4-2018

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Recommended Citation

Yang, Raymond (2018) "'Chinaman' and the Constitution: The Development of Federal Power over Immigration in 19th- Century United States," *Armstrong Undergraduate Journal of History*: Vol. 8 : Iss. 1 , Article 3.

DOI: 10.20429/aujh.2018.080103

Available at: <https://digitalcommons.georgiasouthern.edu/aujh/vol8/iss1/3>

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“Chinaman” and the Constitution:

The Development of Federal Power over Immigration in 19th-Century United States

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On the Sixth of May 1882, H.R. 5804 was signed into law by President Chester Arthur. Titled as “An act to execute certain treaty stipulations relating to Chinese,” it became better known as the Chinese Exclusion Act. With the stroke of his pen and the backing of Congress, the President of the United States signed into law legislation that, for the first time in American history, would restrict immigration from a specific country. It was the climax of a major fight between California and the United States over what actions to take in response to Chinese immigration. This Chinese Question was witness to a transformation of the United States. The Chinese Question, as it turns out, would have a significant impact on American constitutional jurisprudence. The Supreme Court of the United States would end up deciding whether the United States has birthright citizenship, whether noncitizens have the same criminal proceedings as citizens, and whether the power to control immigration is an exclusive federal power. The Chinese Question was a rare cross-party issue because it divided, but also united Republicans and Democrats. California bearing the brunt of the Chinese horde was a decisive battleground and her sons played important roles in the nation’s first major answer to the question. With California undergoing its own reconstruction from Mexican rule to American governance, the

presence of the Chinese would bear the United States fruits of its own crucible. The answers to the Chinese Question, as it turned out, would change the United States by a far greater extent than gold miners or railroad laborers ever could.

California before Exclusion Acts

California was a fluid place. Environmentally diverse and rich, most of what is California today was nothing like it was just a hundred and fifty years earlier.¹ Inhabited by Native Americans before the Spanish took it as a colonial possession, the land that is now California was lost by the succeeding Mexican government in the Mexican-American War. In the Treaty of Guadalupe-Hidalgo – signed on February 2, 1848 – the United Mexican States gave the United States of America half of its national territory.²

Under Spanish rule, California operated under a mercantilist economy.³ Under the Spanish crown, Alta California—as it was then known—operated missions and encouraged civilian outposts to settle to reduce its colonial cost to the crown. Its main benefit to the Spanish empire was its trade goods. Sea otter pelts, for example, were demanded in China and could be traded in Canton for either a large sum of money or mercury, an important ingredient in silver production.⁴ Its second focus, after the end of the pelt trade by royal decree, was hemp production. During this time, the economic orientations were controlled from the Iberian Peninsula thousands of miles away.

¹ Ramón A. Gutiérrez and Richard J. Orsi, ed., *Contested Eden: California Before the Gold Rush* (Berkeley: University of California Press, 1998), 12.

² *Ibid.*, 334.

³ *Ibid.*, 113.

⁴ *Ibid.*, 119.

After the end of Spanish rule in New Spain, economic conditions further deteriorated. Those living in Alta California before the regime change were unsatisfied with the continual neglect of local needs and new economic policies instituted by Mexico alienated many. As a result, many Californios despised the central government in Mexico City.⁵ Nevertheless, radical transformations to the economy were made when massive amounts of land were transferred away from missions to private ranchos.⁶ Those who owned land owned California. But land was only one type of wealth, albeit enduring.

When the English and French settled and moved across North America, they were fixated on riches through the trade of precious commodities such as furs and tobacco. This focus was the same with the American expansion into the West. Much trade occurred between Californios and Anglo-Americans which was all orchestrated by New England merchant houses.⁷ Americans would buy and ranchos – with cheap Indian labor – would produce. This influx of Anglo-Americans and their practices would eventually push Mexico and the United States into war.

The annexation of Texas by the United States brought about a precipitous deterioration in Mexican-American relations and war was declared on May 13, 1846. The factors leading up to Texan Independence and its annexation, however, had already been brewing in California since 1842.⁸ By the time war was declared, Californios were already fighting against American settlers. These settlers were subsequently absorbed into the U.S. Army as the California Battalion. Much like the rest of the war, the American forces massively outnumbered and overpowered the Mexicans. On January 13, 1847, the Treaty of Cahuenga was signed. It was an informal arrangement between American forces in Alta California and local Californios, and it

⁵ Ibid., 130.

⁶ Ibid., 132.

⁷ Gutiérrez and Orsi, ed., *Contested Eden*, 133.

⁸ Ibid., 333.

promised Californios the full exercise of their civil liberties and property rights in exchange for the putting down of their arms.⁹ A year later, the war formally ended, and Alta California became the Alta Californian territory. When the Treaty of Guadalupe-Hidalgo was signed, it transferred what is now the southwestern United States from a land ruled by civil administration based on Spanish and Mexican codes to one that would be governed by common law derived from English and American precedent.¹⁰ Much like the discovery of precious metal, this political union would alter California's history forever..

On January 24, 1848 – 8 days before the Treaty of Guadalupe-Hidalgo was signed – gold was discovered near Sutter's Mill. The subsequent "Gold Rush" inundated California with both American and foreign miners. That and the political upheaval as a result of the war caused California to experience a rapid development of its public sector after 1848.¹¹ A rare instance of rapid statehood after acquiring territorial status, California was overwhelmed by the astronomical growth of its population. Californians struggled to fulfill the mandate of the Constitution which was to have a "republican form of government."¹²

The Spanish Empire had tried looking for gold. Through its many conquests in Central and South America, they lusted for the gold vaults and precious metals that were in possession of the native empires. They created mines all over Latin America, but they found no gold in Alta California. Alta California itself was even named after a mythical island in a novel by García Ordóñez de Montalvo called *Las Sergas de Esplandián*, a place where the only metal to be found was gold.¹³ The Mexicans found some gold in 1842, but it proved to be inconsequential. The

⁹ Ibid., 334.

¹⁰ John F. Burns and Richard J. Orsi, ed., *Taming the Elephant: Politics, Government, and Law in Pioneer California* (Berkeley: University of California Press, 2003), 4.

¹¹ Ibid., 2.

¹² U.S. Const. Art. 4. Sec. 4.

¹³ James J. Rawls and Richard J. Orsi, ed., *A Golden State: Mining and Economic Development in Gold Rush California* (Berkeley: University of California Press, 1999), 3.

exact details of the discovery at Sutter's Mill are clouded by myth. Details that are certain prove poetic, such as the discovery being made on the banks of the American River. Strikingly, the news was initially met without much fanfare. By May 1848 though, the gold bug had struck and the discovery of gold seized the imaginations of everyone with the universal appeal of quick success and instant wealth.¹⁴ People from all over the world rushed to California. Californios joined in. Miners in Mexico, Peru, and Chile headed north. Those on the East Coast had multiple routes. They came by sea, through jungle, and on land.. African-Americans were drawn in, although some went against their will. Thousands of Chinese also came from the East.

Most of the Chinese, if not all, arrived at California from Hong Kong. A British colony ceded by Qing China at the end of the First Opium War, Hong Kong was expected to become a magnet for international trade and commerce. Its deep harbor, organic terminus, regional familiarity, and geographic location were blessings when space was of essence and travel time was of paramount importance. However, Hong Kong did not develop as its imperial overlords had hoped. But in late 1848, the gold fever that started on the banks of the American River reached British Hong Kong.¹⁵ Like the discovery along the American, the exact details of how the news came to Hong Kong is unknown. Much like in California and the rest of the world, the universal allure of plentiful riches was instantly tantalizing. For many Chinese, the Gold Rush promised success. For Hong Kong, it made business. The colony took off.

By 1852, there were at least 25,000 Chinese in California.¹⁶ While this was a massive change considering there were fewer than 1,000 before the Gold Rush, Chinese immigration was relatively in line with the rapid population growth of all ethnicities. The rapid transformation of

¹⁴ Ibid., 5.

¹⁵ Elizabeth Sinn, *Pacific Crossing: California Gold, Chinese Migration, and the Making of Hong Kong* (Hong Kong: Hong Kong University Press, 2012), 40.

¹⁶ Mary Roberts Coolidge, *Chinese Immigration* (New York: Henry, Holt, and Company, 1909), 17.

the Californian economy drove up prices of every good imaginable. The promise of easy riches and rapid success eventually became all but illusory. For late comers, they were likely “Seeing the Elephant,” a popular term for being tricked with a false notion of easy success. The term also underlined a pervasive feeling: the awe of having made it to California.¹⁷ This feeling would be temporary.

Early Frictions: Chinese Immigrants in California

State action against Chinese immigrants started almost immediately. In 1850, the newly created California Legislature passed a foreign miners’ tax.¹⁸ Besides raising tax revenue, it drove away foreign competition from the competitive mining environment. By 1855, there was an added tax just for foreigners who were ineligible to become citizens. The only group that was in this category were the Chinese.¹⁹

As early as 1852, Passenger Bills were being used to impede Chinese immigration. Ships coming into California were taxed according to how many foreigners were onboard.²⁰ Given the migration patterns, the measure by far targeted the Chinese. Such state measures would be later struck down, pursuant to the judgement in the *Passenger Cases* that declared state taxes on people coming into the United States amounted to the regulation of foreign commerce – an exclusive federal power.²¹ California was not entirely hostile to the Chinese, but as history would show, it was hostile enough to end their migration. Just ten years after the Gold Rush

¹⁷ Rawls and Orsi, ed., *A Golden State*, 176.

¹⁸ Mark Kanazawa, “Immigration, Exclusion, and Taxation: Anti-Chinese Legislation in Gold Rush California,” *The Journal of Economic History* 65, no. 3 (2005): 784.

¹⁹ Kazawana, “Immigration, Exclusion, and Taxation,” 785.

²⁰ *Ibid.*, 786-787.

²¹ G. Edward White, *Law in American History, Volume II: From Reconstruction Through the 1920s* (New York: Oxford University Press, 2016): 139.

began in 1858, the Californian Legislature had even passed “An Act to prevent the further immigration of Chinese or Mongolians to this State.”²²

While California was undergoing a transformation of its governmental structure, the United States of America was facing changes of its own. On April 12, 1861, guns roared against Fort Sumter, igniting the American Civil War. The war would end after more than half a million Americans gave their lives for their States and for their Union. California fought on the side of the Union, contributing to the war effort with men and gold.

Halfway around the world, another civil war was being fought. The Taiping Rebellion lasted far longer than the American Civil War – thirteen years and seven months – and was much costlier – at least twenty million for both sides.²³ Yet even in this faraway catastrophe, an American had enormous influence. Frederick Townsend Ward was a trainer of the Ever Victorious Army, a military outfit crucial to the Imperial victory over the Taiping Kingdom. It would serve as a model for later Imperial armies.

Both wars ravaged and altered their country’s trajectory. For the United States, it would be marked by the emancipation of slaves, the destruction of a Southern economy, and the insertion of three very powerful Amendments into the Constitution.

Slavery has long been considered the “original sin” of America. As one of many compromises in the framing of this nation, black slaves were counted as 3/5’s of a person for the purposes of representation. Southerners were satisfied by the fact that property – and therefore wealth – had an effect on congressional representation. Northerners were amicable that slaves would get partial representation rather than full.

²² Kazawana, “Immigration, Exclusion, and Taxation,” 795.

²³ Tobie Meyer-Fong, *What Remains: Coming to Terms with Civil War in 19th Century China* (Stanford: Stanford University Press, 2013), 1.

However, clues of slavery's future lingered in the original Constitution. The federal government could abolish the slave trade starting in 1808.²⁴ The federal government did so by passing "an Act to prohibit the importation of slaves into any part or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight." Passed in 1807 and championed by President Jefferson – a slave owner himself – the law took effect at the earliest possible date permitted by the Constitution- January 1, 1808.

Through the first-half of the nineteenth century, Congress would repeatedly try to reconcile the contradictions of slavery and attempt to balance its influence in government. California was party to such arrangements. Just like in Kansas, slaver owners and Southerners rushed to California. They wanted to profit from the Gold Rush, but they also wanted to make California a slave state. Slave owners who brought with them their slaves to California even adapted their methods to the gold rush economy.²⁵ But in the drafting of the Californian constitution, slavery was outlawed – California would have a free constitution.²⁶ Under the Compromise of 1850, California was admitted as a free state. But by 1861, compromise could no longer keep the nation together. The United States of America went to war with the rebelling Confederate States of America.

After the Confederacy was defeated, the Constitution was further amended. The so-called "Reconstruction Amendments," all passed within five years of the war's conclusion, would secure the rights of the newly freed slaves and provide them with an opportunity to fully

²⁴ U.S. Const. Art. 1. Sec. 9.

²⁵ Stacey L. Smith, *Freedom's Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction* (Chapel Hill: The University of North Carolina Press, 2013), 41.

²⁶ *Ibid.*, 48.

participate in American society. Two of the amendments – the 13th and the 14th – would play important roles in the Chinese Question.

The Role of Federal Government and American Perceptions of “Chinaman”

China had long been on the minds of American leaders. Just as the Europeans were infatuated with the prospect of prosperous trading relations, the Americans hoped for a vibrant commercial future with their new republic. While the United States was contemplating whether to add what would become Oregon to the United States, Senator Thomas Benton of Missouri – a Democrat and a champion of Manifest Destiny – approved of the acquisition. In his speech on the subject on May 28, 1846: “The effect of the arrival of the Caucasian, or White race, on the western coast of America, opposite the eastern coast of Asia, remains to be mentioned among the benefits which the settlement of the Columbia will produce; and that a benefit, not local to us, but general and universal to the human race. Since the dispersion of man upon the earth, I know of no human event, past or to come, which promises a greater, and more beneficent change upon earth than the arrival of the van of the Caucasian race (the Celtic-Anglo-Saxon division) upon the border of the sea which washes the shore of the eastern Asia. The Mongolian, or Yellow race, is there, four hundred millions in number, spreading almost to Europe; as race once the foremost of the human family in the arts of civilization, but torpid and stationary for thousands of years. It is a race far above the Ethiopian, or Black – above the Malay, or Brown, (if [End Page 917] we must admit five races) – and above the American Indian, or Red: it is a race far above all these, but still, far below the White; and, like all the rest, must receive an impression from the superior race whenever they come in contact... The sun of civilization must shine across the sea: socially

and commercially, the van of the Caucasians, and the rear of the Mongolians, must intermix. They must talk together, and trade together, and marry together. Commerce is a great civilizer – social intercourse as great – and marriage greater. The White and Yellow races can merry together, as well as eat and trade together...The Yellow race, next to [Caucasians] in the scale of mental and moral excellence, and in the beauty of form, once their superiors in the useful and elegant arts, and in learning, and still respectable though stationary; this race cannot fail to receive a new impulse from the approach of the Whites, improved so much since so many ages they left the western borders of Asia. The apparition of the van of the Caucasian race ... must wake up and reanimate the torpid body of old Asia.”²⁷

While Thomas Benton refers to the Yellow Race as Mongolians, he is almost certainly referencing China. There are very few civilizations thousands of years old and only one that is both that old and yellow. This conjecture is backed by the texts of state and federal statutes, such as the California 1858 law to “prevent the further immigration of Chinese or Mongolians to this State.”²⁸ This interchange between “Mongolian” and “Chinese” would persist all the way to 1879, when Senator James G. Blaine of Maine – a Republican and a leading statesman during the Gilded Age – declared an opposite feeling: “The question lies in my mind thus: either the Anglo-Saxon race will possess the Pacific slope or the Mongolians will possess it.”²⁹ This shift had a far greater effect than one may initially surmise.

As a matter of reality, immigration did not seem to be a federal power. Instead, it was the States themselves that wielded such power.³⁰ In addition, there is a notion that the United States had few restrictions on immigration before the Chinese Question came to pass. That is also not

²⁷ *Cong. Globe*, 29th Cong., 1st Sess., 917-918 (1846).

²⁸ Kazawana, “Immigration, Exclusion, and Taxation,” 795.

²⁹ *Cong. Record*, 45th Cong., 3rd Sess., 1301 (1879).

³⁰ White, *Law in American History, Volume II*, 129.

true.³¹ For example, the *Passenger Cases* were a result of the five different States attempting to institute a head tax – much like in California. The Slavery Question had its own effect on immigration law.. Free blacks were not allowed to immigrate into several states.³²

The Coolie Trade was inextricably linked with the Chinese Question. No other comparison or view of the Chinese – not even prostitution – did so much to harm Chinese prospects in the United States than the idea that Coolies were unfree labor. Whether the Coolie Trade constituted unfree labor or not, it was treated as such by Americans.³³

The Republican Party had been founded to oppose slavery. It also had an intense hatred for the institution of polygamy. The Chinese practiced polygamy. Their dominance in national politics during the years of Reconstruction allowed them to legislate against these ideas. After all, the Republicans were successful in forcing Mormons to outlaw polygamy by making it a precondition for the ascension of Utah to statehood. In order to become a state, Utah had to explicitly outlaw polygamy by writing it into its state constitution. Their fervor against unfree labor would taint their view of the Chinese.

Horace Page was a California Republican and one of the foremost advocates of Chinese Exclusion. He won his first election to the U.S. House of Representatives by campaigning on the issue of immigration restriction.³⁴ He tried to pass bills to ban the Coolie trade and to ban Chinese immigration. His most powerful arguments were based on slavery suppression and the idea that their presence undermined the efforts of those who passed the 13th Amendment. He did not enjoy much initial success until *Chy Lung v. Freeman*.

³¹ Ibid., 130.

³² Gerald L. Neuman, "The Lost Century of American Immigration Law (1776-1875)," *Columbia Law Review* 93, no.8 (1993): 1866.

³³ Sang Hea Kil, "Fearing Yellow, Imagining White: Media Analysis of the Chinese Exclusion Act of 1882," *Social Identities* 18, no. 6 (2012): 668.

³⁴ Smith, *Freedom's Frontier*, 218.

In 1870, California passed an anti-prostitution statute. Under this law, the State of California had detained and deported dozens of Chinese women.³⁵ In 1874, Chy Lung was arrested with her sister. She went to court and claimed that the law was unconstitutional. She asserted it violated the Commerce Clause, the Civil Rights Act of 1870, and the Burlingame Treaty.

The case went all the way up to the United States Supreme Court, where, in a unanimous decision, it struck down the state statute as encroaching on federal power. Since the statute was contrary to the spirit of the Burlingame Treaty, it warned state actions might jeopardize foreign relations, thereby infringing on the federal power to conduct foreign affairs.

Chy Lung v. Freeman was a tactical victory for the Chinese women, but it would end up being the greatest strategic disaster for the Chinese cause. By ruling that the power to enforce immigration was a plenary power of the federal government, the Supreme Court raised the stakes dramatically. The pro-exclusion voices would now be heard not only in Californian government, but also in the halls Congress, and in the Presidential Election through the Electoral College.

Almost concurrently with *Chy Lung*, the Page Act was passed. A spiritual precursor to the Chinese Exclusion Act, it effectively banned Chinese women from entering the United States.³⁶ The *Chy Lung* decision had outraged numerous groups in California and throughout the United States. Representative Page, with his antislavery arguments on the one hand and the *Chy Lung* decision on the other, was able to convince Congress to finally take action. How and why the federal government would only ban women and not the entire Chinese race was due to the Burlingame Treaty.

³⁵ Ibid., 219.

³⁶ Kerry Abrams, "Polygamy, Prostitution, and the Federalization of Immigration Law," *Columbia Law Review* 105, no. 3 (2005): 643.

Signed in 1868, the Burlingame Treaty was the first equal treaty agreed to by China.³⁷ Among its articles are Article V and Article VI, both of which involve immigration. They allowed for free travel and equal status between the Chinese and Americans. The Treaty stalled any attempt to fully exclude the Chinese. The race to do so, however, had begun.

With the Election of 1880 nearing, the Chinese Question became a major issue. California's Electoral Votes were at stake. The Burlingame Treaty was renegotiated. Known as the Angell Treaty, it reemphasized the commitment of equal status between Chinese and Americans. It also allowed for a temporary suspension of Chinese immigration to the United States. Horace Page had his opening.

H.R. 5804 was introduced in the House on April 12, 1882. Five days later, it was passed 202-37, with 88 Republicans and 102 Democrats supporting it. Eleven days later, it passed the Senate 32-15, with 9 Republicans and 22 Democrats voting in the affirmative. On May 6, 1882, the Chinese Exclusion Act became law.

The Chinese Exclusion Act and the Fate of Chinese Immigrants

The Chinese Exclusion Act practically barred any new Chinese immigration. The Chinese Question, as a result, shifted slightly. What would happen to those Chinese who already lived in the United States? There is much debate about whether the Chinese Exclusion Act was a product of a national animus towards Chinese or an enormous tragedy that started with

³⁷ Salvatore Babones, "The Burlingame Mission: How an 1867 Embassy Prefigured Chinese and American Power," *Foreign Affairs*, November 23, 2017, <https://www.foreignaffairs.com/articles/united-states/2017-11-23/burlingame-mission>

ostensibly good intentions. What is clear is that anti-Chinese animus was real and got much worse, and much more violent after the Act's passage.

Riots in the Pacific Northwest resulted in numerous Chinese deaths. In Rock Springs, Wyoming, a labor riot between Chinese and whites resulted in at least 28 Chinese deaths. On May 1887, 34 Chinese miners in Wallowa County, Oregon were ambushed, massacred, and had their gold stolen. The area was later named Chinese Massacre Cove. In the case of Rock Springs, federal troops were deployed to protect the Chinese miners. News publications were largely sympathetic to the cause of the white miners and some even endorsed the events.

Anti-Chinese ordinances were numerous, and they came in various forms. In San Francisco, a law was passed banning laundry services operated out of wooden buildings. The law was to ostensibly protect the city and its people by instituting higher safety standards. At the time, there were 320 laundries in the city, of which 240 were owned by the Chinese and 310 were made of wood.³⁸ However, it became quite clear the law was unevenly enforced. For example, almost all permit applications submitted by Chinese were denied. However, the same was not true for whites. This law was challenged. The U.S. Supreme Court ruled in favor of the Chinaman, ruling that uneven treatment before a facially neutral law is a violation of the Equal Protection Clause of the Fourteenth Amendment.³⁹ This 1886 *Yick Wo v. Hopkins* decision would have huge ramifications for American constitutional jurisprudence, holding that even a neutral and fair law can violate the Constitution if it is applied and enforced unevenly. It would be cited nearly 70 years later in *Brown v. Board of Education* (1954) when the Court judged that the infamous "Separate and Equal" Doctrine is unconstitutional.

³⁸ *Yick Wo v. Hopkins*, 118 U.S. 359 (1886).

³⁹ *Yick Wo v. Hopkins*, 118 U.S. 374 (1886).

The ban on Chinese immigration was supposed to be temporary, a constraint made so as to not violate the Angell Treaty. But in 1888, the Scott Act was passed. It prevented Chinese immigrants who had left the United States from returning. This law was challenged as well.

Chae Chan Ping v. United States was decided on May 13, 1889. In a unanimous decision, the Court held that the U.S. Congress can override a treaty by a later action. In this case, the Angell Treaty was implicitly repealed by the Scott Act with respect to the portions that are in conflict. Given the larger historical view of the United States during the 19th century, this was not a surprise. Treaties negotiated with various Native American tribes were frequently violated for wide variety of reasons. The Treaty of Guadalupe-Hidalgo was not honored in many respects.⁴⁰ It was in *Chae Chan Ping* that the Supreme Court of the United States declared such actions were constitutional.

Almost ten years to the day after President Arthur signed into law H.R. 5804, President Harrison signed H.R. 6185. Formally titled “An Act to prohibit the coming of Chinese persons into the United States,” the Geary Act became law on May 5, 1892. Besides extending the ban for another ten-year period, it required Chinese citizens to carry on their person at all times a passport or permit. This stipulation caused President Arthur to veto the initial Chinese Exclusion bill. Those without these documents were subject to being detained and deported. Fong Yue Ting was among those without the required documents. He protested, along with two others, that they were “detained without due process of law, and that section 6 of the act of May 5, 1882, was unconstitutional and void.”⁴¹ The Court began by noting that: “whether and upon what conditions [the Chinese] shall be permitted to remain within the United States being one to be

⁴⁰ Gordon Morris Bakken, ed., *Law in the Western United States* (Norman: University of Oklahoma Press, 2000), 537.

⁴¹ *Fong Yue Ting v. United States* 149 U.S. 704 (1893).

determined by the political departments of the Government, the Judicial Department cannot express an opinion upon the wisdom, the policy, or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.”⁴²

Ceding to the government plenary power, the Court concluded that the petitioners had failed the proper procedures. In other words, the proof of burden was on the Chinese to show that they should not be deported. Having failed to do so, the Judiciary could do nothing else.

Some parts of the Chinese Exclusion Act were struck, notably the provision for hard labor. In *Wong Wing v. United States*, the Court held that “when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.”⁴³ Even noncitizens are granted the rights of the 5th and 6th Amendments.

Out of all of these cases, perhaps the most controversial one with the greatest impact is *United States v. Wong Kim Ark*. Decided in 1898, it enshrined the principle of “birthright citizenship.” Chinese citizens were not eligible to become American citizens since Naturalization laws had prohibited such occurrences. Wong Kim Ark, though, was not a Chinese citizen. He was born on 1873 in San Francisco. Presently, there is a phenomenon whereby Chinese visit the United States for several months so they can give birth to children on American soil before returning home. This birth tourism phenomenon has ironically hit California and involved Chinese women.⁴⁴

⁴² *Fong Yue Ting v. United States* 149 U.S. 731 (1893).

⁴³ *Wong Wing v. United States* 163 U.S. 237 (1896).

⁴⁴ Miriam Jordan, “Federal Agents Raid Alleged ‘Maternity Tourism’ Businesses Catering to Chinese,” *The Wall Street Journal*, March 3, 2015, <https://www.wsj.com/articles/us-aents-raid-alleged-maternity-tourism-anchor-baby-businesses-catering-to-chinese-1425404456>

Conclusion

By 1882, the federal government had asserted its authority to regulate immigration. The Supreme Court confirmed its power, but until the Chinese Question came to be asked, most immigration measures were done through the States.

This slide toward federal power should be regarded in the backdrop of the foreign policy orientation of the United States government. These cases were decided less than a decade before the United States would declare war on Spain and face the question of empire. Questions of foreign policy would take an ever-greater importance and the plenary power of the federal government would become important when the United States acquired territories with different peoples. In other words, this course of events was likely to happen eventually. Nevertheless, the seemingly 180-degree course raises questions about why such a change happened.

It could be that the Supreme Court decided to yield to popular will. After all, it had issued what was regarded as a terrible decision in *Dred Scott v. Sandford*, a decision later overturned by the 13th Amendment.. The checks and balances were illustrated in the highest extreme, but at a great human cost.

The Chinese lost when it came to questions about plenary and federal power. More often than not, they won when it involved the 14th Amendment. These so-called *Chinese Exclusion Cases* - *Chae Chan Ping v. United States* (1889) *Fong Yue Ting v. United States* (1893) *Wong Wing v. United States* (1896) *United States v. Wong Kim Ark* (1898) – and other cases involving Chinese - *Chy Lung v. Freeman* (1876) and *Yick Wo v. Hopkins* (1886) – reflect a duality of American jurisprudence, of governmental power, and of civil liberties and equality. Much like the frenetic debate that led to Exclusion, the stance of the U.S. Supreme Court was similarly contradictory. If the cases were separated into two groups – one involving federal power and one

involving the 14th Amendment and the Bill of Rights – they can be seen as remarkably consistent. It is even more consistent when considering the fact that the Supreme Court struck down state head taxes (*Passenger Cases*) but considered federal head taxes constitutional (*Head Money Cases*).⁴⁵

If nuance matters at all, then one can say there is much more than meets the eye when looking for answers to the Chinese Question. As books such as *Laws Harsh as Tigers* indicate, the Chinese have been extremely influential in shaping modern immigration law, principally because modern immigration law began with the involvement of Chinese nationals. The American Civil War is regarded as a Second American Revolution. Much like it seemed Divine Providence intervened in bringing the Framers and Founding Fathers together to forge the United States, it may seem Divine Providence has chosen the Chinese to be bearers of a radical change in American policy.

About the author

Raymond Yang is currently a fourth-year political science and economics student at University of California, Merced. His research interest focuses on 19th century American and East Asian legal history. He plans to attend law school after graduation.

Recommended citation

Yang, Raymond. “‘Chinaman’ and the Constitution: The Development of Federal Power over Immigration in 19th-Century United States.” *Armstrong Undergraduate Journal of History* 8, no. 1 (April 2018).

⁴⁵ White, *Law in American History, Volume II*, 139.