



STUDENT
ESSAY
WINNERS

Selma Moidel Smith Student Essay Winners

The California Supreme Court Historical Society (CSCHS) invites all students (and recent graduates) interested in, or working in California legal history (not just the history of California courts) to compete in its annual nationwide student writing competition. Papers may include elements of digital humanities and may also be coauthored.

Prizes of \$5,000 for 1st place, \$2,500 for 2nd, and \$1,000 for 3rd will be awarded to the best papers addressing California history, broadly considered.

Papers should be at least 7,500 and preferably not more than 12,000 words, including footnotes and other explanatory matter. The competition is open to students and recent graduates in history and/or law, provided that the author(s) did not have full-time academic employment when the paper is written.

Submissions also must not have been published or accepted for publication elsewhere, and the authors are responsible for obtaining permission for any photographs/illustrations, which must be captioned. Winners will likely receive an offer to publish in *California Legal History*, assuming compliance with our publication's editorial and technical standards.¹ The brief descriptions below of the winners' papers are abridged versions of those provided by the administrators of the competition, Professors Laura Kalman (UCSB), Sarah Barringer Gordon (University of Pennsylvania) & Stuart Banner (UCLA).

¹ This introduction is abbreviated from the [Selma Moidel Smith Student Writing Competition: Call for Papers Addressing California Legal History, 2025](#).

Winners in 2025 are:

- Keaton “Kit” Beyer, B.A., UC Berkeley (2024), a student at the Yale Law School, won first place with an article, “Immigration and Invasion in the California Constitution, 1849–1879.” Beyer examines constitutional discourse in nineteenth-century California to shed light on a question of considerable current importance: When, if ever, can immigration constitute an “invasion?”
- Ilani Nurick, a law student at Yale Law School, won second place with an article, “Unratified: California and the Forgotten Original Understanding of the Fourteenth Amendment.” Nurick’s study of California’s ratification debates in the late 1860s over the Fourteenth Amendment helps explain how California became one of the last states to ratify, in 1859.
- AJ Stone Jonathan, JD 24’, UC Berkeley School of Law, a MLIS student at San Jose State University, won third place with an article, “The Woman Witkin.” This paper enables us to see the historian at work. By turning a gendered lens on legal giant Bernard Witkin, AJ Stone Jonathan reveals the equally formidable force of Alba Blanche Pichetto Kuchman Witkin. Witkin’s wife, and then his widow, ensured the maintenance of his legacy. As a publicist and philanthropist, she proved more effective than her talented but irascible husband.

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KIT BEYER*

Immigration and Invasion in the California Constitution, 1849–1879

INTRODUCTION

On March 15, 2025, President Donald Trump declared that the United States had been “invaded” by “a hybrid criminal state,” the Venezuelan transnational gang Tren de Aragua (TdA).¹ With this assertion, he unlocked the formidable powers of the Alien Enemies Act (AEA) of 1798, which authorizes the deportation of noncitizens under conditions of “invasion or predatory incursion . . . against the territory of the United States by any foreign nation or government.”² Ever since, the AEA has been a cornerstone of the President’s attempts, in keeping with his campaign-trail promise, to carry out the “largest domestic deportation operation in American history.”³

Three months after invoking the AEA, President Trump issued a memorandum activating the National Guard to quell protests against his deportation efforts in Los Angeles, this time under the purported authority of Title 10, § 12406 of the U.S. Code.⁴ Section 12406 empowers the President to call the Guard into service in three circumstances, including whenever the

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¹ Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua, 90 Fed. Reg. 13034.

² 50 U.S.C. § 21 et seq.

³ Charlie Savage, Maggie Haberman & Jonathan Swan, *Sweeping Raids, Giant Camps and Mass Deportations: Inside Trump’s 2025 Immigration Plans*, N.Y. Times (Nov. 11, 2023).

⁴ Presidential Memorandum on Department of Defense Security for the Protection of Department of Homeland Security Functions, June 7, 2025.

United States “is invaded or is in danger of invasion by a foreign nation.”⁵ So far, President Trump has relied on two other provisions of § 12406 to justify the takeover of California’s Guard.⁶ Nonetheless, his March AEA proclamation demonstrated that he is willing to frame unlawful immigration activities as an “invasion,” raising the possibility that § 12406’s “invasion” provision could soon come into play.⁷

These events have thus illustrated the significance, both actual and potential, of a key legal question: What constitutes an “invasion”? Further, who decides when an “invasion” has taken place, thereby triggering a host of emergency government powers? Faced with an array of challenges to the Trump administration’s immigration agenda, the federal judiciary is actively grappling with these inquiries—yet judges are not writing on a blank slate. Historical sources have aided their analyses⁸ and will certainly continue to guide future rulings.

Against this backdrop, constitutional discourse in late nineteenth-century California can offer illuminating insights. This article examines how legal actors in this period understood and utilized the concept of “invasion.” It identifies a significant disparity in the usage of the term “invasion” between California’s first, pre-statehood constitutional convention, held in 1849, and its second, postbellum constitutional convention, held from 1878 to 1879. Responding to the social transformations of the intervening years, the 1878–1879 delegates deployed the “invasion” concept in new ways: while its core connotation of threat persisted, the kind of threat it was thought to describe, and the groups it was used against, underwent drastic changes. This contrast had far-reaching ramifications and merits scholarly attention.

I begin with a preview of my central claims. In California’s 1849 Constitutional Convention, elected delegates were erecting a framework for an imagined future State of the Union. They recognized the magnitude of their responsibility. “We are not legislating merely for a single day or a single generation,” one participant proclaimed, “but for ages and generations yet

⁵ 10 U.S.C. § 1206(1).

⁶ *Newsom v. Trump*, No. 3:25-cv-04870-CRB, 2025 WL 1663345, at *10 (N.D. Cal. June 12, 2025) (“Defendants confirm . . . that they rely on the second and third conditions” of § 12406).

⁷ Indeed, in his order enjoining the Administration’s federalization of the National Guard, Judge Charles Breyer of the Northern District of California noted that the government had made a “similar argument” as in a case challenging the removal of Venezuelan citizens based on the AEAs “invasion or predatory incursion” preconditions. *Newsom v. Trump*, *supra* note 6, at 13 (citing *J.A.V. v. Trump*, No. 1:25-cv-00072, 2025 WL 1257450 (S.D. Tex. May 1, 2025)).

⁸ See *infra* note 164 (canvassing recent cases).

in the womb of time.”⁹ Anticipating the outbreak of crises yet unknown, the 1849 delegates sparred over the proper location and scope of the government’s authority to curtail individual liberty during emergencies. Then, once the 1849 California Constitution and its several “invasion” provisions went into effect, it fell to the California Supreme Court to interpret their meaning while passing on the constitutionality of laws enacted during the Civil War. Finally, in the 1878–1879 Constitutional Convention, a fresh set of delegates could draw upon decades of experience with statehood. The topic of “invasion” now surfaced in a new, contentious context: the debate over how to handle the influx of immigrants from China. I argue that delegates’ description of Chinese immigration as an “invasion” was not a mere change in emphasis. Rather, it was a deliberate adaptation of the word to advance racist policy goals, one that would ultimately inform a consequential immigration-related ruling by the United States Supreme Court.

This article proceeds in four parts. In Part I, I examine the debates of the 1849 Constitutional Convention. In Part II, I analyze a pair of California Supreme Court rulings addressing questions involving the government’s “invasion” powers. In Part III, I assess the records of the 1878–1879 Constitutional Convention and the changes apparent therein. I close with a discussion of how California’s nineteenth-century “invasion” evolution can elucidate and complicate contemporary controversies.

I. THE FIRST CONSTITUTIONAL CONVENTION

In early September of 1849, forty-eight men descended upon the small California town of Monterey and gathered in a spacious white-shale schoolhouse.¹⁰ Hailing from a range of backgrounds—free states, slave states, foreign lands, and native California soil¹¹—they shared the goal of framing a constitution for what would someday become the most populous¹² and productive¹³ American state.

⁹ J. Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849*, 434 (1850) (hereinafter Browne, *Debates of the Convention of 1849*).

¹⁰ William Henry Ellison, *A Self-Governing Dominion: California, 1849–1860*, 26 (1950).

¹¹ Browne, *Debates of the Convention of 1849*, 478–79.

¹² U.S. Census Bureau, *Quick Facts: United States* (last visited June 22, 2025).

¹³ U.S. Dep’t of Com., Bureau of Econ. Analysis, *Gross Domestic Product by State and Personal Income by State, 4th Quarter 2024 and Preliminary 2024*, 7 (2025).

At the time of the 1849 Constitutional Convention, newcomers “from every corner of the earth”¹⁴ were streaming into California territory in droves. Overland travelers entered from east, north, and south, while ships brought foreigners from both distant continents and the eastern coast of the United States.¹⁵ Like the delegates, the settlers were diverse in origin but united by a shared pursuit as they chased the glittering allure of gold and economic opportunity. Cohering with these aims, a “free labor” ideology,¹⁶ borne of the idealistic republican theories of the American Revolution,¹⁷ suffused the national antebellum culture. Social attitudes held fast to the belief that America’s exceptionally abundant resources could pave the path to republican self-sufficiency for everyone, including recent immigrants. In this environment, the delegates who gathered in the “serene beauty”¹⁸ of Monterey likely felt a sense of optimism in tackling the momentous task before them. “Your materials are good,” a message from the Governor exhorted them, “let it never be said that the builders lacked skill in putting them together!”¹⁹

Among the “materials” at the delegates’ hands were the constitution-crafting precedents set by sister states and the national government. Delegate William M. Gwin of San Francisco brought copies of Iowa and New York’s state constitutions,²⁰ both of which, like the federal Constitution, prohibited the suspension of the writ of *habeas corpus* except during “rebellion[s] or invasion[s].”²¹ Five days into the proceedings, delegates discussed an equivalent proposal for California: “The privilege of the writ of *habeas corpus*,” the proposal read, “shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require its suspension.”²² This draft clause stimulated delegates to debate the appropriate allocation of state power during an invasion. The convention records shed light upon their predominant concerns and, implicitly, what they took an “invasion” to mean.

¹⁴ Doris Marion Wright, *The Making of Cosmopolitan California: An Analysis of Immigration, 1848–1870*, 19 Cal. Hist. Soc’y Q. 323, 323 (1940).

¹⁵ Homer D. Crotty, *The California Constitutional Convention of 1849*, 31 Hist. Soc’y of S. Cal. Q. 155, 155 (1949).

¹⁶ See generally Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War*, 11–39 (1970).

¹⁷ For a comprehensive overview of the Founders’ republican beliefs, see generally Gordon Wood, *The Creation of the American Republic, 1776–1787*, 46–124 (1969).

¹⁸ Bayard Taylor, *Eldorado, or, Adventures in the Path of Empire*, 142 (1859).

¹⁹ Browne, *Debates of the Convention of 1849*, 8.

²⁰ Ellison, *supra* note 10, at 27.

²¹ U.S. Const. art. I, § 9, cl. 2.; N.Y. Const. of 1846, art. I, § 4; Iowa Const. of 1846, art. II, § 13.

²² Browne, *Debates of the Convention of 1849*, 39.

Charles T. Botts of Monterey made the first motion to amend the proposal.²³ He would have inserted the words “in the opinion of the Legislature” after the words “public safety,” thereby clearly authorizing the legislative branch to determine whether conditions on the ground posed such a threat to public safety as to demand the suspension of the “Great Writ,” long cherished by Americans and their colonial forebears.²⁴

But both Morton M. McCarver of Sacramento and Myron Norton of San Francisco objected to Botts’ suggested amendment.²⁵ McCarver’s argument was twofold. First, he said, “[i]t would be very inconvenient, in cases of great emergency, to wait until the Legislature could convene,” which could take as long as two years. Second, it was unlikely that there would “be any abuse” of the suspension power by the executive because of the prerequisite “that the public safety requires the suspension,” a factual matter that, McCarver contended, would have to be “shown” or “established.”²⁶ Norton echoed McCarver’s two points. Only the executive (meaning the Governor), he said, could suspend *habeas corpus*, “and this power of suspending the writ is given to him for obvious reasons,” including that “[i]t would be impossible, in many cases, for the Legislature to be convened at a proper time.” Further, Norton added, the executive would be “called upon to exercise this power” solely “in cases of invasion, or any sudden emergency, involving the public safety.”²⁷

In resisting Botts’s amendment, both McCarver and Norton conceived of an “invasion” as a threatening phenomenon demanding a rapid response. Norton’s phrasing—“invasion, or any sudden emergency”—appears to generalize from the concept of an “invasion” to the broader category of “sudden emergenc[ies]” that encompasses the specific term, and if an invasion is a “sudden emergency,” it makes sense to anticipate, as Norton did, that an expeditious reaction would be necessary. The legislature, in this view, is too dilatory to be adequate for the task. For that reason, both McCarver and Norton favor lodging the suspension power in the executive, the branch of government that, by virtue of what Alexander Hamilton famously deemed its “unity,” can act with a degree of “[d]ecision, activity, secrecy, and dispatch” that a multimember body cannot match.²⁸ McCarver and Norton’s conception of an invasion thus suggests an abrupt, discrete, and exigent event as opposed

²³ *Id.*

²⁴ Amanda L. Tyler, *Habeas Corpus and the American Revolution*, 103 *Calif. L. Rev.* 641, 641–48 (2015).

²⁵ Browne, *Debates of the Convention of 1849*, 39.

²⁶ *Id.*

²⁷ *Id.* at 39–40.

²⁸ *The Federalist No. 70*, at 472 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

to an ongoing or continuous problem, a conception that underpins their opposition to Botts's legislature-empowering amendment.

Responding to McCarver and Norton's criticism, Botts acknowledged that he faced an uphill climb in persuading a majority of the delegates to support *any* change to the original proposal. Nonetheless, he "begged that gentlemen would consider for a moment what they were doing."²⁹ After all, he reminded his colleagues:

[T]o . . . leave the power in the hands of a single individual . . . is nothing less than to make a Dictator of that individual. . . . He can at his will and pleasure arrest citizens of the State. . . . You put every man at the will of the Executive. . . . [A]t the pleasure of a single individual, he can be deprived of his liberty. . . . If an invasion happens, you are that moment a slave[.]³⁰

Here, Botts confirms the understanding of an "invasion" as a distinct "moment" in time. To Botts, though, unlike McCarver and Norton, the suddenness of an "invasion" furnishes a reason *against*, not in favor of, placing the suspension power in the one-man executive. The executive-empowering arrangement would allow for an immediate deprivation of liberty without forewarning to the people, an unacceptable possibility in Botts's eyes.

A reply came from William Edward Shannon of Sacramento, who thought Botts's amendment "would be found rather inconvenient in practice."³¹ For support, he cited "the case of General [Andrew] Jackson,"³² alluding to an episode that took place during the War of 1812. With Jackson's troops in control of New Orleans but with British foes "within striking distance" of the city, Jackson declared martial law.³³ When a federal judge issued a writ of *habeas corpus* to a legislator whom Jackson had previously ordered arrested on dubious charges, Jackson ordered the judge arrested, too.³⁴ The unfortunate legislator remained in custody until word came of the Treaty of Ghent's ratification, at which point Jackson lifted martial law.³⁵

Shannon's use of the Jackson episode as an example of *habeas* suspension is somewhat questionable because it is unclear whether Jackson intended to

²⁹ Browne, *Debates of the Convention of 1849*, 40.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Abraham D. Sofaer, *Emergency Power and the Hero of New Orleans*, 2 *Cardozo L. Rev.* 233, 241 (1981).

³⁴ *Id.* at 242–243.

³⁵ *Id.* at 244.

suspend the writ formally or to defy it outright.³⁶ Still, the reference illustrates another dimension of delegates' concept of "invasion"; namely, its military associations. It connoted "the most extreme emergency," in Shannon's words,³⁷ that the public could face: military assault by foreign forces. An invader was not just an unwelcome entrant, whether man, beast, or product, into the state. Rather, it brought to mind hostile combatants, weapons in hand, under intentionally organized foreign control.

After Shannon spoke, further back-and-forth debate ensued, in which Kimball H. Dimmick of San Jose articulated the most elaborate argument against legislative suspension:

In cases of rebellion or invasion, it would be impossible for the Legislature to become acquainted with the facts, and provide proper measures, in time to meet the difficulty. The Executive, from his position, has a better opportunity of acquiring this knowledge in advance, and without waiting for the action of the Legislature, he has power under this provision to take such immediate measures as the public safety may require.³⁸

The themes previously noted reappear in Dimmick's statements. That is, Dimmick, like Botts, McCarver, and Norton, thought of an "invasion" as a sudden occurrence, so sudden that there would not be enough time for a legislative body to figure out what the "facts" were and what response they warranted. An "invasion" would unfold so swiftly as to demand action "without waiting." This understanding harmonizes with the word's militaristic connotation, since a military attack is undoubtedly a situation of highest urgency.

After thorough deliberation, the various suggested amendments to the draft clause failed. The proposal, which became Article I, Section 5 of the convention's final product,³⁹ retained its original wording without specifying which branch of government wields either the suspension power or the antecedent power to determine whether a "rebellion or invasion" requiring suspension has taken place.⁴⁰

³⁶ Trevor W. Morrison, Hamdi's *Habeas Puzzle: Suspension as Authorization*, 91 Cornell L. Rev. 411, 429 n.102 (2006).

³⁷ Browne, *Debates of the Convention of 1849*, 40.

³⁸ *Id.*

³⁹ Cal. Const. of 1849, art. I, § 5.

⁴⁰ In this respect, Section 5 parallels the federal Constitution's Suspension Clause. Though that clause appears in Article I of the Constitution, which enumerates the powers of Congress, it does not explicitly delineate which branch can suspend the writ. See Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex Parte Merryman*, 34 U. Balt. L. Rev. 11 (2004) (reviewing various interpretations of the Suspension Clause and arguing for a concurrent executive-legislative suspension power).

Although delegates debated the would-be Article I, Section 5 most extensively, it was not the only provision of the 1849 California Constitution to refer to “invasions.” In late September, delegates adopted what became Article VII, empowering the Governor “to call forth the militia, to execute the laws of the State, to suppress insurrections, and repel invasions,” without debate.⁴¹ What became Article VIII, restricting the legislature’s ability to create debts or liabilities exceeding \$300,000 “except in case of war, to repel invasion or suppress insurrection,” produced some disagreement over the proper quantitative cap, but no dispute over the emergency circumstances exception.⁴²

Overall, the use of the word “invasion” in these other two clauses seems consistent with the usage of “invasion” in Article I, Section 5 as referring to a quick, deliberate act of foreign aggression. Take Article VII. In an era when police presence was rudimentary, states relied on militias to deal with public disorders of various kinds.⁴³ Consequently, delegates expected the Governor to call forth the militia when California faced domestic disturbances in addition to foreign threats. But they textualized this expectation separately by specifying that the Governor could also direct the militia “to execute the laws . . . [and] to suppress insurrection.” If “repel[ing] invasion” could, on its own, signify domestic law enforcement, the preceding clauses become redundant. There is, therefore, a strong reason to read “invasion” as pointing to a different concept, that of an armed foreign operation penetrating the state from the outside.⁴⁴

Article VIII, meanwhile, situates an “invasion” alongside “war” and “insurrection” as exceptions to the general limitation on state borrowing beyond the \$300,000 maximum. All three conditions are emergency circumstances, but each concept can reasonably be read as distinct from the others, with “war” indicating full-scale interstate armed conflict, “invasion” suggesting a more limited armed attack, and “insurrection” confined to the domestic context.⁴⁵ This reading would comport with the understandings that appear among

⁴¹ Browne, *Debates of the Convention of 1849*, 165.

⁴² *Id.* at 165–166.

⁴³ Robert Reinders, *Militia and Public Order in Nineteenth-Century America*, 11 J. Am. Stud. 81, 88–89 (1977).

⁴⁴ See generally Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 174–179 (2012) (discussing “Surplusage Canon” in legal interpretation).

⁴⁵ In saying so, however, I do not rule out the possibility of overlap between them.

Founding-era documents pertaining to the national Constitution,⁴⁶ as well as with dictionary definitions contemporaneous with the 1849 Constitutional Convention.⁴⁷

There is, in short, substantial evidence suggesting that the 1849 delegates viewed an “invasion” as a sudden military attack into the state by a foreign adversary. This formed the core meaning of an “invasion” that was widely shared at the time, and no delegate invoked an alternative or contrary use of the term. And in a pair of decisions handed down during the Civil War, the California Supreme Court would further confirm this conception.

II. THE CALIFORNIA CONSTITUTION IN CIVIL WAR

In the early 1860s, as Union blue and Confederate gray clashed on the battlefield, the California Supreme Court handed down two decisions interpreting Article VIII of the 1849 California Constitution. Under this Article, as noted, the legislature could not “in any manner create any debt or debts, liability or liabilities, which [would] singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars, except in case of war, to repel invasion or suppress insurrection.” The

⁴⁶ In the *Federalist No. 43*, James Madison discusses the Invasion Clause of Article IV, § 4 of the Constitution, which provides that the United States “shall protect each of [the States] against Invasion.” U.S. Const. art. IV, § 4. On Madison’s reading, this clause serves to protect states from both “foreign hostility” and aggression by “more powerful neighbors,” an interpretation that evokes military operations backed by governmental power. *The Federalist No. 43*, at 293 (James Madison) (Jacob E. Cooke ed., 1961).

Madison’s Report of 1800, a resolution analyzing the Alien and Sedition Acts adopted during the Quasi-War with France, is even more explicit: “Invasion is an operation of war. To protect against invasion is an exercise of the power of war.” For that reason, Madison argued, removing “alien friends” from the country did not fall within the scope of congressional authority under the Invasion Clause, for such an action was “no incident to a general state of war,” nor to “a partial state, or a particular modification of war.” James Madison, The Report of 1800 (Jan. 7, 1800), *Founders Online*, Nat’l Archives (last visited Aug. 20, 2025).

Other Framers likewise associated an “invasion” with foreign military operations necessitating an urgent response. During the Philadelphia Convention, for instance, Edmund Randolph faulted the Articles of Confederation for leaving the government in a state of “weakness” that “degraded” the “bravery of our troops.” Though the Articles had been “founded on the weakness of each state to repel a foreign enemy,” the Confederation Congress had proven “insufficient,” and the proposed New Jersey plan, he believed, would also fail “to protect us against foreign invasion.” 1 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 416 (2d ed. 1836). Randolph, like Madison, thus tied “invasion” to international military conflicts and intrusions, as did the California delegates in 1849.

⁴⁷ An authoritative dictionary of the era defines an “invasion,” in the relevant sense, as a “hostile entrance into the possessions of another; particularly, the entrance of a hostile army into a country for the purpose of conquest or plunder, or the attack of a military force.” *Invasion*, Noah Webster, 1 *An American Dictionary of the English Language* (1st ed. 1828). It defines “insurrection” as “rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or state,” implying resistance to domestic law enforcement. *Insurrection*, Noah Webster, 1 *An American Dictionary of the English Language* (1st ed. 1828). Finally, it defines “war” as a “contest between nations or states, carried on by force” for defense, revenge, redress of wrongs, territorial gains, establishing dominion, or plunder, and “accomplished by the slaughtering or capture of troops, and the capture and destruction of ships, towns, and property”; the word “always implies that such contest is authorized by the monarch or sovereign power.” *War*, Noah Webster, 2 *An American Dictionary of the English Language* (1st ed. 1828). These definitions suggest that an “invasion” is one manner of conducting a war: “a hostile army” enters another country to attack, dominate, or plunder it; *i.e.*, to accomplish the ends of warfare. The delegates’ debates in 1849 thus align with Webster’s definitions.

eruption of the Civil War impelled California’s legislature to take actions that tested the boundaries of Article VIII’s command of fiscal responsibility. In this Part, I will examine the two wartime decisions on Article VIII, *Franklin v. State Board of Examiners*⁴⁸ and *People ex rel. McCullough v. Pacheco*.⁴⁹ While the existential threat facing the country was unprecedented, these decisions trod familiar ground, largely affirming the understanding of “invasion” that the delegates had manifested in 1849.

A. *Franklin v. State Board of Examiners*

Franklin arose out of a California act providing for the payment of volunteers enlisting to serve the Union. As historian Brainerd Dyer has explained, “Union troops to fight the Civil War were raised almost entirely by the State governments in response to calls issued by Federal officials” after the Confederates fired on Fort Sumter in April of 1861.⁵⁰ California, historian Aurora Hunt recounts, “was the first western state called upon for volunteers and supplied the greatest number”—a tenth of its military-age men, who served in cavalry and infantry regiments in campaigns along the vast Western frontier.⁵¹ Decades later, a board of Army officers would give a glowing review of California’s performance, observing that

the State authorities were animated by an earnest desire to uphold the authority of the national government and to that end left nothing undone that it was in their power to do; that in their efforts to raise troops for a frontier service . . . they were prompt, energetic and on the whole eminently successful; and that both in the training of the militia and the raising and proper support of their volunteers they expended the money of the State without hesitation and without stint.⁵²

But California’s spirited expression of loyalty did not come cheap.⁵³ Hence, on April 27, 1863, state legislators passed an act authorizing payments of five dollars per month to the war volunteers, with the effect of creating a debt of \$600,000—double the \$300,000 limit in Article VIII.⁵⁴ John Franklin, who

⁴⁸ 23 Cal. 173 (1863).

⁴⁹ 27 Cal. 175 (1865).

⁵⁰ Brainerd Dyer, *California’s Civil War Claims*, 45 S. Cal. Q. 1, 1 (1963).

⁵¹ Aurora Hunt, *The Army of the Pacific (1860–1866): Its Operations in California, Texas, Arizona, New Mexico, Utah, Nevada, Oregon, Washington, Plains Region, Mexico, Etc.*, 24–28 (Stackpole Books 2004) (orig. pub. 1951).

⁵² S. Exec. Doc. No. 1, 51st Cong., 1st Sess. 26–27 (1889).

⁵³ Congress passed legislation to reimburse the States’ expenses. See Act of July 27, 1861, ch. 21, 12 Stat. 276. However, California did not receive reimbursement despite assiduously presenting its claims to the federal government in the 1880s. See Dyer, *supra* note 50, at 2–3.

⁵⁴ *Franklin*, *supra* note 48, at 174–175.

had served as an enlisted soldier in a cavalry regiment and been honorably discharged, asked the Board of State Examiners to approve his claim under the April act.⁵⁵ When the Board refused, Franklin petitioned for a writ of *mandamus* to compel the Board to allow him to claim his bounty, and the case made its way up to the California Supreme Court.⁵⁶ Since the debt resulting from the act clearly exceeded the boundary in Article VIII, the Court recognized that it would be “invalid, unless it is saved by the exception” within Article VIII waiving the \$300,000 limit in cases of war, rebellion, or invasion.

The Court held the act valid. While noting that Article VIII was ambiguous as to the extent of its exception—did it apply only when California was invaded, at war, or under insurrection, or, alternatively, “in all cases where a war or insurrection exists in *any* part of the United States, or there is an invasion or threatened invasion of *any* territory within the National jurisdiction?”⁵⁷—it was not necessary for the Court to resolve that question. Rather, in such “great emergencies” as war, invasion, or insurrection, “the Legislature should be left free to exercise their judgment and discretion upon the subject, answerable alone to the people for any abuse of power.”⁵⁸ This was so, the Court reasoned, because “[t]he existence of the emergency calling for the exercise of the power is purely a political question . . . and it is not, therefore, subject to review, or liable to be controlled by the judicial department of the State.”⁵⁹ Per the Court, it was up to the legislature to determine the extent of its own constitutional authority under Article VIII, and lawmakers had “decided that the exigency ha[d] arisen demanding the exercise of the power.”⁶⁰

For authority, the California Supreme Court pointed to the national Supreme Court’s decisions in *Martin v. Mott*⁶¹ and *Luther v. Borden*.⁶² In *Mott*, the Court ruled against a citizen of New York who was fined for failing to appear for militia service.⁶³ President James Madison, relying on the Militia Act of 1795,⁶⁴ had “call[ed] forth the militia” in response to the War of 1812, but Jacob Mott objected to the President’s orders and defied his militia obligation.⁶⁵ The Court

⁵⁵ *Id.* at 173.

⁵⁶ *Id.* at 174.

⁵⁷ *Id.* at 175 (emphasis added).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 25 U.S. (12 Wheat.) 19 (1827).

⁶² 48 U.S. (7 How.) 1 (1849).

⁶³ *Mott*, *supra* note 61, at 22.

⁶⁴ Ch. 36, 1 Stat. 424.

⁶⁵ *Mott*, *supra* note 61, at 28.

held that “the President is the sole and exclusive judge” of whether an “actual invasion” or “imminent danger of invasion” existed.⁶⁶ It was accordingly not up to “every officer to whom the orders of the President are addressed” to “decide for himself” whether to obey.⁶⁷ Though some scholars have read *Mott* as holding that courts cannot review presidential decisions to deploy the militia,⁶⁸ and *Mott*’s emphatic language can be read to that effect, *Mott* did not directly address the issue of judicial review of the President’s actions, focusing instead on decision-making within the executive chain of command.

By contrast, *Luther*, which relied on *Mott*, squarely confronted the reach of the courts’ purview. As the California Supreme Court noted, this case established the political questions doctrine, under which the lawfulness of certain choices by the executive and legislative departments cannot be adjudicated⁶⁹—that is, they are insulated from the process of judicial review canonically affirmed by the Supreme Court in *Marbury v. Madison*.⁷⁰ *Mott*’s “principle,” according to the Court in *Luther*, meant that the President’s discretion in his statutory calling-forth power could be policed by Congress, not courts.⁷¹

Even though the California Supreme Court could have ended its analysis with *Mott* and *Luther*,⁷² it went further, declaring that “even if it was necessary for the Court to decide whether or not . . . the emergency has arisen” to trigger Article VIII’s exception, there was ample evidence to justify the California legislature’s act.⁷³ It was “public history,” lectured the Court, that “a new confederacy of States” had “prosecuted direct and open hostilities against the National and many of the State Governments.”⁷⁴ True, the Southern rebels had “never invaded” California, but this fact made “no difference,” for “[w]hatever affects any one part of the nation equally affects us.”⁷⁵ Based on

⁶⁶ *Id.* at 29.

⁶⁷ *Id.* at 29–30.

⁶⁸ See, e.g., Stephen I. Vladeck, *Emergency Power and the Militia Acts*, 114 Yale L.J. 149, 172 (2004) (describing *Mott* as concluding that the President’s determination of the need to call forth the militia “was not subject to judicial review”).

⁶⁹ *Franklin*, *supra* note 48, at 176.

⁷⁰ 5 U.S. (1 Cranch) 137 (1803).

⁷¹ *Luther*, *supra* note 62, at 45.

⁷² In fact, the Opinion of the Court reflected the views of just two Justices, Justice Crocker and Justice Norton. The third Justice, Chief Justice Cope, concurred separately and only in the judgment “upon the ground that the exigencies contemplated by the Constitution are matters of the existence of which the Legislature is the sole judge.” This suggests that, unlike his colleagues, Chief Justice Cope did not wish to offer his own determination on the presence or absence of facts that could bring the legislature’s act within Article VIII’s exception.

⁷³ *Franklin*, *supra* note 48, at 176.

⁷⁴ *Id.* at 176–177.

⁷⁵ *Id.* at 177.

these determinations, the Court directed the lower court to issue a *mandamus* compelling the Board to authorize payment to Franklin.⁷⁶

B. People ex rel. McCullough v. Pacheco

Two years after deciding *Franklin*, in *People ex rel. McCullough v. Pacheco*, the California Supreme Court faced another Article VIII challenge to a legislative act. Again, the Civil War context permeated the case. On April 4, 1864, the legislature had approved “An Act to aid the construction of the Central Pacific Railroad, and to secure the use of the same to this State for military and other purposes, and other matters relating thereto.”⁷⁷ The act’s preamble spelled out its purpose and rationale. “War now exists,” the legislature there proclaimed, “and is in immediate and vigorous prosecution between the Government of the United States and certain States which have revolted against its authority.” Although “the Congress of the United States has, for military and other purposes, granted aid for the construction of the Central Pacific Railroad,” the legislature maintained that this federal aid would be “insufficient to complete the work as speedily as is necessary” to meet the demands “of the present state of war and the further (future) danger thereof.” As such, the state was stepping in to furnish further financial support to Central Pacific so as to ensure “that the said railroad be constructed as soon as possible to repel invasion, suppress insurrection, and defend the State against its enemies.”⁷⁸

In response to these exigencies, the act approved the issuance of 1,500 government bonds. Each bond was worth \$1,000 and had attached to it forty interest coupons, worth thirty-five dollars each and signed on the back by the Treasurer of California.⁷⁹ To fund the interest payments, the act established a new tax and appropriated the revenues into a “Pacific Railroad Fund.”⁸⁰ Lastly, the act set forth various conditions for the grant of aid, including that the railroad would, “in case of war, invasion, or insurrection, as well as at all other times, . . . transport and convey over their said railroad all troops and munitions of war belonging to the State of California[.]”⁸¹

California Attorney General John G. McCullough brought suit on behalf of the people of California against California State Treasurer Romualdo Pacheco. McCullough argued that the act was “null and void” as violative of

⁷⁶ *Id.*

⁷⁷ *Pacheco*, *supra* note 49, at 203.

⁷⁸ *Id.*

⁷⁹ *Id.* at 176 (Statement of Facts).

⁸⁰ *Id.* at 204.

⁸¹ *Id.* at 205.

the California Constitution.⁸² His contention rested on the premise, conceded by Pacheco,⁸³ that at the time of the act's passage, California was already bearing a debt in excess of Article VIII's \$300,000 limit; the act provided "no sufficient ways or means . . . for the payment of the debt and liabilities therein attempted to be created as the same falls due and for the full discharge thereof[.]"⁸⁴ The case raised three questions for the California Supreme Court to answer: first, whether the act created a "debt or . . . liability" within the meaning of Article VIII; second, whether, if so, that debt fell within Article VIII's exception; and third, whether the act impermissibly loaned the credit of the state in aid of a corporation or individual,⁸⁵ which would be unlawful under a separate provision, Article XI, of the 1849 California Constitution.⁸⁶

The Court spent most of its opinion answering the first question in the negative. Yet although this result obviated the need to address the second question, the Court went on to address that issue as well, and it decided that even if the act created a debt, it was up to the legislature, not the judiciary, to determine "[w]hether or not the contingency has arisen" that would allow the creation of debts beyond the ordinary limit and bring the act within the exception in Article VIII.⁸⁷ As in *Franklin*, the Court, while underscoring that the factual determination belonged to the "political departments of Government,"⁸⁸ additionally took pains to present its own view of the facts as well: it stated that there was "ample evidence" that "the State of California . . . is actually engaged in war" and that "[w]ar has, in fact, been actually levied within our borders."⁸⁹ By way of example, the Court referred to the "case of the Chapman,"⁹⁰ an incident in which two Confederate sympathizers had attempted to outfit a privateer schooner, the *J.M. Chapman*, to capture Union steamers carrying California gold, an essential resource for the Union war effort.⁹¹ The Court added its observation that "[r]ailroads are, undoubtedly, among the most effective agencies employed in modern warfare."⁹² Together with its independent commentary, the Court credited the legislature's preamble,

⁸² *Id.* at 200 (Argument for Appellant).

⁸³ *Id.* at 207.

⁸⁴ *Id.* at 180 (Statement of Facts).

⁸⁵ *Id.* at 207.

⁸⁶ Cal. Const. of 1849, art. XI, § 10.

⁸⁷ *Pacheco*, *supra* note 49, at 221.

⁸⁸ *Id.* at 222.

⁸⁹ *Id.* at 221–222.

⁹⁰ *Id.* at 222.

⁹¹ See Leonard L. Richards, *The California Gold Rush and the Coming of the Civil War*, 230–33 (2007).

⁹² *Pacheco*, *supra* note 49, at 223.

and it concluded that Article VIII’s exception permitted the debt.⁹³ It also tersely decided the third question in the government’s favor, too.⁹⁴

C. *Lessons from Franklin and Pacheco*

Franklin and *Pacheco*’s handling of Article VIII fits comfortably within the vision of the 1849 delegates. The cases reflect a throughline in how California legal actors understood “invasion” from the 1849 Constitutional Convention into the 1860s. A few takeaways are worth highlighting.

First, the decisions comport with the 1849 delegates’ conception of an invasion as, in a word, an “emergency.” This characterization is explicit in both decisions,⁹⁵ just as it surfaced repeatedly in the debates at the 1849 Constitutional Convention. An invasion, war, or insurrection⁹⁶ could not be a routine occurrence, not something that was familiar to everyday life or constitutive of day-to-day social phenomena. It was an exceptional break from normal affairs.

Second, and relatedly, considerations of exigency played a major role in both the Court’s decisions and the 1849 delegates’ debates. The Court, as mentioned, concluded in *Franklin* and *Pacheco* that the determination of whether factual circumstances amounted to an invasion, war, or insurrection rightly belonged to the political branches of government, not to the judiciary. *Franklin* stressed deference to the legislature’s “judgment and discretion” on a subject that was “in no manner of a judicial character,” a point reiterated in *Pacheco*.⁹⁷ *Pacheco* elaborated that the “responsibility . . . for repelling, or aiding to repel invasion, . . . and the correlative right to determine when the emergency has arisen requiring their action, must, necessarily, to be effective, reside” in the other two branches, particularly since circumstances could become even more severe “at any moment” due to the risk of “an invasion of our State from abroad.”⁹⁸ These statements contain implicit assumptions about relative institutional capacity. Invasions, wars, and insurrections alike, the Court intimated, were matters too high-stakes and fast-developing for the judiciary, with its characteristically slow and deliberate process, to handle, at

⁹³ *Id.* at 225.

⁹⁴ *Id.* at 227.

⁹⁵ *Franklin*, *supra* note 48, at 175 (“the existence of the emergency . . . is purely a political question”; *Pacheco*, *supra* note 49, at 221 (“the correlative right to determine when the emergency has arisen . . .”).

⁹⁶ The decisions did not discuss an “invasion” specifically, that is, as distinct from the other concepts referenced by Article VIII, “war” and “insurrection.” The Court appeared to regard these situations as comparable and often listed them together. Though the Court did not necessarily treat them as synonyms, nothing in the opinions suggests that the Court would analyze any one of these situations differently from the rest.

⁹⁷ *Franklin*, *supra* note 48, at 175; *Pacheco*, *supra* note 49, at 223.

⁹⁸ *Pacheco*, *supra* note 49, at 221–222.

least in the initial step of determining the facts. The “effective” response to an invasion must be an immediate one—something antithetical to the “judicial character.” So, the argument goes, better to commit that determination to the legislature or executive.

The 1849 delegates, when debating Article I, Section 5 on the *habeas corpus* suspension power during times of invasion, had divided over exactly *which* political branch should make the call. This is not the same question that the Court was addressing in *Franklin* and *Pacheco*, which considered the executive and legislative collectively as the “political branches,” yet the 1849 delegates’ debates and the 1860s justices’ opinions reflected similar beliefs. Namely, back in 1849, the apparent reason that other delegates rejected Botts’s proposal to vest the fact-determining role in the legislature was that a multimember lawmaking body would be too slow to act in a context where rapid action would be imperative. Recall Dimmick’s worry: “it would be impossible for the Legislature to become acquainted with the facts, and provide proper measures, in time to meet the difficulty,” whereas the executive could take “immediate measures” to preserve “the public safety.”⁹⁹ Thus, the same traits that the delegates identified as rendering the executive better-qualified than the legislature to deal with invasions seem built into the California Supreme Court’s reasoning about the institutional competence of the judiciary compared to the political branches. Those traits, in turn, rested on the notion, common to the Justices and the delegates, of an invasion as a fast-paced and urgent affair.

Third and finally, the military connotations of “invasion” were a consistent theme. Discussing Section 5, the delegates had referenced Jackson’s imposition of martial law during the War of 1812. Similarly, the Court in *Pacheco*, while asserting the need to defer to the political branches in judging whether an invasion, war, or insurrection, existed, had focused on the state’s “military purposes” in enacting the railroad aid law, the acute risk of “active hostility” evident from the Confederates’ Chapman plot, and the legislature’s stated goal of “defend[ing] the State against its enemies.”¹⁰⁰ Of course, this emphasis is hardly surprising given the war embroiling the United States at the time of the decision, but it nonetheless reinforces the conclusion that the dominant conception of an “invasion” remained tethered to the imagery of physical force and organized threat from a hostile enemy sovereign.

⁹⁹ Browne, *Debates of the Convention of 1849*, 40.

¹⁰⁰ *Pacheco*, *supra* note 49, at 224, 222, 225.

In sum, the *Pacheco* and *Franklin* decisions accord with the 1849 Constitutional Convention’s understanding of an “invasion.” The departure from this understanding lay several decades ahead. When it came, its consequences were immense.

III. THE SECOND CONSTITUTIONAL CONVENTION

Thirty years later, delegates again convened, this time in the Assembly Chambers of the new State Capitol in Sacramento. By now, dark clouds were rolling along the once-sunny horizon of California’s fate. The Civil War had rent the United States apart. Although the Union had prevailed and a series of transformative constitutional amendments had passed, economic downturns, persuasive political corruption, and social turbulence roiled the United States in the 1870s, and California had not been spared.¹⁰¹ These Gilded Age challenges had unsettled the underpinnings of antebellum free-labor tenets,¹⁰² and labor agitation reached a high point with the Great Railroad Strike of 1877 which, in San Francisco, “degenerated into anti-Chinese rioting.”¹⁰³ That same year, labor organizers formed a new and virulently xenophobic Workingman’s Party in San Francisco.¹⁰⁴ “The Chinese must go!” the party’s slogan blared.¹⁰⁵

Racism against Chinese immigrants was no bolt from the blue. The preceding decades had witnessed an upsurge in anti-immigrant sentiment targeting a Chinese labor force that had, in the not-too-distant past, been welcomed as “the most sober, honest, and industrious people in this country”¹⁰⁶ and described by a California governor as “one of the most worthy classes of our newly adopted citizens.”¹⁰⁷ The “gravamen” of the complaint against Chinese immigrants, as Charles J. McClain Jr. succinctly explains, was that “they worked too hard (often for less pay than others were willing to accept), saved too much, and spent too little,” and this resentment morphed into discriminatory and exclusionary legislation.¹⁰⁸ The changed context produced new ideas as delegates confronted the issues of their day.

¹⁰¹ Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 U.C. L. Rev. Const. Q. 35, 36 (1989).

¹⁰² William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 Wis. L. Rev. 767, 786–794 (1985).

¹⁰³ Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863–1877*, 583–585 (1988).

¹⁰⁴ Heather Cox Richardson, *West from Appomattox: The Reconstruction of America after the Civil War*, 178–179 (2008).

¹⁰⁵ Beth Lew-Williams, *The Chinese Must Go: Violence, Exclusion, and the Making of the Alien in America*, 42 (2018).

¹⁰⁶ Lorenzo Sawyer, *Way Sketches Containing Incidents of Travel Across the Plains from St. Joseph to California in 1850, with Letters Describing Life and Conditions in the Gold Region*, 125 (1926).

¹⁰⁷ *California Senate Journal*, 3 Sess., 1852, 15.

¹⁰⁸ Charles J. McClain Jr., *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America*, 10 (1994).

Indeed, like the solons at Philadelphia in 1787, the 1878–1879 California constitution-makers had lived under a framework of government that seemed inadequate to meet present-day problems—in their case, the problems of an industrialized society, increasingly dominated by railroads and still emerging from the long shadow of a crippling economic depression.¹⁰⁹ While just forty-eight framers had convened for the 1849 Constitutional Convention, 152 delegates gathered in 1878,¹¹⁰ reflecting the state’s prodigious population growth¹¹¹ in the interim. Most were “Nonpartisan,” but around a third belonged to the Workingman’s Party, far outnumbering their Democratic and Republican counterparts.¹¹² The delegates’ collective mandate, at bottom, was to tune the 1849 document to the times.

A. Debates of the 1878–1879 Convention

Much of the original text of the 1849 California Constitution ultimately persisted intact. The delegates reauthorized Article I, Section 5, permitting the suspension of *habeas corpus* during rebellions and invasions, without amendment or even a noted objection.¹¹³ Article VIII’s invasion exception for debt creation also survived,¹¹⁴ as did the Governor’s power to call forth the militia during invasions and insurrections.¹¹⁵ These provisions were apparently uncontroversial.

But the delegates’ agreement on the *habeas corpus*, militia, and debt provisions did not mean that the concept of an “invasion” faded into the background. Quite the contrary, it would take center stage beginning on the seventy-third day of the proceedings, Monday, December 9th, 1878. On this day, the delegates met at 9:30 a.m., took roll, and took up a special order for the day: a report from the Committee on Chinese.¹¹⁶

In the Committee of the Whole, reviewing the draft report from the Committee on Chinese, the secretary read out the first section, which gave the legislature the power to enact laws and regulations

¹⁰⁹ Kenneth M. Johnson, *California’s Constitution of 1879: An Unpaid Debt*, 49 Cal. Hist. Soc’y Q. 135, 135 (1970).

¹¹⁰ E.B. Willis & P.K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878*, 11 (1880) (hereinafter Willis & Stockton, *Debates of the Constitutional Convention of 1878–1879*).

¹¹¹ In 1850, California’s population totaled 92,597, whereas by 1880, it amounted to 864,694—an increase surpassing ninefold. State of California, Dep’t of Finance, *State of California Total Population, 1850-2010* (June 2010) (compiled from U.S. Census Bureau data).

¹¹² Johnson, *supra* note 109.

¹¹³ Willis & Stockton, *Debates of the Constitutional Convention of 1878–1879*, 243 (“Section five was then read” to the delegates, but “[t]here being no amendment,” they moved on to the next section).

¹¹⁴ Cal. Const. of 1879, art. XVI, § 16.

¹¹⁵ Cal. Const. of 1879, art. VIII, § 1.

¹¹⁶ Willis & Stockton, *Debates of the Constitutional Convention of 1878–1879*, 627.

for the protection of the State . . . from the burdens and evils arising from the presence of aliens, who are or who may become vagrants, paupers, mendicants, criminals, or invalids afflicted with contagions or infectious diseases, and aliens otherwise dangerous or detrimental to the well-being or peace of the State, and to impose conditions upon which such people may reside in the State, and to provide the means and mode of their removal from the State upon failure or refusal to comply[.]¹¹⁷

John Franklin Miller, who had served on the Committee on Chinese,¹¹⁸ rose to make a lengthy speech. His comments are worth sketching at some length because they illuminate the forces driving the 1878–1879 delegates to reconceptualize “invasion.”

Miller began with a statement of democratic duty. Most Californians, he claimed, expected the convention to “take some decisive action” on Chinese immigration, which they viewed “as a great increasing and expanding evil.”¹¹⁹ The first section of the draft was, in this regard, an attempt to effectuate the purported will of the people.

Even with his claim to democratic legitimacy based on public expectations, Miller was cognizant of limits on the delegates’ authority. He stressed the plan’s consistency with the governing higher law, the U.S. Constitution. The national government, he conceded, held “exclusively” the power to regulate foreign and interstate commerce; the states could regulate only their “internal affairs” under the auspices of “the police power—that power of local regulation” that had not been delegated to the national government.¹²⁰ The California legislature, Miller further admitted, had previously and unsuccessfully attempted to restrict Chinese immigration through its taxation powers.¹²¹ In 1855, it imposed a tax of \$50 per passenger on shipmasters bringing Chinese immigrants into the state. After the California Supreme Court invalidated that taxation statute in *People v. Downer*,¹²² the legislature enacted 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,” levying a capitation tax of \$2.50 per month on all “Mongolian” residents.¹²³ Again, in *Lin Sing v.*

¹¹⁷ *Id.* at 628.

¹¹⁸ *Id.* at 157.

¹¹⁹ *Id.* at 628.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 7 Cal. 169.

¹²³ Theodore Henry Hittell, *Statutes of California, The General Laws of the State of California, from 1850–1864, Inclusive*, 521 (1872).

Washburn,¹²⁴ the California Supreme Court ruled the tax unconstitutional.

At the time, there was no comprehensive body of federal immigration law precedents for the California Supreme Court to apply.¹²⁵ In both *Downer* and *Lin Sing*, the leading authority was *The Passenger Cases*,¹²⁶ an intricate, highly fragmented pair of 1849 rulings in which the Supreme Court had held unconstitutional two state taxes on foreign passengers arriving from overseas. Miller relied on *The Passenger Cases* in his speech, citing, out of the Supreme Court's eight separate opinions, those of Justices Wayne and Grier.¹²⁷ Both justices acknowledged a residual police power of the states to exclude certain undesirable foreigners, such as "paupers" and "criminals"—a right that Justice Grier grounded upon "the sacred law of self-defence"—while denying a reserved state power to indiscriminately tax *all* foreign entrants.¹²⁸ Miller then referred to subsequent Supreme Court cases that had reaffirmed this authority of a state "to protect herself"¹²⁹ against "social evils"¹³⁰ from abroad. Based on these precedents, Miller concluded that California could not "prohibit Chinese immigration" completely, but it could seek to remove "dangerous and burdensome classes."¹³¹

His proposed policy of exclusion, Miller went on, might be met with the objection that Chinese exclusion ran counter to the policy of the United States, which had, since colonial times, "been the asylum of the oppressed of all lands."¹³² "Is Chinese exclusion really a departure from the policy of the nation?" he wondered. "Immigration has been encouraged, but what kind of immigration?" His answer: "white men, men of our own race and color." Black Americans, unlike whites, "came by compulsion." In order "to preserve their liberty," Blacks had recently been "clothed . . . with the panoply of American citizenship," but if they had been excluded from the country from the outset, "what evils and horrors would have been avoided." The law at the time limited

¹²⁴ 20 Cal. 534 (1862). For a detailed account of this case, see Charles J. McClain Jr., *Chinese Immigrants in the California Supreme Court: The Earliest Civil Cases*, 19 Cal. Legal Hist. 73 (2024).

¹²⁵ McClain, *supra* note 124, at 97 (noting that in the mid-nineteenth century, "[t]here was not a great deal of precedent[,] federal or state, on what rights a state might have to regulate immigration"); Adam B. Cox, *The Invention of Immigration Exceptionalism*, 134 Yale L.J. 329, 343 (2024) (dating Congress's first attempts to restrict immigration, and consequent federal court challenges to that legislation, to the late nineteenth century).

¹²⁶ 48 U.S. (7 How.) 283 (1849).

¹²⁷ Willis & Stockton, *Debates of the Constitutional Convention of 1878–1879*, 628–629.

¹²⁸ *The Passenger Cases*, *supra* note 126, at 425, 457. For a detailed account of the *Passenger Cases* and the arguments leading up to them, see Alison L. LaCroix, *The Interbellum Constitution: Union, Commerce, and Slavery in the Age of Federalism*, 362–381 (2024).

¹²⁹ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876).

¹³⁰ *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877).

¹³¹ Willis & Stockton, *Debates of the Constitutional Convention of 1878–1879*, 630.

¹³² *Id.* at 631.

naturalization to whites, observed Miller, and he claimed that the underlying reason behind this policy was “the great fact that the mixture of two distinct races is a calamity to both.”¹³³ From the nation’s fraught experience with slavery and its discriminatory naturalization law, Miller drew the lesson that excluding the Chinese from California, far from contradicting American ideals, would harmonize with the nation’s high moral aspirations.

Thus far, Miller’s speech had addressed crucial themes of state sovereignty and citizenship, themes that united in the area of immigration. At the Supreme Court, as early as the *Passenger Cases*, there were in fact already hints of a connection between exclusion of (certain) immigrants and a state’s power of “self-defense,” but these ideas had remained dormant during the 1849 constitutional debates in California. But now, with Chinese immigration at the forefront of California politics, Miller seized upon early dicta from the high court to construct a full-throated defense of enshrining racist exclusionary policies into the new California constitution.

The concept of an “invasion” served him and other delegates well in accomplishing this feat. Quoting an article from the London *Times*, Miller suggested that “California is destined to witness the peaceful invasion of vast numbers of those strange aliens” from China, then diverted to speculate about Chinese military preparations for an “armed invasion” of Russia.¹³⁴ This contrast between “peaceful invasion” and “armed invasion” spotlighted the term’s rhetorical potential to stretch past its standard military usage. When the delegates reconvened for their afternoon session, that potential came to fruition.

Jacob R. Freud of San Francisco rose to speak, and adopting a more hardline stance than Miller, asserted California’s “legal power, not alone to restrict and prohibit Chinese immigration,” but even to remove Chinese residents.¹³⁵ A state’s reserved powers, he argued, allowed it not just to “check Chinese immigration” but also to “stop the invasion,” and this second, more expansive power rose from a state’s unceded “fundamental right . . . to maintain its own existence.”¹³⁶ White Californians needed to act at once, Freud insisted, “or the time may come when we will be in the minority.”¹³⁷ In Freud’s speech, nonwhite immigration became existential, a matter of the very survival of the state. The characterization of the phenomenon as an “invasion” infused it

¹³³ *Id.*

¹³⁴ *Id.* at 632.

¹³⁵ *Id.* at 633–634.

¹³⁶ *Id.* at 634.

¹³⁷ *Id.*

with urgency, trading on the word's preexisting military connotations while simultaneously broadening its semantic borders.

Freud was not alone. Next came James J. Ayers, who hypothesized that if the national Supreme Court had confronted the question of “Chinese invasion” as opposed to “the voluntary immigration of Europeans,” it would have been willing to sanction state-level exclusion policies.¹³⁸ Like Freud, Ayers deployed the concept of invasion in an expansive sense, such that it overlapped with the formerly separate social process of immigration, while drawing an animus-tainted racial distinction within the category of immigration between white Europeans and the nonwhite Chinese. To Ayers, these processes were different in kind, such that the historically open posture toward European immigrants should not apply to Chinese immigrants. Ayers compared Chinese immigrants to potential “conquerors” who might “supplant” whites “by a process which is more potent and irresistible than . . . the successful invasion of our shores by hostile fleets.”¹³⁹ Thus, “invasion” proved a flexible concept for Ayers, first serving as an outright description of Chinese immigration and then as a point of comparison to stress the gravity of the threat.

In Ayers’ speech and others, the racist “invasion” rhetoric recurred, interwoven among complicated constitutional threads regarding the exclusivity of the federal commerce power and the reserved police powers of the states.¹⁴⁰ Forceful and fearful claims poured forth, one after the other. Whites, as “the race which founded this empire,” must be able to preserve themselves from “any invasion, peaceful or warlike,” of “a race which possesses no political faculty in common with ourselves.”¹⁴¹ Convert-hungry churches and labor-hungry capital had conspired to invite the “Mongolian invasion.”¹⁴² Anyone opposed to checking “this invasion” was “a recreant to his race.”¹⁴³ The Constitution guaranteed the states protection against invasion, and when a state was “being overrun by a foreign foe,” this was an “invasion” no matter “what form” it happened to take.¹⁴⁴

The Sinophobic hysteria culminated in a memorial adopted by the Committee and addressed to both houses of the United States Congress. The

¹³⁸ *Id.*

¹³⁹ *Id.* at 635.

¹⁴⁰ These constitutional debates are beyond the scope of this article, but for an extensive analysis, see generally LaCroix, *supra* note 128.

¹⁴¹ Willis & Stockton, *Debates of the Constitutional Convention of 1878–1879*, 636 (speech of Mr. Ayers).

¹⁴² *Id.* at 647 (speech of Mr. Kleine).

¹⁴³ *Id.* at 655 (speech of Mr. Wickes).

¹⁴⁴ *Id.* at 701 (speech of Mr. Smith).

memorial asserted that Chinese immigration was “rapidly approaching the character of an Oriental invasion,” then went on to claim that “[t]his invasion is to be dreaded by us more than a hostile invasion by armed men.”¹⁴⁵ It implored Congress to pass legislation to prevent Chinese immigration.¹⁴⁶ The House and Senate obliged, and on February 24th, 1879, the delegates adopted a resolution thanking Congress for passing the bill.¹⁴⁷ Four days earlier, on February 20th, they had voted to adopt a set of anti-Chinese provisions, including the section authorizing exclusionary legislation as well as restrictions on employment, into the new constitution.¹⁴⁸ The delegates submitted the 1879 Constitution to the California electorate for approval, and voters ratified it on May 7, 1879.¹⁴⁹

B. Changed Understandings

The 1878–1879 debates reveal a marked shift in how delegates invoked and conceived an “invasion,” breaking from the understanding that dominated in the antebellum convention and the throes of the Civil War. As then, “invasion” represented a crisis, a severe problem that cried out for political actors’ attention, but it was a crisis of a different nature than the sudden armed penetration into California by a foreign enemy. In the discourse of the 1878–1879 delegates, “invasion” no longer entailed violence, arms, or the intentional coordination of a foreign government, the features that had justified the extent and division of the political branches’ emergency powers in the 1849 Constitution. Instead, delegates in the 1870s were preoccupied with civilian migrants who were entering the country of their own will in search of labor opportunities, arriving peacefully and gradually but, in the delegates’ eyes, threateningly.

The term “peaceful invasion,” that Miller borrowed from the London newspaper, reflected this reconceptualization, as invasion became a matter not of force of arms, but of incremental cultural and demographic change or even the mere specter thereof. Back in 1849, and during the active hostilities of the Civil War in the 1860s, the phrase “peaceful invasion” would likely have seemed an oxymoron. By 1879, it could become a legible frame of thought. It allowed delegates to extend the term to encompass the slow-moving social transformation

¹⁴⁵ *Id.* at 739.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1450. President Rutherford B. Hayes would later veto the bill, objecting to its inconsistency with the United States’ treaty obligations toward China. H.R. Exec. Doc. No. 102, 45th Cong., 3d Sess. (1879) (veto message of President Rutherford B. Hayes regarding H.R. 2423, “An Act to Restrict the Immigration of Chinese to the United States”).

¹⁴⁸ Willis & Stockton, *Debates of the Constitutional Convention of 1878–1879*, 1431.

¹⁴⁹ *The Constitution of the State of California: Adopted in Convention at Sacramento, March 3, 1879, Ratified by a Vote of the People May 7, 1879, Together with All Amendments Adopted to and Including October 26, 1915*, vi (Edward F. Treadwell ed., Calif. Statute & Code Compilation Co. 1916).

resulting from immigration. The military associations did not vanish completely, as demonstrated by instances like Ayers’s analogy to “hostile fleets” and the memorial’s comparison to “a hostile invasion by armed men,” both of which involved more traditional uses of the term. But these associations now coexisted uneasily alongside the “peaceful invasion” idea, which derived rhetorical force from them even while pushing the reach of the word beyond them.

The new conception of “invasion,” moreover, was inseparable from the racial ideology that permeated the proceedings in Sacramento. The 1878–1879 usages of “invasion” furthered a racist political project of exclusion that distinguished traditional immigrants, imagined as white and assimilable, from the culturally distinct “invaders” from China. “Foreignness” had always, in some sense, mattered to the definition of an “invasion,” as the concept conjured the image of intrusion by a foreign state, but now, racial difference took preeminence over the actuality of foreign governmental control. Nonwhite immigrants, delegates feared, would destabilize or “supplant” white dominance in the state, changing its very identity. Hence the repeated cry of self-preservation: California, many delegates believed, was defined by white homogeneity. Becoming a multiracial state meant becoming a different state altogether—an outcome, to be clear, that delegates feared and sought to avoid.

No longer was an “invasion” only a precipitous military attack coordinated by a foreign state. It was now internal, protracted, and racial, an ongoing threat that could legitimize broad assertions of state power to exclude and subordinate migrants based on nothing more than their race.

C. Aftermath: Beyond 1879

The Fourteenth Amendment, enshrining the principle of birth equality into constitutional law, offered a barrier against some discriminatory measures against the Chinese. (Indeed, Chinese immigration had featured prominently in the congressional debates around the ratification of that Amendment, with the understanding emerging that the guarantee of birthright citizenship would extend to the children of Chinese immigrants.¹⁵⁰) A series of cases in the 1880s would affirm that the Chinese in California were “person[s]” entitled to the equal protection of the laws.¹⁵¹ For instance, invoking the Equal Protection Clause in *In re Tiburcio Parrott*,¹⁵² the District of California Circuit Court ruled that the state could not make it a crime to employ a Chinese person, even

¹⁵⁰ Garrett Epps, *The Citizenship Clause: A “Legislative History,”* 60 *Am. U. L. Rev.* 331, 335–36, 381 (2010). This understanding would eventually be ratified first by the District of California Circuit Court in *In re Look Tin Sing*, 21 Fed. 905 (C.C.D. Cal. 1884), then by the Supreme Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

¹⁵¹ U.S. Const. amend. XIV, § 1.

¹⁵² 1 Fed. 481 (C.C.D. Cal. 1880).

though Article XIX, Section 2 of the 1879 Constitution authorized laws preventing corporations from employing “any Chinese or Mongolian.”¹⁵³ Likewise, the Supreme Court in *Yick Wo v. Hopkins*¹⁵⁴ invalidated a city laundry ordinance that officials had enforced in a discriminatory manner against the Chinese.¹⁵⁵

Yet when it came to exclusionary immigration policies, the Constitution, as interpreted by the Supreme Court, offered little recourse to the Chinese, even those who had previously resided in the United States. In *Chae Chan Ping v. United States*,¹⁵⁶ the Court unanimously upheld an expansion of the federal Chinese Exclusion Act that forbade Chinese laborers from returning to the United States after going abroad. In his opinion sustaining the act, Justice Stephen J. Field sympathetically cited the 1878–1879 California delegates’ memorial to Congress expressing alarm over an impending “Oriental invasion.”¹⁵⁷ Thus, the delegates’ hyperbolic “invasion” rhetoric met an uncritical reception at the nation’s highest court, to the detriment of Chinese immigrants seeking reentry after temporary travel.

Chae Chan Ping, in turn, would have profound long-term effects on the development of American immigration law, as the modern Supreme Court would interpret the case as inaugurating the now-canonical doctrine of “immigration exceptionalism,” set apart from ordinary constitutional rules.¹⁵⁸ In this way, the echoes of the 1878–1879 debates continue to reverberate today.

CONCLUSION

In the remarkably brief span of thirty years, constitutional designers in California went from speaking of an “invasion” as an armed military attack under the direction of a foreign government to using the term to refer to the peaceful mass migration of civilians into the state. The shift solidified after the Civil War, when Sinophobic sentiment had risen to unprecedented levels and the state’s wartime commitments no longer detracted from the centrality of the “Chinese question.” The history I have recounted suggests that, like

¹⁵³ Cal. Const. of 1879, art. XIX, § 2.

¹⁵⁴ 118 U.S. 356 (1886).

¹⁵⁵ *Id.* at 373 (stating that “the facts shown establish an administration directed so exclusively against a particular class of persons as to . . . amount to a practical denial by the State of that equal protection of the laws which is secured . . . by . . . the Fourteenth Amendment”).

¹⁵⁶ 130 U.S. 581 (1889).

¹⁵⁷ *Id.* at 595.

¹⁵⁸ See Cox, *supra* note 125, at 427 (describing how the Supreme Court has—incorrectly, according to Cox—framed *Chae Chan Ping* and its progeny as the origin of its generally deferential review of immigration policies).

“federalism”¹⁵⁹ and “free labor,”¹⁶⁰ “invasion” has not held one static meaning from the Founding era to the present. Rather, changing historical circumstances have produced changing conceptions of “invasion” in political and legal debates, as new developments spurred the production of new meanings and rhetorical aims. Invocations of “invasion,” the California example reveals, have not corresponded to a single, fixed meaning over time; they have reflected historically contingent political objectives.

What lessons can be drawn from this dynamic process? A straightforward implication of the 1878–1879 Constitutional Convention is that President Trump’s equation of illegal immigration with invasion is not wholly unprecedented. Of course, one need not dig as far back as 1879 to unearth this fact. In 1997, for example, the Ninth Circuit ruled against California in a suit asserting that the federal government had unconstitutionally failed to protect the state from the “invasion” of illegal immigration.¹⁶¹ The three-judge panel mainly dodged the substantive question, as the California Supreme Court had once done in *Franklin*, by taking refuge in the political questions doctrine, stating flatly that a court finding of “invasion” would amount to an “ineffective non-judicial policy decision.”¹⁶² Still, like the *Franklin* court, the Ninth Circuit nevertheless weighed in with its views, reasoning that the term “invasion” “was not intended [by our Founders] to be used as urged by California.”¹⁶³ Lower courts have consistently reached similar conclusions in litigation over the AEA and the Invasion Clause, both of which President Trump has cited to justify his

¹⁵⁹ See LaCroix, *supra* note 128, at 1–3 (noting that “the word ‘federalism’ in its modern sense does not accurately capture the landscape of constitutional debate in the early nineteenth century,” when “there existed many more *federalisms*, plural,” as “meaning was being created” in debates throughout the interbellum period).

¹⁶⁰ See Forbath, *supra* note 102, at 787–796 (identifying the “unraveling” of a republican concept of “free labor” in the late nineteenth century, giving way to a less democratic, more classically liberal laissez-faire doctrine).

¹⁶¹ *California v. United States*, 104 F.3d 1086 (9th Cir. 1997).

¹⁶² *Id.* at 1090–1091.

¹⁶³ *Id.* at 1091 (citing *The Federalist No. 43*, *supra* note 46, at 293) (James Madison).

unilateral immigration-related executive actions.¹⁶⁴

A more interesting question is how the history described in this article could bear upon those cases and the future disputes that are sure to come. Here, a preliminary disclaimer is appropriate. Since the 1849 Constitutional Convention and the 1878–1879 Constitutional Convention both significantly postdate the federal Constitution’s ratification and the enactment of the AEA, their modern-day utility as interpretive aids for the Invasion Clause or the statute is uncertain at best. Justices of the Supreme Court, and especially the justices sympathetic to originalism, are actively developing and contesting the appropriate role of historical tradition in constitutional interpretation.¹⁶⁵ They

¹⁶⁴ Challenges to President Trump’s attempts to deport individuals under the AEA have been widespread, although many court orders issued in these cases thus far have been on a preliminary basis. First to directly address the “invasion” question was D.C. Circuit Judge Karen L. Henderson, who, concurring in *J.G.G. v. Trump*, stated that “[t]he term ‘invasion’ was a legal term of art with a well-defined meaning at the Founding” that “required far more than an unwanted entry; to constitute an invasion, there had to be hostilities.” No. 1:25-5067, 2025 WL 914682, at *16 (D.C. Cir. Mar. 26, 2025) (Henderson, J. concurring). After further analyzing constitutional text, ratification debates, and the text and context of the AEA, the concurrence concludes that “an invasion is a military affair, not one of migration.” *Id.* at *20–21.

District courts have followed Judge Henderson’s lead. Judge Fernando Rodriguez Jr., after surveying historical records, determined that they predominantly used “invasion” to “refer[] to an attack by military forces.” *J.A.V. v. Trump*, *supra* note 7, at 29. Soon after, in *G.F.F. v. Trump*, Southern District of New York Judge Alvin K. Hellerstein ruled on originalist grounds that the President lacked the legal justification for invoking the AEA because “invasion” meant, at the time of adoption, to refer to a “hostile encroachment” in the form of “a military action by a foreign state against the territorial integrity of the United States,” No. 25-cv-2886, 2025 WL 1301052, at *16–17 (S.D.N.Y. May 6, 2025); that same day, District of Colorado Judge Charlotte N. Sweeney, invoking the same historical sources as Judges Henderson and Hellerstein, issued an order to the same effect. *D.B.U. v. Trump*, No. 25-cv-01163, 2025 WL 1304288, at *14 (D. Colo. May 6, 2025). In *J.O.P. v. United States Dept. of Homeland Security*, Fourth Circuit Judge Roger Gregory, citing Judge Henderson’s concurrence, reached the same conclusion. No. 25-1519, 2025 WL 1431263, at *23–24 (4th Cir. May 19, 2025) (Gregory, J. concurring).

Nor have courts diverged from this general consensus outside of the AEA context. For example, in *Refugee and Immigrant Center for Education and Legal Services v. Noem*, Judge Randolph Moss rejected the argument that the Invasion Clause vests the President with authority independent of congressional enactment, approaching the issue from the lens of separation of powers rather than ordinary meaning. No. 25-cv-00306-RDM, at 88 (D. D.C. Jul. 2, 2025). In a footnote, however, he also addressed the definition of “invasion,” looking to Second Circuit precedent for the proposition that an “invasion” entails “armed hostility from another political entity, such as another state or foreign country that is intending to overthrow the state’s government.” *Id.* at 89 n. 14 (quoting *Padawan v. United States*, 82 F.3d 23, 28 (2d Cir. 1996)). Therefore, Judge Moss ruled, the government’s “Invasion Clause argument, accordingly, fails for this reason as well.” *Id.*

¹⁶⁵ Joseph Blocher & Reva Siegel, *The Ambitions of History and Tradition in and Beyond the Second Amendment*, 174 U. Pa. L. Rev. (forthcoming 2026), abstract at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5310411. Notably, resort to historical tradition is distinct from originalism in that it draws upon practices preceding and postdating the enactment of the constitutional text. Marc O. DeGirolami, *Traditionalism Rising*, 24 J. Contemp. Legal Issues 9, 27 (2024). Originalists, by contrast, generally prioritize the moment of the text’s enactment. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1, 1 (2015). The Supreme Court’s traditionalism in recent high-profile cases such as *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 24 (2022), *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 239–40 (2022), and *Kennedy v. Bremerton School District*, 597 U.S. 507, 535 (2022), has heightened scholarly attention to the subject. For an incomplete sample of the fast-growing literature, see Blocher & Siegel, *supra*, at 49 (criticizing the Court’s traditionalism as subjective and antidemocratic); DeGirolami, *supra*, at 21–25, 39–49 (defending traditionalism as well grounded in precedent and offering independent moral justifications for the method); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. Rev. 1477, 1484 (2023) (expressing concern that traditionalism renders modern-day law dependent on “accidents of history”); Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 Nw. U. L. Rev. 433, 480–482 (2023) (explaining the role of history and tradition within originalist theory).

have yet to definitively settle when, whether, and how developments distant from the Founding—or, for certain originalist approaches, the Founding and Reconstruction¹⁶⁶—matter in the interpretive endeavor. Yet for at least some justices, in some constitutional areas, they unquestionably do,¹⁶⁷ so it is worth taking a moment to ponder the implications of the California Convention debates.

Operating under the contestable assumption that TdA is *not* acting under the official military control of the Venezuelan government,¹⁶⁸ I would cautiously¹⁶⁹ venture that, on the whole, California’s constitutional history cuts against the arguments of the Trump administration. The 1849 Constitutional Convention and the *Franklin* and *Pacheco* rulings that followed it can be read to bolster lower courts’ rulings against the Trump administration insofar as they suggest a durable tradition of using “invasion” in its original, Founding-era sense. That is, they indicate that the military-attack concept of “invasion” was not an unusual or ephemeral one, for it persisted through the interbellum period and the Civil War.

The shift that emerged in the late nineteenth century, moreover, functioned as a racist rhetorical weapon to defend white supremacy—hardly a defensible foundation for government action today. After all, history in constitutional interpretation does not only serve as an authority; it illustrates both “the traditions from which [the country] developed as well as the traditions from which it broke.”¹⁷⁰ As Jack Balkin has observed, constitutional interpreters may use history in a “critical” sense, meaning they “treat the past as something that we should not follow in the present and should reject, compensate for, and

¹⁶⁶ See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998); Bruen, *supra* note 165, at 23 (examining “[e]vidence from around the adoption of the Fourteenth Amendment”).

¹⁶⁷ See, e.g., *United States v. Rahimi*, 602 U.S. 680, 723–729 (Kavanaugh, J., concurring) (defending the use of post-ratification history based on the Madisonian concept of liquidation, early precedents from Chief Justice John Marshall, and the opinions of Justice Antonin Scalia).

¹⁶⁸ Conflicting answers to this question have emerged even within the Trump administration. See Charlie Savage & Julian E. Barnes, *Spy Agencies Do Not Think Venezuela Directs Gang*, *Declassified Memo Shows*, N.Y. Times (May 5, 2025).

¹⁶⁹ As Jonathan Gienapp has emphasized, “[e]ven if the Founding generation’s constitutional expressions and arguments feature familiar words, which in many cases carried an identical semantic meaning as they do today, those words were set against a conceptual background distinct from our own. And familiar words, if strung together via unfamiliar conceptual relationships, can convey radically different constitutional ideas.” Jonathan Gienapp, *The Foreign Founding: Rights, Fixity, and the Original Constitution*, 97 Tex. L. Rev. Online 115, 120 (2019). While Gienapp focuses here on invocations of the Founding era in present-day constitutional interpretation, his insights apply more broadly—viz., to the use of history both at the Founding and beyond it, and to the interpretation of both statutes (particularly centuries-old statutes like the AEA) and the Constitution. Therefore, caution in my conclusions is warranted.

¹⁷⁰ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

disown”¹⁷¹—in brief, as what Deborah A. Widiss labels “negative precedent.”¹⁷² The Roberts Court has practiced critical history in cases such as *Espinoza v. Montana Department of Revenue*, discrediting the state government’s reliance on a “checkered tradition” from the late nineteenth century that “was ‘born of bigotry’ and ‘arose at a time of pervasive hostility’” toward a disfavored minority.¹⁷³ The same can be said of the 1878–1879 delegates’ reformulation of the “invasion” concept.

In the end, therefore, this history may be more valuable as a warning against repetition rather than a precedent worth emulating. The characterization by the 1878–1879 delegates of high-volume Chinese immigration as an “invasion” was soaked with racial animus of the sort that, the Supreme Court has repeatedly affirmed, “has no place in law under the Constitution.”¹⁷⁴ Politicians have deployed the “invasion” concept opportunistically in the past, cloaking their racial prejudice with the guise of exigency and legitimacy—a framing that the Supreme Court, subtly but regrettably, accepted in *Chae Chan Ping*. Today’s courts should resist the temptation to repeat that grave mistake.



¹⁷¹ Jack Balkin, *Lawyers and Historians Argue About the Constitution*, 35 Const. Comment. 345, 362 (2020); see also Jack Balkin, *Memory and Authority: The Uses of History in Constitutional Interpretation*, 25–26 (2024) (explaining that critical history “describes faults, sins, and errors” that “we should never let happen again”).

¹⁷² Deborah A. Widiss, Note, *Re-viewing History: The Use of the Past as Negative Precedent in United States v. Virginia*, 108 Yale L.J. 237, 238 (1998).

¹⁷³ 591 U.S. 464, 482–483 (2020) (quoting *Mitchell v. Helms*, 530 U.S. 793, 828–829 (2000) (plurality opinion)).

¹⁷⁴ *Trump v. Hawaii*, 585 U.S. 667, 710 (quoting *Korematsu v. United States*, 323 U.S. 214, 248 (Jackson, J., dissenting)).

ILANI NURICK*

Unratified:

California and the Forgotten Original Understanding of the Fourteenth Amendment

Introduction

On the first Monday in December, 1867, the cattle ranchers, lawyers, railroad speculators, and, of course, the ‘49ers who came to California to pan for gold and stayed whether they found it or not—in short, all those who constituted the closest thing to an elite class in this western state—gathered together to discuss the business of their dusty, lightly populated country.¹ The local items on the agenda for California’s Seventeenth Legislative Session were numerous and mundane. A proposed tax on pet dogs.² A proposal to protect the “grain fields and vineyards in the county of Sonoma.”³ Statutes to “pay a bounty for the scalps” of wild animals⁴ and bills to remove animal carcasses from the city limits of San Francisco.⁵ On January 13, 1868, The legislators passed a charming little bill loquaciously entitled An Act to Amend an Act Entitled an Act Supplementary to an Act Entitled an Act to Amend an Act Defining the Time for Commencing Civil Actions.⁶

The one hundred-odd Californians also had certain national business to attend to. The election of a new senator (after three ballots, the legislature

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¹ *Journal of the Assembly*, 17th Leg., Reg. Sess., at 5 (Cal. 1867).

² *Id.* at 115.

³ *Id.* at 205.

⁴ *Id.* at 548.

⁵ *Id.* at 530.

⁶ *Id.* at 255.

settled on lawyer and journalist Eugene Casserly).⁷ New immigration laws under debate in Congress and their impacts on California.⁸ And the possible ratification of the widest-reaching, power-changing, federalism-inverting amendment ever proposed by the national government three thousand miles away in Washington.⁹ The ratification of the Fourteenth Amendment in July 1868 would change America. In an instant, the new amendment enshrined birthright citizenship and overturned *Dred Scott*; gave the federal government sweeping powers to meddle in formerly state business to protect the rights of the four million freed slaves and Black Americans; and hardened the Radical Republican animosity toward the former Confederates into a constitutional bludgeon, disqualifying disloyal Americans from holding national office and burdening their states with debt.¹⁰

On its face, the Fourteenth Amendment did not seem of great interest or import to California, especially the California of 1868. Before industrialization and the tech boom diversified California's cities, there were almost no Black people nor Confederates in the state. In fact, there were almost no people at all—at least counting only nonindigenous Americans. The state came into the American fold as part of the Mexican Cession, but had remained mostly devoid of American settlers until the Gold Rush of 1849.¹¹ The population soared tenfold from 8,000 white settlers in the years prior to the Gold Rush to over 90,000 by the first federal census conducted in the state in 1850, but was still an order of magnitude smaller than Kentucky.¹² California gained statehood as a key part of the Compromise of 1850, but lingered as a far-flung afterthought associated more with the buccaneering swagger of the gold miners who struck gold and the desperation and licentiousness of those who hadn't.¹³ But even as the population exploded in the mid-nineteenth century, it remained stubbornly *white* growth. The 1850 census recorded just 962 Black Californians.¹⁴ The Gold Rush increased that number to just over 4,000 by 1860 and 4,272 by 1870, but the percentage was microscopic—fluttering between a high of

⁷ *Id.* at 212.

⁸ *Id.* at 100.

⁹ *Id.* at 96–99.

¹⁰ U.S. CONST. amend. XIV.

¹¹ Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico (Treaty of Guadalupe Hidalgo), U.S.-Mex., art. V, Feb. 2, 1848, 9 Stat. 922, 928.

¹² The only comparably populated states were Florida (population: 87,445) and tiny Delaware (population: 91,532). Early California was even dwarfed by Rhode Island (population: 147,545). *1850 Census: Compendium of the Seventh Census*, U.S. DEP'T OF THE INTERIOR 40 (1854).

¹³ An Act for the Admission of the State of California into the Union, ch. 50, 9 Stat. 452 (1850).

¹⁴ *Table II: Population of Each State and Territory (by Counties) in the Aggregate and as White, Free Colored, Slave, Chinese, and Indian, at All Censuses*, U.S. DEP'T OF THE INTERIOR 15-16 (1870) [hereinafter *1870 Census Table II*].

1 percent and a low of 0.07 percent of the total state population.¹⁵ As the Fourteenth Amendment was drafted and contested between 1866 and 1868, Black people in California were politically a nonentity and socially practically nonexistent. Between 1860 and 1870, the total population of California skyrocketed, increasing from 379,994 to 560,247—an increase of nearly 50 percent.¹⁶ Over the course of that same decade, the Black population increased by just 186, an increase of less than 5 percent.¹⁷

Yet despite the sheer irrelevance of the paradigmatic issue addressed by the Fourteenth Amendment—the civil rights of the freed slaves and Black Americans more generally—California was the only historically free state not to ratify the amendment.¹⁸ Ohio and New Jersey each ratified and then rescinded ratification (although Secretary of State Seward included both states in the official tally of ratifying states¹⁹).²⁰ Every state of the former Confederacy save Tennessee first rejected the Fourteenth Amendment before eventually capitulating and ratifying either before certification or in the immediate aftermath (Texas became the last former Confederate state to ratify the Fourteenth Amendment on February 18, 1870²¹).²² Every New England state ratified between 1866 and 1868.²³ California ratified the Fourteenth Amendment on May 6, 1959.²⁴

In many ways, this is odd. California was firmly in the Union camp during the Civil War; indeed, more Californians per capita volunteered for the Union military than any other state.²⁵ In addition, California had played a premier role in the birth and early campaigns of the anti-slavery Republican party—the party’s first presidential candidate, John C. Frémont, was very likely the most famous Californian of all time when nominated in 1856.²⁶ The state’s 1849 Constitution prohibited slavery absolutely: “Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State.”²⁷ Yet the intensity of California’s opposition to the Fourteenth

¹⁵ *Id.*

¹⁶ *Id.* This is in addition to the colossal population increase from 1850 (92,597 people) to 1860 (379,994 people) of 310 percent.

¹⁷ *Id.*

¹⁸ *Constitution Annotated: Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments)*, LIBR. OF CONGRESS.

¹⁹ Joint Resolution Declaring the Fourteenth Amendment to be a Part of the Constitution, 15 Stat. 706, 706-07 (1868).

²⁰ *Constitution Annotated*, *supra* note 18.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Jesse Greenspan, *California’s Little-Known Role in the American Civil War*, HIST. CHANNEL (Dec. 14, 2021).

²⁶ A.J. Aiséirithe, *American Parable: John C. Frémont and the Growth of the United States*, LIBR. OF CONGRESS.

²⁷ CAL. CONST. art. I, § 18.

Amendment matched the pitch of the Southern states. Why did the Fourteenth Amendment flounder in California? Why was it rejected twice in the state legislature?²⁸ And what can California's struggles with ratification teach legal scholars about the original understanding of the Fourteenth Amendment?

The States' Original Public Meaning

Today, there are two general schools of thought regarding the original, intended meaning of the Fourteenth Amendment. The first is the school espoused by supporters of Representative John A. Bingham of Ohio, Section 1 of the amendment's primary drafter. In Bingham's understanding, the Fourteenth Amendment, specifically the Privileges or Immunities Clause of Section 1, guaranteed a broad spectrum of rights to all Americans, secure from encroachment from both the national and state governments.²⁹ These included the rights protected by the first eight amendments of the Bill of Rights, as well as unenumerated rights inherent in the promises of American citizenship.³⁰ This formulation of the Fourteenth Amendment went much further than merely clarifying or rectifying the legal status of the former slaves—it enshrined equality of citizenship into the fabric of America. Unfortunately, Bingham's Fourteenth Amendment went unrealized for nearly a century until the Warren Court relocated the rights from the Privileges or Immunities Clause to a new, flexible doctrine of Substantive Due Process—shunting Bingham's privileges and immunities of citizenship from the first sentence of Section 1 to the second.³¹ This transmutation was necessary because the other, much more conservative conception of the Fourteenth Amendment.

²⁸ *Journal of the Assembly*, *supra* note 1, at 757–58 & 782.

²⁹ See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *YALE L.J.* 57 (1993) (“Bingham had repeatedly stated his belief that the Fourteenth Amendment would enforce the Bill of Rights against the states.”); Cong. Globe, 42d Cong., 1st Sess. 84 (Mar. 31, 1871) (statement of Rep. Bingham) (“[T]he privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.”).

³⁰ See *supra* note 29.

³¹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing substantive due process rights under the Fourteenth Amendment rather than relying on the Privileges or Immunities Clause); *Obergefell v. Hodges*, 576 U.S. 694 (Roberts, C.J., dissenting) (“This Court has interpreted the Due Process Clause to include a ‘substantive’ component” (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))); *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (Scalia, J., concurring) (“Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court’s incorporation of certain guarantees in the Bill of Rights.”); *id.* at 861 (Stevens, J., dissenting) (calling *McDonald* a “substantive due process case” and referring to the “vast corpus of substantive due process opinions” in the Court’s history). But see *Obergefell*, 576 U.S. at 720 (Scalia, J., dissenting) (“What possible ‘essence’ does substantive due process ‘capture’ in an ‘accurate and comprehensive way’? It stands for nothing whatever, except those freedoms and entitlements that this Court really likes.”); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 331 (2022) (Thomas, J., concurring) (“As I have previously explained, ‘substantive due process’ is an oxymoron that ‘lack[s] any basis in the Constitution.’” (quoting *Johnson v. United States*, 576 U.S. 591, 607–08 (2015) (Thomas, J., concurring))).

This conservative second school, advanced originally by the Supreme Court in the *Slaughter-House Cases*, took nearly the opposite view of the Privileges or Immunities Clause and generally read the amendment in a stunningly restrictive fashion.³² Rather than adhering to the Radical Republican view of broad rights infused into the privileges of citizenship, the Court “butchered” the Privileges or Immunities Clause.³³ In *Slaughter-House*, the Court effectively read the clause out of the Fourteenth Amendment and read the amendment’s protections out of the Constitution.³⁴ But originalist and non-originalist scholars have long agreed that the Court’s reading of the Fourteenth Amendment in *Slaughter-House* was cramped and unnecessarily narrow, roaming far from Bingham’s understanding of the amendment.³⁵ Indeed, Professor Akhil Amar has written that “[v]irtually no serious modern scholar—left, right, and center—thinks that [the *Slaughter-House* school] is a plausible reading of the Amendment.”³⁶ Instead, the Court added a conservative gloss so heavy and unfounded in the true roots of the amendment as to make it all but unrecognizable to an honest reading of history and the congressional drafters’ intent.

But Congress is at best an equal partner in amending the Constitution. More realistically, they play second fiddle to the states. Congress proposes amendments, but amendments only become *amendments* when “ratified by the Legislatures” of the states.³⁷ And if need be, the states have a mechanism to nearly excise Congress from the ratification process through convention—Congress has no analogous power to bypass the states.³⁸ The emphasis of so much originalist scholarship is on the *drafters* of amendments, on the

³² The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873) (“Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? . . . We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.” (emphasis added)).

³³ Caleb Webb, *Slaughtering Slaughter-House: An Assessment of 14th Amendment Privileges or Immunities Jurisprudence*, 3 LIBERTY U. L. REV. 8 (2024).

³⁴ Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPP. L. REV. 601, 631 n.178 (2001).

³⁵ See, e.g., Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 CHI.-KENT L. REV. 627, 655–78 (1994).

³⁶ Amar, *supra* note 34.

³⁷ U.S. CONST. art. V.

³⁸ *Id.*

congressmen and senators who propose the changes.³⁹ Logically, this makes sense. If we want to know what an amendment means, let us ask the person who wrote it. But considering the fundamental role states play in ratification, it is equally important to study what the legislatures of the states *believed* and *understood* they were ratifying; their interpretations of any given amendment’s scope and meaning. Considering an operative amendment is the “thing” ratified by three quarters of the states,⁴⁰ if three quarters of the states ratified an interpretation of an amendment different from the drafters’ intent, the actual “thing” ratified would surely be the states’ interpretation.

So, what did the states believe? Did the states and state legislators buy into Bingham’s catholic reading of the amendment? Or did the public share the Supreme Court’s more skeptical view—a limited Fourteenth Amendment that served to shield the victories of the Civil War and little else? The answers to these questions are critical to understanding how modern scholars, lawyers, and judges must interpret the Fourteenth Amendment’s unspecific, hopeful language. And they lie in the debates of state legislatures and the newspapers covering them as local politicians tussled with the formidable decision of whether to ratify the Fourteenth Amendment.

The importance of excavating the ratifiers’ understanding has long been emphasized by modern originalists.⁴¹ Justice Scalia relied on this kind of historical argument specifically when attempting to understand the meaning and scope of the Fourteenth Amendment.⁴² Dissenting in *Obergefell v. Hodges*, Scalia stated:

³⁹ See generally KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014) (reconstructing the Fourteenth Amendment’s meaning primarily through the intentions and speeches of its congressional framers, especially Representative Bingham); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (arguing for an originalist understanding of the Fourteenth Amendment based on the ideology and records of Reconstruction Republicans in Congress); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992) (interpreting the Privileges or Immunities Clause through the drafting and structural logic of the 39th Congress rather than the views of ratifiers); Amy C. Barrett & John C. Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1 (2016) (defending Congress’s role in constructing constitutional meaning and arguing that constitutional interpretation should give weight to congressional enactment).

⁴⁰ U.S. CONST. art. V.

⁴¹ See generally Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627 (2013) (arguing that originalist methodology should focus on the public meaning understood by the state ratifiers, not just the congressional drafters of the Fourteenth Amendment); Richard H. Fallon Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421 (2021) (critiquing simplistic versions of original public meaning and contending that constitutional interpretation must account for the diverse understandings held by state ratifiers and the general public); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) (arguing that constitutional meaning emerges from the people and the states that ratified the Constitution, not just its congressional drafters, and emphasizing how public understanding evolved through the ratification process).

⁴² *Obergefell v. Hodges*, 576 U.S. 644, 715–16 (2015) (Scalia, J., dissenting).

When it comes to determining the meaning of a vague constitutional provision such as ‘due process of law’ or ‘equal protection of the laws’ it is unquestionable that the *People who ratified* that provision did not understand it to prohibit a practice that remained both universal and uncontroversial in the years after ratification.⁴³

Scalia was concerned with the intent and thoughts of the Framers and the drafters of the Fourteenth Amendment. But he was just as concerned with the common understanding of the Constitution as it was *ratified* by the People through the legislatures of the several states.

Investigating the intent of the ratifiers can lead to a different understanding of the originalist interpretation of constitutional language. But more than possibly discovering a separate understanding of a given amendment, studying the ratifiers is likely to provide the closest thing to the broad “American conception” of the amendment at the time of ratification. When congressmen bicker and splinter into competing interpretations (as they did prolifically during the debates on the Fourteenth Amendment⁴⁴), analyzing the states can reveal the more widely shared constitutional beliefs of the nation as a whole. Wisdom-of-the-crowds theory holds that this aggregated, decentralized state-by-state national interpretation will usually reflect the commonly understood, diverse public’s—the *People’s*—consensus of any given proposed amendment’s meaning.⁴⁵ Or at least, a much closer approximation of that understanding compared to a group of a few hundred elite men cloistered together in the same city (and exposed to very little national news from outside the Washington sphere⁴⁶). Therefore, studying how the states conceived of

⁴³ *Id.* (emphasis added).

⁴⁴ The drafting debates over the Fourteenth Amendment were marked by open disagreement, with members of Congress offering competing interpretations for each clause. The following quotes provide a snippet of the debates surrounding the “subject to the jurisdiction thereof” language of the Citizenship Clause. Senators and representatives disputed whether the clause excluded Native Americans, foreigners, or only diplomats—revealing a fractured and unsettled understanding even among the Amendment’s authors. See Cong. Globe, 39th Cong., 1st Sess. 2890 (1866) (statement of Sen. Howard) (“This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States.”); *id.* (statement of Sen. Doolittle) (“[T]he Senator from Michigan does not intend by this amendment to include the Indians.”); *id.* at 2893 (statement of Sen. Trumbull) (“That means ‘subject to the complete jurisdiction thereof.’ . . . What do we mean by ‘subject to the jurisdiction of the United States?’ Not owing allegiance to anybody else.”); *id.* at 1291 (statement of Rep. Bingham) (“Every human being born within the jurisdiction of the United States of parents not owing allegiance to any foreign sovereignty is . . . a natural-born citizen.”).

⁴⁵ See generally Cass R. Sunstein, *Deliberating Groups Versus Prediction Markets (or Hayek’s Challenge to Habermas)* (John M. Olin Program in L. & Econ., Working Paper No. 321, 2007) (detailing the wisdom-of-the-crowds theory).

⁴⁶ See generally GERALD J. BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* 50–51 (1992) (noting that news outside major cities was often delayed or absent, and national news coverage remained uneven through the 1860s).

any given amendment is likely a better medium to understand the *American conception* of the amendment than focusing exclusively on the drafters.

This is not to undermine the vitally important work of studying how the drafters conceived of the Fourteenth Amendment. Congressmen Bingham and Thaddeus Stevens and Senators Charles Sumner and Jacob Howard have provided us rich context and insight into how to best interpret the Fourteenth Amendment's often vague, underexplained words.⁴⁷ And this understanding of the drafters has been widely examined. Justice Black studied the speeches and viewpoints of Bingham.⁴⁸ Sumner's idealistic version of the Fourteenth Amendment has been analyzed both in articles and books.⁴⁹ As has Thaddeus Stevens's radical understanding.⁵⁰

The states have been less analyzed. The materials are more disorganized and frequently missing or buried in state archives. The characters often less colorful. And the state legislators didn't actually *write* the amendments, so provide no insight into how the text evolved from draft to proposal. But there is great historical precedent to using state ratification processes to inform our modern understandings of the Constitution. The 1787–1788 ratifications of the original Constitution gave us a treasure trove of interpretive resources—from the records of the Virginia debates⁵¹ to the Federalist Papers⁵²—that revealed the best arguments on all sides. These state debates compelled participants to explain and expound what the Constitution meant: advocates had to rebut critics' charges, critics had to expose the hidden consequences of every section and clause, and both sides had to show their interpretive hands.⁵³

⁴⁷ See Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007).

⁴⁸ *Adamson v. California*, 332 U.S. 46, 68–92 (1947) (Black, J., dissenting).

⁴⁹ See generally WILLIAMJAMES HULL HOFFER, *THE CANING OF CHARLES SUMNER: HONOR, IDEALISM, AND THE ORIGINS OF THE CIVIL WAR* (2010) (situating Sumner's egalitarian constitutional vision in contrast to his contemporaries and emphasizing his insistence on radical legal reform); ZAAKIR TAMEEZ, *CHARLES SUMNER: CONSCIENCE OF A NATION* (2025) (biographically reconstructing Sumner's central role in framing the Fourteenth Amendment around ideals of national equality and moral progress).

⁵⁰ See generally BRUCE LEVINE, *THADDEUS STEVENS: CIVIL WAR REVOLUTIONARY, FIGHTER FOR RACIAL JUSTICE* 243–53 (2021) (detailing Stevens's role in drafting and promoting the Fourteenth Amendment and his broader egalitarian constitutional project); Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment* (Univ. of Md. Legal Stud. Res. Paper No. 2014-37, 2014), <https://ssrn.com/abstract=2483355> (arguing that Stevens saw the Fourteenth Amendment as a tool to reorient constitutional governance around equal rights and loyalist political power); HANS L. TREFOUSSE, *THADDEUS STEVENS: NINETEENTH-CENTURY EGALITARIAN* (1997) (chronicling Stevens's radicalism in the drafting and promotion of the Fourteenth Amendment, rooted in his deep belief in racial equality and federal supremacy).

⁵¹ See 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* (2d ed. 1836).

⁵² *THE FEDERALIST* (Clinton Rossiter ed., Mentor 1961) (1788); See AKHIL REED AMAR, *THE WORDS THAT MADE US* 227–28 (2021).

⁵³ See AMAR, *supra* note 52, at 245–50 (including one cogent example quoting a particularly skeptical delegate to the Massachusetts ratifying convention, Nathaniel Barrell, as stating after eventually voting yes, “the arguments which have been used in the debates . . . have eased my mind”).

For example, we glean vital precedential information from this continental conversation that Federalists uniformly rejected the legality of secession, insisting the Constitution created a binding union.⁵⁴ Where both sides agreed, it serves as strong evidence of an original consensus—just as Federalists and Antifederalists ultimately agreed the Constitution lacked critical protections for individual liberties.⁵⁵

The extant literature largely overlooks state-centered examinations of later constitutional amendments such as the Fourteenth—and in doing so, we lose sight of the broader American consensus that emerged through state-by-state ratification, not just congressional debate.⁵⁶ Some studies have looked at various Northern ratifications of the Reconstruction Amendments.⁵⁷ Bingham’s home state of Ohio that ratified the Fourteenth Amendment in 1867 before rescinding its ratification the following year has been the focus of closer analysis.⁵⁸ The mindset of the Southern states has been looked at, but usually only as window dressing to a more panoramic piece.⁵⁹ But to get the benefit of group consensus theory—to understand the American consensus of the Fourteenth Amendment—we must closely analyze the ratifications of *every* state that took part in the continental conversation following the Civil War. We should especially analyze states from different geographic and demographic bases, former slave as well as free states, Western as well as Eastern. Furthermore, states where ratification was contested—like Ohio—generated richer interpretive materials than those where the amendment passed easily or under coercive conditions that may have compromised the integrity of debate, such as the former Confederate states. Just as Delaware’s and Pennsylvania’s swift ratifications teach us substantially less regarding the meaning of the original Constitution compared to the heated debates of New York’s nailbiter convention,⁶⁰ the debates of closer-call states offer the clearest

⁵⁴ *Id.* at 259–61 (including a quote from James Madison proclaiming that “the Constitution requires an adoption *in toto*, and *for ever*. It has been so adopted by the other States” and quoting John Jay as stating “a reservation of a right to withdraw [from the Union] . . . was inconsistent with the Constitution, and was no ratification”).

⁵⁵ *Id.* at 267–68 (“As the ratification process progressed and the rights objections continued, and even intensified, the Federalists listened, learned, and pivoted . . . If Anti-Federalists would vote yes, but, Federalists would promise to consider seriously the addition of a bill of rights, post-ratification.”).

⁵⁶ *But see* AKHIL REED AMAR, BORN EQUAL 597–620 (forthcoming Sep. 2025) (focusing specifically on the state ratifications of the Nineteenth Amendment, paying particularly close attention to the ratification debates in Tennessee).

⁵⁷ *See, e.g.*, James E. Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania*, 18 AKRON L. REV. 435 (1985).

⁵⁸ *See, e.g., id.* *See generally* RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER AND SPIRIT* (2021); ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

⁵⁹ *See, e.g.*, Bond, *supra* note 57; BARNETT & BERNICK, *supra* note 58; FONER, *supra* note 58.

⁶⁰ *See* AMAR, *supra* note 52, at 244.

arguments—and perhaps the most candid expressions—of both support for and opposition to the Fourteenth Amendment.

California

These criteria make California an ideal case for study. Because of the state's geographic separation from Washington, its unique demographics, and cultural distinctiveness, any convergence between the Golden State's conception of the Fourteenth Amendment and that of Bingham, Sumner, and the Eastern States, is very likely indicative of a broad, nationwide consensus of the amendment's original meaning. Conversely, where California departs from the drafters' vision, that divergence may signal a deeper fracturing of understanding obscured by a Washington-focused lens.

California is also an abundantly interesting place to study the Fourteenth Amendment because of the state's partisan makeup. Nothing about California in 1868 was foregone. Unlike Kentucky, Maryland, and New Jersey, California was not a Democratic stronghold by any means—the state had voted for Lincoln by *seventeen percent* in 1864.⁶¹ Nor was California similar to many of the northern states that voted heavily Republican in the 1866 midterms.⁶² Two of California's three congressional seats flipped into the Democratic column in 1866, the Third District by barely one percent.⁶³ California was a true battleground state.

This battleground nature compelled California politicians to explain themselves. Unlike Thaddeus Stevens and Sumner who could afford to make bold, unselective statements regarding the Reconstruction Amendments and own the left-most fringe of the Republican party, California pols had to tack to a more moderate course. The appeal to the middle meant California politicians were forced away from quixotic over-promises that the amendment would be a panacea for all America's ills and neither could they scribble it away into nothingness. The pendulum-like nature and slim margins of swing states (the 1867 governor's race was decided by a paltry 9,000 votes out of 90,000 cast⁶⁴) also obliged candidates from both parties to publicly stake out positions during the ratification debates, as voters demanded clarity on the defining issues of

⁶¹ See WALTER DEAN BURNHAM, *PRESIDENTIAL BALLOTS, 1836–1892, 885–91* (1955). Whereas New Jersey voted for Lincoln's opponent, George McClellan, by roughly six percent, Maryland voted for McClellan by ten percent, and Kentucky voted for McClellan by nearly *forty percent*. *Id.*

⁶² Republicans flipped twenty-three seats in the 1866 midterms, almost all of them coming in the North. Office of the Historian, *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES (2025).

⁶³ See *Election History for the State of California: 1867 General Election Results*, JOINCALIFORNIA (2025).

⁶⁴ See *id.*

the day.⁶⁵ Because voters in this close-fought state demanded answers to their constitutional questions and concerns, the California ratification process offers scholars valuable records of how these politicians and the state's public thought about the Fourteenth Amendment.

California's secure place in the Union also gave its politicians greater freedom to speak up and less incentive to conceal their true beliefs, unlike their Southern counterparts, who risked disqualification from office and had federal pardons dangled over their heads as political leverage to vote for the amendment.⁶⁶ Californians were not under federal pressure to mask their true beliefs, and the state's competitive politics pressed legislators to make their strongest case—both for and against the amendment—to convince voters they were acting in California's best interest. For example, both outgoing and incoming governors made statements on the Fourteenth Amendment's ratification and tell two different, yet in some ways strikingly similar, stories.⁶⁷ These parallel positions help reveal a core, shared understanding of the amendment's meaning, just as studying California itself—a distant Western state with demographics unlike any other in the Union—sheds light on the shared American conception of the Fourteenth Amendment. These conditions make California a compelling theater to study how Americans, particularly the ratifiers, understood the scope and powers of the amendment that would, in due time, change the course of history. California was free to take the Fourteenth Amendment or leave it—and California left it.

Summary

Overall, three components of the California conception of the Fourteenth Amendment shed light on the national consensus of the amendment's meaning. First, the understanding of both California Democrats and Republicans regarding Section 1 was much more closely aligned with the Bingham school of broad privileges and immunities that at the very least incorporated the Constitution's first eight amendments against the states.⁶⁸ And surprisingly, this

⁶⁵ See, e.g., *Journal of the Assembly*, *supra* note 1, at 51–54 (recording outgoing Republican Governor Low's arguments in favor of ratifying the Fourteenth Amendment); *id.* at 94–100 (recording incoming Democratic Governor Haight's arguments against ratifying the Fourteenth Amendment).

⁶⁶ See MICHAEL LES BENEDICT, *A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION* 210–22 & 257–77 (1974).

⁶⁷ *Journal of the Assembly*, *supra* note 1, at 51–54 & 94–100.

⁶⁸ See *supra* note 29.

was widely seen as noncontroversial; the obvious meaning of the amendment.⁶⁹ That leading members of both major parties interpreted Section 1 to mean that there would be “no distinctions”⁷⁰ between the civil rights guaranteed to Americans along racial lines is an illuminating vindication of Representative Bingham,⁷¹ Justice Black,⁷² and now Justice Thomas’s⁷³ understanding of Section 1 of the Fourteenth Amendment.

Second, there was a similar consensus among California’s politicians that the Fourteenth Amendment was fundamentally about voting rights.⁷⁴ Suffrage was seen as the major battleground and central pillar of the amendment. The interpretations differed regarding how exactly the Fourteenth Amendment would affect voting rights,⁷⁵ but there was a remarkable universal acknowledgment that the Fourteenth Amendment would do *something somehow* to change the voting systems of every state. How the amendment would bring about these changes was hotly contested and broke down into four interpretations. The most modest interpretation held that the amendment simply adjusted the basis for representation to reflect the end of slavery.⁷⁶ Other Californians envisioned more muscular Sections 2 and 3 nearly or totally eliminating congressional representation for states that refused to expand the franchise to all American

⁶⁹ See, e.g., *Journal of the Assembly*, *supra* note 1, at 100 (quoting Governor Haight’s acknowledgment that “[t]hese inferior races have their civil rights, as all good men desire they should have); *id.* at 52 (quoting Governor Low as stating that Section 1 of the Fourteenth Amendment “declares ‘equality before the law’ for all citizens, in the solemn and binding form of a constitutional enactment”); *Oakland Political Discussion: Opening Speech of Gen’l W. T. Wallace*, *The San Francisco Examiner*, Sep. 14, 1868, at 1 [hereinafter *Opening Speech of Gen’l Wallace*] (quoting Attorney General Wallace as stating that Section 1 of the Fourteenth Amendment merely “undertook to regulate the rights of the negroes according to law; that was very good, and no doubt the Southern people would have adopted it”); Cong. Globe, 39th Cong., 1st Sess. 2890-92 (May 30, 1866) (statement of Rep. Conness) (“I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States.”).

⁷⁰ See *Letter from the Capital [From Our Regular Correspondent]*, *San Francisco Examiner*, Mar. 19, 1868, at 2.

⁷¹ See *supra* note 29.

⁷² See *supra* note 35.

⁷³ See *McDonald v. City of Chicago*, 561 U.S. 742, 823, 858 (2010) (Thomas, J., concurring in part and concurring in the judgment) (“[T]he evidence overwhelmingly demonstrates that the privileges and immunities of such citizens included individual rights enumerated in the Constitution.”).

⁷⁴ For example, Assemblyman Westmoreland stated that “[i]f any State disfranchises any citizens, the representation of such State shall be reduced proportionally to such reduction.” *Id.* at 772. Governor Haight condemned the amendment as “an attempt to force negro suffrage upon the Southern States,” warning it allowed Congress “to withhold representation from any State not conforming its laws to the views of Congress.” *Id.* at 95-96. Attorney General Wallace warned that the Fourteenth Amendment would require California to “allow all the Chinamen to vote,” and claimed that “[i]nstead of giving the negro an equality . . . they will give them an excess of three times as much political power as any one of you exercise,” all “to fix the Chinese in our State forever.” *Opening Speech of Gen’l Wallace*, *supra* note 69, at 1.

⁷⁵ There were three broad veins of argument among California politicians, discussed further *infra* Part II.

⁷⁶ See, e.g., *Journal of the Assembly*, *supra* note 1, at 52 (recording Governor Low as saying of Section 2, “[t]he Constitution, as it now is, contains a provision for partial representation for slaves; the cause of this having passed away; this amendment seems proper”); *id.* at 772 (recording Republican Assemblyman Westmoreland describing Section 2 as recognizing that, “[t]he States, severally, may regulate the exercise of the voting franchise in its borders” and that, “[i]f any State disfranchises any citizens, the representation of such State shall be reduced proportionally to such reduction”).

males over the age of twenty-one.⁷⁷ The most extreme Californians claimed voting rights were a core element of citizenship and therefore automatically enshrined in the Citizenship Clause of Section 1.⁷⁸

All of these interpretations contrast sharply with the modern understanding of the Fourteenth Amendment's divorce from political rights like suffrage.⁷⁹ But if California's perspective reflected a broader national consensus beyond the Washington beltway, it lends convincing support to those who argue for stronger congressional enforcement of Section 2. In California, at least, Section 2 was originally understood by many to be a powerful, coercive mechanism to secure the franchise for all racial minorities and the most important plank of the Fourteenth Amendment.⁸⁰

Third, the debates over ratification in California reveal why the Fourteenth Amendment carried such weight. Even in a state with a virtually nonexistent Black population, Californians engaged more seriously with the amendment's implications than many Northern states that saw it primarily as a vehicle to constitutionalize the victories of the Civil War and cement the promises of the Civil Rights Act of 1866.⁸¹ This more subdued, more temporally constrained amendment is how the Supreme Court in early cases, like the *Slaughter-House Cases* and *United States v. Cruikshank*, interpreted the Fourteenth Amendment as narrowly tied to the Civil War, slavery, and securing the rights of Black people, not butchers.⁸² Californians understood it very differently. To them, the amendment was not just about the legacy of the Civil War. It threatened to guarantee full civil and political equality to all racial minorities—including

⁷⁷ See discussion *infra* Section II.B.

⁷⁸ See, e.g., *Santa Cruz Weekly Sentinel*, *infra* note 154.

⁷⁹ AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 391 (2005) (“But under both Article IV and the Fourteenth Amendment, the basic ‘privileges’ and ‘immunities’ of ‘citizens’ would extend only to civil rights, not political rights. Under Article IV, a Massachusetts visitor would have no right to vote in a South Carolina election So, too, the Fourteenth Amendment guaranteed civil rights but not political rights against each citizen’s homestate.” *Id.*

⁸⁰ See, e.g., *Opening Speech of Gen'l Wallace*, *supra* note 69, at 1 (statement of Attorney General Wallace) (“[I]f there are Chinamen in California, and you do not allow them to vote you shall not count them in your Federal representation, and that if you do not allow them to vote for members of Congress you shall lose power in Congress by just so many Chinamen as come into this State” and “they will give them an excess of three times as much political power as any one of you exercise.”); *Journal of the Assembly*, *supra* note 1, at 99 (statement of Governor Haight) (declaring that Section 2 “confers the elective franchise on the blacks, and provides a system which gives them (though actually a minority) a voting majority over the whites”).

⁸¹ See, e.g., Cong. Globe, 39th Cong., 1st Sess. 1088, 1095 (1866) (statement of Rep. Bingham) (“The proposition pending before the House is simply a proposition to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution today. ‘It hath that extent—no more.’”); *id.* at 2890 (statement of Sen. Howard) (“This amendment which I have offered is simply declaratory of what I regard as the law of the land already . . .”).

⁸² *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71-72 (1873); see *infra* note 199.

Chinese immigrants.⁸³ In California, the Fourteenth Amendment's apparently promised protections of civil rights and voting rights crystallized into a single fear: full equality, including the right to vote, for every Chinese individual born in the state.⁸⁴

Californians didn't seem to mind civil rights for Black Americans who mostly lived thousands of miles away.⁸⁵ Overwhelmingly, they were concerned about the amendment's effects on the 50,000 Chinese Americans and nationals who had built the continental railroad, the nascent California road system, and were quickly establishing themselves in niche after niche in the San Francisco business community.⁸⁶ The anti-Asian opposition to the Fourteenth Amendment was rooted in a vicious strain of anti-immigrant racism that was far more potent than any anti-Black discrimination in California and much more bipartisan.⁸⁷ This fear—that the Fourteenth Amendment would unlock the political system to Chinese Americans—reveals the final element of the Californian conception: that the amendment applied to *all* racial minorities equally.⁸⁸ In this respect, Californians of 1868 had a notably modern understanding of the breadth of who was covered by the Fourteenth Amendment. And this understanding differed from even the most progressive member of the Supreme Court at the time who would have limited portions of the Fourteenth Amendment to only those races more closely related to the purposes the amendment was passed for in the first place.⁸⁹

⁸³ See, e.g., *Journal of the Assembly*, *supra* note 1, at 99 (statement of Governor Haight) (warning that “a portion of those persons in this State who favor negro suffrage hesitate to advocate Chinese suffrage, but the congressional policy makes no distinction” and concluding “[i]f it is a question of justice . . . then it equally requires the ballot to be given to the Chinaman”); Cong. Globe, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Johnson) (predicting that the Fourteenth Amendment would “confer the rights of citizenship, including the right of suffrage, upon Chinese”); *Opening Speech of Gen'l Wallace*, *supra* note 69, at 1 (statement of Attorney General Wallace) (warning that “the only way to get around it is to do just what they want you to do—allow all the Chinamen to vote”); *id.* (predicting that Section 2 would “fix the Chinese in our State forever”); *The San Francisco Examiner*, Mar. 19, 1868, at 2 (asserting the proposed amendment “makes no distinction” between races and thereby risked extending both civil and political rights to all races, including the Chinese).

⁸⁴ See, e.g., *Journal of the Assembly*, *supra* note 83, (statements of Assemblyman Farish and Governor Haight); Cong. Globe, 39th Cong., *supra* note 83 (statement of Rep. Johnson).

⁸⁵ See D. MICHAEL BOTTOMS, *The Apostasy of Henry Huntley Haight: Race, Reconstruction, and the Return of the Democracy in California, 1865-1870*, in AN ARISTOCRACY OF COLOR: RACE AND RECONSTRUCTION IN CALIFORNIA AND THE WEST, 1850-1890, 55, 55-56 (2013).

⁸⁶ See, e.g., Mark Dziak, *Chinese Workers and the Transcontinental Railroad*, EBSCO (2019) (“In the western branch of the effort [to construct the Transcontinental Railroad], up to fifteen thousand Chinese American laborers performed as much as 90 percent of the construction.”).

⁸⁷ In a cogent example of how this bipartisan anti-Asian racism manifested, multiple Union Republicans voted to reject the Fourteenth Amendment alongside every Democratic Assemblyman. *Journal of the Assembly*, *supra* note 1, at 757-58.

⁸⁸ See *supra* note 83.

⁸⁹ Justice Harlan—whose dissent in *Plessy* made him a hero of racial equality—argued that the Citizenship Clause did not necessarily apply to the children of Chinese immigrants and joined Chief Justice Fuller's dissent in *United States v. Wong Kim Ark*. 169 U.S. 649, 732 (1898) (Fuller, C.J., dissenting, joined by Harlan, J.).

In sum, the Californian conception of the Fourteenth Amendment was threefold: The amendment conferred broad civil rights through the Privileges or Immunities Clause. The amendment extended significant political rights, if through a nebulous mechanism. Lastly, the amendment applied these rights to all racial minorities equally, including to Chinese Americans.

I. A Broad Grant of Civil Rights à la Bingham

In 1867, California’s Republican governor, Frederick Low, declined to seek re-election,⁹⁰ setting the stage for a fiercely contested gubernatorial race that ended with Democrats seizing control of the executive office.⁹¹ Their candidate, Henry Huntly Haight, was a former Republican operative—a lawyer who had led the state party during Frémont’s campaign and directed Lincoln’s 1860 efforts in California as the “state chairman.”⁹² But while initially deeply embedded in Republican politics, Haight underwent a dramatic political transformation. By 1861, he had come to regret his vote for Lincoln (even mocking the president as a “vulgar jester”), and as the Civil War wore on, he shifted sharply toward the Democratic Party.⁹³ Though a skilled behind-the-scenes figure, Haight had never held elected office before winning the governorship.⁹⁴ He was also firmly opposed to the Fourteenth Amendment.⁹⁵

By the time Haight took office, Secretary of State Seward had already transmitted the Fourteenth Amendment to the states for ratification, and outgoing Governor Low introduced it to California’s Seventeenth Legislative Session.⁹⁶ But Haight had no intention of remaining silent. In his inaugural address, he vented his disapproval, offering a revealing snapshot of all three strands of the California conception of the Fourteenth Amendment—as seen through the eyes of the head of the state’s Democratic party.⁹⁷

Haight acknowledged that the Fourteenth Amendment aimed to protect a broad array of civil rights for all Americans.⁹⁸ On this point, there was little disagreement—even this fierce opponent of the amendment conceded that if

⁹⁰ *Election History for the State of California: 1867 General Election Results*, JOINCALIFORNIA (2025)

⁹¹ *Id.*

⁹² BOTTOMS, *supra*, note 86, at 73.

⁹³ *See id.* at 73-74. By the 1864 presidential campaign, Haight was actively campaigning for Democrat George McClellan. *Id.*

⁹⁴ *See id.* at 73-75.

⁹⁵ *See id.* at 86.

⁹⁶ *Journal of the Assembly*, *supra* note 1, at 51. While there is some historical debate over whether Governor Low formally introduced the amendment to the Seventeenth Legislative Session, the *Journal of the Assembly* is clear, recording Low as stating: “With this I transmit a certified copy of a joint resolution of Congress, proposing an amendment to the Constitution of the United States.” *Id.*

⁹⁷ *See id.* at 92-103.

⁹⁸ *See id.* at 100.

passed, it would significantly expand the scope of individual rights beyond those recognized in the original, unamended Constitution.⁹⁹ Haight was part of the bipartisan California consensus that understood the amendment to promise far more than the watered-down interpretation of privileges and immunities the Supreme Court would adopt five years later in the *Slaughter-House Cases*.¹⁰⁰ Speaking of the amendment, Haight declared:

These inferior races have their civil rights, as all good men desire they should have. They can sue and defend in the courts; acquire and possess property; they have entire freedom of person, and can pursue any lawful occupation for a livelihood¹⁰¹

The muted, matter-of-fact language of the passage reveals a critical aspect of California’s understanding of the Fourteenth Amendment: civil rights for racial minorities were totally unexceptional! That may be because the amendment was understood to constitutionalize rights *already conferred* by earlier legislation. The “inferior races *have*” these rights, not *will have*.¹⁰² That framing helps explain why even California Democrats found the Privileges or Immunities Clause relatively unobjectionable: it merely codified rights pre-existing the amendment found in key provisions of the Civil Rights Act of 1866.¹⁰³ Before the Supreme Court’s decisions in the *Slaughter-House Cases*¹⁰⁴ and *Cruikshank*¹⁰⁵ sharply narrowed the clause and muddied how modern scholars understand the scope of Section 1, it was, in California, taken for granted that the amendment secured broad civil rights similar to those protected by the Bill of Rights.¹⁰⁶

Importantly, the Supreme Court would later gut Congress’s power to protect racial minorities’ rights to “pursue any lawful occupation,” “freedom of person,” and the ability to “acquire and possess property” in the *Civil Rights Cases* by prohibiting federal enforcement against private actors.¹⁰⁷ But Justice

⁹⁹ *See id.*

¹⁰⁰ *See supra* note 32.

¹⁰¹ *See Journal of the Assembly, supra* note 1, at 100.

¹⁰² *Id.*

¹⁰³ *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (granting all citizens “the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property” as white citizens and “to full and equal benefit of all laws and proceedings for the security of person and property”).

¹⁰⁴ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873).

¹⁰⁵ *United States v. Cruikshank*, 92 U.S. 542, 542-43 (1876) (“The fourteenth amendment . . . adds nothing to the rights of one citizen as against another *The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.*” (emphasis added)).

¹⁰⁶ *See Journal of the Assembly, supra* note 1, at 100.

¹⁰⁷ *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (holding that “[i]t is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment”).

Harlan dissented and in doing so, resurrected a vision of the Fourteenth Amendment almost identical to Governor Haight's. Harlan argued that the "fundamental rights which are the essence of civil freedom" included nearly the exact same list of rights outlined by Haight.¹⁰⁸ Harlan listed the rights "to sue," "to inherit, purchase, lease, sell, and convey property," and "to make and enforce contracts"—the last of which underpins Haight's formulation of the right "to pursue any lawful occupation."¹⁰⁹ Harlan's dissent thus forms a constitutional echo of Haight's vision—one rooted in the concrete rights of citizenship that the Fourteenth Amendment was originally understood to guarantee.

Other court decisions further connect Haight's list of "civil rights" he associated with the Fourteenth Amendment to a more expansive reading of privileges and immunities. In the most famous case enumerating the broad rights associated with the privileges and immunities of citizenship, Justice Bushrod Washington sitting on circuit stated in his opinion in *Corfield v. Coryell* that the "particular privileges and immunities of citizens" included the "right to acquire and possess property of every kind," the "right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits," and the right "to institute and maintain actions of any kind in the courts of the State."¹¹⁰ These track neatly to Haight's conception of the privileges and immunities encompassed by the Fourteenth Amendment (the language regarding property rights is mirrored word for word)—an understanding much broader than the one the Supreme Court would ordain in *Slaughter-House*.¹¹¹ In fact, Haight's understanding of the Fourteenth Amendment was even closer to Justice Washington's than it was to Bingham and Senator Howard Jacob, the amendment's prime sponsor in the Senate. Unlike the two leading Republicans, both Haight and Justice Washington associated the privileges and immunities of citizenship with the identically phrased right of "the elective franchise."¹¹²

¹⁰⁸ *Id.* at 22 (Harlan, J., dissenting).

¹⁰⁹ *Id.* at 16-17.

¹¹⁰ *Corfield v. Coryell*, 6 F. Cas. 546, 553 (C.C.E.D. Pa. 1823) (No. 3,230).

¹¹¹ Compare Haight's language from his inaugural address recognizing the privilege to "sue and defend in the courts" with the language in *Corfield* holding that one of the privileges of citizenship was "to institute and maintain actions of any kind in the courts"; Haight's reference to the right to "acquire and possess property" parallels *Corfield's* description of the right "to acquire and possess property of every kind"; and Haight's assurance that freedmen could "pursue any lawful occupation for a livelihood" mirrors *Corfield's* inclusion of the right "to pass through or to reside in any other State, for purposes of trade, agriculture, [or] professional pursuits." See *Journal of the Assembly*, *supra* note 1, at 100; cf. *Corfield*, 6 F. Cas. at 553.

¹¹² Compare Haight's statement that this "policy proposes to ignore all discrimination in political privileges, founded on race or color" and would "confer[] the elective franchise on the blacks" (emphasis added) with Justice Washington's recognition in *Corfield* that among the privileges deemed fundamental was "the elective franchise." See *Journal of the Assembly*, *supra* note 1, at 100; cf. *Corfield*, 6 F. Cas. at 553.

Contemporary cases also made clear that Haight’s understanding of the Fourteenth Amendment’s Privileges or Immunities Clause aligned with the ultimately rejected Bingham school—a vision of broad individual rights guaranteed to all citizens. Haight’s emphasis on the right to “pursue any lawful occupation” foreshadowed Matthew Hale Carpenter’s argument in *Bradwell v. Illinois* that this right to freely work lay at the heart of the Fourteenth Amendment.¹¹³ In this early women’s rights case, Carpenter represented Myra Bradwell, who, despite being qualified, was barred from practicing law because of her sex.¹¹⁴ Carpenter contended that the freedom to choose and pursue one’s occupation was fundamental to American citizenship and thus protected by Section 1 of the Fourteenth Amendment. Bradwell was therefore constitutionally entitled to enter any profession for which she was prepared.¹¹⁵ Carpenter declared that “all avocations, all honors, all positions, are alike open to every one[;] in the protection of these rights all are equal before the law.”¹¹⁶ Although the Court in *Bradwell* adhered to the narrow view of the Privileges or Immunities Clause,¹¹⁷ Haight—like many California Democrats—embraced the more expansive interpretation.¹¹⁸ He acknowledged this right to pursue an occupation and explicitly linked his reading of the clause to the more liberal understanding championed by Bingham.¹¹⁹

Justice Stephen J. Field’s dissent in the *Slaughter-House Cases* also vociferously championed the broad reading of the Privileges or Immunities Clause—particularly in the context of occupational freedom.¹²⁰ Interestingly, prior to his appointment to the U.S. Supreme Court, Field served as Chief Justice

¹¹³ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 134 (1873) (statement of Matthew Hale Carpenter) (arguing that “all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law” (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 321 (1867))).

¹¹⁴ *Bradwell*, 83 U.S. 130–31.

¹¹⁵ *See id.* at 135–36.

¹¹⁶ *Id.* at 134–35.

¹¹⁷ *See id.* at 139.

¹¹⁸ *See, e.g., Journal of the Assembly, supra* note 1, at 100 (statement of Gov. Haight) (“These inferior races have their civil rights, as all good men desire they should have. They can sue and defend in the courts; acquire and possess property; they have entire freedom of person, and can pursue any lawful occupation for a livelihood.”); *id.* at 52 (statement of Gov. Low) (“[S]ection [1 of the Fourteenth Amendment] declares ‘equality before the law’ for all citizens, in the solemn and binding form of a constitutional enactment, to which no reasonable objection can be urged.”); *Opening Speech of Gen’l Wallace, supra* note 69, at 1 (statement of Attorney General Wallace) (“[Section 1] undertook to regulate the rights of the negroes according to law; that was very good, and no doubt the Southern people would have adopted it.”).

¹¹⁹ Haight expressly listed the privilege to “pursue any lawful occupation for a livelihood” as one of the rights conferred by the Reconstruction Acts and the Fourteenth Amendment. *Journal of the Assembly, supra* note 1, at 100.

¹²⁰ *See The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 47 (1873) (Field, J., dissenting).

of the *California* Supreme Court, elected as a moderate Democrat.¹²¹ Field asserted that “all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition.”¹²² His language closely mirrored Haight’s references to the right to “pursue any lawful occupation” and underscores the extent to which the California conception of the Fourteenth Amendment’s Privileges or Immunities Clause was that of the progressives like Bingham and, in *Slaughter-House*, Field.¹²³ Their understanding of the amendment rested on the conviction that civil freedom required substantive, enforceable rights such as the right to work—not mere formal or statutory equality.¹²⁴

Haight’s view was supplemented and buttressed by California’s former Attorney General and soon-to-be Chief Justice of the State Supreme Court, William T. Wallace.¹²⁵ Wallace won the race for Attorney General as a pre-war Know Nothing in 1855,¹²⁶ before taking a hiatus from politics to serve the Union cause in the Civil War and then serve his own cause as a private attorney.¹²⁷ During the Reconstruction ratification debates, Wallace was gearing up for a campaign for California’s Supreme Court as a Democrat and by 1872, he was Chief Justice.¹²⁸

Wallace spoke often about the Fourteenth Amendment, and his sentiments largely endorsed those of Governor Haight and the majority of the state’s Democratic politicians. Pausing in a rant against Section 2, Wallace asserted that Section 1 merely “undertook to regulate the rights of the negroes according to law; that was very good, and no doubt the Southern people would have adopted it.”¹²⁹ Like Haight, Wallace did not object to a broad reading of Section 1 and a robust Privileges or Immunities Clause that guaranteed civil rights to racial minorities “according to law.” Rather, he, like other Democrats in the

¹²¹ See J. Edward Johnson, 1 *Justices of California 1850–1900*, CALIFORNIA STATE BAR COMMITTEE ON THE HISTORY OF LAW IN CALIFORNIA 9 (1963).

¹²² *Id.*

¹²³ Compare Haight’s recognition that freedmen “have entire freedom of person, and can pursue any lawful occupation for a livelihood” with Justice Field’s dissent in *The Slaughter-House Cases*, asserting that “the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations” and that this principle is so fundamental that “unless adhered to . . . our government will be a republic only in name.” See *Journal of the Assembly*, *supra* note 1, at 100; *The Slaughter-House Cases*, 83 U.S., at 47 (Field, J., dissenting).

¹²⁴ *See id.*

¹²⁵ *William Wallace, 6th Attorney General*, STATE OF CAL. DEP’T OF JUSTICE (2025).

¹²⁶ *See id.*

¹²⁷ *See Death Comes After Long and Distinguished Life*, S.F. CALL (Aug. 12, 1909).

¹²⁸ *See William Wallace*, *supra* note 125.

¹²⁹ *Opening Speech of Gen’l Wallace*, *supra* note 69, at 1.

state, treated such a reading as self-evident.¹³⁰ In fact, it was so incontrovertible to Wallace that the amendment would secure these rights that he offhandedly, without even feeling the need to offer evidence, stated that the *Southern states* accepted this reading of Section 1 as well.¹³¹

The remainder of Wallace’s speech illustrated that the objectionable components of the amendment were not equality of rights, but a perceived sense of actively benefiting racial minorities at the expense of white Americans through a systematic campaign of enfranchising racial minorities while simultaneously disenfranchising white Americans—explored further in Part II.¹³² According to Wallace, the truly unacceptable aspect of the Fourteenth Amendment was its subversion of white supremacy, not for equality, but for Black and Chinese supremacy. “The negro has been in slavery for more than one hundred years,” Wallace fumed. “[A]nd according to [Senator Sumner’s] views, it won’t be doing him justice unless you not only make him equal to the white man, but give him back rents and profits, and fix it so that he will have it all at once.”¹³³

When analyzing Republican opinion in California alongside the interpretations of the ascendant Democrats, we find a surprising amount of overlap, especially regarding the broad reading of Section 1 and the rights believed to be guaranteed to all citizens. Outgoing Republican Governor Low introduced the Fourteenth Amendment to the Seventeenth Legislative Session and provided his own commentary on the scope and sweep of the amendment. On Section 1 specifically, Governor Low stated that “[t]his section declares ‘equality before the law’ for all *citizens*, in the solemn and binding form of a constitutional enactment, to which no reasonable objection can be urged.”¹³⁴

In some ways, this reading is broader than our modern view, in other ways narrower, and in an important respect, much closer to Bingham and the California Democrats’ conception of Section 1. Low explicitly linked the rights guaranteed in Section 1 to *citizenship*, making no distinction between the broader “person” language of the Due Process and Equal Protection Clauses.¹³⁵ Instead, he treated these rights as part of a bundled package—citizenship, he argued, conferred “equality before the law.”¹³⁶ This understanding is in line with Bingham’s view of the Privileges or Immunities Clause—encompassing

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See id.*

¹³³ *Id.*

¹³⁴ *Journal of the Assembly*, *supra* note 1, at 52 (emphasis added).

¹³⁵ *See* U.S. CONST. amend. XIV, § 1; *see also infra* note 143.

¹³⁶ *Journal of the Assembly*, *supra* note 1, at 52.

rights like due process and equal protection, but not limited to those, that collectively formed the civil guarantees of national citizenship.¹³⁷ In closing his arguments urging ratification, Low further connected Section 1 with broad, Bingham-like protections, describing the amendment as “necessary for the protection of *individual* rights”¹³⁸—language classically associated with the first eight amendments of the Bill of Rights.¹³⁹

This view would be explicitly rejected just fifteen years later by the Supreme Court in the *Civil Rights Cases*, where Justice Bradley, writing for the majority, held that “[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth A]mendment.”¹⁴⁰ Low’s understanding, grounded in an individual-rights vision of citizenship and federal protection, foreshadowed a theory of the Fourteenth Amendment that the Court would soon cast aside.

While Governor Low expanded the amendment’s scope of *what* was covered by the Fourteenth Amendment, he did narrow its scope for *who* was covered, seemingly believing Section 1 applied only to citizens.¹⁴¹ This allowed him to emphasize that racial minorities would receive more than just unspecified privileges and immunities, but also the very particular enumerated rights of due process and equal protection (“equality before the law” in Low’s phrasing).¹⁴² Yet this reading sidestepped the intended breadth of the Due Process and Equal Protection Clauses, written to include immigrants and noncitizens.¹⁴³

Low’s understanding was also affirmed by other Republicans, including, in part, California Assemblyman Charles Westmoreland. Westmoreland agreed with Low on the narrower coverage of the Due Process language of Section 1, but not Equal Protection. While stating that Section 1 meant that “[n]o

¹³⁷ See *supra* note 68.

¹³⁸ *Journal of the Assembly*, *supra* note 1, at 54 (emphasis added).

¹³⁹ See, e.g., U.S. CONST. amends. I–VIII; see also *The Bill of Rights: What Does It Say?*, NAT’L ARCHIVES, (“[The Bill of Rights] guarantees civil rights and liberties to the *individual*—like freedom of speech, press, and religion.” (emphasis added)); *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 115 (1873) (Bradley, J., dissenting) (describing the rights protected by the Fourteenth Amendment as “the absolute rights of *individuals*,” “the right of *personal* liberty,” and the “*personal* privileges and immunities of citizens” while condemning the violation in the case as an “infringement of *personal* liberty” (emphasis added)). Note the unsubtle hypocrisy of Bradley’s amorphous views on individual rights and the Fourteenth Amendment when comparing his dissent in *Slaughter-House* to his majority opinion in the *Civil Rights Cases*. See *infra* note 140.

¹⁴⁰ *The Civil Rights Cases*, 109 U.S. 3, 11 (1883).

¹⁴¹ *Journal of the Assembly*, *supra* note 1, at 52 (statement of Gov. Low) (stating that Section 1 of the Fourteenth Amendment, “declares ‘equality before the law’ for all citizens”).

¹⁴² *Id.*

¹⁴³ See, e.g., Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 911 (1991) (“Within the borders of the United States, every person is protected by the Constitution, and it has long been established that ‘person’ includes aliens who are unlawfully present.”); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.”).

State shall deprive any *citizen* of life, liberty or property, without due process of law,” he also asserted that “[n]o State shall deny to any *person* within its jurisdiction the equal protection of its laws.”¹⁴⁴ This may have been a genuine oversight from both Westmoreland and Low. It may also have been a calculated attempt to construe the broad grant of rights covered in Section 1 in a way that would strategically bypass Chinese aliens. Whether or not it was deliberate, Low’s citizens-only interpretation fits within the schema of California’s bipartisan anti-Chinese reading of the Fourteenth Amendment. This warped interpretation redefined the amendment’s scope in a way that was politically convenient—affirming rights for freedmen while evading their full extension to California’s growing population of not-yet-naturalized Chinese immigrants.

Beyond the statements of California’s Democratic and Republican leaders, the state’s newspapers offer a valuable lens into how the amendment was understood by the wider public—capturing the depth, reach, and character of the popular response to the Fourteenth Amendment. *The San Francisco Examiner* offered a fairly typical, while Democratically slanted, explanation of what the amendment would do. The Fourteenth Amendment “provid[ed] that there shall be no distinctions on account of race or color.”¹⁴⁵ This framing is straightforward and to the point. Importantly, it echoes Haight, Low, and Wallace, illustrating a broader agreement on the amendment’s scope: to tear down every distinction based on race. This sounds an awful lot like absolute equality.¹⁴⁶ It certainly sounds at least as strong as Bingham’s Section 1. The newspaper’s gloss on the amendment is further evidence that the Bingham view was more universal in California than just among politicians but was the widely circulated public interpretation of the amendment. This was also agreed to by California’s representatives in Washington. Representative John Conness asserted that Section 1 would secure for racial minorities “equal civil rights with other citizens” and “equal protection before the law.”¹⁴⁷

¹⁴⁴ *Journal of the Assembly*, *supra* note 1, at 771–72 (emphasis added).

¹⁴⁵ *The San Francisco Examiner*, Mar. 19, 1868, at 2.

¹⁴⁶ To illustrate the shared language and ideological overlap between Wallace, Haight, and *The San Francisco Examiner*, consider the recurring theme of race-blind civil rights. All three sources described Section 1 of the Fourteenth Amendment as eliminating distinctions “on account of race or color,” emphasizing equal civil rights for all—language echoed in Wallace’s assertion that the amendment “undertook to regulate the rights of the negroes according to law.” Haight’s recognition that minorities “have their civil rights . . . have entire freedom of person, and can pursue any lawful occupation for a livelihood” and that the amendment made “no distinction” between races, and the *Examiner*’s gloss that the amendment provides “that there shall be no distinctions on account of race or color.” These parallel phrasings reflect a shared understanding: that the Fourteenth Amendment broadly guaranteed civil rights to all racial groups—and, critically, that such a guarantee raised fears among California Democrats about extending those rights to Chinese Americans. See *Opening Speech of Gen’l Wallace*, *supra* note 69; *Journal of the Assembly*, *supra* note 1, at 100; *The San Francisco Examiner*, Mar. 19, 1868, at 2.

¹⁴⁷ See Cong. Globe, 39th Cong., 1st Sess. 2890-92 (May 30, 1866) (statement of Rep. Conness).

In sum, both major California political parties and the local media conceived of Section 1 of the Fourteenth Amendment along the broad lines Congressman Bingham envisioned. This should come as no surprise considering Bingham’s explicit statements that the Privileges or Immunities Clause would incorporate the Bill of Rights,¹⁴⁸ but demonstrates that there was even less debate at the time than previously understood. In California, this was an agreed-upon fact unobjected to by both sides of the political spectrum—the language of Section 1 was obviously broad and meant what it said: equal citizenship for all and the commonly associated privileges and immunities that came with citizenship.¹⁴⁹

II. The Suffrage Implications of the Fourteenth Amendment

Today, the Fourteenth Amendment’s implications on suffrage are negligible or nil. The amendment is widely considered to offer no independent guarantee of voting rights, having been largely eclipsed by the Fifteenth Amendment and judicial doctrine. The Supreme Court originated this version of the amendment in *Minor v. Happersett*, holding that the Fourteenth Amendment (and the Constitution as a whole) “does not confer the right of suffrage upon any one.”¹⁵⁰ Section 2, meanwhile, has never been enforced in any meaningful way by Congress or the courts. This modern understanding is far from, and nearly entirely opposite to, how the amendment was understood by the California ratifiers.

The greatest fear of the Californian opponents to the Fourteenth Amendment was universal suffrage, specifically for Chinese Americans. Indeed, no issue was debated more fiercely or invoked more frequently during the ratification debates than voting rights.¹⁵¹ Whereas civil rights were uniformly agreed to be well within the text of Section 1 and politically a *fait accompli*, voting rights remained the central battlefield of California’s ratification debate.

This issue of voting is where there was the greatest diversity of opinion, depending on party affiliation and personal interpretations of the Fourteenth Amendment. California Republicans downplayed the amendment’s impact on voting, conceiving of Section 2 as merely fixing the representative scheme of the Three-Fifths Clause made anachronistic by the Thirteenth Amendment.¹⁵² One faction of Democrats viewed Section 2 as the muscular key to the

¹⁴⁸ See *supra* note 29.

¹⁴⁹ See *supra* note 146.

¹⁵⁰ 88 U.S. 162, 178 (1874).

¹⁵¹ See *supra* note 83.

¹⁵² See *Journal of the Assembly*, *supra* note 1, at 52.

amendment's power and likely to be strictly enforced in combination with Section 3 to effectively coerce every state into adopting universal suffrage.¹⁵³ There were also Democrats who understood the amendment to grant universal suffrage through the Citizenship Clause of Section 1. To this last group, the privileges of true citizenship, equal citizenship, inherently included voting rights.¹⁵⁴

A. The Minimalist Argument: Fixing the Formula

The minimalist case for voting rights under the Fourteenth Amendment most closely resembles the modern understanding of the amendment's scope. It is easy for us to divorce the Fourteenth Amendment from voting with the hindsight certainty that the Fifteenth Amendment would enshrine voting protections for racial minorities. But in 1868, the Fifteenth Amendment had not been drafted nor proposed and both political camps sought to claim either as much or as little territory of the ultra-contentious issue of suffrage. For the Republicans looking to pass the amendment, this generally meant minimizing the impact of the Fourteenth Amendment on voting, and this was the course favored by California Republicans.¹⁵⁵

When introducing the amendment to the Seventeenth Legislative Session, Governor Low dismissed the fears of Democrats like Governor Haight, stating that Section 2 would only “provide[] a new rule of apportionment of representation” to correct the antebellum system of “partial representation for slaves” that was made defunct by the Thirteenth Amendment.¹⁵⁶ Low cast Section 2 as a modest technical adjustment that would do nothing more than equalize the playing field now that the Three-Fifths Clause had been erased. Whether he truly believed this minimalist perspective or if he was attempting to make the language more palatable for middle-of-the-road Californians is unclear. His total omission of the punitive elements of Section 2 that threatened to reduce representation for states that refused to expand the franchise beyond propertied white men¹⁵⁷ belies Low's innocuous tone and makes it appear like a deliberate attempt to keep the spotlight off voting and on civil rights where there was greater agreement.

¹⁵³ See, e.g., *id.* at 97 (statement of Gov. Haight) (lamenting that the Fourteenth Amendment “confers the elective franchise on the blacks, and provides a system which gives them (though actually a minority) a voting majority over the whites, making those States, negro States”).

¹⁵⁴ *A California Representative on His Dignity*, *Santa Cruz Weekly Sentinel*, Mar. 7, 1868, at 1; see also *infra* note 192.

¹⁵⁵ See *infra* notes 156 & 158.

¹⁵⁶ *Journal of the Assembly*, *supra* note 1, at 52.

¹⁵⁷ See *id.*

Assemblyman Westmoreland also favored this modest interpretation of Section 2. In his reading, Section 2 ensured that “[r]epresentation shall be according to the voting population” and he conceded that “[i]f any State disfranchises any citizens, the representation of such State shall be reduced proportionally to such reduction.”¹⁵⁸ In this precise phrasing, Westmoreland adhered to Low’s interpretation that Section 2 would adjust the representation formula so that representation would be in accordance with the “voting population” rather than include fractions of formerly enslaved people. And while Westmoreland did go further than Low and mention Section 2’s punitive threat, he was careful to enunciate that “[t]he States, severally, may regulate the exercise of the voting franchise in its borders.”¹⁵⁹

But there is a more expansive, if subtle, way of reading Low and Westmoreland’s Section-2-as-a-technical-fix interpretation that does imagine the Fourteenth Amendment leading to greater suffrage. Knowing universal suffrage was still unpopular—especially in California where the boogeyman of Chinese voting loomed over the ratification process for all three Reconstruction amendments—the Republican language built in a logical argument for voting without ever admitting expanded suffrage. For years, Northerners had railed against the three-fifths bonus that inflated Southern political power (without which Jefferson would have lost the election of 1800¹⁶⁰).¹⁶¹ The Thirteenth Amendment abolished slavery—and with it, the Three-Fifths Compromise—but perversely skewed representation further in the South’s favor. Now, instead of three-fifths of a vote per formerly enslaved (and thus nonvoting) person, Southern states would count them as *five-fifths* (while still barring them from voting).¹⁶² And before the Fifteenth Amendment effectively rendered Section 2 of the Fourteenth Amendment superfluous for directly protecting the voting rights of racial minorities, had there not been a rigorously enforced Section 2,

¹⁵⁸ *Id.* at 771–72.

¹⁵⁹ *Id.*

¹⁶⁰ AMAR, *supra* note 52, at 209, 215 & 503 (2021).

¹⁶¹ *Id.* This reaction began almost as soon as the relevant constitutional language was ratified. Speaking of the election of 1800, Amar notes that “[h]ad the Electoral College been apportioned on the basis of free population—with no three-fifths bonus—Jefferson would have finished with about 4 electoral votes less than Adams rather than 8 votes more. In the sharp words of several northern newspapers, Jefferson was riding ‘into the TEMPLE OF LIBERTY, upon the shoulders of slaves.’” *Id.* at 503. Further emphasizing this point, Amar notes that “at least a dozen northern publications” published the headline “JOHN ADAMS has been re-elected President of the United States by a MAJORITY OF ALL THE FREE PEOPLE THEREOF.” *Id.*

¹⁶² *See id.* at 205 (“But under the Constitution, the key issue would not be state taxation, because the requisition system was being scrapped in favor of federal taxation of individuals at the Customs House and elsewhere. The big debate about how to count slaves was now about representation, not taxation; and the obvious anti-slavery position was that slaves should never be counted. Counting slaves in any way—one-fifth, three-fifths, or five-fifths—would create vicious incentives for South Carolina and other slave-importing states to increase their power in the House (and in the Electoral College, whose apportionment was largely based on House seats).”).

the amendment would simply have provided the former Confederate states an even greater political windfall. The former Confederacy would be *rewarded* in additional congressional representatives for their treason. Supporting Section 2 as a mere technical correction to the Three-Fifths Clause would have made little strategic sense for the Republican Party unless it was paired with genuine electoral reform. Whether or not Low and Westmoreland fully grasped the implications, the version of the Fourteenth Amendment they championed would, almost inevitably, have ushered in significantly expanded suffrage.

B. The Twin Dangers of Section 2 and Section 3

California Democrats also elevated the voting rights implications of the Fourteenth Amendment. One of the most common interpretations of these suffrage impacts was the fear that Section 2 would be strictly enforced to drastically reduce or even eliminate congressional representation from states that did not expand suffrage. Section 2 as a strong, coercive mechanism of change did not in the end come about, at least in part because the Fifteenth Amendment, which barred racial prohibitions on voting altogether, was ratified just two years later.¹⁶³ But in 1868, many Californians saw the threat of Section 2 as equally targeting their own system of exclusionary, lily-white voting just as much as the amendment took aim at the South.

Attorney General Wallace explained in detail how Section 2 would be used to coerce the enfranchisement of racial minorities, specifically the large bloc of Chinese Americans in the case of California. “[T]his—the 14th amendment to the Constitution of the United States,” Wallace began:

Provides that if there are Chinamen in California, and you do not allow them to vote you shall not count them in your Federal representation, and that if you do not allow them to vote for members of Congress you shall lose power in Congress by just so many Chinamen as come into this State [T]he only way to get around it is to do just what they want you to do—*allow all the Chinamen to vote*. That settles the whole difficulty. [“Never.” Applause.] They are bringing it on you; they are doing it by statute [and] doing it by Constitutional Amendment.¹⁶⁴

This harangue weaves together the general and specific threat of Section 2 as envisioned by Californians like Wallace. The amendment would force the state to enfranchise “all the Chinamen.”¹⁶⁵ And this was exactly the point of the amendment—“to do just what they want you to do”—and coerce every

¹⁶³ U.S. CONST. amend. XV.

¹⁶⁴ *Opening Speech of Gen'l Wallace, supra* note 69, at 1.

¹⁶⁵ *Id.*

state to adopt universal suffrage.¹⁶⁶ In California, this meant enfranchising tens of thousands of Chinese Americans.

Governor Haight agreed with Wallace on the importance of Section 2 and the centrality of suffrage to the Fourteenth Amendment. Haight condemned the amendment as “an attempt to force negro suffrage upon the Southern States” and warned specifically of the consequences of Section 2.¹⁶⁷ Section 2 would allow Congress “to withhold representation from any State not conforming its laws to the views of Congress.”¹⁶⁸

Even more than *enfranchising* racial minorities, Section 2 was read in combination with Section 3 which, in the minds of this strain of Californian, had the potential to *disenfranchise* thousands of white voters. Wallace warned of this enfranchisement-disenfranchisement whiplash effect of Sections 2 and 3. Directly complementing his dire reading of Section 2, Wallace predicted Section 3 would:

Disfranchise every person who had held office under or had participated in the rebellion, or had given aid or comfort to the rebels, either voluntarily or involuntarily; no matter what sort of pressure was brought to bear upon him, or however compelled to do so by the law of the rebellious State; and a man was to be disfranchised who was obliged to obey the supreme power, and to shoulder a musket he never approved of.¹⁶⁹

On the other side of the aisle, Republican Assemblyman Westmoreland similarly asserted that Section 3 would ensure that “[t]raitors shall neither *vote* nor hold office.”¹⁷⁰

Wallace, Westmoreland, and this school of Californian significantly over-read Section 3. Nowhere does Section 3 disenfranchise or even mention voting; rather it bars former Confederates and sympathizers only from *holding office*.¹⁷¹ But Wallace and Westmoreland each read Section 3 to have the power to disenfranchise hundreds of thousands of white Americans across the South. In other words, the amendment would enfranchise Black and Chinese Americans, disenfranchise white Americans, and bring to fruition the worst fears of Californians, enumerated explicitly by Governor Haight. Haight lamented that ratification of the Fourteenth Amendment “confers the elective

¹⁶⁶ *Id.*

¹⁶⁷ *Journal of the Assembly*, *supra* note 1, at 99–101.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Journal of the Assembly*, *supra* note 1, at 772 (emphasis added).

¹⁷¹ U.S. CONST. amend. XIV, § 3.

franchise on the blacks, and provides a system which gives them (though actually a minority) a voting majority over the whites, making those States, negro States.”¹⁷² That “system” was the dual threat of Sections 2 and 3.

Wallace articulated this fear of subjugation rather than equality. “They are bringing the whole column, nigger and Chinaman, down upon you for the purpose of setting up their rights in opposition to you and your rights.”¹⁷³ There was no mincing words—the Fourteenth Amendment would create another unequal society, one where race was pitted against race, but rather than white supremacy, Wallace suggested California would be placed under a system of Chinese supremacy. The amendment, through Sections 2 and 3, would not guarantee equality of rights, would not just expand the array of rights already guaranteed to white Americans, but would instead give racial minorities rights “*in opposition*” to white Americans—turning the white population of California into second-class citizens.¹⁷⁴

This never happened. Section 2 was toothless and displaced by the Fifteenth Amendment while President Andrew Johnson’s generous use of the pardon power went a long way toward nullifying any suffrage impacts of Section 3 as it pertained to Confederates.¹⁷⁵ But it was an incredibly real threat to Californians who perceived voting rights—both enfranchising racial minorities and disenfranchising the white majority—as a central, in fact, *the* central element of the Fourteenth Amendment.

Given the context of the time, it was, in many respects, a credible fear. The punitive elements of Section 2 are difficult to fathom today—that a state could have their apportionment reduced by a malicious Congress just seems far-fetched. But at the time, this was not only a genuine threat *but had already happened on a systematic scale*. Barely two years previously, the controlling congressional Republicans had refused to seat every member of every Southern delegation, functionally stripping the former Confederate states of their representation.¹⁷⁶ These Southern delegations were riddled with ex-Confederate senators and representatives (and the former Confederate Vice President Alexander Stephens!), former Confederate soldiers and sympathizers, and the Republican-

¹⁷² *Journal of the Assembly*, *supra* note 1, at 97.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *Andrew Johnson and Reconstruction*, NAT’L PARK SERV. (Jan 9, 2024) (“Johnson issued over 13,000 pardons during his administration, and he passed several amnesty proclamations. The last one, issued Christmas Day 1868, granted sweeping pardons to former Confederates, including former Confederate President Jefferson Davis.”).

¹⁷⁶ See *Report of the Joint Comm. on Reconstruction*, H.R. REP. NO. 39-30, at xvi (1866) (stating that “Congress would not be justified in admitting such communities to a participation in the government of the country”); *Report on the Joint Committee on Reconstruction*, NAT’L CONST. CTR. (2025) (noting that “[o]n the opening day of the 39th Congress, Republicans barred Southern representatives . . . from returning to Congress”).

dominated Congress retaliated against the unreformed and unapologetic South, fully eliminating the region's congressional representation¹⁷⁷ (with the lone exception of Tennessee whose delegation was seated in July 1866¹⁷⁸).

Loyal Californians may have been able to distinguish themselves from the measures taken against the traitorous Southern states, and had Congress stopped there, Californians may not have taken the Section 2 threat as seriously as they did. But Congress went further, barring not just Southern delegations, but elected representatives from *Kentucky*, a Union state and the land of Lincoln's birth. For example, John D. Young was elected to the House of Representatives from Kentucky's eastern region in 1866 and resigned his position as Bath County Judge to serve in the 40th Congress.¹⁷⁹ But Congress overwhelmingly voted to exclude him from the House for suspected Confederate sympathies and possible voting irregularities.¹⁸⁰ Young's rejection, despite being a duly elected congressman from a Union state, was another indication of the draconian steps Radical Republicans would take to enforce their new regime.¹⁸¹ And this brazen act of Congress was noticed in California. Haight bristled that:

The late proceedings of Congress in the case of the representatives from Kentucky, illustrate the principle involved. The people of a State which has never seceded or rebelled, which furnished about as large a proportion of soldiers, and performed as much service, and suffered more loss for the Government than any northern State of equal population, by a decisive majority elected representatives to Congress who were refused seats by the dominant party¹⁸²

And every way in which Haight categorized Kentucky was equally true of California. Given these precedents, was it really so outlandish to think that this Congress, if given the explicit power to remove representation via Section 2, would enforce Section 2 strictly, maybe against political opponents not part

¹⁷⁷ Among those elected by Southern states but denied their seats by the 39th Congress were former Confederate Senators Herschel V. Johnson and Benjamin H. Hill of Georgia, James L. Orr of South Carolina, and Robert E. Withers of Virginia, as well as ex-Confederate Congressmen like Thomas Jefferson Foster of Alabama and former Confederate military officers such as John E. Kenna and Joseph Barton Elam. See *Journal of the House of Representatives of the United States*, 39th Cong., 1st Sess., at 4-5 (Dec. 4, 1865).

¹⁷⁸ See *Joint Resolution Restoring Tennessee to Her Relations to the Union*, Pub. L. No. 73, 14 Stat. 364 (1866).

¹⁷⁹ See Young, *John Duncan: 1823-1910*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG. (2025).

¹⁸⁰ See *id.* After initially excluding the entire Kentucky delegation, the House eventually only refused to sit Rep. Young because the Committee of Elections found the "allegations of the contestant [against Young] so sustained by the proof that there was little question as to his exclusion." H.R. REP. NO. 29, 40th Cong., 2d Sess. (1868). On June 22, 1868, the House formally voted to exclude Young for "having voluntarily given aid, countenance, counsel, and encouragement to persons engaged in armed hostility to the United States." *Journal of the House of Representatives*, 40th Cong., 2d Sess. 912-13 (1868).

¹⁸¹ *Journal of the Assembly*, *supra* note 1, at 93.

¹⁸² *Id.*

of the former Confederacy? Perhaps against political opponents like the newly ascendant Democrats of California?

Attorney General Wallace gave voice to the threat that the Radical Republicans in Congress could use the same model they were using to hammer Reconstruction down the throats of the South on California. Wallace warned Californians that while the language of Congress and the intent of the Fourteenth Amendment was aimed at expanding the rights of Black Americans, it was anything but a limited-use weapon:

[T]hey ask you, in defiance of the Constitution, to establish negro suffrage in the Southern States, and in consideration of your allowing them to do that, they will agree to allow you to do as you please in your States. *Why they will turn round and fix the Northern States with it.*¹⁸³

This was barely coded language, cautioning Californians that if they allowed the expansion of Black suffrage, congressionally mandated Chinese suffrage would be next. Wallace then brought together the argument that Section 2 and Section 3 would be used as a cudgel to create a system of minority rule. “[I]nstead of giving the negro an equality,” Wallace thundered, “they will give them an excess of three times as much political power as any one of you exercise.”¹⁸⁴ And lest the audience had missed every coded analog running throughout the philippic, Wallace made the California stakes crystal clear (if not quite grammatical): “in California, by means of the 14th amendment . . . to fix the Chinese in our State forever.”¹⁸⁵

C. The Citizenship Clause Encompasses Voting Rights

The last interpretation of the Fourteenth Amendment’s impact on voting rights was the most expansive and most direct. This subset of Californians argued that the real impact of the amendment came not through the coerced enfranchisement of Section 2 or inverting the voting demographics enough to create racial equality through Section 3, but through Section 1. For these Californians, the Privileges or Immunities Clause was vague enough and broad enough to contain suffrage. In another phrasing, voting rights were inherent to the privileges of citizenship.

Governor Haight indirectly argued that suffrage was among the privileges embedded in citizenship and included in the birthright guarantee of Section 1’s opening sentence. Haight grumbled that the Fourteenth Amendment’s “policy

¹⁸³ *Opening Speech of Gen’l Wallace, supra* note 69, at 1 (emphasis added).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

proposes to ignore all discrimination in political privileges, founded on race or color” and would secure the “elective franchise.”¹⁸⁶ “Privileges” immediately evokes Section 1, but expressly identifying those privileges as *political* ties the amendment directly to suffrage.¹⁸⁷

Modern scholars tend to distinguish the civil rights privileges protected by the Fourteenth Amendment from the political rights protected by the Fifteenth Amendment—and so did many of the amendment’s framers in Washington.¹⁸⁸ But a significant segment of California politicians, including the elected governor, made no such distinction in this pre-Fifteenth Amendment era. The Fourteenth Amendment in their eyes would do the same work and provide all *political* rights and privileges to racial minorities—first and foremost, the political right of suffrage.¹⁸⁹

California’s representatives in Congress further articulated this connection between the privileges of citizenship and voting rights. While the rest of the nation was caught up with the rights—existing and future—of the former slaves, Representative James A. Johnson of California’s Third District was far more concerned with California problems and the rights the Fourteenth Amendment would guarantee to Chinese Americans.¹⁹⁰ Johnson represented the most politically competitive district in the state, winning the 1866 election by a single percentage point, and could little afford to pander to the hard left or hard right.¹⁹¹ He was forced into the California middle, to argue for the interpretative meanings he believed to be most popular (and inherently the most common) among the California public.

Johnson introduced a resolution in the 39th Congress to determine “whether the Civil Rights Bill and the proposed amendments to the Constitution of the United States confer the rights of citizenship, *including the right of suffrage*, upon Chinese.”¹⁹² And more than inquire into this matter, Johnson explicitly argued for the suffrage-through-citizenship understanding of Section 1. “[T] he political party with which I affiliate,” Johnson stated, “declares before the country that the right of citizenship being conferred upon these people, they

¹⁸⁶ *Journal of the Assembly*, *supra* note 1, at 99.

¹⁸⁷ *See supra* note 83.

¹⁸⁸ *See Cong. Globe*, 39th Cong., 1st Sess. 2764-68 (1866) (statement of Sen. Howard) (“But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution.”).

¹⁸⁹ *See Journal of the Assembly*, *supra* note 1, at 99.

¹⁹⁰ *See Santa Cruz Weekly Sentinel*, *supra* note 154, at 1.

¹⁹¹ Johnson won 50.6% of the vote compared to his Union Republican counterpart, Chancellor Hartson, who garnered 49.4 percent. *Election History for the State of California: 1867 General Election Results*, JOINCALIFORNIA (2025).

¹⁹² *See Santa Cruz Weekly Sentinel*, *supra* note 154, at 1 (emphasis added).

will also have the right of suffrage; that the right of suffrage follows naturally, and by force of law, the right of citizenship.”¹⁹³ Apparently, Johnson’s political party (or his construal of the party)—the Democrats of California—believed the Fourteenth Amendment would *absolutely* confer suffrage on every male over the age of twenty-one—including Chinese Americans. This concession cannot be overstated: Johnson acknowledged to the country that, at least in his mind, the California Democratic Party had no doubt that the Fourteenth Amendment would not just indirectly coerce expanded suffrage but would enshrine universal suffrage as a core privilege of citizenship.¹⁹⁴

Of course, Johnson made this argument out of fear, not idealism. Fear of Chinese suffrage was central to how Californians approached the Fourteenth Amendment and underscores the uniquely defensive, racially anxious framework through which the state’s political class interpreted the amendment’s reach. Johnson explained why this expanded suffrage was unacceptable to California:

Now, these are questions of vital importance to the whole people of the United States, but very particularly so to the people that I represent. We have from sixty thousand to eighty thousand Chinese in our State; the males are petty thieves, and the females are harlots. Larceny and prostitution are trades among those people. Like filthy harpies they are defiling the very food we eat, rendering pestilential the air we breathe.¹⁹⁵

In Johnson’s hysterical rhetoric—proudly delivered on the congressional record and reflecting what he believed to be his party’s consensus—the Fourteenth Amendment would naturally enfranchise all the Chinese “petty thieves” and larcenists through the Citizenship Clause.¹⁹⁶ This understanding of the amendment is at odds with modern doctrine, but is essential to grasping both California’s resistance to ratification and the original public meaning it held in the state.

III. The Fourteenth Amendment’s Impact on All Racial Minorities—Including Chinese Americans

As Parts I and II have shown, Californians cared little about the implications of the Fourteenth Amendment on Black Americans and cared everything about the implications on Chinese Californians. That Californians so immediately and readily connected the Fourteenth Amendment to their long-standing tradition of anti-Chinese racism admits the final insight into

¹⁹³ *Id.*

¹⁹⁴ *See id.*

¹⁹⁵ *Id.*

¹⁹⁶ *See id.*

their conception of the Fourteenth Amendment. Californians of all political stripes understood that the amendment would extend far beyond freed slaves or Black Americans—it was a broad, race-transcending instrument with consequences they viewed as dangerously universal. Its protections covered all races, including the 50,000 or so Chinese Americans and immigrants living in California.¹⁹⁷ Californians could have read the amendment narrowly, as applying to only Black Americans. This narrow view would have more closely tracked the Supreme Court’s interpretation of the Fourteenth Amendment. In *Slaughter-House*, the Court declared:

We do not say that no one else but the negro can share in this protection But what we do say, and what we wish to be understood is, that in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all . . . the evil which they were designed to remedy [T]he one pervading purpose . . . [was] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.¹⁹⁸

Instead, the bipartisan Californian concession of a broader reading of the amendment led to the torrent of anti-Asian rhetoric that infested the state ratification debate, and every facet of the debate from civil rights to voting rights was seen through the lens of how it would apply to the Chinese community in California.¹⁹⁹

Governor Haight made clear that he believed the amendment applied to all racial groups, not just Black Americans. “A portion of those persons in this State who favor negro suffrage hesitate to advocate Chinese suffrage, but the congressional policy makes no distinction.”²⁰⁰

Here lies the crux of Governor Haight and the majority of California’s elected officials’ argument. That because the amendment made no distinction between white and Black, between Black and Chinese, it would *necessarily* cover Chinese Americans. If the amendment would protect Black civil rights, it would protect Chinese civil rights. And if the amendment expanded ballot access to Black Americans, it would equally expand ballot access to Chinese Americans. Haight stated:

¹⁹⁷ *1870 Census Table II*, *supra* note 14, at 15–16.

¹⁹⁸ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71–72 (1873).

¹⁹⁹ *See, e.g., Journal of the Assembly*, *supra* note 83.

²⁰⁰ *Journal of the Assembly*, *supra* note 1, at 99.

If it is a question of justice, as some assert, and justice requires the ballot to be given to the negro, then it equally requires the ballot to be given to the Chinaman. If the negro requires the ballot to protect himself, as others assert, then the Asiatic needs it to protect himself.²⁰¹

This was California's final contribution to a broad original meaning of the Fourteenth Amendment: it encompassed the rights of *all* racial minorities—those of Chinese people *just as much as the rights of Black people*. This is a nuanced conception of the Amendment slightly at odds with the Supreme Court's understanding in *Slaughter-House*.²⁰² It is also at odds with Justice Harlan's understanding of the Fourteenth Amendment. In one of Harlan's only blemishes on the Court, he dissented with Chief Justice Fuller in *United States v. Wong Kim Ark* that held that the Citizenship Clause covered Chinese people born in America, as it covered Black and white birthright Americans. Harlan would have come out the other way:

[T]he presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usage of their own country, unfamiliar with our institutions and religion, and apparently incapable of assimilating with our people, might endanger good order, and be injurious to the public interests.²⁰³

The dissent went further, conclusively endorsing the belief that “the president and senate by treaty, and the congress by legislation, have the power, notwithstanding the fourteenth amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens.”²⁰⁴

But while Californians certainly would have applauded this rhetoric, it is also contrary to how they described and understood the Fourteenth Amendment during the ratification process. While Harlan refused to find Chinese Americans definitely covered by the amendment's Citizenship Clause, Californians like Haight espoused a much more expansive view. The paradigm case for the Fourteenth Amendment—according to California—was not the civil rights of Black people, but rather the civil rights of *all* racial minorities.²⁰⁵

This expansive view of the Fourteenth Amendment was shared by California's Republicans, both those who similarly feared the amendment's

²⁰¹ *Id.*

²⁰² See *Slaughter-House Cases*, 83 U.S. at 72 (noting that “the one pervading purpose” of the Fourteenth Amendment was “the freedom of the slave race, the security and firm establishment of that freedom”).

²⁰³ *United States v. Wong Kim Ark*, 169 U.S. 649, 731 (1898) (Fuller, C.J., dissenting, joined by Harlan, J.).

²⁰⁴ *Id.* at 732.

²⁰⁵ See *Journal of the Assembly*, *supra* note 1, at 99.

potential to empower racial minorities and those who were more sympathetic to the Chinese communities in the state. While debating the amendment in Congress, California Representative Conness stated:

The proposition before us relates simply, in that respect, to the children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens. We have declared that by law; now it is proposed to incorporate the same provision in the fundamental instrument of the Nation. I am in favor of doing so. I voted for the proposition to declare that the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States, entitled to equal civil rights with other citizens of the United States.²⁰⁶

As seen in Part I, Californians like Governor Haight were seemingly onboard with expanding the civil rights of Black Americans.²⁰⁷ On the other hand, expanding the rights—particularly the *voting* rights—of Chinese Americans was wholly unacceptable and rendered the Fourteenth Amendment dead on arrival for critics like Haight. Haight proclaimed that “[t]hese inferior races . . . will never, with the consent of the people of this State, either vote or hold office.”²⁰⁸ The notion of Chinese people voting plagued Haight and the other Californians more than any other part of the amendment. The idea of Black people voting couldn’t have been practically threatening, considering how infinitesimal a portion of the state population they made up, but the thought of 50,000 Chinese Americans voting—10% of the vote—had these politicians quaking in their boots.²⁰⁹ In the end, it was not the abstract principles of equality that unnerved California’s political class, but the concrete possibility that those principles might empower the wrong people—starting with the Chinese.

Conclusion

In an evening session on March 17th, 1868, with very little fanfare, the Fourteenth Amendment came to the floor of the California Assembly.²¹⁰ And it was crushed. Twenty-four representatives voted to ratify the amendment.²¹¹ *Forty-six* voted against.²¹² The vote was bipartisan. In a lackluster denouement, the next day Republican legislators tried to force the legislature to reconsider.

²⁰⁶ Cong. Globe, 39th Cong., 1st Sess. 2890-92 (May 30, 1866).

²⁰⁷ See *supra* note 118.

²⁰⁸ *Journal of the Assembly*, *supra* note 1, at 99–101.

²⁰⁹ See *1870 Census Table II*, *supra* note 14, at 15–16.

²¹⁰ See *Journal of the Assembly*, *supra* note 1, at 757–58.

²¹¹ See *id.*

²¹² See *id.* The Assemblymen who voted against ratification included two Union Republicans. See *Record of Members of the Assembly 1849–2017*, CAL. STATE SENATE (2017).

In the blunt finality of *The San Francisco Examiner*, their “attempt was made . . . but failed.”²¹³ The Fourteenth Amendment would become the law of the land without the help of California, where it languished for ninety years before it was belatedly ratified in 1959.²¹⁴

Surveying the documentary record of California’s leading politicians and newspapers during the debates deciding whether to ratify or reject the Fourteenth Amendment highlights three main aspects of the Californian understanding of the amendment. First, the amendment applied to all racial minorities, eliminating distinctions based on race or color. For California, this meant the amendment was a threat to the white hegemony over the state’s sizable Chinese minority. Second, the amendment was directly connected to suffrage. While politicians disagreed over exactly how the amendment would affect voting rights, all agreed that suffrage was central and critical to the Fourteenth Amendment. Third, there was a resounding consensus that Section 1 guaranteed the broad civil rights imagined by Radical Republicans rather than the limited rights the Supreme Court later found in *Slaughter-House*, vindicating Bingham’s understanding of the amendment he helped craft. While some aspects of the amendment were fiercely contested, no one in California—not even the amendment’s sharpest critics—disputed that Section 1’s Privileges or Immunities Clause secured wide-ranging, individual civil rights intended to make racial minorities equal to white Americans.

This understanding is in some ways drastically different from our modern view of the Fourteenth Amendment. Most obviously, current doctrine renders the Privileges or Immunities Clause almost meaningless, protecting virtually nothing. Instead, the Court has moved the various fundamental rights of citizenship into the Due Process Clause, widening the scope of these rights to noncitizens but also distorting Bingham and California’s reading of Section 1.

Additionally, modern doctrine effectively writes Section 2 and any suffrage implications of the Fourteenth Amendment out of the Constitution—a facile and unnecessary appendage to an otherwise powerful amendment. The California focus on suffrage, on the other hand, is in stark contrast to both the modern reading of the Fourteenth Amendment, *and the modern originalist narrative of how the Fourteenth Amendment was understood at the time of ratification*. This may very well be the most glaring and consequential misconception among modern scholars that a state-by-state analysis can correct. If other states similarly focused on suffrage, California would not be an aberration but reflective

²¹³ See *Letter from the Capital [From Our Regular Correspondent]*, *San Francisco Examiner*, Mar. 19, 1868, at 2.

²¹⁴ See *Constitution Annotated*, *supra* note 18.

of the common consensus—a consensus that the Fourteenth Amendment, contrary to current scholarship, was all about voting rights. And this possible misconception is easy to trace and doubly reinforces the need to study the states rather than only the drafters of the amendment. As Professor Amar has found, “[i]n explaining the amendment’s first two sentences to the American public and state legislatures being asked to support and ratify the amendment, Republican leaders repeatedly stressed these sentences’ utter inapplicability to suffrage issues.”²¹⁵ These Republican leaders were those same congressional leaders who drafted the amendment. And yet despite this emphasis on the lack of voting rights, by the time the Fourteenth Amendment wound its way through the congressional game of telephone to the California legislature, its central theme was coercive and universal suffrage.

If similarly understood throughout state ratifying debates, this would invert the meaning of the Fourteenth Amendment from centrally and exclusively about *civil* rights to centrally but inclusively about *political* rights (primarily through Sections 2 and 3) and civil rights (through Section 1). While a fascinating historical footnote, the centrality of Section 2 in the ratifying debates could have significant consequences for how the courts and Congress should understand and enforce the Fourteenth Amendment. Rather than entirely distinct from voting rights, given the import of suffrage to the original meaning of the ratifiers (at least those in California), the Fourteenth Amendment should be seen as providing Congress a cogent tool to enforce universal suffrage—the ability to reduce the congressional representation of states that restrict or abridge voting. This would be in line with the vast majority of Californian ratifiers who presupposed that Section 2 *would* be enforced, either fairly in proportion to the reductions in voting caused by restrictions or unfairly but even more aggressively and in tandem with Section 3 to install a minority government.²¹⁶ If we are to interpret the Fourteenth Amendment in the original manner it was understood by the consensus of Californians, Section 2 should not remain dormant. In the wake of decisions like *City of Boerne*²¹⁷ and *Shelby County v. Holder*²¹⁸ that neutered Congress’s ability to enforce free and fair elections through the Fifteenth Amendment and Sections 1 and 5

²¹⁵ AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 391 (2005); see, e.g., Cong. Globe, 39th Cong., *supra* note 188.

²¹⁶ See *supra* Sections II.A-C.

²¹⁷ *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne*, the Court held that while Congress has authority under Section 5 of the Fourteenth Amendment to enforce constitutional rights protected by Section 1, that power is strictly remedial, not substantive. The Court emphasized that Section 5 grants Congress the power “to enforce,” not the power to determine “what constitutes a constitutional violation.” *Id.* at 519.

²¹⁸ 570 U.S. 529 (2013). The Court curtailed Congress’s power to enforce voting protections, weakening federal oversight of elections and restricting the scope of the Fifteenth Amendment’s enforcement provision. *Id.*

of the Fourteenth Amendment, the enumerated language of Section 2 could revive and resuscitate Congress’s enforcement toolchest with the decisive trump card to insist states do not unduly burden the franchise.

This would have major policy implications. In today’s post-*Shelby* landscape, states are free to pass laws that functionally restrict voting. For example, Texas reinstated a strict voter ID law just hours after *Shelby* was decided; Alabama criminalized absentee ballot assistance by non-relatives, imposing penalties of up to 20 years in prison; and Georgia expanded mass voter challenges and aggressive roll purges ahead of the 2024 election.²¹⁹ Each of these restrictive laws, even if permissible under the Fifteenth Amendment or the Voting Rights Act, would trigger Section 2 of the Fourteenth Amendment if actually enforced.²²⁰

The Fourteenth Amendment’s Section 2 is triggered when a state denies or abridges the right to vote, and while not strictly “denying” the vote, many of this recent spate of laws certainly “in any way abridge[]” that right.²²¹ The Supreme Court has determined that “to abridge” a right requires a lower threshold than outright denial—and specifically in the voting rights context the Court has stated that “abridgment necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot.”²²² In this reading then, Section 2 should kick in whenever a state law diminishes, limits, or reduces an of-age citizen’s right to vote. Yet it doesn’t. Subsequent history—the passage of the Fifteenth Amendment on the heels of the Fourteenth—shriveled and emasculated Section 2 as unnecessary.

But unlike the Fifteenth Amendment that only prohibits voting discrimination based on race, the Nineteenth Amendment that only prohibits voting discrimination based on sex, and the Twenty-Sixth Amendment that only prohibits voting discrimination based on age, Section 2 of the Fourteenth Amendment (read in conjunction with the Fifteenth, Nineteenth, and Twenty-Sixth) is a catchall that protects the *absolute, inviolate* right to vote—with a consequence so dire no state would dare abridge or deny that preservative right. While the more qualified language at first blush comes across as weaker—the

²¹⁹ See, e.g., TEX. ELEC. CODE ANN. §§ 63.001-.009 (West 2023); ALA. CODE § 17-17-24 (2024); GA. CODE ANN. § 21-2-229 (2024); N.C. GEN. STAT. §§ 163-82.6, 163-166.13 (2023) (imposing voter ID requirement and eliminating preregistration for 16- and 17-year-olds); GA. CODE ANN. §§ 21-2-381, 21-2-382 (West 2021) (restricting absentee ballot applications and limiting drop box access); FLA. STAT. §§ 97.0525, 101.62 (2021) (adding vote-by-mail restrictions and limiting ballot drop boxes); IOWA CODE §§ 49.77, 53.2 (2021) (shortening early voting period and restricting absentee ballot deadlines); ARK. CODE ANN. § 7-5-416 (2021) (tightening absentee ballot verification procedures).

²²⁰ These laws do not restrict the right to vote based on race so fall outside the scope of the Fifteenth Amendment and the post-*Shelby* Voting Rights Act.

²²¹ U.S. CONST. amend. XIV, § 2.

²²² *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 359 (2000) (Souter, J., concurring in part).

amendment clearly allows states to discriminate in voting—the severity of the punishment and the fact that said punishment is enshrined in the Constitution transforms Section 2 into the ultimate weapon to enforce voting rights. Indeed, Section 2 is the *only* place in the Constitution where the right to vote is recognized as a right in and of itself, not tied to any secondary modifier.

If the Californian consensus elevating Section 2 and the voting implications of the Fourteenth Amendment truly reflects the broader states' consensus, the amendment provides Congress with a constitutionally secure and Supreme Court-proof remedy to punish states that attempt to dilute, weaken, and *abridge* the right to vote: Congress can and should strip them of their representation.

This prescriptive framework is still speculative and there is much more work to do. Every state must be examined on its own terms and set against the others to construct an accurate, textured portrayal of the national, original public meaning of the Fourteenth Amendment to the people and the states who ratified—and rejected—it. Only by recovering the full, continental debate that surrounded the amendment in the 1860s can we begin to grasp how it was truly understood and should be understood in the 2020s. Once we are listening to this conversation, a truer, more originalist interpretation and application of the Fourteenth Amendment is possible, more in line with how Americans across the country conceived of the amendment at the time of its ratification. Understanding the perspective of California brings us one step closer to that kernel of truth.



A.J. STONE JONATHAN*

The Woman Witkin:

Building a Legacy

Introduction

California has a rich legal history reliant on some singular characters. **C**Bernard E. Witkin is the name of one such character.

Bernard was a respected scholar of California law lauded by current and contemporaneous attempts at recording his life and impact. His work cataloging and summarizing California law dominates his legacy and persists posthumously as a continued California enterprise. His fortune, amassed over years as the dominant publisher of California legal treatises, is perpetually disbursed by the Bernard and Alba Witkin Charitable Foundation.

This paper is about Alba Witkin.

Alba, the third, longest, and last wife of Bernard, spearheaded the achievements of the Bernard and Alba Witkin Charitable Foundation and oversaw the administration of the Witkin wealth and name for seventeen years beyond the death of her husband in December 1995. While Bernard built the capital, Alba sustained the legacy. While she was a regular advocate, philanthropist, and participant in local governance, there is little written that reflects her impact on both Bernard and on the state of California. Alba's story is obscure, gathered in the shadows of her husband's fame.

This paper documents my investigation into Alba Witkin, journeying from the discovery of her existence in pursuit of more information on her role in making history. The paper proceeds from this Introduction to Part A:

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Backgrounding Witkin to provide a description of the discovery process. Here, Bernard is in the foreground, as is typical in most coverage of the Witkins. Next, Part B: A Narrative of Alba Pichetto Kuchman Witkin, gathers and reorders the information discovered into a biographical story of Alba. The search for records of Alba includes a digital excavation as well as trips to two California archives to uncover print materials. Part B intends to crystallize Alba in the greater narrative of California, as a character of great influence all her own. In doing so, an important complementary perspective of Bernard Witkin is also framed.

The paper then provides a Conclusion reflecting on the investigation and resulting narrative.

Part A: Backgrounding Witkin

This paper originated in a trip to the Alameda County Witkin Law Library. The library’s namesake was at that time an obscure reference, only the second instance in which the Witkin name had crossed my path. I first heard of any Witkin at all as a law student exposed to the Witkin treatises. Bernard E. Witkin materialized into a real person with this now-doubled exposure, standing in front of the law library. Curiosity as to the Witkin legacy arose from there.

A1. Beginning with Bernard

I came to know Bernard in an easy yet distanced way, remembered through obituaries and biographies hosted by sites at the top of my “Witkin California” directed search feed. Wikipedia proved fruitful. When I switched from DuckDuckGo to Google, Bernard was even well-documented enough to provoke the embedded AI to provide a summarized and cited overview.

I learned quickly and abundantly from this information, readily available. Bernard was enough of a character to earn several articles by historians dedicated to his biographical record and an oral history project constructed to document his influence. His professional background was unearthed first, his legacy deeply entrenched within his relentless work publishing California legal treatises. He got his start in this career as a wayward student at the School of Law at the University of California, Berkeley—then known as Boalt Hall.¹ There he developed comprehensive outlines of the curriculum that allowed him to successfully complete his degree, though rarely attending class. He used these outlines to his capital advantage, selling his work to classmates. After

¹ Tor Haugen, *How the Discovery of a Racist Speech Led to the Denaming of Berkeley’s Boalt Hall*, BERKELEY LIBRARY, UNIVERSITY OF CALIFORNIA (Jan. 30, 2020); UC BERKELEY LAW, *A Time for Change: Contextualizing the Removal of “Boalt Hall” from the Law School’s Identity* (last visited June 29, 2025).

graduating, Bernard continued this business in legal summaries while working in the California judiciary.²

Bernard served as Associate Justice William Langdon's law secretary, then as Justice Phil Gibson's law secretary, then as the Reporter of Decisions for the California Supreme Court, a role requiring the summation and organization of case records from the supreme and appellate courts. Though he left this employment in due time, Bernard continued a lifelong relationship with the Court. After his death in 1995, the Court held a first-of-its-kind memorial session, honoring a friend who was neither justice nor staff but a critical presence nonetheless.³ In time, Bernard also became the only person who had not served on the Court with a manuscript collection held in the Court Historical Society archives.⁴ He was a substantial contributor both ideologically and financially to the development of judicial education practices in California. Bernard's legacy as a law librarian is recognized in the naming of the Witkin State Law Library at the California State Library in San Francisco, and the Alameda County Witkin Law Library across the Bay in Oakland.

Amongst these notable professional highlights, elements of Bernard's personality and private self were scattered. From these and more, I gathered not just his professional prowess but also his unique personal qualities. Bernard was a beloved and funny man. He was known for his satire, accepted as a trusted source even by those he criticized. As a speaker, he twice introduced California Supreme Court justices with the phrase, "Who wants biography?," before going on to throw comic jests at the judges.⁵

Beyond the judicial world, Bernard was an avid gardener proud to show off his work to house visitors.⁶ My eye was also caught by his archival holdings at the University of California, Davis, cataloged as a "Collection of science fiction serial publications & assorted books." The archive reveals a particularly well-loved hobby of Bernard's, reading fiction, with an inventory that lists an abundance of crime and detective novels.⁷

² *Bernard E. Witkin Biography*, CALIFORNIA STATE LIBRARY (accessed June 29, 2025); John R. Wierzbicki, *A Lawyer by Accident: Bernie Witkin's Early Life and Career, Part 1: A Suitable Replacement*, CALIFORNIA SUPREME COURT HISTORICAL SOCIETY REVIEW (Fall/Winter 2020) 27.

³ *In Memoriam Bernard E. Witkin*, CALIFORNIA SUPREME COURT HISTORICAL SOCIETY (December 3, 1996).

⁴ Martha Noble and Noah Pollaczek, *Creating a Repository for California Judicial History*, CALIFORNIA SUPREME COURT HISTORICAL SOCIETY NEWSLETTER (Spring/Summer 2015), 10.

⁵ Bernard E. Witkin, *Through Bernie's Binoculars*, CALIFORNIA SUPREME COURT HISTORICAL SOCIETY NEWSLETTER (Spring/Summer 2007), 2.

⁶ Hal Norton, *Remembrances of a Legend*, THE CALIFORNIA BAR JOURNAL (February 1996).

⁷ *Bernard E. Witkin Collection*, UNIVERSITY OF CALIFORNIA DAVIS SPECIAL COLLECTIONS (last accessed June 29, 2025).

Bernard also carried deep, influential concerns around notoriety, security, and privacy. He routinely declined to participate in his own biography by way of oral history,⁸ despite maintaining personal records enough to fill 60 linear feet at the California State Library archive. He was constantly at odds with the genius reputation of his older brother Zara, who consulted on engineering projects in the Soviet Union from 1932 to 1934.⁹ He was highly protective of his work product, maintaining a vault in his home for the storage of his manuscripts and purchasing a small fireproof lockbox to deliver his final typewritten manuscripts for publication.¹⁰ This eccentric attitude and fear also permeated his legal work, wherein he repeatedly pushed for increased protections from “uncontrolled crime.”¹¹

It was clear from obituaries that Bernard died loved by a wife, Alba.¹² The same Alba supplied the secondary namesake of the Bernard and Alba Witkin Foundation, an organization found amongst the many online references to Bernard. As compared to other resources, the Foundation website paid particular attention to who Alba was. The “History” page introduces the couple as a unit, then provides a short summation of Bernard’s accomplishments followed by a longer, detailed description of the many substantial impacts Alba made on the local community supported by the philanthropic Foundation. On this particular site, while Alba arrives second to the history, she is meaningfully made the primary subject.¹³

A2: Alba in the Archives

While Bernard’s name led me to direct sources of biographical information, Alba is a more mysterious figure. Spurred on by the Foundation website and by a feminist curiosity as to the forgotten wives of remembered men, I adjusted my search to now center Alba as the character of interest. The process produced dramatically different results than my inquiry into Bernard, requiring significantly more effort to uncover significantly less information.

⁸ John R. Wierzbicki, *Knowing Bernie: The Witkin Oral History Project*, CALIFORNIA LEGAL HISTORY 18 (2023), 301.

⁹ Wierzbicki, *supra* note 2.

¹⁰ John R. Wierzbicki, *Epstein on Witkin: A Conversation with Norm Epstein About His 15-Year Association with Bernie Witkin*, CALIFORNIA LEGAL HISTORY 18 (2023), 19.

¹¹ Bernard E. Witkin, *Freedom and Judicial Security: The Judicial Creation of Fundamental Rights* in VITAL SPEECHES OF THE DAY 49(19), 595.

¹² Norton, *supra* note 6; Wolfgang Saxon, *B.E. Witkin, Legal Scholar and Author, 91*, THE NEW YORK TIMES (Dec. 26, 1995); Nancy McCarthy, *The Passing of a Legal Giant*, THE CALIFORNIA BAR JOURNAL (February 1996); Myrna Oliver, *Bernard Witkin, Expert on California Law, Dies*, LOS ANGELES TIMES (Dec. 28, 1995); Harriet Chiang, *OBITUARY - Bernard Witkin*, SF GATE (Jan. 12, 1996).

¹³ *Our History*, BERNARD AND ALBA WITKIN FOUNDATION (accessed June 29, 2025).

I began in the same manner as I had with Bernard, looking to DuckDuckGo and Google for an overview of materials responsive to the search term “Alba Witkin.” I came prepared with information about Alba from the Foundation website and sparing mentions of her throughout histories of Bernard. Unlike Bernard, there were few readily available biographies to educate me on Alba’s person. Alba had no Wikipedia page and no easily sourced biography hosted by the California government. This search primarily provided superfluous information in the form of obituaries and a few award acknowledgements—many to both Bernard and Alba and few to Alba alone—echoing much the same information as the Foundation shared. Despite the lack of content, from these sources I gleaned a few new biographic elements that led the search back in time beyond when Alba took on the Witkin name. With the addition of maiden names and the surname of her prior husband, Alba gradually took on more attributes beyond her role as a wife of Witkin.

The more novel discoveries of Alba could only be made by departing from the digital sphere and seeking her out in the archives. A search of the California Online Archive catalog revealed, as expected, that Alba’s name was scattered among the materials in the Bernard E. Witkin collection at the California State Library. These materials would center Bernard, as per usual, but could lend insight into the wife that stewarded his legacy.

More remarkable was the discovery of an oral history with Alba archived among the records of the Berkeley League of Women Voters at the Bancroft Library at the University of California, Berkeley. This record was focused on Alba alone, in her role as a community member rather than her role as a wife. Performed in 1994, the oral history collection marked the 75th anniversary of the League’s Berkeley chapter. In my eyes, the presence of Alba amongst these records characterized the woman quite differently than her more stifled, supporting character found among Bernard’s narratives. This was a woman with her own identity, even if that identity had faded from legal history.

Armed with foundational knowledge from the digital record, I reached out to both the California State Library and the Bancroft Library to visit their archives. My intent then was to understand Alba; what follows here, built from that understanding, is my attempt to celebrate Alba and her remarkable influence on Bernard Witkin, California, and her local community.

Part B: Uncovering Alba Blanche Pichetto Kuchman Witkin

B1: Alba Blanche Pichetto

Alba Blanche Pichetto was born in Paterson, New Jersey on November 15,

1919, to Peter and Rose Pichetto.¹⁴ Only a few months earlier, Paterson was one target in a series of anarchist bombings throughout the country, becoming known as a central gathering place for the anarchist community.¹⁵ There is little recorded about Alba's early years on the East Coast.

In 1929, Alba and her family moved to California, where Alba would reside for the remainder of her life. After high school, Alba attended Fresno State College and joined the Delta Sigma Epsilon sorority. While her sorority ranked third in grade point averages of all sororities on campus, Alba and her perfect 3.0 ranked as the highest GPA of any sorority member at Fresno State in 1939.¹⁶ The same year, Alba acted as chairman planning the annual Northern California–Nevada International Relations Conference; the *Fresno Bee* acknowledged her work on the conference under the feature headline, “Plan Friendlier Relations.”¹⁷ Though she also ran for the inaugural role of Women’s Legislative Commissioner among the student officer positions at Fresno State College, she was second in this election to one Roscille Phillips.¹⁸

Alba spent significant time invested in the activities at her school. In her final year at Fresno State College, she was a member of the Spanish club El Circulo Español and President of the California Beta Chapter of Pi Gamma Mu, a coed national honor society for the social sciences. She also served in a number of roles supporting women’s societies, acting as an officer for Delta Sigma Epsilon, Vice-President for the women’s social organization Phrateres, President of the Tokalon Women’s Honor Society,¹⁹ and Vice-President of the Association of Women Students. She was highlighted as a “Prominent Senior” in the campus yearbook. Alba graduated as valedictorian from the College with a degree in Economics in 1941, claiming the highest GPA in her class and serving as one of two speakers representing the graduates.²⁰

Immediately after college, Alba matriculated to Stanford University to pursue a master’s degree in Public Personnel Administration. At this point in history, the United States was thoroughly involved in World War II, with many men conscripted into service. Following the wave of feminist reform brought on by earlier suffragettes, women found themselves more able to step into

¹⁴ Pichetto—*Death Notices*, THE SACRAMENTO BEE (Nov. 13, 1973), 36.

¹⁵ James O’Neill, *How Bomb Blasts a Century Ago Launched the Red Scare and a Raid Against Paterson Anarchists*, NORTHJERSEY.COM (May 31, 2019).

¹⁶ Jean Kautenberg, *OmeGas Lead Grade Points*, THE DAILY COLLEGIAN (Dec. 1, 1939).

¹⁷ Staff Photos, *Plan Friendlier Relations*, THE FRESNO BEE – THE REPUBLICAN (Nov 2, 1939).

¹⁸ *College Student Officers Named*, THE FRESNO BEE – THE REPUBLICAN (Dec. 14, 1939).

¹⁹ See Rachel Lewis, *A Fresno State Honors Society Has Closed Its Door After Nearly 100 Years*, THE FRESNO BEE (July 8, 2020).

²⁰ *The Campus 1941*, ASSOCIATED STUDENTS OF FRESNO STATE COLLEGE (June 1941), 33, 39, 40, 50, 191, 204, 207, 218.

programs and jobs once reserved only for the male sex. For Alba to pursue a master's degree at this time was somewhat unique. While attending Stanford, Alba worked on staff for the Dean of Women, Mary Yost.²¹

Upon graduating from Stanford in 1942, Alba sought employment. That May, the United States responded to the bombing of Pearl Harbor by forcing Japanese Americans into concentration camps. In an early instance of her lifelong dedication to civil rights and education, Alba worked a short term for the American Friends Service Committee. Her role with this Quaker organization involved assisting Japanese American college students in obtaining the necessary documents—references, sponsorships, admissions, and more—to leave World War II internment camps and attend Midwestern and Eastern American colleges.

Alba performed this work for a year, operating out of a vacated Japantown YWCA in San Francisco.²² The tension of World War II, including intensely increased anti-Asian and anti-Japanese sentiment followed her operations. She “thought that internment was a violation of a citizen’s right to be free,” but also characterized the period as “a time when activists didn’t carry signs and placards.”²³ Alba later reported that she found Eleanor Roosevelt’s work to be an inspiration during this era; Alba felt Roosevelt was concerned about access to education for girls, and connected this to developing her own desire to help children.²⁴

Alba described her AFSC employment as foundational to her personal growth, instilling in her values of nonviolence, conscientious objection, and peace. As would be characteristic of her work throughout life, she remained loyal to the American Friends Service Committee even after moving on from her job there. The Committee recognizes her as a former staff member on their website and notes that she sent a financial donation annually for seventy years, until her death, totaling \$1,147,500.²⁵

After a little less than a year in this position, Alba moved to Sacramento. There she took a position as a personnel technician for the State personnel board. To secure the position, Alba was required to take a civil service test qualifying for the role; based on the results of that test, she and another

²¹ Carl Kuchman *Weds Miss Alba Pichetto*, THE SACRAMENTO BEE (Oct. 14, 1946) 13; Women @ Stanford, *Students & Leaders*, STANFORD UNIVERSITY LIBRARIES (accessed June 29, 2025).

²² American Friends Service Committee, *I Was a Staff Member: Alba Pichetto Witkin*, PEACE WORKS (accessed June 29, 2025).

²³ Ora Huth, Transcription of Interview with Alba Witkin (May 21, 1994) from League of Women Voters Oral History MSS 2004/162c, Carton 9:34, 1 (on file with Bancroft Library at University of California, Berkeley).

²⁴ Alameda County CA, *Alba Witkin—PHILANTHROPY*, YOUTUBE (Apr. 8, 2014).

²⁵ American Friends Service Committee, *supra* note 22.

woman were hired. Though she received the job, she was informed by the hiring executive officer that he did not find women to be desirable candidates, did not wish to hire women, and the job was hers solely because she earned the highest score on the civil service test. Alba recalled her first day of work, January 4, 1943, was the same day as Earl Warren's inauguration as governor. The inauguration would have occurred across the street from the Personnel Board at the State Capitol.²⁶

Warren would go on to become Chief Justice of the Supreme Court of the United States, and would later be criticized by Bernard Witkin for his positions on criminal justice. Where Warren affirmed rights for the accused, like the need for Miranda warnings and due process, Bernard Witkin was invested in an efficient and therefore expeditious judicial law enforcement system. For Bernard, the cautions that Warren valued were detrimental to an effective system.²⁷

Alba regularly visited the Stanford Alumni club to build connections in Sacramento, and within a year of arriving also joined the Sacramento League of Women Voters. Here she developed many of her first Sacramento friendships through participation in the League, friends described as “educated women” and “mostly teachers, librarians, and social workers, the jobs open to women at that time.”²⁸ Alba was drawn to the work of the League because from her perspective, they focused on presenting objective information through a nonpartisan approach. Like her future second husband, she found that she enjoyed working on informational publications, such as pros and cons lists for ballot initiatives.²⁹ Her steadfast commitment to the organization would eventually lead to the request that she participate in the Berkeley League of Women Voters oral history.

While a member of the Sacramento League, Alba served in several officer positions, though she never acted as president as the opportunity arrived while she was deeply entrenched in motherhood. As a League representative, she worked as an advocate for women's rights in the California legislative system. She and other members of the League regularly attended legislative sessions at the Capitol and met with state legislators, acting as women watchdogs for the majority male state governance. She collaborated with Margaret Howard at the Young Women's Christian Association and worked regularly with Ev Clare and Kate Nachtrieb, the League's paid legislative advocates for the merit system in

²⁶ Huth, *supra* note 23 at 1.

²⁷ Bernard E. Witkin, *Speech at Commonwealth Club of California: Criminals and the Warren Court* (Dec. 1, 1978).

²⁸ Huth, *supra* note 23 at 2.

²⁹ *Id.* at 3.

California.³⁰ The merit system was precisely how Alba had earned her job as a personnel technician, the principle of the system being that government jobs should be awarded based on fitness rather than political concerns. Eventually, Alba came to take over Nachtrieb's work for the final years of the League's merit system advocacy, into the mid-1950s. She proudly attributed to the League the failure of a 1950s bill introduced by Senator George Miller that would have removed state employment jobs from the statewide civil service system.³¹

B2: Alba Pichetto Kuchman

In 1946, slowly connecting with Sacramento society, Alba married Carl Kuchman and ceased formal employment. The Kuchmans were well known in town, a second-generation Sacramento family with wealth earned in part by a patriarch operating the men's department of a downtown Hale Brothers department store. Carl likely met Alba through his connection to Hales, thanks to Alba's Aunt Kate who operated the Hale's hat department. Aunt Kate and Carl frequently traveled to New York City together to shop for the store.³²

The engagement was announced in the *Sacramento Bee* on September 3³³ and the wedding announcement followed on October 14; the couple wed at the home of Carl's mother Pauline, Alba's new mother-in-law. A California honeymoon traveling between San Francisco, Santa Barbara, and Monterey followed. At the time, Carl had just returned from three years of military service, a Harvard law graduate now working at the law office of Anthony Kennedy Sr.³⁴ He had previously attended Stanford for his undergraduate degree. Marriage to Carl provided Alba with significantly more access to Sacramento social life, as the Kuchmans were members of multiple local social clubs that Alba, as a woman and Sacramento outsider, had no access to. Among these clubs were the Sutter Club, with notable members such as Earl Warren and Anthony Kennedy, and the Del Paso Country Club, both historically open only to men, sometimes to their wives.³⁵

The couple had three children by 1960,³⁶ named Richard, Lisa, and Kenneth.³⁷ Carl reportedly approved of Alba's participation in civic activity

³⁰ *Id.* at 2.

³¹ *Id.* at 4.

³² *Id.* at 3.

³³ *Miss Alba Pichetto Announces Troth*, THE SACRAMENTO BEE (Sept. 3, 1946) 13.

³⁴ THE SACRAMENTO BEE, *supra* note 21.

³⁵ Huth, *supra* note 23 at 3; *Club History*, The Sutter Club (accessed June 29, 2025).

³⁶ Huth, *supra* note 23 at 4.

³⁷ *Alba Witkin Obituary*, EAST BAY TIMES (Jan. 1, 2015).

outside the home and watched the children himself or hired a babysitter when she was away. Alba, by comparison, found her activities within the home as a mother to be stifling, inhibiting her from achieving greater successes for the League.³⁸ Despite this sentiment, Alba managed to participate in numerous civic commitments throughout her time in Sacramento.

Initiated through League connections, Alba was elected to the board of directors of the Sacramento Young Women's Christian Association, where she served for several years. Through both Carl and her aunt, Alba secured a lifelong connection with Eleanor McClatchy and the McClatchy family; they owned a large share of the local newspaper industry including the *Sacramento Bee*. Alba made great use of this connection when she later ran for school board, receiving the sponsorship of the paper.³⁹ She was successfully elected to the board of the Sacramento Unified School District twice, serving from 1961 to 1965.⁴⁰

Carl died in 1967 at age 55, leaving Alba widowed with three children.⁴¹ His death was eventful, making front page news for the *Sacramento Bee*. Carl had collapsed behind the wheel of his car, driven through the wall of a home, and died alongside the woman residing within.⁴²

For the decade following Carl's death, Alba took up a part-time paid position at the Alta California Regional Center. Alba worked for the Center, a disability service provider, during an era of profound legal and social reform surrounding the treatment of people with disabilities. Alba began the role in the wake of the Lanterman Mental Retardation Act passage, which significantly shifted the landscape of Californian institutional disability care. The Act later became known as the Lanterman Developmental Disabilities Services Act and persists to this day, providing for the rights of people in California with developmental disabilities. The Regional Center served over 2,000 patients and was one of many developed throughout the state to provide care to disabled individuals then labeled as retarded. At the time, localized treatment was a new ideology as California began moving away from mass institutionalization at remote locations.⁴³ Alba eventually became executive secretary⁴⁴ for the Center, supporting the development of Sacramento's disability care with a focus on "budgeting, hiring, personnel and other aspects."⁴⁵

³⁸ Huth, *supra* note 23 at 2.

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 2; *Board of Education Members from 1965 to Present*, Sacramento City Unified School District (accessed June 29, 2025).

⁴¹ *Death Notices—Kuchman*, THE SACRAMENTO BEE (June 16, 1967), 42.

⁴² *Driver Dies, Car Steerves, Kills Woman*, THE SACRAMENTO BEE (June 15, 1967), 1.

⁴³ *History of Regional Centers & the Lanterman Act*, Alta California Regional Center (accessed June 29, 2025).

⁴⁴ *On the Scene*, THE SACRAMENTO BEE (June 9, 1976), 39.

⁴⁵ Huth, *supra* note 23 at 4.

While raising three children as a single parent and working for the Center, Alba continued to take on volunteer civic roles. The year of Carl's death, Alba served as a member of the Northern Subcommittee to the California State Advisory Committee on Civil Rights, the designated California body for the U.S. Commission on Civil Rights.⁴⁶ There she participated in a number of meetings and publications on civil rights issues local to California.

For the purpose of committee records, Alba is repeatedly referenced solely as a Ms. or Mrs. Carl Kuchman in a number of reports delivered to the U.S. Commission. These reports address various concerns local to California. One focuses on civil rights issues in Oakland, California, identifying severe underemployment and evidence of racialized employment discrimination for Black and Mexican residents.⁴⁷ Multiple reports address concerns on behalf of Mexican Americans in California, including challenging Los Angeles education practices that placed Spanish speakers in classrooms for disabled children and challenging the lack of Mexican American political representation in California governance. Preparing the report for the latter subject, Alba oversaw California politician Jesse Unruh's testimony concerning the reapportionment of district lines and the impact on Mexican Americans.⁴⁸

Near the end of her time in Sacramento, Alba also served as both Vice-President and President of the City Civil Service Committee. She was the very first woman appointed to the role,⁴⁹ though her nomination was hotly contested by a council member committed to adding Chicano representation to the Committee.⁵⁰ As a Committee member, she furthered her merit-based mission work by advocating to remove barriers to employment, including voting in a contentious conflict to change a city law requiring firefighters to have high school diplomas.⁵¹

Alba frequently used her time on the School Board and the City Civil Service Committee to win sway from a number of newspaper readers,

⁴⁶ Memorandum from Alba Witkin to Louise Nagle on Biography of Alba (May 10, 1994) from League of Women Voters Oral History MSS 2004/162c, Carton 9:34 (on file with Bancroft Library at University of California, Berkeley); *Civil Rights in Oakland, California: A Report of an Open Meeting by the Northern Subcommittee of the California State Advisory Committee on Civil Rights*, California State Advisory Committee to the United States Commission on Civil Rights (August 1967) 1.

⁴⁷ California State Advisory Committee, *supra* note 46 at 5.

⁴⁸ *Education and the Mexican American Community in Los Angeles County: A Report of an Open Meeting by the California State Advisory Committee on Civil Rights*, California State Advisory Committee to the United States Commission on Civil Rights (April 1968) 21; *Transcript of California Advisory Committee Open Hearing on the Problem of Political Representation of the Mexican-Americans in the State of California*, Vol. II (Jan. 22, 1971).

⁴⁹ *Council Puts Woman on Service Board*, THE SACRAMENTO BEE (Jan. 10, 1975), 21; *Sworn In*, THE SACRAMENTO BEE (Jan. 18, 1975, 2); *Italy Boys' Town Founder Honored*, THE FRESNO BEE (May 11, 1975), 76.

⁵⁰ Manuel Valencia, *Woman May Be Choice for City Civil Service Board*, THE SACRAMENTO BEE (Dec. 24, 1974), 9.

⁵¹ *City Firefighters Can Be Younger*, THE SACRAMENTO BEE (Jan. 5, 1978), 30; *Firefighter Qualification Vote Blocked*, THE SACRAMENTO BEE (Dec. 22, 1977), 30.

expressing her opinions in support of school integration, civil service tests, and minority job placement services through quotes and letters to the editor in the *Sacramento Bee*.⁵²

Beyond this service, Alba also spent time as a member of two County boards, the City-County Human Relations Board and a “blue-ribbon” committee to modify the County Charter sections on Civil Service.⁵³

B3: Alba Kuchman Witkin

While the story of their meet-cute eluded my searches, Alba ultimately married Bernard Witkin in 1978. She was Bernard’s third wife, following one divorce and one widowhood for Bernard. Alba quickly left Sacramento and moved into the home he owned in Berkeley, which he reported to her had eleven rooms. Upon moving out of her three-bedroom home and into Bernard’s residence, Alba counted a total of seventeen rooms. The property itself covered nine city lots.

Her role administering the Witkin legacy began as soon as she took office—ahem, signed the marriage contract. Bernard, 73 at the time, was primarily occupied with the updating of his legal treatises. Alba quickly took on a number of administrative duties assisting her husband in his profession day-to-day, as well as much of the labor of a housewife. Though thoroughly enmeshed in the work of the other, the two diligently kept their responsibilities separate. Alba took no part in the legal writing that her husband authored. Having once provided edits that Bernard disregarded, she concluded of his work: “There is no need to correct perfection.”⁵⁴ Winslow Small, an advisor to Bernard on the Witkin legal treatises, described their organizational styles as definitively different. While Bernard “organized around shoe boxes and piles,” Alba wanted “filing cabinets, filed alphabetically.” Alba maintained this system for her own records.⁵⁵

When interviewed, Alba claimed, humorously but with an element of truth, that Bernard would not have married her if not for her driver’s license, as she did all the driving for the couple. The two found themselves in a household practice wherein Bernard “spends a lot of his time writing articles and books” and “Alba runs everything else.” For the remainder of Bernard’s life, Alba took

⁵² *Human Relations Unit Backs Tax Override*, THE SACRAMENTO BEE (January 9, 1969), 4; Alba Kuchman, *For Measure A*, THE SACRAMENTO BEE (Oct. 20, 1971), 22; George Williams, *Sacramento Tries to Put Minority Group People in Apprentice Jobs*, THE SACRAMENTO BEE (Dec. 1, 1968).

⁵³ *Minutes of Civil Service Board Regular Meeting*, City of Sacramento (Feb. 1, 1977); *Minutes of Civil Service Board Regular Meeting*, City of Sacramento (March 7, 1978).

⁵⁴ Huth, *supra* note 23 at 4.

⁵⁵ Wierzbicki, *supra* note 8 at 314.

“care of the roses, the pool and tennis court, taking clothes to the cleaners, bill paying, hotel arrangements, packing, travel tickets, and calling taxis.”⁵⁶ This depiction, provided by Alba in the formality of her League of Women Voters interview, does her even less justice than she is due.

Reviewing the Bernard Witkin archive for mention of Alba reveals the salience of her influence on Bernard’s final years and afterlife. Correspondence from this time is repeatedly addressed to Alba, providing her with the necessary details to facilitate Bernard’s presence at upcoming honorings and speaking engagements. In many post-mortem cases, that meant showing up stag in her husband’s stead.⁵⁷

Alba was frequently a conduit to Bernard, sometimes for communications the true speakers knew Bernard did not want to receive. Nearing the end of Bernard’s life, she received a letter from a James E. Sabine of Brigham Young University’s J. Reuben Clark Law School, beginning “Dear Alba: Since Bernie once said to me ‘I don’t write letters’ and I have found that to be true, I thought I would get even with him by writing this letter to you.”⁵⁸ The letter goes on to speak to legal matters familiar to Bernard and foreign to Alba.

In a similar vein, after a chance encounter at the Berkeley Public Education Foundation, Alba received a letter from an employee of the Bancroft Library Regional Oral History Office. Directed to her explicitly, the writer—a difficult-to-discern name that may be William Bowes—requests a copy of a video made for Bernard’s 90th birthday, to contribute to a Bernard Witkin collection at the Library. Nestled under this first request is a second, an indirect push for Alba to encourage Bernard’s participation in an oral history project.

On the letter, written in black ink on Bancroft Library letterhead, the two asks are underlined in red marker. In Bernard’s hand and the same red marker, to the left of the mention of oral history, is written, “NO I have made this clear again and again.”⁵⁹ This forceful resistance to his own notoriety was characteristic of Bernard, who was the first Reporter of Decisions to remove

⁵⁶ Huth, *supra* note 23 at 4.

⁵⁷ Letter from Linda Orgham, Program Director of California Judges Association to Alba Witkin (1994) from Bernard Witkin Collection Box 2 Folder 6 MSS 0701 (on file at California Judicial Center Library); Letter from Kevin Corbett to Alba Witkin (October 1, 1989) from Bernard Witkin Collection Box 1 Folder 31 MSS 0701 (on file at California Judicial Center Library); Letter from Judith D. Ford to Alba Witkin (February 26, 1998) from Bernard Witkin Collection Box 2 Folder 14 MSS 0701 (on file at California Judicial Center Library); Minutes of Meeting on Renaming the Alameda County Law Library (March 29, 1996) from Bernard Witkin Collection Box 34 Folder 12 MSS 0701 (on file at California Judicial Center Library).

⁵⁸ Letter from James E. Sabine, Brigham Young University J. Reuben Clark Law School, to Alba Witkin (October 24, 1994) Box 11 Folder 21 MSS 0701 (on file at California Judicial Center Library).

⁵⁹ Letter from Unknown Sender, Bancroft Library Regional Oral History Office at University of California, Berkeley, to Alba Witkin (July 19, 1995) Box 2 Folder 5 MSS 0701 (on file at California Judicial Center Library).

his surname from the bindings of his court reports.⁶⁰

This is an area where Alba's influence had great consequences for Bernard's legacy. During his lifetime, Alba encouraged philanthropy under the Witkin name, establishing the Bernard E. and Alba Witkin Charitable Trust in 1982 after four years of marriage.⁶¹ Though Bernard had previously participated in some amount of wealth distribution (he reportedly donated \$250,000 toward a judicial education foundation in 1969⁶²), he did not appear very interested in investing his time in the philanthropic process. Alba made up for this with her years of experience in community services.

Alba also may have had different political notions than Bernard, which encouraged her to redistribute the Witkin wealth. By comparison to Bernard, Alba was critical of California's criminal justice system, which at the time in the late twentieth century was manufacturing what became known as mass incarceration. Responding to the major contention of the time, the three-strikes rule, Alba saw that "three strikes and you're out wins a tremendous vote" but found the concept "ridiculous" when put into practice. Her work with the Charitable Trust was in part an attempt to counter adult criminalization by focusing on youth resourcing and empowerment. From her perspective, Bernard wasn't interested in money, but in "producing what the law was: good, bad, or different." Until she showed up, he had not considered what he would do with all that his legacy was worth.⁶³

Alba put her administrative training to great use as the primary operator of the Bernard and Alba Witkin Foundation—the current name of what was the Charitable Trust. While he was alive, 30 percent of Bernard's yearly income was deposited into the fund, the maximum allowed by law. Alba facilitated a number of philanthropic efforts, including with the Alameda County Bar Volunteer Legal Services Foundation. In that instance, Bernard made clear that the philanthropic funds were the purview of Alba. He returned edits on a proposed introduction that spoke of "The Witkin Foundation" providing for "the needy, the homeless, and the hungry." Bernard directed the author to correct the name to the "Bernard E. and Alba Witkin Foundation" and to speak directly with Alba as to the description of their purpose.⁶⁴

⁶⁰ Edward W. Jessen, *Headnotes About the Reporters 1850-1990*, CALIFORNIA SUPREME COURT HISTORICAL SOCIETY NEWSLETTER (Spring/Summer 2007), 7.

⁶¹ BERNARD AND ALBA WITKIN FOUNDATION, *supra* note 13.

⁶² Draft Remarks by Kevin M. Corbett Introducing Bernard Witkin for the Alameda County Bar Association Foundation Dinner (1989) from Bernard Witkin Collection Box 1 Folder 31 MSS 0701 (on file at California Judicial Center Library).

⁶³ AlamedaCountyCA, *supra* note 23.

⁶⁴ Draft Remarks by Keven M. Corbett, *supra* note 62.

Throughout her tenure running the Foundation, she was particularly attentive to minimizing administrative expenses. She prioritized organizations with large volunteer bases to ensure that donated funds went into services rather than salaries. Access to funds was based purely on a willingness to ask Alba and be considered; she minimized the bureaucracy of philanthropy, writing the checks herself for her husband to sign.⁶⁵ She was reportedly proud of the Foundation's minimal expenses, running a tight operation that in 2006 contributed 98.2 percent of its distributions to charitable causes, the remaining 1.8 percent going to administrative costs.⁶⁶

Alba's interests directed much of the funding, though she was drawn into the legal field by her husband's reputation as well. Funds were regularly directed at schools, libraries, and hospitals as well as invested in advocacy on current event issues; for her part, Alba was against the war in Iraq and against nuclear proliferation.⁶⁷ Alba also continued to be interested in civic engagement during her time in the Bay Area, though much of her energy was taken up by Bernard's activities.

Around 1994, Alba participated in a school naming ceremony hosted by the California Historical Society, recognizing an early librarian of California history. She made consistent attempts to connect with the Berkeley League of Women Voters, though her social life consistently called her back to Sacramento during her early years with Bernard.⁶⁸ Her participation in the League was in many ways tied up with her emergent theories of womanhood, a framework she developed throughout her life alongside a quickly changing nation. She was forever invested in bringing female representation into government processes, believing "women bring a different point of view" that results in a work product "enhanced by their consideration, nurturing, unifying efforts, and their compassion and humanitarian outlook."⁶⁹

Alba was perhaps the feminine presence her husband needed, in her view of their gendered dynamic. Alba was practiced in social navigation from her many years building persuasive relationships with legislators and voters. She had long fought for women to be in positions of power. Bernard was more flippant with his social views, sometimes at the explicit expense of the women

⁶⁵ Lisa Alcalay Klug, *Philanthropic Couple Provide a Model of Generous Efficiency*, SFGATE (July 31, 1995).

⁶⁶ Charles Burress, *Publicity-Shy Philanthropist "A Great Lady"*, SFGATE (December 29, 2008).

⁶⁷ *Id.*; Klug, *supra* note 65.

⁶⁸ Huth, *supra* note 23 at 5.

⁶⁹ *Id.* at 4.

in the room.⁷⁰ Alba balanced this emotional carelessness with her compassion, entangling the Witkin name with humanitarian and civic services that shaded Bernard, attaching his notoriety to generosity.

In addition to attending League brownbag lunches and donating to League auctions, she also took up roles on the boards of several East Bay organizations, including the UC Botanical Garden and the University YWCA. She served for several years on the Alameda County Grand Jury, getting a taste for the judicial side of the law that her husband favored. In 1994, when the Berkeley League of Women Voters celebrated their 75th anniversary, Alba's longtime commitment to multiple California chapters of the League earned her a phone call from Ora Huth requesting an oral history.

Though Bernard's death was less catastrophic than Carl's, it made news across the country.⁷¹ Bernard suffered a heart attack and passed away in his home in 1995.⁷² In the wake of his death, Alba slowly made her way through their contacts, meticulously documenting each person she called and each message she received.⁷³ As she grieved and transitioned into a new era, twice widowed, she spent considerable time on the collection and preservation of Bernard's records and the persistence of their jointly named Foundation.

Bernard's passing also opened up new opportunities for the Witkin legacy. Alba, like many people surrounding her husband, wanted to honor his name. By 1996, Alba was in conversation with the Alameda County Law Library Foundation regarding the naming of the library, or a portion thereof, after Bernard. Within that meeting and in her remarks at the dedication, Alba acknowledged the differential between Bernard's refusal to be a namesake while alive and her wish to lend his name out.⁷⁴ Her efforts in this and other similar dedications allowed Bernard to maintain this humble principle to his death and yet remain memorialized beyond the lifespan of those who knew him truly.

Running the Bernard E. and Alba Witkin Foundation was ultimately Alba's primary occupation until her own death, persisting in awarding funds

⁷⁰ See Bernard Witkin 90th Birthday Celebration Program with the Alameda County Bar Foundation (1994) from Bernard Witkin Collection Box 2 Folder 2 (on file at California Judicial Center Library), containing a portrait of Bernard in a shirt printed with the word "Discretion" and captioned "Is it true Women Judges do it with discretion?"

⁷¹ Saxon, *supra* note 12; McCarthy, *supra* note 12; Oliver, *supra* note 12; Chiang, *supra* note 12.

⁷² Oliver, *supra* note 12.

⁷³ See Condolences Received and Notes Made by Alba Witkin (1995–1996) from Bernard Witkin Collection Box 2 Folder 11 MSS 0701 (on file at California Judicial Center Library).

⁷⁴ Minutes of Meeting on Renaming the Alameda County Law Library, *supra* note 57; Alba Witkin Notes for Remarks at Alameda County Law Library Dedication (n.d.) from Bernard Witkin Collection Box 2 Folder 17 MSS 0701 (on file at California Judicial Center Library).

and building philanthropic networks for seventeen years after this second widowhood. She continued to operate within the Bay Area, focusing her efforts in Berkeley, Oakland, and Alameda County. In 1998, the Foundation provided a notable gift to the School of Law at UC Berkeley to establish a clinical program for students. Under the care of Professor Charles Weisselberg, the program developed into a primary component of experiential learning at the school.⁷⁵ The Foundation continued to support the UC Berkeley School of Law clinical program as it evolved, providing another donation in 2013 to upgrade the physical space used by the clinics.⁷⁶

Alba was most drawn to programs supporting young people, and in 2004 participated in a fundraising drive for the Berkeley Public Library following the rejection of that year's Measure L, a bill that would have erased the \$1.2 million debt that the library carried at that time. The bill's rejection necessitated the need for a fundraising drive asking for assistance from community members. Of the \$100,000 reported to have been raised, Alba contributed \$40,000.⁷⁷ She also supported Berkeley Public Schools with regular donations to their Schools Fund over the span of her thirty years in the area.⁷⁸

For all these efforts, Alba also received honors all her own. The California Judges Association began awarding the Alba Witkin Humanitarian Award in 2005,⁷⁹ which was named for Alba at the suggestion of Court of Appeal Justice Elizabeth Baron.⁸⁰ The award most recently recognized such names as Judge Emily E. Vasquez (2024) and Justice Carol Corrigan (2023).⁸¹ She was inaugurated into the Alameda County Women's Hall of Fame in March 2014 for her philanthropy, at which point the Foundation had donated over \$15 million to local organizations.⁸²

In December of 2014, Alba passed away. Like Bernard, she suffered from a heart attack.⁸³

⁷⁵ [Experiential Learning/Clinical Program Home Page](#), UC BERKELEY SCHOOL OF LAW (accessed June 29, 2025).

⁷⁶ Andrew Cohen, *Home Sweet Home: In-House Clinics Celebrate New Space*, UC BERKELEY SCHOOL OF LAW (Sept. 24, 2014); Andrew Cohen, *Witkin Foundation Gift to Create New Space for Clinical Program*, UC BERKELEY SCHOOL OF LAW (Jan. 1, 2013).

⁷⁷ Matthew Artz, *Locals Open Wallets for Berkeley Public Library*, THE BERKELEY DAILY PLANET (December 17, 2004).

⁷⁸ Berkeley Public Schools Fund, *Alba Witkin 1919–2014* (January 2015).

⁷⁹ EAST BAY TIMES, *supra* note 37.

⁸⁰ *Philanthropist Alba Witkin Dies of Cardiac Arrest at 95; Was Widow of Legal-Treatise Writer Bernard Witkin*, METROPOLITAN NEWS ENTERPRISE (Dec. 30, 2014).

⁸¹ National Association of Women Judges, *Judge Emily E. Vasquez (Ret.) Honored by California Judges Association*, NAWJ (October 2, 2024); Merrill Balassone, *California Supreme Court Justice Carol Corrigan Honored with Humanitarian Award*, CALIFORNIA COURTS NEWSROOM (Sep. 28, 2023).

⁸² Alameda County Women's Hall of Fame, *Alba Witkin*, ALAMEDA COUNTY GOVERNMENT (accessed June 29, 2025); *Alameda County to Honor 12 Women at Annual Hall of Fame Ceremony*, MERCURY NEWS (Jan. 30, 2014).

⁸³ METROPOLITAN NEWS ENTERPRISE, *supra* note 80; EAST BAY TIMES, *supra* note 37.

Conclusion

A series of complicated relationships make up the legal history of California. The marriage of Alba and Bernard Witkin is one such relationship.

Perhaps Alba's most notorious role in history will be supporting Bernard Witkin and his legal legacy. We have her actions to thank for the collection of many of Bernard's records, memorabilia, and memories, both directly and through the continued work of the Foundation she established. The Foundation is now operated by her son, Kenneth Kuchman, and a board of directors. Kuchman is the sole employee.⁸⁴ Beyond continuing his mother's philanthropic endeavors, the Foundation is also responsible for the publication and reproduction of the Witkin collection archived at the California Judicial Center.⁸⁵

That collection, though abundant with information about Bernard, shares relatively little about Alba. Despite Alba's intensive support of Bernard's wellness and business, the two came together late in life and spent less than two decades together. They each lived very separate lives outside the period of their marriage; a truth perhaps reflected in the absence of Alba's own records from the Witkin archive. Within Bernard's boxes, Alba's name is most frequently invoked to solicit support of or for her husband. The two are mutually featured primarily where the Foundation is recognized. It is hard to tell what Bernard thought of his wife, as little personal correspondence between the two is currently available.⁸⁶

Alba shines much brighter when sought out on her own, for her voice in the League of Women Voters history and her changing names splattered throughout the local newspapers of California. Her many roles in service to her community and her state speak to a persevering loyalty and attentiveness. Having pursued her narrative from birth to death, her character is far more expansive than records of Bernard portray. Alba was on the ground, influencing the day-to-day lives of Californians, on a mission to lead with nurturance and compassion. She championed women and children while demonstrating enduring dedication to her husband. She nudged Bernard in the new directions, all the while carving her own name into the civic landscape.

⁸⁴ Adele Grunberg, *Kenneth Kuchman Community Spotlight*, VOLUNTEERING FOR OAKLAND (Feb. 26, 2016); *Leadership*, BERNARD AND ALBA WITKIN FOUNDATION (accessed June 29, 2025).

⁸⁵ *Finding Aid for Bernard E. Witkin Papers* MSS 0701, ONLINE ARCHIVE OF CALIFORNIA (accessed June 29, 2025).

⁸⁶ Some boxes of correspondence are still restricted, to open in 2045.

There is surely more to know on Alba, breadcrumbs which may be revealed through the releases of new Witkin histories or a new attempt at her digital excavation. Responsive scholars might pursue this thread or take a cue from my purpose—centering the woman Witkin—in their future work preserving Californian memories.

The search for Alba will not be complete so long as Bernard's surname prevails in history. This record serves as one more nudge in the direction of Alba, attending to the importance of her legacy.

