



CHINESE

IMMIGRANTS

AND THE

Laws

Harsh
as Tigers

SHAPING

OF MODERN

IMMIGRATION LAW

Lucy E. Salyer

LAWS HARSH AS TIGERS

Chinese
Immigrants
and the
Shaping of
Modern
Immigration
Law

LUCY E. SALYER

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FOR LEE AND NATE

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INTRODUCTION

The future historian will find one of the most interesting chapters on the jurisprudence of the American Republic to consist in a description and analysis of the writ of habeas corpus as applied to landing Chinamen in violation . . . of the Restriction Acts in the United States courts of California.

—*San Francisco Evening Bulletin*, January 24, 1888

This book explores the social and legal history of restrictive immigration policies and their enforcement in the United States between 1891 and 1924. I could not have predicted a decade ago that my research interests would lead me into immigration history. My primary aim was to explore the roots of the American administrative state in the Progressive Era. When I joined a research team studying the history of the Federal District Court for the Northern District of California in 1986, I planned to analyze federal judicial responses to the expansion of administrative power in a variety of areas. But as I studied the court docket books, I was struck by the number of cases brought by Chinese litigants contesting the decision of the collector of the port to deny them entry under the Chinese exclusion acts. Christian Fritz, then serving as law clerk to Judge Robert F. Peckham and completing a history of the court in its first forty years (1851–91), explained that not only had Chinese deluged the court with such challenges (filing more than seven thousand cases in the first decade of the exclusion act's existence), but, even more surprising, the court had ruled in their favor in the vast majority of cases.¹ My research into the subsequent history of the court revealed a similar pattern of successful Chinese litigation until 1905. As I examined the Chinese cases in more depth, I became convinced that they revealed a crucial, yet largely overlooked, story in the history of restrictionism and, even more important, given my initial research interests, that they contributed in significant and unexpected ways to the growth of administrative power.

The Chinese cases suggested that although historians have given ample attention to campaigns to enact restrictive immigration policies, they have not given adequate consideration to how the laws were actually enforced by the administrative agencies and the federal courts. From the time the federal government preempted state authority and assumed sole control over immigration in 1891 until the passage of the Quota Act of 1924, Congress enacted increasingly stringent laws designed to exclude “undesirable” im-

migrants.² Legislation alone did not secure restrictionists' objectives, however. The way the laws were interpreted and enforced proved equally important. In San Francisco, immigrants (mainly Chinese), federal judges, administrative officials, and the general public disputed about how the laws were to be construed and applied. The contending groups did not see the issue simply as a legal or doctrinal question. Their arguments over implementation addressed the social and economic goals of American immigration policy, as well as more general themes such as the proper role of government, the structure of power in American society, and the place of individual rights in the nascent administrative state.

This debate requires scholars to reconsider the basic narrative about developments in immigration law and its administration, which portrays aliens as the defenseless victims of the all-powerful Bureau of Immigration. In the field of administrative law, immigration law has always been regarded as somewhat anomalous—a “maverick” in the words of legal scholar Peter Schuck. He posits that “probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure and judicial role that animate the rest of our legal system.”³ Historically, according to this view, the immigration agency has operated more freely than other agencies, not subject to the same administrative procedures nor generally to the detailed scrutiny of the courts.

Why immigration law has been allowed to become, in essence, an “out-law” in American legal culture has not been fully explained. Schuck suggests as reasons the intimate connection between immigration and foreign policy, the rise of nativism and an ideology of “restrictive nationalism” in the late nineteenth century, and the weak political status of aliens. Historian William Preston, in explaining the unprecedented power of the Bureau of Immigration, focuses on the inability of marginalized alien clients to publicize abuses and mount a campaign to curb the agency’s discretion. Those who came before the bureau, Preston argues, were largely outcasts—“prostitutes, procurers, lunatics, idiots, paupers . . . Chinese and Japanese. These were in the main friendless, despised, ignorant, defenseless people, and more important, *unorganized*.”⁴ Both Schuck and Preston also blame the courts for failing to exercise a more vigilant review of the immigration agency’s decisions and procedures. “For almost a century,” Schuck contends, “the [Supreme] Court has abjured any significant judicial role in the area of immigration policy.”⁵

The narrative I offer here does not challenge the prevailing assessment that in immigration law, “government authority is at the zenith, and individual entitlement is at the nadir.”⁶ By 1924, and even earlier, the Bureau of

Immigration had attained a significant and remarkable degree of discretion. But the Bureau of Immigration did not emerge from its authorizing statute, the Immigration Act of 1891, fully developed with the power and discretion that would later distinguish it from other administrative agencies. Nor did it achieve its distinctive power without opposition, as the resistance of Chinese and other immigrants reveals.

Far from being, as Preston suggests, the passive, disorganized, and ignorant victims of immigration officials, Chinese took a leading role in the debate over enforcement of immigration laws. Though Chinese were the objects of the most discriminatory immigration laws in the United States, they were not content to remain on the fringes of American society or to be shoved out of the country altogether. As Charles McClain and other historians have illustrated, well before 1891 the Chinese who immigrated to the western states learned how to use the law and the courts to mitigate the effects of the hostile and discriminatory legislation directed against them.⁷ By the time the Chinese exclusion law was passed in 1882, the path to the courts had been well marked and leaders in the Chinese community spoke with ease and familiarity about the rights owed them under treaties and the Constitution.⁸ With the aid of attorneys who transformed Chinese complaints into recognizable legal claims, Chinese immigrants repeatedly turned to the federal courts at San Francisco to contest the enforcement of the Chinese exclusion and general immigration laws and enjoyed remarkable success.

The success of Chinese in the federal courts is surprising, given traditional accounts emphasizing judicial deference in immigration cases. The intervention of the federal trial courts in San Francisco suggests that judges played a more active role, at least initially, a fact missed by legal scholars, perhaps because they have focused on the Supreme Court and East Coast European immigrants. The published Supreme Court opinions regarding immigration reveal a narrow view of judicial power to intervene. But the unpublished federal trial courts' records indicate that within their jurisdiction, the lower courts remained active participants in the enforcement of the Chinese exclusion laws.

The federal trial courts' actions in the Chinese cases further indicate that the role of courts in the Progressive Era was more complex than historians have previously recognized. Traditionally, scholars studying courts of that period, such as Arnold M. Paul, Benjamin R. Twiss, Louis B. Boudin, and William F. Swindler, have focused on the Supreme Court and its decisions regarding social and economic regulations.⁹ Writing in the legal realist tradition, such scholars, discarding the notion that judges simply identify and apply law in a neutral manner, highlighted the political nature of

judicial decisions. They portrayed the Court as a bastion of conservatism, clinging to narrow conceptions of government power to defeat local and national economic legislation while protecting certain business interests. The Court, in this view, retreated behind legal formalism to deny democratic reforms that threatened to upset the status quo.¹⁰

Such an interpretation does not provide an explanation for the federal court decisions in the Chinese immigration cases, however. The judges of the federal courts in San Francisco had proven themselves to be staunch exclusionists before their appointment to the bench. William W. Morrow, federal court judge from 1891 to 1923, in particular, had been at the forefront of the congressional campaign to make the Chinese exclusion acts more severe. While sharing their contemporaries' negative, stereotypical views of Chinese, the federal judges were also constrained by their perception of their institutional obligations.¹¹ In the immigration cases, the federal judges often felt bound by the rules and norms of the court that called for hearing and weighing the evidence in individual cases according to standard judicial practice, without regard to the fact that the litigants were Chinese or of Chinese descent.

Thus a central theme of this book is the influence of structure, or of the forum, on the enforcement of policies. Close attention is paid to the practices and actions of the federal trial courts, as well as to judicial opinions. Such an approach does not mean returning to a notion that judges "discover" law, nor does it discard the argument that political orientation influences judicial decision making. Federal judges in northern California clearly allowed their personal anti-Chinese biases to affect their treatment of Chinese litigants. An institutional approach, however, adds a different dimension to the study of courts by suggesting that judges inherit traditions and doctrines that may constrain their actions.

Exclusionists and policy makers at the time understood that the forum—whether it be a court or an agency—influenced the enforcement of immigration policies. The main problem, according to critics, was the inability of courts to discern fraudulent claims made by Chinese. It was widely believed that Chinese applicants and their witnesses lied in the hearings before the court. Although judges shared that belief, they felt bound to accept the evidence unless the government could contravene the testimony or prove perjury. Frustrated by the courts' inability to protect American society from the intrusion of "undesirable" aliens, exclusionists sought to remove jurisdiction to hear immigration cases from the courts and to place sole discretion over immigration policy in the hands of administrative officials. The Bureau of Immigration had the distinct advantage of being free from traditional legal constraints and of being more accountable to public opinion.

By 1905, policy makers had achieved their goal: the jurisdiction of the courts to hear Chinese and other immigration cases was sharply curtailed.¹²

The battle over the enforcement of the Chinese exclusion laws had particular importance for residents on the West Coast, but its outcome had much broader ramifications for the national development of immigration law and procedures. In particular, the Chinese resistance to exclusion provides a concrete explanation for the divergence of immigration law from other branches of administrative law. As Schuck suggests, the rise of nativism and the perceived connection between immigration and foreign policy concerns contributed to the willingness to vest greater discretion in the Bureau of Immigration. But to a significant extent, the more specific and immediate reason for the expansion of the agency's power lay in the difficulties in enforcing the Chinese exclusion laws. The successful litigation by Chinese provided the main impulse for taking away the jurisdiction of the federal courts in immigration matters and for placing immigration regulation, instead, under the firm control of the administrative agency. The Chinese litigation concerning administrative due process had "radiating effects" on other immigrants and other areas of administrative law.¹³ Their early challenges set precedents that would influence later court decisions regarding administrative power. Thus the West and its immigrants, often treated by historians as peripheral to and separate from the immigration on the East Coast, had a powerful effect on the shape and enforcement of immigration laws throughout the nation.

With power over immigration firmly vested in the administrative agency after 1905, new questions arose. Congressional statutes and Supreme Court opinions clearly stated that immigrants were not entitled to a judicial hearing concerning their right to enter or remain in the United States. But were aliens to be denied all the procedural protections and guarantees associated with judicial hearings? Immigrants after 1905 focused on that question in their litigation challenging the Bureau of Immigration's summary administrative procedures as a denial of due process.

The attempt to forge a system of "executive justice" within the Bureau of Immigration after 1905 was not limited to Chinese on the West Coast. As other groups became subject to increasingly stringent laws, they and their American allies joined in the condemnation of administrative procedures that hindered their admission into the United States. Critics appealed to the long-standing American hostility toward bureaucracy and couched their challenges in well-worn phrases from American political discourse. Alleging that the Bureau of Immigration exercised arbitrary, dangerous power, unchecked by judicial control, aliens and their allies used a variety of

tactics to subject the Bureau of Immigration to the rule of law rather than the rule of discretion. In their view, the rule of law meant, at best, judicial hearings with the attendant procedural rights and protections and, at least, the incorporation of judicial procedures into administrative hearings.

Such arguments, however, had lost some currency in the Progressive Era, when reformers hailed administrative agencies and the concomitant exercise of discretion by experts as the harbingers of a more enlightened, efficient age. The rule of law, Robert Gordon has suggested, became transformed by Progressives to require only the reasonable or fair exercise of discretion.¹⁴ To impose more exacting procedural restraints upon government under a notion of rule of law would hamper social justice and effective policy making. Even Progressives who were sympathetic to immigrants' concerns failed to endorse the proceduralist definition of the rule of law, advocating instead better personnel and more elaborate administrative review to curb administrative abuses.

The federal courts, addressing the novel issue of what process was due persons appearing before administrative agencies, generally gave the Bureau of Immigration a wide berth, requiring only that aliens have a fair opportunity to be heard before being excluded or deported. Courts generally agreed that "judicial justice" was not always appropriate or necessary to administrative proceedings. Judges had felt obligated to follow the courts' institutional norms and practices when they decided the right of Chinese to enter the United States, but they did not believe administrative officials should be bound by the same rules. A strict insistence that agencies adopt formal judicial procedures could undermine the basic objectives of administrative government. The Bureau of Immigration had been given power, after all, to free administrators from the technical procedures that hampered courts and frustrated the enforcement of Chinese exclusion and other immigration laws. That the complainants were aliens, not yet members of the American polity, further affected the issue of procedural rights in immigration cases. Few judges were willing to concede to aliens the same rights and privileges citizens might enjoy in administrative hearings.¹⁵

The first chapter of this book explores the broad social, economic, and cultural factors that led the United States to enact increasingly restrictive immigration policies in the late nineteenth century. Although it addresses the substantive features of the new immigration legislation, it focuses on the particular institutional structure designed to implement the laws. The rest of the book falls into two parts. Part I, "Judicial Justice," explores the period between 1891 and 1905 in which Chinese successfully challenged the decisions of the administrative officials to exclude them under the Chinese exclusion laws through use of the federal courts in San Francisco. It ana-

lyzes the reasons for the victories of Chinese, focusing particularly on how institutional norms of the court made it a receptive forum for them. Chapter 2 analyzes the organization, perceptions, and goals of Chinese immigrants vis-à-vis those of the administrative officials responsible for enforcing Chinese exclusion. Chapter 3 focuses on the federal courts' treatment of Chinese cases and contrasts judicial and administrative approaches to immigration decisions. Chapter 4 describes the campaign to remove jurisdiction from the courts, which succeeded by 1905.

Part II, "Executive Justice," analyzes the rise of administrative discretion in immigration policy between 1905 and 1924 and its consequences for immigrants. Chapter 5 examines the proliferation of nativist legislation after 1905, which broadened its aim from Chinese to all "new" immigrants, culminating with the Immigration Act of 1924. As the nation embraced restriction as its dominant policy, the Bureau of Immigration's power grew and the summary procedures it had developed to exclude Chinese became the norm. Chapter 6 details the resistance of immigrants and their allies to these developments and their diverse strategies to challenge the bureau's practices, which, in their view, constituted "bureaucratic tyranny." Their unsuccessful efforts to impose limits on the bureau's power through litigation are explored in Chapter 7. Chapter 8 explores the effects of the courts' abdication of their role in immigration policy. Largely freed from judicial oversight, the bureau engaged in limited procedural reform but continued to tailor its practices to attain restrictionist objectives. The consequence, as the epilogue suggests, was the growth of an agency and a body of law that have never been fully assimilated into American jurisprudence.

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