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Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools

Joyce Kuo[†]

"Separate but equal" public schooling is less often identified with the Asian American struggle for equality, but as Ms. Kuo documents, the Chinese American community in San Francisco was engaged in a protracted struggle for access to educational facilities from which they were legally excluded. In an environment hostile to "Orientals," attempts to gain access through the courts subsequently by applying political pressure proved to be largely unsuccessful and compelled pragmatic but unsatisfactory alternatives for educating Chinese American children. But as the Chinese American population in San Francisco expanded and the segregationist sentiment eroded, de jure segregation slowly became de facto segregation.

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I. INTRODUCTION

*Brown v. Board of Education*¹ is commonly considered to be one of the most critical decisions handed down by the United States Supreme Court.² It has been particularly crucial for the Black American community who directly benefited from the decision to desegregate the schools.³

Yet, in 1971, Justice William Douglas revealed that "*Brown v. Board of Education* was not written for Blacks alone. . . ."⁴ Instead the Court explained that the segregation of Chinese Americans from the California public school system "was the classic case of de jure segregation involved in *Brown v. Board of Education*"⁵

Despite the fact that Chinese Americans have both the longest presence in this country⁶ and the longest history of discrimination⁷ of any Asian group, the history of discrimination against Chinese Americans in the public schools is often forgotten. In addition, the Chinese American community's efforts to challenge the system have also been overlooked. Explained one scholar, "Most people know about *Brown v. Board of Education* and the cases leading up to it, in which African Americans challenged segregated school systems, but few people know that Asian Americans also challenged the legality of segregated schools."⁸ As a result, discussions about discrimination in education often perpetuate the false perception that only Black Americans were affected by the "Separate but Equal" doctrine.⁹

1. 347 U.S. 483 (1954).

2. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 8 (1994). The case has also been called the "Case of the Century" for its "profound and pervasive" effect. See Paul E. Wilson, *The Genesis of Brown v. Board of Education*, 6 KAN. J.L. & PUB. POL'Y 7, 7 (1996).

3. Because the plaintiffs in the case were Black Americans who sought admission to the all-white public schools in their communities, see *Brown*, 347 U.S. at 486, it is no surprise that the case is most often viewed in the context of Black American history.

4. Guey Heung Lee v. Johnson, 404 U.S. 1215, 1216 (1971).

5. *Id.* at 1215-16.

6. See H.M. Lai, *Foreword* to VICTOR LOW, *THE UNIMPRESSIBLE RACE* ix, ix (1982); Kenyon S. Chan & Sau-Lim Tsang, *Overview of the Educational Progress of Chinese Americans*, in *THE EDUCATION OF ASIAN AND PACIFIC AMERICANS: HISTORICAL PERSPECTIVES AND PRESCRIPTIONS FOR THE FUTURE* 39, 39 (Don T. Nakanishi & Marsha Hirano-Nakanishi eds., 1983). The first Chinese immigrants arrived in America immediately after the Declaration of Independence. Lai, *supra*, at ix.

7. See IRVING G. HENDRICK, *THE EDUCATION OF NON-WHITES IN CALIFORNIA, 1849-1970*, at 29 (1977).

8. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Cal. L. Rev. 1241, 1294 (1993), 1 ASIAN L.J. 1, 54 (1994).

9. In general, when one considers racism and discrimination, particularly during the late 1800s, issues between Black and White Americans are usually the one ones that come to mind. See 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, 223 (1994). See generally Deborah Ramirez, *Multi-*

To dispel the perception that Chinese Americans were not victims of discrimination in public schools, this Comment discusses the discrimination faced by Chinese Americans in the public school system from 1850 to 1930. Since the largest concentration of Chinese Americans lived in San Francisco, California, during the late 1800s,¹⁰ much of the discrimination occurred in this city. Historical research has therefore concentrated on the San Francisco School Board's and the California state legislature's efforts to exclude and then segregate Chinese Americans. Thus, this Comment will focus on the impact of the discriminatory practices and the local efforts by the Chinese American community to surmount these barriers to public school education in San Francisco.¹¹

This Comment is divided into five parts. The first part provides a historical framework for examining the discrimination against Chinese Americans in the public schools. This historical context is helpful because it reveals the prevalence of the resentment towards the Chinese living in the U.S. during the late 1800s and early 1900s. Although this is only a cursory discussion, this part indicates that the resentment created a political, economic and social environment which facilitated the passage of exclusion and segregation laws against Chinese Americans.

The second part discusses the evolution of the San Francisco School Board's changing position on Chinese Americans in public schools. Initially excluding Chinese Americans from attending public schools, the School Board fluctuated several times in its attitude towards these students—first excluding them, then admitting them into a separate school, then excluding them again—until the School Board settled on a segregated system. At the same time, the Chinese American community was divided in how to react to the exclusion and segregation policies, with one group

cultural Empowerment: It's Not Just Black and White Anymore, 47 STAN. L. REV. 957 (1995) (discussing changing demographics and advocating a new way to look at minority issues). The one well-known exception was *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where the court for the first time extended the Fourteenth Amendment's Equal Protection Clause to Chinese Americans. However, recent scholarly analysis indicates that the case should be viewed alternatively in the context of economic rights, rather than as a case heralding racial equality. See Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 370 (1995).

10. See HENDRICK, *supra* note 7, at 30. I use the term "Chinese" strictly in this Comment to designate those individuals who maintained strong connections with China, recently arrived in the U.S. or had no plans to settle down in the U.S. I use the term "Chinese American" to designate those individuals, either immigrants or native-borns, of Chinese descent who embraced American culture and intended to settle down. However, I question the continuing need to classify the latter individuals as "Chinese" at all if they maintain no connection to China or the Chinese culture.

11. This Comment does not intend to argue that San Francisco was the only city in the country where Chinese Americans fought for equality in public school education. For example, the fact that *Gong Lum v. Rice*, 275 U.S. 78 (1927), originated in Mississippi implied that there was an active Chinese American community in the South. However, little research has been conducted about the Chinese American communities outside California. As more historical research is conducted regarding the pockets of Chinese American communities across the country, the picture of the Chinese American struggle to overcome the discrimination in public schools will become more complete.

opting to find alternative educational resources and the other group struggling to change the system. The third part of this Comment discusses this latter group's attempts to appeal to the United States Constitution in order to reverse the discriminatory policies of the state legislatures and school boards. Their lack of success in these cases effectively closed off the option of using the legal system to redress their wrongs. The other option closed off to them—using political power and influence to change the laws—is discussed in the fourth part. Whereas Japanese Americans were able to successfully overcome the segregation barrier by employing their political power, Chinese Americans were unable to garner similar support and influence to assist them. The fifth and final part of this discussion does, however, indicate that the Chinese Americans in San Francisco were able to break down the policy of segregation gradually by pursuing case-by-case exceptions, by establishing their interest in public school education through their sheer numbers, and by finally gaining enough leverage to persuade the School Board to open up the public school system.

II.

UNDERSTANDING THE HISTORICAL CONTEXT

Because the laws discriminating against the Chinese American students in the public schools were created on a local and state level, a discussion of the prevalent anti-Chinese public sentiment provides an important historical and political context for understanding the origins of the statutory restrictions and the continuation of the policy segregating Chinese Americans from public schools. In addition, this discussion sets the stage for understanding the reactions of the Chinese American community to the segregation.

The Chinese were the primary group of Asian immigrants in the United States during the late nineteenth century.¹² Arriving in large numbers in the 1850s, Chinese immigrants were tolerated for their manpower during the rapid westerly expansion of the United States, which included the construction of the transcontinental railroads.¹³ However, these same immigrants were quickly viewed as a threat during the economic recession of the 1870s, facing accusations that they had stolen jobs from American workers and that they had caused the economic troubles that had befallen the country.¹⁴ Denounced for their work ethic,¹⁵ appearance,¹⁶ and relig-

12. See John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 *ASIAN L.J.* 55, 56 (1996).

13. See Lai, *supra* note 6, at ix. While some were fleeing the economic and political chaos in China at the time, others were drawn to California with the hopes of finding gold. See Charles M. Wollenberg, "Yellow Peril" in the Schools (I and II), in *THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE* 3, 4 (Don T. Nakanishi & Tina Yamano Nishida eds., 1995). Finding little gold, many found employment in the railroad or mining industries. See *id.*

14. See Lai, *supra* note 6, at x. Ironically, during the periods of labor shortage immediately pre-

ion,¹⁷ the Chinese were considered "inferior and unassimilable."¹⁸ Such anti-Chinese sentiments were reflected in scholarly writings,¹⁹ judicial opinions,²⁰ and political statements.²¹

One of the effects of such resentment was violence targeted at Chinese immigrants. Such violence was unsurprisingly reported all over California,²² where, in 1870, almost 80% of the nation's 63,199 Chinese people lived, the largest percentage in the country.²³ In addition, the violence oc-

ceding the recession, labor agents were sent to China to entice workers to come to America, providing them with false hopes of a return passage home. After completing construction of the railroads and encountering insufferable discrimination as miners, many workers found themselves without passage to China and were forced to stay. See VICTOR LOW, *THE UNIMPRESSIBLE RACE* 27 (1982). As a result, even though many Chinese workers may not have initially emigrated in order to assimilate into the American society, these newly unemployed and abandoned workers settled in San Francisco and became a source of cheap labor. See *id.* See also Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CAL. L. REV. 529, 532 (1984) [hereinafter McClain, *The First Phase*].

15. Explained scholar Charles McClain, Jr., the Chinese were criticized because "they worked too hard (often for less pay than others were willing to accept), saved too much and spent too little." McClain, *The First Phase*, *supra* note 14, at 535.

16. *Id.*

17. Representative William Higby of California stated, "The Chinese are nothing but a pagan race. . . . You cannot make good citizens of them; they do not learn the language of the country; and you can communicate with them only with the greatest difficulty, as their language is the most difficult of all those spoken" Maltz, *supra* note 9, at 227.

18. Lai, *supra* note 6, at ix. In some instances, the Chinese were "deemed both unworthy and incapable of assimilation" into American society. HENDRICK, *supra* note 7, at 32.

19. For example, California's first major historian Hubert Howe Bancroft called the Chinese laborers "human leeches" who were "sucking the life-blood of the country." HENDRICK, *supra* note 7, at 33.

20. For example, in *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889), Justice Stephen J. Field called the Chinese "strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for [the Chinese] to assimilate with our people or to make any change in their habits or modes of living."

21. In his inaugural address in 1862, Governor Leland Stanford stated:

There can be no doubt that the presence of numbers among us of a degraded and distinct people must exercise a deleterious influence upon the superior race, and, to a certain extent, repel desirable immigration. It will afford me great pleasure to concur with the Legislature in any constitutional action, having for its object the repression of the immigration of the Asiatic races.

LOW, *supra* note 14, at 18 (citing H. BRETT MELENDY & BENJAMIN F. GILBERT, *THE GOVERNORS OF CALIFORNIA* 118 (1965)). Between the election years of 1876 and 1879, political parties campaigned on anti-Chinese platforms. The Workingmen's Party, led by Dennis Kearney, emerged in 1878 with "the Chinese Must Go" campaign, which was called the "most well publicized anti-Chinese campaign of all." HENDRICK, *supra* note 7, at 32.

22. One of the most famous anti-Chinese demonstrations occurred in Chico, California, where arsonists tied up four Chinese immigrants, covered them with kerosene and lit them on fire. The Order of Caucasians, a white supremacist organization in California, claimed responsibility. See Chang, *supra* note 8, at 14. In another incident at Nicolaus, about 25 miles from Sacramento, a group of masked Caucasian men dragged 46 Chinese laborers from their beds and tried to send them across the Pacific Ocean on a steamer. Although the captain of the ship refused to take them all the way across the Pacific, he took them off the dock while spectators cheered. See Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The Unusual Case of Baldwin v. Franks*, in 1 CHINESE IMMIGRANTS AND AMERICAN LAW, 197, 204-05 (Charles McClain ed., 1994) [hereinafter McClain, *The Unusual Case*].

23. See Rose Hum Lee, *The Decline of Chinatowns in the United States*, in RACE PREJUDICE

curred nationally,²⁴ sparking a debate over the rights of Chinese immigrants nationwide.²⁵ However, much of the violence against Chinese immigrants began and continued to occur in San Francisco.²⁶ With a high concentration of Chinese immigrants disembarking from their transpacific journeys and settling in San Francisco,²⁷ the City by the Bay became "California's Chinese capital"²⁸ and the focal point of much of the anti-Chinese sentiment.²⁹

Violence, however, was only one manifestation of the resentment against Chinese Americans. Blatant discrimination against Chinese immigrants also existed in California statutes,³⁰ although some of these statutes were quickly overturned by the courts as interfering with the foreign commerce power of the federal government.³¹ On a federal level, however,

AND DISCRIMINATION 146, 151 (Arnold M. Rose ed., 1951). See also Frank Wen-hui Tsai, *Diversity and Conflict Between Old and New Chinese Immigrants in the United States*, in SOURCEBOOK ON THE NEW IMMIGRATION: IMPLICATIONS FOR THE UNITED STATES AND THE INTERNATIONAL COMMUNITY 329, 331 (Roy Simon Bryce-Laporte ed., 1980). The Chinese population made up 10% of the state's overall population, see ROGER DANIELS & HARRY H.L. KITANO, *AMERICAN RACISM: EXPLORATION OF THE NATURE OF PREJUDICE* 37 (1970), the largest non-white minority in California at that time. See Wollenberg, *supra* note 13, at 4.

24. See LOW, *supra* note 14, at 48. Another famous anti-Chinese demonstration was the Chinese Massacre of 1885 which took place in Rock Springs, Wyoming. In that incident, white miners killed twenty-eight Chinese workers, wounded fifteen and chased several hundreds out of town. Not one white miner was indicted by the grand jury for the incident. See Chang, *supra* note 8, at 14-15. In addition, a similar incident to the Nicolaus event occurred in Oregon City, Oregon. See McClain, *The Unusual Case*, *supra* note 22, at 205.

25. See Maltz, *supra* note 9, at 225.

26. One of the first reported violent outbreaks was recorded in 1867, where a mob drove out several Chinese laborers in San Francisco and subsequently burned their shacks and cabins. See LOW, *supra* note 14, at 28.

27. Although sources vary about the exact numbers of Chinese in California, the 1870 census showed that at least one-quarter of California's Chinese lived in San Francisco. See DANIELS & KITANO, *supra* note 23, at 38-39. As a result, San Francisco had the most Chinese of any other place in California. See Thomas W. Chinn, *Chinese Americans*, in RACIAL DISCRIMINATION AGAINST NEITHER-WHITE-NOR-BLACK AMERICAN MINORITIES 19, 21 (Kananur V. Chandras ed., 1978). By 1880, 80% of California's Chinese population lived in San Francisco. See HENDRICK, *supra* note 7, at 30.

28. See Wollenberg, *supra* note 13, at 4.

29. Scholar Irving Hendrick observed that "Even a cursory study of racial tension involving Chinese . . . immigrants in California reflects a strong correlation between population and the extent to which the [group was] targeted for ill-treatment." HENDRICK, *supra* note 7, at 29.

30. For example, the California State Legislature passed the Foreign Miners' License Tax in 1852, aimed specifically at the Chinese working in the mines. See McClain, *The First Phase*, *supra* note 14, at 539. The Legislature also enacted the commutation tax which required owners to post bond or remit payment per foreign passenger in an effort to discourage more Chinese from coming to the United States. See *id.* at 539-40. In 1854, the Legislature imposed a direct capitation tax on all Chinese and Japanese living in the U.S. See *id.* at 544.

31. See Maltz, *supra* note 9, at 224. See also McClain, *The First Phase*, *supra* note 14, at 545. For example, the California Supreme Court overturned the Legislature's attempt to impose a passenger tax on all vessels transporting Chinese immigrants, see *People v. Downer*, 7 Cal. 169 (1857), and overturned a direct capitation tax on all Chinese immigrants residing in the U.S. See *Lin Sing v. Washburn*, 20 Cal. 534 (1862).

Congress enacted its own immigration restrictions.³² Responding to the increasing anti-Chinese aggression, Congress first modified the original terms of the Burlingame Treaty of 1868,³³ even though this treaty had been explicitly adopted by the U.S. government to protect the Chinese in America from discrimination. Without treaty obligations to limit their actions, Congress passed laws restricting Chinese immigration, including the Chinese Exclusion Act of 1882,³⁴ the first immigration law to limit the entry of an ethnic group into the United States.³⁵

32. The United States Constitution explicitly provides that the power to govern naturalization laws resides with Congress. See U.S. CONST. art. I, § 8, cl. 4. In *United States v. Wong Kim Ark*, 169 U.S. 649, 701 (1898), the Court explained that "[t]he power, granted to Congress by the Constitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in Congress. *Chirac v. Chirac*, (1817) 2 Wheat. 259."

33. The Treaty opened trade and commerce between China and U.S. and guaranteed the same privileges and immunities to Chinese immigrants as to American citizens, including freedom of migration, religious choice, and access to public school education. See Additional Articles to the Treaty between the United States of America and the Ta-Tsing Empire, July 28, 1868, U.S.-China, art. IV-VII, 16 Stat. 739, 740. However, naturalization was not granted as part of the treaty, since the Senate added a provision that explicitly prevented Chinese immigrants from being naturalized. See *id.* at art. VI, 16 Stat. at 740. See also Maltz, *supra* note 9, at 229; LOW, *supra* note 14, at 29; HENDRICK, *supra* note 7, at 31-32.

In 1880, Congress revised the Treaty, thereby allowing the U.S. to regulate immigration of laborers, but not to prohibit it. See Treaty between the United States and China, concerning immigration, Nov. 17, 1880, U.S.-China, art. 1, 22 Stat. 826, 826. However, Congress agreed that the U.S. was still not allowed to restrict the mobility of Chinese already in the U.S. and "reaffirmed [their] responsibility . . . to protect all Chinese subjects from abuse and mistreatment." LOW, *supra* note 14, at 47. A few years later, in the Scott Act of 1888, Congress ignored the treaty and prohibited Chinese laborers from re-entering the United States after a temporary leave, despite the papers entitling them to return. See *id.* at 74-75. The United States Supreme Court upheld the Legislature's power to create and enforce this Act. See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) ("Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at anytime, at its pleasure.").

34. Ch. 126, 22 Stat. 58, 58-61 (1882) (repealed 1943). Although initially prohibiting immigration for 10 years, the Act was renewed in 1892, 1902 and then 1904 for an indefinite period of time. See Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 13 (1994). The Supreme Court held that the Acts, collectively known as the Chinese Exclusion Acts, were constitutional. See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) (holding that the 1892 Geary Act was within the power of the legislative and executive branches of government and therefore constitutional). See also LOW, *supra* note 14, at 75; Elizabeth Hull, *Naturalization and Denaturalization: A Documentary History*, in *ASIAN AMERICANS AND THE SUPREME COURT* 403, 404 (Hyung-Chan Kim ed., 1992). The acts were not repealed until 1943 when China became an ally during World War II. See Chan & Tsang, *supra* note 6, at 40; Hull, *supra*, at 404 n.9.

To shed light on the severity of these exclusion acts, the Geary Act of 1892, which renewed the 1882 Exclusion Act for another ten years, was described as a "harsh measure [that] practically stripped the Chinese of protection in the courts," LOW, *supra* note 14, at 75, and "the most draconian immigration law ever passed." Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to the Development of American Law*, in 1 CHINESE IMMIGRANTS AND AMERICAN LAW 135, 150 (Charles McClain ed., 1994). Not only did the Act deny bail in habeas corpus cases, it required the Chinese to obtain a certificate affirming their right to be in the country. Arrested for not having the certificate, the Chinese shouldered the burden of proof of finding one white witness to verify that he had lived in the U.S. before 1880. See LOW, *supra* note 14, at 75; McClain & McClain, *supra*, at 150.

35. See Lai, *supra* note 6, at x.

In response to these immigration restrictions, the Judiciary gave its stamp of approval.³⁶ United States Supreme Court Justice Stephen J. Field explained that:

As [the Chinese] grew in numbers each year the people of the coast saw, or believed they saw . . . great danger that at no distant day that portion of our country would be overrun by them unless prompt action was taken to restrict their immigration. . . . So urgent and constant were the prayers for relief against existing and anticipated evils, both from the public authorities of the Pacific coast and from private individuals, that Congress was impelled to act on the subject.³⁷

Not only were there limitations on the number of Chinese immigrants permitted to enter the United States, but there were also several statutory restrictions, with judicial approval, placed on the Chinese Americans already living in the U.S.³⁸ Regardless of how long they had been living in the U.S., the Chinese in America were considered to be "transients whose loyalties remained with China and who intended to return there."³⁹ Excluded from land ownership,⁴⁰ voting,⁴¹ access to courts,⁴² employment,⁴³ interracial marriages,⁴⁴ and naturalization,⁴⁵ the Chinese were viewed as

36. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) (permitting Congress to modify the Burlingame Treaty with the Scott Act; also called the Chinese Exclusion Case).

37. *Id.* at 595-96.

38. See Maltz, *supra* note 9, at 224-25.

39. *Id.* at 227.

40. The first statute that excluded aliens "not eligible for citizenship" from owning land was passed by California in 1913. See Su Sun Bai, *Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731, 751 (1991). Other states, including Arizona, Louisiana, New Mexico, Idaho, Montana, and Kansas followed California's model. Only two states, Washington and Oregon, preceded California in enacting an alien land ownership prohibition in 1906. See *id.* at 751 n.93 (citation omitted).

41. California's Constitution in 1879 denied voting privileges to "idiots, insane persons, and all 'natives of China.'" Hull, *supra* note 34, at 404 (citations omitted). See also HENDRICK, *supra* note 7, at 32 (citing Section I of the California Constitution which provided that "no native of China, no idiot, insane person or person convicted of any infamous crime, and no person hereafter convicted of embezzlement or misappropriation of public money, shall ever exercise the privilege of an elector in this State.")). See also Bai, *supra* note 40, at 753 n.106.

42. See *People v. Hall*, 4 Cal. 399 (1854) (holding that a Chinese person could not testify against a white person in court). Chief Justice Hugh C. Murray explained that he feared that the Chinese, "[a people] whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point" would soon emerge "at the polls, in the jury box, upon the bench, and in our legislative halls." *Id.* at 404-05.

43. California enacted requirements which made it more difficult for Asians to participate in certain professions. For example, state licensing requirements excluded Asian non-citizens from becoming "attorneys, physicians, teachers, pharmacists, veterinarians, hairdressers, cosmetologists, barbers, funeral directors, peddlers, and hunters." Bai, *supra* note 40, at 751 n.95 (citing Chin Kim & Bok Lim C. Kim, *Asian Immigrants in American Law: A Look at the Past and the Challenge Which Remains*, 26 AM. U.L. REV. 373, 373-407 (1977)).

44. In *Perez v. Sharp*, 32 Cal.2d 711 (1948), the California Supreme Court finally overturned its anti-miscegenation law on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment. The United States Supreme Court, in *Loving v. Virginia*, 388 U.S. 1, 6 & n.5 (1967), noted that California was the first state court in the country to find the anti-miscegenation law unconstitutional.

foreigners, regardless of their intent to reside permanently in the United States, and were thus denied many of the privileges and rights of Americans.⁴⁶

III.

ESTABLISHING THE SEPARATE BUT EQUAL DOCTRINE FOR CHINESE AMERICANS IN SCHOOLS

Despite the harsh stereotypes and blatant discrimination confronting them, many Chinese nonetheless settled in California, particularly San Francisco,⁴⁷ and began to call it home. Taxed without representation,⁴⁸ Chinese American parents began to demand the benefits of facilities, such as public schools, that their taxes supported.⁴⁹ Children born in the United States to parents of Chinese descent asked to attend American schools with other students their age.⁵⁰ Unable to ignore the increasing persistence of the Chinese community, the San Francisco School Board was forced to address the question of whether to admit the Chinese American students into the public school system.

Because the states in general had little guidance from the federal government on how to answer this question,⁵¹ the San Francisco School Board, in deciding their policy on Chinese American students, seemed to improvise, reacting first to the public and then to court decisions. However, af-

45. The Chinese were finally allowed to be naturalized under the Magnuson Bill in 1943. See LOW, *supra* note 14, at 134.

46. Although many Chinese were not eager to assimilate, but instead wanted to retain their cultural identity and their ties to their "homeland," those who did want to settle down found that "[t]he American stereotype of the Chinaman did not easily allow for the chance that some Chinese would choose to accept the American culture." LOW, *supra* note 14, at 33. See HENDRICK, *supra* note 7, at 32-33.

47. See *supra* note 27 and accompanying text.

48. Superintendent of Schools John Pelton noted in 1867 that the Chinese in San Francisco paid \$14,000 annually in taxes. This was more than enough to maintain a school for their benefit, as Pelton later argued. See HENDRICK, *supra* note 7, at 27. He called this "a striking instance of taxation without representation." Wollenberg, *supra* note 13, at 5 (citations omitted).

49. See Lai, *supra* note 6, at x-xi. Little else is explicitly stated about the motivations behind Chinese parents' efforts to gain access to the public schools for their children. One can speculate that the Chinese saw education, particularly of the English language, as critical to gaining acceptance and integrating into American society. Attending public schools with other American children may have been seen as the best way to assimilate. Other reasons may include: the expense of private schooling, the convenience of attending local schools, and the lack of interest in learning about Christianity in the missionary schools.

50. See *infra* notes 100-01, 127-28 and accompanying text. See, e.g., *Tape v. Hurley*, 66 Cal. 473 (1885); *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902).

51. See *Piper v. Big Pine School Dist. of Inyo County*, 193 Cal. 664, 669 (1924) ("The federal constitution does not provide for any general system of education to be conducted and controlled by the national government. It is distinctly a state affair." (citations omitted)); *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528, 545 (1899) ("[T]he education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.").

ter the critical decision in *Tape v. Hurley*,⁵² the school board finally settled on the "Separate but Equal" doctrine.

A. Creating an Exclusion Policy

Although the earliest laws establishing the public school system in California had ignored the explicit mention of race,⁵³ the intent of the legislature to exclude non-whites from the system was evident in a 1855 school law which explicitly referred to "white children."⁵⁴ It was clear through this mention that only white children could attend public schools. The following year, the school passed an act which placed into the hands of the white community and the school board the decision of whether to open additional public schools.⁵⁵ Through these two laws, the Legislature thereby reinforced the exclusion of non-white children from the public school system.

A few years later, the Legislature went even further, officially passing a new School Law of 1860 which segregated specific minority groups, including children of Black, Chinese and Indian descent, into separate schools.⁵⁶ Summarizing the sentiment at the time, the press cheered:

[The codes] let us keep our public schools free from the intrusion of the inferior races. If we are compelled to have Negroes and Chinamen among us, it is better, of course, that they should be educated. But teach them separately from our own children. Let us preserve our Caucasian blood pure. We want no mongrel race of moral and mental hybrids to people the mountains and valleys of California.⁵⁷

Opening a separate school for Chinese Americans, however, was a slow process. Although discussing the possibility of opening a separate evening school, the board blamed the lack of funding for the lack of action.⁵⁸ In August 1859, 30 Chinese parents petitioned the board to estab-

52. 66 Cal. 473 (1885).

53. See LOW, *supra* note 14, at 6.

54. Section 18 of the 1855 school law stated that "the Marshals . . . shall . . . annually, take a specific census of all the white children within their respective precincts . . . and make full report . . . to the County Superintendent of Common Schools, and . . . to the Trustees in their respective school districts . . ." *Id.*

55. Section 34 of the Act of 1856 stated that "[u]pon the petition of fifty heads of white families . . . the Board of Education may, in their discretion, establish a common school or additional common schools . . ." *Id.*

56. The California School Law of 1860 stated that:

Negroes, Mongolians and Indians shall not be admitted into the public schools; and whenever satisfactory evidence is furnished to the Superintendent of Public Instruction to show that said prohibited parties are attending such schools, he may withhold from the district in which such schools are situated, all share of the State School Funds . . . the trustees of any district may establish a separate school for the education of Negroes, Mongolians and Indians, and use the public school funds for the support of the same.

Id. at 17 (citations omitted).

57. *Id.* at 10 (citing *The Public School and Colored Children*, S.F. EVENING BULL., Feb. 24, 1858, at 2).

58. See LOW, *supra* note 14, at 13.

lish a primary school for their children.⁵⁹ Discounting the seriousness of the petition, the school board gave it to the committee for textbooks to review.⁶⁰ The tide changed when Reverend Speer, an advocate of educating the Chinese in public schools, offered a large room in his church for the Chinese school, which the Board accepted.⁶¹

The Chinese School was officially opened as a public school for Chinese students, young and old, in San Francisco's Chinatown in September 1859.⁶² Attendance, however, was sporadic and low in the first year⁶³ and in subsequent years.⁶⁴

Although not conclusive, one reason for this low attendance rate may have been the school board's reluctance to provide a separate school for Chinese Americans and the lack of control the Chinese Americans had over the administration of the school. Claiming the lack of funds,⁶⁵ the Board closed the school after only four months of operation, only to reopen it after the white community protested.⁶⁶ Superintendent of Schools James Denman, without conducting a thorough investigation, quickly blamed the low attendance rates on the lack of student interest in learning, called the Chinese school "a doubtful experiment", and cautioned against continuing to fund the school with public money.⁶⁷ His comments led to another closing of the school, but after protests from the Chinese American

59. *See id.*

60. *See id.*

61. *See id.* at 14. The Church's interest in educating the Chinese was not surprising. One editor of the *Evening Bulletin* commented that the best way to convert the Chinese to the Christian religion was by teaching them English. *See id.* at 7.

62. *See id.* at 13. Teaching English, the school drew a crowd of many older adults who had previously attended the evening school outside Chinatown in order to avoid the commute. *See id.* at 14.

63. School Superintendent James Denman reported that the school opened with 15 students, but averaged only 10 students in the first nine months. *See* LOW, *supra* note 14, at 15-16. This average is disputed, however, and was reported to be 21 students during the first year of administration, and even as high as 40. *See id.* at 16, 31.

64. Census data in 1863 showed that while there were 455 Chinese children in the San Francisco area, none attended public school. *See id.* at 20. By 1864, the average daily attendance reached a high mark of 30 students. *See id.* at 23.

65. *See* LOW, *supra* note 14, at 14 (citing *The Chinese School Abandoned—Twopenny Economy*, S.F. EVENING BULL., Dec. 31, 1859, at 3).

66. For example, a newspaper editorial explained that "Chinamen are required to pay school taxes. . . . It is but decent that they should have some remuneration for their taxes." *Id.* (citing *The Chinese School Abandoned—Twopenny Economy*, S.F. EVENING BULL., Dec. 31, 1859, at 3). Another writer explained, "Surely our worthy Board of Education can find some other means of compromising to the extent of \$75 per month, and thus continue this laudable work of educating the Chinese children; for it is only by doing so that we can prevent their becoming the degraded and pernicious pests of society." *Id.* (citing *The Chinese School*, S.F. DAILY ALTA CAL., Jan. 1, 1860, at 2). However, this is probably a minority perspective. It is more likely that whites supported the closing. *See* HENDRICK, *supra* note 7, at 33.

67. *See* LOW, *supra* note 14, at 16-17. Denman explained that "I very much question the justice and propriety of expending the public funds to sustain this school, when those for whom it was established manifest so little interest in availing themselves of its advantages." *See id.* at 15 (citing *The Board of Education*, S.F. EVENING BULL., Apr. 25, 1860, at 3).

community and their advocates, the school was reopened again.⁶⁸ In addition, clashes between the school board and the Chinese community continued even after the school was opened, such as disputes over the selection of the teacher and the curriculum, again creating a disincentive for Chinese Americans to attend a school whose lessons they had a limited role in creating.⁶⁹

Another factor contributing to the disappointingly low attendance was the decision to move the school beyond the boundaries of Chinatown.⁷⁰ Because the new location "fell in Caucasian territory," not only was there a long commute to school, but white school children often insulted, abused, and threw stones at the Chinese students.⁷¹ This antagonism from their peers probably deterred students from making the commute to school.

Indeed, the violence by the white community against the Chinese had become so systematic by the 1870s⁷² that the once patronizing attitude of "Americaniz[ing] the Chinamen"⁷³ turned to rejection. In 1870 and 1872, the Legislature revised the 1860 School Code so that Chinese American children could not even attend separate schools.⁷⁴ Without a statute providing separate schools for the Chinese, and ignoring the provisions of the Burlingame Treaty of 1868 (which had provided public education for Chinese in America⁷⁵), the school board felt justified in officially and finally

68. See *id.* at 16.

69. See *id.* at 24-26. For example, one teacher wanted to focus on more religious themes, against the wishes of the Chinese parents. In response to this situation, the Chinese merchants petitioned for a reorganization of the school and succeeded in replacing this teacher, although he was rehired again a few years later and resigned soon thereafter. See *id.* Thus, the students' interest in learning may have been masked by the strong religious emphasis in the school as a result of the school's affiliation with the Reverend Speer. A member of the school board argued that:

[I]f the school was reopened, it should be upon precisely the basis that the other schools are on. . . . [T]he [Chinese] school had been injured before by the religious teaching that had been introduced—by long prayers, and reading the Bible. The school professed to be established for the purpose of teaching the Chinese our language. . . . So long as the school was supported by the public moneys, it was wrong to allow it to be construed into a religious school . . . [B]etter teach them the alphabet, which the scholars are anxious to learn, before trying to force the gospel on them.

Id. at 16 (citing *The Chinese School*, S.F. EVENING BULL., Oct. 26, 1860, at 3).

70. See *id.* at 26.

71. See *id.* White school children were often the offenders of anti-Chinese acts. An editor for the *Evening Bulletin* pleaded:

Can't something be done to stop the boys from insulting and abusing Chinamen? . . . many of the city schoolboys do these things. I saw a little squad at it yesterday, right by a church, where we were praying for pardon for our National sins! Won't you speak to the parents of our boys, or their school masters, or Sunday School teachers . . . ?

Id. at 19 (citing *Cowardly Business for American Boys*, S.F. EVENING BULL., Sept. 27, 1861, at 3).

72. See LOW, *supra* note 14, at 19.

73. See *id.* at 7.

74. See *supra* note 56 and accompanying text. After the revisions, Section 56 of the School Law of 1870 read: "The education of children of African descent, and Indian children, shall be provided for in separate schools." *Wysinger v. Crookshank*, 82 Cal. 588, 590 (1890). The word "Mongolians" was removed from the law so that now Chinese Americans were nowhere to be seen in the code. See LOW, *supra* note 14, at 26.

75. See *supra* note 33 and accompanying text.

closing the Chinese School in 1871.⁷⁶ Thus, from 1871 to 1885, the Chinese were explicitly excluded from the all-white and even the separate schools in the public school system.

B. A Community Divided: To Fight or Not Fight

The Chinese community's initial reactions to the closing of the only public school accessible to children of Chinese descent can be divided into two distinct groups. One group sought alternatives to public education by attending private schools established by the local Chinese American community or alternative schools sponsored by missionaries. As a result, the lack of access to public education from 1871 to 1885 did not translate into "no education" for these Chinese Americans in San Francisco. The other group, on the other hand, reacted to the lack of public schools by lobbying for change through the School Board and State Legislature. Although initially unsuccessful, this group's activism laid the groundwork for later efforts to effect change.

For the group of Chinese Americans who did not want to challenge the system, there were two alternative avenues for receiving an education. The first alternative was education in a private school. These schools, known as Chinese Language Schools, were organized and run by Chinese Americans for school-aged children with the explicit purpose of teaching and maintaining the traditional Chinese culture and values.⁷⁷ As described by scholar Charles Wollenberg, "[A Chinese Language School] attempted to operate as if it were located in China, hiring teachers with recognized Chinese degrees and licenses and offering a curriculum identical with that of Chinese institutions."⁷⁸ These schools were attractive for two reasons. The first was that the environment at these private schools was less hostile towards the Chinese culture than the schools created by the San Francisco school board.⁷⁹ The other reason was that, in accordance with the community's interests, education was premised on the belief that Chinese American students would one day "return" to China so there was no need to assimilate into American society.⁸⁰

Another alternative to attending public schools was attending a school offered by Christian missionary organizations. By 1871, many Christian missionary organizations offered some form of English-language instruc-

76. See LOW, *supra* note 14, at 27. Because the school was closed right at the beginning of the violence against the Chinese, much of the responsibility for the closing fell on the shoulders of the Superintendent of Schools James Denman, who believed from the beginning that the Chinese should not be offered a public school education. See *id.* at 30.

77. The most important one was established by the Chinese Six Companies, an organization consisting of the most powerful Chinese merchants and which became "the supreme organ of social control for California's Chinese." Wollenberg, *supra* note 13, at 6.

78. See *id.*

79. See *id.*

80. See *id.*

tion to students of all ages, inspired by the efforts of Reverend Speer who was a vocal advocate for recent immigrants.⁸¹ According to Reverend Otis Gibson, by 1876 approximately 5,500 Chinese were enrolled in these missionary programs, although average attendance was only about one-third.⁸² Although the missionaries were the "staunchest defenders and protectors of the Chinese in California,"⁸³ they were largely motivated by their desire to convert the Chinese to Christianity. Explained one mission, "[T]hat desire to learn the English language is still our principal fulcrum in the effort to lift the Chinese into the light of Christian life. We could bait our hook with the bait of the English primer and make the primer speak to them of Christ."⁸⁴ As such, these schools, while providing some English language instruction, may have deterred consistent attendance as a result of the missionaries' underlying intent.⁸⁵

To some outsiders, the Chinese living in Chinatown seemed satisfied with these two options; however, there was another group of Chinese Americans living in the United States. This group consisted of Chinese immigrants, who may or may not have been living within the boundaries of Chinatown, but who had already assimilated into American society. For this group, public schools were the best option to teach their children the English language, in contrast to the private schools that taught the Chinese language and the missionary schools that taught the Bible. In addition, the Chinese Americans realized that they were being taxed without receiving any benefits, including the benefits of a public school education.⁸⁶ This group of Chinese American parents fought to gain admittance to the public schools by petitioning the School Board and the State Legislature, but they faced defeat each time.⁸⁷ In 1872, a year after the closing of the Chinese School, they petitioned the School Board for an alternative Chinese night school but were referred to the committee on evening schools to no avail.⁸⁸

In another instance, 39 tax-paying Chinese businessmen petitioned the San Francisco Board of Education and then the committee on evening schools for the right to a public school education for their children.⁸⁹ Referred to the Judiciary Committee to determine the question of law, the Chinese community instead gathered 13,000 signatures to petition the state legislature in 1878 for access to the public school system. Arguing that

81. *See id.* at 5-6.

82. *See* Wollenberg, *supra* note 13, at 6.

83. HENDRICK, *supra* note 7, at 27.

84. Wollenberg, *supra* note 13, at 5.

85. *See supra* note 69 and accompanying text.

86. As one scholar noted, "the low percentage of students attending private schools plus the unfairness of taxation without representation resulted in the relentless drive by the Chinese community and their supporters to secure the right of public-school attendance." Low, *supra* note 14, at 54.

87. *See id.* at 54-57.

88. *See id.* at 54.

89. *See id.* at 57; Wollenberg, *supra* note 13, at 7.

they had been taxed for an educational system that benefited only Black and White Americans, they requested that the legislature amend the school law "so that our children may be admitted into public schools, or what we would prefer, that separate schools may be established for them."⁹⁰ Although the petition was rejected, "[t]his action by the Chinese dramatically demonstrated their continual interest in public education even in the midst of a hostile environment."⁹¹

This petition also revealed that integration was not necessarily a priority for all Chinese American parents struggling to gain access to the public school system. By stating that they preferred to have a separate school for their children, these parents revealed their opinion that segregation was perhaps more desirable than integration. Facing discrimination and racism to such a potent degree in the late 1800s, Chinese Americans may have recognized that "Separate but Equal" facilities would benefit them more than suffering through the violence and prejudices of the other Americans in the same school.⁹² Nonetheless, their failed effort even to win a separate school created a seemingly insurmountable barrier to public schools.

C. *Changing the Policy from Exclusion to Segregation*

In 1874, the Supreme Court of California handed down a critical decision in an effort to open public education to all minorities. In *Ward v. Flood*,⁹³ the court explained that the legislature could not exclude children from the public educational system purely because of race.⁹⁴ Relying on the state Constitution, which provided funds for a public school system and explicitly provided young individuals with the opportunity for instruction at these schools, the court determined that the right to education was a "legal right . . . as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guarantees by which other legal rights are protected and secured to the possessor."⁹⁵ Thus, the Fourteenth Amendment's Equal Protection Clause compelled the court to hold that race could not prevent young people from attending school. The court reasoned that:

It would . . . not be competent to the Legislature, while providing a system of education for the youth of the State, to exclude the petitioner and those of her race from its benefits, merely because of their African descent, and to have so excluded her would have been to deny to her the equal protection of the laws within the intent and meaning of the Consti-

90. Low, *supra* note 14, at 57.

91. *Id.*

92. See *supra* note 71 and accompanying text.

93. 48 Cal. 36 (1874).

94. See *id.* at 56.

95. *Id.* at 50.

tution.⁹⁶

Although the court ultimately affirmed segregated facilities for Black Americans in this case,⁹⁷ the court's holding that education was a legal right was groundbreaking. In order to comply with this holding, the California legislature changed the school law in 1880 by removing the word "white" so that public schools would have to admit all children regardless of race.⁹⁸ The School Board also added that in the absence of a separate school for children of African and Indian descent, these children should be admitted to white schools.⁹⁹ Despite the decision in *Ward v. Flood*, the School Law of 1870 still excluded the Chinese students from attending any public school.

Eleven years after the *Ward v. Flood* decision was decided, the California Supreme Court explicitly held that the school board must admit Chinese American students into the public school system. In *Tape v. Hurley*,¹⁰⁰ Mamie Tape, the eight-year-old American-born daughter of an "Americanized" Chinese immigrant, who had lived in San Francisco for fifteen years, was denied admission to public schools.¹⁰¹ The Tapes approached the Imperial Chinese Consulate in San Francisco, who then wrote to Superintendent Andrew Moulder that the denial was:

[A]s inconsistent with the treatises, constitutions and laws of the United States, especially so in this case as the child is native-born, that I consider it my duty to renew the request to admit the child and all other Chinese children resident here who desire to enter the public schools under your

96. *Id.* at 51.

97. The court explained:

[T]he exclusion of colored children from schools where white children attend as pupils, cannot be supported . . . that is, except where separate schools are actually maintained for the education of colored children; and that, unless such separate schools be in fact maintained, all children of the school district, whether white or colored, have an equal right to become pupils at any common school organized under the laws of the State . . .

Id. at 56-57.

98. Section 53 of the State School Law originally stated that, "Every school, unless otherwise provided by special law shall be open for the admission of all *white* children between five and twenty-one years of age, residing in that school district . . ." *Wysinger v. Crookshank*, 82 Cal. 588, 589-90 (1890) (italics added). After the Legislature amended the codes, Section 1662 of the Political Code now read, "Every school, unless otherwise provided by law, must be open for the admission of *all* children between six and twenty-one years of age residing in the district . . ." *Id.* at 592 (italics added). One scholar argued that although the legislature had removed "white" from the school laws, "it [was] highly unlikely that the legislature meant to open the public schools for Chinese students." HENDRICK, *supra* note 7, at 34. Instead, he argued that "[a] general loosening of segregation sentiment concerning Negroes had been developing since the *Ward v. Flood* decision of 1874. Therefore, perhaps with a sense of noble purpose, but at least with a sense of obligation, the word 'white' was deleted from section 1662 of the school law." *Id.*

99. Section 1669 now stated that, "The education of children of African descent, and Indian children, must be provided for in separate schools; provided, that if the directors or trustees fail to provide such separate schools, then such children must be admitted into the schools for white children." *Wysinger*, 82 Cal. at 591. This law remained in effect until 1947. See LOW, *supra* note 14, at 49.

100. 66 Cal. 473 (1885).

101. See LOW, *supra* note 14, at 60; Wollenberg, *supra* note 13, at 3.

charge.¹⁰²

In reaction to this request from the Chinese Consulate, Moulder sought the support of the state in order to deny the Chinese American girl access to public education. State Superintendent William Welcher gave that support, mentioning that the California Constitution had called the Chinese "dangerous to the well-being of the state."¹⁰³ Furthermore, Welcher believed that only citizens should be allowed the benefits of public schooling.¹⁰⁴ With this support, Moulder denied the Chinese consulate's request.¹⁰⁵

Rather than simply complying with the school board's decision, the Tapes took the school board to court. In arguing why Mamie Tape should be admitted to the school, their attorney, W.F. Gibson, distinguished her family from the stereotype that Chinese families did not want to assimilate into American society.¹⁰⁶ Asserting that her whole family had adopted the habits, customs, language, dress, and religion of American society, Gibson also argued that she was not a child of "vicious habits or suffering from any contagious diseases" so as to permit her exclusion under the current state statute.¹⁰⁷ The Superior Court agreed, holding that:

To deny a child, born of Chinese parents in this State, entrance to the public schools would be a violation of the law of the State and the Constitution of the United States. It would, moreover, be unjust to levy a forced tax upon Chinese residents to help maintain our schools, and yet prohibit their children born here from education in those schools.¹⁰⁸

To the chagrin of the school board,¹⁰⁹ the California Supreme Court, in a decision written by Justice John R. Sharpstein, affirmed this decision, interpreting the school code, as it stood on the books, as permitting Chinese American students to attend schools for white children.¹¹⁰ The Court explained that the Legislature had the authority to determine who could be admitted or excluded from the schools, but had not explicitly excluded those of Chinese descent.¹¹¹ In the absence of an explicit exclusion, the Court held that the Legislature had intended to permit Chinese Americans

102. Wollenberg, *supra* note 13, at 3.

103. *Id.* at 8. Although a few board members disagreed with the exclusion policy, the majority on the school board believed the Chinese should not be admitted. *See id.* Said one board member, "[I] would rather go to jail than allow a Chinese child to be admitted to the schools." *Id.* (citation omitted).

104. *See* HENDRICK, *supra* note 7, at 35. In 1884, the year that the case was first raised, not one of the Chinese student population of 1,252 attended public school in San Francisco. *Id.*

105. *See* LOW, *supra* note 14, at 61.

106. *See id.* at 63.

107. *See id.*

108. *Id.* at 62.

109. State Superintendent Welcher called this decision a "terrible disaster" and Superintendent Moulder asserted that the decision "[met] with the disapproval of nearly every citizen." Wollenberg, *supra* note 13, at 8.

110. *See* Tape, 66 Cal. at 474.

111. *See id.*

into public schools.¹¹²

Although this case heralded a victory for the Tapes in winning admission for Mamie Tape to an all-white school, the decision did not overrule the constitutionality of the "Separate but Equal" doctrine. Instead, the Superior Court had commented that "[i]f evil results followed this decision, it was not the fault of the judiciary. The Legislature possessed the power to provide separate schools for distinct races."¹¹³ In this dicta, the court only declared that in the absence of such a "Separate but Equal" requirement, Mamie Tape should be admitted to the all-white school.¹¹⁴

The California state legislature reacted quickly to this dicta. Within days after the Court announced their decision in *Tape v. Hurley*, the California state legislature again amended the school laws so that Chinese American students would be segregated.¹¹⁵ Although unclear as to the consequences of not opening a separate Chinese school, Section 1662 made it crystal clear that if a separate school was offered, Chinese Americans could not go elsewhere.¹¹⁶ This amendment solidified the legislature's stand on the segregation of Chinese Americans from the public schools.

As a result, although the *Tape* case initially heralded a victory for the Chinese American community in providing access to public schools, its ultimate effect was decades of segregation.¹¹⁷ As interpreted by scholar Victor Low:

112. Section 1662 of the Political Code stated that "Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district . . . Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases." *Id.* at 473-74. Although the *Tape* court referred to the code as Section 1667, the Court in *Wysinger v. Crookshank*, 82 Cal. 588, 592 (1890) acknowledged the Court's mistake. The court in *Tape* went on to explain that "we are not aware of any law which forbids the entrance of children of any race or nationality. . . . 'Where a law is plain and unambiguous . . . the legislature should be intended to mean what they have plainly expressed, and consequently, no room is left for construction.'" *Tape*, 66 Cal. at 474 (citing *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

113. LOW, *supra* note 14, at 65.

114. See Wollenberg, *supra* note 13, at 8.

115. The amended Section 1662 of the Political Code now read, in pertinent part:

Trustees shall have the power to exclude children of filthy and vicious habits, or children suffering from contagious or infectious diseases . . . and also to establish separate schools for children of Mongolian or Chinese descent. When such separate schools are established, Chinese or Mongolian children must not be admitted into any other school.

Wysinger, 82 Cal. at 592-93.

116. See HENDRICK, *supra* note 7, at 35.

117. As for Mamie Tape, her admittance into the white school was delayed by demands for proof of her vaccinations to ensure that she was not carrying any contagious diseases, and then by a school board policy limiting the number of children per classroom. She was subsequently placed on a waiting list for the class. See LOW, *supra* note 14, at 69. It was also argued that it would be demoralizing to place her into the white school for a short time and then remove her to the Chinese school. See *id.* at 70. Soon thereafter, a segregated Chinese school was opened, thereby closing off the opportunity for Mamie Tape to go to an integrated school. See *id.* at 71. She attended the first day of the Chinese Primary School opening. See *id.*

The segregation of Chinese students in San Francisco had always been by right of law (*de jure* segregation), and not due to residential patterns (*de facto* segregation). The 1885 amendment simply became the legislative basis which allowed the continuation of *de jure* segregation. For the next twenty-five years, those who advocated segregation in San Francisco would quote this amendment as the justification for preventing Chinese children from going to school with whites.¹¹⁸

Nonetheless, this case initiated a change in tactics for the Chinese American community. Whereas prior to *Tape v. Hurley*, Chinese parents had unsuccessfully appealed to the administrative levels to amend the admissions process, this case symbolized a new era of activism through the legal system.¹¹⁹

In reaction to the new code establishing a "Separate but Equal" school for Chinese American students, the School Board established a new Chinese Primary School in 1885. Unlike the Chinese School established in 1859, this new one had the full weight of legal precedent supporting its *de jure* segregation.¹²⁰

Reminded of their experiences with the on-again, off-again Chinese School during the 1860s, the Chinese American community was reluctant to fully accept the separate facilities.¹²¹ However, the community and the

118. LOW, *supra* note 14, at 67-68.

119. The legal system also became an effective means to address the concerns of the Chinese Americans for two other reasons. The first was the realization that the Chinese government was unable to assist in their efforts to overcome their exclusion in schools. The Chinese government's powerlessness was evidenced primarily in its inability to prevent the United States government from modifying the Burlingame Treaty, which consequently led to the Chinese Exclusion Acts of 1882. See Chinn, *supra* note 27, at 26; see *supra* notes 33-35 and accompanying text. The other reason was a case decided by the Circuit Court of Northern California in 1884 in which the Court declared that "it has always been the doctrine of this country . . . that birth within the dominions and jurisdiction of the United States of itself creates citizenship." *In re Look Tin Sing*, 21 F. 905, 909 (C.C.D. Cal. 1884). Realizing that they could not rely on their so-called protected rights as foreigners through the Burlingame Treaty, the Chinese Americans refocused their efforts on their rights as native-born citizens. See LOW, *supra* note 14, at 59.

120. See LOW, *supra* note 14, at 71. In addition, the popular sentiment was that:

[A]n Act of this kind would remove the irritating influences of race feeling. There is a strong and well-founded conviction that the association of Chinese and white children would be very demoralizing mentally and morally to the latter, and should the Chinese be admitted to the classes as now organized, trouble and turmoil would ensue.

Id. at 66 (citing *School and Chinese*, S.F. EVENING BULL., Mar. 4, 1885, at 2).

121. Only 9 Chinese American children out of 561 in San Francisco enrolled during the first year. See *id.* at 72. Again, although the reasons for the low attendance were uncertain, several themes reminiscent of the previous school emerged. See *supra* notes 65-71 and accompanying text. The school's location outside Chinatown probably deterred potential students due to the distance and due to the fear of anti-Chinese violence. See LOW, *supra* note 14, at 77. Scarred by the school board and community's resistance towards admitting their children, some Chinese American parents probably also feared further repercussions against their children if they sent their children to the public schools. See *id.* at 73. Instead, many parents sent their children to private schools or to China for an education. *Id.* In 1886, the school was moved into Chinatown, and subsequently, admission increased to 24. See *id.* at 77. But the air of distrust still prevailed. See *id.*

The low attendance prompted some members of the community to respond with disdain. One newspaper commented:

San Francisco School Board remained committed to segregation and maintaining the school.¹²²

As a result, more Chinese American students left the alternative schools¹²³ and began to attend the public school. By 1923, there was an average daily attendance of more than 900 students in the public school.¹²⁴

IV.

APPEALING TO THE U.S. CONSTITUTION

The Court's ruling in the Tapes' favor was the precursor to increased activism through the legal system. However, further attempts to change the public schools by challenging the constitutionality of segregation in federal courts failed. In two separate cases, the federal courts upheld different legal methods to segregate Chinese Americans in public schools. In *Wong Him v. Callahan*,¹²⁵ the Circuit Court of the Northern District of California rejected an Equal Protection claim, thereby endorsing segregation through state statutes that explicitly excluded Chinese Americans from public schools as long as the schools were considered "equal" to their white school counterparts. In *Gong Lum v. Rice*,¹²⁶ the United States Supreme Court also rejected an Equal Protection argument that classification of Chinese Americans as "colored people" (thereby subjecting them to the existing laws which segregated "colored people") was unconstitutional. In both cases, the courts clearly explained that the decision of whether or not to segregate Chinese Americans from public schools was a state decision, not a federal one. Upholding the states' application of the "Separate but Equal" doctrine to Chinese Americans, the federal courts in these two cases closed off the possibility of ending the discrimination in public schools through an appeal to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The alleged eagerness of the San Francisco Chinese to have their children educated by the State is belied by the reluctance they now show to take advantage of the educational opportunities opened to them. . . . If the establishment of this school has done nothing else, it has at least dissipated the myth of Chinese thirst for American learning.

Id. at 73 (citing S.F. DAILY ALTA CAL., Apr. 17, 1885, at 4).

122. In 1906, a major earthquake and fire destroyed the school, but in its place, another was built, signifying how steadfast the doctrine of segregation had become in the school board administration of the public school system. See HENDRICK, *supra* note 7, at 35; LOW, *supra* note 14, at 92-93.

123. Only a handful of after-school Chinese language programs sponsored by different churches and one Catholic school teaching English as an alternative to public schools remained. See Wollenberg, *supra* note 13, at 10. In addition, the Chinese Language Schools were forced to change their formats, offering classes after school and on Saturday. *Id.*

124. See LOW, *supra* note 14, at 114.

125. 119 F. 381 (C.C.N.D. Cal. 1902).

126. 275 U.S. 78 (1927).

A. *Reinforcing State Authority to Provide "Separate But Equal" Facilities*

In 1902, the Circuit Court of the Northern District of California affirmed the "Separate but Equal" amendment to the School Code in *Wong Him v. Callahan*.¹²⁷ The plaintiff, a Chinese American man living with his family outside the boundaries of Chinatown, wanted his daughter, a young American-born girl, to attend a neighborhood school rather than a school in Chinatown. Arguing that segregation was a form of discrimination which was "arbitrary, and the result of hatred for the Chinese race," the plaintiff's attorneys asserted that the separate Chinese school violated the Fourteenth Amendment's Equal Protection Clause.¹²⁸

The trial court disagreed. In a short decision, akin to the brevity of the *Tape v. Hurley* case,¹²⁹ District Judge John De Haven explained that the Legislature's motives, whether based on hatred or not, were not proper considerations when determining the validity of a statute.¹³⁰ Instead, the Court emphasized that the state has the power to determine its own public school system structure without judicial interference "[i]f the law does not conflict with some constitutional limitation of the powers of the state legislature."¹³¹ The Court continued by explaining that:

[I]t is well settled that the state has the right to provide separate schools for the children of different races, and such action is not forbidden by the fourteenth amendment to the constitution, provided the schools so established make no discrimination in the educational facilities which they afford. When the schools are conducted under the same general rules, and the course of study is the same in one school as in the other, it cannot be said that pupils in either are deprived of the equal protection of the law in the matter of receiving an education.¹³²

Since Wong Him had not argued that the primary school was unequal, only that the neighborhood school was more convenient for his daughter, the court did not find a violation of the Equal Protection Clause and upheld the "Separate but Equal" Primary School for Chinese Americans.¹³³

It is unclear why the plaintiffs did not appeal the Court's decision. However, the Chinese American community, after the District Court announced its decision, immediately took action again by petitioning the

127. 119 F. 381 (C.C.N.D. Cal. 1902).

128. See *id.* at 382. Scholar Victor Low analogized the claim asserted by the plaintiff to the claim raised in *Plessy v. Ferguson*, 163 U.S. 537 (1896). Noticeably, the claim here was defeated as it was in the *Plessy* case. See LOW, *supra* note 14, at 86.

129. Both cases were an abbreviated two and a half pages long. See *Tape v. Hurley*, 66 Cal. 473 (1885); *Wong Him v. Callahan*, 119 F. 381 (C.C.N.D. Cal. 1902).

130. *Wong Him*, 119 F. at 382.

131. *Id.*

132. *Id.*

133. See *id.* As a result, the Chinese Americans living throughout San Francisco were relocated to the Primary School in Chinatown. See LOW, *supra* note 14, at 86.

California legislature.¹³⁴ The Chinese Six Companies, who often represented the Chinese American community in disagreements with the white community,¹³⁵ issued a statement that they were "heavy taxpayers" who paid a great deal in taxes but did not receive their fair share in benefits in the school system.¹³⁶ Sending a former Baptist missionary on their behalf with the hope that she would have more leverage, the Chinese Americans again saw their petition denied by the Board of Education and the State.¹³⁷

B. Upholding the Constitutionality of Classifying Chinese Americans as "Colored"

The United States Supreme Court did not review *Wong Him*, but it did review and affirm the "Separate but Equal" doctrine as applied to Chinese Americans in *Gong Lum v Rice*.¹³⁸ In that case, the plaintiff's daughter, Martha Lum, was a nine-year-old American citizen of Chinese ancestry who was denied access to an all-white school in Mississippi.¹³⁹ Although the Mississippi Constitution had provided that "[s]eparate schools shall be maintained for children of the white and colored races,"¹⁴⁰ the issue raised in this case was whether American citizens of Chinese ancestry should be considered "colored" under the Constitution.

In his petition for mandamus filed in the Circuit Court of Mississippi, the state's trial court, Lum argued that his daughter should be admitted to the all-white school for several reasons.¹⁴¹ As a taxpayer, Lum argued that his daughter was entitled to attend the all-white high school which his taxes supported. In addition, he argued that because the district did not provide a public school for children of Chinese descent, the district discriminated against her by not allowing her to enroll in the all-white school. Even though the school district provided a school for members of the "colored races", Lum contended that because his daughter was a child of Chinese descent, she was not "colored" as intended under the school laws. Finally, he explained that the School Board had no authority under the law to deny her admission to the school.¹⁴²

Although the trial court granted Lum's petition, the defendants, the School Board of Trustees and the State Superintendent of Education, appealed to the State Supreme Court, who overruled the trial court.¹⁴³ Rely-

134. See LOW, *supra* note 14, at 86.

135. See *id.* at 39.

136. *Id.* at 87 (citing *Merchants in Chinatown Propose to Ask the Legislature to Change the Law that Segregates Their Children*, THE EXAMINER, Feb. 20, 1903, at 4).

137. See *id.* at 87-88.

138. 275 U.S. 78 (1927).

139. See *id.* at 80.

140. *Id.* at 82 (quoting MISS. CONST. of 1890).

141. *Id.* at 81.

142. *Id.*

143. *Rice v. Gong Lum*, 139 Miss. 760, 778, 788 (1925).

ing on legal precedent in Mississippi and other states, the Mississippi Supreme Court explicitly explained that there were two groups of children created by the State Constitution: children of the Caucasian race and children of the colored races (e.g., brown, yellow and black races).¹⁴⁴ The Court stated:

[W]e think that the constitutional convention used the word 'colored' in the broad sense rather than the restricted sense; its purpose being to provide schools for the white or Caucasian race, to which schools no other race could be admitted, carrying out the broad dominant purpose of preserving the purity and integrity of the white race and its social policy.¹⁴⁵

Furthermore, the Court revealed that "[r]ace amalgamation has been frowned on by Southern civilization always, and our people have always been of the opinion that it was better for all races to preserve their purity. . . . [That is,] it was the white race that was intended to be separated from the other races."¹⁴⁶ Therefore, the Court held that children of Chinese descent were part of the Mongolian, or non-white, race under the state constitution and were not entitled to attend a white public school.¹⁴⁷

Although never directly addressing the issue of taxation raised by the plaintiff, the Court did address the issue of State and School Board authority to create segregated schools. The Court admitted that the Legislature was not required to provide separate schools for each of the colored races.¹⁴⁸ In the absence of their own separate school for their own specific race, the Court explained that these non-white races were "entitled to have the benefit of the colored public schools."¹⁴⁹ The Court held that the county school board had complete discretion in creating the boundaries for the white and colored school districts and that the white school district and the colored school districts could be separately defined.¹⁵⁰ Thus, in actuality, the colored school district could encompass the territory of several white school districts without any constitutional problems.¹⁵¹

As a result, the Court held that Lum's daughter could enroll in the colored school in her district. The Court furthermore explained that if the plaintiff was unhappy with the colored school, then he could send his daughter to a private school, for "[t]he compulsory school law of this state does not require the attendance at a public school"¹⁵²

The plaintiffs appealed the decision to the United States Supreme Court. Echoing the language of *Wong Him*, the Supreme Court first ac-

144. *Id.* at 786.

145. *Id.*

146. *Id.* at 787.

147. *See id.* at 788.

148. *See Rice*, 139 Miss. at 787.

149. *Id.*

150. *See id.* at 787-88.

151. *See id.* at 787.

152. *Id.* at 788.

knowledgeed that the creation and maintenance of a public school system was within the exclusive power of the states. Thus, the federal government could not interfere except "in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."¹⁵³

The Court then reexamined the State Supreme Court's discussion about school districts. Although Lum had argued that there was no school in his particular district for his daughter to attend, the Court explained that he was looking at the wrong school district map, that he should have been looking at the colored school districts instead.¹⁵⁴ Because he had not argued that there were no colored schools for his daughter to conveniently attend, the Court explained that "she is not denied, under the existing school system, the right to attend and enjoy the privileges of a common school education in a colored school."¹⁵⁵

Writing for the Court, Chief Justice William Taft focused most of the opinion on the Equal Protection argument of classifying a U.S. citizen of Chinese descent as a member of the colored race and providing her with a "Separate but Equal" education in the already established colored schools.¹⁵⁶ Without consideration of the different facts at issue in this case, the court explained that:

Were this a new question, it would call for very full argument and consideration; but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution.¹⁵⁷

Citing *Plessy v. Ferguson*¹⁵⁸ and various other state cases adjudicating the issue of "Separate but Equal" education,¹⁵⁹ the court held that the states maintained the discretion and authority to establish "Separate but Equal" schools without violating the Fourteenth Amendment.¹⁶⁰ The Court emphasized that:

[M]ost of the cases cited [about segregation] arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we cannot think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races.¹⁶¹

With this decision, the application of the "Separate but Equal" doc-

153. *Gong Lum v. Rice*, 275 U.S. at 85 (citing *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528, 545 (1899)).

154. *See id.* at 84.

155. *Id.*

156. *See id.* at 85.

157. *Id.* at 85-86.

158. 163 U.S. 537 (1896).

159. For a list of state segregation cases cited by the Court, see *Gong Lum*, 275 U.S. at 86.

160. *Id.* at 87.

161. *Id.*

trine to Chinese Americans was affirmed and the doctrine's consequences in California were clear. There would be no further Federal Constitutional challenges regarding segregation in the school code raised by the Chinese Americans in San Francisco.¹⁶²

V.

TURNING TO THE POLITICAL ARENA: DISTINGUISHING THE JAPANESE EXPERIENCE

The *Gong Lum* decision not only shattered the Chinese American community's hopes of appealing to the Federal Constitution to overturn the segregation laws, but also compelled them to realize that using the legal system to aid their efforts was futile. Around the early turn of the century, Chinese Americans also realized that they would not be able to successfully rely on political persuasion and power, either, to help them overcome the discrimination in public schools.

However, another Asian American group, the Japanese Americans, were able to employ this political strategy successfully by soliciting the support of the Japanese and American governments, therefore providing them with the power to gain admittance to the "all-white" schools. Targets of violence and racism similar to that directed at the Chinese,¹⁶³ the Japanese were technically "Mongolian", as the creators of the law had intended them to be,¹⁶⁴ and should therefore have been excluded like the Chinese were from the all-white schools under the law.

Yet, the Japanese Americans encountered a different experience. Because the school laws did not specifically exclude or segregate Japanese Americans from public schools, students of Japanese descent initially at-

162. Further attempts by the Chinese American community to find loopholes in the law in order to avoid the segregation failed. See LOW, *supra* note 14, at 96-98. The city attorney explained that the label "Mongolian" did not change based on where the individual was born. See *id.* at 96. Agreeing, the school board explained, "It makes no difference whether [Chinese families] were natives of the United States for ten generations back, they still remain Mongolian and come under the state law affecting the attendance of Mongolians at the public schools." *Id.* at 97 (citing S.F. NEWS, Oct. 17, 1908, at 1).

163. From their first arrival in the United States between 1890 and 1910, the Japanese immigrants were discriminated against in a similar fashion to the Chinese. See Wollenberg, *supra* note 14, at 14. The Japanese were likened to the Chinese and treated similarly due to their "similar" features and their "similar" languages. They faced racism and hostility in the form of violence from white Americans who feared losing their jobs to the new "yellow menace." See *id.* They faced restrictions on immigration and citizenship. See, e.g., *Ozawa v. United States*, 260 U.S. 178 (1922) (preventing any Japanese immigrant from being naturalized); Hull, *supra* note 34, at 407 (describing the Japanese Exclusion Act of 1924 which extended the Chinese Exclusion laws to include other Asians). In fact, very little difference could be detected in the treatment of both groups. See HENDRICK, *supra* note 7, at 37. Observed one scholar, "From the rhetoric of California politicians, newspapers, and the Asiatic Exclusion League, it is clear that the Japanese were not better loved than the Chinese between 1906 and 1909." *Id.* at 40.

164. See LOW, *supra* note 14, at 89. See also *Ozawa*, 260 U.S. at 198 (holding that "white person" implied "Caucasian" person and those of Japanese descent were not "Caucasian").

tended all-white schools.¹⁶⁵ Alerted to the growing number of Japanese students attending all-white schools¹⁶⁶ and the increasing pressure to alleviate the fear of yet another Asian group in the all-white schools,¹⁶⁷ the San Francisco School Board converted the Chinese Primary School into the Oriental Public School in 1906 to include the Japanese students.¹⁶⁸ Although the Chinese and Koreans complied with the school board order,¹⁶⁹ this segregation sent an alarming message across the ocean to Japan.¹⁷⁰ Both the Japanese in Japan and the Japanese Americans in the U.S. united their efforts to oppose the segregation.¹⁷¹ The Japanese press also reacted in outrage, stating that the segregation was "no longer confined to a handful of school children; it had assumed international proportions."¹⁷² The press even advocated that Japan should retaliate by sending in her navy.¹⁷³

President Theodore Roosevelt immediately expressed his concern for the foreign policy implications of such a segregation policy¹⁷⁴ by directing

165. See Wollenberg, *supra* note 13, at 15. As long as the white parents did not object and there were vacancies in the school, the Japanese students were technically permitted to attend the all-white schools. See LOW, *supra* note 14, at 88.

166. See LOW, *supra* note 14, at 88.

167. Several organizations, including the Union Labor Party and the Japanese and Korean Exclusion League, and even the mayor of San Francisco had all sported political platforms advocating segregation of Japanese students. See *id.* at 88-89. The Japanese and Korean Exclusion League, whose goal was "to work against all Oriental immigration," commented that all the school boards should exclude the Japanese Americans in order to protect the white children from the "destructive influences of forced association with Mongolians." *Id.* at 89 (citing *The Japanese and Korean Exclusion League Formed to Work Against All Oriental Immigration*, THE EXAMINER, May 15, 1905, at 4).

168. See HENDRICK, *supra* note 7, at 39.

169. See *id.*

170. The leaders of the Japanese American community strategically decided to tap into the sympathy of the Japanese in Japan to help them overcome the discrimination in the United States. See Wollenberg, *supra* note 13, at 16.

171. See *id.* Newspapers in Tokyo printed articles, telling its readers, "Stand up. Our countrymen have been HUMILIATED on the other side of the Pacific." *Id.* The Japanese Americans also sought the protection of leading Japanese advocates, such as the Secretary of the Japanese Association, Goroku Ikeda, who personally protested the action before the school board, and Japanese Consul, K. Uyeno, who wrote a formal letter of protest. See *id.* In addition, the Japanese Ambassador to the U.S., Viscount Aoki, also entered into talks with the U.S. Secretary of State, Elihu Root, to discuss the segregation order. Aoki is noted to have said, "After all the years of friendship between the two nations . . . it seems too bad that the poor innocent Japanese school children should be subjected to such indignities." *Id.* (citation omitted).

172. David Brudnoy, *Race and the San Francisco School Board Incident: Contemporary Evaluations*, in NEITHER SEPARATE NOR EQUAL 75, 75 (Roger Olmsted & Charles Wollenberg eds., 1971) (citations omitted).

173. *Id.* at 77.

174. See HENDRICK, *supra* note 7, at 39. Explained Wollenberg:

[Roosevelt] had not spoken out against separate schools for blacks in the South, nor during the entire San Francisco incident did he defend the right of the Chinese to attend integrated schools. . . . Clearly the difference was that Japan was a strong power which had demonstrated its military might, and Roosevelt was determined not to let the action of the San Francisco School Board endanger friendly relations with such a power.

Wollenberg, *supra* note 13, at 18.

the Secretary of State to reassure Japan that he would remedy the situation.¹⁷⁵ In his annual address to Congress, Roosevelt announced "... [the anti Japanese hostility] is most discreditable to us as a people and may be fraught with the gravest consequences to the nation. . . . To shut them out from the public schools is a wicked absurdity."¹⁷⁶ Other political figures also spoke out in favor of integrating the Japanese into public schools.¹⁷⁷

As a result of Roosevelt's persistence and invitation to Washington, D.C. to discuss the implications of the segregation, a "Gentleman's Agreement" was reached in 1907.¹⁷⁸ In the agreement, the School Board agreed to revise the school law to exclude Japanese Americans from segregation requirements.¹⁷⁹ In return, Roosevelt promised to limit the immigration of Japanese into the U.S.¹⁸⁰ and to dismiss the pending legal action.¹⁸¹

175. See Brudnoy, *supra* note 172, at 77.

176. See *id.* Feeling the increased pressure and stating that he was "more concerned over the Japanese situation than almost any other," Roosevelt adopted other tactics to persuade the San Francisco Board to change its law. *Id.* at 76. He threatened to send troops into California and attempted to circumvent the law by recommending to Congress that the Japanese be naturalized. *Id.* at 77. He ordered the Attorney General, Robert Devlin, to take the San Francisco School Board to both federal court and state courts in a case called *Aoki v. Deane*, which was dropped after the school board agreed to repeal the segregation order. See Wollenberg, *supra* note 13, at 18-20. He also sent in the Secretary of Commerce and Labor, Victor Metcalf, to investigate. Metcalf reported that although the segregation was consistent with California law and interpretations of the Fourteenth Amendment, there might be a conflict between treaty obligations between United States and Japan. See *id.* at 17-18; HENDRICK, *supra* note 7, at 40. For more details on the treaty between Japan and the United States, see Brudnoy, *supra* note 172, at 76. See also Wollenberg, *supra* note 13, at 19.

Ironically, President Roosevelt's opinions towards Asians as a whole had not always been so gracious. In fact, he was well-known for his support of exclusionary policies. See Brudnoy, *supra* note 172, at 77. In his own autobiography, he wrote, "I believe this [restriction on Asiatic laborer immigration] to be fundamentally a sound and proper attitude, an attitude which must be insisted upon . . ." *Id.* at 77 n.10.

177. Stanford President David Star Jordan was among the first to criticize the School Board's proposal. See HENDRICK, *supra* note 7, at 41. Superintendent of Los Angeles City Schools Earnest Caroll Moore explained:

During all the time that I have been in the office of Superintendent of Schools here, I have not heard a single word of protest against them (the Japanese). . . . As a California school man, I bitterly regret the action of the San Francisco school authorities. It was wholly unnecessary in my view and is, I am glad to say, not representative of public opinion in California.

Id.

178. See Brudnoy, *supra* note 172, at 77.

179. See *id.* Apparently, the school board also agreed to label the Japanese "Malayans" in order to avoid the restrictions imposed on Mongolians. See LOW, *supra* note 14, at 94. Regardless of their classification, white parents were outraged, but continued to send their children to the "Mongolized schools," as they scornfully called the public schools with Japanese students. *Id.* at 94-95.

180. This agreement led to executive agreements to restrain Japanese immigration in 1907-1908. See Chinn, *supra* note 27, at 26. Ultimately, the Chinese Exclusion Act was extended to include the Japanese. See Hull, *supra* note 34, at 407.

181. See Wollenberg, *supra* note 13, at 21. The agreement eased the tension temporarily between the nations and was considered a "great victory." *Id.* Although the agreement led to the continued admittance of Japanese into all-white schools, the state legislature, after several attempts, was eventually successful in amending Section 1662 in 1921 to exclude the Japanese from the all-white schools.

The 1906 order to segregate the "Orientals" and the subsequent political action taken to make Japanese students an exception to the rule affirmed the isolation of the Chinese from American society. Finding that the Japanese Americans were able to employ the assistance of the Japanese government to exert political pressure in order to gain admission to integrated schools, the Chinese Americans followed their lead. Appealing to political leaders, their pleas for integration were again unheard. For example, a direct appeal by the Chinese Six Companies to President Roosevelt in 1909 pled, "We ask of you to enter a strong protest against the present school laws of California which discriminate against Chinese children, whether citizens or aliens, and we respectfully ask you to assist in taking these laws into the courts to test their constitutionality. . . ." ¹⁸² Roosevelt never answered. ¹⁸³

The Japanese American incident in the schools showed the malleability of the segregation laws when politics became involved. Scholar Irving Hendrick noted, "What was exceptional about the 1906 segregation decision in San Francisco was the blatant politically motivated nature of the action, and the fact that its undoing was played out in the arena of international relations." ¹⁸⁴ Furthermore, he speculated that without the support of international political figures in the early 1900s, the doors to integrated public schools for the Japanese Americans might not have been opened. ¹⁸⁵

In contrast, the Chinese Americans had no political leverage from the powerless Chinese government. ¹⁸⁶ Without political support from their "native" country and in their new "home" country, the Chinese Americans struggled alone in their quest for equal access to schools.

Id. at 23. However, by that point, few integrated school districts actually changed their admission policies to segregate the Japanese from their schools. Only a few school districts in Sacramento County implemented the new school law. *Id.* By 1929, only 575 Japanese students in California attended segregated schools for Orientals, while over 30,000 others attended integrated schools. *Id.*

182. LOW, *supra* note 14, at 97-98 (citing *Chinese of City Wire President Appeal for Same Consideration Shown Japanese*, THE EXAMINER, Feb. 10, 1909, at 1).

183. *See id.* at 98.

184. HENDRICK, *supra* note 1, at 39.

185. *See id.* Some scholars argue that there were other contributing factors as well. In particular, one scholar noted that the "attitude and behavior of the intended [Japanese] victims was [sic] different" from the Chinese. *See id.* at 37. For example, the Japanese Americans also sponsored Japanese Language Schools. However, while the Chinese Language Schools were created in order to preserve the Chinese culture, *see supra* note 77 and accompanying text, the Japanese Language Schools were created in order to help Japanese Americans integrate into American society. "[T]he 'ultimate aim' of the schools was to make 'good American citizens out of the children of Japanese parentage.' Parents and teachers should 'feel proud of educating and turning out good American citizens of their race.'" Wollenberg, *supra* note 13, at 22 (citations omitted).

186. This is evidenced by the Chinese government's inability to prevent the U.S. government from modifying the original Burlingame Treaty. *See supra* notes 33-34 and accompanying text.

VI.

CRUMBLING THE BARRIER OF SEGREGATION ONE PIECE AT A TIME

Although the legal and political strategies proved to be ineffective, the Chinese Americans were able to make small steps towards gaining access to the all-white public schools on a case-by-case basis. Exceptions to the segregation rule, made by school principals who admitted the students in the absence of protests from white parents, were documented since the beginning of the 1900s, although not widely discussed.¹⁸⁷ The few exceptions that could be identified allude to the possibility that there were more exceptions that were simply undocumented. These exceptions also revealed that the force behind the "Separate but Equal" doctrine was gradually eroding during the early 1900s in San Francisco, therefore calling into question the long-term existence of the doctrine in the school system.

Outside San Francisco, where there were fewer Chinese American families, exceptions were made in the absence of established Chinese schools and in the absence of complaints from the white community.¹⁸⁸ For example, in 1899 in Stockton, a Chinese American boy succeeded in registering at the white school without objection from the parents or the school board.¹⁸⁹ In San Jose, Chinese students were admitted to the white school after 1885; despite a few complaints, no action to exclude them was undertaken.¹⁹⁰ Upon hearing of these exceptions, many Chinese Americans, who continued to live in Chinatown, pursued schooling opportunities outside San Francisco.¹⁹¹

Meanwhile, for those who stayed in the San Francisco schools, the Chinese American community won an early victory on the secondary school front. Because many Chinese Americans initially did not advance to the high school level, the school district had not considered opening a Chinese secondary school.¹⁹² In the absence of separate schools, those Chinese Americans who did ascend to that level of education were reluctantly admitted to white schools.¹⁹³ When the school discovered this glitch in 1900 and tried to segregate those students into a single Chinese high

187. See LOW, *supra* note 14, at 109.

188. See *id.* at 110. For example, in one case, Chinese American students were denied admission to a neighborhood school and were told to go to the Oriental School, but were admitted to another neighborhood school down the street. *Id.* In another case, a student was told to "pretend" to be Japanese as a condition of admission to a neighborhood school. Even after refusing to do so, the student was still admitted a year later. *Id.*

189. See HENDRICK, *supra* note 7, at 36.

190. See *id.*

191. The Oakland public school system established the reputation of having not only better facilities, but also a more relaxed attitude towards the Chinese students. See LOW, *supra* note 14, at 93, 96. After the earthquake of 1906, several Chinese American students in San Francisco seized the opportunity to transfer to Oakland. *Id.* at 93. This led to a substantially lower attendance rate when the Chinese Primary School in Chinatown was reopened in 1906. *Id.*

192. See HENDRICK, *supra* note 7, at 35.

193. See *id.*

school, the Chinese American community successfully resisted, threatening to withdraw all their children from the Chinese Primary School, thereby throwing the teachers and the principal out of jobs.¹⁹⁴ The parents' success in preventing the high schools from being segregated was an indication that the Chinese American parents were gaining some leverage in the eyes of the school board.¹⁹⁵ By the time the school board tried again to segregate the Chinese Americans into a separate junior high in the late 1920s, the Chinese American community had enough political clout to avert the board's efforts.¹⁹⁶ Members of the Native Sons even successfully lobbied to change the name from "Oriental" to the less discriminatory "Commodore Stockton."¹⁹⁷

The increasing number of Chinese American students attending the segregated school also contributed to the disintegration of segregation. By the early 1920s, space in the school had become tight, so the School Board was forced to construct a new building.¹⁹⁸ By 1929, the enrollment of students at Commodore Stockton reached 1500.¹⁹⁹ With demand again exceeding space, the School Board agreed to permit Chinese American students to attend Jean Parker and Washington Irving Schools near Chinatown.²⁰⁰ As a result, "[b]y the late 1920s, the elementary school barrier was broken and Chinese children were no longer confined to Commodore Stockton School."²⁰¹

Observed scholar Victor Low, "[w]ith the city's public schools opening up to the Chinese, Commodore Stockton changed from a segregated school by law and policy (de jure segregation) to a segregated school by geographic location (de facto segregation)."²⁰² Despite the fact that segregation was no longer strictly enforced, the existence of Section 1662 in the School Code still relegated Chinese Americans to segregated status, if the School Board chose to enforce it.²⁰³ It was not until 1947 that the

194. *See id.* at 35-36.

195. *See id.*

196. Political support for integrating schools came from a variety of individuals and organizations, including the Native Sons of the Golden State, the Chinese American civil rights organization who exerted political pressure by only endorsing those state legislators who wanted to abolish Section 1662. *See* LOW, *supra* note 14, at 122. Other groups included the North Beach Promotion Association, Northern Federation of Civic Organizations, and the Chinese Young Women's Christian Association. *See id.* at 116-18. High profile individuals who opposed segregation included the Chinese consul-general, Stanford University President David Star Jordan, and the principal of the San Francisco Junior High School. *See id.* at 118. As a result of all this support, the proposal to create a separate junior high school in Chinatown was rejected, and the Chinese American students were admitted to an integrated school. *See id.* at 122.

197. *See id.* at 114-15.

198. *See id.* at 113-14.

199. *See id.* at 123.

200. *See id.*

201. LOW, *supra* note 14, at 123.

202. *Id.*

203. *Id.* at 111.

Chinese Americans finally saw the official de jure segregation of Chinese American students under Section 1662 repealed.²⁰⁴

VII.

CONCLUSION

This discussion reveals that the Chinese Americans were not only discriminated against in the public schools of San Francisco, but they were also active participants in the fight against the discriminatory policies of the State Legislature and the School Board. While a local newspaper stated in 1869 that the typical Chinese immigrant "knows and cares nothing more of the laws of the people among whom he lives than will suffice to keep him out of trouble and enable him to drive a thrifty trade,"²⁰⁵ the Chinese American community directly challenged the exclusion, then segregation, they faced in the schools. They made numerous attempts to change the status quo on the School Board and state levels through petitions and persistence. They followed the historically typical route of seeking legal remedy in the state and federal courts,²⁰⁶ even taking their Equal Protection claim up to the U.S. Supreme Court. They appealed to government officials, as the Japanese Americans had done with much success, to exert political pressure on the states to revoke the segregation laws. When all these attempts failed to bring about change in the public school system, they pursued exceptions on a case-by-case basis in order to win small victories for a few individuals. Their patience and determination in overcoming the discriminatory policy finally paid off, almost a century later.

While the plight of Chinese Americans in fighting the discrimination in the public school system is often forgotten, this omission may be a reflection of the small number of legal opinions handed down by the courts on this issue. Following traditional legal analyses which focus on the weight of legal precedent, the story of the Chinese Americans' attempts to effect change through the legal system would be short due to the limited

204. After the Ninth Circuit Court of Appeals held that segregating students of Mexican descent "against their will and contrary to the laws of California" violated the Fourteenth Amendment, see *Westminster School Dist. of Orange County v. Mendez*, 161 F.2d 774, 781 (9th Cir. 1947), the School Board was compelled to review and reconsider the district's stand on segregation in schools. As a result of that review and the overall positive image of Chinese American support during World War II, the segregation provisions were repealed. See LOW, *supra* note 14, at 135.

205. McClain & McClain, *supra* note 34, at 135.

206. Scholar Lawrence Friedman observed that:

The courts became the forum of civil liberties by a process of trial and error. When legislative help was not politically possible . . . blocked interest groups . . . tried other paths, like mice running through a maze, until they found the one with the cheese. The first time is the hardest; then the route becomes easier to follow; a receptive court invites further litigation. If unpopular minorities . . . found a court or two receptive, they tended to pursue judicial remedies that much more avidly. The increase in this form of litigation, then, adds to the pressure on the courts to extend prior holdings just a little bit further.

LAWRENCE M. FRIEDMAN, *Epilogue*, in *A HISTORY OF AMERICAN LAW*, 669 (2d ed. 1985).

number of cases and the brief opinions issued by the judges. Meanwhile, the struggle on the local, state, and political levels would easily be overlooked. However, when all the efforts are viewed together in entirety, the story of a community of people who tried to surmount the exclusion and segregation barriers is informative and enlightening.

Perhaps another reason for the fact that the discrimination against Chinese Americans in public schools is often forgotten is the lack of information about their struggle. With limited historical texts based on school reports written by biased school officials, newspaper articles, and discriminatory statutes, the story about exclusion and segregation omits the voice of the Chinese American community from their own perspective. Hopefully, this Comment will encourage more research and analysis in order to fully understand the complete picture of almost a century of discrimination against Chinese Americans in the San Francisco public schools.