

# Anti-Chinese Racism at Berkeley: The Case for Renaming Boalt Hall

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## INTRODUCTION

Most people familiar with UC Berkeley School of Law (“Berkeley Law”) know its traditional name and the name of its primary classroom building, Boalt Hall. Yet few know much about the man who gave the law school its name. A closer look at John Boalt’s legacy, however, calls for a reexamination of the law school’s continued association with the Boalt name, given the contrast between UC Berkeley’s values of tolerance, diversity, and inclusion<sup>1</sup> and Boalt’s views that the Chinese were an unassimilable race that ought to be altogether excluded from the United States.

In recent years, many colleges and universities have grappled with a difficult question: under what circumstances should an institution remove a historical name from a building or other campus space, and what principles should guide such a decision? Since 2010, buildings associated with white supremacists and Ku Klux Klan members have been renamed at the

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1. UC BERKELEY, PRINCIPLES OF COMMUNITY, <http://diversity.berkeley.edu/principles-community> [<https://perma.cc/TQ98-7VDN>].

University of Texas, Duke University, the University of North Carolina at Chapel Hill, and the University of Oregon. Other campuses that have confronted – or are currently confronting – naming questions include Yale, Harvard, Georgetown, Princeton, and Stanford universities.<sup>2</sup>

Berkeley Law’s main classroom building is named Boalt Hall after John Henry Boalt, whose widow Elizabeth Josselyn made a substantial donation in 1906 to the fledgling Department of Jurisprudence at UC Berkeley.<sup>3</sup> The funds from this bequest were used to erect the first Boalt Hall, a memorial to her late husband, which was dedicated in 1911. Four decades later, the Department of Jurisprudence became the “School of Law – Boalt Hall” and moved into a capacious new building also denominated Boalt Hall.<sup>4</sup> In 2007, the law school dropped Boalt Hall from its name and officially became the UC Berkeley School of Law so that, according to its then-Dean Christopher Edley, “outside audiences will have a clearer sense of what we are.”<sup>5</sup>

Although Boalt is no longer part of the law school’s name, the Boalt legacy is still everywhere in evidence. The school’s principal classroom building is named – as it has been at all times since 1911 – Boalt Hall and since 1928 a number of professorships and lectureships have borne the Boalt name.<sup>6</sup> In addition, student and alumni organizations make frequent and official use of the name, as do internal email lists. As Dean Edley predicted it would in 2007, the law school continues to be called Boalt “within the family.”<sup>7</sup>

The ubiquity and persistence of the Boalt name raises an obvious question: who was John Boalt? As of May 2017, Berkeley Law’s website was of little help—its namesake is identified only as an attorney and the late husband of benefactor Elizabeth Josselyn Boalt.<sup>8</sup> *Law at Berkeley: The History of Boalt Hall* affords us a few biographical facts: Boalt was born in Ohio in 1837 and graduated from Amherst College. From there he went to Heidelberg and Freiburg to study mining and mechanical engineering. After a stint in the Civil War, he settled in Nevada where he had success in the mining business. Soon he began the study of law, and in short order became a judge. Upon the expiration of his judicial term, Boalt moved to San Francisco in 1871 where he developed a substantial legal practice. He retired from practice in 1892, and died in 1901.<sup>9</sup>

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2. Letter of the Committee to Establish Principles on Renaming (November 21, 2016), [http://president.yale.edu/sites/default/files/files/CEPR\\_FINAL\\_12-2-16.pdf](http://president.yale.edu/sites/default/files/files/CEPR_FINAL_12-2-16.pdf) [https://perma.cc/5L5C-GFPH].

3. SANDRA P. EPSTEIN, *LAW AT BERKELEY: THE HISTORY OF BOALT HALL* 56 (1997).

4. *Id.* at 207.

5. Tanya Schevitz, *UC Berkeley Dropping Boalt Hall From Law School’s Official Name*, S.F. CHRON., (Oct. 10, 2007), <http://www.sfgate.com/bayarea/article/UC-Berkeley-dropping-Boalt-Hall-from-law-school-s-2519014.php>.

6. EPSTEIN, *supra* note 3, at 204.

7. SCHEVITZ, *supra* note 5.

8. See <https://www.law.berkeley.edu/about-us/history/> [https://perma.cc/64GV-ZRMX].

9. EPSTEIN, *supra* note 3, at 56-57.

A capsule biography published in the year of Boalt's death provides a slightly fuller picture.<sup>10</sup> Here we learn that Boalt was descended from illustrious ancestors, including a signer of the Declaration of Independence and a grandfather who served in John Adams' cabinet.<sup>11</sup> We discover that "he [was] a leading light in both the Bohemian and Union Clubs,"<sup>12</sup> then as now two elite San Francisco institutions. And aside from his brief tenure early in his career as a judge in Nevada, "he has never since held, nor even been an aspirant for, any office."<sup>13</sup> Boalt's failure to seek office did not prevent him from taking part in civic affairs, however. The biography briefly mentions an 1888 essay on the "silver question" and monetary policy, and goes into greater detail on the issue for which Boalt was best remembered in the year of his death.

He read a paper on the Chinese question before the Berkeley Club in August, 1877, in which he favored exclusion of the Chinese race, as a policy necessary to the perpetuity of our form of government, and the advancement of our best interests. In this paper he showed conclusively that the Caucasian and Mongolian races are non-assimilating, and cannot live together harmoniously on the same soil unless one be in a state of servitude to the other.<sup>14</sup>

Boalt's paper was instrumental in legitimizing anti-Chinese racism and catalyzing support in California for what became the Chinese Exclusion Act of 1882, "the first federal law ever passed banning a group of immigrants solely on the basis of race or nationality."<sup>15</sup>

## I. THE CHINESE QUESTION

Chinese began to immigrate to the United States during the California Gold Rush (1848–1855),<sup>16</sup> and continued to come in significant numbers to work on the Transcontinental Railroad and other large labor projects.<sup>17</sup> The Chinese population grew rapidly from just over 4,000 in 1850 to nearly 35,000 a decade later. By 1870 the number had nearly doubled, and by the 1880 Census the number stood at 105,465.<sup>18</sup> Chinese immigrants in this period were overwhelmingly male and more than 90% resided in the Pacific

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10. OSCAR SHUCK, HISTORY OF THE BENCH AND BAR OF CALIFORNIA: BEING BIOGRAPHIES OF MANY MEN, A STORE OF HUMOROUS AND PATHETIC RECOLLECTIONS, ACCOUNTS OF IMPORTANT LEGISLATION AND EXTRAORDINARY CASES (1901). For a 2010 account of Shuck's 1200 + page tome, see Charles McClain's review essay available in the Berkeley Law Scholarship repository, available at <https://scholarship.law.berkeley.edu/facpubs/1263> [<https://perma.cc/B7MR-RMU3>].

11. *Id.* at 534.

12. *Id.* at 536.

13. *Id.* at 534.

14. *Id.* (emphasis added).

15. ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT 1 (1998) (emphasis added).

16. CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY 9 (1994).

17. CLARENCE SANDMEYER, THE ANTI-CHINESE MOVEMENT IN CALIFORNIA 15 (1991).

18. MARY COOLIDGE ROBERTS, CHINESE IMMIGRATION 425 (1909).

West, approximately 75% in California alone. In 1880 Chinese accounted for only 0.2% of the population of the United States, but about 8.7% of the population in California.<sup>19</sup> Asian immigrants could not at this time be naturalized, so only a small minority were U.S. citizens.<sup>20</sup>

As gold became scarcer and major rail construction projects were completed, competition among laborers became more intense. The Chinese were driven from the mines and settled in enclaves in large cities. Labor groups (and politicians) increasingly blamed the Chinese for unemployment, poor working conditions and low wages. The Chinese became the target of discriminatory laws and taxes, and by the mid-1870s it was difficult to find a politician who would speak in their favor. Behind Chinese persecution “were fears and forces that had little or no relationship to the Chinese, [i.e.] the stressful reality of class tensions and conflict within white society during an era of economic crisis.”<sup>21</sup> Denis Kearney, founder of the Workingman’s Party of California and a “demagogue of extraordinary power,”<sup>22</sup> travelled the state and nation during the late 1870s decrying labor conditions and the capitalist order. He ended every one of his speeches with the coda: “And whatever happens, the Chinese must go!”<sup>23</sup> The “Chinese Question” was an enormous issue in the California of the 1870s, and the one for which John Boalt was best remembered.

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THE CHINESE QUESTION.

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A PAPER READ BY JOHN H. BOALT,

BEFORE THE BERKELEY CLUB, AUGUST, 1877.

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Figure 1. Title page of Boalt’s *The Chinese Question*

## II. JOHN BOALT’S MAJOR PREMISE

Boalt had a simple answer to the brewing Chinese Question: put an end to Chinese immigration at once. His rationale was only slightly more

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19. *See id.*

20. *Id.* at 80.

21. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 110 (1989).

22. MCCLAIN, *supra* note 16, at 79.

23. *Id.*

complicated. In August 1877 the forty-year-old Boalt delivered before the Berkeley Club an address that began with what he called his “major premise.”

Two non-assimilating races never yet lived together harmoniously on the same soil, unless one of these races was in a state of servitude to the other.<sup>24</sup>

Assimilation of races was necessary, Boalt believed, to bring about “internal harmony essential to a nation’s property and perpetuity.”<sup>25</sup> Boalt enumerated five prominent causes for the non-assimilation of races: (1) physical peculiarities; (2) intellectual differences and differences of temperament; (3) differences in language and customs; (4) hatred engendered by conquest or by clashing of national or race interests; and (5) religious fanaticism. The greater the degree of difference between races in these crucial areas, the more difficult assimilation will be.<sup>26</sup>

To be complete, Boalt argued assimilation must bring members of both races into daily intimate contact. Inter-marriage must become so common “as no longer to excite comment.”<sup>27</sup> Boalt argued that since assimilation “of two nations of comparatively very slight divergence” like the Normans and Saxons was difficult and took centuries of “barbarities, brutalities and suffering” to resolve, assimilation with the Chinese would be that much more difficult, if indeed even possible: “[i]t would certainly seem that in an extreme case of divergence as between extermination and this kind of reconciliation, the former were the more agreeable alternative.”<sup>28</sup> In other words, to Boalt, it was preferable to exterminate a strongly dissimilar race than to assimilate it.

### III. “UNCONQUERABLE REPULSION” AND BOALT’S MINOR PREMISE

Having demonstrated his major premise, that two non-assimilating races cannot live together harmoniously unless one is enslaved to the other, Boalt remarked that twelve years after the end of the Civil War “it is not necessary to say that slavery is in this country no longer possible.”<sup>29</sup> Next comes Boalt’s “minor premise”:

The Caucasian and Mongolian races are non-assimilating races.<sup>30</sup>

Boalt began his proof of this premise with a discussion of physical differences between the races:

For, first, they are separated by physical peculiarities of the most marked and distinctive character. The Chinaman differs from us in color, in

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24. THE CHINESE QUESTION – A PAPER READ BY JOHN H. BOALT, BEFORE THE BERKELEY CLUB, AUGUST, 1877 (on file with author). The paper is referred to as THE CHINESE QUESTION - ANEW in A.W. Bartlett, HISTORICAL SKETCH OF THE BERKELEY CLUB FOR ITS FIRST QUARTER CENTURY (1909).

25. *Id.* at 2.

26. *Id.* at 3-5.

27. *Id.* at 2.

28. *Id.*

29. *Id.* at 7.

30. *Id.*

features, and in size. His contact excites in us, or at least in most of us, an unconquerable repulsion which it seems (sic) to me must ever prevent any intimate association or miscegenation of the races.<sup>31</sup>

As if this were not enough:

Second, the two races are also separate by a remarkable divergence in intellectual character and disposition. Our habits of thought are so entirely different that it seems impossible that they should ever be reconciled.

Boalt contrasted the Chinese with the Indo-Germanic and “even the Slavonic” races, which he contended completely assimilated within a generation or two because they have “in general about the same ideal standard of excellence as our own.” “The Chinaman,” on the other hand, is entirely different.

His notions of right and wrong are in many respects totally unlike ours. His views in regard to the treatment of women are utterly repugnant to us. His heartlessness and inhumanity toward the infirm, the feeble, and afflicted of his own race shock every sensibility of our nature.<sup>32</sup>

Boalt catalogued perceived racial differences at length, including the holding of young girls in San Francisco “for purposes of prostitution within calling distance of the City Hall.” Boalt added that Chinese refuse to tell the truth in court and frequently engage in murder-for-hire, that 100 Chinese will live in a house “not big enough for ten of our own race,” and that they sleep as sardines in a box. Boalt added they are selfish and disregard the pains and cares of others, and there “is nothing in their religion or in their education to counteract or ameliorate these tendencies.” In sum, “the Chinaman has brought to us and planted within our border all the vicious practices and evil tendencies of his home.”<sup>33</sup>

Surveying the history of the Chinese in California since their arrival in the 1850’s, Boalt concluded: “First – We cannot and will not assimilate with them.” Second – “They have not the remotest inclination to assimilate with us.”<sup>34</sup>

Accordingly, Chinese immigration had to be stopped. To those who object that “prohibition of any kind of immigration whatsoever is contrary to the immemorial policy of our republic” and the “noble and memorable utterances of our fathers,” Boalt answered that it “never was the policy of our republic to welcome to our shores a class of immigrants who could not or would not assimilate with our people, nor was it ever so declared.”<sup>35</sup>

Until the “Chinese invasion,” Boalt argued, all immigrants to America were welcome because they readily assimilated and within a generation became thoroughly Americanized. There was but a single exception: the

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31. *Id.*

32. *Id.* at 8.

33. *Id.* at 8–10.

34. *Id.* at 11–12.

35. *Id.* at 12.

“African Negro.” “His coming was bitterly regretted by every one of our early statesmen,” and eminent people now support his removal to Africa. America should learn from its mistake: “We just barely survived [the Negro’s] coming. Is it worthwhile to repeat the mistake?”<sup>36</sup>

In the closing pages of his address, Boalt rejected the claim “prevalent in the Eastern states” that opposition to Chinese immigration is based on the desire of labor to avoid economic competition with hardworking rivals. To refute this notion, Boalt pointed to the attitude towards immigrants from Scandinavia, people who are “as a general rule, full as industrious and economical as the Chinaman.” The difference was that the Scandinavian “readily accepts our government, our customs, our habits and our ways of life. In a few years he becomes as much of an American as ourselves . . . Our best immigrants are those whose race distinctions are soonest obliterated.”<sup>37</sup>

In addition, Boalt argued that opposition to the Chinese transcended class. He conceded that labor was most immediately affected and hence most bitter and intensely opposed, but averred all who value American habits were aware of the danger. Unlike the Chinese, Americans believe in promoting schools, educating their children, contributing to churches and hospitals, eating clean food, and wearing clean clothes. Americans believe overcrowding creates immorality and that the sick and infirm should be kindly treated, even if at great expense. Boalt concluded all who value these habits oppose Chinese immigration.<sup>38</sup>

#### IV. BOALT’S PROPOSAL: PLEBISCITE ON THE CHINESE QUESTION

Boalt recognized that California would be powerless to act on its own to restrict immigration. Starting in the 1860’s and continuing up to the time of his address, California and its political subdivisions enacted laws to make it more difficult for Chinese to settle and prosper in the Golden State. These laws were met with immediate legal challenges and had not fared well in the courts. Boalt conceded in his address that the power to regulate commerce resides with Congress, and that the Burlingame Treaty of 1868 allowed the Chinese the right to free immigration and travel within the United States. In sum, Boalt was acutely aware that the “Supreme Court of the United States has just decided that no State possesses the power of interfering with this immigration.”<sup>39</sup>

Boalt opined that Congress had thus far failed to take action because it understood neither the gravity of the problem nor the extent of California’s opposition to Chinese immigration. He took issue with “prominent men and journals in the East” who claimed “opposition to Chinese immigration in

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36. *Id.*

37. *Id.* at 13.

38. *Id.* at 14–15.

39. *Id.* at 15 (referring to *Chy Lung v. Freeman* 92 U.S. 275 (1876)).

California is confined to a few demagogues and discontented communists,” and proposed that the question be put to a direct advisory vote in California and other Pacific states, “so far the only people exposed to Chinese immigration.”<sup>40</sup>

I therefore make this suggestion: Let the Legislature of California, at their next session, provide for taking the sense of the people of the State of California on the question of Chinese immigration at a general election to be held for that purpose. Let them request the Legislatures of the other Pacific States to adopt a similar measure. I may be mistaken, but I think that vote would result in a showing of at least ten to one opposed to Chinese immigration.<sup>41</sup>

In a matter of months, the legislature in Sacramento took up Boalt’s call for a plebiscite on the Chinese question.

#### V. BOALT’S SUCCESS

The press praised Boalt’s speech<sup>42</sup> and soon it was published as a standalone pamphlet. The *San Francisco Chronicle* opined that putting the question of Chinese immigration to a popular vote would “strengthen our cause in the Eastern States, if it should do no more.”<sup>43</sup> Boalt found a champion in the legislature in Senator Creed Haymond of Sacramento, who was the chair of the newly convened Senate Special Committee on Chinese Immigration. This Committee was charged with preparing a memorial to Congress and delivering copies to each congressman, governor, and all leading newspapers throughout the United States.<sup>44</sup> “As was expected and in fact perfectly understood beforehand, the report was violently anti-Chinese in character and suited the popular prejudice so well that 20,000 copies were printed.”<sup>45</sup>

The Committee went beyond its mandate and included in its report its own “Address to the People of the United States Upon the Evil of Chinese Immigration.” This address and report were widely distributed and “bulked large”<sup>46</sup> in the movement at the time and were “constantly referred to by Pacific Coast Congressmen as representing the opinion of the majority in the Far West.”<sup>47</sup> Boalt’s Chinese Question found a place in the Committee’s report: it was reprinted in its entirety as an appendix. This widely influential (and deeply flawed) report served as “the greater part of the accessible information offered by the Coast states to the discussions in Congress which

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40. *Id.* at 15–16.

41. *Id.*

42. *The Chinese Question*, S.F. CHRON., Nov. 27, 1877 (on file with author).

43. *Id.*

44. SANDMEYER, *supra* note 17, at 60.

45. ROBERTS, *supra* 18, at 83.

46. SANDMEYER, *supra* note 17, at 61.

47. ROBERTS, *supra* note 18, at 83.



ended in the restriction act of 1882.”<sup>48</sup>

Boalt’s Chinese Question was influential not only for its inclusion in this report, but also because its principal proposal soon became law. Senator Haymond “proposed the act and referred to this paper of Judge Boalt’s as its source.”<sup>49</sup> The measure passed both house by margins that appear lost to time.<sup>50</sup> On December 21, 1877—just four months after Boalt’s speech in Berkeley—S.B. 17, “An Act to Ascertain and Express the Will of the People upon the Subject of Chinese Immigration,” was signed into law.<sup>51</sup> For the first time in California’s short history,<sup>52</sup> there would be an advisory measure on the ballot. Thanks to John Boalt, California voters would soon have a chance to show the east the extent of their opposition to Chinese immigration.

CHAP. V.—*An Act to ascertain and express the will of the people of the State of California upon the subject of Chinese immigration.*

[Approved December 21, 1877.]

WHEREAS, It is expedient that the wishes of the people of this State, upon the subject of Chinese immigration, should be unmistakably expressed, therefore,

*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

SECTION 1. That thirty days prior to the next general or special State election the Governor shall issue his proclamation calling upon the electors to signify at said election their will as to the continuance or prohibition of Chinese immigration, by placing upon their ballots the words “For Chinese Immigration,” or the words “Against Chinese Immigration;” and the Inspectors and the Judges of Election, at each and every poll in the State, shall ascertain and make returns of the number of votes cast “For Chinese Immigration” and the number of votes cast “Against Chinese Immigration,” in like manner as other votes are required to be counted and returned, and an abstract thereof shall be transmitted by each County Clerk in the State to the Secretary of State, in the same manner that votes for State officers are now required to be transmitted.

SEC. 2. The Secretary of State shall make a complete abstract of the votes given at such election, and certify the same to the Governor.

SEC. 3. The Governor shall prepare a memorial from the people of the State of California, attested by the Secretary of State, with the great seal attached, setting forth in brief the question submitted to the electors and the vote thereon, and send copies thereof to the President and Vice-President of the United States, to each Cabinet Minister, Senator, member of the House of Representatives, and the Governor of each State and Territory.

Governor to issue proclamation to ascertain will of people in regard to Chinese immigration.

County Clerks to send abstract to Secretary of State.

Abstract to be made by Secretary of State.

Governor to prepare memorial and transmit same to President and other officers.

Figure 2. Boalt’s proposal enacted – S.B. 17, December 21, 1877

48. ROBERTS, *supra* note 18, at 83–84.

49. SHUCK, *supra* note 10 at 535. Note, however, that the Final Edition of History of Senate Bills, Twenty-Second Session of the California Legislature, lists San Francisco Sen. George H. Rogers as the sponsor. Rogers sat with Haymond on the Senate Special Committee on Chinese Immigration.

50. E-mail from California State Law Library, to Charles Reichmann, Lecturer, U.C. Berkeley, Sch. of Law (May 2, 2017, 09:40 PST) (on file with author).

51. 1877 Cal. Stat. 3.

52. *Howard Jarvis Tax Payers Assn. v. Padilla*, 62 Cal.4th 486, 525 (2016) (Cantil-Sakauye, C.J., concurring).

## VI. BOALT'S PROPOSAL AND THE CONSTITUTIONAL CONVENTION OF 1878-79

The advisory measure called for a popular vote at the next statewide election in 1879. But first the prospect of a popular vote on the Chinese Question would be considered at the soon-to-be convened Constitutional Convention. As early as 1857, a rapidly increasing population and a more complex social and economic structure had led to calls for a convention to revise California's original Constitution of 1849.<sup>53</sup> In September of 1877, supporters prevailed in a plebiscite, and a convention was set for the following year.<sup>54</sup> Political corruption, unchecked corporate power, and inequitable taxation were among the biggest issues facing the convention. Chinese immigration also ranked high.<sup>55</sup> As the California Supreme Court recently put it, "[a]nti-Chinese sentiment was a major impetus for the California Constitutional Convention of 1879."<sup>56</sup>

The initial report back to the convention from its Committee on the Chinese evinced "... the depth, the intensity, and the sheer ferocity of Caucasian animus against the Chinese . . ."<sup>57</sup> Proposed provisions forbade the employment of the Chinese by the government and corporations, and took away the right to vote from anyone employing the Chinese.<sup>58</sup> The Chinese were forbidden from owning or alienating land and from suing in state courts, and any lawyer seeking to appear for a Chinese client would be disbarred. Important for current purposes, Sections 4 and 5 would forbid all future Chinese immigration into California.<sup>59</sup>

There was significant support at the convention for these harsh measures, but some delegates believed that some of these proposals were clearly in conflict with settled constitutional principles, and that their adoption would reflect poorly on a state that was at this point striving at every turn "to make the best possible impression upon the east."<sup>60</sup> These delegates believed that the extreme character of the proposed legislation "was enough to tarnish severely California's image and thereby undermine its efforts to win support from its sister states for federal exclusion legislation."<sup>61</sup>

Delegate Horace C. Rolfe was no fan of Chinese immigration, but "opposed running our heads right against the Constitution of the United

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53. MCCLAIN, *supra* note 16, at 79.

54. *Id.*

55. JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 398 (1890 vol. 2).

56. *In re Chang*, 60 Cal. 4th 1169, 1172 (2015).

57. MCCLAIN, *supra* note 16, at 81.

58. *Id.* at 81-82.

59. *Id.* at 81.

60. SANDMEYER, *supra* note 17, at 62.

61. MCCLAIN, *supra* note 16, at 82.

States”<sup>62</sup> and cautioned that as written “you will scarcely get a Justice of the Peace who will be willing to enforce [the anti-Chinese provisions of the proposed new constitution].”<sup>63</sup> For this reason Rolfe “argued against including the proposed immigration provision [in the revised Constitution], proposing instead deference to the impending advisory vote<sup>64</sup> on John Boalt’s ballot proposal:

[T]he last legislature passed an Act submitting the question to the qualified voters of this State, to vote whether they are in favor or against Chinese immigration. Any gentleman may turn to the statutes to find it. They are called upon to vote for or against Chinese immigration. And upon the result of that the Governor and Secretary of State are to memorialize the President of the United States as to what that decision may be.<sup>65</sup>

Delegates seeking to reduce some of the harshness of the initial draft invoked Boalt’s proposal as a means of placating anti-immigration hardliners. By a vote of 54 to 51 the delegates, “quailed before the lash of unconstitutionality,”<sup>66</sup> and struck the anti-immigration provision from the draft.<sup>67</sup> The resulting charter was less likely to run afoul of the federal Constitution and thus more likely to meet with the approval of other states.

The removal of the immigration prohibition softened the final draft considerably, but the remaining provisions were still extremely harsh. In a statewide plebiscite in May 1879 the voters narrowly approved the new constitution, a document expressly prohibiting employment of the Chinese authorizing the Legislature and localities to remove Chinese from their jurisdictions and directing the Legislature to discourage their immigration by all means within its power. The delegates also constitutionalized the denial of the right to vote to any “native of China.”<sup>68</sup>

Disapproval and discouragement would suffice for now, but a ban on all Chinese immigration would have to wait for Congress. As Boalt knew, a ban enacted as law at the state level would have been struck down by the courts: “The Supreme Court of the United States has just decided that no State possesses the power of interfering with immigration,”<sup>69</sup> Boalt had said in his Berkeley address. Cast as an advisory measure, however, it stood a chance of influencing political opinion in Washington.

Before California voters would cast their advisory ballots, Boalt’s words would be heard in Washington—on the floor of the U.S. Senate.

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62. 2 WILLIS & STOCKTON, DEBATES & PROCEEDINGS, CAL. CONST. CONVENTION 1878, 703.

63. *Id.*

64. *Howard Jarvis Tax Payers Assn. v. Padilla*, 62 Cal. App. 4th 486, 536 fn. 24 (2016) (Cantil-Sakauye, C.J., concurring).

65. 2 WILLIS & STOCKTON, *supra* note 62, at 703.

66. SANDMEYER *supra* note 17, at 70 (quoting SWISHER, CALIFORNIA CONSTITUTIONAL CONVENTION p. 91).

67. 2 WILLIS & STOCKTON, *supra* note 62, at 704.

68. *Padilla*, 62 Cal.App. 4th at 486 (internal citations omitted).

69. Boalt, *supra* note 24, at 262 (referring to *Chy Lung v. Freeman* 92 U.S. 275 (1876)).

California Senator Aaron A. Sargent, “the leading anti-Chinese crusader in Congress”<sup>70</sup> in the 1870s, proposed a joint resolution calling on President Hayes to open diplomatic negotiations with a view to changing or abrogating “all stipulations in existing treaties which permit the unlimited immigration of Chinese to the United States.”<sup>71</sup>

On March 7, 1878 Sargent delivered a lengthy speech in support of his proposal. Like Boalt, Sargent believed the Chinese could not be assimilated and would introduce a system of labor “possessing such organic features as embrace all the elements of an independent and antagonistic civilization, [promising] only the degradation of our own.” In support of this proposition, and to close a speech “long enough to cover every point involved in the Chinese question,”<sup>72</sup> Sargent quoted at length “[a]n accomplished gentleman, a member of the California bar, Judge Boalt.”<sup>73</sup> Thus, the arguments of The Chinese Question were heard in the halls of Congress even before Boalt’s ballot measure was put to a popular vote.

#### VII. BOALT’S MEASURE PASSES IN A LANDSLIDE

In the September 3, 1879 general election, the voters in California were asked to vote on Boalt’s plebiscite on the continuance or prohibition of Chinese immigration. The election was a landslide. Only 883 (0.54%) ballots were cast in favor of continued Chinese immigration and 154,638 (95.8%) against. A scant 5,884 (3.64%) voters expressed no preference. Some questioned the fairness of the election on the grounds that only “Against Chinese Immigration” had been printed on the ballots and that in order to vote in favor one had to erase “Against” and write in “For.”<sup>74</sup> Even so, the verdict was clear: in overwhelming numbers the voters in California voted to send a message that they were opposed to future Chinese immigration.

And that message was sent, literally. The statute directed that copies of the certificate of vote be prepared and transmitted by the Governor and Secretary of State to the President and Vice President, members of the Cabinet, all Senators and Members of the House of Representatives, and the governors of all states and territories.<sup>75</sup> Thanks to John Boalt’s suggestion at the Berkeley Club, the voters had spoken, and no longer could Eastern elites say “the opposition to Chinese immigration in California [wa]s

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70. Gyory *supra* note 14, at 82.

71. Cong. Rec. 1878-0307, p. 1544

72. *Work of Our Solons: A March Day of Gusty Winds in Both Houses.*, Wash. Post (March 8, 1878).

73. Cong. Rec. 1878-0307, p. 1552

74. SANDMEYER, *supra* note 17, at 62-3.

75. Certificate of Vote on “An Act to Ascertain and Express the Will of the People of the State on California on the Subject of Chinese Immigration,” <http://digitalhistory.hsp.org/pafirm/doc/certificate-vote-act-ascertain-and-express-will-people-state-california-subject-chinese> [https://perma.cc/G5TK-FWB2].

confined to a few discontented demagogues and communists.”<sup>76</sup> Boalt’s innovation in proposing California’s first advisory ballot measure had its intended effect of demonstrating the depth of hostility across class lines to Chinese immigration.

Boalt understood immigration to be a federal question and proved prescient when he said, “we have no right to assume that the National Congress will not do us justice.”<sup>77</sup> Boalt speculated that Congress’s unwillingness to act “is because they do not yet understand our grievance.”<sup>78</sup> From the ballot measure’s passing in September 1879, national politicians gave increasing attention to the question of Chinese immigration. Just two and one-half years later, Congress signaled that it had heard California loud and clear when it enacted, with President Arthur’s signature, the Chinese Exclusion Act, “the first immigration law ever passed by the United States barring one specific group of people because of their race or nationality.”<sup>79</sup> The Act excluded laborers from emigrating from China for the next ten years. Its provisions were tightened and extended by Congress in subsequent years, and made indefinite in 1902. The Chinese population declined sharply in the United States, “from 105,465 in 1880, to 89,863 in 1900 to 61,639 in 1920.”<sup>80</sup> John Boalt and the forces of Exclusion had won.

#### VIII. THE CASE FOR RENAMING BOALT HALL

In 2017 Yale University announced it would change the name of a residential college commemorating John C. Calhoun, the 19<sup>th</sup>-century statesman and Yale alumnus who served as a Senator, as Vice President of the United States and as Secretary of State.<sup>81</sup> Calhoun was the leading defender of the institution of slavery and in 1837, the year in which John Boalt was born, delivered a speech on the Senate floor in which he declared that slavery should not be seen as a necessary evil (as earlier Southern statesmen had opined), but as a “positive good.”

But let me not be understood as admitting, even by implication, that the existing relations between the two races in the slaveholding States is an evil: - far otherwise . . . where two races of different origin, and distinguished by color, and other physical differences, as well as intellectual, are brought together, the relation now existing in the slaveholding States between the two, is, instead of an evil, a good – a positive good.<sup>82</sup>

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76. Boalt, *supra* note 24, at 262.

77. *Id.*

78. *Id.*

79. GYORY, *supra* note 15, at 6.

80. TAKAKI, *supra* note 21, at 111–12.

81. Noah Rennick, *Yale Will Drop John C. Calhoun’s Name From Building*, N.Y. TIMES (Feb. 11, 2017), <http://www.nytimes.com/2017/02/11/us/yale-protests-john-calhoun-grace-murray-hopper.html> [<https://perma.cc/N5RB-FFME>].

82. 18 *Cong. Deb.* 2186 (1837).

Yale decided to remove the Calhoun name because John C. Calhoun's racist legacy "fundamentally conflicts with Yale's mission and values."<sup>83</sup> In the forty years separating Calhoun's 1837 address to the Senate from Boalt's speech in Berkeley, that "positive good" had become a legal impossibility:

Two non-assimilating races never yet lived together harmoniously on the same soil, unless one of these races was in a state of servitude to the other.

*It is not necessary to say that slavery is in this country no longer possible.*<sup>84</sup>

Boalt agreed with Calhoun that two different races could live together only if one lived in servitude to the other, but ratification of the Thirteenth Amendment had forbidden slavery in the United States. Accordingly, Boalt believed that because the Chinese and Caucasian races could not live together harmoniously, Chinese immigration had to cease.

In changing the name of Calhoun College, Yale President Peter Salovey, in concert with Yale's board of trustees, the Yale Corporation, reversed a 2016 decision to retain the name.<sup>85</sup> Together they applied the findings of Yale's Committee to Establish Principles of Renaming, a committee appointed in August 2016 for this purpose.<sup>86</sup> The Committee outlined four principles to guide any consideration of renaming: (1) whether the namesake's principal legacy is fundamentally at odds with the university's mission; (2) whether that principal legacy was contested during the namesake's lifetime; (3) the reasons the university honored that person; and (4) whether the building so named plays a substantial role in forming community at Yale. Salovey acknowledged that there is a "powerful presumption against renaming"<sup>87</sup> and expressed concerns "about erasing history,"<sup>88</sup> but finally noted that "[t]he decision to change a college's name is not one we take lightly, but John C. Calhoun's legacy as a white supremacist and a national leader who passionately promoted slavery as a 'positive good' fundamentally conflicts with Yale's mission and values."<sup>89</sup>

Other universities have recently made similar values-based decisions. In 2016 the governing body of Harvard University, the Harvard Corporation, voted to retire the law school's official shield.<sup>90</sup> The shield had been adopted

83. Karen N. Peart, *Yale to Change Calhoun's Name to Honor Grace Murray Hopper*, YALE NEWS, Feb. 11, 2017, available at <http://news.yale.edu/2017/02/11/yale-change-calhoun-college-s-name-honor-grace-murray-hopper-0> [<https://perma.cc/NRJ5-PXPP>].

84. Boalt, *supra* note 24, at 257 (emphasis added).

85. Peart, *supra* note 83.

86. *Id.* This committee transmitted its findings on November 21, 2016 in its Letter of the Committee to Establish Principles on Renaming, available at [http://president.yale.edu/sites/default/files/files/CEPR\\_FINAL\\_12-2-16.pdf](http://president.yale.edu/sites/default/files/files/CEPR_FINAL_12-2-16.pdf) [<https://perma.cc/R6B8-SB97>].

87. *Id.*

88. Remnick, *supra* note 81.

89. Peart, *supra* note 83.

90. Susan Svrluga, The Harvard Law shield tied to slavery is already disappearing, after corporation vote, Wash. Post (March 15, 2016) [https://www.washingtonpost.com/news/grade-point/wp/2016/03/15/the-harvard-law-shield-tied-to-slavery-is-already-disappearing-after-corporation-vote/?utm\\_term=.0d359508aaf3](https://www.washingtonpost.com/news/grade-point/wp/2016/03/15/the-harvard-law-shield-tied-to-slavery-is-already-disappearing-after-corporation-vote/?utm_term=.0d359508aaf3)

for use in 1930s and was based on the family crest of Isaac Royall, Jr. whose 1781 bequest was used to create the first endowed professorship of law at Harvard in 1815.<sup>91</sup> Royall derived his wealth from the labor of slaves on his plantation in Antigua and farms in Massachusetts.<sup>92</sup> Royall's biography, like Boalt's at Berkeley Law, was unfamiliar to most students and alumni at Harvard Law until the controversy over the shield began, but the Committee charged with investigating the name concluded, "We cannot un-see what we now know, nor should we. The Law School would not today honor Isaac Royall and his by bequest by taking his crest as its official symbol."<sup>93</sup>

In 2017, the University of San Francisco changed the name of a residence hall named for James D. Phelan, a former mayor of San Francisco, U.S. senator and alumnus and benefactor of the school.<sup>94</sup> Phelan, an opponent of Japanese immigration on the grounds the Japanese were rapacious and unassimilable, campaigned for re-election to the Senate in 1920 with the slogan "Keep California White."<sup>95</sup> USF President Fr. Paul Fitzgerald cautioned "we can not scrub Phelan from our history . . ." but "[i]t's important that our community recognizes that the temptation to run campaigns built on racism and fear of immigration . . . continues to exist around the world today."<sup>96</sup> USF's decision to drop the Phelan name apparently is the first time an American university has changed a name because of the anti-Asian activities of a namesake.

Berkeley should consider acting as did Yale, Harvard, and the University of San Francisco: remove the Boalt name on the grounds that its namesake's racism is inconsistent with the university's values. Use of the Boalt name is jarring at today's racially diverse Berkeley, where nearly 20%<sup>97</sup> of the current undergraduate and 10%<sup>98</sup> of the law school student population report Chinese ethnic background. At the very least, Berkeley needs to acknowledge and contextualize its continued use of the name of a prominent anti-Chinese racist. Yale's Committee to Establish Principles of Renaming was mindful that there should be a "strong presumption against

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91. Recommendation to the President and Fellows of Harvard College on the Shield Approved for the Law School (March 3, 2016) <https://today.law.harvard.edu/wp-content/uploads/2016/03/Shield-Committee-Report.pdf>

92. *Id.*

93. *Id.*

94. Carl Nolte, USF renames building for Toler after students raise concerns on racism, S.F. Chron. (May 12, 2017). <https://www.sfchronicle.com/bayarea/article/USF-renames-building-for-Toler-after-students-11143046.php>

95. *Id.*

96. Michael Barba, USF drops former SF mayor's name from dorms over racist views, S.F. Examiner (May 11, 2017) <http://www.sfexaminer.com/usf-drops-former-sf-mayors-name-dorms-racist-views/>

97. U.C. Berkeley Fall Enrollment Data, <http://opa.berkeley.edu/uc-berkeley-fall-enrollment-data> [<https://perma.cc/WRF5-C2TG>].

98. E-mail from Edward Tom, Director of Admissions, U.C. Berkeley, Schl. of Law, to Charles Reichmann, Lecturer, U.C. Berkeley, Schl. of Law (May 2, 2017, 11:57 AM PST) (on file with author).

renaming a building on the basis of values associated with its namesake,” and worried that removal of names may “obscure important information about our past” and cautioned that to “erase a university’s history is antithetical to the spirit of the institution.”

Even so, the Committee recognized that a name change does not have to mean erasure and may fall within a “university’s ongoing obligation is to navigate change without effacing its past.” A name change comes with an obligation to ensure removal does not have the effect of erasing history, just as name retention may come with obligations to ensure that preservation does not distort history. As Yale found in the case of Calhoun College, a fair appraisal of the historical record sometimes compels the conclusion that names should be changed.

Boalt neither attended nor taught at the law school that bears his name. He made no contributions to the life and mission of the University of California. He was a successful attorney, apparently well liked in his day. But records of his accomplishments are few – and a biography appearing in the year of his death pointed to *The Chinese Question* as his greatest public service.<sup>99</sup> Berkeley Law has honored John Boalt solely because in 1906 his widow made a generous donation to construct the first Boalt Hall. If it continues to honor him, it is either because it has forgotten Boalt’s ardent and influential racism, or because it places continuity and tradition ahead of its own nobler principles and values.

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99. SHUCK, *supra* note 10, at 534-35.