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The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment

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Studies of the federal government's response to racial discrimination during the immediate post-Civil War era have dealt almost exclusively with the treatment of free blacks. This focus is in many respects entirely understandable. After all, the debate over black rights was a major factor dividing the Republican and Democratic parties, as well as one of the central themes of the entire Reconstruction process. Thus it should not be surprising that the subject has attracted the attention of most students of race relations, as well as those interested in the period more generally.

Blacks were not, however, the only racial minority in American during the late Nineteenth Century. Chinese immigrants were also present in significant numbers; moreover, while the status of blacks was the primary concern of the drafters of Reconstruction measures, the impact of such measures on the condition of the Chinese was also the subject of considerable discussion.

Legal scholars have largely ignored these discussions. Admittedly, the literature contains substantial analysis of *Yick Wo v. Hopkins*[1] and The Chinese Exclusion Case,[2] both of which concerned discrimination against the Chinese. Little or no effort, however, has been made to relate the decisions in these cases to the ideology underlying the Republican legislative effort that produced the Thirteenth, Fourteenth, and Fifteenth Amendments. Similarly, while mentioning the issue of citizenship for the resident Chinese,[3] most historical studies of federal policy during the Nineteenth Century have been concerned primarily with the question of Chinese exclusion.[4]

This article will explore the treatment of Chinese people by Congress and the Supreme Court in order both to elucidate the Republican attitude toward the Chinese and clarify the interaction between status, race, and rights in Republican ideology. The article will begin by comparing and contrasting the respective places of black and Chinese people in the political dynamic of the Reconstruction era. The article will then analyze congressional debates over the status of Chinese persons in the period between 1869 and 1872. Finally, the article will examine the Supreme Court's response to anti-Chinese legislation in the immediate post-Reconstruction period and conclude that, although the disposition of these cases fell far short of a blanket condemnation of racial discrimination, it was consistent with the ideology of those who controlled the drafting of the Reconstruction amendments.

I. CHINESE AND BLACKS DURING THE RECONSTRUCTION ERA

The situation of the Chinese in America during the mid-Nineteenth Century bore some important similarities to that of free blacks in the same period. First, both groups were racial minorities, considered inferior by whites, and subjected to discriminatory treatment. For example, the Oregon Constitution of 1857 barred any "Chinaman" who might later arrive in the state from owning real estate or working mining claims,[5] and California barred Chinese persons from testifying in court and imposed discriminatory taxes upon them.[6] Even before the adoption of the Fourteenth Amendment, laws that directly discouraged Chinese immigration were routinely held unconstitutional as inconsistent with federal power over foreign commerce.[7] The antebellum Constitution, however, posed no bar to measures that sharply curtailed the rights of Chinese nationals already living in the United States.[8]

Further, like the defense of black rights, political advocacy of rights for the Chinese carried a substantial risk of alienating important groups of white voters. Not surprisingly, these risks were greatest on the Pacific Coast, where the vast majority of the Chinese lived during the Reconstruction era. For example, an aggressive anti-Chinese posture was the keystone in a Democratic campaign that swept the Republicans from office in the California elections of 1867.[9]

While the western states were the center of anti-Chinese sentiment, Stuart C. Miller has demonstrated that the prejudice against the Chinese immigrants was in fact a nationwide phenomenon reflected in the eastern as well as the western press even prior to the Reconstruction

era.[10] Eastern opposition to Chinese immigration intensified in the late 1860s and early 1870s with attempts to establish small Chinese communities in areas east of the Rocky Mountains[11] and the widespread circulation of a published letter by Henry George warning that the influx of Chinese people posed a danger to American society.[12] Thus, the debate over the proper treatment of the Chinese, like that of black people, had political implications nationwide.

At the same time, a number of important factors differentiated the situation of the Chinese from that of free blacks. First, the political contexts of the respective debates over Chinese and black rights were fundamentally different. Republican advocacy of black rights was not based simply on moral condemnation of racial discrimination; it was also closely intertwined with a struggle for political supremacy between Republicans and southern whites. In the antebellum era, Republicans saw the institution of slavery as the cornerstone of the "slave power"--a group of slave holding whites who sought to control the national government, and to use that government to advance values antithetical to Republican philosophy.[13] After the War, Republicans saw the empowerment of the freed blacks of the South as a necessary counterweight to the perceived threat from an unrepentant white populace.[14] While advocacy of Chinese rights was generally viewed as consistent with basic Republican political and economic philosophy,[15] it did not directly implicate such overarching issues of national power. In this sense, the Republicans' attitude toward the Chinese provides a purer test of their commitment to the ideal of racial equality.[16]

At the same time, however, the situation of the Chinese was complicated by factors not presented by that of free blacks. First, unlike free blacks, who had been at least partially assimilated into American culture by their long presence in the United States, the culture of the Chinese was viewed as fundamentally different from that of mainstream American society. Occasionally, influential Republicans described Chinese culture in favorable terms. For example, Senator Lyman Trumbull of Illinois described the Chinese as "citizens from that country which in many respects excels any other country on the face of the globe in the arts and sciences, among whose population are to be found the most learned and eminent scholars in the world."[17] More often, however, the Chinese worldview was portrayed as antithetical to American values.

One of the most potent, recurrent attacks on the Chinese was directed at their religion. Thus, Republican Senator Henry W. Corbett of Oregon described China as "a pagan nation [whose people] worship their god 'Josh,' [sic] a god made of wood," and I argued that if Chinese were granted full participation in American society "you may soon find established pagan institutions in our midst which may eventually supersede those Christian influences which have so long been the pride of our country."[18] Representative William Higby of California was even more expansive in his condemnation:

> The Chinese are nothing but a pagan race.... You cannot make good citizens of them; they do not learn the language of the country; and you can communicate with them only with the greatest difficulty, as their language is the most difficult of all those spoken; they even dig up their dead while decaying in their graves, strip the putrid flesh from the bones, and transport the bones back to China. They bring their clay and wooden gods with them....Judging from the daily exhibition in our streets, and the well established repute among their females, virtue is an exception to the general rule. They buy and sell their women like cattle, and the trade is mostly for the purpose of prostitution. That is their character.[19]

Higby's tirade also emphasized another important difference between the Chinese and free blacks--the perception that the Chinese lacked any permanent connection with this country. By 1866, virtually every black person in the United States was not only a permanent resident, but also a native of this country. In contrast, almost all of the Chinese in America had been born in China; they were generally viewed as transients whose loyalties remained with China and who intended to return there.

This difference in national origin also had an important impact on the legal status of the Chinese in America. Under the Republican ideology that developed during the Civil War, all free blacks, as native Americans, were automatically entitled to the status of citizenship and the full rights appurtenant to that status.[20] In contrast, the only conceivable route to citizenship for immigrants was through the process of naturalization. This mechanism in turn was withheld from the Chinese by the existing statute, which limited access to naturalization to "free white persons"--a limitation that had been inserted in the first naturalization act passed by Congress.[21]

In the Reconstruction-era discussions about Chinese rights, all of these factors were filtered through the ongoing debate over the proper role of race in governmental policy. At one extreme of these debates were the Democrats and their allies. While some Democrats voted in favor of the Thirteenth Amendment, which abolished slavery, almost none were willing to go further in guaranteeing rights to non-whites in America. At the other extreme were the most radical Republicans, such as Senator Charles Sumner of Massachusetts, who insisted that all race-based classifications be abolished.[22]

Throughout this period, the balance of power was held by more centrist and conservative elements of the Republican party. These Republicans were committed to a theory that I have described elsewhere as one of "limited absolute equality."[23] According to this theory, blacks and other racial minorities were not entitled to civil rights on the ground that racial discrimination was inherently wrong. Instead, their claim was based on the theory that all men, whatever their condition or attributes, were entitled to a certain minimum level of rights. As one prominent Republican put it, with respect to natural rights--the rights to life, liberty, and property--"[i]t is a question of manhood, not of color."[24]

The theory of limited absolute equality had a profound impact on the attitude of Republicans toward the legal rights of the Chinese during the Reconstruction era. Thus, while confidently asserting the superiority of whites, the New York Times also declared that the Chinese should be granted the same legal rights as all other immigrants.[25]

For some Republicans, however, the political ramifications of the Chinese issue were of paramount importance. This phenomenon was not limited to West Coast Republicans. For example, after a small group of Chinese laborers was introduced into Massachusetts, Senator Henry Wilson and Representative Benjamin F. Butler--both of whom consistently took radical positions on measures designed to protect free blacks-delivered scathing attacks on Chinese immigration.[26] This interaction between principle and politics provided the backdrop for the congressional debates over Chinese rights.

II. CONGRESS AND THE CHINESE DURING THE RECONSTRUCTION ERA

A. The Burlingame Treaty

Although Chinese rights were occasionally addressed in discussions of earlier measures designed primarily to protect free blacks,[27] the first provision aimed explicitly at providing the Chinese in America with a measure of protection against discrimination was contained not in a statute, but in the Burlingame Treaty of 1868. The Burlingame Treaty not only declared that both China and the United States were in favor of the principle of free immigration, but also provided that "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."[28] This provision rather clearly threatened most of the laws discriminating against the Chinese in the western states.[29]

Such clauses were fairly common in treaties between the United States and other nations.[30] In the debate over the ratification of the Burlingame Treaty, this language became controversial. A number of senators feared that the clause would override the existing naturalization law and require that Chinese immigrants be given the opportunity to become citizens. To avert this eventuality, the Senate added new language--apparently unique[31]--which provided that none of the provisions of the treaty required the United States to extend naturalized citizenship to Chinese immigrants.[32] While the Senate debates over ratification of the treaty took place in executive session and were therefore not recorded, the latter provision was apparently crucial to the Senate's decision to ratify.[33]

B. The Fifteenth Amendment

The Senate debate over the appropriate form of the Fifteenth Amendment, which dealt with racial discrimination in voting rights, provided a clearer picture of the variety of Republican opinions on the Chinese question. The issue of voting rights created some difficulty for Republican theorists. Earlier measures such as the Thirteenth Amendment, the Civil Rights Act of 1866, and Section One of the Fourteenth Amendment had provided federal protection for rights that all agreed were necessarily appurtenant to citizenship. Some Republicans believed that the right to vote also fell into this category.[34] Others believed, however, that suffrage was a strictly conventional right, to be granted or withheld as experience warranted.[35] Further, the idea of suffrage for non-whites remained politically unpopular in many northern states. Finally, federal control over suffrage cut deeply into cherished state prerogatives. The combination of these factors led to the deletion of a provision guaranteeing race-blind suffrage from the final draft of the Fourteenth Amendment.[36]

Notwithstanding these difficulties, the exigencies of Reconstruction led Congress to impose black suffrage on the defeated Confederate states in 1867 as a means to ensure that the reconstructed state governments would be in the hands of elements loyal to both the Union and the Republican party. At the same time, however, Congress left control over voting requirements in the northern states in the hands of the state governments. This created an obvious tension in Republican policy--a tension that many Republicans felt acutely.[37] In addition, some Republicans argued that the enfranchisement of blacks in loyal states would result in political gains for the party. Finally, by dealing with the suffrage issue, Republicans hoped to remove two issues from the national political agenda: the question of Reconstruction policy[38] and the problem of race relations generally.[39] Taken together, these factors created a consensus in the Republican party about the desirability of congressional action on the suffrage issue in the Third Session of the 40th Congress. Republicans differed, however, on the precise form of the action to be taken.

One of the key issues in the debate over expanding suffrage was the question of the impact of various proposals on the rights of the Chinese. The enfranchisement of the Chinese was not a prerequisite for the achievement of Republican policy objectives. Moreover, a measure aimed specifically at blacks could achieve those objectives with the minimum impact on state prerogatives and without incurring the political costs associated with advocacy of Chinese rights.

Nonetheless, the language of the proposals initially put forth in both the Senate and House of Representatives banned racial discrimination in voting generally. In response, Republican senators introduced a number of alternative formulations designed to ensure that the Chinese

would not be enfranchised by the Fifteenth Amendment.[40] The most extensive discussion of the Chinese issue occured in the debate over the language proposed by Jacob M. Howard of Michigan.

Senator Howard sought the adoption of an amendment which would have provided simply that "[c]itizens of the United States of African descent shall have the same right to vote and hold office . . . as other citizens."[41] Senator Howard himself did not directly discuss the Chinese issue; instead, he argued that "[t]he sole object of this whole proceeding is to impart by a constitutional amendment to the colored man who has become free in the United States the ordinary right of citizens of the United States," and noted the unique position of blacks in American society.[42] Nonetheless, the question of Chinese rights was clearly an important factor in the attitude of a number of Republicans who supported the Howard proposal. Senator Cornelius Cole of California, for example, noted that adoption of Senator Howard's language "will effectually leave out of [this] question the subject of the Chinese immigration which has excited so much feeling";[43] similarly, Senator James W. Patterson of New Hampshire argued that

> by the passage of this proposition we shall relieve . . . black citizens, native to the soil, from the wrong which is done them, without doing any wrong to the Asiatics who may flow in upon our western shores. I prefer . . . to leave that question open, so . . . if . . . increasing tides of immigration pour upon our Pacific coast in such numbers as to endanger the welfare of those States, they may have it in their power to guard themselves against the threatened evils.[44]

Other Republicans took a different view. Senator George F. Edmunds of Vermont opposed the Howard language on principle, noting that while enfranchising blacks, it left "the native of every other country under the sun, the descendant of every other race under the sun, entirely to the mercy of the States."[45] Senator Edmunds asserted that "it is little less than an outrage upon the patriotism and good sense of a country like this, made up of the descendants of all nations, to impose upon them an amendment of that kind."[46] Senator Willard Warner of Alabama connected this argument to political expediency, contending that "this proposition to single out one race is the weakest one that can be put before the country."[47]

Despite these arguments, at one point Senator Howard's proposal gained majority support among mainstream Senate Republicans. It was ultimately rejected because of unanimous opposition from Democrats and their allies.[48] At first glance, the Democratic position on this point might appear to be completely anomalous. The party represented the most virulently racist elements of the generally racist Nineteenth-Century society; indeed, as already noted, an aggressive anti-Chinese position had been the key to Democratic success in California in 1867.[49] Viewed in political context, however, the Democratic opposition to the Howard proposal is perfectly understandable. In essence, the Democrats forced the Republican party to choose between abandonment of the Fifteenth Amendment altogether and opening itself to the politically potent charge of being pro-Chinese. James R. Doolittle of Wisconsin--a nominal Republican who by 1869 was firmly allied with the national Democratic party--made this point explicitly. He opposed the Fifteenth Amendment generally, but raised the specter of massive Chinese immigration and challenged the Republican party to "[e]ither [leave suffrage to state control] or adopt the principle that you are in favor of giving universal equality and political power to all the races in the United States, including the Chinese."[50]

The debate over the language in Senator Howard's proposal clearly reflected the deep divisions within the Republican party over the appropriate treatment of the Chinese. Moreover, the voting pattern actually understated the degree of anti-Chinese sentiment within the party. Republican senators such as Frederick T. Frelinghuysen of New Jersey and Timothy O. Howe of Wisconsin explicitly premised their support of general race-blind language on the view that immigrant Chinese would never become citizens of the United States, and thus would not be covered by the proposed Fifteenth Amendment.[51] In the absence of such assurance, the outcome of the vote on Senator Howard's formulation would have been quite different.

The treatment of the language proposed by Senator Charles Sumner of Massachusetts dramatically illustrates this point. Senator Sumner's proposal would have prohibited all racial discrimination in voting rights, rather than simply discrimination among citizens.[52] At the very least, the Sumner proposal would have enfranchised the Chinese in states such as Michigan and Indiana, which did not condition suffrage on citizenship.[53] Some senators worried that the proposal would require the enfranchisement of all Chinese, even in those states which had previously allowed only citizens to vote.[54]

This last possibility caused great consternation among Republican senators. Senator Frelinghuysen asserted that "I believe that [we] should not introduce into this country hordes of pagans and heathens. I think we are under every obligation to give our own people equal, unrestricted rights. I do not feel that obligation toward the people of Asia."[55] Senator Oliver H. P. T. Morton of Indiana, who had also strongly opposed Senator Howard's formulation, took a somewhat different tack. Noting the mistreatment of the Chinese in California, he argued that if granted the right to vote, "[t]hey will some time come to understand their power, and when they are in the majority will rise up and seize it.... [T] here ought to be some provisions made against a catastrophe of that kind."[56] Stunned by the intensity of the reaction to his proposal, Senator Sumner simply withdrew it without a vote.[57]

Eventually, after exhaustive debate and intricate parliamentary maneuvering, Congress adopted the current, race-blind text of the Fifteenth Amendment. Representatives and senators from the far western states were, however, able to obtain one important concession. The conference committee that produced the final language had before it two different versions of the suffrage proposal. The version adopted

by the House of Representatives had prohibited discrimination based on nativity as well as race. At the insistence of Republicans such as Senator William M. Stewart of Nevada and Representative Aaron A. Sargent of California, the prohibition on nativity-based discrimination was deleted. These Republicans contended that this deletion left the States free to bar natives of China from voting, even if they were later allowed to become citizens.[58]

The accuracy of this assertion was debatable; while some legislative history seems to support the assertion,[59] much of the discussion proceeded on the assumption that a prohibition of discrimination on the basis of race would ban discrimination against the Chinese per se.[60] The uncertainty about the status of Chinese persons complicated the process of ratification--particularly in the western states.[61] Neither California nor Oregon ultimately ratified the Fifteenth Amendment, and despite its limitation to citizens, the potential impact of the proposed amendment on Chinese rights became a major political liability for Republicans in those states. Moreover, the Nevada state legislature ratified only after Senator Stewart sent a letter assuring legislators that the omission of the protection from discrimination based on nativity left the state free permanently to bar the native Chinese from voting.[62]

C. The Civil Rights Act of 1870

One year after congressional action on the Fifteenth Amendment, advocates of Chinese rights gained an important victory in connection with the adoption of the Civil Rights Enforcement Act of 1870.[63] The Enforcement Act was concerned primarily with providing a mechanism for ensuring that blacks would in fact be allowed to enjoy the right to vote guaranteed to them by the Fifteenth Amendment. In response to Chinese complaints about mistreatment by the government of California, Senator Stewart added an amendment to the Enforcement Act patterned on the Civil Rights Act of 1866. While the 1866 Act had protected only citizens from racial discrimination, Senator Stewart's amendment guaranteed that "all persons within the jurisdiction of the United States" would be granted the same specified rights as white citizens.[64] He argued that federal protection of the Chinese was mandated not only by basic concepts of justice and fairness, but also by the Burlingame Treaty itself.[65] The new provision occasioned relatively little debate,[66] and was passed as part of the Enforcement Act.

While its passage was plainly an advance for the rights of the Chinese in America, Senator Stewart's amendment stopped well short of being a general condemnation of discrimination based on race. First, unlike the Civil Rights Act of 1866, the 1870 enactment omitted all reference to equality in property rights. This difference was not accidental; the right to obtain and hold real estate was associated with citizenship in Nineteenth-Century legal thought, and Senator Stewart made a conscious decision to omit it from his proposal.[67]

Second, Senator Stewart's advocacy of Chinese rights extended only to those Chinese already in the country. While recognizing that the Burlingame Treaty required the United States to permit Chinese immigration and required the federal government to protect Chinese nationals, he also declared that "I am opposed to Asiatics being brought here, and will join in any reasonable legislation to prevent anybody from bringing them."[68] Thus, it was not race alone but also status--in this case, legal residency--that required protection. The importance of status would come into even sharper focus later the same year when Congress directly confronted the issue of Chinese naturalization.

D. The First Naturalization Debate

Reacting to widespread allegations of fraud in the existing naturalization process,[69] Republicans in 1870 initiated a concerted effort to overhaul the entire system. This reform proposal was considered first by the House of Representatives. While the long standing provison that limited naturalization to free white people was not the primary focus of the reform effort, the bill initially reported to the House floor would have eliminated that requirement.[70]

Objections to this change were raised not only by Democrats[71] but also by western Republicans. Representative Thomas Fitch of Nevada proposed an amendment that would have explicitly barred the Chinese end Japanese from naturalization.[72] Defending the Fitch proposal, Representative Aaron A. Sargent of California noted that the Fourteenth Amendment distinguished between the respective rights of aliens and citizens, and that the Fifteenth Amendment protected only citizens. He argued further that the denial of the privilege of naturalization to the Chinese was consistent with basic Republican ideology as well as the Constitution, and declared that "I believe . . . the Chinaman and anyone else, no matter what his color, is entitled to the equal protection of our laws in life, liberty, and security; but . . . we should [not] go beyond that and make them all citizens."[73] Representatives Sargent and Fitch both emphasized the differences between Chinese and American culture and argued that the conditions under which the Chinese entered the country precluded their full, free entrance into American society. They predicted grave consequences for "American laws, American culture, and American civilization"[74] if the Chinese were allowed to become naturalized citizens.

These and other attacks necessitated substantial alterations in the original immigration bill. The bill was first tabled,[75] and then sent back to committee.[76] The revised measure that was initially passed by the House left the racial limitation on naturalization intact.[77]

The struggle took a different course in the Senate. Here the reform proposal reported from committee would not have allowed non-white immigrants to obtain citizenship.[78] However, shortly before a vote was to be taken on the bill pursuant to a unanimous consent agreement, Senator Sumner introduced an amendment that would have stricken the word "white" from the immigration laws.[79]

In the heated procedural wrangle that ensued, Senators Stewart and Casserly of California demanded a full discussion of the amendment, arguing that it was in effect a new bill,[80] while other senators resisted, citing the unanimous consent agreement.[81] Initially, the latter group prevailed; a quick vote was taken, and the amendment passed by a margin of 27-22.[82] At this point, however, Senator Stewart declared himself absolved from the previous unanimous consent agreement,[83] and an extended debate continued that carried over until two days later.

Some opponents of the Sumner proposal relied in part on the now-standard anti-Chinese diatribes.[84] Support for the proposal, however, was also weakened by other considerations. Senator John Sherman of Ohio suggested that the issue needed further study and more mature consideration.[85] Others, including Senators Roscoe Conkling of New York and Carl Schurz of Missouri, expressed fears that addition of the Sumner amendment would endanger the entire immigration reform effort.[86]

Senator Sumner's supporters, by contrast, took the position that race-blind naturalization was a matter of high principle. Senator Sumner himself argued that Congress was constitutionally required to take this view. His argument emerged clearly in a brief colloquy with Senator Oliver P. Morton of Indiana. Senator Morton asked "has the Chinaman a natural and moral right to become a citizen of the United States?"[87] Senator Sumner responded:

> I answer that he has not; but I answer with equal confidence that if the United States undertakes to legislate on naturalization, it is bound by the Constitution of the United States, interpreted by the Declaration of Independence, to make no distinction of color.[88]

Earlier Senator Sumner had stated:

> I am not prepared to say that Congress may not shut down the gates and refuse to naturalize anybody; but if it does naturalize, then the law must be in harmony with the requirements of the Declaration of Independence [which prohibit discrimination on the basis of race]. I consider the Declaration of Independence as paramount law, not to be set aside or questioned in any respect--sovereign, absolute, irreversible, and which we are all bound to respect.[89]

Senator Sumner's legal argument rested on two basic premises--first, that the Declaration of Independence should be considered positive, paramount law, and, second, that the Declaration by its terms prohibited racial discrimination. While these premises had a venerable pedigree among radical Republican thinkers,[90] they had never been accepted by a majority of party members. Even some of those who rejected radical legal theory, however, supported Senator Sumner's proposal as a matter of political ideology. Thus, for example, Senator Trumbull contended that:

> [T]he principle upon which the `great Republican party is based . . . is to make freemen of all the men of this countly. If [the opponents of the Sumner amendment] are right, then refuse them admission to this country; but if you allow them to come, make them a part of the body-politic.[91]

Given the variety of considerations affecting the various Republicans positions on the Sumner amendment, it should not be surprising that the voting patterns on the amendment did not break down along normal factional lines. While the core of Senator Sumner's support on the motion to reconsider his proposal came from the radical wing of the Republican party, he was also joined by more conservative senators including Trumbull, Matthew H. Carpenter of Wisconsin, and Joseph S. Fowler of Tennessee. Conversely, Senator Sumner was opposed not only by Democrats and conservative Republicans, but also by radicals such as Senator Morton and Senator Zachariah Chandler of Michigan.[92]

The complicated crosscurrents surrounding the issue were clearly reflected in three roll call votes that were taken in quick succession. First, a motion to reconsider the amendment carried by a vote of 27-14;[93] two senators who had originally supported Senator Sumner switched their votes, and six were present but chose to abstain.[94] On reconsideration, the proposal for race-blind naturalization was defeated by a vote of 30-14.[95] Senator Warner, an opponent of the Sumner initiative, then immediately moved to extend the naturalization laws to "aliens of African nativity and to persons of African descent." This motion carried by a 21-20 margin, with nine senators who had opposed the Sumner amendment voting in favor, and one who supported Senator Sumner, Senator Timothy O. Howe of Wisconsin, voting against the Warner proposal.[96]

The passage of the Warner amendment was of largely symbolic import; as Senator George H. Williams of Oregon had observed, few immigrants came from Africa.[97] In any event, however, it did not alter the primary lesson of the debate over Chinese naturalization--that

for many Republicans, issues of naturalization were not matters of constitutional or even ideological principle, but questions controlled by considerations of expediency.

E. The Second Naturalization Debate

Typically, accounts of Nineteenth-Century debates over the issue of Chinese citizenship mention only the 1870 Senate action. Nevertheless, two years later, a dispute over the issue once again erupted on the Senate floor. As an amendment to a bill that would have provided amnesty for ax-Confederates barred from holding office by the Fourteenth Amendment, Senator Sumner proposed a comprehensive Civil Rights Bill. Senator Sumner's proposal would have banned racial discrimination in a number of specific contexts; in addition, however, section five of the proposal would have eliminated the word "white" from every state or national law, statute, ordinance, regulation, or custom.[98] Among other things, this provision would have eliminated the bar to Chinese naturalization that had been retained in 1870.

Predictably, this possibility brought protests from a number of prominent Republicans. Some of their arguments reflected the kind of raw prejudice so typical of the debates over Chinese rights. For example, noting that Senator Sumner's bill would have required states to allow the Chinese to serve on juries, Senator Corbett declared that:

> I believe that the only thing they recognize as an oath binding upon them is this: that you shall cut off the head of a chicken, and the Chinaman swears in the presence of that, or by that that he will judge of the matter according to that oath.... I think that we are not prepared to allow our juryboxes packed by twelve Chinamen, who can be bought and sold.[99]

Senator John Sherman of Ohio had a more thoughtful response. While supporting most of Senator Sumner's bill, Senator Sherman argued that the naturalization laws should be limited to white persons.[100] He reasoned:

> Take a man . . . from any land peopled by the white race, let him come here, and in five years he easily and rapidly assimilates with our institutions; his blood mingles with our blood and on the whole rather improves the stock. But that principle does not extend to the black or to the Mongolian races .... This [is] partly [because they are] heathen races, who, from their nature, from the tenor of their minds, could not in five years be made good citizens of the United States, they having a different idea of the sanctity of religion, a different idea of the worship of God; their fundamental ideas are different, and you cannot make good republican or democratic citizens out of them in five years, and they cannot and will not and do not mix with the body of the population.[101]

This argument is not based on the idea that the Chinese are per se inferior to whites, but rather on the theory that homogeneity in any society is a virtue. One can, of course, disagree with this premise; if it is accepted, however, Senator Sherman's position on naturalization becomes perfectly plausible.

Despite arguments such as this, efforts to limit the applicability of the Sumner proposal failed. Initially, Senator Sherman's amendment to strike section five altogether was rejected on a close vote.[102] Subsequently, motions by Senators Corbett and Cole that aimed specifically at the naturalization issue were defeated by much larger margins.[103] The latter votes were somewhat misleading, however, reflecting the complicated political relationship between amnesty and civil rights as much as sentiment on the issue of Chinese naturalization itself.[104]

Ultimately, the Sumner proposal, with section five included, was added to the amnesty bill by the narrowest of margins.[105] This addition, however, proved fatal to the amnesty bill itself; it garnered only a 33-19 majority[106]--short of the two-thirds majority the Fourteenth Amendment required for amnesty. Senator Sumner opined that except for the Chinese question, the necessary majority would have been obtained in the Senate.[107] While this conclusion may have been overstated, the issue of Chinese rights clearly did diminish support for the civil rights provision.[108]

The failure of Senator Sumner's 1872 initiative marked the end of serious congressional efforts to provide Chinese immigrants with the full panoply of rights guaranteed to citizens by the Constitution. Nonetheless, existing constitutional, statutory, and treaty rights gave some basis for hope that the federal judiciary would strike down the anti-Chinese legislation that had been adopted in states such as California. The Supreme Court thus became the key actor in efforts to provide federal protection for the Chinese.

III. THE SUPREME COURT AND CHINESE RIGHTS, 1875-1886

A. Anti-Chinese Legislation and the Antebellum Constitution

The Fourteenth Amendment and the Burlingame Treaty were not the only substantial constraints on the freedom of the states to impose disabilities on Chinese immigrants. Even prior to the adoption of the Fourteenth Amendment, the courts in California had held that direct

impediments to Chinese immigration ran afoul of the federal power to regulate foreign commerce.[109] These decisions were well-grounded in existing doctrine, which held that federal authority over such commerce was exclusive.

In 1875, the Supreme Court reaffirmed this doctrine in *Chy Lung v. Freeman*.[110] Chy Lung was a challenge to a California statute that directed the state Commissioner of Immigration to "satisfy himself whether or not" potential immigrants arriving by sea fell into one of a number of undesirable categories, and to require a bond to defray the potential cost of providing public support to any person whom the Commissioner determined belonged to one of such categories.[111] The requirement was challenged by a Chinese woman whom the Commissioner viewed as "lewd and debauched," and who was therefore denied entry into California in the absence of a $500 bond.

This requirement was found to be unconstitutional. Speaking for a unanimous Court, Justice Samuel F. Miller's distaste for the statute was evident. He asserted that " [i] t is hardly possible to conceive a statute more skillfully framed, to place in the hands of a single man the power to prevent vessels engaged in a foreign trade, say with China, from carrying passengers, or to compel them to submit to systematic extortion of the grossest kind."[112] Justice Miller further observed that "if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress."[113] Concluding that the challenged statute went "far beyond" that which was necessary to protect the state against "paupers and convicted criminals from abroad,"[114] Justice Miller reasserted the exclusivity of federal power over immigration in the strongest terms. He declared that:

[T]he passage of laws which concern the admission of citizens and subjects of foreign nations to our shores belongs to Congress, and not to the States. It has the power to regulate commerce with foreign nations: the responsibility for the character of those regulations, and for the manner of their execution belongs solely to the national government.[115]

Chy Lung effectively invalidated all state efforts to interfere directly with the immigration of the Chinese. Of course, the decision had no impact on legal disabilities placed on the Chinese after they had landed. The only barriers to these disabilities were the closely-related provisions of the Burlingame Treaty, the Fourteenth Amendment, and the Civil Rights Act of 1870.

B. The Fourteenth Amendment and Chinese Rights

By 1870, federal courts in California were routinely deploying the Fourteenth Amendment against oppressive anti-Chinese legislation.[116] In contrast, it was not until the mid-1880s that the Supreme Court first dealt with the impact of the Fourteenth Amendment on such legislation. The occasion was a series of challenges to San Francisco city ordinances regulating the operation of commercial laundries.

Prejudice against the Chinese sharply limited their employment opportunities.[117] In a few less desirable industries, however, they came to dominate the market.[118] The commercial laundry industry was one such area of Chinese dominance.[119] For example, in 1880 it was estimated that of the 320 laundries in San Francisco, approximately 240 were owned and operated by Chinese people,[120] and in 1882, one anti-Chinese group of trade unionists estimated that commercial laundries in San Francisco employed 5,107 Chinese and only 615 whites.[121] This industry thus presented a tempting target for the anti-Chinese political movement.

Two San Francisco city ordinances dealing specifically with laundries generated litigation in the Supreme Court.[122] The first, adopted in 1880, required the approval of the city Board of Supervisors in order to operate a laundry in a building not constructed of brick or stone.[123] The second, adopted in 1884, placed a number of restrictions on the operations of such laundries, including a prohibition on the washing and ironing of clothes between the hours of ten in the evening and six in the morning.[124] Because of the vagaries of litigation, the latter ordinance was the first to come before the Court.

The first case in which the Court passed on the merits of the ordinance[125] did not directly implicate the issue of racial discrimination. Rather, in *Barbier v. Conolly*,[126] a non-Chinese laundry worker argued that the ordinance violated the Fourteenth Amendment because it discriminated between workers in different businesses and between workers who performed their functions at different times of the day. Rejecting the challenge for a unanimous Court, Justice Stephen Field characterized the ordinance as "a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies,"[127] and declared that the Fourteenth Amendment "was [not] designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people."[128] At the same time, however,Justice Field asserted that the amendment would invalidate "[c]lass legislation, discriminating against some and favoring others."[129]

Soon *Hing v. Crowley*,[130] decided in the same term as Barbier, began to explore the limits of this concept of class legislation. In Soon Hing, a Chinese laundry worker challenged the same prohibition that had been upheld in Barbier. However, in addition to raising arguments analogous to those that the Court had already rejected, the Chinese worker also claimed that the ordinance was unconstitutional because it was adopted for the illegitimate purpose of driving the Chinese from the laundry industry.[131] Once more speaking for a unanimous Court, Justice Field rejected this argument, asserting that:

> The rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrable from their operation, considered with reference to the condition of the country and existing legislation.... [E]ven if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned.[132]

In other words, with only the rarest exceptions, facial discrimination would be the sole determinate of equal protection violations. Thus, the San Francisco ordinance passed constitutional muster.

In contrast, the following year the requirement that wooden laundries receive the approval of the Board of Supervisors met a different fate in *Yick Wo v. Hopkins*.[133] Under the Court s view of the ordinance, the supervisors had unfettered discretion to grant or deny applications.[134] The Court noted that while the supervisors had denied consent to each of the two hundred Chinese persons who had applied for permission to operate laundries in wooden buildings, eighty non-Chinese had been granted such permission, and only one white had been denied approval.[135] Based on this view of the facts, a unanimous Court found the ordinance unconstitutional.

Race played little direct role in most of Justice Stanley Matthews's opinion for the Court. Instead, the opinion focused primarily on the arbitrary nature of the decision-making process. Justice Matthews began by noting that, while not citizens, the Chinese immigrants could claim the benefit of both the Burlingame Treaty and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and that the Civil Rights Act of 1870 had reaffirmed this protection.[136] Justice Matthews then emphasized that what was at stake in Yick Wo was an aspect of the fundamental rights to life, liberty and the pursuit of happiness.[137] He declared that:

[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.[138]

In characterizing the Yick Wo ordinance as imposing just such a requirement, the Court analogized the situation to cases involving the arbitrary fixing of utility rates[139] and the forced removal of a steam engine from a box-maker's shop.[140] Thus, the Court suggested that the ordinance was unconstitutional on its face.[141]

It was only at this point that race entered directly into the Court's argument. Justice Matthews noted that because the record reflected the actual operation of the challenged ordinances, "we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration."[142] He concluded that:

> [W]hatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protection of the laws.... Though the law itself be fair on its face and impartial in appearance, yet, 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....
>
> No reason whatever, except the will of the supervisors is assigned why [the Chinese] should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood.... No reason for [the discriminatory pattern] is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal.[143]

Based on this language, YiCk Wo is generally viewed by modern scholars as standing for two important propositions (which the commentators treat as virtually self-evident): first, that the Equal Protection Clause bans discrimination against not only blacks, but all minority races,[144] and, second, that the ban applies to discriminatory application of facially neutral statutes.[145] When taken as a whole, however, the import of the case is both broader and narrower than this characterization would suggest.

First, Justice Matthews' argument was not directed solely at racial discrimination. Instead, the use of the ordinance to discriminate against the Chinese was seen as a specific example of a more general problem--the likelihood that officials with unfettered discretion would use that discretion to create the functional equivalent of the "class legislation" condemned in Soon Hing. The same reasoning would apply to the use of official discretion to place any small, identifiable group at a disadvantage.

On the other hand, the Yick Wo opinion was explicitly limited to deprivations of rights that the Court deemed "fundamental: the rights to "life, liberty and the pursuit of happiness"--terms which, in the late Nineteenth Century, were limited to natural or vested rights.[146] The opinion explicitly recognized that "in many cases . . . the responsibility [for final decisionmaking] is purely political, [with] no appeal lying

except to the ultimate tribunal of the public judgment."[147] Thus, the decision cannot be viewed as a generalized rejection of governmentally-imposed racial discrimination.

Finally, the Court's condemnation of discriminatory application must be read against the background of its reasoning in Soon Hing, decided only two years earlier and cited with approval in Yick Wo itself. The Soon Hing Court had indicated that statistical evidence could invalidate an otherwise constitutional regulation only if "in its enforcement it is made to operate only against the [relevant] class."[148] The Yick Wo fact pattern fit this exception almost perfectly. In many situations, however, the impact of racial bias on administrative decisionmaking is less obvious; under Soon Hing, the constitutional challenge would fail in those cases.

In short, those who rely on Yick Wo as a precedent for sweeping condemnations of governmentally-imposed racial discrimination misunderstand the import of the case. The limits of the late Nineteenth Century's federal commitment to legal equality for the Chinese came into even sharper focus only three years later, when the Court was faced with The Chinese Exclusion Case.[149]

IV. THE CHINESE EXCLUSI0N CASE

A. The Road to the Chinese Exclusion Acts[150]

After 1872, the political situation of the Chinese in America continued to deteriorate. In 1876, the platforms of both major political parties contained anti-Chinese planks,[151] and a congressional committee was established to investigate the Chinese problem. While Senator Oliver Morton wrote a minority report for this committee defending the Chinese and favoring continued unfettered immigration,[152] the majority report advocated the renegotiation of the Burlingame Treaty to permit the restriction of Chinese entry.[153] A bill limiting the number of Chinese persons who could be carried by a single vessel to the United States passed both Houses of Congress in 1878,[154] only to be vetoed by President Rutherford B. Hayes on the ground that the limitation was inconsistent with existing treaty obligations.[155]

The pressure for immigration restrictions led to renegotiation of the Burlingame Treaty in 1880, to grant the United States the option to "regulate, limit or suspend," but not "entirely prohibit," the entrance of Chinese laborers.[156] Two years later, a bill prohibiting the entrance of Chinese laborers for twenty years was adopted by both the House of Representatives and the Senate,[157] only to meet once again with a presidential veto--this time by Chester A. Arthur.[158] Soon thereafter, however, a ten-year moratorium was signed into law by President Arthur.[159] In 1888 the ban was extended to include Chinese who had come to the United States, departed, and later attempted to return.[160] It was passage of the latter statute that set the stage for the confrontation in The Chinese Exclusion Case.

B. The Chinese Exclusion Case

In The Chinese Exclusion Case, a Chinese laborer petitioned for a writ of habeas corpus that would have allowed his entrance into the United States. He previously had been a resident of this country, but had returned to China temporarily after receiving an official certificate that purported to allow him re-entry to the United States. Nonetheless, he was denied re-entry pursuant to the 1888 statute that forbade Chinese laborers to enter the country under these circumstances. The Chinese laborer argued that the denial violated both the treaty obligations of the United States and the federal Constitution. The Court unanimously rejected both of these arguments.[161]

The opinion conceded that the denial was inconsistent with the provisions of existing treaties between the United States and China.[162] However, citing the established principle that "so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as [C]ongress may pass for its enforcement, modification or repeal,"[163] the Court held that the 1888 statute effectively overrode the treaty. Thus the controlling question in the case was whether the statute itself was consistent with the Constitution.[164] Here the Court based its decision on a sweeping conception of congressional power over immigration, declaring that "[i]f . . . the government of the United States, through its legislative department, considers the presence of foreigners of different race . . . to be dangerous to its peace and security, [the decision to exclude them] is conclusive upon the judiciary."[165]

Not surprisingly, The Chinese Exclusion Case has been subjected to a barrage of criticism from modern scholars. Louis Henkin, for example, excoriates the decision as "an embarrassment" and declares that "Chinese Exclusion . . . must go."[166] T. Alexander Aleinikoff describes Chinese Exclusion in similar terms,[167] and Laurence H. Tribe contends that the theory of plenary power on which it is based "reflects an error in vision."[168] The basic thrust of these criticisms is that Chinese Exclusion creates an unfortunate and unjustified exception to the general principle of race-blindness, which these commentators view as embodied in the Equal Protection Clause.

Whatever its relationship to modern conceptions of racial justice, the holding in Chinese Exclusion was entirely consistent with the ideological viewpoint that consistently prevailed in Congress during the early Reconstruction era. Under this ideology, rights were a function of status, and racial discrimination was wrong only if it either violated some positive law or denied a person the rights appurtenant to his status. At the same time, the government retained unfettered discretion to grant or deny requests for changes in status that would

carry with them new rights. The plaintiff in Chinese Exclusion requested just such a change in status--to legal resident from one who was outside the borders of the nation. Viewed from this perspective, the decision in Chinese Exclusion was nothing more than the flip-side of Chy Lung,[169] because the state government had no constitutional authority to control entry into the United States, the federal government must have retained plenary power to deny entry to any person it viewed as undesirable. In short, the Chinese Exclusion result is not (as the critics imply) based on an aberrant exception from a general anti-discrimination principle. Instead, the case is a perfectly orthodox application of basic concepts inherent in the dominant Republican ideology of the day.

V. CONCLUSION

The treatment of the Chinese by the Reconstruction Congresses and the post-Reconstruction Supreme Court reflects an ideology that differs substantially from modern conceptions of racial justice. While the most radical Republicans believed that all legal distinctions based on race should be abolished, the dominant group rejected this viewpoint. Instead, this group pursued a vision of equality that was imbedded in a complex matrix of status and natural rights that was at times complicated by other generally applicable legal doctrines as well. Thus, while the Chinese who were granted legal residency became automatically entitled to certain rights by virtue of that status, most Republicans did not feel constitutionally compelled either to grant the Chinese entry, or to allow them to obtain the additional rights appurtenant to citizenship. Of course, depending on one's basic approach to constitutional adjudication, one might still interpret the Constitution (particularly the Fourteenth Amendment) to embody a more robust commitment to racial equality. Based on the actions of the Reconstruction Republicans and the Court, however, attributing such a viewpoint to the framers of the Fourteenth Amendment themselves would be historically unsound.

[1.] 118 U.S. 356 (1886).

[2.] 130 U.S. 581 (1889).

[3.] See, e.g., MARY R. COOLIDGE, CHINESE IMMIGRATION 129-30 (1909); EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 82 (1981); ELMER C. SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 81 (1991).

[4.] See, e.g., COOLIDGE, supra note 3, at 133-41, 16882; SANDMEYER, supra note 3, at 78-108.

Charles J. McClain, The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 18501870, 72 CAL. L REV. 529 (1984), is an outstanding exception. McClain provides an in-depth study of the background of the Civil Rights Act of 1870, discussed infra notes 63-68 and accompanying text.

[5.] See OR. CONST. OF 1857, art. XV, Section 8, reprinted in 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1505 (Bejamin P. Poore comp., 1878).

[6.] See McClain, supra note 4, at 539-64.

[7.] See, e.g., Lin Sing v. Washburn, 20 Cal. 534 (1862) (invalidating a capitation tax on Chinese); People v. Downer, 7 Cal. 169 (1857) (invalidating a penalty on persons transporting Chinese to California).

[8.] See, e. g., People v. Hall, 4 Cal. 399 (1854) (upholding a ban on trial testimony by Chinese persons).

[9.] See SANDMEYER, supra note 3, at 46-47; ALEXANDER P. SAXTON, THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 80-91 (1971).

[10.] See STUART C. MILLER, THE UNWELCOME IMMIGRANT: THE AMERICAN IMAGE OF THE CHINESE, 1785-1882, at 167-72 (1969).

[11.] Some of these efforts and responses are described in GUNTHER BARTH, BITTER,] STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES 1850-1870, at 183-213 (1964); MILLER, supra note 10, at 172-90; and Frederick Rudolph, Chinamen in Yankeedom: Anti-Unionism in Massachusetts in 1870, 53 AM. HIST. REV. 1 (1947).

[12.] Henry George, The Chinese on the Pacific Coast, N. Y. TRIB., May 1, 1869, at 1-2.

[13.] The concept of the slave powered and its relationship to Republican ideology is discussed in detail in ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN 73-102 (1970) and William e. Gienapp, The Republican Party and the Slave Power, in NEW PERSPECTIVES ON RACE AND SLAVERY IN AMERICA: ESSAYS IN HONOR OF KENNETH M. STAMPP (Robert H. Abzug & Stephen E. Maizlish eds., (1986).

[14.] See EARL M. MALTZ, CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS 1863-1869, at 36-37 (1990).

[15.] See, e. g., William M. Armstrong, Godkin and Chinese Labor: A Paradox in 19th Century Liberalism 21 AM. J. OF ECON. & SOC. 91 (1962); cf. Democratic Signs of the Times, N. Y. TIMES, June 26, 1869, at 4 (explaining Republican ideology and its advocacy of rights for blacks).

[16.] The relationship of Republican ideology to the issue of Chinese rights is discussed in detail in SAXTON, supra note 9, at 30-37.

[17.] CONG. GLOBE, 40th Cong., 2d Sess. 1036 (1869.)

[18.] Id at 939.

[19.] CONG. GLOBE, 39th Cong., 1st Sess. 1056 (1866).

[20.] See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 986 (1869) (remarks of Sen. Howard).

[21.] Act of March 26, 1970, 1 Stat. 103 (1790).

[22.] See CONG. GLOBE, 41st Cong., 2d Sess. 5172-73 (1870).

[23.] MALTZ, supra note 14, at 59, 75, 77.

[24.] FONER, supra note 13, at 288-290; THE LINCOLN-DOUGLAS DEBATES 52-53 (Robert W. Johannsen ed., 1965).

[25.] Compare What shall we do with the Chinese?, N.Y. TIMES, June 29, 1869, at 4 with Secondary Symptoms of Native Americanism, N.Y. TIMES, Aug. 12, 1869, at 4.

[26.] See HARPER'S MAGAZINE, Aug. 27, 1870, at 846-47.

[27.] See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (remarks of Sen. Cowan on Civil Rights Bill of 1866); id. at 1056 (colloquy between Reps. Niblack and Higby on early draft of Fourteenth Amendment); id. at 2892 (remarks of Sen. Conness on Fourteenth Amendment).

[28.] Additional Articles to the Treaty between the U.S. and the Ta-Tsing Empire, July 28, 1868, U.S.-China, art. VI, 16 Stat. 739, 740.

[29.] See McClain, supra note 4, at 563.

[30.] See CONG. GLOBE, 42d Cong., 2d Sess. 911 (1872) (remarks of Sen. Nye).

[31.] See id.

[32.] See CONG. GLOBE, 41st Cong., 2d Sess. 4275-76 (1870)(remarks of Rep. Sargent). Rep. Sargent's account was not questioned, and is largely corroborated by CONG. GLOBE, 40th Cong., 3d Sess. 1011 (1869)(remarks of Sen. Doolittle) and CONG. CLOBE, 42d Cong., 2d Sess. 910 (1872) (remarks of Sen. Nye).

[33.] See authorities cited supra note 32.

[34.] See, e.g., CONG. CLOBE, 39th Cong., 1st Sess. 174 (remarks of Rep. Wilson).

[35.] See, e.g., id. at 237 (remarks of Rep. Kasson).

[36.] See Report of the Joint Comm. on Reconstruction, 39th Cong., 1st Sess. XIII (1866)(noting that in drafting the Fourteenth Amendment, the Joins Committee on Reconstruction made a conscious decision not to require states to adopt race-blind suffrage).

[37.] See CONG. GLOBE, 40th Cong., 3d Sess. 1628 (1868) (remarks of Sen. Sawyer); 2 J.C. BLAINE, TWENTY YEARS OF CONGRESS: FROM LINCOLN TO GARFIELD WITH A REVIEW OF THE EVENTS WHICH LED TO THE POLITICAL REVOLUTION OF 1860, at 412-413 (Henry Bill Publishing Co. 1884-1886). See also CONG. GLOBE, 40th Cong., 3d Sess. 912 (1869) (remarks of Sen. Willey); id. app. at 99 (remarks of Rep. Shellabarger).

[38.] See CONG. GLOBE, 40th Cong., 3d Sess. 668 (1869) (remarks of Sen. Stewart)

[39.] See id. at 991 (remarks of Sen. Morton). See also id. at 912 (remarks of Sen. Willey); COMMERCIAL (Cincinnati), Nov. 13, 1868, at 4.

[40.] See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. 899, 938, 939 (1869).

[41.] Id. at 1008.

[42.] Id. at 985.

[43.] Id. at 1008.

[44.] Id. at 1009.

[45.] Id. (remarks of Sen. Edmunds).

[46.] Id.

[47.] Id.

[48.] See id. at 1311.

[49.] See supra note 9 and accompanying text.

[50.] CONG. GLOBE, 40th Cong., 3d Sess. 1011 (1869).

[51.] See id. at 979 (remarks of Sen. Frelinghuysen); 1036 (remarks of Sen. Howe).

[52.] See id. at 1036.

[53.] See id. at 1030 (remarks of Sen. Trumbull).

[54.] See id. at 1033 (remarks of Sen. Morton).

[55.] Id at 1034.

[56.] Id.

[57.] See id. at 1035.

[58.] See CONG. GLOBE, 41st Cong., 1st Sess. 4275 (1870) (remarks of Rep. Sargent); RUSSELL R. ELLIOTT, SERVANT OF POWER: A POLITICAL BIOGRAPHY OF WILLIAM M. STEWART 64 (1983).

[59.] See, e.g., CONG. GLOBE, 40th Cong., 3d Sess. (1869) (remarks of Sen. Cole).

[60.] See id. at 901 (remarks of Sen. Williams).

[61.] The struggle over ratification in the states of the far west is described in detail in WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 153-58 (1965).

[62.] See id. at 157.

[63.] Civil Rights Enforcement Act of 1870, 16 Stat. 140 (1870).

[64.] In the form originally passed by the Senate, the Civil Rights Act of 1866 protected all persons from racial discrimination against the designated rights. The language was changed in the House of Representatives in order to avoid perceived constitutional difficulties See CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1865) (remarks of Rep. Wilson). The subsequent adoption of the Fourteenth Amendment eliminated these constitutional concerns.

[65.] See CONG. GLOBE, 41st Cong., 2d Sess. 3658 (1870).

[66.] Statements opposing the provision were delivered by Democratic Senator Eugene Casserly of California and Democratic Representative James A. Johnson of the same state. See id. at 3701 (Sen. Casserly); 3878-80 (Rep. Johnson).

[67.] See id. at 1536.

[68.] Id. at 3658.

[69.] See, e.g, HARPER'S MAC., Mar. 5, 1870, at 146; id., Apr. 2, 1870, at 210; id., Nov. 12, 1870, at 722.

[70.] See CONC. GLOBE, 41st Cong., 2d Sess. 4267 (1869-70) (remarks of Rep. Davis).

[71.] See, e.g., id. app. at 452-53 (remarks of Rep. Axtall); id. at 510-13 (remarks of Rep. Cleveland).

[72.] See id. at 4266.

[73.] Id. at 4275.

[74.] Id. at 4276 (remarks of Rep. Sargent).

[75.] See id. at 4284.

[76.] See id. at 4318.

[77.] See id. at 4366-68.

[78.] See id. at 4834-36.

[79.] See id. at 5121.

[80.] See id. at 5122.

[81.] See, e.g, id. (remarks of Sen. Trumbull).

[82.] Id. at 5124.

[83.] See id.

[84.] See e.g., id at 5150-52 (remarks of Sen. Stewart); id. at 5156 58 (remarks of Sen. Williams).

[85.] See id. at 5152.

[86.] See id. at 5149 (Sen. Conkling); 5160 (Sen. Schurz).

[87.] Id. at 5175.

[88.] Id

[89.] Id. at 5156.

[90.] See FONER, supra note 13, at 290 (discussing use of the Declaration of Independence by radical Republicans in the antebellum era).

[91.] CONG. GLOBE, 41st Cong., 2d Sess. 5154 (1870). Senator Matthew H. Carpenter of Wisconsin made a similar argument. See id. at 5160-61.

[92.] See id. at 5173.

[93.] Id

[94.] The count is taken from id. at 5176 (remarks of Sen. Thurman).

[95.] Id.

[96.] Id. In addition, three senators--Fenton of New York, Fowler of Tennessee, and Justin S. Morrill of Vermont--had supported Senator Sumner but did not vote on the Warner proposal; conversely, Senator William P. Kellogg of Louisiana had not voted on the Sumner amendment, but supported Senator Warner.

[97.] See id. at 5157.

[98.] see CONG. GLOBE, 42d Cong., 2d Sess. 244 (1871).

[99.] Id. at 898.

[100.] See id. at 845-46.

[101.] Id at 845.

[102.] See id.

[103.] See id. at 912 (Sen. Cole), 918 (Sen. Corbett).

[104.] Some radical Republicans viewed Senator Sumner's civil rights proposal as a weapon against the concept of amnesty itself. They believed (correctly) that although Democrats and conservative Republicans strongly favored the basic idea of amnesty, members of these factions would not support an amnesty bill that also contained powerful federal guarantees against racial discrimination. Subsequent to the defeat of Senator Sherman's amendment, conservative Republican Senator Lyman Trumbull of Illinois suggested, as a counter-strategy, opposing the efforts to weaken the Sumner proposal in any way, hoping to make it "just as obnoxious [as possible]" in order to persuade wavering Republicans to vote against adding civil rights protections to the amnesty bill at all. CONG. GLOBE, 42d Cong., 2d Sess. 896 (1872). Following Senator Trumbull's lead on this point, Democrats voted almost unanimously against the Cole and Corbett amendments. Id at 912, 918.

[105.] See id. at 919.

[106.] Id. at 928-29.

[107.] See id at 985.

[108.] The four Republican senators from the far west-Corbett of Oregon, Cole of California, and Stewart and Nye of Nevada-all abstained on the final vote on the amnesty civil rights proposal. In the past, each had a record of strong support for civil rights issues. See e.g., CONG. GLOBE, 42 Cong., 1st Sess. 653 (1871) (discussing the Ku Klux Klan Act).

[109.] See Lin Sing v. Washburn, 20 Cal. 534 (1862) (invalidating a capitation tax on the Chinese); People v. Downer, 7 Cal, 169 (1857)(invalidating a penalty on persons transporting Chinese people to California).

[110.] 92 U.S. 275 (1875).

[111.] Id. at 277.

[112] Id. at 278.

[113.] Id. at 279

[114.] Id. at 280.

[115.] Id.

[116.] See In re Ah Chong, 2 F. 733 (C.C.D.Cal. 1880); In re Tiburcio Parrott, 1 F. 481 (C.C.D.Cal. 1880); Ho Ah Kow v. Nunan, 12 F.Cas. 252 (C.C.D.Cal. 1879).

[117.] The economic problems and opportunities of the Chinese community are discussed in detail in PING CHIU, CHINESE LABOR IN CALIFORNIA, 1850-1880: AN ECONOMIC STUDY (1963).

[118.] See SAXTON, supra note 9, at 168.

[119.] The development of Chinese involvement in the laundry industry is described in PAUL ONG, THE CHINESE AND THE LAUNDRY LAWS, THE USE AND CONTROL OF URBAN SPACE 32-65 (Unpublished Master's Thesis, University of Washington 1977).

[120.] Yick Wo v. Hopkins, 118 U.S. 356, 358-59 (1886).

[121.] See SAXTON, supra note 9, at 170. See also JACK CHEN, THE CHINESE OF AMERICA 58 (1980) (concluding that the Chinese dominated the commercial laundry industry in San Francisco by 1870).

[122.] The development of the laws aimed against Chinese laundries is described in tail in ONG, supra note 119, at 80-91.

[123.] See Yick Wo, 118 U.S. at 357-58.

[124.] See Barbier v. Connolly, 113 U.S. 27, 28 (1885).

[125.] The first case actually to reach the Court was Ex Parte Tom Tong, 108 U.S. 562 (1883) However, Tom Tong was dismissed on procedural grounds.

[126.] 113 U.S. 27 (1885).

[127.] Id. at 30.

[128.] Id. at 31.

[129.] Id. at 32.

[130.] 113 U.S. 703 (1885).

[131.] Id. at 710.

[132.] Id. at 710-11.

[133.] 118 U.S. 356 (1886).

[134.] Id. at 366.

[135.] Id. at 359. The facts of the case may not in fact have so clearly reflected Official discrimination against the Chinese, but the statistical record leaves race as the only plausible explanation. See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1483 n.3 (2d ed. 1988).

[136.] Yick Wo, 118 U.S. at 368 69.

[137.] Id. at 370.

[138.] Id.

[139.] Id. at 371.

[140.] Id. at 372.

[141.] see id. at 373.

[142.] Id.

[143.] Id. at 373-74.

[144.] See TRIBE, supra note 135, at 1483 n.3.

[145.] See id. at 1483.

[146.] Yick Wo, 118 U.S. at 370. For a further discussion of fundamental rights in the Nineteenth Century, see MALTZ, supra note 14, at 99.

[147.] Id.

[148.] Soon Hing v. Crowley, 113 U.S. 703, 707-11 (1885).

[149.] 130. U. S. 581 (1889).

[150.] For more detailed accounts of the political maneuvering that led to the adoption of the Chinese Exclusion Acts, see COOLIDGE, supra note 3, at 133-41, 168-82; SANDMEYER, supra note 3, at 78-108; SAXTON, supra note 9, at 92-137.

[151.] See Democratic Platform of 1876. reprinted in NATIONAL PARTY PLATFORMS. 1840-1972, at 50 (Donald B. Johnson & Kirk H. Porter, comp., 5th ed. 1973) (calling for an end to Chinese immigration); Republican Platform of 1976, reprinted in id. at 54 (calling for investigation of problems created by Chinese immigration).

[152.] See Views of the Late Oliver P. Morton on the Character, Extent, and Effect of Chinese Immigration to the United States, S. MISC. Doc. No. 20, 45th Cong., 2d Sess. (1878).

[153.] S. REP. No. 689, 44th Cong., 2d Sess. (1877).

[154.] 8 CONG. REC. 1400, 1796 (1878).

[155.] 7 MESSAGES AND PAPERS OF THE PRESIDENT 514-520 (James D. Richardson ed., 1899).

[156.] 8 id. at 610, 629.

[157.] S. Exec. Doc. No. 148, 47th Cong., 1st Sess. (1880).

[158.] 8 MESSAGES AND PAPERS OF THE PRESIDENT, supra note 155, at 112-18.

[159.] See An Act to Execute Certain Treaty Stipulations Relating to Chinese, ch. 126, 22 Stat. 58-61 (1882).

[160.] See An Act in Supplement to an Act Titled, "An Act to Execute Certain Treaty Stipulations Relating to Chinese," ch. 1064, 25 Stat. 504 (1888).

[161.] The Chinese Exclusion Case, 130 U.S. 581, 609 (1889).

[162.] Id. at 600.

[163.] Id (quoting The Head Money Cases, 112 U.S. 580, 599 (1884)).

[164.] See id. at 600-03.

[165.] Id. at 606.

[166.] Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny, 100 HARV. L. REV. 853, 863 (1987).

[167.] See T. Alexander Aleinikoff, Citizens, Aliens, Membership and the Constitution, 7 CONST COMM. 9, 1 1-12 (1990) (describing reliance on Chinese Exclusion as "an embarrassment to constitutional law").

[168.] TRIBE, supra note 135, at 361.

[169.] Chy Lung v. Freeman, 92 U.S. 275 (1875). For a discussion of this case, see supra noteS 110-115 and accompanying text.

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