Legally Codifying A Social Construction:
How American Courts Have Weaponized Whiteness to Exclude Black and Chinese People

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Table of Contents

Introduction

In the wake of the COVID-19 pandemic, racism towards Chinese people skyrocketed.[1] Testimonies of racist and xenophobic acts towards Chinese people and Chinese Americans popped up on news articles, blogs, and across social media platforms.[2] Perhaps the most prominent act of racism that could be felt nationally was Donald Trump's choice to call the coronavirus "the Chinese virus," the "Wuhan virus," and the "kung flu," a decision that went directly against the World Health Organization's guidance against tying diseases to geographic locations and invigorated racist behavior across the nation.

1. Mary Findling et al., *COVID-19 Has Driven Racism And Violence Against Asian Americans: Perspectives From 12 National Polls*, Health Affairs (Apr. 12, 2022), https://www.healthaffairs.org/do/10.1377/forefront.20220411.655787 (noting that the FBI documented a 77 percent increase from 2019 to 2020 in hate crimes against Asian people living in the US – even as such crime statistics are likely vastly underrepresented).

2. *Covid-19 Fueling Anti-Asian Racism and Xenophobia Worldwide,* Human Rights Watch (May 12, 2020), https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide.

Trump first used the term "Chinese virus" on March 17, 2020[3] and he, as well as the White House Twitter, defended his use of the terms on March 18, when the White House Twitter tweeted, "Spanish Flu. West Nile Virus. Zika. Ebola. All named for places."[4] San Francisco State University found a 50 percent increase in news articles relating the coronavirus and anti-Asian discrimination between February 9 and March 7.[5] Even this figure was hypothesized to only cover a small portion of the cases of xenophobia, because the media likely reported only the worst cases.[6]

From mid-March to the beginning of August, an incident reporting center called STOP AAPI HATE received more than 2,500 reports of harassment or violence directed towards the AAPI (Asian Americans and Pacific Islanders) population across the nation.[7] Seven out of ten incidents involved racial slurs, name calling, and profanities.[8] Four out of ten incidents occurred at places of business such as restaurants and grocery stores.[9] Even Antonio Guterres, the United Nations Secretary-General, urged governments to act in response to the "tsunami of hate and xenophobia, scapegoating and scare-mongering" that ensued as a result of the pandemic.[10] This reaction came as a surprise to some, but to anyone who had been paying attention, there was no surprise at all.

This increase in violence towards AAPI came at the same time as national unrest, provoked by gruesome, systemic police brutality and catalyzed by the death of George Floyd. On May 25, 2020, George Floyd was murdered by a police officer who used his knee on Floyd's neck to pin him to the ground. Floyd, who had neither struggled nor resisted detainment, could barely breathe for eight minutes and forty-six seconds before crying for his "momma" and succumbing to death.[11] The macabre killing, combined with Floyd's mild-mannered demeanor and boiling racial tensions, resulted in an

3. Dan Mangan, *Trump defends calling coronavirus 'Chinese virus' – 'it's not racist at all'*, CNBC (Mar. 18, 2020), https://www.cnbc.com/2020/03/18/coronavirus-criticism-trump-defends-saying-chinese-virus.html [https://perma.cc/H5C6-HNXT].

4. The White House 45 Archived (@WhiteHouse45), Twitter (Mar. 18, 2020, 2:34 PM), https://twitter.com/WhiteHouse45/status/1240345890159824901?s=20.

5. Sabrina Tavernise & Richard A. Oppel Jr., *Spit On, Yelled at, Attacked: Chinese-Americans Fear for Their Safety*, N.Y. Times (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/us/chinese-coronavirus-racist-attacks.html [https://perma.cc/DGY7-BRVF].

6. *Id.*

7. *Attacks Against AAPI Community Continue to Rise During Pandemic* (2020), http://www.asianpacificpolicy andplanningcouncil.org/wp-content/uploads/PRESS_RELEASE_National-Report_ August27_2020.pdf. [https://perma.cc/PT8K-AQLH].

8. *Id.*

9. *Id.*

10. *Covid-19 Fueling Anti-Asian Racism and Xenophobia Worldwide*, Hum. Rts. Watch (May 12, 2020, 3:19 PM), https://www.hrw.org/news/2020/05/12/covid-19-fueling-anti-asian-racism-and-xenophobia-worldwide [https://perma.cc/864Y-5FWM].

11. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. Times (Jan. 24, 2022), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/T4U6-RDQY].

explosion of protests across the nation.[12] People from all walks of life came together to demand consequences for the unchecked and pervasive racism that is foundational to the police system.

These protests made something especially clear to AAPI across the nation—the necessity of cross-racial solidarity. This concept is not a new one.[13] The Black community has, time and time again, advocated for the rights of groups of people besides their own.[14] AAPI were forced to confront anti-Blackness in their own communities and make a choice to be "a 'model minority' aspiring to be white-adjacent on a social spectrum carefully engineered to serve the white and privileged," or to be "an active member of a distinct community that emerged from the tireless resistance of people of color who came before [them]."[15] The events of 2020 offer an opportunity to compare how AAPI, specifically Chinese people, and Black people have historically been pitted against each other and against white people in the eyes of the law.

AAPI are largely considered a "model minority" or a "superior ethnic group," somehow immune to racialized problems in a "post-racial America."[16] They are seen as living proof that the American Dream is real and attainable, and that people can achieve anything they desire as long as they put their heads down and work hard. AAPI are seen as more white-adjacent than other communities of color, and this proximity to white privilege has led to fewer AAPI speaking out against model minority stereotyping, despite these stereotypes being inherently racist.[17] This label that AAPI are assigned creates pressure to conform to the white-dominated culture but does not protect AAPI from racism or discrimination as a result of their race.[18] The national reaction to COVID-19 is a particularly apt example—as arbitrarily as the proximity to white privilege was doled out, it was violently snatched back.

This proximity to whiteness has had a similar ebb and flow throughout American history. Perspectives from Chinese immigrants are not generally taught, perhaps because "most accounts of the great Chinese immigration to the United States . . . have concentrated almost exclusively on the reaction it

12. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. Times (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html.

13. Julie Lee Merseth, *Race-ing solidarity: Asian Americans and support for Black Lives Matter*, 6 Politics, Groups, and Identities (2018).

14. Anna Purna Kambhampaty & Haruka Sakaguchi, *'I Will Not Stand Silent.' 10 Asian Americans Reflect on Racism During the Pandemic and the Need for Equality*, TIME (June 25, 2020), https://time.com/5858649/racism-coronavirus [https://perma.cc/PU8S-7UX5] ("referencing Frederick Douglass' 1869 speech advocating for Chinese immigration and noting that the civil rights movement helped all people of color").

15. *Id.*

16. Rosalind S. Chou & Joe R. Feagin, Myth of the Model Minority: Asian Americans Facing Racism xii (2d ed. 2015).

17. *Id.*

18. Miranda Oshige McGowan & James Lindgren, *Testing the "Model Minority Myth"*, 100 Nw. U. L. Rev. 331 (2006).

provoked in the white population."[19] While the first Chinese people to arrive in California found Americans to have a "mixture of enthusiasm and curiosity," that attitude was brief.[20] As more Chinese people immigrated and settled in America, white Americans felt more unrest and irritation.[21]

Among the first anti-Chinese campaigns in legislature was a report in 1852[22] by a California assembly committee which identified the growing Chinese population as a preeminent evil, suggesting a tax be placed on those who did not intend to become American citizens.[23] This was quickly followed by a flurry of mixed opinions—some agreed that the Chinese presence was menacing, while others argued that the Chinese were an "industrious and moral" net benefit to the American economy.[24] Regardless, anti-Chinese taxes were passed soon after, designed to both punish Chinese immigrants already living in the United States and discourage potential immigrants from coming. From the Chinese Exclusion Act of 1882[25] to the Immigration Act of 1924[26], also known as the Asian Exclusion Act, American law was developed to exclude and alienate Chinese people and Chinese Americans.

Although Black Americans have had a very different journey, something that ties these groups together is their purposeful, invidious exclusion throughout American history. There is a persistent theme of these groups of people not being considered American, or even at times human. While there is rich scholarship on the institution of slavery, this paper will focus on the continued exclusion of Black Americans, post-emancipation. Even after emancipation, America still permitted slavery as a sentence for crimes – precursor to the racist and brutal police state we see today.[27]

Throughout Jim Crow and the Reconstruction Era, systemic racism was pervasive, from voting laws, to zoning and redistricting, to segregation.[28] The concept that Black people are lesser than has been so indoctrinated in American culture and society that we are still seeing the repercussions of it today. Rather than Emancipation eradicating slavery, as is the dominant narrative, it transformed slavery into the prison industrial complex. The Thirteenth Amendment created a clear carve-out: "Neither slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have*

19. Charles J. McClain, In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America 2 (1994).

20. *Id.* at 9.

21. Kenneth M. Holland, A History of Chinese Immigration in the United States and Canada, 37 Am. Rev. of Canadian Stud. 150 (2007).

22. ASSEMBLY COMM. ON MINES AND MINING INTERESTS, REPORT, Cal. Assembly, 3d Sess., Appendix to the Journals 829 (1852).

23. McClain, *supra* note 19, at 10.

24. McClain, *supra* note 19, at 11.

25. 8 U.S.C. 7.

26. 43. Stat. 153. (Pub. Law 68-139).

27. Ryan Lavalley & Khalilah R. Johnson, *Occupation, Injustice, and Anti-Black Racism in the United States of America*, 29 J. of Occupational Sci. 487, 491 (2020).

28. *Id.* at 492–93.

been duly convicted, shall exist within the United States."[29] Even as the states were forced to abolish slavery, they created legislation[30] that allowed them to "regulate the behavior of free blacks in ways similar to those that had existed during slavery."[31] This legislation, called the Black Codes, allowed legislators to criminalize only Black people for the smallest transgressions–missing work, insulting gestures, possessing a firearm, etc.[32] These Black Codes, in combination with the carve-out in the Thirteenth Amendment, meant that "former slaves, who had recently been extricated from a condition of hard labor for life, could be legally sentenced to penal servitude."[33]

Even for crimes that were not specifically created by the Black Codes, there was a tendency to "impute crime to color"–Frederick Douglass wrote about how not only was "guilt frequently assigned to a black person regardless of the perpetrator's race, but [also] white men sometimes sought to escape punishment by disguising themselves as black."[34] This trend has continued into the present, where police departments have "admitted the existence of formal procedures designed to maximize the numbers of African-Americans and Latinos arrested – even in the absence of probable cause."[35]

Even as society shifts to color blindness, there is no "other explanation for the startling racial disparities that continue to mark every socioeconomic, health, and political indicator."[36] In fact, there is a trend to separate genetic or biological race from social race, the latter of which is dismissed as "politically correct ideology."[37] Chalking biological race up to science allows a narrative shift wherein "addressing racist policies that make blacks more vulnerable to imprisonment is a violation of color blindness, but suggesting that blacks are genetically predisposed to crime is simply considering a scientific hypothesis."[38] This blatant ignorance–this belief that we live in a post-racial world–is what allows systemic racism to persist, even now. It can be seen most plainly in the need for a Black Lives Matter movement, as well as the rise of the ignorant All Lives Matter countermovement.

This shift sparked a curiosity about the evolution of how race was treated throughout history. This paper will explore the parallels between court cases involving Chinese people and Black people around the mid to late 1800's and showcases the othering and exclusion of both groups, justified and

29. U.S. Const. amend. XIII (emphasis added).

30. *See*, *e.g.*, An Act to Confer Civil Rights on Freedmen, and for Other Purposes, 1865 Miss. Laws 82; An Act to Regulate the Relation of Master and Apprentice Relative to Freedmen, Free Negroes, and Mulattoes, 1865 Miss. Laws 86; An Act to Amend the Vagrant Laws of the State, 1865 Miss. Laws 90.

31. Angela Y. Davis, Are Prisons Obsolete? 28 (2003).

32. *Id.*

33. *Id.* at 28–29.

34. *Id.* at 30.

35. *Id.* at 31.

36. Dorothy Roberts, Fatal Invention: How Science, Politics, and Big Business Re-Create Race in the twenty-first century 291 (2011).

37. *Id.*

38. *Id.* at 292.

normalized by the American court system. Additionally, this paper demonstrates that the social construction of "whiteness"[39] was codified through the legal system in order to legally exclude Chinese and Black people.[40]

Race, including whiteness, is hard to define because different groups have used it differently, for their own purposes. Ian F. Haney López defines race as "a sui generis social phenomenon in which contested systems of meaning serve as the connections between physical features, faces, and personal characteristics . . . social meanings connect our faces to our souls."[41] Although López focuses his analysis on the othering of Mexicans, he is clear that "a Mexican might also be White, Indian, Black, or Asian."[42] He describes how increasing social prejudice against Mexican people "quickly became legal [prejudices]," with laws being passed that both purported to define what a "Mexican" was, and labeled them as "not peaceable and quiet persons."[43] Ultimately, the "attempt to racially define the conquered, subjugated, or enslaved is at the same time an attempt to racially define the conqueror, the subjugator, or the enslaver."[44] By creating sub-classes of races, it follows that there would be a superior race. As Cheryl Harris writes, "being white automatically ensures higher economic returns in the short term, as well as greater economic, political, and social security in the long run. Becoming white meant gaining access to a whole set of public and private privileges that materially and permanently guaranteed basic subsistence needs and, therefore, survival."[45] Even as society evolves, whiteness continues to be the yardstick by which everything else is compared.

Here, I will focus on how the courts have legally developed and legitimated the concept of whiteness to achieve no other purpose besides exclusion.[46] Part I will discuss case law in the mid to late 1800's regarding Chinese people and Chinese Americans. Then, I will discuss case law in the same timeframe regarding Black Americans. The case law will be presented

39. As a concept, "whiteness" is hard to define. In this paper, I will follow Ian Haney López's definition of whiteness: "as a complex, falsely homogenizing term . . . [it] does not denote a rigidly defined, congeneric grouping of indistinguishable individuals. It refers to an unstable category which gains its meaning only through social relations and that encompasses a profoundly diverse set of persons." Ian Haney-López, White by Law xxi–xxii (2006).

40. The same is true for indigenous Americans, and Mexican immigrants. However, the legal history section of the paper is focusing on Chinese and Black Americans in order to explore the dynamic between the model minority and the group often pitted against the model minority.

41. Ian Haney López, *The Social Construction of Race*, *in* Critical Race Theory: The Cutting Edge 191, 193 (Richard Delgado ed., 1995).

42. *Id.* at 197.

43. *Id.*

44. *Id.* at 199.

45. Cheryl Harris, *Whiteness as Property*, 106 Harv. L. Rev. 1707, 1713 (1993).

46. Of course, whiteness has at various times excluded white immigrants who later "became" white under the law: Irish Americans, Italian Americans, etc. *See generally* Neil Gotanda, *Exclusion and Inclusion: Immigration and American Orientalism*, Across the Pacific: Asian Americans and Globalization 1, 129–51 (1999).

chronologically to showcase the development of the interpretation of law over time. Part II will then explore how the courts have weaponized the concept of whiteness by comparing how law is manipulated and interpreted to be exclusionary. I will examine how the repercussions of this legal history have manifested in various areas of law, such as immigration law. In Part III, I will discuss how this knowledge can be used moving forward.

I. An Exploration of Cases Involving Chinese and Black People across History

A. *Cases Involving Chinese people and Chinese Americans*

Chinese people began immigrating to America in large numbers in the 1850s–some to flee the British-driven Opium Wars, some to test their luck in the Gold Rush, and some to seek a better life with more opportunity.[47] By the early 1850s, around 25,000 Chinese immigrants had made their way to the United States and settled into their new lives.[48] After the allure of the Gold Rush settled, even more Chinese immigrants were brought over to begin working on railroad construction.[49] Although Chinese immigrants were originally seen as hardworking, cheap laborers, the growing Chinese population began to make white Americans nervous. Their willingness to work harder for less money was seen as an "economic threat to free white labor."[50] Their cleanliness was also called into question, both physical and spiritual.[51] Anti-Chinese rhetoric "hinged on portraying Chinese people as filthy and disease-ridden. They were also seen as a religious and moral threat as heathens who threatened a Christian America."[52]

In particular, Chinese women were targeted. They were seen as sexual deviants and accused of spreading sexually transmitted illnesses because some Chinese women worked in the sex industry.[53] In 1875, the Page Act[54] was passed. This Act prohibited the recruitment of laborers from China who were brought for "lewd and immoral purposes," specifically forbidding "the importation of women for the purposes of prostitution."[55] Then-President Ulysses S. Grant, in his annual message to Congress, specifically called for Congress to deal with "an evil – the importation of Chinese women, but few

47. *See* Jessica P. Rotondi, *Before the Chinese Exclusion Act, This Anti-Immigration Law Targeted Asian Women*, History (Mar. 19, 2021), https://www.history.com/news/chinese-immigration-page-act-women.

48. *Id.*

49. *See* Kenneth M. Holland, *A History of Chinese Immigration in the United States and Canada*, 37 Am. Rev. of Canadian Stud. 150 (2007).

50. *See* Rotondi, supra note 47.

51. *See* Rotondi, supra note 47.

52. *See* Rotondi, supra note 47.

53. *See* Rotondi, supra note 47.

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

55. *See* Rotondi, supra note 47.

of whom are brought to our shores to pursue honorable or useful occupations."[56] After the Page Act of 1875, the population of Chinese women in the United States dropped. Chinese men--who were neither allowed to immigrate with their wives nor allowed to marry outside their race--were unable to create families.[57] This bachelorhood was viewed with increasing suspicion until eventually, people like H. N. Clement, a San Francisco lawyer, stood before the government to look for a way to "get rid" of the "evil, unarmed invasion" of Chinese people living in America.[58]

Thus, the Chinese Exclusion Act of 1882 was born. This Act "prohibited the immigration of Chinese laborers for a period of ten years and barred all Chinese immigrants from naturalized citizenship."[59] This law codified the "need to restrict, exclude, and deport undesirable and excludable immigrants."[60] By using the law to "clos[e] America's gates [to Chinese people]," Congress managed to "racializ[e] Chinese immigrants as permanently alien, threatening, and inferior on the basis of their race," etching a distinct line between the Chinese immigrants ostensibly polluting the land and the white people who needed protection from them.[61] The cases involving Chinese people that this paper explores are simply a fraction of the cases that developed the idea that Chinese people were not white. To narrow this paper's scope, I focus on major cases from the Supreme Court and California, where the majority of Chinese immigrants lived. While other cases would demonstrate the same point, by focusing on cases that reached the highest court in the United States and cases where the largest population of Chinese immigrants resided, I hope to paint a picture of what it was like to live as a Chinese immigrant.

Although the bulk of the legal history will involve cases around the 1880's, a case that provides necessary context is *People v. Hall*.[62] In this 1854 case, the Supreme Court of California discussed whether a white defendant could be convicted of murder by using testimony of Chinese witnesses.[63] The statutes that the court relied on stated, "No Indian or [Black person] shall be allowed to testify as a witness in any action in which a White person is a party," and "No Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man."[64] Chief Justice Murray, in discussing what groups of people would fall under Indian, Black, or Mulatto,

56. Gerhard Peters & John T. Woolley, *Ulysses S. Grant: Seventh Annual Message*, The Am. Presidency Project, (Dec. 7, 1875), https://www.presidency.ucsb.edu/node/203765 [https://perma.cc/G65E-K4WA].

57. *See* Rotondi, *supra* note 47.

58. Erika Lee, *The Chinese Exclusion Example: Race, Immigration, and American Gatekeeping, 1882-1924*, 21 J. of Am. Ethnic Hist. 36, 36 (2002).

59. *Id.*

60. *Id.* at 37.

61. *Id.* at 38.

62. See People v. Hall, 4 Cal. 399, 399 (1854).

63. *See Id.*

64. *See Id.*

noted how Christopher Columbus gave the title of "Indian" to the indigenous people he found in the Americas, and how this term was "universally adopted, and extended to the aboriginals of the New World, as well as of Asia."[65] Chief Justice Murray used "Indian" in a very general sense, almost as if it were a catch-all third category (besides white and Black). The court did this so that the white man would be "shielded from the testimony of the degraded and demoralized caste."[66]

What is interesting about the analysis in this case is that Justice Murray used race as the exclusive reason for prohibiting the inclusion of the testimony from the Chinese witnesses. Instead of using citizenship, like some of the later courts do, Justice Murray argued that the European white man who moved to America should be protected from the testimony of the "corrupting influences of degraded castes."[67] He also argued that "black" should be defined as to include anyone who is not "of white blood."[68]

The opinion gave the word "white" a distinct signification, putting it on a higher pedestal than "black, yellow, and all other colors"—classifying the other colors as inferior races.[69] This distinction was necessary for Justice Murray because without it, "the same rule which would admit [non-white people] to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls."[70] He described non-white people as "incapable of progress or intellectual development beyond a certain point" and an "actual and present danger" to the superior white man.[71]

Even decades later, the court's attitude toward Chinese people had not changed. *In re Ah Yup*, an 1878 case from the Circuit Court of California, discussed whether a Chinese person could be naturalized and become an American citizen.[72] The court based their analysis on a statute that was amended after the Thirteenth and Fourteenth Amendments were adopted in the U.S. Constitution, allowing Black people to become American citizens. Specifically, the statute extended the naturalization process to "free white persons, and to aliens of African nativity, and to persons of African descent."[73] In contrast to *Hall*, this court excluded Chinese people[74] from being of African descent. Instead, it focused on whether Chinese people could be considered white and whether the statute excluded people who were not white or Black.

65. *Id.* at 400.
66. *Id.* at 402.
67. *Id.* at 403.
68. *Id.*
69. *Id.* at 404.
70. *Id.*
71. *Id.* at 404–05.
72. *See In re* Ah Yup, 1 F. Cas. 223, 223 (C.C.D. Cal. 1878).
73. *Id.*
74. The early courts did not distinguish Mongolia and China as being two different countries – they considered China to be the empire and Mongolian to be the race. For the purposes of discussing the courts' analyses, I will also discuss them as if they were not separate entities and reserve discussion of the distinction for a later section.

By the court's own admission, the term "white person" constituted a very indefinite description of a class of persons.[75] By using a combination of Webster's dictionary, questionably scientific nomenclature, and common understanding, the court found that Chinese people could not be, and have never been, considered white.[76] In fact, while the court could not find anything concrete to show whether Congress intended to include any other race in the term "white," it was clear from the congressional record that there was a universal understanding that "white" excluded Chinese people.[77] In answering the first question of whether Chinese people could be considered white, the court also found their answer to the second—the statute was found to be purposefully created to exclude the Chinese.

Even as citizenship was expanded to include people who were not white or Black, courts were still careful to place restrictions on who could be considered a citizen. The same court from *In re Ah Yup* considered this citizenship question again in 1884 when Look Tin Sing, who had been born in the United States, sought reentry to the United States after visiting China.[78] Although Sing's parents were born in China, they had resided in California for the last twenty years, their family made their business in California, and Sing had left for China intending to return to the United States.[79] The court found that the language of the Fourteenth Amendment, that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," was sufficiently broad to include Sing because he was born in the United States.[80]

The issue, then, became whether Sing could be considered as subject to the jurisdiction of the United States. This jurisdiction derives from whether a person completely renounces allegiance to their original country and pledges fealty to the United States.[81] Although Sing was found to be a citizen of the United States, this case set a dangerous precedent because of the analysis on which the court relied. The court granted Sing citizenship based on the fact that he was born in the United States, following the *jus sanguinis* principle of citizenship. *Jus sanguinis* means "right of blood," and the court was very careful about not extending citizenship to Chinese people who had not been born in the United States. This created extremely narrow precedent, where the court drew a firm line – those born outside of the United States would have a much harder time trying to attain citizenship.

In 1886, the Supreme Court also weighed in on how Chinese immigrants should be treated. In a unanimous decision, the Court in *Yick Wo v. Hopkins*

75. *See In re Ah Yup*, 1 F. Cas. at 223 (noting that there are no white people who are literally white, "and those called white may be found of every shade from the lightest blonde to the most swarthy brunette").

76. *See Id.*

77. *See Id.* at 224.

78. *See In re* Look Tin Sing, 21 F. 905, 906 (C.C.D. Cal. 1884).

79. *See Id.*

80. *See Id.*

81. *See Id.* at 907.

dealt with a San Francisco ordinance that required laundries in wooden buildings to have a specific permit.[82] Although the ordinance was facially neutral, Chinese applicants were denied permits more often than white applicants. The Court found that the ordinance, in practice, divided the applicants into two classes by an arbitrary line, constructed by the mere will and consent of the supervisors.[83] Although this opinion may seem promising—the Court even said that the rights of the petitioners were not diminished simply because they were "aliens and subjects of the Emperor of China"—a closer look reveals the Court's malevolent motivations.[84]

In *Yick Wo*, the Court plainly did not want to find in favor of the Chinese petitioners, maintaining that the Court was "constrained to conclude" that the permits cannot be denied to the petitioners for a reason as arbitrary as their race.[85] Of the "two hundred others who [ ] petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business."[86] The permits had been denied so exclusively to Chinese immigrants that the Court had nothing to hide behind. This language suggests that if those tasked with approving the permits were just a little more clever, a little less obvious, and hid their discrimination better, the Court probably would have been more than happy to uphold the practice.

In fact, the Court demonstrated its eagerness to exclude Chinese people in 1889 in what is known as the Chinese Exclusion Case. Chae Chan Ping, a laborer with Chinese citizenship, lived and worked in San Francisco for twelve years before returning to China with every intention of coming back to the United States.[87] When Ping left the United States, he even had with him a certificate issued by customs that should have allowed him reentry to the country. However, when Ping returned to the United States, he found that his certificate had been annulled, because Congress, a week prior, had amended the law under which Ping's original certificate had been granted.[88]

In the Chinese Exclusion Case, the Court, interestingly, described Chinese people in a similar way to how they are described by the model minority: industrious and frugal.[89] It cited the flood of laborer immigrants as the reason for growing tensions between these immigrants and American citizens.[90] These growing tensions resulted in legislation that limited the ability of Chinese laborers to immigrate and reside in United States. Despite Ping's certificate, existing as a result of a treaty between the United States and China, the Court found that the treaties were of no greater legal obligation

82. *See* Yick Wo v. Hopkins, 118 U.S. 356, 365 (1886).
83. *See Id.* at 368.
84. *Id.*
85. *Id.* at 370.
86. *Id.* at 374.
87. *See* Chae Chan Ping v. United States, 130 U.S. 581, 582 (1889).
88. *See Id.*
89. *See Id.* at 595.
90. *See Id.*

than an act of Congress.[91] The Court also emphasized that laborers like Ping are aliens, and the government has an exclusive and absolute right to exclude such aliens if it so wishes.[92]

The Court's repeated emphasis on independence and sovereignty suggests that it viewed Chinese laborers like Ping as an invasive species—something that American citizens needed protection from. The Court describes the general sentiment at a congressional convention in December 1878, where Chinese laborers were described as having "a baneful effect upon the material interests of the state, and upon public morals; that their immigration was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization."[93] Simply because they were Chinese, Congress accused these laborers of having no interest in the United States or American customs—something that had not been demanded of white people.[94] These white legislators benefited from their white privilege: their loyalty to the United States was never questioned. By contrast, congressional scrutiny of the intentions of Chinese laborers came because these laborers were not white and did not have access to the same privileges white people did.

The opinion explicitly analogizes Ping's case to a conversation where the Secretary of State said, "[t]he control of people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested."[95] The Court even went as far as to compare the exclusion of Chinese laborers to the exclusion of "paupers, criminals and persons afflicted with incurable diseases . . . whose presence is deemed injurious or a source of danger to the country."[96]

In a case with similar facts to *In re Look Tin Sing*, the Supreme Court again addressed the concept of *jus sanguinis* citizenship. Wong Kim Ark, born in San Francisco to parents who were not American citizens but were considered domiciled residents of San Francisco, was not allowed to re-enter the United States after a trip to China.[97] The district attorney argued that although Ark was born in San Francisco, he could not be considered an American citizen because (1) his parents were Chinese and Chinese citizens, (2) Ark was also Chinese ("by reason of his race, language, color and dress"), and (3) Ark was a laborer by occupation.[98]

The Court considered the fact that Ark's parents had established and enjoyed permanent domicile in San Francisco, established a business there,

91. *See Id.* at 600.
92. *See Id.* at 603–04.
93. *Id.* at 595.
94. *See Id.*
93.
94.
95. *Id.* at 607.
96. *Id.* at 608.
97. *See* United States v. Wong Kim Ark, 169 U.S. 649, 649 (1898).
98. *Id.* at 650.

and never engaged in any diplomatic activity for China, as well as that Ark had never considered any other country to be his place of residence.[99] Additionally, the Court noted that Ark had traveled to China on a visit once before when he was seventeen and had been allowed to re-enter the United States based on the sole ground that he was a native-born citizen of the United States.[100] The Court faced the issue of whether a child born in the United States, whose parents are Chinese citizens but have a permanent domicile in the United States, becomes, at the time of his birth, an American citizen by virtue of the Fourteenth Amendment.[101]

Because the Constitution does not explicitly define what it means to be a natural-born citizen, the Court examined the common law instead.[102] It found that in England, children who were born in England to parents who were not English citizens were still considered natural-born subjects.[103] A key aspect to this concept of citizenship, then, became allegiance. People who were born in the colonies were once English subjects, but because they had pledged their allegiance—their duty of obedience to the sovereign under whose protection he is—to the United States, they were considered American citizens.[104]

This case marked a shift for the Court from following a *jus sanguinis* theory to adopting more of a *jus soli* theory, *jus soli* meaning "right of soil." The Court was compelled to find that Ark was a citizen of the United States because if it did not, then it would also have to exclude from citizenship "thousands of persons of English, Scotch, Irish, German or other European parentage, who have always been considered and treated as citizens of the United States."[105] The Court was careful to distinguish that because there were no pertinent statutes, people who were born in China could not be naturalized into becoming American citizens.[106] However, because Ark was born in the United States and did not renounce his citizenship, he was entitled to bear the title of an American citizen.

The *Wong Kim Ark* case is particularly illustrative of the corner the courts had backed themselves into: they were forced to find that Ark was a citizen because otherwise, the citizenship of white immigrants would be vulnerable. At no point were the courts eager to dole out citizenship to Chinese people. It was only when their hands were tied – when the privileges of being white were vulnerable – that the courts reluctantly granted Chinese people United States citizenship. Even so, the courts made sure to be explicit that they saw Chinese people as a subordinate class. Time and time again, the courts described Chinese people as invasive, dangerous, unintelligent, corrupting, and injurious to American culture. They created a standard where

99. *See Id.* at 651–652.
100. *See Id.* at 653.
101. *See Id.*
102. *See Id.* at 654.
103. *See Id.* at 655.
104. *See Id.* at 659.
105. *Id.* at 694.
106. *See Id.* at 704.

Chinese people had to prove their fealty to the United States, had to show they did not intend to corrupt those around them, and had to remain lesser than their white counterparts. Meanwhile, white people were assumed to have achieved this standard. The courts leaned on this hypocrisy to create a distinct line between being Chinese and being white.

B. *Cases Involving Black People and Black Americans*

Slavery as an institution, as a business model, and as systemic violence against Black people has had a profound impact on the development of the United States. Without forcing enslaved people to work beyond their capacity, the colonies would not have survived, much less been able to establish farms and towns.[107] In the 18th century alone, there were an estimated six to seven million enslaved people forcibly brought to the New World.[108] Slavery continued to grow with the invention of the cotton gin, creating a demand for enslaved laborers.[109] Enslaved people in the South tried to escape slavery by running to the North, increasing tensions between slave owners in the South and abolitionists in the North. Even though President Lincoln issued the Emancipation Proclamation on January 1, 1863, news traveled extremely slowly—the last enslaved people were not freed until years later.[110] In the years following, the institution of slavery shifted into other things: Jim Crow laws, Black Codes, and the systemic oppression of Black people. The cases I explore are not all the cases that touch on how the legal system chose to oppress Black people, but rather a selection of how the courts tried to racially define Blackness and differentiate it from whiteness.

An important case to provide introductory context is *Scott v. Sandford*. This case from 1856 informed much of the courts' subsequent analyses and decisions on how Black people should be treated. This case, discussing whether Dred Scott had standing to bring a case to court in the first place, set a dangerous precedent for courts to treat Black people as subordinate. The Court addressed whether the circuit court had jurisdiction to hear the case, given that Scott was a slave—more specifically, whether slaves could be considered citizens.[111]

The Court ultimately decided that there was no jurisdiction, jumping through several hoops to come to that conclusion. First, it distinguished itself from common law English courts, where jurisdiction is presumed. The Court claimed the opposite applied to American courts, arguing that plaintiffs must show in their pleading that the court they are bringing their suit in has jurisdiction over the matter.[112] Furthermore, the Court also noted that

107. Jenny Bourne, *Slavery in the United States*, EH (Mar. 26, 2008), https://eh.net/encyclopedia/slavery-in-the-united-states/.

108. History, *Slavery in America*, (Nov. 12, 2009), https://www.history.com/topics/black-history/slavery [https://perma.cc/4RVF-V4XU].

109. *Id.*

110. Annette Gordon-Reed, On Juneteenth (2021).

111. Dred Scott v. Sandford, 60 U.S. 393, 400 (1857).

112. *Id.* at 401–02.

plaintiffs must specifically aver in their pleading that they are citizens of the United States.[113]

The Court was specific about the scope of the issue they were addressing—it elected to only discuss Black Americans who are or were slaves or descended from people who were enslaved.[114] The Court portrayed Black Americans as sub-human, describing them as a "subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges."[115] In fact, beyond just being sub-human, the Court described enslaved people explicitly as property, over which citizens of the United States have rights to, rights that the Court could not interfere with.[116] The Court interpreted the Constitution as clear: enslaved people cannot be citizens, were not intended to be included as citizens, and therefore do not have any rights of their own.[117]

In describing naturalization towards citizenship, the Court mentioned that if someone who was intended to be included as a citizen under the Constitution "[took] up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."[118] The Court went even further, describing Black people as an "unfortunate race . . . of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[119] The "white population" was explicitly the dominant race to which the Court ascribed these property rights, where white people were allowed to own enslaved people without government interference because the popular social opinion at the time was that Black people were only fit to be property.

The Court, although it very well could, elected not to discuss the "justice or injustice, the policy or impolicy, of [the Constitution]," claiming its duty to solely "interpret the instrument [lawmakers] have framed . . . according to its true intent and meaning when it was adopted."[120] To that end, it distinguished citizenship of a state and citizenship of the United States. Even if a state were to confer citizenship to a Black person, the Court contended that that citizenship would not entail any of the rights and privileges that come with being a citizen of the United States.[121] The Court even went so far as to entirely strip the humanity of Black people, describing them as little more than commodities to be bought and sold.[122]

113. *Id.* at 402.
114. *Id.* at 403.
115. *Id.* at 404–05.
116. *Id.* at 407.
117. *Id.* at 404.
118. *Id.*
119. *Id.* at 407.
120. *Id.* at 405.
121. *Id.*
122. *Id.* at 408.

By examining what the Founders intended when they wrote the Declaration of Independence and the Constitution, the Court concluded that Black people were never intended to enjoy the same rights and privileges as free, white men.[123] It also pointed to several state statutes where Black Americans were regarded as a separate class, not to be seen as citizens within the meaning of the law.[124] In exploring historical context and previous legislation, the Court concluded that a "perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then look upon as so far below [white people] in the scale of created beings…."[125] Scott was found to be neither a citizen of Missouri nor a citizen of the United States, and therefore he did not have the right to bring his case to court.[126]

The tone of Chief Justice Taney's opinion in the *Scott* case and the excessive examples he gives of how Black Americans should not be considered people make it clear that he had absolutely no respect for Scott nor any Black person. Chief Justice Taney wrote in a paternalistic and patronizing manner, as if Black people were livestock who could not possibly ever become citizens of the United States. He was exceedingly thorough, making sure to stress that Black people were not to be regarded as plaintiffs, as citizens, or even as human.

Soon after *Scott v. Sanford*, another case, *Johnson v. Town of Norwich*, was tried in Connecticut, where the court discussed what it meant to be a person of color. The town of Norwich "seized assets from R.I. Stoddard's estate to recover taxes he failed to pay before he died."[127] In this case, the statute in question exempted "the personal and real estate of persons of color" from taxation.[128] Stoddard was one-fourth Black, and the court found this to mean that he should therefore be considered a person of color.[129] The court found the term "persons of color" to be relatively simple to define, finding that it was "not a term or phrase of art, having any peculiar or technical signification . . . [or] any legal or definite meaning."[130] Instead, the court went by the "common, general, and indeed universal acceptation of the phrase "persons of color," adding that "those who have descended in part only . . . and have a distinct, visible admixture of African blood" should also be regarded as people of color.[131] Therefore, the court found that "persons of color" meant

123. *Id.* at 411–12.
124. *Id.* at 412–17.
125. *Id.* at 409.
126. *Id.* at 427.
127. Christopher J. Bryant, *Without Representation, No Taxation: Free Blacks, Taxes, and Tax Exemptions Between the Revolutionary and Civil Wars*, 21 MICH. J. RACE & L. 91, 92 (2015).
128. Johnson v. Town of Norwich, 29 Conn. 407, 408 (1860).
129. *Id.*
130. *Id.*
131. *Id.*

"persons proved to be of such [African] descent and also having and disclosing visibly the peculiar and distinctive color of the African race."[132] The court declined to introduce any specific proportion of mixed blood as part of the definition.[133]

Additionally, in *Johnson v. Town of Norwich*, the court justified its own rule by declaring that the legislative history of the act[134] supported its position, "which shows clearly that the exemption of property furnished by it was designed as a compensation to those persons on whom the constitution of the state does not confer the privilege of the elective franchise, which is confined by that instrument to 'white' male citizens."[135]

This rule, of course, is nowhere near as clear as the court proclaimed it to be, leading to further litigation about who was really considered Black, and therefore excluded from certain rights and privileges extended to white people. For example, many white people used the "one-drop rule," where even a single drop of "Black blood" made a person Black, in order to actively segregate and discriminate.[136] Even the language of "visible admixture" became ambiguous when people with less Black ancestry started to appear more white. In response, some states elected to have a more precise definition—in Michigan, the court considered people who were less than one-fourth Black to be white.[137]

The courts also discussed the boundaries of citizenship in *Guyer's Lessee v. Smith*. Guyer, an American citizen, purchased a fifty-acre property in 1792.[138] In 1841, after Guyer passed, the property was passed on to his two sons.[139] The sons' ownership of this property was called into question when the defendants accused the sons of not being real American citizens, showing through witnesses that "the lessors of the plaintiff [Guyer's sons] are natives and citizens of [the Island of St. Bartholomew], and owe allegiance to his Majesty, the King of Sweden and Norway…" and that their mother was "partly of African blood or descent."[140] This was important because at the time, Maryland law only allowed non-citizens to take land as "purchasers," meaning their land would always be subject to escheat.[141]

The issue, then, was whether the sons could be considered American citizens. The main argument for the validation of their citizenship relied on the Act of 1802, which said that "the children of persons who are, or have been

132. *Id.*

133. *Id.* at 408–09.

134. The act, cited as "Rev. Stat., tit. 55 § 6", exempts a "person of color" from property taxes. *Id.* at 407.

135. *Id.* at 409.

136. F. James Davis, *Who is Black? One Nation's Definition*, PBS Frontline https://www.pbs.org/wgbh/pages/frontline/shows/jefferson/mixed/onedrop.html [https://perma.cc/GN7Z-SQ7D].

137. People v. Dean, 14 Mich. 406, 425 (1866).

138. Guyer's Lessee v. Smith, 22 Md. 239, 246 (1864).

139. *Id.*

140. *Id.*

141. *Id.* at 247.

citizens of the United States, shall, though born out of the limits and jurisdictions of the United States, be considered as citizens of the United States."[142] The language of this statute makes it seem like the analysis should be over—their father was a citizen of the United States, so therefore they should also be considered citizens. While the court noted this inference, it continued on, concluding that because the sons were born out of wedlock, they were barred from being American citizens per the Act of 1802.[143]

The attorneys for Smith made a more explicit racial argument, that "these plaintiffs are not only aliens, but are [also] proved to be of African descent, and it is against the policy of our laws that such persons should hold real estate in Maryland."[144] The court's opinion did not mention the precedent set in *Scott v. Sandford*, perhaps suggesting that the court was hesitant to resolve the case by the use of the sons' race.[145] It is not entirely clear why the court chose to side-step this analysis, but it may have been because fifteen days prior to this opinion being issued, the state of Maryland adopted a new state constitution that abolished slavery and found all men to be created equally free, which may have given the court analytical pause when it was considering this case.[146]

Despite the facially race neutral analysis the court gave regarding the sons, a closer look reveals that racism was still at play. Given the volatility of what was happening at this time—the Civil War, namely—the court may have been looking for an easy way out and avoid a racial analysis at all. As a result, "it is quite possible that, because of these uncertainties and the violent, nation-rending upheaval that questions concerning black people's citizenship had precipitated, the *Guyer* court turned to domestic relations laws – laws that were facially neutral but palpably race salient in their operation – to determine the Guyer brothers' claims to citizenship."[147] A child's citizenship following the racial status of their mother, particularly when the child is born out of wedlock, had significant racial implications. Given the prohibitions against marrying slaves at the time, this analysis meant that nonmarital children, even the ones with white, slave master fathers, would always be considered slaves.[148]

The "visible admixture" issue came up again in 1867, when a man with a large preponderance of white blood tried to vote.[149] Collins, a male citizen of the United States and of Ohio, had "much more of white than African blood, [and] was at the time of his offering to vote plainly apparent, and was proved

142. *Id.* at 249.

143. *Id.*

144. Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2148 (2014) (quoting Appellants' Statement and Points, *Guyer*, 22 Md. 239 (No. 45)).

145. *Id.*

146. *Id.* at 2149.

147. *Id.*

148. *Id.* at 2151.

149. Monroe v. Collins, 17 Ohio St. 665, 666 (1867).

to their satisfaction."[150] Here, the court addressed whether it was constitutional to require people with this "visible admixture" to prove to what extent they were white or Black.[151] The court found that "though the visible admixture of African blood is, under the statute [ ] a *cause of challenge*, it is not made a *disqualification*. The doubt of such a person's qualification, raised by his appearance, is made sufficient to put him to the proof of the degree and proportion of blood, color alone being a very uncertain test."[152]

The court was hesitant to grant Collins the right to vote and looked for any possible reason to deny him that right. Collins was asked several questions that illustrate the court's hesitance. The court asked whether he was "classified or received as a white or colored person," and whether he "associate[d] with white or colored persons."[153] He was also required to produce witnesses to testify, and both he and his father were asked whether his father and mother were married.[154]

In the end, however, the court found that Collins should be allowed to vote because he, by nature of having a preponderance of white blood, should be considered a white man "within the meaning of the word 'white' in the constitution."[155] This analysis points to the court's prevailing refusal to allow Black people vote—it would rather change the definition of what it means to be a white person to include mostly white people.

The extent of this right to vote was further explored in *United States v. Reese.* In this 1875 case, the Court was explicit in limiting who was entitled to the right to vote. Specifically, the Court found that the Fifteenth Amendment did not confer to Black people the right of suffrage, but rather "invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude, and empowers Congress to enforce that right by 'appropriate legislation.'"[156]

The Fifteenth Amendment says that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[157] On its face, it may seem that this would grant anyone the right to vote, regardless of race. However, the Court elected to use an extremely narrow interpretation of the Fifteenth Amendment instead, emphasizing that this amendment "does not confer the right of suffrage upon any one," but that those who are permitted by law to vote cannot be discriminated against.[158] This narrow interpretation of the Fifteenth Amendment empowered states to exclude

150. *Id.* at 666–67.
151. *Id.* at 668-69.
152. *Id.* at 670.
153. *Id.* at 667.
154. *Id.*
155. *Id.* at 672.
156. United States v. Reese, 92 U.S. 214, 214 (1875).
157. U.S. Const. amend. XV.
158. *Reese*, 92 U.S. at 217.

Black people from voting in less obvious ways. From the use of grandfather clauses, poll taxes, to literacy tests, these methods of suppressing the Black vote were upheld as constitutional for decades after the *Reese* decision.

In *Plessy v. Ferguson*, the petitioner was seven-eighths white and one-eighth Black. The Citizens Committee used this particular petitioner as a test case[159] to see whether someone, who by all accounts looked to be white, would still be forcibly ejected from a whites-only passenger car solely because of that one eighth of "African blood."[160] The United States Supreme Court found that he could, and that it was not unconstitutional to have "equal but separate" accommodations for white people versus Black people.

The Court, almost haughtily, dismissed the petitioner's Thirteenth Amendment claim, saying that the Separate Car Act[161], providing for separate accommodations did "not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as punishment for crime," denouncing it as "too clear for argument."[162] The Court reasoned that because there was no literal state of bondage, no physical ownership of mankind as chattel, and no involuntary servitude, the act simply could not violate the Thirteenth Amendment.[163]

The Court also borrowed analysis from past cases where it was found that refusal of accommodations to Black people could not be regarded as imposing a badge of slavery or servitude, but only as imposing an ordinary civil injury.[164] In that opinion for the Civil Rights Cases[165], Justice Bradley says that "it would be running the slavery question into the ground . . . to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."[166] Under the guise of preventing a "boy who cried wolf" situation with racism, the Court found it perfectly acceptable to have separate or to even refuse accommodations to Black people.

There is a careful distinction between social and political equity. While the Court found that the object of the Thirteenth Amendment was "undoubtedly to enforce the absolute equity of the two races before the law . . . it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equity, or a commingling of the

159. *Plessy v. Ferguson*, PBS, https://www.pbs.org/wgbh/americanexperience/features/neworleans-plessy-v-ferguson/.

160. Plessy v. Ferguson, 163 U.S. 537, 538 (1896).

161. Justice Brown writes, "This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152." *Id.* at 540.

162. *Id.* at 542.

163. *Id.*

164. *Id.* at 542–43.

165. C.R. Cases, 109 U.S. 3 (1883).

166. *Id.* at 543.

two races upon terms unsatisfactory to either."[167] The Court's argument was that mere separation did not necessarily imply the inferiority of either race to the other, but it was clear that this argument was mere lip service.[168] It was clear by looking at when and against whom these separate accommodations acts were enforced that the Court had every intention to maintain a racial order disguised by a social order. No one was worried about white people encroaching on Black spaces—the fear was exclusively that Black people would overrun and sully white spaces.

The petitioner also argued that the "reputation of belonging to the dominant race, in this instance the white race, is property, in the same sense that a right of action, or of inheritance, is property."[169] The Court found that even if this were true, the only action for damages against the company for being deprived of his so-called property would derive from a white man being assigned to a colored coach.[170] There would be no action for Black people since they were not lawfully entitled to the reputation of being a white man, they could not be deprived of any property.[171] Even this hypothetical reveals the Court's insidiousness, signaling its disdain for Black people and its desire to protect the fragile, white masses from having to commingle with Black people.

Any discussion of *Plessy* must be juxtaposed with the Court's follow-up decision fifty-six years later, *Brown v. Board of Education*. *Brown* overturned *Plessy*, and held that segregation on the basis of race, even if all else were the same, was inherently unequal and violated the Equal Protection Clause of the Fourteenth Amendment.[172] This opinion explored the actual application of segregation as it applied to schooling—education for Black children was leagues behind the education that existed for white children.[173] The Court's analysis rested its laurels on the actual effect of segregation, rather than any tangible factors that could be compared. It found that separate education facilities were inherently unequal because it generated a resulting feeling of inferiority.[174]

There was as much critique as there was celebration after *Brown* was decided. One critique of the opinion was that rather than resolving the racial dilemma, *Brown* only made it more complex.[175] Instead of an entire class of people perceived as being denied racial equality, suddenly every failure,

167. *Id.* at 544.
168. *Id.*
169. *Id.* at 549.
170. *Id.*
171. *Id.*
172. Brown v. Board of Education, 347 U.S. 483, 495 (1954).
173. *Id.* at 490.
174. *Id.* at 494.
175. Lisa Trei, *Black Children Might Have Been Better Off Without Brown v. Board, Bell Says*, Stanford Report., (Apr. 21, 2004), https://news.stanford.edu/news/2004/april21/brownbell-421.html.

setback, and disparity became a mark of personal failure.[176] The high-level rhetoric and promise of integration, perhaps, was not as effective as court orders to ensure that Black children received the education they needed to progress would have been.[177] By only removing barriers to equal education in theory and not in practice, Black students are still being disenfranchised by a system that is reluctant to do much more for them.

II. The Weaponization of Whiteness: The Dichotomy The Courts Create between White and Non-white People

In discussing legal history, it is evident that the courts tend to view race as a dichotomy: either white or not white. White people can enjoy all of the rights and privileges that come with citizenship, have access to better accommodations and schools, and have more rights, than non-white people. Non-white people do not have that luxury. Courts employed their analyses and precedents to ask non-white people to prove their proximity to whiteness. They were excluded and othered to the point where courts could not even fathom extending them the same rights and privileges as white people.

Both Chinese people and Black people were stamped with this concept of foreignness, even if they had been born in the United States, even if they had lived in the United States their whole lives, and even if they had no intention of ever living anywhere else. The courts weaponized this concept of foreignness—the courts were reluctant to expand the rights and privileges that white people had enjoyed since the British stole the land from the Indigenous peoples and declared it as their own. The separation of white and non-white is inherently violent. Quoting Robert Cover, Ian Haney Lopez writes, "A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, children, even his life . . . when judges have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence."[178] By creating these racial constructs, the courts have used the law violently to create an uneven playing field for non-white people.

The courts, unsurprisingly, do not really attempt to approach the issue from an intersectional perspective. The analysis falls squarely on the heads of white men versus non-white men. The court, at one point, even goes as far as to lump Chinese men and Black men together to form one category of persons. This lack of intersectionality creates issues, because without considering categories like other races, class[179], sexual orientation, disability, and gender, the court's analysis is limited. By treating groups of people as a monolith,

176. *Id.*

177. *Id.*

178. Haney-López, *supra* note 39, at 85.

179. For example, the Chinese Exclusion Act of 1882 only prohibited the immigration of Chinese laborers. Specifically, there were exceptions to the act for diplomats, teachers, students, merchants, and travelers, creating a class dichotomy between Chinese laborers and those who had the funds to travel. 8 U.S.C. 7.

the courts are unable to analyze or account for the unique experiences that people have, the baggage they bring with them to court, and how that should affect a court's interpretation.

Though some may believe that the law should treat everyone equally, interpretation of the law in that way may actually create more problems than it solves. *Brown* is a shining example of where equality under the law does not necessarily translate to real life equity. Even a century after the Emancipation Proclamation, Black children "attend public schools that are both racially isolated and inferior. Demographic patterns, white flight, and the inability of courts to effect the necessary degree of social reform render further progress in implementing *Brown* almost impossible."[180]

Another example is Justice Harlan's dissenting opinion in *Plessy*. Although Justice Harlan was praised for his dissenting opinion in that case, his words—and the effect they had—demand a closer look. In his dissenting opinion, Justice Harlan wrote:

> [I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our constitution is color blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved.[181]

These words, sweeping and almost grandiose, paint a picture of a United States that simply does not exist. Perhaps Justice Harlan was being hopeful, looking towards a future where the law, indeed, would not take account of the color of someone's skin.

Furthermore, Justice Harlan is guilty of the same lack of intersectionality that plagues the rest of the courts as well. In the same breath as his previous, ostentatious statement, he continues:

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, and who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.[182]

180. Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 518 (1980).

181. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

182. *Id.* at 561.

This language is almost baffling. How could a Justice who was so ahead of his time with respect to one race, and yet be so exclusive to another race? Looking at the language of his opinions, Justice Harlan confirmed his stance as someone who did not believe that Chinese people could become American citizens.

In *United States v. Wong Kim Ark*, Justice Harlan reaffirmed his position that his proclaimed concept of colorblindness could not be extended to include Chinese people. He joined the dissenting opinion written by Chief Justice Fuller that emphasized that Chinese people, even if they were born in the United States, by virtue of having even a drop of Chinese blood, should never be considered American citizens.[183]

Chief Justice Fuller highlighted the danger of an increasing Chinese population, "of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usages of their own country, unfamiliar with our institutions, and apparently incapable of assimilating with our people."[184]

By virtue of this language, a racial caste—the very one that Justice Harlan denounced in *Plessy*—is created. Justice Harlan saw no issue with excluding Chinese people from citizenship, thereby marking that group of people as lower, less worthy, and inferior. In fact, much of the language that he used to justify that stance is eerily similar to the language that was used by other courts to deny citizenship to Black people – for example, the Court describes Black people as "subordinate" and "inferior"[185] in the *Scott* case. Justice Harlan used this concept of whiteness, and even Blackness, to intentionally other and exclude Chinese people from enjoying the rights and privileges of being an American citizen.

The judicial exclusion of Chinese people and Black people goes on to validate the social exclusion of these groups as well. Of course, this is more of a chicken and egg situation, where each one builds on the other, resulting in extreme othering. One example of this is the white reaction following the decision in *People v. Hall*. Whereas the court in *Hall* seemed almost hesitant to really categorize Chinese people in a specific way, what was exceptionally clear was that Chinese people were not to be considered white.[186]

The resulting legislation demonstrated no such hesitancy. Chinese people were, by and large, marked by permanent foreignness—so much so that Congress passed the Chinese Exclusion Act in 1882.[187] This Act excluded Chinese workers and prevented Chinese people from naturalizing and becoming American citizens.[188] This exclusionary behavior continued well into the 1900's. Even in 1943, when the Chinese Exclusion Act was repealed, there

183. *Wong Kim Ark*, 169 U.S. at 731 (Fuller, C.J., joined by Harlan, J., dissenting).

184. *Id.*

185. Dred Scott, 60 U.S. at 404–05.

186. *Hall*, 4 Cal. at 404.

187. Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. Rev. 1689, 1697 (2000).

188. *Id.*

was still a national origins quota imposed on all persons of Chines ancestry, regardless of where they were born or coming from.[189] In fact, "racial naturalization laws moved Asian immigrants from unnaturali*zed* noncitizens to unnaturali*zable* noncitizens. The juridical and ideological effect of this move was the production of all people of Asian ancestry as presumptively foreign and thus un-American."[190]

In the opinions discussed, the court compares people of color to a white man for the purpose of excluding that group of people. In a case from 1883, *Chew Heong v. United States*, the United States Supreme Court tried to decide whether a plaintiff should be allowed re-entry into the United States.[191] Ultimately, it held that since the plaintiff was living in the United States when the treaty of 1880 was in effect, that legitimated his presence there, even though the plaintiff was then absent from the United States when the Chinese Exclusion Act was passed, the treaty should be respected, and the plaintiff should be allowed back into the United States.[192] In the dissenting opinion written in *Chew Heong*, Justice Field writes:

> [Chinese people] have remained among us a separate people, retaining their original peculiarities of dress, manners, habits, and modes of living, which are as marked as their complexion and language. They live by themselves; they constitute a distinct organization with the law and customs which they brought from China. Our institutions have made no impression on them during the more than thirty years they have been in the country. They have their own tribunals to which they voluntarily submit, and seek to live in a manner similar to that of China. They do not and will not assimilate with our people; and their dying wish is that their bodies may be taken to China for burial.[193]

This language is almost exactly what Justice Harlan said about Chinese people in *Wong Kim Ark*. These examples are crystal clear—Chinese people should not be citizens, Chinese people are dangerous, Chinese people cannot be considered as part of the American population.

The danger begins with this language. Both Justice Harlan and Justice Field see whiteness as the standard to pursue. Chinese people are seen as frustrating and dangerous because they were thought as unable to accept the basic civic institution of American laws and courts, nor were they willing to assimilate to American culture.[194] The court thus used whiteness as a standard and weapon to exclude Chinese people from participation in the American experience.

The consequences of white people othering of Chinese people and Black people can also be seen by comparing the experiences of three individuals: Wen Ho Lee, a nuclear physicist who was accused of espionage; Amadou

189. *Id.* at 1698.
190. Devon W. Carbado, *Racial Naturalization*, 57 Am. Quarterly 633, 641 (2005).
191. Chew Heong v. United States, 112 U.S. 536 (1884).
192. *Id.*
193. *Id.* at 566–67.
194. Gotanda, *supra* note 187, at 1699.

Diallo, an African immigrant who was a victim of police brutality; and John Deutch, a former director of the Central Intelligence Agency.[195]

Wen Ho Lee, who was Taiwanese American, was portrayed and understood by the general public to be inassimilable, foreign, and was presumed to be disloyal to the United States. By virtue of his race, the FBI accused him of being a spy in the 1980's.[196]

Amandou Diallo, who was Black, was brutally murdered on February 4, 1999 by the police in the entryway to his apartment.[197] By virtue of his race, the police shot first and asked questions later.[198] The police presumed Diallo to be a violent criminal who was carrying a gun simply because he was Black.[199] There is also an element of a lack of assimilation here because Diallo was an African immigrant.

By contrast, John Deutch, a white man who downloaded classified material onto an unsecure home computer, received a simple slap on the wrist – he plead guilty to a misdemeanor, and then President Clinton pardoned him on his last day in office.[200] By virtue of his race, the public presumed Deutch to be assimilated and loyal to the United States. Deutch's skin color afforded him a privilege and a presumption of fidelity that Lee and Diallo did not receive. White people are assumed to be loyal and assimilated; non-white people are assumed to be disloyal and inassimilable.

III. Where Do We Go From Here?

Having outlined how the courts historically weaponized whiteness to exclude Chinese and Black people, this Piece argues that subsequent action should be expressly anti-racist and occur in two parts. First, the courts, armed with this knowledge, are capable of and should begin interpreting law in ways that attempt to undo the precedents they set. Second, legislators should write explicitly inclusive laws that create specific protections for Black, Indigenous, and people of color (BIPOC) in light of the system within which we operate.

Of course, this action is easier said than done. The legal system was created by, and for, white men, so in order to be truly anti-racist, the whole system must be dismantled and rebuilt. The concept of dismantling the system entirely may seem too radical for the general public to accept, so the two solutions can serve as stepping stones towards that end goal.

First, it is essential that the courts take a firm stance in undoing the precedent they set. Recognizing that this is unlikely to happen, particularly given the current makeup of the court at the highest level, the piece will only touch

195. Gotanda, *supra* note 187, at 1691–92.

196. Gotanda, *supra* note 187, at 1691–92.

197. Gotanda, *supra* note 187, at 1691–92.

198. *Amadou Diallo killed by police*, History, https://www.history.com/this-day-in-history/amadou-diallo-killed-by-police-new-york-city.

199. *Id.*

200. Michael J. Sniffen, *Ex-CIA Head Planned Guilty Plea*, Washington Post (Jan. 24, 2001), https://web.archive.org/web/20150915130331/http://www.washingtonpost.com/wp-srv/aponline/20010124/aponline163741_000.htm.

briefly on how this solution might look and will focus more on the proposed second solution. Some may argue that this would require courts to overstep its boundaries as an impartial body tasked with interpreting existing law. To that, I would respond that the courts overstep these imaginary boundaries constantly. Even in cases discussed in this paper, the courts hid their personal political agendas within the explicit reasoning they gave for their findings.

The court is just as capable of creating reasoning to fit this undoing agenda. It is important for the courts to do this because precedent is long-lasting and has widespread consequences. Many of the cases I discussed in this paper are technically still good law, and *Plessy* took half a century to overturn with middling success, at best. What may have been more effective than the Court's decision in *Brown* would be explicit court orders for finite action items to address the inequity within the school system.

An essential place for the courts to start undoing this precedent rests squarely in immigration law. There is no requirement that there exists an alien category to describe non-citizens.[201] Immigration law, much like many of the concepts discussed in this paper, is a construct created by the American government in order to achieve national security, another construct. Society, through law, defines who should be considered an alien and be effectively othered.[202] The legitimization of immigration by the courts promotes a caste system, often racial in nature. In order to dismantle this system, the courts need to stop following the precedent that created this caste system in the first place.

The answer, however, is not to pretend that all races are equated to white people. For example, we can examine how Mexican Americans were treated in the eyes of the law. Although this paper is focused on how the law was constructed and interpreted to exclude Chinese people and Black people, it is important to bring up this example to showcase why it would not be effective for courts to just equate white people with other races. For the most part, courts and the federal government constructed the race of Mexican Americans as white.[203]

Since they were regarded as white, based on following a classical legal theory, that Mexican Americans would have had a similar privileged legal status as white people.[204] This, however, was not the case. The principle of marginality demonstrates that even though Mexican Americans were regarded as white, that only had a "marginal impact on actual conduct."[205] Instead, Mexican Americans experienced a lot of discrimination that was very similar to the discrimination that Black people faced: They were "excluded from public facilities and neighborhoods", "targeted by racial slurs", "not permitted

201. Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. Miami Inter-Am. L. Rev. 263, 268 (1996).

202. *Id.*

203. *Id.*

204. *Id.* at 335–36.

205. *Id.* at 336.

to rent or own property anywhere except in the 'Mexican Colony,'" "segregated in public schools", not hired as often as white people and were typically hired for lower paying jobs, and paid less than white Americans.[206] They were also the victims of racism at the hands of police.[207] The actual social behavior that Mexican Americans experienced on a daily basis did not align with the legal status they were assigned as white people, and they were not afforded the same privileges.[208]

What needs to happen is the dismantling of the actual and expected privileges that are traditionally associated with being white. [209] Non-white people should be lifted up, absolutely, but they should not be compared against what it means to be white. White people have enjoyed the privilege of being considered the standard, so much so that "Whites widely continue to recognize the value of their own Whiteness."[210] It is obvious that a system built by white people would benefit exclusively white people. Francis Lee Ansley observed, "White supremacy is concretely in the interests of all white people. It assures them greater resources, a wider range of personal choice, more power, and more self-esteem than they would have if they were (1) forced to share the above with people of color, and (2) deprived of the subject sensation of superiority they enjoy as a result of the societal presence of subordinate non-white others."[211] So then the question becomes, how do we get white people to confront their own privileges? How do we get rid of the scarcity mindset that there is only so much to go around, and how do we deconstruct the idea that white people should be prioritized within that system?

To that end, lawmakers must write laws that specifically and explicitly grant protections to BIPOC. The need for this can best be demonstrated by Senator Sumner's efforts to abolish all race-based classifications when he introduced legislation in 1870.[212] Senator Sumner, time and time again, wanted to include language that would specifically account for Chinese people—that they would get the right to vote, that they would be protected from discrimination, that they would be allowed to naturalize and become American citizens.[213] However, his fellow senators held similar opinions as Justices Harlan and Field's and felt that Chinese immigrants, specifically laborers, were a danger to society and should be regarded as a lower caste.

Despite Senator Sumner's efforts to draft specific language that would protect Chinese people, the final drafts of the legislation would always leave that language out. Whether it was because the inclusion of that language would make the bill too hard to pass or because his fellow senators were

206. *Id.*
207. *Id.*
208. *Id.* at 337.
209. *Id.* at 340.
210. Haney-López, *supra* note 39, at 140.
211. Haney-López, *supra* note 39, at 142.
212. Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 1 Harv. J. L. & Pub. Pol'y 223, 228 (1994).
213. *Id.*

purposefully trying to exclude Chinese people, this lack of precision in the legislation allowed the courts to subsequently exclude Chinese people from the right to vote, naturalization, and protection from discrimination for years to come. In order to protect against similar violations, any future legislation must be precise in its language and any past, harmful and imprecise legislation must be amended.

The same need for precision existed in the passages of the acts that gave Black Americans the right to vote, the right to be citizens, and protection from discrimination. Whereas before, a bill might read that all men have the right to vote, the bill is amended to include language regarding how all men really means all men, and not just white men. This is essential because the courts have famously interpreted the phrase "all men"[214] to mean just white men. In trying to determine what the Founding Fathers might have meant by "all men are created equal,"[215] the courts have reasoned that because many of the Founding Fathers owned slaves and did not think of their slaves as being equal to them, but rather as pieces of chattel, that all men, by definition, would only include white men. The courts have also interpreted the phrase all men to not include women, either. The reasoning behind that was also a product of the social and political times, where women were not seen as equal partners, but rather were expected to just be homemakers.

Later on, however, legislation would be amended to include specific language to account for what the court had interpreted to be true at the time that the language of the legislation was in front of them. If the legislators had been extremely explicit—all men are created equal encompasses all people, all genders, all races, all sexual orientations, all disabilities—then there would be no need for the courts to step in and insert their own idea of what all men are created equal might mean.

IV. Conclusion

Historically, whiteness has been seen as a shining beacon. It is what beauty standards are based on, it is what dominates most industries, and it is regarded as what people should aspire to be more like. For decades, non-white people have clamored over each other, fighting for that prized status of being white-adjacent. The courts, both a product of the social and political tides of their times, did nothing but encourage such behavior. The white men that sat upon the judicial seats fabricated a social and racial caste—one that placed white people on top and the other races below. The courts then used this dichotomy of being white versus non-white to nurture to develop the exclusion of other races.

The recent events of the coronavirus and the Black Lives Matter protests have highlighted a critical need in our country. While the bottom half of the country is struggling to pay rent, buy food, find healthcare, and live a

214. U.S. Const., Art. I, § 8, cl. 8.
215. *Id.*

normal day to day life, the top one percent of the country has profited off of cheap labor. Billionaires like Jeff Bezos and Bill Gates, not subject to the same rules as everyone else, have capitalized on this system that was built to benefit white people in order to make themselves richer.

This system, that has been running the exact way it is supposed to since day one, profits off of the exclusion of non-white people, while glorifying and praising the privilege of being white. This can be seen in the rampant police brutality in our country—a system that was inherently designed to capture Black people and treat them as a lower caste. It can be seen through ICE and the colonization, fetishization, and racial subordination of the Global South. There millions of children are lost and people are deported without a second thought, entire cultures are wiped in the name of spreading democracy, and people of color are created to be less than the white person.

It can also be seen in the carceral system, where people of color, by and large, are convicted and sentenced more frequently than white people, where cash bail is an antiquated system that was designed to keep people of color in jail, and where people are literally still subjected to slavery, because slavery was never abolished completely and simply exists in a different form. The list goes on forever.

This nation does not know anything besides putting white people on a pedestal, but that can change. When people come together and work towards a common goal, when people across different races, classes, gender identities, etc. band together to demand government protection, amazing things can happen. The Black Lives Matter protests have had an incredible impact on the United States: it illuminated the "inordinate amount of money spent on policing and civilian payouts for police brutality", it "helped stimulate federal oversight for problematic cities such as Ferguson, Louisville, Baltimore, and Minneapolis", it "galvanized a new crop of elected officials and political actors", and it shone a bright light at the issue of police brutality.[216] If we are able to dismantle the existing system and create a new one where people are not perceived exclusively for the color of their skin and courts are able to stop excluding other races as being less than white, then there is hope for a more just, a more equitable, and a better tomorrow.

216. Rashawn Ray, *Black Lives Matter at 10 years: 8 ways the movement has been highly effective*, Brookings Institution (Oct. 12, 2022), https://www.brookings.edu/blog/how-we-rise/2022/10/12/black-lives-matter-at-10-years-what-impact-has-it-had-on-policing.