

## AN ASIAN AMERICAN LOOKS AT THE BILL OF RIGHTS

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In 1990, activities to commemorate Congress' enactment of the Bill of Rights in 1790 paid little attention to the Immigration and Nationality Act, 8 U.S.C. § 703, adopted during the same year. The Act limited eligibility for naturalized citizenship to "free white persons." By using that language, Congress put into motion an exclusionary process which would shape the future of Asian Americans and their communities for 150 years.

Exclusion of Asians from eligibility for citizenship meant that Asian Americans could not run for office and were unlikely to be appointed to positions of political power. Only citizens were eligible to vote and run for political office. The "free white persons" rule also explains the small number of Asian Americans in decision-making positions across the U.S. political-economic spectrum. It additionally explains the persistent stereotype labeling of Asian Americans as foreigners despite their long residence in the United States. This foreigner status precluded most Asian Americans from availing themselves of protections afforded by the Bill of Rights. Further, it explains the occupational segregation Asian Americans have experienced while trying to survive in the United States. Today, the effects of the "free white person" rule are all

around us, most notably through recent incidents of anti-Asian violence.

The courts interpreted Congress' restrictions under the Immigration and Nationality Act to apply broadly to other rights guaranteed to "free white persons." In 1854, Chief Justice James Murray of the California Supreme Court held that a Chinese person could not testify in a California court of law because:

[t]he same rule which would admit [Asians] to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls.

This is not a speculation which exists in the excited and overheated imagination of the patriot and statesman, but it is an actual and present danger.<sup>1</sup>

In 1892, the U.S. Supreme Court held that Chinese immigrants were entitled to fewer legal protections because of their ineligibility for citizenship:

[The Immigration and Nationality Act], like any other, is subject to alteration by Congress whenever

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the public welfare requires it. The right of protection which it confers is limited to citizens of the United States. Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws.<sup>2</sup>

The "free white person" restriction disqualified Asian American immigrants from ever serving in decision-making positions of government. Only American-born Asians could meet the citizenship requirements. Legislative efforts to restrict Asian immigration were directed at limiting the pool of American-born Asians by restricting the number of Asian women and families residing in the United States. In December of 1874, President Ulysses S. Grant targeted Asian women in his address to Congress:

The great proportion of the Chinese immigrants who come to our shores do not come voluntarily . . . [and] [i]n a worse form does this apply to Chinese women. Hardly a perceptible percentage of them perform any honorable labor, but they are brought for shameful purposes, to the disgrace of the communities where settled and to the great demoralization of the youth of these localities. If this evil practice can be legislated against, it will be my pleasure as well as duty to enforce any regulation to secure so desirable an end.<sup>3</sup>

On March 3, 1875 the President signed a law<sup>4</sup> designed to prohibit importation of Asian women for immoral purposes.<sup>5</sup> The Immigration Act of March 3, 1875 authorized the "U.S. consul-general to ascertain whether (any subject of China, Japan, or any Oriental country) has entered into a contract or agreement for a term of service within the United States for lewd and immoral purposes."<sup>6</sup> The Act declared "that the importation into the United States of women for the purpose of prostitution is hereby forbidden."<sup>7</sup>

In testimony before a Senate committee in 1876, former California Governor Frederick F. Low echoed President Grant's views of Chinese women:

Of the women, but very few, rarely any, come of their own will, but they are bought in China, generally from brothels, to be sold here on arrival or held by importers in brothels here. Of those few rare instances, there are some who send to China direct for mistresses, purchasing there rather than to rely on the limited market here afforded. But they are commodities . . . The coolie women, or bauds, make a business traveling to and from China, conducting this trade.<sup>8</sup>

The government relied upon that stereotypical view of Asian women to justify their exclusion from immigration to the United States. Additional legislation was adopted to outlaw importation of "coolie" labor, directed exclusively at Chinese immigrants.<sup>9</sup>

In the minds of those opposing Asian immigration to the United States, exclusion played a key role in politically disabling the Asian-American community. Former California Governor Henry H. Haight explained to Congress his support for immigration exclusion of Chinese in the same Senate hearings in 1876:

The reasons that operate most strongly upon my mind are those of a political and moral character. When I use the word "political" I do not use it, of course, in a partisan sense. I do not think it is desirable to have any considerable class of people in the country who cannot be entrusted with the ballot. The Chinese, as we all understand here, . . . are unfit to exercise the elective franchise. . . . They have no conception whatever of the responsibilities attending the exercise of that duty under a republican government, and their votes would be controlled by the use of money, and in small amounts probably.<sup>10</sup>

Writing more than thirty years later, Walter MacArthur, editor of the *Coast Seaman's Journal*, made clear that:

The opposition to Oriental immigration is justified upon the single ground of race. Whether the incompatibility of the peoples of Asia and America can be attributed to race repulsion, race antipodalism, or race prejudice, one undisputable group of race conflict remains,

namely that of race difference. The race difference between these peoples is radical and irreconcilable, because it reaches to the most fundamental characteristics of each. . . . Only upon the race ground can we comprehend the real nature and dimensions of the subject. Considered from this standpoint, exclusion follows as the inescapable law of our national safety and progress. . . . Recognizing the race aspect of the subject as the main ground of exclusion, the minor grounds such as those of an economic or political nature, serve to reinforce the argument as so many corollaries.<sup>11</sup>

Such arguments persuaded Congress to maintain the exclusion of Asians from residence as well as every other aspect of American social and political life for nearly seventy years. Explaining the role which mainstream America had set aside for Asians, Chester H. Rowell, Editor of the *Fresno Republican*, wrote from California:

We find the Chinese fitting much better than the Japanese into the status which the white American prefers them both to occupy--that of biped domestic animals in the white man's service.<sup>12</sup>

The relegation of Asian Americans to the status of "animals in the white man's service" required legalized exclusion from citizenship; immigration exclusion,

particularly of women in order to limit the birthrate; and socialized exclusion enforced by a stereotype of Asians as unfit to partake in the political process.

The combined effect of the legal and social exclusions was to bar Asian Americans from most government jobs, since most government jobs required citizenship. The absence of Asian Americans in government employment reinforced the impression that Asian Americans were a foreign and disenfranchised people in the United States. For Asian Americans, the restrictions upon eligibility to citizenship began to fall, beginning with Chinese Americans, in the mid-1940s and finally for all Asian Americans in 1952 when Title 8 § 703 was repealed by Congress. Until that time, attempts by Asians to overturn the Congressional limitations on eligibility to citizenship had been consistently denied by the courts.<sup>13</sup>

The "free white person" legislative basis for exclusion of Asians from citizenship allowed the courts to articulate the notion of Asian Americans as foreigners:

The anomalous spectacle of a distant people, living in our community, recognizing no laws of this state except through necessity, and bringing with them their prejudices, national feuds, in which they indulge in open violation of law; whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has

shown; differing in language, opinions, color, and physical conformation; between them and ourselves nature has placed an impassable difference, is now presented, and for them, is claimed not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our government.<sup>14</sup>

The foreigner stereotype had a distinctly Western bias; in particular, Asians were viewed as incapable of understanding, much less adopting, the Western value system. Asian cultural values were considered diametrically opposed to all that white European Americans held dear.<sup>15</sup> As a result, Asian American influence on American society had to be strictly circumscribed by law, by custom, and by thought.<sup>16</sup> The "foreigner" label achieved that end by granting policymakers a justification for further exclusion as well as constructing a social barrier between the society and Asian Americans. Asian American contributions to the transcontinental railway were omitted from history books; Asian American efforts to exercise skills and talents beyond agriculture, gardening and laundries were restricted.<sup>17</sup> Exclusion of Asian Americans from the social decision-making apparatus became the order of the day. The foreigner status was a pillar upon which further stereotypes could be developed and molded to fit the political needs of the time.<sup>18</sup> Social segregation enhanced the influence of the stereotypes while giving credence to the proponents of the "Asiatic menace."<sup>19</sup>

When asked whether allowing Chinese to become citizens would "encourage a better class of Chinese immigration," former Governor Haight testified as follows:

Not at all. They have no conception of that thing. They do not understand it. The only idea, as far as my observation goes, that they could have in that connection would be a possible source of pecuniary profit. . . . They seem to be incapable of forming any opinion of constitutional liberty; that is to say, liberty under a republican government. . . .<sup>20</sup>

When asked whether Chinese were mentally capable of understanding and appreciating citizenship and enjoying equal political rights, former Governor Haight stated:

They are morally and intellectually incapable, I think . . . they have some mental capacity; they are quick in some things; but it seems to me that ingrained into the race for generations are certain qualities of mind which incapacitate the present generation from ever acquiring that sort of knowledge which it is necessary to have for any useful exercise of the elective franchise.<sup>21</sup>

Asian Americans were ineligible for citizenship based on race. Unfortunately, the U.S. Government went further and treated even U.S. citizens of Asian descent

as foreigners. During World War II, the U.S. Western Military District identified Japanese American citizens in the evacuation instructions as "non-alien." In American naturalization law, however, only two categories of residents exist, aliens and citizens. Thus, by using "non-alien," the Government effectively relegated citizens of Asian ancestry to second-class status.

Under the Bill of Rights that was so highly celebrated in 1990, a person accused of a crime is presumed innocent. The government must meet the burden of proving guilt beyond a reasonable doubt. According to the Fifth Amendment, no person is to "be deprived of life, liberty, or property, without due process of law."<sup>22</sup> While Americans of Italian and German ancestry were accorded these protections during wartime in investigations of espionage, Japanese Americans were evacuated wholesale into the internment camps without any due process. All were considered suspect by virtue of their race. The Government did not have to meet any burden of proof as to any individual internee. Even when the issue went before the U.S. Supreme Court, the Court upheld the evacuation of all Japanese Americans on the grounds that some internees had failed to renounce all allegiance to the Japanese Emperor.<sup>23</sup>

Perpetuation of the foreigner myth was ideologically essential to the forcible and systematic exclusion of Asian Americans from the mainstream of U.S. society. Physical violence against the Asian Americans was a complement to legalized exclusion of the "foreigners" who were not entitled to the same rights as "free white persons." Asian Americans were not permitted to testify

against whites who physically assaulted and murdered Asian Americans.<sup>24</sup> Without any Asian Americans in decision-making positions, they also lacked political recourse to redress the violence.<sup>25</sup> Because white supremacists were not held accountable for their violent acts, other persons were encouraged to attack and exploit Asian Americans.<sup>26</sup>

The cycle persists today. In a recent example, both defendants accused of murdering Vincent Chin in 1982 were placed on probation and one was fined \$3,000 by a Detroit judge.<sup>27</sup> Charges of civil rights violations in federal court were ultimately dismissed on appeal.<sup>28</sup> Since that time, numerous incidents of anti-Asian violence have occurred in Philadelphia and across the United States.<sup>29</sup> The same racist stereotypes persist today and encourage similar exclusionary activities.

Many industries and professions adopted citizenship requirements as entry barriers. In 1890, Hong Yen Chang sought admission to the California Bar for the practice of law and was denied on the grounds of his ineligibility for citizenship.<sup>30</sup> Similarly, in the early twentieth century, a Japanese-American lawyer sought admission to the Washington State Bar and was denied on the same ground.<sup>31</sup> In addition, Asian Americans were also excluded for this reason from land ownership<sup>32</sup> and from forming corporations.<sup>33</sup>

As late as 1947, Torao Takahashi, a forty-year resident of California, had to go to the U.S. Supreme Court to obtain his commercial fishing license. In 1943, the California Fish and Game Code prohibited the issuance of a license to any "alien Japa-

nese" and, in 1945, California amended the Code to ban licenses to any "person ineligible for citizenship."<sup>34</sup> Since Japanese Americans were ineligible for citizenship, Takahashi was barred from getting a license.<sup>35</sup>

In sum, the relegation of Asian Americans to hand laundries and the restaurant, garment and subcontracting industries for more than 100 years was not an accident; it was directly tied to the exclusion of Asian Americans from prestigious occupations by the "free white person" rule. Remnants of this policy remain. In 1975 Mow Sun Wong went to the U.S. Supreme Court to end discrimination against permanent residents in government employment.<sup>36</sup> As late as 1989, the United States Coast Guard barred Vietnamese immigrants from fishing off U.S. coastal waters based on a 200-year-old law restricting coastal navigation to U.S. citizens.<sup>37</sup>

Asian Americans still suffer from the effects of systematic exclusion from decision-making, employment, and access to government services. The serious toll of racial violence suffered by Asian Americans in the last ten years is a reminder to the federal, state, and local governments that little progress has been made in overcoming the racial exclusion initiated by Congress in 1790. In celebrating the enactment of the Bill of Rights, all Americans should be mindful of the racial limitations on its scope. If racial minorities do not bring the same level of enthusiasm to the celebration, it is because they have suffered a different history in these United States. What they do bring to the celebration is an understanding that the federal, state, and local governments

have done very little to eradicate the vestiges of racial exclusion. We have an opportunity to make a difference. Two important steps in this direction are to educate the entire population about the different experiences racial minorities have had under the Bill of Rights and to eradicate the effects of centuries-long exclusion by supporting minority empowerment.

## ENDNOTES

1. *People v. Hall*, 4 Cal. 399, 404 (1854).
2. *Fong Yue Ting v. United States*, 149 U.S. 698, 716 (1892).
3. E.P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965* 65 (2d ed. 1986).
4. 18 Stat. 477 (1875).
5. See HUTCHINSON, *supra* note 3, at 65.
6. 18 Stat. 477, § 1 (1875).
7. *Id.* § 3 (1875).
8. S. REP. No. 689, 44th Cong., 2d Sess. 96 (1877).
9. See 18 Stat. 376 (1875).
10. S. REP. No. 689, *supra* note 8, at 290.
11. Walter MacArthur, *Opposition to Oriental Immigration*, 34 ANNALS AM. ACAD. POL. & SOC. SCI. 239, 239 (1909).
12. Chester H. Rowell, *Chinese and Japanese Immigrants—A Comparison*, 34 ANNALS AM. ACAD. POL. & SOC. SCI. 223, 224 (1909).
13. See *Hidemitsu Toyota v. United States*, 268 U.S. 402, 411-12 (1924); *Chang Chan v. Nagle*, 268 U.S. 346, 353 (1924); *U.S. v. Bhagat Singh Thind*, 261 U.S. 204, 213-14 (1923); *Ozawa v. U.S.*, 260 U.S. 178, 198 (1922); *In re En Sk Song*, 271 F. 23, 26 (1921); *In re Bautista*, 245 F. 765, 777 (1917); *In re Alverto*, 198 F. 688, 690 (1912).
14. *Hall*, 4 Cal. at 404 (1854).
15. See MacArthur, *supra* note 11, at 242.
16. See *Hearings on Japanese Immigration Before the House Committee on Immigration and Naturalization*, 68th Cong., 2d Sess. (1925) (report submitted by John B. Trevor).
17. See U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 7 (1980).
18. See U.S. COMMISSION ON CIVIL RIGHTS, *CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s* 20 (1992).
19. Tsiwen M. Law, *Who Called Me an Oriental?*, FELLOWSHIP COMMISSION REPORT TO THE COMMUNITY, Winter 1992, at 3, 3 (on file with author).
20. S. Rep. No. 689, *supra* note 8, at 292.

21. *Id.*
22. U.S. CONST. amend. V.
23. *See Korematsu v. United States*, 323 U.S. 214, 223 (1944).
24. Herbert Hill, *The Rise of Anti-Oriental Agitation*, SOCIETY, Jan.-Feb. 1973, at 46-48.
25. *See id.*
26. *See id.*
27. *See U.S. COMMISSION ON CIVIL RIGHTS, RECENT ACTIVITIES AGAINST CITIZENS AND RESIDENTS OF ASIAN DESCENT* 58 (1986).
28. *See id.*
29. *See id.*
30. *See In re Hong Yen Chang*, 24 P. 156, 157 (Cal. 1890).
31. *See In re Yamashita*, 70 P. 482, 483 (Wash. 1902).
32. *See Terrace v. Thompson*, 263 U.S. 197, 220 (1923); *Poterfield v. Webb*, 263 U.S. 225, 230 (1923).
33. *See Yamashita v. Hinkle*, 260 U.S. 199, 200 (1922).
34. 1945 Cal. Stat. 181.
35. *See Takahashi v. Fish Commission*, 334 U.S. 410, 413 (1947).
36. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (holding that depriving federal government employment of legal permanent residents violated their due process rights).
37. The Jones Act was passed by the first Congress in 1789 and prohibited coastal fishing by non-citizens. *See* 46 U.S.C. § 8103 (1988). While a group of Vietnamese immigrants gained a temporary restraining order prohibiting prosecution under this law in 1989, many believed that the courts would eventually uphold the law's constitutionality. *See Katherine Bishop, For Vietnamese-Americans, a Victory in Congress*, N.Y. TIMES, Oct. 31, 1990, at A26. Congress amended the law to permit fishing by legal aliens in 1990. *See* 46 U.S.C. § 12102 (1992).