Sowing The Seeds of Chinese Exclusion As the Reconstruction Congress Debates Civil Rights Inclusion

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Abstract

During Reconstruction, Congress amended the Constitution to fundamentally reorder the legal and social status of African Americans. Congress faced the challenge of determining how Chinese people would fit in to the emerging constitutional structure. This article draws on a method of digitizing the Congressional Globe to more broadly explore the arguments about Chinese rights and privileges during Reconstruction. Unlike African-Americans, Chinese were part of an international system of trade and diplomacy; treatment of other people of color was understood as a purely domestic question. In addition, while a core feature of Reconstruction was ending the enslavement of African-Americans and overruling Dred Scott by making Africans Americans born in the U.S. citizens and granting them eligibility for naturalization, for Chinese, Congress chose to leave in place racial restrictions on naturalization, which had existed since 1790. This rendered them perpetual foreigners in America. With regard to labor rights, by abolishing slavery, Congress intended to raise up the freedmen, giving African Americans a chance to work on equal terms with other citizens. In the main, Congress continued to treat the Chinese people as constitutive of the so-called "Chinese question," a nominalization that ascribed to them features of caste, from which there was little possibility of upward mobility. Congress recognized that some Chinese workers in the U.S. who were building railroads or working in mines might be subject to labor exploitation from bosses and from jobbers, sometimes white and sometimes Chinese. However, rather than intervene to liberate Chinese laborers through laws that would free

them from involuntary servitude, and give them fair terms on which to compete, Congress eventually moved in another direction: excluding the Chinese altogether in 1882.

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Introduction

Reconstruction is heralded as a period of state building and reflection on some of the highest and most progressive ideals of racial equality[1] and worker autonomy.[2] Debates during this critical time in the nation's history were formative in determining who was an American, what rights Americans were entitled to, and establishing constitutional guarantees. While generations of scholars have written about this important history, few have focused on Reconstruction texts as they refer to Chinese people.[3] Yet for all the commitment to these ideals in the speeches of the Reconstruction Congress, there are distinctly unique and troubling currents beneath the surface when some members of Congress referred to the liberties, rights, and privileges of Chinese in the United States. At the time, many Chinese were involved in building the nation's railroads, and their rights in the states as workers and denizens were also at issue. Examining the Chinese as members of an ascribed racial category and as workers in the American Republic offers an important, under-recognized contretemps to Reconstructions' progressive and reformist discourses on race and labor.[4]

This article examines that dynamic and concludes that while Reconstruction attempted to create a legal regime in which African-Americans

1. Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 (1989); W.E.B. Du Bois, Black Reconstruction: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880 (1935).

2. Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War (1995); Lea S. Vandervelde, The Labor Vision of the Thirteenth Amendment, 138 U. Pa. L. Rev. 437 (1989).

3. Important exceptions include Earl M. Maltz, The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment, 17 Harv. J.L & Pub. Pol. 223 (1994); and John Hayakawa Torok, Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws, 3 Asian L.J. 55 (1996). See also Najia Aarim-Heriot, Chinese Immigrants, African Americans, and Racial Anxiety in the United States, 1848-82, at 84–118 (2003).

4. This article, the first of what is expected to be several, draws on a custom database of the Congressional Globe which allows more detailed searching than is possible with other sources. Accordingly, the database provides an opportunity for new insights into the views of Senators and Representatives during Reconstruction, the critical period when slavery was abolished, the Constitution amended significantly, and the nation debated American identity and the nation-state.

would enjoy greater political and economic rights, it simultaneously laid the foundation for the exclusion of Chinese and other Asians from the United States, a policy marking the Chinese as a caste with an ascribed set of characteristics limiting their liberties in American society, a designation that would extend from 1882 to 1965.[5]

During the Reconstruction debates, members of Congress invoked ideas regarding the Chinese that were prevalent in the nineteenth century — that the Chinese were lesser men,[6] and that the Chinese could not assimilate as Americans.[7] But while these comments reflected public opinion in the debates, the legislators were engaging in something more significant and lasting than public opinion, which could be fleeting. They were amending the Constitution to include issues of racial equality, self-worth, and a phrase they often returned to: "the republican form of government."[8] In that regard, their perceptions of the place of Chinese people in American society informed their constitutional vision, for better or worse.

The Chinese were an "other" about whom little was known, yet they were invoked in more abstract debates about race, religion, equal protection, citizenship, and immigration as Congress attempted to craft a more perfect Constitution. As a category of people, a category more stereotyped than realistic in the minds of Congressmen, Chinese people were invoked sometimes in support of and sometimes against arguments on important measures to reform American democracy and promote free labor. While Congressmen debated grand abstractions such as the universality of human rights, the Chinese were subordinated as "other" in ways that European immigrants, for example, were not.[9] While Congressmen debated ideas about worker inde-

5. See discussion *infra* text accompanying notes 24, 25 of caste in this context.

6. Stuart Creighton Miller, The Unwelcome Immigrant: The American Image of the Chinese, 1785-1882 (1969); Zhang Wenxian, China Through American Eyes: Early Depictions of the Chinese People and Culture in the U.S. Print Media (2017). For images of Chinese in a later period, see Philippa Gates, Criminalization/Assimilation: Chinese/Americans and Chinatowns in Classical Hollywood Film (2019). In the Reconstruction Congress debates, see *infra* Subpart II.B.

7. See, e.g., remarks of Representative Beck in describing the Chinese, dismissively as unfit for political rights, *infra* note 125. See also Cong. Globe, 42d Cong., 2d Sess. 865 (Feb. 7, 1872) (Remarks of Sen. Cole) ("They who are best acquainted with the character and progress of the Chinese population know full well their want of capacity for citizenship.") Senator Corbett continued the dour assessment: "the Chinese population are not prepared to be naturalized in this country, that they do not sufficiently understand the institutions of the country, so as to enable them properly to judge of our legislation and our laws and to act with discretion and judgment in voting." Id. (Feb. 9, 1872). See further discussion *infra* Subpart III.B.2.

8. This phrase was part of the guarantee clause of the original Constitution (U.S. Const. art. IV, § 4) and was used to reformulate the new constitution by highlighting that a state that permitted racial discrimination and labor oppression as Southern states did in the peculiar institution of slavery could not be a "Republican Form of Government." Interestingly, Congress never turned that lens of focus upon the discriminations against the Chinese in the western states.

9. Cybelle Fox & Thomas A. Guglielmo, Defining America's Racial Boundaries:

pendence, workers of Chinese ancestry were subjected to a restricted set of occupations, sometimes under work gangs, in ways that other American workers were not. And while considerable efforts were made in this reform-minded Congress to raise the formerly enslaved to a position of dignity and equality, a discussion that spilled over into the conditions of other peoples, there were pitifully few references to assuring the Chinese were treated similarly. They were not raised up to a position of social and economic parity and political liberty. The ironic result is that one can perceive in these debates — some of the most progressive in American history — the seeds of what would become Chinese exclusion[10] and the Chinese Jim Crow[11] a decade later. In these debates, the seeds were planted by West Coast congressmen and further nurtured by those conservative congressmen who clung to notions of white supremacy despite the nation's general impetus to universal race equality.

While the rights, privileges, and immunities of the Chinese were occasionally center stage, they were more often invoked at the margins of other far-ranging debates as a counterexample sometimes in progressive and sometimes reactionary ways. The subject of Chinese rights was more central in the debates over immigration, citizenship and suffrage. As constitutional scholarship inherently returns its gaze to the origins of the crafting of that fundamental charter of American liberty, it is important to consider the place of the Chinese in these debates. In the words of historian Paula Giddings, it is important to note "when and where [they] entered." in the debates.[12] Approaching the texts of these very fundamental Congressional debates this way has several benefits. It delineates the implicit, which is: that by invoking

Blacks, Mexicans, and European Immigrants, 1890-1945, 118 Am. J. Soc. 327 (2012). Fox and Gugliemo's article is an important one, which we will invoke later in our analysis. Yet, despite its usefulness in highlighting the boundaries of whiteness, in the article's title as well as in the body of the work, the authors make few references to the circumstances of the Chinese, which is the subject of this article.

10. See, e.g., Beth Lew-Williams, The Chinese Must Go: Violence, Exclusion, and the Making of the Alien in America 53–88 (2018); Bill Ong Hing, Making and Remaking Asian America Through Immigration Policy ch. 2 (1993); Gabriel J. Chin, Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration, 46 UCLA L. Rev. 1 (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 (1996).

11. See, e.g., William J. Courtney, San Francisco's Anti-Chinese Ordinances, 1850-1900 (R&E Res. Associates reprt. ed. 1974) (1956) (describing anti-Chinese measures in California); Charles J. McClain, In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America (1996); John R. Wunder, Gold Mountain Turned to Dust: Essays on the Legal History of the Chinese in the Nineteenth-Century American West (2018) (describing various forms of anti-Chinese law and judicial actions); Gabriel J. Chin & John Ormonde, The War Against Chinese Restaurants, 67 Duke L.J. 681 (2018); Gabriel J. Chin, "A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence, 3 U.C. Irvine L. Rev. 965 (2013); Hrishi Karthikeyan & Gabriel J. Chin, Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950, 9 Asian Am. L.J. 1 (2002).

12. Paula J. Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America (2007).

the target group by name, that group is not generally included when speaking more generically about those people who form the norm of the population. It also permits us to identify and isolate exactly where — that is, in the service of what kinds of arguments — the speaker chooses to pronounce the name of that group as differentially situated in the polity.

We use the Reconstruction debates for our primary texts and to that end we have developed a digitized database to facilitate this inquiry.[13] By digitizing the Congressional Globe for the entire 12-year period of Reconstruction, from the 38th to 43rd Congress, we are able to find references to the Chinese that were previously overlooked. We are also able to see the debates as a whole, as a continuum taking place over a decade. We can see how certain subjects and certain words became more or less prevalent and took on different inflections over time. In general, we can conclude that references to "the Chinese" increased markedly over this period. Through a comprehensive database like this, we are indeed able to observe when, where and with what significance the Chinese — whether residents, immigrants, workers, or subjects of the Chinese Empire — entered the discourse of Reconstruction.[14] This article focusing on discrimination against the Chinese is the first of two articles based on this database method.[15]

In 1866, when renowned legal theorist Francis Lieber wrote to Congress to oppose taxes on foreign literature, he contended: "The object of our laws cannot be Chinese exclusion."[16] Notwithstanding Lieber's admonition, it seems that an object of our laws sometimes was exactly that. And even when the Chinese were not the principal object of the law, they could be

13. The Digital databases are part of the Reconstruction Amendment Optical Scanning Project, RAOS, of which Lea VanderVelde is the director. The digital databases of the Congressional Globe for the 37th through 43d Congresses produced from the original oversize, 3 column, 8-point type accounts. RAOS database, copyright Lea VanderVelde and Johannes Ledolter.

14. The topic of Chinese people is referenced by the terms, "Chinese," "Chinaman," "Mongolian," "Cooly," and sometimes "Celestial." In general, there is a marked increase in references to Chinese in the United States over the 12 years of the six congresses from the 38th Congress to the 43d Congress. For example, using simply the term "Chinese" as the marker, there were only 36 references to the term in the 38th Congress, 192 references in the 40th, and 211 references in the 42d Congress. (List on file with authors, produced by RAOS project.) We thank Johannes Ledolter for programing a statistical package for culling the numerous references to our key words from the database.

Although we culled the debates for all references to the word "Chinese," for the most part, we do not analyze reference to "Chinese grasses" or "the Chinese Wall," which had entered the language of the speakers as an idiom. See, e.g., the remarks of Washington Territorial Delegate Selucius Garfield, who believed war with the Indians was inevitable "unless you build a Chinese wall along our frontiers, and shut out American settlers from the broad plains of the West." Cong. Globe, 42d Cong., 2d Sess. 720 (1872) (emphasis added).

15. The subsequent article is focused on Chinese labor immigration. Lea VanderVelde & Gabriel J. Chin, Contracts, Coyotes, Coolies, and Cheap Labor in American Constitutional Thought (July 2020) (on file with authors).

16. Cong. Globe, 39th Cong., 1st Sess., 3599 (1866) (Letter from Francis Lieber, July 2, 1866, introduced by future President, then Rep. James A. Garfield).

invoked to limit the universality of many of the entitlements being debated. For example, the hard labor performed by African-Americans in the South and Chinese in the West also presented itself in labor market terms. Free labor advocates had long made two arguments about slavery's effect on free working men. Advocates argued that slavery, in that it was unpaid, brought down the wages of working men who demanded to be paid. Free labor advocates also argued that the demeaning conditions under which slaves labored, without a freehold of their own, subject to the beck and call of their masters, negatively affected the dignity of labor and laboring men everywhere. These key criticisms of slavery similarly applied to the low wages received by Chinese workers. Their difficult and constrained working conditions similarly threatened the working men who formed the base of the Republican Party. Yet, as arguments were made to "elevate" the Freedmen's plight, raise their wages to reasonable levels, and include the Freedmen among the larger society of citizen workers of the republic,[17] there was a stunningly marked silence on the topic of improving Chinese workers' wages, working conditions, autonomy, access to citizenship and access to lands in the United States.

Ultimately, the Reconstruction debates reveal several tensions and even contradictions in the decisions Congress reached. One is a desire to expand the rights guaranteed to Freedmen without completely rejecting racial nationalism. Another is a desire to increase immigration generally, and trade with China, amid a growing ambivalence about immigration by Chinese people. That ambivalence was reflected in the Burlingame Treaty of 1868, which enthusiastically promoted trade between China and the United States and guaranteed Chinese the freedom to immigrate, but simultaneously denied them the right to become naturalized U.S. citizens. The very piece of law which permitted and even invited Chinese to immigrate also warned that they could not become part of the American polity, part of us, the People of the United States.[18]

Part I provides a theoretical alternative to the way discrimination is generally addressed. We propose that the idea of caste more appropriately suits the circumstances here, where different peoples are subordinated vis-à-vis the dominant group, white men, but accorded different and not necessarily linearly arranged statuses within that social and legal order. Part II briefly outlines the unique legal and political situation of Chinese Americans before the Civil War. While the borders were largely open, the general prohibition preventing nonwhites from naturalizing reflected anxiety about immigrants of color. This revolutionary-era prohibition was not designed for Chinese people, but it became a barrier keeping Chinese residents from naturalizing

17. See generally David Montgomery, Citizen Worker: The Experience of Workers in the United States with Democracy and the Free Market during the Nineteenth Century (1995).

18. The Burlingame Treaty also ensured the Chinese their freedom to worship in the U.S. commensurate with a promise to allow Americans in China the freedom to worship. Burlingame Treaty, U.S.-China, July 28, 1868, 16 Stat. 739.

and receiving the benefits that flowed from citizenship. Part III explores the range of ways that the Chinese were invoked in the Congressional debates during Reconstruction. The Chinese were discussed in overarching arguments about race more generally, both in racist and anti-racist terms. Early in the Reconstruction debates, Chinese people were rarely mentioned at all. As trade with Asia increased, however, and American policies were designed to further increase this trade, attention turned to the presence and status of Chinese people in the United States. In their speeches, Congressmen from the West increasingly brought attention to the Chinese people resident in those regions. California Congressmen coined the idea of the "Chinese question."[19] Thereafter, the topic grew in prevalence. But within Congress itself, in contrast to the attention given to the rights and privileges accorded to Freedmen, there were few who advocated directly for the interests of Chinese people. Congressmen from western states and territories repeatedly introduced anti-Chinese sentiment in increasingly racist terms, raising the call for Chinese exclusion. And Western Congressmen found allies in the conservative Congressmen who advanced arguments of white supremacy. Part IV identifies how these racial attitudes played out with regard to specific legislation. Importantly, the anti-Chinese argument prevailed in connection with many pieces of civil rights legislation, which were tailored to exclude the Chinese. Two prominent examples of this are the restrictions on Asian immigration in the Coolie Act of 1862 and the exclusion of non-citizens from major land ownership programs like the Homestead Act.

I. Each Discrimination Against a People Takes its Own Form

To more precisely assess the treatment of Chinese in the Reconstruction debates, it is important to acknowledge that all forms of discrimination are not unitary. Yes, there are some methods, instances and ideologies of discrimination that are remarkably clear-cut designations between rights-holders and everyone else, the "haves" and "have nots." White supremacy arguments are such a unitary form of discrimination. In that narrative, "whiteness" is the focal point, and there are few distinctions made between subaltern groups; all are simply lumped as non-white.[20] But in many, many instances, discrimination against different peoples is particularized and the stripping of their eligibility for rights and entitlements take slightly different forms. In those instances it defines that people's relationship to the national polity somewhat differently. The purpose of this article is to examine how the Chinese were overlooked and left behind in the massive uplift of Reconstruction, when the rights, privileges, and immunities of former slaves (called freedmen), were enhanced and redefined. To that end we offer a caste analysis. Caste more precisely describes the status of the Chinese in America both before and after

19. See discussion *infra* Part III of this article for discussion of the emergence of the term the "Chinese question."

20. For a discussion of how and where white supremacy vis-à-vis Chinese is reflected in some of the Reconstruction debates, see *infra* text accompanying notes 105–56.

Reconstruction in the myriad ways being Chinese limited liberty and mobility, particularly upward mobility.

In this regard, our methodology differs from the critique of discrimination as unitary in which all peoples who are designated as "others" are lumped together as sharing similar disabilities, or de-privileging, but not the exact same de-privileging, vis-à-vis those persons who enjoy full rights and privileges: white men. Fox and Guglielmo's piece, "Defining America's Racial Boundaries," is an excellent example of that genre. By drawing examples from the laws governing immigrants from different parts of the world, identified as different ethnicities, Fox and Guglielmo successfully outline the privileges associated with white supremacy in the United States from 1890 to 1945. This methodology is excellent in demonstrating white privilege and, more precisely, those privileges that white men could take for granted when entering the United States and moving toward citizenship through naturalization. We wish to take a step beyond that and recognize that "others," while all disadvantaged in some way, were not identically disadvantaged, and that those distinctions are important both historically and for future efforts at progressive reform.

The conventional method of assessing discrimination is unitary and perhaps linear: using white men as the norm, non-whites as arrayed upon a spectrum of greater or lesser degrees of discrimination.[21] Feminist scholars have sometimes fallen into this method of analysis — that is, assessing all power relations between those in power-dominant positions and those in power-subservient positions as virtually identical, hence presuming that discriminations against women simply followed the pattern of discriminations of other peoples.[22] This kind of analysis usually obscures some important distinctions in status vulnerabilities and discriminations between groups. Although all are subject to the heterodoxy of white men, *some* groups enjoyed *some* privileges in common with that dominant group. Others enjoyed privileges vis-à-vis each other. Lumping these kinds of discriminations together obscures the nature of social experience and, just as problematically, obscures the reform paths available to different groups. If the object of one's inquiry is to delineate white male supremacy, as in the case of Fox and Guglielmo, that is indeed the appropriate methodology. But the methodology presents its own traps. Each group can battle to claim the position of "least well-off and most deserving of sympathy" and thus seek a rearrangement of equities only for the most disadvantaged group. This tends to pit disadvantaged groups against each other, with some winners and some losers in any subsequent rearrangement.

21. At a recent scholarly meeting, a scholar of some significance asked one of the authors why we would be interested in considering the status of Chinese during Reconstruction, with the statement that it was all a division of white and non-white.

22. See generally Amy Allen, Feminist Perspectives on Power, The Stan. Encyclopedia of Phil., https://plato.stanford.edu/archives/fall2016/entries/feminist-power (Last updated July 7, 2016).

Instead of linear-array analysis, we utilize the distinctive method of hierarchical and discrimination patterning found in caste codes. Caste codes are more complicated patterns of discrimination. Caste patterns similarly disadvantage peoples, but they also assign different privileges to various subordinated classes.

Historically, this is a particularly appropriate analysis to pursue in the context of Reconstruction reforms because eliminating caste was actually part of the Reconstruction Congress scheme and language.[23] As Dean Carter has pointed out, the Reconstruction Framers understood "the system of slavery as involving more than uncompensated labor. Rather, while slavery worked its most brutal and direct effects upon those actually enslaved, [it had tainted and damaged] the country as a whole."[24] In demonstrating how caste-based analysis works, Professor Carter refines this notion of caste as a system that is present where " all members of a group sharing a common immutable characteristic . . . were bounded within the same category: subject to . . . the same civil disabilities."[25] The Reconstruction Congressmen who framed the Constitution's amendments found caste to be "philosophically objectionable and inconsistent with American democracy: the use of a single trait or status (race/non-whiteness) as permanently defining one's status before the law for all time, with no possibility of redemption as a member of civil society."[26]

A prototype of caste as a more precise method of mapping discrimination is present in the Code of Manu.[27] This Hindu legal code positioned Brahmins at the top of the social order but indicated that even Brahmins did not enjoy perfect liberty because they would lose that precious status if they engaged in some activities commonly enjoyed by other groups. On the other hand, some disparaged groups were accorded unique, remunerative privileges despite their low social status. Transsexuals, for example, were socially disparaged in almost all respects, but they enjoyed the unique privilege of being paid to attend weddings because their presence at a wedding was deemed to bring good luck. Other people in the four social classes below Brahmins also enjoyed certain exclusive privileges vis-à-vis each other. The merchant class, deemed the third social class, was not entitled to enjoy the privileges of Brahmins or the Kshatriya, but they could engage in lucrative methods of business denied to the other two.

23. For example, the term, "caste" increased in usage over the Reconstruction period. The term was used 37 times in the 38th Congress, 73 times in the 39th Congress, and 92 times in the 40th Congress. List on file with authors.

24. William M. Carter, Jr., Class as Caste: The Thirteenth Amendment's Applicability to Class-Based Subordination, 39 Seattle U. L. Rev. 813 (2016). Dean Carter acknowledged that one aspect of this was unitary in that it legalized white supremacy and demonized nonwhiteness." Id. at 826.

25. Id.

26. Id.

27. See generally, Patrick Olivelle, The Law Code of Manu (Oxford World's Classics 2009).

In fact, a system of caste discrimination may serve the heterodoxy of the dominant group more effectively than a linear arrangement. Disadvantaged groups entitled to distinct privileges awarded only to that class will be afraid of losing those privileges, however slight, by aligning with another disadvantaged group. Thus, differential measures of discrimination, differing in kind as well as degree, can more robustly protect the privileged position of the dominant group from challenge by alliances among the disadvantaged classes. Caste discriminations may be more resilient against change than discrimination dualities that pose the dominant group on one side and all "others" on the other.

We believe that this method of multi-variate analysis shines light on the distinctive forms of discrimination to which Chinese people in the U.S. were subject. Identifying those distinctive forms of discrimination underlines two important points. First, a people's history matters. The methods by which peoples were introduced to the United States bears some relation to the particular forms of discrimination employed against them. And second, the path to full recognition in American society is different for different groups; history and circumstances may make certain choices for advancement available and foreclose others. A rising tide, like the waves of Reconstruction, may not raise all boats.

II. The Status of Chinese Residents Before the Civil War: Unable to Naturalize, But Unencumbered in Their Migration

A. *The Legal Status of Chinese Residents Before 1862*

Only 41,397 Chinese immigrated to the United States in the period from 1820 to 1860, out of over 2.75 million immigrants in total.[28] Of those, only 35,000 remained in 1860.[29] These numbers were low not because Chinese entry was restricted. In fact, the nation did not police its borders at the federal level before the Civil War.[30] Rather, the numbers were low because there were few means for Chinese to finance immigration to the United States, and the cost of passage across the vast Pacific Ocean was high.

28. Population of the United States in 1860, Compiled from the Original Returns of the Eighth Census, Introduction, at xxii (1864), https://www2.census.gov/library/publications/decennial/1860/population/1860a-02.pdf (last visited June 22, 2020).

29. Id. at xxvii.

30. In re Kaine, 55 U.S. (14 How.) 103, 114 (1852) ("This country is open to all men who wish to come to it. No question, or demand of a passport meets them at the border. He who flees from crimes committed in other countries, like all others, is admitted; nor can the common thief be reclaimed by any foreign power. To this effect we have no treaty.") There was, however, state regulation. Hidetaka Hirota, Expelling the Poor: Atlantic Seaboard States and the Nineteenth-Century Origins of American Immigration Policy (2017) (describing state regulation of immigration); Gerald L. Neuman, The Lost Century of American Immigration Law (1776-1875), 93 Colum. L. Rev. 1833 (1993).

Once reaching America, Chinese immigrants found themselves disadvantaged by the law and confined to certain occupations. Soon after the nation's founding, the Naturalization Act of 1790 limited citizenship by naturalization to "free white persons,"[31] a category understood to exclude persons of Chinese as well as African ancestry.[32] While African-American residents' recognition as citizens varied somewhat during the antebellum period, with a few states according citizenship and even suffrage to free Blacks,[33] there was no similar leniency regarding Chinese citizenship. Research reveals no evidence that Chinese immigrants were deemed citizens in any state or federal regimes.[34]

Since Chinese immigrants could not be naturalized by law, and very, very few Chinese people were being born in the United States, citizenship was foreclosed to Chinese adults. Consequently, without citizenship, the Chinese could be subject to expulsion and removal from the United States. Several other important liberties, such as voting and some jobs, were also beyond reach.[35] Chinese people were also vulnerable to a range of supplemen-

31. Act of Mar. 26, 1790, 1 Stat. 103. Although the Act was amended several times, Congress carried forward the "free white person language. See Act of April 14, 1802, 2 Stat. 153 (version in effect between 1802 and 1870)

32. Ah Hee v. Crippen, 19 Cal. 491, 497 (1861) (Field, C.J.) ("The plaintiff is a Chinaman, and, of course, is not a citizen of the United States, or entitled to become such under any existing legislation of Congress").

33. The Dred Scott case, the Supreme Court's centerpiece case dealing with race and citizenship cited several examples of states taking more liberal stands on the issue of race, citizenship, and the right of suffrage in Dred Scott v. Sandford, 60 U.S. 393 (1856). Chief Justice Taney's opinion noted that the state constitutions of both New Hampshire and New York conferred the elective franchise without discrimination as to race or color. Id. at 573. Justice McLean's dissent noted: "Several of the States have admitted persons of color to the right of suffrage, and in this view have recognized them as citizens; and this has been done in the slave as well as the free States. On the question of citizenship, it must be admitted that we have not been very fastidious." Id. at 533 (McLean, J., dissenting).

34. Fong Yue Ting v. United States, 149 U.S. 698, 716 (1893) ("Chinese persons, not born in this country, have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws."); Cal. Const. art. II, § 1 (1879) (enfranchising "every male citizen of the United states" and "every male person who shall have acquired the rights of citizenship under or by virtue of the treaty of Queretaro" but "no native of China, no idiot, insane person, or person convicted of any infamous crime . . . shall ever exercise the privileges of an elector."); Or. Cal. Const. art. II, § 6 ("No negro, chinaman, or mullato shall have the right of suffrage."); People v. Washington, 36 Cal. 658, 662 (1869) ("Females, infants, the Chinese and Indians are entitled to the benefit of the writ of habeas corpus, may sue, contract, hold property, etc., but it is preposterous to assert that the possession of those rights implies the possession of the elective franchise, or the right to discharge the duties of a public office.") overruled in part by People v. Brady, 40 Cal. 198 (1870).

35. Free Blacks engaged in civic participation even in places where they were not eligible for citizenship. Martha Jones, Birthright Citizens: A History of Race and Rights in Antebellum America (2018) (discussing African American struggle for rights in antebellum Maryland). Yet, we know of little evidence of Chinese lobbying for citizenship through the participation in civic activities during this period.

tary federal and state legal restrictions.[36] With the population concentrated mostly in the west, the most extensive state restrictions were enacted in California and Oregon.

A California statute prohibited a witness who was Black, mulatto, or Native American, from testifying for or against whites.[37] The California Supreme Court equated the Chinese with African-Americans and extended that prohibition to Chinese.[38]

The testimonial disqualification may have been based upon the notion of preserving white privilege, that is, the unseemliness of a racially subordinate individual testifying against a member of the dominant group. Chinese testimony was suspect for another reason. Some doubted that Chinese oaths carried the solemnity associated with swearing on a Bible because most Chinese were not Christian.[39] This reason for disqualifying Chinese witnesses and doubting their credibility placed them in a similarly disadvantaged position as African-Americans, but for a distinctively different reason. African-Americans often became Christian through missionary efforts. Indeed, there were extensive efforts by churches to extend Christianity to the enslaved in the South. The effort to Christianize the Chinese in the United States at the time was much more modest.[40]

36. See, e.g., McClain, *supra* note 11; In re Chang, 344 P.3d 288 (Cal. 2015) (discussing history of discrimination).

37. See Gabriel J. Chin, "A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence, 3 UC Irvine L. Rev. 965 (2013). However, they could testify for defendants in criminal cases because "the State . . . is not a white person." People v. Awa, 27 Cal. 638, 639 (1865). Section 16 of the Enforcement Act of 1870 created a federal right to testify. Act of May 31, 1870, 16 Stat. 140, 144.

38. The court reasoned that Chinese testifying as witnesses raised the following problem:

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.

People v. Hall, 4 Cal. 399, 404–05 (1854) See also Le Grand v. United States, 12 F. 577, 584 (C.C.E.D. Tex. 1882) (Woods, Justice) (citing Hall; notwithstanding Fourteenth Amendment, state "may exclude Chinese from the right to testify where a white man is a party"); People ex rel. Smith v. Judge of Twelfth Dist., 17 Cal. 547, 554 (1861) (noting that "for different classes of crimes may and do call for different modes of procedure, and so might different classes of criminals, as Chinamen, etc."); John Copeland Nagle, The Worst Statutory Interpretation Case in History, 94 Nw. U. L. Rev. 1445 (2000).

39. In reference to the Chinese, the Supreme Court noted the "loose notions entertained by the witnesses of the obligation of an oath." Chae Chan Ping v. United States, 130 U.S. 581, 598 (1889). Ultimately, however, even non-Christian Chinese were allowed to testify, such as the prosecution witness identified as "Joe Chinaman" by the Supreme Court of the Territory of New Mexico. Territory v. Yee Shun, 2 P. 84, 84 (N.M. 1884).

40. See generally Yang Fenggang, Chinese Christians in America: Conversion,

The testimonial disqualification, in turn, led to further limitations such as access to jobs where bearing witness was important. For example, the right to carry the mail had traditionally been reserved to whites by law. In 1862, Congress proposed that the law be made race-neutral, but the reform was defeated by the argument that if you "allow persons to be mail contractors who are not legal witnesses, they could not testify against a thief who robbed the mails before their eyes; and you thus impair the security of our mail-bags and their contents."[41] In addition, many other occupations were restricted to citizens; for example, federal law restricted service on public or private vessels of the United States to citizens or native-born persons of color.[42]

The bar to naturalization impacted Chinese mobility further by placing the public lands out of reach.[43] (We will examine this in much greater detail when we examine the postwar period.) The Donation Land Act of 1850,[44] for example, offered free land "to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration according to law, of his intention to become a citizen."[45] The Act was discriminatory on its face by creating this privilege for white settlers and some Native Americans, if they were descended in part from white ancestors. White immigrants who were not citizens could benefit, but African Americans and Chinese, even those few born in the United States, could not.

Without citizenship, there were few avenues open to the Chinese to become the sort of independent yeoman of which the ideal republic was expected to be composed.[46] Acquiring land in a settler colonialist society was the initial step to attaining personal independence for individuals and peoples.

Assimilation, and Adhesive Identities 5 (1999) (noting that "early missions were not very successful in terms of converting the Chinese".

41. Cong. Globe, 37th Cong., 2d Sess. 2231, 2322 (1862).

42. Dred Scott v. Sandford, 60 U.S. 393, 420 (1857), superseded (1868).

43. Of course, in terms of the numbers of people affected and the political significance, the Freedpeople presented a much more substantial issue than did the Chinese. There may be more categorical differences in the experience of racism between voluntary and involuntary minorities. John U. Ogbu & Herbert D. Simons, Voluntary and Involuntary Minorities: A Cultural-Ecological Theory of School Performance with Some Implications for Education, 29 Anthropology & Educ. Q. 155, 155–88 (1998). It is not that "voluntary" minorities such as immigrants have no ground for complaint for discrimination or racist treatment, but it has been argued that it is subjectively experienced by them as, all in all, better than remaining where they came from.

44. Act of Sept. 27, 1850, § 4, 9 Stat. 496, 497.

45. Id.

46. This was a major subject of discussion and debate by the Reconstruction Congress as they attempted to pave a way for Freedmen to enter this polity, and in their words, for the American republic to fulfill its true promise.

Many states further restricted the right of noncitizens to own land,[47] including laws targeting Asians in particular.[48]

During this antebellum period, fluid legal conditions left the Chinese some room to immigrate and engage in enterprise. There were practically no federal regulations on immigration[49] other than slave trade laws.[50] While the scope of state regulatory authority was to some extent unclear, there was no doubt that states acting on their own authority could not prohibit immigration, nor impose onerous taxes on it.[51] And in 1858, ratification of a major U.S.-China commercial treaty promised closer connections between the two countries.[52]

B. *The Pacific Shrinks*

During and leading up to Reconstruction, western geography changed. Congress took lasting steps to continue westward expansion and enlarge the U.S. economy. Several notable pieces of legislation placed China and the Chinese in an expanding global sphere. The Homestead Act[53] and the construction of the transcontinental railroad accelerated western migration. The United States acquired Russia's interest in Alaska, and Congress pursued treaty negotiations with China. Increased commerce and improved transportation made Chinese immigration more of an issue.[54]

Even before the Civil War had ended, Congress took steps to enhance the prohibition on the slave trade, concluding in a treaty with Great Britain in 1862.[55] Arising from the some of the same concerns, Congress also prohib-

47. Justin Miller, Alien Land Laws, 8 Geo. Wash. L. Rev. 1 (1939); G.W. Duwalt, The Treaties of the United States and Alien Land Laws of Illinois and Other States of the Union, 43 Cent. L.J. 211 (1896).

48. Dudley O. McGovney, The Anti-Japanese Land Laws of California and Ten Other States, 35 Cal. L. Rev. 7 (1947).

49. See *supra* note 30.

50. See Gabriel J. Chin & Paul Finkelman, Birthright Citizenship, Slave Trade Legislation, and the Origins of Federal Immigration Regulation (forthcoming, UC Davis Law Review).

51. See, e.g., People v. Downer, 7 Cal. 169, 171 (1857) (a state tax of fifty dollars each on Chinese passengers, is invalid and void); see also Lin Sing v. Washburn, 20 Cal. 534, 577 (1862) ("It must be admitted that the act before us is a measure of special and extreme hostility to the Chinese, and that the power asserted in its passage is the right of the State to prescribe the terms upon which they shall be permitted to reside in it. This right, if carried to the extent to which it may be carried if the power exists, may be so used as to cut off all intercourse between them and the people of the State, and obstruct and block up the channels of commerce, laying an embargo upon trade, and defeating the commercial policy of the nation."); see also Kunal M. Parker, Making Foreigners: Immigration and Citizenship Law in America, 1600-2000, at 120–22 (2015) (discussing development of federal supremacy over immigration).

52. Treaty of Tientsin, U.S.-China, June 18, 1858,12 Stat. 1023.

53. Homestead Act of 1862, 12 Stat. 392 (repealed 1976). In addition, the Morrill Act of 1862, 12 Stat. 503 (1862), creating the land grant college system, reflected a federal interest in economic development.

54. For discussion of the term "the Chinese question" see *infra*.

55. Treaty of Mar. 13, 1862, 12 Stat. 1221, 1225 (1862).

ited U.S. ships from participating in the Coolie Trade from Asia.[56] Although Chinese people were never subject to chattel slavery in the United States, some number of Chinese immigrants were likely subject to involuntary servitude similarly to others working in debt servitude.[57] When Congress did turn its gaze upon the Chinese coolie practice,[58] unfortunately, their responses tended toward statutes of exclusion and removal, rather than worker empowerment.[59]

Virtually simultaneously, Congress enacted legislation to foster development of the infrastructure to support trade with China. Describing the Pacific Railroad Act of 1862,[60] one representative imagined riches falling from trains carrying Asian goods across the country and, ultimately, to Europe: "We want to present a transit which will send the whole trade of the Asiatic continent, the Japanese, the Chinese and all, across our country, leaving tribute as it passes on to the continent of Europe as the means of fructifying and enriching this enterprise."[61] Senator Phelps argued that military necessity and internal development independently justified investment in the transcontinental railroad, but offered another reason to speed construction: "the fact that beyond its western terminus lie Japan, China, and the East Indies, with their more than 400 millions of industrial inhabitants, whose commerce,

56. Anti-Coolie Act of 1862, 12 Stat. 340.

57. Lea VanderVelde, Servitude and Captivity in the Common Law of Master-Servant: Judicial Interpretations of the Thirteenth Amendment's Labor Vision Immediately After Its Enactment, 27 Wm. & Mary Bill Rts. J. 1079 (2019).

58. In modern years, the term "coolie" has taken on a derogatory connotation. The term was not inherently derogatory during Reconstruction. Basically the term "coolie" meant Chinese peasants or people kept forcibly under a labor contract from which they could not free themselves, just as "serf" when used in the Reconstruction discourse meant Russian peasants subjected to similar obligations. These terms were sometimes used sympathetically. For example, Sen. Ten Eyck "[Russia] sympathizes with our struggle. She is awake to honor and the issues of the day. Absolute herself, she liberates her serfs." Cong. Globe, 38th Cong. (Jan 5, 1864). The terms "coolie" or "coolieism" did not have precise legal meanings. According to Gaiutra Bahadur, Coolie Woman: The Odyssey of Indenture (2014), "[Coolie] was the bureaucratic term the British used to describe indentured laborers. But it became a highly charged slur."; https://www.npr.org/sections/codeswitch/2013/11/25/247166284/a-history-of-indentured-labor-gives-coolie-its-sting (last visited July 11, 2020). Some have suggested that the term should be limited to labor circumstances where the subject worker earned no money, or never voluntarily agreed to enter a labor contract.

59. See *infra* Part IV.E.

60. Pacific Railroad Act of 1862, 12 Stat. 489, amended by Pacific Railroad Act of 1863, 12 Stat. 807, Pacific Railroad Act of 1864, 13 Stat. 356, Pacific Railroad Act of 1865, 13 Stat. 504, and Pacific Railroad Act of 1866, 14 Stat. 66. Another example is congressional creation of the "Trade Dollar," designed to constitute reliable silver bullion for Asian commerce, to compete with the then-dominant Mexican silver dollar. See Coinage Act of 1873, § 15, 17 Stat. 424, 427 (Feb. 12, 1873); M.C. Waltersdorf, The American Trade Dollar, 8 Soc. Sci. 17 (1933).

61. Cong. Globe, 36th Cong., 1st Sess. 2442. (Remarks of Rep. Smith of Virginia). For some measure of the quantity of Pacific trade in this era, see Elizabeth Sinn, Pacific Ocean: Highway to Gold Mountain, 1850-1900, 83 Pac. Hist. Rev. 220 (2014).

the most tempting prize ever within the reach of any country, may be secured thereby."[62]

To further these connections, Congress promoted maritime traffic as well. First, in 1862, one Congressman proposed deploying armed mail ships to travel between the U.S. and Asia: "[W]e are the only people of pure Caucasian origin at home on the shores of the vast Pacific ocean; we alone possess a Pacific empire, and we are bound to extend its power and influence, morally . . . ."[63] Congress approved steamship service between the United States and China in 1865,[64] and in 1868, authorized appointment of mail agents on board ship and in Asia.[65] Furthering Asian commerce, the U.S. Navy established the Asiatic Squadron in 1866 to make military force available to protect the country's interests.[66]

But trains and ships travel both ways, bringing people from China as they transported goods. California Senator Eugene McDougall warned that "[i]f the railroad is completed across this continent, and ready and rapid communications had with China, we may have as many Chinamen and Malays and East Indians in California as we have of our own race."[67]

Acquiring Alaska from Russia also had Pacific commercial overtones.[68] In these debates, Representative Donnelley of Minnesota urged: "Our 40 million people will in two years, by the construction of the Pacific railroad, be brought face to face with the 400 millions of the Chinese empire . . . The entire Pacific coast of the North American continent fronting Japan, China, and India, should belong to the nation whose capital is here, whose commercial centers will be found at New York and San Francisco, and whose destiny it is to grasp the commerce of all the seas and sway the scepter of the world."[69]

Closer connections with Asia also appealed to Representative Nathanial Banks as an opportunity to expand American influence. "If this transfer is

62. Cong. Globe, 37th Cong., 2d Sess. 1590 (1862) (Remarks of Sen. Phelps). See also Cong. Globe, 39th Cong. 2d Sess. App. 196 (1866) (Remarks of Rep. Woodbridge) ("Mr. Speaker, the future of our glorious country justifies this legislation. Its progress, if we are true to ourselves, can hardly be estimated. By locking the Pacific to the Atlantic the Orient will be brought to our doors, America will be the highway of the nations, and 'New York the banking house of the world.'").

63. Cong. Globe, 37th Cong. 2d Sess. 1600 (1862).

64. Act of Feb. 17, 1865, 13 Stat. 430.

65. Act of July 27, 1868, §§ 5 & 6, 15 Stat. 194.

66. John Quentin Feller, The China Trade and the Asiatic Squadron, 18 Winterthur Portfolio No. 4 291, 292 n. 3 (Winter, 1983) (citing Robert Erwin Johnson, Far China Station: The U.S. Navy in Asian Waters, 1800–1898 (1979)); see also Kemp Tolley, Yangtze Patrol: The U.S. Navy in China ch, 2 (2013).

67. Cong. Globe, 39th Cong., 2d Sess. 1377 (1867). The Anti-Coolie and Anti-Monopoly Association of San Francisco was also concerned. In 1869, they petitioned Congress to end to the appropriation for shipping, explaining that "the principal traffic induced by the subsidy hitherto paid to the Pacific Steamship Company consists in the importation of coolies and prostitutes to the State of California." S. Misc. Doc. 41-34, at 2.

68. Michael J. Green, By More Than Providence: Grand Strategy And American Power In The Asia Pacific Since 1783 56–69 (2017).

69. Cong. Globe, 40th Cong., 2d Sess. 3660 (1868) (Remarks of Rep. Donnelly).

successful, it will no longer be an European civilization or an European destiny that controls us. . . . It may be an American civilization, an American destiny of 600 million souls. Across that great ocean of the future there is not one that is not, a friend of this country, nor a Government that is not willing to strike hands with us in any just movement for any just purpose."[70]

In the context of debates about expanding commerce, Chinese people were often praised both in terms of their skill and diligence. One representative acknowledged that the Chinese wall was a "living monument[] of mechanical skill," like the Pyramids of Egypt.[71] Representative Cole of California praised the Chinese "for their ingenuity and industry, both of which contribute to the value and extent of their productions."[72] That skill and industry enhanced the potential for trade. Cole argued that:

> "[t]he trade of China has enriched every nation that has enjoyed it, and besides it is capable of indefinite expansion. Five hundred million people, distinguished for industry and general education, must of necessity produce an unlimited quantity of valuable commodities. Their products are by no means confined to tea, sugar, rice, cotton, and silks, but comprise everything that ingenuity can invent, or want suggest. In the perfection of many of their manufactures they excel all other people."[73]

The Chinese, he said, eminently possessed "many of the more sober and solid virtues of our race," adding almost parenthetically though, that "[t]hey have little of the dash and none of the recklessness of Americans."[74] The aspect of the Chinese people that most interested Congress though was not their character but the economic potential for trade that they presented: "Their commerce is worth untold millions. It is the richest prize ever placed before a nation. It is within our reach, and the question to be determined is, have we the wisdom to grasp it?"[75]

This move to increasing commercial connections between the United States and China culminated in the Burlingame Treaty, ratified on July 28, 1868.[76] (Coincidentally, on that same day, Secretary of State William Seward announced that the Fourteenth Amendment's ratification.[77]) The terms of the Burlingame Treaty were in some ways a distinctive improvement in status for the Chinese, but with one glaringly important exception. The Treaty recognized the right of Chinese to immigrate to the United States, and guaranteed that they would be treated like the nationals of the most favored nation. Nonetheless, they were expressly denied the right to naturalize,[78] leaving in

70. Cong. Globe, 40th Cong., 2d Sess. App. 388 (1867).(Remarks of Rep. Banks).
71. Cong. Globe, 36th Cong., 1st Sess. App. 363 (1860) (Remarks of Rep. Barrett).
72. Cong. Globe, 38th Cong. 2d Sess. 831 (1865) (remarks of Rep. Cole of California).
73. Id. at 830.
74. Id.
75. Id.
76. Burlingame Treaty, U.S.-China, July 28, 1868, 16 Stat. 740.
77. Proclamation No. 12 Regarding Constitutional Amendment [14th Amendment], 15 Stat. 70100-11 (July 28, 1868).
78. Burlingame Treaty, U.S.-China, July 28, 1868, 16 Stat. 739.

place the existing roadblock to citizenship. Citizenship remained the prize of immigration and that prize was forbidden to Chinese immigrants, exactly on the day that the cornerstone importance of citizenship was embedded in the Fourteenth Amendment to the Constitution.

Paradoxically, the Burlingame Treaty was not fully reciprocal. Under the Treaty, while Chinese people in the United States had limited rights, United States citizens in China had special rights. Under the principle of 'extraterritoriality,' U.S. citizens were exempted by treaty from subjection to Chinese courts or laws,[79] while, of course, Chinese were subject to U.S. courts and laws. The rights of Chinese to immigrate then were embedded in a larger pattern of asymmetry between the Chinese entering the United States and Americans entering China, as well as a further inequitable distinction between Chinese immigrants and the immigrants from other nations. This treaty emphasized the barrier of the Chinese to becoming citizens, on the very day that the Fourteenth Amendment recognized the rights of African Americans to citizenship as "persons born in the United States."[80] The subject of Black citizenship had been debated for weeks and months. The citizenship provision in the Fourteenth Amendment was a direct repudiation of the *Dred Scott* decision, which had held that Black persons could not be citizens. Yet, although there was a Congressional consensus that Black persons could and should be citizens, and that all persons born in the United States were citizens, there was no similar discourse welcoming U.S.-born Chinese to citizenship or permitting Chinese immigrants to naturalize. To the contrary, the box of caste restrictions in which the Chinese found themselves was reinforced on that day.

III. The Chinese Experience in the United States Becomes the "Chinese Question" in the Midst of Reconstruction

The ominous phrase, the "Chinese Question" was first introduced into Congressional discourse by two California representatives relatively late into Reconstruction on April 9, 1870, when Representative James A. Johnson of California, mentioned that he was discussing the "Chinese question" with another California Representative, Aaron A. Sargent.[81] By then, the U.S. Constitution had been amended to abolish slavery and involuntary servitude, recognize birthright citizenship, introduce and enhance equal protection of law and due process, not to mention expand privileges and immunities. Thereafter, the subject of a special and particularized status for the Chinese

79. See Teemu Ruskola, Legal Orientalism: China, the United States, and Modern Law ch. 5 (2013); Note, The United States Court for China, 49 Harv. L. Rev. 793, 793 n.1 (1936).

80. U.S. Const., amend. XIV.

81. Cong. Globe, 41st Cong., 2d Sess. 2557 (1870) (Remarks of Rep. James A. Johnson of California). For an account of Sargent's views about Chinese Immigration, see Christopher Shepard, "No Chinese Wanted:" Aaron Sargent and Chinese Immigration, 1862-1886, 51 J. West 50 (2013).

— a caste — had a term of its own: the "Chinese Question." The term was invoked repeatedly by members of Congress from the Pacific Coast and came into use more broadly.[82]

Yet even before 1870, the Reconstruction Congress seemed acutely aware of the number of Chinese already living in California. 'Sixty thousand' was the number repeated time and again, just as "four million" was invoked for the number of former slaves that were freed by the Thirteenth Amendment in 1865. But to this 'sixty thousand' attached a momentous and threatening shadow unmatched in any discussion of other immigrant peoples. And while increased immigration was generally favored as a national policy, the Chinese were perceived as being too numerous, particularly for Western Congressmen's liking. The potential numbers alone were threatening. In graphic depiction of this image, Senator George H. Williams of Oregon said: "[S]ome great inducement may arise which will pour clouds of Chinese from the millions who inhabit the country where they now live upon the Pacific coast like locusts upon the land of Egypt."[83]

Understanding the Chinese question required knowing how many there were, and the U.S. census of 1870 was the mechanism employed to count them.[84] Normally, most debates about the census concerned the allocation of power by the numbers of representatives allotted to states in Congress. This was a critical logistical, as well as political matter for the 1870 census, because under the old Constitution, southern states counted slaves in the census as 3/5ths of a person for the calculation of representation. With abolition, these 4,000,000 individuals were now to be counted as full persons, raising the counts for state populations, especially in former slave states.

The representational situation on the west coast, where most of the Chinese resided, had its own algorithm. The western territories did not have seats in the House apportioned by population; they merely had non-voting delegates in the House; in the Senate, they were unrepresented. Sixty thousand Chinese residents did not affect the proportional allocation of seats in

82. Google Ngram viewer allows us to see the introduction and spread of the term "Chinese question." According to the Ngram when applied to Google Books in the English language, the term, "Chinese question" first appeared in the early 1860s and reached a relative high point in usage around the time of passage of the Chinese Exclusion Act in the 1880s. Google Books Ngram Viewer, https://books.google.com/ngrams/interactive_chart?content=chinese+question&case_insensitive=on&year_start=1800&year_end=1900&corpus=15&smoothing=0&share=&direct_url=t4%3B%2Cchinese%20question%3B%2Cc0%3B%2Cs0%3B%3BChinese%20question%3B%2Cc0%3B%3BChinese%20Question%3B%2Cc0%3B%3BCHINESE%20QUESTION%3B%2Cc0" width=900 height=500 marginwidth=0 marginheight=0 hspace=0 vspace=0 frameborder=0 scrolling=no (last visited June 22, 2020).

83. Cong. Globe, 39th Cong., 2d Sess. 183 (1866) (Remarks of Sen. George H. Williams of Oregon).

84. 1870 Census: A Compendium of the Ninth Census (June 1, 1870) (1872), https://www.census.gov/library/publications/1872/dec/1870e.html.

the House of Representatives. In any event, a Chinese population numbering 60,000 was a ninth of California's total.[85]

Nonetheless, the Census was specifically amended to account for Chinese, not for purposes of representation, but to enlighten Congress on the increasingly prominent "Chinese question." It was reported that the census schedule was changed specifically to include the Chinese, "so as to throw some light on the grave questions which the arrival of the Celestials among us has raised."[86] Some congressmen feared that the U.S. might cease to be a "Caucasian nation,"[87] and that labor competition from vastly increasing the supply of workers would drive down wages for the American working man. Again, legislators from the West were particularly given to sounding this warning. As California Senator Eugene Casserly stated, "The real danger is . . . the presence at all of the Chinese in our country in any considerable numbers as a permanent element. How easily might they be among us in overwhelming numbers. They are one third of the human race. The single province of Canton, lying over against California, could, out of the surplus of its twelve to fifteen million laborers, swamp the whole Pacific coast and all the States and Territories west of the Mississippi."[88]

This concern about potential Chinese settlement is paradoxical given that the United States was essentially a settler colonial nation and still favored immigration generally.[89] Settler colonial nations usually welcome and encourage settlement for reasons of claiming, occupying, and settling the territories. In most instances, the more people, the better in advancing the nation's empire, particularly vis-a-vis indigenous peoples, who were now also concentrated in the west.[90] Another insight about settler colonial nations is that rather than making workers of the indigenous populations, the colonizers bring their workers with them, often people of another race.[91] That was indeed how the United States had imported slaves from Africa. Utilizing Chinese immigrants to build the nation's railroad, without converting their status from worker to citizen was a parallel move. But at this point in history,

85. Id. at 8 (reporting 560,247 people in California in 1870 census).

86. Cong. Globe, 41st Cong., 2d Sess. 180 (1869).

87. Cong. Globe, 39th Cong., 2d Sess. 1377 (1867) ("We may have as many Chinamen and Malays and East Indians in California as we have of our own race.") (Remarks of Sen. MacDougall of California).

88. Cong. Globe, 41st Cong., 2d Sess. 5384 (1870).

89. See Natsu Taylor Saito, Settler Colonialism, Race, and the Law 52 (2020) ("Settler states establish, maintain, and protect their dominion by subjugating Indigenous peoples, non-Indigenous others, and 'deviant' members of the settle class. The colonizers assert a possessory right to the state and establish legal systems designed to ensure that each population subgroup remains in its assigned place, geographically, socially, economically, and politically.").

90. Patrick Wolfe, The Settler Complex: An Introduction, Am. Indian Culture & Res. J. 37:2 (2013) (analyzing the political economy dynamics of settler societies); Paul Frymer, Building an American Empire: Territorial Expansion in The Antebellum Era, 1 UC Irvine L. Rev. 913 (2011).

91. Wolfe, *supra* note 90.

when the western expanse of American territory was already defined by the new states of California and Oregon, the Chinese population were less needed as settlers. Though the nation continued to encourage European immigration and westward expansion into the central territories, it took no steps to encourage eastward immigration from Asia. To the contrary, in years to come, Chinese immigration would be prohibited altogether with the Exclusion Acts.[92]

Thus, in keeping with our analytical framework that different peoples are subject to different forms of discrimination, the so-called "Chinese question" had distinctively different features for the prospects of full equality, than did efforts to enhance the position of Freedmen in American society. According African Americans' citizenship overturned the notorious and disparaged *Dred Scott* decision; extending naturalization prospects to Chinese workers did not. The dimensions of this caste would become more clearly delineated in the Reconstruction debates, just as the Reconstruction Congress was assailing the idea of caste more generally.

A. *Chinese Immigrants Were Sometimes Included in Broader Arguments of Racial Egalitarianism*

While Western Congressmen continued to be those most opposed to Chinese, several others were open, welcoming, and encouraging of inclusion. Some legislators unwaveringly advanced arguments of universal racial equality. Among these congressmen were: Representative Thaddeus Stevens of Pennsylvania,[93] Massachusetts Senator Charles Sumner, Massachusetts Senator Henry Wilson, Tennessee Senator Joseph Fowler,[94] Illinois Senator Richard Yates, and Michigan Senator Jacob Howard.[95] As Senator Jacob Howard of Michigan said:

92. The 47th Congress enacted "An Act to execute certain treaty stipulations relating to Chinese" also called the "Chinese Exclusion Act of 1882" on May 6, 1882, 22 Stat. 58.

93. Representative Stevens agreed that the principle of racial and national neutrality should prevail. "A large number of Chinese have of late years migrated to the State of California to seek their fortunes. They had the right to go there; and I hold it to be in violation of every rule of law which should have sway in a civilized country to discriminate against them." Cong. Globe, 37th Cong., 2d Sess. 2938–39 (1862).

94. Senator Joseph Fowler, one of the Radicals elected from the formerly slave state of Tennessee immediately after Tennessee was re-admitted to representation in Congress, was almost unique among Congressmen in arguing for absolute equality, for women as well as men. He contended in stirring terms that "all who are the subjects of law" should be allowed to vote:

I would found it on the spiritual worth and inviolability of the individual. It should embrace women as well as men. There is no argument in favor of the suffrage of men that will not apply equally as well to women." It is all a delusion and a sham to talk of excluding women from the ballot and admitting all the civilized and uncivilized men of the world . . . . When they admit the African and the Indian, and exclude their mothers and sisters, it is a startling exhibition of prejudice and the force of custom.

Cong. Globe, 40th Cong., 3d Sess. App. 198 (1869). He might well have included the mothers and sisters of Chinese immigrant men.

95. Representative Charles Durkee of Wisconsin, who was a free soiler and left

> This country is large enough for all the people who may ever see fit to inhabit it, and if the Chinaman shall come to the United States, behave like a citizen of the United States, peacefully and industriously; if like us he shall earn his living honestly and by the sweat of his brow, I welcome him, and I do it with cordiality and with a good heart, and I extend to him the same hand of friendship that I would extend to many other races that I might name.[96]

Senator Richard Yates of Illinois welcomed the challenge of increased diversity as a great strength of the American republic.

> [W]e must have from the Atlantic to the Pacific a mighty empire where all shall be equal, where the Chinese themselves shall only have to become American citizens, shall only have to conform themselves to the institutions and laws of the country to be protected in all their rights. I am not afraid of this trial of republicanism. This is the theater of mighty contests, of great collisions of mental ideas, of mental forces and powers. We are to have here all races, and we are to have a grand contest. I expect to see in my own town a Chinese temple raised opposite to the church where my own family worship. There is to be a mighty collision of moral ideas and forces and powers; but this grand old Government of the free, established by our fathers upon the principles of human liberty and equality, will go on triumphing and to triumph.[97]

Illinois' other senator, Senator Trumbull similarly maintained: "if the Chinese are permitted to come to this country I am for incorporating them as a part of the body politic and making them citizens of this country."[98] (It's unclear from Trumbull's context, though how much was hanging on the term, "if," "if the Chinese are permitted to come.")

One representative argued that the Chinese were assimilable: "The civilization of America . . . rests upon, universal education and intelligence. In China every person of mature age can read and write. So deep is their veneration for learning that a Chinese will not, it is said, step upon a written or printed paper. Intelligence is at the basis of their Government and the source of their power. It is the foundation upon which they construct their

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Congress in 1861 to become governor of Utah had also advocated the position of universal racial equality in earlier congresses. In 1852, he said:

> The influence of our social and religious institutions will go eastward, westward, and southward, until bleeding Africa, once the seat of learning and empire, shall become the recipient of our blessings instead of our curses-until the Indian and the Mexican, the Chinaman and the Japanese, shall mingle in the same social circles, and rejoice that they live under constitutional and representative government, which cherishes equally the rights of all! Our commerce, too, will become greatly enlarged by enlightened views of reciprocal trade, under the fostering aid of oceanic steam navigation. It shall win new triumphs in the cause of civilization, and register the wisdom and justice of our policy in the hearts of coming generations.

Cong. Globe, 32d Cong., 1st Sess. App. 892 (1852).

96. Cong. Globe, 41st Cong., 2d Sess. 5386 (1870).

97. Cong. Globe, 41st Cong., 2d Sess. 1329 (Feb. 16., 1870) (Remarks of Sen. Yates).

98. Cong. Globe, 40th Cong., 2d Sess. 5154 (Feb. 16., 1870) (Remarks of Sen. Trumbull).

classes of society and their orders in government. And however their institutions of the family or the State may differ from ours, where intelligence is the common bond of union and the representative of the common power, as it is with us and with them, we shall be led gently but surely to the same objects and the same end."[99]

Similarly, Senator Charles Sumner stated: "Be the person Irish or German or Chinese he shall have from me the same equal protection."[100] Massachusetts' other Senator, Henry Wilson held a similar view: "Whether a man comes from Asia, Africa, Europe, or the isles of the seas, whatever be his language or his religion or his faith, if he comes to these U.S., I would throw over him the shield and protection of equal law; I would meet him like a brother and treat him as a man that God made. . . . "[101]

B. *Arguments for Racial Incompatibility*

While those Congressmen who opposed full rights for African Americans seized upon miscegenation as an emotionally charged basis for their objection, Congressmen opposed to the Chinese made different arguments of incompatibility.[102] This differentiation in the justifications given for de-privileging peoples is emblematic of caste distinctions. Many Senators and Representatives used supposed Chinese cultural customs or physical characteristics as examples of backwardness,[103] powerlessness,[104] or other

99. Cong. Globe, 40th Cong., 2d Sess. App. 388 (1867) (Remarks of Rep. Banks, Speech on the Purchase of Alaska.).

100. Cong. Globe, 40th Cong., 2d Sess. 4332 (1868). Yet, he was notably inclined to use Chinese as examples in moral lessons on unflattering ways. Defending his radicalism, he explained: "Now, sir, . . . I recognize [the lessons of the past]; but I am not a Chinese to be swathed by any traditions. I break all bonds and wrappers when the occasion requires." Cong. Globe, 39th Cong. 2d Sess. 524 (1867) (Remarks of Sen. Sumner).

101. Cong. Globe, 41st Cong., 2d Sess. 5161 (1870) (Remarks of Sen. Wilson).

102. The invocation of intermarriage, or "amalgamation" was a continuing thread in the racist arguments against civil rights reform. See, e.g., Cong. Globe, 38th Cong., 2d Sess. App. 88 (1865), Speech of Representative Harris, of Illinois on February 21 1865, just after the passage of the 13th Amendment. The term "amalgamation" was invoked 76 times in the 38th Congress alone, and another 32 times in the 39th Congress and 35 times in the 40th Congress. The RAOS database allows us to make these comprehensive counts.

103. In connection with a claim about the power of Congress to specify the arms to be used by the land and naval forces he argued that the President could not "say to Congress, 'I will furnish the men you raise, not with the improved fire-arms of the day, but with old flint locks, or guns without any locks; for instance the ancient Chinese style of musket, which require one man to aim it, resting on the shoulder of a second, while a third man was required to touch it off." Cong. Globe, 37th Cong., 2d Sess. 2969 (1862). In considering an appropriation for a proposed international exhibition, one member stated that "Every civilized nation in the world, except Denmark" had done so, Senator Cowan asked: "[t]he Chinese . . ." Senator Harris answered in the affirmative. Cong. Globe, 39th Cong., 1st Sess. 3161 (1866).

104. Chinese military weakness was a favorite topic. Cong. Globe, 37th Cong., 3d Sess., 626 (1863) (remarks of Rep. Wadsworth) ("Or was it, sir, merely another piece of the Chinese mode of warfare, the beating of gongs and the blowing of horns to scare people whom the eternal devil could not scare. . ."); Cong. Globe, 37th Cong., 2d Sess. 629 (1862)

weaknesses.[105] West Coast congressmen did not see Chinese as a welcome addition to the American family. As California Senator Davis said:

> I do not deny that our national family properly and wisely comprehends all of the nationalities of Europe who may come here, according to the terms of our naturalization laws, and their posterity — but I assert that negroes, Indians, Mongolians, Chinese, and Tartars ought not and cannot safely be admitted to the powers and privileges of citizenship. Both the Indian and Mongolian races are essentially superior to the negro race, but neither can they be properly or safely admitted to citizenship; my judgment is to exclude them all, to keep and perpetuate ours as a purely white man's government.[106]

1. Simple Racism

Some Representatives deployed purely racist arguments of white primacy and supremacy against all persons of color, including Chinese people. This was the unitary and brute form of discrimination. Arguments of white supremacy had long been a feature of American discourse, so it is unsurprising that this sentiment still lingered in the minds of some of the more conservative Congressmen during Reconstruction. One could count on Pennsylvania Senator Cowan and Maryland Senator Reverdy Johnson,[107] who had successfully argued for the slaveholder in the Dred Scott case, to sound this message. Johnson's thinking on race was exemplified in his statement: [God] first made a distinction on account of color. Why was the negro created black? . . . Why were we created white? Is not the mere difference in color sufficient to warn

(Remarks of Sen. Morrill of Vermont) ("If this paper money is a 'war measure,' it is not waged against the enemy, but one that may well make him grin with delight. I would as soon provide Chinese wooden guns for the Army as paper money alone for the Treasury."); Cong. Globe, 37th Cong., 2d Sess. 569 (1862) (Remarks of Rep. Cox) ("our reputation as a military people would about equal that of the Chinese").

105. Senator Morrill drew a lesson on tax policy: "[a] tax dependent on the habits or vices of men is the most reliable of all taxes, as it takes centuries to change or eradicate one or the other. No matter what obstacles may be placed in the way of the introduction of opium, the Chinese will brave death itself rather than suffer the deprivation of their favorite stimulant." Cong. Globe, 37th Cong. 2d Sess. 194 (1862). Representative Andrew Rogers of New Jersey drew upon the perceived characteristics of many races to emphasize his restraint in the face of accusations of disloyalty: "although the full vials of despotism have been poured upon many of our heads, and bastilles, banishments, and ostracism have been many patriots' doom, yet I challenge the plodding Israelite, the idiotic African, the downtrodden Chinese, or the imbecile Turk to equal us in tame submission to the powers that be." Cong. Globe, 38th Cong., 1st Sess. 1621 (1864).

106. Cong. Globe, 39th Cong., 2d Sess. 80 (1866). See also, e.g., Cong. Globe, 39th Cong., 1st Sess. 178 (1866) (remarks of Rep. Boyer) ("When or where did either the Mongolian, Malay, or African race, or indeed any other race than the Caucasian, ever establish any stable government based upon the principles of constitutional liberty? . . . It is certainly our duty to promote the interests and protect the rights of all within our borders. But to be successful this Government must be conducted and perpetuated by the race that made it.")

107. For an analysis of Senator Johnson's positions in the Reconstruction Congress, see Lea VanderVelde, The Anti-Republican Origins of the At-Will Doctrine, Am. J. Legal Hist. (forthcoming).

us that Heaven designed a difference?"108 The conservative and reactionary Senator Cowan was no doubt the most blatantly racist when he addressed the subject of the Chinese. Cowan usually opposed Reconstruction reforms or sought to minimize their effect.109

The argument of white supremacy maintained that all of the cultural, political, and social virtues of the United States had been created by white people,[110] and that non-white groups were inferior to whites,[111] and accordingly should be treated as inferior in terms of rights. Others advanced white supremacy as a matter of religious creation.[112] White supremacy arguments continued to have some foothold in Congress,[113] even though the entire Reconstruction mission was in tension that retrograde view.

108. Cong. Globe, 40th Cong., 1st Sess. 2939 (1867).

109. Senator Cowan had a very narrow interpretation of the Thirteenth Amendment. See analysis of exchange between Cowan and Senator Henry Wilson described and analyzed in VanderVelde, Labor Vision, *supra* note 2.

110. Before the Civil War, Senator Milton Latham, for example, opined: "Sir, if every trace and record of all other races were destroyed, the world would not be deprived of a single noble thought or artistical conception, nor of a single invention or contrivance in mechanical arts capable of exercising an important influence upon civilization. Progress, Mr. President, is a Caucasian term, existing in all Caucasian languages, and expressing the characteristic faculty of the race. Let the Caucasian race disappear from the earth, and you will have nothing left but the stereotyped civilization of the Chinese and the Japanese, and the barbarism of the Ethiopians." Cong. Globe, 36th Cong., 1st Sess. 1726 (1860).

111. Rep. Dawes, an opponent of slavery who critiqued the idea of racial inferiority elaborated this argument to the point of exploding it.

If this be a just and sufficient ground for enslaving the African, it is equally good for enslaving all other inferior races. Look at it. "The inferior race should be in subjection to the superior," says this convenient logic. But the Celt is inferior to the Saxon-ergo, the Celt should be the slave of the Saxon. And, sir, it is bit recently that I heard the remark from one of these defenders of this nefarious system, that the best thing that could be done for the hordes of foreigners flocking to our stores would be at once to enslave them! Yes, sir, let free men bear this in mind, that the slaveholders do not put the right of one man to own another upon the ground of color, but upon condition! The strong may enslave the weak! It is the principle at which we look-all that is wanting is the opportunity; and the man who fastens the chains upon the limbs of the black will with equal readiness, when opportunity offers, fasten them upon the white man. The gentleman's argument, then, proves too much, and consequently proves nothing. He may just as well enslave the Indian, the Hindoo, the Mongolian, the Tartar, as the African.

Cong. Globe, 34th Cong., 1st Sess. 1216 (1856).

112. See also, remarks of Representative Brooks of New York: "Our country is now made up of many different races, not only Caucasian, Mongolian, Indian, Chinese, and Japanese about to come here in the Pacific steamers by thousands, and at last the Esquimaux: . . . You have stored up and are yet storing up for them the elements of awful strife which will produce a perpetual conflict of races . . . . One race is superior to another. God so ordained, and no fiat or authority of yours can bring down the Caucasian to the African, or bring up the African to the Caucasian. All efforts, all struggles will be in vain." Cong. Globe, 40th Cong., 1st Sess. 539 (1867).

113. During the Civil War, Representative Maynard, in support of appointing diplomats to Haiti and Liberia, argued "[t]hat the people there are black, or yellow, or of various shades of complexion, is a matter that should not enter into the question. I do not see how color can be made an objection after having but recently expended many

Representative William Mungen of Ohio, speaking of "the negroes, Indians, Chinese, and Esquimaux" rejected the Radical Republican's claim that all were "men and brothers. I admit their humanity that they are all men and not monkeys; but I deny the 'brotherhood;' I deny the fraternity."[114] He warned against complacency by legislators who risked "transmitting this glorious heritage . . . to a hybrid race-a set of mongrels, mulattoes, crosses between Chinese, Esquimaux, whites, mulattoes, Indians, half-breeds, and nondescripts."[115]

Some congressmen favored Chinese over the Freedmen, arguing for equal treatment of the Chinese based on the supposed and stereotyped good characteristics of Chinese as compared to those of African Americans. Rather than rejecting racial hierarchy and difference, they celebrated the merits of Chinese as compared to African Americans, who they saw as culturally more disadvantaged. For example, Senator Fowler, arguing for what would become the Fifteenth Amendment contended:

> The prejudice of race . . . never asserted themselves so openly and so inconsistently as they have on the present question. These feelings have been carried so far as to place the ancient civilization or the Chinese, marked by its centuries of conquests in arts, science, literature, and philosophy as beneath the intellectual and moral deserts of Africa . . . The Chinese have proved themselves competent, not only to maintain civil institutions in their own land, but to maintain them for centuries extending far beyond the period of history known to western civilization, without a shadow of variation. The African is without any development in his own land, indeed without the conscious recognition of himself or his relations to the universe. He is without history, the embryo of humanity. He is still a man, and when brought under the influence of the highest civilization in history he has rapidly developed in that direction, passing at a bound over centuries of human struggle and human development.[116]

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thousands of dollars to establish diplomatic relations with Japan. It is scarcely two years since we received a delegation from that country upon this floor, under circumstances of great consideration. They were not men of our complexion, yet none of us took offense. I suppose if China were to be represented here, we should receive the Chinese in the same way. The question of social or civil equality cannot arise. Different in nature, in race, habits, and pursuits, there can be no common standard." Cong. Globe, 37th Cong., 2d Sess. 2533 (1862). Representative Crittenden, among others, objected: "I have an innate sort of confidence and pride that the race to which we belong is a superior race among the races of the earth, and I want to see that pride maintained." Id. at 2534.

114. Cong. Globe, 40th Cong., 1st Sess. 519 (1867).

115. He continued: "My Radical friends, who see in these predictions nothing except something to laugh at, and think that the country is safe — that nobody's daughter will marry a negro, at least they know theirs will not and as they frequently say, they are not afraid of a negro, &c. — are only reenacting in a very plain way what has often happened in history. They virtually say, we are the natives of the soil; we control its destinies; we own all this country; we are rich; we are powerful; we do not fear the negro, the Indian, the Chinese, the Esquimaux, the world, the flesh, the devil nor the Democratic party." Id. at 521.

116. Cong. Globe, 40th Cong., 3d Sess. App. 196 (1869).

California Representative Aaron Sargent reversed the relative racial assessment, while maintaining that both peoples were less capable than white people. "I never saw a negro population anywhere which was not infinitely superior to these Chinese in character, morality, and intelligence. It would be an infinite work to elevate them."[117] Representative Sargent brutally denounced the Chinese describing them in the worst possible terms. "In morals and in every other respect they are obnoxious to our people. The women are prostitutes, and the men petty thieves. But how can we keep them out? . . . A people of strange tongue, vile habits, impossible of assimilation, and with customs difficult to penetrate, swarm by thousands to our shores, like the frogs of Egypt."[118] These kinds of argument pitted racial groups against each other based upon nothing more than the speaker's assessment of the relative qualities of the racial stereotypes.

Tellingly, after the passage of the Thirteenth Amendment, racially offensive language addressed to Freedmen declined. Radical Republicans like Senator Wilson could shut down reactionary congressmen who resorted to old and hurtful ways of speaking.[119] But racially offensive language targeting Chinese immigrants continued especially as western Congressmen increasingly brought the subject of "the Chinese question" to the floor of Congress.

2. Political Incapacity

The political objection to the Chinese inclusion in the United States had three components. The first was an argument that only Caucasians, and no one else, had the genius for self-government.120 The second was the threat that in some places nonwhites could outnumber whites to become the voting majority.[121] The third was that non-whites might attain a position of higher stature in society than whites.[122]

These arguments grounded in White supremacy were deployed against African Americans as well as Asians and Native Americans and those legislators using this kind of White supremacy argument treated non-whites

117. Cong. Globe, 40th Cong., 1st Sess. 2939 (1867).

118. Cong. Globe, 37th Cong., 2d Sess. 2929 (1862).

119. See, for example, the extended exchange between Senator Henry Wilson and Senator Cowan detailed in VanderVelde, Labor Vision, *supra* note 2. Wilson took Cowan to task for his racist "sneers" about the physical characteristics of African-Americans with the biting words: [the Senator from Pennsylvania] was not of us; he is not of us now, or he would not rise here and utter these sneers . . . . " Id. at 482.

120. See *infra* at text accompanying notes 100–110.

121. See, e.g., Cong. Globe, 40th Cong., 3d Sess. 1628 (1860) ("[I]n a very few years [California and the Pacific Coast may have] perhaps millions of Chinese and other Asiatics, and it may not be wise to put the Government of those States into their hands.") (Remarks of Rep. Doolittle of Wisconsin).

122. See Gabriel J. Chin & Randy Wagner, The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty, 43 Harv. Civil Rights-Civil Libs. L. Rev. 65 (2008) (noting that after the Civil War, African Americans were an absolute majority of three former Confederate states, and represented over 40 percent of the population in four more).

almost interchangeably.[123] In most speeches concerning political capacity, the primary objective under consideration was the capacity of the Freedmen to exercise the right of suffrage. Notably, however, African American suffrage presented a practical problem quite different from the abstract principle of racial equality or superiority. Passage of the Thirteenth Amendment meant there were no more enslaved persons to be counted as three-fifths of a person for purposes of apportioning Congress and the Electoral College. In this context, Chinese people were invoked only derivatively to strengthen arguments primarily directed at considering people of African heritage.

Senator Doolittle opposed African American suffrage in the District of Columbia in an argument by grouping them with Chinese people:

> There is no man on this floor who will rise and give it as his deliberate opinion that a majority of either the Indian race, the African race, or the Asiatic race within the United States are capable of exercising the right of suffrage. [No Senator believes] the Indians, the Africans, or the Chinese are capable of discharging this highest duty of the citizen. . . . The few, the exceptions only of the white men of this country, are incapable of discharging this duty; but with the Indians, the Africans, and the Chinese it is only the exceptions that are capable of exercising this right.[124]

Kentucky Representative James Beck assured his colleagues that denying political rights to people of color did not harm them because they were incapable of self-government anyway.

> I would protect [the negro] as a free man, as I would protect our women and children, or any other person who had not the capacity for exercising political rights. I would hold the negro unfit for political rights, as we do the Indian and the Chinaman, for a great variety of reasons.[125]

123. Cong. Globe, 39th Cong., 2d Sess. 1569 (1867). Senator McDougall of California warned: "I should like to know who [would] think that there is a God [who] would undertake to place the barbarians of Mississippi and South Carolina in command of that country? Who would place Chinamen in my own State in a position where they might overwhelm the Caucasians of my own country and the men from Europe?"

124. Cong. Globe, 39 Cong., 2d Sess. 313 (1867). See also Cong. Globe, 40th Cong., 2d Sess. 700 (1867) (Remarks of Sen. Doolittle) (in opposing supplementary Reconstruction bill, noting: "I do not say that there are not some persons of Indian, of Chinese, or of African descent who are qualified; but they are exceptions to the general rule. Society must, in the main, be governed by general laws."); Cong. Globe, 40th Cong., 2d Sess. 1 2869 (1868) ("Mr. President there is a difference between the Indian and the Caucasian, between the Mongolian and the Caucasian, between the negro and the Caucasian, which is just as marked and distinct as it can possibly be. There is not from the crown of the head to the sole of the foot, in mind or in body, anything which does not differ.").

125. Cong. Globe, 40th Cong., 2d Sess. 2450 (1868). Representative Beck again attributed all of civilization's positive accomplishments to white people: "The Caucasian race alone has developed that power, and that only under favorable circumstances, by the growth of centuries and by education up to a point which we think we have reached. [Granting power to Freedpeople] is an outrage upon the white race to which we belong, and one which the people of this country never will permit." Id. Denial of rights was for their benefit: "If gentlemen will go there now they will see the negro as happy and better protected and better cared for than in any other State, North or South, in spite of all the efforts of demagogues to make it otherwise."); Cong. Globe, 42d Cong., 2d Sess. 1474 (1872)

Similarly, Representative Noell of Missouri asked rhetorically: "Why have not Chinese or Indians ever taken part in politics on the western frontiers? I fear we cannot make a white man of a negro by act of congress."[126] Undoubtedly, he would have concluded the same about Chinese.

Senator Cowan objected to the Civil Rights Act of 1866 because it would grant citizenship to Chinese born in the United States and to the children of persons of "barbarian races," as he called them.[127] He drew the line of eligibility between European and non-Europeans.

> It is true that the colonists of this country [opened] the door of these privileges wide to men of their own race from Europe. They opened it to the Irishman, . . . to the German, . . . to the Scandinavian races of the North. But where did they open it to the barbarian races of Asia or of Africa? Nowhere. There may be no positive prohibition; but the courts always administered the law upon the basis that it was only the freemen who established this Government and those whom the freemen admitted with them to an enjoyment of political power that were entitled to it.[128]

Senator Cowan further opined that California would come to "belong to the Chinese," if they became citizens and were allowed to enjoy political

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(He boasted that he had "marched into this Hall with a colored Mongolian from China upon my own arm. We therefore have no prejudice against the colored race. I deny the allegation that we have. I am sure that I for one have no such prejudice. The destiny of the African race is now in its own hands, not in ours. That race is on trial. . . . If members of that race shall ever exhibit the same capacity for self-government which the Chinese or Japanese have exhibited, no man will welcome the spectacle more cordially than myself. . . . Whenever the African race shall exhibit their right to social equality, whenever they shall exhibit the same capacity and intelligence which the Chinese or Mongolians have exhibited, social equality will be cheerfully extended to them through all parts of the country."); Cong. Globe, 39th Cong., 1st Sess. 310 (1866) (Similarly, Rep. Hubbard of West Virginia argued: "I believe that all history will sustain the position that only a homogeneous people can make a united nation. I further believe that the effort to introduce into the sovereignty of this country a race which cannot in the nature of things become homogeneous-which fact every instinct of our humanity and the whole legislation of the country attest-can only be productive of contention and conflict-a conflict which must ultimately result in the domination of one or the other of these races, and the ultimate destruction of the weaker race. And this rule I would apply not only to the negro, but to the Indian, the Chinaman; and if there be any people of our own race of whom it could not fairly be predicated that in a few generations they would become homogeneous, or, in other words, Americanized, I would, if I had the power, deny to that people the right of suffrage On the other hand, I would by the fullest legislation secure not only to the negro, but to every inhabitant of this country, of whatever race or lineage, all the protection that the law gives to my wife or minor son . . . But in no case would I extend this right so far as to give to the excluded race the control of the government in any community, and thus provoke the conflict I seek to avoid.").

126. Cong. Globe, 39th Cong., 2d Sess. App. 113 (1867).

127. Cong. Globe, 39th Cong., 1st Sess. 499 (1866). In response to a question from Lyman Trumbull, he admitted that "[t]he children of German parents are citizens; but Germans are not Chinese; Germans are not Australians nor Hottentots, nor anything of the kind. That is the fallacy of his argument." Id. at 498.

128. Id.

power there.[129] Paradoxically, Chinese people were claimed to be incapable of participating in government, yet they were perceived as a threat to overtake that governance if given a vote.

California Senator John Conness, one of the few California congressmen to support Chinese immigration, called him out on this. Senator Conness said: "I beg the honorable Senator from Pennsylvania, though it may be very good capital in an electioneering campaign to declaim against the Chinese, not to give himself any trouble about the Chinese . . . ."[130] Senator Conness would eventually lose his seat in Congress because of his support for protecting the rights of the Chinese.[131]

California's other senator, Senator Davis was more in step with his west coast constituency. He bound race with citizenship, using the curious language that citizens were '*manufactured'* out of immigrants:

> I deny that a single citizen was ever made by one of the States out of the negro race [or] the Mongolian race. I controvert that a single citizen was ever made by one of the States out of the Chinese race, . . . or out of any other race of people but the Caucasian race of Europe. . . . [N]one of the inferior races of any kind were intended to be embraced or were embraced by this work of government in manufacturing citizens.[132]

The Constitution, he declared, "was made by a different race of beings." The Constitution "ignored the black man; it paid no attention to him; … he had nothing to do with it any more than the Indian of the forest had, any more than the Chinaman in California had" in forming his state's constitution.[133]

Senator Williams of Oregon warned that the Civil Rights Act of 1866 could make the Chinese eligible to hold office:

> Is not any man … who is a citizen of the United States, within the meaning of the Constitution, eligible to the office of President or Senator or Representative? Is the Congress of the United States prepared at this time to adopt a proposition that negroes and Indians and Chinese and all

129. Id.

130. Id. Remarks of Senator Conness of California. Continuing in a sparring mode, Conness recommended that Cowan "confine himself entirely to the injurious effects of this provision upon the encouragement of a Gypsy invasion of Pennsylvania. But why all this talk about Gypsies and Chinese? I have lived in the U.S. for now, many a year, and really I have heard more about Gypsies within the last two or three months than I have heard before in my life. It cannot be because they have increased so much of imp, It cannot be because they have been felt to be particularly oppressive in this or that locality; It must be that the Gypsy element is to be added to our political agitation, so that hereafter the negro alone shall not claim our entire attention."

131. Robert Denning, A Fragile Machine: California Senator John Conness, 85 Cal. Hist. No. 4 26 (2008).

132. Cong. Globe, 39th Cong., 1st Sess. 523 (1866).

133. Id. at 528. See also Cong. Globe, 39th Cong., 1st Sess. 575 (1866) (asserting "[t]hat the fundamental, original, and universal principle upon which our system of government rests, is that it was founded by and for white men; that it has always belonged to and been managed by white men; and that to preserve and administer it now and forever is the right and mission of the white man. When a negro or Chinaman is attempted to be obtruded into it, the sufficient cause to repel him is that he is a negro or Chinaman.").

> persons of that description shall be eligible to the office of President of the United States, Senator, or Representative in Congress *before* they are allowed to vote?[134]

Ultimately, President Andrew Johnson vetoed the Civil Rights Act of 1866, reasoning that it made citizens of the Chinese of the Pacific States, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, people of color, negroes, mulattoes, and persons of African blood.[135]

3. Homesteading as a Means of Upward Mobility

There was no doubt that the prospect of increased immigration of laborers would produce consequences for the domestic work force. But through the nineteenth century, the United States still favored immigration as a national policy because of the continued belief that immigrants would develop western lands.136 The customary American narrative is that the opportunity to move west and become homesteaders functioned as the society's escape valve whenever there was an excess supply of workers in the labor market.

Opening federal lands to settlement was a major Reconstruction initiative as well.[137] Opening access to western land grants to Freedmen was seen as the substitute for awarding them the lands they had formerly worked.[138] Again, this distinctively different method of empowerment for Freedmen had no counterpart for Chinese. The vast federal government program for acquiring land was foreclosed to them.[139]

This opportunity continued to be foreclosed because eligibility was limited to citizens or those soon to become citizens. Being a citizen or declaring an intent to naturalize continued to be a precondition to homesteading. The Chinese were barred from naturalization, so declaring an intent to become a citizen was ineffectual. Because the Chinese were foreclosed from becoming

134. Cong. Globe, 39th Cong., 1st Sess. 573 (1866) (emphasis added).

135. Cong. Globe, 39th Cong., 1st Sess. 1679 (1866).

136. See e.g., Cong. Globe, 41st Cong. 1st Sess. 242 (Mar. 24, 1869) (remarks of Senator Sprague).

137. The Homestead Act was a major piece of Reconstruction Era legislation. The Southern Homestead Act of 1866 was a federal law enacted to break a cycle of debt during the Reconstruction following the American Civil War. Senator Sprague expressed the connection between immigration and homesteading in his speech on immigration. Id.

138. Opening homestead lands in a racially neutral way was seen by Reconstruction congressmen as the substitute for "forty Acres and a mule" reparation. The best direct evidence of this is in the contemporary history of Reconstruction written by Senator Henry Wilson, himself a key figure in the Reconstruction dealings. See Henry Wilson, History of the Reconstruction Measures of the Thirty-ninth and Fortieth Congresses, 1865-68 (1868) ("The 5th section allotting one million acres of land in Florida, Mississippi, Alabama, Louisiana, and Arkansas in forty acre lots to Freedmen, was stricken out, the public lands in those States having been opened to settlers, without distinction of color."). On Wilson's significance in Reconstruction reform, see Lea S. VanderVelde, Henry Wilson: Cobbler of the Frayed Constitution, Strategist of the Thirteenth Amendment, 15 Geo. J.L & Pub. Pol. 173 (2017).

139. Act of Mar. 20, 1862, ch. 75, 12 Stat. 392.

independent yeoman farmers on their own lands, they were relegated to the status of unpropertied, perpetual laborers, and accordingly, destined to remain in the labor market permanently. Immigrants from other countries were sometimes also subjected to stereotypes,[140] but while other immigrants were welcome to naturalize, the Chinese were not. The Chinese appear to have been in a caste of their own.

Chinese workers were uniquely targeted for undermining the labor standards because they worked more cheaply. One method to deal with this would have been to assure that the Chinese workers enjoyed the same wages as other workers, eliminating the possibility of undercutting other workers' wages.[141] Congress had had little experience with wage regulation before, however. The Republicans attempted to institute a wage and hour commissioner,[142] but even then, if the Chinese continued to be treated as a caste, this initiative may not have been contemplated as extending to Chinese workers in the west.

Some congressmen subscribed to a pseudo-economic argument that people who consumed less and needed less were willing to work for less. The Reconstruction Congress considered exactly this argument to justify paying women clerks less than men clerks because since they would eventually marry, they would need less.[143] This argument was amped up in the case of the Chinese. Because Chinese workers allegedly ate less, were willing to live together in closer quarters, and spent less than other workers, their frugality and consumption patterns undermined the American standard of living.

The radical republicans repeatedly stated that a man is "worthy of his hire" — by which they meant every man should have a fair and just wage that allowed them to provide for their needs.[144] Several congressmen took the floor to suggest that women should be paid the same as men in government

140. See, e.g., Cong. Globe, 40th Cong. 3rd Sess. App. 259 (1869) (Remarks of Rep. Robinson of New York). Most refer to Irish immigrants and reflect some degree of stereotype. There are 116 references to "Irishman" in the 40th Congress and an additional 188 to "Irish." (See list on file with authors).

141. That is, if underbidding is a serious social problem, as contemporary minimum wage laws seem to imply, do not allow free negotiation of wages below some point.

142. See discussion in VanderVelde, *supra* note 107.

143. See generally discussion in the 40th and 41st Congress over the different pay scales for male and female government clerks. Several Congressmen rejected this argument for a gender-segregated wage scale. For example, Senator Conkling sought to remind the Senators why there was a distinction in pay between male and female clerks. "Why? Because as a rule men past a certain age are called upon to maintain families, they become the heads of families. This is true occasionally in the case of a woman maintaining herself by clerical labor, but it is the exception to the rule, and legislation proceeds not for the sake of the exception, but for the sake of the rule to which the exceptions exist." Cong. Globe, 40th Cong. 3rd Sess. 1779 (1869) (Remarks of Sen. Conkling.) Nonetheless, the gender-segregated wage scale was preserved because efforts to change it died in committee. Id.

144. See, e.g., Cong. Globe, 40th Cong., 2d Sess. 2865 (1868) (Remarks of Rep. Mullins). This phrase, which is biblical in origin (e.g., 1 Timothy 5:18), was invoked at least five times in the 40th Congress alone. (See list on file with authors).

service, though the measures failed.[145] By contrast, only one congressman, Senator Henry Wilson, took the floor to suggest that regardless of savings and spending practices, Chinese workers should be entitled to a just wage vis-à-vis their employers, the same wage as others engaged in similar work. Wilson welcomed Chinese immigration, but not labor at substandard prices. As he stated, "It is reported that they now intend to import Chinese laborers; but I hope it is not true that this railroad company to which we gave those lands propose to bring 1500 Chinamen, imported by these modern slave traders, to take them on to the line of that road and work them for 65 cents a day, they boarding themselves, in lieu of paying $1.75 to the colored men."[146]

Those who opposed Chinese immigration amplified the racial nature of this argument with regard to work performed in the United States. Senator Casserly of California, a hawk on Chinese immigration, won Senator Conness' seat on the issue.[147] Senator Casserly stated:

> It is a known fact in history that wherever these nomadic hordes of Chinese laborers, having no tie to their own soil except that extraordinary one of burial there, have gone throughout the entire East they have rooted out and annihilated the native labor and substituted their own. I ask, does anyone propose such a result for this country? [I do not believe] that the hardy workingmen of the United States, the body of our people, to whose manhood we owe the result of the last tremendous war, will quietly submit to be trodden out and extinguished as the pliant natives of Asia have been under the desolating march of this terrible population.[148]

Then the argument became even more racist:

> Not only that: their presence among us in any great numbers goes to the base of the whole moral strength of our society, to the existence of our society itself. It threatens to supplant the entire Christian forces of, our civilization by forces which are not merely Asiatic, but pagan. I believe that the forced importation of these people is but a fragment of the evil. The real danger is behind all that. It is in the presence at all of the Chinese in our country in any considerable numbers as a permanent element. How easily might they be among us in overwhelming numbers. . . .[149]

145. Furthering this debate, Senator Pomeroy replied: "All females have to live; they have mouths to feed; they must wear clothing; there is no house in Washington open to them any cheaper than to males. They have responsibilities, let me tell the Senator from New York; they have upon them responsibilities equal to what are placed upon men." Cong. Globe, 40th Cong., 3d Sess. 1779 (1869). Although the bill for equal pay for women clerks passed both Houses in different formats, no single bill became law. Id.

146. Cong. Globe, 41st Cong., 2d Sess. 5384 (1870) (Remarks of Sen. Henry Wilson). Senator Fowler of Tennessee also contemplated that wage rates would equalize if Chinese immigrants were not held to long-term contracts. "Here, I say, is an end to your cheap labor, because the Chinaman, with his intelligence, with his wants, and with his opportunities, will demand the same compensation for his labor that our own people will demand. Cong. Globe, 41st Cong., 2d Sess. App. 575 (1870).

147. Wikipedia, John Conness, https://en.wikipedia.org/wiki/John_Conness (last visited July 25, 2020).

148. Cong. Globe, 41st Cong., 2d Sess. 5384 (1870).

149. Id.

While many speeches disparaged Chinese labor, sometimes legislators contended that the Chinese might in fact be superior, more efficient workers. But that did not improve their desirability as neighbors or fellow citizens.[150] Senator Cowan, again, argued essentially that the Chinese could outwork others in America:

> there is a race in contact with this country which, in all characteristics . . . is not only our equal, but perhaps our superior. I mean the yellow race — the Mongol race. They outnumber us largely. Of their industry, their skill, and their pertinacity in all worldly affairs, nobody can doubt . . . . I wish to be understood that I consider those people to have rights just the same as we have, but *not* rights *in connection with our Government*.[151]

In free market terms, there are no reported instances where Chinese laborers (or their labor gang bosses) were offered better wages, but they instead insisted upon a lower amount. If Chinese people were cheap laborers, were willing to work for less, it was because that is all they could get — they were offered less.[152] And in the case of the Chinese immigrant workers, what the worker actually received was probably even further reduced from the wage he earned because an intermediary took a cut. Some entities financed workers' transportation from China, found them jobs, and expected to be repaid with substantial interest.[153] Moreover, railroad labor contracts in the Stanford Collection demonstrate that wages were not paid directly to the workers; they were collected by and paid to the jobber, who supplied the worker.[154] Undoubtedly, the jobber took a cut, diminishing the Chinese worker's wages still further.

150. Senator Davis made a similar argument with respect to politics: "I do not deny that our national family properly and wisely comprehends all of the nationalities of Europe who may come here, according to the terms of our naturalization laws, and their posterity- but I assert that negroes, Indians, Mongolians, Chinese, and Tartars ought not and cannot safely be admitted to the powers and privileges of citizenship. Both the Indian and Mongolian races are essentially superior to the negro race, but neither can they be properly or safely admitted to citizenship; my judgment is to exclude them all, to keep and perpetuate ours as a purely white man's government." Cong. Globe, Cong. Globe, 39th Cong., 2d Sess. 80 (1866). See also, e.g., Cong. Globe, 39th Cong., 1st Sess. 178 (1866) (remarks of Rep. Boyer) ("When or where did either the Mongolian, Malay, or African race, or indeed any other race than the Caucasian, ever establish any stable government based upon the principles of constitutional liberty? . . . It is certainly our duty to promote the interests and protect the rights of all within our borders. But to be successful this Government must be conducted and perpetuated by the race that made it.").

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

152. Terry E. Boswell, A Split Labor Market Analysis of Discrimination Against Chinese Immigrants, 1850-1882, 51 Am. Soc. Rev. 352 (1986).

153. There is considerable uncertainty about whether the Six Companies operated as jobbers or not. See Qin Yucheng, A Century-old "Puzzle": The Six Companies' Role in Chinese Labor Importation in the 19th Century, 12 J. Am.-E. Asian Rel. 225 (2003). Professor Qin takes the position that while they may not have been jobbers in importing Chinese laborers, they enforced the debt obligations that jobbers contracted with the workers. We take no position here. We plan to pursue this issue in subsequent work.

154. Geography of Chinese Workers Building the Transcontinental Railroad, Chinese Railroad Workers in North America Project at Stanford University, https://web.stanford.

Implicitly, white workers were the standard for comparison because they were not too lazy, and yet not too obsessed with toil.[155] In fact, at the time, Americans were considering legal limits on work hours specifically for the purpose of ensuring that workers received adequate time for leisure. The Reconstruction initiative for an eight-hour day was framed to ensure that workers had adequate time for leisure in order to develop and maintain their ability to participate intelligently in the process of governing.[156] It is not surprising that white workers would be the norm. Having just ended slavery, white workers sought to raise Freedmen to their standard. That balance of work and leisure was considered just the right diligence and metabolism to build a true republic. What distinguishes the situation of Chinese people is not that they inherently worked harder but that there was no similar systematic effort to secure Chinese laborers those same benefits and opportunities. There was no similar effort to see that the eight-hour day law applied to Chinese laborers building the nation's railroads, railroads which were built in part by federal subsidies. There was no similar effort to see that Chinese laborers had adequate leisure to ensure their ability to participate in civic affairs, because as a basic premise, their participation in civic affairs was unwelcome. Some Radical Republicans favored extending citizenship, immigration, and better working conditions to Chinese people,[157] but in general, the Congress looked to its western members for guidance. The sole California Senator who was willing to support Chinese immigration, Senator John Conness, lost his seat over the issue. Chinese laborers remained in a caste by themselves.

IV. Specific Legislative Responses to the "Chinese Question"

As commercial connections between China and the United States increased, and the United States received its first trickle of migration from China, Congress engaged in passing several laws that had specific consequences for the Chinese. In general, the federal government's approach to the Chinese was much less generous and protective than its approach to ensuring that Freedmen became citizens and free laborers.[158]

A. *Civil Rights Legislation, the Fifteenth Amendment, and the Debates over "Citizens" Rather Than "Persons" Sidelines the Chinese*

While several congressmen proposed full and universal racial equality, ultimately their views did not prevail in certain specific acts of legislation. The original draft of the Civil Rights Act of 1866 protected the right of all "inhabitants" to own property, among other things, but during debate its protection

edu/group/chineserailroad/cgi-bin/website/virtual (last visited June 24, 2020).

155. Some critical race scholars have called this the "Goldilocks" parable.

156. For discussion of the relationship of the Eight-hour Day initiative to civic participation, see VanderVelde, *supra* note 107.

157. See, e.g., remarks of Senator Wilson quoted at *supra* note 147.

158. Professor Earl Maltz has demonstrated how the terms of the Reconstruction amendments and associated civil rights laws were influenced by concern for extending rights to Chinese. Maltz, *supra* note 3, at 235.

was limited to "citizens" thus maintaining the discrimination against Chinese people.[159] By protecting "inhabitants," the 1870 Civil Rights Act replicated many of the terms of the 1866 Civil Rights Act for the Chinese,[160] including the right to testify and freedom from discriminatory taxation,[161] but excluding the right to own land.[162]

As it had since 1790, federal law continued to restrict naturalization to "free white persons."[163] Senator Sumner initially proposed the simple and elegant solution of repealing the word "white," but this proposal was rejected.[164] Senator Doolittle repeatedly objected that such a move would permit Chinese to naturalize, and then in turn gain protection under the pending Fifteenth Amendment.[165] Accordingly, Congress extended the right of naturalization only to persons of African nativity and descent.

159. Id.

160. 42 U.S.C. § 1981(a) (2018).

161. In 1870, Congress invalidated a Chinese and Mongolian miner's tax imposed by the Idaho territory. Cong. Globe, 41st Cong., 2d Sess. 3862 (1870).

162. Maltz, *supra* note 3, at 235–36. This limitation remains law. See 42 U.S.C. § 1982 (2020) ("All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.").

163. See *supra* notes 31–32 and accompanying text.

164. Cong. Globe, 41st Cong., 2d Sess., at 236–42. For an interesting discussion of how the term "white" deployed in these debates, see Kate Masur, The Law of the Land: Race, Liberty, and Policing before the 14th Amendment, (forthcoming 2020) (unpublished manuscript) (on file with author).

165. Cong. Globe, 40th Cong., 3d Sess. 1628 (1869) ("You are about to reorganize or recast your naturalization laws. . . . The Senator from Massachusetts [Mr. Sumner] has a bill, proposed by him, to strike the word 'white' out of the naturalization laws, to extend all the benefits of naturalization to the Chinese as well as to men of European descent, and with the passage of these bills citizenship will -be conferred upon this vast population to be poured into those States from Asia. Now, is it wise for us to put the governments of the Pacific States into the hands of the Asiatic population? Is it not better that we leave the political power in, those States where we find it, in the hands of our own people and our own race, who can best judge when this right of citizenship shall be extended to the Chinese?"); see also id. at 1030 (Remarks of Sen. Doolittle); id. at 1305 (Remarks of Sen. Doolittle) ("Now, sir, you are about to force upon the country negro suffrage and Chinese suffrage, too; for you have only to strike the word 'white' out of your naturalization laws-and the honorable Senator from Massachusetts [Mr. Sumner] has a bill already pending for that purpose-and Chinese suffrage must have its way in California and Oregon and on all the Pacific slope. Chinese suffrage in those States will be as potent as negro suffrage in the States of the South, perhaps more so; for while the negro population of the South will be diminishing, in all human 'probability, the Chinese, as we open new channels of commerce across the Pacific, as we shall on the completion of the railroad, will be pouring in upon our western shores by hundreds of thousands."); id. at 939 (Remarks of Sen. Corbett) ("Chinese suffrage will virtually be adopted upon the Pacific coast by the authority of the United States; or at least after this amendment shall have been adopted, the naturalization laws can be so altered by Congress as to admit of Chinese suffrage upon the Pacific coast. . . . It may be prudent for us to consider at this time whether we shall establish in this country an Asiatic people who are pagans, who are not Christians.")

The Fifteenth Amendment spoke in terms of protecting "citizens" against racial discrimination in their exercise of the vote.[166] This may not seem surprising, but this was an era in which some states permitted noncitizen voting as well.[167]

These issues also played out when Congress considered Montana and Wyoming Territorial organization. When Congress organized the Montana Territory in 1864, Senator Doolittle prevailed in limiting suffrage only to United States citizens and those who have declared their intention to become such.[168] When asked whether Indians could naturalize he, a lawyer of some learning, noted "[t]hat is a disputed question of law, upon which persons take different sides, as they do about the Chinese, the Malays, and all the red and yellow races; Chancellor Kent, … taking the ground that they are not capable of becoming naturalized."[169]

The issue arose again in 1869 with the Wyoming Territory.[170] Then Senator Patterson of New Jersey argued:

> So by the passage of this proposition we shall relieve these black citizens, native to the soil, from the wrong which is done them, without doing any wrong to the Asiatics who may flow in upon our western shores. I prefer, for one, to leave that question open, so that if a war springs up in Asia and these increasing tides of immigration from Asia pour upon our Pacific coast in such numbers as to endanger the welfare of those -States, they may have it in their power to guard themselves against the threatened evils. . . .[171]

But this time Senator Doolittle, who generally opposed the Fifteenth Amendment in any form, seized upon the principle that the Chinese were superior to African-Americans to undermine the idea of expanding the suffrage at all.

> You know that the Chinese are far in advance of the African in point of civilization. You know that, in comparison with the Chinaman, the African is inferior. You know that in point of industry the testimony of all

166. Maltz, *supra* note 3, at 230–35.

167. Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, 141 U. Pa. L. Rev. 1391 (1993); Gerald L. Neuman, "We Are the People": Alien Suffrage in German and American Perspective, 13 Mich. J. Int'l L. 259, 307 (1992).

168. Cong. Globe, 38th Cong., 1st Sess. 1745 (1864). See Act of May 26, 1864, § 5, 13 Stat. 85, 87 (granting right to vote at first election and to hold office to "all citizens of the United States, and those who have declared their intentions to become such.").

169. Cong. Globe, 38th Cong., 1st Sess. 1843 (1864).

170. "Inhabitants" were denied the right to vote to prevent Chinese suffrage, but citizens and immigrants who had declared their intent to naturalize were enfranchised. Cong. Globe, 40th Cong., 2d Sess. 2802. See Act of July 25, 1868, § 5, 15 Stat. 178, 179 (granting right to vote and hold office to male citizens over 21 and those who have declared their intention to become citizens).

171. Cong. Globe, 40th Cong., 3d Sess. 1009 (1869). See also Cong. Globe, 40th Cong., 2d Sess. 2899 (1868) (Remarks of Sen. Patterson) ("[T]here are reasons for giving the ballot to the black man of the South which do not exist for giving the ballot to the Chinaman in California, or the black man in Ohio or anywhere else.")

> men upon the western coast in relation to the Chinaman is that he loves industry; that he loves to labor. He is trained to labor and habits of industry and habits of frugality and economy that are most remarkable. If we are to carry out, the idea . . . of the equality of all races [to participate in governance of the country], if we are to extend these privileges to the African, why should we not extend them to the Chinaman?[172]

Senator Doolittle is not regarded as seriously advocating extending suffrage to Chinese residents of the territory.

By denying Chinese the right to vote, primarily, by denying them access to citizenship, and then supplementarily, by denying them the opportunity for non-citizen voting in circumstances where such voting was permissible, the Chinese had no means of participating in American governance. The denial of the right to vote is particularly significant because as the U.S. Supreme Court would come to recognize in *Yick Wo v. Hopkins*, voting was "a fundamental political right, because [it is] preservative of all rights."[173] Accordingly, denying Chinese Americans access to the right to vote made them vulnerable to the possibility of deprivation of every other right.

B. *Coolie Act Chinese Immigration as Trafficking in Involuntary Labor: The "Coolie" Question*

The Coolie Act of 1862 directed at Chinese immigrant workers was the primary federal legislative innovation directed at regulating the immigration of those Chinese workers entering the United States under labor contracts.[174] It was enacted in 1862, in the early days of the Civil War, when Congress expanded the ban on the slave trade.[175]

In Cuba and Peru, immigrating Chinese signed contracts, enforceable both by privately exercised corporal punishment and by law, binding them to service for lengthy terms of years. It was well-known that workers were routinely worked to death in these lands. There is considerably more uncertainty

172. Cong. Globe, 40th Cong., 3d Sess. 1011 (1869). He warned further: "in any other State where the negroes are in a majority over the white, political equality and universal equality, forced upon those states . . . must in the end . . . bring social equality also. . . . they might perhaps in the end elect some negro as President of the United States . . . ." Id. Senator Thurman of Ohio also asked "when the question comes whether John Chinaman shall vote, I hope my friend will be able then to explain how it is that this fifteenth amendment excludes him. I hope my colleagues will be able to explain how this great capsheaf of impartial justice, this thing which makes this Radical party almost the ministers of the Almighty, which makes this Radical Government an exemplar on earth of what the divine government is in the other world — I hope he will explain how it is that it enables you to say that a man with a black skin can vote and a man with a yellow skin cannot." Cong. Globe, 41st Cong., 2d Sess. 212 (1869). See also Cong. Globe, 40th Cong., 3d Sess. 989-90 (1869) (Remarks of Sen. Hendricks).

173. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). See also Civil Rights Cases, 109 U.S. 3, 25 (1883) (suggesting that African American's "rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected").

174. See discussion of present and historical connotations of the term "coolie" at note 58.

175. Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (1862).

about the terms and conditions of Chinese immigration labor contracts in the United States, however, how those contracts were enforced. Almost all of the relevant American-based records of this activity were destroyed in the San Francisco earthquake, and very few have survived in China. In his excellent work on Chinese railway workers, Professor Chang concludes that there are only a handful of these actual contracts still in existence anywhere.[176] Scholars continue to explore the answers to questions about the terms and conditions under which Chinese laborers were held, from the point of their departure in China to their involvement in building the Transcontinental railroad in harsh circumstances often for low pay.[177]

The term, "coolie" itself, which today is widely recognized to be pejorative, is an issue of scholarly interpretation when considering its historical

176. See generally Gordon H. Chang, Ghosts of Gold Mountain (2019); The Chinese and the Iron Road: Building the Transcontinental Railroad (Gordon H. Chang & Shelley Fisher Fishkin eds. 2019).

177. There is an active discussion among historians of Asian America about whether the term "coolie" appropriately applies to male Chinese immigrants. Beth Lew-Williams claim they were not coolies, because they were not enslaved or formally indentured. She argues:

Though Chinese men in the United States encountered many forms of economic exploitation, they were not bound or indentured laborers. Women and girls sometimes experienced human trafficking, but Chinese men were compensated for their work, albeit scantily, and were free to leave their place of employment if they could find a better one. That said, free and unfree labor were never dichotomous categories, and at times, circumstances could push individual Chinese workers toward the unfree end of the spectrum. Some arrived in the country heavily indebted to those who had paid their passage, others were coerced into gang labor, and all encountered a dual wage system based on race. Still, Chinese workers never fully embraced the coolie trope . . . . As free labor, the Chinese held a certain degree of economic power and with it the dangerous potential for upward mobility.

Lew-Williams, *supra* note 10, at 34. The evidence that many Chinese women were not free laborers is much stronger. Lucie Cheng Hirata, Free, Indentured, Enslaved: Chinese Prostitutes in Nineteenth-Century America, 5 Signs: J. Women in Culture and Soc'y, No. 1, at 3 (1979). See also, e.g., Manu Karuka, Empire's Tracks: Indigenous Nations, Chinese Workers, and the Transcontinental Railroad 85 (2019) ("To be a Chinese worker on the Central Pacific was definitively not to be a slave, the property of another. It was, however, a reduction to the status of a tool for grading earth and drilling a mountain. It was to be expendable, interchangeable, replaceable."); Moon-Ho Jung, Coolies And Cane: Race, Labor And Sugar In The Age Of Emancipation 4 (2006) (noting "the now nearly universal claim that Asian immigrants to the United States were not coolies" but rejecting it as a "false binary"); Elliott Young, Alien Nation: Chinese Immigration in the Americas from the Coolie Era Through World War II 94 (2014) ("By the close of the nineteenth century, the Chinese laborer had become an immigrant and a free laborer, but he was not just any kind of immigrant [because of discrimination]."); Yucheng Qin, A Century-old "Puzzle": The Six Companies' Role in Chinese Labor Importation in the Nineteenth Century, 12 J. Am.-E. Asian Rel., No. 3/4 225 (2003) (concluding that Chinese in America were not coolies or slaves in thrall to the Six Companies. The Six Companies were only mutual-aid associations rather than labor brokers).

significance, both legally and nineteenth century conversation.[178] This is

178. As the California Court of Appeals explained: "From 1862 to 1885 the history of California is replete with legislation to curb the so-called 'Chinese invasion,' . . . we are impressed with the fact that the terms 'Asiatics,' 'Coolies,' and 'Mongolians' meant 'Chinese' to the people who discussed and legislated on the problem, or at most that they only extended in their thought to natives of China and the inhabitants of adjacent countries having the same characteristics." Roldan v. Los Angeles Cty., 18 P.2d 706, 708 (Cal. Ct. App. 1933). Another prominent example is the case of the union label, invented to facilitate discrimination against Chinese. Ernest R. Spedder, The History of the Label, The Electrical Worker 30 (1911), available at https://books.google.com/books?id=uFBWAAAAYAAJ&dq=cigar%20makers%20international%20union%20label%20coolie%20rat-shop&pg=PA3#v=onepage&q=cigar%20makers%20international%20union%20label%20coolie%20rat-shop&f=false (last visited June 24, 2020). The pioneering label of the Cigar Makers' International Union assured smokers that their cigars had not been made by "inferior rat-shop, Coolie, Prison, or Filthy Tenement-House Workmanship." W.A. Martin, Union Labels, 42 Am. L. Rev. 511, 531 (1908). Similarly, one federal judge explained:

After the Civil War the Pacific Coast states were overrun by the Chinese, until the traffic in coolies became a scandal, and almost or quite destroyed the opportunities of our own people on the Pacific Coast for getting work at remunerative prices. The evil so grew that it became necessary for congress to enact the most stringent legislation against Chinese immigration; and congress did enact such legislation against the Chinese, partly because that people would not assimilate with our people, partly because they only intended to remain in America a short time, partly because of their immoralities, but largely because from their methods of living they could underbid American workmen.

United States v. Morrison, 109 F. 891, 893 (S.D. Iowa 1901). See also, e.g., In re Rosenberg's Estate, 246 P.2d 858, 868 (Or. 1952) ("We are reminded of the coolie who was on the witness stand being interrogated through an interpreter. The attorney propounded a question, whereupon the interpreter submitted the same to the witness who thereupon indulged in an extended Oriental answer. Upon being asked by the attorney what the witness said, the interpreter replied, 'He say 'no.'"); People v. Chin Non, 80 P. 681, 683 (Cal. 1905) (referring to Chinese witness to crime as a coolie); Lin Sing v. Washburn, 20 Cal. 534, 535 (1862) (invalidating state law entitled "an act to protect free white labor against competition with Chinese coolie labor, and discourage the immigration of the Chinese into the State of California"); Park v. Hotel & Rest. Emp. Int'l All., Locals Nos. 106 etc., 30 Ohio Dec. 64, 97 (Ohio Com. Pl. 1919) (noting that picketing union members carried signs stating "Do not patronize this Chinese restaurant, they belong to the yellow race, they are coolies; they will not employ returning soldiers.").

The Supreme Court's famous reference to "coolies" in the Slaughterhouse Cases was more measured, in that it did not assume that all Chinese were coolies, or that all coolies were slaves:

While the thirteenth article of amendment was intended primarily to abolish African slavery, it equally forbids Mexican peonage or the Chinese coolie trade, when they amount to slavery or involuntary servitude; and the use of the word 'servitude' is intended to prohibit all forms of involuntary slavery of whatever class or name.

Slaughter-House Cases, 83 U.S. 36, 37 (1872). By contrast, Justice Field, recounting the background of the 1882 Chinese Exclusion Act, explained:

[T]here went up from the whole Pacific coast an earnest appeal to congress to restrain the further immigration of Chinese. It came not only from that class who toil with their hands, and thus felt keenly the pressure of the competition with coolie labor, but from all classes. Thoughtful persons who were exempt from race prejudices saw, in the facilities of transportation between the two countries, the certainty, at no distant day, that from the unnumbered millions on the opposite shores of the Pacific, vast hordes would pour in upon

clearly an area for further research, and beyond the scope of this article.[179]

There were obvious parallels with the slave trade: European powers sought workers for their colonies by procuring them from China in ways that paralleled the extraction of people from Africa.[180] The United States struggled to suppress the horrendous slave trade trafficking in human beings[181] and had good reason to ensure that such a trade did not arise on its western coast. Noting this comparison, in his 1869 message to Congress, President Grant was enthusiastic about commerce with China, yet urged "such legislation as will forever preclude the enslavement of the Chinese upon our soil under the name of coolies, and also prevent American vessels from engaging in the transportation of coolies to any country tolerating the system."[182]

Like the slave trade laws, the 1862 Coolie Act[183] was aimed at transport by regulating U.S. ships transporting trafficked persons. Both statutes authorized enforcement by other U.S. ships and could result in forfeiture of ships and goods as well as criminal penalties.[184] The Act distinguished between those workers who were in transit under some form of labor capture from those who were "free and voluntary" migrants.

To facilitate this distinction, Section 4 of the 1862 Coolie Act required that a U.S. consular official examine each migrant to confirm their free choice. Upon the official's personal satisfaction with the facts and evidence produced, he would issue a certificate to the ship's master.[185] This certification process enacted in the 1862 Coolie Act was essentially the first type of visa.[186] In

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us, overrunning our coast and controlling its institutions. A restriction upon their further immigration was felt to be necessary to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization.

Chew Heong v. United States, 112 U.S. 536, 568–69 (1884) (Field J., dissenting).

179. As Mae Ngai has observed, "[b]y 1852 the argument against Chinese took on a special cast, with white Americans accusing them of being indentured workers, or coolies, imagined as slaves or semislaves." Mae M. Ngai, The Chinese Question: The Gold Rushes and Global Politics, 1849-1910, in A Global History of Gold Rushes (Benjamin Mountford & Stephen Tuffnell eds., 2018).

180. Senator Clingman of North Carolina recognized British participation in the coolie trade as part of its disgraceful treatment of China and Chinese, noting that Britain waged war against China to force that country to accept opium, and the right to take coolies from China for transport: "Of this coolie trade I need not speak. Everybody knows that it is vastly more inhuman than the slave trade was in its worst days; that the proportion of Chinamen who are destroyed . . . is vastly greater than that of Africans who perish under the slave trade." Cong. Globe, 36th Cong., 2d Sess. 725 (1861). Whether Clingman was right about the comparative suffering aside, unquestionably the trade was cruel and inhumane. See also Patrick Wolfe's observation that settler colonialists tend to take workers with them, often workers of a different race. See *supra* note 91.

181. See *supra* note 50.

182. Cong. Globe, 41st Cong., 2d Sess. 7 (1869).

183. Act of Feb. 19, 1862, ch. 27, 12 Stat. 340 (1862).

184. Like the slave trade laws, the coolie laws applied not only to transit of persons to the United States, but also to U.S. ships that provided transportation of workers under some form of involuntary servitude between foreign ports.

185. 12 Stat. 341.

186. See *supra* note 30. An 1891 statute required ships from foreign ports clearing

1869, Congress extended the 1862 Coolie Act to inhabitants of all of Asia.[187] Thereafter, almost any Asian coming to the United States could only do so subject to the Act. One notable difference between the 1862 Coolie Act and the slave trade laws were the consequences for the subjugated people if the Acts were found to be violated and the passengers were determined to be in the "thrall" of their captors. The slave trade law resulted in the freeing the human cargo from its captors;[188] the fate of Chinese immigrants found to be subject to compulsory labor contracts was less clear.[189]

With the passage of the Thirteenth Amendment, and its prohibition on involuntary servitude anywhere within U.S. jurisdiction, the Reconstruction Congress scanned the landscape of the nation for other instances of involuntary servitude.[190] It was inevitable that Congress would return to the subject of Chinese immigrating under labor contracts.[191] Several of the post-slavery forms of involuntary servitude involved debt servitude and harsh working conditions. It was suspected that many Chinese immigrant workers entered the United States under debt servitude and continued to be held in such conditions in the United States. Were these forms of involuntary servitude?

In the various other situations of involuntary servitude, the Reconstruction Congress crafted particularized remedies. The Reconstruction Congress observed southern states' attempts to maintain employer dominance over Freedmen. Congress responded by ordering the Freedmen's Bureau to interrupt these attempts to re-capture labor.[192] In response to peonage in New Mexico Territory, Congress enacted the Anti-Peonage law, enforced by the military which was ordered to interrupt the practice wherever found.[193] The

for the United States to obtain a health certificate from U.S. officials. The Dago, 61 F. 986, 987 (4th Cir. 1894). The general requirement that individual noncitizens obtain a visa was created in the Immigration Act of 1924. In re Lackides, 10 F.2d 980, 981 (S.D.N.Y. 1925) (holding visa requirement not retroactive). Exclusion for lack of a visa is now codified at 8 U.S.C. § 1182(a)(7)(A)(i).

187. Act of Feb. 9, 1869, ch. 24, 15 Stat. 269 (1869). The terms state "to include and embrace the inhabitants or subjects of Japan, or of any other oriental country."

188. Treaty between the United States and Great Britain for the Suppression of the Slave Trade, April 7, 1862, art. X, 12 Stat. 1225, 1229 ("The negroes who are found on board of a vessel condemned . . . shall be immediately set at liberty, and shall remain free, the Government to whom they have been delivered guarantying their liberty.").

189. At least one court enforced the financial terms of contracts for the transportation of "coolies," in 1864. The Hound, 12 F. Cas. 590, 592 (S.D.N.Y. 1864). Congress did not explicitly declare coolie contracts for a term of service void until 1875. Act of Mar. 3, 1875, § 2, 18 Stat. 477 (1875) ("and all contracts and agreements for a term of service of such persons in the United States, whether made in advance or in pursuance of such illegal importation, and whether such importation shall have been in American or other vessels, are hereby declared void.")

190. See VanderVelde, Servitude and Captivity, *supra* note 57, at 1088–90.

191. We will return to this subject in a forthcoming work, Lea VanderVelde & Gabriel J. Chin, Contracts, Coyotes, Coolies, and Cheap Labor in American Constitutional Thought (July 2020) (on file with authors).

192. See VanderVelde, Servitude and Captivity, *supra* note 57, at 1088–90.

193. See VanderVelde, Servitude and Captivity, *supra* note 57, at 1088–89.

Reconstruction Congress also passed a Bankruptcy Act, providing relief to debtors held in "thrall" by their creditors.[194]

The Reconstruction Congress also reflected upon the debt-servitude of immigrant workers recruited from Eastern Europe. Railroads and New York-based jobbers advanced funds in return for a labor contract obligating Eastern Europeans to immigrate to the United States and be transported west to work on railroads. The Reconstruction Congress refused to aid these capital interests in pursuing workers who quit before repaying their debt. The laboring immigrants that the nation sought, according to one congressmen were those who could pay their own way.[195] Senator Morrill criticized the Bureau of Immigration which brought immigrants to the United States under contracts for labor, because "[i]t smacks so nearly of that trade which was African, and was forbidden in the Constitution of the United States . . . That it was so closely allied to the Coolie business" that it should never have been given a moment's consideration."[196]

Given this concern for free labor, it was unsurprising that Congress turned its attention to Chinese workers in labor camps and working in labor gangs in the West. What is more surprising is that there was little attempt to free the Chinese immigrant from his debt bondage. Unfortunately instead of liberation from the jobbers and employers who held them captive, Congress did little to assist them. The response tended toward sending the immigrant back and closing the door to further immigrants. Some lip service was paid to the availability of writs of habeas corpus, but there was no one arguing for an assistance program analogous to the Freedmen's Bureau in the south, the anti-peonage law, or bankruptcy relief. As the Congress concerned itself with raising the status of other non-whites to parity with the white working man, Congress did not similarly enhance or guarantee the liberties of Chinese residents in the United States. In a sense, it permitted existing systems of labor capture of Chinese workers to remain in place.

An 1870 bill illustrates the tepid response of Congress in preventing extended forced labor; the bill provided only mixed benefits to the oppressed laborer.[197] Entitled "An Act to address servile labor," it was debated in terms

194. Act of Mar. 2, 1867, 14 Stat. 541. For a discussion of the term, in the "thrall" of one's master or one's creditor, see VanderVelde, Anti-Republican Origins, *supra* note 107.

195. VanderVelde, Servitude and Captivity, *supra* note 57.

196. Cong. Globe, 39th Cong., 1st Sess. 4040 (1866). On the other hand, he spoke favorably of Chinese workers, noting with approval "that Chinese labor, being that largely employed in our mining regions, is quite as cheap as that employed in Mexican mines." Cong. Globe, 39th Cong., 2d Sess. 725 (1867). In a speech opposing the Eight-hour law, he criticized lazy Californians: "California, with its wonderful climate and its unparalleled fertility of soil, loaded with precious metals and having the golden gate to the trade of India, China, and all the East — a state where labor is more needed and already more liberally rewarded, perhaps, than upon any other spot on earth — is almost made to halt in its prosperous career by the mere agitation of the eight-hour law. . . . Chinese labor has become a necessity, though it has to struggle against those who refuse to work themselves and deny the right to others." Cong. Globe, 41st Cong., 2d Sess. 148 (1868).

197. "That every contract for labor, any part of the consideration of which shall be the

of whether the Chinese were coolies.[198] It banned any labor contracts for immigration that bound the laborer for more than six months. It shared the resulting fine with the laborer, but only on condition that he agree to immediately leave the country and return to his homeland. As a result, the proposed remedy for having once been unfree was deportation, not liberation with the prospect of remaining in the United States.

Chinese Exclusion, ultimately enacted into national law in 1882, was justified, in part, as a fulfillment of the Thirteenth Amendment.[199] Noting the possibility that some Chinese were held involuntarily, Congress eventually chose exclusion as the response.

C. *Disenfranchising Chinese People from the Nation's Greatest Ownership Opportunity: Acquiring Land and Independence Under the Homestead Act*

As a settler colonialist nation,[200] land policy was a major tool for the creation of the Republic. Over the Nineteenth Century, Indian policy repeatedly sounded the theme that even Native Americans should become yeoman farmers as their lands were taken. Similarly, one proposed remedy for the Freedmen was to encourage them to become independent yeoman farmers.[201] By contrast, the United States systematically denied Chinese people the right to homestead. A key requirement for eligibility to stake a land claim under the Homestead Act, was that the party seeking the land be a *citizen*, or have judicially declared an *intention to naturalize*. Since Chinese had no means of naturalizing as citizen, this entire land distribution program was off limits to them.

In fact, President Buchanan vetoed the 1860 Homestead Act, in part because he thought that it would have benefited Chinese.[202] Then-Senator, and later President Andrew Johnson responded that Buchanan did not understand it, because "the Chinese cannot become citizens of the United States under our naturalization laws, and cannot, therefore, entitle themselves to

money for passage or transportation advanced or secured for any alien from any foreign country to the U.S., which provides for a longer period of service than 6 months, is hereby declared to be a contract for servile labor and contrary to public policy; and any person who shall contract for such labor for a period of more than 6 months, or enforce, or to enforce such contract, shall be deemed guilty of a misdemeanor, and upon conviction thereof, by information or indictment in the district or circuit court of the U.S. shall be punished by a fine of not less than $1,000 nor more than $5,000 together with the costs of prosecution, one half of which shall be paid to the informer, and the other half to the alien held to service as aforesaid, upon condition that he immediately return to his native country, under such regulations for the enforcement of this condition as the court may prescribe." Cong. Globe, 41st Cong., 2d Sess. 4126 (1870).

198. Cong. Globe, 41st Cong., 2d Sess. 4734–55 (1870).

199. Eric Foner, The Second Founding 43 (W. W. Norton & Company, 1st ed. 2019).

200. See *supra* notes 89–90.

201. Senator Thaddeus Stevens was most centrally identified with this policy of allotment of forty acres and a mule for each freedman to provide for their independence. The provisions that he introduced failed. See generally Foner, *supra* note 199, at 73.

202. Cong. Globe, 36th Cong., 1st Sess., 3263 (1860).

any of the benefits conferred by this bill upon citizens of the United States."[203] There had been earlier skirmishes over access to mining lands as well.[204]

D. *Rice as a Surrogate Battleground over the "Chinese Question"*

Chinese immigrants were frequently characterized by their food and eating habits.[205] Representative Brooks of New York mocked the Chinese diet, and their use of chopsticks, while seemingly implying that the Chinese essentially cheated, by living more cheaply than other workers: "These Chinese can live upon what would starve other people. If they do not live altogether upon rice, that diet is diversified only by a mixture of greasy compounds, it may be of dogs or cats and kittens for all I know. Into this composite material the Chinaman dips his chopsticks, alternating with his rice, and that constitutes his subsistence."[206]

In 1860 and 1862, Representatives proposed increasing the tariff on rice as a method of encouraging self-deportation of Chinese. Representative Charles Scott of California proposed doubling the tariff on rice, explaining that in California there are "some 40,000 Chinamen. The rice which they consume is chiefly imported . . . . This rice is purchased by the product of their labor in the extraction of gold from the mines of California. They are scattered through the whole mineral region of that State, and they come in competition with white labor within its limits."[207] When it was noted that others also ate rice, Representative Scott explained: "It is chiefly the article of consumption with the Chinese. They eat scarcely anything else but rice. It is their national food, and I am satisfied that the miners of California will

203. Id. at 3268 (1860).

204. During the antebellum period, Representative Gwin explained that Chinese miners "are like grasshoppers or locusts" and he wanted the law to deny them "the privilege of working those mines, as they heretofore have done, being slaves to Chinese masters, and going to those mines and destroying, in a great degree, their productiveness for the future. I want them to be occupied only by citizens and those who signify their intention to become citizens of the United States." He conceded that "these Chinese slaves — for they are no better than that — can be usefully employed in the State in agricultural purposes." Cong. Globe, 36th Cong., 1st Sess., 1754 (1860). Representative Latham stated: "I do not think it makes so much difference whether the Chinese there are reached or not. If the miners there do not want them, they will drive them out. Where they are not working, and not interfering with the rights of our people, they will let them remain; but if they do not want them to remain, they will soon send them down into the valleys." Id. at 1771.

205. See, e.g., the discussion between Senator Sawyer and Senator Carpenter on taxing rice as the basic foodstuff of the Chinese. Cong. Globe, 42d Cong., 2d Sess., 2036 (Mar. 28, 1872). In a later period, the American Federation of labor argued for extension of the Chinese Exclusion Law using rice as a metaphor. See Samuel Gompers, Some Reasons for Chinese Exclusion: Meat vs. Rice, American Manhood v. Asiatic Coolieism, Which Shall Survive, S. Doc. No. 57-137 (1902).

206. Cong. Globe, 41st Cong., 2d Sess., 2533 (1870) (Remarks of Rep. Brooks).

207. Cong. Globe, 36th Cong., 1st Sess., 2013 (1860) (Remarks of Rep. Scott of California).

be willing to pay an additional tax, provided they can get rid of the 40,000 Chinamen, for the feeling toward them is not of a friendly character."[208]

In 1862, Representative Aaron Sargent, another Californian, clarified that Chinese people were the target of this rice tax. He urged its passage in demeaning terms:

> [T]his class of our population, which use rice as a main article of food, ought to be made to pay a percentage towards the support of the Government, as they do in no other way, by the imposition of the increased duty which I propose upon the importation of cleaned rice. They are, as a class, characterized by vicious habits; and the State would be very glad to get rid of them altogether." While their activities "spread desolation and suffering throughout large communities of our own citizens," he reasoned that "[a] s we must have them in our midst, they ought to contribute towards the burden of the Government.[209]

Sargent's advocacy was met with a firm rebuke from Representative Thaddeus Stevens, one of the most progressive of the Radicals. "If there be any principle upon which this legislation can be justified I do not know where it can be found . . . . [s]uch laws are wholly in conflict with generous spirit of our free institutions. They make a mockery of the boast that this land is the of the oppressed of all climes."[210] "[T]his increased tax upon rice is intended to affect [Chinese migrants] and nobody else."[211] In the end, the proposed tariff did not pass,[212] but Stevens' ultimate observation was portentous: "If it is intended to prohibit a particular class of from coming among us let them say so."[213] Thus, Representative Stevens astutely recognized the covert masking of intended discrimination in facially neutral language.

E. *Exclusion as the Solution to Containment*

During Reconstruction, reactionary and conservative congressmen routinely questioned the Chinese' relationship to the civil rights measures before the Congress. Such representatives included Maryland Democratic Senator Reverdy Johnson, and Kentucky Democrat Garrett Davis, Senator Edgar Cowan of Pennsylvania and Senator James Rood Doolittle of Wisconsin.[214] California and Oregon Congressmen were most vocal in condemning Chinese as a people and advancing an anti-Chinese agenda.

208. Id. at 2014.
209. Cong. Globe, 37th Cong., 2d Sess., 2938 (1862).
210. Id. at 2939 (Remarks of Rep. Stevens of Pennsylvania).
211. Id.
212. Id.
213. Id.
214. As early as 1860, Senator Doolittle linked the power of Congress to limit slavery in the territories with the power to regulate Chinese: What may the owner of property do . . . He may sell it, or refuse to sell it. . . . He can say that the foot of a slave shall never tread upon it. If you concede that Congress can control it as property, you concede the whole ground of power; for Congress would then have power to keep off every Chinaman, every negro, every alien, and could-keep off even our own citizens. Cong. Globe, 36th Cong., 1st Sess., App. 102 (1860).

Senator Davis, for example, stated: "If my voice could prevail, not for my benefit or for the benefit of this generation, there never should be allowed the privilege to one son or daughter of the Mongolian race again to put foot upon the shores of America."[215] He claimed quite unabashedly that the American nation should be white:

> I want no negro Government; I want no Mongolian Government; I want the Government of the white man which our fathers incorporated. The Declaration of Independence was made as irrespective of the negro as it was of the red man of the forest. It embraced neither. Neither of them was a party to it. Neither had any band in its organization. Neither was to take part in it; and that truth is evidenced not only by contemporaneous history, but by the [1803 naturalization act], which expressly limits the naturalization of foreigners to white men.[216]

The anti-Chinese agenda was picked up by another Californian, Representative James A. Johnson, who accused his colleagues of attempting to fix "upon our institutions the curse of negro and Chinese citizenship and equality."[217] He made several attempts to achieve House Resolutions against Chinese suffrage and Chinese immigration. His first was a resolution stating that the House did not intend to extend suffrage to "Chinese or Mongolians" by the Fifteenth Amendment. The attempt was defeated procedurally by a vote of 106 to 42.[218] Undeterred, Representative Johnson introduced new resolutions to prevent Chinese immigration in 1867 and 1868. The first resolution directed the Judiciary Committee to "inquire whether the Congress can by legislation prevent the immigration and importation of Chinese and Mongolians into our country and to report by bill or otherwise."[219] It too was defeated. The next year's resolution directed the judiciary Committee to inquire whether Congress had the power "to prevent the immigration of Chinese *and other inferior races* to our country; and also whether the civil rights acts and proposed [Constitutional amendments] confer the rights of citizenship, including the right of suffrage, upon Chinese as well as all other males born in the United States over the age of twenty-one years, and to report by bill or otherwise."[220] Representative William Pile objected calling the resolution "a burlesque on common sense."[221]

215. Cong. Globe, 40th Cong., 3d Sess., 287 (1869). See also Cong. Globe, 41st Cong., 2d Sess. 1480–81 (1870).

216. Cong. Globe, 40th Cong., 3d Sess., 287 (1869). See also Cong. Globe, 41st Cong., 2d Sess. 1480–81 (1870).

217. Cong. Globe, 40th Cong., 2d Sess., 1385 (1868). Representative James A. Johnson served two terms in Congress before becoming California's Lieutenant Governor.

218. Cong. Globe, 41st Cong., 1st Sess., 202 (1869).

219. Cong. Globe, 40th Cong., 2d Sess., 163 (1867).

220. Cong. Globe, 40th Cong., 2d Sess., 1045 (1868) (emphasis added).

221. See also Cong. Globe, 40th Cong., 2d Sess., 1045 (1868) (remarks of Rep. Johnson) ("Now, these are questions of vital importance to the whole people of the United States, but very particularly to the people that I represent. We have 60,000 to 80,000 Chinese in our state; the males are petty thieves and the women are harlots. Larceny and prostitution are trades among these people. Like filthy harpies they are defiling the very food we eat,

There were other more subtle hints that Chinese immigration was not desired. In 1868, the Secretary of the Treasury reported to Congress that the exemption of Pacific shipping from passenger standards of the pre-Civil War Carriage of Passengers Act of 1855 "was doubtless intended to discourage coolie immigration from China by withholding from them the privileges and protection afforded by law to immigrants from Europe."[222] Furthermore, tens of thousands of copies of the Land Office Report were printed to be shipped overseas to inform potential immigrants about U.S. government land that might be available to them.[223] In an 1869 debate about printing the Report, Senator Anthony quipped that the Report had been printed in various European languages; "and I was afraid that my friends from the Pacific coast would ask us to print it in Chinese, so that we might urge forward emigration from the Celestial empire; but we were saved that."[224] That year, Senator Williams introduced a bill to regulate the importation of Chinese into the United States.[225] The use of the term "import" as applied to persons is itself unusual. It implies that the focus was upon the jobbers as active agents treating workers as their import products. Notwithstanding the Burlingame Treaty and its promise that Chinese could freely migrate, the idea that Chinese should be excluded was being repeatedly urged by western congressmen in the U.S. Congress. Had the Chinese become "the Negro of the Pacific"[226] in the words of Senator Stewart? Their fate was in the hands of a Congress whose commitment to lasting fairness and equality was inconstant.

Conclusion

Commercial developments during Reconstruction brought the United States ever closer to the nations across the Pacific. However, when Chinese began to take advantage of the open borders that then existed, California Senators and Representatives brought their prejudices to the U.S. Congress and framed the idea of the "Chinese question." This took place even as Congress was amending the U.S. Constitution and considering the status of the Freedmen, another racially vulnerable group. The Reconstruction debates demonstrated a variety of views on treatment of Chinese, including

rendering pestilential the air we breathe.").

222. Letter from the Secretary of the Treasury, S. Exec. Doc. 40-47 (Apr. 8, 1868).

223. See e.g. Remarks of Senator Anthony in discussing distribution of a government report. "One object of this distribution is to promote immigration; and in no way can that be done so well as by distributing through our foreign legations copies to public men to editors of newspapers. to emigration societies. and to persons who desire to become acquainted with the advantages of this country for immigration." Cong. Globe, 40th Cong., 2d. Sess. 2688 (1868).

224. Cong. Globe, 41st Cong., 2d Sess., 45 (1869) (remarks of Sen. Anthony). Representative Mungen, likewise, mockingly noted that the republicans "speak fully and freely for 'the American people,' which under republican rule, I presume, means whites, blacks, mullatoes, Indians, Chinese and all." Cong. Globe, 40th Cong., 3d Sess., App. 81 (1869).

225. Cong. Globe, 41st Cong., 2d Sess., 299 (1869).

226. Cong. Globe, 39th Cong., 1st Sess., 1104 (1866) (Remarks of Sen. Stewart).

the universality of rights and race neutrality. But, ultimately, those advocating full rights for Chinese residents did not prevail. Instead, Reconstruction was a missed opportunity to derail more effectively the growing anti-Chinese sentiment that eventually led to exclusion. Despite speech after speech against white supremacy, the Chinese in the United States remained legally constrained in a distinctive set of caste limitations. One of the great ironies of the Congressional debates then, was that in this grand period of social uplift, awash with inspiring mission statements of bringing about an egalitarian republic — a democracy in its best sense — the Chinese were excluded from the notion that a rising tide would raise all boats.