

ARTICLES

POLYGAMY, PROSTITUTION, AND THE FEDERALIZATION
OF IMMIGRATION LAW*Kerry Abrams**

When Congress banned the immigration of Chinese prostitutes with the Page Law of 1875, it was the first restrictive federal immigration statute. Yet most scholarship treats the passage of the Page Law as a relatively unimportant event, viewing the later Chinese Exclusion Act as the crucial landmark in the federalization of immigration law.

This Article argues that the Page Law was not a minor statute targeting a narrow class of criminals, but rather an attempt to prevent Chinese women in general from immigrating to the United States. Most Chinese women migrating to the United States in the early 1870s were prostitutes or second wives in polygamous marriages. Congress feared the unorthodox Chinese practices of polygamy and prostitution, believing that these customs were reflective of an underlying slave-like mentality that rendered the Chinese unfit for democratic self-governance. By identifying and excluding Chinese women as prostitutes, the law prevented the birth of Chinese American children and stunted the growth of Chinese American communities.

The Page Law was an important statute not only because of its goals, but also because of its method. America's international trade objectives and treaty obligations made outright restrictions on Chinese immigration untenable in 1875. By targeting marginal immigrants—women, and prostitutes at that—Congress was able to restrict Chinese immigration while maintaining a veneer of inclusiveness. Thus, in passing the first restrictive federal immigration law, Congress managed to exclude a group of people by defining them as outside the boundaries of legal marriage.

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INTRODUCTION

The regulation of marriage and morality played a pivotal role in the federalization of immigration law. Following the Civil War, as large numbers of Chinese immigrants began to arrive on the West Coast, animosity toward the Chinese resulted in a dramatic transformation in immigration law from a relatively laissez faire, state-based system, to an extensive and restrictive federal regime. Animus toward the unorthodox Chinese practices of polygamy and prostitution was an important factor animating the federalization of immigration law. Congress not only feared the Chinese

practices of polygamy and prostitution, but also believed that these customs rendered the Chinese unfit for self-governance. Congress viewed these institutions as reflective of an underlying "slave-like" mentality, fundamentally at odds with citizenship in a participatory democracy.

Both prostitution and polygamy were deeply entrenched practices in Chinese immigrant culture—and were deeply antithetical to American conceptions of marriage as a consensual "love match." Indeed, most female Chinese immigrants during this period were either prostitutes or second wives in polygamous marriages. The Fourteenth Amendment's command that "[a]ll persons born or naturalized in the United States . . . are citizens of the United States"¹ created an additional concern: The children of these "slave-like" Chinese immigrants would become American citizens, and these practices would thus become part of the fabric of American democracy. To prevent this from happening, it was necessary to prevent Chinese women—especially prostitutes and second wives—from entering the country.

In 1875, Congress passed the first federal restrictive immigration statute: the Page Law.² This law banned the immigration of women who had entered into contracts for "lewd and immoral purposes," made it a felony to import women into the United States for purposes of prostitution, and included enforcement mechanisms specifically targeting Chinese women. The text, legislative history, historical context, and enforcement of the Page Law indicate that one of its animating purposes was to prevent the Chinese practices of polygamy and prostitution from gaining a foothold in the United States. Thus, concern about preserving traditional American conceptions of marriage and family lies at the root of our federal immigration system.

Both the federal and state governments targeted female Chinese immigrants in an effort to protect traditional marriage and sexual norms. In the face of expanding federal power, California in particular struggled to maintain control over its Chinese population. To avoid the charge that it was impermissibly regulating "immigration," it crafted its exclusionary laws as regulations of public morals. While California could not exclude Chinese women for being "Chinese," it could exclude them by classifying them as outside the acceptable category of "wives." This proved to be a particularly effective method of regulation because such laws did not appear to directly target immigration.

As the power to restrict immigration shifted from the states to the federal government, however, courts struggled to determine whether morals legislation targeting foreign prostitutes constituted regulation of vice properly exercised under the states' police power, or a foreign policy question that should be determined by the federal government. Federal courts ultimately struck down state legislation as an impermissible intru-

1. U.S. Const. amend. XIV, § 1.

2. Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974).

sion into the federal government's plenary power over international relations.³

Virtually simultaneously, Congress passed the Page Law, inscribing the same anti-Chinese principles into a federal statute. Like the state statutes, the Page Law was introduced only after other attempts at directly regulating Chinese immigration had been tried and had failed. While the impediment to direct regulation of immigration at the state level was the federal courts' assertion of a federal immigration power, at the federal level the impediment was the Burlingame Treaty with China, which prohibited restrictions on Chinese immigration.⁴ Even though California's statutes targeting "lewd or debauched" women had been exposed by the courts as impermissible encroachments on the federal immigration power, the Page Law sailed through Congress without any expressed concerns that it might contravene the Burlingame Treaty. Targeting women whose sexual behavior and familial structure fell outside an acceptable standard simply did not appear to be a restriction of immigration.

By demonstrating the important role played by social ideals of marriage and morality in the shift from state to federal immigration, this Article contributes to a growing body of scholarship analyzing the importance of the family in American legal history. Historians have shown, for example, that throughout the nineteenth and twentieth centuries, marriage functioned not merely as a private contract between two people, but as a public status that served as the building block of society and framed the social and familial options available to individuals.⁵ Several scholars

3. *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1876) ("The passage of laws which concern the admission of . . . subjects of foreign nations to our shores belongs to Congress, and not to the States."); *In re Ah Fong*, 1 F. Cas. 213, 216 (C.C.D. Cal. 1874) (No. 102) ("Whatever outside of the legitimate exercise of [state police power] affects the intercourse of foreigners with our people . . . is exclusively within the jurisdiction of the general government, and is not subject to state control or interference.").

4. Treaty of July 28, 1868, U.S.-China, art. VI, 16 Stat. 739, 740 [hereinafter *Burlingame Treaty*].

5. Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* 8, 136-38 (2000); see also generally Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* (1998) (tracing role of marriage in citizenship policy beginning in 1907); Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* (1999) (showing shift in attitudes toward women's ability to consent to sexual conduct through nineteenth and early twentieth centuries); Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 Yale L.J. 1641 (2003) [hereinafter *Dubler, In the Shadow*] (analyzing the shifting construction of widows' legal rights to show how marriage laws and norms affected even unmarried women); Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 Colum. L. Rev. 957 (2000) (analyzing effects of marriage norms and laws on cohabitating couples); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373 (2000) (tracing history of resistance to marital rape exemptions in the nineteenth century); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 Geo. L.J. 299, 329, 333 (2002) (showing how, beginning in the 1870s, organizations such as the New York Society for the Prevention of Cruelty to Children began intervening in families with unemployed fathers); Reva B.

have identified Reconstruction as a time during which marriage norms were particularly important and contested, especially in providing access to citizenship for former slaves.⁶ But no one has yet focused specifically on the important role played by marriage in the advent of federal immigration law.

The Page Law itself is surprisingly understudied. Legal scholars and historians interested in immigration often ignore the Page Law altogether. Instead, they cite the Chinese Exclusion Act of 1882,⁷ which restricted the immigration of Chinese laborers, as the first racially based federal immigration law.⁸ While many scholars acknowledge the Page

Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947 (2002) (highlighting adoption of the Nineteenth Amendment as a break with traditional conceptions of family rooted in coverture); Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. Davis L. Rev. 795 (2000) (showing effects of antimiscegenation laws on Filipino/a immigrants).

6. See Peggy Cooper Davis, *Neglected Stories: The Constitution and Family Values* 108–17 (1997) (showing that family rights were an important aspect of the Reconstruction amendments); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* 175–217 (1998) (examining the public debate over the marriage contract in the wake of slave emancipation); Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 Yale J.L. & Human. 251 (1999) (discussing the role marriage played in imposing the dominant cultural norms on African Americans during Reconstruction); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. Rev. 1297 (1998) [hereinafter Hasday, *Federalism and the Family*] (analyzing the importance of family law in slavery and Reconstruction).

7. Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, 22 Stat. 58 (repealed 1943).

8. See, e.g., Iris Chang, *The Chinese in America: A Narrative History* 130–56 (2003) (devoting an entire chapter to the Chinese Exclusion Act but never mentioning the Page Law); Charles J. McClain, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* 149, 309 n.83 (1994) [hereinafter McClain, *In Search of Equality*] (making only brief passing reference to the Page Law and identifying the Chinese Exclusion Act as “the first federal immigration statute to single out an ethnic group by name for invidious treatment”); Christian G. Fritz, *Due Process, Treaty Rights, and Chinese Exclusion, 1882–1891*, in *Entry Denied: Exclusion and the Chinese Community in America, 1882–1943*, at 25, 25–26 (Sucheng Chan ed., 1991) [hereinafter *Entry Denied*] (discussing anti-Chinese sentiments in the 1870s but identifying the Chinese Exclusion Act as the first law in the nation’s history that excluded an immigrant group on the basis of race); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness*, 73 Ind. L.J. 1111, 1120–24 (1998) (discussing legislation targeting Chinese immigrants, but omitting reference to the Page Law); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 550–52 (1990) [hereinafter Motomura, *Immigration Law*] (tracing federal control over immigration to Chinese Exclusion Act and referring to 1875 as falling within a “period when the Burlingame Treaty of 1868 seemed to guarantee unrestricted immigration from China,” with no mention of the restrictions passed by the Page Law during that year); Peter H. Schuck, *The Transformation of Immigration Law*, 84 Colum. L. Rev. 1, 3 (1984) (tracing advent of “classical immigration law” ideology to the exclusion of Chinese during the 1880s, without mentioning the Page Law); Todd Stevens, *Tender Ties: Husbands’ Rights and Racial Exclusion in Chinese Marriage Cases, 1882–1924*, 27 Law & Soc. Inquiry

Law as the decisive marker of a shift from state to federal control over immigration, they do not focus on its targeting of Chinese prostitution.⁹ Historians who have examined the Page Law have generally done so in debates about the significance of the Page Law's impact on the formation of Chinese families in the United States,¹⁰ or in debating whether Chi-

271, 277 (2002) (identifying the Chinese Exclusion Act as the "first racially based immigration restriction in United States history"); Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy* (1865–1965), 15 *Geo. Immigr. L.J.* 625, 626 (2001) (identifying discrimination against Asians as originating from two acts of Congress—the Naturalization Act of 1870 and the Chinese Exclusion Act of 1882—but omitting any reference to the Page Law).

9. See, e.g., Charles Gordon et al., *Immigration Law and Procedure* §§ 1.03[2][a], 2.01, 2.02[2] (rev. ed. 2004) (acknowledging that the Page Law marked an important shift, but only mentioning in passing that it barred "convicts and prostitutes"); Hyung-chan Kim, *A Legal History of Asian Americans, 1790–1990*, at 53–54 (1994) (discussing briefly the Page Law in the context of laws excluding Chinese male laborers in the 1860s and 1870s); Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 45, 217 n.9 (1996) [hereinafter Neuman, *Strangers to the Constitution*] (emphasizing throughout book that the Page Law was the first federal immigration law, but only acknowledging that the Page Law targeted prostitution in one footnote); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *Tex. L. Rev.* 1, 106 & n.727 (2002) (stating in passing that "Congress did not pass a major immigration act until 1875" and mentioning in footnote that the Page Law "prohibited the entry of convicts, prostitutes, and involuntary 'Oriental' laborers"); Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 *Tulsa J. Comp. & Int'l Law* 63, 113 (2002) (describing the Page Law as prohibiting the "entry of certain kinds of voluntary immigrants"); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 *Harv. L. Rev.* 853, 855–56, 856 n.11 (1987) (explaining that the Page Law was passed due to "unemployment, economic depression, and growing 'nativism,' racism, and xenophobia," but mentioning only in a single footnote that the law excluded prostitutes); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 *Colum. L. Rev.* 1625, 1626, 1632–33 (1992) [hereinafter Motomura, *Curious Evolution*] (identifying 1875 as year of onset of federal immigration law, but not identifying the Page Law's content). Recently, several scholars have started to fill this gap. See Cott, *supra* note 5, at 136–38 (explaining importance of the Page Law for Chinese immigration); Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990*, at 23 (1993) (noting that most historians have neglected the Page Law and offering a two-paragraph description of the Page Law's effects on immigration); Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* 5 (1995) (tracing federal curtailment of state immigration regulation to 1876 and mentioning the role of the Page Law).

10. See, e.g., George Anthony Pepper, *If They Don't Bring Their Women Here: Chinese Female Immigration Before Exclusion* (1999) (arguing that the Page Law prevented Chinese family formation in the United States); Benson Tong, *Unsubmissive Women: Chinese Prostitutes in Nineteenth-Century San Francisco* 50, 57 (1994) (arguing that enforcement of Page Law was lax); Sucheng Chan, *The Exclusion of Chinese Women, 1870–1943*, in *Entry Denied*, *supra* note 8, at 94, 106–09 (arguing that Page Law had substantial effect on Chinese immigration); Lucie Cheng Hirata, *Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America*, 5 *Signs* 3, 10 (1979) (concluding that effect of Page Law was unclear); Adam McKeown, *Transnational Chinese Families and Chinese Exclusion, 1875–1943*, 18 *J. Am. Ethnic Hist.* 73, 78 (1999)

nese prostitution was as widespread in California as Congress thought it was.¹¹ These historians, however, have not explained how the Page Law's regulation of sex and gender fits into the broader legal context of a developing federal power over immigration.

Placing the Page Law within its historical context of a cultural crisis over the regulation of sexuality and marriage is crucial to developing a complete understanding of the origins of federal immigration law. We tend to think of immigration law as involving questions of national boundaries, security, and identity, and aimed primarily at regulating labor. In this version of immigration policy, female immigrants are treated either as auxiliary to male immigrant laborers or simply as their female equivalents.¹² Conversely, the family has long been treated as "the quintessential symbol of localism"¹³—a private phenomenon that, while it may mimic the power dynamics of the public sphere, is nonetheless fundamentally separate. Yet regulation of marriage and the family and the implementation of population policy are at the root of much of American immigration law.¹⁴ The Page Law is but one early example of Congress regulating the marriages of female immigrants to shape the racial and cultural population of the United States and is thus an early example of federal law regulating in an area—the family—widely understood to fall within the province of the states.¹⁵

More broadly, the Page Law and its Californian antecedents demonstrate the use of marriage and sexuality as means for achieving regulatory ends that are otherwise prohibited. In both instances, legislators used rhetoric about protecting the institution of marriage and the sexual purity of the community to pass exclusionary legislation. The strategy of playing on such deep-seated values about the role of the family and the centrality of marriage in society made these laws far more popular than they otherwise would have been.

[hereinafter McKeown, *Transnational Chinese Families*] (arguing that exclusion laws were "just one factor among many" in shaping Chinese migrant communities and the establishment of Chinese families).

11. See, e.g., Yong Chen, *Chinese San Francisco, 1850–1943: A Trans-Pacific Community* 75–87 (2000) (arguing that the number of non-prostitutes in San Francisco was suppressed by census takers and others); Pfeffer, *supra* note 10, at 97–99 (arguing that San Francisco census takers overcounted the number of Chinese women who were prostitutes); Tong, *supra* note 10, at 15, 57 (estimating number of prostitutes and arguing that prostitutes posed as wives to circumvent Page Law's provisions); Hirata, *supra* note 10, at 23–25 (estimating number of prostitutes).

12. See, e.g., Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 Conn. L. Rev. 1627, 1631 (1997) (emphasizing labor policy origins of immigration law but omitting reference to women, marriage regulation, or population policy).

13. Hasday, *Federalism and the Family*, *supra* note 6, at 1297.

14. See, e.g., Enid Trucios-Haynes, "Family Values" 1990's Style: U.S. Immigration Reform Proposal and the Abandonment of the Family, 36 Brandeis J. Fam. L. 241 (1997–1998) (critiquing Commission on Immigration Reform's proposal to limit immigration preferences to nuclear family members).

15. See discussion *infra* Part II.A.

This Article demonstrates that the regulation of sexuality, morality, and marriage was a pervasive regulatory force in the development of immigration law. Part I tells the story of the development of animosity against Chinese immigrants on the West Coast, documenting the fear of Chinese marriage and sexual practices and the threat thereby posed by Chinese reproduction. Part II shows how the California legislature attempted to use state laws targeting Chinese prostitutes to reduce the immigration of Chinese women without encroaching on areas of exclusive federal control. Part III examines in detail legal challenges brought by Chinese women who were detained under the California law, showing both how these laws were enforced and how the courts understood them. Part IV turns to the Page Law itself, analyzing its provisions, context, and legislative history, as well as its modes of enforcement. This Part shows that Congress adopted the same discriminatory strategies pioneered by California, using the Page Law to target Chinese women without encroaching on the terms of the Burlingame Treaty. Finally, Part V shows why paying attention to the Page Law matters in understanding the roots of Chinese exclusion. Reading the Supreme Court's assertion of federal power over immigration in light of Congress's passage of the Page Law, we can see that the shift to federal power eliminated the possibility that immigrants could bring equal protection claims challenging discriminatory immigration policies. This Part also shows how the Page Law continued to affect immigration by providing a foothold for anti-Chinese forces that eventually led to the renegotiation of the Burlingame Treaty and the Chinese Exclusion Act, and by pioneering a method of using marriage norms to restrict Chinese women that was used to dramatic effect in the enforcement of the Chinese Exclusion Act itself and later exclusion laws.

I. CHINESE WOMEN AND THE GROWING ANIMOSITY IN THE WEST

There are many histories of the Chinese in America, but most of them treat male laborers as the standard and women as exceptional.¹⁶ Focusing on the experiences of early female Chinese immigrants is difficult because of a troubling lack of sources: Chinese women during the early period of migration left very few written records of their lives.¹⁷ Thus, most scholarship concerning Chinese female immigration concentrates on the turn of the century and later, when women entered the public sphere more prominently, Protestant missionary women began a

16. See, e.g., Kim, *supra* note 9, *passim* (describing anti-immigration policies as racially motivated without examining racist or racial view of women); McClain, *In Search of Equality*, *supra* note 8, at 55–56 (treating antiprostitution statutes as separate from other anti-Chinese legislation).

17. See Judy Yung, *Unbound Feet: A Social History of Chinese Women in San Francisco* 15–51 (1995) [hereinafter Yung, *Unbound Feet*] (discussing the lives of Chinese women during this period).

public campaign against Chinese prostitution,¹⁸ and some women, such as the prostitute Wong Ah So, published their memoirs.¹⁹

While the voices of Chinese women are missing from the early years of their immigration, newspaper articles, political speeches, the legislative history of the Reconstruction Amendments and implementing statutes, and congressional testimony reveal the roots and breadth of the animosity toward them. This Part uses these sources to reconstruct the history of that animosity, demonstrating that the motives of the anti-Chinese movement included not only preservation of labor markets for white laborers, but also the prevention of the development of Chinese families and culture through the migration of Chinese women.

A. *The Economic Origins of Chinese Immigration*

Chinese immigrants first began coming to the United States in large numbers in the late 1840s after news of the discovery of gold in California reached China.²⁰ During the 1840s and 1850s, railroad companies actively recruited Chinese men as laborers.²¹ Although most of these men worked in rural settings, by 1852 the city of San Francisco had a noticeable Chinese population. Of the city's 2,954 Chinese residents, only 19 were women.²²

Industrialists came to depend on Chinese workers as a source of cheap labor. In fact, ninety percent of the workers who built the Central Pacific Railroad were Chinese.²³ Chinese cooks, laundry owners, and domestic workers had the reputation of having a strong work ethic and being willing to work for very low wages.²⁴ When they finally completed the Central Pacific Railroad in 1869, the Chinese no longer had work, and thousands of them moved to San Francisco.²⁵ There, they made major inroads into the "boot and shoe, woollens, cigar and tobacco, and sewing

18. See, e.g., M.G.C. Edholm, A Stain on the Flag, *S.F. Chron.*, Oct. 27, 1904, at 9, reprinted in Judy Yung, *Unbound Voices: A Documentary History of Chinese Women in San Francisco* 124, 128–43 (1999) [hereinafter Yung, *Unbound Voices*].

19. See Wong Ah So, *Memoirs*, in Donaldina Cameron, *New Lives for Old Chinatown*, 57 *Missionary Rev. of the World* 329 (1923), reprinted in Yung, *Unbound Voices*, supra note 18, at 201, 203–10.

20. Kim, supra note 9, at 47.

21. Hing, supra note 9, at 20.

22. Tong, supra note 10, at 3 (citing California Legislature, Population Schedules of California, 1952: City and County of San Francisco (Family History Dep't of the Church of Jesus Christ of Latter-day Saints, microfilm copy)). Kim reports that the Chinese population of all of California exceeded 45,000 by the end of 1852. Kim, supra note 9, at 47. The ratio of women to men in the non-Chinese population was one for every three. Tong, supra note 10, at 4.

23. Salzer, supra note 9, at 8.

24. Hing, supra note 9, at 20. For example, Chinese laborers accepted wages of eight dollars per month to prepare the land for California's first vineyards; the going rate for white workers was thirty dollars per month. *Id.* at 253 n.48.

25. Ronald Takaki, *A Different Mirror: A History of Multicultural America* 198 (1993) [hereinafter Takaki, *A Different Mirror*].

industries."²⁶ The number of Chinese in California continued to grow rapidly during these years: In 1860, there were 34,933 Chinese in California, in 1870, there were 49,277, and by 1880, there were 75,132.²⁷ By 1870, 8.8% of Californians were Chinese,²⁸ as well as 25% of wage earners.²⁹

Animosity toward the Chinese began even before their immigration to the United States. Anti-Chinese rhetoric was first expressed in sexualized terms as early as the 1830s, when the advent of the penny press provided white America with "lurid accounts of bizarre Chinese customs [and] sexual aberrations."³⁰ As early as the 1850s and 1860s, white miners and railroad workers had formed anti-Chinese clubs.³¹

The federal government, however, initially saw Chinese immigration as a positive gain, and Congress ratified the Burlingame Treaty in 1868.³² The treaty was ratified during a period following the Civil War when the United States was aggressively expanding into foreign markets through international trade.³³ Under its terms, China and the United States recognized the "inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other, for purposes of curiosity, of trade, or as permanent residents."³⁴ The treaty also provided for reciprocal grant of "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."³⁵

Despite the federal government's open policy toward Chinese immigration, anti-Chinese sentiment grew in the West. The years following the ratification of the Burlingame Treaty were a time of economic depression.³⁶ The mines were no longer profitable, California suffered a harsh drought, and the stock market crashed, resulting in widespread unem-

26. *Id.*

27. Census Office, Dep't of the Interior, *Statistics of the Population of the United States at the Tenth Census* (June 1, 1880), at 378-79 tbl.IV (1883).

28. *See id.*

29. Salyer, *supra* note 9, at 10.

30. *Id.* at 8.

31. *See id.* (stating that before 1870, some white laborers formed clubs to protest the presence of Chinese in the mines and railroad construction); *see also* Hing, *supra* note 9, at 21 (noting that anti-Chinese clubs "surfaced in the early 1850's").

32. Burlingame Treaty, *supra* note 4.

33. *See* Walter LaFeber, *The American Age: United States Foreign Policy at Home and Abroad Since 1750*, at 148-52 (1989) (describing America's evolution into a superpower through industrialization, aggressive trade practices, and the use of immigrant labor).

34. Burlingame Treaty, *supra* note 4, art. V, 16 Stat. at 740.

35. *Id.* art. VI, 16 Stat. at 740.

36. Kim, *supra* note 9, at 55-56.

ployment.³⁷ White laborers began to blame their economic troubles on the Chinese. By the 1870s, anti-Chinese clubs had formed in the cities³⁸ and, at times, mob violence erupted against Chinese immigrants.³⁹ Charles McClain has succinctly summarized the feelings behind the movement against Chinese laborers: “[T]hey worked too hard (often for less pay than others were willing to accept), saved too much, and spent too little.”⁴⁰

But the sheer number of Chinese laborers willing to work for so little was not the only fault attributed to them: Both Chinese men and Chinese women were accused of taking part in a system of slavery. Even in the early 1850s, when economic prospects still appeared bright for white laborers, politicians expressed concern that the Chinese were practicing a kind of slavery by performing “coolie labor”: indentured servitude through long-term labor contracts, sometimes due to kidnapping. Thus, Chinese laborers were branded as “coolies,”⁴¹ and by extension Chinese prostitutes were “female coolies.”⁴² In 1852, California Governor John Bigler delivered a special address to the state legislature in which he warned that the Chinese were practicing coolie labor and that this practice threatened California’s economy.⁴³

In reality, Chinese immigrants to America were not “coolies”; they were voluntary immigrants, many of whom used a “credit-ticket system” to pay for their passage.⁴⁴ Under this system, an immigrant would borrow money from a broker to pay for his passage, then repay the amount borrowed (plus interest) out of the earnings from his first job.⁴⁵ In contrast,

37. See *id.*; see also Salyer, *supra* note 9, at 9 (noting that shortly after the adoption of the Burlingame Treaty, a severe depression “resulted in reduced wages and widespread unemployment”).

38. See Fourth Ward Democratic Club—Exciting Meeting—Formation of an Anti-Chinese Society—Etc., *S.F. Chron.*, July 20, 1870, at 3 (on file with the *Columbia Law Review*).

39. See Ronald Takaki, *Iron Cages: Race and Culture in Nineteenth-Century America* 248 (1979) (discussing massacre of twenty-eight Chinese miners in Rock Springs, Wyoming in 1885, and killing of twenty-one Chinese in Los Angeles by a white mob in 1871); Howard Zinn, *A People’s History of the United States* 259–60 (quoting an obituary for one Wan Lee, who was stoned to death in the streets of San Francisco by a mob of schoolchildren in 1869). Bill Ong Hing has identified a similar pattern throughout the history of Asian American immigration to the United States: cycles of acceptance, motivated by the desire for “cheap, rootless, and dependable labor” followed by rejection caused by “racial prejudice and fear of economic competition.” Hing, *supra* note 9, at 17.

40. McClain, *In Search of Equality*, *supra* note 8, at 10.

41. “Coolie” was a term used to describe “unfree laborers who had been kidnapped or pressed into service by coercion and shipped to foreign countries.” Ronald J. Takaki, *Strangers from a Different Shore: A History of Asian Americans* 36 (1990) [hereinafter Takaki, *Strangers*].

42. See *infra* text accompanying notes 92–95.

43. Governor John Bigler, Governor’s Special Message (Apr. 23, 1852), reprinted in *Alta Cal.*, Apr. 25, 1852, at 2 (on file with the *Columbia Law Review*).

44. Takaki, *Strangers*, *supra* note 41, at 36.

45. Takaki, *A Different Mirror*, *supra* note 25, at 193–94.

Chinese men and women immigrating to other countries, such as the Kingdom of Hawai'i, really were coolies: They were granted "free" passage and room and board upon arrival in return for a five-year labor contract.⁴⁶ Worse still, thousands of Chinese were kidnapped or pressed into service and shipped to Cuba and Peru.⁴⁷ But even though Chinese laborers immigrated to the United States voluntarily, the prevailing viewpoint among whites at the time was that Chinese laborers were effectively slaves.

By the 1870s, animosity toward Chinese labor had prompted serious political action. An "Anti-Chinese Convention" held in San Francisco in 1870 issued a platform that endorsed the eight-hour workday as "a natural division of time for labor, recreation, and rest" that "expands the mind, dignifies labor, and elevates man," and called for the exclusion of the Chinese from California.⁴⁸ The platform linked the practice of indentured servitude explicitly to both an undermining of white labor and of bedrock principles of American democracy:

[T]he system of importing Chinese or Asiatic coolies into the Pacific States, or into any portion of the United States, is in every respect injurious and degrading to American labor, forcing it, as it does, into unjust and ruinous competition, placing the white workingmen entirely at the mercy of the coolie employer, and building up a system of slavery in what should be a free land. . . .

. . . .

. . . [T]his evil attacks the most sacred rights of the American people, the stability of our Government and its institutions; [impairs] the right of the employed to receive from the employer a reasonable and just stipend . . . and as such must be classed as a national calamity, to be removed and crushed out by the enactment of laws, having for their end the entire suppression of Chinese importation or immigration, whether voluntary or otherwise.⁴⁹

Lawmakers became increasingly concerned about the link between coolieism and slavery following the Civil War. Having just eradicated slavery in their own land, they were quick to see links between this practice and the "barbaric" and "ancient" customs of others. The myth that the Chinese were sending coolies to work in the United States became linked conceptually to the institution of chattel slavery. By extension, the "inherent" propensity of the Chinese to slave-like behavior became a reason to exclude them from the country altogether.

46. Takaki, *Strangers*, supra note 41, at 35-36.

47. *Id.*

48. Anti-Chinese Convention, *S.F. Chron.*, Aug. 19, 1870, at 3 (on file with the *Columbia Law Review*).

49. *Id.*

B. *Marriage, Morals, and the Threat of Chinese Women*

Given the centrality of male laborers to the anti-Chinese movement, one might expect its efforts to have concentrated primarily on excluding Chinese men from California. But what happened was more complicated. Although there was an active movement to exclude Chinese generally from the United States, which eventually led to the passage of the Chinese Exclusion Act of 1882,⁵⁰ many earlier efforts to exclude the Chinese concentrated not on Chinese men but on Chinese women. The dominant strategy was to pass laws that excluded prostitutes for lewd behavior. These laws were then overenforced, effectively excluding Chinese women in general.

The impulse to exclude Chinese prostitutes stemmed from the profound differences between Chinese attitudes toward sexuality and family structure and the more rigid American system in which monogamous marriage was the only permissible outlet for female sexuality.⁵¹ Unlike the American dichotomy of proper wives versus prostitutes, the Chinese system is better described as a continuum in which a Chinese woman's status was dependent on her sexual relationships with Chinese men: First wives enjoyed the highest status, followed by second wives and concubines,⁵² followed in turn by several classes of prostitutes.⁵³ Americans responded to this system in two ways: through a fascination with polygamy and through a conviction that the Chinese treated all women, whether wives in polygamous relationships or prostitutes, as slaves.

1. *Chinese Marriage Customs: Polygamy*⁵⁴ *and Prostitution*. — The perception that most female Chinese immigrants were prostitutes was to a large extent an accurate one. Census reports indicate that by 1870 there were upward of two thousand Chinese women living in San Francisco, and that a majority—somewhere in the neighborhood of seventy percent—were prostitutes.⁵⁵ Recently, historian George Anthony Pepper has argued persuasively that this number was exaggerated by census takers

50. Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, 22 Stat. 58 (repealed 1943).

51. For a cross-cultural theory of how societies inscript their moral order onto women's bodies, see Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* 83–84 (2002).

52. See *infra* note 74 and accompanying text.

53. According to one scholar, there were as many as ten different layers in the prostitution industry in China. Gail Hershatter, *Dangerous Pleasures: Prostitution and Modernity in Twentieth-Century Shanghai* 42–56 (1997); see also Chen, *supra* note 11, at 79 (noting that articles about prostitution in Chinatown newspaper *The Oriental* did not condemn prostitutes).

54. Polygamy refers to marriage in which a spouse of either sex has more than one mate at a time. Polygyny refers to the practice of having more than one wife at a time; polyandry to the practice of having more than one husband. 12 *Oxford English Dictionary* 59 (2d ed. 1989). Technically, then, the practice that disturbed lawmakers was polygyny. I refer to the practice here as polygamy, since that is the more common term and the one used in the historical documents.

55. Pepper, *supra* note 10, at 6, 124 n.13; Tong, *supra* note 10, at 98 tbl.3; Chan, *supra* note 10, at 107; Hirata, *supra* note 10, at 24.

and that the real number was somewhere closer to fifty percent.⁵⁶ Even the fifty percent figure represents a significant portion of Chinese women. Those who were not classified as prostitutes were reported to be laundresses, miners, servants, seamstresses, cooks, or lodging house operators.⁵⁷

Deteriorating economic conditions in China rendered families destitute, contributing to the immigration of both ordinary women and prostitutes.⁵⁸ The traffic in Chinese prostitutes was dominated by tongs (secret criminal gangs), who sent representatives to China to procure girls from their families. In an attempt to ameliorate their economic conditions, many families sold their daughters to tong representatives, who claimed

56. Peffer, *supra* note 10, at 11. Peffer estimates that California census records for 1870 underreported the number of Chinese non-prostitute wives by over five hundred. If the numbers were really as high as those reported by census takers, Peffer reasons, there would have been a massive overabundance of prostitutes in Chinatown, yet prostitutes remained very valuable commodities for importation, worth as much as \$2,500. *Id.* at 7 (citing Hirata, *supra* note 10, at 12). Much of the inaccuracy resulted from the census takers' ignorance of Chinese culture. In his detailed analysis of the 1870 census, for example, Peffer found that one census taker, an Irish immigrant unfamiliar with Chinese culture, found that ninety percent of the women in his jurisdictions were prostitutes, where another census taker, who as head of the Chinese Protection Society had greater familiarity with Chinese culture and marriage customs, found that approximately half of the women in his jurisdiction were prostitutes. *Id.* at 90-94 & nn.17-47. Single women living in households with men were presumed by census takers to be prostitutes, even if the men they lived with were members of their extended family. But many Chinese residents of San Francisco's Chinatown lived in large, mixed-gender groups, so it is likely that many women—both single and married—who were not prostitutes lived in household groups that included several men. *Id.* at 91 (stating that the average mixed-gender dwelling in San Francisco's Chinatown contained seventeen people). Sue Fawn Chung has discovered similar problems with the 1870 census for Virginia City, Nevada. Sue Fawn Chung, *Their Changing World: Chinese Women on the Comstock, 1860-1910*, in *Comstock Women: The Making of a Mining Community* 203, 208 (Ronald M. James & C. Elizabeth Raymond eds., 1998).

57. Tong, *supra* note 10, at 95 tbl.2. It is unsurprising that women who were prostitutes did not hide their profession from census takers—prostitution as a status was not illegal, although “keeping a house of ill fame” or being an “inmate of a house of ill fame” was. *Id.* at 115.

58. Ninety percent of the Chinese who immigrated to America were from Guangdong province. Guangdong had undergone an enormous growth in population during the early 1800s. This growth, combined with a crumbling economy in the wake of the Opium Wars and a shortage of arable land, resulted in a rice shortage and left many residents in extreme poverty. In this weakened state, China in general—and Guangdong in particular—became vulnerable to armed uprisings and local conflicts throughout the 1850s and 1860s. In addition, Guangdong was the site of myriad natural disasters from the 1830s to the 1870s, including droughts, floods, typhoons, crop failures, and famines. See Hing, *supra* note 9, at 19-20 (noting that dramatic population increases, rice shortages, and an unstable political situation led many Chinese to immigrate to America); see also Tong, *supra* note 10, at 35-44 (describing the impact of European economic imperialism and natural disasters). But see Chen, *supra* note 11, at 40 (arguing it was not poverty but “[a] dynamic market economy that had existed there for decades” that “produced individuals who were able to appreciate the significance of the news about California gold and who were willing to act on their understanding of the importance of this news”).

to want the girls as indentured servants or as brides.⁵⁹ These sales were often fraudulent, and, unbeknownst to her parents, a girl sold as a bride or a servant would be put to work as a prostitute. Other women were lured into prostitution by fictitious offers of marriage or were kidnapped outright.⁶⁰ Many others appear to have voluntarily emigrated in order to better themselves financially through prostitution.⁶¹ A few Chinese prostitutes were successful, becoming property owners and brothel owners or operators.⁶²

Of course, prostitution was not an exclusively Chinese phenomenon.⁶³ Throughout the West, prostitution was prevalent wherever men migrated without families.⁶⁴ Even in Chinese neighborhoods of San Francisco, there were native-born whites, European immigrants, Latin American immigrants (mostly from Mexico), a smattering of African American women, and Native Americans working as prostitutes.⁶⁵ Still, Chinese prostitutes outnumbered all of the others combined, probably due to the greater gender disparity among Chinese immigrants, the unique conditions of poverty in China at the time, and the tongs' procurement of prostitutes from China.⁶⁶

As increasing numbers of white women and families began to settle in San Francisco and other parts of the West, prostitution began to be frowned upon rather than welcomed. Just as they were later targeted through restrictive immigration laws, Chinese prostitutes were uniquely identifiable legal targets: An 1866 California law declared Chinese houses of prostitution to be public nuisances;⁶⁷ it was not until 1874 that

59. Tong, *supra* note 10, at 40.

60. See *id.* at 40–44; see also Hirata, *supra* note 10, at 9–12, 15 (describing the methods San Francisco brothels used to obtain women—mainly “luring and kidnapping”).

61. Tong, *supra* note 10, at 42 (explaining that few women sold into prostitution expressed resentment because they knew their sacrifice was so that “the family could live”). For a critique of the distinction between “forced” and “voluntary” prostitution, see Jo Doezenia, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, in *Global Sex Workers: Rights, Resistance and Redefinition* 34, 34–35 (Kamala Kempadoo & Jo Doezenia eds., 1998).

62. Chen, *supra* note 11, at 79.

63. Anne M. Butler, *Daughters of Joy, Sisters of Misery: Prostitutes in the American West, 1865–90*, at 4–7 (1985) (noting that Chinese women made up a very small percentage of the total prostitute population in the West).

64. Tong, *supra* note 10, at 4–5; see Butler, *supra* note 63, at 50 (“[P]rostitutes gravitated toward those communities with employment opportunities. They hunted out the mining towns, the construction sites, the military outposts, the cattle terminals, the supply stations, as well as the larger urban centers of the frontier.”); *id.* at 53 (“[T]he daily customers who sought and supported the prostitutes on the frontier came from those bachelor collections that the women followed across the frontier.”); see also Marion S. Goldman, *Gold Diggers and Silver Miners: Prostitution and Social Life on the Comstock Lode 16–17* (1981) (explaining that few working-class men on the Comstock Lode were able to bring wives, creating a demand for prostitution).

65. Pfeffer, *supra* note 10, at 130 n.17.

66. See *id.* at 12–13, 31.

67. Act of Mar. 21, 1866, ch. 505, 1866 Cal. Stat. 641.

the word "Chinese" was stricken from the law and all houses of prostitution were declared nuisances.⁶⁸

Despite the large numbers of Chinese women working as prostitutes in San Francisco, many of the women who came to the United States as immigrants from China came not as prostitutes but as laborers and wives. There are several documented instances of Chinese women accompanying their husbands on the voyage to America as early as the 1850s and 1860s.⁶⁹ By 1876, at least several hundred recognizable families had reunified or formed.⁷⁰

Census takers may have underestimated the number of wives living in Chinatown because they failed to distinguish among second wives, concubines, and prostitutes. The household structure in prerevolutionary China was significantly different than in most American homes. Three generations lived together, and while the husband was the patriarchal head of the family, the husband's mother ruled within the realm of the household.⁷¹ If a man could afford to, he would take on more than one wife.⁷² Men also took concubines to produce heirs if their wives were childless.⁷³ The "primary wife"—usually the first wife—enjoyed a higher status than the secondary wives and was responsible for the care of the family residence in China and the children.⁷⁴ Because the first wife tended to remain with the husband's family in China, many Chinese women in the United States were "secondary wives."⁷⁵ Furthermore, the distinction between "wife" and "prostitute" was not static: Many women brought to the United States as prostitutes later escaped prostitution by becoming the wives of Chinese laborers.⁷⁶

Some historians have also argued that there may have been groups of Chinese women living together in San Francisco who were neither

68. Act of Feb. 7, 1874, ch. 76, 1874 Cal. Stat. 84.

69. See Takaki, *A Different Mirror*, supra note 25, at 210–11.

70. *Id.* at 211.

71. Yung, *Unbound Feet*, supra note 17, at 45–46.

72. *Id.* at 19, 320 n.89; Adam McKeown, *Conceptualizing Chinese Diasporas, 1842 to 1949*, 58 *J. Asian Stud.* 306, 318 (1999); see also *Record* at 37–38, *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (No. 478) (testimony of Chung Fing).

73. Peggy Pascoe, *Gender Systems in Conflict: The Marriages of Mission-Educated Chinese American Women, 1874–1939*, in *Unequal Sisters* 139, 141 (Vicki L. Ruiz & Ellen Carol DuBois eds., 2d ed. 1994).

74. Chang-tu Hu, *China: Its People Its Society Its Culture* 170 (1960) ("A concubine, unlike a mistress, had legal rights, but these were inferior to those of the first wife. . . . It was easier to divorce a concubine, who was socially inferior to the wife.").

75. See McKeown, *Transnational Chinese Families*, supra note 10, at 98–99.

76. See Yung, *Unbound Feet*, supra note 17, at 41. Lucie Cheng Hirata has noted that Chinese working people did not attach a stigma to prostitution because prostitutes in China were not seen as "fallen women" but as daughters who obeyed the wishes of their families. Women in China who left prostitution were therefore usually accepted in working-class society. This cultural difference, together with a shortage of women in San Francisco, resulted in Chinese men being willing to take former prostitutes as wives. Hirata, supra note 10, at 19.

wives nor prostitutes. In the Pearl River Delta area (the area in the Guangdong Province from which most San Franciscan Chinese emigrated), there was a longstanding tradition of unmarried women who lived in "girls' houses."⁷⁷ These women were called *zishu nu*, or "self-combed women," because they underwent a ceremony in which they combed their hair in a certain way and declared their intention to live without husbands.⁷⁸ Groups of "self-combed women" would live together as "sworn sisters," sometimes even adopting children. The sworn sisters and their adopted children functioned as financially independent family units.⁷⁹ They performed valuable labor, such as rearing silkworms, tending mulberry trees, spinning silk threads, and weaving, that gave them financial independence.⁸⁰ Some of them may have been lesbians.⁸¹ Chen speculates that census takers may have overreported the number of brothels in San Francisco because they were unaware of the tradition of "self-combed women" and therefore assumed that any house consisting only of women must by definition be a brothel.⁸² It is difficult to ascertain from census figures, however, whether "self-combed women" migrated to San Francisco.⁸³

In short, most Chinese women who migrated to California during the 1860s and 1870s were second wives, concubines in polygamous marriages, or prostitutes. Americans were right to conclude that the Chinese were more tolerant of prostitution and that they practiced polygamy, but were certainly wrong to believe that *all* female Chinese immigrants worked as prostitutes. Ultimately, however, the technical truth of whether a particular woman worked as a prostitute was not what mattered: Polygamy and prostitution were taken as evidence that Chinese culture embodied a slave-like mentality.

2. *The Link to Slavery.* — Moral opprobrium of prostitution and polygamy had particular resonance following the Civil War. The public debate over emancipation and the ultimate abolition of slavery brought new focus to the evils of coercion, not only in labor, but also in marriage and sexual relations. Prostitution, which had been prevalent throughout the developing West, began to be viewed through this lens. Prostitution was

77. Chen, *supra* note 11, at 82–83; Janice E. Stockard, *Daughters of the Canton Delta: Marriage Patterns and Economic Strategies in South China, 1860–1930*, at 31–41 (1989).

78. Stockard, *supra* note 77, at 70 (Stockard transliterates the term as "jihso neuuh").

79. Chen, *supra* note 11, at 83.

80. Yung, *Unbound Feet*, *supra* note 17, at 20.

81. *Id.*; see also McKeown, *Transnational Chinese Families*, *supra* note 10, at 99–100 (noting that many female silk laborers practiced "delayed transfer marriage" in which they did not move into their husbands' homes until years after marriage, if ever, and sometimes purchased a secondary wife for him as compensation, and that others joined "spinster houses" or married the ghosts of dead men to avoid marriage).

82. Chen, *supra* note 11, at 83.

83. See McKeown, *Transnational Chinese Families*, *supra* note 10, at 100 (arguing that delayed transfer marriage was restricted to localized areas where silk production offered an independent source of income for women).

the antithesis of marriage,⁸⁴ and frequently compared to slavery.⁸⁵ As Amy Dru Stanley has written of the period, prostitution "appeared to embody all the forces threatening the legitimacy of contract as a model of freedom. . . . [I]t revealed not simply the corrosive aspects of free market relations but also the fragility of home life as their institutional and emotional counterweight."⁸⁶ Marriage, in contrast, was based on "true love and consent,"⁸⁷ and conceived of as part of the private sphere, protected from the taint of commerce. Or, in the words of the historian Nancy Cott, "Prostitution and marriage were opposites: where marriage implied mutual love and consent, legality and formality, willing bonds for a good bargain, prostitution signified sordid monetary exchange and desperation or coercion on the part of the woman involved."⁸⁸

The links between marriage and consent and between prostitution and coercion may explain the widespread belief that all Chinese women were prostitutes and that all or nearly all of them were kidnapped or duped into migrating.⁸⁹ Nancy Cott has attributed this thinking to the "Victorian presumption that women felt only minimal sexual desire, and would engage in sex willingly only for love or the prospect of maternity."⁹⁰ Unfortunately for Chinese female immigrants, the purported involuntariness of their participation in prostitution did not make them more sympathetic as immigrants. The problem was their slavish character: White women "so much better understood" their rights that they were less likely to be duped into indentured servitude and were therefore less of a moral threat.⁹¹

The perceived docility of Chinese prostitutes was explained as part of their nature: If Chinese men were innately coolies, willing to indenture themselves into servitude, Chinese women were innately prostitutes, willing to do the same thing in sexualized terms. In a statement published in the *San Francisco Chronicle*, U.S. Senator Cole, of California, promised that Congress would legislate "to prevent the importation of these female coo-

84. Cott, *supra* note 5, at 137.

85. Stanley, *supra* note 6, at 219.

86. *Id.*

87. Cott, *supra* note 5, at 137.

88. *Id.* at 136.

89. See, e.g., Report of the Joint Special Committee to Investigate Chinese Immigration, S. Rep. No. 44-689, at 456-57 (1876), reprinted in U.S. Congress, Report of the Committees of the Senate of the United States for the Second Session of the Forty-Fourth Congress (Washington, Gov't Printing Office 1877) [hereinafter Committee Report] (testimony of Rev. Augustus W. Loomis) ("These women have not generally or to any considerable extent come to California of their own choice. . . . It is believed that very many of these unfortunate women would abandon the places where they are kept if opportunity was afforded them.").

90. Cott, *supra* note 5, at 137.

91. Committee Report, *supra* note 89, at 146-48 (statement of Alfred Clarke, Clerk at the San Francisco Police Department).

lies, as well as males."⁹² Coolies and citizens were antithetical: A person willing to submit him or herself to a system of slavery could not adequately participate in a democracy. In arguing that the Chinese made poor citizens, Representative Higby listed not only their failure to learn English, unusual religious practices, and refusal to assimilate, but, most tellingly, Higby focused on their treatment of women as prostitutes:

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. You cannot make citizens of them.⁹³

Chinese culture, then, was believed to condone a form of slavery that was antithetical to American notions of marriage and consent. This culture had almost biological roots in the Chinese race;⁹⁴ their "servile disposition" was "inherited from ages of benumbing despotism."⁹⁵ This ideal of slavery was made manifest in the figure of the Chinese prostitute. Prostitution, like coolie labor, was seen as analogous to slavery.

Like prostitution, polygamy was also linked to slavery. As early as 1856, when the Republican national convention adopted a platform calling for the abolition of both polygamy and slavery in the Western territories, the two practices were referred to as the "twin relics of barbarism."⁹⁶ Indeed, the analogy between slavery and polygamy was a "deep, almost literal, equation" because slavery as practiced in the South before the Civil War often was a type of polygamy, which "gave white masters free sexual access to a virtual harem of black women slaves."⁹⁷ No woman, antipolygamists argued, could actually consent to a "system as fundamentally contrary to her interests as polygamy"⁹⁸ (just as no woman would consent to prostitution). One Indiana congressman proposed that the

92. Cornelius Cole: The Senator Interviewed by a *Chronicle* Reporter, S.F. Chron., Oct. 23, 1870, at 1 (on file with the *Columbia Law Review*) [hereinafter Cole Interview].

93. Cong Globe, 39th Cong., 1st Sess. 1056 (1866) (statement of Rep. Higby); see also Cong. Globe, 40th Cong., 3d Sess. 1032 (1869) (statement of Sen. Conness) ("I suppose it will not be gainsayed by any person who is acquainted with the Chinese character and population that not one in ten thousand of them has any capacity whatever for American citizenship.").

94. Although the term "Chinese" is used to refer both to the nationality and the Han ethnic group, nineteenth-century Americans did not see such a distinction and consistently referred to the Chinese as a race (or as part of the "Mongolian" race). See Frank Dikötter, *Race in China*, in *A Companion to Racial and Ethnic Studies* 495, 495–96 (David Theo Goldberg & John Solomos eds., 2002).

95. Committee Report, *supra* note 89, at vi.

96. Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* 55 (2002); see also Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 Harv. L. Rev. 1359, 1366 & n.19 (1992) (citing Republican Party Platform of 1856, in *National Party Platforms 1840–1972*, at 27, 27 (Donald Bruce Johnson & Kirk H. Porter eds., 1973)).

97. Amar & Widawsky, *supra* note 96, at 1366.

98. Gordon, *supra* note 96, at 173.

Freedman's Bureau should protect Mormon plural wives, since they were indistinguishable from slaves.⁹⁹

Even where it existed independently from the nation's history of chattel slavery, as with the practice of polygamy by members of the Mormon church, polygamy appeared to be synonymous with slavery. The Mormon practice of polygamy outraged lawmakers, not only because it appeared to promote lasciviousness, but also because it created a form of despotism that extended beyond the family into the political realm:

As to polygamy, I admit, nay, I charge it to be a crying evil; sapping not only the physical constitutions of the people practicing it, dwarfing their physical proportions and emasculating their energies, but at the same time perverting the social virtues, and vitiating the morals of its victims. . . . It is often an adjunct to political despotism; and invariably begets among the people who practice it the extremes of brutal blood-thirstiness or timid and mean prevarication.¹⁰⁰

The antipolygamist movement inspired unprecedented federal action against the Mormon church. In 1862, Congress passed the Morrill Act for the Suppression of Polygamy.¹⁰¹ The Act was designed to attack the Mormon-controlled legal system in Utah by, among other things, outlawing polygamy in the territories.¹⁰² The Morrill Act, like the Page Law after it, represented a dramatic and unprecedented exercise of federal power.¹⁰³ The argument that polygamy was so threatening that it mandated the exercise of federal power to eradicate it resurfaced again the 1880s, with the proposal of a "United States marriage law" that would have implemented uniform divorce laws and prevented rogue states like Indiana and Utah (where polygamous marriages in particular led to high rates of divorce) from "sapping the nation's moral strength."¹⁰⁴

The Supreme Court itself endorsed the theory that polygamy led to political despotism in its opinion in *Reynolds v. United States*,¹⁰⁵ in which it upheld the provisions of the Morrill Act that made polygamy a crime. Citing the political scientist Francis Lieber, the Court classified polygamy as a type of slavery, one that "leads to the patriarchal principle, and

99. Cott, *supra* note 5, at 113.

100. Cong. Globe, 36th Cong., 1st Sess. 1514 (1860) (statement of Rep. McClelland).

101. Act of July 1, 1862 (Anti-Polygamy Act), ch. 126, 12 Stat. 501 (repealed 1910).

102. *Id.* § 1. The Act also annulled the Utah territorial legislature's incorporation of the Church of Jesus Christ of Latter-day Saints and prohibited any religious organization from owning real estate valued at more than \$50,000. *Id.* §§ 2-3.

103. As Professor Gordon has argued:

The federal government had never before assumed such supervisory power over structures of private authority. The Morrill Act was unprecedented, especially in light of the majority opinion in the *Dred Scott* case, which only five years before had invalidated attempts to ban slavery in the territories. . . . [F]ederal legislation on marriage was a prelude to action against slavery.

Gordon, *supra* note 96, at 81-82.

104. See *id.* at 177.

105. 98 U.S. 145 (1878).

which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy."¹⁰⁶ This understanding of polygamy as a form of slavery created such pressure on the Mormon church that it officially repudiated the practice in 1890.¹⁰⁷ When Utah was finally admitted to the Union as a state in 1894, it was admitted on the condition that "polygamous or plural marriages are forever prohibited."¹⁰⁸

The *Reynolds* court traced the origins of polygamy to, among others, the Chinese, explaining that "[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people."¹⁰⁹ The same understanding of polygamy influenced the debate over Chinese female immigrants. Even those who were sympathetic to the Chinese commented on their practice of polygamy:

Aside from prejudice, which proceeds from ignorance, there is nothing in the habits or customs of the Chinese calculated to injure the morals or business of any intelligent American community. . . . They are as religious, in their way, as the majority of the inhabitants of this city, and their system of marriage, if not in accord with our notions, is not worse than Mormonism and Free Love.¹¹⁰

Others were more vituperative in their identification of polygamy as an innate Chinese trait. The "yellow race; the Mongol race" were a "people to whom polygamy is as natural as monogamy is with us," stated one senator.¹¹¹ The tendency to engage in polygamy was, like prostitution, considered a racial trait, and its presence on the West Coast presented a challenge to Christian, monogamous marriage.¹¹² Lawmakers needed to find a way to keep Chinese women—the harbingers of disease and "moral death"¹¹³—out of the United States.

3. *The Threat of Reproduction.* — A slave-like nature in itself would have been bad enough, but Chinese women posed an additional threat not shared by men: the threat of reproduction. As long as Chinese men migrated alone, the argument went, they would eventually return home

106. *Id.* at 166.

107. Cott, *supra* note 5, at 120.

108. Act of July 16, 1894, ch. 138, § 3, 28 Stat. 107, 108.

109. *Reynolds*, 98 U.S. at 164.

110. H.C. Bennett, *The Chinese in California: Their Numbers and Influence*, Sacramento Daily Union, Nov. 27, 1869, at 8 (on file with the *Columbia Law Review*).

111. Cong. Globe, 39th Cong., 1st Sess. 2891 (1866) (statement of Sen. Cowan).

112. Francis Lieber, in an unsigned article in *Putnam's Monthly*, identified monogamy as "one of the elementary distinctions—historical and actual—between European and Asiatic humanity" and claimed that destroying monogamy would "destroy our very being; and when we say *our*, we mean *our* race." *The Mormons: Shall Utah Be Admitted into the Union?* 5 *Putnam's Monthly* 225, 234 (1855).

113. Cole Interview, *supra* note 92; see also *infra* text accompanying note 126.

to China to be with their families or die in the United States.¹¹⁴ If Chinese women migrated, however, a second generation of Chinese would be born.

Unlike their parents, the second generation would not be immigrants but citizens. Chinese immigrants could not be naturalized: When Congress amended the Naturalization Act of 1790, which had limited naturalization to whites,¹¹⁵ it deliberately denied the Chinese the right to naturalize, extending that right only to African Americans.¹¹⁶ But after the Fourteenth Amendment was ratified in 1868, "all persons born or naturalized in the United States" were citizens of the United States and the state in which they resided.¹¹⁷ American-born Chinese were therefore American citizens.¹¹⁸ While Chinese men were undesirable in that they provided competition for white labor, the addition of Chinese women provided an entirely new threat—a challenge to California's future as a white, Christian state.¹¹⁹

The threat of reproduction was not only a literal threat that children recognizable as racially Chinese would populate the West Coast, but also that a second generation would make possible the reproduction of Chinese culture. The Pacific coast, Congress announced in 1876, "must in time become either American or Mongolian."¹²⁰ Chinese immigrants must be denied citizenship, the argument went, because the "Mongolian race seems to have no desire for progress, and to have no conception of representative and free institutions."¹²¹ Denying the ballot to this "servile class" was "a necessary means to public safety."¹²²

Chinese women also posed a threat of miscegenation that would result in a weak, hybrid race. Nineteenth-century theories of race posited several distinct races, each with innate characteristics, and held that mixing these races would result in the degeneration of the superior race.¹²³

114. See Committee Report, *supra* note 89, at 103 (statement of Frank M. Pixley, esq., representing the City of San Francisco) (stating that Chinese laborers come to the United States "to earn a certain sum of money and return").

115. Act of Mar. 26, 1790 (Naturalization Act), ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795).

116. Act of July 14, 1870 (Naturalization Act), ch. 254, § 7, 16 Stat. 254, 256 (repealed 1952).

117. U.S. Const. amend. XIV, § 1.

118. The right of American-born persons of Chinese descent to American citizenship under the Fourteenth Amendment was ultimately confirmed in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

119. See Cott, *supra* note 5, at 135–38.

120. Committee Report, *supra* note 89, at v; see also *id.* at vii ("[T]heir number in California at the present time is so great that they could control any election if the ballot was put into their hands.").

121. *Id.* at v.

122. *Id.*

123. Cott, *supra* note 5, at 134–35 ("[W]hen 'lower' races intermingled with 'higher' ones, the tendency of the whole was to 'degenerate' to the lower type."); see also Megumi Dick Osumi, *Asians and California's Anti-Miscegenation Laws*, in *Asian and Pacific*

Although social norms¹²⁴ and, later, antimiscegenation laws¹²⁵ prevented Chinese immigrants from marrying whites, these laws did not prevent Chinese prostitutes from bearing children fathered by their white customers. Chinese women were threatening not only because they might reproduce with Chinese men but also because they could infect the white population by producing weak, hybrid progeny. This fear of infection and infiltration was expressed in literal terms in the language of disease. Senator Cornelius Cole, interviewed by the *San Francisco Chronicle*, linked Chinese women with both physical and moral disease as early as 1870:

[W]hen I look upon a certain class of Chinese who come to this land—I mean the females—who are the most undesirable of population, who spread disease and moral death among our white population, I ask myself the question, whether or not there is a limit to this class of immigrants?¹²⁶

American Experiences: Women's Perspectives 1, 7 (Nobuya Tsuchida ed., 1982) (explaining that nineteenth-century social scientists believed that American governmental institutions were "designed by and for Teutonic people" and would be weakened by "commingling" with Asians); Keith E. Sealing, Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation, 5 Mich. J. Race & L. 559, 567 (2000) ("[I]t was universally agreed that the addition of Black blood to White would degrade the White.").

124. In his testimony before the Joint Committee to Investigate Chinese Immigration in 1876, the Rev. Augustus W. Loomis, a prominent missionary, testified that most Chinese men did not marry white women:

There have been no more than four or five instances of Chinamen with white wives in San Francisco, to my knowledge, and in every case they have brought these wives with them from other places. Two or three married Irish women in New York and brought them here. One brought a white wife from the West Indies; one married in Australia; and we remember an instance of a Chinaman taking a half-Mexican woman and living with her at San Jose, and another who brought a half-breed woman from Peru. There has been no disposition to intermarry here in California.

Committee Report, *supra* note 89, at 457.

125. California passed an antimiscegenation law in 1850, Act of Apr. 22, 1850, ch. 140, § 3, 1850 Cal. Stat. 424, 424, then extended it in 1880 to target Asians. 1880 Acts Amendatory of the Codes of California 3 (prohibiting clerks from issuing "a license authorizing the marriage of a white person with a negro, mulatto, or Mongolian"); see also Volpp, *supra* note 5, at 802. Most other Western states passed antimiscegenation statutes targeting Asians in the years following. See, e.g., Act of Dec. 29, 1865, ch. 30, 1866 Ariz. Sess. Laws 58, 58 ("All marriages of white persons with negroes, mulattoes, Indians, or mongolians are declared illegal and void."), amended by Ariz. Rev. Stat. Ann. § 3092 (West 1901) (adding "and their descendents"); Act of Jan. 9, 1867, ch. 11, § 3, 1867 Idaho Sess. Laws 71, 72 ("All marriages of white persons with negroes, mulattoes, Indians or Chinese are declared to be illegal and void."); Mont. Code Ann. §§ 5701–5702 (1935) (repealed 1953) (referring to "Chinese person" and "Japanese person"); Act of Nov. 28, 1861, ch. 32, § 1, 1862 Nev. Stats. 93, 93 (making marriage between white man or woman and "black person, mulatto, Indian, or Chinese" a misdemeanor); Or. Rev. Stat. Ann. § 23-1010 (1940) (amended 1959) (barring whites from marrying "any person having one-fourth or more negro, Chinese, or Kanaka blood"); S.D. Codified Laws § 14.0106(4) (1939) (repealed 1959) (referring to "Korean" and "Mongolian races"); Utah Code Ann. § 40-1-2(6) (1943) (amended 1963) (referring to "Mongolian"); Wyo. Stat. Ann. § 68-118 (Michie 1931) (repealed 1965) (referring to "Mongolians").

126. Cole Interview, *supra* note 92.

Anti-Chinese animosity, then, was firmly rooted in fear of both the competition Chinese men posed to white labor, and of the regenerative and polluting power of Chinese women. Without women, Chinese men could be controlled. If women were allowed to immigrate, they would produce Chinese culture both literally and figuratively: by creating Chinese American children and by perpetuating Chinese culture. The culture they would perpetuate was a culture of hierarchy and slavery, antithetical to America's postwar self-image as a free nation based on principles of freedom of contract. Thus, lawmakers used the abolition of slavery to justify race-based discrimination against a new group—the Chinese. Chinese women were specifically targeted, first through the Californian statutes targeting “lewd or debauched women,”¹²⁷ and then by the federal Page Law itself.

II. IMMIGRATION LAW BEFORE THE PAGE LAW

California's anti-Chinese statutes were passed during a period in which courts had established Congress's sole authority over foreign affairs but Congress had failed to occupy the field. Although scholars such as Gerald Neuman have explored the state-based regulation of immigration prior to 1875,¹²⁸ and other scholars, such as Charles McClain, have noted that California passed anti-Chinese laws during the same time frame,¹²⁹ no one has examined the important role played by the statutes targeting Chinese women as prostitutes in California's struggle to retain state control over immigration. Just as Congress would later use the Page Law to evade the constraints of the Burlingame Treaty, California attempted to use antiprostitution laws to curb Chinese immigration by targeting women outside the protective sphere of marriage. The California Supreme Court was convinced by this distinction, and thus this strategy appeared to be effective until these laws were challenged in federal courts.¹³⁰

Part II.A first describes briefly the pre-Page Law history of state and federal immigration law. Part II.B then places the California anti-Chinese statutes, including those targeting Chinese women, within this context.

A. *The Struggle for Control: The Federal Commerce Power Versus the State Police Power*

There is no clear constitutional source for federal power over immigration; if anything the Framers appear to have expressly avoided including such a power in the Constitution. The Naturalization Clause gives Congress control over citizenship, not immigration.¹³¹ On a literal read-

127. 1873–1874 Acts Amendatory of the Codes of California § 70, at 39; see also *infra* notes 224–228 and accompanying text.

128. Neuman, *Strangers to the Constitution*, *supra* note 9, at 19–43.

129. McClain, *In Search of Equality*, *supra* note 8, at 9–42.

130. See discussion *infra* Part III.

131. U.S. Const. art. I, § 8, cl. 4.

ing, the Migration Clause might appear to be a compromise, supporting state control over immigration until 1808 and federal control thereafter.¹³² The Migration Clause is, however, “now commonly understood to refer only to the slave trade.”¹³³

Indeed, the federal government was relatively inactive in the immigration area until it passed the Page Law in 1875,¹³⁴ which marked the beginning of an onslaught of anti-Chinese legislation. Congress’s only previous foray into immigration law was the highly controversial Alien Enemies Act of 1798.¹³⁵ The Alien Enemies Act, along with its more famous companion, the Sedition Act,¹³⁶ was part of a package of legislation sponsored by the Adams administration targeting aliens and Jeffersonian Republicans.¹³⁷ The Alien Enemies Act established a compulsory registration requirement for foreign residents and authorized the President to deport “all such *aliens* as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof.”¹³⁸ Opponents, led by James Madison, questioned the power of the federal government to regulate immigration.¹³⁹ The Alien Enemies Act was allowed to lapse in 1800, and Congress took no more direct action to restrict immigration until it passed the Page Law.

In contrast, before the passage of the Page Law, the states took a front seat in regulating immigration.¹⁴⁰ Until recently, however, state laws controlling immigration were not viewed by most legal scholars as “immigration” laws at all, because they applied equally to citizens of other states and immigrants from other countries.¹⁴¹ A state’s interest in excluding certain classes of undesirable residents—such as criminals or paupers—could be used to regulate any outsider, whether from across

132. Id. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight. . .”).

133. Cleveland, *supra* note 9, at 81–82. This consensus is largely based on the Supreme Court’s holding in *New York v. Compagnie Générale Transatlantique* that “[t]here has never been any doubt that this clause had exclusive reference to persons of the African race.” 107 U.S. 59, 62 (1883).

134. Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974).

135. Act of June 25, 1798 (Alien Enemies Act), ch. 58, 1 Stat. 570 (expired 1870).

136. Act of July 14, 1798 (Sedition Act), ch. 74, 1 Stat. 596 (expired 1801).

137. Cleveland, *supra* note 9, at 88.

138. Alien Enemies Act § 1.

139. See Cleveland, *supra* note 9, at 94–98; see also James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* 421 (1956) (alleging that Madison’s opposition to the Sedition Law grew out of a view that the government had become a master as opposed to servant of the people); David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 989 (2002) (tracing treatment of foreigners as subversive to Alien and Sedition Acts, which were inspired by fears that French radicalism might take root in the United States).

140. For a more detailed analysis of the tension between state and federal power during this period, see Cleveland, *supra* note 9, at 81–112.

141. Neuman, *Strangers to the Constitution*, *supra* note 9, at 20.

the world or from the state next door.¹⁴² Gerald Neuman has demonstrated that these state laws functioned as immigration laws, refuting the long-held belief that, prior to 1875, the United States essentially had open borders.¹⁴³

Unlike the current federal immigration scheme, these laws did not focus on regulating *numbers* of immigrants by nationality; rather, they were intended to protect states from undesirable *classes* of immigrants.¹⁴⁴ The laws most commonly enacted by states to control immigration were laws regulating the migration of paupers and convicts. State regulation of paupers stemmed from the English poor laws, which required local communities to provide relief to poor people who settled in them.¹⁴⁵ The corollary to this obligation to provide relief was the power to exclude. For example, a 1794 Massachusetts poor law imposed a penalty on any person who knowingly brought a pauper or indigent person into any town in the Commonwealth and left him there and required removal of the pauper "to any other State, or to any place beyond sea, where he belongs."¹⁴⁶ Other laws required vessel owners to post bond for migrants arriving by sea if they were likely to become public charges or return them to their port of embarkation.¹⁴⁷ Following the Revolutionary War, several states instituted prohibitions on the importation of convicts in an attempt to prevent England from resuming its colonial practice of banishing convicts and sending them to America.¹⁴⁸ While restrictions on paupers and convicts were the most widespread state immigration regulations, there were several other important categories as well. Immigrants arriving by vessel were subject to state quarantine laws.¹⁴⁹ Some states prohibited the importation of slaves; and many slave states notoriously prohibited the migration of free blacks.¹⁵⁰

State laws regulating immigration did not go unchallenged. In 1837, the Supreme Court reviewed a state law burdening the importation of paupers and criminals in the famous case of *Mayor of New York v. Miln*.¹⁵¹ In *Miln*, the Court upheld a New York law that required the master of any

142. *Id.* at 19–43; cf. Motomura, *Curious Evolution*, *supra* note 9, at 1626 (stating that "[i]mmigration law," if defined as "the federal law governing the admission and expulsion of aliens," did not exist until 1875).

143. Neuman, *Strangers to the Constitution*, *supra* note 9, at 20.

144. *Id.*

145. *Id.* at 23.

146. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 *Colum. L. Rev.* 1833, 1848–49 (citing Act of Feb. 11, 1794, ch. 8, §§ 10, 13, 15, 1794 Mass. Acts 347).

147. Neuman, *Strangers to the Constitution*, *supra* note 9, at 25, 27. For a detailed analysis of Massachusetts's use of poor laws to discriminate against aliens, see Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 *Law & Hist. Rev.* 583 (2001).

148. Neuman, *Strangers to the Constitution*, *supra* note 9, at 21.

149. *Id.*

150. *Id.* at 34–40.

151. 36 U.S. (11 Pet.) 102 (1837).

ship arriving in New York harbor to report passenger information and post bonds for passengers who might become poor (and hence a financial burden to the state).¹⁵² Writing for the majority, Justice Barbour upheld the statute as a valid exercise of the state police power; it was a measure “against the moral pestilence of paupers, vagabonds, and possibly convicts” and the “evil of thousands of foreign emigrants arriving there.”¹⁵³ Justice Thompson’s concurrence relied both on the state police power and the state commerce power.¹⁵⁴ The lone dissenter, Justice Story, was ahead of his time: He would have held that the federal government alone had exclusive power under the Commerce Clause to regulate immigration.¹⁵⁵ The Court ultimately adopted this stance almost forty years later in *Chy Lung*.¹⁵⁶ In *Miln*, though, even Justice Story agreed that states had the right to “prevent the introduction of paupers into the state” under their police power.¹⁵⁷

The Supreme Court took a step toward making immigration law exclusively federal in 1849. This step was not particularly decisive, however, and was not followed up with congressional action. In the *Passenger Cases*, the Supreme Court struck down head taxes imposed by New York and Massachusetts that were not designed to protect the states against passengers likely to become public charges.¹⁵⁸ The Court struck down the statutes not because they regulated immigration per se, but because they regulated foreign commerce.¹⁵⁹ States, the Court was careful to note, could still “guard against the introduction of any thing which may corrupt the morals, or endanger the health or lives of their citizens.”¹⁶⁰ Thus, states could pass quarantine laws, regulate imports and exports, or exercise their police powers.¹⁶¹

The *Passenger Cases* could have marked a pivotal moment in immigration law. Although the opinion is fractured, with a bare majority of five writing a variety of opinions expressing different theories for the scope of the power, each of the Justices in the majority emphasized the commercial nature of taxing passengers from other lands, and claimed such “commerce” as a federal right.¹⁶² Yet even after the *Passenger Cases*, states continued to enact legislation that effectively controlled immigration—

152. *Id.* at 143.

153. *Id.* at 141–42.

154. *Id.* at 143–53.

155. *Id.* at 155–60.

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

157. 36 U.S. (11 Pet.) at 156. Justice Story repeated this view in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), a case challenging Pennsylvania’s Fugitive Slave Act. Writing for the majority, Story concluded that Pennsylvania’s police power included the right to arrest and restrain runaway slaves and “remove them from its borders,” just as it included the right to arrest, restrain, and remove “idlers, vagabonds, and paupers.” *Id.* at 542–43.

158. *Smith v. Turner (Passenger Cases)*, 48 U.S. (7 How.) 283, 283–86 (1849).

159. *Id.* at 395–97.

160. *Id.* at 400.

161. *Id.* at 400–01.

162. *Id.*

albeit statutes that were struck down as encroaching on Congress's commerce power—and the federal government failed to occupy the field. Thus, while the Supreme Court expressed the idea that control over immigration was exclusively federal prior to its holding in *Chy Lung*, it was not until the events surrounding the Page Law that the principle became unequivocal. States, accustomed to passing laws that were de facto immigration laws, continued to pass them throughout the pre-1875 period, sometimes successfully. The laws attempting to exclude the Chinese from California and the West during this period were passed by states, not by the federal government. And when these statutes were persistently struck down by the California Supreme Court, the California legislature turned to the strategy of regulating the migration of Chinese women.

B. *Laws Affecting Chinese Immigration Before the Page Law*

1. *Congress's Limited Involvement in Immigration.* — Even though the Supreme Court announced a federal power over immigration in the *Passenger Cases*, Congress did not restrict immigration until it passed the Page Law nearly twenty-five years later. Federal involvement in immigration did begin to grow, however, during these years. Two acts of Congress were particularly important. The first statute, an 1862 act regulating the Chinese coolie trade to Cuba,¹⁶³ was not an immigration restriction, but nevertheless affected immigration to the United States. The second, “An Act to encourage Immigration,” passed in 1864, began to put into place the system that would become a vast immigration bureaucracy in much later years.¹⁶⁴

The first law, entitled “An Act to prohibit the ‘Coolie Trade’ by American Citizens in American Vessels,” has received scant attention from legal scholars, and those who do mention it usually describe it inaccurately as a law restricting Chinese immigration to the United States.¹⁶⁵

163. Act of Feb. 19, 1862 (Coolie Trade Prohibition Act), ch. 27, 12 Stat. 340 (repealed 1974).

164. Act of July 4, 1864 (Immigration Act of 1864), ch. 246, 13 Stat. 385.

165. Most scholars overlook the Act altogether. See, e.g., Chen, *supra* note 11; Cott, *supra* note 5; Hing, *supra* note 9; Pepper, *supra* note 10; Salyer, *supra* note 9; Chan, *supra* note 10; Hirata, *supra* note 10; Motomura, *Immigration Law*, *supra* note 8; Schuck, *supra* note 8. Kim gives the Act brief treatment in his book. Kim, *supra* note 9, at 49–50. Several scholars briefly mention the Act, often in a footnote, and misdescribe it as an immigration law. See Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 Harv. C.R.-C.L. L. Rev. 1, 10 (2002) (describing Act as “intended to prevent the importation of ‘Coolies’”); Cleveland, *supra* note 9, at 114 (describing the Act as a prohibition on “involuntary Asian immigration” and as a manifestation of “[a]nti-Chinese sentiment” at the “national level”); Fehlings, *supra* note 9, at 112 (describing the Act as “prohibiting the importation of indentured labor from China”); Henkin, *supra* note 9, at 856 n.12 (describing Act as “legislated to ensure that immigration from China and other ‘Oriental’ countries was voluntary on the part of immigrants”); Charles J. McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 Cal. L. Rev. 529, 537 n.38 (1984) (describing the Act as “prohibiting the importation of coolie labor”). It is clear from the legislative history of the Act that it was

On the contrary, the Act was passed to prohibit Americans from dealing in the slave trade between China and Cuba. Although the trade was illegal under British law, Congress believed that laws of foreign countries would do little to deter Americans from participating in the trade. "Keep the fact secret," warned Representative Eliot in presenting the bill before the House, "let nobody know of it, and there will be found plenty of American men who will be willing to run all kinds of risks of confiscation and seizure under foreign laws so long as their own Government takes no notice of the trade."¹⁶⁶ Tolerating American involvement in the trade was unacceptable, for it looked far too reminiscent of the African slave trade, the legacy of which was still haunting the Union.¹⁶⁷ The statute rectified this problem, making it illegal for Americans to participate in the Chinese coolie trade and allowing the United States government to seize any ships involved in the trade.¹⁶⁸

The Coolie Trade Prohibition Act was passed at the height of the Civil War, and Congress's concern about the evils of slavery is evident from its legislative history. In its initial draft, the bill clearly covered only involuntary servitude, not voluntary indentured servitude, defining the "coolie trade" as transportation of Chinese "against their will and without their consent."¹⁶⁹ Once the bill was passed by the House, however, it was presented to the Senate, and the Senate proposed an amendment that erased the distinction between voluntary and involuntary servitude.¹⁷⁰ The Senate's amendment to the bill struck the language in the bill's first section defining the "coolie trade" as transportation of Chinese "against their will and without their consent."¹⁷¹ *All* coolie trade should be abolished, the Senate Commerce Committee reasoned, not only involuntary trade, because it was difficult to distinguish between slavery and indentured servitude. "[P]ersons of this description," explained Senator Ten Eyck, "being, as is well known, an inferior race," should not be "transported from their homes and sold, under any circumstances."¹⁷² Just as no "negro should be brought from the coast of Africa to be sold with or without his consent," neither should a Chinese person.¹⁷³ The problem was that consent was impossible to determine, as immigrants could be

aimed not at prohibiting importation of Chinese slaves to the United States but at banning American involvement in the trade of slaves between China and Cuba. See Cong. Globe, 37th Cong., 2d Sess. 350-52 (1862).

166. Cong. Globe, 37th Cong., 2d Sess. 350.

167. Representative Eliot's presentation to the House of Representatives gave detailed descriptions of conditions on Chinese slave ships, the means by which Chinese laborers were duped into migrating, and the prices paid for them upon arrival in Cuba, all in an effort to demonstrate that the coolie trade, "this most iniquitous slave trade of the nineteenth century," was a new permutation of the African slave trade. See *id.* at 350-52.

168. *Id.* at 350.

169. *Id.* at 555 (statement of Sen. Ten Eyck).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 556.

"subjected to the influences which may be brought to bear upon them," such as duress and frauds.¹⁷⁴ This concern that a person—especially a non-white person or a woman, who was perceived as weak or helpless—could not consent to slavery was revisited in later debates concerning prostitution.¹⁷⁵

The law as it was finally passed outlawed all coolie labor—both slavery and indentured servitude, involuntary and voluntary.¹⁷⁶ Only "free and voluntary emigration"—emigration that did not involve any indenture—was allowed.¹⁷⁷ Even though it was not an act restricting immigration, the Coolie Trade Prohibition Act did have legal consequences for Chinese immigrants. Because the Act held American shipowners liable for transporting any involuntary Chinese on their vessels, they were required to obtain a consular certificate before leaving Hong Kong, attesting that the emigrants were not under a service of contract.¹⁷⁸ In addition, the Hong Kong consul himself certified that each of the passengers was a "free and voluntary emigrant[.]"¹⁷⁹ And section 4 of the Act, articulating the exception for "free and voluntary migration" from China, was later interpreted as a congressional mandate to encourage Chinese immigration to the United States.¹⁸⁰

The requirement that Chinese migrants be "free and voluntary" might have been understood as banning the "credit-ticket" system that most Chinese laborers used to travel to the United States. Under the credit-ticket system, Chinese laborers were not technically indentured servants. Rather than accepting a fixed term of years of indentured servitude, they were at least in theory paying back the cost of their transportation to the United States out of their wages.¹⁸¹ This practice, however, could be abused, and the Chinese coming to America might have appeared indistinguishable from voluntary coolies migrating to places such as Hawai'i or Cuba. Indeed, in California and elsewhere, Chinese immigrants were commonly referred to as "coolies," even though their migration was voluntary.¹⁸²

174. *Id.*

175. See discussion *infra* Parts II.B.2, III.A.

176. The House approved the amendment on February 14, 1862, and President Lincoln signed it into law on February 20. *Journal of the House of Representatives*, 37th Cong., 2d Sess. 312, 330 (1861).

177. Act of Feb. 19, 1862 (Coolie Trade Prohibition Act), ch. 27, § 4, 12 Stat. 340, 341 (repealed 1974).

178. Record at 61, *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (No. 478).

179. *Id.* at 61–62. The Certificate expressly states that it is "done in conformity with the provisions of the act of Congress, entitled 'An act to prohibit the coolie trade by American citizens in American vessels,' approved February 19th, 1862." *Id.*

180. See, e.g., *Lin Sing v. Washburn*, 20 Cal. 534, 546 (1862). There, appellant Lin Sing challenged an 1862 California Chinese Police Tax on the theory that section 4 of the federal Act signified "direct authorization and invitation to all subjects of the Chinese Empire, who see fit of their free will to come to the United States, to do so." *Id.*

181. See discussion *supra* Part I.A.

182. See discussion *supra* Part I.A.

If there was any question that Chinese migrating voluntarily to California under the credit-ticket system did not flout the Coolie Trade Prohibition Act, Congress made it clear in the Immigration Act of 1864 and in its ratification of the 1868 Burlingame Treaty that it planned to do nothing to discourage Chinese immigration. In the Immigration Act of 1864, Congress officially approved the credit-ticket system.¹⁸³ Section 2 of the law approved contract labor immigration where immigrants entered into wage contracts of up to one year to pay back their transportation costs, and expressly distinguished this practice from "slavery or servitude."¹⁸⁴ So while it was illegal for Americans to participate in the "Coolie Trade," it was legal, even encouraged, for Chinese to immigrate to the United States using the credit-ticket system. The 1864 Act also put into place the basic regulatory apparatus, creating the office of Commissioner of Immigration, and also establishing an office in New York known as the United States Emigrant Office, run by a Superintendent of Immigration.¹⁸⁵

In addition to passing these two statutes, in 1868 Congress ratified the Burlingame Treaty, recognizing the "inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects . . . from the one country to the other, for purposes of curiosity, of trade, or as permanent residents."¹⁸⁶ Under the treaty, the Chinese were to have the same "privileges, immunities, or exemptions in respect to travel or residence as may . . . be enjoyed by the citizens or subjects of the most favored nation."¹⁸⁷ The treaty was ratified during a period when the United States sought to play a greater role in international trade¹⁸⁸ and to encourage cheap immigrant labor.¹⁸⁹ Thus, while Congress did nothing in the years between the *Passenger Cases* and the passage of the Page Law to *directly* restrict immigration—and indeed it passed laws encouraging it—Congress did set forth some boundaries of acceptable Chinese immigration. Immigration under the credit-ticket system was acceptable; indentured servitude, whether voluntary or involuntary, was not, and the Chinese, like all people, had an "inherent and inalienable right" to migrate.

2. *California's Anti-Chinese Statutes.* — The anti-Chinese forces in California during the pre-Page Law years of Chinese immigration were in an

183. Act of July 4, 1864 (Immigration Act of 1864), ch. 246, § 2, 13 Stat. 385, 386 (repealed 1868).

184. *Id.* § 2.

185. *Id.* §§ 1, 4.

186. Burlingame Treaty, *supra* note 4, art. V, 16 Stat. at 740.

187. *Id.* art. VI, 16 Stat. at 740.

188. Committee Report, *supra* note 89, at 35–36 (statement of F.A. Bee, esq., representing the Chinese Six Companies) (explaining that the purpose of the Burlingame Treaty was to open up the Far East to direct trade rather than trading through English merchants).

189. LaFeber, *supra* note 33, at 150.

awkward position. According to the *Passenger Cases*, a state's previously expansive power to control immigration had been significantly curtailed.¹⁹⁰ Officially, the only power California could use to control Chinese immigration was its "state police power"—its power to exclude or regulate the migration of "paupers, idiots, or convicts."¹⁹¹ Yet the federal government did nothing to control immigration during this period, making its "power" over immigration useless to the anti-Chinese movement. If anything, as discussed above, the federal government was encouraging Chinese immigration. California responded with increasingly sophisticated attempts to exercise state power without trammeling on the federal government's commerce power. This strategy culminated in the 1870s with the passage of laws targeting Chinese women.

California's first anti-Chinese laws focused on miners, as most Chinese men worked in mines in the early years of Chinese immigration.¹⁹² In 1850, California passed the Foreign Miners' Tax Law, requiring all foreign miners ineligible for U.S. citizenship (i.e., miners who were Chinese) to pay a monthly tax of twenty dollars.¹⁹³ After the miner legislation, the California legislature became more ambitious. In 1855, a law was passed permanently fixing the rate of the tax at four dollars per month for all foreigners eligible to become citizens of the United States; but raising it two dollars per year for all foreigners ineligible to become citizens.¹⁹⁴ Also in 1855, California passed a Passenger Tax Act, which imposed a tax of fifty dollars on "every person arriving in this State by sea, who is incompetent to become a citizen" (most vessels containing passengers ineligible for citizenship were Chinese).¹⁹⁵ This law was struck down by the California Supreme Court in *People v. Downer* as an unconstitutional encroachment on the federal commerce power under the standard articulated in the *Passenger Cases*.¹⁹⁶

In litigating the *Downer* case, California made no effort to hide that the purpose of the Passenger Tax Act was to "discourage the immigration" of the Chinese.¹⁹⁷ This purpose, the state argued, was well within its state police power, for this power authorized it to do "whatever is requisite to protect the health, morals, lives, and property of [its] citizens, as by preventing crime or pauperism, or any other moral or physical evil."¹⁹⁸

190. *Smith v. Turner (Passenger Cases)*, 48 U.S. (7 How.) 282, 458 (1849).

191. *Id.*

192. For a discussion of the anti-Chinese movement among white miners, see Kim, *supra* note 9, at 47-49.

193. *Id.* at 47. Oregon passed a similar law in 1858 requiring Chinese miners and merchants to obtain monthly, four-dollar licenses. Hing, *supra* note 9, at 21.

194. Act of Apr. 30, 1855, ch. 174, 1855 Cal. Stat. 216 (repealed 1856); see Lin Sing v. Washburn, 20 Cal. 534, 536 (1862).

195. Act of Apr. 28, 1855, ch. 153, 1855 Cal. Stat. 194 (repealed 1955); *People v. Downer*, 7 Cal. 169, 170 (1857).

196. 7 Cal. at 170.

197. *Id.*

198. *Id.*

The state compared the immigration of "persons incompetent to become citizens" with immigration of free blacks.¹⁹⁹ If the state police power gave Southern states the authority to restrict the migration of free blacks, the logic went, why could not California restrict the migration of the Chinese?

But in *Downer*, the California Supreme Court found that the *Passenger Cases* clearly controlled, and invalidated the fifty-dollar head tax.²⁰⁰ This result was unsurprising: Not only did the statute strongly resemble those at issue in the *Passenger Cases*, but a fifty-dollar head tax on each Chinese immigrant would seriously burden vessel owners. Indeed it was shipping companies, and not the Chinese, who were the defendants in the case: The owners of the ship *Stephen Baldwin* owed the state \$12,750 in taxes on 250 Chinese passengers.²⁰¹ In addition, anti-Chinese sentiment in California had not yet fully coalesced in 1857. Many whites, including prominent San Francisco merchants and the state commissioner of immigrants, still supported Chinese immigration at this point and protested the Passenger Tax Act.²⁰² The court's decision can be read just as easily to protect their interests as the interests of the Chinese. As animosity toward the Chinese continued to grow, however, the *Downer* case became a sticking point for the legislature. Once regulation of the Chinese could not be analogized with regulation of free blacks under the state police power, California sought a new way of regulating Chinese immigration: taxing Chinese *residents*, not just Chinese *immigrants*.²⁰³

In 1862, California passed a statute clearly aimed at propping up white labor and taxing the Chinese. Formally entitled, "An act to protect free white labor against competition with Chinese coolie labor, and discourage the immigration of the Chinese into the State of California," the law was informally known as the "Chinese Police Tax."²⁰⁴ The law taxed "each person, male and female, of the Mongolian race" over the age of eighteen and residing in California a sum of \$2.50 per month.²⁰⁵ Exceptions were made for Chinese who were already paying monthly mining or business taxes or who were involved in producing sugar, rice, coffee, or tea—Chinese who were not competing with whites for jobs.²⁰⁶

199. *Id.* at 171.

200. *Id.* at 172.

201. *Id.* at 170.

202. See McClain, In Search of Equality, *supra* note 8, at 18.

203. It appears that the state legislature made one more pass at an exclusion law before turning to taxes on Chinese residents. In 1858 California passed a statute entitled "An act to prevent the further immigration of Chinese or Mongolians to this State." Act of Apr. 26, 1858, ch. 529, 1858 Cal. Stat. 295 (repealed 1955). An attempt was made to enforce the law, but the California Supreme Court declared it unconstitutional and void in an unpublished opinion. See *Lin Sing v. Washburn*, 20 Cal. 534, 538 (1862).

204. Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (repealed 1939); see *Lin Sing*, 20 Cal. at 536.

205. Act of Apr. 26, 1862 § 1.

206. *Id.*

A Chinese man challenged the law and succeeded in getting it struck down by the California Supreme Court.²⁰⁷ Justice Cope, writing for the court, expressed the same set of concerns that would be articulated fourteen years later by the United States Supreme Court in *Chy Lung*.²⁰⁸ California's hatred for the Chinese, Cope reasoned, could prove so destructive as to have national effects: It could "obstruct and block up the channels of commerce, laying an embargo upon trade, and defeating the commercial policy of the nation."²⁰⁹ Significantly, the court left untouched the state's power to "exclude obnoxious persons, such as paupers and fugitives from justice."²¹⁰ The Chinese Police Tax did not fall under such a power because "it nowhere appears that the Chinese as a class are of that description; nor does the act pretend to deal with them as such."²¹¹ In other words, competition for labor dealt with commerce, a federal concern. Protection against "obnoxious persons" was still firmly within the state's police power.

California responded to this challenge with two immigration laws targeting Chinese women and one targeting Chinese criminals and coolie laborers. Taxes on Chinese laborers were clearly not working: The Supreme Court of California continually struck down this type of legislation as an impermissible encroachment on the federal commerce power. Instead, California attempted to fit the Chinese into the categories that California could regulate through its state police power. The categorization of Chinese women as sexually immoral and outside the category of "proper wife" was an important piece of this strategy.

California first targeted Chinese women by passing a law entitled "An Act to prevent the kidnapping and importation of Mongolian, Chinese and Japanese females, for criminal or demoralizing Purposes," in 1870.²¹² In drafting the Anti-Kidnapping Act, the legislature attempted to fit the regulation of Chinese women into the increasingly narrow state police power. The preamble read as follows:

Whereas, the business of importing into this State Chinese women for criminal and demoralizing purposes has been carried on extensively during the past year, to the scandal and injury of the people of this State, and in defiance of public decency; and whereas, many of the class referred to are kidnapped in China, and deported at a tender age, without their consent and against their will; therefore, in exercise of the police power appertaining to every State of the Union, for the purpose of remedying the evils above referred to and preventing further wrongs of the

207. *Lin Sing*, 20 Cal. at 536.

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

209. *Lin Sing*, 20 Cal. at 577.

210. *Id.* at 578.

211. *Id.*

212. Act of Mar. 18, 1870, ch. 230, 1870 Cal. Stat. 330, 330-31.

same character, The People of the State of California, represented in Senate and Assembly, do enact as follows²¹³

The California legislature was ostensibly protecting through its police power at least two classes of people: the general citizenry, who were subjected to "scandal and injury," and the prostitutes themselves, who were "kidnapped . . . without their consent and against their will."

While the law was couched as an exercise of the police power, however, its text made it clear that it was exercising this power through the regulation of immigration. Section 1 required any Asian woman seeking to land in California to obtain a license confirming her voluntary desire to migrate and that she was a "good person of correct habits and good character":

It shall not be lawful . . . to bring or land from any ship, boat or vessel into this State, any Mongolian, Chinese, or Japanese females . . . without first presenting to the Commissioner of Immigration evidence satisfactory to him that such female desires voluntarily to come into this State, and is a good person of correct habits and good character, and thereupon obtaining from such Commissioner of Immigration a license or permit particularly describing such female and authorizing her importation or immigration.²¹⁴

The aspiring immigrant, then, had to demonstrate two conditions to obtain a license from the Commissioner if she was an Asian female. First, she had to be immigrating voluntarily, and second, she had to be a "good person of correct habits and good character." This two-prong test got at the difficult problem of kidnapping and forced prostitution: It was highly possible that women of "correct habits and good character" were nevertheless being duped into migrating for purposes of prostitution. One way to check for this, theoretically, would be to restrict immigration to women who were migrating voluntarily. Anticipating the language of the federal Page Law five years later, the 1870 law used the categorization of Chinese women as presumptive prostitutes to achieve its aim. The burden was on the immigrant to convince the Commissioner of Immigration "to his satisfaction" that she was of good character—otherwise she could be turned away.²¹⁵

On the same day, the California legislature also passed a companion act targeting male coolie labor. This statute, entitled "An Act to prevent the importation of Chinese criminals and to prevent the establishment of Coolie slavery," appears to have been an attempt by California to impose stiffer immigration standards on Chinese laborers than those imposed by Congress.²¹⁶ The federal Coolie Trade Prohibition Act required only that Chinese migrants traveling on American ships convince the Ameri-

213. *Id.*

214. *Id.* § 1.

215. *Id.*

216. Act of Mar. 18, 1870, ch. 231, 1870 Cal. Stat. 332.

can consul in Hong Kong that they were doing so voluntarily.²¹⁷ The new California statute required that Chinese laborers must demonstrate to the California Commissioner of Immigration upon arrival not only that they were voluntarily immigrants, but also that they were "persons of correct habits and good character."²¹⁸

Like the Anti-Kidnapping Act, the Anti-Coolie Act justified itself as an exercise of the state police power, but it is clear from the language of the statute that the underlying concern was the competition presented by Chinese labor. "Criminals and malefactors," the preamble stated, "are being constantly imported from Chinese seaports" and these criminals' "depredations upon property entail burdensome expense upon the administration of criminal justice in this State."²¹⁹ The importation of these "criminals" was not only harming the property of citizens, it was also establishing "a species of slavery . . . which is degrading to the laborers and at war with the spirit of the age."²²⁰ The "crime" committed by these immigrants appears to have been the deflation of wages.

Both the 1870 Anti-Kidnapping Act and the 1870 Anti-Coolie Act made participation in the importation of Chinese criminals, coolies, or immoral women a misdemeanor, punishable by a fine of \$1,000-\$5,000 or a prison term of two to twelve months.²²¹ It appears that the Anti-Kidnapping Act at least began to be enforced against Chinese women almost immediately: One newspaper account reports that twenty-nine female passengers were turned away from the Port of San Francisco on June 14, 1870.²²²

The 1870 Anti-Kidnapping Act was amended at least twice²²³ and eventually became part of California's general immigration law.²²⁴ This law enumerated a list of certain classes of immigrants who had to be reported to the state immigration commissioner by ship captains arriving in California and required ship captains or vessel owners to post \$500 bonds for the "relief, support, medical care, or any expense whatever, resulting from the infirmities or vices" of each such passenger.²²⁵ Before 1874, the classes of passengers requiring such a bond included passengers who were

lunatic, idiotic, deaf, dumb, blind, crippled or infirm, and . . .
not accompanied by relatives who [we]re able and willing to
support him, or [were] likely to become permanently a public

217. Act of Feb. 19, 1862 (Coolie Trade Prohibition Act), ch. 27, § 4, 12 Stat. 340, 340 (repealed 1974).

218. Act of Mar. 18, 1870, ch. 230, § 1.

219. *Id.*

220. *Id.*

221. *Id.* § 2; Act of Mar. 18, 1870, ch. 231, § 2.

222. See Peffer, *supra* note 10, at 33 (citing *Arrival of the Great Republic*, *Alta Cal.*, Jun 15, 1870, at 1).

223. Chan, *supra* note 10, at 98-99.

224. 1873-1874 Acts Amendatory of the Codes of California § 70, at 39.

225. *Id.*

charge, or ha[d] been a pauper in any other country . . . or [was], from sickness or disease, existing either at the time of sailing from the port of departure, or at the time of his arrival in this State, a public charge²²⁶

With the 1874 amendment, this list was broadened to include any passenger who was a "convicted criminal" or a "lewd or debauched woman."²²⁷

It is unclear why the 1870 law was amended. Unlike the 1870 law, the 1874 law was one of general application. In theory, "lewd or debauched" women sailing from any port, domestic or foreign, would be covered by the law.²²⁸ The amendment may have been an attempt to disguise the law's racial targeting of Chinese women or to step up regulation of all prostitution, although in practice, it was still Chinese women who were targeted.²²⁹ Or it may have been an attempt to hide the unusual nature of the law. By adding the category "lewd or debauched woman" to a laundry list of classes of immigrants commonly regulated by states, the law attempted to fit the exclusion of "lewd or debauched" women within the state's police power.

In any case, like the "correct habits and good character" language of the 1870 Act, the language of the amended 1874 law was extremely vague. The law made no distinction "between the woman whose lewdness consists in private and unlawful indulgence, and the woman who publicly prostitutes her person for hire, or between the woman debauched by intemperance in food or drink, or debauched by the loss of her chastity."²³⁰ This language provided California immigration officials with extraordinary discretion to exclude Chinese women who did not fit within Western standards of marriage.

III. CALIFORNIA'S STRATEGY TESTED: THE "CASE OF THE TWENTY-TWO CHINESE WOMEN"

California's 1874 immigration law became the subject of a constitutional challenge. At first it appeared that the California legislature's strategy of targeting women was working: When the Chinese challenged the 1874 law in state court, the law was upheld under the state police power.²³¹ But the law was struck down by Justice Field, riding circuit, in

226. *Id.*

227. *Id.*

228. *Id.*

229. See *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102). Also in 1874, California amended the 1866 Act for the Suppression of Chinese Houses of Ill Fame to strike the word "Chinese." Consequently, there appears to have been rising concern either about prostitution in general or about disguising the racial basis of antiprostitution laws. See Act of Feb. 7, 1874, ch. 65, § 1, 1873 Cal. Stat. 84, 84.

230. *In re Ah Fong*, 1 F. Cas. at 216.

231. *Ex parte Ah Fook*, 49 Cal. 402 (1874), *rev'd sub nom. Chy Lung v. Freeman*, 92 U.S. 275 (1876).

the federal court decision *In re Ah Fong*,²³² and then again by the United States Supreme Court in the landmark decision in *Chy Lung v. Freeman*,²³³ in which the Court firmly articulated the federal power over immigration through the Commerce Clause.

A. Detention Under the 1874 Law

In August 1874, the steamer *Japan*, sailing from Hong Kong, arrived in the port of San Francisco with five hundred passengers, eighty-nine of whom were women.²³⁴ The immigration commissioner for the State of California was Rudolph Norwin Piotrowski, a Polish immigrant who first came to California in 1849.²³⁵ When the *Japan* arrived in San Francisco, Piotrowski and his agents boarded the ship and examined each of the women, questioning them through an interpreter.²³⁶ Finding the testimony of twenty-two of the women to be "perfectly not satisfactory,"²³⁷ he concluded that they were lewd, debauched, or abandoned women within the meaning of the 1874 statute.²³⁸

The questions Commissioner Piotrowski asked the women to determine whether they were lewd, debauched, or abandoned all centered on the validity of their marriages. When asked to summarize his line of questioning, he explained:

The questions which I gave them were generally where they were married; if they had any relatives or companions when they came here; or why & by what means they came. All of them answered that they were married. I asked "Where is your husband?" In California. When did he come? 3 years. How long have you been married? 4 years ago. How are you going to find him? We don't know. Have you any papers to show? They all said they were married; one of them said they were married in China; others say in California."²³⁹

Women with children were permitted to land.²⁴⁰ Those without children, however, were suspect. Their lack of children, Piotrowski said, was "one of the principle reasons" he refused to let them land.²⁴¹ Piotrowski ordered the ship's captain, John H. Freeman, to detain the twenty-two women whom he had deemed "lewd or debauched."²⁴²

232. 1 F. Cas. at 218.

233. 92 U.S. 275.

234. *In re Ah Fong*, 1 F. Cas. at 214; Record at 9, *Chy Lung* (testimony of Capt. John H. Freeman).

235. Record at 4, *Chy Lung* (testimony of Rudolph Norwin Piotrowski).

236. *Id.* at 2 (testimony of Capt. John H. Freeman); *id.* at 4-5 (testimony of Rudolph Norwin Piotrowski).

237. *Id.* at 5 (testimony of Rudolph Norwin Piotrowski).

238. *In re Ah Fong*, 1 F. Cas. at 214.

239. Record at 6-7, *Chy Lung* (testimony of Rudolph Norwin Piotrowski).

240. *Id.* at 7.

241. *Id.*

242. Under the 1874 law, the women would only be able to land if their carrier, the Pacific Mail Steamship Company, put up a bond of \$500 for each of them. Otherwise, they

The detained women, through their lawyer, Leander Quint, petitioned the state district court for a writ of habeas corpus. The court issued the writ and transferred the case to the Fourth District Court in San Francisco.²⁴³ The lengthy transcript of the hearing is an important piece of the story of the shift from state to federal immigration, but it has been ignored by historians and legal scholars.²⁴⁴ The transcript reads like a precursor to the congressional hearings on the Page Law, and indeed, some of the witnesses were repeat players: Dr. Otis Gibson, a missionary, gave expert testimony at the California hearing and also provided remarkably similar testimony before Congress, as did another missionary, Ira Condit.²⁴⁵ Thus, the transcript of the California hearing reveals the earlier stages of a strategy to target Chinese women, a strategy that was later expanded on a national scale in Horace Page's presentation to Congress several months later.

The transcript is also important because it shows us how California's strategy of state enforcement of immigration worked in practice. California immigration officials were primarily concerned with separating Chinese women into two categories: prostitutes and proper wives. California used two forms of evidence to make its case. First, through cross-examination of the women, its lawyers attempted to elicit testimony that would call into question the women's marital status.²⁴⁶ The women were not questioned about whether they were prostitutes or, more generally, whether they were "lewd or debauched." Rather, they were questioned about their marriages, and if their answers failed to satisfy the court, they were deemed "lewd or debauched." Second, lawyers for the state brought in witnesses to identify, through an analysis of the women's clothing and demeanor, whether the women were wives or prostitutes.²⁴⁷ The assumption was that there was a strict dichotomy between wives and prostitutes—a dichotomy at variance with the more nuanced reality of Chinese cul-

would be returned to China. 1873–1874 Acts Amendatory of the Codes of California § 70, at 39.

243. *In re Ah Fong*, 1 F. Cas. at 214.

244. Although several historians detail the plight of these Chinese women in books or articles on the history of Chinese immigration, none discuss the transcript of the hearing. See, e.g., McClain, *In Search of Equality*, *supra* note 8, at 54–63; Chan, *supra* note 10, at 99–105.

245. Record at 17–23, *Chy Lung* (testimony of Dr. Otis Gibson); *id.* at 23–24 (testimony of Ira M. Condit).

246. See, e.g., *id.* at 9–10 (testimony of Lon Ying); *id.* at 12–13 (testimony of Ah Lin); *id.* at 13–14 (testimony of Di He); *id.* at 14–15 (testimony of Ah Fung); *id.* at 15–17 (testimony of Ah Oy); *id.* at 29–30 (testimony of Ah Fook); *id.* at 30–31 (testimony of Yunn Hee); *id.* at 31 (testimony of Sie May).

247. *Id.* at 17–23 (testimony of Dr. Otis Gibson); *id.* at 23–24 (testimony of Ira M. Condit); *id.* at 24–29 (testimony of Gaylos Woodruff); *id.* at 34–35 (testimony of Ah Yek); *id.* at 40 (testimony of Chung Fing); *id.* at 42–45 (testimony of Fang Hoy); *id.* at 45–46 (testimony of Fung Pak); *id.* at 46–47 (testimony of Chu Pou); *id.* at 47–48 (testimony of Ah Lak); *id.* at 48–49 (testimony of Ah Pay); *id.* at 49–50 (testimony of Yok).

ture.²⁴⁸ Proper wives dressed, looked, and behaved in one way, "lewd" women in another, and these were the only options.

B. *The Women's Testimony*

The first strategy was to examine the women (through an interpreter) to determine their marital identity. The examination of Di He was typical:

Q: Mr. Quint: What is your age?

A: 17.

Q: Are you married or single?

A: Married.

Q: Where is your husband living?

A: In this San Francisco.

Q: How long have you been married?

A: Since last year.

Q: Did you ever live in San Francisco before?

A: Only come this time.

Q: Then you never lived here before?

A: No, sir.

Q: Did you come here to meet your husband?

A: She came to find the husband, but had not seen him

[S]he has lived in your prison.²⁴⁹

Even Long Ying, a woman who claimed to be single, was asked primarily about her pending engagement. If the engagement was of questionable validity, she would be assumed to be a prostitute:

Q: Are you a married woman?

A: She is not.

Q: For what purpose did you return to California?

A: She came here to marry a husband. She is engaged to be married.

. . . .

Q: Ask her where this love of hers is that she came here to marry?

A: She says he is at a place called San Tey.

Q: Did he write to her to come here?

A: She says her mother told her to come here to Cal.

Q: Did she give her any directions where she was to find him?

A: She said that her mother was the one that found the husband for her. It was not with her own consent. In Chinese style the mother finds the husband.²⁵⁰

248. See *supra* Part I.B.

249. Record at 13, *Chy Lung* (testimony of Di He); see also *id.* at 12 (testimony of Ah Lin); *id.* at 14–15 (testimony of Ah Fung); *id.* at 15–17 (testimony of Ah Oy); *id.* at 29–30 (testimony of Ah Fook); *id.* at 30–31 (testimony of Yunn Hee); *id.* at 31–34 (testimony of Sie May).

250. *Id.* at 9–10 (testimony of Lon Ying). The answers are in the third person because an interpreter was answering for the witness.

Just as any woman who had children had been permitted by Commissioner Piotrowski to land, any woman who had a “husband” claim her—either on the ship, or later in court—was released.²⁵¹ Conversely, women who were not claimed by “husbands” could not leave. Many of these “husbands” may have been tong representatives who came to claim newly arrived prostitutes.²⁵² Indeed, the proceedings may have been manipulated by the powerful tongs: In several instances, it appears from the transcript that the witness changed his testimony once he was on the witness stand, perhaps out of fear of tong retribution.²⁵³

One detainee, Ah Sin, had a “husband” arrive to claim her, but she could not identify him. At some point during the hearing, a man arrived claiming to be her husband. The Court asked for her to be called in. According to the transcript, she “fail[ed] to recognize the party who claim[ed] to be her husband.”²⁵⁴ The *San Francisco Chronicle*’s description of what was probably the same incident was more descriptive than the transcript’s. According to the *Chronicle*, Mr. Ryan, the District Attorney, suggested that the man claiming to be a husband be placed in a line-up to see if his alleged wife could pick him out. Quint objected, but the judge overruled the objection. The *Chronicle* described the line-up:

A fat, jolly-looking Chinaman was . . . placed in a row with five others, and the woman he claimed as his wife brought into the Courtroom and told by the Chinese interpreter to pick her husband out. She scanned the row, the fat Chinaman rolling his head and endeavoring to catch her eye, and finally he nodded his head at her.²⁵⁵

The female detainees were never asked directly whether they were involved in prostitution. That topic was reserved for the other, male witnesses—Protestant missionaries and Chinese immigrants—who were asked whether the women were identifiable as prostitutes.

C. *The Expert Testimony*

Although much contradictory testimony was elicited during the day-long hearing on a variety of topics, three general themes emerged. Most of the witnesses either supported (or refuted) the view that Chinese women who traveled without their husbands or a male relative chosen by their husbands were likely to be prostitutes, or supported (or refuted) the view that a Chinese prostitute was identifiable through her clothing, hair, and general demeanor. Finally, there was a surprising amount of testimony regarding the Chinese practice of polygamy, given that California’s law did not, on its face target polygamy.

251. Id. at 7–8 (testimony of Rudolph Norwin Piotrowski).

252. See Tong, *supra* note 10, at 57.

253. Id.

254. Record at 50, *Chy Lung*.

255. A Cargo of Infamy, S.F. Chron., Aug. 28, 1874, at 3 (on file with the *Columbia Law Review*).

Christian missionaries who had spent time in China tended to believe that a Chinese woman would never travel without her husband. Dr. Otis Gibson, for example, testified that "[i]t is not the custom at all for the wives to go away without their husbands."²⁵⁶ Similarly, Ira M. Condit stated that in China, "respectable women travel very little. They are occupied at home. They have their o'n [sic] private apartments, & they leave them but very little. There is not much traveling of women; very little. I have seen but very little of it."²⁵⁷ Some Chinese witnesses testified that respectable wives would only travel to the United States if they were accompanied by their husbands, or in rare circumstances, by a close friend or relative.²⁵⁸

As for identifying a woman as a prostitute based on her dress, the missionaries once again provided testimony helpful to the state. Dr. Gibson stated that Chinese prostitutes usually wore bright-colored silk clothing underneath their dark outer clothing, "probably yellow or pink or red, & some figures on it of some kind."²⁵⁹ The "figured flowered garments," he said, "are not generally worn by wives."²⁶⁰ Ira Condit testified that prostitutes generally wear "a gayer style of dress, a dress with yellow in it, & brighter colors."²⁶¹ Fang Hoy, a resident of San Francisco's Chinatown, gave more specific testimony about differences in dress:

There is a distinction between whore & Chinese good woman Chinese high class we call mandarin or rich folks. They dress in silk garments; common people dress in cotton or woolen. But the whore or prostitute, they have dresses just like rich folks . . . Wide sleeves, & have what we call a fancy border on the dress.²⁶²

In its coverage of the hearing, the *San Francisco Chronicle* dubbed Fang Hoy's description of prostitutes' apparel "the badge of the scarlet sisterhood."²⁶³

Several other Chinese men, however, testified that they could not tell the difference between a prostitute and a married woman by the way she dressed.²⁶⁴ Fun Pak explained:

256. Record at 18, *Chy Lung* (testimony of Dr. Otis Gibson).

257. Id. at 24 (testimony of Ira M. Condit).

258. See id. at 45 (testimony of Fung Pak) (respectable wife travels accompanied by husband, or in rare circumstances, a friend of the husband); id. at 48 (testimony of Ah Lak) (wives accompanied by girls or servants, husband, brother, or some other relative); id. at 44 (testimony of Fang Hoy) ("[I]f she is a private woman either with her cousin or her husband coming to this country; prostitutes come here all in a raft.").

259. Id. at 18 (testimony of Dr. Otis Gibson).

260. Id.

261. Id. at 23 (testimony of Ira M. Condit).

262. Id. at 42 (testimony of Fang Hoy).

263. A Cargo of Infamy, *supra* note 255. The *Chronicle* reported the speaker's name as "Fong Noi."

264. See Record at 45, *Chy Lung* (testimony of Fung Pak); id. at 46 (testimony of Chu Pou); id. at 48 (testimony of Ah Lak); id. (testimony of Ah Pay); id. at 49 (testimony of Yok).

If a woman is walking the streets you cannot tell whether she is a married woman; besides, because some of them married woman walk the streets; but there are a higher class of woman that are not going out walking around the streets; but some of a poorer class women walk around the street. Some of the whores or prostitutes may walk the streets, but you could not tell which is the prostitute or the family woman.²⁶⁵

Ultimately, much of the testimony had the same “I know it when I see it” quality as the Supreme Court’s obscenity jurisprudence nearly a century later.²⁶⁶ Ira Condit explained, “There is no definite dress which distinguishes them as such from the others. . . . It is more in their general character & appearance perhaps than anything else.”²⁶⁷ Dr. Gibson identified one woman as a prostitute based on her clothing, but then had trouble explaining why he was so certain that the others were as well:

The flowers on that girl at the end, & her whole get up indicate without a doubt; the others haven’t got that on. It is not discoverable in all of them as I look at them to-day. In half of their cases there is evidence to my mind that they belong to that class from the clothing they have on. I don’t know only by that, and I know by the fact of their comming [sic] as they do here.²⁶⁸

Thus, the hearing was devoted primarily to ferreting out women who were “lewd or debauched” from those who were married, even though the definition of “lewd or debauched,” on its face, had nothing to do with marriage. This imposition of a strict marriage-prostitution dichotomy was typical of the times.²⁶⁹ It also foreshadowed the arguments presented by Horace Page to Congress several months later in support of the Page Law.

Also foreshadowing the Page Law was the emphasis on the Chinese practice of polygamy in the California hearings. In theory, polygamy had nothing to do with the hearings. The issue to be decided was whether the women had been improperly detained—whether or not they were, in fact, prostitutes. No one suggested at the hearing that a woman who was a second wife should be sent back to China because she was “lewd or debauched.” But an underlying theme of the hearing was that the Chinese had very odd marriage customs, and that Chinese women in general were untrustworthy and sexually aberrant. Chinese women in polygamous marriages seemed more akin to prostitutes than to proper wives. Accordingly, there were a significant number of witnesses who testified about the practice of polygamy, even if it was technically irrelevant.

265. Id. at 47 (testimony of Chu Pou).

266. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

267. Record at 23, *Chy Lung* (testimony of Ira M. Condit).

268. Id. at 18 (testimony of Dr. Otis Gibson).

269. See discussion *supra* Part I.B; see also generally Dubler, In the Shadow, *supra* note 5 (describing the historical reach of marriage laws to women living outside of marriage).

At the hearings, Dr. Gibson distinguished between proper, monogamous wives, and wives in polygamous marriages. When questioned about the number of Chinese in San Francisco who were married, Dr. Gibson volunteered that even those women who were married were not really proper wives:

Q: What proportion of the Chinese women coming to this country are married? Could you say from you [sic] own knowledge of the Chinese here?

A: I don't suppose there are in this city to-day perhaps 100 married women. . . . There may be that I don't know of, but I don't think think [sic] there are 20 first wives in this city. . . . I think not, unless you call it married where they have second wives. They, some of them, take this class of women for a second wife, & leave them with the family when they leave here, & somebody else take' [sic] them.²⁷⁰

Indeed, one witness had accompanied his second wife to San Francisco aboard the *Japan*. While his wife's status as a second wife was legally irrelevant, he was nevertheless questioned at length about the details of his marriage customs:

Q: Are you a married or a single man?

A: He has a wife.

Q: Where is your wife living?

A: He says, my wife is living at home in China, & the other wife, or the other concubine or second wife is here.

Q: Then you have two wives [sic], one living here and the other in China, have you?

A: Yes, sir; the older or principal wife is in China, & this secured wife is here.²⁷¹

This series of questions was an early example of what would become a common theme in courts and legislatures in the decades to come: the scandalous practice of polygamy as practiced by the Chinese. Although it does not appear that second wives were excluded through enforcement of these early California statutes, once immigration law became federalized, polygamy became grounds for exclusion.²⁷²

D. *The Court's Ruling, and Ah Fook's Appeal*

Although the California law was a blunt instrument against Chinese immigration, the state court accepted that the exclusion of "lewd or debauched" women fit within the police power. On the next day, August

270. Record at 21, *Chy Lung* (testimony of Dr. Otis Gibson). This testimony is remarkably similar to the statement he presented in support of the Page Law. See *infra* text accompanying note 326.

271. Record at 37, *Chy Lung* (testimony of Chung Fing).

272. See Act of Mar. 3, 1891 (Immigration Act of 1891), ch. 551, § 1, 26 Stat. 1084, 1084.

29, the court ruled against the women without written opinion and ordered them back to the custody of the steamship master.²⁷³

The court's ruling may have been partially impacted by the behavior of the women in the courtroom and the press's coverage of the hearing. One woman, Ah Fook, lost her temper when she was repeatedly questioned under cross-examination, and this led to the clearing of the courtroom by the judge. Ah Fook claimed to have lived in California previously, returned to China where she married her husband, and was now returning to California to be with him. After persistent questioning about the exact location of her previous San Francisco home and the identity of other occupants there, she appears to have had an outburst:

She says now you are foolish; she says she has been here several months, and she could not remember who kept the baker store; she said if you were doing right you would not ask her so many questions; that she went home with a good intention, and she brought her sister here with a good intention.

(Here the proceedings of the court were interrupted by the noisy demonstrations of the Chinese.)²⁷⁴

In the *Alta California's* coverage of the incident, Ah Fook was described as "very obstinate and saucy."²⁷⁵ The *Chronicle*, which referred to her as "Miss Ah Poke," said that she "became excited under a rigid cross-examination."²⁷⁶

Both newspapers documented the "noisy demonstrations of the Chinese" mentioned in the transcript. According to the *Alta California*, "[a]t this point one of the women jumped to her feet and let out a most unearthly yell. Immediately the whole lot were jabbering and screaming at the top of their voices, and it was found impossible to quiet them until they were hustled from the Court-room."²⁷⁷ The *Chronicle* also mentioned the woman who gave an "awful screech" and reported that "the rest of them . . . put their handkerchiefs to their faces and bellowed at the top of their lungs."²⁷⁸ The Chinese interpreter told the *Chronicle* reporter that the women were "expostulating against being kept in prison, saying that they had not killed anybody, stolen anything, or set fire to anything."²⁷⁹ The judge "stuffed his fingers in his ears and retired to his chambers, and Court was suspended fifteen minutes before order could be restored."²⁸⁰

The same day that the judge ruled against them, the women applied for another habeas writ, with the "obstinate and saucy" Ah Fook as lead plaintiff, this time alleging that they were about to be deported to China

273. McClain, In Search of Equality, *supra* note 8, at 58.

274. Record at 30, *Chy Lung* (testimony of Ah Fook).

275. See Chan, *supra* note 10, at 100 (quoting *Alta Cal.*, Aug. 28, 1874).

276. A Cargo of Infamy, *supra* note 255.

277. See Chan, *supra* note 10, at 100 (quoting *Alta Cal.*, Aug. 28, 1874).

278. A Cargo of Infamy, *supra* note 255.

279. *Id.*

280. *Id.*

and asking for a state supreme court ruling. A week later, the Supreme Court of California rendered its decision in *Ex parte Ah Fook*.²⁸¹ In this decision, it appeared that the strategy of targeting Chinese women was working: The court found the statute well within the state's police power.

Ah Fook's first challenge to the law was that it violated a federal treaty. Article VI of the Burlingame Treaty between the United States and China 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 there may be enjoyed by the citizens or subjects of the most favored nation."²⁸² The court dismissed this argument. Because the law was one of general application—applying, at least in theory, to all passengers arriving by ship—and did not single out the Chinese for discrimination, it did not violate the treaty.²⁸³

Nor, found the court, did the law violate the Due Process Clause of the Fourteenth Amendment. It was "obvious," the court opined, that a statute intended to "carry[] into operation [the] quarantine or health laws" of the state "must be prompt and summary."²⁸⁴ The power to exclude lewd women, the court explained, is akin to the power "which isolates those ill of contagious diseases, or those who have been in contact with such."²⁸⁵ The court did not discuss whether the detention might violate the Equal Protection Clause of the Fourteenth Amendment.

In finding that the statute did not violate the Burlingame Treaty or the Due Process Clause, the court emphasized the breadth of the state's police power. If the law were found impermissible under the treaty, the court stated, the state would be "prohibited from excluding criminals or paupers—a power recognized by all the writers as existing in every independent State."²⁸⁶ The court described the power as one of self-protection: The state employed the power, "not to punish for offenses committed without our borders" but instead "to prevent the entrance of elements dangerous to the health and moral well-being of the community."²⁸⁷ This holding was in stark contrast with the court's previous decisions in *Ling Sing v. Washburn*²⁸⁸ and *People v. Downer*,²⁸⁹ in which the California Supreme Court struck down the Chinese Police Tax and the 1855 Act taxing vessels arriving from China, respectively.²⁹⁰ It appeared that, by targeting women and classifying them as outside the institution of monogamous marriage, California had found a way to exclude a significant number of Chinese immigrants.

281. 49 Cal. 402 (1874), rev'd sub nom. *Chy Lung v. Freeman*, 92 U.S. 275 (1876).

282. Burlingame Treaty, supra note 4, art. VI, 16 Stat. at 740.

283. 49 Cal. at 405.

284. Id. at 406 (Cooley, J., concurring).

285. Id. at 406–07.

286. Id. at 405.

287. Id. at 407.

288. 20 Cal. 534 (1862).

289. 7 Cal. 169 (1857).

290. See supra notes 194–211 and accompanying text.

E. The Federal Court Appeal: Ah Fong

After losing their case in front of the California Supreme Court, the Chinese women tried again. Ah Fong, one of the detained women, filed another writ of habeas corpus, but this time in the California federal court.²⁹¹ Her case was heard by Circuit Court Judge Lorenzo Sawyer, District Court Judge Ogden Hoffman, and Supreme Court Justice Stephen Field, riding circuit in San Francisco.²⁹²

Justice Field's decision departed dramatically from that of the state supreme court. According to Field, a state's power to exclude foreigners was much more limited than previously supposed; it included only its "right to self-defense," which was not the broad right to exclude enunciated in cases such as *Miln*,²⁹³ but a very narrow one.²⁹⁴ Further, Field held that the Act contravened the principles of equal protection articulated in the 1870 Civil Rights Act, an issue not even considered by the state supreme court.²⁹⁵

In his first holding, determining that the statute usurped the federal government's power over immigration, Justice Field was careful to note that a state's power of self-protection was not threatened by federal control. A state's police power, according to Justice Field, could justify "all sorts of restrictions and burdens" where these were "not in conflict with established principles, or any constitutional prohibition."²⁹⁶ The problem with the California statute was that it was impermissibly vague, extending far beyond the permissible bounds of the police power. It punished not only paupers but also those who used to be paupers but had become solvent. The "condemned patriot, escaping from his prison and fleeing to our shores," was treated the same as "the common felon who is a fugitive from justice."²⁹⁷ Most relevant to the case at hand, the law made no distinction between public prostitutes and immoral women who keep their vices private:

291. *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102). Ah Fong appears to have been the sister, or at least so she claimed, of Ah Fook, the named plaintiff in the state case. Record at 29, *Chy Lung v. Freeman*, 92 U.S. 275 (1876) (No. 478) (testimony of Ah Fook).

292. McClain, *In Search of Equality*, supra note 8, at 62–63.

293. *Mayor of N.Y. v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837) ("[I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends.").

294. *In re Ah Fong*, 1 F. Cas. at 216.

295. *Id.* at 218. Field also held that the statute contravened the Burlingame Treaty, but this holding was dependent on the first holding that states had no power to regulate conduct beyond a narrow right of self-defense. If a state could not exercise broad powers vis-à-vis immigrants from other countries, then it could not exercise these powers to target the Chinese. *Id.* at 217–18.

296. *Id.* at 216.

297. *Id.* at 215–16.

Nor is there any difference made between the woman whose lewdness consists in private and unlawful indulgence, and the woman who publicly prostitutes her person for hire, or between the woman debauched by intemperance in food or drink, or debauched by the loss of her chastity.²⁹⁸

The cure, according to Field, for ills such as prostitution was not an overbroad statute excluding anyone likely to engage in prostitution, but strong state laws punishing those who actually did: "[I]f lewd women, or lewd men . . . land on our shores, the remedy against any subsequent lewd conduct on their part must be found in good laws or good municipal regulations and a vigorous police."²⁹⁹

Although Field presented his opinion as a restatement of long-established principles of the state police power, it actually created substantial limitations on powers previously exercised by states. Field's opinion in *Ah Fong* circumscribed state power by distinguishing "proper" uses of police power from corrupt uses, such as the prohibition of free blacks. "[M]uch which was formerly said upon the power of the state," according to Field, "grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits."³⁰⁰ But now, in the wake of the Civil War, "no such [argument] would be asserted, or if asserted, allowed, in any federal court."³⁰¹ The war had changed everything, and states could no longer create their own policies of inclusion and exclusion. A state's power to exclude immigrants, Field concluded, was now a very limited power of self-defense. A state can take "precautionary measures against the increase of crime or pauperism, or the spread of infectious diseases from persons coming from other countries."³⁰² The exclusion of lewd or debauched women, based on their status as such, far outstripped this narrow power, especially when the problem could be more easily handled by a "vigorous police."³⁰³

Having determined that the California statute exceeded the state police power, Field could have ended the inquiry. Instead, he went further, holding that the California Act violated the Civil Rights Act of 1870, which prohibited the imposition of a tax or charge on "any person immigrating . . . from a foreign country which is not equally imposed and enforced upon every person immigrating . . . from any other foreign

298. *Id.* at 216.

299. *Id.* at 217.

300. *Id.* at 216.

301. *Id.* at 217.

302. *Id.* at 216.

303. *Id.* at 217. Despite increasing federal control over immigration, states continued to assert their right to exclude paupers and criminals. It was not until 1941 that the Supreme Court declared that California's statute prohibiting the importation of indigent persons posed an unconstitutional burden on interstate commerce. *Edwards v. California*, 314 U.S. 160, 177 (1941).

country.”³⁰⁴ The California statute did not impose a tax on the Chinese women, but it did, Field explained, impose a “charge,” defined as “any onerous condition.”³⁰⁵ Making the right of an immigrant to land dependent on the willingness of a ship captain to pay a bond was “as onerous as any charge which can well be imposed.”³⁰⁶

The Act’s imposition of this “charge” violated the principle of equal protection neither because it was based on race (the statute did not single out Chinese immigrants for special treatment, although they were certainly its targets), nor because it was based on gender (lewd or debauched *men* were not covered by the statute) but because it applied only to immigrants who arrived by vessel, leaving those who travel “by land from the British possessions or Mexico, or over the plains by railway, exempt from any charge.”³⁰⁷

Field expressed his own ambivalence toward the Chinese and reluctance to articulate a race-based theory of equal protection in a series of contradictory statements. On one hand, Field was disturbed that the California law was enforced in a racist manner against Chinese women (many of whom were kidnapped or duped into prostitution) but not against other women who chose to enter the profession. Explained Field, “I have little respect for that discriminating virtue which is shocked when a frail child of China is landed on our shores, and yet allows the bedizened and painted harlot of other countries to parade our streets and open her hells in broad day, without molestation and without censure.”³⁰⁸ Yet in the same paragraph, Field expresses sympathy with the anti-Chinese forces in California, tempered by concern that they be treated evenhandedly:

I am aware of the very general feeling prevailing in this state against the Chinese, and in opposition to the extension of any encouragement to their immigration hither. It is felt that the dissimilarity in physical characteristics, in language, in manners, religion and habits, will always prevent any possible assimilation of them with our people. Admitting that there is ground for this feeling, it does not justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith.³⁰⁹

This animosity was consonant with Field’s general beliefs concerning the Chinese. In 1882, he wrote to a friend in favor of the Exclusion Act, explaining that the “manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating

304. Act of May 31, 1870 (Civil Rights Act of 1870), ch. 114, § 16, 16 Stat. 140, 144 (current version at 42 U.S.C. § 1971 (2000)).

305. *In re Ah Fong*, 1 F. Cas. at 218.

306. *Id.*

307. *Id.* The Court did not hold that race-based claims not involving blacks fell within equal protection until *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). And there was no equal protection theory of gender until *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

308. *In re Ah Fong*, 1 F. Cas. at 217.

309. *Id.*

with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable."³¹⁰ Field later penned the decision in *Chae Chan Ping v. United States*, upholding the constitutionality of the Chinese Exclusion Act in 1889.³¹¹

The solution for Field in *Ah Fong* was to let Congress deal with the problem. The Equal Protection Clause applied only to the states;³¹² what the states could not do without violating the 1870 Act, Congress could. Thus, wrote Field, if the further immigration of the Chinese "is to be stopped, recourse must be had to the federal government, where the whole power over this subject lies."³¹³ In March of 1875, only months after Field's decision, Congress complied by passing the Page Law.

IV. THE FEDERAL EXCLUSION OF CHINESE WOMEN: THE PAGE LAW

The Page Law, like the California statutes after which it was modeled, harnessed deep cultural anxieties about Chinese marriage practices in order to regulate immigration when direct restrictions on immigration were otherwise impermissible. Like California, Congress drafted a law based on the presumption that the sexual practices of Chinese women were aberrant. This had the effect of broadly restricting Chinese female immigration when the Burlingame Treaty prevented outright racial exclusion.

The author of the Page Law was Horace F. Page, a congressman from California. A Republican, Page exemplified his party's stance toward the Chinese in the mid-1870s. Immediately after the Civil War, the Republican Party was unquestionably dominant. But the depression in the 1870s resulted in a strong Democratic showing in 1874, with the Democrats winning the House of Representatives by a decisive majority and narrowing the Republican's majority in the Senate.³¹⁴ A desire to maintain or regain supremacy may explain the Republicans' willingness to take such a strong anti-Chinese stance. This stance was not without controversy, however: In 1876, when the Republican Party included in its national platform a plank opposing the "immigration and importation of Mongolians," one delegate from Massachusetts noted that this was the first time the party had included "a discrimination of race" in its platform.³¹⁵

Regardless of whether his party truly believed in Chinese exclusion, Page himself made a career out of drafting and advocating anti-Chinese

310. Charles W. McCurdy, Stephen J. Field and the American Judicial Tradition, in *The Fields and the Law* 5, 17 (Philip J. Bergan et al. eds., 1986).

311. 130 U.S. 581 (1889).

312. The Supreme Court did not apply the Equal Protection Clause to the federal government until the 1950s in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

313. *In re Ah Fong*, 1 F. Cas. at 217.

314. See Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, at 523 (1988) (discussing "reversal of partisan alignments" in the 1874 election).

315. *Id.* at 567.

legislation. His success in getting the Page Law passed occurred after he had already sponsored several other failed attempts to exclude the Chinese: From 1873 until the passage of the Page Law, Page sponsored four anti-Chinese bills and three House resolutions, all aimed at restricting immigration of Chinese laborers and renegotiating the Burlingame Treaty so that restrictive laws would be permissible.³¹⁶ The House Committee on Foreign Affairs rejected Page's exclusion proposals and refused to consider renegotiating the treaty.³¹⁷ The Page Law, by excluding Chinese women to protect the moral integrity of the Western states, enabled Page to at least partially achieve his goals in a way that circumvented the express terms of the treaty. Page later sponsored the Chinese Exclusion Act of 1882, which dramatically curtailed the immigration of Chinese men by prohibiting the entry of Chinese laborers into the United States.³¹⁸

In December of 1874, President Grant sent his annual message to Congress.³¹⁹ In his message, Grant encouraged the "protection" of Chinese immigrants through the prohibition of coolie labor and prostitution. According to Grant, coolies and prostitutes were different permutations of the same phenomenon—involuntary workers forced to emigrate:

[T]he great proportion of the Chinese immigrants who come to our shores do not come voluntarily, to make their homes with us and their labor productive of general prosperity, but come under contracts with head-men, who own them almost absolutely. In a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes, to the disgrace of the communities where settled and to the great demoralization of the youth of these localities. If this evil practice can be legislated against, it will be my pleasure as well as duty to enforce any regulation to secure so desirable an end.³²⁰

Page responded to Grant's request with the bill that became the Page Law. Instead of attempting to exclude all Chinese immigrants, Page

316. For a detailed discussion of Page's anti-Chinese activities in Congress, see Pepper, *supra* note 10, at 33–36.

317. See *id.* at 34–35. Congress's main consideration in refusing to renegotiate the treaty appears to have been a desire for free trade with China. In 1870, Senator Cornelius Cole of California was asked by a *San Francisco Chronicle* reporter why the United States should abide by the treaty. He responded,

And lose the trade of China? San Francisco commerce is languishing, you tell me, and yet you suggest a means to lop off our growing commerce with the very Power upon which we rely for wealth. The trade of China has been sought for, prayed for, fought for, for years and years . . . I would not consent to any such proceeding.

Cole Interview, *supra* note 92.

318. Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, § 1, 22 Stat. 58 (repealed 1943).

319. 3 Cong. Rec. 3 (1874).

320. *Id.* at 3–4.

took Grant's suggestion to target two groups in particular, just as California had in 1870: coolies and women.

A. *Legislative History*

Congressional testimony on the Page Law illuminates the cultural anxieties that contributed to its passage. When he presented the law on February 10, 1875, Page gave a lengthy speech, interspersed with readings of various statements by "experts" on the Chinese, predominantly Protestant missionaries. The theme of Page's speech was that Chinese women coming to the United States were almost always prostitutes, and even those who were not were almost certainly not wives in the monogamous, Christian sense. Chinese prostitutes—like "coolies"—were no more than slaves, and as such, antithetical to the American system of free labor.³²¹

Dr. Otis Gibson, the Methodist Episcopal Clergyman who had testified in the hearings over Ah Fook and her companions,³²² also gave a statement to Congress, basing his opinions on his work both in China and with the Chinese population in San Francisco. According to Dr. Gibson, there were approximately 2,500 Chinese women and girls living in San Francisco, and "a very large proportion of these females are enslaved prostitutes."³²³ Another missionary estimated that at "least nine-tenths of all female Chinese now in California are of that class of persons, brought here for that purpose, and treated as slaves."³²⁴ While many Chinese women in San Francisco were prostitutes, the proportion was nowhere near ninety percent.³²⁵

Just as the California court hearing over the detention of Ah Fook and her companions turned to the subject of polygamy in a case that ostensibly concerned prostitution, so did the congressional hearings on the Page Law. Once again, Dr. Gibson testified that Chinese women, even if not prostitutes, were not wives in the legitimate, monogamous sense:

[O]f all the Chinese females in San Francisco there are not more than three hundred who are really claimed as wives by the Chinese themselves, and nearly all of these are only secondary wives or concubines, in accordance with the custom of China. Of really first wives I do not think there are fifty in all the Chinese population of this city.³²⁶

Polygamy provided further evidence that the Chinese were incapable of understanding the freedom of contract so important to American de-

321. See 3 Cong. Rec. appx. at 40–45 (1875).

322. See discussion *supra* Part III.C.

323. 3 Cong. Rec. appx. at 41 (statement of Rev. Otis Gibson).

324. *Id.* (statement of Ira M. Condit).

325. See *supra* Part I.B.

326. 3 Cong. Rec. appx. at 41.

mocracy.³²⁷ Polygamy, prostitution, and coolie labor practices were all marks of a "servile population." In a statement signed by 17,000 white citizens of California that Page read into the record, the immigration of Chinese laborers was characterized as a new wave of slave labor:

[O]ur recent history shows with what devotion to the great principles of freedom our citizens placed their lives at the command of the Government and poured out their blood and treasure to terminate the blighting influence of slavery in our midst. Yet an equally and, if possible, a more insidious danger must eventuate by the great increase of this servile population.³²⁸

According to the rhetoric introduced by Page, a country that had worked hard to eradicate slavery from its midst was being inundated with a slave-like people, the Chinese.

In advocating exclusion, Page emphasized the helplessness of his state, California, not only against the perceived servility of the Chinese but also against the tide of immorality and disease believed to accompany Chinese women. He included a letter from California's Commissioner of Immigration complaining that since the decision in *Ah Fong*, he could no longer protect California from "a traffic which is demoralizing to the people of this State."³²⁹ Chinese women, according to the Commissioner, created both physical and moral decay in the white population of San Francisco. "It is well known," his letter explained, "that every city and town in this State has Chinese brothels in such numbers as to spread disease to the young and inexperienced of our population."³³⁰

Chinese women, then, were a pestilence that had to be removed. Either they were prostitutes, or, almost as bad, they were second wives or concubines establishing a system of polygamy contrary to the American model of monogamous marriage. As Page put it in his grandiloquent closing statement, his bill was intended to "place a dividing line between vice and virtue" and "send the brazen harlot who openly flaunts her wickedness in the faces of our wives and daughters back to her native coun-

327. See Gordon, *supra* note 96, at 173 (discussing late nineteenth-century criticisms of Mormon polygamy based on consent).

328. 3 Cong. Rec. appx. at 44. This rhetoric was echoed two years later by the *San Francisco Call*. "The Chinese females who immigrate into this state are, almost without exception, of the vilest and most degraded class of abandoned women. These women exist here in a state of servitude, beside which African slavery was a beneficent captivity." Pfeffer, *supra* note 10, at 79.

329. 3 Cong. Rec. appx. at 42.

330. *Id.* By 1875, the year that Congress passed the Page Law, the American Medical Association had officially identified Chinese prostitutes as a source of contamination and even sponsored a study to examine their effect on the "nation's bloodstream." Salyer, *supra* note 9, at 11-12. And in 1876, Dr. Hugh H. Toland testified before the San Francisco legislature that Chinese prostitutes were the cause of ninety percent of the syphilis cases in San Francisco, and that his white patients thought that "diseases contracted from Chinawomen [we]re harder to cure than those contracted elsewhere." Chen, *supra* note 11, at 86.

try.”³³¹ White Americans, “stout-hearted people” who, “with their wives and children” immigrated to California and “staked everything upon the venture” now were threatened by a “deadly blight.”³³² Only exclusion of the carriers of disease could protect California’s future.

Page’s speech also expressed a fear that China was sending its most debased citizens to the United States—coolie laborers and prostitutes, not respectable merchants—and that America would be weakened as a result. China, Page argued, “insist[ed] on sending here none but the lowest and most depraved of her subjects;” America was becoming “her cess-pool.”³³³ By sending slave-like people to America, Page argued, China had breached its obligations under the Burlingame Treaty, which provided for reciprocal *voluntary* emigration between the two countries:

Has [China] acted in good faith? It may be urged that her subjects come here under a voluntary contract; that her women voluntarily sell themselves into slavery. Can one person induce another to voluntarily do an unlawful act without bringing both within the penalties of the violated law? If this be true, which I very much doubt, then they are doubly guilty. For they add to the crime of prostitution that of voluntary slavery, both of which the Chinese Empire permits its subjects to commit in violation of the laws of our country and in open defiance [sic] of the treaty.³³⁴

The Page Law passed the House and the Senate in the wake of another major piece of anti-Chinese legislation: Congress’s reaffirmation of Asian immigrants’ ineligibility for citizenship.³³⁵ Thus, in the space of a month, Congress both reaffirmed its commitment to precluding new Chinese immigrants from becoming naturalized citizens and created a restrictive immigration law that would prevent the birth of American-born citizens of Chinese ancestry.

331. 3 Cong. Rec. appx. at 44.

332. *Id.*

333. *Id.*

334. *Id.* at 43.

335. See Act of Feb. 18, 1875, ch. 80, § 300B, 18 Stat. 316, 318. Congress extended naturalization rights to Africans in 1870, but did not include Asians. Act of July 14, 1870 (Naturalization Act of 1870), ch. 254, § 7, 16 Stat. 254, 256 (repealed 1952). In 1874, the language “free white persons” was accidentally omitted from the Revised Statutes, so Congress rectified this omission through the passage of the February 18, 1875 law. Chin, *supra* note 165, at 11; see also generally John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *Asian L.J.* 55 (1996) (arguing that the perception that Chinese immigrants were “unassimilable” contributed to the enactment of exclusionary federal laws, and to their being upheld by the judiciary). For a history of Chinese efforts to secure citizenship, see Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 *Asian L.J.* 33, 34–41 (1995).

B. *The Statute*

Horace Page carefully crafted the Page Law to exclude Chinese immigrants without violating the Burlingame Treaty. By officially prohibiting the importation of only coolies and prostitutes, the law did not restrict the “free migration and emigration” of Chinese citizens that was protected by the Treaty.³³⁶ The law’s title was strategically worded to disguise its drastic nature: Entitled “An Act Supplementary to the Acts in Relation to Immigration,” the Page Law was styled as an aid to already existing immigration policies and treaty relations, even though none of these existing policies was as restrictive.³³⁷ Indeed, in order to pass the Chinese Exclusion Act, excluding all Chinese laborers, in 1882, the United States did have to renegotiate the Burlingame Treaty.³³⁸ The new treaty allowed the United States to “regulate, limit, or suspend” but not “absolutely prohibit” the immigration of Chinese laborers.³³⁹ Regulation was arguably permissible when laborers would threaten the country’s “interests” or “good order.”³⁴⁰

The Page Law was divided into five sections. These sections worked together to create a system that criminalized the importation of prostitutes and coolies,³⁴¹ required Asian women to obtain certificates of immigration demonstrating that they were not emigrating for “lewd or immoral purposes,”³⁴² and banned certain classes—felons and prostitutes—from immigrating to the United States.³⁴³ A brief explanation of each section follows.

Section 1 was the only section that explicitly targeted Chinese women. This section made it the duty of the consul-general or consul of the United States residing at ports of embarkation in “China, Japan, or any Oriental country” to “ascertain whether such immigrant has entered into a contract or agreement for a term of service . . . for lewd and immoral purposes” and to refuse to grant any such immigrants the required immigration certificate.³⁴⁴ In other words, American consuls in foreign ports³⁴⁵ had an obligation to screen Chinese and Japanese women before

336. Compare Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974), with Burlingame Treaty, *supra* note 4, art. V, 16 Stat. at 740.

337. See Peffer, *supra* note 10, at 37 (noting that the Page Law’s inclusion of penalties for import of Chinese prostitutes made it “the most severe anti-Chinese legislation” to date).

338. Treaty Between the United States and China, Concerning Immigration, Nov. 17, 1880, U.S.-China, 22 Stat. 826 [hereinafter *Renegotiated Burlingame Treaty*].

339. *Id.* art. I.

340. *Id.*

341. Page Law §§ 2–3.

342. *Id.* § 1.

343. *Id.* § 5.

344. *Id.* § 1.

345. In practice, this provision meant that the American consul in Hong Kong had to routinely interrogate women, as most Chinese emigrating to the United States were from Canton and left China through Hong Kong. See Committee Report, *supra* note 89, at 21

they even left their home countries, and refuse to grant them an immigration certificate if they suspected them of prostitution, a hurdle not imposed on immigrants from other ports, such as those in Europe.³⁴⁶ This section was carefully crafted to appear as an elaboration of the earlier Coolie Trade Prohibition Act,³⁴⁷ and therefore consonant with the Burlingame Treaty; the certificates were to be given to Chinese women "in determining whether the[ir] immigration . . . is free and voluntary, as provided by [the Coolie Trade Prohibition Act]."³⁴⁸

Sections 2 and 4 purported to crack down on the importation of coolie laborers, imposing heightened criminal sanctions for behavior already prohibited under the Coolie Trade Prohibition Act.³⁴⁹ Section 2 of the law made it a crime for a citizen or resident of the United States to transport a "subject of China, Japan, or any Oriental country" to the United States "without their free and voluntary consent, for the purpose of holding them to a term of service," and voided any contracts for such labor.³⁵⁰ Similarly, section 4 made it a felony to contract or attempt to contract to supply the "labor of any coolly [sic]" in violation of laws "prohibiting the coolly [sic] trade," including the earlier 1862 Act.³⁵¹ Because Chinese immigration under the credit-ticket system had been approved by Congress in the 1864 Immigration Act, and forced immigration of Chinese laborers to the United States was virtually nonexistent, stiffening penalties against forced immigration served little or no purpose.³⁵² These provisions did, however, serve a rhetorical purpose: If prostitutes were female coolies, and coolies were already prohibited in earlier legislation without abrogating the Burlingame Treaty, then a ban on the importation of prostitutes must also be consistent with the terms of the treaty.

Section 3 made it a crime to import a woman into the United States for purposes of prostitution. In this respect, the Page Law could be viewed as targeting involuntary labor generally. A closer look at the crim-

(statement of Frank M. Pixley, esq., representing the City of San Francisco) ("[T]he great majority of them come from the city of Canton, the port of which is Hong-Kong, the English sailing port."); *id.* at 174 (statement of Ezekiel B. Vreeland, Deputy Commissioner of Immigration) ("They all come from Hong-Kong. They come from different portions of China and take ship at Hong-Kong.").

346. As a practical matter, Japanese women did not represent a significant number of female immigrants at this time. They did not begin arriving in large numbers until decades later. See Hing, *supra* note 9, at 54 & tbl.4. There appears, however, to have been enough awareness on the part of American lawmakers of the potential for widespread Japanese immigration that they included women from "China, Japan, or any Oriental country" in the language of the Page Law. Page Law § 1.

347. Act of Feb. 19, 1862 (Coolie Trade Prohibition Act), ch. 27, 12 Stat. 340 (repealed 1974).

348. Page Law § 1.

349. *Id.* §§ 2, 4.

350. *Id.* § 2.

351. *Id.* § 4.

352. See *supra* Part II.B.1.

inal provisions, however, indicates that the Page Law singled out prostitutes for the harshest penalties. While section 2 mandated a penalty of up to one year in prison and a fine of \$2,000, and section 4 mandated a penalty of up to one year and a fine of \$500; section 3, the section criminalizing importation of women for purposes of prostitution, provided for up to five years in prison and a fine of \$5,000.³⁵³ Trafficking in prostitutes was clearly far worse than trafficking in other kinds of labor.³⁵⁴

The fifth and final section of the law was the one that most clearly regulated immigration. Section 5 made it unlawful for certain "classes [of aliens] to immigrate into the United States." There were only two such classes: "persons who are undergoing a sentence for conviction in their own country of felonious crimes" and "women imported for the purposes of prostitution."³⁵⁵ This section most closely mimicked the California statutes, once again tying the prohibition against prostitutes to the more conventional prohibition against convicts.³⁵⁶ But this marked an important shift toward the federalization of immigration, as the exclusion of convicts had historically been performed by the states pursuant to the police power.³⁵⁷

Like section 1, section 5 contained an enforcement mechanism. Whereas section 1 required Asian women to obtain certificates declaring that they were not emigrating for "lewd or immoral" purposes at the port of *departure*, section 5 authorized the collector at the port of *arrival* to inspect the vessel and certify that the occupants were not felons or women "imported for the purposes of prostitution."³⁵⁸ Any individuals not certified had to be detained on the vessel pending a judicial challenge to the port collector's decision, unless the vessel master was willing to post bond of \$500 for each such "obnoxious person" or forfeit his vessel.³⁵⁹ The purpose of the bond or forfeiture was to provide funds with which to return the felon or purported prostitute to his or her home country. Although in theory section 5 applied to all immigrants, its enforcement was likely to affect Chinese women differently than other immigrants, as they were required under section 1 to have obtained a certificate attesting to their virtue before setting sail. Other women, for whom a pre-departure certificate was not required, were similarly spared scrutiny upon arrival. Asian women, then, were subjected to two additional hurdles: Even if

353. Page Law §§ 2–4.

354. For an exploration of how current antitrafficking law parallels this distinction between sexual and non-sexual trafficking, see Chantal Thomas, *International Law Against Sex Trafficking*, in *Perspective* 22–42, available at <http://prod.law.wisc.edu/mini/wL> (last visited Jan. 23, 2005) (unpublished manuscript, on file with the *Columbia Law Review*).

355. Page Law § 5 (internal quotation marks omitted). Political prisoners were explicitly exempted from the class of excluded felons. *Id.*

356. See *supra* Part III.

357. The convict portion of the Page Law does not appear to have been effectively enforced. See *infra* Part IV.C.

358. Page Law § 5.

359. *Id.*

they managed to pass the first one by convincing the American consul in Hong Kong that they had not entered into contracts "for lewd and immoral purposes," they could still be excluded upon arrival in the United States if the port commissioner determined that they had been "imported for the purposes of prostitution."³⁶⁰

C. *Enforcement*

While the Page Law clearly targeted prostitutes, the result of the enforcement of this newly federalized immigration system was not just a reduction in prostitutes, but the virtually complete exclusion of Chinese women from the United States.³⁶¹ Government officials who enforced anti-Chinese legislation "demonstrated a consistent unwillingness, or inability, to recognize women who were not prostitutes among all but wealthy applicants for immigration."³⁶² Women who wished to emigrate from China to California now faced a multi-step process designed to weed out suspected prostitutes.

The process began in China, with an interrogation by the Hong Kong consul's office as mandated by section 1 of the Page Law:³⁶³

Have you entered into any contract or agreement with any person or persons whomsoever, for a term of service within the United States for lewd and immoral purposes?

Do you wish of your own free and voluntary will to go to the United States?

Do you go to the United States for the purpose of prostitution?

Are you married or single?

What are you going to the United States for?

What is to be your occupation there?

Have you lived in a house of prostitution in Hong Kong, Macao, or China?

Have you engaged in prostitution in either of the above places?

Are you a virtuous woman?

Do you intend to live a virtuous life in the United States?

Do you know that you are at liberty now to go to the United States, or remain at home in your own country, and that you cannot be forced to go away from your home?³⁶⁴

360. *Id.*

361. Records indicate that the number of Chinese women in San Francisco showed little increase between 1870 and 1880. Chan, *supra* note 10, at 105–07 (suggesting further that "a police crackdown in the mid 1870s made the traffic in women unprofitable, thereby reducing, at least temporarily, the incentive to smuggle them into the country").

362. Peffer, *supra* note 10, at 9. Sucheng Chan has noted that press treatment of Chinese prostitution also indicates that it decreased significantly following the passage of the Page Law. Chan found numerous "lurid stories" about Chinese prostitution between 1854 and 1874, but found almost no mention of them from 1874 until the mid-1890s, with the advent of the scare over "white slavery." Chan, *supra* note 10, at 107–08.

363. Page Law § 1.

364. Despatch No. 301 from David H. Bailey, Consul, to John L. Cadwalader, Assistant Secretary of State (Aug. 21, 1876), microformed on U.S. Dep't of State, Despatches from

The State Department did not require the Hong Kong consul to meet any particular evidentiary standard in determining whether a would-be migrant was actually a prostitute. If the consul "ascertained" that a woman had entered into a contract for "lewd or immoral purposes," he could deny her the certificate.³⁶⁵ It is unlikely that most women—even those who were going to be prostitutes upon their arrival in California, and knew it—would answer "yes" to questions such as "have you lived in a house of prostitution," or "no" to questions such as "are you a virtuous woman?" The key questions were those whose answers might arouse the consul's suspicions but provide no actual proof of prostitution; questions such as "Are you married or single" and "What is to be your occupation in the United States?" If a woman answered "single" or if her aspired occupation seemed improbable, the consul could conclude that she was a likely prostitute. Indeed, the records made available to Congress during later hearings indicate that women who successfully immigrated after the passage of the Page Law were women who traveled with men who they claimed were their husbands.³⁶⁶ Most women (at least, those who did not fail the initial interrogation) were subjected to this line of questioning three times: once by the consul himself, once by the harbor-master of the British colonial government, and yet again on board the ship by the consul.³⁶⁷ The humiliation of these interrogations (as well as the expense of retaining legal counsel to appeal adverse decisions) prevented many women from even attempting to emigrate.³⁶⁸

Officials at the Port of San Francisco verified the efficacy of the Page Law. Testifying before the Joint Committee to Investigate Chinese Immigration just over a year after the passage of the Page Law, the deputy commissioner of immigration in San Francisco explained, in reference to prostitutes, that "this class of Chinese women have been stopped from coming here."³⁶⁹ Another San Francisco official provided statistics demonstrating that the Hong Kong consul's enforcement of the Page Law had drastically reduced the number of Chinese women arriving in San

the United States Consuls in Hong Kong, 1844–1906, reel 10 (Nat'l Archives 1947) [hereinafter Bailey Despatch].

365. Page Law § 1; see also Pepper, *supra* note 10, at 47 (noting that the State Department did not require the Consul "to establish conclusively that a prospective female emigrant was a prostitute but permitted him to reject any woman he suspected of immigrating for 'lewd and immoral purposes'").

366. See Committee Report, *supra* note 89, at 388–89 (statement of Giles H. Gray, surveyor of the Port of San Francisco) (introducing immigration certificate of Wong Lau Si, which states that she is traveling with her husband with the object of being with him in San Francisco).

367. Bailey Despatch, *supra* note 364.

368. Pepper, *supra* note 10, at 56 ("[I]n addition to turning away applicants, consular efforts to enforce the Page Law likely convinced many Chinese wives and daughters not to attempt emigration at all."); Takaki, *Strangers*, *supra* note 41, at 40 ("The Page Law intimidated all women considering emigration.").

369. Committee Report, *supra* note 89, at 175 (statement of Ezekiel B. Vreeland, Deputy Commissioner of Immigration).

Francisco. Giles H. Gray, surveyor of the Port of San Francisco, testified before the Joint Committee that before the Page Law, steamers arrived twice a month, often containing 200 to 400 Chinese women.³⁷⁰ After the law went into effect, these numbers dropped significantly: In the first quarter, from July to October 1875, only 161 Chinese women arrived in San Francisco; by the first quarter of the following year, the number had dropped to 15.³⁷¹

If a woman did manage to survive the interrogation in Hong Kong, she could still be detained upon arrival in San Francisco. Section 5 of the Page Law authorized the collector at the port of arrival to inspect the vessel and certify that the occupants were not felons or women "imported for the purposes of prostitution"; uncertified individuals were sent back to China unless the vessel owner put up a five hundred dollar bond or forfeited his vessel.³⁷² It also appears that the Hong Kong consul took photographs of the women, which were sent with the certificates to be examined by the San Francisco port authorities.³⁷³ Gray testified that under normal circumstances, the Secretary of the Treasury would send a new law in reference to the revenue department or the custom-house service to him immediately.³⁷⁴ The Page Law, not a typical revenue or customs statute but an unprecedented federal immigration statute, slipped through the cracks in the system. Indeed, Gray did not see the law until Congressman Page went himself to the custom-house in August of 1875 and informed the officials of the existence of the law and their duty to carry it out. "We had no copy of it at that time," explained Gray, "he procured it for us, and we consulted together and concluded to enforce it."³⁷⁵

According to Gray, the Page Law prohibited "the immigration or landing of prostitutes and convicts from oriental countries."³⁷⁶ Thus, despite the race-neutral language of the core provisions in sections 3 and 5 banning the importation of *all* prostitutes, Gray and his associates apparently interpreted the Page Law to require them to make "every investigation that we could with reference to females arriving from China upon the China steamers."³⁷⁷

Gray further testified that the Page Law was to ensure that Chinese men did not bring in more than one wife. Gray produced documents to the congressional committee as examples of how the Page Law worked in practice; these documents included an immigration certificate for a wo-

370. *Id.* at 388 (statement of Giles H. Gray, surveyor of the Port of San Francisco).

371. *Id.*

372. Act of Mar. 3, 1875 (Page Law), ch. 141, § 5, 18 Stat. 477, 477-78 (repealed 1974); see also *supra* Part IV.A.

373. See Committee Report, *supra* note 89, at 389 (statement of Giles H. Gray, surveyor of the Port of San Francisco).

374. *Id.* at 395.

375. *Id.* at 394.

376. *Id.* at 388.

377. *Id.* at 387.

man emigrating with her husband that notes that a second wife was denied permission to emigrate after her Page interrogation in Hong Kong. What follows is the text of the immigration certificate, signed by the Hong Kong counsel, David Bailey:

Sir: I inclose [sic] the declaration and photograph of a Chinese woman who is emigrating to the United States with her husband on the steamship Belgic. The man has two wives, but I have declined to grant a certificate to the second wife. The one allowed to come has an asterisk marked over her head in the margins of the photograph. It is my opinion that she is not going to the United States for lewd and immoral purposes.

Very respectfully yours, D. H. Bailey, Consul³⁷⁸

Thus, even though the law appeared to target only prostitution, the Hong Kong consul was apparently interpreting "contracts for lewd and immoral purposes" to cover a broader area than just prostitution per se.

Gray's testimony before the committee also highlights how much more important the antiprostitution provisions of the Page Law were in practice than the antifelon portions. Each woman arriving from China had to have her own certificate and photograph.³⁷⁹ In contrast, the men on board a steamer were given one document for the entire group, certifying that none of the men were contract-laborers or criminals.³⁸⁰ Furthermore, while the port commissioners and surveyors checked the women's individual certificates and identified them using the photographs, their only method of checking the men was to make sure that the number of men arriving was the same number appearing on the certificate.³⁸¹ If, therefore, the Hong Kong consul gave certificates to "a thousand laborers or respectable people in China, and a thousand others who were criminals should get on board, either in harbor or at high sea," the San Francisco officials would never know.³⁸²

The effectiveness of the law in preventing the emigration of Chinese women generally is evident from the marked decrease from 1876 to 1882 in the percentage of Chinese immigrants who were female. In 1882 alone, during the few months between the enactment of the Chinese Exclusion Act and the onset of its enforcement, 39,579 Chinese entered the United States, only 136 of whom were women.³⁸³ The result was that the Chinese were unable to create families within the United States.³⁸⁴ This phenomenon was noted by Justice Field in his majority decision in *Chae Chan Ping v. United States*, upholding the constitutionality of one of the later Chinese exclusion laws.³⁸⁵ Justice Field traced animosity toward

378. Id. at 389 (presenting Bailey's letter).

379. See id. at 391-92.

380. Id. at 392.

381. Id.

382. Id. at 393.

383. Takaki, *Strangers*, supra note 41, at 40.

384. Hing, supra note 9, at 45-46.

385. 130 U.S. 581, 595 (1889).

Chinese laborers to their failure to bring women with them to form families, never mentioning the extraordinary lengths both state and federal government had undergone to prevent Chinese women from migrating: "Not being accompanied by families, except in rare instances, their expenses were small The competition between them and our people was for this reason altogether in their favor."³⁸⁶ In 1890, Chinese men still outnumbered Chinese women in America by 27 to 1. The gender imbalance was not rectified until after World War II: Women made up almost ninety percent of Chinese immigrants from 1946 to 1952.³⁸⁷ And because the Page Law effectively prevented the immigration of Chinese women and kept the male-female ratio in San Francisco's Chinatown skewed, it paradoxically encouraged the very vice it purported to be fighting: prostitution.³⁸⁸

V. THE PAGE LAW AND THE DEVELOPMENT OF AN ANTI-CHINESE IMMIGRATION POLICY

Standing alone, the passage of the Page Law would be a significant event: It was the first restrictive immigration law passed in direct response to the desire to exclude a particular group of people, and it did so by purportedly protecting the institution of monogamous marriage against a dangerous system of polygamy and prostitution. But the Page Law is also important in understanding anti-Chinese immigration legislation for several other reasons.

First, the Page Law demonstrates how the shift from state to federal control over immigration reduced the ability of immigrants to successfully challenge these laws. Prior to the passage of the Page Law, federal courts were developing an equal protection jurisprudence in cases challenging the state laws targeting Chinese women. As Congress began to exercise control over immigration, this jurisprudential development withered.

Second, the Page Law provided anti-Chinese forces with a foothold that paved the way for the Chinese Exclusion Act and subsequent anti-Chinese legislation. This trend is visible in the Report of the Joint Commission to Investigate Chinese Immigration,³⁸⁹ published two years after the passage of the Page Law. The Report continued to focus on marriage and prostitution, and broadened the inquiry into other areas. Third, the Page Law illustrates the federal government's use of marriage as a regulatory weapon against Chinese immigration. This pattern continued in the fifty years following the passage of the Page Law, even when it did so through statutes ostensibly regulating the entry of male laborers, includ-

386. *Id.*

387. Hing, *supra* note 9, at 48.

388. See Peffer, *supra* note 10, at 105-06 (stating that the Page Law "helped perpetuate the importance of prostitution" by creating a society of "unattached men").

389. Committee Report, *supra* note 89.

ing the Chinese Exclusion Act. This Part explores each of these effects in turn.

A. *The Erasure of Equal Protection for Immigration: Chy Lung*

Nearly a year after the enactment of the Page Law, the Supreme Court put the final nail into the coffin of state-based immigration legislation in *Chy Lung v. Freeman*.³⁹⁰ In *Chy Lung*, the Court affirmed Justice Field's decision in *Ah Fong*, conclusively determining that California's statutes targeting "lewd or debauched" women were constitutionally impermissible. The decision makes no reference to the Page Law and appears on its face to reject the idea of excluding women as prostitutes, as it strikes down a California statute that did just that.

Scholars have accordingly read *Chy Lung* to be "highly sympathetic to the immigrant plaintiff,"³⁹¹ striking down a "ludicrous" law.³⁹² But compared to the Page Law, the California statutes were mild. The 1874 California statute required a five hundred dollar bond from anyone importing "lewd or debauched" women into the state; the 1870 statute was a bit harsher, making it a misdemeanor to do so.³⁹³ In contrast, the Page Law banned prostitutes from immigrating outright, made the importation of a prostitute a felony, and set forth a multi-step, rigorous interrogation process that targeted Chinese women at both the port of departure and the port of arrival.³⁹⁴

Read in light of the existence of the Page Law, it is clear that *Chy Lung* did not mandate equality for the Chinese in California. Instead, *Chy Lung*, in combination with the Page Law, offered a solution to the thorny problem of the application of the newly adopted Fourteenth Amendment to the Chinese. If states could not discriminate against immigrants arriving by boat, as Justice Field had held in *Ah Fong*, California could be overrun with Chinese. Yet the Equal Protection Clause mandated just that.³⁹⁵ Consciously or not, the solution provided by *Chy Lung* was to make immigration federal, thus allowing the federal government to do itself what the states could not.

Chy Lung was brought on a writ of error to the Supreme Court as a constitutional challenge by one of the female passengers on the *Japan*.³⁹⁶ Unlike Justice Field's opinion in *Ah Fong*, Justice Miller's opinion in *Chy Lung* did not address equal protection. At this point, the development of an equal protection jurisprudence for immigration was hardly necessary—the Page Law had gone far beyond where any state had gone, and,

390. 92 U.S. 275 (1876).

391. Cleveland, *supra* note 9, at 109.

392. Chan, *supra* note 10, at 104 (arguing that in *Chy Lung*, "the ludicrousness of the state law was . . . exposed for public ridicule").

393. See *supra* text accompanying notes 210–228.

394. See *supra* Part IV.B.

395. *In re Ah Fong*, 1 F. Cas. 213, 213–14 (C.C.D. Cal. 1874) (No. 102).

396. 92 U.S. 275, 276–77 (1876).

since it was a federal law, there was no means by which to challenge it on equal protection grounds.³⁹⁷

The *Chy Lung* decision, rather, strengthened the stand taken in favor of federal control over immigration by Justice Field in *Ah Fong*. It located the power to pass "laws which concern the admission of citizens and subjects of foreign nations to our shores" in Article I of the Constitution as part of Congress's power over foreign commerce.³⁹⁸ State officials, according to the Court, could not be responsible for foreign relations: If Congress does not control foreign commerce and immigration, a "single State can, at her pleasure, embroil us in disastrous quarrels with other nations"³⁹⁹ and "a silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend."⁴⁰⁰

Whereas Justice Field was troubled by the discriminatory targeting of Chinese women by state immigration officials, in *Chy Lung* the Court was outraged by the statute's potential to encourage extortion and corruption among officials. The law's "manifest purpose," according to the Court, "is, not to obtain indemnity, but money."⁴⁰¹ Thus, an immigration official could exploit the broad reach of the statute to extort the innocent as well as the guilty:

The woman whose error has been repaired by a happy marriage and numerous children, and whose loving husband brings her with his wealth to a new home, may be told she must pay a round sum before she can land, because it is alleged that she was debauched by her husband before marriage. Whether a young woman's manners are such as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing in San Francisco.⁴⁰²

Unlike Justice Field in *Ah Fong*, the *Chy Lung* court declined to rule on the issue of equal protection, although it was briefed by the plaintiff.⁴⁰³ Justice Field declined to reiterate the equal protection views he articulated in *Ah Fong* and joined the unanimous majority opinion without writing a separate concurrence. Although the Court echoed the

397. The Equal Protection Clause was not incorporated into the Fifth Amendment until *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954). For a critical assessment, see John Hart Ely, *Democracy and Distrust* 32-33 (1980) ("This is gibberish both syntactically and historically.").

398. *Chy Lung*, 92 U.S. at 280.

399. *Id.*

400. *Id.* at 279.

401. *Id.* at 280.

402. *Id.* at 281. Enforcement of the Page Law eventually led to the same result. Consul David H. Bailey, the American consul in Hong Kong immediately following the enactment of the law, charged each woman he certified to make the trip to the United States ten to fifteen dollars for the privilege. Hirata, *supra* note 10, at 11; see also Peffer, *supra* note 10, at 45-49 (discussing Consul Bailey's role as champion and implementer of the Page Law).

403. Brief for Plaintiff in Error at 10-11, *Chy Lung*.

plaintiff's equal protection argument,⁴⁰⁴ it did so only in the context of arguing that immigration policy affects international affairs:

[I]f this plaintiff and her twenty companions had been subjects of the Queen of Great Britain, can any one doubt that this matter would have been the subject of international inquiry, if not of a direct claim for redress? Upon whom would such a claim be made? Not upon the State of California; for, by our Constitution, she can hold no exterior relations with other nations. It would be made upon the government of the United States.⁴⁰⁵

Given that the subjects of the Queen were *not* being targeted by port commissioners, and that the Page Law created a much stiffer barrier to entry for Chinese women than the California statute, this heightened rhetoric seems overblown. The California statute did not contradict federal policy; indeed, it was a milder version of the same discrimination against Chinese women expressed in the Page Law.

On the same day that it decided *Chy Lung* the Court also handed down the consolidated cases *Henderson v. Mayor of New York* and *Commissioners of Immigration v. North German Lloyd*.⁴⁰⁶ *Henderson* struck down a New York law requiring the owners of vessels landing foreign passengers to give bonds of three hundred dollars for each passenger to indemnify New York against their becoming public charges.⁴⁰⁷ *North German Lloyd* concerned a similar bond law passed by the state of Louisiana.⁴⁰⁸ Together with *Chy Lung*, these cases marked the end of state-controlled immigration.

While it is true that *Chy Lung* struck down discriminatory state laws, when read in light of Congress's passage of the Page Law and California's repeated attempts to retain control over immigration, *Chy Lung* appears in a less favorable light. The deep irony is that the result of the Page Law and *Chy Lung* was the creation of federal immigration laws that were far more discriminatory than anything the states could have passed. When the Reconstruction Amendments and the Civil Rights Acts threatened to make discriminatory state immigration laws unconstitutional, the solution was not to strike down the laws, but to federalize the power of immigration. This pattern was echoed in the late 1870s, when California again stepped up its anti-Chinese agenda, passing laws forbidding Chinese residents employment by private corporations or on public works, authorizing the legislature to remove aliens from the state who did not meet certain conditions, and empowering towns and cities to restrict Chinese to Chinatowns or ghettos.⁴⁰⁹ Although the Chinese were able to challenge

404. That is, that she was treated differently by the enforcers of the statute than a woman from Great Britain or France would be.

405. *Chy Lung*, 92 U.S. at 279.

406. 92 U.S. 259 (1876). Because the Louisiana statute was identical to the New York statute, the Court considered both statutes in one opinion.

407. *Id.* at 267, 275.

408. *Id.* at 275.

409. See Salyer, *supra* note 9, at 12.

most of these laws under the Fourteenth Amendment,⁴¹⁰ once Congress passed the federal Chinese Exclusion Act, these laws were simply preempted, and this avenue of redress disappeared.

At this pivotal moment, immigration law could have developed along a completely different path. Following Justice Field's lead in *Ah Fong*, the Supreme Court could have allowed the states to continue to regulate immigration, holding them to a standard of equal protection in doing so. That is, states could have continued to use a broad understanding of "police power" to restrict immigrants they considered undesirable, as long as these restrictions did not violate equal protection norms. Early on, these norms would have been limited, but over time they would have expanded along with equal protection jurisprudence generally. If that had happened, today we would have a much different set of assumptions about the purposes of immigration, which level of government should control it, and what kinds of restrictions are permissible.⁴¹¹ But that is not what happened. After 1875, federal immigration law burgeoned into a vast system, with regulation of race and nationality at its heart.

B. *Paving the Way for the Chinese Exclusion Act*

The Page Law provided a foothold for the anti-Chinese forces in California. As the first piece of federal legislation restricting immigration, it marked a turning of the tide for California—its Chinese problem was finally recognized as a national crisis. But the law, standing alone, was not seen as sufficient to deter Chinese immigration. Over the next seven years, the anti-Chinese forces grew and continued to devise methods of restricting the Chinese. These forces were to a great extent motivated by fear of competition from Chinese laborers, who accepted lower wages than whites. But a reading of post-Page Law congressional testimony also reveals that the fear of Chinese family structure—and the despotic, antidemocratic "nature" that this system signified—also continued to be an important motivation behind exclusionary anti-Chinese legislation.⁴¹²

In 1876, Congress appointed a Joint Special Committee to Investigate Chinese Immigration. The Committee's report is an astonishing

410. *Id.* at 13.

411. For an argument supporting a return to state-based regulation of immigration, see Spiro, *supra* note 12. But see Michael Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. Rev. 493 (2001) (arguing that Congress cannot devolve its immigration power to the states, and thus that state-based regulations of immigration must be subject to strict scrutiny).

412. George Peffer has argued that the Page Law paved the way for the Chinese Exclusion Act by giving the exclusion movement "time to gain momentum and add labor advocacy to its moral emphasis." Peffer, *supra* note 10, at 42. While I agree that the Page Law functioned as "a valuable stopgap measure," *id.*, I would argue that both antilabor and morals were issues throughout the development of the anti-Chinese movement, and that the Page Law was passed first not because a moral justification against Chinese immigration developed before a labor justification, but because the labor justification was impossible to invoke due to the Burlingame Treaty as it existed in 1875.

document, containing over 1,250 pages of testimony, much of it virulently anti-Chinese.⁴¹³ The investigation was conducted by a congressional delegation sent to San Francisco. Each witness was asked the same twenty-seven interrogatories. These witnesses included government officials, health department officials, policemen, judges, merchants, bankers, manufacturers, farmers, contractors, officers of the Central Pacific Railroad, officers of the Pacific Mail Steamship Company, physicians, missionaries, "white workingmen," "[p]ersons who have lived in China," and "[l]eading Chinamen who can speak English."⁴¹⁴ Of the twenty-seven questions asked, a significant number concerned marriage, prostitution, and morality.⁴¹⁵

The testimony presented in favor of the Page Law had been concerned mostly with the effect of Chinese immigration on the West Coast. By 1876, however, Chinese immigration was becoming a national issue. The investigation accordingly considered the possible effects of Chinese immigration on the rest of the nation. The Chinese "propensity for disease" might not be fatal to the white population in a city with a climate like San Francisco's, but if the "conditions existing in the Chinese quarter of this city [were] transferred to New York, Saint Louis, Cincinnati, New Orleans, or other large cities east of the Rocky Mountains," these cities would become "uninhabitable."⁴¹⁶

The voluminous testimony taken by Congress is difficult to summarize. A wide range of people expressed a wide range of opinions on issues such as whether the Chinese should be excluded outright, whether Chinese already living in the United States should be sent back to China, whether the Chinese were forcing down wages for white labor, whether the Chinese could assimilate, and, if so, whether assimilation was desirable.⁴¹⁷ One notable theme that did emerge was that, even with increased regulation of prostitution, a decision needed to be made about what to

413. See, e.g., Committee Report, *supra* note 89, at iv ("This evidence shows that the Chinese have reduced wages to what would be starvation prices for white men and women . . ."); *id.* at vii–viii (stating that Chinese women "are bought and sold for prostitution, and are treated worse than dogs," and that Chinese fail to care for their sick and dying); *id.* at 68–69 (alleging little hesitancy among native Chinese "in destroying female children at early birth"); *id.* at 131–32 (describing leprosy and other diseases among immigrant Chinese); *id.* at 140–43 (discussing Chinese in general and Chinese prostitutes in particular as sources of smallpox and syphilis).

414. *Id.* at 3.

415. In particular, the following questions elicited testimony about Chinese marriage and sexual practices: "What is [Chinese immigrants'] moral and physical condition?"; "In what way do they live in this city?"; "How many have families?"; "How many Chinese women are there in this country, and what is their condition and character? Are they free, or are they bought and sold as slaves?"; "What is the population of China as far as can be ascertained, and the general condition, manners, customs, and institutions of the people?"; and "What power has a State to prevent the introduction of prostitutes or vagrants from foreign ports?" *Id.* at 2–3.

416. *Id.* at vii–viii.

417. See *id.* at iii–viii.

do with other Chinese women who were still attempting to migrate. Some insisted that the Page Law had ended the immigration of undesirable women.⁴¹⁸ Others testified that the Mayor and San Francisco police department had effectively solved the prostitution problem by instituting a crack-down on brothels.⁴¹⁹ Still others disagreed.⁴²⁰ But no immigration regulation could undo the fact that in the Chinese quarters, there were marriages between husbands and second wives. This reality continued to rankle.

Several witnesses lamented that the respectable first wives, or "wives of honor," were not migrating, even after the Page Law. Frank M. Pixley, representing the people of San Francisco and known for his anti-Chinese views, insisted that Chinese women in California, even those who were not prostitutes, were not proper wives at all:

[T]here is no domestic life among the Chinese in California The true fact is, that the men here who have wives are merchants and business men, wealthy men, and that they are nominal wives. They are not the wives of honor. They are not the wives as would be the first wife if they were China, but they occupied that relation to them here that is common as Americans know as the mistress to the man. If there is one respectable Chinese tested by the requirements of our civilization, the husband who has but one wife, or the wife who has but one husband, whose marriage vows were made in love and fidelity before any authority or any altar that binds their conscience, who have a home in California, and who intend to remain in California and to preserve the marital relations until parted by death, we do not know of it. . . . Family! I think we shall be able to show, literally, that there is not a family, as we understand the honorable and sacred relation of the family tie, among the Chinese in the whole State, or on the entire coast.⁴²¹

Those who disagreed insisted that bringing women to America was the only way to make Chinese immigration work:

I really do think if we are to have this population here it would be much better for us all to have more Chinese women, because if they had a large number of Chinese women here, then the Chinamen would marry and have children, and those children would be a very much better class of people than the present race of Chinamen; just, as a rule, the children of the ignorant European population who come here, having the advantages of

418. See *id.* at 391–95 (statement of Giles H. Gray, surveyor of the Port of San Francisco).

419. *Id.* at 211 (statement of George W. Duffield).

420. *Id.* at 144, 147–48 (statement of Alfred Clarke, Clerk at the San Francisco Police Department).

421. *Id.* at 22 (statement of Frank M. Pixley, esq., representing the City of San Francisco).

our fine public schools, become intelligent and first-rate citizens, much better citizens in many cases than their fathers.⁴²²

In addition to a renewed emphasis on polygamy, the congressional testimony also shows a broadening of social concerns to other public health and sexual issues. The Committee elicited testimony on a number of issues unconnected to labor: the use of opium,⁴²³ the cleanliness of Chinese living conditions (or lack thereof),⁴²⁴ the small spaces in which the Chinese lived,⁴²⁵ the foods they ate,⁴²⁶ their alleged propensities for dishonesty,⁴²⁷ the practice of sodomy,⁴²⁸ and their tendency to carry disease, especially smallpox, syphilis, and leprosy.⁴²⁹ The fear of Chinese prostitutes reached near-hysteria in the testimony of some witnesses, who claimed that boys as young as five were contracting syphilis from irresponsible Chinese prostitutes.⁴³⁰

An important function of the Committee was to determine whether the United States should attempt to renegotiate the Burlingame Treaty so that it could pass legislation more sweeping in its restrictions than the Page Law. Numerous witnesses advocated modifying the Burlingame Treaty and legislation to further exclude the Chinese.⁴³¹ Congress's first response, however, was the Fifteen Passenger Bill, passed in 1879.⁴³² That bill would have restricted steamships from bringing more than fifteen Chinese passengers to the United States on a single voyage. President Rutherford Hayes vetoed the bill, however, as a violation of the Bur-

422. *Id.* at 142 (statement of Dr. John L. Meares).

423. *Id.* at 133.

424. *Id.* at 129.

425. *Id.*

426. *Id.* at 19.

427. *Id.* at 189.

428. *Id.* at 117 (statement of Thomas H. King, Merchant) ("I have [Chinese boys] afflicted about the *anus* with venereal diseases. . . . I have seen them in pollution quite frequently on ships, and often on shore in China, where it is a common practice, a common habit; I have seen it.").

429. *Id.* at 131 (statement of Dr. John L. Meares) (discussing leprosy transacted in Chinese by syphilis transmitted from one generation to another); *id.* at 132 (rebutting idea that Chinese women produced a more virulent form of the disease); *id.* at 202–04 (statement of Frederick A. Gibbs, Supervisor of the City and County of San Francisco, Chairman of the Hospital Committee).

430. *Id.* at 14 (statement of Frank M. Pixley, esq., representing the City of San Francisco (quoting testimony of Dr. Hugh H. Toland, founder of Toland's Hospital)) ("[N]early all the boys in town who have venereal disease, contracted it in Chinatown. . . . The women do not care how old the boys are, whether five years old or more, so long as they have money.").

431. See, e.g., *id.* at 10 (statement of Hon. Frank McCoppin, California State Senate) ("[T]his coast, being the most accessible to them, is in danger of being overrun by this pagan horde, unless their coming be checked by legislation and a modification of existing treaties.").

432. H.R. 2433, 45th Cong., (3d Sess. 1879).

lingame Treaty, and then appointed a commission to renegotiate the treaty.⁴³³

The treaty was successfully renegotiated in 1880. The new treaty allowed the United States to limit immigration of Chinese laborers if their immigration would affect (or threaten to affect) American interests, or endanger the "good order" of the country. The only limit was that the United States was prohibited from completely suspending Chinese immigration.⁴³⁴ In 1882, after the renegotiation of the Burlingame Treaty, Congress passed the Chinese Exclusion Act.⁴³⁵ The Exclusion Act suspended the immigration of Chinese laborers for ten years. The Exclusion Act, however, allowed Chinese residents of the United States to make return trips to China, thus staying within the terms of the newly negotiated treaty.⁴³⁶

This regime changed in 1888 with the passage of the Scott Act. The Scott Act prohibited the entry of all Chinese laborers, even those who were residents of the United States leaving only to visit China.⁴³⁷ The Scott Act was later the subject of the famous case of *Chae Chan Ping*, or the *Chinese Exclusion Case*, in which Justice Field shifted the root of the federal immigration power from the Commerce Clause to a plenary power inherent in national sovereignty.⁴³⁸ While the Scott Act appeared to regulate Chinese immigrants as laborers, just like the Page Law, it also prevented a particular kind of family formation. Chinese men, after all, were returning to China so that they could continue to support their extended families in China with the wages they earned in America, and in many cases so that they could father children with the wives they had left behind.⁴³⁹ Preventing them from returning would prevent them from establishing cross-continental, often polygamous, families.

C. Marriage and Post-Exclusion Act Regulation

The Page Law was not an isolated event in the efforts to exclude the Chinese. Marriage continued to be a method of regulation throughout the period of Chinese exclusion. Habeas corpus petitions filed by Chinese immigrants were so common that the California courts of the period

433. See Salyer, *supra* note 9, at 14; see also E.P. Hutchinson, Legislative History of American Immigration Policy 72-73 (1981) (discussing various amendments to the Fifteen-Passenger Bill and President Hayes' veto).

434. Renegotiated Burlingame Treaty, *supra* note 338, art. I, 22 Stat. at 826.

435. Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, § 1, 22 Stat. 58, 58 (repealed 1943).

436. *Id.* § 3. Indeed, when immigration officials attempted to prohibit the reentry of former residents without certificates, the Supreme Court interpreted the law in favor of the Chinese returnees. See *Chew Heong v. United States*, 112 U.S. 536, 543 (1884).

437. Act of Oct. 1, 1888, ch. 1064, § 1, 25 Stat. 504, 504 (repealed 1943).

438. 130 U.S. 581, 605-06 (1889).

439. McKeown, *Transnational Chinese Families*, *supra* note 10, at 97-98 (noting that Chinese immigrants made "special trips back to China after a few years abroad especially to take a wife and start producing descendants").

have been referred to as a "habeas corpus mill."⁴⁴⁰ Even though none of the statutes passed after the Page Law singled out women as a category of immigrants, courts continued to use Western marriage norms when applying these laws to women.

The federal government expanded its control over immigration by passing general immigration laws that did not specifically target the Chinese. In 1891, Congress passed an act of general application that regulated the immigration of many of the classes of persons previously regulated by state laws, including criminals, paupers, the insane, and people with "contagious diseases." This law went a step beyond the state law classifications, making polygamists excludable.⁴⁴¹ In addition, it set up the Bureau of Immigration and permitted the federal government to deport aliens within one year of their arrival if they were discovered to be excludable for any reason.⁴⁴² In 1892, the Geary Act not only extended the Chinese Exclusion Act for ten more years, but also created the beginnings of a federal passport system.⁴⁴³ Congress continued to maintain the system of Chinese exclusion until 1943, and as nativist sentiment spread, expanded the system of national targeting to include other immigrants, including those from Japan and Southern and Eastern Europe.⁴⁴⁴

The use of marriage to regulate immigration runs like a thread through these statutes and the cases interpreting them. The Chinese Exclusion Act and the Geary Act, for example, led to numerous cases concerning women excluded under the Acts by immigration officials. Courts determined that a wife should be treated under the acts as taking on her husband's status. This principle led to somewhat perverse decisions. In *The Case of the Chinese Wife*, for example, Ah Moy, the wife of a laborer, was found to take on his laborer status, even though she herself was not a

440. Christian G. Fritz, A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California, 32 Am. J. Legal Hist. 347, 347-48 (1988).

441. Act of Mar. 3, 1891 (Immigration Act of 1891), ch. 551, § 1, 26 Stat. 1084, 1084.

442. *Id.* For a more detailed discussion of the Immigration Act of 1891 and its effect on Chinese immigration, see Salyer, *supra* note 9, at 26-28.

443. Act of May 5, 1892 (Geary Act), ch. 60, §§ 1, 6-8, 27 Stat. 25, 25-26 (repealed 1943). Numerous other acts were passed during this time that further restricted Chinese immigration. See Act of July 5, 1884, ch. 220, 23 Stat. 115 (repealed 1943) (amending and tightening restrictions in the Chinese Exclusion Act); Act of Oct. 1, 1888 (Chinese Exclusion Act), ch. 1064, 25 Stat. 504 (repealed 1943) (same); Act of Nov. 3, 1893 (McCreary Act), ch. 14, §§ 1-2, 28 Stat. 7, 7-8 (repealed 1943) (requiring certification of residency for Chinese laborers, and defining "laborer" to include skilled and unskilled immigrants); Act of Aug. 18, 1894, ch. 301, 28 Stat. 372, 390 (granting customs officers final authority to exclude Chinese "unless reversed on appeal by the Secretary of the Treasury").

444. See Act of Feb. 5, 1917 (Immigration Act of 1917), ch. 29, § 2, 29 Stat. 874, 876 (repealed 1952) (restricting Asian immigration); Act of May 19, 1921 (Quota Act (Three Per Cent Act)), ch. 8, § 2, 42 Stat. 5, 5 (repealed 1952) (establishing the three percent immigration quota limit); Act of May 26, 1924 (Immigration Act of 1924), ch. 190, § 11, 43 Stat. 153, 159 (repealed 1952) (reducing the quota to two percent); see also Salyer, *supra* note 9, at 121-38 (discussing the influence of nativism on American immigration policy).

laborer.⁴⁴⁵ Although the husband had a certificate granting him entry because he had already resided in California before the passage of the Exclusion Act, the wife did not have such a certificate, and she was deported as a laborer. At first it appeared that the same principle would apply to wives of merchants. In *In re Ah Quan*, the California Supreme Court held that even though the wife of a merchant took on her husband's merchant status, she was still considered a separate person under the exclusion laws and denied entry to the petitioner.⁴⁴⁶ But fifteen years later, the Supreme Court finally heard the issue and determined that wives of Chinese merchants could enter.⁴⁴⁷ The purpose of the exclusion laws, the Court explained, was to prevent Chinese laborers from entering under the guise of being one of the permitted classes.⁴⁴⁸ Preventing the wife of a merchant from entering would not serve this purpose.⁴⁴⁹ Similarly, the Ninth Circuit held that wives of American citizens of Chinese ancestry were exempt from the certificate requirement.⁴⁵⁰ Todd Stevens has argued persuasively that these cases are best read as "husband's rights" cases: The principle of coverture, whereby a woman had no legal identity separate from that of her husband, in many cases trumped the exclusionary racial policy served by the exclusion acts. A husband had a right to the "care and comfort" of his wife, even if he was Chinese.⁴⁵¹

Because a woman's status as exempt from (or covered by) the Chinese Exclusion Act and subsequent anti-Chinese immigration restrictions was dependent on her marital status, immigration officials and courts devoted much of their attention to determining the validity of Chinese marriages. In these judgments, Western marriage norms often dictated the validity of Chinese marriages. For example, in *Ah Moy*, the case where the court deported a Chinese wife based on her husband's status as a laborer, the court emphasized her youth, stating that "from her appearance in court," she "must be a mere child."⁴⁵² If her "husband" was serious about enjoying the privileges of marriage, the court concluded, he could do so in China—he could "return and protect his child-wife in the celestial empire."⁴⁵³ In another case, immigration officials appear to have concluded that a marriage was invalid in part because of the large age gap between a 56-year-old husband and a 20-year-old wife, assuming

445. *In re Ah Moy*, 21 F. 785, 787 (C.C.D. Cal. 1884).

446. *In re Ah Quan*, 21 F. 182, 187 (C.C.D. Cal. 1884).

447. *United States v. Gue Lim*, 176 U.S. 459, 468–69 (1900).

448. *Id.* at 467.

449. *Id.* at 468.

450. *Tsoi Sim v. United States*, 116 F. 920, 925 (9th Cir. 1902).

451. Stevens, *supra* note 8, at 273–74; cf. Chan, *supra* note 10, at 138 (interpreting cases excluding women as barring family formation among working-class Chinese but "keeping a crack open" for the petite bourgeoisie).

452. *In re Ah Moy*, 21 F. 785, 785 (C.C.D. Cal. 1884).

453. *Id.* at 786.

(incorrectly) that "Chinese customs frown upon the marriage of old men with young girls."⁴⁵⁴

Some judges probed more deeply into Chinese marriage customs in an attempt to ascertain whether a marriage was valid. In *In re Lum Lin Ying*, for example, the court wrestled with the dilemma of deciding whether a marriage between a husband and wife who did not meet each other before marriage was valid.⁴⁵⁵ Lum Lin Ying had been betrothed to her husband since the age of two, and their marriage was solemnized according to the laws of China while she still resided there but her husband was in the United States. After researching Chinese marriage customs, the court determined that the marriage was valid.⁴⁵⁶ Significantly, the validity of the marriage rested on a finding that there was no evidence that Lum Lin Ying was a prostitute. According to the court, "whispered suggestions made on the authority of some of her countrymen" that she was a prostitute did not constitute evidence, and thus "her rejection would be a cruel injustice."⁴⁵⁷ While this logic worked in Lum Lin Ying's favor, the implication was clear: A woman who worked as a prostitute could not be protected under the law as a wife.

Indeed, the strict dichotomy between wife and prostitute underlying the Page Law continued to operate in federal immigration policy throughout the era of Chinese exclusion. In 1907, the passage of a new immigration act added another weapon to the federal government's arsenal by creating a means for deporting female immigrants who were "found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States."⁴⁵⁸ This law was frequently applied to women who obtained entry to the United States as wives and were later arrested for prostitution.⁴⁵⁹

454. *Chew Hoy Quong v. White*, 244 F. 749, 750 (9th Cir. 1918). Sucheng Chan has noted with regard to this case that "many Chinese immigrants married late in life because it took them years to save up enough money to do so." Chan, *supra* note 10, at 118.

455. 59 F. 682, 682 (D. Or. 1894).

456. *Id.* at 682–83.

457. *Id.* at 683–84.

458. Act of Feb. 20, 1907 (Immigration Act of 1907), ch. 1134, § 3, 34 Stat. 898, 900. Even before the 1907 Act, courts upheld the deportation of prostitutes under the theory that they were "laborers" under the exclusion acts. See, e.g., *Wong Ah Quie v. United States*, 118 F. 1020, 1020 (9th Cir. 1902); *Lee Ah Yin v. United States*, 116 F. 614, 616–17 (9th Cir. 1902). The 1907 Act was also notable because it was the first time that criminal conduct within the United States was identified as a basis for deportation. See Jennifer Welch, Comment, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 Cal. L. Rev. 541, 547 (2004).

459. See, e.g., *Quock So Mui v. Nagle*, 11 F.2d 492, 493 (9th Cir. 1926) (upholding deportation of women found in bed with a man not her husband even where there was no proof that she was a prostitute); *Hoo Choy v. North*, 183 F. 92, 93 (9th Cir. 1910) (upholding deportation of woman who entered San Francisco with her citizen husband and lived with him until her arrest for prostitution); *Haw Moy v. North*, 183 F. 89, 91–92 (9th Cir. 1910) (upholding deportation of woman admitted as native-born citizen but arrested for prostitution); *Looe Shee v. North*, 170 F. 566, 568–72 (9th Cir. 1909) (upholding deportation of widow found working as a prostitute).

In 1910, the antiprostitution fever burst beyond the boundaries of immigration law in the form of the Mann Act, which not only broadened the 1907 law as applied to immigrants but also made it a crime to transport a woman for purposes of prostitution across state lines.⁴⁶⁰ In upholding the deportation of women suspected of prostitution, the courts found that by becoming a prostitute, a woman lost the legal protection of marriage. One woman, Li A. Sim, who was the wife of an American citizen of Chinese ancestry, was ordered deported after she was found in a house of prostitution.⁴⁶¹ By engaging in prostitution, the Court found, Li A. Sim had lost her status as a wife:

This situation was one of her own making, and, conceding her right to come into the United States and dwell with her husband because of his American citizenship, it is obvious that such right could have been retained by proper conduct on her part and was only lost upon her violation of the statute.⁴⁶²

Prostitutes were not the only immigrants outside the protections of monogamous marriage. Polygamists, concubines, and women in arranged marriages were also targeted. Polygamists were first excluded as one of the many classes of excludable immigrants in the 1891 Immigration Act.⁴⁶³ In 1907, the exclusion was extended from polygamists to "persons who admit their belief in the practice of polygamy."⁴⁶⁴ This change resulted in diplomatic problems with the Ottoman Empire, which believed that the United States was discriminating against Muslims because of their religious belief in polygamy.⁴⁶⁵ Both the 1907 and 1910 Acts added transporting a woman for any "other immoral purpose" to the list of liability-creating acts, stretching the laws to cover many situations other than clear-cut prostitution.⁴⁶⁶ This change in language was intended to cover "complex situations" involving women who were neither clearly wives in the monogamous, Christian sense nor prostitutes—concubines, mistresses, or women entering into arranged marriages.⁴⁶⁷ It was the "other immoral purposes" language of the 1907 law that resulted in the indictment of John Bitty for attempting to bring his mistress from England to live with him.⁴⁶⁸ The Court held:

The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to

460. White-Slave Traffic (Mann) Act, ch. 395, §§ 2, 6, 36 Stat. 825, 825-27 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (2000)).

461. *Low Wah Suey v. Backus*, 225 U.S. 460, 466 (1912).

462. *Id.* at 476.

463. Act of Mar. 3, 1891 (Immigration Act of 1891), ch. 551, § 1, 26 Stat. 1084, 1084.

464. Act of Feb. 20, 1907 (Immigration Act of 1907), ch. 1134, § 2, 34 Stat. 898, 899.

465. Cott, *supra* note 5, at 139.

466. White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424); Immigration Act of 1907 § 2.

467. Haag, *supra* note 5, at 99-100.

468. *United States v. Bitty*, 208 U.S. 393, 398-99 (1908).

the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse.⁴⁶⁹

Thus, for years following its passage, marriage cast a shadow on immigration laws targeting Chinese immigrants as well as increasing restrictive laws targeting other immigrant women.⁴⁷⁰ The protection of marriage provided both a justification for and a method of excluding Chinese women. The regulation of marriage was present at the birth of the federal immigration system, and as that system expanded, marriage norms were protected and reinforced each step of the way.

CONCLUSION

Marriage played an important yet largely unrecognized role in the development of immigration law and, more generally, in the development of American population policy following the Civil War. With the closing of the frontier, what had once appeared to be a virtually limitless mass of land was suddenly bounded, and Congress shifted its attention from encouraging westward expansion to restricting entry into this now constrained space. While this policy was motivated in part by concerns about labor competition, concerns about creating a white, Anglo-Saxon, Christian culture were equally important. This goal was achieved in part by restricting women, as bearers of children and of culture, from entry. Classifying certain women as improperly married was an effective means of shaping the population, both racially and culturally.⁴⁷¹ Definitions of marriage were therefore integral to the development of a national population policy during the formative years of our country's immigration system.

The Page Law's use of marriage norms as a means of exclusion continues to resonate today. Marriage continues to be a core concern in immigration law and policy, and our laws continue to require immigration officials to evaluate the legitimacy of certain kinds of marriages over others. Generally, the reason given for this inquiry is the prevention of fraudulent marriages—marriages entered into solely to achieve residency or citizenship.⁴⁷² But any decision about whether a marriage is "fraudulent" necessarily requires a judgment about what a proper marriage *is*, as opposed to what it is not. Immigration officials and courts continue to inscribe cultural norms or stereotypes of marriage onto new immigrants

469. *Id.* at 402.

470. See generally Dubler, *In the Shadow*, *supra* note 5.

471. Laws restricting Chinese women are only one example of the use of marriage to shape culture during this period. Congress and state and territorial legislatures also encouraged white, educated women to migrate west, and many Western states began to restrict intermarriage between whites and Native Americans.

472. See Immigration Marriage Fraud Amendments of 1986 (IMFA), Pub. L. 99-639, 100 Stat. 3537 (codified in scattered sections of 8 U.S.C.).

by requiring them to act in particular ways, thus privileging some kinds of marriage over others.⁴⁷³ Prevention of domestic violence has been identified as an important policy goal through the use of a domestic violence exception to the standard two-year conditional residency period.⁴⁷⁴ Thus, policies about what kinds of marriages are acceptable (here, violence-free) shape laws about which immigrants will be included or excluded.

Understanding this dynamic is important to the development of a coherent and useful immigration policy. Immigration decisions are routinely based on judgments about which marriages are proper and which are not, yet this is not an explicitly recognized function of immigration law. Rather, determinations of who may enter into marriage have traditionally been left to states to decide. Immigration scholars must address the thorny issue of whether federal administrative agencies and courts, long considered inappropriate forums for family law decisionmaking, should be in the business of establishing minimum standards of marriage for immigrants. Finally, given that the majority of legal immigrants entering the United States today do so based on family grounds and not labor categories,⁴⁷⁵ any general theory of immigration law or policy proscription must grapple with what role the definitions of marriage should play.

473. In determining whether a marriage is valid for purposes of immigration, officials consider whether the couple has commingled funds, cohabitated after the marriage, and whether they have children. 8 C.F.R. § 216.5(e)(2)(i)–(iii) (2004).

474. Under section 216(b) of the IMFA, an immigrant spouse seeking permanent residency is subject to a two-year waiting period of “conditional permanent residency” before obtaining permanent residency. During this period, if the marriage is ended in annulment or divorce or is deemed fraudulent, the immigrant spouse becomes removable. IMFA § 216(b) (codified at 8 U.S.C. § 1186a(b) (2000)).

475. In 2002, 1,063,732 legal immigrants arrived in the United States. Office of Immigration Statistics, U.S. Dep’t of Homeland Sec., 2002 Yearbook of Immigration Statistics 7 tbl.A (2003), available at <http://uscis.gov/graphics/shared/aboutus/statistics/IMM02yrbk/IMM2002.pdf> (on file with the *Columbia Law Review*). Of these, 673,817 were family-sponsored immigrants; only 174,968 entered based on employment preferences, and only 126,084 were refugees or asylees. *Id.*