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ESSAY

The 14th Amendment and Me: How I Learned Not to Give Up on the 14th Amendment

ROBERT S. CHANG*

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INTRODUCTION

In 2012, at the National Archives in Washington, D.C., I saw the original manuscript of the joint resolution of Congress proposing the 14th Amendment.¹ The cursive script and faded ink made the words difficult to read, but the force of the words was manifest:

... [no] State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.²

* Professor of Law and Executive Director, Fred T. Korematsu Center for Law and Equality, Seattle University School of Law. Copyright © 2019 Robert S. Chang. This Essay was written at the invitation of the Thurgood Marshall Institute of the NAACP Legal Defense Fund as part of a planned volume to commemorate the sesquicentennial of the passage of the 14th Amendment. This volume did not come to be. I am grateful for the careful editing of this Essay provided by LDF Senior Counsel Cody Montag and their legal intern, Terrence Hunger of the University of Mississippi School of Law.

1. *14th Amendment*, THE NATIONAL ARCHIVES (July 9, 1968), <https://archive.org/details/14thAmendment/mode/2up>.

2. U.S. CONST. amend. XIV, § 1.

These words had recently gained a newfound importance for me as I had just become co-counsel representing high school students in Arizona. In that case, *Arce v. Douglas*, the students challenged a state statute that had been used to terminate their school district's Mexican American Studies program.³ The students alleged that the statute had been enacted and enforced in violation of their rights under the 14th Amendment, among other claims.⁴ Not to give too much away, but after six years, the students finally prevailed.⁵

Previously, the 14th Amendment's words had existed as more of an abstraction for me, something that I wrote about in law review articles, often to criticize the myriad ways the United States Supreme Court had limited the reach of those words.⁶ My academic work on the 14th Amendment, until then, had also included an examination of how Asian Americans fit within constitutional jurisprudence.⁷ This work required comparisons of different racial groups and how they navigated the complex and treacherous terrain of race in the United States.⁸ This academic work provided context for me when I litigated the 14th Amendment in the courtroom, which resulted in a newfound appreciation of the amendment.

This Essay examines my evolving perception of and engagement with the 14th Amendment. It begins with an academic perspective on the 14th Amendment, then turns to the 14th Amendment and Asian Americans, followed by an examination of a transformative experience litigating the 14th Amendment. Through these experiences, I have conceptualized some thoughts about how to make the 14th Amendment come alive for the next generation of lawyers.

AN ACADEMIC PERSPECTIVE ON THE 14TH AMENDMENT

One of the most pernicious pronouncements that limited the reach of the powerful words contained in the 14th Amendment occurred fifteen years after its ratification, when the Supreme Court, in

3. Certain details about the case can be gleaned from the published opinions in the case. See *Arce v. Douglas*, 793 F.3d 968, 973 (9th Cir. 2015); see also *González v. Douglas*, 269 F. Supp. 3d 948, 964 (D. Ariz. 2017). Discussed further *infra* Part III.

4. *González*, 269 F. Supp. 3d at 950.

5. *Id.* at 974.

6. E.g., Robert S. Chang & Jerome M. Culp, Jr., *Nothing and Everything: Race, Romer, and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229 (1997).

7. See generally ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* (1999).

8. E.g., Robert S. Chang & Neil Gotanda, *Afterword: The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012 (2007).

the *Civil Rights Cases*, invalidated legislation passed by Congress to ensure access and enjoyment of inns, public conveyances, and places of public amusement for persons of color.⁹ The chief problem with the legislation, at least with regard to the 14th Amendment, was that it interfered not with discrimination by state or local governments but with acts of discrimination by private individuals, which the Court deemed to be mere private wrongs.¹⁰ The Court thought that parties injured by private actors should seek redress under state law, noting that “[i]nnkeepers and public carriers, by the laws of all the [s]tates, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them.”¹¹ The Court made clear, though, that the injured party was not to turn to Congress for relief.¹² In a particularly cruel passage, expressed with no sense of irony, Justice Joseph P. Bradley stated:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws¹³

I am unsure if those who emerged from slavery ever went through a period of feeling that they were the special favorites of the law, or, now elevated and armed with their equal status as citizens, felt that they needed nothing further from Congress or the courts.

Despite this problematic language, in demarcating private acts of discrimination as beyond the reach of Congress, the Court did make a broad pronouncement: If state laws “make any unjust discrimination,” the 14th Amendment would afford relief.¹⁴ In 1896, the Court got a chance to determine what exactly it meant by these words in its landmark decision in *Plessy v. Ferguson*, which established the doctrine of “separate but equal.”¹⁵ The challenge in *Plessy* arose from an 1890 Louisiana law requiring “separate railway carriages for the white and colored races.”¹⁶ Homer Plessy challenged the law in court, argu-

9. The Civil Rights Cases, 109 U.S. 3, 19 (1883).

10. *Id.* at 17.

11. *Id.* at 25.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

16. *Id.* at 540.

ing that the “enforced separation of the two races stamps the colored race with a badge of inferiority,”¹⁷ violating the 14th Amendment’s guarantee of equal protection. The Supreme Court rejected his arguments. In his majority opinion, Justice Henry Billings wrote: “If . . . [enforced separation stamps the colored race with the badge of inferiority], it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”¹⁸ In other words, the Court told black people that any negative impact they felt from the requirement to sit in separate cars was entirely of their own creation and not the concern of the Court. “Separate but equal” became all that racial minorities could expect from the 14th Amendment’s guarantee of equal protection.

The Court’s decision in *Plessy* robbed the 14th Amendment of its meaning and power until the mid-20th century when Charles Hamilton Houston and the NAACP Legal Defense and Educational Fund, Inc. (“LDF”) breathed new life into it through a series of court challenges that led to the Court’s unanimous decision in *Brown v. Board of Education*¹⁹ and beyond.²⁰

These court challenges also led to a less well-known, but very important result: something that has been termed the reverse incorporation of the 14th Amendment’s equal protection guarantee into the 5th Amendment’s Due Process Clause. A companion case to *Brown*, the Supreme Court case *Bolling v. Sharpe* addressed segregated public schools in Washington, D.C.²¹ Because D.C. public schools were segregated by federal authorities, the 14th Amendment was not available to protect the plaintiffs. Chief Justice Earl Warren, while acknowledging that “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,”²² and that the two are not always interchangeable,²³ nevertheless found that an equal protection guarantee is included within the 5th Amendment’s due process guarantee:

Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro chil-

17. *Id.* at 551.

18. *Id.*

19. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

20. A discussion of this decades-long series of cases is beyond the scope of this chapter. For an excellent account, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1977).

21. See *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954).

22. *Id.* at 499.

23. *Id.*

dren of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.²⁴

Before *Bolling*, the guarantee of equal protection of the laws did not apply to the federal government. All manner of mischief was made possible because the federal government was not constrained by this guarantee. The institution of slavery, enshrined in the original Constitution, was made possible because the federal government was not bound by equal protection. Likewise, the lack of a federal equal protection guarantee permitted the disenfranchisement of women²⁵ and the dispossession, displacement, and extermination of Indians.²⁶ Moreover, because the federal government is not constrained by an equal protection guarantee, the federal government was able to limit naturalization to free white persons in the 1790 Naturalization Act.²⁷

The lack of a federal equal protection guarantee also resulted in discrimination against Asians. For example, the lack of said guarantee might be considered to be partially responsible for permitting the federal government to determine, in the late nineteenth century, that most classes of Chinese persons could not enter the country and that no Chinese immigrant could become a United States citizen.²⁸ It also led to the policy that Chinese immigrants who wanted to leave the

24. *Id.* at 500.

25. *Cf.* U.S. CONST. amend. XIX (stating that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex”). Had there been a federal equal protection guarantee, presumably there would have been no need for this amendment.

26. Two early cases established the unique relationship between the federal government and Indian tribes. *See Cherokee Nation v. Georgia*, 30 U.S. 1, 15, 20 (1831) (because the Cherokee Nation was not a foreign state, Court lacked jurisdiction to adjudicate bill “brought by the Cherokee Nation, praying an injunction to restrain the State of Georgia from the execution of certain laws of that State which, as is alleged, go directly to annihilate the Cherokees as a political society and to seize, for the use of Georgia, the lands of the [Cherokee] Nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force”); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (while the Cherokee Nation retained internal sovereignty, its relationship with federal government was that of a “distinct, independent political commun[ity]”). Even if there had been a federal equal protection guarantee at the time, the fact that the relationship was political would have precluded its application to the treatment of Indian tribes by the United States. *Cf. Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (plenary power held by Congress largely precludes equal protection as “[l]iterally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws . . . were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”) (citation omitted).

27. NATURALIZATION ACT OF 1790 § 1, 1 STAT. 103; *see Ozawa v. United States*, 260 U.S. 178, 194-95 (1922).

28. CHINESE EXCLUSION ACT, PUB. L. NO. 47-126, 22 STAT. 58, 58-61 (1882).

United States temporarily had to obtain certificates for reentry and that these same duly issued certificates could, with the stroke of a pen, be nullified.²⁹ It resulted in the statute requiring Chinese immigrants, who were lawfully present in the United States, to have and carry certificates to prove their lawful presence or face deportation.³⁰ Pursuant to that law, a white witness needed to vouch for the Chinese laborer in order for the certificate to be valid.³¹ The federal government could limit the right of naturalization to white persons and persons of African nativity or descent, such that a lawful immigrant of Japanese or South Asian ancestry, who otherwise met the requirements to become a naturalized citizen, could be denied naturalization.³² All manner of mischief.

The principle that the federal government was not bound to provide equal protection of the laws was invoked by the Court during World War II as part of the justification of a curfew that applied only to persons of Japanese ancestry, including those who were United States citizens. In *Hirabayashi v. United States*, Chief Justice Harlan F. Stone rejected Gordon Hirabayashi's argument that discrimination against citizens of Japanese ancestry violated the 5th Amendment, noting: "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process."³³ In the Court's view, the curtailment of Hirabayashi's liberty interest by a curfew restricting only persons of Japanese ancestry, citizen or not, did not amount to a denial of due process.³⁴ As Justice Stone made clear, at stake in *Hirabayashi* was merely a curfew, suggestive that a greater curtailment of liberty might violate due process.³⁵

That may be what Fred Korematsu hoped for when he pursued his challenge to the military order that required him to leave his home for the government's incarceration camps for Japanese Americans. In *Korematsu v. United States*, in an opinion written by Justice Hugo Black, the Court largely ignored that the liberty interest at issue was far greater than that in *Hirabayashi*, and expressed that "all legal re-

29. *Chan Ping v. United States*, 130 U.S. 581, 582, 609 (1889).

30. *Fong Yue Ting v. United States*, 149 U.S. 698, 742 (1893).

31. *Id.*

32. *See generally* *United States v. Thind*, 261 U.S. 204, 207–8 (1923); *see also* *Ozawa*, 260 U.S. at 198.

33. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

34. *Id.* at 99–101.

35. *Id.* at 112–14.

strictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] that courts must subject them to the most rigid scrutiny.”³⁶ Yet, the Court concluded that “Korematsu was not excluded . . . because of hostility to him or his race,” but instead “was excluded because we are at war with the Japanese Empire.”³⁷ That we were at war with Italy and Germany and those of Italian and German ancestry were not similarly burdened could be ignored because the federal government, not constrained by an equal protection mandate, was at greater liberty to discriminate.

The civil rights movement, especially the challenges to segregated education, led to a reinvigoration of the 14th Amendment, including expanding its equal protection guarantee to apply to the federal government.³⁸ This was followed by the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.³⁹ Like the earlier Civil Rights Act of 1875, these new civil rights acts were challenged in court. For example, in *Heart of Atlanta Motel v. United States*, the appellant motel challenged the constitutionality of Title II of the Civil Rights Act of 1964, arguing that Congress lacked the power under the Commerce Clause⁴⁰ to prohibit it from refusing to rent rooms on the basis of race.⁴¹ The Court, however, rejected this argument, making it abundantly clear that “equal access to public establishments . . . could be readily achieved by congressional action based on the commerce power of the Constitution.”⁴²

But unlike prior cases, when the power of the federal government to make good on the promises of the 13th, 14th, and 15th Amendments was largely circumscribed, the 1960s civil rights acts were largely upheld by the Supreme Court.⁴³ This was no surprise given that the Court was led at the time by Chief Justice Earl Warren, who had a liberal majority and effectively overruled *Plessy* with the decision in *Brown*. But then the Warren Court became the Burger Court.

36. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

37. *Id.* at 223.

38. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

39. CIVIL RIGHTS ACT OF 1964, PUB. L. NO. 88-352, 78 STAT. 241 (1964); VOTING RIGHTS ACT OF 1965, PUB. L. NO. 89-110, 79 STAT. 437 (1965); FAIR HOUSING ACT OF 1968, PUB. L. 90-284, 82 STAT. 73 (1968).

40. COMMERCE CLAUSE, U.S. CONST. art I, § 8, cl. 3.

41. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 243–44 (1964).

42. *Id.* at 250.

43. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

President Nixon, elected in 1968, remade the Supreme Court with four appointments in approximately 18 months during his first term in office, replacing Earl Warren with Warren Burger, Abe Fortas with Harry Blackmun, Hugo Black with Lewis F. Powell, Jr., and John Marshall Harlan II with William Rehnquist.⁴⁴

This reshaped — and more conservative — Court began dismantling the reach of the 14th Amendment in the 1970s, either directly or by limiting the reach of civil rights statutes intended to fulfill its promise. Discrimination had to have been intentional;⁴⁵ there were strict causation requirements such that remedial measures could be justified only if there was “prior discrimination by the government unit involved.”⁴⁶ and remedies for statutory violations were limited. In addition, remedies were limited in order to not harm so-called innocent white people, whose undeserved settled expectations from seniority systems locked into place the effects of past discrimination.⁴⁷

The Burger Court greatly limited the power of federal courts to fulfill the promise of *Brown*. For example, in *Milliken v. Bradley*, the Court made clear that remedies to redress school segregation would be carefully examined so that any remedy did not exceed the scope of the constitutional violation.⁴⁸ The immediate effect in that case was to invalidate an interdistrict remedy because the only constitutional violation established before the district court stemmed from segregation within the Detroit City School District.⁴⁹ Justice Thurgood Marshall, in dissent, asserted that the problem of white flight cannot be ignored and that the practical effect of the majority’s decision would be that “[t]he very evil *Brown I* was aimed at will not be cured, but will be perpetuated for the future.”⁵⁰

I attended law school between 1989 and 1992 and learned the language of feminist legal theory and critical race theory to understand this slow demolition of the civil rights gains of the earlier period and labeled the new era as the Second Redemption or post-civil rights

44. See Warren Weaver, Jr., *Four Nixon Justices Vote as Bloc on 70% of Cases*, N.Y. TIMES, June 28, 1973, at 20; Thomas Healy, *A Supreme Legacy: The Conservative Legacy of the Burger Court Lives on in the Precedents It Set*, NATION (June 23, 2016), <https://www.thenation.com/article/archive/a-supreme-legacy/>.

45. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

46. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

47. *Id.* at 276.

48. *Milliken v. Bradley*, 418 U.S. 717, 738 (1974).

49. *Id.*

50. *Id.* at 802 (Marshall, J., dissenting).

era.⁵¹ As an academic, I wrote about this earlier historical period as a way to understand the retrenchment of civil rights I observed take place following what has been described as the Second Reconstruction embodied by the 1960s civil rights acts. I saw in Justice Sandra Day O'Connor's words echoes of Justice Brown, who declared in *Plessy* that any feeling of inferiority experienced by members of the colored race was in their heads.

For example, in *City of Richmond v. J.A. Croson Company*, the Supreme Court held that Richmond's failure to identify past illegal conduct as the basis for its "Minority Business Utilization Plan" for awarding public construction contracts to its citizens violated the Equal Protection Clause.⁵² The fact that 99.33% of government construction contracts went to white-owned businesses in a city that was more than 50% black was not a sufficient factual predicate to justify Richmond's program requirement that 30% of government construction contracts be awarded to minority-owned businesses.⁵³ Justice O'Connor, noting that statistical disparity cannot by itself establish a prima facie case of discrimination, states, blithely, "Blacks may be disproportionately attracted to industries other than construction."⁵⁴ For Justice O'Connor, the notion that this disparity is reflective of discrimination might simply be in the heads of black people because, after all, they may just not prefer the construction trade. Likewise, we may look at corporate boardrooms today and say that black people may be disproportionately attracted to lower positions in corporations, and that any notion that the lack of diversity is a product of discrimination is, as Justice Brown wrote in *Plessy*, "because the colored race chooses to put that construction upon it."⁵⁵

Justice O'Connor also channeled Justice Bradley (who declared in the *Civil Rights Cases* that black people were no longer to be the special favorites of the law)⁵⁶ in a key decision on the use of affirma-

51. E.g., John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2206 n.284 (1992) (listing "at least 12 themes reflected in the move from the civil rights era of the mid-1960s to the present post-civil-rights era"); Robert L. Hayman, Jr., *Re-cognizing Inequality: Rebellion, Redemption and the Struggle for Transcendence in the Equal Protection of the Law*, 27 HARV. C.R.-C.L. L. REV. 97, 57 (1991) (describing retrenchment of civil rights as "apparent triumph of the second Redemption").

52. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989).

53. *Id.* at 479.

54. *Id.* at 503.

55. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

56. *The Civil Rights Cases*, 109 U.S. 3, 25 (1883).

tive action programs by universities. In *Grutter v. Bollinger*, the Supreme Court upheld the University of Michigan Law School's affirmative action program but emphasized that it must be temporary.⁵⁷ Justice O'Connor, writing for the majority, emphasized that it had been twenty-five years since the Court gave its blessing in *Regents of the University of California v. Bakke* to "use race to further an interest in student body diversity in the context of higher education," but that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."⁵⁸ Implicit in her opinion was the view that underrepresented racial minorities get to "enjoy" their privileged status as special favorites of the law for just a little while longer.⁵⁹ The sunseting of affirmative action reflects a worldview within which the time must come when the uplifted minorities have to stand for themselves and can no longer rely on the beneficence of affirmative action, no longer able to be the special favorites of the law.

This is the 14th Amendment that I knew as an academic.

THE 14TH AMENDMENT AND ASIAN AMERICANS

As an Asian American, I have a complicated relationship with the 14th Amendment, because it only partially incorporated persons of Asian ancestry into its protections. Though its due process and equal protection guarantees extended to any person, its first sentence, the so-called Citizenship Clause, only partially incorporated people who looked like me into the national body. I say partially incorporated because the federal government remained free to discriminate to restrict naturalization on the basis of race and national origin.⁶⁰ In this section, I first discuss due process and equal protection before turning to the incomplete Citizenship Clause.

The last two clauses of section one of the 14th Amendment state: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁶¹ The import of "any person"

57. See generally *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

58. *Id.* at 343.

59. *Id.* ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable.").

60. U.S. CONST. amend. XIV, § 1, cl. 3.

61. *Id.*

is discussed in the *Slaughter-House Cases*.⁶² In Justice Samuel Miller's majority opinion, after observing that the 13th, 14th, and 15th Amendments specifically pertained to black people, he stated:

We do not say that no one else but the negro can share in this protection. Both the language and spirit of these Articles are to have their fair and just weight in any question of construction. Undoubtedly, while negro slavery alone was in the mind of the Congress which proposed the Thirteenth Article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void. And so if other rights are assailed by the States, which properly and necessarily fall within the protection of these Articles, that protection will apply, though the party interested may not be of African descent.⁶³

The Court got a chance to test its commitment to this proposition in its decision in *Yick Wo v. Hopkins*.⁶⁴ That case involved a San Francisco ordinance that permitted laundries to be operated with no restriction if housed in a brick or stone structure but required the written consent of the city Board of Supervisors to operate a laundry in other structures.⁶⁵ On its face, the ordinance did not discriminate.⁶⁶ The problem arose when the Board began granting and withholding consent.⁶⁷ After the passage of the statute, Yick Wo, Wo Lee, and 200 other persons of Chinese ancestry petitioned the Board for permission to continue operating laundries in their wooden structures, which many of them had been using for over twenty years.⁶⁸ They were all denied.⁶⁹ Eighty others who operated laundries in wooden structures, none of whom were Chinese, were granted permission by the board to continue operations.⁷⁰ Only one non-Chinese person, Mrs. Mary Meagles, was denied permission.⁷¹

Yick Wo and Wo Lee refused to pay the fines for violating the ordinance and were placed in jail.⁷² They filed suit in state court seek-

62. *Slaughter-House Cases*, 83 U.S. 36 (1872).

63. *Id.* at 72.

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

65. *Id.* at 368.

66. *Id.* at 373–74.

67. *Id.* at 366.

68. *Id.* at 374.

69. *Id.*

70. *Id.*

71. *In re Wo Lee*, 26 F. 471, 473–74 (C.C.D. Cal. 1886).

72. *In re Yick Wo*, 9 P. 139 (Cal. 1885).

ing habeas relief.⁷³ After losing in the California Supreme Court, they appealed initially to the Circuit Court for the District of California.⁷⁴ The circuit court appeared to acknowledge that “[t]he necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.”⁷⁵ Yet it chose to defer to the “greater weight of judicial authority in this state” by upholding the ordinance, but expressed hope that “both parties and the United States [S]upreme [C]ourt will co-operate to procure a speedy decision.”⁷⁶

The Supreme Court quickly took up the review. As a threshold matter, the Court made clear, early in its opinion, that the fact that Yick Wo was a subject of the emperor of China was irrelevant for purposes of the due process and equal protection provisions of the 14th Amendment.⁷⁷ It stated that “[t]hese provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws.”⁷⁸ Because Yick Wo was protected by the 14th Amendment, the defendants had to answer the substantive charge of discrimination.

The attorneys for the defendants argued:

Why should we want to destroy the [C]hinese laundry business? Do we not voluntarily give them our clothes to wash? Have we not given them three-fourths of the laundry business of San Francisco? We take them into our families as cooks and butlers, and into our churches and [S]unday-schools, and they sleep with us (temporarily) in our cemeteries.⁷⁹

The Court rejected this argument and found that the facts recounted above “establish[ed] an administration directed so exclusively against a particular class of persons . . . that . . . [it] amount[ed] to a practical denial by the [s]tate of that equal protection of the laws.”⁸⁰

73. *Id.*

74. *Wo Lee*, 26 F. at 476.

75. *Id.* at 471, 474.

76. *Id.* at 477.

77. *Yick Wo*, 118 U.S. at 368–69.

78. *Id.* at 369.

79. Authorities and Argument for Defendant and Respondent, *Yick Wo v. Hopkins*, 1885 WL 18153, at *95 (1885) (Nos. 1280, 1281).

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

The Court thus found that an ordinance, neutral on its face, could be applied in a manner that violated the Equal Protection Clause.⁸¹

Though *Yick Wo* had argued that the law itself violated the Constitution, the Court did not make clear if the law was to be struck down in ordering *Yick Wo* and *Wo Lee* to be freed. Early in the opinion, the Court suggested that the ordinance was deficient because “[t]he power given to . . . [the supervisors] is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint.”⁸² While the Court does not opine directly on the sufficiency of the ordinance, following its suggestion leads to the conclusion that evidence regarding discriminatory enforcement of a law may be sufficient to strike down the entire law. This may be particularly true if there is a factual record that suggests that the discretion granted to enforce the ordinance was, in essence, a license to discriminate. This understanding of *Yick Wo* became crucial in my litigation of the 14th Amendment in an Arizona courtroom, as recounted below.

But *Yick Wo* and the Court’s application of the 14th Amendment to safeguard the rights of persons of Asian ancestry were later undercut because of the incomplete protection provided by the Citizenship Clause. The opening sentence of the clause, in section one of the 14th Amendment, states: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”⁸³ Importantly, this ensures that anyone with national citizenship, whether acquired through birth or naturalization, also acquires state citizenship, preventing states from denying state citizenship to black people and others and discriminating on that basis. But what does the qualifying clause “and subject to the jurisdiction thereof” mean?

The meaning of those words was tested when *Wong Kim Ark*, born in 1873 in San Francisco, left the United States to visit China in 1894 and was denied entry upon his return to the United States in 1895.⁸⁴ Despite the fact that *Wong’s* papers included a certification by white men that he had been born in the United States, the collector of customs decided that *Wong* was not a U.S. citizen and was barred

81. *Id.* at 373–74.

82. *Id.* at 366–67.

83. U.S. CONST. amend. XIV, § 1, cl. 1.

84. *United States v. Wong Kim Ark*, 169 U.S. 649, 652–53 (1898).

from entry based on the Chinese Exclusion Act.⁸⁵ Wong Kim Ark sued, and his case made it to the Supreme Court. A divided Court determined that the Citizenship Clause meant that a person born in the United States and whose parents were not consular officials of a foreign government was, by virtue of birth, a U.S. citizen.⁸⁶

Wong Kim Ark was silent, though, as to “persons . . . naturalized.”⁸⁷ The amendment itself was silent as to who may become a citizen through naturalization. Likewise, the Constitution is silent on this issue other than stating that Congress shall have the power “[t]o establish an uniform Rule of Naturalization.”⁸⁸ Under this authority, Congress passed the 1790 Naturalization Act, which limited the privilege to “free white persons.”⁸⁹ Following the Civil War and the Reconstruction Amendments, Congress revised the Act to permit “white persons and . . . [persons] of African nativity . . . [or] descent” the right to naturalize.⁹⁰

But for those who fell outside of those categories, a federal government not bound to provide equal protection was free to determine that some do not belong. If persons of Asian ancestry may be banned from United States shores, then it follows that good reason exists to also exclude persons of Asian ancestry from joining the national political body as citizens. Nothing could be done, following *Wong Kim Ark*, about pesky birthright citizenship. But the harm could at least be limited by forbidding naturalization, either explicitly by statute as accomplished with Chinese immigrants, or by statutory interpretation and reliance on racial categories as accomplished by the Court in *Ozawa v. United States*⁹¹ and *United States v. Thind*.⁹² Then, to the extent that birthright citizenship is a problem, the strategy shifts to prevent births by severely restricting immigration to prevent family formation. As one Congressman said in support of the Immigration Act of 1924, which was intended to foreclose immigration from Asia completely through the use of the facially race- and nationality-neu-

85. *Id.* at 650, 653.

86. *Id.* at 705.

87. U.S. CONST. amend. XIV, § 1, cl. 1.

88. U.S. CONST. art. I, § 8, cl. 4.

89. U.S. REV. STAT. § 2169.

90. *Ozawa v. United States*, 260 U.S. 178, 190, 193 (1922).

91. *Id.* at 176, 190, 193 (holding that a person of Japanese ancestry could not become naturalized because he was not a “free white person”).

92. *United States v. Thind*, 261 U.S. 204 (1923) (holding that “a high-caste Hindu, of full Indian blood” must have his certificate of citizenship canceled because he was not a “free white person”).

tral legal category, *alien ineligible for citizenship*: “The necessity [for this provision] . . . arises from the fact that we do not want to establish additional Oriental families here.”⁹³ Another technique used to restrict family formation was through anti-miscegenation laws.⁹⁴

In this sense, the 14th Amendment’s Citizenship Clause was incomplete, because it left open the possibility that certain people could be deemed ineligible for naturalization by race or nationality. This would not be corrected for Chinese immigrants until World War II, when the imperatives of war produced the political will to open naturalization to those from China, a U.S. ally.⁹⁵ It was corrected for Filipino immigrants and South Asian immigrants in 1946, and for all immigrants from Asia in 1952 with the passage of the McCarran-Walter Act.⁹⁶ Opening up the pathway to naturalization, though, should not be confused with opening the borders for entry. During the mid-20th century, most Asian countries had yearly quotas capped at 100 immigrants per year.⁹⁷ To provide context, the quota for calendar year 1963 for the following countries was as follows: Austria, 1,450; Germany, 26,533; Ireland, 6,054; Poland, 7,460; and United Kingdom, 28,291.⁹⁸ Europe as a region had a quota allotment that year of 99,244.⁹⁹ All of Asia, 2,256; all of Africa, 1,010.¹⁰⁰ In this way, the (mostly) white national character of this nation was maintained, at least for a little while longer. Asian exclusion, for the most part, persisted.

Further, the Privileges and Immunities Clause of the 14th Amendment, which prevents states from treating citizens of other states in a discriminatory manner, only protects citizens of the United States.¹⁰¹ Immigrants from Asia ineligible for naturalization could never bring themselves under the protection of this clause.

The incomplete Citizenship Clause had repercussions far beyond the denial of naturalization. Once the federal government recognized

93. RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 235 (alteration in original).

94. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (laws banning interracial marriage); Hrishikesh Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-miscegenation Statutes to Asian Americans, 1910–1950*, 9 *ASIAN L.J.* 1 (2002).

95. CHINESE EXCLUSION ACT, repeal, PUB. L. 78-199, 57 STAT. 600 (1943).

96. IMMIGRATION AND NATIONALITY ACT, PUB. L. 82-414, 66 STAT. 163 (1952).

97. LUCE-CELLER ACT, PUB. L. 483.

98. IMMIGR. & NATURALIZATION SERV., DEP’T JUST., *ANNUAL REPORT OF THE IMMIGRATION AND NATURALIZATION SERVICE* 34 (1964).

99. *Id.*

100. *Id.*

101. U.S. CONST. amend. XIV, § 1, cl. 2.

“alien ineligible for citizenship” as a category that justified treating Asians differently from other immigrants, states began relying upon that federal classification to discriminate. States such as California and Washington enacted alien land laws, whose constitutionality was upheld in a series of cases in 1923.¹⁰² In the Washington case, *Terrace v. Thompson*, the Supreme Court found that because the category “aliens ineligible for citizenship” was one created by Congress, the state could rely upon the federal category which “in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership.”¹⁰³ Stated differently, federal discrimination underwrote and authorized state discrimination, notwithstanding that due process and equal protection were supposed to extend to all persons under the 14th Amendment.

In this manner, the 14th Amendment’s promise contained in the expansive protections to all persons ended up being a mixed bag for Asian Americans.

LITIGATING THE 14TH AMENDMENT IN ARIZONA

It is easy to be critical of 14th Amendment jurisprudence. But you need to move beyond critique if you find yourself in court litigating on behalf of clients who claim that their 14th Amendment rights have been violated. Representing students who challenged a state law that was used to terminate the Mexican American Studies Program at the Tucson Unified School District (“TUSD”) changed my relationship with the 14th Amendment.¹⁰⁴

The Mexican American Studies Program at TUSD was created in 1998.¹⁰⁵ Controversy about the program erupted in 2006 when Dolores Huerta, who had co-founded the National Farmworkers Association with Cesar Chavez, spoke at an assembly at Tucson High Magnet School.¹⁰⁶ When asked by students about anti-immigrant legislation, she responded that Republicans hate Latinos.¹⁰⁷ The Arizona

102. See *Porterfield v. Webb*, 263 U.S. 225 (1923) (upholding California’s Alien Land Law); see also *Terrace v. Thompson*, 263 U.S. 197 (1923) (upholding Washington’s Alien Land Law).

103. *Terrace*, 263 U.S. at 220.

104. *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015); *González v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017).

105. Abena Hutchful, *What You Need To Know About The Arizona Mexican-American Studies Trial; Update: Judge Rules Ban Unconstitutional*, NAT’L COAL. AGAINST CENSORSHIP (Aug. 23, 2017), <https://ncac.org/news/blog/what-you-need-to-know-about-the-arizona-mexican-american-studies-trial>.

106. *González*, 269 F. Supp. 3d at 952.

107. *Id.*

state legislature learned of this and trouble ensued. Then-State Superintendent of Public Instruction Tom Horne accompanied his deputy, Margaret Garcia Dugan, who was to speak at the school.¹⁰⁸ Her message was plain and simple — she was Latina, she was a Republican, and she did not hate herself.¹⁰⁹ Some students at this assembly engaged in a silent protest because they had been informed before the assembly that they would not be permitted to ask questions of the speaker.¹¹⁰ The protesting students placed blue tape over their mouths, stood up, and left the assembly.¹¹¹ The tape had a double message that was intended to symbolize the current silencing as well as the historical suppression of spoken Spanish in Arizona public schools.¹¹² School administrators in the Southwest had used a variety of punishments historically to punish students who spoke Spanish at school, including placing tape over their mouths.¹¹³

Tom Horne was seated on stage when this occurred.

Horne responded first with an open letter to the Tucson community published in a local newspaper.¹¹⁴ Without evidence, he blamed the silent student protest on the Mexican American Studies Program and called for its citizens to end ethnic studies at TUSD.¹¹⁵ When this open letter failed to produce his desired result, Horne turned to the Arizona legislature, testifying before key committees and drafting bills that would empower the state superintendent, a position he occupied, to effectively terminate ethnic studies courses and classes in Arizona's public schools.¹¹⁶ Though his first two attempts failed, he succeeded on his third try, and the Arizona legislature passed House Bill ("HB") 2281, which then-Governor Jan Brewer signed into law in May 2010.¹¹⁷ In January 2012, rather than lose 10% of its funding, TUSD terminated its Mexican American Studies Program.¹¹⁸

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. See Patricia Gándara & Gary Orfield, *A Return to the "Mexican Room": The Segregation of Arizona's English Learners*, UCLA (July 8, 2010), <https://civilrightsproject.ucla.edu/research/k-12-education/language-minority-students/a-return-to-the-mexican-room-the-segregation-of-arizonas-english-learners-1/gandara-return-mexican-room-2010.pdf>.

113. AIDA HURTADO & PATRICIA GURIN, *CHICANA/O IDENTITY IN A CHANGING U.S. SOCIETY, ¿QUIÉN SOY? ¿QUIÉNES SOMOS?* 93 (2004).

114. *Id.* at 953.

115. *Id.*

116. *Id.* at 954.

117. *Arce v. Douglas*, 793 F.3d 968, 975 (9th Cir. 2015).

118. Marc Lacey, *Rift in Arizona as Latino Class Is Found Illegal*, N.Y. TIMES (Jan. 7, 2011), https://www.nytimes.com/2011/01/08/us/08ethnic.html?pagewanted=all&_r=0.

In April 2012, when I found myself in the National Archives in front of that talismanic document, I had just become co-counsel in *Arce v. Douglas*, representing Maya Arce, Nicholas Dominguez, and Korina Lopez, three TUSD students who challenged HB 2281, arguing that it violated the 14th Amendment, its enactment and/or enforcement was motivated by discriminatory intent, and it was overbroad. A month earlier, before my role was formalized, I had taken students in my civil rights clinic to Arizona to help the students' attorney, Richard Martinez, prepare for a summary judgment hearing. The student-plaintiffs had moved for summary judgment on their 1st Amendment claims; the state cross-moved for summary judgment on those claims.¹¹⁹ Though the students had also alleged an equal protection violation, that claim was not part of the summary judgment proceedings.¹²⁰

We waited nearly a year for the judge to rule.

Though the judge found one portion of the statute to be unconstitutionally overbroad, the judge granted summary judgment to the state on all of the students' 1st Amendment claims.¹²¹ Then, in a move that shocked us, the judge, on his own motion, granted summary judgment to the State on the students' equal protection claims, even though neither the students nor the State had sought summary judgment on these claims.¹²²

We were shocked by the judge's ruling because it is unusual, as a matter of both procedural and substantive fairness, to rule on a claim not raised by the parties in a summary judgment proceeding. We were also shocked because we had excellent facts demonstrating selective enforcement. Though Horne had railed against the evils of all ethnic studies programs, and HB 2281 was drafted in general terms that did not single out Mexican American Studies, the only program targeted for enforcement was TUSD's Mexican American Studies, even though TUSD also had programs in Pan Asian Studies, African American Studies, and Native American Studies.¹²³ Further, one of the chief complaints made by then-Superintendent Horne in testifying before the legislature about the Mexican American Studies Program was its use of work by Paolo Freire, an educational theorist who was also a

119. *Arce*, 793 F.3d at 974.

120. *Id.*

121. *Id.*

122. *Id.*

123. *González v. Douglas*, 269 F. Supp. 3d 948, 957–58 (D. Ariz. 2017).

Brazilian Marxist.¹²⁴ When a legislator brought to Horne's attention that there was a public charter school in Tucson called the Paolo Freire Freedom School, Horne responded that he was "very concerned"¹²⁵ and would look into it, but never did.¹²⁶ That school continued operating with no repercussions while TUSD's Mexican American Studies Program was shut down. Most of the students taking MAS courses were Mexican American; most of the students at the Paolo Freire Freedom School were white.¹²⁷

This looked a lot like *Yick Wo*: a facially neutral law was being applied in a discretionary manner that discriminated against people of color — in this case, Latinx students.

To be fair to the judge, he had seen and heard part of the student plaintiffs' equal protection arguments because the students had sought a preliminary injunction, arguing that they had a strong likelihood of success on their equal protection claims.¹²⁸ And the judge had the authority to grant summary judgment on equal protection if he felt that the issue had been fully and fairly argued. Perhaps the judge felt that he had seen and heard enough.

Our task, though, was to appeal and persuade the Ninth Circuit that our equal protection claims had not been fully and fairly heard and that we deserved an opportunity to present them to the trial court.¹²⁹ We also made other First Amendment arguments based on overbreadth and void for vagueness that could have won the case outright.¹³⁰ Though we were unable to persuade the panel on those theories, the appellate court reversed the grant of summary judgment on equal protection and viewpoint discrimination.¹³¹ Further, the court directed that a trial was required on equal protection.¹³² This was unusual. Typically, appellate courts will remand cases for further proceedings, which would have left it open for the parties to seek summary judgment on equal protection or would have permitted the

124. *Id.* at 955.

125. Transcript at 100–01, Hearing on H.B. 2281 Before H. Educ. Comm., 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

126. *Id.* at 955–56.

127. *Arce v. Douglas*, 793 F.3d 968, 973 (9th Cir. 2015); *González*, 269 F. Supp. 3d at 955.

128. Plaintiffs' Second Motion for Preliminary Injunction at 14, *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015) (No. 4:10-cv-00623-AWT).

129. Plaintiffs-Appellants/Cross-Appellees' Response and Reply Brief at 12, *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015) (Nos. 13-15657, 13-15760).

130. *Id.* at 21.

131. *Arce*, 793 F.3d at 990.

132. *Id.*

court, on its own motion, to direct the parties to brief the issue for summary adjudication.

It was now summer 2015, with three years lost because of the improper grant of summary judgment. Discovery in this case had stalled pending the resolution of summary judgment and its appeal, so we were now headed into a very time-intensive and expensive phase of discovery as part of pretrial preparation. In September 2015, we were extremely fortunate when attorneys in the New York office of Weil, Gotshal & Manges joined as co-counsel.¹³³

Yick Wo was an important case for us to draw parallels to, though I did not fully appreciate how important it was initially. Part of the problem was that the facts in *Yick Wo* were so extreme — all of the more than 200 Chinese laundry operators who sought permission to operate were denied; all of the more than 80 non-Chinese laundry operators, with the exception of the hapless Mrs. Mary Meagles, were granted permission. Here, we had only one affirmative instance of enforcement, coupled with instances of lack of enforcement. Was this going to be enough to persuade the judge that our facts presented a *Yick Wo* style of discriminatory enforcement? And even if we prevailed on that basis, would that be enough to get the statute tossed?

Our clients had pursued both a facial and an as-applied challenge to the law.¹³⁴ Success on the facial challenge would have invalidated HB 2281. The as-applied challenge, if successful, would have invalidated the enforcement but would leave the law in place.

It is extremely difficult to invalidate a facially-neutral law on equal protection grounds. Our research had shown that the last time the Supreme Court upheld the invalidation of a facially neutral state statute had been in 1985.¹³⁵ In that case, *Hunter v. Underwood*, the Court found that a race-neutral Alabama state constitutional provision adopted in 1901 had been motivated by an intent to disenfranchise black citizens, as evidenced in part by the opening address made by John Knox, president of the state constitutional convention: “And what is it we want to do? Why it is, within the limits imposed by the Federal Constitution, to establish white supremacy in this

133. Though additional lawyers from the firm worked on the case, the primary attorneys were Weil partners Steve Reiss and James Quinn and associates Luna Ngan Barrington and David Fitzmaurice.

134. See Pls. Pretrial Proposed Findings of Fact and Conclusions of Law ¶ 1, *González v. Douglas*, 269 F. Supp. 3d 948 (D. Ariz. 2017).

135. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

State.”¹³⁶ But 1901 was very different from 2010. What could be openly expressed in Alabama then was very different from what legislators express now. Discriminatory motivation has become more difficult to discern and prove today.

The 10-day bench trial took place in June and July 2017. Because of the 4th of July holiday and the judge’s schedule, we had a two-week break in the middle of the trial. One morning in the lead up to the second week of trial, Steve Reiss, the lead trial attorney, looked over at me and with a wry smile on his face said, “This is *Yick Wo*.” One of the Weil associates, David Fitzmaurice, and I looked at each other. I am not sure what David was thinking, but I was thinking, “Yes, we’ve been citing to that case since our appellate briefs. Our case is and isn’t *Yick Wo*, which only gets us so far.” I am not sure why I did not say this aloud. Perhaps it was the Cheshire Cat-like grin on Steve’s face.

It is only two years later, as I reflect on the 14th Amendment that I realize how right he was. I had been reading *Yick Wo* too narrowly, thinking of it as an as-applied selective enforcement challenge, which typically invalidates the discriminatory enforcement action but leaves the statute in place. But a close reading of the case shows that the Court treated it as more than that. The Court understood the challenge as follows:

It is contended on the part of the petitioners that the ordinances for violations of which they are severally sentenced to imprisonment are void on their face as being within the prohibitions of the Fourteenth Amendment, and, in the alternative, if not so, that they are *void by reason of their administration*, operating unequally so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances — an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.¹³⁷

The Court rejected the direct facial challenge, finding that regulating businesses is generally within a municipality’s police powers.¹³⁸ But the Court appears to have accepted what might be described as an indirect facial challenge where the ordinances in question might be found to be “void by reason of their administration.”¹³⁹ This reading of *Yick Wo* is supported by the Court’s characterization of the chal-

136. Official Proceedings of the Constitutional Convention of the State of Alabama, May 21, 1901 to September 3, 1901, p. 8 (1940) (quoted in *Hunter*, 471 U.S. at 229).

137. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (emphasis added).

138. *Id.* at 371.

139. *Id.*

lenged ordinances: “They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent.”¹⁴⁰ The Court adds that “[t]he power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary and acknowledges neither guidance nor restraint.”¹⁴¹

This notion of an indirect facial challenge is supported by the Court’s discussion of *Yick Wo* 13 years later. The Court described how it had come to the conclusion that the San Francisco laundry ordinance was “adjudged void”: “[t]his court looked beyond the mere letter of the ordinance to the condition of things as they existed in San Francisco, and saw that under the guise of regulation an arbitrary classification was intended and accomplished.”¹⁴²

Though we may not have consciously developed our trial strategy to follow *Yick Wo*, in retrospect, we did precisely that. We asked the court to look beyond the mere letter of HB 2281 to the conditions that existed in Tucson and throughout Arizona. Those conditions showed that an arbitrary classification, disfavoring Latinx students, was intended and accomplished despite the stated policy of the statute (which the student plaintiffs did not challenge) “that public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people.”¹⁴³

Intent with regard to enactment, though, is extremely difficult to prove. Other than John Huppenthal, who played a dual role as a state senator who supported and voted in favor of the bill and as state superintendent of public instruction who later enforced the statute, we did not call legislators to testify about their state of mind when they enacted HB 2281. Other than providing in briefs to the court some of what they expressed in legislative hearings, it would have been foolhardy to call legislators to testify given the scope of legislative privilege. Instead, we had to get at enactment inferentially. *Yick Wo*’s inferential approach is consistent with the modern Court’s inferential

140. *Id.* at 366.

141. *Id.* at 366–67.

142. *Atchinson, Topeka & Santa Fe R.R. Co. v. Matthews*, 174 U.S. 96, 105 (1899) (discussing *Yick Wo*).

143. H.B. 2281, 54 Leg., 2nd Reg. Sess. (Az. 2017).

approach as expressed in the much more often cited *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.¹⁴⁴

Initially as drafted, HB 2281 gave enforcement authority to the state superintendent of public instruction.¹⁴⁵ One lawmaker, concerned that this gave too much unconstrained power to one individual, amended the bill to instead give enforcement authority to the state board of education.¹⁴⁶ Huppenthal provided a key amendment that the state board and the state superintendent had co-equal enforcement power.¹⁴⁷ Then, he added an amendment that delayed when the statute would go into effect until the start of the next calendar year.¹⁴⁸ Huppenthal was already running for the office of state superintendent when he supplied these amendments.¹⁴⁹ He won that elected office, and as state superintendent, he found TUSD in violation of the statute and imposed a fine resulting in a loss to the district of 10 percent of state funding until TUSD eliminated the Mexican American Studies Program.¹⁵⁰

There is a telling phrase from *Yick Wo* that aptly describes what we were trying to show the judge about the Arizona statute: “In fact, an Ordinance which clothes a single individual with such power, hardly falls within the *domain of law*, and we are constrained to pronounce it inoperative and void.”¹⁵¹ It also turned out that the individual clothed with this power in Arizona had, during his time as state senator and as state superintendent, been blogging anonymously, saying such things as:

No Spanish radio stations, no Spanish billboards, no Spanish TV stations, no Spanish newspapers. This is America, speak English.

The rejection of American values and the embracement of the values of Mexico in La Raza classrooms are the rejection of success and the embracement of failure.

I don’t mind them selling Mexican food as long as the menus are mostly in English.¹⁵²

144. *Vill. Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

145. *González v. Douglas*, 269 F. Supp. 3d 948, 955 (D. Ariz. 2017).

146. *Id.* at 955.

147. *Id.* at 957.

148. *Id.* at 956.

149. *Id.*

150. *Id.* at 958, 962.

151. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (quoting *City of Baltimore v. Radecke*, 49 Md. 217, 231 (1878) (emphasis in original)).

152. *González v. Douglas*, 269 F. Supp. 3d 948, 957–58 (D. Ariz. 2017) (citations omitted).

Taken together, though there was no direct evidence that a majority of the legislators harbored animus against Mexican Americans when they voted for HB 2281, the evidence permitted the court to look beyond the mere letter of the statute to the condition of things as they existed in Tucson and throughout Arizona to conclude that, under the guise of regulation, an arbitrary classification was intended and accomplished.¹⁵³ The statute gave Superintendent Huppenthal a license to discriminate.¹⁵⁴ The statute fell outside of the domain of law. The judge found that the statute had been enacted and enforced in violation of our clients' 14th Amendment equal protection rights.¹⁵⁵

Steve Reiss was right. Our case was *Yick Wo*. Too often, *Yick Wo* operates at the margins as an exceptional case because it is thought to present such a stark factual pattern where impact alone is determinative.¹⁵⁶ Instead, it should be more prominent in our 14th Amendment equal protection playbook that permits full consideration of discriminatory enforcement located within the local and historical context that supports the ultimate conclusion (and remedy) that the challenged law is void by reason of administration.

THE 14TH AMENDMENT AND THE NEXT GENERATION OF LAWYERS

Litigating the 14th Amendment gave me a newfound appreciation for the amendment. It took me from armchair critic to active engagement. This experience has made me wonder how we can make the 14th Amendment live for our students. Perhaps we can draw our inspiration from how Charles Hamilton Houston made the 14th Amendment come alive for students such as Thurgood Marshall.

153. *Id.* at 966–67 (finding that MAS had been implemented as part of a remedial effort to redress de jure discrimination in the school district; “the statute was enacted to target a single educational program in use in a single school district in Arizona” which was “probative of discriminatory intent”; finding that several statements by legislators and supporters of the bill reflected racial animus; and finding that “Horne, Huppenthal, and other officials used code words to refer to Mexican Americans in a derogatory way”).

154. One of Huppenthal's amendment restored enforcement authority to the superintendent, a position he was seeking; the other delayed the effective date of the statute so that if he won that office, he would have enforcement authority. After he took office as superintendent, he then proceeded to act on his animus. *Id.* at 968 (discussing Huppenthal's blog comments as providing “the strongest evidence that racial animus motivated the enforcement” of the statute).

155. *Id.* at 972.

156. See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that cases such as *Yick Wo* are rare where impact alone is determinative).

The film *Simple Justice*¹⁵⁷ opens with a young Marshall blowing off steam with fellow classmates who are about to begin their studies at Howard Law School. As they are playing dice, Charles Hamilton Houston walks by and expresses his displeasure with this activity. As he walks away, Marshall asks who that was, and he is told that it is the dean of the law school and that his nickname is “Iron Shoes.” The nickname is never really explained, but the viewer is left to guess that it refers to Dean Houston being a difficult taskmaster.¹⁵⁸

The scene then cuts to the classroom, with Marshall seated in the front. Dean Houston asks Marshall where he is from. He answers, “Baltimore,” then repeats his answer rolling the “o” and “r” in a working-class Baltimore accent.¹⁵⁹ Though it gets laughs from a number of his classmates, Dean Houston is not amused. Houston asks, “Why are you paying, Mr. Marshall, to attend our little Howard Law School and not going tuition-free to the prestigious University of Maryland?”¹⁶⁰ Marshall responds, sarcastically, “I happen to be a Negro.”¹⁶¹ After a little more back and forth, Dean Houston asks why Negroes do not attend Maryland.¹⁶² When students are unable to answer, perhaps because they perceived it as an unchangeable social fact that, as articulated by Marshall, “Negroes don’t attend Maryland,” and which therefore must be accepted, Houston walks to the chalkboard, on which is written “*Plessy v. Ferguson*”¹⁶³ and underlines “*Plessy*.” After a brief colloquy with various students about the case, Dean Houston states:

Plessy, Mr. Hill, is why you ride from Richmond, Virginia, in a racially segregated train. *Plessy*, Mr. Durham, is why no one in this room can eat in most of the restaurants here, in the capital of the world’s greatest democracy. And *Plessy*, Mr. Marshall, is the reason it is against the law in 17 states for black children to go to school with white children.

157. *SIMPLE JUSTICE* (New Images Productions, Inc. 1993) (based on the first edition of RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1976)).

158. Other nicknames for Dean Houston included “iron pants” and “cement shoes,” “which suggested the same image of a stern taskmaster.” Jack Greenberg, *In Tribute: Charles Hamilton Houston*, 111 HARV. L. REV. 2161, 2161 (1998).

159. *SIMPLE JUSTICE*, *supra* note 157.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* This was a reference to *Plessy v. Ferguson*, which enshrined the doctrine of “separate but equal.” See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

There are two kinds of lawyers, gentlemen. There are my kind, and there are parasites on society. My kind of lawyer is going to be a social engineer, my kind of lawyer is going to be a fighter for social change. My kind of lawyer is going to find out everything there is to know about *Plessy*, because *Plessy* is a dragon, gentlemen, and my kind of lawyer is going to go out and slay it. That's why you're here, Mr. Marshall, or it had better be, and if it's not, you better pack up and leave, because you will not make it.¹⁶⁴

Later classroom scenes show students arguing the ins and outs of the 14th Amendment and what it says or does not say about the doctrine of separate but equal enshrined in *Plessy*. When one student refers to that amendment but is unable to recite it, Marshall comes to the rescue and paraphrases, "No state shall make or enforce any law which abridges the privileges of citizens of the United States; nor shall any State deny to any person the equal protection of the laws."¹⁶⁵ You can see Houston start warming to Marshall. Likewise, you can see Marshall blossom.

Though most law students are familiar with Thurgood Marshall and have at least a passing awareness of his role in *Brown*¹⁶⁶ and his role as the first African American to sit on the Supreme Court, most know nothing of Charles Hamilton Houston.¹⁶⁷ Those who do know of Houston know that he is rightfully credited with formulating the legal strategy to dismantle Jim Crow segregation,¹⁶⁸ but even this does not capture the depth of Houston's social justice vision. Houston knew that winning in the courts was not enough. He appreciated that he needed to have a cadre of black civil rights attorneys to carry out the fight for equality with him and who would carry on the fight after

164. SIMPLE JUSTICE, *supra* note 157.

165. *Id.* The full text of Section 1 of the 14th Amendment states: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. amend. XIV, § 1, cl. 2-3.

166. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

167. Judge A. Leon Higginbotham, Jr., notes that "[m]ost colleges and law schools give students no exposure to the black heroes in the law who built the foundation for the later success of blacks in the 1960s, 1970s, and 1980s." Foreword, GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1984).

168. *E.g.*, *Hollins v. Oklahoma*, 295 U.S. 394 (1935) (challenging the jury panel on the basis that black citizens were excluded from jury service); *see also* *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that it was unconstitutional for law schools to reject students on the basis of race).

him.¹⁶⁹ When he saw that schools were not producing this cadre of black civil rights attorneys,¹⁷⁰ Houston decided to transform Howard Law School so that its graduates would be equipped not only to enter private practice right away, because racism made clerkship opportunities scarce, but also to ensure that its graduates would be trained consistent with his vision:

[The] Negro lawyer must be trained as a social engineer and group interpreter. Due to the Negro's social and political condition . . . the Negro lawyer must be prepared to anticipate, guide and interpret his group advancement . . . [Moreover, he must act as] business adviser . . . for the protection of the scattered resources possessed or controlled by the group . . . He must provide more ways and means for holding within the group the income now flowing through it.¹⁷¹

Houston, as Vice-Dean of Howard Law School, worked tirelessly in the classroom and as an administrator to bring about this vision.¹⁷² It was in this capacity that Houston encountered Thurgood Marshall. It was in this capacity that he molded Marshall.

It would be hubris for me to think that the Korematsu Center for Law and Equality, founded in 2009 at the Seattle University School of Law, could ever hope to accomplish what Charles Hamilton Houston did at Howard Law School. Nevertheless, what Houston accomplished provides a model, and the Korematsu Center draws inspiration and lessons from Houston, especially through the Korematsu Center's Civil Rights Clinic.

169. Biographer Genna Rae McNeil writes that he gained an appreciation during law school "that if it were not for teachers and scholars, the law might never be more than precedent — judgments confirming the correctness of earlier judgments." MCNEIL, *supra* note 167, at 63.

170. Houston sought to continue his law studies to get a Doctor of Juridical Science degree (J.S.D.) so that he would be able to fulfill his vision:

My reasons for desiring graduate work are both personal and civic . . . a deep desire for further study in the history of the law and comparative jurisprudence . . . [and the belief that] there must be Negro lawyers in every community . . . the great majority [of which] must come from Negro schools . . . [where] the training will be in the hands of Negro teachers. It is to the best interest of the United States . . . to provide the best teachers possible.

Id. at 48.

171. *Id.* at 69 (quoting Charles Hamilton Houston, "Personal Observations on the Summary of Studies in Legal Education as Applied to the Howard University School of Law").

172. Leland Ware credits Houston for transforming Howard Law School "from an unaccredited evening program to a laboratory for Civil Rights litigation." Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930–1950*, 52 MERCER L. REV. 631, 633 (2001); *see also* Robert L. Carter, *A Tribute to Thurgood Marshall*, 105 HARV. L. REV. 33, 36 (1991) (describing Thurgood Marshall's legal education, Judge Carter characterized "[t]he overriding theory of legal education at Howard during those years was that the United States Constitution — in particular, the Civil War Amendments — was a powerful force, heretofore virtually untapped, that should be used for social engineering in race relations.").

Launched in 2012, the Civil Rights Clinic was intended, initially, to be a clinic that focused on amicus advocacy.¹⁷³ The reasons for this were manifold. Amicus advocacy is particularly well-suited to a one-semester clinic, because, with careful case selection, students can begin and end a project, drafting and filing an amicus brief, in the course of one semester. Another reason is that amicus advocacy is particularly well-suited for academic settings because there can be greater freedom in presenting historical context, social science, and arguments that may allow a court to appreciate the consequences of its decision that extend beyond how it affects the immediate litigants before it.¹⁷⁴

Related to the last point is that amicus advocacy can have the beneficial effect of democratizing the courts.¹⁷⁵ In a sense, courts are a supremely antidemocratic institution. Litigants appear before a court and the tribunal may issue a ruling that affects countless others aside from the litigants. These countless others, unless they are able to intervene,¹⁷⁶ have no voice in the litigation. Amicus briefs, though, offer a way for the voiceless to have a say in the litigation.¹⁷⁷

An amicus curiae brief, formally a “friend of the court” brief, can serve various functions. They can help judge and justices appreciate the impact of their decisions; they can provide valuable contextual information in the form of so-called Brandeis briefs;¹⁷⁸ and they can give voice for those who are otherwise shut out of the particular litigation.¹⁷⁹

Students working in the clinic are able to contribute in ways that bring the law to life. In the clinic, we teach our students to be social engineers in the sense espoused by Houston: “A social engineer was a

173. *Ethnic studies case heads to trial in Tucson*, SEATTLE UNIV. SCH. L. (June 21, 2017), <https://law.seattleu.edu/newsroom/2017-news/ethnic-studies-case-heads-to-trial-in-tucson>.

174. See Robert S. Chang, *The Fred T. Korematsu Center for Law and Equality and Its Vision for Social Change*, 7 STANFORD J. C.R. & C. L. 197 (2011); Robert S. Chang & Karin Wang, *Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 UCLA ASIAN PAC. AM. L. J. 22 (2009); Ruben J. Garcia, *A Democratic Theory of Amicus Advocacy*, 35 FL. ST. U. L. REV. 315 (2008).

175. See Chang & Wang, *supra* note 174.

176. See Fed. R. Civ. P. 24 (Intervention).

177. See also Aaron-Andrew P. Bruhl & Adam Feldman, *Separating Amicus Wheat from the Chaff*, 106 GEO. L.J. ONLINE 136 (2017).

178. A “Brandeis brief” refers to a brief that relies on non-legal data, such as scientific or social science information, rather than legal citations. Future Supreme Court Justice Louis Brandeis submitted the first of such briefs as a lawyer before the Court in *Muller v. Oregon*, 208 U.S. 412 (1908), a case involving the constitutionality of limiting hours for female laundry workers.

179. See Chang & Wang, *supra* note 174; Bruhl & Feldman, *supra* note 177 at 137; Garcia, *supra* note 174 at 342; see also Stephen G. Masciocchi, *What Amici Curiae Can and Cannot Do with Amicus Briefs*, 46 COLORADO LAWYER 23 (April 2017).

highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of ‘problems of . . . local communities’ and in ‘bettering conditions of the underprivileged citizens.’”¹⁸⁰

Houston fully understood the challenges to using the 14th Amendment to overcome segregation. Nevertheless, he persisted: “As he explained to his students, discrimination, injustice, and the denial of full citizenship rights and opportunities on the basis of race and a background of slavery could be challenged within the context of the Constitution if it were creatively, innovatively interpreted and used.”¹⁸¹ The film *Simple Justice* shows him drilling his students incessantly on the ins and outs of the 14th Amendment.¹⁸²

This bore fruit when his former student, Thurgood Marshall, with his LDF team, persuaded the Court that *Plessy v. Ferguson* was wrongly decided.

CONCLUSION

Today, we can draw inspiration from Houston. We can make the 14th Amendment come alive for our students by showing them that despite the roadblocks placed by courts to limit the reach of the 14th Amendment, the amendment and its guarantees remain vibrant, vital. As it was in Houston’s day, the 14th Amendment is what we make of it.

We ought not, we cannot, give up on the 14th Amendment.

180. GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS 84–85 (2011).

181. *Id.* at 84.

182. *SIMPLE JUSTICE*, *supra* note 157.