

The Case of the 22 Lewd Chinese Women

A crazy 19th-century case shows how the Supreme Court should deal with Arizona's immigration law.

By Paul A. Kramer



The S.S. *Elford* at port in Portland, Ore. The question of states and immigration law has been under debate before.

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When Arizona's notorious immigration law passed two years ago—seemingly out of nowhere—supporters said the measure would merely “mirror” and “assist” federal immigration enforcement. S.B. 1070, which comes before the U. S. Supreme Court this week, in fact contained harsh new criminal penalties against immigrants in an effort to achieve “attrition through enforcement,” as the state of Arizona puts it. (Or, as Mitt Romney has called it, *self-deportation*.) The Supreme Court will consider the four provisions of S.B. 1070 blocked by a federal district judge

in July 2010: provisions that require state and local police to try to determine the immigration status of anyone detained if reasonable suspicion exists that they are in the United States illegally; that criminalize an immigrant's failure to register with the federal government and carry a registration card; that make it illegal for undocumented immigrants to work or solicit work; and that permit state and local police to arrest immigrants without warrants if there is probable cause to deport them because they have committed a crime. At stake is whether federal law trumps—and thus invalidates—these contested elements of state law.

Laws like Arizona's have become familiar as Alabama, Georgia, Indiana, South Carolina, and Utah have passed versions of immigration control. At first, these moves by the states were surprising because federal primacy over immigration policy had gone virtually undisputed over the previous 100 years. Go back further in time, however, and you see that American society has gone the way of state-based crackdowns on immigration before. About a century and a half ago, for example, California set out to seal its borders against unwelcome arrivals. As today, the state's immigration code met legal challenges, and the resulting Supreme Court decision helped firmly establish federal authority over immigration. One critical case involved 22 Chinese women who were identified by a California official as "lewd"—i.e., prostitutes—and barred from entering the United States under state law. Its story shows how 19th-century Supreme Court justices came to disapprove mightily of state efforts to regulate immigration.

The Case of the 22 Chinese Women, as it became known, began at 1 p.m. on Monday, Aug. 24, 1874, when California's commissioner of immigration, Rudolph Piotrowski (himself an immigrant, from Poland), boarded the American steamer *Japan*, recently docked at San Francisco harbor, and inspected its passengers. The ship had set out from Hong Kong, and nearly all of the 600 people aboard were Chinese. Finding 22 of the female passengers suspicious—because they were traveling without husbands or children and their replies to his questions about their domestic circumstances were "perfectly not satisfactory"—he commanded the ship's master to pay a bond of \$500 for each woman to disembark. When the master refused, Piotrowski ordered the women detained onboard and forcibly returned to Hong Kong on the ship's next voyage. They were, he said, "lewd."

No one ever determined whether or not the women were prostitutes, but the answer mattered a great deal. California law required any ship's master transporting "lewd and debauched women" to pay \$500 bonds to the commissioner of immigration. As it happened, California officials did not work very hard to distinguish between "lewd and debauched" women and Asian women. The state had spent the previous decades implementing laws that extorted the Chinese with the goal of expelling them. A Foreign Miner's Tax

directed at Chinese miners had siphoned off roughly one-half their earnings; a Chinese Police Tax had been charged to most persons “of the Mongolian race.” Chinese adults were prohibited from testifying against whites in criminal or civil cases and Chinese children denied access to the state’s public schools. The Chinese, it was said, were arriving in overwhelming numbers to take jobs that, however low-paying, back-breaking, and life-threatening, belonged to Americans, and their “alien” language and culture threatened American morality and civilization.

Some anti-Chinese laws proved vulnerable when brought before the California Supreme Court. Meanwhile, by the 1870s the federal government was gathering strength as it re-engineered the South. “States’ rights” was, for a long moment anyway, the shrill cry of beaten slaveholders. By the middle of the decade, expanding federal authority and the remaining California laws aimed at driving out or subordinating the Chinese were headed for a direct collision.

The day after Piotrowski ordered the detention of the 22 women, someone—likely Chinese merchants—retained lawyers for them. At the four-day trial in San Francisco, the two sides grappled over state and federal power, the women’s rights, and about what a quick inspection through an interpreter could and could not tell you about an immigrant. The state argued that California had a right to protect itself against “pestilential immorality.” The women’s lawyers countered that their clients had certificates of transit and rights under the United States’ treaty with China, which guaranteed the “inherent and inalienable right of man to change his home and allegiance.” Called to the witness stand, the women protested their innocence; many insisted they had husbands, some in China and some in the United States. When a woman named Ah Fook, who told the court she had traveled to San Francisco with her sister in search of sewing work, burst into tears, insisting on her “good intention,” the other women joined her, “making the room echo with their cries and screams.” The bewildered judge hurriedly left the bench and the women were temporarily removed from the chamber.

As the trial progressed, lewdness proved to be soft legal ground upon which to build a barrier between legal and illegal immigration. A missionary testified that

dissolute women in China wore a “flowered, gaudy kind of clothing,” but other witnesses disagreed. Judge Robert F. Morrison, noting the looseness of the women’s attire, decided that there would be “no indelicacy or impropriety in gazing down their sleeves.” The women’s lawyer “performed the operation” upon several of them, finding that all wore “some dress of gaudy color and material beneath their outer garment.” Lewdness was apparently a matter for eyeball jurisprudence.

Morrison ruled against the women: They were “lewd,” he said, and the state’s codes legitimately aimed to preserve California’s “well-being and safety.” But the fight was not over. The women went to the California Supreme Court, which heard the case the following week. They lost again. They sought relief from the Circuit Court for the District of California and here, they triumphed. The court’s decision was somewhat startling. In his September 1874 opinion in the case, Justice Stephen Field (a Supreme Court justice who was hearing lower-court cases, **a practice at the time**), recognized that state governments could invoke “the sacred law of self-defense”—the power to exclude convicts, lepers, those afflicted with incurable disease, and others likely to become public charges. But states’ power in this arena was tightly restricted in light of the federal powers. “Whatever outside of the legitimate exercise of this right affects the intercourse of foreigners with our people,” he wrote, “their immigration to this country and residence therein, is exclusively within the jurisdiction of the general government, and is not subject to state control or interference.” Field saw state immigration laws as atavistic holdovers from slavery, when governments had sought to “exclud[e] free negroes from their limits.” And he noted that “the most serious consequences,” including war, might result from a state government’s abuse of foreign nationals. Instead of remaining hostage to codes that protected states from free black people, the law needed to protect the nation from unruly states. Finally, Field argued that the California statute violated the women’s rights under the U.S. treaty with China, the recently passed Fourteenth Amendment, and an 1870 federal law that blocked states from imposing “onerous” conditions on a singled-out group of immigrants.

San Francisco's anti-Chinese press was outraged; would the U.S. Supreme Court sustain what the *Examiner* called "the monstrous perversion of law"? Field wondered, too. In announcing his decision, he suggested that the government take the case to the Supreme Court. The case, now called *Chy Lung v. Freeman*, was argued in 1876 and marked the first time that a Chinese litigant appeared before the United States' highest court.

In its ruling in March, the Supreme Court upheld the women's victory, flattening California's statute with language that bordered on the incredulous. For Justice Samuel Miller, who wrote the decision, the law was wrongheaded for three distinct reasons. First, it swelled a petty state official like Piotrowski with an arbitrary and potentially tyrannical power that, in practice, would create "systematic extortion of the grossest kind." As he put it, "Whether a young woman's manners are such as to justify the commissioner in calling her lewd may be made to depend on the sum she will pay for the privilege of landing." Second, the law led to rushed, shallow profiling. "The commissioner has but to go aboard a vessel filled with passengers ignorant of our language and our laws," Miller wrote, "and without trial or hearing or evidence, but from the external appearances of persons with whose former habits he is unfamiliar, to point with his finger ... and say to the [ship's] master, 'These are idiots, these are paupers, these are convicted criminals, these are lewd women, and these others are debauched women.'" Finally, the law granted California the license to deflate the United States' global standing or even prompt retaliation. If state governments had the power to deny immigrants entry, the court found, "a single State [could], at her pleasure, embroil us in disastrous quarrels with other nations."

A legislative recipe for extortion; a capricious exercise of perception and power; a dangerous usurpation of federal control: What was not wrong with California's immigration law? "It is idle to pursue the criticism," Miller concluded. The statute was "in conflict with the Constitution of the United States, and therefore void."

Federal authority over immigration did not guarantee justice. Congress went on to bar the immigration of Chinese laborers in 1882. Still, the Supreme Court's

decision in *Chy Lung v. Freeman* stands as a rebuke to Arizona today. Like California's lewdness code, S.B. 1070 calls for hasty estimates by government officials based on "the external appearances of persons," rather than judgments based on "trial or hearing or evidence," as Miller put it. The law extends a state government's power "far beyond what is necessary, or even appropriate" to protect state residents. And it is a state law that impinges on international affairs, "whose enforcement renders the general government liable to just reclamations."

In his 1874 opinion, Justice Field, for his part, warned that the regulation of immigration by state-level authorities would inevitably lead to superficial profiling and the abuse of power. If states could take it upon themselves to deny immigrants the right to enter the country merely on suspicion of law-breaking or immorality, he prophesied, "a door will be opened to all sorts of oppression." One hundred and thirty-eight years later, Arizona and a handful of other states have opened that door. It is now the Supreme Court's job to close it.

Paul Kramer is a historian at Vanderbilt University and the author of "The Blood of Government: Race, Empire, the United States and the Philippines." He can be reached at paul.kramer49@gmail.com or paulkrameronline.com.