

THE FIRST TIME AS TRAGEDY, THE SECOND TIME FARCE: PROPOSITION 187, SECTION 1981, AND THE RIGHTS OF ALIENS

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The immigration problems of today [1926] had their counterparts in the problems of yesterday, and students of present-day problems cannot afford to overlook the experience of the past with similar problems.¹

I. INTRODUCTION

On November 8, 1994, Proposition 187 — which seeks to deny basic public services, including health care, education, and social services,² to persons determined by state and local officials

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1. HISTORICAL ASPECTS OF THE IMMIGRATION PROBLEM: SELECT DOCUMENTS x (Edith Abbott, ed., 1926).

2. Proposition 187 adds § 130 to Part 1, Division 1 of the California Health and Safety Code. Paragraph (a) provides:

- (a) In order to carry out the intention of the People of California that, excepting emergency medical care as required by federal law, only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of publicly-funded health care, and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.
Proposition 187, § 6.

The initiative adds § 48215 to the California Education Code. Paragraph (a) provides:

- (a) No public elementary or secondary school shall admit, or permit the attendance of, any child who is not a citizen of the United States, an alien lawfully admitted as a permanent resident, or a person who is otherwise authorized under federal law to be present in the United States.

The section also adds § 66010.8 to the Education Code, which among other things requires:

- (a) No public institution of post-secondary education shall admit, enroll, or permit the attendance of any person who is not a citizen of

to be in the country in violation of federal immigration laws — was approved by the voters of California.³ At least ten suits were immediately filed to halt enforcement of the measure.⁴ In November 1995 a federal judge in Los Angeles declared much of the initiative preempted by the federal government's exclusive control over immigration, and thus unconstitutional.⁵

In one of the lawsuits, *Jesus Doe v. Regents*,⁶ plaintiffs, the undocumented students enrolled in public higher education, argue that Proposition 187's restriction on access to higher education

allows [a] (documented) foreign student, whose parents have never paid a cent of taxes . . . [,] to pay out-of-state tuition, yet it ousts undocumented students (many of whose parents have paid, and will continue to pay, copious amounts of

the United States, an alien lawfully admitted as a permanent resident in the United States, or a person who is otherwise authorized under federal law to be present in the United States.

Proposition 187, § 7.

Proposition 187 adds § 10001.5 to the California Welfare and Institutions Code. The section begins as follows:

- (a) In order to carry out the intention of the People of California that only citizens of the United States and aliens lawfully admitted to the United States may receive the benefits of public social services and to ensure that all persons employed in the providing of those services shall diligently protect public funds from misuse, the provisions of this section are adopted.
- (b) A person shall not receive any public social services to which he or she may otherwise be entitled until the legal status of that person has been verified as one of the following:
 - (1) A citizen of the United States;
 - (2) An alien lawfully admitted as a permanent resident;
 - (3) An alien lawfully admitted for a temporary period of time.

Proposition 187, § 5. For the full text of the proposition, see *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 787-91 (C.D. Cal. 1995).

3. Bill Stall & Cathleen Decker, *Wilson and Prop. 187 Win*, L.A. TIMES, Nov. 9, 1994, at A1.

4. Steve Albert, *Courts Put Prop. 187 on Hold*, THE RECORDER, 10, 1994, at 1. They include *Jesus Doe v. Regents of the Univ. of California* ("Doe v. Regents"), (CAL-SF) (No. 965090); *Pedro A. v. Dawson*, (CAL-SF) (No. 96-5089); *League of United Latin American Citizens [LULAC] v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995) and the four court cases consolidated as *Gregorio T. v. Wilson*, 54 F.3d 599 (9th Cir. 1995) (Nos. 95-55186, 95-55188, 95-55191 & 95-55192).

5. *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal., 1995). The text of the proposition as preempted by the LULAC decision can be found at 908 F. Supp. at 791-94. For the argument that Prop. 187's education provisions violate international law, see Note, Stephen M. Knight, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT'L & COMP. L. REV. (1995). An excellent collection of articles about the latest upsurge in anti-immigrant politics can be found in *IMMIGRANTS OUT! THE NEW NATIVISM & THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* (Juan F. Perea ed., 1997).

6. *Jesus Doe v. Regents of the Univ. of California* ("Doe v. Regents"), (CAL-SF) (No. 965090).

taxes) who want to pay the same tuition rates. All that the class members wish is to be treated in the same way.⁷

Central to their argument is the nineteenth century equal protection statute codified at 42 U.S.C. section 1981.⁸ Section 1981 states in part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.⁹

The plaintiffs argue that the “denial of a college education is a classic violation of § 1981 in the delivery of educational services.”¹⁰ The *Jesus Doe* plaintiffs rely partly on *Duane v. Government Employees Insurance Co [GEICO]*¹¹ to support their section 1981 argument. The Fourth Circuit held in *Duane v. GEICO* that a private corporation illegally discriminated against a legal permanent resident. But the state of California flatly insists that “illegal aliens do not come within the classes of persons protected by the provisions of section 1981”¹²

7. Petitioners’ Memorandum of Points and Authorities in Support of Order to Show Cause re: Preliminary Injunction, at 11, *Doe v. Regents* (No. 965090).

8. 42 U.S.C.A. § 1981 (West 1994).

9. In 1991, Congress amended § 1981 by designating the text above as subsection (a), “Statement of Equal Rights[.]” and adding:

(b) Make and Enforce Contracts Defined

For the purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection Against Impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

The Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (1991).

10. *Id.* (internal quotation marks and citation omitted).

11. *Duane v. Government Employees Ins. Co.*, 37 F.3d 1036 (4th Cir. 1994) [hereinafter “*Duane v. GEICO*”]

12. Defendants’ Memorandum of Points and Authorities in Opposition of Order to Show Cause re: Preliminary Injunction at 8, *Doe v. Regents* (No. 965090). The term “illegal aliens” will not be used in this paper. A person cannot *be* “illegal.” Given the tenor of the debate, one would think that heinous crimes were being committed; the fact is that there are a myriad of ways that an immigrant can fall out of proper documented status:

[S]ome forms of unauthorized presence involve criminal violations while others do not; some nonimmigrants render themselves deportable by violating conditions of their admission, while others do so by passage of time; some aliens enter without inspection even though they are legally entitled to enter. Some aliens who have been paroled into the country pending decision on a request for admission are thought of as illegal aliens, even though they are not unlawfully in the country at all. Permanent resident aliens who commit acts rendering

In what may come as a surprise, the question of whether section 1981 applies to undocumented immigrants has yet to be ruled upon by a court. "[I]t appears that no published § 1981 case has ever been brought by undocumented aliens."¹³ In the landmark case of *Plyler v. Doe*,¹⁴ the United States Supreme Court held that the Fourteenth Amendment guarantee of equal protection¹⁵ extends to undocumented individuals. Section 1981 was not at issue in that decision. While existing precedent might appear to limit section 1981's reach to persons lawfully present in the United States,¹⁶ the question has yet to be decided by the Supreme Court. *Duane v. GEICO* is in conflict with the Fifth Circuit decision in *Bhandari v. First National Bank of Com-*

them deportable are not normally thought of as illegal aliens. The Immigration and Nationality Act itself recognizes that one may fail to maintain lawful status "through no fault of his [or her] own or for technical reasons." 8 U.S.C. § 1255(c) (1988).

Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1899 n.414 (1993).

Unfortunately, the U.S. Supreme Court has on occasion failed to appreciate the nature of these distinctions. See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that evidence gathered unconstitutionally by the INS should not be suppressed, in part because an alien's "unregistered presence in this country, without more, constitutes a crime.") (footnote omitted). Such analysis, however untenable, is hardly unprecedented. In 1903, the Supreme Court rejected a First Amendment challenge to the deportation of an alien anarchist:

It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise.

U.S. ex rel. John Turner v. Williams, 194 U.S. 279, 292 (1903). Certainly, *Plyler v. Doe*, 457 U.S. 202 (1982), represents a far more realistic and open-minded approach to a situation raised by the presence of non-citizens, documented or not, as part of the community.

13. Petitioners' Reply Memorandum in Support of Request For Preliminary Injunction at 6, *Doe v. Regents* (No. 965090). The author found just two district court opinions applying § 1981 to undocumented aliens, and one of those is unpublished. *LULAC v. Pasadena Indep. Sch. Dist.*, 662 F. Supp. 443 (S.D. Tex. 1987); *Doe v. Edgar*, 1989 WL 91805 (N.D. Ill. 1989). See also *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. 1972).

14. *Plyler v. Doe*, 457 U.S. 202 (1982).

15. U.S. CONST. amend. XIV, § 1.

16. See, e.g., *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 419-20 (1948); *Graham v. Richardson*, 403 U.S. 365, 377-78 (1971). See *infra* text accompanying notes 89-115.

merce,¹⁷ on whether section 1981 applies to *private* alienage discrimination. While an annotation on litigation challenging private alienage discrimination using section 1981 found a handful of cases on both sides of that question,¹⁸ there is no question that California's expulsion of students would be state action. In 1995, the high court granted certiorari in *Duane v. GEICO*, apparently to settle this split in between the circuits.¹⁹ In its petition for certiorari to the Supreme Court, however, GEICO argued to the Court that section 1981 should not be understood to apply to aliens at all, suggesting that the 1870 Congress which passed the statute was concerned solely with racial discrimination against persons, some of whom happened to be aliens, rather than with protecting aliens as such.²⁰ The alien in *Duane v. GEICO* was Caucasian, and thus GEICO claimed that the law simply did not afford him any protection. Before this question was decided by the Supreme Court, the litigants settled the case and the petition for certiorari was dismissed.²¹

Numerous circuit courts have noted the applicability of section 1981 to discrimination on the basis of alienage.²² Given the plain language of 42 U.S.C. section 1981, the Supreme Court should have little difficulty including undocumented immigrants under the broad protections guaranteed to "all persons" by this historic statute.²³ Undocumented aliens are "persons" under the Fourteenth Amendment,²⁴ and section 1981 was passed pursuant

17. *Bhandari v. First Nat'l Bank of Commerce*, 829 F.2d 1343 (5th Cir. 1987) (en banc), *cert. granted and judgment vacated*, 429 U.S. 901 (1989), *reaffirmed on remand*, 887 F.2d 609 (en banc), *cert. denied*, 494 U.S. 1061 (1990).

18. Tim A. Thomas, Annotation, *Application of 42 USCS § 1981 to Private Discrimination Against Aliens*, 99 A.L.R. FED. 835 (1997). The author noted "the uncertain state of the law on this issue," and suggested that attorneys consider raising a claim of discrimination "on another basis." *Id.* at 836.

19. *Duane v. Government Employees Ins. Co.*, *cert. granted*, 115 S. Ct. 1251, 1995 U.S. LEXIS 1652 (1995).

20. *Petition for Writ of Certiorari, Government Employees Ins. Co. v. Duane*, *cert. dismissed*, 1995 U.S. LEXIS 3780 (1995) at 4 (on file with author).

21. *Duane v. Government Employees Ins. Co.*, *cert. dismissed*, 1995 U.S. LEXIS 3780 (1995).

22. *See, e.g.*, *Inada v. Sullivan*, 523 F.2d 485, 489 (7th Cir. 1975); *Banerjee v. Roberts*, 641 F. Supp. 1093, 1104 (D. Conn. 1986); *Rodriguez v. Steirheim*, 465 F. Supp. 1191 (S.D. Fla. 1979), *aff'd mem.*, 609 F.2d 1007 (5th Cir. 1980); *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 762 (5th Cir.1986); *Garner v. Giarrusso*, 571 F.2d 1330, 1340 (5th Cir. 1978). *See also* *LULAC v. Pasadena Indep. Sch. Dist.* 662 F. Supp. 443 (S.D. Tex. 1987); *Mohamed v. Parks*, 352 F. Supp. 518 (N.D. Ala. 1987); *Doe v. Edgar*, No. 88-C579, 1989 WL 91805 (N.D. Ill. 1989); *Commercial Standard Fire & Marine Co. v. Galindo*, 484 S.W.2d 635 (Tex. Civ. App. 1972).

23. "The starting point in statutory construction is the language . . . itself." *United States v. James*, 478 U.S. 597, 604 (1986) (internal quotation marks omitted).

24. *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

to that amendment.²⁵ Thus, the statute must logically be interpreted to reach discrimination against all persons, regardless of their immigration status.²⁶

While the language of the statute is alone sufficient to decide this question, the legislative history of section 1981 in fact indicates that the law, passed to counteract an eerily similar anti-immigrant mood in nineteenth century California, was specifically designed to extend the Fourteenth Amendment's guarantee of equal protection to aliens. This legislative history makes clear that the Congress which passed section 1981 had in mind the kind of invidious discrimination represented by Proposition 187. The purpose of this article is to explore the history and purpose of this Civil War-era law to illustrate why section 1981 must logically apply to "any person present within the jurisdiction of the United States."²⁷

II. THE CIVIL RIGHTS ACTS AND THE FOURTEENTH AMENDMENT

A. *THE CIVIL RIGHTS ACT OF 1866*

Section 1981 is rooted in two major pieces of legislation passed by Congress in the wake of the Civil War: the Civil Rights Act of 1866 (the "1866 Act"²⁸) and the Civil Rights Act of 1870 (the "1870 Act"²⁹).³⁰ The 1866 Act, passed over President Johnson's veto,³¹ is among the most significant, far-reaching and con-

25. See *General Building Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375, 389-90 (1982).

26. The Supreme Court has noted that "it would be incongruous to construe the principal object of [section 1981] in a manner markedly different from that of the [Fourteenth] Amendment itself." *Id.* At 390 (footnote omitted). In fact, § 1981 was passed partially in response to the claim that the Fourteenth Amendment was not "self-executing." See *infra* note 67. Of course, section 1981 does not reach all forms of discrimination. The trial court in *Duane v. GEICO*, 784 F. Supp. 1209 (D. Md. 1992), cited several decisions finding no coverage under § 1981, such as discrimination on the grounds of national origin, *Saint Francis College v. Al-Khazrahi*, 481 U.S. 604 (1987), and disability, *Simon v. St. Louis County Police Dep't*, 14 Fair Emp. Prac. Cas. (BNA) 1363 (E.D. Mo. 1977), *aff'd in part, rev'd in part*, 656 F.2d 316 (8th Cir. 1981).

27. *United States v. Otherson*, 637 F.2d 1276, 1283 (9th Cir. 1980).

28. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

29. Act of May 31, 1870, ch. 114, 16 Stat. 140, codified as amended at 42 U.S.C. §§ 1981, 1987-1991 (1988 & Supp. III 1991). This act is variously referred to as the Civil Rights Act, the Voting Rights Act, the Voting Rights Enforcement Act, and the Enforcement Act.

30. See *Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976); *General Building Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375, 389-90 (1982).

31. CONG. GLOBE, 39th Cong., 1st Sess. 1857-61 (1866). This was apparently the first override of a presidential veto in United States history. JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME* 131 (1995).

troversial laws ever passed by the United States Congress. Section 1 of the act declared that

citizens . . . of every race and color . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens . . .³²

This simple statute set forth the broad outlines of a broad federal guarantee of equal protection of the law for all Americans. Questions about Congress's power to pass such a law eventually led to the passage of the Fourteenth Amendment,³³ ensuring that equal protection would remain the supreme law of the land. The protections of the Civil Rights Act of 1866 was expressly applied to citizens alone.³⁴ Congress was soon to be confronted with the limitations of this approach to civil rights. Then, as today, the issue came to a head in California.

B. *DISCRIMINATION AGAINST CHINESE ALIENS IN CALIFORNIA*

The Chinese came to California as early as 1820.³⁵ By 1860, the Chinese made up fully nine percent of the state's population.³⁶ But many Californians did not welcome the Chinese.³⁷ During the 1850s and 1860s, California sought to discourage further Chinese immigration by passing numerous discriminatory laws. Unequal taxation and discriminatory enforcement of gen-

32. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1868).

33. Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223, 235 n.64 (1994).

34. The Civil Rights Act originally passed by the Senate extended federal protection over all "persons," but it was amended to cover only citizens due to questions over Congress's authority in this area — questions put to rest by the passage of the Fourteenth Amendment. *Id.* at 235, n.64.

35. Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 648 n.171 (1981).

36. *Id.*

37. CHARLES J. McCLAIN, JR., *IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH CENTURY AMERICA* 9 (1994) [hereinafter "McCLAIN: THE CHINESE STRUGGLE"]. The following history relies largely on this book, and his earlier article, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529 (1984). See also Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223 (1994). As a columnist for a San Francisco newspaper during this period, Mark Twain provides a colorful contemporaneous description of some of the violence and discrimination directed at early Chinese immigrants. See *GOLDMINERS & GUTTER-SNIPES: TALES OF CALIFORNIA BY MARK TWAIN* 10-14, 83-84, 150-52 (Ken Chowder, ed., 1991).

erally applicable laws added further to their continued harassment.³⁸ "It is a well known fact," observed a unusually fair-minded State report in 1862, "that there has been a wholesale system of wrong and outrage practiced upon the Chinese population of this State, which would disgrace the most barbarous nation on earth."³⁹ The courts offered the Chinese little refuge. In 1854, in "an opinion containing some of the most offensive racial rhetoric to be found in the annals of California appellate jurisprudence,"⁴⁰ the California Supreme Court decided that no Chinese person could testify against a white person in court.⁴¹ The decision overturned a murder conviction.

Contrary to widespread belief,⁴² the Chinese community did not remain passive in the face of this onslaught of legal disabilities and violence. Chinese leaders expressed their community's concern by lobbying for legal protection before state committees, both in person and through hired lobbyists.⁴³ They also were quick to challenge the unequal treatment in court.⁴⁴ Concern and embarrassment over the worst excesses of the anti-Chinese discrimination⁴⁵ helped lead to the signing of the Burlingame

38. See generally McCLAIN: THE CHINESE STRUGGLE, *supra* note 37. The extent of California's official harassment of the Chinese during this era is hinted at by the fact that fully half of California's revenues were derived from taxes paid by Chinese laborers. See Harper's Index, HARPERS, May 1977, at 13.

39. Report of the Joint Select Committee Relative to the Chinese Population of the State of California, Appendix to the Journals, 13th Sess., Cal. Legis. (1862), reprinted in McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 26 n.132.

40. McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 21.

41. *People v. Hall*, 4 Cal. 399 (1854). California law provided that "No black or mulatto person, or Indian, shall be permitted to give evidence in favor of, or against, any white person." Act of Apr. 16, 1850, ch. 99, § 14, 1850 Cal. Stat. 229, 230, amended by Act of Mar. 18, 1863, ch. 70, 1863 Cal. Stat. 69, repealed by omission from codification CAL. PENAL CODE § 1321 (1872) (officially repealed, Act of Mar. 30, 1955, ch. 48, § 1, 1955 Cal. Stat. 488, 489). Engaging in "a kind of amateur foray into history and ethnography," the state Supreme Court decided that Chinese were more like blacks and Indians than whites and therefore were also covered by the law. McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 21. For an account of the circumstances surrounding this case, see *id.* at 21-23. In 1868, the new Fourteenth Amendment equal protection clause received some of its first applications as part of an effort to strike down the bar against Chinese testimony. *Id.* at 31-33.

42. McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 2-3.

43. *Id.* at 15-16, 23.

44. The Chinese were generally successful in securing representation for their legal challenges, much to the displeasure of the the anti-Chinese press. "Some tawney-haired humanitarian sentimentalists have come to the rescue of the Mongol in this manner," observed the Sacramento Bee on one such occasion. *Id.* at 67 n.114. The *San Francisco Daily Alta* struck a similarly sarcastic note on the arrest of thirteen Chinese laundrymen for failure to pay one of that city's many discriminatory taxes: "doubtless [the arrest will] give some enthusiastic attorney occasion to air his ideas of equity and practice." *Id.* at 51 n.35.

45. Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America*, 72 CAL. L. REV. 529, 551 (1984).

Treaty in 1868.⁴⁶ This treaty promised to Chinese aliens in the U.S. "the same privileges, immunities, and exemptions in respect to travel and residence, as may there be enjoyed by the citizens or subjects of the most favored nation."⁴⁷

Whatever its effectiveness in addressing the problems faced by the Chinese in California, the Burlingame Treaty provided a strong argument that rights guaranteed by federal agreement were being trampled by a state and its citizens. That argument was made by prominent Chinese merchants in a meeting with a delegation of congressmen visiting San Francisco in June 1869.⁴⁸ The Chinese community's leaders specifically referred to a discriminatory tax on Chinese miners as violating the treaty. Most of all, they objected to the ban on Chinese testimony.⁴⁹

C. THE VOTING RIGHTS ACT OF 1870

Six months after the San Francisco meeting, on January 10, 1870, Senator William Stewart of Nevada brought to the Senate floor a bill, S. No. 365, "to secure all persons the equal protection of the laws"⁵⁰ Given that description, and the immediate post-Civil War era, one might assume that the law was targeted at the protection of African-Americans. Instead, however, the bill appears to be a response to the concerns expressed by the Chinese community at the San Francisco meeting.⁵¹ The original language provided:

46. July 28, 1868, United States-China, 16 Stat. 739 (1869-71). The Burlingame Treaty was an amendment to the existing Treaty of Tientsin, June 18, 1858, United States-China, 12 Stat. 1023 (1859-63). See McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 30-33. For a summary of U.S.-Chinese treaty relations in the mid-eighteenth century, see *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 590-99 (1889).

47. The Burlingame Treaty, Art. VI, 16 Stat. 739, reprinted in McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 30.

48. McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 36-37.

49. *Id.* at 37.

50. CONG. GLOBE, 41st Cong., 2d Sess. 323 (1870). The proposed law was the result of a Judiciary Committee inquiry requested by Stewart:

RESOLVED, That the Committee on the Judiciary be requested to inquire if any States are denying to any class of persons within their jurisdiction the equal protection of the law, in violation of treaty obligations with foreign nations and of section one of the fourteenth amendment to the Constitution; and if so, what legislation is necessary to enforce such treaty obligations and such amendment, and to report by bill or otherwise.

Id. at 3 (approved by the Senate, Dec. 6, 1869).

It is interesting that Senator Stewart had been the prosecutor in *People v. Hall* (see *supra* note 41 and accompanying text). McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 37.

51. McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 38.

That *all persons* within the jurisdiction of the United States, Indians not taxed excepted, *shall have the same right* in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property *as is enjoyed by white citizens*, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. *No tax or charge shall be imposed or enforced by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void.*

Sec. 2 . . . That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties *on account of such person being an alien*, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor⁵² (emphasis added)

While obviously drawing on the language of the Civil Rights Act of 1866,⁵³ Stewart's bill is different in several respects. Most significantly, as seen in the emphasized sections, it was drafted to outlaw discrimination against aliens; whereas the 1866 Act covered only citizens. This purpose is further evidenced by the careful deletion of the phrase "to inherit, purchase, lease, sell, hold, and convey real and personal property" found in the 1866 Act after the reference to evidence,⁵⁴ since at that time aliens were barred from owning property.⁵⁵

The bill was first debated on the Senate floor on February 24, 1870. Senator Stewart explained that "[t]he original civil rights bill protected all persons born in the United States This bill extends it to aliens, so that all persons who are in the United States shall have the equal protection of the laws That is all there is in the bill."⁵⁶ Given the anti-Chinese mood in California, it is significant that a senator from that state, Eugene

52. CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870). Note that the reference to "white persons" in § 2 was replaced with the word "citizens" in the final version. For this and other changes in the language of the bill as finally passed, see *infra* note 93.

53. See *supra* text accompanying note 52.

54. *Id.*

55. Laws limiting the property rights of aliens remain common today. See James R. Mason, Jr., "Pssst, Hey Buddy, Wanna Buy a Country?" *An Economic and Political Policy Analysis of Federal and State Laws Governing Foreign Ownership of United States Real Estate*, 27 VAND. J. TRANSNAT'L L. 453, 463 (1994).

56. CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

Casserly, raised the first objection to Stewart's proposal. Casserly asked whether the provision barring the taxation of immigrants did not "strike entirely at the police power of the States over the subject of immigration."⁵⁷ Stewart explained that the "Supreme Court of the United States in *The Passenger Cases* decided that the States could not charge passengers for landing."⁵⁸ He noted the distinction between such a tax and — constitutionally acceptable — regulation by states "after immigrants arrive."⁵⁹ For his part, Senator Pomeroy of Kansas wanted to know if the bill was intended to give "the same civil rights to all persons in the United States which are enjoyed by citizens of the United States."⁶⁰ On being told that the law might not interfere with some legal disabilities faced by aliens — largely having to do with inheriting property — Pomeroy expressed his support by stating "I only question the propriety of not going further myself."⁶¹

With that, the Senate moved on to other business. An effort to bring the bill back to the floor later failed;⁶² standing on its own, Senator Stewart's bill never became law.⁶³ But on April 19, 1870, a major voting rights proposal was introduced by Senator Edmunds.⁶⁴ When that bill came before the full Senate in May, Stewart immediately gained approval to append his equal protection proposals as amendments.⁶⁵

As the proposed Senate bill No. 810, made its way through the Senate, the Nevada senator continued to play a leading role

57. *Id.*

58. CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849).

59. CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870).

60. *Id.*

61. *Id.*

62. *Id.* at 1678.

63. Instead, it was passed over. *Id.* at 2901, 4307.

64. *Id.* at 2808. This was Senate bill No. 810; it also originated with the Senate Judiciary Committee. *Id.* at 3658.

65. Stewart introduced his bill as follows:

I move to amend the amendment by adding some additional sections consisting of two bills reported from the Committee on the Judiciary that have been printed and on our tables for a long time. One is Senate bill No. 114, to enforce the fourteenth article of amendment of the Constitution of the United States in regard to holding office; and the other is the bill (S. No. 365) to secure all persons the equal protection of the laws.

Id. at 3480. Although both additions were based on the fourteenth amendment — No. 114 dealing with disabilities on former Confederate rebels, and No. 365 with equal protection for aliens — many references in the debates to the fourteenth amendment provisions appear to refer only to the former provision. Stewart's equal protection bill, which was to become section 1981, was more often referred to as "the Chinese bill" or "the equal protection bill." At times it is unclear which amendment is being discussed. *See, e.g., id.* at 3672 (comments of Sen. Thurman).

in its passage.⁶⁶ Notwithstanding his best efforts, the bill's opponents managed to extend the debate through six day and evening sessions. While the bulk of the bill — and the attending debate — dealt with voting rights, the senators did not overlook the significance of Stewart's proposed law. Ohio's Senator Sherman noted that Stewart's amendments

provide for enforcing the fourteenth amendment as well as the fifteenth, and provide also for dragging into the controversy the Chinese question and questions of that kind. *I am not sure but that after discussion I would agree with the Committee on the Judiciary, that we must protect the Chinese against the local laws of California; but it seems to me we ought to do it with our eyes open, and understand what we are doing.*⁶⁷ (emphasis added)

66. "I am anxious that it should be passed before the Senate adjourns to day[.]" Stewart declared. "We might just as well finish it in one session as in seven." *Id.* at 3480. Stewart's concern with speed in securing passage of the voting rights law was partially motivated by concern over the upcoming Fall 1870 elections. *See id.* at 3014 ("It is quite important that it should be passed on account of several State elections that are to take place."). The Senate bill's provisions for enforcing the Fifteenth Amendment's guarantee of the right to vote were of course hotly contested by Senate Democrats. *See, e.g., id.* at 3481 (remarks of Sen. Vickers). Additionally, there was considerable debate on the first of Stewart's two amendments, which related to the disabilities placed on former Confederate rebels by the Fourteenth Amendment. *See, e.g., id.* at 3488-92. The senators did not often focus directly on the equal protection amendment; however, some of the considerable vitriol which was directed at the act may well have been inspired by the notion of equal protection for (Chinese) aliens as much as by a guarantee for the right of all (i.e. African-American) citizens to vote. *See, e.g., id.* at 3484 ("Providence has wisely made and separated the races by a law which no Government can annul. . . . The alien and sedition law, which was so odious to our fathers, and which produced a complete revolution in the political parties of that day, was not comparable in the hideous character of its features to the one before us.") (remarks of Sen. Vickers); *id.* at 3806 ("answer me as an honest Senator whether you believe that if the men who framed the Constitution had known that the legislation of the last five years, particularly your civil rights bill, your fourteenth and fifteenth pretended amendments, and this most iniquitous bill to enforce these pretended amendments, would have been enacted, they would ever have entered into the Federal Union? No, sir.") (comments of Sen. Saulsbury).

67. *Id.* at 3570. Sherman made clear his support for taking some action. "I have no doubt of the necessity of passing this or some such bill. The fourteenth and fifteenth amendments will not be enforced by the simple operation of their own force as amendments to the Constitution." *Id.* at 3568. This simple assumption underlies the entire debate over this bill, which was designed "to enforce" the constitution. The perceived necessity of legislation to implement the constitution was likely driven in no small part by Southern hostility to the Civil War amendments; but it also arose out of the language giving Congress the power to enforce the fourteenth and fifteenth amendments "by appropriate legislation." Apparently a court in California had held that the fourteenth amendment had no force without implementing legislation. *Id.* (comment of Sen. Sherman). This now-discredited notion mirrors the more familiar, modern resistance to enforcement of international efforts to guarantee human rights through multilateral treaties, which are often held to be non-self-executing. *See, e.g., Sei Fujii v. State*, 38 Cal.2d 718, 721-24 (1952) (Articles 55 and 56 of United Nations Charter not self-executing).

Senator Williams of Oregon was less generous; he denounced the whole enterprise:

The Senator from Nevada proposes a bill to enforce the fifteenth amendment, and upon that he piles another bill which is intended to enforce the fourteenth amendment, and upon that he piles another which is intended to protect citizens in the enjoyment of their civil rights; and this conglomerated mass of incongruities and uncertainties is to be put through here in the name of a bill to enforce the fifteenth amendment!

I object to the Senate bill, because it is indefinite and vague in all or nearly all its provisions.⁶⁸

Stewart took the floor and delivered an eloquent speech in response to these concerns, focussing the Senate's attention on the discrimination in California against the Chinese. He declared that the provision was

of more importance to the honor of this nation than all the rest of this bill. We are inviting to our shores, or allowing them to come, Asiatics. We have got a treaty allowing them to come. Now while I am opposed to Asiatics being brought here, and will join in any reasonable legislation to prevent anybody from bringing them, yet we have got a treaty that allows them to come to this country. We have pledged the honor of the nation that they may come and shall be protected. For twenty years every obligation of humanity, of justice, and of common decency toward those people has been violated by a certain class of men — bad men I know; but they are violated in California and on the Pacific coast. While they are here I say it is our duty to protect them. . . . *It is as solemn a duty as can be devolved upon this Congress to see that those people are protected, to see that they have the equal protection of the laws, notwithstanding that they are aliens. They, or any other aliens, who may come here are entitled to that protection.* If the State courts do not give them the equal protection of the law, if public sentiment is so inhuman as to rob them of their ordinary civil rights, I say I would be less than a man if I did not insist, and I do here insist that that provision shall go on this bill, and that the pledge of this nation shall be redeemed, that *we will protect Chinese aliens or any other aliens whom we allow to come here.*^[69]and give them a hearing in our courts; let them

68. CONG. GLOBE, 41st Cong., 2d Sess. at 3656.

69. Supporters of Proposition 187 might be eager to seize on Sen. Stewart's use of words to argue that Section 1981 should not extend to undocumented immigrants, who by virtue of their immigration status are not "allowed" to be in the United States. For one thing, however, proponents of this view will have to contend with the fact that section 1981 was first used in the 1870s to strike down laws targeted at aliens who were prohibited by a state from landing. See *infra* Part IV.

For another, the question of permission with regard to undocumented labor is far from uncomplicated. Employers have long depended on the ebb and flow of undocumented workers, and both federal and state authorities continue to "allow" this labor to be used. In fact, Proposition 187 itself will only encourage the use of

sue and be sued; let them be protected by all the laws and the same laws that other men are. That is all there is in that provision.

. . . The fourteenth amendment to the Constitution says that no State shall deny to any person the equal protection of the laws. Your treaty says that they shall have the equal protection of the laws. Justice and humanity and common decency require it.⁷⁰ (emphasis added)

In the early morning hours of the final day of debate, the Democrats made their last stand against the proposal, asserting that after the long night's legislative give and take "there is not one Senator in this Chamber who knows what this bill now is."⁷¹ But the legislation was read, and just before seven in the morning of Saturday, May 21st, by a vote of 43-8, the Senate passed into law a "bill to enforce the right of citizens of the United States to vote in the several States of this Union."⁷² The ever-alert Stew-

undocumented labor, as it further suppresses the costs associated with an undocumented workforce. The proposition "leave[s] immigrant workers and their employers curiously out of the picture." Leo R. Chavez, *Immigration Reform and Nativism*, in IMMIGRANTS OUT!, *supra* note 5, at 70. Cf. *Del Rey Tortilleria, Inc. v. NLRB*, 876 F.2d 1115, 1125 (7th Cir. 1992) ("when we deny backpay to illegal aliens, we tell employers to hire more of them.") (Cudahy, J., dissenting). As noted by former Labor Secretary Robert Reich: "One reason that employers in the United States are willing to risk employer sanctions right now and hire illegal immigrants is because they can get those illegal immigrants at less than the minimum wage, put them in squalid working conditions, and they know that the illegal immigrants are unlikely to complain." Chavez, *Immigration Reform and Nativism*, in IMMIGRANTS OUT!, *supra* note 5, at 70.

70. CONG. GLOBE, 41st Cong., 2d Sess. at 3658. Stewart's powerful speech has often been discussed in cases reviewing the legislative history of § 1981. See *Duane v. GEICO*, 37 F.3d at 1042-43; *United States v. Maravilla*, 907 F.2d 216, 226 (1st Cir. 1990); *Cuello-Suarez v. Autoridad de Energia Electrica de Puerto Rico*, 737 F. Supp. 1243, 1248-49 (D.P.R. 1990), *aff'd*, 988 F.2d 275 (1st Cir. 1993); *United States v. Otherson*, 637 F.2d 1276, 1284 (9th Cir. 1980); *Espinoza v. Hillwood Square Mut. Ass'n.*, 522 F. Supp. 559, 563 (E.D. Va. 1981); *De Malherbe v. International Union of Elevator Constructors*, 438 F. Supp. 1121, 1139 (N.D. Cal. 1977); *Runyon v. McCrary*, 427 U.S. 160, 200 (1976) (White, J., dissenting).

71. CONG. GLOBE, 41st Cong., 2d Sess. at 3688 (remarks of Sen. Thurman); see *also id.* (remarks of Sen. Casserly).

72. *Id.* at 3690. Sections 16 and 17 of the bill contain the equal protection provisions that today are separately codified at 42 U.S.C. § 1981 and 18 § U.S.C. 242:

Sec. 16. And be it further enacted, That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person emigrating thereto from a foreign country which is not equally imposed and enforced upon every person emigrating to such State from any other foreign country, and any law of any State in conflict with this provision is hereby declared null and void.

art successfully moved to amend the title to read "and for other purposes," pointing out that his Fourteenth Amendment proposals were also part of the bill.⁷³

The voting rights bill passed by the House of Representatives, H.R. 1293, did not contain Sen. Stewart's equal protection language.⁷⁴ The two bills went to a conference committee to be reconciled;⁷⁵ the conference adopted the Senate version.⁷⁶ On May 24-25 the Senate took up the conference report; the Democrats sought to delay.⁷⁷ But with the time for debate at last ex-

Sec. 17. And be it further enacted, That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by fine not exceeding \$1,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Id. at 3689.

73. *Id.* at 3690. Nevertheless, for the first order of business at the Senate's next session, Sen. Casserly of California took the extraordinary step of moving to "correct the Journal," claiming surprise at the presence of the equal protection amendment in the bill as printed in the *Globe*. *Id.* at 3700. "I see that the bill to enforce the right to vote under the fifteenth amendment, as passed, contains a section, section sixteen, which I did not understand was before the Senate That section comprises what was known as a bill to enforce the fourteenth amendment." *Id.* at 3700-01. Casserly asserted that "no such bill was before the Senate[,] or in the alternative that it had been "totally ignored in the discussion" *Id.* at 3701. Senator Thurman agreed, saying that he was as surprised as Casserly "to find . . . these sections to enforce the fourteenth amendment, and the bill which we have been accustomed to call the Chinese bill" *Id.* at 3702. "Mr. President," interjected Senator Stewart, "this is a very remarkable motion." *Id.* The Senate chair went through the record, with particular emphasis on Stewart's speech made after Casserly yielded the floor; Casserly then felt constrained to withdraw his motion. *Id.* at 3703. Senator Corbett of Oregon took the opportunity of Sen. Thurman's admission of confusion to suggest, by means of a sarcastic poem which had been used against the Republicans by Thurman during the recent all-night debate, *id.* at 3677, that Thurman was confused because he was drunk. *Id.* at 3703.

74. Technically speaking, the bill passed by the Senate was also numbered as H.R. 1293, only the House's language was entirely deleted and the Senate's put in its place; this was the result of some sophisticated parliamentary wrangling. *See id.* at 3480.

75. Stewart, Edmunds and Stockton represented the Senate on the committee, *Cong. Globe*, 41st Cong., 2d Sess. at 3705; the House side included Reps. Bingham, Davis and Kerr. *Id.* at 3726.

76. The only change made to the equal protection provision was grammatical; the word "emigrating" was changed to "immigrating," "a mere verbal correction." *Id.* at 3753.

77. *See id.* at 3754 (remarks of Sen. Stockton). Senator Casserly and others also attempted to derail the bill's final passage by asserting that the conference committee had exceeded its authority in amending the bill, but were overruled. *Id.* at 3756, 3758-59, 3801-03. The California senator continued to make known his objection to the equal protection section: "One of the worst provisions of the bill as it passed this body . . . escaped the notice of nearly every one of the minority of this body I refer to those provisions which were taken out of a bill for the enforcement of the

pired, Stewart made his final pitch. His remarks leave little room for question as to the intended scope of the law:

Mr. President, I congratulate the Senate and the country that we are about to assert some of the powers of Congress for the protection of voters; for the protection of the downtrodden; for the protection of persons in their political and civil rights; that we are about to get a bill which asserts something of the dignity and power of this nation.

There are other protections in it . . . which extend the strong arm of the Government to the protection of the Chinese; those provisions which protect those industrious, helpless people whom we have invited to our shores; those provisions which go at this late day to *wipe out to some extent the infamy that rests upon this nation for having invited the Asiatics to come here, having made treaties for their protection, and then allowed a State in this Union to pass barbarous and cruel laws, to place upon them unjust and cruel burdens, to tax them differently from other people, and collect that tax in a brutal manner.* At the last session of the Democratic Legislature of that State a law was passed to make money out of poor Chinese immigrants, requiring that each immigrant should pay ten dollars for being vaccinated; ten dollars with a view to keeping up a horde of officers to prey upon these poor people. During the whole session of that Legislature they discussed ways and means to make money out of the poor Chinese.⁷⁸ (emphasis added)

Stewart then challenged California's Sen. Casserly directly, drawing attention to the ugly mood then prevailing on the west coast:

Why did the Senator from California over and over again last night allude to these sections without daring to express any opinion on their intrinsic merits? I will tell you the reason. There are good men in California, there are humane men who feel the disgrace of allowing men to be robbed and murdered without protest. For the Senator here to say that no

fourteenth amendment." *Id.* at 3759. Although speaking at length on other subjects, Casserly claimed to have more to say regarding Stewart's amendment, "because they are provisions which greatly affect the interests and the feelings of the people of the State who sent me here. . . . [M]y understanding of the subject matter before the Senate was such as to prevent any idea on my part that such provisions were in the bill. . . ." *Id.* at 3801; *see also id.* at 3760. Senator Williams (perhaps wryly) interrupted at this point: "I wish to ascertain whether this is the conclusion of the speech of the Senator from California or not, so that there may be no controversy about it hereafter." *Id.* at 3801. Casserly avoided answering the question, and he later gave up the floor without making his promised remarks.

78. *Id.* at 3807. The senator from Nevada proceeded to respond to the charge from Casserly that the provisions had not been debated. Stewart made reference to several points at which he or other senators had drawn attention to his amendments. He even read back into the record his lengthy speech of May 20 (*see supra*, text accompanying note 70) which focussed on discrimination against the Chinese in California. *Id.* at 3807-08.

such law ought to be passed would shock them as much as it would any honest Senator. . . .

Dare he say to the good people of California that while the Chinese are here under our laws, and while we have a Constitution which says that no State shall deny to any person within its jurisdiction the equal protection of the laws, Congress ought not to pass a law to give them protection? If he would make a speech that would be palatable to the Chinese-baiting portion of his constituents it would disgust every honest man

The other side say, 'Give us Kuklux, give us repeaters, give us Chinese, robbers and murderers; let them have their way and you shall have peace.' I say no; upon those terms there is no peace. *There is no peace except in . . . the equal protection of all persons by the law.*⁷⁹ (emphasis added)

Shortly thereafter, the Senate passed the final bill into law, 48 to 11.⁸⁰

The following day, May 26th, the bill's House sponsor, Representative Bingham, reported to the House on the conference report.⁸¹ Bingham explained to his colleagues the purpose of the Senate provisions:

Touching the provision of the Senate amendment limiting the power of the States to impose taxes upon immigrants, I wish to say . . . that the only effect of the section is to assert the power of the United States, under the express provision of the national Constitution, over the several states of this Union and no further, that *hereafter the taxes imposed by the several States upon immigrants shall be equal; . . . that immigrants being persons within the express words of the fourteenth article of the constitutional amendments, shall, whenever they be found within the jurisdiction of any of the States of the Union, be entitled to the equal protection of the laws, not simply of the State itself, but of the Constitution of the United States as well.*⁸² (emphasis added)

The House concurred in the conference report,⁸³ and the resulting bill was signed into law by the president.⁸⁴

79. *Id.* at 3808.

80. *Id.* at 3809; thirteen senators were absent. Unfortunately, twelve years later, Congress itself discriminated against Chinese immigration by passing the Chinese Exclusion Act. Act of May 6, 1882, Ch. 126, 22 Stat. 58 (repealed 1943).

81. *Id.* at 3853.

82. *Id.* at 3871.

83. *Id.* at 3915

84. *Id.* at 3959. The law became known as the Voting Rights Act of 1870. Act of May 31, 1870, ch. 114, 16 Stat. 140. The statutory paper trail becomes somewhat clouded because all federal statutes were reorganized and republished in 1874 as the Revised Statutes of 1874. See generally *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 624-34 (1979) (Powell, J., concurring). However, "Congress did not intend the revision to alter the content of federal statutory law." *Id.* at 625. Section 16 of the 1870 Act was understood by the revisers to have superseded § 1 of the 1866 Act (its antecedent) insofar as the two provisions overlapped. *Id.* at 633 n.13. The

Once Stewart's provision had passed, "no one in Congress could have any doubt that Section 16 was aimed at securing the rights of the Chinese."⁸⁵ The legislation was in fact denounced on these grounds by the "bitterly anti-Chinese" *San Francisco Examiner*.⁸⁶ And the federal government took immediate steps to halt California's discriminatory Foreign Miners License Tax.⁸⁷ As described in detail below,⁸⁸ the law was also immediately tested against other discriminatory local laws in California.

III. SECTION 1981 AND ALIENAGE DISCRIMINATION

In the intervening century and a quarter since the passage of section 1981, much progress has been made in the area of equal protection. Part III will focus on the interpretation of the Fourteenth Amendment and of section 1981 with regard to alienage discrimination. It is interesting to note how the construction of these two provisions, one constitutional and the other statutory, has diverged. While the Fourteenth Amendment has been held to protect undocumented persons, dicta in Supreme Court decisions can be read to limit section 1981's coverage to immigrants legally present in this country. Part III argues that any such holding would be fundamentally incorrect, particularly in light of the historical context discussed immediately above, in Part II.

A. SUPREME COURT DECISIONS

It has long been established that most of the protections of the United States Constitution are extended to all individuals physically present in this country. As the Supreme Court noted in the 1880s, "the Fourteenth Amendment to the Constitution is not confined to the protection of citizens,"⁸⁹ and "all persons . . . stand equal before the laws of the States."⁹⁰ The Constitution does distinguish between "citizens" and "persons" in several places, and the consistent — and unavoidable — interpretation has been that the intent of the documents' framers, in choosing the word "person," was broad and inclusive:

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons

1866 Act's protections for property, not extended to aliens in 1870, were separately codified. *Id.* at 633. See also *Duane v. GEICO*, 37 F.3d at 1038-39.

85. *McCLAIN: THE CHINESE STRUGGLE*, *supra* note 37, at 40.

86. *Id.*

87. *Id.* at 40-41.

88. See *infra* text accompanying notes 160-72. See also *McCLAIN: THE CHINESE STRUGGLE*, *supra* note 37, at 68.

89. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

90. *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879).

from deprivations of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.⁹¹

From the preceding section, Congress's intent to extend the protection of the Fourteenth Amendment to aliens is clear. Section 1981, passed pursuant to that constitutional amendment, has thus correctly been held to bar governmental discrimination on the basis of alienage. The principal modern Supreme Court precedent is *Takahashi v. Fish & Game Commission*.⁹² That decision held unconstitutional a 1945 California law barring "persons ineligible to citizenship" from procuring commercial fishing licenses.⁹³ Writing for the majority, Justice Black rested that landmark anti-discrimination decision on two broad premises. First, on preemption grounds, the Court criticized the state's contention that it could follow the lead of federal immigration laws (which at that time barred Japanese aliens from citizenship): "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration"⁹⁴

91. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (citations omitted); see also *Wong Wing v. United States*, 163 U.S. 228, 242 (1896) ("The term 'person,' used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic.") (Field, J., concurring in part and dissenting in part). The Constitution also several times refers to "the people."

Unfortunately, in recent years the United States Supreme Court has seized on this language to question whether aliens are included within this notion of "the people." In *United States v. Verdugo-Urquidez*, which held that the Fourth Amendment did not apply to a search and seizure by U.S. law enforcement agents of property located in Mexico and owned by a Mexican alien, Justice Rehnquist suggested for the court that

'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

494 U.S. 259, 265 (1990). A vigorous dissent countered that the words "the people," were used to avoid awkward phrasing: otherwise, the Fourth Amendment would read, "The right of persons to be free in their persons. . . ." *Id.* at 287 n.9. However, this discussion was expressly reserved for another day, and the court has not yet ruled squarely on this question. The majority's analysis has been criticized for "conjuring up images of Dred Scott." Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 Wis. L. REV. 965, 998.

92. *Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948). For an interesting precursor to this ruling in a case involving anti-Chinese legislation, see *In re Ah Chong*, 2 F. 733 (C.C.D. Cal. 1880); see text accompanying notes 165-67.

93. 334 U.S. at 414.

94. 334 U.S. at 419. California argued that the state had a "special public interest" as "trustee-owner" of all fish as they pass through its coastal waters; the state

Secondly, the Supreme Court referred to section 1981:

The protection of this section has been held to extend to aliens as well as to citizens. [Footnote 7⁹⁵] Consequently the

supreme court had upheld the law on this basis, *id.* at 417, but the Supreme Court found this in inadequate ground to support the discrimination. *Id.* At 421.

In recent years the Court has revived the "special public interest" doctrine, seemingly laid to rest by *Takahashi*. This doctrine allows states to bar aliens from employment in positions which involve the exercise of discretionary power "go[ing] to the heart of representative government." *Bernal v. Fainter*, 467 U.S. 216, 220-21 (1984) (internal quotations omitted). Under the modern Court's approach, then, the level of scrutiny applied to a state alienage classification will depend on whether a political or governmental function is involved. See Jennifer Huffman, Note: *Justice Rehnquist and Alienage as a Suspect Classification*, 7 GEO. IMMIGR. L.J. 845 (1993). The Court has developed a two-part test to answer this question. See *Bernal*, 467 U.S. at 221-22. The definition of governmental function has been broad, including probation officers, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), and public school teachers. *Ambach v. Norwich*, 441 U.S. 68 (1979). However, it was not so broad as to include a notary public; *Bernal v. Fainter*, 467 U.S. 216 (1984) — the latest Supreme Court equal protection decision involving aliens — applied strict scrutiny to strike down Texas' restriction of that position to citizens.

95. Here the Supreme Court cites to four cases: *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *United States v. Wong Kim Ark*, 169 U.S. 649 (1897) (§ 1981 cited in support of holding that a child born in the United States to Chinese parents was a United States citizen under the Fourteenth Amendment — fifty-five pages were required to arrive at this self-evident conclusion; two justices dissented); *In re Tiburcio Parrott*, 1 F. 481 (1880) (constitutional provision and laws forbidding any California corporation from employing Chinese persons held to violate, *inter alia*, § 1981); and *Fraser v. McConway & Torley*, 82 F. 257 (1897) (§ 1981 cited in support of holding that tax on employers of three cents per day, per alien employed, violates Fourteenth Amendment).

A comparison of the laws disputed in *Tiburcio Parrott* with the provisions of Proposition 187 makes clear that California has been over this ground before. Article XIX of the then-recently adopted California Constitution declared:

Section 1. The legislature shall prescribe all necessary regulations for the protection of the state, and the counties, cities and towns thereof from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids, afflicted with contagious or infectious diseases, and from aliens otherwise dangerous or detrimental to the well-being or peace of the state, and to impose conditions upon which such persons may reside in the state, and to provide the means and mode of their removal from the state upon failure or refusal to comply with such conditions; provided, that nothing in this section shall be construed to impair or limit the power of the legislature to pass such police laws or other regulations as it may deem necessary.

Section 2. No corporation now existing, or hereafter formed, under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as may be necessary to enforce this provision.

Section 3. No Chinese shall be employed on any state, county, municipal, or other public work, except in punishment for crime.

Section 4. The presence of foreigners ineligible to become citizens is declared to be dangerous to the well-being of this state, and the legislature shall discourage their immigration by all the means within its power

section and the Fourteenth Amendment on which it rests in part protect "all persons" against state legislation bearing unequally upon them either because of alienage or color. See *Hurd v. Hodge*. The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide "in any state" on an equality of legal privileges with all citizens under non-discriminatory laws.⁹⁶

Thus, the court held, "the power of a state to apply its rules exclusively to alien inhabitants as a class is confined within narrow limits."⁹⁷

Another important precedent involving alienage discrimination, *Graham v. Richardson*,⁹⁸ also cited section 981 in support of its equal protection and preemption holding. Referring to a previous welfare restriction case, *Shapiro v. Thompson*,⁹⁹ involving discrimination between classes of citizens, the *Graham* court invalidated efforts by Arizona and Pennsylvania to limit aliens' eligibility for welfare:

[The] justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in *Shapiro*, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state.¹⁰⁰

1 F. at 494-95. In contrast to the close reading given to Proposition 187 by Judge Pfalzer in her opinion in the *LULAC* case, 908 F. Supp. 755 (C.D. Cal. 1995), under which a considerable portion of the proposition emerged unscathed despite a seemingly obvious intent and effect of encroaching on the exclusive federal power over immigration, the federal judges hearing the case in 1880 looked past the narrow language to the law's "purpose and effect" and struck it down in its entirety as violative of the United States Constitution.

96. 334 U.S. at 419-20 (emphasis added) (citation omitted).

97. 334 U.S. at 420. *GEICO*, in its petition for writ of certiorari to the Supreme Court in *Duane v. GEICO*, argued that because the *Takahashi* opinion referred, in the alternative, to "alienage or color" and the alien in question was Japanese, its statement that section 981 reaches alienage was mere "dictum." (Petition for Writ of Certiorari, Government Employees Ins. Co. v. Duane, cert. dismissed, 1995 U.S. LEXIS 3780 (1995) at 4 (on file with author)). But the Supreme Court in *Takahashi* specifically declined to rule that California's refusal to issue fishing licenses to "persons ineligible to citizenship" was a result of "racial antagonism directed solely against the Japanese . . ." 334 U.S. at 418. Justice Murphy in fact wrote a powerful concurrence detailing the widespread racial animosity directed at the Japanese and disagreeing with the majority's reluctance to decide the case on that ground. *Id.* at 422-27 (Murphy, J., concurring); see, e.g., *id.* at 422 ("The statute in question is but one more manifestation of the anti-Japanese fever which has been evident in California in varying degrees since the turn of the century.").

98. 403 U.S. 365 (1971).

99. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

100. *Graham v. Richardson*, 403 U.S. at 376 (quoting *Leger v. Sailer*, 321 F. Supp. 250, 253 (E.D. Pa. 1970)). One of the statutes in question (Arizona's) provided that "[n]o person shall be entitled to general assistance who does not meet and

The Court then cited section 1981 as evidence of conflict with federal authority:

The protection of this statute has been held to extend to aliens as well as citizens. *Takahashi*, 334 U.S., at 419 n.7. Moreover, this Court has made it clear that, whatever may be the scope of the constitutional right of interstate travel, aliens lawfully within this country have a right to enter and abide in any State in the Union "on an equality of legal privileges with all citizens under non-discriminatory laws." *Takahashi*.¹⁰¹

Although the question was not presented in either case, the Court appeared to limit the coverage of section 1981 to *lawful* aliens.¹⁰² However, it was not until *Plyler v. Doe*¹⁰³ that the court had this issue squarely presented, and that case did not arise under section 1981. In the 1970s, as would California in the 1990s, Texas decided to restrict admission into its free public school system to those children who were "citizens of the United States or legally admitted aliens."¹⁰⁴ The *Plyler* majority had little difficulty with the state's position, recently echoed by California's attorney general, in defending Proposition 187,¹⁰⁵ that

maintain the following requirements: 1. Is a citizen of the United States, or has resided in the United States a total of fifteen years." *Id.* at 367.

101. 403 U.S. at 377-78 (citations altered). The initial citation to *Takahashi* is curious because footnote seven itself simply refers to prior precedent. *See supra* note 95. Is *Graham* somehow implying that *Takahashi* does not stand on its own for the proposition that section 1981 protects aliens?

102. *See* *Takahashi*, 334 U.S. at 416, 419-420; *Graham*, 403 U.S. at 371. The issue of section 1981's coverage of aliens also arose in *Runyon v. McCrary*, 427 U.S. 160 (1976), which held — following the reasoning of *Jones v. Alfred H. Mayer*, 392 U.S. 409 (1968) — that because section 1981 was similarly based on the 1866 Act, it too prohibited private discrimination. 427 U.S. at 168 n.8. This analogy was forcibly attacked in dissent by Justice White (who may have had the better understanding of the legislative history and section 1981's origins in the 1870 Act.) White was correct in arguing that section 1981 "logically must be construed either to give 'all persons' a right not to be discriminated against by private parties in the making of contracts or to given no persons such a right." 427 U.S. at 206. Given that the 1870 Act was targeted at discrimination against aliens, he felt that the majority was wrong to construe section 1981 to cover private racial discrimination as he felt that aliens "clearly never had such a right under [section 1981,]" *id.*, because the 1870 Act was passed pursuant to the Fourteenth Amendment, which covers only state action.

103. *Plyler v. Doe*, 457 U.S. 202 (1982).

104. TEX. EDUC. CODE ANN. § 21.031 (Vernon Supp.1981), *reprinted in* *Plyler*, 457 U.S. at 205 n.1.

105. *See* Defendants' Memorandum of Points and Authorities in Opposition of Order to Show Cause re: Preliminary Injunction, *Doe v. Regents* (No. 965090) at 10 ("Thus, it was the feeling that persons who had followed the rules laid down by Congress and entered the country legally should be able to pursue their endeavors in this country free of arbitrary discrimination that formed the basis of the *Takahashi*, *Graham*, and *Truax* decisions. It is on this basis that legal aliens were 'persons within the jurisdiction of the United States' within the meaning of section 1981. *Illegal* aliens clearly are not such 'persons' inasmuch as they entered the country in violation of the law, and thus, once here, clearly do not have the same expectation of equal treatment that legal aliens have.") (original emphasis; footnote omitted).

undocumented persons were not “persons within the jurisdiction of the United States.”

To permit a State to employ the phrase “within its jurisdiction” in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment.¹⁰⁶

Justice Brennan wrote for the five to four majority that held that the statute violated equal protection.¹⁰⁷ Brennan’s opinion reiterated that education was not a “fundamental right,”¹⁰⁸ and found that undocumented individuals did not constitute a suspect class.¹⁰⁹

It is unfortunate that *Plyler* did not instead reaffirm that aliens as a group do constitute a suspect class, and consider whether there was any basis relevant to education for a state to distinguish between classes of aliens based on their federal immigration status. As the court noted in *Matthews v. Diaz*, “there is little, if any, basis for treating persons who are citizens of another state differently from persons who are citizens of another country. Both groups are noncitizens as far as the State’s interests in administering its welfare programs are concerned.”¹¹⁰ A state’s differentiation between these two groups “has no apparent justi-

106. *Plyler v. Doe*, 457 U.S. at 213. This question was addressed by the Supreme Court almost a century ago. *United States v. Wong Kim Ark*, 169 U.S. 649, 695-96 (1898) (“the change of phrase in that section, reenacting section 16 of the statute of May 31, 1870, c. 114 (16 Stat. 144), as compared with section 1 of the Civil Rights Act of 1866 — by substituting, for the words in that act, ‘of every race and color,’ the words, ‘within the jurisdiction of the United States’ — was not considered as making the section, as it now stands, less applicable to persons of every race and color and nationality than it was in its original form . . .”).

107. See *Plyler v. Doe*, 457 U.S. at 230. *Plyler* has been extensively discussed elsewhere. See, e.g., Elizabeth Hull, *Undocumented Alien Children and Free Public Education: An Analysis of Plyler v. Doe*, 44 U. PITT. L. REV. 409 (1983); Tom Gerety, *Children in the Labyrinth: The Complexities of Plyler v. Doe*, 44 U. PITT. L. REV. 379 (1983); Susan H. Bitensky, *Theoretical Foundations For a Right to Education Under the U.S. Constitution*, 86 NW. U.L. REV. 550 (1992); Note, Max Stier, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992). It is important to point out that the Court views as “not yet definitively settled the questions *whether a minimally adequate education is a fundamental right* and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.” *Papasian v. Allain*, 478 U.S. 265, 285 (1986) (emphasis added).

108. *Plyler* at 221.

109. *Plyler*, 457 U.S. at 219 n.19. An alien’s lack of legal documentation is not a “constitutional irrelevancy” because entry into this class is “the product of voluntary action.” *Id.* Cf. note 12, *infra*.

110. 426 U.S. at 85.

fication”¹¹¹ And the *Plyler* court did declare that a state may “not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools”¹¹² The “denial of education to innocent children is not a rational response to legitimate state concerns.”¹¹³

B. *THE DUANE/BHANDARI CIRCUIT COURT CONFLICT*

Following *Plyler*, and given the plain language of both section 1981 and the Fourteenth Amendment, the burden is clearly on those who suggest that an undocumented person is not a “person.” The critical importance of an understanding of the closely-intertwined relationship between the Reconstruction-era civil rights laws is demonstrated by *United States v. Otherson*.¹¹⁴ There the Ninth Circuit was faced with an appeal by several Border Patrol agents who had been convicted under 18 U.S.C. section 242¹¹⁵ of depriving undocumented immigrants of their civil rights.¹¹⁶ An indication of Congress’s intent with respect to section 1981 can be found in the language of its criminal counterpart, which was passed in 1870 as part of the same bill as section 1981¹¹⁷ but is now separately codified at 18 U.S.C. section 242: “Whoever . . . subjects any inhabitant . . . to the deprivation of any rights . . . on account of such inhabitant being an alien . . . shall be fined” (emphasis added) The defendants were part of a group of agents who routinely brutalized aliens along the border.¹¹⁸ The statute at that time¹¹⁹ applied to “any inhabit-

111. *Id.*

112. *Plyler*, 457 U.S. at 229 (alteration in original) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).

113. *Plyler*, 457 U.S. at 224 n.21.

114. *See United States v. Otherson*, 637 F.2d 1276 (9th Cir. 1980).

115. 18 U.S.C. § 242 (West Supp. 1995). The statute provides in part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than \$1000 or imprisoned not more than one year, or both

116. *Id.* at 1277.

117. *See supra* note 72.

118. The Border Patrol agents were engaged in a pattern of particularly egregious conduct:

On the morning of July 3, a Border Patrol surveillance aircraft radioed Otherson and Freselli that an alien on the ground had directed an obscene gesture at the aircraft. Otherson and Freselli later picked up three or four aliens who had been taken into custody and drove them to the area assigned to appellant Brown. There, Otherson told Brown that one of the aliens — wearing a red shirt — was the one who had made the obscene gesture to the surveillance aircraft. Brown pulled this man from the transport van and questioned him about the gesture,

ant.” The agents did not deny the beatings, but rather argued that an undocumented person who crossed the border the same day was not an “inhabitant.”¹²⁰ The interpretation was apparently a question of first impression.¹²¹

Though their argument was not implausible on their face, the Ninth Circuit ruled against the agents, stating that a “review of the statute’s history and purpose . . . makes it clear that appellants’ claim is without merit.”¹²² The Court held that the word “[i]nhabitant’ as used in the act included any person present within the jurisdiction of the United States.”¹²³ Furthermore, Congress explicitly approved this holding in 1988 when it altered the wording of 18 U.S.C. section 241, the criminal conspiracy counterpart to section 242, to extend its protections from “any

but received no reply. He slapped the alien four or five times across the face, then held the man’s arm on the floorboard of the van and beat his hand with a nightstick.

The alien still refused to answer questions about the obscene gesture, and Brown repeatedly slapped him across the face and struck his injured hand with the nightstick. Otherson joined in, punching the alien in the stomach. Finally, the alien was put back into the transport van and driven by Otherson and Freselli to another area, where agent Dirk Dick was on duty. Otherson told Dick that they had the alien who had “flipped off” the surveillance aircraft. Dick then slapped and punched the alien before he was taken at last to patrol headquarters.

The next day (July 4, 1979), Otherson took two aliens apprehended by him in San Ysidro to an area where Brown and agent Daniel Charest already had several illegal aliens in custody. Separating one alien from the group, Brown sat him down and slapped him five or six times across the face with an open hand. Otherson kicked another alien in the leg, hit him with his nightstick, and kicked his shoes into a canyon. The aliens were taken to sector headquarters and left there for routine deportation.

There was evidence to indicate that appellants’ abuse of aliens in their custody was part of a deliberate plan or policy. In late June or early July, Border Patrol Agent Ronald Gamiere, who apprehended the red-shirted alien, overheard Brown, Otherson, and a third agent talking. One of them had asked “Who’s the designated hitter?” or “Are you the designated hitter?” or a similar question. On July 3, before Otherson drove the red-shirted alien to Brown’s location, the two appellants had a radio conversation in which Brown replied “Affirm” to Otherson’s question, “Are you Delta Henry?” (In one version of the phonetic alphabet code used by Border Patrol agents, “Delta Henry” is equivalent to “DH” letters with no legitimate meaning in Border Patrol parlance.) Later on July 3, while Otherson was taking the red-shirted alien from Brown’s location to Dick’s, he explained to trainee Freselli that “we find it necessary to do things like this because the criminal justice system doesn’t do anything to these assholes.”

637 F.2d at 1277-78.

119. It has since been amended. See Act of Sept. 13, 1994, P.L. 103-322, 108 Stat. 1970, 2109, 2113, 2147.

120. 637 F.2d at 1277.

121. *Id.* at 1278.

122. *Id.*

123. *Id.* at 1283.

citizen" to "any person."¹²⁴ The Judiciary Committee declared that "[t]his change will *focus attention on the nature of the right to be protected rather than on the status of the victim* seeking to invoke the section's protection."¹²⁵ (emphasis added)

Similar reasoning brought a court to the same answer in *Duane v. GEICO*.¹²⁶ In 1994, the Fourth Circuit held in that case that section 1981 prohibits non-governmental discrimination on the basis of alienage, rejecting an insurance company's claim that the Civil War era statute reached only governmental discrimination against aliens.¹²⁷ The court of appeals, citing *Graham*¹²⁸ and *Takahashi*,¹²⁹ noted that the "Supreme Court has established that section 1981 prohibits at least public discrimination against aliens"¹³⁰ The 1866 Civil Rights Act had already been held to cover private action by the Supreme Court in *Runyon v. McCrary*.¹³¹ The *Duane* court noted that Senator Stewart patterned the 1870 Act after the 1866 statute at issue in *Runyon*, including similarly exempting private conduct from criminal penalties: "Section 17, like section 2 of the 1866 Act, exempted private violations of section 16 from the criminal sanctions it imposed. Section 16 [now section 1981], thus, must have applied to private discrimination because section 17's exemption would otherwise have been meaningless."¹³² *Duane* therefore held that section 1981 covered private as well as public alienage discrimination.

This holding conflicted directly with the Fifth Circuit holding in *Bhandari v. First National Bank of Commerce*.¹³³ *Bhandari* overturned, by a 7-6 vote, a previous panel in the same case,¹³⁴ as well as a prior contrary decision in the Fifth Circuit,¹³⁵ both of which agreed that section 1981 barred *private* alienage discrimination. While at issue in this article is section 1981's coverage of aliens, and not the now-moot public/private distinction, a com-

124. 18 U.S.C. § 241 (West Supp. 1994); see Act of Nov. 18, 1988, Pub. L. 100-690, 102 Stat. 4396 (1988).

125. H.R. REP. NO. 100-169, at 7 (1987). *But see* United States v. Maravilla, 907 F.2d 216, 225 (1st Cir. 1990) (declining to construe "inhabitant" under § 242 to cover "a temporary foreign daytime visitor.").

126. *Duane v. GEICO*, 37 F.3d at 1042.

127. The case arose prior to Congress's 1991 amendment, which makes explicit that section 1981 applies to nongovernmental discrimination. See *supra* note 7.

128. 403 U.S. 365 (1971).

129. 334 U.S. 410 (1948).

130. 37 F.3d at 1040.

131. *Runyon v. McCrary*, 427 U.S. 160 (1976).

132. 37 F.3d at 1041.

133. 829 F.2d 1343 (5th Cir. 1987) (en banc), cert. granted and judgment vacated, (1989) 429 U.S. 901, reaffirmed on remand, 887 F.2d 609 (en banc), cert. denied, (1990) 494 U.S. 1061.

134. *Bhandari v. First Nat'l Bank of Commerce*, 808 F.2d 1082 (5th Cir. 1987).

135. *Guerra v. Manchester Terminal Corp.* 498 F.2d 641 (5th Cir. 1974).

parison with *Duane* illustrates that, unlike *Duane* and *Otherson*, the *Bhandari* court failed to properly consider the law's historical context. The case arose after Jeetendra Bhandari was denied credit by a bank, partly because he was not a citizen of the United States.¹³⁶ The Fifth Circuit conceded that official alienage discrimination was proscribed by section 1981, distinguishing *Graham* and *Takahashi* by noting that they both "plainly rest on a state-action/Fourteenth Amendment analysis[;]"¹³⁷ "clearly [section 1981] was limited to public alienage discrimination alone"¹³⁸ *Bhandari* largely rests on the majority's open disagreement with the landmark Supreme Court cases of *Jones v. Alfred H. Mayer Co.*¹³⁹ and *Runyon v. McCrary*.¹⁴⁰ "[I]t seems to us beyond serious dispute that the reasoning of *Jones* and *McCrary* cannot stand of its own force. . . . There is no occasion to extend its flawed reasoning to a new subject."¹⁴¹ A brief dissent dryly remarked that "while law review articles enjoy the luxury of finding Supreme Court reasoning 'severely flawed,' the Fifth Circuit Court of Appeals is not at liberty to decide a case on this ground."¹⁴²

The circuit court's frank disregard for precedent is startling; however, the judges were likely aware that, at the time *Bhandari*

136. 829 F.2d at 1344.

137. *Id.* at 1349 n.12.

138. *Id.* at 1351.

139. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

140. *Runyon v. McCrary*, 427 U.S. 160 (1976).

141. 829 F.2d at 1349. The Fifth Circuit added that Congress's passage of an anti-discrimination provision as part of IRCA, 8 U.S.C. § 1324b, INA § 274b(a)(1), argued against the view that § 1981 already prohibited such discrimination. 829 F.2d at 1351. Pursuant to IRCA:

It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien)

(B) in the case of a citizen or intending citizen . . . because of such individual's citizenship status.

This argument was echoed by GEICO in its petition for writ of certiorari. *Duane's* counsel virtually conceded the point to the Supreme Court, saying that "an employer's refusal to hire an undocumented alien is not alienage discrimination, just as its refusal to hire full time a 14 year old African American is not racial discrimination." Brief in Opposition at 20. Section 1981's overlap with the 1964 Civil Rights Act was similarly a focus of the Court's decision in *Patterson*: "We should be reluctant . . . to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute." 491 U.S. at 181. However, no such "remedial scheme" exists for persons expelled from public school, or denied health care, by state fiat. Similar arguments have been rejected under FLSA, *Patel v. Quality Inn South*, 846 F.2d 700 (11th Cir. Ala. 1988), *cert. denied* 489 U.S. 1011 (1989), and Title VII, *EEOC v. Tortilleria La Mejor*, 758 F. Supp. 585 (E.D. Cal. 1991). After all, IRCA's sanctions are not targeted at the undocumented worker, but at the employer.

142. *Id.* at 1354 (Reavley, J., dissenting).

was decided, the Supreme Court was considering overruling *Runyon*.¹⁴³ Instead, however, in *Patterson v. McLean Credit Union*,¹⁴⁴ the Supreme Court re-affirmed *Runyon*.¹⁴⁵ Significantly, the Court then granted certiorari in *Bhandari* and vacated the decision "for further consideration in light of *Patterson*"¹⁴⁶ But, again en banc, by a sharply divided 8-6 vote, the Fifth Circuit affirmed: "We arrived at our earlier en banc decision of this appeal in full recognition of the authority of *Runyon*," claimed the majority, "albeit expressing reservations along the way regarding its analysis"¹⁴⁷ The Supreme Court then denied certiorari.¹⁴⁸ Justice White dissented, joined by Justice O'Connor:

I would grant the petition because it is not clear to me that § 1981 should be construed to prohibit private, as well as official, discrimination on the basis of race, but to prohibit only governmental discrimination on the basis of alienage. Prior cases, see [*Graham* and *Takahashi*], have indicated that § 1981 prohibits official discrimination against aliens. In *Runyon*, we held that § 1981 extends to private conduct, a holding reaffirmed in *Patterson*. Certiorari should be granted to settle whether § 1981 proscribes private alienage discrimination.¹⁴⁹

In sum, while no Supreme Court decision has directly faced the question, section 1981 has correctly been interpreted to protect aliens, consistent with the Fourteenth Amendment. It is only due to the limitation of that constitutional provision to state action that the Fifth and Fourth Circuits disagreed as to whether section 1981 reached private discrimination on the basis of alienage. However, it appears that no appellate court has applied Section 1981 in a case involving an undocumented person. Yet not only does the provision's plain language and its ties to the Fourteenth Amendment mandate coverage in such a case, but Section 1981, however, was first implemented to protect immigrants who today would be considered undocumented, as discussed in Part IV.

IV. THE UNDOCUMENTED IMMIGRANT IN EARLY AMERICAN HISTORY

In a recent article, Professor Gerald Neuman of Columbia notes that "the argument has been repeatedly offered, in connec-

143. See Stuart Taylor, *Court, 5-4, Votes to Restudy Rights in Minority Suits*, N.Y. TIMES, Apr. 26, 1988, at A1.

144. 491 U.S. 164 (1989).

145. 491 U.S. at 172.

146. 492 U.S. 901.

147. *Bhandari*, 887 F.2d 609, 610 (5th Cir. 1989).

148. 494 U.S. 1061 (1990).

149. *Id.* at 1062.

tion with the rights of 'illegal aliens,' that neither the original Constitution nor the Civil War Amendments contemplated the existence of illegal aliens because there was no immigration law until 1875."¹⁵⁰ Neuman's article seeks to expose as myth the popular notion that the borders of the United States "were legally open until the enactment of federal immigration legislation in the 1870s and 1880s."¹⁵¹ Neuman's scholarly article surveys a range of state laws regulating immigrants prior to 1870 — unfortunately not including the case of California¹⁵² — touching on the areas of crime, poverty, disease, race, and ideology. During this era, the states "employed three principal methods for dealing with undesired immigration: return of the immigrant, punishment of the immigrant, and punishment of third parties responsible for the immigrant's arrival."¹⁵³ To simplify, Neuman argues that today's undocumented immigrant had an analog in the mid-nineteenth century: "From the point of view of an individual state, an alien whose entry involved a violation of state law would seem to be an 'illegal alien.' The parallel holds most strongly in those instances where the state law addressed its prohibition to the alien, or where physical removal of the alien was a legal sanction."¹⁵⁴

The analogy is less clear from the federal point of view; Neuman admits that "[m]ore analysis is needed to decide whether a state's 'illegal aliens' were also 'illegal aliens' vis-a-vis the United States."¹⁵⁵ But he does suggest that "[i]f the policy of the United States was to leave certain categories of immigration regulation to the states, then constitutionally valid state immigration laws embodied the immigration policy of the United States."¹⁵⁶ In other words, a person considered by a state to be

150. Neuman, *supra*, note 12, at 1834.

151. *Id.*

152. It seems churlish to criticize Neuman for not including examples from California, given his explanation that his article's limits are partly "a concession to the shortness of life." *Id.* at 1841. Nevertheless, California's rich history of restrictions on immigrants, and harassment of them after their arrival, should not be overlooked. It appears that, then as now, Californians sharp reactions to unwanted immigrants helped to drive a more restrictive national immigration policy.

153. *Id.* at 1883 (footnote omitted).

154. *Id.* at 1883 (footnote omitted). Neuman points out that avoidance of bonds and commutation fees might also support an analogy to modern undocumented status, as with an immigrant who avoided such requirements "by fraud or by landing in secret." *Id.* at 1900 n.416.

155. *Id.* at 1900.

156. *Id.* at 1901. ("An illegal immigrant to Massachusetts who remained in Massachusetts would then be an illegal immigrant to the United States, even if that immigrant would have faced no barrier in entering Michigan."). Although many of these laws were of dubious constitutionality, the question is not entirely clear. A line of Supreme Court cases, beginning with *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824) and principally including *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102

present in violation of its immigration laws was undocumented vis-a-vis the United States, and not just vis-a-vis the state itself. Building on this admittedly tentative conclusion, Neuman argues that undocumented immigrants

have always existed in the United States. They are not a new phenomenon that could not have been contemplated by the Framers of the Constitution, or of the Fourteenth Amendment. An originalist argument that 'illegal aliens' lack Fourth Amendment rights, or should be excluded from the census, or that the U.S.-born children of such aliens are not entitled to citizenship, cannot be made without evidence that they were treated in that fashion in the eighteenth and nineteenth centuries.

In this context, it is interesting to note how section 1981 was first put into practice. In 1874, shortly after the law was passed, a group of twenty-two Chinese women was detained in San Francisco harbor on board the steamer *Japan* after the state's Commissioner of Immigration deemed them to be prostitutes and thus ineligible to land under state law.¹⁵⁷ A petition for habeas corpus was filed in state court. Among the arguments put forward on the women's behalf was one, made by a lawyer for the steamship company, that California's law was in conflict with section 16 of the recently passed Civil Rights Act of 1870¹⁵⁸ — which is today codified as section 1981. The judge disagreed, but the issue was not raised in the state supreme court, which affirmed.¹⁵⁹

A similar petition was then filed in California's federal district court; whose decision revoking custody was authored by U.S. Supreme Court Justice Stephen Field, sitting as a circuit judge on a three-judge panel.¹⁶⁰ The opinion rested in part on the conflict between California's attempt to exclude these individuals and the federal Burlingame Treaty with China.¹⁶¹ But, added Justice Field, "[t]here is another view of this case, equally

(1837), and *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849) — was read in 1876 by the high court in *Henderson v. Mayor of New York*, 92 U.S. 259 (1876), to support the exclusive federal authority over immigration. That federal authority was clear enough prior to the 1870s, but unable to be expressed until after the Civil War, essentially due to the divisive issue of black slavery. See, e.g., *In re Ah Fong*, 1 F. Cas. 213, 216 (1874) ("we cannot shut our eyes to the fact that much of what was formerly said upon the power of the state in this respect, grew out of the necessity which the southern states, in which the institution of slavery existed, felt of excluding free negroes from their limits.").

157. McClain: THE CHINESE STRUGGLE, *supra* note 57, at 55-56.

158. *Id.* at 57-58.

159. *Ex parte Ah Fook*, 49 Cal. 402 (1874); see McClain: THE CHINESE STRUGGLE, *supra* note 37, at 58.

160. *In re Ah Fong*, 1 F. Cas. 213 (1874); McClain: THE CHINESE STRUGGLE, *supra* note 37, at 58.

161. *In re Ah Fong*, 1 F. Cas. at 217-18.

conclusive for the discharge of petitioner, which is founded upon the legislation of congress since the adoption of the fourteenth amendment."¹⁶² Citing the new principle of "equality of protection" under that amendment, and noting that the law today codified as section 1981 was passed pursuant to that amendment and had banned unequal charges upon immigrants, the court found that statute under which the Chinese women were being prosecuted to be "in direct conflict with the act of congress."¹⁶³ Field stated, "[t]he great fundamental rights of all citizens are thus secured against any state deprivation, and all persons, whether native or foreign, high or low, are, whilst within the jurisdiction of the United States, entitled to the equal protection of the law."¹⁶⁴

Assuming that some of these women actually were prostitutes,¹⁶⁵ and thus present in California in violation of state law, this incident provides an excellent test of Neuman's thesis. The alacrity with which a federal court reached out to protect the Chinese from state law supports Neuman's argument and illustrates the broad intent of the framers of the 1870 Civil Rights Act and the Fourteenth Amendment on which it rests. Any argument that undocumented immigrants are undeserving of equal protection of the law must confront this legislation, which extended equal protection of the law to Chinese aliens in the face of the intense and officially sanctioned discrimination targeted at them by the state of California. Perhaps, pursuant to Neuman's contention, Chinese immigrants who arrived in San Francisco without paying a fifty-dollar state head tax, or who landed without their moral character being screened as required by state law, were early-nineteenth century "undocumented aliens" from the state's point of view. The application of section 1981 to protect such persons stands as a powerful declaration of the federal government's rejection of the notion that such persons can be stripped of all rights.

162. *Id.* At 218.

163. *Id.* At 218. See also *Ho Ak Kow v. Nunan*, 12 F. 252 (1879); McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 48, 73-76.

164. *In re Ah Fong*, 1 F. Cas. at 218. Field's decision recalls Justice Miller's statement for a majority of the Supreme Court's just the previous year, discussing the Civil War amendments to the Constitution in the *Slaughterhouse Cases*, that "[i]f other rights are assailed by the states which properly and necessarily fall within the protection of these articles, that protection will apply though the party may not be of African descent." 83 U.S. (16 Wall) 36, 72 (1873). Miller noted that if "Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void." *Id.*

165. This may be a reasonable assumption. See McCLAIN: THE CHINESE STRUGGLE, *supra* note 37, at 57.

Today, the attorney general of California urges the state courts hearing the challenges to Proposition 187 to defer to the electorate, characterizing the equal protection challenge to the proposition as an “attempted theft of the people’s power”¹⁶⁶ The passage of the initiative indeed stands as testimony to growing antipathy in this country towards undocumented persons and immigration in general.¹⁶⁷ But the attorney general’s position that section 1981 should apply only to *documented* aliens relies on an implicit premise that the Forty-first Congress would have tolerated the legal disabilities and harassment of Chinese aliens in California — if only these persons had been in the country illegally. The application of section 1981 to protect such persons in the years immediately following the law’s passage seriously undermines this argument, and strengthens the case for section 1981’s relevance to modern undocumented immigrants. Field’s 1874 declaration — which presaged the holding in *Takahashi*¹⁶⁸ by seven decades and, following *Plyler*,¹⁶⁹ essentially states the law as it remains today — was made contemporaneously with the Fourteenth Amendment and the 1870 Act, before the post-Civil

166. Defendants’ Memorandum of Points and Authorities in Opposition of Order to Show Cause re: Preliminary Injunction at 2-3, *Doe v. Regents* (No. 965090) (“Under the California Constitution ‘[a]ll political power is inherent in the people.’ . . . Through this action petitioners, who are concededly illegal aliens, seek to usurp the will of the people. . . . The Court is respectfully urged to prevent this attempted theft of the people’s power by denying petitioner’s request for a preliminary injunction herein.”) (brackets in original).

167. “You are the posse, and SOS is the rope,” an author of Proposition 187 — also known as the “Save Our State” (SOS) initiative — told a crowd during the campaign. Patrick J. McDonnell, *Prop. 187 Turns Up Heat in U.S. Immigration Debate*, L.A. TIMES, Aug. 10 1994, at A1. Patrick Buchanan made a proposed five-year ban on all immigration a centerpiece of his candidacy for the presidential nomination of the Republican party. *Immigration War Cry in White House Race*, DAILY MAIL, May 10, 1995, at 12. As many as 12 states are planning their own versions of Prop. 187. See Ann Davis, *The Return of the Nativists*, NAT’L L.J., June 19, 1995, at A1. Proposition 187 quickly drew the attention and concern of the international community. Ernesto Zedillo condemned the initiative in his first appearance as president-elect of Mexico. *President-elect Condemns California’s Proposition 187*, BBC Summary of World Broadcasts, Nov. 11, 1994, available in LEXIS, Nexis Library, BBCSWB File. Zedillo said “that, along with health, the right to education is a basic universal principle and therefore all Mexicans must oppose actions that violate this principle, such as California’s Proposition 187.” Zedillo, *supra.*; see also Jeff Franks, *Prop. 187 threatens U.S.-Mexico Ties*, REUTERS, Nov. 10, 1994, available in LEXIS, Nexis Library, REUWLD File. And a special rapporteur on human rights from the United Nations, visiting the United States in October 1994, reported that Prop. 187 “contains discriminatory and anti-constitutional provisions, in particular in terms of access to education.” *Report by Mr. Maurice Gille-Ahanhanzo, Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance*, para. 81, E/CN.4/1995/78/Add.1, Jan. 16, 1995. See also Daniel Bernheim, *Sunshine State in the Shadow of Shame*, GLASGOW HERALD, Nov. 30, 1994, at 10.

168. *Takahashi v. Fish & Game Comm.*, 334 U.S. 410 (1948)

169. *Plyler v. Doe*, 457 U.S. 202 (1982).

War reaction set in and buried these great laws for almost a century. No matter how the majority of voters in the individual states might view certain immigrants, after 1870 it was no longer within their power to single out aliens for mistreatment.

V. CONCLUSION

Senator Stewart's outrage over the many cruel abuses heaped upon the heads of the Chinese in California is palpable in many of his remarks on the Senate floor. Stewart would be as concerned with the unequal and unjust laws targeted at disfavored minorities.¹⁷⁰ But these groups are not defenseless. The result of his legislative handiwork — a guarantee of equal protection to all persons in the United States — stands, more than a century later, as a formidable obstacle to the application of Proposition 187. The effect of the bill, agreed Representative Bingham, was to ensure that "immigrants . . . shall . . . be entitled to equal protection of the laws."¹⁷¹

California's nineteenth century anti-Chinese laws stand today along with the Japanese internment and the southern states' Jim Crow laws as some of the lowest and meanest expressions of officially sanctioned racial discrimination. A century from now, the passage of Proposition 187 will stand with them in that state's too-long catalog of shameful xenophobic reaction. "Debar the half-million of emigrants who annually reach our shores from the elective franchise, and what would be the effect?" asked one author in a spirited response to similarly restrictionist proposals made by the Know-Nothing movement in the mid-nineteenth century. "Why, the growth, in the very midst of the community, of a vast disfranchised class — of an immense body of political lepers — of men having an existence apart from their fellow-men, not identified with them, not incorporated with society; and consequently tempted on all sides to conspire against it, to prey upon it, and to keep it in disorder."¹⁷² The nation's judiciary, state and federal, must not allow this to happen. As Justice Field noted in 1879, "[i]t is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is caught upon the

170. See text accompanying notes 69-70.

171. Cong. Globe, 41st Cong., 2d Sess., at 3871.

172. Parke Godwin, *Secret Societies—The Know-Nothings*, PUTNAM'S MONTHLY, Jan. 1855, reprinted in THE IMMIGRATION PROBLEM, *supra* note 1, at 801.

broad shield of our blessed constitution and our equal laws."¹⁷³ It is that high spirit which has motivated the courts to reject both the narrow defense of the brutal Border Patrol agents in *Other-son*¹⁷⁴ and the refusal to insure an alien in *Duane*.¹⁷⁵ That same spirit should be invoked to halt the enforcement of Proposition 187.

173. *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (1879) (footnote and internal quotation marks omitted). Note that, notwithstanding this nice rhetoric, Field was the author of the infamous Chinese Exclusion Case. *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

174. *United States v. Otherson*, 637 F.2d 1276 (9th Cir. 1980).

175. *Duane v. GEICO*, 37 F.3d at 1042.