Yick Wo at 125: Four Simple Lessons for the Contemporary Supreme Court

Marie A. Failinger

Hamline University School of Law

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YICK WO AT 125: FOUR SIMPLE LESSONS FOR THE CONTEMPORARY SUPREME COURT

Marie A. Failinger

The 125th anniversary of Yick Wo v. Hopkins is an important opportunity to recognize the pervasive role of law in oppressive treatment of Chinese immigrants in the nineteenth and twentieth centuries. It is also a good opportunity for the Supreme Court to reflect on four important lessons gleaned from Yick Wo. First, the Court should never lend justification to the evil of class discrimination, even if it has to decline to rule in a case. Second, where there is persistent discrimination against a minority group, the Court must be similarly persistent in fighting it. Third, the Court needs to take legislative motivation more seriously in cases of persistent class discrimination. Finally, the Court cannot give sanction to any dominant group's view that the country's economic and social wealth belongs to them.

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INTRODUCTION

Yick Wo v. Hopkins, a staple of every Constitutional Law course, was 125 years old this past year.¹ In a perhaps fitting commemorative, in 2010 the City of San Francisco, where Yick Wo was arrested and

¹ Professor of Law, Hamline University School of Law. I would like to thank my research assistant, George Blesi, for his careful read and able assistance.

¹ Yick Wo v. Hopkins, 118 U.S. 356 (1886) was decided on May 10, 1886.
imprisoned, appointed its first Chinese American mayor, Ed Lee. This event was greeted by the Asian Law Caucus with the statement, "This is an historic moment for our great City. It signals a new era in San Francisco government and also for the city's residents, over thirty percent of whom are Asian American." In a classic story of backroom politics, Lee was chosen by the San Francisco board of supervisors to complete the mayoral term of new California Lieutenant Governor Gavin Newsom. The selection of a Chinese American mayor for San Francisco is particularly poignant in light of the California legislature's 2009 resolution designating December 17th, the repeal date of the Chinese Exclusion Acts, as a day to remember Yick Wo and recognize the contribution of Chinese and other immigrants to the state of California.

Yick Wo has continued to spark academic debate, most recently incited by Gabriel Chin, who questions whether Yick Wo is really a property and treaty case rather than a race case; but the lessons of Yick Wo

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4. See Rojas, supra note 3 (noting that as an Asian American mayor, Lee joins Jean Quan, Oakland's new mayor). Political sources claim that Lee's appointment, which was intended to be temporary until the subsequent election, was orchestrated by moderates who were concerned that other candidates were too liberal, and by Rose Pak, a key Asian political player in the San Francisco community. See Gerry Shih, Beyond the Scenes Power Politics: The Making of a Mayor, NEW YORK TIMES, January 7, 2011, at 17A, available at http://www.nytimes.com/2011/01/07/us/07bcmayor.html?pagewanted=all#. Newsom came to national attention when he authorized marriage licenses for gay and lesbian couples without apparent authority from state law. See Rachel Gordon, THE BATTLE OVER SAME-SEX MARRIAGE/ Uncharted territory / Bush's stance led Newsom to take action, SAN FRANCISCO CHRONICLE, February 15, 2004, at A-1, available at http://articles.sfgate.com/2004-02-15/news/17411552_1_lesbian-couples-same-sex-marriage-gay-rights.


Wo for constitutional adjudication reverberate beyond this debate. There are at least four fairly simple lessons the Justices can re-learn from the history behind Yick Wo. Constitutional scholars have been debating them for decades in works too numerous to mention. However, the saga of Yick Wo and the state and federal cases involving Chinese immigrants and citizens in the late 19th century ("the Chinese cases") remind us of important baseline lessons for the Court's treatment of seminal social justice issues that come before the Court. These lessons are:

1. The Court should never lend its justification to the evil of class discrimination, even if it must refuse to decide a case as a consequence.

2. If the Court is going to strike at legal injustice, persistence is an important virtue. An isolated victory for civil rights, such as Yick Wo, will not make much of a difference for minority groups who are scapegoated or pursued by angry or fearful majorities when it is not followed up by similar rulings. In making such decisions, historical context is critical for Supreme Court opinions and should not be treated as irrelevant or tainted evidence in these cases.

3. The Court needs to become serious in grappling with the problem of legislative purpose in equal protection cases. While the Court has frequently acknowledged that legislative motivation is rarely pure, it has failed to set clear and realistic standards for identifying and proving invidious purpose.

4. At their core, many civil rights disputes are property disputes: they embody the litigants' understanding about who is entitled to the goods or advantages at stake. Yick Wo and the Chinese cases should remind the Court that if it simply gives in to majority assumptions about "who owns" the social, moral, or material resources of our country, its rulings will inevitably result in serious social harm to minority groups.

I. Re-visitor the Story

Yick Wo's own story in the case reports and histories is so sparse that it is difficult to remember the man himself, much less his

co-appellant Wo Lee. But remember we should as long as we are going to valorize civil disobedients like Rosa Parks as keepers of our social conscience. Yick Wo came from China to the United States in 1861; by 1864 he had set himself up in the laundry business at 349 Third Street in San Francisco, right behind the current Moscone Convention Center. He had successfully maintained a licensed laundry in San Francisco for at least twenty-two years by 1885, when, after he was imprisoned for ignoring a San Francisco supervisors’ ordinance, his habeas corpus petition reached the California Supreme Court.

Professor David Bernstein and other historians suggest that the Chinese launderers took up a necessary place in the Western social order: they would do “women’s work” for nonwealthy White men as a price of earning a living and establishing a foothold in America. Men significantly outnumbered women for the first few decades after the pueblo of Yerba Buena was renamed San Francisco in 1847; women were only about 16 percent of the population in 1853. Immigration restrictions on the entry of Asian women, fueled in part by concerns that they would increase the number of prostitutes in the city, exacerbated this gender discrepancy. As

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7. See In re Wo Lee, 26 F. 471, 476 (C.C.D. Cal. 1886) (holding that the federal district court was not empowered through a writ of habeas corpus to overturn the California Supreme Court’s ruling in Yick Wo that the laundry ordinance was constitutional); see also Charles McClain, In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America 326 n.84 (1994) (suggesting that Yick Wo is possibly the name of the launderer’s business and not the defendant himself).


10. See David E. Bernstein, Lochner, Parity and the Chinese Laundry, 41 WM. & MARY L. REV. 211, 220 (1999). Bernstein notes that Chinese businesses primarily served nonwealthy Whites, since wealthier Whites had servants to do their laundry. Id. at 224. Ironically, Chinese launderers were criticized for taking jobs from White widows and single women, or housewives, even though these women were in short supply in early California. Id.


12. Id. (noting that there were 138 women out of 500 inhabitants at the city’s founding, but by 1853, of the 50,000 residents of San Francisco, only 8,000 were women and 300 were children); see also Martin Brown & Peter Phillips, Competition, Racism, and Hiring Practices among California Manufacturers, 1860–1882, 40 INDUS. & LAB. REL. REV. 61, 62 (1986).

13. See John Jung, Chinese Laundries: Tickets to Survival on Gold Mountain 25–26 (2007). The Page Act, passed in 1875, demonstrates this fear: aimed at the immigration of “Mongolian, Chinese or Japanese females for immoral purposes,” it required immigrants to prove they were of “good character,” i.e., implied that they were presumed to be prostitutes until they proved otherwise. Id. Jung notes that this was one of many reasons that Chinese wives preferred to stay in China. Id. For a discussion of prostitution
a result, it was difficult "to furnish [the bachelors of California] with clean linen when [they] desire[d] because there [weren't] enough washerwomen or wives around to do it." Those Native and Spanish American women who were in business began to charge such high prices that some workers sent their clothing to Hong Kong to be laundered and returned months later. However, "[t]he Chinese and the free [N]egroes, of whom there was now [in 1851] a goodly sprinkling .. performed washing and women's business, and such menial offices as American White males would scorn to do for any remuneration."16

As immigrants, Yick Wo and his countrymen found themselves in a familiar place in American history: even though they were often performing work not desired by Whites, they remained the social targets of high economic and social anxiety in a tight California labor market. The San Francisco labor market stood at the vortex of four streams of hungry workers: disillusioned miners coming to the city at the end of the Gold Rush, skilled Chinese immigrants finishing work on the Transcontinental Railroad in 1869,18 White workers seeking refuge from an economic depression in the East,19 and immigrants sailing into San

in nineteenth century California, see Danielson, supra note 11. Danielson notes that in 1870, only five manufacturers had women employees.

14. Danielson, supra note 11 (quoting Felix Paul Wierzbick, California As It Is And As It May Be: Or, A Guide To The Gold Fields 80–81 (1849)).


16. Danielson, supra note 11, at 3 (quoting Frank Soule, John H. Gihon, and James Nisbet, The Annals of San Francisco, Containing A Summary Of The History Of California And A Complete History Of Its Great City 369 (1855)).

17. See Henry Kittridge Norton, The Story Of California From The Earliest Days To The Present 283 (2nd ed. 1913) (noting that Chinese laborers were largely employed as carpenters, cooks, and in draining and tilling); Bernstein, supra note 10, at 222 (noting that strikes by White miners led to bans on Chinese workers in many mining operations).

18. See Jung, supra note 13 (discussing the 10,000 Chinese workers unemployed when the Central Pacific and Union Pacific railroads were united at Promontory Point, Utah in 1869, and noting a similar phenomenon when the Canadian Pacific railroad was completed in 1885); Paul C. P. Su, The Chinese Laundryman: A Study Of Social Isolation 48 (ed. John K. W. Tchen, 1987) (noting the large demand for Chinese labor until the end of the railroad building period); McClain, supra note 7, at 298 n.163 (noting that the Central Pacific Railroad was unable to secure an adequate and reliable labor force to build the western part of the transcontinental railroad and decided to experiment with Chinese laborers, including ex-miners looking for work); Ralph Kauer, The Workingman's Party of California, 13 Pac. Hist. Rev. 278, 280 (1944). Jung notes that the completion of the railroads exacerbated economic conditions for another reason: the railroads were able to bring cheaper goods from the East Coast, damaging Western businesses.

19. See Kauer, supra note 18, at 279–81 (describing the industrial depression in the mid 1870s, the national railroad strikes of 1877 which were crushed with military troops, and the resulting agitation of West Coast laborers in defense of their rights); Jerome A. Hart, In Our Second Century: From An Editor's Notebook 52–53 (1931), available at The Virtual Museum of the City of San Francisco, http://www.sfmuuseum.org/hist2/kearneyism.html (last visited Mar. 27, 2012) (noting the severe economic effect of
Francisco Bay. Historians tell us that White Americans were happy to employ the Chinese for distasteful or low-paying economic development work such as swamp clearing, mercury mining, and railroad building. White citizens were even willing to mine for gold alongside Chinese immigrants so long as they believed that there was sufficient supply for all. However, once it became clear that the unlimited wealth in the mining beds was just a myth, Whites began their efforts to exclude the Chinese from mining work, using laws (e.g., mining taxes), strikes, and unlawful violence to drive them out. As the economic downturn in the closing of the Bank of California); Siu, supra note 18, at 49 (noting the mass migration of workers from the East); Chris Carlsson, The Workingmen's Party and the Dennis Kearney Agitation, FOUNDSF (1995), http://foundsf.org/index.php?title=The_Workingmen's_Party_%26_The_Dennis_Kearney_Agitation (last visited Mar. 27, 2012).

20. See Siu, supra note 18, at 44 (noting that the Chinese were imported to work in California industries via clipper ships from Hong Kong). Jung notes that Chinese immigrants came largely from Guangdong province because floods and droughts were destroying crops there, China was under difficult concessions to foreign powers, and there was significant civil unrest, including bandity. JUNG, supra note 13, at 3–4.

21. McClain, supra note 7, at 9. In 1852, Governor McDougal endorsed the importation of Chinese immigrants to drain California's swamplands. Id. Jung notes that Chinese workers were responsible for creating the levees in the Sacramento River delta which made it possible for California farmlands to produce such a rich agricultural bounty. JUNG, supra note 13, at 7–8; see also Assemb. Con. Res. 76, 2009 Assemb., Res. Ch. 108 (Cal. 2009), available at http://www.decl7.org/acr _76_bill.pdf (noting the Chinese contribution to "parting the waters to build the vital levees of the California Delta, and establishing California's first-class agriculture and fishing industries").

22. McClain, supra note 7, at 84. McClain notes that the mines depended on Chinese laborers to extract gold and the mercury which was used to bond it. Id.

23. See Norton, supra note 17, at 286 (noting that the Chinese were welcome so long as gold was plentiful); see also Siu, supra note 18, at 48–49 (noting their employment in the woolen mills and domestic service as well); Dec. 17, supra note 5 (noting that Chinese laborers were employed in the lumber industry, fisheries, and canneries, and responsible for many of the delfas and levees needed for agricultural and fishery success). Having few women and children to draw from as in the East, manufacturers also required the Chinese as workers. Brown & Phillips, supra note 12, at 62.

24. Charles McClain notes that "the first Chinese [immigrants] were greeted with a mixture of enthusiasm and curiosity," invited to participate in civic ceremonies and lauded by Governor John McDougal in 1852 as "one of the most worthy classes of our newly adopted citizens—to whom the climate and the character of these lands are peculiarly suited." McClain, supra note 7, at 9 (quoting Gunther Barth, Bitter Strength: A History of the Chinese in the United States, 1850–1870 (1964)); see also Norton, supra note 17, at 284–85 (noting that the Chinese were welcome to do "the drudgery of life at a reasonable wage when every other man had but one idea—to work at the mines for gold."). Norton also describes how the Chinese were recruited by ship owners who distributed pamphlets and maps about "the golden hills of California." Id. Indeed, P.T. Barnum exploited Americans' sense that the Chinese were an exotic curiosity in his shows. See JUNG, supra note 13, at 8.

25. Brown & Phillips, supra note 12, at 62 (discussing efforts to exclude the Chinese). Siu notes that, perhaps due to this violence, the number of Chinese involved in
West pushed White Americans into the cities to try their hand at new occupations, they ran into stiff competition for jobs from skilled Chinese workers in textile, shoemaking, and cigar-making industries. As a result, they began to shift part of the blame for their unemployment from the capitalist class to the Chinese immigrants who took those jobs.

As in many other economic downturns in the United States, both false rumors and angry, ugly diatribes began to circulate about the Chinese. Perhaps most critically, White American workers came to believe the false tale that the Chinese were "coolie" labor or indentured servants whose near-slave working conditions were responsible for dragging down wages for all. White employers competing with Chinese entrepreneurs were only too happy to contribute to those rumors. A Knights of Labor Pioneer Laundry Workers Assembly flyer emanating from Washington D.C. typifies the way in which labor leaders exacerbated public fears:

MEN FROM CHINA come here to do LAUNDRY WORK . . . . The supply of these men is inexhaustible. Every one doing this work takes BREAD from the mouths of OUR WOMEN . . . . Will you oblige the AMERICAN LAUNDRIES to CUT THE WAGES OF THEIR PEOPLE by giving your patronage to the CHINAMEN? * * * If this undesirable element "THE CHINESE EMIGRANTS" are not stopped coming here . . . the end will be that our industries will be absorbed UNLESS we live down to their animal life.

mining dropped from 50 percent of the Chinese population in 1861 to 30 percent of the population in 1870. Siu, supra note 18, at 46–48.


27. Id. at 74 (noting the strategic way that White employers used the Chinese against strike threats and in unskilled jobs).

28. See, e.g., id. at 64 (noting that the Chinese were excluded from White labor movements); Kauer, supra note 18 at 286 (noting that the White labor movement in California, already suspicious of the capitalist class, blamed their economic hardships on the Chinese, monopolistic rich landowners, the Central Pacific Railroad (with its significant ownership of mining stock) and governments corrupted by graft and control by political bosses); Carlson, supra note 19 (noting that the Chinese were "scapegoated by white workers as 'coolie' labor, driving wages downward").

29. McClain, supra note 7, at 11. Even California Governor John Bigler repeated the incorrect belief that the Chinese were bound to indentured servant contracts (so-called "coolie labor") that held them hostage. Id.; see also, e.g., Bernstein, supra note 10, at 218 (noting the false rumors that the Chinese were indentured servants). However, Brown and Phillips note that employers were not interested in switching from Chinese to White labor because, in addition to their use as bargaining chips with White labor, there were usually lower training costs associated with the Chinese. Brown & Phillips, supra note 12, at 65.


Unemployed White workers' resentment of Chinese laborers and the capitalist class reached a fever pitch in the last quarter of the nineteenth century. By 1877, unemployed San Francisco workers were holding nightly demonstrations around City Hall, often targeted at Chinese immigrants. Because the Chinese immigrants had found a strong foothold in the industry (owning 240 of the 320 known laundries at the time Yick Wo was arrested for violating the laundry licensing ordinance), Chinese laundries were a visible target of these riots. On July 23, 1877, a White mob, fired up by orators at the so-called Sand Lot, marched off to destroy fifteen to twenty-plus Chinese laundries and stone the Chinese Methodist Mission. Mob violence against the Pacific Mail Steamship Line for playing a key role in transporting Chinese immigrant workers was headed off by a “Pickle-Handle brigade” of 4,000 to 5,000 men organized by the Committee of Safety, though riots continued to flare for three more days. Subsequently, Dennis Kearney, who became the chief leader of these protesters, marched hundreds of laborers to the Nob Hill residential district where most of the capitalists lived.

By 1880, crowds of unemployed workers would amass near San Francisco city hall on a daily basis and march to factories and workshops, demanding that Chinese workers be fired and asserting their “rights” to

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32. See, e.g., Hart, supra note 19, 52–54 (noting the resolutions passed at the July 21, 1877, meeting of the workingmen expressing sympathy for workers rioting in Pittsburgh, Albany, Chicago, and St. Louis, denouncing the use of military force against them, and insisting on the abolition of public subsidies to transportation companies and state takeovers of railroad property). Hart also notes the party's call for an eight-hour work day and Workingmen's Party demands for abrogation of the Burlingame treaty, the abolition of national banks, and accountability by political office-holders. Id.

33. Id. at 54–55.

34. See Laurene Wu McClain, From Victims to Victors, A Chinese Contribution to American Law: Yick Wo versus Hopkins, in CHINESE AMERICA: HISTORY AND PERSPECTIVES 53 (2003), available at http://www.highbeam.com/doc/1G1-98313166.html [hereinafter Wu McClain]. Danielson suggests that the Chinese had a monopoly on laundries by 1855. Danielson, supra note 11. The laundry business posed a good opportunity for the Chinese to own businesses, since they did not need to know English to be successful and the capital costs of starting a business were low. See Bernstein, supra note 10, at 220.

35. See Hart, supra note 19, at 52–53.

36. See Carlson, supra note 19; Kauer, supra note 18, at 279 (noting that there was approximately ten thousand dollars in damage); Wu McClain, supra note 34, at 53. There is some discrepancy in the reports about how many laundries were destroyed.

37. Carlson, supra note 19; see also Hart, supra note 19, at 53. Again, there is some discrepancy in the reports about how many men formed this brigade.

38. See Kauer, supra note 18, at 280; Carlson, supra note 19 (describing Kearney's speech in front of Crocker Mansion); Hart, supra note 19, at 53, 59–61 (describing in great detail the formation of militias to protect the city, including the breakdowns of these militias by ethnicity).
available jobs and necessary occupations.\textsuperscript{39} By 1885–86, race rioting and threats of racial retaliation broke out in Wyoming, Washington, and Oregon as well as other parts of California.\textsuperscript{40} Mobs routed Chinese immigrants out of their homes, burned their dwellings, forced them onto departing boats, and murdered them without sanction.\textsuperscript{41} On October 24, 1871, a thousand Los Angeles residents took ropes, knives, and pistols to Chinatown, where they pulled the frightened Chinese from hiding places and hanged nineteen by the neck.\textsuperscript{42} The mob then looted Chinese stores and proudly paraded through the streets, displaying what they had stolen.\textsuperscript{43} Of the 150 men indicted for this assault, only six were convicted, and those six were quickly released from their sentences.\textsuperscript{44}

These riots sparked even more anti-Chinese politics at every level in California. Dennis Kearney threatened to mobilize followers to use force if White laborers’ demands were not met, and he led with the battle cry, “The Chinese must go!”\textsuperscript{45} Kearney’s 1878 Workingmen’s Party of California platform declared its intent “to wrest the government from the rich and restore it to the people” and “to rid the country of cheap Chinese labor by any means.”\textsuperscript{46} The Workingmen advocated barring Chinese workers from public works and mercantile professions and prohibiting them from becoming citizens.\textsuperscript{47} The party successfully inserted provisions into the 1879 California Constitution that prohibited corporations or the government from employing Chinese workers and denied Chinese immigrants property protections.\textsuperscript{48} They also delegated the removal of Chinese immigrants from their homes and businesses to cities and clarified that no Chinese-born citizen could become an elector in California.\textsuperscript{49}

\textsuperscript{39} Carlsson, supra note 19. See also Kauer, supra note 18, at 279 (discussing the patrols and the three naval vessels sent by U.S. authorities to prevent further destruction of washhouses, docks, and Nob Hill residences).
\textsuperscript{40} McClain, supra note 7, at 173–76.
\textsuperscript{41} Id.
\textsuperscript{42} Siu, supra note 18, at 50.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} McClain, supra note 7 at 80; see also Hart, supra note 19, at 55 (noting Kearney’s threat to bury San Francisco’s elite just as the Russian revolutionaries overthrew Moscow’s aristocracy).
\textsuperscript{46} Hart, supra note 19, at 55 (quotations omitted).
\textsuperscript{47} McClain, supra note 7, at 82–83; Kauer, supra note 18, at 284–85.
\textsuperscript{48} Id. at 284–85.
\textsuperscript{49} McClain, supra note 7, at 82–83. McClain notes that the successful provisions were much tamer than those proposed, which would have given the California legislature the power to remove Chinese immigrants from the state, forfeited the charter of any corporation employing foreigners, and denied the right to vote to anyone employing them. Id. at 81–82. The proposed constitution would also have stripped Chinese immigrants of the power to sue or be sued in the state’s courts and disbarred lawyers who tried to represent them. Moreover, it would have denied the Chinese trade licenses and the right to fish. Id.
With few exceptions, California's governing class did not resist these nativist movements but instead poured fuel on the flames. From Governor John Bigler, who in 1852 spoke to the legislature on the evils of Asian immigration, to San Francisco's John Miller, who chaired the Committee on the Chinese in the California constitutional convention, government officials lined up against the Chinese. Indeed, in 1879, the ballots of all parties fielding candidates indicated that they were against Chinese immigration, and the popular vote against Chinese immigration in San Francisco was 40,030 to 229. More ominously in terms of checks and balances, the chief justice of the California Supreme Court and five of the six associate justices elected that year were candidates of Kearney's Workingmen's Party, and some remained on that court as late as 1892. That may explain the uneven record on cases filed in the California Supreme Court, including the *Yick Wo* decision handed down in December 1885, which found against Yick Wo.

Responding to the angry protests over the Chinese presence in the laundry industry, the mayor and the San Francisco board of supervisors passed more than a dozen ordinances restricting laundries. These ordinances included maximum-hours regulations aimed at preventing Chinese laundry owners from working different shifts in shared buildings and zoning laws that attempted to push the Chinese laundries away.

50. *McClain*, supra note 7, at 10; see also *Norton*, supra note 17, at 287–89.

51. *McClain*, supra note 7, at 81. According to McClain, Miller, a San Francisco businessman, was hostile to the Chinese even though he was not a Workingmen's Party member. Under him, the drafting committee report would have not only prevented further Chinese immigration into the state but also placed resident Chinese "beyond the pale of the law." *Id.* One delegate suggested that these provisions would have condemned the Chinese to starvation in violation of their treaty rights. *Id.* at 82.

52. *Hart*, supra note 19, at 57.

53. *Id.*; see also *Kauer*, supra note 18, at 287. The California Supreme Court Historical Society lists the justices elected to the California Supreme Court in 1879 as Robert F. Morrison (Chief, serving until March 1887), Erskine M. Ross (serving until October 1886), John R. Sharpstein (serving until 1892), Samuel Bell McKee (serving until January 1887), Milton H. Myrick (serving until January 1887), and James D. Thornton (serving until January 1891); they were joined by holdover E.W. Kinstry (serving until 1888). *History of the California Courts, The California Supreme Court Historical Society* http://cschs.org/02_history/02_.html (last visited March 27, 2012).

54. Examples of hostile rulings include *People v. Hall*, 4 Cal. 399 (1854) (exclusion of Chinese testimony), *Ex parte Ah Fook*, 49 Cal. 402 (1874), rev'd, *Chy Lung v. Freeman*, 92 U.S. 25 (1875) (upholding California anti-prostitution immigration statute, and denying any Fourteenth Amendment relevance), and *People v. SS Constitution*, 42 Cal. 578 (1872) (upholding the requirement of a bond for incoming passengers). The Court did overturn some laws, particularly where White economic interests were involved, such as the 1880 laundry law. *McClain*, supra note 7, at 280–81; see also *Carlsson*, supra note 19.

55. See Wu McClain, *supra* note 34, at 53 (noting that fourteen laundry ordinances were passed between 1873 and 1884).

56. See *Bernstein*, supra note 10, at 231–33, 237–39 (noting that a decade after the U.S. Supreme Court decided *Soon Hing v. Crowley*, 13 U.S. 703 (1885), denying a habeas
from their customer base in White residential neighborhoods to sparsely populated or toxic industrial areas of the city. They also included ordinances intended to harass the Chinese: ordinances prevented the delivery of laundry with horse-led carriages, rooftop drying racks, and mouth tubes used to squirt starch on laundry—all practices primarily utilized by Chinese laundries.

Of more serious concern to their businesses, the supervisors passed structural ordinances like the one in *Yick Wo*, which attempted to drive Chinese launderers out of business altogether, or at least out of town. In 1880, the board of supervisors unanimously passed Order 1569, which prohibited anyone from maintaining a laundry within San Francisco County without the consent of the board of supervisors unless the laundry was constructed of brick or stone. Violation of this order was a misdemeanor, punishable by a $1000 fine and/or up to six months in the county jail. As the United States Supreme Court recited, this ordinance vested the entire discretion for approving laundries constructed with wood on the supervisors, who subsequently denied all Chinese

petition by a laundryman who violated the 10 p.m. curfew, the supervisors passed another hours ordinance to protect White women’s laundry services). This regulation prohibited laundry work between 7 p.m. and 6 a.m., although it was invalidated soon after its enactment, only to be replaced in 1912 by a similar ordinance, also upheld, this time by the California Supreme Court in *Ex parte Wong Wing*, 138 P. 695 (Cal. 1914). *Id.* at 239. These cities also passed ordinances regulating the maximum hours that individual employees could work. *Id.* at 237–44.

57. *See Bernstein, supra note 10, at 250–62* (describing city zoning ordinances passed between 1882–1911 that attempted to keep laundries out of suburban areas; confined them to certain sections of cities or required an operating permit outside of these areas; or prohibited Chinese immigrants from renting space in buildings not solely used for laundries, a move to drive out small laundries).

58. *Id.* at 225 n.78 (noting the Los Angeles and Honolulu ordinances passed against the water tube practice); 224–45 (noting rumors that the Chinese were squirting starch from their mouths to spread disease and the *Los Angeles Times* accusation that Chinese laundrymen were attempting to spread disease with their syphilitic mouth sores); JUNG, *supra* note 13, at 76 (discussing an ordinance forbidding laundrymen from carrying laundry on horizontal poles, a practice only the Chinese used); McCLAIN, *supra* note 7, at 101 (discussing the 1880 ordinance prohibiting laundry scaffolds on rooftops without supervisor consent, a practice used by Chinese laundries, even though no laundry fires had started because of the scaffolds).

59. McCLAIN, *supra* note 7, at 104 (noting that the 1882 ordinance challenged in *In re Quong Woo*, 13 F. 229, 229 (C.C.D. Cal. 1882), which required laundries to get the consent of twelve neighboring landowners, would be "tantamount to a sentence of death on a large part of the Chinese laundry industry" and would drive out any laundry within the laundry district).


applications for licenses and granted all but one of the White owners’ applications.\textsuperscript{62}

In light of recurrent violence and scapegoating, Yick Wo’s decision\textsuperscript{63} to challenge the supervisors’ regulation by continuing to operate his laundry without a license should surely be enshrined in the annals of civil disobedience along with the 1960s lunch counter sit-ins. Yet, Yick Wo’s stand was part of a broader response by Chinese immigrants and their prominent White lawyers who challenged the several forms of discrimination that governed their lives.\textsuperscript{64} That broad-based attack was a forebear of the coordinated and planned attacks on racial segregation in the South that the nation witnessed in the 1950s and 60s.

Among other forms of oppression, the Chinese were the targets of discriminatory taxes, which they consistently fought in the courts and legislature as best they could.\textsuperscript{65} For example, a “miner’s tax” had to be paid by any foreigner (miner or not) who lived in a mining district, targeting the Chinese in effect if not by name.\textsuperscript{66} Similarly, commutation taxes required ship owners to post a $500 bond (or a payment of $5 to $50 per passenger) on each Chinese immigrant coming into the country, and more for mentally ill or disabled passengers.\textsuperscript{67} The 1862 Chinese police tax, designed to discourage Chinese immigration, forced all Chinese laborers to pay $2.50 per month.\textsuperscript{68}

Government policy and law also segregated the Chinese from White society both figuratively and literally. For example, an 1863 statute prevented Chinese persons from testifying in court against White persons.\textsuperscript{69}
There were also attempts to contain Chinese persons within Chinatown or segregate them into certain other areas of San Francisco, and Chinese children were turned away from public schools.

After the Chinese Exclusion Acts were passed on the heels of overblown rumors of massive immigration fraud, legal Chinese immigrants fought battles with federal authorities to re-enter the country after they had left. Even native-born Chinese Americans who came back into the country met challenge after challenge to their citizenship. As an example of their aggressive fight for citizenship or legal residence, 2,657 habeas petitions were filed in California federal courts after the Exclusion Acts, from 1891 to 1905, all protesting detention of immigrants or citizens in California ports, compared to 273 such petitions filed by European entrants on the East Coast. With the help of the Chinese Six companies and the Tung Hing Tong trade association, many hired prominent American lawyers and underwrote test cases that challenged discriminatory legislation as it was passed. Indeed, the Supreme Court heard seventeen cases involving Chinese immigrants from 1881–96. Moreover, Chinese

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70. Id. at 223–25 (discussing the Californian state constitutional provision for removal of Chinese from cities and city attempts to remove the Chinese using the Bingham ordinance).

71. Id. at 134–44 (discussing school segregation and ensuing litigation).

72. See Dec. 17, supra note 5. In purported execution of its treaty obligations with China, Congress passed statutes that imposed stringent restrictions on Chinese immigration in 1882, 1884, 1888, and 1892, the so-called Chinese Exclusion Acts. The Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943) was the first congressional restriction on immigration, and the 1892 Act finally closed the door to Chinese immigration. Although upheld in Chae Chan Ping v. United States, 130 U.S. 581 (1889) and in Fong Yue Ting v. United States, 149 U.S. 698 (1893), these acts were eventually rescinded in 1943. See Denny Chin, Representation for Immigrants: A Judge's Personal Perspective, 78 FORDHAM L. REV. 633, 636 n.10 (2009).


74. The Chinese Six Companies is the popular name for the Chinese Consolidated Benevolent Association, San Francisco chapter, a geographically-organized civic organization which served as an immigrant support and social organization for the Chinese. See H. Mark Lai, Becoming Chinese American: A History of Communities and Institutions, 58–63 (2004). The Tung Hing Hong was a trade organization created by the Chinese to collect dues, provide for legal costs and fees of its members, resolve member disputes, and determine where its members could operate. Wu McClain, supra note 34, at 54; see also Mary Praetzellis, Chinese Oaklanders: Overcoming the Odds, Putting the “There” There: Historical Archaeologies of West Oakland (2005), http://www.sonoma.edu/asc/cypress/finalreport/part3.htm.

75. Wu McClain, supra note 34 (describing Chinese organization of test cases); Salyer, supra note 73, at 100 (discussing complaints against the Chinese for hiring the best legal talent for these cases).

76. See Dec. 17, supra note 5.
people sent delegations to the state legislature to plead their cases, and even hired a lobbyist by 1860 to fight discriminatory laws.\textsuperscript{77}

Yick Wo and his fellow defendants were not alone in this struggle against the laundry ordinances. Nor was Yick Wo the first to take a stand, though his has been described as the perfect test case given his many years in the business and a clean bill of health from sanitary and other inspectors.\textsuperscript{78} Quong Woo was convicted for violating a June 10, 1882 laundry ordinance\textsuperscript{79} which prohibited the establishment of laundries without neighbors' consent.\textsuperscript{80} Quong Woo had been a licensed laundryan for eight years at the time of his arrest and alleged in his habeas petition that he did not believe he could secure the approval of twelve citizen-taxpayers on his block,\textsuperscript{81} presumably because of racial prejudice.

After the ordinance affecting Quong Woo was invalidated and then re-instituted without the citizen permission provision,\textsuperscript{82} Woo Yeck, Tom Tong, and Hung Hang challenged the ordinance, apparently for similar issues.\textsuperscript{83} In \textit{Wo Lee}, Judges Sawyer and Field invalidated this ordinance as

\begin{itemize}
\item \textsuperscript{77} See McClain, \textit{supra} note 7, at 13–14 and 23–24 (describing the Chinese complaints to the legislature and the hiring of a lobbyist).
\item \textsuperscript{78} See \textit{Wo} McClain, \textit{supra} note 34, at 54.
\item \textsuperscript{79} See \textit{In re Quong Woo}, 13 F. 229, 230 (C.C.D. Cal. 1882). In \textit{Yick Wo}, the California Supreme Court noted the series of ordinances on this topic: Order 1569, passed May 24, 1880; essentially similar ordinance 1587 passed July 28, 1880; and Order 1767, adopted April 8, 1884, which imposed additional licensing conditions in an area bounded by the intersection of Devisadero Street and San Francisco Bay, across to Channel Street, then to Potrero Avenue, Dolores Street, to Riley and back again to Devisadero. In \textit{re Quong Woo}, 9 P. 139, 142–45 (Cal. 1885). This ordinance required laundryan to get a certificate that the premises were drained and sanitary, that the machinery was in good condition and not dangerous, that workers were not laundering between 10 p.m. and 6 a.m. or on Sunday, and that no one on the premises had an infectious disease. \textit{Id.} at 301–02. Yick Wo argued that this ordinance had superseded the one under which he had been punished. \textit{Id.} at 299–300. Although this order repealed all orders expressly in conflict with it, the Court held that order 1569 was not repealed because it covered only construction and not operations within the laundries. Bernstein, \textit{supra} note 10, at 244–48; see also \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886).
\item \textsuperscript{80} In \textit{re Quong Woo}, 13 F. 229, 230 (C.C.D. Cal. 1882). Justice Sawyer, who wrote a similar opinion in \textit{In re Wo Lee}, articulated concerns about a "slippery slope," noting that the power claimed by the supervisors could permit them to prohibit cooking stoves, heaters, or restaurants at their pleasure. In \textit{re Wo Lee}, 26 F. 471, 474 (C.C.D. Cal. 1886).
\item \textsuperscript{81} In \textit{re Quong Woo}, 13 F at 230.
\item \textsuperscript{82} See, e.g., McClain, \textit{supra} note 7, at 106–07.
\item \textsuperscript{83} See \textit{Ex parte Tom Tong}, 108 U.S. 556 (1883). In \textit{Tom Tong}, the Supreme Court focused on the question of whether this proceeding was civil or criminal, which would give the Court the power to consider a writ of habeas corpus even if there had been no final judgment in the Circuit Court. \textit{Id.} at 559. The Court determined that Tom Tong had brought a suit to enforce a civil right to secure his liberty interest against those holding him, and held that it did not have jurisdiction. \textit{Id.} at 560. The opinion in \textit{Ex parte Hung Hang}, 108 U.S. 552 (1883), is very cursory in terms of the facts, but the Court denied a writ because it could not yet exercise appellate jurisdiction, this not being one of the cases
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resting on the arbitrary will of the supervisors and noted that much of the prohibited 150 square miles was pasture lands, sand banks, and unoccupied islands, where a wooden laundry could cause no harm.\textsuperscript{84} Even in the cases where Chinese laundrymen won, it was not without comment, however ironically meant, on their outsider status.\textsuperscript{85}

Yick Wo was one of many Chinese laundrymen who had petitioned the board of supervisors for permission to operate in wooden buildings after Orders 1559 and 1569 were sustained by California courts.\textsuperscript{86} Despite his certificate from the health officer and board of fire wardens that his building was fire safe and properly drained, Yick Wo was denied permission to operate.\textsuperscript{87} On August 22, 1885, he was arrested for operating his laundry without a permit, convicted in the police court, and imprisoned.\textsuperscript{88} Two days later, his lawyers filed a petition for a writ of habeas corpus in the California Supreme Court, which upheld the ordinance on December 29.\textsuperscript{89} Yick Wo’s lawyers then turned to Judge Lorenzo Sawyer in the federal Circuit Court.\textsuperscript{90} However, Judge Sawyer concluded that the federal court could not hear a case first commenced in state court.\textsuperscript{91} Wo Lee, also convicted and imprisoned though he had operated for twenty-five years in the same location, chose another avenue: he filed a habeas corpus petition directly in the federal court,\textsuperscript{92} only to be rebuffed by Sawyer on jurisdictional grounds.\textsuperscript{93} By January 29, 1886, Yick Wo and Wo Lee had both appealed to the U.S. Supreme Court.\textsuperscript{94}

In the California Supreme Court’s decision in Yick Wo, the question of equal protection was only a note. Arguing that many individuals have to give up individual rights that cause “serious mischief to others” so everyone can enjoy the general benefits flowing from government, the California court sustained the ordinance as a familiar fire regulation in a city where “the danger from fire is ever present and overshadowing.”\textsuperscript{95} A

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84. \textit{In re Wo Le}, 26 F. 471, 473 (C.C.D. Cal. 1886). This language was also quoted Yick Wo, 118 U.S. at 361–62.
86. \textit{McClain, supra} note 7, at 115.
87. \textit{Id}.
88. \textit{Id}.
89. \textit{Id} at 115, 118.
90. \textit{Id} at 119.
91. \textit{Id}.
92. \textit{Id}.
93. \textit{Id} at 120.
94. \textit{Id} at 120–21.
95. \textit{In re Yick Wo}, 9 P. 139, 141 (Cal. 1885). Admittedly, this pronouncement is somewhat confusing: “If they prove deficient in these qualifications, the evil cannot be remedied by invalidating their acts, performed by virtue of authority vested in them, or
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terrible fire had occurred in a Chinese laundry in February 1880, prompting the supervisors to call for brick or stone laundries and the fire marshal to claim that the Chinese “were as a race careless in the use of fire.” However, most witnesses before the supervisors admitted that fires in Chinatown were no more prevalent than in other parts of the city. One insurance witness even admitted that the reason his company stopped insuring businesses in Chinatown was the company’s fear of White arsonists starting fires there.

The California court conceded that all such legislation is subject to abuse by officials without “the capacity and integrity essential to a proper administration of the trust reposed in them,” but the court seemed reluctant to invalidate any law because of the lack of these virtues. Rather, the court disposed of Yick Wo’s equal protection claims by citing U.S. Supreme Court laundry cases that held that previous laundry ordinances were uniformly applicable to all laundries, and therefore not unconstitutional. In contrast, the federal court also focused on the potential confiscation of Chinese property and livelihood in violation of due process. To the extent that the federal Circuit Court focused on class legislation, it directly targeted the economic implications of such legislation:

[t]he necessary tendency, if not the specific purpose, of this ordinance . . . is to drive out of business all the numerous small laundries, especially those owned by the Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.

In contrast to the California Supreme Court’s opinion, Federal Circuit Judge Sawyer’s opinion (despite ultimately declining to exercise jurisdiction) “minced no words” in attacking the ordinance. Citing Quong Woo and a similar discretionary Baltimore ordinance on steam engine businesses, Sawyer in Wo Lee acknowledged that the ordinance

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where they have exercised discretionary powers, by impugning their judgment or motives, rather than their right to exercise the discretion.” Id. at 299.

96. McLain, supra note 7, at 99.
97. Id.
98. Yick Wo, 9 P. at 142.
99. McLain, supra note 7, at 110, 118. The cases cited were Barbier v. Connolly, 113 U.S. 27 (1885) and Soon Hing v. Crowley, 113 U.S. 703 (1885), both authored by Justice Field sitting on the U.S. Supreme Court.
100. See In re Wo Lee, 26 F. 471, 474 (C.C.D. Cal. 1886) (noting the potential for the “absolute confiscation of the large amount of property shown to be now, and to have been for a long time, invested in these occupations”).
101. Id.
102. McLain, supra note 7, at 119.
permitted the supervisors to engage in racial discrimination, noting “the notorious public and municipal history of the times.”103 Indeed, Judge Sawyer found that the aim of the law, administered as a prohibition against the Chinese, “must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events.”104 Sawyer introduced the argument that the ordinance violated the Fourteenth Amendment, a ground later accepted by the U.S. Supreme Court.105

U.S. Justice Stanley Matthews’ opinion in *Yick Wo* picked up both due process property and equality themes, distinguishing the San Francisco laundry ordinance from other discretionary laws. He noted that the law conferred “naked and arbitrary power” without any guidance to ensure the rule of law would be obeyed.106 Though he verged toward invalidation under the due process clause because of the law’s infringement on a right to occupation, Matthews ultimately rested the Court’s decision on the discriminatory nature of the ordinance; as he stated, there was no other explanation for the ordinance but “hostility to the race and nationality to which the petitioners belonged.”107 With that, Justice Mathews intoned the principle that *Yick Wo* has become famous for:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.108

Despite the fact that *Yick Wo* has gone down in the annals of American jurisprudence as an important civil rights case, it was greeted by the popular press of the time with acrimony.109 The *San Francisco Evening Bulletin* published a scathing editorial, noting that equal protection was “fine in theory . . . but it could only be based on an equality of habits, acquirements, and tendencies. The problem with the Chinese was that they had habits and tendencies that made their laundries dangerous.”110 And, in a parallel to modern-day assaults against Supreme Court “activism,” the

103. *In re Wo Lee*, 26 F. at 474–75.
105. Id.
107. Id. at 366–67.
108. Id. at 373–74.
110. Id.
Evening Bulletin attacked the Supreme Court’s “judicial Bourbonism,”¹¹¹ suggesting that the Court was unwilling to concede the facts about the Chinese.¹¹² Indeed, in a claim reminiscent of Justice Scalia’s and Thomas’s complaints against Supreme Court “platonic guardians,”¹¹³ the newspaper noted ironically, “‘[t]he Delphic oracle at Washington intimates that we can do nothing to bridge the chasm which separates [the Chinese] from the modern races of men. We can do nothing to elevate or reform them, for that would be discrimination, contrary to the Fourteenth Amendment.’”¹¹⁴ The newspaper concluded that the only solution was to exclude the Chinese,¹¹⁵ a view that was even then being implemented by the federal government, as evinced by the Chinese Exclusion Act of 1882.¹¹⁶

II. LESSON ONE: THE COURT SHOULD NOT PARTICIPATE IN WHAT IT KNOWS IS EVIL, EVEN IF THE COURT CANNOT FIND A CONSTITUTIONAL JUSTIFICATION FOR CHALLENGING IT

The first history lesson that Yick Wo and the other Chinese cases should teach us is that Justice Jackson was right in his Korematsu dissent: it is better for the Supreme Court not to decide a case than to decide it in violation of the true meaning and spirit of the Constitution.¹¹⁷ Faced with the choice of invalidating or upholding the constitutionality of President Roosevelt’s 1942 order (backed up by criminal legislation) authorizing the military to intern Japanese citizens, Justice Jackson chose neither unpalatable alternative. He confessed that the Constitution could not be read idealistically to invalidate every unconstitutional military command in a time of war: the Constitution entrusted wartime decisions to the Executive, and the need for military success was often immediate.¹¹⁸ On the other hand, the Supreme Court would deal a far worse blow to liberty than the order itself by validating an unconstitutional government decision premised

¹¹². MCCLAIN, supra note 7, at 126.
¹¹⁴. MCCLAIN, supra note 7, at 126.
¹¹⁵. Id.
¹¹⁶. See Dec. 17, supra note 5.
¹¹⁸. Id.
on racism, panic, or ill-informed decision making. The short-term harm from the order itself is magnified if racist government action is rationalized by the Court as consonant with the Constitution or the Constitution is rationalized to conform to the order. Justice Jackson argued,

"[O]nce a judicial opinion rationalizes such an order ... the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."

Of course, the principle that the Court should not participate in the justification and implementation of evil depends on two basic premises: first, the Court must know of the unjust and unconstitutional conditions facing appellants to the Court, and second, the Court must understand that these conditions are unjust and evil, given all of the circumstances. Certainly, as in this case, the law can perpetuate injustice so intrinsically evil that no amount of immediate social good can conceivably outweigh it. Yet, we have to acknowledge the rare possibility that an otherwise seemingly unconstitutional order may be so critical to protecting the Constitution or security of the nation that a failure to enforce would be tantamount to a violation of the Court's oath to protect and defend the Constitution.

In this case, however, the first criterion—knowledge of the pervasive discrimination—surely had to be met. The United States Supreme Court during the Yick Wo era had to be familiar with the intentional harm being visited upon the Chinese in California and elsewhere. Most obviously, Justice Stephen Field, who sat on the Court from 1863 to 1897, was the presiding circuit judge in a number of the important Chinese decisions that came before the lower federal courts in the latter part of the nineteenth century. Justice Field had previously participated as a California Supreme

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119.  Id. at 245–46. Justice Frankfurter's diaries suggest that Justice Douglas felt that citizens should be able to prove their loyalty before courts. Justice Black's view was that the courts could not review anything the military did if he were in the military, he would have ignored a court order to return the evacuated Japanese. Justice Black objected to any reference to the exclusion that might have given enemy "propagandists a lift." FROM THE DIARIES OF FELIX FRANKFURTER 251–52 (Joseph P. Lash ed., 1975).

120.  Korematsu, 323 U.S. at 246.


Court judge in at least some of the early Chinese victories, such as the invalidation of the Foreign Miners' License Tax. His opinions as a circuit judge demonstrate his familiarity with the pervasiveness of the racial discrimination occurring in California. A telling example is Justice Field's opinion as a circuit judge in the previously mentioned In re Quong Woo in 1882, which had to do with a law passed to rid "suburban" residential neighborhoods of Chinese laundries. In In re Quong Woo, Justice Field demonstrated that he understood that the Chinese were targeted: any kinds of onerous conditions could be imposed on "some of our worthy resident aliens from Europe" if the ordinance were constitutional, even if their businesses were not in themselves "against good morals or contrary to public order or decency, or dangerous to the public health and safety," like laundries. In an apparent jab at the ruling elite in San Francisco, Justice Field noted that this kind of ordinance could also be applied to lawyers, bankers, merchants, traders, mechanics, journalists, "indeed, [to] all brain-workers and hand-workers" whose business could depend upon the "caprice of others." In fact, if the laundry ordinances were lawful, the supervisors could prohibit almost any person from conducting any business on his own property. Justice Field noted that such ordinances "must be reasonable—that is, not oppressive nor unequal nor unjust in their operation—or they will not be upheld." Even more pointedly, he remarked that as a Chinese alien protected by treaties, Quong Woo had the right to pursue any ordinary trade "without let or hindrance . . . except such as may arise from the enforcement of equal and impartial laws."

In another case heard by Field, Chy Lung v. Freeman, also known as the Case of the Twenty-Two Chinese Women, Justice Field in oral argument expressed his belief that the Chinese women who were refused the right to immigrate for alleged prostitution were selectively prosecuted because they were Chinese, something the Fourteenth Amendment forbade. Indeed, in the end, the Supreme Court itself invalidated the requirement that ship owners post a bond before their Chinese passengers could de-

123. See McClain, supra note 7, at 25 (describing Ah Hee v. Crippen, 19 Cal. 491 (1861)).
124. McClain, supra note 7, at 25 (describing In re Quong Woo, 13 F. 229, 230 (C.C.D. Cal. 1882)). The law applied to both established and new laundries and the punishment was steep for a business owner: up to $1,000 in fines in an era when the daily manufacturing wage for a Chinese immigrant was $1.00 per day. Brown & Phillips, supra note 12, at 68–69 n.33 (noting that White men in similar jobs made about $2.40/day).
125. In re Quong Woo, 13 F. at 231.
126. Id. at 232.
127. Id.
128. Id.
129. Id. at 233.
130. See McClain, supra note 7, at 59–61.
board in the first case involving Chinese litigants to be decided by the Supreme Court. Again sitting as circuit judge, Justice Field decided in In re Look Tin Sing that an American-born citizen of Chinese parentage did not lose his citizenship simply because he traveled to China, despite the U.S. district attorney's claim that an ethnic Chinese man born in the United States had to have a certificate to deboard just like eligible resident aliens who traveled to China. Reminding the district attorney that the noncitizen parentage of former slaves and of American-born Chinese residents was irrelevant to their own citizenship, Justice Field went further in noting that the United States also happily naturalizes those who renounce their former country and declare themselves willing to be U.S. citizens (so long, he might have wryly noted, as they are not Chinese).

California Supreme Court cases also demonstrated the animosity of the state and local government to the Chinese, and these cases were also available to the U.S. Supreme Court. People v. Hall was perhaps the worst of such cases; it upheld a statute that provided, "[n]o Black or Mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any White person." In that case, Chief Justice Murray began with the odd premise that Columbus had confused American natives with "Mongolians" or "Asiatics" and concluded by saying that the prohibition against "Indians" testifying was really meant to apply to ethnic Asians. He then expressed the worry that if Chinese people could be witnesses, they would next be voters, jurors, legislators, and judges—an "actual and present danger" given their refusal to follow the law and racial inferiority. Sometimes state legislation was so extreme in its hostility that even the California Supreme Court, with all of its race prejudice, could not sustain it. One example was a statute that prohibited Chinese from coming into California at all, invalidated in Ex parte Ah Cue. Similarly, in Lin Sing v. Washburn, the California Supreme Court narrowly invalidated a head tax imposed only on Chinese immigrants designed (as the bill title states) to get rid of Chinese coolie labor.

131. Chy Lung v. Freeman (Case of the Twenty-Two Chinese Women), 92 U.S. 275 (1875).
132. In re Look Tin Sing, 21 F. 905, 910 (C.C.D. Cal. 1884); McCLAIN, supra note 7, at 163–65.
133. In re Look Tin Sing, 21 F. at 910.
134. People v. Hall, 4 Cal. 399, 399, 404–05 (1854).
135. Id. at 400–02.
136. Id. at 404–05.
137. Ex parte Ah Cue, 35 P. 556, 557 (Cal. 1894) (invalidating a statute proclaiming "the coming of Chinese persons into the State, whether subjects of the Chinese empire or otherwise" is prohibited).
138. Lin Sing v. Washburn, 20 Cal. 534 (1862). Justice Field was in the dissent. See Ex parte Kuback, 24 P. 737, 738 (Cal. 1890) (invalidating an ordinance criminalizing the employment of any Chinese persons more than eight hours per day, decided after Yick Wo).
Governmental hostility was not confined to routine legislation. Even provisions of California’s new constitution had to be struck down for their clear attempts to target the Chinese, political decisions likely to be available to the Supreme Court. In In re Tiburcio Parrott, the federal circuit court invalidated a provision of the new constitution that prohibited California corporations from employing Chinese resident aliens. In In re Ah Up, Judge Lorenzo Sawyer ruled against a California provision that declared Chinese resident aliens ineligible for naturalization.

Finally, unless members of the Court were scrupulously avoiding the press altogether, they could not avoid popular references to “the Yellow Peril,” the hysterical view that Chinese and other Asian immigrants would overwhelm Caucasian civilization. That was a Los Angeles Times headline. Popular American author Bret Harte also coined the term “heathen Chinese” to describe the Chinese. Some warned that the Chinese were an immoral lot, involved in gambling, prostitution and opium smuggling, that they kept unsanitary “hovels,” and ate unusual food. One children’s chant, echoing a popular misconception, claimed that the Chinese ate dead rats “like gingersnaps.”

A more ambivalent pamphlet in circulation expressed the feelings of admiration and resentment felt by many workers, noting that the Chinese
were "remarkably" hard-working and careful farmers who could live off small plots of land rented to them at exorbitant prices by White landowners. The pamphlet ends with the note that "man is the only weed tolerated in China, and he teems everywhere," and that it would be harder to get population control in China than to Christianize the Chinese. Another notes that no country can equal China "as an industrial supplanter and trade-absorber" since Chinese laborers will work twenty hours per day to a White man's twelve hours, on "incomparably poorer food, housing and clothing" and without fresh air or sunshine. A third warns that the Chinaman will learn a trade to "supplant his teachers" in business through his "industry, suavity and apparent child-like innocence, seconded by unequalled patience ... keenest business ability" and "disregard of truth." Members of the Court might also have been aware of news reports of "legislative history" for oppressive bills that the California legislature passed. For example, during the 1858 passage of a bill to prevent Chinese immigrants from coming through California ports, a legislative committee reported that Chinese "habits, manners, and appearance are disgusting in the extreme," and noted "that California is peculiarly the country of the [W]hite man and that we should exclude the inferior races." Or they might have read the Evening Post's post-Exclusion Act warning that unless employers replaced them with "good White workers," Chinese laborers would still be making clothes, bread, cigars, and shoes for Californians.

In national politics, members of the Supreme Court would surely have noted the post-Reconstruction appeal by West Coast Democrats that the "Republican doctrine of 'universal equality for all races' would lead to an 'Asiatic' influx and control of the state by an alliance of 'the Mongolian and Indian and African.'" They might also have been aware of Congressional debates over post-Reconstruction constitutional amendments, including California Republican senator Cornelius Cole's argument that if the Fifteenth Amendment were written to include non-Blacks (e.g., Asians), it would "kill our party as dead as a stone."
Moreover, persistent Congressional efforts to further restrict Chinese immigration must have surely impressed the Supreme Court. After the Burlingame Treaty Amendments in 1880 permitted United States restrictions on laborers coming into the country, Congress passed a series of Chinese Exclusion acts that prohibited the Chinese from becoming naturalized citizens, suspended Chinese laborer immigration for ten years, and required laborers to have registration documents to come and go from the United States. The 1884 Exclusion Act confirmed that Chinese laborers of any nationality were excluded, expanded the exclusions to include miners and skilled laborers, and narrowed the favorable treatment provided merchants. The law provided that the re-entry certificate would be the only acceptable evidence permitting laborers visiting China to re-enter the United States. Unsatisfied, Congress passed the Scott Act in 1888, prohibiting any laborer who left after the effective date of the Act from ever re-entering the U.S.; the Geary Act in 1892, which extended the ban on laborers for another ten years and instituted a pass system for Chinese laborers; and the 1924 Act that prohibited all immigration by aliens ineligible for citizenship (that is, all Asians).

If all of this evidence was insufficient to demonstrate pervasive discrimination against the Chinese, the Court might have followed Congressional debates over the extension of the Exclusion Acts. A chilling illustration is the 1890 debate in which members "were regaled with tales of Asian hordes waiting to inundate the country and of prophecies of the imminent collapse of Western civilization if new and more radical measures were not adopted." The Court would surely also have been aware of New York Times reports on the East Coast Chinese community's mobilization against the Geary Act, which required Chinese to have their certificate of residence on them at all times, a "pass" system reminiscent of modern-day South Africa.

155. See Chin, supra note 64, at 8; Fritz, supra note 122, at 353 (noting that the act also required Chinese authorities to issue English-language certificates describing and vouching for merchants, diplomats and other nonlaborers who were permitted to come to the United States irrespective of the laborer ban).

156. Chin, supra note 64, at 10.

157. Id.

158. Id. at 16–17, 23. Chin notes that in 1924, the right to immigrate was tied to the right to naturalization, which essentially tied it to race since Asians were racially excluded from naturalization. Gabriel J. Chin, The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965, 75 N.C. L. Rev. 273, 281–82 (1996). Racial exclusion policies were upheld as late as the mid-1960s in Hitai v. INS, 343 F.2d 466 (2d Cir. 1965). Chin, supra note 64, at 23.

159. McClain, supra note 7, at 202.

160. Id. at 203, 205–06.

161. See, e.g., Nelson Mandela, Long Walk to Freedom 83 (1994) (noting that African children live in African-only societies, and an African can "be stopped at any time
Despite this clear evidence of malignant intention by authorities and legislatures from local to national levels, the U.S. Supreme Court did not take any significant lead in responding to anti-Chinese sentiment. Although, as suggested, it did overrule some state legislation as in *Yick Wo*, the Court's interpretation of federal immigration law "piled on" to the discrimination experienced by the Chinese at the state level. For example, in *United States v. Wong Yiu*, a Chinese laborer who had entered the country in violation of the Chinese Exclusion Acts claimed that he had to be deported under earlier, more fulsome procedures for Chinese deportation rather than later, swifter, general deportation laws. Justice Holmes demurred, noting that the whole purpose of the earlier law was to ensure that the Chinese would indeed be deported, and concluding that it would be illogical to give the Chinese essentially more rights to deportation due process than other deportees on the strength of an earlier law that deported only them.

The Chinese cases offer an important footnote: the federal courts' track record in protecting civil rights of minorities is not necessarily dependent upon how "enlightened" judges' personal views of the minorities in question may be. The fact that justices are often affected by the social and political times may be an explanation—but it is not an excuse—for their failure to ensure the civil rights of all. The Chinese cases are a telling example of how personal prejudice of a federal judge does not prevent him or her from enforcing the basic commands of the Constitution against hostile legislation. Justice Field, a key player at both the trial and the appellate level in the Chinese cases, expressed the clear opinion that Chinese immigration was unwise, noting in *In re Ah Fong* that "the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible assimilation of them with our people." That was not the only time he expressed misgivings about the Chinese as immigrants. Indeed, some have credited him with the proposal to enact the first Chinese Exclusion Act.

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163. See id. at 69. Similarly, the Court refused to accept the uncontroverted testimony that Quock Ting was American-born. Quock Ting v. United States, 140 U.S. 417 (1891).
164. See Fritz, supra note 122, at 352 (1988) (quoting *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102)).
165. See, e.g., id. at 364, for his exchange with the attorney for Chew Heong, who left for China before the federal registration certificates were available, and thus, like perhaps 12,000 to 15,000 of his countrymen, could not establish his right to return to the United States under the 1884 Act. In that exchange, Field noted "[i]f they [the Chinamen] do not come back at once they should not be allowed to come at all."
166. Id. at 363.
Yet, while his record was not consistently in favor of the Chinese—particularly after Congress gave him more authorization to justify rulings against them—in many cases Justice Field invalidated laws on what we would now call equality grounds. In *In re Ah Fong*, despite his comments, Justice Field struck down a state law prohibiting Chinese immigrants from landing.167 Perhaps most dramatically, in the *Case of the Twenty-Two Chinese Women*,168 Justice Field objected to differential treatment of Chinese and White American prostitutes, arguing that while “the State can exclude all dangerous persons, [t]he idea is that whatever protection the law gives shall be uniform and shall extend to all classes.”169 In other cases early in his career, he sided with the Chinese as well.170

Similarly, Judge Hoffman, who decided many of these cases for the Chinese, was strongly negative about Chinese immigration. He once noted that the flood of Chinese labor not only harmed native labor, but also menaced “our interest, our safety, and even our civilization.”171 While he was deeply hurt by popular criticism of his opinions and wearied by the large number of these cases he had to decide,172 his sense of judicial duty drove him to decide cases as he believed the law required. Indeed, prior to passage of the Chinese Restriction Acts, Judges Sawyer and Hoffman were accused of “playing with” and creating “loopholes” in federal immigration laws that benefitted the Chinese.173 Judge Hoffman continued to hold for the Chinese even after Field found sanction in the Exclusion Acts to start holding against them.174 (By contrast, Justice John Harlan, the dissenting civil rights hero of *Plessy v. Ferguson*,175 consistently treated the Chinese

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167. *Id.* at 352 (quoting *In re Ah Fong*, 1 F.Cas. 213 (C.C.D. Cal. 1874) (No. 102)).
169. *Id.* (quoting Justice Field’s remarks in Morning Call, Sept. 18, 1874, p. 1, col. 7). McClain notes that some newspaper accounts suggest Field’s belief that the Fourteenth Amendment nationalized the Bill of Rights. *Id.* at 59 n.71.
170. See Fritz, supra note 122, at 349, 354 (citing Field’s rulings in *In re Ah Sing*, 13 F. 286 (C.C.D. Cal. 1882) and *In re Low Yam Chow*, 13 F. 605 (C.C.D. Cal. 1882)).
171. *Id.* at 355 (quoting *In re Low Yam Chow*, 13 F. 605 (C.C.D. Cal. 1882)).
172. *Id.* at 356, 358–59. Ironically, the collectors were depicted as heroes in the popular press, as “‘striving hard’ to prevent frauds and the landing of ‘bogus coolies’ [who] found themselves opposed by ‘every Chinaman in the city, the Chinese Consulate, dozens of purchased lawyers and untoward circumstances enough to make them sicken of their task.’” *Id.* at 359 (quoting San Francisco *Alta California*, Dec. 18 1883).
173. *Id.* at 360.
174. *Id.* at 349, 363–366 (describing Field’s remarks in the case of Chew Heong). The U.S. Supreme Court reversed Field on the basis that his fellow judges, Hoffman and Sawyer, had dissented—namely, that Chinese residents could not be expected to produce a certificate that was not even available when they left the country. *Id.* at 365.
175. 163 U.S. 537, 552 (1895) (Harlan, J., dissenting).
with animosity, noting in *Plessy* that "[t]here is a race so different from our own that we do not permit those belonging to it to become citizens."\(^{176}\)

As suggested earlier, the Court may also decide that a case manifests constitutional evil that is yet not as serious as the evil to be prevented by the statute, such as the protection of the nation. Certainly, there are any number of constitutional cases, including *Korematsu*, where the Court seems troubled by the prospect that basic civil rights are being violated and yet concludes that the evil to be prevented by the law strongly outweighs the particular harm to individuals.\(^{177}\) *Korematsu*’s pronouncement that, in wartime, civil liberties of some must give way to the protection of all is echoed by the Court in many of the wartime First Amendment cases.\(^{178}\)

In retrospect, the thought that Chinese immigration might offer a similar parallel to the feared Japanese or German invasion of American shores in World War II seems absurd to modern ears. But, in fact, this sense of dread about the hordes of immigrants who were flooding the country and "threatening civilization" was not limited to federal judges. The newspapers and politicians of the day took up this cause and fed the public fear that the Chinese were the cause of all kinds of social evils that they had nothing to do with. In 1856, a California legislator compared the Chinese miners to the plague of locusts that visited Egypt.\(^{179}\) One can see this kind of panic in modern commentaries on illegal immigration, where Mexican migrants evading the border fence are equated with Al-Qaeda terrorists and accused of everything from starting epidemics to

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176. Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 Iowa L. Rev. 151, 156 (1996) (quoting *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting)); see also United States v. Wong Kim Ark, 169 U.S. 649, 705-07 (1898) (Harlan, J., dissenting) (expressing Justice Harlan’s desire to strip citizenship from a native-born American of Chinese ethnicity); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 595 (1889) (demonstrating Justice Harlan’s agreement with the Court’s opinion that it seemed “impossible for [the Chinese] to assimilate with our people or to make any changes in their habits or modes of living”).

177. See, e.g., United States v. Korematsu, 323 U.S. 214, 216, 219-20 (1944) (noting “that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” and that “[c]ompulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”).


179. McClaIn, *supra* note 7, at 18.
creating "stealth citizens," i.e., "anchor babies." And the political pandering to the fear of "Chinese coolie labor" can be seen everywhere in this period, from Dennis Kearney's speeches on the sandlots of San Francisco to the pronouncements of the President and key Congressmen. We can also see resounding echoes of the serious economic structural problems that the United States faces today, including significant wealth disparities, great distrust of bankers and capitalists, the willingness of immigrants lured by employers to take low-wage labor jobs, and job displacement caused by the disappearance of key industries. Some historians have argued that the Chinese cases represent a major struggle between the federal government and the states over who would have the power over immigrants and the responsibility for the issues created by immigration, an argument not dissimilar to today's immigration debates. Then, as now, immigrants serve as an easy and visible group to blame for the failure of both federal and state government to acknowledge that our voracious need for immigrants, often to do our dirty work, has to be balanced with responsibility for its effects, both on the immigrants themselves and on the wider community.

However, *Korematsu* and the Chinese cases are perhaps the cases that prove the rule. Perhaps the most poignant evidence of what can occur if we disregard the history of the Chinese exclusion period is *United States v. Dennis*, the case justifying the punishment of small Communist cells for teaching the overthrow of the government. In that case, the Court cites *Chae Chan Ping v. United States*, the Chinese Exclusion case, for the proposition that:

The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty . . . . 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. It matters not in what form such aggression and encroachment come . . . .

180. For an extended discussion of these parallels, see Marie A. Failinger, *Recovering the Face-to-Face in American Immigration Law*, 16 S. CAL. REV. L & SOC. JUST. 319, 327-44 (2007).
182. See, e.g., Salyer, *supra* note 73, at 98 (noting the statement of Senator William Stewart in 1892 that the American people are now convinced that the Chinese cannot be assimilated).
184. See Chin, *supra* note 6, at 1378 (stating that the conflict arose as a struggle between California and the federal government to control immigration from Asia).
The nineteenth century Supreme Court's validation of hysterical fears that Chinese immigrants, like small Communist cells, were ready to engulf the country should give the modern Court pause before it validates similar hysterical fears taken up by Congress, the Executive, or a state. In case after case where the Court has thrown its weight behind Congressional or Executive decisions to repress civil liberties, history has determined that there is often more smoke than fire behind governmental excuses for suppressing liberties—-from the anti-syndicalism acts of the early 1920s to the detention of Guantanamo Bay detainees.

Thus, Justice Jackson has been proven right: the Court should be wary when it finds itself pulled into a battle in which civil liberties or basic constitutional principles are going to be victims of social and economic fear and resentment. If after searching precedents and souls, the Supreme Court justices believe that they cannot legitimately or effectively stand up for the civil liberties of immigrants and other minorities, the Court will do less damage by denying certiorari rather than by giving sanction to the government's effort which is bound to do evil. As Justice Jackson rightly warned, any precedent against civil liberties lies around like a loaded gun to be used during the next anxious historical moment to thwart the human rights of another group.

III. Lesson Two: The Court's Consistently Faithful Attention to Injustice from Case to Case is Important, Because Only Such Sustained Attention in Case After Case is Likely to Have a Positive Impact on the Course of Freedom and Equality

A tempting position for the Supreme Court to take is that it decides only the cases before it, and, like a common law court, its only obligation to future decisions is to take an adequate account of past case precedent. It is particularly tempting for the Court to take this stance as a defensive response to popular cries of judicial activism. However, a comparison of the Court's action in the civil rights cases to its response in the Chinese cases demonstrates that only a Court that is persistent in fighting injustice in case after case will make a real difference for persecuted minorities. Despite the painful slowness of the Court's commitment to the


elimination of segregation in the South, after *Brown v. Board of Education*\(^{189}\)
the Court was unremitting and relatively comprehensive until the mid-
1970s, which paid off. In case after case the Supreme Court went out of
its way to reject subterfuges created to avoid school desegregation, such as
closure of public schools combined with public support of private schools,
“local school” options, and plain intransigence.\(^{190}\) The Court also rejected
other government attempts to enforce segregation on busses,\(^191\) in vot-
ing,\(^{192}\) on juries,\(^{193}\) and in personal relationships.\(^{194}\)
Moreover, the Court went out of its way to protect the nascent civil
rights movement as much as it could. The Court rejected attempts to
break the NAACP, squelching suits against the NAACP for damages for
libel,\(^{195}\) attacks on the organization for stirring up civil rights litigation,
and attempts to expose its membership to public retaliation.\(^{196}\) The Su-
preme Court also went well beyond “business as usual” in supporting the
civil rights movement, shielding movement participants with whatever
doctrines it could validly muster. During the height of the civil rights era of
the 1960s, the Supreme Court decided almost two dozen cases involving

\(^{189}\) 347 U.S. 483 (1954).
\(^{190}\) See, e.g., Norwood v. Harrison, 413 U.S. 455 (1973) (invalidating public text-
book loan program to private schools in district where White students had fled public
schools); Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968) (invalidating plan requiring students
to choose between previously all-Black and all-White schools at first and eighth grade,
and assigning student to previous segregated school if no election was made); Griffin v.
Cnty. Sch. Bd., 377 U.S. 218 (1964) (invalidating school board’s decision to close all public
schools to avoid integration); Gos v. Bd. of Educ., 373 U.S. 683 (1963) (invalidating school
transfer plans that permitted students to transfer only to schools where they were in the
racial majority).

\(^{191}\) See Bailey v. Patterson, 369 U.S. 31 (1962) (holding unconstitutional enforced
racial segregation on interstate busses); Heart of Atlanta Motel Inc. v. United States, 379
U.S. 241 (1964) (holding constitutional the Civil Rights Act of 1964 sections prohibiting
discrimination in public accommodations).

court finding that county literacy test for voting violated Voting Rights Act of 1965);

\(^{193}\) See, e.g., Eubanks v. State, 356 U.S. 584, 585 (1956) (invalidating almost complete
exclusion of Blacks from grand jury pool and noting “unbroken line of cases” since
Strauder v. West Virginia, 100 U.S. 303 (1879) (establishing invalidity of excluding Negroes
from grand or petit juries)).

\(^{194}\) See Loving v. Virginia, 388 U.S. 1 (1967) (holding that Virginia’s miscegenation
statute was unconstitutional); McLaughlin v. State, 379 U.S. 184 (1964) (striking down
cohabitation statute applying only to relationships between Black men and White women
or White men and Black women under the equal protection clause).

\(^{195}\) See New York Times v. Sullivan, 356 U.S. 264 (1964); see also Taylor Branch,
suit to punish the civil rights protests).

\(^{196}\) See NAACP v. Button, 371 U.S. 415 (1963) (invalidating attorney solicitation
statute applied against NAACP to forestall further desegregation litigation); NAACP v.
Alabama, 357 U.S. 449 (1958) (holding that requiring the NAACP to disclose its mem-
bership list violated members’ right to privacy in their associations).
sit-ins and protests. In each case, until *Adderley v. Florida*, the Court exercised robust and searching judicial review, invalidating virtually all of these convictions. The grounds it utilized to invalidate state laws were breathtakingly eclectic, ranging from constitutional (equal protection and First Amendment) and statutory (the new Civil Rights Acts) grounds to flat-out rejection of the lower court's evidence as insufficient under state law. The full effect of the Court's patient and consistent rejection of attempts to evade the desegregation implications of *Brown* or to frighten and punish civil rights protesters can probably not be measured with any degree of certainty. However, it is clear that principal actors in the desegregation conflict believed the Court was having a significant effect. For example, in a statewide television address during the 1964 presidential campaign, Senator Strom Thurmond of South Carolina accused the Democratic Party of protecting “the Supreme Court in a reign of judicial tyranny.”

In the Chinese cases, on the other hand, it often fell to federal district court judges—particularly those in California—to protect the Chinese against both the blatant illegality of local officials and grudgingly restrictive readings of federal immigration laws. To be sure, the Chinese won some early cases in the state courts: the capitation tax, the police tax, the miner's tax, and the 1856 enactment prohibiting Chinese

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198. As just a sample of the legal bases for these cases, see, e.g., Boynton v. Virginia, 364 U.S. 454 (1960) (holding invalid under the Interstate Commerce Act the arrest of Black law student who sat in at a bus terminal restaurant); Garner v. Louisiana, 368 U.S. 157 (1961) (invalidating arrests at lunch counter protest on the basis that conduct was insufficient to support a conviction); Taylor v. Louisiana, 370 U.S. 154 (1962) (holding that defendants could not be arrested for violating a non-statutory segregation custom of separate waiting rooms under the equal protection clause); Bouie v. City of Columbia, 378 U.S. 347 (1964) (invalidating conviction due to process grounds because state Supreme Court's construction of statute gave no fair warning to defendants sitting in at luncheonette).


200. See *McClain, supra* note 7, at 17-18. In 1857, the California Supreme Court held in *People v. Downer*, 7 Cal. 169 (1857), that the capitation tax was an interference with the federal government's power to regulate foreign commerce. *Id.* at 18.

201. See *McClain, supra* note 7, at 25-28. In *Lin Sing v. Washburn*, 20 Cal. 534 (1862), the California Supreme Court invalidated this tax of $2.50 per month on all non-business-owning Chinese residing in California, except those who worked in the mines or made sugar, rice, coffee or tea. *Id.* at 26-27. Once again, the court relied on federal law to determine that the police tax interfered with federal power over foreign commerce. *Id.* at 28. Then-Chief Justice Field dissented from this ruling on the police tax. *Id.* at 29.

202. As previously noted, in *Ex parte Ah Pong*, 19 Cal. 106 (1861), the California Supreme Court invalidated an 1861 amendment to the foreign miners' license law that required any foreigner living in a mining district but ineligible to be a citizen (that is, the Chinese) to pay a miners' tax. The California Court held that Ah Pong, a laundryman, could not be subject to a tax specifically named the “Foreign Miners License Tax.” *McClain, supra* note 7, at 24. In an opinion written by then-California Supreme Court
immigrants from landing in California were all invalidated. However, perhaps the most significant demonstration of the California Supreme Court’s views about the Chinese cause was Justice Hugh Murray’s opinion in *People v. Hall.* Justice Murray said of the Chinese that their “mendacity is proverbial” and their race was by nature marked “as inferior . . . and incapable of progress or intellectual development beyond a certain point.” And there were other cases that more indirectly displayed that same attitude. For example, in *People v. Williams,* the California Supreme Court sustained defendant’s offer of testimony for the “notorious fact” that “Chinese are in the habit of resisting forcibly the collection of taxes, and that all collectors feel compelled to go armed for the purpose of resisting the assaults of the Chinese.” Although the Chinese won some cases in the California Supreme Court, the court certainly could not be counted on to protect the Chinese against all discriminatory legislation.

In such an atmosphere, the federal courts provided a welcome alternative avenue of relief. While most of the nonimmigration cases were resolved in state court, the federal courts provided some protection for the Chinese as well. For example, San Francisco’s “minimum airspace” lodging house ordinance targeted at the Chinese was enforced by police using ladders to enter Chinese boarding houses in the middle of the night. Even while Judge Hoffman was reluctant to overturn the ordinance on its face, he scolded San Francisco about the need for even-handed enforce-

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Chief Justice Field, that court also affirmed in *Ah Hee v. Crippen,* 19 Cal. 491 (1861) that the tax collector could not replevin a horse for miner’s license taxes allegedly owed by a person mining on private property without a license. *Id.* at 25.

203. See McClain, supra note 7, at 18.

204. 4 Cal. 399, 404–05 (1854).

205. *Id.* at 405; see also *People v. Chew Wing Gow,* 52 P. 657 (Cal. 1898) (granting a new trial to a Chinese immigrant on grounds of insufficient evidence, however, the Court cites at length from the district attorney’s comments: “[l]ike all other Chinese murder cases, this case abounds in perjury . . . . If, however, new trials are to be granted because perjury exists in a Chinese case . . . then we may as well close our courts to the trial of all Chinese cases and save the expense to the county.”).

206. See *People v. Williams,* 17 Cal. 142, 142–43, 147 (1860) (objecting to the characterization of a Chinese person murdered by a tax collector as a “victim”).

207. McClain, supra note 7, at 29, 139–42 (discussing *People v. Awa,* 27 Cal. 638 (1865) (holding that Chinese people could testify against anyone but White people), and *Tape v. Hurley,* 6 P. 129 (Cal. 1885) (holding that, under a statute that required the schools to be open to “all children,” a Chinese child could not be excluded based on her race from San Francisco schools)).

208. See, e.g., McClain, supra note 7, at 108; 118–19 (noting the California Supreme Court’s decision to uphold the laundry licensing ordinances, including that at issue in *Yick Wo*).

ment of the law. When Judge Hoffman heard the lodging house case, he was so disgusted that he all but invited the Chinese to challenge a related ordinance which called for county jail inmates to have their hair shorn. That ordinance was intended to humiliate the Chinese wearing queues (pig-tails) or to pressure them into paying fines in lieu of (presumably costly to the city) imprisonment for violation of the various ordinances directed at them. Similarly, in Chy Lung v. Freeman, Justice Miller noted that "a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the equal loss of an equally powerful friend."

Where immigration was concerned, the lower federal courts were critical and persistent actors in protecting the passage rights of Chinese immigrants. Between 1882, when the first Chinese Exclusion Act was passed by Congress, and 1890, Chinese travelers filed 7,080 habeas petitions to challenge the decisions of the San Francisco collector in charge of deciding which Chinese travelers were going to be allowed to enter the United States. Of those, the Chinese won about eighty-five to ninety percent. They were so successful that Congress finally eliminated the right to judicial review for administrative immigration decisions, a legislative move ratified by the U.S. Supreme Court in 1892.

The immigration cases demonstrate that the federal district judges, including Judges Hoffman and Sawyer, took the writ of habeas corpus

210. See id. at 44-45, 65-69 (noting that though the challengers lost because they failed to prove that the law was being enforced on a discriminatory basis, the court still admonished the city that it had to enforce the ordinance impartially). The anti-Chinese movement consistently focused on overcrowding and unsanitary conditions in the Chinese district, making sensational reports such as the claim that as many as forty Chinese men occupied a single room, and describing the Chinese as "a moral leper in our community." Id. at 302-03 n.5.
211. Id. at 69, 74 (noting that Justice Field held the ordinance invalid as a special punishment).
212. Id. at 65.
213. 92 U.S. 275 (1875) (invalidating bond requirement for immigrants on ships).
214. Chin, supra note 6, at 1379 (quoting Chy Lung, 92 U.S. at 279).
215. Salyer, supra note 73, at 92. Salyer notes that 2,657 habeas petitions were filed in San Francisco between 1891 and 1905, even after Congressional restrictions on judicial review. Id. at 93. By contrast, only 273 habeas petitions were filed by the primarily European immigrants entering at Ellis Island between 1891 to 1910. Id. at 92. Chinese immigrants were significantly more likely to be denied admission, with 5 to 34 percent excluded in the years between 1894 and 1901, respectively, as compared to 1.3 percent of non-Chinese applicants. Id. at 93.
216. Id. at 92.
217. Id. at 92; see also McClain, supra note 7, at 169-71 (discussing the In re Jung Ah case, involving a stolen certificate, and noting the San Francisco district judges' "insistence that the treaty of 1880 be taken seriously"). Salyer notes that because of previous treaty interpretations, Chinese immigrants ironically retained the right to judicial review longer than others. Salyer, supra note 73, at 93-97.
and the evidentiary requirements of the law very seriously. Jung Ah Lung, returning from China, claimed that his right-of-return certificate had been stolen by pirates. Judge Hoffman granted him habeas corpus on the strength of customs records and testimony of three witnesses over the objection of the United States, which claimed that only the certificate was valid evidence of his residence. When the collector challenged the right of the Chinese to apply for habeas corpus in In re Jung Ah Lung, Judge Hoffman replied that

[A]n abrogation of the writ of habeas corpus, which has always been considered among English-speaking peoples the most sacred muniment of personal freedom, must be unmistakably declared by Congress before any court could venture to withhold its benefits from any human being, no matter what his race or color.

Salyer notes, however, that perhaps due to the large number of habeas cases filed by the Chinese, the due process afforded Chinese immigrants and citizens attempting to enter was far less than that afforded criminal defendants. Petitioners were brought before the U.S. attorney to give a statement (admissible against the petitioner in court) without their lawyers, then released on bail. Officials widely believed that the Chinese and their witnesses lied in the proceedings, having “no regard for an oath” according to U.S. attorney John P. Carey, who also labeled the proceedings “novel and strange.” Both the collector and the U.S. attorney cross-examined petitioners and witnesses at length, trying to find holes in their cases that would jeopardize their claim. Judge Hoffman suggested that this was a “Star Chamber” proceeding that was probably illegal but necessary to handle all of the cases that were coming before the court.

218. Salyer, supra note 73, at 94.
220. 25 F. 141 (D. Cal. 1885).
221. Salyer, supra note 73, at 102 (quoting In re Jung Ah Lung, 25 F. at 142–43). Salyer notes that the Chinese Inspector S. J. Ruddell suggested to a congressional subcommittee that the writ of habeas corpus be taken away from the Chinese, which would solve the problem of immigration. Id. Sen. Watson C. Squire responded, “that would be a little inimical to the spirit of the Constitution?” Id.
222. Id.
223. Id.
224. Id.
225. Id. at 103 (quoting In re Jung Ah Lung, 25 F. at 142–43, aff’d, United States v. Jung Ah Lung, 124 U.S. 621, 628–32 (1888)). Salyer notes that this practice was probably dropped by the 1890s in favor of a system in which the Chinese cases were referred to a U.S. commissioner who tried the case de novo in an informal hearing, with the commissioner often encouraging petitioners to bring more witnesses. Again, there was vigorous cross-examination of Chinese witnesses, including requests for minute details about their
Due to increasingly restrictive Exclusion Acts passed in 1882, 1884, and 1888, and to the United States' 1880 amendment of the 1868 Burlingame treaty with China, the only Chinese who could enter the United States were nonlaborers such as merchants, students, and travelers. However, the federal courts in California had to contend with a number of administrative measures that interpreted those laws in such a way as to limit the flow even of immigrants permitted to enter under the treaty. In one blatantly racist response, the federal court had to turn back the collector's challenge to the right of ethnic Chinese people who had been born in the United States to return after a journey to China, a battle which the government lost in 1898 when the U.S. Supreme Court declared that they were indeed citizens in *Wong Kim Ark.* In a telling Catch-22, after the 1882 act required Chinese laborers leaving the United States for visits to China to get identification certificates from customs collectors to present on their return to the United States, the federal court had to overrule the San Francisco collector when he refused to admit those Chinese resident aliens without certificates who had left for visits even before the certificate requirement became law and therefore had no way of getting a certificate.

Furthermore, the collector even mounted challenges to Chinese laborers' claims that they had not left the United States (and therefore did not need a return certificate.) Thus, for example, Justice Field (sitting as circuit justice) and Judge Sawyer had to issue a habeas writ to a Chinese cabin waiter, Ay Sing, while he was onboard the *City of Sydney.* Ah Sing left his U.S. port eight days before the immigration commissioner started issuing certificates to returning Chinese immigrants and never left the ship at any of its foreign ports of call. Justice Field agreed that Ah Sing never left the jurisdiction of the United States, and in later cases, further ruled that crewmen did not lose their residence in the United States because they took a few hours of shore leave in foreign ports.

trips such as how many steps there were out of the petitioner's back door, where the petitioner sat in the village schoolhouse, and whether the petitioner's mother had bound feet. *Id.* at 103–04.

226. *Id.* at 97.

227. 169 U.S. 649, 673 (1898) (holding that persons born in the United States of resident alien Chinese parents were citizens of the United States by virtue of the Fourteenth Amendment).

228. *McClain, supra* note 7, at 149.

229.  *See, e.g., In re Chin Ah On,* 18 F. 506, 507 (D. Cal. 1883); *McClain, supra* note 7, at 151, 157. Even after the 1884 amendments, Justices Sawyer and Hoffman had to release thirty laborers who left the United States before the 1882 acts and were refused landing upon their return because they could not produce collector's certificates. See *In re Ah Quan,* 21 F. 182, 184 (C.C.D. Cal. 1884); *McClain, supra* note 7, at 160–61.

230.  *In re Ah Sing (Case of the Chinese Cabin Waiter),* 13 F. 286, 288–89 (C.C.D. Cal. 1882); *McClain, supra* note 7, at 152.

immigration cases decided in favor of the Chinese include Judge Hoffman's ruling that the son of a Chinese merchant immigrating to work in his father's business was not meant to be excluded by the Exclusion Act,\(^\text{232}\) and Justice Field's early ruling that American-born persons of Chinese descent were U.S. citizens.\(^\text{233}\)

Similarly, the California federal judges were required to beat back numerous hostile administrative interpretations of what evidence was acceptable in support of a Chinese petitioner's claim that he had the appropriate status to land. After the federal exclusion of Chinese laborers in the 1882 act, non-laborer Chinese immigrants were required to obtain certificates from the Chinese government attesting to their merchant or student status. However, the San Francisco Customs collector refused to admit a Chinese immigrant because he did not have the so-called Canton certificate, even though he had other evidence of his merchant status.\(^\text{234}\) In Justice Field's opinion, the 1880 revision of the Burlingame Treaty and 1882 Act only modified the United States' commitment to free entry of Chinese laborers. Therefore, he held that refusing a Chinese merchant entrance because he could not produce his Chinese government identification certificate was a clear violation of the United States' commitment to China.\(^\text{235}\)

We should not, however, glorify lower federal court intervention too much; although the federal district court was often the champion of the Chinese, over time the federal judges became "quite hard-nosed about interpreting the law."\(^\text{236}\) As evidence, we might recall Justice Field's circuit decision in *Chew Heong*, overruling three other judges in holding that the collector's certificate was the only acceptable evidence of previous U.S. residence,\(^\text{237}\) or his decision in *In re Ah Moy (Case of the Chinese Wife)* that an immigrating wife, though she did not assume the laborer status of her husband, was still required to present a laborer's certificate to deboard.\(^\text{238}\)

Just as certainly, the U.S. Supreme Court's record in protecting the Chinese against hostile rulings is less than stellar. To be sure, *Yick Wo* is not the only case in which the Supreme Court vindicated critical rights of the Chinese. The Supreme Court overruled Justice Field's decision in *Chew Heong*, holding that under U.S. treaty obligations, laborers in the country on November 17, 1880, had the right to come and go as they

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232. *Id.* at 156–57.
233. *In re* Look *Tin Sing*, 21 F. 905, 909–10 (C.C.D. Cal. 1884); *McClain*, *supra* note 7, at 163–64. This case was not appealed to the Supreme Court.
234. *McClain*, *supra* note 7, at 149.
235. *Id.* at 153–54 (discussing *In re* Low *Yam Chow (Case of the Chinese Merchant)*, 13 F. 605, 63 (C.C.D. Cal. 1882)).
237. *Id.* at 161–62. McClain notes that the practice at that time was that the presiding judge could overrule other judges, even if they outnumbered him. *Id.* at 162.
238. *In re* Ah *Moy (Case of the Chinese Wife)*, 21 F. 785, 785–86 (C.C.D. Cal. 1884).
pleased without producing a collector’s certificate.\textsuperscript{239} And certainly the Court’s holding in \textit{Wong Kim Ark} that U.S. born persons of Chinese descent are citizens under the Fourteenth Amendment is even more important, though its rhetoric is certainly less than ringing from a civil rights perspective.\textsuperscript{240}

Despite these few cases, on the whole, the United States Supreme Court’s opinions display little effort to protect the Chinese against a tide of legislation attempting to make their lives as miserable as possible, particularly at the federal level. For example, before \textit{Yick Wo}, in \textit{Soon Hing v. Crowley}, the Court refused to permit a writ of habeas corpus to be issued for a Chinese launderer who was imprisoned for violating the 10:00 p.m. curfew ordinance.\textsuperscript{241} After \textit{Yick Wo}, the Court continued to decide contested cases against the Chinese—almost stretching to do so—in contrast to the more measured rulings of California District Court Judges Sawyer and Hoffman.\textsuperscript{242} For example, in \textit{Lem Moon Sing v. United States}, the Court affirmed that there was no judicial review of a final administrative decision of deportation due to a Congressional statute barring such review.\textsuperscript{243} In \textit{Quock Ting v. United States}, the Supreme Court held that a Court could reject a petitioner’s habeas corpus petition even though his testimony was not contradicted by any other evidence.\textsuperscript{244}

In interpreting the substantive rules for admission, the Court also usually found against the Chinese. In \textit{United States v. Lee Yen Tai}, the Court...
refused to rule that a later, more Chinese-friendly treaty abrogated a previous statute that permitted easy exclusion of Chinese immigrants. In *Yee Won v. White*, the Court held that the Chinese wife and child of a merchant's son could not enter the United States without the requisite $1,000 in property required for laborers to bring their families to the United States. The Court reasoned that they assumed the son's status, and that he had become a laborer while he was in the United States. As late as 1928, the Court held in *Nagle v. Loi Hoa* that Chinese merchants could not be admitted to the United States if they could only produce the merchant's certificate from French Indo-China, where they had long resided, rather than China, their place of birth. The court also refused jurisdiction in some cases, and in others, permitted Congress to restrict due process rights for the Chinese being deported.

As noted earlier, it is tempting to suggest that in the Chinese cases, the Supreme Court was merely recognizing its limits as a court and acting as a common law court should. In that view, the duty of the Court was to take each case on its merits and decide it within the four corners of the treaties with China and the increasingly restrictive federal statutes governing the entry of the Chinese. However, as both the civil rights era cases and the Chinese cases suggest, the Supreme Court cannot act as a common law court by pretending that each case is sui generis and governs only those before the court. In the context of epic struggles over civil rights, that posture is many times disingenuous because the Court's pronouncements against minorities have a profound impact on the national conversation over minority rights. When the Court takes its public role seriously, as in the civil rights cases in the 1960s, its rulings have at least the promise of making a political and social difference on behalf of minorities. When it fails to do so, as it did in the Chinese cases, cases such as *Yick Wo* take on the cast of a pretentious moment of self-congratulation and fail to serve their purpose.

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246. See *Yee Won v. White*, 256 U.S. 399, 400–01 (1921).
248. See, e.g., *Ex parte Hung Hang*, 108 U.S. 552 (1883) (denying jurisdiction on a writ of habeas corpus for an alleged illegal immigrant); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (upholding the exclusion of Chinese witnesses in a deportation proceeding and the right of Congress to provide for registration of Chinese laborers going abroad); *Li Sing v. United States*, 180 U.S. 486 (1901) (upholding the exclusion of Chinese witnesses, and holding with *Fong Yue Ting* that deportation orders are not punishment and need not be attended by criminal due process protections); *Fok Yung You v. United States*, 185 U.S. 296 (1902) (denying jurisdiction of a review of a detention of a Chinese man who was passing through the United States on his way to Mexico); *Lee Lung v. Patterson*, 186 U.S. 168 (1902) (refusing jurisdiction to review collector's decision not to let the wife and child of a merchant land, even though he was permitted to do so and they had presented Hong Kong certificates of identity).
IV. Lesson Three: The Supreme Court Needs to Be More Serious About Its Review of Legislative Purpose in Equal Protection Discrimination Cases

In some areas of recent constitutional adjudication, such as in its recent establishment clause jurisprudence, the Supreme Court has had a serious and complex discussion about how it should review legislative purpose.249 Racial discrimination claims brought under the equal protection clause do not reflect a similar pattern. In many constitutional law texts, Yick Wo is paired with Gomillion v. Lightfoot to stand for the proposition that legislative purpose will be found invidious when the racially disparate impact is "tantamount for all practical purposes to a mathematical demonstration" that the legislature's purpose is to segregate people on the basis of race.250 There have been few cases, particularly since Batson v. Kentucky,251 which have attempted to define what the Supreme Court meant when it decided that "discriminatory intent" would be required for a constitutional violation in Washington v. Davis.252 The Court has since then been less than willing to seriously explore and discuss the kinds of evidence that will give rise to an inference, presumption, or finding of invidious legislative purpose. Perhaps the best we have are some references by the Court that attempt to give some vague definition to the substantive standard to be employed: for example, the Court's reference to "animus" or "the bare desire to harm a politically unpopular group," a term that Justice Scalia rightly implies is ill-defined.253 Or we might look at the Feeney recitation that a legislature must pass a law "because of" its harmful impact on a disadvantaged group and not "in spite of" that impact.254 (As I will note, the 1970s cases Village of Arlington Heights255 and Batson v. Kentucky256 are among the few exceptions that do attempt to set standards.)

252. Washington v. Davis, 426 U.S. 229, 239 (1976) (deciding that a law with a racially discriminatory impact does not violate the equal protection clause unless the law also has a racially discriminatory purpose). The Court has often ignored Justice Stevens' concurring opinion that often "the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor" and that "the actor is presumed to have intended the natural consequences of his deeds." Id. at 253 (Stevens, J., concurring).
Over and over in its jurisprudence, the Court has acknowledged that legislative motivation is rarely clear or pure. Yet, it has failed, over time, to grapple in any realistic or disciplined way with the question of how invidious purpose can be identified and proven by plaintiffs, especially in those circumstances where “everybody knows” what the purpose of the law is but the legislative body has the good sense not to put the purpose of the law in the preamble.

Despite that lack of guidance, the principle \textit{Yick Wo} is known for cannot be the constitutional standard: that rule suggests that if a law harms virtually everyone in one class (here, the Chinese laundrymen) and nobody in another (here, all of the White laundrymen except one), the Court should find discriminatory purpose. For one thing, such a standard gives a Court unwilling to protect minorities a good excuse to permit discriminatory business as usual. For example, in another discriminatory enforcement case, \textit{Ah Sin v. Wittman}, the Supreme Court refused to invalidate selective police raids against Chinese gambling houses, distinguishing \textit{Yick Wo} on the grounds that there was insufficient proof that such gambling “did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese as to whom it was not enforced.”

Of course, it will not always be the case that a legislative body hell-bent on harming the plaintiff class will be successful in its aim if it uses only facially neutral statutes. The Chinese basket-carrier’s law is a good example of this: when the court upheld the law prohibiting carrying poles on baskets on the sidewalk as a “neutral” exercise of the police power (much like an earlier prohibition of slaughterhouses in the city) and refused to take the discriminatory motive of the ordinance seriously, the response of the Chinese was simply to move their poles to the streets, or to carry a single basket without a pole. Thus, the supervisors’ attempt to harass the Chinese in this way failed.

This willingness by the courts, including the Supreme Court, to turn a blind eye to racially discriminatory legislative motives and goals was all too evident in the Chinese cases, with significant consequences. That the legislature was populated by anti-Chinese members was easy to observe. For example, in the elections of 1879, the bottom of the ballot in San Francisco was printed with the words, “Against Chinese Immigration.” The California Supreme Court refused to see any invidious purpose in the early cases. Even though they invalidated it, they even refused to see animus in the Foreign Miners’ License Tax that treated all

257. See, e.g., Palmer v. Thompson, 403 U.S. 217, 224 (1971) (noting that it is often difficult or impossible to identify the sole or predominant motive of the legislature).
258. 198 U.S. 500, 507–08 (1905).
259. McClain, supra note 7, at 46.
260. Id. at 47.
261. Kauer, supra note 18, at 287.
resident foreigners of a mining district as miners, even though that law
could not have been referring to anybody but the Chinese. While, as in
the civil rights era, it is hard to prove cause and effect between state and
federal Supreme Court decisions and legislative actions, these decisions
failing to protect the Chinese were followed by law after law against the
Chinese in California. Even after Congress acted to declare racial dis-


crimination illegal in 1870, new measures passed in 1880 permitted
cities to segregate the Chinese in their own ghettos in cities or move
them outside of city boundaries, and refused them business and commer-
cial fishing licenses. There were also legislative attempts to make it a
felony for the Chinese to have an occupation, and to prohibit businesses
from keeping books in languages other than English. Bills also attempt-
ed to impose a tax solely on Chinese residents collectible by the state
militia, and tax the product used to make starch utilized in Chinese laun-
dries, which allegedly gave them a competitive advantage in the industry.

Of more direct consequence, in a case reminiscent of the Supreme
Court’s sleight of hand in Plessy, the California Supreme Court refused to
find invidious discrimination in California’s “separate but equal” approach
to Chinese testimony. In People v. Brady, which challenged the bar against
Chinese witnesses testifying against White people, the California court
reasoned that both Chinese and White criminals received the same pun-
ishment if they were convicted, and both could use the testimony of
Whites while neither could use the testimony of Chinese witnesses.
Because they could now not defend themselves in court, the California
court essentially made it “open season” on Chinese miners and others
who dared to cross the paths of resentful Whites.

The lengths to which state court judges went in order to avoid de-
claring that discriminatory intent motivated legislative bodies are, in
retrospect, almost comical. County court Judge John Stanley, for example,

262. See McClain, supra note 7, at 24 (discussing Ex parte Ah Pong, 19 Cal. 106
(1861), which invalidated the Foreign Miners’ License Tax), 36–40 (discussing Congress-
man Stewart’s attempts to secure the rights of the Chinese in Section 16 of the Civil
Rights Act of 1870).
263. Id. at 25–26.
264. Id. at 40.
265. Id. at 92.
266. Id.
267. Id. at 92–93.
268. Id. at 35 (discussing People v. Brady, 40 Cal. 198, 208 (1870)).
269. Id. at 31–36 (discussing cases in which Whites attacked Chinese victims and the
victims were not allowed to testify in their own behalf, thus freeing the White defendants).
270. See, e.g., Soon Hing v. Crowley, 113 U.S. 703, 710–11 (1885) (upholding a laun-
dry hours regulation prohibiting washing from 10:00 p.m. to 6:00 a.m. on the basis that
the law was not facially discriminatory against Chinese launderers); Chin, supra note 6, at
1373–74 (exploring the courts’ reasoning in the Yick Wo and Soon Hing cases).
rejected a discriminatory intent charge leveled against a laundry ordinance which required laundrymen who did not use a horse and wagon—obviously directed at the Chinese who could not afford them—to pay a fifteen dollar license fee. Judge Stanley noted that he did not need to inquire about legislative motivation even though he acknowledged the discrimination against both launderers “of lesser means” and the Chinese. Rebuffing the challenge, he stated “[s]uggestion has been made that the order was intended to apply primarily to a race of persons not expressly designated in it. However that may be, this Court has nothing to do with the secret motives or intentions of the body which passed the order.”

Even the newspapers admitted what judges like Stanley would not. The *San Francisco Evening Bulletin* reacted to the queue ordinance requiring the county jail to shave off the pigtails of all convicted prisoners, and to an ordinance requiring coroner permission to disinter the dead that was meant to harass the Chinese returning their family members’ remains to China, by noting the deep humiliation these laws caused the Chinese.

In the early years, even federal judges in California were reluctant to impute invidious motives to the state legislature and local supervisors. When the defendants requested the court to take judicial notice of a discriminatory enforcement pattern against the Chinese in a boarding house ordinance, Judge Hoffman declared that “the court had no right to inquire into the motives of the legislature and disclaimed any knowledge that the law in question was being enforced only against the Chinese.”

In the same fashion, the U.S. Supreme Court in *Ah Sin v. Wittman*, faced with discriminatory enforcement of a gambling ordinance in a case reminiscent of *Yick Wo*, responded that the government “would have no incentive in race or class prejudice or administration in race or class discrimination” and suggested that a court would need to be certain of discriminatory intent before striking down any law because of it.

However, some ordinances evinced too much discriminatory motivation even for the federal judges to take. Judge Hoffman invalidated the humiliating queue ordinance both because it was a punishment the supervisors were not authorized to impose, and because it was class legislation directed at persons entitled to equal protection. In his opinion, Judge Hoffman stated:

271. McClain, supra note 7, at 51–52; see also Soon Hing v. Crowley, 113 U.S. 703, 711 (1885) (where the U.S. Supreme Court similarly notes “[t]he diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.”); Chin, supra note 6, at 1389 (noting the Court’s view in Soon Hing that even if there were an improper motive, the Chinese would still have to prove discriminatory enforcement).

272. McClain, supra note 7, at 48–49.

273. Id. at 69.

[W]e cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should have only such operation, and treat it accordingly.

Similarly, at a certain point, Judge Sawyer had enough, noting in Wo Lee:

If the facts . . . shown by the notorious public and municipal history of the times, indicate a purpose to drive out the Chinese laundrymen, and not merely to regulate the business for the public safety, does it not disclose a case of violation of the provisions of the fourteenth amendment to the national constitution, and of the treaty between the United States and China in more than one particular? . . . That it does mean prohibition, as to the Chinese, it seems to us must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events. Can a court be blind to what must necessarily be known to every intelligent person in the state?

Finally, in In re Lee Sing, the San Francisco supervisors had passed the Bingham Ordinance, which would relocate any ethnic Chinese in San Francisco to a single area. Judge Sawyer held that its purpose, which should be apparent to anyone, was to “forcibly drive out a whole community” of 20,000 people, irrespective of their individual merits or situation.

Despite these few candid assessments, in most cases, both state and federal courts suggested their unwillingness to search the context and the persistence of legislative attempts to harm the Chinese. They turned a blind eye to discriminatory ordinances and discriminatory enforcement, even when the Chinese were “repeat players” before those courts, except in those cases where the law was so absurd that it was virtually impossible to find any other explanation for the law. These opinions are consistent with the intimations in Yick Wo and Gomillion—and indeed, the declaration in

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278. Id.; see also McClain, supra note 7, at 230.
modern-day cases such as Romer v. Evans\textsuperscript{279}—that legislative motivation will be presumed to be benign unless there is no other reasonable explanation but discrimination for the law. While such a rule may well be appropriate in cases where an isolated piece of legislation comes before the courts in jurisdictions with no history of legislative targeting of a minority (as in most of the Court's "rational basis" decisions),\textsuperscript{280} it surely cannot be an appropriate rule when many cases before the courts evince a determination by the legislative body to disadvantage a minority class. For the courts to pretend, by reviewing these cases in isolation, that nothing untoward is going on in this jurisdiction is to invite further legislative punishment of the disadvantaged class and thus to be an accomplice in perpetuating evil against that class.

The task of searching legislative motivation is not as hard as it appears. Indeed, the Supreme Court has provided two fair and non-burdensome methods of determining whether the legislature is invidiously harming a plaintiff class. Justice Stevens puts it in a more complex way: the courts should examine whether "an impartial lawmaker could logically believe the classification would serve a legitimate purpose that transcends the harm to the members of the disadvantaged class."\textsuperscript{281}

One of these methods is the factor approach of Arlington Heights, which combines subjective evidence such as legislative history statements and testimony by lawmakers with objective evidence such as departures from standard procedure and substantive changes.\textsuperscript{282} Coupled with a strong but rebuttable presumption of benign legislative intent, this approach should reveal those cases in which legislative motivation, though not described on the face of the law, is clearly invidious. With appropriate judicial review and more specific criteria, the Arlington Heights approach would protect legislatures against the concern that a court might invalidate legislation because of isolated legislative statements or disagreement with the substance of the law. The other approach that the federal courts have effectively used is the burden-shifting approach of Castaneda v. Partida\textsuperscript{283} and Batson v. Kentucky.\textsuperscript{284} This approach required the legislature to come up with evidence that its reasons were legitimate if there is clear disparate impact on the plaintiff class and some evidence, though not to

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\textsuperscript{281} City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).
\textsuperscript{283} 430 U.S. 482, 494 (1977).
\textsuperscript{284} 476 U.S. 79, 96–98 (1986).
\end{flushleft}
the level of certainty that Yick Wo or Gomillion required, that there is some legislative hostility to a minority class.285

It is not clear why the Court has refused to extend these approaches to all equal protection cases requiring discriminatory intent, even when they have proven useful in those cases where the Court has applied them. It is not even clear how the Court decides which cases to apply them in.286 But the Court’s failure to consistently apply these rules becomes clear in many of its cases. Perhaps most prominently, the Court seemed to ignore these rulings in City of Mobile v. Bolden, in which case it rejected a significant amount of Arlington Heights “factor” evidence that suggested racially discriminatory gerrymandering,287 and in City of Richmond v. J.A. Croson Company, where the Court similarly brushed aside significant evidence of discriminatory exclusion of African American contractors from Richmond construction projects.288 This approach, which holds plaintiffs to a nearly impossible evidentiary burden in equal protection cases, stands in clear contrast to the willingness of members of the Rehnquist court to describe affirmative action facial classifications as “odious” and constitutionally on par with the more insidious and persistent attempts to harm a minority class demonstrated in the Chinese cases.

285. Id.; Castaneda, 430 U.S. at 494.


As a Property teacher, I often remind students that property concepts, particularly those we unconsciously use to organize our sense of justice, pervade social understandings in civil rights cases. The saga of Yick Wo should remind the Court that it is neither courageous nor just to give in to social assumptions about who owns the social, moral, or material resources of our country.

From the very beginning of the conflict between Whites and the Chinese over material property and economic opportunity in the nineteenth century, Whites made it clear that they assumed that the United States and its riches were theirs to own and exploit. We might remember the ubiquitous slogan during that period: “California for the Americans.”289 From the 1852 pronouncements of California Governor John Bigler, who felt that “[e]xtraordinary measures were needed . . . [to] ‘check [the] tide of Asiatic immigration,’”290 to the U.S. Supreme Court’s upholding of the Geary Act with its “pass” system in 1893, the constant theme of legislative, executive, and judicial validation of popular hysteria about the Chinese sounded in property theory’s “absolute right to exclude.”

The response of White manufacturers to competition from the Chinese in their own industries is illustrative: in industries such as canneries and woolen mills, where White industrialists did not have to worry about Chinese competition because the capital start-up costs were too high, employers welcomed the Chinese as a low-cost source of labor that could keep White male and female workers’ demands in check (although they were as willing as others to believe in the cultural superiority of Whites).291 By contrast, in the shoe and cigar industries, where the Chinese who learned the trades could compete with Whites, manufacturers quickly jumped on the bandwagon in supporting the Chinese Exclusion Act, aggressively portraying the Chinese as “inferior and socially disruptive.”292 Indeed, in the cigar industry, White competitors were all too happy to scare the populace into buying “White” by circulating rumors that “Chinese cigars were passed through ‘Mongolian leprous hands’ and sealed with black spit.”293 While competitors often find ways to disparage their opponents’ commercial practices or goods, it is difficult to explain

289. See Norton, supra note 17, at 286.
290. McClain, supra note 7, at 10–11.
292. Id. at 70–71.
293. Id. at 71.
such class-based racist behavior apart from the assumption that White
trepreneurs believed that economic opportunity belonged to them as a
class, and not to their Chinese counterparts.

This view that America was the God-given property of Whites per-
vaded the popular literature as well. In asking American consumers to
spend their money at White-owned rather than Chinese-owned laundries,
the Knights of Labor Pioneer Laundry Workers Assembly made it clear
who (in their view) was entitled to American fortune and who was not:

We say in conclusion that the CHINAMAN is a labor con-
sumer of our country without the adequate returns of
prosperity to our land as is given by the labor of our people to
our glorious country. Our motto should be: OUR
COUNTRY, OUR PEOPLE, GOD, AND OUR NATIVE LAND.”

Many Californians were blatant about who was entitled to the
wealth of the country: Kearney’s Workingmen’s Party marched under slo-
gans such as, “This is a country for free White labor, not coolie labor.”

Lawmakers were not immune from the presumption that only
Whites deserved the economic opportunities available in the United
States. Indeed, sometimes they were quite blatant about it. For example,
laws passed by the California legislature included: “An Act to Protect Free
White Labor against competition with Chinese Coolie Labor, and to Dis-
courage the Immigration of the Chinese into the State of California,”
and the capitation tax, entitled “An Act to Discourage the Immigration to
this State of Persons Who Cannot Become Citizens Thereof.” And some
believed that only White people were entitled to jobs, a view embodied
in proposed Article XIX of the new California Constitution, which
would have barred Chinese immigrants from working on public works,
carrying on mercantile businesses, and obtaining jobs from

corporations. Similarly, California legislators demonstrated their hostility to sharing
the state’s bounty with those of Chinese origin and interest in encouraging
Chinese immigrants to leave through laws coupling discriminatory taxation
with prohibitions or disabilities on working in many of the state’s
industries.

Politicians and legislatures were only too happy to affirm this notion
that the material prosperity of America belonged to Whites, even if they

295. Mary P. Ryan, Civic Wars: Democracy and Public Life in the American
City During the Nineteenth Century 287 (1997).
296. See McClain, supra note 7, at 26.
297. Id. at 17.
298. Kauer, supra note 18, at 284–85. While not all of these proposals were passed and
some were later invalidated by the courts, the prohibition against corporations and public
works employing the Chinese was included in the constitution. Id.
were not willing to do the dirty work the Chinese would do to earn it. In 1885, the San Francisco board of supervisors committee noted:

The fact that the race is one that cannot readily throw off its habits and customs, the fact that these habits and customs are so widely at variance with our own, makes the enforcement of our laws and obedience to our laws necessarily obnoxious and revolting to the Chinese, and the more rigidly this enforcement is insisted upon and carried out the less endurable will existence be to them, the less attractive will life be to them in California. Fewer will come and fewer will remain.299

Similarly echoing the theme that America is for Whites, San Francisco mayor James Phelan defended a decision to quarantine all Chinese in Chinatown because a man had died of bubonic plague in a residence hotel in Chinatown. He claimed that the Chinese were fortunate, with the unclean habits of their coolies and their filthy hovels, to be permitted to remain within the corporate limits of any American city. In an economic sense their presence has been, and is, a great injury to the working classes, and in a sanitary sense, they are a constant menace to the public health.300

Perhaps the most literal symbol of Whites' views that they “owned” the wealth of the United States was the Bingham ordinance of 1890. As noted previously, that ordinance provided that no Chinese person could live or conduct business in San Francisco outside of a narrow area previously set aside for slaughterhouses, tallow factories and other unhealthy businesses.301 The ordinance would have required all ethnic Chinese in San Francisco, both in Chinatown and elsewhere, to leave the city or move into the new district, giving up as much as $15 million in real estate.302 The ordinance was aimed at stopping the spread of the alleged “cancer” or “ulcer” of a growing Chinatown that was cutting off the aristocratic neighborhoods of Nob Hill and Powell/Mason from the commercial center of the city.303 Though there had been plans for a test case against the ordinance, Supervisor Bingham ran amok and arrested seventy-five Chinamen living outside of this area, including a father tending to his sick child.304 Federal Judge Sawyer was so disgusted at the allegations of the complaint that he ordered many of them stricken from

299. McCaIN, supra note 7, at 278.
300. Id. at 241.
301. Id. at 224.
302. Id. at 229.
303. Id. at 225, 229.
304. Id. at 226.
the record: the city alleged that the Chinese were criminal, vicious, immoral, incorrigible perjurers whose property decreased the value of surrounding property; that they left their sick to die in the streets and were a moral danger to other races; and that they had to be removed to districts where they would have less contact with other races.\textsuperscript{305}

In the end, Judge Sawyer expressed concern not only about the discriminatory targeting of the Chinese, but also about the way the law worked an arbitrary deprivation of property, putting the Chinese completely at the mercy of sellers in the district where they were to be relocated.\textsuperscript{306} In the later years, as earlier suggested, the federal courts occasionally were willing to see state and local ordinances for what they were: attempts by Whites to take the hard-earned property rights of ethnic Chinese persons, citizens and resident aliens alike, on the theory that only Whites were entitled to the bounty of the country.

While the Bingham ordinance was perhaps the most egregious attempt by majority Whites to claim ownership of American opportunity, it is not simply a historical footnote. The Court’s modern affirmative action cases display White plaintiffs’ similar assumptions that certain opportunities are “owed” to them as White persons.

Jennifer Gratz, who was denied admission to the University of Michigan undergraduate program, demonstrates this unwritten expectation that the opportunities available from government belong to Whites by right if only they work hard. Jennifer said that she “thought she was a shoo-in” to the University because of her 83rd percentile ACT score, and her background as a cheerleader, student body president, homecoming queen, and volunteer.\textsuperscript{307} She was so sure of herself that she had not applied to any other school until she got a letter from the University indicating that she was “well qualified, but less competitive” than other admitted students.\textsuperscript{308} When she received her rejection:

\begin{quote}
Jennifer was] devastated, angry, and embarrassed all at once. Jennifer thought about all the hard work on her studies, extracurriculars, and application . . . [She] was sure that something had gone terribly wrong. Her thoughts flashed to a Hispanic classmate who had been admitted to Michigan with lower grades than hers. Finally, Jennifer uttered the first words that came to her, “Dad,” she said, “Can we sue them?”\textsuperscript{309}
\end{quote}

\begin{footnotes}
\item[305.] McClain, supra note 7, at 229–30.
\item[306.] Id. at 230.
\item[308.] Id. at 2.
\item[309.] Id.
\end{footnotes}
For Jennifer, the expectation that her classmate was not worthy because of his race and a number was firmly fixed. Her co-plaintiffs similarly admitted in interviews that "they had been relatively confident they would be admitted to Michigan and had done little to line up comparable backup choices."\(^{310}\)

Similarly, Allen Bakke, who set the affirmative action debate in education on its course, maintained that he should have been admitted because of his higher test scores,\(^ {311}\) even though an admissions interviewer described him as opinionated with a limited approach to problems in the medical profession. Indeed, he thought he was entitled to admission even though several White students with lower scores had been admitted to his claimed seat.\(^ {312}\) And Marco DeFunis, who applied to the University of Washington Law School "[f]eeling that his credentials were as good as anyone's [and] that he was the victim of unfair treatment," claimed that race discrimination was obvious given his LSAT score.\(^ {313}\) This despite the fact that of the seventy-four admitted law school applicants with scores lower than his, thirty-eight were White and only thirty-six were identified minorities.\(^ {314}\) Although DeFunis had been accepted at four other law schools, he insisted on attending Washington "because it would have saved him and his wife an estimated $1,500 a year in possibly lost salaries."\(^ {315}\)

This pattern is repeated in employment affirmative action cases as well. Randy Pech, the principal in *Adarand Constructors v. Pena*, complained to anyone who would listen that "government programs that disfavored White men were gaining momentum."\(^ {316}\) Highly cognizant of the fact that his was the only "White" guardrail company in his area, he

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310. *Id.*


313. *Ivor Kraft, DeFunis v. Odegaard, RACE, MERIT AND THE FOURTEENTH AMENDMENT 27, 29 (1976).*

314. *Id. at 29.*

315. *Id. at 175 n.168.*

claimed that when he heard that he had submitted the low bid but the contract would go to a minority firm, "I flipped." It is a pattern repeated in gender as well as race cases. For example, Paul Johnson, who was passed over for the job of Santa Clara County highway dispatcher, "always believed that if you set goals and worked hard, you could achieve them." He testified, "I knew there was no one else taking the test that was anywhere near qualified as I was . . . . Usually, if you're doing the job, you automatically get it." In fact, when the woman who was instead hired applied for the position, her supervisor shouted, "don't you realize that you're taking a man's job away?"

Each of these plaintiffs implicitly believed that he or she was entitled to a job or opportunity as a virtual "property" right even if there is no legal foundation for that assumption: no one is legally entitled to be admitted to a public university even with a perfect test score, and no one is legally entitled to receive a public construction contract even if his work is exceptional and his costs are low. These plaintiffs' responses suggest that they were expecting, as property, a benefit tied to their hard work and overall qualities, a benefit which they automatically assumed the minority who gained "their spot" had not earned.

Of more concern is the fact that the Supreme Court both acknowledges White plaintiffs' anger over losing their "entitlements" and uses their property assumptions as a policy justification for invalidating affirmative action programs. The Court treats affirmative action plaintiffs as "innocent" victims of the programs, implying that the minorities who received the benefits of the programs were not "innocent." More critically, the Court accepts the hostility and stigmatization of Whites directed at recipients of affirmative action as a primary justification for striking down these programs. Such programs can "lead to a politics of racial hostility" and "resentment" by "innocent victims" of those who receive benefits. In affirming such feelings held by people like Jennifer Gratz, the Court seems unwilling to recognize that only those persons who believe they have something in the nature of a "property interest" or entitlement to the benefit at issue will be resentful or stereotype minorities to justify their failure to get what was "theirs."

The consequences of accepting the unexamined and perhaps unconscious beliefs of majority "victims" that they and not minorities are entitled to the benefits of American society are manifested in the Chinese
cases. Property is protected, at least in part, because it provides security of person and other property to the owner. In times of high economic and social anxiety, human beings will resort to extraordinary means to protect their property, including, as we saw in the Chinese cases, killing, threatening and driving others out. If the costs of violence are too high, persons who believe their property is at risk will make those who compete for what is “theirs” miserable, using the auspices of the law wherever possible. For the Supreme Court to accept any dominant group’s unconscious beliefs that they are entitled to the opportunities available in the United States—that these opportunities are their “property”—is like putting a loaded gun in their hands for the time the decide to utilize their stronger social or economic position to “take” that property out of the hands of other deserving persons with less power. The Chinese cases prove no less.

CONCLUSION

The Chinese cases pose a continuing affront to the promise of equal protection that the Court has enunciated in many modern cases, particularly in affirmative action cases. We cannot forget them in a time when the Court seems reluctant to discern any legislative purpose but a benign one, unless the government is dabbling in religion or dares to put a racial classification on the face of a statute. We cannot certainly forget them in a time when the Court seems reluctant to assume that racial and ethnic minorities are especially at risk in a majority-rule system roiled by economic and social anxiety. There is a glaring contrast between the Court’s persistent and aggressive role in supporting the civil rights movement of the early 1960s and its painful attempts to ignore the hostility leveled against the Chinese by local, state, and federal governments in the late nineteenth and early twentieth centuries.

The Chinese cases should be a reminder to the Court of what will happen if it validates the fear-producing legislation aimed at the “other,” especially the immigrant. They should make the Court think carefully about the social and political backlash if it fails to conscientiously and persistently assume its role in the constitutional scheme as a protector of minority interests. It is a small victory that some federal judges, despite racist biases operating in their own private lives, believed that the honor of the law and the nation’s treaty promises outweighed contemporary views about the claimed social inferiority of the Chinese. It is a perhaps small victory that Yick Wo is remembered as the constitutional promise we make to minorities. But it is a significant defeat that we do not all remember the tragic circumstances that brought Yick Wo to the U.S. Supreme Court.