

William & Mary Law Review

Volume 41 (1999-2000)
Issue 1 *Institute of Bill of Rights Symposium:
Fidelity, Economic Liberty, and 1937*

Article 8

December 1999

Lochner, Parity, and the Chinese Laundry Cases

David E. Bernstein

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Constitutional Law Commons](#), and the [Fourteenth Amendment Commons](#)

Repository Citation

David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 Wm. & Mary L. Rev. 211 (1999), <https://scholarship.law.wm.edu/wmlr/vol41/iss1/8>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmlr>

LOCHNER, PARITY, AND THE CHINESE LAUNDRY CASES

DAVID E. BERNSTEIN*

From the 1860s to the early twentieth century, Chinese laundrymen throughout the American West suffered from violence, boycotts, and hostile regulation of their occupation by local governments. The vast majority of Chinese laundrymen were not permitted to vote because they were aliens ineligible for citizenship. The laundrymen therefore could not effectively defend themselves against hostile legislation in the political arena. They did, however, challenge dozens of laundry ordinances in court. This Article reviews the cases brought by the laundrymen and examines some of the lessons the cases teach.

Part I of this Article discusses the historical background of the legal battles over Chinese laundries. Anti-Chinese laundry legislation arose out of a broader, popular anti-Chinese movement in the American West. As the Chinese became increasingly prominent in the laundry industry, anti-Chinese forces inevitably targeted Chinese laundries.

Part II discusses anti-Chinese laundry legislation promulgated in California, Montana, Oregon, and elsewhere in the West. Part II also examines the legal challenges brought by the Chinese to such legislation. Anti-Chinese laundry laws generally took one of four forms: licensing legislation, maximum hours laws, zoning ordinances, and taxation. These laws almost never discriminated against the Chinese explicitly. Nevertheless, such laws were passed in order to shut down Chinese laundries, or at

* Associate Professor, George Mason University School of Law. This Article was presented at the Fidelity, Economic Liberty, and 1937 Symposium at the William & Mary School of Law, at the American Law and Economics Association's annual conference in May 1999, and at workshops sponsored by Vanderbilt Law School and Boston University School of Law. The author benefitted from questions and comments at each of these forums. Randy Barnett and Ron Cass provided helpful additional comments. The author gratefully acknowledges the financial assistance of the John M. Olin Foundation.

least to give white competitors an advantage over Chinese laundrymen.

State courts faced with challenges to laundry regulations brought by Chinese laundrymen generally upheld the laws. Federal courts, however, usually invalidated them. The courts that ruled against the Chinese found that the states' police power had a broad scope. The courts that ruled in favor of the laundrymen, meanwhile, typically held that the measures in question were not within the scope of the police power and that the Fourteenth Amendment protected the right to earn a livelihood free from unreasonable government interference. Some of the latter opinions preceded the infamous *Lochner v. New York*¹ case by decades, but anticipated *Lochner's* reasoning and rhetoric.

Professor Burt Neuborne's controversial article, *The Myth of Parity*, argues that federal courts are more likely to protect federal constitutional rights from hostile local majoritarian sentiment than are state courts.² Part III of this Article shows that the history of the anti-Chinese laundry laws provides evidence consistent with Neuborne's thesis.

Part IV of this Article argues that the history of the anti-Chinese laundry laws lends support to revisionist accounts of the origins and effects of *Lochnerian* jurisprudence.³ Tradition-

1. 198 U.S. 45 (1905).

2. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1124 (1977) [hereinafter Neuborne, *The Myth of Parity*]; see also Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 797 (1995) [hereinafter Neuborne, *Parity Revisited*].

3. Throughout this Article, the phrases "Lochnerian" or "Lochnerian jurisprudence" are used to refer to the liberty-of-contract jurisprudence associated with the *Lochner* Era, instead of the more common "substantive due process" or "laissez-faire jurisprudence." The phrase "substantive due process" is anachronistic; it was never used by *Lochnerian* judges, or for that matter, by their opponents. See Gary D. Rowe, *The Legacy of Lochner: Lochner Revisionism Revisited*, 24 L. & SOC. INQUIRY 221, 244 (1999); see also James W. Ely, Jr., *Reflections on Buchanan v. Warley, Property Rights, and Race*, 51 VAND. L. REV. 953, 956 (1998). The phrase has no known use before the early 1930s, see G. Edward White, *Revisiting Substantive Due Process and Holmes's Lochner Dissent*, 63 BROOK. L. REV. 87, 108 (1997), and only caught on years later as a pejorative oxymoron used by opponents of *Lochnerism*, and, later, opponents of the Warren court, see Rowe, *supra*, at 244-45. The phrase "laissez-faire jurisprudence," meanwhile, is a misnomer. While *Lochner*-Era courts sometimes invalidated economic regulations, they never attempted to institute a regime remotely approaching the sort of Nozickian night watchman state normally

ally, constitutional scholars and historians have argued that by protecting economic rights from "progressive" legislation, post-Reconstruction courts protected the rich and powerful at the expense of the poor and helpless.⁴ Moreover, this effect was purportedly intentional. A recent review essay explains that "[p]rogressive historians and New Deal constitutionalists have portrayed the jurisprudence of economic regulation from Reconstruction to 1937 as if it were designed to do little more than meet the needs of the Carnegies and Morgans at the expense of the people."⁵ In particular, decisions invalidating labor laws on constitutional grounds, including the *Lochner* decision itself, have traditionally been seen as irredeemably reactionary. To the extent that Lochnerian judges believed that invalidation of pro-union and other progressive legislation protected the public from special interest legislation, this is seen as evidence that the legal elite was blind to economic and social realities that necessitated government intervention to ensure that labor markets functioned properly and to redress inequalities of bargaining power.⁶

The traditional view, as expressed above, is based on the implicit assumption that market outcomes were unfair to all but wealthy and corporate interests, who benefitted at the expense of the rest of society, while government regulation benefitted the public at large, especially "workers." Given consistently rising standards of living for workers during the heyday of American capitalism, when government support for labor unions was minimal,⁷ the roots of this belief are obscure. Moreover, as elemen-

associated with the phrase "laissez-faire." See JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 103-04 (2d. ed. 1998).

4. See, e.g., ROBERT G. MCCLOSKEY, *AMERICAN CONSERVATISM IN THE AGE OF ENTERPRISE* 84 (1951); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 568 (2d ed. 1988); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 53, 58.

5. Rowe, *supra* note 3, at 222.

6. See TRIBE, *supra* note 4, at 586 n.37 ("What was wrong was simply that, as a picture of freedom in industrial society, the one painted by the Justices badly distorted the character and needs of the human condition and the reality of the economic situation.").

7. See F.A. HARPER, *WHY WAGES RISE* 13 (1957); see also HENRY HAZLITT, *ECO-*

tary public choice economics suggests, because the wealthy as a class faced no fundamental disadvantages in the political market, there is no a priori reason to believe that economic regulations worked systematically to their disadvantage, nor has such disadvantage been demonstrated empirically.⁸

Indeed, public choice suggests that politicians often supply legislation to meet the demands of important voter constituencies, rather than to serve the interests of a public at large.⁹ To put it another way, legislation tends to benefit those with political power at the expense of those who lack it. Several revisionist scholars have shown that the public at large—which faces severe coordination and information problems in opposing “class legislation” benefitting powerful interest groups—gained from the invalidation by Lochnerian courts of legislation that assisted special interests at the public’s expense.¹⁰

Meanwhile, this author, along with a few other revisionist scholars, have started to document the negative effects of facially neutral regulatory legislation on racial minorities, particularly African Americans. From the 1890s on, African Americans in the

NOMICS IN ONE LESSON 104 (2d ed. 1962); BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 125 (1980) (noting improvement of the standard of living in the United States between the Civil War and World War I, despite “relatively few welfare laws and unions”). For international comparisons, see E.H. PHELPS BROWN & MARGARET H. BROWNE, *A CENTURY OF PAY* (1968); E.H. PHELPS BROWN, *PAY AND PROFITS* (1968).

8. In fact, the scholarly literature provides many examples of regulatory capture, where the established companies in an industry used the regulatory process to their advantage.

9. See Gary S. Becker, *Pressure Groups and Political Behavior*, in *CAPITALISM AND DEMOCRACY: SCHUMPETER REVISITED* 120, 124 (Richard D. Coe & Charles K. Wilber eds., 1985).

10. See SIEGAN, *supra* note 7, at 124-25; James W. Ely, Jr., *Melville W. Fuller Reconsidered*, 1998 J. SUP. CT. HIST. 32, 46; Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 SW. U. L. REV. 627, 668-70 (1988); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83, 128-29 (1989); Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 400-28; Keith Poole & Howard Rosenthal, *The Enduring Nineteenth Century Battle for Economic Regulation: The Interstate Commerce Act Revisited*, 36 J.L. & ECON. 837 (1993); Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 11 HASTINGS CONST. L.Q. 91, 95-96 (1983); Jonathan R. Macey, *Public Choice, Public Opinion, and the Fuller Court*, 49 VAND. L. REV. 373, 385-86 (1996) (reviewing JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910* (1995)).

South faced a fundamental obstacle to success in the political process: they were largely disenfranchised.

Legal scholars have traditionally paid little attention to how regulatory legislation impacted racial minorities, perhaps because they assume that discriminatory social norms can develop and be sustained in a free market economy, even in the absence of reinforcing state action.¹¹ Yet modern political economy, particularly public choice theory, challenges the wisdom of downplaying the role of state regulation, including facially neutral regulations, in enforcing discriminatory norms.¹²

In a series of articles, this author has investigated negative effects of facially neutral labor and zoning regulations on African American welfare.¹³ Consistent with public choice intuitions,

11. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1065-85 (1995).

12. As Mancur Olson's classic work *The Logic of Collective Action* explains, large, diffuse interest groups have trouble enforcing mutually desired norms in the absence of coercion. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965). In other words, it is very difficult for a cartel, including a cartel of racist whites, to operate effectively unless the government intervenes on its behalf. As Robert Cooter explains, "discriminatory social groups suffer the same problems of instability as any other cartel. To sustain discriminatory norms, evaders must be punished by a combination of informal sanctions and formal laws." Robert Cooter, *Market Affirmative Action*, 31 SAN DIEGO L. REV. 133, 156 (1994).

The role violence, often implicitly or explicitly endorsed by government, traditionally played in suppressing racial minorities in the United States has also not received sufficient attention from legal historians.

13. See, e.g., David E. Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. 276 (1994) [hereinafter Bernstein, *The Davis-Bacon Act*]; David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781 (1998) [hereinafter Bernstein, *Law and Economics*]; David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89 (1994) [hereinafter Bernstein, *Licensing Laws*]; David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797 (1998) [hereinafter Bernstein, *Philip Sober*]; David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85 (1993) [hereinafter Bernstein, *Rise of the "Underclass"*]; David E. Bernstein, *The Shameful, Wasteful History of New York's Prevailing Wage Law*, 7 GEO. MASON U. CIV. RTS. L.J. 1 (1997) [hereinafter Bernstein, *History of New York's Prevailing Wage Law*]; David E. Bernstein, Note, *The Supreme Court and "Civil Rights," 1886-1908*, 100 YALE L.J. 725 (1990). Several other scholars similarly have investigated the negative effects of facially neutral labor and zoning regulations on African American welfare. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION*

these laws at best failed to take the interests of African Americans into account, and at worst were intentionally used to exclude them from relevant markets. Lochnerian decisions invalidating these regulations had positive effects on African American welfare, while decisions deferring to the government's regulatory power were disastrous for African Americans.¹⁴

Like African Americans in the South, Chinese residents of the United States were unable to vote. Facially neutral regulation that affected the Chinese therefore provide another opportunity to test the intuition that regulatory legislation, even purportedly progressive legislation, often served to harm politically vulnerable groups, either intentionally, or because the interests of the disenfranchised groups were not taken into account in the political process. Concomitantly, one can use the history of the laundry laws to test the thesis that Lochnerian jurisprudence invalidating regulations that interfered with liberty of contract helped such groups.

As discussed in detail below, this Article documents how categories of legislation traditionally seen as "progressive," including maximum hours, zoning, and licensing laws, sometimes served as subterfuges for intentionally discriminatory policy. Meanwhile, courts that chose to incorporate Lochnerian reasoning into their Fourteenth Amendment jurisprudence protected Chinese laundrymen from legislation that intentionally discriminated against them, even when the discrimination was neither obvious nor proven at trial, and also protected them from legislation that was not intentionally discriminatory, but had severe and disproportionate negative consequences for the laundrymen. Lochnerism, then, rather than being irrelevant or even hostile to

LAWS 91-115 (1992); Ely, *supra* note 3, at 953-73; Richard A. Epstein, *Lest We Forget: Buchanan v. Warley and Constitutional Jurisprudence in the "Progressive Era,"* 51 VAND. L. REV. 787 (1998); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 390 (1988); Karlin, *supra* note 10, at 640-47; Jennifer Roback, *Rules v. Discretion: Berea College v. Kentucky*, 20 INT'L J. GROUP TENSIONS 47, 51 (1990).

14. The role of labor regulations in harming African Americans is discussed in further detail in the author's forthcoming manuscript from Duke University Press, tentatively entitled ONLY ONE PLACE OF REDRESS: LABOR REGULATIONS, AFRICAN-AMERICANS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (forthcoming 2000).

the concerns of politically powerless Chinese laundrymen, as the traditional view would suggest, was crucial to their protection.

I. CHINESE LAUNDRIES: THE HISTORICAL BACKGROUND

Chinese immigrants began to establish laundries in San Francisco around 1848, at the start of the Gold Rush.¹⁵ As in other Western boom towns, the population of San Francisco was disproportionately male.¹⁶ Laundering, however, was considered women's work, unfit for a white man.¹⁷ Before the Chinese arrived, a few Spanish-American and Native American women engaged in the laundry business in "Washerwomen's Lagoon."¹⁸ When the Gold Rush brought thousands of single men to San Francisco, the washerwomen began to charge extremely high fees; it was "almost cheaper to discard [a shirt] and buy a new one" than to launder it.¹⁹ Some San Franciscans even sent their laundry to Canton, China, or Hong Kong, where foreign laundries laundered shirts for twelve dollars a dozen and then returned them weeks, or even months, later.²⁰ Chinese residents of Hawaii soon recognized their geographic advantage and entered into the laundry business, charging eight dollars a dozen.²¹ Lured initially by gold fever, a few Chinese immigrants to the United States established local laundries. By 1850, with the arrival of Chinese competition, the price for washing shirts fell to five dollars a dozen.²²

Although a few Chinese immigrants to the United States pioneered Chinese involvement in the laundry industry, most

15. See Paul Ong, *An Ethnic Trade: The Chinese Laundries in Early California*, J. ETHNIC STUD., Fall 1981, at 95, 96.

16. See A HISTORY OF THE CHINESE IN CALIFORNIA: A SYLLABUS 63 (Thomas W. Chinn ed., 1969) [hereinafter A HISTORY OF THE CHINESE IN CALIFORNIA].

17. See Alexander Yamato, *Racial Antagonism and the Formation of Segmented Labor Markets: Japanese Americans and Their Exclusion from the Workforce*, 20 HUMBOLDT J. SOC. REL. 31, 42 (1994).

18. A HISTORY OF THE CHINESE IN CALIFORNIA, *supra* note 16, at 63.

19. *Id.*

20. See ALEXANDER MCLEOD, PIGTAILS AND GOLD DUST 111 (1947); SYLVIA SUN MINNICK, SAMFOW: THE SAN JOAQUIN CHINESE LEGACY 143 (1988).

21. See MINNICK, *supra* note 20, at 143.

22. See A HISTORY OF THE CHINESE IN CALIFORNIA, *supra* note 16, at 63.

prospected for gold.²³ Many of these Chinese met with a great deal of initial success.²⁴ Their good news reached home, and Chinese immigration to the United States soared from 2176 in 1851 to 20,026 in 1852.²⁵

Hostility among white miners to Chinese competitors grew substantially with the Chinese immigration boom of 1852.²⁶ As the Chinese arrived, false rumors spread among white miners that the Chinese immigrants to the United States were "coolies."²⁷ Chinese coolie labor was a system that exchanged indentured labor for minimal wages and passage loans to Latin America.²⁸ Employers treated coolies poorly, often worse than slaves, because the coolies' employers had no economic interest in the coolies' long-term health.²⁹

In fact, Chinese immigrants to the United States were not indentured coolies. Their contracts for passage loans to North America required a monetary repayment, not a servile one.³⁰ Their economic situation was no different from that of white forty-niners who borrowed money to finance their journey to the West. Nevertheless, most white workers believed the coolie myth and were upset and angry at the prospect of having to compete with malnourished coolie laborers.³¹ For decades, the coolie myth legitimized legislation that discriminated against Chinese immigrants.³²

23. See MARY ROBERTS COOLIDGE, *CHINESE IMMIGRATION* 16-17 (1909).

24. See *id.*

25. See *id.* at 498.

26. See Terry Boswell, *A Split Labor Market Analysis of Discrimination Against Chinese Immigrants, 1850-1882*, 51 AM. SOC. REV. 352, 356 (1986).

27. *Id.* at 358.

28. See *id.*

29. See LUCILLE EAVES, *A HISTORY OF CALIFORNIA LABOR LEGISLATION* 106-07 (1910); Boswell, *supra* note 26, at 358 n.7.

30. See COOLIDGE, *supra* note 23, at 45-46; GEORGE F. SEWARD, *CHINESE IMMIGRATION: ITS SOCIAL AND ECONOMICAL ASPECTS* 136-58 (1881); RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 35-36 (1989); Boswell, *supra* note 26, at 358.

31. See Boswell, *supra* note 26, at 357.

32. See *id.* at 359; Margaret Kolb Holden, *The Rise and Fall of Oregon Populism: Legal Theory, Political Culture and Public Policy, 1868-1895*, at 369 (1993) (unpublished Ph.D. dissertation, University of Virginia) (on file with Alderman Library at the University of Virginia).

Anti-Chinese sentiment developed out of broader anti-immigrant feelings among miners. Within months of the start of the Gold Rush, white miners persuaded the legislature to institute a twenty dollar per month tax on foreign miners in order to drive out competition from Mexicans and other Latin Americans.³³ This tax was repealed in 1851, just prior to the wave of Chinese migration.³⁴

In response to the influx of Chinese, white miners agitated for a new tax on foreign miners that would discourage this new source of competition.³⁵ California legislators responded by levying a three dollar per month tax on all foreign miners.³⁶ The state later increased this tax and eventually amended it so that it applied only to the Chinese.³⁷ The tax was high enough to create a substantial revenue stream for the state, but not so high as to force all Chinese out of the mines.³⁸

Besides engaging in political activism, white miners reacted to the influx of Chinese competitors with violence. The violence became especially serious during a recession caused by a decline in gold prices between 1853 and 1854.³⁹ Many Chinese left the

33. See COOLIDGE, *supra* note 23, at 29-30; EAVES, *supra* note 29, at 111.

34. See COOLIDGE, *supra* note 23, at 30.

35. See *id.* at 29-31.

36. See *id.* at 32.

37. See Act of May 4, 1852, ch. 37, §§ 1, 6-10, 1852 Cal. Stat. 84, 84-86 (repealed 1853); Boswell, *supra* note 26, at 359. The tax was raised by a dollar in 1853, and for the first time the Chinese were clearly the major target of the law. See Act of March 30, 1853, ch. 44, § 6, 1853 Cal. Stat. 62, 63 (repealed 1939); COOLIDGE, *supra* note 23, at 31-33. A new version of the law, passed in 1861, required that all foreigners residing in mining districts who were not eligible for citizenship (that is, the Chinese) would be required to pay the tax. See Act of May 17, 1861, ch. 401, § 93, 1861 Cal. Stat. 419, 448-49; COOLIDGE, *supra* note 23, at 35. The law ceased to be enforced after passage of the Fourteenth Amendment in 1868. See COOLIDGE, *supra* note 23, at 36. Chinese immigrants ultimately paid approximately 85% of all of the revenue collected from the tax. See Priscilla S. Wegars, *The History and Archaeology of the Chinese in Northern Idaho, 1880 Through 1910*, at 32-33 (1991) (unpublished Ph.D. dissertation, University of Idaho) (on file with the University of Idaho Library).

The Oregon Constitution banned the Chinese from owning mining claims or land. See OR. CONST. of 1860, art. II, § 6; art. XV, § 8.

38. See COOLIDGE, *supra* note 23, at 33.

39. See PING CHIU, *CHINESE LABOR IN CALIFORNIA, 1850-1880: AN ECONOMIC STUDY* 16-22 (1963); COOLIDGE, *supra* note 23, at 255-56; RICHARD E. LINGENFELTER, *THE HARD ROCK MINERS: A HISTORY OF THE MINING LABOR MOVEMENT IN THE*

mines because of the foreign miners' tax and anti-Chinese violence.⁴⁰ In the ensuing decades, legal harassment and violence followed Chinese miners throughout the West.⁴¹

As opportunities in the mines diminished, some Chinese, recognizing the demand among white miners for laundry service, set up wash houses just outside mining camps.⁴² Other Chinese established laundries in San Francisco, or in other cities in California and throughout the West.⁴³ Chinese immigrants rarely came to the United States with experience as launderers.⁴⁴ In China, like America, laundering was considered women's work.⁴⁵ Some Chinese who established laundries learned the trade through apprenticeships, while others gained laundering skills while working as house servants.⁴⁶

Despite their initial lack of laundering skills, the laundry business appealed to Chinese immigrants. Laundry ownership did not require proficiency in English or a large capital investment—an ample water supply and a shack with a stove usually sufficed.⁴⁷ Many Chinese opened laundries in partnership, fur-

AMERICAN WEST 1863-1893, at 107 (1974); ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 50 (1971).

40. See COOLIDGE, *supra* note 23, at 38. Nevertheless, as late as 1870, 27% of the Chinese in the United States were miners, and they constituted 11.2% of the miners in the United States, as well as 27.5% of those in the West. See Wegars, *supra* note 37, at 29-30.

41. See, e.g., *State v. Owsley*, 42 P. 105, 107 (Mont. 1895) (upholding "poll tax" targeted at Chinese mine workers); *Tibbitts v. Ah Tong*, 2 P. 759, 764-65 (Mont. 1882) (denying the right of Chinese immigrants to own mining property); *Territory v. Lee*, 2 Mont. 124, 144 (1874) (declaring law requiring aliens to forfeit ownership of placer mines to be unconstitutional); LINGENFELTER, *supra* note 39, at 109-19 (describing anti-Chinese violence in Nevada in the late 1860s).

42. See PAUL C.P. SIU, *THE CHINESE LAUNDRYMAN: A STUDY OF SOCIAL ISOLATION* 52-53 (1987); Boswell, *supra* note 26, at 364; Fern C. Trull, *The History of the Chinese in Idaho from 1864-1910*, at 17 (1946) (unpublished M.A. thesis, University of Oregon) (on file with the University of Oregon Library).

43. City laundries offered their owners two advantages over mining camp laundries. First, it was easy to find a purchaser once the original owner decided to return to China. See Ong, *supra* note 15, at 95-96. Second, other Chinese workers were readily available to run the laundry while the owner took a trip to China or elsewhere. See *id.* Laundrymen in rural areas who had partners also were able to visit China. See Florence C. Lister & Robert H. Lister, *Chinese Sojourners in Territorial Prescott*, 31 J. SW. 1, 17 (1989).

44. See SIU, *supra* note 42, at 107.

45. See Lister & Lister, *supra* note 43, at 21.

46. See SIU, *supra* note 42, at 52-53.

47. See TAKAKI, *supra* note 30, at 93; John Gioia, *A Social, Political and Legal*

ther reducing the risk of capital loss.⁴⁸ Additionally, many Chinese opened laundries because owning a business was a status symbol in the American Chinese community and in the immigrant's home village, to which the laundry owner generally planned to return.⁴⁹ The laundry business was also attractive because it did not initially raise the competitive ire of whites;⁵⁰ few white women and even fewer men wanted to work as launderers.⁵¹ A well-organized guild system allowed the laundrymen to set common prices,⁵² allocate markets,⁵³ and create a job training and unemployment system.⁵⁴ Violation of guild rules by a member or an attempt by an upstart to work outside of the guild was met with economic retaliation or, if necessary, violence.⁵⁵ Once Chinese laundrymen became established, they rapidly brought their relatives into the business.⁵⁶ By 1860, most laundry workers in California were Chinese.⁵⁷

Study of Yick Wo v. Hopkins, in *THE CHINESE AMERICAN EXPERIENCE: PAPERS FROM THE SECOND NATIONAL CONFERENCE ON CHINESE AMERICAN STUDIES* 211, 212 (Genny Lim ed., 1980); Rose Hum Lee, *Occupational Invasion, Succession, and Accommodation of the Chinese of Butte, Montana*, 55 AM. J. SOC. 50, 53 (1949); Daniel Liestman, *The Chinese in the Black Hills, 1876-1932*, 27 J.W. 74, 76 (1988); Lister & Lister, *supra* note 43, at 15; Li-hua Yu, *Chinese Immigrants in Idaho* 113 (1991) (unpublished Ph.D. dissertation, Bowling Green State University) (on file with the University of Michigan (Ann Arbor) Library).

48. See Lister & Lister, *supra* note 43, at 17. Most partners were related by clan or village. See *id.*

49. See Lee, *supra* note 47, at 53; Lister & Lister, *supra* note 43, at 17.

50. See Ong, *supra* note 15, at 101. Idaho laundrymen did not have a formal guild, but they fixed prices nevertheless. There was also sufficient cooperation among the Idaho laundrymen that they never seemed to locate in the same area of a city or have any dispute over their patronage. See Li-Hua Yu, *supra* note 47, at 124-25.

51. See Li-Hua Yu, *supra* note 47, at 124-25.

52. See A HISTORY OF THE CHINESE IN CALIFORNIA, *supra* note 16, at 63; Ong, *supra* note 15, at 103.

53. In San Francisco, for example, laundries had to be situated so that there were at least ten doors between them. See A HISTORY OF THE CHINESE IN CALIFORNIA, *supra* note 16, at 63.

54. For example, when a washhouse closed, workers left unemployed received first opportunity at jobs at other laundries and received temporary room and board from other members of the organization. See Ong, *supra* note 15, at 103.

55. See A HISTORY OF THE CHINESE IN CALIFORNIA, *supra* note 16, at 63; Ong, *supra* note 15, at 103.

56. See SIU, *supra* note 42, at 53. The majority of American laundrymen were born in Toyshan District, China. See *id.* at 107.

57. See Ong, *supra* note 15, at 95.

Several events soon led to the establishment of even more Chinese-owned laundries throughout the West. In the 1860s, many Chinese immigrants, tired of battling hostile miners, found work building the Central Pacific Railroad. By the time of the railroad's completion in 1869, approximately eighty-three percent of the 12,500 railroad construction workers were Chinese.⁵⁸ The completion of the railroad left these laborers unemployed.⁵⁹ Meanwhile, a series of successful strikes by white mineworkers from 1867 to 1869 led many mining companies to ban Chinese miners from underground work and often from all mining jobs.⁶⁰ When strikes proved unsuccessful, miners and union activists sometimes resorted to violence against the Chinese.⁶¹

Deprived of other opportunities, many Chinese took low-paying manufacturing jobs in California cities.⁶² In 1870, forty-six percent of the workers in the four main industries in San Francisco were Chinese, as were twenty-five percent of all wage earners in California.⁶³ Meanwhile, *de jure* discrimination against Chinese laborers increased. For example, in the spring of 1870, San Francisco promulgated an ordinance excluding Chinese from public works jobs.⁶⁴ In 1872, Oregon passed a statute similarly prohibiting the employment of Chinese on public works projects.⁶⁵ In July of 1875, the proprietors of a shirt factory, which

58. See SEWARD, *supra* note 30, at 23-24; Boswell, *supra* note 26, at 361.

59. This pattern repeated itself when the Northern Pacific built its line through the Pacific Northwest. At one point, the Northern Pacific employed 15,000 Chinese laborers in Washington, and another 6000 in Montana and Idaho. See William T. White, *A History of Railroad Workers in the Pacific Northwest, 1883-1934*, at 8 (1981) (unpublished Ph.D. dissertation, University of Washington) (on file with the University of Idaho Library).

60. See Boswell, *supra* note 26, at 361.

61. See *id.* at 357 (discussing the racial antagonism and riots targeted at the Chinese).

62. See TAKAKI, *supra* note 30, at 87-88 (discussing the racial antagonism and riots targeted at the Chinese); Boswell, *supra* note 26, at 362. By 1880, 52% of boot and shoe workers, 84.4% of cigar manufacturers, and 32.7% of woolen mills workers were Chinese. See Boswell, *supra* note 26, at 363.

63. See LUCY E. SALYER, *LAWS HARSH AS TIGERS* 10 (1995).

64. See WILLIAM J. COURTNEY, *SAN FRANCISCO ANTI-CHINESE ORDINANCES, 1850-1900*, at 49 (reprint 1974) (1956).

65. See *Baker v. Portland*, 2 F. Cas. 472, 473 (D. Or.) (No. 777) (voiding this statute).

planned to employ about 400 people, received a boiler permit conditioned on their agreement to employ no more than 150 Chinese. The permit further required the factory to decrease that number each quarter until the entire work force was white.⁶⁶ Skilled craft unions further limited economic opportunity for Chinese immigrants by trying to exclude the Chinese from their trades.⁶⁷ Violence and discriminatory local legislation forced the Chinese out of the fishing industry.⁶⁸

Many Chinese workers tired of holding tenuous jobs as unskilled and semi-skilled laborers and became entrepreneurs. The Chinese specialized in three businesses: restaurants, vegetable peddling, and laundries. By 1870, almost three-quarters of California's laundry workers were Chinese.⁶⁹ Between 1870 and 1880, the percentage of California Chinese working as launderers rose from 4.92 to 8.14.⁷⁰ A far higher percentage of Chinese worked in the laundry business in some communities in California and elsewhere.⁷¹ Some Chinese worked in laundries owned by whites, but most either owned their own businesses or

66. See COURTNEY, *supra* note 64, at 58.

67. See Boswell, *supra* note 26, at 362. Chinese cigar workers, for example, were under constant attack. In 1874, the Cigar Makers' Union in California adopted a white label to indicate that cigars were made by white union men. See Herbert Hill, *Black Labor and Affirmative Action: An Historical Perspective*, in *THE QUESTION OF DISCRIMINATION* 190, 200 (Steven Shulman & William Darity, Jr. eds., 1989). The cigar box had a reproduction of the union's logo, along with the words "White Labor, White Labor" and the following message:

Buy no cigars
except from the box marked
with the trade union label
thus you help maintain the
white as against the Coolie
standard of life and work

Id. This is the origin of the union label. See *id.* at 201.

68. See, e.g., ARTHUR MCEVOY, *THE FISHERMEN'S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES, 1850-1980*, at 112-19 (1986).

69. See Ong, *supra* note 15, at 95.

70. See Eric Fong & William T. Markham, *Immigration, Ethnicity and Conflict: The California Chinese, 1849-1882*, 61 *SOC. INQUIRY* 471, 481 (1991).

71. See, e.g., Ronald M. James et al., *Competition and Coexistence in the Laundry: A View of the Comstock*, 25 *W. HIST. Q.* 165, 167 (1994) (reporting that in 1880, 149 Chinese, constituting 28.6% of the Chinese male population of Virginia City, Nevada, worked as laundrymen).

worked for other Chinese.⁷² Many of those who worked for other Chinese either ultimately opened their own laundries or bought out employers who decided to return to China.⁷³

Chinese laundries received most of their business from poor whites who could not otherwise afford to have their shirts laundered. Wealthier whites had washing done in their houses, primarily by white servants.⁷⁴ Despite the valuable service rendered by the Chinese to the poorer citizens of the West, the laundry business proved to be only a temporary refuge from white hostility.

The Chinese were particularly vulnerable to gender-related criticism because they were "men doing women's work." In Montana and other sparsely settled locales, whites charged Chinese laundrymen with crowding out widows and other single women from the laundry field. In more settled urban areas like San Francisco, the Chinese stood accused of disrupting white families by taking away a task traditionally assigned to housewives.⁷⁵

Anti-Chinese organizations spread false rumors about Chinese laundries. Perhaps the most mundane rumor charged that the Chinese routinely cheated their customers.⁷⁶ Other accusations required more imagination. For example, from a distance it appeared to some that Chinese laundrymen sprayed water and starch from their mouths onto clothes as they ironed.⁷⁷ The process actually involved blowing air through a tube filled with

72. See SIU, *supra* note 42, at 77-82.

73. See *id.* at 82-85.

74. See SEWARD, *supra* note 30, at 115. Wealthier people were particularly hesitant to send their clothes to the Chinese because the Chinese had a reputation for being rough with good fabric and for mixing all sorts of clothes together. See *id.* at 341-42.

75. See Ong, *supra* note 15, at 105. Similar sentiments were voiced in Canada. See Lee Wai-Man, *Dance No More: Chinese Hand Laundries in Toronto*, POLYPHONY, Summer 1984, at 33.

76. This led, for example, to a Portland law requiring launderers to give a written receipt to their customers. See *In re Wan Yin* (The Laundry License Case), 22 F. 701, 701 (D. Or. 1885). This further led to a union-backed campaign in 1886 to force Chinese launderers in Los Angeles to write tickets in English. See GRACE H. STIMSON, *RISE OF THE LABOR MOVEMENT IN LOS ANGELES* 66 (1955).

77. See MARY MCNAIR MATTHEWS, *TEN YEARS IN NEVADA, OR, LIFE ON THE PACIFIC COAST* 252-53 (reprint 1985) (1880).

water. Anti-Chinese activists nevertheless insisted that Chinese laundrymen spit on clothing and thereby spread disease.⁷⁸ Even people sympathetic to the Chinese believed the water-spraying myth.⁷⁹ Opponents of the Chinese also argued that the open cesspools behind Chinese laundries were a significant health hazard.⁸⁰ The *Los Angeles Times* attributed the appearance of

78. See James et al., *supra* note 71, at 170-71; Raymond Lou, *Chinese-American Agricultural Workers and the Anti-Chinese Movement in Los Angeles*, in *LABOR DIVIDED: RACE AND ETHNICITY IN UNITED STATES LABOR STRUGGLES, 1835-1960*, at 49, 60 (Robert Asher & Charles Stephenson eds., 1990) [hereinafter Lou, *Chinese-American Agricultural Workers*]; Michele Shover, *Chico Women: Nemesis of a Rural Town's Anti-Chinese Campaigns, 1876-1888*, 67 CAL. HIST. SOC'Y Q. 228, 235 (1988); Stacy A. Flaherty, *Boycott in Butte*, MONT.: MAG. W. HIST., Winter 1987, at 34, 37; Paul A. Frisch, The 'Gibraltar of Unionism': The Working Class of Butte, Montana, 1878-1906, at 183 (1992) (unpublished Ph.D. thesis, University of California, Los Angeles) (on file with the University of California, Los Angeles Library); cf. ROSE HUM LEE, *THE GROWTH AND DECLINE OF CHINESE COMMUNITIES IN THE ROCKY MOUNTAIN REGION* 112 (Arno Press 1978) (1947) (Ph.D. thesis, University of Chicago) (recounting complaints that Chinese laundrymen had "filthy, nasty habits . . . especially when sprinkling clothes").

In 1882, Los Angeles passed an ordinance prohibiting the spraying of water on clothes by using the mouth. See Raymond Lou, *The Chinese American Community of Los Angeles, 1870-1900: A Case of Resistance, Organization, and Participation* 128 (1982) (unpublished Ph.D. thesis, University of California, Irvine) (on file with the University of California, Irvine Library) [hereinafter Lou, *The Chinese American Community*]. The fate of this law is unknown.

Honolulu passed a measure banning this practice of blowing water through tubes in 1896. See *Republic v. Ching Geung*, 11 Haw. 667, 668 (1899). The Supreme Court of Hawaii held that the law was unconstitutionally overbroad because it applied even to someone engaging in the practice in his own home on his own clothing. See *id.* The Hawaii Supreme Court later upheld a narrower Oahu law banning the practice of "spraying clothes with liquid projected from the mouth" in commercial laundries in *Territory v. Ah Choy*, 17 Haw. 331, 331 (1906). The Chinese defendants challenged this law on the grounds that it was unreasonable and because it was class legislation directed against Chinese laundrymen. See *id.* The court acknowledged that it was uncontested that no harm from the practice had ever been shown, and that only Chinese laundrymen engaged in the practice, but upheld the law nevertheless. See *id.*

79. See MCLEOD, *supra* note 20, at 114. Historians, relying on primary sources, have also been taken in by the myth. See, e.g., SANDY LYDON, *CHINESE GOLD: THE CHINESE IN THE MONTEREY BAY REGION* 243 (1985); Liestman, *supra* note 47, at 76; Trull, *supra* note 42, at 22.

Anti-Chinese laundry propaganda used the spitting myth as late and as far away from its original source as 1930s New York. See RENQU YU, *TO SAVE CHINA, TO SAVE OURSELVES: THE CHINESE HAND LAUNDRY ALLIANCE OF NEW YORK* 32 (1992).

80. See LYDON, *supra* note 79, at 187, 245; Daniel Liestman, *The Various*

mysterious "syphilitic sores" among "moral persons" to Chinese washhouses.⁸¹

Like other Chinese immigrants, the vast majority of Chinese laundrymen either were bachelors or left their wives in China.⁸² The resulting gender imbalance led to wild accusations of sexual misconduct among the Chinese, especially laundrymen. People charged that "[o]rientals beguiled little girls to their laundries to commit crimes *too horrible to imagine*."⁸³ As late as 1902, American Federation of Labor leader Samuel Gompers claimed that the Chinese enticed little white boys and girls into becoming "opium fiends."⁸⁴ According to Gompers, the children then spent their days in the back of laundry rooms as sex slaves to the Chinese.⁸⁵

Hostile attitudes towards Chinese laundrymen led to proposals for hostile legislation. Labor unions often promoted this legislation.⁸⁶ Union leaders found they could strengthen their movement by advocating anti-Chinese measures, even in fields

Celestials Among Our Town: Euro-American Response to Port Townsend's Chinese Colony, 85 PAC. NORTHWEST Q. 93, 95 (1994); Lou, *Chinese-American Agricultural Workers*, *supra* note 78, at 60. Liestman points out that the sanitary conditions of all laundries, Chinese and non-Chinese, were similar, but only the Chinese laundrymen faced legal harassment. See Liestman, *supra*, at 95-96. In Port Townsend, a \$20 annual tax was placed on the Chinese, allegedly to force them to improve sanitation. See *id.* The laundrymen successfully challenged this tax in court. See *id.* Coolidge states that "the French laundries of the poorer class were quite as unsanitary [as the Chinese laundries]." COOLIDGE, *supra* note 23, at 269.

81. William R. Locklear, *The Celestials and the Angels: A Study of the Anti-Chinese Movement in Los Angeles to 1882*, 42 HIST. SOC'Y S. CAL. Q. 239, 253 (1960).

82. See SIU, *supra* note 42, at 156-75.

83. OSCAR HANDLIN, *THE AMERICANS* 304 (1963); see also STUART C. MILLER, *THE UNWELCOME IMMIGRANT* 185-86 (1969) (describing incidents in which Chinese laundrymen allegedly "ravag[ed] more than twenty young white girls between the ages of 9 and 13 in the back room" and led other women into a life of prostitution). These rumors spread across the continent. As a result of the hysteria, Massachusetts passed a law, later invalidated by the state Supreme Court, prohibiting women under age 21 from entering Chinese-owned establishments. See *In re Opinion of the Justices*, 207 Mass. 601 (1911). In 1912, Saskatchewan passed a law prohibiting Chinese men from employing white women. See Constance Backhouse, *The White Women's Labor Laws: Anti-Chinese Racism in Early Twentieth Century Canada*, 14 LAW & HIST. REV. 315, 345 (1996).

84. SAMUEL GOMPERS & HERMAN GUSTADT, *SOME REASONS FOR CHINESE EXCLUSION: MEAT VS. RICE, AMERICAN MANHOOD AGAINST ASIATIC COOLIEISM—WHICH SHALL SURVIVE?*, S. DOC. NO. 57-137, at 29 (1902).

85. See *id.* at 18-22.

86. See Lou, *The Chinese-American Community*, *supra* note 78, at 128.

where the Chinese did not directly compete with whites, such as the laundry industry.⁸⁷ In fact, labor unions were active in anti-Chinese efforts in cities where few Chinese directly competed with whites.⁸⁸ For labor leaders,

the anti-Chinese movement became a means by which they could manipulate the political and organizational energy of the entire labor force, . . . thereby using the Chinese issue as a device to prevent an active challenge to their leadership and to their control of unionized occupations by unemployed and unskilled workers.⁸⁹

Similarly, politicians found they could appeal to white constituents by promulgating discriminatory measures.⁹⁰ Chinese immi-

87. "The labor and anti-Chinese movements overlapped so thoroughly as to be scarcely distinguishable in California, where the exclusion issue provided the basis for labor solidarity at key points." DAVID ROEDIGER, *THE WAGES OF WHITENESS* 179 (1991) (citing ALEXANDER SEXTON, *THE INDISPENSIBLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 19-20* (1971)).

88. See, e.g., GEOFFREY DUNN, *SANTA CRUZ IS IN THE HEART* (1983); Lou, *The Chinese-American Community*, *supra* note 78, at 128.

89. Herbert Hill, *Anti-Oriental Agitation and the Rise of Working-Class Racism*, *SOCIETY*, Jan.-Feb. 1973, at 43, 46. This policy gave unions far "more legitimacy and influence in some of the industrial regions of the Far West than in most other sections of the country." GEORGE M. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* 225 (1981); see also ROGER DANIELS, *ASIAN AMERICA: CHINESE AND JAPANESE IN THE UNITED STATES SINCE 1850*, at 29-30 (1988) ("Labor leaders from Dennis Kearney through Samuel Gompers, and almost all of the leaders of American socialism, insisted that Chinese be kept out, sent home, and denied citizenship."); MICHAEL KAZIN, *BARONS OF LABOR: THE SAN FRANCISCO BUILDING TRADES AND UNION POWER IN THE PROGRESSIVE ERA* 163 (1987) ("From the 1860s to the 1920s, the demand for Asian exclusion bound together white wage-earners in a movement that spoke loudly and forcefully for a majority of Californians. Organized labor spearheaded the mobilization and thereby gained support from citizens who either could not or would not join a union."). Coolidge points out that the rise in anti-Chinese legislation in San Francisco correlated with the rise of San Francisco trade unions. See COOLIDGE, *supra* note 23, at 344-45.

In Montana, the Knights of Labor, which represented both skilled and unskilled workers, led the anti-Chinese movement. See Frisch, *supra* note 78, at 162-63. The Chinese rarely competed with members of the Knights for jobs, but opposition to the Chinese nevertheless brought them some advantages. See *id.* ("In Montana, xenophobia solidified the ranks of organized labor, brought new recruits into the union fold, [and] strengthened labor's support with the middle class. . . ."); see also White, *supra* note 59, at 8 ("Local [union] organizers relied heavily on the widespread anti-Chinese prejudices in the region to recruit new members.").

90. See Ong, *supra* note 15, at 100, 106.

grants, meanwhile, lacked the political power to stop such measures; applicable federal law banned them from citizenship because they were neither white nor "Negro."

When a recession hit the Western United States in the late 1870s, anti-Chinese sentiment swelled. Western whites failed to persuade the federal government to exclude Chinese immigrants from the United States, so westerners attempted to use violence, boycotts, and state and local legislation to force out the Chinese. Laundrymen were among the main victims of this "Chinese Must Go" movement. For example, in January 1877, the San Francisco Board of Supervisors appropriated \$1500 to the Citizen's Anti-Chinese Committee to stir up anti-Chinese sentiment.⁹¹ Later that year, anti-Chinese mobs descended on Chinatown and destroyed twenty-five Chinese laundries.⁹²

Despite violence against Chinese laundries and legal harassment, the number of Chinese laundries continued to grow. By 1880, over three-quarters of all laundrymen in California were Chinese.⁹³ Workers and owners shared in the laundries' prosperity, as demonstrated by a doubling of wages for Chinese laundry workers between 1882 and 1909.⁹⁴

Anti-Chinese sentiment in the West arguably hit its zenith between 1879 and 1886. In 1879, the virulently anti-Chinese Workingman's Party candidate received forty-five percent of the

91. See COURTNEY, *supra* note 64, at 64.

92. See A HISTORY OF THE CHINESE IN CALIFORNIA, *supra* note 16, at 63; MCLEOD, *supra* note 20, at 207; Connie Y. Yu, *The Chinese in American Courts*, BULL. CONCERNED ASIAN SCHOLARS, Fall 1972, at 22, 27. Chinese laundries were also a particular target of rioters in Denver in 1880. See Roy T. Wortman, *Denver's Anti-Chinese Riot, 1880*, 42 COLO. MAG. 275, 284-85 (1965).

Some of the San Francisco Chinese filed suit against the city and recovered damages because the city had failed to give them adequate protection from the rioters. See CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY AMERICA 321 n.9 (1994). Nevertheless, until around the turn of the century, Chinese laundries in San Francisco had to be "barricaded against hoodlums with wire netting and bars" until they looked like prisons. COOLIDGE, *supra* note 23, at 269.

In 1878, an unrepentant San Francisco Board of Supervisors passed a law that banned the use of Chinese granite as a building material on public works, and also banned opium smoking, a favored pastime of the Chinese. See COURTNEY, *supra* note 64, at 67.

93. See Ong, *supra* note 15, at 95.

94. See COOLIDGE, *supra* note 23, at 387.

vote for California governor, just a percentage point less than the victorious Republican candidate.⁹⁵ Also in 1879, California enacted a new constitution containing several anti-Chinese provisions.⁹⁶ Federal courts invalidated most of these statutes.⁹⁷ State courts, meanwhile, could not be trusted to protect the rights of the Chinese—most of the individuals elected to the California Supreme Court and other political offices in 1879 were members of the Workingman's Party.⁹⁸ As this Article discusses in detail below, beginning in 1880, San Francisco passed a series of measures intended to drive the Chinese out of the laundry business.⁹⁹ Two of these measures reached the United States Supreme Court with mixed results. Other cities also passed anti-Chinese legislation in the early 1880s.

California was a swing state in national elections.¹⁰⁰ Congressional Democrats and Republicans, pandering to anti-Chinese sentiment in that state, passed the Chinese Exclusion Act in 1882, excluding most potential Chinese immigrants from the United States.¹⁰¹ Anti-Chinese forces in the West, however, were not satisfied because resident Chinese were not expelled. This dissatisfaction was exacerbated by the fact that some Chinese continued to arrive in the United States because of loopholes in the Act and fraud. In late 1885 and early 1886, anti-Chinese sentiments climaxed and violent anti-Chinese riots broke out throughout the West.

95. See Fong & Markham, *supra* note 70, at 483.

96. For a discussion of, and lengthy quotations from, various sections of the California State Constitution at issue, see *In re Tribucio Parrott*, 1 F. 481, 483-86, 499-501 (C.C.D. Cal. 1880).

97. See, e.g., *id.* at 514-15 (invalidating a provision banning corporations from employing Chinese).

98. Cf. McClain, *supra* note 92, at 79-83 (describing the Workingman's Party's rise to power, their successes in the 1878 and 1879 elections, and their influence in the Constitutional convention of 1879); Elmer Clarence Sandmeyer, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 63-75 (describing the Workingman's Party's rise to power through the leadership of Dennis Kearney, and its subsequent victories in the 1879 elections and the Constitutional convention of 1879).

99. See *infra* notes 108-462 and accompanying text.

100. See Daniels, *supra* note 89, at 54 ("The presidential election of 1880 in California was decided by fewer than one hundred votes in a canvass of 164,000, and in no national election from 1876 through 1896 did the winning candidate have a margin of more than 13,000 votes in California.").

101. See Act of May 6, 1882, ch. 126, 22 Stat. 58 (repealed 1943).

Local governments continued to promulgate anti-Chinese laundry legislation in the late 1880s and early 1890s, particularly in California. By the early 1900s, however, the Chinese issue was far less significant in Western politics. The federal government renewed the Chinese Exclusion Act in 1892¹⁰² and 1902.¹⁰³ With Chinese immigration drastically reduced and a massive shortage of Chinese women available for the Chinese men already residing in the United States, the Chinese population of California dwindled,¹⁰⁴ while the white population increased substantially. By the 1910s, Japanese immigrants, who did not yet face immigration restrictions, became a target of the enmity previously reserved for the Chinese.¹⁰⁵

Cities nevertheless occasionally promulgated anti-Chinese laundry laws through the 1930s. In addition, general regulatory laws, such as zoning and maximum hours laws, failed to take into account the interests of the politically powerless Chinese laundrymen. The Chinese had become increasingly concentrated in cities,¹⁰⁶ and within those cities concentrated in the laundry business. Any laws that harmed Chinese laundries were therefore a tremendous economic threat to the Chinese community as a whole. Fortunately, federal courts allowed Chinese laundries to thrive by protecting Chinese laundrymen from hostile regulations. From 1900 to 1930, approximately twenty-five percent of all employed male Chinese in the United States worked in laundries.¹⁰⁷ Of those laundrymen who started families in the United States, many sent their children to college and beyond, thereby creating a prosperous—albeit for many decades small and isolated—Chinese-American community. The next section of this Article reviews the various types of legislation used to harm Chinese laundrymen and the courts' reactions to those laws.

102. See Act of May 5, 1892, ch. 60, 27 Stat. 25 (repealed 1943).

103. See Act of April 29, 1902, ch. 641, 32 Stat. 176 (repealed 1943).

104. The total Chinese-American population shrank from 105,465 persons in 1880 to 89,863 in 1900 and 61,639 in 1920. See TAKAKI, *supra* note 30, at 111-12.

105. See ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 74-78 (1962); David E. Bernstein, *Two Asian Laundry Cases*, 23 J. SUP. CT. HIST. 95, 101-08 (1999).

106. See DANIELS, *supra* note 89, at 69.

107. See Peter S. Li, *Ethnic Businesses Among Chinese in the U.S.*, J. ETHNIC STUD., Fall 1976, at 35, 39 (1976).

II. ANTI-CHINESE LAUNDRY LEGISLATION AND THE JUDICIAL RESPONSE

During the worst period of anti-Chinese agitation, from the 1860s to around 1900, Western jurisdictions passed dozens of facially neutral laws intended to harm Chinese laundries. Maximum hours laws, zoning laws, licensing laws, and tax laws were all used in the war against Chinese laundries. State courts generally upheld these laws as proper exercises of the police power. Federal courts, however, often invalidated them as a violation of the Chinese's Fourteenth Amendment right to pursue a lawful occupation. Federal courts invalidated laundry laws on grounds of racial discrimination in rare cases, such as in *Yick Wo v. Hopkins*,¹⁰⁸ when the Chinese litigants proved that the laws in question affected only the Chinese.

After 1900, legislation targeted Chinese laundrymen less often. Because the laundrymen could not vote, however, regulatory legislation passed for nondiscriminatory reasons, including certain zoning and maximum hours laws, failed to take into account the laundrymen's interests and injured them disproportionately. Chinese laundrymen therefore launched aggressive litigation campaigns to have these laws declared unconstitutional, at least as applied to Chinese laundries. The Chinese also continued to battle sporadic zoning, maximum hours, and tax laws that had discriminatory intent. Depending on the issues raised in a particular case, courts ruling in favor of the Chinese relied on either *Yick Wo* or *Lochner*.

A. Maximum Hours Laws

In a deliberate attempt to harm Chinese laundries, San Francisco passed the first maximum hours law applying to laundries in 1882.¹⁰⁹ Despite the clear discriminatory intent, the United States Supreme Court upheld this law as a reasonable exercise of the police power that was intended to reduce the risk of night-

108. 118 U.S. 356 (1886).

109. See Gioia, *supra* note 47, at 212-13 (stating that although "[s]ome of these ordinances were legitimate guidelines . . . most were discriminatory in nature since they placed an undue burden on . . . Chinese laundries").

time fires.¹¹⁰ The Court also held that maximum hours laws did not violate the liberty interests of laundry workers.¹¹¹

In the early twentieth century, San Francisco again began to enforce and tighten its maximum hours regulations affecting laundries. Although this crackdown was not primarily a result of anti-Chinese sentiment, the Chinese nevertheless suffered disproportionately. Meanwhile, in *Lochner v. New York*,¹¹² the Supreme Court held maximum hours laws to be unconstitutional. A state court upheld the San Francisco maximum hours law, but a federal court held it unconstitutional under *Lochner*.¹¹³ Oakland passed its own laundry hours law, one of the last intentionally anti-Chinese laundry laws, in the 1930s, but the state Supreme Court invalidated this law under *Lochner*.¹¹⁴

1. San Francisco's 1882 Maximum Hours Law

In the 1880s, Chinese laundrymen typically worked from ten to sixteen hours per day.¹¹⁵ Many Chinese laundries, however, operated twenty-four hours a day. To meet high rents, San Francisco laundrymen often had two firms sharing the same space and facilities, working in shifts and alternating their signs.¹¹⁶ In October 1882, the San Francisco Board of Supervisors passed an ordinance that, among other things, prohibited the laundering of clothes between 10:00 P.M. and 6:00 A.M.¹¹⁷ This law therefore effectively prohibited the sharing of laundry facilities. The law went into effect in January 1883, and the city quickly arrested one hundred Chinese laundrymen for violating it.¹¹⁸

In June of the same year, the board of supervisors passed a new measure identical in all relevant respects to the previous

110. See *Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Barbier v. Connolly*, 113 U.S. 27 (1885).

111. See *Soon Hing*, 113 U.S. at 708-10.

112. 198 U.S. 45 (1905).

113. See *infra* notes 217-37 and accompanying text.

114. See *id.*

115. See Gioia, *supra* note 47, at 212.

116. See H. H. BANCROFT, *ESSAYS AND MISCELLANEOUS, MONGOLIANISM IN AMERICA* 348 (n.p. 1890); A HISTORY OF THE CHINESE IN CALIFORNIA, *supra* note 16, at 63; MCLEOD, *supra* note 20, at 114.

117. See MCCLAIN, *supra* note 92, at 106.

118. See *id.*

law.¹¹⁹ Laundryman Woo Yeck challenged this new ordinance after authorities arrested him for washing clothes at a time banned by the statute.¹²⁰ A San Francisco Superior Court judge ruled the measure valid, but Woo Yeck's attorney managed to petition for another habeas writ.¹²¹ The Superior Court of Alameda County in Oakland heard the petition and held that the ordinance was unconstitutional because it interfered "with the natural and inalienable right of every individual . . . to life, liberty and the pursuit of happiness, and to acquire, hold and enjoy property."¹²²

After the Oakland opinion was released, Chinese laundrymen ignored the ordinance.¹²³ San Francisco authorities therefore sought a new opportunity to test the validity of the law.¹²⁴ A white launderer named Emile Moynier agreed to cooperate in a test case.¹²⁵ It is not clear whether Moynier sincerely objected to the law; he may have cooperated with the City hoping that the law would be upheld, thereby putting his Chinese competitors out of business. In any event, the Chinese laundrymen's guild retained counsel, which entered the case as *amicus curiae*.¹²⁶

A three-judge panel of the Supreme Court of California upheld the law in the *Moynier* case.¹²⁷ The court first held that the provisions of the ordinance relating to fire safety and sanitation were clearly lawful police measures.¹²⁸ The provisions were not discriminatory, the court added, because they applied to "all persons" in the laundry business.¹²⁹ As for the hours provision of the ordinance, the court simply stated: "[W]e cannot say it is not

119. See *In re Woo Yeck*, 12 Pac. Coast L.J. 382, 382 (Cal. App. Dep't Super. Ct. 1883).

120. See *id.*

121. See ALFRED CLARKE, REPORT OF ALFRED CLARKE, SPECIAL COUNSEL FOR THE CITY AND COUNTY OF SAN FRANCISCO IN THE LAUNDRY ORDER LITIGATION 6 (n.p. 1885).

122. *Woo Yeck*, 12 Pac. Coast L.J. at 3.

123. See CLARKE, *supra* note 121, at 7.

124. See MCCLAIN, *supra* note 92, at 108.

125. See CLARKE, *supra* note 121, at 6 (referring to *Moynier* as a "test case").

126. See MCCLAIN, *supra* note 92, at 108.

127. See *Ex parte Moynier*, 2 P. 728 (Cal. 1884).

128. See *id.* at 729-30.

129. *Id.* at 730.

necessary . . . for the proper police and sanitary condition of the city."¹³⁰

The Chinese laundrymen did not give up. They continued to engage in civil disobedience by ignoring the ordinance, leading to three hundred arrests.¹³¹ The laundrymen proceeded to tie up San Francisco's police courts by demanding jury trials.¹³²

The laundrymen's lawyer, Thomas Riordan, filed a petition for a writ of habeas corpus with the full California Supreme Court on behalf of a laundryman, Soon Hing, who had been arrested for violating the ordinance.¹³³ The court denied the petition.¹³⁴ Riordan then filed a new petition for a writ of habeas corpus with the federal circuit court.¹³⁵ Riordan argued that the ordinance was not a proper exercise of the police power, but was intended only to "oppress" Chinese laundrymen.¹³⁶ The two-judge panel split on the issue,¹³⁷ which led Riordan to appeal to the United States Supreme Court.¹³⁸

Meanwhile, San Francisco's attorney, Alfred Clarke, arranged another test case involving a white launderer named Francis Barbier.¹³⁹ For procedural reasons ancillary to this discussion, Barbier's case reached the Supreme Court first in *Barbier v. Connolly*.¹⁴⁰ *Barbier* was a test case that Clarke manufactured. According to Clarke, "[s]crupulous care was taken to make it a fair test case, and to present fully all the specifications of error that had been presented by the opponents of the order."¹⁴¹ In fact, however, Clarke intentionally failed to raise the claim that the statute resulted from anti-Chinese discriminatory motives, even though he knew that a Chinese litigant such as Soon Hing would have raised this claim. Clarke justified this omission by

130. *Id.*

131. *See* CLARKE, *supra* note 121, at 4.

132. *See id.*

133. *See id.*

134. *See id.*

135. *See id.*

136. *Id.*

137. *See id.*

138. *See id.* at 5.

139. *See id.* at 6.

140. 113 U.S. 27 (1885).

141. CLARKE, *supra* note 121, at 6.

noting that Soon Hing "signs his name with an X" and therefore was likely "misinformed as to the motives of the Board."¹⁴² Besides, Clarke added, "it is questionable whether the judicial power has the authority to examine the motives of a legislative body which is a co-ordinate branch of the Government."¹⁴³

Had the Supreme Court realized that *Barbier* did not present a true case or controversy, it would have been obligated to dismiss the case for lack of standing. Instead, the Court issued a ruling favorable to the city.¹⁴⁴ Justice Field, writing for a unanimous Court, rejected the claim that a limitation on launderers' working hours was unconstitutional both as a deprivation of the individual's right to labor and as impermissible "class legislation."¹⁴⁵ Field stated that the law was a permissible police power regulation intended to reduce the risk of fires.¹⁴⁶ After this adverse decision, many Chinese laundrymen began to comply with the hours ordinance.¹⁴⁷ By this time, the police courts had already collected \$1680 in fines from those who had disobeyed the law.¹⁴⁸

The Supreme Court dashed any hopes the Chinese still had of defeating the ordinance when it announced its decision in *Soon Hing v. Crowley*,¹⁴⁹ just two months after it decided *Barbier*. Riordan argued that the legislature adopted the hours regulation ordinance to compel Chinese laundrymen to abandon their lawful businesses.¹⁵⁰ Justice Field, once again writing for a unanimous Court, found that the hours regulation was "purely a police regulation" and therefore was within the ordinary powers of a municipality.¹⁵¹ San Francisco was subject to high winds and was composed mostly of wooden buildings, so "regulations of a strict character should be adopted to prevent the possibility of fires."¹⁵²

142. *Id.*

143. *Id.*

144. *See Barbier*, 113 U.S. at 32.

145. *Id.*

146. *See id.* at 30-31.

147. *See Clarke*, *supra* note 121, at 7.

148. *See id.*

149. 113 U.S. 703 (1885).

150. *See id.* at 708.

151. *Id.*

152. *Id.*

Riordan also argued that the ordinance illicitly discriminated between the laundry industry and other industries.¹⁵³ Under the ordinance, Riordan argued, all other industries were allowed to employ workers during the hours forbidden to the laundry industry.¹⁵⁴ According to Riordan, this discrimination compelled a finding that the ordinance was invalid.¹⁵⁵ Field responded that other businesses may not pose as great a risk of fire as laundries, which constantly needed fire to heat water.¹⁵⁶

Field also rejected Riordan's argument that the ordinance discriminated between small laundries, which in effect could not operate late at night at all, and larger laundries, which specialized in the "fluting, polishing, blueing, and wringing of clothes."¹⁵⁷ According to Riordan, the ordinance permitted the latter activities at night.¹⁵⁸ Field responded that it was not at all clear to him that the ordinance permitted these activities.¹⁵⁹ Even if it did, however, Field noted that these activities presented a lesser fire hazard.¹⁶⁰

Next, Field rejected Riordan's argument that the ordinance violated a constitutional right to labor for such hours as a person may choose. Field argued that society may set some limits on liberty of contract if these limits benefit the public.¹⁶¹ Laws regulating the hours of labor, Field added, "have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."¹⁶²

Finally, Justice Field reached Riordan's "principal objection" to the ordinance—that hatred of the Chinese motivated it.¹⁶³ Field concluded that the Court was bound by the language of the

153. *See id.*

154. *See id.*

155. *See id.* at 708-09.

156. *See id.*

157. *Id.* at 709.

158. *See id.*

159. *See id.* at 710.

160. *See id.*

161. *See id.*

162. *Id.*

163. *See id.*

statute, which displayed no discrimination against the Chinese.¹⁶⁴ Even if the supervisors had discriminatory motives, Field added, the ordinance would not be invalid "unless in its enforcement it is made to operate *only* against the class mentioned."¹⁶⁵

After the Supreme Court ruling, maximum hours laws spread to other cities. Los Angeles, for example, passed a law in the spring of 1885 forbidding laundries to operate after 9:30 P.M.¹⁶⁶ The night that ordinance went into effect, police arrested sixty-five laundrymen.¹⁶⁷

2. Maximum Hours Legislation in Early Twentieth-Century San Francisco

Over a decade after the Supreme Court decided *Soon Hing*, Chinese laundrymen again came into conflict with San Francisco authorities over maximum hours legislation. According to one contemporary source, the main impetus for these laws was public concern over the working conditions faced by young women employed by white-owned steam laundries.¹⁶⁸ Women-dominated, whites-only laundry unions played a major role in promoting the legislation.¹⁶⁹ Steam laundry owners also supported maximum hours laws.¹⁷⁰ They apparently believed it would give them a competitive advantage over the French, Japanese, and Chinese-owned hand laundries with which they competed.¹⁷¹ Chinese laundry owners, meanwhile, vigorously opposed the legislation.¹⁷²

164. See *id.*

165. *Id.* at 711 (emphasis added).

166. See Lou, *The Chinese American Community*, *supra* note 78, at 128.

167. See *id.*

168. See Lillian R. Matthews, *Women in Trade Unions in San Francisco*, 3 U. CAL. PUBLICATIONS ECON. 1, 11-12 (1913). Matthews explained that white women replaced Chinese workers in steam laundries in the 1880s. See *id.* at 10.

169. See *id.* at 12.

170. See *id.*

171. See *id.* It soon became clear, for example, that French-owned hand laundries, which provided most of their workers with room and board, had difficulty complying with the ordinance. See *id.* at 33-34.

172. See *id.* at 12-13.

The first new hours law, passed in 1900, prohibited work in laundries between the hours of 7:00 P.M. and 6:00 A.M.¹⁷³ Apparently, a court declared this law unconstitutional within a few months of its enactment.¹⁷⁴ In 1901, the whites-only Laundry Workers' Union signed a contract with the owners of large white-owned steam laundries. This contract established a ten-hour work day and a sixty-hour work week.¹⁷⁵ In 1903, the union won an agreement for a nine-hour work day. In 1907, steam laundry owners agreed to establish a forty-eight-hour work week,¹⁷⁶ but only if French and Japanese-owned laundries adopted the same work week.¹⁷⁷ The Japanese—a growing presence in the laundry industry who were subject to attack by the union and the owner-supported "Anti-Jap Laundry League"¹⁷⁸—refused to comply, as did the mostly family-run French hand laundries.¹⁷⁹ Japanese laundry workers received weekly wages similar to those received by white workers, plus room and board.¹⁸⁰ In return for this higher compensation, Japanese laundrymen worked ten hours a day, plus overtime, as opposed to the eight-hour work day that white workers sought.¹⁸¹

When the French and Japanese did not go along, the union again turned to legislation. In 1912, San Francisco enacted an ordinance prohibiting a broad range of laundry-related activities, including washing, ironing, and delivering clothes between 6:00 P.M. and 7:00 A.M.¹⁸²

By this time, the Chinese laundries apparently were not a significant threat to white-owned steam laundries.¹⁸³ The city's unofficial policy of refusing steam laundry permits to Asian

173. See *id.* at 13.

174. See ROBERT EDWARD LEE KNIGHT, *INDUSTRIAL RELATIONS IN THE SAN FRANCISCO BAY AREA, 1900-1918*, at 47 (1960).

175. See *id.* at 65.

176. See *id.* at 190.

177. See *id.* at 191.

178. Yamato, *supra* note 17, at 47; see Matthews, *supra* note 168, at 34-36.

179. See Yamato, *supra* note 17, at 48-49.

180. See Shichiro Matsui, *Economic Aspects of the Japanese Situation in California* 61 (1922) (unpublished M.A. thesis, University of California, Berkeley) (on file with the University of California, Berkeley Library).

181. See *id.* at 63-64.

182. See SAN FRANCISCO, CAL., ORDINANCE NO. 144, §§ 1, 4 (1912).

183. See Matthews, *supra* note 168, at 36.

immigrants deprived the Chinese of their ability to compete on a large-scale basis by forcing all Chinese laundrymen to operate hand laundries.¹⁸⁴ The ordinance therefore had a significant negative impact on the Chinese, and they waged a legal campaign against it.

The first case attacking the ordinance arose in *Ex parte Wong Wing*¹⁸⁵ when authorities arrested and a court subsequently convicted a laundryman named Wong Wing for ironing clothes during the prohibited hours.¹⁸⁶

The California Supreme Court rejected Wong Wing's appeal.¹⁸⁷ The court found that the hours regulation at issue was not an "unreasonable exercise of the police power."¹⁸⁸ The court cited *Ex parte Moynier*,¹⁸⁹ in which it had approved an ordinance forbidding work in public laundries between 10:00 P.M. and 6:00 A.M.¹⁹⁰ The court also cited the United States Supreme Court's decisions in *Barbier* and *Soon Hing*.¹⁹¹

Given the well-established general power of a municipal legislature to regulate the hours of operation, the only remaining question, the court stated, was the reasonableness of the eleven hours of laundry work allowed by the statute.¹⁹² In addressing this question, the court first recognized that previous courts had upheld statutes that allowed laundries to operate for sixteen hours a day.¹⁹³ The court then noted that many, perhaps most of the occupations in San Francisco, were "conducted during less than [the] 11 working hours a day" allowed by the ordinance.¹⁹⁴ The court concluded that it was neither unreasonable nor unconstitutional for the board of supervisors to limit the operating hours of laundries to eleven hours.¹⁹⁵

184. See Bernstein, *supra* note 105, at 97-98. The Chinese managed to survive by keeping their prices low and working long hours. See *id.*

185. 138 P. 695 (Cal. 1914).

186. See *id.* at 695.

187. See *id.* at 696.

188. *Id.* at 695.

189. 2 P. 728 (Cal. 1884).

190. See *id.* at 730.

191. See *Wong Wing*, 138 P. at 695.

192. See *id.* at 696.

193. See *id.* at 695-96.

194. *Id.* at 696.

195. See *id.*

Another laundryman, Yee Gee, challenged the same ordinance in federal district court.¹⁹⁶ Yee Gee's attorney made three distinct arguments in support of his request for a restraining order against enforcement of the statute. First, he argued that, like the ordinance in *Yick Wo v. Hopkins*, this ordinance contained a provision that granted "the board of supervisors the arbitrary discretion to grant or refuse licenses to carry on the laundry business"¹⁹⁷ The court rejected this argument because Yee Gee had no standing to challenge the provision, as he had not been denied a license.¹⁹⁸

Yee Gee's attorney also argued that San Francisco passed the law in order to discriminate against the Chinese.¹⁹⁹ The court rejected this claim as well, citing *Soon Hing* for the proposition that a legislative body's improper motive in adopting a measure does not invalidate the measure if it is fair on its face and capable of impartial application.²⁰⁰

Finally, Yee Gee's attorney attacked the hours provision of the law as an unreasonable restraint on Yee Gee's ability to pursue his occupation.²⁰¹ The city responded that the hours regulation was a valid police power measure, citing *Barbier v. Connolly*,²⁰² *Soon Hing v. Crowley*,²⁰³ and *Ex parte Wong Wing*²⁰⁴ for support.²⁰⁵ The court rejected the city's argument, and concomitantly, the California Supreme Court's *Wong Wing* opinion. The *Yee Gee* court found that the *Wong Wing* opinion rested "largely, if not entirely, upon the authority of the [*Barbier*] and [*Soon Hing*] cases. . . ."²⁰⁶ What the California Supreme Court failed to recognize, the court continued, was that the ordinance at issue

196. See *Yee Gee v. City of San Francisco*, 235 F. 757 (N.D. Cal. 1916).

197. *Id.* at 759.

198. See *id.* at 760.

199. See *id.* at 758 (responding to petitioner's argument, the court stated that "[I]t is not alleged that the ordinance has received any partial or discriminating enforcement").

200. See *id.* (citing *Soon Hing v. Crowley*, 113 U.S. 703 (1885)).

201. See *id.* at 759, 761.

202. 113 U.S. 27 (1885).

203. 113 U.S. 703 (1885).

204. 138 P. 695 (Cal. 1914).

205. See *Yee Gee*, 235 F. at 761.

206. *Id.* at 762.

in *Barbier* and *Soon Hing* was easily distinguishable from the 1915 ordinance.²⁰⁷ The latter ordinance, unlike the others, could not be justified as reflecting a narrow concern with fire prevention. Besides providing for longer working hours for launderers, the *Barbier* and *Soon Hing* statutes banned only activities that could create a fire hazard, such as washing and ironing, and they only applied to certain areas of the city.²⁰⁸ By contrast, the 1915 ordinance applied uniformly to *all* activities associated with the laundry business throughout the city,²⁰⁹ including such innocuous activities as delivering and advertising.²¹⁰

The court then turned to the question of whether the city could justify the ordinance as an exercise of the police power. The court quoted extensively from *Lochner*, to the effect that the law at issue in *Lochner*, limiting the number of hours a baker could work, could not be upheld under the police power as either a labor law or a regulation for the protection of the health of bakers.²¹¹ The laundry law, the court declared, was "an unreasonable interference with the liberty of the citizen in the prosecution of his occupation," and had "no real or substantial relation to the purpose sought to be accomplished."²¹² Laundries are "a perfectly legitimate, harmless, and necessary business," and not a danger to public health or safety.²¹³

The court concluded by implicitly attacking the consistent harassment of Chinese laundries through government regulation. The laundry business, the court noted, had been subjected to more "so-called police regulation than all other classes of business combined," with ever greater restrictions imposed.²¹⁴ The court observed that the original requirement that San Francisco laundries be closed for eight hours a day in certain parts of San Francisco grew to a requirement that laundries in the en-

207. *See id.*

208. *See id.*

209. *See id.*

210. *See id.* at 763.

211. *See id.* at 766. *Lochner* implicitly invalidated Justice Field's dictum in *Soon Hing* that maximum hours laws were within the police power. *See Lochner v. New York*, 198 U.S. 45, 45 (1905).

212. *Yee Gee*, 235 F. at 767.

213. *Id.*

214. *Id.* at 768.

tire city be closed for thirteen hours a day.²¹⁵ As with the kindred regulation in *Lochner*, the laundry law was passed under the pretense of being a police power regulation, but was "in reality, passed from other motives."²¹⁶

3. *Oakland's 1935 Maximum Hours Law*

The last significant maximum hours laundry case involved an Oakland laundryman named Byron Mark.²¹⁷ After World War I, Chinese hand laundries in Oakland faced stiff competition from more technologically advanced, white-owned steam laundries. The Chinese retained a niche in the laundry industry by maintaining competitive prices and working long hours.²¹⁸ For example, Mark and his employee worked from ten to sixteen hours per day, six days a week.²¹⁹ When the Chinese began using washing machines and electric irons in the 1930s, their laundries became a serious competitive threat to white-owned laundries.

White laundry owners believed they could protect themselves from Chinese competition by limiting the hours the Chinese laundrymen might work.²²⁰ Oakland's two white-owned laundry associations hired an attorney to lobby for a maximum hours ordinance.²²¹ In 1935, the Oakland City Council passed a measure prohibiting any laundry from operating, picking up, or delivering laundry between 6:00 P.M. and 7:00 A.M.²²²

In the months after the ordinance was passed, thirty-eight Chinese laundrymen were arrested for working after 6:00 P.M. They each pleaded guilty and paid a twenty-five dollar fine. When Byron Mark was arrested for violating the hours law, he decided to plead not guilty because he believed that the law was

215. *See id.*

216. *Id.* (quoting *Lochner*, 198 U.S. at 64).

217. Byron's grandson, Gregory, has written an excellent account of the litigation and its background. *See* Gregory R. Mark, *The 1935 Oakland Laundry Ordinance: The Genesis of Discriminatory Justice*, 11 Q.J. IDEOLOGY 41 (1987).

218. *See id.* at 49.

219. *See id.* at 44.

220. *See id.* at 49.

221. *See id.* at 48.

222. *See id.* at 45 (summarizing the Oakland Municipal Code of 1935).

racially motivated and simply "not fair."²²³ The law posed a grave threat to the ninety-three Chinese laundries in Oakland and their four hundred workers.²²⁴

Although Mark pleaded not guilty in Oakland Police Court, the court nevertheless convicted and fined him twenty-five dollars. Eventually, the case reached the California Supreme Court. Mark's attorneys suggested in their brief that the law had a racially discriminatory motive, but principally argued that the city could not put restrictions on the hours of laundries that did not also apply to any other occupation or business.²²⁵ They wrote that "the whole scheme of this Statute is to single out the laundryman, be he French or Chinese, and forbid him to do what every other tradesman may do freely."²²⁶ Finally, they argued that the maximum hours law was a "special law forbidden by the State Constitution' [and that] it denied an individual's liberty and property without due process of law and equal protection of the laws."²²⁷

The court found in favor of the laundrymen. The court distinguished the maximum hours laws held constitutional in prior cases on the ground that, at least ostensibly, those laws "had some reasonable relation to the prevention of fires at a time when fires were a greater hazard and menace to life and property."²²⁸ The court added, however, that the Oakland ordinance not only prohibited actual laundering, which could be a fire hazard, but also prohibited nonhazardous activities, such as soliciting, picking up, and delivering laundry.²²⁹ Moreover, unlike the ordinances sustained by the United States Supreme Court in *Barbier* and *Soon Hing*, and the California Supreme Court in *Wong Wing*, the Oakland ordinance applied to all laundries in the city, without regard to the various levels of fire hazard pres-

223. *Id.* at 41.

224. *See id.*

225. *See id.* at 51.

226. *Id.* (quoting Mark's attorney, John L. McNab, in the *Memorandum of Points and Authorities on Behalf of the Petitioners* he drafted in the case).

227. *Id.* (quoting Mark's attorney, John L. McNab, in the *Memorandum of Points and Authorities on Behalf of the Petitioners* he drafted in the case).

228. *In re Mark*, 58 P.2d 913, 915 (Cal. 1936).

229. *See id.*

ent in different parts of the city.²³⁰ Finally, the court favorably quoted *Yee Gee* for the proposition that maximum hours laws for laundries are unconstitutional if they are not narrowly tailored to reduce the risk of fire.²³¹

Having held that the law was not a valid police power measure, the court found the hours law to be unconstitutional under *Lochner v. New York*²³² and other cases.²³³ Moreover, the court added, even if regulation of the hours of labor by itself were a legitimate exercise of the police power, such regulations must operate uniformly to be valid.²³⁴ The court stated that the operation of a laundry is in no way a nuisance, nor is laundry work particularly unhealthful.²³⁵ Restricting the hours of launderers, and no other workers the court concluded, was an "unreasonable restriction upon the rights of laundry owners, operators, and employees in the city of Oakland"²³⁶ The law violated the state and federal constitutions because it deprived Mark of his liberty and property without due process of law and denied him equal protection of the laws.²³⁷

B. Licensing Laws

One of the most famous cases in American constitutional law, *Yick Wo v. Hopkins*,²³⁸ arose out of San Francisco's licensing legislation promulgated to eliminate Chinese laundries.²³⁹ After a long legal battle, the litigants finally argued the constitutionality of the legislation before the United States Supreme Court. In *Yick Wo*, the Court held that a facially neutral law is unconstitutional if it is administered in a blatantly discriminatory way.²⁴⁰ The Court also suggested, in dictum, that due process

230. See *id.*

231. See *id.* at 916.

232. 198 U.S. 45 (1905).

233. See *Mark*, 58 P.2d at 916.

234. See *id.*

235. See *id.* (citing *In re Quong Woo*, 13 F. 229, 231 (C.C.D. Cal. 1882)).

236. *Id.*

237. See *id.* The court also decided a companion case, *In re Wong Way*, 58 P.2d 916 (Cal. 1936), the same way in a short per curiam opinion.

238. 118 U.S. 356 (1886).

239. See *id.* at 357.

240. See *id.* at 373-74.

requires that government officials not exercise arbitrary authority over one's livelihood.²⁴¹

On February 5, 1880, a fire in a San Francisco Chinese laundry killed ten laundrymen.²⁴² At the next board of supervisors' meeting, a supervisor introduced a bill requiring that all buildings "erected and used by Chinese as laundries" . . . be constructed of brick or stone.²⁴³ At the following meeting, the board passed this measure after deleting the reference to the Chinese, which would have rendered the law facially unconstitutional.²⁴⁴ The ordinance affected 310 out of the 320 laundries in San Francisco in 1880 that had been constructed of wood.²⁴⁵ The Chinese owned approximately three-quarters of the wood laundries.²⁴⁶

The board, however, did not simply want a general fire protection measure that would mainly affect Chinese laundries, but one that would affect *only* them.²⁴⁷ In May, the board of supervisors passed a new ordinance that permitted owners of wooden laundries to obtain a license from the board subject to the board's unlimited discretion.²⁴⁸ The ordinance also prohibited the use of rooftop scaffolding, a peculiarity of Chinese laundries, without the board's permission.²⁴⁹

The Chinese laundrymen ignored the legislation. In June of 1880, the police arrested a laundryman named Ah Din and charged him with "maintaining a wooden laundry without hav-

241. *See id.* at 372-73.

242. *See* MCCLAIN, *supra* note 92, at 100.

243. *Id.* (quoting the resolution proposed by Supervisor Charles Taylor, as reported in the EVENING POST, Feb. 10, 1880, at 1). Another supervisor introduced a resolution asking the city attorney to inform the board whether Chinese laundries could be restricted to designated parts of the city and county. *See id.*

244. *See id.* at 100-01. The text of the order is reprinted in *In re White*, 7 P. 186, 186 (Cal. 1885).

245. *See* Gioia, *supra* note 47, at 214. The 10 laundries constructed of stone were large businesses owned by whites. *See id.*

246. *See id.*

247. Indeed, the very fact that the ordinance was limited to laundries suggests either an unreasonable reaction to the deadly fire or anti-Chinese animus. Laundries were far from the only fire hazards in San Francisco. *See id.* ("4,390 of the 27,000 buildings in San Francisco were [constructed of] either brick or stone.").

248. *See id.* at 213. The Court declared this ordinance invalid in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), nearly six years after its enactment.

249. *See* MCCLAIN, *supra* note 92, at 101.

ing obtained the consent of the board of supervisors."²⁵⁰ A police court declared the legislation void because it deprived the defendant of property without due process.²⁵¹

Despite this decision, the city continued to enforce the law. The police arrested another Chinese laundryman, Ah Ling, for operating a wooden laundry.²⁵² The police court convicted him, but he appealed to the superior court, which held that the law was unconstitutional.²⁵³ The court found that the law tended to create a monopoly, interfered with vested rights, and constituted impermissible class legislation depriving the poor of the ability to go into the laundry business.²⁵⁴ The decision also criticized the unlimited discretion given to the supervisors.²⁵⁵

In October 1882, the San Francisco Board of Supervisors passed an ordinance that again required laundry operators to receive its permission to operate. In June of 1893, the board of supervisors passed another ordinance that required laundry operators to obtain certificates from the city health officer and the board of fire wardens.²⁵⁶ Los Angeles promulgated a similar law around the same time.²⁵⁷ The October 1882 ordinance went into effect the following January, and the city quickly arrested one hundred Chinese laundrymen for violating it.²⁵⁸

Tom Tong, an arrested Chinese laundryman, filed a petition for a writ of habeas corpus in federal court, complaining that none of the relevant public officials would grant him the authorizations he needed under the ordinance.²⁵⁹ A two-judge circuit court panel heard the case. Circuit Judge Lorenzo Sawyer²⁶⁰ believed the ordinance was unconstitutional because laundries

250. *Id.*

251. *See id.*

252. *See id.*

253. *See id.*

254. *See id.* at 103.

255. *See id.* at 102-03.

256. *See Gioia, supra* note 47, at 213.

257. *See Lou, The Chinese American Community, supra* note 78, at 128.

258. *See McCLAIN, supra* note 92, at 106.

259. *See id.*

260. Judge Sawyer was generally very sympathetic to the Chinese during his tenure on the circuit court. *See Linda Przybyszewski, Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit*, 1 W. LEGAL HIST. 23, 54-56 (1988).

were not a nuisance. District Judge Ogden Hoffman,²⁶¹ the other panel member, disagreed.²⁶² On appeal, the Supreme Court held that it lacked jurisdiction.²⁶³

After the *Ah Ling* and *Tom Tong* decisions, San Francisco ceased enforcing laundry licensing laws until 1885,²⁶⁴ when the United State Supreme Court upheld maximum hours laws targeted at Chinese laundries.²⁶⁵ Buoyed by these victories, Clarke, San Francisco's attorney, moved to establish the validity of the ordinances that required new laundries to be constructed of brick or stone, Order 1559, and that required existing owners of wooden laundries to obtain permission from the board of supervisors to continue to operate, Order 1569.

Clarke found a cooperative white laundry owner, E. White, willing to serve as a sham defendant. Clarke managed to persuade the California Supreme Court to affirm the validity of Order 1559,²⁶⁶ and to secure a superior court ruling affirming the validity of Order 1569.²⁶⁷ With Order 1569 pending before the California Supreme Court, an attorney for the Chinese laundrymen filed an affidavit alleging that the *White* case was a sham created by Clarke and therefore was not a true case and controversy. The state supreme court dismissed the case.²⁶⁸

Following the California Supreme Court's decision affirming Order 1559,²⁶⁹ dozens of Chinese laundrymen petitioned the board of supervisors for permission to operate in wooden buildings.²⁷⁰ The supervisors denied each application.²⁷¹ While the authorities left white laundrymen unmolested, police began to

261. For more on Judge Hoffman, see CHRISTIAN G. FRITZ, *FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851-1891* (1991).

262. Although there is no published opinion, Sawyer recounted his views in *In re Wo Lee*, 26 F. 471, 473 (C.C.D. Cal. 1886). See MCCLAIN, *supra* note 92, at 323 n.50.

263. See *Ex parte Tom Tong*, 108 U.S. 556, 560 (1883).

264. See Gioia, *supra* note 47, at 214.

265. See *supra* notes 109-11 and accompanying text.

266. See *In re White*, 7 P. 186, 186 (Cal. 1885).

267. See MCCLAIN, *supra* note 92, at 115.

268. See *id.* at 114-15 (suggesting that all parties involved decided to adjudicate the issues in another proceeding, instead of in *White*).

269. See *White*, 7 P. at 186.

270. See MCCLAIN, *supra* note 92, at 115.

271. See *id.*

arrest unlicensed Chinese laundrymen.²⁷² One failed applicant, Yick Wo, was arrested in August for operating his laundry without permission.²⁷³ Yick Wo's attorneys filed a habeas corpus petition and the case found its way to the California Supreme Court in *In re Yick Wo*.²⁷⁴

Although Yick Wo had received certificates from the city health officer and fire warden attesting that his laundry met local sanitary and fire standards, the court held that the law was a proper exercise of the police power.²⁷⁵ Laundries, the court stated, posed a risk of fire.²⁷⁶ The supervisors properly did not consider themselves bound by the advice of the fire warden when protecting the public from risk.²⁷⁷ The court tersely rejected Yick Wo's claim that his Fourteenth Amendment rights had been violated. Such a claim, the Court found, could not succeed after *Barbier v. Connolly* and *Soon Hing v. Crowley*.²⁷⁸

Soon after Yick Wo lost his case, a local court convicted another Chinese laundryman, Wo Lee, for operating his laundry without the permission of the supervisors.²⁷⁹ His attorneys immediately filed a petition for a writ of habeas corpus in federal circuit court.²⁸⁰ Judge Sawyer, who heard the case, condemned the law: "The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese. . . ."²⁸¹ Judge Sawyer suggested that because the law clearly was intended to drive the Chinese out of business, it violated the constitutional rights of the laundrymen.²⁸² He refused, however, to free Wo Lee or to

272. *See id.*

273. *See id.*

274. 9 P. 139 (Cal. 1886).

275. *See id.* at 141.

276. *See id.*

277. *See id.*

278. *See id.* at 146.

279. *See In re Wo Lee*, 26 F. 471, 471 (C.C.D. Cal.), *rev'd sub nom.* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

280. *See id.* at 471.

281. *Wo Lee*, 26 F. at 474.

282. *See id.*

enjoin enforcement of the ordinance.²⁸³ Judge Sawyer instead deferred to the California Supreme Court on grounds of comity.²⁸⁴

On consolidated appeal to the Supreme Court, the Court unanimously reversed *Yick Wo* and *Wo Lee*.²⁸⁵ First, the Court suggested that the law was facially unconstitutional because it left laundrymen at the mercy of the "purely personal and arbitrary power"²⁸⁶ of the supervisors to grant or deny a license.²⁸⁷ Having one's livelihood be at the mercy of "the mere will of another," added the Court, "seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."²⁸⁸

The Court found, however, that it did not need to reach the issue of whether the law was facially invalid as a violation of due process because the law, as applied, clearly discriminated against the Chinese. The Court wrote:

[T]he facts shown establish an administration directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners . . . by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.²⁸⁹

Justice Matthew, writing for the Court, then proclaimed a lasting principle in American constitutional law:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.²⁹⁰

283. *See id.* at 476-77.

284. *See id.* at 475.

285. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

286. *Id.* at 370.

287. *See id.*

288. *Id.*

289. *Id.* at 373.

290. *Id.* at 373-74.

The Court noted that San Francisco's public health and fire safety officers inspected and approved Yick Wo and Wo Lee's laundries.²⁹¹ The only reason the city gave for its refusal to allow Yick Wo and Wo Lee to continue "their harmless and useful occupation" was the "will of the supervisors."²⁹² The supervisors also withheld licenses from two hundred other Chinese-owned laundries, while allowing eighty other laundries owned by whites "to carry on the same business under similar conditions."²⁹³ The Court concluded that this disparity could be explained only by "hostility to the race and nationality to which the petitioners belong[ed]."²⁹⁴ The enforcement of the laundry law, therefore, was an unconstitutional denial of the equal protection of the laws.

After the Court decided *Yick Wo*, the San Francisco Board of Supervisors amended all laundry ordinances to require that licenses issue upon the grant of certificates by the health officer and fire wardens.²⁹⁵ Under this policy, arrests and convictions of Chinese laundrymen for violating laundry ordinances decreased substantially, but remained common.²⁹⁶

C. Zoning

The first major zoning ordinance directed at Chinese laundries in 1882 was promulgated in San Francisco in 1882. The

291. *See id.* at 374.

292. *Id.*

293. *Id.*

294. *Id.*

295. *See* GENERAL ORDERS OF THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO 199-201 (n.p. 1888), *cited in* COURTNEY, *supra* note 64, at 74. *Yick Wo* also curbed attempts to use licensing laws against Chinese laundrymen in other cities, which increasingly posed a threat to the Chinese. For example, in January 1886, the Washington territorial legislature passed legislation giving cities and towns the power to license laundries and ordering that aliens not be licensed. *See* Jules Alexander Karlin, *The Anti-Chinese Outbreaks in Seattle, 1885-86*, 39 PAC. NORTHWEST Q. 103, 117 (1948).

296. *See* Gioia, *supra* note 47, at 219. The Chinese avoided conflict with the board of Supervisors by not applying for the licenses required to run a steam laundry, and instead, running only hand laundries. *See* Bernstein, *supra* note 105, at 97-98. A Japanese laundryman, however, challenged the board's denial of a license to him all the way to the Supreme Court. *See id.*

intent of the law was to keep Chinese laundries out of residential neighborhoods. A few years later, municipalities tried to use zoning ordinances to effectively ban Chinese laundries entirely. Later still, general zoning laws, passed without discriminatory intent, had a disproportionate negative impact on Chinese laundrymen.

1. *San Francisco's 1880 Zoning Law*

In San Francisco, Chinese laundrymen could establish their businesses in either major shopping areas where potential clients worked or in residential neighborhoods where potential clients lived. A business district location provided the advantage of customer density and contributed to the business-like and impersonal nature of the trade,²⁹⁷ which in turn limited white hostility.²⁹⁸ On the other hand, residential neighborhoods frequently had lower rents and less competition. Most laundrymen, eager to avoid conflict with whites, initially set up shop in business districts. As those areas became saturated, however, Chinese entrepreneurs began to establish laundries in white residential neighborhoods.²⁹⁹

Hostility to Chinese laundries intensified when the Chinese began to move their laundries into residential neighborhoods. The establishment of Chinese laundries throughout the city led to a substantial increase in the Chinese population in white areas because the laundry workers and owners often lived in their shops.³⁰⁰ Professor Ong estimates that over a thousand Chinese laundry workers lived in white neighborhoods by 1880.³⁰¹

White San Franciscans, though content to patronize laundries in the business districts, began to complain that the Chinese laundries were reducing property values in residential neighborhoods.³⁰² In May 1880, the board of supervisors passed an ordi-

297. See Ong, *supra* note 15, at 104-05.

298. See *id.*

299. See *id.* at 105.

300. See *id.*

301. See *id.*

302. See MCCLAIN, *supra* note 92, at 104. Most likely, there was a division in opinion between people who lived on the same block as a laundry, and whose property values were therefore most at risk, and others who lived in the vicinity, who appre-

nance that made it unlawful for any person to "establish, maintain or carry on a laundry"³⁰³ in the area where most Chinese laundries were located without first obtaining the consent of the board.³⁰⁴ The board would grant a license on the recommendation of at least twelve tax-paying citizens—which excluded Chinese—who lived on the block.³⁰⁵ Los Angeles promulgated a similar law around the same time.³⁰⁶

Opponents of the ordinance believed that, if upheld, the law would destroy the Chinese laundry industry in San Francisco. They were probably correct, as it appears that only one Chinese laundryman managed to obtain the required signatures. Even in that instance, the anti-Chinese "League of Deliverance" intimidated signers into retracting their approval.³⁰⁷

Shortly after San Francisco passed its zoning ordinance, Quong Woo, an eight-year veteran of the laundry business, was arrested for violating the ordinance.³⁰⁸ Quong Woo filed a petition for a writ of habeas corpus in federal court in San Francisco. Supreme Court Justice Stephen Field, sitting as a circuit judge, granted the writ in *In re Quong Woo*.³⁰⁹ Field reasoned that licenses may not be used to prohibit occupations "which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety."³¹⁰ Field noted that Quong Woo was in the United States under a treaty with China that entitled him to pursue any of the lawful trades without hindrance.³¹¹ Field concluded that:

[h]is liberty to follow any such occupation cannot be restrained by invalid legislation of any kind; certainly not by a municipal ordinance that has no stronger ground for its en-

ciated the convenience of having a laundry nearby.

303. *Id.* at 101 (quoting San Francisco Board of Supervisors, Order No. 1569); see Gioia, *supra* note 47, at 213.

304. See MCCLAIN, *supra* note 92, at 101.

305. See *In re Quong Woo*, 13 F. 229, 229-30 (C.C.D. Cal. 1882).

306. See Lou, *The Chinese American Community*, *supra* note 78, at 128. The Los Angeles law apparently only applied to new laundries. Its fate is unknown.

307. See MCCLAIN, *supra* note 92, at 104; Ong, *supra* note 15, at 112 n.59.

308. See *Quong Woo*, 13 F. at 229.

309. See *id.*

310. *Id.* at 233.

311. See *id.*

actment than the miserable pretense that the business of a laundry—that is, of washing clothes for hire—is against good morals or dangerous to the public safety.³¹²

Quong Woo thus established the important principle that laundries were not public nuisances that could be regulated at will.

2. Other Anti-Chinese Laundry Zoning Ordinances in 1880s' California

As we have seen, *Yick Wo* limited the ability of jurisdictions to exclude Chinese laundries through licensing. Zoning ordinances therefore became a favored tool in the effort to close down Chinese laundries in California.

In July 1885, the Board of Trustees of Modesto prohibited the operation of a laundry in any part of Modesto, except "west of the railroad track and south of G street."³¹³ Modesto authorities arrested Hang Kie for violating this ordinance. Hang Kie filed a petition for a writ of habeas corpus in state court challenging the law's constitutionality.³¹⁴ In *In re Hang Kie*,³¹⁵ the California Supreme Court found that the zoning ordinance was a police or sanitary regulation within the state's constitutional powers.³¹⁶ The court cited *Moynier, Barbier*, and *Soon Hing* in support of this finding.³¹⁷

Professor Ong contends that *Hang Kie* was a crucial victory in the campaign of harassment against Chinese laundries because it gave local jurisdictions the right to control the location of laundries.³¹⁸ Ong, however, almost certainly overestimates the importance of *Hang Kie*.

A federal court decision soon trumped *Hang Kie* by invalidating a Stockton, California ordinance in November 1885.³¹⁹ This

312. *Id.*

313. *In re Hang Kie*, 10 P. 327, 327 (Cal. 1886).

314. *See id.*

315. 10 P. 327 (Cal. 1886).

316. *See id.* at 328-29.

317. *See id.* at 328.

318. *See* Ong, *supra* note 15, at 107.

319. Around the same time, the Watsonville town council adopted an ordinance forbidding the washing of clothes within town limits. *See* LYDON, *supra* note 79, at 187. Santa Cruz passed a purported health ordinance regulating the disposal of

ordinance required all laundries to move to a largely uninhabited part of the city.³²⁰ Stockton's Chinese laundry owners raised five thousand dollars to challenge the ordinance and hired a white lawyer to represent them.³²¹ In January 1886, Stockton police arrested every laundry owner in town for violating the ordinance.³²² Local authorities arranged a test case with the counsel for the Chinese³²³ before federal district judge Lorenzo Sawyer.³²⁴

Judge Sawyer found that the ordinance was an unreasonable regulation, observing that the law "does not regulate—it extinguishes."³²⁵ The ordinance, Sawyer added, "destroys . . . an established ordinary business, harmless in itself, and indispensable to the comfort of civilized communities, and which cannot be so conveniently, advantageously, or profitably carried on elsewhere."³²⁶ "Indeed," Sawyer asserted, "if this ordinance be valid, it is difficult to perceive what rights the people of California have which a municipal corporation is bound to respect."³²⁷ Sawyer explained that the actual purpose of the ordinance was to force the Chinese out of Stockton. "[I]n order that they shall go,"³²⁸ continued Sawyer, the city encroached on the "sacred rights" of both white and Chinese residents.³²⁹

Sawyer found that the ordinance violated the right to labor, "one of the highest privileges and immunities secured by the constitution to every American citizen, and to every person residing within its protection."³³⁰ Moreover, because the ordinance did not have a grandfather clause, it unconstitutionally deprived established laundry owners of their property without due pro-

sewage in a way intended to discriminate against Chinese laundries. *See* DUNN, *supra* note 88.

320. *See* MINNICK, *supra* note 20, at 143-45.

321. *See id.* at 146.

322. *See id.*

323. *See id.*

324. *See In re Tie Loy* (The Stockton Laundry Case), 26 F. 611 (C.C.D. Cal. 1886).

325. *Id.* at 612.

326. *Id.*

327. *Id.*

328. *Id.* at 613.

329. *Id.*

330. *Id.*

cess of law.³³¹ Sawyer concluded that "this sweeping, exclusive, destructive, prohibitory ordinance, making it an offense to pursue one of the most ordinary and necessary occupations," was not within the state's police power.³³²

Judge Sawyer invalidated another anti-Chinese zoning ordinance in *In re Sam Kee*.³³³ Chinese laundryman Sam Kee was arrested for violating a Napa, California ordinance that forbade the maintenance of public laundries in a section of the city where his laundry had operated for twenty years.³³⁴ Judge Sawyer found that Sam Kee's laundry was not a nuisance.³³⁵ In the court's judgment, the effect of the ordinance was "simply to confiscate the property, and deprive its owner of it without due process of law."³³⁶ Judge Sawyer added that the ordinance

abridges the liberty of the owner to select his own occupation and his own methods in the pursuit of happiness, and thereby prevents him from enjoying his rights, privileges, and immunities, and deprives him of equal protection of the laws secured to every person by the constitution of the United States.³³⁷

In support of his opinion, Sawyer cited his earlier opinion in *Tie Loy* and the Supreme Court's opinion in *Yick Wo*, but conspicuously failed to mention *Hang Kie*.

3. Zoning Ordinances in the 1890s

In 1890, San Francisco's Bingham Ordinance created a Chinese ghetto in the city.³³⁸ Not aimed exclusively at laundries, the ordinance prohibited any Chinese from locating, residing, or carrying on a business anywhere outside a designated tract.³³⁹

331. See *id.* at 615.

332. *Id.* The local newspaper editor reacted to the decision by writing that Judge Sawyer "would not even be qualified as a rural police judge." MINNICK, *supra* note 20, at 148.

333. 31 F. 680 (C.C.N.D. Cal. 1887).

334. See *id.* at 680-81.

335. See *id.* at 681.

336. *Id.*

337. *Id.*

338. See San Francisco, Cal., Ordinance No. 2190 (Feb. 17, 1890).

339. See *id.*

Those who lived or worked outside the ghetto at the time had sixty days to move.³⁴⁰

Litigants soon challenged the ordinance before Judge Sawyer, who made short work of it in *In re Lee Sing*.³⁴¹ In an eloquent opinion, Judge Sawyer denounced those who would

forcibly drive out a whole community of twenty-odd thousand people, old and young, male and female, citizens of the United States, born on the soil, and foreigners of the Chinese race, moral and immoral, good, bad, and indifferent, and without respect to circumstances or conditions, from a whole section of the city which they have inhabited, and in which they have carried on all kinds of business appropriate to a city, mercantile, manufacturing, and otherwise, for more than 40 years.³⁴²

Sawyer concluded that the ordinance was a direct violation of the United States Constitution, the nation's statutes, and its treaties with China.³⁴³ Judge Sawyer stated that "any reasonably intelligent and well-balanced mind,"³⁴⁴ would recognize this, so he abjured formal legal analysis.³⁴⁵

Despite the reluctance of federal courts to uphold them, anti-Chinese laundry zoning laws continued to proliferate in California. In 1892, the town of Chico passed a draconian ordinance requiring a written permit from the town's board of directors before an individual could open a public laundry outside two designated areas of the municipality.³⁴⁶ The ordinance also required that no permit be granted unless the applicant obtained the written consent of a majority of both the real property owners within the block on which the laundry was to be established and of those within the four immediately surrounding blocks.³⁴⁷

340. *See id.*

341. 43 F. 359 (C.C.N.D. Cal. 1890); *see also* Charles J. McClain, *In re Lee Sing: The First Residential Segregation Case*, 3 W. LEGAL HIST. 179, 193-95 (1990).

342. *Lee Sing*, 43 F. at 361.

343. *See id.*

344. *Id.*

345. *See id.*

346. *See Ex parte Sing Lee*, 31 P. 245, 245-46 (Cal. 1892). For background on Chico's anti-Chinese movement, *see* Shover, *supra* note 78, at 223-43.

347. *See Sing Lee*, 31 P. at 246.

A Chinese laundryman named Sing Lee was arrested for violating this ordinance.³⁴⁸

The California Supreme Court heard the case and began its opinion in *Ex parte Sing Lee*³⁴⁹ by noting that a laundry is not offensive or dangerous to the health of those living within its vicinity.³⁵⁰ A locality, the court acknowledged, could adopt reasonable public health or safety regulations regarding laundries, such as those upheld in *Moynier*, *Barbier*, and *Soon Hing*,³⁵¹ however, "the ordinance which the petitioner here is charged with violating is not of this character, and the restrictions which it imposes upon the right to carry on a public laundry have no tendency to promote the public health, or in any way to secure the public comfort or safety."³⁵² Rather, the court found, the ordinance at issue left the right of a person to establish a public laundry "to the unrestricted will and caprice" of local property owners.³⁵³ This condition not only interfered "with the inalienable right of such person to engage in a lawful occupation, but also with the right of the owner of property to devote it to a lawful purpose."³⁵⁴ The court cited *In re Jacobs*,³⁵⁵ a much-maligned precursor to *Lochner v. New York*,³⁵⁶ for the proposition

348. *See id.* at 245.

349. 31 P. 245 (Cal. 1892).

350. *See id.* at 246.

351. *See id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. 98 N.Y. 98 (1885). The law at issue in *Jacobs* regulated cigarmaking, but only if it took place in a tenement dwelling. *See id.* at 103. The New York Court of Appeals found that the law could not be construed as a valid health and safety measure under the police power. *See id.* at 112-13. The court concluded that the "law was not intended to protect the health of those engaged in cigarmaking, as they are allowed to manufacture cigars everywhere except in the forbidden tenement houses." *Id.* at 113.

In fact, the New York Cigar Makers' Union, composed of German Jews, championed the law to eliminate competition from recent Eastern European Jewish immigrants who made cigars in their tenements. *See* William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 795. As in many other cases, scholars have often missed the real motivation behind alleged health and safety regulation. *See, e.g.,* John Roche, *Entrepreneurial Liberty and the Fourteenth Amendment*, 4 LAB. HIST. 3, 23 (1963) ("Like many other pieces of social legislation then and now, [the *Jacobs* law] was passed on an *ad hoc* basis, by cigar-smoking legislators, and a cigar-smoking Governor . . .").

356. 198 U.S. 45 (1905). *Jacobs* is considered the "outstanding case," prior to

that liberty and property rights cannot be thus invaded by unreasonable laws disguised as police regulations.³⁵⁷ In further support of its decision, the court quoted extensively from *Yick Wo v. Hopkins*³⁵⁸ and *In re Quong Woo*.³⁵⁹ As the court noted, the law invalidated in *Quong Woo* was similar to the ordinance at issue in all relevant respects.³⁶⁰

A federal court also ruled in favor of Chinese laundrymen in *In re Hong Wah*.³⁶¹ The sheriff of San Mateo County had imprisoned Hong Wah for violating an ordinance limiting the parts of the city of San Mateo where laundries could operate.³⁶² Approximately thirty percent of the city was off-limits to laundries.³⁶³ The *Hong Wah* court acknowledged that the California Supreme Court had upheld a similar ordinance in *Hang Kie*.³⁶⁴ The court also noted, however, that the federal district court had reached a contrary result in *Sam Kee*.³⁶⁵ In addition, the court stated that later precedent had eroded *Hang Kie*, perhaps to the extent that the California Supreme Court would no longer follow it, and therefore the court ruled in Hong Wah's favor.³⁶⁶

After *Sing Lee* and *Hong Wah*, anti-laundry zoning became less common, but the decisions did not deter all municipalities from targeting the Chinese laundries. For example, Sacramento passed an ordinance prohibiting laundry owners from renting out space in a building not used solely for a laundry.³⁶⁷ The law's effect would be to drive small Chinese laundries out of Sacramento's downtown, without affecting large, white-owned commercial laundries, which owned their facilities.

Lochner, that protected liberty of contract. SIDNEY FINE, *Laissez Faire and the General-Welfare State* 156 (1956).

357. See *Sing Lee*, 31 P. at 246.

358. See *id.*

359. The court refers to this case as the *Laundry Ordinance Case*. See *id.* at 247.

360. See *id.*

361. 82 F. 623 (N.D. Cal. 1897).

362. See *id.* at 624.

363. See *id.*

364. See *id.* at 625 (citing *In re Hang Kie*, 10 P. 327 (Cal. 1886)).

365. See *id.* (citing *In re Sam Kee*, 31 F. 680 (C.C.N.D. Cal. 1887)).

366. See *id.* at 626 (noting the conflict between *Hang Kie* and the more recent precedents of *Ex parte Whitwell*, 32 P. 870 (Cal. 1893) (invalidating a law regulating insane asylums), and *Ex parte Sing Lee*, 31 P. 245 (Cal. 1892)).

367. See SACRAMENTO, CAL., ORDINANCE 824, § 3 (1907).

In *Ex parte San Chung*,³⁶⁸ a Chinese laundryman argued that the law was unconstitutional because it was unreasonable, was discriminatory, and oppressive, restrained trade, and violated his right to pursue his occupation without unlawful interference or unnecessary restraint.³⁶⁹ The California Court of Appeals rejected this challenge. The law was facially neutral, the court wrote, and therefore did not discriminate against San Chung "as an individual or as a member of the Mongolian race."³⁷⁰ Meanwhile, under *Barbier v. Connolly*³⁷¹ and *Soon Hing v. Crowley*,³⁷² the law was a valid police power measure.³⁷³ The court also cited favorably the California Supreme Court's opinion in *Yick Wo*, but failed to note that the United States Supreme Court unanimously overruled that decision.³⁷⁴

4. *The Threat from General Zoning Laws*

San Chung was one of the last cases involving an intentionally anti-Chinese laundry zoning ordinance.³⁷⁵ A new threat to Chinese laundries, however, soon arose from broad, generally applicable zoning laws that did not take into account the laundrymen's interests and circumstances. In 1911, Los Angeles passed a zoning ordinance establishing residential districts covering most of the city.³⁷⁶ The ordinance prohibited conducting and maintaining "works and factories," including laundries, within the boundaries of such districts.³⁷⁷ Many Chinese laundry owners suddenly found themselves operating illegally. If the Chinese had possessed political influence, they probably could have won an exemption from the zoning law, as did other harm-

368. 105 P. 609 (Cal. Dist. Ct. App. 1909).

369. *See id.* at 610.

370. *Id.* at 611.

371. 113 U.S. 27 (1885).

372. 113 U.S. 703 (1885).

373. *See San Chung*, 105 P. at 612.

374. *See id.*

375. In 1906, the town of Pacific Grove, California, "passed an ordinance prohibiting any Chinese laundries from operating inside the town limits." LYDON, *supra* note 79, at 244-45. The fate of this law is unknown.

376. *See* Los Angeles, Cal., Ordinance 21,996 (new series) (1911).

377. *Id.*

less businesses.³⁷⁸ Instead, they sought to defend their interests in court.

A laundryman named Quong Wo was arrested for continuing to run his laundry in a residential district in *Ex parte Quong Wo*.³⁷⁹ Quong Wo's attorney filed an application for a writ of habeas corpus in the California Supreme Court. Seven people residing near the laundry signed affidavits stating that the "operation of the laundry has not in any way affected their safety, comfort, or welfare, or, to their knowledge, that of any resident in the neighborhood."³⁸⁰ The California Supreme Court noted that the ordinance was facially neutral.³⁸¹ The court refused to find that the law was being applied unequally, even though Quong Wo's attorney demonstrated that several white-owned steam laundries continued to operate unmolested in the same residential district.³⁸² The court also held that the ordinance in question did not illegally confer arbitrary authority on the city to exempt certain businesses from the ordinance, as in *Yick Wo*.³⁸³ The city's exemption of certain small pieces of land containing factories and other businesses from the ordinances did not prove "unreasonable discrimination."³⁸⁴

Finally, the court addressed what it considered Quong Wo's "main contention": that the laundry business is a "lawful and necessary occupation"³⁸⁵ that may not be confined within defined limits in a city or town.³⁸⁶ The court decided that even if a laundry is not a nuisance, it can be excluded from certain parts of a city if "necessary for the safety, health, and comfort of society at large,"³⁸⁷ a principle established in *Hang Kie*.³⁸⁸ The court also

378. See ELMER C. SANDMEYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* 41 (Illini Books 1973) (1939).

379. 118 P. 714, 715-16 (Cal. 1911).

380. *Id.* at 716.

381. See *id.*

382. See *id.*

383. See *id.*

384. *Id.* at 717.

385. *Id.*

386. See *id.*

387. *Id.*

388. See *id.* at 718 (citing *In re Hang Kie*, 10 P. 327 (Cal. 1886)). The court distinguished *Ex parte Sing Lee*, 31 P. 245 (Cal. 1892), on the ground that the ordinance involved in *Sing Lee* essentially banned laundries throughout the city, not just in

relied on *Ex parte San Chung*³⁸⁹ in support of its view that laundries may be regulated because they can spread disease to nearby residents,³⁹⁰ even though Los Angeles had not presented any evidence on this point.

Another challenge to Los Angeles's zoning ordinance came before the California Court of Appeals in 1919 in *Sam Kee v. Wilde*.³⁹¹ By this time, the city had amended the ordinance so that industrial districts, where "works and factories" were allowed to operate, could be established by petition if enough local residents agreed.³⁹² Owners of various local businesses and factories persuaded their neighbors to consent to the creation of mini-industrial districts composed entirely of the nonconforming property.³⁹³

Laundrymen Sam Kee and Hop Wah, however, failed to persuade their neighbors to consent to an industrial district composed of their respective laundries.³⁹⁴ They sued the Clerk of Los Angeles County for refusing to renew their licenses. The plaintiffs argued that the relevant ordinances were "void and unconstitutional" to the extent that they affected the laundry business.³⁹⁵ The Superior Court of Los Angeles County agreed and ruled in plaintiff's favor.³⁹⁶

On appeal, however, the court of appeals reversed and upheld the ordinances on the strength of various United States Supreme Court and California Supreme Court decisions affirming the constitutionality of zoning laws. Among the cases cited by the court were the laundry cases of *Quong Wo*, *Moynier*, *Soon*

residential areas. See *Quong Wo*, 118 P. at 718 (citing *Sing Lee*, 31 P. at 246).

389. 105 P. 609 (Cal. Dist. Ct. App. 1909).

390. See *Quong Wo*, 118 P. at 719.

391. 183 P. 164 (Cal. Dist. Ct. App. 1919).

392. See *id.* at 164-65 (discussing Ordinance Nos. 26,555 and 22,798, which prescribed the procedure for petitioning the city council to establish industrial and residential districts).

393. See *id.*

394. The appellate court accepted respondent's argument that Hop Wah and Sam Kee failed to acquire the necessary signatures; however, it noted that the lower "court failed altogether to find upon the issue . . . as to whether or not the petitioner prepared and endeavored to obtain signatures." *Id.* at 165.

395. *Id.*

396. See *id.*

Hing, and *Barbier*.³⁹⁷ The court did not bother to distinguish—or even cite—federal decisions invalidating the zoning ordinances previously challenged by Chinese laundrymen.

D. Special Laundry Taxes

Another common anti-Chinese measure was a special tax on laundries, designed to apply mainly or solely to Chinese laundries. These taxes were common throughout the West, especially in Montana, until the Montana Supreme Court finally held that these special taxes were unconstitutional in 1913.

1. Early Laundry Taxes: 1860s-1870s

Perhaps the first anti-Chinese laundry ordinance was a laundry tax passed by the Portland City Council in 1864.³⁹⁸ Beginning in 1869, Montana subjected Chinese laundrymen to a harsh laundry tax³⁹⁹ that forced the Chinese to forfeit twenty-five percent of their gross earnings.⁴⁰⁰ The law was facially neutral, but its intent “was obviously discriminatory.”⁴⁰¹ Eventually, perhaps because of an adverse court ruling, the Montana Territory ceased enforcing the tax.⁴⁰²

In 1873, San Francisco passed an ordinance requiring laundries employing one horse-drawn vehicle to pay two dollars per quarter, those employing two such vehicles to pay four dollars per quarter, and those employing none to pay fifteen dollars per quarter.⁴⁰³ This schedule had clear discriminatory implications

397. *See id.* at 166.

398. *See* Holden, *supra* note 32, at 198 n.15. A county court ultimately invalidated this tax. *See id.*

399. *See* Mont. Territory, Legislative Assembly, *Laws, Memorials and Resolutions of the Territory of Montana*, 6th Sess., § 16, at 55 (1870); Montana Territory, Legislative Assembly, *Laws, Memorials and Resolutions of the Territory of Montana*, 5th Sess., § 20, at 61 (1869).

400. *See* ROBERT E. WYNNE, REACTION TO THE CHINESE IN THE PACIFIC NORTHWEST AND BRITISH COLUMBIA, 1850 TO 1910, at 62 (Arno Press 1978) (1964); Larry D. Quinn, “Chink Chink Chinaman”: *The Beginning of Nativism in Montana*, 58 PAC. NORTHWEST Q. 82, 88 (1967).

401. Robert R. Swartout, Jr., *Kwangtung to Big Sky: The Chinese in Montana 1864-1900*, MONT.: MAG. W. HIST., Winter 1988, at 42, 51 n.46.

402. *See generally In re Yot Sang*, 75 F. 983, 985 (D. Mont. 1896) (holding a later laundry license tax unconstitutional).

403. *See* San Francisco Bd. of Supervisors Order No. 1098 (June 23, 1873), *noted in*

because almost all of the Chinese laundries came under the third classification.⁴⁰⁴

In February 1874, thirteen Chinese laundrymen were arrested for failing to pay the fifteen dollar quarterly license fee.⁴⁰⁵ A local court declared the ordinance invalid because it violated the equal protection of the laws by "discriminat[ing] unjustly against the poor, wantonly and unnecessarily add[ing] to their burden, and substantially prohibit[ing] them from the pursuit of a useful and worthy calling."⁴⁰⁶ The court declined to reach the issue of intentional discrimination against the Chinese, explaining that "this court had nothing to do with the secret motives or intentions of the body which passed the order."⁴⁰⁷ The board of supervisors repealed the law on February 24, 1874, and replaced it with a nondiscriminatory tax.⁴⁰⁸

In 1876, however, the board of supervisors passed a new license tax identical to the tax of 1873. On May 2, 1876, a state district court declared this measure unconstitutional.⁴⁰⁹ The court found the San Francisco tax to be unreasonable and that it illicitly discriminated against poor launderers.⁴¹⁰ This court,

Gioia, *supra* note 47, at 213.

404. See A HISTORY OF THE CHINESE IN CALIFORNIA, *supra* note 16, at 24; SANDMEYER, *supra* note 378, at 52.

405. See MCCLAIN, *supra* note 92, at 51; see also COURTNEY, *supra* note 64, at 57; A HISTORY OF THE CHINESE IN CALIFORNIA, *supra* note 16, at 24. This was a companion measure to the infamous Queue Ordinance, which required that all people in jail must have their hair cut to an inch in length. This ordinance was meant to harass the Chinese, who generally wore their hair in a long braid. See SANDMEYER, *supra* note 378, at 52. The United States Circuit Court held that the ordinance was unconstitutional in *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6456) (finding the requirement that Chinese prisoners must have their hair cut under the Queue Ordinance amounted to "cruel and unusual punishment").

406. *Chinese Laundry Ordinance: It Is Declared Void by Judge Stanly*, EVENING BULL. (San Francisco), July 9, 1874, at 3 [hereinafter *Chinese Laundry Ordinance*] (publishing Judge Stanly's opinion in *People v. Soon Kung*).

407. *Id.*

408. See San Francisco Bd. of Supervisors Order No. 1135 (Feb. 24, 1874), noted in Gioia, *supra* note 47, at 213.

409. See *The Laundrymen's License: The Excessive License Imposed upon Laundrymen Declared Void*, *People v. Hung Hai*, DAILY ALTA CAL. (San Francisco), May 3, 1876, at 1 [hereinafter *The Laundrymen's License*]; see also BENJAMIN S. BROOKS, BRIEF OF THE LEGISLATION AND ADJUDICATION TOUCHING THE CHINESE QUESTION, REFERRED TO THE JOINT COMMISSION OF BOTH HOUSES OF CONGRESS 86 (San Francisco Women's Co-operative Printing Union 1877).

410. See *The Laundrymen's License*, *supra* note 409, at 1 (publishing Judge McKee's

unlike its predecessor, held that it was entitled to inquire into the ulterior motives of the supervisors and to invalidate a law passed to oppress the Chinese.⁴¹¹ The court did not reach the issue of anti-Chinese animus, however, because the court found the law to be void on its face. The board of supervisors repealed the law on May 1, 1878, and promulgated a new nondiscriminatory tax.⁴¹²

Meanwhile, the discriminatory taxation of Chinese laundries spread to Los Angeles. Throughout the 1860s and 1870s, the Chinese dominated the growing laundry industry in Los Angeles. In 1872, the Chinese owned eleven of the thirteen wash-houses in the city.⁴¹³ The city council passed a five dollar per month tax that nominally applied to all businesses in the city but was enforced only against Chinese laundrymen.⁴¹⁴ The city temporarily stopped enforcing the tax against laundry owners when they refused to pay, and the city's attorneys warned against taking action only against the laundries.⁴¹⁵ Under public pressure, however, the city renewed its enforcement of the tax. The Chinese chose to accept the tax as a cost of doing business rather than raise the money needed to fight a costly legal battle.⁴¹⁶

In the 1878 city elections, the anti-Chinese Workingman's Party won twelve of fifteen city council seats. The party had pledged to use discriminatory taxes to drive the Chinese out of the city.⁴¹⁷ By this time, Chinese laundries employed three hundred Chinese and outnumbered non-Chinese laundries approximately ten to one.⁴¹⁸ In January 1879, the city council passed an ordinance taxing "regular" laundries . . . as differentiated from 'poor women who do washing,' twenty five dollars per month.⁴¹⁹ Rumors circulated that the "wily Mongolians" were plotting to

order declaring tax unconstitutional in *People v. Hung Hai*).

411. *See id.*

412. *See Gioia, supra* note 47, at 213.

413. *See Lou, The Chinese American Community, supra* note 78, at 125.

414. *See id.* at 120, 126.

415. *See id.* at 126-27.

416. *See id.* at 127.

417. *See Locklear, supra* note 81, at 248.

418. *See id.*

419. *Id.*

establish an enormous laundry under one roof, thereby having to pay only one tax.⁴²⁰

Faced with the threat of litigation from the laundry owners, the council reduced the fees on laundries to six dollars per month, a fee the laundrymen quietly accepted. With legal harassment of Chinese laundries in check, their numbers grew from eleven in 1872 to fifty-two in 1890, despite an 1886 boycott organized by labor unions.⁴²¹

Anti-Chinese laundry taxation spread even to remote frontier towns such as Prescott, Arizona. By the late 1870s, thirty of the ninety-nine Chinese in Prescott worked as laundrymen.⁴²² The village council passed a law that required keepers or owners of laundries to pay a licensing tax of ten dollars per quarter.⁴²³

2. Laundry Taxes in the 1880s

In late 1884, the City of Portland, Oregon passed an ordinance requiring laundry owners to pay a quarterly license of five dollars.⁴²⁴ Wan Yin, the proprietor of a washhouse in Portland, refused to pay the fee and was arrested.⁴²⁵ He filed a petition for a writ of habeas corpus challenging his imprisonment.⁴²⁶ In *In re Wan Yin*,⁴²⁷ federal district judge Matthew Deady, a champion of Chinese rights,⁴²⁸ declared the law unconstitutional.⁴²⁹ Judge Deady acknowledged that Portland had the power to tax offensive trades, but he found that "washing is a useful and inoffen-

420. *Id.*

421. See Lou, *Chinese-American Agricultural Workers*, *supra* note 78, at 49, 58 & 307 n.9. The organizers called for a boycott of both Chinese-owned businesses and white-owned businesses that employed Chinese. See *id.* at 310 n.60. White-owned laundries evaded the boycott completely by falsely advertising that they had dismissed their Chinese employees. See *id.*

422. See Lister & Lister, *supra* note 43, at 45.

423. See *id.* at 57.

424. See Portland, Or., Ordinance 4448 (Dec. 4, 1884).

425. See *In re Wan Yin* (The Laundry License Case), 22 F. 701, 702 (D. Or. 1885).

426. See *id.*

427. The Laundry License Case, 22 F. 701 (D. Or. 1885).

428. See Ralph J. Mooney, *Matthew Deady and the Federal Judicial Response to Racism in the Early West*, 63 OR. L. REV. 561, 627-37 (1984).

429. See *Wan Yin*, 22 F. at 705.

sive occupation."⁴³⁰ The only reason that the city found it offensive, the court continued, was because laundering was "principally performed by the Chinese."⁴³¹ Judge Deady noted that "while this circumstance may excite race prejudice, it by no means makes the business 'offensive' to the senses."⁴³²

3. *More Laundry Taxes in Montana*

Beginning in 1895, the Chinese again faced discriminatory taxation in Montana, where Chinese men were finding particular success in the laundry business.⁴³³ A Montana statute required every male engaged in the hand laundry business to pay a license fee of ten dollars per quarter; if the owner had one or more employees, the license fee rose to twenty-five dollars.⁴³⁴ The law exempted steam laundries and female-operated hand laundries, all of which were owned by whites.⁴³⁵

430. *Id.* at 704.

431. *Id.*

432. *Id.* Laundry taxes proliferated elsewhere in the West in the 1880s. For example, in Port Townsend, Chinese laundrymen successfully launched a court battle against a \$20 annual tax that applied only to them. See Liestman, *supra* note 80, at 95-96. Deadwood and Spearfish, South Dakota, each passed laundry license ordinances in 1885. See Liestman, *supra* note 47, at 76-77. Local courts apparently overturned these ordinances. See *id.* Phoenix also passed a laundry license tax in early 1886. See BRADFORD LUCKINGHAM, *MINORITIES IN PHOENIX* 87 (1994). The local courts apparently upheld this law as well. See *id.*

433. For example, in Butte in 1890, the Chinese had four laundries. See Lee, *supra* note 47, at 51. By 1895, this grew to 18, and reached a peak of 31 in 1900 and 1905, declining to 20 during the years from 1910 to 1920, and then declining further after that. See *id.* Laundries constituted more than one-third of Chinese businesses in Butte during this period. Moreover, the Chinese dominated the laundry industry in Butte. In 1895, the ratio of Chinese to American laundries was 18:11; in 1900, 31:9; in 1905, 31:5; in 1910, 20:7; in 1915, 21:7; and in 1920, 20:7. See *id.* at 53. In a later work, Lee suggests that these figures for Chinese laundries are substantial underestimates because many Chinese laundries were unlicensed. See LEE, *supra* note 78, at 194.

434. See MONT. POL. CODE § 4709 (Wilbur F. Sanders 1895). The City of Butte passed its own laundry ordinance in 1894, which seems to have been the model for the state law. See LEE, *supra* note 78, at 144. The Butte law required "[t]hat all male persons in the city who are now or shall hereafter engage in the laundry business shall pay a licen[s]e of \$5 per quarter." *Id.* at 114 (quoting the Butte ordinance).

435. See Lee, *supra* note 47, at 53; Swartout, *supra* note 401, at 51 n.46. At this time, "home laundries" operated by white women were numerous and these home

Two Chinese laundrymen unsuccessfully challenged the law in separate cases in Montana state court.⁴³⁶ Another Chinese laundryman, however, emerged victorious in federal district court.⁴³⁷ Although the Supreme Court reversed the latter decision on procedural grounds, the Court did not disturb the lower court's holding that the law was unconstitutional on its merits.⁴³⁸

In 1908, Montana inaugurated a tax of ten dollars per quarter on laundries.⁴³⁹ Like the earlier statute, this statute exempted steam laundries and self-employed laundresses.⁴⁴⁰ Essentially, the statute applied solely to Chinese laundrymen.

Quong Wing, a Chinese laundryman, challenged the law in *Quong Wing v. Kirkendall*,⁴⁴¹ but the Montana Supreme Court ruled against him.⁴⁴² The court held that the law was reasonable, particularly in light of the United States Supreme Court's decision in *Muller v. Oregon*,⁴⁴³ which upheld protective legislation for women.⁴⁴⁴

In an opinion written by Justice Holmes, the Court affirmed the Montana Supreme Court's opinion.⁴⁴⁵ Holmes reasoned that a "[s]tate does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry."⁴⁴⁶ Thus, laws preferring steam laundries to hand laundries were permissible. Moreover, added Holmes, *Muller* established the constitutional-

laundries were gradually absorbed by the steam laundries. See Lee, *supra* note 47, at 53.

436. See *State v. Camp Sing*, 44 P. 516 (Mont. 1896); *State ex rel. Toi v. French*, 41 P. 1078, 1079 (Mont. 1895). For greater detail, see Bernstein, *supra* note 105, at 95-101.

437. See *In re Yot Sang*, 75 F. 983 (D. Mont. 1896). For details, see Bernstein, *supra* note 105, at 98.

438. See *In re Yot Sang*, 171 U.S. 686 (1898) (per curiam).

439. See MONT. REV. CODE ANN. § 2776 (Smith 1908).

440. See *id.*

441. 101 P. 250 (Mont. 1909), *aff'd*, 223 U.S. 59 (1912) (affirming the Montana Supreme Court's ruling in favor of the defendant, but allowing the plaintiff to raise issues on remand which the plaintiff disclaimed during the appeal). For more details on this litigation, see Bernstein, *supra* note 105, at 95-101.

442. See *Quong Wing*, 101 P. at 252.

443. 208 U.S. 412 (1908).

444. See *id.* at 423.

445. See *Quong Wing*, 223 U.S. at 64-65.

446. *Id.* at 62.

ity of regulatory legislation granting women special protections.⁴⁴⁷

Holmes noted that Quong Wing's counsel had not raised the issue of racial discrimination.⁴⁴⁸ Holmes specified that if the law were targeted solely at the Chinese,⁴⁴⁹ as it seems to have been by its limited application to hand laundries, it would be unconstitutional under *Yick Wo*.⁴⁵⁰

The Court remanded the case to the state district court, where Quong Wing provided evidence that the statute in question affected only Chinese laundrymen.⁴⁵¹ The district court therefore declared the statute unconstitutional,⁴⁵² a determination reluctantly affirmed by Montana's supreme court.⁴⁵³

4. Threatened Taxation in New York During the Great Depression

As the Chinese population spread throughout the United States, the threat of discriminatory legislation followed them. In 1933, the New York city council proposed an ordinance that would have required all public laundries to pay a license fee of twenty-five dollars per year and to post a one thousand dollar security bond.⁴⁵⁴ These provisions were intended to drive small laundries out of business.⁴⁵⁵ Another provision of the proposed legislation would have banned aliens from owning laundries.⁴⁵⁶ Most Chinese laundry owners either could not afford the fees, were not American citizens due to discriminatory naturalization laws, or faced both problems.⁴⁵⁷ The Chinese laundrymen organized to oppose the proposed ordinance and hired a white lawyer to represent them politically.⁴⁵⁸ The lawyer persuaded the coun-

447. See *id.* at 63 (citing *Muller*).

448. See *id.*

449. See *id.*

450. See *id.* (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)).

451. See *Quong Wing v. Kirkendall*, 130 P. 2, 2 (Mont. 1913).

452. See *id.*

453. See *id.*

454. See YU, *supra* note 79, at 32.

455. See *id.*

456. See *id.*

457. See *id.*

458. See *id.* at 42-43.

cil to reduce the license fee to ten dollars and the bond to one hundred dollars, and to exempt "Orientals" from the citizenship requirement.⁴⁵⁹

The proposed New York law, along with *In re Mark*,⁴⁶⁰ represented the tail end of the era of harassment of Chinese laundries. Once the United States entered World War II, with China as an ally, anti-Chinese sentiment diminished considerably.⁴⁶¹ Meanwhile, relatively few American-born Chinese, who were American citizens by constitutional right, entered the laundry business.⁴⁶²

The legacy of the laundry cases, however, lives on in their influence on American constitutional law. For instance, *Yick Wo v. Hopkins* is one of the most famous cases in American constitutional history, and other Chinese laundry cases played smaller, but meaningful, roles in the development of constitutional doctrine. The next two sections of this Article discuss the lessons that can be learned from the history of the laundry laws and the judicial reaction to them.

III. CHINESE LAUNDRY CASES AND THE PARITY DEBATE

Scholars have long debated whether federal courts are institutionally more able and more willing to protect federal constitutional rights than are state courts; this is known as the "parity" debate.⁴⁶³ The debate was triggered by the Supreme Court's statement in *Stone v. Powell*⁴⁶⁴ that "there is 'no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to [constitutional claims] than his neighbor in the state courthouse.'"⁴⁶⁵

Professor Burt Neuborne responded to this dictum with an influential article detailing the following perceived advantages of

459. *See id.*

460. 58 P.2d 913 (Cal. 1936).

461. *See DANIELS, supra* note 89, at 188-99.

462. *See Li, supra* note 107, at 38-39.

463. *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 233 (1988).

464. 428 U.S. 465 (1976).

465. *Id.* at 494 n.35 (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 509 (1963)).

federal courts over state courts as protectors of federal constitutional rights: (1) The federal bench is a far more elitist institution than is the state bench and attracts more competent, diligent judges; (2) federal judges specialize in federal law, including federal constitutional law; (3) federal judges enjoy life tenure, and therefore are insulated from majoritarian pressures; and (4) federal judges have a psychological bias in favor of protecting federal constitutional rights. They are more likely than state judges to see enforcing the federal Constitution as their responsibility, while state judges are more likely to be jealous of state authority.⁴⁶⁶

By contrast, Professor Erwin Chemerinsky argues that federal courts are not an inherently superior forum in which to protect federal constitutional rights.⁴⁶⁷ Chemerinsky believes that the preference among academics for federal enforcement of federal constitutional rights arose in the historical context of the 1950s.⁴⁶⁸ At that time, federal courts were dramatically expanding civil rights and civil liberties protections at the expense of state power.⁴⁶⁹ Given the radical nature of the Supreme Court's jurisprudence at that time and given the extent to which that jurisprudence trampled on traditional state prerogatives, "there was reason to question whether state courts would follow these . . . requirements."⁴⁷⁰ Meanwhile, the federal courts were dominated by Democrats and liberal Republicans, who were thought to be "more likely to enforce desegregation, apply constitutional criminal procedure protections, and follow Warren Court decisions than were their state counterparts."⁴⁷¹

466. See Neuborne, *The Myth of Parity*, *supra* note 2, at 1121-28; see also Neuborne, *Parity Revisited*, *supra* note 2, at 798 (arguing that despite changes, disparity continues).

467. See Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 598-600 (1991). For similar views, see Barry Friedman, 12 CONST. COMMENT 441, 448-50 (1995) (reviewing LARRY W. YACKLE, *RECLAIMING THE FEDERAL COURTS* (1994)).

468. See Chemerinsky, *supra* note 467, at 596.

469. See *id.*

470. *Id.*

471. *Id.* at 597; see also Friedman, *supra* note 467, at 449 ("While the federal courts were unquestionably the place to be in the 1960's and 1970's, that has not always been true in the past and may not be true today."). Friedman also notes that often "[t]hose who prefer federal courts to vindicate federal rights also have a selective view of what those rights should be." Friedman, *supra* note 467, at 450.

In this historical context, Chemerinsky adds, "[t]he assumption of a lack of parity between federal and state courts is not surprising."⁴⁷² In more normal circumstances, however, Chemerinsky believes that the argument that federal courts are more likely to protect federal constitutional rights is weak. For example, in 1991, when Chemerinsky was writing, conservative Reagan and Bush appointees, thought to be relatively hostile to expansive interpretations of federal constitutional rights, dominated the federal bench. Chemerinsky contends that there is no reason to believe that these judges would be more protective of federal constitutional rights than state judges would be.⁴⁷³

Professor Larry Yackle, however, agrees with Professor Neuborne that federal courts are better forums for the vindication of rights than are state courts.⁴⁷⁴ He argues that "[w]e do not depend entirely on the ideological make-up of individual sitting *judges* to give federal rights a generous interpretation; we also rely, even more fundamentally, on the competence, perspective, and institutional location and structure of the federal courts."⁴⁷⁵

The history of the Chinese laundry litigation provides evidence favoring the anti-parity position. Federal courts were far more likely than state courts to rule in favor of Chinese petitioners. With one glaring exception,⁴⁷⁶ final federal court rulings in Chinese laundry cases unanimously favored the Chinese laundrymen.⁴⁷⁷ Final state court rulings, by contrast, overwhelmingly

The discussion here assumes no particular view of what rights should be protected.

472. Chemerinsky, *supra* note 467, at 597.

473. See *id.* at 598-99; see also Friedman, *supra* note 467, at 450-51 ("Many state courts recently have demonstrated a willingness to protect rights that far exceeds that of the federal courts. Civil liberties lawyer[s] today are going to think long and hard about which court system to use, at least in states in which the state constitution is being revitalized.").

474. See LARRY W. YACKLE, RECLAIMING THE FEDERAL COURTS 44 (1994).

475. *Id.* at 50.

476. See *Soon Hing v. Crowley*, 113 U.S. 703 (1885); cf. *Quong Wing v. Kirkendall*, 223 U.S. 59 (1912) (upholding Montana laundry regulation but suggesting *sua sponte* that the law was unconstitutional).

477. See, e.g., *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886); *Yee Gee v. City of San Francisco*, 235 F. 757 (N.D. Cal. 1916); *In re Hong Wah*, 82 F. 623 (N.D. Cal. 1897); *In re Sam Kee*, 31 F. 680 (N.D. Cal. 1887); *In re Lie Toy* (The Stockton Laundry Case), 26 F. 611 (D. Cal. 1886); *In re Quong Woo*, 13 F. 229 (C.C.D. Cal. 1882); *In*

avored the government. State courts *upheld* the challenged laws in eleven of the seventeen cases decided by state courts.⁴⁷⁸ In contrast, state courts *invalidated* the challenged laws in only six of the seventeen cases.⁴⁷⁹

At first blush, the greater protection the federal courts gave to the Chinese might appear to be due to historical circumstance. Federal judges felt obligated to assert federal authority over immigration and to establish the federal government's authority to enforce the Fourteenth Amendment against the states in the post-Civil War era. In other words, federal judges wanted to preserve the power that the national government successfully asserted during the Civil War.

Certainly, this consideration influenced federal judges. For example, with regard to immigration, the Burlingame Treaty required the United States government to permit Chinese immigration and to protect Chinese residents of the United States.⁴⁸⁰ White Californians reacted by attempting to regulate immigration directly through state law.⁴⁸¹ When courts invalidated direct

re Yot Sang, 75 F. 983 (D. Mont. 1896); *In re* Wan Yin (The Laundry License Case), 22 F. 701 (D. Or. 1885).

478. See, e.g., *Ex parte* Wong Wing, 138 P. 695 (Cal. 1914); *Ex parte* Quong Wo, 118 P. 714 (Cal. 1911); *In re* Hang Kie, 10 P. 327 (Cal. 1889); *In re* Yick Wo, 9 P. 139 (Cal. 1886); *Sam Kee v. Wilde*, 183 P. 164 (Cal. Dist. Ct. App. 1919); *Ex parte* San Chung, 105 P. 609 (Cal. Dist. Ct. App. 1909); *In re* White, 6 W. Coast Rep. 644 (Cal. 1885); *Territory v. Ah Choy*, 17 Haw. 331 (1906); *Quong Wing v. Kirkendall*, 101 P. 250 (Mont. 1909); *State v. Camp Sing*, 44 P. 516 (Mont. 1896); *State ex rel. Toi v. French*, 41 P. 1078 (Mont. 1895).

479. See, e.g., *In re* Mark, 58 P.2d 913 (Cal. 1936); *Ex parte* Sing Lee, 31 P. 245 (Cal. 1892); *Quong Wing v. Kirkendall*, 130 P. 2 (Mont. 1913) (ruling in favor of laundryman only because of direction by United States Supreme Court); *In re* Woo Yeck, 12 Pac. Coast L.J. 382 (Alameda Super. Ct. 1883); *People v. Hung Hai*, in *The Laundrymen's License*, *supra* note 409, at 1; *People v. Soon Kung*, in *Chinese Laundry Ordinance*, *supra* note 406, at 3.

480. See Additional Articles to the Treaty Between the United States and the Ta-Tsing Empire, July 28, 1868, U.S.-China, art. VI, 16 Stat. 739, 740.

481. In 1852, for example, California passed an act requiring that each owner or master of a vessel bringing passengers to California to post a bond of five hundred dollars for every alien passenger landed or pay a commutation fee of five dollars to the state hospital fund. See CAL. POL. CODE, ch. 1, art. 7 (1887). This act was eventually declared unconstitutional in *People v. S.S. Constitution*, 42 Cal. 578 (1872), and *Chy Lung v. Freeman*, 92 U.S. 275 (1876). In 1855, California passed a law even more directly targeted at Chinese immigration to discourage them from moving to California because they could not become citizens. See *People v. Downer*, 7 Cal.

regulations, anti-Chinese forces tried to harass the Chinese into leaving. Supervisor Goodwin of San Francisco, the author of some of the early laundry legislation and other anti-Chinese measures, argued that only local legislation could discourage excessive Chinese immigration because of the federal government's treaty with China.⁴⁸²

Not surprisingly, federal judges saw anti-Chinese legislation as an attempt to exercise control over immigration, a power that belonged solely to the national government. Federal district judge Matthew Deady of Oregon concluded that Western anti-Chinese legislation "is but a poorly disguised attempt on the part of the state to evade and set aside the treaty with China, and thereby nullify an act of the national government."⁴⁸³ He directly analogized state discrimination against the Chinese to the South's rebellion, arguing that between the anti-Chinese legislation "and 'the firing on Fort Sumter,' by South Carolina, there is the difference of the direct and indirect—and nothing more."⁴⁸⁴ Deady concluded by warning state officials that the question of whether the Chinese should be allowed in the country was not a state matter, "but one which belongs solely to the national government."⁴⁸⁵

One can speculate that a desire to assert federal authority over immigration influenced the votes of at least some of the Supreme Court Justices in *Yick Wo v. Hopkins*. Less than two years before it decided *Yick Wo*, the Supreme Court twice unanimously upheld a maximum hours law that was clearly designed to harm Chinese laundrymen.⁴⁸⁶ Yet the *Yick Wo* Court unanimously invalidated a discriminatory laundry licensing law.⁴⁸⁷ One could—as the Court did—explain this apparent anomaly by

169, 169 (1857). This law required the master or owner of each vessel with Chinese immigrants aboard to pay a \$50 tax on each passenger landed. See *id.* at 170, 170 (discussing California's anti-immigration law of 1855). This law was declared unconstitutional in *Downer*. See *id.* at 170-71.

482. See EAVES, *supra* note 29, at 144.

483. *Baker v. Portland*, 2 F. Cas. 472, 475 (D. Or.) (No. 777).

484. *Id.*

485. *Id.* at 474.

486. See *Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Barbier v. Connolly*, 113 U.S. 27 (1885).

487. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

simply distinguishing the ordinances at issue.⁴⁸⁸ While one can easily see how the differences between the licensing and the hours ordinances could lead some of the Justices to change their votes, it is less clear why these differences should have resulted in a switch from a 9-0 vote against the Chinese to a 9-0 vote in their favor.⁴⁸⁹

Perhaps, then, the most important external events that occurred between *Soon Hing* and *Yick Wo* help explain the Court's turn around. In late 1885 and early 1886, vicious anti-Chinese riots broke out throughout the West.⁴⁹⁰ The riots killed or wounded dozens of Chinese and forced thousands to flee their homes.⁴⁹¹ These riots were a clear challenge to federal authority, as the rioters sought to drive aliens who were under federal protection from the country.⁴⁹² It is entirely possible that in unanimously deciding *Yick Wo*, the Supreme Court was sending a message to the West that the status of the Chinese would be decided through federal law, not local oppression.

Federal judges also were eager to establish federal authority over the states under the Fourteenth Amendment. Judge Deady of Oregon faced severe public criticism for granting habeas corpus writs to several Chinese immigrants imprisoned under unconstitutional legislation.⁴⁹³ In the 1885 laundry license case, *In re Wan Yin*,⁴⁹⁴ Deady defended his exercise of habeas corpus jurisdiction, arguing that it was necessary as "a bulwark against

488. *See id.* at 367.

489. The Court argued that unlike the maximum hours laws, the licensing law vested entirely arbitrary authority in the San Francisco Board of Supervisors to grant or deny a laundryman permission to engage in his livelihood. *See id.* at 368. This is not a completely persuasive explanation for the vote in *Yick Wo*, however, because the *Yick Wo* Court clearly was motivated in part by the obvious discriminatory application of the licensing law, not simply by its arbitrariness. It is true that the *Yick Wo* ordinance was more clearly discriminatory in its operation than were the maximum hours laws, but San Francisco's attorney cited plausible nondiscriminatory reasons why the *Yick Wo* ordinance only affected Chinese. *See id.* at 359. Essentially, the city argued that only Chinese laundries had scaffolding on their roofs and that this was a particular fire hazard. *See id.*

490. *See* McCLAIN, *supra* note 92, at 173-75.

491. *See id.*

492. *See id.* at 174-75.

493. *See* Holden, *supra* note 32, at 358-59.

494. 22 F. 701 (D. Or. 1885).

local oppression and tyranny, as well 'up north' as 'down south.'⁴⁹⁵ Without federal habeas corpus jurisdiction, he added, the Fourteenth Amendment "would be a dead letter."⁴⁹⁶

Federal Ninth Circuit Judge Sawyer also regarded upholding the rights of the Chinese as indispensable to the national government's ability to enforce the Fourteenth Amendment. In *Wo Lee*, Sawyer wrote:

[I]f, by an ordinance, general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and, in effect, nullifying the provisions of the National Constitution, then the insertion of provisions to guard the rights of every class and person in that instrument was a vain and futile act.⁴⁹⁷

Sawyer had little personal sympathy for the Chinese,⁴⁹⁸ yet, "[i]f race hostility threatened federal promises of equal protection, Sawyer felt called upon to act boldly as a representative of the national government."⁴⁹⁹

495. *Id.* at 705.

496. *Id.*

497. *In re Wo Lee*, 26 F. 471, 474 (C.C.D. Cal. 1886).

498. In private correspondence, Judge Sawyer stated:

The Chinese are vastly superior to the negro, but they are a race entirely different from ours and never can assimilate and I don't think it desirable that they should and for that reason I don't think it desirable that they could come here. I think we made a mistake when we opened our door of immigration to them.

FRITZ, *supra* note 261, at 247. In an opinion invalidating a law prohibiting the Chinese from being employed on public works, Judge Sawyer acknowledged that he believed that "an unlimited immigration of that people" was "unpleasant," "undesirable," and "ultimately dangerous to our civilization." *In re Parrott*, 1 F. 481, 518 (C.C.D. Cal. 1880) (Sawyer, J.).

499. Przybyszewski, *supra* note 260, at 46. Judge Deady forwarded a letter from the governor of Oregon criticizing a pro-Chinese decision. *See id.* at 46-47. Sawyer wrote to Deady:

He seems to think it *presumpt[u]ous* of a judge of the United States Courts to perform the duties imposed upon him by the Constitution and laws of the United States, and examine into the question . . . [w]hether this great state of Oregon . . . has in any way transcended its authority as a member of this Union and in any way in any particular violated the

While post-Civil War nationalism undoubtedly played a role in the federal courts' decisions in the Chinese laundry cases, federal decisions remained far more favorable to the Chinese in later years, after federal authority over immigration and under the Fourteenth Amendment was well-established.

Moreover, the fairness of federal judges toward the Chinese was not limited to laundry cases. As Lucy Salyer points out, Ninth Circuit judges hearing immigration cases in the 1890s were not sympathetic personally to the Chinese;⁵⁰⁰ the judges' "perceptions of their institutional obligations" led them to treat the Chinese fairly.⁵⁰¹ The judges obviously felt institutional obligations in the laundry cases as well. Unlike state judges, who were protective of state authority, federal judges in the laundry cases clearly believed that their primary duty was to enforce the federal Constitution.

It also seems salient that the federal judges who decided the Chinese laundry cases were appointed, not elected, and were therefore largely insulated from majoritarian pressures. By contrast, recall that most of the California Supreme Court justices elected in 1879 were members of the virulently anti-Chinese Workingman's Party.⁵⁰² Anti-Chinese forces were able to capture the state government, including the judiciary, but had far less influence on the federal government.

The history of the Chinese laundry cases thus provides some evidence to support Professor Neuborne's position that federal courts will generally be more protective of federal constitutional rights than will state courts because of federal judges' institutional loyalties and insulation from democratic pressures.⁵⁰³

Constitution and laws of the United States to which it is subordinated.

Id. at 48.

500. See SALYER, *supra* note 63, at xvi.

501. *Id.*

502. See *supra* note 98 and accompanying text; see also LYDON, *supra* note 79, at 120-28 (giving an overview of the Workingman's Party).

503. One can argue that the Chinese cases and the Warren Court Era race cases are similar in that they both involved a region deviating from national norms. Westerners were especially hostile to the Chinese, and southerners were especially hostile to blacks. This analysis begs the question, however, of why federal judges would be more likely to enforce national norms than state judges. After all, federal judges typically are from the state in which they sit, and therefore should share regional

While the history of Chinese laundry laws is not nearly enough evidence to prove the universal applicability of Neuborne's insights, it does show that federal courts have been superior protectors of federal constitutional rights outside the narrow context of Warren and Burger Court activism.

IV. LOCHNER AND THE LAUNDRY CASES

Between Reconstruction and the New Deal, American courts struggled with the issue of how much protection the Fourteenth Amendment accorded to economic activity. In the *Slaughter-House Cases*,⁵⁰⁴ decided in 1873, a one-vote majority of the Supreme Court adopted a narrow reading of the Amendment. The Court held that it was not entitled to interfere with state and local economic regulations that did not explicitly discriminate against African Americans.⁵⁰⁵ The four dissenters, however, argued vigorously that the Amendment gave courts wide authority to invalidate legislation that violated traditional concepts of economic liberty.⁵⁰⁶

A significant percentage of federal and state courts implicitly or explicitly rejected the *Slaughter-House* majority opinion in favor of the dissent, and invalidated certain economic regulations under the Fourteenth Amendment.⁵⁰⁷ Ultimately, in *Lochner*, a one-vote majority of the Supreme Court accepted the

biases. Many federal judges, in fact, were active in local politics before ascending to the bench.

504. 83 U.S. (16 Wall.) 36 (1873) (upholding a law granting a monopoly to a slaughterhouse); see also *Durbridge v. Slaughterhouse Co.*, 27 La. Ann. 676 (1875) (finding that the slaughterhouse had achieved its legal monopoly through bribery and corruption).

505. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 69-72.

506. See *id.* at 89-111 (Field, J., dissenting), 111-24 (Bradley, J., dissenting), 124-30 (Swayne, J., dissenting).

507. Historians typically cite *Ritchie v. People*, 40 N.E. 454 (Ill. 1895) (invalidating a law that limited women to a maximum of eight hours of daily factory labor), *Godcharles v. Wigeman*, 6 A. 354 (Pa. 1886) (invalidating a law requiring cash payment of wages), and *In re Jacobs*, 98 N.Y. 98 (1885) (invalidating a law regulating the production of cigars), but there are many other cases where the courts favored the principles expressed in the *Slaughter-House* dissent over those of the majority. See, e.g., *Joseph v. Randolph*, 71 Ala. 499, 508 (1882); *State v. Moore*, 18 S.E. 342, 345 (N.C. 1893), overruled in part by *State v. Hunt*, 40 S.E. 216 (N.C. 1901).

Slaughter-House dissenters' view that the Fourteenth Amendment barred certain types of state economic regulation.⁵⁰⁸

Despite the pre-New Deal Court's reputation for judicial activism, courts declared relatively few regulations unconstitutional under the Fourteenth Amendment.⁵⁰⁹ Even after the Supreme Court endorsed judicial protection of liberty of contract in *Lochner*, the vast majority of state regulations were never challenged, and, of those that were challenged, only a small fraction were invalidated.⁵¹⁰ Nevertheless, the results of judicial oversight of economic regulations seemed sufficiently onerous to "progressive" forces in the United States that they began to view the courts,⁵¹¹ and even the Constitution itself,⁵¹² as serious obstacles to their goals. Populists, Progressives, and labor activists launched a vigorous propaganda offensive against *Lochnerism* and the judges who upheld it.⁵¹³

Ultimately, the Supreme Court abandoned *Lochnerism* during the New Deal.⁵¹⁴ With the triumph of New Deal statism, *Lochner* became one of the most despised cases in Supreme Court history, condemned by liberals and conservatives alike. For genera-

508. See *Lochner v. New York*, 198 U.S. 45, 53 (1905).

509. See Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 944-45 (1927); Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 COLUM. L. REV. 294, 295 (1913).

510. See Michael J. Phillips, *The Progressiveness of the Lochner Court*, 75 DENV. U. L. REV. 453, 453 (1998); Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 SUP. CT. HIST. SOC'Y Y.B. 53, 69-70; Melvin I. Urofsky, *State Courts and Protective Legislation During the Progressive Era: A Reevaluation*, 72 J. AM. HIST. 63, 64 (1985).

511. See, e.g., WILLIAM G. ROSS, *A MUTED FURY* 136-43 (1994) (describing Theodore Roosevelt's attack on the federal judiciary during the 1912 presidential campaign).

512. See, e.g., George Gorham Groat, *Economic Wage and Legal Wage*, 33 YALE L.J. 489, 500 (1924) ("An eighteenth century constitution cannot, without change, be fitted to these twentieth century conditions."). See generally Herman Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 AM. J. LEGAL HIST. 288, 288 (1971) (noting that "scholars such as Woodrow Wilson, J. Franklin Jameson, and Henry Jones Ford dissented from the reverential approval usually accorded the American constitution" because they believed the Constitution did not adequately address modern problems).

513. See generally ROSS, *supra* note 511 (providing a comprehensive study of the Populist, Progressive, and labor union attack on *Lochnerism* and antiprogressive judges).

514. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

tions, almost no law review writers, treatise authors, or historians had a good word to say about Lochnerian jurisprudence.⁵¹⁵

Overwhelming hostility to Lochnerism continues today. Supreme Court justices consistently use *Lochner* as an epithet to hurl at their colleagues when they disapprove of a decision declaring a law unconstitutional. For example, conservative Justices accused their colleagues of Lochnerizing when the Court curtailed abortion restrictions in *Planned Parenthood v. Casey*.⁵¹⁶ Liberal Justices returned fire when the Court declared a property regulation unconstitutional under the Takings Clause in *Dolan v. City of Tigard*⁵¹⁷ and when the Court used the Commerce Clause to invalidate a congressional edict in *United States v. Lopez*.⁵¹⁸

Animosity to Lochnerian jurisprudence has been based on three underlying premises: first, that judicial protection of economic liberties during the *Lochner* Era had no basis in the text or history of the Constitution, but was instead a manifestation of the reactionary political views of the judges involved; second, that courts invalidated progressive legislation meant to rein in corporate power and ameliorate the plight of the poor and vulnerable; and, third, that Lochnerism helped the wealthy and powerful at the expense of the rest of society, especially the poor and members of minority groups. Recent revisionist scholarship, however, has challenged each of these suppositions.

The remainder of this Article uses the Chinese laundry litigation to illuminate the debate between traditional anti-*Lochner* dogma and the new revisionist scholarship. In the years between *Slaughter-House* and *Lochner*, Chinese laundry cases, along with other cases involving challenges to anti-Chinese regulations, were among the most important vehicles through which judges implicitly rejected the *Slaughter-House* majority opinion and constructed a jurisprudence that protected economic liberties.⁵¹⁹

515. See WILLIAM WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 123 (1988) (finding that "*Lochner* has become in modern times a sort of negative touchstone").

516. 505 U.S. 833, 959-61 (1992) (Rehnquist, C.J., dissenting).

517. 512 U.S. 374, 405-11 (1994) (Stevens, J., dissenting).

518. 514 U.S. 549, 605-07 (1995) (Souter, J., dissenting).

519. See generally Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth*

These cases, while not necessarily definitive, provide the modern scholar with excellent data to test the traditional and revisionist theories.

A. *The Origins of Lochnerism*

From the very day *Lochner* was decided through the present, critics have argued that *Lochner* and related decisions had no basis in the text or history of the Constitution, but that they were instead based on the personal political preferences of the justices.⁵²⁰ Many legal scholars and historians claim that these predilections were based on the doctrines of Social Darwinism.⁵²¹

Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence, 29 U.S.F. L. REV. 353 (1995) (examining how the Chinese laundry cases contributed to 14th Amendment jurisprudence).

In some Chinese laundry cases, the courts explicitly cited the *Slaughter-House* dissents to justify their opinions. See, e.g., *In re Tie Loy*, 26 F. 611, 613-14 (C.C.D. Cal. 1886). In other cases, the courts used reasoning similar to the *Slaughter-House* dissents, but failed to explicitly cite to those dissents, or even, in some cases, to the Fourteenth Amendment, relying instead on the "supervisory power which judges thought they were entitled to exercise over the actions of municipal corporations under traditional common law principles." MCCLAIN, *supra* note 92, at 131.

520. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (criticizing *Lochner* majority for deciding the case based "upon an economic theory which a large part of the country does not entertain"); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 273 (1997) ("[C]ourts substitute[d] their own views of policy for those of legislative bodies."); ROBERT BORK, *THE TEMPTING OF AMERICA* 36-49 (1990) (arguing that the Court had no authority under the Constitution to invalidate economic legislation under the Due Process Clause); EDWARD S. CORWIN, *COURT OVER CONSTITUTION* 107-09 (1938) (claiming that the original interpretation of the Due Process Clause was limited to ensuring a fair trial for accused persons); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14-21 (1980); PAUL KENS, *JUSTICE STEPHEN FIELD* 6 (1997) ("The Court's critics claimed that judges had constructed these theories from thin air, that liberty of contract and substantive due process were not based on the words of the Constitution . . ."); AVIAM SOIFER, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 LAW & HIST. REV. 249, 250 (1987) (noting that *Lochner* "is still shorthand in constitutional law for the worst sins of subjective judicial activism").

521. See, e.g., DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* 42 (3d ed. 1992); PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 228 (2d ed. 1983); RICHARD HOFSTADER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 5-6 (rev. ed. 1955); CLYDE E. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS E. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* 24 (1954); PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* 5

Others argue that Lochnerian jurisprudence was rooted in hostility toward labor unions and favoritism toward large corporations.⁵²² Recently, Cass Sunstein's claim that Lochnerian judges

(1990); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 236 (1960); BENJAMIN TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 154 (1942); MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 104 (1949); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence, Part II*, 25 HARV. L. REV. 489, 496-99 (1912).

The purported tie between Lochnerism and Social Darwinism seems to be based on a misreading of Justice Holmes's dissent in *Lochner*, and little else. Holmes famously wrote that "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). A close reading of the context of the *Social Statics* remark reveals that Holmes was arguing that the *sic utere tuo ut alienum non laedes* principle—"use your own property in such a manner as not to injure that of another"—could not be the basis of American constitutional law. Holmes simply was using Spencer as an example of a prominent intellectual who believed the *sic utero* principle should be the basis of law. Holmes, however, was *not* accusing the Court of believing in Social Darwinism, or of otherwise being influenced by Spencer, whose works Holmes had never read. See PHILIP P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM 173 (1965) (noting that Holmes had never read Spencer).

John Gray has noted that it is unfair to caricature Spencer as a Social Darwinist. See JOHN GRAY, LIBERALISM 31 (1986). Spencer is more appropriately seen as a classical liberal evolutionist whose views were perverted by Progressives who shared his evolutionist methodology, but had illiberal political views. See *id.*

522. See BELL, *supra* note 521, at 35 ("Called upon to decide pressing questions concerning the relations of labor and capital, the power of state legislatures, and the rights of big business, the courts foreswore impartiality and came down heavily on the side of economic interests."); ARCHIBALD COX, THE COURT AND THE CONSTITUTION 135 (1987) (claiming the Supreme Court engaged in a "willful defense of wealth and power"); CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS 207 (1958) (criticizing "judge-made constitutional doctrines supported by the conservative groups of the country and fostered by the extreme individualism of leaders of industry and finance . . ."); JACOBS, *supra* note 521, at 24 ("The development of the liberty of contract as a limitation upon the powers of both the state and the national governments was a judicial answer to the demands of industrialists in the period of business expansion following the Civil War."); A.H. KELLY & W.H. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 498 (4th ed. 1970) (arguing that *Lochner*-Era judges were "concerned primarily with protecting the property rights and vested interests of big business," which manifested itself in the doctrine of freedom of contract); ARTHUR SELWYN MILLER, THE SUPREME COURT AND AMERICAN CAPITALISM 50, 57 (1968) (stating that courts protected economic activity from adverse governmental regulation, based on principles and opinions that "are singularly devoid of rational reasons for the decisions"); JOHN E. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920, at 430-31 (1978) (noting the Supreme Court's "hostility to union activity" and to "laws that encouraged unionism"); MELVIN UROFSKY, A MARCH OF LIBERTY: A CONSTITU-

believed that "[m]arket ordering under the common law was understood to be a part of nature rather than a legal construct," and formed a "baseline from which to measure" the constitutionality of state action⁵²³ has been very influential among legal scholars. The historical basis of Sunstein's claim, however, is extremely thin. In addition to *Lochner* itself, Sunstein cites only five out of the hundreds of state and federal cases decided between *Slaughter-House* and the New Deal relevant to his thesis, and even then misreads those cases from both a legal and economic perspective.⁵²⁴

Revisionists, meanwhile, have argued that *Lochner*ian jurists did not decide cases in a willfully political way, but genuinely tried to enforce what they saw as the mandates of the Fourteenth Amendment. Judges were confronted with a terribly vague Amendment, which does not describe what is meant by "privileges or immunities," "equal protection," or "due process." *Lochner*ian judges did not define these phrases by reference to the common law, the precepts of which were actually often used to deny liberty of contract claims.⁵²⁵ Rather, *Lochner*ian judges

TIONAL HISTORY OF THE UNITED STATES 553-55 (1988) (attributing the *Lochner* decision to anti-union bias by the Supreme Court); WIECEK, *supra* note 515, at 121 (finding that the Supreme Court and lower federal and state courts "distrusted labor organization[s]"); Robert L. Hale, *Labor Legislation as an Enlargement of Individual Liberty*, 15 AM. LAB. LEGAL REV. 155, 155 (1925) (arguing that the process of meeting the burden of proof in cases challenging labor legislation weighs in favor of big business).

523. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987).

524. The cases cited by Sunstein are *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), *Nebbia v. New York*, 291 U.S. 502 (1934), *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), *Bunting v. Oregon*, 243 U.S. 426 (1917), and *Muller v. Oregon*, 208 U.S. 412 (1908). See Sunstein, *supra* note 523, at 880-81. See generally Hovenkamp, *supra* note 13, at 382-83 (rejecting thesis that *Lochner*ian judges were "formalists").

Contrary to Sunstein's assumption that the courts relied on the common law to favor market ordering, common-law precepts were actually often used to deny liberty of contract claims. See, e.g., *Muller*, 208 U.S. at 418-23; *Patterson v. Bark Eudora*, 190 U.S. 169, 173-79 (1903); *Holden v. Hardy*, 169 U.S. 366, 368-74 (1898). Moreover, Sunstein assumes that laws establishing minimum wages and maximum hour laws served to redistribute income to the poor. See Sunstein, *supra* note 523, at 880. Minimum wage laws in fact price the unskilled out of the labor market to the benefit of other workers, while maximum hours laws, by their very nature, do not redistribute income, except perhaps among workers whose firms organize their labor utilization differently.

525. See, e.g., *Muller*, 208 U.S. at 419; *Holden*, 169 U.S. at 397. The author thanks

relied on two long-standing American intellectual traditions that heavily influenced American conceptions of liberty and the proper role of government in the post-bellum era.⁵²⁶ the tradition that valued "natural rights" and "free labor,"⁵²⁷ and the tradition that opposed "class legislation"—legislation that benefits politically powerful interest groups at the expense of other citizens.⁵²⁸

The Chinese laundry cases support the revisionist position. There is no hint of Social Darwinism in the opinions invalidating laundry regulation, nor is there any intimation of pro-corporation or anti-union bias. Indeed, neither large corporations nor labor unions were parties to any of the lawsuits. While labor unions generally may have been virulently anti-Chinese, and

John Goldberg for raising this point.

526. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 346-49 (1978); EARL M. MALTZ, *CIVIL RIGHTS, THE CONSTITUTION AND CONGRESS, 1863-1869* (1990); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

527. See, e.g., JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910*, at 77 (1995) (suggesting that natural law precepts, not Social Darwinism, influenced Justice David Brewer, a prominent Supreme Court proponent of laissez-faire ideology); KENS, *supra* note 520, at 7 (discussing Justice Field); Daniel R. Ernst, *Free Labor, the Consumer Interest, and the Law of Industrial Disputes, 1885-1900*, 36 AM. J. LEGAL HIST. 19, 19 (1992) (stating that *Lochner*-Era judges "acted to uphold a system of values which they termed the free labor system"); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 782-86 (noting courts' reliance on "free labor" ideology); Charles W. McCurdy, *The Roots of "Liberty of Contract" Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20, 24-26 (arguing that *Lochner*-Era judges viewed labor contracts as a special sort of contract because of the dominant "free labor ideology"); William E. Nelson, *The Impact of the Anti-slavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 558-60 (1974).

528. See MICHAEL J. BRODHEAD, DAVID J. BREWER: *THE LIFE OF A SUPREME COURT JUSTICE, 1837-1910*, at 120 (1994); HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 33-45 (1993) (discussing the Jacksonian origins of laissez-faire jurisprudence); KENS, *supra* note 520, at 7 (discussing Justice Field); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV. 293, 293-94 (1985); Ely, *supra* note 10, at 46; Lawrence M. Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 CAL. L. REV. 487, 527 (1965); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 973-74 (1975); McCurdy, *supra* note 527, at 26; Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 248 n.211 (1997).

corporations that needed labor were more Sinophilic, it would be an unwarranted, even absurd, stretch to argue that Lochnerian courts favored the Chinese laundrymen to aid corporations and harm unions. In several of the pro-Chinese cases, in fact, judges noted their objections to the laundry laws' tendency to drive out small laundries and favor large corporate entities.⁵²⁹

Although pro-Chinese laundry decisions fail to reveal economic class bias, the opinions do illustrate courts' commitment to the natural rights/free labor theory. For example, the Superior Court of Alameda County invalidated a maximum hours law because the law interfered "with the natural and inalienable right of every individual . . . to life, liberty and the pursuit of happiness, and to acquire, hold and enjoy property."⁵³⁰ Judge Sawyer, objecting to Stockton's laundry zoning law, wrote that the ordinance violated the Fourteenth Amendment's right to labor, "one of the highest privileges and immunities secured by the constitution to every American citizen, and to every person residing within its protection."⁵³¹ Sawyer found that another laundry zoning ordinance violated the Fourteenth Amendment because it "abridge[d] the liberty of the owner to select his own occupation and his own methods in the pursuit of happiness, and thereby prevent[ed] him from enjoying his rights, privileges, and immunities, and deprive[d] him of equal protection of the laws."⁵³²

In *In re Quong Woo*,⁵³³ Justice Field objected to a laundry licensing ordinance because San Francisco had placed unnecessary obstacles in the way of those who sought to pursue an ordinary and useful trade.⁵³⁴ A city, Field added, may not use its licensing power "as a means of prohibiting any of the avocations of life which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety."⁵³⁵ Finally, in *Yick Wo*, the Supreme Court analogized the unmiti-

529. See, e.g., *In re Wo Lee*, 26 F. 471, 474 (1886).

530. *In re Woo Yeck*, 12 Pac. Coast L.J. 382, 383 (Cal. App. Dep't Super. Ct. 1883).

531. *In re Tie Loy* (The Stockton Laundry Case), 26 F. 611, 613 (C.C.D. Cal. 1886).

532. *In re Sam Kee*, 31 F. 680, 681 (C.C.N.D. Cal. 1887).

533. 13 F. 229 (C.C.D. Cal. 1882).

534. See *id.* at 233.

535. *Id.*

gated discretion given to the San Francisco supervisors over Chinese laundries to "the essence of slavery itself."⁵³⁶

Judges also expressed their opposition to class legislation when invalidating laundry laws. A San Francisco judge, for example, invalidated a license fee because it was an "unequal and discriminating" law that "discriminat[ed] unjustly against the poor, wantonly and unnecessarily add[ed] to their burden, and substantially prohibit[ed] them from the pursuit of a useful and worthy calling."⁵³⁷ In a Montana case voiding a taxation scheme that taxed Chinese-owned hand laundries far higher than white-owned steam laundries, the court concluded that the statute at issue was an unequal, discriminatory law that could not be sustained under the Fourteenth Amendment's Equal Protection Clause or the 1866 Civil Rights Act.⁵³⁸ In *In re Quong Woo*,⁵³⁹ Justice Field invalidated the laundry licensing ordinance on the ground that a city's ordinances "must be reasonable,—that is, not oppressive nor unequal nor unjust in their operation."⁵⁴⁰ Even the Supreme Court's *Yick Wo* opinion, often regarded as a harbinger of modern equal protection doctrine, was steeped in the language of the anti-class legislation tradition: "[T]he facts shown establish an administration directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners."⁵⁴¹

B. What Type of Regulations Did Lochnerian Courts Invalidate?

Legal scholars and historians have simply assumed that economic legislation invalidated by Lochnerian courts was generally wise regulation meant to protect consumers or workers as a class from their inequality of bargaining power with increasingly

536. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

537. *Chinese Laundry Ordinance*, *supra* note 406, at 3 (publishing Judge Stanley's opinion in *People v. Soon Kung*).

538. See *In re Yot Sang*, 75 F. 983, 985 (D. Mont. 1896), *rev'd on other grounds sub nom.* *Jurgens v. Yot Sang*, 171 U.S. 686 (1898).

539. 13 F. 229 (C.C.D. Cal. 1882).

540. *Id.* at 232.

541. *Yick Wo*, 118 U.S. at 373.

rapacious corporations.⁵⁴² These views are based implicitly either on old-fashioned Marxian class analysis or on Progressive optimism about the role of government in regulating economic affairs.⁵⁴³

Revisionists, meanwhile, note that modern law and economics scholarship has cast serious doubt on the proposition that "progressive" regulation in fact served the public interest. Public choice theory suggests that much regulation inevitably serves the cause of particular special interests, not the public as a whole, while empirical studies of regulations typically find that they harm consumers and workers.⁵⁴⁴ As Jim Ely concludes: "[I]t unfairly loads the historical deck to presume the benign purpose and effect of so-called reform legislation."⁵⁴⁵ Indeed, some revi-

542. See, e.g., PAUL, *supra* note 521, at 236. For early versions of this criticism, see Louis M. Greeley, *The Changing Attitude of the Courts Toward Social Legislation*, 5 U. ILL. L. REV. 222, 226-32 (1910); Albert M. Kales, "Due Process," *The Inarticulate Major Premise and the Adamson Act*, 26 YALE L.J. 519, 523 (1917); Thomas Reed Powell, *Collective Bargaining Before the Supreme Court*, 33 POL. SCI. Q. 396, 397-429 (1918); Margaret Spahr, *Natural Law, Due Process and Economic Pressure*, 24 AM. POL. SCI. REV. 332, 332-54 (1930); cf. LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF 149-50 ("Lochner's critics pointed out that bakers 'chose' to enter such contracts while caught in a social and economic setting that dictated a particular outcome. Government intervention was justified to control private forces that coerced workers and other vulnerable groups to act in certain ways."); James W. Ely, Jr., *Economic Due Process Revisited*, 44 VAND. L. REV. 213, 213 (1991) ("In many constitutional histories the presentation of economic issues between 1880 and 1937 resembles a Victorian melodrama. A dastardly Supreme Court is pictured as frustrating noble reformers who sought to impose beneficent regulations on giant business enterprises.").

543. See generally Christopher T. Wonnell, *The Influential Myth of a Generalized Conflict of Interests Between Labor and Management*, 81 GEO. L.J. 39 (1992) (discussing the falsely perceived tension between labor and management).

544. Ronald Coase concluded that studies of regulation, published in the *Journal of Law and Economics*,

tend to suggest that the regulation is either ineffective or that, when it has a noticeable impact, on balance the effect is bad, so that consumers obtain a worse product or a higher-priced product or both as a result of the regulation. Indeed, this result is found so uniformly as to create a puzzle: one would expect to find, in all these studies, at least some government programs that do more good than harm.

Ronald H. Coase, *Economists and Public Policy*, in *LARGE CORPORATIONS IN A CHANGING SOCIETY* 169, 184 (J. Fred Weston ed., 1974); see also Bernard H. Siegan, *Separation of Powers & Economic Liberties*, 70 NOTRE DAME L. REV. 415, 475 (1995) (explaining that even if a regulation is based on good intentions, its final form may not serve the interests of the public).

545. Ely, *supra* note 10, at 46 (finding that "much regulation has resulted in the

sionists not only refuse to presume that reform legislation was benign, but also contend that certain categories of regulation strongly endorsed by progressives, including zoning,⁵⁴⁶ licensing laws,⁵⁴⁷ protective laws for women,⁵⁴⁸ and maximum hours laws,⁵⁴⁹ frequently worked to harm immigrants, women, and members of racial minority groups.

The history of anti-Chinese laundry legislation provides further evidence that much regulatory legislation was not wise or humane, but anti-competitive and discriminatory. The use of zoning laws, licensing laws, maximum hours laws, and protective laws for women to stifle the Chinese laundry business preceded the more general dissemination of such laws throughout the country. Montana passed its first law protecting women launderers from Chinese competitors in 1869,⁵⁵⁰ decades before Progressive activists began lobbying for protective legislation for women workers. The earliest zoning laws were used to regulate Chinese laundries, and these laws may have served as models for later zoning.⁵⁵¹ Maximum hours laws applicable to the private sector seem to have been another regulatory innovation used initially against Chinese laundries before being used more

reduction of economic efficiency, misallocation of resources, and redistribution of income from the consumer to the regulated group").

546. See EPSTEIN, *supra* note 13, at 114-15; Bernstein, *Philip Sober*, *supra* note 13, at 862-64; Ely, *supra* note 3, at 958-60; Epstein, *supra* note 13, at 788-89; William A. Fischel, *Why Judicial Reversal of Apartheid Made a Difference*, 51 VAND. L. REV. 975, 979-81 (1998).

547. See Bernstein, *Licensing Laws*, *supra* note 13, at 89.

548. See Bernstein, Note, *supra* note 13, at 736-37.

549. See EPSTEIN, *supra* note 13, at 298; Bernstein, Note, *supra* note 13, at 729-33.

550. Amendment to Act Relative to Elections of 1865 § 6, 1870 Mont. Laws 55 (indicating that the laws only applied to *male* launderers, a class dominated by the Chinese); Act Providing for the Collection of Revenue § 20, 1869 Mont. Laws 61.

551. As Gordon Whitnall wrote:

It must be granted that in those early days a laundry was almost synonymous with Chinamen, and the [zoning] regulation was unquestionably a move towards racial segregation. However, that purpose is not openly stated, and now that the racial element is eliminated, we can look back upon that early legislative act and find that the regulation it imposed, so far as we can reconstruct the conditions that then prevailed and from what we know of the city now, would be thoroughly in keeping with all of the accepted practices of zoning.

Gordon Whitnall, *History of Zoning*, 155 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 9 (1931).

widely. Licensing laws, although used against the Chinese in San Francisco and Los Angeles in the 1880s, did not "achieve [] a firm foothold in the statute-books of most American states" until after 1890.⁵⁵²

This does not suggest that all economic regulations had discriminatory intent and/or effects, but does indicate that the growing state and local regulatory apparatuses of the late nineteenth century and early twentieth century drew not only on reformist impulses, but also from a deep well of prejudice and exclusionary sentiment. Moreover, to the extent that the Chinese laundry cases influenced judicial attitudes toward regulation and contributed to the development of Lochnerian jurisprudence, the courts had good reasons to develop doctrines that ensured that regulatory legislation was truly public-spirited and not "passed from other motives."⁵⁵³

C. *Who Did Lochnerian Jurisprudence Help?*

Traditionally, legal scholars and historians have accused Lochnerian courts of "an unadorned endorsement of the strong and wealthy at the expense of the weak and poor."⁵⁵⁴ Liberty of contract, a typical jeremiad proclaims, "meant freedom of the rich to impose terms."⁵⁵⁵ According to one prominent legal historian, "[t]he result in *Lochner* was that the Constitution was virtually treated as a legal sanction of the Survival of the Fittest."⁵⁵⁶ Derrick Bell even purports to find an implicit connection between Lochnerian ideology and racism.⁵⁵⁷

Revisionists, by contrast, note that Lochnerian courts never invalidated widows' pensions, poor laws, or other legislation that clearly redistributed wealth to the poor.⁵⁵⁸ Rather, the courts,

552. Friedman, *supra* note 528, at 489.

553. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

554. MCCLOSKEY, *supra* note 4, at 84.

555. WIECEK, *supra* note 515, at 126 (quoting "the comparable and contemporaneous English doctrine").

556. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 202 (1993).

557. See Derrick Bell, *Does Discrimination Make Economic Sense?*, HUM. RTS., Fall 1988, at 38, 41-42.

558. See Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1362 n.17 (1983).

consistent with anti-class legislation and free labor ideology, opposed both legislation that seemed to redistribute wealth from the public at large to a special interest group, and legislation that seemed to interfere unreasonably with occupational freedom. The people who benefitted most from Lochnerian jurisprudence were those least capable of defending their interests in the political process: poor and disenfranchised aliens, women, and blacks.⁵⁵⁹ Lochnerian jurisprudence, however, was too tepid and was applied far too inconsistently to be of great aid to political outsiders.⁵⁶⁰

Once again, the Chinese laundry cases support the revisionists' point of view. Appeals to Lochnerism were the Chinese litigants' only recourse against facially neutral legislation passed with discriminatory intent. Courts rejected notions akin to modern equal protection doctrine requiring courts to invalidate laws passed with discriminatory intent if the laws have discriminatory effects.⁵⁶¹

In *Soon Hing v. Crowley*,⁵⁶² for example, the Supreme Court unanimously held that a regulatory statute could be declared unconstitutional for discriminating against a minority group *only* if the language of the statute was explicitly discriminatory⁵⁶³ or if "in its enforcement it is made to operate *only* against the class mentioned."⁵⁶⁴ More subtle discriminatory effects and/or discriminatory motives not apparent from the language of the statute would not render a law unconstitutional.⁵⁶⁵ This remained the law well into the twentieth century. In a 1916 laundry case, for example, a federal judge, who was otherwise

559. See Bernstein, Note, *supra* note 13, at 736-37.

560. See generally EPSTEIN, *supra* note 13, at 108 ("Lochner stood for small (but not small enough) government."); Bernstein, *Law and Economics*, *supra* note 13, at 838-39 ("[O]ppressed African-Americans were often the victims of too little judicial hostility to regulation, not too much.").

561. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985).

562. 113 U.S. 703 (1885).

563. See *id.* at 710.

564. *Id.* at 711 (emphasis added).

565. See *id.*; see also *Chinese Laundry Ordinance*, *supra* note 406, at 3 (publishing Judge Stanley's opinion in *People v. Soon Kung*, where Judge Stanley wrote that the "suggestion has been made that the order was intended to apply primarily to a race of persons not expressly designated in it. However that may be, this Court has nothing to do with the secret motives or intentions of the body which passed the order").

sympathetic to the Chinese plaintiff's claim, stated that a law passed with discriminatory motives did not violate the Equal Protection Clause if the law is fair on its face and capable of impartial application.⁵⁶⁶

Although claims of anti-Chinese discrimination were generally unavailing,⁵⁶⁷ courts that applied Lochnerian principles to anti-Chinese laundry laws almost always invalidated such laws. By contrast, when courts instead deferred to the states' police power, they almost always upheld the oppressive laws.

The importance of Lochnerism to protecting Chinese laundrymen can be seen from a review of several cases involving challenges to maximum hours statutes. In *Soon Hing*, the Court rejected the argument that such a law violated the right of workers to choose their hours of labor.⁵⁶⁸ According to the Court, laws regulating the hours of labor, rather than being class legislation or violations of free labor principles, "have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."⁵⁶⁹

Just twenty years later, in *Lochner*, the Supreme Court invalidated a maximum hours laws that applied only to bakery workers.⁵⁷⁰ The Court held that the law was not within the police power because baking was not a particularly unhealthful occupation.⁵⁷¹ The law, the Court argued, was not passed to protect the public health or the health of bakers, but was class legislation passed for "other motives."⁵⁷² The Court concluded that the hours law violated the right of workers to negotiate their conditions of labor under the Fourteenth Amendment.⁵⁷³

566. See *Yee Gee v. City of San Francisco*, 235 F. 757, 760 (N.D. Cal. 1916); see also *Ex parte San Chung*, 105 P. 609, 611 (Cal. Dist. Ct. App. 1909).

567. But see *Quong Wing v. Kirkendall*, 223 U.S. 59, 63 (1912) (noting the statute would be unconstitutional if found to be discriminating); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (invalidating laundry regulation because it applied solely to the Chinese).

568. See *Soon Hing*, 113 U.S. at 710-11.

569. *Id.* at 710.

570. See *Lochner v. New York*, 198 U.S. 45, 59 (1905).

571. See *id.* at 64.

572. *Id.*

573. See *id.* at 58.

The Court's reversal on this issue led to salutary results for Chinese laundrymen. In *Yee Gee v. City of San Francisco*,⁵⁷⁴ a federal district court invalidated a San Francisco maximum hours law for laundries.⁵⁷⁵ As discussed above, the court relied heavily on *Lochner* in its decision.⁵⁷⁶ The court concluded that the maximum hours law was "an unreasonable interference with the liberty of the citizen in the prosecution of his occupation," and had "no real or substantial relation" to any purported public purpose.⁵⁷⁷ As with the kindred regulation in *Lochner*, the municipality passed the laundry law under the pretense of being a police power regulation, but the law was "in reality passed from other motives."⁵⁷⁸ Similarly, in *In re Mark*,⁵⁷⁹ the California Supreme Court found that Oakland's laundry hours law was unconstitutional under *Lochner* and like-minded cases.⁵⁸⁰

These maximum hours cases demonstrate the utility of Lochnerian jurisprudence for disenfranchised minorities and others without power in the political system. Courts adhering to either Lochnerism or modern equal protection doctrine would have invalidated the statute at issue in *Soon Hing* because it had blatantly discriminatory origins and obvious discriminatory effects, and interfered with liberty of contract. Unlike Lochnerism, however, modern equal protection notions would not have helped the laundrymen in *Yee Gee*, as the statute at issue in that case was passed primarily to aid members of a labor union, not to harm the Chinese. Nor would modern equal protection doctrine have aided Byron Mark, unless he had been able to prove that the law under which he was charged had discriminatory origins and effects, neither of which could have been obvious to the court. As Richard Epstein points out, "[i]t is far easier to control government abuse by enforcing the constitutional limitations on legislative power in the first instance" than by "try[ing] to filter out the discriminatory uses from the legitimate ones."⁵⁸¹

574. 235 F. 757 (N.D. Cal. 1916).

575. See *id.* at 769.

576. See *supra* notes 196-216 and accompanying text.

577. *Yee Gee*, 235 F. at 767.

578. See *id.* at 768 (quoting *Lochner*, 198 U.S. at 64).

579. 58 P.2d 913 (Cal. 1936).

580. See *id.* at 916.

581. EPSTEIN, *supra* note 13, at 115.

By policing the legislative process to prohibit special interest legislation and legislation interfering with a free labor market, Lochnerian courts protected the disenfranchised from regulations that neglected their interests. The significance of this protection should not be underestimated. Between aliens, blacks, foreign-born Asians, and until passage of the Nineteenth Amendment, women in some states, a huge percentage of the American population was incapable of defending itself in the legislative process. Moreover, public choice theory suggests that voting citizens who belong to dispersed majorities often suffer at the hands of concentrated special interest groups that wield disproportionate political power. Contrary to traditional assumptions, many of the conflicts that reached the courts during the *Lochner* Era did not primarily involve laws that protected workers against businessmen or consumers against corporations. Rather, the laws at issue pitted organized workers against unorganized workers, large corporations with political influence against upstarts, and special interests against the public at large.

One response to this revisionist viewpoint is to assert that Lochnerian decisions protecting disenfranchised minorities were largely irrelevant because hostile majorities were typically able to achieve their goals through violence, intimidation, boycotts, and discrimination not supported by state action.⁵⁸² The Chinese laundry cases, however, provide an example in which Lochnerism made a difference. Protected by federal and some state courts from much of the discriminatory legislation targeting them, Chinese laundries thrived throughout the West, even in cities where they faced organized boycotts, including Butte,⁵⁸³

582. See Michael J. Klarman, *Race and the Supreme Court in the Progressive Era*, 51 VAND. L. REV. 881, 939 (1998).

583. Boycotts of the Chinese in Butte, Montana during the mid-1880s and early 1890s proved fruitless. See Frisch, *supra* note 78, at 169-70, 174, 176-77. A more serious boycott of Chinese laundries in late 1896 started after the *Yot Sang* court declared Montana's new laundry law unconstitutional. See Flaherty, *supra* note 78, at 36. The proprietors of three leading steam laundries, the Hotel and Restaurant Keepers, and the Cooks and Waiters' union led the boycott. After a titanic struggle, the boycott failed. See *id.* at 46-47. Between 1895 and 1900, the number of Chinese laundries in Butte grew from 18 to 31. See Lee, *supra* note 47, at 51. The number of white-owned laundries, meanwhile, declined from 11 to 9, and declined further to

Chico,⁵⁸⁴ Helena,⁵⁸⁵ Los Angeles,⁵⁸⁶ Prescott,⁵⁸⁷ and Salt Lake City.⁵⁸⁸

Another response to the revisionist viewpoint is that the protection of despised and disenfranchised groups was frequently a fortuitous byproduct of Lochnerism's hostility to special interest legislation rather than a conscious decision by the courts to protect these groups. This point should be readily conceded; as

5 by 1905, even though the Chinese still ran 31 laundries. *See id.* at 53.

584. Anti-Chinese forces launched an unsuccessful boycott of laundries in Chico, California in 1877. *See Shover, supra* note 78, at 233.

585. On January 27, 1866, a Helena newspaper published a notice, signed by "A Committee of Ladies," complaining about "Mongolian hordes" who were driving white women out of the laundry business. John R. Wunder, *Law and Chinese in Frontier Montana*, MONT.: MAG. W. HIST., Summer 1980, at 18, 20. The committee called on the community to boycott all Chinese launderers. *See id.* The editor of the newspaper in which the ad appeared wrote that the committee had his support "against the almond-eyed citizens of the John persuasion," and asked local residents to support the boycott. *Id.* (quoting T.J. Favorite, the editor of the *Montana Radiator* in an article appearing in the newspaper on January 24, 1866). The boycott failed. *See id.*

586. Labor unions launched a boycott of Chinese businesses, including laundries, in 1886. *See Lou, Chinese-American Agricultural Workers, supra* note 78, at 57. The boycott failed miserably, largely because of the opposition of white middle class women. *See id.* at 58. These women sympathized with the Chinese and also appreciated the fact that the Chinese undertook many domestic chores, such as laundering, that the women would otherwise have had to do themselves. *See id.* at 49, 58. The number of Chinese laundries in Los Angeles grew from 11 in 1872 to 52 in 1890. *See id.* at 307 n.9.

587. In 1878, the *Enterprise*, a local newspaper, called for a boycott of Chinese laundries. *See Lister & Lister, supra* note 43, at 53-54. The newspaper editorialized: "As washermen, they have never had any mercy on white men and women's clothing. . . . Why, then, not start one or two steam laundries here, white laboring men and women, and earn the money that now goes into heathen hands?" *Id.* at 54. Two white women started a hand laundry, but it failed. *See id.* In 1886, at the height of anti-Chinese sentiment in the West, and with rioting throughout the West, a group of citizens organized an Anti-Chinese League. *See id.* at 57-59. Among its ventures was a new business called the "White Laundry." *Id.* at 61. Still, the Chinese laundries survived, and even thrived. In 1900, an advertisement in a local newspaper placed by a white laundry owner appealed to anti-Chinese sentiment in an attempt to win customers:

Do the Chinese support the schools: Nit! Do the chinks spend their money where they make it? Nein! Are they a credit to the country or an honor to the town? Nixey! Then why not send your clothes to a white institution? Hey? The Prescott Steam Laundry invites your patronage. D. M. Clark, Proprietor.

Id. at 71.

588. *See Daniel Liestman, Utah's Chinatown*, 63 UTAH HIST. Q. 70 (1996).

noted previously, for example, many of the judges that ruled in favor of the Chinese had a rather low opinion of them. But the fact that judges who despised the Chinese nevertheless protected their occupational liberty is actually part of Lochnerism's allure. Lochnerian free labor and anti-class legislation doctrines provided neutral principles that shielded groups such as the Chinese from harmful legislation without relying on judges to rise above the prejudices of their society.

CONCLUSION

Legal theory too often relies on understandings of legal history based on myth and speculation, as opposed to empirical historical evidence, including evidence gleaned from relevant cases. For example, the debate over whether *Neuborne's* anti-parity thesis relies too heavily on the anomalous Warren Court Era has involved much speculation but little historical investigation. Careful study of the Chinese laundry cases reveals that, consistent with the anti-parity view, federal courts have at least sometimes been superior guardians of federal constitutional rights outside the narrow context of the Warren Court Era.

The laundry cases also provide evidence that the entrenched theories regarding the origins and effects of Lochnerian jurisprudence are mistaken. Investigation of the laundry cases supports the thesis. Lochnerism originated not in reactionary politics or judicial commitment to common-law baselines, but in judicial commitment to free labor principles and judicial opposition to class legislation. Moreover, the laundry cases suggest, consistent with revisionist scholarship, that laws invalidated by Lochnerian courts were not the universally wise, public-spirited legislation of legal-historical myth. Rather, they were often special interest legislation that harmed the most defenseless elements of society. Finally in the context of Chinese laundry cases, as in other contexts, Lochnerian decisions did not systematically favor the rich over the poor, but favored the politically humble over the politically powerful. In short, this Article adds to the growing literature suggesting that the redistributive effects of Lochnerism were far more egalitarian than legal scholarship has typically acknowledged.