

## UNEXPLAINABLE ON GROUNDS OF RACE: DOUBTS ABOUT *YICK WO*

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*Yick Wo v. Hopkins* is simultaneously celebrated as a classic equal protection case, establishing the rule against discriminatory prosecution, and lamented as the first and last case in which the Supreme Court invalidated a prosecution as racially motivated. This essay explores why *Yick Wo* proved to be a dead end. It proposes that the traditional view of *Yick Wo* is mistaken: *Yick Wo* was about neither race discrimination nor prosecution. *Yick Wo* turned on the Court's treatment of the conduct at issue, operating a laundry, as a constitutionally protected property right. Therefore, a forgotten but large body of cases from the Jim Crow era holds that *Yick Wo* is a Catch-22: *Yick Wo* applies when some other provision of law invalidates the statute but is categorically inapplicable to prosecutions for conduct the state has the power to criminalize. In addition, because the property interest at stake was constitutionally protected, *Yick Wo*'s race was irrelevant to the decision; a white person or corporation deprived of property would have had precisely the same claim. In fact, *Yick Wo*'s race was a barrier to, rather than a basis for, relief: he could raise a property claim only because he had a treaty right to operate a laundry on the basis of equality with others. When the treaty was inapplicable, the Supreme Court upheld race-based economic discrimination against Chinese and other Asians. *Yick Wo* is famous because it apparently foreshadows the antiracist jurisprudence of the post-Brown era. Read in the context of the jurisprudence

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*of its own time, however, Yick Wo is completely consistent with Plessy v. Ferguson and stands primarily for the mundane point that a valid treaty trumps inconsistent state law.*

## INTRODUCTION

*Yick Wo v. Hopkins*<sup>1</sup> has been called “pathbreaking,”<sup>2</sup> “leading,”<sup>3</sup> “seminal,”<sup>4</sup> and “a landmark by any standard.”<sup>5</sup> A staple of constitutional law textbooks,<sup>6</sup> it is understood to hold that “the selective enforcement of a facially neutral statute may violate the Equal Protection Clause of the Fourteenth Amendment.”<sup>7</sup> Put another way, “[t]he principle the court established in *Yick Wo* is straightforward: where the government discriminates based on race in its enforcement of the criminal law, it denies equal protection of the laws.”<sup>8</sup> The case is celebrated as a small miracle, an almost unique example of a Court that approved much

1. 118 U.S. 356 (1886).

2. Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHL.-KENT L. REV. 605, 615 (1998) (referring to “the pathbreaking nineteenth-century equal protection case”).

3. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 226 (1928).

4. *Wayte v. United States*, 470 U.S. 598, 630 (1985) (Marshall, J., dissenting); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1647 (1992).

5. Earl M. Maltz, *Only Partially Color-Blind: John Marshall Harlan’s View of Race and the Constitution*, 12 GA. ST. U. L. REV. 973, 1016 (1996); see also *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50 (1959) (“the classic case”); CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 701 (2001) (“[a] classic example”).

6. See, e.g., PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 1021 (5th ed. 2006); JESSE H. CHOPER ET AL., *CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS* 1180 (9th ed. 2001); DANIEL A. FARBER ET AL., *CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY* 190 (3d ed. 2003); RONALD D. ROTUNDA, *MODERN CONSTITUTIONAL LAW: CASES AND NOTES* 652 (8th ed. 2007); CHARLES A. SHANOR, *AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION* 693 (3d ed. 2006).

7. Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1315–16 (1997); see also, e.g., 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 18.8, at 319 (3d ed. 1999); Jack Greenberg, *Reflections on Leading Issues in Civil Rights, Then and Now*, 57 NOTRE DAME L. REV. 625, 634–35 (1982) (“[*Yick Wo*] held that a San Francisco ordinance prohibiting the operation of laundries in wooden buildings denied equal protection of the laws because almost all the laundries in wooden buildings were operated by Chinese. Moreover, white laundry operators had obtained some exemptions from the law while Chinese had not.”); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 621–22 (1993) (“The landmark equal protection decision of *Yick Wo v. Hopkins* . . . is generally read as one of the first cases in which the Court allowed an equal protection challenge to discriminatory administration of the law . . .”).

8. DAVID COLE, *NO EQUAL JUSTICE* 159 (1999); see also, e.g., *In re Griffiths*, 413 U.S. 717, 720 (1973); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 486 n.229 (2001) (describing *Yick Wo* as “invalidating a commercial laundry ordinance because it was enforced on the basis of ethnicity rather than on the basis of its stated public safety rationale”); *Developments in the Law—Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1536 (1988) (“In the first of these landmark cases, *Yick Wo v. Hopkins*, the Supreme Court invalidated a facially neutral municipal ordinance that was applied discriminatorily against Chinese laundry operators. In invalidating the ordinance, the Court laid the equal protection foundation for the selective prosecution defense . . .”).

legal discrimination against African-Americans and Chinese choosing to prohibit racially biased decision making.<sup>9</sup>

For all its fame, *Yick Wo* has disappointed in a way that demands explanation. The United States is a big country with its share of racial concerns; since 1886, a fair judiciary should have applied *Yick Wo* to invalidate hundreds or thousands of discriminatory prosecutions.<sup>10</sup> However, Professor David Cole stated in 1999 that there are “no reported federal or state cases since 1886 that had dismissed a criminal prosecution on the ground that the prosecutor acted for racial reasons.”<sup>11</sup> Other distinguished commentators have made similar observations.<sup>12</sup> The close connection between race and criminal justice makes it impossible to explain *Yick Wo*’s complete lack of progeny by concluding that the Court identified the problem of racially selective prosecution in 1886 and solved it, so it has never bothered us again. A key fact in the case was that none of the Chinese laundrymen who applied for licenses got them; that “the inexorable zero”<sup>13</sup> appeared for a second time in the career of the same case is profoundly puzzling.

One possible explanation looks outside of *Yick Wo* to the racist justice system: the Court established a good principle that other actors would not enforce. But *Yick Wo*’s desuetude cannot be blamed exclusively on judicial hostility or on the absence of lawyers willing to advance discrimination claims. The Court invalidated discriminatory state acts,<sup>14</sup>

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9. See, e.g., BREST, *supra* note 6, at 371, n.67 (“The Court did intervene in some egregious instances.”); OWEN M. FISS, 8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 309 (1993) (“[*Yick Wo*] anticipat[ed] a theory of equal protection that awaited the Warren Court Era for its full vindication . . . .”); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 99 (1993) (“Such victories, alas, were rare.”).

10. See, e.g., Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996) (discussing race and class bias in prosecution of domestic violence).

11. COLE, *supra* note 8, at 159. It is always dangerous to claim that there are “no reported cases” on a question of law, but my research assistant and I looked, and we, like many other researchers, could find none. The closest may be *People v. Harris*, reversing a conviction and remanding for a new trial on the ground that the defense should have been presented to the jury. 5 Cal. Rptr. 852 (Cal. App. Dep’t Super. Ct. 1961). *Yick Wo* may have had influence below the level of reported cases. It is a near-certainty that criminal defendants have won selective prosecution motions that were not appealed, or, after filing strong motions, got spectacular plea deals or judicial or prosecutorial dismissals on pretextual grounds.

12. See, e.g., FISS, *supra* note 9, at 309 (noting that the Court “left *Yick Wo* on the books but denied it any operative effect”); RANDALL KENNEDY, RACE, CRIME, AND THE LAW 354 (1997) (“Research has uncovered no cases . . . in which a court has ruled that, on grounds of racial discrimination, a prosecutor has abused his discretion.”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1539–40 (1981) (“It says something about the wide berth the judiciary has given prosecutorial power that the leading case invalidating an exercise of prosecutorial discretion is the nearly century-old decision in *Yick Wo v. Hopkins*. . . . *Yick Wo* was the first and last time the United States Supreme Court struck down a prosecution for the invalid selection of a target.”).

13. *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977).

14. See, e.g., *Buchanan v. Warley*, 245 U.S. 60 (1917) (invalidating a municipal racial housing segregation ordinance); *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating a grandfather clause under the Fifteenth Amendment).

including in criminal cases.<sup>15</sup> The judicial attitude was undoubtedly hostile, and there were too few lawyers advancing the claims of African-Americans and other people of color, but even such significant disadvantages cannot explain a complete absence of cases.

Nor is it the case that the lack of an effective remedy is overdetermined by the nature of prosecutorial discretion. Although imperfect, the *McDonnell Douglas*<sup>16</sup> and *Batson*<sup>17</sup> regimes both smoke out some discrimination and have not rendered impossible either the operation of the labor market—inevitably a highly discretionary institution—or the jury system.<sup>18</sup>

This essay offers a new explanation: *Yick Wo* has never been applied to invalidate a conviction based on racially selective prosecution because the Court did not hold that prosecuting an individual because of his race violates the Equal Protection Clause of the Fourteenth Amendment. Although that principle is the law now, that meaning was imposed on the case after *Brown v. Board of Education*.<sup>19</sup> In the context of the jurisprudence of the era, *Yick Wo* was understood to mean, and meant, something completely different.

The facts of *Yick Wo* are simple and dramatic. The San Francisco ordinance at issue prohibited operation of a laundry in a wooden building “without first having obtained the consent of the board of supervisors.”<sup>20</sup> This consent was in addition to health and fire inspections required by other law. When the ordinance became effective, the city’s laundry operators made their applications. Of 320 laundries, 310 were in wooden buildings and therefore subject to the law; of these, 240 were operated by Chinese.<sup>21</sup> Applying a regulation with no standards and offering no explanation, the board rejected all petitions from Chinese laundry operators and granted all but one of the other applications.<sup>22</sup> *Yick Wo* and *Wo Lee* laundered without licenses and were criminally prosecuted. They were jailed after conviction of misdemeanors. *Wo Lee* lost his petition for a writ of habeas corpus in the federal circuit court;<sup>23</sup> *Yick Wo* lost in the California Supreme Court.<sup>24</sup> They appealed to the U.S. Supreme

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15. The Court granted relief in a number of cases alleging discriminatory jury selection. *See, e.g.,* *Rogers v. Alabama*, 192 U.S. 226 (1904); *Carter v. Texas*, 177 U.S. 442 (1900); *Neal v. Delaware*, 103 U.S. 370 (1880).

16. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

17. *Batson v. Kentucky*, 476 U.S. 79 (1986).

18. A number of commentators offer proposals for refining the Court’s approach to discriminatory prosecution. *See, e.g.,* McAdams, *supra* note 2; Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127 (2003); Marc Price Wolf, Note, *Proving Race Discrimination in Criminal Cases Using Statistical Evidence*, 4 HASTINGS RACE & POVERTY L.J. 395 (2007).

19. 347 U.S. 483 (1954).

20. *Yick Wo v. Hopkins*, 118 U.S. 356, 357 (1886) (quoting the San Francisco ordinance).

21. *Id.* at 358–59.

22. *Id.* at 359.

23. *In re Wo Lee*, 26 F. 471, 476 (C.C.D. Cal. 1886).

24. *In re Yick Wo*, 9 P. 139, 146 (Cal. 1885).

Court, and won. The men, the Court said, had been arbitrarily deprived of their property interest in earning a living.<sup>25</sup>

The first problem with the general understanding of *Yick Wo* is that it was not fundamentally a criminal case. The wrong was done by civil authorities who were enforcing invalid regulations that affected what the Court considered vested constitutional rights. Logically, such a precedent might be inapplicable to law enforcement authorities pursuing valid criminal prosecutions. And so the cases held. Part I of this Article describes a body of cases, largely forgotten for the past thirty years, holding *Yick Wo* inapplicable to criminal cases. These cases refused to consider claims of discriminatory prosecution, even in principle, because *Yick Wo* prohibited states only from punishing those engaged in lawful businesses; *Yick Wo* did not mean that criminals the state could lawfully sanction had a defense because other criminals went unprosecuted. In 1941, the California Attorney General Earl Warren won an often-cited expression of the principle in the California Court of Appeals, which held: “[T]he only possible application of the doctrine of the *Yick Wo* case to a criminal prosecution would appear to be in an instance where a person was under prosecution for the commission of some otherwise harmless act which ordinarily had not theretofore been treated as a crime.”<sup>26</sup> Part I explores the rise and fall of this doctrine.<sup>27</sup>

Part II examines the *Yick Wo* decision itself and proposes that it did not turn on race.<sup>28</sup> Part II proposes further that *Yick Wo* rested on the conclusion that the laundrymen had been arbitrarily deprived of a constitutionally protected property interest. This conclusion shaped the import of the decision in two ways. First, *Yick Wo* had no necessary application when a property interest was not implicated. Second, once the decision is understood to be based on protecting property, the race of the person arbitrarily deprived of his property becomes irrelevant. That is, the Constitution does not provide that *Chinese* people, or *people of color*, may not be deprived of property without due process of law. Nor does it provide that members of one race may not be deprived of property without due process of law *if* members of another race are allowed to enjoy their property. Instead, the Constitution provides that *no one* may be deprived of property without due process of law, regardless of the treatment of members of the same or other races. Thus, if *Yick Wo* had been white, African-American, or a corporation, unjustified deprivation of property without due process of law would not have been any more or any less unconstitutional.

While *Yick Wo* discussed the Equal Protection Clause at length, that language turns out to be an artifact of the era’s due process jurispru-

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25. *Yick Wo*, 118 U.S. at 368–74.

26. *People v. Montgomery*, 117 P.2d 437, 446 (Cal. Ct. App. 1941).

27. See *infra* notes 34–96 and accompanying text.

28. See *infra* notes 97–124 and accompanying text.

dence.<sup>29</sup> All due process violations, the Court explained, were automatically also equal protection violations because others were allowed to pursue their occupations and retain their property. The equal protection discussion was simply another way of saying that Yick Wo's property had been taken without due process of law. *Yick Wo's* later career makes clear that it is a nonracial decision.<sup>30</sup> The Court invoked *Yick Wo* to invalidate regulations constituting invidious economic classifications among businesses and corporations. Yet, the Court permitted many kinds of racial discrimination notwithstanding *Yick Wo*.

Even as a noncriminal, nonracial, non-equal protection (at least in the modern sense) decision, *Yick Wo* could still be significant if it held that Chinese people were entitled to the same or similar constitutional protection of their economic rights as were others. However, *Yick Wo* held no such thing. Instead, as Part III explains, the Court explored Yick Wo's property rights only after carefully demonstrating that a treaty and a federal statute protected Chinese economic activity.<sup>31</sup> Without the treaty, Yick Wo would have lost.<sup>32</sup> In subsequent cases where the Court found the treaty inapplicable, it rejected equal protection arguments, consistently upholding race-based economic discrimination against Asians until the late 1940s.

Instead of being a landmark, *Yick Wo* is mundane. It holds that states must comply with valid and applicable treaties, hardly a controversial principle. On this basis, federal law protected Yick Wo's economic rights. Once he had federally protected rights, they could be taken away only after due process of law, again, not a new idea, even in 1886.

The Article concludes by exploring the possible doctrinal implications of the traditional misreading of *Yick Wo*.<sup>33</sup> *Yick Wo* appears in many of the modern cases establishing the contours of judicial evaluation of claims of discriminatory prosecution. It is a classic token, illustrating that such claims are not impossible. Because the case was decided on other grounds, it proves no such thing. Perhaps the Court's repeated invocation of *Yick Wo* is makeweight; the doctrine would have the features it does even if no defendant ever has or ever could satisfy its requirements. On the other hand, perhaps the Court intends to have an extremely restrictive standard, yet one that could be satisfied in an extreme case. If so, recognition of the erroneous understanding of *Yick Wo* warrants reconsideration of the doctrine.

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29. See *infra* notes 107–24 and accompanying text.

30. See *infra* notes 125–92 and accompanying text.

31. See *infra* notes 130–60 and accompanying text.

32. See *infra* notes 161–92 and accompanying text.

33. See *infra* notes 224–30 and accompanying text.

I. IS *YICK WO* A CRIMINAL CASE?

As Randall Kennedy explained,<sup>34</sup> the misconduct in *Yick Wo* was performed by civil administrators, not police or prosecutors. There was no discussion in *Yick Wo* about law enforcement conduct; all the responsibility was placed on the discriminatory San Francisco board of supervisors.<sup>35</sup> The statistical data the Court analyzed was about license grants and denials, not arrests or prosecutions.<sup>36</sup> For all that appears, the police and prosecutors impartially charged all who violated a law that was discriminatorily administered by someone else.

In addition, the case was about something innocent, doing laundry, in (or at least on the cusp of) an era where the Court believed the Constitution robustly protected economic rights. This Court recognized a substantive due process right “to earn [a] livelihood by any lawful calling, to pursue any livelihood or avocation.”<sup>37</sup> The laundry business was part of this right.<sup>38</sup> As Justice Field said in an 1882 decision written on circuit:

Licenses . . . may be required . . . where the nature of the business demands special knowledge or qualifications . . . [or] as a means of raising revenue . . . . But in neither case can they be required as a means of prohibiting any of the avocations of life which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety. Nor can conditions be annexed . . . which would tend to such a prohibition.<sup>39</sup>

A case limiting government power to punish constitutionally protected behavior applies uneasily to prosecutions of rapists, robbers, and murderers. Accordingly, many courts refused to apply *Yick Wo* to criminal cases. As a 1950 *Yale Law Journal* note reported: “While courts

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34. KENNEDY, *supra* note 12, at 354–55.

35. *Id.*

36. *Id.*

37. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

38. See *Crowley v. Christensen*, 137 U.S. 86, 94 (1890) (distinguishing *Yick Wo* in a liquor licensing case: *Yick Wo* involved “a business harmless in itself and useful to the community,” while here “the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe”); *Yee Gee v. City & County of S.F.*, 235 F. 757 (N.D. Cal. 1916) (enjoining an ordinance strictly limiting hours of work in laundries); *In re Quong Woo*, 13 F. 229, 233 (Field, Circuit Justice, C.C.D. Cal. 1882) (invalidating an ordinance requiring permission of neighbors to operate a laundry: “[H]e has, under the pledge of the nation, the right to . . . follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the state . . . , except such as may arise from the enforcement of equal and impartial laws. His liberty to follow any such occupation cannot be restrained by invalid legislation of any kind; certainly not by a municipal ordinance that has no stronger ground for its enactment than the miserable pretense that the business of a laundry—that is, of washing clothes for hire—is against good morals or dangerous to the public safety”); *Ex parte Sing Lee*, 31 P. 245, 247 (Cal. 1892) (invalidating a laundry ordinance: “It is very clear to us that the right of an owner to use his property in the prosecution of a lawful business, and one that is recognized as necessary in civilized communities, cannot be thus made to rest on the caprice of a majority or any number of those owning property surrounding that which he desires to use”); see also *Royall v. Virginia*, 116 U.S. 572, 583 (1886) (stating that an attorney has a “constitutional right” to practice professionally without compliance with unconstitutional licensing provision).

39. *Quong Woo*, 13 F. at 233.

have readily used [the Equal Protection Clause] to strike down discriminatory laws, they have never been fully converted to the proposition that discriminatory enforcement of a nondiscriminatory law is also within the constitutional prohibition.”<sup>40</sup> A *Columbia Law Review* note explained in 1961:

[N]otwithstanding that the proscription of the fourteenth amendment extends to all forms of state action, executive and judicial as well as legislative, the extent to which this administrative discrimination is prohibited by the equal protection clause, if at all, and the extent to which the constitutional guarantee of equal treatment will effectively aid victims of discriminatory enforcement, have for several reasons remained unsettled.<sup>41</sup>

Lest these ideas be dismissed as the ravings of student note writers, Wayne LaFave agreed in a 1962 article:

The real extent of the constitutional protection from unequal law enforcement, however, remains unclear in the state cases. . . . All in all, about half of the appellate courts considering the problem have concluded that the equal protection clause is not applicable to discriminatory penal enforcement.<sup>42</sup>

Half of all the appellate courts, that is, concluded that selecting defendants based on race was entirely permissible. Given that there were no winners, any cases suggesting that racial discrimination was prohibited were arguably dicta.

The leading case, though not the earliest, is *People v. Montgomery*,<sup>43</sup> an elaborate 1941 California Court of Appeals opinion. The underlying “white slavery” prosecution was the Heidi Fleiss case of its era. The *Los Angeles Times* referred to the defendant as “Charles W. Montgomery, 43-year-old halfbreed”,<sup>44</sup> specifically, he was “Negro-Portuguese.”<sup>45</sup> Co-defendant Edith Johnson was a “negress,”<sup>46</sup> and a third defendant was named the “Black Widow.”<sup>47</sup> California Attorney General Earl Warren represented the state. As the head of the office, his name appeared on many briefs in cases handled throughout his office, but in an appeal of a

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40. Note, *Discriminatory Law Enforcement and Equal Protection from the Law*, 59 YALE L.J. 354, 354 (1950).

41. Note, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103, 1103 (1961).

42. Wayne R. LaFave, *The Police and Nonenforcement of the Law—Part I*, 1962 WIS. L. REV. 104, 135 (citations omitted).

43. 117 P.2d 437 (Cal. Dist. Ct. App. 1941), *post-conviction relief denied*, 125 P.2d 108, 110 (Cal. Dist. Ct. App. 1942).

44. *Girl Kidnapping Charged to White Slave Ring Suspects*, L.A. TIMES, Apr. 25, 1940, at A3.

45. *Slave Ring Suspects Seized After Girl Gives Officers Tip*, L.A. TIMES, Apr. 23, 1940, at A1.

46. *Slave Syndicate Charge Denied*, L.A. TIMES, July 31, 1940, at A11.

47. *‘Black Widow’ Vice Convictions Sustained: Appellate Court Turns Down Pleas of Ann Forrester and Portuguese Negro*, L.A. TIMES, Sept. 30, 1941, at A8. Her race is not clear, although the papers mentioned the race of other defendants so often that it is unlikely that it would have gone unremarked if she were African-American.



case implicating corruption in the Los Angeles Mayor's Office,<sup>48</sup> perhaps he paid personal attention. Celebrity lawyer Morris Lavine, winner of *Griffin v. California*<sup>49</sup> and *Chapman v. California*,<sup>50</sup> represented Montgomery.<sup>51</sup>

One of Montgomery's appellate claims was that, on the authority of *Yick Wo*, the jury should have been instructed that nonprosecution of others was a defense. The court rejected the argument because the defense was categorically unavailable in criminal cases: "[T]he only possible application of the doctrine of the *Yick Wo* case to a criminal prosecution would appear to be in an instance where a person was under prosecution for the commission of some otherwise harmless act which ordinarily had not theretofore been treated as a crime."<sup>52</sup> The court explained:

Appellant misconstrues . . . the *Yick Wo* case. . . . [I]n the *Yick Wo* case the equal protection of the law was extended to persons of a particular race to enable them to engage in a lawful business on a basis of equality . . . . While all persons accused of crime are to be treated on a basis of equality before the law, it does not follow that they are to be protected in the commission of crime. . . . The remedy for unequal enforcement of the law in such instances does not lie in the exoneration of the guilty at the expense of society. . . . Protection of the law will be extended to all persons equally in the pursuit of their lawful occupations, but no person has the right to demand protection of the law in the commission of a crime.<sup>53</sup>

Other jurisdictions agreed. The Colorado Supreme Court, emphasizing the benign nature of the laundry business, held *Yick Wo* inapplicable "to those enterprises which, because of their very nature, are likely to become destructive of good morals and the peace and order of society."<sup>54</sup> Similarly, the Michigan Supreme Court explained that "[h]ere, the nature of the operation in question is illegal, and the applicable statute leaves no room for the exercise of any discretion as to whom it may af-

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48. The case spawned a libel suit when *Liberty Magazine* reported allegations that an LAPD captain and former mayor Frank Shaw's brother had worked with the ring. *Blasts at Shaw Regime Mark Opening of Trial: Ex-Mayor, Seeking Damages for Liberty Article, Charged with Being Head of Corrupt Machine*, L.A. TIMES, Jan. 9, 1942, at A1; *Capt. Contreras Denies Part in Vice Syndicate: Officer Accused by 'Black Widow' Gives Shaw Suit Testimony*, L.A. TIMES, Mar. 6, 1942, at A3. Something was up: the Mayor of Los Angeles asked for leniency for the Black Widow because she provided information about corruption in earlier administrations. *Black Widow Plea Explained: Mayor Says Leniency Urged Because of Aid She Gave Authorities*, L.A. TIMES, Nov. 14, 1941, at A2.

49. 380 U.S. 609 (1965).

50. 386 U.S. 18 (1967).

51. The colorful attorney's first Supreme Court case had been an unsuccessful appeal of his own extortion conviction. See *Lavine v. California*, 286 U.S. 528 (1932) (per curiam). He also appeared in *Tomoya Kawakita v. United States*, 343 U.S. 717 (1952), *Phyle v. Duffy*, 334 U.S. 431 (1948), *Adamson v. California*, 332 U.S. 46 (1947), and *Lisenba v. California*, 314 U.S. 219 (1941). See also Morris Lavine, *Legendary Trial Lawyer*, L.A. TIMES, Dec. 1, 1982, at C4.

52. *People v. Montgomery*, 117 P.2d 437, 446 (Cal. Dist. Ct. App. 1941).

53. *Id.*

54. *Dwyer v. People*, 261 P. 858, 858 (Colo. 1927).

fect. Hence the *Yick Wo* case is not controlling.”<sup>55</sup> The Pennsylvania Supreme Court found *Yick Wo*

and others in the same category are clearly distinguishable . . . in that they are concerned with the denial of a right to which the particular claimant was entitled on the face of applicable ordinances or statutes, while in the case at bar claimant asserts that she has been wrongfully deprived of the right to do an act expressly forbidden by ordinance. To state such a doctrine as the latter is to refute it.<sup>56</sup>

Appellate courts in Illinois,<sup>57</sup> New Mexico,<sup>58</sup> South Dakota,<sup>59</sup> and Virginia<sup>60</sup> cited *Montgomery* with approval.<sup>61</sup> Others distinguished *Yick Wo* on the ground that the ordinance at issue there was discretionary, while penal laws are mandatory.<sup>62</sup> Of course, pre-*Bolling v. Sharpe*,<sup>63</sup> a discrimination claim by a federal criminal defendant would have to overcome the Court’s reminder that “[t]he Fifth Amendment contains no equal protection clause.”<sup>64</sup>

Meanwhile, the Supreme Court’s jurisprudence called the *Montgomery* doctrine into question but did not completely kill it. The Court’s 1905 decision *Ah Sin v. Wittman*<sup>65</sup> certainly implied the availability of a discriminatory prosecution defense. *Ah Sin* claimed that *Yick Wo* barred conviction under a gambling ordinance because “said ordinance and the provisions thereof are enforced and executed . . . solely and exclusively against persons of the Chinese race, and not otherwise.”<sup>66</sup> However, the Court explained that *Yick Wo* was inapplicable, because it

concerned the use of property for lawful and legitimate purposes. The case at bar is concerned with gambling, to suppress which is recognized as a proper exercise of governmental authority, and one which would have no incentive in race or class prejudice or administration in race or class discrimination. . . . There is no averment that the conditions and practices to which the ordinance was di-

55. *Soc’y of Good Neighbors v. Van Antwerp*, 36 N.W.2d 308, 310 (Mich. 1949).

56. *In re Certificate of Occupancy 500 Paxinosa Ave.*, 66 A.2d 225, 226 (Pa. 1949).

57. *See People v. Tillman*, 282 N.E.2d 231, 233 (Ill. App. Ct. 1972) (“The basic premise of the equal protection clause is that the state may not discriminatorily deprive an individual of his rights. In this case, however, there is no deprivation of a right because there is no right to commit crime.”).

58. *See State v. Baldonado*, 441 P.2d 215, 217 (N.M. Ct. App. 1968) (citing *Montgomery*).

59. *See State v. O’Connor*, 265 N.W.2d 709, 714 (S.D. 1978) (“The contention of the defendant, based as it is on the *Yick Wo* doctrine . . . is well answered in *People v. Montgomery*.”) (citations omitted).

60. *See Sims v. Cunningham*, 124 S.E.2d 221, 225 (Va. 1962) (quoting *Montgomery* at length).

61. *See also Washington v. United States*, 401 F.2d 915, 924–25 (D.C. Cir. 1968) (expressing clear skepticism of the government’s claim that equal protection is inapplicable to criminal prosecutions, but not deciding the issue).

62. *See Highland Sales Corp. v. Vance*, 186 N.E.2d 682, 688 (Ind. 1962); *Michaels v. Twp. Comm. of Pemberton Tp., Burlington County*, 67 A.2d 324, 326–27 (N.J. Super. Ct. Law Div. 1949) (citing *Gorieb v. Fox*, 274 U.S. 603 (1927)).

63. 347 U.S. 497 (1954).

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

65. 198 U.S. 500 (1905).

66. *Id.* at 506.

rected did not exist exclusively among the Chinese, or that there were other offenders against the ordinance than the Chinese. . . . No latitude of intention should be indulged in a case like this. . . . This is a matter of proof, and no fact should be omitted to make it out completely, when the power of a Federal court is invoked to interfere with the course of criminal justice of a State.<sup>67</sup>

*Ah Sin* implied that upon appropriate proof, the defense would be available. But perhaps the reference to the “lawful and legitimate” nature of Yick Wo’s conduct limited the doctrine. As the defense was rejected on the facts, perhaps the statement was *dicta*; as the crime was mere gambling, perhaps the doctrine, even if available, would be limited to trivial offenses.

In *Edelman v. California*,<sup>68</sup> a vagrancy case, the Court implied that “systematic or intentional discrimination”<sup>69</sup> would be a defense in a criminal case, but again, the offense was a misdemeanor, and thus did not necessarily resolve application of the defense to serious crimes. Moreover, because the Court found that the defense had not been preserved for review as a federal question,<sup>70</sup> the implication that the defense existed could always be dismissed as *dicta*.

The turning point was 1961. In that year, the Supreme Court decided *Two Guys From Harrison-Allentown, Inc. v. McGinley*.<sup>71</sup> *Two Guys* upheld denial of an injunction against alleged discriminatory enforcement of Pennsylvania’s Sunday closing law. The Court reasoned that anyone charged “may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination.”<sup>72</sup> *Two Guys* made clear that in at least some cases, discriminatory prosecution would be a criminal defense, not just give rise to a damages claim or warrant an injunction requiring prosecution of other offenders.

A year later, the Court decided *Oyler v. Boles*,<sup>73</sup> upholding West Virginia’s habitual criminal sentencing law. As the Supreme Court consolidated the doctrinal developments following *Brown*, the Court explained how the new tiered scrutiny would apply to discriminatory prosecution claims. Although the Court found that the defense was not proved, it applied a modern understanding of equal protection:

[S]ome selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics . . . might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, relig-

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67. *Id.* at 507–08.

68. 344 U.S. 357 (1953).

69. *Id.* at 359.

70. *Id.*

71. 366 U.S. 582 (1961).

72. *Id.* at 588–89.

73. 368 U.S. 448 (1962).

ion, or other arbitrary classification. Therefore grounds supporting a denial of equal protection were not alleged.<sup>74</sup>

The Court cited *Yick Wo* and the civil equal protection case of *Snowden v. Hughes*<sup>75</sup> with a “cf.” and the parenthetical “by implication,” implying that the cases fell short of dictating the holding. The Court threaded the needle, holding that the law could police racial or religious discrimination while disclaiming any obligation to monitor other forms of selective enforcement, such as that based on a defendant’s record. Yet because the defense was available in cases of race discrimination, even to habitual criminals, any contention that it was limited to trivial offenses became untenable. Once again, the skeptic could call *Oyler* just more dicta, but the Court seemed to be making a point.

*Oyler v. Boles* was decisive.<sup>76</sup> Later in 1962, one commentator noted: “It seems clear from the Court’s language in *Oyler* that it has implicitly rejected the assertion of some state courts that the principle of *Yick Wo* would never apply to render discriminatory enforcement a defense to a criminal prosecution.”<sup>77</sup> Although into the early 1970s some commentators pointed to a split of authority,<sup>78</sup> by the mid-1970s, *Oyler*’s effect was broadly accepted.<sup>79</sup>

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74. *Id.* at 456.

75. 321 U.S. 1 (1944).

76. See *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) (citing *Oyler* and later cases in stating that “[t]his Court has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race”); *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) (“The Equal Protection Clause prohibits selective enforcement ‘based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’”) (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

77. Note, *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 75, 121 (1962).

78. See Thomas E. Kellett, *The Expansion of Equality*, 37 S. CAL. L. REV. 400, 415 (1964) (“However, there has been a great deal of inconsistency and uncertainty in the application of this doctrine to law enforcement agencies.”); Alan J. Russo, *Equal Protection from the Law: The Substantive Requirements for a Showing of Discriminatory Law Enforcement*, 3 LOY. L.A. L. REV. 65, 65 n.2 (1970) (“*Yick Wo*, however, dealt with an administrative licensing board, and some state and lower federal courts have refused to apply it to law enforcement agencies which administer penal laws.”); Terrill A. Parker, Comment, *Equal Protection As a Defense to Selective Law Enforcement by Police Officials*, 14 J. PUB. L. 223, 227 (1965) (“Whereas *Yick Wo* wished to carry on the lawful business of laundering in a location made illegal by lack of a permit, others seek to escape prosecution for the commission of a crime by showing that there are those who have not been prosecuted for the same crime.”); Comment, *Constitutional Law: Intentional Discriminatory Enforcement of Criminal Statute Held to Violate the Fifth Amendment*, 55 MINN. L. REV. 1234, 1235 (1971) (“The courts are split, however, as to whether the equal protection prohibition against discriminatory enforcement should be applied to cases in which a criminal statute was discriminatorily enforced.”); Comment, *Prosecutorial Discretion in the Initiation of Criminal Complaints*, 42 S. CAL. L. REV. 519, 538 (1969) (“State and lower federal courts have divided on whether to extend the *Yick Wo* rule, which was specifically concerned with a licensing board, to law enforcement agents.”); Note, *Current Developments in State Action and Equal Protection of the Law*, 4 GONZ. L. REV. 233, 248 (1969) (“Some courts have refused to apply *Yick Wo* to enforcement of penal laws on the public policy that failure to prosecute certain persons should not nullify valid penal laws . . . . *Yick Wo* has been distinguished also on the premise that acts which are not harmful in themselves . . . should fall within the rule, while acts which are harmful in themselves . . . should not be within the rule.”).

79. Dennis J. White, Comment, *Curbing the Prosecutor’s Discretion: United States v. Falk*, 9 HARV. C.R.-C.L. L. REV. 372, 374 (1974) (“Resistance on this ground to the extension of *Yick Wo*, however, has not carried over into the more recent cases.”); Comment, *The Ramifications of United States v. Falk on Equal Protection from Prosecutorial Discrimination*, 65 J. CRIM. L. & CRIMINOLOGY

An important case demonstrating *Oyler*'s effect was the California Supreme Court's decision in *Murguia v. Municipal Court*,<sup>80</sup> unanimously recognizing racially discriminatory prosecution as a defense to all degrees of crime<sup>81</sup> and expressly overruling the *Montgomery* line.<sup>82</sup> Although *Murguia* called *Yick Wo* "the landmark decision,"<sup>83</sup> the first case it cited was *Oyler*: "Over a decade ago, the United States Supreme Court recognized that the equal protection clause is violated if a criminal prosecution is 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'"<sup>84</sup> "Indeed, if this issue of the availability of discriminatory enforcement as a defense were ever an open one, we believe the United States Supreme Court resolved it over a decade ago in *Two Guys v. McGinley*,"<sup>85</sup> where the Court denied an injunction against a criminal Sunday closing law prosecution on the ground that store employees "may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination."<sup>86</sup> *Murguia* rejected the prosecution's contention that the rationale of *Yick Wo* "does not apply to the enforcement of penal laws."<sup>87</sup> Nor was the remedy limited to "a civil suit for damages or injunctive relief."<sup>88</sup>

Other jurisdictions followed this doctrinal path. In a 1972 decision, the Minnesota Supreme Court emphasized the triviality of the offense when considering a selective enforcement claim: "[I]n this type of case, which involved what may be legally characterized as a petty offense—one not intrinsically harmful, a defendant should be permitted to raise the defense."<sup>89</sup> Four years later, the distinction disappeared:

In the decades following *Yick Wo*, the courts seemed to limit the holding to cases involving regulatory ordinances with penal sanctions, such as Sunday closing laws. However, in recent years courts have been abandoning the distinction between regulatory and penal

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62, 63 (1974) ("The invalidity of the distinction was finally settled in the Supreme Court's reassertion of *Yick Wo* in *Oyler v. Boles*. The Court clearly implied that the application of a habitual criminal statute would be overturned if the petitioner had shown deliberate discrimination. Because habitual criminal statutes deal only with felonies (which are *malum in se*), the Supreme Court tacitly acknowledged that *Yick Wo* can be used to prevent the prosecution of any type of crime."); Note, *United States v. Falk: Developments in the Defense of Discriminatory Prosecution*, 72 MICH. L. REV. 1113, 1115–17 (1974).

80. 540 P.2d 44 (Cal. 1975).

81. *Id.* at 50, 55–56; *id.* at 58 (Richardson, J., concurring).

82. *Id.* at 54 n.11.

83. *Id.* at 49.

84. *Id.* at 46.

85. *Id.* at 52.

86. *Id.* (quoting *Two Guys v. McGinley*, 366 U.S. 582, 588 (1961)); see also Jeffrey L. Garland, Note, *Murguia v. Municipal Court—The Defense of Discriminatory Prosecution*, 3 PEPP. L. REV. 351 (1976); Sheri L. Perlman, Note, *Murguia v. Municipal Court: California Recognizes the Defense of Discriminatory Prosecution*, 6 GOLDEN GATE U. L. REV. 885 (1976); Gregory E. Wolff, Note, *The Development of the Defense of Discriminatory Prosecution: Murguia v. Municipal Court*, 8 SW. U. L. REV. 687 (1976).

87. *Murguia*, 540 P.2d at 50.

88. *Id.* at 51.

89. *State v. Vadnais*, 202 N.W.2d 657, 660 (Minn. 1972).

laws. The trend is toward a rule allowing the defense . . . to be raised in a variety of criminal cases.<sup>90</sup>

The court determined that “the defense of discriminatory enforcement by law enforcement officials on all levels of state criminal laws and municipal penal ordinances may be raised by a defendant.”<sup>91</sup> After another eight years, every trace of the bad old days had been consigned to the memory hole; in 1984, the Minnesota Supreme Court observed, citing *Yick Wo*, that “[t]he United States Supreme Court has long held that when the law is administered in a discriminatory fashion, the defendant is entitled to a dismissal of the charges.”<sup>92</sup>

In *Bailleaux v. Gladden*,<sup>93</sup> a 1962 decision, the Oregon Supreme Court found itself

[i]mpressed with the analysis of the *Yick Wo* doctrine made in *People v. Montgomery* and cited [the case] with approval . . . in *State v. Hicks*.<sup>94</sup> We note again its statement that the remedy for unequal enforcement of the law “does not lie in the exoneration of the guilty at the expense of society.” We also find that the *Montgomery* case has since been consistently followed and applied in California.<sup>95</sup>

By 1977, the Oregon Court of Appeals distinguished the earlier Oregon Supreme Court cases, and noted that “[t]he rationale in *Montgomery* referred to by the court in *Hicks* was later expressly disapproved by the California Supreme Court in *Murguia*, which held that the equal protection clause safeguards individuals from intentional and purposeful invidious discrimination in enforcement of all laws, including penal statutes.”<sup>96</sup>

Two points flow from the *Montgomery* line of cases. First, whatever the Court actually meant by *Yick Wo*, until the 1960s, a powerful explanation for its desuetude was that many courts held it inapplicable to criminal cases—inapplicable, that is, to the very situation that the case is celebrated for today. Second, this body of law raises the question of why these courts decided what they did, of what *Yick Wo* actually meant. Perhaps courts from California to New Jersey, from Minnesota to Virginia, failed to comply with the clear command of the Supreme Court through lack of legal ability or deliberate disobedience. Alternatively, perhaps these courts correctly understood *Yick Wo* to mean something other than what courts and scholars advanced in the post-*Brown* era.

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90. *City of Minneapolis v. Buschette*, 240 N.W.2d 500, 502–03 (Minn. 1976) (citations omitted).

91. *Id.* at 503.

92. *State v. Russell*, 343 N.W.2d 36, 37 (Minn. 1984).

93. 370 P.2d 722, 724 (Or. 1962) (citations omitted).

94. 325 P.2d 794, 804 (Or. 1958).

95. *Bailleaux*, 370 P.2d at 724 (citations omitted). The Oregon Supreme Court was wrong. See *Murguia v. Municipal Court*, 540 P.2d 44, 53–54, 54 n.10 (Cal. 1975) (stating that “the great majority of California authorities have similarly recognized the availability of such a defense”).

96. *State v. Hodgdon*, 571 P.2d 557, 559 (Or. Ct. App. 1977) (citation omitted).

II. *YICK WO* AND RACE

If the *Yick Wo* Court believed that the Due Process Clause protected the right to engage in the laundry business in the absence of a legitimate reason to exclude a person from it, then nonracial considerations suffice to explain the outcome of the case. A person of any race would have been in just as strong a position to contest arbitrary deprivation of property as was a Chinese person. Similarly, that the denial of a permit was on the basis of racial prejudice would not have made the analysis any different than had the denial been based on the administrator's whim, caprice, laziness, or any other reason insufficient to justify invasion of property rights.

Following the arguments in *Yick Wo*'s brief,<sup>97</sup> the *Yick Wo* opinion treated *Yick Wo*'s interest in washing clothes as a constitutionally protected property right.<sup>98</sup> As Dean Benno Schmidt has observed, "The bulk of the opinion sounds in unconstitutional delegation";<sup>99</sup> the administrator had been given arbitrary power over property rights. Similarly, Professor Thomas Joo explained in a landmark article that *Yick Wo* is an early example of, or precursor to, the substantive due process jurisprudence of the *Lochner* era, using the Fourteenth Amendment to protect economic rights.<sup>100</sup> Earl Maltz also recognized that *Yick Wo* cannot be regarded as a modern case that happened to be decided in 1886.<sup>101</sup>

Of course, even then the Court allowed some regulation, even of lawful pursuits. Thus, in *Soon Hing v. Crowley*,<sup>102</sup> the Court denied habeas corpus relief to a San Francisco laundryman who was locked up for washing clothes after 10:00 p.m. within city limits. Under the ordinance, no laundry could operate without a fire inspection and a health inspection; even with these, it could not operate after 10:00 p.m. or before 6:00 a.m. The Chinese claimed that the rules were designed to put them out

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97. Argument for Appellant and Plaintiff in Error at 3–6, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (Nos. 1280, 1281) (assignments of error were: (1) engaging in the laundry business is a natural right; (2) restriction of those in wooden buildings is a bill of attainder; (3) the ordinance deprives laundrers of property without due process of law; and (4) the ordinance is discriminatorily applied in violation of the civil rights laws, the Equal Protection Clause, and treaties with China).

98. See, e.g., *Peters v. San Antonio*, 195 S.W. 989, 992 (Tex. Civ. App. 1917) ("The ordinance [in *Yick Wo*] was seeking to destroy the right of a man to conduct a lawful business in an arbitrary and unreasonable way . . . . It was an attempt to invade and destroy a vested right, and that could not be done in an unreasonable and oppressive way.").

99. Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of Strauder v. West Virginia*, 61 TEX. L. REV. 1401, 1469 (1983).

100. Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 353–56 (1995).

101. Earl M. Maltz, *The Federal Government and the Problem of Chinese Rights in the Era of the Fourteenth Amendment*, 17 HARV. J.L. & PUB. POL'Y 223, 245–48 (1994). Professor Maltz persuasively argues that the cases involving Chinese were "largely ignored." *Id.* at 223. He agrees that "the *Yick Wo* opinion was explicitly limited to deprivations of rights that the Court deemed 'fundamental.'" *Id.* at 248. Another important article about the jurisprudence of this era is Richard S. Kay, *The Equal Protection Clause in the Supreme Court, 1873–1903*, 28 BUFF. L. REV. 667 (1980).

102. 113 U.S. 703 (1885).

of business. But, said the Court, the law was not facially discriminatory, and the Court regarded mandated rest periods as “beneficent and merciful,”<sup>103</sup> although a skeptic might say that with friends like these, the Chinese did not need enemies.

But the ordinance in *Yick Wo* was layered on top of the regulatory regime approved in *Soon Hing* accounting for legitimate health and safety concerns. Accordingly, the Court concluded that the new requirement of board consent was about something else. The ordinances at issue in *Yick Wo* conferred “not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power . . . . The power given to them is not confided to [the supervisors’] discretion in the legal sense of that term, but is granted to their mere will.”<sup>104</sup> “[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.”<sup>105</sup>

An arbitrary denial materialized in this case:

It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever . . . is assigned why they should not be permitted to carry on . . . their harmless and useful occupation.<sup>106</sup>

In addition to the due process analysis, the Court explained that the deprivation represented an impermissible classification. In this famous passage, the Court said:

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . . No reason for [denial to the Chinese and grants to others] is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified.<sup>107</sup>

Commentators understand the due process and equal protection analyses as distinct, independent justifications. Under the period’s jurisprudence, however, due process and equal protection claims were not distinct: they were two sides of the same coin.

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103. *Id.* at 710; *see also* *Barbier v. Connolly*, 113 U.S. 27 (1885) (upholding regulations).

104. *Yick Wo v. Hopkins*, 118 U.S. 356, 366–67 (1886).

105. *Id.* at 370.

106. *Id.* at 374.

107. *Id.* at 373–74.



Again, *Yick Wo* repeatedly reflects the Court's view that what was at stake was a "right";<sup>108</sup> indeed, "the fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions."<sup>109</sup> In this era, courts and advocates understood an arbitrary deprivation of a property right to automatically constitute a denial of equal protection as well.<sup>110</sup>

[W]herever the power of regulation is exerted in such an arbitrary and unreasonable way as to cause it to be in effect not a regulation, but an infringement upon the right of ownership, such an exertion of power is void because repugnant to the due process and equal protection clauses of the Fourteenth Amendment.<sup>111</sup>

For example, unfair rate regulation means that a railroad "is deprived of the lawful use of its property . . . without due process of law . . . and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."<sup>112</sup> This point is supported by the Court's Fifth Amendment jurisprudence, which, before *Bolling v. Sharpe*, read an equal protection component into the Due Process Clause in precisely this situation.<sup>113</sup>

108. *Id.* at 365.

109. *Id.* at 370. The lower courts agreed that the petitioners had protected property interests. *See In re Wo Lee*, 26 F. 471, 474 (C.C.D. Cal. 1886) ("If it is competent for the board of supervisors to pass a valid ordinance prohibiting . . . following any ordinary, proper, and necessary calling . . . except at its arbitrary and unregulated discretion . . . then . . . there has been a wide departure from the principles . . . supposed to guard and protect the rights, property and liberties of the American people."); *In re Yick Wo*, 9 P. 139, 142 (Cal. 1885) ("[W]e do not find that they have *prohibited* the establishment of laundries, but that they have, as they well might do, *regulated* the places at which they should be established.")

110. *See Duluth & Iron Range R.R. Co. v. St. Louis County*, 179 U.S. 302, 305 (1900) ("[W]e conclude that the act which, it is asserted repealed or amended the contract was void, because a mere arbitrary exercise of power giving rise, if enforced, not only to a denial of the equal protection of the laws, but to a deprivation of property without due process of law."); *Lake Shore & Mich. S. Ry. Co. v. Smith*, 173 U.S. 684, 699 (1899) (stating that unreasonable rate-setting legislation is "a violation of that part of the constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of the laws"), *overruled by Pa. R.R. Co. v. Towers*, 245 U.S. 6 (1917); *Yesler v. Bd. of Harbor Line Comm'rs*, 146 U.S. 646, 655 (1892) ("By the . . . constitution of Washington no private property can be taken or damaged for public use without just compensation. The similar limitation upon the power of the general government, expressed in the Fifth Amendment, is to be read with the Fourteenth Amendment, prohibiting the states from depriving any person of property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. The amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights."); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884) (Field, J.) (noting that the Fourteenth Amendment "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights").

111. *Atl. Coast Line R.R. Co. v. N.C. Corp. Comm.*, 206 U.S. 1, 20 (1907).

112. *Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 458 (1890).

113. *See Detroit Bank v. United States*, 317 U.S. 329, 337-38 (1943) ("Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress. Even if discriminatory legislation may be so arbitrary and injurious in character as to violate the Due Process Clause of the Fifth Amendment, no such case is presented here.") (citations omitted); *Steward Mach. Co. v. Davis*, 301 U.S. 548, 584-85 (1937) ("The

Although such cases held, essentially, that an equal protection violation was another way of describing a due process violation, the excerpted passage of *Yick Wo* leaves room for the argument that the case broke new ground by holding that racial discrimination as a general matter “is not justified.” On the other hand, the passage is also consistent with the interpretation that the discrimination was not among races, but among those granted and those denied their property rights; if so, *Yick Wo* is not a race case at all. A less-cited portion of *Yick Wo* shows that the latter interpretation is correct.<sup>114</sup> The ordinance, said the Court:

divides the owners or occupiers into two classes, . . . on one side which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living.<sup>115</sup>

The Court concluded that the problematic classification was not between Chinese and others; it was between those allowed to enjoy their rights and those not. The wrong was not invidious race discrimination, but invidious denial of property rights. *Yick Wo* cited an industrial licensing case that invalidated an ordinance because it permitted decision based on “enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed.”<sup>116</sup> Racial discrimination was no different from any other ground insufficient to warrant interference with property.<sup>117</sup>

Later cases support the conclusion that the Court understood the prohibited classification not as between races but between those allowed and denied their property rights. In *Dobbins v. City of Los Angeles*, the Court struck down a prohibition on opening gasworks except in specified places.<sup>118</sup> While the plaintiff was building a gasworks, Los Angeles prohibited it from that location without explanation. *Yick Wo*, the Court said, “held that although an ordinance might be lawful upon its face, and

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Fifth Amendment unlike the Fourteenth, has no equal protection clause . . . though we assume that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.”).

114. Thus, in *American Sugar Refining Co. v. Louisiana*, Justice Brown, author of *Plessy*, explained that taxation, an interference with a property right, could not be segregated; he upheld a business tax, but added that “[o]f course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers,” the tax would be invalid. 179 U.S. 89, 92 (1900).

115. *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886).

116. *Id.* at 373 (quoting *City of Balt. v. Radecke*, 49 Md. 217 (1878)).

117. Put another way, the passage makes perfect sense if any group is substituted for Chinese—so long as the Court is talking about vested property rights. It may be perfectly constitutional to prohibit opticians from filling prescriptions for eyeglasses. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 486 (1955). But denial of property rights to opticians that are freely allowed to others (e.g., “all persons but opticians may build single family homes in Zone R-1”) would certainly be unconstitutional.

118. *See* 195 U.S. 223 (1904).

apparently fair in its terms, yet if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of the power would be invalidated by the courts.”<sup>119</sup> Changing the permitted zone brought the transaction “within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment.”<sup>120</sup> Unless the energy companies are considered the same as racial minorities, *Dobbins* shows that race plays no part in the *Yick Wo* principle.

Similarly, in *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*,<sup>121</sup> citing *Yick Wo*, the Court invalidated a statute conditioning issuance of a building permit on consent of the neighbors. Those neighbors “are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily . . . . The delegation of a power so attempted is repugnant to the due process clause of the Fourteenth Amendment.”<sup>122</sup> Tellingly, *Yick Wo* is cited as authority in a Jim Crow-era “pole” tax case, involving a challenge to taxes on a telegraph company’s infrastructure.<sup>123</sup> However, it plays no role in challenges to racially discriminatory “poll” taxes, which deprived individuals of the right to vote.<sup>124</sup> *Yick Wo* does not turn on racial discrimination; it turns on deprivation of vested property rights.

### III. *YICK WO* AND FEDERALISM

If *Yick Wo* is a civil, nonracial case about taking property, it could still be important if it held Chinese had property rights under the Constitution on the same basis as members of other races. In *Buchanan v. Warley*, the Supreme Court held that African-Americans could not be denied the right to own real property.<sup>125</sup> This was an important case. *Buchanan* was not flatly inconsistent with *Plessy*, but it limited *Plessy*’s potential implications; some matters, *Buchanan* made clear, could not be segre-

119. *Id.* at 240.

120. *Id.* at 241.

121. 278 U.S. 116 (1928).

122. *Id.* at 122 (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)); *see also, e.g.*, *Gorieb v. Fox*, 274 U.S. 603, 607–08 (1927) (distinguishing *Yick Wo*, stating that “[t]he ordinance there involved vested uncontrolled discretion in the board of supervisors, and this discretion was actually exercised for the express purpose of depriving the petitioner in that case of a privilege that was extended to others”); *Boyd v. Bd. of Councilmen*, 77 S.W. 669 (Ky. 1903) (following *Yick Wo* in building permit case).

123. *See Mackay Tel. & Cable Co. v. City of Little Rock*, 250 U.S. 94, 100 (1919) (“Nor was there an offer to show that the circumstances of the several companies and their telegraph lines were so much alike as to render any discrimination in the application of the pole tax equivalent to a denial of the equal protection of the laws.”).

124. *See Breedlove v. Suttles*, 302 U.S. 277, 283 (1937).

125. *See* 245 U.S. 60 (1917). *See generally* David Bernstein, *Philip Sober Retraining Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 799 (1998).

gated. *Buchanan* did not necessarily imply *Brown* (John W. Davis famously won *Buchanan* and lost *Brown*), but it was a step towards it.

*Yick Wo* had hints of *Buchanan*. The *Yick Wo* Court stated that the “rights of petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China.”<sup>126</sup> If this were all the Court had to say, *Yick Wo v. Hopkins* might be the Chinese *Buchanan v. Warley*.<sup>127</sup> However, *Yick Wo*’s rights were protected only because he had a treaty right to a laundry license on the basis of equality with others.<sup>128</sup> *Yick Wo*’s brief cited no less than four sections of this treaty.<sup>129</sup> Other cases show that without the treaty right, the Fourteenth Amendment standing alone did not restrain San Francisco from excluding him and all other Chinese from the laundry business; the Supreme Court repeatedly upheld laws excluding Asians from economic activity on the basis of race.

#### A. *Yick Wo as a Treaty Case*

*Yick Wo* arose as part of a contest between the United States and California over the power to control Asian immigration. In an effort to drive the Chinese out of California, the state and localities implemented legal innovations designed to convince them that it would be better just to leave. For example, *Yick Wo* was preceded by a California law prohibiting corporations from employing Chinese<sup>130</sup> and followed by a San Francisco ordinance simply requiring them to move away.<sup>131</sup> Federal courts struck down these laws on various grounds, including that they conflicted with a treaty with China granting “the same privileges, immunities, and exemptions, in respect to travel or residence as may be enjoyed by the citizens or subjects of the most favored nation.”<sup>132</sup> Statutes throughout the West targeted Chinese in the laundry business.<sup>133</sup>

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126. *Yick Wo*, 118 U.S. at 368.

127. Later cases explicitly applied the Fourteenth Amendment to Chinese. See *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) (applying citizenship clause of Fourteenth Amendment to Chinese); *Wong Wing v. United States*, 163 U.S. 228 (1896) (holding Chinese entitled to jury trial prior to punishment for crime).

128. See Ming-sung Kuo, *The Duality of Federalist Nation-Building: Two Strains of Chinese Immigration Cases*, 67 ALB. L. REV. 27 (2003) (comparing *Yick Wo* and the Chinese exclusion case); Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 615–22 (2007) (discussing Burlingame Treaty).

129. See Argument for Appellant, *supra* note 97, at 6–8 (citing the Declaration of Independence, the Fourteenth Amendment, sections 1977 and 1979 of the Revised Statutes (now 42 U.S.C. §§ 1981(a), 1983), section 1 of article 1 of the California Constitution, and four provisions of the treaties with China).

130. *In re Tiburcio Parrott*, 1 F. 481, 483 (C.C.D. Cal. 1880) (invalidating the law).

131. *In re Lee Sing*, 43 F. 359, 360–61 (C.C.N.D. Cal. 1890) (invalidating the law).

132. *In re Tiburcio Parrott*, 1 F. at 504; see also *In re Ah Fong*, 1 F. Cas. 213, 217 n.3 (Field, Circuit Justice, C.C.D. Cal. 1874) (No. 102).

133. See generally David Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999) (reviewing cases brought by laundrymen regarding hostile legislation); David Bernstein, *Two Asian Laundry Cases*, 23 J. SUP. CT. HIST. 95 (1999) (discussing two Asian laundry cases in their historical contexts).

By 1886, the Court was familiar with California's efforts to eliminate the Chinese.<sup>134</sup> The Court recognized early on the federal interest in protecting Chinese from state mistreatment. Ten years before *Yick Wo*, in *Chy Lung v. Freeman*,<sup>135</sup> for example, the Court unanimously invalidated a California law allowing imposition of a high bond on ships' masters landing immigrants. The Court explained that the nation's foreign policy could not be subject to the intervention of state officials: "[A] silly, an obstinate, or a wicked commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend."<sup>136</sup> The country affected was no secret: "[W]e venture the assertion, that, if citizens of our own government were treated by any foreign nation as subjects of the Emperor of China have been actually treated under this law, no administration could withstand the call for a demand on such government for redress."<sup>137</sup>

Meanwhile, a United States–China treaty came into force in 1858.<sup>138</sup> The 1868 amendments known as the Burlingame Treaty recognized "the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration . . . for purposes of curiosity, of trade, or as permanent residents."<sup>139</sup> In addition, "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."<sup>140</sup> A supplementary 1880 treaty provided: "Chinese subjects . . . shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."<sup>141</sup> Accordingly, for better and for worse, the status of Chinese had a federal character different from that of racial groups comprised mostly of citizens.

Also on the books in 1886 was section 1977 of the Revised Statutes, now 42 U.S.C. § 1981(a). It provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

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134. As the circuit court opinion put it, "Can a court be blind to what must be necessarily known to every intelligent person in the state?" *In re Wo Lee*, 26 F. 471, 475 (C.C.D. Cal. 1886), *rev'd sub nom.* *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

135. 92 U.S. 275 (1875).

136. *Id.* at 279.

137. *Id.*

138. Treaty of Peace, Amity, and Commerce, U.S.-China, June 18, 1858, 12 Stat. 1023.

139. Additional Articles to the Treaty Between the United States and China, U.S.-China, art. V, July 28, 1868, 16 Stat. 739.

140. *Id.* art. VI.

141. Treaty Between the United States and China, Concerning Immigration, U.S.-China, art. III, Nov. 17, 1880, 22 Stat. 826.

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.<sup>142</sup>

As Justice White demonstrated in *Runyon v. McCrary*,<sup>143</sup> this provision, enacted in 1870, was intended to protect the rights of Chinese immigrants in the West who were discriminated against in violation of, or at least in tension with, their treaty rights.<sup>144</sup>

The Court knew the treaty well. Several years before *Yick Wo*, the Court issued the first in a line of decisions that would extend over many years.<sup>145</sup> In 1883, the Court found no jurisdiction in two habeas corpus petitions where laundrymen raised the same issues that would ultimately be decided in *Yick Wo*.<sup>146</sup> In *Chew Heong v. United States*,<sup>147</sup> Justice Harlan intricately analyzed the interaction between the treaties and implementing federal legislation. Former resident Chew Heong sought re-admission to the United States even though he did not possess the special reentry certificate required for racial Chinese to cross the border. He was undocumented because he departed before the law requiring certificates came in to force. Yet, under the treaties, he was in a class of persons entitled to leave, return, and live in the United States. The Court determined that “the legislation of Congress and the stipulations of the treaty may stand together,” and held the certificate requirement inapplicable to those traveling abroad when it came into effect.<sup>148</sup>

The next year, laundryman Soon Hing raised a treaty claim in his appeal.<sup>149</sup> *Soon Hing*'s author, Justice Field, was particularly familiar with the treaty. As the author of the trial court opinion in *Chew Heong*, he had dissented from his own reversal when that case reached the Court.<sup>150</sup> Field also regularly applied the treaty as Circuit Justice in Cali-

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142. 42 U.S.C. § 1981(a) (2000).

143. 427 U.S. 160 (1976).

144. *Id.* at 195–205 (White, J., dissenting). See generally Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850–1870*, 72 CAL. L. REV. 529, 530–31 (1984) (“The evidence is simply indisputable . . . that section 1981 derives from section 16 of the Civil Rights Act of 1870, a statute that was not designed—at least not in any primary sense—to promote the civil rights of the nation’s newly emancipated black citizens, but rather to respond to the plight of another aggrieved racial minority—the Chinese of California.”). The treaties and 42 U.S.C. § 1981 offered protection, but what subconstitutional law giveth, it may taketh away. The next round of laws were designed to exclude Asians on the basis of race. See Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998).

145. *E.g.*, *Lau Ow Bew v. United States*, 144 U.S. 47 (1892); *United States v. Jung Ah Lung*, 124 U.S. 621 (1888); *Baldwin v. Franks*, 120 U.S. 678 (1887).

146. *Ex parte Hung Hang*, 108 U.S. 552 (1883); *Ex parte Tom Tong*, 108 U.S. 556 (1883).

147. 112 U.S. 536 (1884), *rev’g In re Cheen Heong*, 21 F. 791 (Field, Circuit Justice, C.C.D. Cal. 1884).

148. *Id.* at 559–60.

149. *Soon Hing v. Crowley*, 113 U.S. 703, 706 (1885) (“The petition also averred that section four of the ordinance was in contravention of the provisions of the Burlingame Treaty.”).

150. Under the procedure apparently applicable at the time, Field’s opinion prevailed in the trial court, even though the other three judges on the panel disagreed with him.

fornia,<sup>151</sup> including in laundry<sup>152</sup> and right-to-work cases.<sup>153</sup> Although he recognized the threat to civilization presented by the “vast hordes” of Asia, he frequently invalidated state measures because to the national “government belong exclusively the treaty-making power and the power to regulate commerce with foreign nations, which includes intercourse as well as traffic, and . . . the power to prescribe the conditions of immigration or importation of persons. The state in these particulars . . . is powerless.”<sup>154</sup>

Given their familiarity with the treaty, it is not surprising that the *Yick Wo* Court did not turn first to the Fourteenth Amendment when analyzing the legal status of Chinese. Instead, the first justification for its conclusion that Yick Wo’s rights “are not less” was “the treaty between this Government and that of China,” which provided that the United States would seek “to secure to [Chinese in the United States] the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation.”<sup>155</sup> The Court then noted that the Fourteenth Amendment is not limited to citizens. This observation was surely better than the alternative, but in this era it did not clearly imply the outcome given that the Fourteenth Amendment applied to citizens, too, and the Court had already or would soon uphold discrimination against them on the basis of race,<sup>156</sup> religion,<sup>157</sup> and sex.<sup>158</sup> Finally, the Court pointed out that section 1977 of the Revised Statutes—

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151. See, e.g., *In re Look Tin Sing*, 21 F. 905, 908 (Field, Circuit Justice, C.C.D. Cal. 1884) (noting that a person of Chinese racial ancestry born in the U.S. is a U.S. citizen); *In re Ah Fong*, 1 F. Cas. 213, 218 (Field, Circuit Justice, C.C.D. Cal. 1874) (No. 102) (stating that “[t]he only limitation upon the free ingress into the United States and egress from them of subjects of China is the limitation which is applied to citizens or subjects of the most favored nation; and as the general government has not seen fit to attach any limitation to the ingress of subjects of those nations, none can be applied to the subjects of China. . . . The detention of the petitioner is therefore unlawful under the treaty,” and discussing federal civil rights statutes implementing the Fourteenth Amendment).

152. *In re Quong Woo*, 13 F. 229, 233 (Field, Circuit Justice, C.C.D. Cal. 1882) (invalidating an ordinance requiring permission of neighbors to operate a laundry: “The petitioner is an alien, and under the treaty with China is entitled to all the rights, privileges, and immunities of subjects of the most favored nation with which this country has treaty relations. . . . [H]e has, under the pledge of the nation, the right to remain, and follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the state, or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws. His liberty to follow any such occupation cannot be restrained by invalid legislation of any kind; certainly not by a municipal ordinance that has no stronger ground for its enactment than the miserable pretense that the business of a laundry—that is, of washing clothes for hire—is against good morals or dangerous to the public safety.”).

153. *Baker v. City of Portland*, 2 F. Cas. 472, 475 (C.C.D. Or. 1879) (No. 777) (“This treaty having guaranteed to the Chinese the right to reside here permanently with the same privileges and immunities as the subjects of Great Britain, Germany and France, which certainly includes the right to labor for a living, if it includes anything, the state cannot, in the exercise of any of its admitted general powers, limit or deny this right.”).

154. *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6546).

155. *Yick Wo v. Hopkins*, 118 U.S. 356, 368–69 (1885).

156. See *infra* notes 193–212 and accompanying text.

157. *Davis v. Beason*, 133 U.S. 333, 346–48 (1890) (upholding a law criminalizing voting by Mormons).

158. *Minor v. Happersett*, 88 U.S. 162, 178 (1874) (upholding the disenfranchisement of women).

in essence a statute implementing the treaty—provided that all persons within the jurisdiction of the United States shall be subject to the same “licenses” as white citizens “and to no other.”<sup>159</sup> “The questions we have to consider and decide in these cases, therefore,” the Court concluded, “are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.”<sup>160</sup>

Given that *Yick Wo* won and that the Court invoked three sources of law—the treaty, the civil rights statute, and the Fourteenth Amendment—it is necessary to isolate the significance of each to determine what the Court really decided. It turns out, however, that there is a control group showing that the freestanding Fourteenth Amendment would not have protected *Yick Wo*. In a line of race cases where the only doctrinal claim was the Fourteenth Amendment, the treaty was inapplicable, and the civil rights statutes not mentioned.

Until the *Brown* era, when the treaty was inapplicable the Court repeatedly and unanimously upheld the exclusion of Chinese and other Asians from some businesses on the basis of race, notwithstanding the Equal Protection Clause. In cases from California and Washington, the Supreme Court upheld racial restrictions on land ownership or possession. On the *Chy Lung* rationale, the Court would not allow states to exclude noncitizens from all forms of productive labor, meaning *Yick Wo* likely had a right to work in a laundry owned or operated by someone else. Citing *Yick Wo*, *Truax v. Raich*<sup>161</sup> held that aliens enjoy “the right to work for a living in the common occupations of the community”; any other rule would bring states “into hostility [with] exclusive federal power . . . to control immigration.”<sup>162</sup> However, in *Clarke v. Dekebach*,<sup>163</sup> the Court elaborated that “it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification.”<sup>164</sup>

One instance where “alien race” was reasonably considered, according to the jurisprudence of the era, was when those aliens were Asian. Racial restrictions on Asians were a part of federal law since 1790 when the First Congress passed, and George Washington signed, a law limiting naturalization to “free white persons.” In refusing to naturalize a Japanese person in 1922, a unanimous Court explained that this was “a rule in force from the beginning of the Government, a part of our history as well

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159. *Yick Wo*, 118 U.S. at 369.

160. *Id.*

161. *Truax v. Raich*, 239 U.S. 33 (1915).

162. *Id.* at 41–42; see also ERNST FREUND, POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 729 (1904) (asserting that states cannot prohibit aliens from working: “The federal adjudications in the matter of discrimination against Chinese in the laundry business, while involving also treaty rights, seem to support this position.”).

163. 274 U.S. 392 (1927).

164. *Id.* at 396.



as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions.”<sup>165</sup> Starting in 1882, when immigration of other races was numerically unlimited, Congress restricted Asian immigration.<sup>166</sup> States borrowed the federal racial structure by imposing restrictions on “aliens ineligible to citizenship,” particularly laws prohibiting ownership of land. “Alien ineligible to citizenship” was in this context a term of art: “While any alien is ineligible to naturalization, whatever his race, if he lacks any one of several other qualifications required for naturalization, the [Alien Land Laws] have been interpreted as applying solely to those ‘ineligible aliens’ whose ineligibility is due to their race.”<sup>167</sup> Such laws were, as Justice Rehnquist explained, “discrimination on the basis of race ‘by incorporation.’”<sup>168</sup>

In *Terrace v. Thompson*,<sup>169</sup> the Court rejected an equal protection challenge to a Washington State law permitting land ownership only by citizens or aliens who had declared an intention to become citizens.<sup>170</sup> The Court explained that it was reasonable to exclude from land ownership those whom the law prohibited from becoming citizens:

[I]t is not to be supposed that [Congress’s] acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. The State properly may assume that the considerations upon which Congress made such classification are substantial and reasonable. Generally speaking, the natives of European countries are eligible. Japanese, Chinese and Malays are not.<sup>171</sup>

The Court found that the statute was not a racial classification, although it bore more heavily on those who could never become citizens: “All persons of whatever color or race who have not declared their intention in good faith to become citizens are prohibited from so owning agricultural lands.”<sup>172</sup>

However, the controlling principle was that because Congress could discriminate against Asians, so too could the states. In *Porterfield v. Webb*,<sup>173</sup> decided the same day as *Terrace v. Thompson*, the Court upheld California’s prohibition, which applied only to racially ineligible aliens; the law welcomed white aliens who had simply chosen not to naturalize.

165. *Ozawa v. United States*, 260 U.S. 178, 194 (1922).

166. Chin, *supra* note 144, at 6.

167. Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 CAL. L. REV. 7, 7 n.1 (1947); *see also* *Gorman v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 203 N.Y.S. 632, 633–34 (App. Div. 1924) (finding that subjects of Great Britain are not ineligible aliens).

168. *Sugarman v. Dougall*, 413 U.S. 634, 654 (1973) (Rehnquist, J., dissenting). The point of these laws was rarely disguised. *E.g.*, *Mitsuuchi v. Security-First Nat’l Bank of L.A.*, 229 P.2d 376, 378 (Cal. Ct. App. 1951) (“[W]e note that it was the public policy of the State to prevent title to agricultural lands to vest directly or indirectly in persons of Japanese ancestry who were not American citizens.”).

169. 263 U.S. 197 (1923).

170. “Declaration” was a formal legal step in the naturalization process involving filing papers, not merely an oral statement.

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

172. *Id.*

173. 263 U.S. 225 (1923).

That distinction did not require a different result. Using what is now clearly recognizable as the language of rational basis review, the Court explained: “In the matter of classification, the States have wide discretion. Each has its own problems . . . . It is not always practical or desirable that legislation be the same in different States.”<sup>174</sup>

The Court upheld criminal enforcement of the laws,<sup>175</sup> their application to leases as well as sales,<sup>176</sup> and their application to indirect ownership, such as through securities.<sup>177</sup> The Court also held that in criminal prosecutions, Asians could be presumed to be foreign citizens and bear the burden of proving United States citizenship.<sup>178</sup> As the Court later summarized this line of cases, “although the Fourteenth Amendment extends protection to aliens as well as citizens, a state may for adequate reasons of policy exclude aliens altogether from the use and occupancy of land.”<sup>179</sup> The adequate policy reason was racial, and because of his race, the state could, consistently with the Fourteenth Amendment, imprison Yick Wo if he committed the crime of owning, leasing, or otherwise controlling real property for commercial purposes.<sup>180</sup> The Court’s determination in *Buchanan v. Warley* that African-Americans had a right to own land was answered the opposite way for Asians: states could prohibit it.

As late as 1948, the year of *Shelley v. Kraemer*,<sup>181</sup> a majority of the Court pointedly refused to invalidate this sort of racial discrimination. In *Oyama v. California*,<sup>182</sup> Chief Justice Vinson and five others struck California’s statutory presumption that land titles acquired by U.S. citizen children were shams subject to escheat if the purchase price came from parents who were racially ineligible for citizenship.<sup>183</sup> As the U.S. citizen child in *Oyama* was six years old when he purchased his farm, the presumption that the racially ineligible parents were really in control was plausible. But only four Justices, Black, Douglas, Murphy, and Rutledge, contended that the land laws themselves constituted unconstitutional racial discrimination. Three justices insisted the presumption was valid; Justice Jackson argued: “If the State can validly classify certain Asiatics

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174. *Id.* at 233.

175. *Cockrill v. California*, 268 U.S. 258, 263 (1925).

176. *Porterfield v. Webb*, 263 U.S. 225, 233 (1923).

177. *Frick v. Webb*, 263 U.S. 326, 333–34 (1923).

178. *See* *People v. Morrison*, 13 P.2d 803, 804 (Cal. Ct. App. 1932), *appeal dismissed per curiam for want of a substantial federal question*, 288 U.S. 591 (1933).

179. *Nebbia v. New York*, 291 U.S. 502, 526 (1934) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Webb v. O’Brien*, 263 U.S. 313 (1923)).

180. Presumably, on a federalism rationale, immigrants could not be prohibited from controlling some real property for residential purposes; if states could force them to sleep in the street, that would be tantamount to forcing them to leave. But no cases have been found suggesting that courts recognized a federal constitutional right to any degree of control over land for commercial purposes of any sort.

181. 334 U.S. 1 (1948) (prohibiting judicial enforcement of racially restrictive covenants).

182. 332 U.S. 633 (1948).

183. *See id.* at 646–74.

as a separate class for exclusion from land ownership, I do not see why it could not do so for purposes of a presumption.”<sup>184</sup> Only in the post-war run-up to *Brown*, and then only in state cases, did courts decide that the land laws themselves amounted to unconstitutional racial discrimination against Asians.<sup>185</sup>

*Yick Wo* was not the last winner. Asians prevailed when, as in *Yick Wo*, they could show that state discrimination conflicted with a treaty. In *Jordan v. K. Tashiro*,<sup>186</sup> the Supreme Court held that California could not prevent Japanese from building a community hospital.<sup>187</sup> In *Asakura v. City of Seattle*, a Japanese person was held entitled to a pawnbroker’s license.<sup>188</sup> Although the noncitizens raised equal protection claims, both cases were decided on treaty grounds. In *Asakura*, the Court explained:

The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.<sup>189</sup>

It was in this sense that the *Yick Wo* Court ruled discrimination “in the eye of the law, is not justified.”<sup>190</sup> The law was the treaty, and conduct prohibited by paramount federal law, no matter how sensible as a matter of logic or policy, “is not justified.”<sup>191</sup>

184. *Id.* at 686 (Jackson, J., dissenting).

185. See *Sei Fujii v. State*, 242 P.2d 617, 630 (Cal. 1952) (“The California alien land law is obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis.”); *State v. Oakland*, 287 P.2d 39, 42 (Mont. 1955) (“[T]his court now finds the Alien Land Law . . . unconstitutional and void as being in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.”); *Kenji Namba v. McCourt*, 204 P.2d 569 (Or. 1949). In *Takahashi v. Fish & Game Comm.*, 334 U.S. 410, 422 (1948), seven justices held that the principle of the alien land law cases did not permit denial of fishing licenses to racially ineligible aliens. However, the Court refused to overrule the alien land cases. *Id.* at 420–22. Justices Reed and Jackson dissented. *Id.* at 427, 431.

186. 278 U.S. 123 (1928).

187. *Id.* at 128–29 (“Giving to the terms of the treaty, as we are required by accepted principles, a liberal rather than a narrow interpretation, we think, as the state court held, that the terms ‘trade’ and ‘commerce,’ when used in conjunction with each other and with the grant of authority to lease land for ‘commercial purposes’ are to be given a broader significance than that pressed upon us, and are sufficient to include the operation of a hospital as a business undertaking; that this is a commercial purpose for which the treaty authorizes Japanese subjects to lease lands.”).

188. See 265 U.S. 332 (1924); see also *In re Naka’s License*, 9 Alaska 1 (D. Alaska 1934) (determining that a Japanese citizen was entitled to a liquor license under a treaty).

189. *Asakura*, 265 U.S. at 341; see also, e.g., FRANCIS NEWTON THORPE, *THE ESSENTIALS OF AMERICAN CONSTITUTIONAL LAW* 206 (1917) (“The discrimination is none the less unconstitutional because the person discriminated against is an alien, when the treaty between the United States and the sovereignty to which the alien owes allegiance secures to the alien in the United States ‘the same rights, privileges, immunities, [equal treatment], and exemptions . . .’” (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))).

190. *Yick Wo*, 118 U.S. at 374.

191. *Id.*

The determinative legal consideration, then, was the treaty, perhaps bolstered by considerations of freestanding federalism as in *Chy Lung*,<sup>192</sup> but the Equal Protection Clause did not affect the outcome of *Yick Wo* or the other cases. When a treaty protected the right to own property or to engage in business, it alone sufficed to warrant relief. When the treaty did not apply, the Equal Protection Clause alone did not warrant relief. Decided on another basis, *Yick Wo* could not serve as an influential Equal Protection Clause precedent.

*B. The Legal Context: The Era's Modest Limits on Racial Classifications*

Contemporaneous court decisions leave little room to speculate that *Yick Wo* rests on some residual unarticulated antiracist basis. Michael Klarman, discussing cases as late as the 1940s, explained: “[T]he Court . . . operated almost entirely within the structure envisioned by most of the Fourteenth Amendment’s drafters—that is, racial discrimination was impermissible with regard to certain fundamental rights, rather than across the board.”<sup>193</sup> Equal protection was the “last resort of constitutional arguments.”<sup>194</sup> In *Yick Wo*, this thin reed was grasped by a group regarded as the “Yellow Peril.” Although the borders were then open to other races without numerical limitation, Congress overwhelmingly passed the Chinese Exclusion Act in 1882.<sup>195</sup> In 1889, in *Chae Chan Ping v. United States*,<sup>196</sup> the Court upheld the Chinese Exclusion Act, holding that Congress could exclude Chinese attempting to enter the United States, including long-term residents returning from overseas trips. In 1893, the Court approved race-based deportation of Chinese permanent residents for any reason or no reason.<sup>197</sup>

The Court’s language suggests that it believed firm resolution of the “Chinese Question” was not just reasonable, but urgent. The unanimous *Chae Chan Ping* Court, for example, noted the “well-founded apprehension—from the experience of years—that a limitation to the immigration of certain classes from China was essential to the peace of the community

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192. It remains true that states have limited authority to discriminate against noncitizens, while the national government has much broader discretion to grant or deny benefits to aliens. Compare *Graham v. Richardson*, 403 U.S. 365, 374–77 (1971) (state cannot deny public benefits to resident aliens), with *Mathews v. Diaz*, 426 U.S. 67, 84–85 (1976) (federal government can select which aliens to benefit: “The equal protection analysis also involves significantly different considerations because it concerns the relationship between aliens and the States rather than between aliens and the Federal Government”).

193. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 235 (1991). But of course, when dealing with fundamental rights or other vested interests, discrimination is less relevant because the rights may be protected from infringement even on a nondiscriminatory basis.

194. *Buck v. Bell*, 274 U.S. 200, 208 (1927) (Holmes, J.).

195. *Chin*, *supra* note 144, at 12–14.

196. 130 U.S. 581, 609–11 (1889).

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

on the Pacific coast, and possibly to the preservation of our civilization there.”<sup>198</sup> The immigrants represented Chinese “aggression and encroachment” through “vast hordes of its people crowding in upon us.”<sup>199</sup> That these hordes were simply outside the Fourteenth Amendment was a respectable argument. In 1898, the Justice Department argued that the birthright citizenship clause of the Fourteenth Amendment was inapplicable to Chinese, and thus even those born here were aliens. The Justice Department lost, but Owen Fiss is surely right that the “outcome in the case was hardly a foregone conclusion.”<sup>200</sup>

Equal protection doctrine provides that similarly situated individuals must be treated similarly, but, by the same reasoning, individuals have no expectation to be treated identically with those with whom they have nothing in common. If “the Chinese cannot assimilate with our people, but continue a distinct race among us, with institutions, customs and laws entirely variant from ours,”<sup>201</sup> or if they are of “a race so different from our own that we do not permit those belonging to it to become citizens of the United States,”<sup>202</sup> then Chinese are not similarly situated with other races. While all persons are protected by the Equal Protection Clause, even the modern Court has recognized that neither “the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant”<sup>203</sup> need be treated the same as a citizen or permanent resident. Surely, therefore, it is reasonable, even obligatory, on the part of a responsible legislature to treat a group which threatens the very “preservation of our civilization” differently from citizens or immigrants whose presence is a positive good.

*Yick Wo* was bracketed by decisions liberally allowing racial discrimination. Three years before *Yick Wo*, in *Pace v. Alabama*,<sup>204</sup> the Court upheld a statute imposing greater penalties for interracial adultery than for same-race adultery. Justice Field reasoned that the law “applies the same punishment to both offenders, the white and the black.”<sup>205</sup> This was a preview of the question presented a century later in *McCleskey v. Kemp*,<sup>206</sup> but by 1987, the Court seemed to say that an equal protection claim would be made out if the authorities intentionally punished interracial killings more harshly than intraracial homicides.<sup>207</sup> In 1883, the Supreme Court did not believe that race was irrelevant to criminal law; higher penalties for interracial crimes were permitted, so long as they

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198. *Chae Chan Ping*, 130 U.S. at 594.

199. *Id.* at 606.

200. Fiss, *supra* note 9, at 300.

201. *Chew Heong v. United States*, 112 U.S. 536, 568 (1884) (Field, J., dissenting).

202. *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

203. *Mathews v. Diaz*, 426 U.S. 67, 80 (1976).

204. 106 U.S. 583 (1883), *overruled by McLaughlin v. Florida*, 379 U.S. 184 (1964).

205. *Id.* at 585.

206. 481 U.S. 279 (1987).

207. *Id.* at 291 n.8.

were meted out “equally” to black and white. In addition, *Pace* made clear that the Fourteenth Amendment did not categorically prohibit the use of race as an element of a crime or the use of the criminal law to enforce segregation.<sup>208</sup> Three years after *Yick Wo*, the Court upheld the Chinese Exclusion Act in *Chae Chan Ping*, agreeing, apparently, with Congress’s racist characterizations of Chinese immigrants.

Ten years after *Yick Wo*, *Plessy v. Ferguson*<sup>209</sup> also upheld a regulatory statute enforceable through criminal penalties, again demonstrating that the Court had no intention of purging racial considerations from the criminal law.<sup>210</sup> If a classification may constitutionally appear on the face of legislation, there is Supreme Court authority that administrators can engage in the same classification.<sup>211</sup> Therefore, these decisions directly suggest that prosecutors could engage in the same race-based policy judgments as the legislators did in *Pace*, and could, for example, use their limited resources to focus on prosecuting interracial fornication if they concluded that those prosecutions would be most beneficial to the community.

*Pace*, *Yick Wo*, and *Chae Chan Ping* were unanimous decisions with an overlapping majority.<sup>212</sup> The composition of the Court had changed by the time of the seven to one decision in *Plessy*, but there is no reason to think the views of the justices were dramatically different. It strains credulity to think that the Justices’ views on the general reasonableness of racial classifications switched, as a group, without comment, from approval in 1883 to categorical rejection in 1886, and back to approval in 1889, 1893, and 1896. It is much more plausible that *Yick Wo* was part of the otherwise consistently racist jurisprudence of the Justices who participated in it, and its outcome is fully explained by the property and federalism doctrines upon which it explicitly relies.

### C. Legislation with Discriminatory Purpose

A distinct reason for *Yick Wo*’s irrelevance involves racial discrimination that the Court refused to police. The design and application of criminal law is a potentially important tool for effectuation of any policy objective, including racial discrimination. Today, it is a fatal defect if a

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208. *Pace*, 106 U.S. at 585.

209. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

210. *Plessy* approved of more than separate but equal; in 1899, Justice Harlan writing for a unanimous Court upheld a Georgia county’s decision not to have a high school for African-Americans at all. *See Cumming v. Bd. of Educ.*, 175 U.S. 528, 544–45 (1899).

211. *Snowden v. Hughes*, 321 U.S. 1, 11 (1944) (“If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. . . . [S]tate action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature.”).

212. Justices Field, Grey, and Harlan participated in *Pace*, *Yick Wo*, *Chae Chan Ping*, and *Plessy*; Justices Bradley and Miller participated in the first three; Chief Justice Fuller participated in *Chae Chan Ping* and *Plessy*.

criminal law is enacted for the purpose of targeting a suspect class.<sup>213</sup> At the time of *Yick Wo*, it was not a problem; if the legislative history showed that a facially neutral statute targeted African-Americans, it was not, on that basis, invalid.

In *Soon Hing v. Crowley*,<sup>214</sup> for example, a laundry case decided the year before *Yick Wo*, the challengers alleged that the ordinance “was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police, or other legitimate purpose.”<sup>215</sup> Too bad, said the Court: “[T]he impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.”<sup>216</sup> But there was a deeper objection: “[E]ven if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate against only the class mentioned; and of this there is no pretence.”<sup>217</sup>

Similarly, in *Williams v. Mississippi*,<sup>218</sup> the Court upheld a death sentence imposed by an all white jury, even though the jury was selected from electors under a provision of the Mississippi Constitution designed to disenfranchise African-Americans. The Mississippi Supreme Court had acknowledged this purpose: “Within the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the circle of expedients, to obstruct the exercise of suffrage by the negro race.”<sup>219</sup> “But,” said the U.S. Supreme Court, “nothing tangible can be deduced from this.”<sup>220</sup> The laws “do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them.”<sup>221</sup> Thus, even where an overt racial classification would have been unconstitutional, discriminatory motivation for a facially neutral law created no legal problem.

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213. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

214. 113 U.S. 703 (1885).

215. *Id.* at 710.

216. *Id.* at 711.

217. *Id.*

218. 170 U.S. 213 (1898).

219. *Id.* at 222 (quoting *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896)).

220. *Id.*

221. *Id.* at 225; see also *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) (“Petitioners have also argued that respondents’ action violates the Equal Protection Clause because the decision to close the pools was motivated by a desire to avoid integration of the races. But no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”); *Washington v. Davis*, 426 U.S. 229, 243 (1976) (“Whatever dicta [*Palmer v. Thompson*] may contain, the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences.”).

*Soon Hing* was important not only because the Court held that discriminatory motives for enactment were beyond scrutiny, but also because it was irrelevant that the law applied not to the City and County of San Francisco as a whole, but only to a designated area: "All persons engaged in the same business within the prescribed limits are treated alike and subjected to similar restrictions."<sup>222</sup> This is consistent with the general principle that it is permissible to have different legal regimes in different parts of a state,<sup>223</sup> but notable when applied to the racial context. It is perfectly permissible, it appears, to have laws applicable only to particular neighborhoods, so long as everyone, regardless of race, creed, or color, who came to the attention of the police in Chinatown, the South Side, or El Barrio is prosecuted equally.

The Supreme Court approved some explicit racial classifications and gave free rein to invidiously designed and structured substantive criminal law. Accordingly, a racist legislature or prosecutor could discriminate effectively without selectively applying facially neutral laws. These decisions are important for three reasons. First, they may explain the absence of more *Yick Wo*-type cases; discrimination could be built into the law itself. Second, the decisions reflect a general tolerance of racial discrimination militating against the idea that *Yick Wo* or any other case of the era constituted an aggressive attack on racial discrimination in one particular context. Third, even if *Yick Wo* created strong anti-racist doctrine, it would have been cynical doctrine, offered knowing that it would be evaded using techniques described and approved by the Court.

#### CONCLUSION: IMPLICATIONS FOR CURRENT DOCTRINE

Because the government conduct infringed a property interest protected by the Due Process Clause, *Yick Wo* simply sheds no light on the authority of prosecutors or police to punish those violating valid laws. Because the group at issue was granted rights by treaty, the opinion simply sheds no light on the permissibility of racial discrimination when the state law did not directly conflict with federal law. Failure to appreciate the Asian context of *Yick Wo* has led to substantive error. *Yick Wo* is no evidence that the *Plessy*-era Court sometimes got the law right. Instead, *Yick Wo* is entirely consistent with the other jurisprudence of the era:

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222. *Soon Hing v. Crowley*, 113 U.S. 703, 708 (1885).

223. See, e.g., *Salsburg v. Maryland*, 346 U.S. 545 (1954) (finding no equal protection violation in applying the exclusionary rule to some offenses but not to others); *Gardner v. Michigan*, 199 U.S. 325 (1905); *Missouri v. Lewis*, 101 U.S. 22, 31 (1879) ("[T]here is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. . . . If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.").



tolerant of racial classifications, sometimes protective of particular fundamental rights, and willing to police state interference with matters it regards as exclusively federal.

Yet when the Supreme Court decides a case about discriminatory prosecution, *Yick Wo* is usually a respected cameo player. In *Wayte v. United States*,<sup>224</sup> upholding prosecution of men who failed to register for the draft and then wrote to Selective Service about it, the majority denied the dissent's claim that *Yick Wo* would have lost under the majority's principle; all of the justices, that is, wanted *Yick Wo* on their side.<sup>225</sup> *McCleskey v. Kemp*<sup>226</sup> pointed to *Yick Wo* as a case where statistical evidence alone warranted an inference of discrimination.<sup>227</sup> *Yick Wo*'s most significant appearance was in *United States v. Armstrong*,<sup>228</sup> where the Supreme Court set a high standard for a defendant claiming discriminatory prosecution to discover information about prosecutorial decision making. The Supreme Court said that its standard did not make a selective prosecution claim "impossible to prove. . . . [W]e invalidated an ordinance, also adopted by San Francisco, that prohibited the operation of laundries in wooden buildings. The plaintiff in error successfully demonstrated that the ordinance was applied against Chinese nationals but not against other laundry-shop operators."<sup>229</sup> But if *Yick Wo* was not a discriminatory prosecution case, then there are no examples of successful challenges to discriminatory prosecution.

It is unclear how important *Yick Wo*'s role as an example is to the Court's jurisprudence; was it a partial basis for decision, or merely an observation? Perhaps it is unimportant for them to have a test that might smoke out discriminatory prosecutions. If so, a test that never grants relief is as good as one that exceedingly rarely grants relief. On the other hand, the Court has recognized an obligation "to eliminate the taint of racial discrimination in the administration of justice."<sup>230</sup> Perhaps this sentiment was accurate. If so, recognizing that *Yick Wo* has very different contours than is commonly understood warrants a reexamination of the doctrine.

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224. 470 U.S. 598 (1985).

225. *Id.* at 608 n.10; *id.* at 630–31 (Marshall, J., dissenting).

226. 481 U.S. 279 (1987).

227. *Id.* at 293 n.12.

228. 517 U.S. 456, 466 (1996).

229. *Id.* (citation omitted).

230. *Powers v. Ohio*, 499 U.S. 400, 402 (1991).

