"DEVILISHLY UNCOMFORTABLE":

In the Matter of Sic — *The California Supreme Court Strikes a Balance Between Race, Drugs and Government in 1880s California*

BY MIKELIS BEITIKS*

On the evening of October 22, 1885, some 300 residents of Stockton showed up at the town's city hall for an "Anti-Chinese Meeting." The turnout was so large that officials had to relocate the meeting to the nearby Turn-Verein Hall to accommodate the crowd.[1] To read newspaper accounts of this event is to feel as though one is watching the raucous, conflict-establishing closing scene of a play's first act — a thunderous and irreversible event that will surely lead to something interesting after the intermission.[2]

Exhibiting a dynamic that had been playing and replaying in West Coast towns for several decades, Stockton's white residents were pacing, clenching their jaws and cracking their fingers over difficult economic times, and

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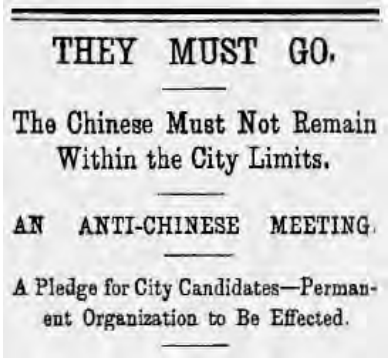
1 "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885. (The Turn-Verein Hall was Stockton's German ethnic hall).

2 "They Must Go," *The Stockton Daily Independent*, October 23, 1885. See also, "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

then coming to a consensus that Chinese immigrants were to blame for their hardship.[3] Stockton's anti-Chinese meeting was reportedly called to "urge the necessity of excluding the Chinese from the city,"[4] but a headline describing the meeting in the *Stockton Mail* the next day captures the gathering's purpose more bluntly: "Law or no Law, John Chinaman Must Go."[5]



THEY MUST GO.

The Chinese Must Not Remain Within the City Limits.

AN ANTI-CHINESE MEETING.

A Pledge for City Candidates—Permanent Organization to Be Effected.

In an era of partisan politics, Stockton's anti-Chinese meeting was a collaborative event. Future governor of California, former U.S. congressman and Stockton resident James Budd was the featured speaker. Budd declared that if "healthy public sentiment" prevailed, every Democrat, Republican, Workingman, Socialist and Sandlotter "would put his shoulder to the wheel, and help to throw the Chinese to the other side of the Mormon slough." He assured those present that there was "no question" that the town could use the law to target the Chinese, and then went further, proclaiming that it was in fact "the duty" of local government to make life "so devilishly uncomfortable," for the Chinese as to make them "glad to leave." Budd informed the crowd that Stockton's City Attorney, Frank Smith, was already drafting ordinances to this effect — sanitary laws targeting the Chinese, similar to ones that had been recently adopted in San Francisco. His speech was followed with great applause.[6]

Stockton's chief of police then stood and spoke in "glowing language of the filth and corruption that met his gaze" in Chinatown, giving details

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[3] Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (Chicago University of Illinois Press, 1991), 97. It is noteworthy that this 1885 action by Stockton was one of a series of many momentous anti-Chinese actions that were happening even within that very month in California. Sandmeyer lists over thirty California communities that were taking drastic action against their Chinese during this period of 1885, in a series of actions motivated by dissatisfaction with the implementation of preceding anti-Chinese legislation, and spurred by a murderous anti-Chinese riot in Wyoming.

[4] "They Must Go," *The Stockton Daily Independent*, October 23, 1885.

[5] "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

[6] Id. The Mormon Slough was Stockton's southern border in 1885.

of conditions that could be targeted by sanitary laws. His account was received with "laughter and good-natured applause."[7]

With the substance and the color of the meeting's thrust sufficiently established, resolutions were drafted to support only anti-Chinese candidates in the upcoming election and to create a permanent anti-Chinese committee to ensure follow-through. As the resolutions were enthusiastically adopted by those in attendance, there was but one "No" vote cast in the hall — "a single voice, the voice of a woman."[8]

Mrs. Farrington, a landlord to some of Stockton's Chinese residents, rose amidst bustle and gavel-raps for order to attempt to speak in defense of the town's Chinese. She reminded the group that some of Stockton's Chinese residents had lived in town for three decades — longer than almost any of the whites in attendance — and that the Chinese were undeniably prompt and dutiful in paying their bills and their taxes. She attempted to continue her plea, but before she should say any more, the meeting's chairman aggressively cut her off, calling Farrington and people of her type a "curse to the city."[9]

The chairman's dismissal of Farrington was "drowned in uproarious applause." He rounded out his scorning by saying that Stockton would be better off if it could be rid of the Farrington-types of the town right along with the Chinese, and then shouted a motion to adjourn over her objection, abruptly closing the meeting.[10]

And just like that, with the downswing of the chairman's gavel, the curtain drops on the first act of the play, the lights go up in the house, and the crew begins to move furiously, re-setting the stage.

In the second act, less than a week after this dramatic meeting, the Stockton City Council would pass local sanitary ordinances "aimed at the Mongolians." These ordinances set penalties for various aspects of open cooking fires, gambling, operating laundry facilities in town, and opium smoking — penalizing practices unique to the town's Chinese residents.[11]

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7 "They Must Go," *The Stockton Daily Independent*, October 23, 1885.

8 "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

9 Id.

10 Id.

11 "John Chinaman Must Go," *The Stockton Daily Evening Mail*, October 27, 1885.

Within six months of the passage of these laws, an arrest of two Chinese residents of Stockton would be made under the opium-smoking ordinance. This arrest would lead the city to appear before the California Supreme Court and see the opium law struck down as in violation of the California Constitution of 1879.

The case is *In the Matter of Sic*, and the contextual history of the decision speaks volumes about California's anti-Chinese legislation in the late nineteenth century, America's earliest drug laws, and the wrinkles between federal, state, and local government law that needed ironing out as California settled onto its new constitutional foundation after 1879.[12]

ANTI-CHINESE LEGISLATION IN CALIFORNIA

> *"Diverse motives entered into the opposition of Californians to the Chinese. Fundamental to all of them was the antagonism of race, reinforced by economic competition. . . . In true frontier fashion, Californians attempted to solve the problems arising from the Chinese by local measures. . . ."*
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> — Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California*[13]

More or less from the moment they settled in California, Chinese immigrants were subjected to various local, state and federal laws explicitly aimed at unsettling them.[14]

These laws took countless forms. Laws levied heavier taxes on Chinese miners; prohibited Chinese from fishing; made requirements of laundry businesses that Chinese proprietors couldn't meet; prohibited traditional Chinese hairstyling; prevented companies and municipalities from hiring Chinese workers; hindered Chinese burial practices; outlawed the conditions in which the Chinese slept; banned the type of gambling practiced by Chinese men; denied the Chinese the right to vote; prohibited Chinese children from attending white schools; explicitly forbade Chinese

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12 *In the Matter of Sic*, 73 Cal. 142 (1887).

13 Sandmeyer, 109–10.

14 Hyung-chan Kim, *A Legal History of Asian-Americans, 1790–1990* (Westport: Greenwood Press, 1994), 47.

immigration; made the use of ceremonial firecrackers and gongs illegal; prohibited Chinese from marrying whites; and the list goes on.[15]

The California Constitutional Convention of 1879 was perhaps the legal pinnacle of the anti-Chinese movement in California. While the 1879 Convention was undoubtedly needed to redraft the original 1849 Constitution (which had been "hastily drawn up by men whose experience in California was measured only by months"[16]), one scholar has gone so far as to say that the Convention was "called almost exclusively to deal with the Chinese problem."[17] The number of Chinese immigrants in California more than doubled between 1860 and 1879. This influx seemed nowhere near diminishing, and the white citizens of the state were desperate to stop the deluge.[18]

In turn, it seems as though the primary debate at the Convention concerned the question of how to make the Constitution as anti-Chinese as possible without running afoul of the federal government. [19]

Ultimately, the 1879 Constitution was written with an entire article devoted to anti-Chinese governance that included provisions compelling the Legislature to legislate against the Chinese, provide means for their removal from the state, prevent their immigration into the state, and prohibit their employment by government agencies.[20]

Anti-Chinese legislation of the era was fervently supported by white labor interests (who saw the Chinese immigrants as competition) and loudly trumpeted by opportunistic politicians.[21] Occasionally, the legislative acts that resulted from the anti-Chinese movement were almost comically blunt in revealing their legally questionable motivations. For example, the 1862 California Supreme Court case of *Lin Sing v. Washburn* has at issue a

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15 For general discussions of the various laws passed against Chinese during this era including these, see: Sandmeyer; Kim; John Hayakawa Torok, "Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws," *Asian Law Journal* 3 (1996): 55; and Daina C. Chiu "The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism," *California Law Review* 82 (1994): 1053.

16 Sandmeyer, 66.

17 Kim, 56.

18 Sandmeyer, 17.

19 Sandmeyer, 68–73.

20 Sandmeyer, 71–72.

21 Sandmeyer, 41.

state legislative act that was *officially* titled "An Act to Protect Free White Labor Against Competition with Chinese Coolie Labor, and Discourage the Immigration of the Chinese into the State of California."[22] In declaring this act unconstitutionally discriminatory, the Court wrote: "The act applies exclusively to the Chinese, and there is no doubt that the object of the legislature in passing it is correctly expressed in the title."[23]

Legislative bodies were no doubt ruthless toward the Chinese in California, but the courts, such as the *Lin Sing* court, were generally more forgiving.[24] Most state and local legislation against the Chinese was found invalid upon reaching the judiciary.[25]

In many legal opinions coming out of the anti-Chinese movement, one can see thinly veiled frustrations of the judiciary in dealing with out-of-control legislative bodies. Those crowning achievements of the anti-Chinese movement — the anti-Chinese provisions of the 1879 California Constitution — were struck down less than a year after they were enacted in the federal case *In re Ah Chong*.[26] The *Ah Chong* opinion contains several long paragraphs detailing the faultiness of the anti-Chinese constitutional provisions before cutting directly to the bone of the matter in a brief penultimate paragraph that drips disappointed frustration:

> These various provisions are referred to as instances illustrative of the crudities, not to say absurdities, into which constitutional conventions and legislative bodies are liable to be betrayed by their anxiety and efforts to accomplish, by indirection and

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22 *Lin Sing v. Washburn*, 20 Cal. 534 (1862).

23 Id., 566.

24 I would be remiss not to qualify this sentence by saying, "barring at least one glaring exception." In 1854, the California Supreme Court released a white man accused of murdering a Chinese man because the testimony against him was provided exclusively by other Chinese men, who were determined to be unfit to give testimony against white people. The case is *People v. Hall*, 2 Cal. 399, and the language in the decision is a grade-A example of the distant and uncritical "logic" applied to the racial classifications of the time. Kim calls the *Hall* decision "not only discriminatory but irrational" (Kim, 48), and Torok notes that this decision "reinforced popular anti-Chinese sentiment and sanctioned the violence perpetrated with impunity by whites against Chinese immigrants" (Torok, 65).

25 Sandmeyer, 56.

26 *In re Ah Chong,* 2 F. 733 (1880).

> circumlocution, an unconstitutional purpose which they cannot effect by direct means.[27]

California's anti-Chinese legislative efforts didn't stand up particularly well even in presumably more friendly state courts, but in federal court, with cases like *Ah Chong,* the anti-Chinese movement takes real judicial browbeatings.[28]

The various federal court deaths of California's misadventures in legislating against its Chinese residents include the 1886 U.S. Supreme Court case *Yick Wo v. Hopkins,* a canonical work of American constitutional law that struck down a San Francisco ordinance regulating the types of buildings in which laundries could be operated because the ordinance was being applied discriminatorily in violation of the Fourteenth Amendment.[29] What should also be remembered about *Yick Wo,* though, is that it overturned the opinion of the California Supreme Court, which had upheld the same San Francisco laundry ordinance as within San Francisco's regulatory capacity under its police power.[30]

JOHN CHINAMAN MUST GO

Heavy Ordnance Aimed at the Mongolians.

City Laws Passed by the Council Last Night—Wash-Houses to be Forbidden Except in Specified Places.

Four ordinances, whose object is to drive the Chinese from the city, were submitted to the City Council last night. Three of them were passed and given to the Mayor to receive his signature. The fourth, referring to laundries, was referred to the Ordinance Committee, to be adjusted so that it would not prohibit laundries on a certain half of a lot upon which is now situated a white laundry belonging to [illegible] in which Councilman Eshbach is interested. Adjoining that laundry is a Chinese wash-house, and on the opposite side of the same block is another Chinese wash-house.

It was in the midst of this back-and-forth between legislatures and courts and between California and the federal government that City Attorney Frank Smith drafted Stockton's 1885 anti-Chinese ordinances. Aware of the thin line he had to walk to avoid litigation, *The Stockton Daily Independent* would praise Smith's wile in crafting the ordinances, noting, "They apply equally

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27 Id., 739–40.

28 For two quick state examples, see *The People v. Downer et al.*, 7 Cal. 169 (1857), in which a passenger tax on Chinese passengers was ruled "invalid and void," or *Tape v. Hurley,* 66 Cal. 473 (1885), which compelled the admission of Chinese students to San Francisco public schools.

29 *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). See Sandmeyer, 76, for a general discussion of *Yick Wo*.

30 *In the Matter of Yick Wo*, 68 Cal. 294 (1885).

to white persons violating their provisions, but most of the offenses named are committed chiefly by Chinese."[31] *The Stockton Daily Evening Mail* would report that care was taken to delay the passage of the laundry ordinance (which aimed to prohibit the operation of any laundry business in town, thereby driving the Chinese operators out), so as to re-word it in such a way as not to affect a white laundry operation.[32]

However, despite this praise, Smith's laundry ordinance would gasp its last breath in a courtroom.

The case challenging Smith's laundry ordinance, *In re Tie Loy*, also called *The Stockton Laundry Case*, was heard in a federal district court.[33] It is possible that no court opinion in the field is as packed with vitriol at the audacity of an anti-Chinese ordinance than the *Stockton Laundry* opinion. The author of the opinion, former California Supreme Court Chief Justice Lorenzo Sawyer, unwaveringly discharges Tie Loy and does away with the Stockton law. Sawyer's dismantling of Smith's laundry ordinance is less like a careful surgeon scalpeling away at the cancerous elements of a body than it is like an indignant man with a sledgehammer swinging away at drywall. Some choice quotes from the opinion:

> This ordinance does not regulate — it extinguishes. It absolutely destroys, at its chosen location, an established ordinary business, harmless in itself, and indispensable to the comfort of civilized communities, and which cannot be so conveniently, advantageously, or profitably carried on elsewhere. . . .[34]
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> Of course, no one can in fact doubt the purpose of this ordinance. It means, "The Chinese must go;" and, in order that they shall go, it is made to encroach upon one of the most sacred rights of citizens of the state of California — of the Caucasian race as well as upon the rights of the Mongolian. It should be remembered that the same clause in our Constitution which protects the rights of every native citizen of the United States, born of Caucasian parents, equally protects the rights of the Chinese inhabitant who is lawfully in the country. When this

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31 "Passage of Important Ordinances Against the Chinese," *The Stockton Daily Independent*, October 27, 1885.

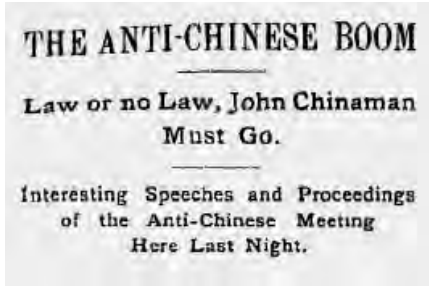
32 "John Chinaman Must Go," *The Stockton Daily Evening Mail*, October 27, 1885.

33 *In re Tie Loy*, 26 F. 611 (1886).

34 Id., 612.

barrier is broken down as to the Chinese, it is equally swept away as to every American citizen; and in this instance the ordinance reaches American citizens as well as Chinese residents. . . .[35]

It does not appear to me to be difficult to determine that this sweeping, exclusive, destructive, prohibitory ordinance, making it an offense to pursue one of the most ordinary and necessary occupations, without regard to the manner of its pursuit, or the character of the appliances with which it is carried on, is not within the police power of the state. . . .[36]


THE ANTI-CHINESE BOOM

Law or no Law, John Chinaman Must Go.

Interesting Speeches and Proceedings of the Anti-Chinese Meeting Here Last Night.

It would appear from the *Stockton Laundry* opinion that the very same seemingly equal application and sneakily hidden intentions that won Smith praise for the laundry ordinance in the Stockton press also spelled its future downfall.

Smith, of course, was not some sort of isolated legal mad scientist, or some rogue city attorney recklessly crafting local government policy in the backwaters of California. The problems with Stockton's anti-Chinese ordinances are indicative of a coast-wide phenomenon of the era, in which laws were crafted against the practices of the Chinese in a political climate of "Law or no Law — John Chinaman must Go," [37] and little thought was given to the head-slapping complications inherent therein.

The opium ordinance at issue in *Sic*, anti-Chinese legislation that it was, sat squarely in this minefield of local government law that the State of California was trying to traverse safely in the 1880s, avoiding explosions of federal invalidation with one foot and explosions of mass anti-Chinese violence with the other.[38]

In dealing with opium, Stockton also stretched into another hot-button field of law, that of drug policy.

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35 Id., 612–13.

36 Id., 615.

37 "The Anti-Chinese Boom," *The Stockton Daily Evening Mail*, October 23, 1885.

38 Sandmeyer, 98. Sandmeyer takes a perspective that emphasizes great respect for the "strenuous efforts" that channeled anti-Chinese sentiment into legislation rather than letting it erupt into violence more often.

OPIUM: AMERICA'S FIRST PROHIBITED DRUG

> "*There can be no reasonable argument made against the enactment and enforcement of a rigid municipal law against a habit so insidious and deadly, so debasing and utterly destructive of all that goes to constitute manhood, as the habit of smoking opium. It is a practice than which no other evil against which municipal laws are enacted, can be worse in its effects on society.*"
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> —*The Stockton Daily Evening Herald*, Editorial, August 21, 1878[39]

On November 15, 1875, the City of San Francisco passed an ordinance prohibiting the operation of opium dens within city limits.[40] This law is considered America's first anti-drug legislation.[41] Ostensibly, the ordinance was passed to protect the welfare and morals of San Francisco's white men and women.[42] However, it primarily targeted Chinese opium den operators, and was undoubtedly anti-Chinese legislation, first and foremost.[43]

Following San Francisco's lead, similar anti-Chinese/anti-opium local ordinances and state laws proliferated up and down the West Coast, and into any state that had a significant Chinese population.[44] The California State Legislature enacted an opium ban in 1881, making various opium-associated actions misdemeanors under the section of its penal code reserved for crimes against religion, conscience, and good morals.[45]

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39 "The Opium Ordinance," *The Stockton Daily Evening Herald*, August 21, 1878.

40 "The Opium Dens," *The San Francisco Chronicle*, November 16, 1875.

41 See, for example, Stephen A. Maisto, Mark Galizio, Gerard Joseph Connors, *Drug Use and Abuse*, *Sixth Edition* (Belmont: Wadsworth, 2010), 33.

42 "The Opium Dens," *The San Francisco Chronicle*, November 16, 1875.

43 See Kathleen Auerhahn, "The Split Labor Market and the Origins of Antidrug Legislation in the United States," *Law and Social Inquiry* 24 (Spring 1999): 411, 417. For an in-depth look at the creation of opium laws and their close ties to the anti-Chinese movement, see Diana L. Ahmad, *The Opium Debate and Chinese Exclusion Laws in the Nineteenth-Century American West* (Reno: University of Nevada Press, 2007).

44 Richard J. Bonnie and Charles H. Whitebread II, *The Marihuana Conviction: A History of Marihuana Prohibition in the United States* (Charlottesville: University Press of Virginia, 1975), 14.

45 "An Act to Amend an Act Entitled 'An Act to Establish a Penal Code,' Approved February 14, 1872, by Adding a New Section Thereto, to Be Known as Section

Just as all anti-Chinese legislation of the era sought to do, opium ordinances targeted the lifestyle of the West Coast's Chinese in an effort to make them "devilishly uncomfortable." However, where the majority of anti-Chinese ordinances were either laws like the laundry ordinance in *Yick Wo* (targeting the way that specifically the Chinese made their living), or were like the cubic-feet-of-air ordinances for sleeping conditions (targeting the way that specifically the Chinese maintained themselves or their homes), legislation against opium was complicated by targeting something that white people were also actively participating in.

As a prime example of the unintended consequences of anti-Chinese opium laws, when, in 1878, Stockton itself passed an ultimately ineffective opium ordinance pre-dating the one at issue in *Sic*, *The Stockton Daily Evening Herald* called the ensuing arrests of some whites in opium dens to be "gross injustice" and felt it necessary to warn its readers to stay away from the dens for fear that the law would also apply to them.[46]

In addition to unintentionally snaring certain whites, anti-opium legislation also faced the complication of delving into an issue of substance control that resembled alcohol prohibition, which brought it closer to being a debatable issue than most anti-Chinese legislation was.

The potential hypocrisy of forbidding opium smoking while still allowing the seemingly equal evil of alcohol consumption did not go without discussion in opium debates.[47] For a time preceding opium ordinances, opium usage was considered no worse than alcohol in California, but rather simply different. In San Francisco in 1870, a *San Francisco Chronicle* article about smuggling considers the use of opium by the Chinese as a simple cultural quirk — just an item of commerce that the Chinese dealt in and white people didn't. The article shows remarkable empathy for the similarities between opium use for the Chinese and analogous practices of other American groups: "To a Chinaman, opium is as much a necessity as whisky to a

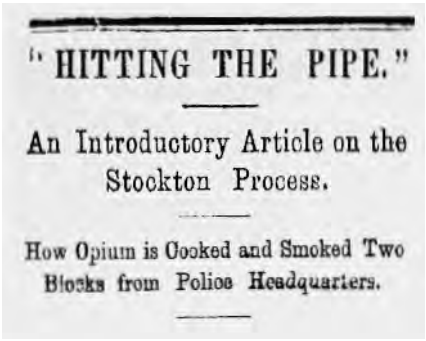
307, Relating to the Sale and Use of Opium," March 4, 1881, *The Statutes of California and Amendments to the Codes, 1881, 24th Session of the Legislature* (Sacramento: State Office, 1881), 34.

46 "Gross Injustice," *The Stockton Daily Evening Herald*, September 4, 1880.

47 See, for example, "Rum and Opium," *The Stockton Daily Evening Herald*, May 24, 1880.

Californian, lager to a German, or poi to a Kanaka."[48] The same year that this article was printed, the *Chronicle* also reported that a white man was charged with selling a Chinese man "bogus opium" — the City was not only tolerating the Chinese opium practice before 1875, it was protecting it.[49]

In part, this is because the use of opium in non-smoking forms was actually rather common among white people of the era, so use of the substance itself was not unfamiliar. It has been shown that the most common users of opium at the time were white women.[50] However, most whites who used the drug were "opium eaters" and not "opium smokers."[51] Opium smoking remained foreign, and fascinating to white Americans unfamiliar with the drug as it grew in popularity. Newspaper accounts exploring the practice of smoking and opium addiction were frequently published,[52] and an entire book devoted to the matter was written in 1881 by a doctor.[53] These early accounts of the effects of opium smoking were, almost without fail, lurid and phantasmagoric.[54]



"HITTING THE PIPE."

An Introductory Article on the Stockton Process.

How Opium is Cooked and Smoked Two Blocks from Police Headquarters.

48 "Opium Smuggling," *The San Francisco Chronicle*, February 19, 1870.

49 "Police Court Record," *The San Francisco Chronicle*, January 11, 1870.

50 Edward M Brecher and the Editors of Consumer Reports, *Licit and Illicit Drugs* (Mt. Vernon: Consumers Union, 1972), 17.

51 Id., 5.

52 See, for example, "Hitting the Pipe," *The Stockton Daily Independent*, May 29, 1883, or "Opium — A Fiend talks to a Reporter About It," *The Stockton Daily Independent*, August 28, 1883.

53 H.H. Kane, M.D., *Opium Smoking in America and China: A Study of its Prevalence, and Effects, Immediate and Remote, on the Individual and the Nation* (New York: G.P. Putnams's Sons, 1882). As an interesting aside on Kane's book in the context of this article, Kane writes on the fourth page of his book that he is "indebted for a great deal of information" on opium smoking to one Dr. G.A. Shurtleff, who was superintendent of the State Insane Asylum at Stockton.

54 For an example, Kane pulls no poetic punches in describing the drug's trappings:

> Upon the morals of the individual the effects are well marked. The continued smoking of this drug plunges the victim into a state of lethargy that knows no higher sentiment, hope, ambition, or longing than the gratification of this diseased appetite. It blunts all the finer sensibilities, and cases the individual

Opium smoking was a strange new drug habit that captured the imagination. When the wild descriptions of the seemingly mystical powers of the drug were coupled with the apocalyptic racial propaganda that came to be attached to the people it was most associated with, the laws that resulted from the regulation of opium smoking were destined for interesting interaction with the systematic and compartmentalized legal science mentality that permeated American jurisprudence in the 1880s.[55]

The judicial reactions that arose from these early opium laws are indicative of both the legal complications and the racial motivations behind the drug legislation. For example, in an 1886 federal case out of Oregon denying a writ of habeas corpus for a Chinese resident who allegedly distributed opium in violation of a state law, *Ex parte Yung Jon,* federal judge Matthew Deady delivers the opinion of the court and does not parse his words about the origins of the legislation he is reviewing:

> [T]he use of opium, otherwise than as this act allows, as a medicine, has but little, if any, place in the experience or habits of the people of this country, save among a few aliens. Smoking opium is not our vice, and therefore it may be that this legislation proceeds more from a desire to vex and annoy the "Heathen Chinee" in this respect, than to protect the people from the evil habit. But the motives of legislators cannot be the subject of judicial investigation for the purpose of affecting the validity of their acts.[56]

As frank as Deady is in his opinion on what he perceives as the limits of judicial review on the will of a possibly racist majority, a complementarily

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in a suit of vicious armor, that is as little likely to be pierced by the light of true morality as a rhinoceros hide by a willow twig. To him, Heaven is equivalent to plenty of the drug, Hell, to abstinence from it.

Once fastened upon the victim, the craving knows no amelioration; it is a steady growth with each succeeding indulgence, gaining strength as the huge snow-ball gains in circumference and weight by its onward movement. No wonder that laws have failed to blot it out. A man may wish to be free from it, as may a dove in the talons of an eagle, or a lamb in the embrace of a tiger, and with as little good result. The awakening comes too late. (Id., 128)

55 For a background on the Legal Science Movement see William P. LaPiana, *Logic and Experience: The Origin of Modern Legal Education* (New York: Oxford University Press, 1994).

56 *Ex parte Yung Jon*, 28 F. 308 (August 14, 1886), 312.

frank federal case coming out of California and decided the very same month as *Yung Jon* reaches the opposite conclusion. The judge in the case *In re Ah Jow* is former California Supreme Court Chief Justice Lorenzo Sawyer again, and he discharges a Chinese prisoner charged with violating a Modesto ordinance penalizing any person visiting a place where opium is sold or given away by ruling, rather simply:

> The ordinance applies to all citizens, as well as aliens, and deprives them of rights and privileges secured by the constitution and laws of the United States. If directed only against Chinese, then it would be void under the fourteenth amendment as discriminating against them.[57]

Sawyer cites *Yick Wo* in his decision, a case that had been decided by the Supreme Court of the United States less than four months prior.[58]

Springing from the same questionable sources as other anti-Chinese legislation, opium ordinances faced difficulties in enforcement, as it was unclear what exactly the people were trying to prohibit besides the practices of the Chinese, generally. As mentioned before, the opium ordinance at issue in *Sic*, Stockton Municipal Ordinance 192, was not Stockton's first attempt to regulate the drug.[59] Indeed, concerns with police hesitance in enforcing Stockton's 1878 opium law led to an inclusion of explicit penalties for law enforcement officials who did not give full effort to their enforcement of Ordinance 192.[60]

As a further complication, Section 3 of Ordinance 192 seemed to not just prohibit opium dens (as was the normal practice for anti-opium laws), but went further and prohibited the gathering of two people anywhere to

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57 *In re Ah Jow*, 29 F. 181 (1886), 182.

58 *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

59 See "Police as Judges," *The Stockton Daily Evening Herald*, January 27, 1880.

60 The relevant section of Ordinance 192: "It shall be the duty of the Chief of Police and of regular and special police officer of the city of Stockton to see that the provisions of this ordinance are strictly enforced, and any of such officers who shall knowingly and willfully neglect or refuse to diligently prosecute any person violating any of its provision, or who shall neglect or refuse to diligently investigate any alleged violation which may come to his knowledge, shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment not exceeding three months, and shall be subject to removal from office." A draft of the ordinance was printed in full in *The Stockton Daily Evening Mail* on October 27, 1885.

smoke opium.[61] Since opium-smoking practices of the time necessitated at least two people, Ordinance 192 essentially banned opium smoking outright, even if one were to partake in the privacy of his own home.[62]

While *Sic* is ultimately decided on a state constitutional issue, some of the most jurisprudentially interesting language in the majority opinion comes in the discussion of the appropriateness of an outright ban like this, and the government's place in regulating personal intake of a substance this invasively. Writes majority opinion author Justice Jackson Temple:

> To prohibit vice is not ordinarily considered within the police power of the state. A crime is a trespass upon some right, public or private. The object of the police power is to protect rights from the assaults of others, not to banish sin from the world or to make men moral. It is true no one becomes vicious or degraded without indirectly injuring others, but these consequences are not direct or immediate. *In jure non remota sed proxima spectatur. . . .* Possibly this resulting injury to others and to society may justify the legislature in declaring these vices to be crimes. We are not required to pass upon that question, and we do not. It is enough to say that such legislation is very rare in this country. There seems to be an instinctive and universal feeling that this is a dangerous province to enter upon, and that through such laws individual liberty might be very much abridged.[63]

Justice Van Patterson's concurring opinion, while agreeing that the law is invalid, really slams this question home, focusing almost exclusively on invalidating Ordinance 192 for its overextension into a realm of "certain great principles that cannot be invaded" by legislation.[64] Namely, the right of every man to "eat, drink, and smoke what he pleases in his own house."[65]

Opium laws on the West Coast were America's first drug laws. They were carried into law books with fervent anti-Chinese sentiment, but when they arrived at the courts they posed individual liberty questions much

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61 From Section 3 of Ordinance 192. Quoted in *Sic* at 144.

62 See, for example, "Hitting the Pipe," *The Stockton Daily Independent*, May 29, 1883, or Kane *supra* note 53 at 70.

63 *In the Matter of Sic*, 73 Cal. 142 (1887), 145–46.

64 Id., 150.

65 Id.

different from the typical "Can we discriminate against these Chinese or not?" question that most anti-Chinese legislation presented.[66]

In *Sic*, the California Supreme Court had the unique privilege of being able to avoid both the discrimination and individual liberty questions presented by opium laws, but it seems very likely that these deep auxiliary questions of *why* we make laws must have led the Court to examine *how* we make laws much more closely than it typically would have.

SIC, DILLON, AND THE RESTRICTION OF LOCAL GOVERNMENT

> "*The decisions on this question are so very conflicting that they present no obstacle to our considering it as a new one. . . .*"
>
> —Justice Jackson Temple, *In re Sic*

Article XI, section 11 of the original 1879 California Constitution states, "Any county, city or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with the general laws."[67]

This is the provision of the 1879 Constitution at issue in *Sic*. The California Penal Code (part of "the general laws") contained Section 307, which prohibited certain opium transactions and opium dens. Stockton, for its local part, had Municipal Ordinance 192, essentially prohibiting opium smoking altogether. The question before the Court was whether under section 11 of article XI, Ordinance 192 conflicted with Section 307. If the two laws did conflict, Stockton's law would be invalidated.

Defending the validity of Ordinance 192 for Stockton was its drafter, Stockton City Attorney Frank Smith. Smith had been reelected to his office in no small part because of his role in drafting the anti-Chinese ordinances that included Ordinance 192, and because of the belief that he was the most qualified lawyer in town to defend Stockton's local governance

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66 For an excellent example of a court discussing the evolution of government at issue in the early opium cases, see *Territory v. Ah Lim*, 1 Wash. 156, (1890), 165–66.

67 For a discussion of this particular section of the 1879 Constitution in much more depth than I go into here (including a criticism of how the *Sic* Court read the commas in the section), see John C. Peppin, "Home Rule in California III: Section 11 of Article XI of the California Constitution," *California Law Review* 32 (1944): 341.

against state attacks like the one presented in *Sic*.[68] In a speech campaigning for his reelection after his 1885 anti-Chinese ordinances were adopted, Smith said, "[Y]ou will understand readily why a city attorney should not be forward in expressing opinions that might be misconstrued as evidence of prejudice against the Chinese, but if you want to know how I stand, I am strongly in favor of using every lawful means to get the Chinese out of Stockton's limits. . . . The city has and will continue to have my best efforts towards that end."[69]

Going into his defense of Ordinance 192, Smith had already seen one of his 1885 anti-Chinese ordinances struck down in federal court in the *Stockton Laundry* case.[70]

Attacking the validity of Ordinance 192 was Lyman I. Mowry, a San Francisco lawyer who had appeared many times before the California Supreme Court representing Chinese clients.[71] Mowry was the go-to lawyer for the Six Companies Chinese Association (one of the groups that funded Chinese challenges to anti-Chinese laws) during this era, and, as could be expected, this work made him infamous in the San Francisco press. In a newspaper article describing the theft of bread from the front porch of Mowry's San Francisco home, the opening paragraph reads "Lyman I. Mowry, the attorney who has assisted many Chinese to take bread from the mouths of white men and women, has recently suffered from the enforcement of the lex talionis. White men have

ATTORNEY LYMAN I. MOWRY, CHARGED WITH ONCE HAVING BEEN A HIGHWAYMAN.

68 "The City Attorney," *The Stockton Daily Independent*, October 29, 1885. Incidentally, Smith successfully defended several other ordinances he drafted from state preemption, including an anti-prostitution ordinance decided a month after *Sic* in which his opposing counsel was none other than anti-Chinese crowd rouser and future governor James Budd. See *Ex Parte Johnson*, 73 Cal. 228 (1887).

69 "They Are Sound," *The Stockton Daily Independent*, October 29, 1885.

70 *In re Tie Loy*, 26 F. 611 (1886).

71 A sampling of cases in which Mowry stood as counsel for Chinese clients: *People v. Wong Ah Ngow*, 54 Cal. 151 (1880); *Ah Jack v. Tide Land Reclamation Co.*, 61 Cal. 56 (1882); *Ex parte Young Ah Gow*, 73 Cal. 438 (1887); *People v. Lum Yit*, 83 Cal. 130 (1890); *People v. Chun Heong*, 86 Cal. 329 (1890).

been stealing his bread."[72] Other newspaper accounts paint him as a chain-smoker and an alcoholic,[73] raise questions as to whether he is a member of a Chinese secret society,[74] and tout his mastery of the feminine art of cooking.[75] His courtroom demeanor was described as overconfident and aloof.[76]

Mowry's petitioner's brief to the Court for Sic is handwritten in flat and fast cursive, complete with sloppy corrective marginalia, and cites to barely a half-dozen out-of-state cases the Court could refer to for support of state preemption.[77] Smith's respondent's brief for Stockton is neatly typed, underlined in places for emphasis, and cites to somewhere in the neighborhood of fifty cases for the Court to examine supporting Stockton's right to pass and enforce ordinances like 192.[78] As it would turn out, fortunately for Mowry, the case did not come down to presentation or precedent.

As Justice Temple's epigraph to this section shows, the Court looked at the authority preceding it, and decided that the conflict of opinions on the matter made no particular authority persuasive. The Court then decided to resolve the question raised by the interaction between Section 307 and Ordinance 192 as a matter of first impression. With the case law out of the picture, the Court was left to decide what exactly "conflict with the general laws" meant — how far Stockton could go with regulating opium intake in the town before their effort became necessarily a challenge to the authority of the state. Answering this question meant deciding between two contemporary competing schools of thought on the role of municipalities in governance. The two schools of thought are those of Michigan Judge Thomas Cooley and Iowa Judge John Dillon.

Cooley's was the perspective advocated by Smith and Stockton, and was a position of strong local governance.[79] His *Treatise on Constitutional*

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72 "Lyman I. Mowry's Bread," *The San Francisco Call*, August 23, 1892.

73 "Tobacco Smoke Annoyed Her," *San Francisco Chronicle,* September 13, 1899.

74 "Says Mowry is a Highbinder," *San Francisco Call*, August 21, 1896.

75 "Man in the Kitchen," *San Francisco Chronicle*, June 3, 1894.

76 "Fong Ching Shee," *San Francisco Chronicle*, January 6, 1888.

77 Petitioner's Brief. The court documents are available at the California State Archives by requesting the file either for *In the Matter of Sic*, 73 Cal. 142, or WPA #13791. By way of trivia, the original petition for the writ of habeas corpus for Sic is signed by a man named Lee Po and is signed in Chinese characters.

78 Id., Respondent's Brief.

79 Id.

Limitations declared that "the American system is one of complete decentralization, the primary and vital idea of which is, that local affairs shall be managed by local authorities, and general affairs only by the central authority."[80] Cooley believed in the virtues of "local constitutionalism."[81] Rudimentarily summarized, Cooley's philosophy was that deference should be given to local governments whenever appropriate, as their grassroots structure and participatory nature made them better suited to discern a public purpose in legislation than state governments were.[82] So absolutely did he believe in the importance of a decentralized system that he once wrote in an opinion, "[L]ocal government is a matter of absolute right; and the state cannot take it away."[83]

Dillon's basic philosophy, on the other hand, can be rudimentarily summarized with the idea that local governments should not be given any more authority than they absolutely must be given — those powers expressly delegated to municipalities in state constitutions. Dillon simply didn't trust local government to make smart decisions. In a notably disdainful section of his *Treatise on Municipal Corporations* he wrote, "[T]he value of our municipal corporations has been impaired by evils that are either inherent in them or that have generally accompanied administration," and then went on to insinuate that locally elected officials lack "intelligence, business experience, capacity, and moral character," and that as a result, the "administration of the affairs of our municipal corporations is too often unwise and extravagant."[84]

Essentially, Dillon believed that local governments were filled with corrupt and unthinking fools. So low was his opinion of local government and high his preference for limiting their power that he enumerated only three circumstances where local governments could act:

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80 Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon The Legislative Power of the States of the American Union* (Boston: Little, Brown, and Company, 1868), 189.

81 David J. Barron, "The Promise of Cooley's City: Traces of Local Constitutionalism," *University of Pennsylvania Law Review* 147 (1999): 487, 492.

82 Id., 521.

83 *People v. Hurlbut*, 24 Mich. 44 (1871), 108.

84 John F. Dillon, *The Law of Municipal Corporations, Third Edition* (New York: James Cockfort & Co., 1881), § 11, 19–20.

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers and no others*: First, those granted in *express words*; second, *those necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[85]

Naturally, Dillon's perspective was the perspective advocated by *Mowry* and *Sic*.

Both Cooley and Dillon are fruit from the same tree, growing as they did out of a singular root problem of widespread government malfeasance accompanying and following the industrial revolution. In some sense, their differing perspectives are simply two sides of the same coin.[86] The coin toss in *Sic* would land with Dillon's side facing up.

After discarding the case law in *Sic,* the Court scrambles over to Dillon, and points out that Stockton had no express authority to regulate opium under the state constitution.[87] It then settles the conflict issue by theorizing that legislating on the same matter and thus creating a situation where a citizen could be tried twice for the same offense, or where being tried for a local offense could preclude being tried under a state offense, is the type of conflict that article XI, section 11 is trying to prevent. Its authority for this is a loose analogy to the relationship between the federal government and the states.[88]

To be blunt, the Court's opinion is shaky. In part, this shakiness is precisely because they threw away the case law, which favored Stockton and would likely have dictated a different result. In considering the *Sic* ruling for a similar overlapping ordinance a few years after the decision, the Idaho Supreme Court would write:

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85 Id., § 89, 115–16.

86 For an article that delves more deeply into the differences between and fates of Cooley and Dillon, See Edwin A. Gere, "Dillon's Rule and The Cooley Doctrine," *The Journal of Urban History* 8 (1982): 271.

87 *In the Matter of Sic*, 73 Cal. 142 (1887), 148. While the opinion is not devoid of case law, there is only one case citation in the entire majority opinion, and that is to an Alabama case, not a California case.

88 Id., 148–49.

> In [*Sic*] the court says: "The decisions on this question are so very conflicting that they present no obstacle to our considering it as a new one," etc., and proceeds to consider it as a new one, and hold such ordinances void. After carefully considering the authorities on both sides of this question, I find that the clear weight of authority and reason is against the rule adopted by the supreme court of California. . . .[89]

As this 1894 Idaho decision shows, The *Sic* decision was not particularly influential even soon after it was decided (although it was applied semi-regularly in California for some time[90]). As of 2011, *Sic* has not been cited in a court opinion from any state for over forty years.[91] Part of the reason for this is exactly what the Idaho court says. It is no longer, and it probably never was, "good law."

However, if one can take a page from the *Sic* court and put the law aside for a moment, the virtue of the decision becomes more apparent.

In 1887, the California Supreme Court was in the center of a maelstrom of anti-Chinese political and legislative activity, assaulted on one side by out-of-control local uprisings and on the other side by heavy-handed federal slapdowns. Before the Court stood a Stockton ordinance clearly stemming from anti-Chinese sentiment. The same type of unhesitating anti-Chinese sentiment that had given rise to endless ill-advised legislation in California — legislation that was routinely embarrassingly crushed in the federal courts. In touching on opium, this same Stockton ordinance also infringed on potential individual liberties in a manner that was likely not fully considered in its drafting, and certainly in a manner that the Court had never previously considered.

To put the law aside and run to Dillon was a highly sensible decision for the *Sic* Court to make. In some ways, the story behind Stockton's 1885 anti-Chinese ordinances and opium ban could serve as a textbook example of why Dillon would have developed the philosophy that he did — a mob-like small-town meeting that resulted in overbearing and shortsighted policy.

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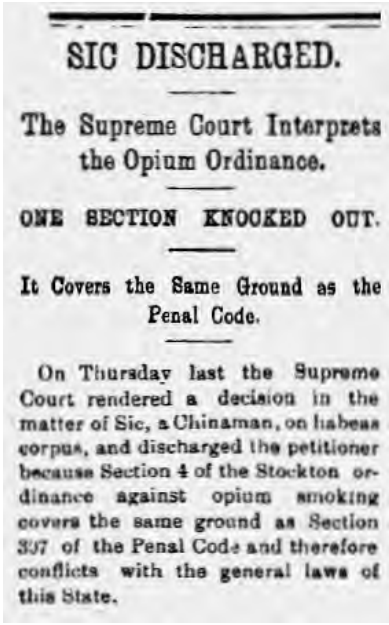
89 *State v. Preston*, 4 Idaho 215 (1894), 219.

90 A few examples: *Ex parte Christensen*, 85 Cal. 208 (1890); *Ex parte Taylor*, 87 Cal. 91 (1890); *Ex parte Hong Shen*, 98 Cal. 681 (1893); *Ex parte Mansfield*, 106 Cal. 400 (1895); *Ex parte Stephen*, 114 Cal. 278 (1896).

91 Most recent citation: *Bishop v. San Jose*, 1 Cal. 3d 56 (1969), 69.



SIC DISCHARGED.

The Supreme Court Interprets the Opium Ordinance.

ONE SECTION KNOCKED OUT.

It Covers the Same Ground as the Penal Code.

On Thursday last the Supreme Court rendered a decision in the matter of Sic, a Chinaman, on habeas corpus, and discharged the petitioner because Section 4 of the Stockton ordinance against opium smoking covers the same ground as Section 397 of the Penal Code and therefore conflicts with the general laws of this State.

Viewed in its historical context, as opposed to its legal context, the *Sic* decision makes perfect sense. It limits local power at a time when local power was proving to be disastrous and sends a message of "Please calm down and think about this a little more," in the least offensive way it can.

The *Stockton Daily Independent*, which consistently published anti-Chinese articles during this era, reacted rather benignly to the *Sic* decision, publishing a simple, matter-of-fact account of the decision remarkably free of any criticism of the Court.[92] Within a week of the decision, the paper would publish an article about *Sic* being applied to release a white Santa Cruz man who had been arrested under a local ordinance regulating bar and theater licenses. The headline for this Santa Cruz article is "SIC SEMPER: Makes a Santa Cruz Ordinance Sicker."[93] The tone of the article is not one of anti-state-power, "Look at what else this horrible decision is doing!" but rather a shoulder-shrugging tone of "Well, it looks like this silly ruling applies to everyone, and everything. Those are the breaks."

As the State of California struggled with the anti-Chinese movement and a related new field of drug regulation, the California Supreme Court struck a much-needed balance to settle down the whole system with its decision in *Sic*. It may not have settled the matter in a way that was particularly comfortable for local government, but it certainly took some fire out from under the movement for the "devilishly uncomfortable."

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92 "Sic Discharged," *The Stockton Daily Independent*, June 17, 1887.

93 "Sic Semper," *The Stockton Daily Independent*, July 20, 1887.