

Prostitutes, Coolies, Slaves, and Citizens: How Gender, Race, and Class, Constructed Citizenship and the Nation State during the Asian Exclusion Movement*

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NOTE: This Schmooze paper is not yet a systematic treatment of these themes. I am giving you several sections of an immigration chapter I'm working. Comments will be most welcome (3/4/08)

Introduction

It is a common assertion that American activists have been “taking it to court” more since the Roosevelt era than they did prior to that—that they seek to achieve what they cannot achieve through the policy making process by judicial determination. It is likewise claimed that a substantial reason why Americans pay more attention to the Supreme Court these days than in the past is that the Court has arrogated to itself the resolution of questions that are so difficult and messy to resolve through the political process. However, if we attempt to recover the role of attentive publics and activists in pressing their issues in court at particular moments in American history, we can quickly find that attention was focused on, and resources mobilized toward, the courts in general and upon the Supreme Court in particular, to resolve issues that were not handled by the political process to the satisfaction of these participants. By bringing it to court, these participants in the legal process played an important role in shaping what the law was. This can certainly be seen in the late 19th and early 20th centuries in the case of restrictions on naturalized citizenship for Asian immigrants and would-be immigrants.

Immigration had an important role to play in working out the contours of federalism in the post-Civil War decades. States, and subsequently the federal government, assumed the role of policing harms and excluding those that threatened from abroad. Late 19th and early 20th century immigration policy was integrally linked to changing relations between the federal government and the state with regard to regulation of harms and police powers, to changing understandings of the national commerce power, and to ways in which notions of sovereignty in the international arena (constructed in part by the Court) contributed to the lodging of responsibilities with the national government in lieu of with state and local governments. From 1875 forward, immigration in general but Asian immigration in particular provided the occasion for Congress to expand the range of its authority and control over the borders. State officials and state legislators continued seeking to carve out niches for state action over public nuisances, disease, and moral perils as power over immigration was nationalized. Immigration policy can be seen, then, as a combination of increasingly assertive federal power over the borders—which included the increasing reliance on official documents and passports—plus state

* The author would like to thank Abigail Graber, Michael Pollack, and Alyssa Work, Swarthmore College seniors, for their research assistance on this project.

action that made life for Asian immigrants who arrived discouraging and difficult to the point of signaling that they were generally unwelcome.

The question of admissibility to citizenship of Asians in America was one with important ramifications for American political development. Congress increasingly claimed the power to admit, exclude, and deport aliens. Executive branch bureaucracies and officials were empowered with quasi-judicial powers to perform these functions, and federal courts weighed in on the parameters of these powers. Organizations and litigators emerged that went to court on behalf of individual Asian Americans—and against. Federal courts became lightning rods for Asian exclusionist sentiment, and unpopular decisions resulted in organized efforts to curb the power of the courts. Struggles emerged between branches of the federal government for control over immigration decision-making, and over whether the federal courts could hear *habeas corpus* petitions. Federal judges on the west coast had dockets overflowing with *habeas* petitions from Asian immigrants, and yet some of these judges felt obliged to rule on the merits because treaties superseded contrary state or federal lawmaking. Well-aware of the need for workload reduction in the area of immigration, judges sometimes nevertheless were reluctant to relinquish judicial determinations to bureaucrats. As aliens and their advocates brought cases to court, immigration law drove important changes in administrative law.¹ Individual rights and the meaning of due process shifted in the interplay of courts, bureaucrats, and Congress.

Even after legislation upheld by the Supreme Court effectively stripped the judiciary of power to hear such *habeas* petitions, the Court continued to play an important role in pronouncing upon the meaning of statutes regulating admissibility to citizenship, and upon procedures and evidentiary hearings by the Bureau of Immigration—especially when these involved persons alleging to be American citizens.² Court decisions prompted new legislation, and new legislation Court decisions, demonstrating that courts were rarely the final word in what was a continuing political struggle. Only with the passage of the 1924 Johnson-Reed Act (the National Origins Act) did some kind of “settling” of the law occur—at least with regard to those we generally refer to as immigrants. American-born women whose citizenship was negated by marriage to foreigners ineligible for naturalization and who had lived with that husband abroad would continue to have to plead their case for American citizenship in U.S. courtrooms, and their citizenship was restored inconsistently and somewhat capriciously, at least into the mid-1930s.³

In the aftermath of the Civil War, suitability for admission to citizenship was being rethought on a variety of fronts, with analogies to the recently enslaved race rarely

¹ Gabriel J. Chin, “Regulating Race: Asian Exclusion and the Administrative State,” 37 *Harvard Civil Rights-Civil Liberties Law Review* 1, 3 (Winter 2002).

² Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Chapel Hill: University of North Carolina Press, 1995), 207-216.

³ Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (Berkeley: University of California Press, 1998), 143-149.

far from mind. African-Americans became citizens of the United States at a time when bourgeois women were agitating for voting rights, when the status of Indians and their capacity to assimilate was on the political agenda as a result of struggles over land and views about what it meant for the nation to protect children, when white male workers organized and defended their own notions of free labor against a spectre of coercion and forces that unmanned the worker, and the influx of Chinese in the American west provoked hostility and assertions that Asians were racially unfit for democratic citizenship. As Charles Merriam claimed of this period, political liberty was increasingly becoming linked to political capacity.⁴

Narratives about the lessons of the Civil War were being constructed on the west coast—where an Asian presence was beginning to be felt—as well as elsewhere, and processes of construction had important implications for immigration. Once slavery had been abolished and those of African heritage were clearly made citizens of the United States, Americans outside the South increasingly associated slavery with barbarism, and societies retaining slavery with lower levels of civilization. Many Americans, following the lead of social scientists of the day, believed that civilization was a racial affair, and that their own (white? Caucasian? Western European? there were important variations on this argument) stood in the lead. The division of labor between men and women was also a marker of advanced civilization for some female activists who contended that females were constructive, creative, nurturing, and ethical leaders in advanced civilizations such as their own; in more ‘primitive’ civilizations, women did not perform these specialized roles and might function more as beasts of burden.⁵

The question of suitability for citizenship was one that increasingly mapped onto thinking about racial differences.⁶ Whiteness was associated with more advanced civilization, darker races with earlier stages in human development. Beliefs about hierarchical achievement of civilization, progress, and evolution from the late 1880s yielded to language about native intelligence, initiative, skill and energy of different immigrant stocks. “Us” was redefined as various activists attempted to define what made others “not like us”—i.e., them. Eugenics, a term first coined in 1883, had become a buzzword by the 1920s and some scientists sought to use genetic management to

⁴ Charles E. Merriam, *A History of American Political Theories* (New York: Macmillan, 1928), in Aileen S. Kraditor, *The Ideas of the Woman Suffrage Movement, 1890-1920* (New York: Columbia University Press, 1965), 52.

⁵ See, for example, Patrick Geddes and J. Arthur Thomson, *Evolution of Sex*; Gail Bederman, *Manliness and Civilization*, 154-156 and passim.

⁶ See Daniel J. Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton and Oxford: Princeton University Press, 2002), 12-13; Desmond King, *Making Americans: Immigration, Race, and the Makings of a Diverse Democracy* (Cambridge, MA and London: Oxford University Press, 2000), 51.

improve or even perfect the human race.⁷ Immigrant looks could lead to rejection if some trait suggested physical inferiority or medical vulnerability.⁸

Various forms of coerced relationships, whether in labor or in marriage and sexual relations, were equated with slavery, an institution with which these Americans wanted nothing further to do.⁹ While Chinese workers in America were generally voluntary immigrants who used a “credit-ticket system” to pay for their transportation to the United States, they were nevertheless identified as participants in servitude. “If Chinese men were innately coolies, willing to indenture themselves into servitude, Chinese women were innately prostitutes, willing to do the same thing in sexualized terms.”¹⁰ Whether as prostitutes, concubines, young female children sold by their family into servitude, or as young women sold as brides, Chinese women were seen as innately docile female coolies. Servility was associated with racialized character, and “Coolies and citizens were antithetical: A person willing to submit him or herself to a system of slavery could not adequately participate in a democracy.”¹¹

The Chinese exclusion laws that proliferated from the 1870s onward were “justified in part on the premise that the Chinese, as born slaves of Oriental despots, were incapable of understanding the notion of individual rights and could therefore never assimilate into America’s republican values.”¹² As Nancy Cott notes, “Restriction of immigration began in an era when the qualifications for citizens were often expressed in terms of capacities for freedom, consent, and morality, but always engaged considerations of ‘race’ as well.”¹³ The fact that Chinese and Japanese immigrants sought judicial review using constitutional provisions concerning due process, equal protection, takings of property, *habeas corpus*, evidentiary rules and more did not alter the impression of exclusionists concerning the understanding of American notions of rights and republican values.¹⁴ Instead, Chinese and other Asian immigrants were seen as crafty and duplicitous, whose testimony could not be believed.

White workers, concerned about the expected impact that an influx of Asians would have on wages, were among those loudly voicing these concerns in racialized

⁷ Alan M. Kraut, *Silent Travelers: Germs, Genes, and the ‘Immigrant Menace’* (New York: Basic, 1994), 273.

⁸ Kraut, *Silent Travelers*, 78.

⁹ Kerry Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” 105 *Columbia Law Review* 641, 657-658 (2005).

¹⁰ Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” 651-652, 658-659. Quote p. 658.

¹¹ Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” 658-659.

¹² Teemu Ruskola, “Canton Is Not Boston: The Invention of American Imperial Sovereignty,” p. 285 in Mary L. Dudziak and Leti Volpp, eds., *Legal Borderlands: Law and the Construction of American Borders* (Baltimore: Johns Hopkins, 2006).

¹³ Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000), 134.

¹⁴ For the point about Chinese immigrants and the use of Anglo-American legal norms, see Lucy E. Salyer, *Laws Harsh as Tigers* (Chapel Hill: University of North Carolina Press, 1995): 247-248.

terms. Slavery had patterned working class expression in important ways: “Whiteness was a way in which white workers responded to a fear of dependency on wage labor and to the necessities of capitalist work discipline.”¹⁵ With autonomy and independence markers of manhood, it was important for workers to differentiate labor for hire in an industrializing economy from slave labor. In the process of working class formation, “white workers could, and did, define and accept their class position by fashioning identities as ‘not slaves’ and as ‘not Blacks’.”¹⁶ Whiteness was a form of property, the boundaries of which were policed; the Irish became but were not initially white.¹⁷ After the Civil War, African-American slavery no longer functioned in the same way to demarcate white wage work, but it appears that dependency and servility could continue to do so.¹⁸ Thus, if dependency, docility, and servility were black, Native American (only after Little Bighorn), Mexican, female, and Asian, they were not characteristic of men of more “advanced” races, working classes included. For workers of the Gilded Age, “there were ethnic exclusions from manliness.”¹⁹ Newly arriving ethnic groups were often described as black, a tradition that dated back to the arrival of the Irish. During the great labor uprisings of 1877 and during a socialist-initiated labor rally in San Francisco, anti-Chinese clubs seized the moment, initiating a rampage of murder, break-ins, and incendiary fires including the lumber yard by the docks of the Pacific Mail Steamship Company, landing point at that time for Chinese immigrants. The labor and anti-Chinese movements in California were intertwined and grew up together.²⁰ Sometimes, Irish and other working class immigrants were able to associate themselves with whiteness by joining the anti-Chinese exclusion movement.²¹

Polygamy and prostitution were both seen as moral harms and as forms of unfreedom for women. It is hardly a coincidence that the crusade against Mormon polygamy that had produced the federal Morrill Act for the Suppression of Polygamy in 1862 led to the Supreme Court decision upholding a bigamy conviction in *Reynolds v. U.S.* at roughly the same time that the Page Act became law.²² The Protestant home mission women who would later open a (rather unsuccessful) Industrial Christian Home in Salt Lake City for Mormon women seeking to escape polygamy believed, with many of their Victorian peers, that “Mormon women were trapped in a marriage system that made a mockery of female purity and virtually enslaved wives,” reducing their status to a

¹⁵ David Roediger, *Wages of Whiteness: Race and the Making of the American Working Class* (New York and London: Verso, 1991), 13.

¹⁶ Roediger, *Wages of Whiteness*, 13.

¹⁷ See Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge: Harvard University Press, 1998) and David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (London: Verso, 1991)

¹⁸ Roediger, *Wages of Whiteness*, 170-172.

¹⁹ Roediger, *Wages of Whiteness*, 179; see also David Montgomery, *The Fall of the House of Labor*, 25.

²⁰ Roediger, *Wages of Whiteness*, 168, 179; Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley: University of California Press, 1971), 113-115 and passim.

²¹ See Roediger, *Wages of Whiteness*, 179.

²² The Page Act was passed in 1875; *Reynolds v. United States* was handed down in 1878 while Utah remained a territory.

sacrifice to men.²³ The anti-polygamy agitation of the 1870s, including sensational novels and stories, faced an apparent roadblock with the First Amendment, which Mormon leaders claimed protected their religious freedom. Nevertheless, Justice Waite, writing for the Court in *Reynolds*, posed the question as “whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.”²⁴ Belief was free but religious exercise was not. Reviewing the history of the free exercise clause, Justice Waite concluded that “Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.” Moreover, Waite referenced the difference between advanced and primitive civilizations, noting that “Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”²⁵ Congress certainly had the power to legislate with respect to marriage, “this most important feature of social life”:

Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.²⁶

Every civil government may legitimately determine whether monogamy or polygamy will be the law of the land. Congress subsequently passed the 1882 Edmunds Act, disenfranchising polygamists, barring them from jury service and from holding political office.²⁷ The Edmunds-Tucker Act of 1887 instituted additional penalties for polygamy, dissolved the church corporation in Utah, and seized financial assets of the corporation.²⁸

²³ Peggy Pascoe, *Relations of Rescue: The Search for Female Moral Authority in the American West, 1874-1939* (New York: Oxford, 1990), 21. There was conflict between the home mission women and the male Board of Control of the home, once established, over whether most first wives and the children of polygamous unions were eligible for entry.

²⁴ *Reynolds v. United States* 98 U.S. 145, 162 (1878 term; decided January 6, 1879).

²⁵ *Reynolds v. United States*, 164.

²⁶ *Reynolds v. United States*, 165-166. The authority in question is German immigrant scholar, political scientist, and jurist Francis Lieber, an influential figure at Columbia Law School who wrote works such as Civil Liberty and Self-Government.

²⁷ The Edmunds Act was challenged in court, with multiple plaintiffs claiming that this was an ex post facto law. Justice Matthews, writing for the Court in the 1885 decision in *Murphy v. Ramsey* (114 U.S. 15) held that anyone still engaging in bigamy or polygamy following the 1882 Act even if they had initiated these plural marriages prior to passage of the Act could be barred from voting.

²⁸ The constitutionality of the Edmunds-Tucker Act was challenged in *Mormon Church v. United States* 136 U.S. 1 (1890) and was upheld, with Justice Bradley writing for the Court. Congress held general and plenary power over the territories of the United States, and had power to disapprove acts of the territorial legislature. The public or charitable corporation in question uses its resources to spread the doctrines and

In upholding this latter act, Justice Bradley wrote for the Court that the “practice of polygamy. . . [is] a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world.” Congress has made stringent laws in an attempt to “suppress this barbarous practice,” and the Church of Jesus Christ of the Latter Day Saints nevertheless continues to attempt to spread its usages.²⁹ When Utah was admitted to statehood in 1896 after half a century of petitioning, it was with women having the right to vote and polygamy having been outlawed by the Mormon Church.³⁰

Asians were also seen as threats to the moral fabric, and to the institution of the proper, Christian, Victorian family. Anxieties about unruly and uncontained behavior came especially to focus upon Asian male migrants, who were “perceived as importers of unnatural sexual practices” and prosecuted for sodomy, statutory rape, vagrancy, intergenerational, and same-sex relations with adolescent males.³¹ Anti-Chinese propaganda included charges that the ‘Celestials’ were involved in “the wholesale seduction of white women, the spread of opium addiction, and the introduction of oral sex and incest into the United States.”³² Gambling, opium, gang activity, and other vices were laid to inheritable characteristics of the race. Asians in America raised concerns about birthright citizenship for Chinese children born in the United States; if the parents were not eligible for citizenship by virtue of the undesirability and unassimilability of their race, why were their children any less problematic? If an (improperly) naturalized Chinese-American or a birthright citizen of Asian heritage should leave the shores of America, should they even be readmitted since their claims of citizenship rested on what many saw as a technicality or improper reading of the law?

In controversies surrounding naturalization and citizenship for Asians seeking entry to America during the 50 years from the Page Act to the Johnson Reed Act, the discourses of slavery, race, gender, class, and morality were all intertwined. Developments and narratives in each arena implicated the others and, often by analogy, influenced policy and law in the others. The boundaries of these arenas of contestation were porous, and they were often porous in the courts as well. To enter into the struggle

practices of the church and in attempting to spread polygamy, is engaging in an illegal practice. (The legislation seems to be a predecessor of RICO forfeitures; the Court saw no attempt to quell free exercise).

²⁹ Mormon Church v. United States 136 U.S. 1, 48-49 (1890).

³⁰ http://www.utah.com/visitor/state_facts/statehood.htm. The largely Mormon territorial legislature had granted the vote to women in 1870, perhaps hoping to expand Mormon support as the anti-Mormon assault was beginning. It is interesting that some home mission women, having supported female suffrage in Utah because they believed women had naturally allied interests, and that women would (in Frances Willard’s term), use the ballot for “home protection”, later consider removing the franchise from women as a short-term means of crushing polygamy, since Mormon women had not risen up to outlaw women’s suffering. See Pascoe, *Relations of Rescue*, 47-49. See also Edward Leo Lyman, “Struggle for Statehood,” Utah History Encyclopedia, accessed 2/22/08 at http://historytogo.utah.gov/utah_chapters/statehood_and_the_progressive_era/struggleforstatehood.html.

³¹ Nayan Shah, in “Between ‘Oriental Depravity’ and ‘Natural Degenerates’: Spatial Borderlands and the Making of Ordinary Americans,”⁸ in Mary L. Dudziak and Leti Volpp, eds., *Legal Borderlands: Law and the Construction of American Borders* (Baltimore: Johns Hopkins, 2006).

³² David Roediger, *The Wages of Whiteness: Race and the Making of the American Working Class* (New York and London: Verso, 1991), 179. Roediger cites Wood, *Black Scare*, 99-101; Parnet, *Labor and Immigration*, 29-30; Shankman, *Ambivalent Friends*, 19; Miller, *Unwelcome Immigrants*, 180-83; Bernstein, *Draft Riots*, 227; J. Sakai, *The Mythology of the White Proletariat*, 35-37

over Asian exclusion requires going beyond labor protectionism and racial hostilities to an examination of the ways in which qualities considered necessary for democratic citizenship were being deliberated and defined on multiple fronts in the late 19th and early 20th centuries.

Federalizing Immigration Law: the Role of Gender

Immigration policy was largely set by the states until the Supreme Court declared, in 1875 and 1876 that immigration was a matter of national jurisdiction and most state regulations of foreigners seeking to enter the United States were unconstitutional. The key cases from the Court's 1875 term were *Henderson v. Mayor of the City of New York*, decided with *Commissioners of Immigration v. North German Lloyd* and *Chy Lung v. Freeman*; the decisions were handed down on March, 1876. The cases arose in New York, Louisiana, and California respectively. Justice Miller, writing for the Court in all three cases, argued that the Court had established as early as the *Passenger Cases* (1849) that regulation of commerce by a state was in conflict with the laws and Constitution of the United States and therefore void; in the matter at hand, a regulation of commerce with foreign nations was likewise void.³³ In New York and Louisiana, the states required a bond for every incoming passenger, or commutation in money; in California, only certain enumerated classes were required to post such bond. The Court believed the California statute, operating directly on the passenger, was designed to prevent the immigration of certain classes of passengers altogether. Justice Miller reasoned that this was a "most extraordinary statute" empowering the Commissioner of Immigration "to satisfy himself whether or not any passenger who shall arrive in the State by vessels from any foreign port or place (who is not a citizen of the United States) is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease. . . a public charge, or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman . . ." ³⁴ Any such person, as determined by the Commissioner of Immigration, would be barred from landing unless the master, owner, or consignee of the vessel provide a separate bond in each case against any expense incurred for the support of such a person for two years. Writing a decade before the Court's much-noted decision in *Yick Wo v. Hopkins* (1886), Justice Miller argued that "we are at liberty to look to the effect of a statute for the test of its constitutionality," and found that the statute was designed to bar persons from particular foreign countries, e.g., China.³⁵

³³ This formulation of the holdings of the *Passenger Cases* 48 U.S. 283 (1849) is drawn from Justice Miller's extensive remarks in the *Head Money Cases* 112 U.S. 580 (1884)

³⁴ *Chy Lung v. Freeman* 92 U.S. 275, at 277.

³⁵ *Id.* at 278, 279. Justice Samuel Miller, the author of the *Slaughter-House* majority opinion was still on the Court when *Yick Wo* was decided, apparently unanimously; see *Yick Wo v. Hopkins* 118 U.S. 356 (1886).

Because the powers exercised in these cases brought the United States into conflict with other nations, the Court reasoned, such powers must belong exclusively to the Federal government. State police powers cannot extend this far (leaving open the question of whether states could protect themselves at all from foreign criminals, paupers, and diseased individuals--what would be considered “absolutely necessary”?) With the nationalization of immigration, Congress and federal administrative agencies became more active in regulating access to citizenship.

The regulation of morality and marriage were also central to the federalization of immigration law.³⁶ The first federal legislation restricting immigration targeted women. From the time of the Page Act in 1875 through the period under consideration in this study, the national state was involved in regulating admission and citizenship by regulating women. States on the west coast saw control over the entry of Asian women as a means to control the number of Asians within their borders, especially important since the children born in the United States were citizens.³⁷ If the “supply” of Asian women, especially those of childbearing age, could be curtailed, Asian males already present in significant numbers would not be able to create families in America. Anti-miscegenation laws at the state level reinforced the effort, helping make sure that no hybrid marriages would occur.³⁸ California extended its miscegenation statute in 1880, prohibiting issuance of a marriage license to a white person seeking to marry a “Negro, mulatto, or Mongolian.”³⁹ Norms about marriage and sexuality contributed to the rationale and means of exclusion—first of Chinese and later of other Asian women.⁴⁰

The Page Law made importation of women for purposes of prostitution a felony and declared null and void any contracts made for such purposes prior to arrival in the United States. The law specifically mentioned “subjects of China, Japan, or any Oriental country” in its aim of making sure that immigration was free and voluntary. The act also barred the importation of unfree labor, including contracts for term of service,

³⁶ Kerry Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” 105 *Columbia Law Review* 641 (April 2005): 641-716.

³⁷ Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” 661-664.

³⁸ See Geoffrey S. Neri, “Of Mongrels and Men: The Shared Ideology of Anti-Miscegenation Law, Chinese Exclusion, and Contemporary American Neo-Nativism” (2005, paper 458), *bepress legal series*, accessed at <http://law.bepress.com/cgi/viewcontent.cgi?article=2300&context=expresso> on 03/01/2008.

³⁹ Ruth Frankenberg, *White Women, Race Matters: The Social Construction of Whiteness* (Minneapolis: University of Minnesota Press, 1993), 74, http://books.google.com/books?id=F_vqBeDBLQgC&pg=PA74&lpg=PA74&dq=chinese+marriage+white+california+1880&source=web&ots=mCPugFr8bs&sig=su0tm0MLl96LHxEtIDwnNDBJXeg&hl=en See also California Jim Crow History at <http://www.jimcrowhistory.org/scripts/jimcrow/lawsoutside.cgi?state=California>. Accessed 3/1/08.

⁴⁰ See Abrams, “Polygamy, Prostitution, and the Federalization of Immigration Law,” 715.

specifically mentioning “the coolly-trade.”⁴¹ In inspecting arriving ships for prostitutes, collectors at port were directed to forbid entrance to “any such obnoxious persons.”⁴²

But who was deemed a prostitute? There was enormous capacity for discretion at point of entry (and exit, since the consul residing at the port of departure was to sign off as well). The census in California listed occupations of Chinese female residents mid-century, but the numbers for prostitution may well have been inflated by the perceptions of those conducting the census. Likewise, customs and immigration officers made their own judgments about the purposes for which young women were seeking to enter the United States. Following the Page Act, the American consul in Hong Kong had responsibility for certifying the character of all Chinese women seeking to emigrate to the United States, but there was ample opportunity for bribery and corruption of immigration officials both at the point of exit and the point of entry.⁴³ Many Chinese women who claimed to be married were considered inappropriately married or not married according to Victorian standards, and were detained once they reached California as likely prostitutes. The subsequent Chinese Exclusion Act of 1882, barring entry of Chinese laborers for ten years, essentially restricted female entry on a class basis, offering the prospect of admission only to those who were the wives or daughters of merchants (or of officials, teachers, students, or travelers).. Laborers already inside the United States, armed with proper certificates to return to America when leaving temporarily, were not readily able to bring women back with them from China as wives. Two years after the Chinese Exclusion Act, federal courts determined that women who had not previously entered the United States could be barred, even if married to Chinese laborers who had established their right to enter. The husband’s status of laborer excluded them.⁴⁴

Becoming identified as a member of an exempt class became an art in itself. Documents from officials, both in the U.S. and in China, grew ever-more important, as did testimony from white witnesses for those seeking re-entry after having left the United States temporarily. Women with bound feet were generally judged to be admissible since this was a class marker, and it was considered very likely that these women were not working women.⁴⁵ Women would submit testimonials about their character and at least one submitted x-rays of her bound feet.⁴⁶ Clothing, money, and possessions were

⁴¹ The Page Act of 1875, U.S. Congress, 43rd Congress, Session 2, Ch. 141, accessed at <http://w3.uchastings.edu/wingate/pageact.htm>

⁴² The Page Act of 1875, U.S. Congress, 43rd Congress, Session 2, Ch. 141, accessed at <http://w3.uchastings.edu/wingate/pageact.htm>

⁴³ Sarah Refo Mason, “Social Christianity, American Feminism and Chinese Prostitutes,” 203. See also Coolidge, 1909, 419.

⁴⁴ *In re Ah Quan* and *Case of the Chinese Wife [Ah Moy]*, 21 Federal Reporter 182 (1884) and 21 Federal Reporter 785 (1884) respectively; cited in Judy Yung, *Unbound Feet*, 23. See also Sucheng Chan, “The Exclusion of Chinese Women, 1870-1945,” 94-146 in Sucheng Chan, ed., *Entry Denied: Exclusion and the Chinese Community in America, 1882-1943* (Philadelphia: Temple University Press, 1991).

⁴⁵ See Judy Yung, *Unbound Feet: A Social History of Chinese Women in San Francisco* (Berkeley: University of California Press, 1995)

⁴⁶ Sucheng Chang, *Chinese American Transnationalism* (Philadelphia: Temple University Press, 2006), 17 accessed at http://books.google.com/books?id=2PtTNPOgtzYC&pg=PA17&vq=lawyer&dq=sucheng+chang+chinese+american+transnationalism&source=gbs_search_r&cad=0_1&sig=tEwuDRvYDI NGDvwtc5D4TbIMNE0

other markers of class in the eyes of those who had power over entry. For those seeking re-entry when return certificates were not absolutely necessary, facility with the English language and appearance of reputable white witnesses were also indicators of a certain class suitability, supporting evidence of a claim of merchant status.⁴⁷ Chinese seeking re-entry came to recognize that wealthy and middle-class white witnesses were worth a great deal to them in this process.⁴⁸ As officials sought to close loopholes and enforce the laws to the maximum, wives seeking entry as a member of an exempt class often had to win this right in the courts. Despite court victories such as that in the Circuit Court for the District of Oregon in 1890, which held that wives of merchants could join their husbands in the United States despite not themselves holding merchant certificates, immigration to America remained an ordeal for any Chinese woman attempting to enter.⁴⁹ “Immigration officials apparently operated on the premise that every Chinese woman was seeking admission on false pretenses and that each was a potential prostitute until proven otherwise.”⁵⁰

American-born women, but not men, were stripped of their U.S. citizenship when they married foreign nationals in the 1907 Expatriation Act—whether or not these women ever left the United States. This included, of course, Chinese women born in the United States. The law attempted to make uniform practices of courts and the Departments of Commerce and Labor, Justice, and State that had varied considerably prior to this effort.⁵¹ The 1907 legislation, passed in the year that immigration from Southern and Eastern Europe peaked, also expressed a certain moral disapproval of elite trans-Atlantic unions with other members of the Old World elite.⁵² Expatriation, historically reserved as severe punishment for crimes such as treason, became the condition of women married to foreign spouses.⁵³ This law could be seen as reinscribing and rigidifying gender expectations, since the nationality of a wife now clearly followed that of her husband in federal law for the first time.⁵⁴ Moreover, a married woman could not apply for citizenship—only her spouse could, and if he was granted citizenship, hers would follow. Women who married Western European males could regain U.S. citizenship if their husbands succeeded in becoming naturalized citizens.⁵⁵ In an era of flux, not only with regard to the immigrant population but during which America interacted increasingly abroad, and in which women were seeking and taking new public authority, clear lines were drawn.

⁴⁷ In one instance, the testimony of ethnic and probably working class Jewish witnesses was discounted.

⁴⁸ Sucheng Chang, *Chinese American Transnationalism*, 18.

⁴⁹ Judy Yung, *Unbound Feet*, 23, citing Judge Matthew Deady’s decision in *In re Chung Toy Ho and Wong Choy Sin*, 42 Federal Reporter 398 (1890) and also referencing *United States v. Gue Lim*, 88 Federal Reporter 136 (1897).

⁵⁰ Judy Yung, *Bound Feet*, 23-24.

⁵¹ Bredbenner, *A Nationality of Her Own*, Ch. 1.

⁵² Bredbenner, *A Nationality of Her Own*, 59-69.

⁵³ See Linda K. Kerber, *No Constitutional Right to Be Ladies* (New York: Hill & Wang, 1998), 41.

⁵⁴ For a recent discussion of the history of marriage law, see Gretchen Ritter, *The Constitution as Social Design: Gender and Civic Membership in the American Constitutional Order* (Stanford: Stanford University Press, 2006), Ch. 3; see also Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000).

⁵⁵ Ethel Mackenzie, prior to the case, refused to take the route of having her British husband apply for citizenship; this requirement became daunting for many once the quota system was imposed.

The Supreme Court upheld the 1907 Act in the 1915 case of *Mackenzie v. Hare*.⁵⁶ Mackenzie, an elite California suffrage activist who remained within the jurisdiction of the United States after she married a British subject in 1909, had attempted to register to vote after California passed female suffrage. She claimed that Congress had exceeded its authority by depriving her of her birthright citizenship, and had deprived her of the privileges and immunities of citizens of the United States.⁵⁷ Justice McKenna, writing for the Court in upholding the California Supreme Court, argued that a citizen always has the right to expatriate him/herself. For the Court, Congressional language in the 1907 Act was clear in stating that a wife's nationality follows her husband's, and Mackenzie had voluntarily consented to her expatriation by her marriage in 1909. The "legislation was urged by conditions of national moment" [rational basis test?] and

as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the Government into embarrassments and, it may be, into controversies. It is as voluntary and distinctive as expatriation and its consequence must be considered as elected."⁵⁸

As a result of the Court's ruling, hundreds of women born in the United States were compelled to register as enemy aliens during World War I because of the nationality of their spouses, and millions of dollars of property in the hands of such couples was seized.⁵⁹ Since women were not always considered citizens in the homeland country of their spouses, "in the United States in the interwar years, gender was a category of instability and potential statelessness; most individual cases of statelessness involved women and arose from marriage."⁶⁰ Children were likewise sometimes caught up in these matters of statelessness.

Middle class Victorian women, already highly mobilized around suffrage and social policy issues worked hard to reverse this marriage policy which stripped citizenship from those who had held it by birth. It would seem that they were mostly concerned with problems facing middle-class women such as themselves, rather than

⁵⁶ 239 U.S. 299 (1915); See Linda Kerber, *No Constitutional Right to Be Ladies* (New York: Hill & Wang, 1998), 40-43 for a discussion of the Mackenzie case.

⁵⁷ *Mackenzie v. Hare* 239 U.S. 299 at 307-308 (1915); Kerber, *No Constitutional Right to Be Ladies*, 41-42.

⁵⁸ McKenna, J., for the Court, *Mackenzie v. Hare* 239 U.S. 299 at 312. According to Schuck and Smith, *Citizenship Without Consent*, 86-88, at the time of the adoption and ratification of the 14th Amendment, Congress had understood birthright citizenship to be consensual in that a citizen could renounce his or her citizenship by expatriation. While the 1868 Expatriation Act had not established any procedures through which expatriation could occur, leaving it to the State Department to define appropriate procedures, the 1907 Expatriation Act did codify expatriation practices. For the *Mackenzie* court, this was perfectly within the power of Congress.

⁵⁹ Kerber, *No Constitutional Right to Be Ladies*, 41-42.

⁶⁰ Linda K. Kerber, "Toward a History of Statelessness in America," 135-158 in Mary L. Dudziak and Leti Volpp, eds., *Legal Borderlands: Law and the Construction of American Borders* (Baltimore: Johns Hopkins, 2006); quote is p. 143.

those of Asian women.⁶¹ As a result of intense lobbying, public speaking, and efforts by newly-enfranchised women, some of the problems created by the 1907 Act were remedied in 1922. The resulting Cable Act (also known as the Married Women's Independent Nationality Act) no longer stripped some women of their citizenship upon marriage to foreign nationals. However, these women, even if born in the United States and of white Anglo-Saxon background, could never acquire the same citizenship status they had by birthright. They would become naturalized citizens. Naturalized citizens were subject to denaturalization or even deportation by the federal government, especially if they were seen as disloyal or immoral.⁶²

The Cable Act could be read as a further measure of Asian exclusion. White American women who married "inappropriate" aliens were in fact denaturalized by the Cable Act, made into potentially liminal figures without a country to claim them as citizens. The 1922 law made explicit that women who married men ineligible for naturalization were not covered by the Act,⁶³ flatly stating that "any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States."⁶⁴ An American-born woman was not able to regain her citizenship if a spouse was ineligible for naturalization and she had left the United States to live with him for a number of years, even in cases of death or divorce from that spouse.⁶⁵

"The Cable Act's abolition of marital naturalization furthermore provided a legal opportunity for the Immigration Bureau to challenge the automatic admission of citizens' foreign wives to the United States."⁶⁶ By decoupling the spouse from the husband for purposes of naturalization, "most resident immigrant women who married Americans after the passage of the Cable Act became stateless on their wedding days and remained

⁶¹ The scrapbooks of Harriot Stanton Blatch contain many newspaper clippings and reports of speeches about this struggle in the period following passage of the 1907 Act, and my observation is based largely on reading these. Blatch was herself married to an Englishman and lived outside the United States for some years prior to returning in 1902. See also Bredbenner, *A Nationality of Her Own*, 149.

⁶² Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (Berkeley: University of California Press, 1998), 134.

⁶³ Marian L. Smith, "'Any Woman Who is Now or May Hereafter Be Married': Women and Naturalization, ca. 1802-1940," *Prologue*, a Magazine of the National Archives, Vol 30, no. 2 (Summer, 1998). Accessed at <http://www.archives.gov/publications/prologue/1998/summer/women-and-naturalization-1.html>

⁶⁴ Cable Act of September 22, 1922, §3, reprinted in *U.S. Immigration and Naturalization Laws and Issues: A Documentary History*, edited by Michael C. LeMay and Elliott Robert Barkan (Greenwood Publishing Group, 1999), accessed at http://books.google.com/books?id=a1Aclme7AMkC&dq=cable+act+1922+text&source=gbs_summary_s&cad=0

⁶⁵ Kerber, "Toward a History of Statelessness in America," 144. If women resided two years overseas in the husband's country or five years in some other country, and the ^{husband} was ineligible for naturalization, "they were considered to have renounced their citizenship and could not reclaim it if the marriage ended by death or divorce. Thus, even the legal device intended to protect women from vulnerability increased the vulnerability of some." Kerber (144) counts among the liabilities of the Cable Act the fact that women who married American men were made stateless if they came from countries that expatriated them when they married a foreigner, and this included Britain and Canada.

⁶⁶ Bredbenner, *A Nationality of Her Own*, 149.

so until they earned a naturalization certificate.”⁶⁷ The Quota Act of 1921 was sometimes read to deny foreign wives of American citizens entry and citizenship, and family reunification became a significant issue.⁶⁸ The 1924 Johnson-Reed Act moved the resident citizen’s immigrating wife outside the operation of the quota system, giving family reunification priority; however, the nonresident expatriate married (or previously married) to foreign men were snared in the quota requirements. Particular racial and ethnic groups and particular family arrangements came to be favored.⁶⁹ With passage of the Cable Act, women who were naturalized American citizens had trouble bringing husbands and fiancés in to the U.S. from the mid-1920s through the 1930s; this affected many Jewish women. “In the context of fascist expansion, the inability of American women, whether citizens by birth or by naturalization, to transmit their citizenship to their stateless children or husbands spelled danger.”⁷⁰ In an era when other marriage regulations were generally left to the states, the Cable Act could be seen as a regulatory policy aimed at women, providing strong federal discouragement of liaisons with those men ineligible on racial grounds to become U.S. citizens.

Women Taking It to Court: Chinese Women and the Mission Home Workers

In the context of rising federal attempts to regulate marriage and moral harms, with states adding regulations of their own, Asian exclusion assumed a gendered dimension and also brought forth some noteworthy crusaders on behalf of Chinese women. Despite the rising tide of Asian exclusion sentiment that relied in no small measure upon drawing analogies between Asians and American blacks—individual Chinese girls and women had their advocates willing to engage the legal system on their behalf. Discourses of polygamy, prostitution, slavery, and unfreedom were joined, even when these female advocates sometimes had to employ other language to fight their judicial and quasi-judicial battles.⁷¹ While citizenship and naturalization for Asian women were increasingly off the table because of larger forces, female activists fought individual deportations and incarcerations, sought custody over and eventual liberty for young women they saw enslaved or abused, and sought to make America home for many young Chinese women and girls. While they often acted out of a sense that they knew better than the young women themselves what was in their self-interest, they nevertheless altered the life chances of many of these women, usually for the better.⁷²

⁶⁷ Bredbenner, *A Nationality of Her Own*, 157.

⁶⁸ Bredbenner, *A Nationality of Her Own*, 113-119.

⁶⁹ Bredbenner, *A Nationality of Her Own*, 120.

⁷⁰ Kerber, “Toward a History of Statelessness in America,” 144.

⁷¹ Pascoe argues that as Mission Home women increasingly turned to government as an ally, they were less able to have recourse to language about women’s special moral authority or sisterhood of women. See *Relations of Rescue*, 187-188, 191.

⁷² While marriage was a preferred outcome in the eyes of Mission Home workers, some of these young women received training for work. Because of resources for education available through the home and discrimination against Chinese in the wider society, rescue women often found work as domestics or as other service workers; a few were able to become teachers, and a few remained to work as aides or translators at the Mission Home. These last might travel across the country to check in on former residents who had married Chinese men living across the nation, who had sought brides at the Mission Home and who had been adjudged suitable.

The Women's Missionary Society of the Methodist Episcopal Church on the Pacific Coast was organized in 1871 "to elevate and save the souls of heathen women," and the Presbyterian Mission Home was organized shortly thereafter.⁷³ Both grew out of what Peggy Pascoe has termed "relations of rescue"—the desire of Victorian women in the late nineteenth and into the early twentieth century to establish middle-class woman's moral authority over the male-settled and unruly American west.⁷⁴ The Presbyterian Mission Home was especially aggressive in the battle against prostitution, and may have rescued about 1,500 girls in police-assisted raids on brothels in just its first thirty years in existence.⁷⁵ Originally forming themselves in 1873 as the "California Branch of the Women's Foreign Missionary Society of the Presbyterian Church of San Francisco" with some thought of supporting missionary work to establish a refuge for prostitutes and female child slaves in Shanghai, these Presbyterian activists decided within a year to instead open a refuge in San Francisco. Originally an auxiliary of the Woman's Foreign Missionary Society of Philadelphia, the organization severed that connection in 1889, affiliated with the Board of Foreign Missions in New York, and became the Women's Occidental Board of Foreign Missions.⁷⁶

The Presbyterian Chinese Mission Home work on behalf of women labeled prostitutes, which included young women without husbands and without financial resources for self-support. Rather than seeing "fallen" women who were endangering the morals of the community, Mission Home women saw victims who had been wronged by men. Their work earned them the ire of many community members swept up in exclusionist sentiment. While many of their neighbors were working to exclude all Chinese (and all Asians), Mission Home activists were going to court to help some Chinese women remain in the country. They came to the aid of individual females detained at the border or detained as prostitutes. They also worked to educate and Christianize their residents, highly supervised their social interactions, and arranged marriages with proper Christian Chinese men.⁷⁷

Middle-class Victorian women engaged in Mission Home work made extensive use of the image of the Chinese "slave girl" in their work. In their eyes, young Chinese girls engaged in prostitution—often duped, sold by their families, or kidnapped—were slaves. Even if they had contracted to work as prostitutes for several years—a common enough arrangement by all accounts—they were presumed to be unwilling victims, just as were the young Chinese women who entered marriage contracts with men they did not

⁷³ Judy Yung, *Unbound Feet: A Social History of Chinese Women in San Francisco*. (Berkeley: University of California Press, 1995), 35 quote in original, most likely from founder Reverend Otis Gibson.

⁷⁴ See Peggy Pascoe, *Relations of Rescue: The Search for Female Moral Authority in the American West, 1874-1939* (New York: Oxford University Press, 1990).

⁷⁵ Judy Yung, *Unbound Feet*, 35, citing superintendent Donaldina Cameron, whose tenure there as superintendent began in 1897 and lasted until she was basically forced to retire in the 1930s. See also Pascoe, *Relations of Rescue*.

⁷⁶ Sara Refo Mason, "Social Christianity, American Feminism and Chinese Prostitutes," 204-205.

⁷⁷ See Pascoe, *Relations of Rescue*; Sarah Refo Mason, "Social Christianity, American Feminism and Chinese Prostitutes: The History of the Presbyterian Mission Home, San Francisco, 1874-1935," in Maria Jaschok and Suzanne Miers, eds., *Women and Chinese Patriarchy* (London and New Jersey: Zed Books, 1994), 206-209.

know. For most arriving young Asian girls and women, the insidious power of men had already been exerted and they had been ensnared before arrival in the United States, but tongs (local gangs) of Chinese in America involved in this “slave trade” made it difficult for girls to escape once they had arrived. In the early 20th century, San Francisco mission home women offered their support to legislation that would deport tong members engaging in the traffic in women. Their resolution in support of such legislation stipulated further that “the testimony of any slave girl, be they white, black, or yellow” would be sufficient to convict an owner, keeper, or visitor for immoral purpose of a slave girl.⁷⁸

Many ostensible Chinese marriages, lacking clear analogy to the “real”, consensual, Christian marriages Victorian women idealized, were also seen akin to slavery. All these relationships contributed to the image of those who were victims as women, lured, cowed, or manipulated by men, organized groups of men, or corrupt officials more powerful or cunning than themselves.

The image of enslavement used by San Francisco mission women was used differently by male politicians seeking to close the borders to Asians. “More concerned with female powerless than with unlimited immigration, home mission women did not favor immigration restriction.”⁷⁹ Holding to an ideal of purity, home mission women insisted that unless men were held to the same standards as women, women should not be punished for their participation in acts for which men were not punished either in court or by public opinion.⁸⁰

There was no room in this world view for alternate sexual norms and practices that were beginning to be recognized among the American working classes, and that led to associations between women and men outside the bonds of marriage.⁸¹ For these Victorian reformers, unsupervised visits between the sexes or visits with unscreened or unapproved male visitors were barred. For them, it was inconceivable that Chinese women would consent to prostitution or polygamy, or that they would choose to remain in such circumstances if given a choice. The young women who refused rescue or who returned to relationships these matrons viewed as unacceptable were hard to explain. This same perspective would inform the crusade against the white slave trade. Whether coming fresh from the countryside to the snares of the city or coming from abroad, young women could easily fall into the wrong hands. They were warned against males seeking to befriend them on shipboard or upon arrival. Organizations of east coast women would attempt to identify unaccompanied young immigrant women and see them to safe lodging houses, even following them to their intended final destination in the United States and, through networks of similarly concerned women, reporting when they failed to show up and searching for them. **[insert citation].**

⁷⁸ Peggy Pascoe, *Relations of Rescue*, 55n60.

⁷⁹ Pascoe, *Relations of Rescue*, 55.

⁸⁰ Pascoe, *Relations of Rescue*, 43.

⁸¹ On changing sexual mores among American working class young people in the late 19th and early 20th centuries, see John D’Emilio and Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America*, 2nd edition (Chicago: University of Chicago Press, 1997).

While Chinese Mission Home workers had seen police and government as hostile to their early efforts, they came increasingly to rely upon government and both judicial and quasi-judicial processes. Mission Home women were concerned with younger enslaved girls (*mui tsai*) who would likely be sold into prostitution once they were a bit older. By the 1880s, California state law offered protection for minors in service work, which included girls working “in houses of doubtful character,” and the Chinese Mission Home sought to establish legal guardianship of these young children.⁸² By this decade, the Society for the Prevention of Cruelty to Children, armed with quasi-legal powers, was able to assign Chinese children taken from their parents to mission home care.⁸³ These Societies were empowered to remove children for both bodily cruelty and moral corruption; the first one in the United States was founded in New York in 1875. A bit later, with juvenile courts proliferating during the Progressive Era in considerable part due to the work of female activists, California juvenile judges granted Mission Home matrons custody over children judged to be delinquent. “By the 1920s, these ties to the justice system had become indispensable to the Chinese Mission Home”; local, state, and national authorities provided the Mission Home with a stream of residents.⁸⁴

The work of the Chinese Mission Home women required engagement with courts and quasi-judicial bodies in other ways. Young women who were removed or rescued from brothels, or who escaped and came to the Mission Home, were often dragged into court. “Owners” seeking to recover an important source of income would frequently charge the woman with having stolen property, such as jewelry that the woman regarded as a gift. The Mission Home could then be served with habeas corpus petitions by ostensible owners or their lawyers. The use of writs of habeas corpus by tongs involved in prostitution was considered pervasive. When young women were detained by immigration officials at the port, tong members and their lawyers used the writs on their behalf. “Gaining entry via a writ of habeas corpus practically labeled a woman a prostitute.”⁸⁵ In 1890, one woman complained that “Cargoes of such women are landed here without certificates while wives of respectable Chinese . . . cannot land. It is maddening to think of the writ of habeas corpus, that sacred birth right of Anglo Saxons, and the safeguard of our liberties, being turned into a slave chain to drag these women down to hell.”⁸⁶ When habeas petitions were filed in the case of women detained or residing after rescue or flight at the Chinese Mission Home, women such as Margaret Culbertson (superintendent from 1878-1897) or Donaldina Cameron (superintendent from 1897-1934) also went to court to defend these women.⁸⁷

⁸² Sarah Refo Mason, “Social Christianity, American Feminism and Chinese Prostitution,” 206.

⁸³ Pascoe, *Relations of Rescue*, 186.

⁸⁴ Pascoe, *Relations of Rescue*, 186. Pascoe argues that women, in turning to the state, undermined their claim to women’s exclusive moral authority.

⁸⁵ Robert Barde, “An Alleged Wife: One Immigrant in the Chinese Exclusion Era,” Prologue, a magazine of the National Archives, Vol 36 no. 1 (Spring 2004), at <http://www.archives.gov/publications/prologue/2004/spring/alleged-wife-2.html>

⁸⁶ Mrs. S. L. Baldwin quoted in Barde, “An Alleged Wife”.

⁸⁷ See Sarah Refo Mason, “Social Christianity, American Feminism and Chinese Prostitutes: The History of the Presbyterian Mission Home, San Francisco, 1874-1935,” in Maria Jaschok and Suzanne Miers, eds.,

Especially in the 1890s and following, police were more likely to cooperate and participate in raids on brothels or in rescue raids on behalf of specific individuals instigated by Mission Home superintendent Donaldina Cameron. Here, too, the state was heavily involved in transferring women to the custody of the Mission Home workers. By the end of the 1890s, the Chinese Mission Home was often used as a holding tank for women who had been arrested in prostitution raids, sent there by law enforcement officials.⁸⁸ The Mission Home workers would attempt to intervene in both prosecutions and deportations if they felt the woman was worthy of their assistance (i.e., willing to abandon prostitution and change their lives).

Working closely with immigration officials, Chinese Mission Home women who were appalled by conditions under which immigrant women were detained at the Pacific Mail Dock facilities for women, were permitted to take some of them to the Mission Home to be held. Interviewing these women, the Mission Home women (aided by their resident translators) would advise immigration officials on the disposition of particular cases.⁸⁹ New facilities for the reception and detention of immigrants to San Francisco were opened at Angel Island in 1910, ending the practice of lodging detained women at the Mission Home; however the connection between the Chinese Mission Home and immigration officials continued.

“Mission Home officials acted as informal legal advocates for Chinese women and girls faced with bewildering immigration requirements,” and women from the Home tended to be more likely to respond to women’s needs than law enforcement or immigration officials.⁹⁰ Superintendent Donaldina Cameron and her associates spent increasing amounts of time pleading the cases of Chinese would-be immigrant women before immigration and law enforcement officials, seeking leniency in individual cases.⁹¹ Charity organizations in San Francisco came under increasing state control shortly after the turn of the century. While the Chinese Mission Home was not affiliated with local charity organizations or societies, it was increasingly involved with bureaucracies that could give or withhold compensation payments for orphans or abandoned children; that could determine whether a facility was unsanitary and unsafe; and that had powers of investigation.⁹² Thus the boundary between private and public blurred, as it did so many times during the Progressive era. The functions of organizations and institutions founded by Progressive era women were either absorbed by the state or institutions they helped create, such as the juvenile courts in turn helped shape the workings of the organizations with which they interacted. Especially at the height of the Progressive era, their activities underscore the observation made by Jane Addams that there appeared to be a “wavering

Women and Chinese Patriarchy (London and New Jersey: Zed Books, 1994), especially 203-206. A good deal of this highly varnished account is based on interviews with former directors and residents of the Home.

⁸⁸ Pascoe, *Relations of Rescue*, 186. Pascoe asserts that relations between the Mission Home and the police grew even closer during the assault on organized crime in Chinatown during the early 1900s, an assault known as the “tong wars”.

⁸⁹ Pascoe, *Relations of Rescue*, 187.

⁹⁰ Pascoe, *Relations of Rescue*, 187.

⁹¹ Pascoe, *Relations of Rescue*, 187.

⁹² Pascoe, *Relations of Rescue*, 189-190.

line between the public and private activities, so that you can scarcely tell what is philanthropy and what is public service.”⁹³

Taking Exclusion and Naturalization to Court

Asian immigrants challenged state laws stripping them of land claims and employment. They contested exclusion and naturalization decisions and often took their complaints to court. The Chinese Exclusion Acts singled out Chinese for separate treatment and detention; “Chineseness” was subject to the discretion of immigration officials, who sometimes made decisions based on the apparent westernization of the prospective entrant. Judgments about Chineseness, especially for those of mixed heritage, would also hinge on apparent social class. At San Francisco, the port of entry for the vast majority of Chinese arriving in the United States, this was first at the Pacific Mail Steamship Company terminal and after 1910, at the new processing and detention facility at Angel Island, removed from the mainland. Chinese turned quickly to lawyers and the courts to make their case for admittance. According to James R. Dunn, who became chief inspector in the San Francisco office [of immigration?] in 1899, his vigorous and technical enforcement of existing laws and institution of new rules to aid in exclusion, would-be Chinese immigrants who found it now harder to enter doubled their recourse to attorneys under his administration.⁹⁴

Recourse to attorneys did not seem to be limited to those Chinese with robust financial assets. Since immigration attorneys sometimes served as brokers for individuals, filing witness affidavits, arranging for witnesses to testify before the immigration service, and handling other matters for those denied entry prior to any legal appeals, at least one estimate of the percentage of Chinese using immigration attorneys was as high as 90%.⁹⁵ According to one estimate, there were at least 7,000 appeals filed by Chinese in the first ten years during which the Exclusion Acts were operative, and between 1891 and 1905, another 2,600.⁹⁶ Attorneys could marshal previous rulings and court decisions, as well as bring experts, witnesses, and evidence to bear in an attempt to

⁹³ The quote is from Jane Addams, “Philanthropy and Politics,” 2140. On this dynamic boundary see Carol Nackenoff, “Gendered Citizenship: Alternative Narratives of Political Incorporation in the United States, 1875-1925,” 137-169 in David F. Ericson and Louisa Bertch Green, eds., *The Liberal Tradition in American Politics* (New York: Routledge, 1999).

⁹⁴ Erika Lee, *At America's Gates*, 55-56, citing commissioner Dunn’s communication to J.D. Powers, November 28, 1899.

⁹⁵ Erika Lee, *At America's Gates*, 139, based on the author’s survey of over six hundred Chinese entering the United States through San Francisco from 1884 to 1941. She points out that immigration attorneys were not allowed to be present for, or otherwise participate in, initial hearings and interrogations conducted by immigration service officials, but could subsequently examine at least some of the applicant’s file material to rebut the immigration service decision (139).

⁹⁶ Robert Barde, “An Alleged Wife: One Immigrant in the Chinese Exclusion Era,” *Prologue*, a magazine of the National Archives, Volume 36 no. 1 (Spring 2004), accessed at <http://www.archives.gov/publications/prologue/2004/spring/alleged-wife-1.html>

reverse decisions.⁹⁷ Though attorney fees for a habeas case was estimated to be no less than \$100 in 1885, it appears that many Chinese found access to attorneys.⁹⁸

Friends and family in the United States came to the financial aid of some detainees needing attorneys; it was not unheard of for a white friend or neighbor to retain a lawyer for a particular detainee.⁹⁹ However, Chinese benevolent associations speaking local dialects formed in local communities to aid residents and keep order, also provided the underpinning for legal challenges. These local associations sent representatives to what became known as the Chinese Six Companies (the Chinese Consolidated Benevolent Association). Originally formed to resolve disputes among Chinese in America, the Chinese Six Companies expanded to advocate for Chinese in America, keeping an attorney on retainer to combat anti-Chinese practices and legislation.¹⁰⁰ The Chinese Six Companies supported some of the law suits challenging exclusion and naturalization decisions, and the association seems to have initiated at least one such challenge (in the case of the Geary Act, below).

In short, the Chinese could turn to “an organized network of immigration lawyers who facilitated Chinese entry and reentry by keeping track of the necessary paperwork and lobbying on behalf of clients.”¹⁰¹ As exclusion laws grew more complex and enforcement became more vigorous, the number of immigration lawyers serving Chinese clients grew. “Chinese had a long history of hiring the best American lawyers to challenge anti-Chinese legislation even before 1882.”¹⁰² As Chinese turned to the courts to appeal denials of entry, this network of lawyers aided them. The U.S. Department of the Treasury observed in 1899 that the Chinese tended to be represented by the “very best attorneys in the city.”¹⁰³ Evidence corroborates this conclusion.

Some of the most prominent San Francisco lawyers handled Chinese legal work. Thomas Riordan of San Francisco was the lawyer most likely to be found representing Chinese clients in the 1880s and 1890s, and he was retained by the Chinese consulate to represent high-profile cases as well.¹⁰⁴ Admitted to the Bar of the Supreme Court of the United States in 1884, Riordan argued for the ability of courts to issue writs of habeas corpus following passage of the restriction act of 1884, and also argued against the constitutionality of the Scott Exclusion Act (1888).¹⁰⁵ Riordan served as counsel or co-counsel, or filed a brief in support of counsel, on behalf of fifteen Chinese whose cases were before the Supreme Court during the 1880s and 1890s, and his practice was not

⁹⁷ Erika Lee, *At America's Gates*, 139.

⁹⁸ Treasury Department estimate, cited in Erika Lee, *At America's Gates*, 140.

⁹⁹ Sucheng Chang, *Chinese American Transnationalism*, 17-18.

¹⁰⁰ Salyer, *Laws Harsh As Tigers*, 40. See also <http://www.abanet.org/publiced/greatdebates/ChineseExclusion.pdf> at pp. 30-31.

¹⁰¹ Lee, *At America's Gates*, 138.

¹⁰² Lee, *At America's Gates*, 138. Previous sentence about growth of immigration lawyers also same source and page.

¹⁰³ Lee, *At America's Gates*, 139, quoting communication from Oscar Greenhalgh to Walter S. Chance, March 11, 1899.

¹⁰⁴ Lee, *At America's Gates*, 139.

¹⁰⁵ <http://freepages.genealogy.rootsweb.com/~nrmelton/sfbrior.htm>. © 2005, Cathi Skyles. Original source "The Bay of San Francisco," Vol. 2, page 303-304, Lewis Publishing Co, 1892.

limited to such cases.¹⁰⁶ Riordan was co-counsel in the case of *Chew Heong v. United States*, leading to an important if relatively short-lived decision that the Exclusion Acts of 1882 and 1884 could not be read retroactively to exclude a Chinese laborer who entered the United States in 1880, left for Honolulu in 1881, and sought re-entry into the United States in 1884 without the certificate of re-entry stipulated in these exclusion acts.¹⁰⁷ The Scott Act had permanently banned the immigration of Chinese labor to the United States (as efforts to renegotiate the Burlingame Treaty of 1868 were meeting opposition in China) and prohibited their return to the United States, which had remained possible if they had held return certificates. The legal challenge was over the exclusion of Chinese laborers who had left the United States with valid return certificates, but who were then denied re-entry with passage of the Scott Act.

Riordan also filed a brief in the successful appeal of Wong Kim Ark to the U.S. Supreme Court following passage of the Scott Act and other exclusion acts. The appellee was born in the United States and was a laborer who had left on a temporary visit in 1894 and was turned away upon return in August, 1895, on the grounds that the Chinese Exclusion Acts barred his entry into the United States. Wong Kim Ark filed a habeas appeal.¹⁰⁸ While members of Congress had deliberated whether American-born children of Chinese aliens were citizens even prior to the Civil Rights Act of 1866 and the Fourteenth Amendment, Congress seems to have understood that it was extending birthright citizenship to the children of resident aliens, including Chinese, upon passage of these post-Civil War measures.¹⁰⁹ However, Congress had been assured several times during these debates that very few children of alien parents would qualify for birthright citizenship, and that there was no significant reason for concern; few Chinese, for example, were residing in the United States at the time.¹¹⁰ Moreover, with the Burlingame Treaty and the operation (both at home and through reciprocal action in China) of subsequent federal statutes complicating the picture, the Court majority in *United States v. Wong Kim Ark* spent about fifty-two pages attempting to establish that the American-born son of Chinese aliens legally within the United States but ineligible for naturalization was an American citizen by birthright. Justices Fuller and Harlan in dissent disavowed this conclusion, reviewed the statutory and 14th Amendment history differently, and held that the parents, ineligible for naturalization, were not properly within the jurisdiction of the United States (parallel to Indians with tribal relations) or the state of California for purposes of the citizenship clause.¹¹¹

Riordan was sometimes joined before the Court with Harvard-educated lawyer and future Ambassador to the Court of St. James Joseph H. Choate. Choate, a New

¹⁰⁶ My source here is a Lexis search for Thomas D. Riordan as counsel prior to 1910. Riordan is listed as counsel or co-counsel, or as filing briefs in at least four additional cases before the Supreme Court.

¹⁰⁷ *Chew Heong v. United States* 112 U.S. 536 (1884); 1884 U.S. LEXIS 1908

¹⁰⁸ *United States v. Wong Kim Ark* 169 U.S. 649 (1898); 1898 U.S. LEXIS 1515.

¹⁰⁹ Peter H. Schuck and Rogers M. Smith, *Citizenship Without Consent: Illegal Aliens in the American Polity* (New Haven: Yale University Press, 1985), 77-78.

¹¹⁰ Schuck and Smith, *Citizenship Without Consent*, 78-79.

¹¹¹ *United States v. Wong Kim Ark* 169 U.S. 649 (1898); Justice Gray wrote for the majority. Dissent by Justice Fuller with whom Justice Harlan joined, 169 U.S. 649, 724-726. Schuck and Smith, *Citizenship Without Consent*, 78.

Englander, attempted to challenge the exclusion acts in cases such as *Fong Yue Ting v. United States* (1893). In this case, which consolidated three different Chinese exclusion cases, the Chinese laborers in question were apprehended in New York for not possessing the certificates of residence required under the Geary Act of 1892; in one case, the laborer was denied such a certificate. Their habeas petitions had been dismissed, and the Supreme Court affirmed that denial. Justice Gray, writing for the Court, quoted from the 1892 case of *Nishimura Ekiu v. United States*, involving the exclusion of a 25 year old Japanese woman who claimed to be married to a man residing in the United States, the veracity of such claims being challenged by the customs official in San Francisco.¹¹² Gray, quoting from this case, maintained that

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States, this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

Gray held that this was also consistent with the decision written by Justice Field in *Chae Chan Ping* (1889), though Justices Field joined Justices Brewer and Fuller in dissenting in *Fong Yue Ting*.¹¹³ Choate, who frequently appeared before the Supreme Court, won an 1898 case before the Supreme Court on behalf of a group of New York Indians for recovery of money from the non-consensual sale by the U.S. of land in Kansas that had been set aside for their behalf under a mid-19th century removal treaty.¹¹⁴

Oliver P. Stidger, who succeeded Riordan, had a large practice based in Chinese immigration work, and was a vocal critic of the exclusion laws. In 1908, Stidger signed a contract with the Chinese Six Companies to represent individual Chinese residing

¹¹² According to the Act of 1891, in addition to exclusion of Chinese, the commissioner of immigration was authorized to bar entry to "a person without means of support, without relatives or friends in the United States," and "a person unable to care for herself, and liable to become a public charge, and therefore inhibited from landing under the provisions of said act of 1891, and previous acts of which said act is amendatory;" and the District Attorney of the United States insisting that the San Francisco commissioner's finding and decision were reviewable by the superintendent of immigration and the Secretary of the Treasury only [CHECK FACTS]. *Nishimura Ekiu v. United States* 42 U.S. 651 (1892); 1892 U.S. LEXIS 1999. The women detained were placed in the custody of the Methodist Episcopal Chinese and Japanese Mission in San Francisco.

¹¹³ For the dissenters, there is no inherent or arbitrary power to banish or expel Chinese domiciled in the United States, and they insisted that, as the 14th Amendment protects any person from violation of due process or equal protection of the laws, so the 5th Amendment protects persons lawfully within the United States. *Fong Yue Ting v. United States* at 739.

¹¹⁴ *New York Indians v. United States* 170 U.S. 1 (1898); 1898 U.S. LEXIS 1525.

throughout the United States, for which he was paid \$2,400 per year, paid monthly.¹¹⁵ By 1915, Stidger was the official attorney for the Chinese Chamber of Commerce, and his firm, Stidger, Stidger, and Kennah was one of the leading firms representing Chinese immigrants.¹¹⁶ Henry C. Kennah, who joined the firm around 1912, had served as an immigrant inspector in San Francisco for several years in the early years of the century.¹¹⁷ Kennah was not the only lawyer for the Chinese who had experience in the Bureau of Immigration; one lawyer advertising in 1906 claimed to have worked in the Bureau for over ten years.¹¹⁸ In a fascinating brief news article, it is clear that anti-immigration forces pursued disbarment of Oliver P. Stidger and Kennah at some point, barring them practicing in “immigration stations.” The Department of Labor claimed that they were involved in an international smuggling ring through which hundreds of Chinese entered through the port of San Francisco. The two attorneys, who vowed to fight the disbarment, were said “to have smoothed the legal way for the admission of the Chinese through the connivance of emigration officials, many of whom have either been dismissed or suspended from the service by Anthony Caminetti, commissioner general of immigration.”¹¹⁹ Caminetti, of course, was an important figure in the later Mann Act prosecution that would bear his name. The article represented Stidger and Kennah as having “controlled eighty-five per cent of the Chinese legal business at the immigration station at Angel Island here for several years.”¹²⁰

Lawyers and law firms advertised for Chinese work in Chinese language newspapers such as the *Chung Sai Yat Po* in San Francisco. The San Francisco firm of Ball, Straus, and Atwood advertised that Straus was a lawyer with “a very good mastery of Chinese.”¹²¹ In newspaper advertisements, attorney Alfred L. Worley said “most Chinese in this city” depended on him and “the charge was fair,” promising to handle cases “with heart and soul.”¹²² Worley and his partner, George A. McGowan, represented a number of Chinese immigrants from the early 1900s to the 1920s. They practiced in both state and federal courts and maintained an office in a prestigious office building in San Francisco.¹²³ McGowan had served in the California Assembly.¹²⁴ Their well-

¹¹⁵ Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1996), 346n18 accessed at http://books.google.com/books?id=eZ7TqtjYlfcC&pg=PA373&vq=Hoadley&dq=%22george+hoadley%22+supreme+court&source=gbs_search_s&sig=PA2j6eQema-0gnmq59bWf3f-u2Q#PPA346,M1

¹¹⁶ Erika Lee, *At America's Gates*, 139.

¹¹⁷ Erika Lee, *At America's Gates*, 140.

¹¹⁸ Charlie D. O'Connor's advertisement in *Chung Sai Yat Po* for February 27, 1906 promised “fast, convenient, and cheap” service; quoted in Erika Lee, *At America's Gates*, 140.

¹¹⁹ “Attorneys Are Disbarred in San Francisco” reported by the Associated Press, *New York Times* (?), no date, but obviously after 1912 when Kennah joined the firm. Accessed at [http://docs.newsbank.com/openurl?ctx_ver=z39.88-](http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:EANX&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=1)

[2004&rft_id=info:sid/iw.newsbank.com:EANX&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=1](http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:EANX&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=1)

¹²⁰ “Attorneys Are Disbarred in San Francisco” reported by the Associated Press, *New York Times* (?), no date, but obviously after 1912 when Kennah joined the firm. Accessed at [http://docs.newsbank.com/openurl?ctx_ver=z39.88-](http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:EANX&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=1)

[2004&rft_id=info:sid/iw.newsbank.com:EANX&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=1](http://docs.newsbank.com/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:EANX&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=1)

¹²¹ Erika Lee, *At America's Gates*, 140, quoting the firm's ad in *Chung Sai Yat Po* for November 22, 1906.

¹²² Lee, *At America's Gates*, 140, quoting Worley's 1906 advertisement of January 30 and 31, 1906.

¹²³ Erika Lee, *At America's Gates*, 139-40.

known immigration court work did not help their reputations, apparently, as there was a “whiff of the less-than-respectable” about the firm, with their frequent run-ins with the Immigration Service and their willingness to take on unpopular cases.¹²⁵ In 1916, McGowen took the case of a twenty year old woman who had been refused admission at Angel Island, whose husband was a much older merchant who had gone to China to find a bride; she was given two days to file an appeal. The Immigration Service was convinced that the husband was merely “alleged” on the basis of discrepant responses “husband” and “wife” made to interrogators (not uncommon when couples had met very briefly), and the husband hired McGowen.¹²⁶ In an appeal process that lasted nearly two years, the husband persisted, hiring another attorney, Dion Holm to file various additional appeals including a writ of habeas corpus. The Circuit Court of Appeals for the Ninth Circuit was not insensitive to due process and fair procedure complaints involving individual immigrants, and held that the Department of Labor had engaged in unfair proceedings in this particular case. The young woman, incarcerated during that entire period, was freed to enter the United States.¹²⁷

Since so many women were detained under suspicion they were entering as prostitutes, a good deal of legal business was available to be had on behalf of women (or, in the case of women imported for purposes of prostitution, on behalf of the tongs or individuals who claimed ownership). A few Chinese American attorneys seemed to be representing immigrants by the early 1920s, and one of these, Chan Chung Wing represented a merchant’s wife seeking entry to the United States in 1920. He was a member of the law firm of Wing, O’Malley, and McGrath, and apparently a partner.¹²⁸

Other lawyers who represented the Chinese before the Supreme Court included Harvey E. Brown, and J. Hubley Ashton (chief counsel for Wong Kim Ark), who often seemed to work together with Riordan. Ashton, a former assistant attorney general of the United States and acting attorney general for 1868-69, was considered an authority in international law, and practiced in federal and international courts.¹²⁹ Ashton represented a number of Chinese challenging exclusion laws before the Supreme Court in the 1890s. The presence of Harvey E. Brown, former District Attorney in San Francisco and close associate of Leland Stanford, illustrates a different route by which elite lawyers became advocates for the Chinese. Brown represented the Oriental and Occidental Steamship

¹²⁴ Franklin Harper, *Who’s Who on the Pacific Coast* (1913), accessed at http://books.google.com/books?id=vV4DAAAAYAAJ&pg=PA368&vq=Worley&dq=mcgowan+worley+san+francisco&source=gb_srch_r&cad=0_2

¹²⁵ Robert Barde, “An Alleged Wife: One Immigrant in the Chinese Exclusion Era,” *Prologue*, a magazine of the National Archives, Vol. 36 no. 1 (Spring 2004), accessed at <http://www.archives.gov/publications/prologue/2004/spring/alleged-wife-1.html>

¹²⁶ Barde, “An Alleged Wife.”

¹²⁷ Barde, “An Alleged Wife,” quoting the Circuit Court’s April 1918 opinion in *Chew v. White, Immigration Com’r*, Case No. 3088.

¹²⁸ Erika Lee, *At America’s Gates*, 140.

¹²⁹ On J. Hubley Ashton, *Men of Mark in America: Ideals of American Life Told in Biographies of Eminent Living Americans*, edited by Merrill E. Gates, Vol 1, (Washington, D.C.: Men of Mark Publishing Company, 1905), accessed at <http://books.google.com/books?id=pSoEAAAAYAAJ&pg=PA109&lpg=PA109&dq=j+hubley+ashton+law+chinese&source=web&ots=nPJ5XTmnpf&sig=jbhSRsVKiATlqkOA0BZp6YjFmI>

Company beginning in 1874, a company was owned by Stanford. In the early history of Chinese exclusion, some challenges were brought by shipping companies required to pay taxes to land those who might become public charges (the very state restrictions that, when overturned, helped establish that control of immigration was a federal matter), and a bit later, challenges to detention brought by Chinese often named the master of the ship as the detainee, since ships were required to detain those not allowed to land and then transport them back to China. These challenges, then, brought the lawyers for carriers into the cases on the side of the Chinese detainees, since the collector at the port had barred entry in the first place.¹³⁰ Brown appeared in the case of *Chew Heong* and in other cases. When West Coast exclusionists blamed the railroads for the influx of Chinese, it may have been about more than the use of Chinese workers to build the railroads since Stanford owned both the shipping company and a major railroad, and Brown served as legal counsel for both.¹³¹

George Hoadly, former governor of Ohio and veteran attorney before the Supreme Court, sometimes argued on behalf of Chinese clients alongside one of the most prominent attorneys to practice before the Court in the late nineteenth century, James C. Carter. They participated in challenging court decisions pertaining to the return right of U.S. resident Chinese merchants without certificates after the exclusion acts of 1884 and 1888 and wrote a joint brief to the Supreme Court in *Chae Chan Ping*, though the ultimate disposition of this case was highly deferential to Congress and unfavorable to the Chinese.¹³²

Chinese in America mobilized to fight the 1892 Geary Act, which not only extended the ban on immigration of Chinese laborers for another ten years beyond the initial ten year period stipulated in the Exclusion Act of 1882 but also required that those Chinese laborers entitled to remain in the United States apply within a year for a certificate of residence from the collector of internal revenue. The burden of proof that a laborer was lawfully within the United States rested upon that person, and testimony of a white witness was expected. Any laborer failing to register could be arrested, brought before a U.S. commissioner or a judge for deportation proceedings, and also sentenced to a year at hard labor before deportation. The Chinese Six Companies posted circulars widely in San Francisco and elsewhere advising Chinese not to register but rather to stand together in opposition to the law. The Chinese Six Companies claimed the law violated the Burlingame Treaty of 1868 and the U.S. Constitution, and hired three prominent appellate attorneys from Washington, DC to challenge its constitutionality.¹³³ According to one Chinese account, “to test this law in the Supreme Court it certainly needs money

¹³⁰ <http://www.abanet.org/publiced/greatdebates/ChineseExclusion.pdf> at p. 33.

¹³¹ <http://www.abanet.org/publiced/greatdebates/ChineseExclusion.pdf> at p. 33

¹³² McClain, *In Search of Equality*, 196-199 and 347n28 accessed at http://books.google.com/books?id=eZ7TqtjYlfcC&pg=PA196&vq=Hoadley&dq=%22george+hoadley%22+supreme+court&source=gbs_s&search_r&cad=0_1&sig=n9BoMH81ewWMEhQ9vqT-6-AOMSk#PPA196,M1

¹³³ Lucy E. Salyer, *Laws Harsh as Tigers* (Chapel Hill: University of North Carolina Press, 1995), 46-47. The attorneys were J. Hubley Ashton, Joseph H. Choate, and Maxwell Evarts.

for the lawyers' fees and other expenses, so the Six Companies levied a dollar upon every Chinaman to meet these expenses."¹³⁴

The test case the Chinese Six Companies and the legal team of J. Hubley Ashton, Joseph H. Choate, and Maxwell Evarts chose involved three Chinese laborers in the United States. Fong Yue Ting and Wong Quan had resided in the United States since before the Chinese Exclusion Act of 1882, had refused to register, and been ordered deported; Lee Joe had attempted to register in New York, but the collector of internal revenue had denied the certificate on the grounds that the witnesses, being Chinese, were not credible and although a court heard his case, he was ultimately ordered deported.¹³⁵ After the deadline for registration had passed, the case was scheduled on the Supreme Court's docket. The attorneys hired by the Chinese Six Companies argued that Congress had no power to deport those Chinese who failed to register and furthermore, the procedures established for registration and deportation (including hard labor) violated due process guarantees.¹³⁶

The Court had already conceded extensive powers to Congress in *Chae Chan Ping v. U.S.* (also known as the Chinese Exclusion Case) and *Nishimura Ekiu v. U.S.*, decided in 1889 and 1892 respectively. Jurisdiction over its own territory was held to be a marker of independence and sovereignty, and Congress could by legislation choose to exclude foreigners, treaties notwithstanding. "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated," Justice Field, who had heard Chinese exclusion cases in California, wrote for the majority in *Chae Chan Ping*.¹³⁷ The latter case upheld the authority of officers of the bureau of immigration, newly created by statute of March 3, 1891, with Justice Gray asserting that while the writ of habeas corpus is a right, Congress may grant to executive branch officials the exclusive power to review evidence:

An alien immigrant, prevented from landing by any such officer claiming authority to do so under an act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful. [Chew Heong v. United States, 112 U.S. 536](#); [United States v. Jung Ah Lung, 124 U.S. 621](#); [Wan Shing v. United States, 140 U.S. 424](#); [Lau Ow Bew, Petitioner, 141 U.S. 583](#). And Congress may, if it sees fit, as in the statutes in question in *United States v. Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be entrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and

¹³⁴ Connie Young Yu, "Up Against the Law," in *Remembering 1882*, p. 18, quoting Fong Kum Ngon *Overland Monthly*, May 1894. Accessed 3/3/08 at http://66.47.228.95/CHSA_Remembering1882.pdf

¹³⁵ Salyer, *Laws Harsh as Tigers*, 47-48.

¹³⁶ Salyer, *Laws Harsh as Tigers*, 48.

¹³⁷ *Chae Chan Ping v. United States* 130 U.S. 581, 603-604, 606 (1889). On Justice Field's posture concerning habeas petitions from Chinese aliens while serving in California, see Christian G. Fritz, *Federal Justice in California: the Court of Ogden Hoffman, 1851-1891* (Lincoln: University of Nebraska Press, 1991).

no other tribunal, unless expressly authorized by law to do so, is at liberty to reexamine or controvert the sufficiency of the evidence on which he acted.¹³⁸

Therefore, attorneys in *Fong Yue Ting* and *Wong Quan* tried to distinguish between exclusion and the arrest and deportation of those living within the United States.¹³⁹ Attorneys contested the absolute, arbitrary power lodged in the hands of the collector of internal revenue; the law did not make clear what kind of investigation or evidence this collector need to take, leaving far too much administrative discretion. Chinese residing in America were subject to arrest without a warrant or without probable cause; there was no requirement for a grand jury indictment; the Chinese defendant could not summon witnesses on his behalf during the administrative proceeding, could not examine or rebut evidence considered by government officials, and could not consult with an attorney. The punishment, deportation, was furthermore cruel and unusual. Most importantly, the Geary Act failed to permit a full judicial hearing concerning the right of these unregistered Chinese to remain within the United States.¹⁴⁰ These arguments failed to carry the day. Justice Gray, writing for the Court, dismissed the petitioners' habeas petitions.¹⁴¹ "The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country," the Court held.¹⁴² Citing as authorities various scholars of international law, Gray insisted that the right to deport or expel aliens was a function belonging to sovereign independent nations.¹⁴³ Invoking the political questions doctrine, Gray argued that "the power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene."¹⁴⁴

Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore, remain subject to the power of Congress to expel them, or to order them to be removed and deported from

¹³⁸ *Nishimura Ekiu v. United States* 142 U.S. 651, 660 (1892).

¹³⁹ Salyer, *Laws Harsh as Tigers*, 48.

¹⁴⁰ Salyer, *Laws Harsh as Tigers*, 49, citing the Brief for Appellants.

¹⁴¹ Justices Brewer, Field, and Fuller dissented.

¹⁴² *Fong Yue Ting v. United States* 149 U.S. 698, 707 (1893)

¹⁴³ *Fong Yue Ting* at 711.

¹⁴⁴ *Fong Yue Ting* at 713.

the country, whenever, in its judgment their removal is necessary or expedient for the public interest.¹⁴⁵

Only Justices Brewer, Field, and Fuller dissented, finding that while these aliens resided with the United States they were entitled to protection of the Constitution, and finding that there were problems in these cases that implicated the Fourth, Fifth, Sixth, and Eighth Amendments.¹⁴⁶

Federal courts played an important role in shaping and overseeing processes governing admission or exclusion of aliens, especially until they were stripped of the power to hear habeas cases in 1905. Those who would argue that the federal courts supported exclusionist legislation and that their decisions more or less tracked rising exclusionist sentiment could certainly find some evidence for this position, but this is too simple a picture to be accurate.¹⁴⁷ Federal courts played an important and even central role in frustrating the growing anti-Chinese movement in the late 19th century—to such an extent that the courts became a target of exclusionists.¹⁴⁸ It was not so much that federal judges harbored more benign views of the Chinese than many of their peers, but rather their understanding of equal protection and due process guarantees and constructions of the 14th Amendment requirements of what states owed to all persons within their jurisdiction were in play.¹⁴⁹ Moreover, for some judges and Supreme Court justices, U.S. treaty obligations (e.g., under the 1868 Burlingame Treaty) were not to be abrogated unilaterally by Act of Congress, never mind infringed by the actions of states such as California. Unless and until these treaties were renegotiated, these judges considered themselves bound, regardless of the wishes of citizens or the political branches of government.

The outcome of the *Ju Toy* case in 1905 was important for the struggle between branches of the federal government for control over immigration decisions and appeals. It was also important in linking individual rights with an administrative process that was beyond the purview of the courts.¹⁵⁰ Here, the Court acceded to a diminution of the federal courts' role in hearing appeals, even from those alleging to be U.S. citizens.

In *U.S. v. Ju Toy*, the Court, held that one stopped at the border because of the Chinese Exclusion Acts, who alleges that he is a natural born citizen of the United States, has no appeal to the federal courts from a finding by customs officials and from that of the Secretary of Commerce and Labor (where the Bureau of Immigration was lodged)

¹⁴⁵ *Fong Yue Ting* at 724.

¹⁴⁶ Dissent by Mr. Justice Brewer, *Fong Yue Ting* at 733.

¹⁴⁷ I tend to read Ian F. Haney López's very good work, *White By Law: The Legal Construction of Race* (New York: New York University Press, 1996) as taking this view of the Court. Of course the cases he examines well illustrate how the Court aided the exclusionist project.

¹⁴⁸ Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851-1891*. (Lincoln: University of Nebraska Press, 1991), pp. 223 and 210-249.

¹⁴⁹ Fritz, *Federal Justice in California*, 224.

¹⁵⁰ See Gabriel J. Chin, "Regulating Race: Asian Exclusion and the Administrative State," 37 *Harvard Civil Rights-Civil Liberties Law Review* 1, 63 (Winter, 2002): 1-64.

that he is not.¹⁵¹ Justice Oliver Wendell Holmes, writing for the Court and apparently exhibiting his noted posture that elected officials should receive a great deal of judicial deference, held that a decision by the Secretary of Commerce and Labor was conclusive on the issue; “the act of August 18, 1894 [28 Stat. at L. 372, 390, chap. 301, 1, U. S. Comp. Stat. 1901, p. 1303] purports to make the decision of the Department final—whatever the ground on which the right to enter the country is claimed,” including citizenship (198 US ???). Decisions of this sort, Holmes argued, may be entrusted to executive branch officers: “The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the 5th Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial.” Holmes and those concurring accepted Congressional jurisdiction-stripping, in effect. In a lengthy dissent, Justice Brewer, joined by Justice Peckham, argued that writs of habeas corpus for someone attempting to re-enter the United States and alleging to be a native-born citizen of the United States should be preserved. Ju Toy’s deportation amounted to a punishment and a violation of the 5th Amendment. Rules circumventing access to the courts and leaving such a decision completely in the hands of ministerial officers constitute a denial of due process of law.

When the highest court ultimately granted Congress wide powers over policing U.S. borders, the federal courts and the Supreme Court itself remained involved in due process and fair procedure issues, most especially when persons alleging to be citizens were involved in immigration bureau proceedings.¹⁵²

There remained a very important area of contestation in immigration law engaging the Court. The Court was involved in defining whiteness for purposes of naturalization and citizenship under the Naturalization Act of 1790 that employed the phrase “free white persons”, an Act amended in the aftermath of the Civil War to include persons of African descent.¹⁵³ Most of the “action” before the Court occurred in the early 1920s, as restrictionist forces were gaining the day in Congress. In the 1922 case of *Takao Ozawa v. United States*, Ozawa’s lawyer argued that the purpose of the 1870 Act was to extend the naturalization laws to persons of African descent and aliens born in Africa; neither this nor the subsequent act of 1875 containing language of “free white persons” was designed to restrict but rather to enlarge naturalization.¹⁵⁴ Moreover, “white person” as construed by the Court as well as the state courts has meant persons without Negro blood, he argued.¹⁵⁵ According to this view,

¹⁵¹ *United States v. Ju Toy* 198 U.S. 253 (1905)

¹⁵² Salyer, *Laws Harsh as Tigers*, 209-216.

¹⁵³ David M. Reimers, *Unwelcome Strangers: American Identity and the Turn Against Immigration*. New York: Columbia University Press, 1998, 13-14.

¹⁵⁴ *Takao Ozawa v. United States* 260 U.S. 178 (1922), Mr. George W. Wickersham, Counsel, with Mr. David L. Withington.

¹⁵⁵ Counsel for Ozawa, *id.*

the words “free white persons” had in 1875 acquired a signification in American statute law as expressing a superior class as against a lower class, or, to speak explicitly, a class called “white” as against a class called “black”; the white man against the Negro.¹⁵⁶

The Solicitor General argued, however, that by the time of the 1906 Act establishing the Bureau of Immigration and Naturalization “and to provide for a uniform rule for the naturalization of aliens throughout the United States”¹⁵⁷ “it had become settled that Japanese and all other people not of the white or Caucasian race were not eligible for naturalization as ‘white persons.’”¹⁵⁸

Japanese immigrants facing discriminatory legislation and seeing most fellow Japanese barred from immigrating by the Gentlemen’s Agreement of 1907, also mobilized to press their claims in court. Masuji Miyakawa, who was naturalized in 1905, became the first Japanese-American member of the bar in the United States, served as chief counsel in a 1906 case before the California Supreme Court establishing the right of Japanese children to attend public school in San Francisco, and fought against treaty restrictions that barred U.S. entry of Japanese laborers. He wrote a lengthy article in 1907 about the legal aspect of the naturalization question for the Japanese in 1907.¹⁵⁹

Naturalization was of vital interest, not only because many Japanese aliens wished to become Americans, but because legal eligibility or ineligibility for naturalization had been an important signifier in other types of discriminatory legislation. Exclusionists targeted the capacity of Asians in America to hold mining claims, own or lease farming land, or even find employment in the hope of pushing them out of America altogether. The legal capacity to be naturalized, then, became a means of combating virulent discrimination for Asians. Political avenues to seek redress seemed closed off. Going to court could circumvent having to rely upon the (lack of) initiative of Japanese diplomats and moreover, did not depend—at least in any direct fashion—on the state of public opinion in America.¹⁶⁰ Of course if activists had had the benefit of Robert Dahl’s little essay of 1957, or Gerald Rosenberg’s *Hollow Hope*, they would have perhaps concluded

¹⁵⁶ *Id.*

¹⁵⁷ From Justice Sutherland’s majority opinion at 190-191.

¹⁵⁸ Brief of Mr. Solicitor General Beck and Mr. Alfred A. Wheat, Special Assistant to the Attorney General, *Ozawa v. United States*.

¹⁵⁹ “Masuji Miyakawa, Class of 1905,” http://www.law.indiana.edu/alumni/profiles/miyakawa_masuji.shtml. Also “Miyakawa Masuji Dead,” *New York Times*, March 6, 1916 at <http://proquest.umi.com.proxy.swarthmore.edu/pqdweb?index=0&did=104667620&SrchMode=1&sid=5&Fmt=10&VInst=PROD&VType=PQD&RQT=309&VName=HNP&TS=1203454680&clientId=19234>. Both accessed February 19, 2008. Yuji Ichioka, “The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case,” *Amerasia* 4: 2 (1977), 4.

¹⁶⁰ For this point, see Ichioka, “The Early Japanese Immigrant Quest for Citizenship,” 8.

that the Court tends to stick fairly closely to election returns and might have watched out what they wished for when they decided to take it to Court.

How and why the Ozawa case got to Court also reveals the mobilized efforts of Japanese in America to acquire access to citizenship. The California Alien Land Law of 1913 applied to “aliens ineligible to citizenship” and prohibiting such aliens or corporate bodies whose members or stockholders were majority alien, from purchasing agricultural lands, leasing such lands for more than three years, or bequeathing or selling agricultural land already purchased to other such aliens. Various influential individuals, authors, newspapers, and organizations of Japanese in America took up the cause of naturalization rights, and the effort to seek naturalization rights kicked into high gear after the 1913 California land act. (The passage of even more restrictive alien land acts by California and Washington in 1920 and 1921 respectively made addressing the legal barriers to naturalization even more acute for the Japanese in America.) The Japanese Interdenominational Board of Mission, headquartered in San Francisco and comprised of immigrant Christian churches, endorsed seeking immigration rights, as did the Buddhist Mission of America. Chiba Toyoji, editor of a monthly journal devoted to promoting immigrant agriculture, proposed a naturalization test case as the best way forward.¹⁶¹ The Pacific Coast Japanese Association Deliberative Council, formed in 1914 and composed of a variety of west coast associations to address problems they faced in common, disregarded the wishes of the Japanese government and the Foreign Ministry to leave the issue of naturalization to the work of diplomats, who had determined the time was not ripe to press harder in negotiations for naturalization rights.¹⁶² In 1914, the Council passed the following resolution:

Whereas, recognizing the present urgency of solving the naturalization question, be it hereby resolved that a test case be instituted at an appropriate time in pursuit of the just legal goal of acquiring the right of naturalization for the Japanese.¹⁶³

The case of Ozawa Takao began to draw attention among leaders of organized groups of Japanese naturalization advocates on the west coast after the he appealed the decision of the U.S. District Court.¹⁶⁴ The case looked ideal because Ozawa confounded the stereotypes of the unassimilable Asian. Born in Japan, Ozawa had come to San Francisco in 1894, was graduated from Berkeley High School, and attended the University of California for three years. In 1906, he moved to Honolulu and worked for an American company. Married to an American-educated woman and with two children, he had outstanding references as to his moral character, and he averred that he almost always spoke English at home—to the extent that his children cannot speak Japanese, that he had no connection to Japanese organizations or churches (he sent his children to an American church), that he neither drank nor smoked, did not gamble, and was honest and industrious. Moreover, he argued, he had been a continuous resident of the United States

¹⁶¹ On growing support for naturalization rights among the Japanese immigrant community, see Ichioka, “The Early Japanese Immigrant Quest for Citizenship,” 6-7.

¹⁶² Yuji Ichioka, “The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case,” *Amerasia* 4: 2 (1977), 9-12.

¹⁶³ Quoted in Ichioka, “The Early Japanese Immigrant Quest for Citizenship,” 10.

¹⁶⁴ Ichioka, “The Early Japanese Immigrant Quest for Citizenship,” 12.

for twenty-eight years.¹⁶⁵ Ozawa's application to become a naturalized citizen had been denied by the United States District Court for the Territory of Hawaii in 1916 on the ground that Revised Statutes, section 2169 barred Ozawa, who was otherwise "eminently qualified under the statutes to become an American citizen."¹⁶⁶ Section 2169 of Title XXX of the Revised Statutes of 1875 amended U.S. naturalization law to include former slaves, stating that "The provisions of this title shall apply to aliens, being free white persons and to aliens of African nativity and to persons of African descent."¹⁶⁷ In other words, Ozawa was not white. The Ninth Circuit in San Francisco did not hand down a decision but passed Ozawa's case to the Supreme Court on May 31, 1917.

The Pacific Coast Japanese Association Deliberative Council resembled in structure many of the mass-based organizations and associations of the progressive era lauded and discussed by Theda Skocpol.¹⁶⁸ Locals affiliated with state or regional associations, which in turn comprised the umbrella organization; in this case, Japanese locals from both Canada and the United States were linked. The Japanese Association of America, part of the Pacific Coast Japanese Association Deliberative Council and having all locals in California, Nevada, Utah, Colorado, and Arizona affiliated with it, brought the Ozawa case before the larger Deliberative Council as Ozawa's appeal was made to the Ninth Circuit. The Deliberative Council sought the court transcript from Hawaii, and the General Secretary of the Japanese Association of America began to solicit legal opinions of the Association's counsels. Materials were circulated to other central bodies in the Pacific Coast Japanese Association Deliberative Council.¹⁶⁹ While the Foreign Minister attempted to have leaders "take steps to prevent the Japanese within your jurisdiction from undertaking a test case campaign," but Japanese diplomats in the U.S. had little control over naturalization activists. The Council voted unanimously to support Ozawa in a meeting in late July, 1917, establishing a four-person naturalization committee comprised of a representative of each central body in the U.S.¹⁷⁰ This committee retained David L. Withington, Ozawa's attorney in Honolulu, and chose as principal counsel George W. Wickersham, who had served as U.S. Attorney General under William Howard Taft.¹⁷¹

The case was much discussed in the Japanese language press, and pursuit of the test case became more controversial when it became clear that there were technicalities that might have argued against moving forward. Some advocates of naturalization pull back from the *Ozawa* case. Chief legal counsel Wickersham, fearing the Court might declare the case moot, advised the head of the committee (Yamaoka Ototaka of Seattle)

¹⁶⁵ From Ozawa's legal briefs, quoted in Ichioka, "Early Japanese Immigrant Quest for Citizenship," 10-11.

¹⁶⁶ Judge Charles F. Clemons's decision quoted in Ichioka, 12, from San Francisco Consulate General, *Documental History of Law Cases Affecting Japanese in the United States, 1916-1924*, 8-9.

¹⁶⁷ Quoted in *Takao Ozawa v. United States* 260 U.S. 178 (1922)

¹⁶⁸ Theda Skocpol, *Protecting Soldiers and Mothers* (Cambridge: Belknap Press of Harvard University Press, 1992); Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Norman, OK: University of Oklahoma Press, 2003).

¹⁶⁹ Ichioka, "The Early Japanese Immigrant Quest for Citizenship," 9-12.

¹⁷⁰ Ichioka, "The Early Japanese Immigrant Quest for Citizenship," 12-13.

¹⁷¹ Ichioka, "The Early Japanese Immigrant Quest for Citizenship," 14; On Wickersham, see <http://www.millercenter.org/academic/americanpresident/taft/essays/cabinet/450>

to search for a second case, and the naturalization committee examined other possible test cases during 1920.¹⁷² The case chosen involved Yamashita Takuji and Kono Hyōsaburō, who had been naturalized in Washington and who, upon filing articles of incorporation to form a real estate company in that state, were rejected by the Secretary of State on the grounds that their naturalization was not legal. It was 1921, and Washington had recently followed California's lead in passing a highly restrictive alien land law two months prior to the Secretary of State's decision. Wickersham and Seattle attorney Corwin S. Shank took the case to the Washington State Supreme Court and lost. This case was then appealed to the U.S. Supreme Court, and the attorneys believed that at least in this case if not in Ozawa's, the Court would have to determine whether Japanese were eligible for naturalization under existing statutes.¹⁷³ The passage of alien land acts by California and Washington in 1920 and 1921 respectively made addressing the legal barriers to naturalization even more acute for Asians in America.

In November, 1922, The Supreme Court addressed Ozawa's case first, ruling on the merits and taking the issue of whiteness head-on. Justice Sutherland, writing for the Court, concluded that Ozawa, not being white but rather mongolian, was ineligible for naturalized citizenship. Sutherland reasoned about what the framers must have had in mind when they thought about race. He argued that it would be unreasonable for the Court to conclude that Congress, in passing the 1906 Act, made a fundamental change in this constant understanding without consideration, recommendation, or debate.¹⁷⁴ Were the framers of the first naturalization act in 1790 intending merely to exclude "the black or African race and the Indians then inhabiting this country?" Sutherland says rather that "the intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified."¹⁷⁵ His approach to originalism excluded races the framers did not think about. The case of Yamashita and Kono, the Court held, was concluded by the Ozawa ruling.

The Japanese fared no better in the cases challenging West Coast alien land laws.

¹⁷² Ichioka, "The Early Japanese Immigrant Quest for Citizenship," 15. On the debate over continuing with the *Ozawa* case, see Ichioka, pp. 14-16. The issue was that Ozawa had filed his petition of intent to naturalize in 1902. According to the Naturalization Act of 1906, Section 4, an applicant was to file for naturalization no more than seven years after filing the petition of intent (<http://www.historycentral.com/HistoricalDocuments/NaturalizationAct.html>). Ozawa did not file until 1914, and the 1906 Act would be read as applying to his case even retroactively, given the manner in which most restrictive legislation on immigration was being applied by the courts. The Supreme Court had articulated this position in a January, 1918 decision involving one Antonio Morena. A highly influential Japanese language newspaper in the U.S., the San Francisco-based *Nichibei Shimbun*, pointed out this problem and recommended either postponing or withdrawing the Ozawa case. Japanese language newspapers in different cities took different positions according to evidence examined by Ichioka. The *Shin Sekai* in San Francisco, remaining in favor of the test case, sponsored a public forum on naturalization in May, 1918.

¹⁷³ Ichioka, "The Early Japanese Immigrant Quest for Citizenship," 16.

¹⁷⁴ *Id.* At 194.

¹⁷⁵ *Id.*, 194-95; quote 195.

With California and Washington barring aliens ineligible for citizenship to lease or purchase agricultural land—or even to serve as guardians of minors who had title to such land—the economic livelihood of Asian tenant farmers in America was at stake. The Supreme Court, in 1923, allowed the state restrictive legislation to stand. In *Terrace v. Thompson*, a case brought by plaintiff landowners who wished to lease to a Japanese tenant but who were barred by the 1921 Washington Anti-Alien Land Law, the Court held that there was no violation of equal protection or denial of due process when the classification in question was based on citizenship; such a classification was reasonable.¹⁷⁶ Justice Butler, writing for the Court, held that “while Congress has exclusive jurisdiction over immigration, naturalization and the disposal of the public domain, each State, in the absence of any treaty provision to the contrary, has power to deny to aliens the right to own land within its borders.”¹⁷⁷ Moreover, “the rights, privileges and duties of aliens differ widely from those of citizens,” and Congress “may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit.”¹⁷⁸ The law targets aliens who might naturalize but who have declared no intention to do so as well. The Court agreed with the lower court that “It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens.”¹⁷⁹ Justice Butler disposed of the California Alien Land Act case of *Porterfield v. Webb* that same day, in accordance with *Terrace*, noting that no treaty with Japan made provision for the acquisition, enjoyment, transfer, or ownership of land.¹⁸⁰ American citizens who contented in courts that such laws restricted their own property rights by barring them from transferring to those they chose were told that a U.S. citizen [O’Brien] “has no legal right to enter into the proposed contract with Inouye [a would-be sharecropper], who is an ineligible Japanese alien, unless the latter is permitted by law to make and carry out such a contract.”¹⁸¹

The Court would continue to police the borders of whiteness. Still maintaining that “the words ‘white person’ are synonymous with the words ‘a person of the Caucasian

¹⁷⁶ *Terrace v. Thompson* 263 U.S. 197 (1923); 1923 U.S. LEXIS 2736

¹⁷⁷ Butler, J. for the Court in *Terrace v. Thompson* 263 U.S. 197, 218.

¹⁷⁸ Butler, J. for the Court in *Terrace v. Thompson* 263 U.S. 197, 218, 220.

¹⁷⁹ *Terrace v. Thompson* 263 U.S. 197, 220-221, quoting the District Court for the Western District of Washington. While Justices McReynolds and Brandeis believed there was no justiciable question and that therefore the case should not have been heard, there were no recorded dissents.

¹⁸⁰ Both *Terrace* and *Porterfield* are issued November 12, 1923. *Porterfield v. Webb* 263 U.S. 225; *Frick v. Webb* 263 U.S. 326 also authored by Butler extended the logic to Japanese residents seeking to buy stock in California corporations owning agricultural land; *Webb v. O’Brien* 263 U.S. 313, also written by Butler, was decided the same day as *Frick* (November 19, 1923). See note 83 below. All four cases were slated for oral argument April 23 and 24, 1923.

¹⁸¹ *Webb v. O’Brien* 263 U.S. 313, 321 (November 19, 1923), Justice Butler writing for the Court. Thus, California may restrict the ability of aliens ineligible to citizenship to make contracts, unless a treaty (in this case with Japan) would supersede the power of California to do so.

race’, ”¹⁸² a position Sutherland would soon have cause to revisit, the *Ozawa* Court declined to review the evidence presented from the science of ethnology. It anticipated that some borderline ambiguity would remain and would have to be examined case-by-case. There would be, of necessity, different cases and a “gradual process of judicial inclusion and exclusion.”¹⁸³ By the following year, Sutherland had determined that what was operative was not “Caucasianness” but “whiteness” as understood by the common man—the common man who seemed to be constant from the founders’ time to 1923. In *U.S. v. Bhagat Singh Thind*, Sutherland and an apparently unanimous Court rejected the claim to Caucasian status of a high caste Hindu. The statute, the Court reasoned, does not employ the word “Caucasian” but rather “white persons”; “these are words of common speech and not of scientific origin.”¹⁸⁴ The word “Caucasian” was probably unfamiliar to the original framers of the 1790 naturalization statute. The statutory language must be “interpreted in accordance with the understanding of the common man from whose vocabulary they were taken.”¹⁸⁵

The question for determination is not, therefore, whether by the speculative processes of ethnological reasoning we may present a probability to the scientific mind that they have the same origin, but whether we can satisfy the common understanding that they are now the same or sufficiently the same to justify the interpreters of a statute—written in the words of common speech, for common understanding, by unscientific men—in classifying them together in the statutory category as white persons.¹⁸⁶

Resemblance, not blood, ancestral history, or DNA is what mattered. And it is the common, average person, who knew who resembles whom.

Justice Sutherland gave voice to at least a partial sort of popular constitutionalism rooted in the wishes, values, and tastes of the people, and his opinion seemed to trigger no opposition from his frequent opponents on the bench on matters of government regulation of economic and social ills. Sutherland concluded for the Court that “[i]t is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.”¹⁸⁷ The construction of the “desirable” American had taken on a decidedly Northern and Western European cast in immigration restriction discourse, and the

¹⁸² *Id.*, 197-98.

¹⁸³ *Id.*, at 198, quoting *Davidson v. New Orleans* 96 U.S. 97, 104 [YEAR?]

¹⁸⁴ *Id.*, at 208.

¹⁸⁵ *Id.*, at 208, quote 209, citing *Maillard v. Lawrence* 16 Howard 251, 261 [YEAR?]

¹⁸⁶ *Id.*, at 209-210.

¹⁸⁷ *Id.*, at 215.

distinction between older and newer immigrants was brightly drawn.¹⁸⁸ It is clear that the Court was noticing “social facts” of public opposition to assimilation with new immigrant stock and racialized social science in constructing statutory language and a vision about the meaning of race that would be faithful to the Constitution.

In the *Ozawa* and *Thind* cases, the Court attempted to settle a highly contentious political issue. And the Court was perceived as having done so. Though Asian immigrants to America viewed the decisions as expressions of racial prejudice and rejection, they also noted that the Court had clarified criteria for naturalization.¹⁸⁹ One could reasonably conclude that these cases paved the way for Congress to enact the Johnson-Reed Act (National Origins Act) of 1924, excluding Asians from the quota system established for other immigrants. The “bright-line” rulings on capacity for naturalization had the effect of turning Asian immigrants away from the courts in their efforts to become citizens. Lower court dockets on the west coast would change.

¹⁸⁸ See Desmond King, *Making Americans: Immigration, Race, and the Origins of the Diverse Democracy* (Cambridge and London: Harvard University Press, 2000), 19-20.

¹⁸⁹ See Ichioka, “The Early Japanese Immigrant Quest for Citizenship,” 17 with regard to the *Ozawa* case and Japanese response; the remark about clarifying the ineligibility of the Japanese was made by the head of the four-man naturalization committee that had been established by the Pacific Coast Japanese Association Deliberative Council, Yamaoka Ototaka of Seattle.