AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 7: The Republican Era – Equality/Race

**Ho Ah Kow v. Nunan, 12 F. 252 (C.C.D.Ca. 1879)**

*The Burlingame Treaty of 1868 opened trade and immigration between the United States and China. The subsequent wave of Chinese immigration into California soon provoked an anti-immigrant backlash that roiled politics on the West Coast and eventually in the national government. In 1876, the California state legislature adopted a law that made it a crime for any person to be found sleeping or lodging in a room or apartment containing less than five hundred cubic feet of space per person occupying it. The law was aimed at crowded housing predominant in immigrant precincts of the state’s urban areas, and particularly in Chinatown in San Francisco. Shortly thereafter, the San Francisco board of supervisors adopted an ordinance specifying that any male person imprisoned in the county jail shall immediately have his hair “cut or clipped to an uniform length of one inch from the scalp.” The “queue ordinance” was aimed at Chinese men who refused to pay a fine under the housing law. It was customary for Chinese men in the period to wear their hair shaved except for a long braid or queue. The queue was required by a longstanding imperial edict in China that attempted to suppress the alternate hairstyles favored by dissenting regions within the country. The queue was further held to be a symbol of honor and religious duty.*

*In the spring of 1878, Ho Ah Kow was convicted of occupying a room that was too small under the state law. He refused to pay the $10 fine and was detained in the county jail for five days. In keeping with the queue ordinance, the sheriff shaved the prisoner’s head upon his arrival at the jail. Kow brought suit in federal district court against the sheriff seeking monetary damages in the amount of $10,000 under a federal civil rights statute for the deprivation of his federal constitutional rights under the Fourteenth Amendment and causing him mental anguish, disgrace in the eyes of friends and relatives, and ostracism by his countrymen. Justice Stephen Field heard the case while performing circuit duties with Judge Lorenzo Sawyer. The court ruled in favor of Kow, holding that the ordinance sheriff’s actions under the ordinance was a violation of Kow’s federal constitutional rights.*

Justice FIELD.

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The validity of this ordinance is denied by the plaintiff on two grounds: 1. That it exceeds the authority of the board of supervisors, the body in which the legislative power of the city and county is vested; and, 2. That it is special legislation imposing a degrading and cruel punishment upon a class of persons who are entitled, alike with all other persons within the jurisdiction of the United States, to the equal protection of the laws. We are of opinion that both these positions are well taken.

The board of supervisors is limited in its authority by the act consolidating the government of the city and county. It can do nothing unless warrant be found for it there, or in a subsequent statute of the state. As with all other municipal bodies, its charter -- here the consolidation act -- is the source and measure of its powers. In looking at this charter, we see that the powers of the board and the subjects upon which they are to operate are all specified. . . . It can impose no penalty in any other case; and when a penalty other than that of fine or forfeiture is imposed, it must, by the terms of the act, be in the form of imprisonment. It can take no other form. . . . The mode in which a penalty can be inflicted and the extent of it are thus limited in defining the power of the board. In their place nothing else can be substituted. No one, for example, would pretend that the board could, for any breach of a municipal regulation or any violation of the consolidation act, declare that a man should be deprived of his right to vote, or to testify, or to sit on a jury, or that he should be punished with stripes, or be ducked in a pond, or be paraded through the streets, or be seated in a pillory, or have his ears cropped or his head shaved.

The cutting off the hair of every male person within an inch of his scalp, on his arrival at the jail, was not intended and cannot be maintained as a measure of discipline or as a sanitary regulation. The act by itself has no tendency to promote discipline, and can only be a measure of health in exceptional cases. Had the ordinance contemplated a mere sanitary regulation it would have been limited to such cases and made applicable to females as well as to males, and to persons awaiting trial as well as to persons under conviction. The close cutting of the hair which is practiced upon inmates of the state penitentiary, like dressing them in striped clothing, is partly to distinguish them from others, and thus prevent their escape and facilitate their recapture. They are measures of precaution, as well as parts of a general system of treatment prescribed by the directors of the penitentiary under the authority of the state, for parties convicted of and imprisoned for felonies. Nothing of the kind is prescribed or would be tolerated with respect to persons confined in a county jail for simple misdemeanors, most of which are not of a very grave character. For the discipline or detention of the plaintiff in this case, who had the option of paying a fine of ten dollars, or of being imprisoned for five days, no such clipping of the hair was required. It was done to add to the severity of his punishment.

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The claim, however, put forth that the measure was prescribed as one of health is notoriously a mere pretense. A treatment to which disgrace is attached, and which is not adopted as a means of security against the escape of the prisoner, but merely to aggravate the severity of his confinement, can only be regarded as a punishment additional to that fixed by the sentence. If adopted in consequence of the sentence it is punishment in addition to that imposed by the court; if adopted without regard to the sentence it is wanton cruelty.

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The second objection to the ordinance in question is equally conclusive. It is special legislation on the part of the supervisors against a class of persons who, under the constitution and laws of the United States, are entitled to the equal protection of the laws. The ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage, and was so understood by everyone. The ordinance is known in the community as the "Queue Ordinance," being so designated from its purpose to reach the queues of the Chinese, and it is not enforced against any other persons. The reason advanced for its adoption, and now urged for its continuance, is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be superadded to imprisonment. . . .

The class character of this legislation is none the less manifest because of the general terms in which it is expressed. The statements of supervisors in debate on the passage of the ordinance cannot, it is true, be resorted to for the purpose of explaining the meaning of the terms used; but they can be resorted to for the purpose of ascertaining the general object of the legislation proposed, and the mischiefs sought to be remedied. Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation, and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so, the most important provisions of the constitution, intended for the security of personal rights, would, by the general terms of an enactment, often be evaded and practically annulled. *Brown v. Piper* (1875). The complaint in this case shows that the ordinance acts with special severity upon Chinese prisoners, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners if enforced against them. Upon the Chinese prisoners its enforcement operates as "a cruel and unusual punishment."

Many illustrations might be given where ordinances, general in their terms, would operate only upon a special class, or upon a class, with exceptional severity, and thus incur the odium and be subject to the legal objection of intended hostile legislation against them. We have, for instance, in our community a large number of Jews. They are a highly intellectual race, and are generally obedient to the laws of the country. But, as is well known, they have peculiar opinions with respect to the use of certain articles of food, which they cannot be forced to disregard without extreme pain and suffering. They look, for example, upon the eating of pork with loathing. It is an offense against their religion, and is associated in their minds with uncleanness and impurity. Now, if they should in some quarter of the city overcrowd their dwellings and thus become amenable, like the Chinese, to the act concerning lodging-houses and sleeping apartments, an ordinance of the supervisors requiring that all prisoners confined in the county jail should be fed on pork would be seen by everyone to be leveled at them; and, notwithstanding its general terms, would be regarded as a special law in its purpose and operation.

During various periods of English history, legislation, general in its character, has often been enacted with the avowed purpose of imposing special burdens and restrictions upon Catholics; but that legislation has since been regarded as not less odious and obnoxious to animadversion than if the persons at whom it was aimed had been particularly designated.

But in our country hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the constitution. That amendment in its first section declares who are citizens of the United States, and then enacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no state shall deprive any person (dropping the distinctive term citizen) of life, liberty or property, without due process of law, nor deny to any person the equal protection of the laws. . . . And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs and the enforcement of contracts; but that no charges or burdens shall be laid upon him which are not equally borne by others, and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment.

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We are aware of the general feeling -- amounting to positive hostility -- prevailing in California against the Chinese, which would prevent their further immigration hither and expel from the state those already here. Their dissimilarity in physical characteristics, in language, manners and religion would seem, from past experience, to prevent the possibility of their assimilation with our people. And thoughtful persons, looking at the millions which crowd the opposite shores of the Pacific, and the possibility at no distant day of their pouring over in vast hordes among us, giving rise to fierce antagonisms of race, hope that some way may be devised to prevent their further immigration. We feel the force and importance of these considerations; but the remedy for the apprehended evil is to be sought from the general government, where, except in certain special cases, all power over the subject lies. To that government belong exclusively the treaty-making power and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic, and, with the exceptions presently mentioned, the power to prescribe the conditions of immigration or importation of persons. The state in these particulars, with those exceptions, is powerless, and nothing is gained by the attempted assertion of a control which can never be admitted. The state may exclude from its limits paupers and convicts of other countries, persons incurably diseased, and others likely to become a burden upon its resources. It may perhaps also exclude persons whose presence would be dangerous to its established institutions. But there its power ends. Whatever is done by way of exclusion beyond this must come from the general government. That government alone can determine what aliens shall be permitted to land within the United States and upon what conditions they shall be permitted to remain; whether they shall be restricted in business transactions to such as appertain to foreign commerce, as is practically the case with our people in China, or whether they shall be allowed to engage in all pursuits equally with citizens. For restrictions necessary or desirable in these matters, the appeal must be made to the general government; and it is not believed that the appeal will ultimately be disregarded. Be that as it may, nothing can be accomplished in that direction by hostile and spiteful legislation on the part of the state, or of its municipal bodies, like the ordinance in question -- legislation which is unworthy of a brave and manly people. Against such legislation it will always be the duty of the judiciary to declare and enforce the paramount law of the nation.

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