

不領証與議院章程亦不符則華人
再者註冊苛例本會館轉飭各
司皆謂大悖國例和約且加白

In Search of Equality

*The Chinese Struggle
against Discrimination in
Nineteenth-Century
America*

Charles J. McClain

In Search of Equality

*The Chinese Struggle against Discrimination
in Nineteenth-Century America*

CHARLES J. McCLAIN

University of California Press

BERKELEY LOS ANGELES LONDON

University of California Press
Berkeley and Los Angeles, California

University of California Press, Ltd.
London, England

© 1994 by
The Regents of the University of California

Library of Congress Cataloging-in-Publication Data

McClain, Charles J.

In Search of equality : the Chinese struggle against discrimination in
nineteenth-century America / by Charles J. McClain.

p. cm.

Includes bibliographical references and index.

ISBN 0-520-20514-6

1. Chinese Americans—Legal status, laws, etc.—History.

I. Title.

KF4757.5.C47M37 1994

346.7301'3—dc20

[347.30613]

93-4942

CIP

Printed in the United States of America

9 8 7 6 5 4 3 2 1

The paper used in this publication meets the minimum requirements of
American National Standard for Information Sciences—Permanence of
Paper for Printed Library Materials, ANSI Z39.48-1984. ∞

*To my father,
Charles J. McClain,
and the memory of my mother,
Loretta Cahill McClain,
and to my wife, Laurene,
and son, Christopher*

Acknowledgments

I have been at work on this project, off and on, for a good number of years and have incurred a good number of debts along the way. Several friends and colleagues have read all or parts of this manuscript and have given me the benefit of their comments and criticisms: Patty Blum, Robert Berring, Sucheng Chan, Robert Kagan, Him Mark Lai, Kristin Luker, Paul Mishkin, Harry N. Scheiber, Aviam Soifer, and Ling-chi Wang. I received valuable research assistance at the beginning of this project from Maureen Young and at the end from Torrey Shanks. I have been blessed with the services of two excellent translators cum research assistants, Winnie Wong and Kit Chui. Henry So, associate librarian at Boalt Hall, has also come to my assistance repeatedly with translations. Michael Griffith, historian/archivist of the U.S. District Court for the Northern District of California, has been an invaluable source of advice on tracking down court records. At various times I have been greatly assisted by the reference staffs of the Bancroft Library, Boalt Hall Library, and Asian American Studies Library, University of California at Berkeley, the law library, University of California at Davis, the National Archives, San Francisco Branch, the California State Library, the California State Archives, and the Library of the San Francisco Theological Seminary, San Anselmo, California. Thanks are due also to my editors at the University of California Press, Naomi Schneider and Dore Brown, for their patience and skill in shepherding this work through to publication and to Steve Gilmartin, my copyeditor, for the many valuable suggestions he made for its improvement.

I am greatly indebted to the National Endowment for the Humanities for a grant that allowed me to take a year off from administrative and teaching duties to do research on this project. For the support and encour-

agement they have given me over the years I wish to thank Sanford Kadish and Jesse Choper, former deans of the law school at Berkeley, the present dean, Herma Hill Kay, and the several chairs of the Jurisprudence and Social Policy Program with whom I have worked: Harry N. Scheiber, Sheldon Messinger, and Daniel Rubinfeld. I would like too to acknowledge the administrative assistance of Rod Watanabe and the help that Margo Rodriguez, Leslie Farrer, and Celia Ronis have given me in preparing parts of the manuscript.

The last and most important debt of gratitude I wish to acknowledge is to my wife, Laurene Wu McClain. She has assisted me with some of the research, has carefully read and commented on much of the text, and has given me her unstinting support and the benefit of her wise counsel throughout the project's duration.

I am grateful to the editors of the relevant journals for permission to use in revised form all or portions of the following previously published articles: "The Chinese Struggle for Civil Rights in 19th Century America: The First Phase, 1850–1870," *California Law Review* 72 (1984): 529–68, copyright 1984, California Law Review Inc.; "The Chinese Struggle for Civil Rights in Nineteenth-Century America: The Unusual Case of *Baldwin v. Franks*," *Law and History Review* 3, no. 2 (Fall 1985): 349–73; "In Re Lee Sing: The First Residential Segregation Case," *Western Legal History* 3, no. 2 (Summer/Fall, 1990): 179–96, copyright the Ninth Judicial Circuit Historical Society; "Of Medicine, Race and American Law: The Bubonic Plague Outbreak of 1900," *Law and Social Inquiry: Journal of the American Bar Foundation* 3, no. 3 (1988): 447–513, copyright 1988, American Bar Association.

Contents

<i>Acknowledgments</i>	ix
<i>Introduction</i>	1
 PART I THE BEGINNINGS OF DISCRIMINATION AND THE FIRST CHINESE RESPONSES	 7
1. California's First Anti-Chinese Laws	9
2. Test Cases in the 1870s	43
 PART II THE DECADE OF THE 1880S: SEEKING THE EQUAL PROTECTION OF THE LAWS	 77
3. The California Constitutional Convention and Its Aftermath	79
4. The Laundry Litigation of the 1880s	98
5. The Struggle for Access to the Schools	133
 PART III THE DECADE OF THE 1880S: COURT CONTESTS WITH THE FEDERAL GOVERNMENT	 145
6. Federal Exclusion Act Litigation: The First Phase	147
7. Seeking Federal Protection against Mob Violence: The Unusual Case of <i>Baldwin v. Franks</i>	173
8. Federal Exclusion Act Litigation: The Second Phase	191
 PART IV CENTURY'S END: LAST EPISODES OF SINOPHOBIA	 221
9. Challenging Residential Segregation: The Case of <i>In re Lee Sing</i>	223

10. Medicine, Race, and the Law: The Bubonic Plague Outbreak of 1900	234
<i>Conclusion</i>	277
<i>List of Abbreviations</i>	285
<i>Notes</i>	287
<i>Subject Index</i>	365
<i>Index of Cases</i>	382

Introduction

I came to work on the subject of this book in a somewhat roundabout fashion. I teach constitutional history and have long had a special interest in the constitutional history of the United States in the period immediately following the Civil War. Some years ago I set about to do a short piece on the Supreme Court's treatment of the equal protection clause of the Fourteenth Amendment during this period. That provision of the amendment provides that "no State shall deny to any person within its jurisdiction the equal protection of the laws." The project led me to the well-known 1886 United States Supreme Court case of *Yick Wo v. Hopkins*, still one of the leading cases on the meaning and purport of that provision. There the Supreme Court had under consideration a challenge by a group of Chinese laundrymen to a San Francisco ordinance that required all operators of laundries in wooden buildings to obtain permits from the city's board of supervisors. The laundrymen alleged that the ordinance was being used routinely to deny Chinese applicants laundry permits and that its passage was a mere pretext for driving all Chinese out of the laundry business. The Supreme Court found merit in the laundrymen's contentions and held that the ordinance as applied violated the equal protection clause of the Fourteenth Amendment. As I reflected on the case, it occurred to me that it was as interesting for its socio-historical as for its legal-historical import. It certainly called into question the conventional image of the Chinese that one encountered in the history books.

The Chinese, I think it is safe to say, occupy at best an obscure niche in the historical consciousness of the average educated American. Most know that thousands of Chinese immigrants came to the West Coast in the second half of the nineteenth century—initially to work California's newly opened gold fields, later to labor on the construction of the trans-

continental railroad and in other trades. Most know as well that their presence came to arouse hostility in the white population and that this hostility was eventually translated into discriminatory local and national legislation. But there general familiarity ends. This is not at all surprising. Most accounts of the great Chinese immigration to the United States in the nineteenth century have concentrated almost exclusively on the reaction it provoked in the white population.¹ They have tended to ignore the Chinese and their perception of their experience in this country. As one of the leading historians of anti-Orientalism in California, Roger Daniels, has put it, "Other immigrant groups were celebrated for what they had accomplished; Orientals were important for what was done to them."²

Those relatively few scholarly writings that have focused on the Chinese community, until very recently at any rate, have tended to be deprecatory, emphasizing what is usually described as the authoritarian structure of Chinese-American society; the corruption or ineptitude of the leadership; and the passivity, docility, and otherworldliness of the Chinese masses. These writings make much of what they see as the unique character of the Chinese immigration. The Chinese who came to this country, so the argument goes, had no desire to settle or assimilate, wishing only to accumulate a quick fortune and return home.³ One historian, Gunther Barth, even suggests that it was this feature of their immigration that was most responsible for the misfortunes that were visited upon them. According to this thesis—one which, I hasten to add, I view as untenable—white Californians offered the hand of welcome to the newcomers from Asia but saw their overtures of goodwill rebuffed. They then turned on the Chinese and determined to exclude them from the privileges and obligations they extended to other immigrants.⁴

Two related views are that the nineteenth-century Chinese immigrants were utterly unacquainted with American political institutions and that they passively submitted to discrimination. U.S. Supreme Court Justice Stephen Field, who, as we shall see, should have known better, observed in 1884, "Our institutions have made no impression on [the Chinese] during the more than thirty years they have been in this country."⁵ And Barth argues that the Chinese community failed to appreciate the severity of the legal restrictions under which it operated or to respond to them in any significant way.⁶ On this view the Chinese were, in the words of the early twentieth-century historian of California, Robert Glass Cleland, a group of people "who suffered with helpless stoicism whatever indignities were thrust upon [them]."⁷

But *Yick Wo* could hardly be seen as an instance of a people suffering indignities with helpless stoicism. It was clearly an example of resistance to perceived discrimination. Furthermore, it took little rummaging around in the federal and state case reports to realize that it was but one of many cases brought by the Chinese during the nineteenth century. Indeed between 1880 and 1900 Chinese litigants carried some twenty appeals to the Supreme Court of the United States. Furthermore, I discovered, one could find examples of the Chinese protesting discriminatory treatment dating back to the very infancy of the immigration. Knowing that the Presbyterians had been active in the San Francisco Chinese community, I visited the San Francisco Theological Seminary, a Presbyterian institution in San Anselmo, California. There I found an extraordinary series of letters, indicating that the leaders of the Chinese community had in 1860 asked a churchman to help them find a lobbyist to speak on their behalf against anti-Chinese legislation then being considered by the state legislature. (I discuss this incident in detail in chapter 1.) *Yick Wo*, in fine, was but the small tip of a very large iceberg.

The thesis of this book is that the conventional wisdom concerning the Chinese and their supposed political backwardness needs to be stood on its head. The nineteenth-century Chinese-American community may, because of language, have been more isolated from mainstream society than other immigrant groups in certain respects, but lack of political consciousness was not one of its distinguishing characteristics. As this account will demonstrate, there is abundant evidence that the leaders of the nineteenth-century Chinese community—and many other Chinese as well—were thoroughly familiar with American governmental institutions, the courts in particular, and knew how to use those institutions to protect themselves. Far from being passive or docile in the face of official mistreatment, they reacted with indignation to it and more often than not sought redress in the courts. Indeed during the second half of the nineteenth century, the Chinese mounted court challenges to virtually every governmentally imposed disability under which they labored. Why a fact so obvious and so important as this should have been so largely ignored by American historiography shall always remain to me something of a mystery. The Chinese readiness to resort to the courts to remedy perceived wrongs is an aspect of their experience in the United States barely touched on in the published literature. Yet it is surely one of the most salient and defining features of that experience. To ignore it would be comparable to ignoring the many legal contests of black Americans. It would be as if an historian of African America should, after surveying the

long, shameful treatment of blacks, ask why, in the midst of so much persecution did these people never think of going to court to defend themselves.

To ignore Chinese legal initiatives is, as well, to ignore an important facet of U.S. constitutional history in general. The cases brought by the Chinese raised immensely interesting questions of constitutional and statutory interpretation. Many of them contributed significantly to the molding of American constitutional jurisprudence. The general neglect of this important episode in American legal history has, thankfully, begun to change in the last few years, during which time a number of articles devoted to the Chinese decisions of the federal courts in the American West have appeared in print. Among them are Linda C. A. Przybyszewski's "Judge Lorenzo Sawyer and the Chinese Civil Rights Decisions in the Ninth Circuit" and Lucy Salyer's "Captives of Law: Judicial Enforcement of the Chinese Exclusion Laws, 1891–1905." These are welcome additions to the literature, and one hopes more will follow.⁸

This book seeks to chronicle the nineteenth-century Chinese conflicts with Caucasian officialdom and to provide an interpretative framework for understanding them. To the extent the sources allow, it tries to keep the Chinese in the foreground of the account and to document their view of events. It conversely pays comparatively little attention to their opponents, the Sinophobes. That subject, I think, has been adequately dealt with by others.⁹ The book may be seen then, in this respect, as part of a movement in the historiography of the Chinese immigration that has taken hold in recent years, one that tries to break free of stereotypes and to see the Chinese more as subjects and shapers than as objects of history. Much good work along these lines has been produced in recent years. I might make particular mention of *This Bittersweet Soil*, Sucheng Chan's exhaustively researched and richly textured study of the Chinese in California agriculture; *Chinese Gold*, Sandy Lydon's sensitive, evocative portrayal of the Chinese community in Monterey Bay; and finally the numerous scholarly writings of Him Mark Lai, one of the true pioneers of Chinese American historical studies.¹⁰

Scholars working on a project of this sort must confront the fact that much of the primary source material they would expect to consult seems irretrievably lost to history. The earthquake that struck San Francisco, the state's most important city, on April 18, 1906, and the fires that followed it destroyed all of Chinatown, virtually all of the city's business district, and many of the city's principal government buildings. Numerous relevant documentary materials were lost in the conflagration. These include important government documents, the records of the principal

organizations of nineteenth-century Chinese America, and, it appears, essentially all of the personal papers, correspondence, and business records of the lawyers and other Caucasians who dealt with the Chinese. Because of the absence of these records we will never be able to have as complete a picture as we would like. However, we do have complete runs of all major California newspapers published during the period and virtually all relevant federal and state court files. As the reader will see, I have relied on these sources extensively. We also have scattered issues of nineteenth-century Chinese-language newspapers. In an effort to get at the Chinese viewpoint, I have had these issues scanned and relevant items translated. Though they are far fewer in number than one might wish, I have found many extraordinarily revealing items in them. How much more complete our understanding of the dynamics and diversity of the Chinese-American community would be if we had more primary sources is made clear in the last chapter. For the episode chronicled there—an outbreak of bubonic plague in Chinatown and the court cases it gave rise to—we have available a complete run of one Chinese-language paper and are consequently able to provide a much fuller account of the Chinese perspective on the events (or perhaps better put the Chinese “perspectives,” for as the sources clearly show here this was not a monolithic community) than in the book’s other chapters. Because of the incomplete state of the archival record I have from time to time had to fall back on what is probably best called informed speculation. I have, however, always tried to keep that speculation tethered in the sources, and I remain confident that the picture I have painted here is correct in its essential details.

This is the first book to appear in print on the topic of the Chinese and their struggles in the courts, but it is preceded by Hudson Janisch’s solid doctoral dissertation on the subject, “The Chinese, the Courts and the Constitution.”¹¹ This work, lengthy and comprehensive, gives proportionately greater emphasis to the Chinese battles with the federal government arising out of the exclusion laws than it does to their battles with state and local government—the mirror image of this work’s emphasis. It does not make use of court files, other archival material or Chinese-language materials to the extent this book does. Nor does it offer the same conceptual framework for understanding the events in question. It is, however, a valuable and illuminating work.

I wish to make two general remarks in conclusion. First, as the reader will quickly notice, this work focuses almost entirely on California. California was of course not the only place where nineteenth-century Chinese immigrants settled. As the century wore on, Chinese could be found living in

increasing numbers in other western states and indeed, toward the end of the century, outside the West entirely. I do not mean to suggest that their story is unimportant. In these places too the Chinese encountered hostile treatment and there too one can find examples of resistance to racial oppression. The story of the Chinese outside of California is itself an interesting story, some of which in recent years has begun to be told by scholars.¹² But California was throughout the nineteenth century the place where the vast majority of Chinese lived. It was also the great epicenter of Sinophobia and the place where virtually all of the great Chinese cases originated.

Second, the Chinese names used in this book are taken from court records and reports in English-language papers. They are in almost all instances reprinted here exactly as they appear in those sources. Since, with a few exceptions, we do not have the Chinese characters to compare them with, we cannot say whether the English transliterations that were used are accurate. It is possible—indeed likely—that in some instances the names that appear in the court cases discussed in this book are not the names of persons at all but fictitious business names. The evidence at hand, however, is fragmentary and not absolutely dispositive. Rather than going to the trouble of trying to reach a determination in each case, I have adopted the convention of treating all of the names that appear in the cases as if they were the names of individuals.

I

THE BEGINNINGS OF DISCRIMINATION AND THE FIRST CHINESE RESPONSES

1 California's First Anti-Chinese Laws

The Rise of Anti-Chinese Resentment

The first Chinese to arrive in California were greeted with a mixture of enthusiasm and curiosity. They were few in number and seemed a harmless and exotic addition to the cosmopolitan mass of humanity that was gathering in Northern California in the wake of the discovery of gold at Sutter's Mill. In August 1850, for example, on the occasion of the ceremonies held in San Francisco to observe the death of Zachary Taylor, the city fathers invited the local Chinese to send a contingent to participate in the rites and assigned it a prominent place in the funeral cortege.¹ Many local observers noted with great satisfaction the large Chinese presence two months later at the San Francisco celebrations of California's admission to the Union.² And in a January 1852 address to the California legislature, Governor John McDougal endorsed the importation of Chinese for the purpose of draining California's immense swamplands, describing them as "one of the most worthy classes of our newly adopted citizens—to whom the climate and the character of these lands are peculiarly suited."³

This spirit of hospitality lasted but a brief time, however. As the number of Chinese grew, their presence came to be deeply resented, especially in the state's mining districts where they concentrated. (As early as 1852 a San Francisco newspaper reported that leaders of the Chinese community in California were sending circulars to their countrymen in China, urging them not to come to California because of the growing anti-Chinese hostility in the state.)⁴ Many explanations have been offered for the hostility, and no doubt there is a grain of truth in each of them. But a principal reason for the resentment was nicely stated in a most revealing passage from Theodore Hittell's *History of California*, published in 1898: