BUILDING THE NEW SUPREMACY:

California's "Chinese Question" and the Fate of Reconstruction

ROMAN J. HOYOS*

The so-called "Chinese question" was one of the most important and consequential political and constitutional issues facing California in its first half-century as a state.[1] The Chinese were one of the fastest growing populations in the state in the second half of the nineteenth century. Their presence and status within California drove most of the bedrock political issues of the day: capital versus labor, race and gender, citizenship and nation, and the nature of local, state, and federal power, not to mention international relations. The Chinese worked in the most important economic industries in the state, including mining, railroads, and agriculture. Their willingness to work for low wages for large, often corporate, employers was viewed as a threat to the political, economic, and cultural status of white laborers.

* Associate Professor, Southwestern Law School (Los Angeles). I would like to thank John Tehranian, Timothy Mulvaney, Ken Stahl, Priya Gupta, Arthur McEvoy, Annie Decker, and the participants at the 2013 Local Government Law Conference for their comments, suggestions, and discussions of an earlier draft of this article.

[1] I treat the "Chinese" people here as a singular people because this is how they were treated by the legal and political actors who are the focus of this paper. It is not to suggest, however, that they were in fact a singular people. Eve Armentrout-Ma, "Urban Chinese at the Sinitic Frontier: Social Organizations in United States' Chinatowns, 1849–1898," *Modern Asian Studies* 17 (1983): 107.

Ultimately, they became an "indispensable enemy" in the formation and consolidation of California's labor movement. Their inscrutable foreignness also made them appear to be a threat to the public at large, especially their "opium dens" and brothels. Ultimately, the Chinese became an indispensable outlet for the economic frustrations of communities throughout the West. Massacres and "roundups" of Chinese people became a regular occurrence in the late nineteenth century in California and the West.[2]

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[2] There is a substantial and ever-growing literature on the Chinese experience in California and the United States in the nineteenth and early twentieth centuries. On legal history, see Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995); Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994); David C. Frederick, *Rugged Justice: The Ninth Circuit Court of Appeals and the American West, 1891–1941* (Berkeley: University of California Press, 1994): ch. 3; Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891* (University of Nebraska Press, 1991); Gordon Morris Bakken, "Constitutional Convention Debates in the West: Racism, Religion, and Gender," *Western Legal History: The Journal of the Ninth Judicial Circuit Historical Society* 3 (1990): 213; Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," *Hastings Constitutional Law Quarterly* 17 (1989): 35; Christian G. Fritz, "A Nineteenth Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California," *The American Journal of Legal History* 32 (1988): 347.

On labor history, see Stacey L. Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (Chapel Hill: The University of North Carolina Press, 2013); Moon-Ho Jung, *Coolies and Cane: Race, Labor, and Sugar in the Age of Emancipation* (Baltimore: Johns Hopkins University Press, 2006); Peter Kwong, *Forbidden Workers: Illegal Chinese Immigrants and American Labor* (New York: New Press: distributed by W.W. Norton, 1997); Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley: University of California Press, 1995); Chris Friday, *Organizing Asian American Labor: The Pacific Coast Canned-Salmon Industry, 1870–1942* (Philadelphia: Temple University Press, 1994); Sucheng Chan, *This Bittersweet Soil: The Chinese in California Agriculture, 1860–1910* (Berkeley: University of California Press, 1986).

On local and urban history, see Benson Tong, *Unsubmissive Women: Chinese Prostitutes in Nineteenth-Century San Francisco* (Norman: University of Oklahoma Press, 1994); Natalia Molina, *Fit to be Citizens?: Public Health and Race in Los Angeles, 1879–1939* (Berkeley: University of California Press, 2006); Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco's Chinatown* (Berkeley: University of California Press, 2001); Yong Chen, *Chinese San Francisco, 1850–1943: A Trans-Pacific Community* (Stanford: Stanford University Press, 2000). On immigration history, see Sucheng Chan, *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*

The "Chinese question" was not, however, solely a question about economic competition. It was also a discursive device through which Californians worked out their ideas about slavery, freedom, law, constitutionalism, and the state. As Moon-Ho Jung has shown, for example, the Chinese question helped Americans navigate the transition from a slave to a post-emancipation society. In California, the degraded Chinese "coolie" laborer became a symbol of slavery, and exclusion the means by which Californians could remain a "free" state. Even though Chinese laborers entered into contracts to work, the hallmark of free labor ideology, the contracts were often seen as a form of indentured servitude. "Chinese" and "coolie" were often used synonymously in political and constitutional discourse to emphasize the foreignness of the Chinese and their threat, as a race, to new American ideas about freedom and free labor.[3]

The Chinese were also seen as a threat to the welfare of local, state, and eventually to the national communities and governments. As a threat, they came under intense scrutiny and regulation by state and local governments. They were often blamed for the social and moral ills of the community. As Nayan Shah has explained, "The medical knowledge of Chinese deviance and danger emerged in the context of a fervent anti-Chinese political culture and escalating class confrontations generated by the social tumult of industrialization, rapid urbanization, and tremendous migration into San Francisco."[4]

(Philadelphia: Temple University Press, 1991); Grace Delgado, *Making the Chinese Mexican: Global Migration, Localism, and Exclusion in the U.S.–Mexico Borderlands* (Stanford, California: Stanford University Press, 2012); Erika Lee, *At America's Gates: Chinese Immigration During the Exclusion Era, 1882–1943* (Chapel Hill: University of North Carolina Press, 2003); Erika Lee and Judy Yung, *Angel Island: Immigrant Gateway to America* (New York: Oxford University Press, 2010).

On race, class, and gender, see Najia Aarim-Heriot, *Chinese Immigrants, African Americans, and Racial Anxiety in the United States, 1848–82* (Urbana: University of Illinois Press, 2003); D. Michael Bottoms, *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850–1890* (Norman: University of Oklahoma Press, 2013); 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 (1994): 55. See also Jean Pfaelzer, *Driven Out: The Forgotten War Against Chinese Americans* (Berkeley: University of California Press, 2008).

[3] Jung, *Coolies and Cane*; see also Bottoms, *An Aristocracy of Color*; Smith, *Freedom's Frontier*.

[4] Shah, *Contagious Divides*, 4.

Cholera outbreaks, for instance, were often traced back to Chinatowns. Opium dens not only enervated and degraded the Chinese themselves, but lured innocent white men and women into moral turpitude. Laundry businesses, a vocation many Chinese people turned to after being forced out of other trades and industries, were perceived as threats to the public health and safety. Their seemingly baleful practices were usually attributed to their owners' status as Chinese. Indeed, the Chinese were often taxed simply for being "foreign."

Continued agitation over the Chinese question in California through the end of the nineteenth century was also instrumental in the emergence of a new phase in immigration legal history. The Chinese Exclusion Acts of 1882 marked the first time in which a specific racial group was excluded from entering the United States. The tightening of these restrictions over the subsequent decade, and the U.S. Supreme Court's plenary power doctrine which insulated the decisions of federal immigration officials from judicial review, was the culmination of this new racialized immigration.[5]

Implicit in these conflicts and transitions, though rarely explored, is the role that the Chinese question played in Reconstruction and the changes occurring in the American state following the Civil War.[6] Most of the legal history of the Chinese in California has focused on questions of individual rights and/or immigration law. But the attempts to regulate and exclude the Chinese would be the basis upon which some of the terms of constitutional Reconstruction would be worked out. The Chinese were willing litigants, and, through merchant associations known as the Chinese Six Companies and other organizations, had the means to acquire talented lawyers in California. Chinese litigants regularly prevailed once in court. Federal judges evinced a willingness to protect the rights of Chinese people even when they themselves were hostile towards the presence of Chinese in California.[7] But at the end of the day, Chinese were excluded from entering the United States, wiping out many

[5] See, e.g., Chan, *Entry Denied*; Delgado, *Making the Chinese Mexican*; Lee, *At America's Gates*; Salyer, *Laws Harsh as Tigers*.

[6] Harry Scheiber has been one of the few to point out this aspect of the Chinese question. Scheiber, "Race, Radicalism, and Reform," 74–78.

[7] See, e.g., Fritz, *Federal Justice*. Judge Ogden Hoffman's commitment to his professional duty over his personal views seems strikingly similar to Robert Cover's notion of "judicial positivism," which he argues helps to explain why anti-slavery judges would protect slaveholders' rights to slaves. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975).

of the successes they experienced in federal courtrooms over several decades. From the perspective of the Chinese this is the tragic result of their efforts, especially after judges seemed so willing to set aside their personal convictions, and often in the face of open hostility to their decisions.

There is, however, a different narrative. It does not require us to abandon or suppress the tragedy of the Chinese experience in the nineteenth century; in a way, it makes the story tragic from the outset. But it does require us to reframe the meaning of the Chinese question. Fundamentally, the question as it played out in the courts was about state power more than individual rights. The rights of the individual Chinese litigant were always secondary; they mattered only to the extent that they provided a context for working out a new constitutional order.

The Chinese question had triggered federalism questions before the Civil War, centering on whether the state's action interfered with the federal government's commerce and treaty powers. These issues remained after the war, but Reconstruction introduced new legal technologies that transformed the relationship between state and local, and the federal government. Clauses in the Fourteenth Amendment to the U.S. Constitution such as "due process," "privileges or immunities," and "equal protection," as well as congressional legislation enforcing these clauses, provided tools for federal courts to penetrate the state's police power in novel ways. The Burlingame Treaty, ratified the same year as the Fourteenth Amendment, extended the privileges and immunities protections to Chinese immigrants.[8] The anti-Chinese movement in California became tied to a states' rights ideology that persisted even after the Civil War. It was rooted in the idea that state and local governments possessed broad authority under their police power to regulate men and things.[9] But as state and local governments used this power to regulate the Chinese, they increasingly butted up against the powers of the federal government, and the restrictions imposed by the Fourteenth Amendment. Anti-Chinese activists would recoil at the ways in which the federal courts protected the rights of Chinese. They even used the constitutional convention, an institution with a long historical connection to popular sovereignty,

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[8] The privileges or immunities clause was limited to "citizens" under the Fourteenth Amendment.

[9] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

to fortify the state's power to protect itself from the threats posed by Chinese immigrants. The convention's efforts, along with those of several municipalities, ultimately proved the undoing of states' rights in this field.

The procedural trigger for applying these clauses, in the Chinese cases, was the federal courts' expanded habeas corpus jurisdiction. The Habeas Corpus Act of 1867 enabled federal judges in the Ninth Circuit to expound on the Fourteenth Amendment's clauses. The Habeas Act, passed the same year as the first Reconstruction Acts, allowed federal courts to hear petitions for habeas corpus from prisoners held by state authority for the first time. Although Congress withdrew the U.S. Supreme Court's appellate jurisdiction under the act the following year, the lower federal courts' jurisdiction remained intact. The Chinese in California took full advantage of the Act's protections, turning California's federal district and circuit courts into "habeas mills" that applied the protections of the Fourteenth Amendment and the Burlingame Treaty in ways that circumscribed the powers of state and local governments.[10] Congress would restore the Supreme Court's appellate jurisdiction in the 1880s, and the Court would use it to consolidate federal supremacy with respect to immigration.

THE OLD SUPREMACY

Throughout the last half of the nineteenth century state and local governments in California used their tax and police powers to regulate and exclude Chinese people. California was not unique in this regard. As William Novak has explained, "early American associationalism was a mode of governance. Membership in and exclusion from a range of differentiated self-governing associations determined one's bundle of privileges, obligations, and immunities . . . ."[11] Illinois and Indiana, for example, had long excluded African

[10] Fritz, "A Nineteenth Century 'Habeas Corpus Mill.'"

[11] William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in Meg Jacobs, et al., eds., *The Democratic Experiment: New Directions in American Political History* (Princeton: Princeton University Press, 2003): 85, 98; see also Laura F. Edwards, "The People's Sovereignty and the Law: Defining Gender, Race, and Class Differences in the Antebellum South," in *Beyond Black and White: Race, Ethnicity, and Gender in the United States South and Southwest* (Arlington: University of Texas Press, 2003): 3; idem, "Status Without Rights: African Americans and the Tangled History of Law and Governance in the Nineteenth Century U.S. South,"

Americans from their borders. States on the eastern seaboard imposed taxes and other obligations on migrants likely to become public charges. And all state and local governments used the police power to protect their communities from the myriad threats to the public health, safety, welfare, and morals. What distinguished California's efforts was its specific targeting of Chinese immigrants, which butted up against federal power. Before Reconstruction, the conflict centered on Congress's power over foreign commerce.

Local governments' use of the police power in the 1850s was less likely to interfere with federal power than it would after Reconstruction. For one thing, during the 1850s the bulk of the Chinese population was engaged in mining, and thus beyond the boundaries of municipal government. In the absence of formal structures of government, miners' associations appropriated the task of exclusion. These associations of white men took it upon themselves to enforce a racialized political economy that denied property ownership (at least in mines) to Chinese, and recognized the right of exit as the Chinese miners' lone right of locomotion. The miner associations drove off Chinese miners, dispossessed them of their mining claims, and used threats of violence and murder as their chief regulatory tool.[12]

With respect to the formal organs of government, the state legislature, rather than local governments, assumed responsibility for regulating and excluding the Chinese. California's legislature experimented with a number of measures to exclude and penalize Chinese people for migrating to and/or living and working in California. These efforts were not very successful, except in generating tension within California, and between California and the federal government. The Legislature's chief tactic in dealing with the Chinese was taxation. The Legislature imposed a variety of fees and taxes on Chinese, employers, and shippers to stem Chinese migration and labor. In May 1852, for example, the state re-enacted the Foreign Miners' License Tax, "to Provide for the Protection of Foreigners and to define their liabilities and privileges," a $3/month tax on miners from foreign countries. Unlike its predecessor, this tax was aimed specifically at Chinese miners. It also denied those who did not pay the tax access to courts.

The American Historical Review 112 (2007): 365; idem., *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

12 Pfaelzer, *Driven Out*, 8–16, 34–38.

In 1861, the state revised the statute making all foreigners ineligible for citizenship residing in a mining district liable for tax. Violence was often used in the collection of such taxes. One collector, for instance, tied two Chinese men together by their hair (or queues) while they searched the men's belongings for money to pay the tax.[13]

The Chinese challenged these taxes in two separate cases on *state* constitutional grounds. In *Ex parte Ah Pong*,[14] a Chinese laundryman, Ah Pong, refused to pay the tax, and was ordered to work on roads until the tax was paid off, not an uncommon penalty at the time. Ah Pong petitioned for a writ of habeas corpus in state court, challenging the statute's constitutionality. The California Supreme Court released Ah Pong, but avoided the constitutional issue, construing the act to apply to miners only. In the second case, *Ah Hee v. Crippen*, the Chinese plaintiff secured a temporary victory on the constitutional issue. Ah Hee sued in replevin to recover a horse that had been taken for his failure to pay the tax. Ah Hee challenged the tax on state constitutional grounds, arguing that it violated article I, section 7 of California's 1849 Constitution, which granted foreigners the same property rights as United States citizens. The district court agreed. Again, however, the California Supreme Court avoided the constitutional claim, deciding the case favorably to Ah Hee on other grounds.[15]

Two other taxes imposed in the mid-1850s were aimed more directly at excluding the Chinese, and triggered federal constitutional challenges. In 1852, the state imposed a "commutation tax." This tax was designed to discourage migration by requiring shipmasters to prepare a list of all foreign passengers, identify those passengers deemed mentally ill or disabled, and post a $500 bond for each foreign passenger. The bond was usually reduced to $5, and shippers simply added it as a surcharge to the ticket. California was not the first state to impose such a tax. States in the East, including Massachusetts and New York, required shipmasters to post bonds for passengers who were likely to become public charges.[16]

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13 McClain, *Search for Equality*, 12, 24; Pfaelzer, *Driven Out*, 31–32.

14 19 Cal. 491 (1861).

15 McClain, *Search for Equality*, 24–25

16 Hidetaka Hirota, "The Moment of Transition: State Officials, the Federal Government, and the Formation of American Immigration Policy," *Journal of American History* 99 (March, 2013): 1092.

But in 1855, the state imposed another tax on shipmasters or ship owners for landing people in California who could not become citizens, i.e. the Chinese.[17] The difference with this tax was that the early taxes imposed by other states were at least plausibly imposed in support of the state's police power to protect the public welfare; those taxes went to support indigent immigrants. California's taxes, however, were imposed to prevent the immigration of a particular group of people. California's commissioner of immigration, Edward McGowan, quickly realized the distinction, and refused to enforce the 1855 tax because he thought it was an unconstitutional interference with the federal government's power over foreign commerce. The California Supreme Court agreed, and struck down the act in *People v. Downer* in a brief opinion.[18] The state legislature tried to address the constitutional problem in 1858 by trying to exclude persons thought detrimental to public welfare, but it was also struck down.[19]

A final tax, the "Chinese Police Tax," was directed at Chinese labor. Entitled "An Act to protect Free White Labor against competition with Chinese Coolie Labor and to Discourage the Immigration of the Chinese into the State of California," the legislature imposed a monthly tax on most Chinese laborers residing in the state. Employers could also be made liable for tax. Once again, the California Supreme Court struck down the act for interfering with the federal government's foreign commerce power. Being directed at the Chinese, the effect of the tax would be to discourage immigration at the very least.[20]

Aside from the taxes, the state imposed another disability on the Chinese, though it originated in the courts. In *People v. Hall*,[21] the California Supreme Court created a ban on Chinese testimony. Section 14 of the California Criminal Proceedings Act declared, "No black or mulatto person, or indian, shall be permitted to give evidence in favor of, or against, any white person." Through a binary conception of race that divided the races into white and non-white, the court held that this statute banned Chinese testimony, too.[22]

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17 McClain, *Search for Equality*, 17.

18 7 Cal. 169 (1857).

19 As discussed in *Lin Sing v. Washburn*, 20 Cal. 534, 438 (n. 63, 293); McClain, *Search for Equality*, 18.

20 McClain, *Search for Equality*, 25–29; *Lin Sing*, 577–578.

21 4 Cal. 399 (1854).

22 McClain, *Search for Equality*, 21.

Tortured as the analysis may have been, it nonetheless fit within a concept of citizenship that allocated rights and privileges on the basis of a person's status.[23] In fact, the denial of Chinese testimony was central to the creation of a racialized state in California in the 1850s. "Extending testimony privileges to the Chinese, for instance, also meant endowing the Chinese with the power to command white action," such as compelling the arrest of white men.[24] Clearly, this should be beyond the power of an "inferior" race.

The Chinese testimony cases following the Civil War illustrate the emerging line of scrimmage in Reconstruction jurisprudence on the Chinese question. *People v. Washington*[25] examined the ban on Chinese testimony in light of the 1866 federal Civil Rights Act. In that case, a black man, George Washington, stole some gold from a Chinese miner. Washington was prosecuted for theft, but the only testimony against him was that of Chinese witnesses. Washington's attorney moved to dismiss the case on the grounds that the Civil Rights Act entitled Washington to the same privilege of the ban on Chinese testimony as that of whites. The trial judge agreed, and the prosecutor appealed to the California Supreme Court. As Michael Bottoms has explained the dilemma, "If the court found the Civil Rights Act constitutional, *all* testimony would be admissible. . . . On the other hand, if the court rejected Congress's right to pass such legislation, then the barriers to racial minorities survived, and Washington was not equal to whites." The court ultimately upheld the Civil Rights Act, and preserved California's racial structure, by resting its decision on the Thirteenth Amendment. However, the court also recognized that the recently-ratified Fourteenth Amendment likely rendered the issue moot.[26]

In 1869, the year *Washington* was decided, the basic scope of the Fourteenth Amendment was still being sorted out, and many believed that it only applied to African Americans. In fact, the United States Supreme Court raised the question without deciding it in the *Slaughterhouse Cases*. This construction of the Fourteenth Amendment of course left plenty of room for unequal protection for other groups, including the Chinese. In

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[23] Novak, "The Legal Transformation of Citizenship"; Edwards, "Status Without Rights."

[24] Bottoms, *An Aristocracy of Color*, 25.

[25] 36 Cal. 658 (1869).

[26] Bottoms, *An Aristocracy of Color*, 49–51.

1871, in another Chinese testimony case, *People v. Brady*,[27] divisions within the California Supreme Court over the boundaries of the Fourteenth Amendment began to appear. The majority again upheld the testimony ban. In so doing, the Court held that the new amendment was not intended to interfere with "internal police" of state governments, which included the state's control over its trial procedure. By contrast, the dissent argued that the Equal Protection Clause applied to the case, and abrogated the ban on Chinese testimony.[28] *Brady* raised the question at the heart of constitutional Reconstruction that would be fought out in state and federal courts through the end of the century: whether the Fourteenth Amendment imposed new limits on state and local governments' police powers.

RECONSTRUCTION

As this legal debate over Chinese testimony reveals, Reconstruction had changed the legal discourse by giving lawyers and judges new legal technologies to deploy. The most obvious change, and the most consequential, was the Fourteenth Amendment. The amendment's due process and equal protection clauses gave Chinese litigants new theories by which to challenge state and local anti-Chinese laws. The privileges or immunities clause was limited to "citizens" and thus did not apply directly to the Chinese, who could not become citizens. But a similar clause in the Burlingame Treaty with China did. Ratified the same year as the Fourteenth Amendment, it granted Chinese immigrants the same "privileges, immunities, and exemptions" as those of the most favored nation.

As important as the Fourteenth Amendment was the Habeas Corpus Act of 1867. The 1789 Judiciary Act had limited federal habeas jurisdiction as to prisoners held in federal custody. The 1867 act expanded federal habeas jurisdiction to include prisoners held in state custody. It also expanded the writ from a pre-trial procedure to a post-conviction device that allowed challenges to state denials of federal rights. This change "struck directly at traditional powers of the state courts," and of states more generally. The importance of the 1867 act has been largely overlooked because Congress withdrew the U.S. Supreme Court's appellate jurisdiction under the act the following year, fearing

[27] 40 Cal. 198 (1871).

[28] McClain, *Search for Equality*, 35–36.

that it might use it to strike down congressional Reconstruction legislation. But the lower federal courts retained the new habeas jurisdiction. Chinese litigants took advantage of the new procedural device to challenge discriminatory state laws, and federal judges largely supported those efforts. Thus while the U.S. Supreme Court has long been criticized for abandoning the promise of Reconstruction in general and the Fourteenth Amendment in particular, judges in the Ninth Circuit used the Habeas Corpus Act to build a robust jurisprudence around the due process, equal protection, and privileges or immunities clauses in the 1870s and 1880s that limited state power.

The impact of these measures began to emerge in California in the early 1870s, as Chinese litigants took advantage of the federal courts' new habeas jurisdiction to challenge state laws. Two cases decided within a month of each other in 1874 outline the main lines of debate. Both cases arose out of an incident involving passengers on the ship *Japan*. California's commissioner of immigration decided not to allow certain female passengers to land after determining that they were "lewd and debauched." Separate petitions for habeas relief were filed in state and federal courts challenging the California statute giving the commission power to make such determinations.

In *Ex parte Ah Fook* the petitioners argued that the statute violated both the Burlingame Treaty and the Fourteenth Amendment. The California Supreme Court disagreed on both counts. The Court relied on the traditional distinction between the commerce and police powers, and held that the Treaty's privileges, immunities, and exemptions clause could not intrude upon the state's police power. "Otherwise, we should be prohibited from excluding criminals and paupers — a power recognized by all the writers as existing in every independent State. We can but think, that to give the general language of the treaty a construction which would deprive both the States and the United States Government of this power of self-protection would be a departure from the evident meaning and purpose of the high contracting parties."[29]

The Court also denied that the Fourteenth Amendment's due process clause had any effect on the state's police power. In fact, the Court dismissed the significance of the Fourteenth Amendment's due process clause. "A clause substantially the same as that contained in the amendment, is found in the Constitution of California, and in the constitutions of all of the several States."

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[29] *Ex parte Fook*, 49 Cal. 402, 405 (1874).

The Fourteenth Amendment added nothing to the meaning, scope, or significance of such clauses. Due process had to be determined in light of the power being exercised. As the statute was a public health measure, the legislature was given the broadest discretion possible. "[H]ealth laws . . . must be prompt and summary" in order "to prevent the entrance of elements dangerous to the health and moral well-being of the community." And the Court saw no reason to overrule the commissioner's decision or strike down the statute.[30]

By contrast, while riding circuit, U.S. Supreme Court Justice Field held in *In re Ah Fong* that the statute violated the foreign commerce clause and the privileges, immunities and exemptions clause of the Burlingame Treaty, as well as the Fourteenth Amendment's equal protection clause. Field rejected the argument that the statute was a legitimate exercise of the police power. Police involved matters of internal governance, while exclusion dealt with external relations, or foreign commerce, which was Congress's domain. Moreover, as the statute discriminated between Chinese and people of different foreign countries, it encroached upon the federal treaty power, which in this case had been used to grant Chinese the privileges, immunities, and exemptions of the most favored nation.[31]

To this point, there was nothing terribly novel about Field's holding. Conflict with Congress's foreign commerce power had been an issue before the Civil War, and the treaty power had long been a part of the federal constitution. Field's discussion of the Fourteenth Amendment, though, was significant because the federal commerce and treaty powers arguably settled the case. Field could have avoided the Fourteenth Amendment issue. Instead, he held, "Discriminating and partial legislation, favoring particular persons, or against particular persons of the same class, is now prohibited" by the Fourteenth Amendment's equal protection clause.[32] Discriminating, or "class," legislation was distinct from the police power, which had to be directed toward protecting the general welfare. Field would later hold, as we will see, that the Fourteenth Amendment did not limit the states' police power. But since federal courts would have to determine what was class legislation and what was not, it was clear that federal courts would play a

30 Ibid., 406–07.

31 *In re Ah Fong*, 1 F. Cas. 213 (1874).

32 Ibid., 218.

larger role in defining what was and was not within the states' police powers. The new supremacy was becoming apparent.

Ah Fook and *Ah Fong* delimited the boundaries of the Reconstruction debate over the Chinese question. Reconstruction represented a potentially major shift in the structure of constitutional authority in the United States. The state court defended traditional conceptions of state governmental power, especially the police power. It defined that power broadly, and rejected the notion that Reconstruction had transformed it in any meaningful way. Federal courts, by contrast, found in the amendment and other Reconstruction legislation, a new set of limits on the power of the states. Even though the cases that came through the federal courts in the 1870s and 1880s involved individual rights, they were vehicles for asserting the supremacy of the federal government. This debate in the courts, which spilled over into popular politics, provided the context for debates that ensued in California's constitutional convention. These debates revealed a deep ambivalence about the impact of Reconstruction, as delegates simultaneously asserted and denied a new supremacy.

AMBIVALENCE

While there were several reasons for assembling a second constitutional convention in California in the late 1870s, the Chinese question was the most proximate. The enormous growth in population and the growing complexity of the state's economy had rendered the 1849 constitution and the government organized under it largely ineffective. Reformers were especially interested in reining in the state's tax power, the power and influence of corporations, and shoring up the state's judicial and representation systems.[33] But it was the Chinese question that gave the desire for a new constitution its urgency. The movement for a new convention was driven largely by the Workingmen's Party whose slogan was "The Chinese Must Go!" Even though Workingmen did not muster a majority of the convention's delegates, they set the agenda and framed the debates, making clear that the Chinese were their central concern.

While the presence of the Chinese could be felt in debates ranging from corporations and railroads to legislative representation, I want to

[33] Noel Sargent, "The California Constitutional Convention of 1878–9," *California Law Review* 6 (1917): 1, 1–4.

focus on two interconnected debates that help to highlight the connection between the Chinese and Reconstruction in California. The first debate concerned the state's bill of rights, and specifically two clauses, the right to alter or abolish government and the "new" supremacy clause. The debate over these clauses was a prelude to the second debate over what would become article XIX of the new Constitution, which would be titled simply "The Chinese." Article XIX was intended to challenge the Ninth Circuit's jurisprudence on Chinese rights, and reaffirm the state's ability to regulate and exclude its Chinese population. But even at its most defiant, the convention revealed an ambivalence about the impact of Reconstruction.

The broad issues raised in California's debate over the right to alter or abolish government and the new supremacy clause were not unique to California. The right to alter or abolish government had been the key right undergirding a localized conception of popular sovereignty prior to the Civil War. However, because it could legitimately be used to support the idea of state sovereignty, and hence secession, lawmakers and legal thinkers after the Civil War began to search for ways to limit and abstract the right. Convention delegates throughout the country were involved in this reconceptualization of the right.[34] What was unique about California's debate was the Chinese question.

The debate over these clauses began when section two of the bill of rights was reported to the convention.[35] San Francisco lawyer and Workingmen's Party member Clitus Barbour immediately offered an amendment declaring California's right to police itself, in addition to reserving the right to alter or abolish government. It read,

> The people of the State have the inherent, sole, and exclusive right to regulate their internal government, and the police thereof. They have the right to determine what is detrimental to the well-being

[34] I have written about this process elsewhere. Roman J. Hoyos, "A Province of Jurisprudence?: The Invention of a Law of Constitutional Conventions," in Markus Dirk Dubber, and Angela Fernandez, eds., *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Oxford: Hart, 2012); idem, "Peaceful Revolution and Popular Sovereignty: Reassessing the Constitutionality of Secession," in Alfred L. Brophy, and Sally Hadden, eds., *Signposts: New Directions in Southern Legal History* (Athens: University of Georgia Press, 2013).

[35] *Debates and Proceedings of the Constitutional Convention of the State of California*, 3 vols. (Sacramento: J. D. Young, Supt. State Printing, 1880): I, 232.

> of the State, and to exhaust the power of the State to prohibit and prevent it. They have the right to alter or abolish their Constitution and form of government whenever they may deem it necessary for their safety and happiness.[36]

At first blush, Barbour's amendment appears to be an uncontroversial restatement of the state's police power. But he made it clear that the "peculiar situation of this people" gave the clause a distinct meaning; it was designed to address the "overshadowing curse everywhere present" by reserving to the people their power to protect the public welfare.

Throughout the debates anti-Chinese delegates referred to Chinese as a "nuisance," "blight," "pestilence," "filthy," "leprous," etc. These were not simply rhetorical devices, they were intended to bring the Chinese within the regulatory powers of the state. Nuisances, particularly threats to the public health, fell squarely within the state's police power to both abate and prevent threats to the public's health, safety, welfare, and morals.[37] These delegates had some contemporary science on their side. Some physicians had identified the Chinese themselves, and the Chinatowns in which many lived and worked, as sources of disease.[38] Local governments used these connections to regulate Chinese people and their territories as a threat to the public health.[39] As early as 1854, a committee of San Francisco's Common Council declared the Chinese to be a "nuisance" in the wake of a cholera epidemic, which could have led to their removal or expulsion from the city. But until the late 1860s it appears that local governments "mapped" the Chinese and the spaces in which they lived, rather than regulating them directly.[40] This mapping made the Chinese and their patterns of behavior visible and legible to local governments. By the late 1860s, California's municipalities began regulating the Chinese and Chinatowns as "nuisances" in a serious way. To protect these efforts both to regulate and exclude the Chinese, Barbour wanted up front "an emphatic declaration in the Constitution, declaring that this State has the right to regulate her own internal government."[41]

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36 Ibid.

37 Novak, *The People's Welfare*.

38 Salyer, *Laws Harsh as Tigers*, 11–12

39 Shah, *Contagious Divides*, 1–157.

40 Shah, *Contagious Divides*, 20–25, 51; Molina, *Fit to be Citizens?*, 26.

41 *California Debates*, 233.

Charles W. Cross, a Republican elected on the Workingmen's Party ticket, made clear that Barbour's amendment was a gauntlet. "And now," he argued, "as the Government of the United States, one of the parties to this compact, has declared the relation of the several States to the General Government, so we, as a party to this compact, have a right, and it is our duty, in this the only place where we can express our views of our relations to the General Government, to give a clear statement of what we consider these relations to be." Barbour's amendment was intended to challenge both Reconstruction and the Ninth Circuit's construction of it. He continued that "if it be the sentiment of the people of the State of California that no power outside the State of California has a right to interfere in our police regulations, and prevent our taking such steps to formulate such measures as we shall think for the interest, for the protection, of the people of this State, we have a right, and it is our duty, to declare ourselves upon such propositions."[42]

After a brief debate, Barbour's amendment failed.[43] Its failure was not due to a desire to protect the Chinese, however. Delegates well understood that the real issue was about the Chinese, and preferred to discuss it at the appropriate time. Moreover, delegates saw in Barbour's amendment elements of the states' rights doctrine that had led to secession. Charges of secessionism were often used against extremists on the Chinese question. In part because of these charges, as well as charges that the Workingmen were communists or socialists,[44] a new clause was inserted in California's bill of rights.

The "new" supremacy clause was one of the most important innovations of the postbellum constitutional conventions. The clause recognized the federal constitution as the supreme law, and often declared that citizens owed "paramount allegiance" to the federal government. They were called "new" supremacy clauses, because there was an "old" supremacy clause contained in Article VI of the federal constitution. The first of the new supremacy clauses appeared in West Virginia's 1863 constitution, which essentially took the clause from Article VI and inserted it into its bill of rights.[45] But the clause could be more elaborate. Maryland's 1864 constitution held that,

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42 Ibid., 233.

43 Ibid., 237.

44 Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention of 1878–79* (Claremont, CA: Pomona College, 1930), 93.

45 West Virginia Constitution, Article 1, sec. 1.

"every citizen of this State owes paramount allegiance to the Constitution and the Government of the United States, and is not bound by any law or ordinance of this State in contravention or subversion thereof."[46] Recognition of a citizen's "paramount allegiance" to the federal government was an implicit rejection of the secession. The implicit connection was made explicit in Nevada's 1864 constitution, where the supremacy clause was included in the same section that rejected the idea of secession as a constitutional right.

The obvious question, of course, was whether such clauses were even necessary. "[W]e can incorporate [a supremacy clause] into our constitution, but the Constitution of the United States is binding so why?" asked a delegate in Georgia's convention.[47] "Is it not all powerful in itself?"[48] The answer, of course, was the Civil War. "After what has occurred in our recent national history, it appears to me that every State which has a Constitutional Convention ought to adopt a proposition of the nature that is proposed . . . , and especially in view of the fact that it seems as if the old controversy would never die, but must come up from time to time," argued one California delegate.[49] The new supremacy clauses were designed to settle the secession question by specifically recognizing the federal government's ultimate constitutional supremacy.

As initially reported to the convention, California's supremacy clause was a far-reaching statement of the new constitutional supremacy. In addition to declaring the federal constitution the "paramount law of the land," it also held, "We recognize the Constitution of the United States of America as the great charter of our liberties."[50] Delegates debated both the "paramount law" and the "charter of our liberties" clauses. Supporters of the new supremacy urged its adoption for a couple of reasons. One was its plain obviousness. William White, an Irish farmer and Workingmen's Party member, insisted that, "We all know that the Constitution and laws of the United States are the paramount law of this land and we should declare it so."[51]

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46 Maryland Declaration of Rights (1864), Article V.

47 *Journal of the Proceedings of the Constitutional Convention of the People of Georgia* (Augusta, Georgia: E.H. Pughe, Book and Job Printer, 1868), 240 (remarks of Hager).

48 Ibid.

49 *California Debates*, I: 239 (remarks of McCallum).

50 Ibid., 232.

51 Ibid., 238.

But other delegates feared the novelty of California's new supremacy clause. Horace Rolfe, a Republican lawyer, moved to strike the clause as "entirely unnecessary." Rolfe stated that he did "not recognize the Constitution of the United States as the great charter of our liberties. We had State charters before there was any Constitution of the United States."[52] Charles Ringgold, a Workingman, also rejected entirely the notion that the federal constitution could be a charter of liberties. Recognition of the primacy of the federal constitution rearranged the entire constitutional structure. He could not "indorse this section, for it strikes at all State sovereignty. I believe in State sovereignty, and shall ever stand by it as long as I live."[53] The supremacy clause also undermined popular sovereignty. As Workingman Nathaniel G. Wyatt explained, "The powers of the Government of the United States are derived from the people through the government of the States, and wherever there is a reserved power it is with the people and not with the United States."[54]

Underlying this fear of federal supremacy was the fear that an explicit acknowledgment of federal supremacy would undermine the state's ability to deal with Chinese laborers. Barbour drew out the implications of the charter of liberties clause. It "will be construed into the doctrine of centralization." Yet, "Our purpose and duty," he argued, "is to lay down and declare the power of this State, and not the power of the Federal Government."[55] Surprisingly, Barbour here invoked the states' rights ideas of South Carolina's John C. Calhoun. He told the convention that he believed "that the principles and doctrines that were asserted by Calhoun were correct, and would have been maintained by the people of the United States if the element of slavery had been out of the consideration." Slavery was destroyed, "[b]ut the principle still lives." Indeed, without slavery, states' rights could now realize its full potential. "I say we ought to declare it here — as John C. Calhoun declared the doctrine of the sovereignty of the States — not for the purpose of preserving slavery, but for the purpose of destroying a slavery as bad as that of the South."[56]

Ultimately, the supremacy clause remained, but without the charter of our liberties clause. The final version simply stated, "The State of California

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52 Ibid., 238.
53 Ibid., 242–43.
54 Ibid., 242.
55 Ibid., 242.
56 Ibid.

is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."[57] But it revealed the convention's ambivalence about the meaning of the Civil War and Reconstruction. These issues continued throughout the convention. John Miller, a Republican Non-Partisan lawyer, drew the connection between the bill of rights debate and the Chinese question. "It is evident that a long debate will be provoked here, as to the rights and powers of the States, and as to the rights and powers of the General Government. That discussion will necessarily come up in the considerations of the measures or propositions which have already been introduced here, and which are now before the Committee on Chinese."[58]

And indeed it did. The Report of the Committee on Chinese sparked a lengthy debate, but it was left substantially intact in what became article XIX. The report contained six sections. Section 1 simply reiterated the state's power to regulate aliens "dangerous or detrimental to the well-being or peace of the State. . . ." Sections 2 through 5 imposed a variety of liabilities on Chinese people and their employers. Corporations and governments were barred from employing Chinese, Chinese were barred from fishing in state waters, and were also deprived of property, contract, and residency rights. Section 6 reserved the power of the state to exclude Chinese, and to delegate that power to municipalities. It also punished companies for importing Chinese "coolie" labor, which it determined to be "a form of human slavery."[59]

While all six sections seemed directed toward the same end, different constitutional theories were contained within it. John Miller, the chairman of the Committee on Chinese, explained to the convention that the committee could not agree on how to deal with the Chinese, and so presented three plans for consideration. The least constitutionally-suspect, he thought, was section 1, which simply reaffirmed the state's police power. For Miller this was as far as the convention could go without encroaching upon the federal government's commerce power. The second plan was exclusion, which Miller argued was pre-empted by the U.S. Supreme Court's commerce clause jurisprudence. The third approach, which Miller referred to as "a plan of starvation by constitutional provision," sought to "deny Chinese rights to protection of the law," specifically the privileges and immunities clause of the

57 Ibid., III: 1510.

58 Ibid., I: 234.

59 Ibid., II: 721.

Burlingame Treaty. "Because by labor all must live, and if you deprive them of their right to labor, they must starve. . . . It is indefensible, for it deprives the prohibited people of the right to life."[60] Miller's opposition to sections 2 through 6 did not mean that he was progressive toward Chinese rights. "All agreed that Chinese immigration was an evil, and that if possible the further influx of Chinese to this country should be stopped," he argued.[61] But the convention could only act within its proper sphere of authority.

Other delegates, especially Workingmen, felt that the entire report fell firmly within the state's power to police its boundaries. Jacob Freud, a Workingman from San Francisco and at 21 years of age the convention's youngest delegate, argued that California had the power both to regulate and remove Chinese, and relied on the doctrine of dual federalism, which held that federal and state governments were sovereign within their spheres. What was at issue for Freud, then, was "the universal right of every State to regulate and control its own internal affairs, such as corporations and public works within its borders." And it was clear to his mind that "every State has the avowed power to protect itself against foreign and well known dangerous classes, such as paupers, vagrants, criminals, and persons afflicted with contagious and infectious diseases. This power is a part of the police power of the State. Under this constitutional power of a State, New York and Massachusetts have been upheld by the Courts in turning back criminals from Europe."[62] The power to police, then, included within it the power to exclude.

As Freud elaborated on exclusion as a police technique he revealed his view of the changing (or rather *un*changing) constitutional order:

> The question then arises, has the State no more reserved power? I think it has. Among the reserved rights of the State I claim that there is none so prominent, essential, and constitutional as the right of the State to receive, remove, or repel any person or any people who may be dangerous to its health, to its peace, or its prosperity. No sovereign State on earth ever yielded that right. No sovereign State on earth can exist without that power. *When did the American States then cede that power to the General Government? I challenge any man to show*

60 Ibid., 630.
61 Ibid., 628.
62 Ibid., 634.

> *me where, or when, or in what words.* The fundamental right of every State is to maintain its own existence. Self-preservation is not only the first law of nature, but also the first law of States. California has the right not only to protect but also to preserve herself. California has the right to declare the Chinese upon her soil dangerous and detrimental to her peace, progress, and prosperity, and therefore to prohibit them hereafter from settling or residing within her borders.[63]

In short, the police power gave California the authority to remove or exclude individuals who posed a threat to the social order. The state also had both the right and the power to determine that the Chinese — as Chinese — posed such a threat. Clitus Barbour agreed. "I do not think that the Burlingame treaty, the Fourteenth Amendment, or the Civil Rights bill would have been considered infracted by any municipal regulation for the abatement of that nuisance."[64] And the Chinese were "the crowning nuisance, which calls for the exercise of the sovereign power of the State for its abatement."[65]

Freud agreed that the federal *constitution* was the "supreme law of the land," but this did not necessarily make the federal *government* supreme; *that* was the new supremacy, and not a concept Freud could yet endorse. Federal supremacy could not vitiate the state's police power. The power of a state "to make its own Constitution and laws," along with its "sovereign control over its people" remained, and that meant that "[f]or self-preservation or self-protection, it may exclude any save citizens of other States." The federal government's commerce power was distinct, and did not include the power to impose "hordes of coolies of a degraded, servile and alien race" on a "free State." Nevertheless, he registered his ultimate ambivalence of his position by conceding the issue to arbitration by the U.S. Supreme Court. Barbour did, too, ultimately referring to the report as a "revolutionary measure" aimed at "shocking [the] sensibilities" of Congress and the rest of the nation.[66]

Where Freud saw an unchanged constitutional order, Charles J. Beerstecher registered his fears about Reconstruction's revision of that order. "I believe, sir, that in these latter days there has been a tendency to rob the States of their rights, and the time has come when persons who desire to see American

63 Ibid. (emphasis added).
64 Ibid., 660.
65 Ibid., 652.
66 Ibid., 661.

institutions perpetuated, who desire to see the spirit that actuated the founders of this country carried out in its true intent and purposes, that they should rise up and see to the centralizing efforts at Washington."[67] Barbour shared Beerstecher's fear: "There rests the keystone of the whole arch, and that is its ultimate resort. Who is to decide? In whom is the power of judgment lodged?" This, of course, had been the key to the Chinese question all along.

Critics of the Report responded in a variety of ways. Republican delegate Horace Rolfe, for instance, thought the report was "absurd," and that if adopted would make the convention and the state a "laughing-stock of the world": "The first Court before which our work is brought would disregard it, and treat it as unconstitutional and void — as a violation of the Constitution of the United States. So that it is a mere waste of time to pass any such provisions."[68] Miller, of course, had already argued that the state could rely only upon its police power, which he distinguished from exclusion.

Charles Stuart, a Republican farmer from Sonoma, built on Miller's argument, and drew a connection between the anti-Chinese movement and secession. "I am opposed to all these sections from number one to number eight," he argued.

> They are not proper to be placed in any Constitution of the United States, let alone ours. It is in direct conflict with the Constitution of the United States and the treaty-making power. It is a boyish action for us to admit either one or the whole of these articles to be engrafted in our organic law. It would be the laughing-stock of the world, a disgrace to the State, a movement toward secession, and a disregard of the constitutional laws of the United States.[69]

Stuart's connection of exclusion and regulation of the Chinese to secessionism is revealing. He ridiculed the constitutional and jurisprudential backwardness of the Report's supporters, especially in their reliance on opinions written by Chief Justice Roger Taney. One delegate (referring to Democratic Non-Partisan James Ayers, who had drafted section 4), he began, "quoted very lengthily from Roger Taney. I remember when Taney

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67 Ibid., 646.

68 Ibid., 656.

69 Ibid., 642. Stuart was a major agricultural employer, and claimed to have employed thousands of Chinese and White workers.

made another decision. Do you know what became of it? I remember his Dred Scott decision. I think that was the first political case that was ever decided in the United States, and I remember what that led to, and I think you do." For Stuart, the Civil War was the new constitutional dividing line.[70]

Republican lawyer James Shafter made the point more explicitly. He felt that the jurisprudential arguments were beside the point. "Among all the cases cited here one important one seems to have been overlooked." The Civil War had settled the question by "the force of arms. The ultimate force of government, the inexorable will guided by the highest intelligence of the people, declared that the Constitution of the United States, and the treaties made in pursuance thereof, are the paramount law of this land from this time forth." The War itself was the foundation for the new supremacy. Thus, "we recognize our allegiance, politically, first of all, to the Federal Constitution, and next, to the Constitution of the State of our adoption." And in any conflict between the police power and federal authority, the "police power must yield."[71]

While opponents of the Chinese Committee Report ultimately lost, they had managed to convince its proponents that they were at the very least on shaky constitutional ground. While the bulk of the debate focused on the conflict between the Chinese Committee Report and the federal commerce and treaty powers, it also entailed a broader construction of the impact of the Civil War and Reconstruction on the constitutional order. By the end of the debate the most that the Report's proponents actually seemed to hope for was that it would spur action at the federal level. In fact, the convention would memorialize Congress to take action on the Chinese. The irony of the Report's success in placing article XIX into the new Constitution was that, in forcing the issue, proponents sealed the demise of the constitutional order they sought to protect.

THE NEW SUPREMACY

Article XIX was challenged almost immediately after the new constitution went into effect. Over the coming decades, not only would the article

[70] Ibid., 642.

[71] Ibid., 675, 672, 684.

be gutted by federal judges in California on a variety of grounds, but the constitutional authority over immigration would be centralized in the federal government. Habeas was the central legal device upon which federal supremacy over the Chinese, and immigration more generally, would be centralized. This consolidation began in what became known as the "habeas mill," the federal district and circuit courts in California in the 1880s. District Judge Ogden Hoffman and Circuit Judge Lorenzo Sawyer were the chief cogs in the mill, and processed thousands of habeas petitions. Their willingness to discharge Chinese petitioners generated considerable criticism of their courts. Oregon's District Judge Matthew Deady would also play a role in teasing out the jurisprudential issues. Finally, U.S. Supreme Court Justice Stephen Field was perhaps the dominant figure jurisprudentially, both on circuit and in his opinions for the Supreme Court.

The first challenge to article XIX was *In re Parrott*. Tiburcio Parrott was the son of one of the wealthiest men in the state, John Parrott. Tiburcio owned a mercury mine, and employed Chinese laborers in a variety of jobs. Section 2 of article XIX barred corporations from employing Chinese labor. In February 1880, the state legislature passed enforcement legislation. A week after the Legislature criminalized employing Chinese labor, Parrott manufactured his arrest to challenge section 2, then petitioned for a writ of habeas corpus in California's federal circuit court, before Judges Hoffman and Sawyer.[72]

The state conceded that the prohibition of Chinese employment was not an exercise of the state's police power. Rather, it based its authority on its "reserved power over corporations." This power, though, according to the court, was designed to protect stockholders, creditors, and the general public. But the object with the enforcement statute clearly was to exclude the Chinese. Thus, Judge Hoffman held that the section was unreasonable, "irrespective of the rights secured to the Chinese by the [Burlingame] treaty." Nevertheless, Hoffman also held that section 2 of article XIX violated the plain terms of the Burlingame Treaty, specifically the privileges, immunities, and exemptions clause of article VI. "The declaration that 'the Chinese must

[72] Andrew Johnston, "Quicksilver Landscapes, the Mercury Mining Boom, Chinese Labor, and the California Constitution of 1879," *Journal of the West* 43 (2004): 21, 21.

go, peaceable or forcibly,'" Hoffman wrote, "is an insolent contempt of national obligations and an audacious defiance of national authority."[73]

Hoffman's opinion reveals that force, as some of the California delegates had argued, lay behind the new supremacy. For example, he explained, "The attempt to effect this object [exclusion] by violence will be *crushed by the power of the [federal] government*." While the federal government may not have yet had a monopoly on violence, it had certainly proven in the Civil War to be able to marshal superior force over the states. Hoffman appeared invigorated as a federal judge by this power:

> The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance.[74]

The new constitutional supremacy grew out of, indeed could only be based upon, a clear supremacy in violence.[75]

Sawyer agreed with Hoffman, but took the opportunity to discuss the meaning of "privileges" and "immunities." In contrast to modern scholars who identify the *Slaughterhouse Cases* as the death knell of the Fourteenth Amendment's privileges or immunities clause, Sawyer found in the Court's jurisprudence a robust conception of the clause. And he used *Slaughterhouse* to interpret the privileges, immunities, and exemptions clause of the Burlingame Treaty.[76] According to Sawyer, all of the opinions in *Slaughterhouse* agreed that the fundamental meaning of privileges and immunities was that it "*embraces nearly every civil right for the establishment and protection of which organized government is established*. . . . There is no difference of opinion as to the significance of the terms 'privileges and immunities.'" Certainly included among privileges and immunities was "the right to labor for

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[73] *In re Parrott*, 491, 492, 493, 494.

[74] *In re Parrott*, 499 (emphasis added).

[75] Elmer Sandmeyer made a similar point years ago, but ultimately hedged. Elmer Clarence Sandmeyer, "California Anti-Chinese Legislation and the Federal Courts: A Study in Federal Relations," *Pacific Historical Review* 5 (1936): 189, 211.

[76] *In re Parrott*, 505, 506 (Sawyer, J.) (quoting *Slaughterhouse*, 76) (emphasis in original).

subsistence" (a point Miller had made in the convention). To deny Parrott's right to employ Chinese labor, then, violated the Burlingame Treaty.

But Sawyer, unlike Hoffman, continued beyond the treaty power. He also held that article XIX violated the Fourteenth Amendment's due process and equal protection clauses, which applied to "persons," as opposed to "citizens." Moreover, section 16 of the 1870 Civil Rights Act protected property and contract rights (including the right to and of labor) of "all persons within the jurisdiction of the United States." The Fourteenth Amendment and its enforcement legislation protected Chinese and their employers from discriminatory state laws, even those made by a state constitutional convention. Thomas Joo has argued that in cases protecting the Chinese right to labor we can see the origins of the economic substantive due process that would come to define the so-called "*Lochner* era" and its "laissez-faire constitutionalism."[77] But the application of the Fourteenth Amendment to anti-Chinese legislation was less about laissez-faire than it was about federal supremacy.

In a series of cases dealing with Chinese laundries, federal courts continued to build out this new supremacy. While *In re Parrott* struck down section 2 of article XIX, other cases chipped away at the state's police power. During the convention debates, this was considered the state's narrowest and safest basis of authority. Yet Justice Field had held that even that power was subject to federal scrutiny under the Fourteenth Amendment in *Ah Fong*. In cases after the new Constitution went into effect, federal courts would continue to subject the police power to judicial scrutiny.

In re Quong Woo, for example, involved a frontage consent ordinance for laundries. Quong Woo had owned and operated a laundry for several years. A new city ordinance required him to obtain the consent of a certain number of neighbors to operate his laundry, which he was unable to do. The federal court found the ordinance problematic in two ways. First, laundries were not inherently "offensive" businesses. Thus to single out this business, as opposed to making all businesses subject to frontage consent, was held unreasonable. Second, the court held that the city could not delegate its police powers to property owners. Such delegation also called into question the reasonableness of the law, since it could embody the prejudices

[77] Thomas Wuil Joo, "New Conspiracy Theory of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence," *University of San Francisco Law* Review 29 (Winter 1995): 353.

of one's neighbors. The precise basis of the court's opinion, though, was not entirely clear. The court seemed to be engaging in a due process analysis, but it concluded that the frontage consent requirement violated the privileges and immunities clause of the Burlingame Treaty.[78]

Eventually, the U.S. Supreme Court was forced to weigh in on the Chinese question. In a series of cases, the Court also moved from the commerce and treaty powers to the Fourteenth Amendment in evaluating anti-Chinese legislation. The first two cases upheld local ordinances, but nonetheless applied the equal protection clause to them. *Barbier v. Connolly* and *Soon Hing v. Crowley* dealt with San Francisco ordinances barring public laundries from operating during certain hours. These ordinances were directed at Chinese laundries that had moved into suburban areas. As the Chinese moved their laundries into more affluent neighborhoods, they found that their rent increased. To offset the increase in rent, two laundries would often operate in the same space, one during the day and one at night. The ban on operating laundries at night was designed to break up this practice and Chinese incursions into white suburbia.[79]

Field wrote the Court's opinion in both Supreme Court cases challenging the San Francisco ordinances, and used them to elaborate his opinion in *In re Ah Fong*. For instance, he made it clear that the Fourteenth Amendment was intended to reach only "class legislation," not the police power. The distinction lay in whether the regulation served a "public purpose" or favored or disfavored a particular class of people. In these cases, Field upheld the ordinances because he viewed them as public safety regulations, necessary to protect the public against fires in a city built of wood. Field's opinion demonstrated a commitment to filtering state governmental action through the new strictures of the Fourteenth Amendment. Indeed, this was required if the courts were to make distinctions between class legislation and the police power. In *Soon Hing*, Field introduced a new dimension to the analysis. In dicta, he suggested that legislation could be facially neutral but discriminatory in its administration.[80] In *Yick Wo v. Hopkins* the Court took up this question directly.

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78 *In re Quong Woo*, 13 F. 229 (1882).

79 Bottoms, *An Aristocracy of Color*, 136–168.

80 *Barbier v. Connolly*, 113 U.S. 27, 31–32 (1884).

Yick Wo involved yet another San Francisco ordinance aimed at Chinese laundries. This one required laundry owners to obtain a license from the Board of Supervisors. While the ordinance applied to all public laundries, no Chinese applicant had received such a license. In separate cases filed in state court and federal courts, Chinese laundry-owners challenged the ordinance. Once again, the state and lower federal courts identified the main lines of debate. The California Supreme Court in *In re Yick Wo*, treated the case as an unproblematic police power case, giving broad deference to the board. The Court saw the ordinance as a reasonable exercise of the city's police power, rooted in a long history of licensing laws, and declared that the argument that the board's discretion is liable to abuse "cannot be held conclusive. No doubt all power is liable to abuse, wheresoever lodged."[81]

In the federal case, *In re Wo Lee*, Judge Sawyer was less charitable. He criticized the ordinance as vesting "arbitrary discretion" in the board. According to Sawyer, "The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital." Such a construction of the ordinance suggested that it was "a violation of other highly important rights secured by the fourteenth amendment and the [Burlingame] treaty." Sawyer ultimately deferred to the California Supreme Court.[82] But on appeal the U.S. Supreme Court agreed with Sawyer, striking down the ordinance because it was "purely arbitrary, and acknowledges neither guidance nor restraint."[83]

Lower federal courts also used the Fourteenth Amendment's privileges or immunities clause directly (rather than indirectly through the Burlingame Treaty's clause) to attack state and local regulations. As municipalities began regulating Chinese through general rather than class legislation, they opened the door for courts to apply the privileges or immunities clause even in cases dealing with Chinese non-citizens. In cases like *In re Wo Lee*, *In re Tie Loy*, and *In re Wan Yin* the federal courts rejected

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81 9 P. 139, 142 (1885).

82 *In re Wo Lee*, 26 F. 471, 474, 475 (1886).

83 *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886).

ostensibly neutral laundry ordinances directed against Chinese laundries. In *Tie Loy*, for instance, Stockton limited laundries to certain areas within or just outside of the city. Since the statute applied to all laundries, not just those owned by Chinese, Sawyer struck it down as violating the Fourteenth Amendment's privileges or immunities clause.[84]

The new supremacy did not just involve the application of new constitutional doctrines to state action. It also involved an enlarged role for federal courts at all levels. This was apparent in the 1870s, and crystal clear by 1885, when Oregon's federal District Judge Matthew Deady was forced to defend this role. In *In re Wan Yin*, which appeared while *Yick Wo* was on appeal, an Oregon municipality levied an onerous $20 per year "license fee" upon "public laundries." When Wan Yin refused to pay the fee, he was imprisoned, and then petitioned the federal district court for a writ of habeas corpus. Deady released Wan Yin, holding that the license was actually a "tax," and beyond the municipality's authority. Relying on cases like *In re Parrott* and *Ah Lee*, Deady specifically reiterated the notion that federal courts could release petitioners held in violation of the due process clause of the Fourteenth Amendment.[85]

Deady found himself at odds with local anti-Chinese folk in Oregon, as did Sawyer and Hoffman in California, so he took the opportunity to elaborate his role as a federal judge in his opinion. He noted that the "Case of Lee Tong" had been the subject of criticism at a recent American Bar Association meeting. The chief complaint was that the 1867 Habeas Corpus Act had given " 'the lowest class of federal judges' " jurisdiction in habeas cases, and by extension had conferred on them the ability to overturn judgments made by state authorities, particularly in Chinese cases. Deady responded that "however 'low' he may be" he was nevertheless conferred the power to be "a bulwark against local tyranny and oppression." Deady thus affirmed that even the lowliest federal judge still stood higher in the new constitutional hierarchy than did any state official.[86]

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[84] *In re Wan Yin* [The Laundry License Case], 22 F. 701 (D.C., D. Ore., 1885); *In re Tie Loy*, 26 F. 611 (Cir. Ct., D. Cal., 1886).

[85] Ralph James Mooney, "Matthew Deady and the Federal Judicial Response to Racism in the Early West," *Oregon Law Review* 63 (1984): 561, 605; *In re Wan Yin*.

[86] *In re Wan Yin*, 705.

CONSOLIDATION

In 1885, Congress restored the U.S. Supreme Court's habeas appellate jurisdiction that it had taken away in 1868 during the *McCardle* litigation. The restoration was a response in part to the Ninth Circuit's jurisprudence in the Chinese civil rights litigation; Congress wanted the Supreme Court to rein in the power of the lower federal courts. At the same time, in a series of acts from 1875 to 1892 Congress gradually centralized authority over immigration, and tightened restrictions on Chinese immigration. The new restrictions did not eliminate Chinese restriction, however, and the Ninth Circuit judges continued to allow Chinese immigrants to enter, even after Judges Hoffman and Sawyer died in 1891. With their restored appellate jurisdiction, the Supreme Court began to regulate and overrule the Ninth Circuit decisions. But the Court did not devolve power back to the states. Instead, it not only upheld the new immigration acts, but determined that immigration decisions of federal officials were to be immune from judicial review. The lower federal courts had always held that the Congress's power over Chinese immigration was supreme; the U.S. Supreme Court now made this power plenary.

The Page Act of 1875 was Congress's first tentative foray into the Chinese immigration issue. It barred Chinese prostitutes from entering the United States. In 1882, Congress began to build an administrative structure for regulating immigration. In the Immigration Act of 1882, which was not concerned with Chinese exclusion, Congress divvied up authority between state and federal governments, giving states an important role in matters of immigration. That same year it passed the Chinese Exclusion Act, which forbade the immigration of Chinese laborers for ten years. Two subsequent acts tightened the restrictions on Chinese immigration. The Scott Act of 1888 prohibited the return of Chinese laborers who left the country,[87] and the Geary Act of 1892, also known as the "Dog Tag Law," required all Chinese laborers lawfully in the country to apply for a certificate of residence or be deported.[88] But it was the Immigration Act of 1891 that transformed congressional power of immigration and the Chinese question; this act also consolidated federal supremacy. The act abolished the

[87] Salyer, *Laws Harsh as Tigers*, 7, 22.

[88] Pfaelzer, *Driven Out*, 291.

state–federal partnership created in 1882, and centralized immigration in the federal superintendent of immigration. It made all decisions of the inspection officers appealable only administratively, cutting off a major portion of judicial review in immigration cases.[89]

While these acts were restrictive, the Supreme Court, in an age long characterized as "laissez-faire," tightened them even more. It did so in three ways important for the new supremacy. First, in *Chae Chan Ping*, the Court held that Congress's power over immigration was plenary, and that *it* was not bound by the privileges, immunities, and exemptions clause of the Burlingame Treaty. Justice Field wrote that a treaty was simply an act of Congress, and could thus be changed by an act of Congress, even if the legislation was in direct violation of the treaty. Moreover, he continued, this type of legislation "was, of course, not a matter of judicial cognizance."[90] The power to exclude foreigners was an incident of sovereignty that the federal government could exercise at will.[91]

Second, the plenary power, which the Court applied to both expulsions and exclusions, was not subject to traditional due process requirements like the right to trial by jury. The Court distinguished between rights and privileges, and characterized both entry and residence of non-citizens as privileges, which Congress could withdraw at will.[92] Congress could confer statutory due process protections. But as long as an immigration official made a deportation or exclusion decision in accordance with the statute the process was due.[93]

Finally, the Court rendered the administrative decisions binding and conclusive on the federal courts. The finality clause included in the 1891 Immigration Act making administrative decisions final was not unusual in nineteenth-century administrative law. Other administrative bodies like the General Land Office had been given similar power. But it was used to separate administrative from legal questions.[94] In the Chinese Exclusion

89 Salyer, *Laws Harsh as Tigers*, 26.

90 *Chae Chan Ping v. United States*," 130 U.S. 531, 600–602 (1889).

91 Ibid., 603–609; see also *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

92 Salyer, *Laws Harsh as Tigers*, 30–31.

93 *Fong Yue Ting*, 730; *Nishimura Ekiu*.

94 Salyer, *Laws Harsh as Tigers*, 29.

Cases, the Court collapsed the distinction between law and administration, and made the administrative decision binding on courts, making them immune to judicial review. In *Ju Toy v. United States*, the Supreme Court held that the determination of the collector was conclusive, "whatever the ground on which the right is claimed, — as well when it is citizenship as when it is domicil, and the belonging to a class excepted from the exclusion acts."[95] In other words, a Chinese person claiming to be a United States citizen by birth was subject to the pure discretion of an immigration official, and could not claim the protections afforded by the Fourteenth Amendment in a court of law.

Ju Toy's decision that only the federal government could make determinations as to who was or was not a citizen (or more precisely who could rely upon the law to make claims to the protections of citizenship and who could not) was consistent with the supremacy aims of the Fourteenth Amendment. Through Sections 1 and 5, the Fourteenth Amendment made the federal government supreme regarding questions of citizenship. Section 1 defined national citizenship as a birthright, and protected those citizens' privileges and immunities. Section 5 gave to Congress specifically the power to protect U.S. citizens' privileges and immunities. These powers taken together meant that the federal government had the power to decide who is included within the body politic. This power is a mark of sovereignty. Thus, the Fourteenth Amendment's conferral of that power to the federal government was an important step in the construction of the new supremacy. The Supreme Court's decision in *Ju Toy* further entrenched this power by effectively stripping American citizens of Chinese descent of their political power, reducing them to what political theorist Giorgio Agamben has termed "bare life." They were simply bodies used to further the aims of the state.[96] Here, the aim was the maintenance of a racialized state in which the federal government was supreme. The federal power to exclude even citizens marked the apex of the new supremacy.

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95 *Ju Toy v. United States*, 198 U.S. 253, 262 (1905).

96 Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998).

CONCLUSION

Reconstruction was, of course, a critical turning point in the history of American rights, liberty, citizenship, and the state. But too often we presume that the legal and constitutional changes effected by the Civil War and Reconstruction emerged in full form in ways we are familiar with today. Reconstruction provided Americans with new legal languages, discourses, procedures, and structures that could be applied in novel ways on the ground. Whatever the "intent" behind these new technologies, their open-endedness and flexibility meant that the new structure would have to be worked. California's experience with Chinese immigration was one of the most visible and volatile conflicts through which the new constitutional order was constructed.[97] And it suggests two revisions. First, while Reconstruction as a federal policy may have ended in 1877, Reconstruction as a phenomenon had a much longer life. This begs for a new periodization, as well as new themes to capture the larger project. Some historians have begun to do this by characterizing the period as an "age of emancipation."[98] This leads to the second revision, which deals with the meaning of Reconstruction. Historians and other scholars have tended to focus on the rise of individual rights and their protection as the central project of Reconstruction. Thus, when the Supreme Court refused to recognize those rights in cases like *Slaughterhouse* and the *Civil Rights Cases*, we characterize it as "retreating from" or "abandoning" Reconstruction.[99] Adding federal supremacy as an additional element of Reconstruction complicates that thesis, especially when individual rights and federal supremacy work against each other. Recognizing that tension should help us to look for new syntheses of the legal and constitutional history of that period.

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[97] Michael Bottoms makes a similar point. Bottoms, *An Aristocracy of Color*, 207–08.

[98] See, e.g., Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998); Jung, *Coolies and Cane*.

[99] Roman J. Hoyos, "Playing on a New Field: The U.S. Supreme Court in Reconstruction," in Edward O. Frantz, ed., *A Companion to the Reconstruction Presidents, 1865–1881* (New York: Wiley-Blackwell, 2014, forthcoming).