"A Chinaman's Chance"* in Court: Asian Pacific Americans and Racial Rules of Evidence

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* The title is a reference to *Chun Kock Quon v. Proctor*, 92 F.2d 326, 329 (9th Cir. 1937), where the court granted a writ of habeas corpus because an apparent U.S. citizen was excluded without good reason by overzealous administrators: "When Federal officers mete out such treatment to a man previously established to be an American citizen, we can well understand the bitter irony of the current phrase 'A Chinaman's chance.'"

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INTRODUCTION

Many scholars have observed that a key characteristic of the Asian Pacific American experience has been the presumption of foreignness, that Asians are not "real" Americans no matter how long they have lived in the United States, or how well they appear to have assimilated into mainstream culture.[1] As these scholars have noted, all Asians, as Asians, were targeted by the Asian Exclusion Laws that built on the Chinese Exclusion Act, and all Asians, as Asians, were burdened by the racial restrictions on naturalization that were in federal law between 1790 to 1952, and the restrictions on immigration in force between 1882 and 1965.[2] They also note the contributions of high and popular U.S. culture to the idea that Asians were not real Americans, and were somehow ineradicably foreign.

This scholarship focuses on group categorization and stereotype, arguing that classes such as "the Chinese," "Orientals," or "Asians" were classified by or denigrated socially in particular ways. This Article addresses several legal aspects of the presumption of foreignness as they applied not only to groups, but also to particular individuals of Asian racial background. While some of these have been written about before, others have not been given their full due.

By common law and statute, the law of evidence discriminated against Asians in various ways. Part I addresses the special treatment of Asians as witnesses in immigration and other cases.[3] State and federal courts and legislatures treated Asian testimony as less credible, or made it incompetent entirely. Part II addresses legal presumptions about the citizenship of Asians.[4] State and federal courts required persons of Asian racial ancestry, and only them, to prove that they were citizens in the context of statutes imposing restrictions on Asians. The law thus used negative attitudes about Asian Americans to disadvantage them in

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1. *See, e.g.*, FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 79–129 (2002); Keith Aoki, *"Foreign-ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 UCLA ASIAN PAC. AM. L.J. 1, 21–40 (1996); Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1024–25, 1025 n.101 (2001); Robert S. Chang, *Closing Essay: Developing a Collective Memory to Imagine a Better Future*, 49 UCLA L. REV. 1601, 1607 (2002); Neil Gotanda, *New Directions in Asian American Jurisprudence*, 17 ASIAN AM. L.J. 5, 38–41 (2010); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2–3 (2002); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 270–78, 289–311 (1997); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997); Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1617 (2005) ("The foreignness essential to the racialization of Asian Americans has operated to vitiate the notion that Asian Americans stand at the center of national membership." (footnote omitted)).

2. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 13–15, 19–22, 26–50 (1998); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 280–82, 286, 291–94 (1996) [hereinafter Chin, *Civil Rights Revolution*].

3. *See infra* Part I.

4. *See infra* Part II.

concrete ways. Not only were their substantive rights diminished, but also their ability to protect the rights they retained under law was made more challenging.

I. ASIANS AS UNTRUSTWORTHY WITNESSES

A. Competency and Credibility Under State Law

1. Incompetency

Continuing and expanding the tradition in American law of discriminating against African American witnesses,[5] the California Crimes and Punishments Act of 1850 provided that "[n]o black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person."[6] As a matter of textualism, this statute would seem inapplicable to Asians, who are simply unmentioned. But in *People v. Hall* in 1854,[7] the California Supreme Court held that the phrase "black person" "must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian."[8] Accordingly, a white man convicted of murder based on Chinese testimony was entitled to a new trial.

Perhaps recognizing that the textual point was debatable (one of the three justices dissented without opinion), the panel explained that, "even in a doubtful case, we would be impelled to this decision on grounds of public policy."[9] The court warned that allowing Chinese to testify would imply possession of other civil rights:

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5. 1 THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 226 (1858) ("One of the consequences of the want of liberty in the slave is his disqualification to be a witness in cases affecting the rights of freemen."); Gilbert Thomas Stephenson, *Race Distinctions in American Law*, 43 AM. L. REV. 869, 873–78 (1909).

6. Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230, *amended by* Act of Mar. 18, 1863, ch. 70, § 1, 1863 Cal. Stat. 69, 69, *repealed by* Act of Mar. 30, 1955, ch. 48, § 1, 1955 Cal. Stat. 488, 489. It went on to decree that "[e]very person who shall have one eighth part or more of Negro blood shall be deemed a mulatto, and every person who shall have one half of Indian blood shall be deemed an Indian." *Id.* This statute and its civil counterpart were impliedly repealed by the 1872 Penal Code and Code of Civil Procedure. CAL. PENAL CODE § 1321 (1872); CAL. CIV. PROC. CODE § 1880 (1874). *See generally* People v. McGuire, 45 Cal. 56, 57 (1872) (per curiam) ("[T]he Legislature, by the passage of the Codes, has repealed all laws which exclude Chinamen from testifying in actions to which white men are parties.") The Revised Laws of the State of California, a draft not enacted into law but which formed the basis of the 1872 codes, retained the disqualification in part in the Penal Code and in full in the Code of Civil Procedure. 3 REVISED LAWS OF THE STATE OF CALIFORNIA: CODE OF CIVIL PROCEDURE § 1880(3) (1871); 4 REVISED LAWS OF THE STATE OF CALIFORNIA: PENAL CODE § 1321 (1871) ("Except in cases of homicide, or when the offence was committed upon his person or property, no Mongolian, Chinese, Indian or person having one-half of Indian blood, is a competent witness in any criminal action or proceeding.").

7. People v. Hall, 4 Cal. 399 (1854).

8. *Id.* at 404.

9. *Id.*

> The same rule which would admit them 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.
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> This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an actual and present danger.[10]

The court had clear opinions on the character of Chinese immigrants in the United States:

> The anomalous spectacle of a distinct people, living in our community, recognizing no laws of this State, except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law; . . . whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.[11]

People v. Hall looks like an example of judicial activism through dramatic expansion of the language of the statute, but the California Supreme Court correctly predicted the views of the legislature. In 1863, agreeing that Asians should not be witnesses, the legislature amended the statute to read: "No Indian, or person having one half or more of Indian blood, or Mongolian or Chinese, shall be permitted to give evidence in favor or against any white person."[12] As of 1863, then, African Americans were allowed to testify freely in California—perhaps a nod to the changes being brought about by the Civil War. But the rights of Chinese were restricted, and not just Chinese but also other "Mongolians."[13]

In 1870, the California Supreme Court rejected a claim that the recently enacted Fourteenth Amendment invalidated California's testimonial disqualification.[14] It explained that the Constitution did not require the admission of evidence that would not help achieve justice:

> The theory of the law . . . [is] that every person shall be permitted to

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10. *Id.* at 404–05.

11. *Id.* at 405.

12. Act of Mar. 18, 1863, ch. 70, § 14, 1863 Cal. Stat. 69, 69 (amending Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230) (repealed 1955). The prohibition applied in civil cases as well. *See* Speer v. See Yup Co., 13 Cal. 73 (1859).

13. Other legal materials suggest that "Mongolians" include more than just Chinese. *See, e.g.*, *In re* Knight, 171 F. 299, 300 (E.D.N.Y. 1909) ("A person of the Mongolian race, either Chinese or Japanese, cannot be naturalized . . . ."); *In re* Saito, 62 F. 126, 126 (C.C.D. Mass. 1894) ("The Japanese, like the Chinese, belong to the Mongolian race . . . ."); *cf.* Roldan v. L.A. Cnty., 18 P.2d 706 (Cal. Dist. Ct. App. 1933) (holding that a Filipino person is "Malay," not Mongolian).

14. People v. Brady, 40 Cal. 198, 210–11 (1870).

> testify who can aid the Court in coming to a correct conclusion as to the facts upon which it is to adjudicate. The reason why the testimony of such persons would be valueless in judicial investigations may be that they are incapable of testifying intelligently; that they are too unreliable to be of any service; that their admission would probably defeat justice by producing false testimony, or that they have particular prejudices against certain classes which would cause their evidence likely to do harm where the rights of such persons are concerned; such evidence, it is presumed, would impede rather than advance the cause of justice. It would not tend to protect any, but might cause the conviction of the innocent, or the acquittal of the guilty . . . . [T]his is what the Legislature have decided, and had a right to decide, in enacting the law.[15]

Chinese were incompetent, then, not because of prejudice or discrimination, but based on pure rationality and to ensure fairness.

In his magisterial treatise on evidence, John H. Wigmore reported that "[n]o statutory exclusion of the Chinese race as witnesses seems ever to have obtained in any State law except that of California . . . ."[16] This is somewhat misleading; in fact, California was a leader in the area. In 1865, the Arizona Territory borrowed from and expanded California's law,[17] disqualifying any "black or mulato, [sic] or Indian, Mongolian or Asiatic" from testifying for or against a white person.[18]

California Chief Justice and future federal judge Lorenzo Sawyer recognized the consequences of creating a group that could be victimized with practical legal impunity:

> In the nature of things, it would seem, that the very fact of the existence in our midst of a large class of people, upon whom crimes can be committed without fear of detection or conviction, and, therefore, with impunity, must tend to encourage the commission of crimes upon that class . . . .[19]

He feared that, "in due time, more hardened and experienced reprobates will graduate to exercise their skill upon a wider field of criminal enterprise."[20] But this worry was not enough to make him invalidate the law.

The tradition of restricting the admissibility of testimony based on race ended in the states with the passage of the Voting Rights Act of 1870, § 16 of which is now 42 U.S.C. § 1981(a).[21] It provides: "[A]ll persons within the

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15. *Id.* at 211.

16. 1 JOHN H. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 516, at 931 (2d ed. 1923).

17. Admittedly, Arizona was then a territory rather than a state, so Wigmore was technically correct.

18. Act of Nov. 10, 1864, § 14, 1865 Howell Code Az. 50, 50 (repealed 1871).

19. People v. Jones, 31 Cal. 566, 574 (1867).

20. *Id.*

21. Voting Rights Act of 1870, ch. 144, § 16, 16 Stat. 140, 144 (codified as amended at 42 U.S.C. § 1981(a) (2006)).

jurisdiction of the United States shall have the same right in every State and Territory to . . . give evidence . . . as is enjoyed by white citizens . . . ."[22] As Justice White persuasively explained in *Runyon v. McCrary*, this section was introduced in Congress in 1870 because of the need to "protect Chinese aliens."[23] Commenting on the Fourteenth Amendment and § 1981(a) in 1887, one author described, "what will doubtless be accepted as the true rule, viz. that Chinese persons are, under the Constitution and laws of the United States guaranteeing to them 'the equal protection of the laws,' competent witnesses."[24]

And indeed, research has uncovered no instances of testimonial incompetency in state courts after the early 1870s. Cutting off what could have been an easy subterfuge, several courts held that Chinese witnesses's religious beliefs were not sufficient to render them incompetent.[25] Japanese people were also held competent.[26] In *State v. Lem Woon*, the Oregon Supreme Court refused to allow impeachment based on "the revengeful disposition of the Chinese people as a race" rather than some characteristic of the individual.[27] The court noted that such a principle would set "a dangerous precedent" because it logically could not be limited to Chinese:

> [A] rule that would admit evidence of such characteristics or customs of a class or a race to affect the credibility of an individual witness of that class or race cannot apply to the Chinese more than to the Negro, Indian, or any other people who practice them. This characteristic of the Chinese, if it does exist among them, is probably out-classed by family or neighborhood feuds existing to this day in certain localities in our own country, where wrongs of generations ago are still being avenged.[28]

2. Credibility

It is clear that fact finders did not treat Chinese testimony as on a par with that of a citizen. As one expert explained: "Chinese and other oriental races, are recognized as having little regard for the obligation of an oath, but their testimony may not be arbitrarily rejected."[29] Courts frequently noted the race of witnesses,

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22. *Id.*

23. Runyon v. McCrary, 427 U.S. 160, 200 (1976) (White, J., dissenting). *See generally* Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CALIF. L. REV. 529, 530–31 (1984) ("[S]ection 1981 derives from section 16 of the Civil Rights Act of 1870, a statute that was not designed—at least not in any primary sense—to promote the civil rights of the nation's newly emancipated black citizens, but rather to respond to the plight of another aggrieved racial minority—the Chinese of California.").

24. STEWART RAPALJE, A TREATISE ON THE LAW OF WITNESSES § 24, at 28 (1887).

25. *E.g.*, People v. Lim Foon, 155 P. 477, 482 (Cal. Dist. Ct. App. 1915); Green v. State, 71 Ga. 487, 493 (1883); Territory v. Yee Shun, 2 P. 84, 85 (N.M. 1884).

26. Pumphrey v. State, 122 N.W. 19, 20 (Neb. 1909).

27. State v. Lem Woon, 107 P. 974, 978 (Or. 1910).

28. *Id.*

29. 14 THE ENCYCLOPAEDIA OF EVIDENCE 159 (Edgar W. Camp ed., 1909) (footnotes

seemingly giving more credibility to facts supported by white witnesses;[30] indeed, Asian criminal defendants sometimes won appellate reversals if juries rejected exculpatory testimony of white witnesses.[31] In 1896, the California Supreme Court found no error in the prosecutor's argument "in substance, that the jury should disregard the testimony of all the Chinese witnesses in support of an alibi, as against the testimony of the white witnesses for the prosecution; and that the testimony of Chinese witnesses, unless corroborated by white witnesses, was insufficient to raise a reasonable doubt . . . ."[32]

Oregon had a special cross-examination rule for Chinese witnesses, at least where the defendant was Chinese and charged with murder. In *State v. Mah Jim*,[33] the Oregon Supreme Court was apparently concerned that the defendant had been framed for a murder committed by other people. Accordingly, the court concluded that there should have been greater leeway for cross-examination to uncover the plot. Said the court:

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omitted); *see also In re* Shong Toon, 21 F. 386, 392 (D. Cal. 1884) (noting that the court was "[p]rofoundly impressed . . . with the unreliability of Chinese testimony in general"); *In re* Woman's N. Pac. Presbyterian Bd. of Missions, 22 P. 1105, 1109 (Or. 1890) (overturning a trial court order awarding custody of Chinese children to their grandmother based on the unreliability of Chinese testimony: "Chinamen, such as we have among us, can rarely be trusted in such matters, however bland and plausible they may appear. Those of the race who have come to this coast have generally exhibited a total disregard of virtue, candor, and integrity, and have shown such a propensity to cunning, deception, and perfidy that, if they were to engage in an effort to accomplish an apparently meritorious object, a strong suspicion would arise that there was some covert, sinister scheme at the bottom of it."); Chiou-Ling Yeh, *The Chinese "Are a Race that Cannot Be Believed": Jury Impaneling and Prejudice in Nineteenth-Century California*, 24 W. LEGAL HISTORY 1 (2011) (discussing attitudes of prospective jurors toward Chinese witnesses). *But see* United States v. Lee Yung, 63 F. 520, 521 (S.D. Cal. 1894) (refusing to deport a defendant based on his brief trip to Mexico; noting that he was "what is termed an 'Americanized Chinaman,' having adopted the Christian religion and American manners of dress and living," and had "a high reputation for truthfulness and reliability").

30. *See, e.g.*, People v. Chin Non, 80 P. 681, 682 (Cal. 1905) ("All the witnesses, white and Chinese alike, testify to these facts, making it a clear case of deliberate murder."); People v. Fong Sing, 175 P. 911, 914 (Cal. Dist. Ct. App. 1918) ("[W]e cannot perceive how the excluded testimony could have added any more support to the alibi theory than it derived from the testimony of an unimpeached white witness."); People v. Ah Wing, 169 P. 402, 405 (Cal. Dist. Ct. App. 1917) ("The evidence of his guilt is quite clear from the testimony of white witnesses."); State v. Ah Chuey, 14 Nev. 79, 92–93 (1879) (noting that key facts were "shown by the testimony of white witnesses"); *see also infra* notes 65–66.

31. People v. Un Dong, 39 P. 12, 13 (Cal. 1895) ("On the part of defendant, a large number of Chinese witnesses, and some white witnesses, gave testimony tending strongly to show that defendant was not present at the time of the assault, and did not participate therein."); People v. Singh, 53 P.2d 403, 405 (Cal. Dist. Ct. App. 1936) ("A conclusive alibi was established in behalf of Sansar Singh which requires a reversal of the judgment with respect to him. Eight white witnesses testified to facts which are undisputed . . . ."); *see also* People v. Green, 34 P. 231, 232 (Cal. 1893) (reversing a conviction for robbery of a Chinese person because the trial court limited closing arguments to one hour per side, and, as evidence of the closeness and complexity of the case, noting that "[t]his testimony of five white witnesses on the part of the defendant was irreconcilably inconsistent with that of the three Chinamen who had testified in chief on the part of the people").

32. People v. Foo, 44 P. 453, 455–56 (Cal. 1896).

33. State v. Mah Jim, 10 P. 306 (Or. 1886).

> Experience convinces every one that the testimony of Chinese witnesses is very unreliable, and that they are apt to be actuated by motives that are not honest. The life of a human being should not be forfeited on that character of evidence without a full opportunity to sift it thoroughly.[34]

The court explained that the Chinese witnesses "may have been attempting to carry out a diabolical design,—no one can tell what that class of persons may have in view."[35] Because Chinese practices "are very peculiar and mysterious," courts should not "adopt a refined, technical rule as to the admission of evidence tending to show what their motives may be."[36]

Two years later, the Oregon court reversed another conviction on the same ground. In *State v. Ching Ling*,[37] the court explained:

> In cases of homicide among these Chinamen, it is almost impossible to ascertain who the guilty parties are. I am satisfied that they will not hesitate to conspire, and make those answerable for outrages who had no hand in perpetrating them. It behooves courts and juries, in the trial of these people for capital offenses, where the evidence of their guilt depends mainly upon the testimony of their own kind, to be prudent, vigilant, and discriminating; otherwise they are liable to be made use of as a means to carry out the machinations of the crafty and designing.[38]

The court explained that there were multiple reasons for the policy:

> Juries should be loth to convict a Chinaman of murder in the first degree upon Chinese testimony, not wholly on account of a tender regard for the life of the accused, but also from a respect and reverence for truth and justice. If we were disposed, through a dislike of the race, to consider the life of a Chinaman as a trivial matter, still we would have no right to immolate justice upon the altar of our prejudice.[39]

B. Chinese Witnesses Under Federal Law

Treatment of Chinese witnesses under federal law was another matter; there was no pretense of equal treatment from the last quarter of the nineteenth century to the middle of the twentieth. Beginning in 1882, Congress restricted the immigration of Chinese.[40] Over time, Congress passed a series of statutes requiring racial evidence when dealing with Chinese.[41] The Supreme Court uniformly upheld these special requirements.[42] Under these laws, Chinese

34. *Id.* at 306–07.
35. *Id.* at 307.
36. *Id.*
37. State v. Ching Ling, 18 P. 844 (Or. 1888).
38. *Id.* at 847.
39. *Id.*
40. Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (suspending the admittance of Chinese laborers into the United States) (repealed 1943).
41. *See infra* notes 43–47, 57, 60–61 and accompanying text.
42. *See infra* notes 48–49, 51–52, 54, 56, 58, 68–69 and accompanying text.

witnesses were subject both to rules of absolute incompetency and to impeachment based on race, and claims based on their testimony were subject to enhanced burdens of proof.

1. Incompetency

In several contexts, testimony of Chinese witnesses was deemed incompetent to prove particular points. Exclusion was based on a belief that Chinese were not credible.

a. Residence certificates

In 1892, Congress amended the 1882 Chinese Exclusion Act to require that Chinese laborers lawfully present in the United States obtain and carry a residence card[43] on penalty of a year of hard labor and deportation.[44] A Chinese person found without his residence card was subject to a trial to determine his status.[45] Testimony of a "credible white witness" was necessary to establish the individual's lawful residence.[46] In 1893, Congress amended the statute to require "at least one credible witness other than Chinese."[47]

In *Fong Yue Ting v. United States*, the Supreme Court upheld the registration requirement and its evidentiary limitation.[48] The Court explained that governments were free to discriminate against witnesses on the basis of race:

> [T]he requirement of proof, "by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act," is within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence . . . .[49]

But what of the Voting Rights Act of 1870, prohibiting racial discrimination against witnesses?[50] The Court in *Fong Yue Ting* held that "[t]he competency of all witnesses, without regard to their color, to testify . . . rests on acts of Congress, which Congress may at its discretion modify or repeal."[51] Congress was within its authority in "not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race."[52] In the period before the rise of modern equal protection jurisprudence, the Court did not hold that Congress had

43. Geary Act, ch. 60, § 6, 27 Stat. 25, 25–26 (1892) (repealed 1943).
44. *Id.* § 4.
45. *Id.* § 6.
46. *Id.*
47. Act of Nov. 3, 1893, ch. 14, §6, 28 Stat. 7 (repealed 1943).
48. Fong Yue Ting v. United States, 149 U.S. 698, 729 (1893).
49. *Id.* (quoting § 6 of the Geary Act).
50. Voting Rights Act of 1870, ch. 144, § 16, 16 Stat. 140, 144, (codified as amended at 42 U.S.C. § 1981(a) (2006)).
51. *Fong Yue Ting*, 149 U.S. at 729.
52. *Id.* at 730.

the same obligation as did states to treat people equally.[53] There was, therefore, no compelling doctrinal argument that the Constitution restricted Congress's actions in making rules of evidence.

Beyond this technical point, the Court seemed to recognize that Chinese witnesses were generally untrustworthy. Allowing Chinese to testify, which had been permitted under the prior version of the Chinese Exclusion Act, "was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath."[54] Exclusion of testimony based on race did not go uncriticized. Wigmore, for example, stated that "the supposed special danger of perjury by Chinese attempting to evade those statutes of exile was precisely what might be expected from the people of any country when a hostile measure is attempted to be enforced by the harshest means."[55]

b. Returning merchants

Merchants had certain privileges under the Chinese Exclusion laws. Unlike laborers, they were not absolutely excluded from reentry into the United States after leaving. Thus, merchants in the United States could leave and return. This statute was no obscurity; the Court mentioned, interpreted, or applied the exception for merchants in at least eleven decisions.[56]

For this special status, one white witness was insufficient to establish a Chinese merchant's status, and thus their right to reentry. In 1893, Congress provided that, to be allowed to land, a returning merchant "shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business . . . for at least one year before his departure from the United States."[57] The Court upheld the statute against an equal protection attack on the

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53. *See* La Belle Iron Works v. United States, 256 U.S. 377, 392 (1921) ("The Fifth Amendment has no equal protection clause . . . .").

54. *Fong Yue Ting*, 149 U.S. at 730 (quoting Chae Chan Ping v. United States, 130 U.S. 581, 598 (1889)). Thus, even if it caused hardship, courts applied the law rigorously. *See, e.g.*, United States v. Williams, 83 F. 997, 999 (C.C.N.D. Cal. 1897) ("It may be that the law, in making the defendant, or any one of his race, incompetent as a witness to prove such fact [i.e., lawful residence], works in this particular case a hardship; but the court cannot, for this reason, suspend its operation.").

55. WIGMORE, *supra* note 16, at 931.

56. Nagle v. Loi Hoa, 275 U.S. 475, 476 (1928); Cheung Sum Shee v. Nagle, 268 U.S. 336, 343–46, (1925); Yee Won v. White, 256 U.S. 399, 399–400 (1921); White v. Chin Fong, 253 U.S. 90, 92–93 (1920); Chin Fong v. Backus, 241 U.S. 1, 3–5 (1916); Tom Hong v. United States, 193 U.S. 517, 520–23 (1904); Lee Lung v. Patterson, 186 U.S. 168, 169, 176 (1902); Li Sing v. United States, 180 U.S. 486, 493–95 (1901); United States v. Gue Lim, 176 U.S. 459, 460–61, 463–64, 466–68 (1900); Lem Moon Sing v. United States, 158 U.S. 538, 546 (1895); Lau Ow Bew v. United States, 144 U.S. 47, 62–64 (1892); *see also* Tulsidas v. Insular Collector of Customs, 262 U.S. 258, 264–66 (1923) (applying the merchant exception to the Philippines during the period when it was a U.S. commonwealth).

57. Act of Nov. 3, 1893, ch. 14, § 2, 28 Stat. 7, 8 (repealed 1943). White witnesses also had to

authority of *Fong Yue Ting*, explaining: "We cannot . . . yield to the earnest contention made in behalf of inoffensive Chinese persons who seek to come within the limits of the United States and subject themselves to their jurisdiction, by modifying or relaxing, by judicial construction, the severity of the statutes under consideration."[58]

c. Pharmacy workers in China

A final special restriction on Chinese credibility remains in the United States Code as of 2013. 21 U.S.C. § 201 is part of the system of regulation of the practice of pharmacy and the sale of medicine in the United States consular districts in China, which have been defunct since 1943.[59] The statute places a special limitation on Chinese subjects working in U.S.-licensed pharmacies in China:

> Where it is necessary for a [licensee] . . . to employ Chinese subjects to compound, dispense, or sell at retail any drug, medicine, or poison, such [licensee] . . . may employ such Chinese subjects when their character, ability, and age of twenty-one years or over have been certified to by at least two recognized and reputable practitioners of medicine, or two pharmacists licensed under this chapter whose permanent allegiance is due to the United States.[60]

That is, Chinese subjects, but not U.S. citizens or other foreigners, must demonstrate their good character. And, because Chinese were prohibited from naturalizing and becoming U.S. citizens until 1943, for practical purposes, no person of Chinese ancestry could testify when this law had operative force. Violation of the law is a misdemeanor, punishable by fine and imprisonment.[61]

2. Credibility

To the extent that Chinese testimony went to legal issues and questions not mentioned in the statutes, it was not technically incompetent, and was therefore admissible.[62] Thus, while a Chinese person seeking admission had to prove that he was a merchant through witnesses other than Chinese, federal courts held that a Chinese person already in the United States could use Chinese testimony to prove

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prove "that during such year [the merchant] was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant." *Id.*

58. *Li Sing*, 180 U.S. at 495.

59. *See U.S., Britain Give Up Extra China Rights*, N.Y. TIMES, Jan. 12, 1943, at 4 (describing the treaty ending American extraterritorial jurisdiction within China).

60. 21 U.S.C. § 201 (2012).

61. *Id.* § 212.

62. *See, e.g.*, *In re* Tung Yeong, 19 F. 184, 190 (D. Cal. 1884) ("Chinese persons, in common with all others, have the right 'to the equal protection of the laws,' and this includes the right 'to give evidence' in courts. A Chinese person is therefore a competent witness. To reject his 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.").

merchant status as a defense to a deportation action.[63] Also, no special evidentiary requirements attached to a claim that a person of Chinese racial ancestry was born in the United States. This was quite consequential, because entry as a U.S. citizen was one of the few avenues open to racial Chinese.

Beyond admissibility per se, there was a split in the reported decisions on the weight of Chinese testimony, whether Chinese testimony should be treated with suspicion. A number of courts offered stirring defenses of impartial justice: The Fifth Circuit, for example, reversed a district court's deportation order and granted relief to a Chinese person, explaining:

> It is only by arbitrarily rejecting the uncontradicted testimony that the order of deportation can be sustained.
>
> The same fairness and impartiality should govern in considering and weighing the testimony of persons of Chinese descent who claim to be citizens of this country as are given to the testimony of any other class of witnesses.[64]

Similarly, the Ninth Circuit proclaimed that:

> [A] court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All people, without regard to their race, color, creed, or country, whether rich or poor, stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim, or caprice, in passing upon the credibility of every witness.[65]

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63. Louie Dai v. United States, 238 F. 68, 75 (3d Cir. 1916) ("Unless disqualified by provisions of the act, Chinese persons are competent witnesses. The statute in no place disqualified them. They may testify in any number to any fact. The law simply limits their number as witnesses to one fact, and provides, that as to that fact, testimony shall not be conclusive unless it include [sic] the testimony of a witness other than Chinese. That fact is the residence of laborers, and does not, by expression or necessary implication, extend to the fact of the occupation of merchants. We are therefore of opinion that the evidence of the defendant's mercantile status is not insufficient because it consisted wholly of the testimony of Chinese witnesses."); *see also* United States v. Quong Chee, 89 P. 525, 530 (Ariz. 1907) ("The issue presented was therefore his right to remain. The obligation to establish such right 'by affirmative evidence to the satisfaction of such judge.' [sic] would entitle him to the introduction of any affirmative evidence necessary thereto, and is not analogous to the procedure upon his offering to land from the vessel upon his re-entry.").

64. Chin Hing v. United States, 24 F.2d 523, 524 (5th Cir. 1928); *see also* Lo Kee v. United States, 31 F.2d 407, 408 (5th Cir. 1929); Gee Cue Beng v. United States, 184 F. 383, 385 (5th Cir. 1911) ("Counsel for the United States . . . contend[s] that the commissioner need not believe a Chinese witness in a Chinese deportation proceeding when he sees him, and has an opportunity to judge of his credibility. Even if we were disposed to agree with counsel that United States commissioners may disregard evidence in cases where only the liberty of a Chinese person is involved, it would be of no avail here unless we should go further and impute perjury, not only to the appellant, but to some five unimpeached witnesses, including a white citizen, and at least one government witness; and we are not disposed to here indorse such contention.").

65. Woey Ho v. United States, 109 F. 888, 890 (9th Cir. 1901). Similarly, the court in United States v. Lee Huen, 118 F. 442, 463 (N.D.N.Y. 1902) wrote:

Nevertheless, as in the state courts,[66] federal courts deciding immigration cases frequently noted the race of witnesses,[67] indicating that the testimony of whites was regarded as being particularly credible. This included the U.S. Supreme Court. For example, in *Kwock Jan Fat v. White*,[68] a person of Chinese ancestry claimed derivative U.S. citizenship so that there was no technical prohibition on testimony of witnesses other than Chinese. But the Court's opinion in the applicant's favor recited no less than nine times that the testimony of "three white witnesses" (or some variation) supported the claim.[69]

Moreover, even courts recognizing formal competency as to most issues

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> This court cannot assent to the proposition that in one of these cases a witness for the person sought to be deported is interested merely because he is a Chinese person. Such a rule would make most witnesses in a court of justice interested witnesses, and, if interest alone justifies the court in refusing credence to the testimony of a witness, then many in every trial would be more or less discredited by reason of mere national kinship, and the court or jury, as the case might be, would be at liberty to refuse to be bound by their testimony when testifying in favor of a party of their own nationality. There is no rule of law that justifies the assumption that a Chinese person is more interested in his countrymen than is a person of some other nationality in his. A Yankee may testify for a Yankee, but he is not therefore interested. An Irishman may testify for an Irishman, an Englishman for an Englishman, a German for a German; but such witnesses are not, in the eye of the law, interested. No discredit can legally attach to the testimony of a person because he gives his evidence in behalf of a party belonging to his own nationality.

66. *See, e.g.*, People v. Chin Non, 80 P. 681, 682 (Cal. 1905); People v. Fong Sing, 175 P. 911, 914 (Cal. Dist. Ct. App. 1918); People v. Ah Wing, 169 P. 402, 405 (Cal. Dist. Ct. App. 1917); State v. Ah Chuey, 14 Nev. 79, 92–93 (1879); *see also* People v. Foo, 44 P. 453, 455–56 (Cal. 1896); People v. Un Dong, 39 P. 12, 13 (Cal. 1895); People v. Green, 34 P. 231, 232 (Cal. 1893); People v. Singh, 53 P.2d 403, 405 (Cal. Dist. Ct. App. 1936).

67. *See, e.g.*, Ng Heu Yim v. Bonham, 79 F.2d 655, 656 (9th Cir. 1935) (holding that, although the "white witness [was] of good character and unquestioned veracity," the witness's testimony that the Chinese person "look[ed] like" a boy he had known twenty years before was insufficient to warrant reversal of administrative finding); *Lo Kee*, 31 F.2d at 407 ("Three white witnesses testified that they had known Lo Kee in New Orleans from 8 to 14 years, and that he was a man of good character."); Chan Sing v. Nagle, 22 F.2d 673, 674 (9th Cir. 1927) ("In support of the application, the testimony of four white witnesses was also received."); *Louie Dai*, 238 F. at 70 (3d Cir. 1916) (recognizing the critical fact of merchant status was supported by "four white witnesses and one Chinese witness, who testified that they had known him as a resident of Lansdowne, Pennsylvania, engaged in the laundry business"); Moy Wing Sun v. Prentis, 234 F. 24, 26 (7th Cir. 1916) ("Five white witnesses connected with a Sunday school in Chicago testified to petitioner's attendance at the Sunday school since about the middle of 1912 . . . ."); United States v. Lui Lim, 4 F. Supp. 873, 875 (D. Id. 1933) ("W. T. Brown, a white person and a native of the United States, testified that the defendant and his uncle came to Boise, Idaho, some time between 1891 and 1895 . . . ."); *In re* Chu Poy, 81 F. 826, 829 (N.D. Oh. 1897) (denying a deportation order on the ground that the defendant was not a legitimate merchant, and explaining that "[t]he story which he and his Chinese witnesses tell about his mercantile employments is wholly consistent with what we know about him from the white witnesses").

68. Kwock Jan Fat v. White, 253 U.S. 454 (1920).

69. *Id.* at 455 ("three white men"); *id.* ("[T]hree white witnesses are representative men of this town and would have no motive in misstating the facts."); *id.* at 457 ("three white witnesses called by petitioner"); *id.* at 460 ("testimony of three white witnesses"); *id.* ("three white witnesses from Monterey"); *id.* at 461 ("three credible white witnesses"); *id.* ("the three white witnesses are representative men of this town"); *id.* ("the white witnesses . . . are men of standing in this town"); *id.* at 462 ("Michaelis, Ortins and another important white witness").

could still set high barriers for Chinese testimony. It is fair to say that many courts treated Chinese testimony as suspect. One U.S. district court judge explained that

> Congress has not . . . enacted that, when a person of Chinese descent claims to have been born in the United States, he must establish such fact by testimony of witnesses other than Chinese. This omission cannot be supplied by the courts, and therefore Chinese persons are competent witnesses in cases of this character . . . .[70]

However, there was bitterness to go along with the sweet:

> [W]here only this class of witnesses testify that the Chinese person . . . is a native of this country, unless the court is fully satisfied of the truth of such testimony, its finding should follow the presumption that a Chinese person coming from China, and seeking to land in the United States, is an alien, and not a native-born citizen . . . .[71]

Another group of courts treated Chinese testimony as formally suspect. A U.S. district court judge in New York explained: "If Chinese witnesses, unimpeached, except by their appearance and manner of testifying, are to be believed and their testimony accepted, all Chinese persons desiring to enter the United States will set our exclusion laws at defiance. It is not necessary to comment on this class of testimony."[72]

A U.S. district court judge in Oregon denied an application for readmission of a person claiming native citizenship based on Chinese testimony alone. In this class of cases, the Chinese Exclusion Act did not require white witnesses. Yet, the court ruled: "I am not willing to establish the precedent of admitting Chinese persons, who have admittedly remained out of the country for so great a length of time, unless some white witness, or some fact not depending upon Chinese testimony, corroborates the testimony of the Chinese witnesses . . . ."[73] He rejected the argument that exclusion of a U.S. citizen was unfair: "Those who leave the country when infants must not expect to gain ready readmission after they have, in effect, reached maturity. If satisfactory proof of their right to land is not possible in such a case, the fault is theirs."[74]

This holding is remarkably unsympathetic in that it holds infants to a high standard of foresight and responsibility. And yet, it is hard to accuse the judge of faithlessness to the policy of the Chinese Exclusion Act.[75] Judicial defenders of

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70. *In re* Jew Wong Loy, 91 F. 240, 243 (N.D. Cal. 1898).
71. *Id.*
72. United States v. Chu King Foon, 179 F. 995, 997 (N.D.N.Y. 1910).
73. *In re* Louie You, 97 F. 580, 581 (D. Or. 1899).
74. *Id.*
75. *See, e.g.*, Rodgers v. United States *ex rel.* Buchsbaum, 152 F. 346, 352 (3d Cir. 1907) ("[C]ases arising under the Chinese exclusion acts are sui generis, involving the judicial or administrative enforcement of a particular policy on the part of the United States having as its object the prevention of competition between Chinese labor and other labor in this country. There, contrary to the general rules of evidence, prima facie presumptions are indulged against the Chinaman, and it

impartial justice, who insisted that Chinese testimony could be sufficient when the law did not exclude it, ignored rather than reconciled the terms of the law they were applying. One might have asked these judges why the law would exclude Chinese, prohibit their naturalization, and treat their testimony as inadmissible in several important contexts if they were racial equals. It is hard to explain why Congress would impose those burdens if it regarded the mistaken deportation of a U.S. citizen or a lawful immigrant of Asian ancestry as equivalent to the deportation of a U.S. citizen or immigrant of what the law treated as a more desirable race. Accordingly, the suspicion of Chinese testimony seems no more or less fair than the underlying policy of racial exclusion.

II. THE STATUTORY PRESUMPTION OF FOREIGNNESS

A. The Racial Presumption in Deportation Cases

The Chinese Exclusion Act embodied a major idea, namely that Chinese were undesirable immigrants. It also contained a number of subsidiary presumptions designed to carry out the exclusion. One notable presumption is a provision of the Geary Act, passed in 1892, placing the burden of proving lawful presence on all persons of Chinese ancestry.[76] That is, even though persons of Chinese ancestry born in the United States were U.S. citizens,[77] all racial Chinese were nevertheless presumptively foreign.

The statute provided "[t]hat any Chinese person or person of Chinese descent arrested under the provisions of this act . . . shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof . . . his lawful right to remain in the United States."[78] The Supreme Court held that this statute applied to racial Chinese in the United States claiming to be U.S. citizens.[79] As a result, any person of apparent Chinese ancestry

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may be that the principles of statutory construction properly may be applied to the Chinese exclusion acts in a manner somewhat different from that in which they are applicable . . . [such as] other statutes in pari materia."); United States v. Yong Yew, 83 F. 832, 837–38 (E.D. Mo. 1897) ("Again, considering the public policy of the United States, as asserted and assented to in the several treaties already referred to between the United States and China, and the repeated and emphatic declarations of such policy by the congress of the United States, . . . I am disposed to so rule this case as to really subserve that policy. Chinese labor and Chinese civilization are not wanted in this country . . . ."); *see also* United States *ex rel.* Hintopoulos v. Shaughnessy, 353 U.S. 72, 78 (1957) (rejecting a claim that "the Board applied an improper standard in exercising its discretion when . . . it took into account the congressional policy underlying the Immigration and Nationality Act of 1952, the latter being concededly inapplicable to this case").

76. Geary Act, ch. 60, § 3, 27 Stat. 25, 25 (1892) (repealed 1943).

77. United States v. Wong Kim Ark, 169 U.S. 649, 649 (1898).

78. Geary Act § 3.

79. Morrison v. California, 291 U.S. 82, 89 (1934) (quoting Chin Bak Kan v. United States, 186 U.S. 193, 200 (1902) ("The inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed.")). In 1922, the Supreme Court had recognized that there was a split in

could be seized and deported if he or she could not prove U.S. citizenship or other lawful statuses, such as a merchant status or entry prior to the Chinese Exclusion Act.

A federal statute placed the burden on all aliens to show admissibility and lawful admission. This functionally extended the presumption of deportability to all Asians, who were generally inadmissible after 1924 because of their racial ineligibility to citizenship.[80] Accordingly, the position of all Asians in the United States was precarious: at any moment they could be called upon to prove citizenship or lawful entry on pain of deportation because their race itself was evidence of deportability. The rule was different with non-Asians; the United States bore the burden of first proving alienage, foreign birth, or citizenship before a non-Asian being deported had the obligation to prove legal status.[81] As the Supreme Court explained, "[e]xcept in case of Chinese, or other Asiatics, alienage is a condition, not a cause, of deportation."[82]

The presumption of foreignness extended to the idea that all persons of Chinese racial ancestry would be treated as if they were from China even if they were natives and citizens of some other country.[83] People of Chinese ancestry subject to deportation who wanted to be sent somewhere other than China bore the burden of showing that they were citizens or subjects of a country other than China,[84] and, even if they did, the statute provided that they would nevertheless be deported to China if their actual country of citizenship or residence charged a fee

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authority in the lower courts, notwithstanding *Chin Bak Kan*. Ng Fung Ho v. White, 259 U.S. 276, 283 n.1 (1922). This doubt was dispelled by *Morrison*.

Note that this presumption was not a "Thayer" presumption, which dissipated as soon as some evidence to the contrary was introduced. It was a "Morgan" presumption, shifting the burden of persuasion. *See* MIGUEL A. MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES 735–37, 739 (5th ed. 2012) (explaining the differences between the Thayer and Morgan presumptions).

80. 8 U.S.C. § 221 (1925) (repealed 1952); Tsugio Myazono v. Carr, 53 F.2d 172, 174 (9th Cir. 1931) (placing the burden of proof on a Japanese person claiming to be U.S. citizen); *see also* Kishan Singh v. Carr, 88 F.2d 672, 679 (9th Cir. 1937) (placing the burden on an Asian Indian to prove his entry into the United States before the effective date of a prohibition on Asian immigration).

81. United States *ex rel.* Bilokumsky v. Tod, 263 U.S. 149, 153 (1923) ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. It is true that the burden of proving alienage rests upon the Government. For the statutory provision which puts upon the person arrested in deportation proceedings the burden of establishing his right to remain in this country applies only to persons of the Chinese race . . . ." (citation omitted)).

82. *Id.* at 157.

83. Geary Act § 2 (designating China as the default deportation destination for "any Chinese person or person of Chinese descent," particularly if the alternative country to which the person claimed citizenship required a deportation tax).

84. United States v. Sing Lee, 125 F. 627, 628 (W.D.N.Y. 1903) ("The burden of proof in this class of cases, both as to the right to remain within the United States and the right of removal to a country other than China, rests upon the accused.").

for their return.[85] This, of course, would be a great hardship for a person of Chinese ancestry from Canada, Mexico or some other place.[86]

The presumption of foreignness in the immigration context did not rest entirely upon the statute; some courts applied it based on general principles.[87] For example, a U.S. district court judge from Washington state concluded: "There is a natural presumption that a person of the Mongolian race, coming to this country from China, is an alien; and to overcome that presumption . . . convincing evidence is essential."[88] The judge explained that when dealing with

> such a person, he is himself an exhibit, his language, manners, and physical appearance must be considered as evidence tending to prove his alienage, and without evidence sufficient to create a belief that such a person is, notwithstanding his alien parentage, a citizen by birth, the natural presumption merges into a legal conclusion.[89]

The Ninth Circuit agreed with this approach to determining citizenship, affirming a deportation order in part because the litigant's "personal appearance, indicat[ed] by his dress, physiognomy, and queue, that he was a Chinaman."[90]

B. The Burden of Proof in Citizenship Cases

A number of courts, following a 1914 decision of the U.S. Court of Appeals for the Second Circuit, held that Chinese persons claiming to be U.S. citizens should be held to a higher standard of proof than the ordinary civil preponderance of the evidence: "[T]here is a natural presumption that a person of the Mongolian race is an alien, and it is essential that the evidence to overcome it and to show that the man is entitled to the privileges of citizenship in the United States should be clear and convincing."[91]

In 1954, the federal courts issued a series of decisions representing an important milestone in the end of special treatment of Asian litigants in

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85. United States v. Yuen Pak Sune, 183 F. 260, 266–67 (N.D.N.Y. 1910) (ordering deportation to China because Canada had a Chinese head tax), *aff'd*, 191 F. 825 (2d Cir. 1911).

86. This problem was repeated during a later period when the United States had no diplomatic relationship with the People's Republic of China and people born in mainland China faced deportation to places they had never been. *See* Ng Kam Fook v. Esperdy, 375 U.S. 955, 955–56 (1963) (Douglas J., dissenting from denial of certiorari).

87. *See Ex parte* Lung Wing Wun, 161 F. 211 (W.D. Wash. 1908).

88. *Id.* at 212–13.

89. *Id.* at 213.

90. Low Foon Yin v. U.S. Immigration Comm'r, 145 F. 791, 797–98 (9th Cir. 1906).

91. Lee Sim v. United States, 218 F. 432, 435 (2d Cir. 1914); *see also* Lee Lew You v. United States, 230 F. 820, 821 (2d Cir. 1916) ("The presumption that a person of the Mongolian race is not a citizen is materially strengthened when he seeks to enter the country in so clandestine a manner."); Ly Shew v. Acheson, 110 F. Supp. 50, 58–59 (N.D. Cal. 1953), *vacated sub nom.* Ly Shew v. Dulles, 219 F.2d 413 (9th Cir. 1954); *Ex parte* Chin Him, 227 F. 131, 133–34 (W.D.N.Y. 1915) (following *Lee Sim*); *Ex parte Lung Wing Wun*, 161 F. at 212–13.

immigration cases. In 1943, the Chinese Exclusion Act had been repealed,[92] so the "credible white witness" regime was gone. In 1952, Congress eliminated racial restrictions on naturalization and the prohibition on immigration of people of Asian racial background, although only tiny numbers were allowed in until 1965.[93] As one court explained:

> In the past, applicants . . . had a substantial motive, perhaps, to present fraudulent claims, because the Chinese Exclusion Act barred all alien Chinese from admission to the United States, and the only manner in which a person of the Chinese race could enter was by proving citizenship of the United States. This motive no longer exists, because under the present law persons of the Chinese race are not excluded from entry.[94]

For these reasons, the particular imperatives of suspicion of Chinese testimony had diminished, although they had not dissipated entirely.

Nevertheless, it was clear that in 1954, the year of *Brown v. Board of Education*,[95] the underlying principles of jurisprudence—as well as the practicalities—had changed. A unanimous panel of the Seventh Circuit rejected the cases holding that Chinese claimants to citizenship were required to prove their status by clear and convincing evidence:

> The Court of Appeals in *Mar Gong v. Brownell*, in repudiating this theory stated: "We recognize all that may be said with respect to the necessity of the court guarding against imposition, but we also are of the view that no special quantum of proof should be exacted from any person claiming American citizenship merely because of his racial origin." We agree with this statement but think it could well be expressed in more emphatic language. We would be much chagrined to think that the adjudication of an asserted right in the courts of this country was dependent in the slightest degree upon the national origin of the party involved. To think otherwise is to countenance discrimination in the courts, the one certain place where it should be unknown.[96]

Today, it would be shocking for the Department of Justice to argue, as it did in 1954, that testimony should be reviewed with suspicion based on race, and there are many cases holding that it is erroneous to do so.[97]

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92. Magnuson Act, ch. 344, 57 Stat. 600 (1943) (repealing the Chinese Exclusion Act and subsequent amendments to it).

93. Chin, *Civil Rights Revolution*, *supra* note 2, at 291, 298.

94. Lou Goon Hop v. Dulles, 119 F. Supp. 808, 810 (D.D.C. 1954).

95. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

96. Lee Wing Hong v. Dulles, 214 F.2d 753, 758 (7th Cir. 1954) (citation omitted) (quoting Mar Gong v. Brownell, 209 F.2d 448, 453 (9th Cir. 1954)); *see also Ly Shew*, 219 F.2d at 416; Wong Fon Haw v. Dulles, 125 F. Supp. 658, 659 n.4 (S.D.N.Y. 1954).

97. *See, e.g.*, Huang v. Gonzales, 453 F.3d 142, 148 (2d Cir. 2006) ("[T]his is the rare case where remand is required because of the IJ's apparent bias and hostility toward Huang. The hearings

The Seventh Circuit's stirring suggestion in *Mar Gong v. Brownell* that discrimination should be unknown to federal courts was necessarily aspirational where substantive federal immigration law drew lines on the basis of race until 1965 and the federal courts administered them.[98] Accordingly, it could not be literally true that courts treated people of different races equally. Nevertheless, the law was headed in the direction of equality, and many courts were not eager to embrace explicit racial discrimination if there was some way to ameliorate it.

C. The Racial Presumption in Alien Land Cases

In the two decisions in *Morrison v. California*, the U.S. Supreme Court approved extending the presumption of foreignness beyond the immigration context.[99] Even though the cases involved criminal prosecutions, the justices unanimously held that the law could presume persons of Asian racial ancestry found in the United States were aliens and place the burden on them to prove otherwise.[100]

The cases dealt with California's anti-Asian alien land law.[101] The alien land laws of California and other states built on federal naturalization laws prohibiting or restricting the naturalization of Asians. Asian immigrants were "aliens ineligible to citizenship."[102] Fifteen states took advantage of this classification to prohibit aliens ineligible to citizenship from owning or possessing agricultural property or certain other forms of real property.[103] Many, including California, enforced the prohibition through criminal sanctions.

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included several instances of questioning by the IJ that were at least inappropriate and at worst indicative of bias against Chinese witnesses.").

98. *See, e.g.*, Au Wee Sheung v. United States, 44 F.2d 681, 682 (7th Cir. 1930) (upholding a deportation order in spite of an illegal arrest and the appellant's claim of U.S. citizenship); Moy Guey Lum v. United States, 211 F. 91, 95 (7th Cir. 1914) ("Under the facts of the present case, we are unable to say that the appellant has proved beyond a reasonable doubt that he was entitled to remain in the United States."); Fong Gum Tong v. United States, 192 F. 320, 320–21 (7th Cir. 1911) (upholding a deportation order, despite the testimony of two Chinese witnesses that the appellant was born in the United States).

99. Morrison v. California, 291 U.S. 82, 92–96 (1934), *aff'g* 22 P.2d 718 (Cal. 1933); Morrison v. California, 288 U.S. 591 (1933) (mem.), *dismissing appeal from* 13 P.2d 800 (Cal. Dist. Ct. App. 1932); *see also infra* note 111.

100. *See Morrison*, 291 U.S. at 82, 87–88 (1934).

101. *See generally Anti-Alien Land Legislation*, 31 YALE L.J. 299, 299–305 (1922) (surveying anti-alien land laws' prevalence and the contemporaneous legal issues they raise); Charles Wallace Collins, *Will the California Alien Land Law Stand the Test of the Fourteenth Amendment?*, 23 YALE L.J. 330 (1914) (examining California's anti-alien land law and the grounds upon which it may be constitutionally challenged in the future); *The Alien Land Laws: A Reappraisal*, 56 YALE L.J. 1017, 1018–19, 1022–24, 1030–31 (1947) (discussing California anti-Asian alien land law's historical application up until and after *Morrison*.).

102. Immigration Act of 1924, ch. 185, §§ 11(d), 13(c), 28(c), 43 Stat. 153, 159, 162, 168.

103. *See generally* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. REV. 37, 37 n.4, 38–40, 55–60 (1998) (identifying state anti-alien land laws upheld by the Supreme Court); Dudley O. McGovney, *The Anti-Japanese Land Laws of California*

1. Evidence of Race Shifts the Burden to Prove Citizenship

To prevent Asian control of land through straw owners and other stratagems, in 1927, California enacted section 9b of the alien land law, stating that, if the State offered, among other evidence, "proof that the defendant is a member of a race ineligible to citizenship . . . , [there shall be] a prima facie presumption of ineligibility to citizenship of such defendant."[104] The burden of proving citizenship "or eligibility to citizenship . . . shall thereupon devolve upon such defendant."[105] Oregon adopted a similar statute during World War II.[106]

Accordingly, under certain circumstances, engaging in otherwise innocent conduct, such as picking apples, became presumptively criminal solely because it was being done by a person of apparent Asian ancestry. Once the State proved race, the statute shifted the burden to defendants to prove their innocence that they were not racially Asian or that they held U.S. citizenship by birth. In the absence of persuading the fact finder, persons of Asian ancestry would be convicted of a crime. Of course, given the possibility of racial prejudice among jurors and the impossibility of perfect jury fact-finding, under this scheme, a U.S. citizen might erroneously be convicted.

The California Supreme Court found the statute unobjectionable: "[C]ourts cannot put aside the historical controversies which preceded the adoption of the Alien Land Acts and the reasons which impelled their adoption."[107] The court observed that the land laws "so directly affect national safety."[108] This may have been a reference to an earlier decision which held, citing the U.S. Supreme Court, that "[i]f one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership [or possession] of noncitizens."[109]

The social segregation of Asian races, the California Supreme Court explained, necessitated the presumption because other forms of proof were likely to be unavailing. The court noted the difficulties in enforcing the acts, which

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and Ten Other States, 35 CALIF. L. REV. 7, 7 nn. 3–6, 8 nn. 7–16, 23–24 (1947) (comparing state treatment of landownership with respect to Asians); *see also* IMMIGRATION AND NATIONALITY LAW REVIEW ASS'N ALIEN LAND LAW PROJECT, REPORT TO THE GOVERNOR, SENATE, AND HOUSE OF REPRESENTATIVES OF THE STATE OF FLORIDA RECOMMENDING REPEAL OF THE RACIALLY DISCRIMINATORY ALIEN LAND PROVISION OF THE FLORIDA CONSTITUTION (Dec. 2000), *reprinted in* 22 IMMIGR. & NATIONALITY L. REV. 749, 749–61 (2001) (analyzing the history and effect of Florida's anti-alien land law).

104. People v. Osaki, 278 P. 252, 252 (Cal. Dist. Ct. App. 1929).

105. Act of July 29, 1927, ch. 528, § 9 (b), 1927 Cal. Stat. 880, 881. This presumption applied in civil cases as well. CAL. CIV. PROC. CODE § 1983 (1927) (repealed 1965); Act of Apr. 25, 1927, ch. 244, § 1, 1927 Cal. Stat 434 (repealed 1955).

106. *The Alien Land Laws: A Reappraisal*, *supra* note 101, at 1024–25.

107. People v. Osaki, 286 P. 1025, 1035 (Cal. 1930).

108. *Id.* at 1027.

109. *Ex parte* Ramirez, 226 P. 914, 920 (Cal. 1924) (quoting Terrace v. Thompson, 263 U.S. 197, 220–21 (1923)).

> arise in no small measure from the difficulty of identifying one member of the several ineligible alien races from another by reason of racial similitudes. They speak in Oriental languages which have no basic relation or resemblance to the English or Latin languages, and, because of their Oriental forms of worship and their lack of knowledge of and interest in our national and ancestral traditions and future objectives, they live in groups or communities having no social, civic, or political intercourse with the citizens of the country, or those eligible to become citizens, hedged in by impenetrable privacy and secrecy as to their status as citizens and affairs generally to a degree that nowhere else obtains.[110]

In the aforementioned pair of cases that arose from the same prosecution and were both decided under the name *Morrison v. California*, the U.S. Supreme Court unanimously agreed with the California Supreme Court that the racial presumption was constitutional.[111] The Court explained that once the State proved that the defendant was a member of an ineligible race, it was reasonable to shift the burden to the defendant to prove citizenship:

> In the vast majority of cases, he could do this without trouble if his claim of citizenship was honest. The People, on the other hand, if forced to disprove his claim, would be relatively helpless. In all likelihood his life history would be known only to himself and at times to relatives or intimates unwilling to speak against him.[112]

Quoting a decision based on the Chinese Exclusion Act where the Court held that a racial Chinese person in deportation proceedings could be compelled to prove citizenship, the Court said: "The inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed."[113] Therefore, "casting upon a Japanese defendant the burden of proving citizenship after proof of his race had been given by the state was not an impairment of his immunities under the federal constitution."[114]

The Court's claim that citizenship could be proved "without trouble" was disingenuous. The alien land laws existed only because of anti-Asian racial hostility. In addition, there was a long tradition of suspicion of Asian testimony in both California and federal law, the latter of which had been upheld by the U.S. Supreme Court. A U.S. citizen of Asian ancestry, then, might have found the protection of a jury trial to be cold comfort. The Court seemed to accept the

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110. *Osaki*, 286 P. at 1035–36.

111. Morrison v. California, 291 U.S. 82, 87–88 (1934), *aff'g* 22 P.2d 718 (Cal. 1933); Morrison v. California, 288 U.S. 591 (1933) (mem.), *dismissing appeal from* 13 P.2d 800 (Cal. App. 1932). Dismissals for want of a substantial federal question are decisions on the merits. Hicks v. Miranda, 422 U.S. 332, 344 (1975).

112. *Morrison*, 291 U.S. at 88.

113. *Id.* at 89 (quoting Chin Bak Kan v. United States, 186 U.S. 193, 200 (1902)).

114. *Id.*

doubtful idea that it is possible to fairly apply in an individual case a law that is unfair in its nature because it is based on negative beliefs about, and designed to disadvantage, the particular group of which the individual is a member.

Placing the burden of proof on the alleged alien is also unfair. In *Kwock Jan Fat v. White*,[115] the Supreme Court stated that "[i]t is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."[116] But the sentiment that it is worse to deport (or convict) a U.S. citizen than it is to allow a noncitizen to avoid liability is simply incompatible with the requirement that racial Asians claiming to be U.S. citizens bear the burden of proving citizenship.[117] By definition, the standard reflects a slight preference for erroneous findings against the individual. Thus, this passage could represent the Court's own point of view, but it is not compatible with the Chinese Exclusion Act that it deemed constitutional and enforced for many decades.

2. Mere Accusation Cannot Shift the Burden to Prove Citizenship

The Supreme Court struck down a presumption in section 9a of California's law, which shifted the burden of proving racial eligibility to the defendants based on the State's mere allegation that an ineligible alien was occupying land without requiring any proof of race. One of the defendants in *Morrison v. California*, Morrison, was a Caucasian citizen charged with conspiracy to violate the land laws by selling to a person of an ineligible race. The Court held that California had to prove that the seller actually knew the person to whom he was selling land was an ineligible alien. The Court said:

> He may never have seen [the buyer] . . . . He may have made his agreement by an agent or over the telephone or by writings delivered through the mails. Even if lessor and lessee came together face to face, there is nothing to show whether [the buyer] was a Japanese of the full blood, whose race would have been apparent to any one looking at him. Moreover, if his race was apparent, he may still have been a citizen . . . .[118]

In essence, the Court refused to take a chance that a Caucasian would be imprisoned for insufficient racial vigilance.

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115. Kwock Jan Fat v. White, 253 U.S. 454 (1920).

116. *Id.* at 464. This phrase echoes the famous criminal dictum. *See* Coffin v. United States, 156 U.S. 432, 456 (1895) ("Blackstone (1753–1765) maintains that 'the law holds that it is better that ten guilty persons escape than that one innocent suffer.'") (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *358).

117. Assuming that the burden on racial Chinese was proof to a preponderance of the evidence, that would suggest that Congress favored neither erroneous deportation of a U.S. citizen of Chinese ancestry, nor erroneous non-deportation of an unauthorized Chinese person, except where the evidence was in equipoise, in which case Congress put the risk of error on the claimant. *See, e.g.*, Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997).

118. Morrison v. California, 291 U.S. 82, 92–93 (1934).

The Court also held the presumption of section 9a unconstitutional as to the allegedly ineligible buyer; here as well, the State had to prove the buyer's racial ineligibility.[119] The buyer, unlike the seller, would almost certainly have seen herself in the mirror at some point, so would know whether she appeared to be Asian or not. Nevertheless, the Court found that there was a lack of need to prosecute by presumption rather than direct evidence coupled with a risk of injustice.

The lack of need flowed from the fact that generally, "the race of a Japanese or Chinaman will be known to any one who looks at him. . . . The triers of the facts will look upon the defendant . . . and will draw their own conclusions."[120] The State can also "call witnesses familiar with the characteristics of the race, who will state his racial origin."[121] So, in the ordinary prosecution, there is no need for the State to dispense with direct evidence of the race of a defendant.

The "probability of injustice to the accused" flowed from the fact that aliens who were in fact ineligible might not realize it, because their prohibited racial admixture was too small. "One whose racial origins are so blended as to be not discoverable at sight will often be unaware of them. If he can state nothing but his ignorance, he has not sustained the burden of proving eligibility, and must stand condemned of crime."[122] Thus, the Court refused to take the risk that a mostly white or African person might be convicted of being Asian. For example, "[a] laborer, born in Canada, his parents apparently mulattoes, but one of his grandparents a Filipino, according to the charge in an indictment, would be ignorant in many cases whether he was a Filipino or an African."[123] "There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the People."[124] But the Court did not retreat from its holding that, once the State proved a defendant's race, the defendant could be required to prove citizenship.[125]

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119. *See id.* at 93 (classifying the buyer's disqualification as "a mere presumption").

120. *Id.* at 94.

121. *Id.* In the Court's world, evidently there was a corps of experts who could look at people and identify their race. *Cf. How to Tell Japs from the Chinese: Angry Citizens Victimize Allies with Emotional Outburst at Enemy*, LIFE, Dec. 22, 1941, at 81–82 (addressing Americans' "distressing ignorance . . . on how to tell" a person's racial and ethnic background visually).

122. *Morrison*, 291 U.S. at 94.

123. *Id.* at 95.

124. *Id.* at 96.

125. *Id.* at 87–88.

D. The End, and Continuation, of Race-Based Evidence

Ultimately, the special need for evidentiary use of Asian appearance became unnecessary. Racial restrictions on naturalization terminated in 1952.[126] In addition, the alien land laws were declared unconstitutional by several state supreme courts,[127] and U.S. Supreme Court decisions cast some doubt on them.[128] Asian race thus eventually lost its substantive relevance both to state laws and federal immigration law.

Another legal doctrine still in existence, though, echoes this regime. In *United States v. Brignoni-Ponce*,[129] the Supreme Court held that "apparent Mexican ancestry" could be used as a factor in determining whether there was reasonable suspicion for the border patrol to stop a person near the Mexican border on suspicion that they had entered unlawfully: "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor," although the Court made clear that race was insufficient standing alone to justify a stop.[130] Even today, then, law enforcement authorities regularly use race as evidence of guilt, at least for purposes of stops and arrests.[131]

CONCLUSION

The experience of Asians with racial rules of evidence has a number of interesting features.

One is the struggle of judges to adhere to principles of equal justice while applying an inherently racist law. Notwithstanding the discriminatory policy of the law, many judges ruled in favor of Asians in particular cases. More interestingly, many insisted that individual Asians were to be judged as individuals, not simply as members of a race deemed undesirable. But none of these courts, apparently, ever explained how the principle that the rights of Asians were as weighty as those of

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126. *See* Chin, *Civil Rights Revolution*, *supra* note 2, at 282 (citing Immigration and Nationality Act of 1952, ch. 477, § 201(a), 66 Stat. 163, 175; *id.* § 311, 66 Stat. at 239).

127. Sei Fujii v. State, 242 P.2d 617, 630 (Cal. 1952); State v. Oakland, 287 P.2d 39, 42 (Mont. 1955); Namba v. McCourt, 204 P.2d 569, 583 (Or. 1949).

128. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 421–22 (1948) (striking down a California fishing law that discriminated against "aliens ineligible to citizenship," but distinguishing, rather than overruling, alien land law cases); Oyama v. California, 332 U.S. 633, 644–45 (1948) (invalidating the presumption that a land purchase by a U.S. citizen minor with ineligible parents was fraudulent); *see also* Rose Cuison Villazor, *Rediscovering* Oyama v. California*: At the Intersection of Property, Race and Citizenship*, 87 WASH. U. L. REV. 979, 999–1007 (2010).

129. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

130. *Id.* at 885–87.

131. *See* Gabriel J. Chin et al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 67–70 (2010); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007, 1043, 1046–47, 1064–65 (2010); *see also* Gabriel J. Chin & Kevin R. Johnson, *Profiling's Unlikely Enabler: A High Court Ruling Underpins Ariz. Law*, WASH. POST, July 13, 2010, at A15.

members of any other race could be reconciled with the policy of Asian Exclusion, the restriction of their testimony and the presumptions imposed on them. The policy of exclusion implied substantively that it would be better were the excluded group to be gone. The special evidentiary rules implied that this same group were not to be trusted. Either the policy and the rules, on the one hand, or the idea that Asians were equal, on the other, had to be incorrect. Given this radical dissonance, the defense of impartial justice had to be either less radical (because empty) or more radical (because they involved rejection of the anti-Asian regime) than the courts let on.

The cases may also offer support for Derrick Bell's interest convergence thesis,[132] which proposes that minorities are more likely to win legal rights when granting those rights benefits whites. The reasoning of the courts in many of these cases supports the idea of interest convergence. Courts defending Asian rights often did so in opinions mentioning the possible impact on whites. When California Chief Justice Sawyer deplored the development of criminals who could victimize Chinese who could not testify against them, the victimization of Chinese was not enough; he feared that "in due time, more hardened and experienced reprobates will graduate to exercise their skill upon a wider field of criminal enterprise."[133]

Courts also ruled that Asian rights had to be honored in order to protect those of whites. For example, a court rejecting the proposition that Chinese were interested witnesses in immigration cases noted:

> There is no rule of law that justifies the assumption that a Chinese person is more interested in his countrymen than is a person of some other nationality in his. A Yankee may testify for a Yankee, but he is not therefore interested. An Irishman may testify for an Irishman, an Englishman for an Englishman, a German for a German; but such witnesses are not, in the eye of the law, interested.[134]

And the Court in *Morrison v. California* struck down section 9b of California's alien land law to protect Caucasian sellers and those of mixed race. If "[t]he admixture of oriental blood might be too slight for [a defendant's] race to be apparent,"[135] then the person may be mostly white or, in fact, entirely white and charged in error. The Court found this unacceptable.[136] Even when the Asian litigant won, the interests of whites were significant or paramount.

The most important point is the breadth and expansive nature of the regime of Asian Exclusion. Although substantive law was very important, evidence

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132. Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

133. People v. Jones, 31 Cal. 566, 574 (1867).

134. United States v. Lee Huen, 118 F. 442, 463 (N.D.N.Y. 1902).

135. Morrison v. California, 291 U.S. 82, 95 (1934).

136. *Id.* at 95–96.

principles both made the substantive laws much harsher and independently contributed to negative stereotypes about Asians in the United States, which in turn justified further substantive laws. A particularly influential jurisdiction was the United States itself, because it extended the idea of Chinese dishonesty to courts in all fifty states. Suspicion of Chinese witnesses ultimately extended to all Asians; the law implied that the concern, the risk to be regulated, was the race as a whole, and not for example, some discrete characteristics of the particular Chinese who immigrated to California in the 1860s and 1870s. Under the rationale of *People v. Hall*, Japanese, Koreans, Asian Indians, Filipinos, and other Asians were just as "black" as the Chinese in the sense that they were not white.[137] When the statutes of California and Nevada embraced that principle, they applied based on Mongolian or Asiatic race, not to the Chinese alone.

This unfortunate history of restrictions on Chinese testimony, the alien land laws, and racial restrictions on immigration and naturalization are gone. But mere repeal of laws and overruling decisions cannot have eliminated the social and cultural effects of a body of jurisprudence that was in force in one way or another for a full century between 1854 and 1954.

137. *See* People v. Hall, 4 Cal. 399, 404 (1854) (defining "white" as used in the Constitution as including Caucasians and excluding all others).