

> prescribe what persons may be employed by corporations organized under its laws, their number, their nationality, perhaps even their creed. [The state] may determine what shall be their age or complexion, their height or their weight, the number of hours they shall work in a day, or the number of days in a week, and the rate of their wages.[132]

Hoffman's view of the state's power over corporations was much more limited:

> "[T]he reserved power may be exercised and to almost any extent to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets."[133] [However,] "the rights and interests acquired by the company, and not constituting a part of the contract of corporation, stand upon a different footing."[134]

Thus, a restriction on corporations which is not related to the securing of the corporate charter or the administration of the corporation is suspect. Hoffman wrote: "That the law in question, substantially and not merely theoretically, violates the constitutional rights of the owners of corporate property, [e.g. the shareholders,] can readily be shown."[135] Thus, in Hoffman's view, a corporation's inability to hire Chinese workers violated the rights of the *corporation*, not those of the would-be workers.

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[129] *Id.* at 17-20.

[130] E.g. *Pico v. United States*, 1856 U.S. Dist LEXIS 113, *United States v. Osio*, 1855 U.S. Dist. LEXIS 46, *United States v. Sunol*, 1855 U.S. Dist. LEXIS 55.

[131] Fritz at 211. See also *People v. Hall*, 4 Cal. 399 (1854).

[132] *Parrott* at 486.

[133] *Id.* at 490, citing *Miller v. State of New York*, 82 U.S. 478, 498 (1872).

[134] *Id.*, citing *Maine Cent. R. Co. v. State of Maine*, 96 U.S. 499, 500 (1877)

[135] *Id.* at 492.

Hoffman, generally, gave little attention to the Chinese people affected by the laws. Hoffman's concern was that the anti-Chinese Penal Code sections would adversely impact corporations and shareholders. "If its provisions be enforced, a bank or a railroad company will lose the right to employ a Chinese interpreter to enable it to communicate with Chinese with whom it does business. A hospital association would be unable to employ a Chinese servant to make known or minister to the wants of a Chinese patient; and even a society for the conversion of the heathen would not be allowed to employ a Chinese convert to interpret the gospel to Chinese neophytes."[136]

Finally, with respect to the attorney general's argument that the laws were valid under the reserved power, Hoffman was

> of opinion that . . . the law is void, as not being a "reasonable," *bona fide,* or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed class had been Irish, Germans, or Americans; that the corporations have a constitutional right to utilize their property by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living, and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms as may be agreed upon, subject only to such police laws as the state may enact with respect to them in common with private individuals.[137]

Hoffman thus held that it was the rights of California corporations in their "property," e.g. their labor force, which were violated, not the rights of the Chinese. This was the argument made by Parrott's attorney, T.I. Bergin. Bergin stated, "In this city alone there are 8,397 corporations and they represent considerably more than one-half of the wealth of the city," and argued, "They possess a constitutional *right to employ just whom they choose*."[138]

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[136] *Id.*
[137] *Id.* at 493.
[138] Kens at 215-216. Emphasis is Kens's, the quote is uncited.

Assuming, arguendo, that the Penal Code sections were a legitimate exercise of the reserved power, Hoffman held that the laws were invalid because they conflicted with the Burlingame Treaty.[139] Hoffman cited Justice Marshall: "'[T]he act of congress or the treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.'"[140] Thus, "while that treaty exists, the Chinese have the same rights of immigration and residence as are possessed by any other foreigners. Those rights it is the duty of the courts to maintain, and of the government to enforce."[141]

Hoffman concluded that the laws were an

> open and seemingly contemptuous violation of the provisions of the treaty which give to the Chinese the right to reside here with all the privileges, immunities and exemptions of the most favored nation. It is in fact but one and the latest, of a series of enactments designed to accomplish the same end.
>
> The attempt to impose a special license tax upon Chinese for the privilege of mining, the attempt to subject them to peculiar and exceptional punishments commonly known as the queue ordinance,[142] have been frustrated by the judgments of this court.[143]

And because the Burlingame Treaty was the supreme law, it voided the Penal Code sections which were contrary to it.

While Hoffman recognized that the Burlingame Treaty was valid and preempted state laws to the contrary, he was not in support of it. In dicta, Hoffman wrote that the

> opinion entertained by most thoughtful persons[, t]hat the unrestricted immigration of the Chinese to this country is a great and growing evil; [which] . . . presses with much severity on the laboring classes, and that if allowed to continue in numbers bearing any considerable proportion to that of the teeming population of the Chinese Empire, it will be a menace to our peace and even to our civilization . . . .

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[139] For the relevant text of the Burlingame Treaty, see *supra* at n.119.

[140] *Parrott* at 495, citing *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824).

[141] *Id.* at 498-499.

[142] The Queue Ordinance, passed in 1880 by the San Francisco Board of Supervisors, required that "every male prisoner sentenced to jail should have his hair cut to within one inch of his scalp." Sandmeyer at 51. As Judge Hoffman seems to indicate, this law had a disproportionate effect on Chinese men. See also *infra*, n.160.

[143] *Parrott* at 497.

> The demand, therefore, that the treaty shall be rescinded or modified is reasonable and legitimate.[144]

B. Judge Sawyer's Opinion

Judge Lorenzo Sawyer was born in New York in 1820 and, following legal studies under future Supreme Court Justice Noah Swayne, was admitted to the Ohio bar in 1846.[145] Sawyer caught "gold fever" and headed to the mining fields of California in 1850.[146] Apparently unsuccessful, Sawyer established a law practice in Sacramento, and later Nevada City, that same year.[147] In 1854, Sawyer was appointed city attorney for San Francisco, and later returned to private practice where he remained until 1862, when he was appointed to a judgeship by Governor Leland Stanford — railroad tycoon, supporter of Chinese labor, and enemy of Denis Kearney.[148] Sawyer was elected to the Supreme Court of California in 1863, but lost his reelection bid in 1870.[149] In 1870, Sawyer was appointed to the Circuit Court for the Northern District of California.[150]

Judge Sawyer began with a discussion of the supremacy of treaties: "The states have surrendered the treaty-making power to the general government, and . . . the treaty resulting is the supreme law of the land, to which not only state laws but state constitutions are in express terms subordinated."[151] Sawyer cited the Burlingame Treaty: "'Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in

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[144] *Id.* at 498, rearranged for clarity.
[145] Johnson, Vol. 1 at 95.
[146] *Id.*
[147] *Id*.
[148] *Id.* at 96. For the description of Stanford, see *supra*, Sections II and V.
[149] Johnson at 96.
[150] *Id*.
[151] *Parrott* at 501.

respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation.'"[152]

To define the phrase "privileges and immunities," as used in the Burlingame Treaty, Judge Sawyer used the definition enumerated in Supreme Court Justice Field's dissent in *The Slaughterhouse Cases*: "'Clearly among these [privileges and immunities] must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.'"[153] Sawyer also cited *The Slaughterhouse Cases* dissenting opinions for the proposition that one has a property interest in one's occupation:

> "In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. . . ."[154] "Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty."[155]

Sawyer found further support in the Bible:

> When God drove [man] "forth from the Garden of Eden to till the ground, from whence he was taken," and said to him, "in the sweat of thy face shalt thou eat bread, till thou return unto the ground[,]" He invested him with an inalienable right to labor in order that he might again eat and live.[156]

Thus, in Sawyer's view, labor was a "privilege and immunity," and because article XIX restricted Chinese persons' rights, Sawyer held:

> [A]ny legislation or constitutional provision of the state of California which limits or restricts that right to labor to any extent, or in any manner, not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty; and such are the express provisions of the constitution and statute in question.[157]

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[152] *Id.* at 504, citing the Burlingame Treaty.
[153] *Id.* at 505, citing *The Slaughter-House Cases*, Justice Field, dissenting, 83 U.S. 36, 97 (1872).
[154] *Id.* at 505-506, citing *The Slaughter-House Cases*, Justice Bradley, dissenting, 83 U.S. at 122.
[155] *Id.* at 506, citing *The Slaughter-House Cases*, Justice Swayne, dissenting, 83 U.S. at 127.
[156] *Id.* at 506-507.
[157] *Id.* at 507.

Thus, the constitutional provisions were void for violating the Burlingame Treaty's protection mandate that "'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 by enjoyed by the citizens or subjects of the most favored nation.'"[158]

Sawyer's discussion of labor-as-property-interest mirrors the argument of Parrott's counsel, who argued: "'You might as well take the clothes from a Chinaman's back, or take his luggage from his hand, when he lands in this country as to take the sacred right to labor from him.'"[159]

Unlike Judge Hoffman, Judge Sawyer discussed the equal protection aspects of the provisions. Judge Sawyer noted that section 1977 of the Revised Statutes (now 42 U.S.C. 1981), which was

> passed to give effect to [the Fourteenth Amendment], provides that "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."[160]

Importantly, Sawyer noted, is the use of the term "all persons" instead of "all citizens" which would extend the protection of section 1977 to include Chinese citizens in California pursuant to the Burlingame Treaty.[161]

The coverage of Chinese persons under the Fourteenth Amendment decided, Sawyer analyzed the California Constitution under the Fourteenth Amendment:

> It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or "the equal protection of the laws," where the laws forbid their laboring, or making and enforcing contracts to labor, in a very large

[158] See *Id.* at 485, citing Article 6 of the Burlingame Treaty.
[159] Kens at 500. Bergin's quote is uncited.
[160] *Parrott* at 508-509.
[161] *Id.* at 509.

field of labor which is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race, or color.[162]

Similarly, "to deprive a man of the right to select and follow any lawful occupation — that is, to labor, or contract to labor, if he so desires and can find employment — is to deprive him of both liberty and property" as defined in the Fourteenth Amendment and section 1977.[163]

To summarize the equal protection clause, Sawyer cited Justice Field's opinion in *Ho Ah Kow v. Nunan*:

> "[I]n our country[,] hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the constitution. [The equal protection clause] thus assured to every one while within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others . . . ."[164]

Sawyer held:

> Upon reason and these authorities, then, it seems impossible to doubt that the provisions in question are both, in letter and spirit, in conflict with the constitution and laws of the United States, as well as with the stipulations of the treaty with China. And this constitutional right is wholly independent of any treaty stipulations, and would exist without any treaty whatever, so long as Chinese are permitted to come into and reside within the jurisdiction of the United States.[165]

Sawyer then discussed whether the constitutional provisions and Penal Code sections were a legitimate use of the state's reserved power over corporations. The goal of the constitutional provisions was clear:

> The object, and the only object, to be accomplished by the state constitutional and statutory provisions in question is manifestly to restrict the right of the Chinese residents

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[162] *Id.*

[163] *Id.* at 510.

[164] *Id.,* citing *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879). *Ho Ah Kow* was a civil action for damages brought by a Chinese man whose ponytail was cut off pursuant to the Queue Ordinance. The case was decided by Judges Field and Sawyer.

[165] *Id.* at 512-513.

> to labor, and thereby deprive them of the means of living, in order to drive those now here from the state, and prevent others from coming hither; and this abridges their privileges and immunities, and deprives them of the equal protection of the laws, in direct violation of the treaty and constitution — the supreme law of the land.[166]

The end result, therefore, was unlawful and, even if the provisions were lawfully enacted, they would be unconstitutional and void.[167]

Sawyer examined the overall invidiousness of article XIX. While sections 2 and 3 restricted the employment of Chinese persons, section 1 provided for regulations to be enacted to deal with "vagrants, paupers, mendicants," etc. Indeed, "it is difficult to conceive of any more effectual means, so far as they go, to reduce the Chinese to 'vagrants, paupers, mendicants, and criminals,' in order that they may be removed, than to forbid their employment . . . ."[168] Sawyer noted that Chinese persons are not any more predisposed to vagrancy than any other race. In fact, "the Chinese are able to labor cheaply and still accumulate large amounts of money to send out of the country [which is] the objection perhaps most frequently and strenuously urged against their presence . . . ."[169]

In closing, Sawyer suggested to the anti-Chinese movement the proper way by which the Chinese could be legally excluded.

> There are other objections to an unlimited immigration of that people, founded on distinctions of race and differences in the character of their civilization, religion and other habits, to my mind of a far more weighty character. . . .
>
> . . . [H]owever unpleasant [the existence of Chinese persons] may be to the very great majority of the citizens of California, that however undesirable, or even ultimately dangerous to our civilization, an unlimited immigration of Chinese may be, the remedy is not with the state, but with the general government. . . .
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> . . . To persist, on the part of the state, in legislation in direct violation of these treaty stipulations, and of the constitution of the United States, and in endeavoring to enforce

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[166] *Id.* at 516.
[167] *Id.*
[168] *Id.* at 517.
[169] *Id.* at 518.

> such void legislation, is to waste efforts in a barren field, which, if expended in the proper direction, might produce valuable fruit . . . .[170]

In other words, the Chinese are a problem which can only be solved through federal action. State-directed efforts at regulating the Chinese should be pointed toward the federal government.

VIII. The Aftermath

The Workingmen's Party has been described as "the largest, most vociferous, and most influential anti-Chinese movement in California's history."[171] The power and influence of the party waned in the years following the 1879 Constitution. By 1880, at least in name, "the Workingmen's party had faded from the California scene."[172] However, the world had not seen the last of Denis Kearney.

> After the adoption of the new constitution and the passage of the Anti-Chinese Restriction Bills of 1879 and 1882 California began to move, and she is still a booming. Chinese immigration is excluded. There are a few smuggled in over the borders of British Columbia on the north and Mexico on the south. I spent the winter of 1887-8 in New York and Washington agitating for the total exclusion of the Chinese, which resulted in the Scott Chinese Exclusion Act of 1888. My next fight will be to get Canada to pass an Anti-Chinese Exclusion Law. At present she is being made the dumping ground for Asiatic pests who are afterwards smuggled into our country.[173]

In the years following *Parrott,* various local ordinances were passed which restricted the Chinese, most notably, restrictions on laundries. In February, 1880, the San Francisco Board of Supervisors passed a measure providing that "'all buildings erected and used as laundries, within the corporate limits of this city and county, on and after March 1, 1880, shall be constructed but one story in height, with brick or stone walls, not less than twelve inches in thickness.'"[174] In

[170] *Id.* at 518-519.
[171] McClain at 79.
[172] Saxton at 152. Saxton claims that two elements of the party remained, namely, the labor vote and corruption. *Id.* at 152-153.
[173] Bryce at 747. This is an excerpt of a letter from Kearney to Bryce.
[174] McClain at 100-101, citing the San Francisco Board of Supervisors, Order No. 1559.

May, 1880, the Board of Supervisors passed another measure, making it unlawful "'to establish, maintain or carry on a laundry' within the corporate limits of the city and county without having first obtained the consent of the board of supervisors, 'except the same be located in a building constructed of either brick or stone," with fines of up to $1,000 and imprisonment of up to six months.[175] McClain notes, "In spite of their eventual neutral formation, it seems fairly clear that the February and May laundry ordinances were motivated more by racial antipathy than by any simple concern for promoting public safety."[176] This laundry legislation spurred a flurry of lawsuits, most notably *Yick Wo v. Hopkins* in which the Supreme Court held that the May, 1880 laundry ordinance had an overwhelmingly discriminatory effect on Chinese, and therefore violated the equal protection clause of the Fourteenth Amendment.[177]

As noted in dicta in *Parrott*, if the anti-Chinese movement wanted an answer to the Chinese question, it would be found through federal legislation. After the California Constitution was ratified, a federal statute was passed funding and empowering certain commissioners to travel to China to negotiate a new treaty.[178] The supplementary treaty of November 17, 1880 declared that if the immigration of Chinese laborers to the United States,

> "or their residence therein affects or threatens to affect the interests of that country or to endanger the good order of the said country or of any locality within the territory thereof . . . the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it."[179]

In May, 1882, the innocuous-sounding "act to execute certain treaty stipulations relating to Chinese" was passed. Referred to as the Chinese Exclusion Act, the May, 1882 act provided that

> until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such

[175] *Id.* at 101, citing the San Francisco Board of Supervisors, Order No. 1569.
[176] *Id*.
[177] *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).
[178] *Chae Chan Ping v. U.S.*, 130 U.S. 581, 596 (1889).
[179] *Chae Chan Ping*, 130 U.S. at 596. Citing the supplementary treaty.

> suspension it shall not be lawful for any Chinese laborer to come, or, [if having come during the ten-year period,] to remain within the United States.[180]

Chinese laborers who had been in the United States prior to the passage of the act were free to leave the country and return, provided they obtained a certificate proving they were in the United States prior to the act.[181] The Chinese Exclusion Act was subsequently broadened by the Scott Act in 1888 to include all Chinese persons, not simply laborers, and including laborers "previously resident in the United States and who held a certificate as specified in the original 1882 exclusion law."[182] The Scott Act was lobbied for by none other than Denis Kearney.[183]

Chae Chin Ping, a Chinese laborer, left San Francisco bound for China on June 2, 1887. Ping had obtained a certificate for reentry, but returned after passage of the Scott Act. Thus, Ping's certificate was invalid and he was denied entry.[184] Ping petitioned the Circuit Court for the Northern District of California, and the matter was heard by Judge Lorenzo Sawyer.[185] Sawyer, in holding the Chinese Exclusion Act valid, wrote: "As we faithfully enforced the laws, as we found them, when they were in favor of the Chinese laborers, we deem it, equally, our duty to enforce them in all their parts, now that they are unfavorable to them."[186] Similar to the advice given to the anti-Chinese movement in dicta, that the proper mode for restricting the Chinese presence in the country was through federal legislation, Sawyer wrote: "It is not the function of the courts to abrogate an unsatisfactory law by arbitrarily refusing to enforce it. The

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[180] Ch. 126, 22 Stat. 58.

[181] Ch. 126, 22 Stat. 58, section 4.

[182] Jan C. Ting, "Other Than A Chinaman": How U.S. Immigration Law Resulted from and Still Reflects A Policy of Excluding and Restricting Asian Immigration, 4 Temp. Pol. & Civ. Rts. L. Rev. 301, 303 (1995), paraphrasing Chapter 1064, 25 Stat. 504.

[183] See *supra.*

[184] *In re Chae Chan Ping*, 36 F. 431 (C.C.N.D. Cal. 1888) aff'd sub nom. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)

[185] *Id.*

[186] *Id.* at 436.

only proper mode of getting rid of such a law, is, for congress to repeal or modify it."[187] If nothing else, Sawyer's federalism was consistent.

In re Chae Chin Ping was appealed to the United States Supreme Court.[188] Justice Field held that the act did not violate the China–United States treaty, and that restricting the immigration or residence of aliens was well within the powers of congress.[189] Thus, the Chinese Exclusion Act was a valid exercise of Congress's powers and remained in force and effect until "An act to repeal the Chinese Exclusion Acts, to establish quotas, and for other purposes" was passed in December, 1943.[190]

IX. Conclusion

The California Constitution of 1879 sought to deter the presence of Chinese persons in California by forbidding corporations from employing Chinese workers. While it is unlikely any single individual or group was the driving force behind the anti-Chinese sentiment in post-Gold Rush California, the Workingmen's Party was an outspoken voice in the constitutional debates, especially on the topic of article XIX and the "Chinese question." The Workingmen's Party numerically dominated the constitutional delegation and Denis Kearney, the immigrant leader of the party, was so widely known that the constitutional delegation resolved to give him thanks for his efforts in the anti-Chinese movement.

This paper has explored the events and circumstances which led to the passage of article XIX, from the first Chinese immigrants in 1848 to the vehement arguments in the constitutional debates. Even the delegates had doubts about their ability to pass article XIX, but the point may

[187] *Id.* at 437.
[188] *Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889).
[189] *Id.* at 603-604.
[190] Chapter 344, 57 Stat. 600.

well have been to create a test case, which would prompt federal legislation if it failed. Sure enough, article XIX failed under the scrutiny of Judges Hoffman and Sawyer in *In re Tiburcio Parrott* as being a violation of the Fourteenth Amendment and the federal treaty power. *Parrott* may have been the impetus for the federal Chinese Exclusion Act of 1882, which itself was held to be a valid exercise of federal powers by Judge Sawyer (and later by the Supreme Court, in an opinion written by Justice Field). The Chinese Exclusion Act remained good law for over fifty years after it was deemed constitutional in *Chae Chan Ping v. U.S.*.

On July 17, 2009, the California Assembly passed Assembly Concurrent Resolution No. 42:

> Resolved, That while this nation was founded on the principle that all men are created equal . . . we recognize that the practices of our state and its government have not always honored that promise. . . .
>
> . . . [T]he Legislature deeply regrets the enactment of past discriminatory laws and constitutional provisions which resulted in the persecution of Chinese living in California, which forced them to live in fear of unjust prosecutions on baseless charges, and which unfairly prevented them from earning a living. [191]

The federal government followed suit, and on June 18, 2012, the House of Representatives passed House Resolution 683.[192] Resolution 683 acknowledges the Chinese Exclusion Act and its various amendments, ending with an acknowledgement, "[t]hat the House of Representatives regrets the passage of legislation that adversely affected people of Chinese origin in the United States because of their ethnicity."[193]

While apologies by state and federal legislatures cannot undo the wrongs they committed on Chinese workers and immigrants, such apologies demonstrate that the era of racist legislation may be behind us. One particular theme from the anti-Chinese movement still resonates today;

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[191] California Assembly Concurrent Resolution 42, Chapter 79.
[192] H.Res 683, 112 Cong.
[193] *Id.*, section 1.

the low cost of immigrant or foreign labor jeopardizes American jobs.[194] Article XIX of the California Constitution of 1879 resulted from racism, fear of being replaced by workers willing to work for less, and a charismatic figurehead. We, as a society, should seek to ensure that no similar constitutional amendment or legislation is ever passed again.

[194] Ricardo Lopez, Ronald D. White and Stuart Pfeifer, "Deal brings end to L.A., Long Beach ports strike," *Los Angeles Times*, December 5, 2012; discussing a strike by a clerical workers' union, whose complaint was job outsourcing. See also Justin Lahart and Tom Orlick, "China's Export Pain May Be Mexico's Gain," *Wall Street Journal*, February 6, 2012; discussing the shift by United States companies from China to Mexico for their labor needs.