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How Equal Protection Did and Did Not Come to the United States, and the Executive Branch Role Therein

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HOW EQUAL PROTECTION DID AND DID NOT COME TO THE UNITED STATES, AND THE EXECUTIVE BRANCH ROLE THEREIN

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What follows is an interbranch comparison of federal policy toward three racial groups in the United States—African Americans, Native Americans, and Asian Americans—during the four decades following the post-bellum entrenchment of the right to "equal protection of the laws." It should be read as an extended, analytic commentary on the Timechart compilation of policy developments in each branch of the federal government during these years, which is appended at the end of this Essay. My analytic focus is on institutional forces that conduced to executive branch intervention on behalf of racial minorities (or not). This will be elaborated in the conclusion.

I. AFRICAN AMERICANS

The Equal Protection Clause—meant to restrict racial discrimination—entered the United States Constitution as one of several measures enacted by a Congress stripped of Southern representatives in the aftermath of the Civil War, and then imposed on the South as a condition for readmission into Congress. During Reconstruction, Republicans used the military victory to coerce the Southern states into ratifying the Thirteenth Amendment, allowing suffrage for African Americans (via the Reconstruction Acts of 1867–1868[1]), and then into ratifying the Fourteenth (and, if not yet admitted back to Congress by 1869, the Fifteenth) Amendment(s). By the time of the 1874 election, this dominant national coalition of Republicans in the non-seceded states, combined with African American and white Republicans in the South, no longer dominated either Congress or the national mood. By this time, however, the rights had been formally entrenched at the national level.

In this first post-bellum decade, the dongressional Republicans gave the nation the Thirteenth, Fourteenth, and Fifteenth Amendments; the Civil

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1. Ch. 153, 14 Stat. 428–30 (1867); ch. 5–6, 15 Stat. 2–5 (1867); ch. 30, 15 Stat. 14–16 (1867); ch. 25, 15 Stat. 41 (1868).

Rights Act of 1866;[2] a treaty in 1866 that freed all slaves owned by the Cherokee;[3] the Reconstruction Acts of 1867–1868;[4] the Enforcement Act of 1870;[5] the Ku Klux Klan Act of 1871;[6] and the Civil Rights Act of 1875.[7] The Civil Rights Act of 1875 was pushed through a lame duck Congress—a Congress having gone Democratic in the election of 1874—and was filibustered until its most controversial provision, the desegregation of public schools, was dropped.[8] While this Act did squeak through the lame duck Republican House early in 1875, its day (except for the jury provision) had already come and gone.[9] It passed the House (162 to 99) only with the votes of ninety Republicans who had just been ousted from office.[10]

In the election of 1874, the American electorate basically turned its back on Reconstruction, changing the House of Representatives from a two-thirds Republican majority to a Democratic majority.[11] In the election of 1876, after a commission sorted through disputes over election numbers, Republican Rutherford B. Hayes was given the Electoral College by one vote, despite a clear majority by Democrat Samuel Tilden in the popular vote.[12] In 1876, the Democrats retained their House majority and came within three of tying the Republican majority in the Senate; in the 1878 election, the Democrats surpassed the Republicans in both houses.[13] The national mood had plainly shifted by the time of the 1874 elections, and the

2. Ch. 31, 14 Stat. 27–30 (1866).

3. Alberty v. United States, 162 U.S. 499, 500 (1896) (stating that petitioner "became a citizen of the Cherokee Nation under the ninth article of the treaty of 1866, 14 Stat. 799, 801, by which the Cherokee Nation agreed to abolish slavery").

4. *See supra* note 1.

5. Ch. 114, 16 Stat. 140–46 (1870).

6. Ch. 22, 17 Stat. 13–15 (1871).

7. Ch. 114, 18 Stat. 335–37 (1875).

8. Alfred H. Kelly, *The Congressional Controversy over School Segregation, 1867–1875*, 64 AM. HIST. REV. 537, 555–56 (1959).

9. *Id.*

10. PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 68 (2011).

11. Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 125–33 (1994) (describing the election as a "mobilized deliberation" and a forgotten "constitutional moment").

12. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 575–76 (1988) (discussing the "electoral crisis" that resulted from the 1876 election); XI WANG, THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860–1910, at 148–49 (1997).

13. SAMUEL KERNELL & GARY C. JACOBSON, THE LOGIC OF AMERICAN POLITICS 575 (2d ed. 2003).

shift endured long enough to let the Democrats control both houses of Congress by 1879.[14]

The executive branch shifted in a similar direction but far less abruptly. The President, the Department of Justice ("DOJ"), and federal troops acted against the massive violent resistance in Southern states by suspending the writ of habeas corpus in nine South Carolina counties in 1871,[15] bringing hundreds of prosecutions annually from 1871 through 1877, and then again during the Garfield-Arthur administration of 1881-1885.[16] During 1878, President Hayes's first full calendar year in office, there was a brief dip in prosecutions, apparently reflecting his effort to attempt to let Southern officials provide "'harmony and good feeling,'" as leaders such as Wade Hampton had promised they would if the federal troops withdrew from the South.[17] By October 1878, President Hayes had received enough reports of electoral violence in South Carolina and Texas that he decided to make "'a clear, firm and accurate statement of the facts as to Southern outrages.'"[18] The next year his administration quadrupled the number of prosecutions, from twenty-three to ninety-three.[19] The intensity with which the Democratic party opposed these measures shows up in the low enforcement year of 1880, after the Democrats briefly took control of Congress.[20] During the 1879–1880 Congress, President Hayes vetoed no fewer than eight efforts (by Democrats) to repeal the voting rights enforcement laws.[21] Congress refused to appropriate any funds at all for federal marshals in the fiscal year July 1, 1879, through June 30, 1880, because of antipathy toward their role in voting rights enforcement.[22]

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14. *Id.* Voting figures after 1872 and until well into the twentieth century cannot give a complete picture of national sentiment because of the role played by white violence to keep African Americans and their white sympathizers from the polls in the South once the Democrats had "redeemed" it. *See infra* notes 43–47.

15. *See* FONER, *supra* note 12, at 454–58; LOU FALKNER WILLIAMS, THE GREAT SOUTH CAROLINA KU KLUX KLAN TRIALS, 1871–1872, at 39, 45–48 (1996).

16. *See* Graph, *infra* p. 193.

17. WANG, *supra* note 12, at 152–53; *see also* RAYFORD W. LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON 12–36 (Da Capo Press 1997) (1965) (discussing the "let alone" policy of Hayes toward the South during his presidency).

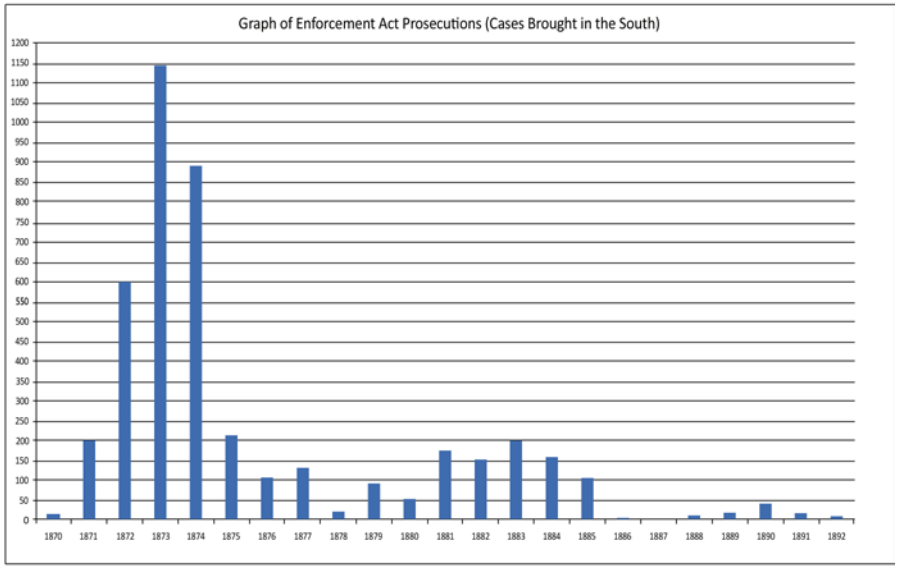
18. WANG, *supra* note 12, at 161.

19. *Id.* at 148, 161.

20. *See* Graph, *infra* p. 193.

21. LOGAN, *supra* note 17, at 32.

22. Charles Fairman, 7 *Reconstruction and Reunion, 1864–1888, Pt. II, in* OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE U.S. (1987).



Democrat Grover Cleveland won the popular vote for President in 1884, 1888, and 1892 (although in 1888, Republican Benjamin Harrison took the Electoral College).[23] In 1889, however, the Republicans returned to control, for a two-year interlude, both Houses of Congress and the Presidency.[24] Republicans Henry Cabot Lodge (Mass.) in the House and George F. Hoar (Mass.) in the Senate struggled mightily to pass a bill that would create federal supervisors to observe voter registration and guard against fraud at the ballot box.[25] The bill passed the House.[26] The Democratic Senate minority then used the following tactics to stall and eventually defeat the bill in the lame duck session (the Republicans having lost the House again in the 1890 election): (1) a filibuster; (2) a mass Democratic walkout to prevent a quorum; and (3) Democratic success (by a one-vote margin) at changing the subject.[27] The thirty-five votes to change the subject included five Silverite Republicans (two each from Colorado and Nevada, and William D. Washburn from Minnesota[28]) and Senator Simon Cameron of Penn-

23. KERNELL & JACOBSON, *supra* note 13, at 578–79.

24. BRANDWEIN, *supra* note 10, at 182.

25. *Id.*

26. *Id.* ("The bill passed the House on July 2, 1890, but in the Senate Democrats and western "silver" Republicans joined forces to hold it over until the next session.").

27. *Id.* at 182–85.

28. *William Drew Washburn*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=W000175 (last visited Aug. 26, 2013).

sylvania, a business-oriented Republican who was heavily involved in silver speculation.[29] In 1891, House Republicans (now in a decided minority) abandoned their efforts to protect African American voters.

Along with Democratic President Grover Cleveland, the election of 1892 brought in two Democratic congressional chambers.[30] In 1894, the party took advantage of this situation by rescinding almost all provisions of the Reconstruction voting rights enforcement acts.[31] The Republicans, having dropped the civil rights issue and being completely absorbed with protecting business interests against the rising labor and populism movements, did not filibuster.[32]

The Administration of (Republican) President Theodore Roosevelt provides a limited exception to the otherwise dismal picture for African American civil rights that prevailed between 1885 and 1910. Without taking on a recalcitrant Congress, President Roosevelt used his DOJ in 1901-1909 to prosecute Klan-type mobs that were terrorizing African Americans into abandoning their jobs;[33] to prosecute and convict a Floridian who violated the 1867 federal anti-peonage law;[34] to produce an amicus brief endorsing the petition for habeas corpus of an African American man arrested under a peonage statute of Alabama;[35] to prosecute members of a lynch mob for violating Sections 5508 and 5509 of the Revised Statutes of 1901;[36] and to successfully prosecute contempt of court charges against a

29. *James Donald Cameron*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=c000065 (last visited Aug. 26, 2013).

30. KERNELL & JACOBSON, *supra* note 13, at 578–79.

31. BRANDWEIN, *supra* note 10, at 182–85; Act of Feb. 8, 1894, ch. 25, 28 Stat. 36 (1894).

32. BRANDWEIN, *supra* note 10, at 185.

33. Hodges v. United States, 203 U.S. 1, 2–4 (1905), *overruled in part by* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Pamela S. Karlan, *Contracting the Thirteenth Amendment:* Hodges v. United States, 85 B.U. L. REV. 783, 785–90 (2005); Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888–1910*, *in* 8 OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 3, 379–84 (1993). For the descriptions of the 1903 prosecutions of *United States v. Morris* and *United States v. Maples*, see Timechart, *infra* pp. 216–26. The latter conviction of *Maples* was overturned by the Fuller Court in *Hodges v. United States*. *See Hodges v. United States*, ENCYLOPEDIA OF ARKANSAS HISTORY AND CULTURE, http://www.encyclopediaofarkansas.net/encyclopedia/entry–detail.aspx?entryID=7404 (last visited Oct. 4, 2013). The Fuller Court overturned a similar set of Roosevelt Administration criminal convictions in 1907 on the same grounds. *See, e.g.*, Boyett v. United States, 207 U.S. 581, 581 (1907) (per curiam).

34. *See* Clyatt v. United States, 197 U.S. 207, 219 (1905) ("The indictment charges that the defendant did 'unlawfully and knowingly return one Will Gordon and one Mose Ridley to a condition of peonage, by forcibly and against the will of them, the said Will Gordon and the said Mose Ridley, to work to and for Samuel M. Clyatt.'").

35. Bailey v. Alabama, 211 U.S. 452, 452–53 (1908).

36. Riggins v. United States, 199 U.S. 547, 550 (1905). Section 5508 reads:

white sheriff, deputy, and lynch mob members who cooperated in lynching an African American man whose appeal they knew was pending in the Supreme Court.[37]

President Roosevelt's DOJ also entered two cases to support treaty rights of Native Americans against infringements by states and negotiated access to "white" schools for Japanese-Americans in California, although at the cost of limiting Japanese immigration.[38] Apart from the diplomatic efforts on behalf of these Japanese residents, President Roosevelt limited his minority-protective efforts to his DOJ, and they are modest in comparison to Republican efforts of the post-bellum decade.

Moreover, the Fuller Court thwarted most of President Roosevelt's DOJ prosecutions and amicus briefs on behalf of African American civil rights.[39] The sole exception seemed to be on the topic of lynch mob murders, which intrinsically posed a threat to judicial prerogatives. The Fuller Court refused to allow a habeas petition from a man held in jail pending trial for a lynching that resulted in murder.[40] Additionally, it not only upheld the power of a circuit court to issue contempt charges for knowingly lynching an African American man whose appeal challenging a rape conviction was pending in the United States Supreme Court,[41] but also tried the partic-

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

Hodges, 203 U.S. at 5.

Section 5509 reads:

> If, in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed.

United States v. Mason, 213 U.S. 115, 119 (1908)

37. United States v. Shipp (I), 203 U.S. 563, 571–72 (1906); United States v. Shipp (II), 214 U.S. 386, 386–87 (1909).

38. *See infra* Parts II–III.

39. In *Clyatt*, the Court reversed and remanded the peonage conviction claiming technical problems with the indictment. 197 U.S. at 22 (1905). In *Hodges* and *Boyett*, the Court ruled that private persons cannot be punished by the federal government for violent intimidation used to drive African Americans out of desirable jobs. *Hodges*, 203 U.S. at 19–20; Boyett v. United States, 207 U.S. 581, 581 (1907). In *Bailey*, it rejected the arguments of the Roosevelt Administration's *amicus* brief, refusing to issue a writ of habeas corpus to an African American man jailed for violating an Alabama peonage statute. 211 U.S. at 452–53.

40. Riggins v. United States, 199 U.S. 547, 551 (1905).

41. Shipp (I), 203 U.S. at 575.

ipants and found them (a sheriff, a deputy, and four members of the mob) in contempt of court.[42]

An unremitting campaign of violence, fraud, and intimidation kept many African Americans in the South from voting in the half-century following the Civil War, at the cost of many lives. During this time, there was also an epidemic of public lynching in the South. Between 1885 and 1900, 2,500 persons were lynched in the United States, mostly in the South; the great majority of those lynched were African American.[43] Yet, starting with Mississippi in 1890, the state-level legislative changes that spread across the South in a twenty-year period were most effective in shaping election results.[44] After Mississippi, the following states were affected by these legislative changes: South Carolina in 1895; Louisiana in 1898; North Carolina in 1900; Alabama in 1901; and Virginia in 1902.[45] By 1910, all eleven of the former Confederate states, as well as Oklahoma, had legislated restrictions producing African American disenfranchisement.[46] These eventually disenfranchised nearly all the Southern African American voters.[47]

The judicial branch in this time period essentially followed the pace of the executive branch as opposed to the legislative branch. The Chase Court (which lasted until 1873) and the Waite Court (1874–1888) proved moderately protective of civil rights of African Americans. Both Courts trimmed the Fourteenth Amendment and some Reconstruction legislation by interpreting them narrowly in cases such as *Blyew v. United States*,[48] *the Slaughterhouse Cases*,[49] *United States v. Cruikshank*,[50] *the Civil Rights Cases*,[51]

42. Shipp (II), 214 U.S. at 403–05, 425.

43. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 312 (7th ed. 1994).

44. J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTIONS AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910, at 139–42 (1974).

45. LOGAN, *supra* note 17, at 348.

46. *Id.*

47. *Id.*

48. 80 U.S. 581 (1872). The Court construed the limiting term "affecting persons," from the Civil Rights Act of 1866, § 3, as not applying to African Americans who were simply denied the right to give evidence as witnesses, but as applying only to the parties to a suit—defendants or litigants. *Id.* at 590–94. The section removed into federal jurisdiction all "'causes, civil and criminal,' . . . 'affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act,'" among which rights are the right to give evidence and the right to have full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. *Id.* at 590–91.

49. 83 U.S. 36, 74–81 (1873) (construing the Fourteenth Amendment Privileges or Immunities Clause narrowly, to include only such privileges as derived from the national character of the Constitution, such as the right to travel freely among the states).

and *United States v. Harris*.[52] The Waite Court used the federal commerce power to declare void a state law desegregating common carriers within the state that moved in interstate commerce.[53] The Waite Court also declared unconstitutional a few sections of civil rights acts in a way that left them easily amendable to pass judicial muster, politics permitting.[54]

Both the Chase and Waite Courts, however, also upheld civil rights principles in important cases. The Chase Court *rejected* a railway company's claim that providing (physically) identical but separate cars for different races amounted to equal treatment in satisfaction of District of Columbia law.[55] Similarly, the Waite Court: (1) expanded the reach of the Fifteenth Amendment by interpreting it to contain no state action limit on federal enforcement legislation in spite of its language;[56] (2) upheld a state-

50. 92 U.S. 542, 554–55 (1876) (construing the Fourteenth Amendment narrowly, to prohibit a State from "depriving any person of life, liberty, or property, without due process of law" and from denying any person "the equal protection of the laws," but noting that the Amendment "adds nothing to the rights which one citizen has under the Constitution against another," and insisting that indictments for violating the Fifteenth Amendment, Thirteenth Amendment, or the Civil Rights Act of 1866 implementing the Thirteenth, had to include an element of discrimination based on race or previous servitude).

51. 109 U.S. 3, 11–14, 21–22 (1883) (construing the Fourteenth Amendment as applying only to situations of state wrongdoing, not defining the licensing of inns and common carriers as examples of state action, and interpreting the Thirteenth Amendment "badges of servitude" as not extending to the Jim Crow system).

52. 106 U.S. 629 (1883). The Court in *Harris* narrowly construed the Fourteenth Amendment: "[W]hen . . . the laws of the state, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the [Fourteenth] amendment imposes no duty and confers no power upon Congress . . . [to] add anything to the rights of one citizen as against another." *Id.* at 638–39.

53. Hall v. DeCuir, 95 U.S. 485, 488–89 (1878).

54. *See Harris*, 106 U.S. at 640–41. In *Harris*, the Court held that Section 5519 of the Ku Klux Klan Act of 1871 was unconstitutional because it exceeded Congress's powers, was not warranted by the Fourteenth Amendment since it criminalized private action even when states acted properly, and was not warranted by the Thirteenth Amendment due to its overbreadth: it "covers any conspiracy between two free white men against another free white man to deprive the latter of any right accorded him by the laws of the state or of the United States." *Id.* This quote in fact describes the situation in *Harris* even though the Court did not expressly note it. *See* BRANDWEIN, *supra* note 10, at 153–60; *The Civil Rights Cases*, 109 U.S. at 13–15 (holding that Sections 1 and 2 of the Civil Rights Act of 1875 were unconstitutional because it exceeded Congress's powers and they were not warranted by the Fourteenth Amendment since they penalized private action even when states acted properly); United States v. Reese, 92 U.S. 214, 220–21 (1875) (holding that Sections 3 and 4 were unconstitutional as exceeding Congress's Fifteenth Amendment powers because they did not state clearly enough that they apply only to interferences with the vote on specifically racial grounds).

55. Railroad Co. v. Brown, 84 U.S. 445, 452–53 (1873) (noting that the legal requirement that the railroad not discriminate by race is violated by placing the races in separate cars, even though the cars were identical).

56. *Ex Parte* Yarbrough, 110 U.S. 651, 665 (1884) ("In such cases [where state law limited voting rights to whites, the Fifteenth] amendment does, *proprio vigore*, substantially confer on the

law-based damages award against a white café owner for refusing to serve an African American customer;[57] (3) upheld several attacks on racial discrimination in jury selection; and (4) upheld Section 4 of the Civil Rights Act of 1875, which banned such discrimination.[58]

The Court under Chief Justice Fuller (1888–1910),[59] who was appointed by the first post-bellum Democratic president, Grover Cleveland, was a different story. It flatly rejected the civil rights advances of the two previous Supreme Courts.[60] Its "separate but equal" ruling in *Plessy v. Ferguson*[61] contradicted the reasoning of the Chase Court from *Railroad v. Brown* and the state action reasoning from the Waite Court *Civil Rights Cases*.[62]

negro the right to vote, and [C]ongress has the power to protect and enforce that right."); United States v. Cruikshank, 92 U.S. 542, 555–56 (1876) (noting that the Fifteenth Amendment confers on Congress the power to protect the right to be free of race discrimination in voting).

57. Walker v. Sauvinet, 92 U.S. 90, 92–93 (1875).

58. *See* Bush v. Kentucky, 107 U.S. 110, 122–23 (1883) (quashing indictment for murder of an African American man accused of killing a white girl on grounds that African Americans had been excluded from consideration for grand jury service, pursuant to state law in force at time of the indictment); Neal v. Delaware, 103 U.S. 370, 397–98 (1881) (rejecting as beyond credibility the claim of Delaware officials that zero of the 26,000 African American residents "were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries," and setting aside the conviction for murder as having resulted from unconstitutional and unlawful jury-selection procedure); *Ex Parte* Virginia, 100 U.S. 339, 348–49 (1880) (upholding, under Section 4 of the Civil Rights Act of 1875 and the Fourteenth Amendment Equal Protection Clause, the indictment, arrest, and imprisonment of a state judge for excluding African Americans from jury lists); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (declaring unconstitutional, as a violation of the Equal Protection Clause, a state law limiting jury service to white male adults).

59. Chief Justice Melville Fuller was a former campaign manager for Senator Stephen Douglas. As an Illinois legislator, Fuller had introduced a bill endorsing a constitutional amendment to overturn the Emancipation Proclamation and guarantee slavery against federal intervention. J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in* CONTROVERSIES IN MINORITY VOTING: A TWENTY-FIVE YEAR PERSPECTIVE ON THE VOTING RIGHTS ACT OF 1965, at 135–76 (Chandler Davidson & Bernard Grofman eds., 1992).

60. Additionally, while *Hall v. DeCuir*, 95 U.S. 485 (1878), was not a civil rights advance, its logic should have led to a rule that state laws imposing racial separation on common carriers that travel interstate also violate the federal commerce power. The Fuller Court ruled to the contrary in 1890 in *Louisville, New Orleans, and Texas Railway v. Mississippi*, 133 U.S. 587 (1890), and again ten years later in *Chesapeake & Ohio Ry. v. Kentucky*, 179 U.S. 388 (1900).

61. 163 U.S. 537 (1896) (upholding a state law requiring common carriers to place African Americans and whites into separate but equal cars).

62. *See supra* notes 51 and 54. In the *Civil Rights Cases*, the Court reasoned that if state law discriminated on the basis of race, this would violate the Fourteenth Amendment Equal Protection Clause. 109 U.S. 3, 13–15 (1883). In *Railroad Co. v. Brown*, the Court reasoned that placing races into separate, albeit identical, railroad cars violated a legal rule against racial discrimination by the carrier. 84 U.S. 445, 452–53 (1873). For Fuller Court decisions that extended *Plessy v. Ferguson* to state laws requiring racial separation in schools and colleges, see *Cummings v. Richmond (Georgia) Cnty. Bd. of Education*, 175 U.S. 528, 545 (1899), ruling that Richmond's decision to close its public high school for African American students, while continuing to run a public high school for white females and to subsidize a public high school for white male students, did not violate the Equal Protection Clause, and *Berea College v. Kentucky*, 211 U.S. 45, 69–70 (1908),

The Fuller Court's many rulings on claims of racial exclusion in juries from 1891-1909 demonstrated its refusal to set aside convictions of African Americans irrespective of egregiously biased jury selection patterns,[63] flagrantly flouting the logic of *Neal v. Delaware*.[64] In 1903, the Fuller Court put a state action requirement back into the Fifteenth Amendment, ignoring prior reasoning to the contrary by the Waite Court in *Cruikshank* and *Yarborough*.[65] In the voting deprivation cases, *Williams v. Mississippi*[66] and *Giles v. Harris*,[67] the Court flouted the rule from the Waite Court's *Yick Wo v. Hopkins*[68] decision that the racially biased administration of a facially neutral law is unconstitutional under the Equal Protection Clause[69] (despite lip service to *Yick Wo* in *Williams*).[70] This last set of decisions opened the floodgates to massive African American disfranchisement across the entire former Confederacy; however, the decisions did not arise until Congress,

upholding a Kentucky prohibition against any private corporations that operated a school where white and colored children received instruction together at the same time and place.

63. *E.g.*, Gibson v. Mississippi, 162 U.S. 565, 591–92 (1896) (refusing to undo conviction of African American defendant and remove proceeding to federal court, although county listed no African American jurors for years, and county population was more than three-fourths African American); *see also* Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1455–72; Fairman, *supra* note 22, at 373 n.76.

64. 103 U.S. 370. *See supra* note 58 and accompanying text; Timechart, *infra* pp. 216–26.

65. *See* James v. Bowman, 190 U.S. 127, 139 (1902) ("[A] statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the 15th Amendment upon Congress to prevent action by the state through some one or more of its official representatives."); *see also supra* note 56.

66. 170 U.S. 213, 225 (1898) (refusing to quash indictment of an African American defendant because, despite the all-white composition of the grand jury in a state where seventy-three percent of the voters had recently been African American, and despite statutes recently adopted that had the impact of drastically restricting suffrage for African Americans and that required eligibility to vote as a prerequisite for jury duty, it had "not been shown that [these statutes'] actual administration was evil; only that evil was possible under them").

67. 189 U.S. 475, 482–88 (1903) (refusing to declare the Mississippi voting law unconstitutional either *per se* or as administered, despite being shown a fact pattern as egregious as that of *Yick Wo v. Hopkins*, in which massive numbers of African Americans were refused the right to register to vote during a grace period prior to a drastic restriction of eligibility, while all the whites who applied to register during this period were permitted to do so). Follow-up efforts by Giles and African Americans involved in a parallel situation in Virginia also failed to bring rectification from the Fuller Court. *See* Giles v. Teasley, 193 U.S. 146, 166–67 (1904) (refusing to grant either damages or a writ of mandamus to correct alleged mass violations of the Fifteenth Amendment by Alabama voting registrars); Jones v. Montague, 194 U.S. 147, 152–53 (1904) (rejecting an appeal from African Americans alleging a wrongfully conducted election under a wrongfully adopted 1901 Constitution of Virginia on the grounds that the congressional election of 1902 was completed, rendering the case moot).

68. 118 U.S. 356 (1886).

69. *Id.* at 373–74.

70. *Williams*, 170 U.S. at 223–24 (acknowledging that racially biased administration of a law is unconstitutional).

with presidential approval, had *already* overturned most of the Reconstruction era voting rights protection acts in 1894.[71]

II. NATIVE AMERICANS

At least briefly, the post-bellum Congress of the non-seceded states showed support for other racial minorities beyond the former slaves, specifically Native Americans and Chinese Americans. Both proponents and opponents of the Civil Rights Act of 1866 interpreted the language of the bill, once enacted, as giving birthright citizenship to persons of Chinese descent (and other non-whites) and to those Native Americans who lived away from tribal governments and among white Americans.[72] The same understanding extended to its paraphrase of the birthright citizenship clause of the Fourteenth Amendment.[73] The favorable post-bellum sentiment toward Native Americans even received an embrace from President Andrew Johnson (Democratic Unionist, elevated to presidency by the assassination of his predecessor). In 1866, he signed a ratified treaty with the Cherokee Tribe to undo an 1846 decision of the Supreme Court under Chief Justice Roger Taney that insisted on reading an earlier treaty as not giving the Cherokee the power to adopt whites into the tribe to the extent of having criminal jurisdiction over them.[74] Even the *exemptions* preventing Native Americans on tribal reservations from attaining birthright citizenship under the 1866 Civil Rights Act[75] or the Fourteenth Amendment,[76] and their exemption from the group accorded rights listed in Section 16 of the Civil Rights Act of 1870,[77] can be viewed as supportive of tribal sovereignty; off-reservation

71. Act of Feb. 8, 1894, ch. 25, 28 Stat. 36 (1894).

72. Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination, and the Civil* Rights Act of 1866, 63 Cal L. Rev. 662, 671–75 (1975) (citing Cong. Globe, 39th Cong., 1st Sess. 498 (1866) (regarding Chinese people born in the United States and "domesticated" Native Americans who "live in civilized society"); CONG. GLOBE, 39th Cong., 1st Sess. 599 (1866) (regarding "every person of every color"); CONG. GLOBE, 39th Cong., 1st Sess. 572 (1866) (regarding "Indians not taxed")).

73. U.S. CONST. amend. XIV, § 1.

74. Talton v. Mayes, 163 U.S. 376, 379–81 (1896) (noting the existence of the treaty). The Taney Court decision occurred in *United States v. Rogers*, 45 U.S. 567 (1846).

75. Ch. 31, 14 Stat. 27–30 (1866) ("excluding Indians not taxed" and thereby excluding them from the Act's list of citizen rights).

76. U.S. CONST. amend. XIV, § 1 (granting citizenship rights only to persons born in the United States who were "subject to the jurisdiction thereof").

77. Enforcement Act of May 31, 1870, ch. 114, 16 Stat. 140, 144 (1870) ("Sec. 16. . . . [A]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens. . . .").

Native Americans were meant to be covered rather than exempted by these provisions.[78]

Additionally, in two 1866 cases the post-bellum Supreme Court exhibited some brief support for Native Americans by striking down state tax laws (of Kansas and New York) that infringed upon prior national treaties with certain tribes.[79] Here, the Court followed the tradition of Chief Justice John Marshall by upholding national power (to make treaties) against state infringements thereon, to the benefit of Native American tribes.[80]

A period of wars between the U.S. Cavalry and Native American tribes ensued from 1866 until 1890 due, in part, to the ever-growing movement of the white population westward in search of opportunities in fur-trading, mining, farming, and ranching.[81] Some of the sporadic violent conflicts were caused by the drastic (and wasteful) depletion of buffalo by whites to the extent that Native Americans raided white settlements to avoid starvation; but an additional source of conflict was the massive degree of fraud perpetrated against Native American tribes.[82]

President Grant and President Hayes both attempted to mitigate this problem by attacking the corruption among Indian agents of the government. Beginning in 1869, President Grant turned specifically to two measures to clean up corruption and malfeasance by the Indian agents. First, the President established a ten-member Board of Indian Commissioners, comprised of respected philanthropists who would exercise oversight over the Indian agents and political relations with the tribes.[83] Second, all Indian agents would be replaced by individual missionaries selected from a variety of Christian denominations.[84] The goal was to turn away from the policy of separation, which kept producing outbreaks of warfare (costly in

78. *See supra* note 72; *see also infra* note 99.

79. The Kansas Indians, 72 U.S. 737, 737 (1866); The New York Indians, 72 U.S. 761, 761 (1866).

80. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 555–57 (1832) (ruling that federal treaties with, and national laws concerning, Native Americans supersede any contrary state law: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.").

81. PAUL BOYER ET AL., THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE 503–14 (2008).

82. *Id.* From 1872 to 1875, white hunters killed millions of bison, took their skins for commercial use, and left the bodies to rot. *Id.* at 501–02.

83. DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MAKING OF JUSTICE 52 (1997).

84. *Id.*

lives and resources), toward a policy of Christianizing Native Americans and teaching them how to survive by farming.[85]

Grant called this new approach his "Peace Policy."[86] He believed that the only alternative to the Peace Policy was the "extinction of a race," which would be an appalling alternative to "all Christendom."[87]

Although Grant's Peace Policy continued through the term of President Hayes, any other show of congressional or presidential support for Native American sovereignty was short-lived. Under pressure from westerners, such support dissipated even before the public turned away from Reconstruction. By 1871, Congress legislated that treaties would no longer deal with tribes.[88] In the same year, the executive branch decision to interpret a federal tax law as having implicitly overridden a quite explicit Cherokee treaty provision to the contrary was upheld by the Supreme Court.[89]

From 1871 through the first decade of the twentieth century, the fate of Native Americans worsened greatly, primarily due to the policies of the 1887 Dawes Act and 1898 Curtis Act to sell tribal lands in efforts to lure Native Americans to live non-tribally and as individual farmers or in towns.[90] The policies started benevolently (albeit misguidedly) but, in time, became infested with fraud, resulting in widespread and severe impoverishment of Native Americans.[91] Whites, not Native Americans on the reservations, were the ones who voted; and both Congress and the President responded to their constituency on this matter.[92] There was no substantial political constituency who favored leaving a third of the continental United States in control of Native Americans.

In this political setting, the Supreme Court varied its approach more than Congress did. In the 1880s, the moderately rights-protective Waite Court[93] was able to intervene once, when the Bureau of Indian Affairs ("BIA") attempted to impose federal criminal law on reservations before

85. *Id.* at 51–52; FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS 1880–1920, at 2–3 (1984).

86. WILKINS, *supra* note 83, at 52; HOXIE, *supra* note 85, at 3.

87. Ulysses S. Grant, State of the Union Address (Dec. 6, 1869), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29510 (last visited Oct. 6, 2013).

88. Ch. 120, 16 Stat. 544, 566 (1871) ("[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . .").

89. The Cherokee Tobacco, 78 U.S. 616, 618–21 (1871) (ruling that the 1868 federal tax on any "tobacco . . . within the exterior boundaries of the United States" superseded the guarantee in the 1866 Cherokee Treaty that Cherokee could sell any farm products free from federal taxation).

90. HOXIE, *supra* note 85, at 78, 154.

91. *Id.* at 30–38.

92. *Id.*

93. *See supra* notes 48–58 and accompanying text.

Congress had acted. In this 1883 decision, the Court insisted that this (essentially *ultra vires*) action violated treaties and had not been authorized by Congress.[94] Congress, however, was free to override the effect of the decision by simply legislating what the BIA wanted, and it did so in the Major Crimes Act of 1885,[95] which the Court then promptly upheld in *Kagama v. United States*.[96] Similarly, the not particularly rights-protective Fuller Court intervened on behalf of Native Americans in 1905 when it declared that a congressional ban on selling liquor to Native Americans, as applied to off-reservation Native Americans who held U.S. citizenship, was unconstitutional.[97] Congress responded with the Burke Act of 1906, which postponed for twenty-five years the citizenship that the Dawes Act would have granted.[98]

Also, the Waite Court wavered in its commitment to the rights of Native Americans. In 1884, despite readily available evidence that congressional understanding in 1866 was to the contrary,[99] the Court denied birthright citizenship, with its concomitant eligibility to vote, to a Native American born on a reservation within the United States who had moved to Omaha where he first satisfied residency requirements and then attempted to vote.[100] The majority of Justices ruled (7-2) that he would have to be naturalized before he could be a citizen.[101] In the 1887 Dawes Act, Congress overturned this judicial policy by granting citizenship to all Native Ameri-

94. *Ex Parte* Crow Dog, 109 U.S. 556, 558–59, 570–72 (1883) (ruling that the Bureau of Indian Affairs's effort to displace tribal criminal jurisdiction and move it into federal courts violated the provision of Rev. Stat. § 2146, which exempts from the general jurisdiction of United States courts those criminal offences committed in Indian country by one Native American against the person or property of another, and offences committed in Indian country by a Native American who has been punished by the local law of the tribe).

95. Major Crimes Act of Mar. 3, 1885, ch. 342, 23 Stat. 385 (1885).

96. 118 U.S. 375 (1886).

97. *In re* Heff, 197 U.S. 488, 505–09 (1905) (ruling that "when the United States grants the privileges of citizenship to an Indian [as it had under the Dawes Act allotment process], gives to him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the state, it places him outside the reach of [Indian-specific] police regulations on the part of Congress").

98. Burke Act of May 8, 1906, ch. 2348, 34 Stat. 182 (1906).

99. Senator Trumbull, floor manager of the 1866 Civil Rights Act (whose wording was later adapted for the Fourteenth Amendment) responded to the question of whether the Act would give birthright citizenship to Native Americans: "'[I]t should apply to the Indians so far as those who are domesticated and pay taxes and live in civilized society are concerned.'" Greenfield & Kates, *supra* note 72, at 673 n.53. Furthermore, "[t]he vast majority of . . . supporters of the fourteenth amendment . . . advocated it as a method of placing the principles of the 1866 Act in the Constitution . . . ." *Id.* at 664 n.9.

100. Elk v. Wilkins, 112 U.S. 94, 95–96, 109 (1884).

101. *Id.* at 109.

cans who take an allotment or take up life away from the tribe and adopt "habits of civilized life."[102]

As a general matter, when the President and Congress were united in a policy toward a quasi-foreign people (here Native Americans), courts had little authority. Unlike Chief Justice Marshall, who at least had the decency to bemoan his lack of power in the face of unjust treatment of Native Americans,[103] the Waite and Fuller Courts simply announced repeatedly that the political branches were within their authority when they decided that the national interest called for policy that broke with an earlier treaty.[104]

The Supreme Court did have a role to play when the issue was a disputed interpretation of the Constitution between tribe members and their tribal government. For instance, in 1896 the Court ruled that the Bill of Rights does not restrain tribal governments, thereby demonstrating a measure of respect toward tribal sovereignty.[105] The Court also had a role to play when Native Americans complained that a state law conflicted with their federal treaty.[106] In the same year, the Fuller Court went against Native American interests by upholding a state regulation on hunting by tribes on unoccupied federal land within the state of Wyoming.[107] This *Ward v. Race Horse* decision broke with the Marshall and Chase Courts' patterns of striking down state laws that conflicted with federal Native American treaties, and also defied President Cleveland's DOJ. The Fuller Court then corrected its own pro-state-law pattern to uphold treaty rights during the administration of President Teddy Roosevelt, whose DOJ challenged state

102. *In re* Heff, 197 U.S. 488, 492 (1905) (citing Section 6 of the Dawes Act: "[E]very Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens.").

103. Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831) ("If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence.").

104. *See supra* notes 89 and 96 and accompanying text.

105. Talton v. Mayes, 163 U.S. 376, 384 (1896) (noting that the Fifth Amendment limits the national government but does not limit the quasi-sovereign tribal governments).

106. *See infra notes* 107–108 and accompanying text.

107. Ward v. Race Horse, 163 U.S. 504, 514–15 (1896) ("The enabling act declares that the state of Wyoming is admitted on equal terms with the other states, and this declaration, which is simply an expression of the general rule, which presupposes that states, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted, repels any presumption that in this particular case congress intended to admit the state of Wyoming with diminished governmental authority.").

laws restricting treaty-protected tribal fishing and water rights in 1905 and 1908.[108]

III. CHINESE-AMERICANS AND OTHER ASIAN-AMERICANS

The situation of Asians-Americans in the United States engaged presidential support for a longer time and more thoroughly than the support shown to Native Americans. President Grant and President Hayes had limited their efforts to cleaning up the behavior of Indian agents, and subsequent presidents did little for Native Americans apart from the occasional DOJ challenges to state laws that interfered with Native American-related treaties.[109] In contrast, for about seventeen years after the Civil War, protection of the Chinese attracted a measure of presidential effort; this period was almost as long the presidential involvement in prosecuting attacks on African American voters. Presidential efforts to assist Japanese persons on the west coast then emerged at the turn of the twentieth century under President Roosevelt's Administration.[110]

The President was responsible for negotiating the Burlingame Treaty of 1868, which gave China favored nation status and assured good treatment to its tourists and residents in the United States.[111] This transpired in the post-bellum atmosphere of benevolence toward racial minorities. As previously noted, Congress knowingly phrased the birthright citizenship Section of the Civil Rights Act of 1866 and its successor, the Fourteenth Amendment, Section 1, to encompass Chinese persons and other non-whites born in the United States.[112] Congress also extended *most* of the citizen rights from the 1866 Act to all "persons" in the 1870 Enforcement Act; the exceptions were the rights to buy, sell, and lease real property.[113] As of 1866, these rights had been guaranteed to all citizens on the same basis as they were guaranteed to "white citizens"; however, non-citizen residents who were neither of African descent nor "white" could not attain them as federal rights for the following reason: The Naturalization Act of 1870 in-

108. Winters v. United States, 207 U.S. 564, 576–78 (1908) (noting that the federal treaty with Native Americans implicitly reserves to them the water rights in dispute and is supreme over state law to the contrary, irrespective of law admitting state into the Union "'upon an equal footing with the original states'"); United States v. Winans, 198 U.S. 371, 381–83 (1905) (same).

109. *See supra* Part II.

110. *See infra* note 130 and accompanying text.

111. Shirley Hune, *Politics of Chinese Exclusion: Legislative-Executive Conflict 1876–1882*, 9 AMERASIA 5, 8–9 (1982), *reprinted in* 1 ASIAN AMERICANS AND THE LAW: CHINESE IMMIGRANTS AND AMERICAN LAW 93, 96–97 (Charles McClain, Jr., ed., 1994).

112. *See supra* notes 72 and 99.

113. *See supra* notes 5 and 77 (citing the Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (1870)).

cluded only whites and persons of African descent.[114] In the immediate post-bellum years, the warm congressional feeling toward Chinese people was only temperately so. And it cooled a few years before the President's did.

By 1879, citizens of western states, especially California, who were angry at the judicial striking down of numerous anti-Chinese-resident laws, managed to persuade Congress (by bipartisan majorities, but more Democrat than Republican votes) to break with the Burlingame Treaty and to limit Chinese laborer immigration.[115] Republican President Hayes vetoed the bill, lamenting in his diary about American mistreatment of "other weaker races" as well, *viz*., "Negroes and Indians."[116]

Nonetheless, political feeling against Chinese workers in the West remained so intense that both political parties rallied to the cause of limiting immigration. In November of 1880, facing increasingly numerous anti-Chinese riots in the western states, President Hayes negotiated a new treaty agreeing to "reasonable" limits on immigration; and the Senate ratified it.[117] In 1881, President Arthur publically endorsed the idea of a limit, but then vetoed, as too extreme, a congressional measure that would ban Chinese workers for the next twenty years.[118] Congress tried again with a ten-year limit and Arthur signed the Chinese Exclusion Act in 1882.[119] This act also banned entry by wives of laborers and required a specially issued federal identification card for any Chinese person who wished to leave and then re-enter the United States.[120]

After 1881, no further executive branch action to protect resident Chinese or Chinese citizens was taken in the period of this study. Instead, Congress passed restriction after restriction (always applied to "laborers," not professionals, merchants, students, or tourists) and made returns to the United States difficult (ostensibly in fear that new Chinese immigrants would enter with forged documents claiming to be returning).[121] The President always signed these measures. Indeed, just days before the November 1884 election, President Arthur's DOJ took a hard line, arguing against the

114. Act of July 14, 1870, ch. 254, 16 Stat. 254, 256.

115. Hune, *supra* note 111, at 12–15.

116. *Id.* at 15.

117. *Id.* at 16–17.

118. *Id.* at 17–19.

119. *Id.* at 21.

120. *Id.* at 21; HYUNG-CHAN KIM, ASIAN AMERICANS AND THE SUPREME COURT 11–12 (1992); Sucheng Chan, *The Exclusion of Chinese Women, 1870–1943*, *reprinted in* 1 ASIAN AMERICANS AND THE LAW: CHINESE IMMIGRANTS AND AMERICAN LAW, *supra* note 111, at 2, 18–20.

121. Hune, *supra* note 111, at 22–23.

re-admission of Chew Heong, a Chinese laborer who had been a lawful U.S. resident at the time of the 1880 Treaty (allowing for "reasonable" regulations of Chinese laborers in the United States), but who had left the country prior to the enactment of the 1882 rule requiring a special identity card for re-entry.[122] He had been outside the United States until September 1884, so there was no procedure available by which he could have obtained the required re-entry identification card.[123] The Supreme Court rejected the DOJ's arguments and relied on the principle of interpreting law to conform to prior treaties whenever possible; thus, the Court found language in the 1882 and 1884 exclusion acts to allow his entry.[124]

In 1897, Republican President McKinley's DOJ was no better. In *Wong Kim Ark*,[125] the DOJ argued against the citizenship of U.S.-born persons of Chinese descent under the Fourteenth Amendment. The Supreme Court rejected the DOJ's argument and acknowledged Wong Kim Ark's citizenship.[126] *Wong Kim Ark* was decided eleven years after the Dawes Act gave citizenship to Native Americans who lived off the reservation in "civilized" ways.[127] The 1892 Geary Act, signed by Republican President Harrison, had imposed special restrictions on "persons of Chinese descent."[128] For instance, Chinese people had to leave the United States if they could not prove to a judge that their residence in the United States was legal.[129] Presumably, the 1898 decision in *Wong Kim Ark* rendered this part of the act unconstitutional as applied to American citizens.

Then, in 1906, a diplomatic incident involving Japanese school children in San Francisco brought about a brief flurry of presidential efforts to smooth the situation. The Japanese government took offence when Japanese children in San Francisco were segregated into public schools for African American and Chinese American children. Between 1906 and 1908, President Roosevelt and the State Department, with the concurrence of Congress, negotiated the "Gentlemen's Agreement," the upshot of which

122. Chew Heong v. United States, 112 U.S. 536, 536–39 (1884).

123. *Id.* at 538–39.

124. *Id.* at 549–57 (noting that courts are obligated to interpret statutes, if at all possible, as not conflicting with prior treaties and that, so interpreted, various exceptions in the 1882 and 1884 acts covered Heong and allowed for his re-entry).

125. 169 U.S. 649 (1898).

126. *Id.* at 692–93 (ruling that so long as his parents were in the United States as residents, rather than on a temporary diplomatic mission of the Chinese government [which, under the reigning legal fiction, would have put them on foreign soil], they were "subject to the jurisdiction" of the U.S. government and Wong Kim Ark was entitled to birthright citizenship under the Fourteenth Amendment).

127. *See supra* notes 97–102 and accompanying text.

128. Geary Act, ch. 60, 27 Stat. 25, 25–26 (1892).

129. KIM, *supra* note 120, at 21–23.

was that Japan would stop sending laborers to the United States, but Japanese and Korean schoolchildren already in California would be permitted to attend "white" schools.[130]

But for the limited exception of the Gentlemen's Agreement, from 1882 until 1906 the only federal branch of government at all protective of Asian people in the United States was the judiciary; and it faced constraints similar to those it confronted on the subject of Native Americans. While treaty law could not undo the Constitution on domestic matters, the treatymaking authority of the President and Senate, and the congressional role in foreign policy, outranked judicial authority in policies concerning people outside the United States. The Supreme Court could, however, play a role in protecting Chinese people once they were within the country: *Yick Wo v. Hopkins*[131] announced that the Equal Protection Clause meant that state policy, whether legislative or administrative, could not discriminate against persons based on their nationality or race.[132] In 1892, the Court overrode the decision of an immigration bureaucrat as to the admission of Chinese merchant Lau Ow Bew, insisting that the administrator misunderstood the relevant law.[133] Congress stepped in relatively promptly, however, with the 1894 Chandler Act,[134] which eliminated judicial review of decisions by immigration bureaucrats over efforts by Chinese laborers to re-enter the country; such decisions could now be appealed only to the Secretary of the Treasury (later to the Secretary of Labor and Commerce[135]). In 1895, the Supreme Court upheld this withdrawal of jurisdiction from Article III judges,[136] and it reiterated its position in challenges in 1904[137] and 1905,[138] as they applied to Chinese-descent persons claiming U.S. birthright citizenship and trying to re-enter the United States. In 1908, however, the Court finally

130. *Id.* at 39–40; HENRY KIYAMA, THE FOUR IMMIGRANTS MANGA 140–41 (1999). Korea at the time was a colony of Japan. *Id.*

131. 118 U.S. 356 (1886).

132. *Id.* at 373–74.

133. Lau Ow Bew v. United States, 144 U.S. 47, 59–62 (1892).

134. Chandler Act of 1894, ch. 301, 28 Stat. 372, 390 (1894).

135. Act of Feb. 14, 1903, ch. 552, 32 Stat. 825 (1903).

136. Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

137. United States v. Sing Tuck, 194 U.S. 161, 170 (1904) (ruling that writ of *habeas corpus* to persons of Chinese descent claiming birthright U.S. citizenship and attempting to re-enter United States after trip to China not be granted on grounds that such persons must first exhaust intra-executive branch appeals as provided in the Chandler Act).

138. United States v. Ju Toy, 198 U.S. 253, 263 (1905) (ruling that it does not deny due process for the Chandler Act to grant final authority to executive branch officials for decision to bar entry to the United States. for a person of Chinese descent claiming birthright U.S. citizenship and attempting to re-enter the United States after trip to China, even where a U.S. district court has found that the person is a bona fide U.S. citizen).

announced that persons of Chinese descent claiming birthright U.S. citizenship and being prevented from re-entering their country are entitled to a fair hearing on the subject of their citizenship and, if one is denied by immigration officials, they have a constitutional due process right to appeal to the federal judiciary via habeas corpus.[139] In the same year, the Court injected due process into the rights of a U.S. resident alleged to be a Chinese laborer but claiming to be a student who was facing deportation.[140] The Court insisted that immigration officials allow this U.S. resident to present more evidence before a district court judge than had theretofore been allowed.[141]

IV. CONCLUSION

Supreme Court support from 1868 to 1908 was more modest for Asian Americans and Native Americans than it was for African Americans because of the extensive authority that our constitutional system gives to the political branches when addressing issues concerning foreign or quasi-foreign peoples. Yet, support occasionally surfaced, particularly with respect to checking abuse of administrative authority. The Supreme Court's freedom from having to run for re-election did apparently enable it to provide somewhat more support for racial minorities from 1868 to 1887 than is generally recognized, although this support utterly disappeared for African Americans from 1888 to 1908, when the Court was led by Chief Justice Fuller, a white supremacist.[142] With the voting public repeatedly producing a divided government (or a Democratically controlled government) after 1874, it was apparent to most federal office holders that significant numbers of northerners had come to agree that the South was justified in its restrictions of the civil rights of African Americans, and/or gave up opposing the intense (Southern) resistance to these rights because it was politically and financially costly not to do so.[143] Under such circumstances, it was highly likely that Supreme Court Justices who had less commitment to civil rights than did the Waite Court would eventually be appointed .

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139. Chin Yow v. United States, 208 U.S. 8, 12–13 (1908) (ruling that fair hearing had been denied in the executive branch procedure and that Chin Yow could bring his case before the federal court).

140. Liu Hop Fong v. United States, 209 U.S. 453, 456–60 (1908).

141. *Id.* at 461–63 (blocking a deportation order of a Chinese person who had entered the United States on a lawful student visa, but was being ordered deported after a hearing by a U.S. commissioner, a district court judge's decision based on reading the hearing transcript, and on an additional deposition from the commissioner; and ruling that the relevant statutory scheme required that, prior to deportation, such person is entitled instead to a full *de novo* hearing before a district court where he might present witnesses and other evidence).

142. *See supra* Part I.

143. *See supra* notes 11–14 and accompanying text.

It is worth asking, however, what prompted the lag time between congressional abandonment of civil rights protection for African Americans in 1875, and presidential abandonment of the matter after 1886? For example, at the end of President Grant's term of office, the Administration prepared for White League violence in the South during the 1876 elections by stationing 338 federal marshals in South Carolina, 166 in North Carolina, 745 in Florida, and 840 in Louisiana.[144] A moment's reflection points to the fact that the President, unlike a senator or a representative, has a national constituency. The President is the national face of the party and, as such, has an electoral incentive to court the whole nation; protection of voting rights in all parts of the country are therefore potentially of interest to the President. Moreover, because his term of office was not coterminous with that of the House or with two-thirds of the Senate, the dramatic public shift in voter sentiment that showed up in the 1874 House election could not change the holder of the presidential office. The popular vote did go against the Republicans in 1876, but the Electoral College system ended up with a deal that gave the presidency to the Republicans anyway. The Republicans managed to hold the presidency until 1884, despite apparent lack of voter support for Reconstruction, in part because its electoral constituency was carved up differently from that of the House of Representatives or Senate. If the United States had something closer to a parliamentary system, as advocated in recent decades by scholars such as James Sundquist and Sanford Levinson—a system that abandoned staggered terms of office and the separation of electoral constituency between the legislative and executive branches—elections would more efficiently translate majority will into public policy.[145] As thinkers like President Madison warned, however, such systems offered greater potential for majority tyranny as well.[146] The fact that the presidency has a constituency significantly different from that of the House of Representatives seems to have created incentives in the years 1874 through 1885 to protect the African American minority of voters from some of the crime to which they would otherwise have been subjected.

144. BRANDWEIN, *supra* note 10, at 130–31.

145. *See* SANFORD LEVINSON, FRAMED: AMERICAN'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 229–33 (2012) (discussing the shifting meaning of "divided government" and the advantages of parliamentarianism); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 25–78 (2006) (discussing the "significant distortions and outright failures of American politics" resulting from an "undemocratic legislative process"); JAMES SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 18–21 (1986) (discussing the advantages of a "parliamentary democracy" and incremental changes to improving a divided U.S. government).

146. THE FEDERALIST NOS. 47–48 (James Madison), NOS. 49–51 (Alexander Hamilton or James Madison).

Similarly, the fact that the Senate electoral system was structured to be unable to respond immediately to political majority trends kept it relatively moderate on Reconstruction, such that it produced, in its role of approving or disapproving the President's Supreme Court nominees, the relatively moderate Justices of the Waite Court who were in place until 1888. After 1888, the Court finally came to express the opposition to Reconstruction that appears to have prevailed with the voting public as early as 1874.

In addition to providing a modicum of protection for African Americans for a decade after the U.S. voting public had tired of the problem, the President also played a role: (1) during the late 1870s until the early 1880s, in moderating Congress's inclination to deal harshly with the Chinese people; and (2), from 1906 to 1908, in countering California's hostility toward resident Japanese.[147] Unlike individual representatives or senators, the President has a national electoral constituency and, as the human embodiment of diplomatic ties to our allies, has an international diplomatic constituency. The former gave him freedom from the kind of regional anti-Chinese hysteria that produced intense pressure on representatives and senators from the western states; the latter freed him (or perhaps cross-pressured him) to offer modest support for the rights of Asian Americans in some of the years when Congress was happy to do the opposite.[148] Again, the kind of policy reform advocated in some quarters, which would place the President into some sort of parliamentary system without a separate election, would seem to work against these mild liberating tendencies.

Similarly, in a handful of cases around the turn of the twentieth century, the DOJ went to court on behalf of Native American tribal treaty rights to natural resources that were being impeded by state-level law.[149] In this time period, presidential administrations appeared unwilling to counter Congress on policy toward Native Americans, but were willing, at least occasionally, to stand up for federal treaty prerogatives against attacks by individual states.

Finally, despite Congress's firm disposition to the contrary, there was a small but discernible resurgence of African American rights protection under President Roosevelt. Some of the motivation appears to have been personal ideology. As Governor of New York, Roosevelt oversaw desegregation of the state's public schools.[150] Upon taking office in 1901, he publicly invited eminent African American leader Booker T. Washington to

147. *See supra* Part III.

148. *See supra* Part III.

149. *See supra* note 107 and accompanying text.

150. *Slavery by Another Name: Teddy Roosevelt and Progressivism*, PBS.ORG, http://www.pbs.org/tpt/slavery-by-another-name/themes/progressivism/ (last viewed Oct. 6, 2013).

dine in the White House, setting off a storm of Southern criticism; and he also appointed some African Americans to patronage positions that were under his control.[151] During the Roosevelt presidency, the DOJ prosecuted white marauders who used violence to drive African Americans out of jobs;[152] creditors who attempted to force African Americans into servitude to pay off debts;[153] and a sheriff, his deputies, and private persons who cooperated with and participated in lynch mobs.[154] Even though President Roosevelt was more racially progressive than his immediate predecessors, he was far from a paragon of racial enlightenment. After the election of 1906 took place, President Roosevelt discharged three whole companies of African American soldiers, without benefit of courts martial, over an incident of interracial violence in Brownsville, Texas, on the grounds that they refused to testify against one another in the investigation.[155] Nonetheless, to the degree that he was motivated to do so, the prerogatives of his office offered some space for policies more racially progressive than those Congress would endorse at the time.

Periodically, American political and legal scholars urge reconsideration and revision of those features of our electoral system intended to slow down the democratic juggernaut—separation of the policymaking branches and creation of differing electoral constituencies for each, as well as staggered rather than coterminous terms of office.[156] The account provided here perhaps offers the cautionary tale that, in at least one historical period, these inconvenient institutional features did function as designed—to mitigate the harshness of majority tyranny.

151. *American President: Theodore Roosevelt: On Race and Civil Rights*, MILLER CTR. OF THE UNIV. OF VIRGINIA, http://millercenter.org/president/roosevelt/essays/biography/4 (last viewed Oct. 6, 2013).

152. *See supra* note 33 and accompanying text.

153. *See supra* note 34 and accompanying text.

154. *See supra* notes 36–37 and accompanying text.

155. Richard Wormset, *Jim Crow Stories: The Brownsville Affair (1906)*, PBS.ORG, *available at* http://www.pbs.org/wnet/jimcrow/stories_events_browns.html (last visited Oct 6, 2013). The official report on the incident, dated February 7, 1909, faulted a dozen of the soldiers as culprits. *See Brownsville Incident*, THEODORE ROOSEVELT CTR. AT DICKINSON ST. UNIV., www.theodorerooseveltcenter.org/Learn-About-TR/Themes/Race-Ethnicity-and-Gender/The-Brownsville-Incident.aspx (last visited Aug. 26, 2013). A later investigation showed them to have been framed by deceitful white witnesses. *Id.*

156. *See supra* note 145 and accompanying text.

TIMECHART OF INTERBRANCH COMPARISON ON RACIAL MINORITIES POLICY[157]

Query: In the first four decades after the Fourteenth Amendment entrenched "equal protection of the laws" for all "persons," what role did each federal branch play in securing equal protection for unpopular racial minorities?

KEY:

- + protective policies
- - harmful policies
- *S. Ct. in italics*
- **President and Executive Branch bold**
- CONGRESS in small caps
- Cases coded in **bold** were brought by DOJ prosecutions on behalf of racial minority

I. Asian Americans 1865–1874

+ 1866: CONGRESS enacts the Civil Rights Act, extending to all persons born in the United States American citizenship (except "Indians not taxed," that is, reservation Indians); U.S. born Chinese thereby acquire U.S. civil rights.

+ July 28, 1868: Through the Burlingame Treaty, **President** and SENATE grant China most favored nation status for its tourists and U.S. residents.

+ 1870 (§16 of May 31 Enforcement Act): CONGRESS extends most civil rights from the 1866 law not just to all citizens, but to all persons (within U.S. jurisdiction), and specifically forbids unequal taxation based on country of immigrant origin.

-1870: CONGRESS in § 16 of May 31 Enforcement Act excludes rights to buy, sell, or lease property, which were guaranteed to citizens in § 18 of same Act.

- 1870: CONGRESS in Naturalization Act adds Africans to whites as naturalizable citizens, but continues to omit Asians.

II. Native Americans 1865–1874

157. The events listed in the Timechart are discussed in the author's forthcoming publication, *see generally* LESLIE F. GOLDSTEIN, THE SUPREME COURT AND MINORITY RACES, Chs.3–4 (forthcoming 2016).

+ 1866: **President** and SENATE undo 1846 *United States v. Rogers* ruling of Chief Justice Taney by new treaty with Cherokee that makes explicit the tribe's power to extend its exclusive civil and criminal jurisdiction to white men by adopting them into the tribe.

+ 1866: CONGRESS exempts "Indians not taxed" from U.S. citizenship in Civil Rights Act, thereby honoring tribal sovereignty.

+1866: CONGRESS sends Fourteenth Amendment to states, exempting those Native Americans from U.S. citizenship who are "not [fully] subject to the jurisdiction of the United States," thereby honoring tribal sovereignty over reservation Indians.

+1866: *S. Ct.* strikes down state taxes of both Kansas and New York on Native American tribes, on grounds that they conflict with prior treaties.

+ +1869–1880: **President Grant** adopts two-step "Peace Policy" to eliminate fraud by Indian agents, replacing them with missionaries and appointing a Board of Commissioners, comprised of philanthropists, to supervise them. Goal: avoid extinction of Native Americans by Christianizing them and teaching them how to survive through farming. Policy also followed by **President Hayes**.

- March 3, 1871: CONGRESS forbids treaties with Native American tribes.

- -May 1, 1871: *S. Ct.* (*Cherokee Tobacco Tax Case*) upholds executive branch application of a tobacco tax law in a way that violates terms of treaty with Cherokee.

[1866–1890: Period of intermittent Native American wars in the West provoked by threat of Native American starvation].

III. African Americans 1865–1876

+ Dec.1865: Thirteenth Amendment ratified—CONGRESS & states.

+ 1866: Civil Rights Act —CONGRESS.

+ 1866: **President** & SENATE in treaty free all the African American slaves owned by Cherokee and grant them and their descendants all rights of native Cherokee.

+ 1868: Fourteenth Amendment ratified by CONGRESS & states.

+ 1870: Fifteenth Amendment ratified by CONGRESS & states.

+ 1870: CONGRESS in Naturalization Act adds Africans to whites as naturalizable citizens.

+ May 31, 1870: Enforcement Act (largely aimed at enforcing Fifteenth Amendment and punishing political terrorism in the South) ratified by CONGRESS.

+ April 20, 1871: Ku Klux Klan Act (focused on acts for which Klan was notorious, such as "going in disguise on a public highway" with intent to deprive of civil rights) ratified by CONGRESS.

- 1872: *S. Ct.* in ***Blyew v. United States*** reads federal law narrowly, and avoids removing to federal courts cases where African Americans are refused right to serve as witnesses.

+ 1873: *S. Ct*. in *Railroad Co. v. Brown* reads federal law broadly, resulting in desegregating railroad in the District of Columbia and rejecting "separate but equal" argument.

- Nov. 1874: U.S. public votes overwhelmingly to put Democrats in majority in HOUSE OF REPRESENTATIVES.

-/+ Jan. 1875: Lame duck Republican CONGRESS adopts (watered down) Civil Rights Act (leaves schools segregated and mandates racial equality in access to public carriers, inns, and theaters, as well as racial nondiscrimination in access to juries).

+ 1871–1877 **Executive Branch** brings hundreds of prosecutions annually of Ku Klux Klan malefactors. *See* Graph *supra* p. 193.

+/-- 1876: *S. Ct.* twists language of federal Enforcement Act (***United States v. Reese***) to strike down two sections. Also dismisses several murder indictments as lacking proof of required racial motive (***United States v. Cruikshank***), but stretches language of Fifteenth Amendment to remove its apparent state action limitation (***United States v. Cruikshank***), establishing Fifteenth Amendment voting rights as national rights protectable against private action.

+1876: *S. Ct.* in *Walker v. Sauvinet* upholds thousand dollar damages award (despite absence of jury trial) against white café owner for violating Louisiana law mandating equal access irrespective of race to public accommodations (here a privately owned but state licensed café), when the café refused on racial grounds to serve an African American man.

IV. Asian Americans 1875–1908

-/+ 1879: Bipartisan but more heavily Democrat CONGRESSIONAL majority votes for bill to alter Burlingame Treaty and limit Chinese worker immigration. **President Hayes** (Republican) vetoes it successfully.

- 1880: Both major party platforms (plus Greenback Labor Party) pledge to limit Chinese immigration.

- Nov. 1880: China and United States sign new treaty endorsing "reasonable" restrictions on immigration ratified by the **President** and SENATE.

- 1881: **President Chester A. Arthur** (Republican Vice President who succeeded to the presidency) in annual message endorses restriction of Chinese immigration.

-/+ 1881: CONGRESS votes to restrict Chinese immigration for twenty years. **President Arthur** successfully vetoes it as unreasonably extreme.

- 1882: Chinese Exclusion Act suspends Chinese laborer immigration for ten years and denies entry to United States by wives of Chinese laborer

residents. Reiterates prohibition on naturalization of Chinese. Specifies that resident laborer Chinese people who leave the United States must show special federally issued I.D. card in order to re-enter. Approved by CONGRESS.

- July 1884: CONGRESS tightens procedures for ANY Chinese people wishing to enter the United States.

+/- Dec.1884: *S. Ct. re*-admits Chew Heong to the United States on grounds that prior treaties allow his admission, despite **DOJ** argument that 1884 Act barred his re-entry.

+ 1886: *S. Ct.* in *Yick Wo v. Hopkins* declares void as violation of Equal Protection Clause a law applied against Chinese people but not against similarly situated Anglos.

- Oct. 1, 1888: CONGRESS passes Scott Act, forbidding re-entry to United States by lawful Chinese laborer residents out of the country as of Oct. 1, 1888 and henceforth.

- 1889: *S. Ct.* in *Chae Chan Ping v. United States* [*Chinese Exclusion Case*] upholds Scott Act despite its acknowledged conflict with prior treaty (follows reasoning of 1871 *Cherokee Tobacco Tax* case).

+ March 14, 1892: *S. Ct.* in *Lau Ow Bew v. United States* reverses decision of collector of the port of San Francisco (upheld at district and circuit court levels). *S. Ct*. permits Chinese merchant, long resident in the United States, to re-enter without certificate from Chinese government that port collector wrongly believed the 1884 Act required.

- May 5, 1892: CONGRESS in Geary Act § 1 extended Chinese laborer exclusion for ten more years; in §§ 2 and 3 said all resident Chinese "*and persons of Chinese descent*" (emphasis added) who could not satisfy a judge that their residence since May 5, 1892 was legal must be removed from the United States.

- 1893: *S. Ct.* in *Fong Yue Ting v. United States*, despite three angry dissents, upholds §§ 2 and 3 of Geary Act.

- 1894: CONGRESS in Appropriations [Chandler] Act removes judicial review from decisions by immigration bureaucrats; appeal on exclusion of aliens is only to Secretary of the Treasury.

- 1895: *S. Ct*. in *Lem Moon Sing v. United States* upheld 1894 withdrawal of judicial review from individual executive branch decisions to exclude an alien.

+ 1896: *S.Ct.* in *Wong Wing v. United States* strikes down as violation of due process § 4 of Geary Act that allowed sentencing for up to a year of imprisonment at hard labor prior to deportation of those Chinese who could not prove lawfulness of residency.

+ /- 1898: *S. Ct*. in *Wong Kim Ark v. United States* upheld (against [Republican] **DOJ** arguments) the citizenship of a Chinese person born in

the United States, implicitly declaring unconstitutional the "and persons of Chinese descent" language of the Geary Act.

- 1902: CONGRESS extended all prior bans on Chinese immigration indefinitely.

- 1904: CONGRESS re-enacted the already indefinite 1902 ban on Chinese immigration.

--/+ 1904, 1905, 1908: *S. Ct.* in *Chin Yow v. United States* (1908) amends 1904 (*Sing Tuck*) and 1905 (*Ju Toy)* decisions that had allowed executive discretion over refusals of re-entry to Chinese-descent person claiming United States birth citizenship. Now Chinese persons entitled to a "fair hearing" and, if denied, can obtain it by judicial review.

+ 1905: **President Theodore Roosevelt** in annual message endorses racially non-discriminatory immigration policy, and threatens to veto CONGRESSIONAL exclusion of Japanese persons.

+ 1908: *S. Ct.* in *Liu Hop Fong v. United States* interprets § 13 of the Act of 1888 (25 Stat. 476) to require a full district court hearing (*de novo*) on appeal of Commissioner decision (rather than mere review of the Commissioner's hearing transcript) before deporting a Chinese person adjudged by the Commissioner to have been a laborer despite proper certificate from China affirming status of "student." Ruled that certificate should be given legal effect unless competent evidence to the contrary is presented and also that Liu Hop Fong should be permitted to present evidence.

[1898–1906: Labor shortage in California produces sharp increase in Japanese immigration.]

+/- 1906–1908: **President Theodore Roosevelt** (prompted by Japanese offense at placement in "colored" schools) negotiates for and CONGRESS authorizes a deal with Japan ("Gentleman's Agreement"): Japanese residents in San Francisco may attend the "white" school, but Japanese and Korean laborers may not immigrate to the United States (unless joining an immediate family member or already owning a farm in the United States).

[1907–1909: Sharp decrease in Japanese immigration.]

[-1917: CONGRESS bars ALL Asian immigration, including from the Middle East.]

[- 1920s: *S. Ct.* upholds state prohibitions on landowning by Asians.]

V. Native Americans 1875–1908

-/+ 1883: *S. Ct.* in *Ex Parte Crow Dog* rejects effort by **Bureau of Indian Affairs ("BIA")** to impose Unites States criminal law on Native American reservations.

- 1884: *S. Ct.* in *Elk v. Wilkins* ruled that non-reservation Native Americans (born on reservation within United States boundaries, living off reser-

vation) do not have United States citizenship unless naturalized (Justices Harlan and Woods dissent).

- 1885: CONGRESS accedes to request from **Secretary of Interior** by enacting Major Crimes Act removing Native American jurisdiction over (and federalizing) seven crimes, even if committed intra-tribally on reservation.

- 1886: *S. Ct.* in *United States v. Kagama* upheld the Major Crimes Act despite its conflict with prior treaties (*see Cherokee Tobacco Tax Case*).

-/+ 1887: CONGRESS passes Dawes Act arranging for individual allotments (alienable within twenty-five years) of heretofore tribal land and also for selling off "surplus" tribal lands, resulting in 80% of land value belonging to Native Americans lost to them by 1934. Act corrects *Elk v. Wilkins* error by bestowing citizenship on all Native Americans who take an allotment or take up life away from the tribe, and adopt "habits of civilized life."

+ 1896: *S. Ct.* rules that tribal sovereignty exempts tribal governments from restrictions of the Bill of Rights in dealing with tribal members (*Talton v. Mayes).*

-/+ 1896: *S. Ct.* in *Ward v. Racehorse* upheld state-level regulations of Native American hunting on federal land that contradicted guarantee in prior treaty; appeared to turn away from the precedents of Kansas and New York Indians cases of 1866. **U.S. Attorney General** is counsel for Racehorse.

- 1898: CONGRESS in Curtis Act (June 28) extends Dawes Act to cover the Five Civilized tribes (previously exempted due to agricultural success), contrary to extant treaty and property law, resulting in the immiseration of previously prosperous tribes. Also authorizes (in § 13) **Secretary of Interior** to issue mineral leases on tribal land with monetary proceeds to go to tribal benefit.

- 1899: *S. Ct.* in *Stephens v. Cherokee Nation* upholds aspect of the Curtis and Dawes Acts that lets Dawes Commission determine who is a tribal member for purposes of land allotment.

- 1902: *S. Ct.* in *Cherokee Nation v. Hitchcock* upholds legislative grant of authority (in Curtis and Dawes Acts) to **Secretary of Interior** to issue mineral leases on tribal land with monetary proceeds to go to tribal benefit.

-- 1903: *S. Ct.* in *Lone Wolf v. Hitchcock* upholds selloff and allotment of tribal land in a treaty, which the HOUSE favored but slipped through the SENATE in 1900 by subterfuge, despite clear conflict with treaty law and massive evidence of fraudulent dealing by non-Native Americans and of opposition to the sale by tribal membership. (In 1901, **President McKinley** had already announced that the lands were open for [white] settlement.)

++ 1905: *S. Ct.* in ***United States v. Winans*** rules that Native American fishing rights preserved in prior federal treaty prevail over later state regulations (turning its back on *Racehorse,* 1896). **DOJ** defends tribal treaty rights.

+ 1905: *S. Ct.* in *In re Heff* forbids CONGRESS to prohibit sale of liquor to only Native Americans, saying that they must be treated as equal citizens, having become citizens via the Dawes Act allotment process.

- 1906: CONGRESS (provoked by *In re Heff*) in Burke Act postpones Native American citizenship during the twenty-five years of federal land supervision, with power in **Secretary of Interior** to shorten individual supervision periods.

++ 1908: *S. Ct.* in ***Winters v. United States*** upholds tribal rights to divert streams for navigation on grounds of prior federal treaty in the face of contrary state law (staying with its 1905 *Winans* logic on fishing rights.) **DOJ** defends Native American treaty against state law.

VI. African Americans 1876–1903

[In 1874, Democrats gain control in the HOUSE OF REPRESENTATIVES and not until 1889 do Republicans again control both CONGRESSIONAL branches plus the **Presidency**; Until 1889, the closest is 1881–1882 when Democrats nonetheless have 50% of SENATE, with easy filibuster.]

+ 1876–1885: **Executive branch** prosecutions for electoral terrorism in the South continue in significant numbers but in lower numbers than peak years of 1872–1874.

+ 1877: *Chief Justice Waite* on circuit in ***United States v. Butler*** upheld ten convictions of private persons for racially discriminatory vote-discouraging violence.

- 1878: *S. Ct.* in *Hall v. de Cuir* invalidates Louisiana statute forbidding race discrimination in common carriers as violation of Commerce Clause if applied (even within state) to interstate carriers.

+ 1880: *S. Ct.* in *Ex Parte Siebold* rejects argument that state officials (of Baltimore, Maryland) may not be held accountable in federal courts for obedience to federal election laws.

+ 1880: *S. Ct*. in *Strauder v. West Virginia* declared unconstitutional state law that restricted jury service to white males.

+ 1880: *S. Ct*. in ***Ex Parte Virginia*** upheld conviction of a state official for federal crime of excluding African Americans from jury lists on account of race, under §4 of 1875 Civil Rights Act, which it also upheld.

+ 1881: *S. Ct.* in *Neal v. Delaware* rejected as beyond credibility claim of Delaware officials that zero of the 26,000 African Americans residents

qualified for jury duty as "sober and judicious persons"; ruled the criminal trial in question unconstitutional.

+ 1883: *S. Ct.* in *Bush v. Kentucky* threw out indictment for murder by an African American of a white, on grounds that African Americans had been excluded from consideration for grand jury service, pursuant to state law in force at time of the indictment.

- 1883: *S. Ct.* in ***Civil Rights Cases*** declares unconstitutional the public accommodations provisions of 1875 Civil Rights Act because they fail to specify that unequal treatment by the state or its officials is what is forbidden. Merely private action is ruled not punishable under Fourteenth Amendment.

- 1883: *S. Ct.* in *United States v. Harris* declares unconstitutional §5519 of the federal code because it allowed punishment of merely private persons, rather than state officials, for denying "equal protection of the laws."

+ 1884: *S. Ct*. in ***Ex Parte Yarborough*** upheld convictions of private persons for violent interference with Fifteenth Amendment rights (that is, no state action required for conviction.).

+/- 1889–1890: The Republican HOUSE OF REPRESENTATIVES passed the Hoar-Lodge bill, which would have sent federal enforcement officials to the South to secure voting rights for African Americans. Action in the SENATE was blocked by filibuster of Democrats until, during the lame duck session, a handful of Republican SENATORS voted with the Democrats to bring up a new subject. In 1890 the Democrats again took control in CONGRESS.

- 1890: *S. Ct.* in *Louisville, New Orleans & Texas Railway Co. v. Mississippi*, upholds Mississippi law requiring separate cars for whites and African Americans in in-state common carriers (despite the 1878 case of *Hall v. deCuir*), as not undue burden on interstate commerce.

- 1890: *S. Ct.* in *Chesapeake & Ohio Railway v. Kentucky* upholds Kentucky law requiring separate cars for whites and African Americans in in-state common carriers (despite *Hall v. deCuir*), as not undue burden on interstate commerce.

- 1891: *S. Ct.* in *In re Wood* on procedural grounds (wrong writ, wrong timing) refuses to examine allegation that New York courts have been excluding African Americans from juries and thereby denying equal protection.

- 1893–1894: Both houses of CONGRESS and the **Presidency** were finally controlled by the Democrats. They legislated in 1894 to rescind the federal provisions that enforced voting rights in the South. Republicans had turned their attention away from African Americans, to economic issues, and did not filibuster.

- 1895: *S. Ct.* in *Mills v. Green* refused to invalidate procedures used in South Carolina to keep African Americans from voting for state constitutional convention, ruling that the election was finished, so the issue was moot.

- 1895: *S. Ct.* in *Andrews v. Swartz* refuses to examine allegation of racial exclusion from jury, claiming procedural error.

-- 1896: *S. Ct.* in *Gibson v. Mississippi*, *Smith v. Mississippi*, and *Murray v. Louisiana* refuses to examine allegation of racial exclusion from jury, claiming procedural error.

- 1896: *S. Ct.* in *Plessy v. Ferguson* permitted a state law that required "separate but equal" accommodations on railway cars for white and nonwhite races, ignoring "state action" logic of earlier *Civil Rights Cases* (of 1883).

-- 1898: *S. Ct.* genuinely turned its back on Reconstruction. In *Williams v. Mississippi* claimed that the Mississippi law, which in application deprived the vast majority of African Americans of the vote, and of jury eligibility, was not close enough to the bias in application of *Yick Wo v. Hopkins* to be judged unconstitutional.

- 1899: *S. Ct.* ruled in *Cummings v. Board of Education* that county did not violate equal protection when it closed the only African American high school but continued to run one for white girls and subsidize one for African American boys.

+/- 1900: *S. Ct.* in *Carter v. Texas* remands to state courts to permit convicted murderer to show evidence that selection of the grand juries for many years in his county deliberately excluded qualified African Americans on grounds of race; his fate still left to state courts.

- 1900: *S. Ct.* in *Wiley v. Sinkler* rejects damages suit from South Carolinian against a voting official who refused to allow him to vote. Despite claim he was "in every respect duly qualified" to vote in elections in South Carolina. *S. Ct.* relied on his neglect to claim in court that he was a registered voter.

- 1903: *S. Ct.* in *Tarrance v. Florida* rejects claim of racial exclusion from jury, saying proof absent.

- 1903: *S.Ct.* in *Brownfield v. South Carolina* rejects claim of racial exclusion from jury, saying proof absent despite allegation that county was 80% African American.

- 1903: *S. Ct.* in *Giles v. Harris*, despite being shown fact pattern as egregious as that of *Yick Wo v. Hopkins*, refuses to declare Alabama voting law unconstitutional either per se or as administered and instead says that only the elected branches are powerful enough to deal with an intransigent state.

- 1903: *S. Ct.* in ***James v. Bowman*** ignores rules that have been in place since *Reese* and *Cruikshank* and declares that Fifteenth Amendment can be violated only by state, not private, officials.

++ 1903: **President Theodore Roosevelt's DOJ** indicted two groups of whites for threatening and violently intimidating African American workers to leave their jobs and move away. The first, ***United States v. Morris***, charged eleven whites with intimidating African American sharecroppers. The jury did not convict. The second, ***United States v. Maples***, charged fifteen white men with intimidating eight African American sawmill workers to leave their jobs, and the jury convicted three. The charge was that these white men violated §§ 1977 and 5508 by conspiring to use violence and threats to deprive eight named African Americans of the Thirteenth Amendment right to contract freely to dispose of their labor. The appeal of this case became the 1906 *United States v. Hodges*.

- 1904: *S. Ct.* in *Giles v. Teasley* refuses to grant either damages or a writ of mandamus to correct alleged mass violations of the Fifteenth Amendment by Alabama voting registrars.

- 1904: *S. Ct.* in *Jones v. Montague* rejects an appeal from African Americans denied voting rights by the 1901 Constitution of Virginia on the grounds that the congressional election of 1902 was completed, so the case was moot.

+/- 1904: *S. Ct*. in *Rogers v. Alabama* reverses and remands to state courts for proceedings that will allow convicted murderer to present evidence that grand jury was selected in ways that deliberated excluded qualified African Americans; defendant's fate still left to state authorities.

-/++ 1905: *S. Ct.* reverses the conviction for peonage in ***Clyatt v. United States*** due to wrong wording in the indictment and remands for retrial. Upheld 1867 federal law against peonage.

++ 1905: *S. Ct*. in ***Riggins v. United States*** ruled that federally convicted member of mob that had lynched an African American man could not use procedure of writ of habeas corpus.

++ 1906 *S. Ct.* ruled in ***Shipp v. United States (I)*** that contempt of court charge could issue from the *Supreme Court* against sheriff and deputies and mob participants for cooperating in a lynch mob that killed an African American man whose appeal was pending in the Supreme Court.

- 1906: *S .Ct*. in *Thomas v. Texas* rejects claim of jury exclusion, claiming evidence absent.

+ 1906: **President Theodore Roosevelt's DOJ** indicted another group of Arkansas whites for violently intimidating a group of African American workers to leave their railroad jobs. Case became the 1907 case of ***Boyett v. United States***.

- 1906: *S. Ct.* ruled in ***United States v. Hodges*** that federal government does not have power under Thirteenth Amendment to punish a private criminal conspiracy to use violence to intimidate African American (or others) out of freely contracting for a job, and threw out the criminal convictions for having done so.

- 1907: *S. Ct.* relied on ***Hodges*** to rule per curiam in ***Boyett v. United States*** (1907), to invalidate the criminal convictions of intimidators of African American railroad workers.

-/+ 1908: *S. Ct*. in ***Bailey v. Alabama*** disagrees with amicus from **DOJ** and refuses to issue pretrial release on habeas of an African American man jailed under a peonage law.

- 1908: *S. Ct*. in *Berea College v. Kentucky* upheld state law forbidding even private corporations to educate African Americans and whites together.

++ 1909: *S. Ct*. in ***United States v. Shipp (II)*** finds guilty on the charge of contempt of court a sheriff, one deputy, and four private parties based on evidence of their cooperation and participation in lynching an African American man whose appeal they knew was pending in the *Supreme Court*.