1995

The Six Companies and the Geary Act: A Case Study in Nineteenth-Century Civil Disobedience and Civil Rights Litigation

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WESTERN LEGAL HISTORY

THE JOURNAL OF THE
NINTH JUDICIAL CIRCUIT HISTORICAL SOCIETY

VOLUME 8, NUMBER 2 SUMMER/FALL 1995

Western Legal History is published semi-annually, in spring and fall, by the Ninth Judicial Circuit Historical Society, 125 S. Grand Avenue, Pasadena, California 91105, (818) 795-0266. The journal explores, analyzes, and presents the history of law, the legal profession, and the courts—particularly the federal courts—in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

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POSTMASTER:
Please send change of address to:
Editor
Western Legal History
125 S. Grand Avenue
Pasadena, California 91105

ISSN 0896-2189

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The Six Companies and the Geary Act: A Case Study in Nineteenth-Century Civil Disobedience and Civil Rights Litigation

Ellen D. Katz

In 1892, the Chinese Consolidated Benevolent Association in San Francisco urged the resident Chinese community to ignore a federal law. The United States Congress had just passed the Geary Act, which required all Chinese laborers living in the United States to register with the collector of internal revenue. Under the act, those who did not register would face arrest and likely deportation.[1] The Benevolent Association, also known as the Six Companies,[2] claimed that the act violated both the constitutional right to due process and treaty

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[1]Act of May 5, 1892, ch. 60, 27 Stat. 25 (1892).

[2]The association was widely known as the Six Companies, but the actual number of district associations, called *hui kuan* or "companies," forming the whole organization varied over time. The association was initially composed of five *hui kuan*; it expanded and reorganized with the arrival of new groups and reformulation of established ones. See William Hoy, *The Chinese Six Companies* (San Francisco, 1942), 1-10 [hereafter cited as Hoy, *Chinese Six Companies*]; Victor G. Nee and Brett de Bary Nee, *Longtime Californ': A Documentary Study of an American Chinatown* (Palo Alto, 1973), 272-77 [hereafter cited as Nee and Nee, *Longtime Californ'*]; Stanford M. Lyman, "Conflict and the Web of Group Affiliation in San Francisco's Chinatown, 1850-1910," *Pacific Historical Review* 43 (1974), 473, 480 n.28 [hereafter cited as Lyman, "Conflict and the Web"]. See also infra, notes 14-26, and accompanying text.

obligations with China. To combat the legislation, the association enlisted the assistance of the Chinese Legation to exert diplomatic pressure, retained leading attorneys to bring a test case to the Supreme Court, and—perhaps most dramatically—called on the resident Chinese community to risk deportation and participate in a massive campaign of civil disobedience.

By opposing the Geary Act, the leaders of the Six Companies took a calculated gamble. They hoped that the nonregistration campaign, combined with diplomatic and legal action, would prompt the repeal or the judicial invalidation of the act. In retrospect, the association made a disastrous miscalculation. After thousands of Chinese residents had ignored the law and the registration period had expired, the Supreme Court upheld the act as constitutional in *Fong Yue Ting v. United States*.[3] Dozens of Chinese laborers were placed in deportation proceedings, Chinese residents in San Francisco challenged the authority of the Six Companies, and the association's president, Chun Ti Chu, lost his position. While Congress subsequently provided some relief by extending the registration period,[4] the Geary Act remained law.

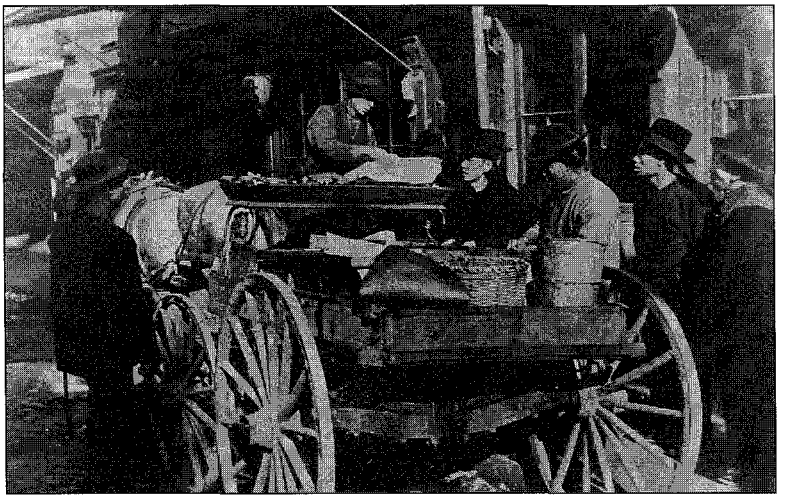
The leaders of the Six Companies and the thousands of Chinese laborers who ignored the act had failed to anticipate the Supreme Court's decision in *Fong Yue Ting*. During the decade before the congressional passage of the act, thousands of Chinese aliens, under the leadership of the Six Companies, had petitioned for writs of habeas corpus in the federal courts on the West Coast, and, with a remarkable degree of success, proved why otherwise valid restriction laws did not apply to them.[5] Several federal judges overlooked their own inclinations and public clamor to uphold treaty obligations and to protect the rights of Chinese litigants. As a result, the Chinese immigrant community came to view the federal courts as their reliable, if reluctant, allies.

In 1892, the leaders of the Six Companies anticipated similar support. They expected the Supreme Court to invalidate what

[3]149 U.S. 698 (1893).

[4]Act of November 3, 1893, ch. 14, 28 Stat. 7 (1893).

[5]During the late nineteenth century, both the federal district court and the circuit court in northern California functioned as federal trial courts. Chinese immigrants could petition for writs of habeas corpus in either court, although most went before the district court. When the circuit court decided appeals from the district court, it consisted of both the regularly appointed circuit judge and the U.S. Supreme Court justice responsible for the circuit. See Lucy Elizabeth Sayler, "Guarding the 'White Man's Frontier': Courts, Politics, and the Regulation of Immigration, 1891-1924" (Ph.D. diss., University of California, Berkeley, 1989), xx, 49 n.114 [hereafter cited as Sayler, "Guarding the 'White Man's Frontier'"].



The leaders of the Six Companies were merchants in the Chinese immigrant community generally regarded as men of education and ability. (Photograph by Arnold Genthe, Library of Congress)

they believed to be a blatant abrogation of legal principles that the federal courts had repeatedly upheld. They argued that Congress had no authority to order the mandatory registration of a resident immigrant population protected both by treaty obligations and the Constitution of the United States. They erred not because they believed in the redemptive power of the legal process, but, rather, because they failed to appreciate the extent to which immigration law itself had changed by 1892. The very success of Chinese litigants during the 1880s had prompted proponents of Chinese exclusion to secure more stringent legislation. As Congress eliminated many of the exemptions that had enabled Chinese aliens to gain entry, the federal courts handed down decisions less favorable to Chinese petitioners. By 1889, the Supreme Court had recognized congressional power to regulate immigration as an incident of sovereignty,[6] an expansive principle that the Court would use to uphold the Geary Act four years later.

Moreover, the Six Companies' campaign proved unsuccessful because the association failed to employ the strategy that had enabled Chinese litigants to circumvent much of the restriction legislation during the 1880s. Federal judges were committed to uphold the law, and ruled favorably in cases brought by Chinese petitioners because existing legislation and judicial

[6]*Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

precedents mandated such results. Chinese litigants succeeded largely because they stressed that their claims were consistent with, but exempt from, the congressional legislation. Their strategy was to show why the exclusion laws did not apply to a particular petitioner.

By contrast, the association's campaign against the Geary Act sought the direct invalidation of federal legislation. Leaders of the Six Companies may have believed that the "consistent-exemption" strategy would be of little use in challenging this particular law, and thus eschewed the case-by-case approach. As a result, they abandoned the reason for which federal judges had previously ruled so favorably; in its place, they adopted a tactic that had failed before,[7] and held little promise of success.

Even so, the association's campaign against the act nearly succeeded. The Six Companies convinced more than eighty-five thousand Chinese laborers nationwide—87 percent of those targeted by the act—to ignore the congressional order and risk deportation.[8] The association's legal and diplomatic efforts brought its test case to the highest United States court only five days after the registration period had ended, and its attorneys persuaded three Supreme Court justices that the act was unconstitutional.[9] While a majority of the Court upheld the legislation, Congress subsequently enacted the McCreary Amendment, extending the registration period and thereby preventing massive deportations. Although the registration requirement remained the law, the Six Companies continued to challenge its provisions on a case-by-case basis, achieving thereby a modest success.

Indeed, it appears likely that the leaders of the Six Companies anticipated the McCreary legislation when they first promoted civil disobedience on a national scale. While they sought judicial invalidation of the Geary Act, they knew that the non-registration campaign would make the act, even if it were constitutionally valid, an administrative nightmare impossible to implement. Thus, while Congress would not enact legislation protecting the rights of Chinese laborers, the association knew that the prospect of deporting thousands of Chinese aliens presented an administrative and financial burden that would prompt congressional action. Its error was its failure to recognize how newly established legal principles would bar ultimate victory.

[7]Ibid.; see also infra, notes 101-4, and accompanying text.

[8]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 114.

[9]149 U.S. at 734. Chief Justice Fuller and Justices Field and Brewer dissented. Justice Harlan did not participate in the decision.

ARRIVAL, GROWTH, AND RESISTANCE

During most of the nineteenth century the federal government had little interest in restricting immigration, and left the field free and unregulated.[10] As late as 1868, Congress endorsed the "the natural and inherent right" to expatriate[11] and "the inherent and inalienable right of man to change his home and allegiance."[12] Beginning in the late 1840s, Chinese immigrants took advantage of the open policy and began arriving in the United States in significant numbers. Most came to the West Coast and worked as miners, cooks, and laundrymen at mining camps. By the 1860s, many Chinese were laying tracks in the Sierra Nevada for the Central Pacific Railroad Company. With the end of the gold rush and the completion of the railroad, Chinese immigrants moved in greater numbers to cities like San Francisco and entered manufacturing and trade.[13]

The Chinese who settled in San Francisco and in other communities formed district associations known as *hui kuan*, the members of each of which spoke a common dialect, came from the same area in China, or belonged to the same ethnic group.[14] These associations functioned as benevolent societies similar

[10]For most of the century, the federal government became involved with immigration issues only when state and local enactments encroached on congressional authority to regulate interstate and foreign commerce. See, e.g., *Henderson v. Wickham, Commissioners of Immigration v. North German Lloyd*, 92 U.S.(2 Otto) 259 (1876), *Chy Lung v. Freeman*, 92 U.S. (2 Otto) 275 (1876), and *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (invalidating state laws requiring ship masters to pay alien taxes for arriving passengers).

[11]An Act concerning the Rights of American citizens in Foreign States, ch. 249, 15 Stat. 223 (1868), quoted in Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny," *Harvard Law Review* 100 (1987), 853, 855 n.9 [hereafter cited as Henkin, "Constitution and United States Sovereignty"].

[12]Burlingame Treaty, 16 Stat. 739, T.S. no. 48 (July 28, 1868).

[13]In 1852, several thousand Chinese were living in California, but sources differ as to the precise number, with estimates ranging between twelve thousand and twenty-five thousand. The number of Chinese in the United States had risen to more than sixty-three thousand by 1870 and more than one hundred five thousand by 1880. Ninety-nine percent of this population lived on the West Coast. See Mary Roberts Coolidge, *Chinese Immigration* (1909; reprint, New York, 1969), 425, 501 [hereafter cited as Coolidge, *Chinese Immigration*]; Elmer Clarence Sandmeyer, *The Anti-Chinese Movement in California* (1939), 16-17 [hereafter cited as Sandmeyer, *Anti-Chinese Movement*]; Hudson Janisch, "The Chinese, the Courts and the Constitution: A Study of the Legal Issues Raised by Chinese Immigration to the United States, 1850-1902" (J.S.D. diss., University of Chicago, 1971), 3 [hereafter cited as Janisch, "The Chinese, the Courts and the Constitution"]; Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 21.

[14]Lyman, "Conflict and the Web," supra note 2 at 479.

to those created by European immigrants on the East Coast. They helped members find employment, housing, and medical care, provided credit and loan services, and kept order within the community by setting forth rules governing behavior.[15]

In the late 1850s, the district associations in San Francisco founded the Chinese Consolidated Benevolent Association, a coordinating council that functioned as the unofficial government of the Chinese community and as its voice in dealings with government officials and the Euro-American population as a whole.[16] The leaders of the Six Companies were merchants in the Chinese immigrant community and were regarded, by even the most vitriolic critics of the association, as "men of education and ability."[17] Similar organizations, such as the Chinese Civil Rights League in New York, existed in other parts of the country, but none achieved the prominence and influence of the Six Companies. The association became, in the words of the historian Charles McClain, "unquestionably the most important organization in Chinese-American society in the 19th century."[18]

[15]Two other types of community organizations—the family associations and the secret societies—operated as benevolent societies. Family associations consisted of members who shared the same lineage or a common surname and assisted newcomers with the immigration process, housing, and employment. Secret societies, known as "tongs," also provided lodging, medical care, and dispute mediation. In China, these organizations were associated with subversive activities, political rebellions, and criminal activities. In the United States, the tongs operated underground businesses involved with gambling, opium distribution, and prostitution. At times, they challenged the district associations for leadership in the Chinese community. See Nee and Nee, *Longtime Californ'*, supra note 2 at 64-65; Shin-Shan Henry Tsai, *China and the Overseas Chinese in the United States, 1868-1911* [hereafter cited as Tsai, *China and the Overseas Chinese*] (Fayetteville, 1983), 34-38; Ivan Light, "From Vice District to Tourist Attraction: The Moral Career of American Chinatowns, 1880-1940," *Pacific Historical Review* 43 (1974), 367, 370-75 [hereafter cited as Light, "Vice District"]; Lyman, "Conflict and the Web," supra note 2 at 474-79; Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 93-94.

[16]Jack Chen, *The Chinese of America* (New York, 1980), 26-28 [hereafter cited as Chen, *Chinese of America*]; Hoy, *Chinese Six Companies*, supra note 2; Nee and Nee, *Longtime Californ'*, supra note 2 at 67-69; Lyman, "Conflict and the Web," supra note 2 at 480, 484-90; Fong Kum Ngon, "The Chinese Six Companies," *Overland Monthly* (May 1894), 518 [hereafter cited as Fong, "Chinese Six Companies"].

[17]Richard Hay Drayton, "The Chinese Six Companies," *California Illustrated Magazine* (August 4, 1893), 472, 473 [hereafter cited as Drayton, "Chinese Six Companies"]. In China, the merchant class did not hold high social status, but, as a result of the absence of gentry and a scholar class in the Chinese community in the United States, merchants assumed leadership roles. Chen, *Chinese Americans*, supra note 16 at 27-28.

[18]Charles J. McClain, Jr., "The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870," *California Law Review* 72

The individual *hui kuan* and then the Six Companies led the Chinese community in challenging the numerous discriminatory practices Chinese immigrants faced virtually from their arrival in the United States.[19] While the federal government sanctioned unrestricted immigration, local and state governments, particularly on the West Coast, implemented policies meant to restrict the arrival of new Chinese immigrants and limit the rights of those already in the country. They enacted entry, license, and occupation taxes, denied Chinese aliens the franchise, and prevented Chinese children from attending public schools with Euro-American students.[20]

The district associations resisted these practices. They retained an attorney to represent Chinese interests,[21] objected in the popular press to anti-Chinese rhetoric,[22] and lobbied against

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(1984), 529, 540-41 n.57 [hereafter cited as McClain, "Chinese Struggle for Civil Rights"]. See also Gunther Barth, *Bitter Strength: A History of the Chinese in the United States, 1850-1870* (Cambridge, Mass., 1964), 77-100 [hereafter cited as Barth, *Bitter Strength*]; Chen, "Chinese of America," supra note 16 at 27-28; Nee and Nee, *Longtime Californ'*, supra note 2 at 65-67.

[19]Anti-Chinese sentiment on the West Coast actually predated the arrival of Chinese immigrants. American traders, diplomats, and missionaries, among others, viewed the Chinese as being strangely dressed, superstitious, dishonest, and amoral, and as participating in acts of sexual deviance and other aberrational behaviors. See Stuart Creighton Miller, *The Unwelcome Immigrant: The American Image of the Chinese, 1785-1882* (Berkeley, 1969), 83-94 [hereafter cited as Miller, *Unwelcome Immigrant*].

[20]Thomas Alexander Aleinikoff and David A. Martin, *Immigration: Process and Policy*, 2d ed. (St. Paul, 1991), 3 [hereafter cited as Aleinikoff and Martin, *Immigration*].

[21]Within months of their arrival in San Francisco, leaders of the Chinese community approached Selim Woodworth and asked him to act as their "adviser and arbitrator." Woodworth accepted the offer. *Daily Alta California*, December 10, 1849. On April 25, 1854, the *Daily Alta California* reported that "The Chinese fee the lawyers better than any other class of citizens." Lucile Eaves wrote that the Chinese "had learned at this early date the advantages of employing an able lawyer to present their side of the situation." Idem, *A History of California Labor Legislation* (Berkeley, 1910), 108 [hereafter cited as Eaves, *California Labor Legislation*]; see also McClain, "Chinese Struggle for Civil Rights," supra note 18 at 541 n.58.

[22]An example of this occurred in April 1852, when California's governor, John Bigler, wanted to impose state taxes to discourage Chinese immigration and to exclude Chinese immigrants from the state's mines, from its juries, and from giving testimony in court. Norman Asing, a Chinese merchant in San Francisco, responded by publishing an open letter criticizing the governor's remarks, saying that California lacked the authority to restrict Chinese immigration and arguing that Chinese aliens were entitled to American citizenship. Asing told Bigler that "The declaration of your independence, and all the acts of your government, your people, and your history, are against you." Asing to His Excellency Gov. Bigler, *Daily Alta California*, May 5, 1852. See McClain, "Chinese Struggle for Civil Rights," supra note 18 at 538; Lyman, "Conflict and the Web," supra note 2 at 481.

discriminatory legislation.[23] While achieving mixed success,[24] the associations' efforts underscore the point that, contrary to contemporaneous Euro-American perceptions[25] and many historical accounts,[26] Chinese immigrants knew their legal rights, and understood how to use legal and political processes to challenge discriminatory practices.

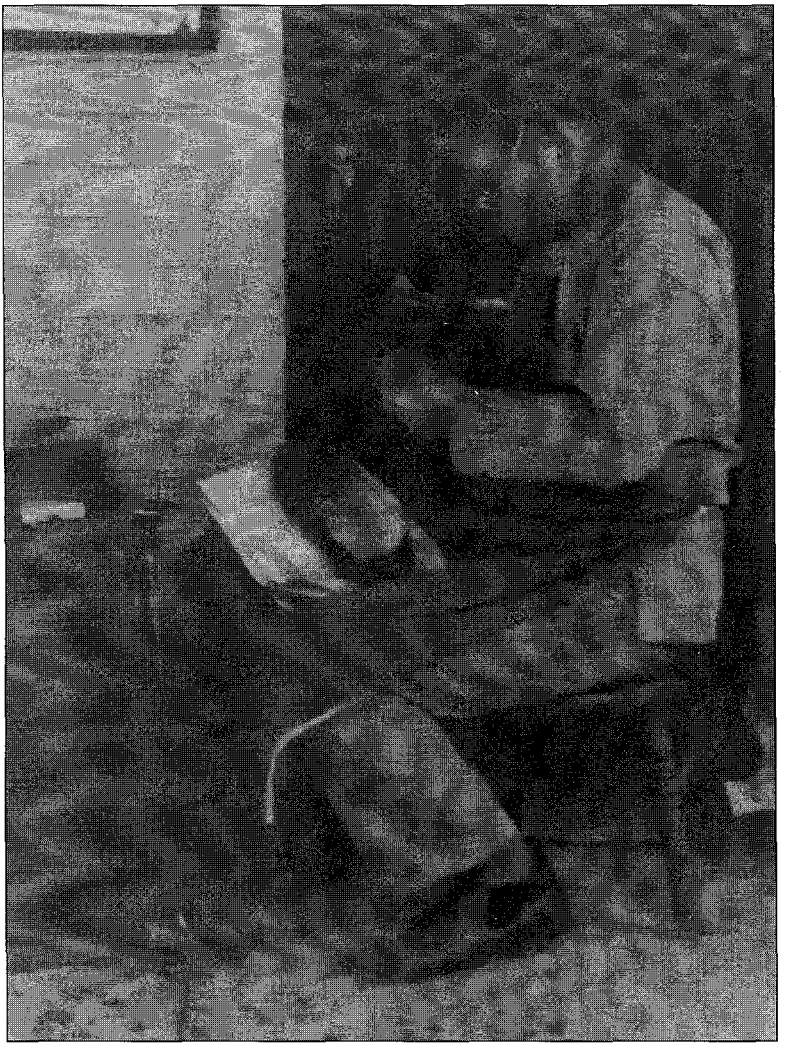
However, opposition to their efforts grew steadily, as did the number of people seeking to restrict Chinese immigration. The exhaustion of the mines, the completion of the railroad, and

[23]In 1853, for example, the California legislature considered a number of bills that threatened to limit and even bar Chinese access to California mines. The leaders of the district association met with legislators and pointed out that addressing Chinese grievances would increase trade between the United States and China. The committee responded favorably and called for the rejection of the most onerous proposals. See McClain, "Chinese Struggle for Civil Rights," supra note 18 at 540-43.

[24]For instance, while the district associations prevented enactment of mining restrictions in 1853, the legislature subsequently passed measures that limited Chinese access to the mines. See McClain, "Chinese Struggle for Civil Rights," supra note 18 at 543.

[25]From the popular press to Supreme Court justices, much of the Euro-American populace viewed the Chinese during this period as transient, unassimilable people who neither understood nor cared about American political and legal institutions. The *Daily Alta California* for July 24, 1869, reported that the typical Chinese immigrant "knows and cares nothing more of the laws and language of the people among whom he lives than will suffice to keep him out of trouble." A *New York Times* commentator warned that the Chinese had "no knowledge or appreciation of free institutions or constitutional liberty. . . . We should be prepared to bid farewell to republicanism and democracy." September 3, 1865. In 1884, Justice Field wrote, "Our institutions have made no impression on [the Chinese]." *Chew Heong v. United States*, 112 U.S. 536, 566 (Field, J., dissenting).

[26]Many historical accounts of the Chinese during this period depict a community unlikely to sustain a meaningful challenge to federal legislation. These accounts say that the Chinese immigrant community was characterized by corrupt and inept leadership, and passive and indifferent masses. They emphasize that, unlike all other immigrant groups to the United States, the Chinese did not intend to settle permanently in this country, but, rather, sought to make money and return to China. As a result, the argument goes, Chinese aliens had no interest in understanding American political and legal institutions and remained indifferent to them even as they faced increasingly severe legal restrictions. See, for example, Barth, *Bitter Strength*, supra note 18 at 1-8. This portrait is partially the result of the historic emphasis on Euro-American reaction to Chinese immigration rather than on the Chinese and their perceptions and experiences. As Roger Daniels wrote, "Other immigrant groups were celebrated for what they had accomplished; Orientals were important for what was done to them." Idem, "Westerners from the East: Oriental Immigrants Reappraised," *Pacific Historical Review* 35 (1966), 373, 375. The result, according to Stanford Lyman, was a "one-sided image of victimization unrelieved by any analytical accounts of the organizational activity or associational creativity of the Asian victims." Idem, "Conflict and the Web," supra note 2 at 473. See also Miller, *Unwelcome Immigrant*, supra note 19 at 169.



The Six Companies urged Chinese laborers like this cobbler to ignore the Geary Act's registration requirement. (Photograph by Arnold Genthe, Collection of The Oakland Museum of California, Gift of Anonymous Donor)

the growing population of Euro-American settlers on the West Coast substantially increased anti-Chinese agitation among Euro-American laborers. The panic of 1873 and depression of 1877 further galvanized the movement. Restrictionists like Dennis Kearney of the Workingman's Party demanded the elimination of the Chinese presence in California. The cry went up, "The Chinese Must Go!"[27]

As the Six Companies resisted these efforts, it found the federal government an increasingly dependable ally. The Reconstruction amendments had invalidated many anti-Chinese practices,[28] and constitutional principles of federalism as well as U.S. treaty obligations functioned to limit restrictionist efforts at the state and local level.[29] The 1868 Burlingame Treaty between the United States and China recognized "the mutual advantage of free migration and emigration of their citizens." It also guaranteed Chinese citizens in the United States all the

[27]See Coolidge, *Chinese Immigration*, supra note 13 at 150; Eaves, *California Labor Legislation*, supra note 21 at 136-50; Robert F. Heizer and Alan F. Almquist, *The Other Californians: Prejudice and Discrimination Under Spain, Mexico, and the United States to 1920* (Berkeley, 1971), 154-77.

[28]Much Reconstruction legislation served to protect Chinese immigrants from discriminatory practices. See, e.g., the Voting Rights Act of 1870, 16 Stat. 144, §16 (guaranteeing to "all persons" the "same right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of all persons and property as is enjoyed by white citizens"); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that the equal-protection clause of the Fourteenth Amendment protects Chinese immigrants from the discriminatory enforcement of a San Francisco ordinance regulating laundries); *In re Quong Woo*, 13 F. 229 (C.C.D.Cal. 1882) (invalidating as an interference with the right to labor a city ordinance that required laundry owners to obtain signatures from twelve neighbors before the issuance of an operation permit); *In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880) (invalidating the provision of the state constitution prohibiting employment of Chinese immigrants in public works projects); *How Ah Kow v. Nunan*, 12 F. Cas. 252 (C.C.D. Cal. 1879) (no. 6546) (invalidating the San Francisco "Queue Ordinance" that mandated maximum hair length for all city prisoners). But see *Barbier v. Connolly*, 113 U.S. 27 (1885), and *Song Hing v. Crowley*, 113 U.S. 703 (1885) (upholding as a legitimate exercise of the police power a city ordinance prohibiting the operation of laundries at night); *In re Wong Yung Quy*, 2 F. 624 (C.C.D. Cal. 1880) (upholding burial regulation notwithstanding its disproportionate burden on Chinese immigrants). See also *Runyon v. McCrary*, 427 U.S. 160, 195-201 (1976) (White, J., dissenting); Aleinikoff and Martin, *Immigration*, supra note 20 at 3.

[29]*Henderson v. Wickham*, 92 U.S. (Otto) 259 (1876); *Chy Lung v. Freeman*, 92 U.S. (Otto) 275 (1876); *In re Ah Fong*, 1 F. Cas. 213 (C.C.D. Cal. 1874) (no. 102) (invalidating as discriminatory the California statute denying entry to disabled, unaccompanied, or "lewd" immigrants who arrived by vessel). See also McClain, "Chinese Struggle for Civil Rights," supra note 18 at 545; Linda C.A. Przybyszewski, "Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit," *Western Legal History* 1 (1988), 23, 29 [hereafter cited as Przybyszewski, "Sawyer and the Chinese"].

"privileges, immunities and exemptions in respect to travel and residence" that the United States extended to citizens "of the most favored nation."[30]

In 1874, Justice Stephen J. Field instructed those seeking to restrict Chinese immigrants that their efforts at the state and local level were destined to fail: "Recourse must be had to the Federal government, where the whole power over this subject lies."[31] The restrictionists followed Field's advice, and applied increasing pressure on Congress to change the policy of open immigration, characterizing Chinese immigrants as deviant and criminal. In 1875 Congress responded to the growing xenophobia by enacting legislation limiting immigration. The statute prohibited the entry of criminals, prostitutes, idiots, lunatics, convicts, and "persons likely to become a public charge."[32]

The restrictionists believed the legislation did not go far enough, and sought the express exclusion of Chinese immigrants. In 1876, both the Democrat and Republican parties included provisions regarding "Mongolian immigration" in their platforms for the presidential election. Hoping to attract Californian voters, the Republicans called for a congressional investigation into the effects of Chinese immigration and a modification of the Burlingame Treaty.[33] The Democrats recommended outright exclusion.[34] That same year, a joint congressional investigation into the effects of Chinese immigration recommended exclusion.[35] Anti-Chinese demonstrations in

[30]Burlingame Treaty, 16 Stat. 739.

[31]*In re Ah Fong*, 1 F. Cas. 213, 217 (C.C.D. Cal. 1874) (no. 102).

[32]Act of March 3, 1875, ch. 141, 18 Stat. 477.

[33]The Republican party was divided on the issue of Chinese exclusion. Northern and eastern Republicans, including Hannibal Hamlin, Lincoln's first vice-president, opposed exclusion as being racist and contrary to America's liberal traditions. Western Republicans, including the California senator Aaron Sargent, led the fight for restrictive legislation. As a result, Rutherford B. Hayes, as the Republican candidate, avoided the issue during the campaign. See Coolidge, *Chinese Immigration*, supra note 13 at 111; Gary Pennanen, "Public Opinion and the Chinese Question, 1876-1879," *Ohio History* 77 (1968), 139, 141.

[34]Coolidge, *Chinese Immgration*, supra note 13 at 111.

[35]This recommendation was based on the report submitted by Senator Aaron Sargent of California, yet much of the testimony during the hearings supported continued Chinese immigration. Oliver Morton of Indiana, who had originally headed the investigation but died before its completion, believed the investigation failed to prove that California had suffered either morally or economically from the presence of the Chinese, and in fact indicated that the state had benefited from their presence. Sargent, who took over the investigation at Morton's death, submitted a report based on the same testimony that called for immigration restriction. Coolidge, *Chinese Immigration*, supra note 13 at 96-107, 132-33; Eaves, *California Labor Legislation*, supra note 21 at 163-66.

San Francisco and petitions from the California legislature buttressed the joint congressional committee's findings.[36]

The Six Companies challenged the movement toward exclusion. In 1876, the association called on the president for protection, stating, "Our people in this country . . . have been peaceable, law-abiding, and industrious. . . . While benefitting themselves with the honest reward of their daily toil, they have . . . left all the results of their industry to enrich the state."[37] The following year, the association called on congressional leaders to uphold U.S. treaty obligations by protecting Chinese immigrants from violence and rejecting restrictionist proposals.[38] Their efforts were to no avail. To federal legislators, the demands of Euro-American voters proved far more persuasive than the concerns of a disenfranchised immigrant group.[39]

However, while congressional support for restricting immigration grew, the Burlingame Treaty remained an obstacle to any legislative effort. Customs Inspector J. Thomas Scharf later wrote of the treaty, "The declaration concerning voluntary immigration was unfortunate in tying the hands of our Government so that it could not freely legislate against an invasion coming under the guise of a voluntary immigration."[40] In 1879, when Congress passed a bill that prohibited any ship from bringing more than fifteen Chinese immigrants to the United States in any single voyage, President Hayes vetoed the act as violating the Burlingame Treaty.[41]

In 1880, Congress responded by authorizing a diplomatic trip to China to renegotiate the 1868 treaty. The revised treaty permitted the United States "to regulate, limit or suspend" but not "absolutely prohibit" the immigration of Chinese laborers when U.S. officials believed such immigration threatened the country's interests or its "good order." Still, the treaty protected the right of Chinese laborers already in the United States "to go and come of their free will and accord." It also

[36]Eaves, *California Labor Legislation*, supra note 21 at 148-50.

[37]Chen, "Chinese of America," supra note 17 at 142.

[38]Lyman, "Conflict and the Web," supra note 2 at 481.

[39]Chinese immigrants were denied the right to become naturalized and thus could not vote. See infra, notes 192-97, and accompanying text.

[40]J. Thomas Scharf, "The Farce of the Chinese Exclusion Laws," *North American Review* 166 (1898) 85, 87.

[41]*Cong. Rec.*, 1879, 45, 2275-76. The Yale College faculty had sent a petition to President Hayes urging him to veto the bill. The former secretary of the U.S. Legation to Peking, S. Wells Williams, who was then professor of Chinese history and language, had coordinated this response. Tsai, *China and the Overseas Chinese*, supra note 15 at 47. See also Coolidge, *Chinese Immigration*, supra note 13 at 136-39, 150; Eaves, *California Labor Legislation*, supra note 21 at 164-71.

reaffirmed the United States' commitment to protect Chinese immigrants from "ill treatment at the hands of any other person" and "to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation."[42]

Within a year of ratification, anti-Chinese agitation led Congress to conclude that the continued immigration of Chinese laborers "endangers the good order of certain localities." Pursuant to the 1880 treaty, it passed legislation that suspended the immigration of Chinese laborers for ten years.[43] It authorized the collector of customs at each port, under the supervision of the secretary of the treasury, to decide whether to admit or exclude Chinese aliens seeking entry. The legislation provided for a judicial evaluation of the status of Chinese laborers suspected of being in the United States illegally, and mandated the expulsion of those laborers found to be in the country unlawfully. Attorneys for the United States would represent the government in all litigation involving Chinese exclusion.[44]

Because the 1880 treaty had protected the right of Chinese laborers in the United States "to go and come of their free will and accord," the 1882 act exempted from its provisions Chinese laborers in the United States since the signing of the 1880 treaty. In order to protect their mobility, the act established an identification system to distinguish these laborers from new immigrants. When a Chinese laborer in the United States wanted to leave the country, the collector of customs would issue a "return" certificate that enabled the laborer to reenter the United States. The legislation also called on the Chinese government to issue what came to be known as Canton certificates to Chinese merchants and other non-laborers in the United States. These certificates identified the status of the holders and authorized entry into the United States.[45]

THE HABEAS CORPUS CASES

Proponents of exclusion celebrated the 1882 legislation and anticipated the end of Chinese immigration, but the act did not

[42]Treaty of November 17, 1880, 22 Stat. 836, T.S. no. 49, art. 1, 3. For a description of the negotiations leading to the revised treaty, see Tsai, *China and the Overseas Chinese*, supra note 15 at 50-59.

[43]The act defined laborers as including both skilled and unskilled workers as well as all Chinese working in the mining industry. Act of May 6, 1882, 22 Stat. 58, §§12, 15.

[44]Ibid.

[45]Ibid. at §§4, 6.

provide for such a result.[46] While limiting the entrance of laborers pursuant to the 1880 treaty, the legislation reaffirmed treaty obligations to protect Chinese aliens living in the United States and to assure them of most-favored-nation status. The act protected the right of all Chinese nonlaborers to enter the United States. Total exclusion of all Chinese immigration was never the goal.

Even under its own terms, the legislation failed to produce the expected results. Federal administrative officers and judges disagreed as to how the law should be interpreted and enforced, and Chinese aliens, led by the Six Companies, took advantage of this dispute to circumvent the restriction provisions.

After the passage of the 1882 act, Chinese laborers and other Chinese immigrants continued to arrive in the United States. In San Francisco,[47] the collector of customs adopted a rigid interpretation of the act and denied entry to all Chinese immigrants without either a return certificate or a Canton certificate.[48] These immigrants then petitioned for writs of habeas corpus in the federal courts in California. They claimed they possessed a right of entry under the categories exempted by the 1882 act.

In a remarkable number of cases, the federal judges in San Francisco agreed. While personally sympathetic to the anti-Chinese legislation, they were loath to interpret the 1882 act inconsistently with U.S. treaty obligations. Since the 1880 treaty granted China and the Chinese most-favored-nation status and all nonlaborers the right to free entry and exit, the federal courts recognized that Chinese aliens claiming exemption from the 1882 act had the right to petition the court for writs of

[46]That so many proponents of exclusions nevertheless expected this result may be attributed in part to the nearly thirty years of anti-Chinese agitation during which exclusionists were told that Congress, not the states, had the authority to restrict and exclude Chinese immigrants. As a result, anti-Chinese forces misconstrued the 1882 act to provide more than it did, and quickly became frustrated with the results. See Christian G. Fritz, "A Nineteenth-Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California," *American Journal of Legal History* 32 (1988), 347, 354 [hereafter cited as Fritz, "Nineteenth-Century 'Habeas Corpus Mill'"].

[47]The pivotal judicial decisions regarding the 1882 act took place in federal courts in San Francisco largely because most Chinese arrived at that port, the Six Companies was based in the city, and the collector there adopted a particularly stringent approach.

[48]The collector of customs was a coveted position, awarded out of patronage and closely tied to party politics. The public clamor against the Chinese pressured the collector to enforce the restriction provisions vigorously and with an eye toward maximum exclusion. See Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 49-50.

habeas corpus.[49] As a result, the federal courts reviewed the petitioner's claim to enter de novo and often reached conclusions contrary to those of the collector.

As an example, the collector and the federal judges disagreed as to what constituted sufficient evidence of prior residence or nonlaborer status. The collector maintained that only return or Canton certificates were acceptable, a rigid approach that presented immediate problems for protected groups who had left the United States before the 1882 legislation became effective. In contrast, the federal judges permitted Chinese petitioners to present evidence other than identification certificates to prove their exempt status. The judges emphasized that the 1880 treaty guaranteed the right of Chinese aliens in the United States to leave freely and reenter the country, and that the restriction act targeted only those Chinese laborers seeking entry for the first time after 1882. They asserted that the collector's approach penalized Chinese aliens for exercising their rights under the 1880 treaty. Absent express congressional authorization to abrogate treaty obligations, the judges said they would not sanction the collector's approach. To do so, they argued, would be to attribute to the legislative branch of government a want of good faith and a disregard of solemn national engagements that, unless upon grounds that left the court no alternative, it would be indecent to impute to it.[50] The collector's approach, they charged, was unreasonable; it violated the spirit of both the restriction legislation and the 1880 treaty with China, and would cause the repeal of the restriction legislation.[51]

Thus, when the San Francisco collector detained Ah Sing, the first Chinese alien to arrive in the city after the 1882 law went into effect, the circuit court granted his petition for relief. Ah Sing was a cabin steward who had lived in California since 1876, but had left the country before the 1882 act was passed and thus before the collector began issuing return certificates.

[49]Judge Ogden Hoffman argued that the right of detained Chinese aliens to seek writs of habeas corpus was undeniable: "That any human being claiming to be unlawfully restrained of his liberty has a right to demand a judicial investigation into the lawfulness of his imprisonment, is not questioned by any one who knows by what constitutional and legal methods the right of liberty is secured and enforced by at least all English-speaking peoples." *In re Chin Ah Sooey*, 21 F. 393, 393 (D.C.D. Cal. 1884). Hoffman later called the writ of habeas corpus "the most sacred" document of freedom that is available to everyone regardless of race. *In re Jung Ah Lung* and *In re Jung Ah Hon*, 25 F. 141, 143 (D.C.D. Cal. 1885).

[50]*In re Chin Ah On*, 18 F. 506, 507-8 (D.C.D.Cal. 1883).

[51]See, e.g., *In re Ah Sing*, 13 F. 286 (C.C.D.Cal. 1882).

Justice Stephen J. Field said that Congress did not intend the 1882 act to apply to Ah Sing's case.[52] Moreover, since Ah Sing did not leave the U.S. vessel during the voyage, Field said that he had not technically left U.S. territory.[53]

The collector responded by detaining other Chinese aliens who had travelled with Ah Sing and who had left the ship while on leave in Australia, but Field discharged the petitioners and chastised the collector for adopting an approach that would lead to the repeal of the act. According to Field, the "wisdom of its enactment will be better vindicated by a construction less repellent to our sense of justice and right."[54]

Field and his fellow judge, Ogden Hoffman, again provided relief when the collector refused admission to Low Yam Chow, a Chinese merchant from San Francisco who did not have a Canton certificate. Field said the 1882 law required only that a Chinese alien provide evidence of his right to enter; a Canton certificate helped to identify an alien's merchant status, but was not a prerequisite for admission.[55] Hoffman added that requiring Canton certificates and other rigid policies would result in the repeal of the Restriction Act.[56] He subsequently warned supporters of the 1882 act that unreasonable and over-harsh interpretations would bring the law into "odium and disrepute."[57] Hoffman held that Chinese laborers claiming prior residence could establish their right to entry with docu-

[52]*In re Ah Sing*, 13 F. 286, 288 (C.C.D. Cal. 1882). Field served on the California Supreme Court from 1857 to 1863, when he became an associate justice on the United States Supreme Court, where he sat until 1897. While he was a justice on the Supreme Court, he sat periodically on the circuit court in California. See supra note 5.

[53]*In re Ah Sing*, 13 F. 286, 289 (C.C.D. Cal. 1882).

[54]*In re Ah Tie*, 13 F. 291, 294 (C.C.D.Cal. 1882). See also Fritz, "Nineteenth-Century 'Habeas Corpus Mill'," supra note 46 at 354.

[55]*In re Low Yam Chow*, 13 F. 605, 609 (C.C.D.Cal. 1882).

[56]Ibid. at 616-17.

[57]*Daily Alta California*, September 13, 1882. Hoffman demonstrated his commitment to the aims of the Restriction Act in a letter to Judge Matthew Deady, who sat on the district court in Oregon. Deady had held that Ho King, a detained Chinese actor, was not a laborer within the meaning of the 1882 act because a laborer was "one that hires himself out or is hired out to do physical toil." But, since some Chinese laborers (gardeners and fishermen, for instance) worked together and shared profits rather than receiving wages, Hoffman feared that Deady's definition of laborer might open "the door . . . to those classes whom the law intended to exclude." Hoffman asked Deady to modify his opinion before publication, but Deady did not comply. See Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 355-56; Ralph James Mooney, "Matthew Deady and the Federal Judicial Response to Racism in the Early West," *Oregon Law Review* 63 (1984) 561, 616-17.

mentary evidence or corroborative testimony that would suffice to satisfy any candid and unbiased mind.[58]

By insisting that all detained aliens had the right to petition for habeas corpus and to provide evidence in court, federal judges guaranteed themselves a crowded docket.[59] Thousands of detained Chinese aliens inundated the federal courts in San Francisco with petitions for writs of habeas corpus. Fourteen months after the 1882 legislation went into effect, 33 percent of Chinese immigrants gaining entry to the United States did so through successful habeas corpus petitions in federal court.[60] By September 1883, the *Daily Alta California* had dubbed the Northern District Court of California "the habeas corpus mill."[61]

Both to provide some relief to the overcrowded courts and to curb the number of successful Chinese petitioners, Congress enacted new legislation in July 1884. The new law rendered the return certificates the only means for nonlaborers to establish the right to reentry; testimony or other corroborative evidence would no longer be acceptable. Likewise, nonlaborers needed Canton certificates verified by the American consuls in China and customs-house officials in the United States to enter the country.[62]

Given this express congressional mandate, federal judges in California enforced the "no-certificate-no-entry" policy against all aliens targeted by the original legislation. Since the Customs House in San Francisco had begun issuing return certificates on June 6, 1882, Chinese laborers who left the United States after that date could not reenter the country without a return certificate.[63] Yet, because of U.S. treaty obligations, several federal judges refused to interpret the 1884 legislation retroactively, holding that the 1884 amendments did not apply to Chinese laborers who had left the country before the enactment of the 1882 legislation. Since the 1884 amendments did not explicitly address the issue, Hoffman refused to infer congressional intent to abrogate the 1880 treaty.[64] Judge Lorenzo

[58]*In re Tung Yeong*, 19 F.184, 186 (D.C.D.Cal. 1884).

[59]Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 358.

[60]Janisch, "The Chinese, the Courts, and the Constitution," supra note 13 at 497-99.

[61]September 16, 1882. See also Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 348.

[62]Act of July 5, 1884, ch. 220, 3 Stat. 155, §§4, 6.

[63]*In re Leong Yick Dew*, 19 F. 490, 492 (C.C.D. Cal. 1884).

[64]*In re Shong Toon*, 21 F. 386, 389-90 (D.C.D. Cal. 1884); *In re Ah Quan*, 21 F. 182 (C.C.D. Cal. 1884).

Sawyer also insisted that the "treaty and the act must, if possible, be so construed so that they can stand together."[65] Since the 1880 treaty provided that any restriction on immigration "shall be reasonable," Sawyer held that to require Chinese aliens to have return certificates that were not available until after they had left the country was both unreasonable and without legal basis.[66]

Field, who returned to the West Coast in September 1884, disagreed. Determined to take a hard line against the Chinese,[67] he said that the 1884 law absolutely required return certificates for all incoming laborers. He insisted that Chew Heong, a detained Chinese laborer who had been living in the United States when the 1880 treaty was signed, but had left California before the 1882 Restriction Act, needed a return certificate to reentry and had no right to reentry without one.[68]

Thomas D. Riordan, counsel for the Six Companies and for Chew Heong, tried to persuade Field otherwise. During oral argument, Riordan said that to insist on such a requirement violated U.S. treaty obligations and congressional intent regarding the 1882 and 1884 legislation. Moreover, Riordan pointed out, Field's view would leave stranded the thousands of Chinese aliens who were in the same position as Chew Heong.[69] Field responded:

> And what shall the Courts do with them? Can it give each one of them a separate trial? Can it let each of them produce evidence of former residence? No; it was because the Courts were overcrowded that the

[65]*In re Chew Heong*, 21 F. 791, 795 (C.C.D.Cal. 1884) (Sawyer, J., dissenting).

[66]Ibid. at 807-8.

[67]Field's approach upon his return conflicted with his earlier and more favorable decisions toward Chinese aliens. Fritz attributes this changed approach to Field's frustrated political ambitions and the prevailing public opinion. Californians had not supported Field during his 1880 bid for the presidency, in part because of his decisions regarding the Chinese before the enactment of federal restriction legislation. While Field's *Chew Heong* decision came two months after he had lost his 1884 presidential bid and had renounced further political aspirations, public opinion is likely to have influenced his views. See *Daily Alta California*, September 27, 1884; Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 365 n.82.

[68]*In re Chew Heong*, 21 F. 791, 793 (C.C.D. Cal. 1884).

[69]Estimates vary as to the exact number of Chinese who found themselves in this situation. Between twelve thousand and fifteen thousand Chinese, like Chew Heong, left California after 1880 but before any return certificates had been issued. See *Daily Alta California*, September 27, 1884; Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 363.

> second Act was passed. It was to relieve that pressure. . . . My mind is made up on the matter.[70]

Field insisted that, although the 1884 act did not expressly address the issue, Congress did indeed intend the "no-certificate-no-entry" policy to apply to Chew Heong and others like him. He said, "Congress never supposed that Chinamen intended to go back to China and stay several years. If they do not come back at once they should not be allowed to come at all. We can't have them going away and staying as long as they want to."[71]

Sawyer dissented, but, since Field was the presiding judge, he controlled the power of decision.[72] Riordan then appealed the decision to the Supreme Court, which reversed Field's ruling on the circuit court.[73] The Court agreed with Sawyer that, if possible, courts should adopt a statutory construction "which recognized and saved rights secured by the treaty." Writing for the majority, Justice Harlan stated that "any interpretation of [the new legislation] would be rejected which imputed to congress an intention to disregard the plighted faith of the government."[74]

Encouraged by this and other favorable decisions,[75] Chinese aliens denied entry continued to petition for writs of habeas

[70]*Daily Alta California*, September 27, 1884.

[71]Ibid.

[72]Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 363.

[73]*Chew Heong v. United States*, 112 U.S. 536, 549 (1884).

[74]Ibid. Field, who also heard the case again when it came before the Supreme Court, dissented, and said that the decision negated the 1884 act entirely. Ibid. at 561 (Field, J., dissenting). After the decision, Sawyer wrote to Judge Deady, "It is some consolation, after all the lying, abuse, threatening of impeachment as to our construction of the Chinese Restriction Act, and the grand glorification of Brother Field for coming out here and so early, promptly, and thoroughly sitting down on us and setting us right on that subject, to find that we are not so widely out of our senses after all." See Sawyer to Deady, December 22, 1884, quoted in Przybyszewski, "Sawyer and the Chinese," supra note 29 at 42 n.69.

[75]See *United States v. Jung Ah Lung*, 124 U.S. 621, 632 (1888), *aff'g*, *In re Jung Ah Lung* and *In re Jung Ah Hon*, 25 F. 141 (D.C.D. Cal. 1885) (upholding the right of detained Chinese aliens to full judicial review of the facts surrounding their detention); *In re Look Tin Sing*, 21 F. 905, 910-911 (C.C.D. Cal. 1884) (holding that even though Chinese immigrants could not become naturalized, their children born in the United States were American citizens and thus were not subject to restriction legislation); *In re Tung Yeong*, 19 F. 184 (D.C.D. Cal. 1884) (holding that children of merchants were exempt from the restriction provisions as well). But see *In re Ah Moy*, 21 F. 785, 786 (C.C.D. Cal. 1884) (holding that the families of laborers could not enter the United States even if the laborers were exempt from the restriction legislation).

corpus in federal court. By 1885, one-fifth of all Chinese immigrants to enter the country had done so through such petitions. By 1888, more than four thousand Chinese had petitioned for hearings; 85 percent had received favorable rulings.[76]

These decisions attracted a number of experienced Euro-American attorneys to represent Chinese immigrants in habeas corpus actions. As the historian Lucy Sayler has noted, "Chinese immigration cases became a new specialty."[77] Lawyers could earn between seventy-five and one hundred dollars for a case, and competed for a share of the practice. Still, a small group of attorneys retained by the Six Companies handled most such cases in San Francisco; the association paid legal expenses when a newly arrived immigrant was indigent. Independent Chinese "brokers" and family members also aided Chinese newcomers in finding legal assistance. It was widely acknowledged that Chinese immigrants hired the best legal talent,[78] and there is no doubt that this contributed to their success in court.

To many Euro-American citizens in California, the ability of so many Chinese immigrants to maneuver their way through the immigration process was a source of great frustration. Federal judges were criticized for granting Chinese immigrants too much deference, for creating loopholes, and for "engag[ing] in a persistent effort to defeat on technical grounds the operations of the [Restriction] law."[79] More vigorously, Euro-Americans condemned Chinese petitioners, the Six Companies, and their attorneys as the most culpable, alleging that Chinese immigrants consistently lied to evade and undermine the restriction legislation. As early as December 1883, the *Daily Alta California* satirized the restriction legislation, calling it both the "Chinese Evasion Act" and "An Act to perfect the art of lying among the Chinese and their white auxiliaries."[80] The following year, the paper reported that customs officials had become disgusted with the Chinese immigration cases.[81]

[76]Janisch, "The Chinese, the Courts, and the Constitution," supra note 13 at 678-79.

[77]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 153.

[78]Thomas Riordan, counsel for the organization, represented dozens of Chinese aliens seeking entry. Others who provided counsel included former government inspectors from the Customs House and former U.S. attorneys. For instance, Marshall Woodworth, who, as a U.S. district attorney, had defended the collector's decisions to exclude Chinese aliens, began representing them when his term ended. Ibid. at 152-54.

[79]*In re Chin Ah Sooey*, 21 F. 393, 395 (D.C.D.Cal. 1884). See also *Daily Alta California*, January 17, 1884.

[80]*Daily Alta California*, December 18, 1883.

[81]Ibid.

Most legislators, administrative officials, and judges believed that nearly all Chinese aliens lied to gain entry to the United States.[82] Hoffman complained of the "unscrupulous mendacity" and "fertile ingenuity" of the Chinese people displayed in "the endless gamut of deceptions which have in so many instances wearied and disgusted the court."[83] Although he said that fraudulent evidence and dishonest testimony were less pervasive than most Californians seemed to think,[84] he acknowledged that some degree of fraud was inevitable in "any court honestly and fearlessly by discharging its duty under the law and the evidence." He explained:

> To reject [a Chinese alien's] testimony when consistent with itself, and wholly uncontradicted by other proofs, on the sole ground that he is a Chinese person, would be an evasion, or rather violation, of the constitution and law, which every one who sets a just value upon the uprightness and independence of the judiciary, would deeply deplore.[85]

Hoffman's point highlights the dilemma in which the federal judges found themselves. Personal inclinations and public sentiments demanded maximum exclusion, but institutional practices and legal provisions constrained judicial action.[86] Hoffman believed that, presented with consistent Chinese testimony, he was obliged to render favorable decisions. To rule otherwise would indict the integrity of the judicial system. Thus, despite his personal misgivings regarding the Chinese, he discharged Chinese petitioners.

To a certain extent, the perception that Chinese aliens lied to evade the restriction laws was accurate. After the enactment of the restriction legislation, Chinese immigrants continued to

[82]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 102.

[83]*In re Shong Toon*, 21 F. 386, 392 (D.C.D. Cal. 1884).

[84]For example, Hoffman emphasized "that in no case has a person been allowed to land on the plea of previous residence on unsupported Chinese oral testimony," and pointed out that five times more Chinese had left San Francisco than had arrived. *In re Tung Yeong*, 19 F. 184, 186, 190 (D.C.D. Cal. 1884). See also Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 361.

[85]*In re Tung Yeong*, 19 F. 184, 189-90 (D.C.D. Cal. 1884).

[86]Robert Cover described a similar dilemma confronting several judges during the antebellum period. Personally opposed to slavery, these judges nevertheless felt constrained by their office to uphold and enforce legislation that included the fugitive-slave laws. According to Cover, these judges justified their rulings by elevating the formal stakes, retreating to mechanical formalism, and ascribing responsibility elsewhere. See Robert M. Cover, *Justice Accused* (New Haven, 1975), 119-22, 226-56.

come to the United States, hoping that with false papers and the false testimony of relatives in the country they would successfully navigate the immigration process.[87]

The provisions of the restriction legislation themselves seemed to invite fraud. For instance, the 1882 act provided that Canton certificates constituted prima facie evidence of the alien's right to land.[88] As a result, attorneys for the Chinese petitioners typically introduced a Canton certificate and then rested the case, leaving the U.S. attorney with the burden to rebut an immigrant's claim of merchant status. Notwithstanding the latitude given the U.S. attorney and the judge's own cross-examination, the government's inability to meet the burden of proof meant that Chinese aliens landed who were in fact laborers.[89]

Furthermore, the exclusion laws encouraged fraud by forcing Chinese immigration underground and creating a profitable business. Secret societies would pay about five thousand dollars to secure the landing of a Chinese prostitute,[90] while Chinese merchants in the United States claimed the birth of a new son when returning from visits to China and then sold the slot to a young Chinese immigrant who played the part.[91] United States immigration officials accepted bribes to provide false documents and to overlook problems in individual cases.[92] Even so, immigration fraud was less extensive than most people believed. The prevalent racist portrait of the Chinese as "deceitful, cunning and dishonest" contributed to an exaggerated account of the extent of immigration fraud.[93] However, many Californians viewed the success of Chinese litigants in federal courts as proof of fraud. Surely, if Congress had enacted legislation to restrict Chinese entry into the United States and thousands of Chinese immigrants continued to enter, something was awry. And that something was believed to be the mendacity of the Chinese community.[94] Such critics may have missed the extent to which the Chinese were simply asserting their legitimate claims to exemptions from the restriction laws.

[87]Tsai, "China and the Overseas Chinese," supra note 15 at 98-99.

[88]Act of May 6, 1882, 22 Stat. 58.

[89]See *In re Tung Yeong*, 19 F. 184, 188 (D.C.D.Cal. 1884); Fritz, "Nineteenth-Century 'Habeas Corpus Mill,'" supra note 46 at 361.

[90]Nee and Nee, *Longtime Californ'*, supra note 2 at 92.

[91]Peter C.Y. Leung, "When a Haircut Was a Luxury: A Chinese Farm Laborer in the Sacramento Delta," *California History* 64 (1985), 212-13.

[92]Eaves, *California Labor Legislation*, supra note 21 at 183.

[93]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 106. See also Miller, *Unwelcome Immigrant*, supra note 19 at 29-31.

[94]Ibid.

Some lied to evade the law, but others were exercising their rights under it.

CHAE CHAN PING AND THE PORTENT OF THINGS TO COME

The perception that Chinese aliens were manipulating the immigration process led to increased hostility not only against the Chinese community but against the courts as well. As the legal system appeared to be of little use in blocking Chinese entry, exclusionists turned to extralegal means. In western states, they initiated violent attacks against Chinese aliens; in one such instance in Rock Spring, Wyoming, white miners murdered twenty-eight Chinese workers who had refused to strike.[95] In 1887, a Justice Department official warned that "The courts are already impaled upon the shafts of vituperation and ridicule by the Press of the State, and the danger is, that the people will lose all confidence in them, a result much to be feared, and than which there is not worse."[96]

Since the federal courts refused to abrogate the 1880 treaty, proponents of exclusion again pressed for the revision of U.S. obligations. In 1888, Congress sent a diplomatic mission to China to renegotiate the treaty. When it was rumored that the Chinese would not agree to the proposed twenty-year prohibition on the immigration of Chinese laborers, Congress passed the Scott Act, prohibiting Chinese laborers who left the country from returning.[97] The legislation invalidated all identification certificates issued pursuant to the 1882 and 1884 acts and banned the issuance of any further certificates.[98] The act left stranded approximately twenty thousand Chinese laborers who had left the United States thinking their certificates entitled them to reentry.[99]

While Chinese immigrants had previously gained entry to the United States by demonstrating their exemption from restrictive legislation, the Six Companies knew the strategy would not work for the thousands of laborers with invalid return certificates. Thus, when the collector denied entry to Chae Chan Ping, a laborer returning from a short visit to China, the association decided to challenge the constitutional-

[95]See John R. Wunder, "The Chinese and the Courts in the Pacific Northwest: Justice Denied?" *Pacific Historical Review* 52 (1983), 191, 192; Janisch, "The Chinese, the Courts, and the Constitution," supra note 13 at 790-85.

[96]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 56, 79-80.

[97]Tsai, "China and the Overseas Chinese," supra note 15 at 89-93.

[98]Act of October 1, 1888, ch. 1064, 25 Stat. 504 (1888).

[99]Coolidge, "Chinese Immigration," supra note 13 at 280.

ity of the law and raised one hundred thousand dollars to fund the litigation.[100] The Six Companies' attorneys, James Carter and George Hoadley, argued that Congress had no authority to exclude aliens who had already entered the United States legally, and that to do so violated the 1880 treaty and breached the contract constituted by the return certificate. The Circuit Court agreed that the Scott Act violated the 1880 treaty, but nevertheless upheld the legislation as constitutional.[101] A unanimous Supreme Court agreed.[102] In an opinion written by Justice Field, the Court admitted that the Scott Act was in "contravention of express stipulations" of U.S. treaty obligations, but that such "contraventions" did not invalidate the legislation. The Court said that treaties were the equivalent of legislative action "to be repealed or modified at the pleasure of congress. . . . The last expression of the sovereign will must control." Thus the Court held that the Constitution did not prevent Congress from enacting legislation that conflicted with international treaties.[103]

Furthermore, the Court held that congressional power to regulate immigration stemmed from more than simply the federal power to regulate foreign commerce. Field wrote that the power to exclude, while not enumerated in the Constitution, was inherent in sovereignty. "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation." And when Congress decided to exclude certain aliens, "its determination is conclusive upon the judiciary.[104]

The Court's decision in *Chae Chan Ping* gave Congress far greater power over immigration than had been previously recognized, and provided the basis for judicial abdication to congressional will. Still, the Court's holding raised significant and unanswered questions. Even if, as Field argued, the power of a sovereign nation to exclude aliens were "not open to contro-

[100]Tsai, "China and the Overseas Chinese," supra note 15 at 94.

[101]*In re Chae Chan Ping*, 36 F. 431, 433-436 (C.C.D. Cal. 1888).

[102]*Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

[103]Ibid. at 600. The Court had previously held that courts would uphold congressional acts that were inconsistent with earlier treaty obligations. See *Whitney v. Robertson*, 124 U.S. 190 (1888); *Head Money Cases*, 112 U.S. 580 (1884). In 1900, the Court extended this doctrine in what Louis Henkin called "opaque dictum . . . without explanation or justification, from U.S. treaty obligations to customary international law" in *The Paquette Habana*, 175 U.S. 677, 700 (1900). Henkin, "Constitution and United States Sovereignty," supra note 11 at 863-64.

[104]*Chae Chan Ping*, 130 U.S. at 603, 606.

versy," the Court's holding failed to address why that power should be lodged with the federal government and not with the states. After all, the Tenth Amendment retained for the states all non-delegated powers. Indeed, the principle of inherent powers conflicted with the idea of the federal government as a government of only delegated powers.[105] Moreover, even if the federal government had the "inherent" power to control immigration, the Court failed to explain adequately why congressional exercise of that power was "conclusive on the judiciary."[106]

Nevertheless, the Court's unanimous holding in *Chae Chan Ping* sparked little controversy.[107] In retrospect, the Six Companies should have recognized the decision as a warning that its campaign against the Geary Act was unlikely to succeed. In *Chae Chan Ping*, the association had brought a direct attack against federal legislation and lost. Four years later, it would issue a similar challenge and lose again.

In part, the Six Companies' confidence that it would defeat the Geary Act may be attributed to the continued success of Chinese petitioners in the federal courts. While the Supreme Court had upheld the Scott Act, Chinese aliens found they

[105]Nearly fifty years later, the Court would extend the principle that sovereignty was a source of federal power. In *United States v. Curtiss-Wright Export Co.*, Justice Sutherland stated that the federal government's power over foreign affairs stemmed not from the Constitution but, rather, from the very independence of the nation. The principle of enumerated powers, he said, applied to the federal government "only in respect to our internal affairs." Ibid., 299 U.S. 304, 315-18 (1936). See also Aleinikoff and Martin, *Immigration*, supra note 20 at 15; Henkin, "Constitution and United States Sovereignty," supra note 11 at 858.

[106]Henkin has argued that no historical, theoretical, or constitutional basis exists to exempt "any exercise of governmental power from constitutional restraint," maintaining that "no such exemption is required or even warranted by the fact that the power to control immigration is unenumerated, inherent in sovereignty, and extraconstitutional." Idem, "Constitution and United States Sovereignty," supra note 11 at 857, 860 n.31, 862. The Court, however, has repeatedly upheld this principle and allowed Congress to discriminate against aliens and exclude them based on vague standards and undisclosed factual findings. See, e.g., *United States ex. rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (holding that "whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (holding that following the exercise of administrative discretionary power to exclude an alien, "no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence"). See also Aleinikoff and Martin, *Immigration*, supra note 20 at 15.

[107]Pointing out that the *Harvard Law Review* simply reported the holding without comment, Henkin asserts that "legal commentators were unperturbed by the idea that the federal government had an unenumerated power to exclude immigrants." Idem, "Constitution and United States Sovereignty," supra note 11 at 857 n.20. See also *Harvard Law Review* 3 (1889), 136.

could still gain entry to the United States through petitions for writs of habeas corpus. Those asserting nonlaborer status or citizenship resulting from birth in the United States continued to claim exemption from the exclusion legislation. Overall, they received favorable rulings from the U.S. commissioners, who, since 1888, had replaced the federal judges hearing habeas corpus cases.[108] While the commissioners granted government attorneys substantial leeway in cross-examining Chinese witnesses, they typically discharged Chinese petitioners. For instance, Commissioner E.H. Heacock believed that uncontroverted testimony should control the decision of the court, a position less stringent than that set forth by the Supreme Court.[109] Heacock also said that testimony containing minor discrepancies did not necessarily mandate denial of the petitioner's claim.[110] Thus, notwithstanding *Chae Chan Ping*, the federal courts continued to discharge Chinese petitioners, authorizing their entry into the United States. In 1890, a customs inspector estimated that since 1888, the federal district court had reversed the collectors' decisions in 86 percent of the cases.[111]

The Six Companies' confidence in challenging the Geary Act may also be attributed to the Chinese exemption from an 1891 act restructuring the administration of immigration proceedings.[112] This legislation gave a new federal superintendent of immigration sole authority over the enforcement of immigration laws, subject only to review by the secretary of the trea-

[108]Just before passage of the Scott Act, Congress authorized a U.S. commissioner in the federal courts to hear the habeas corpus cases brought by Chinese immigrants. As early as 1884, Hoffman had called on Congress to transfer responsibility for these cases from the federal courts. Otherwise, he predicted, "It will be impossible for the courts to fulfill their ordinary functions" because of the backlog of Chinese petitions. *In re Chow Goo Pooi*, 25 F. 77, 82 (C.C.D. Cal. 1884). To ease that backlog, beginning in 1888, U.S. commissioners replaced federal judges in hearing Chinese habeas corpus cases, determining whether petitioners had the right to enter, independent of the collector's previous decisions. Federal judges then provided appellate-style review of the commissioners' decisions, differing only on matters of law. While a judge could reverse a commissioner's holding, in practice this rarely occurred. Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 162-71.

[109]*Quock Ting v. United States*, 140 U.S. 417, 419-22 (1891) (holding that courts need not decide in favor of Chinese petitioners presenting consistent and uncontroverted testimony).

[110]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 167.

[111]Ibid. at 73.

[112]Act of March 3, 1891, ch. 551, 26 Stat. 1084-86. This act also added to previous legislation designating excludable aliens (polygamists, people with contagious diseases, and people likely to become public charges), and provided for the deportation of aliens within one year of their arrival upon a finding that they were excludable at entry.

sury. It thus eliminated judicial review in immigration cases.[113] The act, however, expressly exempted Chinese aliens from its provisions, and thereby established a dual system for the administration of immigration laws.[114] The collector of customs continued to enforce the law against Chinese immigrants, while the new superintendent of immigration enforced it against all other aliens seeking entry. The 1891 prohibition of judicial review did not apply to Chinese immigrants, who became the only immigrant group to continue to enjoy that right through habeas corpus petitions in federal court.

Access to judicial review and success in the federal courts contributed to the confidence with which the Six Companies pursued its campaign against the Geary Act. Equally important was its conviction that the act's provisions differed fundamentally from those the Court had upheld in *Chae Chan Ping*.

THE CAMPAIGN AGAINST THE GEARY ACT

NONREGISTRATION AND DIPLOMACY

Congress passed the Geary Act in 1892 to replace the 1882 legislation that was about to expire. The legislation was, in the words of Senator Henry Teller of Colorado, "exceedingly harsh in its provisions," but well supported by "public sentiment."[115]

[113]No congressional comment or debate took place as to why the act included this provision. Sayler suggests that the denial of judicial review was consistent with, although not identical to, similar statutes pertaining to the Treasury Department and providing executive and administrative officers final decision-making authority. Idem, "Guarding the 'White Man's Frontier,'" supra note 5 at 70-72. It is also possible that the success of Chinese litigants in contesting the collectors' decisions on the West Coast prompted Congress to enact legislation that would preclude similar litigation involving other immigrants. Regardless of the intent, the Supreme Court subsequently upheld the denial of judicial review as constitutional. Affirming the principle set forth by Field in *Chae Chan Ping*, Justice Gray wrote, "It is not within the province of the judiciary to order that foreigners . . . shall be permitted to enter. . . . The decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Nishimura Ekiu*, 142 U.S. at 660.

[114]No congressional debate is recorded as to why the Chinese were exempted from the 1891 act, and congressional intent on the issue is not clear. This provision seems particularly odd given the frustration in Congress and among voters regarding continued Chinese immigration. Sayler surmises that the act merely reflected the perception of the Chinese as being separate from other immigrants. Congress targeted the 1891 act at European immigrants; Chinese exclusion laws already existed and a system of enforcement was in place. Idem, "Guarding the 'White Man's Frontier,'" supra note 5 at 75.

[115]*Cong. Rec.*, 1892, 52, 3558.

The act included strengthened enforcement measures to curb what legislators perceived as pervasive Chinese fraud. Senator Wilbur F. Sanders of Montana explained, "We have been mocked and that is why we are dissatisfied."[116]

The Geary Act extended all existing restriction legislation for ten years and ordered the removal of all Chinese aliens found to be illegally in the United States. The law mandated that a Chinese alien charged with illegal status must "establish by affirmative proof" his or her right to remain in the country. It thereby shifted the burden of proof from the government to the alien.[117]

The act required Chinese laborers legally residing in the United States to register with the collector of internal revenue within one year of the act's passage. Those failing to register would be arrested without opportunity for bail, and, very likely, deported. The statute prescribed a summary deportation proceeding with limited judicial involvement: it ordered the deportation of any Chinese laborer without a certificate unless that laborer could prove that "accident, sickness, or other unavoidable cause" prevented him from registering. Upon providing such proof, the laborer then had to establish that he was in the United States lawfully and present at least one Euro-American witness to testify on his behalf.[118]

The Geary Act was not the only existing federal statute to contain a deportation provision,[119] but it was unique in that it provided for the deportation of aliens who had legally entered the United States.[120] While the Scott Act had prevented Chinese laborers from coming into the country, the Geary Act threatened to uproot and deport longtime, legal residents of the United States.

The attorneys for the Six Companies, J. Hubley Ashton and James Carter, asserted that the Geary Act granted the collector of internal revenue a degree of discretion that violated the con-

[116]Ibid. at 3568.

[117]Act of May 5, 1892, ch. 60, 27 Stat. 25 (1892).

[118]Ibid. at §6.

[119]Congress had enacted a deportation statute in 1888 when it amended existing laws prohibiting the importation of aliens to perform preexisting contracts in the United States to authorize the deportation of those immigrants who had landed notwithstanding the prohibition. Act of October 19, 1888, ch. 121, 25 Stat. 566 (1888) (amending Act of February 26, 1885, ch. 164, 23 Stat. 332 [1885]) and Act of February 23, 1887, ch. 220, 24 Stat. 414 [1887]).

[120]Immigration law continues to authorize the deportation of aliens for conduct occurring subsequent to lawful entry. See Immigration and Nationality Act, §241 (a)(2)(A), 8 U.S.C.A. §1251 (a)(2)(A) (1995) (designating as deportable an alien who commits a crime of moral turpitude within five years of lawful entry to the United States).

stitutional guarantee to due process.[121] Section Six of the act ordered Chinese laborers to apply to the collector for a certificate of residence, but neither required the collector to issue such a certificate nor specified what evidence would suffice to qualify for certification. In addition, the law did not provide for judicial or administrative appeals through which laborers who were denied certificates could challenge the collector's decision. As a result, said Ashton and Carter, the act provided legal resident aliens no protection from the arbitrary discretion exercised by the collector. Acknowledging *Chae Chan Ping*'s holding that Congress had the inherent power to restrict immigration, Ashton and Carter maintained that, in the context of deportation, constitutional principles significantly constrained that power. They argued that the Scott Act had abrogated the 1880 treaty only insofar as it prohibited the free entry and exit of Chinese laborers.[122] Treaty provisions protecting Chinese aliens living in the United States remained valid. While the registration requirement was ostensibly meant to protect Chinese laborers legally in the country, its harsh enforcement mechanisms violated constitutional norms of due process. Ashton said, "It is not for Congress to devise any process by which [legal resident aliens] may finally be deprived of their liberty or property, and make it 'due process of law' by its mere will."[123]

The Six Companies was thus convinced that the Geary Act was both distinct from the Scott Act and constitutionally invalid. Adding to this conviction was the criticism the act had sparked. Senator Butler of South Carolina voted against the act and called it a "disgrace to the country." Senator Hitt of Illinois pointed out that the legislation reversed the presumption of innocence until proven guilty and held Chinese laborers guilty per se until they could prove otherwise. He stated, "Never before was this system applied to a free people, to a human being, with the exception of the sad days of slavery."[124] Numerous newspapers denounced the legislation as a vote-getting measure, a sop thrown to the far-western states, and an insult to China and the Chinese people.[125]

Anticipating that the judiciary would agree with such assessments, the Six Companies decided to bring a test case challenging the law, and began soliciting contributions from members

[121]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 112-13.

[122]The 1880 treaty had protected the right of Chinese laborers to "go and come of their free will and accord." See supra, note 44, and accompanying text.

[123]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 113-14.

[124]Tsai, *China and the Overseas Chinese*, supra note 15 at 98.

[125]Coolidge, "Chinese Immigration," supra note 13 at 219-20.

to fund the effort.[126] At the same time, the association also urged Chinese laborers to ignore the registration requirement. In conjunction with organizations like the Chinese Civil Rights League in New York City, the Six Companies posted circulars in San Francisco and other cities describing the Geary Act as "cruel [and] unjust" and asking Chinese immigrants to "stand together." Because the law violated both the United States Constitution and treaty obligations, the Six Companies argued, civil disobedience was appropriate.[127]

In September 1892, the Six Companies told John Quinn, the collector of internal revenue in San Francisco, that the Chinese community would not comply with the act. Calling the legislation "an unwarranted and an unnecessary insult to the subjects of a friendly nation," the Six Companies said the Geary Act violated "every principle of justice and equity and fair dealing between friendly powers."[128] Moreover, the association claimed that the law, while limited to laborers, would harass all Chinese residents and subject them "to blackmail of the worst type."[129] As an example, the association said a San Francisco merchant travelling to New York on business would "be stopped at every little hamlet, village, and town on the line of the railroad and arrested on the charge of being a laborer who has failed to register."[130] Finally, the presidents of the association defended nonregistration as the only reasonable response to legislation. They argued that if the English government had enacted a similar regulation applicable to American citizens, "we think the U.S. would resent the indignity."[131] They stated, "We know of no law which makes it a crime for us to advise our fellow subjects that they have a right to disregard a law which is in violation of the constitution and the treaties."[132]

The nonregistration campaign proved successful. Noncompliance was so extensive that when a laborer named Charlie

[126]See Tsai, *China and the Overseas Chinese*, supra note 15 at 97; Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 111 n.68. See also San Francisco *Morning Call*, September 10, 20, 30, 1892.

[127]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 110.

[128]*Cong. Rec.*, 1893, 53, 2443.

[129]Ibid.

[130]Ibid.

[131]Coolidge, "Chinese Immigration," supra note 13 at 209.

[132]Ibid. at 220-21. At a meeting in New York regarding the Geary Act, members of the Chinese Civil Rights League agreed with this position. Dr. J.C. Thoms noted that bail was available to all criminals except murderers, "yet the crime of being born a member of the greatest race in earth is made not bailable. Do you ask us to obey the laws of the land? We say yes, but to submit to such a yoke of tyranny, never, never!" *New York Times*, September 23, 1892.

Kee registered, the *New York Times* reported on its front page Kee's "defiance" of the Six Companies' campaign.[133] Eleven months into the registration period, only 439 of the approximately 26,000 Chinese laborers targeted by the Geary Act in San Francisco had applied for certificates of residence.[134] When the registration period ended on May 5, 1893, only 13,242 Chinese laborers in the United States had registered. Eighty-five thousand Chinese aliens had ignored the Geary Act.[135]

The association planned to test the Geary Act in court no matter how many, or how few, laborers refused to register. Thus the nonregistration campaign was clearly susceptible to the "free-rider" problem. A laborer who ignored the Six Companies' campaign and registered would benefit from the litigation if it proved successful; he would also be protected from deportation in the event the association lost its case.[136] Yet only 13 percent of the Chinese laborers targeted by the act chose this course. The rest ignored the requirement and refused to register.

Representative Thomas Geary, the original sponsor of the act, attributed Chinese noncompliance to the coercive practices of the Six Companies. He accused the association of manipulating the Chinese population, alleging that "The edict of these Six Companies is more powerful and far-reaching than an edict of the Czar of Russia."[137] He called on the U.S. attorney in San Francisco to indict the presidents of the Six Companies for interfering with registration, hoping that such action would intimidate the association into changing its policy. The U.S. attorney informed the attorney general of Geary's request, but both attorneys decided that the indictment would not withstand judicial scrutiny.[138]

Geary's belief that Six Companies had manipulated the Chinese community into noncompliance was widely shared. One journalist in California, Richard Hay Drayton, wrote that the Six Companies had imposed a "forced contribution of one dollar per head" on all Chinese immigrants. He claimed that the association had originally been founded to import Chinese laborers to be its serfs and that, in return for passage money, legal assistance, medical care, and even funeral arrangements, the new immigrant "binds himself to obey the orders of the Com-

[133]*New York Times*, September 30, 1892.

[134]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 111.

[135]*Cong. Rec.*, 1893, 53, 2441.

[136]See Mancur Olson, Jr., *The Logic of Collective Actions* (Cambridge, Mass., 1965), 5-65.

[137]Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 111.

[138]Ibid. at 111-12, 112 n.71.

panies. . . . Few are the Chinamen residents here," he continued, "who get out of the clutches of the Six and become independent of them; the vast majority are their bondsmen." As such, he said, the immigrants had no choice but to obey the Six Companies' command not to register.[139]

Drayton's claims ignore the possibility that the Chinese laborers shared the association's conviction that the Geary Act was legally invalid and that civil disobedience was justified. It also misrepresents the nature of the relationship between the Six Companies and its members. By providing the services Drayton noted, the association did receive the loyalty of its members, but its authority was closer to that of a ward politician who could rely on the loyalty and support of his constituents in exchange for services rendered. In defense of the association, Fong Kum Ngon wrote in 1894 that the "Six Companies have power only to advise their people to do things, but not to compel."[140] Yet, Fong noted, most Chinese immigrants "naturally obeyed the advice of the Six Companies."[141] The historian Stanford Lyman has argued that the "electoral irrelevance" of the Chinese community meant that "the Chinese, unlike European immigrants, were not the objects of any local ward politician's solicitations."[142] This isolation forced the Chinese community to develop its own benevolent and governmental organizations. It engendered solidarity within the community, fostered a system of internal social norms, and reduced organizational costs. Thus, when the Six Companies urged Chinese laborers to challenge the Geary Act, the majority "naturally obeyed" and refused to register.[143]

The leaders of the Six Companies had presented nonregistration as a symbolic and principled response to what they believed to be unjust law, but this response proved to be of strategic value as well. The association anticipated judicial invalidation of the act, but unless that invalidation came quickly after the registration period had ended, many Chinese laborers without certificates would be deported. The Six Companies' leaders thus wanted to accelerate the normal judicial process, and were aided in this by the nonregistration campaign, which presented the attorney general, Richard Olney,

[139]Drayton, "Chinese Six Companies," supra note 17 at 472.

[140]Fong, "Chinese Six Companies," supra note 16 at 524.

[141]Ibid. at 525.

[142]Lyman, "Conflict and the Web," supra note 2 at 476 n.5, 476 n.8.

[143]See Bruce A. Ackerman, "Beyond Carolene Products," *Harvard Law Review* 98 (1985), 713, 724-25 (arguing that the insularity of minority populations enables them to "break through the free-rider barrier and achieve organizational effectiveness").

with the responsibility to arrest and deport eighty-five thousand Chinese laborers. Before undertaking a task of this magnitude, Olney wanted the Six Companies' case against the act resolved. He therefore needed the Supreme Court to hear the case as quickly after the close of registration as possible.[144]

The diplomatic support enlisted by the Six Companies further ensured a speedy hearing before the Court. In September 1892, the association appealed to the Chinese government for assistance in challenging the registration requirement. Enclosing a copy of the Geary Act, the presidents of the Six Companies told the Chinese emperor that the legislation violated treaty obligations and "heaped upon the Chinese people indignity and degradation."[145] The Chinese government responded with verbal protestations to the United States government and support for the Six Companies' litigation effort. The Chinese vice-consul in San Francisco said the act would never stand the test in the courts.[146] The Chinese minister, Tsui Kwo Yin, denounced the act as an abrogation of the 1880 treaty and a "violation of every principle of justice, equity, reason and fair dealing between two friendly powers."[147] In March 1893, he called on the newly appointed secretary of state, Walter Gresham, to ask Olney to schedule the case before the Court before its adjournment in May. Gresham and Olney complied with this request.[148]

On May 5, 1893, the registration period mandated by the Geary Act ended. The following day, United States marshals arrested Fong Yue Ting, Wong Quan, and Lee Joe. Fong Yue Ting and Wong Quan were Chinese laborers who had failed to obtain certificates of residence during the registration period. Lee Joe was a Chinese laborer who had applied for a residence certificate a month earlier, but whose application had been

[144]Coolidge, *Chinese Immigration*, supra note 13 at 219 n.19.

[145]*New York Times*, September 21, 1892.

[146]Ibid., March 28, 1893. See also San Francisco *Morning Call*, September 20, 1892.

[147]Coolidge, *Chinese Immigration*, supra note 13 at 221.

[148]*New York Times*, March 25, 1893. See also George E. Paulsen, "The Gresham-Yang Treaty," *Pacific Historical Review* 37 (1968), 281, 282-83, 283 n.4 [hereafter cited as Paulsen, "Gresham-Yang Treaty"]. Rumors circulated during the registration period that the Chinese government would retaliate against American missionaries and commercial interests in China if the Geary Act were enforced. American missionary societies lobbied for repeal of the registration requirement and Representative John F. Andrew introduced a bill calling for that result. *New York Times*, January 27, 1893. Still, both Gilbert Reid, a missionary in China, and the U.S. minister in Peking, Charles Denby, reported that retaliation seemed unlikely, although Denby speculated that the deportation of the thousands of Chinese laborers to southern China might prompt anti-foreign riots. *New York Times*, March 38, 1893.

denied because the witnesses he produced to verify his residence "were persons of the Chinese race and not credible witnesses."[149] On May 6, the District Court for the Southern District of New York ordered all three laborers deported in accordance with the Geary Act. Each petitioned for a writ of habeas corpus, arguing that he had been detained without due process of law and that the registration requirement was unconstitutional. The circuit court dismissed the writs but allowed the laborers to appeal. Four days later, on May 10, the Supreme Court heard the Six Companies' arguments against the act. Five days after that, the Court rejected those arguments and upheld the act as constitutional.[150]

Justice Gray, writing for the five-justice majority,[151] stated that the inherent sovereign powers doctrine set forth in *Chae Chan Ping* included the right of every independent nation to "exclude and to expel all aliens." This right "rests upon the same ground, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[152] That the Chinese laborers targeted by the Geary Act had entered the United States legally was of no consequence. Gray said that the laborers "continue to be aliens . . . and therefore remain subject to the power of Congress to expel them . . . whenever in its judgment their removal is necessary or expedient for the public interest."[153] He insisted that deportation was not punishment and that the act's deportation provisions constituted due process.[154]

The three dissenting justices, however, agreed with the Six Companies that *Chae Chan Ping* was not controlling. They said that deportation was distinct from exclusion and constituted a penalty warranting more procedural safeguards than Congress had provided in the Geary Act. Field, who had written the Court's decision in *Chae Chan Ping*, noted "a wide and essential" difference between preventing Chinese aliens from entering the country and deporting those who had acquired

[149]149 U.S. at 702-4.

[150]149 U.S. at 698-704.

[151]The majority consisted of Justices Blatchford, Brown, Gray, Jackson, and Shiras.

[152]149 U.S. at 707.

[153]Ibid. at 713-14.

[154]Ibid. at 730. Courts have consistently held that deportation, while often a severe measure, is not punishment, and that deportation proceedings remain civil in nature. Sixth Amendment procedural protections do not apply. See, e.g., *Argiz v. I.N.S.*, 704 F. 2d 384, 387 (7th Cir. 1983) (per curiam) (holding that the Sixth Amendment guarantee to speedy trial does not apply in deportation proceedings).

residence in the United States in accordance with U.S. treaty obligations.[155] He admitted that the registration requirement served a constitutional goal—to identify and thus protect Chinese laborers legally in the United States from the restriction provisions—yet he objected to the means by which the law sought to accomplish that goal. He concluded that the Geary Act deprived resident aliens of the full protection of the law to which they were entitled, and emphasized that a laborer who failed to register faced deportation. He wrote:

> His deportation is thus imposed for neglect to obtain a certificate of residence, from which he can only escape by showing his inability to secure it from one of the causes named. That is the punishment for his neglect, and that being of an infamous character can only be imposed after indictment, trial, and conviction. If applied to a citizen, none of the justices of this court would hesitate a moment to pronounce it illegal. . . . The punishment is beyond all reason in its severity. It is out of all proportion to the alleged offence.[156]

So, too, Justice Brewer found it significant that the registration requirement targeted laborers who were lawfully in the country and protected by the Constitution. He admitted that the Constitution had no extraterritorial effect, but emphasized its "potency within the limits of our territory." While noting that aliens seeking entry at the borders of the United States could not claim constitutional protection, Brewer insisted that legal resident aliens, such as the Chinese laborers targeted by the Geary Act, were entitled by the Constitution to more procedural protections than the act provided.[157]

Similarly, Chief Justice Fuller insisted that congressional power to deport rested "on different grounds" from its exclusion power. Deportation, unlike exclusion, deprived an alien

[155]149 U.S. at 746-47 (Field, J., dissenting).

[156]Ibid. at 758-59.

[157]Ibid. at 733-34, 742-44 (Brewer, J., dissenting). David Martin has criticized this "location" theory, arguing that it "requires almost willful shutting of one's eyes to physical reality." Martin points out both that modern exclusion cases typically involve aliens detained or paroled in the United States and that all aliens in exclusion proceedings are, at the very least, in U.S. territorial waters. He insists that "such aliens plainly come within the territorial jurisdiction of the United States in the significant sense that the country's sovereign will . . . can be applied to them immediately, uncomplicated by any direct contest with another sovereign." Idem, "Due Process and Membership in the National Community: Political Asylum and Beyond," *University of Pittsburgh Law Review* 44 (1983), 165, 179.

of "that which has been lawfully acquired." Like Field, Fuller pointed out that the Geary Act punished laborers for failing to register. "No euphemism can disguise the character of the act in this regard. It . . . inflicts punishment without a judicial trial. It is, in effect, a legislative sentence of banishment, and as such, absolutely void."[158] Fuller found the provisions of the act incompatible with the "immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created and those principles secured."[159]

The dissenters argued that the Geary Act was unconstitutional because, like the Six Companies, they believed that the congressional power to deport was fundamentally different from its power to exclude. They believed that the Constitution limited congressional exercise of the deportation power and that more rights were due to aliens in deportation proceedings.[160] Field objected to the majority's ruling, arguing that had the Geary Act applied to citizens, "none of the justices would hesitate a moment to pronounce it illegal."[161] The majority agreed. The Court found the important distinction not between deportation and exclusion, but rather between alienage and citizenship. As Justice Gray stated, "legal resident aliens continue to be *aliens* [emphasis added],"[162] and thus subject to expulsion at congressional will. To the majority, the power to deport, like the power to exclude, was an element of congressional plenary power to regulate immigration. Congress could afford resident aliens as few or as many rights as it deemed appropriate. The Court would not second-guess congressional

[158]149 U.S. at 763 (Fuller, C.J., dissenting).

[159]Ibid. at 762-63. Aleinikoff and Martin have labeled Fuller's rationale in distinguishing exclusion from deportation the "stake" theory: it suggests that legal resident aliens are "due" more "process" because of their identification to, and ties with, America. Yet modern cases afford recently arrived illegal aliens with ostensibly no ties to the United States more procedural protections than aliens facing exclusion proceedings at the border. Moreover, while Fuller argued that the Geary Act deprived the petitioners of something lawfully acquired—their legal residence—he failed to explain why the Scott Act did not similarly deprive Chae Chan Ping of something lawfully acquired, that being a return certificate. Idem, *Immigration*, supra note 20 at 35.

[160]Interestingly, neither the Six Companies nor the dissenters challenged the existence of congressional power to deport aliens, even though the constitutional principles supporting congressional power to exclude aliens—murky in their own right—do not obviously provide the basis for the power to deport. See ibid.

[161]149 U.S. at 759 (Field, J., dissenting).

[162]149 U.S. at 714.

decisions in this realm, and thus upheld the validity of the Geary Act.[163]

REACTION AND THE MCCREARY AMENDMENT

The Court's decision in *Fong Yue Ting* took the Chinese community by surprise.[164] In San Francisco, "consternation and dismay filled Chinatown."[165] The *Morning Call* reported, "The confidence in the success of their fight had been so universal and supreme that the defeat stunned the leaders."[166] Members of the secret societies saw the ruling as a means to wrest power from the Six Companies. It was alleged that on May 17 a contract had gone out for the murder of the association's president, Chun Ti Chu, the leader who spearheaded the campaign against the Geary Act. Placards posted in the Chinese community in San Francisco denounced him as an enemy of the Chinese people, offered three hundred dollars for his murder, and promised both protection and legal assistance if the murderer were caught.[167] Chun Ti Chu survived the threats, but was removed as Six Companies' president.[168]

Although the Court had validated the Geary Act, the question of enforcement remained. Estimates of the cost to arrest and deport all eighty-five thousand nonregistered Chinese aliens ranged from seven million to more than ten million dollars. The task would occupy at least three judges for a dozen years.[169]

[163]Three years later the Court affirmed that the judiciary would place "no limits . . . upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein." *Wong Wing v. United States*, 163 U.S. 228, 237 (1896). Still, a decade after *Fong Yue Ting*, the Court observed that it "has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law.'" *Yamataya v. Fisher*, 189 U.S. 86, 100 (1903). Within the context of deportation proceedings, which procedures constitute essential elements of due process has remained a source of debate. See, e.g., *Woodby v. I.N.S.*, 385 U.S. 276, 286 (1966) (holding that deportation orders must rest on "clear, unequivocal, and convincing evidence"); *Aguilera-Enriquez v. I.N.S.*, 516 F.2d 565 (6th Cir. 1975), *cert. denied.*, 423 U.S. 1050 (1976) (holding that absence of counsel does not deprive an alien of fundamental fairness).

[164]Coolidge, *Chinese Immigration*, supra note 13 at 223.

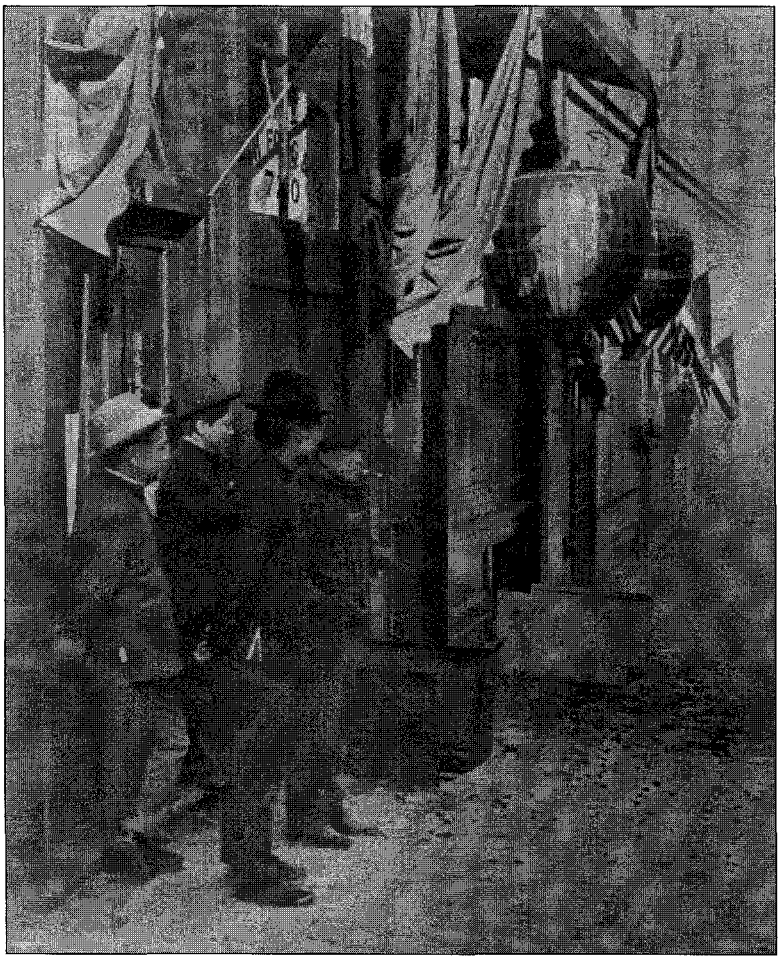
[165]Sandmeyer, *Anti-Chinese Movement*, supra note 13 at 105.

[166]May 16, 1893.

[167]Drayton, "Chinese Six Companies," supra note 17 at 475.

[168]Lyman, "Conflict and the Web," supra note 2 at 481-82 n. 35.

[169]*Cong. Rec.*, 1893, 53, 2422, 3687. See also Eaves, *California Labor Legislation*, supra note 21 at 195.



Street in Chinatown (Photograph by Arnold Genthe, Collection of The Oakland Museum of California, Gift of Anonymous Donor)

Indeed, it seems likely that the Six Companies had anticipated as much when it first advocated nonregistration as a tactic to combat the act. When Congress originally passed the act, administrative officers noted that the standing appropriation of sixty thousand dollars was insufficient to cover deportation costs, even without a nonregistration campaign.[170] Thus the Six Companies knew that the failure of thousands of laborers to register would render the act impossible to enforce. Even the

[170]Coolidge, *Chinese Immigration*, supra note 13 at 219.

most ardent exclusionists in Congress would have no choice but to provide some legislative relief.

The relief sought by both the Six Companies and Chinese diplomats was an extension of the registration period and delayed enforcement of the act until that period had expired. Minister Tsui informed Secretary of State Gresham that the Chinese government would view an extension of the registration period with great satisfaction.[171] Rumors circulated that enforcement of the act would prompt retaliation from China. Viceroy Li Hung Chang predicted the expulsion of Americans in China, and W.A.P. Martin, the missionary president of the Imperial College in Peking, said that China would eliminate missionary rights. The Six Companies' attorney, Ashton, said that China would terminate all diplomatic and commercial relations with the United States.[172] At the end of May 1893, Secretary of the Navy Hilary Herbert ordered United States gunships to the Yangtze River to protect American interests in China.[173]

As a result of massive noncompliance, inadequate funding, and pressure from the Six Companies and the Chinese government, the Cleveland administration decided not to enforce the Geary Act.[174] Gresham told Tsui that enforcement would be delayed due to lack of funds and that Congress would amend the act during the next session to moderate some of its harsher legislative provisions.[175] Both the secretary of the treasury and the attorney general instructed their subordinates to refrain from enforcing the law.[176]

Nonenforcement enraged much of the white population on the West Coast. White mobs in Fresno and Tulare forced Chinese laborers from the towns and ordered Chinese merchants to close their shops.[177] The anti-Chinese Law and Labor League in San Francisco called for the impeachment of the "law-defying traitor known as Grover Cleveland."[178] The *Morning Call* reported that the Chinese "have invaded the White House and captured Grover the Great and [the Chinese Minister] and his big retinue of Celestials are masters of the situation."[179] Dray-

[171]Ibid. at 230.

[172]Paulsen, "Gresham-Yang Treaty," supra note 148 at 286.

[173]*New York Times*, May 18, 28, 1893; see also Paulsen, "Gresham-Yang Treaty," supra note 148 at 287.

[174]*Cong. Rec.*, 1893, 53, 2444.

[175]Paulsen, "Gresham-Yang Treaty," supra note 148 at 285.

[176]*Cong. Rec.*, 1893, 53, 2444.

[177]Paulsen, "Gresham-Yang Treaty," supra note 148 at 288.

[178]San Francisco *Morning Call*, September 15, 1893.

[179]Ibid., September 12, 1893.

ton, among the journalists, demanded strict enforcement of the act:

> The Six Companies doubtless are to blame for the failure on the part of most of the Chinese to register, but if the latter—be they here by right or fraud—are under more obligation to follow the dictates of the former than to obey the laws of this country, Hong Kong or San Quentin is a good destination for them, and the sooner they reach one place or the other the better for ourselves. The inimical and defiant attitude assumed by the Six Companies ought to entail punishment, which can be inflicted upon them by depriving them of the slaves from whose labor they make their wealth.[180]

Frustrated with official nonenforcement, members of the Labor League decided to enforce the act as private citizens. Beginning in September 1893, they swore out complaints against Chinese laborers who had not registered;[181] some federal judges then issued warrants pursuant to the complaints.[182] But these warrants created problems for United States attorneys who had been instructed by the Cleveland administration not to enforce the act. Some refused to order arrests pursuant to

[180]Drayton, "Chinese Six Companies," supra note 17 at 477.

[181]San Francisco *Morning Call*, September 21, October 18, 1893. To obtain the names of nonregistered Chinese laborers, members of the Labor Council had enlisted the support of the San Francisco Police Department, which orchestrated raids in Chinatown and arrested sixty-eight Chinese suspects on fictitious charges. Although the suspects were subsequently released, the police gave to the council the identification information obtained during the bookings. Labor Council members then used this information to swear out complaints against Chinese laborers who had not registered. See Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 188.

[182]The Geary Act did not specify whether private citizens could enforce its provisions, but District Judge Jonathan Ross and other federal judges who issued warrants pursuant to these complaints inferred authorization by looking to earlier restriction legislation, which provided that "any party on behalf of the United States" could file complaints for the arrest of Chinese aliens who violated restriction legislation. See Act of September 13, 1888, ch. 1015, § 13, 25 Stat. 476 (1888). However, judicial reliance on this statute appears somewhat dubious, since the validity of the law itself was unclear. The 1888 act was meant to become effective upon the ratification of a pending treaty with China. When China failed to ratify, courts upheld certain provisions deemed not dependent on ratification; Section 13, however, was generally regarded as invalid, absent ratification. See Sayler, "'Guarding the 'White Man's Frontier,'" supra note 5 at 189.

these private complaints;[183] others opted for selective enforcement, arresting only "Chinese gamblers, highbinders, and other of the criminal classes, so as not to interfere with the industrious and tax-paying portions of that population."[184]

Ashton objected to these private enforcement measures, saying that the courts had followed "irregular and unauthorized" procedures in sanctioning private complaints. He demanded that judges recognize only complaints from government officers.[185]

Tsui also objected to private enforcement, calling on the Cleveland administration to stand by its promise of nonenforcement. Gresham responded by reiterating the administration's commitment to nonenforcement, and the attorney general halted further private prosecutions.[186] More than one hundred Chinese laborers had already been ordered deported, but all had appealed the deportation orders, objecting to the circumstances surrounding their arrests. Olney prohibited their deportation until the appeals were resolved.[187]

In November 1893, Congress enacted the McCreary Amendment, which gave Chinese laborers an additional six months to register. The amendment mandated the release of the laborers who had been arrested and ordered deported under the Geary Act, and discontinued all legal proceedings begun under the original legislation.[188] Virtually all nonregistered Chinese laborers took advantage of this "second chance" and registered with the collector of internal revenue.

However, while massive deportations never occurred, resi-

[183]On August 1, 1893, U.S. Attorney Denis wrote to the attorney general, stating, "I have at present locked in my safe nineteen warrants issued upon complaints which I have refused and still refuse to put in the hands of the marshall for service." Quoted in Sayler, "Guarding the White Man's Frontier,'" supra note 5 at 191 n.66.

[184]Ibid. at 192.

[185]J. Hubley Ashton to Attorney General, September 7, 1893, reprinted in ibid. at 190.

[186]Paulsen, "Gresham-Yang Treaty," supra note 148 at 289.

[187]Ibid.

[188]Act of November 3, 1893, ch. 14, §1, 28 Stat. 7 (1893). The amendment also made stricter the guidelines by which resident Chinese merchants could prove their status upon reentering the United States. The act defined a merchant as "a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name." The amendment required that the merchant seeking reentry present the testimony of two non-Chinese witnesses that he had conducted a business for not less than one year before his departure from the United States, and that during that time he had engaged in no manual labor, other than was necessary to his business. A merchant unable to provide such testimony would be denied landing. Ibid. at §2.

dent Chinese laborers remained subject to the registration requirement and faced deportation if they failed to comply. During 1894, most Chinese laborers prosecuted for failing to register were, in fact, deported. The majority had previously been convicted of a felony, placing them in a class the McCreary Act held immediately deportable,[189] but, as prosecutions expanded from Chinese felons to other Chinese laborers, the courts began providing more favorable rulings. Some laborers avoided deportation by demonstrating their inability to obtain certificates; others established that they had become laborers only after the registration period had ended.[190] Procedures regarding the admissibility of evidence became more flexible and, in some cases, courts accepted corroborative testimony from Chinese witnesses when no Euro-American ones were available. As with the Chinese habeas corpus cases regarding entry, many Chinese aliens avoided deportation by demonstrating their exemption from the harsher provisions of the legislation.[191]

CONCLUSION

Passage of the McCreary legislation meant that the United States would not expel the eighty-five thousand Chinese laborers who had ignored the Geary Act. The amendment gave them a second opportunity to register. But, while the repercussions for noncompliance with the act proved relatively minor, the

[189]San Francisco *Morning Call*, December 19, 1893. Chinese laborers convicted of a felony could escape deportation only by proving citizenship resulting from birth in the United States or by demonstrating receipt of a valid certificate of residence before the felony conviction. Most Chinese laborers with felony convictions could not meet either of these provisions. Moreover, prison wardens sent the names of Chinese inmates nearing the end of their terms to U.S. attorneys in the region; U.S. marshals then arrested these laborers upon their release. See Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 195. Leaders of the Six Companies viewed these prosecutions as a means to restore some of the authority they had lost as a result of the Court's decision in *Fong Yue Ting*. Since the secret societies had used the Six Companies' defeat to increase their power (Chen, *Chinese of America*, supra note 16 at 182-84, 198), the association retaliated by providing the U.S. attorney's office in San Francisco with a list of known tong members. See Lyman, "Conflict and the Web," supra note 2 at 480-82; Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 199.

[190]For instance, Commissioner Heacock released laborers who had been at sea during the registration period and who had been in Alaska, where registration was impossible. He also released a former merchant who had become a laborer only when his business had been destroyed. Sayler, "Guarding the 'White Man's Frontier,'" supra note 5 at 200-201.

[191]Ibid.

Six Companies' challenge to the legislation had failed. Leaders of the association had promoted nonregistration and initiated litigation because they were convinced that Congress lacked the authority to pass legislation like the act. The association's members expected the Court to agree that deportation was distinct from exclusion and that legal resident aliens were constitutionally entitled to more procedural protections than Congress had provided in the Geary Act.

To the association's members, the habeas corpus cases during the 1880s had indicated that federal judges would protect Chinese aliens from efforts to abrogate the rights provided by treaty obligations and the Constitution of the United States. The Six Companies insisted that the Scott Act and the Court's holding in *Chae Chan Ping* had invalidated the 1880 treaty only with regard to the free entry and exit of Chinese laborers. The Scott Act had embodied the express congressional intent to reject the free-entry provision, and, as a result, the federal courts upheld the measure. Neither the Scott Act nor *Chae Chan Ping*, however, said anything about the rights of Chinese laborers who chose to remain in the United States. As a result, the Six Companies believed, these laborers were still protected by treaty obligations. Indeed, Congress included the registration requirement in the Geary Act to protect resident Chinese laborers from being mistaken for those illegally in the country. As a result, the association's members believed the judiciary would invalidate the Geary Act insofar as the enforcement of the registration provision represented an unduly onerous burden and violated both due-process and treaty provisions that Congress never expressly meant to reject.

Fong Yue Ting proved them wrong. In part, the association had misconstrued the success of Chinese aliens in the habeas corpus cases. Federal judges had not protected the rights of Chinese aliens as much as they had upheld the law. During much of the 1880s, discharging Chinese petitioners conformed with the legal principles to which the judges had sworn their loyalty. Chinese aliens succeeded because they had demonstrated their claims as consistent with, but exempt from, the restriction laws.

But this very success prompted opponents of Chinese immigration to secure stricter legislation that allowed fewer "consistent-exemption" claims. When the Six Companies tried a different approach by seeking to invalidate the Scott Act, the Court responded by upholding the legislation and recognizing congressional plenary power to restrict immigration. By 1893, the expansive doctrine set forth in *Chae Chan Ping* proved too powerful to permit a majority of the justices to invalidate the Geary Act. Having already identified the inherent power of

Congress to restrict immigration absent judicial interference, the Court felt no compulsion to distinguish deportation from exclusion. As with its power regarding exclusion, Congress had the power to make choices regarding deportation. Its determinations would bind the judiciary. Thus, whether seeking entry or contesting deportation, Chinese laborers, as aliens, were entitled to no more rights than Congress chose to afford them.

The alien-citizen distinction not only explains the Court's decision in *Fong Yue Ting*, but also reveals why the Six Companies' campaign was doomed to fail long before the litigation even began. A vote in the Senate twenty-three years before Congress passed the Geary Act provides what may be the best explanation for the failure of the association's 1892-93 campaign against the legislation. In July 1870, Senator Charles Sumner proposed amending the naturalization laws to eliminate all references to the word "white." He stated, "All men are created equal, and therefore all men have a right to equal political power in this country."[192] Several senators, particularly those from western states, objected, because Sumner's proposal would authorize the naturalization of Chinese immigrants.[193] Ultimately, the Senate agreed to permit "aliens of African descent or nativity" to become naturalized, but expressly rejected expanding the provision to include "persons born in the Chinese empire."[194]

The rejection of Sumner's 1870 amendment denied Chinese immigrants the right to become naturalized and the right to vote. The post-Reconstruction disenfranchisement of African-American citizens in the southern states demonstrates that the passage of Sumner's amendment would not necessarily have guaranteed newly naturalized Chinese-American citizens full voting rights.[195] But the rejection of Sumner's amendment ensured that Chinese immigrants would be denied the franchise. In 1910, Lucile Eaves wrote that the rejection of this amendment "branded [Chinese immigrants] as permanent aliens who should never be admitted to membership in the body politic."

[192]*Cong. Globe*, 41st Cong., 2d sess., 1870, 5121, 5157.

[193]Ibid. at 5121.

[194]Act of July 14, 1870, ch. 254, §7, 16 Stat. 254, 256 (1870); *Cong. Globe*, 41st Cong., 2d sess., 1870, 5177. Because the statute as passed did not expressly prohibit Chinese from naturalization, a few courts permitted Chinese aliens to become American citizens. In 1878, however, Judge Sawyer held that the 1870 amendment did not apply to Chinese aliens and that they had no right to become naturalized under it. *In re Ah Yup*, 1 F. Cas. 223, 224-25 (C.C.D. Cal 1878) (no. 104). See also Eaves, *California Labor Legislation*, supra note 21 at 129-33; McClain, "Chinese Struggle for Civil Rights," supra note 18 at 538 n.46, 544.

[195]See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

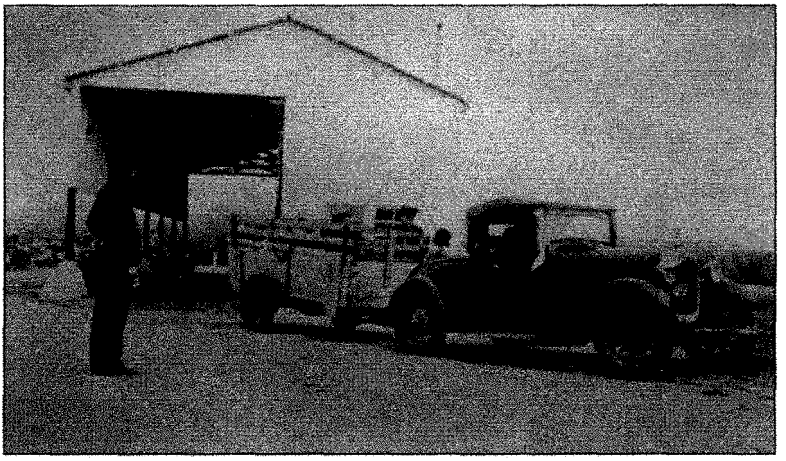
And since no segment of the voting population was committed to protect Chinese interests, the 1870 senatorial debate "paved the way" for more onerous and restrictive legislation.[196]

As Mary Roberts Coolidge pointed out, with the exception of the McCreary Amendment, Congress had enacted all restriction measures during an election year.[197] Denied electoral power, the Six Companies exhausted all other available channels in its campaign against the Geary Act and very nearly succeeded in defeating the legislation. It called on, and received contributions from, the Chinese community to fund the litigation efforts; it convinced the laborers targeted by the act to ignore the registration requirement; and it enlisted the assistance of the Chinese government to exert diplomatic pressure. All this helped bring a test case to the Court and minimize the damage following the Court's decision. The Six Companies' attorneys convinced Chief Justice Fuller, Justice Brewer, and even Justice Field, the author of *Chae Chan Ping*, that deportation was indeed different.

In sum, the Six Companies coordinated a multifaceted campaign against the Geary Act, organizing grass-roots opposition nationwide, and exhausting legal and diplomatic channels at the highest levels of government. The campaign is remarkable because members of an immigrant benevolent society believed they could defeat a federal law. Even more remarkable, however, is that they nearly did just that.

[196]Eaves, *California Labor Legislation*, supra note 21 at 133.

[197]Coolidge, *Chinese Immigration*, supra note 13 at 233.



Los Angeles Police Chief James Davis's "bum patrol" turned back transients at California's border crossings. (SRA Report)